DIZIONARIO SISTEMATICO DEL DIRITTO DELLA CONCORRENZA

a cura di

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ESTRATTO

Jovene editore 2013

Private enforcement of Antitrust Law in China

I. Introduction

China had been considering enactment of an antitrust law at least ten years before the Anti-monopoly Law finally was passed in 2007 and took effect on August 1, 2008. Together with the Anti-unfair Competition Law, it marked the completion of main framework of competition laws in China.

The goal of the Anti-monopoly Law is to prevent and restrain monopoly conducts, protect fair competition, enhance economic efficiency, safeguard interests of consumers and the society, and promote healthy development of market economy[1]. After EU model, the Anti-monopoly Law prohibits monopoly agreements, abuse of dominant market position and concentrations that lead, or may lead to elimination or restriction of competition[2].

There are three authority agencies responsible for public enforcement of Anti-monopoly Law in China. The Ministry of Commerce ("MOFCOM") reviews concentrations[3]; the National Development and Reform Commission ("NDRC") is responsible for price related monopoly cases[4]; and the State Administration of Industry and Commerce ("SAIC") enforces remaining cases[5], i.e. non-price related monopoly cases. These three authority agencies all set up Anti-monopoly Bureaus to specifically assume anti-monopoly responsibilities. They work independently but are coordinated by the Anti-monopoly Commission which was established by the State Council (or the central government) to organize, coordinate and guide anti-monopoly enforcement[6].

Public enforcement may be empowered to appropriate departments at provincial level to take charge of enforcement of the Anti-monopoly Law[7]. For example, in the recent luxury liquor RPM case, NDRC authorized Guizhou Province Pricing Administration and Sichuan Province Development and Reform Commission to investigate and impose RMB 247 million (about USD 39.8 million) and RMB 202 million (about USD 32.6 million) respectively on Guizhou Moutai and Sichuan Wuliangye.

Public enforcement of the Anti-monopoly Law gradually shows its teeth. Apart from review of concentration of undertakings which steadily increases to around 200 cases a year, Anti-monopoly authority agencies also strengthen their enforcement against monopoly agreement and abuse of dominant position,which could be illustrated by above liquor RPM case.

But no matter in terms of impact or number of cases, private enforcement of Anti-monopoly Law is playing an equally or even more important role. More and more big companies, multinational or local, are being or have been sued under

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[1] Article 1 of the Anti-Monopoly Law: This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy. English Version of Anti-monopoly Law is available on: *http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm*.

[2] Article 3 of the Anti-Monopoly Law: For the purposes of this Law, "monopolistic conducts" are defined as the following: (1) monopolistic agreements among business operators; (2) abuse of dominant market positions by business operators; and (3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition.

[3] *http://fldj.mofcom.gov.cn/*.

[4] *http://jjs.ndrc.gov.cn/default.htm*.

[5] *http://www.saic.gov.cn/fldyfbzdjz/*.

[6] Article 9 of the Anti-Monopoly Law.

[7] Article 10 of the Anti-Monopoly Law.

Anti-monopoly Law, such as Microsoft[8], Johnson and Johnson[9], Tencent[10], Baidu[11], etc. Anti-monopoly Law is increasingly utilized by private parties as shell to protect interest from being infringed or as sword to attack competitors.

This article is going to introduce the major aspects of private enforcement of Anti-monopoly Law, covering jurisdiction, standing, collective redress, evidence and burden of proof, statute of limitation, remedies and legal costs.

As a starting point, relevant substantive and procedural laws include Anti-monopoly Law, the General Principles of the Civil Law, the Contract Law, the Tort Liabilities Law, the Civil Procedure Law and relevant administrative regulations and judicial interpretations[12]. The most important source of private enforcement perhaps is the Provisions of the Supreme People's Court on Certain Issues Relating to the Application of Law in Hearing Cases Involving Civil Disputes Arising out of Monopoly Conducts (the "Judicial Interpretation"), which is issued by the Supreme People's Court on May 3, 2012 and took effective on June 1, 2012. Before the official version was published, a draft had been released for public consultation on April 26, 2011. Comparison between these two versions may be helpful to reveal true intention of the Supreme People's court.

General speaking, private enforcement of China's Anti-monopoly Law borrows many rules from IP civil litigation, mainly because both of them are recognized as highly technical and professional knowledge are necessary for a competent judge to hear the case. It is true that monopoly dispute litigations are flooded with economic terms, such as market definition, SSNIP, market power, efficiency, etc. These features set monopoly dispute cases apart from ordinary civil cases, such as contracts and torts. Accordingly, it is understandable that monopoly dispute cases are adjudicated by judges of IP division of court only.

However, it is not sufficient to protect consumer interests from being harmed by monopoly conducts. Lack of effective collective redress and collection of evidence constitutes major obstacles. Tremendous efforts have been made to mitigate such hardship but many problems could not merely be solved by judicial interpretations of the Supreme People's Court because they are more related to basic civil procedures and even fundamental legal philosophy, such as concerns of abuse of litigation or U.S. style "litigation culture". Judicial interpretation could only alleviate problems to the extent not conflicting with the Civil Procedure Law. Resolution of these fundamental issues rests on determination of which group entitled to more protection, innocent companies or arguably more innocent consumers.

It still has long way to go to establish an effective private enforcement of Anti-monopoly law in China. Fortunately, it is not unpromising.

II. Jurisdiction

China's court system is composed of four levels, the Supreme People's Court, high people's court, intermediate people's court and basic people's court. The Supreme People's Court is at the highest level and is the court of last resort of all cases in China. High people's court is at level of provinces, intermediate people's court at level of prefectures, and basic people's court at level of counties, all called local people's courts. But not all

[8] Microsoft was accused of excessive pricing by Guangzhou Kam Hing Textile Dyeing Co. which brought such counterclaim in November 2012.

[9] Johnson & Johnson Medical (China) Ltd. was sued by its distributor Rainbow in and the damage claim was dismissed by the Shanghai No. 1 Intermediate People's Court in 2012.

[10] Qihoo 360 sued Tencent for abuse of market dominant position by tying and exlusive dealing, claiming RMB 150 million ($23.79 million). The case was recently ruled against Qihoo 360 by Guangdong Provincial Higher People's Court in March 2013.

[11] Baidu was sued by Renren for abuse of dominant position in the online search market in 2009.

[12] Judicial interpretation is not law; however, it has binding effect on the court and could be cited as legal source. It could only be issued by the Supreme People's Court.

courts have jurisdiction over monopoly dispute cases.

Jurisdiction is determined by the level of court and the place where the court is located. The former jurisdiction is called grade jurisdiction and the later territory jurisdiction. Grade jurisdiction over first-instance cases varies based on factors of impact, complexity, nature, foreign elements, damage claimed, etc.[13]. For example, basic courts are excluded from hearing cases involving foreign elements and IP cases. Monopoly civil dispute is one type of cases which shall be heard only by intermediate or higher people's courts, unless basic people's courts obtain approval from the Supreme People's Court[14]. Moreover, a court is further divided into different divisions according to the nature of case, for example, civil division, criminal division, administrative division, etc. More specifically, monopoly civil dispute cases are adjudicated by IP division. It means judges hearing monopoly dispute cases generally have IP law backgrounds.

To determine which court has territorial jurisdiction of monopoly disputes will take into account specific circumstance of the case and is based on Civil Procedure Law and relevant judicial interpretations concerning jurisdiction over contract or torts disputes[15]. The general rule of territorial jurisdiction (also called "general territory jurisdiction") is that the case shall be heard by the court of the place where the defendant has domicile[16]. Except the general jurisdiction, special territory jurisdiction applies to contract and tort disputes. Where monopoly disputes civil case arises out of contract, it shall be under the jurisdiction of the court of the place where the contract is performed; where the case is claimed as being infringed, it is under the jurisdiction of the court of the place where the tort is committed[17]. Jurisdiction of monopoly disputes arising out of contract also could be chosen by both sides upon written agreement among the location of the defendant or plaintiff's domicile, location of the subject matter, performance or execution of the contract, or location materially connected to the dispute[18].

Even though the cause of action of dispute originally is not monopoly conduct, the case shall be transferred to people's court which has the jurisdiction if the people's court accepting the case has no such jurisdiction, as long as the defendant raises a defense based on Anti-monopoly Law or the case should be adjudicated under Anti-monopoly Law[19].

One thing worth noting is that Anti-monopoly Law has extraterritorial jurisdiction, which is very rare in Chinese laws. Like many other countries' antitrust laws, China's Anti-monopoly Law provides that it is applicable to monopoly conducts outside the territory of China if such conduct has effect of eliminating or restraining competition in domestic market of China[20].

III. Standing

An important issue in private enforcement of antitrust law is who has standing to bring a claim for remedy. In the U.S., federal antitrust law only allows direct purchaser to bring a claim for damage. However, China's Anti-monopoly Law and Monopoly Dispute Judicial Interpretation are silent on this issue.

The only provision related to standing issue seems to be Article 50 of Anti-monopoly Law, which says "where the monopoly conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law". According to these words, it is not unrea-

[13] For example, according to general rule of grade jurisdiction stipulated by Civil Procedure Law, intermediate people's courts shall have jurisdiction as courts of first instance over major cases involving foreign element, cases having major impact on its area, and cases designated by the Supreme People's Court; high people's courts shall have jurisdiction as courts of first instance over civil cases that have major impact in its province. There are other more detailed rules concerning grade jurisdiction.

[14] Article 3 of the Judicial Interpretation.

[15] Article 4 of the Judicial Interpretation.

[16] Article 21 of the Civil Procedure Law.

[17] Article 23 and 28 of the Civil Procedure Law.

[18] Article 34 of the Civil Procedure Law.

[19] Article 5 of the Judicial Interpretation.

[20] Article 2 of the Anti-monopoly Law.

sonable to interpreted it as anyone who suffers loss, directly or indirectly, caused by monopoly conduct has right to bring a claim.

But to discuss standing of indirect purchaser separately perhaps is not as meaningful as in the U.S. Unlike U.S., China lacks effective collective redress such as U.S. style class action which will be discussed in more details below, neither individual indirect purchaser nor lawyer has sufficient financial motive and ability to pursue an indirect purchaser claim which requires very complex pass-through analysis. In this sense, indirect purchaser standing issue, allowed or not, would not change the landscape of private enforcement of Anti-monopoly Law in a meaningful way, except that very limited number of cases may be brought by public interest lawyers who know they are very unlikely to succeed.

Another standing issue is whether victim has to resort to administrative agencies first before being allowed to bring a claim to a court. One example of such rule is civil cases involving securities such as insider trading, in which plaintiff may not directly bring a lawsuit against the infringer to a court if Securities Regulatory Commission doesn't affirm the relevant act as constituting a violation. By contrast, Monopoly Dispute Judicial Interpretation explicitly states that such rule doesn't apply to monopoly disputes and a court shall accept a civil lawsuit directly filed by a plaintiff without any requirement of precedent administrative procedures[21].

Collective redress is one of the most important components of private enforcement of antitrust law. Without effective collective redress, Anti-monopoly Law hardly could protect consumer interests by compensating their loss.

There are three types of collective redress under Civil Procedure Law: joint action, representative action, and public interest action. Joint action is that where different persons' subject matter or action is the same or of the same category, the court can combine their actions upon the consent of these persons. If persons have common rights and obligations with respect to the subject matter of action and one person's act is recognized by other persons, such an act binds other persons; if persons have no common rights and obligations, an act of one person has no binding effect[22]. Persons comprising a party may elect representatives among themselves to act for them. The act of these representatives shall bind all litigants of the party without approval thereof on all respects except modification or relinquishment of claims, admission of claims of the opposing party, or settlement[23].

Where the subject matter of action is of the same category and the number of victims is large but uncertain when the lawsuit is brought, the court may issue a public notice, stating the circumstance and claims of the case and informing those entitled to register with the court within a certain period of time. It is group action. Victims also can elect their representatives to proceed with the suit as in joint action. The court may consult with complainants for determining representative if they fail to elect such representatives by themselves. Binding effect of acts of representatives is the same as in joint action. The judgments or written orders rendered by the court bind all those who have registered with the court. More importantly, such judgments or written orders shall apply to those who have not registered but bring complaint in period of limitation of the action[24].

Public interest action was newly introduced to the Civil Procedure Law in 2012. The Law says that government agencies and organizations which are prescribed by laws are entitled to bring a lawsuit with the court against conducts which damage public interest, such as environment pollution and conducts infringing multiple consumer' legal interests[25]. However, it is not clear which government agencies and organizations having stand-

[21] Article 2 of the Judicial Interpretation.
[22] Article 52 of the Civil Procedure Law.
[23] Article 53 of the Civil Procedure Law.
[24] Article 54 of the Civil Procedure Law.
[25] Article 55 of the Civil Procedure Law.

ing to bring a suit for consumers under Anti-monopoly the Law because there is no agencies and organizations are explicitly authorized by Laws to do so on behalf of consumers. Such government agencies and organization are very likely to be Administration of Industry and Commerce («AIC») and official consumer associations, because Protection of Consumer Rights and Interests Law provides that AIC and Consumers Associations have duties and responsibilities to take measures to protect consumers' interests. Nonetheless, Protection of Consumer Rights and Interest Law fails to explicitly say AIC and official consumer association can bring a suit on behalf of consumers[26]. It is not surprising because Protection of Consumer Rights and Interests became effective in 1993, way before 2012 when public interest action was introduced. Moreover, how to implement public interest action remains unknown because specific aspects are lacking, such as who is entitled to damages and how to allocate them, etc.

However, all three types of collective redress probably are unable to effectively protect consumer interests in practice, because they barely tackle difficulties caused by small but numerous losses sustained by individual consumers. First, joint action is not a kind of collective redress in the strict sense because it merely combines multiple actions into one which is mainly for economic judicial process rather than for bringing as many consumers as possible to the case. In fact, when there are thousands and millions victims, joint action no doubt will be paralyzed by flood of legal documents produced for bringing those victims into the procedure. Second, group action seems to help guarantee a consistent result for different victims because the judgment binds those who even haven't register with the court, but it cannot guarantee a fair result to protect all the victims equally. Those who register with the court may obtain compensations without leaving anything to those who have not registered. Moreover, group action is unable to reduce judicial cost much because those victims who want to get compensation still have to initiate legal procedure. Obviously, they lack such financial motives. Eventually, violators may easily escape from liabilities. Third, as set forth above, public interest action is far from being mature and effective to protect consumer interest in many aspects.

It is hard to deny that collective redress is well under-developed in China. The standard is to see whether there is a mechanism which is able to encourage private enforcement by aggregating financial interest to a level high enough to motivate lawyers to bring a lawsuit. It seems impossible to have such an effective collective redress without opt-out mechanism given that it is criticized and highly debated inside and outside the U.S. The essence of such debate actually is about which value should prevail, deterrence effect of antitrust law or prevention of abuse of class action by providing inappropriate incentive for lawyers.

Heavily influenced by civil law tradition, China is unlikely to introduce opt-out class action into civil procedure law in the near future. Thus, marginal incentive for victims and lawyers to be involved in this kind of case definitely will be taken advantage by infringers to rip off consumer interests.

IV. Evidence and burden of proof

Rule of evidence is very critical, if not the most important, for the plaintiff to win every kind of civil cases. Given the complex and facts-intensive nature of monopoly dispute, rule of evidence is even more important in such cases. If plaintiff has no effective means to obtain necessary evidence, it is very hard or even impossible for victims to get remedies.

1. *Collecting evidence*. – China has a typical inquisitorial judicial system, in which the judge controls major aspects of a trial, including collection of evidence.

[26] Article 28, 31 and 32 of the Protection of Consumer Rights and Interests Law.

Although the general principle is that it is the duty of a party to provide evidence, the Civil Procedure Law provides that if a party is unable to collect the evidence itself due to objective reasons or if the court considers the evidence necessary for the trial of the case, the court shall investigate and collect the evidence[27]. Another article further prescribes that the court shall have such right to make investigation and collect evidence from the relevant entities or individuals[28]. In practice, however, the court's resources are very limited, no matter in terms of finance resources or time which is available for the judge to investigate and collect evidence. It is especially true for monopoly dispute cases.

It could not say that the Supreme People's Court and the legislatures are blind to this severe problem that the court basically has no means to help victims to collect necessary evidence which is mainly possessed by the defendant who usually refuses to turn over. The Supreme People's Court prescribed that where there is evidence proving that a party possesses evidence but refuses to provide without justifiable reasons, if the opposite party alleges the content of such evidence is disadvantageous to the evidence possessor, such allegation can be presumed as having been established[29]. Such provision seems to alleviate hardship of victims; however it doesn't resolve the problem completely because many times the plaintiff has no knowledge of what evidence the defendant might have, not to mention having evidence to prove that the defendant possess such evidence. For instance, how could a victim know what document containing information of a cartel the defendant has, if such cartel is secret?

Perhaps having realized rule of evidence is very unfriendly to victims in a monopoly dispute case, the Supreme People's Court furthers efforts of tipping the scale in favor of the plaintiff. For example, the plaintiff may use the defendant's publicly disclosed information as evidence to prove that the defendant has market dominant position. The court may determine that the defendant is dominant in the relevant market if the information disclosed so proves, unless there is sufficient evidence to the contrary[30]. But it is still far from being encouraging the victim to win the case.

2. *Expert witness*. – A highlight of private enforcement of Anti-monopoly Law in China is introducing expert witness to the trial. The Judicial Interpretation provides that a party may ask one or two persons with special knowledge to illustrate specialized issues in the trial[31]. A party may also apply with the court to entrust professional institutions or professionals with market survey or economic analysis reports on specialized issues[32]. Such professional institutions or professionals may be determined by both parties through consultation upon the consent of the court, and shall be designated by the court if consultation fails[33]. Credibility of such market survey or economic analysis is determined under the relevant rule concerning «appraisal conclusions» in the Civil Procedure Law and other judicial interpretations[34].

3. *Confidential information*. – Confidential information contained in the evidence is entitled to protection by the court. Both Civil Procedure Law and Judicial Interpretation provide that evidence involving state secrets, trade secrets and personal privacy shall not be presented in the public trial[35]. Judicial Interpretation further provides that the court, upon its own decision or party's request, may take measures to restrict or prohibit reproduction of relevant evidence, present relevant evidence only to attorneys or order relevant persons to sign confidentiality undertakings[36].

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[27] Article 64 of the Civil Procedure Law.
[28] Article 67 of the Civil Procedure Law.
[29] Article 75 of the Provisions of the Supreme People's Court on Evidence in Civil Proceedings.
[30] Article 10 of the Judicial Interpretation.
[31] Article 12 of the Judicial Interpretation.
[32] Article 13 of the Judicial Interpretation.
[33] Id.
[34] Id.
[35] Article 68 of the Civil Procedure Law and Article 11 of the Judicial Interpretation.
[36] Article 11 of the Judicial Interpretation.

4. *Burden of Proof*. – Switch of burden of proof helps overcome the main hurdle that is caused by hardship of collecting necessary evidence for the plaintiff to win the case. Allocation of the burden of proof is well recognized as decisive in many cases. Fortunately, the Supreme People's Court fully understands this issue and tries to mitigate plaintiff's burden through switching it between parties.

In general, a party to an action has a duty to provide evidence in support of his allegations. It means that the plaintiff shall prove elements of the claim and the defendant has burden to provide evidence to support his defense[37]. The Supreme People's Court sufficiently takes into account plaintiff's hardship of collecting necessary evidence and switches some burden of proof from the plaintiff to the defendant.

For example, according to Anti-monopoly Law, it seems that the plaintiff has to prove that the agreement in the case has effect of excluding and restraining competition because, under Anti-monopoly Law, monopoly agreements refer to agreements, decisions or other concerted conducts which eliminate or restrict competition[38]. In the Judicial Interpretation, the Supreme People's Court provides that in horizontal monopoly agreement cases, the defendant has duty to prove that alleged agreement has no effect of excluding or restraining competition[39]. There is no "per se" illegal rule in China's Anti-monopoly Law because even in hard-core cartel Anti-monopoly Law doesn't exclude possibility for the defendant to escape liabilities by defenses of R&D, small undertakings, economic depression, etc. Switching burden of proof by the Supreme People's Court reflects "per se" illegal rule to some extent.

One interesting thing is that the final version of Judicial Interpretation deletes same treatment of switching burden of proof from the plaintiff to the defendant in RPM cases, which were included in the draft version for public consultation. In a RPM case, the judgment of a Shanghai intermediate court stated that the plaintiff has to prove that vertical agreement, including RPM agreement, has effect of excluding or restraining competition to demonstrate the existence of monopoly agreement. The decision was rendered right after the Judicial Interpretation was formally published. It is hard to say that it merely was coincident. The Supreme People's Court and lower courts may be affected by Leegin case in the U.S.[40].

In cases of abuse of market dominant position, the plaintiff needs to prove that defendant has such position and abusive conduct, but if the defendant is a public utility enterprise or business operators with lawful exclusive status, dominant position is presumed according to the specific circumstances of the market structure and competition situations, unless it is rebutted by sufficient evidence to the contrary[41].

V. Statute of Limitation

Under Chinese Civil Law and Civil Procedure Law, limitation of action doesn't exclude plaintiff's right to bring a lawsuit but gives the defendant a defense. If the defendant doesn't raise the defense, the judge will neither explain the issue to remind the defendant to do so, nor applies to the case automatically[42]. There are two types of limitation of actions in Chinese civil procedure law: standard limitation and special limitation. Except as otherwise stipulated by laws[43], such as damage for body injury, claims arising out of unqualified goods, etc., standard limitation of two years applies to all types of civil cases[44]. Special limitations vary from 6 months to 3 years. Notwithstanding that most types of civil disputes have

[37] Article 64 of the Civil Procedure Law.
[38] Article 13 of the Anti-monopoly Law.
[39] Article 7 of the Judicial Interpretation.
[40] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007),
[41] Article 64 of the Judicial Interpretation.
[42] Article 3 of the Provisions of the Supreme People's Court on Several Issues concerning the Application of Statute of limitations during the Trial of Civil Cases.
[43] Article 141 of the General Principles of the Civil Law.
[44] Article 135-136 of the General Principles of the Civil Law.

same period of limitation of actions, running, suspension and discontinuation of limitation may differ. Limitation of action matters in monopoly civil dispute cases not only because it is related to whether the plaintiff could win the case but also to how to calculate damages.

Period of limitation of action for monopoly civil dispute cases is two years, because there is no special stipulation in Anti-monopoly Law. As general rule of running of limitation[45], the Judicial Interpretation reinstate that the limitation for damages shall begin to run from the date on which a plaintiff becomes aware of or should have become aware of the infringement of its rights or interests[46].

But the Judicial Interpretation gives special stipulation regarding discontinuation of limitation of action. The complexity is caused by interaction between private enforcement and public enforcement. General rule of discontinuation of limitation is that "a limitation of action shall be discontinued if a lawsuit is brought or if one party makes a claim or agrees to fulfill the obligation"[47], and a new limitation shall be counted from the time of the discontinuance. In monopoly dispute cases, causes of discontinuance include report to enforcement agencies. The limitation discontinues on the date when the complainant reports the monopoly conduct the enforcement agencies. If the enforcement agency decides to not accept the case, to withdraw the case or terminate the investigation, the limitation of action start to run anew from the date when the complainant becomes aware of or should have become aware of such decision of the agency. If the enforcement agency finds monopoly conducts after investigation, the limitation shall be calculated anew from the date when the plaintiff becomes aware of or should have become aware of such decision of the agency becomes legally effective[48].

In many instances, monopoly conducts are continuous and last for more than two years before the plaintiff is aware of such violation and files the lawsuit. If the defendant defends by arguing that limitation is over, the Judicial Interpretation stipulates that, under this circumstance, damage shall be "calculated from the time two years before the date on which the plaintiff files the lawsuit to the people's court"[49].

One point worth noting is that a maximum period of limitation is twenty years, regardless of suspension or discontinuance of limitation, unless there is special circumstance under which people's court may extend the period[50]. Of course, such maximum period also applies to monopoly dispute cases.

VI. Remedies

If the plaintiff sustains losses caused by the defendant's monopoly conducts, the court can order the defendant to assume civil liabilities[51]. The main methods of assuming civil liability include cessation of infringements, removal of obstacles, elimination of dangers, return of property, compensation for losses, etc.[52].

1. *Invalidity of contract*. – The Judicial Interpretation provides that if terms of contract violate mandatory provisions of the Anti-monopoly Law, other laws or administrative regulations, relevant terms are invalid[53]. The liability arising from invalidity of contract is to restitute the property acquired under the contract to other party, and if the property cannot be restituted or restitution is not necessary, compensation shall be made at its estimated price[54]. Moreover, the party who

[45] Article 137 of the General Principles of the Civil Law.
[46] Article 15 of the Judicial Interpretation.
[47] Article 140 of the General Principles of the Civil Law.
[48] Article 16 of the Judicial Interpretation.
[49] Id.
[50] Article 137 of the General Principles of the Civil Law.
[51] Article 14 of the Judicial Interpretation.
[52] Article 134 of the General Principle of Civil Law. Other methods include restoration of original condition, repair, reworking or replacement, payment of breach of contract damages, elimination of ill effects and rehabilitation of reputation and extension of apology.
[53] Article 15 of the Judicial Interpretation.
[54] Article of 58 of the Contract Law.

has fault shall compensate the other party for losses caused by such fault, and if both parties have faults, each party is liable respectively according to its fault[55].

2. *Damages*. – Punitive damage is very rare in Chinese laws[56]. Apparently, the Anti-monopoly Law doesn't make punitive damage available for victims of monopoly conducts. But upon the plaintiff's request, the damage may include the reasonable expenses incurred by the plaintiff to investigate and stop the monopoly conduct[57], which may include attorney fee.

Although there is no explicit language in the Anti-monopoly Law and the Judicial Interpretation directly addressing victims' entitlement to attorney fee if they win, judicial interpretations of the Trademark Law and the Copyright Law may provide support if the judge intends to grant victims attorney fee. Both in judicial interpretation of the Copyright Law[58] and the Trademark Law[59], the Supreme People's Court almost identically provides that upon request of party and based on circumstances of the case, courts can include in damages attorney fee which is pursuant to regulations of relevant government departments. Defendants may argue that lack of language itself demonstrate that the Supreme People's Court doesn't have such intention. But it is not impossible for courts to have discretion to include attorney fee in damages as reasonable expense to stop the infringement.

One thing worth noting is that in China attorneys are allowed to represent clients upon contingency fee as long as the rate is not higher than 30% except in some categories of cases, such as criminal cases, administrative cases and collective redress cases[60].

VII. Legal costs

Except attorney fee, Parties have to pay litigation fees, which may include case acceptance fee[61], application fee[62], and costs incurred by the witnesses, authenticators, interpreters and adjusters for appearing before court, such as travel expenses, accommodation expenses, living expenses, and subsidy for missed work[63]. The case acceptance fees shall be prepaid by the plaintiff[64].

Losing party bears litigation fee and where the party partially wins or loses the case, the court may determine the amount of the litigation fees to be respectively borne by the parties according to the circumstances[65]. The Civil Procedure Law also specifically states that the losing party shall pay for the expense of witness, which include traffic expense, accommodation and meals, and the losses of working time, no matter which party calls the witness[66].

If a party has difficulty of paying litigation fees, he may apply for judicial aid for postponement, reduction or exemption of the litigation fees; only natural person is eligible for exemption[67]. Reduction and exemption of the litigation fees generally are conditioned on financial distress of a person or an entity. Postponement of litigation fees apply to spe-

[55] Id.

[56] For instance, article 96 of Food Safety Law prescribes that besides claiming damages, a consumer may require the producer or the seller to pay 10 times price received, if the food is fails to meet the safety standards or the seller knowingly sells such food. But compensation of ten times food price arguably is not punitive damage, because it is relative low if compared to the damages caused to the body.

[57] Article 14 of the Judicial Interpretation.

[58] Article 26 of the Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes of Copyright.

[59] Article 17 of the Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes of Trademarks.

[60] Articles 12 and 13 of the Measures for the Administration of Attorney Fee.

[61] Case acceptance fee is paid to the court for adjudicating the case.

[62] Application fee is mainly paid to the court for enforcement of decision, preservation measures, payment order, bankruptcy, etc.

[63] Article 6 of the Measures for the Payment of Litigation Fees.

[64] Article 20 of the Measures for the Payment of Litigation Fees.

[65] Article 29 of the Measures for the Payment of Litigation Fees.

[66] Article 74 of the Civil Procedure Law.

[67] Article 44 of the Measures for the Payment of Litigation Fees.

cific types of cases, such as social insurance benefits, marine accident, traffic accident, medical treatment accident, or other personal injury accident and claiming, which don't explicitly include business dispute cases.

However, above judicial aid institution perhaps cannot effectively mitigate financial obstacles faced by victims of monopoly conducts. Inherent complexity of monopoly dispute case usually will cause huge expense for the plaintiff, for example expense for expert witness and economic analysis. The plaintiff facing such financial burden is unlikely able to resort to judicial aid because it results from case itself instead of plaintiff's financial distress.Accordingly, if there is nothing to effectively make monopoly dispute cases affordable for victims, remedies actually are not approachable.

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