

Understanding of Basic Issues on Judicial Interpretation of Civil Procedure on Antimonopoly



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- Background and Process of Making the Judicial Interpretation of Civil Procedure on Antimonopoly
 - Consistent Basic Principles and Spirits for the Judicial Interpretation of Civil Procedure on Antimonopoly
 - Understanding of Several Basic Issues

Background and Process of Making the Judicial Interpretation of Civil Procedure on Antimonopoly

- ❑ Since August 1, 2008 to the end of 2011, district courts across China accepted and heard 61 civil monopoly cases of first instance, and concluded 53 cases.
- ❑ As early in 2009, the Supreme People's Court officially launched the work of drafting the judicial interpretation of monopoly, and ended three years later.
- ❑ On April 24, 2011, public opinions were solicited.
- ❑ On January 30, 2012, the Judicial Committee of the Supreme People's Court passed it after discussion.
- ❑ This Interpretation will be implemented on June 1, 2012.

Consistent Basic Principles and Spirits for Judicial Interpretation of Civil Procedure on Antimonopoly

□ **Target of Civil Procedure on Antimonopoly**

- Dispute settlement type VS. order construction type
- Direct target
 - Provide the victim with the civil relief
 - Prevent and stop the monopoly behavior
- Ultimate target
 - Maintain the free and energetic market competition mechanism
 - Realize the best “degree” of implementing the Antimonopoly Law – to avoid the insufficient deterrence and also the excessive deterrence
- The direct target needs to serve the ultimate target. Meanwhile, the realization of direct target restricts the realization of ultimate target.

□ Basic Principles and Spirits

- Obey the laws
 - Antimonopoly Law, Tort Liability Law , Contract Law , Civil Procedure Law
- Summarize the mature judicial experience
 - Experience of hearing the improper competition cases
 - Experience of judging monopoly cases
- Proceed from national conditions and actual situation
 - Define rules to facilitate litigation instituted by the party involved
 - Avoid the excessive deterrence, and restrain the market vitality
 - Coordinate the relationship between administrative law enforcement and civil justice
- Reflect the global vision and international perspective

Understanding of Several Basic Issues

- ❑ Case types and litigation qualification
- ❑ Relationship between administrative law enforcement and civil procedure
- ❑ Case jurisdiction and hearing
- ❑ Burden of proof and evidences
- ❑ Civil liability

Case Types and Litigation Qualification

❑ Dispute type

- Tort litigation: Losses incurred by the monopoly behavior
- Non-tort litigation : Dispute caused by the violation of contract contents and regulations of industry associations against the Antimonopoly Law

❑ Litigation qualification

- Meet the general requirements for the litigation qualification- Civil Procedure Law (Article 108)
- Qualification for tort litigation
 - ❑ Types and requirements of losses
 - Actual losses
 - Losses caused by the monopoly behavior(causal relationship can not be too distant)
 - Losses which the Antimonopoly Law intends to prevent

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- ❑ Failure of distinguishing the direct purchaser from the indirect purchaser
 - Whether allowing the indirect purchaser to file a lawsuit will lead to the unchecked litigation?
 - ❑ The punitive damage system is not established for the Antimonopoly Law, and the power of private pursuit of relief is insufficient
 - ❑ The features of monopoly behavior determine the difficulty of proof, and the litigation blindly instituted by individuals as rational subjects will not become common
 - ❑ The requirements for actual losses have limited the litigation qualification, and the causal relationship chain for the indirect purchaser can not be too distant
 - ❑ Practices of implementing the Antimonopoly Law show the worry seems to be unnecessary
 - How to treat the pass-on defense
 - ❑ Allowing the indirect purchaser to file a lawsuit need allow the pass-on defense , and the problem about burden of proof shall be solved through the judicial practice.

❑ Qualification for non-tort litigation

■ Openness of causes:

- ❑ Whether any dispute is caused for the contract's violation of the Antimonopoly Law

- ❑ Whether the regulations of industry associations become invalid for the violation of Antimonopoly Law

- The confirmation litigation mainly confirms the efficacy of civil legal behavior

- Actual losses are not the prerequisites

Relationship between Administrative law Enforcement and Civil Procedure

- ❑ General mechanism for the enforcement of Antimonopoly Law
 - Public enforcement oriented type
 - Private enforcement oriented type
 - Mixed type
- ❑ Mechanism for the enforcement of Antimonopoly Law
 - Mixed type: Dual-track operation, complementing each other's advantages
 - Whether is the administrative law enforcement procedure preceded?
 - ❑ Antimonopoly Law does not set the administrative enforcement as the premise
 - ❑ The preceding of administrative law enforcement procedure will influence the monopoly behavior victim in obtaining the relief
 - ❑ Receiving the litigation directly instituted by the party involved to the court has become an international trend
 - ❑ Receiving the litigation directly instituted by the party involved to the court has become true.

■ Ways of litigation:

- Direct litigation
- Subsequent litigation

■ Relationship treatment

- Procedure competition and cooperation Mutually independent in principle Whether needing to be suspended?
- The efficacy of fact verified by the administrative judgment upon the civil judgment
- Reasons ultimately uninvolved in the judicial interpretation
 - Complex situation makes the unified treatment difficult
 - To be solved through the judicial practice

Case Jurisdiction and Hearing

- ❑ Qualitative standard for the civil dispute cases on monopoly
 - Cases needing to be judged according to the Antimonopoly Law
- ❑ Centralized jurisdiction
- ❑ Territorial jurisdiction : treat differently according to the tort dispute and contract dispute
- ❑ Transferred jurisdiction
 - ❑ Handle the monopoly issues proposed during the counterclaim or deraignment
 - ❑ Maintain the centralized jurisdiction system for the civil dispute cases on monopoly, and also prevent the party involved from abusing the monopoly deraignment and counterclaim so as to delay the litigation
 - ❑ The hearing court shall review whether there are evidences

Burden of Proof

- ❑ General rules for distribution of burdens of proof
 - Who claims, who bears the burden of proof
 - The claimant should bear the burden of proof of the facts which the claims are based on ; the opposing party involved of the claimant should provide evidences for the facts which can eliminate or hinder the claims
 - The distribution of objective burdens of proof (or the burden of proof in result sense) is stipulated in the substantive law (mainly the basic terms on claim)

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- ❑ Legal basis of distributing the burdens of proof for the civil procedure on antimonopoly
 - Article 50 of Antimonopoly Law: The operator shall legally bear the civil liability for the losses of others incurred by his/her monopoly behavior.
 - The Antimonopoly Law does not stipulate the inversion of (objective)burden of proof
 - The plaintiff should bear the burden of proof for the existence of accused monopoly behavior, effect of eliminating and limiting the competition , losses of the plaintiff, and the causal relationship between the accused monopoly behavior and the losses of the plaintiff.
 - The defendant should bear the burden of proof for the various deraignment causes to prove the monopoly behavior does not exist

Distribution of Burdens of Proof Concerning Monopoly Agreement Cases

- Features of stipulating the monopoly agreement behaviors in the Antimonopoly Law
 - Distinguish the horizontal agreement from the vertical agreement
 - The fundamental criterion of judging the existence of monopoly behavior is to check whether the effect of eliminating or limiting the competition exists
 - Reasonable rules become the sole method of analyzing whether some behavior has the nature of monopoly
- Influence on the distribution of burdens of proof
 - Differently treat the horizontal agreement and vertical agreement

Burden of Proof Concerning Horizontal Agreement Cases

- ❑ When reasonable rules serve as dominant analysis rules, the presumption of effect of eliminating or limiting according to the specific monopoly behavior (horizontal agreement) when distributing the burdens of proof should not be influenced. Of course, the defendant may provide the counterevidences. In this case, the plaintiff only needs to prove the defendant has conducted the specific monopoly behaviors, and the defendant bears the burden of proof upon the deraignment or immunity from liability to prove the monopoly behavior does not exist
- ❑ What horizontal agreements generally have the effect of eliminating and limiting the competition?
 - art.13 fixed price, limited output, market segmentation, limited new technology, boycott transaction
- ❑ Treatment of other horizontal agreements
 - General rules applicable to the distribution of burdens of proof

Burden of Proof in Vertical Agreement Cases

- Competition issues concerning the majority of vertical agreements will appear only when the competition among brands is inadequate. That is to say, the negative influence shall be imposed on the competition only when a certain level of market power exists at the supplier or purchaser level, or both levels simultaneously.
- art.14 Fixed resale price Limit the lowest resale price
- The plaintiff should first prove defendant has conducted the specific monopoly behavior and this behavior has the anti-competition effect in the relevant markets; if the evidences of plaintiff achieve certain degrees of proof, the burden of proof shall be transferred;
- Next, the defendant needs to prove his/her behavior is conducive to the competition , and effect of promoting the competition exceeds that of anti-competition; if the evidences of defendant achieve certain degrees of proof, the burden of proof shall be transferred to the plaintiff.

Transfer of Burdens of Prima Facie Proof and Subjective Proof

- ❑ Under specific circumstances, the court may easily deduce whether certain behavior has the effect of eliminating and limiting the competition on the basis of certain evidences and by combining the basic economics experience and common sense. If so, the defendant shall provide the counterevidences to prove his/her behavior does not have the effect of eliminating and limiting the.
- ❑ Realize the balance between the reduction of cost for the reasonable analysis and the accurate determination of competition effect

Distribute of Burdens of Proof for the Case on the Abuse of Dominant Market Position

- ❑ General rules: The plaintiff should bear the burden of proof for the fact that the defendant has the dominant position relevant markets and the accused monopoly behavior according to the provision in Article 17.1 of Antimonopoly Law, and the defendant shall bear the burden of proof for the legitimacy of his/her behavior.
- ❑ Evidences and proof of dominant market position
 - The information released by the defendant to the outside
- ❑ Proof of dominant market position of public enterprise
 - Reduce the burden of proof: If the public enterprise or other operator with the exclusive status legally obtained abuse the dominant market position, the people's court may reduce the burden of proof of plaintiff, and affirm the dominant position of the defendant in a certain market according to the market structure and competition situation, but excluding the case under which the sufficient counterevidences are provided to refute.

About evidences

- ❑ Handling of important evidences voluntarily submitted by the actor of monopoly to the administrative enforcement organ
 - Coordination between leniency system and civil procedure
 - Evidence protection
- ❑ Analysis and application of market survey or economic analysis report
 - Whether the report contain adequate facts or data foundation
 - Whether the report uses reasonable and reliable market survey or economic analysis methods
 - Whether the report considers relevant factors that may change the result of market survey or economic analysis
 - Whether the experts display due prudence and diligence as professionals

Civil liabilities

- Forms of undertaking liabilities for monopoly
 - Damages
 - Injunctive Relief
(stop infringement and eliminate hazards)
 - Invalidation of agreement

❑ Principles for attribution of damage liability

- In tort liability law – Rule of fault as principle, and principle of no fault as exception
- Article 50 of the Antimonopoly Law specifies that if an operator implements a conduct of monopoly and causes others to suffer a loss, the operator shall undertake the civil liability according to the law.
 - ❑ Characteristics: The law does not specify fault elements and causes for exemption, which, in reality, establishes the principle of liability without fault for damages
 - ❑ Reasonableness of this mode:
 - The Antimonopoly Law is a part of the compulsory public policy, and must guarantee its effective enforcement
 - Certainty of law

Calculation of Damage

❑ Substantive methods

- Context theory, object difference theory, market share theory and regression analysis method

❑ Procedural methods

- Is it possible to reduce the scale of proofs for damage and make the court decide at its discretion? For example, Article of the Civil Procedure of Japan.
- So far, a court has made a similar judgment: The plaintiff has evidences to prove the monopoly has caused an actual loss to the plaintiff, but the plaintiff is hard to prove the amount of the loss, and the people's court can determine a reasonable damage amount according to the proved facts, and considering the nature, extent, duration and other facts of such illegal conduct.

Thank you! Welcome comments!