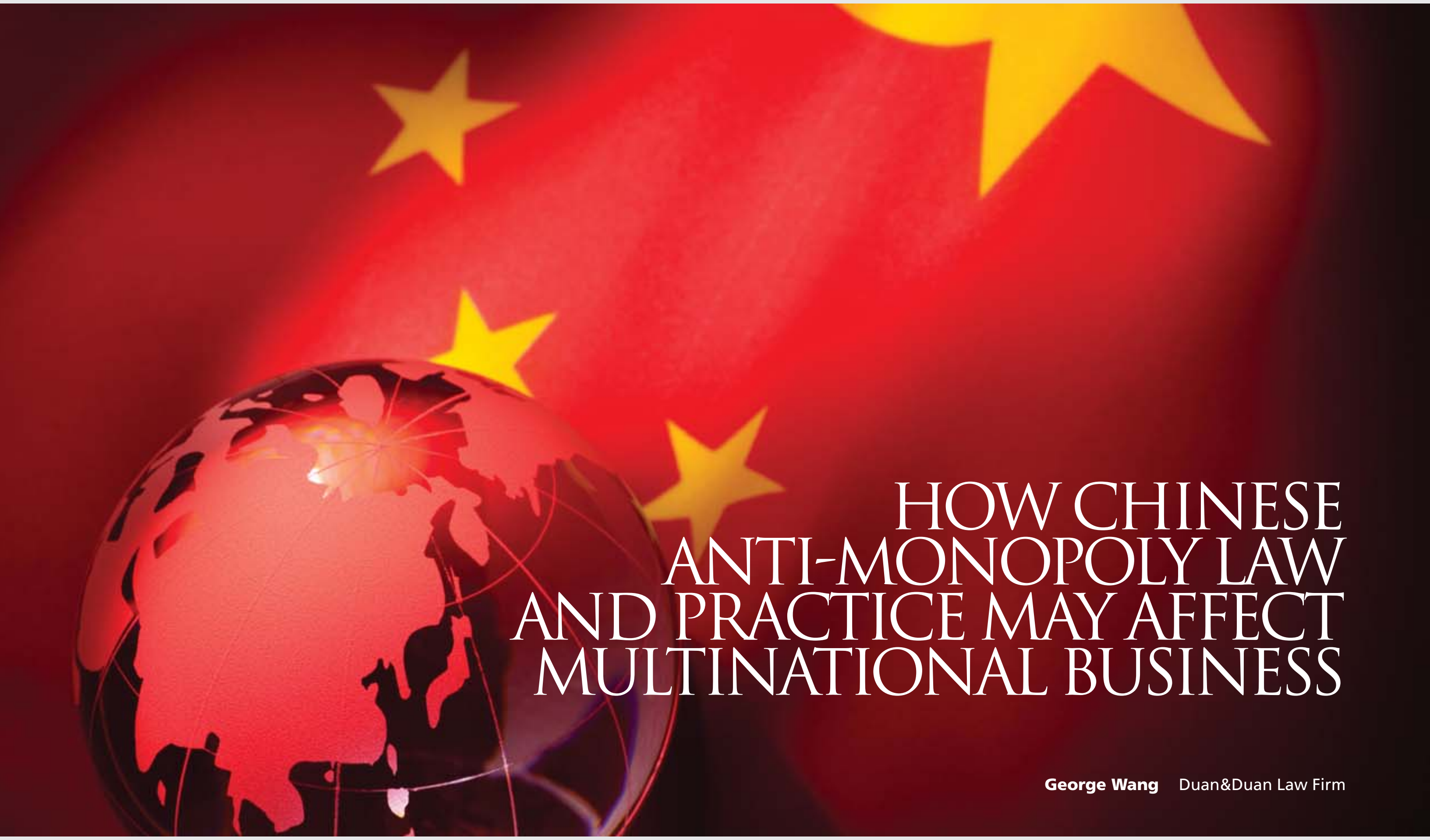

HOW CHINESE ANTI-MONOPOLY LAW AND PRACTICE MAY AFFECT MULTINATIONAL BUSINESS

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THE HISTORY OF THE ANTI-MONOPOLY LAW IN CHINA

Since its accession to WTO in 2001, China has committed to the establishment and improvement of anti-monopoly law regime for a decade. The *Anti-monopoly Law* was finally adopted and promulgated by the National People's Congress of China and came into effect as of August 1, 2008. Chinese authorities have since then rolled out more than 30 guidelines, supplements and directives to provide practical guidance to the public.

THE PURPOSE OF THE ANTI-MONOPOLY LAW

Like all other major jurisdictions such as the US and EU, this Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, and safeguarding the interests of consumers. In the course of drafting and deliberation, the Chinese legislators consulted with the US and EU counterpart laws to learn the most advanced and developed legal norms and practices in the anti-monopoly law sector.

THE DEFINITION OF MONOPOLISTIC CONDUCTS

First of all, the monopolistic conducts that are outlawed include:

(1) Monopoly agreements

Monopoly agreements include agreements, decisions and other concerted conducts designed to eliminate or restrict competition e.g. fixing or changing commodity prices, restricting the amount of commodities manufactured or marketed, splitting the sales market or the purchasing market for raw and semi-finished materials, joint boycotting of transactions, etc.

(2) Abuse of dominant market position

Abuse of dominant market position means any single company with more than 50% market share without a fair reason (i) selling commodities at prices below cost. (ii) refusing to enter into transactions with their trading counterparts, (iii) allowing their trading counterparts to make transactions exclusively with themselves or with the companies designated by them, (iv) conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions, (v) applying differential prices and other transaction terms among their trading counterparts who are on an equal footing, etc.

(3) Concentration of business that leads to elimination or restriction of competition

Concentration of businesses means the merger of companies and control by acquisition of shares or assets. Usually this refers to merger and acquisition, and like the Sherman Act, Clayton Act and the Hart-Scott-Rodino Anti-Trust Improvement of 1976 of the US, concentration filing and approval prior to the closing of the takeover deal is required.

ENFORCEMENT OF THE ANTI-MONOPOLY LAW

(1) Three Law Enforcement Agencies

There are three separate Chinese law enforcement agencies to enforce the three main types of conducts regulated under Anti-Monopoly Law. Ministry of Commerce (MOC) is responsible for reviewing and approving concentration deals. State Administration of Industry and Commerce (SAIC) is responsible for overseeing any violations in relation to monopoly agreements and National Development and Reform Commission (NDRC) is the watchdog for price-related monopoly misconducts.

(2) Concentration Filing with MOC

Among the three conducts regulated by the Law, the concentration filing with MOC has so far become the most notable enforcement and practice of the Law. In a span of a few years, China has become the world's number three jurisdiction in terms of the most concentration filings, after the US and EU, with many involving US multinational companies. Up to September 30, 2012, there are altogether 474 concentration filings that have been reviewed by MOC, among which, 458 cases have been approved unconditionally. Most multinationals have significant business and presence in China so their global mergers and acquisitions will have a direct impact on their respective China operations and require compliance with the Chinese anti-monopoly law.

96.6% of the total number of cases received unconditional approval from the MOC. This leads to businesses and legal experts' questioning of the necessity of filing. The only threshold of filing is business revenue, regardless of the market shares – which is blamed for triggering the unnecessary filings that are clogging up the system which comprises of only two dozen staff at MOC lagging behind a backlog of cases. However, MOC rejected Coca-Cola's takeover of China's Hui Yuan Fruit Juice deal in 2009 which is the only deal that does not pass MOC's anti-monopoly law review so far. MOC under the Law can attach conditions to approval thus making it conditional approval. For examples, MOC demanded Pfizer divest its vaccine business in China in 2010 as a pre-requisite to approve its acquisition of Wyeth. MOC required Google to continue opening Android platform in its recent takeover of Motorola Mobile in 2012.

Most of the filings can pass the MOC review, while a few will pass with conditions such as divestment of certain business, injunction of more acquisitions, carry on present business model, etc. Only one deal gets rejected. This corresponds with our experience in handling MOC concentration filings. In one case that we handled, for instance, MOC wanted initially to reject the concentration filing which involves a joint venture deal among a big Chinese enterprise and a US Fortune 500 electric giant for many reasons not concerning competition or monopoly but industrial policies and ultimately, the historic emotional discomfort among the central government agencies against the Chinese enterprise. In lieu of the rejection which requires announcement and exposes the decision to public questions imposing pressure, MOC advised the parties involved to voluntarily withdraw the application so that they can avoid making a rejection decision.

Many legal experts and business people are appealing for a fast track review, an express route that is available in EU which separates the viable deals from the rest and provides approval in a shorter timeframe. The fast track guidelines have been drafted and are under review by the MOC.

Though violation of the MOC filing currently carries no criminal liability and a maximum fine of 500,000 RMB yuan (US $80,000), many foreign companies cannot treat it lightly because the fines are severe enough to stain the foreign companies' reputation and image, holding back their future operation in China.

(3) Civil litigations concerning monopoly conducts

With a view to correctly hearing cases involving civil disputes arising out of monopolistic conducts, 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 Monopolistic Acts* ("Provisions") took effect on June 1, 2012. The Provisions serve as practical guidance for court to try and hear the civil disputes arising out of monopolistic acts which are filed by natural persons, legal persons or other organizations that suffer losses due to monopolistic acts. It requires the defendants to bear the burden of proof in some cases.

The existence of an investigation or decision by an enforcement body (like SAIC or NDRC) will not be a prerequisite to pursuing a private action in court against an individual or company. Any individual can sue a big company for monopolistic misconducts.

THE LATEST RELEVANT CASE (VERTICAL PRICE-FIXING LITIGATION OF RESALE PRICE MAINTENANCE BY J&J)

On 18 May 2012, the Shanghai No. 1 Intermediate People's Court dismissed allegations that Johnson & Johnson Medical (China) Ltd. , the US multinational's China arm had set a minimum resale price in breach of China's Anti-Monopoly Law and rejected the plaintiff's claim of damages of CNY 14.4 million (US $2.3 Million). It is understood that the plaintiff has filed an appeal to the Shanghai Higher People's Court.

The Shanghai Court found that a plaintiff must meet three criteria in order to establish an antitrust injury and claim damages, including: (1) the defendant engaged in monopoly conduct; (2) the plaintiff suffered losses; and (3) a causality link must be established between the losses and the monopoly conduct.

The Shanghai Court found that the distribution agreement between the defendants and the plaintiff did contain an RPM clause. The reason why the case is dismissed for now is that the plaintiff cannot provide enough evidence to prove its loss and there are a number of suppliers offering similar products. So an RPM arrangement, which is so popular in manufacturer/distributor agreements could cause a restricting or eliminating effect on competition if such RPM is proved to constitute a monopoly agreement according to the three criteria aforementioned.

CONCLUSION

As China becomes the world's No. 2 economy, only after the US, it has built up the legal framework to regulate the anti-monopoly legal issues in a remarkably short timeframe. This has posed a significant challenge for businesses that are aiming at mergers and acquisitions that may include China operations by placing a requisite MOC concentration filing. For many US manufacturers who are looking at China as one of their largest markets, provisions in vertical monopoly agreements with their Chinese distributors such as resale price maintenance and horizontal monopoly agreements such as separation of markets would face serious administrative and judicial review upon complaints. Most notably, any individual or company, even those with no direct business relationship with a big company can sue the company on the ground of monopoly misconducts. Hence, the compliance with Chinese anti-monopoly law should be brought to the attention of the general counsels and attorneys of the US companies having business or presence in China.

George Wang is a partner, at Duan&Duan Law Firm and he is Co-Chair of the International Investment & Anti-Trust Commission of the Shanghai Bar Association. Mr. Wang's practice includes corporate, mergers & acquisitions, investment, capital market, financing , dispute resolution, etc. He frequently advises on cross-border transactions involving China and the US. He has advised on matters relating to both inbound and outbound investment and M&A transactions. He also advises companies on their listing in China and the US. He studied in China and the UK and got a postgraduate degree at Oxford University in law. You may contact him by email at George@duanduan.com.