环球反垄断法律专递
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➢ 纵向价格协议究竟是否当然的垄断协议？——关于海南裕泰案的司法审查结论评述

On The Illegality of Vertical Agreements: Comments on *Hainan Yutai Technology Feed Ltd. v. Hainan Provincial Price Bureau*

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摘要：

长久以来，中国反垄断行政执法机构和司法机构对纵向垄断协议的认定一直存在分歧。行政执法机构认为纵向垄断协议属于“本身违法”，一旦符合《反垄断法》第十四条的行为要件，不需要进行竞争性分析即可进行行政处罚；司法机构则认为纵向协议可能存在竞争与反竞争的双重作用，应当进行竞争性分析以判断其违法性。2017 年，最高人民法院在海南裕泰案中针对双方的分歧做出了调和性回应。最高院肯定了纵向协议双面效应，却同时裁定执法机构对纵向协议的反竞争性不负有举证责任。法院还主张经营者应当根据《反垄断法》第十五条的豁免条款进行抗辩，实际上认定了经营者对其行为负有不具有反竞争性的举证责任。

Summary:

For a long time, Chinese Anti-Monopoly Law Enforcement Agencies (AMEA) and judicial branches have been applying different standards when reviewing the illegality of vertical agreements. Chinese AMEA persists that vertical agreements are *per se* illegal. Once such an agreement presents external elements provided in the Article 14 of the Anti-Monopoly Law (AML), it violates the law without further competitive analysis. However, Chinese courts have been recognized the dual effects of vertical agreements. Therefore, a court will consider competitive and anti-competitive influences of a vertical restraint when judging on its illegality. In 2017, the Supreme Court of China responded to such a discrepancy in *Hainan Yutai Technology Feed Ltd. v. Hainan Provincial Price Bureau* in an intermediary way. The Court realized the dual effects of vertical restraints, while ruled that the AMEA should not burden the obligation to prove the anti-competitiveness of vertical restraints in question. The court further decided that the business operator in the case should defend its immunity according to Article 15 of the AML, which in fact shifted the proof burden to the undertaking’s side.

➢ 论反垄断民事争议的可仲裁性

On The Arbitrability of Antitrust Civil Disputes in China

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摘要：

在南京嵩旭公司诉三星公司案件中，中国法院否定了反垄断民事争议的可仲裁性。本文分析了欧美相关判例以及现有法律规定，从争议实质出发认为否定反垄断民事争议的可仲裁性的理由并不充足，且与当今的国际潮流不符。否认反垄断民事争议的可仲裁性，还可能陷入国际反垄断争议有关的仲裁在中国无法依据《纽约公约》承认和执行外国仲裁裁决的尴尬境地。

2019 年 7 月 2 日，中国代表团在海牙国际私法会议第 22 届外交大会闭幕式签署了《承认与执行外国民商事判决公约》，未来涉及固定价格、围标、限制出口或者配额、划分市场等核心卡特尔行为有关的国际民商事判决在中国将被得到承认与执行。相应的司法机构应当对这一问题做出进一步的思考。

Summary:

Chinese court denied the arbitrability of antitrust civil disputes in *Nanjing Songxu Technology Co., Ltd v. Samsung (China) Investment Co., Ltd.* This article aims to provide a critical review on such a rule based on relevant precedents of EU and the U.S. Overall, the reasoning of such a decision is insufficient, and such a rule introduces dilemma when one argues for enforcing an international antitrust arbitral award according to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, to which China is a signatory country.

On July 2, 2019, Chinese delegation signed *the Convention on the Recognition and Enforcement of Foreign Civil and Commercial Judgments* at the closing ceremony of the 22nd session of the Hague Conference on Private International Law, stipulating that international civil and commercial judgments related to core cartel behaviors such as price fixing, bid rigging, exports or quotas restriction, and market allocation will be recognized and enforced in China in the future. Therefore, the judicial branch should reconsider their stand regarding the arbitrability of antitrust civil disputes accordingly.

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纵向价格协议的问题已经成为中国反垄断法实施当中争议最大的问题之一，执法机构在过去十年间查获了大量纵向价格协议的案例，却引来很大的反弹声浪，质疑的理由包括：（1）纵向价格协议对于商业企业而言是非常重要的且有效（甚至是不可缺少的）销售管理策略，很多企业控制纵向价格的出发点并不是排斥竞争；（2）在中国市场上存在大量的纵向价格控制的商业模式，而执法机构却仅及其一、忘乎其余，有失公平；（3）在反垄断法发达的美国和欧盟，已经很少认定单纯的纵向价格控制行为是违法的垄断行为了。除了来自经营者和部分专业学者的质疑外，中国的法院系统从 2013 年锐邦诉强生案开始就在关于纵向价格协议的垄断民事侵权诉讼案中采取了与执法机构截然不同的分析思路和监管态度，几乎看不到法院因认定纵向价格协议违法而支持原告侵权索赔主张的判决。尽管如此，反垄断行政执法与垄断行为司法审查始终依着各自的路径平行前进，不见交叉，直到 2017 年海南裕泰科技饲料有限公司（下称海南裕泰）因不服海南省物价局的行政处罚，向当地法院提起行政诉讼，经过一审、二审及再审审查，最终以最高人民法院再审行政裁定书为终结，使得此案成为反垄断行政执法司法审查的标志性案例。

最高人民法院最终支持了海南省物价局对于纵向价格协议的执法决定，同时也坚持了法院系统在垄断民事诉讼案件中关于纵向价格协议的应当具有“排除、限制竞争效果”的判断标准，这种“煞费苦心”的调和却也“不知不觉”地将《反垄断法》第十五条即关于垄断协议豁免的路径引入了纵向价格协议的合法性判断中来。归纳最高人民法院的再审行政裁定书，主要观点如下：

（1） 垄断协议是指具有“排除、限制竞争效果”的协议、协同行为和决定，横向协议中固定价格、限制产量、划分市场等行为可以直接推定违法，而其他协议行为（当然包括纵向价格协议）应当进行合理分析确定是否构成垄断协议；

（2） 纵向协议具有促进竞争和限制竞争的双面效应，在当前阶段，基于执法效率和执法需要的考量，执法机构无需对协议是否符合“排除、限制竞争效果”这一构成要件承担举证责任，

即可依据《反垄断法》第十四条的规定认定垄断协议；

（3） 经营者可以提交证据进行抗辩，推翻执法机构的认定，或依据《反垄断法》第十五条的规定主张豁免；

(4) 在行政诉讼中对反垄断机构执法中认定纵向垄断协议合法性的判断标准，与民事诉讼中对纵向垄断协议的审查标准，存在明显的差别。

行政裁定书的结论是，海南裕泰的行为符合《反垄断法》第十四条第一项的规定，又未能提交证据证明其行为符合《反垄断法》第十五条的规定，因此，海南省物价局的认定符合事实和法律规定。

无论是在美国、欧盟还是世界上其他司法辖区，司法机构是认定一项行为是否构成违法垄断行为的最终裁决机构，中国自然也不例外。海南裕泰案给了中国司法机构一个机会直接对反垄断行政执法决定发表意见，无论人们对这个意见如何评论，在未来很长一段时间都将是针对纵向价格垄断协议的标准法律意见。从中我们可以看到，纵向垄断协议行为具有促进竞争和限制竞争的双重效应，可以适用合理分析原则，当事人面对执法机构或是法院都有权也应当就其行为的合理性提交证据进行抗辩。2019 年 7 月颁布的《禁止垄断协议暂行规定》第 22 条第 2 款已经将固定价格、限制产量和划分市场的横向垄断协议行为视为核心卡特尔、排除适用中止调查，而 2019 年 5 月，上海市市场监管局已经对海昌隐形眼镜有限公司上海分公司等两公司的纵向价格限制案终止调查。我们可以看到，在中国无论是反垄断执法机构还是司法机构，对于纵向价格协议的监管态度已经日趋一致，而就纵向价格协议实施（实质性）合理分析原则已然是获得各方认可的共识。

➢ 反垄断专论（双语）Antitrust Monograph (Bilingual)

论反垄断民事争议的可仲裁性

On The Arbitrability of Antitrust Civil Disputes in China

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根据《反垄断法》第 50 条的规定，因垄断行为给他人造成损害的，应承担损害赔偿责任。实践中经常出现的情况是，普通商事交易合同中双方当事人约定通过仲裁方式解决争议，而一旦真的发生争议，双方当事人提交仲裁机构裁决，一方当事人以对方当事人实施垄断行为作为主要诉请主张，另一方当事人则以反垄断争议不适用仲裁而提出管辖异议，从而提出一个问题即反垄断民事争议纠纷的可仲裁性。这种情况在国际商事领域更为常见，问题也更突出。本文拟结合中国和美国、欧盟的实践做法做一个简单探讨。

According to Article 50 of the Anti-Monopoly Law (AML), where any damage is caused by one's monopolistic conduct to others, one shall be liable for the damage he caused. In practice, it is common that parties to an ordinary commercial contract agree to resolve their disputes by arbitral resolution. However, when one party complains that the other party has implemented monopolistic practices as its main claim and sends the case to an arbitration body, the other may raise an objection to jurisdiction on the grounds that the anti-monopoly dispute does not apply to arbitration. Now the problem raised is whether anti-trust civil disputes are arbitrable. This question is more common and more controversial in international business transaction realm. This article intends to discuss on the arbitrability of anti-trust civil disputes based on the practice of China, the United States, and the European Union.

一、中国的案例

2016 年，中国出现了一个类似案例。2012 年 5 月至 2013 年 11 月，南京嵩旭科技有限公司（下称嵩旭公司）作为三星（中国）投资有限公司（下称三星公司）的经销商，为其销售三星牌显示器产品。双方在《经销协议》中约定本协议履行过程中发生的有关争议应提交仲裁机关解决。2014 年，嵩旭公司向南京中院起诉三星公司在经营过程中实施了垄断行为，而三星公司认为纠纷应按协议约定提交仲裁机关解决，因此基于约定的仲裁条款向法院提起管辖权异议。南京中院指出垄断纠纷属于可仲裁事项，但由于双方签订的两份协议约定了不同的仲裁机构，仲裁条款约定无效，驳回了三星公司提出的管辖权异议。三星公司对原审裁定不服，随后向江苏省高院上诉，2016 年 8 月，二审法院驳回了上诉，维持了原裁定，但却是认定垄断纠纷本身不可仲裁，理由如下：

I. The Case of China

One relevant Chinese case arises in 2016. From May 2012 to November 2013, Nanjing Songxu Technology Co., Ltd. ("Songxu"), as a distributor of Samsung (China) Investment Co., Ltd. ("Samsung"), sold Samsung display products in China. The parties agreed in their Distribution Agreement that any dispute arising from the performance of the Agreement shall be submitted to an arbitration body for resolution. In 2014, Songxu filed a lawsuit in the Nanjing Intermediate Court against Samsung for its monopolistic conduct in the course of performance, but Samsung believed that the dispute should be submitted to an arbitral body for settlement according to the Distribution Agreement, and therefore filed an objection to jurisdiction with the court according to the arbitration clause agreed upon. The Nanjing Intermediate Court found that monopoly disputes were arbitrable, but due to the fact that two parties had agreed on two different arbitration institutions in their two separate agreements, the arbitration clause was invalid, and thus the objection was overruled. Samsung disagreed with the original ruling and appealed in the Jiangsu High Court. In August 2016, the High Court dismissed the appeal and upheld the original ruling, but held that the monopoly dispute itself could not be arbitrated for the following reasons:

1、从《反垄断法》的内容可见，目前反垄断执法主要依靠行政执法机关。而最高人民法院在司法解释中，仅对反垄断民事争议通过民事诉讼途径私人进行救济作出规定，并且对垄断纠纷民事诉讼的管辖也仅仅限定在省会城市中级人民法院和最高人民法院指定的法院。（换言之《反垄断法》的实施应当仰赖公权力机构）。2、反垄断法具有很强的公共政策性，在各个国家长期都属于不可仲裁的纠纷。（虽然近年已有松动）但在我国，由于反垄断法实施时间较短，反垄断执法和司法实践较少，尚未形成成熟的反垄断执法和司法经验，反垄断的公共政策性必然是我国考量可仲裁性的重要因素。我国现阶段对能否通过仲裁途径进行垄断纠纷的权利救济尚无法律明确规定，而且至今尚未见垄断纠纷进行仲裁的实践。3、本案纠纷不仅仅涉及嵩旭公司与三星公司，还涉及公共利益。而本案所涉垄断纠纷争议因涉及第三方及消费者利益，已突破双方合同约定，故不能据此约定确定本案纠纷应当仲裁解决。

(1) According to the AML, the AML relies on the administrative agencies to enforce it. However, the Supreme Court, in its judicial interpretations, only stipulates that remedies regarding anti-monopoly civil disputes, which shall be provided by individuals through civil proceedings, and the jurisdiction for civil proceedings for such a dispute shall be limited to intermediate courts in provincial capital cities and courts designated by the Supreme Court. In other words, the enforcement of the AML relies on the public institutions. (2) AML is a matter of a public policy, and historically, disputes arose from it are not arbitrable in many countries. (Although it has been loosened in recent years) However, in China, due to the short implementation period of the AML, mature AML enforcement and judicial experience have not yet been accumulated, the public policy nature of AML is certainly an important factor for China to consider as to arbitrability. At the present stage in China, there is no explicit legal provision on arbitration method for monopolistic disputes, and no arbitration practice for monopolistic disputes has been seen. (3) The dispute in this case is not only between Songxu and Samsung, but also involves public interests. As the dispute involves the interests of a third party and consumers, it has beyond the

contractual agreement between the two parties, so the arbitration clause do not encompass the dispute in question and so that the case is not subject to arbitration.

归纳而言，江苏省高院否定反垄断民事争议可仲裁性的理由主要是反垄断法具有公共政策性，涉及垄断行为的裁决会影响争议之外的第三方，应当主要依赖公权力机构裁处纠纷，而且世界各国大多长期不承认反垄断争议的可仲裁性。但这些理由实际上在 1986 年美国的三菱汽车案中都被推翻了。

To summarize, the main logic behind Jiangsu High Court's denial to the arbitrability of anti-trust civil dispute is the public policy nature of the AML. The decision over monopolistic dispute would have effects on a third party, which shall be made by a public authority. And lastly, for a long time, most countries do not recognize the arbitrability of such dispute. However, similar reasoning is actually overturned in the 1986 Mitsubishi Motors case in the United States which is stated below.

二、美国、欧盟等国家和地区关于反垄断争议可仲裁性的实践态度

1968 年，美国联邦第二巡回上诉法院审理的“American Safety 案”确立了“美国安全原则（American Safety Doctrine）”：反托拉斯法项下的请求权究其本质而言，不宜通过仲裁方式解决。[1] 理由如下：（1）反托拉斯法包括了许多国家利益，违反反托拉斯法的行为会影响成千上万甚至上百万的人，会造成令人难以置信的经济破坏。国会也不希望通过非司法方式来解决此种争议；（2）反托拉斯案件通常很复杂，因而司法方式比仲裁方式更适合这类案件的解决；（3）在反托拉斯案件中，拥有讨价还价优势地位的一方很可能会迫使对方订立附属合同，使其不情愿地把可能产生的任何争议提交仲裁；（4）商事仲裁员通常来自商业社会，一般只具备衡平观念，因此，正如战争与和平问题不能交由平民百姓来决定一样，反托拉斯争议也不能让来自普通商业社会的仲裁员去解决，特别是不能交给对美国的法律和价值观念不甚了解的外国仲裁员去解决。但是，1986 年美国联邦最高法院审理的“三菱汽车案”实质上地推翻了“美国安全原则”，针对美国联邦第二巡回上诉法院在“Safety 案”中提出的否定反托拉斯争议可仲裁性的数项理由，联邦最高法院指出，不存在因公共政策上的原因而禁止将国际反托拉斯争议交付仲裁的情形，反托拉斯案件虽然复杂，但是并不意味着仲裁庭不能正确地处理反托拉斯争议，“我们不能纵容这样的假设，即当事人和仲裁机构不能也不愿意选择有能力的、尽责的和公正的仲裁员……我们的结论是，出于国际礼让的考虑，对外国和跨国仲裁庭能力的尊重，以及在国际体制中当事人对解决争议可预测性的迫切需要，都要求我们执行当事人的协议，即使在国内反托拉斯争议中可能出现相反的结果。”随后，1997 年“Kotam Electronics 案”[2]又进一步确立美国国内的反托拉斯纠纷也可通过仲裁解决。

[1] American Safety Corp. v. J. P. Maguire &Co. , 391 F. 2d at 827-828 (2d Cir. 1968).
[2] Kotam Electronics, Inc. v. JBL Consumer Products, Inc. , 93F. 3d 724 (11th Cir. 1996).

II. Practical Attitude of the United States, the European Union and Other Countries on the Arbitrability of Anti-trust Disputes

In 1968, the US Second Circuit Court of Appeals established *American Safety* doctrine in the "American safety case"[3]: Right of claims under antitrust acts are by their nature inapplicable to arbitrary resolution. The reasons are as follows: (1) Antitrust laws cover many national interests. Violations of antitrust laws can affect tens of thousands or even millions of people 's and cause incredible economic losses. Congress also does not wish to resolve such disputes by nonjudicial means; (2) antitrust cases are often so complex that judicial means are more appropriate than arbitration; (3) in antitrust cases, the party with a bargaining advantage may force the other party to enter into ancillary contracts to submit related disputes to arbitration; (4) commercial arbitrators mostly only have commercial background with basic common sense. Therefore, just as "issues of war and peace are too important to be vested in the generals..... decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community -- particularly those from a foreign community that has had no experience with or exposure to our (U.S.) law and values"[4]. However, in 1986, the U.S. Supreme Court overturned the decision of the Second Circuit in the *American Safety* case; see Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)[5]. In response to several reasons for denying the arbitrability of antitrust disputes in the *American Safety* case, the U.S. Supreme Court held that there was no such public interest which arbitrary settlement resolution was an inappropriate dispute settlement approach. The complexity of the antitrust case does not mean that the tribunal is incompetent to handle the antitrust dispute.

> "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.... we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." see Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)

In 1997, the U.S. court further ruled that the United States domestic antitrust dispute can also be resolved through arbitration. See Kotam Electronics, Inc., v. Jbl Consumer Products, Inc., 93 F.3d 724 (11th Cir. 1996) [6].

[3] See American Safety Equipment Corp., Plaintiff-appellant, v. J. P. Maguire & Co., Inc., a Delaware Corporation, Defendant-appellee. American Safety Equipment Corp., Plaintiff-appellant, v. Hickok Manufacturing Co., Inc., Defendant-appellee, 391 F.2d 821 (2d Cir. 1968), https://law.justia.com/cases/federal/appellate-courts/F2/391/821/134195/

[4] *Id.* at

[5]Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985), see https://supreme.justia.com/cases/federal/us/473/614/

[6]Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985), see https://supreme.justia.com/cases/federal/us/473/614/

在欧盟，德国、瑞典、荷兰等国法律中明文规定涉及竞争、垄断的民事纠纷可以通过仲裁程序解决。1999 年的 “Eco Swiss 案”[7]，是欧盟法院首次对反垄断争议的仲裁性问题给出意见。在本案中，欧盟法院虽未直接针对垄断纠纷可否仲裁解决作出正面答复，支持成员国法院基于国内法对公共政策的考量撤销仲裁裁决，但从法律上欧盟法院认为成员国法院拥有对仲裁裁决的合法性进行实质性审查的权利，且当判定某一仲裁裁决违反公共政策时，成员国法院应撤销该仲裁裁决本身。在“Eco Swiss 案”之后，反垄断民事纠纷的可仲裁性已基本得到欧盟各国的默认。

Civil disputes involving competition and anti-trust issues are susceptible to resolution of arbitration which is expressly provided in the laws of countries such as Germany, Sweden and Netherlands in the European Union. The *Eco Swiss v. Benetton International* Case[8] in 1999 is the first time European Court commented on the arbitrational issue of antitrust disputes. In this case, the court of the European Union did not give a direct answer on the arbitrability of monopolistic issues, and supported national courts to annul arbitral awards based on public interest concerns. The court held that the courts of member countries have the right to conduct a substantial review of the legitimacy of arbitral awards, and that the courts of member countries should annul the arbitral awards when they determine that the arbitral award in question fails to observe national rule of public policy. After the *Eco Swiss* case, the arbitrability of antitrust civil disputes has been basically acquiesced by the EU countries.

三、关于中国反垄断民事争议的可仲裁性探讨

反垄断争议纠纷的可仲裁性问题在反垄断法中系一个边缘性问题，却是一个不容忽略的程序性问题。反垄断争议在中国是否具有可仲裁性，尽管已经有法院的裁定意见，但并不能平息争议。这不仅仅是反垄断争议可不可以通过仲裁解决的问题，至少还包含以下问题：（1）法律无明文规定是阻碍反垄断民事争议提交仲裁解决的障碍吗？（2）反垄断法的公共政策性是否是反垄断争议适用仲裁解决的实质性障碍？（3）对于美国或欧盟做出的反垄断民事争议仲裁裁决，中国法院是否应当承认？（4）如果国际反垄断民事争议可以通过仲裁解决，国内争议是否也可以通过仲裁解决？等。

III Discussion on the Arbitrability of Civil Disputes over China’s AML

The arbitrability of anti-monopoly disputes is a cross border issue in the anti-monopoly regime, but it is a procedural issue that cannot be ignored. Whether anti-monopoly disputes can be arbitrated in China, although Chinese court has made its judgement, relevant dispute has not been quelled. This is not only a question of whether antitrust disputes can be resolved through arbitration, but also contains, among others, the following questions: (1) Is the lack of legal regulation an obstacle to arbitration resolutions for antitrust civil disputes? (2) Is public policy nature of the AML a substantive impediment to the arbitration resolution for antitrust disputes? (3) Should the Chinese courts recognize arbitration

[7] Case C-126/97 Eco Swiss China Time Ltd v. Benetton International NV. [1999] ECR I-03055.
[8] *Eco Swiss v. Benetton International,* from the EU law data base at https://eur-lex.europa.eu/homepage.html

awards regarding antitrust civil dispute produced in the U.S. or EU? (4) If international antitrust disputes can be settled through arbitration, can domestic disputes be settled through arbitration as well?

首先，《反垄断法》第 50 条的规定并没有排斥仲裁解决民事纠纷的可行性。《仲裁法》第 2 条、第 3 条以及第 65 条等三个条款涉及仲裁事项范围的规定，其中第 2 条对于可仲裁性纠纷作出一般性、概括性规定，第 3 条列举了不可以仲裁解决的争议范围，第 65 条是对第 2 条的补充。上述规定都没有禁止反垄断争议提交仲裁解决。

Firstly, Article 50 of the AML does not exclude the feasibility of arbitrary resolution. Three articles including Article 2, Article 3 and Article 65 of the Arbitration Law define the scope of arbitrable matters. Specifically, Article 2 makes general and abstract provisions on disputes that can be arbitrated, Article 3 lists the scope of disputes that cannot be settled through arbitration, and Article 65 is a supplement to Article 2. None of the foregoing prohibits the submission of antitrust disputes for arbitration.

其次，反垄断法虽然具有公共性，但因垄断行为而引起的民事纠纷是平等双方当事人之间争议，解决的是民事侵权责任的承担问题。美国联邦最高法院已经指明反垄断的公共政策性不应成为禁止反垄断民事争议提交仲裁解决的理由。更何况，有大量的垄断行为可能只是对部分的经营者或消费者造成损害，经济力量的不平等也并不等同于法律主体地位的不平等。

Secondly, although the AML is usually regarded as public policy matter, civil disputes caused by monopolistic behavior are disputes between the two equal parties, and the issue of which is tort liability. The Supreme Court of the United States has stipulated that public policies on anti-monopoly shall not be grounds for prohibiting arbitration as a dispute settlement resolution. What's more, there are a large number of monopolistic acts that may only harm some business operators or consumers, and the inequality of economic power does not induce the inequality of legal subject status.

再次，鉴于美国、欧盟及其成员国等国家和地区都已经承认反垄断民事争议的可仲裁性，在国际反垄断民事争议纠纷中必然存在通过仲裁解决争议的方式，对于此类仲裁裁决中国法院仅以法无明文规定或反垄断法的公共政策性为由拒绝承认和执行，显然是有违国际礼让原则的。1986 年中国加入《纽约公约》时承诺，中国法院承认和执行在公约缔约国内按照中国法律属于“契约性和非契约性商事关系”争议的仲裁裁决。次年，最高人民法院颁布的《关于执行我国加入的<承认与执行外国仲裁裁决公约>的通知》中第 2 条对“契约性和非契约性商事关系”进行了界定，总体而言是因为合同或者侵权，抑或是按照相关法律规定而引发的经济性权利及义务关系，没有明确将反垄断争议排除在承认和执行的仲裁裁决范围之外。2019 年 7 月 2 日，中国代表团在海牙国际私法会议第 22 届外交大会闭幕式签署了《承认与执行外国民商事判决公约》，未来涉及固定价格、围标、限制出口或者配额、划分市场等核心卡特尔行为有关的国际民商事判决在中国将被得到承认与执行。

Thirdly, since the United States, the European Union and some member countries have recognized the arbitrability of anti-trust civil disputes, refusing to recognize and enforce such arbitration

awards clearly violates the principle of international courtesy. According to the New York Convention which China joined in 1986, Chinese courts should recognize and enforce the arbitration awards in disputes over "contractual and non-contractual commercial relations" in accordance with Chinese laws. The following year, the Chinese Supreme Court promulgated the *Circular on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which China is a Signatory* and it defines "contractual and non-contractual commercial relations" as relations relate to contractual or tort obligations or to economic rights and obligations provided in relevant Chinese laws.[9] In this document, anti-trust dispute is not excluded from the scope of arbitral awards that can be recognized and enforced in China. On July 2, 2019, Chinese delegation signed *the Convention on the Recognition and Enforcement of Foreign Civil and Commercial Judgments* at the closing ceremony of the 22nd session of the Hague Conference on Private International Law, stipulating that international civil and commercial judgments related to core cartel behaviors such as price fixing, bid rigging, exports or quotas restriction, and market allocation will be recognized and enforced in China in the future.

最后，接受反垄断民事争议的可仲裁性，并不意味着《反垄断法》的实施失去标准。且不说如今仲裁机构特别是一些权威性仲裁机构的仲裁员所具有的专业素养足以应付反垄断法的相关争议，在法院承认和执行仲裁裁决过程中，还是可以通过实质性审查等严格标准对仲裁裁决进行监督。

Lastly, the recognition of the arbitrability of anti-monopoly civil disputes does not mean that the implementation of the AML lost its standard. The professionalism of today's arbitration institutions, especially the arbitrators of some authoritative arbitration institutions, suffice to properly handle antitrust issues. And judicial review over arbitration awards can still be exercised through substantive review and other strict standards through the court's recognition and enforcement of arbitration awards.

总之，从现有法律规定和争议性质看，否定反垄断民事争议的可仲裁性的理由并不充足，且与当今的国际潮流不符，更重要的是，反垄断法是全球化程度最高的法律之一，而大量的反垄断争议都具有国际性，在中国已经签署公约承诺承认和执行涉及竞争的国际民商事判决的大背景下，有必要对反垄断民事争议的可仲裁性做更深入的思考。

In short, from the existing legal provisions and the nature of the dispute, the reasons for denying the arbitrability of anti-monopoly civil disputes are not sufficient, and do not conform with the current international trend. More importantly, antitrust law is one of the laws with the highest degree of globalization, and many antitrust disputes are international. Considering China has signed the *Convention on the Recognition and Enforcement of International Civil and Commercial Judgments* which encompasses competition disputes, it is necessary to think more deeply about the arbitrability of anti-monopoly civil disputes.

[9] Article 2, Circular on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which China is a Signatory.

本期作者简介 Introduction to the Author

万江律师为环球律师事务所常驻北京的合伙人。万江律师自 2005 年开始执业。曾长期就职于国家发改委反垄断局，主要从事反垄断执法、立法和国际交流工作，先后主办、承办数十起反垄断案件，主笔起草关于反垄断宽大制度、承诺和解制度的反垄断指南草案。2012 年 2 月至 7 月期间万江律师获派赴欧盟竞争总司及爱尔兰竞争局实习工作。万江律师著有《中国反垄断法——理论、实践与国际比较》（第二版，中国法制出版社 2017 年 6 月出版）、《<企业国有资产法>释义》、《劳务派遣法律实务操作指引》等专著。

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Dr. Wan is a partner of Global Law Office in Beijing. Dr. Wan has extensive experience with complex antitrust and competition law issues. Prior joining Global Law office, he served as a senior case handler at Price Supervision and Anti-monopoly Bureau(PSAB) of National Development of Reform Commission(NDRC) participating in a number of significant anti-trust & cartel investigations and leading the draft of Leniency Program and Commitment Rules under China's Anti-monopoly Law. Dr. Wan received an intensive training in both DG Competition of the European Commission and Irish Competition Authority in 2013. He acquired Ph.D. in law in 2010 at China University of Political Science and Law.

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有志加入环球反垄断团队者，可将个人电子简历等资料投递到环球人力资源部电子邮箱：hr@glo.com.cn，并注明“反垄断业务申请”。

环球简介 Introduction to GLO

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历史. 作为中国改革开放后成立的第一家律师事务所，我们成立于 1984 年，前身为 1979 年设立的中国国际贸易促进委员会法律顾问处。

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专业. 我们能够将精湛的法律知识和丰富的执业经验结合起来，采用务实和建设性的方法解决法律问题。我们还拥有领先的专业创新能力，善于创造性地设计交易结构和细节。在过去的三十多年里，我们凭借对法律的深刻理解和运用，创造性地完成了许多堪称“中国第一例”的项目和案件。

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环球反垄断团队由十余名合伙人和律师组成，其中一些合伙人和律师既有实务操作经验也有丰富的执法经验，已为医药、互联网、汽车、电器、IT、食品、化工、航运、零售等行业的众多境内外客户提供一站式反垄断专业服务，服务范围包括经营者集中申报、反垄断调查、反垄断诉讼、反垄断风险防范与合规等。我们对中国反垄断法律法规及其实践具有深刻认识和专业理解。我们的主要服务内容包括：

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