CHINA'S HIGH COURT MAINTAINS THE STATUS QUO FOR NOW, BUT THE FUTURE FOR RESALE PRICE MAINTENANCE IN CHINA IS OPTIMISTIC FOR PRODUCT MANUFACTURERS

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We have been closely following the case of *Yutai v. Hainan Provincial Price Bureau*, [1] the first dispute involving the legality of a resale price maintenance program brought by China's antitrust enforcement agency, the State Administration of Market Regulation ("SAMR") (formerly the "National Development and Reform Commission"). On June 24, 2019, the Supreme People's Court ("SPC") published its decision, which says less about the current state of the law but more about the future of resale price maintenance in China, which is promising for product manufacturers.

As we have previously explained, before *Yutai*, the legality of resale price maintenance programs in China depended entirely on the plaintiff's perspective; the SAMR took the position that under Article 14 of the 2007 Anti-Monopoly Law, resale price maintenance was per se illegal, but Chinese courts (hearing disputes between private litigants) applied a more flexible "rule of reason" analysis to determine, on a case-by-case basis, whether there were sufficient pro-competitive benefits for the resale price maintenance program that justified its use. Even in the course of the *Yutai* litigation, the lower court affirmed that these different standards would apply depending on whether the resale price maintenance program was challenged by the SAMR or another private party. [2]

In July of 2018, Yutai appealed to the SPC — for manufacturers doing business (or wanting to do business) in China, the hope was that the SPC would finally provide clarity as to the legality of resale price maintenance programs in China by endorsing either the "per se illegal" or more permissive "rule of reason" approach. Unfortunately, rather than choosing one or the other, the SPC confirmed that a divergent system — one in which "per se illegality" exists for purposes of enforcement actions brought by the SAMR and the more lenient "rule of reason" analysis applies in disputes between private parties — remained the state of the law.

What the SPC did provide, however, is a glimpse into how this area of the law might be evolving to better suit China's emerging economy. That is, the SPC explained, the SAMR has every interest in disallowing resale price maintenance at this point in time in order to safeguard the Chinese economy from the sort of anticompetitive effects of resale price maintenance that might easily correct in a mature market but will not (currently) in China. At the same time, similar to the U.S. Supreme Court, [3] the SPC noted that vertical agreements such as resale price maintenance programs can also have pro-competitive effects, such that as China's economy continues to develop and mature, it may become more appropriate for the SAMR to instead apply a "rule of reason" approach to assessing resale price maintenance programs.

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In fact, in *Yutai*, the SPC may have already moved the needle a bit in this direction by suggesting that the current standard for assessing the legality of a resale price maintenance program (even in regard to SAMR enforcement) is more of a "light per se" rule, insofar as a company could potentially rebut a claim that its resale price maintenance program is anticompetitive by demonstrating that it does not actually eliminate or restrict competition.

What does all of this mean? At the moment, it means that the legality of resale price maintenance programs in China is still difficult to predict. Companies with a high-market share should still be wary of potential enforcement actions by the SAMR; companies with lesser market shares are certainly not immune, but they should have less potential exposure if SAMR enforcement trends persist. [4] What the SPC has done is provide some insight into where resale price maintenance in China may be going as its economy becomes more sophisticated, which is toward a more U.S.-style "rule of reason" approach to these issues. If this reading of the tea leaves is correct, it is good news for manufacturers doing business in China, who should be able to leverage more advantageous strategies — such as resale price maintenance programs — in the future.

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[1] For more information, please see our previous two articles on this case: Michael R. Murphy, Yujing Shu, & Jack S. Brodsky, *Resale Price Maintenance in China: One Country, Two Systems*, JD SUPRA (June 11, 2018), https://www.jdsupra.com/legalnews/resale-price-maintenance-in-china-one-22995/; Michael R. Murphy, Yujing Shu, & Jack S. Brodsky, Yutai Seeks Clarity from Chinese High Court on Resale Price Maintenance Divergence, K&L GATES U.S. ANTITRUST, COMPETITION & TRADE ALERT, (Oct. 11, 2018), http://www.klgates.com/if-at-first-you-dont-succeed-yutai-again-yutai-seeks-clarity-from-chinese-high-court-on-resale-price-maintenance-divergence-10-10-2018/

[2] The Hainan High People's Court's Dec. 21, 2017 decision is available at: http://wenshu.court.gov.cn/content/content?DocID=23889d51-88d8-4e87-aaa4-a85c01845f73&KeyWord=%E9%94%90%E9%82%A6

[3] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[4] *See Resale Price Maintenance in China: One Country, Two Systems, supra* n.1.

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