HANKUN
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Han Kun Law Offices

Han Kun Newsletter

Issue 184 (8th edition of 2022)

Legal Updates

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1. Anti-monopoly Law Amendment Analysis Series – An Overview of Key Internet-related Changes

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Introduction

The NPC Standing Committee on June 24, 2022 enacted the Amended Anti-monopoly Law, which entered into force on August 1, 2022 (the "**amended Anti-monopoly Law**"). This is the first time the Anti-monopoly Law has been amended since its promulgation nearly 15 years ago and is the legislative outcome of a four-year endeavor by China's lawmakers since the revision work was formally planned in 2018 by the Anti-monopoly Commission of the State Council. The amendment improves existing rules and systems related to antitrust matters by considering previous law enforcement practices, international practices, and new realities in domestic markets. It epitomizes China's stance on formulating and implementing competition rules compatible with a socialist market economy and the government's determination to foster a unified, open, competitive, and orderly market system.

This commentary is the sixth of our special series which aims to provide timely and granular analysis of main changes in the amended Anti-monopoly Law, and addresses a critical aspect in practice: key changes in relation to the Internet sector.

Although the current Anti-monopoly Law has generally been working effectively since promulgation, the advent and boom of new forms of business have posed incompatibilities between the existing antitrust system and law enforcement realities. The amended Anti-monopoly Law refines the regulatory framework on antitrust matters in the Internet sector to adapt to structural changes in China's domestic economy, while raising new concerns for Internet companies in China regarding antitrust compliance. This commentary gives an overview and analysis of key changes in the amended Anti-monopoly Law concerning the Internet sector.

The prohibitive principle against using Internet technologies for monopoly

According to Article 9 of the amended Anti-monopoly Law, "undertakings shall not use data and algorithms, technologies, capital advantages, platform rules, etc. to engage in any monopolistic practice prohibited by this law." This provision introduces a general principle that "prohibits business operators from using Internet technologies to conduct monopolistic behaviors", conclusively enacting the emphasis of law enforcement in recent years on combating Internet-related monopoly. It establishes the overarching principle on antitrust regulation over the Internet sector, extending relevant antitrust rules to the platform economy. Amid the normalization of Internet regulation as a whole, it is very likely that antitrust regulation over the Internet sector will also enter a new phase where "regulation and development" carry equal weight. In this respect, how Internet companies govern their daily operating activities will become a key compliance focus.

Monopoly agreements: "organizers" and "aiders" should also assume liability

The current Anti-monopoly Law prohibits monopoly agreements among "undertakings with competitive relationships" or between "an undertaking and its trading counterparties"; however, it is silent as to parties who are neither competitors nor counterparties but who have organized or aided the conclusion of monopoly agreements. This, to some extent, presents a practical difficulty for regulators, as the current antitrust framework provides no legal basis to pursue liability against such "organizers" or "aiders" of monopoly agreements, which is an issue that is especially prominent when Internet platforms are involved.

A preliminary solution to the above problem is provided in the *Anti-monopoly Guidelines of the Anti-monopoly Commission of the State Council for Platform Economy* (the "**Anti-monopoly Guidelines for Platform Economy**") as for how to deal with undertakings that organize or aid the conclusion of monopoly agreements. On that basis, the amended Anti-monopoly Law further prescribes in Article 19 that "an undertaking shall not organize other undertakings to reach any monopoly agreement or provide substantive aid to other undertakings to reach any monopoly agreement." Moreover, the *Provisions on Prohibition of Monopoly Agreements (Draft for Comment)*, released by SAMR, would further refine this aspect of the amended Anti-monopoly Law. These provisions are set out in the following table.

Anti-monopoly Guidelines for Platform Economy[1]	The amended Anti-monopoly Law	Provisions on Prohibition of Monopoly Agreements (Draft for Comment) [2]
Article 8. Hub-and-spoke Agreements Undertakings operating on a platform and having a competitive relationship with each other may reach a hub-and-spoke agreement which has the effect of a horizontal monopoly agreement by virtue of their vertical relationship with the platform operator or through organization and coordination by the platform operator. The following elements may be taken into account when determining whether such agreements constitute a monopoly agreement prohibited by Article 13 and	Article 19. An undertaking shall not organize other undertakings to reach any monopoly agreement or provide substantive aid to other undertakings to reach any monopoly agreement.	Article 17. An undertaking shall not organize other undertakings to reach any monopoly agreement or provide substantive aid to other undertakings to reach any monopoly agreement. The term "organize" herein shall refer to the following circumstances: (I) Where the undertaking is not a party to the monopoly agreement, but plays a decisive or dominant role in reaching or implementing the monopoly agreement in terms of its subject scope, main content, performance conditions, etc.; (II) Where an undertaking enters into agreements with multiple counterparties in trading, and purposely causes such competing counterparties to communicate intentions or exchange information

[1] 《国务院反垄断委员会关于平台经济领域的反垄断指南》[Anti-monopoly Guidelines of the Anti-monopoly Commission of the State Council for Platform Economy] (St. Council Anti-monopoly Commission [2021] No. 1, promulgated and effective Feb. 7, 2021).

[2] 《禁止垄断协议规定（征求意见稿）》[Provisions on Prohibition of Monopoly Agreements (Draft for Comment)] (issued by SAMR on June 27, 2022).

Anti-monopoly Guidelines for Platform Economy[1]	The amended Anti-monopoly Law	Provisions on Prohibition of Monopoly Agreements (Draft for Comment) [2]
Article 14 of the Anti-monopoly Law: whether such competing undertakings have reached and implemented any monopoly agreement to exclude or restrict competition in the relevant market by using technical means, platform rules, data and algorithms, etc.		with each other through the undertaking to reach a monopoly agreement set forth in Articles 8 to 12 hereof. The term "substantive aid" herein shall refer to the circumstance where the undertaking does not carry out the above organization activities but provides support for reaching or implementing the monopoly agreement and such support has causality with and a significant impact on eliminating or restricting competition.

It is clear from the above table that, the *Provisions on Prohibition of Monopoly Agreements (Draft for Comment)* specify the acts of "organizing" and "aiding" the conclusion of monopoly agreements set forth in the amended Anti-monopoly Law and the Anti-monopoly Guidelines for Platform Economy. Specifically, Item (II) of Article 17 prescribes a typical hub-and-spoke agreement scenario, where an apparent vertical monopoly agreement hides the substance of a horizontal monopoly agreement. Item (I) specifies the act of organizing or aiding monopoly agreements in a broader sense, which does not require an upstream-downstream relationship between the platform and the contractual parties or a competitive relationship among the contractual parties. This clarification provides a legal basis for regulators to constrain platforms from promoting horizontal, concerted monopolistic practices through vertical relationships. It also allows regulators to prevent business operators on a platform from using third-party algorithms for monopolistic collusion.

Abuse of market dominance: clarified prohibition on using Internet technologies to abuse market dominance; newly added restriction on self-preferencing

Article 22 of the amended Anti-monopoly Law further integrates the Article 9 principle into the regulatory framework on abuse of market dominance, providing that "an undertaking with a market dominant position shall not use data and algorithms, technologies, platform rules, etc. to abuse such position as prescribed in the preceding paragraph." The Anti-monopoly Guidelines for Platform Economy previously elaborated on how regulators will evaluate various types of business activities carried out by Internet platforms by using data and algorithms, technologies, and platform rules, which, combined with Article 22, continue a consistent policy tone on this issue.

It is notable that Article 20 of the *Provisions on Prohibition of the Abuse of Market Dominance (Draft for Comment)* adds a new type of market dominance abuse, i.e., an Internet platform with market dominance which uses data and algorithms, technologies, or platform rules to unjustifiably give itself preferential treatment when competing with undertakings who use the platform, and such preferential treatment may

be: (1) treating its own products more favorably in searches or rankings; or (2) using non-public data gleaned from undertakings on the platform to develop its own products or assist its own decision-making. As SAMR mentioned in its drafting notes, Article 20 "appropriately uses theoretical research findings and legislative and law enforcement practices in overseas jurisdictions as reference", meaning that it, to some extent, follows the current legislative trend across the world to set up a "gatekeeper" mechanism targeting major Internet platforms. In this context, a key question to consider is how to regulate self-preferential conduct of gatekeeper platforms.

SAMR's earlier *Guidelines for Internet Platforms to Fulfil Primary Responsibilities (Draft for Comment)*[3] has proposed similar rules on extremely large platforms by stipulating that, "an extremely large platform operator, when engaging in fair competition with undertakings using the platform, shall not unjustifiably use platform-acquired, non-public data of undertakings and users on the platform that are generated or provided during their use of platform services"; and that, "when providing relevant products or services, an extremely large platform operator shall treat the platform (or its affiliates) and undertakings using the platform on an equal basis, and shall not give preferential treatment to itself (or its affiliates)." Although the above provisions are not set in stone since the Guidelines have not entered into force, Article 20 of the *Provisions on Prohibition of the Abuse of Market Dominance (Draft for Comment)* and the *Guidelines for Internet Platforms to Fulfil Primary Responsibilities (Draft for Comment)* show congruence in terms of wording, though the former seems more specific than the latter. In addition, the main criteria for defining an extremely large platform are quantitative, objective thresholds such as turnover. By contrast, there are different methods to determine whether an Internet platform has a market dominant position, which leads to uncertainty. If Article 20 of the *Provisions on Prohibition of the Abuse of Market Dominance (Draft for Comment)* is adopted and becomes effective, it would mean that some Internet platforms not deemed "extremely large" may also be restricted with respect to self-preferencing activities, which may significantly impact their choice of business models.

Market players may have different views on "self-preferential conduct". In fact, "self-preferencing" is commonly regarded as a reasonable business need of vertically integrated companies and is to some extent pro-competitive, because a vertically integrated company can leverage its competitive edge in its specialized field to become an active presence in upstream and downstream markets, enhancing market access and boosting competition within those horizontal markets. Meanwhile, for Internet platform companies, collaboration across the value chain further optimizes management. Therefore, in our opinion, less strict restrictions on "self-preferencing", or at least a relatively higher threshold for identifying platforms that should be subject to such restriction, may be a better choice for the draft regulations above to avoid stifling progress across the Internet sector.

Concentrations of undertakings: higher thresholds for notification, mandatory notification conditions for concentrations below the thresholds, and enhanced penalties for illegal concentrations

A draft amendment to the *Provisions of the State Council on Notification Thresholds for Concentrations of*

[3] 《互联网平台落实主体责任指南（征求意见稿）》[Guidelines for Internet Platforms to Fulfil Primary Responsibilities (Draft for Comment)] (issued by SAMR on Oct. 29, 2021).

Undertakings would raise the bar for reporting concentrations of undertakings while adding a new circumstance requiring notification, as specified in the following table.

The current Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings[4]	The draft amendment to the Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings[5]
Article 3 Where a concentration of undertakings satisfies either of the following thresholds, the concentration shall be notified in advance to the anti-monopoly law enforcement agency of the State Council, and no such concentration may be implemented without clearance of the prior notification: ■ Over the preceding fiscal year, the combined global turnover of all undertakings participating in the concentration exceeded RMB **10 billion**, with at least two of such undertakings respectively attaining a turnover of more than RMB **400 million** within China; or ■ Over the preceding fiscal year, the combined turnover within China attained by all undertakings participating in the concentration exceeded RMB **2 billion**, with at least two of such undertakings respectively attaining a turnover of more than RMB **400 million** within China.	Article 3 Where a concentration of undertakings satisfies either of the following thresholds, the concentration shall be notified in advance to the anti-monopoly law enforcement agency of the State Council, and no such concentration may be implemented without clearance of the prior notification: ■ Over the preceding fiscal year, the combined global turnover of all undertakings participating in the concentration exceeded RMB **12 billion**, with at least two of such undertakings respectively attaining a turnover of more than RMB **800 million** within China; or ■ Over the preceding fiscal year, the combined turnover within China attained by all undertakings participating in the concentration exceeded RMB **4 billion**, with at least two of such undertakings respectively attaining a turnover of more than RMB **800 million** within China.
N/A	Article 4 Where a concentration of undertakings does not meet the notification thresholds set forth in Article 3 hereof but satisfies both of the following conditions, the concentration shall be notified in advance to the anti-monopoly law enforcement agency of the State Council, and no such concentration may be implemented without clearance of the prior notification: ■ One of the undertakings participating in the concentration had a turnover of more than RMB 100 billion within China over the preceding fiscal year; ■ The market value (or valuation) of the other undertaking in a merger prescribed in Item (I), Article 2 hereof or any other undertaking in

[4] 《国务院关于经营者集中申报标准的规定》[Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings] (as revised by St. Council, Decr. 703; promulgated and effective Sept. 18, 2018).

[5] 《国务院关于经营者集中申报标准的规定（征求意见稿）》[Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings (Draft for Comment)] (issued by SAMR on June 27, 2022).

The current Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings[4]	The draft amendment to the Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings[5]
	any activity prescribed in Items (II) and (III) of Article 2 hereof is no less than RMB 800 million, and the turnover within China of such undertaking over the preceding fiscal year accounts for more than one third of its global turnover during the same period.

The first condition under the new Article 4 would basically apply to all major Internet platforms in China, and it would not be difficult for their mergers or acquisitions to satisfy the second condition (i.e., the market value or valuation of the target company is no less than RMB 800 million and its domestic turnover comprises over one third of its overall turnover during the preceding fiscal year). Also, per our experience, a target company with a valuation of RMB 800 million or more is normally at a Series B financing level, and the "one third" threshold can be easily satisfied if the transaction target is a domestic undertaking in China. Given the above, we believe that Article 4 is intended to address M&A transactions that may "pinch off young shoots"; that is, acquisitions that may have the effect of eliminating competitors in their early stages of development. Article 4 would require such transactions to be notified as concentrations of undertakings and to undergo examination even if their turnover does not meet the notification thresholds. Therefore, if this provision takes effect, the number of transactions requiring notification is likely to increase.

In addition, as for transactions falling short of the notification thresholds, although the current Anti-monopoly Law gives authority to the anti-monopoly law enforcement agency to investigate such transactions, it does not offer any legal basis to require the transaction parties to notify the transaction. By contrast, according to Article 26 of the amended Anti-monopoly Law and Article 7 of the *Provisions on Review of Concentrations of Undertakings (Draft for Comment)*, where a concentration of undertakings does not meet the notification thresholds but has or may have the effect of eliminating or restricting competition, the State Administration for Market Regulation is empowered to require notification or supplementary notification of such concentration of undertakings. Therefore, special attention should be paid to the fact that, after the amended Anti-monopoly Law enters into force, if an undertaking is required by the anti-monopoly authority to notify its transaction as a concentration of undertakings, the closing of the transaction will be forced to be delayed and the transaction process will be severely affected.

In addition to notification thresholds, the amended Anti-monopoly Law also adjusts the penalty amounts that may be imposed on undertakings which fail to make a required notification. Specifically, as amended, the Anti-monopoly Law will impose penalties on undertakings that implement illegal concentrations based on whether the illegal concentration has the effect of eliminating or restricting competition. For illegal concentrations that do not have the effect of eliminating or restricting competition, the upper limit of penalties will be raised from the current RMB 500,000 to RMB 5 million; for illegal concentrations that may eliminate or restrict competition, the amended law will impose penalties of no more than 10% of the violator's sales amount in the preceding year, in addition to existing measures such as ordering violators to cease their concentrations and to return to the status quo ante. Given the enhanced penalties and increased cost of violations, Internet companies are advised to evaluate the antitrust risks of their

transactions in a more prudent manner.

Individual accountability assumed by business leaders

The amended Anti-monopoly Law attaches greater importance to antitrust compliance by the legal representative and person-in-charge of undertakings. As the enabling law of subsequent antitrust regulations, the law formally establishes in Article 55 the mechanism under which the antitrust authority is empowered to arrange regulatory talks with the legal representative or person-in-charge of an undertaking suspected of violating the Anti-monopoly Law. This is an endorsement of the regulatory authority's moves in recent years to summon senior executives of Internet companies for regulatory talks and require them to conduct self-inspection and rectification of their non-compliant behaviors. With the amended Anti-monopoly Law taking effect, such means are likely to be frequently used in future regulatory actions.

Moreover, the amended Anti-monopoly Law imposes penalties on individuals involved in monopolistic activities, providing that "where the legal representative, principal-in-charge, and directly responsible person of an undertaking are personally accountable for the conclusion of a monopoly agreement, a fine of no more than RMB 1 million may be imposed on them." Although the definitions of "person-in-charge", "principal-in-charge", and "directly responsible person" still await further clarification, law enforcement practices in other countries such as the United States have shown that, in addition to high-level officers and beneficiaries, mid-level employees may also be held accountable for an undertaking's monopolistic conduct.[6] Also, while the act of refusing or obstructing a regulatory investigation may be subject to criminal liability (e.g., the crime of disrupting the performance of official duties), the amended Anti-monopoly Law further stipulates in Article 67 that violation of the Anti-monopoly Law *per se* may constitute a criminal offence. As there is no provision under the current criminal law system in China to specially criminalize monopolistic conduct, implementation of Article 67 may require and thus lead to corresponding legislative efforts in the criminal law, which is a space to be closely watched in the near future.

Potential impact of the public interest litigation mechanism on Internet enterprises

The amended Anti-monopoly Law provides in Article 60 that, where an undertaking commits monopolistic acts that harm the public interests, a people's procuratorate at the level of cities divided into districts or above may lodge a civil public interest lawsuit before a people's court in accordance with law. Given earlier proposals by NPC deputies, this provision may cater to individual consumers or self-employed business owners who are unable to file an anti-monopoly lawsuit due to insufficient funds, limited litigation resources, or unaffordable burden of proof[7]. In fact, earlier practice has already provided a glimpse of the application of the public interest litigation mechanism to the regulation of Internet platforms. The

[6] Caron Beaton-Wells, *U.S. Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique*, THE ANTITRUST BULLETIN 56(2), footnote 35 (2011), available at: https://www.researchgate.net/profile/Caron-Beaton-Wells/publication/273514695_US_Policy_and_Practice_in_Pursuing_Individual_Accountability_for_Cartel_Conduct_A_Preliminary_Critique/links/5a4ea311a6fdcc7b3cda7c0c/US-Policy-and-Practice-in-Pursuing-Individual-Accountability-for-Cartel-Conduct-A-Preliminary-Critique.pdf.

[7] *Antitrust Law Amendment: Special Focus on the Internet Domain with Class Action Proposed as An Option*, available at: https://www.yicai.com/news/100971889.html; *CPPCC Member Li Shouzhen: Antitrust Law Revision Is Needed to Curb Monopoly in Digital Economy*, available at: http://www.zggpjz.com/keji/shuma/5676.html.

Supreme People's Procuratorate commented on a leading 2020 case that, in the "administrative public interest litigation case lodged by the Qianxi County People's Procuratorate of Guizhou Province to urge rectification of unfair competition conduct by an online catering platform", the Qianxi Procuratorate's pre-litigation act of urging rectification has a leading significance in "actively and stably extending the scope of application of the public interest litigation system and maintaining the economic order in cyberspace[8]." The Supreme People's Procuratorate also appealed for endeavors to promote public interest litigation for antitrust and anti-unfair competition purposes at its recent press conference[9]. Furthermore, by the end of 2020, the standing committees of 18 provincial-level people's congresses have adopted decisions or resolutions to authorize their procuratorates to explore public interest litigation while handling public interest infringement in the Internet sector[10].

Given the broad meaning of "social public interest", it is reasonable to expect a great number of public interest lawsuits will be lodged by procuratorates after Article 60 takes effect. Thus, Internet enterprises are advised to cope with complaints raised by consumers or vendors more actively and keep alert to antitrust compliance risks during their day-to-day operations.

Conclusion

14 years after the promulgation of the Anti-monopoly Law, the 2022 amendment is a result of China's unremitting efforts to address constantly emerging concerns along its fruitful journey toward making and implementing competition rules compatible with a socialist economy and fostering a unified, open, competitive, and orderly market system. The amended Anti-monopoly Law is bound to exert significant influence on all facets of China's market economy such as corporate compliance and antitrust law enforcement. This commentary is merely one of a special series of articles to give in-depth analysis of the amended Anti-monopoly Law by considering concerns and pain points market players face in their compliance with the country's antitrust laws.

[8] *Leading Cases concerning Cyberspace Governance Released by the Supreme People's Procuratorate*, available at: https://www.spp.gov.cn/spp/xwfbh/wsfbh/202101/t20210125_507452.shtml.

[9] *Press Conference of the Supreme People's Procuratorate to Reflect on Public Interest Litigation Work in 2021*, available at: https://www.spp.gov.cn/spp/baqfgcxhtk/xwfbh.shtml.

[10] *A Strong Signal from the Supreme People's Procuratorate to Advance Cyberspace Governance!* available at: https://www.spp.gov.cn/spp/zdgz/202101/t20210125_507542.shtml.

2. China's Sports Arbitration System Finally In Place!

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China's sports arbitration system was previously set out in Article 32 of the *Law of the People's Republic of China on Physical Culture and Sports* (the "**Sports Law**", as amended in 2016); however, it was never put into practice because the term was too principled in nature. With China hosting more major international sporting events, such as the Olympic Games and the IAAF World Championships in Athletics, there is an urgent need for a sound arbitration system to hear, review, and settle the ever-increasing number of disputes in this field.

Following this trend, the fast-tracked revision to the Sports Law commenced about a year ago to establish a more specified, implementable sports arbitration system in China. On June 24, 2022, the *Law of the People's Republic of China on Physical Culture and Sports (2022 Revision)* (the "**revised Sports Law**") was finally enacted, following prior release of an initial revision draft on October 21, 2021 (the "**First Revision Draft**") and a second revision draft on April 20, 2022 (the "**Second Revision Draft**"). The revised Sports Law will enter into force on January 1, 2023. As revised, the law adds a new chapter that provides the fundamental framework and principles for sports arbitration in China. In short, pursuant to the revised Sports Law, a sports arbitration commission will be established by the General Administration of Sport of China to govern the arbitration of sports disputes, and to formulate detailed arbitration rules on arbitrators' qualifications, composition of the arbitration panel, and other relevant mechanisms. We look forward to observing how this newly formed system will be implemented.

In this commentary, we give our viewpoints on building and improving the sports arbitration system in China under the revised Sports Law by introducing dispute resolution practices in football, the world's most popular sport, and referring to the arbitration system of the Court of Arbitration for Sport ("**CAS**"), the world's most established system for sports arbitration.

The sports arbitration institution as an independent body

Our viewpoint: *Pursuant to the revised Sports Law, the sports arbitration commission is to be established by the General Administration of Sport of China. Given the nature of the General Administration of Sport of China as an administrative organ, it is important to consider how to implement the prescribed arbitration mechanisms and rules to protect them from administrative interference and to guarantee the impartiality and independence of sports arbitration in China.*

From a global perspective, de-administration is stressed among all international and national sports arbitral institutions, including CAS, to protect the lawful and independent arbitration of sports disputes from interference by local governments or administrative organs. A typical example is CAS, which boasts the most established sports arbitration system in the world. Since the Swiss-headquartered CAS was originally established as part of the International Olympic Committee ("**IOC**") and was financially dependent on the IOC, its impartiality and independence were challenged by arbitration parties and questioned by the Federal Supreme Court of Switzerland. In response, CAS underwent significant reforms and created an

International Council of Arbitration for Sport ("**ICAS**") to look after the administration, running, and financing of CAS, which made itself completely independent of the IOC and safeguarded the impartiality and independence of its arbitration process.

In China, the Sports Law also emphasizes that "sports arbitration shall be conducted independently in accordance with law and shall not be interfered with by any administrative organ, social organization, or individual". Nevertheless, as we notice, the organization responsible for setting up "a sports arbitration commission", China's sports arbitration body, was changed from the non-profit All-China Sports Federation in the First Revision Draft to the administrative department for sports under the State Council (i.e., the General Administration of Sport of China) in the Second Revision Draft and in the adopted version of the law. Given that the General Administration of Sport of China is an administrative organ, it is important to consider how to guarantee the administrative, management, and financial independence of the sports arbitration commission that this administrative organ establishes, so as to maintain impartiality and independence of sports arbitration in China.

Scope of arbitrable disputes for sports arbitration

Our viewpoint: *The scope of arbitrable dispute cases before the sports arbitration commission is not specifically defined in the revised Sports Law, leaving substantial room for interpretation and further clarification.*

According to the revised Sports Law, the parties concerned may apply for sports arbitration for three types of disputes pursuant to arbitration agreements, the articles of association of a sports organization, the rules of sports events, etc.: (1) disputes out of dissatisfaction with decisions such as disqualifications, cancellation of competition results, and match suspensions; (2) disputes arising from registration or interactions among athletes; and (3) other disputes arising in competitive sporting activities. The revised Sports Law also excludes from the scope of sports arbitration those disputes arbitrable under the *Arbitration Law of the People's Republic of China* and labor disputes under the *Law of the People's Republic of China on Mediation and Arbitration of Labor Disputes*.

According to the above provision, on one hand, it becomes unclear as to which cases may be considered arbitrable under the catch-all provision of "other disputes arising in competitive sporting activities"; on the other hand, commercial disputes and labor disputes are expressly excluded from the scope of sports arbitration. This hybrid method of broad inclusion and exclusion used in the provision does not make it easy to accurately identify which disputes will fall within the jurisdiction of the sports arbitration commission.

Sports disputes often contain multiple legal relations such as property rights (e.g., salary) and personality rights (e.g., right of publicity). It is difficult to conclude whether a sports dispute is of a property nature subject to commercial arbitration or a labor dispute subject to labor arbitration. For example, among disputes within the football industry, labor issues are the most typical and common kind of dispute between clubs and their players, which should naturally be regarded as eligible for sports arbitration. However, as this kind of dispute can be classed as both a property rights case and a labor dispute, it invites questions as to whether, under the revised Sports Law, such a dispute would fall within the scope of sports arbitration. However, we certainly understand that such a broad scope of arbitrable disputes under the revised Sports

Law is a legislative technique to provide flexibility for subsequent implementation rules. Either way, further clarification is needed, through subsequent arbitration rules and practice to specify which types of disputes are eligible for sports arbitration and which are not.

Linkage between sports arbitration and a sports organization's internal dispute resolution mechanism

Our viewpoint: *So far, the revised Sports Law appears silent as to whether submitting the dispute to a sports organization's internal dispute resolution mechanism is a prerequisite before resorting to sports arbitration. While implementing the arbitration system under the revised Sports Law, it is worth referring to international practices and establishing an orderly transition between the internal dispute resolution mechanism of various professional sports organizations in China (e.g., the Chinese Football Association) and the sports arbitration system.*

Article 95 of the revised Sports Law provides that sports organizations are encouraged to establish an internal dispute resolution mechanism to resolve disputes in a fair, just, and efficient manner; where a sports organization does not have an internal dispute resolution mechanism or the internal dispute resolution mechanism fails to handle a dispute in a timely manner, the parties concerned may apply for sports arbitration. Article 96 further stipulates that where a party concerned is dissatisfied with the decision or result of dispute resolution under the internal mechanism, it may apply for sports arbitration with the sports arbitration institution within 21 days from the date of receipt of such decision or result.

A further question then arises: can parties concerned directly resort to sports arbitration without referring to an existing internal mechanism to resolve their dispute? In other words, is seeking recourse under an internal dispute resolution mechanism a condition precedent to requesting sports arbitration? While the revised Sports Law is silent on this issue, we are of the opinion that directly requesting arbitration without first going through the internal mechanism will not assist in the rapid resolution of sports disputes within the relevant sports industry. Indeed, the exact process needs to be further tested and verified in practice.

As to sports dispute resolution in the international community, Article R52 of the CAS *Code of Sports-related Arbitration* requires that appellants must have exhausted all internal legal remedies available before appealing their cases to CAS. For example, in football-related disputes, the parties concerned may only appeal their case to CAS if they have sought remedies from the International Federation of Association Football ("**FIFA**") and are dissatisfied with the decision made by FIFA; they are not allowed to file the dispute directly to CAS. This is also prescribed in the FIFA Statutes.

This leads to another question. Long before the Sports Law was revised, the Chinese Football Association ("**CFA**") established an arbitration commission as its internal dispute resolution mechanism, while the charter of the arbitration commission still stipulates that "the award made by the Chinese Football Association arbitration commission shall be final and binding", which is obviously incompatible with the revised Sports Law. Therefore, in light of the design of jurisdictional transition between FIFA and CAS, it is advisable for CFA to introduce a similar mechanism in its charter or arbitration rules to follow the new arbitration system in China, including removing the provision that the CFA award is final and binding, and adding content such as "a party dissatisfied with the CFA award may appeal its case to the sports

arbitration commission under the General Administration of Sport of China within 21 days from the date of receiving such an award."

Moreover, under the current system, an awkward dilemma may arise where a party has received a satisfactory result from the sports organization's internal dispute resolution mechanism but cannot truly enforce its rights because the internal mechanism does not have any legal enforcement effect. For example, in a typical labor dispute between a football club and its player, if the arbitration commission within the CFA rules in favor of the player and requires the club to pay salary in arrears, theoretically, the player will not need to seek legal remedy through any other channels. However, because the award made under the internal mechanism cannot be legally enforced, once it is made, even if the CFA has imposed its own penalties on the club, the club may still refuse to pay the relevant salary and the player will in fact be unable to safeguard his legitimate rights and interests because he is not entitled to request a court to order compulsory enforcement. In such a circumstance, can the player submit the same case directly to the sports arbitration institution under the Sports Law? Does it fall within the statutory scope of arbitration under the Sports Law where "a party concerned is dissatisfied with the decision or result of dispute resolution under the sports organization's internal mechanism"? These questions also await clearer answers once specific arbitration rules are implemented in the future.

The legal effect of sports arbitral awards

Our viewpoint: *Although the revised Sports Law confers final and binding force on sports arbitral awards, it concurrently allows an award to be overturned by the people's court if "there are errors in the application of laws and regulations", which effectively threatens the final and binding effect of sports arbitration awards and may undermine the efficiency of dispute resolution.*

According to Article 97 of the revised Sports Law, "A sports arbitral award shall take legal effect as of the date on which it is made. After the award is made, if either party concerned applies for sports arbitration or lodges a lawsuit before a people's court in regard to the same dispute, the sports arbitration commission or the people's court shall reject such lawsuit application or filing." This provision will effectively confer final and binding force on awards made by the sports arbitration commission.

Surprisingly, however, Article 98 of the revised Sports Law expressly stipulates that, "Under any of the following circumstances, a party concerned may petition the intermediate people's court in the place where the sports arbitration commission is located for overturning the award within 30 days upon receiving the arbitral award: **(1) there are indeed errors in the application of laws and regulations;** …" "Errors in application of laws and regulations" as a statutory cause for overturning a sports arbitration award will definitely cause the court to conduct a substantive review of the award, which goes beyond the mere review of non-substantive issues such as major procedural defects, the bribery of arbitrators, etc., and will undoubtedly pose severe challenges to the final and binding effect of sports arbitral awards.

By comparison, as to the mechanism for overturning a CAS award, Article 190 of the *Federal Act on Private International Law of the Swiss Confederation* provides that a CAS award is final from the time when it is communicated, and an arbitral award may be set aside only: (1) where the sole member of the arbitral tribunal was improperly appointed or the arbitral tribunal improperly constituted; (2) where the arbitral

tribunal wrongly accepted or denied jurisdiction; (3) where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims; (4) where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated; (5) where the award is incompatible with public policy. Thus viewed, the statutory grounds for overturning a CAS award are essentially procedural, meaning that the Swiss Federal Supreme Court will not intervene in or entertain a substantive trial of the dispute. In fact, the Swiss Federal Supreme Court has confirmed in its No. 4A_18/2008 judgement that, even an obviously wrong application of the law or finding of facts is not a sufficient ground to overturn an arbitral award for the reason of violating public policy.

In our opinion, "erroneous application of laws and regulations" as a ground for overturning an arbitral award under the revised Sports Law deviates from the general principles that judicial review of an arbitral award should only focus on procedural issues and the court should respect the discretionary power of arbitral tribunals on substantive issues. On one hand, such a basis may virtually undermine the final and binding force of an arbitral award; on the other hand, the court's intervention in review of substantive issues may severely complicate and prolong the arbitration process, which contravenes the original purpose of establishing the arbitration system as a way to accelerate the resolution of disputes through adjudication by professional arbitrators who are familiar with the corresponding sport.

Sports arbitration rules

Our viewpoint: *In formulating its sports arbitration rules, China should focus on correlating the national sports arbitration rules with the international system, so as to advance jurisdiction of China's sports arbitration commission over relevant international disputes and expand China's influence in sports arbitration in the international community.*

The internationalization of sports is an inevitable trend. China has affirmed its determination to follow this trend in Article 14 of the revised Sports Law, providing that "the State encourages international exchanges in sports, promotes the Olympic spirit, and supports participation in international sports." A well-established sports dispute resolution mechanism will undoubtedly strengthen China's internationalization of sports. Therefore, under the overarching framework of China's sports arbitration system designed by the revised Sports Law, it is crucial to formulate organized arbitration rules to expand China's jurisdiction and influence in sports arbitration in the international community.

This acute need for organized sports arbitration rules is exemplified in the numerous unfavorable results received by Chinese football clubs and other parties in previous international arbitration proceedings before FIFA and CAS, resulting from certain partial stances taken by FIFA and CAS and China's unfamiliarity with the dispute resolution procedures and rules established by these international institutions. As China is set to build up its own sports arbitration system, it will be helpful to study FIFA's Circular 1010, under which FIFA agrees to delegate its jurisdiction to relevant national-level arbitral tribunals if they satisfy certain criteria. If the sports arbitration commission to be established satisfies such criteria, we reasonably anticipate that the sports arbitration commission of China will retain jurisdiction over relevant foreign-related disputes, and that the unfavorable situations previously facing Chinese clubs and other parties in foreign-related disputes may change.

Given that, while formulating China's sports arbitration rules, the sports arbitration commission is advised to connect the national rules to the corresponding international standards and to introduce detailed procedural provisions to protect the rights of parties, so as to establish a set of sophisticated, comprehensive, and internationalized arbitration rules.

For example, as to the appointment of arbitrators, CAS expressly requires in its *Code of Sport-related Arbitration* that, in addition to appropriate legal training and a good command of at least one CAS working language, an eligible arbitrator should possess a good knowledge of sport in general and recognized competence with regard to sports law[11]. A dual background of law and sport is obviously a reasonable criterion for selecting sports arbitrators. However, given the current sports development reality in China, if the "law plus sport" standard is adopted to select sports arbitrators, it is highly likely that only a few candidates will be qualified; but overly lenient requirements are not desirable either, which may compromise the professionalism of sports arbitration. Thus, how to strike a balance when setting forth the criteria for appointing arbitrators under China's sports arbitration system is another issue to be considered.

With respect to publicizing arbitral awards, according to the CAS *Code of Sports-related Arbitration*, the awards of appeal cases, cases of a disciplinary nature, and some cases before the ad hoc division for the Olympic Games will be made public, and contents to be disclosed include basic information of the parties concerned, the composition of the arbitral panel, basic facts and applicable laws identified in the award, and the reasons and rationale for making the award. Similarly, FIFA also publishes the judgments it makes, including the redacted version of judgments that contain confidential information. As a result of such publicity, jurisprudence has been gradually developed for international football dispute resolution. According to our experience in representing parties in international football dispute cases before FIFA and CAS, parties cite previous CAS and FIFA awards to support their arguments. Publicizing awards will also assist in providing parties with reasonable expectations of the results of the disputes.

As for the sports arbitration regime in China, the revised Sports Law does not touch on whether an arbitral award should be made public or not, which is an issue awaiting clarification by subsequent rules. We suggest that sports arbitration awards be made public in China for the following reasons. Unlike the traditional civil and commercial arbitration systems which are fully developed, sports arbitration in China is still in its infancy. Publication of arbitral awards will place China's sports arbitration system in line with the internal standard and thus at a high starting point; it will also invite industry and public supervision to spur prudence, impartiality, and fairness of the arbitration process. This will enhance the credibility of sports arbitration among the public in China, and bolster the healthy and fast development of the national sports industry in China.

Conclusion

The revision of the Sports Law is a milestone event in the field of sports dispute resolution in China, which signifies a major leap in the country's establishment of its own sports arbitration system. We will closely

[11] Code of Sport-related Arbitration in force as from 1 July 2020, S14: The ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language …

monitor and look forward to the series of subsequent rules and measures for implementing the system. We are convinced that the ever evolving and improving sports arbitration system in practice will provide strong legal guarantees for China to realize its national fitness strategy while the country is marching on the goal to become a global sporting powerhouse.

Important Announcement

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