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A Comparative Analysis of Third Party Rights Pertaining to Price Maintenance Agreements in China and Ghana

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Abstract
*As a general rule, Chinese law frowns on anti-competitive behaviour of companies. The National Development and Reform Commission (*NDRC*) is the Chinese antitrust administrative agency that has the responsibility to enforce the law relating to behaviour by companies that constitutes price-related anti-competitive behaviour. However, the law itself has made provision for exceptional instances under which anti-competitive behaviour may be permitted. This short paper makes the case that even though the NDRC may not be able to fight against anti-competitive behvaiour which is exempted under the Anti-Monopoly Law, companies that are the beneficiaries of such agreements may have a hard time seeking to enforce such agreements because these agreements are fraught with their own set of legal problemsor challenges.*

I. INTRODUCTION

It goes by various names in various jurisdictions. In the United Kingdom, it has been known as competition law whilst in the United States and the European Union, it is often referred to as antitrust law. In China and Russia, it is commonly referred to as anti-monopoly law[1]. Irrespective of how it is called, competition law has become necessary in all the major jurisdictions in the world in order to maintain fair competition in the market by curtailing anti-competitive behaviour by big companies that try to emasculate the small businesses that may want to compete with them in the market for particular products[2]. The ultimate beneficiary of competition law is the average consumer of products sold on the market. Competition by its very nature ensures that goods will not be sold at unreasonable prices and thus the consumer is not given just a wide choice in terms of variety, but also he will be assured of paying very reasonable prices for those goods. Resale price maintenance agreements made at the behest of big companies fall within this category of anti-competitive conduct in the market place. The following comparison of the law governing resale price maintenance agreements in both Ghana and China therefore seeks to tease out the legal issues pertaining to such agreements in both countries.

II. THE CONTRACTUAL NATURE OF RESALE PRICE MAINTENANCE AGREEMENTS

Resale price maintenance agreements are first and foremost contracts. Therefore, the enforcement of such agreements ought to be governed by the law of contract. Significantly, vertical resale price maintenance agreements are agreements made between a manufacturer of a commodity and a reseller or distributor to the effect that the reseller (or distributor) will not resell the goods below a certain price either to retailers or to ultimate consumers. In order to maintain the resale price throughout the market, a clause is usually inserted in such agreements to the effect that if the reseller or distributor should sell to retailers, he will equally exact a similar clause from the retailers in order to ensure that even the retailers will maintain the fixed price desired by the manufacturer. This sparks off a chain or series of resale price maintenance agreements that run vertically from the manufacturer to the ultimate consumer of such goods. If these agreements are carried out as expected by the manufacturer, they will surely result in a sale of the product at a uniform price throughout the market.

III. ANY THIRD PARTY RIGHTS IN RESALE PRICE MAINTENANCE AGREEMENTS?

Where the originator of such resale price maintenance agreements is not a dominant market shareholder, vigorous competition from other manufacturers will surely neutralize his scheme because his uniform prices may make his commodity uncompetitive on the market and thus causing such an enterprise to lose customers. However, the story

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[1] See the Anti-Monopoly Law of the People's Republic of China. This law was adopted at the 29th Meeting of the Standing Committee of the Tenth National People's Congress on August 30th, 2007and came into force on August 1st, 2008.

[2] See Taylor, Martyn D. (2006). International Competition Law: A New Dimension for the WTO? P. 1. New York: Cambridge University Press

is different where the originator of such resale price maintenance agreements is a monopoly in the market or a dominant market shareholder. Most consumers will have no option but to just buy from this monopoly which will end up ripping off customers. It is because of this that Article 6 of the Anti-Monopoly Law of the People's Republic of China has stipulated that "The operators which have dominant market positions shall not abuse their dominant positions to eliminate or restrict competition." Also, Articles 13, 14, 15 and 18 of the same Anti-MonopolyLaw state as follows:

A. Article 13: "The following monopoly agreements are prohibited from being made between operators which are in competition:

1. those on fixing or changing the prices of a commodity;
2. those on limiting the production or sales volume of a commodity;
3. those on dividing a sales market or material purchase market;
4. those on restricting the purchase of new technology or new equipment or preventing the development thereof;
5. those on boycotting trading; and
6. other monopoly agreements as determined by the State Council anti-monopoly law enforcement authorities."

"For the purposes of this Law, "monopoly agreements" refer to protocols, decisions, or other coordinated behavior for eliminating or restricting competition."

B. Article 14: "The following monopoly agreements shall not be made between operators and their trading counterparts:

1. those on fixing the price for resale of a commodity to a third party;
2. those on restricting the minimum price for resale of a commodity to a third party; and
3. othermonopoly agreements as determined by the State Council anti-monopoly enforcement authorities."

C. Article 15: "Article 13 or 14 hereof is not applicable if operators can prove that the agreements are concluded for:

1. advancing technology, or researching and developing new products;
2. improving product quality, lowering cost, increasing efficiency, unifying specifications and standards, or implementing a division of labor based on specialization;
3. improving the operation efficiency and competitiveness of small- and medium-sized operators;
4. realizing public interests such as energy conservation, environmental protection, and rescue and relief efforts;
5. alleviating problems related to a serious drop in sales or obvious overproduction during an economic downturn;
6. protecting legitimate interests during foreign trade or foreign economic cooperation; or
7. othercircumstances specified by laws or the State Council. Where Article 13 or 14 does not apply as a result that agreements that fall under any of the circumstances of Items 1 to 5 of the preceding paragraph, the operator shall also prove that the agreements do not seriously restrict the competition in relevant market and enable consumers to share the benefits therefrom."

D. Article 18: "The dominant market position of an operator shall be determined based on the following factors:

1. The operator's market share in a relevant market, as well as the competition situation of the relevant market;
2. The ability of the operator to control the sales market or material purchase market;
3. The financial and technical ability of the operator;
4. The degree of reliance of other operators on the operator in terms of trading;
5. The degree of difficulty for market entry by other operators; and
6. Other factors relevant to the determination of a dominant market position of the operator."

From the above quotations, it is easy to see that Article 13 of the Anti-Monopoly Law concerns horizontal resale price maintenance agreements whilst Article 14 of the same law concerns vertical resale price maintenance agreements. However, Article 15 makes some exceptions for a certain category of resale price maintenance agreements irrespective of whether they are horizontal or vertical resale price maintenance agreements. The implication is that if a company is able to prove that its resale price maintenance agreement falls within the ambit of Article 15 of the Anti-Monopoly Law of the PRC, then such an agreement is perfectly lawful and the National Development and Reform Commission (NDRC) cannot fight against such a resale price maintenance agreement. This raises the issue of whether such resale price maintenance agreements can be enforced in court by the companies that stand to benefit from such agreements.

Grace Li has argued that the doctrine of privity does not exist in the Uniform Contract Law (UCL) of the People's Republic of China and that it is the principle of subrogation that is applicable to contracts under Chinese law based on Article 73 of the Uniform Contract Law of the People's Republic of China.[3] She argues further that the principle of subrogation applies to cases of debt collection under which a third party is permitted by law to sue to enforce the payment of debts under circumstances where he has an interest in the payment of such debts. However, resale price maintenance agreements have nothing to do with the collection of debts so the provisions of Article 73 of the Uniform Contract Law of the People's Republic of China relating to subrogation do not apply to resale price maintenance agreements.

At common law, resale price maintenance agreements are generally not enforceable because of the doctrine of privity of contract. This doctrine enables retailers in a vertical resale price maintenance agreement to resist attempts by the manufacturer to enforce such agreements. The doctrine of privity of contract states that it is only the parties who are privy (i.e. parties) to a contract who can sue to enforce such a contract and that outsiders cannot sue to enforce a contract even if the contract was made for the benefit of such outsiders. Effectively, this means that a contract cannot impose an obligation on a person who is not a party to it. In the same vein, a third party cannot acquire rights under a contract to which he is not a party. Since the manufacturer of the goods is not a party to the resale price maintenance agreement between the distributer and a retailer, this effectively shuts out the manufacturer from being able to enforce such an agreement even though it is made for the benefit of the manufacturer. This doctrine has proved to be problematic for third parties for whose benefit such contracts are made.

In Ghana (a common law jurisdiction), exceptions have been made to the rules of privity of contract but these exceptions do not extend to resale price maintenance agreements. In section 5, subsection 1 of Ghana's Contracts Act, 1960 (Act 25) it is provided as follows:

> "5. (1) Any provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Part, be enforced or relied upon by that person as though he were a party to the contract.
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> (2) Subsection (1) does not apply to—
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> (a) a provision in a contract designed for the purpose of **resale price maintenance**, that is to say, a provision whereby a party agrees to pay money or otherwise render some valuable consideration to a person who is not a party to the contract in the event of the first-mentioned party selling or otherwise disposing of any goods, the subject-matter of the contract, at prices lower than those determined by or under the contract; or
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> (b) a provision in a contract purporting to exclude or restrict any liability of a person who is not a party thereto."

[3] *See Li, Grace (2009). The PRC Contract Law and Its Unique Notion of Subrogation. Journal of International Commercial Law and Technology, Vol. 4, Issue 1 at pp. 18-19*

Lord Denning, one of the most respected English judges in the last century, had had this to say in respect of suits by companies to enforce resale price maintenance agreements under English law:

> "Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party . . . It is different when a third person has no legitimate interest, as **when he is seeking to enforce the maintenance of prices to the public disadvantage** …"[4] (The emphasis is mine)

The views of Lord Denning are hardly surprising because it has always been the policy of the common law to encourage freedom of competition in trade. Therefore, the common law has frowned on contracts whose purpose has been to restrict such freedom of competition. Thus, as far back as 1758, Lord Mansfield had declared of an agreement by which two proprietors of salt-works had undertaken not to sell salt below a stipulated fixed price that ". . .at what rate so ever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence and ought to be discountenanced"[5] Similarly,an American court had declared: "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices are injurious to the public interest and void."[6]

It is this concern to control the freedom of contract of businessmen with respect to such agreements that are injurious to consumers' interests which is reflected in section 5 (2) (a) of Ghana's Contracts Act, 1960 (Act 25). The reason why section 5 (2) (a) is necessary is that although resale price maintenance agreements may be void at common law if they are in excessive and unreasonable restraint of trade, they are regarded by the courts as enforceable where the contracting parties are able to show that their particular agreement is not in excessive restraint of trade and that the restriction on freedom of competition involved in their agreement is reasonable and compatible with the interests of the public.[7] Thus, there are resale price maintenance agreements which are enforceable at common law too. The effect of section 5 (2) (a) is that such agreements can be enforced by only the parties to them. Third parties may not sue to enforce such agreements in restraint of trade. The intention of the Ghanaian legislature here is clearly to limit the lawful scope of enforceable price maintenance agreements.

The facts of the well-known case of **Dunlop v. Selfridge**[8] provide an illustration of what is meant by a resale price maintenance agreement that purports to confer a benefit on a third party. In this case, the plaintiff manufacturer of tyres entered into a contract with a distributor in tyres under which the distributor undertook, among other things, not to sell tyres to certain kinds of retailers at prices below the current list prices of the manufacturer. The distributor could, however, sell at a discount to certain classes of retailers, which included the defendant in the case, provided that the distributor obtained from such retailers an undertaking not to sell the plaintiff's products to private customers at prices below the plaintiff's list prices. The defendant violated his agreement on the resale price maintenance agreement which he made with the distributor not to sell the plaintiff's products below the plaintiff's list prices and the plaintiff sued. The contract between the distributor and the defendant provided that, in such situations, the defendant was to pay to the plaintiff £5 for each product of the plaintiff's sold below the list price.

Recovery was denied the plaintiff on the general ground that there was no privity of contract between the plaintiff and the defendant under the contract. Because recovery was denied on this doctrinal ground, no need was felt to discuss the more specific issue of policy raised by the resale price maintenance agreement involved in the case. In Ghana although the wider rule in Dunlop v. Selfridge has been abolished, the legislature has been convinced, presumably by reasons of economic policy, of the need to retain the rule denying third parties the right to enforce retail price maintenance agreements.

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*[4] See **Beswick v. Beswick** [1966] Ch. 538 at p. 557.*
*[5] See **The King v. Norris** (1758) 2 Keny. 300; 96 E.R. 1189.*

[6] See per Hughes J. in Dr. Miles Medical Co. v. John D. Park & Sons Co. (1911) 220 U.S. 373 (Supreme Court of the U.S.A.)
[7] See, e.g. Palmolive Co. (of England) Ltd. v. Freedman [1928] Ch. 264 and English Hop Growers v. Dering [1928] 2 K.B. 174.
[8] See [1915] A.C. 847

IV. CONCLUSION

The above write-up shows that despite the existence of the antitrust laws in both Ghana and China PRC, there are some types of resale price maintenance agreements that are still valid in both countries even though such agreements are generally frowned upon as a type of anticompetitive conduct by giant companies or monopolies. The problem with these legitimate resale price maintenance agreements, however, lies in the fact that the giant companies which are the beneficiaries of these agreements cannot enforce these agreements because the laws have not gone the further step of bridging the legal gap such that nonparties to such contracts can sue to enforce these contracts as long as they are meant for the benefit of such companies. It would therefore appear that the law merely tolerates these contracts but it does not encourage them in both jurisdictions and hence this may explain the lukewarm attitude of the law to such contracts in both countries. Only the distributors can sue retailers to enforce such contracts but what incentive do distributors have to eagerly seek the enforcement of such contracts? It is the manufacturers who are the actual beneficiaries of such contracts and hence only the manufacturers may have the actual incentive and desire to seek enforcement of such contracts.