China: Competition Litigation

This country-specific Q&A provides an overview to competition litigation laws and regulations that may occur in China.

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1. **What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?**

The *Anti-Monopoly Law of the People’s Republic of China* ("PRC") ("AML") provides that an undertaking that engages in monopolistic conduct which causes loss to others shall bear civil liabilities. [1] The AML lists three types of monopolistic conduct: monopoly agreements, abuse of dominant market position, and concentration of undertakings that leads or may lead to anti-competitive effects. Theoretically speaking, each of the three monopolistic conducts can be relied upon as a cause of action. Practically speaking, however, concentration of undertakings that leads or may lead to anti-competitive effects may not be able to serve as the basis for a competition damages claim, which is supported by the fact that there have been no case on this ground in practice.

[1] – The AML also allows undertakings under investigation to bring an administrative action against the decision made by the AML enforcement agencies before the court. The competition administration action will not be discussed in this article.

2. **What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?**

Since a competition damages claim is a civil case, the procedural formalities and standards of pleading to commence such claim shall be governed by the *Civil Procedure Law of PRC* ("CPL"). The requirements for instituting a civil lawsuit are laid out by Art. 119 of the CPL, which include:

- the plaintiff(s) must be a natural person(s), legal person(s), or other organisation(s) with a direct stake in the case;
- there must be a specific defendant(s);
- there must be a specific claim(s), facts, and reasons; and
- the lawsuit must fall within the scope of acceptance of civil lawsuits by the courts, as well as the jurisdiction of the court which accepts the lawsuit.

3. **What remedies are available to claimants in competition damages claims?**

Damages and injunctions are available to the claimants in competition damages actions in PRC. The AML does not limit the types of remedies for injuries arising out of monopolistic conduct, and thus in principle, the various civil liabilities (e.g., cessation of infringement, exclusion of hindrance, elimination of danger, restoration of property, restitution of the original state, compensation for loss, apology) set forth in the *General Rules of Civil Law* ("GRCL"), *Tort Liability Law* ("TLL") and *Contract Law* ("CL") are all applicable in competition damages claims. However, considering the particulars of monopolistic conducts, certain types of liabilities may neither be appropriate nor available for competition damages actions (e.g., exclusion of hindrance, elimination of danger, restoration of property, restitution of the original state, and apology), and the civil liabilities for monopolistic conduct typically include cessation of infringement and compensation of loss. This is also confirmed
by the Provisions of the Supreme People’s Court on Application of Laws in the Trial of Civil Disputes arising from the Monopolistic Practices (“SPC AML Interpretation”).[2]

[2] – Art. 14 of the SPC AML Interpretation provides that the courts may order the defendant(s) to cease infringement, compensate for loss, etc.

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

1. Both AML and the SPC AML Interpretation are silent on damages calculation in competition damages claims. Nevertheless, when the SPC AML Interpretation was first issued on May 8, 2012, the head of the SPC IP division elaborated on several issues related to damages calculation in a press release. According to the press release, the damage caused by monopolistic acts as stipulated in the AML should be considered actual loss. Furthermore, the discretionary method for damages calculation commonly used in IP cases could also be applied to competition damages claims, which means that the courts may determine the reasonable amount of damages at their discretion by considering, among others, factors such as the nature, extent and duration of the alleged monopolistic conduct. In addition, the SPC AML Interpretation also stipulates that the courts may, upon the plaintiff’s request, include in the damages reasonable expenses incurred by the plaintiff in the course of investigating and curbing the monopolistic practice. For instance, in the case of Huawei vs. ID, both parties were unable to produce neither evidence proving the actual loss suffered by Huawei, nor evidence proving how much profit IDC earned from the infringement. The court at its discretion, after considering the relevant factors (including the facts of the case, the nature of infringement, degree of subjective fault, the duration of the infringement, the damage effect, and the reasonable expenses incurred by Huawei in order to investigate and stop the relevant abusive conduct), ordered IDC to pay damages of RMB 20 million to Huawei.

As of this writing, no competition damages actions in which the courts have applied any specific methodology for damages calculations has been found. Nonetheless, it is noteworthy that there are several pending competition damages actions, and it still remains to be seen whether the courts will apply specific methodology for damages calculations in such cases.

2. Joint and several liabilities are recognised under the PRC law. In competition damages claims, if two or more defendants jointly commit an infringement that causes others to suffer damages, they shall bear the liabilities jointly and severally. The amount of damages for which the defendants should be jointly and severally liable shall be determined pursuant to their respective degree of responsibility. If it is impossible to allocate the liability for damages among the defendants, the defendants shall bear the liability equally.

3. PRC competition rules are also silent on whether leniency applicants would be given any beneficial treatment in follow-on competition damages claims. However, it is a common
understanding that a leniency applicant will not be given immunity from civil liabilities. Having said that, it is also noteworthy that, according to the Draft Guidelines for the Application of Leniency Regime to Horizontal Monopoly Agreements ("Draft Leniency Guidelines"), the materials (such as reports submitted by undertakings for leniency application and documents generated therefor) shall be kept confidential and shall not be used as evidence for relevant civil proceedings unless otherwise stipulated by law. Furthermore, according to the Draft Guidelines on Commitment Procedure ("Draft Commitment Guidelines"), the AML enforcement agency’s decisions on suspension or termination of investigation shall not be interpreted as an affirmation that such suspect monopolistic conduct is in violation of the AML. Nevertheless, it remains uncertain whether the above-mentioned provisions would be adopted in the final versions and how they will operate in practice in competition damages claims.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

1. The limitation period for competition damages claims shall be 3 years, pursuant to Art. 188 of the GRCL. According to the SPC AML Interpretation, such 3-year limitation period shall commence from the date on which the plaintiff knew or should have known that its rights and interests are infringed by the alleged monopolistic practice.

2. The GRCL elaborates on the circumstances under which the limitation period shall be suspended or interrupted. The GRCL also lays out the major obstacles that have occurred during the last six months of the limitation period, which could suspend the limitation period. The major obstacles include force majeure, the right holder being controlled by the obligor or others, or other obstacles which have caused the right holder to fail to make claims. The limitation period shall expire after six months from the elimination of the causes of the suspension of the limitation period.

In addition, the GRCL also sets forth the circumstances under which the limitation period shall be interrupted and shall be recalculated from the interruption and the termination of relevant procedures. The circumstances include: the plaintiff requesting the defendant to compensate damages, the defendant agreeing to fulfill its obligations of compensation, the plaintiff bringing the lawsuit or applying for arbitration, and other circumstances equal to the launch of a lawsuit or an application for arbitration.

3. Considering the particulars of competition damages claims, the SPC AML Interpretation provides additional circumstances concerning the interruption of the limitation period. According to the SPC AML Interpretation, if the plaintiff reports the alleged infringement to the AML enforcement agency, the limitation period shall be interrupted from the date of such report. If the AML enforcement agency decides to not open the case, revoke the case, or terminate the investigation, the limitation period shall be recalculated from the date when the plaintiff knew or should have known of such decision. If the AML enforcement agency determines after investigation that the alleged conduct constitutes a violation of the AML, the limitation period shall be recalculated from the date when the plaintiff knew or should have known that the decision of the AML enforcement agency comes into force.
4. It is also worth noting that the damages shall be calculated by considering at most three years in the case of a continuous or repeated infringement. According to the SPC AML Interpretation, if the monopolistic practice has been continuing for more than three years by the time the plaintiff files a competition damages claim before the court, and the defendant raises the defense based on the limitation period, the damages shall be calculated by considering three years from the litigation date. However, this may cause uncertainty for follow-on competition damages claims. For those claims, it is likely that the alleged monopolistic practice has been terminated before the litigation date. Assuming that the alleged monopolistic practice lasted for more than three years, it is unclear which three-year time period will be considered for damages calculation in this regard.

6. Which local courts and/or tribunals deal with competition damages claims?

1. Based on a series of judicial interpretations issued by the SPC, with respect of private antitrust cases in Beijing, Shanghai, and Guangdong (excluding Shenzhen), the three IP Courts (Beijing IP Court, Shanghai IP Court, and Guangzhou IP Court) have jurisdiction over the first-instance competition damages claims.

2. As of this writing, the SPC has also approved to set up multiple IP tribunals within the Intermediate People’s Courts of 15 cities [4] to have cross-territorial jurisdiction over certain types of IP-related cases – including competition damages claims. These IP tribunals have cross-regional jurisdiction over first-instance competition damages claims within the entire provinces or multiple cities within certain provinces. For example, the Wuhan (the capital of Hubei province) IP Tribunal has jurisdiction over first-instance competition damages claims within Hubei province; the Suzhou IP Tribunal has jurisdiction over first-instance competition damages claims within four cities of Jiangsu province (Suzhou, Wuxi, Changzhou, and Nantong), while the first-instance competition damages claims within the remaining nine cities of Jiangsu province (Nanjing, Zhenjiang, Yangzhou, Taizhou, Yancheng, Huai’an, Suqian, Xuzhou, and Lianyungang) are subject to the jurisdiction of the Nanjing (the capital of Jiangsu province) IP Tribunal.

3. Regarding competition damages claims in territories other than those mentioned above, according to the SPC AML Interpretation, the Intermediate People’s Courts (1) of the provincial capital cities, (2) of certain specific cities (currently mainly referring to Dalian and Xiamen), and (3) other Intermediate People’s Courts designated by the SPC have jurisdiction over first-instance competition damages claims.

4. The SPC recently issued a notice to further adjust the jurisdiction of first-instance civil cases between Higher People’s Courts and Intermediate People’s Courts. According to the newly issued notice, Intermediate People’s Courts have jurisdiction over first-instance civil cases with a claimed amount not exceeding RMB 5 billion. First-instance civil claims that equal to or exceed RMB 5 billion and other first-instance civil cases that have significant influence shall fall into the jurisdiction of Higher People’s Courts. The rules mentioned above should also be applicable to competition damages claims.

5. Furthermore, the SPC has been authorized by the Standing Committee of the National People’s Congress to set up a new IP tribunal of appeal within the SPC to accept second-instance competition damages claims and other IP-related cases. The SPC IP Tribunal had been established and became operational on January 1, 2019.
7. **How does the court determine whether it has jurisdiction over a competition damages claim?**

1. The competition damages claims typically belong to infringement actions. Pursuant to the CPL, in the case of an infringement lawsuit, the courts at the place of the defendant’s domicile or at the place where the infringement occurs shall have jurisdiction. The place where the infringement occurs includes the place where the infringement is committed and the place where the infringing consequence takes place.
2. The plaintiff may choose either one of the competent courts mentioned above. If the plaintiff files a lawsuit in two or more competent courts, the court that accepts the case first shall have jurisdiction over the action.

8. **How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?**

1. From the substantive law perspective, the laws applicable to competition damages claims mainly involve the AML, the GRCL, the TLL, and relevant SPC judicial interpretations such as the SPC AML Interpretation.
2. From the procedural law perspective, the CPL and its corresponding SPC judicial interpretations (such as the *Interpretations of the Supreme People’s Court on Application of the Civil Procedural Law of the People’s Republic of China* ("SPC CPL Interpretation") and the SPC AML Interpretation) shall be the governing rules for competition damages claims.
3. The standards of proof applied in a civil case include “preponderance of evidence” and “clear and convincing evidence”, which should also be applicable to competition damages claims in general. But it is unclear how the courts will apply such standards in competition damages claims. Preponderance of evidence requires the plaintiff to introduce more likely evidence than the defendant. This standard is the easiest to meet. According to the *Several Provisions of the Supreme People’s Court on Evidence for Civil Actions* ("SPC Evidence Provisions"), where the parties produce conflicting evidence on the same fact, the evidence that is more likely than the other one will prevail. The CPL also provides the “clear and convincing evidence” standard. This standard requires the plaintiff to prove that a particular fact is substantially more likely than not to be true. This standard sets a higher threshold than the preponderance of evidence standard. Pursuant to the SPC CPL Interpretation, a litigant bearing the burden of proof shall prove that there is a high probability that a particular fact is true. The burden of proof, an issue closely related to the standard of proof, according to the CPL, the parties to the litigation shall generally be responsible for providing evidence for their assertions or claims. Where a party or their attorney is unable to collect evidence on their own due to objective reasons, or in the case of evidence deemed by the court to be necessary for trial of case, the court shall investigate and collect the evidence. Regarding competition damages claims, to establish the civil liability of an infringer (i.e., the defendant), the plaintiff typically submits evidence to
prove three elements: (i) the defendant has committed monopolistic practice; (ii) the plaintiff has suffered actual damages; and (iii) there is a causal link between the defendant’s monopolistic practice and the damages suffered by the plaintiff. If it fails to meet the burden, then the plaintiff shall undertake the unfavourable consequences. Likewise, the defendant shall bear the burden to provide evidence to prove its arguments or rebut the alleged claims.

5. In addition, the SPC AML Interpretation also provides more detailed guidelines on the burden of proof. Regarding cartel cases, the defendant shall bear the burden to prove that such agreements do not have an anti-competitive effect. Regarding the abuse of dominance, the plaintiff shall bear the burden to prove that the defendant has a dominant market position and has abused such dominance, whereas the defendant bears the burden to prove the legitimacy of its activities. As for vertical monopoly agreements, although there are no specific rules on the allocation of the burden of proof, the general principle mentioned above shall apply.

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

1. While the findings and conclusions of domestic AML competition authorities are not binding on the courts, such findings and conclusions are more likely to be adopted by the courts compared with other documented evidence. According to Art. 114 of the SPC CPL Interpretation, the facts stated in the administrative decisions shall be presumed to be true unless there is evidence to the contrary. Although this rule does not specifically include the application and conclusion in the administrative decisions, the courts will typically interpret it broadly as to make it applicable to the application and conclusion section, which are based on the fact findings. Furthermore, Art. 77(1) of the Several Provisions of the Supreme People’s Court on Evidence in Civil Proceedings (“SPC Evidence Interpretation”) also provides that the documents formulated by state organs or social bodies according to their respective functions are, as a general rule, more forceful than other written evidence. Therefore, it may be difficult for the courts to ignore or overrule a valid decision finding the defendant in violation of the AML in the follow-on competition damages claims.

2. Having said that, it is noteworthy that divergence exists between the courts and the AML enforcement agencies against vertical monopoly agreements (e.g., RPM). For instance, in 2016, the Shanghai Price Bureau imposed a penalty on Shanghai Hankook (“Hankook”) for entering into and implementing RPM agreements with its Shanghai distributors from 2012 to 2013. Subsequently, one of its Wuhan distributors sued Hankook in Shanghai IP Court for engaging in a vertical monopoly agreement. In July 2018, the Shanghai IP Court dismissed the competition damages claim filed by the distributor. The distributor alleged that Hankook forced it to enter into an agreement that restricted resale prices. The Shanghai IP Court found that Hankook and the distributor reached an RPM agreement. However, the court held that the plaintiff failed to prove anti-competitive harm, and that the RPM agreement therefore did not constitute a vertical agreement prohibited by the AML.

The SPC recently had elaborated on the divergence between the courts and the AML
enforcement agencies against vertical monopoly agreements (e.g., RPM) in a retrial case between Hainan Yutai and Hainan Price Bureau. In 2017, Hainan Price Bureau fined Hainan Yutai for restricting the resale price of its distributors, which was not performed by its distributors. Hainan Price Bureau found that Hainan Yutai’s conduct constitutes an unimplemented vertical monopoly agreement. The first-instance court overruled the Hainan Price Bureau decision and held that Hainan Yutai’s conduct did not constitute a vertical monopoly agreement because Hainan Yutai’s conduct had no anti-competitive effect. The second instance court revoked the first-instance decision and confirmed the Hainan Price Bureau decision. Hainan Yutai applied for the SPC to retry the case. The SPC touched upon the divergence between the courts and the AML enforcement agencies against RPM. The SPC held that the review standards in AML public enforcement and competition damages claims should be different. For public enforcement, RPM would be presumed to constitute vertical monopoly agreement prohibited by Art. 14 of the AML, which could be rebutted by the undertakings concerned; there is no need to prove the anti-competitive requirement. In competition damages claims, the precondition for supporting the claims of the plaintiff is that the conduct of undertakings has caused it to suffer loss, which is the direct embodiment of the anti-competitive effect of monopolistic conduct. Therefore, it is not improper for the courts to review the anticompetitive effect of the alleged monopolistic agreement which may be the basis on which the plaintiff may have suffered losses.

Regarding infringement decisions of foreign competition authorities, although the parties in a competition damages litigation may submit such decisions to the courts as part of their evidence, the findings and conclusions in such decisions may only serve as reference.

10. **To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?**

There are no explicit rules governing the relationship between AML public enforcement procedure and private actions. According to the current AML and other relevant regulations, the public enforcement agencies and the courts both have the power to proceed with the investigation and review simultaneously. Obviously, if the two proceedings proceed at the same time, the decisions made by the AML enforcement agencies and the courts may be different. Under such circumstance, the courts may, at its sole discretion, invoke the catch-all provision of Art. 150 of the CPL to suspend the trial while waiting for the AML enforcement agencies’ decision. However, the courts is not obligated to do so. For example, as we have witnessed in *Huawei vs. IDC*, the court did not suspend the trial while a related public investigation was pending but proceeded to issue the judgment. Furthermore, there is no procedure at hand permitting public enforcement agencies to stay a private action while the public enforcement action is pending.

11. **What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?**
1. There is no western type of class action under PRC law. Nevertheless, China has a collective and representative action regime in civil actions. If plaintiffs have a common subject matter or if their subject matters are of the same type, they may jointly file a lawsuit before a court. Where there are numerous plaintiffs in a joint action, representatives (2-5 persons) may be selected by and from the group of plaintiffs. The litigation actions of the representatives shall be binding upon the plaintiffs they represent. However, issues such as change or waiver of claims, confirmation of claims of the counterparties, as well as settlement, are subject to approval by the plaintiffs they represent. Judgments or orders rendered by the courts are effective for all joint applicants. The same judgments or orders are also binding on plaintiffs who have not participated in the joint actions but have instituted legal proceedings within the limitation period. The collective and representative action could be applicable to several types of disputes, e.g., property management disputes, or disputes arising from securities. As of this writing, we have not seen any collective and representative action in the AML civil cases.

2. The standard for establishing a joint action is that either (i) the subject matter for each party is the same, or (ii) the subject matters for each party are of the same type, the court deems that the disputes of all the parties may be consolidated, and all the parties agree to consolidate their disputes.

3. In addition, public interest litigation is also available under PRC law. According to Art. 55 of the CPL, for acts which harm public interest such as environmental pollution or infringement of the legitimate rights and interests of multiple consumers, the authorities or relevant organisations stipulated by law (e.g., Consumer Protection Association) may file a lawsuit. Further, the procuratorates are authorized to institute such public interest lawsuit instead, if no aforementioned authorities or organisations bring such lawsuit. Since the mechanism is not well established in China, it is still unclear how the mechanism would be implemented in practice, especially with respect to the competition damages claims.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

The AML and relevant regulations or judicial interpretations do not mention any unique defences for competition damages actions. According to Art. 1 of the SPC AML Interpretation, both direct purchasers (e.g., dealers) and indirect purchasers (e.g., consumers) who have suffered loss due to monopolistic practice would have standing to bring a civil lawsuit. Therefore, it seems that the passing-on defence may also be applicable in this regard.

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

1. For competition litigation in China, the parties may ask the courts to call one or two individuals with relevant expertise (“Individuals with Expertise”) to appear in court to explain relevant professional issues. However, the opinions presented by Individuals with Expertise during the court session will be deemed the statements made by the parties
who engage such individuals.

2. In addition, the PRC laws also allow the parties to apply the court to appoint professional institutions or professionals ("**Court-Appointed Professionals**") to prepare a market survey or economic analysis report ("**Survey or Report**") on the professional issues. Subject to the consent of the court, the parties may negotiate the particular institutions or professionals. Failing to do so, the court will designate the professional institutions or professionals. The Survey or Report will be reviewed by the court with reference to the rules applicable to appraisal conclusion. The Survey or Report may be deemed as having evidentiary value, if there are no contrary evidence or reasons.

3. There are no explicit rules regarding the duties owned by the Court-Appointed Professionals, but they may be held to owe the same obligations as the appraisers. Pursuant to the PRC laws, the appraisers are obligated to (1) respect science and abide by professional ethics, (2) keep confidential the secrets disclosed in the case, (3) issue the appraisal conclusion in a timely manner, and (4) appear in court to announce the appraisal conclusion and answer questions related to the appraisal [5].

[5] - See Art. 8 of the Interim Regulations on Judicial Appraisal of the People’s Court.

14. **Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?**

The competition damages claims will proceed in accordance with the CPL, and the judges will be the primary decision-maker at trial. Pursuant to the CPL, the trial for competition damages claims is conducted in the following sequence:

1. **Court Investigation** During the trial, there will be a court investigation procedure during which:

   (i) the plaintiff states his/her/its claims;

   (ii) the defendant states his/her/its defences;

   (iii) the plaintiff presents his/her/its evidence (including the statement of Individuals with Expertise) and the defendant conducts the cross-examination on those evidence (including inquiring about the Individuals with Expertise or the witness appointed by the plaintiff);

   (iv) the defendant presents his/her/its rebuttal evidence (including the statement of Individuals with Expertise) and the plaintiff conducts cross-examination on those evidence (including inquiring the Individuals with Expertise or witness appointed by the defendant);

   (v) the Court-Appointed Professionals (if any) presents their survey or professional
report and both the plaintiff and defendant conduct cross-examination on those surveys or reports, including inquiring about the Court-Appointed Professionals;

(vi) the court presents evidence collected by itself (if any) and both the plaintiff and defendant conduct cross-examination on such evidence.

(vii) the plaintiff inquires the defendant about the facts of the case;

(viii) the defendant inquires the plaintiff about the facts of the case; and

(ix) the judges inquire both parties about the facts of the case.

2. **Court Debate** After the court investigation stage is over, court debate will be conducted in the following order:

   (i) oral statements by the plaintiff;

   (ii) defence by the defendant; and

   (iii) debate between the two sides.

3. **Mediation** After the court debate, judges will ask both parties about their intention to mediate. Upon receipt of a positive response from both parties, the court will organize the mediation discussion/negotiation immediately after trial or set up other mediate sessions.

4. **Closing Statement** Both parties briefly present their closing statement respectively.

15. **How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?**

   1. The PRC laws do not explicitly stipulate any time limit within which a competition damages claim must get to trial after proceedings commence. Due to the complexity of competition damages claims and the volume of evidence involved in such litigations, it may take months for a litigation competition damages claim case to get to trial.

   2. However, the PRC laws provide a general time limit within which civil lawsuits must be concluded (i.e., a case following the normal procedure must be concluded within six months from the date of establishment of case file, which may be extended for another six months upon the approval of the president of the court, but further extensions require the approval from the superior court.). The aforesaid time limit only applies to domestic cases. If the case involves foreign elements (e.g., one of the litigants is a foreigner or foreign party, the monopolistic practice is conducted outside PRC, etc.), there is no statutory time limit for closing the case.

   3. Like other civil lawsuits, the litigants in competition damages claims may appeal the first-instance judgements, but only one level of appeal is possible. The appeal
proceedings of the domestic case shall be completed within three months from the date of establishment of case file for the appeal and can be extended upon the approval of the president of the court. The approval of the president of the court is required where there is a need for extension. Similarly, such statutory time limit does not apply to cases involving foreign elements.

16. **Do leniency recipients receive any benefit in the damages litigation context?**

As analysed above, PRC competition rules are silent on whether leniency applicants would be given any beneficial treatment in follow-on competition damages claims. However, it is largely believed that the leniency recipient will not receive such benefit. That being said, it is also noteworthy that, according to Art. 16 of the Draft Leniency Guidelines, materials such as reports submitted by undertakings for leniency application and documents generated therefor shall be kept confidential and shall not be used as evidence for relevant civil proceedings, unless otherwise stipulated by law.

17. **How does the court approach the assessment of loss in competition damages cases? Are “umbrella effects” recognised? Is any particular economic methodology favoured by the court? How is interest calculated?**

1. As mentioned above, the PRC laws do not provide any detailed guidance as to the assessment of loss in competition damages cases. In general, the PRC court has broad discretion in this regard. For example, according to the statement of the head of the SPC IP division, the discretionary method for damages calculation commonly used in IP cases could also be applied to competition damages claims. Thus, the courts may determine a reasonable amount of damages at their discretion by considering factors such as the nature, extent and duration of the alleged monopolistic conduct, among others.

2. The PRC laws do not explicitly provide whether damages arising from “umbrella effects” can be recovered. Previous competition damages cases have not touched upon damages arising from “umbrella effects” as well. As such, it remains to be seen whether the PRC courts will recognize the damages arising from “umbrella effects”.

3. Since the competition damages claims in China are limited, it is hard to say whether there is any particular economic methodology that is favoured by the PRC court. While the PRC courts may consider the economic methodologies proposed by economists, they have broad discretion in choosing the economic methodology applicable to each case, which may vary from case to case.

4. In competition damages cases, the plaintiff is entitled to claim statutory interest for the amount of loss suffered, which may be calculated from the date such loss is suffered until damages are compensated.

18. **Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?**

As mentioned above, if two or more defendants jointly commit an infringement that causes others to suffer damages, they shall bear the liabilities jointly and severally. The amount of damages for which the defendants should be jointly and severally liable shall be determined
pursuant to their respective degree of responsibility. If it is impossible to allocate the liability for damages among the defendants, the defendants shall evenly bear the liability. If a defendant pays more than its share of the damages, it is entitled to seek contribution from the other defendants. The rightful amount for each defendant is determined based on their role, degree of fault in the monopolistic practice as well as contribution to the damages. However, it remains unclear how the PRC courts will allocate liability among the defendants.

19. **In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?**

   1. Only in very limited circumstances will the PRC court dispose of a competition damage claim without a full trial. According to the SPC CPL Interpretation, the court may dismiss the lawsuit if it finds that the requirements for instituting a civil lawsuit are not satisfied, or that they fall under any of the circumstances specified in Art. 124 of the CPL (e.g., a lawsuit within the scope of administrative actions or the parties have reached a written agreement to submit their dispute to an arbitral organ for arbitration).

   2. In addition, the court may dispose of the competition damages claims if the plaintiff and the defendant reach a settlement. Under such circumstance, the court can issue the mediation ruling upon the request of litigants without a full trial, provided that the terms and conditions of the settlement are not in violation of the applicable laws and regulations.

20. **What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?**

As indicated in Question 11, China has a collective and representative action regime in civil actions. Collective settlements may be available in the context of collective and representative actions if all of the plaintiffs approve of the settlement.

Given that the settlement in the collective and representative action will be binding upon merely the plaintiffs approving such settlement, parties outside of PRC who have not participated in the legal action as plaintiffs in the first place (and hence have not approved the settlement) may not be covered.

21. **Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?**

The PRC court may, at the plaintiff’s request, include in the scope of damages the reasonable expenses incurred by the plaintiff in the attempt to investigate and stop the monopolistic practice. Since there is no statutory standard to determine such expenses, the PRC court has broad discretion in determining what constitutes reasonable expenses. For instance, in the case of Huawei vs. IDC, the court ordered IDC to compensate Huawei RMB 20 million, which covers, among other losses suffered by Huawei, the reasonable expenses incurred by Huawei in order to investigate and stop the relevant abusive conduct of IDC (including legal fees and
However, the litigation costs awarded by the court may be limited if some of the claims made by the plaintiff are found to lack merit or are not supported by the court. In such case, the court may decide to allocate the costs between the parties.

22. **Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party’s costs? Are lawyers permitted to act on a contingency or conditional fee basis?**

Third parties are not explicitly prohibited from funding competition damages claims in China, and neither are there any restrictions on the funding of such litigations. Also, there is no legal basis on which the third party litigation funders may be held liable for the other party’s costs.

Lawyers are permitted to act on a contingency or conditional fee basis for competition damages claims.

23. **What, in your opinion, are the main obstacles to litigating competition damages claims?**

Since the AML became effective in 2008, the number of competition damages claims has been on the rise. However, China is still confronted with some obvious obstacles to litigating competition damages claims.

(a) First, the burden of proof in competition damages claims is still largely on the plaintiff. In practice, it is extremely difficult for a plaintiff to prevail in competition damages claims due to a lack of a discovery process under PRC laws and a lack of necessary resources for the plaintiff to collect sufficient evidence compared with the competition authorities.

(b) Second, the operable rules applicable to competition damages claims are still absent. For example, the assessment framework for damages calculation remains to be established.

(c) Third, the competition damages claim is in its nascent phase, and thus there are few case precedents available for reference.

(d) Fourth, the PRC laws do not provide punitive damages for competition damages claims. In combination with a low chance of prevailing in such claims, claimants generally lack a strong incentive to bring such lawsuits.

24. **What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?**

1. Starting from January 1, 2019, the SPC is responsible for the appeal of competition
litigations, which reflects the efforts of PRC judiciary to enhance the uniformity of AML application and to improve adjudication quality in private competition litigations. As such, it is likely that more influential competition cases will appear in the next five years.

2. Economic analysis reports will play an increasingly important role in future competition litigations, and the judges will give more focus on such reports during court hearings.

3. The methodology for damages calculation is important. With a precedent more favourable to the plaintiff, people may be incentivized to bring more competition damages cases.