Kluwer Competition Law Blog

# Stand-alone actions possible for anti-competitive behaviour in Hong Kong?

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Speaking at a recent conference in Hong Kong, the President of the Hong Kong Competition Tribunal, Mr Justice Godfrey Lam, examined whether parties might seek remedies for anti-competitive acts in Hong Kong based on common law economic torts without relying on follow-on actions under the Competition Ordinance.

A follow-on action is a private action for damages resulting from a contravention of a conduct rule under the Competition Ordinance, which requires a prior determination by the Tribunal (or on appeal), or an admission in a commitment accepted by the Hong Kong Competition Commission ("**HKCC**").

The question raised was whether it might be possible to seek redress for anti-competitive acts where the cause of action is not based on contravention of a conduct rule. We will look at a few such potential alternative avenues below.

**Breach of the Companies Ordinance and the *Loyal Profit case***

In February 2016, a travel agency, Loyal Profit International Development, sought injunctions against directives issued by the Travel Industry Council ("**TIC**"), one of which required travel agencies to bring Mainland Chinese tourists only to shops that registered under a Refund Protection Scheme. Loyal Profit's Counsel argued at the pre-trial hearing in June 2016 that having a list of registered shops to be frequented by tourists was "outright anti-competitive."

The TIC's articles of association state that it would:

- "discourage unfair competition without however interfering in any way with initiative and enterprise based on fair trading"
- "promote friendly relations with others in the travel industry and to provide means for negotiations and liaison with other bodies concerned with the development of travel both in Hong Kong and abroad"

Without first complaining to the HKCC, Loyal Profit brought the case directly in the High Court based on contravention of the Companies Ordinance, pursuant to which a company's exercise of powers is limited by its articles.

As the cause of action is not a contravention of a conduct rule under the Competition Ordinance, it does not appear to fall under its provisions. The case will be heard in February 2017.

**Economic torts**

Historically at common law, anti-competitive behaviour has been challenged under the unlawful restraint of trade doctrine embodied in such "economic torts" as inducing breach of contract and interference with business by unlawful means. However, there is a higher burden of proof in such cases requiring, in addition to the interference, an intention to cause economic injury.

In the ongoing *global air cargo cartel litigation* the English Court of Appeal recently considered the application of such economic tort claims to a cartel, where some of the alleged cartel behaviour concerned commerce outside the EU and so was beyond the scope of EU competition law (see *Air Canada v Emerald* (2015)). In that case, the Court focused in particular on the requirement that the defendant must have an intention to injure the claimants. The Court referred to the judgment of the House of Lords in *OBG v Allen* (2007), which held that actual intention to harm the claimant must be a cause of the defendant's conduct as distinguished from a mere likelihood or knowledge that a course of conduct would probably harm the claimant. The English Court of Appeal in *Newson Holding v IMI Plc* (2013), a cartel damages case, also considered that the intention of the cartelists "to make a profit at the expense of a class of persons to whom the wrongful acts were targeted," regardless of whether they were direct or indirect customers, was not sufficient intention to satisfy the requirement of intent. Applying these principles, the Court of Appeal in *Air Cargo* determined that in a cartel case, where a wrong doer would not know who would ultimately suffer the harm, the necessary intention would not be made out.

These decisions, although limiting the ability of claimants to bring cartel damages claims based on economic tort, are under English law. Such economic tort claims remain to be tested in Hong Kong courts, where the enforcement regime is substantially different, and will no doubt continue to be tested.

**Restraint of trade – contractual provisions**

Clauses in employment and business contracts that restrict competition are only enforceable in common law and as a matter of public policy if they do no more than is reasonably necessary to protect the employer's legitimate interests.

There is a vast body of case law striking down contractual provisions in restraint of trade and such actions are commonplace.

**Breach of other legislation**

Apart from the Competition Ordinance, and as noted in the *Loyal Profit case* , anti-competitive behavior can be addressed in other ways and under other legislation.

For example, under the Securities and Futures Ordinance, the Securities and Futures Commission has jurisdiction to bring proceedings in the Market Misconduct Tribunal and the Court for insider dealing, price rigging and price manipulation — all of which are similar in concept to the provisions in the Competition Ordinance. In 2012, a day after a bank agreed to settle with US, British and Swiss regulators for the alleged manipulation of Libor, the Hong Kong Monetary Authority ("**HKMA**") launched an investigation into the bank for allegedly rigging the Hong Kong's benchmark interest rate. The HKMA concluded that the bank's traders tried to rig Hong Kong's benchmark interest rate for a period of time and ordered the bank to take disciplinary action against responsible employees.

In July 2015, a former proprietor of a Hong Kong engineering company was charged by the Independent Commission Against Corruption ("**ICAC**") for conspiracy to offer about HK$45 million in bribes to secure consultancy and renovation contracts of two residential estates. This was found to be contrary to provisions of the Prevention of Bribery Ordinance and the Crimes Ordinance. The initiation of these proceedings occurred in parallel to the HKCC's market study of anti-competitive conduct in the building maintenance industry.

The above two examples are classic cases of price fixing and bid-rigging that fall squarely within the areas of conduct prohibited by the Competition Ordinance. It remains to be seen whether the HKCC will interfere (or indeed has jurisdiction to interfere) in cases initiated by regulators or private litigants bearing competition elements, where the Competition Ordinance is not relied on.

**Last word**

The structure of the Competition Ordinance has been criticized as limiting the ability of affected parties to prevent activity clearly intended to be sanctioned. The limited jurisdiction and resources of the HKCC and the Competition Tribunal, as well as express limits on the right to bring private follow-on actions, is likely to encourage litigants (and judges) to explore alternative avenues.

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