

YUTAI SEEKS CLARITY FROM CHINESE HIGH COURT ON RESALE PRICE MAINTENANCE DIVERGENCE

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By: Michael R. Murphy, Yujing Shu, Jack S. Brodsky

Today, product manufacturers doing business in China face uncertainty with regard to resale price maintenance ("RPM"). For more than five years, the National Development and Reform Commission ("NDRC") and Chinese courts have taken divergent approaches to RPM — the NDRC employs a "*per se*" prohibition while Chinese courts have adopted a more moderate "rule of reason" approach. In December 2017, the Hainan High People's Court solidified the confusion for product manufacturers in its *Yutai v. Hainan Provincial Price Bureau* [1] decision, but, as of last week, product manufacturers have a newfound chance of clarity. Only a few days ago, Hainan Yutai Feed Technology filed an application with the Shenzhen Circuit Court to reexamine the decision of the Hainan High People's Court. [2]

Both global and Chinese product manufacturers hope that the High Court will unify the completely different public and private enforcement standards for RPM that they face today. For a more in-depth analysis of these conflicting approaches as well as the *Yutai* decision, please see our previous article entitled *Resale Price Maintenance in China: One Country, Two Systems*. [3] In short, the NDRC, the agency in charge of public enforcement of RPM policies in China, adopted a *per se*-like enforcement approach similar to that utilized by the European Union. The NDRC's stance is recognized as the "prohibition + exemption" approach because the NDRC (except for a few enumerated exemptions) may deem the mere existence of an RPM arrangement as anticompetitive without assessing the anticompetitive effects of the policy. On the other hand, Chinese courts responsible for private enforcement of RPM have taken a more moderate stance on RPM akin to the "rule of reason" applied in the United States. Unlike the NDRC, Chinese courts have found RPM arrangements to be illegal only when they eliminate or restrict competition. Chinese courts, therefore, recognize that RPM may promote procompetitive effects and weigh the procompetitive versus anticompetitive aspects of RPM policies.

The first *Yutai* decision left product manufacturers to balance two completely different standards of RPM legality in China. Yet, with the *Yutai* decision under further review, the Chinese courts have another opportunity to unify the RPM landscape in China, and product manufacturers can hope for clarity on the use of RPM in the country.

[1] The judgment is available at: <http://wenshu.court.gov.cn/content/content?DocID=23889d51-88d8-4e87-aaa4-a85c01845f73&KeyWord=%E9%94%90%E9%82%A6>.

[2] Because China is not a common law system, like the United States, the decision of the Hainan High People's Court does not have binding effect on the courts in other provinces in China other than these courts in Hainan Province.

[3] The article is available at: <http://www.klgates.com/resale-price-maintenance-in-china--one-country-two-systems-06-07-2018/>.

KEY CONTACTS



MICHAEL R. MURPHY
PARTNER
BOSTON
+1.617.261.3132
MICHAEL.R.MURPHY@KLGATES.COM



YUJING SHU
PARTNER
BEIJING
+86.10.5817.6100
YUJING.SHU@KLGATES.COM



JACK S. BRODSKY
ASSOCIATE
BOSTON
+1.617.951.9184
JACK.BRODSKY@KLGATES.COM

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