CHINA LAW UPDATE

UNIFYING TECHNICAL IP ADJUDICATION:
THE LAUNCHING OF INTELLECTUAL PROPERTY
TRIBUNAL OF SUPREME PEOPLE’S COURT

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I. INTRODUCTION

On 1 January, 2019, the Chinese Supreme People’s Court (hereinafter referred to as “SPC”) inaugurated its Intellectual Property (hereinafter referred to as “IP”) Tribunal located in Beijing, which becomes the top judicial authority for a bunch of highly technical IP cases. The establishment of IP Tribunal of SPC is a major breakthrough in China’s protection of IP rights. This new Tribunal also serves to further optimize the legal environment for scientific and technological innovation, and to accelerate the implementation of the Innovation-driven Development Strategy.

This note briefly sketches the jurisdiction of IP Tribunal and highlights several institutional innovations. Part II introduces the jurisdiction of IP Tribunal based on the technical-oriented classification of IP cases and discusses the inclusion of antitrust jurisdiction in IP Tribunal. Part III casts light on the leapfrog appeal mechanism and other advanced trial mechanisms.

II. THE JURISDICTION OF THE IP TRIBUNAL

China’s National Intellectual Property Strategy Outline (hereinafter referred to as “Outline”) promulgated in 2008 proposed “to improve the trial system for intellectual property and optimize the allocation of judicial resources”.\(^1\) Driven by this vision, China has been exploring the specialization of adjudication for IP rights in the past decade. Different from other specialized IP courts in other countries, the SPC IP Tribunal possesses a delicate jurisdiction over technical IP cases and antitrust cases.

The SPC IP Tribunal has exclusive jurisdiction over appellate cases of technical IP disputes and antitrust disputes. While the selection of technical IP cases, as a departure from the traditional

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classification of IP, is a policy-oriented choice to accelerate the unification of adjudication in the animated technology market, the inclusion of antitrust cases is a continuation of centralized jurisdiction based on the previous practice. Although it is a relatively rare practice to combine IP cases and antitrust cases in specialized court jurisdiction, this arrangement brings some vigor to the IP Tribunal.

A. Technical IP Cases

In the comparing sense, it is not a rare practice to differentiate IP rights based on different standards so as to correspondingly distribute IP cases to professional benches. Based on this theory, in recent decade the differentiation of technical IP has been frequently emphasized in China. The technical IP, as generally recognized, includes invention patent, utility model patent, new plant variety, integrated circuit layout design, know-how, computer software and other IP which involves highly professional technical knowledge.

On the one hand, such division is to coordinate the policy to enhance technology innovation. By providing a more concentrated and stronger protection of technical IP, the policymaker is expecting to promote a more reliable technology market so as to stimulate more market input and thus enhance technology innovation.

More importantly, on the other hand, as a growing number of hard cases involving technology-specific issues have been brought before the court in recent decades, a higher demand for quality and efficiency on IP judicial protection has been put forward. For a long period, these cases indeed became a “hot potato” for many courts. Courts on different level and different regions are equipped with uneven specialty to try cases involving complicated technicality,
which led to a large amount of incongruent adjudications. Besides, certain systematic factors aggravated the differentiation.

Particularly striking is the dispersive jurisdiction over technical IP cases. Until 2016, there were approximately 420 IP tribunals and 3 specialized IP courts across the country and principally, the second-instance IP cases are tried in 32 high courts in different provinces. In view of this massive structure, there is no possible tier that can efficiently centralized the adjudication. Even on the High Court level, while 32 is still a considerable number to integrate, the local protectionism and imbalanced economic development also can drive different regional High Courts dispersed. In response, parties in IP cases may exploit advantages in this divergent situation, like forum shopping. It is also noted that the three specialized IP courts in Beijing, Shanghai and Guangzhou established on 2014, were pilot project to concentrate the first-instance technical IP cases. However, the extent to which the specialized IP courts resolves is quite limited. Since the specialized IP courts are still at the intermediate level. The decisions of specialized IP courts, once appealed, are to be reviewed by their respective higher courts, namely the provincial high courts, where divergent adjudication takes place as well.

In addition, the incoordination between judicial adjudication and administrative management made the technical IP protection much trickier. Since China adopts a dual system of judicial and administrative IPRs protection, the IP right verification cases shall be decided by the State Intellectual Property Office (hereinafter referred to as “SIPO”), and where an applicant disagrees with the decision of the SIPO to reject his application, he may submit a request for review to the Patent Review Committee (hereinafter referred to as “Committee”). Under this arrangement, conflicts frequently arise when the infringement litigation intersects with the reexamination procedure. During the litigation, it is common for defendants to raise a defense against invalidity of patent right in dispute, but the court cannot review such defense and usually suspend the trial procedure until the Committee makes the decision, otherwise the court may also render a decision based on an uncertain patent right. Once either party disagrees with the Committee, he/she shall bring an administrative action which is a relatively separate judicial procedure from the civil procedure. All the cases in review of the Committee decision are within the exclusive jurisdiction of Beijing IP court
(first-instance) and Beijing High Court (Second-instance). Therefore, the adjudication over patent cases had become further divergent in this regard.

With the establishment of the SPC IP Tribunal, the adjudication system for technical IP case is effectively centralized and thus the adjudication of technical IP cases is expected to be unified. Instead of the conventional structure of middle courts trialing first-instance case and regional high courts trialing second-instance case, the IP Tribunal now takes high courts’ position in making the second instance judgement. Meanwhile, the IP Tribunal also replace the Beijing High Court over the appellate review of reexamination decision, thus making it possible to efficiently link the civil infringement litigation and administrative reexamination litigation.

**B. Antitrust Cases**

It is widely accepted that the competition law and IP law are closely related in several aspects. Both IP law and competition law pursue the aims of promoting innovation and enhancing welfare, but they take quite different approach which from time to time intersects and may even conflicts. From the point of innovation, whereas the IP law is like a Levitan that utilize the exclusive rights, a sort of legal monopoly right, to encourage creative work, the competition law is more like a gatekeeper keeping an eye out for anti-competition factors to ensure the innovative resources are efficiently allocated. Because of these inherently incompatible characteristics, there are strong differences in doctrine regarding the general criteria for resolving conflicts between these two realms. This can be seen from the cases about the abuse of IP rights where exclusive right directly clashes the competition policy. The interplay between IP rights and competition law is very important for the maintenance of a competitive and a dynamic economic climate.

In view of the intersection between IP law and competition law, the monopoly and other unfair competition cases has been included in the category of IP disputes since 2008 when the antitrust law first came into force, which means that the antitrust cases are also
adjudicated by IP tribunals. On 2014, it was further specified that the specialized IP courts also handle the antitrust cases. Therefore, it is not strange for the SPC IP Tribunal to include antitrust jurisdiction. Although indeed it is scarce in comparative law, it is rather consistent with the China’s existing judicial policies and practices.

Furthermore, it may be plausible to say that the antitrust cases can reduce the risk of tunnel vision, which is a common suspicion that has been discussed in the context of specialized court for years. Generally, the tunnel vision is formed because the specialized court is more inclined than a court of generalists to propositions that they are arranged to focus. And when the specialist judges are confronted with the same sorts of issues and facts, litigants and lawyers, the judges may have a strong tendency to identify with them or at least be susceptible to the bar that regularly practices before them. As a consequence, they will become overly sympathetic to the policies furthered by the specific law and hence develop a tunnel vision. As discussed above, the antitrust law shares some conflicted interests with IP law. For the bench who trial both IP cases and antitrust cases, it is reasonable to believe that the bench are more possible to pace to and give the incompatible interests a fair weigh.

III. INSTITUTIONAL INNOVATIONS GO WITH THE IP TRIBUNAL

A. The Leapfrog Appeal Mechanism

Given that the SPC IP Tribunal takes over appellate jurisdiction previously exercised by the provisional high court over technical IP cases and antitrust cases, but the IP Tribunal belongs to the highest

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level in four-tier court system, a so called “leapfrog appeal mechanism” is designed to cope with the IP Tribunal.

Under the current IP trial system, most first-instance cases are tried in the intermediate courts and some are tried in the prescribed primary courts. Due to the four-tier court system and the two-instance final review system, it is impossible to directly appeal a case from the primary or intermediate level to the supreme level. Hence, in order to efficiently centralize the target cases, the leapfrog appeal mechanism is formed to match the IP Tribunal. Under leapfrog mechanism, if either party disagrees with the decision made by the court of first instance, as long as his case falls within the jurisdiction of SPC IP Tribunal, he can directly appeal to SPC without going through any other courts in-between.

It is also worth noting that, the leapfrog appeal mechanism is significantly different from the commonly recognized leapfrog appeal systems in foreign jurisdiction, like Germany and Japan, in which leaping an appeal means that the party may, in case of no objection to the facts of the first instance court, agrees to go through the second instance and appeal directly to the third level court (usually the supreme court). Based on the institutional context of third-instance final review system, the rationale of this leapfrog appeal mechanism is to reduce the instance of a case according to the willingness of the parties, and its main purpose centers on litigation economy. However, the leapfrog appeal for IP Tribunal does not reduce the trial instance, but only changes the second-instance court from the provisional courts to the SPC. It only raises the level of the court of second instance.6

B. Promoting Technical Fact-Finding Mechanism

With the launching of IP Tribunal, a set of fact-finding methods have been utilized to facilitate the trial of technical IP Cases. The “technical investigator” has been further refined with the promulgation of a series of provisions clarifying the authority and

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responsibility of the technical investigator.\textsuperscript{7} Basically, the technical investigator shall offer a proposal on the controversial focus of technical facts, as well as the scope, order and method of investigation; and assist judges in organizing experts and professionals in relevant technical fields to give their opinions. A technical investigation office has been set up in the SPC IP Tribunal to be responsible for the daily management of technical investigators, assigning technical investigators to participate in litigation activities relating to intellectual property cases and providing technical advice.

It is also worth noting that some advanced equipment and devices are provided to facilitate the parties and the tribunal. Information technology tools currently completed or under construction by the IP Tribunal include: online electronic filing, automatic generation of electronic files, online access to files and so on. Besides, augmented reality technology, virtual reality technology and video long-range transmission technology are applied in trial to promote the visualization of technical details and increase the efficiency of trial.\textsuperscript{8}

VI. CONCLUSIONS

The establishment of SPC IP Tribunal is one of the key links in China’s reform of judicial system, for it reflects some bold innovation in systematic reform. Since the Outline first proposed to explore the IP appeal mechanism in 2008, it has taken ten years for China to establish the IP Tribunal as the sole appellate body situating in national level. On account of the need to unify technical IP cases and be consistent with the convention that combine antitrust jurisdiction with IP jurisdiction, the IP Tribunal is granted with an exclusive jurisdiction over technical IP cases and antitrust case, which turns out to be a unique and vibrant practice in the world.
