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China's Recent Pilot IP Precedents System

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1 Background

In the past several years, the Supreme People's Court ("SPC") of China has been working on establishing a precedent system appropriate for China. In 2010, the SPC launched the Guiding Cases System ("GCS"). Under the GCS, the SPC each year selects and publishes certain representative cases from all level of courts as Guiding Cases. The Guiding Cases are for the purpose of interpreting, clarifying or refining written laws if the law is too general, has ambiguities or holes. Courts nationwide should "refer to" the Guiding Cases when handling cases with similar facts or legal issues. The GCS aims to limit judicial discretion and unify the standard of application of law.

However, the GCS is not functioning well as expected. So far, only 77 Guiding Cases were published and statistics show that the majority of the Guiding Cases were rarely cited or considered by courts. The small number of Guiding Cases might be one reason of restricting their value in application. Another reason is the lack of detailed rules on how judges should "refer to" the Guiding Cases in court proceedings and written opinions. Some key practical questions were not answered, for example, 1) whether the Guiding Cases shall be followed in later cases rather than merely used as references? 2) whether judges are obliged to search for Guiding Cases in the published database on their own initiative? and 3) whether judges shall provide reasoning on why or why not to follow a Guiding Case if a party submits it? In the current practice, Guiding Cases were rarely addressed in judgments, even though parties have submitted and requested the court to follow.

2 Latest Progress of a Pilot IP Precedents System in the Beijing IP Court

In April 2015, the SPC designated the Beijing IP Court as its IP Case Law Center to experiment on rules of *Stare Decisis*, which is an evolved version of the GCS in the area of IP law. The IP Case Law Center is working on some draft guidelines and rules to re-build the GCS into a more certain and practical system. Such IP Precedents System is clarified to distinguish from the case law system originated from the common law tradition in that, precedents play their guiding roles, fill in statutory gaps and refine given statutory rules rather than create new rules.

The citation of precedents has been gradually developing in the Beijing IP Court practice since the establishment of the IP Case Law Center in April 2015. Statistics show that, from March 2015 to October 2016, the Beijing IP Court has cited precedents in 168 decisions, in 128 of which the

precedents were submitted by the parties and in 47 of which the precedents were voluntarily invoked by judges. Among the 168 decisions, the Beijing IP Court has followed precedents in 117 judgments, distinguished factual basis and not followed precedents in 51 decisions. In the next two years, the Beijing IP Court aims to significantly expand the number of precedents and make them an indispensable part of judicial opinions.

2.1 The nature and hierarchy of IP precedents are made clear

- Two main guidelines under preparation are the *Procedural Guidelines for Applying Precedents in IP Trials (Draft)* and the *Norms for Uniformity of Advocacy, Trial and Ruling of the Beijing IP Court (Draft)*. These draft guidelines are to clarify detailed rules on applying precedents in IP trials.
- An effective judicial decision can become a precedent upon a special process of selection, review and release. A precedent can be binding or persuasive, according to the hierarchy rules. China is a statute law country where court decisions cannot be an independent source of law, so IP precedents should be cited as a reason but not a legal basis for a ruling. Therefore, they are *de facto* but not *de jure* binding.
- Decisions made by a superior court, or by the same court in earlier decisions are binding precedents to its inferior courts and the court itself. For an IP Court, precedents of the SPC, its appellate court at the provincial level, and its own previous decisions are binding; holdings from courts in other provinces or courts (either at the same level or a lower level) in the same province are persuasive precedents.
- In general, the higher the authority is, the more persuasive the decision is. The hierarchy of precedents (from most to least persuasive) is: Guiding Cases published by the SPC, cases included in the SPC Gazette, cases issued by the SPC, High Court cases, Intermediate Court cases, District Court cases and cases from foreign jurisdictions.

2.2 A mechanism for selecting and issuing IP precedents will be established

- The IP Case Law Center has formed an expert committee (consisting of retired senior judges, law professors, and senior IP lawyers) for the selection of IP precedents. To become an IP precedent, a rendered decision must be “fair and impartial”, “convincing” and have “exemplary effect”. The committee will review candidate cases recommended by qualified nominators (e.g., judges and scholars) and determine whether the relevant criteria have been met. The final decision is made through a two-thirds vote. Selected IP precedents are published on the IP Case Law Center website and recorded in the precedent database.
- Two normative documents are expected to be issued in the near future in support of the selection review of IP precedents, namely the *Appraisal and Assessment Rules for Precedents of the IP Case Law Center (Draft)* and the *By-law of Expert Consultation Committee of the IP Case Law Center (Draft)*.
- A special database for IP precedents is now under construction for use by judges, lawyers, litigating parties and scholars. It is expected to be officially launched in the middle of 2017.

2.3 The procedure of submitting and citing precedents is clarified

- Precedents should be submitted before the close of evidence production, or if there is justifiable reason, no later than the end of debate stage of court hearing.
- In addition to citing a precedent in the legal briefs, a litigating party should submit a separate case table indicating the title, case number, court, relevant legal rules, summary of ruling,

similarities between the precedent and the present case and why the court should follow it.

- Parties shall be given opportunities to review precedents and submit rebuttal precedents. In general, precedents, either submitted by parties or proactively identified by judges, should be cross-examined at the pre-trial hearing. For precedents submitted during a hearing which may affect the outcome of a case, the court may stay the trial unless the receiving party agrees to cross-examine the precedents at the hearing.
- During the trial, the court should allow the parties to debate over whether prior decisions and the case in suit involve similar facts and legal issues, and whether a precedent is binding or persuasive, etc.

2.4 Rules are provided on when judges should follow, refer to, ignore or overrule a particular IP precedent in their judicial opinions

- Judges are required to comment on every precedent submitted by the parties and explain why they follow or not follow the precedent. Failure to discuss a precedent in court opinions would prejudice a party's due process rights and could be a ground for appeal.
- For each previous case submitted by the parties, the court should first identify whether it has facts and legal issues similar to the present case. If the answer is no, the prior case is distinguishable and is not a precedent. If the answer is yes, then it is regarded as a precedent. Judges are bound to follow it or consider it as a persuasive reference, depending on whether the precedent is binding or persuasive.
- A precedent may be overruled in some cases, for example, if its legal ruling and reasoning were wrong, there were errors in the precedent's procedure, or it has been expressly or impliedly overruled by the SPC. Under such circumstances, the court should forward the precedent to the judicial committee, the highest judicial department within the court, for review. Upon approval, the precedent at issue will be officially overruled and removed from the precedent database.
- Furthermore, courts have the power to ignore a binding precedent for judicial policy or statutory reasons, e.g., a new legislature or judicial interpretation has made the precedent obsolete, or the social, economic and political situations upholding the precedent have changed.

3 Implications for Judges and IP Lawyers

The IP Precedents System sets a higher standard for IP judges and lawyers.

On one hand, the professionalism and self-discipline of judges would be greatly strengthened. Chinese court opinions have been traditionally criticized for being self-contradictory, low quality and lack of sufficient legal reasoning. With the IP Precedents System, judges are forced to take care of consistency, conduct in-depth analysis and articulate more comprehensive, sophisticated and reasonable legal reasoning. Court judgments would, accordingly, become more evenhanded, transparent and predictable.

On the other hand, because the room for discretionary power is limited, the role and skills of lawyers would become more important and decisive. Lawyers will have more incentive to search for favorable precedents and distinguish unfavorable precedents, as a particular precedent might be the key to winning a lawsuit. Interactions between judges and lawyers will help build up a healthy legal community in which joint efforts can be sought and one side is supplementary and respectful to the others.

In conclusion, the establishment of the IP Precedents System is a great movement in China. It

represents “fresh” and “advance” in the Chinese judiciary system. The infrastructure and use of the system rely on high-tech and Internet. It brings more arms to IP law practitioners, and more legal certainties. It calls for open and dynamic minds, transparency, professionalism, and pulls together the legal community. It is an indication of the SPC’s strong willingness to improve judges’ professional levels and the quality of judicial opinions, build a more impartial judiciary, and uniform legal standards.

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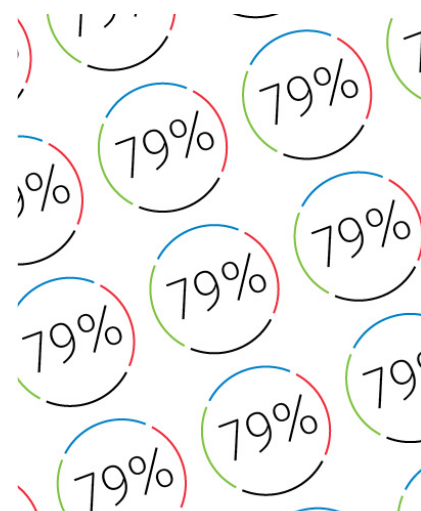
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