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China is to Establish a National IP Appellate Court

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On October 26, 2018, China's National People's Congress (NPC) issued a Decision, approving the establishment of a new IP Tribunal within the Supreme People's Court (the "SPC") as a national IP appellate court akin to the role of the Court of Appeals for the Federal Circuit (the "CAFC") in the United States.

1. Summary of the NDC Decision

According to the Decision, the new body within the SPC will hold exclusive jurisdiction over appeals against:

- Civil judgments and rulings in technology-related IP cases, i.e., those regarding invention and utility model patent infringement, new plant species, IC design, trade secret, software, and anti-trust; and
- Administrative judgments and rulings in technology-related IP cases, i.e., those regarding patent, new plant species, IC design, trade secret, software, and anti-trust.

In other words, it means the SPC IP Tribunal jurisdiction encompasses two types of patent cases:

- appeals of infringement judgments or non-infringement declaratory judgments made by trial courts nationwide, including the three specialized IP courts in Beijing, Shanghai and Guangzhou, the 16 intermediate courts with specialized IP Tribunals and other intermediate courts (usually in capital cities of provinces) having jurisdictions over patent cases; and
- appeals of administrative judgments made by the Beijing IP Court on patent validity or rejections of patent applications.

The new SPC IP Tribunal is expected to commence operations from Jan 1, 2019 in Beijing (with separate personnel and location from the SPC) with a 3-year pilot phase and is likely to recruit IP judges from the provincial high courts who had experience in hearing patent cases, given that the provincial high courts would no longer deal with appeals of patent and other technology-related cases.

The current IP Chamber of the SPC will continue to maintain its supervising role,

focusing on reviewing retrial petitions against appeal decisions, including those against the decisions made by the new IP Tribunal.

The new IP Tribunal within the SPC will only hear appeals regarding patent and other technology-related cases. Trademark and copyright related appeals (first instance starting mainly from primary courts) will continue to be heard by intermediate courts, specialized IP courts or high courts of different provinces. Regarding design patent cases, the new SPC IP Tribunal will not hear civil appeals, but will hear administrative appeals. The NPC Decision does not mention anything about IP criminal appeals.

2. Virtues of the SPC IP Tribunal

There are three virtues of centralizing patent appeals: promoting uniformity of the law, increasing the quality of decision making, and enhancing the efficiency of case disposition.

A. Promoting uniformity of the law

Under the current legal system, patent and technology-related cases are generally handled initially by the intermediate courts or specialized IP courts and appealed to high courts of different provinces, which led to splits on different patent law issues. Certain provincial high courts gained a reputation as being pro-patentee, whereas other high courts were perceived as being patentee unfriendly. Another issue is local protectionism. The disuniformity in patent law created forum shopping by patentees and alleged infringers. Parties raced each other to the courthouse, each trying to file their respective case (patent infringement action or non-infringement declaratory action) first in their most favored forum.

Furthermore, there is a pronounced disuniformity between patent infringement proceedings and invalidity proceedings. Currently, the Beijing IP Court holds exclusive jurisdiction over appeals of administrative decisions on patent validity and re-examination made by the PRB (Patent Re-examination Board) of the State IP Office and its judgment could be further appealed to the Beijing High Court. The Beijing High Court does not have an appellate review jurisdiction over patent infringement cases filed in the other two specialized IP courts/intermediate courts, leaving the appeals of trial decision regarding patent infringement to be heard by provincial high courts.

The new SPC IP Tribunal will centralize the patent appeal system by replacing individual provincial high courts for patent infringement appeals and the Beijing High Court for validity review appeals, to hopefully promote uniformity of application of patent law and reduce, if not eliminate, forum-shopping and local protectionism. More foreign companies are anticipated to be motivated to litigate in China to enforce their patents. As a result, the new SPC IP Tribunal will contribute to facilitating a more convenient and international business environment.

B. Increasing the quality of decision making

Legal and technical issues for patent and technology-related cases are often more complex and require the judge to have a high level of professionalism. Nevertheless, a

judge's capability of analyzing legal issues varies in lower courts. The new SPC IP Tribunal will comprise of judges who possess adequate trial experience and expertise in handling patent and technology-heavy cases. Accordingly, the establishment of the new SPC IP Tribunal will hopefully improve the quality of decision making and act as a guide in technology-related cases for trial courts and PRB proceedings.

C. Enhancing the efficiency of case disposition

The establishment of a new SPC IP Tribunal would shorten the litigation period and improve efficiency to a certain extent. Currently, many retrial petitions are filed before the SPC against appeal decisions made by provincial high courts. When the new SPC IP Tribunal is established, there would only be one step required to reach the SPC, which will facilitate the ultimate disposition of a dispute. Given all the appeal decisions are made by the SPC, it can be reasonably predicted that the quantity of retrial petitions involving patent and other technology-related cases will be significantly reduced.

3. Prospects of the New SPC IP Tribunal

It can be anticipated that an increasing number of patent owners will enforce their patent rights following the improvement of the judicial environment. As a result, the new SPC IP Tribunal is going to be a busy forum that faces a very heavy case load. It is still questionable whether the judges and staff of the new SPC IP Tribunal are well prepared for the beginning of 2019. It is also worth paying attention to whether the new system will lengthen the litigation period and whether the quality of decisions could be guaranteed.

Even though the current IP Chamber of the SPC will continue its supervising role, it can be reasonably predicted that fewer decisions will be revoked via retrial proceedings within the same court. Parties might not be interested in filing retrial petitions if they expect a lower success rate such that the quantity of retrial petitions will be significantly reduced. Under such circumstances, this supervisory body can be expected to play a more important role on legal applications rather than the factual issues.

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