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Expert Auxiliary System in China

James Yang (Zy Partners), Yin Li (ZY Partners), and Hui Zhang (Baker & McKenzie) · Tuesday, September 26th, 2017

In China, judges handling patent litigations often experience difficulties in claim construction and infringement determination due to the lack of technical backgrounds. Although forensic appraisals were then widely adopted to help judges identify professional facts, some downsides were observed in the technical appraisal system. As for the expert auxiliary system, it is playing a more active role than before but still has limited operational rules in practice.

In this regard, this article introduces the Chinese expert auxiliary system along with other related efforts and experiments to deal with technical issues in judicial proceedings.

1. Background

Traditionally, IP judges in China heavily relied on the forensic appraisal to identify technical facts. However, the current IP appraisal practice was revealed some downsides. Firstly, the time consuming and cumbersome appraisal process, including the selection and engagement of an appraisal institute will dramatically delay the trial. Secondly, the limited number of qualified appraisal institutes and qualified appraisers for IP cases cannot keep up the pace of the booming technology developments. Moreover, none of the appraisal institutes has its own technical facilities (such as labs) or in-house appraisers. They have to engage a third party if a test is necessary and select candidate experts from a pool of qualified appraisers. These limitations cause quality concerns on the forensic appraisal system. Thirdly, judges are over-dependent on appraisal conclusion without proper due diligence on disputed technical issues.

Realizing these limitations and striving to enhance the capacity in identifying technical issues, Chinese courts also tried other alternative approaches, such as expert consultation and expert juror. But these approaches have intrinsic defects. Usually, an expert consultation meeting is arranged by the court outside courtroom, the involved experts are asked to provide opinions without having a thorough understanding of case facts and parties' arguments. More importantly, the expert consultation opinion will not be provided to the parties for cross-examination, hence lacks justification as an adjudication basis. In practice, a large number of expert jurors are SIPO examiners. Hardly can the courts find an expert juror specialized in the disputed technical issue but is free from conflicts of interest with either party. Therefore, none of the alternative options has been widely adopted.

2. Legal Framework of Expert Auxiliary

The expert auxiliary system was developed to enhance the capacity of litigants to cross-examine appraisal conclusions. It was firstly provided in 2002 in the judicial interpretations of the Supreme People's Court of China (the "SPC"), and was later incorporated in the amended Civil Procedural Law in 2013. According to the written provisions, a party may invite one or two persons with expertise, upon court approval, to provide professional opinions and clarifications, to cross-examine appraisal opinions, or to address inquiries to the appraiser or the expert auxiliary of the opposite party at the court hearing. In addition to cross-examination of an appraisal conclusion, an expert auxiliary may also provide opinions and clarifications on other related professional issues.

In the SPC Interpretations on Civil Procedural Law enacted in 2015, some supplementary rules were set forward. For example, a party must seek approval from the court for inviting expert auxiliary before the deadline for evidence submission; the opinions regarding professional issues shall be treated as statements of the entrusting party; and an expert auxiliary is not allowed to participate in court activities other than those relating to the concerned professional issues.

The term of expert auxiliary was not officially written out in any enacted provisions, but has been widely used in academic discussions to refer to persons with expertise involved in judicial proceedings.

3. Judicial Practice of Expert Auxiliary

Among case decisions involving expert auxiliary in the database provided by IP House (IP House offers quite comprehensive database of nationwide IP decisions issued in the recent 10 years, and professional data analysis), our preliminary research shows that expert auxiliaries appear in 56 court judgments or rulings in relation to patent litigations, among which, 75% were made after 2014. Three of them were published by the SPC as guiding cases or typical cases. And 80% decisions were made by courts in Beijing, Shanghai and Zhejiang, indicating that expert auxiliaries were preferred in high-profile cases heard by courts in more developed jurisdictions for IP trials.

Expert auxiliaries are playing an increasingly important role nowadays. An experienced judge from Shanghai opined in his article that courts should place more reliance on expert auxiliaries. In his view, expert auxiliaries are well-known professionals with a high prestige and good reputation in a particular field. Even though expert auxiliaries are engaged by parties rather than by courts, these prestigious experts are not likely to make testimony contradictory to basic technical facts or widely accepted science knowledge. Their knowledge and experience can help clarify and sum up disputed technical facts, and can greatly improve the efficiency and quality of trials.

However, it is also discovered that the party engaging expert auxiliary may expect surprises or uncertainties in the court hearing. In a high-profile case tried by the SPC, the expert auxiliary admitted a technical fact unfavorable to his entrusting party. That's a reminder to litigators that sufficient communications and rehearsals are critically necessary before an expert auxiliary appears in courtroom.

There are limited operational rules for the expert auxiliary system. In practice, different courts may have different practices. There have been controversial discussions over what specific procedural rules shall be applied to the expert auxiliary.

In most cases, expert auxiliaries are allowed to seat beside the agent *ad litem* of the entrusting party to attend the entire hearing process and to make oral statements just like the attorney does. In some other cases, expert auxiliaries are treated as witnesses and only permitted to make testimony on a

witness stand. They are not allowed to observe the whole hearing and are invited into the court room by the judge when needed.

Although the SPC judicial interpretations newly enacted in 2015 have clarified that, an expert auxiliary is only allowed to participate in court activities relevant to the concerned professional issues, we have not seen a wide implementation of the new provisions.

4. Experiments in Intellectual Property Courts

Even though the expert auxiliary system has been introduced for more than 10 years, it is not functioning well as expected for a number of reasons. A notable reason is that, expert auxiliaries are engaged by parties rather than by the court following a formal selection and engagement process. The neutrality of the expert auxiliary is questionable for judges. Another reason is that, both parties are entitled to engage their own expert auxiliaries, and in some cases, the two sides' experts provide different or conflicting comments. It will cause problems for judges to weigh these conflicting opinions and decide to admit which side's opinion.

After the three special IP courts were established in Beijing, Shanghai and Guangzhou in late 2014, the system of technical investigator was gradually built up in the IP courts. The technical investigator is a kind of expert auxiliary hired by the court, serving as a technical assistant to judges in technology related IP cases, or the "technical brain" of judges. The Chinese technical investigator system took reference to similar practices in Japan, South Korea and Taiwan.

A technical investigator is entitled to participate into an entire trial and provide professional opinions for judges. He may be required to propose methods and steps for technology-related evidence investigation, inspection or preservation. He can attend court hearings and raise questions to parties to clarify technical facts. He can provide assistance to judges for engaging forensic appraisal or seeking consultation from other professionals. He may be invited to panel deliberations to give professional opinions on technical facts concerned. But, the technical investigator has no voting right and his opinions in the deliberations are not accessible by parties.

Usually one technical investigator will be assigned for one case on needed basis. Parties are entitled to recuse the assigned technical investigator for statutory reasons. For example, the technical investigator is an interested party or lacks necessary technical background required by the case.

From a recent report of the SPC on the three-year pilot operation of the three IP courts, 61 technical investigators in total have been appointed and have participated in 1144 technology-related cases, providing technical consultation opinions or attending court hearings, which account for 9% of the total technology-related cases docketed within the past three years by the three IP courts.

The technical investigator system is not confined to trials of patent infringement cases, can also be applied to litigations concerning patentability and validity. In the meantime, expert auxiliaries of litigants continue to play active roles in non-technology related IP cases.

Ordinary courts, with IP tribunals, are drawing on the practice of the three IP courts to build up their own technical investigator teams. This system is developing rapidly.

5. Summary Conclusions

For years, China courts have developed a few systems, aiming to improve their capacity of dealing with technical issues, such as the forensic appraisal system, the expert auxiliary system, and the technical investigator system. They are all of significant meaning to the whole frame. The forensic appraisal system was observed some downsides. The expert auxiliary system was introduced to enhance the cross-examination capacity of litigants but has limited practice. The technical investigator system was recently established, but is under a rapid expansion. With the presence of the technical investigator, the testimony of an expert auxiliary will have a more probable value. Chinese courts are expected to make more persuasive judgments on patent cases with less controversy on identification of technical issues.

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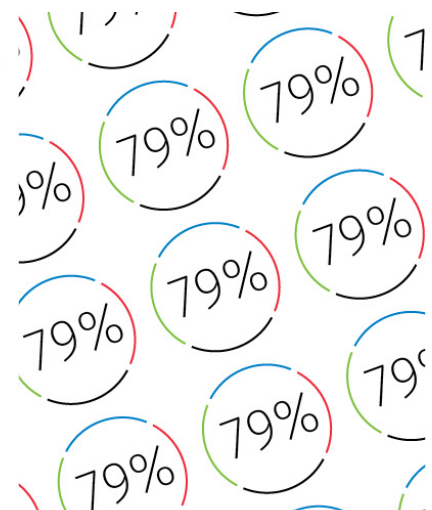
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