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Analysis of the Construction of Chinese Anti-Suit Injunctions about SEPs

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Abstract: *With the development of Chinese science and technology careers, there is an increasing number of Chinese telecommunicating enterprises going abroad. With territorial and international characteristics, the SEPs (Standard Essential Patents), represented by wireless telecommunicating techniques, have become the key subject of numerous parallel international lawsuits. The countries operating the Common law system have been using anti-suit injunctions to solve the problems of international parallel lawsuits, and Chinese courts also attempted to solve these problems by using anti-suit injunctions, however, which were assaulted by foreign courts immediately. Although deeply influenced by the Civil law system, Chinese courts do have the fundamental right to issue anti-suit injunctions about SEPs. In consideration of the international comity, issuing anti-suit injunctions also needs to satisfy the form and real conditions.*

Keywords: *SEP, Anti-suit injunctions, Intellectual property, International comity*

1. Introduction

With the development of Chinese wireless telecommunicating technology and the strength of international competence, numerous telecommunicating enterprises, like Huawei and Xiaomi, have gone abroad[1]. However, due to the late start-up of the Chinese wireless telecommunication research, most of these SEPs are in the possession of foreign patentees, while some countries have begun to take measures like discriminatory patent fees or sanctions to ambush Chinese enterprises under the background of the trade war between the two strongest countries. Such conditions make it convenient for foreign patentees to abuse their SEP rights (Zhao, 2021) [2]. Therefore, Chinese enterprises have become the main litigation subjects of such SEPs in international parallel lawsuits, which brings greater risk to industrial developments.

Patents are issued by different countries' administrative branches according to the relevant regulations, which have a strong domestic color. This means, without the treaties, patents take affection only in the issued countries[3]. However, to satisfy the needs of telecommunicating and global trading, the SEPs represented by wireless techniques must also have transnational characteristics (Zhu, 2021) [4]. To reduce the costs, the patentees and the users would always negotiate about guaranteeing these SEPs globally. When negotiations go into trouble, the parties would ask the courts to decide on the global fee rates of the guarantees about these SEPs based on the "FRAND" principle. Due to the territorial nature of patents, the parties would be reluctant to give up the rights to forum shopping, leading to international parallel lawsuits, a typical phenomenon of jurisdiction conflicts. In 2020, China issued three anti-suit injunctions to protect her judicial sovereignty, and all of them have been assaulted by anti-antisuit injunctions issued by foreign courts.

2. Literature in the Common law system countries

2.1. The issuance standards of anti-suit injunctions

In Common law system countries, anti-suit injunctions have been established for a long time, during judicial practices, judges have formed different standards for issuing anti-suit injunctions.

In the UK, where anti-suit injunctions got born, the courts have formed three principles applying to issue anti-suit injunctions: (1) The applicant has the right not to be sued in a foreign country; (2) The applicant cannot get compensation on equity in foreign lawsuits; (3) Foreign lawsuits are bullying and troublesome. All of them were emphasized in the case of British Airways Board *v.* Laker Airway Ltd, in

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which Lord Diplock added that if the parties had reached an exclusive jurisdiction agreement to exclude a foreign court's jurisdiction, then the first principle will be considered satisfying[5]. In the case of Société Nationale, Lord Goff added useless as a kind of bullying, which means if the foreign lawsuits are impossible to succeed and they only aim to prolong the proceedings, they would be considered bullying and troublesome, leading to the issuance of anti-suit injunctions from British courts[6].

Transregional jurisdiction conflicts are more obvious in the US due to the federal system. Derived from an injunction to solve the transregional jurisdiction conflicts, anti-suit injunctions were used more to solve the international jurisdiction conflicts after the US changed the diplomatic policy from passive isolationism to active connectionism. There are no statutory regulating anti-suit injunctions, and the standards have been formed during long-term practice. Due to the different attitudes towards comity, different courts may have different standards, and three issuance standards exist among the federal circuit courts (Zhu, 2020) [7].

The D.C.Cir, the 2nd Cir, and the 6th Cir apply the strict standard, which considers comity as an important pillar of international relationships. This standard states that according to comity, one country's jurisdiction shouldn't intervene in the other country's jurisdiction, only when the foreign lawsuits do damage to the domestic lawsuits, or the parallel lawsuits may lead to massive damages to domestic interests, can anti-suit injunctions be issued.

The 5th Cir, the 7th Cir, the 8th Cir, and the 9th Cir apply the lenient standard, which holds an opposite view against the strict standard[8]. Compared with comity, this standard focuses more on the negative influence that parallel lawsuits bring to domestic lawsuits and the inconvenience or extra costs to the parties[9]. The lenient standard thinks that in case the parties and object of action are the same, the two lawsuits are relevant, and the courts can issue an anti-suit injunction forbidding the parties to commence or continue the lawsuit in the foreign court.

The 1st Cir holds the neutral standard, the typical case of which is Quaak *v.* KPMG. This standard is similar to the issuance standard of the UK, but it is more conscious. The court needs to consider does the party who commences the foreign lawsuit have subjective malice or compared with the comity, does the applicant have a more urgent interest to protect. The court can issue anti-suit injunctions only when all of them need to be proved by the applicant.

As far as I'm concerned, the neutral standard and the British standards seem comprehensive and well-rounded, but the judge of the malice is subjective. Due to the tradition of underestimating foreign courts' ability, they always judge foreign lawsuits as malicious and bullying out of distrust of other countries. Ewelina stated that the Italian court was always called the Italian torpedo for its difficult and long proceedings by other EU members.

2.2. The Basis of Anti-suit Injunctions in Common Law Countries

The right of equity and the court's discretionary right over jurisdiction are the cornerstones upon which the injunction system has been established in the common law world.

In the 18th century, with the incorporation of the common courts into the equity courts, the priority of equity has been preserved, and the judges have the right to determine whether malicious the parties are and issue injunctions to prevent improper foreign lawsuits based on equity. It seems that equity doesn't exist in the Civil law world, while IP rights have an instinctive conflict between proprietors and the public, and interest balancing plays an instrumental role in the field of IP (Feng, 2003) [10]. There is no difference between equity and interest balancing. When it comes to the protection of SEPs, Chinese courts have instinctive rights to balance the interests of both parties by issuing injunctions to forbid unfair and malicious foreign lawsuits.

In common law countries, the courts have the right to determine their jurisdiction and deny others, which also constructs the basis of anti-suit injunctions. As a country with statutory laws, while making decisions, Chinese judges need to refer to the relevant provisions and compare them with the facts. which regulate the jurisdiction of the courts distinctively, it seems there is no room for courts to determine the jurisdiction of other courts[11]. Chinese courts can merge or transfer jurisdictions legally according to civil procedure law, which is also common in judicial practices. This means China's courts have to right to decide jurisdictions.

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3. Literature in the Civil law system countries

3.1. The conflicts between anti-suit injunctions and the international comity

The doctrine of international comity derived from Westphalian sovereignty was first proposed by Urlich Huber. He believed that comity is the basis of international law, which stated that the reason why a country would apply to foreign laws is comity, which is between courtesy and obligations. Scholars and judges in the Common law world emphasized that issuing an anti-suit injunction doesn't influence the authority of foreign courts, nor does damage their judicial sovereignty (Leng, 2009). In 1987, Lord Goff realized that the objective of anti-suit injunctions is only the party. Nevertheless, scholars from the Civil law world disagreed with him and thought anti-suit injunctions do influence foreign courts' sovereignty.

Compared with the other vehicles restricting forum shopping, issuing anti-suit injunctions is the most effective. Facing the plaintiff's forum shopping, the respondent can apply for a counterclaim or disagreement of jurisdiction, apply for an advanced declaration not to admit the judgment, or apply for an anti-suit injunction to forbid the plaintiff from continuing the process[12]. Among them, the first two do not directly affect the conduct of litigation in foreign courts, but anti-suit injunctions do have such effectiveness to suspend or terminate foreign courts' litigations.

Many scholars thought the attitudes reflected by anti-suit injunctions is the lack of trustiness in foreign courts, issuing courts don't believe foreign courts can treat the parties equally and deal with the conflicts of jurisdiction, so they enforce their jurisdiction over foreign courts, which do not proper according to the doctrine of comity, the laws of each State have force within the limits of that government and bind all subject to it, but not beyond. So, the conflict between anti-suit injunctions and comity is instinctive.

3.2. Theory of Substantial Claim in Civil Law Countries

Although civil law countries have long rejected to admit anti-suit injunctions issued by foreign courts, there were examples of civil law countries issuing the injunctions actively. For example, the German Supreme Court used to decide that a party who had initiated divorce proceedings abroad had violated German divorce regulations and customs, perpetuating a tort according to the BGB, and therefore issued a special performance order prohibiting the party from continuing the foreign lawsuits.

It is important to realize that the reason why the German court issued the injunction is not a damage to the parties' procedural rights, but a real threat to their substantive rights. The civil law countries represented by Germany consider substantive rights as the center. As an auxiliary tool to compensate for substantive rights, the issuance of anti-suit injunctions can only happen when substantive rights get hurt.

This theory was also supported by *the Brussels Convention* and *the Draft of the Hague Convention*, the formal name of which is *the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*. The two conventions established a principle that there is a compulsory obligation for member countries to recognize and enforce a foreign judgment made by the other member country in civil and commercial matters only when it is concerned with substantive rights and obligations between the parties. Although the two conventions have not got effective in China currently, which still reflect the requirement of recognition of foreign judgment.

4. The construction of Chinese Anti-suit Injunctions

4.1. The Issuance Standards of Anti-suit Injunctions

4.1.1. The Prerequisite: International Parallel Lawsuits

China's courts have jurisdiction, extraterritorial litigation must be the same as the lawsuit has been filed and accepted in China, constituting international parallel litigation, to apply for the injunction. At this point, we should explore how much the same degree of litigation and extraterritorial litigation can constitute international parallel litigation under the meaning of the injunction.

If domestic and foreign litigations have the same litigants and the same subject matters, of course, constitute international parallel lawsuits, which satisfy the prerequisite for issuing anti-suit injunctions. What if the litigants are not the same?

In the EU, *the Brussels Convention* addressed that even though the litigants are not the same, the two

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lawsuits are related and may result in conflicting judgments, they constitute parallel lawsuits. In this condition, the court can suspend the trial. This provides a reference for us to judge the international parallel litigation.

When a party has filed a lawsuit in China for a global license fee rate about SEPs, the other party then files a lawsuit abroad for the same thing, the result of the litigations is likely to be in conflict, even if the parties are not the same, which can generally be considered as international parallel litigations, in line with the prerequisites for the issuance of an injunction.

4.1.2. The Substantive Condition

China is deeply influenced by civil law countries and should focus more on the protection of the substantive rights of the parties. In the case of Huawei *v.* Conversant, the SPC held that if the German court's decision was implemented, Huawei would have to accept a license fee rate nearly 20 times higher than the Chinese court's decision, which would lead to a great threat to Huawei's substantive rights. Similarly, in the case of Xiaomi *v.* IDC, the Wuhan Intermediate Court held that the injunctions issued by Indian courts would inevitably affect the operation of Xiaomi and its overseas affiliation, causing great damage to its interests and making it difficult to repair. Therefore, the court can measure whether the foreign litigation unduly endangers the substantive rights of the parties. Only when the answer is yes, can the court issue anti-suit injunctions.

4.2. Promoting the Mutual Recognition of Injunctions

Anti-suit injunctions play an important role in resolving forum shopping. Looking around China's handling of forum shopping in international civil litigation, it seems too rigid and ignores the flexibility of international coordination and cooperation. Judicial sovereignty should be respected, but judicial cooperation also has its role. For cases with competing jurisdictions, China's traditional judicial practice is to accept cases without making out whether there exists prior litigation or not and to refuse to recognize and enforce foreign court decisions, especially in SEP disputes. Chinese courts choose to issue anti-suit injunctions, indicating that China hopes to resolve the conflicts of jurisdiction, however, the injunctions issued by China have been fiercely confronted by foreign courts.

According to the theory of transnational law, domestic legislation can also play a transnational effect (Yan, 2008). How to make China's anti-suit injunctions be widely recognized and implemented? Bilateral and multilateral treaties for mutual recognition and enforcement of the injunctions can be a good choice. For the protection of China's judicial sovereignty, in principle, China should refuse to recognize foreign anti-suit injunctions, while in some cases, after review, Chinese courts can recognize the anti-suit injunctions made by the foreign courts.

Firstly, the basis of such treaties must be reciprocity, for example, in some cases China has recognized the foreign anti-suit injunctions, then in the same situation, the foreign court should also recognize Chinese. Secondly, the effect of foreign anti-suit injunctions should be limited to suspension rather than termination, which provided the parties a path to restart the domestic lawsuit if the decision made by the foreign court is unfair.

5. Conclusion

At the end of 2020, the SPC proposed to make China a resort for IPR dispute resolution. It is foreseeable that SEP disputes and parallel lawsuits in China will be more common in the future, and more anti-suit injunctions from China will emerge, which will inevitably be deplored and against by foreign courts. China's anti-suit injunction system should be established, especially in the issuance of standards to clarify the prerequisite and the substantive condition, and through the treaties to protect its recognition and enforcement abroad.

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