

China Issues Rules to Establish Appellate Court with Nationwide Jurisdiction Over Patent and Other Complex Technical Cases

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Intellectual Property

On October 26, 2018, the Standing Committee of the People's National Congress of the People's Republic of China (PRC) passed *Decisions on Several Procedural Issues Relating to Patent and Other Intellectual Property Cases* (the Appellate Rules), which will give the Supreme Court jurisdiction over patent and other complex technical IP cases¹ (the Designated Subject Matter), instead of the respective geographical appeals courts. During the committee's session on October 22, 2018, Chief Justice of the PRC Supreme People's Court (the Supreme Court), Hon. Zhou Qiang, made an explanatory speech stressing the significance of establishing such rules to protect innovation, create a sound business environment, and ensure uniformity of legal decisions. A new IP-focused tribunal within the Supreme Court is expected to be established before the end of 2018 to handle these appellate cases. The Supreme Court will then issue applicable rules further detailing the subject matter requirements for the new IP tribunal. The Appellate Rules will come into effect on January 1, 2019, and require the Supreme Court to then report to the People's National Congress on their implementation three years later.

The Appellate Rules set out the following two core rules for civil and administrative cases which are to be directly appealed to the Supreme Court, and thus skipping provincial and municipal High People's Courts under the prior rules:

- For civil cases, an appeal of a first-instance court decision in regard to invention or utility patents, new plant species, integrated circuits layout designs, technical secrets, computer software, or antitrust shall be appealed to the Supreme Court; and
- For administrative law cases (i.e., judicial review of decisions of administrative agencies), the same language applies except that "invention or utility patent" are replaced by "patent", thereby also including design patents in the subject matter that shall be appealed to the Supreme Court.

¹ "IP cases" in Chinese jurisprudence includes, in addition to conventional intellectual property categories such as patent, copyright, and trademark, also antitrust and monopoly cases, which are also heard by "IP tribunals" in courts of first instance. "IP" as used herein is used consistent with this meaning.

One Centralized Appellate-level Tribunal with Nationwide Jurisdiction Will Increase PRC Supreme Court Exposure to Certain IP Cases

The Appellate Rules are expected to bring uniformity by eliminating conflicting decisions between different provincial and municipal High Courts, and also deter local protectionism. The main aim of establishing the Appellate Rules is to create an appellate tribunal with nationwide jurisdiction over cases involving the Designated Subject Matter within the Supreme Court. Under the prior rules, the High Courts of local provinces and municipalities heard appeals. It is not uncommon that High Courts in different localities may issue conflicting decisions. Moreover, High Courts in China may issue judicial guidelines that serve as strong referential rules of decision or procedure within those courts' jurisdiction alone for issues that are not clearly addressed in statutes. By removing jurisdiction from the High Courts in the Designated Subject Matter, the Appellate Rules will bring an end to both practices.

Accordingly, the Appellate Rules enable the Supreme Court to more directly weigh in on IP cases than under the prior appellate procedural rules. Under the prior civil procedure rules in China, decisions from the courts of first instance may only be appealed once, and these appeals would be heard by regional High Courts. The Supreme Court would only review the decision in a patent case at its discretion under the Trial Supervision Procedure.² The Appellate Rules provide more opportunities for the Supreme Court to adjudicate patent cases without resorting to the Trial Supervision Procedure by allowing that appeals from the court of first instance will be heard by the Supreme Court.

The Appellate Rules also specify that when the Supreme Court does invoke the Trial Supervision Procedure for the Designated Subject Matter, the Supreme Court can either decide the case or it may remand the case to lower courts, at its discretion. Therefore, the venue rule is strictly unified under both appeal and Trial Supervision Procedures. Note that an appellate decision by the newly established IP tribunal of the Supreme Court is itself also subject to the Trial Supervision Procedure by the Supreme Court. Another tribunal or chamber formed within the existing IP division of the Supreme Court will be called upon to handle the trial supervision procedure for an appellate decision issued under the Appellate Rules.

Following the establishment of 15 IP tribunals nationwide, as [Covington has previously reported](#), and an additional one in Jiangxi Province in July 2018, the Appellate Rules continue China's efforts to concentrate jurisdiction over IP matters, this time at the appellate level. As previously noted, at the level of first-instance cases, these specialized IP Tribunals have cross-regional and exclusive jurisdiction over IP matters. With the Appellate Rules coming into effect soon, the proceedings for certain IP litigation in China will be completed with a second step; proceedings will first commence at one of the specialized IP tribunals or courts, with any appeal taken directly to the Supreme Court. Forum selection is expected to be less important in parties' overall litigation strategies, because even if a party selects a favorable forum for the first instance trial, the appeal will not be heard by a local court, eliminating the possibility of local protectionism. In addition, parties will be less able to seek a forum with favorable local judicial procedures or rules of decision. This may lead parties to develop new strategies focusing on the appellate level, including advocating for principles of decision that focus on a coherent uniform

² Trial Supervision Procedure is a unique procedural rule in PRC where the competent court may re-examine or re-try cases that were previously adjudicated, even if the appeal period has expired.

patent regimen, and advancing more motion practice and settlement procedures during the appeal process than have previously been observed.

Subject Matter Requirements: Patent and Other Complex Technical IP Cases and Antitrust Cases, but Not Design Patent, Trademark, and Non-software Copyright cases, or IP-related Criminal Cases

The Appellate Rules currently only focus on complex technical IP cases. For both civil and administrative law cases, the Supreme Court's jurisdiction does not include trademark cases, non-software copyright cases, or IP-related criminal cases, unless these cases also involve antitrust issues. In other words, those cases will continue to be appealed to the provincial and municipal High Courts. However, a design patent infringement decision by a local court will be appealed to the High Courts, while a design patent administrative law case, i.e. invalidation or reexamination where the defendant is the Patent Reexamination Board of CNIPA³, will now be appealed to the Supreme Court. Here, design patent right holders and stakeholders, such as smartphone companies holding GUI design patents, may face potential forum choices depending on whether they are facing an invalidation or infringement proceeding.

The Appellate Rules also include antitrust cases, consistent with the practice in China of specialist IP tribunals hearing antitrust cases. This recognizes the high level of sophistication and complex technical issues in antitrust-related causes of action, which also need consistent nationwide rules and adjudication by skilled judges. According to the Appellate Rules, antitrust cases will also be appealed to the Supreme Court directly from first-instance trial courts. This may for example impact the Guangdong High Court's guidelines on Standard-Essential Patents (SEP) cases issued in April 2018. Those guidelines include rules for the governing law, conduct that demonstrates a lack of "good faith" in SEP licensing negotiations, and issues regarding disclosure of comparable royalties to the court and determination of royalty rates. Whether the Guangdong High Court's guidelines will be preserved, or whether the new IP tribunal will make its own rules, remains to be seen. In addition, the newly established tribunal under the Supreme Court may also introduce harmonized legal rules with regard to resale price maintenance (RPM) and other types of vertical restraints, as different municipal or provincial High Courts such as Shanghai, Guangdong, and Hainan have applied different or even conflicting approaches to RPM.

According to a press report⁴, China is also considering the further expansion of the Supreme Court's nationwide jurisdiction to include trademark, trade secrets, and unfair competition cases three years after the current reform is implemented.

Comparison with Other Jurisdictions Worldwide

It is common in jurisdictions that frequently enforce patent rights to have one single unified appellate court. In the U.S., the *Federal Courts Improvement Act* of 1982 created the U.S. Court of Appeals for the Federal Circuit with sole appellate jurisdiction over all patent appeals in the

³ Formerly called the State Intellectual Property Office, or "SIPO", this agency was renamed in August 2018 from SIPO to China National Intellectual Property Administration (CNIPA). The renaming relates to a prior institutional reform which incorporated trademark matters into the Intellectual Property Office's functions.

⁴ <https://www.yicai.com/news/100047608.html>. Final access date: October 30, 2018.

United States, as well as certain other subject matter governed by U.S. federal law. The Patent Court of Korea (PCK) and Japanese Intellectual Property High Court (IPHC) were created in 1998 and 2004, respectively, to handle patent appeals. In Germany, although higher-level regional courts (*Oberlandesgerichte*) will hear the appeal from a patent case decision made by a lower regional court, Germany is one of the 13 signatory states of the Agreement on a Unified Patent Court (UPCA), including the UK, France and other EU member states except for Croatia, Poland and Spain.⁵ The UK ratified the UPCA on April 26, 2018, despite its current plan to leave the European Union.⁶ As an exclusive right that defines entitlements for nationwide markets and industries, as well as an important component of nations' innovation policies, patent rights are increasingly undergoing a global trend of harmonization to allow countries, including China, to ensure the consistent and robust enforcement of valid rights.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our team:

<u>Ruixue Ran</u>	+86 10 5910 0511	<u>rran@cov.com</u>
<u>Robert Williams</u>	+86 21 6036 2506	<u>rwilliams@cov.com</u>
<u>Sheng Huang</u>	+86 10 5910 0515	<u>shuang@cov.com</u>
<u>Alexander Wang</u>	+86 10 5910 0507	<u>aywang@cov.com</u>

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⁵ <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013001&DocLanguage=en>

⁶ <https://www.gov.uk/government/news/uk-signals-green-light-to-unified-patent-court-agreement>