

Research on China's Response to the Anti-Suit Injunction System in Europe and America

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Abstract

In recent years, in international litigation over standard essential patents, courts in various countries, especially those in the UK and the US, have frequently issued anti-suit injunctions, triggering a game between anti-suit injunctions and counter anti-suit injunctions. The absence of an anti-suit injunction system in China not only puts Chinese enterprises in a very passive position in foreign-related civil litigation, especially in foreign-related intellectual property litigation, but also seriously interferes with and threatens China's judicial sovereignty and court jurisdiction. It is necessary for China to establish an anti-suit injunction system to provide necessary countermeasures. It is recommended to refer to the practice of foreign courts, and the issuance standards of anti-suit injunctions should balance flexibility and certainty. At the same time, factors such as the protection of China's public interests, whether the foreign litigation is vexatious or oppressive, and whether the anti-suit injunction can control the respondent should be considered, so as to facilitate judges to carry out case-by-case analysis, increase judges' discretion, and let judges measure various factors in specific cases.

Keywords

Anti-suit Injunction; International Parallel Litigation; Standard Essential Patent.

1. Overview of Standard Essential Patents and Anti-Suit Injunctions

A standard essential patent (SEP) refers to a patent that is included in international standards, national standards, and industry standards and must be used when implementing the standards. Once a standard incorporates a patent, others' use of the standard will necessarily involve the use of the patented technology. The combination of standards and patents gives SEPs the characteristics of necessary implementation, irreplaceability, and compulsoriness. Against the backdrop of "technological patentization, patent standardization, and standard monopolization", the integration of patents and standards has "strengthened the patentee's monopoly" and further enhanced the monopolistic power of patent holders.

An anti-suit injunction is an order issued by a court with judicial jurisdiction to restrict a party from initiating or continuing a lawsuit in another court or tribunal, or from taking further actions in the lawsuit. British scholar Look Chan Ho believes that an anti-suit injunction is a personal restrictive order issued to a party to prevent him from bringing or continuing a lawsuit in a foreign court. This definition highlights the personal nature of the anti-suit injunction[1].

In a broad sense, anti-suit injunctions include three types: anti-suit injunctions, anti-enforcement injunctions, and counter anti-suit injunctions. Among them, an anti-suit injunction or a counter anti-suit injunction prohibits the other party from initiating the same lawsuit against the same sued act or subject in a court other than the accepting court, including a foreign court. Once an anti-suit injunction is issued, the respondent must withdraw the lawsuit in other jurisdictions and can only initiate the lawsuit in the jurisdiction determined by the anti-suit injunction; otherwise, he will be subject to corresponding punishment measures, such as high fines, imprisonment, market exit, etc. Therefore, on the surface, the anti-suit injunction is aimed

at the litigants, but in fact, it will restrict the courts of another jurisdiction from exercising their powers, essentially interfering with the judicial sovereignty of other countries, and it is an important system for the courts of European and American countries to gain obvious advantages in the global judicial jurisdiction game.

Based on summarizing many scholars and combining the judicial practice of issuing anti-suit injunctions abroad, in order to strengthen intellectual property protection, make up for the defects of foreign-related jurisdiction legislation, and improve the international dispute resolution mechanism for intellectual property, it is necessary for China to establish an anti-suit injunction system and bridge the conflict between the anti-suit injunction and judicial sovereignty through the principle of international comity. The anti-suit injunctions of foreign countries have caused great obstacles to the parties in China's civil litigation from exercising their rights normally according to law, and have also caused a great impact on the exercise of judicial jurisdiction by Chinese courts according to law. China should establish an anti-suit injunction system based on the principle of international comity to protect the legitimate rights and interests of the parties in China's civil litigation and safeguard national judicial sovereignty[2].

2. Practice of Issuing "Anti-Suit Injunctions" in China and Triggered Problems

In response to the anti-suit injunctions and counter anti-suit injunctions issued by foreign courts, there is currently no system completely identical to the anti-suit injunction within China's legal framework. In the international parallel litigation between Chinese wireless communication enterprises and standard essential patent holders, in the face of the practice of issuing anti-suit injunctions by common law countries, they initially only accepted it and did not apply for issuing counter anti-suit injunctions for countermeasures. At the same time, before the overseas courts ruled on the global license fee of standard essential patents, Chinese wireless communication enterprises have always adhered to the principle of patent territoriality and did not require ruling on the global license fee (such as the case of ZTE Corporation v. Conversant Corporation heard by the Shenzhen Intermediate People's Court).

Therefore, starting from August 2020, within just four months, China successively made five adjudications with the nature of anti-suit injunctions in the form of act preservation. Typical cases include: Huawei v. Conversant, Xiaomi v. InterDigital, and Samsung v. Ericsson.

Facing the anti-suit injunctions issued by Chinese courts, the Delhi High Court of India and the U.S. District Court for the Eastern District of Texas quickly responded with tit-for-tat measures, triggering a game between anti-suit injunctions and counter-anti-suit injunctions. The former issued a counter-anti-suit injunction on October 9, 2020 (approximately two weeks after the Wuhan Intermediate People's Court issued the anti-suit injunction), prohibiting Xiaomi from applying to the Wuhan Intermediate People's Court for enforcement of the anti-suit injunction. The latter issued a counter-anti-suit injunction on January 11, 2021 (less than three weeks after the Wuhan Intermediate People's Court issued the anti-suit injunction), prohibiting Samsung from filing lawsuits in the Wuhan Intermediate People's Court that interfere with the jurisdiction of U.S. courts[3].

After the above cases issued anti-suit injunction rulings, they received some positive evaluations in the international community. Some foreign media commented on China's issuance of anti-suit injunctions, stating that as a legal tool already adopted internationally, the use of anti-suit injunction systems by Chinese courts is legitimate and has a positive impact on protecting the legitimate rights and interests of licensees. However, there are also negative evaluations in the international community. For example, Adam Mossoff, a patent law professor at George Mason University, argued that Chinese courts have not fairly adjudicated the rights

of innovators and accused infringers. Instead, they have set patent royalties below market rates for 5G and other technologies used in smart phones and other tech products manufactured by Chinese companies like Huawei and Xiaomi. He also claimed that "China does not abide by the rule of law and due process, seeks to dominate next-generation technologies and global commerce, and abuses its court system to achieve this goal. These anti-suit injunctions pose a threat to the rule of law that enables the global innovative economy and today's mobile revolution.[4]"

It can be seen that China's practice of anti-suit injunctions has just begun, yet it has already attracted fierce foreign opposition and academic discussions, inevitably raising concerns about its future path. This has triggered reflections on whether China should establish an anti-suit injunction system and how to construct a reasonable one.

3. Analysis of the Necessity of Introducing the Anti-suit Injunction System in China

The anti-suit injunctions issued by China in the above three cases were all granted in the form of behavioral preservation, triggering controversial feedback from the international community. Foreign anti-suit injunctions have caused significant obstacles to the legitimate exercise of rights by parties in China's civil litigation and also posed a major impact on the judicial jurisdiction of Chinese courts. Therefore, it is necessary for China to introduce the anti-suit injunction system.

3.1. From the Perspective of Objective Reality

Anti-suit injunctions issued by foreign courts have not only caused a great worry to Chinese litigants but also imposed institutional constraints on the development of related industries in China. Data released by the Ministry of Commerce shows that the total import and export volume of intellectual property royalties was 378.3 billion yuan, of which exports were 76.02 billion yuan, a year-on-year increase of 27.1%. With the growth of intellectual property product imports and exports, corresponding disputes have also increased. In standard-essential patent (SEP) litigations accepted by Chinese courts, parties from countries like the U.S. and UK may apply to relevant foreign courts for anti-suit injunctions based on their litigation strategies and commercial interests, requiring Chinese SEP litigation parties to withdraw their lawsuits or refrain from enforcing judgments made by Chinese courts. Intimidated by severe penalties, Chinese litigants often are forced to reach settlements with foreign enterprises.

Enterprises like Huawei and ZTE have encountered anti-suit injunctions in foreign courts, being forced to withdraw SEP litigations filed in Chinese courts or not enforce Chinese court judgments. This not only deprives Chinese enterprises of the right to sue in Chinese courts and enforce Chinese court judgments but also seriously disrupts and damages China's civil litigation procedures, posing a grave threat to China's judicial sovereignty.

3.2. From the Perspective of Jurisprudential Analysis

First, in international litigation involving forum shopping, parties typically prefer to apply for anti-suit injunctions in their domestic courts rather than filing jurisdiction objections in foreign courts or applying for a stay of proceedings based on the "forum non conveniens" principle. This is because: foreign courts may have overly broad jurisdiction rules or lack the forum non conveniens principle, making it difficult to obtain a stay order; applying for a stay in a foreign court may be regarded as accepting jurisdiction, enabling the foreign court's judgment to be enforced internationally; filing jurisdiction objections or applying for a stay in foreign courts is costly and inconvenient; and parties must act swiftly, while domestic courts allow the fastest way to initiate litigation, and parties are most familiar with domestic courts. [5]Therefore,

without introducing the anti-suit injunction system, Chinese litigants may lose the initiative and be at a disadvantage in international litigation.

Second, although China's defensive legislation on refusing to recognize and enforce foreign judgments can partially avoid adverse consequences for parties in foreign litigation, this remedy cannot comprehensively protect the legitimate rights and interests of Chinese parties in international civil litigation, nor does it sufficiently punish or deter cross-border malicious litigants.[6] For acts where one party violates an exclusive court jurisdiction agreement or a valid arbitration agreement, obtains a valid judgment in a foreign court, and applies for its enforcement in other countries, China's current legislation appears powerless. Therefore, compared with the defensive refusal to recognize and enforce foreign judgments, the anti-suit injunction is a more effective weapon.

Finally, there is no system in Chinese law with the same function as anti-suit injunctions. Chinese law does not contain the concept of anti-suit injunctions, only two concepts superficially similar to anti-suit injunctions: maritime injunction and temporary injunction. However, these two concepts differ significantly from anti-suit injunctions. First, maritime injunctions apply to maritime cases, not general international civil litigation. One of the application conditions for a maritime injunction is correcting the respondent's act that violates legal provisions or contractual agreements. If the parties have a prior exclusive jurisdiction agreement or arbitration agreement, and one party sues in another court, it can be determined as a breach of contract. In such cases, the maritime injunction functions similarly to an anti-suit injunction. However, if no such agreement exists between the parties, a maritime injunction can only be issued when the respondent has violated legal provisions, while the issuance of an anti-suit injunction has no such requirement, and there are no clear legal provisions on the conditions for issuing an anti-suit injunction. Second, temporary injunctions mainly exist in the field of intellectual property, that is, ordering parties to stop infringing acts before litigation, targeting acts of intellectual property infringement and occurring at the pre-litigation stage, which is different from the litigation acts targeted by anti-suit injunctions.

It should be added that the five anti-suit injunctions currently issued by China were all granted in the form of behavioral preservation. However, the framework of behavioral preservation is insufficient to accommodate anti-suit injunctions: first, behavioral preservation focuses more on substantive aspects, while anti-suit injunctions focus more on procedural issues; second, anti-suit injunctions involve the issue of international comity, involving considerations of a country's national public interests and public policies, which must balance public and private interests simultaneously, while behavioral preservation pays more attention to the comparison and measurement of private interests and is insufficient to accommodate public policy considerations.

In summary, it is necessary for China to establish a separate anti-suit injunction system to adapt to the needs of current international civil litigation judicial practice.

4. Design Scheme for China's Anti-suit Injunction System

4.1. Basic Principles for Issuing Anti-suit Injunctions

4.1.1. Principle of Compliance with International Treaties

International conventions are common norms that sovereign states should abide by when participating in international activities. According to China's Civil Procedure Law, civil and commercial international treaties acceded to by China have priority and direct application. Therefore, when issuing anti-suit injunctions, it is necessary to first review whether there are international treaties or bilateral treaties that China has joined, and whether such treaties have specific provisions on parallel litigation. If a Chinese court has no jurisdiction under the

convention or treaty, and a party requests the court to issue an anti-suit injunction, the court should respect the convention's provisions and refuse to issue the injunction.

4.1.2. Principle of Party Autonomy

As one of the countries with the most mature anti-suit injunction system, the UK previously saw conflicts between the principle of party autonomy and the principle of international comity in issuing anti-suit injunctions before The Angelic Grace case. After this case, the academic community basically reached a consensus that the principle of party autonomy should take precedence. [7] If both parties initially choose to refer disputes to arbitration or reach a court choice agreement, and one party ignores the agreement, it is equivalent to a malicious breach of contract. Such a breach violates the principle of good faith in private law and should be punished in the domestic court based on the country's basic legal principles. In this case, there is no legal obstacle for the UK court to issue an anti-suit injunction.

Therefore, under the current international legislative trend of highly respecting "party autonomy," China should also follow the principle of "party autonomy" priority when constructing the anti-suit injunction system. When there is a valid arbitration agreement between the parties designating a Chinese court or an arbitration institution, it is necessary to protect the jurisdiction of Chinese courts or arbitration institutions and issue anti-suit injunctions against the "breaching party" for initiating separate litigation. In cases where there is no jurisdiction agreement between the parties, since there are no contractual rights between the parties, China should issue fewer anti-suit injunctions based on a high degree of consideration for "international comity."

4.1.3. Principle of Respect for International Comity

On the surface, anti-suit injunctions are issued against parties, but they indirectly interfere with the jurisdiction of foreign courts. Therefore, countries are very cautious when deciding whether to issue anti-suit injunctions. Even in the famous *Laker v. Sabena* case where the U.S. and UK competed for jurisdiction, the courts of both countries gave international comity a very high status in their judgments.

The U.S. Court of Appeals for the District of Columbia Circuit pointed out that comity is an inevitable product of our internationally independent yet economically interdependent international system. Just as people, products, and issues flow freely between neighboring countries, national interests also cross territorial boundaries. However, no country can expect its laws to operate beyond its jurisdiction and be enforced. Each country often needs to rely on other countries to help achieve its regulatory purposes. The UK House of Lords also believes that comity refers to the polite and friendly mutual understanding and tolerance between nations, mutual respect for each other's laws, state organs, and customs, which requires the applicant to override the requirements of comity with the most convincing evidence when seeking an anti-suit injunction.

Therefore, in foreign-related intellectual property litigation, when deciding whether to issue an anti-suit injunction, Chinese courts must consider the principle of international comity, balance "judicial comity" and "judicial restraint," and strike a balance between judicial comity and safeguarding national judicial sovereignty.

4.1.4. Principle of the Most Significant Relationship

According to the principle of the most significant relationship, China has the closest connection with the dispute involved. The "principle of the most significant relationship" is a development of the "substantial connection principle." Currently, the most influential legal application rules for foreign-related intellectual property jurisdiction drafted by scholars from Europe and the U.S. have also adopted the principle of the most significant relationship in case of jurisdiction conflicts. One is the Principles of Jurisdiction, Choice of Law, and Judgments in Transnational Disputes formulated by the American Law Institute, and the other is the Principles of Conflict

of Laws for Intellectual Property developed by the Max Planck Research Group on Conflict of Laws in Intellectual Property in Europe. Applying the principle of the most significant relationship as a principle to follow when issuing anti-suit injunctions is in line with international practice.

4.2. Conditions for Issuing Anti-suit Injunctions

Based on the comprehensive consideration of the above basic principles for issuing anti-suit injunctions, the factors to be considered for issuing an anti-suit injunction include the following situations:

4.2.1. There is a substantial connection between Chinese courts and the dispute, and the Chinese court is the 'natural forum' for resolving the dispute

A natural forum refers to a court that has the most real and substantial connection with the litigation, that is, a court more suitable for hearing the case compared to other foreign courts. To determine whether there is a substantial connection between the dispute and Chinese courts, it is generally judged based on factors such as the main connecting points of the case being in China and the existence of an exclusive court choice agreement.

4.2.2. The foreign litigation violates China's exclusive jurisdiction

Article 273 of China's Civil Procedure Law stipulates: "Litigation arising from disputes over contracts for Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures, and Sino-foreign cooperative exploration and development of natural resources performed within the People's Republic of China shall be under the jurisdiction of the people's courts of the People's Republic of China," which is a mandatory provision of China's foreign-related jurisdiction. Exclusive jurisdiction has the legal consequence of negating the validity of court jurisdiction agreements or arbitration agreements. When one party violates the exclusive jurisdiction provisions by filing a lawsuit or applying for arbitration in another country's court, Chinese courts may issue anti-suit injunctions.

4.2.3. The foreign litigation is vexatious or oppressive

This is judged based on two aspects: whether the respondent has subjective intent in the foreign litigation and whether it has caused interference to the applicant[8]. For whether the respondent has subjective intent, it can be judged based on factors such as whether the respondent attempts to interfere with China's normal judicial procedures and hinder the realization of the applicant's normal right to sue, and whether there is intent to delay litigation progress or even undermine China's judicial jurisdiction. Whether the respondent has been disturbed can be determined based on whether the respondent, knowing that they would receive an anti-suit injunction, still chose the court to gain a legal or strategic advantage, or knowing that the applicant had filed a lawsuit in an appropriate jurisdiction, still initiated litigation activities in other countries, exhausting the applicant in terms of both economy and energy, and even forcing the applicant to accept unequal terms and reach a settlement with them.

4.2.4. Whether there is control over the party

If an issued anti-suit injunction cannot control the party, it loses its meaning. Considering that parties who violate anti-suit injunctions are generally subject to penalties such as fines and imprisonment, the respondent of an anti-suit injunction should generally have Chinese nationality or a domicile in China, engage in production and business activities in China, or have enforceable property in China, so that the anti-suit injunction can be effectively enforced and issuing it is meaningful.

4.3. Penalties for Violating Anti-suit Injunctions

Implementing effective penalty measures against parties who violate anti-suit injunctions is the guarantee for the effectiveness of anti-suit injunctions. [9] In constructing China's anti-suit injunction system, combined with relevant legal provisions, the consequences and related responsibilities for violating anti-suit injunctions can be stipulated as follows:

4.3.1. Imposition of Fines

According to China's current practice of issuing anti-suit injunctions, in the above-mentioned cases of *Conversant v. Huawei*, *InterDigital v. Xiaomi*, and *Samsung v. Ericsson*, the Supreme People's Court and the Wuhan Intermediate People's Court both imposed a daily fine of 1 million yuan on the respondents, adopting the daily fine method. The fine accumulates daily from the effective date of the judgment until the respondent withdraws the foreign litigation. This daily accumulation method can increase the sense of urgency for the respondent and enhance the pressure to comply with the anti-suit injunction.

The determination of the daily fine standard can be comprehensively considered based on factors such as the content of the dispute, the nature of the dispute, the size of the subject matter involved, the subjective malice of the respondent, and the severity of the consequences that may arise if the anti-suit injunction is not issued[10]. China also needs to introduce a compensatory fine system. For the respondent's malicious forum shopping and filing of unreasonable litigation abroad, when issuing an anti-suit injunction, order the respondent to pay the reasonable and necessary expenses incurred by the applicant in responding to the foreign litigation as a sanction for the respondent's non-compliance with the anti-suit injunction.

Based on the above fine penalties, if a party who violates an anti-suit injunction generates property in China or future property in China, it can be enforced within the scope of the fine.

4.3.2. Attachment of Property

Attachment of property includes seizing the respondent's real estate, movable property, or other physical objects with property value. Attachment is a temporary measure that neither deprives the respondent of ownership of the property nor the right to dispose of the property, aiming to temporarily restrict the respondent's business activities and order it to fulfill the court's ruling as soon as possible. Attachment is equivalent to freezing the production materials or material conditions necessary for the respondent's production and operation, which may have a significant negative impact on the respondent's business activities. In this sense, its deterrence may even be greater than fines.

4.3.3. Judicial Detention

China's Civil Procedure Law stipulates that for acts such as malicious litigation, refusal to appear in court, violation of court rules, forgery or destruction of evidence, and refusal to perform legally effective judgement, fines and detention can be imposed. When a party violates an anti-suit injunction, judicial detention can be used to restrict the personal freedom of the party or its principal responsible person, putting pressure on them to fulfill the anti-suit injunction ruling, which has a greater deterrence than the first two penalties.

4.3.4. Attachment of Property

If a party who violates an anti-suit injunction knew that our court had already prohibited them from filing lawsuits abroad despite the fact that our courts have already prohibited such actions, in order to exclude the jurisdiction of our courts and interfere with our judicial procedures, then our country can refuse to recognize and enforce the judgments obtained by that party in foreign courts. If foreign judicial organs accept the lawsuit filed by the respondent despite China's prior issuance of an anti-suit injunction, China's refusal to recognize and enforce foreign judgments also reflects the principle of reciprocity.

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