

Study on the Construction of Multiple Settlement Mechanism of Intellectual Property Disputes in Pilot Free Trade Zone---Taking Shaanxi Pilot Free Trade Zone as an Example

Yuhong Wang^{1,a}, Xiaojie Song^{1,b,*}, Ruirui Zhang^{1,c} and Gang Ye^{1,d}

¹Xi'an University of Technology, Xi'an, Shaanxi, China

^awangyuhong@xaut.edu.cn, ^b18829085927@163.com, ^c894251059@qq.com, ^d123058964@qq.com

*corresponding author

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Abstract: In the course of the development of China's Pilot Free Trade Zone, with the increase of new kinds of professional and complex intellectual property cases, the parties' demands for resolving disputes are becoming more and more diverse. Therefore, it is of great significance to build up the multiple settlement mechanism of intellectual property disputes in Pilot Free Trade Zone. The connotation and components of the multiple settlement mechanism of intellectual property disputes are defined, and the current situation of the multiple settlement of intellectual property disputes in Shaanxi Pilot Free Trade Zone is investigated. Referring to experiences of other FTZs, it is suggested that the establishment of settlement institution, the completion of connecting mechanism of various dispute resolution methods and the simplification of settlement process are key measures to improve the multiple settlement mechanism of intellectual property disputes in Pilot Free Trade Zone.

1. Research Background

China has taken systematic innovation as its core, replicability and popularization as its basic requirement, and trade liberalization and facilitation as its main purpose. China (Shaanxi) Pilot Free Trade Zone is the only FTZ in Northwest China. With the FTZ entering the "fast lane" of all-round development, intellectual property disputes are increasing, so it is difficult to satisfy the special requirements of the intellectual property disputants resolution by a single litigation method. The establishment and perfection of the multiple settlement mechanism of intellectual property disputes in Pilot Free Trade Zone will help to meet the diversified demand for resolving intellectual property disputes, ease the pressure of judicial resolution of intellectual property cases, and improve the quality and efficiency of dispute resolution, in order to promote the intellectual property protection system in Pilot Free Trade Zone.

2. Connotation and Constitution of Multiple Settlement Mechanism of Intellectual Property Disputes in FTZ

2.1. Connotation

The multiple dispute settlement mechanism refers to the coordination of various dispute resolution methods to form a unified dispute resolution system, including litigation and non-litigation solutions.^[1] The purpose of the multiple dispute settlement mechanism is to promote the mutual development of litigation and non-litigation solutions and to optimize dispute settlement resources.^[2] The multiple settlement mechanism of intellectual property disputes is the concrete application of multiple dispute settlement mechanism in the field of intellectual property rights. Therefore, the multiple settlement mechanism of intellectual property disputes in Pilot Free Trade Zone can be defined as: a reasonably coherent and mutually coordinated system for the settlement of intellectual property disputes by using a variety of dispute resolution methods, to provide a diversified, convenient and appropriate dispute resolution services for disputing parties in Pilot Free Trade Zone.

2.2. Components

Due to the extensive nature of the intellectual property disputants, the difference of various disputes, the diversity of demand of disputants and the complexity of different rights and interests, it is unpractical to solve all types of intellectual property disputes in the same way, nor can the general rules reflect all kinds of interests and claims. The diversity of disputes determines the differentiation of dispute settlement mechanisms. The multiple settlement mechanism of intellectual property rights mainly includes reconciliation, mediation, administrative adjudication, arbitration, litigation and so on.

3. Experience in Resolving Intellectual Property Disputes in Other Domestic FTZs

3.1. Experience in Shanghai FTZ

Shanghai Pilot Free Trade Zone has established a new type of arbitration mechanism, including the arbitration institution, the arbitration rules and the judicial review opinions on the foreign arbitration rules of the FTZ. It has also set up a civil mediation organization in the FTZ and established a mediation confirmation procedure with the court in the FTZ, initiated a dispute settlement mechanism linking the litigation and non-litigation in the FTZ, and introduced the mediation organization into the court in the FTZ.^[3] In addition, Shanghai Pilot Free Trade Zone has actively explored a multiple settlement mechanism for intellectual property disputes, preliminarily established the Pudong New area (FTZ) intellectual property dispute settlement mechanism framework and rapid settlement of intellectual property disputes platform.

3.2. Experience in Fujian FTZ

Fujian Pilot Free Trade Zone has set up the first cross-Strait intellectual property mediation arbitration center in Fuzhou, and explored the mediation mechanism of foreign intellectual property arbitration in the FTZ. A multiple dispute settlement mechanism that connects litigation and non-litigation has been promoted by setting up the intellectual property circuit trial court and the intellectual property court in the FTZ, introducing the mediation organization into the court in the FTZ, establishing a multiple dispute settlement platform for commercial disputes involving those within the FTZ, and optimizing the procedure of docking intellectual property disputes in the FTZ.^[4] Meanwhile, three branches of arbitration institutions--Xiamen Arbitration Commission International Commercial Arbitration Academy, Xiamen Arbitration Commission Pingtan Branch and Fuzhou Arbitration Commission International Commercial Arbitration Court, have been introduced successively into the FTZ.

3.3. Experience in Hubei FTZ

Wuhan Intellectual Property Bureau and Office of Wuhan Arbitration Commission have jointly established Wuhan Intellectual Property Arbitration Mediation Center, which organically combined the administrative mediation of intellectual property disputes with arbitration. Based on the Wuhan intellectual property claim service platform, innovative intellectual property rights reporting and protecting service network system has been built. Wuhan Intellectual Property Tribunal has the centralized jurisdiction over intellectual property disputes in the FTZ, and the Yichang People's Court has implemented cross-regional filing services for cases involving the FTZ. The Xiangyang Intermediate people's Court has set up a special collegial panel to hear the cases concerning the Xiangyang District of the FTZ, and has set up the Circuit Tribunal of the FTZ in the Court of Xiangyang High-tech Zone to raise the level of hearing the cases concerning the FTZ professionally.^[5]

3.4. Enlightenment of Practice in Domestic FTZs

In the process of constructing multiple settlement mechanism of intellectual property disputes in FTZs, Shanghai, Fujian, Hubei and other FTZs have gathered many valuable experiences, such as the establishment of an intellectual property court in the FTZ, the introduction of third-party mediation institutions, the improvement of the coordinating mechanism of litigation and mediation, and the innovation of the intellectual property arbitration mechanism in the FTZ. Meanwhile, such

measures as strengthening judicial review and enforcement of intellectual property arbitration awards in the FTZ, optimizing arbitral and administrative resource allocation, and establishing intellectual property arbitration confirmation system, are all worth referring, combined with the development of Shaanxi Pilot Free Trade Zone.

4. Analysis on the Current Situation of Multiple Settlement Mechanism of Intellectual Property Disputes in Shaanxi FTZ

In order to gain an in-depth understanding of the current situation of multiple settlement of intellectual property disputes in the Shaanxi FTZ, the author has successively visited the intellectual property administrative organs, the judicial organs, the arbitration agencies, and the respective trade zones of Shaanxi Province to conduct investigations. The achievements of the multiple settlement of intellectual property disputes in the Shaanxi FTZ are summarized, such as establishing the Xi'an Intellectual Property Tribunal, the China (Xi'an) Intellectual Property Protection Center, the Shaanxi FTZ Arbitration Institute and the Shaanxi FTZ International Commercial Mediation Center, building up a joint mechanism for litigation and mediation of intellectual property disputes, and promoting the work of "three-in-one" in the civil, administrative and criminal trials of intellectual property cases. At the same time, the following deficiencies in the multiple settlement of intellectual property disputes in the Shaanxi FTZ need to be further remedied:

4.1. Multiple Settlement Organizations of Intellectual Property Disputes in the FTZ Needs to be Developed

A sound intellectual property dispute settlement system in the FTZ is the institutional guarantee for the construction and operation of the multiple settlement mechanism of intellectual property disputes. With regard to intellectual property judicial institutions, the Xi'an Intellectual Property Tribunal, located in Xi'an International Logistics Park, has effectively integrated the judicial resources for intellectual property cases in Shaanxi Province, optimized the trial mechanism for intellectual property cases, and provided innovation for the judicial protection of intellectual property rights in the FTZ, yet there are still some problems to be solved, such as limited trial resources for intellectual property cases at the basic level in the FTZ, which cannot meet the demands of the intellectual property right holders in the area to resolve disputes conveniently and efficiently. With regard to aid institutions for intellectual property rights protection, the China (Shaanxi) Intellectual Property Rights Assistance Center affiliated to the Shaanxi Intellectual Property Rights Service Center can provide such legal advice for the obligee as accepting complaints about intellectual property infringement violations, consulting, early warning and tort judging, etc., but the professional mediation function for intellectual property disputes is still blank. Although the Shaanxi FTZ Arbitration Institute, the Shaanxi FTZ International Commercial Mediation Center and the Silk Road Arbitration Center of the China International Economic and Trade Arbitration Commission have been set up, substantive activities remain to be carried out. Compared with general intellectual property disputes, the intellectual property disputes in the FTZ have the characteristics of concerning foreign-related factors, more complex and technical nature, which require a more perfect multiple settlement mechanism in the FTA.

4.2. The Operation of Multiple Intellectual Property Dispute Settlement Methods in the FTZ Needs to be Improved

First of all, with regard to the judicial adjudication of intellectual property disputes, new kinds of intellectual property disputes in the FTZ such as trademark infringement of original equipment manufacturing and parallel imports, intellectual property infringement of e-commerce platforms, Internet anti-trust cases, intellectual property disputes in cultural and creative industries, intellectual property cases involving well-known enterprises have increased considerably. At present, the judicial trial of intellectual property cases is somewhat inadequate in terms of trial concept, level of trial and trial mechanism, etc. There exists a conflict between the long period of judicial proceedings and the rapid and convenient demand for the protection of intellectual property rights in the FTZ, as well as

contradiction between the openness of judicial proceedings and the confidentiality requirements of intellectual property dispute settlement in the FTA. Moreover, the tension between the limited resources of judicial litigation and the increasing number of intellectual property cases in the FTA needs to be alleviated. Secondly, in the intellectual property dispute mediation, except administrative mediation and judicial mediation, civilian mediation and industry mediation have played a very limited role. Thirdly, in the aspect of administrative adjudication of intellectual property disputes, the practice of administrative adjudication on intellectual property infringement is relatively few, and the relevant intellectual property legislation lack binding provisions on the administrative organs to exercise their adjudication power. The procedure of the administrative ruling is not comprehensive, and the judicial review on the administrative ruling has not yet been unified. Fourthly, with regard to arbitration of intellectual property disputes, the Opinions of the Supreme People's Court on Providing Judicial Protection for the Construction of the FTZ, published publicly in January 2017, provides that an arbitration agreement between enterprises registered in the FTZ to settle disputes in accordance with specific arbitration rules, at a particular place in the mainland of China, and arbitrated by mutually agreed arbitrator may be recognized by the people's court as a valid arbitration agreement. This provision has opened the door of China's interim arbitration to a limited extent. The Rules on Arbitration of International Investment Disputes of the China International Economic and Trade Commission, which came into effect on October 1, 2017 (on a trial basis), regulates interim measures, arbitration and conciliation, and emergency arbitrator procedures. The development of interim arbitration in the FTZ will further promote the perfection of the arbitration mechanism, and bring new opportunities for the dispute resolution in the FTZ. The arbitration rules of Shaanxi FTZ have not been formulated yet and the practice of ad hoc arbitration and interim measures has still not been carried out.

4.3. The Connecting Mechanism of Multiple Intellectual Property Dispute Settlement Methods in the FTZ Needs to be Established

At present, the coordination and interaction among the multiple ways to settle intellectual property disputes in Shaanxi FTZ is still in its infancy. In February 2015, the Shaanxi Provincial Higher People's Court and the Shaanxi Provincial Intellectual Property Office signed an outline agreement on strengthening the link between intellectual property administrative enforcement and criminal justice of intellectual property rights, aiming at promoting the establishment of a joint mechanism for litigation and mediation in intellectual property disputes, and carrying out judicial confirmation of administrative mediation agreement on patent disputes. In October 2016, they further refined the docking mechanism of litigation and mediation of intellectual property (patent) disputes, and made it clear that patent administrative authorities could participate in the mediation of patent disputes conducted before and during litigation. If an agreement has been reached through mediation by the patent administrative authority, the disputants may apply for judicial confirmation. In practice, the joint work of litigation and mediation in intellectual property disputes is quite limited, and the coordination mechanism of mediation and arbitration has not been established effectively. The establishment of the joint mechanism for litigation and mediation in intellectual property disputes, the judicial or arbitral confirmation of intellectual property dispute mediation agreement is beneficial to the innovation of the multiple settlement mechanism of intellectual property disputes in the FTZ.

5. Countermeasures to Improve the Multiple Settlement Mechanism of Intellectual Property Disputes in Shaanxi FTZ

5.1. Perfecting the Multiple Settlement Organizations of Intellectual Property Disputes in the FTZ

5.1.1. Perfecting Judicial Organs of the Intellectual Property Disputes in the FTZ

First of all, considering the amount of intellectual property cases in the existing zones of Shaanxi FTZ, and the jurisdiction of the district court to the intellectual property cases at first instance in the FTZ, designated by the Supreme People's Court and approved by the Shaanxi Provincial Higher

people's Court, the Xi'an Yanta District People's Court can set up a dispatched tribunal in the High-Tech Area of the FTZ, and hear civil lawsuits of intellectual property disputes at the first instance, whose subjects, objects and legal facts are related to those in the FTZ. Secondly, with the increasing number of intellectual property disputes in the FTZ, the district courts in each area of the FTZ should actively apply to the Supreme People's Court for jurisdiction over intellectual property civil disputes at first instance in due course, to create conditions for the establishment of the dispatched tribunal in their respective trade area. At the same time, learning from the practice of Shanghai FTZ, a group of experts and scholars from various industries and universities as well as Hong Kong and Macao residents, who are proficient in the WTO system, international trade rules, patent and trademark legal system, might be selected and appointed by the Standing Committee of the People's Congress at the same level as professional people's jurors to participate in the trial of intellectual property cases in the FTZ.

5.1.2. Perfecting Mediation Organizations of the Intellectual Property Disputes in the FTZ

It is suggested to set up an intellectual property dispute mediation center in Shaanxi FTZ under the Shaanxi Intellectual Property Service Center. Its main function is to accept civil disputes of intellectual property in the FTZ and conduct specialized mediation; guide and distribute cases to administrative authorities, judicial organs or arbitration institutions according to the mediation situation and the will of the parties. The mediation center can extensively absorb all kinds of legal workers and intellectual property experts as mediators to form a team of professional mediators with reasonable structure and complementary advantages.

5.1.3. Perfecting Arbitration Institutions of the Intellectual Property Disputes in the FTZ

Based on the advantages of professionalism, autonomy and flexibility of arbitration, it is suggested that the commercial arbitration institutions cooperate with the judicial administrative authorities to establish commercial arbitration or intellectual property arbitration institutions in other areas of the FTZ other than Xi'an International Logistics Park and Xi'an High-tech Industries Development Zone, which shall provide a diversified and competitive way to settle disputes for the intellectual property right holders in the FTZ.

5.2. Completing the Operation Mechanism of Various Dispute Settlement Methods in the FTZ

5.2.1. Completing the Judicial System of the Intellectual Property Disputes in the FTZ

First, the courts should actively exercise jurisdiction over all kinds of intellectual property rights cases in the FTZ according to the law, fully respect and protect the parties' legal right of action, implement the registration system for filing cases, and actively respond to the judicial protection needs of intellectual property rights in the FTZ. Second, the courts should pay attention to the study and judgment of the new and complicated intellectual property cases in FTZ, form the corresponding adjudication rules, strengthen the case guidance, standardize the discretion, unify the application of the law, and provide the timely guidance for the enterprises in the FTA. Third, the courts should provide strict judicial protection according to law, actively apply temporary protection measures before litigation, increase compensation amount for infringement, and severely punish criminal crimes to intellectual property rights. Fourth, the courts should seek a reasonable balance among the interests of disputant parties, the public and the state, accurately delimit the boundary of protecting intellectual property rights, and prevent the abuse of intellectual property rights. Fifth, the courts should constantly optimize the trial mode of "three in one" of intellectual property disputes, give full play to the advantages of specialized adjudication and the scale merit of centralized trial, and improve the comprehensive efficiency of judicial protection of intellectual property rights.

5.2.2. Completing the Mediation System of the Intellectual Property Disputes in the FTZ

It is necessary to establish and improve the mediation notification mechanism, guide the parties to settle intellectual property disputes through mediation channels, construct an expert consultation mechanism for the mediation of intellectual property disputes, clarify the scope of cases for mediation, and standardize mediation procedures. Meanwhile, in order to build a diversified mediation mechanism for intellectual property disputes in the FTZ, which includes administrative

mediation, litigation mediation, arbitration mediation and social organization mediation, it is also important to encourage trade associations and professional service organizations to participate in the mediation of intellectual property rights in the FTZ.

5.2.3. Completing the Administrative Adjudication System of the Intellectual Property Disputes in the FTZ

First of all, increase appropriately the proportion of intellectual property administrative adjudication. Compared with litigation, the speed of administrative adjudication is faster, the period is shorter, the personnel of administrative adjudication and enforcement is more professional, and the administrative adjudication of intellectual property disputes as a whole is more efficient. Secondly, the administrative adjudication system for intellectual property disputes shall be further improved from the legislative level: the administrative adjudication procedure including the procedure of claiming and prior notice, the statement of reasons and requests and the defense procedure be standardized, the neutrality and impartiality of administrative authorities in the administrative adjudication process be ensured, the administrative and judicial jurisdiction over intellectual property infringement disputes be rationally divided, and the judicial review on the administrative adjudication for intellectual property disputes be strengthened.

5.2.4. Completing the Arbitration System of the Intellectual Property Disputes in the FTZ

The arbitration institutions already established in Shaanxi FTZ shall actively provide arbitration services for the intellectual property right holders: recruit arbitrators with professional expertise and establish a roster of arbitrators who will specifically serve in the FTZ, meanwhile allow the disputing parties to select arbitrators outside the roster of arbitrators; formulate the Arbitration Rules of Shaanxi FTZ, explore the introduction and innovation of ad hoc arbitration, award ex aequo et bono, interim measures, emergency tribunal, consolidation of arbitration, joinder of third parties, agreed arbitration evidence, combination of arbitration with mediation, procedures for small claims, etc.^[6]

5.3. Optimizing the Multiple Settlement Process of Intellectual Property Disputes in the FTZ

It is suggested that the Intellectual Property Dispute Mediation Center in Shaanxi FTZ (hereinafter referred to as “Mediation Center”), affiliated to the Shaanxi Intellectual Property Service Center, be taken as the transit and coordination hub to construct the docking mechanism of litigation, mediation and arbitration for intellectual property disputes in the FTZ. When a party applies to the Mediation Center for mediation and reach a mediation agreement, the Mediation Center shall guide the parties to apply for judicial or arbitral confirmation to the people’s court with jurisdiction or an agreed arbitration institution; if no mediation agreement has been reached, the Mediation Center shall lead the intellectual property right holder to bring an action to the competent court or apply for arbitration to the agreed arbitration institution.

If a party brings a suit in the people’s court with jurisdiction, the people’s court may guide the party to settle the dispute through the Mediation Center before filing the case. After obtaining the consent of both parties, the Mediation Center may be appointed to mediate in litigation for the intellectual property disputes that have been filed. If mediation succeeds, the court shall issue a civil mediation statement or withdraw the appeal; if mediation fails, the court will promptly hear the case.

The party concerned may request the intellectual property administrative authority to make an administrative ruling on the intellectual property cases in the FTZ, at the same time, the intellectual property administrative authority may mediate the amount of compensation for intellectual property infringement.

The parties may also apply directly to the agreed arbitration institution for arbitration.

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