An Analysis of the Alternative Resolution Mechanism for Intellectual Property Disputes in the Guangdong-Hong Kong-Macao Greater Bay Area

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ABSTRACT
Intellectual property disputes are increasing, and how to resolve intellectual property disputes more efficiently and conveniently has become an important issue for the sustainable development of intellectual property rights in the Guangdong-Hong Kong-Macao Greater Bay Area (hereinafter referred to as " the Greater Bay Area"). Based on China's national conditions as well as the existing system, the relevant mechanisms based on arbitration and mediation are improved to better utilize the role of alternative dispute resolution for intellectual property disputes in the Greater Bay Area. The mechanisms includes using the rules for “Mediation of Intellectual Property Disputes” as a reference, promoting relevant market-based pilots, expanding the scope of arbitrability, and establishing professional teams for mediation and arbitration.

Keywords: *Guangdong-Hong Kong-Macao Greater Bay Area, intellectual property dispute resolution, non-litigation mechanism.*

1. INTRODUCTION

Based on the problem of conflict of laws in multiple places in the Guangdong-Hong Kong-Macao Greater Bay Area, this paper proposes better non-litigation ways to resolve intellectual property disputes in order to better promote the development of intellectual property rights, thereby promoting the overall development of the Guangdong-Hong Kong-Macao Greater Bay Area and providing a path for the construction of national cross-border jurisdictions.

2. RESEARCH BACKGROUND

Located at the southern tip of China, Guangdong-Hong Kong-Macao Greater Bay Area (hereinafter referred to as " the Greater Bay Area") is the frontier of our coastal opening to the outside world and has an important strategic position. It has several important ports, aviation hubs, a complete industrial system, and a leading level of economic development in China. The Outline of the Greater Bay Area Development Plan proposes that the Greater Bay Area will be built into an international science and technology innovation center with global influence. Through empirical analysis, Yang Deyun (2021) concluded that "for every 1 percentage point increase in patent acceptance, the economy of the Greater Bay Area grows by 0.035 to 0.045 percentage points", and further suggested the implementation of an independent IPR advantage strategy to promote the positive role of innovation in the construction of the Greater Bay Area.

Intellectual property rights, as one of the important grasp of innovation development, is the rightsizing of innovation achievements. 2020 the number of authorized patents in the nine cities of the Greater Bay Area grows more than 40% year-on-year. At the same time, the number of IPR cases received in Guangdong Province in 2020 will increase by 24% year-on-year. Therefore, the number of IPR cases in the Greater Bay Area, where technological innovation is booming, shows a trend of rapid growth, and it is difficult to meet the existing demand by relying solely on litigation for relief.[1]

In the face of the complexities of the Greater Bay Area across jurisdictions, the rapid development of intellectual property rights seeking, and the high efficiency of dispute resolution, an alternative dispute resolution mechanism for intellectual property rights is imperative.

3. OVERVIEW OF THE GREATER BAY AREA IPR ADR MECHANISM

3.1Types of IPR dispute resolution and their characteristics

Arbitration, one of the main types of non-litigation settlement of intellectual property rights in China, has the advantage of high efficiency. China's Copyright Law provides for the arbitrability of copyright. In addition, Article 53 of the Trademark Law and Article 60 of the Patent Law both provide that parties to a dispute may agree to choose an arbitration method to resolve the dispute.

The other main type is mediation, which is an alternative settlement mechanism where parties reach an agreement with the assistance of a neutral third party. 2010s "Supreme People's Court Vigorously Promotes Case Mediation - Promoting the Formation of a Diversified Dispute Resolution Pattern" points out the need to find a mediation mechanism in line with China's judicial practice. China's People's Mediation Law clarifies the principle and procedural issues of the mediation mechanism. Civil disputes over intellectual property rights are subject to the relevant provisions of mediation applicable to civil and commercial disputes in general.

The non-litigation resolution of intellectual property rights has distinctive features and requires the establishment of specialized IP dispute resolution institutions and the participation of professionals. In addition, ADR institutions have convenient and flexible settlement methods, rules, and procedures, which the parties can negotiate and coordinate the whole process of dispute resolution, reflecting the true will and values of the parties. Therefore, the parties have a higher possibility of accepting the result of the settlement and consciously performing it.

3.2Regulations related to non-litigation dispute resolution of intellectual property rights in the Greater Bay Area

In 2019 Macao enacted (Law 19/2019, Law on Arbitration (hereinafter referred to as "Law 2019"), which establishes the principles and specific rules of arbitration in Macao, and provides that mediation is an auxiliary to litigation proceedings and that parties may agree to mediate before the arbitral tribunal. This indicates that Macao law treats mediation as an adjunct to arbitration and litigation. The arbitration and mediation system in Macao is still in the developmental stage and is not yet typical.

The arbitration and mediation systems in Hong Kong are more well developed, typical and referable. The Arbitration Ordinance (Cap. 609), the Mediation Ordinance (Cap. 630), and related laws and regulations have been enacted. The Arbitration Ordinance also specifies the types of IPRs and disputes that can be arbitrated.

China's mainland promulgates the Arbitration Law and the People's Mediation Law to provide a legal basis for arbitration and mediation. China establishes the model of mediation in arbitration and the model of arbitration determination of mediation agreement to complement the strengths and weaknesses of the mediation and arbitration models.

The conditions for ADR of IPR disputes in the Greater Bay Area have been established, and interactions in terms of arbitration cooperation among the three places are quite frequent. For instance, a series of bilateral agreements have been signed between the Supreme People's Court of the Mainland and the Hong Kong and Macao Special Administrative Regions, and bilateral agreements have been signed between the Hong Kong and Macao Special Administrative Regions on the mutual enforcement of arbitral awards. The resolution of intellectual property disputes using non-litigation mechanisms has great potential in the Greater Bay Area.

4. LITERATURE REVIEW

4.1Current status of domestic research

The main viewpoints of relevant studies in the domestic academic community are currently focused on the following aspects.

4.1.1Intellectual property disputes are defined as civil legal disputes

At present, intellectual property rights are generally defined as a kind of civil rights in academic circles. For example, Professor Liu Chuntian believes that "intellectual property is the collective name of rights based on creative intellectual achievements and industrial and commercial marks generated by law, and its rights include copyright, trademark rights, patent rights, trade secret rights, integrated circuit layout design rights and rights of new varieties of animals and plants." [2] Professor Feng Xiaoqing also believes that "the protection of intellectual property rights shall arise by the law and be enjoyed by the civil subjects prescribed by law." [3]Accordingly, defining intellectual property rights as civil legal disputes solves the fundamental problem of

studying dispute resolution mechanisms in the form of alternative litigation.

4.1.2Settlement of civil disputes over intellectual property rights in the non-litigation form

Alternative Dispute Resolution (ADR), also known as Alternative Dispute Resolution (ADR), is a dispute resolution method outside of court litigation. At present, academics generally advocate the resolution of civil IPR disputes through ADR, reflecting the importance and relevance of studying the alternative dispute resolution mechanism for IPR.

For example, Long Fei (2015) discusses the importance of a diversified dispute resolution mechanism from the perspective of national governance and believes that dispute resolution mechanism marks the modernization of the national governance system and governance capacity." [4] Liang Ping (2013) also suggests that a single litigation mechanism cannot fully meet the actual needs of parties to resolve disputes, and the pluralistic construction of IP civil dispute resolution mechanism should focus on efficiency, confidentiality, market orientation, and take into account the interests of consumers. [5]

4.1.3Emphasize the construction of a scientific and diversified intellectual property dispute resolution mechanism

Against the background of resolving civil disputes over IPR through non-litigation forms, it is necessary to strengthen the construction of a pluralistic IPR dispute resolution mechanism to cope with the rapidly changing technological innovation and complex IPR disputes. Chen To (2013) proposes that IPR disputes should pay attention to the construction of diversified settlement mechanisms, emphasizing that "diversified mechanisms such as litigation, arbitration and mediation should be continuously developed and improved, and supporting mechanisms such as procedural guidance and court-attached ADR should be established. "vii In 2012, Liu Youhua (2012) analyzed the current situation of litigation resolution of intellectual property disputes in China and proposed the core dilemma of the construction of dispute resolution mechanism, advocating the typology of intellectual property disputes and the establishment of relevant supporting resolution methods. [6]

4.1.4Exploring the Conflict of Laws on Intellectual Property and the Path of Resolution in the Context of the Greater Bay Area

Exploring the alternative dispute resolution mechanism for intellectual property disputes in the Greater Bay Area is faced with many dilemmas such as conflict of laws. It is necessary to build a diversified dispute resolution mechanism based on the actual situation in the region and on a coordinated basis. Mei Ao (2020) proposes that attention should be paid to alleviating the dilemma of legal differences in intellectual property rights in the Greater Bay Area, promoting the settlement mechanism of intellectual property disputes, and facilitating regional construction to create a favorable rule of law environment; [7] Chen Jiamin (2020) proposes the adoption of a new form of ODR on top of the Nansha International Arbitration Center as well as the Shenzhen International Arbitration Court to implement an arbitration cooperation mechanism from the perspective of arbitration cooperation mechanism; focusing on the relationship with the Greater Bay Area hair regional peculiarities, targeted research on the main conflicts of intellectual property laws in the Greater Bay Area, which helps to build an alternative dispute resolution mechanism for intellectual property disputes that meets practical needs. [8]

4.2Current status of foreign research

4.2.1Foreign academics also advocate the ADR system in the United States as the representative of the intellectual property ADR mechanism.

Foreign scholars have gradually formed a scientific understanding of the ADR mechanism of intellectual property through summarizing the practical experience of intellectual property dispute resolution in many countries. Among them, foreign scholars generally respect the ADR system of the United States. For example, Christina Walpoleug (1998) proposed that due to the convenience of ADR dispute resolution, it has become the mainstream dispute resolution method for civil and commercial disputes in the United States instead of litigation, and ninety-five percent of civil and commercial disputes are resolved through ADR[9]; Simon Roberts (2011) also proposed that with the continuous application and development of ADR in some developed countries, it now includes negotiation, mediation, arbitration, and other settlement methods, forming a more complete and effective dispute resolution system. [10]

In addition, foreign scholars generally consider IP dispute cases to be arbitrable. SD Paul (1999) studied the arbitrability of IP disputes at the end of the last century, and in his arbitrability test for IP disputes, he proposed that there exist alternative forms of resolution of IP disputes through arbitration, but they must also be subject to the normal limits of contract law and public order[11]; H Hovenkamp, MD Janis (2014) also suggests that the vast majority of IPR litigation can achieve resolution before trial. [12]

4.2.2Foreign academics also advocate the resolution of IP civil disputes through the WIPO dispute resolution system

WIPO is an international organization established specifically for the protection of international intellectual property, and the WIPO dispute resolution system includes both interstate and private dispute resolution systems. arbitration, expedited arbitration, and mediation followed, in the absence of a settlement, by arbitration. [13]" The WIPO dispute resolution system helps parties to resolve IP disputes through alternative forms of dispute resolution using a series of rules of use.

A large number of scholars have advocated the application of the WIPO dispute resolution system. For example, Edward Kwakwa (2002) argues that the WIPO dispute resolution system has facilitated international IP protection through the establishment of a special international institution, the formulation of special procedural rules, and the provision of a suitable arbitration and ADR approach for civil IP disputes. (2002) [14] also argues that the WIPO dispute resolution system promotes international IP protection through the establishment of specialized international institutions, the formulation of specialized procedural rules, and the provision of arbitration and ADR methods suitable for handling civil IP disputes. [15]

In general, the relevant research of foreign academics has certain significance to domestic academic research in terms of broadening thinking, developing perspectives, and references. However, it is necessary to realize that a large number of foreign academic research results do not apply to the current situation in China due to the differences in the legal system and specific national conditions.

5. THE DILEMMA OF NON-LITIGATION SETTLEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THE GREATER BAY AREA

5.1Theoretical limitations

The ADR mechanism is exemplified by the arbitration mechanism and the mediation mechanism. China's mainland, Hong Kong and Macao have developed both arbitration mechanisms and mediation mechanisms. Therefore, this paper studies the ADR of IPR disputes in terms of both arbitration and mediation.

5.1.1Differences in arbitration mechanisms in the three places

As far as the existing arbitration mechanism can achieve the resolution of IPR disputes, neither China's mainland nor Macao excludes IPR as an object of arbitration, and the Hong Kong Arbitration Ordinance directly affirms the arbitrability of IPR disputes. As mentioned above, the legal framework for inter-district judicial assistance in civil and commercial matters in China has been further improved.

Nevertheless, there are still ambiguities in the judicial assistance in arbitration between China, Hong Kong and Macao. For example, the CEPA signed between the Mainland and Hong Kong and Macao stipulates that the duration of an arbitral award is based on the time limits stipulated in the law of the place of enforcement, but the time limits in the three places are not consistent, resulting in different results when the same award is applied for enforcement.

In addition, the differences in the scope of admissibility of IPR arbitration in the three places will affect the cross-jurisdictional enforcement of IPR. The Arbitration Ordinance of Hong Kong provides that disputes concerning the existence, scope, validity, competence, and infringement of intellectual property rights can be submitted to arbitration in Hong Kong; the Arbitration Law of the Mainland provides that disputes over contracts or other property rights and interests between equal subjects are within the scope of arbitration awards; Macao has only sporadic expressions in its arbitration law, civil procedure code and industrial property legal system. Therefore, the three places may refuse to enforce arbitration on the grounds of "violation of social public interest or public policy" in disputes involving intellectual property rights and infringement.

5.1.2Difficulties in the validity of mediation agreements

Guangdong, Hong Kong and Macao have obvious differences in the legislation of mediation mechanisms. Hong Kong has successively introduced laws and regulations, such as the Mediation Ordinance and the Hong Kong Mediation Code, to encourage and facilitate the operation of the mediation mechanism. Macao has no specific legislation on mediation, and its mediation mechanism is dependent on litigation and arbitration procedures, with judges and arbitrators organizing mediation. The mediation system in China's mainland is guided by the People's Mediation Law of the People's Republic of China, and no specific legislation has been enacted for IPR mediation.

The difficult issue of the validity of IPR mediation agreements has not been resolved. Hong Kong considers mediation agreements to be contracts; Macao considers mediation agreements to have the effect of general contracts and can be used as the basis for enforcement[16]; the Mainland considers mediation agreements to be contracted between the parties and can be given the effect of enforcement after judicial confirmation procedures. At present, only specific courts in Guangdong Province can

judicially confirm the mediation agreements mediated and reached by specially appointed mediation organizations and mediators. In the Interpretation of the Civil Procedure Law, it is also stipulated that the people's courts rule not to accept mediation agreements involving the confirmation of intellectual property rights. Thus, it can be seen that the scope of intellectual property mediation agreements that can be judicially confirmed is narrow.

5.2Practice dilemma

During the field research, our project team learned that there are regional differences in the services provided in the Greater Bay Area in terms of intellectual property disputes, such as Guangzhou and Zhuhai. The Zhuhai Intellectual Property Protection Association, as a non-profit social organization, has formed a relatively complete workflow for rights protection assistance, a reporting, and complaint work system, etc. under the guidance of the Zhuhai Intellectual Property Bureau and the Civil Affairs Bureau, and the expert pool contains professionals from Guangdong, Hong Kong and Macao in various intellectual property fields, and the framework of the organization is relatively complete. However, the organization lacks contact with the courts and other intellectual property agencies, making it difficult to participate in the resolution of intellectual property disputes promptly. At present, the work of the association is mainly for the promotion of the mediation channels of IPR disputes.

Guangzhou provides relatively more comprehensive services in the area of ADR of IPR disputes. The Guangzhou Intellectual Property Court, for example, has a "Diversified Dispute Resolution" service on its official website, including guidelines for pre-litigation joint mediation and a list of mediators, which has put the service of combining mediation and litigation online, making it more convenient to resolve IPR disputes in the Guangdong, Hong Kong and Macao Bay Area.

On the other hand, the project team has learned that the possibility of choosing an alternative dispute resolution for IPR is relatively low, based on the characteristics of IPR cases. The first is the characteristics of intellectual property itself. Since the application of intellectual property rights such as patents takes time, to seize the market, the patent right holder is likely to put this product into the market before the application is finished. By the time the product goes through the application, it may already be obsolete. In addition, the IP rights holder is usually more invested in the property rights, and is more powerful than the other party. In this case, if the right party is infringed by the IPR, it will not agree to the non-litigation solution and will usually choose the litigation method.

6. FUTURE DEVELOPMENT DIRECTION

6.1Improve and implement the "Rules for Mediation of Intellectual Property Disputes" (hereinafter referred to as "the Rules")

On November 1, 2021, the first domestic commercial mediation rule focusing on the resolution of foreign-related intellectual property disputes, was officially implemented, which is an important achievement in the field of intellectual property dispute resolution in China, especially in the construction of alternative dispute resolution mechanisms. As a mediation rule with a strong focus and enforceability, it undoubtedly makes up for the lack of a specific law on the mediation of IPR disputes at the national level.

In practice, the IPR Committee of CCPIT should follow up on the IPR disputes mediated based on the Rules promptly, summarize the shortcomings and omissions in the mediation of disputes by the details and data of the actual cases and revise them. With the signing of the Singapore Convention on Mediation, should also be taken into consideration by the IPR Committee of CCPIT, and the two important basic principles of respecting the autonomy of the parties and ensuring the fairness and impartiality of the mediator should be clarified, to realize the "unification" with the international mediation mechanism. "[17].

6.2Establishing a professional mediation team for intellectual property disputes in the Greater Bay Area

Although there are still differences in the legal rules of Guangdong, Hong Kong and Macao because of their geographical nature, the international conventions on intellectual property such as the Berne Convention, the Paris Convention, and the TRIPS Agreement, are commonly applied in the three places, have to a certain extent increased the convergence of the main contents of the legal rules on intellectual property in the three places, thus ensuring the stability of the established professional mediation team for intellectual property disputes in the Greater Bay Area, and it is not easy for one place or It is not easy for changes in mediation rules in one or more places to have a great impact on them.

In the process of establishing a mediation team for intellectual property disputes in the Greater Bay Area, the existing standards for mediators in the three regions should be integrated and the strengths of the three regions should be taken into account to form a new unified mediator admission system. At the same time, the Greater Bay Area Bar Practice Examination to be held for the first time in 2021 will also be of great reference value for the admission of mediators, and the examination will be used to ensure that the mediation team of intellectual property

disputes in the Greater Bay Area has a comprehensive knowledge of the law and local policies as well as a standardized and proficient use of mediation skills. [18] Given nature of intellectual property rights, the knowledge reserve of mediators should be fully considered when hiring mediators, and certain mediation groups should be divided according to the types of intellectual property disputes, with mediators in the corresponding mediation groups being responsible for mediating a specific type of intellectual property disputes, to realize the "specialization" of personnel. To realize the continuous learning and innovation of the established mediation team, a special mediator evaluation body should be established to evaluate the mediators and the mediation cases they handle regularly.

6.3Promote the establishment of social adjustment mechanisms in market-related pilot

At present, people's mediation in China is still more of a public interest civil mediation, and the corresponding assessment and incentive mechanism is still missing or not even established. It is difficult for people's mediation to play its role in practice. Especially in the mediation of disputes involving intellectual property rights, the amount of intellectual property rights authorized in the Greater Bay Area is large, and the disputes are mostly concentrated among high-tech enterprises, thus it is especially important to ensure the efficiency and adequacy of dispute mediation.

In the United States, for example, which was the first to market dispute mediation, mediation service companies were established to compete in the relevant market. Under the pressure of competition, the company has to maintain its dispute resolution strength, continuously strengthen its mediation team. At the same time, the market-oriented operation forms a certain fee mechanism, which guarantees the company's financial resources and can attract social talents with professional knowledge to participate in the dispute resolution service industry, so that the quality of mediators can be maintained at a high level. In addition to receiving higher quality dispute resolution services, the parties to a dispute are more likely to reach a consensus and sign a mediation agreement than in the case of public interests.

Promoting the establishment of a market-oriented pilot social mediation mechanism can undoubtedly integrate and bring into play the social resources of the Bay Area more effectively, and meet the judicial needs of the parties to intellectual property disputes for specialty and efficiency while promoting the economic exchanges between Guangdong, Hong Kong and, Macao.

6.4Establishing a perfect arbitration system for intellectual property disputes

In both common law and civil law countries, arbitration has become a universal option for resolving IPR disputes. China has not yet established a sound arbitration system for IPR disputes, and lacks relevant substantive rules and procedural norms. To promote the development of the IPR ADR mechanism in the Greater Bay Area, it is necessary to establish a substantive and procedural institutional framework for IPR arbitration, vigorously develop the IPR arbitration business in the Greater Bay Area, and build a perfect IPR arbitration system in the Greater Bay Area.

To build a perfect IPR arbitration system, we must first untie IPR cases under the current arbitration system and expand the arbitrable scope of IPR disputes. China's Arbitration Law restricts the scope of arbitrability. Article 3 stipulates that the types of non-arbitrable disputes include disputes with personal attributes and administrative factors. Although the current Arbitration Law does not stipulate whether intellectual property disputes are arbitrable, the prevailing view, from legal analysis, is that intellectual property disputes naturally belong to arbitrable cases. However, most dispute subjects and arbitration institutions are unwilling to take the risk of violating the Arbitration Law to arbitrate intellectual property disputes. Therefore, to give full play to the role of the arbitration system in resolving intellectual property disputes, a special law on intellectual property arbitration should be enacted to further clarify and expand the scope of arbitrable intellectual property disputes, so that intellectual property arbitration can be more operative in practice.

At the same time, to make the special law on IPR arbitration effective, it is necessary to clarify its supporting procedural norms for IPR arbitration, to give better play to the efficiency advantages of the arbitration system. In the light of the actual situation in China, the relevant provisions of the Arbitration Law and the Civil Procedure Law can be taken into account in the process of establishing the procedural norms for IPR arbitration, and specific provisions can be made on specific issues such as time limits and preservation, to strengthen the scientific and operability of the procedural norms for IPR arbitration.

6.5Cultivate a professional team for arbitration of intellectual property disputes

Given the characteristics of the arbitration system itself, arbitrators are selected with a prominent professional character. In arbitration institutions around the world, arbitrators often include legal experts and efficient professors with profound legal knowledge, as well as excellent lawyers who have accumulated rich experience in the practical world. The disputes must be

conducted by professionals who are familiar with intellectual property laws because the legal issues related to intellectual property are more specialized than the general civil legal issues.

To cultivate a professional team for arbitration in the field of IPR disputes, we can start from two aspects, namely, the establishment of IPR arbitration institutions for training and IPR arbitration talents. At present, the number of professional IPR arbitration institutions in China is relatively small, which can hardly meet the actual demand. Meanwhile, due to the imperfect substantive rules and procedural norms of IPR arbitration, the only professional IPR arbitration institutions are also lacking in operational efficiency and business capacity. Therefore, it is necessary to speed up the establishment of specialized IP arbitration institutions, and to disperse the pressure of cases and improve the efficiency of case resolution. At the same time, the selection and training of specialized talents for IPR arbitration should be increased. A pool of IPR experts should be set up in each region to organize unified training and professional anxiety activities, with emphasis on improving the professional business level of arbitrators.

7. CONCLUSION

The research perspective of this article focuses on the Greater Bay Area, where multiple jurisdictions coexist, and proposes that alternative dispute resolution is the current general trend of judicial practice in the Greater Bay Area. The article explores the theoretical overview, laws, and dilemmas of the non-litigation resolution of intellectual property disputes in the Greater Bay Area, as well as the future direction of development from theory and practice, mediation and arbitration. It will be beneficial to promote a series of in-depth cooperation among the Greater Bay Area in the field of intellectual property and optimize the construction of the rule of law.

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