

The Implementation Status and Practical Difficulties of Anti-suit Injunction in China

Hongjun Huang^{1,a,*}

¹*School Of Foreign Studies, Hefei University of Technology Xuancheng Campus, No. 301, Xunhua Road, Xuanzhou District, Xuancheng City, Anhui Province, China*

a. 1356725061@qq.com

**corresponding author*

Abstract: As a form of relief, anti-suit injunction originated in the UK. With the development of China's economy and technology, international economic exchanges have become more extensive and frequent. The contradiction between licensing negotiations involving FRAND licensing rates and market expansion has also become increasingly intensified. The difficulty of standard essential patent licensing negotiations and the number of international parallel lawsuits involved have increased sharply, and the friction and conflict of interests between economic entities have also increased accordingly. Therefore, anti-suit injunctions have become a hot topic of concern in China's judicial practice and theoretical circles in recent years. This article first makes a basic explanation of the basic meaning and historical origins of anti-suit injunctions, and takes the reasons and impacts of the frequent application of anti-suit injunctions in today's international community as the starting point to understand the current status of the application of anti-suit injunctions in China. It then further sorts out the domestic intellectual property behaviour preservation system and the typical cases of foreign-related standard essential patents in which anti-suit injunctions have been issued recently, and leads to the practical difficulties faced by China in the current application of anti-suit injunctions. Based on this, measures to alleviate the current practical difficulties are analyzed: improving the legal basis, clarifying the review factors, and promoting China's international cooperation and coordination in anti-suit injunction relief.

Keywords: Standard-essential patents, the International parallel litigation, anti-suit injunction

1. Introduction

1.1. Basic meaning of Anti-suit Injunction

An anti-suit injunction refers to a restrictive order issued by a court of one country against the other party to the case at the request of one party to the case after accepting the case but before making a ruling, in order to prohibit the party from filing or continuing to file a lawsuit that has already been filed in the court of another country. Foreign proceedings involving the same parties and disputes as pending or contemplated litigation or arbitration proceedings in that country.[1] It is usually directed at actual or potential litigants in other proceedings and is binding on the parties, but not against foreign courts.

Since its inception, anti-suit injunctions have been controversial, mainly because scholars and judges in continental legal systems believe that they violate international public law and may constitute interference with foreign judicial sovereignty and foreign court jurisdiction. However, the value of anti-suit injunctions as a powerful and practical legal tool is also undeniable. It plays an important role in improving judicial efficiency, pursuing judicial fairness, maintaining a balance of international interests and following the principle of international comity.

1.2. Historical Origins

The anti-suit injunction can be traced back to the 15th century in England. The British royal court created the anti-suit injunction system in order to prevent the church courts from expanding their jurisdiction. This remedy was subsequently used by the Court of Chancery to prohibit a party from bringing an action contrary to conscience before the ordinary courts. The first case in history issued by the United Kingdom prohibiting parties from suing in foreign countries was the case of *Love v. Baker* in 1665. By the 19th century, the British courts had fully applied anti-suit injunctions to transnational litigation, and it was also accepted by major member states of the Commonwealth such as Canada, Singapore, and India. This actually promoted anti-suit injunctions to become a method of transnational litigation around the world. And it is commonly used forms of institutional practice.

2. Reasons and impacts of frequent application of anti-suit injunctions

With the development of the times, the applicable environment and frequency of anti-suit injunctions have also changed. In international parallel litigation involving standard essential patents, anti-suit injunctions have become a frequently used legal practice. Along with this, various anti-suit injunctions and tit-for-tat anti-suit injunctions have been used, resulting in the phenomenon of anti-suit injunction "competition" in international parallel litigation, which has also had a series of impacts on international parallel litigation itself.

2.1. Reasons why anti-suit injunctions are frequently used

In today's society, anti-suit injunctions are widely used to solve the problems caused by international parallel litigation. Although the disadvantages of parallel litigation cannot be ignored, it may cause the judgments of multiple courts to be unable to reach a consensus, reduce the recognition of the judgments, and increase the litigation costs of the parties in order to protect their own economic interests. However, the anti-suit injunction itself still has advantages that cannot be ignored.

From a national perspective, the globalization of production has promoted the circulation of technological factors and the innovation of various production technologies. As a result, the importance of patent rights has gradually been recognized. However, the relevant laws of various countries in international parallel litigation have not yet been perfected, and there is no unified conclusion on the jurisdiction of cross-border infringements. In order to fight for their own interests, the parties take advantage of the differences and conflicts in international jurisdiction, so anti-suit injunctions are widely used. In addition, affected by the development of the multi-polarization of the world, courts in some countries may extend their jurisdiction to other countries and regions beyond the territoriality when handling cases related to standard essential patents, and seek broader jurisdiction in their own country by issuing anti-suit injunctions against other countries.

From an individual level, parties motivated by profit will tend to choose courts that are beneficial to them. Therefore, in licensing negotiations for standard essential patents, they tend to apply for anti-suit injunctions in their home country rather than raising jurisdictional objections or filing jurisdictional objections with foreign courts. The foreign court applied for a stay of proceedings based

on the principle of forum non conveniens.[2] In addition, parties may also file lawsuits in courts of multiple countries or regions to maximize their rights and interests.

2.2. The impact of the anti-suit injunction “race”

The so-called "race" for anti-suit injunctions actually means that in international parallel litigation, courts in various countries issue various anti-suit injunctions and counter-anti-suit injunctions in order to further safeguard their country's judicial sovereignty and jurisdiction and resolve patent disputes, resulting in anti-suit injunctions. The phenomenon of continuous enrichment and upgrading of the types of anti-suit injunctions and counter-anti-suit injunctions actually symbolizes the development trend of the “race” for anti-suit injunctions in international parallel litigation of standard essential patents.

In the international parallel litigation of standard essential patent disputes, the two courts are often confronted with each other, because both anti-suit injunctions and anti-anti-suit injunctions are passive defenses against the effective judgments of foreign courts, and the anti-suit injunction itself is somewhat aggressive, which greatly increases the probability of jurisdiction conflicts in the field of intellectual property rights and makes it easier to cause conflicts between the two courts.[3] Anti-suit injunctions are applied to solve the abuse of litigation and improve judicial efficiency. From this perspective, the widespread application of anti-suit injunctions has aggravated the conflict of jurisdiction among courts in various countries and put the parties in a dilemma of rights protection. In this case, the parties have to file more parallel lawsuits, which further increases the parties' own sunk costs of rights protection. "Competition" will also affect the parties' choice of appellate courts. Because the court receiving the case will still be subject to an anti-suit injunction issued by another country or region during the trial of the case or even after the judgment is made, which limits the court's own execution of the case, consumes a lot of judicial resources and brings great inconvenience to the court's judicial work.

3. Factors Considered in Issuing an Anti-Suit Injunction in China

With the development of economic globalization and world multi-polarization, countries are paying more and more attention to the protection of judicial sovereignty, and the phenomenon of courts issuing anti-suit injunctions is an inevitable trend. Given that the issuance of anti-suit injunctions may affect the judicial autonomy of other countries and even international diplomatic relations, courts often need to carefully consider the issuance of anti-suit injunctions. Through the study of many anti-suit injunction cases, it is found that courts mainly consider the issuance of anti-suit injunctions from the aspects of jurisdiction, efficiency, fairness, balance of interests, case particularity and international comity.

3.1. Jurisdiction, efficiency, fairness

In terms of jurisdiction, it is necessary to consider whether foreign litigation will threaten the domestic jurisdiction, while respecting the autonomy of the parties in jurisdictional matters. In addition, it is also necessary to consider the principle of actual connection, that is, whether there is an actual connection between the court and the case.

In terms of efficiency, if a court has jurisdiction over a case but has many inconveniences in hearing the case, and if other courts have jurisdiction over the case and are more convenient to hear the case, the original court can refuse to exercise jurisdiction on the grounds that it is an inconvenient court. At the same time, in order to prevent malicious delays in litigation, the principle of the first court to receive the case emphasizes that the court that receives the case first has priority jurisdiction over the case. If a party maliciously uses this principle to delay or circumvent an expected unfavorable lawsuit,

an injunction will be issued. In addition, if a foreign judgment conflicts with a domestic judgment and hinders the execution of the domestic judgment, the court may also issue an injunction.

In terms of fairness, courts generally believe that domestic litigation will not cause unfair consequences to the parties, so whether foreign litigation is fair becomes a major consideration. If there are institutional defects in foreign laws and the parties cannot obtain legitimate relief in that country, the domestic court may issue an anti-suit injunction. However, the judgment that there are defects in the foreign legal system actually involves the negation of the foreign legal system, and this aspect of consideration is still under discussion.

3.2. Balancing interests

Anti-suit injunction cases often involve the interests of multiple parties, including personal interests and public interests. In the Laker case heard by the U.S. District Court for the District of Columbia, the court held that if it did not issue an anti-suit injunction and allowed the defendant to file a parallel lawsuit in the UK, the British court would likely prohibit the plaintiff from taking remedial measures against any defendant, making the defendant not required to bear legal liability, and the damage caused to the plaintiff was far greater than the damage caused to the defendant by the issuance of an anti-suit injunction. Therefore, an anti-suit injunction was issued.[4] Consideration of public interests includes two aspects: one is the impact of the case itself on the public interest, and the other is the impact of the issuance of an anti-suit injunction on the public interest. If the issuance of an anti-suit injunction has little or no impact on the public interest, then the issuance of an anti-suit injunction is permissible.

3.3. Special Cases

In divorce cases, given the different divorce-related legal standards in different countries, the court may issue an injunction against the parties to prevent them from escaping from their own country's divorce judicial decisions. Similarly, in standard essential patent cases, since territoriality is the basic attribute of intellectual property rights, it is completely legitimate to file a lawsuit in a foreign court against infringement of foreign intellectual property rights, and domestic courts should not intervene.[5] However, since the implementation of standards is global and the holders of standard essential patents must be bound by the FRAND (Fair, Reasonable, and Non-discriminatory) commitment, patents can be classified as international. Therefore, injunctions and standard essential patents are inseparable in most cases.

3.4. International Courtesy

Regarding the consideration of international comity, if we analyse the cases in the United Kingdom and the United States, there is no explicit law to make clear provisions for international comity, and different countries or even different courts in the same country do not have consistent standards, but there are roughly two obvious models: one is the liberal model, which emphasizes that the court can prohibit people under its jurisdiction from suing in foreign countries, focusing on whether repeated lawsuits are oppressive in nature, and not paying much attention to the principle of international comity; the other is the conservative model, also known as the restrictionist model. This model attaches importance to the value of the principle of international comity in judicial decisions.[6] Although conservatism allows the use of anti-suit injunctions, the issuance of anti-suit injunctions is strictly considered on the premise of adopting a policy that allows parallel litigation.

4. Practical Dilemma of Applying Anti-suit Injunction in China

Although it is quite common for courts in the United Kingdom and the United States to apply anti-suit injunctions, because China is not a country with case law and does not have a legal tradition of anti-suit injunctions, there is insufficient domestic judicial practice and a lack of demand for response, so it is difficult to attract widespread attention in the domestic legal community. Pay attention and promote in-depth research to extend this system to other fields. Because of this, there are problems in the current practical application of anti-suit injunctions in China, such as the applicable legal basis that needs to be improved, the identification of review factors is not clear, and the negative impact of “persistent litigation” and counter-anti-suit injunctions is difficult to resolve.

4.1. The applicable legal basis needs to be improved

In China, the legal basis for an injunction is generally considered to be the provisions of the Civil Procedure Law on behaviour preservation, and the injunction system can be derived from the provisions of the Civil Procedure Law on behaviour preservation. Chapter 4 of the newly implemented Special Maritime Procedure Law establishes the legal system of maritime injunctions in China. In the field of intellectual property rights, the Patent Law, the Trademark Law, the Copyright Law and the relevant judicial interpretations of the Supreme People's Court all have provisions on the "pre-litigation temporary injunction" system for the parties. The purpose of these provisions is to block illegal acts by forcing one party to act or not act in a specific manner, and to prevent the expansion of the infringement results. These interpretations laid the foundation for the establishment of a behaviour preservation system in the Civil Procedure Law in the future.

It is generally believed that there are two purposes for establishing a behaviour preservation system: first, similar to the purpose of property preservation, it is to prevent future judgments from being unenforceable or difficult to enforce; second, it is to prevent damage to the parties caused by the other party's behaviour. At present, people's expanded understanding of the legal basis of anti-suit orders in China mainly arises from the second purpose of behaviour preservation, that is, to prevent the parties from continuing to suffer damage or subsequent damage due to the other party's behaviour. At present, China has not established an anti-suit order system. The use of a behaviour preservation system to deal with anti-suit orders is because the application of behaviour preservation orders in standard essential patent disputes that lack a legal basis is based on the behaviour preservation system. The purpose of the application is interpreted on the basis of the purpose preservation system. Although it has a certain degree of rationality, it lacks a clear legal basis and specific issuance standards, which is easy to cause judicial abuse.

Since behavioural preservation is different from anti-suit injunction, if it is used to solve the issue of issuing anti-suit injunction in international parallel litigation of standard essential patents, it is easy to be questioned by foreign countries. And expanding behavioural preservation from a narrow sense of preventing harm and avoiding the expansion of damage to a measure of rights protection may lead to it becoming a measure to widely resist parallel litigation, and restricting the right of parties to sue due to abuse.[7]

4.2. The review factors are not yet clear

China's Civil Procedure Law does not have clear provisions on the requirements for behaviour preservation. The requirements of "emergency" and "irreparable damage" cannot be fully summarized in theory, so there are no specific rules for the review of the application for an injunction. The Supreme People's Court's judicial interpretation on behaviour preservation in intellectual property disputes has made specific provisions on the application for a temporary injunction. According to this judicial interpretation, when reviewing the injunction request filed by the right holder against

intellectual property infringement, the court should comprehensively consider factors such as the possibility of infringement of intellectual property rights, whether the damage is irreparable, the comparison of the size of the damage between the two parties, and the impact on the public interest. In standard essential patent dispute cases, although the injunction is related to standard essential patents, it is not aimed at potential patent infringement, but simply the litigation behaviour of the counterparty in a foreign court. When applying for an injunction, the party accuses the other party's litigation behaviour of infringing its own legitimate rights and interests, rather than pointing to patent implementation behaviour. Therefore, the analytical requirements framework determined by the above judicial interpretation cannot be directly applied to the issue of injunctions.

In addition, the application of the injunction also involves the issue of overlapping litigation. The Supreme People's Court has a specific interpretation and determination of repeated litigation in domestic litigation, which generally requires that the parties, subject matter and claims of the litigation are the same.[8] However, Chinese courts lack specific determinations on the identification of cross-border overlapping litigation. Referring to the judicial interpretation of the Supreme People's Court, whether the litigation filed in a foreign court constitutes overlapping litigation in this case should also depend on whether the three factors of the parties, subject matter and claims are the same or overlapping. At this time, it is difficult for the applicant to prove that the litigation procedures of the foreign court will excessively damage the legitimate rights and interests enjoyed in the domestic litigation, and there is no need for the domestic court to issue an injunction. After determining that there is overlapping litigation, the domestic court needs to consider whether the overlapping litigation outside the territory will cause excessive or improper damage to the applicant. The key here is not whether there is damage, but whether the damage is "excessive".

There is no universal principle in the world that subsequent courts must respect the jurisdiction of the court that first accepted the case. Therefore, some domestic studies believe that this principle should be promoted to be accepted internationally, and the anti-suit injunction system that embodies the so-called "simplistic thinking of fighting violence with violence" should be compressed or even replaced. However, this idea may be too idealistic and does not fully consider the negative consequences of this principle stimulating parties to file lawsuits first, as well as the complexity of the competition between sovereign states' judicial jurisdictions.[9]

4.3. Negative impact of “persistent litigation”

The application of anti-suit injunctions has simultaneously triggered more targeted anti-anti-suit injunctions. The issuance of anti-anti-suit injunctions has become increasingly common in the judicial systems of various countries. The conflict between anti-suit injunctions and anti-anti-suit injunctions is a new problem faced by various countries in the application of anti-suit injunctions. In the "Samsung v. Ericsson case", Samsung filed an application for behavioural preservation with the Wuhan Intermediate People's Court long before Ericsson filed a counterclaim, mainly hoping that the Wuhan Intermediate People's Court would issue an anti-anti-suit injunction to prohibit Ericsson from filing a lawsuit in other courts. Ericsson responded by submitting an application for a temporary restraining order and an anti-interference injunction in the United States, which is also known as an "anti-countersuit injunction". In the "OPPO v. Sharp case", the German court issued an anti-anti-suit injunction only 7 hours after the Chinese court issued the anti-suit injunction.

It can be seen from this that the intensity of confrontation among countries in the international parallel litigation of standard essential patents and the "entanglement" of injunctions and anti-injunctions have brought more tedious work to the litigation process. The courts accepting parallel litigation need to repeatedly carry out a series of procedural work around injunctions and anti-injunctions, and the substantive litigation may be withdrawn or suspended at any time due to the issuance of injunctions and anti-injunctions, which adds more uncertainty to the court's trial,

judgment and execution of the ruling. The parties also need to bear higher litigation costs. Both the court and the parties have to spend a lot of time and energy to deal with procedural issues. The result of the complication of the court's litigation procedures is that in order to obtain results that are beneficial to themselves, the parties file more lawsuits to confront each other, and after advancing the process of resolving patent disputes, they return to the original point of filing lawsuits.

5. Solutions to the practical difficulties of anti-suit injunctions

The most direct goal of relief is to protect China's judicial sovereignty and the interests of parties seeking relief in Chinese courts. Both public and private interests require China to take measures to reduce the adverse effects of the application of anti-suit injunctions. The goal of making China a preferred place for international intellectual property litigation also puts forward internal requirements for alleviating the above difficulties.[10] For this reason, in order to alleviate the current practical difficulties in the application of anti-suit injunctions in China, we should start from improving the legal basis for the application of anti-suit injunctions, clarifying the review factors for issuing anti-suit injunctions, and promoting international cooperation and coordination on anti-suit injunction relief.

5.1. Improve the legal basis for applying anti-suit injunctions

At present, in judicial practice, China mainly applies anti-suit injunctions based on the behavioural preservation system. It can be found that behavioural preservation in anti-suit injunction cases is essentially a temporary measure. Moreover, it is difficult to accommodate anti-suit injunctions within the framework of the general behavioural preservation system. In recent years, with the continuous enrichment of judicial experience in the application of anti-suit injunctions in the field of domestic intellectual property rights, it is urgent to improve the legal basis for the issuance of anti-suit injunctions by Chinese courts to ensure that the applicable basis for the issuance of anti-suit injunctions by courts at all levels is clear and unified. Although the anti-suit injunction in international parallel litigation of standard essential patents has its own particularity, it takes a long time to establish a new anti-suit injunction system alone, and it will inevitably involve the compatibility and coordination of domestic legislation. The review rules of anti-suit injunctions can be separately stipulated through judicial interpretation. At the same time, combined with China's judicial experience in recent years and drawing on international practices, the application standards of anti-suit injunctions in international parallel litigation cases of standard essential patents in China can be constructed.

China is a country of codified law. To improve the anti-suit injunction system, just like China has introduced a judicial system with common law characteristics, it is necessary to extract the essence of the case law on anti-suit injunctions in common law countries and remove the dross, so as to form complete and reasonable legal rules on the issuance of anti-suit injunctions. In the future, as China has accumulated more abundant theoretical foundations and judicial practice experience in the application of anti-suit injunctions in the field of intellectual property rights, it is possible to establish an independent intellectual property anti-suit injunction system by amending the Civil Procedure Law or issuing special procedural laws. In addition, it is also necessary to consider establishing an effective connection between the anti-suit injunction system and the "Blocking Measures" issued by the Ministry of Commerce, and use the "Blocking Measures" to block the application of foreign anti-suit injunctions, so as to effectively protect the applicability of China's anti-suit injunctions.

5.2. Clarifying the review factors for issuing an anti-suit injunction

The foreign-related factors of the anti-suit injunction make the specific implementation of the anti-suit injunction more strategic than other non-foreign-related litigation systems, which requires the court to carefully consider it before issuing the anti-suit injunction. When reviewing and considering whether to agree to the party's application for the issuance of an anti-suit injunction, the domestic court should have discretion to avoid malicious litigation. First of all, it is possible to review the party's behaviour in the licensing negotiations and litigation procedures to determine whether the party is qualified to apply for the anti-suit injunction, and whether the respondent and the applicant act in good faith and abide by the principle of good faith as an important consideration for whether to issue the anti-suit injunction.

According to the theory of "public order reservation" in private international law and the judicial practice experience of the aforementioned Anglo-American legal system countries in cross-border litigation on standard essential patents, the impact of foreign litigation or other court proceedings that the respondent may initiate on Chinese litigation and related public order should be the primary consideration for whether to issue an anti-suit injunction. Therefore, when reviewing an anti-suit injunction application, the domestic court should first determine whether the potential foreign litigation and Chinese litigation have a substantial connection in terms of the parties, the subject matter of the litigation, the core interests of the dispute, etc., and constitute a repeated litigation, without being bound by the formal differences between infringement litigation, contract litigation and antitrust litigation, and then consider whether the repeated litigation will lead to the parties' rights under Chinese procedural law being frustrated and the Chinese court being unable to exercise jurisdiction. The issuance of an anti-suit injunction itself should be aimed at promoting the parties in the individual case to reach a settlement on fair, reasonable and non-discriminatory licensing of standard essential patents worldwide.

5.3. Promoting international cooperation and coordination in anti-suit injunction relief

Today, cross-border litigation exists in many fields, especially in the field of standard essential patents. The struggle for jurisdictional sovereignty and the protection of national interests by courts in various countries have made the existing TRIPs Agreement unable to solve this dilemma. The special challenges between standards and patents are becoming increasingly prominent, and new cooperation and coordination are imperative. The World Intellectual Property Organization can work with the communication industry standardization organizations of various countries and regions to clarify patent-related issues to facilitate the parties to exercise their rights and reduce the jurisdiction conflicts of courts in such litigation. On April 3, 2024, the World Intellectual Property Organization (hereinafter referred to as "WIPO") released the WIPO Strategy for Standard Essential Patents (2024-2026), and proposed that WIPO will play the role of a global discussion platform, improve transparency, become a knowledge and data centre, and provide more services in the field of standard essential patents, so as to further promote consensus on basic issues and principles of standard essential patents around the world.

In the process of actively promoting international cooperation and coordination to strengthen patent protection and enforcement, China can, based on the WIPO strategy, resolve the issue of the application of anti-suit injunctions by signing bilateral or regional agreements, especially in cross-border patent litigation, standardize the application of anti-suit injunctions and respect the patent jurisdiction of various countries, and form a good international judicial order of bilateral or multilateral reciprocity and mutual respect. In addition, when promoting the resolution of the issue of the application of anti-suit injunctions in cross-border standard essential patent litigation, China

should give full play to its international influence and use the WIPO platform to discuss and formulate solutions with broad consensus with other countries.

6. Conclusion

The anti-suit injunction system is conducive to maintaining the favourable position of domestic parties in foreign-related litigation and maintaining national judicial sovereignty, but it does not mean that the anti-suit injunction can be issued at will. In order to better apply the anti-suit injunction in the future judicial practice of international parallel litigation of standard essential patents, China should first clarify the goal of applying the anti-suit injunction, make the application and review of the anti-suit injunction predictable, and then further improve the issuance rules of the anti-suit injunction in international parallel litigation of standard essential patents in combination with China's actual situation. It can construct the applicable legal basis for the anti-suit injunction in standard essential patent cases in the form of judicial interpretation as soon as possible, set clear and definite conditions for the application of the anti-suit injunction, standardize the review considerations, and improve the procedural matters for the application of the anti-suit injunction and the punishment measures of the anti-suit injunction. From the long-term perspective of the development of international relations, it is necessary to promote the realization of the WIPO strategy, promote the conclusion of the International Civil and Commercial Governance Convention at the international level, actively promote the establishment of a special third-party platform for the resolution of standard essential patent disputes, and strengthen international mutual trust and cooperation in intellectual property rights.

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