ANTISUIT INJUNCTIONS IN CHINA: A NEW FORM OF LEGAL TRANSPLANT?

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Courts in the U.S. and UK have increasingly issued injunctions preventing one party from pursuing parallel litigation in another jurisdiction (anti-suit injunctions or ASIs) in cases involving standards-essential patents and FRAND licensing commitments. Often, these injunctions prevent a party from seeking a FRAND rate determination in a foreign court while such a rate determination is pending in the domestic court. In a number of cases, U.S. courts have issued ASIs to prevent parallel FRAND proceedings in China.

In response, courts in other jurisdictions – namely Germany, France and India – have begun to issue anti-anti-suit injunctions (AASIs) to prevent parties from seeking ASIs that would hinder their own proceedings. And even anti-anti-anti suit injunctions (AAASIs) have emerged as more than theoretical possibilities. Amidst this international jockeying for jurisdictional control, commentators have wondered where it will end, and whether every country involved in complex, multi-jurisdictional disputes will get into the ASI game. Now, in three cases within the last year, China has stepped forward as another major jurisdiction in which ASIs may be sought by litigants in global FRAND disputes.

This development is notable for several reasons. First, the ASI, as a procedural mechanism, is largely a creation of common law jurisdictions, where it has existed for five hundred years. Its origins can be found in the need to rationalize jurisdiction between the English courts of law and the ecclesiastical courts of equity. Given this common law heritage, the ASI has not historically been utilized in civil law jurisdictions. Indeed, civil law courts that have discussed ASIs in recent cases have expressed displeasure at their increasing use, and have issued AASIs to counter their effect.

Second, an ASI mechanism has not traditionally existed under Chinese law until very recently. Other than a single admiralty case (also issued recently), we are unaware of the issuance of an ASI by a Chinese court until 2020. This recent issuance of ASIs by Chinese courts has seemingly coincided with the desire of China, more broadly, to take center stage in global technology matters, including FRAND disputes.

The adoption by a jurisdiction of a foreign legal concept or procedure is referred to generally as “transplantation”. The formal study of legal transplantation began in the early 1970s, largely through the work of Alan Watson. Since then, it has been applied in numerous areas of law across many different jurisdictions. Peter Yu, in particular, has studied the modes of legal transplantation of intellectual property laws from the West to China. The introduction of intellectual property laws to China during the early twentieth century was largely the result of pressure from colonial powers. Following the Cultural Revolution, however, the evolution of intellectual property laws in China grew from a combination of foreign pressure and internal desire for modernization. China’s entry into the WTO in 2001 spurred further modifications to its IP laws, largely to conform to WTO standards. As Yu observes, “many Chinese leaders and members of the public considered the WTO membership not only as an economic issue, but also as an issue affecting national pride.” In 2008, China enacted major amendments to its patent law, this time, as noted by Yu, to satisfy its own internal needs rather than to conform to international standards or to satisfy foreign trading partners.

Nevertheless, during the 2010s, the U.S. continued to be critical of China’s IP regime, alleging that it was insufficient to protect the rights of IP holders. China’s emergence in 2020 as a force in global FRAND disputes, however, signals a new mode of legal transplantation. Here, the Chinese courts have adopted a procedural mechanism from the common law and utilized it to gain an advantage in adjudicating matters between international litigants. This move was not in response to pressure from the West, or an effort to conform to Western standards. On the contrary. China’s assertion of exclusive jurisdiction in these FRAND cases has been opposed by courts in other jurisdictions, most notably in the United States. The enthusiastic issuance of ASIs by Chinese courts thus represents a new mode of legal transplantation: one in which foreign legal processes are adopted not merely to conform to foreign expectations and norms, but to be used for national advantage in international fora.

In this paper, we trace the emergence of ASIs in China by examining the Chinese legal framework that makes these common law procedures possible within the Chinese legal context, and seek to gain a better understanding of the internal forces that led to the rapid adoption of this procedural mechanism in Chinese litigation. By focusing on the ASI mechanism in China, we also hope to shed new light on the nature of legal transplantation in the twenty-first century, as transplantation has itself transformed from a defensive and reactive approach by developing economies to one that could today be viewed as a proactive attempt to seize the advantage on the international stage.