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Intellectual Property

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I. China Joins the Hague System for the International Registration of Industrial Designs

On February 5, 2022, China acceded to the Hague System for the International Registration of Industrial Designs (the "**Hague System**"), and the Hague provisions became effective in China on May 5, 2022.[1] The Hague System, administered by WIPO, provides a mechanism for registering an industrial design in multiple countries or regions simultaneously through one single application, filed in one language with one set of fees (in one currency).[2] Thus, under the Hague System, a whole series of applications that would otherwise have to be filed with the respective national offices are replaced by one international application. The initial period of protection under the Hague System is five years. The right holder can then renew their design twice, which guarantees at least 15 years of protection.[3]

With China's accession, the Hague System now covers nine of the world's top ten economic markets.[4] For example, the United States joined the Hague System in 2015.[5]

The main advantages of the Hague System lie in the following two aspects:

1. Simple and Convenient Procedures

The Hague System offers the possibility of obtaining protection for industrial designs in as many as 94 countries by means of a single international application filed with WIPO's

[1] *China Joins the Hague System*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Feb. 5, 2022), https://www.wipo.int/hague/en/news/2022/news_0005.html.

[2] *How Does the Hague System Work*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, https://www.wipo.int/hague/en/how_hague_works.html (last visited Jun. 26, 2022).

[3] *How Does the Hague System Work, supra*.

[4] *China Joins the Hague System*, *supra*.

[5] *Hague Agreement Concerning the International Registration of Industrial Designs*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Feb. 5, 2022), https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/hague.pdf.

International Bureau in Geneva, Switzerland.[6] The Hague System provides simple and convenient procedures to secure international design protection. Highlights of the procedure include:

a. *One Language*. Applicants need not prepare application documents in the language of each designated country. Instead, an international application may be filed in English, French or Spanish at the applicant's option.[7]

b. *Centralized Filing*. Once an application is internationally registered, it will become effective in each designated country, unless the Office of the designated country issues a notification of refusal within a specified time limit.[8]

c. *Centralized Management*. With a single international registration that is effective in multiple countries, it is convenient for the right holder to subsequently manage the protection (*e.g.*, a change in the holder's name and address can be recorded in the International Register and will take effect in all designated countries).[9]

2. Relatively Low Cost

The efficiency of the Hague System allows the applicant to obtain design protection at a relatively low cost. In terms of official fees, applicants are required to pay a basic fee, a publication fee and a standard designation fee in Swiss Francs when filing the international application. Unless the designated country makes a declaration requiring an "individual designation fee", the applicant is not required to pay additional fees for obtaining design protection in each designated country.[10]

Due to the possible existence of the "individual designation fee," the discount on the official fees for the applicants to obtain design protection in multiple countries through the Hague System might not be particularly significant. However, the reduction in agency fees for applicants in the process in designated countries will be substantial.

Applicants using the Hague System may handle the international application procedures with or without attorney representation. Following the international registration, the IP office of each designated country may perform substantive examination to check whether the designs comply with their local domestic laws. Unless protection is denied by a designated country, there is no need for the applicant to appoint an attorney to handle an application for any specific country.[11] Furthermore, since the subsequent management of the protection is centralized, agency fees will not be incurred at the related Offices of the Contracting Parties. Therefore, for applicants who need to obtain design protection in countries such as China where the national law stipulates that foreign applicants must appoint a representative, obtaining design protection through the Hague system substantially reduces agency fees.

Practice Points for China

Although the Hague System provides procedural convenience and cost savings for design patent applicants to obtain design protection in the international context, certain issues must

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[6] *Hague Guide for Users*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Feb. 2022), at 10, 13, https://www.wipo.int/export/sites/www/hague/en/guide/pdf/hague_guide.pdf.

[7] *Hague Guide for Users*, *supra*, at 13. 34.

[8] *Hague Guide for Users*, *supra*, at 12.

[9] *Hague Guide for Users*, *supra*, at 13.

[10] The Hague Agreement Concerning the International Registration of Industrial Designs, Geneva Act of 1999, art. 7(2), Jul. 2, 1999 (hereinafter "Hague Agreement").

[11] *Hague Guide for Users*, *supra*, at 38.

be handled with caution when filing design applications for China through the Hague System.

1. Declaration on Article 5(2)(b)(ii) of the Agreement

According to Article 5(2)(a) of the Hague Agreement, China has declared that "a brief description of the reproduction or of the characteristic features of the industrial design that is the subject of that application" must be contained in any application designating China. If such a description is not provided in the application, and not corrected within three months, the international application will be deemed not to designate China.[12]

It is worth noting that the United States does not require such a declaration; rather, the United States declares a requirement for a claim.[13] U.S. applicants are advised to bear in mind this difference to avoid any adverse impacts on the designation of China in an application.

2. Declaration on Article 7(2) of the Agreement

According to Article 7(2) of the Hague Agreement, China has declared that the prescribed designation fee shall be replaced by an individual designation fee for any application designating China. At present, WIPO has announced the specific amount and payment method of the designation fee for China.[14]

3. Declaration on Article 13(1) of the Agreement

According to Rule 7(3)(v) of the Common Regulations, the number of industrial designs included in the international application may not exceed 100. However, Article 13(1) of the Hague Agreement stipulates that, any Contracting Party whose law requires the unity of design or that only one independent and distinct design may be claimed in a single application may make a declaration that the international application designating it shall comply with the requirements of its local law. China has made the above declaration under *PRC Patent Law* Article 31.2 on the unity of design patent application.

The declaration will not affect the right of an applicant to include two or more industrial designs in an application in accordance with Article 5(4) of the Hague Agreement.[15] However, Chinese authorities are permitted to refuse the effect of international registration of any international application designating China that does not meet the requirements of unity.[16]

4. Declaration on Rule 9(3)(a) of the Common Regulations

According to Rule 9(3)(a) of the Common Regulations, China has declared that certain specified views of the product or products which constitute the industrial design or in relation to which the industrial design is to be used are required in the application. At present, WIPO has announced the specific content of the declaration, and applicants should

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[12] *Hague Guide for Users*, *supra*, at 82.

[13] *Hague System Member Profiles: United States of America*, https://www.wipo.int/hague/memberprofiles/result?countries=10288&datafields=9577,9578,9579,9580,9581,9585,9586,9587,9588,9589,9590,9591,9592,9593,9582,9583,9584,9645 (last updated Jun. 26, 2022).

[14] *Individual Designation Fee: China*, https://www.wipo.int/edocs/hagdocs/en/2022/hague_2022_07.pdf (last visited Jun. 26, 2022).

[15] Hague Agreement, art. 13(1).

[16] Hague Agreement, art. 13(1).

pay close attention to China's special requirements for the views in applications designating China.[17]

According to China National Intellectual Property Administration (CNIPA), as of May 13, 2022 (just a week after the Hague Agreement came into effect in China), CNIPA, as the Receiving Office, has received a total of 141 international design applications.[18] Next, China will step up the revision of the relevant provisions of the *Implementing Regulations of the Patent Law* and the *Patent Examination Guidelines*, improve the design examination rules for applications filed through the Hague System, and provide supporting systems such as the information system and fee system.[19] To avoid trouble in obtaining protection of international registered design in China, it will be important to pay close attention to the differences in the requirements for design applications between the United States and China.

II. China's Supreme People's Court (SPC) Issues *Judicial Interpretation on the Application of the Anti-Unfair Competition Law (AUCL)*

On March 17, 2022, the SPC issued the *Judicial Interpretation on Several Issues Concerning the Application of the Anti-Unfair Competition Law* (the "**Judicial Interpretation**"), which came into force on March 20, 2022. The implementation of the Judicial Interpretation will further standardize the application of the AUCL on such issues as confusion of the origin of goods (AUCL Art. 6), false or misleading language used in promotional and marketing activities (Art. 8), commercial defamation (Art. 11), certain unfair competitive acts in the Internet field including forced URL re-direction (Art. 12), aiming at strengthening the role of the AUCL in regulating the order of market competition and combating unfair competition. Business operators competing in China's marketplace are advised to pay close attention to the guidance provided in the Judicial Interpretation and subsequent developments in the application of the AUCL.

Key takeaways from the Judicial Interpretation, which consists of 29 articles, are as follows:

1. The Judicial Interpretation clarifies that the court may apply the general prohibition of unfair competition based on the notion of fairness and good-faith under AUCL Art. 2 in its adjudication of cases, even if the unfair acts concerned do not fall under any of the enumerated conducts.

AUCL Article 2.1 provides that "business operators shall adhere to the principles of voluntariness, equality, fairness and good-faith" in their business dealings, and abide by laws and business ethics." This article lays the foundation of the AUCL and is the general provision regulating all sorts of unfair competitive acts. Based on this article, AUCL Chapter II lists various "acts of unfair competition" in detail. The problem brought about by such a legislative structure is that there have been different opinions over whether AUCL Article 2 can be directly applied in the adjudication of specific cases. Some people believe that the provisions of Chapter II have exhaustively enumerated all acts of unfair competition regulated by the AUCL and are the only basis for adjudicating specific cases, whereas AUCL Article 2 is merely a proclamation of the basic objective of the legislation and should not be directly applied in adjudicating specific cases.

[17] *Specific information on "compliant views" required in China,* https://www.wipo.int/edocs/hagdocs/en/2022/hague_2022_8.pdf (last visited Jun. 26, 2022)

[18] https://www.cnipa.gov.cn/col/col2920/index.html （last visited Jun. 26, 2022).

[19] https://www.cnipa.gov.cn/art/2022/2/9/art_53_173132.html (last visited Jun. 26, 2022).

Article 1 of the Judicial Interpretation provides a clear response to the aforesaid position. The article stipulates that where a business operator disrupts the order of market competition, damages the legitimate rights and interests of other business operators or consumers, and its act falls outside of the enumerated provisions of AUCL Chapter II, the Patent Law, the Trademark Law, or the Copyright Law, AUCL Article 2 may be applied to determine the nature of the act. This new provision provides guidance in two aspects. First, AUCL Article 2 can be used as a direct legal authority for adjudicating cases in determining whether the acts of business operators constitute unfair competition. Second, Article 2 can be a supplement to the various acts of infringement under the specific intellectual property laws and acts of unfair competition specifically enumerated under AUCL Chapter II. In other words, where the provisions of specific intellectual property laws and AUCL Chapter II are applicable, there is no room for Article 2 to apply.

Article 1 of the Judicial Interpretation endorses the previous judicial practice concerning AUCL Article 2, and for the first time codifies and establishes in the statutory language the direct application of Article 2. In conjunction with Articles 2 and 3 of the Judicial Interpretation, the application of AUCL Article 2 in anti-unfair competition disputes will effectively be broadened, which will bring about better protection of legitimate rights and interests of business operators.

2. The scope of application of AUCL is expanded

According to AUCL Article 2.2, the term "unfair competition" refers to "the conduct of business operators in violation of the provisions of this Law, disrupting the order of market competition, and damaging the lawful rights and interests of other business operators or consumers in their production and business activities". In practice, the interpretation of "other business operators" in the above definition has been controversial. One opinion is that the AUCL is aimed to protect a fair market competition order and govern the competitive relationship between competitors. Therefore, "other business operators" in the AUCL should be limited to other business operators that have a competitive relationship. Since there is no competitive relationship between operators in different industries, disputes between them do not fall within the scope of the AUCL. Although judging from the current judicial practice, whether the plaintiff and the defendant belong to the same industry or whether there is a competitive relationship between them is not a statutory prerequisite considered by the court when hearing an unfair competition dispute, the clarification of the meaning of "other business operators" still has practical significance for the application of the AUCL in an era with increasingly more diverse business formats and complex market competition scenarios.

According to Article 2 of the Judicial Interpretation, "other business operators" are defined as "market entities that have possible relationship of competing for business opportunities or harming competitive advantages with operators in production and business activities". This definition does not require both parties to the dispute to belong to the same or similar industries, nor does it require that there is a direct or indirect competitive relationship between the two. In other words, whether the defendant's conduct constitutes unfair competition has nothing to do with whether it belongs to the same industry as the plaintiff or whether it constitutes direct or indirect competition with the plaintiff.

In an era where the integration of business formats is getting deeper and deeper, and the competitive advantages of business operators are more and more easily transformed between different fields, Article 2 of the Judicial Interpretation will facilitate realizing the aim of the AUCL—that is, to maintain a fair market competition order and protect the legitimate rights and interests of business operators.

3. The protection scope of AUCL Articles 6(2) and 6(3) is expanded

According to AUCL Articles 6(2) and 6(3), unauthorized use of influential company names, social organization names, personal names, main part of the domain names, website names, webpages, etc. of another's, that misleads people into believing that the product belongs to or

has a specific affiliation with another, is an act of unfair competition. The above mentioned conduct and the conduct enumerated under AUCL Article 6(1) are all acts of counterfeiting and confusion prohibited by the AUCL. However, unlike Article 6(1), Article 6(2) and 6(3) do not use the expression "same or similar", which raises doubts as to whether the protections of business names and network identifications provided by the latter two also cover "similar" names or network identifications.

Article 11 of the Judicial Interpretation dispels the above doubts. According to Article 11, unauthorized use of logos similar to influential company names, organization names, personal names, main part of the domain names, website names, webpages, etc. of another's which mislead people into believing that the product belongs to or has a specific affiliation with another are also a violation of Article 6(2) and 6(3). This article fixes the defects in the wording of AUCL Article 6 and provides more comprehensive protection to the rights of business operators infringed by acts of counterfeiting and confusion.

4. Compensation for victims of unfair competitive acts is further increased

According to AUCL Article 17.4, when a business operator suffers damage from counterfeiting and confusion (Article 6) or trade secrets misappropriation (Article 9), if it is difficult to determine the actual loss of the right holder or the illegal gains from the misappropriation obtained by the infringer, the court may award the right holder a compensation of less than 5 million RMB according to the circumstances of the infringement. The above provisions set the right to statutory compensation for victims of counterfeiting, confusion and trade secret misappropriation. However, the scope of application of the statutory compensation does not include other acts of unfair competition listed under AUCL Chapter II or those that go beyond AUCL Chapter II but are covered by AUCL Article 2. Therefore, the AUCL's crackdown on unfair competitive acts other than the acts of counterfeiting, confusion, or trade secrets misappropriation was relatively weak, and now the Judicial Interpretation has reinforced the protection in this regard.

According to Article 23 of the Judicial Interpretation, in the presence of the unfair competition acts as stipulated in AUCL Articles 2 (the general principle clause), 8 (false or misleading language used in promotional and marketing activities), 11 (commercial defamation) and 12 (certain unfair competitive acts in the Internet field), the right holder may also claim the statutory compensation under AUCL Article 17.4. The above provisions give victims of the aforementioned unfair competitive acts the same protection as victims of counterfeiting, confusion, and trade secrets misappropriation, thereby increase the overall level of protection under the Law.

Overall, due to the implementation of the Judicial Interpretation, the crackdown on unfair competitive acts is strengthened, and the level of protection for the order of fair market competition is heightened. With the help of the Judicial Interpretation and the *Judicial Interpretation on Trade Secrets* (released in 2020 and see our client alert here), China has established a relatively complete civil judicial protection system against unfair competition, and business operators will be expected to enjoy a more fair and orderly market competition environment in China.

III. China's Supreme People's Court (SPC) Promulgates *Several Provisions on Jurisdiction of Intellectual Property Civil and Administrative Cases of First-Instance*

On April 20, 2022, the SPC issued *Several Provisions on the Jurisdiction of First-Instance Intellectual Property Civil and Administrative Cases* (the "**Jurisdiction Provisions**"), which came into force on May 1, 2022. With the implementation of the Jurisdiction Provisions, the jurisdiction of first-instance intellectual property civil and administrative cases in China will undergo a significant change as follows:

Ordinary Intermediate People's Courts will have jurisdiction over the first-instance civil and administrative cases on ownership and infringement disputes of design patents and cases involving the recognition of well-known trademarks.

Since 2014, four Intellectual Property Courts have been successively established in Beijing, Shanghai, Guangzhou and Hainan Free Trade Port. At the same time, the SPC has successively approved the establishment of specialized Intellectual Property Tribunals within the Intermediate People's Courts in 27 cities all around China, including Nanjing, Wuhan, Shenzhen, Ningbo, etc., to have jurisdiction to adjudicate highly specialized intellectual property cases across regions.[20]

According to the *Decision on Establishing Intellectual Property Courts in Beijing, Shanghai and Guangzhou* (the "**Decision on the IP Courts**") and the *Decision on the Establishment of the Intellectual Property Court of Hainan Free Trade Port* (the "**Decision on the Hainan IP Court**") issued by the Standing Committee of the National People's Congress, China's top legislature, the *Regulations on the Jurisdiction of Intellectual Property Courts in Beijing, Shanghai and Guangzhou* issued by the SPC, and the replies of the SPC on the establishment of the intellectual property tribunals in relevant Intermediate People's Courts, the jurisdiction of the civil and administrative cases of first-instance on ownership and infringement disputes involving patents of all kinds, and cases of first-instance involving the recognition of well-known trademarks belongs to the four Intellectual Property Courts and the Intermediate People's Courts designated by the SPC (including the Intermediate People's Courts where the Intellectual Property Tribunals are located, the Intermediate People's Courts where the provincial capitals are located and other designated Intermediate People's Courts). Intermediate People's Courts other than the above-mentioned courts have no jurisdiction over the above-mentioned cases. According to Article 2 of the newly implemented Jurisdiction Provisions, the jurisdiction of first-instance civil and administrative cases of design patent ownership, infringement disputes and cases involving the recognition of well-known trademarks is now expanded to all intermediate people's courts, whether designated by the SPC or not.

However, there are two exceptions to this newly launched jurisdictional system. As the Decision on the IP Courts stipulates that Beijing, Shanghai and Guangzhou Intellectual Property Courts have cross-regional jurisdiction over the first-instance intellectual property civil and administrative cases relating to patents in the province where they are located,[21] and the Decision on the Hainan IP Court stipulates that the Hainan Free Trade Port Intellectual Property Court has jurisdiction over the first-instance civil and administrative cases of intellectual property rights relating to patents in Hainan Province,[22] Intermediate People's Courts located in Beijing, Shanghai, Guangdong and Hainan do not have jurisdiction over the first-instance civil and administrative cases for design patent relating to ownership and infringement disputes due to the implementation of the Jurisdiction Provisions of which the legislative hierarchy is lower than that of decisions made by the Standing Committee of the NPC. Similarly, there is also an exception to the jurisdiction of first-instance civil and administrative cases involving the recognition of well-known trademarks. Even if the Jurisdiction Provisions are implemented, the first-instance civil and administrative cases involving the recognition of well-known trademarks in Beijing, Shanghai and Hainan will still be under the exclusive jurisdiction of the intellectual property

[20] Guanghai Lin et al., *Understanding and Application of "Several Provisions of the Supreme People's Court on the Jurisdiction of First-Instance Intellectual Property Civil and Administrative Cases"*, People's Justice, No. 16 2022

[21] See Article 2 of the Decision on the IP Courts.

[22] See Article 2 of the Decision on the Hainan IP Court.

courts in these three places. In contrast, all Intermediate People's Courts in Guangdong Province will have jurisdiction over first-instance civil and administrative cases involving the recognition of well-known trademarks within their territories.

The above-mentioned adjustments to the jurisdiction of design patent cases and cases involving the recognition of well-known trademarks disperse these cases that were originally under the jurisdiction of the four intellectual property courts and the designated intermediate people's courts to other ordinary Intermediate People's Courts, which significantly increases the number of courts with jurisdiction over these relevant cases. In the long run, it will enable the intellectual property courts and the designated Intermediate People's Courts to focus more on the adjudication of technical cases (e.g. cases relating to invention patents, utility model patents, new varieties of plants, IC layout designs, technical secrets, and computer software) so as to improve the judicial efficiency. However, in the short term, the consistency of adjudication standards may be compromised due to the fragmentation of the jurisdiction.

It should be pointed out that the Jurisdiction Provisions further reiterates that the basic people's courts at the grass-root level as specifically designated by the SPC may still have jurisdiction over the first-instance civil cases of design patent ownership and infringement disputes.[23] Therefore, the jurisdiction of design patent civil cases may be further dispersed, which deserves further attention.

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[23] See Article 2.1 of the Jurisdiction Provisions.