IP Litigation in Japan

The rise of the global marketplace and multinational corporations has resulted in IP litigation and disputes that span continents. In some cases, it is necessary that one country follow or use the laws of another country in order to establish the best means by which law may be applied to solve the dispute. While this may also lead to the local jurisdiction being biased by the foreign law, this process has been deemed to be necessary given the surge of litigation and lawsuits in foreign jurisdictions that many companies both face and bring forth.

In addition, ex officio research is deemed essential to overcome the biases inherent in an adversarial system in which one of the litigants may be more financially capable of initiating prolonged litigation (particularly, if the less financially bereft litigant is an SME with fewer financial resources at its disposal to conduct expensive research to litigate an infringement, licensing case, or in the case when calculating financial damages to be awarded to one party).

Expert Opinion by Expert Witness

When Japanese judges require a greater depth of information or a detailed analysis of how a foreign law(s) in question may be/should be applied in the case in question, the judges may appoint an expert witness(es) to provide such information either through a written report or in rare instances, expert testimony. Litigants may also request the appointment of an expert witness, however this has not been so common in Japan, as litigants are unable to appoint their own expert witnesses, and thus, they are unsure whether or not the conclusions or analyses provided by the expert witness will benefit or hinder their case. It is quite possible that a litigant's own request for testimony by an expert witness could completely undermine their own case; hence, most Japanese companies are reluctant to request expert testimony. Courts have also been hesitant to appoint experts to tender an opinion simply due to the unresolved issue of who will end up shouldering the cost for such a service. Finally, the standardization of a means by which

the amount of damages is calculated is absolutely necessary for cases of infringement and in cases of licensing negotiations deemed to have been conducted in bad faith.

Obtaining Foreign Law Information

The London Treaty serves as an information exchange system under which numerous countries (mainly European) have agreed to provide to other signatories information such as legal precedents, theory, and analysis of the application of laws. In situations which require a greater technical explanation, third parties (i.e., independent law firms, research institutes) in the home country of one of the parties involved in the dispute may also be consulted for expert opinions. Participation in such a system has permitted a greater understanding of how to analyze and apply foreign laws in multiple countries and allows for members to more readily anticipate how recent amendments to one country's laws may impact potential litigation and international commerce between nations. Japan is currently not a member to this legal information sharing system and the accession by non-EU states is permitted. Currently, four countries which are not members of the EU (Belarus, Costa Rico, Mexico and Morocco) have ratified the treaty.

Japanese Research System on Foreign Law

A feasibility study into the development of what would largely constitute a foreign law research institute that could be used in international lawsuits, etc., has been performed. It is deemed necessary to establish either an internal or external agency that would be able to provide information to the court regarding another country's laws which may be relevant to the case at hand. This would allow the establishment of the manner in which ex officio examinations and expert testimony may be conducted and set the costs associated therewith. By judicial administration of such a system, neutrality is maintained and Japan could be party to reciprocal exchanges of legal information with numerous other countries. Ultimately, this would level the playing field so that a larger corporation would not be the sole provider of potentially numerous expert witnesses that may bias decisions in their favor.

Additionally, the cost and time required to settle international disputes in Japanese courts would decrease by creating a standardized system.

Other remedies include the establishment of an external agency which would oversee the determination of how foreign law can be applied to international disputes in Japan. International law firms could play a role in the establishment, the maintenance, the contribution of information/analyses and interpretations relating to foreign laws.

Japan has recently taken the first steps in recognizing that the development of a system which can mediate international intellectual property disputes is essential. The Japan Patent Office (JPO) has invited suggestions from corporations and the public as to how best settle future IP disputes. While this appears initially focused on disputes between domestic entities, it is worth noting that there is the possibility of applying the adopted protocols and the decisions regarding domestic disputes to international disputes.

The incorporation of a system or agency for furthering the use and understanding of foreign law in international disputes will serve to further prepare Japan for the future of international commerce.

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