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Trends and Developments

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COVID-19 Lockdown

Although the year 2020 may not be remembered as one of remarkable innovation in patents, it will certainly be remembered for innovating new “normals” in patent litigation in India. The COVID-19 pandemic struck us with tremendous momentum, but Indian courts devised several innovative mechanisms to ensure that court business was not derailed. The biggest challenge before the courts was preventing courts from becoming “hotspots” for the spread of the coronavirus and, for this reason, physical appearances were completely prohibited. Instead, the court hearings and the filing of documents were entirely shifted to virtual platforms and, with the help of robust IT infrastructure, hearings were made possible from the comfort of home.

Due to COVID-19, a 21-day lockdown was announced in India on 23 March 2020 and courts suspended their functioning. But even during the lockdown, matters in which urgent relief was sought, were being heard through the mode of videoconferencing. An aggrieved party was required to apply online for an urgent hearing and state the reasons for urgency. Only in matters where extreme urgency was made out, would the registrar allow a matter to be heard during the lockdown. Although the initial lockdown period did not witness any movement in patent litigation, it gradually gained momentum from May 2020 onwards and by August 2020, patent litigation was near to normal levels. Between January and March 2020, there were five new patent cases filed with the Delhi High Court while, in the rest of the year, approximately 28 new patent cases were filed. This remains close to the average number of patent cases filed with the Delhi High Court over the last three years.

Videoconferencing

The shifting of the entire litigation process online created a need to lay down guidelines and contours that ensured seamless and uniform conduct of hearings through videoconferencing. Accordingly, in the exercise of its powers under Articles 226 and 227 of the Constitution of India, the High Court of Delhi framed rules for videoconferencing called the “High Court of Delhi Rules for Video Conferencing for Courts 2020”. These rules are applicable to the High Court of Delhi and to all the courts and tribunals subordinate to it. These rules may be used at any stage of judicial proceedings conducted by the courts and demand

that all the courtesies and protocols applicable to a physical court shall apply to virtual proceedings. The new rules also set out the requirements and the minimum equipment needed to accomplish videoconferencing.

These rules have even paved the way for conducting examination of witnesses through videoconferencing so that trials are not disrupted in the absence of physical hearings. Witnesses can now be examined from remote locations and even overseas through videoconferencing. Cross-examination of witnesses, production of documents during cross-examination and the digital availability of the entire judicial record for trial have been facilitated by way of said rules. To ensure fair conduct, the rules require the presence of a court-appointed co-ordinator at the remote point where the witness is located. The duty of the co-ordinator is to secure the digital judicial record, ensure compliance with the rules and the fair conduct of the hearing. The statutory provisions – including the Code of Civil Procedure, the Criminal Procedure Code, the Indian Evidence Act and the Information Technology Act, 2000 – apply to hearings conducted through videoconferencing as much as they apply to physical judicial proceedings.

Delhi High Court Retains IP Pre-eminence

The established trend for filing most suits for IP infringement in Delhi and Mumbai continued in 2020 and the Delhi High Court led significantly in terms of volume. Interestingly, approximately 299 cases were filed relating to IP rights such as trade marks, patents, copyrights and designs in the Delhi High Court in 2020. By way of virtual hearings, the Delhi High Court granted injunctions in less than a month in approximately 195 cases, which constitutes 65% of cases filed during this time. Courts grant injunction only after substantial arguments and going through voluminous records submitted by the parties. It is remarkable how the courts, litigants and advocates have adapted to the new system of virtual hearings in such a short time and interesting court room spectacles are now reproduced in a virtual environment.

Suspension of Limitation Periods

Another development that not only affects patent litigation but all proceedings in India, whether before courts or tribunals

INDIA TRENDS AND DEVELOPMENTS

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under general or special laws, is the suspension of limitation by the Supreme Court of India. The COVID-19 pandemic and subsequent lockdown posed significant difficulties for litigants in meeting the limitations provided under law because of the restrictions placed on movement, the closure of physical filings and the danger of spreading the virus. Thus, the Supreme Court of India took a suo motu cognizance of this situation in re: Cognizance for Extension of Limitation, Suo Motu Writ Petition (Civil) 03 of 2020, and issued directions that all limitations are extended with effect from 15 March 2020, till further notice. The impact of this direction is that if there were a period prescribed under law to do any act, and if that period were scheduled to expire after 15 March 2020, it would be automatically extended. This direction has been passed by the Supreme Court of India in exercise of the powers granted under Article 142 of the Constitution of India to do complete justice, which have the force of law.

Effect on IP infringement cases

There is no direct impact of the extension of limitation on suits for infringement of patents. The limitation to file a suit for infringement of an IP right is three years from the last act of infringement but since the cause of action in these suits is mostly a continuing one, the limitation automatically gets extended. However, the extension of limitation may impact the defendants in such suits. The law provides a 30-day period to defendants in which to file a reply to suit in the form of a written statement and a grace period of another 90 days is provided subject to conditions, such as costs, that the court may impose on the defendant for availing themselves of this grace period. Thus, in cases where the 30-day period or the outer limit of 30+90 days was to expire after 15 March 2020, the defendant in a suit for infringement may seek to have the delay condoned in view of the extension of time granted by the Supreme Court of India.

In another judgment, *Sagufa Ahmed & Ors. v Upper Assam Plywood Products Pvtl Ltd. & Ors.* (Civil Appeal Nos 3007-2008 of 2020), the Supreme Court of India has held that the extension of all limitations granted earlier only apply to normal periods of limitation, but not to cases where both the normal period of limitation and the period that can be condoned has already expired. The impact of this decision is yet to be seen on the right to file a written statement by a defendant in a suit where only the normal 30-day period had expired before the extension was suo motu granted by the Supreme Court but, the grace period of 90 days expired later.

The impact of time extensions is most clearly seen in the appeals and other proceedings that are being filed before the Intellectual Property Appellate Board (IPAB). Under the Patents Act, an appeal from an order of a Controller of Patents should be filed within three months from the date of that order and a reply to any petition for revocation of a patent should be filed by

a patentee within two months from receipt of the petition. In view of the extension granted by the Supreme Court of India, IPAB has been liberally condoning the delays in filing of appeals and replies during the period of extension. This has come as a breather considering the gravity of the situation and difficulties faced by the parties in pursuing their cases in the face of COVID-19 pandemic.

The High Court of Delhi Rules Governing Patent Suits, 2020

Another significant development in 2020 – one that can steer patent litigation into a specialised branch of litigation – is a proposal of “The High Court of Delhi Rules Governing Patent Suits, 2020” (Rules). The proposed Rules aim to ease and clarify the requirements of a patent suit. These Rules prescribe the precise requirements of pleadings in a patent suit so that there is uniformity in the manner in which patent suits are filed. These precise requirements also provide guidance for lawyers in conducting patent suits, who otherwise may not be familiar with this domain. The patent suits on which the proposed Rules would apply include suits for:

- infringement of patent rights granted under Section 48 of the Patents Act, 1970 (Act);
- declaration as to non-infringement under Section 105 of the Act;
- grant of reliefs under Section 106 of the Act, in cases of groundless threats of infringement proceedings; and
- counterclaim of revocation of patent, filed under Section 64 of the Act by the defendant in an infringement suit.

The Patent Rules provides step-by-step directions on the conduct of proceedings in patent suits from filing to final hearing. The Delhi High Court had sought comments/suggestions from members of the Bar on the proposed Rules and these are yet to be notified. Needless to say, the proposed Rules, with any modifications based on the comments received from the members of the Bar, would adequately address the issues arising from the complexities involved in patent suits.

Looking Ahead

The last 12 months have seen various initiatives taken by courts to assure litigants that unforeseen force majeure events will not impact the functioning of courts and dispensation of justice. Fortunately, the number of COVID-19 cases is declining in India and, with the introduction of vaccines, the entire judicial machinery is gearing up for a new start. In this regard, by way of recent notifications, several courts in India have already begun physical hearings and even the Delhi High Court is gradually beginning to return to normality, with physical hearings every alternate day.

LexOrbis is one of the leading, and amongst the fastest-growing, IP firms in India, having offices at three strategic locations in Delhi, Mumbai and Bengaluru. With a team of over 90 highly reputed lawyers, engineers and scientists, the firm acts as a one-stop shop and provides practical solutions and services on all IP and legal issues faced by technology companies, research institutions, universities, broadcasters, content developers and brand owners. Its services include Indian and global IP portfolio development and management, advisory and documenta-

tion services on IP transactions/technology-content transfers, and IP enforcement and dispute resolutions in forums across India. LexOrbis has a global reach with trusted partners and associate firms. Its team of highly accomplished legal professionals is adept at handling all business needs and addressing complex legal and techno-legal issues. The firm also employs cutting-edge technology systems to improve its processes and efficiency.

Authors



Manisha Singh is the managing partner and founder of LexOrbis. She oversees and supervises all practice groups at the firm. Starting her career at a time when Indian IP laws and practices were undergoing substantial changes, she played a crucial role in advising Indian

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Varun Sharma is a lawyer with licences to practise as an advocate and a patent agent in India. Varun holds a BTech in Electronics and Communications and a degree in Law from Delhi University. His experience includes appearing before various Indian courts, the Intellectual

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