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Patent Exhaustion Doctrine in China

Article 69 of the current PRC Patent Law (the "Law") established the "Patent Exhaustion Doctrine," providing: "None of the following shall be deemed an infringement upon a patent right: (1) using, promising to sell, selling or importing any patented product or product directly obtained through a patented process after such product is sold by the patentee or with the permission thereof; …"

There are several reasons for such a provision: firstly, a patentee can profit from his patent through manufacturing or licensing the manufacturing of the patented product and it would not be fair to allow the patentee to profit twice from the same product; secondly, granting a patentee the right to profit repeatedly from the same patented product would also hinder the utilization and absorption of the patent. In addition, any law granting such a right would be difficult to enforce as a practical matter.

The patentee can be either Chinese or foreign, and the "sale" of patented products can be made either in China or abroad; this means that under the Law both domestic and international exhaustion apply to products sold or licensed to be sold by the patentee. In order to make the provision clearer, the concept of "parallel import" was incorporated in Article 69. Consequently, parallel importation of a patented product will not be treated as an act of infringement, nor will be selling patented products in foreign countries, or selling or using such products imported into China. However, the Law is silent on how exhaustion will apply to imported products sold outside China under contractual restrictions.

Two things need to be pointed out about the patent exhaustion doctrine:

So called "patent exhaustion" means that the patentee shall not have any right of control on each patented product that is sold. But this does not mean that the whole right of the patent ended upon the sale of the product; the patent remains valid and protected throughout the patent term. Also, the patent exhaustion doctrine generally requires that the patented product was sold by the patentee or with his permission. This is to be distinguished from the notion of a patented product being put on the market "legally" – as in the case of use of a patent mandated by the government without the patentee's permission. Here it would make better sense that the exhaustion doctrine should also apply, although all do not seem to agree on this.

On the other hand, the language of the Law makes no distinction between restricted sales and unrestricted sales. It is thus unclear whether international patent exhaustion can be precluded by contractual restrictions on the products sold. Moreover, international exhaustion, contractual restrictions, and antitrust issues intertwine in complex ways. Therefore, in dealing with patent related matters, multinational corporations need to strategize carefully to best achieve their objectives.

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