

IP Courts and the Worldwide Trend toward Specialization

Yuri Fancher Machado, Maria Eduarda de O. Borrelli Junqueira, and Weixian Zhu

Share:



©2024. Published in *Landslide*, Vol. 16, No. 3, March/April 2024, by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association or the copyright holder.

Recognizing that intellectual property (IP) assets are crucial tools for driving innovation and promoting growth of the global economy and involve legal complexities, numerous countries have either implemented or are contemplating the establishment of specialized courts. For example, most of the European Union (EU) member states have introduced either a specialized IP court or specialized IP divisions within the general courts, including many in Central and Eastern European countries like Croatia, Czech Republic, Hungary, Lithuania, and Poland. Some non-EU Eastern European countries, including Azerbaijan and Belarus, have also introduced specialized IP courts or divisions. ¹ Furthermore, since April 1, 2023, the Unified Patent Court has been in existence. This specialized court is designed to harmonize patent law across the EU, representing the first supranational jurisdiction in Europe for civil law matters. ² Likewise, Canada, Japan, Thailand, and many other countries have adopted a similar approach to specialization.

Despite the global trend toward specialization, specialized IP courts can differ significantly in their scope depending on the jurisdiction. Some, for example, focus solely on patent disputes, while others address specific legal issues like IP rights validity; and they are increasingly wrestling with complex disputes that interrelate with advanced technologies and specific issues within various industries. Their roles also vary, with some serving as trial courts and others as appellate bodies, empowered to review lower court decisions. Thus, grasping the mechanics of specialized IP courts in a certain area can be highly advantageous for IP owners, particularly when dealing with global disputes.

This article examines the influence of specialized IP courts in Brazil and China, considering the extensive and solidified commercial partnership between both countries and their recent cooperation in the areas of science, technology, education, and culture ³—areas that unequivocally are related to the IP field.

Specialized IP Courts in Brazil

Brazil is one of the major countries in the world in terms of territorial size and population, with a size of 8,510,000 km² and over 214 million inhabitants. The numbers in the judiciary are similarly numerous: in 2022, there were over 31 million new cases filed before the judiciary in the various fields of law—a remarkable number in the history of the Brazilian judiciary—with 81.4 million total lawsuits pending a final decision on the merits. ⁴

IP is gaining substantial attention across various industries in Brazil, particularly after the COVID-19 pandemic as legal actions focused on the enforcement of IP rights have significantly increased. As a member of numerous treaties that influence the local protection of IP, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Brazil is increasingly acknowledged as an important venue for global disputes involving IP assets.

Generally, the same judge is bound to analyze many different types of lawsuits in the same civil chamber, from consumer to family to IP-related cases, requiring an understanding of the complex details of very different areas of law. This certainly affects the quality of the decisions rendered in such cases, as it is difficult for a single judge to be highly specialized in such a broad range of subjects.

In recent years, the Brazilian judiciary has innovated to enhance efficiency and quality, aligning with the revised Section 6 of the Brazilian Code of Civil Procedure, emphasizing the importance of cooperation for timely, fair, and effective judgments. The specialization of courts in Brazil is one of the ways to put into practice such principles. In fact, the specialization of chambers in business matters has been a recommendation of the Brazilian National Council of Justice since 2019, ⁵ mainly in districts with a greater concentration of companies and business activities, given the social and economic consequences arising from them. To illustrate how specialized courts can have a positive impact, recent research showed that the average time of lawsuits filed with specialized business courts in São Paulo is 217.8 days, while generalist courts take almost twice the time at 415 days. ⁶

As part of this development in the realm of IP matters, specialized IP courts have been established in certain Brazilian states, equipping judges to stay up to date and adapt to the evolving IP legal

landscape. Within the jurisdiction of São Paulo's state court, specifically in the judicial district of the state capital, two distinct trial courts are specialized in handling cases related to IP, among other cases involving corporate and arbitration law. In addition, specialized trial courts handling business matters, including IP cases, are situated in districts beyond the capital city, encompassing the greater São Paulo metropolitan area, Campinas, Ribeirão Preto, Santos, São José do Rio Preto, São José dos Campos, and Sorocaba. The São Paulo court of appeals also includes specialized divisions for managing corporate, IP, and bankruptcy cases, with jurisdictions resembling those of the first instance trial courts.

State courts in Rio de Janeiro, Rio Grande do Sul, and Minas Gerais have established specialized lower courts and/or appellate courts dedicated to handling IP lawsuits. The federal court in Rio de Janeiro, the headquarters of the Brazilian Patent and Trademark Office and the venue for numerous invalidity lawsuits related to patents, industrial designs, and trademarks, serves as a specialized IP court at both the trial and appellate levels. Due to the rising number of IP cases and the demand for more efficient judgments, a new rule was recently issued to, among other adjustments to the judicial structure, incorporate the specialization of the 12th Federal Court in Rio de Janeiro alongside the other already established specialized courts. ⁷ Consequently, one-third of the caseload from certain established specialized courts was redistributed to the newly formed 12th Federal Court to expedite case resolutions.

Acknowledging the importance of specialized courts, the president of the 2nd Region of the Federal Court recently emphasized the primary goals of this strategic initiative: (1) to advance the court's specialization project, aligning it with its areas of expertise; (2) to strive for a fair distribution of caseloads among federal judges, promoting a balance in procedural demands; (3) to enhance the efficiency of judicial services, elevating the quality and predictability of rulings; and (4) to guarantee the attainment of the court's objectives, with a critical focus on upholding the constitutional principle of expeditious legal proceedings. ⁸

While the duration of the ongoing lawsuits still could be improved upon, there is no doubt that the growth in the number of specialized courts in business matters in Brazil (which include IP disputes) contributes to greater standardization of the case law, legal certainty, and predictability, as judges will be in charge of a few specific areas related to business law, be able to dedicate more time to understand the theory involved in the disputes, and get more familiarized with such subjects. This would positively impact the quality of the decisions rendered in such disputes.

Besides being a way to promote timely, fair, and effective judgements, the specialization of courts also makes Brazil more economically attractive. According to a World Bank report, the existence of specialized jurisdictions to judge disputes between companies demonstrates the economic

attractiveness of a country. ⁹ Brazil has proactively played a role in establishing specialized lower and appellate courts focused on IP cases in several states, with the goal of improving legal certainty and quality of their rulings. Despite the ongoing need for improvement, the Brazilian judiciary's commitment to upholding the rights of IP holders is apparent, and Brazil has already established itself as a prominent global forum for IP disputes, particularly in cases involving high-stakes litigation.

Specialized IP Courts in China

In China, not all courts have jurisdiction over IP cases; such jurisdiction is famous for its intricacies. In general, for the first instance civil and administrative IP cases, jurisdiction is given to IP courts (Beijing IP court, Shanghai IP court, Guangzhou IP court, and Hainan IP court), intermediary people's courts where provincial capitals are located, and other intermediary people's courts designated by the Supreme People's Court. But their jurisdiction covers only disputes arising from ownership and infringement of invention patents, utility models, new varieties of plants, mask designs, trade secrets concerning technologies and software, and monopolies. ¹⁰ Disputes arising from design patent ownership and infringement as well as recognition of well-known trademarks are judged by IP courts and intermediary people's courts. County-level people's courts approved by the Supreme People's Court also have jurisdiction over those cases except for design patent administrative cases. ¹¹ Jurisdiction of other cases outside the scope of the aforementioned areas is given to county-level people's courts, which are designated by the Supreme People's Court. Currently, there are 558 county-level people's courts (roughly 18% of all the county-level courts ¹²) of this kind, ¹³ with several county-level courts hearing cases from different counties within a city.

China tends to concentrate its IP disputes jurisdiction to a few courts, as hearing IP cases requires expertise that is different from common civil and administrative cases. In particular, this mindset is shown in its role-setting of specialized IP courts and tribunals. There are two levels of this role-setting, namely, at the Supreme People's Court level and at the intermediary level. At the Supreme People's Court level, the Intellectual Property Tribunal of the Supreme People's Court (IPTSPC) was established on January 1, 2019, to hear appellate cases from intermediary people's courts, IP courts, and provincial high people's courts, roughly like the U.S. Court of Appeals for the Federal Circuit. At the intermediary level, there are four IP courts and 26 IP tribunals that are affiliated with relevant intermediary people's courts. ¹⁴ Since its inception, the hearing process in the IPTSPC has become much longer. For example, in 2019, the average time for resolution of general cases was 73 days; in 2022, it was 165.2 days. ¹⁵ Civil and administrative cases have seen a similar increase in resolution time. ¹⁶ High case-judge ratio, ¹⁷ increasing numbers of complex

cases, and COVID-19 are the main reasons. At the intermediate level, four IP courts in particular, it is generally recognized that IP courts are efficient in their resolutions, although there is no publicly available information that discloses the average days of resolution.

Benefits and Drawbacks

Generally, IP specialized courts are set up to (1) strengthen IP protection, (2) achieve consistency, and (3) bring together judges with IP expertise. ⁽¹⁸⁾ Actually, the latter two serve the aim of strengthening IP protection. In practice, every April 26 on World IP Day, the Supreme People's Court releases the top 10 IP cases and 50 typical IP cases, and many provincial high people's courts as well as some county-level courts like Shanghai Pudong New District People's Court release either typical or exemplary cases to seek consistency within each jurisdiction. In addition, courts at various levels make efforts to increase the amount of monetary damages. On March 2, 2021, the Supreme People's Court released "Interpretation of the Supreme People's Court on the Application of Punitive Damages in the Trial of Intellectual Property Infringement Civil Cases" ⁽¹⁹⁾ together with exemplary cases to provide guidance on how to apply punitive damages to IP infringement cases. Several provincial high people's courts, such as Beijing and Shandong, drafted guidelines based on the interpretation.

However, the idea of specialized IP jurisdiction also brings some problems. For example, specialized jurisdiction means that more IP cases are channeled to a few specialized courts, which heavily burdens the judges in these courts. ⁽²⁰⁾ Therefore, there have been several rounds of adjustment to specialized court jurisdiction, with the newest one on October 21, 2023. Another problem results from specialized IP jurisdiction being arranged for civil and administrative cases rather than criminal cases. This more often than not leads to conflicting judgments between civil and criminal cases; for example, one non-civil-infringing behavior may be considered a crime. In a notable criminal case, the suspect was charged with unauthorized production of the registered trademark 五芳斋/WUFANGZHAI. Wufangzhai is a famous brand of zongzi, a kind of food made of glutinous rice wrapped with reed or similar leaves, usually eaten during the Dragon Boat Festival. The suspect bought genuine Wufangzhai zongzi in bulk and put them into gift boxes produced by the suspect on which the 五芳斋/WUFANGZHAI trademark was used without authorization of the trademark owner. According to the first sale doctrine, the suspect's behavior was not civilly infringing, but the court considered it a crime.

Notable IP Cases and Their Impact

The IPTSPC hears many notable IP cases. One is the vanillin trade secret case, in which the highest damages (RMB 159 million) for trade secret infringement were awarded to the owner by the

Chinese courts. The case sets an example of how to calculate trade secret damages. In this case, the IPTSPC used the profit margin of the trade secret owner multiplied by the infringer's sales volume to calculate the damages by taking into consideration such factors as sales volume, maliciousness, commercial value of the infringed trade secret, pertinacity of the infringement, and reverse impact on the owner's market share. ²¹ The case shows Chinese courts' intention to strengthen IP protection by recovering damages based on the IP's real market value rather than solely on statutory damages. It also illustrates the detailed calculation process for other courts' reference.

Conclusion

Although Brazil and China ²² are civil law countries, a comparative analysis between the Brazilian and Chinese systems is difficult given the particularities and distinct features of each country's judiciary—there is no “one-size-fits-all.” Undoubtedly, a major common point is the unequivocal and escalating emphasis the two judicial systems place on addressing conflicts involving IP. Both countries recognize the need for specialization of judges on the subject, highlighting the essential role it plays in ensuring effective judgments. The existence of numerous specialized IP courts in Brazil and China, along with positive results and faster case resolution times, emphasizes the growing importance of IP for these nations, serving as another point of convergence.

It is noteworthy to observe a global inclination toward the specialization of courts hearing IP cases, with numerous countries worldwide adopting a similar pattern, such as the EU, Central and Eastern European countries, Canada, Japan, and many others. Specialized IP courts have indeed proven beneficial, having contributed to heightened legal certainty through the uniformity achieved in legal rulings and accelerated legal decision-making processes. Investors and innovators view these as IP-friendly environments.

Endnotes

1. Olga Gurgula et al., *Specialised IP Judiciary: What Are the Key Elements to Consider When Establishing or Reforming an Effective IP Court?*, 71 GRUR INT'L 206 (2022), <https://academic.oup.com/grurint/article/71/3/206/6489393>.
2. *Patents: Creation of the Unified Patent Court (UPC)*, ENTREPRENDRE (Dec. 13, 2022), <https://entreprendre.service-public.fr/actualites/A16187?lang=en>.
3. *Relationship between Brazil and China: A Strategic Partnership on the Rise*, EXAME (May 17, 2023), <https://exame.com/mundo/relacao-entre-brasil-e-china-uma-parceria-estrategica-em-ascensao>.

4. BRAZILIAN NAT'L COUNCIL OF JUST., JUSTICE IN NUMBERS 2023 (2023), <https://www.cnj.jus.br/wp-content/uploads/2023/08/justica-em-numeros-2023.pdf>.
5. Recommendation No. 59, of October 22, 2019, of the Brazilian National Council of Justice, <https://atos.cnj.jus.br/atos/detalhar/3068>.
6. ANA PAULA RIBEIRO NANI, THE CORPORATE COURTS OF THE COURT OF JUSTICE OF SÃO PAULO (2023), https://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/33641/DissertacaoMestradoFGV_AnaPaulaNani-vFAPESP.pdf.
7. Resolution No. TRF2-RSP-2023/00033, of August 3, 2023, of the Tribunal Regional Federal da 2a Região, <https://www.jfrj.jus.br/sites/default/files/SEASI/trf2-rsp-2023-00033.pdf>.
8. Mauro Ferreira, *Expansion of Specialized Courts in Intellectual Property in the Federal Court of Rio de Janeiro*, CLARKE MODÉT (Sept. 27, 2023), <https://www.clarkemodet.com/en/legislative-news/expansion-of-specialized-courts-in-intellectual-property-in-the-federal-court-of-rio-de-janeiro>; TOZZINI FREIRE ADVOGADOS, INTELLECTUAL PROPERTY BULLETIN (12th ed. 2023), <https://tozzinifreire.com.br/site/conteudo/uploads/boletim-propriedade-intelectual-edicao-12-64e7a5dacdf1c.pdf>.
9. WORLD BANK GRP., DOING BUSINESS 2020: BRAZIL (2020), <https://archive.doingbusiness.org/content/dam/doingBusiness/country/b/brazil/BRA.pdf>.
10. Zuigao Renmin Fayuan Guanyu Zhishichanquan Minshi Xingzheng Anjianguanxiade Ruoganguiding (最高人民法院关于第一审知识产权民事、行政案件管辖的若干规定) [Several Provisions of the Supreme People's Court on the Original Jurisdiction over Civil and Administrative Cases involving Intellectual Property] (promulgated by the Sup. People's Ct., Apr. 10, 2022, effective May 1, 2022), art. 1, CLI.3.5116056(EN) (Chinalawinfo).
11. *Id.* at art. 2.
12. There are 3,087 county-level people's courts throughout mainland China.
13. Zuigao Renmin Fayuan Guanyu Yinfa Jicengrenminfayuan Guanxia Diyishenminshixingzhenganjian Biaozhun De Tongzhi (最高人民法院关于印发基层人民法院管辖第一审知识产权民事、行政案件标准的通知) [Notice by the Supreme People's Court of Issuing the Standards for Civil and Administrative Cases involving Intellectual Property Rights under Original Jurisdiction of the Primary People's Courts] (promulgated by the Sup. People's Ct., Apr. 20, 2022, effective Apr. 20, 2022), CLI.3.5116065(EN) (Chinalawinfo).
14. These IP tribunals are in the intermediary people's court in the cities of Chengdu, Nanjing, Suzhou, Wuhan, Hefei, Hangzhou, Ningbo, Zhengzhou, Nanchang, Changchun, Lanzhou, Xiamen, Wulumuqi, Jingdezhen, Chongqing, Shenyang, Wenzhou, Wuxi, and Xuzhou.
15. ANNUAL REPORT OF INTELLECTUAL PROPERTY TRIBUNAL OF THE SUPREME PEOPLE'S COURT (2019), <https://www.court.gov.cn/zixun/xiangqing/225861.html>.
16. ANNUAL REPORT OF INTELLECTUAL PROPERTY TRIBUNAL OF THE SUPREME PEOPLE'S COURT (2020), <https://www.court.gov.cn/zixun-xiangqing-288081.html>; ANNUAL REPORT OF INTELLECTUAL PROPERTY

TRIBUNAL OF THE SUPREME PEOPLE'S COURT (2021), <https://www.court.gov.cn/zixun-xiangqing-347361.html>.

17. On October 21, 2023, the Supreme People's Court amended the original jurisdiction of the IPTSPC by narrowing the scope of cases under its jurisdiction.
18. Yi Jiming, *Why IP Courts Shall Be Established*, THEORY WK. (June 18, 2014), http://rmfyb.chinacourt.org/paper/images/2014-06/18/05/2014061805_pdf.pdf.
19. Zuigao Renmin Fayuan Guanyu Shenli Qin Hai Zhishichanquan Minshianjian Shiyong Chengfaxingpeichang De Jieshi (最高人民法院关于审理侵害知识产权民事案件适用惩罚性赔偿的解释) [Interpretation of the Supreme People's Court on the Application of Punitive Damages in the Trial of Intellectual Property Infringement Civil Cases] (promulgated by the Sup. People's Ct., Mar. 2, 2021, effective Mar. 3, 2021), CLI.3.353342(EN) (Chinalawinfo).
20. Generally, a judge may hear as many as 400–600 cases a year, which are handled together by one judge, one assistant, and one court clerk.
21. Jiaxingshi Zhonghua Huagongyouxianzerengongsi, Shanghai Xincheng Xinjishu Youxianzerengongsi Yu Wanglong Jituanyouxiangongsi, Ningbo Wanglong Keji Gufenyouxiangongsi, Xifushi Wanglong Xiangliao (Ningbo) Youxiangongsi, Fu Xianggen, Wang Guojun (嘉兴市中华化工有限责任公司、上海欣晨新技术有限公司与王龙集团有限公司、宁波王龙科技股份有限公司、喜孚狮王龙香料(宁波)有限公司、傅祥根、王国军) [Jiaxing Zhonghua Chem. Eng'g Co., Ltd., Shanghai Xincheng New Tech. Co., Ltd. v. Wanglong Grp. Co., Ltd., Ningbo Wanglong Sci. & Tech. Corp. Ltd. by Shares, Xifushi Wanglong Indus. Flavour (Ningbo) Co., Ltd., Fu Xianggen & Wang Guojun] (Sup. People's Ct. Feb. 19, 2021), CLI.C.312099613 (Chinalawinfo).
22. Besides Hong Kong, an autonomous common law region, China is a civil law country. CHANG WANG & NATHAN MADSON, *INSIDE CHINA'S LEGAL SYSTEM* 78 (2013).

ENTITY:

SECTION OF INTELLECTUAL PROPERTY LAW

TOPIC:

INTERNATIONAL LAW, INTELLECTUAL PROPERTY

The material in all ABA publications is copyrighted and may be reprinted by permission only. Request reprint permission [here](#).

Authors

Yuri Fancher Machado

Montaury Pimenta Machado & Vieira de Mello

Yuri Fancher Machado is a partner at Montaury Pimenta Machado & Vieira de Mello in Rio de Janeiro, Brazil, where he assists clients from different industry and technology sectors in protecting their intellectual property, with particular emphasis on complex intellectual property litigation and online brand protection.

Maria Eduarda de O. Borrelli Junqueira

Montaury Pimenta Machado & Vieira de Mello

Maria Eduarda de O. Borrelli Junqueira is a partner at Montaury Pimenta Machado & Vieira de Mello in Rio de Janeiro, Brazil. Her experience includes handling complex litigation matters involving patents, trademarks, copyrights, domain names, designs, and unfair competition law.

Weixian Zhu

Tiantai Law

Weixian Zhu is a partner at Tiantai Law's Shanghai office, where he focuses his practice on intellectual litigation and data compliance and litigation.