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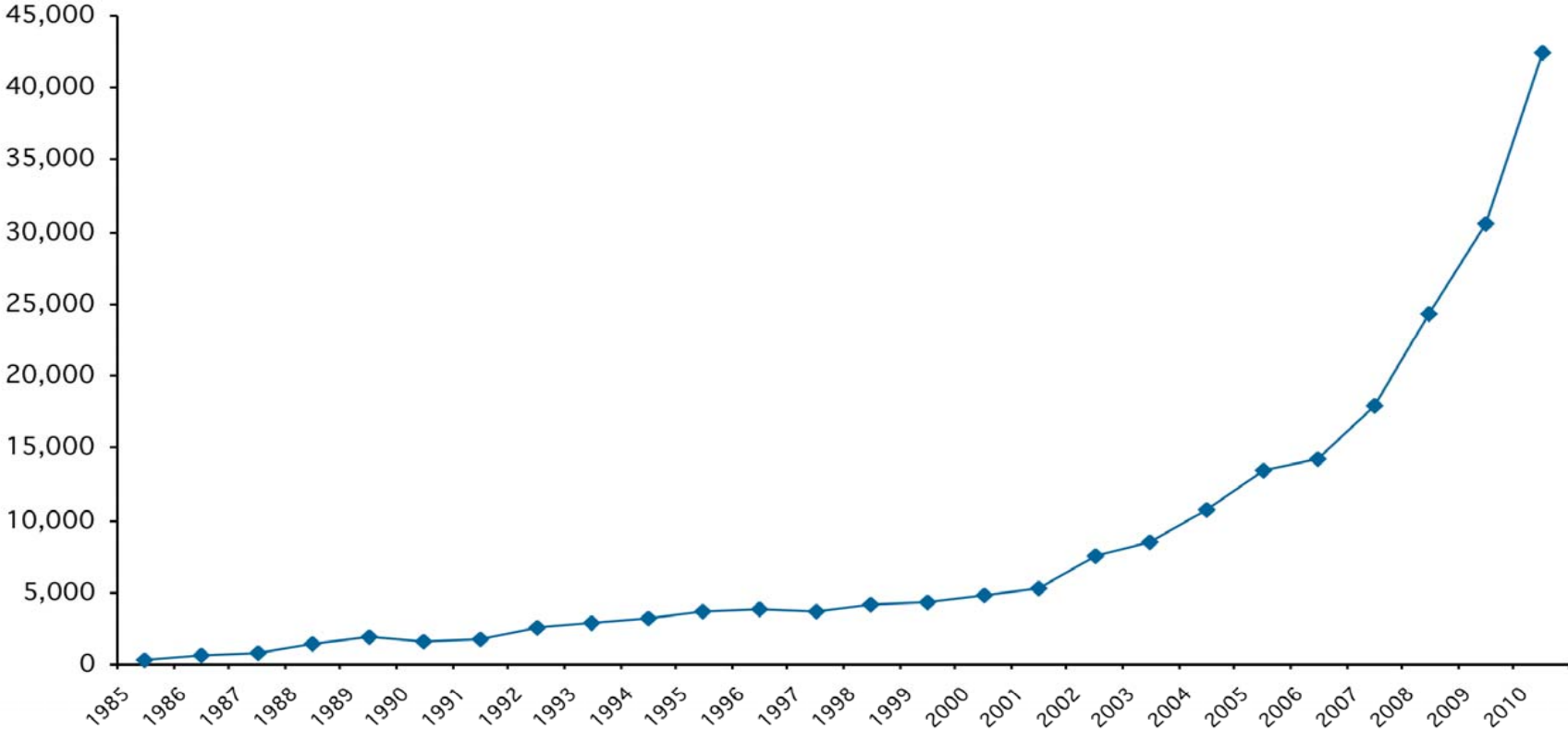
IP Developments in China

April 2012

Benjamin Bai

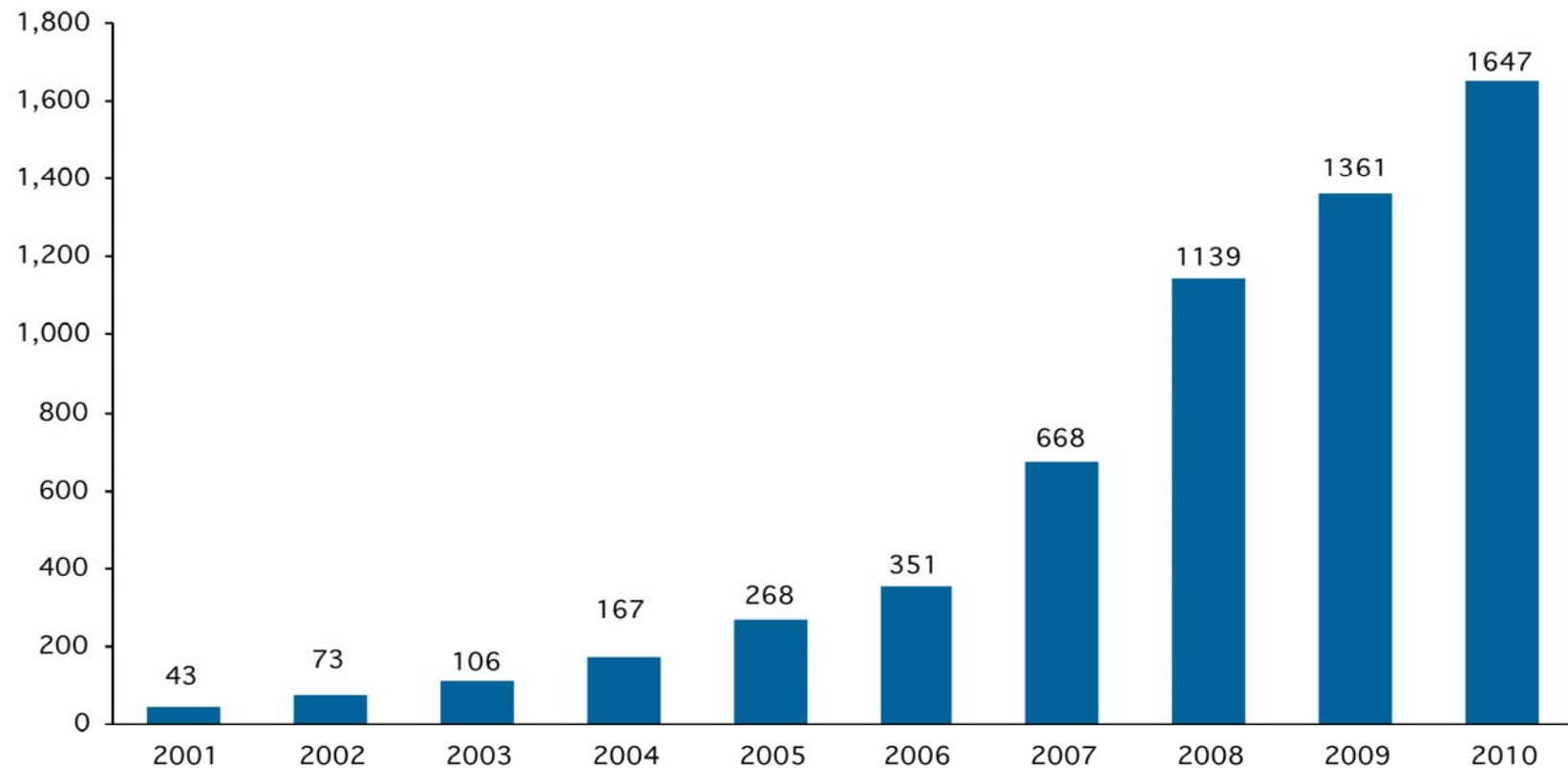
Explosive growth of civil IP cases (1985-2010)

1985-2010 IP Civil Cases of 1st Instance (Received)



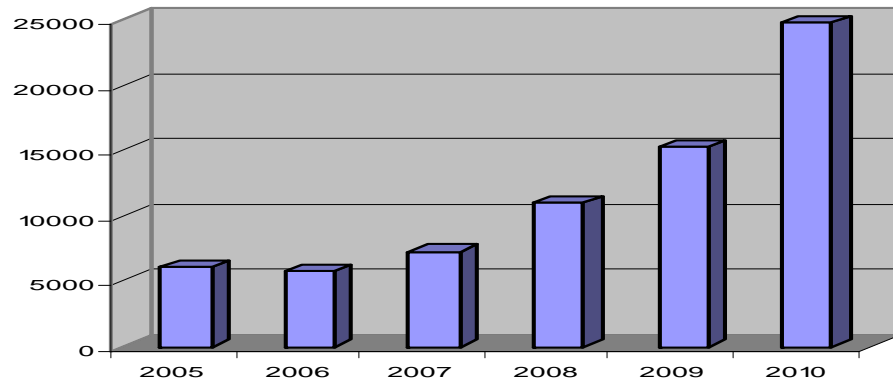
IP cases involving foreign parties: tip of the iceberg

Foreign Related IPR Civil Cases Concluded

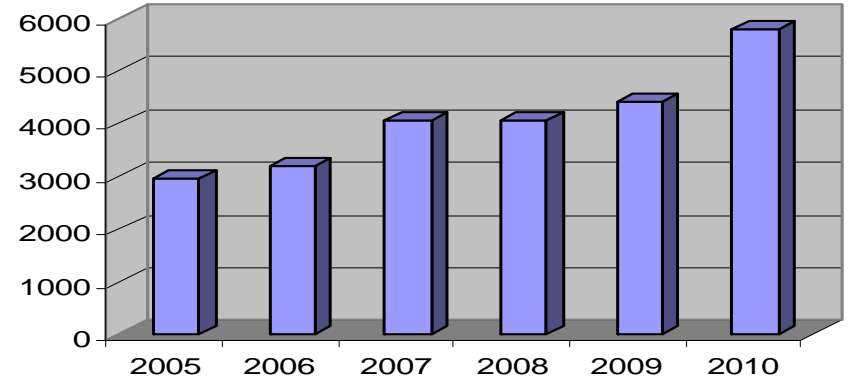


Case Filing Trends

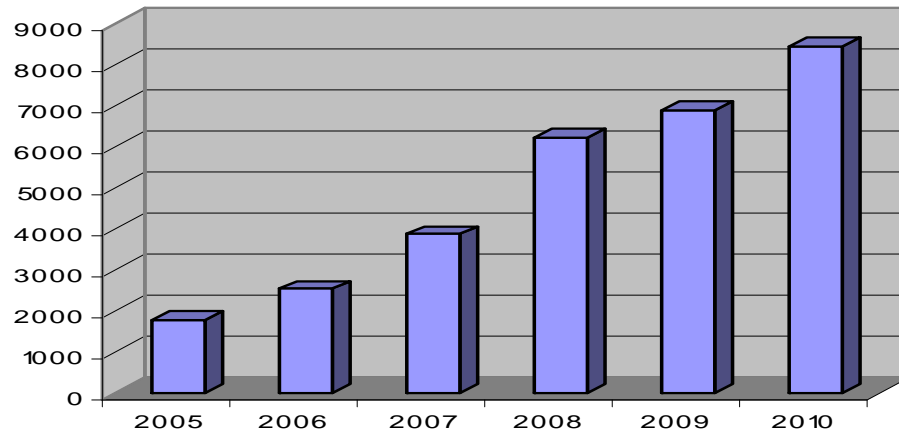
Copyright



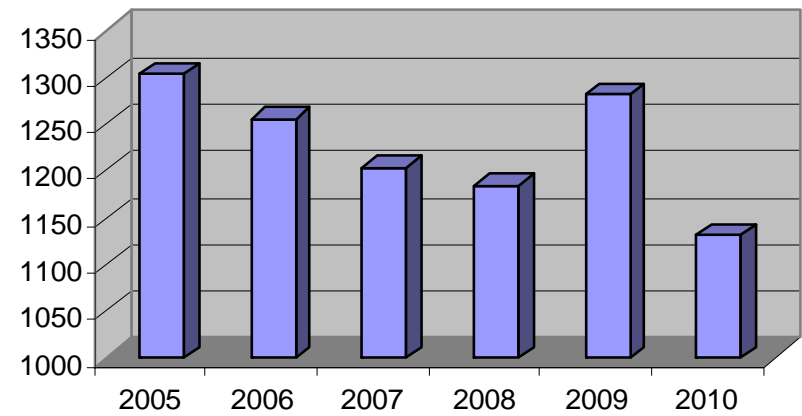
Patent



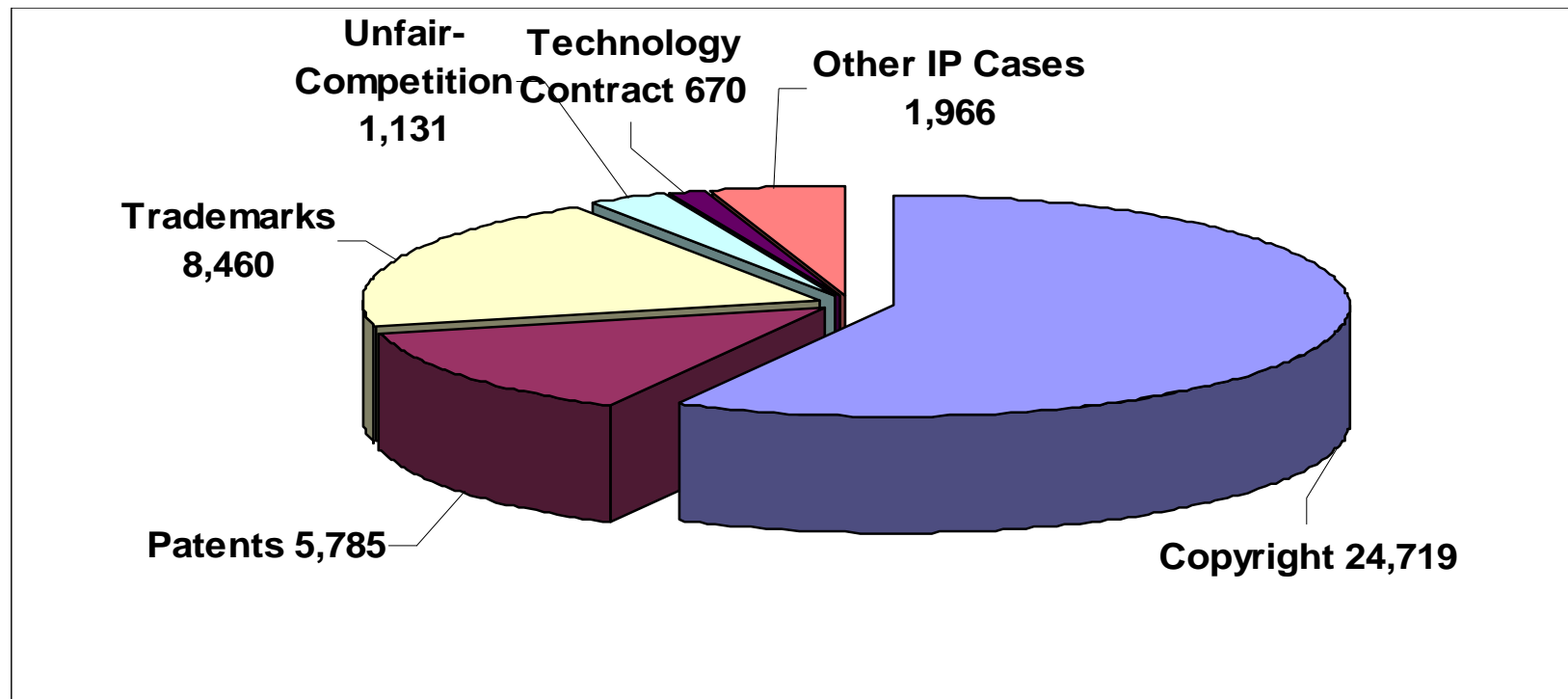
Trademark



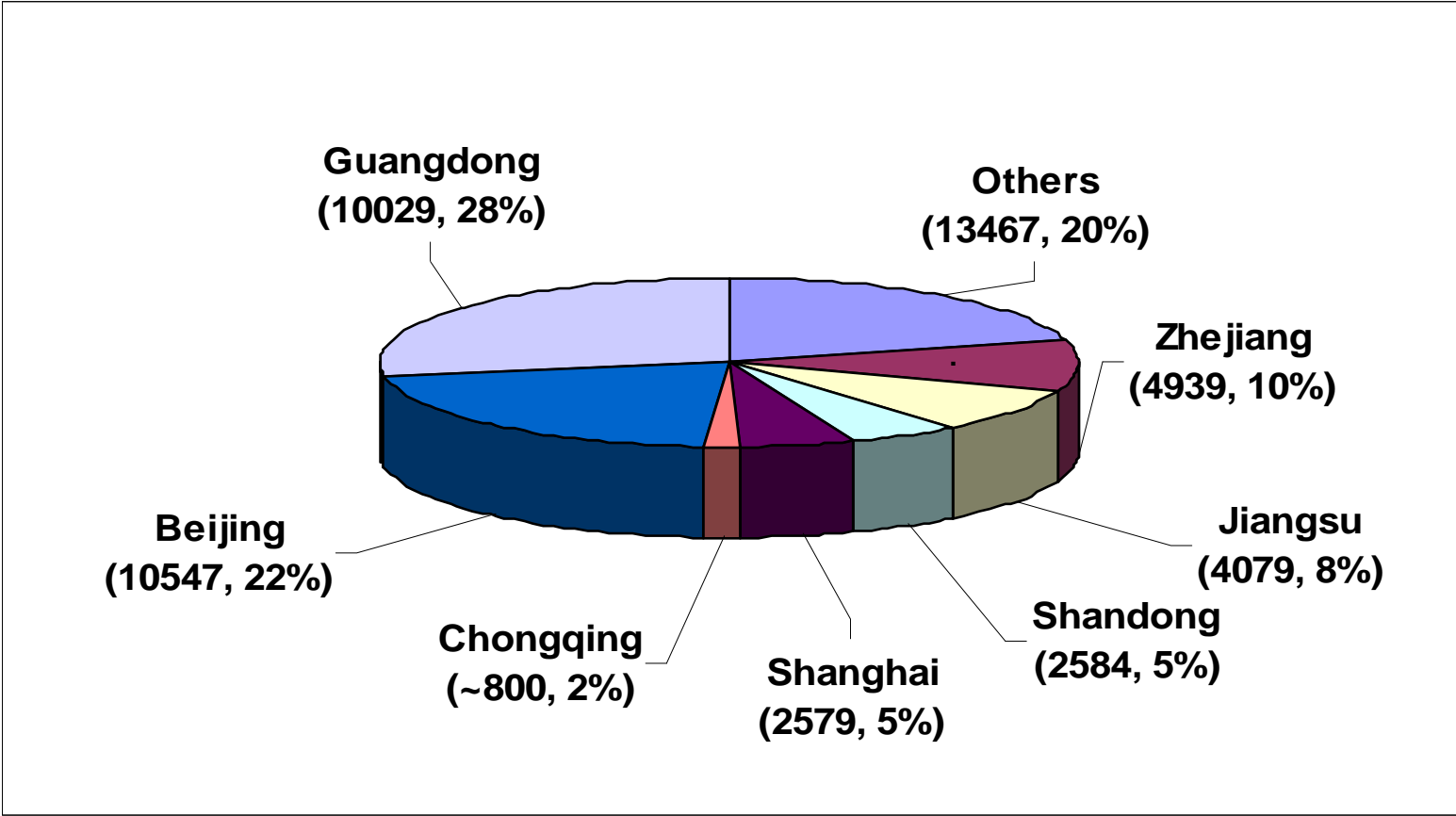
Unfair-Competition



Breakdown of IP Cases in China: 2010



2010 Breakdown by Region



September 2007: The Largest Patent Infringement Damages in China; - Settled for €16m in 2008

China fines Schneider €31m

French company in court patent dispute

Record intellectual property case penalty

By Jamil Anderlini in Beijing

A Chinese court has ordered France's Schneider Electric to pay a Chinese company €31m in damages for infringing its patent, the largest amount ever awarded in an intellectual property case in the country.

Intellectual property violations are one of the main sources of

friction between China and the rest of the world, and in the vast majority of IPR cases involving foreign players, the Chinese company is the defendant.

The intermediate People's Court in Wenzhou city, eastern Zhejiang province, told Schneider to stop making five types of miniature circuit-breakers, which it ruled were based on patents held by low-voltage equipment maker Chint Group of Wenzhou. The court also awarded Chint Rmb335m (€31.2m) in damages.

"This is the biggest amount by far granted in an intellectual property case in China," said

Larry Sussman, partner at O'Melveny & Myers lawyers in Beijing. "It's a startling development and could mean we are embarking on a new path in China."

Lawyers say China is notable for awarding tiny sums in IP rights cases and while there has been a number of high-profile rulings in favour of foreign companies, the wins have been largely symbolic and the amounts awarded inconsequential.

The fact the ruling was made by the hometown court of the plaintiff could have affected the outcome, lawyers say.

Schneider said yesterday it was

"disappointed" by the verdict, but intends to appeal and is challenging Chint's patents in a separate case. The company "strongly contests the validity of Chint's utility model" and "will continue working closely with the related Chinese judicial authorities to clarify the dispute". It asserts it has been using the technology in the disputed circuit-breakers since the early 1990s, before Chint's patent applications in 1999.

In spite of the record size of the damages a Chint spokesman said yesterday the ruling was "very normal in the process of the law" and showed the company was jus-

tified in protecting its intellectual property rights.

The damages were based on Schneider's profits from sales of the products from August 2004 to July 2006, according to a copy of the verdict obtained by the FT. Last month the Supreme Court in Beijing upheld the Zhejiang Provincial High Court ruling ordering Chinese motorcycle manufacturer Zhejiang Huatian to pay Rmb8.3m to Yamaha of Japan for infringing its trademark. That was the largest pay-out to a foreign company in an IP case in China and was seen as a watershed, said August Zhang, a lawyer at Rouse & Co.

December 2008: Samsung Mobile Phones Found Infringing and ordered to pay US\$7.3 Million damages



China Environmental Project Tech vs. FKK, et. al., winning US\$7.6 Million (May 2008), affirmed by Supreme Court on December 21, 2009

[19] 中华人民共和国国家知识产权局

[51] Int. Cl.

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[73] 专利权人 武汉晶源环境工程有限公司
地址 430077 湖北省武汉市卓刀泉路168号武
汉晶源环境工程有限公司
[72] 发明人 彭斯干 唐崇武
[56] 参考文献
CN1008811A 1988. 4. 6 CO2F3/02
CN2104216A 1993. 7. 7 CO2F7/00
JP-A-03-052632 1991. 3. 6 B01D53/34
JP-A-59-109225 1984. 6. 23 B01D53/34
燃煤烟气脱硫(91年第1版) 1991. 9. 1 张新生等,
中国地质大学出版社
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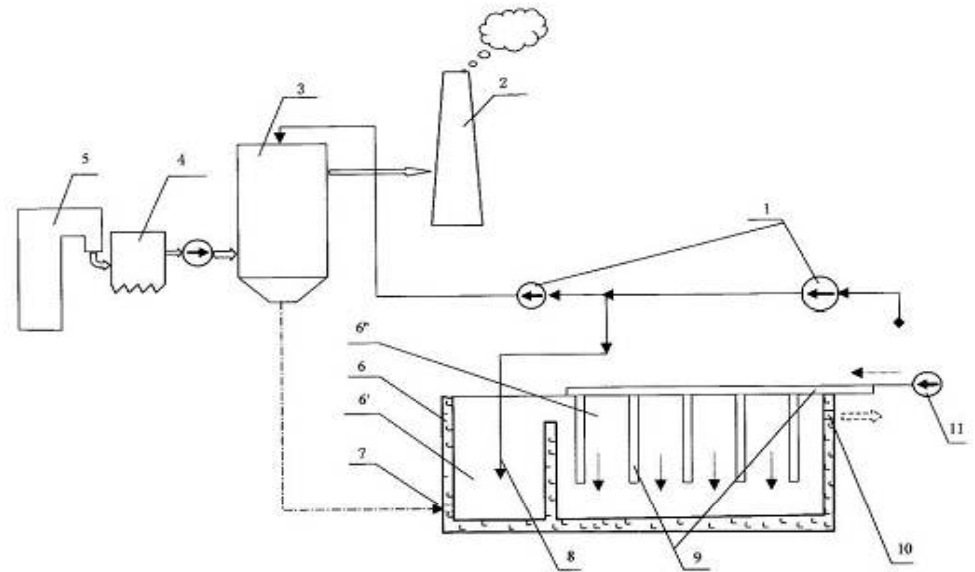
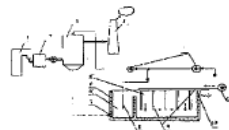
[74] 专利代理机构 中国科学院武汉专利事务所
代理人 王敏峰 宋国荣

权利要求书 1 页 说明书 5 页 附图页数 1 页

[54] 发明名称 曝气法海水烟气脱硫方法及一种曝气装置

[57] 摘要

本发明涉及曝气法海水烟气脱硫方法及一种曝气装置,它包括提取海水、用海水在洗涤塔中洗涤烟气中的SO₂,将吸收了SO₂的酸性海水与未吸收SO₂的海水掺混,对该混合的海水鼓入空气,向混合海水中鼓入空气的数量,可以是空气以标准立方米/小时、海水以立方米/小时来计量,其空气与混合后的海水的比例是:空气为从0.1到1.5,海水为1;曝气时间为从2分钟到20分钟以及将曝气处理后的海水排往海域等步骤,提供了一种能利用海水资源进行高效、低成本,同时使参与脱硫的海水排入海中后不造成新的污染的烟气脱硫方法及装置。



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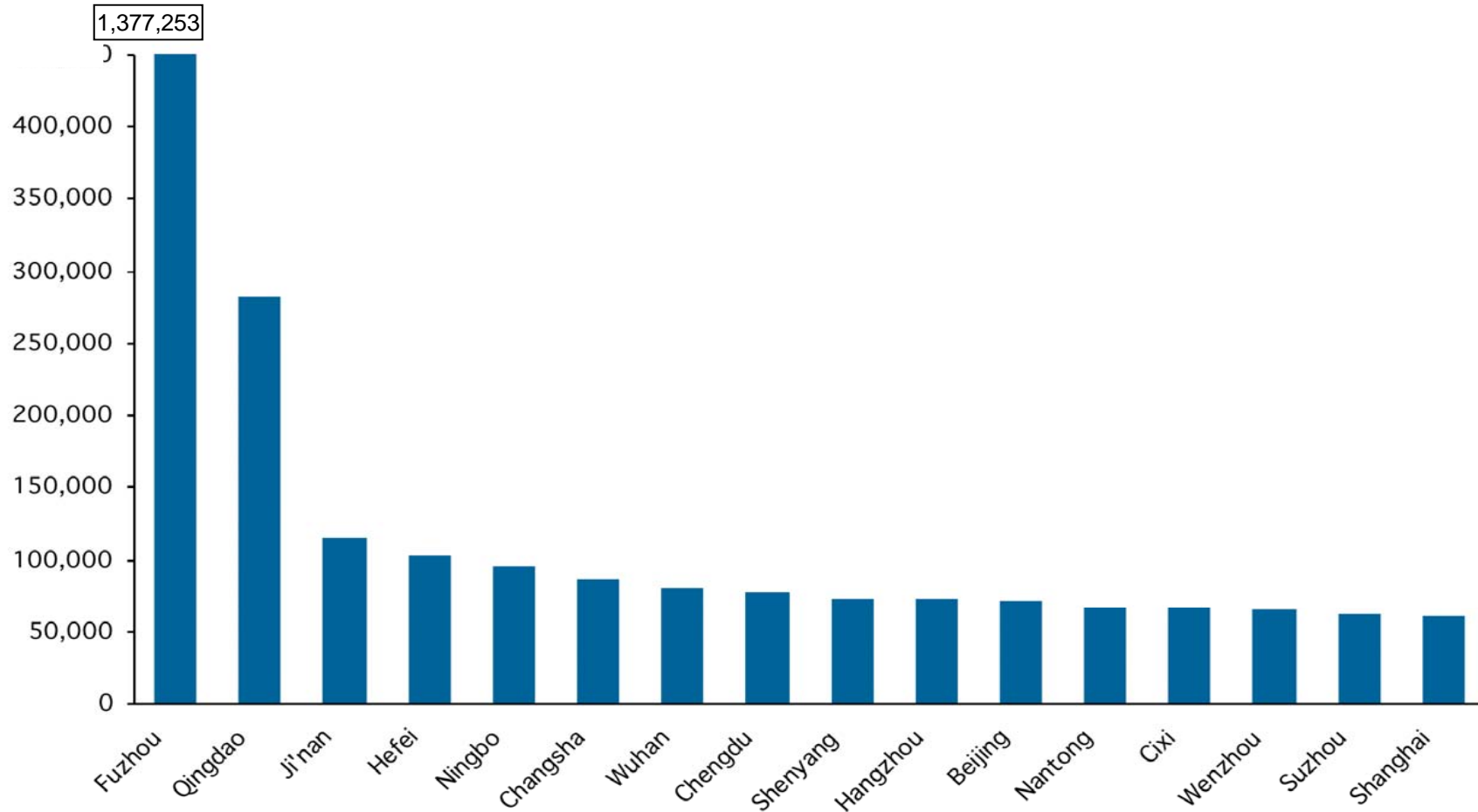
Neoplan vs. Zhongwei and Zhongda Winning US\$3.1 Million (2008/2009)



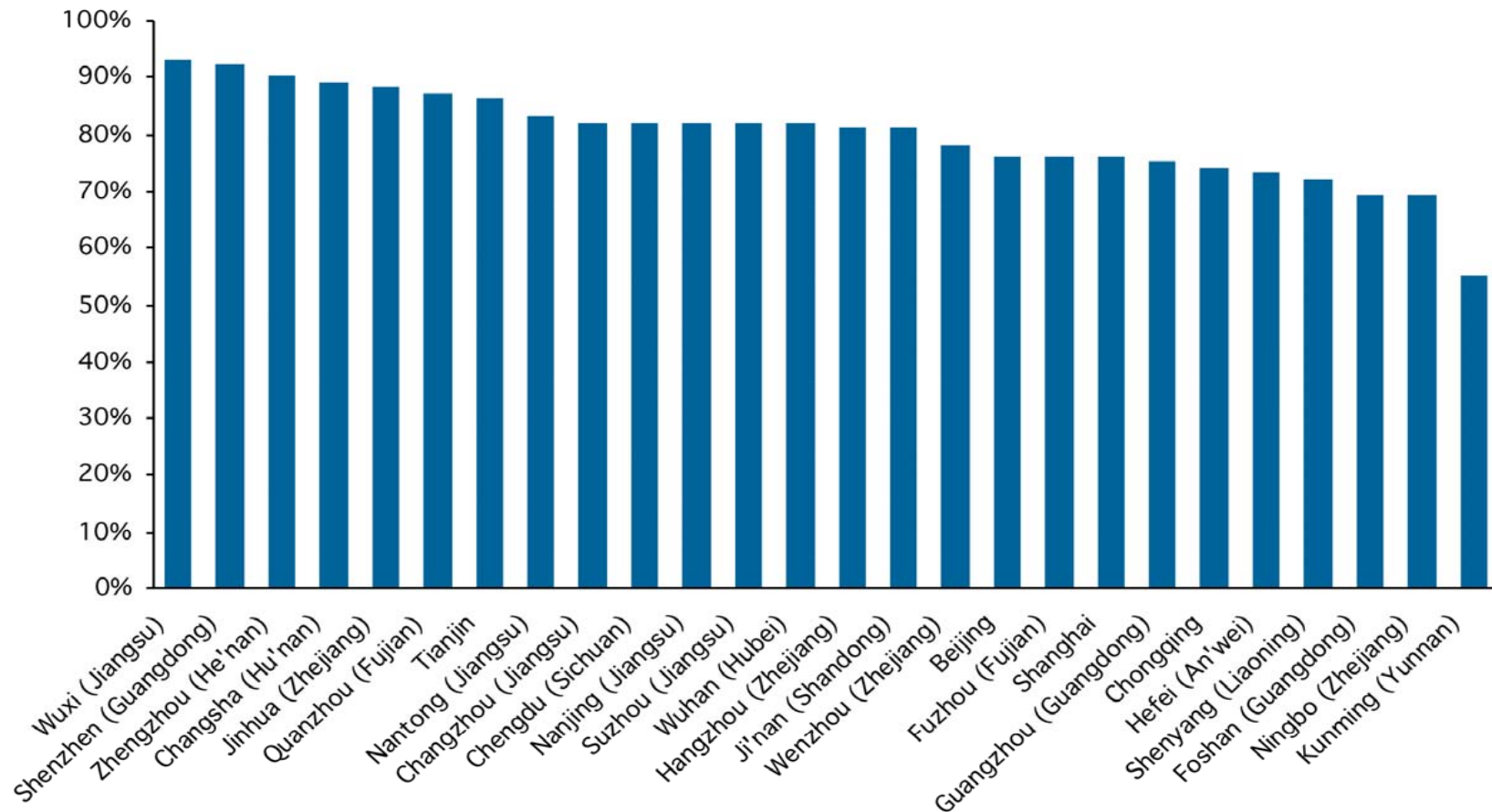
Strix, Ltd. vs. two Chinese companies Winning US\$1.3 Million (Jan. 2010)



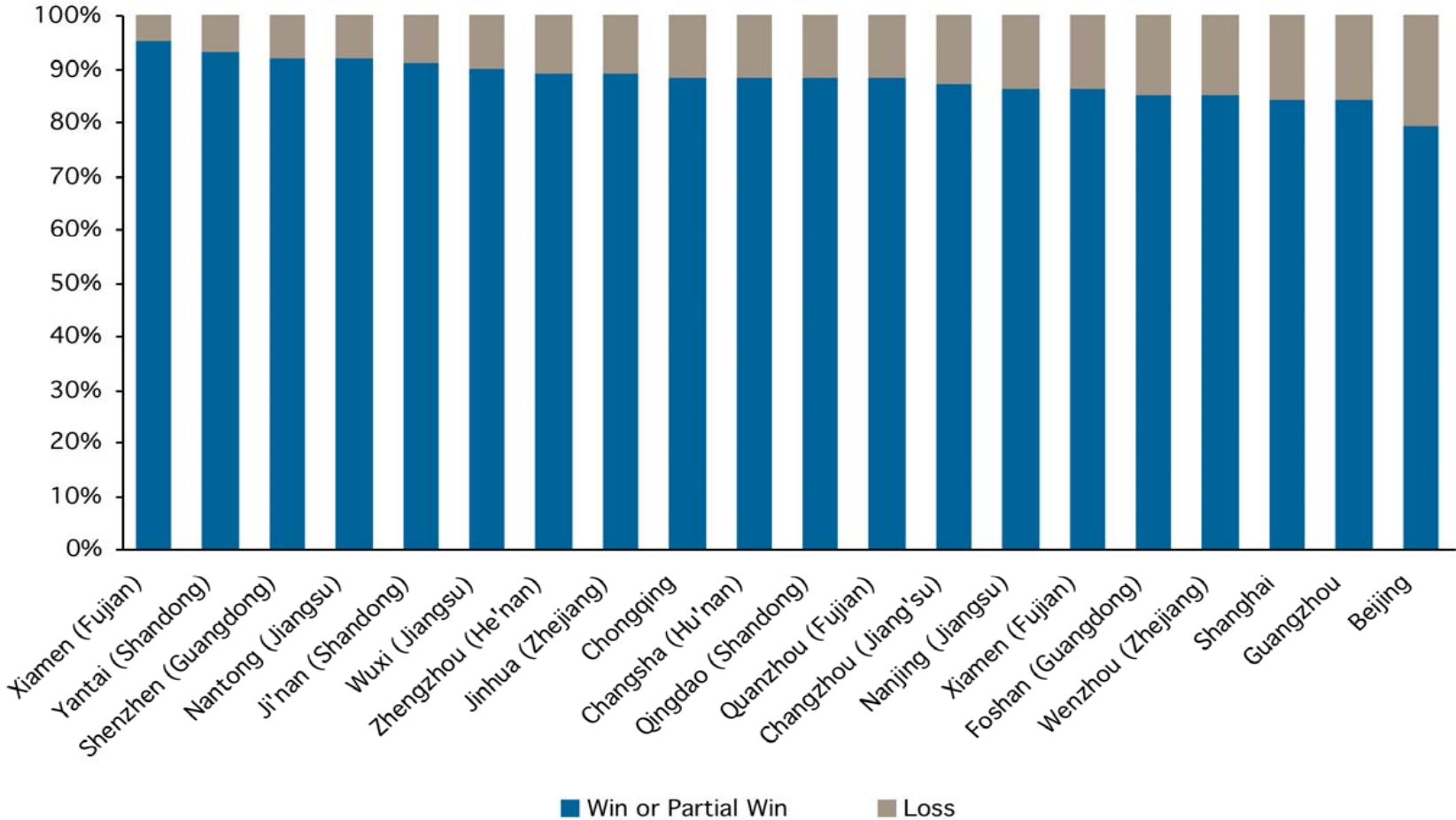
Average Patent Damages Award (RMB)



Rate of Permanent Injunction (26 Cities) in Patent Cases



Plaintiff's Win Rate in Patent Cases



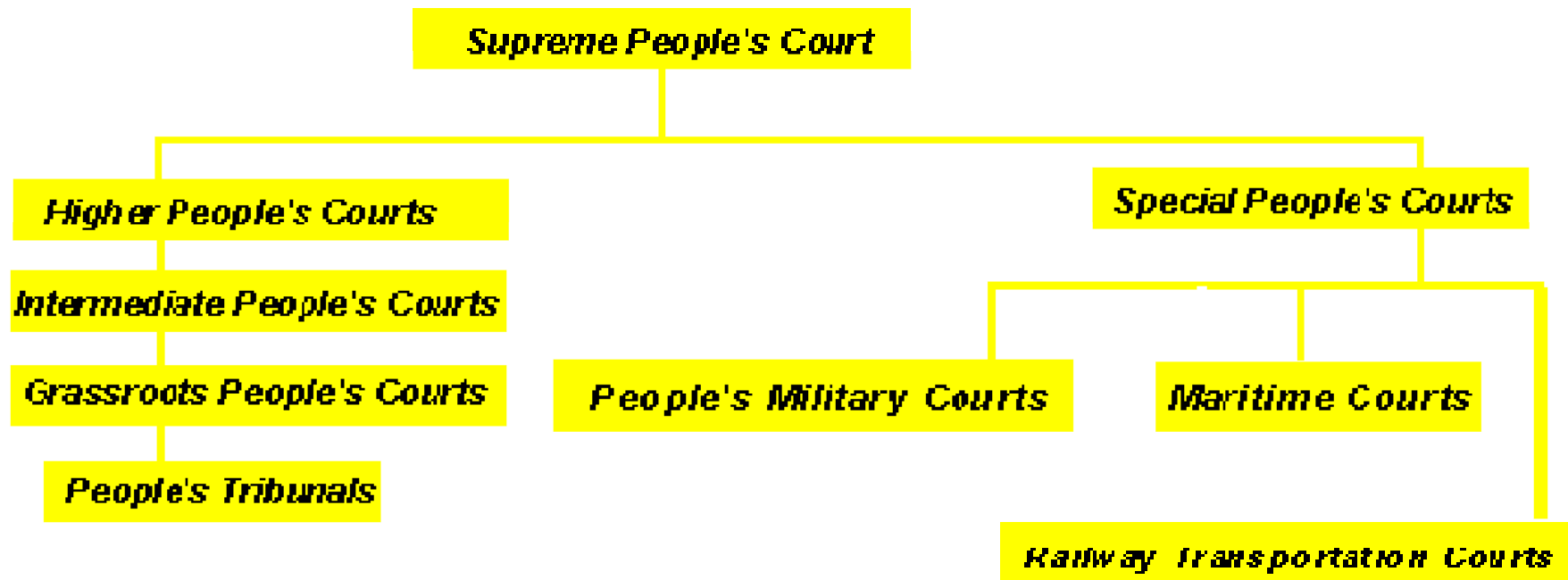
Empirical Studies: TM infringement cases in Zhejiang Province 2004-2009

- 1,270 trademark infringement cases in Zhejiang province during the years 2004–2009 were compiled and analyzed by Nathan Snyder.
- **Key Findings:**
 - **Win rates do not show foreign vs. domestic bias.**
 - Foreign companies win more cases than domestic companies.
 - Chinese courts are improving.

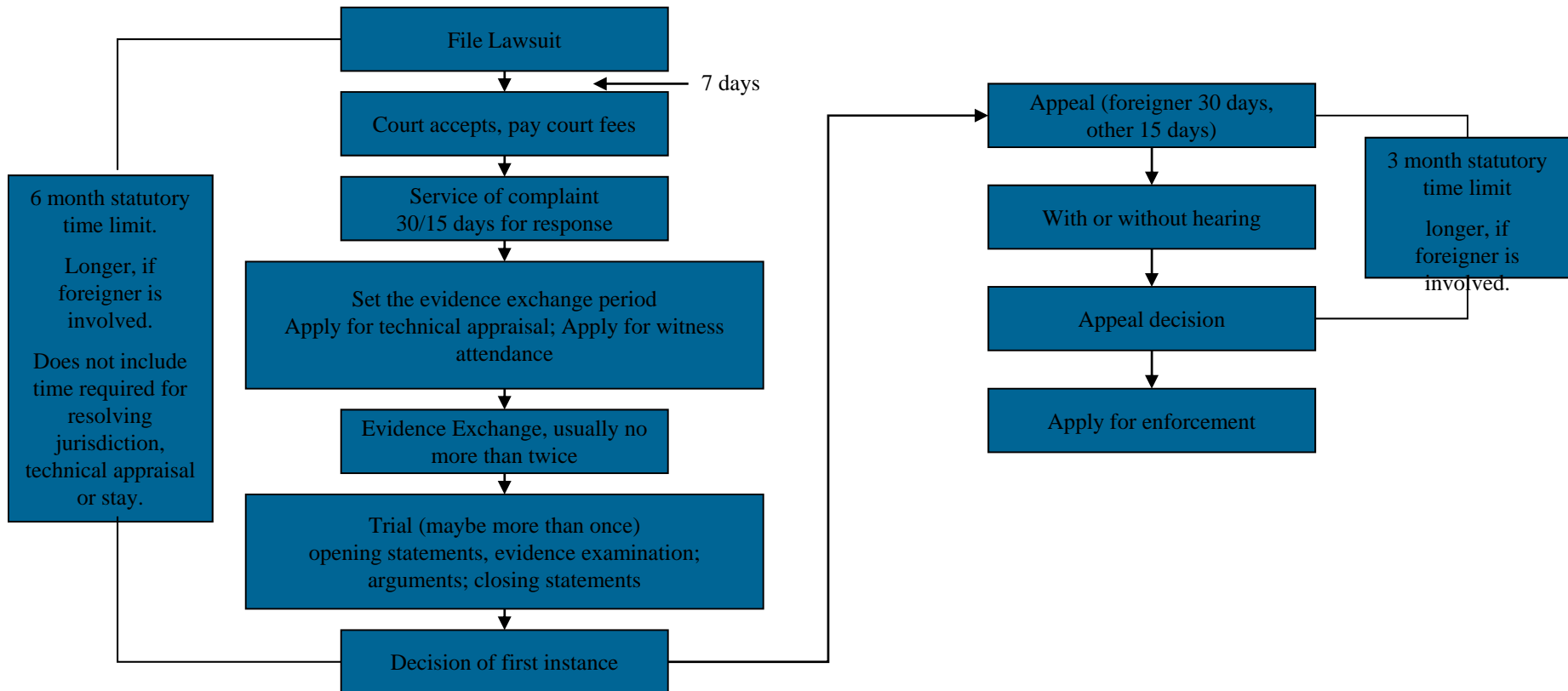
Nathan W. Snyder, Putting Numbers to Feelings: Intellectual Property Rights Enforcement in China's Courts—Evidence from Zhejiang Province Trademark Infringement Cases 2004–2009, 10 Nw. J. Tech. & Intell. Prop. 349 (2012).

<http://scholarlycommons.law.northwestern.edu/njtip/vol10/iss6/1>

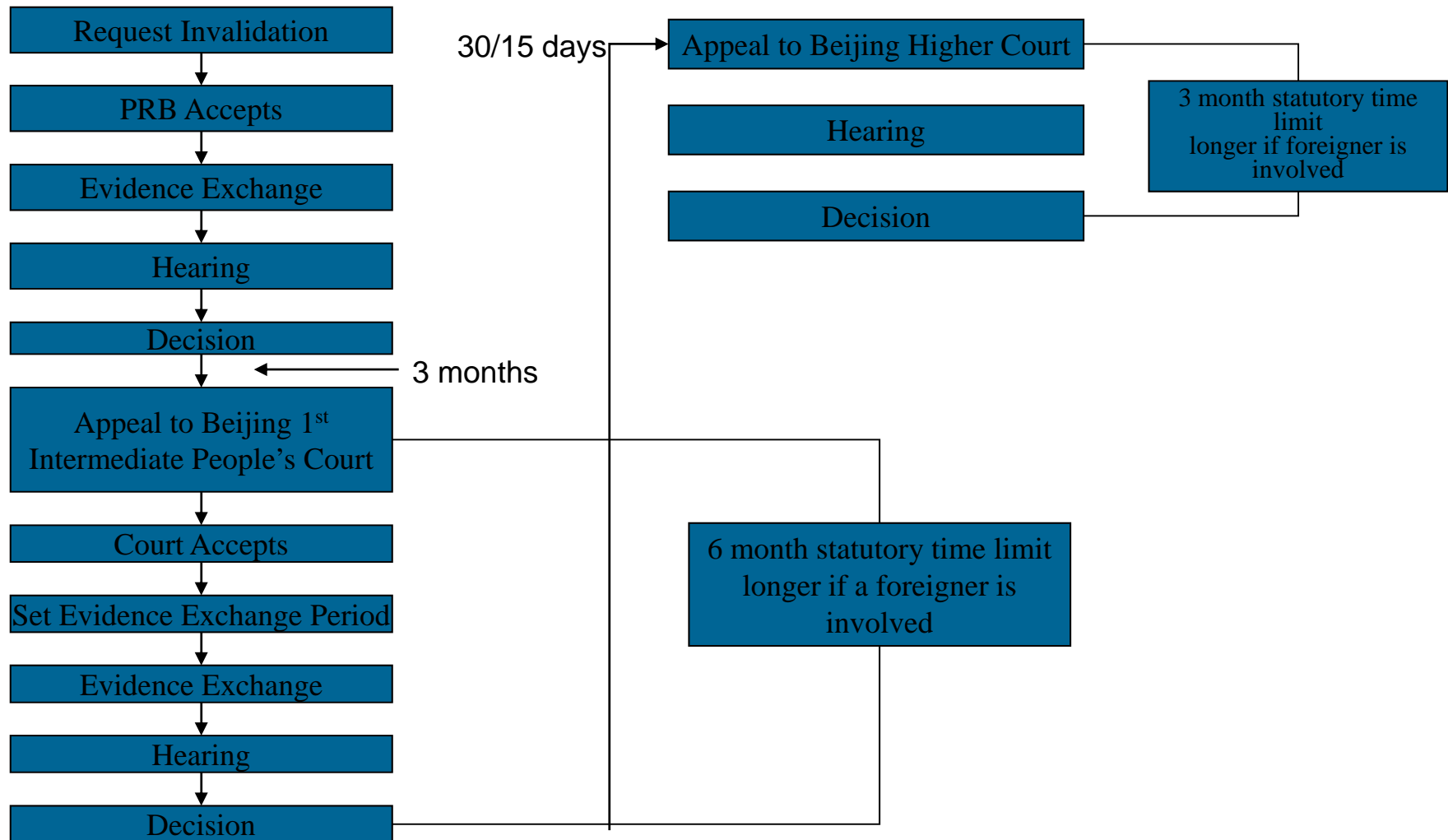
Chinese Court System



Patent Infringement Action: Procedures



Patent Invalidation Action: Procedures



Patent Invalidation Statistics

PRB:

2183 invalidation requests in 2007;

2038 invalidation requests in 2008;

2247 invalidation requests in 2009;

2411 invalidation requests in 2010;

- About 40% invalidated, 10% partially invalidated and 50% maintained
- For invention patents, **rate of success is less than 1/3**

Appeal to Courts:

About 20% decisions appealed to courts

Rate of Success: about 1/4

Supreme People's Court's Judicial Guidance on IP Adjudication

*Opinion on Several Issues Relating to Sufficient Utilization of IP Adjudication
to Foster Development and Prosperity of Socialist Culture and to Promote
Autonomous and Coordinated Economic Development*

December 16, 2011

Guidance on Claim Construction

- Balanced approach to claim construction
 - claim language v. object of invention
- Pioneer inventions are entitled to broader protection; conversely, incremental inventions lesser protection.
- Object of invention limits scope of patent; inferior inventions should not be covered.
- Disclosed but unclaimed technical features are dedicated to the public.
- Patentee is estopped from asserting any subject matter surrendered during prosecution or invalidation.

Guidance on Infringement Determination

- All elements rule.
- No infringement if one element and its equivalent is missing.
- An equivalent must meet the function/way/result analysis and must also be obvious.
- Practicing prior art is defense to infringement, both literally and equivalently.

Guidance on Prior Art Defense:

- There should be a primary prior art reference;
- A secondary reference can be combined with the primary reference;
- The combination must be obvious to a person of ordinary skill in the art;
- In other words, the missing technical features from the primary reference can be obtained by a person of ordinary skill in the art, without inventive labor.
- Prior art includes conflict applications (抵触申请)

Guidance on Patent Abuse

- Concept of “Patent Abuse” (滥用专利权)
 - Malicious assertion of invalid patents
 - Warning letter; or
 - Infringement action
 - Patentee knows that the patent is in prior art
- A form of unfair competition
- Liability for Damages

Guidance on Pre-Suit Injunctions

- Conditions for “Pre-Suit Injunction” (诉前禁令)
 - Facts clear; and
 - Infringement readily ascertainable
- Cases involving complex technologies
 - Not amenable to pre-suit injunction
 - If practicable, courts must hear arguments from both sides in determining infringement.
- Pre-Suit Injunction should not issue where there is an invalidation decision on the patent in suit (even if the decision is under appeal).

Guidance on Process Patent Enforcement

- Courts must balance patentee's rights and accused infringer's trade secrets in enforcing process patents.
- Burden of proof shifts where patented process makes a new product.
 - Patentee proves that the product and process is not known to the public before priority date; and
 - Then defendant must prove they use a different process.

Guidance on Process Patent Enforcement

- Court **may** shift burden of proof even if patented process does NOT make a new product, if
 - Patentee proves that the products are identical;
 - Patentee has made reasonable efforts but is unable to prove infringement; and
 - Court concludes that there is a high likelihood that defendant uses the patented process based on common knowledge and facts of the case.
- Court should grant evidence preservation in cases of difficulty in collecting infringing evidence.
 - Must prevent abuse and safeguard defendant's trade secrets.

Supreme Court Case Study:

*Fujian Dolin Steel Group, Ltd. vs. Qidong
Balin Steel Balls Company*

*Civil Docket No. 979 (2010)
September 8, 2010*

Claim Construction Issue:

Claim 1.

A method of making steel powder, characterized in that

- Sintering steel shavings generated from gear production;
- After sintering, subjecting the steel shavings to two-stage pulverization; and
- Sifting the steel powder so obtained to various sizes.

Issue: What does “two-stage pulverization” mean?

Claim Construction Rules:

- **Claim construction starts with claim language.**
- **Where a claim is subject to different interpretations, one must resort to the specification and drawings for the proper interpretation.**
- **Where a term is clearly defined in the specification, such definition must be adopted for claim interpretation.**
- **Relevant dictionaries can be used to aid claim construction.**

Claim Construction Facts:

- **“two-stage pulverization” is not a term of art which has a well-accepted meaning.**
- **“two-stage pulverization” is explained in the specification as follows.**

“The invention uses two-stage pulverization. A C-type pulverizer is used for rough pulverization and a F-type pulverizer for fine pulverization. In this invention, steel shavings of bigger size are broken down to smaller sizes by the C-type pulverizer, followed by fine pulverization.”

Claim Construction Facts:

- **According to the Dictionary of Chemical Engineering Terms, pulverization equipment can be for rough pulverization and for intermediate or fine pulverization.**
- **Rough pulverization starts with particles ranging from 40-1,500 mm in diameter and break down them to those ranging from 5-50 mm in diameter.**
- **C-type pulverizers is used for rough pulverization.**
- **Intermediate or fine pulverization starts with particles ranging from 5-50 mm in diameter and break down them to those ranging from 0.1-5 mm in diameter.**
- **Rolling-type pulverizations is used for intermediate or fine pulverization.**

Claim Construction Ruling:

- **In light of the definition in the specification, “two-stage pulverization” must be interpreted as a two step process comprising rough pulverization followed by fine pulverization.**
- **The above interpretation is consistent with the specification and is also consistent with the Dictionary of Chemical Engineering Terms.**

Accused Infringing Process:

- **The accused infringer uses a double-gear pulverizer.**
- **Steel shavings are run through the double-gear pulverizer several times to obtain the desired particle sizes.**

Infringement Determination:

- **All elements rule.**
- **No infringement if one element and its equivalent is missing.**
- **Single-stage fine pulverization is not the same as or equivalent to two-stage pulverization comprising rough pulverization followed by fine pulverization.**
- **No infringement!**

Infringement Determination:

- **But the plaintiff asserts that the gear spacing in the double-gear pulverizer can be adjusted to do both rough and fine pulverization.**

- **Court held that there is no evidence to prove such.**

- **What if it was true? Infringement?**
 - **Single stage vs. two stage**

Conclusions

- China's Current IP landscape is generally plaintiff-friendly
 - Overall plaintiff's win rate > 80% in many cities
 - Foreign parties win more than domestic parties in many cities
 - Rate of permanent injunction >75% in many cities
 - Invention patent validity rate > 67%
- Chinese Supreme Court offers glimmer of hope for better IP enforcement system
 - Emphasis on judicial accuracy, consistency, and transparency
 - Interpreting patent claims to be more akin to the U.S.
 - Patent abuse to curb junk patent assertion
 - Burden-shifting to aid process patent enforcement
- But restraints on preliminary injunctions are undesirable!

Thank You
For More Info, Please Contact

Benjamin Bai

Partner

Allen Overy LLP, Shanghai Office

benjamin.bai@allenoverly.com