



「Significance of Capital Contribution with Patent Licensing Rights in China」

Enterprises with patented technology often collaborate with Chinese companies with a solid network and deep financial strength in the local area in the form of Joint Ventures to enter the Chinese market more easily when entering China. In this case, Korean companies (especially start-ups) tend to prefer in-kind contributions of patented technologies rather than cash contributions.

The first issue to be determined when making in-kind contributions by patented technology is whether to invest as a patent or a patent licensing right. In our experience, some companies invest a lot of money in the joint venture process only to realize the difference in hindsight, and either abandon the joint venture project or reconsider it from scratch. Below, we briefly explain the case of contributing by a patent licensing right in China.

1. Legal basis for capital contribution of patent licensing rights

According to the provisions of Article 27, paragraph 1, of the Company Law of China, shareholders may make capital contributions with non-monetary assets such as physical assets, intellectual property rights, land use rights, etc. that can be valued in cash and transferred in accordance with the law, except for assets that cannot be used as capital contributions under the relevant law of China.

Article 13, Paragraph 2 of the Administrative Regulation of the People's Republic of China on the Registration of Market Entities lists assets that cannot be used for capital contribution, including labor services, credit, name of a natural person, goodwill, franchise rights, or assets secured by

collateral.

(i) Patent licensing right can be evaluated for its value, (ii) is legally transferable, and (iii) does not belong to assets that cannot be used for capital contribution. Therefore, according to the above regulations, it can be concluded that capital contribution by patent licensing right is legally possible in China, which is also widely recognized in China.

In addition, most Chinese courts have judged that capital contributions with patent licensing rights are in accordance with the law and are therefore recognized.

2. Court precedents

The two cases below are the cases in which the Intermediate People's Courts of Shanghai and Nanjing in Jiangsu Province recognized the capital contributions with patent licensing rights among major cities in China.

- **The 2018 ruling from the Shanghai Second Intermediate People's Court**: The agreement stipulated that the contribution was undertaken through the technology usage rights as per the contract. The valuation was conducted on the usage rights rather than ownership. Given that the invested company effectively utilized the technology in its business operations, it was acknowledged that the obligation for contribution with the patent licensing right or technology license had been fulfilled.
- **The 2013 ruling from the Nanjing Intermediate People's Court in Jiangsu Province**: Despite the absence of a distinct agreement on whether the investment stemmed from patent rights or patent licensing rights, it was observed that the invested company had employed patent technology in its business operations without undergoing the patent transfer process. Additionally, since there is no legal prohibition against contributions via patent licensing rights, the contribution based on patent licensing rights should be acknowledged.

The above court rulings are all civil lawsuits filed by investors in which there was a dispute as to contribution with patent rights versus patent licensing rights, and the courts recognized contribution with patent licensing rights. While contribution with patent licensing rights is recognized by Chinese courts as above, it is also important to note the practice attitude of the local registration department.

3. Attitudes of Different Local Authorities

In China, whether it is a cash contribution or an in-kind contribution, the contribution method and its amount must be registered with the local authorities. In our experience, local authorities take a different stance toward the registration of contributions by patent licensing rights, which often leads to difficulties in practice.

For example, the registration departments in Beijing and other regions were of the opinion that it is not possible to register the contributions with patent licensing rights, and registration departments in Shanghai and other regions gave an ambiguous opinion that it should be judged depending on specific circumstances. The registration department in Hunan Province stated that they did not recommend it because they had no experience in actually registering capital contributions with patent licensing rights.

In other words, the biggest challenge to overcome when contributing with patent licensing rights in China is the formidable 'barrier' by the

registration department. Furthermore, even within the same registration department, there are no uniform internal regulations or work guidelines, so it is not uncommon to see different opinions from different officials. However, filing an administrative lawsuit against the department in charge of registration (i.e., the government) is not an easy option in China, so it is inevitably difficult for those working in practice.

While currently uncommon, however, there are a few recorded cases where the completion of contribution involving patent licensing rights has taken place through the registration process. As the industry's awareness of this trend continues to grow, the possibility of wider acceptance gains traction. The anticipation is that with the formulation of clearer practical guidelines, this approach might eventually transform into a universally recognized method of contribution in China in the future.

4. Implications

As noted above, despite the absence of legal prohibition, contribution via patent licensing rights in China faces practical challenges. There exist varying attitudes from local authorities and courts, contributing to its limited usage. Should investors find themselves compelled to invest through patent licensing rights, it is advisable to engage legal professionals from the outset of investment. Thoroughly assessing the aforementioned issues and devising a comprehensive business plan can ultimately mitigate risks and achieve cost savings.

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