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The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

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# Patent Litigation

Pakistan  
Bharucha & Co.

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# Law and Practice

*Contributed by Bharucha & Co.*

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**Bharucha & Co.** has a patent department that consists of a combination of advocates and patent agents, along with other office assistants, and deals with almost all kinds of

patent matters, including filing, prosecution, registration, post-registration, assignments, annuities, searches and analysis.

## Authors



**Mohammad Fazil Bharucha** is a partner of the firm. Mr. Bharucha focuses on a range of contentious and non-contentious IP matters, including litigation. He often represents clients in the High Court in patent and trade mark disputes, has been involved in the committee drafting the curriculum for the introduction of IP law courses in colleges and universities in Pakistan and has also conducted training session for members of the judiciary in relation to IP laws. He is an advocate of the High Court, and a member of the Sindh Bar Council, the Karachi District Bar Association, the International Association for the Protection of Intellectual Property (AIPPI), the Asian Patent Attorneys Association (APAA), the International Federation of Intellectual Property Attorneys (FICPI), the Licensing Executive Society (LES), the Chartered Institute of Patent Attorneys (CIPA) and the American Intellectual Property Law Association (AIPLA).



**Samina Naz Siddiqui** is a patent associate within the team. Mrs Siddiqui is involved in advising clients on Patent Examination Reports, the drafting of claims, general correspondence, assignments and searches, especially relating to the pharmaceutical, chemical and biotechnological sectors. She is a member of APAA.



**Hameeda Asif** has extensive experience advising national and international clients on both legal and technical matters, and on prosecution and contentious matters, especially relating to the pharmaceutical, chemical and biotechnological sectors. She is an Associate Attorney at the firm, and a member of the Sindh Bar Council, Karachi District Bar Association, APAA, LES and AIPPI.

## 1. Types of Intellectual Property Rights & Grant Procedure

### 1.1 Types of Intellectual Property Rights

Inventions in Pakistan are protected as patents based on statutory laws under the Pakistan Patents Ordinance 2000 (the Ordinance) and the Patent Rules 2003 (the Rules). However, over the years courts have given decisions and they are also persuasive.

### 1.2 Grant Procedure

An application for a patent protection is filed with the Pakistan Patent Office on the prescribed form.

There are three types of applications:

- a conventional application claiming 'right of priority' from an application first made in a World Trade Organization (WTO) member country;
- an ordinary application (non-conventional) with provisional or complete specification; and
- application for a patent of addition, for improvement or modification of an invention for which a patent has already been applied for or granted.

Once a conventional or ordinary application is filed, its elements will be scrutinised individually. Examination is based on substantial and formal matter, including a prior art search, and multiple reports may be issued. If all the objections are met to the satisfaction of the Controller of Patents (the Controller), the application is accepted and advertised in the Gazette of Pakistan. Where no objections have been filed against the application within four months of publication, a sealing fee is paid. Upon payment of a sealing fee, a Letters Patent Document (grant letter) is issued.

However, where an application for an addition or improvement has been filed, the procedure for grant is the same as above but under the Ordinance, Section 41 the provision of a patent of an addition is not to be refused on the ground of inventive step. The term of a patent of addition is equal to the term of the main invention or the part of it that is unexpired, ie, it will expire with the main patent.

### 1.3 Timeline for Grant Procedure

The duration of the grant procedure depends on the complexity of the subject matter of the invention, the number of official actions issued by the Patent Office, hearings, if any, and the subsequent grant of equivalent patents of WTO member countries. After acceptance and upon publication of an invention, third-party observation and/or opposition

lengthen the timeframe for the grant of a patent. On average it takes about two-three years from the date of filing the application until grant is made, provided there is no opposition.

Under the Ordinance, Section 81 all applications and communications to the Controller may be signed by a patent agent or an advocate authorised in writing by the person concerned and as per rule 7(1) every applicant is required to provide an address for service in Pakistan. Where an inventor is not present in Pakistan, a patent agent or legal practitioner in Pakistan must be appointed.

Official fees are as follows:

- filing fee for a specification consisting of 40 pages and 20 claims: approximately USD33;
- fee for filing a response to an examination report (per report): approximately USD4; and
- sealing fee: approximately USD33.

## 1.4 Term of Each Intellectual Property Right

The total term of a patent is 20 years from the date of the initial filing, which is not extendable.

## 1.5 Rights and Obligations of Owner of Intellectual Property Right

The holder of a valid patent has the right to:

- prevent third parties not having the owner's consent for the acts of making, using, offering for sale, selling or importing for these purposes that product and at least the product obtained directly by that process;
- assign or transfer the patent by succession and to conclude licensing contracts;
- institute court proceedings against any person who infringes the patent by performing without his or her agreement.

A patentee may initiate a suit for infringement and the court may grant relief by way of damages, injunction and accounts.

Regarding imports, under the Customs Act, 1969 the authorities may seize, confiscate or detain any infringing articles at the border and prevent the products from entering Pakistan.

## 1.6 Further Protection After Lapse of Maximum Term

There is no further protection given to any patent after the 20-year term.

## 1.7 Third-Party Rights to Participate in Grant Proceedings

Third parties have a right to make observations in writing to the Controller after publication of the specification, but they cannot become party to the proceedings. Such observations

are to be on the novelty of the invention along with evidence in support of it.

## 1.8 Remedies Against Refusal to Grant Intellectual Property Right

In the event of a refusal to grant a patent, the applicant may file an appeal in the High Court.

## 1.9 Consequences of Failure to Pay Annual Fees

The annual renewal fee is to be filed by the due date or within six months of that date with a late fee. If it is not paid during this term the patent is deemed terminated and is likely to be removed from the register of patents. As a remedy, a restoration application within 18 months from the due date of renewal may be filed, along with statement of satisfactory reason for non-payment and the official fee of approximately USD90.

# 2. Initiating a Lawsuit

## 2.1 Actions Available Against Infringement

The patent-owner may initiate a civil suit in a court of law. Where an infringed patented product has been imported, the patent-owner may seek action through the customs authorities.

Additionally, an action against a third party may also be brought under the Competition Act 2010, Section 10 for deceptive marketing practices.

## 2.2 Third-Party Remedies to Remove Effects of Intellectual Property Rights

An action to remove the effects of a patent in Pakistan takes one of the following forms:

- opposition proceedings may be brought before the Controller against the grant of the patent by any person within four months of its advertisement in the Patents Journal;
- any interested person or the Federal Government may file an application for the revocation of a patent before the High Court under the Ordinance, Section 46 or before the Controller under Section 47;
- if the public interest, in particular national security, nutrition, health or development of other vital sectors of the national economy so requires and the Federal Government has determined and is satisfied that the manner of exploitation by the owner of the patent or the licensee is anti-competitive and that the exploitation of the invention would remedy such practices, the Federal Government under Section 58 may, even without the consent of the owner of the patent, decide that a Government agency or a third person designated by the Federal Government may exploit a patented invention; or

- under the Ordinance, Section 59, the Controller has the power to grant a compulsory licence on request, made in the prescribed manner after the expiry of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever expires later.

### 2.3 Courts with Jurisdiction

Civil suits can be initiated before Intellectual Property Tribunals that have jurisdiction, which is determined by the defendant's place of business or residence. Appeal against the judgment and order of the Tribunal is to be filed in the High Court that has territorial jurisdiction over the Tribunal. An appeal against the High Court's order may be filed in the Supreme Court of Pakistan.

### 2.4 Specialised Bodies/Organisations for the Resolution of Disputes

Intellectual Property Tribunals are specialised bodies that deal with all disputes relating to intellectual property.

### 2.5 Prerequisites to Filing a Lawsuit

There are no prerequisites to filing a lawsuit.

### 2.6 Legal Representation

Individuals may choose to represent themselves if they do not want to engage a lawyer. However, with a view to assisting the court or tribunal it is advisable to engage a lawyer who is well versed in court practice and procedures.

### 2.7 Interim Injunctions

Interim injunctions are available. The law relating to temporary injunctions has been provided in the Specific Relief Act 1877 and the Specific Relief Act, Section 53 provides that the temporary injunction is to continue until a specified time, or until the further order of the Court. They may be granted at any time during an action, and are regulated by the Civil Procedure Code 1908 (CPC).

The grant of an interim injunction is governed by three basic principles, ie, a prima facie case; the balance of convenience; and irreparable loss.

### 2.8 Protection for Potential Opponents

According to the Ordinance a defendant may not be charged for the damages where it is proved that at the date of infringement he or she was not aware and had no reasonable ground for supposing that the patent existed. A person shall not be deemed to have been aware or to have had reasonable grounds for supposing that the patent existed simply because the word 'patent', 'patented', or any word or words expressing or implying that a patent has been obtained for the article is present, unless the number of the patent is clearly visible.

### 2.9 Special Limitation Provisions

Under the Limitation Act 1908, Part IV, the claim of compensation for infringement is limited to a three-year period from the date of infringement.

### 2.10 Mechanisms to Obtain Evidence and Information

There is no prescribed mechanism by which a party can obtain relevant information and evidence from the other party or a third party.

According to the CPC, a court may order the production of documents relating to the matter in the suit in the parties' possession. This includes documentary evidence of every description upon which the parties intend to rely.

### 2.11 Initial Pleading Standards

As per the CPC, Order 7, Rule 1, a pleading refers to a complaint or written statement. In a complaint, the plaintiff is required to:

- state the facts of the cause of action;
- name the court in which suit is to be brought, together with the name, description and residence of the plaintiff and the defendant;
- demonstrate that the court has jurisdiction;
- name the relief that the plaintiff claims; and
- provide a statement of the value of the subject matter of the suit for jurisdiction purposes including court fees.

There is no special provision for lawsuits in intellectual property proceedings that differ from non-intellectual property proceedings.

It is not possible to supplement pleadings with additional arguments.

### 2.12 Representative or Collective Action

The CPC allows collective actions in Pakistan, including class action lawsuits and proceedings. Class actions are permitted subject to the framework laid out in CPC, Order 1, Rule (1), which states that:

“All persons may be joined in one suit as plaintiffs where:

- any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and
- if such persons brought separate suits, any common question of law or fact would arise.

However, under Order 1 Rule (2) of the CPC the court has power where it appears to it that any joinder of plaintiffs may embarrass or delay the trial of the suit, the court may

put the plaintiffs to their election or order separate trials or make such other order as may be expedient.”

## 2.13 Restrictions on Assertion of Intellectual Property Right

The rights under the patent shall not extend to:

- acts in respect of articles that have been put on the market anywhere in the world by the owner of the patent or with his or her consent; or by an authorised person or in any other legitimate manner such as a compulsory license;
- the use of articles on an aircraft, land vehicles or vessels of other countries which temporarily or accidentally enter the airspace, territory or waters of Pakistan;
- acts done only for experimental purposes relating to a patented invention;
- acts performed by any person who in good faith, before the filing or, where priority is claimed, the priority date of the application on which the patent is granted in Pakistan, was using the invention or was making effective and serious preparations for such use; or
- acts, including tests, necessary for the approval of a product for its commercialisation after the expiration of the patent; or
- acts done for teaching purpose in educational or research institutions.

If a licence agreement or any other contract between the patent owner and any third party contains any anti-competitive clause, permission from the Competition Commission of Pakistan is required under the Competition Act 2010, Section 5.

## 3. Infringement

### 3.1 Necessary Parties to an Action for Infringement

The necessary parties for an infringement action are a patent proprietor and/or exclusive licensee; it is not possible for a third party (non-licensee) to take action for infringement. The defendant to such an action is the party accused of committing the alleged infringing act, there can often be multiple defendants to an action.

According to the Ordinance, Section 64, the holder of an exclusive licence under a patent shall have the same rights as the patentee to participate in proceedings for any infringement of the patent committed after the date of the licence, and in awarding damages or granting any other relief in any proceedings, the court shall take into consideration any loss suffered or likely to be suffered by the exclusive licensee or, where applicable, the profits earned from the infringement so far as it constitutes an infringement of the rights of the exclusive licensee.

### 3.2 Direct and Indirect Infringement

For a direct infringement to be constituted, the product or process in question needs to satisfy all the essential features of a patented invention, ie, if any one of the features of a patented invention is not satisfied, there has been no direct infringement.

However, even if the infringed product or process in question does not satisfy all the essential features as a patented invention, it may be ascertained that a part of the patent, even if not claimed, pertains to part of the disclosure of the invention, and this would amount to contributory or indirect infringement pursuant to the Ordinance, Section 60.

### 3.3 Scope of Protection for an Intellectual Property Right

The scope of protection of a patent is defined by its claims. The extent of the invention, according to the Ordinance, Section 15, subsection 3(c), is that every complete specification shall end with a claim concisely defining the scope of the invention for which protection is claimed.

In addition, the meaning of each term used in the scope of claims is interpreted in consideration of the statements in the description and drawings.

### 3.4 Defences Against Infringement

Available defences are listed below:

- *Invalidity*: a party cannot be held to have infringed a patent that is not valid; therefore often a party alleged to have infringed a patent will respond with a counter-claim that the patent in question is invalid and should be revoked.
- *Exhaustion*: in Pakistan, exhaustion applies where an article is “put on the market anywhere in the world by the owner of the patent or with his consent or by an authorised person or in any other legitimate manner such as compulsory licenses.”
- *Compulsory licences*: such licences are provided for in the Ordinance, section 59 on request to the Controller after the expiry of four years from the date of filing the patent application or three years from the date of the grant of the patent, whichever expires later. The Controller may issue a non-voluntary licence to prevent the abuses that result from the exercise of the rights conferred by the patent, eg, failure to work. Furthermore, under the Ordinance, section 58 the Federal Government may, even without the consent of the patent-owner, decide that a government agency or a third person designated by the Federal Government may exploit a patented invention on certain grounds established under the section 58.
- *Prior user right*: use of and acting in good faith may not be considered an infringement under the provision of the Ordinance, section 30(5)(d), read with section 30(6), which state.



“(5)(d) acts performed by any person who in good faith, before the filing or, where priority is claimed, the priority date of the application on which the patent is granted in Pakistan, was using the invention or was making effective and serious preparations for such use;

30(6) The right of prior user referred to in clause (d) of s.(5), may be transferred or devolve only together with the enterprise or business, or with that part of the enterprise or business, in which the use of preparations for use have been made.”

### 3.5 Role of Experts

Experts/scientific advisers assist the court by providing opinions in the field as to how a person skilled in the art would read the prior art and how the claims of the patent would be understood.

### 3.6 Procedure for Construing the Terms of the Patent’s Claim

The scope of protection of a patent is determined by its claims. Specifically, the invention is that specified in the claims of the patent specification, as interpreted by the description and any drawings contained in that specification. There is no separate procedure for construing the terms of a patent’s claims.

The language of the claims is important for determining infringement or declaration of non-infringement proceedings, the court will construe the claims and consider whether the alleged infringing product or process falls within the scope of the claims as construed.

## 4. Revocation/Cancellation

### 4.1 Reasons and Remedies for Revocation/Cancellation

Under the Ordinance, Section 46 a patent may, on the petition of any person interested or by the Federal Government or in a counterclaim in a suit for infringement of the patent, be revoked in part or in whole by the High Court, by any of the grounds upon which the patent may be refused. Although the Controller may revoke the patent under the Ordinance, Section 47 at any time within twelve months after the sealing of a patent, any person who did not oppose the grant of the patent may apply to the Controller for an order revoking the patent on any of the grounds upon which the patent could have been opposed. The reasons for revocation are any one or more of the grounds upon which the grant of the patent could have been opposed, eg:

- the applicant for the patent obtained the invention or any part of it from him or her or from his or her legal representative, assignee, agent or lawyer;
- the invention is not a patentable invention within the meaning of this Ordinance;

- the specification does not disclose the invention in a manner clear and complete enough for it to be carried out by a person skilled in the art;
- the claims are not clear or extend beyond the scope of the disclosures in the complete specification as originally filed; and
- the complete specification describes or claims an invention other than that described in the provisional specification and that the other invention either forms the subject of an application made by the opponent for a patent which if granted would bear a date in the interval between the date of the application and the leaving of the complete specification, or has been made available to the public by publication in any document in the interim.

### 4.2 Partial Revocation/Cancellation

A patent may be revoked in part or in whole on any one or more of the grounds upon which the grant of patent may be refused, as per **4.1 Reasons and Remedies for Revocation/Cancellation**, above.

### 4.3 Amendments in Revocation/Cancellation Proceedings

Amendment in revocation or cancellation proceedings is possible when the Controller gives permission.

### 4.4 Revocation/Cancellation and Infringement

It is at the discretion of the court or authority before which the matter lies to hear them together or separately.

## 5. Trial & Settlement

### 5.1 Special Procedural Provisions for Intellectual Property Rights

There are no special procedural provisions for intellectual property rights proceedings and the procedure laid down in the CPC is followed.

### 5.2 Decision Makers

The case is heard and decided by the Presiding Officer of the Intellectual Property Tribunal, who is appointed by the Federal Government after consultation with the Chief Justice of the High Court within the jurisdiction of the Tribunal. The required qualifications of the Presiding Officer are that he or she has served as a judge of the High Court or a District and Session Court or is an advocate qualified for appointment as a judge of the High Court.

Parties have no influence on who is the decision-maker.

### 5.3 Settling the Case

Within the proceedings of an action before the Intellectual Property Tribunal, there is no formal mechanism for settling a case. However, parties may settle the dispute at any stage of the proceedings.

## 5.4 Other Court Proceedings

Depending on the circumstances of the case, parallel revocation/infringement proceedings may have an influence on the current proceedings and the court hearing any such proceeding has the power to stay the proceedings before it until a decision in other parallel proceedings is rendered.

## 6. Remedies

### 6.1 Remedies for the Patentee

The remedies available to a patentee are damages, injunction and accounts. The Ordinance does not differentiate between types of infringers; hence there are no additional remedies for a deliberate or wilful infringer.

### 6.2 Rights of Prevailing Defendants

The prevailing defendant may claim for reimbursement of fees and lawyers' fees but the courts do not usually allow such fees.

### 6.3 Types of Remedies

Different types of remedy do not exist.

### 6.4 Injunctions Pending Appeal

See 6.1 Remedies for the Patentee, above for details.

## 7. Appeal

### 7.1 Special Provisions for Intellectual Property Proceedings

There are no special provisions, except that an appeal against the decision of the Controller may be filed before the High Court.

Under the Intellectual Property Act 2012, Section 19 any person aggrieved by the final judgment and order of the Tribunal may, within 30 days of the final judgment or order of the Tribunal, refer an appeal to the High Court with jurisdiction over the Tribunal. Unless expressly restricted in scope or otherwise, this statutory right of appeal confers the right of re-hearing of the whole dispute to the High Court.

The procedure of a hearing appeal is given in the Ordinance, Section 70. Every appeal before the High Court must be made by way of a petition and in a form and containing particulars as laid down in the rules of the High Court. The appeal will be heard by a single High Court judge and if he or she thinks fit, the appeal may be referred at any stage of the proceedings to a larger Bench of the High Court. Furthermore, every appeal shall be heard as expeditiously as possible and endeavour shall be made to decide the appeal within a period of twelve months from the date on which it was filed.

## 7.2 Type of Review

Only the issues raised in an appeal are considered.

## 8. Costs

### 8.1 Costs Before Filing a Lawsuit

Professional fees for the issue of warning letters depend upon the complexity of the matter and the lawyer chosen for the purpose, as there is no standard fee for these procedures.

### 8.2 Calculation of Court Fees

The court fees for filing an infringement suit are approximately USD108, which are not dependant on value, patent or defendant.

### 8.3 Responsibility for Paying Costs of Litigation

Parties involved in litigation bear their own costs and the plaintiff pays the court fee. It is extremely rare that the courts order the losing party to pay the winning party's costs, and even such costs are minimal.

## 9. Alternative Dispute Resolution

### 9.1 Type of Actions for Intellectual Property

Alternative dispute resolution is not a common way of settling in patent matters in Pakistan. However, the CPC, Section 89 [A] provides alternative dispute resolution. It states that:

*"...the court may where it considers necessary having regards to facts and circumstances of the case, in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediation and conciliation"*

The section should be read together with Rule 1A (iii) Order X:

*"1A: the court may adopt any lawful procedure not inconsistent with the provisions of this code to:-*

*(iii) adopt, with the consent of parties, any alternative method of dispute resolution including mediation, conciliation or any such other means."*

## 10. Assignment and Licensing

### 10.1 Requirements or Restrictions for Assignment of Intellectual Property Rights

Assignment must be made in writing and should clearly identify which rights are assigned and which rights are retained under the patent. Application for the recordal of assignment is to be filed with the Controller.



### **10.2 Procedure for Assigning an Intellectual Property Right**

Either the assignor or assignee needs to apply to the Controller for a registration of assignment in the prescribed manner, along with the notarised assignment document, a Power of Attorney and the prescribed fee. The Controller examines the application and if everything is in order, the assignment is recorded.

### **10.3 Requirements or Restrictions to License an Intellectual Property Right**

A patentee may grant an exclusive or non-exclusive licence to any third party by way of a licence agreement. This licence agreement is to be recorded with the Controller.

### **10.4 Procedure for Licensing an Intellectual Property Right**

An application, along with the licence agreement, a statement in duplicate of the facts upon which the applicant relies and evidence in duplicate verifying the statement, needs to be submitted in the prescribed manner to the Controller, together with a Power of Attorney.

#### **Bharucha & Co.**

F-7/1, Block 8, Kehkashan  
Clifton  
Karachi 75600  
PAKISTAN



Tel: +92 21 3537 9544  
Fax: +92 21 3537 9557-58  
Email: [email@bharuchaco.com](mailto:email@bharuchaco.com)  
Web: [www.bharuchaco.com](http://www.bharuchaco.com)