

# China: Divisional Practice in the BRICs and other Countries – Part 6 of a 9-Part Series

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## Divisional Practice in China

### *Time Periods for filing a Divisional Application*

**In China, an Applicant can file a divisional application:**

1. At any time while a parent application is pending **but no later** than the expiration of 2 months from the date of receipt of the Notification to Grant Patent Right from the **Chinese Patent Office (SIPO)** [the 2 month period is the time during which the application proceeds through the formalities of registration]. An Applicant can file a divisional application during this 2 month period regardless of whether or not the Applicant proceeds with the formalities of registration (namely, paying the issue fee). However, see the important note below.
2. Within 3 months from the date the Applicant receives a **Notification of Rejection** in a parent application (regardless of whether or not the Applicant requests **reexamination** of the Examiner's decision). A Notification of Rejection notifies the Applicant that the application is rejected and that prosecution has been "closed" by the Examiner. An Applicant can file a request to the Board of Patent Reexamination (a Reexamination Request) to re-examine the application in view of the Examiner's decision.
3. At any time after filing a Reexamination Request.
4. If the Board of Patent Reexamination (Board) overturns the Examiner's rejection, the application is returned to the Examiner for further examination. During this further examination, an Applicant can file a divisional application (but a divisional application can be filed no later than the expiration of 2 months from the date of receiving the Notification to Grant Patent Right).
5. If the Board maintains the Examiner's Rejection, an Applicant may appeal to court (namely, a first instance court) within 3 months of receipt of the reexamination decision from the Board (Reexamination Decision). An Applicant can file a divisional application during this 3 month period regardless of whether or not the Applicant files an appeal.
6. If an Applicant appeals to a first instance court after receipt of the Reexamination Decision.

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7. If the first instance court maintains the Reexamination Decision, an Applicant may further appeal to the second instance court within 15 days from receipt of the first instance court's decision. Regardless of whether or not the Applicant files an appeal with the second instance court, the Applicant can file a divisional application within 15 days of receipt of the decision from the first instance court.

8. After appealing a decision from a first instance court to a second instance court.

9. If the first instance court overturns the Reexamination Decision, an Applicant can file a divisional application.

**Important Note:** An Applicant cannot file a divisional application after the expiration of the 2 month period from the date of receipt of the Notification to Grant Patent Right of the parent application, if the parent application has been withdrawn, or is deemed to have been withdrawn and the application has not been restored (namely, reinstated). Additionally, in accordance with current patent practice in China, a divisional application can be filed from a previously filed divisional application (meaning “cascading” divisionals are permitted).

In China, a divisional application has the same **filing date as the very first parent application**. This date is referred to as the “divisional submission date” (rather than the filing date). After a divisional application is filed, an Examiner reviews the divisional submission date to confirm that the divisional filing is correct and is not after the (1) expiration of the 2 month period from the date of receipt of the Notification to Grant Patent Right in the very first parent application; (2) withdrawal of the very first parent application; or (3) withdrawal of the very first patent application which has not been reinstated. In addition, the Examiner will determine whether the divisional application satisfies any of items 1-9 above.

The divisional submission date is particularly important with respect to “cascading divisionals” (such as, for example, a second divisional application (divisional application 2) filed from first divisional application (divisional application 1)). A cascading divisional can be filed voluntarily (meaning the divisional application can be filed for any reason) or in response to a lack of unity rejection raised in a prior filed divisional application.

If a further filed divisional application (such as divisional application 2) is a voluntary divisional filed from a previously filed divisional application (such as divisional application 1), an Examiner will review the divisional submission date of divisional application 2 with the status of the very first (original) parent application. Specifically, the Examiner will review the divisional submission date (of divisional application 2) to confirm that the divisional filing is correct and is not after the (1) expiration of the 2 month period from the date of receipt of the Notification to Grant Patent Right in the very first parent application; (2) withdrawal of the very first parent application; or (3) withdrawal of the very first patent application which has not been reinstated. In addition, the Examiner will determine whether the divisional application satisfies any of items 1-9 above (but as it relates to the status of the very first parent application).

If a further filed divisional application (such as divisional application 2) is filed in response to a lack of unity rejection raised by an Examiner in a previously filed divisional application (such as divisional application 1), an Examiner will review the divisional submission date of divisional application 2 with the status of divisional application 1. Specifically, the Examiner will review the divisional submission date (of divisional application 2) to confirm that the divisional filing is correct and is not after the (1) expiration of the 2 month period from the date of receipt of the Notification to Grant Patent Right in

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divisional application 1; (2) withdrawal of divisional application 1; or (3) withdrawal of divisional application 1 which has not been reinstated. In addition, the Examiner will determine whether divisional application 2 satisfies any of items 1-9 above (but as it relates to the status of divisional application 1).

Practically speaking, the filing a further divisional application based on a previously filed divisional application is many times not possible because the very first parent application is granted, rejected or withdrawn (meaning it is “closed”). However, if a previously filed divisional application (such as divisional application 1) was filed in response to a lack of unity rejection, the filing of a further divisional application (such as divisional application 2) in response to the lack of unity rejection is considered to be an “EXCEPTION”. In addition, as discussed below, in order to receive the benefit of this “EXCEPTION”, an Applicant must submit a copy of the Office Action where the lack of unity rejection was raised when filing the further divisional application (divisional application 2). If a copy of the Office Action is not submitted, the Examiner will examine the divisional submission date (of divisional application 2) according to the status of the very first parent application and will reject the divisional application (divisional application 2) if the very first parent application is closed.

## ***Requirements for Filing a Divisional Application***

When filing a divisional application, a copy of the specification, abstract and drawings from the parent application must be filed. A set of claims (either the original claims from the parent application or a new claim set) must also be included. In addition, the following are also required:

1. Payment of all the necessary filing fees;
2. A Power of Attorney;
3. Priority document of the parent application;
4. An assignment; and
5. If the divisional application is being filed in response to a lack of unity raised in a previously filed divisional application, a copy of the Office Action where the lack of unity rejection was raised.

## ***Claims of a Divisional Application***

A divisional application may be filed with the claims as originally filed in the parent or PCT application. However, the claims of a divisional application filed using the claims of a parent or PCT application will need to be amended at some point during prosecution to ensure that neither the parent or divisional application claim the exact same subject matter. However, partial overlap of the subject matter between a parent and a divisional application is permitted (for example, if claim 1 of a parent application claims a plate having a length of 5 to 10 meters, claim 1 of a divisional application can recite a plate having a length of 1 to 20 meters).

## ***Double Patenting***

In China, an Applicant is entitled only to a single patent per invention (meaning that the claims of 2 patents cannot protect the same invention; thereupon, the claims cannot have the exact same scope). In other words, what is considered to be “statutory” double patenting in the United States is

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not permitted. Thus, an Examiner may require amendment of the claims of either the parent or divisional application as necessary to ensure that neither application includes a claim for any identical matter claimed in the other application. Moreover, there is no obviousness-type double patenting in China.

### ***Examination of Divisional Applications***

A divisional application is treated as a substantive application and is accorded a separate application number, requires separate fees, requires a separate request for examination, will be prosecuted separately from the parent application, and will result in an independent patent from the parent application. The fees for a divisional application are the same as for any parent application. The term of patent for a divisional application is twenty years (for an invention) or ten years (for a utility Model or design) from the filing date of the very first parent application.

### ***Special or Unique Requirements for Filing a Divisional Application in China***

The time periods applicable for a divisional application, such as the time limit for requesting substantive examination or paying the fee for requesting substantive examination, are calculated from the initial filing date (or priority date) of the very first parent application. If a time limit has expired or is less than two months from the divisional submission date, the Applicant is permitted to complete any formalities or pay any required fees within 2 months from the divisional submission date or within 15 days from receipt of the Notification of Acceptance of the divisional application.

A divisional application cannot be used to change the application type (such as an invention, utility model or design) of the parent application. In other words, if the parent application is for a utility model, a divisional application cannot be filed directed to a design.

The inventor(s) of a divisional application must be the same as or be included in the list of the inventors contained in the parent application.

The Applicant of a divisional application must be the same as the parent application. If the Applicant for the parent and divisional application are different, an assignment must be submitted.

### ***Function of Divisional Applications in China***

The legislative intent behind the filing of one or more divisional applications in China has its origin in the unity of invention requirement, namely, providing an Applicant with the opportunity to protect those inventions described and claimed in a parent application that do not form a single inventive concept. However, despite this intent, divisional applications are used in China to achieve a variety of purposes.

For example, a divisional application can be filed to incorporate an amendment that would not be entered by an Examiner during prosecution of a parent application. In general, when responding to an Office Action, an Applicant must amend the claims according to the comments provided by the Examiner in Office Action and cannot enlarge the scope of the claims (in contrast, when making voluntary amendments, an Applicant is permitted to enlarge the scope of the claims). Therefore, if an Applicant wishes to include new claims or claim amendments that were not accepted during prosecution of a parent application (such as enlarging the scope of the claims, adding one or more claims directed to embodiments not present in the original claims, or making other amendments that

would not have been in accordance with the Examiner's comments), an Applicant can file a divisional application with the new claims.

Additionally, if during prosecution an Examiner indicates that certain claims are allowable but other claims are not patentable, an Applicant can cancel the claims deemed not to be patentable in order to place the application in condition for allowance. The Applicant can pursue the canceled claims in a divisional application.

Moreover, an Applicant can file a divisional application with the same claims as in a parent application for the purposes of having different Examiner examine its application.

This is Part 6 of a nine-part series examining divisional practice in the BRIC as well as several non-BRIC countries.

To view Part 1 (Divisional Practice in Mexico), [click here](#).

To view Part 2 (Divisional Practice in Brazil), [click here](#).

To view Part 3 (Divisional Practice in the United States), [click here](#).

To view Part 4 (Divisional Practice in India), [click here](#).

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This post was written by Lisa Mueller and Ivan Shen of Shen IP.

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National Law Review, Volume IV, Number 29

Source URL: <https://natlawreview.com/article/china-divisional-practice-brics-and-other-countries-part-6-9-part-series>