Anti(-anti)-suit injunctions

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Anti-(anti-)suit injunctions

- Introduction to ASIs and AASIs
- Panel discussion
- Case Summaries
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What is an Anti-Suit-Injunction ("ASI")?

- Established by *common law*-courts

- By way of an ASI, a court can impose prohibitions on a party to a proceeding pending before it from bringing an action in a (foreign) court or from continuing a proceeding pending in that (foreign) court

- The ASI is directed against the individual party, not the other court (nevertheless, an ASI is perceived to be at least an indirect interference in (usually, foreign) court proceedings)

- In the past, it was a means to enforce contractual jurisdiction clauses and/or arbitration clauses
How do you get one (in the UK)?

- Does the English court have personal jurisdiction over the respondent?
- Does the English court have a sufficient interest to justify restraining foreign proceedings?
- Can an appropriate ground for obtaining relief be made out?
  - Contractual grounds - respondent must show ‘strong reasons’ why the agreed forum should not be used.
  - Non-contractual grounds - applicant to show that the respondent’s conduct is “oppressive or vexatious”, or that it interferes with the English courts’ due process
- Even if all the other requirements are met, is it appropriate to grant the injunction?
How do you get one (in the Netherlands)?

- Possible to get an order to prohibit unlawful conduct

- Question: is the enforcement unlawful?

- Freedom to initiate court proceedings (article 6 ECHR), only limited in highly exceptional circumstances

- Only if claim is evidently unfounded or in case of ‘legal stalking’ (abuse of procedural law)
Can you get cross-border ASIs in Europe?

- No, limiting enforcement in other EU Member States is not possible. See CJEU Turner/Grovit (C-159/02) and CJEU Allianz/West Tankers (C-185/07)

  - Contrary to the principle of mutual trust and comity
  - Undermines the other State’s jurisdiction to hear and decide the case
  - Such interference is incompatible with the system of the Brussels I bis regulation

- What about outside of Europe?
Rise of ASIs in FRAND litigation?

- Some FRAND terminology:
  - Standards essential patent (“SEP”) - a patent which is necessarily infringed by compliance with a technical standard
  - Standard setting organisation (“SSO”) - develop and define technical standards
  - SSOS require SEPs to be licenced on fair, reasonable and non-discriminatory (“FRAND”) terms
- Unwired Planet v Huawei - the UK court for the first time set the terms of a global FRAND license between the parties.
- Additional courts since expressed a willingness to set global FRAND terms - e.g. U.S. (TCL v Ericsson) and China (Xiaomi v Interdigital)
- “Race to the court house” to seize preferred forum and prevent opponent bringing proceedings elsewhere using ASIs
The A2SI - EU’s response to ASIs

- Procedural tool for parties to regain ‘freedom to sue’

- Apparent willingness of EU courts to effectively counter-act ASIs - to an extent

- But: is it a further encroachment on the jurisdiction of a sovereign court, i.e. part of the problem rather than the solution?
The A2SI - How do you get one (France & UK)?

- **France**
  - Does the French court have jurisdiction over the matter?
  - Is the ASI looking to enforce an arbitration or jurisdiction clause?
  - Is the harm imminent or is there a manifestly unlawful disturbance?
  - Is the scope of the requested A2SI proportionate?

- **UK**
  - Would the A2SI affect the foreign proceedings?
  - Is the English court the more appropriate forum?
  - Would the ASI be vexatious and oppressive?
The A2SI - How do you get one (Germany)?

- Based on the general (pre-emptive) claim for injunctive relief, Sec. 1004 German Civil Code

- Patentee has a right to enforce its (territorial) right (which is protected pursuant to Art. 14 German Constitution).

- The (foreign) ASI constitutes a risk of first infringement of impairing this constitutionally protected right

- The A2SI must be the only effective means to counter the ASI
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Panel discussion

► Will it ever / where does it stop?

► Policy considerations and future of ASIs

► Strategic considerations
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The A2SI - IPCom v Lenovo (USA, UK, France)

USA
- 14.03.2019: Lenovo files proceedings before the US District Court for the Northern District of California
- 18.09.2019: Lenovo files Motion for anti-suit injunction
- 28.10.2019: Lenovo files Emergency Motion to Expedite Hearings on Motion for A2SI
- 02.07.2019: IPCom files proceedings re infringement of patent EP'268
- 25.10.2019: IPCom files motion for A2SI
- 31.10.2019: Judge grants order re US Emergency Motion
- 08.11.2019: Judge grants A2SI

UK
- 02.07.2019: IPCom files proceedings re infringement of patent EP'268
- 25.10.2019: IPCom files motion for A2SI
- 31.10.2019: Judge grants order re US Emergency Motion
- 08.11.2019: Judge grants A2SI

France
- 24.10.2019: IPCom obtains authorisation to seek an A2SI
- 30.10.2019: Judge grants order re US Emergency Motion
- 08.11.2019: Judge grants A2SI

IPCom files PI proceedings re infringement of patent EP'268
Hearing scheduled for 06.11.2019

Young EPLAW 19 April 2021 - Anti-(anti-)suit injunctions
The A2SI – Nokia v Daimler (USA, Germany)

Germany

March 2019
Nokia files various patent infringement proceedings against Daimler based on SEPs

March/April 2019
Continental (supplier of Daimler) joins the proceedings as intervenor

09.07.2019
Nokia requests an A2SI

11.07.2019
District Court Munich I grants A2SI

12.12.2019
A2SI confirmed by Higher Regional Court Munich

USA

10.05.2019
Continental files complaint i.a. against Nokia re FRAND determination before the USDC ND Cal.

12.06.2019
Continental requests ASI against Nokia re German proceedings

September 2019
Continental withdraws request for ASI
The A4SI - Interdigital v Xiaomi (CN, IND, DE)

China
- 09.06.2020: Xiaomi files complaint re FRAND-Determination before the People’s Court of Wuhan
- 23.09.2020: ASI granted
- 04.12.2020: A3SI granted

India
- 29.07.2020: Interdigital files patent infringement proceedings before the High Court New Delhi
- 29.09.2020: A2SI granted

Germany
- 09.11.2020: A2SI granted (District Court Munich I)
- 28.01.2021: A2SI confirmed and clarified that it has also effect against the A3SI (i.e. effectively, an A4SI)
The A4SI - Ericsson v Samsung (CN, US)

**China**
- **7.12.2020**: Samsung brings action for determination of global FRAND rate Ericsson SEPs
- **14.12.2020**: Samsung files for ASI coupled to A3SI
- **25.12.2020**: Samsung obtains ASI coupled to A3SI
- **10.03.2021**: ASI/A3SI confirmed in reconsideration ruling
- **16.03.2021**: ASI/A3SI confirmed in jurisdictional objection ruling

**US**
- **11.12.2020**: Ericsson brings FRAND action at Eastern District of Texas
- **28.12.2020**: Ericsson applies for order to prevent interference US proceedings
- **12.01.2021**: A2SI granted, effectively also A4SI because preventing interference A3SI
- **16.01.2021**: Appeal lodged by Samsung
The A4SI – What is prohibited?

The defendants shall be ordered (...) to pay a fine of up to EUR 250k
to cease and desist from pursuing the ASI of the Wuhan-court or to take any other
judicial/administrative measure aimed at directly/indirectly prohibiting the
applicants from bringing patent infringement proceedings in Germany
in particular,
to withdraw the request for an ASI before the Wuhan-court within 24 hours after
service of this order or take other appropriate means to finally revoke the ASI,
to cease and desist from continuing the ASI-proceedings (except as regards the
withdrawal),
to cease and desist from indirectly prohibiting the applicants from bringing
patent infringement proceedings in Germany.
Thank you!