



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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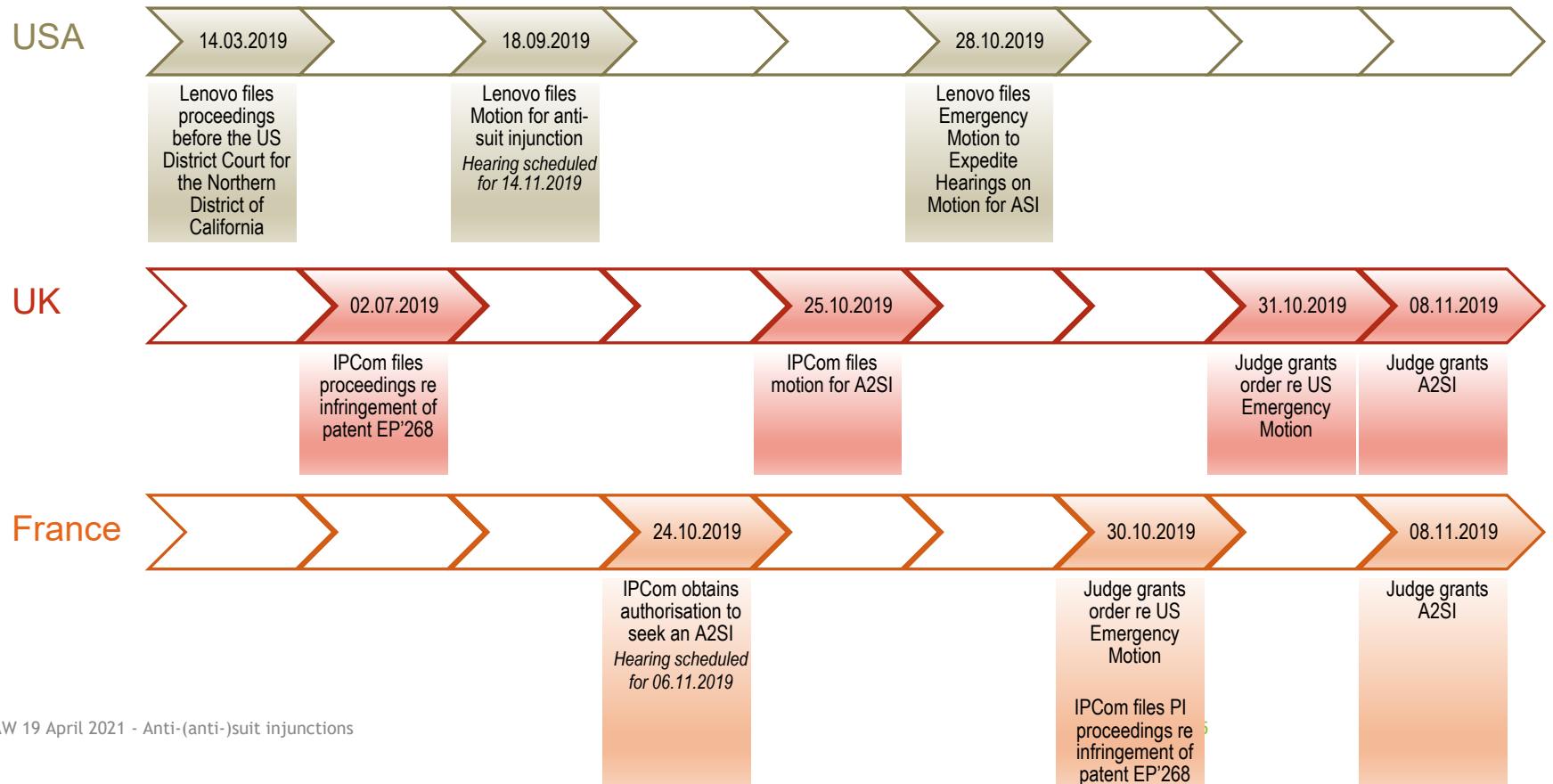
Panel discussion

- ▶ Will it ever / where does it stop?
- ▶ Policy considerations and future of ASIs
- ▶ Strategic considerations

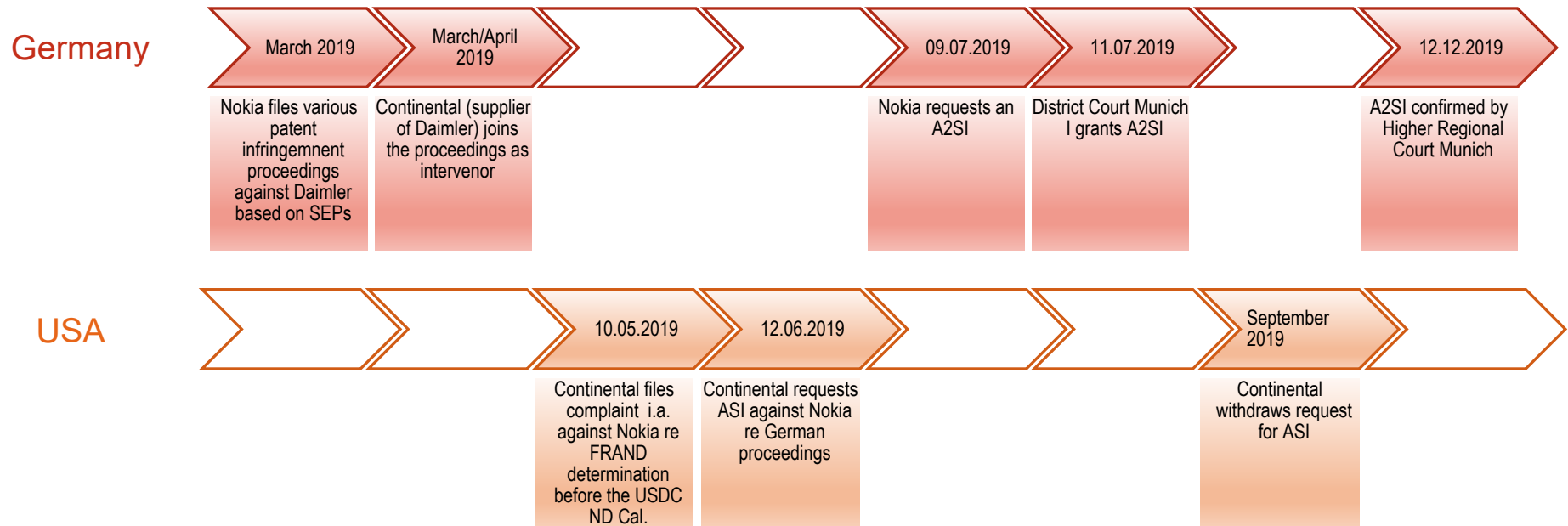
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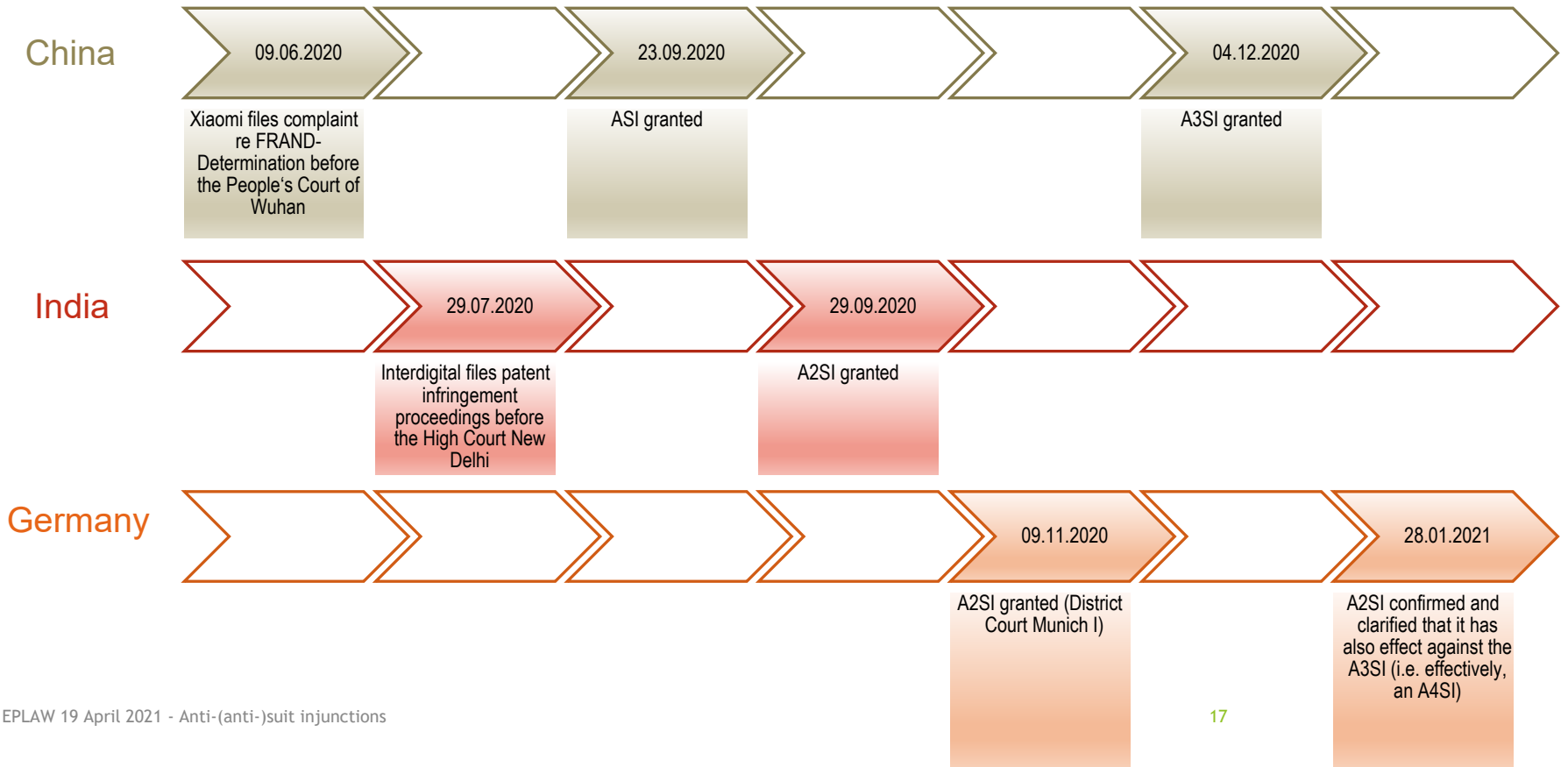
The A2SI - IPCom v Lenovo (USA, UK, France)



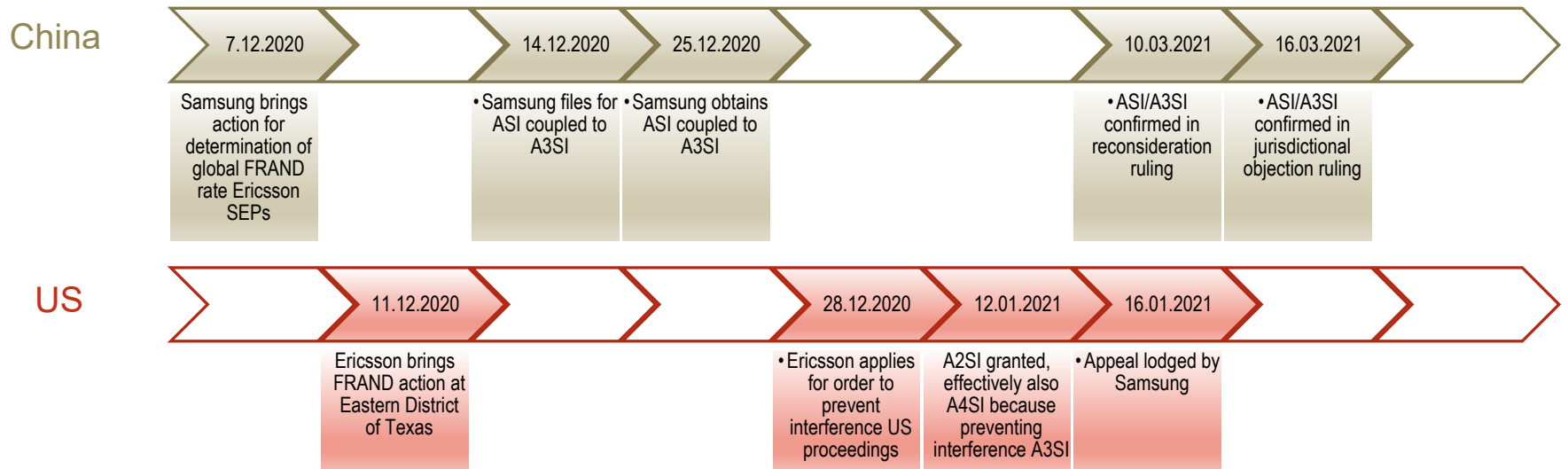
The A2SI - Nokia v Daimler (USA, Germany)



The A4SI - Interdigital v Xiaomi (CN, IND, DE)



The A4SI - Ericsson v Samsung (CN, US)



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!