Anti(-anti)-suit injunctions

Marie-Léa Rols (Bardehle Pagenberg)
Matthew Raynor (Bristows)
Philipp Widera (Vossius & Partner)
Roeland Grijpink (HOYNG ROKH MONEGIER)
Anti-(anti-)suit injunctions

- Introduction to ASIs and AASIs
- Panel discussion
- Case Summaries
Anti-(anti-)suit injunctions

- Introduction to ASIs and AASIs
- Panel discussion
- Case summaries
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
Anti-(anti-)suit injunctions

▶ Introduction to ASIs and AASIs

▶ Panel discussion

▶ Case Summaries
Panel discussion

- Will it ever / where does it stop?

- Policy considerations and future of ASIs

- Strategic considerations
Anti-(anti-)suit injunctions

- Introduction to ASIs and AASIs
- Panel discussion
- Case Summaries
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 Hearing scheduled for 14.11.2019
- 28.10.2019: Lenovo files Emergency Motion to Expedite Hearings on Motion for 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 Hearing scheduled for 06.11.2019
- 30.10.2019: Judge grants order re US Emergency Motion
- 08.11.2019: Judge grants A2SI
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
- **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!