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The Current State of SEP Litigation in China

BY FEI DENG, SHAN JIAO, AND GUANBIN XIE

THE PAST DECADE HAS WITNESSED AN increase in Standard Essential Patent (SEP) litigation around the world. Among jurisdictions, China has attracted significant attention arising from the battles over anti-suit injunctions (ASI) and anti-anti-suit injunctions (AASI) between Chinese courts and courts in other jurisdictions, in *Xiaomi v. Inter-Digital* and *Samsung v. Ericsson*.¹

There perhaps will be more companies bringing, or being dragged into, SEP litigation in China. This article provides an overview of the lay of the land for SEP litigation in China.

Legislative Background of SEP Litigation in China

Because China is a civil law system, there are two types of sources that are binding on Chinese courts and can be cited by judges in their decisions: the laws are one type, and the other type is the judicial interpretations issued by China's Supreme People's Court (SPC).

The main Chinese laws relevant to SEP litigation are:

- (1) the Contract Law of the People's Republic of China;
- (2) the Patent Law of the People's Republic of China;
- (3) the Anti-Monopoly Law of the People's Republic of China; and
- (4) the Standardization Law of the People's Republic of China.

As mentioned above, the SPC may issue judicial interpretations, which have the same legal force as statutes and are binding on all Chinese courts. There has not been an SEP-specific judicial interpretation yet, but the more general Supreme People's Court's *Interpretations Concerning*

Certain Issues on Application of Law for Trial of Cases on Disputes over Patent Infringement (II), contains two articles relevant to SEP litigation—Article 24.2 sets the basic principle for granting injunction for SEPs, and Article 24.3 confirms the judicial practice of rate-setting cases being filed before the Chinese courts.²

A High People's Court may issue guidelines that provide guidance to lower courts within that particular province. However, a guideline is not a formal source of law. Guidelines issued by a high court in a particular province are not legally binding even to the courts within that specific province, and such guidelines cannot be cited by judges as a source of law in their decisions. Regardless, in practice, courts within the specific province would follow the guidelines issued by the respective high court, without citing to the guidelines. Examples of such guidelines related to SEPs include the Beijing High People's Court's *Guidelines for Patent Infringement Determination (2017)* issued in April 2017, in which Articles 149–153 are specific to SEPs; and the Guangdong High People's Court's *Work Guidelines on Adjudicating Cases of Disputes over Standard Essential Patents (Trial)*, issued in April 2018.

The Anti-Monopoly Commission under the State Council, the competition policy-making authority of the central government, which has merged into the Anti-Monopoly Bureau of China's State Administration for Market Regulation (SAMR), also issued “guidelines” related to SEPs in September 2020, namely the *Anti-Monopoly Guidelines for the Field of Intellectual Property Rights*. Guidelines issued by the State Council provide guidance for antitrust authorities at central and local levels. But they are merely referential, and not binding on courts.

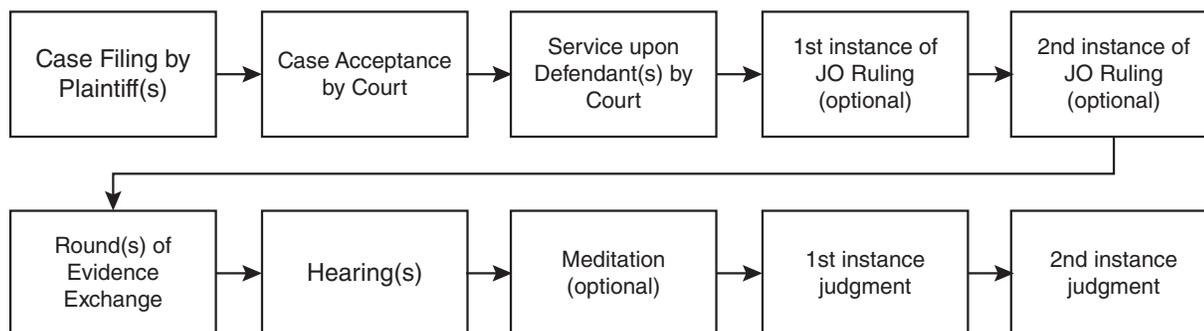
Procedural Background of SEP Litigation in China

Chinese courts have routinely heard SEP-related cases. Generally speaking, there are three major types of SEP cases in China:

- (1) Patent infringement cases where a patentee may seek damages and/or injunctive relief or potential licensees may seek a declaration of non-infringement;
- (2) Anti-monopoly civil actions where the issues usually arise from excessive pricing, bundling, discriminatory treatment, etc.; and
- (c) Rate-setting cases where either patentee or implementer may ask the court to adjudicate FRAND licensing terms (including royalty rate) effective within China or on a global basis.

Regardless of the case type, SEP-related cases are almost all heard by an IP tribunal within a court or by specialized IP courts. These cases all follow similar procedural steps. The flowchart below—the steps of which are explained in the text following the chart—provides an overview of the entire life cycle of a civil litigation in China, including those related to SEPs.

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Chart 1 Life Cycle of Civil Litigation Proceedings in China

Note this flowchart does not cover the patent invalidation procedure, which is a separate proceeding routinely conducted in parallel with the patent infringement action. Normally the potential licensee must first file for invalidation before the Intellectual Property Protection Department (previously, Patent Reexamination Board (PRB)) of the China National Intellectual Property Administration (CNIPA).

Simply put, one cannot go directly to a Chinese court to file for patent invalidation, but one must go to the CNIPA. After the CNIPA issues an invalidation decision, either party may file for a judicial review of the invalidation decision by the Beijing IP Court, and may further file for appeal against the Beijing IP Court's 1st instance judgment to the SPC.

Below we provide a more detailed description of each step of the flowchart in the context of SEP litigation. In addition, it is worth noting that an ASI may occur during any step of the flowchart.

Case Filing and Case Acceptance. When a plaintiff files a complaint with a Chinese court, it does not necessarily mean the court has formally accepted and instituted the case. The court may have a seven-day review period³ to decide whether the complaint satisfies the statutory requirements and finally institutes the case.

Service upon Defendants. For Chinese defendants, the Chinese courts usually will serve them via express mail, which should take no longer than three days to serve. For cases involving non-Chinese parties, Chinese courts may use a variety of methods to serve parties who do not have domicile in the territory of China, including but not limited to service by convention, diplomatic service, service by mail, service by fax or email, and service by public announcement.⁴ Traditionally, Chinese courts used the service procedure under the Hague Convention, which takes up to 7 to 12 months in practice, but nowadays Chinese courts are exploring quicker alternative service methods. For example, last year, in *OPPO v. Sharp*, the Shenzhen Intermediate Court served Sharp, a Japanese company, via the postal channel, which took only about one week.⁵

Jurisdiction. The court system in China consists of the Basic People's Court, the Intermediate People's Court, the High People's Court, and the SPC, in ascending order of hierarchy. China has a relatively centralized jurisdiction over technology-related intellectual property cases and anti-monopoly cases. The court of first instance for SEP cases is the Intermediate People's Courts at the location of the capital city of provinces, autonomous regions and municipalities, and Intermediate People's Courts designated by the SPC,⁶ as well as Beijing, Shanghai, and Guangzhou IP Courts,⁷ unless the amount of claimed damages is above five billion RMB, in which event the case should be filed with a High People's Court.⁸

On January 1, 2019, the SPC established within itself a new tribunal—the Intellectual Property Tribunal—which from then on handles all second instance appeals of all anti-trust cases and most IP cases, including all SEP cases.⁹ If an Intermediate People's Court issues a first instance judgment, the judgment does not take effect immediately, and any party may, within the appeal period, appeal to the IP Tribunal of the SPC, which will conduct a full hearing on the determination of facts, application of law, and procedural issues of the case and issue a second instance judgment. Previously, the appeal for SEP cases tried by the intermediate courts went to the high courts, but after the establishment of the IP Tribunal of the SPC, all appeals are adjudicated by the IP Tribunal of the SPC, which helps unify the legal standard for all SEP cases at the stage of appeal.

"JO" in the flowchart refers to the jurisdictional objection proceeding, which is an option to be exercised by defendant(s). In most, if not all, SEP cases, defendants will choose to file for JO as a delaying tactic. Once filed, the trial and appeal of the JO may take six months to one year, when defendants may better prepare evidence and their litigation strategy. The chance of winning a JO is low, but it is almost a routine step taken by defendants in civil litigation, given the otherwise fast-moving pace of Chinese litigation proceedings.

Hearing. A court panel in China consists of an odd number of judges. Usually it is three, but in many high-profile

SEP cases, the number may be five. For technical cases such as SEP cases, there usually will be one or two technical investigators present at the hearings, who are appointed professionals with in-depth knowledge about technical issues relevant to the case, to assist the judges to clarify technical issues in findings of infringement. For example, some technical investigators are seconded from the CNIPA, which means their former day job was to review patent applications or patent invalidation petitions.¹⁰ Technical investigators can be very helpful in practice. However, as a matter of legal standing, technical investigators are not part of the panel and do not have decision-making power over the result.¹¹

There can be several pre-trial hearings, with each hearing spanning roughly a day to a week, during which the judges would go through the complaint, response, and evidence and summarize the disputed factual and legal issues.¹² Pre-trial hearings are not must-haves. The court may decide to go through the evidence in a formal hearing with a full panel. The actual “debate” is often the final step, during which both sides’ counsel debate over the disputed factual and legal issues and give closing arguments, which takes roughly a day.

Oral testimony of witnesses and experts is usually part of the formal hearings, and there is no deposition-style procedure in China. But experts have to testify under oath before the judges; otherwise his or her testimony may not be admissible as evidence. Live testimony is somewhat similar to the practice at bench trials in the United States, since the fact-finders in Chinese cases are judges, not a jury. Usually, it follows the format of both sides’ experts taking turns to provide affirmative statements first, and then answering questions raised by one’s own counsel and then answering questions raised by the other side’s counsel. Judges may ask questions at any point.

In terms of schedule, court hearing dates are not set several months ahead as is common in the United States. They are usually set about several weeks in advance in China.

Overall, the whole proceeding from case filing to first-instance judgment may vary, depending on whether a defendant challenges jurisdiction and in which court a plaintiff chooses to file its case. Courts with a heavier workload, for example, the Beijing IP Court, may process cases more slowly than others. But usually, it should not take more than three years to issue the first-instance judgment.

Summary Statistics and Characteristics of Mobile Telecommunications SEP Litigation in China over the Past Decade

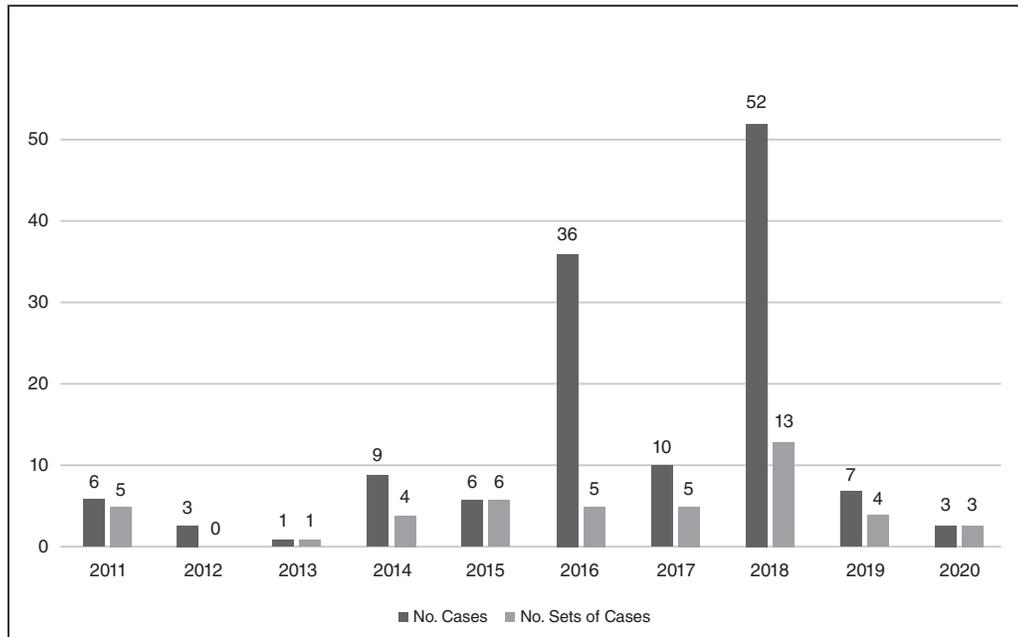
To provide an overview of the state of SEP litigation in China, we have gathered information on all publicly reported SEP litigation cases in the mobile telecommunications industry accepted by the Chinese courts between 2011 and 2020.¹³ Although most rulings and decisions are published in China, litigation filings themselves are not. Therefore, to limit the scope of this study so as to maximize coverage within the scope, we focused our study on the mobile

telecommunications industry, which has seen the most SEP litigation not only in China, but also worldwide.¹⁴

We identified 133 SEP cases accepted by the Chinese courts in the mobile telecommunications industry between 2011 and 2020. It should be noted that in China’s litigation system, when a patent owner sues the same defendant for infringing more than one patent, multiple case numbers are assigned, one for each patent. Also, when a matter involving the same plaintiff and the defendant has several different causes of action—for example, an assertion of abuse of dominance and a request for a FRAND rate determination—multiple case numbers are also assigned, one for each cause of action. To count the “non-duplicative” cases, we grouped cases with the same parties into a “set of cases,” although they have different case numbers.¹⁵ Based on this measure, the 133 cases are grouped into 46 sets of cases. Below are key summary statistics and characteristics we have drawn from these cases:

- **How Many Cases Were Filed Each Year?** As indicated in Chart 2, there seems to have been an explosion in the number of cases in 2016 and 2018, but the number of sets of cases grew more slowly. Thus, the “explosion” in cases in 2016 and 2018 seems to be mostly due to the same parties filing cases on multiple patents, as in cases such as *Qualcomm v. Meizu* in 2016;¹⁶ *ACT v. Xiaomi*, *ACT v. OPPO*, and *ACT v. Vivo* in 2018.¹⁷
- **What Were the Main Causes of Actions?** Of the 133 cases, 108 (81%) were filed as patent infringement actions, 16 (12%) were filed as disputes over FRAND licensing terms, and 8 (6%) were filed as anti-monopoly actions. Only one case, *TCL v. Ericsson*, was filed as an unfair competition action.¹⁹ As described earlier, a plaintiff can file multiple cases simultaneously under different causes of actions, such as in *Qualcomm v. Meizu*.
- **Which First-Instance Courts Were the Most Popular?** The Beijing Intellectual Property Court, the Shanghai Intellectual Property Court, and the Shenzhen Intermediate People’s Court were the top three courts—together they handled over 70 percent of first-instance SEP case filings during the past decade. More recently, the Nanjing Intermediate People’s Court in Jiangsu Province and the Wuhan Intermediate People’s Court in Hubei Province are also becoming “hot spots” for SEP case filings.
- **Which Companies Were Bringing or Defending SEP Cases in China?** The case filings are highly concentrated, with the top five plaintiffs, namely Huawei, Royal KPN, Siemens, ZTE, and Advanced Codec Technologies (ACT) accounting for about half of the total number of sets of cases. Defendants are less concentrated, with the top five defendants, namely Xiaomi, InterDigital, Apple, HTC, and Ericsson accounting for about one-third of the total number of sets of cases.

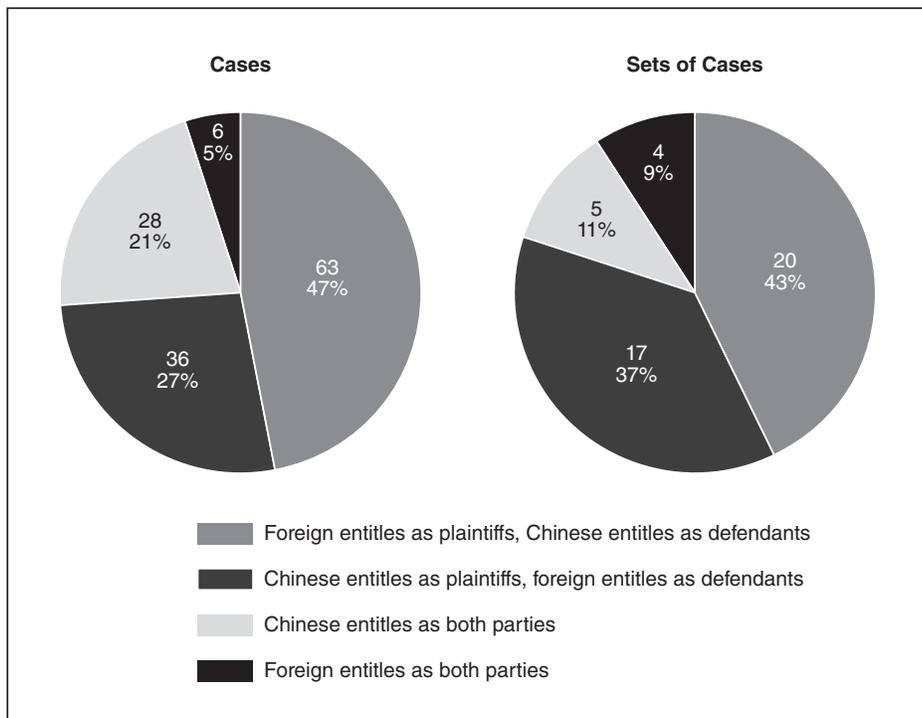
Chart 2: Number of Accepted Cases by Year¹⁸



■ **What Is the Nationality of Companies Suing and Being Sued?** As indicated in Chart 3, if one looks at the number of cases, it may seem that more cases involve foreign entities suing Chinese entities than the other way around. However, when looking at the number of sets of cases, this asymmetry is substantially

smaller—20 sets of cases (43% of total) involve foreign plaintiffs suing Chinese defendants while 17 sets (37% of total) involve Chinese plaintiffs and foreign defendants. This indicates that the asymmetry in cases is mostly due to foreign plaintiffs litigating more patents on average than Chinese plaintiffs.

Chart 3: Nationality of Companies Suing and Being Sued



■ **Did the Chinese Litigation Serve as the Opening Attack or as a Response?** It is not surprising that in the global SEP dispute environment not all litigations were first filed in China. In about one-fourth of the cases involving at least one foreign party, and two-fifths of the sets of cases, the parties had already been engaged in litigation in other countries before the Chinese litigation was filed. As a recent example, in January 2020, Sharp filed a patent infringement lawsuit against OPPO in Japan related to WLAN.²⁰ As a response, in February 2020, OPPO filed a lawsuit against Sharp in the Shenzhen Intermediate People's Court, seeking damages as well as a FRAND rate determination over Sharp's 3G, 4G, and WLAN SEPs.²¹

Key Issues in Published Mobile Telecommunications SEP Decisions

Among the 133 SEP cases (46 sets of cases) litigated in China in the mobile telecommunications industry over the past decade, a court judgment has been issued in 12 cases (8 sets of cases). Most of the other cases were withdrawn or dismissed before any judgment was issued.

In this section, we provide a summary of the key findings in these judgments on issues such as the determination of the FRAND royalty rate and whether an injunction should be granted. In addition, we discuss the recent cases where the Chinese courts have issued rulings concerning global rate setting and ASIs.

Determination of the FRAND Royalty Rate for Chinese SEPs. Generally speaking, there are three commonly used approaches to calculate FRAND royalty rate: (1) benchmarking the royalty based on comparable licenses ("comparable license approach"); (2) apportioning an appropriately defined aggregate royalty burden ("ARB") of the entire standard to the SEP(s)-in-suit ("top-down approach"); (3) calculating the incremental economic benefit of the SEP(s)-in-suit versus next-best non-infringing alternative(s) ("bottom-up approach").²²

There have been four cases in which the Chinese courts have issued a judgment that delves into the issue of how a FRAND royalty rate should be determined for Chinese SEPs.

■ *Huawei v. InterDigital*:²³ The earliest FRAND rate decision in China, *Huawei v. InterDigital*, was issued by the Shenzhen Intermediate Court in February 2013 and upheld by the Guangdong High Court later that year. Although both the lower court and the appeals court decisions were vacated in December 2018 by the Supreme People's Court at the parties' request, they are still worth looking at, given that this set of decisions set precedent for FRAND rate determination in China.²⁴ Based on rates derived from lump-sum payment licenses InterDigital signed with Apple in 2007 and with Samsung in 2009, the courts

calculated that the FRAND royalties to be paid by Huawei for InterDigital's 2G, 3G, and 4G essential Chinese patents should not exceed 0.019% of the sales prices of Huawei's relevant products.

■ *Huawei v. Samsung*:²⁵ The Shenzhen Intermediate Court ruled in January 2018 that Huawei had abided by its FRAND obligations while Samsung had not during the parties' cross-licensing negotiation and issued an injunction against Samsung. Although this was an injunction case rather than a FRAND rate-setting case, the court evaluated whether the cross-license rates offered by both parties were FRAND. In its evaluation, the court adopted a top-down method, setting the ARB as 5% for 3G and 6%–8% for 4G, according to statements major SEP holders made at around the time the standards were set, and apportioned these ARBs to Huawei's and Samsung's 3G and 4G portfolios based on the relative strengths of Huawei's and Samsung's portfolios. In evaluating Huawei's and Samsung's respective portfolio strengths, the court relied on indicators including the size and essentiality ratio of the parties' SEPs, the number of proposals that the party submitted and were adopted during the standard-setting process, and the percentage of challenged patents that were found to be valid.

■ *Iwncomm v. Sony*:²⁶ The Beijing IP Court issued a judgment in March 2017, which was later upheld by the Beijing High Court, awarding Iwncomm, a Chinese network technology company, 8.6 million RMB (around USD\$1.3 million) in damages and an injunction against Sony, for infringement of an SEP essential to WAPI, a Chinese national standard for wireless communications. The FRAND rate for the patent-in-suit was determined to be one RMB (around USD\$0.14) per unit based on four Iwncomm licenses containing the same rate, albeit for Iwncomm's entire WAPI portfolio. The total damage award was trebled after multiplying the FRAND rate by the infringing products' sales, based on factors such as the defendant's "fault" during the licensing negotiation.

■ *Huawei v. Conversant*:²⁷ The Nanjing Intermediate Court issued a FRAND rate decision in September 2019, determining that the FRAND rates for Conversant's Chinese SEPs are 0.00225% for Huawei's single-mode 4G handsets and 0.0018% for Huawei's multi-mode (2G/3G/4G) handsets. In arriving at these results, the court adopted Huawei's proposed top-down methodology, first adjusting the worldwide ARBs to discounted "China ARBs" for each standard, and then apportioning the "China ARBs" to Conversant's Chinese SEP portfolio based on the number of SEPs in the portfolio relative to the total number of SEPs in China, after essentiality evaluation. The court did not adopt Conversant's proposal of using the FRAND rate determined in *Unwired Planet v.*

Huawei, adjudicated by a UK court, as a benchmark, due to the benchmark being insufficiently adjusted for the potential difference in the value and essentiality ratio between Unwired Planet's portfolio and Conversant's portfolio.

Based on these four decisions, it can be observed that the Chinese courts have adopted both the top-down and comparable license approaches when calculating FRAND rates. None of the decisions adopted the bottom-up approach, but this seems to be due to the parties not presenting a bottom-up analysis. It can also be observed that the Chinese courts have now fully embraced the top-down approach for 2G/3G/4G standards, with the ARB based on certain SEP owners' statements, as demonstrated in *Huawei v. Samsung* and *Huawei v. Conversant*. For the comparable license approach, it seems that in cases such as *Huawei v. Samsung* and *Huawei v. Conversant*, parties may not have submitted actual licenses but rather attempted to rely on the FRAND rates for other portfolios set in other litigation matters. However, these attempts were in each case rejected by the Chinese courts on the basis of comparability. When parties did submit evidence of actual licenses, such as in *Iwncomm v. Sony*, or public information on existing licenses, such as in *Huawei v. InterDigital*, the Chinese courts have relied upon them in calculating the FRAND rate.

Global Rate Setting. Although no such judgment has been issued yet, there have been several rulings recently that indicate the Chinese courts are going to determine the global FRAND royalty rates for SEPs in some cases. As mentioned above, the Supreme Peoples' Court confirms the judicial practice of rate-setting cases being filed before the Chinese courts when the negotiation fails after "sufficient negotiation."²⁸ "Standard Essential Patents Licensing Dispute" is an independent cause of action in China, which can be filed either by the patent holder or the potential licensee. Such a cause of action does not necessarily connect with any infringement action or declaration of non-infringement action. In the past, precedents filed under the cause of action of SEP Licensing Dispute were limited to Chinese patents only, regardless of whether the negotiation was global in nature. However, in recent cases, quite a few cases were filed under the cause of action of SEP Licensing Dispute for setting the FRAND global rate.

For example, in December 2020, the Shenzhen Intermediate Court ruled in *OPPO v. Sharp* that it will determine the global FRAND rate and other licensing terms for Sharp's 3G, 4G, and WLAN SEPs.²⁹ Despite the jurisdictional objection filed by Sharp, for the first time, a Chinese court expressed the willingness in a ruling to determine the global FRAND royalty rates. The Shenzhen court states in its ruling that it "believes that the determination of global royalty rates by the court can facilitate the overall effectiveness, fundamentally resolve the disputes between two parties, avoid the repeated litigation in different countries and therefore is in accordance with the FRAND principle."³⁰ In

addition, the Wuhan Intermediate Court accepted a lawsuit filed by Xiaomi against InterDigital related to determination of the global FRAND rate and stated in its ruling that "adjudication of global royalty rates can resolve the problem of choosing and determining the scope of licensing between two parties, save the licensing cost, reduce litigation exhaustion and therefore is extremely reasonable."³¹ So far, it is yet to be seen how Chinese courts will decide the global FRAND rate for SEPs and how these decisions are going to be enforced, if the parties do not settle during the process.

Anti-Suit Injunction. The anti-suit injunction system in China belongs to a type of "behavior preservation" measure in China. Article 100 of the *Civil Procedure Law* stipulates:

For cases in which the action of a party to the lawsuit or any other reason causes difficulty in enforcement of a judgment or causes other harm to the litigants, a People's Court may, pursuant to an application by a counterparty litigant, rule on preservation of its property or order the counterparty to undertake certain acts or prohibit the counterparty to undertake certain acts; where the litigants do not make an application, a People's Court may rule that preservation measures be adopted where necessary.³²

The SPC also issued a judicial interpretation on behavior preservation in general, that is, *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Reviewing the Injunction Cases involving Intellectual Property Disputes*. There was no ASI-specific guidance until the first-ever ASI issued in China by the SPC in *Huawei v. Conversant*, as discussed below.

On August 28, 2020, The SPC issued China's first ASI ruling during the appeal procedure of *Huawei v. Conversant*,³³ which prohibited Conversant from enforcing the first instance injunction order issued by the District Court of Düsseldorf of Germany on August 27, 2020. The SPC sets a framework for evaluating ASIs in China, considering factors such as: (1) the impact of enforcing a foreign judgment on the ongoing Chinese lawsuit, (2) the necessity of granting preservation, (3) a reasonable balance of the interests of both the applicant and the respondent, (4) whether the preservation could impair the public interest, (5) whether granting the preservation is consistent with the principle of international comity, etc.

Procedurally it is worth noting that an ASI can be issued by a Chinese court on an *ex parte* basis. As noted by SPC in *Huawei v. Conversant*, the court issued the ASI on an *ex parte* basis without hearing from Conversant before issuing the order. The court reasoned that the motion related to an "urgent matter," in accordance with the SPC's guidance that "the People's Court shall, prior to granting a behavior preservation measure, inquire [of] the applicant and the respondent, except when the situation is urgent, or the inquiry may affect enforcement of the behavior preservation measure."³⁴ The parties can seek reconsideration of the grant or denial of an ASI motion by the same court reviewing the ASI motion. The applicant/respondent of an ASI order can

apply for a reconsideration to the people's court that issued the ruling within five days upon receipt of the ruling. The people's court must review the application within ten days after receiving the reconsideration application.³⁵ During the reconsideration procedure, the parties can submit evidence and hire lawyers to make arguments for them. The court usually holds a hearing, organizes the evidence production and cross-examination, and hears the opinions from both parties.

For instance, in *Huawei v. Conversant*, Conversant filed a reconsideration application on September 2, 2020, with the SPC and a hearing was held on September 4, 2020. The attorneys for both parties attended the hearing.³⁶ In *Xiaomi v. InterDigital*, InterDigital filed the reconsideration application to the Wuhan Court a few days after the ASI ruling was issued on September 23, 2020 (the reconsideration ruling does not mention the specific date of the application), and a hearing was held on October 16, 2020. The attorneys for both parties attended the hearing, during which InterDigital submitted 17 items of evidence and the Court provided Xiaomi's previous ASI application and evidence to InterDigital.³⁷

Conclusion

China has become a major jurisdiction for resolving global SEP disputes, with its courts now open to global rate-setting and ASI/AASI. The observations we provide in this article may help companies faced with SEP litigation in China familiarize themselves with the lay of the land. ■

Wenti De Guiding(关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定) [Provisions on Several Issues Relating to Laws Applicable for Trial of Civil Dispute Cases Arising from Monopolies] (promulgated by the Sup. People's Ct., Jan. 30, 2012, effective Jun. 1, 2012, revised Jan. 1, 2021) [hereinafter Antitrust Dispute Interpretations], <http://gongbao.court.gov.cn/Details/4b8770fa8e9ced993f7a4b2edffeb8.html> (in Chinese), Art. 3.

⁷ Guanyu Beijing Shanghai Guangzhou Zhishi Chanquan Fayuan Anjian Guanxia De Guiding (关于北京、上海、广州知识产权法院案件管辖的规定) [Rules on Jurisdiction of Beijing, Shanghai and Guangzhou Intellectual Property Courts] (promulgated by the Sup. People's Ct., Oct. 27, 2014, effective Nov. 3, 2014), <http://gongbao.court.gov.cn/Details/b7a6d56264c13d9d6ff2a573d7f88d.html> (in Chinese).

⁸ Guanyu Tiaozheng Gaoji Renmin Fayuan He Zhongji Renmin Fayuan Guanxia Diyishen Minshi Anjian Biaozhun De Tongzhi (关于调整高级人民法院和中级人民法院管辖第一审民事案件标准的通知) [Notice on Adjustments to the Criteria for First-instance Civil Cases under the Jurisdiction of Higher People's Courts and Intermediate People's Courts] (promulgated by the Sup. People's Ct., Apr. 30, 2019, effective May 1, 2019) (in Chinese), art. 1.

⁹ Guanyu Zhishi Chanquan Fating Ruogan Wenti De Guiding (关于知识产权法庭若干问题的规定) [Regulation on Several Issues Concerning Intellectual Property Tribunal] (promulgated by the Sup. People's Ct., Dec. 27, 2018, effective Jan. 1, 2019), <http://gongbao.court.gov.cn/Details/a7474431cc0e66666117c1edc5dd76.html> (in Chinese), art. 1.

¹⁰ Zhishi Chanquan Fayuan Jishu Diaochaguan Xuanren Gongzuo Zhidao Yijian (Shixing) (知识产权法院技术调查官选任工作指导意见(试行)) [Work Guidance for Selecting Technical Investigators for IP Courts (Trial)] (promulgated by the Sup. People's Ct., Aug. 8, 2017, effective Aug. 14, 2017), <http://gongbao.court.gov.cn/Details/e8f18e20f4d034cb7c20cb52b9edfe.html> (in Chinese).

¹¹ Guanyu Jishu Diaochaguan Canyu Zhishi Chanquan Anjian Susong Huodong De Ruogan Guiding (关于技术调查官参与知识产权案件诉讼活动的若干规定) [Several Provisions on Technical Investigators' Participation in Litigation Activities Relating to Intellectual Property Cases] (promulgated by the Sup. People's Ct., Mar. 18, 2019, effective May 1, 2019), <http://gongbao.court.gov.cn/Details/03f68e42ee657ed2e05daa4a9806d5.html> (in Chinese).

¹² Guanyu Shiyong Zhonghua Renmin Gongheguo Minshi Susong Fa De Jieshi (关于适用《中华人民共和国民事诉讼法》的解释) [Interpretations on Application of the Civil Procedural Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Dec. 18, 2014, effective Feb. 4, 2015, revised Jan. 1, 2021) [hereinafter CPL Interpretations], <http://gongbao.court.gov.cn/Details/63ff48da6a9792f8ad1cb65a8b99d1.html> (in Chinese), art. 225.

¹³ All relevant information was gathered up to Jan. 15, 2021, through keyword searches from public sources, including China Judgments Online <https://wenshu.court.gov.cn/>, where the Chinese courts publish rulings and judgments, and various other public websites.

¹⁴ Zhao & Lu provides a similar, but wider, survey of Chinese SEP cases from 2011 to 2019 across all industries. See Qishan Zhao & Zhe Lu, *Statistics of Chinese SEP Cases in 2011–2019*, LEXFIELD (July 2, 2020), http://www.lexfieldlaw.com/?c=n&a=Publication_detail&myid=8&id=135.

¹⁵ When one plaintiff sues multiple non-related defendants over the same patent, each case would be given a different case number, and we do not group these cases into one "set" since these cases involve different parties on the defendant side.

¹⁶ In June 2016, Qualcomm filed a lawsuit against Meizu, a Chinese mobile phone company, in the Beijing IP Court, requesting a determination that Qualcomm's license terms offered to Meizu were FRAND and a ruling that Meizu should take a license under those terms for 3G and 4G SEPs. Following that initial complaint, Qualcomm filed 16 additional patent infringement complaints, some on SEPs and others on non-SEPs against Meizu in Beijing and Shanghai IP Courts. See *Qualcomm and Meizu Sign 3G/4G Global Patent License Agreement*, QUALCOMM (Dec. 30, 2016), <https://www.qualcomm.com/news/releases/2016/12/30/qualcomm-and-meizu-sign-3g4g-global-patent-license-agreement>; *Qualcomm Files 17 New Complaints in China Courts Against Smartphone Maker Meizu*, REUTERS (June 30, 2016), <https://www.reuters.com/article/us-qualcomm-meizu-patents/>

¹ See, e.g., Wuhan and Anti-Suit Injunctions, CHINA IPR (Dec. 28, 2020), <https://chinaipr.com/2020/12/28/wuhan-and-anti-suit-injunctions/>.

² Guanyu Shenli Qinfan Zhuanliquan Jiufen Anjian Yingyong Falv Ruogan Wenti De Jieshi (Er) (关于审理侵犯专利权纠纷案件应用法律若干问题的解释(二)) [Interpretations Concerning Certain Issues on Application of Law for Trial of Cases on Disputes over Patent Infringement (II)] (promulgated by the Sup. People's Ct., Jan. 25, 2016, effective Apr. 1, 2016) [hereinafter Patent Infringement Interpretations (II)], <http://gongbao.court.gov.cn/Details/409a66a5e85613e92594a31b410220.html> (in Chinese).

³ Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013) [hereinafter CPL], <http://gongbao.court.gov.cn/Details/42a89051fa54947fa9d96bf7276b6a.html> (in Chinese), art. 123.

⁴ CPL, art. 267.

⁵ OPPO Guangdong Yidong Tongxin Youxian Gongsi Deng Su Xiapu Zhushi Huishe Deng Biaozhun Biyao Zhuanli Xuke Jiufen An (OPPO广东移动通信有限公司等诉夏普株式会社等标准必要专利许可纠纷案) [OPPO Guangdong Mobile Communications Co., etc. v. Sharp Corporation, A Dispute over Standard Essential Patents Licensing], (2020) Yue 03 Min Chu 689.

⁶ Guanyu Shenli Qinfan Zhuanliquan Jiufen Anjian Yingyong Falv Ruogan Wenti De Jieshi (关于审理侵犯专利权纠纷案件应用法律若干问题的解释) [Interpretations Concerning Certain Issues on Application of Law for Trial of Cases on Disputes over Patent Infringement] (promulgated by the Sup. People's Ct., Dec. 21, 2009, effective Jan. 1, 2010) [hereinafter Patent Infringement Interpretations], <http://gongbao.court.gov.cn/Details/4b8770fa8e9ced993f7a4b2edffeb8.html> (in Chinese), Art. 2; Guanyu Shenli Yin Longduan Xingwei Yinfa De Minshi Jiufen Anjian Yingyong Falv Ruogan

- qualcomm-files-17-new-complaints-in-china-courts-against-smartphone-maker-meizu-idUSKCN0ZG1I6.
- ¹⁷ In November 2018, Advanced Codec Technologies (ACT) filed 18 lawsuits based on several SEPs related to an audio coding standard against Xiaomi, OPPO, and Vivo in the Nanjing Intermediate People's Court. See *US NPE Leverages China Litigation To Secure Xiaomi Deal*, IAM (Dec. 17, 2019), <https://www.iam-media.com/frandseps/us-npe-leverages-china-litigation-secure-xiaomi-deal>.
- ¹⁸ The three cases accepted in 2012 were part of the *Nokia v. Huaqin* set of cases first accepted in 2011 by the Shanghai No.1 Intermediate People's Court. Nokia's initial 2011 case filing claimed Huaqin's infringement of four SEPs owned by Nokia. The court subsequently decided to have separate cases for each of the four SEPs, resulting in three spin-off cases in 2012. Therefore, the three cases in 2012 are already accounted for in the *Nokia v. Huaqin* set of cases in 2011. For this reason, zero set of cases is counted as accepted in 2012.
- ¹⁹ It is reported that in 2018 TCL brought two lawsuits against Ericsson, one under unfair competition claims at the Guangzhou IP Court and another under anti-monopoly claims at the Shenzhen Intermediate Court. *Guangzhou Intellectual Property Court Has Gradually Become the "Preferred Place" for International High-Technology Patent Dispute*, GUANG ZHOU ZHENG FA (Dec. 19, 2018), <http://www.gzszfw.gov.cn/article/document.do?shld=12029&ctgid=5> (in Chinese); *Antitrust Regulation for the Abuse of Market Dominance in SEPs*, YI DIAN ZI XUN (May 22, 2020), <http://www.yidianzixun.com/article/OPRAP9wq> (in Chinese).
- ²⁰ *Sharp Files Patent Infringement Lawsuit Against OPPO Japan*, SHARP (Jan. 30, 2020), <https://global.sharp/corporate/news/200130-a.html>.
- ²¹ *The Patent War Between OPPO and Sharp Continues: Formal Negotiations Have Not Been Entered*, SOHU NEWS (Mar. 31, 2020), https://www.sohu.com/a/384578311_166680; *Is This Seat Taken? A Chinese IP Court Proclaims Its Authority to Declare Global FRAND Terms*, NAT'L L. REV. (Dec. 7, 2020), <https://www.natlawreview.com/article/seat-taken-chinese-ip-court-proclaims-its-authority-to-declare-global-frand-terms>.
- ²² Fei Deng et al., *Comparative Analysis of Court-Determined FRAND Royalty Rates*, ANTITRUST, Summer 2018, at 47.
- ²³ Jiaohu Shuzi Tongxin Youxian Gongsi, Jiaohu Shuzi Jishu Gongsi, Jiaohu Shuzi Zhuanli Konggu Gongsi, IPR Xuke Gongsi Yu Huawei Jishu Youxian Gongsi Biaozhun Biyao Zhuanli Shiyong Fei Jiufen Shangsu An (交互数字通信有限公司、交互数字技术公司、交互数字专利控股公司、IPR许可公司与华为技术有限公司标准必要专利使用费纠纷上诉案) [InterDigital Communications, Inc., InterDigital Technology Co., InterDigital Patent Holdings, Inc., IPR Licensing Inc. v. Huawei Technologies Co., Ltd., An Appeal of Dispute over SEP Royalty Rate], Second Instance Civil Judgment by Guangdong High People's Ct., Oct. 16, 2013 (2013) Yue Gao Fa Min San Zhong Zi No. 305.
- ²⁴ INTERDIGITAL, 2018 ANNUAL REPORT 114–15, https://www.annualreports.com/HostedData/AnnualReportArchive/i/NASDAQ_IDCC_2018.pdf.
- ²⁵ Huawei Jishu Youxian Gongsi Yu Sanxing (Zhongguo) Touzi Youxian Gongsi Deng Qin Hai Faming Zhuanli Quan Jiufen An (华为技术有限公司与三星(中国)投资有限公司等侵害发明专利权纠纷案) [Huawei Technologies Co., Ltd. v. Samsung (China) Investment Co., Ltd., et al., Dispute over Invention Patent Infringement], First Instance Civil Judgment by Shenzhen Interm. People's Ct., Jan. 4, 2018, (2016) Yue 03 Min Chu Nos. 816, 840.
- ²⁶ Xi'an Xidian Jietong Wuxian Wangluo Tongxin Gufen Youxian Gongsi Yu Suoni Yidong Tongxin Chanpin (Zhongguo) Youxian Gongsi Qin Hai Faming Zhuanli Quan Jiufen An (西安西电捷通无线网络通信股份有限公司与索尼移动通信产品(中国)有限公司侵害发明专利权纠纷案) [Xi'an Iwncomm Radio Network Co., Ltd. v. Sony Mobile Communications (China) Co., Dispute over Invention Patent Infringement], First Instance Civil Judgment by Beijing IP Ct., Mar. 22, 2017, (2015) Jing Zhi Min Chu No. 1194; Suoni Yidong Tongxin Chanpin (Zhongguo) Youxian Gongsi Yu Xi'an Xidian Jietong Wuxian Wangluo Tongxin Gufen Youxian Gongsi Qin Hai Faming Zhuanli Quan Jiufen An (索尼移动通信产品(中国)有限公司与西安西电捷通无线网络通信股份有限公司侵害发明专利权纠纷案) [Sony Mobile Communications (China) Co. (Appellant) v. Xi'an Iwncomm Radio Network Co., Ltd. (Respondent), Dispute over Invention Patent Infringement], Second Instance Civil Judgment by Beijing High People's Ct., Mar. 28, 2018, (2017) Jing Min Zhong No. 454.
- ²⁷ Huawei Jishu Youxian Gongsi Su Kangwensen Wuxian Xuke Youxian Gongsi Queren Bu Qin Hai Zhuanliquan Ji Biaozhun Biyao Zhuanli Xuke Jiufen An (华为技术有限公司诉康文森无线许可有限公司确认不侵害专利权及标准必要专利许可纠纷案) [Huawei Technologies Co., Ltd. v. Conversant Wireless Licensing S. à. r. l., A Dispute over Non-Infringement and Standard Essential Patents Licensing], First Instance Civil Judgment by Nanjing Interm. People's Ct., Sept. 16, 2019, (2018) Su 01 Min Chu Nos. 232, 233, 234.
- ²⁸ Patent Infringement Interpretations (II), art. 24.3.
- ²⁹ *Is This Seat Taken? A Chinese IP Court Proclaims Its Authority to Declare Global FRAND Terms*, NAT'L L. REV. (Dec. 7, 2020), <https://www.natlawreview.com/article/seat-taken-chinese-ip-court-proclaims-its-authority-to-declare-global-frand-terms>.
- ³⁰ *Id.* at 5.
- ³¹ Xiaomi Tongxun Jishu Youxian Gongsi Deng Su Jiaohu Shuzi Gongsi Deng Biaozhun Biyao Zhuanli Xuke Feilv Zhengyi Caijue Jiufen An (小米通讯技术有限公司等诉交互数字公司等标准必要专利许可费率争议裁决纠纷案) [Xiaomi Communication Technology Co., etc. v. InterDigital, Inc., etc., A Dispute over Standard Essential Patents Licensing], Dec. 4, 2020, (2020) E 01 Zhi Min Chu 169 Zhi Er.
- ³² CPL, art. 100.
- ³³ Huawei Jishu Youxian Gongsi Su Kangwensen Wuxian Xuke Youxian Gongsi Queren Bu Qin Hai Zhuanliquan Ji Biaozhun Biyao Zhuanli Xuke Jiufen An (华为技术有限公司诉康文森无线许可有限公司确认不侵害专利权及标准必要专利许可纠纷案) [Huawei Technologies Co., Ltd. v. Conversant Wireless Licensing S. à. r. l., A Dispute over Non-Infringement and Standard Essential Patents Licensing], Aug. 28, 2020, (2019) Zui Gao Fa Zhi Min Zhong Nos. 732, 733, 734 Zhi Yi.
- ³⁴ Guanyu Shencha Zhishi Chanquan Jiufen Xingwei Baoquan Anjian Shiyong Falv Ruogan Wenti De Guiding (关于审查知识产权纠纷行为保全案件适用法律若干问题的规定) [Provisions on Several Issues Concerning the Application of Law in Reviewing the Injunction Cases involving Intellectual Property Disputes] (promulgated by the Sup. People's Ct., Dec. 12, 2018, effective Jan. 1, 2019), <http://gongbao.court.gov.cn/Details/3485741fc1d04e68f9df633dc791e6.html> (in Chinese). Art. 5.
- ³⁵ CPL Interpretations, art. 171.
- ³⁶ Huawei Jishu Youxian Gongsi Su Kangwensen Wuxian Xuke Youxian Gongsi Queren Bu Qin Hai Zhuanliquan Ji Biaozhun Biyao Zhuanli Xuke Jiufen An (华为技术有限公司诉康文森无线许可有限公司确认不侵害专利权及标准必要专利许可纠纷案) [Huawei Technologies Co., Ltd. v. Conversant Wireless Licensing S. à. r. l., A Dispute over Non-Infringement and Standard Essential Patents Licensing], Sept. 11, 2020, (2019) Zui Gao Fa Zhi Min Zhong Nos. 732, 733, 734 Zhi Er.
- ³⁷ *Id.* at 23.