CPI's Asia Column Presents:

Foundational Factors for China's Determination of FRAND Rates

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In May 2018, the appellate court in China's Guangdong Province, where some of largest Chinese mobile handset manufacturers are based, issued special judiciary guidelines in dealing SEP cases. One of the most interesting provisions suggested that at least the Guangdong court was willing to adjudicate the global FRAND rates, at the request of the litigants. While we have not seen any such global rates made by any of the Chinese courts, it seems to many of us that Chinese judges, whether in Shenzhen or in the Intellectual Property Court in the Supreme Court, may sooner or later encounter opportunities to make a ruling over the rate determination.

This article will briefly discuss some of the foundations China should focus in developing if the courts are genuinely interested in coming out such global rates with credibility. FRAND rates are global in nature and any of such decisions have global significance. Whether or not the courts are the ideal place for handling such disputes, judges are better ready soon after the opportunities come.

Loopholes in Jurisdictional Rules

Generally speaking, Chinese courts may exercise jurisdiction over FRAND cases through a special FRAND fee dispute cause of action or anti-monopoly cause of action. The FRAND fee dispute cause of action originated from Huawei v. InterDigital case back in 2013. The anti-monopoly cause of action comes from the "excessive fee" clause under the Anti-Monopoly Law. Both causes of actions seem to be loosely based on Chinese anti-monopoly laws and in particular the nature of the FRAND fee dispute cause of action is somewhat perplexing.

Why Chinese courts may exercise jurisdiction under the anti-monopoly claims? In China, anti-monopoly claims are generally treated as tort claims in nature. The jurisdiction for tort claim includes the places where the tort is committed, and the places where consequences of tort act occurs, or the domicile of the defendant. One significant loophole is the so-called places where consequences of tort act occurs. A plaintiff can always allege it suffers from the anti-monopoly tort act and its home court should have jurisdiction. If Chinese courts give a blind yes to such allegations, it will essentially allow plaintiffs to choose where they want to sue.

Chinese courts may have to at least set out some clearer rules on standard of proof about the "consequences of tort act occurs" in the context of anti-monopoly violations. A plaintiff must prove at the outset what are the consequences of licensors and how it happens, if any at all.

Chinese courts should be fully aware of the likelihood of abusive forum shopping by implementers. This is particularly problematic when there are earlier court actions between the same parties outside China. When a SEP licensor sues an implementer outside China based on SEP disputes, for infringement and/or for FRAND rate determination, a Chinese court action will make the situation much more complex. Conflicting court opinions may be exactly what the implementers are looking for, as part of its "hold out" strategy.

Confidentiality

Chinese judges now widely recognize the use of top down approach and comparable licenses in determining royalty rates. In future FRAND rate cases in China, we may see the courts will first determine which licensees were "similarly-situated", then calculate the royalty rates from a set of comparable licenses. However, disclosure of comparable licensing agreements is very sensitive issue, even when the parties choose to do so with waivers from third parties.

If the courts in China wish to conduct the proceeding with full trust from litigants around the world, the issue of confidentiality must be handled flawlessly. In China, even back in 2012, Supreme Court's judicial interpretation for private antitrust lawsuits already stipulated measures such as ordering non-public hearing, compulsory undertakings for confidentiality, restriction or bans on reproduction of documents or review only by attorneys. Such measures will be critical when courts try to determine FRAND rates by looking at "comparable licenses" or other confidential information. Courts must instruct counsels acting for SEP owners and implementers to sign the undertaking for protecting confidentiality agreement. In China, one sensitive issue is in-house counsels often appear in the courtroom to particulate in the entire proceeding and have access to all documents and evidence. Chinese courts might consider much more restrictions of access by in house counsels to confidential information provided by the other side.

A related point is the possibility of limited discovery. China does not have US style discovery, but more courts, the latest example including Beijing, are willing to grant special orders to counsels to investigate evidence from third parties, which include government authorities. This kind of investigation orders could open up some new opportunities for litigants to find out more evidence.

Expert Witness

The value of economic analysis has increasingly been given recognition by Chinese judges. In some recent high profile court cases or antitrust investigations, economists' testimony have played substantial roles, even those from US-based economists. This was quite unthinkable even 10 years ago.

In August 2019, Beijing local government issued a special policy guideline encouraging active participation of expert witness in evaluation intellectual property. If this guideline is fully implemented, we may see the judges are willing to spend more courtroom time for both sides to present expert opinion and allow cross-examinations and rebuttals etc. In the past, one reason for judges to be less willing to grant request for appearance of experts was the concerns of extended hearings. Judges probably have to realize that a lot more time will be needed for FRAND cases.

We expect that judges may soon scrutinize qualification of experts although no clear criteria has been established. More rules about the scope of expert opinion and the way of presenting or cross-examining experts may come out. After all, Chinese judges and counsels receive quite little training in handling experts in the courtroom.

Amicus Brief

The utility of amicus brief has started to be appreciated. Beijing Intellectual Property Court has even experimented publishing such amicus briefs in certain cases. And in certain high profile cases Chinese courts are known to receive briefings or opinions from prominent professors or even industry associations.

The courts in China are short of establishing a formal system close to amicus brief. One reason is that China has not made those litigation documents open to the public and it is almost impossible for others to timely submit amicus brief. Courts also lack experience in dealing with amicus in actual proceedings. But Chinese judges should soon realize that being open to amicus brief type submissions is a very valuable way for them to adjudicate FRAND cases that are of global significance. Even before the official adoption of amicus brief, industry associations, professors or

companies should actively seek opportunities to submit their opinion or reports to Chinese courts where FRAND cases are being litigated.

Due Process in Antitrust Investigation

Whenever China antitrust enforcement agencies start looking at the issue of FRAND rates, they must bear in mind fundamental due process requirements. For example, on April 5, 2019, the ICN published the *Framework for Competition Agency Procedures*, which provides that, the antitrust investigation should be focus on the competition-related information. The investigator should provide reasonable time for the relevant personnel to respond to the inquiry in the investigation in considering the effectiveness of the investigation. Such recommendations need to be implemented in China, so that the parties involved in such investigation procedures will not be overly burdened. Noticeably, the recently issued interim SAMR rules against dominant market position have not set out any additional procedural safeguards beyond what has been in the general administrative penalty rules issued by the same agency in December 2018. The traditional approach in China always emphasizes "objectivity, completeness, fairness and timelines" in dealing with to what extent evidence should be uncovered by the enforcement authorities. There is a strong and urgent need to address the issue of relevancy, reasonableness and proportionality, as shown in the ICN framework document. This should be a priority when FRAND rates are of the priority concern in any antitrust investigations.

To conclude, we believe China's courts and antitrust enforcement authorities have to closely look at some of the foundational factors as discussed here, if they wish to make decisions on global FRAND rates with confidence and credibility. None of these factors are far from reach. There is no reason not to do any of them.

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