COULD (CHINA-BASED) ARBITRATION SAVE THE FRAND RATE SETTING GAME?

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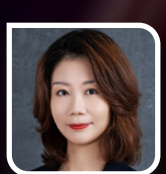
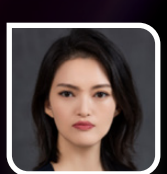

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I. INTRODUCTION

The recent fights among different courts around Anti-suit injunctions ("ASIs") and anti-anti-suit injunctions ("AASIs") and similar demonstrate how FRAND rate setting litigations could escalate. [2] ASIs and AASIs are so troubling as it directly touches on the issue of a state's sovereignty, in the eyes of many governments and judges. The ASI "war" leads to stalemates and uncertainties and may become focal points of new trade disputes.

One aspect we analyzed before in our earlier CPI article – The Science of China FRAND Rate Setting – brings up the possibility that arbitration world, especially China, continue reforms and developments to the extent that patent owners and implementers may eventually find some trusted place for FRAND rate setting, assuming key stakeholders even have the willingness to deal with the rate issue.[3]

There seems no argument that arbitration would be a good alternative solution to FRAND rate setting game. Some legal experts agree that disputes around SEPs and FRAND are tailor-made for arbitration because the arbitration mechanism is relatively less time-consuming, more flexible, and cost-saving than litigating across multiple jurisdictions around the world.[4]

As China is already the key battleground for SEP cases, the question is whether China arbitration world take the lead to work with global partners to convince patent owners and implementers to sit down and accept arbitration, no matter where such arbitration would take place.

China's arbitration system has undergone significant development and growth over the years. Various local governments are keen to attract foreign arbitration centers to join. China's CIETAC recently made some international initiatives to promote China arbitration to support the Belt and Road Initiatives.[5] In particular, China has been promoting cooperation with WIPO in arbitration/ADR of foreign-related Intellectual Property ("IP") cases. The Shanghai government announced the opening up of a WIPO arbitration center in Shanghai in 2020, and reportedly the WIPO Shanghai arbitration center already closed IP cases after being entrusted to do so by the local Pudong district court.[6]

Assuming China-based implementers might be willing to accept arbitration in China or through a China-based arbitration organization, is it possible for China to develop such a system trusted by all the stakeholders? This article tries to expand our earlier discussions and examines several critical aspects of arbitration procedures in China, (i) arbitration panels; (ii) confidentiality; (iii) interim measures; (iv) discovery; and (v) enforceability of awards, to shed more light on what will be required to develop arbitration in China.

The first part of the article reviews the current stalemates in the ASI/AASI battles, as the background or urgency of alternative solutions. The second part provides more explanations on foreign-related arbitration in China (arbitration law/rules/practices and arbitration atmosphere) and analyze how the current system might handle SEP/FRAND disputes. The last part presents some possible ideas for going forward.

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2 A review of the anti-suit injunction can be seen here: The Anti-Suit Injunction - A Transnational Remedy for Multi-Jurisdictional SEP Litigation (May 10, 2017). Cambridge Handbook of Technical Standardization Law - Patent, Antitrust and Competition Law, https://dc.law.utah.edu/scholarship/40/.

3 He Jing, *THE SCIENCE OF CHINA'S FRAND RATE-SETTING, Competition Policy International*, March 2020.

4 Joff Wild, *Despite the difficulties, it is time to embrace arbitration as the best way to resolve licensing disputes*, August 31, 2019, https://www.iam-media.com/embrace-arbitration.

5 A Belt and Road Arbitration Joint Declaration was made in Beijing in November 2019. http://www.moj.gov.cn/Department/content/2019-11/12/612_3235567.html.

6 See the press report. https://finance.sina.com.cn/tech/2020-10-22/doc-iiznctkc6964132.shtml. Also, please see the Supreme Court IP Tribunal's article on Qiushi magazine Issue 1 of 2021.

II. BACKGROUND: ASI STALEMATES

Recently, two cases happening in Wuhan, China caught huge attention in the world of SEP. In the case between Samsung Electronic Co., and Ericsson Telephones before Wuhan Intermediate People's Court ("WIPC China") concerning technologies related to 4G and 5G FRAND rate-settings, the WIPC China granted an anti-suit injunction requested by Samsung regarding the FRAND rate-setting dispute on December 25, 2020. Three days later, the U.S. Court granted Ericsson's anti anti-suit injunction request against Samsung three days later.[7]

Interestingly, *Samsung v. Ericsson* is not the first case that WIPC issued ASI. In *Xiaomi v. InterDigital* (2020), WIPC China granted Xiaomi's ASI's request against InterDigital on September 23, 2020.[8] In response, DHC India granted an anti-enforcement injunction requested by IDC on October 9, 2020, in which DHC India ordered Xiaomi not to enforce WIPC China's ASI during the proceedings in India.

In August 2020, the first anti-suit injunction that China granted is *Huawei v. Conversant*, which eventually resulted in a settlement according to the most recent Supreme Court guidance.[9] After Nanjing Court issued its China FRAND rate decision in September 2019, the Supreme Court IP Court of China granted an anti-suit injunction prohibiting the Düsseldorf Regional Court ("Dusseldorf court") from enforcing its injunction against Huawei in Germany. A major reason in the ruling is that Conversant's act of enforcing the Dusseldorf judgment may hinder the judicial review of Chinese courts or may render the Chinese court's judgment unenforceable, given German court's FRAND rate determination is about 18.3 times higher than that in Nanjing court decision.

Also, in Shenzhen, back in October 2020, in a FRAND rate setting case, Oppo apparently was granted an anti-suit injunction against Sharp, which also was said to win an anti-anti-suit injunction in a German court, while the details remain unknown. The same court indeed rejected Sharp's objection to jurisdiction.[10]

Unsurprisingly, courts that are involved in the ASIs and AASIs are all have their own justifications. Chinese courts highlighted their key concerns that a failing of issuing ASIs would cause irreparable harm to the implementer's market and balance of interest tips in favor of the implementers. The Chinese courts believe that the ASIs will not interfere with the foreign court's jurisdiction. By contrast, Justice C. Hari Shankar at DHC India criticized WIPC China's anti-suit injunction in its ruling as it "directly negates the jurisdiction of this Court and infringes the authority of this Court to exercise jurisdiction in accordance with the laws of this country." Comity suddenly seems to be wide open for differing interpretations.

A deeper motivation underlying ASIs is believed to relate to the UK court decision in the *Unwired Planet* case.[11] Some commentators said that WIPC China's ASI issued against IDC in its SEP litigation with Xiaomi is a predictable reaction to the UK Supreme Court decision against Chinese implementers in *Unwired Planet v. Huawei* and *Conversant v. Huawei & ZTE*.[12] Even a widely distributed article written by Chinese judges in Beijing Higher People's Court openly called for a direct response to the UK Supreme Court decision.

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7 In *Samsung v. Ericsson* (2020), the WIPC China granted Samsung's anti-suit injunction request on December 25, 2020 by holding that the respondent Ericsson and its affiliates, during the proceeding of this case until when the judgement of this case becomes effective, shall not request counts in China or other countries and region to determine the license conditions (including the license royalty rate) or license fee, over the 4G and 5G SEPs involved in this case, and immediately withdraw or cease any such request that have been raised.

8 On September 23, 2020, WIPC China granted an anti-suit injunction requested by Xiaomi after Xiaomi paid a bond of RMB 10 million (approximately USD 1.5 million), ordering that during the case proceedings in PRC: 1) IDC shall immediately withdraw or suspend any preliminary and/or permanent injunction(s) filed before DHC India; 2) IDC shall not file any application for preliminary and/or permanent injunction(s) before courts in China and/or other jurisdictions; 3) IDC shall not file requests to enforce any injunction granted or likely to be granted in any jurisdiction; 4) IDC shall not file any lawsuit against Xiaomi in any jurisdiction for concluding the relevant global royalty rate; and 5) if IDC fails to comply with this court order, it will be fined RMB 1 million (approximately USD 150,000) per day. http://patentblog.kluweriplaw.com/2020/11/20/recent-development-on-sep-disputes-in-china-anti-suit-injunction/.

9 See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725921.

10 See https://www.juve-patent.com/news-and-stories/legal-commentary/china-wakes-up-in-global-sep-litigation/.

11 On August 26, 2020, the Supreme Court of the United Kingdom (UKSC) gave judgment in *Unwired Planet v. Huawei and Conversant Wireless Licensing v. Huawei & ZTE* [2020] UKSC 37. The judgment confirms that English courts may set the terms for global FRAND licenses to portfolios of declared standard essential patents. https://www.bristows.com/viewpoint/articles/unwired-planet-v-huawei-and-conversant-v-huawei-zte-supreme-court-judgment-2020/.

12 "It was apparent that Chinese IP courts would move in this direction in response to the UK Supreme Court's decision in the *Unwired Planet/Conversant* cases. As with the recent issuance of anti-anti-suit injunctions, the Chinese IP courts are forcing scrutiny of how influential their rulings will be with global SEP stakeholders. As the Unwired Planet decision acknowledged, a court cannot force a party to accept a license that the court has determined is FRAND, but it may be able to impose unacceptable consequences for the failure to do so." *Is This Seat Taken? A Chinese IP Court Proclaims Its Authority to Declare Global FRAND Terms* https://www.natlawreview.com/article/seat-taken-chinese-ip-court-proclaims-its-authority-to-declare-global-frand-terms.

At this moment, there is still no conclusive assessment on what ASIs and AASIs may impact on the pending SEP licensing negotiations, for at least two reasons. First, how courts will enforce their ASIs and AASIs remain unclear. Second, patent owners find it very challenging to persuade Chinese courts from not continuing the current proceeding on FRAND rate setting.

What seems to be clear is that Chinese courts are at least willing to exercise their powers to intervene into the current SEP licensing negotiations. According to Judge Zhu Jianjun, who presided over the trial of *Huawei v. InterDigital* and *Huawei v. Samsung*, he is convinced that China should actively establish an antisuit injunction system as a counter measure.[13] Another commentator believes that China would be the last market that most foreign companies would give up, which would provide China's courts a privilege to set the rate.[14]

A bigger worry is that as the courts now jumped into the ASI war in the United Kingdom, Germany, China, and India, which carries SEP/FRAND disputes to a risky path where the commercial disputes become political, and the rule of law and comity issues are increasingly be controversial point. It might not take very long before the court behaviors will be on agenda of trade talk or bilateral government meetings.

While courts are expected to trade injunctions and rulings in such FRAND cases, we want to examine how arbitration can make a difference here, especially a China-based arbitration can somehow resolve the dilemma.

III. OVERVIEW OF ARBITRATION IN CONTEXT OF FRAND LICENSING

In an ideal world, arbitration is supposed to be very useful dispute resolution mechanism, where the dispute involves a multitude of patents and spans several jurisdictions. Researchers generally agree that arbitration in SEP/FRAND cases have several advantages that can make it the preferable choice in appropriate settings.

First, the main strength of arbitration mechanism enables parties to choose arbitrators with the necessary expertise for SEP/FRAND disputes, "which are often complex, not only in a legal but also in a technical and economic sense."

Second, arbitration promises a higher degree of confidentiality, which can be of particular relevance for SEP/FRAND dispute because "the economic stakes are often high, and the proceedings allow for a deep insight into the licensing practices and business models of the parties involved."

Third, there is the advantage of significant efficiencies and cost savings. Because SEP portfolios consist of numerous patent "families," with siblings originating from multiple jurisdictions, they can cause legal disputes before various national courts, which base their jurisdiction on the respective domestic SEPs in the portfolio, triggering invalidation actions and even stalemates in the cases of ASIs and AASIs.[15] In contrast, arbitration mechanisms can "more easily … cover entire SEP portfolios" because the territoriality principle does not hinder arbitration tribunals from hearing patent cases from various jurisdictions, which is more efficient than court proceedings. Cross-border emergency arbitration hearings would be far more efficient in terms of interim or conservatory measures than a plethora of state court proceedings in various jurisdictions for interim or conservatory measures, providing parties with relatively effective enforcement of IP rights.[16]

Finally, the cross-border enforcement of arbitral awards requires recognition and enforceability according to the New York Convention — resolving the stalemate of ASIs in court proceedings.

However, in reality, arbitration as alternative has yielded mixed results, at best, when it involved Chinese implementers. InterDigital and Huawei used arbitration to reach a settlement after their lawsuit in Shenzhen was done in the court of first instance and the Chinese regulator's investigation was suspended. What put both parties together for the arbitration seemed to be the flexibility offered by arbitration. According to some researchers, InterDigital and Huawei noticed that "what constitutes a FRAND royalty can be characterized by acute legal uncertainty" and this uncertainty is only distinguished when the warring parties come from countries "with different ideas about how to compensate owners of

13 Zhu Jianjun, Judge of Shenzhen Intellectual Property Court, *Standard essential patent global license rate—A study of judicial adjudication*.

14 Sophia Tang, *Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law*, September 27, 2020/in Views, https://conflictoflaws.net/2020/anti-suit-injunction-issued-in-china-comity-pragmatism-and-rule-of-law/.

15 Peter Georg Picht & Gaspare Tazio Loderer, *Arbitration in SEP/FRAND Disputes: Overview and Core Issues*, https://www.ius.uzh.ch/dam/jcr:32d2c1e3-21ca-4e0b-a175dad6bdd10272/Picht_Loderer__Arbitration%20in%20SEP-FRAND%20Disputes__JOIA%202019_575-594.pdf.

16 *Id*.

[IP] rights."[17] Because of the legal uncertainty could leads a dissatisfactory FRAND royalty, IDC and Huawei achieved an agreement on choosing three technical standards administered by at least three standard organizations (ETSI, TIA, and ITU) without specifying the national law to govern the hear issue in their arbitration, and their disputes were submitted to arbitration before the International Chamber of Commerce (the "ICC").[18] The arbitration, finally took place in Paris, the headquarters of the ICC. As for the procedural law, the parties achieved an agreement on choosing the New York law to govern the arbitration itself. In May 2015, the ICC rendered an award in setting a patent FRAND rate.

Regrettably, the experiment would eventually end up with a New York court action to enforce the arbitration award.[19] Huawei was unsatisfied with the arbitral panel award and filed a motion for vacatur before the Paris courts, and IDC reacted through a petition in the Southern District of New York to confirm and enforce ICC award relied on the court's "interpretation of the New York Convention, a widely adopted convention that governs the enforcement of international arbitral awards."[20]

After the *InterDigital* arbitration, it seems that few other Chinese implementers agreed on using arbitration to resolve licensing disputes with the patent owners. Anecdotal evidence shows that Chinese parties have a general suspicion about arbitration outside China. This is consistent with the way commercial disputes are handled through arbitration. Many Chinese companies give up their rights to defend themselves or initiate arbitration in foreign arbitration proceedings.

What if these arbitrations are handled by CIETAC or other China-based arbitration centers? Or even by WIPO's arbitration centers in Shanghai? Since China is one of the main battlefields of global SEP/FRAND disputes, would these be feasible (or even ideal) choices for parties bringing arbitration? Next, we will analyze various critical aspects of the arbitration system that are relevant to a trusted outcome of a FRAND case.

IV. ANALYSIS OF CHINA ARBITRATION

Arbitration related legislation and judicial practice in China, on both substantive and procedural aspects, have grown over years and now are generally considered consistent with international arbitration practice. As examples, the validity of foreign related arbitration agreement used to be challenged in judicial and arbitration practice before 2006. China thus issued a special judicial interpretation - Implementation of the of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China (the "Judicial Interpretation of the Arbitration Law") in September 2006 to address this issue. For the review of the validity of a foreign-related arbitration agreement, the law agreed by the parties shall apply; if the parties have not agreed on the applicable law but the place of arbitration, the law of the place of arbitration shall apply. If there is no agreement on the applicable law and no agreement on the place of arbitration or agreement on the place of arbitration If it is unclear, the law of the forum shall apply.[21]

Besides the substantive arbitration law in China, to accommodate China's economic transition and promote China's trade and reform policy objectives, such as the "Belt and Road Initiative," China has announced its intention to create a more transparent and arbitration-friendly atmosphere, aligning with the internationally accepted standard.

17 Greenbaum, Eli, *Arbitration Without Law: Choice of Law in FRAND Disputes* (2016). Res Gestae. 26. https://ir.lawnet.fordham.edu/res_gestae/26.

18 The IDC and Huawei arbitration involved technical standards administered by at least three standards organizations-the European Telecommunications Standards Institute (ETSI), the Telecommunications Industry Association (TIA), and the International Telecommunications Union (ITU). See *Certain Wireless Devices with 3G Capabilities and Components Thereof*, Inv. No. 337-TA-800, slip op. at 418-19 (ALJ June 28, 2013) (Initial Determination).

19 IDC, licensor of patents for wireless technology filed petition against licensee, seeking order enforcing foreign arbitration award setting forth the terms and conditions of patent license agreement. Huawei, licensee brought cross petition, seeking to say enforcement proceeding pending resolution of proceeding to annul the award filed in Paris, the seat of the arbitration. The District Court, John G. Koeltl, J., held that: (1). New York courts had secondary jurisdiction, pursuant to Convention on the Recognition and Enforcement of Foreign Arbitral Awards, over award, and thus parties' dispute was limited to whether United States should enforce the award, and (2). New York enforcement proceeding would be stayed pending resolution of annulment proceeding in Paris. Petition stayed; cross-petition granted. *InterDigital Commc'ns, Inc. v. Huawei Inv. & Holding Co.*, 166 F. Supp. 3d 463 (S.D.N.Y. 2016).

20 *Id.*

21 Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China http://www.lawinfochina.com/display.aspx?lib=law&id=5496&CGid=.

China established various arbitration tribunals to resolve large commercial disputes involving foreign-related disputes, including as China International Economic and Trade Arbitration Commission ("CIETAC"), Shanghai International Economic and Trade Arbitration Commission ("SHIAC"), South China International Economic and Trade Arbitration Commission/ Shenzhen Court of International Arbitration ("SCIA"), and Beijing International Arbitration Center ("BIAC").[22]

Noteworthily, the WIPO's Shanghai Center for Arbitration and Mediation was established and put into operation in 2020. It is understood that WIPO may also establish a center for arbitration in Beijing and other cities. According to the head of the Shanghai Municipal Justice Bureau, "[t]he establishment of the center is a milestone for the opening up of China's foreign-related arbitration business to the outside world. It is also a vivid example and best practice to show Shanghai's efforts to build itself into an international highland of IP protection and an arbitration center in the Asia Pacific region."[23]

According to CIETAC Annual Report, in 2017, the total number of foreign related arbitration cases accepted by the CIETAC is 2298 (the total amount of monetary damages involved in the claims reached about 10.4 billion U.S. dollars), with a year-on-year increase of 22.5 percent; among them, 476 cases involving foreign affairs, Hong Kong, Macao, and Taiwan, accounting for 20.7 percent of all cases accepted by the CIETAC.[24] The main parties involved in the cases are from the United States, Canada, Brazil, Mexico, Germany, Britain, France, Italy, Austria, the Netherlands, South Africa, Russia, Australia, India, Japan, South Korea, Singapore, Hong Kong, etc. To provide more choices for the foreign parties, the New Trade Arbitration Committee has 1,437 arbitrators in the directory, which has been implemented on May 1, 2017. Among them, 405 arbitrators come from Hong Kong, Macao, Taiwan and foreign countries, accounting for 28.2 percent of the total number of arbitrators. In 2017, 47 arbitrators from foreign countries or Hong Kong, Macao and Taiwan participated in 71 cases.

Putting aside the size and scale of arbitration, we will examine five specific aspects relating to foreign-related arbitrations in China to have a depth comprehension on the current arbitration in China regarding foreign-related SEP/FRAND disputes: (i) arbitration panels; (ii) confidentiality; (iii) Interim or conservatory measures; (iv) procedure order in practice; and (v) the enforceability of awards.

A. Arbitration Panels

The panel system for arbitrators is a well-kept tradition since the establishment of the Chinese arbitration regime in 1954. In 2005, Article 21 of the CIETAC rules confirms this practice. The panel of arbitrators is a pool of arbitrators available for parties' selection. In a foreign-related dispute arbitration, parties usually decide to have an arbitral tribunal is made up of three arbitrators. Each party will select or authorize the chairman of the arbitration commission to appoint one arbitrator. The third arbitrator must be selected jointly by the parties or be appointed by the chairman under a joint mandate from the parties, and the third arbitrator will be the presiding arbitrator.[25]

A foreign party may benefit from the fact that in a CIETAC arbitration, appointments of arbitrators may include individuals not included on CIETAC's panel of arbitrators, granting it access to a wider array of candidate arbitrators. In SEP/FRAND disputes, it is very important for warring parties of different countries to have an independent and impartial arbitral tribunal. Parties also need to have sufficient choice of arbitrators with the necessary expertise for SEP/FRAND disputes, which are often complicated, not only in a legal but also in a technical and economic sense. The pool of arbitrators given by the arbitration institutions available for the parties' selection often has limitations to respond their need in such complex disputes. Thus, it is important to ensure the access to experts not on the existing roster of arbitrations.

This is something to improve in China. In practice, while the parties can, in theory, select arbitrators from outside the panel, such appointments are subject to the approval of the CIETAC, which, in many cases, will be refused.[26] Moreover, as for the neutral nationality issue, the arbitration rules of the Chinese arbitration institutions do not include a clear provision. Unless the parties have decided, in their arbitration clause, that the sole arbitrator or the chief arbitrator is a citizen of a third country, most of the foreign-related cases arbitrated in the Chinese arbitration institutions end up having chief arbitrators of Chinese nationality.

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22 Zhang Shouzhi, *Arbitration procedures and practice in China: overview*, https://uk.practicallaw.thomsonreuters.com/3-5200163?transitionType=Default&contextData=(sc.Default)&firstPage=true.

23 *WIPO arbitration and mediation center in Shanghai established* https://www.chinadaily.com.cn/a/202010/23/WS5f926ab8a31024ad0ba80904.html.

24 See http://news.cctv.com/2018/09/16/ARTIRFvQ3ctPlPDbEZccGtVa180916.shtml.

25 Article 31, Arbitration Law.

26 Salient Issues in Arbitration in China.

A bigger issue is the choice of presiding arbitrator, in case of failure of consent among the parties. The arbitration commission must act fairly and choose someone who is seen as truly capable and neutral. This would be one of most significant tests for any China-based arbitration. At present, China's arbitration commission always picks the presiding arbitrator from the existing roster. If they continue such practice, they must be able to include more experts to this list.

B. Confidentiality

Arbitration promises a higher degree of confidentiality than court proceedings, which can be particularly relevant to SEP/FRAND disputes because "the economic stakes are often high, and the proceedings provide a deeper insight into the licensing practices and business models of the parties involved." Almost all the major international commercial arbitration institutions have made provisions on confidentiality in their arbitration rules, which mainly involve the principle of non-disclosure of arbitration procedures, arbitration institutions' responsibility in confidentiality, etc.

CIETAC, as the domestic arbitration institution with the largest number of cases, clearly defined "confidentiality" in Article 38 of its Arbitration Rules revised in 2014: "(1) Hearings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision; (2) for cases heard in camera, the parties and their representatives, the arbitrators, the witnesses, the interpreters, the experts consulted by the arbitral tribunal, the appraisers appointed by the arbitral tribunal and other relevant persons shall not disclose to any outsider any substantive or procedural matters relating to the case."

The Arbitration Rules of CIETAC, on the basis of the principle of a non-public hearing, have also added the obligation of confidentiality of the parties involved in arbitration, that is, the obligation of confidentiality of both the substantive matters and the proceedings of the arbitration.

Practically speaking, Chinese arbitration should make sure to respect the parties' positions on what constitutes confidentiality by accepting parties' agreements on confidentiality and the way they are willing to protect that confidentiality. That practice is more practical and reasonable than only depending on Article 38 language.

We have inquired with experts who are familiar with CIETAC arbitration procedures to find out to what extent its current practice on protecting confidentiality may be improved to ensure sufficient protection of all the sensitive business information, including the kind of confidentiality club that we have seen in UK and other jurisdictions. The response is that China's current rules are flexible enough to grant such protection, as long as the panel of arbitrators is willing to grant procedural orders. The violation of the procedural orders could result in negative consequences in the final arbitral award.

C. Interim or Conservatory Measures

While it may not be used at all in SEP/FRAND cases, it is worth pointing out that China's arbitration law indeed offers the option of granting interim measures, for injunction or property reservation. There may be a situation where parties need interim measures to prevent irreparable, serious, or substantial harm. For example, in a SEP/FRAND arbitration dispute, the SEP holders have a strong incentive to seek an interim injunction against bad faith acts by implementors.

Under CIETAC Arbitration Rules, Article 23 stipulates that "in accordance with the applicable law or the agreement of the parties, a party may apply to the Arbitration Court for urgent interim relief pursuant to the CIETAC Emergency Arbitrator Procedures (Appendix III). The emergency arbitrator may decide to order *necessary* or *appropriate* emergency measures. The order of the emergency arbitrator shall be binding upon both parties."

However, this rule does not necessarily lay down the conditions for the grant of interim measures, often leaving the arbitrators, in the light of the circumstances of a particular case, with broad discretion to order 'any interim measure which they consider "necessary" or "appropriate." In practice, the lack of clear standards poses major challenges: for the parties, it leads to uncertainty as to whether their request will be accepted; for arbitrators, it leaves them without firm guidance on the criteria they should apply.

D. Document Production (Discovery)

Discovery in China arbitration proceedings is mostly limited to document production. Most such document production processes are directed by procedural orders, which is a type of procedural document that is widely used in international arbitration to assist the tribunal to exercise its administrative power in organizing an arbitration proceeding. An arbitration expert in China told the author that, in practice, this approach tends to improve both the efficiency and the transparency of the arbitration procedure, particularly in parties' discovery requests and their determination on confidentiality.

According to the experts, generally, arbitrators consider parties' conduct when making order as to costs. This conduct includes the party's compliance with the terms of procedural orders. Furthermore, parties who delay proceedings, e.g. document production, and thereby significantly impact the costs of the arbitration by making unreasonable procedural requests such as filing of additional documents long after pleadings have closed can be implicitly sanctioned when an order as to costs is made.

In SEP/FRAND arbitrations involving trade secrets, procedural orders can be made to limit the scope of discovery under Chinese arbitration law and arbitration rules, and the corresponding penalties are used to guarantee execution.

E. Enforceability

China is a party to the New York Convention and therefore subject to reciprocity and commercial reservations. The New York Convention was ratified by a diplomatic conference of the United Nations in 1958 and came into effect in 1959. To arbitrate and accept and execute arbitration awards made in other contracting states, the Convention allows the courts of contracting states to give effect to private agreements. It refers to arbitrations that are not considered domestic awards in the state where recognition and compliance is sought and is generally considered the basic instrument for international arbitration.

China has been trying hard to improve its records of enforceability of arbitration decisions, whether made domestically or overseas. This is seen as a critical test of credibility of China's arbitration system. The outcome of enforceability of international arbitration decisions will be reported to the Supreme Court for review.

In theory, the award of foreign-related arbitration issued in China can be enforceable in other jurisdictions that signed the Convention. According to the past experiences, there are several grounds to challenge awards such as no valid arbitration agreement between parties; the subject matter of the dispute is not contemplated by the terms of the arbitration agreement or is not arbitrable; or the arbitral award is in conflict with public policy etc.

In reality, the level of difficulty in enforcing an award is connected to the arbitral institution's reputation. For parties to determine the integrity of an arbitration institution, publicly available data on a forum is vital. The most well-established international arbitral institution in China, CIETAC, has consistently provided specific data and annual reports to establish its reputation. Moreover, the awards of these Chinese arbitration institutions are facing challenge of enforceability abroad. Therefore, it is hoped that China will ongoingly improve transparency of arbitration institutions by offering specific data and annual reports to the public for reference, and therefore establish its reputation.

V. COULD WIPO ARBITRATION BE A PREFERRED CHOICE IN CHINA?

While we are not concluding if any of China's arbitration center is already or will soon be a place acceptable to patent owners and implementers, it is important to highlight what WIPO arbitration center has been making available.

WIPO is an agency of the United Nations. It was created by an international convention in 1967 "to promote intellectual property protection throughout the world."[27] the WIPO Arbitration and Mediation Center (the "WIPO Center") was established in 1994 and offered alternative dispute resolution services to resolve international commercial disputes involving intellectual property. In late 2013, the WIPO Center announced model submission agreements built on the standard WIPO Mediation, Arbitration, and Expedited Arbitration Rules propose parties choose arbitration in a dispute concerning FRAND.[28]

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27 Convention Establishing the World Intellectual Property Organization, Article 3.

28 *Id.*; and also see *WIPO ADR for FRAND Disputes* https://www.wipo.int/amc/en/center/specific-sectors/ict/frand/.

A framework collaboration between the Supreme People's Court of China ("SPC") and WIPO has been established upon the signing of a Memorandum of Understanding (the "MoU") in April 2017. Among a number of activities involving WIPO under the MoU, SPC and the WIPO Arbitration and Mediation Center collaborate in the area of mediation to help resolve IP disputes in China. In October 2019, the WIPO Arbitration and Mediation Shanghai Service has been accredited by the Ministry of Justice of China to provide foreign-related mediation and arbitration services for foreign-related IP disputes in China. Cooperation has commenced concerning mediation of foreign-related IP cases pending with relevant courts in Shanghai.[29] By December 31, 2020, the WIPO Shanghai Service had received in total 18 foreign-related IP mediation cases referred from courts in Shanghai. To date, substantive mediation proceedings have been conducted in four out of these 18 cases. Out of these four cases, three were settled, resulting in a settlement rate of 75 percent.[30]

At present, it appears that WIPO arbitration centers, in Shanghai or a possible future Beijing center, would stand out as very desirable candidate on solving SEP/FRAND disputes for WIPO's reputation and other reasons.

First, WIPO is apparently the trusted international organization in China IP world. In one of most important policy roadmap speech on IP in December 2020, President Xi has openly called for China's participation in the global intellectual property governance within the framework of the World Intellectual Property Organization.[31] The arbitral awards made by WIPO centers in China will be more likely accepted. Second, WIPO Center is probably trusted more by non-Chinese patent owners, compared to local courts. WIPO should be more adapted to demands from patent owners, in terms of following international practice and providing bigger choice of trusted experts who know the SEP/FRAND fields. Finally, it is secure and easy to implement. Some international arbitration rules set confidential matters in the arbitration process. If a party refuses to perform within China's territory after WIPO Center makes the award, it may apply to a Chinese court for enforcement following the Civil Procedure Law's relevant provisions on foreign-related arbitration. The application of the award in other countries requires the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention has been ratified by more than 140 contracting parties, covering major countries and regions globally, and it can be implemented after being recognized by the competent authorities of the execution place.

VI. CONCLUSION

All the above reflect the somewhat hopeful thinking of the authors. Would WIPO be interested in taking bold steps to quickly build its centers in China and actively approach patent owners and implementers? Or would those already in ASIs/AASIs stalemate situations proactively engage with WIPO or other China arbitration centers for possible solutions?

Time to choose.

29 *WIPO Arbitration and Mediation Shanghai Service Initiates "Court-referred Mediation Promotion Scheme"* http://sipa.sh.gov.cn/ywzx/20210114/8a6c8e2cfed64c7baf00c-470daab821e.html.

30 *Id.*

31 See the Xinhua press report at http://www.xinhuanet.com/english/2020-12/02/c_139556530.htm.