

ARTICLE

FRAND Defences Against the Grant of Injunctive Relief: Applying *Huawei v ZTE* in Singapore and China

Joseph Lau

Faculty of Law, National University of Singapore, Singapore
Corresponding author. E-mail: lawlcyj@nus.edu.sg

(Received 31 March 2020; revised 6 July 2020; accepted 13 July 2020)

Abstract

From the size of A4 paper to 5G in the telecommunications sector, standards are ubiquitous. Standard essential patents (SEPs), which protect technology essential to standards, enable their proprietors to gain significant market power. Antitrust authorities therefore scrutinize the exercise of SEPs for breaches of competition law. In this regard, the ability of SEP proprietors to obtain injunctions against implementers as a remedy for infringement of SEPs where licensing negotiations have broken down or are ‘ongoing’ has proven controversial. Some fear that this enables SEP proprietors to threaten injunctions unless implementers agree to unfair, unreasonable, or discriminatory terms. In *Huawei Technologies Co Ltd v ZTE Corp* [2015] ECLI:EU:C:2015:477, the Court of Justice of the European Union identified circumstances where a SEP proprietor’s application for injunctive relief as a remedy for infringement of its SEP constitutes an abuse of a dominant position, with the classification of the SEP proprietor’s application as being abusive forming a ‘FRAND Defence’ which implementers may invoke against the grant of the injunction requested. This article analyzes whether this approach can be replicated by the Singapore Courts and whether the Chinese Courts, which have already dealt with SEP licensing disputes, adopt a similar approach.

Keywords: China; Competition Law; Intellectual Property Law; Singapore; Standard Essential Patents

Foreign legal rules should not be unthinkingly imported into local jurisprudence.¹ Social, political, and economic factors present in the legal system of origin may be absent in the host country or may be present with substantial variations.² Applying these observations to the judgment of the Court of Justice of the European Union (‘CJEU’) in *Huawei Technologies Co Ltd v ZTE Corp*³ (*Huawei*), this article explores whether the framework laid down in that judgment regulating the conduct of the proprietors of standard essential patents (SEPs) and implementers during licensing negotiations for SEPs⁴ can be replicated by Singapore Courts, which have yet to be confronted with SEP licensing disputes; and whether Chinese courts, which have already adjudicated such disputes, adopt a similar approach.

China is an important player in all areas of antitrust enforcement, including abuse of dominance and licensing of intellectual property rights (IPRs).⁵ Chinese Courts have already been confronted

¹Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (2nd edn, Oxford University Press 1992), cited in Kenneth Khoo & Allen Sng, ‘Singapore’s Competition Regime and its Objectives: The Case Against Formalism’ [2019] Singapore Journal of Legal Studies 67, 70.

²Umakanth Varottil, ‘The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony’ (2016) 31(2) American University International Law Review 253, 256.

³Case C-170/13 [2015] ECLI:EU:C:2015:477.

⁴*ibid* paras 61, 63, 65–67 and 71.

⁵Su Sun, ‘Foreword’, in Becky Nao Koblit, *The Practitioner’s Guide to Antitrust in China* (Wolters Kluwer 2015).

with the issues raised in *Huawei*, namely whether a SEP proprietor's application for injunctive relief as a remedy for infringement of its SEP constitutes an abuse of a dominant position, and, if so, whether the classification of the SEP proprietor's application as an abuse of a dominant position forms a defence which implementers may raise against the grant of injunctive relief to the SEP proprietor.⁶ While Singapore Courts have yet to confront such issues, the attractiveness of Singapore in terms of the strength of protection of IPRs⁷ and the efforts of the government to establish Singapore as an intellectual property ('IP') dispute resolution hub⁸ suggest that it is only a matter of time before they have to do so.

While substantial difficulties preclude the replication of the *Huawei* framework for SEP licensing negotiations by Singapore Courts, other mechanisms under Singapore law can be exploited to achieve the objectives behind *Huawei*. Chinese Courts replicate *Huawei* insofar as the success of a SEP proprietor's application for injunctive relief depends on its conduct and that of the implementer during licensing negotiations, requiring implementers to negotiate in good faith for a license if they wish to repel the SEP proprietor's application.⁹ This approach can be attributed to the doctrine of good faith ('DOGF') in Chinese law. However, Chinese Courts do not replicate *Huawei* in *totality*, as the SEP proprietor's application for injunctive relief need not constitute an abuse of dominance under Article 17 of the Anti-Monopoly Law of the People's Republic of China ('AML')¹⁰ before the Chinese Courts can dismiss it.¹¹

This article adopts the following structure: Section I introduces standards, SEPs, and undertakings to license SEPs on fair, reasonable and non-discriminatory ('FRAND') terms; Section II explains and analyzes *Huawei*; Section III discusses the likely reception of *Huawei* before Singapore Courts; Section IV elaborates on the partial replication of *Huawei* by Chinese Courts; and Section V compares the mechanisms under Singapore law which can be used to regulate SEP licensing negotiations against the approach of Chinese Courts in this area, querying whether these jurisdictions can learn from each other and examining whether the similarities or differences between their approaches can be traced to the economic or innovation policies of each jurisdiction.

Standards, SEPs and Undertakings to License SEPs on FRAND Terms

'Standards' are technical specifications that provide or are intended to provide a common design for products or processes.¹² Many products and services implement standards, like the size for A4 paper¹³ or 4G in the telecommunications sector.¹⁴ By ensuring compatibility and interoperability

⁶*Huawei* (n 3) para 41.

⁷In 2019, Singapore was ranked #2 in the world for the strength of its intellectual property protections. See Klaus Schwab (ed), *The Global Competitiveness Report 2019* (World Economic Forum 2019) 507 <http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf> accessed 4 Jun 2021.

⁸In 2019, Singapore's Parliament passed the Intellectual Property (Dispute Resolution) Act 2019 (No 23 of 2019). The Act 'takes significant steps forward in positioning Singapore as a hub for international [IP] dispute resolution'. See Singapore Parliament, Second Reading of the Intellectual Property (Dispute Resolution) Bill, 5 Aug 2019, Singapore Parliament Reports, vol 94 (Louis Ng Kok Kwang MP).

⁹Insofar as the SEP in question concerns voluntary national, industry or local Chinese standards (as classified under the Chinese system), or an international standard. See Section I below for an elaboration on the Chinese system of classifying standards.

¹⁰Anti-Monopoly Law of the People's Republic of China, (adopted at the 10th National People's Congress on 30 August 2007, effective 1 August 2008).

¹¹Though see n 195 below for recent developments which may qualify this analysis.

¹²Mark A Lemley, 'Intellectual Property Rights and Standard-Setting Organizations' (2002) 90(6) *California Law Review* 1889, 1896.

¹³European Commission, *Competition Policy Brief: Standard-Essential Patents* (European Union 2014) 1 <https://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf> accessed 13 Jul 2020.

¹⁴Oke Odudu, 'Intellectual Property Rights', in David Bailey & Laura Elizabeth John (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018).

between products,¹⁵ standards benefit consumers and manufacturers.¹⁶ Product interoperability ensures that different manufacturers' products work together, reducing costs for consumers.¹⁷ For instance, with no standardized charger, each new phone requires a new charger.¹⁸ Standardized chargers help consumers avoid this additional cost, as consumers can use existing chargers for new devices. Increased demand for standard-compliant products, which offer consumers such cost savings through interoperability, then benefits manufacturers who implement standards, as this translates into increased sales of their products.¹⁹

Standards may be *de jure* or *de facto*.²⁰ *De jure* standards may be adopted by a standard-setting organisation (SSO) through a consensus process.²¹ Usually, in exchange for taking part in this process, SSO members undertake to license patents protecting technology essential to the standard (namely, SEPs)²² on FRAND terms ('FRAND Undertaking'). *De jure* standards may also be set by public authorities.²³ For instance, the *Standardization Law of the People's Republic of China*²⁴ sets out, *inter alia*, the following categories of Chinese standards: national standards (which may be mandatory or voluntary/non-compulsory), industry standards and local standards (both of which are voluntary), with various Chinese government entities being involved in the development of these standards.²⁵ A *de facto* standard usually originates from individual firms and becomes a standard because it is widely used (eg, Adobe PDF).²⁶ The process by which it is set may or may not involve the provision of FRAND Undertakings from proprietors of patents essential to it.²⁷

SEPs can confer significant market power upon their owners, as once a standard has been set and industry players have invested heavily in standard-compliant products, the market is effectively locked into the standard and its related SEPs.²⁸ This allows SEP proprietors to potentially behave in anti-competitive ways.²⁹ For instance, they may engage in 'patent hold up', holding implementers to ransom by refusing to grant licenses to use technology essential to the standard, or only granting licenses based on unfair, unreasonable or discriminatory terms.³⁰ The FRAND Undertakings provided by SSO members help address this risk.³¹ However, this is only part of the equation, as

¹⁵Alison Jones, 'Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars' (2014) 10(1) European Competition Journal 1, 2.

¹⁶Richard H Stern, 'Who Should Own the Benefits of Standardization and the Value It Creates?' (2018) 19(1) Minnesota Journal of Law, Science and Technology 107, 115–116.

¹⁷Renata B Hesse, 'Response to Institute of Electrical and Electronics Engineers, Incorporated' (US Department of Justice, 2 Feb 2015) <www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated> accessed 4 Jun 2021, cited in Stern (n 16) 116.

¹⁸European Commission (n 13) 1–2.

¹⁹Stern (n 16) 116.

²⁰*ibid* 115.

²¹*ibid*.

²²European Commission (n 13) 2.

²³Hui Yan & Jiaqian Li, 'Balancing Between 'De Facto' and 'De Jure' in Standard-setting Strategy by a Latecomer Country: The Case of ICT Industry in China' (2018) 8(12) Developing Country Studies 24, 24.

²⁴The Standardization Law of the People's Republic of China (revised and adopted at the 12th National People's Congress on 4 November 2017, effective 1 January 2018).

²⁵Standardization Law (n 24); Piergiuseppe Pusceddu, 'Hic sunt dracones? Mapping the Legal Framework of China's Innovation Policy: Standardization and IPRs' (2020) 51(5) International Review of Intellectual Property and Competition Law 559, 578. For the benefit of interested readers, Pusceddu's article provides a fuller explanation of the categories of Chinese standards.

²⁶Nadia Soboleva & Lawrence Wu, 'Standard Setting: Should There Be a Level Playing Field for All FRAND Commitments?' (2013) 1 CPI Antitrust Chronicle, 2–3.

²⁷*ibid* 4.

²⁸European Commission (n 13) 3.

²⁹*ibid*.

³⁰European Commission, (n 13) 3; *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2017] EWHC 2988 (Pat) para 92 (Birss J).

³¹Jones (n 15) 5; European Commission (n 13) 3.

competition law intervenes to regulate SEP proprietors' exercise of the rights conferred upon them by their SEPs. *Huawei* is one example of this.

The *Huawei* Judgment

Huawei revolved around Article 102 of the *Treaty on the Functioning of the European Union* ("TFEU"), which provides that 'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States'.³² Article 102 of the TFEU only applies if the undertaking alleged to have engaged in abusive conduct holds a dominant position on the relevant market.³³ In the context of claims that an SEP proprietor's application for injunctive relief as a remedy for infringement of its SEP constitutes abuse, the 'relevant market' is the market for licensing of the relevant SEP.³⁴ Owning a SEP does not necessarily confer a 'dominant position' in this market.³⁵ Instead, courts of European Union ('EU') Member States determine this on a case-by-case basis.³⁶

Equipped with this understanding, this article now turns to the facts of *Huawei*. Huawei Technologies Co Ltd ('HT') owned a SEP relating to the 'Long Term Evolution' ('LTE') standard and had provided the European Telecommunications Standards Institute ('ETSI'), an SSO, with a FRAND Undertaking.³⁷ ZTE Corp ('ZC') marketed products using the LTE standard and was negotiating with HT for licensing of HT's SEP.³⁸ Negotiations broke down, and HT brought an action before the German Courts against ZC for infringement of HT's SEP.³⁹ HT sought, *inter alia*, an injunction against ZC that prohibits continued infringement of HT's SEP.⁴⁰ The German Court referred to the CJEU the question of whether HT's application for an injunction against ZC was an abuse of a dominant position under Article 102 of the TFEU.⁴¹ Before the CJEU, it was not contested that HT occupied a dominant position in the relevant market.⁴²

The CJEU's response was to provide a roadmap for SEP licensing negotiations.⁴³ Where a SEP proprietor has given a FRAND Undertaking, if it complies with that roadmap and the implementer fails to comply with the same, it is *unlikely* to be a breach of Article 102 of the TFEU for the SEP proprietor to seek injunctive relief against the implementer as a remedy for infringement of its SEP.⁴⁴

³²Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 102.

³³Jones (n 15) 16.

³⁴*Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2017] EWHC 2988 (Pat) para 631 (Birss J); *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2018] EWCA Civ 2344, [2018] RPC 20 para 216 (Lord Kitchin).

³⁵C-170/13 *Huawei Technologies Co Ltd v ZTE Corp* [2015] ECLI: EU:C:2015:477, Opinion of Advocate General Wathelet para 57; *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2018] EWCA Civ 2344, [2018] RPC 20 para 226 (Lord Kitchin).

³⁶*ibid.*

³⁷*Huawei* (n 3) paras 21–22.

³⁸*ibid* para 24.

³⁹*ibid* para 27.

⁴⁰*ibid.*

⁴¹*ibid* para 41.

⁴²*ibid* para 43.

⁴³Rupprecht Podszun, 'SEP Litigation and *Huawei*: Negotiations in the Shadow of Competition Law' (2017) 62(4) *The Antitrust Bulletin* 786, 797.

⁴⁴*Huawei* (n 3) paras 56 and 71. The English Courts have emphasized that *Huawei* was not laying down mandatory conditions, non-compliance with which would render proceedings for injunctive relief in respect of SEP infringement a breach of Article 102 of the TFEU. Instead, account must be had of the circumstances of the case. This does not mean that the roadmap in *Huawei* is irrelevant – an SEP proprietor's failure to alert the implementer of the alleged breach of the SEP was held to itself render an application for injunctive relief in respect of infringement of the relevant SEP abusive, while the rest of the roadmap for SEP licensing negotiations set out in *Huawei* will constitute a valuable guide as to whether such an application is abusive and whether an implementer is willing to take a license on FRAND terms. See *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2017] EWHC 2988 (Pat) para 741 (Birss J); *Unwired Planet International Ltd v Huawei*

The steps which each party is to take under the roadmap (called ‘obligations’ for ease of reference)⁴⁵ are tabulated below:

Table 1. Obligations of parties in relation to SEP licensing negotiations

Obligations of the SEP proprietor	Obligations of the implementer
Prior to bringing the action seeking an injunction, the SEP proprietor should alert the implementer of the alleged infringement of the SEP, designating the SEP and specifying the way in which it has been infringed. ⁴⁶	The implementer should express its willingness to conclude a licensing agreement on FRAND terms. ⁴⁷
After the implementer has expressed its willingness to conclude a licensing agreement on FRAND terms, the SEP proprietor must present to the implementer a specific, written offer for a license on FRAND terms, in accordance with the SEP proprietor’s FRAND Undertaking to the relevant SSO, specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated. ⁴⁸	The implementer must respond diligently to the SEP proprietor’s offer, in accordance with recognized commercial practices in the field and in good faith, a point which must be established on the basis of objective factors, and which implies, in particular, that there are no delaying tactics. ⁴⁹
	If the implementer refuses the SEP proprietor’s offer, the implementer may rely on the abusive nature of an action for a prohibitory injunction only if it has submitted to the SEP proprietor, promptly and in writing, a specific counter-offer that corresponds to FRAND terms. ⁵⁰
	If the implementer is using the teachings of the SEP before a licensing agreement has been concluded, then from the point at which the implementer’s counter-offer is rejected, it must provide appropriate security in accordance with recognized commercial practices in the field. ⁵¹

Three issues raised by *Huawei* require further elaboration, namely:

- a) Whether *Huawei* created a ‘FRAND Defence’;
- b) Whether *Huawei* applies only to exclusionary conduct; and
- c) What is the purpose of the implementer’s obligations under *Huawei*?

Each is explored in turn.

FRAND Defence

‘FRAND Defence’ refers to an implementer’s ability, where the SEP proprietor has given a FRAND Undertaking, to raise the abusive nature of the SEP proprietor’s application for injunctive relief, as a remedy for the infringement of its SEP, as a defence against the grant of such relief to the SEP proprietor. *Huawei* provides a FRAND Defence. As discussed above, *Huawei* concerned a patent infringement dispute between HT and ZC, where HT had provided a FRAND Undertaking to license its SEP on FRAND terms. The CJEU held that:

Technologies Co Ltd [2018] EWCA Civ 2344, [2018] RPC 20 paras 269 and 271 (Lord Kitchin); *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37, [2021] 1 All ER 1141 para 149–157 (Lords Reed, Hodge, Briggs and Sales and Lady Black) (judgment delivered after this article was accepted for publication).

⁴⁵Though see n 44 above.

⁴⁶*Huawei* (n 3) paras 61 and 71.

⁴⁷*ibid* paras 63 and 71.

⁴⁸*ibid*.

⁴⁹*ibid* paras 65 and 71.

⁵⁰*ibid* para 66.

⁵¹*ibid* para 67.

In the context of that dispute, the referring court raises the question whether the action for infringement seeking an injunction ... brought by [a SEP proprietor] ... against [an implementer] ... is ... an ‘abuse of a dominant position’, within the meaning of Article 102 TFEU, and, accordingly, whether that action must be dismissed.

...

...the fact that the patent has obtained SEP status means that [HT] can prevent products manufactured by competitors from appearing or remaining on the market and, thereby, reserve to itself the manufacture of the products in question.

In those circumstances, and having regard to the fact that [a FRAND Undertaking] creates legitimate expectations on the part of [implementers] that the [SEP proprietor] will ... grant licenses on such terms, a refusal by the [SEP proprietor] to grant a license on those terms may ... constitute an abuse within the meaning of Article 102 TFEU.

It follows that, having regard to the legitimate expectations created, *the abusive nature of such a refusal may ... be raised in defence to actions for a prohibitory injunction...*⁵² [emphasis added].

The above indicates that the CJEU analyzed the question referred to by the German Court as having two dimensions:

- a) Where a SEP proprietor has provided a FRAND Undertaking, would its application for injunctive relief, as a remedy for the infringement of its SEP, constitute an abuse of a dominant position under Article 102 TFEU?; and
- b) If so, would this form a defence that implementers could use to resist the grant of injunctive relief as a remedy in SEP infringement proceedings?

The CJEU addressed (a) by holding that where a SEP proprietor provides a FRAND Undertaking, then whether its application for injunctive relief constitutes an abusive refusal to grant a license on FRAND terms should be decided with reference to the framework for SEP licensing negotiations provided in *Huawei* as a guide.⁵³ As for (b), the excerpt above shows the CJEU’s view that, where the SEP proprietor’s application for injunctive relief constitutes an abusive refusal to deal, the legitimate expectations of implementers, engendered by the SEP proprietor’s FRAND Undertaking, justify the ability of implementers to raise the SEP proprietor’s refusal to deal as a defence against the grant of an injunction as a remedy for infringement of the SEP.⁵⁴ Confirming the above, in *Unwired Planet International Ltd v Huawei Technologies Co Ltd* (*Unwired HC*), one of the principles which Birss J derived from *Huawei* was that:

If the [SEP proprietor] does abuse its dominant position in bringing the claim...*that affords a defence to the claim for an injunction.* In other words, the proper remedy is likely to be *refusal of an injunction* even though a patent has been found to be valid and infringed and the implementer has no license.⁵⁵ [emphasis added].

⁵²*Huawei* (n 3) paras 41 and 52–54.

⁵³*ibid* para 71.

⁵⁴*Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2017] EWHC 2988 (Pat) [724] (Birss J).

⁵⁵*ibid* para 744(vii).

Types of Conduct Covered

The distinction between ‘exclusionary’ and ‘exploitative’ conduct is significant as some commentators interpret *Huawei* as being concerned *only* with exclusionary conduct.⁵⁶ ‘Exclusionary conduct’ is conduct by a dominant undertaking that forecloses the market, meaning that it prevents profitable expansion by competitors, prevents new entry to potential competitors or compels competitors to exit the market.⁵⁷ ‘Exploitative conduct’ is conduct that is unfair or unreasonable to those depending on the dominant firm for supply of goods or services on the relevant market⁵⁸ (eg, the imposition of unfair purchase or sales prices).⁵⁹ Those who believe that *Huawei* is only concerned with exclusionary conduct refer to Advocate General (AG) Wathelet’s opinion on the case, where he proposed an analysis based on exploitation rather than exclusion.⁶⁰ They then draw attention to the following portions of *Huawei*:

Although [HT] has the right to bring an action for a prohibitory injunction...the fact that the patent has obtained SEP status means that [HT] *can prevent products manufactured by competitors from appearing or remaining on the market and, thereby, reserve to itself the manufacture of the products in question.*

In those circumstances, and having regard to the fact that [a FRAND Undertaking] creates legitimate expectations on the part of [implementers] that the [SEP proprietor] will ... grant licenses on such terms, a refusal by the [SEP proprietor] to grant a license on those terms may...constitute an abuse within the meaning of Article 102 TFEU.

...

... the exercise by the [SEP proprietor] of its [IPRs], by bringing actions for a prohibitory injunction ... may be characterised, *in circumstances such as those in the main proceedings*, as an abuse, *where those proceedings are liable to prevent products complying with the standard in question manufactured by competitors from appearing or remaining on the market.*⁶¹ [emphasis added].

These extracts ostensibly emphasize the exclusion of competitor products as the basis for finding abuse.⁶² The CJEU appears to have departed from AG Wathelet’s analysis, focusing on exclusionary conduct.⁶³ Others decline to interpret *Huawei* this way, arguing that since Article 102 of the TFEU covers exploitative and exclusionary conduct, there is no reason to assume that the CJEU intended to limit *Huawei* to exclusionary conduct.⁶⁴ While the former view finds support in the text of

⁵⁶Sean-Paul Brankin et al, ‘*Huawei*: Injunctions and Standard Essential Patents – Is Exclusion a Foregone Conclusion?’ (2015) 30(1) Antitrust 80, 83–84 <<https://www.crowell.com/files/Huawei-Injunctions-Standard-Essential-Patents-Is-Exclusion-a-Foregone-Conclusion.pdf>> accessed 4 Jun 2020.

⁵⁷European Commission, ‘DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses’, 4 <<https://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>> accessed 4 Jun 2020.

⁵⁸Rhodri Thompson et al, ‘Article 102’, in David Bailey & Laura Elizabeth John (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018).

⁵⁹TFEU (n 32).

⁶⁰Brankin et al (n 56).

⁶¹*Huawei* (n 3) paras 52–53 and 73.

⁶²Brankin et al (n 56).

⁶³*ibid.*

⁶⁴Jorge L Contreras et al, ‘The Effect of FRAND Commitments on Patent Remedies’ in C Bradford Biddle et al (eds), *Patent Remedies and Complex Products: Towards a Global Consensus* (Cambridge University Press 2019). See for example Jorge L Contreras and Peter Georg Picht, ‘Are PAEs Different? The Legal Treatment of Patent Assertion Entities in Europe and the United States’ (2018) 2(3) IEEE Communications Standards Magazine 80; Alison Jones & Renato

Huawei, the latter view is speculative. While Article 102 of the TFEU indeed covers exploitative and exclusionary conduct,⁶⁵ *Huawei* is silent on the risk that that SEP proprietors might resort to patent litigation to extract unfair licensing terms from implementers.⁶⁶ It therefore seems a stretch to read *Huawei* as covering exclusionary and exploitative conduct. However, there was no positive holding in *Huawei* that if a SEP proprietor's application for injunctive relief was exploitative in nature, this could never lead to a finding of abuse. The fairest analysis is, therefore, that *Huawei* provides a case-specific answer, confirming that where the SEP proprietor's application for injunctive relief constitutes exclusionary conduct, it may be an abuse under Article 102 of the TFEU, but leaving open the issue of whether a SEP proprietor's application for injunctive relief is an abuse if it constitutes exploitative conduct.⁶⁷

Purpose of the Implementer's Obligations under Huawei

The implementer's obligations form part of a larger regulatory framework, being one of the elements which (unless the facts and circumstances of the case dictate otherwise) an implementer must prove is satisfied to characterize the SEP proprietor's application for injunctive relief as an abuse and exploit the FRAND Defence provided by *Huawei*. The CJEU held that the purpose of this framework was to balance safeguarding SEP proprietors' IPRs with 'maintaining free competition', in respect of which Article 102 of the TFEU prohibited abuses of a dominant position.⁶⁸ Each element of the *Huawei* framework was therefore designed to contribute towards this objective. Free competition is maintained as implementers are provided with a FRAND Defence, protecting them against abusive applications for injunctive relief by SEP proprietors. Simultaneously, the implementer's obligations under *Huawei*, which will likely need to be satisfied for implementers to have a FRAND Defence, balance the maintenance of free competition with the protection of SEP proprietors' IPRs, by depriving implementers of a FRAND Defence where they engage in 'reverse hold up', dragging out negotiations to force SEP proprietors to accept a lower royalty rate than is fair.⁶⁹ Where an implementer engages in such conduct, the SEP proprietor's ability to obtain injunctive relief against that implementer protects the interest of the SEP proprietor in achieving a fair return for its investment in developing the patented technology.

Huawei before The Singapore Courts

Rationalising Huawei from the perspective of Singapore Courts

The reception of the *Huawei* framework for SEP licensing negotiations before Singapore Courts cannot be discussed without acknowledging Singapore's traits as a common law jurisdiction which is not an EU Member State. This gives Singapore a unique position compared to Germany (which referred the questions discussed in *Huawei* to the CJEU) and most other EU Member States (e.g. Austria, France) which are civil law jurisdictions. Even the reception of *Huawei* in the United Kingdom ('UK'), another common law jurisdiction, is not a *precise* guide⁷⁰ as unlike

Nazzini, 'The Effect of Competition Law on Patent Remedies', in C Bradford Biddle et al (eds), *Patent Remedies and Complex Products* (Cambridge University Press, 2019).

⁶⁵Brankin et al (n 56) 82.

⁶⁶Nicolas Petit, '*Huawei v ZTE*: Judicial Conservatism at the Patent-Antitrust Intersection' (2015) 2 CPI Antitrust Chronicle 1, 5.

⁶⁷Haris Tsilikas, '*Huawei v ZTE* in Context – EU Competition Policy and Collaborative Standardization in Wireless Telecommunications' (2017) 48(2) International Review of Intellectual Property and Competition Law 151, 172–173.

⁶⁸*Huawei* (n 3) para 42.

⁶⁹*Unwired HC* (n 54) para 95 (Birss J).

⁷⁰This is not to say that UK cases considering *Huawei* are not useful. Precedent from other common law jurisdictions is regarded by Singapore Courts as persuasive (see Kevin Y L Tan, 'As Efficient as the Best Businesses: Singapore's Judicial System' in Jiunn-Rong Yeh & Wen-Chen Chang (eds), *Asian Courts in Context* (Cambridge University Press, 2014)). However, in using UK cases discussing *Huawei* to predict the likely reception of the *Huawei* framework for SEP licensing

UK Courts, which were required to follow CJEU decisions in certain circumstances,⁷¹ Singapore Courts are not bound by CJEU jurisprudence. One must therefore consider how Singapore Courts would rationalize the *Huawei* framework from their vantage point, especially in terms of the content and source of the implementer's obligations under that framework, as this is key to understanding the likely response of Singapore Courts to *Huawei*.

In terms of the content of the implementer's obligations under *Huawei*, while *Huawei* does not lay down fixed steps for implementers to follow to enjoy a FRAND Defence against a SEP proprietor's application for injunctive relief,⁷² it nonetheless lays down 'points of reference' to assess whether implementers are willing to enter into a license on FRAND terms,⁷³ each of which is consistent with what the Singapore Courts would consider to be a duty on the part of an implementer to negotiate for SEP licensing in good faith. This may motivate the Singapore Courts to find that while *Huawei* does not lay down specific procedural steps for implementers to follow during SEP licensing negotiations, the overarching *spirit* of the implementer's obligations under *Huawei* suggests that to enjoy a FRAND Defence, implementers must negotiate for SEP licensing in good faith. Substantiating this requires an understanding of what 'good faith' entails from the perspective of Singapore Courts. While an all-encompassing definition of 'good faith' is elusive,⁷⁴ two points help resolve this ambiguity. Firstly, 'good faith' is a norm whose content cannot be established in an abstract way, depending instead on the facts of the case.⁷⁵ Accordingly, to determine whether, when viewed from the perspective of Singapore Courts, *Huawei* requires implementers to negotiate for SEP licenses in 'good faith', we need only be concerned with the meaning of 'good faith' where parties are negotiating a contract. Secondly, 'good faith' is an excluder, a phrase with no positive meaning of its own.⁷⁶ The concept might therefore be clarified by focusing on conduct demonstrating *bad* faith, which is more easily identifiable, with 'good faith' then being defined as the absence of such conduct.⁷⁷ Pursuing this line of inquiry, in *Walford v Miles*⁷⁸ ('*Walford*'), where the House of Lords rejected the imposition of a duty to negotiate in 'good faith', Lord Ackner held that:

a duty to carry on negotiations in good faith is...repugnant to the adversarial position of the parties...involved in negotiations. Each party...is entitled to pursue his...own interest, so long as he avoids making misrepresentations. *To advance that interest he must be entitled...to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen negotiations by offering him improved terms.*⁷⁹ [emphasis added]

negotiations before Singapore Courts, one must be careful not to rely on conclusions of the UK Courts driven by their need to comply with EU law at the time their judgment was handed down.

⁷¹The status of CJEU jurisprudence before the UK Courts after 31 December 2020 is a complicated issue. Interested readers may consult the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020 and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.

⁷²See n 44 above.

⁷³*Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37, [2021] 1 All ER 1141 para 157 (Lords Reed, Hodge, Briggs and Sales and Lady Black) (judgment delivered after this article was accepted for publication).

⁷⁴Woo Pei Yee, 'Rethinking a Principle Underlying Contract Law' (2002) 22 Singapore Law Review 132, 175.

⁷⁵See Helmut Heinrichs in *Palandt Bürgerliches Gesetzbuch* (61st edn, C H Beck 2002) and Giorgio Cian & Alberto Trabucchi, *Commentario breve al codice civile* (5th edn, CEDAM, 1997), cited in Martijn W Hesselink, 'The Concept of Good Faith', in Arthur Hartkamp et al (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International 2004).

⁷⁶Robert S Summers, "'Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54(2) Virginia Law Review 195, 262.

⁷⁷Edward P Belobaba, 'Good Faith in Canadian Contract Law', in Law Society of Upper Canada, *Commercial Law: Recent Developments and Emerging Trends* (Richard De Boo Publishers 1985), cited in Ter Kah Leng, 'Good Faith in the Performance of Commercial Contracts Revisited' (2014) 26(1) Singapore Academy of Law Journal 111, 122.

⁷⁸[1992] 2 AC 128 (HL).

⁷⁹ibid 138.

Lord Ackner implies that ‘brinksmanship’ – threatening to withdraw from negotiations or withdrawing from them in the hope of extracting better terms from the other side – would be precluded by a duty to negotiate in ‘good faith’. This suggests that where parties are negotiating a contract, brinksmanship demonstrates *bad* faith, and a duty to negotiate in ‘good faith’ precludes either side from such conduct. Further guidance might be derived from *Western Australia v Taylor* (*‘Western’*), where it was held that the following, *inter alia*, would *not* be considered good faith negotiation: an unexplained failure to communicate within a reasonable time, stalling negotiations by unexplained delays in responding to correspondence, or failure to make counter-proposals.⁸⁰ More recently, in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* (*‘HSBC’*), which concerned a contractual obligation to negotiate in ‘good faith’, it was held that ‘good faith’ was reducible to a core meaning of acting honestly and observing accepted commercial standards of fair dealing.⁸¹

Applying the above, Singapore Courts are likely to find that the implementer’s obligations under *Huawei* are consistent with a duty to negotiate in good faith with SEP proprietors for licensing of SEPs. Three observations support this. Firstly, *Huawei* suggests that implementers should not engage in brinksmanship: if the implementer is not satisfied with the SEP proprietor’s initial offer, it should not threaten to withdraw from negotiations or actually do so, in the hope that the SEP proprietor may offer improved terms. The implementer is also discouraged from engaging in ‘delaying tactics’⁸² with the same objective. Instead, the implementer should promptly submit a counter-offer to the SEP proprietor.⁸³ Secondly, all the examples from *Western* of what would *not* be negotiating in good faith⁸⁴ are discouraged on the part of the implementer. It should not, without explanation, fail to respond to the SEP proprietor’s offer within a reasonable time, engage in delaying tactics or fail to make its own counter-proposal.⁸⁵ Thirdly, what was identified in *HSBC* as the ‘reducible core’⁸⁶ of a duty to negotiate in good faith is encouraged from the implementer. In the absence of extenuating circumstances, it is to observe ‘accepted commercial standards’⁸⁷ in terms of responding to the SEP proprietor’s offer and in terms of the quantum of security which it must provide if its counter-offer is rejected and it is already reliant on the teachings of the SEP.⁸⁸

If Singapore Courts then interpret the spirit of the implementer’s obligations under *Huawei* as requiring them to negotiate for SEP licenses in good faith, this begs the question of what Singapore Courts would identify as the source of this duty. Discussing tort first, while there may be some overlap between the implementer’s obligations under *Huawei* and the tort of deceit, deceit cannot explain *all* the implementer’s obligations under *Huawei*. Deceit is made out where the defendant makes a representation of fact, knowing that it is false and intending that the plaintiff act upon it and the plaintiff does so, causing him to suffer damage.⁸⁹ Consequently, where an implementer makes fraudulent representations to the SEP proprietor during licensing negotiations, and these are acted upon by the SEP proprietor, causing it to suffer damage, the implementer is liable for deceit. Additionally, since negotiating in ‘good faith’ requires acting honestly,⁹⁰ such conduct also breaches the implementer’s duty under *Huawei* to negotiate in good faith.

⁸⁰[1996] 134 FLR 211, 224–225 (a decision of the National Native Title Tribunal).

⁸¹[2012] 4 SLR 738 (CA) para 45.

⁸²*Huawei* (n 3) para 65.

⁸³*ibid* para 66.

⁸⁴*Western* (n 80).

⁸⁵*Huawei* (n 3) paras 65–66.

⁸⁶*HSBC* (n 81).

⁸⁷*ibid*.

⁸⁸*Huawei* (n 3) paras 65 and 67.

⁸⁹*Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 (CA) paras 14–15.

⁹⁰*HSBC* (n 81).

However, with reference to Table 1, where an implementer who refuses a SEP proprietor's offer does not provide the SEP proprietor with a counter-offer but instead threatens to withdraw from negotiations in the hope of extracting better terms from the SEP proprietor, this does not, in and of itself, give rise to liability under deceit, but *may still transgress the implementer's duty under Huawei to negotiate for SEP licenses in good faith*.⁹¹ The tort of deceit, therefore, cannot explain all an implementer's obligations under *Huawei*. The overlap between the two seems coincidental, as liability for deceit does not depend on the tortfeasor being in negotiations with the plaintiff and relief for deceit does not depend on the conduct complained of occurring in the context of negotiations for a contract.⁹²

Singapore courts are also unlikely to conclude that the law of unjust enrichment is the source of any duty to negotiate in good faith on the part of the implementer. In *Huawei*, the German Court also referred to the CJEU the question of whether HT's application for an account of profits as a remedy for infringement of its SEP would be an abuse of dominance.⁹³ The CJEU answered this question in the negative,⁹⁴ meaning that in cases like *Huawei*, a SEP proprietor which seeks to reverse any unjust enrichment received by an implementer through infringement of the SEP can seek an account of profits as a restitutionary remedy. Notably, the ability of the SEP proprietor to do so is unrestrained by whether the implementer has negotiated for a SEP license in good faith. The reversal of any unjust enrichment accruing to the implementer by virtue of its infringement of the SEP thus does not depend on whether the implementer complies with their duty to negotiate for a SEP license in good faith.

As for the contract, in *Huawei*, there was no contract between HT and ZC obligating ZC to negotiate in good faith. This distinguishes *Huawei* from *HSBC*, where the litigants were contractually obliged to negotiate in good faith, and the Singapore Courts upheld the enforceability of that obligation.⁹⁵ In the absence of a clause in a contract between the SEP proprietor and the implementer, obligating the latter to negotiate for a license in good faith, another option worth exploring is whether the implementer's obligations can be traced to the SEP proprietor's FRAND Undertaking. Under Singapore law, the doctrine of privity precludes an entity from enforcing a contract it is not party to.⁹⁶ There are some exceptions to this. For instance, a non-party may enforce a term of a contract if the contract expressly provides that he may.⁹⁷ Some civil law jurisdictions proceed directly to this position, allowing contractual parties to agree that contractual rights can be enforced by third parties.⁹⁸ The French doctrine of *stipulation pour autrui*⁹⁹, for example, allows third parties to acquire enforceable legal rights against parties to the contract.¹⁰⁰

Unwired HC reveals that while it is possible to rely on the SEP proprietor's FRAND Undertaking as the source of an implementer's duty to negotiate in good faith for a license, this is *not* what happened in *Huawei*. In *Huawei*, HT had given a FRAND Undertaking.¹⁰¹ In *Unwired HC*, the SEP proprietor also did so.¹⁰² Birss J held that although the FRAND Undertaking was an obligation

⁹¹*Huawei* (n 3) para 66.

⁹²Michael Furmston, et al, *Contract Formation: Law and Practice* (2nd edn, Oxford University Press 2016) para 13.39.

⁹³*Huawei* (n 3) para 72.

⁹⁴*ibid* para 76.

⁹⁵*HSBC* (n 81) paras 32–48.

⁹⁶Andrew Phang Boon Leong & Tham Chee Ho, 'Privity of Contract', in Andrew Phang Boon Leong (ed), *The Law of Contract in Singapore* (Academy Publishing 2012).

⁹⁷Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed), s 2(1)(a).

⁹⁸Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal' (2001) 32(3) Victoria University of Wellington Law Review 817, 822.

⁹⁹Translating into 'stipulation for a third party'. See Gary F Bell, 'Formation of Contract and Stipulations for Third Parties in Indonesia', in Mindy Chen-Wishart et al (eds), *Formation and Third-Party Beneficiaries* (Oxford University Press 2018).

¹⁰⁰*Unwired HC* (n 54) para 106 (Birss J).

¹⁰¹*Huawei* (n 3) para 22.

¹⁰²*Unwired HC* (n 54) para 101 (Birss J).

imposed on the SEP proprietor, it also created obligations on the part of implementers, as the logic of the FRAND Undertaking meant that implementers must negotiate fairly if they wished to exploit the constraint which the FRAND Undertaking places on the SEP proprietor's rights.¹⁰³ Simply put, even though an implementer was not party to the FRAND Undertaking between a SEP proprietor and SSO, if the implementer enforced that undertaking, it would be obligated to negotiate for a license in good faith. Birss J then inquired whether the SEP proprietor's FRAND Undertaking in *Unwired HC* was enforceable by implementers.¹⁰⁴ The undertaking was governed by French law and *stipulation pour autrui* applied, rendering it enforceable by third parties.¹⁰⁵ Birss J then held that:

the facts of [*Huawei*] are different from what had gone before. The distinctions are the essential nature of the SEP...and the irrevocable nature of the FRAND undertaking...The [CJEU] holds...that these...features mean that...*implementers have a legitimate expectation that the SEP owner will grant licenses on FRAND terms so that refusal to grant such a license may in principle constitute abuse.*

[T]he legitimate expectation justifies the CJEU's conclusion **without having to enter into an argument about the enforceability of the FRAND undertaking.** The CJEU has identified that implementers have such a legitimate expectation **without having to decide that the undertaking can be enforced at the suit of an implementer.**

[T]he FRAND undertaking is justiciable and enforceable in court *irrespective of competition law.* That gave implementers **legal rights and obligations** which [*Huawei*] was not able to recognise. The FRAND undertaking gives an implementer who is prepared to accept whatever terms are FRAND a right which amounts to a defence to the claim for an injunction. *That is because the implementer is entitled as a matter of law to be granted a FRAND license...* Therefore the legal landscape which the CJEU were presented with in [*Huawei*] was *incomplete* in a material way¹⁰⁶. [emphasis added]

These holdings were not challenged on appeal.¹⁰⁷ Two observations are made. Firstly, Birss J held that in *Unwired HC*, irrespective of competition law, the implementer had a right to enforce the FRAND Undertaking.¹⁰⁸ By this, he was referring to the fact that the FRAND Undertaking in question was governed by French law and *stipulation pour autrui* applied, such that the implementer, despite not being party to the FRAND Undertaking, could enforce it.¹⁰⁹ This gave rise not just to rights which the implementer could enjoy but also obligations, following Birss J's holding that where an implementer sought to enforce a FRAND Undertaking, it must also negotiate for a license in good faith.¹¹⁰ This mechanism for imposing a duty to negotiate in good faith on implementers traces its origins to the fact that under the law governing the FRAND Undertaking at issue, it can be enforced by an implementer not party to the FRAND Undertaking. However, Birss J also emphasized that *Huawei* did not rest on the ability of implementers, as non-parties to the FRAND

¹⁰³*Unwired HC* (n 54) para 160 (Birss J).

¹⁰⁴*ibid* para 86.

¹⁰⁵*ibid* paras 100 and 139 (Birss J).

¹⁰⁶*ibid* paras 721–723.

¹⁰⁷*Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2018] EWCA Civ 2344, [2018] RPC 20 para 27 (Lord Kitchen).

¹⁰⁸*Unwired HC* (n 54) para 723.

¹⁰⁹*ibid* paras 100 and 139 (Birss J).

¹¹⁰*ibid* paras 160 and 723.

Undertaking, to enforce that undertaking.¹¹¹ Instead, he observed that the CJEU based its decision on the ‘legitimate expectations’ of implementers and did not enter into a discussion on the enforceability of the FRAND Undertaking,¹¹² ruling out the possibility that the obligations imposed by *Huawei* on implementers can be traced to the SEP proprietor’s FRAND Undertaking to the SSO.

Singapore Courts may be more receptive to the argument that competition law is the source of the implementer’s duty to negotiate in good faith under *Huawei*. One of the objectives of Singapore’s competition watchdog, the Competition and Consumer Commission of Singapore (CCCS), is balancing the incentives for innovation generated by IPRs and the exclusionary effects which IPRs can have on competition and innovation.¹¹³ The objective of the *Huawei* framework for SEP licensing negotiations, namely balancing free competition with safeguarding the IPRs of SEP proprietors, aligns with this. From the perspective of Singapore Courts, then, a duty on the part of implementers to negotiate for SEP licenses in good faith can be rationalized as one imposed by Singaporean competition law in the interest of achieving the CCCS’ objectives. The alignment between the objectives of the *Huawei* framework for SEP licensing negotiations and those of the CCCS suggests that Singapore Courts should follow *Huawei* in this respect. However, whether Singapore Courts *should* follow *Huawei* is a different question from whether they *can* do so. While balancing free competition with safeguarding the IPRs of SEP proprietors is plainly desirable, substantial difficulties prevent the Singapore Courts from achieving this objective by replicating the *Huawei* framework for SEP licensing negotiations. Fortunately, as will be elaborated upon subsequently, other mechanisms under Singapore law can be exploited to balance free competition with safeguarding the IPRs of SEP proprietors.

B. Inability of Singapore Courts to Make First Instance Findings Regarding Breach of Section 47 of the Competition Act

Singapore’s competition legislation is the *Competition Act* (CA)¹¹⁴, and the pertinent provision is section 47, which prohibits conduct on the part of undertakings amounting to the abuse of a dominant position in any market in Singapore. Where a SEP proprietor claims that an implementer has infringed his SEP and seeks an injunction as relief, *Huawei* indicates that should the implementer comply with its obligations under the roadmap for SEP licensing negotiations provided by the CJEU and the SEP proprietor fail to comply with its obligations under the same, the court should, barring extenuating circumstances, find that the SEP proprietor’s application for injunctive relief constitutes an abuse of a dominant position. This finding is made by the court in the context of patent infringement proceedings, with no precondition that the implementer first obtains a decision from national competition authorities that the SEP proprietor’s application is abusive. Essentially, the court hearing the infringement proceedings makes a ‘first instance’ holding that an abuse has occurred. This presents difficulties in the Singapore context, as there is no standalone civil enforcement right with regard to competition law in Singapore – though section 86 of the CA provides that parties which have suffered loss or damage directly as a result of a breach of section 47 of the CA have a right of action in civil proceedings, this right arises only *after* the CCCS has made a finding that section 47 of the CA was breached.¹¹⁵ Implementers facing SEP infringement proceedings before the Singapore High Court (SGHC) cannot, therefore, request it to make a first instance finding that the SEP proprietor’s application for injunctive relief as a remedy

¹¹¹*Unwired HC* (n 54) paras 721–723 (Birss J).

¹¹²*ibid.*

¹¹³Burton Ong, ‘The Interface Between Intellectual Property Law and Competition Law in Singapore’, in Steven D Anderman (ed), *The Interface Between Intellectual Property Rights and Competition Policy* (Cambridge University Press 2007).

¹¹⁴(Cap 50B, 2006 Rev Ed).

¹¹⁵Lim Chong Kin & Scott Clements, *Competition Law in Singapore* (2nd edn, Kluwer Law International BV 2016) para 252.

for infringement of its SEP breaches section 47 of the CA. Supporting this analysis, in *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* ('*GlobalP*'), the SGHC observed that under the CA, all complaints under the CA would be decided by the CCCS at first instance.¹¹⁶ Insofar as it requires courts hearing SEP infringement proceedings to make first instance findings of abuse of dominance, *Huawei*, therefore, cannot be replicated by Singapore Courts.

Singapore's Focus on Exclusionary Conduct

While *Huawei* indicates that a SEP proprietor's application for injunctive relief, which constitutes *exclusionary* conduct, breaches Article 102 of the TFEU, the question of whether a SEP proprietor's application for injunctive relief, which constitutes *exploitative* conduct, breaches Article 102 of TFEU remains open. Should the scope of *Huawei* extend to exploitative conduct, this presents difficulties for its adoption by Singapore Courts, as the CA is more concerned with exclusionary conduct¹¹⁷. Explaining this, Article 102 of the TFEU provides examples of abuses of a dominant position, the first being 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.¹¹⁸ This example is also found in section 18 of the UK's Competition Act 1998 ('UKCA').¹¹⁹ Because of the emphasis on 'fairness' in this example, it is often categorized as an instance of exploitative abuse.¹²⁰ Although section 47 of the CA is modelled on Article 102 of the TFEU and section 18 of the UKCA, it omits this example from its list of potential abuses, replacing this with 'predatory behaviour towards competitors'.¹²¹ This exclusion suggests that the CA is more concerned with exclusionary rather than exploitative conduct.¹²² Consequently, even if Singapore Courts could make first instance findings of breach of section 47 of the CA, they may follow *Huawei* only insofar as it applies to exclusionary conduct.

Ability to Dismiss Applications for Injunctive Relief Because of Breaches of the Competition Act

Since *Huawei* creates a FRAND Defence, another prerequisite for the replicability of *Huawei* by Singapore Courts is that under Singapore law, a breach of the CA must provide grounds for dismissing an application for injunctive relief. While this has not been tested, it may be possible having regard to the nature of injunctions as a form of equitable relief.¹²³ Because of this, applicants for injunctions must come to court with 'clean hands'.¹²⁴ In *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* it was clarified that 'unclean hands' refers to illegal or inequitable conduct which has an immediate and necessary relation to the equity sued for and which is a depravity in a legal and moral sense.¹²⁵ Applying this definition and assuming that Singapore Courts follow the test for abuse of dominance in *Huawei*, then if a SEP proprietor applies for injunctive relief against an implementer to remedy infringement of its SEP but fails to carry out its obligations under the *Huawei* roadmap for SEP licensing negotiations, whilst the implementer has satisfied its own

¹¹⁶[2010] SGHC 97 para 72.

¹¹⁷Robert Ian McEwin, 'Introduction', in Robert Ian McEwin et al (eds), *Competition Law in Singapore - Principles, Practice and Procedure* (LexisNexis 2007).

¹¹⁸TFEU (n 32).

¹¹⁹Competition Act 1998, s 18(2)(a).

¹²⁰Alison Jones & Brenda Sufirin, *EU Competition Law: Text, Cases and Materials* (6th edn, Oxford University Press 2016) 351–352, cited in Khoo & Sng (n 1) 90.

¹²¹Richard Whish, 'Abuse of a Dominant Position', in Lim Chong Kin & Cavinder Bull (eds), *Competition Law and Policy in Singapore* (2nd edn, Academy Publishing 2015).

¹²²McEwin (n 117).

¹²³Daniel Koh et al, *Law and Practice of Injunctions, Interim Measures and Search Orders in Singapore* (Sweet & Maxwell/Thomson Reuters Asia 2017) para 1.001.

¹²⁴*ibid.*

¹²⁵[2011] 2 SLR 232 para 113.

obligations under the same, the criteria for ‘unclean hands’ would likely be satisfied. The SEP proprietor’s application for equitable relief in the form of an injunction would constitute illegal conduct as it would likely breach section 47 of the CA. This amounts to a depravity in both a legal and moral sense, allowing Singapore Courts to refuse the SEP proprietor’s application.

Objections Against the Implementer’s Duty to Negotiate in Good Faith

Since *Huawei* is likely to be rationalized by Singapore Courts as imposing on implementers a duty to negotiate for SEP licenses in good faith, the following observation by Coomaraswamy J in *ARIEF (Singapore I) Pte Ltd v NTUC Fairprice Co-operative Ltd* (*‘ARIEF’*) appears to preclude the adoption of the *Huawei* framework for SEP licensing negotiations by Singapore Courts:

Singapore...does not recognise a general duty of good faith implied into contracts at common law...Parties in an *existing* contractual relationship...retain the freedom to perform their contractual obligations in their own self-interest and in a manner which maximises their benefit, subject only to the limits imposed by the general law.

This is all the more so when...parties are negotiating the terms of a prospective contractual relationship...As Lord Ackner explained in [*Walford*], “the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties involved in negotiations”. Furthermore...there are practical difficulties in enforcing an agreement to negotiate in good faith, when the question arises whether an obligation to negotiate in good faith has been breached, **it is well-nigh impossible for a court to discern which party was responsible for... negotiations breaking down, let alone whether that party brought about the breakdown by failing to act in good faith.**¹²⁶ [emphasis in italics in original, emphasis in bold added]

This extract highlights two problems: firstly, that a duty to negotiate in good faith is repugnant to the freedom of parties in adversarial positions to pursue their self-interest while negotiating a contract, and secondly, uncertainty over when a duty to negotiate in good faith is breached. While these problems were raised in relation to the enforceability of an agreement to negotiate in good faith,¹²⁷ they should also apply to a duty to negotiate in good faith imposed by competition law. There is thus an economic justification behind the protection of the freedom of parties in adversarial positions to pursue their self-interest whilst negotiating a contract, namely the preservation of a system of free competition.¹²⁸ Regardless of origin, a duty to negotiate in good faith, which curtails this freedom, must therefore account for the importance of preserving a system of free competition and justify curtailing parties’ liberty to manoeuvre. As for the second problem, regardless of the source of a duty to negotiate in good faith, courts require a clear idea of when the duty is breached to facilitate its enforcement.

Considering both problems then, neither justifies a departure by Singapore Courts from *Huawei*. Discussing the first problem, what constitutes a system of free competition – the presence of competitors or fair competition? In Singapore, debates in Parliament on the CA indicate that the emphasis is on protecting fair competition rather than the presence of competition.¹²⁹ *Huawei*

¹²⁶[2015] 2 SLR 630 paras 64–65.

¹²⁷*HSBC* (n 81) para 33.

¹²⁸Marcel Fontaine, ‘Concluding Report’ in International Chamber of Commerce (ed), *Formation of Contracts and Precontractual Liability* (The Dossiers of the Institute of International Business Law and Practice, ICC Publication no 440/9, ICC Publishing SA 1990) 345.

¹²⁹Singapore Parliament, Second Reading of the Competition Bill, 19 Oct 2004, Singapore Parliament Reports, vol 78, col 873 (S Iswaran MP, Deputy Speaker of Parliament).

fits into this perspective. As discussed earlier, the duty to negotiate in good faith which *Huawei* imposes upon implementers combats reverse hold up, ensuring that SEP proprietors cannot be held to ransom by implementers who, *inter alia*, draw out negotiations to extract better licensing terms from SEP proprietors. Viewed in this way, the implementer's duty under *Huawei* to negotiate in good faith helps maintain a system of free competition rather than being repugnant to it.

The problem of uncertainty also loses its force when applied to *Huawei*. With reference to [Table 1](#), the CJEU in *Huawei* set out broad categories of conduct that may breach the implementer's duty to negotiate in good faith. While some uncertainty remains regarding when an implementer's conduct falls into those categories, this merely reflects the fact that it is illogical and arbitrary to generalize regarding when, for instance, an implementer's conduct amounts to delaying tactics. No benchmark can be set for the timeliness of the implementer's counter-offer, as this depends on case-specific elements like the number of SEPs asserted and the details in the infringement claim.¹³⁰ The CJEU's approach of laying down broad categories of conduct that may breach the implementer's duty to negotiate in good faith, which can then be flexibly applied to each case, thus makes more sense than attempting to set precise benchmarks for when this duty will be breached. *Huawei* is also supplemented by *Walford*, *Western*, and *HSBC*, which, as discussed earlier, flesh out for Singapore Courts the content of a duty to negotiate for a contract in good faith.

The Predominant Objective of the Competition Act

The predominant objective of the CA is the promotion of economic efficiency.¹³¹ During the Second Reading of what was then the Competition Bill, Dr Vivian Balakrishnan stated that:

*the objective of the Bill is to promote the efficient functioning of our markets and hence enhance the competitiveness of our economy...Instead of attempting to catch all...anti-competitive activities, our ...focus will be on those that have an appreciable effect on competition in Singapore or that do not have any net economic benefit. In assessing whether an action is anti-competitive, we will also [consider] whether it promotes innovation, productivity or longer-term economic efficiency. This approach will ensure that we do not inadvertently constrain innovative and enterprising endeavours.*¹³² [emphasis added]

The extract hints at a link between innovation and economic efficiency. Indeed, 'dynamic efficiency' is a form of economic efficiency relating to the optimal use of resources for enhancing innovation and the development of new products.¹³³ The importance of dynamic efficiency to Singapore cannot be understated, as constraints in size and manpower dictate that Singapore's future economic growth must be based on innovation.¹³⁴ Pertinently, Singapore's Committee on the Future Economy recommends that Singapore strengthen its innovation ecosystem and design a regulatory environment that supports innovation.¹³⁵

¹³⁰European Commission, 'Setting out the EU Approach to Standard Essential Patents' COM (2017) 712, 10.

¹³¹McEwin (n 117); Khoo & Sng (n 1) 87.

¹³²Singapore Parliament, Second Reading of the Competition Bill, 19 Oct 2004, Singapore Parliament Reports, vol 78, col 864 (Vivian Balakrishnan MP, Senior Minister of State for Trade and Industry).

¹³³Josef Drexel, 'Is There a 'More Economic Approach' to Intellectual Property and Competition Law?' in Josef Drexel (ed), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar 2008).

¹³⁴Pearl Lee, 'Singapore Needs to Base Its Growth on Productivity and Innovation: Ong Ye Kung' *The Straits Times* (25 Jan 2017), cited in Lin, 'Private Equity in Singapore', in Dora Neo et al (eds), *Financial Services Law and Regulation* (Academy Publishing 2019).

¹³⁵*Report of the Committee on the Future Economy: Pioneers of the Next Generation* (Committee on the Future Economy 2017) ii, 8, 13 and 29 <https://www.mti.gov.sg/-/media/MTI/Resources/Publications/Report-of-the-Committee-on-the-Future-Economy/CFE_Full-Report.pdf> accessed 4 Jun 2021.

The problem is then that innovation often requires a large upfront investment.¹³⁶ If rivals can quickly adopt an innovation, this reduces the chances that this investment can be recouped, disincentivising competition by innovation, as undertakings will not innovate if it bankrupts them.¹³⁷ This is where IPRs come in as an important tool to promote dynamic efficiency. They protect the right of innovators to exclude others from using their ideas, preserving the financial incentive for innovation.¹³⁸ Khoo & Sng then argue that because of the importance of preserving dynamic efficiency to achieve growth in Singapore, defences against liability for infringement of IPRs should come from within the IPR regime and not competition law.¹³⁹ The logic of this argument is that if competition law curtails the ability of IPR owners to enforce their exclusive rights by providing additional defences against liability for infringement of IPRs, this will render IPRs less attractive as incentives for innovation, diminishing their utility in promoting dynamic efficiency. If the predominant objective of Singapore competition law, as represented by the CA, is to promote economic efficiency, it is then antithetical to that objective for Singapore competition law to introduce defences against the infringement of IPRs.

To be precise, *Huawei* does not absolve implementers of liability for infringing SEPs. It only provides a defence against the grant of injunctive relief as a remedy for infringement. The implementer remains liable for infringing the SEP, whose proprietor can explore other remedies for the infringement (see the discussion on how a SEP proprietor may obtain an account of profits as a remedy, notwithstanding an implementer's having negotiated for a license in good faith). Nevertheless, insofar as *Huawei* curtails the ability of a SEP proprietor to enforce its patent rights, reducing the attractiveness of patents and hence their ability to spur competition via innovation, *Huawei* still engages the logic of Khoo & Sng's argument.

Alternatives to *Huawei*

There are two alternatives to *Huawei* under Singapore law. The first of these, which relies on the implementer's enforcement of the SEP proprietor's FRAND Undertaking, was raised earlier. Following *Unwired HC*, where under the law governing the FRAND Undertaking, it is enforceable by an implementer, then irrespective of competition law, that undertaking gives the implementer a defence to a claim by the SEP proprietor for an injunction.¹⁴⁰ Notably, this alternative is based on the implementer's contractual rights rather than competition law and does not require Singapore Courts to find that section 47 of the CA has been breached, avoiding some of the obstacles against the Singapore Courts' adoption of *Huawei* discussed earlier.

Another alternative relies on the Singapore Courts' discretion to refuse injunctive relief in response to patent infringement¹⁴¹ and section 55 of Singapore's Patents Act¹⁴² ('PA'). Discussing the former first, where a SEP proprietor has provided a FRAND Undertaking, and the implementer is willing to take a license on FRAND terms, the principles regulating a court's discretion to refuse injunctive relief in response to patent infringement allow it to dismiss a SEP proprietor's application for such relief, *without needing to find that the SEP proprietor's conduct breaches the provisions of the applicable competition legislation relating to abuse of a dominant*

¹³⁶Gerald F Masoudi, 'Intellectual Property and Competition: Four Principles for Encouraging Innovation' (The United States Department of Justice, 11 Apr 2006) <<https://www.justice.gov/atr/speech/intellectual-property-and-competition-four-principles-encouraging-innovation>> accessed 4 Jun 2021.

¹³⁷*ibid.*

¹³⁸Anurag Gupta & Satyajeet Mazumdar, 'Competition Law and Intellectual Property Rights: Whether Conflicting or Complementing Each Other to Serve a Common Purpose?' (2011) 2(2) Asian Journal of Law and Economics No 5, 11.

¹³⁹Khoo & Sng (n 1) 80.

¹⁴⁰*Unwired HC* (n 54) paras 139 and 723 (Birss J).

¹⁴¹Koh et al (n 123) para 6.023.

¹⁴²Cap 221, 2005 Rev Ed.

position. *Shelfer v City of London Electric Lighting Company*¹⁴³ (*'Shelfer'*) is the leading authority on when injunctive relief for patent infringement should be refused,¹⁴⁴ setting out four criteria for the refusal of such relief: the injury to the plaintiff's legal rights must be small, capable of being estimated in money and adequately compensated by a small money payment, and it must not be oppressive to the defendant to grant an injunction.¹⁴⁵ Three points should be noted: Firstly, the *Shelfer* criteria are a 'good working rule' and not a 'statute or straightjacket' to be inflexibly applied.¹⁴⁶ Secondly, in practice, the most important consideration is whether it is oppressive to the defendant to grant injunctive relief.¹⁴⁷ Finally, the fact that not all the criteria are established does not mean that an injunction should be granted.¹⁴⁸

English Courts have applied *Shelfer* to refuse injunctions, where SEP proprietors have provided FRAND Undertakings and implementers are 'willing' to take licenses on FRAND terms, without requiring a finding that the SEP proprietor's application breaches section 18 of the UKCA.¹⁴⁹ In *Nokia OYJ v ICom GmbH & Co KG*¹⁵⁰ (*'Nokia'*), ICom, a SEP proprietor, sought an injunction against Nokia for infringement of ICom's SEP.¹⁵¹ Nokia was willing to take a license over the SEP on FRAND terms, and ICom had provided a FRAND Undertaking.¹⁵² Roth J declined to grant an injunction, stating that:

... I am...uncertain...why a permanent injunction should be granted in this case...*It seems to me a classic case for consideration of the Shelfer criteria, given those circumstances.* You are willing to give a license. Nokia wants a license. You cannot agree on the terms. They will be determined. There will then be a license. In those circumstances for a non-trading entity to get an injunction seems...extraordinary.¹⁵³ [emphasis added]

Several observations are made. Firstly, while Roth J did not articulate which of the *Shelfer* criteria was engaged in *Nokia*, nothing in the excerpt relates to the size of the injury to ICom's legal rights, whether this could be estimated in money or adequately compensated by a small money payment. The relevant criteria must therefore have been that, in the circumstances, it was oppressive to Nokia to grant the injunction. Secondly, with none of the other *Shelfer* criteria being applicable, the oppressiveness of an injunction was sufficient to deny ICom's application (this being consistent with the point highlighted earlier that one does not have to establish all four *Shelfer* criteria to defeat the grant of an injunction). *Nokia* therefore suggests that where a SEP proprietor has provided a FRAND Undertaking and the implementer is 'willing' to take a license on FRAND terms, the grant of an injunction to the SEP proprietor as a remedy for infringement of its SEP is oppressive to the implementer, with this being sufficient to deny the application for injunctive relief.

¹⁴³[1895] 1 Ch 287.

¹⁴⁴Lionel Bently & Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 1250.

¹⁴⁵Norman V Siebrasse et al, 'Injunctive Relief' in C Bradford Biddle et al (eds), *Patent Remedies and Complex Products* (Cambridge University Press 2019).

¹⁴⁶*HTC Corporation v Nokia Corporation (No 2)* [2013] EWHC 3778 (Pat), [2014] RPC 30 para 8 (Arnold J); *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822 para 123 (Lord Neuberger).

¹⁴⁷Siebrasse et al (n 145).

¹⁴⁸*Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822 para 123 (Lord Neuberger).

¹⁴⁹Alison Jones & Renato Nazzini, 'The Effect of Competition Law on Patent Remedies' in C Bradford Biddle et al (eds), *Patent Remedies and Complex Products* (Cambridge University Press 2019).

¹⁵⁰[2012] EWHC 1446 (Ch).

¹⁵¹Jones & Nazzini (n 149).

¹⁵²*ibid.*

¹⁵³*Nokia* (n 150), quoted in Marc Dominic Mimler, 'United Kingdom' in Peter Chrocziel et al (eds), *Intellectual Property and Competition Law* (Kluwer Law International BV 2016).

Thirdly, Birss J held in *Unwired HC* that an implementer who does not negotiate fairly is not a willing licensee.¹⁵⁴ *Unwired HC* read with *Nokia*, therefore, suggests that an implementer's ability to invoke *Shelfer* to defeat the SEP proprietor's application for injunctive relief requires the implementer to have negotiated for an SEP license in good faith. Finally, while there is some doubt over whether *Nokia* only applies where the SEP proprietor is, like IPCom, a non-practising entity ('NPE'),¹⁵⁵ even if *Nokia* is so limited, this has little practical significance. The term 'NPE' applies to entities that own patents but do not practice them, whether those patents are acquired or the product of research.¹⁵⁶ Patent assertion entities ('PAEs') are NPEs whose business model revolves around the acquisition and assertion of patents.¹⁵⁷ Between January 2000 to July 2015, PAEs initiated roughly 64% of all SEP litigation cases in the United States in the telecommunications and networking sectors over a 16-year period.¹⁵⁸ In practice then, most SEP disputes involve a form of NPE, so even if the scope of *Nokia* is limited to scenarios where the SEP proprietor seeking the injunction is an NPE, *Nokia* will still apply in most SEP disputes.

However, *Nokia* alone does not service *Huawei's* objective of balancing the maintenance of free competition with safeguarding the IPRs of SEP proprietors.¹⁵⁹ Indeed, it seemingly leaves SEP proprietors worse off, as they are unable to obtain injunctive relief against infringing implementers without a licensing deal on FRAND terms being any closer. This is where section 55 of the PA comes in. Section 55(1) provides that 'Any interested person may apply to the court for the grant of a license under a patent on the ground that the grant of the license is necessary to remedy an anti-competitive practice.' Several observations are made. Firstly, 'any interested person' is not defined by the PA, but one might reasonably conclude that this category extends to the SEP proprietor and the implementer. While it can be expected that these parties will apply to the court to exercise its powers under section 55, since it is in the interest of both parties to conclude a licensing deal on FRAND terms, Singapore's Parliament should amend section 55 to allow the Singapore Courts to exercise their powers under section 55 of their own motion, to deal with the unlikely event that neither the SEP proprietor nor the implementer makes a section 55 application or the more plausible scenario that there is some dragging of feet by both parties in making this application, for whatever reason.

Secondly, 'anti-competitive practice' is not defined by the PA¹⁶⁰, and the Singapore Courts have not defined this concept.¹⁶¹ It is arguable that section 55 does not require a prior finding of breach of the CA by the CCCS, as there is no mandatory link between an 'anti-competitive practice' under section 55 and the work of the CCCS.¹⁶² It is therefore open to Singapore Courts to find that, where

¹⁵⁴*Unwired HC* (n 54) para 160.

¹⁵⁵Florian Mueller, 'UK High Court Denies a Patent Injunction Against Nokia in Light of a FRAND Commitment' (Foss Patents, 30 May 2012) <<http://www.fosspatents.com/2012/05/uk-high-court-denies-patent-injunction.html>> accessed 4 Jun 2021; Mimler (n 153).

¹⁵⁶David L Schwartz & Jay P Kesan, 'Analysing the Role of Non-Practicing Entities in the Patent System' (2014) 99(2) Cornell Law Review 425, cited in Nikolaus Thumm & Garry Gabison (eds), *Patent Assertion Entities in Europe* (European Union 2016) 15 <<https://publications.jrc.ec.europa.eu/repository/bitstream/JRC103321/lfn28145enn.pdf>> accessed 4 Jun 2021.

¹⁵⁷Thumm & Gabison (n 156) 15–16; Ruslan Galiakhmetov et al, 'How to Enhance Patent Commercialisation? An Analysis of Patent Aggregators in Europe' (2018) 22(4) International Journal of Innovation Management 1850040, 1850040–7.

¹⁵⁸Jorge L Contreras, 'Assertion of Standards Essential Patents by Non-Practicing Entities' in D Daniel Sokol (ed), *Patent Assertion Entities and Competition Policy* (Cambridge University Press 2017) 21.

¹⁵⁹*Huawei* (n 3) para 42.

¹⁶⁰George Wei, *Some Thoughts on Intellectual Property Rights in Singapore: A Monograph for Gerald Dworkin* (George Wei 2009) 214.

¹⁶¹Ong (n 113). *Global* does not define the term 'anti-competitive practice' under section 55 of the PA. The phrase 'anti-competitive conduct' was merely used in the judgment to refer to conduct breaching the provisions of the CA (see *Global* (n 116) paras 16(a) and 25).

¹⁶²Wei (n 160).

a SEP proprietor who has provided a FRAND Undertaking seeks injunctive relief against an implementer for infringement of its SEP and the implementer is willing to take a license on FRAND terms (the same circumstances allowing the court to refuse the SEP proprietor's application for an injunction under *Shelfer*), the SEP proprietor's conduct amounts to an 'anti-competitive practice' which must be remedied by the grant of a license, *without requiring a prior decision by the CCCS that the SEP proprietor's conduct breaches section 47 of the CA, or having to make a first-instance finding of their own to that effect*.¹⁶³ This avoids the difficulty regarding the inability of Singapore Courts to make first-instance findings that section 47 of the CA has been breached.

Thirdly, sub-section 55(7) of the PA indicates that the court's powers under section 55 are to be exercised with a view to securing that the inventor or other person beneficially entitled to the patent receives reasonable remuneration, having regard to the economic value of the license. This services *Huawei's* goal of balancing the maintenance of free competition with the safeguarding of the SEP proprietor's IPRs¹⁶⁴ while ensuring that while the implementer is shielded from anti-competitive conduct on the part of the SEP proprietor, the SEP proprietor and the implementer conclude a licensing arrangement that fairly compensates the SEP proprietor.

Finally, it is worth noting that by exploiting *Nokia* and section 55 of the PA to regulate SEP licensing disputes, Singapore Courts would avoid introducing competition law defences against the infringement of SEPs. *Nokia* is purely an application of the principles surrounding a court's discretion to refuse injunctive relief in response to patent infringement, whilst section 55 is found within Singapore's PA. This addresses the concern that Singapore Courts should avoid introducing competition law defences against liability for infringement of IPRs.

Huawei before the Chinese Courts

Chinese Courts partially replicate *Huawei*, insofar as the success of a SEP proprietor's application for injunctive relief under Chinese law (where the SEP in question concerns voluntary national, industry or local standards (as classified under the Chinese system)¹⁶⁵ or international standards) depends on the SEP proprietor and implementers' conduct during licensing negotiations. If an implementer of such SEPs wishes to fend off the relevant SEP proprietor's application for injunctive relief, it must have negotiated for a license in good faith. However, the Chinese Courts do not follow *Huawei* insofar as it requires a prior finding that the relevant SEP proprietor's application for injunctive relief constitutes an abuse of dominance under the applicable competition legislation, in China's case, article 17 of the AML.¹⁶⁶

Before launching into this discussion, some points regarding China's legal system must be borne in mind. China has a four-tiered court system, with the apex court being the Supreme People's Court ('SPC').¹⁶⁷ Below the SPC are the Higher, Intermediate and District People's Courts.¹⁶⁸ In 2014, specialist IP courts were established in Beijing, Shanghai, and Guangzhou as Intermediate People's Courts.¹⁶⁹ The SPC and Higher and Intermediate People's Courts have trial and appellate jurisdiction.¹⁷⁰ Since

¹⁶³For completeness, see Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (2nd edn, Sweet & Maxwell 2014) paras [2.4.4] and [34.4.5] where Ng-Loy argues that section 55(2) of the PA merely illustrates *one instance* in which the court may exercise its powers under section 55(1). See also Ng-Loy Wee Loon, 'Exploring Flexibilities Within the Global IP Standards' (2009) 2 *Intellectual Property Quarterly* 162, where Ng-Loy argues that section 55 of the PA is consistent with Singapore's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights.

¹⁶⁴*Huawei* (n 3) para 42.

¹⁶⁵See n 25, above.

¹⁶⁶Though see n 195 below for recent developments which may qualify this analysis.

¹⁶⁷Chang Wang and Nathan H Madson, *Inside China's Legal System* (Chandos Publishing 2013) 75–76.

¹⁶⁸*ibid* 76.

¹⁶⁹Mingde Li, 'Special Intellectual Property Courts in China', in Nari Lee et al (eds), *Governance of Intellectual Property Rights in China and Europe* (Edward Elgar 2016).

¹⁷⁰Wang & Madson (n 167) 78.

China is a civil law jurisdiction, Chinese judges do not make law by deciding cases¹⁷¹ and guidelines issued by them do not bind lower courts.¹⁷² Nevertheless, precedents in Chinese law should not be ignored, especially the judgments of the SPC, which has an important legislative function in promulgating judicial interpretations providing general rules for Chinese Courts to follow¹⁷³. The SPC is also the court to watch in terms of SEP licensing disputes in China, as in 2019, jurisdiction over appeals involving competition and IP laws was centralized in the hands of an appellate-level IP tribunal in the SPC.¹⁷⁴

Partial Replication of Huawei

In March 2016, the SPC issued a Judicial Interpretation ('2016 JI'), Article 24 of which provided that:

“With regard to [a SEP] for a non-compulsory national, industry or local standard which expressly incorporates the patent, the people’s court will generally deny an injunction request (based on such patent) where (i) the patentee intentionally violated the FRAND obligations when negotiating with the accused infringer for licensing terms such that no agreement was reached; and (ii) the accused infringer is patently not at fault during the negotiations.”¹⁷⁵

Like *Huawei*, under the 2016 JI, a SEP proprietor’s ability to obtain injunctive relief (at least where the SEP relates to a voluntary national, industry or local standard, as classified under the Chinese system) is tied to the behaviour of the SEP proprietor and the implementer during licensing negotiations, with an injunction being denied where the SEP proprietor has not negotiated on a FRAND basis, and the implementer was ‘not at fault’ during negotiations. However, unlike *Huawei*, the 2016 JI does not seem to require Chinese Courts to find that the SEP proprietor’s application for injunctive relief amounts to an abuse of dominance under Article 17 of the AML before they can dismiss that application.¹⁷⁶

Continuing this trend, in March 2017, the Beijing Intellectual Property Court ('BIPC') issued its judgment in *Xi'an Xidian Jietong Wireless Communication Co, Ltd v Sony Mobile Communication Products (China) Co Ltd*¹⁷⁷ ('IWNComm I').¹⁷⁸ The plaintiff, IWNComm, owned a SEP relating to a voluntary standard and had provided a FRAND Undertaking.¹⁷⁹ Sony was negotiating with IWNComm for licensing of the SEP, but negotiations failed, and IWNComm claimed that Sony had infringed its SEP.¹⁸⁰ The BIPC found Sony liable for infringement and granted IWNComm

¹⁷¹ibid.

¹⁷²Claire Guo, 'Intersection of Antitrust Laws with Evolving FRAND Terms in Standard Essential Patent Disputes' (2019) 18(3) *John Marshall Review of Intellectual Property Law* 259, 272.

¹⁷³Wang and Madson (n 167) 78; Xiaoye Wang et al, *Competition Law in China* (3rd edn, Kluwer Law International BV 2018) para 51.

¹⁷⁴Ni Zhenhua, 'China Established a Centralized IP Appellate Tribunal' (China Law Insight, 15 Jan 2019) <www.chinalawinsight.com/2019/01/articles/intellectual-property/china-established-a-centralized-ip-appellate-tribunal/> accessed 4 Jun 2021.

¹⁷⁵David Shen & Jill Ge, 'Iwncomm v. Sony: First SEP-based Injunction Granted in China' (Allen & Overy, 10 Apr 2017) <www.allenoverly.com/en-gb/global/news-and-insights/publications/iwncomm-v-sony-first-sep-based-injunction-granted-in-china> accessed 4 Jun 2021.

¹⁷⁶Susan Ning et al, 'Injunctive Relief for Standard Essential Patents Holders Will be Restricted' (King & Wood Mallesons, 6 Apr 2016).

¹⁷⁷Beijing Intellectual Property Court, 22 March 2017.

¹⁷⁸Ashish Bharadwaj & Dipinn Verma, 'China's First Injunction in Standard Essential Patent Litigation' (2017) 12(9) *Journal of Intellectual Property Law & Practice* 717, 717–719; Tristan Sherliker, 'A Telecoms Blockbuster: Beijing High Court Upholds Patent Injunction in *IWNCOMM v Sony*' (2018) 38(5) *The Licensing Journal* 10, 11.

¹⁷⁹Tristan Sherliker, 'A Telecoms Blockbuster: Beijing High Court Upholds Patent Injunction in *IWNCOMM v Sony*' (2018) 38(5) *The Licensing Journal* 10, 10 and 12.

¹⁸⁰Ashish Bharadwaj & Dipinn Verma, 'China's First Injunction in Standard Essential Patent Litigation' (2017) 12(9) *Journal of Intellectual Property Law & Practice* 717, 718.

an injunction.¹⁸¹ When assessing IWNComm's application for injunctive relief, the BIPC's approach was to assess which party was at fault for the breakdown in negotiations. If the implementer was to blame and the SEP proprietor was not at fault, then an injunction should be granted.¹⁸² Shortly after *IWNComm 1*, the Beijing High People's Court ('BHPC') provided more guidance in the form of the Guidelines for Patent Infringement Determination¹⁸³ ('Beijing Guidelines'), which are generally affirmative to the BIPC's approach in *IWNComm 1*.¹⁸⁴ Pertinent articles from the Beijing Guidelines are set out below:

149. In a case about a [SEP] explicitly disclosed in recommended national, industrial or local standards, if the patentee is intentionally in breach of its obligation for licensing on [FRAND] terms as promised in the process of formulating the standards when the patentee and the [implementer] negotiate [for SEP licensing], thereby resulting in a failure to reach a patent licensing contract and the [implementer] *has no obvious fault in the negotiations*, the court generally shall not uphold the [SEP proprietor's] claim for stopping the act of implementing the standard. Where a standard is not a recommended national, industrial or local standard, but belongs to *an international standard* or a standard made by other [SSOs], if the patentee explicitly discloses the patent and makes a [FRAND] commitment according to the policy of the [SSOs], the above provision can be referred to.

...

150. *In the negotiation for licensing [SEPs], the negotiating parties should be in good faith. The patentee who makes [a FRAND Undertaking] shall fulfill the obligations under the [FRAND Undertaking]; the accused party who requests the patentee to license on [FRAND] terms should also diligently negotiate in good faith.*

...

153. Where the patentee has not fulfilled its obligation for licensing on [FRAND] terms, and the accused party has serious fault in the negotiation, a people's court shall determine whether the patentee's request for ceasing infringement of a [SEP] should be supported, after having analysis of the degree of fault between the parties and judgment on which party shall undertake the primary responsibility for the breakdown of the negotiation.

If any of the following acts is committed, it may be found that the accused infringer has clear fault...:

- (1) *failing to diligently respond within reasonable time after receiving written notification of infringement from the patentee;*
- (2) *failing to diligently respond within reasonable time on whether to accept license conditions of the patentee; or refusing to accept specific conditions proposed by the patentee but failing to propose new conditions, after receiving specific conditions of license from the patentee;*
- (3) *obstructing, delaying or refusing to participate in the license negotiation without adequate reasons;*

¹⁸¹Bharadwaj & Verma (n 180) 718.

¹⁸²Shen & Ge (n 175).

¹⁸³Yin Li et al, 'New Developments on SEP-Related Disputes in China' (Kluwer Patent Blog, 3 Jul 2017) <<http://patentblog.kluweriplaw.com/2017/07/03/new-developments-sep-related-disputes-china/>> accessed 4 Jun 2021.

¹⁸⁴*ibid.*

- (4) proposing a[n] apparently unreasonable condition during negotiation, which results in failure to reach a license agreement;
- (5) the accused infringer has any other serious faults in the negotiation.¹⁸⁵ [emphasis added]

Under the Beijing Guidelines, adherence to the principle of good faith is the primary obligation of the SEP proprietor and the implementer during licensing negotiations.¹⁸⁶ For its part, the SEP proprietor is required to comply with its FRAND Undertaking. As for implementers, with reference to Table 1, an implementer's duties under the Beijing Guidelines mirror those imposed on implementers under *Huawei*. The obligations to respond diligently to the SEP proprietor's offer,¹⁸⁷ to produce a counter-offer if not satisfied with the SEP proprietor's initial offer,¹⁸⁸ and not to engage in delaying tactics¹⁸⁹ are common to both. Unsurprisingly, commentators see the Beijing Guidelines as being consistent with *Huawei*.¹⁹⁰ The Beijing Guidelines were employed by the BHPC in March 2018 in the appeal from *IWNComm 1*.¹⁹¹ The BHPC considered the conduct of *IWNComm* and Sony during licensing negotiations and, noting that Sony had, *inter alia*, engaged in delaying tactics, concluded that Sony was more at fault for the breakdown of negotiations and upheld the grant of an injunction.¹⁹²

Like the 2016 JI, the Beijing Guidelines do not require Chinese Courts to find that the SEP proprietor's application for injunctive relief amounts to an abuse of a dominant position under article 17 of the AML before they can dismiss that application. The 'Guidelines for the Trial of Standard Essential Patents Disputes (Trial Implementation)' ('Guangdong Guidelines'), issued by the Guangdong High People's Court ('GHPC') in April 2018,¹⁹³ do not differ much from the 2016 JI or the Beijing Guidelines.¹⁹⁴ Essentially, the issues of whether injunctive relief should be granted to the SEP proprietor and whether the SEP proprietor's application for such relief amounts to an abuse of a dominant position under article 17 of the AML are decoupled from one another under Chinese law, unlike *Huawei* where a SEP proprietor's application for injunctive relief must be abusive before it raises a FRAND Defence.¹⁹⁵

¹⁸⁵Guidelines for Patent Infringement Determination (2017) Beijing High People's Court, arts 149, 150 and 153. For an English translation, see 'Guidelines for Patent Infringement Determination (2017)', Beijing High People's Court' (BJGY.chinacourt.gov.cn, 27 Apr 2017) <<http://bjgy.chinacourt.org/article/detail/2017/04/id/2825592.shtml>> accessed 4 Jun 2021.

¹⁸⁶Liyang Hou & Mengchi Tian, 'IPR Protection and Antitrust Regulation of SEPs in China', in Kung-Chung Liu & Reto M Hilty (eds), *SEPs, SSOs and FRAND* (Routledge 2019). As Article 149 of the Beijing Guidelines indicates, they may apply to cases where the SEP in question concerns international standards, in certain circumstances. See Li et al (n 183).

¹⁸⁷*Huawei* (n 3) para 65; Guidelines for Patent Infringement Determination (2017) (n 185) Art 153(2).

¹⁸⁸*Huawei* (n 3) para 66; Guidelines for Patent Infringement Determination (2017) (n 185) Art 153(2).

¹⁸⁹*Huawei* (n 3) para 65; Guidelines for Patent Infringement Determination (2017) (n 185) Art 153(3).

¹⁹⁰Li et al (n 183).

¹⁹¹*Sony Mobile Communications Products (China) Co, Ltd v Xi'an Xidian Jietong Wireless Network Communication Co, Ltd* [2017] Jingmin 454.

¹⁹²Sherliker (n 179) 12.

¹⁹³The Guangdong Guidelines apply to SEP cases in the telecom industry but can be used 'by reference' in disputes in other industries. See Adrian Emch et al, 'Guangdong Court Issues New Guidance for Standard Essential Patent Disputes' (Hogan Lovells, May 2018) 3 <www.hoganlovells.com/~media/shalib011174531v4clientalertguangdonghighcourtsepguidelines.pdf?la=en> accessed 4 Jun 2021.

¹⁹⁴Articles 10 - 14 of the Guangdong Guidelines, which deal with when a SEP proprietor's application for injunctive relief will be denied, focus on the relative fault between the parties for the breakdown in negotiations, seemingly without demanding a prior finding of a breach of Article 17 of the AML. Ben Ni, 'Guidance on SEP Disputes in China' (2018) 276 *Managing Intellectual Property* 13, 13-14.

¹⁹⁵Though see Article 27 of the Anti-Monopoly Guidelines on Intellectual Property Rights, officially released by China's State Administration for Market Regulation *after* this article was accepted for publication, which may provide a *new*, competition law-based route to dismissing the SEP proprietor's application.

Explaining the Approach of the Chinese Courts

Since the Chinese Courts' approach for assessing applications by SEP proprietors for injunctive relief is independent of the AML, one must look outside Chinese competition law for the influences driving this approach.¹⁹⁶ The Chinese Courts' approach may instead be explained as an extension of the DOGF in Chinese law. This doctrine is the 'highest guiding principle' or 'royal principle' for the Chinese law of obligations¹⁹⁷ and applies to all stages of a contract, *including pre-contractual negotiations*.¹⁹⁸ Pertinently, the DOGF was discussed by the Chinese Courts in the context of a SEP licensing dispute in *Huawei v IDC*¹⁹⁹ ('IDC'). InterDigital Communications ('InterDigital') owned SEPs relating to wireless communications standards and had provided a FRAND Undertaking.²⁰⁰ InterDigital was negotiating with Huawei for licensing of those SEPs.²⁰¹ Huawei then sued InterDigital before the Shenzhen Intermediate People's Court ('SIPC') for violating its FRAND Undertaking.²⁰² The SIPC ruled that InterDigital had violated its FRAND Undertaking, and this was upheld on appeal by the GHPC.²⁰³ In reaching this conclusion, the Chinese Courts held that the DOGF prescribed by the General Principles of the Civil Law of the People's Republic of China²⁰⁴ ('GPCL') and the Contract Law of the People's Republic of China²⁰⁵ ('CLPRC') *provided a basis for implementers to enforce a SEP proprietor's FRAND Undertaking*, citing the following as establishing the scope and effect of a FRAND Undertaking:

- a) Article 4 of the GPCL: 'In civil activities, the principles of voluntariness, fairness, consideration for equal value, and good faith shall be observed';
- b) Article 5 of the CLPRC: 'The parties shall observe the principle of fairness in defining each other's rights and obligations'; and
- c) Article 6 of the CLPRC: 'The parties shall observe the principle of good faith in exercising their rights and fulfilling their obligations'.²⁰⁶

The DOGF is applied to curb the abuse of legal rights.²⁰⁷ Since a FRAND Undertaking can be construed as a promise by the SEP proprietor not to exercise the full scope of its patent rights, in

¹⁹⁶See n 195 above.

¹⁹⁷Wang Liming & Xu Chuanxi, 'Fundamental Principles of China's Contract Law' (1999) 13(1) Columbia Journal of Asian Law 1, 16, cited in Chunlin Leonhard, 'A Legal Chameleon: An Examination of the Doctrine of Good Faith in Chinese and American Contract Law' (2010) 25(2) Connecticut Journal of International Law 305, 308–309.

¹⁹⁸*Zhonghua Renmin Gongheguo Hetongfa* [Contract Law of the People's Republic of China] (Law Press China 2007) 3, cited in Leonhard (n 197) 308.

¹⁹⁹*Huawei Technologies Co v InterDigital Communications, Inc*, 2011 Shen Zhong Fa Zhi Min Chu Zi No 857 (Shenzhen Intermediate People's Court 2011); *Huawei Technologies Co v InterDigital Communications, Inc*, 2013 Yue Gao Fa Min San Zhong Ni No 305 (Guangdong High People's Court, 2013).

²⁰⁰Jyh-An Lee 'Implementing the FRAND Standard in China' (2016) 19(1) Vanderbilt Journal of Entertainment and Technology Law 37, 48.

²⁰¹Guangliang Zhang & Gary Zhang, 'A Review of *Huawei v IDC*' (Managing Intellectual Property, 27 Mar 2015) <<http://www.managingip.com/Article/3440420/A-review-of-Huawei-v-IDC.html>>, cited in Lee (n 200) 49.

²⁰²Lee (n 200) 49.

²⁰³*ibid* 49–50.

²⁰⁴General Principles of the Civil Law of the People's Republic of China (adopted at the 6th National People's Congress on 12 April 1986, effective 1 January 1987).

²⁰⁵Contract Law of the People's Republic of China (adopted at the 9th National People's Congress on 15 March 1999, effective 1 October 1999).

²⁰⁶Lee (n 200) 56–57.

²⁰⁷Bing Ling, *Contract Law in China* (Sweet & Maxwell Asia 2002) 50, Zhu Jingwen & Han Dayuan (eds), *Research Report on the Socialist Legal System With Chinese Characteristics*, vol 3 (Enrich Professional Publishing 2013) 17; Hui Zheng, 'Overview', in Yuanshi Bu (ed), *Chinese Civil Law* (Munich: CH Beck; Oxford: Hart Publishing 2013), 5, cited in Lee (n 200) 60.

exchange for the adoption of the standard by the relevant SSO,²⁰⁸ where a SEP proprietor which has provided a FRAND Undertaking attempts to enforce the SEP by injunction, while licensing negotiations have yet to conclude, this may constitute an abuse of the SEP proprietor's legal rights,²⁰⁹ which is prohibited by the DOGF. Implementers may therefore invoke the DOGF to defeat a SEP proprietor's application for injunctive relief, where this application constitutes an abuse of the SEP proprietor's legal rights by contradicting its obligations under the FRAND Undertaking.

However, the DOGF also indicates that the ability of an implementer to do so cannot be unqualified. Where an implementer is to blame for the failure of parties to conclude a licensing arrangement, for instance, because it has engaged in brinksmanship, that implementer would be in breach of Article 4 of the GPCL and Articles 5 and 6 of the CLPRC. In those circumstances, it would contradict the ethos of the DOGF prescribed by those provisions to allow the implementer to rely on the DOGF to enforce the SEP proprietor's FRAND Undertaking and defeat that party's application for injunctive relief. Logic dictates that where the implementer is at fault for the breakdown in SEP licensing negotiations, it cannot be an abuse of the SEP proprietor's legal rights for it to seek injunctive relief against the implementer for infringing its SEP.

This is, in fact, the approach disclosed by the 2016 JI, the Beijing Guidelines and the Guangdong Guidelines, which, as discussed earlier, focus on the conduct of the SEP proprietor and the implementer during licensing negotiations, with injunctive relief being granted to the SEP proprietor where the breakdown in licensing negotiations can be traced to the actions of the implementer.

Comparison of National Approaches

Comparing the mechanisms under Singapore law that can be used to achieve the objectives of the *Huawei* framework for SEP licensing negotiations against the approach of Chinese Courts to regulating SEP licensing negotiations, two observations are made. Firstly, both jurisdictions eschew reliance on competition law, in the form of section 47 of the CA and article 17 of the AML, respectively, to regulate applications by SEP proprietors for injunctive relief as a remedy for infringement of SEPs.²¹⁰ As discussed earlier, implementers litigating SEP infringement claims before Singapore Courts may explore whether, under the law governing the SEP proprietor's FRAND Undertaking, they have a *contractual* defence against the SEP proprietor's application for injunctive relief, or whether the principles governing Singapore Courts' discretion to refuse injunctive relief as a remedy for patent infringement provide them with a defence against the grant of injunctive relief to the SEP proprietor. Neither of these mechanisms requires a prior finding by Singapore Courts that section 47 of the CA has been breached. As for Chinese law, Section IV demonstrates that an implementer's ability to raise a SEP proprietor's failure to negotiate for licensing of its SEP on a FRAND basis as a defence against the grant of injunctive relief to the SEP proprietor is *not* contingent on a prior finding by Chinese Courts that the SEP proprietor's conduct breaches article 17 of the AML.²¹¹

This similarity between the two approaches might be explained by the importance of innovation as an engine of economic growth in both jurisdictions. It was shown earlier that the Singapore Courts are unlikely to allow competition law to provide defences against liability for infringement of SEPs, due to concerns that curtailing the rights which patents provide will render them less attractive as incentives for innovation, diminishing their utility in promoting dynamic efficiency, where the preservation of dynamic efficiency is crucial in achieving the innovation-based economy

²⁰⁸Mark A Lemley & Carl Shapiro, 'A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents' (2013) 28(2) Berkeley Technology Law Journal 1135, 1140, cited in Lee (n 200) 60.

²⁰⁹Lee (n 200) 60.

²¹⁰Though, see n 195 above.

²¹¹Though, see n 195 above.

critical to Singapore's continued growth because of its constraints in size and manpower. The need for China to transition into an innovation-based economy is no less pressing, albeit for different reasons. Upper middle-income countries, like China, can become stuck at that stage of development.²¹² At this stage, countries face diminishing marginal returns from reliance on labour, and capital and innovation are needed to drive growth.²¹³ China recognizes this, and the National Medium to Long-term Plan for the Development of Science & Technology (2006–2020) has set the goal for China to become an 'innovation-oriented' country by 2020.²¹⁴ The importance of an IP regime which facilitates innovation towards this enterprise has not been lost on China, with Justice Tao Kaiyuan, Vice-President of the SPC, writing extra-judicially that the strengthening of IP protection is an indispensable part of an innovation-driven development strategy.²¹⁵ In this context, it is unsurprising that in regulating SEP licensing negotiations, Chinese Courts have not allowed Chinese competition law to introduce defences against the grant of injunctive relief to SEP proprietors as a remedy for infringement of their SEPs.²¹⁶ This is in line with China's effort to transition into an innovation-based economy, as by preserving the strength of the rights conferred by SEPs to their proprietors, the Chinese approach preserves the utility of patents in promoting the dynamic efficiency needed to increase the pace of innovation.

Secondly, the two approaches differ in terms of complexity. A committee appointed by Singapore's Ministry of Law to review Singapore's IP dispute resolution system observed that 'the reduction of cost and complexity is undoubtedly a desideratum of our legal system, and striving for it must be correct as a matter of general principle.'²¹⁷ However, when one contrasts the Chinese approach to regulating SEP licensing negotiations against the mechanisms which implementers have to utilize to resist an SEP proprietor's application for injunctive relief before the Singapore Courts, the former is more straightforward. Under Chinese law, the DOGF provides a straightforward legal basis for implementers to resist an SEP proprietor's application for injunctive relief. In contrast, the two routes for implementers to resist a SEP proprietor's application for injunctive relief before the Singapore Courts are rather convoluted. The route based on the governing law of the FRAND Undertaking requires implementers to first establish what that law is (which may be complicated by the absence of a governing law clause) and then establish whether, under that law, the FRAND Undertaking is enforceable by third parties. Foreign law is treated by Singapore Courts as an issue of fact, which must be proved by adducing sources of foreign law or expert opinion,²¹⁸ so should the governing law of the FRAND Undertaking not be Singapore law (for example, in *Unwired HC*, it was French law),²¹⁹ then the duration and cost of litigating a SEP proprietor's application for injunctive relief before the Singapore Courts will be increased by the need to present evidence regarding the content of the governing law of the FRAND Undertaking.

As for the route based on *Shelfer*, if Singapore Courts are going to demand, through the assessment of whether an implementer is a 'willing' licensee, that implementers negotiate for SEP licenses in good faith, this begs the question why the PA cannot be amended to require that implementers

²¹²Dan Prud'homme & Taolue Zhang, *China's Intellectual Property Regime for Innovation: Risks to Business and National Development* (Springer International Publishing 2019) v.

²¹³Jan Fagerberg et al, 'Innovation and Economic Development', in Bronwyn H Hall & Nathan Rosenberg (eds) *Handbook of the Economics of Innovation*, vol 2 (Elsevier 2010), cited in Prud'homme & Zhang (n 212) 4.

²¹⁴Prud'homme & Zhang (n 212) 5.

²¹⁵Tao Kaiyuan, 'China's Commitment to Strengthening IP Judicial Protection and Creating a Bright Future for IP Rights' (World Intellectual Property Organization Magazine, Jun 2019) <www.wipo.int/wipo_magazine/en/2019/03/article_0004.html> accessed 4 Jun 2021.

²¹⁶Though see n 195 above.

²¹⁷Intellectual Property Dispute Resolution Committee, *Final Report: Review of Singapore's IP Dispute Resolution Framework* (Ministry of Law 2016) para 1.2.3.

²¹⁸*Re Harish Salve* [2018] 1 SLR 345 (CA) para 45.

²¹⁹*Unwired HC* (n 54) para 100 (Birss J).

owe SEP proprietors a duty to negotiate in good faith for a license over SEPs. Four points support this. Firstly, while Singapore has never embraced a general concept of ‘good faith’, it has recognized certain contracts as contracts of utmost good faith.²²⁰ Marine insurance contracts, for instance, are classified by section 17 of the Marine Insurance Act (Cap 387, 1994 Rev Ed) (‘MIA’) as contracts ‘based upon the utmost good faith’, which can be avoided if this is not observed. Section 20 of the MIA then regulates representations made by the insured to the insurer during negotiations for marine insurance contracts, enabling the insurer to avoid the contract if these are false. This approach addresses the ostensible disparity between insured and insurer in terms of knowledge of the former’s circumstances: the insured is presumed to know more about its own circumstances, with the insurer relying on the insured to disclose all material facts.²²¹ If Singapore can recognize a concept of ‘good faith’ in *specific* circumstances, based on the features and risks of the relationship between the parties concerned, then in the interest of balancing fair competition with safeguarding SEP proprietors’ IPRs, the PA should be amended to create an exception for SEP licensing negotiations, requiring implementers to negotiate in good faith.

Secondly, the fact that this duty would be provided by the PA addresses concerns that *competition* law should not introduce defences against the grant of injunctive relief as a remedy for patent infringement. The utility of patents in promoting dynamic efficiency is preserved as SEP licensing negotiations are regulated within Singapore’s IPR regime, without any curtailment of the strength of IPRs by competition law.

Thirdly, in *HSBC*, Rajah JA (as he then was) held that clauses binding contractual parties to negotiate in good faith were consistent with Singapore’s cultural value of promoting consensus and that it was in the wider public interest in Singapore to promote such an approach towards resolving differences.²²² There is no reason why these observations should be limited to *contractual* obligations to negotiate in good faith. A duty on the part of implementers to negotiate for SEP licenses in good faith would therefore be consistent with Singapore’s public policy.

Finally, as mentioned earlier, Singapore Courts may resist imposing a duty to negotiate in good faith on implementers because such a duty is repugnant to the freedom of parties to pursue their self-interest while negotiating for a contract and because of uncertainty over when such a duty is breached. Having demonstrated earlier that neither consideration should trouble Singapore Courts in the context of SEP licensing negotiations, the path is clear for Singapore Courts to learn from the Chinese Courts in applying a less complex approach to regulating SEP licensing negotiations.

Conclusion

Foreign decisions should not be uncritically applied without appreciating local conditions and the facts of the case.²²³ Considering the foregoing discussion on the CJEU’s approach to regulating SEP licensing negotiations, this observation rings true. It is difficult and undesirable to standardize *Huawei* as the approach which all jurisdictions take towards this issue. In some jurisdictions, like Singapore, replication seems impossible due to the features of local law and objectives of the CA. Other jurisdictions like China have charted their own path and regulate the issue of injunctive relief for SEP proprietors outside the parameters of competition law through the DOGF.²²⁴ Each jurisdiction must consider how best to balance the IPRs of SEP proprietors and the maintenance of free

²²⁰Woo (n 74) 133.

²²¹Yeo Hwee Ying, ‘Of Shifting Winds – Insured’s Pre-contractual Duty of Good Faith in Singapore’ (2018) 30 Singapore Academy of Law Journal 345, 346–347.

²²²*HSBC* (n 81) para 40.

²²³*Pang’s Motor Trading v Competition Commission of Singapore* [2014] SGCAB 1 para 34.

²²⁴Though, see n 195 above.

competition, crafting a solution adapted to local law and which coheres with the philosophies guiding its implementation.

Acknowledgements. I thank Associate Professor Burton Ong for comments on an earlier draft. All errors and omissions remain my own. Save where this article has been updated to specifically reference developments after that date, the law in this article is stated as of 13 July 2020.

Author Biography

Joseph Lau, LLM (Intellectual Property & Technology Law) (National University of Singapore); BA (Oxon). Teaching Assistant, National University of Singapore, Faculty of Law.