

The Role Play of International Comity and Conflict Resolution in the Injunction System

---Taking HUAWEI v. CONVERSANT as an Example

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Abstract

Recently, Huawei and Conversant have won the eight-year war over standard essential patents, and the Intellectual Property Court of the Supreme People's Court of China has made the first decision of the nature of "injunction", which has aroused wide international attention. During the judgment of the case, the principle of international comity has been invoked many times, at the same time, it also reminds us of the problem that has been the common concern of the practical and academic circles, that is, the relationship between the injunction system and the principle of international comity, where to go. There is a natural conflict between the principle of international comity and the injunction system. In the context of the Huawei and Conversant case, this paper analyzes the conflict of values between the two through the definition, connotation, development, and role. With the above conflict points, we analyze and summarize the application of the principle of international comity in the anti-suit injunction system in the common law system and the civil law system, and come up with the solution measures on how to deal with the conflict in the application practice of the above countries. Considering the special characteristics of our country in the injunction system, that is, under the legal system of behavioral preservation to make the "injunction" nature of the decision, this paper ultimately focuses on the establishment of an independent injunction system in line with China's national conditions. After all, the injunction system and behavioral preservation system is a fundamental difference, so the establishment of an independent system is conducive to play the maximum effect of the system.

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HUAWEI v. CONVERSANT Injunction Case Analysis

Case Background

In January 2018, Huawei filed three lawsuits with the Nanjing Intermediate People's Court ('Nanjing Intermediate Court') in Jiangsu Province, seeking confirmation of the licensing fee rates for key patents in China. To counter Huawei's lawsuits in China, in April 2018, Conversant filed a standard essential patent infringement lawsuit with the District Court of Düsseldorf, Germany, requesting the court to issue an injunction to stop Huawei's patent infringement and recover damages.

On 16 September 2019, the Nanjing Intermediate Court rendered first-instance judgments in three cases involving royalties for standard-essential patents between Huawei and its Chinese subsidiaries and Conversant. Conversant appealed against the court's decision to the Supreme People's Court, claiming that the standard essential patent royalties determined by the court were too low.

On 27 August 2020, the Intellectual Property Division of the SPC accepted Huawei's application for an injunction. The company argued that the court in Düsseldorf, Germany had issued a first-instance judgement finding that Huawei and its German affiliates had infringed the European patents (i.e., patents related to the patents owned by Huawei) of Conversant. It ordered that Huawei and its German affiliates be prohibited from supplying, selling, using or importing or possessing the relevant mobile terminals for the aforesaid purposes, that Huawei and its German affiliates be prohibited from supplying or delivering the infringing mobile phones and tablets to their customers, that Huawei and its German affiliates be required to provide information on the relevant infringing acts and sales practices, and that Huawei and its German affiliates be required to destroy and recall the infringing products, and that Huawei and its German affiliates be required to bear the costs of litigation. The judgement was provisionally enforceable on the basis of a €2.4 million guarantee provided by Conversant. The decision found that the standardized base price for patent licenses offered by Conversant to Huawei did not violate the principles of fairness, reasonableness and non-discrimination (FRAND). The standardized patent licence base rate for 2G/3G/4G multifunctional mobile terminal products in the above offer by Conversant is approximately 18.3 times higher than the standardized patent licence base rate in China as determined by the Nanjing Intermediate People's Court in the first-instance judgment of the three cases. Once Conversant files an enforcement application with the Düsseldorf court, Huawei Technologies and its German affiliates will either be forced to withdraw from the German market or be forced to accept the prices proposed by Conversant. In that case, Huawei Technologies and its German affiliates would suffer irreparable losses, and it would be difficult to enforce the final judgments in the three cases regarding the corresponding Chinese standard essential patent licence fees. Therefore, it is necessary to prohibit Conversant from applying for an injunction to enforce the injunction authorized by the Düsseldorf Court's judgment until the final judgments in the three cases have been rendered.

After receiving Huawei's request for an injunction, the SPC took into account the factors of necessity, weighing of pros and cons, and the principle of international comity, and on the basis of requiring Huawei to provide guarantees, issued a decision on behavioral preservation within 48 hours: Conversant shall not seek to enforce the aforesaid German decisions until the SPC has issued its final judgement. Any violation of this decision shall be subject to a fine of RMB1,000,000 per day from the date of violation, to be calculated cumulatively on a daily basis. The decision was served on the same day. Conversant filed an application for reconsideration within the reconsideration period, and the SPC held a hearing on 4 September to hear both parties in response to Conversant's application for reconsideration and issued a reconsideration decision on 11 September rejecting Conversant's

application for reconsideration.

Case Analysis

In the course of the Supreme Court's judgement, with respect to whether to adopt Huawei's application for behavioral preservation, the Supreme Court considered the following factors, including the impact of enforcing the German judgement on the litigation in China, the necessity of issuing an application for behavioral preservation, the use of the comparative law of impaired interests to measure the relevant interests of the two and the principle of international comity. Given that this article focuses on how the principle of international comity plays a role in the injunction system, the interpretation of this case also focuses on the principle of international comity.

The Intellectual Property Division of the Supreme People's Court is of the view that in the process of applying the principle of international comity, in general, the interests of national sovereignty and the interests of the other country to a certain extent should be taken into account under the premise of moderate and appropriate considerations; specifically, the following factors should be properly considered: the sequence of time of acceptance of the case, appropriateness of the jurisdiction of the case, and whether the impact on the hearings and rulings of the extraterritorial court is moderate. In this case, our court accepted the case earlier than the German Düsseldorf Court; our court ruled that the act of restricting Conversant from applying to the German Düsseldorf Court for the enforcement of the relevant judgement before the final judgement was made in this case did not involve the German litigation against Huawei's determination of infringement of the European patents, did not affect the subsequent litigation process in the German Düsseldorf Court, and did not damage the legal effectiveness of the substantive hearings and judgements of the German litigation, so the legal effect of our proposal should be considered. The legal effect of the judgement of the German Court of Düsseldorf is therefore within a moderate range of the impact of the stay of execution of the judgement of the German Court of Düsseldorf on the hearings and decisions of the Court.

The principle of international comity played an important role in the judgement of the case, laying a solid foundation for the two parties to ultimately actively engage in commercial negotiations and reach a consensus under the premise of mutual respect, and achieve a win-win situation at both the legal and social levels (Edelman & Salinger, 2021).

The Injunction System and the Principle of International Comity

The conflict of the principle of international comity and anti-suit injunction

The institution of an injunction is a system whereby a court of a State issues an order preventing a party from instituting proceedings abroad or continuing proceedings abroad, excluding the jurisdiction of another State (Clopton, 2019). If the party disregards the injunction, sanctions are imposed. This is the narrowest form of injunction, which in a broader sense also includes an anti-injunction order (Mansour, 2023), meaning an order restraining judicial or arbitral proceedings in another country when the order restrains the proceedings in that country, and an order restraining the enforcement of the judgement, when the litigation in the other country continues until the final judgement is delivered, in which case the country also obtains an order restraining the enforcement of the judgement.

The earliest injunctions appeared in the English law in the 15th century, when the English Crown Court issued injunctions in order to weaken the jurisdiction of the ecclesiastical courts and expand its own jurisdiction in order to reach checks and balances, so as to solve the problem of conflict of jurisdiction between the English Crown Court and the ecclesiastical courts (Van Caenegem, 1988). Since the 19th century, the English courts have begun to apply the injunction extraterritorially, evolving into a system utilized by the UK in dealing with international jurisdictional conflicts.

The principle of international comity refers to the extent to which different states, and in particular their courts and legal systems, can respect and sympathize with each other in appropriate circumstances. Or the extent to which a State should any and recognize another State, including the jurisdiction of its courts, relevant judgments and orders. The principle is often seen as a public order rather than a right that can be freely chosen (Mills, 2013). Ulrik Huber, a Dutch legal scholar, suggests that the application of the principle of international comity should be carried out without causing harm to the citizens of the state applying the law of the other state, i.e. the state may consider not applying the principle of international comity in the event that harm is caused in one of the following three situations: violation of the public interest; legal circumvention; and violation of due process. Huber also suggests that the application of the principle of international comity should be carried out by both parties of the two states, if they have reached a tacit agreement to apply the principle of international comity. Huber also suggests that the principle of international comity can only be applied when both states agree on its application by tacit consent (Childress III, 2010).

The injunction system was created to weaken the jurisdiction of the court of another party, so the injunction system itself affects the jurisdiction of other countries (Sohoni, 2020), while at the same time, the principle of international comity is developed on the basis of national sovereignty, and the two are bound to be in conflict (Childress III, 2010).

Under different legal systems, the status of the application of the injunction system also varies. The common law system will issue and implement the relevant injunction, the industry has also launched a series of discussions, regardless of the direction of the discussion, but only for the injunction system in the implementation of the problem, rather than whether to use this system (Gergen et al., 2012); however, the civil law system is different, the civil law system has not yet appeared in the use of the injunction system, the degree of recognition is very low, and only in a very small number of exceptions to the possible effect (Merryman & Pérez-Perdomo, 2018). Therefore, there is a view that the civil law system emphasizing national sovereignty will comply with the principle of international comity not to interfere with the jurisdiction of other countries, while the emphasis on substantive justice of the

common law system will be contrary to the principle of international comity in order to protect the rights and obligations of the parties (Donovan & Roberts, 2006). However the correctness of this view is somewhat lacking. First, the common law system insists that it applies the injunction system is purely out of the maintenance of the rights and interests of the parties, and the litigation rights of the parties are given by the state public power, so the restriction of the right is also to a certain extent limited to the state public power (Pfander & Wentzel, 2020); Second, whether it is the common law system or the civil law system, both attach importance to the maintenance of national sovereignty, but also emphasize the protection of individual private rights, so the above point of view is not a strong opposition between the two. Secondly, both common law and civil law systems attach importance to the maintenance of state sovereignty and the protection of individual private rights at the same time. Thirdly, the common law system is on the premise of assuming that all countries will choose substantive justice, i.e., will not give up jurisdiction, want to use the injunction system to satisfy their own jurisdiction over other countries, which is obviously unfair. Therefore, belonging to different legal systems is not the reason why there is an inherent conflict between the injunction system and the principle of international comity (Fry, 2008).

Although there is an inherent conflict of values between the injunction system and the principle of international comity, it also shows that the principle of international comity plays an important role in the application of the injunction system, or to a certain extent, the understanding of the principle of international comity will constrain the application of the injunction system.

The application of the principle of international comity in the practice of anti-suit injunction

The application of the principle of international comity in the practice of injunctions under common law systems has been analyzed mainly in the United Kingdom and the United States. In their own judicial practice, the principle of international comity is not waived in the course of judicial practice, either by applying it as an element of the review process or by claiming that one does not want to cause offence to other countries.

From our understanding of *Airbus Industrie GIE v. Patel* and *Star Reefers Pool Inc v. JFC Group Co. Ltd.* we can conclude that the basic approach of the UK for deciding whether to issue an injunction is to weigh the interests of the parties, and that the party applying for an injunction has to show that the litigation in the foreign court is or will be vexatious or oppressive in the future (Altun, 2020). The proof needs to satisfy two things: firstly, that England is clearly the more appropriate forum, and secondly, that substantial justice in defence of the home party requires that the other party in the court of the other country be restrained from litigating in the other country (Liakopoulos, 2022). The English court held that the principle of international comity requires a recognition that it is normal and not contrary to customary international law or manifestly unjust that courts located in two places may reasonably and legitimately arrive at different answers when deciding the question of the weight to be given to different factors. In such circumstances, the English court could not take the liberty of deciding how the foreign court should rule. The closer the foreign court's connection with the parties and the dispute in the case, the stronger the case against interference with relief by way of injunction (Spottiswood, 2018). Accordingly, the English court adopted an approach that conditionally considered the principle of international comity, i.e., it considered international comity in the course of its case-by-case review, rather than understanding it to be a general prohibition on granting an injunction (Paul, 1991).

U.S. courts have held that it is virtually impossible to expect a foreign court not to feel offended by a U.S. court's decision to enjoin its action as such. Foreign courts will still oppose injunctions because

their procedural matters should be left entirely to their discretion. In the absence of virtually any rules on how to conduct the international comity balance, it is not enough to require that courts be careful not to violate international comity principles unless United States courts abandon injunctions altogether (Tan, 2004). The thinking of US courts on whether to issue an injunction is divided into two steps. The first step is to consider whether the circumstances of the case satisfy the constituent elements for the issuance of an injunction. The second step is to consider whether the issuance of an injunction violates the principle of international comity. However, due to the vagueness of the concept, the second step often gives the court a great deal of discretionary space. The United States courts, based on the assumption that it is difficult for foreign courts to be comely, have found it difficult to realize the role of international comity. Therefore, regardless of whether the U.S. courts use international comity as a substantive consideration, or other considerations for the prudent issuance of an injunction, it is impossible to fundamentally change the current restrictive effect of international comity on the injunction.

The application of the principle of international comity in the practice of injunction under civil law system is mainly analyzed in Germany and France. In general, the institution of the injunction is hardly recognized in civil law countries and is often seen as a challenge to state sovereignty, which may only be applied in rare cases.

German courts have taken the view that it should be left to them alone to decide whether they have jurisdiction to hear a case and that foreign courts may not give directions as to whether and to what extent a German court may act in a particular dispute. The German approach to anti-suit injunctions is in line with the case law of the CJEU. In *Turner v. Grovit*, the Court held that an injunction aimed at restricting proceedings in another EU Member State was incompatible with European law. Such an injunction would be contrary to the principle of mutual trust. Any injunction prohibiting a party from bringing such an action was deemed to constitute an interference with the jurisdiction of the foreign court (Weidemaier & Gelpert, 2014).

In relevant French judicial practice, in *Banque Worms c Brachot*, the French court appeared to endorse the legitimacy of what amounted to an anti-suit injunction order, which was enforced by means of an 'astreinte' (a daily fine for non-compliance) in order to protect French insolvency proceedings (Watt, 2003). However, in the subsequent *Stolzenberg* case, the French court held that the issuance of an injunction was inappropriate in principle (Hilbertz, 2023). It is also important to note that not all injunctions can be enforced in France, and that an injunction can only be enforced if two conditions are met: firstly, the claims in the case do not fall within the scope of the Treaty or EU law; and secondly, the injunction must be aimed at enforcing pre-existing contractual obligations (i.e., a choice of court agreement or an arbitration clause).

Judicial Practice in China

In recent years, the judicial practice of China's courts on injunctions has been accumulating year by year, especially in the field of intellectual property. In the dispute case between Huawei and Conversant, the Intellectual Property Court of the Supreme People's Court made a ruling on the injunction against enforcement based on the legal system of behavioral preservation in the Civil Procedure Law, and this act in the nature of an injunction is regarded as the first case in China in which an injunction was explicitly applied.

The legal basis for China's issuance of rulings in the nature of injunctions is Article 103(1) of the Civil Procedure Law, which states that the people's court may, upon the application of the opposing party, rule on the preservation of the property of a party in a case in which it may be difficult to enforce the

judgement or cause other damage to the party due to the conduct of one of the parties or for other reasons. Although the ruling in the Huawei-Conversant dispute is seen as the first ruling in the nature of an injunction, however, there is a difference between an injunction and China's behavioral preservation provisions. Firstly, Chinese behavioral preservation is a temporary measure, whereas injunctions in common law systems have substantive law significance (Gan, 2023). Secondly, injunctions (especially restraining orders) involve international parallel proceedings. Finally, behavioral preservation does not reflect a conflict of judicial sovereignty between states, but injunctions interfere with the exercise of foreign court jurisdiction (Mills, 2013). It can be seen that if an injunction is issued under a behavioral preservation provision, it is essentially the implementation of common law remedies on the basis of the civil law system (Epstein, 1982), as is the case in China. In the process of applying the judgement of the principle of international comity, its considerations, such as the impact of the application for enforcement of the foreign court's judgement on the court, and whether the issuance of the injunction itself is necessary are similar to the considerations of the issuance of an injunction in common law countries. In general, the Supreme People's Court's thought process in considering the principle of international comity and the question of whether or not to issue an injunction is similar to that of the common law countries, i.e., firstly, it considers the possibility of ruling on the preservation of conduct, and secondly, it judges Whether the preservation of the act will adversely affect the judgement of the foreign court, and whether it is against the principle of international comity, although it should be noted that the specific process of determining the issuance of an injunction is still different due to the inherent difference between the act of preservation and the injunction, and there is a fundamental difference in the effectiveness.

In view of the increasing number of injunctions received by China in the field of intellectual property rights recently, in the future, China should endeavor to coordinate the provisions of behavioral preservation and the injunction system, or establish an independent injunction system to give full play to the maximum effect of the system, to ensure that China's courts are able to regulate the enterprises that have abused the patent rights to hinder competition in accordance with the laws and regulations, so as to protect the lawful rights and interests of China's enterprises.

Conflict Resolution Measures

Through the analysis of the application of international comity in the practice of injunction, whether in civil law countries or common law countries, due to the existence of the inherent conflict between the two, the principle of international comity in the application of the injunction system to play a relatively limited role (Picker, 2008). In order to make the principle of international comity in the injunction system to play a better role and accelerate the resolution of the conflict between the two, this paper in the above analysis on the basis of the following two measures.

On the one hand, limit the conditions for the application of the injunction system. Some practitioners believe that the anti-suit injunction system has shown a trend of expanding and internationalizing the countries and areas of application (Zhang et al., 2024), which means that measures to avoid the indiscriminate issuance of anti-suit injunctions should be put on the agenda as soon as possible. Fundamentally restricting the conditions for the application of the injunction system can both reduce the number of injunctions issued and avoid conflicts of jurisdiction and tensions in international relations. However, it is necessary to grasp the scale of the restrictive conditions; limiting the conditions for the application of the injunction system does not completely prohibit the issuance of injunctions, and the courts should appropriately apply the system in the light of the principle of international comity and the specific circumstances of the case.

On the other hand, the principle of international comity should be strengthened in the restrictive role of the injunction system. Generally speaking, the practice of injunctions in common law countries is divided into two stages: firstly, checking whether a case meets the relevant constituent elements of an injunction according to national legal rules or case law; and secondly, deciding whether to make an injunction decision that does not violate the requirements of the principle of international comity. This view, however, is contrary to the principle of international comity defended by Huber, whose third principle is that states imply consent to comity as a prerequisite, the promotion of international trade as an end in itself, and disruption of public order, circumvention of the law, and violation of due process as exceptions (Contreras, 2019). The practice of common law injunctions conflates the constituent elements of an injunction with an understanding of the principles of international comity, or assumes that as long as the constituent elements of an injunction are met, the requirements of the principles of international comity are violated. This practice essentially turns the principle of international comity, which should be a binding condition, into a mere binding verbal declaration, which is one of the main reasons why injunctions have become increasingly common in common-law countries in recent years. Such an approach would lead to an expansion of the Court's discretion and competence and exacerbate conflicts between the competences of national courts. The correct approach for courts is to accept the presumption of refusal of injunctions in principle and to ignore the presumption that injunctions are granted only under strict exclusionary conditions. Huber, in his book *On the Conflict of Laws in Different Countries*, clearly points out the three exceptions to the application of the principle of international comity, namely, where the parties have acted in violation of the public interest, where it constitutes a circumvention of the law, and where it violates the principle of due process (Lorenzen, 1918). Thus, the cross-border injunctions issued by the Court in these three situations do not violate the principles of international comity. This approach, which adopts the original text advocated by Huber, maximizes the impact of international comity principles on the practice of courts in issuing injunctions. Moreover, the issuance of injunctions by courts is a unilateral judicial act (Copeland, 2020). In order to minimize the negative impact of such an act on foreign courts, a court deciding to issue an injunction should respect the elements of an injunction issued in its own country, while at the same time respecting,

to the extent possible, the relevant provisions of the host State.

Conclusion

It is true that there is a conflict of values between the institution of anti-suit injunctions and the principles of international comity, but it is not irreconcilable. In the process of issuing an injunction, countries will add the principle of international comity as a consideration, yet in the real application it deviates from the original proposition of the proposer of the principle of international comity. Instead of issuing an injunction as a principle and violating the principle of international comity as an exception, the principle of not issuing an injunction should be the exception to the principle of international comity, which would, to a certain extent, strengthen the restrictive role of the principle of international comity in the injunction system (Swanson, 1996). On the other hand, the injunction system is, after all, an act of interfering with the jurisdiction of another country, and should also try to minimize the negative impact during the issuance process.

The Huawei-Conversant dispute is significant as China's first 'injunction' decision. However, its legal basis is fundamentally different from the injunction system of behavioral preservation, China in the future improvement of the system, we can consider reconciling the contradictions between the system of behavioral preservation and the system of injunction, or even the establishment of an independent system of injunction in order to give full play to its maximum effectiveness in order to meet the objective needs of the judiciary.

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