Neutral Citation Number: [2016] EWHC 958 (Pat)

Case No: HP-2014-00005

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PATENTS COURT

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 29/04/2016

Before:

THE HON. MR JUSTICE BIRSS

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Between:

UNWIRED PLANET INTERNATIONAL LIMITED	**Claimant**
- and -	
(1)HUAWEI TECHNOLOGIES CO., LIMITED **(2)HUAWEI TECHNOLOGIES (UK) CO., LIMITED** **(3) SAMSUNG ELECTRONICS CO., LIMITED** **(4) SAMSUNG ELECTRONICS (UK) LIMITED**	**Defendants**
- and -	
UNWIRED PLANET, INC.	**Ninth Party**
UNWIRED PLANET LLC	**Tenth Party**
- and -	
TELEFONAKTIEBOLAGET LM ERICSSON	**Eleventh Party**

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Sarah Ford (instructed by **Enyo Law**) for **Unwired Planet**
James Segan (instructed by **Powell Gilbert**) for **Huawei**
Meredith Pickford QC (instructed by **Bristows**) for **Samsung**
Mark Brealey QC and Daniel Piccinin (instructed by **Freshfields Bruckhaus Deringer**) for **Ericsson**

Hearing dates: 25th April 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BIRSS

Mr Justice Birss :

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1. In this application Samsung contends that the competition law aspects of the case should be transferred to the Competition Appeal Tribunal (the CAT). Its application is supported by the witness statement of Sophie Lawrance. Ericsson opposes the transfer, supported by Unwired Planet. Huawei adopts a neutral stance. In order to address the issue it is necessary to recap briefly on the nature of these proceedings even though I have given numerous previous judgments doing so.

2. Unwired Planet holds a portfolio of patents related to telecommunications. Most of them were acquired from Ericsson. Many of the patents in Unwired Planet's portfolio are declared essential to various telecommunications standards including GSM, UMTS and LTE. I will refer to patents which have been declared as essential to a standard as SEPs.

3. The first to fourth defendants are companies forming part of two major telecommunications equipment businesses: Huawei and Samsung. Both groups sell mobile devices and infrastructure equipment such as base stations.

4. On 10th March 2014 Unwired Planet brought proceedings for patent infringement in this jurisdiction. It contends that the products sold by Huawei and Samsung which are compliant with the standards infringe its SEPs. I will refer to Huawei and Samsung together as the patent defendants. The patent defendants deny the infringement claims. They contend the patents are invalid, are not infringed and are not essential to the relevant standard.

5. In addition to the conventional allegations of patent infringement, there are also disputes about FRAND. FRAND stands for fair, reasonable and non-discriminatory. The Particulars of Claim allege that Unwired Planet has pursued negotiations with each of the patent defendants to license the patents on FRAND terms but the patent defendants have refused to take a FRAND licence. Unwired Planet accepts that it owes an obligation to the standard setting body for telecommunications in Europe, ETSI, to offer licences on FRAND terms under the ETSI IPR Policy. The patent defendants contend the licences on offer are not FRAND and have made counter offers of licence terms they contend are FRAND.

6. Furthermore the patent defendants have also brought counterclaims for breaches of competition law. The counterclaim is against Unwired Planet and joins Ericsson. The allegations include claims based on Art 101 and Art 102 TFEU. One of the main allegations is that the terms offered by Unwired Planet are not FRAND. Another is that by seeking an injunction in these proceedings Unwired Planet has acted contrary to Art 102 TFEU. Claims based on Art 101 TFEU focus on the Master Sale Agreement (MSA) by which Ericsson's patents were transferred to Unwired Planet. One of the main allegations is that Ericsson and Unwired Planet are in breach of competition law because, via the MSA, Ericsson divided its patent portfolio and assigned part of it to a "hybrid NPE" (Unwired Planet). Unwired Planet is said to be a hybrid NPE because Ericsson retains the right under the MSA to a substantial share in the licensing revenue generated by Unwired Planet and can transfer further (unspecified) patents to Unwired Planet in future.

7. Part of the reasoning why transferring patents to a hybrid NPE like Unwired Planet is said to be a breach of competition law arises from the different positions in the market in which the assignor and assignee are situated. The original patent holder, Ericsson, competed in the downstream market with potential licensees such as Samsung and was therefore open to and indeed probably needed cross-licences from those competitors. This is said to have strongly influenced its licensing approach. Also as a major R&D organisation, manufacturer and seller, its commercial reputation is a matter of importance. On the other hand, as an NPE, Unwired Planet is in a different position. It is said simply to be seeking to monetise the patents it holds whereby it can act aggressively, threaten and sue putative licensees with no adverse consequences, reputational or otherwise. It has no products and so is not interested in cross-licences.

8. The core point in the defence of Unwired Planet and Ericsson to these allegations is again FRAND. They contend that FRAND licences are and always have been available, that that is what competition law demands, and that as a result there is no breach.

9. A further issue is what is referred to as the Ericsson control defence. The point is that Samsung has a patent licence from Ericsson which is dated after the MSA. Therefore Ericsson and Unwired Planet say it is not a licence of the Unwired Planet patents. Samsung contends that for various reasons the patents nominally held by Unwired Planet are in fact and in law still held or controlled by Ericsson and are therefore licensed under the later licence.

10. The relief claimed by the patent defendants in the counterclaims includes declarations that the MSA is void for breach of Art 101, that Unwired Planet has infringed Art 102 by failing to offer any FRAND licences, an injunction to restrain Unwired Planet from enforcing the patents until FRAND terms have been agreed or settled by the court and an indemnity or damages including exemplary damages for breaches of competition law against both Ericsson and Unwired Planet.

11. The proceedings involve other issues as well but there is no need to go into them at this stage. Managing the proceedings was going to be a major task and the case was docketed to a single judge. To make it triable, the case has been split into a set of distinct trials. The first four are technical trials (A to D) which relate to the validity and infringement/essentiality of four Unwired Planet SEPs. So far three of those trials have been completed and the fourth is due to start next week. A fifth technical trial (E) is due before the end of July. It relates to the only non-SEP in the group of patents on which Unwired Planet sued in the first place. In that case Google remains a defendant because although Google and Unwired Planet have settled as regards SEPs, they have not settled as regards non-SEPs. A sixth trial is set for 13 weeks in the autumn of 2016. That is the so-called non-technical trial. This trial will deal with the competition law issues, FRAND and the Ericsson control defence. Finally and only if necessary there might be a seventh trial. This would deal with various further factual issues relating to the patent infringement claims, including allegations of joint tort liability and the position of products alleged to infringe which were not the sample products used at the technical trials. Although one cannot say for certain, the seventh trial is only likely to be required in fairly unlikely circumstances.

12. The transfer application relates to the non-technical trial. Samsung asks that the competition law issues in the non-technical trial, which represent the bulk of it

(everything except the Ericsson control defence), be transferred to the CAT. The parties are now in the process of exchanging substantial expert evidence on economics from eight economists (the figure eight is disputed but the number must be at least about six). Samsung submits that the CAT was established to provide a forum benefitting from dedicated, specialist expertise appropriate for resolving the mixed issues of law and economics that ubiquitously arise in connection with competition law and that the CAT is uniquely well suited as the forum for hearing lengthy, complex, economics heavy cases such as the present one. Since this is a stand-alone case it could not originally have been brought in the CAT but that anomaly was removed on 1st October 2015 in a move intended to enable litigants in stand-alone actions as well as follow-on claims to benefit from the CAT's expertise and resources. Importantly, Samsung has established that there would be no delay if these matters were transferred because the CAT is presently able to accommodate the case in precisely the same period in which the non-technical trial is currently listed. There would be no lack of continuity because the same judge (Birss J) who will hear the non-technical trial can sit as a Chairman of the CAT. One difference would be that in the CAT I would sit as the chairman of a panel of three judges, one of whom would be a distinguished economist and the other of whom would be able to bring specialist knowledge and expertise in competition issues from a field such as accountancy, industry or law. The second difference would be that the CAT panel benefits from outstanding logistical and legal support provided by CAT staff and legal assistants ("referendaires") which is of particular value in lengthy complex actions.

13. Ericsson submits the issues should not be transferred. First, it points out that I raised the possibility of transfer with the parties seven months ago on 2nd October 2015 when the CAT's jurisdiction was expanded and transfer became possible. No party suggested transfer at that stage and nothing has changed. There is no good reason to re-open the issue at this late stage.

14. Second it submits there is no good reason why transfer should take place. It is not the law that a case involving novel competition law and economic expert evidence should be transferred to the CAT. The Chancery Division (including the Patents Court), the Commercial Court and the CAT all share concurrent jurisdiction to apply competition law. The competition law issues in this case arise in the context of a patent infringement claim and are closely connected with patent law and patent licensing. All three approaches advanced in this case in evidence for how to arrive at a FRAND royalty rate (which Ericsson says is the real issue) call for expertise in patents, the technology to which those patents relate and patent licensing. Thus the Patents Court is the appropriate forum for the case.

15. Third the transfer would give rise to very serious problems because of the connection between the transferred issues and other issues which cannot or should not be transferred. That is for two main reasons. First it is because the FRAND issues are not only competition law questions. Unwired Planet and Ericsson recognise that they owe obligations to offer FRAND licences. The obligations arise under the ETSI IPR Policy which is enforceable by third parties as a matter of contract and subsist in any event. These issues may not be transferrable at all or, even if they are, ought not to be transferred. Either way serious difficulties may arise. Second the question of relief cannot be transferred. At the root of all this is a claim for an injunction to restrain patent infringement. So far the patents in Trials A and C have been found valid and

essential (and infringed). The patents in Trial B were found invalid. Samsung and Huawei say no injunction should be granted on the patents found valid and infringed because it is prepared to take a FRAND licence. But the parties cannot agree what terms are FRAND. A key task at the non-technical trial is to decide what FRAND terms are and deal with the issue of an injunction as a remedy for patent infringement. That cannot or should not be done by the CAT. There are also points about damages for past acts but they do not add to the injunction point on this application.

16. Ericsson submits the problem could manifest itself in the following way. If the non-competition law FRAND issues are not transferred then there is a risk of inconsistent outcomes. The judge sitting in the High Court could decide the non-competition law FRAND issue one way, say holding that a FRAND royalty would be X%, while in the CAT the two other members might agree that the same question, posed under competition law, should have the answer Y% and out-vote the judge. Alternatively if the judge alone reaches the same conclusion as the CAT, the question may arise about whether the judge reached a view independently of the other members of the tribunal.

17. Fourth Ericsson submits the transfer will increase costs due to a need for extra trial bundles and due to inevitable interruptions of the trial in order to manage the diaries of not one but three tribunal members.

18. In my judgment Ericsson's fourth point is not significant, the first point is odd but ultimately not determinative since transfer would not disrupt the timetable, the second point is relevant and the third point is crucial. In response to the third point, Samsung submits that its application is to transfer all the FRAND issues to the CAT and the court can do so as a matter of the correct interpretation of the relevant legislation. Furthermore, although it is true that FRAND arises under two or even three heads (competition law, contract, and if different equitable refusability (see ***Unwired Planet*** judgments [2015] EWHC 1029 (Pat) and [2015] EWHC 2097 (Pat)) and although it is true one can conceive of a problem in theory; in practice there is no problem at all because each party's pleaded cases, submissions and evidence about FRAND are on the same basis without distinguishing between different heads. Moreover, in practice, a Chairman has never been outvoted in the CAT and Ericsson's concerns are not realistic. On the question of relief, Samsung explains that what it envisages is that the court would be transferring issues for determination by the CAT in a manner similar to seeking a preliminary ruling from the CJEU and the way certain specified price control matters are referred from the CAT to the Competition and Markets Authority. The price control matter goes to the CMA for a determination, then the judgment comes back to the CAT and together with any other necessary judgments or decision the CAT has to make, leads to an order made by the CAT. So here it is envisaged that the CAT would make determinations on the referred issues and the matter would then come back to the Patents Court for all remaining decisions to be made. In practice Samsung envisages that the entire non-technical trial would physically be heard in the CAT's premises with me sitting in different capacities at different moments as necessary. The mechanism also addressed a point raised by Huawei about appeals. By this route Samsung envisages that any appeals from the non-technical trial would still be from the Patents Court to the Court of Appeal since all orders relating to remedies would be made by the Patents Court. The determinations of the CAT would be before the Court of Appeal by that route.

19. I also asked whether the fact that the CAT had a UK wide jurisdiction made any difference (since the Patents Court is a court of England and Wales only). The parties said it did not.

The law

20. Section 16 of the Enterprise Act 2002 empowers two kinds of transfer from the court to the CAT. By s16(1)(a) the Lord Chancellor may make regulations which make provision enabling the court to transfer to the CAT "for its determination so much of any proceedings before the court as relates to an infringement issue". Infringement issue is defined as any question relating to whether or not an infringement of a Chapter I or II prohibition or Art 101 or 102 TFEU has been or is being committed. By s16(4) rules of court may provide for the court to transfer to the CAT "so much of any proceedings before it as relates to a claim to which s47A" of the Competition Act 1988 applies. It is common ground that the transfer in issue in this case relates to s16(1)(a) and not 16(4).

21. Paragraph 2(a) of The Section 16 Enterprise Act 2002 Regulations 2015 (SI 2015 No 1643) provides that where in any proceedings before the court there falls for determination an infringement issue the court may by order transfer to the CAT "for its determination so much of the proceedings as relates to the infringement issue". The term infringement issue has the same meaning as in s16.

22. Transfers to the CAT are governed by CPR PD 30 paragraphs 8.1 to 8.13. The paragraphs concerned with transfers under s16(1) and paragraph 2 of the regulations are paragraphs 8.10 to 8.13. Paragraph 8.10 provides that the order may be at the court's own initiative or by application of either side. Paragraph 8.11 provides that the court must consider all the circumstances including the wishes of the parties. Paragraph 8.12 is a practical provision about informing the CAT immediately if a transfer is ordered and sending relevant documents. Paragraph 8.13 relates to appeals from the order for transfer.

23. In ***Sainsbury's v Mastercard*** [2015] EWHC 3472 (Ch) Barling J made an order transferring those proceedings to the CAT. The order was made at the court's initiative and after consultation with the parties. It was not opposed. Barling J was able to transfer the proceedings on the basis that he would then chair the CAT panel and the matter would be heard at the same time as it would have been heard in the Chancery Division. So the transfer was able to take advantage of the same judicial continuity Samsung submits is possible here. In his judgment Barling J explains the legislative background and addresses the specialist nature of the CAT and its relationship to the High Court in paragraphs 13-18.

24. Ericsson drew a contrast between ***Sainsbury's*** and the present case. That case was a s47A case as well as one relating to an infringement issue. Although the order made included a proviso preserving the court's jurisdiction over anything not capable of being transferred, the transfer essentially sent the whole of the case to the CAT. Therefore the problem said to arise in this case did not arise in ***Sainsbury's***.

25. Ericsson also submitted that other competition cases very similar to ***Sainsbury's*** which have been brought against credit card companies and are proceeding in the Commercial Court, have not been transferred.

26. The decision to transfer is an exercise of the court's discretion to be addressed taking into account all the circumstances (PD30 para 8.11). Although the power to order the transfer in this case is provided for by a distinct regulation rather than as part of the CPR, the overriding objective (CPR r1) obviously applies. Neither party suggested otherwise. Barling J did so in ***Sainsbury's*** (see para 33).

27. This requires the court to deal with cases justly and at proportionate cost. The objectives in r1.1(2)(a) to (e) play a part in this application. Saving expense and dealing with the case in a manner proportionate to the value, importance, complexity and position of the parties are all relevant. So too is dealing with the case expeditiously and fairly, and allotting an appropriate share of the court's resources to it.

28. A key practical factor will be the extent to which transfer would create any delay or increase in the costs. Another important consideration will be the extent to which the two key distinguishing features of the CAT as compared to the High Court would be of assistance in addressing the likely evidence in the case and in resolving the particular questions arising in that case. The distinguishing features of the CAT are a panel comprising two extra members with economics and other specialist competition experience and the support both logistical and legal. The Chairman in the CAT is not a distinguishing feature since that would either be a High Court judge or a senior lawyer. Also important will be the extent to which dividing the issues between the CAT and the High Court may cause difficulties further in the proceedings.

29. When taking the various factors into account and weighing them up, it seems to me that no transfer should be made without some positive reason for doing so. This is not intended to impose an unfair burden on the party seeking transfer but it is intended to address the point that the jurisdictions of the High Court and the CAT are concurrent and to encapsulate the same sort of considerations referred to by the Court of Appeal in ***Memminger v Triplite*** [1992] RPC 210. ***Memminger*** was about a transfer between two tribunals with concurrent jurisdiction (the Patents Court and the then Patents County Court). The court held that there has to be some reason to disturb the "status quo" of the case proceeding where it is. The parties' wishes should be taken into account (see now PD 30 para 8.11) but would not be determinative, and the effect on other litigants was also relevant (see now CPR r1.1(2)(e)).

This application

30. I am told that the costs of the proceedings are likely to reach £50 million. That is a huge sum. Samsung submitted that:

> "The reason that it is so expensive is because it is arguably one of the most significant and important cases from the point of view of (a) the clients; but (b) generally in this field that this court has had to consider for some time. We say that in the light of that, it deserves the best-of-both-worlds solution that Barling J referred to of your Lordship leading as Chairman and supported by distinguished economists and outstanding legal and logistical support. We say that would assist in the just and efficient resolution of these complex, economically-heavy proceedings."

31. I accept that the non-technical trial is likely to be a significant case for the litigants and, perhaps, generally. The issues raised by FRAND and standards essential patents have been problems in the telecommunications industry for a number of years. Most cases settle or are decided in arbitrations. Unless it settles this matter will be something of a test case.

32. Although I have not been shown any draft experts' reports I do not doubt that the particular competition law issues here necessarily involve voluminous and complicated economic evidence. Judges of the Patents Court are used to dealing with complex and lengthy technical evidence, including maths, and are capable of handling the sort of economic evidence which will arise in this case. All the same I am sure that sitting with a distinguished economist would help me, or any patents judge, grapple with that material. I am certain that having the support of a referendaire would aid the expeditious resolution of the case.

33. Nevertheless the emphasis on competition law cannot be taken too far. Ericsson is right to emphasise the significance of patenting and the technology in this action. The proceedings as a whole and the competition law issues are all about telecommunications patents and patent licensing. I do not go as far as Ericsson that the expertise called for is that of the Patents Court *rather than* the CAT, it seems to me that ideally both would be useful (a sort of IP CAT). So a patents judge sitting in the CAT would be a good way of dealing with the case.

34. The status quo element (***Memminger*** above) has less importance in this case than it might in a future case because the CAT was not an option when the competition law issues were raised. Nevertheless I note that both the parties who are said to have acted in breach of competition law, which is a serious allegation, oppose the transfer; and I note that the other patent defendant, Huawei, is neutral. So only one party in this four party case actively seeks transfer.

35. A minor matter is the order of 12th December 2014. That is the order which formally provided for the non-technical trial in the first place. It stated that at that trial the court would determine "all of the competition law issues raised by the proceedings" as well as the Ericsson control defence. At the time that reference to competition law issues made sense. The scope of the order has caused no practical problems in the meantime but in fact the issues (such as FRAND) arise under multiple heads.

36. At one stage Huawei sought summary judgment on some FRAND issues by arguing that Unwired Planet was in breach of its contractual FRAND obligations irrespective of competition law. Huawei's point was that while the competition law questions might not be suitable for summary determination, looking at FRAND as a matter of contract could be. I declined to deal with the issue summarily because I held that the FRAND issues of contract and competition law were closely interrelated. Samsung relied on this to support its submission that Ericsson's third point while it may pose a theoretical risk, posed no serious risk in practice.

37. I agree with Samsung that it is unlikely that competition law would mandate a FRAND royalty rate at a different level from a FRAND rate mandated by the ETSI IPR Policy. The same goes for other licence terms and this all reflects the fact that the issues are interrelated. However it does not mean that one can rule out the different heads mattering in this case. If the patentee is not found to be in a dominant position

then there can be no abuse under Art 102 and no basis under that limb of competition law to challenge the licences on offer as non-FRAND. Without getting into the detail at all or expressing a view on the merits, it is at least a tenable view that even a holder of a patent which is essential to a standard (or a portfolio of SEPs) may not satisfy the test for dominance since they may not enjoy the independence of action which is the hallmark of a dominant position. Accordingly it is at least a tenable possibility in this case that the settlement of FRAND licence terms at the non-technical trial will take place under the contractual head of the ETSI IPR Policy and not under competition law.

38. There is a degree of circularity in all this but it shows that this is new legal territory. It is not only that the questions may be difficult to answer, the correct basis on which the questions themselves arise is not a simple matter. One thing is clear however, FRAND is not the only issue at the non-technical trial but FRAND, by whichever route it arises, is at the heart of the dispute.

39. This takes me to the question of whether the court has jurisdiction to transfer the contractual FRAND issues to the CAT. It is clear that the competition law issues in this case under Art 101 and 102 are "infringement issues" as defined in the legislation. Samsung submitted that the words "*so much of*" the proceedings "*as relates to*" an infringement issue in Paragraph 2 and s16(1)(a) were wide and if given a purposive construction were wide enough to include all the FRAND issues however they arise. Samsung referred to the Government's 2013 consultation response on Private Actions in Competition Law. This recognised the utility of the CAT as a forum for resolving competition law disputes and referred to the idea of allowing the CAT to deal with stand-alone cases as helping reduce the opportunity for contesting jurisdiction. I agree that the words in the Act and the regulation are widely drawn but the consultation does not help. I do not believe it was focussed on the issue before me.

40. Samsung submitted that the words were clearly wide enough to transfer issues, such as the correct construction of the MSA, which fell to be decided as part of a decision about Art 101 or 102. I agree, but that sort of issue necessarily falls to be decided in order to address the infringement issue. The relationship between the infringement issues and the construction of the MSA is close and inevitable. It is different from the contractual FRAND issues which, although they raise closely related considerations, are legally distinct.

41. Nor can it be said that the contractual FRAND issues are merely consequential or ancillary to the infringement issues. The words are probably wide enough to cover that too but it does not help. Nor does contractual FRAND arise simply a defence to the competition law claims. Defences must be transferrable however they arise but the contractual FRAND allegations here include a case that Unwired Planet has breached its contractual FRAND obligations.

42. Ericsson did agree with Samsung that if the court did transfer issues to the CAT such as contractual FRAND issues, then the transfer would confer jurisdiction on the CAT to deal with them even though they may not have been able to be commenced in the CAT. This may be compared to ***National Westminster Bank v King*** [2008] EWHC 280 (Ch) concerning the issues transferred from the High Court to the County Court which the latter had no originating jurisdiction to deal with.

43. Ericsson's position was that contractual FRAND "might" not be capable of being transferred, in other words that paragraph 2 and s16(1)(a) might not be wide enough to permit it.

44. Although Ericsson only put the matter in this qualified way, I do not have the luxury of avoiding making a decision on the point. In my judgment the words of s16 and paragraph 2, construed purposively and giving them as wide a meaning as I can, are not wide enough to transfer for determination a distinct cause of action which is not itself an infringement issue for it to be determined by the CAT. The provisions are expressed in a limited way. Their purpose was not simply to empower the court to transfer the whole proceedings to the CAT if those proceedings involve an infringement issue, on the contrary they only empower transfer of so much of those proceedings as relates to the infringement issue to the CAT. The approach Huawei took at one stage of advancing the FRAND issues as matters of contract demonstrates why they are legally distinct questions from those brought under competition law even though they plainly interrelate. The contractual FRAND issues do not relate to an infringement issue in the sense that they need to be addressed in order to decide any infringement issue. Rather the two things interrelate with each other because they arise in the same context and raise closely related factual, legal and policy questions. Patent and contract claims fall to be decided by the High Court. The fact that the specialist expertise of the CAT could be usefully brought to bear in grappling with those issues since they are so closely intertwined with factors which arise under competition law, does not mean they can be transferred. The CAT is a specialist tribunal for dealing with infringements of competition law. Nothing in the Act or the regulation demonstrates any intention by the legislator to broaden the scope of its responsibilities beyond that.

45. Therefore to transfer the competition law aspects of this claim to the CAT would leave the interrelated contract claims in the High Court. However to split the issues in this way would create a division in the handling and decision making process. Samsung submitted I could sit in the CAT with the two other members and decide the various issues wearing whichever "hat" was appropriate for whichever issue. I am not concerned that this might create a problem about the appearance of judicial independence. A reasonable and fair minded observer would not think the judge alone coming to the same conclusion as the panel of three was an indication of a lack of independence.

46. However I do not think it is practical to divide the decision making in this way given the centrality of FRAND to this case. If the issues are split the tribunal would have to be constantly mindful about who should be making a particular decision. The interrelationship between the issues makes that problem worse, not better. If the legal landscape was clear, again it might be a different matter, but it is not. Transferring competition law FRAND but not transferring contractual FRAND would be a recipe for confusion.

47. Not without some regret, I will decline to transfer this case to the CAT.