

Security Deposit of the Huawei/ZTE-Framework assessed by Methods of the EU-SEP-Regulation

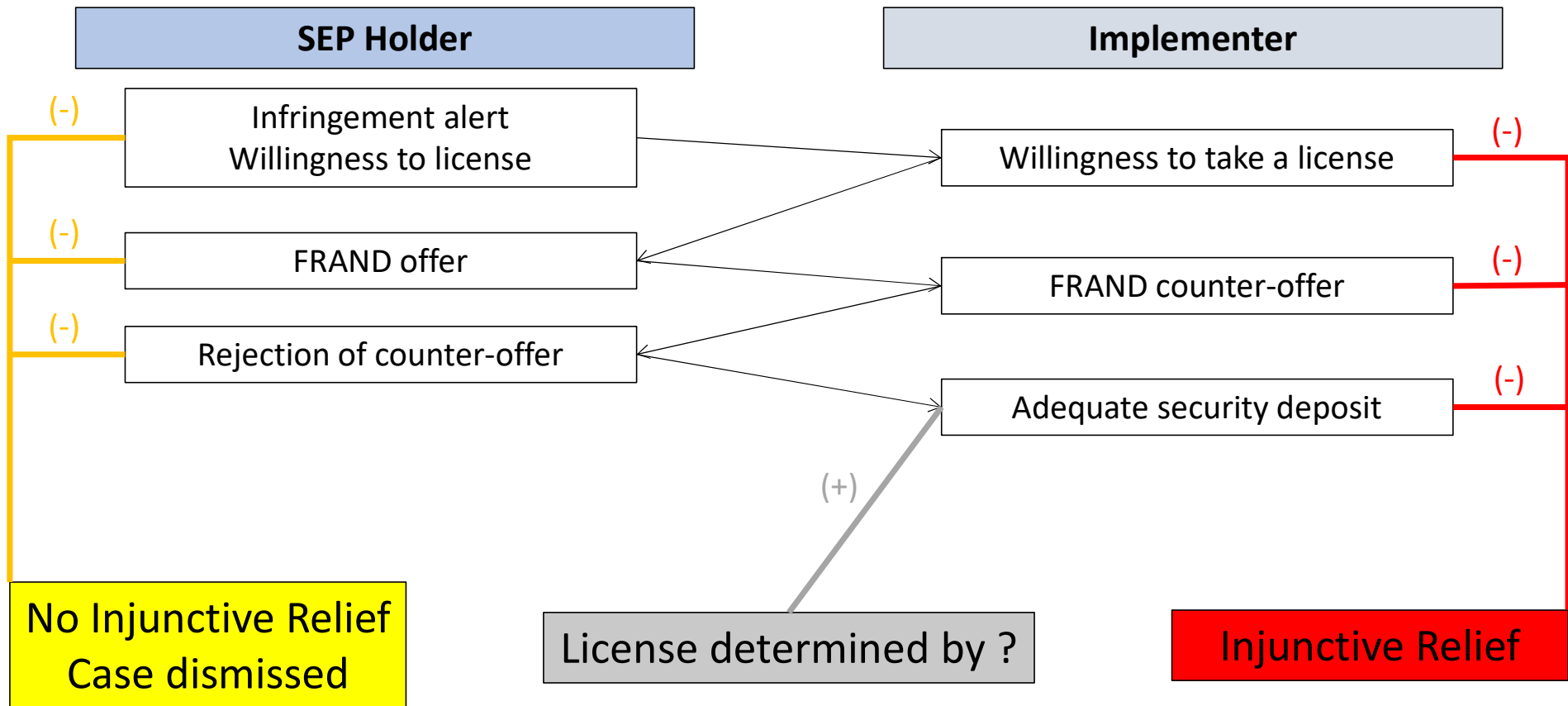
Judge Fabian Hoffmann, German Federal Court of Justice (Bundesgerichtshof)

Institute of Law Studies - Polish Academy of Sciences

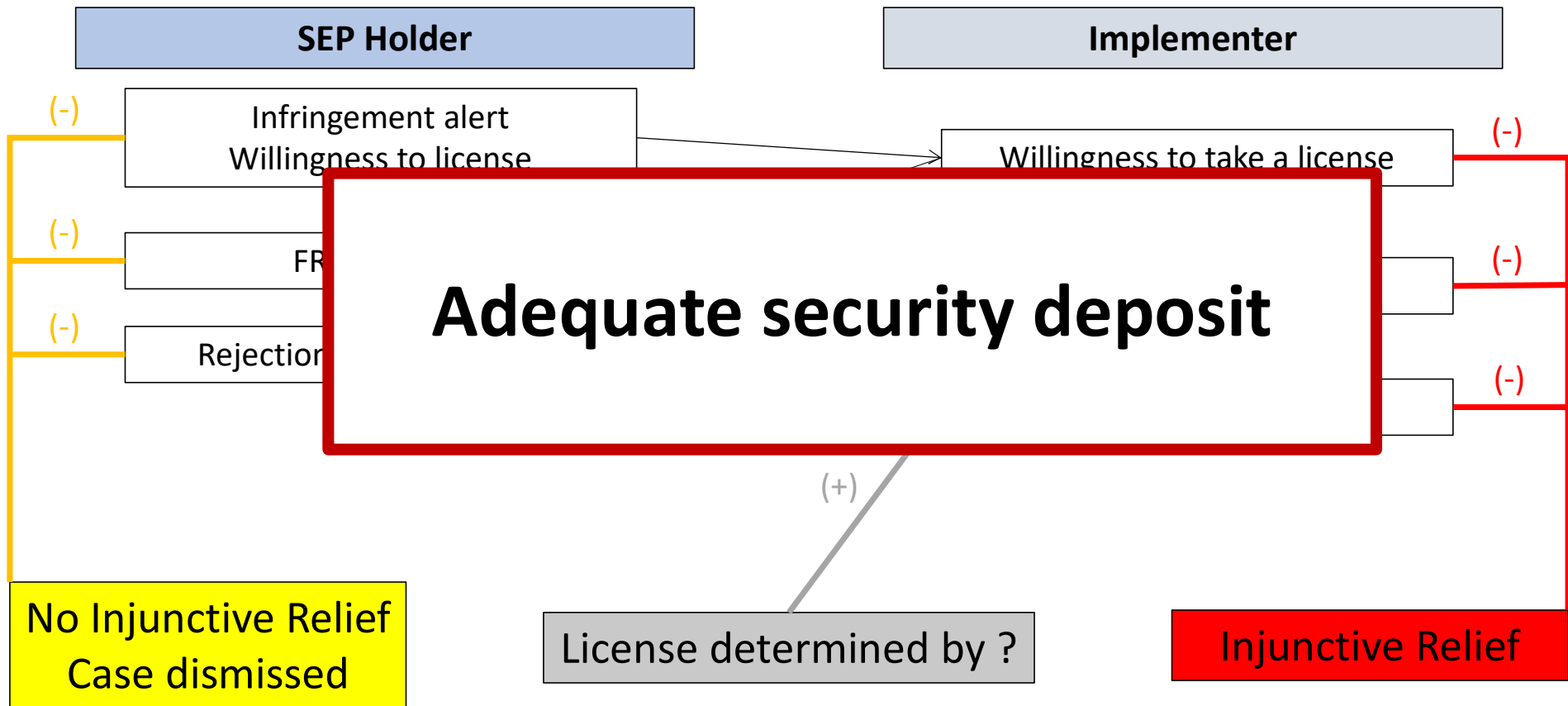
Conference on Emerging Issues in Licensing and Enforcement of SEPs

In Warsaw, September 7-8, 2023

Huawei v. ZTE Framework



Huawei v. ZTE Framework



ECJ Judgement Huawei / ZTE

- Where the alleged infringer is using the teachings of the SEP before a licensing agreement has been concluded, it is for that alleged infringer, from the point at which its counter-offer is rejected, **to provide appropriate security, ...**

(para 67)

Problem

- FRAND-Rate is determined at end of litigation
- Security deposit already after counter-offer
 - => Amount of deposit cannot be as precise as final judgement
 - => Differences will be balanced afterwards

What is "appropriate" today?

SEP-Holder offer:
0.550 % for a mobile device


Implementer offer:
0.059 % for a mobile device

Unknown court decision will be:
0.124 % per device¹

SEP-Holder offer is:
too high by 444 %

Implementer offer is:
too low by 52 %

¹ amounts are taken from [2017] EWHC 711
- *Unwired Planet v. Huawei*



Implementer is expected to provide
security at least equal to counter-offer

Solution: FRAND-Determination by Conciliator

- EU-SEP-regulation: FRAND-Determination by Conciliator
 - third party
 - independent
 - with expertise
 - aimed to anticipate the judgement
- German Federal Court of Justice (Bundesgerichtshof)
Ruling to a similar situation in copyright law:
 - Vote of the Conciliator "**serves as guideline**" for the court and
 - carries a certain "**presumption of reasonableness**".²

=> Best basis for an early assessment of the security deposit

² BGH, Judgement 20.03.2013 - I ZR 84/11 para 21

Security is defined by Proposal of Conciliator

- Difference to the rate in the judgement
=> should be marginal
- If Difference is considerably high:
 - no or little harm => balanced at the end
- Law could be established by courts
 - based on ECJ ruling Huawei/ZTE "appropriate security"

Effects of such a legal practice

- Implementer has to pay for a reasonable deposit **very soon**
 - right after the proposal by the conciliator
 - if not: **immediate injunction**
- no motivation for hold-out:
 - no benefit by not paying because of the costs for providing security
 - no risk of bankruptcy and
 - no risk of hiding in order to avoid enforcement

Effects of such a legal practice

- Security would include everything of a sentence of payment:
 - compensation for damages of the past
 - interest for default: 8.12 % p.a. in Germany today
- => long litigation creates additional losses on side of implementer
- => EU-SEP-regulation with FRAND-Determination could prevent hold-out