

Patents and Patent Litigation in Europe – Past, Present and Future

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INTRODUCTION

At present, there is no single, unitary patent right that covers all of (or even covers more than one of) the EU Member States. Instead, there are in effect only national patents valid and in force in each jurisdiction, regardless of whether those patents are applied for centrally via the European Patent Office (“EPO”) or individually via the patent offices of the individual jurisdictions. Furthermore, there is no single jurisdiction for determining patent cases on a Europe-wide basis and, as a consequence, patents have to be litigated on a country-by-country basis. Thus, patent litigation in Europe tends to be fragmented and there is considerable scope for forum shopping as each party seeks to ensure that its cases are heard in those jurisdictions which it considers more favourable to it.

In this article, we shall explain the attempts which have been made to rectify this situation, how those attempts have foundered so far and what prospects there might be for resolving the matter.

Some 38 years have passed since the enactment of the European Patent Convention (“EPC”) and 36 have passed since the enactment of the Community Patent Convention (“CPC”). That Europe today still does not possess a unified method of determining these important rights is a sad commentary on the ability of the EU to resolve such matters and, in the view of many judges, practitioners and people in industry, is a woeful state of affairs. One perhaps cannot do better than quote the then European Commissioner for Internal Market and Services Frits Bolkestein when he said in 2004:

It is a mystery to me how Ministers at the so-called ‘Competitiveness Council’ can keep a straight face when they adopt conclusions for the Spring European Council on making

Europe more competitive and yet in the next breath backtrack on the political agreement already reached on the main principles of the Community Patent in March of last year. I can only hope that one day the vested, protectionist interests that stand in the way of agreement on this vital measure will be sidelined by the overriding importance and interests of European manufacturing industry and Europe’s competitiveness. That day has not yet come.

THE EUROPEAN PATENT AND THE COMMUNITY PATENT

An important distinction needs to be drawn at the outset between so called “European Patents” and “Community Patents”. Patent practitioners will be familiar with the concept of the European Patent – it is the system which is currently administered and overseen by the EPO based in Munich, Germany. It has been in effect since June 1978 and is the most widely used system for obtaining patents in Europe.

There are two important points to note with respect to the existing system. Firstly, at present at least, the European Patent System has nothing to do with, and is not a part of, the EU. The European Patent System was set up by a large number of European countries, many of whom at that time were not members of the European Economic Community (as it was then known). It is true that over the years a large number of signatories to the EPC have joined the EU and there is now a considerable overlap. But the EPC has 38 signatories, compared with the 27 EU Member States. For example, Iceland, Norway, Switzerland and Turkey are all signatories to the EPC but are not members of the EU. Secondly, although designated a “European Patent”, the name is something of a misnomer: although the system enables the securing of patent protection in a number of jurisdictions through the medium of a single application to the EPO, an important

feature of the system is that on grant the applicant does not receive a single, unified patent – instead, the applicant is granted a “bundle” of national patents, each of which takes effect as if it were a patent granted by each individual patent office of the various designated jurisdictions. The only way in which a European Patent can be regarded as unified is:

- If an opposition is filed against the “patent” within 9 months of the grant, then any decisions taken by the EPO in the course of that opposition (e.g. amendment of the claims or revocation of the patent) will apply to all country designations of that patent; and
- Following changes in the law which came into force in 2008, patent owners may apply centrally to the EPO for post-grant amendments to the claims and, if granted, those amendments will apply to all country designations.

Those points aside, each designation effectively becomes a national patent and can only be amended or revoked by the relevant national institutions (patent office or court) of each individual jurisdiction. One may only bring actions for infringement by bringing separate actions in each individual country.

Matters are further complicated by the fact that amendment and/or revocation proceedings in the national courts can take place concurrently with opposition and/or amendment proceedings in the EPO. Even more unfortunately, proceedings before the EPO tend to be very slow: for example, reaching a final judgment in patent opposition proceedings can take approximately four or five years, as compared (for example) to roughly two years for a final judgment in national proceedings before the UK courts. As a consequence, there is a serious risk of inconsistent judgments as between the national courts and the EPO. For example, a matter can go through to final judgment in the UK with the UK designation of the patent being found valid and infringed, and damages awarded accordingly: subsequently, the patent may be held invalid in the EPO, and thus deemed never to have existed. However, as the matter will be *res judicata* as between the parties, the “infringer” in the UK will not be able to claim back their damages, even though technically there never was a patent to infringe!

However, since the mid-1970s the EU has had on its books proposals for a sepa-

rate right which, in theory at least, ought to overcome many of these issues. This is the so-called “Community Patent”. This was provided for by Council Resolution on the Community Patent Convention (“CPC”), signed on 15 December 1975. Unlike the European Patent, the Community Patent was intended to be a single, unified patent covering the whole of the EU, which would be in force or be revoked across the whole of the EU and not be subject to the type of jurisdictional “salami slicing” highlighted above.

HISTORY OF THE COMMUNITY PATENT

Although enacted in 1975, the CPC was never ratified. Over the years there have been several attempts to give it impetus and bring it into force. These attempts have tended to founder on two main issues: translations and the arrangements for litigation.

As regards the former, the problem was that it was originally envisaged that a Community Patent would be translated into the official language of each Member State. That is in fact how the EU operates: all official actions are translated into all its official languages. However, as the EU has expanded this has meant that the number of translations required has increased as the number of Member States has grown. While that may be acceptable in terms of legislation where the costs of translation are in effect a “cost” of government, for an individual patentee having to translate a patent into so many languages would be extremely costly, rendering the process prohibitively expensive.

As regards the litigation issues, this in itself involved a number of sub-issues:

- Firstly, there was the question of how to deal with issues of validity and infringement. For example, there is a significant difference between how these issues are dealt with in Germany as opposed to the majority of the rest of Europe. In Germany, issues of validity and infringement are dealt by separate courts; in most other countries they are dealt with together. We will not rehearse the arguments for and against dealing with matters separately or together here, but suffice to say that there was a strong push, initially at least, to follow the German model;
- Secondly, there was the jurisdictional issue. If certain national courts were designated as being able to hear patent issues on a Europe-wide basis, that

might potentially lead to companies scrambling to bring their cases in countries which have less than efficient litigation systems. For example, there has for many years been a feature known variously as “the Belgian torpedo” or “the Italian torpedo” where litigants have sought to take advantage of the slow procedures in those jurisdictions to neutralise patents and the abilities of patent holders to bring infringement proceedings; and

- Thirdly, there was again the issue of language: the main bone of contention was the choice of language in which the litigation was going to be conducted.

Underlying this was what one might describe as an “all eggs in one basket” syndrome. The EU now has a population of over 500 million. This makes it nearly twice as large as the United States and three times the size of Japan. Thus the industry wants to be sure that if it signs up to this new entity and uses it, there are proper safeguards in place to ensure that the litigation is not determined in a haphazard manner. Patent holders do not want their entire EU rights being litigated (a) in jurisdictions which have little or no experience of patent matters, or (b) in a language in which they may find it difficult to appreciate what is going on.

Several initiatives to re-launch amended versions of the CPC were made in the 1990s and the early part of this century but they foundered on the rocks of the translation regime or the nature of the jurisdiction. But underlying all of this was a strong feeling that there were vested and protectionist interests at work, as demonstrated by the quote from Commissioner Bolkestein above.

THE EUROPEAN PATENT LITIGATION AGREEMENT

In the early years of this century, fed up at the lack of progress at an EU level, a number of European countries decided to go it alone and not wait for the Community Patent. This led to the European Patent Litigation Agreement (EPLA), a proposal produced by a working party of specialists from several jurisdictions.

The EPLA was less ambitious in its scope than the Community Patent. It provided a framework within which a signatory state could agree that the courts of other signatory states were empowered to determine disputes regarding its patents and

those decisions would then be enforceable. In return, those other states agreed that the first signatory state could determine disputes relating to patents covering their states. Thus it did not require all the contracting parties to the EPC to sign up. It was a much looser arrangement than the Community Patent, utilising the existing resources of the various signatory states.

The EPLA foresaw a specialised pool of judges, panels of whom would sit in Courts of First Instance and Appeal, with a central division and regional divisions. For translation issues, the EPLA adopted the London Agreement, which allows states to dispense with requiring translation into their own languages if the specification of the patent had been translated into one of the EPO languages (French, German or English). Parties could agree to hold the proceedings before the European Patent Court Regional Divisions in a language of their choosing. However, the central division would hold proceedings in one of the EPO languages.

The various proposals were considered by the European Patents Judges at two meetings; the proposals were subsequently endorsed by them. By mid-2006, a number of countries had ratified the proposals and it appeared likely that these would be brought into effect.

However, the EPLA had to be shelved in 2007 when the Legal Service of the European Parliament concluded that it would be contrary to Article 292 of the EC Treaty for the Member States to contract together to form the EPLA outside of EU governance. The basis of this was that the Member States had ceded to the EU the harmonisation of laws relating to intellectual property and the EPLA fell within that scope.

At the time the European Commission, perhaps with a view of mollifying the various interested constituents, indicated a renewed determination to put the Community Patent back to the top of the agenda and push forward its proposals.

THE PROPOSALS FOR THE COMMUNITY PATENT

The origins of the last attempt to revive the Community Patent were made by the European Commission in August 2000, by way of a proposed Community Patent Regulation, thereby abandoning its attempts to deal with it by way of a separate convention.

The Treaty on the Functioning of the European Union of 2008 (“TFEU” – otherwise known as the “Lisbon Treaty”) makes specific provision in Article 118 for separate legislation for the creation of uniform European-wide intellectual property rights and separately for language arrangements for European intellectual property rights. Furthermore, pursuant to TFEU, the European Community no longer exists, therefore any successor to the Community Patent was likely to be called the European Union Patent (“EUP”).

Under the last proposals, the European and EU Patents Court would consist of local, regional and central divisions of a Court of First Instance, a unified Court of Appeal and a Registry (“the Court”). The Court’s jurisdiction would be split, with the central division hearing revocation cases and the regional and local courts hearing infringement actions (including declarations for non-infringement). The other courts can also deal with issues of validity where these are raised by way of defence and/or counterclaim. However, where a counterclaim for revocation of the EUP is lodged, the local and regional courts will be able to decide between: (i) hearing the case, with a technically qualified pool judge assigned to the case; (ii) hearing or staying the infringement action and referring the revocation to the central division; or (iii) referring the entire case to the central division. Parties will be able to agree between themselves where they wish to bring a case, including to the central division.

Significantly, the proposals provided that the Court would have exclusive jurisdiction in respect of actions for actual or threatened infringement of a patent, declarations of non-infringement, and patent revocation, as well as actions for preliminary and protective measures and injunctions, actions for damages derived from provisional protection conferred by patent publication, actions relating to use of an invention prior to the grant of a patent or to prior user right, actions for the grant or revocation of compulsory licences of Community patents, and actions on compensation for licences.

As of July 2010, the Council proposed that an applicant would be able to file its patent application in any language. The EUP would then be granted in one of the EPO languages. The applicant would then have to file translations of the claims in the other two EPO languages. Translation of the full specification would only be

required when the patent is litigated in an EU language of the choice of the alleged infringer. The patentee would also have to file a patent translated into the language of the proceedings at the court. The Commission also foresaw that high quality machine translations into other languages of the specification of EUPs would be made available to the general public, free and on demand. It is hoped that this would overcome the translation difficulties previously referred to.

In June 2009 the Council of Europe referred to the Court of Justice of the European Union (“CJEU”) the question as to whether the proposals were compatible with the EU Treaties. The CJEU subsequently held an oral hearing in May 2010.

On 2 July 2010, the Advocates-General of the CJEU released their preliminary opinion – it was at this point that the proposals encountered their first real setback. The CJEU’s conclusion was that while the general legislative proposals were generally acceptable they were not compatible with the EU treaties in four respects:

- The proposals did not guarantee the full application and observance of the pre-eminence of EU law,
- The proposals did not provide for sufficient protection of litigants if the Patent Court itself had failed to observe EU law;
- The language regime did not protect sufficiently against discrimination of litigants from certain Member States; and
- The proposals did not allow for effective control of the EPO’s administrative functions in respect of the granting of the EUP.

The first and second points above concerns the question of pre-eminence of European law. Under EU law the final arbiter of European law is the CJEU. Potentially, this was a significant problem. Many practitioners and judges are critical as to how the EU has dealt with issues arising under the Community Trade Mark. So there may be a reluctance to allow the CJEU to have the final word on patent matters. In addition, there is the question of delay: at present it takes approximately two years for an issue to be referred to the CJEU and then determined. In a fast moving patent case where the patentee is frequently seeking injunctive relief, or where a defendant is seeking to remove from the register

a potential “blocking” patent, such a delay is not acceptable.

The third point concerns the comments about the language regime not discriminating against litigators from Member States whose official language is not one of the official languages of the EPO. What this seems to suggest is that litigators from those territories would be at a disadvantage if they could not litigate in their “home” language. But the logical extension to that would be to allow a linguistic free-for-all in the Court. But this would be to resurrect what was one of the main concerns voiced against the original proposals; multi-national corporations are not likely to relish the prospect of their patents covering a market of 500 million people being potentially revoked in proceedings conducted in, for example, Serbo-Croat. Furthermore, one can readily envisage litigants who are planning to take patent actions (whether by way of infringement or revocation proceedings) finding companies in some of the more obscure language territories of the EU to bring their cases for them specifically with a view to seeking a linguistic advantage before the Court.

The CJEU eventually released its full opinion on 8 March 2011. The CJEU not only confirmed the Advocate General’s opinion that the proposed Court system would be unconstitutional, but in fact went even further, effectively bringing an end to the possibility of establishing a supranational court with exclusive powers to hear cases relating to a community or unitary patent.

The CJEU’s reasons are summarised in paragraph 89 of the opinion, in which it is stated:

...the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the CJEU of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer

on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.

As mentioned previously, the proposed Court system would have been vested with exclusive jurisdiction with respect to most types of patent action, including actions for infringement, declarations of non-infringement, revocation, and indeed most other forms of action relating to patents. The CJEU objected to the fact that the national courts of the contracting States would be divested of that jurisdiction and be left only with those (limited) powers that did not fall within the Court's exclusive jurisdiction. More particularly, the CJEU took exception to the fact that under the proposed Court system the national courts would be deprived of their power (or, as the case may be, their obligation) to refer questions to the CJEU for a preliminary ruling, as provided for in Article 267 of the TFEU. In addition, the CJEU pointed out that of decisions made under the proposed Court system were in breach of European law they could not be the subject of infringement proceedings for any such breaches, nor could they give rise to any financial liabilities on the part of any Member State or States. As such, the CJEU concluded that the (then) current proposals for the creation of a unified patent litigation system are not compatible with the provisions of the EU Treaty and the TFEU.

This is a major blow to the prospect of achieving a unified system for litigating patents in Europe at any time in the foreseeable future. The substance of the CJEU's objection to the proposed supranational patents court is the divestiture of power from the national courts and from the CJEU itself. Therefore, it now appears that any supranational patents court system (if indeed one is ever implemented) cannot have exclusive jurisdiction to hear patent actions and presumably therefore will have to exist alongside, and as an alternative to, the pre-existing routes for litigating patents in Europe.

Therefore, rather than unifying and simplifying the patent litigation system in Europe, any supranational patents court system may simply serve to provide yet another forum for potential litigants and add yet another layer of complexity to an already cumbersome system of potential

conflicts, inconsistencies and "forum shopping".

Whatever the legal nature of such a supranational court's powers, whether a unified patent litigation system without exclusive jurisdiction would be a viable alternative to pre-existing routes would depend on the practical implementation of such a system, and crucially the speed and costs of litigating patents via such a system. It must be recalled that there was much hope and expectation that the system for opposing European patents in the EPO would simplify patent litigation across Europe: as already discussed in this article, that has certainly not been the case.

It is important to note that the CJEU's opinion was directed towards the powers of the putative court system in relation to the proposed Community Patent, and not towards its powers with respect to European patents. In other words, the CJEU did not appear in this opinion to address whether or not the proposed European and Community Patents Court would be unconstitutional with respect to European patents.

THE UNITARY PATENT – A PHOENIX FROM THE FLAMES?

In November 2010, it became clear that negotiations with respect to the proposed Community Patent had reached an impasse. As was expectable, the sticking point was the issue of language: more specifically, agreement could not be reached on the translation requirements for the Community Patent. Later, at a meeting of the Competitiveness Council in December 2010, it was confirmed that a unanimous agreement with respect to the Community Patent was, frankly, impossible, both now and for the foreseeable future.

However, shortly before this, on 11 October 2010, several Member States had indicated that they would be willing to consider enhanced cooperation as a means of establishing a unitary patent.

Enhanced cooperation is a procedure under European law which allows Member States to agree amongst themselves in order to establish laws between them which cannot be established between all Member States. The mechanism and procedure for enhanced cooperation are set down in the provisions of the EC Treaty and the EU Treaty, as amended by the TFEU. Under the relevant provisions, enhanced cooperation must aim to further the objectives, protect the interests, and reinforce the

integration process, of the EU. Enhanced cooperation must only be authorised as a last resort, once it has been established that the objectives of such cooperation cannot be attained within a reasonable period by the EU as a whole. A minimum of nine Member States (i.e. one third of Member States) must participate in the enhanced cooperation. Acts adopted within the framework of enhanced cooperation will only bind participating Member States: however, non-participating Member States can subsequently elect to participate if they so choose.

The unitary patent established under enhanced cooperation would not, by definition, be a Community Patent because (at least as envisaged) not all members of the EU would participate. However, if successful, the enhanced cooperation would establish a unitary patent right valid throughout all participating states.

Initially, twelve Member States made formal requests to the Commission to the effect that they wished to engage in the enhanced cooperation procedure to establish a unitary patent. On 14 December 2010, the Commission released a formal proposal for a Council decision authorising enhanced cooperation in the area of creation of unitary patent protection.

The envisaged characteristics of the proposed unitary patent right are set out in the Commission's proposal. It is important to note that these characteristics are not set in stone: the proposal states that proposals for specific measures implementing enhanced cooperation will be submitted once the enhanced cooperation has been authorised by the Council.

The envisaged unitary patent would co-exist with national patents and with European patents. Applicants would make a single application to the EPO and, until the moment of grant, would have the choice between three options:

- A unitary patent valid in those Member States participating in the enhanced cooperation;
- A unitary patent as above, and a European patent designating other contracting states of the EPC; or
- A European patent designating selected contracting states of the EPC.

The envisaged unitary patent would be autonomous in nature and provide equal protection throughout the participating Member States. It could only be granted,

revoked, or transferred, or may lapse, in respect of those territories as a whole.

As regards language and translations, it is envisaged that the specification of the unitary patent would be published in the language of the proceedings and shall include a translation of the claims in the other two official languages of the EPO (as is the case for European patents in accordance with Article 14(6) of the EPC). To ensure legal certainty, translations would not have legal value. In the event of a dispute relating to a unitary patent, a full translation of the specification would have to be provided by the patentee at their expense, into the language of the Member State where the alleged infringement took place or where the alleged infringer is domiciled (at the alleged infringer's option), and into the language of the Court hearing the dispute (at that Court's request).

The European Parliament provided its consent to the proposed enhanced cooperation in February 2011, and the Council of Competitiveness Ministers formally adopted the decision authorising the enhanced cooperation on 10 March 2011. At the time of the Council's decision, 25 out of 27 EU Member States had signed up to the enhanced cooperation. The remaining two Member States, Italy and Spain, are staying outside the process for the time being (because, as discussed previously, of their objections relating to the languages under which the proposed unitary patent system would operate).

The next step in the procedure will be for the Commission to draw up detailed provisions governing the nature of the unitary patent right to be implemented under the enhanced cooperation. It is not known at present how long it may take the Commission to formulate its proposals, or indeed whether those proposals will meet with acceptance from all quarters. It will, however, be interesting to see what emerges from the Commission's proposals and in particular whether the decision of the CJEU in relation to the proposed Community Patent court system has any impact upon what the Commission proposes in relation to the unitary patent.

As mentioned above, the CJEU's opinion was directed only towards the powers of the putative Community patent court system with respect to the Community Patent. Strictly, therefore, one could argue that the CJEU's opinion did not address the question of constitutionality with respect to the proposed *unitary* patent. However, it

is difficult to see how the opinions of the Court with respect to one would not apply with equal force to the other.

CONCLUSION

The plethora of changes that have taken place to patents and the associated litigation for the past 40 years demonstrate that it is difficult to predict exactly what is going to happen in the coming months and years. What is clear is that practitioners and those in industry would be well advised to monitor closely the ongoing developments, as changes to the current practice and procedure (if and when they come into force) are likely to be major.