

Patent Litigation in Europe and the New Unified Patent Court

The Current Position

- European Patent Convention 1973 & National legislation (such as the UK Patents Act 1977) implementing the Convention means:
 - **National** applications for **national** rights; OR
 - Centralised application for a “Bundle” of **national** rights from EPO in Munich and centralised opposition
 - BUT in **both** cases **national** infringement and revocation proceedings i.e. national court of first instance and national courts of appeal
- Result can be increased cost and inconsistency: (Hilti v Muller, Document Security Systems –v- European Central Bank, Angiotech v Conor, Novartis v Johnson & Johnson, the Lundbeck cases (Excitalopram), LEO v Sandoz (Calcipotriol cases), Olanzapine cases, Gemcitabine cases, Occlutech cases, Oxycodone cases, Apple v Samsung cases

Patent Litigation in Europe and the New Unified Patent Court

IP Day 2012,
Vienna

24 September 2012

Kevin Mooney

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The Current Position

- Other Problems
 - + National substantive and procedural differences
 - bifurcation in Germany, Austria and Hungary
 - Rolls Royce procedure (cross-examination) and costs in England
 - + Significant variations in speed
 - = Forum shopping
 - + Lack of any common appeal court
- Contrast United States - One US patent, local Federal District Courts and the CAFC now 28 years old!

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Current Proposal – The Unitary Patent

- **2 Draft Regulations:** one creating the “Unitary Patent” pursuant to Article 14 2 EPC (Note 25 countries – no Italy or Spain – but may change) and one setting out the translation regime for the Unitary Patent
- Text of Regulations **provisionally** agreed by Legal Affairs Committee of European Parliament on 01 December 2011
- Formal vote of EU Parliament – Postponed
- EU Council Vote – Postponed
- Controversy – Articles 6 to 9 – European Council “suggests” their deletion on 29 June 2012

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The Current Position

- What industry wants:

*“For **BUSINESSEUROPE**, a common patent jurisdiction system for both European patents and unitary patents for both validity and infringement disputes is needed. It is essential that the patent jurisdiction is in place when the first European unitary patent is granted.*

*Any new jurisdiction system must, however, bring real improvements for companies compared with the current unacceptable situation of diverse national jurisdiction systems. It must deliver **the highest level of quality, cost-effectiveness, efficiency, legal certainty and reliability.**”**

*Extract from a letter of 20.10.2011 from BusinessEurope to the Polish Presidency of the European Union.

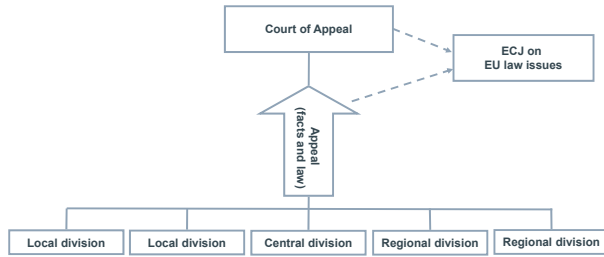
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Current Proposal – The draft Court Agreement

- Court is now called “Unified Patent Court”
- Central Division and national/regional divisions
- Jurisdiction of local/regional divisions determined according to the Brussels Regulation (but needs amendment) – see later
- Pure validity actions, declarations of non-infringement and some infringement actions go to Central Division – see later
- Exclusive jurisdiction over the Unitary Patent and (eventually) over all existing European Patents
- Standard procedure for all courts – Rules being drafted
- Technical (sometimes optional) and legal judges
- Flexible language regime

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Current Proposal – Structure



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Commission's Favoured Structure

- Regional Divisions
 - 21 States set up 6 regional divisions:
 - RD-North [DK, EE, FI, LT, LV, SE]
 - RD-East [CZ, HU, PL, SK]
 - RD-Southeast [BG, CY, GR, RO]
 - RD-West [IE, NL, UK]
 - **RD-Centre [AT, DE]**
 - RD-South [ES, PT]
- Conferral of jurisdiction on the Central Division
 - 3 States [LU, MT, SI] confer jurisdiction on the central division
- Local Divisions
 - 3 States set up 1 local division each [BE, FR, IT]
 - 1 Member State [DE] sets up 4 local divisions
 - **In addition to participating in a RD together with [AT]**

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Nationalities of Panels of Judges

- Local Division with more than 50 cases pa in past 3 years
 - 2 local and one (long term) foreign judge
- Local Division with less than 50 cases pa in past 3 years
 - 1 local and 2 (ad hoc) foreign judges
- Regional Division
 - 2 regional and 1 foreign judge
- Local or Regional panels may request technical judge
- Central Division
 - 2 legal (different nationalities) and 1 technical judge
- Parties may agree single judge
- Court of Appeal
 - 3 legal (different nationalities) and 2 technical judges

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Current Proposal – Jurisdiction

- Local or Regional Division where infringement occurred
- OR
- Local or Regional Division where Defendant (or 1 of them) is resident
- OR
- Central Division if the defendant is domiciled outside the EU
- Action for Invalidation/Revocation or declaration of non-infringement before the Central Division
- Parties may agree upon the Division, including the Central Division, for infringement
- Note the possibility of bifurcation if there is a counterclaim in an infringement action

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Now agreed on 29th June 2012

- Location of Central Division – Paris/London/Munich
- Art 58(1) – Prolongation of transitional period from 5 to 7 years
- Art 58(d)(1) – Extension of review by Administrative Committee
- Art 29(4) – More flexible language regime e.g. one party may request the language of grant.
- Increase in jurisdiction of central division re non-EU defendants
- BUT
- Regulation for Unitary Patent
 - Council "suggests" deletion of Articles 6-9
 - Parliament resistant
 - Decision by Parliament on way ahead after the summer

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Future Timetable

- Text finalised and agreed – October 2012
- Inter-governmental conference – January 2013
- Rules of Procedure finalised – April 2013
- Ratification by at least [13] Member States - ?2013/14
- Agreement enters into force - 2014
- Transitional arrangements
- Grant of first European Patent with unitary effect

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Rules of Procedure

- Drafting Committee

- Status

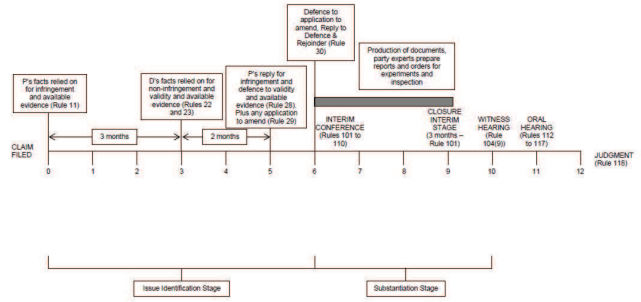
- 25th May 2012 – draft submitted for public consultation to commence October 2012

- Rule 1.1

“The Court shall conduct proceedings in accordance with the Agreement on a Unified Patent Court (“the Agreement”) and these Rules of Procedure. In the event of a conflict between the provisions of the Agreement and those of the Rules of Procedure, the provisions of the Agreement shall prevail.”

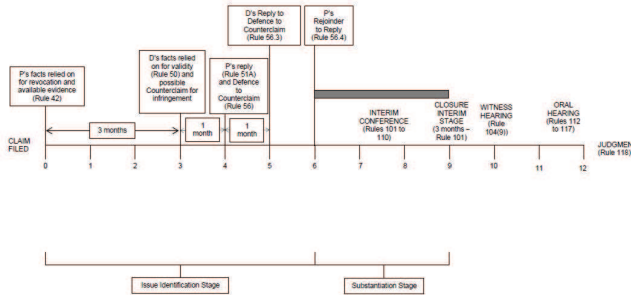
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Infringement and Defence of Invalidity



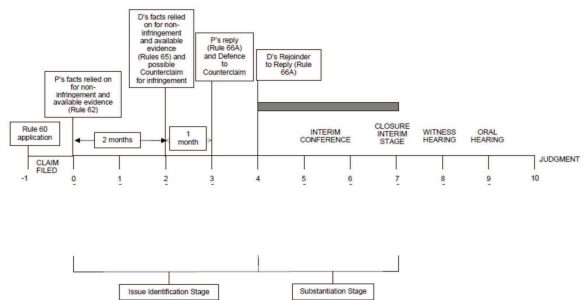
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Revocation Action (Rules 40 to 56)



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Declaration of Non-Infringement (Rules 60 to 70)



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Rules of Procedure - Controversies

- Bifurcation: <http://www.nytimes.com/2012/04/09/technology/ogihp-patent09.html?r=1&ref=global>

- Agreement – Article 15(a)(2)(b)
- Where there is a counterclaim for revocation the Court **shall have the discretion** either to:
 - (b) refer the counterclaim to the central division **and suspend or proceed with the infringement proceedings**
- Rule 35.3

“Where the panel decides to proceed in accordance with Article 15a(2)(b) of the Agreement, **may** stay the infringement proceedings pending a final decision in the revocation procedure and shall stay the infringement proceedings where the defendant has demonstrated that there is a high likelihood that the relevant claims of the patent (or patents) will be held to be invalid **on any ground** by the final decision in the revocation procedure.”

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Rules of Procedure - Controversies

- Rule 118 and 118A

- Rule 118.3:

“If a revocation action is pending before the central division, the local or regional division:

- may render its decision on the merits of the infringement claim, including its orders, under the condition subsequent pursuant to Art. 34a(1) of the Agreement that the patent (patents) is (are) not held to be wholly or partially invalid by the final decision in the revocation procedure or a final decision of the European Patent Office or any other term or condition, or,
- may** suspend the infringement proceedings pending a final decision in the revocation procedure or a final decision of the European Patent Office and **shall** suspend the infringement proceedings if it is of the view that there is a high likelihood that the relevant claims of the patent (or patents) will be held to be invalid on any ground by the final decision in the revocation procedure or of the European Patent Office.”

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Rules of Procedure - Controversies

- Contrast Rule 211.1 – Provisional Measures
- Rule 211.2 and .3:

“2. In taking its decision the Court shall be satisfied **with a sufficient degree of certainty** that the applicant is the right-holder, that the patent in question is valid and that his right is being infringed, or that such infringement is imminent.

3. In taking its decision on the Application for provisional measures, the Court shall have the discretion to weigh up the interests of the parties.”

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Rules of Procedure - Controversies

- Separate witness hearing and questioning of witnesses
 - Responsibility of and at discretion of judge-rapporteur (Rule 104) but parties must seek orders in pleadings
 - Some companies wish less discretion
- Rule 450 – Decisions at first instance
 - Rule 450.4:

“The decision of the Court of First Instance shall contain a summary of the requests and facts submitted by the parties and a statement of the facts and arguments on which the Court bases its decision.”

