

PRESENTATION:

**TOWARDS A UNIFORM COURT SYSTEM
AND PATENT LITIGATION IN EUROPE**

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What I will speak of here is not so much under the heading of invalidity, although what I will discuss, regarding the latest developments in Europe, will certainly influence validity issues and litigation. As you might know, there has always been diversity in patent litigation in the different European countries, although with respect to claim interpretation and many other areas we already have harmonized law. Nevertheless, courts in the different countries still, in some way, follow traditional ways. For example, the English have a very limited claim interpretation and German courts have a more generous scope of protection.

The problem remains that patents must be litigated in each country separately. There is a possibility of cross border litigation, but the main goal, which has always existed in Europe, has been to form a unity with respect to litigation. This goal failed 25 years ago on the subject of the correct definition of a court in the first instance and in the second instance. Now, Europe has returned to this old goal and dream of a uniform court system and patent litigation.

In an international conference in 1999 of the member states of the European Patent Organization, the Working Party on Litigation was founded with the task of developing an integrated judicial system, to include *uniform rules of procedure* and a *common court of appeal*. I emphasize those goals because there was some discord afterwards in regard to them. The European Patent Organization is comprised not only of countries of the European Union, but also countries outside, such as Switzerland, Norway and others. A number of Eastern countries are also included. Thus, the intended international convention was developed to comprise all these countries.¹ It is called a “protocol,” which means it is a voluntary agreement between those countries. Countries may decide they want to join or they may decide they want to stay away if the overall structure or content is not satisfactory.

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¹ For general background, see AIPPI, Report on the Diplomatic Conference for the Revision of the European Patent Convention, Munich, Nov. 20 - 29, 2000.

Avail. at: <http://www.aippi.org/reports/report-EPO-Dipl.Conf.htm>.

In spite of the limited mandate to form a Common Court of Appeal, during the basic concept work of the protocol some delegations developed the idea to found a Common European Court of First Instance. This is discussed in more detail in a paper by the Working Party in the year 2000.² The first idea of the protocol was to create a single court, residing in one European city, to decide infringement cases for all the territories where EPC patents are enforced and infringed.

The languages of the European Patent Judiciary Essay Court would be the three working languages of the European Patent Office, namely English, French and German. Although in theory this could facilitate communication within a single court, it would put an enormous burden on the litigating parties. It could result in a situation where a Greek or Portuguese defendant, summoned to a court in Luxembourg, must defend his case in German, even though an infringement occurred only in his home country, or there was no infringement at all. The Working Party on Litigation failed to mention in its famous paper where and how to recruit judges with patent litigation experience and sufficient language skills for such a centralized court. A number of delegations, in particular those countries with well-functioning patent court systems like Germany's, objected to this proposal.

Furthermore, they questioned the potential quality and efficiency of the proposed court. The Working Party paper expressly intended to exclude existing national courts from the system, because they apparently wanted to create a totally new European system with no links to existing courts. But it soon became clear that one would need a considerable number of judges, which are simply not available except in the existing national courts. Also, German practitioners warned that one should not put at risk a well-functioning system like Germany's, which permits even small companies to enforce their patents in a relatively short time at a reasonable cost. Where does one find a court willing and able to decide a patent case within six-months of filing the action? Well, here in Virginia, I understand; and in Germany, you can find at least three courts where it can be done at a much cheaper cost.

The modified version of the Working Party paper recognized the need of litigating parties, especially small and medium sized enterprises, to conduct litigation at home in local courts. However, the proposal was not very attractive. In response to the problem of finding judges, it was proposed that a pool of judges be created, in what they called a "peripatetic court," which would sit at different locations at different times. The possibility of regional chambers was then added to the original proposal. These would be considered *ad hoc* chambers, with changing judges for each individual case and without a permanent establishment and structure in any of the different member states. I think this would run contrary to the interests of case law predictability.

Another proposal of the Working Party paper was that judges should be appointed to the first and second instance of the common European court, and at the same time form a common pool from which they would be assigned to cases. The judges would not commonly and exclusively work with cases of one regional chamber, but would travel from court to court, case-by-case and instance-to-instance. This system was last used by the

² *Id.*

Emperor Charlemagne in 800 AD, going back to the early Germanic tribes. The Duke went from city to city to bring justice to the people. I think this is a little bit antiquated.

The proposed alternative is a decentralized system with centralized national courts. This alternative, supported primarily by the German delegation but also by the large majority of the bar in a number of European countries and patent judges, was based on the fear that one single court of first instance would never be in a position to cope with the number of patent infringement cases expected. Germany alone has approximately 600 patent cases in the first instance per year. Whether there will be 600, 800 or 1000 European cases from all 15 countries is difficult to predict. There might even be more countries, not only in the Community, but there might be the eastern countries and countries like Switzerland, Norway, and so forth. A number of international organizations like the AIPPI, FICPI, Associations of Lawyers, and different European countries also oppose the proposal of a single centralized court.

I will give you the resolution of the AIPPI on this subject at the Congress of Melbourne³ – the International Association also became interested in this topic. In October 2000 at a conference in London, it was decided that the Working Party should prepare two different proposals for the litigation protocol. One, prepared by the German delegation for a decentralized system in the first instance, would include national courts. The other, prepared by the Swiss delegation, would provide for a central court system. The Working Party appointed three experts: one from the European Patent Office to prepare the central proposal; and two upon the suggestion of the German Justice Department, a federal patent court judge and myself as a litigator.

So far, I am still the only litigator in the group and this has been my criticism from the beginning. For twelve months, the Working Party discussed questions of litigation without a single litigator in the group. Members of the Patent Office and the Justice Department represented the National Delegations. They all discussed detailed questions of jurisdiction and litigation without a litigator on board.

The two legislative proposals were submitted in The Hague in April of 2001, and at the conference of the subgroup of the Working Party. A number of delegations favored the idea of a central court (just for the theory of centralized and uniform litigation, which I can understand), after having recognized that the traveling judges proposal was too complicated and would result in severe legal due process deficiencies. All the countries present at the conference favored the proposal of the German experts.

Now what is this proposal? The idea is that instead of founding a centralized single court in one city, one should start with a concentration of jurisdictions in the different countries. Mario, I hope I am not wrong when I say that Italy has more than 100 jurisdictional possibilities for filing an infringement, is that still true?

Mario Franzosi: We have improved the system, I have to say. We now have 350-450 courts.

³ Avail at: www.aippi.org/reports/resolutions/res-q165-e-Congress-2001.htm.

Pagenberg: Not bad for a start. In Germany, we have 14, France has 10, and other countries have fewer.

The first point in the German proposal is that each country starts with one single, centralized court where all patent litigations should be concentrated. This at least applies to countries that have a number of cases that the court can handle. Those countries with a number of cases that goes beyond that could perhaps appoint three different courts. For example, if one normally counts 100 cases per court, there could potentially be a problem in Germany, with 600 cases, unless the judges could work faster.

This court should be integrated under a common rule for European patent adjudication; this however, would be mainly an administrative measure and may not influence how the court functions. The court should be “super national,” which is also a matter of administration.

The judges, of course, should be carefully chosen and should have excellent language skills. The important thing is there will be no language limitations in the court of first instance. This is an important issue, as I mentioned. (However, the example I gave regarding a defendant coming from a distant country in Europe and suddenly speaking German is probably a bit exaggerated.)

Some further points. It is self-evident that there should be a common substantive law and a common rules of procedure. It is important, of course, that the court have exclusive jurisdiction for infringement and validity – a change for Germany, where there is separation between the two.

The validity questions should be decided by inter-party discussion. Therefore, the German court cannot invalidate an English patent forever, but must discuss only among the parties to reach a decision.

The jurisdictional question, regarding the possibilities of forum shopping, is whether the defendant will eventually have a seat where the plaintiff has a seat, if the defendant does not have a seat in the community and the country where the infringement was committed. The reason behind this question of jurisdiction is that industry, in particular, wanted to avoid multiple litigations. Therefore, the possibility of concentration is provided, but at the same time (this is an additional proposal I made during the conference) we can avoid the problem of a plaintiff/patentee who started litigation on a certain patent in a specific country, when there were other options. He wants to take a chance and see how that specific court handles the case, and if he is dissatisfied during the first hearing, files a second case in another country in a different court. That should be avoided in order to reduce multiple litigations – which I think could help to reduce patent enforcement costs.

Another problem concerns what we call in Europe “torpedo litigation,” in which Mario is a specialist. The idea here is to slow down litigation by filing declaratory judgment actions in a court with slow-moving trials, with trials sometimes lasting five years or more. Relatedly, if you get a warning letter, you would want to avoid receiving a quick court injunction. Under the process convention system, the first to sue decides jurisdiction, so the idea is to use a slow court, to block the enforcement and any litigation for the remaining patent life. Dealing with this type of activity is tricky; I do not want to go into detail because Mario prepared a very good article on the topic. The European community

does not completely agree on how these things should work, but that should give you a general sense of it.

Some critics believe that there was another issue with forum shopping, saying that, with jurisdictions in different countries, forum shopping is still possible. However, if a party has a choice between different courts and can choose one that is most appropriate and most convenient, that is not always bad.

If you ask me, the first rule is that forum shopping is only bad when others do it, particularly if works for them. Before starting litigation, I normally inform the client of the differences in courts, even between German courts. Some courts favor interlocutory injunctions in patent cases and others do not. Some provide a decision within six or eight months in a main suit without expert opinions; others order expert opinions, prolonging the case. Some courts apply an extremely favorable theory of equivalents; others apply a more moderate approach. Some stay proceedings pending an opposition or a nullity suit, others seldom stay.

Since I understand these differences, I can choose the court promising the best result in a given case. In fact, if I have the choice between different courts, it is not uncommon for me to call a judge and ask what hearing date he can promise from the office docket. Sometimes, as a patentee, I prefer a fast decision because of parallel litigation in the U.S. and I want to settle things in Europe first, before the patent soon expires. Sometimes I wait for the discovery outcome in the U.S. and do not mind waiting in Europe because there is still an opposition pending.

The creation of a single European court with European patent jurisdiction exclusivity would provide that forum shopping would not be possible. However, this proposal is no longer on the table. The Working Party paper, the "counter-paper" I might call it, now speaks of regional chambers – which can only mean that these chambers have jurisdiction according to some regional criteria based on the domicile seat, defendant's establishment, or place of infringement. However, the plaintiff would still have the choice between the different regional chambers, allowing the possibility of forum shopping, even under the centralist system. Thus, the possible choice between different chambers or courts is not bad, but rather, the natural result of procedural justice. Forum shopping is only an evil when it is misused, but is not a harm to be abolished at any cost. That would be unfair.

Supporters of the Working Party paper say they want uniformity and predictability and therefore need a single court. But, a single court is no guarantee of uniformity. One will not always find uniformity between two chambers of the same court. For example, the courts in Munich and Düsseldorf are the only ones in Germany with two patent chambers in the first instance. Do you think that the judges talk over lunch about the details of a case? Yes, they may sit together at lunchtime and discuss their general approach on certain legal issues. But it cannot be excluded that decisions in appellate cases can turn out to be different or even sometimes contradictory. I could cite surprising examples. In a single central court, one will meet between 10 and 15 chambers for the expected 800-2000 cases that might be filed each year.

A look at the European Patent Office and the Community Trademark Office shows that it will take time and effort to develop a truly European approach. Thus, a single, centralized court is no better a guarantee for harmony than a number of central, national

courts. Some may say that in a central court judges can at least have lunch together and straighten things out. Yes, one might expect lively discussions at lunchtime, but the problem in the central European court is language barriers make oral communication on difficult legal principles not a primary lunchtime activity.

The goal of caseload uniformity, and thereby predictability in infringement decisions and validity cases, can only be achieved by a European court system of first instance. This can only happen if the existing national infringement courts, with experienced judges, are integrated as part of the European system. This would ensure that their competence can be maintained, along with a clear set of procedural rules and uniformity of judicial practice and case management.

Case management was one of the issues discussed in this Summit. I will just make a short remark on how I view the practice of the German courts and why the courts have been successful in their practice of predictability in different cases. I had two very large cases recently in Düsseldorf and Mannheim. (The main courts, which handle about 550 cases, are Düsseldorf, Munich, and Mannheim.) Both cases were difficult technical cases and in both the judge was fully prepared. He knew the 200-page briefs and all the exhibits nearly by heart. It is surprising how thorough and well prepared he was in the hearing. The hearing took only about two hours, even in this big case, because the judge had already ruled on certain issues – not by making a decision, but by telling the parties to limit the case to 10% of the questions they raised at the beginning.

As an attorney, you have a good focus on how a case should proceed. The case really boils down to a limited number of two or three features of the patent claim. You can forget the other 90%, which is raised at the beginning to ensure completeness. With preparation, you have a good feeling as to how good the case is. As a plaintiff, you should be convinced that you will win, otherwise you should not start the case. However, you can tell a lot in the very first statement in the hearing – the Judge's cooperation will signal to the parties how he views the case and the costs for the losing party. The court announcement is seldom changed because the writing preparation is so detailed, and the involvement is already started in the exchange of briefs. The litigator wants to know what he's getting into; he needs faces. He needs a court where he knows the people, knows the judges – not only the presiding judge (we always have three judges in the first instance), but also the reporting judges and the others. He must know the general attitude. So, in these regards, it won't work to replace the system with rotating judges for each case.

Developing the harmonization process will happen in the next six-months, with a full Working Party session at the end of the year [2001]. There will also be parallel sessions concerning our competitive model of community patent regulation, which the European Commission wants to push a little bit. We will certainly see, within the next 6 to 12 months, certain decisions taken on an international level by governments and the national delegations. I think the near future in Europe will be very interesting. You should follow it up. Of course, we will not see the European courts by the end of 2002, but it is very likely that the structure will already be established. I think it will be a very thrilling experience.

Thank you.