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# Navigating the European litigation maze

Litigating the same patent in more than one European jurisdiction is complex, costly and time consuming. But often it is unavoidable

By **Joff Wild**

Although the European Union is supposed to be a single market, when it comes to patent litigation this is not the case. Instead, companies that believe their rights are being infringed in more than one country by the same defendant are faced with a jurisdiction-by-jurisdiction trawl through the courts in order to get justice; and even then, there is no guarantee that the same decision will be handed down in every country. Put simply, therefore, cross-border patent litigation in Europe is a complex task that requires highly specialised skills to undertake successfully.

In this special roundtable, experts from two key European jurisdictions – the UK and Germany – examine some of the issues that litigants may face and discuss ways of tackling the types of challenge that cross-border disputes almost always present. Those taking part are: Bernd Allekotte and Ulrich Blumenröder of Grünecker, Kinkeldey, Stockmair & Schwanhäusser in Munich; Pierre-André Dubois and Shannon Yavorsky of Kirkland & Ellis International LLP in London; George Godar and Neville Cordell of DLA Piper UK LLP in London; and Felix Rödiger and Christian Harmsen of Bird & Bird in Düsseldorf.

**Joff Wild:** *Under what circumstances is a cross-border patent dispute likely to develop in Europe?*

**George Godar:** *Where there are equivalent patents in different countries in Europe which have been either granted via an EPO*

*application – which is most likely – or through a number of national applications of substantially the same form; in circumstances where the same infringing product or process is being sold, worked or used in some other way in a number of those countries.*

**Pierre-André Dubois:** *Although it is possible to obtain patent protection through the mechanism of a European patent application, the rights conferred by the patent are national and must be enforced nationally, as no central system of enforcement currently exists. From a trading point of view, the member states of the European Union are connected legally and economically, and most patent infringement will more often than not take place in more than one jurisdiction – meaning that enforcement and litigation strategies must almost always be viewed from a pan-European perspective. As Europe grows, these strategies must evolve organically to take account of the new economies and litigation landscapes which exist in each jurisdiction. It is currently the case that although harmonisation of patent practice is widely considered a compelling issue, and unifying proposals have been tabled, the reality is that enforcing a patent throughout Europe can be complex and time consuming.*

**Felix Rödiger:** *The term cross-border is often used for infringement cases on the basis of the Brussels Regulation (EU 44/2001) in which one single court decides on infringement of the national and foreign parts of a European patent at the same*

time. Such typical cross-border cases were popular, particularly in Germany and The Netherlands, until the recent GAT/LuK decision of the ECJ. Here the court found that infringement actions with any kind of validity issues should be dealt with only by the court of the country where the national part of the European patent was registered.

These days, multinational litigation means to enforce or attack a patent in more than one country in parallel litigations at the same time. In such a scenario, each litigation is conducted separately, although under one joint management.

Such multinational litigation strategy is considered in order to increase the pressure on the defendant(s) or in order to use the different countries' litigation systems for different purposes. For instance, one might consider filing a *saisie* in France, Italy or Belgium and then using the information obtained in another country such as Germany. Further, one might consider applying for a preliminary injunction or a border seizure in individual countries.

**Bernd Allekotte:** It is fair to say that the term cross-border patent dispute may need to be redefined: in its traditional sense, one often discussed whether one single European patent court may grant injunctive relief against an infringer for a number of European countries at the same time; although we have seen some of such cross-border cases, by far the most European litigation cases have been handled in parallel proceedings in multiple European courts more or less simultaneously.

I think we all agree that ever since the recent holding of the ECJ in GAT v LuK in particular, patentees are even more reluctant to try to establish a cross-border dispute. Nowadays, however, we see a dramatically expanding awareness of clients for infringement situations where allegedly infringing actions are committed not just in one, but rather in several jurisdictions, often akin to the facts dealt with by the US Supreme Court in the recent AT&T v Microsoft decision.

To give you an example: clients ask how courts deal with the fact that not all of the steps of a patented method are performed within one country. I see such issues frequently in the area of telecommunications. These cases often deal with the aspects of extraterritorial reach of domestic patents and jurisdictional issues. In a way, they are truly cross-border as well and I see them much more frequently than

the traditional cross-border cases.

**JW:** When confronted with a potential cross-border dispute, what are the key issues to consider when devising a litigation strategy?

**Christian Harmsen:** The key issues to consider are the expertise of the relevant courts, the duration of the proceeding before these courts and the specific procedural rules, such as cross-examination of experts or whether the invalidity defence will be heard. Finally, one might take into consideration the amount of damages in each jurisdiction and whether specific tools for fact finding are available.

**George Godar:** There are a number of things that have to be thought through – for example: which countries' courts are patent friendly; the language of proceedings and evidence; whether a preliminary injunction is available; the extent to which the patentee can use disclosure documents or evidence obtained from one country for the benefit of proceedings in another country; whether infringement and validity are considered at the same time by the same court; and whether an EPO opposition will affect the timing of an infringement action.

It is also important to look at the relationship between the potential defendants in each country. If, for example, the infringer in each country is a Dutch entity, then the Dutch courts may allow the patentee to sue in the Netherlands for all infringing acts in all countries. It is also possible – but not yet tested – that if there is a Dutch holding company and its subsidiaries are infringing in different countries, and the degree of control is such that the holding company is in de facto control of them, the patentee might obtain a negative injunction on the holding company to stop the activity and a mandatory injunction to exercise its control over the subsidiaries to stop them infringing in the other countries.

**Ulrich Blumenröder:** Any intelligent litigation strategy starts with a thorough investigation of the markets concerned. Then one needs to evaluate the disparities between the different EU countries. Most clients are cost-conscious and decide to enforce their patents in only a few jurisdictions. In any case, my experience clearly is that one needs to coordinate the various national litigation proceedings carefully; this not only



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saves costs and time, and serves to streamline the cases, but also avoids making contradicting arguments in the various litigations.

**Shannon Yavorsky:** Yes, cost is a vital issue and deciding on how to proceed is often best done by doing a cost/benefit type analysis. It may be that an infringer is minded to engage in protracted litigation so that it has enough time to complete the development of a non-infringing product. On the other hand, the infringer may wish to obtain a quick decision on invalidity or non-infringement to start selling its product as soon as possible. The patent owner must think critically about its own commercial objectives. The owner may want to delay a determination on validity or non-infringement for as long as possible to prolong the commercial exploitation of its product or process. Alternatively, it may make commercial sense to attempt to obtain an injunction as quickly as possible to stop the infringer from diluting its market share.

Any cross-border litigation strategy should also bear in mind the particularities of each jurisdiction. The timing and costs of bringing proceedings in each jurisdiction may vary widely and any potential litigant would be well advised to consider carefully where to focus its time, attention and money from the very beginning. The choice of jurisdiction is often informed by the particularities of each case. As one example, a potential litigant who has meagre information on the defendant's infringing actions may be better placed in the English court system where the disclosure exercise permits the claimant greater access to materials held by the defendant. However, UK courts are often less patent-friendly than those in certain other jurisdictions and will scrutinise in detail any attack on validity.

**JW:** *What effect have the ECJ's decisions in GAT v LuK and Roche v Primus had in developing such strategies?*

**Pierre-André Dubois:** These decisions have really narrowed the options for litigants involved in and considering cross-border actions. The possibilities that were once seen to be offered for patent litigation by virtue of Article 6(1) of the Brussels Regulation now seem remote and a potential litigant seeking to enforce a patent throughout Europe must craft its strategy carefully and with regard to the attendant opportunities and limitations of each jurisdiction.

The Roche v Primus case established that where a patent is being infringed by companies throughout Europe belonging to the same group, each group company must be sued in its own jurisdiction. In GAT v LuK, the court considered whether the issue of the validity of a patent, raised either as a direct action or as a counterclaim in an infringement action, could be considered in the member state in which the action was issued even if this was not the jurisdiction that granted the patent. The ECJ said that only the court of the member state that issued the patent could rule on the issue of validity.

**Christian Harmsen:** These two decisions of the ECJ were to be expected and marked the end in the rise and fall of cross-border actions in Europe. After the great enthusiasm in the mid-90s, there were a number of decisions from various countries limiting the application of international jurisdiction of national courts. The Dutch spider in the web doctrine, the Belgian Röhme Enzyme decision and the Italian Windmoeller decision put a big question mark over cross-border practice even before GAT v LuK. This decision now makes such cross-border actions so risky and so easy to attack that they are simply not recommendable anymore. The very limited application in exceptional cases of preliminary injunctions in the Netherlands and Belgium against local entities is still alive but may be overturned soon as well. Certainly, they have no meaning for European-wide patent strategies.

**Neville Cordell:** Yes, the Dutch angle can still be an important one. In Bettacare v H3, a preliminary injunction case heard in the Netherlands, the claimant sought an injunction covering other jurisdictions, or at least Germany. The defendants argued invalidity. Both defendants were established in the Netherlands so there was no doubt of geographical jurisdiction. The court held that the preliminary arguments in favour of invalidity were not convincing and so granted injunctions in the Netherlands and Germany. It had jurisdiction on the basis that both the defendants were established in the Netherlands and, when considering preliminary relief, the court was entitled to make a preliminary judgment based on the chances of success and merits. Because the court was satisfied on the evidence that infringement was being committed in Germany, the injunction granted covered Germany as well, but not other countries as infringement had not been proven.

Preliminary cross-border injunctions are still possible in the Netherlands, therefore, provided that the defendant is Dutch (or possibly infringing the Dutch patent), the invalidity argument is weak and the patentee produces evidence of infringement in each country in which it seeks the grant of a preliminary injunction.

**Bernd Allekotte:** Well, let me stress that the bread-and-butter litigation remains unaffected, as the vast majority of all cases are not litigated as cross-border cases. It is probably fair to say that most of the remaining willingness to initiate cross-border litigation was seriously stifled by the GAT v LuK case in particular. Almost all cross-border cases are very important due to their potential impact on the relevant market, which is why almost always the validity of the plaintiff's patent is attacked, and this is usually the end of any serious cross-border consideration after GAT v LuK. So, I think that the effect of this case, in particular, is that the plaintiff-patentee will be rather inclined to start parallel infringement cases in various jurisdictions, whereas the defendant will, in most cases, have an effective tool to prevent cross-border litigation.

One should not underestimate the possibility of border seizure measures. Our experience certainly is that border seizure on the grounds of alleged patent infringement can be a very effective tool for stopping infringing devices entering the European Union and we see an increasing number of clients that want to use it.

**JW:** When looking to instruct a law firm or firms to help you with the litigation, what are the key skill sets and attributes to look for?

**Felix Rödiger:** In multi-jurisdictional scenarios it is important to develop a strategy beyond that which is appropriate for each national jurisdiction alone. It is, therefore, key to involve a multinational law firm that has offices in all the countries. Only such a law firm can recommend a strategy on a neutral basis that takes advantage of the peculiar national tools available in the different jurisdictions. Further, it is important that such a law firm can speak with one tongue and act in coordination without wasting time and money on single country efforts that do not make sense in the overall strategy.

**George Godar:** Those involved in a potential cross-border dispute should look for their

outside advisers to have good litigation skills; knowledge and experience of patent law in the local regions concerned and of the procedural steps available. And, yes, using one firm which has the same level of expertise across different jurisdictions and the ability to coordinate litigation strategy to maximise advantage can certainly be a significant benefit.

**Shannon Yavorsky:** We currently practise in Europe in the United Kingdom and in Germany. Evidently, we have a very big patent litigation practice in the US. We often work on cross-border and transatlantic cases. When looking at firms to assist us in jurisdictions where we do not practise, we will look at the particular local expertise of the firm – as opposed to the mere fact that a particular firm may have local offices in different countries – and its willingness to develop with us a cogent and comprehensive local strategy which will take into account the overall, often global, objective of a case. We need to know that the assistance we will receive will not be only legally right but commercially sound: often this will mean for the local firm departing from its normal path of litigation and letting another jurisdiction lead the process.

**JW:** In Europe, can you expect a uniform approach to issues such as obviousness and the doctrine of equivalents? How are these issues approached in your jurisdiction?

**Ulrich Blumenröder:** With respect to the doctrine of equivalents, I do not see a uniform approach. In Germany, modifications will be caught under the doctrine of equivalents if: (1) the modified means have objectively the same effect as the means of the patent; and (2) a person skilled in the art was able to find such modified means; and (3) the person skilled in the art would also consider such modified means as a solution to what is patented when reading the patent.

In my practice, I handle quite a few cases where the same patent is enforced in various jurisdictions – it is interesting to see that Article 69 of the European Patent Convention (EPC) and the related Protocol have not led to a uniform approach of the courts in the EPC member states. Through the EPC 2000 – which comes into force on 1st January 2008 – the doctrine of equivalents is recognised for the first time ever in the Protocol; but there is no guidance



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Throughout his career Neville has had a 100% success rate in acting for clients in first instance trials. Many of Neville's cases have been reported and are landmark decisions in the field of intellectual property law. He is listed as one of the leading intellectual property lawyers in the Legal 500 (2006 edition), which describes him as being "excellent".

as to under what conditions it shall apply. It is probably fair to say that under the current regime – ie, without a Community patent or the European Patent Litigation Agreement (EPLA) – no uniform approach can be expected even though the House of Lords and the German Supreme Court have started citing each other.

**Pierre-André Dubois:** The UK has never had a doctrine of equivalents. Like all member states, it has adopted the European Patent Convention and Protocol, within which Article 69 sets out what is intended as a European-wide guideline for the interpretation of patents. Article 69 states that the extent of the protection conferred by a European patent will be determined by the terms of the claims, and that the description and drawings will be used to interpret such claims. Article 69 was considered in the UK by the House of Lord's in *Kirin-Amgen Inc v Hoechst Marion Roussel Limited*. In that case, Lord Hoffmann said that the determination of the extent of

protection conferred by a European patent is an examination in which there is only one compulsory question, namely that set by Article 69: what would a person skilled in the art have understood the patentee to have used the language of the claim to mean? If the result of this investigation is that a matter would have been contemplated by the inventor from a reading of the disclosure, then it will be covered. UK law does not endorse a more literal approach to claim construction; however, it will examine carefully what the wording of the patent implies. UK law is therefore much more stringent than, for example, US law on the doctrine of equivalents.

When it comes to obviousness, UK law follows today the same approach as that set forth in 1985 in the *Windsurfing* case – as recently reformulated in the *Pozzoli SPA v BDMO SA* case. Obviousness is assessed by applying a four-part test: 1. identify the notional person skilled in the art and then identify the relevant common general

knowledge of that person; 2. identify the inventive concept of the claim in question or, if that cannot readily be done, construe it; 3. identify what, if any, differences exist between the matter cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed; and 4. assess whether, viewed without any knowledge of the alleged invention as claimed, those differences constitute steps which would have been obvious to the person skilled in the art or whether they require any degree of invention.

The UK approach to obviousness is pragmatic, ie, is the invention novel and non-obvious, and will it prevent the patenting of an old idea that does not contribute to human knowledge?

**Felix Rödiger:** The English, Dutch and German courts have often cited each other's decisions in order to develop a more unified approach to questions such as obviousness and equivalence. The German Supreme Court, for instance, developed the three so-called Cutting-Blade questions in 2004, which were obviously made following the three Catnic/Improver or Protocol questions of the High Court in England. It is ironic, though, that these questions were developed at a time when the English courts were about to abandon their three questions.

In the end, a fundamental difference remains between English and German case law which derives from the fact that the English case law does not apply any doctrine of equivalents, while all decisions are made within the field of literal infringement. Under German law, literal infringement is only the first level and only when literal infringement is ruled out the level of equivalence and the three Cutting-Blade-Questions come into play. This is because the German infringement judge is bound to the wording of the claim when discussing literal infringement and may consider the state of the art comparison in the so-called Formstein objection only when discussing equivalent infringement. This differentiation is due to the dual system in Germany and the fact that there are no squeeze-type arguments such as may be used in an English litigation.

**Neville Cordell:** To sum up: there is no doctrine of equivalents in England; but there is a form of the doctrine in Germany. So, no uniform approach there. While with regard to obviousness there are different tests in different jurisdictions – the revised

Windsurfer/Pozzoli test in England, the problem-solution approach elsewhere – which may or may not lead to the same result.

**JW:** Given that in most European jurisdictions there is no, or very limited, discovery, how does a plaintiff most effectively build its case?

**Shannon Yavorsky:** As previously mentioned, the UK has a comparatively extensive disclosure process and arguably there is no European equivalent for a UK claimant's ability to obtain extensive information through this process. While much more restricted than the discovery process under US litigation, the UK system will force parties to disclose all relevant documents and parties cannot be selective about what documents to disclose without facing the risk of sanctions. Civil law countries offer what is known as *saisie description*, which is effectively an *ex parte* procedure enabling the patent holder to enter the premises of an alleged infringer to find evidence of infringement. The distinct advantage of this procedure, which is available in, among other countries, Italy and France, is that the patent holder is not required first to issue proceedings.

**Neville Cordell:** Discovery may not be so important for the patentee in patent disputes relating to a product because the patentee may be able to buy the product and determine whether it infringes. But if the dispute relates to a process, there is a difficulty in obtaining evidence of infringement. In English proceedings a patentee can get an order for inspection of a process, however, provided it has sufficient evidence of infringement to justify a claim in the first place.

A patentee may be able to use disclosure it obtains from English proceedings to launch actions in other countries, although the English courts' permission will be required to use the information and documents in other proceedings.

A patentee should always look for inconsistencies in descriptions of a product or process supplied by the alleged infringer in different jurisdictions and apply to use such inconsistencies in evidence in relevant jurisdictions.

**Felix Rödiger:** The German approach to this is very easy and effective at the same time. All the claimant has to do is argue in a substantiated manner. There is no need to



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bring factual evidence of infringement. The substantiated allegation of such infringement is sufficient to bring the action. The defendant is then obliged to explain with the same depth of arguments why it is not infringing. It is, in most cases, not sufficient for the defendant simply to dispute the allegation of facts brought by the claimant. It is also not sufficient to list alternative scenarios under which there would be no infringement. The defendant will have to take a clear position as to why it does not infringe. It is thus important for the claimant to argue in as much detail as possible why it thinks that the patent claim is fulfilled so that the defendant will have to rebut with the same level of detailed arguments.

If even a substantiated allegation cannot be brought, then it is necessary to gather evidence. For that purpose there is new German case law under which the court will grant an ex parte preliminary injunction to have the allegedly infringing goods inspected by a court-appointed expert. Alternatively or in addition, a *saisie* in France, Italy or Belgium might be appropriate. The information obtained could be used to bring the German infringement action, assuming, of course, that the infringing product is identical in both countries.

**Bernd Allekotte:** Although there are certainly some ways to obtain evidence from the defendant in Germany, a plaintiff will need to rely on other means to obtain evidence even after the European (Enforcement) Directive 2004/48/EC is transposed into national German law. In some cases, we have successfully relied on evidence which was produced in countries where it is rather easier to obtain, such as France or the United States, but in some cases the patentee is in a miserable situation. Although the provisions of the European (Enforcement) Directive are miles away from what US laws provide on discovery and the production of evidence, I think the Directive's Articles 6 and 7 will definitely help a patentee to build its case successfully.

**JW:** How likely are courts to overturn a patent granted at the EPO generally and in your jurisdiction specifically?

**George Godar:** In the UK, it used to be very likely. Only a small number of strong patents came before the court, usually patents obtained as part of an ever-greening policy which English courts can readily see

through, often on the basis of lack of inventive step.

It is less likely in Germany, but the courts there are getting better at seeing through bad patents.

**Pierre-André Dubois:** Whether a patent has been granted by the EPO or by the UK Intellectual Property Office will not impact on the outcome of proceedings before the UK courts. UK courts are arguably not patent-friendly – over a period of three years, close to 50% of the patents challenged before the UK courts were declared invalid in part or in totality.

In many jurisdictions, national infringement proceedings may be stayed pending a decision on validity at the EPO – a process which can take up to six years. However, the UK courts will not stay national proceedings when there are proceedings pending at the EPO. A recent case in the UK, *Unilin Beheer BV v (1) Berry Floor NV (2) Information Management Consultancy Ltd t/a Responsive Designs Plc (3) B&Q Plc*, has demonstrated that patentees can now litigate in the national courts with the certainty that if the patent is held valid and infringed, a subsequent EPO decision of invalidity will not affect the UK judgment. This is an important win for patent holders in the UK, who can now be sure that the national courts are willing to overturn a European patent and that this decision is *res judicata* in the UK.

**Christian Harmsen:** Due to the dual system in Germany, an infringement court would not overturn a patent. All a German judge can do is to stay the infringement action pending the outcome of a nullity action in the Federal Patents Court or an opposition. A peculiarity in this respect is that a German nullity action may only be started once the opposition proceeding is final, which may take years. If no such opposition or nullity action is pending, the German judge will have to apply the wording of the claim “like a piece of law”.

An infringement action will be stayed only if the court is convinced that the nullity action will be successful. Simple doubts will not suffice to argue a stay decision. There was a practice in the past that an infringement action should be stayed only if new state of the art was raised in the nullity action which was not previously considered throughout the grant proceeding and which, in addition, was considered likely to render the patent invalid. Today there is a certain tendency to stay in other circumstances as well, but the court



still has to be convinced of the likelihood of success of the pending nullity action.

The German Federal Patent Court has established some case law which differs in some respects from EPO cases. Thus, there is at least a chance that the court will come to a different decision to the EPO even if the European patent was upheld in opposition proceedings.

**JW:** Pursuing cases in a number of European countries is bound to make litigation expensive. What are the most effective ways of controlling costs?

**Ulrich Blumenröder:** Experience shows that duplicative work is an issue in parallel infringement proceedings. Tough and well-organised case management certainly helps to avoid duplicative efforts and work by the attorneys in the various jurisdictions involved. In some cases, it may even be advisable to attack a patent infringer in one country only; in particular, in cases where it manufactures in one country only and this country is a suitable forum for litigation. If your client considers filing a patent infringement lawsuit against, say, a German company that manufactures infringing devices only in Germany, and exports throughout the world from there, it would be well advised to go primarily against the infringer in Germany and have the manufacturing stopped quickly there.

In clear cases of infringement, the threat of a number of lawsuits in various jurisdictions is sometimes enough to settle on favourable terms.

**Felix Rödiger:** Litigation in several countries is costly per se. It has to be seen as an investment in a well-developed strategy either towards the market or towards a certain competitor. Still, there are means to control the costs – the most effective one being to put the organisation and coordination of the various national litigation in the hands of one experienced senior litigator. It is then his responsibility to coordinate the national activities in the most effective way. Personal meetings, for example, are very costly, but at the same time one will not be able to guide a team of national litigators without the odd face-to-face get-together. The timing and the selection of issues to discuss are then crucial. All-hands meetings are often not necessary. One should instead split the entire team up into effective sub-groups which will work on the same topic.

**Pierre-André Dubois:** It is crucial to define clear goals at the outset: ie, is it more important to exclude the competitor from the market or generate licensing revenue; or is the litigation being used as part of a global strategy where the stakes are in fact outside Europe?

Other issues include: deciding whether litigation is more favourable than licensing; realistically analysing the merits and costs; employing a focused disclosure strategy; keeping the legal team lean, if possible; obtaining a detailed budget from any expert before retention; and continually revisiting strategies in view of changing business objectives.

Overall, avoid duplication of efforts. If faced with litigation in a number of countries, leverage resources and knowledge, such as experts, but also counsel.

**George Godar:** I would also like to add: make sure there are open lines of communication between lawyers insofar as permitted by the rules; use one firm that can coordinate well; and ensure that the lawyers have a common language for communications.

**JW:** What weapons are available to defendants seeking to slow a case down? How effective can these be?

**Christian Harmsen:** There are countries where the courts will apply a fixed schedule and other countries where the courts will allow the parties to decide whether they wish to make further arguments. The German courts will either set a hearing date right from the beginning and allow parties to exchange arguments until such hearing date, or fix a hearing date after the first round of exchange of arguments. In any event the weapons to slow down a proceeding are very limited.

There is one quite effective tactic, though, which is to bring expert opinion over technical questions as party submission. Such technical expert opinion will then often force the claimant to counter with its own expert opinion, meaning that the court is approached with two diverse expert opinions. If this technical question is decisive for the outcome of the case, and if the judges are unable to decide the technical question themselves (which often is the case simply because the factual questions are not a matter of inspection), then the court is forced to ask for a technical opinion from a court-appointed expert. In practice, this will



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prolong the litigation for at least a year and in many cases for two years or even longer.

**Neville Cordell:** A defendant may still be able to achieve a delay of between six months and one year by seeking a declaration of non-infringement over a foreign patent in a slower country. While Belgium and Italy are now declining to make declarations of non-infringement over foreign patents, it may still take some time before the courts of those countries rule on their own jurisdiction.

A defendant may also be able to slow national proceedings down by launching an EPO opposition, if possible. If there is a pending EPO opposition, the national proceedings may be stayed. This could be effective, although in the UK stays are now less likely to be granted because EPO oppositions are taking so long. Courts often say that given the time it takes for EPO oppositions to be concluded, it is a denial of justice to stay the national proceedings.

**Shannon Yavorsky:** The choice of jurisdiction could be part of a strategy to slow a case down. For example, the courts in Belgium and Italy are considered to be relatively slow in ushering a case through the system while the courts of England and Germany are considered comparatively swift. Notably in the UK, once a statement of claim is filed, there is no real way to slow down the process as a claimant. Cases are managed by the court under a case management process and precise deadlines will be imposed on the parties.

**Bernd Allekotte:** The issues of infringement and validity are heard by different courts in Germany. A defendant seeking to delay a case will primarily consider initiating invalidity proceedings against the plaintiff's patent and will try to convince the infringement court to stay proceedings until a decision has been rendered as regards the validity of the patent.

As already mentioned, potential defendants may also consider filing a motion for a negative declaratory judgment in a foreign jurisdiction where courts may render a decision rather slowly, such as Belgium or Italy. At least until a few years ago, this resulted in severe delays to some German trials. Recently, however, there has been a noticeable decrease in choosing such a strategy since a change in applicable European law.

*JW: There have been moves, such as the*

*proposed EPLA, to create a one-stop shop for European patent litigation. What would be the advantages and disadvantages of such a system? Do you think that we will see one introduced in the coming years?*

**Pierre-André Dubois:** The obvious and oft-cited advantage is that patent holders will have one place to go to enforce their rights instead of potentially having to enforce its rights in any number of European jurisdictions. A one-stop shop would greatly streamline infringement proceedings with the knock-on effect of savings of time and expense.

The recent review by Andrew Gowers of the UK intellectual property framework supported both the European Commission's proposal for a Community patent and the EPLA. The Community patent would be a true single patent providing identical protection in each member state. The EPLA would introduce a central European patent court which would be a real one-stop shop for patent holders to enforce their rights across Europe.

The main practical issue, at least at the outset, if the EPLA were implemented would be to arrive at a set of procedural rules and a bench which would be sufficiently uniform and representative of the different legal cultures. Prior discussions around the EPLA were based on a model where most proceedings would be in writing with no discovery – which would be unsatisfactory. Will we see a one-stop shop in the coming years? Most likely, yes. If anything, the ECJ's decisions in *GAT v LuK* and *Roche v Primus* should encourage support for a central system.

**Neville Cordell:** In terms of the EPLA, there are potential advantages and disadvantages.

On the plus side, litigation costs would come down in many circumstances. There would be no parallel proceedings and the need for multi-jurisdictional patent litigation would be obviated. With regards to appeals (in the EU), there would be more consistency in decision-making.

However, across Europe there is a varied standard of specialisation of patent judges which could lead to forum shopping if there were no central European patent court. Appeals would probably have to go to the ECJ, which may create time-to-decision problems; in addition to which, the ECJ is made up of academics and mainly public law judges. They may not know patents sufficiently well. In addition, we may end up losing useful weapons such as disclosure in the UK, depending on the procedures adopted under the EPLA.

**Ulrich Blumenröder:** Quite frankly, I doubt that we will see a one-stop shop for European patent litigation. From what I hear, the EPLA is pretty much dead.

The advantage of a uniform patent litigation system would certainly be the potential benefit of enforcing a patent in a single market that is bigger than the US by filing just one lawsuit. Even though such European-wide litigation would certainly be more expensive than, say, a domestic German litigation, it would still be considerably cheaper than multiple lawsuits in various EU jurisdictions. Contradicting decisions of national courts, in particular when applying the doctrine of equivalents, would clearly be avoided.

However, depending on what side of the fence you stand, and depending on the result in a specific case, a one-stop shop can also have severe disadvantages for both the plaintiff and the defendant. Think, for example, about a decision in favour of the plaintiff-patentee in a true borderline case where some very complex equivalence issues have been raised. This has the potential to have a severe impact on the defendant; even if such a decision that enjoins the defendant from manufacturing and distribution of a specific device for the whole European Union is one day lifted by a court of appeals, the damage may be substantial, even irreversible. Therefore, I think that it is very important to think carefully about enforcement issues when talking about European litigation.

**Christian Harmsen:** The desired advantages are, of course, a reduction in costs and time for litigation purposes, and to have a one-stop shop for all countries. But in practice, these goals may be illusory.

The advantage of the EPLA proposal would be that the effective court structure in the first instance would be maintained as much as possible. There would be a unified case law in the second instance, which brings up the question of to what extent the first instance courts would be influenced in their case law by this appeal court.

From a legal and procedural point of view there is no need to change a well-established system that has proved itself capable of providing effective court decisions in most cases.

In the end, I do not think that we will see the EPLA proposal introduced over the next few years.

**Pierre-André Dubois:** Anyone contemplating patent litigation in Europe needs to be aware of the growing interest in the interface between IP rights and competition law. While in the past European courts have had little appetite for this topic, this is changing at a fast pace. Patent owners should expect to see more and more challenges founded on competition law grounds in Europe (whether by way of Euro-defences or complaints before the European Commission), such as abuse of the registration process or abuse of a dominant position through improper licensing practices.

**Felix Rödiger:** The best way to improve the effectiveness of patent litigation in Europe is to establish specialised national courts for patent infringement only. The degree of specialisation we have seen so far in many countries has been limited to IP matters. Although this is certainly a step in the right direction, it is not sufficient. Patents are very different from trademarks, for example.

A second step would be to provide specialised national courts with a sufficient number of judges who are not ordered away after a short stay, but who instead remain long enough to establish consistent case law. This, in the end, is the success story of the German patent infringement courts, such as those in Düsseldorf, Mannheim and Munich, even though we would still wish to have more judges. The cases are getting increasingly complex and thus require a more thorough and time-consuming preparation of the oral hearing so as to be able to decide the case with the sufficient due diligence a patent litigation requires.



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**JW:** Are there any other issues you would like to raise?