

PATENT LITIGATION EUROPE

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The problem with European Patent Law

- ▶ Multiple patents
- ▶ Multiple laws
- ▶ Multiple languages and (legal) cultures

Some solutions thus far
































- ▶ Draft Community Patent
- ▶ Harmonized jurisdiction rules
 - ▶ Reg. 44/2001 on jurisdiction
- ▶ Harmonization of enforcement laws
 - ▶ Dir. 2004/48 on enforcement
- ▶ Uniform customs measures for IP infringements
 - ▶ Reg. 1383/2003 on customs measures

European Patent Convention

- ▶ ≠ European Union instrument
- ▶ ≠ not really one system
- ▶ one application/grant procedure/one opposition procedure
- ▶ one scope of protection rule (art. 69)
- ▶ results in bundle of national patents
- ▶ so, infringement case: country by country
- ▶ so, post opposition invalidity: country by country
- ▶ no supranational court

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Member states

- | | |
|---|---|
|  AT ✕ Österreich |  IS ✕ Ísland |
|  BE ✕ Belgique / België |  IT ✕ Italia |
|  BG ✕ Balgarija |  LI ✕ Liechtenstein |
|  CH ✕ Schweiz / Suisse / Svizzera |  LT ✕ Lietuva |
|  CY ✕ Kypros |  LU ✕ Luxembourg |
|  CZ ✕ Česká Republika |  LV ✕ Latvija |
|  DE ✕ Deutschland |  MC ✕ Monaco |
|  DK ✕ Dänemark |  NL ✕ Nederland |
|  EE ✕ Eesti |  PL ✕ Polska |
|  ES ✕ España |  PT ✕ Portugal |
|  FI ✕ Suomi / Finland |  RO ✕ Romania |
|  FR ✕ France |  SE ✕ Sverige |
|  GB ✕ United Kingdom |  SI ✕ Slovenija |
|  GR ✕ Elláda |  SK ✕ Slovenská Republika |
|  HU ✕ Magyarország |  TR ✕ Türkiye |
|  IE ✕ Ireland / Éire | |

Community Patent ???

- ▶ Ideal: one unitary right for the whole of the EU just as CTrade Mark, CDesign, CPlantbreedersr.
- ▶ Conception took place long time ago, baby does not want to be born
- ▶ Draft Regulation is ready (march 2004)
- ▶ Litigation system:
 - ▶ transitional period: national courts
 - ▶ then decentralized CP courts; appeal ⇒ CFI Lux.
 - ▶ Union wide injunctions and invalidity
- ▶ But when will birth take place ???

Eur. Patent Litigation Agreement EPLA

- ▶ CPC no immediate solution
- ▶ Uncertainty about cross border relief
- ▶ So, EPO worked on EPLA
 - ▶ unique system with own procedural rules
 - ▶ European Patent Court (central and regional divisions) of 1st instance and appeal
- ▶ EPLA provides for only part of members to implement it
- ▶ Not big chance of getting off the ground, some EPO countries are against and EU does not want formation of a block

New effort by EU Commission 16.01.'06

- ▶ EU Commission launched a new consultation round in belief that *a unitary system of patent protection for the EU is required to boost competitiveness of European industry*
- ▶ But, if no EPLA and/or CPC are born, we have to cope with the existing divided and insecure system

Multinational disputes/ courts authority

- ▶ Principle: country by country assessment of infringement/invalidity
- ▶ Supreme Court Netherlands *Lincoln v. Interlas* (1989): basis for cross border relief
- ▶ Followed by German and Belgian courts
- ▶ US *Voda v. Cordis* ????
- ▶ Lots of cross border infringement cases in EU

Multinational disputes/ jurisdiction

- ▶ EU Regulation 44/2001
- ▶ Court of domicile defendant (art. 2)
- ▶ Co-defendants can be sued, sufficient connection required (art. 6,1)
- ▶ after abuse, CoA The Hague invented spider in the web doctrine *Expandable Grafts* 1998
- ▶ Court of infringing act (art. 5,3)
 - ▶ is applied restrictively: no cross border relief
 - ▶ also not in declaratory cases (Belgian/Italian torpedo, now exploded)

Spider in the web: *Primus v. Roche*

- ▶ ECJ to deal with questions on sufficient connection in Dutch case *Primus v. Roche*
- ▶ *a)* s.c. if defendants are part of one group
- ▶ *b)* s.c. if defendants act on basis of common policy and if so, is place of origin relevant
- ▶ *c)* s.c. if infringing acts defendants are (virtually) the same

Spider caught in the web?

- ▶ Opinion AG Léger (8 Dec '05):
 - ▶ Judgments on national patents are not necessarily irreconcilable
 - ▶ Technical scope of protection under 69 EPC might be identical, but
 - ▶ Legal scope is different
 - ▶ So, no application of art. 6(1) or spider in the web
 - ▶ Recognizes limitations and inefficiency of this system and points at EPLA and CPC for solutions

Multinational disputes: infringement and invalidity

- ▶ Relation infringement and invalidity in cross border cases
- ▶ Art. 22(4) Reg. 44/2001: concerning validity of patents exclusive jurisdiction for courts where patent is registered
- ▶ UK ↔ Dutch approach
- ▶ Who is right?

ECJ *Gat v. Luk*

- ▶ We will soon (?) know
- ▶ AG Geelhoed rejects Dutch approach:
 - ▶ 22(4) is applicable when in infringement cases the defendant, or in declaratory non-infringement cases the plaintiff argues that the patent is invalid; court can always
 - ▶ refer the case to the invalidity court (*oops*, and if the case is not pending there?)
 - ▶ or postpone the case until the invalidity court decides (*oops*, and if the case is not pending there?)
 - ▶ or deal with it, if defendant is in bad faith (???)

Conclusion thus far

- ▶ *Gat v. Luk* and *Primus v. Roche* will set the scene for multinational patent disputes
- ▶ It may mean more or less the end of the cross border practice
- ▶ The more reason for either *EPLA* and/or *CPC*

For now: where to litigate?

- ▶ Patent climate/ win rates on validity and infringement
- ▶ Litigation costs
- ▶ Litigation pace
- ▶ May be the classical cross border possibility is still available in some jurisdictions, like The Netherlands or Belgium

THANKS!

More details:

[NautaDutilh EU patent cd-rom](#)

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