

Sixth EPIP Conference
EUROPEAN POLICY and INTELLECTUAL PROPERTY

Santiago de Compostella
7 October 2005

**Status quo and proposals for patent
litigation harmonization
in Europe**

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Patent Litigation

The most important issues

- Validity of the patent – nullity action
- Extent of protection (scope) of the patent – Article 69 EPC with Interpretation Protocol
 - interpretation in relation to the infringing act
- Relevant state of the art
- Knowledge of the person skilled in the art
- Need for expert evidence

How to conclude litigation?

- Settlement by the parties
 - in Europe, 50%-95 % of cases
- Main instruments in settlement
 - licensing
 - limitation clauses
- Payments – compensation
- Judgment

Alternative Dispute Resolution

- Mediation
- Elements of mediation in the court procedures
- "Case management"
 - Bring senior executives to the negotiation table: knowledge of the interests, priorities and future strategies of the business
 - Use expertise of patent attorneys + lawyers – technology / law
 - Confrontation of emotions, control over them
 - Focus on the interests and needs of the parties
 - Drafting outline of agreement (need for experts)

Patent litigation in Europe

Current situation

- Coexistence of national and European patent granting systems
- No Community patent
- Since 1980, the EPO has granted 700.000 European patents
 - subject to national law in the post-grant phase
 - infringement and revocation actions dealt with by national courts

Litigation of European patents

Current situation unsatisfactory

- Jurisdiction of too many courts
 - unbalanced qualification & experience of judges
 - effect of decisions territorially limited: cross-border injunctions?
- Multiple litigation, costs, delays, legal uncertainty
- Great differences of procedure
- Application and interpretation of EPC lacks uniformity

Reform initiative at Intergovernmental level: Paris 1999

Working Party on Litigation mandated to

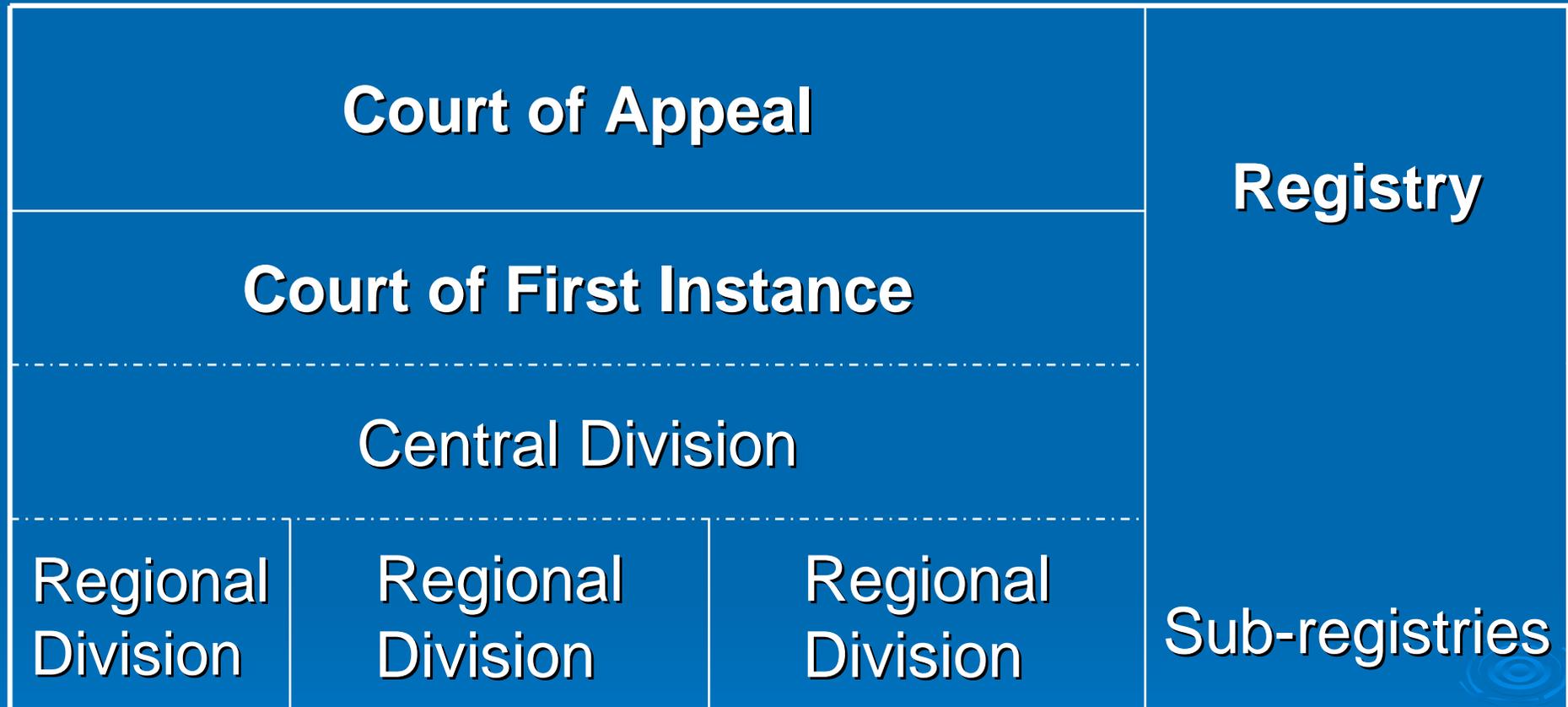
- draw up an **optional** agreement to the EPC creating an **integrated judicial system**, including **uniform rules of procedure** and a common appeal court
- define terms for establishing a “Facultative Advisory Council”

Six years after the Paris Mandate

Working Party on Litigation has finalised

- Draft Agreement on the establishment of a European patent litigation system
- Draft Statute of the European Patent Court
- <http://patlaw-reform.european-patent-office.org/>

European Patent Court



Setting up Regional Divisions

- A Regional Division shall be set up
 - on request of a State or a group of States
 - by the Administrative Committee
- up to 3 Regional Divisions in one State if workload justifies setting up more than one Regional Division

Court of First Instance

Central Division + Regional Divisions =

- unitary court
- uniform rules of procedure
- internationally composed panels
- exclusive jurisdiction on infringement and validity of European patents
(after a 7 years transitional period)

Court of Appeal

- Hear appeals and cross-appeals against decisions of the Court of First Instance
- Act as Facultative Advisory Council
 - deliver non-binding opinions on any point of law concerning European or harmonised national patent law
 - to national courts trying infringement and validity actions

A self-contained legal system

- Substantive patent law
- Uniform rules of procedure
 - provisions on damages
 - injunctions
 - provisional & protective measures
- Composition of panels
- Language regime
- Representation

Composition of panels

➤ Court of First Instance

- odd number of judges
- at least 1 technically qualified judge
- at least 2 legally qualified judges
 - of at least two different nationalities
- guarantee of “*gesetzlicher Richter*”

➤ Court of Appeal

- same provisions apply *mutatis mutandis*

Jurisdiction of the European Patent Court

- in respect of
 - actions for **actual infringement**
 - **threatened infringement**
 - for a **declaration of non-infringement**
 - actions or **counterclaims for revocation**
 - actions for **damages**
 - compensation derived from the **provisional protection** conferred by a published European patent application

Jurisdiction of the European Patent Court

➤ **exclusive**

- actions for **revocation**
- actions for infringement where the alleged **infringer is domiciled in a EPLA State** or where all parties are in **agreement**

➤ **non-exclusive**

- actions for infringement where the alleged **infringement occurred in an EPLA State** even though the alleged infringer is not domiciled in an EPLA State

Few questions still outstanding

- The **seat** must be agreed
- The level of procedural **fees** to be paid by parties and of financial contributions from the EPLA States have to be set
- The **effect of decisions** of the EP Court is still at issue
- **Rules of procedure** of the Court must be prepared (interim committee)

Perspectives for future work

- **Declaration of the Working Party on Litigation (November 2003)**
 - "Proposed jurisdictional arrangement offers an **optimum solution** for users"
 - "EPLA constitutes a **suitable basis** for convening an Intergovernmental Conference"
- 10-12 states have participated actively in the negotiations
 - including UK, DE, FR, NL, CH, SE, DK, FI

But the EPLA is held in abeyance

- “... in view of the work being done by the European Union to introduce a Community patent with a judicial system of its own”

Community patent

- Earlier attempts
 - 1975 Community Patent Convention
 - 1989 Agreement relating to Community patents
- Both failed on grounds of **litigation and language regimes**
- August 2000: Commission proposes **Regulation** on the Community patent
- Based on Art. 308 EC Treaty, adoption requires **unanimity** of all 25 EU Member States

Jurisdictional arrangement (1)

- Creation of **Community Patent Court** with exclusive jurisdiction for litigation concerning Community patents
- At first instance, **judicial panel** attached to the European Court of First Instance (ECFI)
- Right of **appeal** before **ECFI**
- Seat in Luxembourg

Jurisdictional arrangement (2)

- Sections composed of 3 judges
- Judges assisted by technical experts
- Language of proceedings
 - Language of domicile of defendant
 - Upon request by the parties and if the Court agrees, any other official language of the EU
 - Possibility to hear parties & witnesses in other official languages of the EU (translation & interpretation)

Community patent v. EPLA



Wait for Community Patent Court?

- Long-term prospects
- EPLA would be applicable to ~ 850 000 European bundle patents effective at the date of entry into force
 - European bundle patents will co-exist for many years (if not for ever) with the Community patent
 - The future Community patent system will not include any jurisdictional arrangement for European patents

Wait for Community Patent Court?

- The European Patent Court could be fully operational within five years after the EPLA has been adopted by an Intergovernmental Conference
 - It may take a generation or more before a Community Patent Court has developed its patent law jurisprudence
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Thank you for your attention.
Questions and comments.

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<http://patlaw-reform.european-patent-office.org/>