The future UPLS for patent litigation in Europe

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Introduction

In this "Festschrift" commemorating the existence of 100 years of the Dutch Patent Code it is paramount to realise that the international arena in which users of the patent system operate, has changed dramatically during the last decades. That is why this is written in English. It facilitates an exchange of ideas and communication in Europe and elsewhere. As for industry, national patent judges increasingly operate in an international arena. It seems not too farfetched to predict that within the next 100 years patent litigation in the Netherlands will be conducted mainly in English – possibly alongside the use of our beautiful mother tongue in a minority of cases. In Dutch patent courts as of yet party-experts are being questioned directly in English occasionally – without translation – and typically more than half of the file in a Dutch patent case consists of English texts without the need to provide for Dutch translations. Both would be unheard of 100 years ago, when we re-instated our national patent system.

For over half of the past century Europe has been trying to get a more rational patent litigation system. Due to political disagreement industry still is deprived of a single unified patent litigation system (UPLS) that can deal with validity and infringement of European patents in one single integrated law suit with cross-border effect. There still is no European Patent Court. Instead the present enforcement system is divided up along national lines, resulting in the all too familiar costly, inefficient and indeed somewhat embarrassing system of parallel litigation across Europe involving "the same" European patent. After grant – for which a unified system is provided by the European Patent Convention since 1977, industry is left with a so-called "bundle of national patents" and litigation has to be instigated in every national European jurisdiction separately – especially since the European Court of Justice put a hold to cross-border litigation in July 2006, a practice that was born and developed in the Dutch patent courts during the nineties to deal with this problem along the lines of the Brussels Convention/Regulation, which subsequently met with approval in German and Swiss courts – but also with fierce resistance in for instance the English courts.

This system is no longer up to the modern globalised world. But it proves rather difficult to change.

After the widely regretted political undermining of EPLA in 2006, the Council Working Party on Intellectual Property (Patents) under subsequent Presidencies has, in close co-operation with the European Commission, been trying to reach a UPLS for patents in Europe. Presently a draft...
Agreement on the European and Community Patents Court (ECPC) together with a draft Statute of the Court and a working paper on the draft Rules of Procedure for a Unified Patent Litigation System are being discussed. This is combined with work on the development of a European Community Patent (Compat), now called the European Union patent. Amongst others a Group of Experts, appointed by the Commission, has been trying to be of some assistance during this process. In June 2009 the EU Council decided to seek the opinion of the European Court of Justice, in accordance with Article 300(6) of the EC Treaty, on the following question:

"Is the envisaged Agreement creating a Unified Patent Litigation System (currently named European and Community Patents Court) compatible with the provisions of the Treaty establishing the European Community?"

Should the result of the Opinion be positive – and why indeed should it not? – one can predict progress. Especially since the unanimous political adoption of the so-called Council Conclusions during the last month of the Swedish Presidency, although it remains to be seen whether this really managed to overcome the political deadlock on the UPLS in the Council. It is important to keep in mind that the prime focus for a UPLS should be the prospect of the users of the patent system, that is to say industry at large. What they basically want is reasonable speed, procedural efficiency, effective remedies, proportionate costs and legal predictability (or adequate quality of the courts, which should command confidence of users). The acid test, I think, should be whether the proposals provide for a better system than we currently have in various jurisdictions.

**Latest UPLS proposals for the EEUPC**

The Draft Agreement seeks to import the positive features of the EPLA proposals but within the European Union legal order, although the system is designed to be open for non EU-EPC Contracting States, such as Switzerland, Norway and Turkey. Hence the legal instrument of a so called mixed agreement. The envisaged Court system is designed to combine the best of both legal traditions across Europe, i.e. the Continental (in essence Roman (civil)) law system and the English (common law) tradition, both materially and procedurally. Although this in itself constitutes a gigantic effort, a consensus seems to be slowly growing among judges and lawyers (and maybe professionals at large) on a European level that this is feasible. It is the politicians that still have to join the bandwagon with real commitment.

Let’s see what is on the table now and what remains controversial thus far. Unfortunately I have to restrict myself to a few main points due to space-restrictions inflicted upon me by the board.
of editors. Writing for a specialised group of readers interested in 100 years of Dutch patent law – and what might lie ahead, I assume some familiarity with the basics of the current UPLS proposals. In short the state of play is this: The EEUPC consists of a Court of First Instance (CFI), with a central division, regional and local divisions, panels of 3 or 4 judges with a maximum of 1 technical judge, always in multinational composition, and a (centralised) Court of Appeal (CoA, also mutinationally comprised, but with 5 judges and at most 2 technical judges) and a Registry. There is a pool of judges and a set-up for training facilities for them. As an option infringement and revocation proceedings can be bifurcated (German system), but also tried in the same proceeding, as is presently done in the majority of other jurisdictions outside Germany. The draft provides for a transitional period of 7 years during which the EEUPC will function alongside the national patent courts and in addition there is an opt-out possibility for pending European Patents or applications. On average proceedings for the CFI should last no longer than a year and the same is envisaged for appeal proceedings. CFI proceedings consist of a written phase, an interim phase and an oral hearing (typically not lasting longer than one day) and can be characterised as a moderately frontloaded system. The remedies required by the Enforcement Directive are incorporated under the UPLS.

What follows are some critical notes from an ardent supporter of a future UPLS. My focus points are 1) jurisdiction of the divisions of the CFI (Article 15a), 2) composition of panels (Article 6), which is related to appointment of judges (Articles 10, 11) and the pool of judges (Article 13), 3) the role of the CoJEU (Article 48) and 4) case management (Article 24), and procedural efficiency.

1) The CFI will comprise a central division alongside local and regional divisions (Article 5). This is for reasons of accessibility. Unlike under EPLA, the system will use local languages (Article 29) – a big minus, but at present there seems to be no other way to go – but it is a missed chance, I would say. Most of industry will not like this at all – and the opportunities for forum shopping and delay are increased.

The jurisdiction system of the draft Agreement is unnecessarily complicated and bears all the scars of a political compromise. It is particularly questionable whether the current proposals meet the yardstick of procedural efficiency. It seems they need to be re-visited.

As a rule it is not possible to file an infringement action directly with the central division, if a local or regional division is established. Unless both parties agree (Article 15a(6)), which probably will not happen too often in real-world patent litigation. This is strange and unfortunate. It is only different in case the defendant is domiciled in – or the infringing acts (threaten to) take place in – a member state without a decentralised CFI, cf. Article 15a(1) last sentence.

Direct actions for revocation will go to the central division (Article 15a(3)), unless an earlier infringement action was started, but counterclaims for revocation basically not – and there will be a system of options once a typical infringement action is met with a

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14 Dr. Jochen Pagenberg has suggested to introduce a permanent opt-out possibility not only during the transitional period, but permanently, for cases without cross-border aspects, in less far reaching form limited to a first action of a patentee or alleged infringer, so that any further action would have to go to the EEUPC. In a survey conducted among European patent judges at the 4th Venice Judges’ Forum in November 2008, 2/3 of the respondents were in favour of this idea without restrictions, that presently is not in the Draft Agreement. The survey can be consulted at the EPLAW website, www.eplaw.org, together with Dr. Pagenberg’s paper for the Strasbourg Colloquium of October 2008 where he first ventured this idea, as well as an outline of the results of the survey.

15 It would be my guess that introduction of this possibility as a rule – known from the EPLA system – would probably play down critical voices from innovative industrial circles rather substantially indeed.
counterclaim for revocation, which will frequently happen (or the other way around, for that matter), Cf. Article 15a(2). The local division may\textsuperscript{16} in such a case:

(a) proceed with both infringement and revocation all together and call in a technical judge from the pool (resulting in a panel of 4 with a deciding vote for the presiding judge), or

(b) bifurcate infringement and revocation proceedings German style (referring the revocation claim to the central division while staying or proceeding with the infringement claim locally), or

(c) with the agreement of the parties refer the entire case to the central division.

In theory all EPC member states may opt for their own local division. They may also group together in regional divisions (Article 5). My personal hope is that many states will opt for regional divisions. I can see the Netherlands joining up with the UK, Ireland, the Scandinavian countries and perhaps some others like Belgium and Portugal, for instance.

By far the biggest issue of concern with this among users is how to avoid inexperienced local (or regional) CFI's. The Draft Agreement seeks to encourage clustering of countries into regional divisions by setting minimum thresholds of numbers of cases filed during the transitional period\textsuperscript{17} as well as facilitating calling in experienced and/or technical judges from the pool of judges in panels of local or regional CFI's. However, it remains to be seen whether the current proposals – that are not too convincing – can be seriously modified into better solutions, in order to foreclose countries with strong patent traditions to back off entirely, or – even worse – industry to simply refuse using the system at all. This risk of a massive opt-out followed by a fall-back to national routes would be worse than the current patent litigation system in Europe and should be avoided by all means.

One way of looking at this issue – which would certainly not be mine – is to say that the option for bifurcation is a way out of this danger, since inexperienced local divisions could decide to bifurcate or refer to the central division. As we say in Dutch: This would be to place the horse behind the wagon.

The advantages of bifurcation are mainly said to be alleged efficiency: Experienced patent infringement courts in Germany like those of Düsseldorf, Munich and Mannheim deal with 4 cases a hearing on average, while revocation proceedings take an entire day. On the other hand, it is said, only 25% of the infringement proceedings eventually get their revocation counterparts. Whether this is also due to other factors like costs, the fact that a party may be injunctioned with no proper compensation if it turns out that the patent is invalid and serious backlogs within the BPatG we do not know. So, the argument runs,

\textsuperscript{16} This is phrased entirely optional, which is the reason I do not have too strong feelings about it; there certainly is no need to bifurcate, although some anti-bifurcation devotees whisper the current system is biased against not bifurcating – a risk I do not particularly see.

\textsuperscript{17} In earlier drafts serious efforts were made to make this compulsory beyond the transitional period or to cut EU funding below certain thresholds, but this was withdrawn subsequently, which is unfortunate. Article 58(3) of the draft states that during the first 7 years in local divisions with less than 50 cases commenced annually the composition of said local divisions is turned around: 2 from the pool, 1 national – or they should join a regional division. To my mind this will not meet the acid test. I suppose everybody can see this is not good enough.
efficiency calls for bifurcation. For a Dutch audience this is not convincing at all, since we are used to fast interim injunctive relief Dutch style ("kort geding"). As we know, in such minitrial-type proceedings – frequently used – both infringement and validity issues are taken seriously by predicting the likelihood of the outcome of the full proceedings. If it is the reasoned prediction of the judge – based on the material at hand after an oral hearing of a couple of hours and with the possibility to file beforehand all the materials considered relevant for the case, including party-expert's witness statements in affidavit-form or (rather informal) oral evidence taken at the hearing – that the patent will be held valid and infringed in full proceedings, an interim injunction is normally granted in patent cases (aside maybe from patent troll- and FRAND-issues). No ruling in “kort geding” has any bearing whatsoever on the full proceedings, so the outcome of subsequent full proceedings can go either way. In my appreciation this is a better (and way faster) option than the German bifurcated full proceedings to safeguard the possibility of obtaining a swift injunction when necessary.

2) An issue closely related to this is composition of panels, Article 6 (and appointment of judges, Articles 10 and 11, as well as Articles 2 and 3 of the draft Statute). This is an issue of serious concern too.

It is submitted that a much stronger incentive than aired in the present drafts is needed, for instance by wide discretionary powers for the President of the EEUPC to compose panels ad hoc, to really mix up panels of the CFI in order to spread among all member states differences in knowledge and experience. At least a minimum requirement should be to have 1 legal judge from the pool in any CFI panel – alternated on a case-by-case basis. That is not provided in the present drafts.

The basic rule that CFI panels should be multinationally comprised is seriously diluted by Article 6(2) and (3): local divisions sit in panels with 2 permanent local national judges and 1 judge from the pool with a different nationality (but fluent in the local language) to start with – although often with 1 extra technical judge from the pool as well, once a counterclaim for revocation pops up and the local division decides to proceed with both infringement and revocation combined – a normal scenario in the mainstream of European jurisdictions nowadays. In case of more than 50 cases a year the third (non-national) judge will have to move house, since he or she will serve on a permanent basis in that local division according to Article 6(3) of the draft. This is unfortunate. The whole concept of an exchange of ideas and mix of legal cultures by permanently mixing national judges from different legal upbringing and experience is gone right from the outset. It boils down to permanent local divisions, once the threshold of 50 cases a year is met.

This could qualify as poor drafting, since it bears the risk of undermining the proper functioning of the local divisions of the CFI and could entail incentives for forum shopping too, but some member states that easily meet this threshold (and some practitioners from those member states, I should add) seem to be in favour of it. They point out that efficiency calls for the system presently on the table. I sincerely doubt that.

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18 See Report Q 165 AIPPI, August 3 2008, p. 2 (presided by Dr. Jochen Pagenberg).
19 Notably it also entails the possibility of obtaining a reasoned preliminary judgement on validity: if considered invalid, no injunction is granted in "kort geding".
It could easily turn into a prolonged compartmentation of certain national litigation traditions and that is not what is called for in a supranational court as the EEUPC. What we really need within the UPLS is a reasonably swift procedure to get a preliminary injunction and/or interim decision on validity – f.i. Dutch "kort geding" style. It seems rather unrealistic to predict that the current number of German infringement proceedings of several hundreds a year (according to their arithmetic) will continue unaltered under a UPLS, which will do away with nearly all European multiple litigation involving one and the same European patent. And besides, things are different when validity is a serious consideration right from the outset.

The idea as such of a pool of experienced patent judges (Article 13) from amongst whom less experienced panels can be fortified up to the proper level to do the job, is not too bad in itself – but it will be mere theory should the concept of semi-permanent local divisions be allowed to proceed. Furthermore, the draft foresees that all appointed European patent judges (experienced or not) are automatically pool members. That would not directly be my idea to convince the skeptics that this provides for the top quality one-stop-shop in Europe we are looking for. This might just not pass the acid test I mentioned. The advisory committee should have some sort of right of veto to block appointments, I would say.

The concept that the pool should be filled with technical judges from all fields of technology looks nice on paper. Aside from practical problems to get this pool thus properly staffed, the danger often expressed is that the legally trained professional judges (or at least less experienced ones) stop thinking once the technical judge takes the floor (in the nightmare scenario of users of the system: in chambers, thus foreclosing any possibility to influence the debate). In essence it boils down to a question of judicial attitude. The draft rightly provides for a minority of technical judges in every panel. It should also be an issue without saying that a technical judge should not be preside (the other way around from the current practice of the TBA's in Munich).

For me this would not be one of my main concerns. In The Hague we frequently make use of the help of deputy judges in a panel (always a maximum of 1 in a panel of 3 and never presiding) with a technical background and a main professional life outside the courts. They are of great help. Presently they need to have a law degree as well though, this being a requirement by statute for appointment as a (deputy) judge. But this may change in the future. Already in the Plant Breeders Chamber in my court we have a minority of 1 technical non-legally trained so-called "expert member" sitting together in a panel with 2 legally trained judges. It is not our experience that the abovementioned danger

20 Cf. Article 57b draft Agreement: it has a task in “assisting” the Mixed Committee (member states’ representatives) in the preparation of the appointment of judges and consists of patent judges and patent practitioners "with the highest recognised competence". That sounds promising – unlike Article 3(3) of the draft Statute that stipulates that judges are appointed by the Mixed Committee by ensuring “a balanced composition of the Court on as broad geographical basis as possible among nationals of the Contracting States” leaving ample room for political appointments without due diligence to true patent experience of the appointees.

21 Technical judges do not need to be full-time appointees, which is a good thing, but even so, an engineer from field x might have similar difficulties coming to grasp with present day complicated technology developed off the mainstream of his focus in field x as legally trained judges have. It seems paramount to have the patent court staffed with experienced judges with an open mind for technology and above all a willingness to make the utmost effort to try to fully understand the technology at hand. The last thing we need is judges that entirely rely on opinions of technical laymen. Under EPLA the concept of the technical judge – familiar in some national jurisdictions (German, Austrian, Swedish), but rather foreign in others (UK, French, Dutch) – was accepted after all. Some other form of assistance might still be necessary even with technical judges on board, though (and not only in revocation actions, but sometimes in infringement cases too), amicus curiae briefing (with parties (re)present(ed)) of some sort – under a flexible set of rules of procedure this should never be a problem in a proper court.
materialises. Our Swedish colleagues and practitioners are positive about their system with technical judges in their national patent courts (in a non-bifurcated system). It could just work out rather well.

3) Article 48 of the draft Agreement remains another major concern, i.e. the role of the CoJEU (or ECJ as it was called before "Lisbon"). The EEUPC should not have a full third instance; that will not pass the acid test, for instance because it will involve unacceptable delay. It will put a hold on the proper functioning of the European patent system. The centralised CoA should do the job of ensuring uniform interpretation of material patent law in Europe.

The issue is whether the CoJEU, which after all is a (let us not forget: highly esteemed) constitutional court, that was not designed, nor staffed to deal with (technically and legally) complicated present day patent litigation, should have a say on every little, however important detail of material patent law by way of a right of review, or that its role should be limited, either entirely excluded, or limited to EU constitutional issues, for instance by way of a discretionary power for the CoA to ask the CoJEU preliminary questions. It is very clear that the majority of the member states and all users do not want the CoJEU as a third instance. Personally I do not know of any patent practitioner, here or abroad, who publicly or privately says otherwise.

It will be interesting to learn what the CoJEU’s Opinion will have to say on Article 48.

The clearest remedy from a legal point of view would be a protocol to the EU basic Treaty denying the CoJEU any say in matters of material patent law. The middle position, i.e. a discretionary power for the CoA as mentioned, would probably be most balanced and might be the maximum acceptable to users. This seems the intention of the present draft Article 48, but doubts can be aired whether this is "waterproof" enough in view of what qualifies as *acquis communautaire* nowadays. For further review I refer to the EPLAW letter to the French Presidency and the Commission in the summer of 2008 on this issue.

4) A well-known one-liner holds that slow justice equals no justice. Every practitioner will agree. Time is of particular importance in the UPLS. Patents provide for monopolies with limited duration designed to stimulate technological development. It is paramount to stop infringement of rightly granted patents as it is equally important to kick out patents that are null and void and thus wrongly granted. Although it is intended to have proceedings in the CFI normally finalised within a year, some simple arithmetic while reading the present draft rules of procedure (RoP) for the CFI show this will be rather difficult to achieve under these rules. This is unfortunate and should not be compromised. It also shows there still is a long way to go.

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22 A specialised chamber of the CoJEU or the CFI staffed with experienced patent judges might be a second best option, but it is difficult if not impossible to foresee how this could be done in the present legal community order – aside from issues as staffing and speed. Should it be legally impossible to deny the CoJEU as presently set-up a say in issues of material patent law, I am convinced the system will fail, because users will simply avoid it. It certainly will not pass the acid test.

23 Published on their website [www.eplaw.org](http://www.eplaw.org). IPJA wrote a letter with the same bearing, a copy of which can be obtained from the author or other IPJA (board) members.

24 Drafting RoP is particular challenging where 2 completely different traditions of proceedings, Continental and Anglo-Saxon, are intended to be merged as is the case here. It will be a formidable task indeed – but I am convinced the job can be done. In November 2006 a small group of patent practitioners from all over Europe, judges and advocates/lawyers, were brought together by the EPO
timetable of the proceedings set at as early a stage as possible and to stick to it. Case-
management lies in the hands of the judge-rapporteur, appointed from amidst the panel,
and the RoP together with the Practice Directives should be tailored to provide him or
her with the widest possible powers to keep up the speed of proceedings – even, where
necessary, contrary to the express will of the parties, in extreme cases. The UPLS should
not have to tolerate slow parties. Maybe the Dutch Accelerated Regime for patent cases
(AR) with a time-frame of little more than a year from start (petition for Court
permission to enter the AR) to finish (handing down of judgment with all the relevant
Court orders) on average could function as an example – but the English High Courts
operate in a similar manner I am told, and if an order for a speedy trial is granted even
considerably quicker, I am sorry to have to admit; luckily enough we always win when it
comes to costs, though, which is also important in view of accessibility of the system for
SME’s. Both courts practice non-bifurcated proceedings and thus meet the yardstick of
procedural efficiency in that respect, I should add.

A good rule in the present drafts in respect of procedural efficiency is to ban unlimited
auxiliary requests in revocation proceedings (Rule 20(2)(c) and (3)) as well as the rules
designed to limit oral evidence (f.i. questioning of party-experts) to what is really
required and to place this under the effective control of the court (Article 33(1)(a) and
Rule 37(3)(b)) and also the basic rule that the oral hearing normally should be
completed in one day (without prejudice to Article 23, that clearly proscribes the EEUPC
to deal with patent litigation in ways which are proportionate to its importance and
complexity, cf. Rule 38). It is encouraging to note that English judges seem to be
supporting such rules too.

Appeal proceedings are different from the Dutch, i.e. no de novo appeal as a rule and only
a limited possibility to rely on new facts and evidence (Article 45(4)) which also adds up
to speed and efficiency. With a first instance designed to thoroughly deal with all the
aspects of the case at hand, this seems a proper way to proceed.

**Final remarks**

Presently some considerable resources and efforts are being invested in trying to get a UPLS
started up. This would entail a final step towards a more rationalised patent litigation
scheme in Europe.

The prospect of success is there, but it could also – again – fail due to lack of political will
from all the European countries involved. This would be such a shame and embarrassing as
well.

Should the latter scenario nevertheless prevail – however unfortunate – this would not
necessarily mean the end of the story of trying to design a more rational patent litigation

and EPLAW in Venice to try to make the RoP for the then envisaged EPLA Court. Within a week’s time they came up with more or
less detailed principles hence known as the Venice Principles. These subsequently were approved by all the European patent judges
participating in the Second Venice Judges’ Forum. It still functions as a work of reference for the drafting of the UPLS’ RoP. It shows
what combined European efforts by patent professionals might achieve. A system which takes the best practices out of both
traditions mentioned might positively come out of the intensified consultations on this subject facilitated by the Swedish Presidency
in the second half of 2009. Such a system should inspire confidence.
system in Europe that is up to present day market economy. Dr. Margot Fröhlinger has repeatedly stated publicly\textsuperscript{25} that the Commission will seriously consider the option of so-called \textit{enhanced cooperation}, provided for in the EU Treaty, should the now envisaged EU-wide UPLS fail. Although this would mean a step backwards indeed, it would at the same time bear the prospect of getting a step further in the form of a “coalition of the willing”, with whom it might be possible to get a European Patent Court function on a smaller geographical scope, so less ambitious to start with. As with EPLA – designed as an \textit{optional} protocol to the EPC – this would entail the enactment of a UPLS for those member states willing to try to foster European patent litigation towards a more rational level. I am convinced that should this second best scenario materialise, it will prove itself successful fairly quickly. Users are ready for it. It will hopefully then also prove to have been a stage towards paving the way for the yet unwilling to join the willing in the very end.

Paradoxically enough on this festive occasion, I do hope that 100 years ahead – but I actually expect this to happen considerably earlier – the Dutch Patent Code will have become obsolete, because by 2110 patent litigation will be typically dealt with under a UPLS in the Netherlands and elsewhere in Europe. It will deal with cases concerning European patents as well as European Union patents. I am nearly convinced this cannot be just a dream.

The Hague, September 2009
(updated January 2010)

\textsuperscript{25} F.i. at the Strasbourg Conference commemorating the French Presidency in October 2008 and at the 4th Venice Judges’ Forum in November 2008.