

EPLAW Congress 2018 – Report

On 30 November, the great and the good of European patent litigation braved Belgian fuel protests to attend the 2018 European Patent Lawyers Association (EPLAW) annual General Assembly and Congress in Brussels. The event was attended by about 150 members this year, each of whom has significant experience in patent litigation in their jurisdiction so, as ever, it was a prime opportunity to address the current challenges in patent litigation and the pros and cons of different jurisdictional approaches, in line with EPLAW's aim to work towards a harmonised European patent litigation system.

General Assembly

With a few bleary faces from the networking drinks the night before (which, in the name of European harmonisation, had spilled over into the hotel bar until the early hours) the day kicked off with the General Assembly. Highlights of this part of the Congress, which addresses formal association business, were the selection of **Thierry Calame** (Lenz & Staehelin, Switzerland) as the new President, replacing **Klaus Haft** (Hoyng Rokh Monegier, Germany), the appointment of new Board member (**Cordula Schumacher** (Arnold Ruess, Germany) and the passing of an important motion that, in the event of Brexit, the statutes will be amended to enable the continued membership of UK lawyers (who may also participate in the interim). This was also the time for the presentation of prizes to the winners of the UPC moot that took place at the Young EPLAW Congress earlier this year: **Adrien Bonnet** (Hogan Lovells, France), **Yngve Øyehaug Opsvik** (Grette, Norway) and **Charlie French** (Bristows, UK).

First panel discussion: Pros and Cons of Different Patent Litigation Systems in Europe

The first panel was composed of **Ivan Burnside** (Eli Lilly), **George Moore** (Mylan) and **Clemens Heusch** (Nokia) giving their personal in-house counsel perspectives on different patent litigation systems based on their experience with parallel cases in many European jurisdictions.

One of the key points to emerge from this discussion was that judges must be educated by appropriate experts in the relevant field and that neither judges nor advocates can properly perform this role (although this was slightly disputed in the second panel discussion, as addressed below). Cross-examination is important to keep experts on the straight and narrow and provide a check on the extreme statements that can sometimes be seen in written opinions, a process likened to a PhD candidate being called upon to defend their doctoral thesis at a viva. However, this need not equate to UK style cross-examination, which was considered to have become too much of a game in which highly skilled barristers try to trip up experts by confusing them with multiple hypotheticals during hours of intense questioning and a very expensive way to get to the truth. Shorter, more targeted cross-examination in front of a judge who understands the technical arguments would be preferable. Ivan Burnside gave the example of the highly effective questioning of a court appointed expert that he observed by a German Supreme Court Judge, which lasted a mere 20 minutes and thus dispelled the idea that cross-examination is not possible due to time constraints in some legal systems such as the proposed UPC. However, he considered "hot tubbing" of experts (calling experts to give evidence and be cross-examined concurrently) to be a bad idea. This would result in experts being selected for very different reasons, for example being the most senior/respected, the most plain speaking or simply the most dominant. Scientists are a diverse group and the best scientist will not necessarily be the loudest. George Moore also noted that court-appointed experts often do not allow justice to be done, particularly where the court-appointed expert is in reality a patent attorney lacking the precise expertise to educate the court as to the knowledge and mind set of the skilled person, even where they understand the background technology. He much preferred the use of party experts on each side giving the Court the opportunity to hear, question and balance the experts' views.

A further topic for discussion was disclosure requests and whether courts should allow for document production on request. Ivan Burnside expressed the view that fishing expeditions are costly and rarely productive for anyone, and the UK approach to standard disclosure is appropriate in some cases but should not be ordered automatically. However, there are examples where the availability of disclosure is important, such as Drug Master Files (DMFs), which are usually in the control of one party and very relevant to a case, but not available to the public (including the opposing party in litigation). The Enforcement Directive provides the means to access such documents but many jurisdictions are resistant to making even narrow orders for disclosure.

Moving onto case management, Ivan Burnside noted that this is highly desirable and a pre-trial review in particular can be very helpful, for example where it is used to reduce the scope of, or remove the need for, cross-examination where there is no dispute between witnesses. However, litigants can be prejudiced by case management and cases can be won or lost on case management decisions. Bearing this in mind, the lack of any appeal mechanism for most case management decisions is a major concern and the UPC when it comes must allow fast review of case management decisions. George Moore added that preliminary opinions can also be helpful and help to focus the issues at trial but they must be made available well in advance.

In relation to venues for litigation from a life sciences perspective, George Moore noted that the preferred venue for revocation actions across Europe is in fact the EPO as businesses want cheap, efficient and reliable systems and the EPO is the best on offer, so patent litigators should not lose sight of this. In relation to the different courts across Europe, the venue is decided by the patent and the product rather than the individual. George distinguished between two types of case: (i) strategic cases (usually before the drug loses market exclusivity); and (ii) repeated cases across Europe after exclusivity has expired, recent examples being the multiple European cases relating to tadalafil, tenofovir and sustained-release quetiapine. For strategic cases, particular courts are selected for different reasons but the most popular courts are the UK, Germany, Netherlands and occasionally France due to their established track record in patent litigation. Businesses are looking for a reliable, determinative judgment that will be transportable to other jurisdictions and will resolve the issues in dispute. However, businesses would not normally litigate the second type of case in these countries (the generic markets are too small in the UK and the Netherlands and the court fees are too high in Germany). George also noted that, for the second type of case, most courts get to the same result in the end, despite the different court systems.

Clemens Heusch emphasised the different needs of electronics/tech sector companies holding very large numbers of patents and for them the crucial importance of SEPs with the associated question of FRAND licensing. Referring to the multi-jurisdictional patent litigation between Nokia and Apple a few years ago, this had involved 12 separate jurisdictions and required him to choose the most complementary selection of multiple jurisdictions rather than select a single jurisdiction from possible alternatives. Infringement claimants look for a sufficient size of market covered by the rights to be asserted and a sufficiently effective remedy to put pressure on the defendant. Time to trial, costs and language of the proceedings are all relevant considerations.

Strong case management such as in the UK can be excellent to encourage early settlement. He had been impressed by the recent UK judgments in SEP/FRAND cases and the willingness of the UK court to put a price tag on FRAND. The difficulties with disclosure and confidentiality in German proceedings had given UK proceedings the edge in his view.

Second Panel Discussion – Judges Experiences and Views

After a coffee break the Congress resumed with a Judges panel comprising **Judge Jussi Karttunen** (Market Court, Finland), **Judge Andreas Voß** (Oberlandesgericht Karlsruhe,

Germany), **Judge Sang Hoon Na** (Patent Court of Korea), **Christian Hilti** (non-permanent judge, Swiss Patent Court) and **Attorney Myles Jelf** (Bristows LLP UK) as a replacement for Justice Henry Carr. Myles had spoken with Justice Richard Arnold to ensure consistency with the views of the UK judges in his comments. The topics covered were essentially the same as those in the first session but seen from a Judges viewpoint.

In general all the judges are in favour of firm case management to assist a fair and efficient running of the court to timetable and to crystallise issues at an early stage. However it is important to have a flexible approach as not all cases are the same. On preliminary opinions, there are some jurisdictional variations in their use. For example, in the Mannheim court in Germany there is no possibility of a preliminary opinion at the first instance but on appeal a written preliminary opinion is provided by the Judge Rapporteur to the Appeal Court before the oral hearing, but this is not seen by the lawyers representing the parties and is merely an aide memoire for the Judges. In Switzerland detailed legal and technical preliminary opinions are given by the first instance Court after the first exchange of briefs to facilitate opportunities for early settlement which are explored at a completely off the record hearing.

When it came to expert witnesses there was less disparity of view, with most of the Judges saying that expert witnesses were essential to teach the court about the relevant technology at the relevant time. A notable exception was Germany where Judge Vos said he would seldom hear expert witnesses in patent infringement cases. He regards the construction of the patent and the patent claims as a question of law. It will therefore be an important question for the UPC to decide whether claim construction is seen as a matter of fact or a matter of law. Those Judges in favour of hearing expert witnesses all agreed the value of cross-examination to test the expert's views and keep them honest but it should be limited in time and confined to key technical issues in dispute.

The judicial panel then moved on to consider the value of oral pleading as against written submissions. The general consensus was that oral arguments are important provided they are kept brief and to the point. Their purpose should be to amplify key points from the written briefs and allow the arguments to be tested by the Judge. They should not be long winded or used as an opportunity to take the case in a different direction.

Post Lunch Debate

Prior to the break for lunch, Sture Rygaard (Plesner, DK) presented the results of the EPLAW members survey on the pros and cons of different aspects of patent litigation systems in Europe to prime the audience and the speakers for a lively debate in the afternoon. This was moderated by Bas Berghuis (Simmons & Simmons, NL) and Sture Rygaard who skilfully brought together in-house counsel, judges and attorneys from the floor in a lively debate to identify the best features of the systems currently operating in Europe, hopes for improvements where needed and the preservation of best practice already achieved. At times the new rules and procedures for the UPC were at times considered and commented upon.

Final Reports

The afternoon concluded with a report from Kevin Mooney (Simmons & Simmons, UK) and Pierre Véron (FR) on the latest progress and recent developments for the UPC and a report from Daan de Lange (Brinkhof, NL) on the highlights of the Judges Conference in Venice.

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