Latest developments in concentration and specialisation of courts on the national level*

PETER HEINRICH*

I.

If European Community Patents will appear in court, it will not be before approximately 2008-2010. Therefore, the patents which the courts and the members of our Association shall deal with in the next 10-15 years will mainly be European and national patents.

We have heard about the possible future court system for European patents.

But what about litigation concerning national patents? Community patents seem to be more attractive than national patents, they now get by far the largest share of attention. But also national patents and the national courts systems deserve attention. If the quality of national patent litigation improves this will inevitably also help to create high quality European patent court systems.

I do not have to lose a word about the need, it is the same that has led to the projects for centralised European litigation (European patents and Community patents).

What is important now is that there is a considerable development in the direction of concentration and specialisation on the national level. Some improvements have already been achieved, others are in preparation.

By concentration I mean the reduction of the number of courts having jurisdiction over national patents. This number, as you know, may reach dozens of courts even in small countries. It is obvious that a smaller number of courts can be more specialised.

We can distinguish between direct and indirect concentration. By direct I mean the reduction by law of courts having jurisdiction. Indirect or de facto concentration occurs if national procedural law gives the plaintiff the freedom of choice between several courts, above all at every place where infringement occurs. Plaintiffs will then usually choose an experienced court – at least for strong cases.

II.

In the Netherlands the number of courts for patent matters has been reduced from 19 to 1 in 1987. Therefore, the only remaining goal to be achieved is now the recruitment of experienced judges for the respective chambers of that one court (District Court of The Hague) and of the Court of Appeal.

In Sweden only the District Court of Stockholm has jurisdiction over patent cases. One chamber handles all I.P. cases. For patent cases «technical judges» are added to the chamber. There is a proposal to merge the jurisdictions for appeals in opposition proceedings (administrative appeal court/supreme administrative court) and for civil actions.

In Finland, the Helsinki District Court has exclusive jurisdiction as the court of first instance over patent infringement and invalidation cases. The Helsinki Court of Appeals has similar exclusive jurisdiction at the second instance; appeals are available from the Court of Appeals to the Supreme Court. However, as judges are routinely circulated within said courts to handle different types of cases, the Finnish system does not currently permit sufficient specialisation of judges handling patent cases. A governmental workgroup has recently been established to assess the need of changing the way patent and other intellectual property cases are tried in find. The group is expected to suggest ways for ensuring sufficient specialisation of the judges handling patent cases.

In Austria only the Commercial Court of Vienna has jurisdiction over patent infringement actions. Nullity actions are dealt with by the Nullity Division of the Austrian Patent Office.

In Hungary the Metropolitan Court of Budapest has exclusive

jurisdiction over patent infringement actions. Nullity actions are dealt with by the Hungarian Patent Office.

In Great Britain there are two specialist Courts of first instance:

1. The Patents Court which is part of the High Court;

2. The Patents County Court (for technically simple disputes between relatively small companies).

In the Patents Court, there are two specialist Judges (Pumfrey J and Laddie J) but also three other Judges who can hear the less technically complicated cases (Neuberger J, Patten J and Levison J). In the Patents County Court, there is only one Judge – His Honour Judge Fysh.

Appeals from both Courts go to the Court of Appeal. In the Court of Appeal there are 3 judges of whom one is a specialist Patents Judge (Lord Justice Jacob). There is obviously little need for further concentration but some people even doubt whether the Patents County court is necessary.

In Belgium the 1984 Patent Act has reduced the number of courts having jurisdiction in patent matters to five (instead of twenty-six under the preceding regime), namely Brussels, Antwerp, Liège, Mons and Ghent. In practice Brussels and Antwerp seem to handle a large majority of the cases. This reduction to five courts of first instance, however, is regarded by many practitioners as insufficient. The judges are moved from one chamber to another within the same court and it is rare to have a patent case heard by a judge having more than five years in the field. Many practitioners suggest that Brussels alone would be sufficient (one chamber hearing the cases in Dutch and another in French, ideally one bilingual chamber). They wish that judges may stay longer and acquire more experience in such chamber.

In France the number of competent courts was reduced to 10 first and 10 second instance courts in 1968 (both for infringement and validity cases. There is a certain de facto specialisation to three courts, above all Paris with 60% of all cases. This permits a considerable degree of specialisation of judges at the Paris courts of first and second instance. A further de jure concentration is regarded as advantageous, in particular with a view to the new court system on the European level.

In Germany 12 first and 12 second instance courts have jurisdiction over patent infringement cases. There is a further de facto specialisation to 3 of these courts (Düsseldorf, Munich and Mannheim). This provides sufficient specialisation of judges. Nullity actions are dealt with exclusively by one specialised court, the Bundespatentgericht.

In Italy the rules of jurisdiction for patent cases have been changed recently. Instead of about 450 there are now 12 courts. The courts of Milan and Rome will probably form specialised division for intellectual property matters. The 12 courts having jurisdiction over patent cases still include e.g. Bari and Palermo, i.e. courts with an insufficient number of patent cases. On the other hand there is a certain de facto concentration to Milan, Rome, Turin, Venice, Bologna and Naples. There is no tendency at the moment to further reduce the number of courts by law.

In Switzerland 26 courts have jurisdiction conceming patent cases (infringement and validity). There is a considerable de facto concentration to the commercial courts of Zurich, Aargau, St. Gall and Bern, of which Zurich has most experience in patent matters. AIPPI Switzerland has taken the initiative to create one single patent court. A working group under the presidency of Dr. Christian Hilti (member of EPLA) is working an the project. The outcome is still open. Problems might arise because the spirit of "federalism" (decentralisation) is traditionally strong in Switzerland and because it remains uncertain whether the patent court would be financially self-sufficient.

In Denmark, the Eastern and Western Division of the High Court have exclusive jurisdiction over patent cases as courts of ferst instance. In practice, however, most patent infringement cases are started as interim injunction proceedings in the Bailiff s court (part of normal City Courts). A proposal exists for reducing the number of City Courts from 82 to 25.

In Spain the ordinary courts have jurisdiction over patent cases (infringement and validity), i.e. in principle judges of ferst instance. There is, however, a certain de facto concentration to the courts of Madrid, Barcelona, Bilbao and Valencia. There are no specialised Patent Courts yet, but there is one section in the Audiencia Provincial of Barcelona and another one in Bilbao, where appeals an patent cases which correspond to that court are decided. This does not permit sufficient specialisation of judges. At the moment no further de jure concentration is beeng discussed in Spain.

III.

The result is:

– One single first instance for patent infringement cases in: Austria, Finland, Hungary, Netherlands, Sweden.

– Two courts of first instance: Denmark, Great Britain.

– 5 courts of first instance: Belgium.

– 10 and more courts of first instance: France, Germany, Italy, Switzerland, Spain.

IV.

A very small number of courts (1-3) having jurisdiction over patent matters per country seems preferable.

This should also apply to preliminary injunctions.

Such concentration – and specialization – would also permit to link national courts with a decentralised European court system.

Courts having jurisdiction over European patents and national patents and later also European Community patents would benefit from a higher number of cases of therefore of more specialisation.

Anhang

EPLA

European Patent Lawyers

Association

Resolution concerning concentration and specialisation of national patent courts (draft prepared by P. Heinrich and F. de Visscher, as amended on 20. November 2003)

EPLA, the Europe-wide non-profit organisation of lawyers specialised in patent litigation, having considered the following:

– that for many industrial enterprises, in particular small and medium-sized, national and European patents will still be widely used in the future, even beside the Community patent;

– that in the Community patent system itself the national courts will have jurisdiction for hearing the cases, at least in a first period;

– the wish of the industry and generally of all those involved in patent cases for specialised and experienced judges;

– the positive results in terms of quality and speed in the countries where only a limited number of courts has jurisdiction over patent cases, either by virtue of the statutory judicial organisation (de jure concentration) or as a consequence of the practitioner's choice to go by preference to the courts known for having experience in this field (de facto concentration);

– that even in countries where only a small number of courts deal with patent cases, the practitioners feel the need, and express the wish, to further reduce the number;

– that the existence of a very small number of specialised national patent courts would also facilitate it to leave European and Community patent litigation of first instance with existing national courts.

Recommends:

1) that in each European country the number of courts having jurisdiction in patent matters be reduced to a very minimal number, in most countries to one court only, and

2) that within these courts, the patent cases be brought systematically before the same chamber and the judges be given the possibility to stay in office for a reasonably long time in that chamber and thereby to acquire experience;

3) that at least in the interim period before the establishment of a european patent court system specialised national judges become more acquainted with patents and exchange their view;

4) that EPLA members in their countries work for the achievement of such concentration and specialisation.

And suggests that the appropriate European authorities take the necessary steps to that end with respect to the EU member states.

Brussels, 21 November 2003

* Presentation at the annual convention 2003 of the EPLA (European Patent Lawyers Association), Bruxelles, 21. November 2003

** Dr. Iur., Rechtsanwalt, Zürich.