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EPLA:
a European judge for the European patent

Cour de cassation – INPI seminar
Cour de cassation
October 2, 2006

EPLA

A CHALLENGE FOR FRENCH LAWYERS

Speech given by Mr Pierre Véron
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Lawyer
Honorary President
of the AAPI (French association of industrial property litigators)
and the EPLAW (European Patent Lawyers Association)

As a practising attorney I wear in turn three hats:

- as a lawyer,
- as a legal adviser for companies,
- as an economic player,

As such, I will present my viewpoint on the EPLA (European Patent Litigation Agreement).

I will then make a concrete proposal for its implementation.

THE VIEWPOINT OF THE LAWYER

As a patent lawyer I am very proud to see that patent law will soon be the first area of law to have a European international court for the settlement of disputes between parties.

Up to now, no European court system has been entrusted with the task to resolve private law disputes.

For so far the role of Community courts has not been to resolve private disputes on the merits:

- they control the compliance with legality of the Community institutions' acts;
- they answer interlocutory questions from the national courts concerning the interpretation of Community treaties;
- they deal with Community public law dispute.

However, they never entertain proceedings in which they have full jurisdiction, related to private law matters and involving private parties.

It is therefore with great pride we hear that patent law will be a ground for legal innovation.

Nevertheless, if I may use such an image, this pride is overshadowed with the concern of the patient on the operation table to whom the surgeon is explaining that a pioneer operation is about to be performed on him, the former understanding that he will be the guinea pig.

The pioneer is proud, but the guinea pig is somewhat concerned.

The first series of legal difficulties concern the articulation between the EPLA system and the Community system.

Some provisions have already been made to build bridges between the latter and the former: for example, the EPLA founding draft agreements provide that the European patent court will be chosen by the Contracting states as a national court entitled to refer to the European Court of Justice.

However, other questions will have to be settled in the future, in particular if a Community patent was created, in order to allow the European Court to rule on the validity of such patent (since only a Community court may assess the validity of a Community title, which explains why the Tribunal de grande instance of Paris is re-named Community trade marks court when it rules on the validity of a trade mark).

The second series of legal difficulties arises from the fact the EPLA will institute an entirely new legal order which will have, as we speak now, no connection of any sort with the national legal systems concerning rules of law other than patent law.

The European patent court will be what is called in French procedural law a court with limited jurisdiction, in other words a court with a specific subject-matter jurisdiction, in this particular instance the validity and infringement of European patents.

However, as a practising lawyer I will make the following practical remark, which I think you expect from me today, that a dispute does not only raise legal issues.

For a patent infringement litigation will not be dealt with in the same way as in proceedings before the European Patent Office where, during the discussion on the patent validity, the legal context remains restricted and closed; it is an administrative dispute in which the function of the judge only consists in verifying if the title was granted in accordance or not in accordance with a higher legal norm, i.e. the European Patent Convention.

By contrast, civil law litigation, i.e. private law litigation, is abundant, changing and unpredictable.

Let's take a very simple and frequent example: a patent owner and his licensee disagree, the former considering that the licence does not exist any longer and brings proceedings against the licensee for infringement; it is patent law litigation.

But in response to the infringement action the former licensee maintains that the licence still exists; it is a contract law matter.

I have not seen in the EPLA founding texts any answer to the two following basic questions:

- will the European patent court have jurisdiction to rule on issues other than validity or infringement which would be incidentally raised? In other words, the EPLA does not take up the principle of Article 49 of the new French code of civil procedure pursuant to which "A court seized of a claim in relation to which it has jurisdiction, shall decide of all the defences raised, even where they shall require an interpretation of a contract, save where they shall raise issues coming under the exclusive jurisdiction of an another court";.
- if the European patent court had jurisdiction to resolve such matters, which law, or to be more specific, which conflict of laws rule (in the sense of private international law) should it apply?

This last point is definitely critical and must be discussed in the final draft of the EPLA.

Let's take again the example of the former licensee, sued for patent infringement, who maintains that his licence agreement is still ongoing, whereas the patent owner, the claimant, argues that it is terminated.

Will the European patent court have jurisdiction to rule on the question whether the agreement is still effective or not?

This is a question of contract law and not patent law.

If the European patent court is competent, which law should it apply?

When a national judge, for example, the French judge is faced with this question, the answer is simple: if the case is merely on a national scale (the licence of a French patent granted in France by a French patent owner to a French licensee), he will, of course, apply French law to contracts.

If the case contains a foreign element (e.g. where the patent owner is foreign or the agreement does not involve just France, etc.), the national judge will try and find in his toolbox of conflict of laws rules, i.e. his country's private international law, which law is applicable; that may be a foreign law.

However, the EPLA, once more, does not comprise any provision concerning the European patent court's jurisdiction to rule on issues other than European patents' validity or infringement.

It does not therefore comprise any provision concerning the law applicable in such case (the only rule of conflict of laws contained in the EPLA is Article 51 (1) pursuant to which the right of a person to be party to the proceedings is determined by "the applicable national law", without any indication of which national law!).

It would seem that the authors of the EPLA have not contemplated the possibility that a question of what may be called civil law could be raised in patent litigation.

There is, however, a very simple answer to this problem.

A number of Community texts, such as Article 97 of regulation No. 40/94, of December 20, 1993 on the Community trade mark, provide that for questions that do not fall under the scope of protection of the Agreement, "the court shall apply its national law, including its private international law".

Likewise, it would thus be possible to envisage that for questions other than patent validity or patent infringement each division of the European patent court should apply the national law, including the private international law of the state where it seats.

It is important that the agreement should be completed in order to take into consideration conflicts between private individuals.

Surely one can object that an international agreement should not be cluttered with details.

I willingly agree, but a clear answer to problems that are so frequent is nevertheless indispensable.

It would not be legally correct to let case law take care of the settlement of these issues.

When I see that it has taken exactly thirty-eight years for basic questions of cross-border patent litigation raised by cases such as Luk v. GATT and Roche v. Primus to be taken before the European Court of Justice, I believe I am right to insist on providing a legislative answer in the EPLA.

This is the viewpoint of the lawyer.

THE VIEWPOINT OF THE LEGAL ADVISER

As legal adviser for companies, the patent lawyer is faced with a pedestrian/car driver issue, for clients are sometimes the car drivers holding a patent and other times they are the pedestrians sued for infringement.

A number of points are extremely positive.

The very first point, which demands an unconditional support on the part of lawyers, is the proximity the EPLA will develop between the litigant and the judicial system; we are not entering the detestable Community system, initially planned, of a unique Community court system with a centralised first instance.

Some big patent cases and other patent cases opposing small firms do not require to be decided in Luxemburg or in Munich.

Lawyers are equally very favourable to the language regime which will enable to continue to use French before the French division of the European patent court.

This is undoubtedly a positive point.

Questions related to the concentration of the dispute before a single court, require a more detailed approach.

The risk of divergent decisions should indeed be eliminated.

However, I remain cautious since famous cases such as Epilady or Muller/Hilti, which have been mentioned, were settled by divergent decisions in different countries.

At present, divergent decisions still exist and again this year, the Cour d'appel of Paris has held valid a patent which had been held invalid by the Bundespatentgericht.

However, this is not just an international problem since the same patent held valid by the Cour d'appel of Paris was held invalid a few weeks later by the Tribunal de grande instance of Paris.

Such contradiction may exist between two national divisions of the European patent court, at least at first instance.

Being in a unitary judicial order does not settle all the issues of divergent case law.

Another beneficial effect of the EPLA will be the costs reduction since the cost of international proceedings will probably be less than the overall costs of national proceedings and perhaps even less than the costs of proceedings before English courts.

These are the positive points.

The main negative point, for the patent holder, will be to put all his eggs in one basket: once the patent is revoked, it will be so over the European territory.

THE VIEWPOINT OF THE ECONOMIC PLAYER

As an economic player, the lawyer is of course pleased to see that the French battlefield will be open to stimulating competition.

French economic and legal players appear to be well-equipped; French judges, lawyers and patent attorneys, as well as experts, are perfectly competent and competitive.

However, there is inevitably some concern regarding the additional exposure to international competition to be faced since under the new regime, if one keeps in mind that the courts will be close to the places of infringement, the claimant will be given a very large latitude to choose the judge he, in fact, prefers.

PARIS, SEAT OF THE EUROPEAN PATENT COURT!

Finally, I would like to make a proposal.

Some have said before me, and they were right, that it was very important that the new European patent court system should be independent from the European Patent Office, at least to stop opponents' allegations that the EPLA is in fact a war machine to impose software patents.

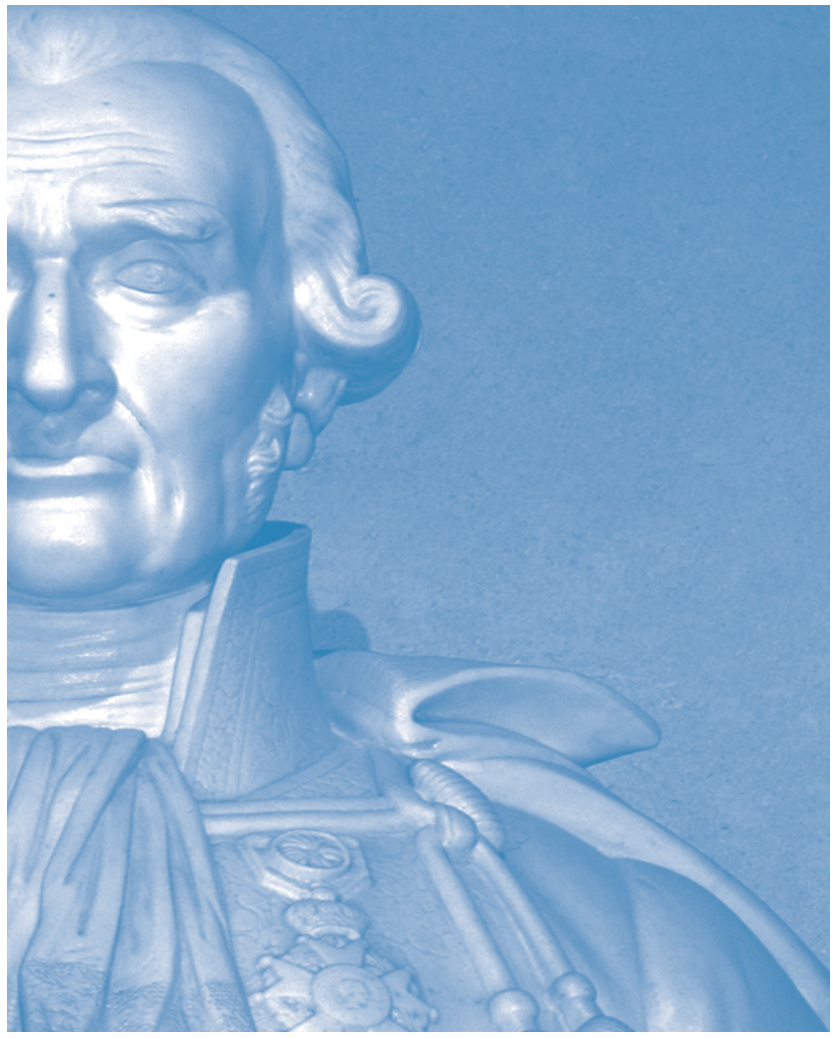
It would therefore be preferable, as a sign of independence, not to choose Munich as seat of the European patent court and its centralised division.

Besides, and since this new court system will not be, at least in the predictable future, a Community court system, there is no necessity to comply with the rule of the Treaty of Rome which provides that Luxemburg should become the seat of a Community court system.

I therefore propose that: since the court system to be set up should be remote from the European Patent Office, since we have the possibility to create a European patent system, let's not have the new European patent court in Munich to avoid being too close to the European Patent Office, nor in Luxemburg as nothing obliges us to make such choice.

Let's choose Paris, if you don't mind!

SEMINAIRE



BIGOT DE PREAMENEU 1747 - 1825

La Cour de cassation
L'Institut National de la Propriété Industrielle

L'accord EPLA : un juge européen pour le brevet européen

Lundi 2 octobre 2006

Cour de cassation, Grand'chambre
De 14 h 30 à 17 h 00
(entrée : place Dauphine, rue de Harlay-Paris 1er)

Allocution d'ouverture,

Guy Canivet, premier président de la Cour de cassation
Benoît Battistelli, directeur général de l'INPI

Présentation

Alain Pompidou, président de l'Office européen des brevets
un représentant de la Commission européenne

I - L'accord EPLA : le point de vue des magistrats

M. Pumfrey, juge à la Patents Court (Royaume-Uni)
R. Lutz, président de la Cour fédérale des brevets (Allemagne)
Alice Pezard, président de chambre à la cour d'appel de Paris

II - L'accord EPLA : le point de vue des utilisateurs

T. Sueur, président du COMIPI du MEDEF
C. Derambure, président de la Compagnie des conseils en propriété industrielle (CNCPI)
P. Véron, avocat

Conclusion

Guy Canivet, premier président de la Cour de cassation
Benoît Battistelli, directeur général de l'INPI

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