

AWAITING THE COMMUNITY PATENT



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Earlier this year, the European Council at last reached a political agreement on the Community Patent. It may therefore be expected that something like 30 years after the Luxembourg Convention, the first Community Patent will be registered. EU member states also agreed on a court system for the resolution of disputes about the Community Patent. But will the industry use the Community Patent rather than the good old European one (to say nothing of the national patent)? When will all the legal and practical hurdles on the way to the Community Patent Court be cleared (for instance, the thorny issue of whether this Court will be able to decide over non-patent law issues such as whether a licence agreement has been terminated, when this is raised as a defence to an infringement action. And, if the Court has jurisdiction, which body of conflict of law principles it will rely on to decide which substantial law it will apply to such defence)? In the meantime, and probably at least for the next 10 years, national courts will have to be used to settle disputes arising out of European patents.

What are the positive sides of the French judicial system in this respect? In a nutshell: a very efficient tool for gathering evidence of infringement, a reasonable time frame, affordable costs and a patent-friendly attitude.

Saisie-contrefaçon (search and seizure order for proving infringement) is a very powerful tool: it is so efficient-and-cheap that both the drafters of the Community Patent regulation and the drafters of the European Patent Litigation Agreement have adopted it (to say nothing of the Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights which would oblige EU member states to introduce this in their statutory provision).

French litigation remains one of the cheapest in Europe (the reasons are: no discovery and no schedule of *ad valorem* fees). The plaintiff's situation is still enhanced by the current trend of the courts to grant significant amounts for costs (the Court of Appeal of Paris grants up to €100,000 (\$117,421) to the successful plaintiff in heavy patent cases).

As to the timeframe, it is rather comparable to that of Germany when the validity of the patent in suit is concerned.

Whether French courts are patent friendly or not answered by the statistics 1990-1999 period. An average of 180 patent cases were decided each year by the court of Paris in first instance and the patentee prevailed in 55% of cases (in 23% of cases the patent was found invalid and in 22% the patent was found valid but not infringed).