

# 2B: The European Unitary Patent & the Unified Patent Court

Overview, Preparatory Committee & Crystal Ball

21st Annual IP Law & Policy Conference Fordham,  
NY, 4 April 2013

Robert van Peurseem

Justice

Court of Appeal The Hague

# Unitary Patent

- Unitary Patent: Art. 142 EPC: A European Patent granted by the EPO for the Union as a whole
  - Union: All EU members except Spain & Italy
  - EU legislation: Reg (EU) no.1257/2012 (enhanced cooperation)  
Reg (EU) no. 260/2012 (translations)
  - Now: validation EP country by country
  - Future: option to validate EP for entire Union → unitary patent
- 
- ES & I: CJEU case legality enhanced coop pending, A-G: positive

# Agreement on Unified Patent Court

- Agreement signed 19 Feb 2013: EU member states instituting a new unified court system for patent cases – 1st supranational Court for disputes between private litigants in Europe
- For classical EP's & new unitary patents
- One stop shop: 1 decision (cross-border) for all participating countries
- Exclusive court system for unitary patents (Art. 3 UPC, rec 25 Reg 1257/2012)
- Transitional period: For normal EP's: 7 years optional (t.p. may be extended, so maybe 14 years)
- After transitional period: opt out for then existing patent(s) & applications → opt in later on always possible
- All eggs in 1 basket? → option → national filings (Pharma?)

# UPC

- Signed by (meanwhile) 25 EU countries, including Italy
- Spain & Poland out
- Entry into force after 13 ratifications, including UK, Germany, France
- Preparatory Committee set target date: somewhere in 2015
- Overoptimistic?
- EPC 1973 – took 5 years
- Unitary patent coupled with entry into force of UPC

# Court set-up (political compromise)

- CFI:
  - Central Division (Paris (seat) + London + Munich (sections)) – & Registry in Lux!
  - Local Divisions (1 per country, if > 100 cases 1 xtra, max 4)
  - Regional Divisions (2 or more countries, panelcomp: 2 regionals, 1 pooler)
  - 3 legal members, 1 technical optional, always multinational
- CoA Luxembourg
  - 3 legal + 2 technical, always multinational
- Pool of judges (training facilities in Budapest!):
  - ‘highest standards of competence’ / ‘proven experience in the field of patent litigation’
  - Local Div < 50 cases → 1 national, 2 poolers
  - Local Div > 50 cases → 2 nationals, 1 pooler, sometimes permanent pooler

# Technical judge in CFI

- Additional technical judge from the pool
  - Upon request of a party
  - Upon request of the panel
  - Compulsory if no bifurcation: Division deals with validity (& infringement) itself

# Jurisdiction infringement – Article 33 UPC

- 1) Place of infringement
- 2) Residence – or (principle) place of business defendant
- 3) As co-defendant (if co-def's have commercial relationship) in any Division if it concerns the same alleged infringement
- 4) Defendant from outside the Union: place of infringement or Central Division (or elsewhere as co-defendant, v. 3))
- 5) Division of choice both parties (including Central)
- 6) No Local/Regional Division → Central Division
- Art. 33(2), 2nd par: infringement > 3 Regional Div → defendant may ask referral to Central → discouraging Reg Div's?

# Claims for invalidity (optional bifurcation – Article 33(3) UPC)

- Counterclaim for invalidity in infringement proceedings:
  - a) FR/UK/NL-type: Division *deals with entire case* (no bifurcation)
  - b) DE/AU-type: Division *sends invalidity to Central* and suspends ('high likelihood claims will be invalidated') or continues with infringement (bifurcation)
  - c) with agreement of parties → Division *sends integral case to Central*
- Invalidity as main action: Central Division
  - May subsequently be combined with counterclaim for infringement in Central or Local/Regional Division → discretion to bifurcate etc a), b), c)
- Declaration for non-infringement: Central Division
  - Suspended if met by counterclaim for infringement by Local/Regional Division within 3 months



# Languages

- Language(s) of country/countries of Division
- Local Division may add language (EN f.i.)
- Parties may choose language of patent → Panel has to approve → if not pp can ask referral to Central
- Panel may choose language of patent if parties agree
- President CFI may decide for language of patent upon request 1 party
- Central Division: language of the patent
- Infringement action before Central: Union defendant may ask for translations in his language
- CoA: language of first instance, but more flexible if parties agree
- All Divisions: interpretation facilities at oral proceedings if requested

# Appeal & request for re-hearing

- Appeal:
- Against every decision
  - Suspension of enforceability injunction only if asked for and granted
  - As a rule suspensive effect of appeal against revocation action
- No *de novo* appeal
  - No new facts admitted if already known in 1st instance
- Cases of importance → referral to full CoA (*en banc*)
- Request for re-hearing:
- Fundamental procedural defects
  - Right to be heard, Art. 6 ECHR

# Preparatory Committee

- Inaugural meeting 26 March 2013
  - Chair: Paul van Beukering (NL): started with e-mail to IPJA, EPLAW & EPI:
  - Roadmap for early establishment & coming into operation of UPC
  - 5 project teams with experts in these fields and co-ordinators:
    - 1) Legal framework: Priority: broad consultation on RoP
    - 2) Financial aspects
    - 3) IT
    - 4) Facilities
    - 5) Human resources & training: Priority: selection & training of UPC judges
  - Input from industry, patent judges & practitioners: formal & informal consultations
  - Communication: Prep Cee website launched shortly

# How to proceed?

- 2nd meeting Prep Cee end May/early June:
- Composition & planning project teams
  - List of tasks: Annex II Non-paper (NL-SE) annexed to Council Doc 7265/13:
  - [http://www.upc.documents.eu.com/PDFs/2013-03-08\\_Setting\\_up\\_Preparatory\\_Committee\\_UPC\\_st07265.en13.pdf](http://www.upc.documents.eu.com/PDFs/2013-03-08_Setting_up_Preparatory_Committee_UPC_st07265.en13.pdf)
  - Herculean job – to mention but a few:
    - Legal: RoP, Rules (sub-)Registries, Legal Aid, Court Fees, Admin/Budget/Advisory Cees
    - IT: electronic filing & CM system, on-line accessibility for judges/staff/parties and partly for the public, secure exchange of doc's & info, design comprehensive Court website
    - HR & Training: prep election Adv Cee members & selection of 1st judges, setting up Pool of judges

- Herculean, or should one say?:



# Crystal balling

- UPC: 13 ratifications
- Referenda needed/promised (DK, Ireland, UK?)
- Constitutional Court Karlsruhe?
- Prep Cee: somewhere in 2015 – not realistic, tremendous amount of work to be done – users deserve proper preparation
- Is industry going to use it?
  - Wisdom wanted from Advisory Committee recommending capable patent judges!
  - In the beginning no full time job – possibility of double hats – gaining trust?
  - If not: Transitional period, national filings
- Pythia: We will (or will we?) live to see it...
  - Question without answer: Will bifurcation become the norm, will it die, or co-exist?

Thank you