

Patent Litigation in Europe—A Glimmer of Hope? Present Status and Future Perspectives^{*}

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I. THE POTENTIAL FOR PATENT LITIGATION IN THE EUROPEAN UNION

When looking at the number of patent applications filed and the number of patents issued since the adoption of the Convention on the Grant of European Patents (European Patent Convention—EPC) in 1973 and its entry into force in 1977,¹ the EPC must be viewed as a success story. During the EPC's first one and one-half years of operation from June 1, 1978 through December 31, 1979, applications filed totalled 15,151.² This figure was 82,870 for 1998 with 1,177,256 designations.³

By the end of 1998, 443,775 total European patents had been issued, with designations in the last few years annually exceeding the mark of 270,000.⁴ The future increase of European patent

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1. EPO O.J. 6 (1977).

2. EPO O.J. 257 (1979).

3. 1998 EPO ANN. REP. 55. The membership in the EPC increased from 7 to 19 Contracting States in 1998: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, the Netherlands, Portugal, Spain, Sweden, Switzerland, and the United Kingdom; *cf.* EPO O.J. 240 (1999). Moreover, so-called extension agreements exist between the European Patent Organization and the following states: Albania, Latvia, Lithuania, Romania, Slovenia, and the Former Yugoslav Republic of Macedonia; *cf.* EPO O.J. 241 (1999). In 1998 the number of extension requests for these countries passed the 10,000 mark for the first time—in 1997 it was 7,000; *cf.* 1998 EPO ANN. REP. 33.

4. 3. Untersuchung von Urteilen der Nichtigkeitsenate des Bundespatentgerichts und von Urteilen des X. Senats des Bundesgerichtshofs [BGH], Table at 2 (July 1999); 1998 EPO ANN. REP. 55, 63.

applications filed and European patents issued can be reasonably predicted.⁵ Bulgaria, the Czech Republic, Estonia, Hungary, Poland, Romania, Slovakia, and Slovenia are invited to accede to the European Patent Convention (EPC) by July of 2002.⁶ The EPC will then have twenty-seven Contracting Parties. In view of these facts, little imagination is needed to realize the magnitude of the potential for European patents' validity and infringement litigation in the fifteen Member States of the European Union.

II. PRESENT STATUS OF PATENT LITIGATION IN EUROPE

A. The EPC's Basic Scheme of Operation

According to article 2(2) of the EPC, a European patent has, in each of the Contracting States for which it is granted, the same effect and is subject to the same conditions as a national patent granted by that state, unless otherwise provided in the EPC. In particular, it confers on the patentee the same rights as those conferred by a national patent granted in that state (article 164(1) of the EPC). Nonetheless, the EPC, with its article 69 rule on the extent of protection, imposes on all courts the necessity of construing the national patents in the same way.⁷

Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity

5. In 1999 the number of applications increased dramatically to some 122,000, of which 59% were Euro-PCT applications. The number of extension requests in 1999 was around 15,000, which represented a rise of about 50% (see Report of the Administrative Council of the European Patent Organization on the 78th mtg. (Dec. 7 and 8, 1999), 2000 EPO O.J. 41).

6. 1998 EPO ANN. REP. 33.

7. Article 69(1) of the EPC reads as follows:

The extent of the protection conferred by a European patent or a European patent application shall be determined by the terms of the claims. Nevertheless, the description and drawings shall be used to interpret the claims." In order to ensure a harmonized application of article 69(1) of the EPC, the Contracting States agreed on the *Protocol on the Interpretation*, which forms an integral part of the Convention pursuant to article 164(1) of the EPC.

found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.⁸

Mr. Justice Laddie of the UK High Court of Justice therefore correctly observed that national patent rights based on European patents “[c]an be considered as cuttings from the European stock and planted in the national soil.”⁹ Article 138 of the EPC sets forth the only grounds under which a European patent may be revoked under the law of a Contracting State with an effect on its territory. Eventually, in article 64(3) of the EPC it is clarified that any infringement of a European patent should be dealt with using national law, whether it is procedural or substantive law.¹⁰ It must be added that in this context, however, the cuttings of the European patent stock in national soil may, and often does, lead to different or even contradicting results when identical clones are tested in national courts for infringement or validity. The well known case of the so-called “*Epilady*” patent serves as a prominent example.¹¹

The fact is that the national patents out of the European patent bundle exist independently of each other. It is therefore quite possible for one national patent out of the European bundle to be declared wholly or partially null and void while another is held to be valid. It is moreover not impossible that the scope of protection of one patent turns out to be different from that of the other one.¹²

8. *Id.*

9. *In re Coin Limited v. Suzo International (U.K.) Limited et al.*, [1997] F.S.R. 660, 672.

10. *Cf. Singer/Lunzer, The European Patent Convention—A Commentary*, No. 64-06 (London 1995).

11. *Cf., e.g. Epilady VII* [1993] G.R.U.R. at 242 (Int.); *Epilady XII* [1993] G.R.U.R. at 252 (Int.); *Epilady U.K* [1990] 21 App. Cas. at 561 (I.I.C.). See also the respective discussion in *Expandable Grafts Partnership v. Boston Scientific B.V.* [1999] F.S.R. 352, 358 (No. 18 s.).

12. *Id.*

Doubts, which might have existed regarding the *jurisdiction* in proceedings concerning the registration or validity of European patents, have been removed by article Vd of the Protocol to the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 1968 (Brussels Convention). Article Vd was added by the 1978 Accession Convention.¹³ It provides for exclusive jurisdiction of the courts of each Contracting State for any European patent granted for that state, regardless of domicile of the defendant and without prejudice to the jurisdiction of the EPO under the EPC. In other words, the designation of an EPC Contracting State in a European patent application and the grant of a European patent, followed by registration for that state and not the place of filing the application as provided for in article 16(4) of the Brussels Convention, is deemed the exclusive jurisdiction in proceedings concerning the registration or validity of European patents, trademarks, designs, or other similar rights requiring deposit or registration. In the absence of article Vd of the 1978 Protocol, one may assume the jurisdiction of German Courts under article 16(4) of the Brussels Convention, because Munich is the seat of the EPO and the place where applications for European patents are filed.¹⁴ However, the general rules of the Brussels Convention are to be applied in proceedings concerning the infringement of European patents.¹⁵ In this context one must realize that strict separation of validity and infringement proceedings is practically impossible whenever both are in issue. Thus, in principle, validity and infringement of a patent may be tried by the same court. This is true because “[w]here questions of infringement and validity both arise it is invariably not possible to conclude there is infringement without

13. 1978 EC O.J. (L 304) 1.

14. Cf. Prof. Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters and to the Protocol of its Interpretation by the Court of Justice, No. 173 (Oct. 9, 1978), reproduced *inter alia* in: A. DASHWOOD ET AL., A GUIDE TO THE CIVIL JURISDICTION AND JUDGEMENTS CONVENTION 399, 451 (1987), and WADLOW, ENFORCEMENT OF INTELLECTUAL PROPERTY IN EUROPEAN AND INTERNATIONAL LAW, No. 2-130, 2-131 (London 1998).

15. For details, see Kieninger, *Internationale Zuständigkeit bei der Verletzung ausländischer Immaterialgüterrechte: Common Law auf dem Prüfstand des EuGVÜ*, 1999 G.R.U.R. INT. 280, 281 (with numerous further references). See also *infra* note 9.

validity being determined.”¹⁶ The issue of validity will normally be the principal element of the dispute.¹⁷

In this context it should be added that, when applying article 138 of the EPC, courts of the EPC Contracting States have revoked European patents for the same reasons articulated in the opposition by the European Patent Office. This is also true of state of the art, which had already been considered by the EPO Examination and Opposition division. Those conclusions are viewed as non-binding for the courts when deciding on nullity pursuant to article 138 of the EPC.¹⁸ Depending on the national patent law provisions of the EPC Contracting States, actions for the revocation of European patents before national courts may be initiated even before the opposition proceedings have come to an end in the European Patent Office.¹⁹

B. *Difficult Fact Finding*

It is true, but difficult to believe, that at the present time comprehensive and reliable information on the numbers and nature of cases litigated involving validity or infringement of European patents in the 19 EPC Contracting States is not available. So far, even the efforts of the European Patent Office have provided only limited data for France, Germany and the Netherlands.

In Germany, as in Austria, validity and infringement are tested by different courts or judicial bodies. The Federal Patent Court had exclusive jurisdiction over validity from 1983 to 1997, during which

16. Fort Dodge Animal Health Ltd. v. Akzo Nobel N.V. [1998] F.S.R. 222, at 243; Expandable Grafts Partnership v. Boston Scientific B.V., [1999] F.S.R. 352, 361.

17. Cf. Fort Dodge Animal Health Ltd. v. Akzo Nobel N.V., [1998] F.S.R. 244.

18. Cf., e.g., German Federal Supreme Court (BGH), *Bogensegment* 1996 G.R.U.R. 862, at 864; *Zahnkranzfräser* [1996] G.R.U.R. 56 (int.); *Regenbecken* [1998] G.R.U.R. 895 (explicitly followed in *Bühler AG v. Chronos Richardson Ltd.* [1998] R.P.C. 609, 618 (*Aldous, L.-J.*). Cf. also the previous UK cases referred to by Lord Justice Aldous, *ibidem*, at 610, as well as *Biogen Inc. v. Medeva Plc.*, [1997] R.P.C. 1.

19. Cf. *Beloit Technologies Inc. v. Valmet Paper Machinery Inc.* [1997] R.P.C. 489, 503. Because of the lengthy opposition proceedings in the EPO, which take from about 4-8 years, British Courts are also not inclined to stay the English proceedings pending a final resolution of the European proceedings. Cf. also G.D. Harris, *Analysis: The Patents Court and the EPO—The Ultimate Mixed Message*, 1999 I.P.Q. 250, 251, reporting on “notorious delays in the appeals procedure in the EPO which have been known to result in delays of up to 14 years in the resolution of issues,” *id.* at 251.

time 462 nullity actions were filed. This represents 1.2% of all 389,684 European patents issued with the designation of Germany, (or 95.7% of all EP's). Of those 462 suits, 202 were withdrawn, and 67 are still pending. Of the remaining 193 cases that ended with a decision on the merits, 42 (31%) of the European patents were declared valid, 56 (42%) were partly invalid, 35 (26%) were invalid, and one was surrendered.²⁰

For the Netherlands, where the Hague Courts have exclusive jurisdiction over patent cases involving validity and infringement, statistics reveal that, for the period from 1993 to 1997, 129 actions were filed involving European patents. Of those cases, 30 ended without a decision on the merits. Of the remaining 99, only 57 explicitly or implicitly dealt with validity. Of those, 44 were held valid, 4 were held partly invalid, and 9 were held invalid.²¹

Data available for France for the period from 1986 to 1997 indicates a total of 61 cases involving European patents. Of those cases, 25 were not related to either validity or infringement, and in 5 others validity was not challenged. Of the 29 patents tested, 18 were held valid, 6 were held partly invalid and 5 were held invalid.²² Data on hearings in the United Kingdom Patent Court are available; however, the data cannot be reliably classified. The number of cases tried during the 1998-1999 year is assumed to be less than 100. A very rough, unofficial estimate by the EPO is that some 600 court actions are filed per year in the Contracting States that have in issue the validity or infringement of European patents.

C. The Thorny Life under the Brussels (and Lugano) Convention

As already indicated above, the jurisdiction for litigating validity and infringement of European patents is largely controlled by the Brussels and corresponding Lugano Convention.²³ It would exceed

20. See *supra* note 4.

21. EPO Internal Doc. (Nov. 5, 1997).

22. EPO Internal Doc. (Nov. 5, 1997).

23. See *supra* note 3. The Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 1988 by and large corresponds to the Brussels Convention. It has extended the area of application to all states then Members of the European Economic Area. 1998 O.J. (L 319).

my task to attempt to provide more than a brief presentation of the basic mechanisms of the Brussels Convention for adjudicating patent disputes, including the most recent application by courts of some EPC Contracting States. The only aim of this exercise is to demonstrate, as far as possible, the weakness of the entire system. This weakness is due to the fact that the Union is still lacking not only the Community patent, but also many of its indispensable attributes, which were provided for under the Council Agreement relating to Community patents; *inter alia*, the system provided for patent litigation under the Protocol on Litigation.

Prior to addressing the basic principles of the Brussels Convention controlling patent litigation, it seems necessary to consider its very aims. In *Duijnstee v. Goderbauer* the European Court of Justice (ECJ) circumscribed these aims as follows:

[A]ccording to the preamble to the Convention, the Contracting States, anxious to “strengthen in the Community, the legal protection of persons therein established,” considered that it was necessary for that purpose “to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgements, authentic instruments and court settlements.”²⁴

Both the provisions on jurisdiction and those on the recognition and enforcement of judgements are therefore aimed at strengthening the legal protection of persons established in the Community.²⁵ As pointed out in *Effer v. Kantner*:

[t]he Convention provides a collection of rules which are designed *inter alia* to avoid the occurrence, in civil and commercial matters, of concurrent litigation in two or more Member States and which, in the interests of legal certainty and for the benefit of the parties, confer jurisdiction upon the

24. *Duijnstee v. Goderbauer*, [1983] E.C.R. 3663, 3674-75 (Case 288/82).

25. *Id.*

national court territorially best qualified to determine a dispute.²⁶

As the ECJ has pointed out, it is not the object of the Convention to unify the rules of substantive law and the procedures of the different Contracting States.²⁷

As the headings of the respective Sections reveal, the Brussels Convention differs regarding its rules on jurisdiction. On the one hand, the general rule adopted in article 2 is that defendants domiciled in a Contracting State are to be sued in courts of their state of domicile. On the other hand, the special jurisdiction of Section 2, by way of derogation from that general principle of the Convention, confers in article 5(3) that “in matters relating to tort, delict or quasi-delict” jurisdiction is conferred on the courts in the place where the harmful event occurred. Article 6(1) provides another special jurisdiction: a defendant, who is one of a number of defendants, may be sued in the State where any one defendant is domiciled.

It is established case law of the ECJ that the “special jurisdiction” enumerated in articles 5 and 6 of the Convention, as derogation from the general principle that jurisdiction is vested in the Courts of the State of defendants’, must be interpreted restrictively.²⁸ Without going into details regarding the interpretation of the complex expression “place where the harmful event occurred” in article 5(3) of the Convention, it should be pointed out that in construing the proper Convention of that expression, the ECJ in *Mines de potasse de l’Alsace* held that the expression encompasses both “[t]he place where the damage occurred and the place of the event giving rise to it.”²⁹ In *Dumez France and Tracoba* the ECJ further pointed out that the jurisdictional rule contained in article 5(3) supports the need for a close connecting factor between the dispute and the Court hearing the case, i.e., the need for sound administration of justice.³⁰ Finally, in

26. [1982] E.C.R. 825 (Case 38/81).

27. Case C-365/88, *Hagen v. Zeehaghe*, 1990 E.C.R. I-1845.

28. Case 189/87, *Anthanasios Kalfelis v. Bankhaus Schröder, Münchmeier, Hengst & Co.* 1988 E.C.R. 5565; see also Case C-26/91, *Handte*, 1992 E.C.R. I-3967 Case C-68/93, *Fiona Shevill v. Press Alliance SA*, 1995 E.C.R. I-415.

29. Case 21/76, 1976 E.C.R. 1735.

30. Case C-220/88, 1990 E.C.R. I-49.

Kalfelis the Court held “. . . [t]hat a court which has jurisdiction under article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.”³¹

From case law of the ECJ Advocate General, Darmon draws the conclusion in *Shevill v. Press Alliance* that the Court of one contracting state where the damage arose cannot hear proceedings for compensation for damage arising in other Contracting States because there is no element of proximity connecting the forum with the dispute. Courts in the place where the damage arises are best placed to access the harm done to the victims’ reputations within their judicial districts and to determine the extent of the damage. The adoption of such a criterion avoids the occurrence of concurrent litigation in different forums, since the compensation for each of them is restricted to the damage arising within their respective judicial districts.³² The ECJ eventually answered the respective questions referred to by the House of Lords in *Shevill v. Press Alliance* that:

[o]n a proper construction of the expression “place where the harmful event occurred” in article 5(3) of the Convention, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the Courts of the Contracting State of the place where the publisher of the defamatory publication is established, which *have jurisdiction to avoid damages for all the harm caused* by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which *have jurisdiction to rule solely in respect of the harm caused in the state of the court seised*.³³

31. [1988] E.C.R. 5565.

32. [1995] E.C.R. I-431.

33. [1995] E.C.R. I-462, and operative part, I-465. Following the principles developed by the ECJ, the Court of First Instance of Düsseldorf denied its jurisdiction under article 5(3) of the Brussels Convention for adjudicating an infringement of the Belgium part of a European patent of an Italian patentee by a Belgium domiciled defendant in Belgium, who had at the same time potentially infringed the German part of the European patent at hand. So far only the

With regard to the application of the co-defendant rule of article 6(1) of the Brussels Convention, it is important to note that the ECJ in *Kalfelis v. Bankhaus Schröder inter alia* held that:

[f]or Article 6(1) of the Convention to apply there must exist between various actions brought by the same plaintiff against different defendants a connection of such a kind that it is expedient to determine those actions together in order to avoid the risks of irreconcilable judgements resulting from separate proceedings.³⁴

It follows from this, and from the necessity to apply article 6(1) restrictively, that the choice to sue defendants from different Contracting States for infringement of parallel patents arising in different Contracting States in one court is limited. Article 6(1) may apply if the defendants form part of the same group of companies, sold identical products in national markets of the Contracting States, and there was some “taking part” in “the common design” by defendants.³⁵ Under these circumstances, simultaneous hearings and settlement of all the actions would be covered by article 6(1) of the Brussels Convention. Affirming in principle such a possibility, however, does not answer the question of how to prevent the plaintiff in such circumstances from engaging in forum shopping, which the Convention tries to prevent. An analogy with article 5(3) and the case law handed down under it by the ECJ³⁶ led the Hague Court of Appeals to the conclusion that all the actions had to be brought in the

jurisdiction for the infringement of the German part in Germany has been affirmed (in *Schußfadengreifer* [1999] G.R.U.R. 455 (Int.)). With reference to the ECJ *Marinari v. Lloyd's Bank plc and Zubaidi Trading Co.* decision (Case C 364/93, 1995 E.C.R. I-2719), the Düsseldorf Court also stated that the place where a consequential damage occurred does not establish jurisdiction under article 5(3) of the Brussels Convention (*Id.* at 457-58).

34. Case 189/8, 1988 E.C.R. 5565.

35. *Cf. Unilever Plc. v. Chefaro Properties Ltd.*, [1994] F.S.R. 135, 139-41, where L.J. Glidewell stated:

In order to show infringement by common design, it is necessary for the plaintiff to show some act of the common design—not merely an agreement. The issue, therefore, before the judge and this court is: does the evidence show a good arguable case that there was such a common design and/or that Akzo had procured or assisted Chefaro to infringe.

36. *See supra* notes 11-13.

jurisdiction where the head office of the group of defendants or the office from which the business plan originated, the so-called “spider in the web,” was domiciled.³⁷

The already reported exclusive jurisdiction under article 16(4) is of utmost importance for the application of the Brussels Convention to patent litigation. Article 16(4), in connection with article Vd of the 1978 Protocol in proceedings *concerned with the registration or validity* of a European patent, provides exclusive jurisdiction to the courts of the EPC Contracting States for which that patent was granted.³⁸ In order to ensure that subject matter of exclusive jurisdiction will be heard only in competent courts under the rule set forth in article 19 of the Brussels Convention, a court seised of a claim that is principally concerned with a matter falling within exclusive jurisdiction of the courts of another Contracting State must deny its jurisdiction on its own motion. The issue immediately arises as to what is meant by “principally concerned.” In view of the practically indissoluble link between validity and infringement in patent litigation,³⁹ in which the first is without exception a precondition of the second and is easy to decide, it is not very helpful that preliminary or incidental dealing with a matter which falls into exclusive jurisdiction of the courts of another Contracting State should not oblige a court to deny jurisdiction.⁴⁰

Mention should also be made that the Brussels Convention, in order to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions that might result, provides for a *lis pendens* rule in article 21.⁴¹ Under that rule, any court other than the court first seised with the same cause of action between the same parties shall, of its own motion, stay its proceedings. Where the jurisdiction of the court first seised is

37. Cf. *Expandable Grafts Partnership v. Boston Scientific B.V.* [1999] F.S.R. 353, 360. However, see also the critical comments by P. MeierBeck, *Aktuelle Fragen des Patentverletzungsverfahrens*, 1999 G.R.U.R. 379, at 380.

38. See *supra* note 3.

39. See *supra* note 3.

40. Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*, 1979 O.J. (C 59) 1, 39.

41. Cf. Case 144/86, *Gubisch v. Palumbo*, 1987 E.C.R. 4861. For details on the *lis pendens* rule, see Pålsson, *Lis Pendens under the Brussels and Lugano Conventions*, FESTSKRIFT TILL STIG STRÖMHOLM 709 (1997).

established, any other court shall decline jurisdiction in favour of that court.⁴² As to specific requisites of *lis pendens* under article 21 of the Brussels Convention, it suffices here to add that the ECJ in *Gubisch v. Palumbo* held with respect to the objective identity of the “same cause of action” that its concept could not be restricted to mean two claims that are entirely identical.⁴³ Additionally, as long as the parties are the same, it is immaterial that the positions of the parties as plaintiff and defendant are reversed in the two actions.⁴⁴ This has far reaching consequences for litigating validity and infringement of European patents. Suppose, for example, that potential infringer of a European patent with designations of Belgium, France, Germany, the Netherlands and the United Kingdom commenced proceedings in Belgium, where apparently it takes some five years for a patent infringement action to come to trial and another five years for appeal, sought to establish that the national designations of the European patent of the potential plaintiff in Belgium were invalid and not infringed in France, Germany, or in Belgium. The courts in Germany, or France would have to decline jurisdiction for any later filed action on infringement of the German or French part of the European patent between the same parties.⁴⁵ Patent practitioners refer to forum shopping of this type as “deploying the Belgian torpedos.” An alternative discussed in intellectual property law journals is the “Italian torpedo.” This torpedo is a means for preventing a patentee from obtaining effective relief by starting litigation in a Brussels Convention country, which is believed or hoped to have slow court procedures.⁴⁶ Consequently, the Court of Appeals of Düsseldorf

42. Moreover, article 22 is concerned with related actions, which are loosely related actions that are brought in the courts of different states. Here, the court first seised may stay its proceedings while actions are pending at first instance.

43. Accordingly, the Court held, it covers the case where a party brings an action before a court in a Contracting State for the rescission or discharge of an international sales contract while an action by the other party to enforce the same contract is pending before a court in another Contracting State, [1987] E.C.R. 4861.

44. The Court of Appeal of Düsseldorf, following the *Gubisch v. Palumbo* ECJ decision, however, held that there was no identity of the parties if in the pending Italian proceedings the defendant was a subsidiary of the defendant before the German Court, *Kondensatorspeicherzellen* [1998] G.R.U.R. 803 (Int.). For more details, see Pålsson, *supra* note 40, at 717, with further references to the ECJ Case Law.

45. *Cf. Sepracor Inc. v. Hoechst Marrion Roussel Ltd.*, [1999] F.S.R. 746.

46. *Impfstoff* [1998] G.R.U.R. 804. *Cf. also* Franzosi, M., *Worldwide Patent Litigation*

stayed infringement proceedings under article 21 of the Brussels Convention against a potential infringer of the German part of a European patent. Earlier, the potential infringer had filed an action on validity of the Belgian part of that European patent, while at the same time also moving for a judgement of non-infringement *in Germany* with the Tribunal de Première Instance in Brussels.⁴⁷

The last Brussels Convention provision that is important to patent litigation in this context is article 24, which shifts provisional and protective measures outside the usual rules on jurisdiction. Under this provision courts of a Contracting State may be approached for such measures covered by the law of that state. This is true even if under the Brussels Convention, the courts of another Contracting State have jurisdiction over the substance of the matter. Two main questions arise here. The first question is whether provisional and protective measures under article 24 may be ordered if the order affects other Contracting States. The second question is whether such orders are fully enforceable in other Contracting States. As to the latter issue, under the case law of the ECJ, a distinction is made between protective interlocutory orders arising out of *inter partes* and *ex parte* protective measures. Whereas the latter must be sought separately in each state, enforceability of the former should be secured based on the order.⁴⁸ In *Denilauler v. Couchet Frères* the ECJ clarified that the justification for the additional jurisdiction under article 24 lies in the fact that the local courts are in the best position to judge the circumstances affecting whether the requested measures are to be allowed or refused.⁴⁹ In view of this *ratio* of article 24, in *Expandable Grafts Partnership et al. v. Boston Scientific B.V. et al.* the Hague Court of Appeals held that measures to be imposed under this provision can be operative only within the territory of the state of the court. According to the Dutch court it was irreconcilable with the *Denilauler v. Couchet Frères* ruling of the ECJ “[t]hat a Dutch Court which has jurisdiction exclusively by virtue of article 24, should issue

and the Italian Torpedo, [1997] EIPR, 382.

47. *Id.*

48. Case 125/79, *Denilauler v. Couchet Frères* 1980 E.C.R. 553. *Cf. also* Dashwood, *supra* note 13, at 140, with further references.

49. *Id.* para. 16.

regulatory measures having effect abroad.”⁵⁰ The UK Court of Appeal pointed out that the measures at hand “must be provisional and, in our view, granted in aid of or as an adjunct to some final determination then in contemplation.”⁵¹ For the sake of clarity, the Hague Court of Appeals, which found jurisdiction with respect to all defendants including those domiciled outside the Netherlands based not exclusively on article 24 but also on article 6(1) of the Brussels Convention, advocated the view that it had jurisdiction over all Boston Scientific Group Corporations regarding actions for interim injunction against infringement of the foreign patents. The Hague Court, however, refused such actions “[b]ecause the likelihood is that the foreign patents will be declared null and void.”⁵² Thus, contrary to the position of the British courts, which refuse to look into the validity issue of foreign patents as soon as they have been challenged,⁵³ the Dutch court feels adequately skilled to make its own preliminary value judgement in this regard.

Although, in the 1970s, the Brussels Convention was “discovered” as an apparently appropriate instrument to be applied in the field of patent litigation, it was not until 1994 that it gained practical importance in that field.⁵⁴ On February 3, 1994,⁵⁵ based on articles 5(3) and 6(1) of the Brussels Convention, the Hague Court of Appeals granted a so-called “cross-border patent prohibitory injunction” for the infringement of a European patent granted for the Netherlands, as well as for the Federal Republic of Germany, France, Liechtenstein, Luxembourg, Austria, United Kingdom, Switzerland and Sweden.⁵⁶ The Hague decision has attracted enormous attention and was a starting signal for entirely new case law under the Brussels

50. [1999] F.S.R. at 362.

51. *Fort Dodge Animal Health Ltd. v. Akzo Nobel N.V.*, [1998] F.S.R. at 245.

52. [1999] F.S.R. at 362-63.

53. *Coin Controls Ltd. v. Suzo International (U.K.) Ltd.* [1997] F.S.R. 660, 677. Meier-Beck, 1999 G.R.U.R. 379, at 380.

54. Cf., e.g. D. Stauder, *Die Anwendung des EWG-Gerichtsstands- und Vollstreckungsübereinkommens auf Klagen im gewerblichen Rechtsschutz und Urheberrecht*, 1976 G.R.U.R. INT. 465, 510.

55. [1995] I.E.R. 8, German translation 1995 G.R.U.R. 253 (Int).

56. For a thorough analysis of that decision, cf. Bertrams, *The Cross Border Prohibitory Injunction in Dutch Patent Law*, 26 I.I.C. 618 (1995).

Convention. This occurred first in the Netherlands,⁵⁷ then in Germany,⁵⁸ and eventually in the United Kingdom,⁵⁹ the mother country of the patent system. The current slowly began to revert because the British courts convincingly demonstrated that, in their understanding, no conclusion could be reached in a patent litigation on infringement without consideration of the validity of the patent. The British Courts thus touched upon the weakest point of the Brussels Convention as applied to patent litigation.

First, the Court of Appeal of the United Kingdom explicitly pointed out that for the purposes of article 19 of the Brussels Convention an infringement claim covering acts carried out in the United Kingdom is principally concerned with validity of the United Kingdom patent; therefore, by reason of article 19 and article 16 of the Brussels Convention, the claim falls within the exclusive jurisdiction of the United Kingdom Court. It then concluded that:

[I]f the United Kingdom Courts have exclusive jurisdiction over the dispute concerning the United Kingdom patent, then there is no justification for the respondents attempting to obtain from the Dutch Court even provisional relief as an aid to or an adjunct of the claim for final relief in respect of the United Kingdom patent. It would be vexatious to seek such relief.⁶⁰

The Court, however, accepted that a contrary opinion was also tenable. Thus, the matter was not *acte clair*. It therefore referred a number of questions, which were designed to the European Court of Justice to elucidate how articles 6, 16(4), 19 and 24 should be applied.⁶¹ Following the April 23, 1998 decision of the Hague Court

57. For an overview of the Dutch case law, see Gielen, *Litigating Patents in the Netherlands: Procedure and Cross-Border Effects; Where Do We Stand?*, PATENT WORLD, Dec. 1997/Jan. 1998, at 27; cf. also Coletti, *No Relief in Sight: Difficulties in Obtaining Judgements in Europe Using EPO Issued Patents*, 1999 J.P.T.O.S. 351 359.

58. For the German case law, see P. von Rospatt, *Entscheidungen deutscher Gerichte in Patentverletzungsprozessen mit grenzüberschreitender Wirkung*, 1997 G.R.U.R. INT. 861; and P. Meier-Beck, 1999 G.R.U.R. 379.

59. Cf. *Coin Limited v. Suzo International (U.K.) Limited* [1997] F.S.R. 660; *Fort Dodge Animal Health Ltd. v. Akzo Nobel N.V.* [1998] F.S.R. 222.

60. *Fort Dodge Animal Health Ltd. v. Akzo Nobel N.V.* [1998] F.S.R. 245, 246.

61. [1998] F.S.R. at 246.

of Appeals in *Expandable Grafts Partnership et al. v. Boston Scientific B.V. et al.*, Dutch case law also experienced important corrections, which are already partially reported on above.⁶²

Given the foregoing analysis of the basic mechanisms of the Brussels Convention, it seems difficult to claim that these mechanisms have proven to be instruments that make patent litigation in the Member States of the European Union or the European Economy more efficient. In fact, the opposite appears to be true. In *Sepracor Inc. v. Hoechst Marrion Roussel Ltd. et al.*, Mr. Justice Laddie bluntly characterized the system under the Brussels Convention:

A less sensible system could not have been dreamt up by Kafka. It does not meet the legitimate needs of patent holders and potential infringers within EPC countries and simply proliferates pre-emptive litigation. The fact that there is a difference of opinion between the courts in various countries as to the effect of the Brussels Convention has not caused the problem, but it has exacerbated it. The sooner that difference is resolved by the ECJ the better.⁶³

Other judges seem to share this view. For instance, Mr. Justice Brinkhoff, from the Hague Court of Appeals, has described the situation as totally unacceptable. In his opinion, a revision of the Brussels Convention could solve the problems. A better solution in his understanding, however, would be a European patent court:

[C]ross-border patent dispute should be decided by “cross-border” courts, i.e., courts composed of experienced judges from different countries.⁶⁴ Such court would provide a legal

62. See also J. Brinkhoff, *Cross-Border Injunctions: Dead in the EU?*, IP WORLD-WIDE, Mar./Apr. 1999, at 3; von Maibom/Pitz, *Die europäische “Transborder-rechtsprechung” stößt an ihre Grenzen*, 1998 G.R.U.R. INT. 765. Doubts as to the cross-border injunctions case law in the Netherlands had been raised before, cf. Brinkhoff, *Geht das grenzüberschreitende Verletzungsverbot im niederländischen einstweiligen Verfügungsverfahren zu weit?*, 1997 G.R.U.R. INT. 489.

63. [1999] F.S.R. at 352 (No. 14).

64. For example, other judges, such as Sir Robin Jacob, have even suggested that the Enlarged Board of Appeal of the European Patent Office should be staffed by national judges with patent experience and that the Board could go “on circuit” for the short periods necessary (cf. Sir Robin Jacob, *The Stephen Stewart Memorial Lecture: Industrial Property—Industry’s*

framework to match the existing economic and commercial realities in Europe.⁶⁵

III. THE EU GREEN PAPER AND ITS FOLLOW-UP

When compared with the level of economic and legal integration in the European Union, characterized by the single currency and the exhaustion of industrial property rights within the territory of the Union, the area of European patent protection, in general, and that of patent litigation, more specifically, must appear rather puzzling to the neutral spectator.⁶⁶ The obvious questions he or she might ask are: How does the Community handle this issue? Do plans exist on the part of the European Union aimed at improving the present state of affairs or at introducing an entirely new system? What has happened to the Convention for the European Patent for the Common Market (Community Patent Convention—CPC) of 1975, as last adopted in 1989, in the context of the Agreement Relating to Community Patents (ACP)? What happened to its “Protocol on the Settlement of Litigation Concerning the Infringement and Validity of Community Patents” (“The Protocol on Litigation,” POL)?⁶⁷

The EU Commission eventually took the initiative and, on June 24, 1997, presented its “Green Paper on the Community Patent and the Patent System in Europe.”⁶⁸ It was much welcomed, but it is a shy attempt to revitalize the mentioned Community instruments in the patent field given the general level of integration reached in the union in the meantime. The shyness is best demonstrated by the fact that, despite the existence of the single market and the single currency, the Commission sought advice from the interested circles regarding

Enemy?, [1997] I.P.Q. 1, 6).

65. J. Brinkhoff, IP WORLDWIDE, Mar./Apr. 1999, at 4-5. See also Antje Sedemund-Treiber, *Strukturen einer europäischen Patentgerichtsbarkeit*, MITTEILUNGEN DER DEUTSCHEN PATENTANWÄLTE 121, 125 (1999), where the President of the German Federal Patent Court is pleading in the same direction.

66. For an overall characterization of the state of the European Patent System, see the report prepared for the EU Commission by J. Straus, *The Present State of the Patent System in the European Union*, Luxembourg 1997, at 5, with further references.

67. 1989 O.J. (L 401).

68. COM(97)314 final.

whether a Community Patent was even needed.⁶⁹

Even though the future of the Community Patent System proper is not the topic of this paper, I wish to expressly maintain that, in view of the actual stage of economic, political, and legal integration in the Union, a unitary Community patent system covering all relevant aspects including subject matter eligible for patent protection, patentability requirements, patent granting procedure, effects of the patents, infringement and validity, is a *must*. In fact, it is overdue both politically and economically. This opinion has been formed by the vast majority of those reacting to the Commission's Green Paper, which the European Parliament adopted on November 19, 1998, as a Resolution on the Green Paper.⁷⁰ The resolution stated *inter alia* that the 1975 Luxembourg Convention and the 1989 Agreement relating to Community patents, which has not come into effect, do not provide unitary protection of patents within the European Union. The European Parliament stated "[t]hat the Community patent must form the subject of a Community regulation which has Article 235 of the EC Treaty as its basis." Furthermore, the European Patent Office, in co-operation with national authorities, should be the technical operator of the Community patent.⁷¹ With regard to the jurisdiction in patent infringement or revocation actions, the European Parliament advocated the view that: "the substance of such cases should be examined by two national courts and that the European Court of Justice should be the court which hears appeals on points of law."⁷²

69. The Heading Under 2.2 of the Green Paper, "The Need for Further Action on the Community Patent," reads:

The first question that needs to be addressed is whether and to what extent interested parties would be prepared to use the Community patent system as devised in the Luxembourg Convention if it were at last to come into effect following ratification by the twelve Signatory States. Would industry be attracted towards the new system or would, on the contrary, the existing system of the European Patent and national patents prove sufficient to meet its needs? In the latter eventuality, use of the Community Patent would be extremely limited, if not marginal.

Id. at 3. By the same logic the first question in this context reads: "Generally speaking, what would in your view be the advantages and disadvantages of patent protection covering the entire Community, in terms of . . ." *Id.* at 6.

70. Also published in 1999 EPO O.J. 193.

71. 1999 EPO O.J. 193, 194.

72. Lit. K. 6 (1999 EPO O.J. 195). The Resolution of the European Parliament also contains a number of other suggestions, *inter alia*, relating to the crucial language issue and the

In the area of direct interest, namely court jurisdiction in validity and patent infringement cases, the Green Paper remains modest. Based on the assumption that, as provided under the Litigation Protocol of 1989, infringement cases should remain in the jurisdiction of national Community Courts, the Green Paper's respective questions were focused exclusively on validity. The Green Paper envisioned "[e]xclusive jurisdiction for revocation proceedings to bodies operating within the EPO (revocation division) and, on appeal, the Court of First Instance of the European Communities," or, tentatively, "[j]urisdiction of national courts, whose decisions should have effect in the territory of the Member State in which the court is located."⁷³ Not surprisingly, the responses submitted to the Commission went beyond the points raised. They unanimously revealed that it was absolutely essential for infringement and validity proceedings to be held together and tried by the same court at the same time. The responses gave several reasons for this, including cost, delay, and securing uniform interpretation as to the scope of the claims. A significant number of respondents also rejected the idea of referring revocation to the EPO, primarily because of the time consuming procedure already experienced.⁷⁴ As to the question of which court should be the Community patent court of first instance, the designated national courts or a common court, be it located in one place or different divisions in different geographic areas, or being peripatetic, i.e. circuit court, the responses were less than clear. The responses displayed a certain tendency to give preference to a common court, however. No sympathy was expressed either for revocation for a given Member State only, or for *inter partes* invalidation. There was expressed, however, unanimity that for appeals from first instance decision on infringement and validity of Community patents jurisdiction should be with a single or common court of appeal.⁷⁵

After having considered the November 19, 1998 Resolution of the

costs, which cannot be discussed here.

73. COM(97)314 final, at 12.

74. Cf. CJA Consultants Ltd., Report on Responses to the European Commission Green Paper on Promoting Innovation through Patents, 10 (June 1998).

75. *Id.* at 11.

European Parliament and the results of hearings with interested circles the Commission released on February 5, 1999 a Communication to the Council, the European Parliament, and the Economic and Social Committee,⁷⁶ entitled “Promoting Innovation Through Patents—The Follow-Up to the Green Paper on the Community Patent and the Patent System in Europe.”⁷⁷ According to the Commission, the aim of this Communication was to announce the various measures and new initiatives that the Commission planned to take or propose in the future to make the patent system attractive for promoting innovation in Europe.⁷⁸

The Commission enumerated several actions that are urgent at the Community level. The first is the preparation of a draft regulation on Community patent based on article 235 EC in the course of 1999. The next is the preparation of a proposal for a Directive based on article 100A EC on the patentability of computer programs. The Commission also called for provisions clarifying the role of patent agents in the European Union. Furthermore, they mentioned both launching a pilot action designed to back the efforts of national patent offices to promote innovation and organizing a European conference for exploring “legal protection” insurance for legal action in connection with patents. The Commission also listed launching a procedure for accession of the Community to the EPC and the preparation of a communication from the Commission on better dissemination of information on patent law among inventors, researchers, and small and medium size enterprises. A study of employees’ inventions and of the harmonization of the scope of exceptions to the effects of patents in sectors that are required to have prior authorization for market release have been announced as medium-term actions.⁷⁹

In this context the announced action of the Commission regarding the preparation of a draft Regulation on Community patent is of

76. Doc. (COM 42) (1999).

77. 1999 EPO O.J. 197.

78. No. 1.3 (1999 EPO O.J. 203,204).

79. Cf. The Summary of actions and recommendations in *Urgent and Medium-term actions at Community level*, 1999 EPO O.J. 199. Note, however, that until February of 2000, the Commission did not release any draft for a Community patent regulation or any other communication.

primary importance and is briefly addressed here. A decisive reason for the Commission's action was their overdue realization of the perception that there existed a *real need* for a unitary Community patent covering the entire territory of the European Community and that in order to meet that need. The established system would need to be more cohesive than the system that the Luxembourg Convention, concluded in 1975 and revised in 1989, had envisaged. The Commission added that it was the unanimous opinion of the users that the Luxembourg Convention presents a major disadvantage in exploiting the internal market of the Community as the "natural market," and therefore it is no longer in a position to guarantee the necessary unitary protection.⁸⁰ The main features of a Community patent in the form of a Community Regulation based on article 235 of the EC Treaty, therefore should be as follows: It must be a unitary instrument, i.e. have same impact Community wide; it must be affordable, i.e. cost about the same as a European patent covering a limited number of countries; it must guarantee legal certainty; and it should, at least for a transitional period, co-exist with the national and the European patent, to which further improvements should be made.⁸¹

The Communication remained somewhat unenlightened as to the system to be proposed for guaranteeing legal certainty. On the one hand it clearly stated that the system adopted in the Luxembourg Convention, under which any national court deciding on patent infringement where a counterclaim for revocation was made could revoke the Community patent with effect throughout the Community, was considered a major risk and a source of legal uncertainty. On the other hand while not yet explicitly envisioned, the solution apparently would entrust competence for deciding on revocation and infringement regarding Community patents to a single court of First Instance per Member State. The Commission did not express any specific view as to which court(s) should act as an appeal court in the Communication. Instead, it commented on the suggestions made by the Economic and Social Committee of the European Parliament that the national court of First Instance should only have competence to

80. Cf. No. 2.2 of the Communication (1999 EPO O.J. 205).

81. Cf. No. 2.3 of the Communication (1999 EPO O.J. 206-10).

decide the validity *inter partes*. Moreover, it also mentioned the recommendation of the European Parliament that two national courts should rule on the substance with the ECJ acting as a court of appeal,⁸² but added that these suggestions need to be studied in greater depth.⁸³ Some more recent statements of Officials of the EU Commission, however, imply that the Commission gives some preference to a scheme in which the jurisdiction for validity and infringement would be at the first instance with a single court per Member State and the Community Court of First Instance would hear appeals on points of law.⁸⁴

IV. INTERGOVERNMENTAL CONFERENCE OF EPO MEMBER STATES

It is an open question whether and when the plans that the EU Commission envisioned with respect to the Community Patent Regulation will materialize. Many hurdles, which in the past had proven to be insurmountable, will have to be overcome. First in line among those is the translation issue. Even if the EU Member States would eventually prove that they have matured enough to compromise, a Community Patent Regulation could not solve the present problem of patent litigation for many decades. This is because it would not affect the many hundred thousands of European patents already issued or those that will be issued in the future under the EPC. To master the “Kafka scenario” controlled by the Brussels Convention, other means are necessary and, at last, are being sought.

On June 24 and 25, 1999 an Intergovernmental Conference of the Member States of the European Patent Organization on the reform of the patent system in Europe took place in Paris.⁸⁵ This Conference, *inter alia*, considered the European patent litigation situation and concluded it was necessary “[t]o increase the effectiveness and legal certainty of the protection conferred by the European patent by establishing a jurisdictional system that meets the need for a uniform

82. See also *supra* note 25.

83. Cf. No. of the Communication 2.3 (1999 EPO O.J. 208).

84. October 1999 lecture given by Mr. Noteboom at the Patinova '99 Congress in Chalkidiki, Greece.

85. Cf. 1999 EPO O.J. 545.

interpretation of the European Patent.”⁸⁶ The Conference therefore recommended that the Contracting States, to the extent possible, provide for a concentration of courts dealing with patent litigation and with the help of the EPO provide for the training of judges. Moreover, the conference mandated a working party chaired jointly by Germany, Luxembourg, and Switzerland to present *inter alia* before July 1, 2000 “[a] draft text for an optional protocol to the EPC which, with regard to litigation concerning European patents, would commit its signatory states to an integrated judicial system, including uniform rules of procedure and a common Court of Appeal.”⁸⁷

In the meantime, the Working Party has met on several occasions, but little has leaked to the public on the results achieved. One therefore should not succumb to the temptation to speculate too much. The date that the group must deliver its draft text is approaching quickly. It is clear from the mandate itself that the envisaged integrated judicial system should be optional and should be headed by a Common Court of Appeal; moreover, the system should have uniform rules of procedure. Thus, not too many alternatives remain open as to the structure. One decision among those alternatives is whether the Competent Court of First Instance should be a national or a European-central court. Past experience suggests that the competence of national patent courts, even if only one single court per EPC Contracting State is appointed, should not be viewed as a very realistic or acceptable alternative to the multinational industry. Also, as clearly revealed by the responses to the EU Green Paper, neither a separation of revocation and infringement proceedings, nor any involvement of the EPO in revocation proceedings appear acceptable. The responses given to the EU Green Paper are equally valid in reference to the issue at hand, namely an integrated judicial system under the EPC.⁸⁸

In view of the complexity of patent litigation, which can hardly find a similarly complex counterpart in other areas of law due to its

86. *Id.* para. 2.

87. *Id.* at 548. The other two tasks mandated are: a study relating to conditions under which arbitration might be acknowledged by the Contracting States in validity and infringement litigation, and a search for the term to establish and finance a common advisory entity to which national jurisdiction could refer when seeking advice relating to validity and infringement.

88. *See supra* note 26.

inseparable link to technology, new opportunities should be available to examine the substance of the cases. Furthermore, there should also be an opportunity to hear appeals on points of law. In this latter regard, an interesting suggestion was made by Dr. Messerli, Vice-President of the EPO and Chairman of the Enlarged Board of Appeal, in his presentation at the International Patent Appeal Examination Symposium in Tokyo.⁸⁹ Dr. Messerli developed a scheme for an entirely integrated European patent jurisdiction. On one side, the scheme places European or National Patent Courts of First Instance, having jurisdiction on infringement and revocation of European patents, with a possibility to appeal to a Common European Patent Court of Second Instance. On the other side, it places the existing patent granting structure of the EPO, including Boards of Appeal. This structure should be headed by a Supreme European Patent Court, which would hear appeals on points of law filed from the decisions of the European Patent Court of Second Instance, as well as from decisions of the Boards of Appeal of the EPO. In the understanding of Dr. Messerli, the Enlarged Boards of Appeal should be merged into this Supreme European Patent Court. It is generally understood that the European Patent Court should be staffed by judges experienced in patent matters. In view of the positive experience with the Federal Patent Court in Germany, those in Germany who have addressed the future jurisdiction scheme in Europe have understandably advocated the view that the patent courts dealing with the substance of cases should be composed of lawyers and technical members.⁹⁰ Since lawyers in Europe, unlike their colleagues in the USA, generally lack any technical education, this fact is of particular concern. A situation that allows for experts appointed by the court to eventually decide the case should be avoided.⁹¹ As to which rules of procedure to apply, the Working Group drafting the text of the Protocol could find many solutions in the Agreement on the Community Patent and its Protocol on

89. Organized by the Japanese Patent Office, on November 19th and 20th, 1998.

90. Cf. A. SEDEMUND-TREIBER, MITTEILUNGEN DER DEUTSCHEN PATENTANWÄLTE 125 (1999); M. Rau, *Wie soll ein gerichtliches Patentschutzsystem in Europa neben den nationalen Gerichten unter besonderer Berücksichtigung des "Grünbuch-Gemeinschaftspatents EU" aussehen?* MITTEILUNGEN DER DEUTSCHEN PATENTANWÄLTE 241, 242 (1998).

91. Cf. M. RAU, MITTEILUNGEN DER DEUTSCHEN PATENTANWÄLTE 242 (1998).

Litigation of 1989, which have been generally accepted in the past.

Of course, an optional Protocol to the EPC does not appear to be a final solution for litigating European patents. This is especially true for European patents with the designation of the Member States of the European Union. If the Protocol would be signed and ratified by only a limited number of the EU Member States. The Community and its single market would then be divided into two classes; the first class being those controlled by the Protocol forming a truly single market, and the other class being those within the single market, which would remain outside. Such a situation might be acceptable temporarily but cannot constitute a lasting solution. It therefore should be envisioned and possibly set forth in a Resolution to be adopted in parallel to the adoption of the Protocol that, as soon as a certain number of EU Member States have become party to the Protocol, article Vd of the 1978 Protocol to the Brussels Convention, or a legal instrument of the European Union succeeding the Brussels Convention, should be revised to read: "Without prejudice to the jurisdiction of the EPO under the EPC . . . , the European Patent Courts as provided for under the Protocol to the EPC shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with registration or validity, as well as with infringement of any European patent." Once such a revision of the Protocol to the Brussels Convention has been completed, that scheme could be entirely applied under the future Community Patent Regulation.

V. CONCLUDING REMARKS

Is there a glimmer of hope that Europe will, within foreseeable time, get an integrated system for litigating European patents, or do we have to agree with Coletti, who recently titled his JPTOS contribution "No Relief In Sight"?⁹² Past experience calls for caution and contained optimism, but optimism nevertheless. The June 1999 Intergovernmental Conference of the Member States of the European Patent Organization and its mandated tasks, as well as the clear evidence that the Brussels Convention scheme in its present form does not solve the problems put pressure on the EPC Contracting

92. See *supra* note 54.

States as well as on the EU Commission and other responsible organs of the European Union. During the past two years, the latter have finally left the stage of dormancy to become active. Moreover, the prospects of enlarging the number of the EPC Contracting States by the year 2002 and the subsequent or parallel enlargement of the Community should remove even the last remaining hesitations, spurring on the ability to compromise that is already present at this point in time. Otherwise, even more unexperienced courts and judges will enrich the already busy landscape of European patent litigation. The first step in the right direction should be an optional Protocol to the EPC, which should lead Europe to an institution modelled after the most successful U.S. Court of Appeal for the Federal Circuit. The fact that the European Union is not a Federal State should not be an annoyance.

Finally, there is another possibility of central revocation of European patents that only affects the parties. In June 1999 the U.S. Delegation at the Hague Conference on Private International Law preparing a preliminary Convention on jurisdiction and the effects of judgements in civil and commercial matters (a Convention that corresponds to the Brussels Convention at universal level) proposed that courts having jurisdiction over a defendant should also have competence to make determinations concerning the status or validity of the deposit or registration of, *inter alia*, patents, with effect only on the parties.⁹³ No matter how attractive for United States lawyers the prospect of litigating the validity of a European patent may be, I do not believe that this would solve our problems or lower the cost of patent litigation. This type of conflict resolution should be reserved for arbitration, which is controlled by mutual agreement of the parties involved. Under all circumstances a European CAFC would be preferable.

93. *Hague Conference on Private International Law*, Work, Doc. 241.