Cross-border: Europe
European patent system: the growing need for reform

Even patent practitioners find it hard to rationalise the complexities of the European patent system. To start with, there is no one European system, but rather two distinct systems through which patents can be granted in European countries. However, once granted, patent rights are always enforced through the national courts of those countries.

The two basic systems are:

- the national systems in each country; and
- the European Patent Office (EPO).

The EPO was established by the contracting states to the European Patent Convention. The major advantage of the convention system is that it allows for the submission of a single application to the EPO which, if the relevant criteria are satisfied, will grant a patent. The patent holder then determines the geographical scope of protection that it requires by seeking to have the patent validated in one or more of the states that are party to the convention. Once validated, the patent is treated as a national patent in each state in which it has been validated. Thus, the laws of each member state govern infringements and any actions involving the validity of that patent.

This system has led to some strange outcomes. For example, if the validity of a patent granted by the EPO is attacked in France and in the United Kingdom, the French courts may conclude that it is valid, and the UK courts that it is invalid. This confusing situation has caused problems since the inception of the EPO.

Another major drawback of the EPO system is that there are 22 official languages in the 31 signatory states to the convention. To obtain a patent through the EPO, an application must be in either English, French or German. Thereafter, if a proprietor wishes to have its patent validated in a signatory state, the patent must be translated into the official language of that state. At present, it costs approximately £1,200 to have a patent translated into one language.

Although the need for reform is clear, little has been done to this end in recent years. Certain problems have become mired not just in the politics of the convention states, but also as a result of the way in which the European Union has intervened in EPO matters.

Computer-implemented inventions
When considering the EPO problems, one striking feature keeps recurring: the problem of bureaucratic inertia. An example is the subject matter that is deemed by the EPO as excluded from being treated as an invention.

If an idea is deemed to be novel and involves an inventive step, the convention places a further hurdle in the way of the idea being treated as an invention. The idea cannot fall within one of the excluded classes, which include software. Software ‘as such’ is incapable of being patented. However, software is widely patented in the United States. Since so much modern equipment and so many aspects of daily life involve software, the fact that it cannot be patented by the EPO has caused tension between the United States and the EPO. The result is that the EPO has done everything possible to bend its own rules to allow it to patent software inventions. This has led to some tortuous interpretations of its own rules, but the effect is that the national courts often demonstrate different views on what constitutes a software patent.

The confusion surrounding software patents leaves patentees in a state of uncertainty. There is no good reason why, once an EPO examiner is satisfied that an invention is not in an excluded class, a national court should revoke the patent based on a different view of what is excluded. This simply replaces an EPO examiner’s opinion with that of the national courts.

Such uncertainty could easily be resolved by amending the convention. However, this will not happen, not least because to do so would require the approval of
the European Commission and the European Parliament, even though the EPO is not an EU organisation. At present, certain members of the European Parliament are opposed to the patentability of any software and think that the EPO has already gone too far.

Even though the EPO is not an EU organ, the fact that the majority of the convention states are also EU member states means that those states cannot take action without the agreement of the commission.

It seems that little will be done in the near future to clarify the position of software patents before the EPO. Business should use whatever channels it can to try to clear up these anomalies and trade organisations should be lobbied to try to rectify this position.

Oppositions

Under the EPO system an opposition can be filed against a patent within nine months of that patent being granted. The opposition will claim that the patent has been incorrectly granted and will cite specific grounds (eg, lack of novelty or inventive step). The patent will then pass to the Opposition Division of the EPO. With appeals, an opposition can last for many years. The problem is that while the opposition grinds on, the patent is in force and its 20-year life is ticking away. National courts which are asked to deal with infringers of an opposed patent may seek to stay actions pending the outcome of the opposition, which could take years. The whole process is unsatisfactory and could be solved, at least in part, by the EPO amending its procedures so that oppositions could be dealt with in a more streamlined way.

Patentees appear to be forgotten in the desire to keep bureaucrats working as they prefer. Recently there has been some reform of the opposition process, but where possible industry should press for an overhaul of this process.

Language

If a patentee wishes its patent to apply in a number of convention states, it faces high translation costs. In October 2000 the London Agreement was concluded in an attempt to try to dispense with some of the translation requirements. Initially the process was held up as the French Parliament considered that the requirements of the London Agreement were potentially unconstitutional. However, on August 24 2007 the French government adopted a bill authorising the ratification of the London Agreement and the French National Assembly has approved the bill, so it will be adopted by the end of 2007. When this happens, the regime for EPO translations will change dramatically.

Under the agreement, any state that has English, French or German as its official language in the EPO will agree to dispense with the requirement to have a patent granted in one of these three official languages translated into the language of that country. Hence, any patent granted in English will not need to be translated into French or German. However, the claims of a patent will always need to be translated into all three official languages. The claims are a relatively small section of the whole patent and in effect set out the extent of the invention claimed in the patent.

In addition, the London Agreement provides that any country that does not have English, French or German as its official language will dispense with the translation of the patent into its national language and will prescribe one of the three official languages as the language in which its patents will be granted. Such countries will continue to have the right to require a translation of the claims into their own language, but this will reduce the translation costs considerably.

It will be optional for convention countries to sign up to the London Agreement. To date, 10 states (Germany, Denmark, Iceland, Latvia, Monaco, Slovenia, Switzerland, the Netherlands, Sweden and the United Kingdom) have said that they wish to join the system, with Sweden and Denmark stating that they will choose English as the official language for their granted patents.

This reform represents good progress towards making the system more user friendly for patentees and is a rare step forward.

Litigation

There are complex issues in relation to the enforcement of a patent granted through the EPO. If a patent has gone national in the United Kingdom, Germany and France and a patentee wishes to enforce the patent against infringers in those countries, it must sue in the national courts of each country. In so doing, the patentee exposes itself to three different judicial systems, each of which will move at a different pace, with different procedures and different costs. In addition, the outcome may be different in each country.

To try to reform this system, the European Commission proposed the implementation of a pan-European patent, to be known as the Community patent. However, the proposal became mired in the EU decision-making process and has not progressed. The problems revolve around the nature of the judiciary in such a system, as well as the language(s) to be used, although this issue may have been lessened by the London Agreement. However, the major issues still remain and it seems unlikely that the Community patent will be available in the medium term.
Without a Community patent, the problem of how to reform the litigation of EPO patents in the national courts remains. One possible way forward exists in the draft European Patent Litigation Agreement (EPLA).

The EPLA has been written by practitioners, mainly judges, from a number of convention member states with a view to streamlining the process for enforcement of EPO patents. Under the EPLA there would be a judiciary of European patent judges, whose job would be to settle litigation concerning the infringement and validity of all patents granted through the EPO. There would be a court of first instance and a court of appeal. The courts would apply the patent law applicable to EPO patents, which would be the same for all patents granted through the EPO. All convention states would be eligible to join the EPLA, which would provide obvious advantages for patentees.

However, the EPLA has run into problems. The European Commission has not taken kindly to EU member states trying to establish a judicial process outside the European Union to deal with EPO patents. Indeed, the European Parliament asked its own lawyers to consider whether states that are members of both the convention and the European Union are entitled to establish the EPLA. The conclusion was that an EU member state may breach its obligations under the EC Treaty by entering into the EPLA, and further that such member states cannot, outside the framework of the EU institutions, assume obligations which might affect EU rules laid down for the attainment of the objectives of the EC Treaty. In effect, this means that EU member states cannot enter into international agreements unless the commission allows them to do so.

As the issue of the sovereignty of EU member states and their relationship with the commission is not clear cut, it is likely that, before the EPLA can be implemented, a definitive opinion from the European Court of Justice would have to be obtained as to whether member states can enter into the EPLA without the commission’s permission. A referral to the European Court of Justice could be made by the commission, Parliament or any member state – however, this has not yet been done.

Momentum has now focused on the EPLA due to the lack of success in establishing the Community patent. In addition, since the EPLA has been drafted by practitioners, it has enjoyed greater acceptance than if it had been drafted by politicians.

However, before the EPLA can be put in place, certain provisions need to be considered and agreed. In relation to the establishment of a European Patent Court, it is vital that the system takes into account the wishes of the users of the court. There is a move towards adopting a more continental European approach to the court procedure, so that more emphasis would be placed on written testimony, with a reduction in oral testimony.

UK judges constantly reiterate that the cost of bringing patent infringement proceedings in the United Kingdom is high. Indeed, such costs can be high, especially for complex pharmaceutical cases, but in reality they are generally similar to the overall costs in Germany, which is often regarded as being a low-cost jurisdiction. They argue that patent litigation should be made cheaper to allow small and medium-sized enterprises to avail themselves of the courts. The United States is the biggest global economy and patent litigation there is common and much more expensive than in any European jurisdiction. Therefore, it seems strange that the European approach is to try to make court actions cheaper by interfering with procedural matters which affect the quality of the judicial product. In the case of England, if judges were to take on more direct responsibility for running cases, they could monitor and control costs as the case develops.

Patentees should be aware that if the EPLA is implemented (and it would be a good idea if it were), they should lobby through their advisers and professional bodies to obtain the best possible system for the EPLA courts. They should consider whether the abolition or reduction of the cross-examination of witnesses is a sensible option. In the English system, cross-examination is an essential element to establish the truth – if economy took precedence, the judge could simply flip a coin and save everybody a great deal of time and money.

**Conclusion**

The one positive step taken in the past year towards reforming the European patent system is France’s adoption of the London Agreement. With the exception of the London Agreement, there have been no major changes to the system in the past year. However, many issues still need to be addressed if the European system is to be streamlined to a point where money is not wasted and where patentees are not treated as virtual inconveniences, and certainly as secondary to bureaucrats and politicians.

Companies and their advisers should be aware of the problems that exist in relation to patents in Europe and should ensure that, wherever possible, they apply pressure by all means possible to try to deal with these problems. Politicians in particular spend a great deal of time discussing the ideas-led society and how in the future Europe will have to stay ahead of the rest of the world by coming up with new solutions to problems.
To this end, intellectual property is fundamental, but politicians do not really understand the problems and often companies do not give sufficiently high priority to understanding the nature of their IP assets.

Those funding companies often overlook the need for a company not only to obtain IP rights, but also to have the money to enforce them where necessary. The whole understanding of intellectual property and how it should be utilised requires an interlocking knowledge of corporate, finance and IP law, as well as common sense.

It is to be hoped that a chapter on the same issue written in one year’s time will be able to report more progress – but the author will not be holding his breath that this will be the case.