



d e m i n o r



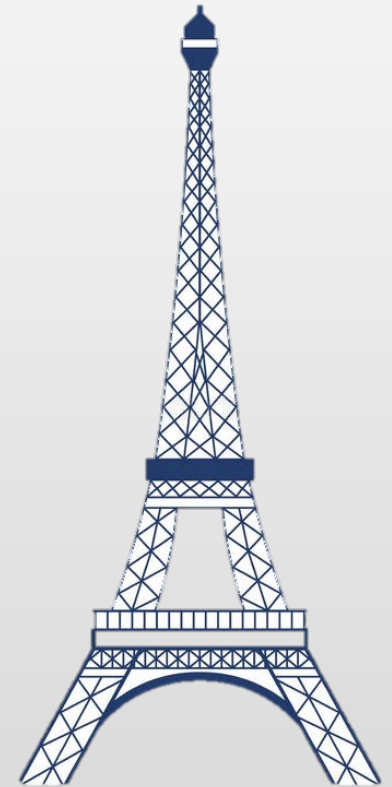
AUGUST DEBOUZY



MOLOLAMKEN

NYIPLA
Patent Litigation Committee Meeting
August 23, 2023

Europe's Unified Patent Court
&
Litigation Funding



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I. LITIGATION FUNDING



Litigation Funding

■ What Is Litigation Funding?

- Litigation funding provides money upfront from a financial firm to cover the costs of litigation.
- In return, the financial firm retains a portion of any monetary recovery from the litigation.
- Litigation funding is largely about accurately predicting litigation risk.
- High-value cases, such as patent cases, are generally most attractive to litigation funders.
- Litigation funders finance all types of IP cases, including copyright and trade secrets cases.



Litigation Funding

■ Size of the Litigation Funding Industry

- Over \$3 billion in annual funding
- Over 40 active funders
- Over a 15% increase in new funding commitments in 2022

■ Using Litigation Funding for IP Litigation

- Litigation funding is a popular option for innovators who are trying to monetize their IP portfolios.
- Litigation funding is a way to control costs, particularly for innovators asserting large portfolios against many infringers.



Litigation Funding

■ Benefits for IP Litigation

- Covers the high costs of IP litigation
- Helps to vet IP, such as patents, for litigation
- Allows the funder to act as a thought partner to help guide clients through litigation

■ Trade-Offs

- IP owners must give up a portion of their monetary recovery in litigation.
- This can be a worthwhile trade-off for IP owners that are less concerned about the potential damages and more concerned about preventing competitors from using their technology.



Litigation Funding

■ The Process for Funding IP Litigation

- 1) Selection of the funder, law firm, and claim owner
- 2) Law firm and funder conduct due diligence on the IP and claims
- 3) Negotiation of a term sheet
- 4) Negotiation of the final agreement

■ Types of Funding Arrangements

- Recourse v. non-recourse funding
- Single case v. portfolio funding
- Trial court v. appeals funding
- Non-contingency v. partial contingency v. 100% contingency

Litigation Funding



■ Key Takeaways

- 1) Litigation funding is still relatively new**
- 2) Litigation funding is continuing to grow**
- 3) Litigation funding applies mainly to plaintiffs**
- 4) Litigation funding comes in many varieties**



II. EUROPE'S NEW UNIFIED PATENT COURT

I. INTRODUCTION

I.1. Geographical Scope

17 current participating Member States

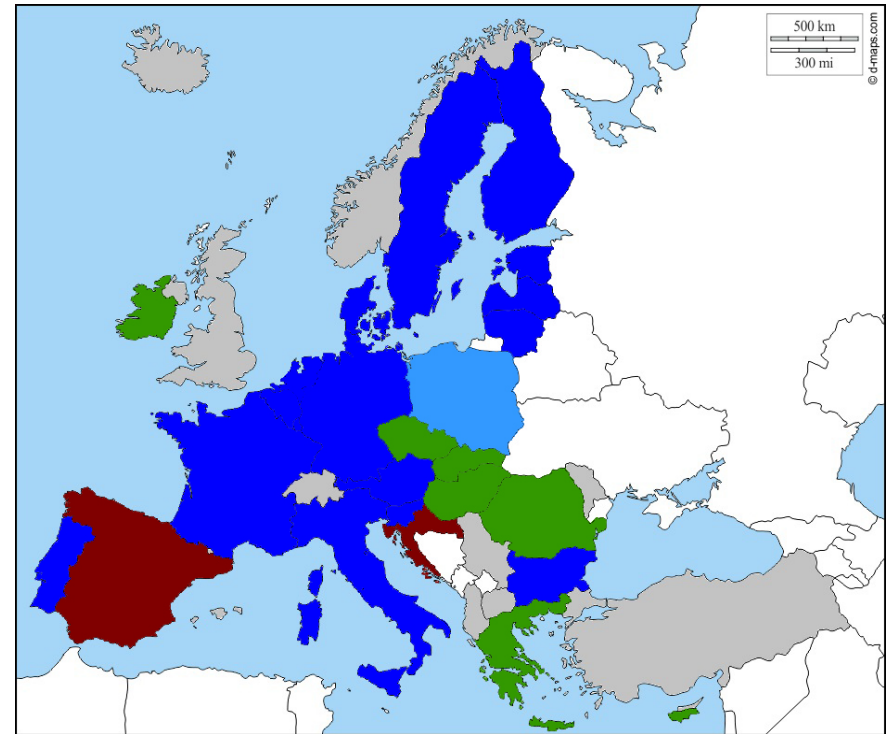
Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Slovenia and Sweden






+350M consumer's market

States that are not participating (among others)

- United Kingdom (no longer part of the EU)
- Poland (did not sign UPCA)
- Spain (refused to join UPCA and UP)

Unified Patent Court (UPC) / Unitary Patent (UP)



	17 Member States to the UPC and the UP
	1 Member State of the UP (no signing of the UPCA)
	7 Member States waiting for the signing of the UPCA
	2 Member States refusing to join UPCA and the UP (2013)
	11 Member States of the EPC non-covered by the UPCA/UP

I. INTRODUCTION

I.2. Geographical Scope - extended

17 current participating Member States

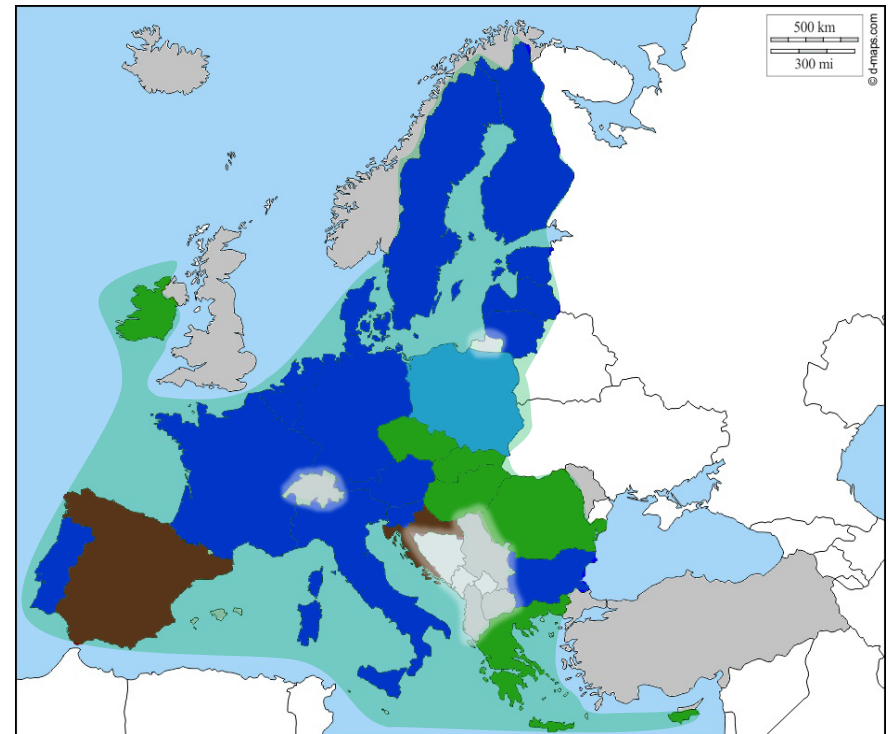
Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Slovenia and Sweden






+350M consumer's market

EU Regulation Bruxelles 1a recast

Extension of the effect of UPC decision to all EU, if related infringement also in non UPC countries
=> **~450M consumer's market**

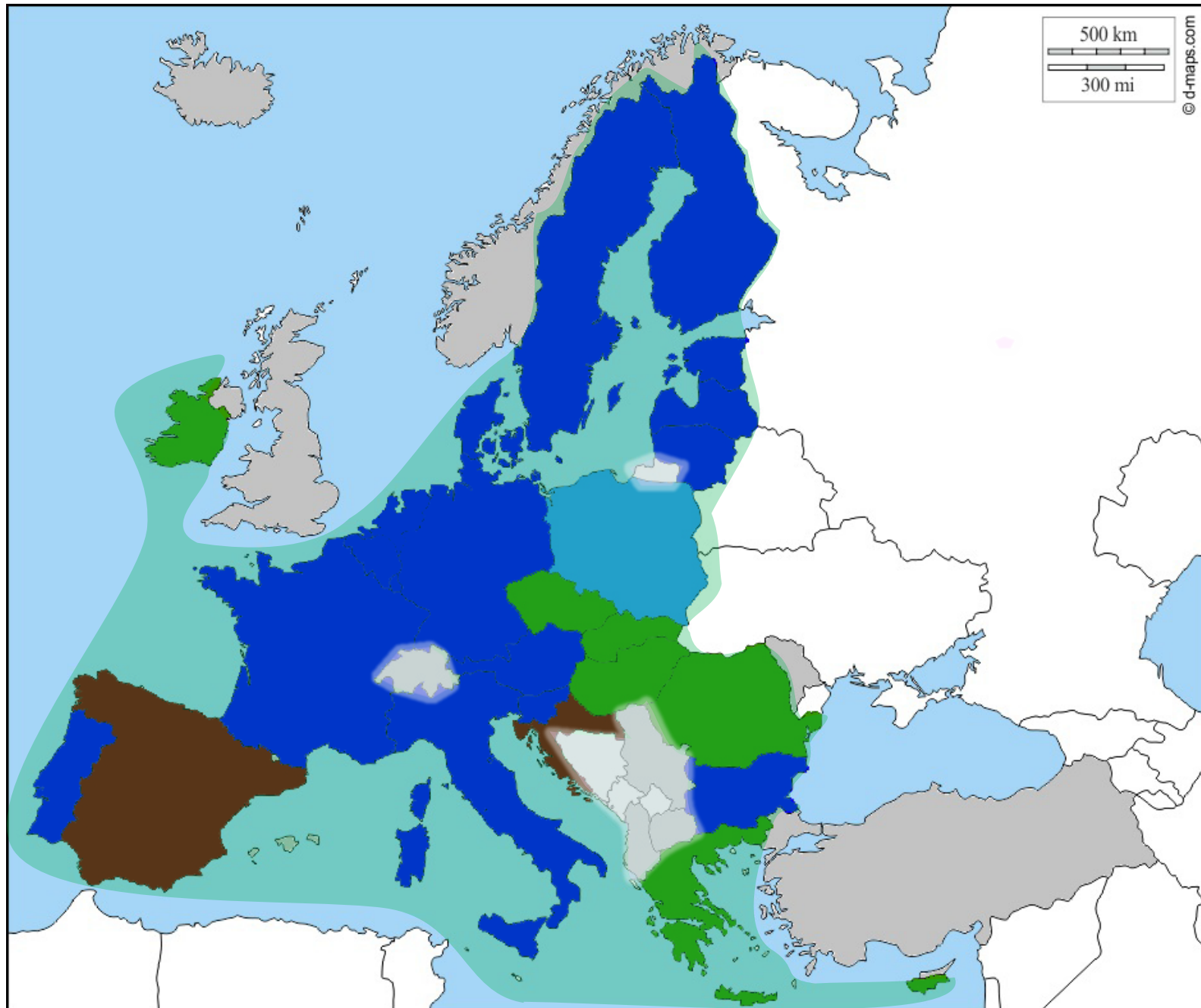
Unified Patent Court (UPC) / Unitary Patent (UP)



	17 Member States to the UPC and the UP
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	7 Member States waiting for the signing of the UPCA
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	11 Member States of the EPC non-covered by the UPCA/ UP

I. INTRODUCTION

I.2. Geographical Scope - extended



Jurisdiction expected to be pro patentee:

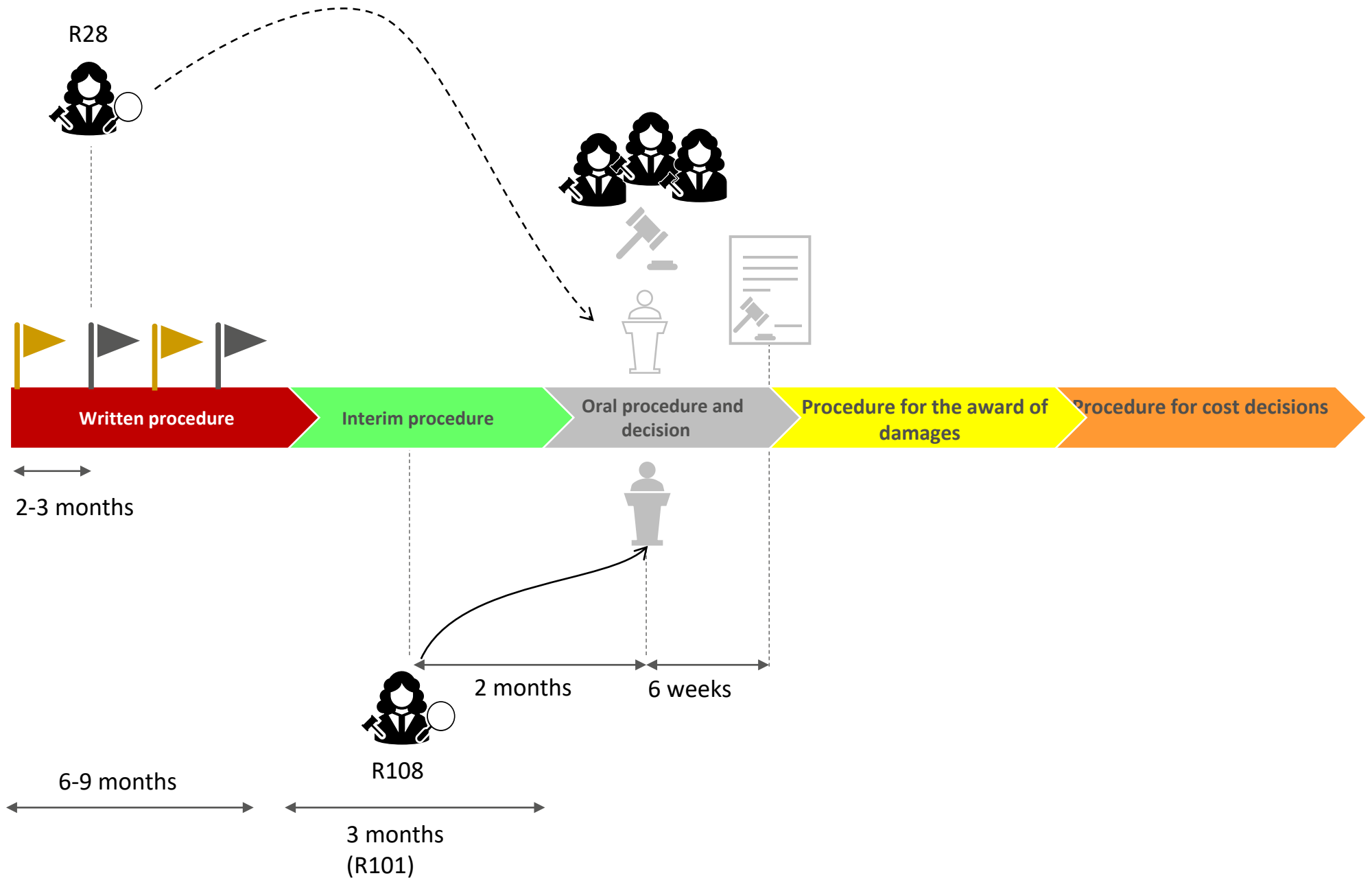
- **Short deadlines**
 - 2-3 months set deadline for answer, only 2 fold of briefs
 - First instance proceedings ruled on the merits in 12-14 months
 - Appeal (nullity appeal) in 11-14 months without suspensive effect on infringement
- **Front loaded proceedings**
- **Injunction relief** (contentinental Europe practice)
- **Improved access to evidence** (significantly re. DE proceedings)
- **Choice of the language** (incl. [EN]) to the infringement claimant

Even more likely to be pro patentee in the first years

- **Claimant fee funded court**
- **Needs to justify its being**

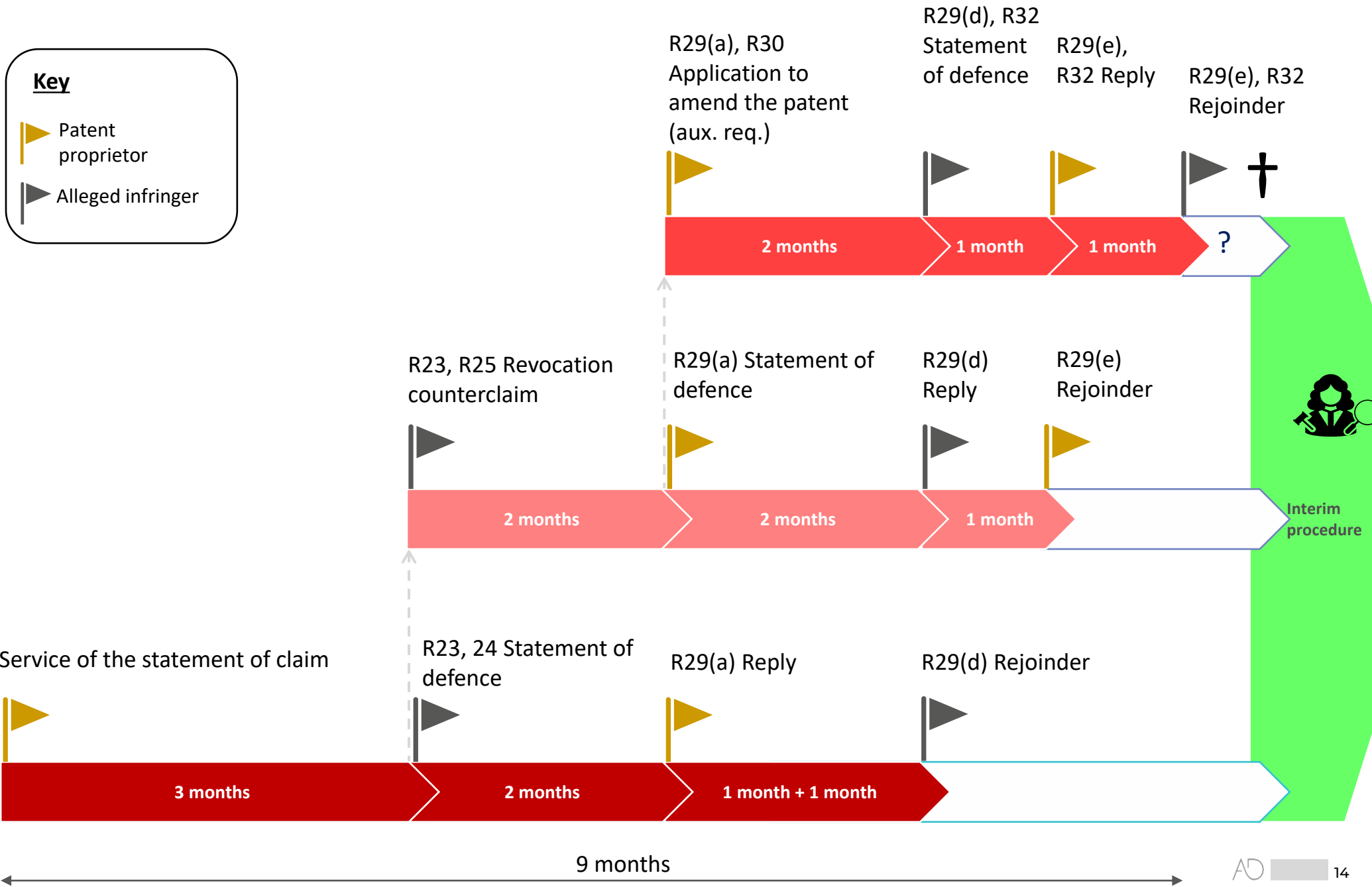
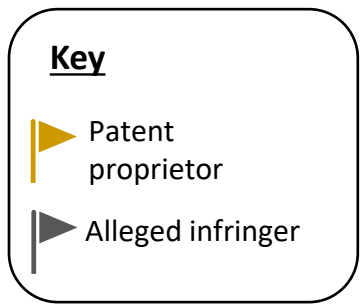
II. PROCEDURAL SCHEMES BEFORE THE UPC

II.1. Typical infringement claim scheme



II. PROCEDURAL SCHEMES BEFORE THE UPC

II.2. Infringement action **with** revocation counterclaim



II. PROCEDURAL SCHEMES BEFORE THE UPC

II.2. Provisional measures, incl. Preliminary injunction



- 2 steps procedure (R205):
 1. Written procedure
 2. Oral procedure
- An application for provisional measures may be lodged **before** or **after** main proceedings on the merits of the case have been started before the Court (R206)
- **No delay** for the oral hearing or the decision: « **as soon as possible** » (R210)
- Possible without hearing the defendant: The applicant may ask that provisional measures be ordered without hearing of the defendant, R212(1)
« *in particular where any delay is likely to cause irreparable harm* »
(then possible revocation as recourse)
- Protective letter (R207) as *a priori* attempt to prevent *ex parte* provisional measures
- Duration of the procedure: 2 to 3 months















II.Ω. Summary

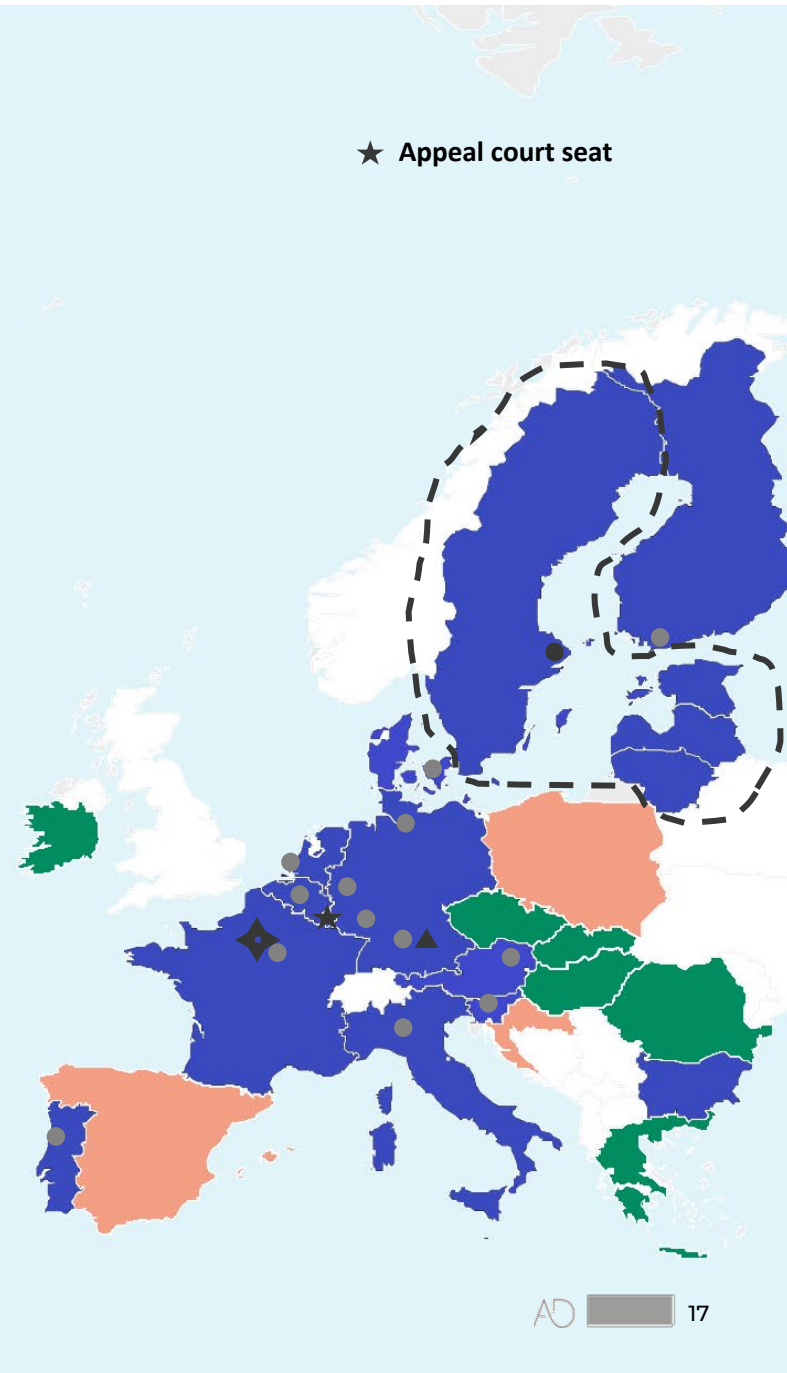
Written
Time constrained proceedings
Front loaded

- More open 3-month interim « case management proceedings »
- 1-day final pleading – decision on the spot + 6 weeks for the written ruling
- Subsequent proceedings on the damages
- Provisional enforcement pending appeal
 - not *de novo* (nullity appeal)
 - even more time constrained
- Almost automatic injunction relief against infringer

III. UPC MIX: LOCATIONS, JUDGES' SKILL & LANGUAGES

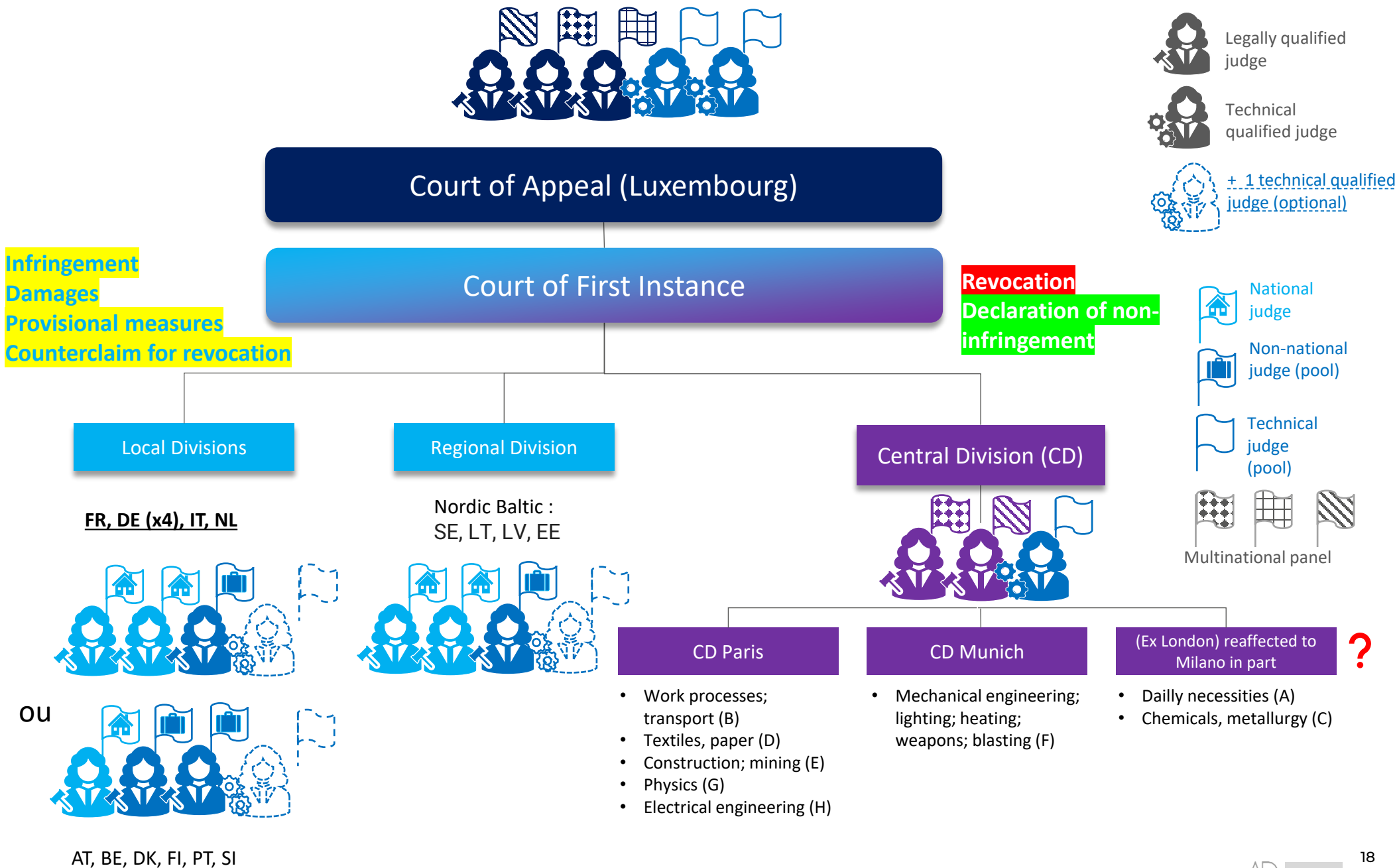
III.1. Map

Division	Spoken language (+ English)
◆ Central Division - Seat, Paris	
▲ Central Division - Section, Munich	
● Regional Division - Nordic Baltic, Stockholm	
● Vienna Local Division	
Brussels Local Division	
Copenhagen Local Division	
Helsinki Local Division	
Paris Local Division	
Düsseldorf Local Division	
Hambourg Local Division	
Mannheim Local Division	
Munich Local Division	
Milan Local Division	
The Hague Local Division	
Lisbonne Local Division	
Ljubljana Local Division	



III. UPC MIX: LOCATIONS, JUDGES' SKILL & LANGUAGES

III.2. UPC Judges



III. UPC MIX: LOCATIONS, JUDGES' SKILL & LANGUAGES

III.3. UPC Judges' skill



-  National judge
-  Non-national judge (pool)
-  Technical judge (pool)

- Know in advance since affected to one local division
- Majority of the panel (2/3 or 2/4 with preponderant voice)
- +100 patent infringement cases each

=> favors predictability on the infringement ruling

IV. EVIDENCE BEFORE THE UPC

IV.1.1 On-site evidence

On site-evidence

(1) Order to preserve evidence - seizure (*R. 192 to 198 RoP*)

(2) Order for inspection (*R. 199 RoP*)

<= French Seizure « Saisie-contrefaçon »

IV. EVIDENCE BEFORE THE UPC

IV.1.2 French Seizure

French Seizure « Saisie-contrefaçon »

get a bailiff

get an opponent premises

get an accompanying ...

Patent attorney

IT expert

Locksmith

Policeman

retrieve evidence of ...

materiality of infringement

distribution channel

infringer's turnover

without prior notice (ex parte order from the court)

<= this is where the UPC may slightly differ

IV. EVIDENCE BEFORE THE UPC

IV.1.3. UPC Seizure - Examination of the application

Contradictory procedure could be contemplated by the Court

Examination of the application (R193 to R195 RoP)

The Court has a discretionary power, it **can**:

- **inform the defendant** about the application and invite him to lodge an objection to the application
- **summon** the parties to an oral hearing
- **set the date for an oral hearing**: as soon as possible after the date of receipt of the Application for preserving evidence.

The Court shall take into account **the urgency of the situation**

A withdrawal of the application is possible (R194§6) if the patent subject of the Application is the subject of a **protective letter (R207 RoP)**

IV. EVIDENCE BEFORE THE UPC

IV.1.4. UPC Seizure - Execution

R196 RoP

Execution

- The order shall be enforceable immediately, unless the Court decides otherwise.
- The Court may order the following regarding the execution of the order :

→ Regarding the **representative of the applicant**:

- A **professional**/expert independent and impartial
- If national law authorizes it: a bailiff can enforce or assist the execution

→ Regarding the **conditions of the enforcement**:

- **Prohibition of the presence of an employee or director** of the applicant to be present at the execution of the measures
- **The person who shall carry out the measures, shall present a written report on the measures to preserve evidence** (according to national law) to the Court within a time period to be specified
- Measure to **protect confidential information** (club with a non disclosure agreement)

IV. EVIDENCE BEFORE THE UPC

IV.1.4. Seizure - Differences between UPC and French seizures

	UPC	FRANCE
Ex Parte Procedure	Inter Partes is the principle but, as in NL, which results in 80% of ex parte	YES
Required prima facie evidence	YES	NO
Protective letter	YES	NO
Presence of a bailiff	If national law authorises it	YES

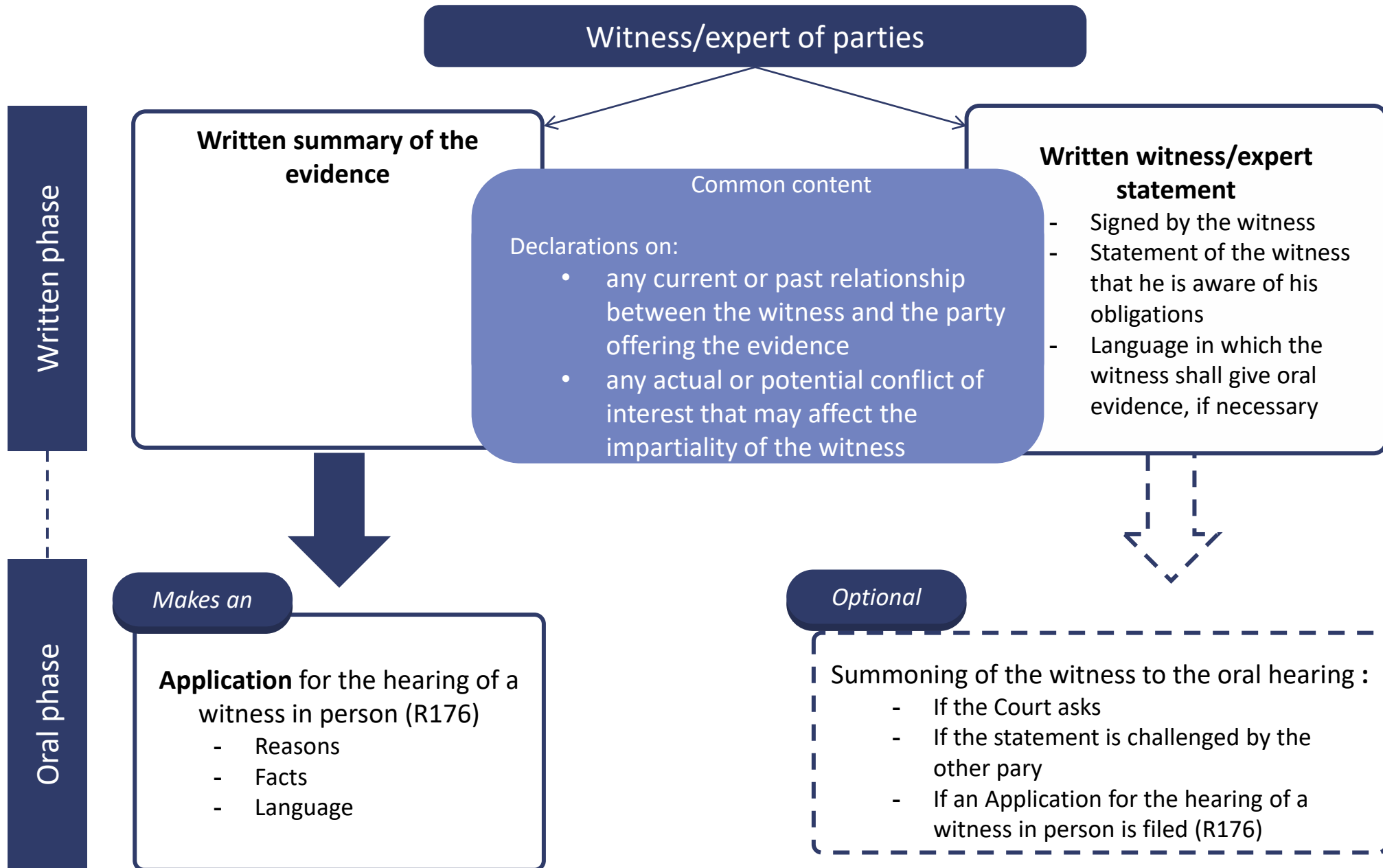
IV. EVIDENCE BEFORE THE UPC

IV.1.4. Seizure - Differences between UPC and French seizures

	UPC	FRANCE
Presence of a representative of the applicant	YES if expert, independent and impartial	YES if independent
Protection of confidential information	YES	YES
Time period to act after the seizure	YES 31 calendar days	YES 31 calendar days
Possible compensation for the defendant if measures are revoked/not applicable	YES	YES

IV. EVIDENCE BEFORE THE UPC

IV.2.1. Witnesses and experts of the parties



IV.2.2. Witnesses and experts of the parties

Witness/expert of parties



Importance of the experts or witnesses that can be presented by the parties or appointed by the Court

A witness/expert of the party may also refuse to answer questions if answering them would:

- violate a professional privilege or
- other duty of confidentiality imposed by the national law applicable to the witness or
- expose him or his spouse, partner equal to a spouse under applicable national law, descendant, sibling or parent to criminal prosecution under applicable national law (Art. 179§3 RoP)

V.Ω. Summary

- No discovery (but forced production of known to exist evidence is possible)
- Generalized visit at the opponent's premises (French saisie)
- Key role of the witnesses' / technical experts' opinion or deposition

Ω. UPC / NATIONAL - PROS AND CONS

	UPC	FRANCE	GERMANY
Extraterritorial effect	+	-	-
Duration	+	-	+
Damages	+	-	-
Costs	-	+	+
Predictability (short term)	-	+	+

Ω. UPC / NATIONAL - PROS AND CONS

	UPC	FRANCE	GERMANY
Judges	⊕ ⊕	⊕	⊕
Risks of retaliation	⊕	⊖	⊕
Means of evidence: seizure/expert	⊕ / ⊕ ⊕	⊕ ⊕ / ⊕	⊖ / ⊕
Closest prior art	⊖	⊕	⊕
Technical knowledge	⊕	⊖	⊖
Claim amendments	⊕ ⊕	⊖	⊕
Substantive law	⊕	⊖	⊖



QUESTIONS?

Casting a Worldwide Net: How Litigation Funders Can Leverage Europe's New Unified Patent Court

March 14, 2023 [Commercial](#), [Public](#), [Special Features](#)

 MOLOLAMKEN


AUGUST DEBOUZY

The following article was contributed by [Lionel Martin](#) (Partner, August Debouzy), [Pierre-Olivier Ally](#) (Counsel, August Debouzy), [Ben Quarmby](#) (Partner, MoloLamken LLP) and [Jonathan E. Barbee](#) (Counsel, MoloLamken LLP).

Europe's Unified Patent Court (UPC) is on the cusp of launch, confirmed for this June 1, 2023. It has been eagerly anticipated by the patent litigation community across the member states—starting with 17 European countries, but expected to extend rapidly to all of Europe minus Poland, Spain, Croatia, and, most notably, the UK.

The UPC has been long in the making: over ten years have passed since the agreement was first signed. What is to be expected of this new court, and what opportunities does it present for litigation funders?

Uniformity and Scale. The principal goal of the UPC is to offer a single, consistent, and coherent court system in Europe for the litigation of patents. Historically, procedural differences in the member states' national patent and court systems meant that the timeline of patent litigation could vary wildly from one jurisdiction to the next. The jurisdictions also differed on substance: infringement, validity, and injunctive relief rulings were not consistently applied across the board. And the one way in which the national jurisdictions were similar—comparatively low damages models—acted as further disincentive for patent owners looking to enforce their rights.

The UPC promises to overhaul that system entirely. It is expected to issue speedy judgments on both infringement and validity. It should set the scene for damages verdicts that are not only more consistent across jurisdictions, but also generally much greater in size—as one would expect for verdicts covering at least 17 member states. And it promises greater accessibility and uniformity insofar as English will be the preeminent language of infringement proceedings in any matter involving allegations of infringement extending beyond a single member state.

The UPC must now live up to that promise, and there is some uncertainty as to how the system will play out in its early stages. Will the court be able to keep up the expected pace? What standards will the court rely on when imposing preliminary injunctions? How will damages awards be limited or expanded? How will the appellate process work? How will early litigants help shape the law and jurisprudence of the UPC?

Those questions and many more will have to be answered in the coming months and years. But if the UPC delivers on even part of its promised mandate, it may represent an exciting new arena for litigation funders working with patent owners to enforce their rights. Indeed, there is reason to believe that the court will strive to be patentee-friendly—at least at the outset—in order to attract its “customers”.

Opportunities for Litigation Funding. Many of the key features of the UPC as currently contemplated, align neatly with the incentives and priorities of litigation funders and patent owners.

- **Broader Geographic Reach.** The UPC makes multi-jurisdictional patent campaigns cost-effective and efficient by allowing plaintiffs to target infringement across at least seventeen countries in one court proceeding. Plaintiffs no longer need to pick and choose the countries in which to enforce their patents. The reach of the UPC is likely to expand further: the UPC is expected to be integrated into European mutual recognition mechanisms that will allow the UPC’s jurisdiction to extend not only to the EU but also to Switzerland, Norway, and the UK. While these mutual recognition mechanisms have long existed, national courts have historically been reluctant to rely on them. The UPC, by contrast, is expected to do so much more regularly.
- **Reduced Transaction Costs.** Reliance on a single proceeding across multiple countries will cut down on the costs of litigating in multiple European countries in parallel. The UPC will therefore dramatically reduce the resources necessary to launch and maintain a multi-jurisdictional campaign in the EU. The UPC will also cut down on the logistics and transactional costs associated with such campaigns. A plaintiff, for example, no longer needs to hire three separate teams to enforce patents in, for instance, France, Germany, and Italy, and pay additional fees for those three teams to coordinate to ensure coherence across jurisdictions.
- **Short Time to Trial.** UPC proceedings will expedite the pace of patent campaigns. Some commentators suggest that proceedings will only take 12-15 months from complaint to final ruling—a significant boon for patent owners looking to promptly and efficiently enforce their rights. If this holds true, and if sustainable, this pace would rival the speed of some of the fastest dockets among U.S. district courts.
- **Efficient Evidence Gathering Procedures.** Unlike the U.S., there is no formal discovery in the UPC, which significantly reduces litigation costs and can expedite proceedings. But the UPC offers several key features that will be of value to patent owners: (i) plaintiffs may move to seize evidence of infringement from a defendant’s premises, and (ii) they may obtain court orders to force defendants to produce documents.
- **Larger Damages Awards.** Since UPC judgments will cover more countries and consumers, the potential damages awards should be considerably larger than they would be in a single jurisdiction. This should help drive up the value of settlements, and put more pressure on

defendants to settle earlier. It also radically tips the scale on the economics of patent litigation funding in the EU. Suddenly, the EU becomes an attractive venue in-and-of-itself for funders—not just an ancillary venue in support of higher-stakes U.S. litigation.

- **Broad Injunctive Relief.** The UPC will allow patent holders to seek injunctive relief across multiple countries in one shot. This too should help drive bigger and earlier settlements—a boon for funders looking for a rapid return on their investment.
- **High-Quality Decisions.** It is expected that the Court will render first-rate decisions for two principal reasons: (i) it has attracted seasoned IP judges from across Europe, and (ii) the judges consist of a mix of legally and technically qualified judges. Furthermore, due to the high specialization of the Court, the number of judges will be quite limited (<100), which may help contribute to greater respect for precedent from fellow judges, which in turn leads to greater predictability for litigants.

Will the UPC be able to deliver on all of these fronts? Only time will tell. But for a savvy funder looking for an early mover advantage in a relatively underdeveloped market, and with the opportunity to potentially help shape early UPC jurisprudence in ways that will benefit patent owners for years to come, these are exciting times indeed....

July 24, 2023

Early Adoption of the Unified Patent Court

Dr. Henrik Holzapfel, Charles (Chuck) Larsen, Diana Pisani

McDermott Will & Emery

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The Unified Patent Court (UPC) opened its doors on June 1, 2023. Nineteen actions were initiated during the first six weeks, across a range of subject areas and case values.

It had been widely assumed that large companies would opt-out their high-value patents, particularly in the pharmaceutical sector. However, there are two cases valued at EUR 100 million in progress. **Amgen, Inc.** has brought an infringement action against **Regeneron Pharmaceuticals** and **Sanofi-Aventis** for infringement of EP 3666797—a patent claiming antigen binding proteins for treating conditions related to raised cholesterol levels—while Sanofi-Aventis has applied for revocation of the patent in a separate action. These cases show that the potential of the UPC as a forum for cross-border enforcement and damages can outweigh the risk of centralized revocation.

Other notable companies asserting patents at the UPC include **Edwards LifeSciences**, **Philips**, and **Huawei**, while the companies on the receiving end of the infringement actions include **Tesla**, **Nestlé Health Science**, **Netgear** and **Belkin**.

The EP 797 cases have the highest values by a considerable margin. The other cases range between EUR 150,000 and EUR 15 million. As expected, Germany is the busiest location for UPC litigation. Three revocation actions have been allocated to the Munich Central Division, while the most popular local divisions are Munich (nine of the 16 infringement cases) and Düsseldorf (three cases).

PATENTEE / LICENSEE	OTHER PARTIES	SUBJECT MATTER	ACTIONS FILED	TOTAL VALUE OF

[Privacy](#) - [Terms](#)

				ACTIONS (EUR)
Amgen Inc.	Sanofi- Aventis; Regeneron	Antigen binding proteins	1 Infringement; 1 Revocation	200 million
Edwards Life Sciences	Meril and others	Prosthetic heart valve	2 Infringement	16 million
AIM Sport Vision	Supponor	Image processing	1 Infringement	15 million
Ocado Innovation Ltd	Autostore System	Storage systems	3 Infringement	14 million
10x Genomics	Vizgen, Inc.	Analyte detection	1 Infringement	10 million
Philips / Access Business Group	Belkin and others	Inductive power transfer	2 Infringement	5 million
KraussMaffei Extrusion	Troester	Extrusion apparatus	1 Infringement	2 million
Avago Tech	Tesla	Power supply control; Transmitter	2 Infringement	2 million
Healios Osaka Uni	Astellas Institute	Retinal pigment epithelial cells	2 Revocation	1 million
Huawei	Netgear	Networks	1 Infringement	1 million
Franz Kadewei	Bette	Bathtub sanitation	1 Infringement	0.5 million
N.V. Nutricia	Nestlé Health Science	Respiratory Tract Infection	1 Infringement	0.15 million

treatment

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UPC already a hit with patentees in Germany

IAM

European Union, Germany | July 5 2023

After much planning and uncertainty, the Unified Patent Court (UPC) has finally opened its gates. The new court aims to be an attractive venue for patent litigation in Europe and a viable alternative to state courts.

With a manageable number of cases – many of which have been filed in Munich – allowing for quick decisions and English being accepted as a language for proceedings in all chambers, the UPC looks to be off to a positive start.

A surferable wave of cases

One of the most appealing features of the UPC is its promise to deliver legal certainty on patent disputes in the form of an oral procedure, to be followed swiftly by a decision within one year. This undertaking is supported by strict deadlines for written submissions, which are generally due after only two or three months and limited to two rounds of exchange of written submissions.

During the UPC's sunrise period, there was significant doubt as to whether that promise could be kept if a large wave of cases flooded the new court system. The legally qualified judges – who primarily work part-time and serve in the pool of judges to support the 14 local/regional chambers – have only limited availability. This sparked uncertainty around the UPC's capacity to handle a higher caseload and plaintiffs voiced fears about the court becoming overwhelmed. A high volume of infringement actions brought in the court's first days could potentially congest the system for years, making applicants hesitant to use the UPC to enforce their patent rights instead of a national court – especially those in Germany, which are held in high esteem.

As of mid-June, however, only around 20 cases have been reported as having been lodged. Roughly two-thirds of these were filed with local chambers in Germany, with the majority of these accumulating in Munich's local chamber. The central division of Munich also received a portion of the remaining cases, highlighting the city as a key destination for UPC proceedings. The German local chambers have thus been able to obtain a sizeable share of cases, which could significantly shape future case law.

English as a language of proceedings

Another element that is likely to attract more cases in the coming months is the last-minute decision made on the morning of the UPC's launch. Germany, along with France and Italy, chose to allow English as a language of proceedings in infringement cases according to Article 49(2) of the UPC Agreement. Previously, at least for the

German chambers, only claims in German were permissible. While the German local chambers displayed mixed enthusiasm about supporting the option of using English throughout the extensive discussions – even if it was agreed upon by the parties – understanding on a supranational level appears to have resolved the language issue.

English may now be chosen as a language of proceedings in all UPC divisions as an alternative or in addition to local languages (except for the Nordic Baltic regional division, which only provides for English). The current rule allows for claims and briefs to be submitted in English, but in the interest of the panel, the judge-rapporteur may order that the local language be used for oral proceedings and decisions with certified translations attached.

This presents an obvious advantage for international disputes, efficiently reducing delays and translation costs. Further, more cases in English allow for greater flexibility for judges handling cases and thereby increases the chambers capacity, as judges of different nationalities to the local chamber will be able to manage those proceedings.

A bright future for the UPC

With all openings for legal judges filled in time and – despite three resignations in June – a broad field of specialised and technically qualified judges, the UPC is now up and running. With a manageable number of cases filed so far, the court's ambitious goal to provide an efficient, Europe-wide forum for patent litigation looks achievable. Recent developments such as the last-minute changes with regard to languages and increasing numbers of unitary patent filings suggest an overall optimism towards the UPC as a new playing field.

Daniel Skiebe

Clifford Chance

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Another Growth Spurt For Legal Funding Industry In 2022

By **Andrew Strickler**

Law360 (February 16, 2023, 12:45 AM EST) -- The legal investing business had another big year in 2022, according to a Thursday report from industry broker Westfleet Advisors, with a double-digit jump in new case investments and more investor money available to back cases.

In an interview with Law360 Pulse, Westfleet chief executive Charles Agee noted that if the industry were to maintain the gains seen in 2022, the size of the industry would approximately double in five years.

"That's brisk growth for any industry," he said.

Westfleet's annual report found 44 active funders in the commercial litigation funding arena, and a 16% increase in new commitments to law firms and their clients — the largest **year-over-year jump** seen in the four years since the survey was started.

Upwards Growth for Legal Funding Industry

The Westfleet report found the size of new funding in 2022 jumped 16%, the largest year-over-year gain in at least four years.

2022	\$3.2B
2021	\$2.8B
2020	\$2.5B

Source: Westfleet Advisors • Created with [Datawrapper](#)

The industry had total assets under management of \$13.5 billion in 2022, up from \$12.4 billion in 2021. In 2020, it was \$11.3 billion.

The report put the average deal size across all types of transactions at \$8.6 million, up from \$6.5 million in 2021. Single-matter deals averaged \$4.3 million, up from \$3.5 million. Portfolio investments, in which investors back groups of similar cases, averaged \$10.5 million, up from \$8.5 million in 2021.

"Thus, across all deal types, the average size of the capital commitments increased in 2022 versus 2021," the report states. "However, we believe 2021 may have been an aberrational year since the 2022 figures are more reflective of averages in prior years."

The survey gathered transactions from July 1, 2021, to June 30, 2022. The data, which came from a subset of 44 active funders and publicly available data, reflects only funding activity involving a U.S.-based firm as lead counsel, a U.S. counterparty or a U.S. litigation or arbitration.

Agee said pent-up demand and new investments going to claims that didn't get off the ground during the COVID-19 pandemic likely played a factor in the year's big gains.

A marked increase in funders' use of insurance, along with a growing secondary market for funding investments, may also be having a marginal impact by helping industry players spread risk and find ways to invest in cases that might have otherwise gone unfunded.

"I'd love to say those innovations are really fueling the growth rate, but in reality, I don't think they have had a chance to have that much of an impact," Agee said. "What I do think we're seeing is a solid, robust, year-over-year growth rate, even in the face of some headwinds, and at the core of that is significant demand for litigation funding."

The report found the percentage of capital going to "claim monetization" increased to 14% from 8% in 2021, an increase the report attributed to "activity directed at corporate plaintiffs in antitrust litigation."

Patent litigation continues to be a major arena for the industry, representing 21% of all capital commitments last year. While patent case allocations were at 29% the previous year, Westfleet said that may have been driven up by a small number of "outsized" portfolio deals.

Of total allocations, 28% went to the biggest U.S. law firms, down from 41%. Nearly \$1 out of every \$5 committed to BigLaw cases were part of a portfolio deal. In 2022, lawyer-directed deals comprised approximately 61% of capital commitments, up from 52% in 2021.

The report doesn't capture return-on-investment data, case rejection rates, or other metrics for an industry that works largely behind confidentiality agreements and strongly resisted calls for court disclosures.

In a January report on the litigation funding market, the U.S. Government Accountability Office said researchers had found **significant gaps** in information needed to assess the impact on civil litigation more broadly.

In its Thursday report, Westfleet noted only a "few hundred commercial litigation and arbitration matters" are funded annually in the U.S.

"Compared to the millions of civil cases filed annually in the U.S. and the hundreds of billions of dollars spent litigating these cases, the U.S. commercial litigation finance industry is but a rounding error," the report states. "While we expect the industry to continue to grow, we do not expect its size relative to the U.S. civil litigation system to materially change."

--Editing by Lakshna Mehta.



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Unified Patent Court Advantages Leave US Trailing Behind

By **Vincent Angwenyi, Roberto Dini and Mario Franzosi** (June 22, 2023, 4:16 PM BST)

The Unified Patent Court and Unitary Patent System, which launched on June 1, will benefit patent holders and add to Europe's attractiveness as a litigation venue. It will also have a broader impact on the global patent landscape.

Over the past decades, U.S. patent enforcement has been handicapped by inter partes review of issued patents, the weakening of injunctive remedies by the U.S. Supreme Court's 2006 decision in *eBay Inc. v. MercExchange LLC*[1] and other actions taken across the U.S. government. Amplifying the shortcomings of litigation in the United States, the new UPC regime will put further pressure on American legislators.

The difference between the United States and Europe in the treatment of patents is increasingly clear against a backdrop of continuing growth of industries depending on patents and their efficient enforcement. As readers are well aware, and as confirmed in a recent study of the U.S. National Science Foundation in 2020,[2] knowledge and technology-intensive industries contributed some 11% of the global gross domestic product.

The importance to national GDP, employment and trade flows has been demonstrated in the United States, as assessed by the U.S. Patent and Trademark Office in March 2022,[3] and in the European Union, as highlighted in the joint report published in October 2022 by the European Patent Office and the EU Intellectual Property Office.[4]

Further studies, for example issued by the Information Technology and Innovation Foundation in 2019,[5] indicate that stronger intellectual property rights correlate to increased trade, with countries having similar levels of IP rights protection.

As these findings indicate, a robust framework for the protection, including enforcement, of IP rights is paramount.

The Unitary Patent System and the Unified Patent Court

While the regional importance, and global trade flows, of knowledge-intensive industries remain robust, the EU and the U.S. have taken different approaches in enforcement of patents. This difference has an impact today on enforcement choices, in the midterm on investment and levels of innovation and ultimately on GDP and living standards.

Europe has moved ahead by taking one of the most consequential steps in relation to the enforcement of patents: the establishment of the UPS.[6]

As reflected in the regulation establishing unified patent protection, the objective of the UPS is to enhance cooperation between the participating member states in the field of patents by making available a European patent with unitary effect.[7] Pursuant to an agreement among participating member states, it also sets up a UPC operating under its own statute to improve the enforcement framework of patents and ensuring expeditious and high-quality decisions.[8]

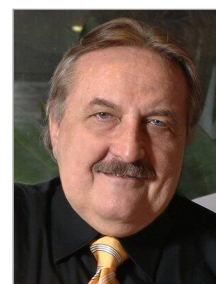
Like any negotiated framework, the UPS was not realized overnight. Although the core regulations establishing the UPS were adopted in January 2013, the UPS entered into force on June 1. It essentially introduced two main elements:

- The UPC whose exclusive jurisdiction covers all European patents and European patent applications, European patents with unitary effect as well as supplementary protection certificates; and
- A unitary patent right that provides a single patent right covering all participating member states that take part in the enhanced cooperation.

Currently, 17 member states of the EU have ratified the UPC agreement: Austria, Belgium, Bulgaria, Denmark,



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Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Slovenia and Sweden. Spain, Poland and Croatia decided to stay out of the UPC.

The remaining EU member states are signatories but have not yet ratified the UPC agreement.[9]

The establishment of the UPC with decision-making powers applicable to the participating member states is a bold step, with a number of potentially significant benefits for both patent owners and implementers of patented technologies.

The UPC is essentially a new specialized supranational court that will be starting from a clean slate but drawing upon the experience of its judges and subject to review by the European Court of Justice.

The UPC has a wide range of remedies that it may employ in case of infringement, including wide discretion in relation to the grant of injunctive relief against infringers as well as against intermediaries whose services are used by infringers.[10]

For European patents with unitary effect, this would mean an injunction covering the territory of all participating member states. For European patents, this would cover the territory of the participating member states in which the European patent has been validated.

There is indeed a debate whether the local divisions of the UPC will follow the injunction practice of the participating member state in which the division is located. Some commentators consider that the UPC may adopt a patentee friendly approach, similar to that taken by the German and Dutch courts.[11]

Another significant benefit of the UPS is the increased flexibility in terms of strategic considerations for enforcement of patents in Europe.

While there is certainly the strategic choice for a patent owner to opt out their European patents from the UPS during the transition period and choose instead to take a national route in terms of enforcement,[12] the true value of the UPS lies in the ability to enforce European patents with unitary effect in a single court instead of several national courts.[13]

This means that patent owners can obtain an injunction covering the territory of the participating member states, while of course taking the risk that the UPC may, conversely, take the decision, equally applicable across that territory, to revoke the patent.[14]

The ability to enforce patents in one court instead of several national courts in Europe will potentially result in significant cost savings, not only as it relates to court fees, but also costs for legal counsel as well as ancillary expenses. This is particularly the case for industries that typically tend towards EU-wide patent protection.

Looking, for instance, at the court fees,[15] the UPC has both a fixed fee element as well as a value-based fee for cases with a value above €500,000 (\$547,873).

The maximum value-based fee is €325,000 (\$356,117) for cases with a value exceeding €50 million (\$54.7 million). The value-based fee is not applicable to revocation cases or counterclaims. There is additionally a broad scale of recoverable costs depending on the value of the case.

To put this in context, looking broadly at the cost of litigating in Germany, a first instance infringement action, together with a revocation action, with a combined value of around €10 million (\$10.9 million) would give rise to court fees of around €180,000 (\$197,240), with the recoverable cost element being around €200,000 (\$219,156).

A similar UPC action has been calculated to give rise to court fees of around €63,000 (\$69,034), with the recoverable cost element going up to €800,000 (\$876,549).[16]

A replication of such fees on a national level across several European countries, taking into consideration likely variations in these costs as well as national peculiarities in patent enforcement, such as the bifurcated system in Germany, which affects the duration of actions, makes it easy to see the benefit in terms of uniformity of costs and procedure that a central action before the UPC will offer. A central action will also bring significant savings in terms of costs for legal counsel and ancillary costs.

Considering the size of the UPS market, the overall cost savings in this regard as compared to litigating in the U.S. are significant, thus making litigation before the UPC an attractive first choice for patent owners.

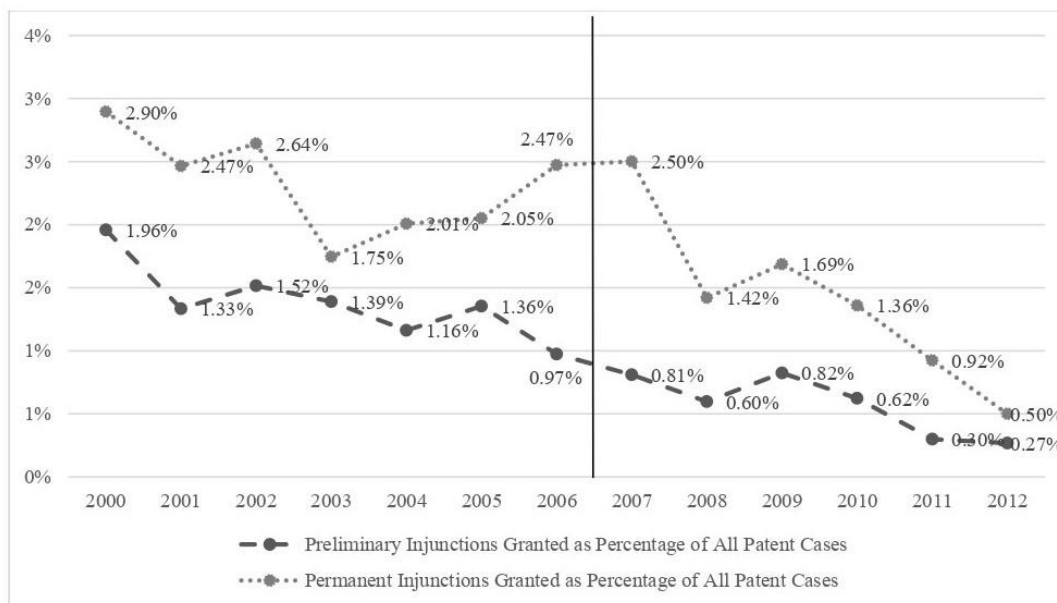
The Current State of Patent Enforcement in the U.S.

Compared to the evident progress in patent enforcement in Europe, patent owners in the United States have faced increasingly difficult challenges in protecting and enforcing their IP rights in recent decades.

First, in 2006, the Supreme Court's decision in eBay overturned the long-standing American rule that courts should issue permanent injunctions against patent infringement absent exceptional circumstances. As reflected in a 2015

study,[17] the effect of the ruling drove the permanent injunction grant rate to miniscule levels.

Graph: Rate of Injunctions Granted Sought Before and After eBay Based on Total Patent Cases



In 2007, the Supreme Court, with the *KSR International Co. v. Teleflex Inc.* decision,[18] again took aim at patent owners, criticizing the U.S. Court of Appeals for the Federal Circuit's "teaching, suggestion, motivation" test for obviousness under Title 35 of the U.S. Code, Section 103.

In its place, the Supreme Court proposed several criteria that could be used to invalidate a claim for obviousness. The effect of the Supreme Court's ruling was once again striking: One study by the Albany Law Journal of Science and Technology found a sevenfold increase in the willingness of district courts to invalidate patents under Section 103 after *KSR*.[19]

But the Supreme Court was not finished.

In the *Quanta Computer Inc. v. LG Electronics Inc.* case[20] in 2008, the court ruled against patent owners on the issue of exhaustion. In 2010, it took up a series of cases related to subject matter eligibility under Title 35 of the USC, Section 101, concluding with the landmark *Alice Corp. v. CLS Bank International* decision in 2014.[21]

Again, the Supreme Court's jurisprudence had a massive impact. Compared to the five years prior to the *Alice* decision, the first five years afterward saw a 1,056% increase in the number of decisions finding ineligible claims under Section 101.

The court then took aim at venue, the location of the court of first instance where the patentee can sue for infringement. In 2017, the court confirmed in *TC Heartland LLC v. Kraft Foods Group Brands LLC*[22] the limitation in the patent venue statute that

any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

Once again, the impact was immediate and significant, as filings in plaintiff-favored districts fell precipitously.[23]

The Supreme Court has not been alone in the United States in undercutting the value of patents and hobbling their enforcement. The legislative and executive branches also have taken actions adverse to patent rights.

In 2011, Congress applied further pressure to patent owners with the passage of the Leahy-Smith America Invents Act. Among its provisions, it established a new post-grant validity challenge procedure, inter partes review.

The procedure allows for the filing of a petition to challenge the prior art validity of any granted patent. The petitioner can be any party, though if the petitioner is the target of a patent infringement lawsuit, the petition must be filed within a year of service of the complaint.

The petition is considered by the Patent Trial and Appeal Board and if the PTAB finds that the petition demonstrates a "reasonable likelihood" that the challenged claims are invalid, the review is initiated.

By and large, inter partes review has been a powerful tool against patent owners. Since its inception, 53% of petitions resulted in at least some claims cancelled, amended or disclaimed, excluding settlements and procedural dismissals.

Further, once instituted, just 10% of reviews terminated with all claims upheld as valid. And finally, district courts have granted stays of litigation pending inter partes review in well over 70% of ongoing cases.[24]

These stays often result in a delay of the court proceedings for two years or more, as PTAB decisions are reviewed on appeal. While the PTAB must follow the "reasonable likelihood" test in order to institute a petition, nearly three-fourths of all PTAB decisions on institution have in fact result in allowing the petition to go forward.

Perhaps most distressing for patents owners is the fact that an inter partes review can be instituted any time over the life of a patent. Thus, a patent owner gains very little certainty regarding the validity of the patent even after going through an exhaustive review process during the prosecution of the underlying application.

This also undermines the authority of the USPTO when it grants a patent. Given the high invalidation rates at the PTAB, a decision to grant a U.S. patent by the patent office might be thought of as merely a provisional decision.

Thus, with no time limitation, there is a considerable risk that an inter partes review might be filed, which represents a significant threat to the validity of the patent. This sword of Damocles threatens to interfere with all licensing and enforcement actions of a patent owner throughout the life of the patent.

In addition, this effort made by a third party to check the patent validity before the PTAB seems to be a duplication of efforts, taking into account that a validity check is already provided during the litigation proceeding.

Therefore, attacking the validity of a patent before the PTAB, not knowing if this patent is commercially valuable and will be asserted against somebody in the future, should be considered as a waste of time and money, done only in favor of particular economic interest meant to increase the already exorbitant costs of litigation in the United States.

All this stands in direct contrast with the European system, in which members of the public can only challenge validity of a published patent within nine months of publication. Otherwise, validity challenges can only be filed by parties that have been sued for infringement.

Finally, to add further insult to injury, the executive branch has added additional challenges to patent owners seeking exclusion orders at the U.S. International Trade Commission.

In 2013, the Obama administration overrode the ITC exclusion order that would have banned the importation of certain iPhones and iPads in light of infringement of Samsung standard-essential patents. In its letter addressed to the ITC, the administration cited "various policy considerations" relating to SEPs and "the effect on competitive conditions in the U.S. economy and the effect on U.S. consumers." [25]

Conclusion

The above cases, statutes and executive actions are not exhaustive, but outline the increasing challenges facing innovators in the U.S. The basis, means and forums within which a patent can be found invalid have increased. At the same time, the available remedies for patent infringement have decreased.

Moreover, the treacherous path to enforcement of patent rights in the United States comes at a significant price, with attorney fees through trial averaging several million dollars. The pendulum has been swinging in favor of infringers for so long that patentees wonder when it will ever swing back. They begin to despair of whether the pendulum has broken off.

It is not the intention of this article to paint the picture that the UPC does not have its disadvantages for innovators, including the uncertainty of a new system with untested value, the potential to have a central revocation, fragmentation of jurisprudence as well as having a multilayered legal structure in Europe.[26]

Rather it is to highlight how the UPC represents an effort to support innovators with an organized, cost-effective and meaningful path to enforcing IP rights. We take the liberty to suggest that if the United States hopes to maintain its position as a leader in innovation, it may be wise to follow suit and reverse its present course.

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