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IP Newsletter Switzerland

System Change in Swiss Patent Litigation to Improve Quality and Efficiency of Proceedings

The 1st of January 2012 marks an important date for patent litigation in Switzerland with the new Swiss Federal Patent Court beginning its work. From that day on, the Federal Patent Court will be the exclusive court of first instance for patent-related disputes in Switzerland, replacing the currently 26 cantonal courts dealing with patent cases.

The new Federal Patent Court is expected to improve quality and efficiency of adjudication of patent disputes in Switzerland. It will be composed of two full time judges, namely Messrs Dieter Brändle and Tobias Bremi, and of 31 (part-time) adjunct judges of whom 20 have technical backgrounds (patent attorneys) and 11 have patent law expertise (patent litigators). The adjunct judges will sit on a case by case basis, depending on the expertise required by the particular case.

The Court's composition is designed not only to ensure high quality adjudication of patent matters, but also to enable the Court to handle a large caseload in a swift and cost efficient manner. Since for most cases the Federal Patent Court will have the required expertise within its own ranks, it will not have to appoint technical experts and to rely on their expert reports. Clearly this will increase the efficiency and the speed of the proceedings, including the proceedings for injunctive and other interim relief.

The Federal Patent Court will have exclusive jurisdiction over claims concerning patent validity and infringement as well as over requests for granting compulsory licenses. In other matters related to patents, such as claims for entitlement or claims arising out of a patent license and/or a research and development agreement, there will be a concurrent jurisdiction of the Federal Patent Court with the 26 cantonal courts. This means that the plaintiff is afforded the freedom to choose the convenient forum, which on account of the judges' expertise and further procedural benefits in many cases will be the Federal Patent Court. If the plaintiff however chooses to bring his claim before the cantonal court (e.g., claim for royalties under a license agreement), the case will be transferred to the Federal Patent Court in case the defendant raises a counterclaim for invalidity or (non-) infringement of the patent in question. If invalidity or (non-)infringement of a patent is merely raised as an objection, the cantonal court must stay the proceedings and set a deadline within which the defendant may file an invalidity or (non-)infringement 'action' with the Federal Patent Court.

This procedural characteristic of transferring invalidity and infringement issues to the Federal Patent Court is also expected to work as a strong incentive to lodge any patent related claims directly with the Federal Patent Court.

In cases where the plaintiff claims infringement of patents and other intellectual property rights (e.g., copyrights, designs, trademarks), the plaintiff will have to bring separate claims against the infringer before the Federal Patent Court (patents) and the competent cantonal court (other IP rights), respectively.

Within its field of exclusive or concurrent jurisdiction, the Federal Patent Court will also be empowered to rule on injunctive and other interim relief. As a rule, interim measures will be decided by a single judge. In cases where technical questions are at issue, the decision on interim relief will be made and issued by a panel of three judges, one of whom has the required technical background.

The fact that as from 1st of January 2012 one single court will be competent to decide over *ex parte* injunctions prohibiting the sale of allegedly patent infringing goods makes it easier for the prospective infringer to file a protective brief in anticipation of such *ex parte* request. In the past, the prospective infringer had to guess with which of the 26 cantonal courts the

patent owner would possibly file the request for *ex parte* injunctive relief. As from 1st of January 2012, it is clear that such request has to be filed with the Federal Patent Court. Once the protective brief is filed, the Federal Patent Court must keep and consider it for a period of six months. The protective brief is only communicated to the opposing party if and when a request for interim relief is filed with the court.

Proceedings before the Federal Patent Court will mainly be governed by the Federal Code of Civil Procedure (CCP) in force since 1st of January 2011. There are however some specific procedural rules applicable in proceedings before the Federal Patent Court which are worth to be highlighted: first, a new provision of the Swiss Patent Act coming into force on 1st of January 2012 entitles a patent owner to request from the Court a precise description of the allegedly patent infringing processes, products and/or means of production based on a mere *prima facie* showing of actual or imminent infringement (similar to the French *saisie-contrefaçon*). Complementary to this specific form of pre-trial gathering of evidence for infringement (which has been dubbed *saisie helvétique*), the CCP in general allows a court to order pre-trial evidentiary measures in case of a mere showing of legitimate interest, which interest could lie in the need to properly analyse the merits of a potential lawsuit before lodging the claim.

A further characteristic of the proceedings before the Federal Patent Court is that the proceedings may be conducted in English provided the Court and the parties involved agree. Anyway, the parties are free to use the German, French or Italian language for their written and oral submissions even if the language of the proceedings as designated by the Court is a different one. Clearly, in the context of a pan-European patent litigation, this flexibility in languages has the potential to reduce pre-litigation efforts and costs for starting proceedings in Switzerland.

In terms of transition to the new patent litigation system, there are still some uncertainties as to what will happen to the patent cases which are pending on 1st of January 2012 before one of the 26 cantonal courts. As a rule, these cases will be transferred to the new Federal Patent Court provided that the cantonal proceedings are not at an advanced stage (i.e., only if the main hearing has not yet taken place). Therefore, except where the circumstances require immediate action, it is not recommendable to commence a patent litigation in one of the 26 cantonal courts later this year as the case will anyway be transferred to the Federal Patent Court whose judges will have to familiarise themselves with the case.

In view of the above, it is fair to conclude that patent litigation in Switzerland is about to make a significant step forward and now has the means to close the gap to other leading venues for patent litigation in Europe. The fact that the decisions of the Federal Patent Court can only be appealed to the Federal Supreme Court (one-instance appeal system) further increases the speed of the proceedings and adds to the attractiveness of Switzerland as a venue for patent litigation.

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