



The Unified Patent Court - A Nordic Perspective

Vilhelm Schröder | Munich, 6 October 2023

Agenda

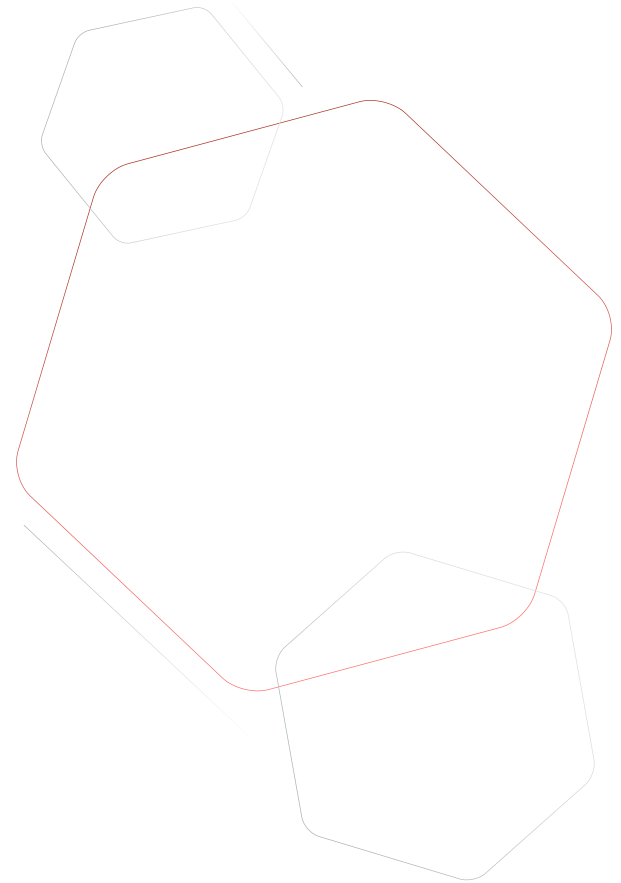
- › 1. Structure of the Court
- › 2. The Helsinki Local Division
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- › 4. Applicable Law
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- › 6. Publicity of Hearings and Trade Secret Protection
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- › 8. Shopping Time?
- › 9. Questions & Potential Challenges

Introduction



1. Structure of the Court

- › “One court”
- › The UPC consists of a Court of First Instance, a Court of Appeal, a Registry, and a Patent Mediation and Arbitration Centre
- › The Court of First Instance contains
 - a Central Division with its seat in Paris and a section in Munich (and Milan to come)
 - thirteen local divisions
 - one regional division
- › The Court of First Instance usually has a composition of three judges consisting of a combination of national judges and judges selected from a pool of judges
- › The pool of judges consists of all legally qualified and technically qualified judges from the Court of First Instance who are full-time or part-time judges of the Court





2. The Helsinki Local Division

- › Location: Helsinki, Finland (Located in the premises of the Market Court)
- › The languages of proceedings used by the Local Division is English Finnish and Swedish
- › The panel consists of one legally qualified national judge and two legally qualified judges of other nationalities selected from the pool of judges
- › The legally qualified judge of the Helsinki local division is Judge Petri Rinkinen

3. The Nordic-Baltic Regional Division

- Sweden is part of the Nordic-Baltic regional division with Estonia, Latvia and Lithuania
- Seat: Stockholm
 - However, the regional division may hear cases in multiple locations
- Language of the proceedings is English
- The panel consists of two legally qualified judges who are nationals of the member states of the regional division and one legally qualified judge from the pool of judges who is not a national of one of the member states of the regional division
- Judge Stefan Johansson (Sweden) and Judge Kai Härmand (Estonia) are the legally qualified judges of the Nordic-Baltic regional division



Rules



4. Applicable Law

- Art. 20 UPCA
“The Court shall apply Union law in its entirety and shall respect its primacy.”
- Art. 24 UPCA
In full compliance with Article 20, when hearing a case brought before it under this Agreement, the Court shall base its decisions on:
 - (a) *Union law, including Regulation (EU) No 1257/2012 and Regulation (EU) No 1260/20121 ;*
 - (b) *this Agreement;*
 - (c) *the EPC;*
 - (d) *other international agreements applicable to patents and binding on all the Contracting Member States; and*
 - (e) *national law.”*
- Note: Requests for preliminary rulings from the CJEU (Art. 21 UPCA)



5. Jurisdiction of the UPC

- Art. 32 UPCA: Exclusive jurisdiction on (classical) European patents, unitary patents, SPCs issued for a product covered by such a patent
 - Jurisdiction on actions for actual or threatened infringements and related defenses, actions for declaration of non-infringement, actions for provisional and protective measures and injunctions, actions for revocation and counterclaims for revocation
- During the transitional period actions relating to (classical) European patents (not European Patents with unitary effect) may alternatively be brought before national courts
- Competence of the divisions of the Court of First Instance:
 - Infringement & PIs
 - Court where infringement (or threatened infringement)
 - Defendant's domicile
 - Invalidity
 - Central division; Or, if in the form of a counterclaim, also local / regional division possible
- Overlapping proceedings: How will the court rule e.g. on *lis pendens* questions and requests for stay?

6. Publicity of Hearings and Trade Secrets

- Art. 45 UPCA: The proceedings shall be *open to the public* unless the court decides to render them confidential, to the extent necessary, in the interest of one of the parties or other affected persons, or in the general interest of justice or public order
 - Possibility to hold the trial behind closed doors for example when trade secrets are being discussed or disclosed to the extent this is necessary in the interest of one of the parties (the trade secret holder)
- Rule 262 (1) RoP: Decisions and orders to be *published*. Written pleadings as well as evidence generally *public*, unless a party has requested that certain information be kept confidential and have provided specific reasons for such confidentiality
 - For pleadings and evidence: “reasoned request” to the Registry required
- Can one of the parties and/or their representatives also be excluded from certain parts of the hearing or from viewing documents?
 - Problematic from a fair trial point of view

7. Opt-out and Opt-out Withdrawal

- UPCA includes a possibility of opting out from the exclusive competence of the UPC
 - Effect: only national courts have competence
- Note: Opt-out should be done
 - Before the end of the 7-year transitional period; and
 - *Before* one is sued before the UPC
- To consider: Risk of geographically broad revocation. But on the other hand, infringement judgments also broad scope
- An opt-out can be withdrawn at the patent holder's discretion, but only if there are no actions pending before the national courts
 - Once an opt-out has been withdrawn, it cannot be reinstated



Choosing Forum





8. Shopping Time?

- A “battle of courts” to emerge?
 - Many courts may have jurisdiction simultaneously before action launched
- At least four factors matter when choosing forum (both within the UPC and *vis-à-vis* the national courts)
 - i. Jurisdiction (dealt with previously)
 - ii. Speed
 - iii. Quality of the Proceedings
 - iv. Quality of the Rulings

ii. Speed

- It will be important how fast the court can hand down PIs when product expected to enter the market
 - Speed can be particularly important for certain industries
- But also relevant how fast rulings will be given in main matters on infringement and invalidity
 - If infringement actions take too long, that is a problem for patent holders
 - If invalidation actions take too long (and infringement action not stayed), that may be problematic for defendants



iii. Quality of the Proceedings

- › Do the judges have a good “grip” of the proceedings
- › How are proceedings managed, focus only on disputed issues? How are the important questions narrowed down? And is irrelevant evidence disallowed?
- › Questions from the panel in the proceedings:
 - To witnesses, experts and/or counsel
 - Civil procedure, how broadly should the court ask questions? What kind of questions should / can the court ask?
 - Difference between infringement and invalidation proceedings?
- › Impartiality key
 - Also for the technical judges

iv. Quality of the Rulings

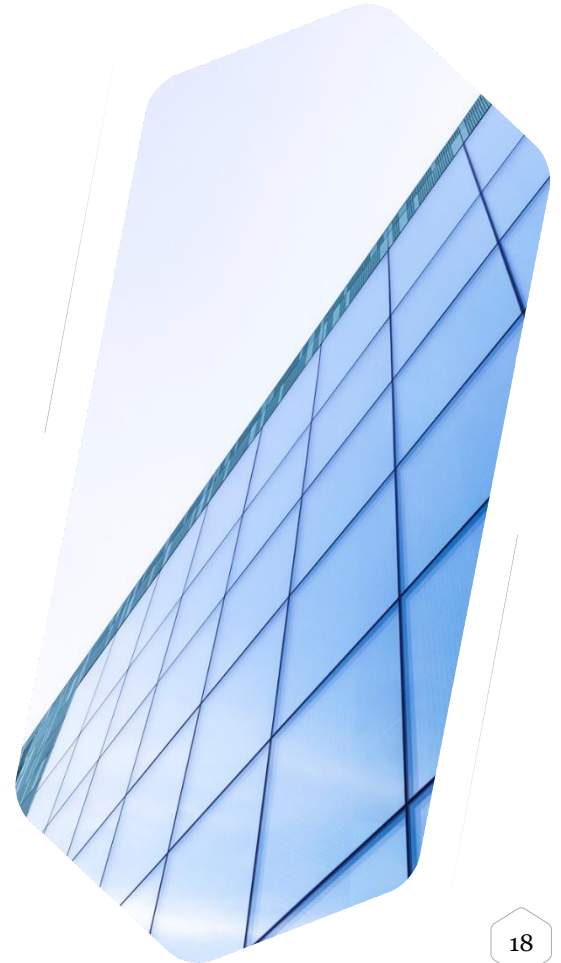
- › Not a good development if only race related to which court is most patent friendly
 - Bad spiral, and wrong yardstick(?)
 - Better yardstick: objective quality of rulings
 - Importance of central division and especially the appellate court
 - Need to balance interests and ensure uniformity of rulings
 - In which circumstances will patents be invalidated, and on which grounds
 - Clearly weak patents should not survive, but strong patents should
- › How well are the rulings written
 - Legal grounds
 - Understanding of the technical field
 - Well-reasoned interpretation of facts and evidence
 - Operative part

Questions & Potential Challenges



9. Questions & Potential Challenges (1)

- The effect of less extensive oral hearings and hearing of experts and witnesses, compared to e.g. Finnish procedure? Good or bad?
- “Cultural” differences – pros and cons
 - Problems may arise if judges let their own rules and practice influence too much, without adequately taking into account all the judges’ backgrounds and the that this is a *new* system
 - On the other hand, influence from many systems might lead to best options from each system being chosen and “bad habits” being eliminated



9. Questions & Potential Challenges (2)

> Enforcement?

- UPC rulings enforced under *national* rules
- Will the national enforcement offices be able to fully enforce the rulings? Will the enforcement vary, depending on where it takes place? Should it?
- Can all the divisions of the UPC draft the operative part of the rulings taking into account the enforcement laws and practice of *all* member states
 - May be difficult
- Further harmonization needed at some point?

> Costs?

- May be a problem especially for small and medium sized companies
 - But note: small and micro companies can get a fee reduction

9. Questions & Potential Challenges (3)

- › A “battle of courts” (aka forum shopping) to emerge?
- › Many courts may have jurisdiction simultaneously before action launched
- › Not a good development if only race related to which court is most patent friendly
 - Bad spiral, and wrong yardstick
 - Better yardstick: objective quality of rulings
 - Importance of central division and especially the appellate court
 - Need to balance interests and ensure uniformity of rulings
 - In which circumstances will patents be invalidated, and on which grounds
 - Clearly weak patents should not survive, but strong patents should
- › Overlapping proceedings: How will the court rule e.g. on *lis pendens* questions and requests for stay?

9. Questions & Potential Challenges (4)

- › Publicity of briefs and evidence
 - Where will the line be drawn and on which grounds?
- › Trade secret protection
 - How will the court protect trade secrets in relation to the public? How high will the threshold be?
- › What will be the timetable for resolving issues with the CMS and have a fully working system?



Thank you!

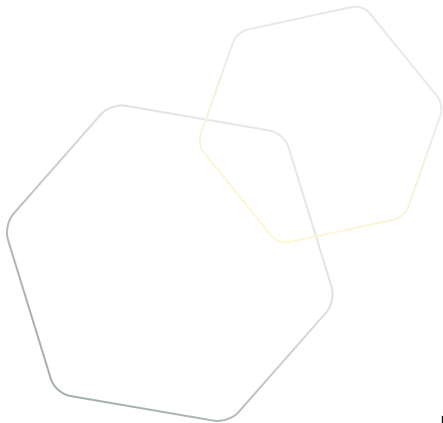


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