The sick patent

With controversy over languages for the proposed community patent having induced deadlock, this ambitious Europe-wide project is close to flatlining. But at least a new agreement has delivered a defibrillating burst to the current system reports JEREMY FLEMING

Continued failure by the EU to take forward the idea of a new community patent was thrown into relief last month when the French parliament and senate ratified the London Agreement, a measure designed to make the existing fragmented European patent application system easier. Over a period of many years there has been an attempt to harmonise the patents system within the union, but EU proposals have been dogged by arguments over language and the workability of a new patents model. This new development will put further pressure on member states to go back to the drawing board.

The current European patent application is made in one of the European Patent Office's three official languages: English, French and German, but then has to be translated into the official language of those states in which the patent owner seeks protection. A considerable part of the cost of obtaining protection under the European Patent Convention is swallowed up in acquiring these translations, and in order to gain protection in all 32 states party to the convention, owners need to translate patents into 22 languages. In 2000 the London Agreement proposed that states could nominate one of the convention's official languages as an 'agreed language' and allow patent proprietors to lodge in that language, with only two further translations required in the official languages. Now that France has ratified the agreement it can come into force, since the country was the only remaining key signatory required.

The move will not impact on lawyers as much as on patent agents who traditionally carry out such translation work, but it is significant given the ongoing situation of proposals for a European community patent on the emergency ward of European legislation. Internal market commissioner Charlie McCreevy recently said that the EU "simply must deliver on the community patent and sound litigation agreements because in today's increasingly competitive global economy Europe cannot afford to lose ground in an area as crucial as patent policy". But despite Brussels for years advocating reform of the bloc's heavily fragmented and cumbersome patent system, progress has run into opposition from national capitals.

The plan to set up a community patent that would grant inventors protection across all EU member states had to be abandoned four years ago because governments were unable to agree on a language regime for the new patent. In December last year the Commission suffered a fresh setback when countries, led by France, prevented the publication of a more radical version of the patent strategy. In the absence of

Main sources of ongoing controversy over the community patent are the resistance of countries such as Spain and Italy to accept the proposal that patents should be filed in English, French or German and complaints from virtually all countries that existing provisions relating to translating the claims into all EU languages are unworkably expensive

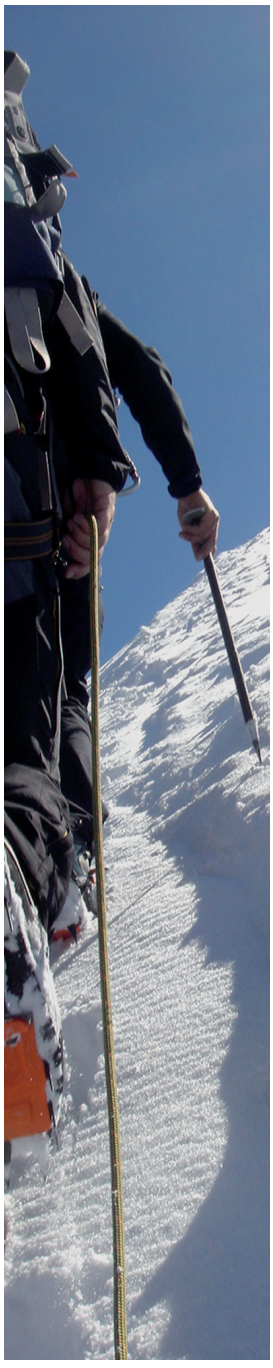
progress on the community patent, the Commission latched onto the draft European Patent Litigation Agreement (EPLA), which seeks to create a unified system for handling patent disputes, including a string of special patent courts, as some form of interim solution. In November 2006, an informal panel of judges from different European countries met in San Servolo, Italy, and adopted rules of procedures for the EPLA court. They signed the so-called 'Second Venice Resolution', and it was this that the Commission hoped to endorse. But in February this year a leaked interim legal opinion of the European Parliament's legal service gave a negative opinion on the EPLA, concluding that it would constitute a breach of article 292 of the EC Treaty.

EPLA's plan was broadly welcomed by practitioners. Differences of national courts' approaches to patent disputes are a source of irritation to lawyers. António de Magalhães Cardoso, a partner in the Lisbon office of Vieira de Almeida & Associados, says that the problem of inconsistency is the most pressing in sectors which rely on pan-European commercial strategies, such as pharmaceuticals providers. National courts also have notoriously changeable approaches to patents disputes. This is evident in Austria at the moment, where Lothar Wiltschek, head of Wiltschek Rechtsanwälte in Vienna, says that government attempts to remove the Austrian Patent Office's jurisdiction over patents disputes have not been welcomed by the legal profession: "Under new constitutional proposals the administrative courts will now deal with patent cases and not the patent office. This is a problem because there is little expertise on patent issues within the administrative courts."

However the EPLA plan has many detractors within the profession as well according to Mr Cardoso: "Many perceive that the EPLA process would create a regime more weighted in favour of patent holders rather than the alleged infringers, and there is also a strong desire to see a choice of forum maintained – in other words, to avoid a situation which would see patent cases sent through an EPLA system by mandate rather than discretion."

Paris-based Gide Loyrette Nouel partner Grégoire Triet comments: "The decision of France to ratify the London Agreement is I think very different from the EPLA issue. Litigation is much more complicated because it would be harder to accept a harmonised approach to enforcement that could see German or English languages and lawyers come to dominate procedure. This is especially the case since more than half of European patents are registered in English, 20 per cent in German and fewer than ten per cent in French. French lawyers might consider that a centralised EPLA system would see domination of the enforcement system by English lawyers."

Language issues are also the main source of friction within the community patent debate. The idea for an EU-wide patent began in the 1970s and has been dogged by problems relating to language translation and timing ever since. In 2000, renewed EU efforts resulted in a Community Patent Regulation (CPR),



which proposed that a patent application should be filed in only one language (English, French or German) and would be examined by the European Patent Office in Munich. The claims of the patent, once granted, would then have to be translated into all EU languages. However, the patent would not be enforceable against an entity until it is provided with a copy of it in its own national language. The CPR would also establish a court holding exclusive jurisdiction to invalidate issued patents; thus, a community patent's validity will be the same in all EU member states.

Dialogue regarding the community patent made clear progress in 2003 when a political agreement was reached, but a year later it foundered. In particular the time delays for translating the claims and the text of the claims in case of an infringement remained problematic issues throughout discussions and in the end proved insoluble. In January last year the EU launched a public consultation on how future action to create an EU-wide system of patent protection could best take account of stakeholders' needs. But although the community patent was one of the issues the consultation focused on, there is still no agreement.

The main sources of ongoing controversy are the resistance of countries such as Spain and Italy to accept the proposition that patents should be filed in English, French or German, and complaints from virtually all countries claiming that the existing provisions relating to translating the claims into all EU languages are unworkably expensive. Philip Westmacott, head of Bristows' London IP department, says the fundamental problem with the community patent process is that the aim is to create an improved, more harmonised, system but that the proposals lying on the table do not represent an improvement: "That is what industry told the Commission in reply to its review process on the discussions last year." He adds: "People are increasingly suggesting that if the proposals don't work something entirely new should be considered."

> French ratification of the London Agreement means the current unharmonised patents system should become more efficient which may put greater pressure on the Commission to find a solution to the community patent stalemate

For now, French ratification of the EPO means that the current unharmonised patents system should become more efficient. This should in turn put greater pressure on the Commission to find a solution to the community patent stalemate, according to Mr Westmacott, since "the better the fragmented system is, the more of a genuine innovation any replacement must be".

But perhaps it also offers some glimmer of hope. Gide Loyrette's Mr Triet notes: "Given that the London Agreement has now been ratified by France there may be more opportunities to revisit the community patent at ministerial level in the coming months." Amsterdam-based De Brauw Blackstone Westbroek partner Gertjan Kuipers agrees, "now there has been movement in France on the London Agreement, that could signal a renewed chance for EU member states to consider ways around the impasse within the dialogue on the European community patent".

But those hopes could well fade fast, if the past is anything to go by. The community patent is running out of false dawns, and if the idea continues to stagnate member states will start to wonder whether there is any point wasting time discussing the issue. ■