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30 credits, Fall 2010  
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# Patents and SMEs

- Managing intimidation activities from financial strong actors -

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Topic: Intellectual Property Law

## Conclusions

For the last 20 years it has become very clear that the current European patent system counteract with innovation activities and business development within the knowledge based economy. It is very hard for Small and Medium sized Entities to develop and maintain their intellectual property rights as their main assets when they face intimidation activities from a financial strong actor. Due to the current patent system it is not obvious to go into court and sue a potential patent infringer. For Small and Medium sized Entities it is crucial to be able to move forward with their technologies; to get stuck in court proceedings where they will lose window of opportunities, not being able to reach the market fast enough would be devastating. The thesis focus on Small and Medium sized Entities dependent on patents as their main asset.

Over the years different tools have been discussed in order to find alternatives that would give Small and Medium sized Entities better conditions for surviving intimidation activities. Patent Litigation Insurances have been widely discussed in past. However, the different insurance schemes established in the past have not been very successful. Therefore extensive resources have been put into the work of finding out what the fundamentals are for having a well functioning patent litigation insurance scheme on an EU level. Another concept that have been discussed is the use of a Patent Defence Union where Small and Medium sized Entities form a voluntary patent pool and collectively defend their patents against financial strong actors. The parties in the Patent Defence Union benefit from each other's resources such as financial resources, networks and experience in patent related disputes.

During the thesis work it is evident that in order to find suitable solutions for parties in patent related disputes they must step outside the legal system in order to find solutions that a settlement within a reasonable time. In addition there are great uncertainties when entering court proceedings, especially if the dispute originates from patents in force in different European countries. Multiple litigations calls for extensive resources, but also a high degree of uncertainty since the competences among the judges differs. It is a failure for the current patent system when actors choose not use the system in order to reach satisfying settlements.

Progress has been made to enhance the European patent system through the work of the European Patent Litigation Agreement and EU patent. It has become clear for politicians and decision makers within EU that the need of a well functioning, reliable and well functioning European patent system is absolute necessary in order to have EU as the most competitive market in the world.

The conclusion is the importance of being able to solve disputes fast and that panels involved in a dispute resolution have the appropriate competence. If these requirements are met the need for a patent litigation scheme will decrease since Small and Medium sized Entities can afford to go court, and they will not get stuck there. Therefore I believe that the work towards having an enhanced European patent system will have positive spillover. Alternative dispute resolution mechanisms such as mediation might also help to decrease patent related disputes going to court.

## **List of abbreviation**

CJA	CJA Consultant Limited
ECPC	The European and Community Patent Court
EEUPC	European Union Patents Court
EPC	European Patent Convention
EPLA	European Patent Litigation Agreement
EPO	European Patent Office
EU	European Union
IA	Intellectual Asset
IPR	Intellectual Property Right
PCT	Patent Cooperation Treaty
PDU	Patent Defence Union
PRV	Patent och registreringverket
PLI	Patent Litigation Insurance
SME	Small and Medium sized Entity
UK	United Kingdom
US	United States of America
WIPO	World of Intellectual Property Organization

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## 1. Introduction

Business development in the emerging knowledge based economy calls for new ways of thinking. Instead of having machines, inventories, stock of trades etc. listed as the most valuable assets on the company balance sheet, companies need to manage, develop and maintain their intellectual property rights (IPR), and/or intellectual assets (IA) in order to gain competitive advantage and stay on top of their game.

Knowledge based business development is heavily dependent on IPRs (patents, copyright, trademarks, design rights etc.) and IA (know-how, trade secrets, tools and processes for identifying IA etc.). Both IPRs and IA are integral parts of knowledge based companies and add value to both the company balance sheet and the business in general. Therefore a start-up venture based on at least one valuable patent will face enormous problems when their main asset is challenged by a party that are equipped with sustainable resources.

Due to the current patent system it is very hard to defend patents through court actions and still use the technology in conflict when conducting further business development. Patent litigations are very expensive, especially in Europe where the losing party must pay for all costs. Due to its high degree of uncertainty it is almost impossible to calculate either patent litigation costs or the outcome of the trial.

Due to strong financial resources and the capability to handle uncertainty in terms of having allocated resources, financial strong parties have a considerable advantage when initiating litigation processes. Compared to SMEs, larger companies have the ability to bear higher costs and use their financial advantage as a part of their patent litigation strategy. Patent litigation can be used as a tool to acquire rights to patented technologies or hinder business development on technologies owned by companies with less economical muscles<sup>1</sup>. Some critics of the patent system mean that a patent is just a license to litigate; this is especially true in USA where the question regarding license OR litigate has arisen<sup>2</sup>.

Over the years, extensive work has shown the importance of having functional tools to correct patent related disputes originating from intimidation activities performed by large economic strong actors. Critics have pointed out the need of having some kind of aid for SMEs facing patent related disputes, which then would help to remove intimidation activities. Large values get lost when technology based SMEs does not dare to invest in or develop their business due to the fear of losing their main assets. It is of utter importance to find alternatives that can help SMEs from intimidation activities and to see that they have good conditions when developing their businesses. If we fail, there is a great chance of the global welfare to significantly decrease.

As a result, different forms of Patent Litigation Insurances (PLIs) have been offered in the past with the objective of protecting and helping SMEs. For various reasons these insurances

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<sup>1</sup> Takila, Sami, Arbitrating patent disputes; an alternative to patent litigation?, 2000 "Patent cases in the United States typically cost over a million dollars a party to try and appeal. Even costs exceeding 15 million dollars are not uncommon. Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.3 "Costs in Sweden arise from 1 million SEK and upwards, and the amount will exceed considerably if litigation will be held in more than one country."

<sup>2</sup> Kenyon & Kenyon, Building and enforcing Intellectual Property value <http://library.findlaw.com/2002/Nov/11/132516.pdf> collected 15th of December 2006.

have not been attractive enough for either the insurer or the insured. Some of the insurances were not even meant to generate profit for the insurer but to only reach breakeven. The main objective was to help SMEs or single inventors financially in litigation activities.

The interest of having a Patent Litigation Insurance has once again arisen through the EU Commission. One of the objectives is to strengthen the situation for SMEs within the EU in patent litigations. Another activity worth mentioning is the concept of Patent Defence Union(s) (PDU). The solution of having SMEs forming a patent pool and use it as a collective body facing financial strong actors has gained interest among SMEs. Lately there has also been some progress relating to the European patent system, both through the work with the European patent litigation agreement (EPLA) and the EU patent, with the objective to find a more effective patent system which would benefit SMEs

From a theoretical point of view both PLI and PDU seem to be good alternatives focusing on giving support and resources to SMEs facing conflicts with economic strong players. However, what are the practical implications? For instance, the aid from a PLI scheme might lead to SMEs getting stuck in court, in a system that is not coherent and/or fully developed to properly handle patent related disputes. I would also like to emphasize the importance to investigate the probability of these concepts to be established.

To get a satisfying overview it is crucial to also look into the work of the European patent system and dispute resolution mechanisms relating to the different alternatives.

## **1.1. Purpose**

Technology Based SMEs operating on a knowledge based business arena are heavily dependent on their Intellectual Assets (IA) and Intellectual Property Rights (IPRs) as their key assets to their businesses and often specialized in certain technical areas and dependent on very few patents in order to survive.

The thesis aims to monitor progress in the work of finding alternatives with the objective to stop intimidation activities by large actors, and also discuss and analyze the different concepts that is presented in this work.

In order to have a good structure and a satisfactory delimitation of the thesis, I have concentrated on the following questions at issue:

- What are the different implications regarding the dispute resolution mechanisms litigation, arbitration and mediation? The different implications will be discussed and analyzed in section 7.1-4
- To what extent is Patent Litigation Insurance a tool for decreasing intimidation activities by large actors? This question highlights the probability of establishing a well functioning Patent Litigation Insurance scheme and likeliness for SMEs to have a desired outcome. The question will be further discussed and analyzed in section 7.1.
- To what extent is Patent Defence Union a tool for decreasing intimidation activities by large actors? This question highlights the probability of establishing a Patent Defence Union and likeliness for SMEs to have a desired outcome. The question will be further discussed and analyzed in section 7.2.

- To what extent will the progress of the European patent system help decreasing intimidation activities by large economic strong actors? This question foremost aims at the progress of having a more efficient patent system. This question will be further discussed and analyzed in section 7.4

## **1.2. Method**

In the preparatory work for the thesis I have gone through various reports executed from authorities on both national and EU level. Since the thesis discuss the development of the European patent system and the possibilities of finding alternative solutions for SMEs exposed to intimidation activities I have mainly focused on material explaining the progress of the work within this fields. A crucial factor, when looking into each option, is to evaluate the probability of each alternative to reach a satisfactory outcome. Therefore I had to look into what dispute resolution mechanisms that are connected to each alternative in order to find out how effective and reliable the different alternatives are.

## **1.3. Delimitations and disposition**

Technology Based SMEs has a number of key assets such as IA and IPRs a.o. However, the thesis will solely concentrate on patents. Due to time constraints it is not possible to cover all IPR and IA within a company in this thesis.

Since the thesis aims at finding possibilities to decrease intimidation activities by economic strong actors, the delimitation has been set out to not include activities performed by companies other than intimidation activities executed by large economic strong companies to SMEs.

Knowledge-intensive firms operate mainly on an international arena. However, it would be impossible to have a global perspective due to different legislations, court systems etc, i.e. the U.S court system differs from the Swedish, and so does also the U.K court system. However, due to the fact that Swedish patent law and patent system is harmonized with EU legislation, it is natural to look into the work that has been presented within the EU on this subject. Therefore the thesis discuss both the national (Swedish) and European patent system and the and consequences related to possible use of the concepts PLI and PDU

In order to have a reasonable scope the thesis will mainly discuss three areas: patent litigation insurance, patent defence union and the progress of the EU patent.

## **2. Patents**

In knowledge based businesses patents are often the key asset which knowledge intense firms build their business upon. Section 2 gives the reader a short description regarding the concept of patents and some examples the general problems patent owner might face, i.e. problems knowledge intensive firms face in relation to infringing activities.



## 2.1. Short introduction to the concept of patents and patent infringements

*“Anyone who has made an invention susceptible of industrial application, or his or her successor in title, is entitled pursuant Chapters 1 to 10 of this act to obtain, upon application, a patent for the invention in Sweden, and thereby acquire an exclusive right to exploit the invention”<sup>3</sup>.*

The patent holder has an exclusive right to use the patented technology within his/her profession during a limited period of time<sup>4</sup>. The patent holder is not only allowed to commercialize products and services, perform research activities etc. but to also exclude others from using the patented technology<sup>5</sup>. In order to keep the patent valid the patent holder must pay annual fees associated with the patent ownership<sup>6</sup>

The patent must be tried in a national court in order to determine whether it is valid or not<sup>7</sup>. The fact that a granted patent may not be valid creates uncertainty in the patent system. However, the trial is also dependent on what the opponent shows regarding known technologies etc. If the opponent performs a terrible work in investigating prior technology or any other fact that may be the cause for invalidating the patent, the patent will still be valid. On the other hand, if the opponent is very skilled and find evidence in order to invalidate the patent then the patent will be extinct. Therefore it may be a possibility to win one case but to lose the next.

An actor using a patented invention without permission may be accused of patent infringement. The patent owner shall therefore give the infringer a notice that he/she is infringing on a protected technology, the infringement must stop immediately. If the infringer decides not to follow the patent holder’s notice, the patent holder must decide whether or not he/she will take precautions against the infringer<sup>8</sup>.

Therefore it is of utter important that the patent holder evaluates the situation at hand. The patent holder must look into both best and worst cases scenarios in order to make a sound judgment of the situation<sup>9</sup>:

1. The danger in suing for infringement and by that have the granted patent’s validity tested and perhaps invalidated.
2. The possibility to infringe on a similar technology owned by the infringer. This scenario will affect both p. 1 and 3.
3. The uncertainty of predicting the result of the dispute beforehand and that many cases show that the patent owner is the losing party.
4. The losing party appeals to higher court and the patent owner get stuck in the court system.

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<sup>3</sup> Translation of the Swedish Patent Act Section 1.

<sup>4</sup> <http://www.prv.se/Patent/> collected 5<sup>th</sup> of May 2010

<sup>5</sup> [http://www.wipo.int/patentscope/en/patents\\_faq.html#patent](http://www.wipo.int/patentscope/en/patents_faq.html#patent) collected 5<sup>th</sup> of May 2010

<sup>6</sup> <http://www.prv.se/Patent/Avgifter/> collected 5<sup>th</sup> of May 2010

<sup>7</sup> Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.5

<sup>8</sup> Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.7

<sup>9</sup> Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.8

### **3. Dispute resolution**

Before initiating the discussion regarding the concepts PLI and PDU and the progress of the work relating to the European patent system, section 3 discusses three main dispute resolution mechanisms, i.e. litigation, arbitration and mediation. The impact of resolution mechanisms is evident when discussing strategic choices for SMEs in relation to the different concepts and the European patent system. Both the concepts presented in this work, and the work of having a more efficient European patent system are heavily dependent on the dispute resolution mechanisms presented in this section in order to be well functioning tools helping SMEs to deal with possible intimidation activities..

#### **3.1 Litigation**

##### **3.1.1 Litigation as a dispute resolution mechanism**

Patent litigation is time consuming and cost a lot of money. The average case in the USA takes about five years but the litigation process in other cases might continue for over 20 years, which exceeds the lifetime of a patent<sup>10</sup>. In addition there might be problems to get the case to national courts due to the fact that court houses are crowded with cases. In Finland, the period of time for a case to be handled all the way to the Supreme Court is about 7-8 years. The first instance alone needs about three years to decide a verdict

By going into litigation the business of the company may be going into different directions that are not desired. For example, resources within a small company may be spent on the litigation process instead of working on enhance the business power of the company. Large actors do not face these problems to the same extent as small actors. Large companies often have their own legal departments and their researchers can still concentrate on their research activities. For instance, in the US 1 million dollars is easily spent on one case<sup>11</sup>. Costs amounting 15 million dollars are not uncommon in the field of patent disputes.

It is obvious that a weak patent in the hands of a skilled attorney is more effective in court opposed to the situation where one has a strong patent in the hands of a general practicing attorney. To have financial resources in order hire the best practitioners is crucial for winning cases. One can easily see the possibilities for a financial stronger part to take advantage of the fact that they are economical superior. Winning cases on the basis that you are financial stronger does not have anything to do with justice. The outcome of court litigation is that financial stronger parties have great opportunities to get small actors stuck in court; the reason behind this is to force small actors to let bigger companies use technology that is not rightfully theirs.

One can easily see the financial muscles required when getting into heavy litigation. Also, multiple litigation activities are not desirable since cost and uncertainty escalates for every country the dispute will go to court in. In Europe this is a major problem since the market is unitary but the legal boundaries are not. For instance, the expertise of the judges does not cover both the technical and legal areas. Therefore they must rely on the witness information held by the parties foremost regarding the technical aspects. One can easily imagine the

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<sup>10</sup> Takila, Sami, Arbitrating patent disputes; an alternative to patent litigation?, 2000 s.30

<sup>11</sup> Takila, Sami, Arbitrating patent disputes; an alternative to patent litigation?, 2000 s.32

advantage for the wealthier part presenting the case by more skilled experts. Judges are not very familiar with IPR related disputes in their courtrooms and they do not have a third impartial party to consult with during the hearings. Therefore there are, in some cases, problems in getting a verdict that is accepted by the system.

In Finland there is a great difference between the numbers of patents granted (12000) and litigation cases regarding patent disputes (10/year)<sup>12</sup>. There is few litigation cases reported compared to how many patents that are granted. The mechanism litigation is not desired in patent disputes; otherwise it would not have been used so poorly. The fact that information presented in court rooms become publicly available and as a consequence no longer is seen as confidential between further demonstrates the downside of litigation. The same goes for the verdict that is also made public.

### **3.1.2 Litigation - Effects on the business climate**

By having court litigation as a dispute resolution mechanism, the parties in the dispute automatically become counterparts. They will aim for a win/lose situation that will work in favour for them. On the market for IP, actors are dependent on each other in order to make business. The fact that many companies need to license in/out technology calls for second thoughts, you do not want to make enemies in a field where collaboration is needed. Therefore SMEs seldom want to trouble large actors (or any other actors for that matter) on the market due to future relationships by going into litigation procedures.

On top of that, the parties' attorneys might aggressively influence their clients in the ongoing battle in court.

## **3.2 Arbitration**

The general characteristics of arbitration procedure are that it is speedy, less costly, does not call for multiple litigations, delivers a final verdict and the outcome and subjects discussed in the dispute are confidential as opposed to litigation in court.

The opportunity to use staff members instead of hired consultants is a cost reducing factor. Staff members presenting relevant facts makes the arbitration proceedings very cost effective compared to the scenario where attorneys must both represent their client in court proceedings and present their facts before a court. Arbitration also has the possibility to expose the core problem of a dispute; discoveries of a dispute can be expensive if they must be made in "all possible areas" of the dispute. Therefore arbitration provides the possibilities to save money drastically. Also, the possibility to use arbitration conducted by one single arbitrator narrow down the costs even more.

In technical areas, alternative dispute resolution mechanisms such as expert arbitration have been widely used<sup>13</sup>. From an economical point of view, one can easily see that expert arbitration for settling technical disputes is advantageous.

However, the most sought after feature in the arbitration procedure is the confidentiality aspect, especially where contract and collaborations are based on confidential information. The business concept of a company can vanish if information becomes publicly known

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<sup>12</sup> Takila, Sami, Arbitrating patent disputes; an alternative to patent litigation?, 2000 s.28

<sup>13</sup> Kingston William, Enforcing small firms' patent rights, 2000, p.44.

through court proceedings. There is also the possibility to only let the arbitrators have information that is confidential. However, if in such case the parties must ask expressly for it.

Arbitration does not call for multiple litigation processes and the parties do not need attorneys in every country the dispute shall be conducted in. Arbitration can be held everywhere and conducting any existing law the parties wish. The multiple litigation processes linked to the European patent system have exposed the need for arbitration procedures as a dispute resolution mechanism in patent related disputes.

The verdict from an arbitration procedure is non-appealable unless there are special circumstances. The risk of putting the dispute in the hands of one or more arbitrators can be considered risky. Therefore it is very important that the selection process of the arbitrators is very cautious. The reliability of an arbitration award gives the parties an incentive that the dispute will be solved if the parties proceed to arbitration. One must remember that arbitration is a mutual agreement to resolve a dispute. The parties are bound by contractual agreement that they will accept the verdict. The parties can also select arbitrators specialized in issues regarding the conflict and by that create the best conditions for a satisfying verdict. The arbitrator knows both the subject and the subject of the dispute, and therefore there are a good chance that the parties feel they have received a fair trial.

However, arbitration is only valid between the parties in the conflict. Questions regarding the validity of a patent cannot be answered through arbitration. One must therefore go into litigation procedures in national courts in order to challenge the validity of a patent. If one of the conflicting parties wants a decision that will be valid in relation to third parties, arbitration is not an alternative.

### **3.2.2 Arbitration in Europe**

There have been recommendations from European Patent Office (EPO) to use arbitration provided that criteria are fulfilled<sup>14</sup>. As the law stands in the EU, intellectual property is a matter for the individual member states<sup>15</sup>. This means that every country within the EU can independently decide. Italy has already made an arrangement where a judge can delegate a patent case to a technical expert and simply endorse the experts' findings<sup>16</sup>. It is important that every country in Europe find new ways in this matter and help to stabilize the technical market. If one single country brought in legislation regarding compulsory arbitration and it proved to be a success, the possibilities for such a legislation to be copied by other countries increases.

In order to get compulsory arbitration, EU negotiators must find allies from both the US and the rest of the world<sup>17</sup>. There are many high-tech SMEs who want to expand their ability to act. The office of Advocacy in the US Small Business Administration is continuously looking for ways to improve the situation for SMEs and therefore should they be able to make

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<sup>14</sup> Kingston William, Enforcing small firms' patent rights, 2000,p.48

<sup>15</sup> e.g. Courts of Justice of the European Communities (1981): Case No.144 *Keurkoop v. Nancy Kean*  
Kingston William, Enforcing small firms' patent rights, 2000,p.50

<sup>16</sup> Kingston William, Enforcing small firms' patent rights, 2000,p.50

<sup>17</sup> Kingston William, Enforcing small firms' patent rights, 2000,p.54

common cause with the EU authorities to bring a change and push the development in the right direction for this purpose.

However, both large companies and lawyers may not like expert arbitration, the request for services from lawyers will decrease. Lawyers are trying to maintain their position as a very important factor in both the legal and business arena; the combined opposition most likely prevent the legislation needed for compulsory arbitration.

It comes down to the parties' council to instruct their clients with the thought giving them the best possible option in order to proceed in the matter. If one of the parties is very strong and the opponent is not financially equal, litigation might be an alternative.

Arbitration has gained some critic in being too eager to find joint solutions or to split the dispute in half.

### **3.2.3 Arbitrability**

In Sweden the national authority who grants patents are the only instrument allowed to decide on issues regarding patent's validity. Arbitration is seldom used in Sweden to solve patent related disputes and an explanation to that may be the impossibilities for the arbitration as a dispute resolution mechanism to decide on the most frequent question asked in a patent dispute: is the patent valid?

According to the Swedish Arbitration Act (SFS 1999:116) section 1, first paragraph disputes that can be settled between private parties can be subject for arbitration;

*“Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution. Such an agreement may relate to future disputes pertaining to a legal relationship specified in the agreement. The dispute may concern the existence of a particular fact.”*

However, patent's validity cannot be solved between private parties. National authorities must decide on the validity of a patent according to Swedish Patent Law and therefore is the subject non-arbitrable according to Swedish Law. However, the parties can freely decide or through arbitration get a verdict that one of the parties must withdraw his/ her patent. By doing so, third parties will be affected indirectly by the arbitration verdict.

### **3.3 Mediation**

The litigator's goal is to win, and delivering the other side a loss. Mediation is not about winning or losing, it is a way to explore the possibility for parties in a dispute to co-exist in the future. Through mediation both parties can see for themselves what the other party really mean or say and by that reach settlements both parties gain from. There are no lawyers bringing information to their client with an underlying thought of winning the case. In mediation the lawyers must step aside for a moment and let the business people look into how the dispute can be solved. Many great solutions are made from business solutions where both parties benefit from the agreement compared to the situation where one party wins through litigation.

Commercial creativity is cared for and business prospects are opened up in ways most litigators would never have considered. When parties decide to sit down and settle a dispute in a business manner, they look at what they have, what they want and how to get it.

Over 95 percent of US patent cases settle before trial. Settlement rates in patent infringement cases are roughly 80 percent. Since the majority of patent disputes settle, the question is: can we obtain earlier and better outcomes? Increasingly, disputants and courts are using mediation and saving millions of dollars in litigation costs as well as settling disputes more effectively than going to trial. The degree of confidentiality achieved in the mediation process and the impact of influencing solutions is another advantage<sup>18</sup>.

### **3.3.1 Mediation – a mechanism to settle a dispute**

Mediation is a well established process for resolving disagreements in which an impartial third party (the mediator) helps parties in a dispute to find a mutually acceptable resolution.

Conflicts are necessary to developing business relationships to fit into new environments. Many times a conflict can be the driving force behind development, and the saying: an infringement or a lawsuit may be a first way to say hello is very true. Therefore it is very important to be able to deal with these conflicts in an intelligent way. A conflict can very easily develop into large costs and damaged business relationships. It is of utter importance that time, money and business relationships can be saved, maintained and developed.

A very large part of disputes in courts and arbitration procedures are settled into an agreement that the parties in question have agreed upon<sup>19</sup>. Often there is a will to find joint solutions outside the court or arbitration centre and therefore mediation is a very good dispute resolution tool before going into litigation or arbitration. According to the rules of mediation, the mediation procedure is a voluntarily dispute resolution mechanism<sup>20</sup>, the parties control the process. The parties can co-operate in future ventures, exchange technologies or license agreements, perhaps linked to success of co-operative efforts, and/or can agree to avoid doing or to perform a specific act. The process allows and encourages them to get a picture of their opponent's interests and needs which in the long run may strengthen the relationship between the parties and the mediation process.

Due to its nature, mediation it can be seen as a relatively fast mechanism to solve patent disputes<sup>21</sup>. The agreement made in a mediation process is not legally binding; the whole purpose with mediation is to get the parties to agree and not to make a verdict in favour to any of the parties. Thus, the possibility to go into litigation if one of the parties feels that it is necessary is not withdrawn; all options are still available after an unsuccessful mediation.

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<sup>18</sup> Bionews: Article, The Case for Mediation of Patent Disputes, Helena Tavares Erickson, Oct/Nov 2005

<sup>19</sup> [http://www.sccinstitute.com/upload/shared\\_files/regler/web\\_A4\\_Medling\\_sv.pdf](http://www.sccinstitute.com/upload/shared_files/regler/web_A4_Medling_sv.pdf) s. 3, collected 15<sup>th</sup> of October 2006.

<sup>20</sup> [http://www.sccinstitute.com/upload/shared\\_files/regler/web\\_A4\\_Medling\\_sv.pdf](http://www.sccinstitute.com/upload/shared_files/regler/web_A4_Medling_sv.pdf) s. 3, collected 15<sup>th</sup> of October 2006.

<sup>21</sup> Takila Sami, Arbitrating Patent Disputes: An alternative to patent litigation?, 2000, p.38.

## **3.3.2 The mediator**

### **3.3.2.1 Evaluating the Mediator**

Probably the most important step in the mediation process is the selection of the mediator. For example, WIPO Arbitration and Mediation Centre assist the parties in identifying and agreeing upon a mediator. The Centre present potential candidates for the parties to consider based on the wishes the parties have given. There are however fundamental issues to deal with before deciding on a mediator. What role do the parties want the mediator to play; do they want the mediator to provide a neutral evaluation of their dispute, or do they want the mediator to act as facilitator of their negotiations by assisting them in identifying the issues, exploring their respective underlying interests and developing and evaluating possible options for settlement? From this point of view it is important to decide whether the mediator shall be experienced in the subject or more particularly skilled in the process of mediator. It is also important to look into the complexity of the case if there is a need to have more than one mediator to be able to cover cases that are technology very complex and craves special competence that cannot be found in just one mediator.

### **3.3.2.2 Characteristics of the Mediator**

However, the role of the mediator has in the past been slightly distorted. In some cases there has been a retired judge with the experience from court litigation or arbitration procedures that still feel his role is to make decisions and judgments on what he thinks shall be done. Due to the background, the mediator informs the parties what will happen if they do not manage to reach a settlement through mediation. The mediation focus will be on what might happen in the future if the parties are unable to settle the dispute.

A mediator who is a retired judge may see things as they are in court. It is all about the monetary settlement and how that should be divided. This is not what a mediator shall do; a mediator must give creative solutions through discussions with the parties in conflict. By doing so the mediator put focus on the situation right here and now and actually helps the parties to solve the dispute. The interests of the parties are much more important than the monetary settlement. The fact that mediation involves different elements compared to litigation does call for additional skills.

The mediator must help the parties to find ways to find a settlement by isolate disputed issues and consider different alternatives in order reach a settlement that contain the parties' needs. A skilled mediator encourages the parties to express their interest to each other. The process shall not focus on winning or losing, it shall focus on the interest of both parties to reach solutions both parties can benefit from. The mediator shall in an impartial manner guide both parties in the conflict to reach an agreement. A mediator must have qualifications for the specific matter and the experience to handle a dispute of a specific category. The mediator shall give his/her point of view and give creative suggestions in order to reach a settlement between the parties.

It cannot be stressed enough that the mediator is not a judge or an arbitrator in the mediation process He/ she is only a neutral interpreter of the conflict that will serve for the possibilities to reach an agreement between the parties in the dispute and enable a win/ win situation.

### **3.4 Summary dispute resolution mechanisms**

Neither litigation nor arbitration is the best way to uphold or create a good business relationship. By having them as dispute resolution mechanisms the parties in the dispute automatically become enemies. They will fight as gladiators in order to get a verdict in favour for either of them. Within the innovation system and the market for IP related products and services different actors are dependent on each other. The simple fact that many companies need to license in technology would be devastating for, especially SMEs, to make enemies in a field where collaboration is needed. Therefore SMEs feel that they do not want to trouble large actors on the market due to future relationships.

By going into litigation the business of the company may be going into different directions that are not desired from a company view. For example, resources within a SME may tied to the litigation process instead of working on enhance the business power of the company. Large actors do not face these problems to the same extent as small actors, large companies often have their own legal departments and their researchers can still concentrate on their research activities.

Mediation is the perfect environment for the parties to understand what has exactly been said and done during the conflict. Sometimes misunderstandings grow out of second hand information received by any of the parties. Mediation can therefore be perfect to set records straight and to minimize misunderstandings, sometimes there are no conflict at hand only misunderstandings of any given information. As a consequence the behaviour on the market between the actors will change to the better.

Therefore, the strongest incentive for mediation is to actually settle the dispute at a very low cost compared to litigation or arbitration. By settling a dispute cheap and fast both parties can use their remaining resources to be creative. However, the only forum to challenge a patent's validity is through court proceedings

## **4. Patent litigation insurance**

The concept of Patent Litigation Insurance (PLI) gives small and medium-sized entities (SMEs) an opportunity to enter into a litigation process and have their costs covered by insurance. However, before we begin to discuss whether PLI is a suitable concept for SMEs, we need to determine how likely it is that such insurance will be offered to the market at reasonable terms. The outline for Section 2 contains a historical overview regarding the development of PLI on both a national and EU level. A major part of this section also presents the findings in the CJA reports published in 2003 and 2006, reports with the objective to determine the probability of having a well functioning PLI in an EU level.



## **4.1 Historical overview patent litigation insurance**

### **4.1.1 Scandinavia**

A couple of decades ago, the Swedish Inventors' Association (SIA) had an insurance which cost a few thousand SEK for every patent/ year<sup>22</sup>. The insurance covered costs up to 2 million SEK per dispute and was in the beginning only for disputes within the boundaries of Sweden. After a couple of years, the insurance was expanded and valid in Western Europe as well. Nevertheless, the insurance was put to rest. After two litigations, which were lost in the mid 90's, the SIA was not able to give out the insurance anymore; the insurance was not profitable for the SIA<sup>23</sup>.

In order to find a new insurance solution an investigation was done by the Industry Ministry, the NUTEK-investigation<sup>24</sup>. The proposition included private actors to finance the project. The Swedish Financial Services Authority meant that the initial cost would be at least 20 million SEK to be able to have an insurance cover equally to the SIA insurance, and that the insurance had to be compulsory to all new patent owners. One of the reasons the insurance was not brought to the market is the compulsory scheme and unwillingness from companies of having such a scheme<sup>25</sup>.

Out of the Scandinavian countries, Denmark has been the most active country dealing with patent infringement issues. The Danish patent authorities have worked with questions regarding insurance schemes for over 20 years<sup>26</sup>.

The EU commission has since then taken up the Danish view on questions regarding Patent Litigation Insurances. Denmark has been very good in shedding light on issues as the one mentioned in this work. During the time period Denmark had the chairmanship in the EU Council during the second half of 2002, they put together a conference together with EU Commission regarding patent infringements and insurance possibilities in such situation. At the conference the message was spread that Europe suffers from great economical losses due to patent infringements. According to a Danish survey more than three out of four Danish SMEs have faced patent infringement activities and that other countries are in a similar position as well<sup>27</sup>. Therefore it is urgent to find a solution where it is possible for SMEs to fight patent infringement regardless of who the opponents are.

### **4.1.3 EU level**

The EU Commission made an investigation about potential insurance solutions. The commission stated that patent infringement insurance was in no way some kind of charity, it was a business oriented solution that would help to commercialise the development of insurance. The question in the investigation was:

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<sup>22</sup> Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.9

<sup>23</sup> Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.9

<sup>24</sup> Sjögren, NUTEK R 1997:4

<sup>25</sup> Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.10

<sup>26</sup> Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.10

<sup>27</sup> Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.10

- What are the criteria for a patent litigation insurance scheme in order to be profitable for the insurance companies?<sup>28</sup>

The commission assigned CJA Consultant Limited (UK)<sup>29</sup> to carry out a study from the perspective of the question raised above. CJA presented their final reports in January 2003 and June 2006.

## 4.2 The CJA study (Patent litigation insurance)

Section 4.2 mainly narrate the findings in the two reports presented by the CJA Consultants Ltd European Policy Advisers regarding the possibility of finding a well functioning patent litigation insurance scheme on an EU level.

### 4.2.1 Scope of the study

According to the CJA studies<sup>30</sup> only European and Community patents are relevant for the present study<sup>31</sup>. Due to the Community patent/EU patent still has not come into force; the study primarily focuses on European Patents granted through the national Patent Offices

In order to determine the insurability, it is crucial to find court statistics in every national country within the E.U. regarding patent litigation activities<sup>32</sup>. The litigation frequency, time period, actions and costs of litigation vary in the different Member States, national statistics have to be achieved and used separately<sup>33</sup>.

Figures concerning number of cases settled before first instance, number of cases appealed, settlements before second appeal judgement etc. must be investigated. Insurers need to know the situation in every single member state in order to identify the average costs in the different areas as for example damages, settlements. However it was found during the CJA study that court records are incomplete and therefore not very reliable. For example, the records do not separate national patents from European Patents<sup>34</sup>.

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<sup>28</sup> Larsson Torbjörn, Patentintrång - en fråga för staten?, VINNOVA, 2003 p.11

<sup>29</sup> CJA Consultant Limited is an organisation who works as an adviser to the EU Commission, governments and organisations around the world.

<sup>30</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORTS published in January 2003 and June 2006, CJA Consultants Ltd European Policy Advisers.

<sup>31</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 6.1.1.

<sup>32</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 7.2.1.

<sup>33</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 7.1.1.

<sup>34</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 7.2.2.

Also, there are no existing statistics of damages awarded owing to the number of out of court settlements<sup>35</sup>. According to patent practitioners in the various member states, litigation usually does not end up in damage awards and cases that are settled rarely are awarded<sup>36</sup>.

#### **4.2.2 Litigation activities within the EU Member States**

Germany is by far the country within the EU that has the most patent litigation activities. It has 1000 litigation cases starting every year out of a patent pool of 300.000 patents, i.e. 1 out of every 300 patents is litigated. The high litigation number is partly explained by separation in Germany of infringement and invalidating. However, regardless of the separation, if these two actions were put together the number of effective patent litigation is reduced to 1 of 600. Compared to France, holding only 50 litigation cases/year and a ratio of 1 out of 5000 patent litigated, one get an idea of the frequent in patent litigation activities in Germany compared to other states. Also, the amount of German litigation (considering infringement and nullity together) is nearly equal to the rest of the EU put together<sup>37</sup>.

There are no specific future trends according to the study other than that patent litigation activities might increase and that patent assets will be more valuable in the future due to the safety litigation insurance will establish. More effective use of patents by industry is to be expected and the presence of insurers helping to increase legal and technical evaluations will end up into more investigations of patents that will lead to more settlements, mediation activities and faster resolution of disputes because the insurers' first objective is speedy resolution in every conflict<sup>38</sup>.

#### **4.2.3 The demand for a patent litigation insurance scheme**

The potential value for patent litigation insurance is not shown on the market. Only a small proportion of all patents in the EU are covered by some kind of litigation insurance<sup>39</sup>. It seems that the schemes existing only attract a small number of clients and that the insurance is not properly designed for the purpose. Patent lawyers, insurers and companies feel that a successful insurance scheme in this matter must have a broad scope. The costs for the insurance cannot be set into an unreasonable level and the scope must be satisfactory for its purpose. None of the existing schemes have succeeded in this in order to make them attractive on a widespread market<sup>40</sup>.

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<sup>35</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 8.8.

<sup>36</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 8.8.2.

<sup>37</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 8.1.1.

<sup>38</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 8.6.

<sup>39</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, section 14.1.1.

<sup>40</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, section 14.1.2.

However, the need for patent litigation insurance or another instrument helping SMEs is obvious. The CJA study shows the potential demand from patent lawyers, companies and insurers in order to find a well functioning scheme. Even on an EU level some of the member states recognize that the value of patents will increase for both SMEs and the economy at large<sup>41</sup>. The EU Commission continues to work for suitable patent litigation insurances will be put on the market, there is a demand for cost effective patent litigation insurance and it will likely improve the value of patents to users.

Well functioning PLI schemes will increase the strength and security of patents. A direct result of a patent litigation insurance is that SMEs would start to file more patent applications when they know that they will have financial aid in case of a patent dispute. The SMEs will feel more confident and they will be able to find the money to make use of the patent and not saving them for potential litigations. The insurance gives the companies a security when they provide them with funds so they will be able to check the strength of their case. There are examples of small companies that have given up manufacture when they have been faced by infringement accusations<sup>42</sup>. As mentioned above the benefits will be considerable for both the companies and the member states.

The potential demand by industry and the potential interest from insurers in providing PLI on a wider scale shows that there are ways of minimising the difficulties. The study has shown that if companies and patent lawyers accept a compulsory insurance scheme the insurers may be ready to give the insurance a wide and accurate scope. Another conclusion that has emerged from the study is that the patent litigation insurance shall be divided into two parts. The first part contains the initial investigation<sup>43</sup> without any risk evaluation; the second part includes a larger amount of money which is provided if the risk assessment set out a reasonable chance of success. The EU Commission may further develop the outline of the scheme.

In round table discussions the nature of the uncertainty of a patent action was heavily discussed. As mentioned earlier, the procedures and circumstances are remarkably different in the member states. Therefore it is hard for both patent owners and insurance companies to calculate on costs, the need of an insurance etc.

#### **4.2.4 Insurance companies providing a patent litigation insurance scheme**

The insurance must be profitable for the insurers otherwise there are no incentives for them in providing such an insurance. Also, usually insurers have basic data to make correct assessments of risks. For several reasons these figures are not available at the moment or, as stated above, misleading or hard to interpret. The basic data may contain issues as number of patents granted, costs damages, the length of patents etc. One reason for the basic data not being available might be that lawyers do not want reveal the real numbers in patent disputes,

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<sup>41</sup> PATENT LITIGATION INSURANCE “A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks”, FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, section 14.1.4.

<sup>42</sup> PATENT LITIGATION INSURANCE “A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks”, FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, section 10.7.1 p.29

<sup>43</sup> see section 4.2.6

one must remember that patent litigation is very profitable for lawyers and a market that they want to possess.

None of the large insuring companies are interested in participating from the start of a patent litigation insurance scheme. However Lloyd's seem to be more interested than the other insurers based on an idea of having a lead sponsor with some sort of back up from other organizations.<sup>44</sup>

#### **4.2.5 Risk assessment in relation to the insurance**

One of the more problematic areas in creating well-functioning patent litigation insurances is that it is hard to estimate the risk of ending up in a litigation process, the risk of losing a trial etc. Therefore it has been a problem in the past to find a premium that is not too high and a scope that is not too narrow. The patent side strongly dislikes the complexity of such procedure and the uncertainty of results. The risk of being infringed or pursued for infringers vary greatly depending on products, technologies etc. Therefore it is a must find new risk assessments methods on every potential infringement situation, i.e. different products or processes will have different premiums although it is built on the same technology<sup>45</sup>. The relatively big cost of risk assessment activities has been a major factor preventing patentees to take insurances in the past.

Risk assessment analysis is not carried out unless the dispute will go to court, i.e. a patent action is initiated. The parties in a dispute that ends up in court firmly believe that they have good case and that they also have been given the advice that they have good chances of winning the case. The participants in the round table discussion thought that it would be a good idea to divide the chances into good, bad and 50/50. The insurance companies agreed to cover for 50/50 cases and better<sup>46</sup>.

Logically, no company want to proceed into litigation if their chances are bad, litigation costs money and the insurance only cover for damages and costs related to court proceedings to a certain point. It was however considered that even if the parties have an equal chance of success settlement would be in the better interest of the parties.

#### **4.2.6 An essential step in a patent litigation insurance scheme – The initial investigation**

The first part of a potential PLI is to have an initial investigation without any risk evaluation from the insurance companies. An insurance cover up to 35000€ shall be provided to the threatened party or the party accusing another of infringement. The given amount shall cover

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<sup>44</sup> PATENT LITIGATION INSURANCE “A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks”, FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, 5.1.13

<sup>45</sup> PATENT LITIGATION INSURANCE “A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks”, FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, 14.7.1.

<sup>46</sup> PATENT LITIGATION INSURANCE “A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks”, FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, 14.7.3

the expenses for the initial investigation regarding the technology and law concerning the patent, translation costs may also be included<sup>47</sup>.

Every investigation shall relate to one product or manufacturing process. The idea behind initial investigation is to resolve patent dispute in an informally way, i.e. cheap and fast. Both sides will have their interests protected in the dispute; the objective of the preliminary investigation is to find solutions that both parties at least respect. The majority of the cases will be settled in the initial investigation. The parties will agree to that no infringement has been done or maybe a licensing deal will be a solution in case of infringement. Only in rare cases will the dispute proceed into the second part of the PLI which also is the most expensive part. Also, only if there is a good chance of actually winning the case, then the insurance will be released<sup>48</sup>.

The initial investigation allows both small and large companies to assert their patents in appropriate cases against each other. For the SMEs it has been impossible to this before due to the financial limitation of a smaller company. The possibility to use the initial investigation phase may be attractive to large companies as well. However it is not as favourable as it is for the SMEs, large companies still have an advantage by having strong economic resources. Therefore it is of utter importance to find attractive incentives for large companies as well in every step of the way to well-functioning PLI. One way of doing this would be to discuss how the large companies' deals with this issue today and through that find an attractive scheme for the preliminary investigation.

#### **4.2.7 Insurance cover**

When the parties in a dispute cannot reach a settlement or a decision that both parties respect in the initial investigation, the dispute will be put forward into stage two of the patent litigation insurance. However, if either side of the parties in conflict is advised that their chances of success in the conflict is less than 50% then a settlement will be reached. The party with the smallest amount of chances of winning will work for a solution in the initial investigation stage. If both parties estimate that they have a better chance than the above mentioned, they will proceed into court litigations. Their respective insurance companies will after evaluation of risk assessments of their own give a cover for up to 1.5M € for cost and an equally large amount for damages from infringements<sup>49</sup>. The amount given is supposed to cover all but the most expensive cases<sup>50</sup>, it is also seen as realistic and in some countries even generous. It will however be wise to select a number of large companies in different technical sectors and get a clear picture whether these figures mentioned in this section are realistic.

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<sup>47</sup> "Patent litigation insurance a study for the European Commission on possible insurance schemes against patent litigation risks" (January 2003) by CJA Consultants Ltd, 14.4.1 p.46

<sup>48</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, p.3

<sup>49</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, section 14.5.1 p.51

<sup>50</sup> "PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, section 14.5.3 p.51

#### **4.2.8 Patent litigation insurance – a voluntary or compulsory scheme**

According to the round table discussion the proposal of a compulsory scheme was rejected in the questionnaire. For example, Denmark thought that a compulsory system will have the same effect as having another tax costs and that large companies would see it in a similar way<sup>51</sup>. All parties involved in this study would prefer a voluntary scheme. However, as discussed above, it is impossible to provide a voluntary insurance in the range of 300-600€ unless it is widely popular. The premium set out in this example, shows that in order to make a healthy business for the insurance companies the insurance must be compulsory. Without the compulsory scheme the premiums would be high and the take-up low and neither patentees nor insurance companies would like to be involved<sup>52</sup>.

Insurers concluded that the only basis on which they would wish to be involved would be on a scale which only a mandatory scheme could provide. It may be possible to move to a voluntary scheme later once a scheme is well established. In such scheme it is necessary for legislation to regulate questions like:

- when the insurance will be taken out,
- if a patentee must insure all of his/her patents after entering the insurance scheme by insuring one of its patents, etc<sup>53</sup>.

However, if all legislature activities have been made and are implemented, the insurers need a start up period between of at least 4-8 years before having the numbers or patents required for such a scheme<sup>54</sup>.

#### **4.2.9 Settle the dispute before litigation**

The insurers shall not have the right to prevent the parties in a dispute to go to litigation if they both have reasonable chance of success. Due to complexity cases, there are seldom better prognoses of success than 60/40. An explanation might be that the difficulty of the legal and technical issues makes it very hard to estimate the outcome of a dispute beforehand. It is not unusual that both sides are given 60/40 estimation and that they are using the same arguments in order to justify them<sup>55</sup>.

The 2006 CJA study mentions the possibility to use mediation in early stages of conflicts possibly at the recommendation of the insured's legal adviser. Costs could be saved even if

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<sup>51</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, section 10.11.1

<sup>52</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, section 14.8.1

<sup>53</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 15.2.4.

<sup>54</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 15.30.1

<sup>55</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2003, CJA Consultants Ltd European Policy Advisers, section 14.9.1

the dispute is not entirely solved, the case might be narrowed down and due to the smaller case the remaining parts may go to either litigation or arbitration at a cheaper cost.

**4.2.10 Insurance premiums**

In order to calculate premiums one must have a clear picture on the patent environment in every member state of the EU. Factors that affect the premium are i.e. how many patents are validated in each country every year and how many patents that is actually in force in every country<sup>56</sup>. According to the study, some member states had great difficulties in showing statistics<sup>57</sup> in these matters, and one must also bear in mind that there are also differences between the statistic numbers in various member states. For example, the average lifespan of patents originating from different member states differs, see below.

Country	UK	Germany	France	Denmark	Sweden	Spain	Austria
Lifespan	8 years	8 years	6 years	6 years	6 years	5 years	4 years

The figures presented above shall be seen as very rough numbers and a brief example of the situation in the various member states.

Information given informally during the study from patent attorneys shows that generally 1 of 1000 patents end up in a dispute<sup>58</sup>, compare with the discussion in section 4.2.2. and the average "life" of a patent is 8-10 years. Based on these factors a roughly estimated premium was done. A company would have to pay, as stated above, somewhere between €300-600 in order to obtain patent litigation insurance for a European patent<sup>59</sup>. However, there were suggestions that the premium would be far more expensive in specific areas such as biotechnology and software patents but there were no clear evidence found that cases in these areas are more expensive and that damages are considerable higher. Although it may be an option to increase or decrease the premium if the geographical area is expanded<sup>60</sup>.

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<sup>56</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 6.2.3.

<sup>57</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT June 2006, CJA Consultants Ltd European Policy Advisers, section 6.3.

<sup>58</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT January 2003, CJA Consultants Ltd European Policy Advisers, section 14.6.1

<sup>59</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT January 2003, CJA Consultants Ltd European Policy Advisers, section 14.6.2

<sup>60</sup> PATENT LITIGATION INSURANCE "A Study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks", FINAL REPORT January 2003, CJA Consultants Ltd European Policy Advisers, section 14.6.3



#### **4.2.10.1 Analyse of the total costs in a patent litigation insurance scheme**

In the CJA report, costs are considered to have to be negligible, in order for the system to work.<sup>61</sup> These “negligible” costs would amount to around 300-600€ per patent/ year<sup>62</sup> and is based on the fact that the insurance must be compulsory and not a scheme where an actor can participate in voluntarily. The insurance scheme must be of a compulsory nature in order to keep costs down and have the costs “negligible”, i.e. costs amounting around 300-600€ is not possible if the scheme is voluntarily. However, as discussed above, it is impossible to provide a voluntary insurance in the range of 300-600€ unless it is widely popular and the premium set out in this example shows that in order to make a healthy business for the insurance companies the insurance must be compulsory. Without the compulsory scheme the premiums would be even higher and the take-up low and neither patentees nor insurance companies would be interested.

Let us compare how much money companies spend on their patents and how much the fee for a Patent Litigation Insurance would add to the overall costs. In Sweden, it costs 4000 SEK in national application fee and another 4000SEK for the international application; these costs include examination expenses.<sup>63</sup> Renewal fees for a patent are between 200- 4500 SEK increasing for every year the patent is maintained.<sup>64</sup> There is also the granting fee on 1100 SEK. If we put these costs together we would end up at somewhere around 12000 SEK. If we on top of this put the patent litigation insurance fee, we can automatically see the large percentage the insurance fee adds and one must remember that the costs are taken from the compulsory insurance scheme, not a voluntarily. The overall costs then increase with approximately 30%, compared to the costs before adding the insurance fee. The total costs related to patenting activities will be substantial for SMEs.

### **4.3 Summary patent litigation insurance**

For over 20 years there have been discussions regarding the need for an instrument/system regarding the situation were SMEs are attacked by financial strong actors through intimidation activities. As a consequence different solutions containing insurance schemes have been discussed. The schemes that have reached market have failed; they have proved to be too expensive and not beneficial for either the insurer or the insured.

As a result, CJA delivered two reports on the subject determining the requirements for a well functioning insurance scheme on an EU level. The insurance must according to the CJA 2003 and 2006 reports have the following elements:

- The insurance must be compulsory
- A first instance (first investigation round) shall be an option before any heavy risk assessment
- The insurance shall cover up 35000€ in the first investigation round

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<sup>61</sup> “Patent litigation insurance a study for the European Commission on possible insurance schemes against patent litigation risks” (January 2003) by CJA Consultants Ltd, p.49.

<sup>62</sup> “Patent litigation insurance a study for the European Commission on possible insurance schemes against patent litigation risks” (January 2003) by CJA Consultants Ltd, 10.2.3.

<sup>63</sup> [http://www.prv.se/om\\_prv/prislista/patent\\_ansokningsarenden.html](http://www.prv.se/om_prv/prislista/patent_ansokningsarenden.html) collected 24th of May 2006. These costs are about to change: from the 1<sup>st</sup> of October 2006, the fees will be reduced to 3000 SEK (see PRV newsletter, [http://www.prv.se/om\\_prv/nyhetsbrev/2006-09-05.html](http://www.prv.se/om_prv/nyhetsbrev/2006-09-05.html).)

<sup>64</sup> [http://www.prv.se/om\\_prv/prislista/patent\\_ansokningsarenden.html](http://www.prv.se/om_prv/prislista/patent_ansokningsarenden.html) collected 24th of May 2006.

- The insurance shall cover up to 1.500 000€ for costs in court proceedings and damage awards
- The patent owner shall pay 5000€ in order to get the first investigation round started
- If there would be any public financing, both parties in the dispute would be entitled to the financial aid provided.

## **5. Patent defence union**

The concept Patent Defence Union (PDU) builds upon a voluntary patent pool where participating actors together defend their patents.

### **5.1 Background**

The concept of Patent Defence Union (PDU) was proposed in the study *Enforcing Small Firms' Patent Rights*. It has some advantages compared to the option PLI, including being able to develop "contingency fee" arrangements with lawyers or to attract venture capitalists in investing for shares in ventures based one or more patents. It could also work to persuade large firms to include in their "Corporate Social Responsibility" policies, i.e. an undertaking not to intimidate economic weaker companies with threats of litigation costs, but to agree to a suitable dispute resolution.

### **5.2 Concept of Patent Defence Union**

The PDU is a solution for SMEs forming a patent pool in order to collectively stand up against large actors that potentially use intimidation as a way of getting their hands on technologies they do not rightfully own. By establish a union; the members of PDU have the ability to collectively stand up against the large actors. The work in the PDU may not solely involve directly defending patents that are infringed, the PDU may possibly have some kind of lobbying activities in order to get large actors to participate and as a consequence make them changing their behaviour.

#### **5.1.1 Large companies relating to the concept of Patent Defence Union**

There are objectives in getting together in a PDU, with the help from a PDU SMEs will gain a protection they have not had before. Once the large actors will be aware that they cannot intimidate members of a PDU, they might decrease their intimidation activities; they will have to negotiate for a license or purchase the technology in question.

Many infringement/intimidation decisions are made by middle managers in large companies who do not have full insight in their company's strategic vision or primarily value their own career path higher than the business of the company<sup>65</sup>. Large actors do not fear SMEs – they know they are economically superior compared to the SMEs. However, large actors do not know about the resources within a specific PDU which makes an intimidation decision done by any manager in the company considerable risky. The pure existence of the PDU might change the decision making in larger companies regarding intimidation.

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<sup>65</sup> Kingston William, *Enforcing small firms' patent rights*, 2000, p.61.

In the future, it might be a moral hazard to intimidate smaller companies; maybe intimidation of smaller companies will be equal to theft (from a moral point of view) and something that SMEs could be lobbying for. Large companies may lose a considerable amount of goodwill if they can be tied to activities such as intimidation of smaller companies.

A PDU is also dependent on who is involved in the union. If actors within the union are very strong, innovative and respected companies, large companies would then have a problem in shutting down potential business partners for themselves or other actors in the business.

### **5.1.2. Conflict between members**

A proposed solution is that disputes between members in the PDU will be solved by arbitration. The arbitration procedure as a dispute resolution mechanism will be agreed upon through contractual agreements. If the members of the PDU agree that arbitration procedure would follow the services of World Intellectual Property Organisation (WIPO) there would be no need for PDU involvement in disputes between members of the PDU. The parties would then apply to WIPO for arbitration service. WIPO has been successful in arranging their domain name services into a quick and low cost arbitration. As a result WIPO may be able to improve their existing expedited services for patents.<sup>66</sup>

### **5.1.3. Conflicts between non –members**

In conflicts between non-members there are, most likely, no contractual relations between the parties regarding dispute resolution. However, if the PDU will have successful lobbying activities in building respect towards the large actors there is a possibility to find solutions where conflicts regarding patent disputes may be solved in a more suitable way than intimidation.

## **5.2. Summary PDU**

First of all, it is easy to attack a small actor with little or no experience at all in patent litigation. Since intimidation activities is used by large companies to get the upper hand in cases as above mentioned, the risk of facing an experienced organization instead of a small firm will call for second thoughts. The fact that most patent conflicts nowadays in a non-contractual relation, in this case a non PDU member, ends up in a litigation process or a court proceeding show that it is extremely expensive to go into such situation.

Litigation costs both time and money and the effort SME must put in are not in proportion compared to the larger companies. The PDU will have both the resources and the expertise to put up for a good fight against the large actor. A pleasant side effect would be that compared to the situation where the infringer quite easily can calculate the insurance cover in a patent litigation insurance case, the infringer cannot estimate the resources within the PDU organisation (both monetary and experience). A consequence will be that the large actor cannot win simply through its power to intimidate. The large actor must stop using the technology in conflict and the large company will lose money which is not desired, i.e. the large actor will face immediate costs. The fact that the PDU is dealing with the case means that the SME will not be directly responsible for damages (which in some jurisdictions can be very large).

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<sup>66</sup> Kingston William, Enforcing small firms' patent rights, 2000, p.67.

## 6. Patent Systems in Europe

### 6.1 National patents

A national patent office deals with applications for national patents, in Sweden PRV<sup>67</sup>. If both the invention and application meet the requirements of national patent law, a patent will be granted. A national patent is limited to the territory of the state where it has been granted. A common scenario is that inventors, businesses, companies etc. choose to apply for a patent at a national patent office. After the preliminary examination and a novelty search is performed by the national patent office, the applicant decides whether or not go for a patent<sup>68</sup>.

Members of the EU states have the following options<sup>69</sup>:

- Apply for a national patent at the national authorities
- Apply for a European patent at the EPO, or
- File a patent application under the International Patent Cooperation Treaty (PCT).

### 6.2 European patent system

A European patent application is dealt with by the EPO following the procedures in the European Patent Convention (EPC) which was entered into force 1977. All EU Member States are Contracting States to the EPC<sup>70</sup>. The procedures for the search, examination and grant of European patents are centralized when handling patent application in one of the three working languages of the EPO (German, French and/or English). Parties applying for a patent can obtain a European patent for one or more Contracting States of the EPC on the basis of one single patent application<sup>71</sup>. A European patent has the same legal effect as a national patent in the Contracting States. However, the European patent does not automatically become valid; it must be validated in the necessary states<sup>72</sup>. If the patent proprietor lacks to fulfill any of the validation requirements, the European Patent will be void<sup>73</sup>.

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<sup>67</sup> Koktvedgaard and Levin, Lärobok i immaterialrätt, p.231

<sup>68</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.5 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of May 2010

<sup>69</sup> Koktvedgaard and Levin, Lärobok i immaterialrätt, p.241-242

<sup>70</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.5 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of May 2010

<sup>71</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.5 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of May 2010

<sup>72</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.6 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of May 2010

<sup>73</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.6 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of May 2010

Since costs have been a major issue relating to patenting activities, an agreement was adopted in October 2000 by an Intergovernmental Conference of the EPC Contracting States (The London Agreement). The agreement entered into force on the 1<sup>st</sup> of May 2008 allowing for collective action to reduce patenting caused by validation requirements<sup>74</sup>.

### **6.2.1 Drawbacks from the existing European patent system**

As previously mentioned, infringements of European patents are dealt with by national courts. The alleged infringer must be brought to trial before national courts; national authorities and courts are the only parties who can deal with infringement issues.

In order to attack a European Patent, that is valid in more than one European country, a number of parallel infringement actions based on the very same European patent must be initiated. Similar actions must also be made where one will revoke a European Patent after the nine month expiry in every country where the patent was granted<sup>75</sup>.

Due to its current construction, the patent system is considered weak and uncertain. Court decisions in the various national courts differ to a large extent between the countries. The very same patent may be granted, amended and revoked in three different EU countries<sup>76</sup>. The confidence for the patent system decrease and companies see potential risk to invest in patent related products, services etc. Costs cannot be properly calculated, licensing deals cannot be made. A weak European patent system has a tremendous impact on companies' ability to operate, especially SMEs.

The qualifications and experiences among the judges differ among the national courts. In some member states there are experienced courts whereas in other states any court may handle patent related disputes. Also, the procedural rules in every country differ from another. Therefore, the procedure in a given patent dispute may differ; facts, evidence etc. might be valued differently depending on which national court the dispute will be settled in. Also, there is a significant divergence in the speed of the proceedings between the member states.

A party may take advantage by initiating actions in particular countries hoping for better treatment compared to another jurisdiction. For example, an infringer will initiate a declaration of non infringement before a court that is reputed as slow or inexperienced in order to get out of a justified claim of infringement<sup>77</sup>. A patent owner with a strong case may

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<sup>74</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.6 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23<sup>rd</sup> of May 2010

<sup>75</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.1, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>76</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.2, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>77</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.3, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

try to bring the case in front of a court that is known to award high damages or being known as patent owner friendly, actions like these is called forum shopping<sup>78</sup>. Such actions weaken the patent system and parties using the system in a similar way for their personal benefits cause themselves problems in the long run.

If we allow forum shopping, parties may develop jurisdiction blocking strategies based on *lis pendens*<sup>79</sup> rules.

When having a European patent system dependent on national courts leads to a fragmentation of the European market. It is impossible to ensure patents validity given the same level of protection throughout the EU member states. The effect on the European motto, free movement of goods will be hard to achieve if there are rules in national courts that differ and affect the trade as a whole<sup>80</sup>.

### 6.3 The Community patent/ EU patent

As a consequence of the current weak and uncertain European patent system a third patent system has been discussed since the early 70's, the Community Patent. The Community patent should not be confused with European patents which are granted under the EPC. The Community Patent is a patent law measure being discussed within the E.U and handled by the European Patent Office (EPO). The Community Patent has in the past been known as the European Community Patent or EC Patent and sometimes the shortened name is ComPat. The idea is that individuals and companies are allowed to obtain a unitary patent within the E.U and a patent right that is consistent across Europe in accordance to the principles of the internal market, i.e. the same conditions shall exist regardless where in the E.U the patent is carried out

The progression of the Community patent has been slow since the start in the 70's. In year 2000 discussions increased and resulted in a political agreement made in March, 2003. Unfortunately, one year later in March 2004 the Competitiveness Council failed to agree on various details of the regulation<sup>81</sup>. One of the reasons was the choice of language. France fears that many patent applications will be written in English which they not accept<sup>82</sup>. The

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<sup>78</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.3, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>79</sup> *Lis pendens* is Latin for "suit pending. *lis pendens* literally means that litigation is pending. It tells the public that a lawsuit affecting the property is in progress and that any judgment awarded in that legal action will have priority as of the date of the *lis pendens*.

<sup>80</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.4, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>81</sup> In particular the time delays for translating the claims (differs in Germany and Spain) and the authentic text of the claims in case of an infringement remained problematic issues throughout discussions and in the end proved insoluble. <http://cordis.europa.eu/aoi/article.cfm?article=1310> collected 26<sup>th</sup> of December 2006.

<sup>82</sup> <http://www.eupolitix.com/EN/News/200702/7be97fa5-3cb6-403f-aadf-103ad99a9950.htm> collected 3<sup>rd</sup> of February 2007.

objective is to reduce translation costs and speed up the patent process, but France has refused to ratify the proposal. Reactions to the failure were fierce; critics meant that the E.U.'s capacity of being the most competitive economy in the world greatly was undermined. Opinions were also raised that some of the member states are looking after their individual interests, instead of looking at the big picture.

### **6.3.1 The need for an unitary EU level patent**

The European Commission states that a Community patent is an essential step towards creating a common market within the boundaries of EU. Smaller companies such as SMEs means that if the Community patent is a less costly scheme compared to the court system of today, they will be interested. Larger companies' are a bit more reluctant to move away from the present European patent system, one of the reasons is the insecurity regarding the competence of the European Patent Court. The risk of having a European-wide patent revoked by an inexperienced judge is not desired<sup>83</sup>.

Given the importance of patent policy for innovation, the Commission launched a broad consultation on the future of patent policy in Europe in January 2006. The urgent need for a simple, cost-effective patenting process were obvious, such patenting process would add great values to the European industry was the conclusion<sup>84</sup>.

A majority of the parties found the most import criteria for having a Community patent to be: a high quality unitary patent<sup>85</sup>. In February 2007, EU Commissioner Charlie McCreevy is quoted saying:

*“The proposal for an E.U-wide patent is stuck in the mud. It is clear to me from discussions with member states that there is no consensus at present on how to improve the situation”*<sup>86</sup>.

The German chancellor Angela Merkel has suggested creating one big single market between the EU and US The advantages would be to strengthen the ties between these large continents and to open for discussions regarding finding common grounds on trade tariffs and IPRs.

In the view of the difficulties during the years in reaching an agreement on the Community patent, other legal agreements have been proposed outside the EU legal framework to reduce the cost of translation (of patents when granted) and litigation, namely the London Agreement and the European Patent Litigation agreement (EPLA)<sup>87</sup>

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<sup>83</sup> [http://en.wikipedia.org/wiki/European\\_Patent\\_Litigation\\_Agreement](http://en.wikipedia.org/wiki/European_Patent_Litigation_Agreement) collected 26<sup>th</sup> of December 2006.

<sup>84</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.9 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of December 2010

<sup>85</sup> [http://ec.europa.eu/internal\\_market/smn/smn42/docs/patents\\_en.pdf](http://ec.europa.eu/internal_market/smn/smn42/docs/patents_en.pdf) collected 3rd of February 2007.

<sup>86</sup> <http://www.eupolitix.com/EN/News/200702/7be97fa5-3cb6-403f-aadf-103ad99a9950.htm> collected 3rd of February 2007.

<sup>87</sup> [http://en.wikipedia.org/wiki/Community\\_Patent#\\_note-5#\\_note-5](http://en.wikipedia.org/wiki/Community_Patent#_note-5#_note-5) collected 26<sup>th</sup> of December 2006.

However, recently the progress regarding a Community patent has moved up to a rapid speed. Governments in Europe have started to realize the importance of having a well functioning patent system that is competitive to the systems in the US and Asia. For instance Maud Olofsson has proclaimed:

*“European industry must have better rules and lower costs in terms of patents to meet the increasingly tough global competition”*<sup>88</sup>.

With the entry of force into the Lisbon Treaty<sup>89</sup> the Community patent changed name into the EU patent. The European Union Patents Court (EEUPC) is the new name of The European and Community Patent Court (ECPC)<sup>90</sup>. The creation of an EU patent and establishment of a European and EU Patents Court is supported by EPO. However, EPO states that there will be some time before the plans can be implemented<sup>91</sup>.

One of the main issues regarding the EU patent scheme is the cost of translations. Translations are extensive costs tied to patents and for SMEs it is crucial to avoid costs. Since SMEs are a valuable players in developing innovations based on new technology it is important to make sure that SMEs find the proposed EU patent scheme affordable.

The Council’s approach in 2003 was that the patent proprietor would provide translations of the patent claims into all official Community languages. The Council’s statement received sharp criticism. The translation cost is a main issue especially for SMEs<sup>92</sup>. Since then, massive work towards a solution for decreasing the extensive translation costs related to patents has taken place. There have been discussions regarding formal languages for an EU patent. To only have a few official languages would save a lot of translations costs, and to use machine translations is also welcomed by the stakeholders. However, machine translations shall not have legal effect, but only to be used for information purposes<sup>93</sup>.

On the 4<sup>th</sup> of December 2009 the member states of the EU agreed on the main elements of the EU patent and a single European patent court<sup>94</sup>. Unfortunately there are still some serious issues that the member states cannot agree upon, such as the choice of language. Italy and Spain state that they are being discriminated when the official languages used within the EU

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<sup>88</sup> <http://www.sweden.gov.se/sb/d/13722/a/156596> collected 27th of May 2010

<sup>89</sup> 1st of December 2009

<sup>90</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.2 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of May 2010

<sup>91</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.2 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of May 2010

<sup>92</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.3 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of May 2010

<sup>93</sup> COMMISSION STAFF WORKING DOCUMENT “*IMPACT ASSESSMENT- Accompanying document to the Proposal for a COUNCIL REGULATION on the translation arrangements for the European Union patent* p.5 <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html#info> collected 23rd of May 2010

<sup>94</sup> [http://ec.europa.eu/internal\\_market/indprop/patent/index\\_en.htm](http://ec.europa.eu/internal_market/indprop/patent/index_en.htm) collected 27th of December 2009



patent are the official language (English, German and French)<sup>95</sup>. Sweden, Germany and England requested a so-called enhanced cooperation, and if the Commission considers that there is no possibility of consensus among EU countries, they will support an enhanced cooperation and exclude member states that are not willing to accept the outline of the EU patent<sup>96</sup>.

## **6.4 European Litigation Agreement (EPLA)**

When discussing the progress of the European patent system it is necessary to look into the process regarding the European Patent Litigation Agreement. Through the work with EPLA extensive reports have been made by the EU Commission in order to investigate what the benefits are, costs related to a new judicial system, the probability of having an EPLA etc. Section 6.4 gives you an explanation of the main characteristics for an EPLA scheme.

### **6.4.1 Background**

Back in 1999 at an intergovernmental conference held in Paris, the member states of the EPO put together a working party relating to the whereabouts of the legal situation regarding patents within the boundaries of the EU.

The objective of the working group was to create a non-compulsory agreement on an integrated judicial system for the settlement of litigation relating to European patents. The mandate to submit the agreement in question was renewed at a similar conference held in London 2000. After several years of work the working party reached a draft for a European Patent Litigation Agreement (EPLA). The agreement offers a general European Patent Court with the authority to deal with both infringement and revocation related issues regarding European patents. The European Patent Court would also act as a Facultative Advisory Council that upon request gives non-binding opinions regarding European or harmonized national patent law in relation to national court handling disputes in related matters<sup>97</sup>.

The draft of the European Patent Litigation Agreement is non- compulsory, the member states can choose voluntary if they want to participate<sup>98</sup>.

Denmark, Germany, Finland, France, Luxembourg, Monaco, the Netherlands, Sweden, Switzerland and the United Kingdom have all been active in the EPLA working party from the beginning<sup>99</sup>. In an announcement made on the 20<sup>th</sup> of November 2003 the working party stated among other things; the proposal offers an optimal solution for users and the draft

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<sup>95</sup> [http://www.e24.se/makro/varlden/eu-patent-kan-bli-verklighet-trots-sprakbrak\\_2459639.e24](http://www.e24.se/makro/varlden/eu-patent-kan-bli-verklighet-trots-sprakbrak_2459639.e24) collected 22nd of May 2010

<sup>96</sup> [http://www.e24.se/makro/varlden/eu-patent-kan-bli-verklighet-trots-sprakbrak\\_2459639.e24](http://www.e24.se/makro/varlden/eu-patent-kan-bli-verklighet-trots-sprakbrak_2459639.e24) collected 22nd of May 2010

<sup>97</sup> <http://www.epo.org/patents/law/legislative-initiatives/epla.html> collected 22nd of December 2010

<sup>98</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.5, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>99</sup> <http://www.epo.org/patents/law/legislative-initiatives/epla.html> collected 22nd of May 2010

forms appropriate base in the long perspective to create a new court system within the boundaries of the EU.

#### **6.4.2. The construction of EPLA**

The objective behind the EPLA is to create an effective litigation system for European patents with the objective to create and develop a competitive and dynamic European market. To be able to reach that objective the European countries must act collectively, single states cannot act on their own.

The EPLA is an independent international agreement creating a new organization, the European Patent Judiciary including the European Patent Court with the authority to deal with infringement and revocation actions regarding European patents<sup>100</sup>.

In the European Patent Judiciary there is a supervisory body, i.e. the Administrative Committee which includes representatives from the member states that will supervise the European Patent Court. On demand, the Administrative Committee will set up Regional divisions handling central legislative and budgetary authorities<sup>101</sup>.

The Court of First Instance will include a Central Division with Regional Divisions sited in the participating states. The Court of Appeal will be an instrument where appeals against the Court of First Instance will be heard. The Court of Appeal will also serve as a facultative advisory council delivering a.o. opinions concerning European or harmonized national patent law regarding infringement and validity activities. Legally and technically qualified judges will be part of the panels and deal with cases in harmony with standardized rules or procedures<sup>102</sup>.

The EPLA are supposed to have the same language regime as of the EPC (English, French and German). The choice of language during the procedures is dependent on several factors<sup>103</sup>.

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<sup>100</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.6, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>101</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.6, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>102</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.6, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>103</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.6, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

The financing of EPLA is based on the assumption that the European Patent Judiciary will be financed by court fees, if necessary the participating states might contribute with facilities and staff at the disposal of European Patent Court<sup>104</sup>.

In order to meet the legal requirements of the Community, measures have been taken to ensure the compliance with the Community legal order<sup>105</sup>.

#### **6.4.4. Cost estimation of an EPLA scheme**

Due to lack of information, and the individual national court systems in Europe, it is very hard to determine costs of patent litigation. Costs represented below are estimations received from individuals within the legal system such as lawyers, judges etc. The cost estimates are based on the assumption that the Contracting States will not contribute any financing; the European Patent Court shall be fully financed by court fees<sup>106</sup>.

##### **6.4.4.1 National courts**

The costs below concerns patent cases in the range of small to medium scale where the sum in dispute lays around €200.000-€1.000.000. Costs included are a.o, court fees, lawyer's fees, etc. Important to notice is that a patent case rarely is litigated in more than three countries. If so, it is common that the case is settled outside the courtrooms<sup>107</sup>.

If we compare the costs related to patent disputes in Germany, France and great Britain one can easily see that the costs in a UK court is substantially higher compared to proceedings in front of a German or a French court. In the UK, the average patent case costs lies well over EUR 1 000 000<sup>108</sup>. The average patent case in Germany costs around EUR 250 000 for both validity and infringements<sup>109</sup>. Patent litigation costs are more expensive in Great Britain compared to Germany or any other European country. It is a great advantage for large companies to initiate litigations against SMEs in British court rooms due to the financial implications for smaller companies. On the other hand, SMEs want their disputes solved in

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<sup>104</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.7, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>105</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.7, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>106</sup> Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents European Patent Office acting as secretariat of the Working Party on Litigation, EPO, 2006 p.10, [http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/\\$File/impact\\_assessment\\_2006\\_02\\_v1\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/2D620982152DB517C12572A700433C61/$File/impact_assessment_2006_02_v1_en.pdf) collected 23<sup>rd</sup> of May 2010.

<sup>107</sup> [http://www.european-patent-office.org/epo/epla/pdf/impact\\_assessment\\_annex1\\_2006\\_02.pdf](http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex1_2006_02.pdf) collected 20th of May 2006.

<sup>108</sup> [http://www.european-patent-office.org/epo/epla/pdf/impact\\_assessment\\_annex1\\_2006\\_02.pdf](http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex1_2006_02.pdf) collected 22nd of May 2006.

<sup>109</sup> [http://www.european-patent-office.org/epo/epla/pdf/impact\\_assessment\\_annex1\\_2006\\_02.pdf](http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex1_2006_02.pdf) collected 22nd of May 2006.

states such as Germany and France where they will be able to cope with the financial matters<sup>110</sup>. Therefore, the impact of having litigation activities in France and Germany differs greatly compared to multiple litigations in Germany, France and Great Britain.

#### **6.4.4.2 European Patent Court**

The estimated annual cost of the European Patent Court is €7.200.000. The annual costs include salaries of judges, staff, expenses for facilities etc<sup>111</sup>. The calculation is based on 850 cases a year.

The language system will add to the costs regarding the court process. For example, costs for simultaneous translation during oral proceedings and translations of files that are not written in the official EPO languages. However, experiences show that interpretation and translation are seldom needed since the majority of the cases relating to European Patents are now heard and held where the language used is English, German or French<sup>112</sup>

The average court cost for a small to medium scale case before the European Patent Court should not exceed 65 000€ for a process in both instances<sup>113</sup>. The costs of attorneys and lawyers are usually the highest. Assume that the lawyers and the patent attorneys in a small to a medium-scale case would demand 50% of the fees normally gained by multiple litigations. The calculation is based on the fact that one case is solved in front of one court. There is no need for three teams in three different national courts. Based on that, one can say that the cost would 1/3 of the fees normally paid. However, performing before the European Patent Court means that the parties' lawyers and attorneys must put more effort into the proceedings regarding responsibility and risks. Therefore it is not quite measurable to a national court hearing<sup>114</sup>.

The court fees for the parties would lie between €53.000-€380.000 dependent on which instance the case is carried through. The average patent case would then amount to between €83.000-€415 000. Costs before the European Patent Court is up to 45% more cost effective compared to litigation in national courts, and this does not include the costly litigation processes in the UK. These beneficial effects would be even further enhanced if other member states were to comply with the EPLA scheme.

Thus, a European Patent Court would reduce costs and multiple litigations.

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<sup>110</sup> [http://www.european-patent-office.org/epo/epla/pdf/impact\\_assessment\\_annex1\\_2006\\_02.pdf](http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex1_2006_02.pdf) collected 20th of May 2006.

<sup>111</sup> [http://www.european-patent-office.org/epo/epla/pdf/impact\\_assessment\\_annex2\\_2006\\_02.pdf](http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex2_2006_02.pdf) collected 22nd of May 2006.

<sup>112</sup> [http://www.european-patent-office.org/epo/epla/pdf/impact\\_assessment\\_annex2\\_2006\\_02.pdf](http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex2_2006_02.pdf) collected 22nd of May 2006.

<sup>113</sup> [http://www.european-patent-office.org/epo/epla/pdf/impact\\_assessment\\_annex2\\_2006\\_02.pdf](http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex2_2006_02.pdf) collected 22nd of May 2006.

<sup>114</sup> [http://www.european-patent-office.org/epo/epla/pdf/impact\\_assessment\\_annex2\\_2006\\_02.pdf](http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex2_2006_02.pdf) collected 22nd of May 2006.

#### **6.4.7. Comparative analysis of the costs**

A conclusion is that the costs of a medium scale patent case before the European Patent Court are likely to be higher than the costs in a similar patent dispute before both one and two courts in an EPC contracting state, except for Great Britain. Whereas companies must litigate before national courts in three or more European states, the costs of having litigation before the European Patent Court will be considerable lower than to litigate in separate national courts.

### **7. Analyse**

#### **7.1. Patent litigation insurance**

The likeliness of finding a wide spread well functioning patent litigation insurance scheme seems farfetched at the moment. Right now there are so many obstacles to overcome when setting up a scheme like this. Unfortunately there are no reliable data regarding court statistics, which also varies between the member states of EU. It is hard for both the insurance companies and the policyholders to calculate risks, costs etc. related to a patent litigation insurance scheme. However, in the reports from CJA a number of key factors were presented<sup>115</sup>.

Since a patent litigation insurance scheme would have to be compulsory in order to be established, and also be rather expensive for the parties signing up for insurance, makes it a doubtful alternative. It would also take quite some time to create sufficient political support to set up the scheme, as well as implement it. One of the conclusions that can be drawn from the CJA reports is that neither insurance companies nor potential companies signing up for insurance want to have a patent litigation insurance scheme at any cost.

There are no guarantees that the insurance will cover the complete costs of litigation or the infringer may be aware of the patentees' insurance and also know the limitations of the insurance cover. In cases like these, the patentee would not have support from patent litigation insurance.

##### **7.1.1 The impact of dispute resolution mechanisms**

Initially, the concept of patent litigation insurance was meant to give SMEs or companies with small financial resources aid in situations where they will be intimidated by large companies equipped with a substantial amount of resources. No one can deny the need for financial aid. However, in the last couple of years it has become evident that litigation is not suitable for solving patent related disputes. It is time consuming, costly and information included in the court proceedings are made public. Window of opportunities might get lost and/or companies go bankrupt during the process. Companies dependent on their know-how etc. connected to patents will drop their potential market advantage when their trade secrets etc. become publicly known. Also, the competence in national courts within EU regarding patent related disputes varies which increases the uncertainty. These are the main criteria for not choosing litigation as the main alternative in order to defend your infringed patents. With

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<sup>115</sup> See section 4.3

the help of patent litigation insurance, costs are covered but there are still issues to be dealt with.

In the final report from CJA in 2006, CJA emphasizes the possibility of using mediation in the patent litigation insurance scheme. Due to the critic of getting stuck in the national court rooms when using PLI schemes CJA pointed out that the scheme also could contain different steps where mediation could be one of them. Very early in the conflict mediation is used in order to find a more business like solution and by that avoid that the conflict will end up in court. The development within the CJA patent litigation insurance scheme is very much in line with the progress of having disputes solved outside legal courtrooms.

The fact that patent related disputes are solved outside the legal court system is a bad mark for both the national and European patent system. The market does not trust the system and have, from a business perspective, identified the potential danger of using litigation as a dispute resolution mechanism. All information handled in the court proceedings are made public or at least known to third parties through court proceedings. Therefore, the importance of having a well functioning court system cannot be underestimated; the legislature powers are the backbone of our society. Arbitration and/or mediation cannot function if court activities can be seen as negligible. If there are weak legislature powers, large companies will have a tremendous advantage in every arisen dispute, the world of IP will become the new Wild West. The European market is shutting down its own market by having such an ineffective court system.

Also, the only way to challenge patent's validity is through national courts, this cannot be underestimated. A more efficient patent system is desperately needed. If there is a more effective court system the possibilities of having a coveted PLI scheme is essential for SMEs. Since they do not have the powers to

## **7.2. Patent defence union**

First of all, it is easy to attack a small actor with little or no experience at all in patent litigation. Since intimidation is used by large companies to get the upper hand in cases as above mentioned, the risk of facing an experienced organization instead of a small firm will call for second thoughts. The fact that most patent conflicts nowadays in a non-contractual relation, in this case a non PDU member, ends up in a litigation process or a court proceeding. Litigation costs both time and money and the effort SME must put in are not in proportion compared to the larger companies. The PDU will have both the resources and the expertise to put up for a good fight against the large actor. A pleasant side effect would be that compared to the situation where the infringer quite easily can calculate the insurance cover in a patent litigation insurance case, the infringer cannot estimate the resources within the PDU organisation (both monetary and experience). A consequence will be that the large financial strong actors cannot win simply through its power to intimidate. The large actor must stop using the technology in conflict and the large company will lose money which is not desired, i.e. the large actor will face immediate costs. The fact that the PDU, which is a judicial body, is dealing with the case means that the SME will not be directly responsible for damages (which in some jurisdictions can be very large).

The concept of PDU is remarkably interesting; a group of SMEs forming voluntary patent pools with the objective to defend their patents against financially equipped actors. The collaboration platform established only has one purpose; to defend the patents within the

patent pool. One can imagine the benefits from having a collaboration platform where partners instead develop technologies deriving from patents within the pool and by that create value, instead of having as their main objective to defend the very same patents. There is a risk that patent defense unions have negative impact on collaborations with third parties and establishment of collaboration platforms; it is highly unlikely that parties in a patent defense union have the same interest of developing technologies in a certain direction. The concept of PDU must be further developed, and find solutions that will offer a broader variety of incentives for companies to get together in a patent pool. PDU in current form will impede the progress of open innovation which is crucial for creating value and increasing the global welfare.

### **7.2.1 The impact of dispute resolution mechanisms**

However, by forming a patent defense union, financially strong actors might be hesitant before they intimidate financially weaker companies. As a consequence, the PDU and the infringing party might agree upon arbitration in order to solve the conflict at hand. Arbitration is compared to litigation a much more desired dispute resolution mechanism. Since patent disputes are fundamentally technical there is a need for expert arbitration. WIPO set up facilities for this back in 1992, but the number of cases solved by expert arbitration, providing a final settlement, is very low<sup>116</sup>. As mentioned previously, the most common action in patent related disputes is to enforce the patent's invalidity. On the other hand, in countries where it is possible to deal with validity issues, for example in the US, no attempt to use expert arbitration in patent disputes has been used in any major way.

Therefore it is interesting to look into why arbitration is not an alternative, except for validity issues. Litigation is a great advantage for large firms with large economical resources. There is no company in the world that wants to give up their advantage if they do not get something in return they feel make the sacrifice worth it. In cases where litigation is avoided the companies in conflict are often to a large extent on the same financial level. When companies are on the same financial strength cross-licensing is often used to get access to one another's technologies. Only companies on the same economic level have the incentive to avoid litigation, either if they are small, medium or large scale companies. There is further evidence that if you cannot intimidate one another in terms of legal costs and delays, the incentive to go to court is gone. As a consequence, if neither of the parties can outmanoeuvre the other, both parties would like to get a cheap and fast settlement of the dispute regardless of the economical strength of the parties.

In order to achieve a cheap and fast settlement mediation is probably the most effective dispute resolution mechanism available. In the last decade mediation has developed into one of the most popular dispute resolution mechanisms when parties in conflict need a quick settlement in order to proceed with their businesses. Mediation has also been recommended in early stages to keep costs down in PLI schemes. As with arbitration, questions regarding patents validity cannot be solved through mediation either but the question if it is desired to enter into litigation regarding patent's validity must be evaluated as well.

Where Mediation has been used it enjoys remarkable high rates of success, due to its non-binding nature. Even if a settlement is not reached the parties in mediation know more about the conflict than they did prior to the mediation. The parties are also in control of the process

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<sup>116</sup> Kingston William, Enforcing small firms' patent rights, 2000, p.45.

and can decide in which direction the mediation procedure will heading. Each party have an individual right to terminate the mediation procedure<sup>117</sup>.

Mediation is a way to create and maintain business relationships, chances are that lucrative license agreements can be negotiated in the mediation processes. It is essential to find win/win situations through mediation. Mediation is from a business perspective the best option in creating win/win situations, it is cheap, fast and potentially creating new collaboration partners on the market. Both time and money will be saved and spent on new products launched on the market in collaboration with new business partners. Mediation is very suitable in the concept of PDU where the members of the union wants to solve dispute fast and a low cost.

One of the disadvantages concerning mediation is that the agreement is not binding, i.e. not comparable to a verdict. However, as it is stated earlier, mediation agreements can be set out in an arbitration award by having an arbitration procedure in connection to the mediation.

The parties in the conflict can also direct influence how and who will solve the disagreement. By finding suitable mediators for the specific conflict at hand it is easier to reach a satisfying result. Maybe the conflict is not solved but narrowed down, even such a scenario may be positive when the conflict is then easier to handle. SMEs will benefit from that.

### **7.3. PLI vs. PDU – pros and cons**

The alternatives analyzed primarily in section 7.1-7.2 have both advantages and disadvantages. As it is stated in section 7.1, PLI is a scheme where an insurance company will pay for at least a part of the cost in a litigation process. The main disadvantage in the patent litigation concept is that it will be expensive, probably so expensive that only companies are aware of their disadvantageous situation decide to have the insurance (if the scheme is voluntary). The insurance companies will then pretty soon be bankrupt. According to the CJA reports the insurance must be compulsory in order to get the costs negligible. However, the insurance costs in a compulsory scheme cannot be seen as negligible in the total sum paid annually by the patentee. The fact that it is so expensive to create economic balance in a dispute makes the balance even more unbalanced. If SMEs must pay insurance costs that are a very large part of the total sum paid annually for a patent, the outcome is that SMEs must spend money they cannot afford for a protection they do not want/need. However, if the patentee wins a case financed by insurance they will have the compensation by themselves compared to the concept of a PDU where the members will share the reward within the union.

The concept of PDU may be a good way to not only fight infringing activities but also have lobbying activities in order to gain respect from larger companies. It is also possible to create a corporate environment where intimidation activities will be unethical behavior that large companies fear to be accused of. The PDU may have the power to let the market set out new rules instead of relying on financial support in a dispute. The time aspect is important to SMEs and by ending up in court SMEs might face difficulties.

From a business point of view, the PDU is the model that most likely will work today. However, strategic decisions must be made in order to reach satisfying results. The PDU is

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<sup>117</sup> [http://www.wipo.int/freepublications/en/arbitration/449/wipo\\_pub\\_449.pdf](http://www.wipo.int/freepublications/en/arbitration/449/wipo_pub_449.pdf) p.9 collected nov 2006.



also the model where the actors (members) can act more freely without interference from a third party such as an insurance company or lobbying activities toward the legislator to change the current legal system. It is therefore possible to have the patent defence union as a tool to change the behavior for the companies using intimidation as a business concept.

#### **7.4. The progress of the European patent system**

Due to the current European patent system SMEs face difficulties defending their IPR in relation to financial strong actors. The patent system is one of the underlying difficulties in realizing a well functioning EU level PLI scheme. A weak and uncertain legal system is not desired if you want to have your disputes solved, and why would you want financial aid from patent litigation insurance when litigation in the current system is the least desired resolution mechanism available.

Recently politicians within EU have discovered the importance of having a reliable and efficient European patent system. In parallel, there have been works with both the European patent litigation agreement and the establishment of the EU patent in order to find a unified patent system throughout EU. It is crucial to have a unitary judicial system if EU will be a competitive market within the global knowledge based economy.

The long awaited EU patent may be the solution for litigation in the future. If the European Patent Court tied to the EU patent will be an efficient and a less costly alternative compared to the national multiple litigation model for EU patents there is a possibility for competent judges solve patent related disputes fast. As a result window of opportunities can be taken advantage of. However, there are indications that the EU patent will be in force in the near future, but there are still issues that need to be solved.

To be able to fulfil the E.U objective: to be the most competitive economic market in the world, it is of utter importance to find satisfactory dispute resolution mechanisms to help the market to be more effective. From a legal perspective the EU patent scheme is an interesting option in creating a strong and more efficient legal environment concerning patents. A well functioning EU patent scheme will increase patenting activities among SMEs, more investments will be made, easier to attract VC etc.

However, politicians and decision makers must prioritize the establishment of the EU patent in order to secure the development of the European economy. In the last couple of years politicians have had a further focus on realizing a scheme which offers a satisfactory European patent system. The EU Commission has established a number of reports, and extensive work in order to achieve the goal.

Unfortunately some of the EU member states focus on defending their political positions instead of make sure to secure the development of the European economy. The question regarding what languages that will be used in the EU patent scheme is the burning issue. However the EU Commission has clearly expressed that the progress towards an establishment of an EU patent scheme will be put through even though consensus cannot be met between the EU member states. This gives an indication of the prioritizing for the development of a European patent system that will enhance the EU competitiveness on the global knowledge based market. Thus, the future for a well functioning and reliable European patent system looks bright

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