

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 22, Issue 1

2011

Article 8

VOLUME XXII BOOK 1

Multi-National Patent Litigation: Management of Discovery and Settlement Issues and the Role of the Judiciary

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James Pooley and Vicki Huang

Abstract

National patent laws protect intellectual property rights. However, these rights can only be enforced in the country that granted the patent. Therefore, a patent owner must pursue infringement or revocation proceedings in each country where his patent rights are challenged even if the defendant is the same party. Patent owners are forced to pursue duplicative litigation on a ?nation-by-nation basis, incurring significant costs and draining valuable judicial resources. Duplicative litigation may result in conflicting outcomes, the impact of which can be complex and costly.... This article will focus on Germany, Japan, the United Kingdom, and the United States. First, we will provide a broad overview of the procedural landscape of these jurisdictions, paying particular attention to discovery and settlement. Then, we will examine the formal and informal mechanisms involved in cross-border discovery and settlement. Finally, we will propose some mechanisms that judges can use to facilitate an efficient discovery process and the settlement of international patent disputes.

KEYWORDS: patent litigation, multi-national, multi-jurisdictional, international patent litigation, discovery

*Mr. Pooley and Ms. Huang prepared this article while working as a partner and an associate, respectively, in the Palo Alto office of Morrison & Foerster LLP.

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INTRODUCTION¹

National patent laws protect intellectual property rights. However, these rights can only be enforced in the country that granted the patent.² Therefore, a patent owner must pursue infringement or revocation proceedings in each country where his patent rights are challenged even if the defendant is the same party.³ Patent owners are forced to pursue duplicative litigation on a “nation-by-nation basis,”⁴ incurring significant costs and draining valuable judicial resources. Duplicative litigation may result in conflicting outcomes, the impact of which can be complex and costly.

Several proposals have been put forward by academics and others to address this problem. These include the creation of an international court,⁵ the exercise of jurisdiction over foreign patent claims by a single national court,⁶ and the development of bilateral or multilateral treaties prescribing foreign judgment recognition.⁷ However, all of these suggestions face significant hurdles. For example, the creation of an international court (if feasible) would likely generate multiple follow-up proceedings in domestic courts;⁸ the proposal to exercise jurisdiction over foreign patent claims inevitably provokes fears over loss of national sovereignty;⁹ and the negotiation of treaties can be regarded as a long-term prospect

¹ This article is based on materials prepared for the Intellectual Property Owner’s 5th International Judges Conference on Intellectual Property Law held in April, 2009.

² See *Brown v. Duchesne*, 60 U.S. 183, 187 (1856).

³ John Gladstone Mills III, *A Transnational Patent Convention for the Acquisition and Enforcement of International Patent Rights*, 88 J. PAT. & TRADEMARK OFF. SOC’Y 958, 958 (2006).

⁴ Kerry J. Begley, *Multinational Patent Enforcement: What the “Parochial” United States Can Learn from Past and Present European Initiatives*, 40 CORNELL INT’L L.J. 521, 522 (2007).

⁵ Pauline Newman, *On Global Patent Cooperation*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 3, 4 (1997).

⁶ Begley, *supra* note 4, at 567.

⁷ *Id.*

⁸ See generally *id.*

⁹ See Newman, *supra* note 5, at 6.

at best. Indeed, the search for an elegant solution unavoidably bumps into a hard reality: while the substantive law may be mostly harmonized, procedural laws in various nations diverge widely.¹⁰

The differences between the United States and Europe and Asia plainly illustrate this point. For example, many European and Asian countries employ specialized patent trial courts,¹¹ whereas the United States stands alone in offering trial by lay juries in patent actions.¹² In addition, discovery exists in other common law jurisdictions, such as the United Kingdom, but U.S.-style depositions are extremely unusual. Still further, civil law countries, such as Germany and Japan, use bifurcated proceedings to separate issues of validity and infringement into different, independent tribunals. Clearly, different civil procedural rules complicate any attempt to harmonize multinational patent enforcement.

However, it is not the goal of this article to advocate wholesale change to harmonize local civil procedural rules. Instead, we propose some pragmatic suggestions that litigants and judges can employ to improve the efficient management of multinational patent disputes within the current framework.

These suggestions will focus on two of the most significant factors that impact the efficient resolution of these disputes, namely (1) the existence and scope of discovery, and (2) the ability to settle the case. In multinational litigation, discovery is often sought from civil law countries with restrictive discovery laws, and settlement is complicated by the fact that resolution in one country can still leave a closely-related dispute pending in others.¹³ We argue that it is these specific aspects of the case—discovery and settlement—that litigants need to understand and judges need to address as part of transnational case management.

¹⁰ See Jan Klink, *Cherry Picking in Cross-border Patent Infringement Actions: A Comparative Overview of German and UK Procedure and Practice*, 26 EUR. INTEL. PROP. REV. 493, 494 (2004).

¹¹ James F. Holderman, *Address Judicial Patent Specialization: A View from the Trial Bench*, 2002 U. ILL. J.L. TECH. & POL'Y 425, 428 (2002).

¹² *Id.* at 427.

¹³ Begley, *supra* note 4, at 523.

This article will focus on Germany, Japan, the United Kingdom, and the United States. First, we will provide a broad overview of the procedural landscape of these jurisdictions, paying particular attention to discovery and settlement. Then, we will examine the formal and informal mechanisms involved in cross-border discovery and settlement. Finally, we will propose some mechanisms that judges can use to facilitate an efficient discovery process and the settlement of international patent disputes.

I. PROCEDURAL OVERVIEW OF GERMANY, JAPAN, THE UNITED KINGDOM, AND THE UNITED STATES

A. *Germany*

Germany is the most popular jurisdiction in Europe for patent actions.¹⁴ Indeed, “[m]ore than 50 percent of all patent litigation cases in Europe are commenced in Germany.”¹⁵ However, unlike common law jurisdictions, Germany, a civil law country, has a bifurcated system so that actions for infringement and revocation are heard in different courts.¹⁶ Patent infringement cases are heard by specialized patent panels in District Courts, and their decisions are subject to review by the Courts of Appeal.¹⁷ These courts only deal with infringement proceedings and are not permitted to decide questions of patent validity.¹⁸ Importantly, therefore, invalidity of the patent is not a defense to a charge of infringement.¹⁹

In an infringement hearing, which lasts only a few hours, the presiding judge specifies the issues to be discussed.²⁰ During the

¹⁴ Christian Thiel, *Patent Litigation in Germany*, 21 CEB CAL. BUS. L. PRAC. 13, 13 (2006).

¹⁵ *Id.*

¹⁶ Thomas Bopp & Henrik Holzapfel, *Germany*, in INTERNATIONAL PATENT LITIGATION: DEVELOPING AN EFFECTIVE STRATEGY 103, 103 (David Wilson ed., 2009).

¹⁷ Thiel, *supra* note 14, at 13.

¹⁸ *Id.* (“Validity issues are dealt with exclusively by the European Patent Office (EPO), the Federal Patent Court, or the Federal Supreme Court in separate opposition or nullity proceedings.”).

¹⁹ Klink, *supra* note 10, at 499.

²⁰ Thiel, *supra* note 14, at 14.

hearing, the court proposes ways to settle the dispute.²¹ As discussed by Klink,²² if no settlement is reached, the court gives directions and timelines as to subsequent procedures, and sets a date for trial.

Patent revocation cases are heard in the Federal Patent Court with appeals to the Federal Court of Justice.²³ This bifurcated system means that the defendant must commence separate revocation proceedings in the Federal Patents Court while at the same time obtain a stay in the infringement action.²⁴ Infringement proceedings will only be stayed if there is convincing evidence that the revocation claim will be successful, such as documents demonstrating a lack of novelty.²⁵ A stay is granted in only approximately ten to fifteen percent of cases.²⁶

In Germany, discovery is narrowly permitted in both infringement and revocation proceedings. Evidence is attached to the claim and statements of defense,²⁷ and usually includes an example of the infringing product or some kind of product brochure.²⁸ In these German proceedings, there is no pre-trial discovery procedure or exchange of witness and expert statements,²⁹ but pre-action search orders are available.³⁰ Written evidence is preferred,³¹ and depositions are not permitted.³² According to Thiel, “German civil procedure provides little help to a plaintiff attempting to secure evidence to prove its case.”³³

²¹ ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Sept. 1, 2009, BUNDESGESETZBLATT, Teil I [BGBl. I], § 278 (Ger.), available at <http://www.gesetze-im-internet.de/zpo>.

²² Klink, *supra* note 10, at 498.

²³ Bopp & Holzapfel, *supra* note 16, at 104.

²⁴ Klink, *supra* note 10, at 499.

²⁵ See Jochen Bühling, *Germany*, in GLOBAL PATENT LITIGATION: STRATEGY AND PRACTICE ¶ 103 (Willem A. Hoyng & Frank W. E. Eijsvogels eds., 2006).

²⁶ Bopp & Holzapfel, *supra* note 16, at 107.

²⁷ Klink, *supra* note 10, at 498.

²⁸ Thiel, *supra* note 14, at 15.

²⁹ Klink, *supra* note 10, at 499.

³⁰ Bopp & Holzapfel, *supra* note 16, at 117. A pre-action search order is a search order granted against a potential defendant to assess whether an action or a legal proceeding should be commenced. *See id.*

³¹ Klink, *supra* note 10, at 499.

³² See Bühling, *supra* note 25, at ¶ 126.

³³ Thiel, *supra* note 14, at 14.

While the law does not provide for broad discovery, in Germany, as with other civil law countries, the judge plays a significant role as an inquisitor, and plays a significant role in marshalling the evidence.³⁴ For example, the judge will conduct research, question the witnesses, and prescribe pretrial hearings on technical issues.³⁵ Therefore, if the judge deems it relevant, evidence obtained from depositions or pre-trial discovery in foreign jurisdictions can be admissible in a German proceeding.³⁶ The power of the judge in his or her inquisition can even trump other courts' protective orders designed specifically to limit disclosure and use of confidential information produced in discovery.³⁷

B. Japan

Similar to the bifurcated system in Germany, Japanese district courts traditionally hear infringement proceedings, while the Japanese Patent Office (JPO) conducts hearings on validity issues.³⁸ In 2005, the IP High Court was established as a special branch of the Tokyo High Court to hear appeals from district courts and the JPO.³⁹ The IP High Court and the district courts are supported by over one hundred technical advisers and full time research officials.⁴⁰

³⁴ See William H. Richardson & Aaron Sawchuk, *Effectively Managing A Global Patent Litigation Strategy*, MCCARTHY TÉTRAULT (Feb. 8, 2007), http://www.mccarthy.ca/article_detail.aspx?id=3454.

³⁵ *Id.* See also Bühling, *supra* note 25, at ¶ 126.

³⁶ Bühling, *supra* note 25, at ¶ 126

³⁷ See *id.* Such protective orders are sometimes referred to as “measures of secrets.” See *id.* “One must assume that a damaging document or admission in one pre-trial examination will surface in other related proceedings.” Richardson & Sawchuk, *supra* note 34.

³⁸ Ayako Matsui, *Patent Litigation in Japan*, 21 CEB CAL. BUS. L. PRAC. 29, 30 (2006).

³⁹ See *History*, INTELLECTUAL PROP. HIGH COURT, <http://www.ip.courts.go.jp/eng/aboutus/history.html> (last visited Mar. 20, 2011). The Supreme Court of Japan hears final appeals. See Masahiro Otsuki, *Japan, in International Patent Litigation: Developing an Effective Strategy* 159, 159 (David Wilson ed., 2009).

⁴⁰ Ruth Taplin, *Transforming Intellectual Property in Japan*, KNOWLEDGE LINK NEWSL. FROM THOMSON SCIENTIFIC, July 2007, at 5, <http://science.thomsonreuters.com/i/klnl/8398180/8398184/japan.pdf>.

Today, since a change in 2000, invalidity is an affirmative defense to a patent infringement claim.⁴¹ Therefore, although there is a bifurcated system, the court may make an independent determination about the patent's validity in a patent infringement case if the court decides that the patent claim is clearly invalid.⁴² However, the alleged infringer still remains free to seek invalidation of the patent by the JPO through parallel revocation proceedings.⁴³ Pending the outcome of the JPO invalidation hearing, the infringement litigation may be suspended.⁴⁴ The courts and the JPO coordinate with each other so that evidence that was presented to the court in the infringement proceeding can be used by the JPO in its determination of the validity of the patent.⁴⁵ This coordination enhances consistency of decisions between the two authorities.⁴⁶

In Japan, the parties have limited access to “discovery tools, such as preservation of evidence orders, document production orders, and orders for inspection of premises.”⁴⁷ While there are procedures similar to interrogatories, these “are often ineffective because there are no penalties for noncompliance.”⁴⁸

Patent litigation often does not proceed to trial in Japan. Most parties wish to settle disputes informally, and there is significant judicial pressure to avoid a trial.⁴⁹ Wagnild explains that parties are expected to comply with pretrial procedures, such as “*minji cho-tei*” (a preliminary hearing by a layperson) and “*wakai*” (negotiated settlement).⁵⁰ Furthermore, during trial, where proceedings may extend over a long period of time, judges make strong efforts to encourage parties to settle the case.⁵¹

⁴¹ See Otsuki, *supra* note 39, at 182.

⁴² Matsui, *supra* note 38, at 30.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 *ASIAN-PAC. L. & POL'Y J.* 1, 17–18 (2002).

⁵⁰ *Id.* at 18.

⁵¹ *Id.*

C. *The United Kingdom*

In the United Kingdom, patent litigation is concentrated in the Patents Court, which is part of the High Court's Chancery Division.⁵² Infringement and validity issues are typically heard at the same time and by the same court.⁵³ Invalidity of the allegedly infringed patent is an affirmative defense, and it is not uncommon for a defendant to counterclaim for revocation.⁵⁴ At an early stage in the proceedings, the court holds a case management conference and sets a timetable to resolve the case.⁵⁵ The case management conference often leads to a narrowing of the issues and the setting of an early trial date, resulting in the efficient disposal of the case.⁵⁶ In most cases, subject to the court's discretion, the unsuccessful party will be ordered to pay the costs of the successful party.⁵⁷

As a general rule, discovery (or disclosure, as it is known in the United Kingdom) is wider than it is in other European jurisdictions,⁵⁸ but more restrictive than it is in the United States.⁵⁹ Each party is required to make a reasonable search and disclose to all others, by way of a list, all documents in its control which "adversely affect his own case," "adversely affect another party's case," or "support another party's case."⁶⁰

However, parties can limit disclosure by withholding or redacting on the grounds of "legal advice privilege" and "litigation

⁵² We note that all patent actions must be brought in the Patents Court—either in the Patents County Court or the Chancery Division of the High Court—with more complex actions being brought in the latter. See Sally Field, *Patent Litigation in the U.K.*, 21 CEB CAL. BUS. L. PRAC. 7, 7 (2006).

⁵³ Paul England & Sebastian Moore, *United Kingdom*, in INTERNATIONAL PATENT LITIGATION: DEVELOPING AN EFFECTIVE STRATEGY 245, 249 (David Wilson ed., 2009).

⁵⁴ Field, *supra* note 52, at 8.

⁵⁵ See Sedona Conference, International Overview of Discovery, Data Privacy & Disclosure Requirements, The Sedona Conference Working Group Series (WG 6), Sept. 2009, at 183, available at http://www.thosedonaconference.org/dltForm?did=The_Sedona_Conference_International_Overview_of_Discovery_Data_Privacy_and_Disclosure_Requirements (enter name and e-mail address to obtain pdf copy of the document).

⁵⁶ See Field, *supra* note 52, at 8–9.

⁵⁷ Civil Procedure Rules (CPR), 1998, S.I. 1998/3132, art. 44.3, ¶ 2 (U.K.).

⁵⁸ England & Moore, *supra* note 53, at 254.

⁵⁹ Field, *supra* note 52, at 9.

⁶⁰ CPR, 1998, S.I. 1998/3132, arts. 31.6–31.7 (U.K.).

privilege.”⁶¹ Legal advice privilege protects lawyer-client communications and litigation privilege “protects documents which were created for the dominant purpose of gathering evidence for use in proceedings . . . and for giving legal advice in relation to such proceedings.”⁶² In addition to the limitations imposed by these privileges, the Patents Court has introduced rules restricting disclosure in a validity suit to items “coming into existence 2 years before or after the priority date of the patent in suit.”⁶³

Documents which are not privileged “must be disclosed even if they are commercially sensitive and confidential.”⁶⁴ As Field explains, each party gives the court an implied undertaking to use disclosed information only for the purpose of litigation, and an additional confidentiality order can be applied to limit disclosure of specific documents to the other party’s legal advisors.⁶⁵

In the United Kingdom, document discovery is common but there are no witness depositions⁶⁶ like those found in the United States. Rather, written witness statements are served upon the parties before trial.⁶⁷ Also before trial, a letter of claim can be sent to the alleged infringer with a request for the infringing activity to cease.⁶⁸ The purpose of the letter is to try to settle the case before expensive court proceedings begin.⁶⁹ While not compulsory, failure to send a letter of claim may trigger cost penalties in subsequent proceedings.⁷⁰ The courts actively “encourage the use of alternative dispute resolution” and will award adverse costs to those parties who “unreasonably refuse” to engage in mediation.⁷¹

⁶¹ See England & Moore, *supra* note 53, at 254–55.

⁶² *Id.*

⁶³ Field, *supra* note 52, at 9.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ CPR, 1998, S.I. 1998/3132, arts. 32.4, 32.10 (U.K.).

⁶⁸ Klink, *supra* note 10, at 495.

⁶⁹ *Id.*

⁷⁰ *Id.* (“In the United Kingdom, the court has wide discretion as to whether and to what extent costs are awarded.”).

⁷¹ Field, *supra* note 52, at 12.

D. United States

In the United States, patent cases are usually heard in federal district courts and are one of the “most hard-fought areas of [U.S.] civil litigation.”⁷² The United States distinguishes itself from the jurisdictions discussed above by allowing the factual disputes in a patent case to be determined by a jury.⁷³ Also, in comparison to the other jurisdictions discussed above, American courts allow extensive and permissive discovery.⁷⁴ In the United States, adversaries are required to provide initial disclosures,⁷⁵ expert discovery,⁷⁶ additional pretrial disclosures,⁷⁷ witnesses for depositions,⁷⁸ written interrogatories,⁷⁹ and document production.⁸⁰ Although there are protective privileges, like the attorney-client privilege, the scope of discovery is broad—any request that may lead to relevant information is permissible.⁸¹ As a consequence of this exhaustive discovery, patent litigation in the United States is more expensive than it is anywhere else in the world.⁸² While

⁷² James F. Haley & William J. McCabe, *United States*, in INTERNATIONAL PATENT LITIGATION 267 (David Wilson ed., 2009).

⁷³ *Id.* at 282.

⁷⁴ Larry Coury, *C'est What? Saisie! A Comparison of Patent Infringement Remedies Among the G7 Economic Nations*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1101, 1106 (2003).

⁷⁵ FED. R. CIV. P. 26(a)(1).

⁷⁶ FED. R. CIV. P. 26(a)(2).

⁷⁷ FED. R. CIV. P. 26(a)(3).

⁷⁸ FED. R. CIV. P. 26(b)(4); FED. R. CIV. P. 27.

⁷⁹ FED. R. CIV. P. 27(a)(3).

⁸⁰ FED. R. CIV. P. 26(a)(1)(A)(ii).

⁸¹ Gabi Klemm, *Considerations and Strategies in International Patent Litigation: Comparison of Means to Obtain Evidence for Patent Infringement* 16 (Mas-Ip Diploma Papers & Research Reports, Paper No. 12, 2001), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1015&context=ndsip&seiredir=1#search=%22www.bepress.com/ndsip/papers/art12%22>.

⁸² See James F. Holderman & Halley Guren, *The Patent Litigation Predicament in the United States*, 2007 U. ILL. J.L. TECH. & POL'Y 1, 10 (2007) (“In the United States, litigation costs of taking a patent lawsuit through discovery range from \$350,000 to \$3 million, and the costs of a patent case taken through to appeal range from \$650,000 to \$4.5 million. For comparison, in the United Kingdom, which is the most expensive country in Europe for patent litigation, the costs range from approximately £200,000 (about US\$370,000 at current rates) to £1.5 million (about US\$2.775 million). In Germany, which is the least expensive of the European countries, costs range from €15,568 (about US\$19,677) to €41,888 (about US\$52,944), although infringement and validity are tried separately.”).

countries, such as the United Kingdom, have some form of “loser pays” system, in the United States each party generally bears its own attorneys fees.⁸³

Although exhaustive, discovery in the United States is not limitless. Discovery can be refused on grounds that the information sought is privileged, is unduly burdensome or is under a protective order.⁸⁴ In addition, while the traditional rule is that a party charged with producing documents must bear its own costs of production,⁸⁵ courts do have some discretion to shift a portion of the costs onto the requesting party to protect the responder from “undue burden or expense.”⁸⁶

Furthermore, discovery of electronic records, like e-mail, is common in the United States. This relatively new form of discovery had and continues to have the effect of increasing the scope and cost of pretrial proceedings.⁸⁷ The same basic legal rules govern discovery of documents and electronically stored information (“ESI”).⁸⁸ In December 2006, the federal rules were amended to address particular features of electronic discovery.⁸⁹ A significant body of case law now exists that deals with the discovery of ESI.⁹⁰

Moreover, unlike Germany and the United Kingdom,⁹¹ sworn testimony from witnesses can be obtained before trial by the taking of depositions.⁹² Depositions are usually videotaped and are considered a useful tool to assess the strength of a witness and to identify further evidence.⁹³ As lawyers from both sides are

⁸³ See generally Keith N. Hylton, *Litigation Cost Allocation Rules and Compliance with the Negligence Standard*, 22 J. LEGAL STUD. 457 (1993).

⁸⁴ FED. R. CIV. P. 26.

⁸⁵ Fed. R. Civ. P. 26(c).

⁸⁶ See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (citing FED. R. CIV. P. 26(c)).

⁸⁷ Charles Christian, *US Government Agency e-discovery Trendst*, ORANGE RAG (Feb. 13, 2009, 8:17 AM), http://theorangerag.blogharbor.com/blog/_archives/2009/2/13/4091253.html.

⁸⁸ FED. R. CIV. P. 34.

⁸⁹ Sedona Conference, *supra* note 55, at 203.

⁹⁰ *See id.*

⁹¹ See *supra* Parts I.A, I.C, respectively.

⁹² Haley & McCabe, *supra* note 72, at 277.

⁹³ FED. R. CIV. P. 30(b)(3). See also Haley & McCabe, *supra* note 72, at 277.

involved before, during, and after depositions, the process of taking depositions significantly adds to the high cost of litigation.

Despite the financial cost, the advantage of liberal discovery is that it provides the patent owner with detailed insight into the alleged infringing conduct. Moreover, the exchange of information can lead to a more accurate cost-benefit analysis of proceeding to trial and can press the parties into settlement negotiations. Significantly, in the United States, only five percent of patent cases are tried,⁹⁴ the rest are resolved via settlement, voluntary dismissal, or by consent judgment.⁹⁵ However, while most cases settle, they typically settle late in the proceeding.⁹⁶ To encourage earlier settlement, courts will intervene, usually at the first case management conference.⁹⁷

II. CROSS-BORDER DISCOVERY

A. *United States Litigants Seeking Evidence Abroad*

A party from the United States seeking evidence from a foreign jurisdiction has several formal avenues at his disposal, including *The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters* (“the Hague Convention”).⁹⁸ The Hague Convention provides parties with a standardized procedure to gather evidence in foreign jurisdictions.⁹⁹ Signatories¹⁰⁰ to the

⁹⁴ Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 913 fig.3 (2001).

⁹⁵ *Id.* at 913.

⁹⁶ PETER S. MENELL, LYNN H. PASAHOW, JAMES POOLEY & MATTHEW D. POWERS, FED. JUDICIAL CTR., PATENT CASE MANAGEMENT JUDICIAL GUIDE 2–38 (2009).

⁹⁷ *Id.* at 2–39.

⁹⁸ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter Convention]. For a discussion of whether courts should apply the Federal Rules of Civil Procedure or the Hague Evidence convention, see Kathleen B. Gilchrist, *Rethinking Jurisdictional Discovery Under the Hague Evidence Convention*, 44 VAND. J. TRANSNAT’L L. 155 (2011).

⁹⁹ See generally Colin A. Underwood & Adam S. Katz, *Introduction The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters*, PROSKAUER ON INTERNATIONAL LITIGATION AND ARBITRATION, ch. 13(II) (2007), <http://www.proskauerguide.com/litigation/13/I> [hereinafter Underwood & Katz, *Hague*].

¹⁰⁰ See Hague Conference on Private International Law, *Status Table: 20: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*,

Hague Convention, including the United States, the United Kingdom, and Germany,¹⁰¹ agree to methods of cooperation in the taking of evidence from other signatory states.¹⁰² Thus, under the Hague Convention, United States litigants can discover both documents and testimony from foreign parties for use in U.S. proceedings.¹⁰³

Litigants seeking evidence under the Hague Convention are required to follow a number of procedural steps. For example, a litigant in a United States proceeding seeking documents or testimony¹⁰⁴ must first obtain a “Letter of Request” from the U.S. Court hearing the case, in order to initiate document discovery from a foreign jurisdiction.¹⁰⁵ This letter is transmitted to the “Central Authority” of the jurisdiction from which the information is sought.¹⁰⁶ Upon receipt, the Central Authority transmits the Letter of Request to the appropriate judicial body within the foreign jurisdiction, which then provides an expeditious response.¹⁰⁷

The Hague Convention is not the only procedural guide governing the procurement of foreign evidence. The rules of the foreign jurisdiction can still play a role in dictating the methods and procedures used to obtain evidence.¹⁰⁸ For example, Article 16 of the Hague Convention provides that a diplomatic or consular agent can take evidence “in aid of proceedings commenced in the

available at http://www.hcch.net/index_en.php?act=conventions.status&cid=82 [hereinafter Status Table].

¹⁰¹ See *id.*

¹⁰² See Hague Conference on Private International Law, *Outline Evidence Convention: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, available at <http://www.hcch.net/upload/outline20e.pdf>.

¹⁰³ *Id.* See also Underwood & Katz, *Hague*, *supra* note 99, at (C)(1).

¹⁰⁴ See Underwood & Katz, *Hague*, *supra* note 99, at (B). According to some practitioners, obtaining testimony from witnesses located abroad can be a daunting challenge requiring significant knowledge of civil procedure in non-United States jurisdictions. Colin A. Underwood & Adam S. Katz, *Introduction The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters*, Proskauer on International Litigation and Arbitration, ch. 13(III)(D)(1) (2007), <http://www.proskauer.com/litigation/13/III> [hereinafter Underwood & Katz, *Additional*].

¹⁰⁵ See Convention, *supra* note 98, at art. 1.

¹⁰⁶ *Id.* at art. 2.

¹⁰⁷ See *id.* at art. 6; art. 9.

¹⁰⁸ See *id.* at art. 9.

courts of a State which he represents.”¹⁰⁹ However, Article 11 of the Convention recognizes the continued role of the rules of the foreign jurisdiction by providing that the “person concerned may refuse to give evidence insofar as he has a privilege or duty to refuse to give the evidence” under the law of his foreign jurisdiction.¹¹⁰ While the Hague Convention may not be the only law relating to foreign discovery requests, it is still particularly relevant to litigants because, by ratifying the Convention, the signatory country indicated its general attitude to pre-trial discovery and its outer limits.¹¹¹

There are other limitations on the American litigant seeking discovery abroad. Most non-United States jurisdictions will not allow the extensive breadth of American-style discovery.¹¹² In particular, pre-trial discovery is uncommon in civil law jurisdictions.¹¹³ Many Hague Convention signatories, including Germany and the United Kingdom, have formally rejected the absolutist approach to discovery found in U.S. litigation.¹¹⁴ These countries have restricted pre-trial discovery under the provisions of Article 23 of the Hague Convention, which permits States to ensure that document production requests be “sufficiently substantiated.”¹¹⁵ These countries have also prohibited generally-worded requests directed at discovering any and every document in the possession of the other party to the proceeding.¹¹⁶ Therefore, the litigant must describe the evidence “with particularity and precision.”¹¹⁷

¹⁰⁹ *Id.* at art. 16.

¹¹⁰ *Id.* at art. 11.

¹¹¹ *See, e.g., id.*

¹¹² *Id.*

¹¹³ Gabi Klemm, Abstract, *Considerations and Strategies in International Patent Litigation: Comparison of Means to Obtain Evidence for Patent Infringement* (Mas-Ip Diploma Papers & Research Reports, Paper No. 12, 2001), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1015&context=ndsip&sei-redir=1#search=%22www.bepress.com/ndsip/papers/art12%22>.

¹¹⁴ Underwood & Katz, *Hague*, *supra* note 102, at (D).

¹¹⁵ Convention, *supra* note 98, at art. 23. *See also* Underwood & Katz, *Hague*, *supra* note 99, at (D)(3).

¹¹⁶ Underwood & Katz, *Hague*, *supra* note 99, at (D)(3).

¹¹⁷ Underwood & Katz, *Additional*, *supra* note 104, at (D)(1).

A United States litigant seeking discovery from a non-Convention jurisdiction will be further limited to the procedural avenues used domestically, or that are dictated by some other treaty.¹¹⁸ For example, Japan, unlike Germany, the United Kingdom, and the United States, is not yet a signatory to the Hague Convention.¹¹⁹ Rather, the United States and Japan are parties to a separate, bilateral treaty, the Consular Convention of 1963 between the United States and Japan (“Consular Convention”), detailing the rules for the collection of evidence between their jurisdictions.¹²⁰ Thus, foreign discovery requests from the United States to Japan are “governed by the Article 17 of the [Consular Convention], customary international law and the practice of nations, and applicable U.S. and local Japanese law and regulations.”¹²¹ Under the Consular Convention, consular officers are charged with a number of different responsibilities, including “tak[ing] depositions, on behalf of the courts or other judicial tribunals or authorities of the sending state, voluntarily given.”¹²²

According to Wagnild, “although this treaty was intended to resolve the problems associated with collecting evidence in Japan, major obstacles still exist that effectively preclude most forms of [American-style] discovery.”¹²³ For example, depositions may be conducted in Japan¹²⁴ for use in a court in the United States “only [1] if the deposition is presided over by a U.S. consular officer; [2] is conducted on U.S. consular premises[;] [3] is taken pursuant to an American court order or commission; [4] and if any non-Japanese participant traveling to Japan applies for and obtains a

¹¹⁸ Underwood & Katz, *Hague*, *supra* note 99, at (G)(1).

¹¹⁹ See Status Table, *supra* note 100.

¹²⁰ Consular Convention Between the United States and Japan, U.S.-Japan, Mar. 22, 1963, 15 U.S.T. 768 [hereinafter Consular Convention].

¹²¹ *Japan Judicial Assistance*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, http://travel.state.gov/law/judicial/judicial_678.html#evidoverviewsum (last visited Sept. 15, 2011).

¹²² Consular Convention, *supra* note 120, at art. 17(1)(e)(ii).

¹²³ Wagnild, *supra* note 49, at 20.

¹²⁴ For rules governing taking depositions of willing witnesses in Japan, see 22 U.S.C. §§ 4215, 4221 (2006); FED. R. CIV. P. 28–31; 22 C.F.R. § 92.55–92.66 (providing general authority); Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, art. 5(f), 5(j); Consular Convention, *supra* note 120, at art. 17(1)(e)(ii).

Japanese Special Deposition visa.”¹²⁵ If the attorney does not comply with these rules, “that attorney is considered to be violating Japan’s sovereignty.”¹²⁶ Significantly, American courts cannot compel compliance with U.S. discovery rules nor the production of evidence in Japan, as evidence must be voluntarily given.¹²⁷ Nevertheless, a Japanese litigant fighting a case in a U.S. court has a strong incentive to comply. An American court will not allow a defendant to shield himself behind an argument that a document or a witness is protected from discovery under Japanese law.¹²⁸ The court may penalize the Japanese defendant for failure to produce evidence, either with a heavy sanction or a negative finding against him.¹²⁹

The bilateral treaty “effectively restricts the taking of depositions in Japan to the U.S. embassy in Tokyo or U.S. consulate in Osaka.”¹³⁰ The available rooms are booked many months in advance, which can delay discovery efforts for months or years.¹³¹ Some scholars suggest that the procedures required by the bilateral treaty will not apply to certain situations where “(1) the individual giving the testimony is an employee of a party to the action or has been hired by the party to represent it (e.g., the individual is an expert witness) and (2) a binding oath ‘to tell the truth’ is not required for the proceeding.”¹³² According to this logic, an interference proceeding in the United States Patent and Trademark Office (USPTO), for example, would not be covered by the Consular Convention.¹³³

¹²⁵ *Japan Judicial Assistance*, *supra* note 121.

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *See, e.g.*, Katherine Hyde, *Japanese Companies & Employment Litigation: Special Concerns*, JAPAN SOC’Y (Apr. 24, 2008), http://www.japansociety.org/japanese_companies_employment_litigation_special_concerns_1.

¹²⁹ *See, e.g., id.*

¹³⁰ *Taking Depositions in a Foreign Country*, WHITE & CASE (Sept. 22, 2006), <http://www.whitecase.com/publications/detail.aspx?publication=1028>.

¹³¹ *Id.*

¹³² Charles L. Gholz, Steven B. Kelber & Masayasu Mori, *The Taking of Voluntary Testimonial Depositions in Japan for Use in U.S. Patent Interferences*, 78 J. PAT. & TRADEMARK OFF. SOC’Y 138, 138 (1996).

¹³³ *Id.*

B. Non-United States Litigants Seeking Access to Discovery in the United States.

Foreign litigants seeking discovery in the United States can apply to a United States district court under § 1782 of Title 28 of the United States Code, entitled “Assistance to Foreign and International Tribunals and to Litigants Before such Tribunals.”¹³⁴ Section 1782 was enacted with the “twin aims of ‘providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our [U.S.] courts.’”¹³⁵ Although there are other methods for non-U.S. litigants to obtain judicial assistance, for example the Hague Convention, § 1782 is “the principal choice for incoming discovery requests.”¹³⁶

According to the text of § 1782, the applicant needs to show that he is an “interested person,” that the proceeding is before a “foreign or international tribunal,” and that the person resides in the district of the court to which he is applying.¹³⁷ This broad framework was clarified by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.* (“*Intel v. AMD*”).¹³⁸

The Supreme Court in *Intel v. AMD* set out at least four factors to consider in the exercise of a court’s discretion under § 1782: (1) whether the documents or testimony sought are within the non-United States tribunal’s jurisdictional reach, and thus accessible absent the assistance of § 1782;¹³⁹ (2) “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad

¹³⁴ 28 U.S.C. § 1782(a) (2006).

¹³⁵ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 252 (2004) (quoting *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002) [hereinafter *Intel v. AMD*]).

¹³⁶ Klemm, *supra* note 81, at 22.

¹³⁷ 28 U.S.C. § 1782(a).

¹³⁸ *Intel v. AMD*, 542 U.S. at 246.

¹³⁹ *Id.* at 264. (“[W]hen the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence.”).

to U. S. federal-court judicial assistance”;¹⁴⁰ (3) “whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States”;¹⁴¹ and (4) whether the request contains “unduly intrusive or burdensome” demands.¹⁴² The Court further explained that anyone with relevant information, including corporations operating in the United States and non-United States citizens, can be ordered to produce evidence as long as they are found within the jurisdiction of the U.S. court.¹⁴³

While the Supreme Court helped to clarify the statute in *Intel v. AMD*, it still provides an expansive framework for district courts to grant § 1782 requests. As Massen argues, although *Intel v. AMD* theoretically restricts the language of the statute, its scheme still “allows a broad class of individuals to seek broad, U.S.-style discovery for use in a variety of judicial and quasi-judicial proceedings that may be pending at the time of the request, but need only be in reasonable contemplation.”¹⁴⁴ In addition, there is “no threshold requirement that the evidence sought [in the United States] . . . be discoverable under the law governing the foreign proceeding.”¹⁴⁵

A non-United States litigant can initiate a § 1782 request with a United States district court in one of two ways: (1) by a letter of request from a non-United States or international tribunal to the Department of State for transmission to the proper United States district court; or (2) a party or other “interested person” may make an application directly to the United States district court.¹⁴⁶ However, privileges will still apply; according to § 1782, “a person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 244–45.

¹⁴² *Id.* (“Also, unduly intrusive or burdensome requests may be rejected or trimmed.”).

¹⁴³ *Id.* at 264.

¹⁴⁴ Marat A. Massen, Note, *Discovery for Foreign Proceedings After Intel v. Advanced Micro Devices: A Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. CAL. L. REV. 875, 882 (2010).

¹⁴⁵ *Intel v. AMD*, 542 U.S. at 247.

¹⁴⁶ 28 U.S.C. § 1782(a) (2006).

applicable privilege.”¹⁴⁷ Generally, privileges under both United States and non-United States law can be available in the United States so that foreign defendants maintain their expectations of confidentiality.¹⁴⁸ This does not apply to plaintiffs who voluntarily subject themselves to the United States legal system by filing their complaints there.¹⁴⁹ Finally, whether material is ultimately admissible in the foreign proceeding still depends on the rules of evidence and civil procedure in the relevant foreign court.

III. DISCOVERY AND SETTLEMENT

Whether a party seeks discovery under the Hague Convention, § 1782, or by direct application to the relevant court, at some point in the process a judge becomes involved. Judicial intervention arises to assess, among other issues, compliance with procedural rules, privileges, confidentiality, and the scope of the request.

With regard to settlement, judges play different roles in different jurisdictions. In Germany, the judicial narrowing of the issues at an early stage, the proposal of settlement options, and the presence of statutory settlement fees all encourage parties to try to settle the case. Similarly, in Japan, the judicial management of the issues and evidence and the cultural aversion to trial promote settlement discussions early in the case. In the United Kingdom, early case management, judge-ordered narrowing of the issues by the parties, and penalties for refusing reasonable settlement offers encourage efficient management of the case by promoting settlement discussions. In the United States, while the costs of discovery are high, the revelations from extensive discovery—for example, expert reports or documents undermining validity—can crystallize the key issues in the case and pressure the parties to make informed settlement decisions.

In every jurisdiction, therefore, judicial discretion is exercised at critical points in the litigation which can impact attitudes toward settlement. However, it is possible for judges to insert themselves

¹⁴⁷ *Id.*

¹⁴⁸ Klemm, *supra* note 81, at 24.

¹⁴⁹ *Id.*

more directly into the settlement process. This Article now outlines some pragmatic suggestions for judges to consider in order to promote a more streamlined discovery process and to create pathways to settlement.

IV. SUGGESTIONS FOR A COORDINATED APPROACH

A. *Court-Ordered Mediation*

One option for judges is to require all parties to multi-national litigation to undergo global mediation. This could be ordered either by all relevant judges acting together, or by one or more who direct the parties to address all of their issues in one mediated proceeding. The mediator would be appointed by consent of the parties, since the ultimate outcome must be consensual, but the court could assist in finding acceptable mediator candidates. Each side could bring to the mediation its lead representatives¹⁵⁰ and decision-makers necessary to authorize a resolution.

Recognizing that settlement is more often a process than an event, the parties should be encouraged to engage in multiple meetings during the course of their litigation. Indeed, as part of an early mediation, the parties could focus on defining key issues of their dispute, drafting protocols for inter-party discovery requests, and examining pathways to settlement. A single meeting early on in the process could assist in developing new perspectives and opening informal channels of communication, so that even if the global dispute is not settled, the individual national cases might proceed more efficiently.

¹⁵⁰ In most multi-national patent disputes there exists a lead litigation manager or counsel who oversees the party's global litigation strategy. See David Wilson, *Developing a Strategy and Managing International Patent Litigation*, in INTERNATIONAL PATENT LITIGATION: DEVELOPING AN EFFECTIVE STRATEGY 9, 21 (David Wilson ed., 2009) ("If the litigation involves multiple cases in several jurisdictions it is critical that there is one person with overall responsibility who has sight of the entire picture, whether that be an external lawyer reporting to a client or in-house counsel.").

B. Global Case Management Conference

A second option is to order a global case management conference,¹⁵¹ similar to those already held in many jurisdictions. The conference could be held in front of a mediator acting as “friend of the court.” During the conference, draft orders for deadlines, protocols, the scope of discovery, and cooperation strategies could be prepared for submission in local courts. This approach could improve the speed with which cases are brought to trial, as the mediator’s intent would be to commit the parties to a strict timetable.

One disadvantage of this option is that not all jurisdictions will have litigation pending at the same time. For example, a patent dispute may develop in Europe but not in the United States if the alleged infringer’s product is not yet on that market or is held up by the United States Food and Drug Administration. Nevertheless, a cross-border structure for mediated communication about dispute management would allow later cases to be assimilated more sensibly into a proposed global case management system. Success of this procedure need not be defined by agreements reached but can be measured simply by increased communication.

C. Prioritizing Requests from “Networked Judges”

Once global litigation begins, judges involved in the dispute in their respective jurisdictions should become aware of each other’s role. For example, one judge could request that the parties alert the court to the other judges presiding over related cases. Having an identified network of judges will enable communication among them to coordinate discovery and other case management issues.

Applications under the Hague Convention can be extremely time consuming, as requests must be communicated via the designated “Central Authority” before going to the relevant court. Instead, parties could be encouraged to apply directly to the court

¹⁵¹ See, e.g., N.D. CAL. PATENT L.R. 2-1(a) (2000) (providing procedural rules for patent case management conferences); MENELL, *supra* note 96, at 1–4 (discussing the process and benefits of a case management conference in United States patent litigation); England & Moore, *supra* note 53, at 250 (illustrating the use and timing of the case management conference in the United Kingdom).

of the home jurisdiction in question which then passes on that request. The receiving judge could then, seeing that the request has come from a judge in the “case network,” prioritize its execution, indulging an assumption of compliance with all procedural and privilege matters and Article 23 limits. Of course, this process demands that the requesting judge ensure that all requirements have in fact been met, or force the parties to attest to such compliance under penalty of costs.

In addition to discovery issues, it is easy to see how the judicial network could coordinate other activities, such as hearings that require attendance of the same witnesses or counsel. This would promote overall efficiency.

D. Formal and Informal Communication Between Judges

There are other scenarios where simple communication between individual judges could improve the management of a dispute. For example:

- A United States court requesting a Japanese court to examine a witness could communicate the key aspects of evidence and procedural rules that the Japanese court might follow to ensure that the evidence becomes admissible in a United States court.
- A United States court, upon receipt of a potentially burdensome request for discovery by a United Kingdom litigant, could contact the English judge involved to determine whether the scope of the request is legitimate, and perhaps even whether the evidence would ultimately be admissible. The American judge could consider this information in exercising discretion over the issue.
- If parties in Germany decide to settle a case, the fact that this portion of the global case

settled could be communicated to all the judges in the network.¹⁵²

Clearly, communication among the courts in parallel proceedings could promote efficient resolution of multi-national patent litigation. However, inter-court communication by judges raises concerns regarding neutrality and credibility unless the process is transparent and fair. Therefore, and particularly at the outset of this experimental approach, a formalized process would increase litigants' and judges' confidence.

CONCLUSION

Multinational patent litigation is a regular occurrence between common law jurisdictions, like the United States and the United Kingdom, and civil law jurisdictions, like Germany and Japan. However, while the substantive law may be harmonizing across these jurisdictions, procedural laws remain widely divergent. Understanding these procedural differences, particularly in relation to discovery and settlement, is critical to the management of complex cases.

This article has attempted to provide a broad overview of the procedural landscapes of Germany, Japan, the United Kingdom and the United States. Judicial discretion is exercised at critical points in litigation in all jurisdictions, and we have suggested several proposals for pragmatic judicial intervention. Active discussion of the complexity of multinational litigation is the first step towards efficiently managing such litigation by both practitioners and the judiciary.¹⁵³

¹⁵² Admittedly, some judges prefer to be technically and perceptibly neutral and may choose not to have access to foreign orders or settlements. However, if the notification process is formalized among all judges willing to take part, the increased awareness of other related cases may encourage further collaboration.

¹⁵³ Some lessons may be learned from developments in cross-border insolvency cases. The American Law Institute (A.L.I.) published "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases," in 2003 as part of its Transnational Insolvency Project. A.L.I. & INT'L INSOLVENCY INST., GUIDELINES APPLICABLE TO COURT-TO-COURT COMMUNICATION IN CROSS-BORDER CASES iii (ALI ed., 2003). These guidelines have already been endorsed by a number of countries, including the United States, and a number of courts around the world, including the Superior Court of Justice in Ontario,

Canada in 2004 and the Supreme Court of New South Wales, Australia in 2009. *See* Protocol Concerning Court-To-Court Communications In Cross Border Cases, Ontario Superior Court of Justice: Commercial List, (Apr. 4, 2004), <http://www.ontariocourts.on.ca/scj/en/commerciallist/protocol.htm>; J.J. Spigelman, C.J., Sup. Ct. NSW, PRACTICE NOTE SC Eq 6 Supreme Court Equity Division – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives (Mar. 11, 2009), http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/478; ALI, *NCBJ and Others Endorse ALI's Insolvency Guidelines*, 29 A.L.I. REP. (2007), http://www.ali.org/_news/reporter/winter2007/06-NCBJ_and_Others_Endorse.html; Catherine Kessedjian, *Dispute Resolution in a Complex International Society*, 29 MELB. U. L. REV. 765, 807 (2005).