"*The Judge's Perspective*", Lord Justice Jacob (given at EPLA Munich conference July 2007).

**Is there a single "Judge's perspective"?**

The uninformed outsider might think, from general belief, that there is basically just one big legal divide in Europe: that between the common law and the so-called "continental" traditions. Not so. European Patent Judges come from a wide variety of very different legal traditions. Civil procedures are very different, one from another, not just as between the common law countries but right across Europe. The very legal cultures of different European countries are different one from another. Our legal professions are organised differently. And all this is even before you take into account language differences.

So you might expect the answer – no, there is no single Judge's perspective. And that is what I would have expected too – until I came to know and respect my fellow patent judges in Europe. The EPO set up the biannual meeting of patent judges. I have been to most since I became a Judge in 1993. More recently the EPO has also jointly, with the European Patent Lawyers' Association, sponsored conferences of judges and practitioners in Venice.

Much has come of this. I believe that those judges who frequently decide patent cases, whether they are full career judges or those, like myself, who became judges after a long career as a patent lawyer, have come to realise that we can not only work together but would like to do so – to produce a more harmonised and efficient and decisive system for Europe.

Our co-operation in Venice to produce draft principles for the rules of a new EPLA Court demonstrates that this can be achieved.

We are, uniformly or almost uniformly of the view that the way forward is EPLA and not via some sort of EU Court. I will explain why below.

**The users' perspective**

The users' perspective is not a politician's. An English poet, Alexander Pope, once wrote:

*"For forms of government let fool's contest, What's best administered is best."*

That is the view of the users. What they want is a simple, cheap and predictable system. That is why the EPO opposition system as it stands at present is failing the users. That is the reason why you do not hear industry saying: “please attach a patent court to the EU judicial system.”

*Right: Sir Robin, at a recent IP event in Central London*
I will be frank: I do not think the EU court is a suitable place for patents to go. There is no need, and no point, save one for politicians, not users. Unless there is an EU proposal which achieves all of the key requirement, the thing will not work. The key requirements are:

a) Keep the ECJ out of substantive patent law – it not suited for this (and probably does not want it);
b) Speed (another reason for (a) – the ECJ has so much work it could not produce results quickly – yet industry needs to know where it stands and cannot wait years for an answer
c) Cheap as possible language regime – one in practice designed for the case in hand
d) Experienced patent judge on the panel
e) Local presence
f) No possibility of forum shopping
g) An effective way of dealing with technical understanding and dispute.

**How we got here**

The European Patent System is unfinished business. That business started in the Council of Europe in the 1950s. By 1963 the outline of what was to become the EPO was well in place – but there was nothing about a judicial system.

Time after time proposals were put forward – the 1975 CPC, the 1988 revision, various proposals from the Commission, the more recent “common political approach.” None were based on the proposition we should look for what industry wants. None were based on the use of existing judges. All were essentially theoretical. Above all none of these ideas were practical. So they all failed – as will all other similar ideas.

**The problem**

The problem is the patchwork nature of the existing system – with various results

from various countries at disparate speeds. And the corresponding need to draft a patent for use everywhere and to take advice in lots of countries. Not good for a common market. Only last Friday I handed down a judgment agreeing with the judge below, who had disagreed with a German infringement court. I agreed with a French court in Rennes (*Pozzoli v BDMO SA* ([2007] EWCA Civ 588). The German validity court has yet to decide the case. Appeals lie in all the jurisdictions, save probably the UK where, unless the House of Lords decides to take the case which is very unlikely, it is over.

Why did the patentee have to sue in three jurisdictions? It is not good for Europe. In some cases market conditions are such that winning in one is enough to win for the whole of Europe because it is not possible to isolate sales in a particular country.

It is important here to recognise that cases are not certain. Yes we all try to reach the "right" result. But in reality there is no so such absolute thing. Most cases we do not see are predictable – if the alleged infringement is bang with the claim or the invention is clearly disclosed in a prior document there is no problem – and there is unlikely to be any litigation. But what judges normally get are the cases which could go either way. Different answers are possible – and all the more so if you use different methods of evidence gathering. What is needed is one result – reached by as good a practicable method as can be devised. And reached soon – it is generally better for commerce to have an early "wrong" answer than a much later "right" one.

**Possible solutions**

1. Stay as we are
2. Stay as we are but allow cross-border actions
3. An EU solution
4. EPLA

**Why staying as we are will not do**

I have already described the current situation. Most of industry is agreed that it is far from good for European industry. Note that I put that way. It would not matter if it worked well enough for industry's needs, no matter how untidy it might look to civil servants and politicians.

But there is no point in changing unless we can produce something better.

## Why cross border injunctions will not do

As is well-known the Dutch courts started this practice of enforcing patents granted in other countries. The Court of Justice put an end to it (or virtually so) with *Gat v Luk*. I am glad, for I do not think cross-border assertion of IP rights is appropriate:

(1) It leads and led to forum shopping of the worst kind – people 10 years ago were in practice saying "let this go to Holland", they have the kort geding and are pro-plaintiff. Jan Brinkof, when still a judge, described some Dutch lawyers, then drumming up business around the world, as "Rambo lawyers."
(2) It actually represents an interference by the courts of one state in what is the affair of another state. This has profound implications. Many would say it is no business of foreign courts to make orders closing down factories in my country.

Recently a number of academic lawyers in Europe, partly based around some, but not all, at the Max Plank Institute, have proposed an amendment to the Recognition and Enforcement of Judgments Regulation so as to allow cross-border jurisdiction in patents. Similarly, in *Voda v Cordis*, academics in the US urged the Court of Appeals for the Federal Circuit to decide that US courts had "long-arm" jurisdiction over foreign, including European patents. I am afraid they are wrong. It is all part of the keep things tidy approach which ignores, because it has no or little experience of, the practical implications.

## Why an EU solution is neither necessary or desirable

As I have said attempts to go this way are very old – never driven by industry. What are the problems?

(1) Language – Any system which requires use of many languages will not do

(2) Unsuitability of procedure. The EU courts are essentially structured to deal with questions of law. Fact finding and deeply technical questions are not readily bolted on to it.

(3) This has proved to be so in the case of trade marks. With the greatest of respect the ECJ and the courts of first instance have not done well in trade marks.

Things are much too slow; there is much uncertainty. Being blunt: if this is what the system produces for trade marks who would give patents to it? I wish to make it clear that this is not a general criticism of the ECJ. When it comes to most other fields, it is my experience that it produces clear and helpful judgements – for example its VAT judgments in my opinion are better and clearer than those in my own country!

(4) Delay. You only have to look at how long things take to realise that adding more work for the court will not help.

(5) Inexperienced patent Judges. This is important. It is a basic EU rule that you cannot be a national judge and an EU judge at the same time. Unless that rule is changed it will not be practicable to use the developed expertise of the national patent judges of those European countries which experienced patent judges. Who would trust their litigation to inexperienced judges? – none save those who have rotten cases.

(6) Inflexibility – a seat in Luxembourg is not appropriate for a Europe wide jurisdiction of this sort – and the court would necessarily have all the bureaucracy which goes with being attached to a much larger system.

I pause to note that it is primarily those countries with little or no experience of patent litigation which favour the ECJ route. And even there, in my experience, their judges do not agree. You will know that at the Venice meetings the judges have been virtually overwhelming in their support for EPLA – a support reinforced at the last Patent Judges' Symposium in Thessaloniki.

**EPLA – Is there a legal objection?**

From time to time it is suggested that EPLA is not legally possible because it is incompatible with the laws of the EU. I have not been able to see why. What business is of the EU how member states decide their patent cases? True it is that sometimes some questions of EU law will arise (e.g. where a question about the Enforcement Directive, or a defence based on breach of EU competition is raised) but provided the court concerned (a) must apply EU law and (b) can refer questions of EU law to the ECJ, what is the problem?

My answer is there is none. This has been established already by the decision of the ECJ in *Dior v Evora* Case C-337/95. This concerned the supra-national

Benelux Court. This is a court for the three Benelux countries. It takes references on trade marks from the national courts of any of the three countries. The Court of Justice in *Dior* said:

[21] There is no good reason why such a court, common to a number of Member States, should not be able to submit questions to this Court, in the same way as courts or tribunals of any of those Member States.

That would just what the EPLA court could do. Note that the Court's decision is not based on any special recognition of the Benelux Court in the Treaty.

Recently there was an interim legal opinion for the Parliament suggesting EPLA was not lawful. I decided to ask the recently retired AG Sir Francis Jacobs about it. He put me in touch with Professor Arnull, a well-known expert. We wrote a joint paper, now published as [200] EIPR 209. He wrote most of it, but I helped with some of the ideas. Professor Sir Francis Jacobs has informally told me he agrees.

This is very important. It means that the EPLA system is available to those countries which wish to use it. It will have to apply EU law and will be able to refer questions to the ECJ. The debate about whether we should go ahead is political, not legal.

I would add two points. First it is being said that also that there is a problem because there is "mixed competence". I have yet to see any justification for this. Second, there may be a problem in including non-EU countries within EPLA. There may be force in this – a court with a Swiss judge in it could have difficulty in applying EU law or making a reference to the ECJ. But there must be a way round this, probably by a separate Treaty.

**Why EPLA is the way forward**

1. It would use experienced judges – and they would be able to share experience with less experienced judges

2. It would be possible to be entirely flexible about language. Translation costs would only be incurred where necessary.

3. It would have a local presence

4. By changing the constitutions of the courts so that the judges kept meeting and working with different judges uniformity would be achieved. And the parties could not forum shop.

5. It would be speedy – see the Venice principles with the objective of a determination at first instance in a year. Of course there would be problems and important matters of detail to be settled. But that is where attention should focus. If we do not do something soon in Europe, our competitors will pass us readily by. China has created a working patent system over the last 20 years. There is more patent litigation there than in any other country, nearly all Chinese v Chinese. It works fast and with reasoned judgments. Japan has recently re-organised its patent litigation system. I suspect India will do so soon – there is talk of it now. It is no good Europe remaining inward looking, putting perceived national interest, or the interests of lawyers or translators first. We have the opportunity to create a patent litigation system for Europe which will take the best bits of different national traditions – to create a first class system. We should get down to it.