

# TOP OF THEIR GAME

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**T**here's never been a better time to be an intellectual property lawyer. Looking back to the start of the global financial crisis, while some practice areas have faltered and others have collapsed in dramatic fashion, IP has gone from strength to strength. Companies have looked upon IP rights as essential assets that need protecting and exploiting, with a value that hasn't diminished.

Law firms have been at the vanguard of helping corporates to sweat their IP assets and IP partners have continued to bring in substantial fees while transactional work has been in the doldrums. As such, IP teams within larger law firms are enjoying renewed profile within their firms.

With these trends looking set to continue, it was fitting that the fourth annual *Legal Business* round table, in conjunction with leading Irish firm

McCann FitzGerald, focused on how IP would dominate the agenda in the year ahead. Thirteen of Europe's very best IP practitioners gathered at McCann's London office in Tower 42 to discuss the year ahead, looking forward to another seismic year for the cream of the IP profession. Guests came from a range of backgrounds – leading global giants with strong IP practices; major full-service firms with market-leading IP teams; IP boutiques; the Bar; and, in Stephen Ingham, assistant general patent counsel of Lilly UK, a major client with a huge global IP portfolio.

#### **COUNTER CYCLICAL**

Rosaleen Byrne, IP and dispute resolution partner at McCann FitzGerald, began the discussion by emphasising the counter-cyclical strength of IP practices. 'Things have been very busy and very buoyant despite otherwise not-so-busy or not-as-buoyant areas of the Irish economy,' she says. 'On the patent side in particular, we have ▶



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► seen the nature of the disputes changing. We have been busy for the past ten years on traditional pharmaceuticals work but we are now seeing more queries on some cases on biologics and antibodies in particular; that has been a big change for us. In a market like Dublin where you do not have scientific expertise within law firms that has been challenging and interesting.'

The Dublin-based corporate leader also has one of the leading IP practices and has acted in more than 90% of the patent disputes that have gone to trial in Ireland in the last ten years.

Nicola Dagg, head of Allen & Overy's IP litigation team in London, says that her experiences lately have been similar to Byrne's and that despite the financial crisis and the fallout from that, her team has had a very busy couple of years. 'The pipeline [of IP cases coming through]

looked a bit variable throughout the course of last year, but it is firming up again now,' she says.

She adds that at the same time as heavy patent work in the life sciences sector there has been the patent work in the smartphone and tablet sector: the so-called smartphone wars. She says that some of those battles seem to be coming towards an end at the moment.

Edward Nodder, head of patent litigation at Bristows, agrees that the mobile phone wars have been an incredible source of work for specialist IP law firms in recent years. 'Some suggest it might be heading for a little lull, but I believe there is plenty more fuel left in the bottle,' he says.

One area that Nodder says shows no sign of abating is the persistent warfare between big pharmaceutical companies and the generics. 'It is

endless,' he says. 'I cannot see it ever going away; there usually is no settlement deal that can be struck, and you just need to be clear where you stand and the work rolls in.'

However, while there might be plenty of litigation work around, not as much is making it to the courts as is believed. From the Bar's perspective, Justin Turner QC of Three New Square says his impression is that things are reasonably brisk, but if you took the telecoms work away – which is a relatively new sector from the perspective of IP litigation – the IP Bar isn't unusually busy. 'I do not get the impression that there is more litigation in sectors other than telecoms, compared to say ten years ago,' he says. 'All the specialist Chambers seem to be busy, but I think that is largely supported by big cases in the telecoms sector.'

From the client perspective, Lilly's Ingham says that when it comes to defending or enforcing a major patent, perhaps worth billions to a company, the priority is to get the quality service, the quality litigating firm, over and above what that is going to cost. 'If the matter is sufficiently prioritised to warrant litigation then we want to go for the best quality that we can get to handle that, and cost comes as a secondary

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#### LOOKING AHEAD

The feeling around the table is that IP litigation is rapidly evolving. Nodder says that he is seeing savings made for clients thanks to a greater effort from law firms to ensure that work is not duplicated between jurisdictions, ensuring that you do not have ten separate law firms each doing ten separate analyses of a problem; that all the outputs are shared and collaboratively worked on.

'The average number of patents involved per trial has gone up immensely,' says Penny Gilbert, co-founder of IP litigation boutique Powell Gilbert. 'Whereas we used to see one, maybe two patents, with the mobile phone wars now there may be up to four to six per trial and multiple trials per litigation between the same parties – that lifts the whole volume.'

Indeed, the round table participants collectively reported a growing sophistication in the way IP rights holders are approaching litigation in order to maximise its effectiveness and keep costs to a minimum. Larry Cohen, a London-based IP partner at Latham & Watkins, says that he spent rather less time in court in 2012 than he did in previous years but has been seeing a spurt in contract disputes involving IP rights, between two companies that would rather avoid going to court. With the growth in class actions and attempts to monetise IP, he predicts there will be an increased number of these disputes that deal with the fundamental ownership and the exploitation of the rights between vendor and purchaser, licensor and licensee, rather than what he calls 'vanilla infringement rights'.

'We have also seen quite a lot of what I call soft IP disputes; although they are anything but soft when they really come down to it,' says Cohen. 'Again, it has always been there; it has been a bit of a Cinderella compared with the patent disputes, but they have their place, and they are important.'

There has been a noticeable rise in 'soft' IP litigation among many of the firms present at the round table. Charles Lloyd, head of trade marks, copyright and media group, as well as the

advertising group at Taylor Wessing, says the number of 'grey market goods' trade mark cases is on the rise, as is the volume of copyright, design and advertising cases. Again, not many cases are reaching trial but there is a definite increase in activity. In Ireland Paul Lavery, head of McCann's technology and innovation group, says that there has been a spate of misleading and comparative advertising cases involving telecoms companies, while Byrne says there have been a lot of disputes arising from marketing by generics companies, whether that involves trade marks, passing off or comparative advertising.

However, David Rose, IP partner at SJ Berwin, says that despite all the talk of firms expanding their IP practices, he is not convinced that the true volume of high-end IP litigation has moved onto another plane compared to where it was a few years ago. For example, he points out that the number of patent cases going to trial in the UK Patents Court (ignoring interim decisions and Supplementary Protection Certificate (SPC) cases), has fallen from 2009 (when there were 25 reported judgments on infringement/validity issues) to 11 or so decisions in the last year.

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Rowan Freeland, IP partner at Simmons & Simmons, and soon to be head of its Munich office, says that it doesn't take much to have a bumper year where patent work is concerned. 'One big patent case is very big; you have two and you are frantic; you have three and you are despairing, then they all settle and you panic. But since each case is so big, it's hard to tell from your firm's business whether it's edged a bigger market share or whether the whole market is expanding.'

Nonetheless, Gilbert agrees that the pipeline could be a little slow moving outside of technology disputes in the UK: 'I agree with David and Justin; if you take out the telecoms work, perhaps pharma and bio has not shot off at the great speed that we are seeing with these other industries.'

That said, she notes that there are more situations now where clients will come to her team very early to try to look at their strategy for Europe as a whole. It may be that they will even decide not to take action in the UK, but will take action elsewhere for various strategic

reasons. This means that even single-office firms in London such as Powell Gilbert have an increasingly global outlook, or at least more European-wide than just focusing entirely on the UK. 'That strategic decision is partly balancing the costs of litigating in this jurisdiction, looking at the likelihood of success before the courts, and what procedural benefits you might obtain in the UK, of which there are still very many, with cross-examination, disclosure, and so on, compared with procedural opportunities elsewhere to achieve the desired commercial end point,' she says. Nodder says that he has seen this also at Bristows – perceiving there was a finite pool of work in the UK, Bristows was exploiting roles and opportunities that extend way beyond the UK jurisdiction.

#### FUNDING OPTIONS

Ultimately, if a big client needs to litigate in multiple jurisdictions, including London, then the cost is not the primary concern. The fact that UK litigation has faced wave after wave of cost reforms has had little effect on the UK IP market. As Lilly's Ingham says, when it comes down to big patents, cost isn't the deciding factor.

'There is a certain context that one has to put the national costs into,' says Ingham. 'For example, if you are considering a freedom to operate (FTO) issue connected to a new medicinal product and working off a rule of thumb that it is going to take on average in excess of £500m to bring a product to the market, then if there is a patent that presents a substantive launch risk for your product in Europe – the costs of litigating that patent are going to pale into relative insignificance. The business necessity to launch the product strongly drives the need to mitigate such FTO risks.'

But Nodder says this situation is arguably unique to the pharmaceutical world, where the upholding of one blockbuster patent could make or break an originator company. In other areas, such as low technology and manufacturing, where the profit margins are much tighter, it was difficult to see how the 'good old-fashioned' detail, length and cost of UK High Court litigation can continue to be justified in the face of competition from cheaper jurisdictions, although the revitalised Patents County Court with its streamlined procedure and capped costs recovery is a great alternative in appropriate cases.



**Penny Gilbert, Powell Gilbert: Average number of patents involved per trial has increased considerably**



**David Rose, SJ Berwin: Patents County Court a terrific cost-effective forum for disputes**

Allen & Overy's Dagg sees the big hi-tech clients now talking about monetising their IP and transferring chunks of their IP portfolios that are not strategic to other entities' business, potentially to non-practising entities (NPEs) – a patent owner that does not manufacture or use the patented invention but who litigates and/or licences it out commercially.

One method of funding disputes that seems to be becoming increasingly popular is conditional/success fees. Nodder believes that this type of approach could be particularly popular for cases involving NPEs, pointing out that damages-based agreements will also soon be available for UK IP litigators but probably not elsewhere in Europe.

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Gordon Harris, head of IP at Wragge & Co, says that a number of clients have been playing the contingency fee card in recent years, particularly over the monetisation of IP.

Cohen says that the problem with using contingency fees for NPE cases in Europe generally is that usually the level of damages will not support the kind of contingency fee litigation that is evident in the US. This is why, he says, third-party litigation funding hasn't really taken off in Europe. He says that he spent quite some time looking at third-party options for corporate clients that want to de-risk some of their litigation and prefer, for whatever reason, to allow others to take at least part of the risk.

‘We came to the same conclusion on these damages-based agreements,’ says Lloyd. ‘It is difficult to see in most IP disputes how that is going to be attractive to us.’ Dagg also points out that it is unclear whether defendants can avail themselves of DBAs, which may be a major limitation.

‘Are there not going to be a couple of problems with this?’ asks Rose. ‘First, culturally we are not used to contingency arrangements – maybe we will get over that. Second, even for sizeable firms, there is also a real balance sheet concern; maybe there is a crossover in terms of culture and balance sheet, but they sit slightly separately.’

Freeland suggests that a change in attitude towards contingency fee arrangements when they come in for IP cases and offering clients some ‘skin in the game’ would require a fundamental rethink of a firm's business model. ‘If you lose in our sort of litigation that is an awful lot of fees at stake,’ he says, ‘and you have to be taking that risk enough times that statistically you are going to pay for the losers with the winners. And even then it's doubtful whether the amounts of damages likely to be available will be enough, and you can't take a cut of an injunction.’ ▶



**Paul Lavery, McCann FitzGerald: Surge in misleading advertising and comparative advertising cases in Ireland**



**Edward Nodder, Bristows: Persistent battles between big pharma and generics a good source of work**

► The margins are far too tight in IP litigation and many around the table felt that IP litigation doesn't attract the level of fees that it is reputed to do, especially compared to the larger commercial law cases. Certainly in the past major patent litigation in the UK courts generated huge fees for law firms but those kind of cases are few and far between, especially when compared to a major commercial dispute involving Russian oligarchs, say.

'The Bar has been under steady financial pressure, for the last 20 years,' says Turner QC. 'When I started practise the patent Bar was considered to be the highest paid area of the Bar, possibly along with the tax Bar. Today we have fallen significantly behind the commercial Bar in terms of earnings. I do not have an explanation for that but it is certainly my impression.'

'Commercial disputes have got bigger and bigger, and there has not been the same cost pressures,' says Cohen. 'Arbitrators, in particular, have not been so keen to try and limit the costs. That is one of the reasons why I genuinely think that the IP practice has lost what was a relatively pre-eminent position towards the top of the tree, in terms of litigation size. £5m in fees for an IP case, for example, is still a relative rarity, whereas

£5m in fees for some of the commercial litigation or arbitration is much more commonplace.'

One of the reasons that law firms are not pulling in the same level of fees that they once did, and aligned to growing interest from clients in alternative ways to fund IP litigation, is that cost management in cases has become more sophisticated. Harris says that big clients are naturally trying to drive costs harder, which leads to key decisions moving to impersonal procurement teams.

'Procurement departments are under continual pressure to drive every purchase decision of legal services on a cost basis, block by block, bit by bit,' he says. 'Longstanding relationships are being eroded by procurement departments' focus on the numbers. We have found it a bit of a challenge.'

Byrne says the problem exists in Ireland too. 'Even the metrics some of the procurement people use as weighting factors are irrelevant or not as appropriate or relevant as they should be. There is the relationship point and then the use of the wrong criteria,' she says.

Turner QC's experience is that to date the Bar has not often been asked to provide up-front quotations for the cost of litigation. But the

indications are that this will change and that barristers will have to be prepared, perhaps alongside their instructing solicitors, to provide firmer indications of what their fees to trial will be and to carry the risk of being required to work within that guidance.

Rose says that although judges have made some noises about the proportionality of costs in IP litigation over the years, they haven't actually pushed that hard and the actual cost of litigating in the UK remains relatively high. He believes the most cost-effective solution for many IP disputes is to litigate through the Patents County Court (PCC).

'Every firm around this table is or has been in the PCC and, if they are not, they should be; it is a terrific forum,' he says. 'For our high-end clients that have important cases which can be decided in a day or two, there is a lot going for it: they trust the judge, they do not want the disclosure and many will not mind the £50k cost cap.'

#### SINGLE VISION

One development that is likely to change the face of IP litigation in Europe is the introduction of the Unified Patent Court (UPC), which is currently pending ratification by at least 13 contracting



**Charles Lloyd, Taylor Wessing: Volume of soft IP cases is on the rise**



**Rowan Freeland, Simmons & Simmons: European IP community must now sell Unified Patent Court to clients**

member states, including France, Germany and the UK, to enter into force.

Under the proposed system, the UPC will comprise a Court of First Instance, a Court of Appeal and a Registry. The Court of First Instance will be comprised of a central division (with its seat in Paris and two sections in London and Munich) and several local and regional divisions in the contracting member states. The Court of Appeal will be located in Luxembourg. The proposed split would see Paris as the seat of the Central Division and it would also hold the office of the President of the Court of First Instance. London would handle areas such as chemistry, including pharmaceuticals, while Munich would deal with mechanical engineering, among other areas.

That the UK will be taking care of pharmaceuticals is a boon to many of the firms featured around the table but Munich getting technology cases will give German firms some competitive advantages in that area. But ultimately the feeling is that even in a centralised court system clients will seek out the best practitioners in a 'flight to quality', regardless of where they are located. The IP

**'The Unified Patent Court has advantages for our clients and what we need to do now is make sure it delivers those advantages, and go out and sell it.'**

Rowan Freeland, Simmons & Simmons

experts around the table are more concerned by the procedural changes, which will change how cases are conducted.

Gilbert believes that we are likely to see more cases coming through, principally because the market has become much wider. 'Damages could be bigger, which may mean that it is going to be worth smaller litigants giving it a go – one-stop for the whole of Europe,' she says.

However, there is concern that the procedure will use a Dutch-style system, according to Freeland. He says cases will feature up-front written pleadings and all evidence to be served with the initial pleading. Since most of the courts are going

to be approaching the system from a civil law mindset, those from the UK common law system will have to fight very hard to get the sort of things they are used to, particularly areas such as cross-examination of witnesses.

While most of the courts are going to be approaching the system from a civil law mindset, those from the UK common law system will have to fight very hard to get the sort of things they are used to, particularly areas such as cross-examination of witnesses. Turner QC says the absence of techniques such as cross-examination under the new system would make a huge difference. 'It is not so much the process of cross-examination which is valuable but the fact that witnesses know the material



**Rosaleen Byrne, McCann FitzGerald: Clients will need guidance on assimilating the Unified Patent Court**

► they file will be tested in cross-examination. It is this process which keeps experts and their legal advisers on the straight and narrow. I have observed real differences in what expert witnesses are prepared to say when equivalent cases are litigated in tribunals such as the EPO where there is no threat of cross-examination.'

The situation is perhaps even more serious in Ireland, argues McCann's IP and dispute resolution partner Fiona O'Beirne, because the likelihood is that Ireland will have no local court, but will participate in a regional court. 'It has the potential to do away with any significant patent litigation in Ireland,' she says.

However, Byrne says that it is likely that the UPC will lead to more work for IP teams, at least in the short term, because the transitional period will be so complex in terms of the options available to clients that in fact there will be a greater need for enforcement advice and strategic advice. As a client, Ingham concurs with this point of view. 'Navigating through the options is going to be something that is going to require outside expertise,' he says.

In the main, the IP specialists present were not unduly concerned about the effects of the UPC in the immediate future – the system is still some

### LEGAL BUSINESS/ McCANN FITZGERALD ROUND TABLE

■ **Rosaleen Byrne** IP and dispute resolution partner, McCann FitzGerald

■ **Larry Cohen** IP partner, Latham & Watkins

■ **Nicola Dagg** Head of IP litigation, Allen & Overy

■ **Rowan Freeland** IP partner, Simmons & Simmons

■ **Penny Gilbert** Partner, Powell Gilbert

■ **Gordon Harris** Head of IP, Wragge & Co

■ **Stephen Ingham** Assistant general patent counsel, Lilly UK

■ **Paul Lavery** head of technology and innovation, McCann FitzGerald

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■ **David Rose** IP partner, SJ Berwin

■ **Justin Turner** QC Member, Three New Square

■ **Mark McAteer** National editor, *Legal Business*

years from becoming established. Individual contracting states could take a year to ratify the proposals and local courts will cover most existing patents as there is no 'grandfathering' older patents into the system. Only EU unitary patents, which will come in around the same time as the UPC opens for business, will fall under the immediate jurisdiction from day one, unless companies opt out – and the pharma industry is rumoured to be opting out en masse.

Nonetheless, Freeland suggests that the best way forward is to accept that everything isn't perfect and work with it. 'Currently we have all been focused on looking at the proposals and identifying the things in the proposals that need to be made better,' he says. 'We have succeeded on some of those, and we have failed on others. We are now stuck with the system as it is, and although it still has a lot of defects, it has advantages for our clients as well, and what we need to do now is make sure it delivers those advantages, and go out and sell it.'

But while there are concerns about the future for IP litigators in Europe, going forward few would argue that right now, IP practices are very much in the best of health. **LB**

mark.mcateer@legalease.co.uk



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McCann FitzGerald, focused on how IP would dominate the agenda in the year ahead. Thirteen of Europe's very best IP practitioners gathered at McCann's London office in Tower 42 to discuss the year ahead, looking forward to another seismic year for the cream of the IP profession. Guests came from a range of backgrounds – leading global giants with strong IP practices; major full-service firms with market-leading IP teams; IP boutiques; the Bar; and, in Stephen Ingham, assistant general patent counsel of Lilly UK, a major client with a huge global IP portfolio.

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looked a bit variable throughout the course of last year, but it is firming up again now,' she says.

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Nonetheless, Gilbert agrees that the pipeline could be a little slow moving outside of technology disputes in the UK: 'I agree with David and Justin; if you take out the telecoms work, perhaps pharma and bio has not shot off at the great speed that we are seeing with these other industries.'

That said, she notes that there are more situations now where clients will come to her team very early to try to look at their strategy for Europe as a whole. It may be that they will even decide not to take action in the UK, but will take action elsewhere for various strategic

reasons. This means that even single-office firms in London such as Powell Gilbert have an increasingly global outlook, or at least more European-wide than just focusing entirely on the UK. 'That strategic decision is partly balancing the costs of litigating in this jurisdiction, looking at the likelihood of success before the courts, and what procedural benefits you might obtain in the UK, of which there are still very many, with cross-examination, disclosure, and so on, compared with procedural opportunities elsewhere to achieve the desired commercial end point,' she says. Nodder says that he has seen this also at Bristows – perceiving there was a finite pool of work in the UK, Bristows was exploiting roles and opportunities that extend way beyond the UK jurisdiction.

#### FUNDING OPTIONS

Ultimately, if a big client needs to litigate in multiple jurisdictions, including London, then the cost is not the primary concern. The fact that UK litigation has faced wave after wave of cost reforms has had little effect on the UK IP market. As Lilly's Ingham says, when it comes down to big patents, cost isn't the deciding factor.

'There is a certain context that one has to put the national costs into,' says Ingham. 'For example, if you are considering a freedom to operate (FTO) issue connected to a new medicinal product and working off a rule of thumb that it is going to take on average in excess of £500m to bring a product to the market, then if there is a patent that presents a substantive launch risk for your product in Europe – the costs of litigating that patent are going to pale into relative insignificance. The business necessity to launch the product strongly drives the need to mitigate such FTO risks.'

But Nodder says this situation is arguably unique to the pharmaceutical world, where the upholding of one blockbuster patent could make or break an originator company. In other areas, such as low technology and manufacturing, where the profit margins are much tighter, it was difficult to see how the 'good old-fashioned' detail, length and cost of UK High Court litigation can continue to be justified in the face of competition from cheaper jurisdictions, although the revitalised Patents County Court with its streamlined procedure and capped costs recovery is a great alternative in appropriate cases.



**Penny Gilbert, Powell Gilbert: Average number of patents involved per trial has increased considerably**



**David Rose, SJ Berwin: Patents County Court a terrific cost-effective forum for disputes**

Allen & Overy's Dagg sees the big hi-tech clients now talking about monetising their IP and transferring chunks of their IP portfolios that are not strategic to other entities' business, potentially to non-practising entities (NPEs) – a patent owner that does not manufacture or use the patented invention but who litigates and/or licences it out commercially.

One method of funding disputes that seems to be becoming increasingly popular is conditional/success fees. Nodder believes that this type of approach could be particularly popular for cases involving NPEs, pointing out that damages-based agreements will also soon be available for UK IP litigators but probably not elsewhere in Europe.

**‘Whereas we used to see one, maybe two patents, with the mobile phone wars now there may be up to four to six per trial and multiple trials per litigation between the same parties.’**

Penny Gilbert, Powell Gilbert

Gordon Harris, head of IP at Wragge & Co, says that a number of clients have been playing the contingency fee card in recent years, particularly over the monetisation of IP.

Cohen says that the problem with using contingency fees for NPE cases in Europe generally is that usually the level of damages will not support the kind of contingency fee litigation that is evident in the US. This is why, he says, third-party litigation funding hasn't really taken off in Europe. He says that he spent quite some time looking at third-party options for corporate clients that want to de-risk some of their litigation and prefer, for whatever reason, to allow others to take at least part of the risk.

‘We came to the same conclusion on these damages-based agreements,’ says Lloyd. ‘It is difficult to see in most IP disputes how that is going to be attractive to us.’ Dagg also points out that it is unclear whether defendants can avail themselves of DBAs, which may be a major limitation.

‘Are there not going to be a couple of problems with this?’ asks Rose. ‘First, culturally we are not used to contingency arrangements – maybe we will get over that. Second, even for sizeable firms, there is also a real balance sheet concern; maybe there is a crossover in terms of culture and balance sheet, but they sit slightly separately.’

Freeland suggests that a change in attitude towards contingency fee arrangements when they come in for IP cases and offering clients some ‘skin in the game’ would require a fundamental rethink of a firm's business model. ‘If you lose in our sort of litigation that is an awful lot of fees at stake,’ he says, ‘and you have to be taking that risk enough times that statistically you are going to pay for the losers with the winners. And even then it's doubtful whether the amounts of damages likely to be available will be enough, and you can't take a cut of an injunction.’ ▶



**Paul Lavery, McCann FitzGerald: Surge in misleading advertising and comparative advertising cases in Ireland**



**Edward Nodder, Bristows: Persistent battles between big pharma and generics a good source of work**

► The margins are far too tight in IP litigation and many around the table felt that IP litigation doesn't attract the level of fees that it is reputed to do, especially compared to the larger commercial law cases. Certainly in the past major patent litigation in the UK courts generated huge fees for law firms but those kind of cases are few and far between, especially when compared to a major commercial dispute involving Russian oligarchs, say.

'The Bar has been under steady financial pressure, for the last 20 years,' says Turner QC. 'When I started practise the patent Bar was considered to be the highest paid area of the Bar, possibly along with the tax Bar. Today we have fallen significantly behind the commercial Bar in terms of earnings. I do not have an explanation for that but it is certainly my impression.'

'Commercial disputes have got bigger and bigger, and there has not been the same cost pressures,' says Cohen. 'Arbitrators, in particular, have not been so keen to try and limit the costs. That is one of the reasons why I genuinely think that the IP practice has lost what was a relatively pre-eminent position towards the top of the tree, in terms of litigation size. £5m in fees for an IP case, for example, is still a relative rarity, whereas

£5m in fees for some of the commercial litigation or arbitration is much more commonplace.'

One of the reasons that law firms are not pulling in the same level of fees that they once did, and aligned to growing interest from clients in alternative ways to fund IP litigation, is that cost management in cases has become more sophisticated. Harris says that big clients are naturally trying to drive costs harder, which leads to key decisions moving to impersonal procurement teams.

'Procurement departments are under continual pressure to drive every purchase decision of legal services on a cost basis, block by block, bit by bit,' he says. 'Longstanding relationships are being eroded by procurement departments' focus on the numbers. We have found it a bit of a challenge.'

Byrne says the problem exists in Ireland too. 'Even the metrics some of the procurement people use as weighting factors are irrelevant or not as appropriate or relevant as they should be. There is the relationship point and then the use of the wrong criteria,' she says.

Turner QC's experience is that to date the Bar has not often been asked to provide up-front quotations for the cost of litigation. But the

indications are that this will change and that barristers will have to be prepared, perhaps alongside their instructing solicitors, to provide firmer indications of what their fees to trial will be and to carry the risk of being required to work within that guidance.

Rose says that although judges have made some noises about the proportionality of costs in IP litigation over the years, they haven't actually pushed that hard and the actual cost of litigating in the UK remains relatively high. He believes the most cost-effective solution for many IP disputes is to litigate through the Patents County Court (PCC).

'Every firm around this table is or has been in the PCC and, if they are not, they should be; it is a terrific forum,' he says. 'For our high-end clients that have important cases which can be decided in a day or two, there is a lot going for it: they trust the judge, they do not want the disclosure and many will not mind the £50k cost cap.'

#### SINGLE VISION

One development that is likely to change the face of IP litigation in Europe is the introduction of the Unified Patent Court (UPC), which is currently pending ratification by at least 13 contracting



**Charles Lloyd, Taylor Wessing: Volume of soft IP cases is on the rise**



**Rowan Freeland, Simmons & Simmons: European IP community must now sell Unified Patent Court to clients**

member states, including France, Germany and the UK, to enter into force.

Under the proposed system, the UPC will comprise a Court of First Instance, a Court of Appeal and a Registry. The Court of First Instance will be comprised of a central division (with its seat in Paris and two sections in London and Munich) and several local and regional divisions in the contracting member states. The Court of Appeal will be located in Luxembourg. The proposed split would see Paris as the seat of the Central Division and it would also hold the office of the President of the Court of First Instance. London would handle areas such as chemistry, including pharmaceuticals, while Munich would deal with mechanical engineering, among other areas.

That the UK will be taking care of pharmaceuticals is a boon to many of the firms featured around the table but Munich getting technology cases will give German firms some competitive advantages in that area. But ultimately the feeling is that even in a centralised court system clients will seek out the best practitioners in a 'flight to quality', regardless of where they are located. The IP

**'The Unified Patent Court has advantages for our clients and what we need to do now is make sure it delivers those advantages, and go out and sell it.'**

Rowan Freeland, Simmons & Simmons

experts around the table are more concerned by the procedural changes, which will change how cases are conducted.

Gilbert believes that we are likely to see more cases coming through, principally because the market has become much wider. 'Damages could be bigger, which may mean that it is going to be worth smaller litigants giving it a go – one-stop for the whole of Europe,' she says.

However, there is concern that the procedure will use a Dutch-style system, according to Freeland. He says cases will feature up-front written pleadings and all evidence to be served with the initial pleading. Since most of the courts are going

to be approaching the system from a civil law mindset, those from the UK common law system will have to fight very hard to get the sort of things they are used to, particularly areas such as cross-examination of witnesses.

While most of the courts are going to be approaching the system from a civil law mindset, those from the UK common law system will have to fight very hard to get the sort of things they are used to, particularly areas such as cross-examination of witnesses. Turner QC says the absence of techniques such as cross-examination under the new system would make a huge difference. 'It is not so much the process of cross-examination which is valuable but the fact that witnesses know the material



**Rosaleen Byrne, McCann FitzGerald: Clients will need guidance on assimilating the Unified Patent Court**

► they file will be tested in cross-examination. It is this process which keeps experts and their legal advisers on the straight and narrow. I have observed real differences in what expert witnesses are prepared to say when equivalent cases are litigated in tribunals such as the EPO where there is no threat of cross-examination.'

The situation is perhaps even more serious in Ireland, argues McCann's IP and dispute resolution partner Fiona O'Beirne, because the likelihood is that Ireland will have no local court, but will participate in a regional court. 'It has the potential to do away with any significant patent litigation in Ireland,' she says.

However, Byrne says that it is likely that the UPC will lead to more work for IP teams, at least in the short term, because the transitional period will be so complex in terms of the options available to clients that in fact there will be a greater need for enforcement advice and strategic advice. As a client, Ingham concurs with this point of view. 'Navigating through the options is going to be something that is going to require outside expertise,' he says.

In the main, the IP specialists present were not unduly concerned about the effects of the UPC in the immediate future – the system is still some

### LEGAL BUSINESS/ McCANN FITZGERALD ROUND TABLE

■ **Rosaleen Byrne** IP and dispute resolution partner, McCann FitzGerald

■ **Larry Cohen** IP partner, Latham & Watkins

■ **Nicola Dagg** Head of IP litigation, Allen & Overy

■ **Rowan Freeland** IP partner, Simmons & Simmons

■ **Penny Gilbert** Partner, Powell Gilbert

■ **Gordon Harris** Head of IP, Wragge & Co

■ **Stephen Ingham** Assistant general patent counsel, Lilly UK

■ **Paul Lavery** head of technology and innovation, McCann FitzGerald

■ **Charles Lloyd** Head of trade marks, copyright, media and advertising, Taylor Wessing

■ **Edward Nodder** Head of IP, Bristows

■ **Fiona O'Beirne** IP and dispute resolution partner, McCann FitzGerald

■ **David Rose** IP partner, SJ Berwin

■ **Justin Turner** QC Member, Three New Square

■ **Mark McAteer** National editor, *Legal Business*

years from becoming established. Individual contracting states could take a year to ratify the proposals and local courts will cover most existing patents as there is no 'grandfathering' older patents into the system. Only EU unitary patents, which will come in around the same time as the UPC opens for business, will fall under the immediate jurisdiction from day one, unless companies opt out – and the pharma industry is rumoured to be opting out en masse.

Nonetheless, Freeland suggests that the best way forward is to accept that everything isn't perfect and work with it. 'Currently we have all been focused on looking at the proposals and identifying the things in the proposals that need to be made better,' he says. 'We have succeeded on some of those, and we have failed on others. We are now stuck with the system as it is, and although it still has a lot of defects, it has advantages for our clients as well, and what we need to do now is make sure it delivers those advantages, and go out and sell it.'

But while there are concerns about the future for IP litigators in Europe, going forward few would argue that right now, IP practices are very much in the best of health. **LB**

mark.mcateer@legalease.co.uk