

Newsletter No.

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**The new Swiss Federal Patent Court** («SFPC») will be the exclusive venue for all patent litigation in Switzerland. The Court will consist of highly qualified judges with backgrounds in law or science. This change in the Swiss judicial system will ensure high quality jurisprudence in the area of patent law.

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# The new Swiss Federal Patent Court will begin hearing cases on January 1, 2012



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## Current Situation Regarding Patent Litigation in Switzerland

There are currently 26 courts in Switzerland with jurisdiction over matters involving patents. These courts handle roughly 30 patent cases per year. 60% of patent cases are dealt with by the Commercial Courts in Aarau, Berne, St. Gall and Zurich. Of these cases, the majority are handled by the Commercial Court in Zurich.

## New Swiss Federal Patent Court

Starting next year, the SFPC will be established with its seat in St. Gall. The aim is to vest jurisdiction over cases involving patents in the hands of a specialised court in order to ensure predictable and timely outcomes in such cases.

## Subject Matter Jurisdiction

The SFPC will have exclusive jurisdiction over claims concerning the validity of patents as well as those alleging patent infringement, and over claims regarding the granting of a licence in patent matters. The SFPC will also be the only venue where preliminary injunctions may be sought in patent cases.

There will still be a concurrent jurisdiction of the SFPC with cantonal courts in other matters which neither concern validity nor infringement, but still have a connection with patents, such as claims arising out of patent licence agreements or title to patents.

If the infringement or validity of a patent is raised as either a preliminary question or objection in cantonal proceedings, the cantonal court must stay the proceedings and set a deadline for the initiation of a claim before the SFPC. If the infringement or invalidity of a patent is raised as a counterclaim, the cantonal court must transfer the entire proceedings to the SFPC. It is therefore likely that most claims in which concurrent jurisdiction exists will be dealt with by the SFPC from the beginning, since most claimants will not want to take the risk of the proceedings being transferred to the SFPC at a later stage.

## Rules of Procedure

Proceedings before the SFPC will mainly be governed by the new Swiss Code of Civil Procedure. However, there are two major exceptions that we wish to highlight: According to the SFPC, the proceedings will be conducted in one of the official Swiss languages – German, French or Italian – or in English as long as the court and all parties involved have given their consent. In addition, the revised Patent Act sets out the (lowered) requirements for obtaining a precise description (*Beschreibung*) of patent infringing processes or products in preliminary measures.

The SFPC will assume all cases falling within its subject matter jurisdiction, which are pending as of January 1, 2012 and in which the main hearing (*Hauptverhandlung*) has not yet taken place. It remains disputed whether such cases will be treated in accordance with the old cantonal codes of civil procedure (art. 404 of the Swiss Code of Civil Procedure) or whether the SFPC may apply the new Swiss Code of Civil Procedure.

Therefore, since the judges will need to familiarise themselves with the cases that have been transferred from the various cantonal courts, an initial backlog of cases is to be expected.

### Appeals

Decisions of the SFPC will only be appealable to the Swiss Federal Supreme Court, which will review the factual findings of the SFPC only for clear error or arbitrariness. The Swiss Federal Supreme Court will, however, subject the SFPC's legal analysis of the case to a full review.

As a result, contrary to many other European jurisdictions, only two instances will handle patent cases in Switzerland, which is likely to expedite such proceedings.

### Composition of the Swiss Federal Patent Court

The SFPC will be composed of two main judges, 20 adjunct judges having experience in technical fields, and 11 adjunct judges with a background in patent law. This structure should improve the cost efficiency of the SFPC while at the same time enabling the court to handle a large workload if necessary.

Preliminary measures will be decided by a single judge or – if technical questions are at issue – by three judges, one of whom has a background in science. Since, in previous years, most judges have lacked a technical background, courts have had to obtain brief expert reports before deciding on motions for preliminary injunctions. Since the technical knowledge of an «additional» judge will replace the expert report, it is possible that this will no longer be necessary. It is hoped that this mechanism will cut the duration of preliminary injunction proceedings by as much as two to three months.

### Costs

Court fees for the SFPC will range from CHF 1,000 to CHF 150,000 depending on the amount in dispute, the difficulty and size of the case, and the financial situation of the parties. The losing party will have to bear a share of the winning party's attorney's fees pursuant to a fixed tariff. Pre-trial attorney's fees may also be recoverable in part.

### Closing Remarks

Overall, the new SFPC represents a significant improvement for patent litigation in Switzerland, which will hopefully bring increased legal certainty and technical expertise to this field of law. The Swiss Federal Supreme Court will likely render some guiding decisions that will serve as cornerstones for the SFPC's future case law.

Moreover, the rather small Swiss patent community will have a clear focus on this court and critically monitor its decisions.

All in all, starting on January 1, 2012, the SFPC will likely make Switzerland an attractive new venue for patent litigation in Europe.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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