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### GAT, Solvay, and the Centralization of Patent Litigation in Europe

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# GAT, SOLVAY, AND THE CENTRALIZATION OF PATENT LITIGATION IN EUROPE

Marketa Trimble\*

## INTRODUCTION

As business has become global, so have disputes about patents, patent infringement, and patent validity. In many ongoing disputes between patent holders and alleged infringers, parties are engaging in parallel court proceedings in multiple countries to litigate infringements of parallel patents<sup>1</sup> and to contest the validity of patents. Concentrating litigation involving identical inventions and identical or similar conduct into one national or multinational court could result in faster, more efficient, and more consistent enforcement of patents.<sup>2</sup> There are a number of obstacles to any centralization of litigation. As the debate about a unified patent litigation system in Europe has shown,<sup>3</sup> even countries that are geographically, economically, culturally, and historically proximate face substantial challenges when attempting to adopt a single centralized patent litigation mechanism, even if they link the introduction of the mechanism to the creation of a unitary patent.<sup>4</sup>

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\* Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. This Recent Development was preceded by the author's blog post, titled *Solvay v. Honeywell and an Alternative Route to a Central Patent Court in Europe*. See Marketa Trimble, *Solvay v. Honeywell and an Alternative Route to a Central Patent Court in Europe*, PATENTLY-O (Sept. 3, 2012 3:00 PM), <http://www.patentlyo.com/patent/2012/09/solvay-v-honeywell-and-an-alternative-route-to-a-central-patent-court-in-europe.html>.

<sup>1</sup> Parallel patents are patents granted for the same invention in different countries.

<sup>2</sup> For a discussion of the potential advantages of centralized patent litigation, see MARKETA TRIMBLE, *GLOBAL PATENTS: LIMITS OF TRANSNATIONAL ENFORCEMENT* 44–59, 64–72 (2012). For discussions of costs of multiple parallel litigation, see *Communication from the Commission to the European Parliament and the Council—Enhancing the Patent System in Europe*, at 7–8, COM (2007) 165 final (Apr. 4, 2007), and Dietmar Harhoff, *Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System*, at 14–18 (Feb. 26, 2009), available at [http://ec.europa.eu/internal\\_market/indprop/docs/patent/studies/litigation\\_system\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_system_en.pdf).

<sup>3</sup> See, e.g., Press Release No. 17/11, Court of Justice of the European Union, *The Draft Agreement on the Creation of a European and Community Patent Court Is Not Compatible with European Union Law* (Mar. 8, 2011), available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110017en.pdf>; *Conclusions*, Part I.3, EUCO 76/12 (June 29, 2012). For a recent analysis of the EU proposals, see Thomas Jaeger, *All Back to Square One?—An Assessment of the Latest Proposals for a Patent and Court for the Internal Market and Possible Alternatives*, 43 IIC: INT'L REV. INTEL. PROP. & COMPETITION L. 286 (2012) (Ger.).

<sup>4</sup> Cf. *Proposal for a Regulation of the European Parliament and of the Council Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection*, at 2–3, COM (2011) 215 final (Apr. 13,

In Europe, where the establishment of a patent litigation mechanism has been linked to the creation of a unitary patent, a path to a Unified Patent Court has now been paved.<sup>5</sup> However, it will take more time before the court system and the unified litigation mechanism become operational. Even when the court system and the litigation mechanism are operational, they will not address the problems of all patent owners fighting infringements of multiple national parallel patents because the mechanism has been designed to deal only with new unitary patents or European patents under the European Patent Convention.<sup>6</sup>

The idea of a unified patent litigation system in Europe, which traces its origins to at least the 1970s,<sup>7</sup> received an important stimulus in 2006 when the Court of Justice of the European Communities (“CJEU”)<sup>8</sup> rendered its judgment in *Gesellschaft für Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG* (“GAT”).<sup>9</sup> *GAT*, by its interpretation of the exclusive jurisdiction provision of the European Union (“EU”) legislation on jurisdiction of courts in EU member countries, appeared to foreclose the possibility of centralizing the litigation of infringements of patents of multiple countries into one national court.<sup>10</sup> According to the CJEU in *GAT*, a single national court, at least theoretically, can decide on the infringement of multiple national patents.<sup>11</sup> In practice, however, it is unlikely that national courts will be able to make such decisions because, based on *GAT*, whenever a defendant

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2011). The Regulation was adopted in 2012. See Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, 2012 O.J. (L361) 1 (EC). The validity of the Regulation has been challenged indirectly in actions brought by Italy and Spain. See Joined Cases C-274/11 & C-295/11, *Spain v. Council of the European Union*, Dec. 11, 2012, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=131666&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=543756>.

<sup>5</sup> Agreement on a Unified Patent Court, Council of the European Union, *opened for signature* Feb. 19, 2013, 16351/12, available at <http://register.consilium.europa.eu/pdf/en/12/st16/st16351.en12.pdf>.

<sup>6</sup> The proposed Unified Patent Court will only adjudicate cases concerning European patents (under the Convention on the Grant of European Patents of 5 October 1973, commonly known as the European Patent Convention), “European patents with unitary effect” (under Regulation (EU) No 1257/2012, *supra* note 4), and supplementary protection certificates (under EU legislation). Agreement on a Unified Patent Court, *supra* note 5, arts. 32 & 2(d)–(h).

<sup>7</sup> See TRIMBLE, *supra* note 2, at 27.

<sup>8</sup> The acronym “CJEU” now refers to the Court of Justice of the European Union.

<sup>9</sup> Case C-4/03, 2006 E.C.R. I-6523.

<sup>10</sup> See *id.* paras. 25–31.

<sup>11</sup> See *id.* para. 16 (“If, on the other hand, the dispute does not concern the validity of the patent or the existence of the deposit or registration and these matters are not disputed by the parties, the dispute will not be covered by Article 16(4) of the [Brussels] Convention . . . Such would be the case, for example, with an infringement action, in which the question of the validity of the patent allegedly infringed is not called into question.”).

raises the issue of the validity of a foreign patent, a national court must dismiss, or at a minimum stay, the proceedings as they relate to the infringement of the foreign patent.<sup>12</sup>

The grim outlook that the supporters of centralized patent litigation in Europe have faced since *GAT*<sup>13</sup>—an outlook that so far has not been improved by the conclusion of the proposed Agreement on a Unified Patent Court<sup>14</sup>—might be replaced by a renewed hope that a national court or a small number of national courts in Europe could naturally emerge as a central court or courts for patent litigation. This glimmer of hope comes from another recent CJEU judgment, *Solvay SA v. Honeywell Fluorine Products Europe BV* (“*Solvay*”).<sup>15</sup> That case offers a new interpretation of the effects of the exclusive jurisdiction provision—an interpretation that might be flexible enough to permit at least some national courts to decide patent infringement cases that concern patents granted outside of their country, even when defendants in those cases raise the issue of patent validity.

This Recent Development analyzes whether *Solvay* can be extended to cover preliminary assessments made by German courts in patent infringement proceedings when the assessments concern the validity of the patents in question. Part I discusses the impact that the *GAT* decision has had on the centralization of patent litigation in Europe. Part II then analyzes the portion of the *Solvay* decision that pertains to the question of applying exclusive jurisdiction in proceedings on provisional measures. Based on the analysis in Part II, Parts III and IV explore whether the reasoning in *Solvay* can be extended to cover other preliminary decisions concerning the validity of foreign patents, and if so, whether such an extension would be compatible with *GAT*.

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<sup>12</sup> See *id.* para. 31. For a debate about the impact of *GAT* on infringement proceedings and whether courts may stay or will have to dismiss the proceedings when the validity of a foreign patent is raised, see JAMES J. FAWCETT & PAUL TORREMANS, *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW* 360–65 (2d ed. 2011).

<sup>13</sup> For some of the commentaries on the impact of *GAT*, see TRIMBLE, *supra* note 2, at 57. See also Toshiyuki Kono & Paulius Jurčys, *General Report*, in *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW: COMPARATIVE PERSPECTIVES* 41–42 (Toshiyuki Kono ed., 2012).

<sup>14</sup> See *supra* notes 5–6.

<sup>15</sup> C-616/10, July 12, 2012, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=124996&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=898044>.

## I. THE IMPACT OF *GAT*

*GAT* solidified the notion of exclusive jurisdiction over decisions on the validity of patents—the notion that only the courts and administrative bodies of the country in which a patent was granted may decide the validity of the patent.<sup>16</sup> The notion is not surprising; in the United States the Court of Appeals for the Federal Circuit reached the same conclusion in *Voda v. Cordis Corp.*<sup>17</sup> Although *Voda* concerned only the possibility—or rather the impossibility—of extending supplementary jurisdiction over foreign patents, the arguments in *Voda* suggest that the Court of Appeals would reject the idea of U.S. courts deciding the validity of foreign patents regardless of the jurisdictional ground on which the foreign patent was brought into a U.S. court.<sup>18</sup>

In the EU, Article 16.4 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (“Brussels Convention”), replaced in March 2002 by Article 22.4 of the Brussels I Regulation, vests exclusive jurisdiction over matters of patent validity in the courts of the EU member state where a patent was granted.<sup>19</sup> Such courts have exclusive jurisdiction “in proceedings concerned with the registration or validity of patents.”<sup>20</sup> In *GAT*, the CJEU faced the question of

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<sup>16</sup> See Case C-4/03, 2006 E.C.R. para. 22.

<sup>17</sup> *Voda v. Cordis Corp.*, 476 F.3d 887, 902 (Fed. Cir. 2007) (stating that “a patent right to exclude only arises from the legal right granted and recognized by the sovereign within whose territory the right is located”). Recently, the U.K. Supreme Court expressed the same opinion on the justiciability of the validity of foreign-registered intellectual property rights in *Lucasfilm Limited v. Ainsworth*. [2011] UKSC 39.

<sup>18</sup> See, e.g., *Voda*, 476 F.3d at 902 (“It would be incongruent to allow the sovereign power of one to be infringed or limited by another sovereign’s extension of its jurisdiction.”).

<sup>19</sup> Convention concernant la compétence judiciaire à l’exécution des décisions en matière civile et commerciale [Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters], art. 16.4, 1968 J.O. (L 299) 32, 35 (EC) [hereinafter Brussels Convention]; Council Regulation 44/2001, 2001 O.J. (L 12) 1, 8 (EC), art. 22.4 [hereinafter Brussels I Regulation]. This Recent Development uses the numbering of the Brussels I Regulation even when it refers to decisions that concerned its predecessor, the Brussels Convention. The Brussels I Regulation will be replaced as of January 10, 2015, by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), 2012 O.J. (L351) 1 (EC) [hereinafter Brussels I Regulation (recast)].

<sup>20</sup> Brussels I Regulation, *supra* note 19, art. 22.4 (“The following courts shall have exclusive jurisdiction, regardless of domicile: . . . in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.”). For a discussion of one difference in the various language versions of the Brussels I Regulation, see Case C-4/03, *Gesellschaft für Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG*, Opinion of Advocate General Geelhoed, 2006 E.C.R. I-6511, para. 33 [hereinafter Opinion of Advocate General Geelhoed].

whether the exclusive jurisdiction provision concerned only actions for a declaration of invalidity of a patent or whether the provision also applied when the issue of patent validity reached the court in a different manner—as a counterclaim, or as a defense raised by the defendant in a patent infringement suit.<sup>21</sup> The CJEU decided that, regardless of the manner in which the issue of validity arises in court proceedings, a court may not decide the validity of foreign patents.<sup>22</sup>

The holding in *GAT* thereafter impacted the wording of the revised Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“Lugano II Convention”), which sets the rules of jurisdiction for courts in the European Economic Area.<sup>23</sup> The revised Lugano II Convention now includes in its exclusive jurisdiction provision—which is otherwise a mirror image of Article 22.4 of the Brussels I Regulation—an additional clarification that the exclusive jurisdiction applies “irrespective of whether the issue [of patent validity] is raised by way of an action or as a defence.”<sup>24</sup> The same wording has also been inserted in the recast of the Brussels I Regulation, which was adopted at the end of 2012 and which will apply from January 10, 2015.<sup>25</sup>

To fully appreciate *GAT* and the accompanying judgment in *Roche Nederland BV v. Frederick Primus* (“*Roche*”)<sup>26</sup> it is important to recall that both judgments reflected the CJEU’s reaction to undesirable patent litigation practices that had spread across Europe. The practices included strategic forum shopping and the launching of threatening (and feared) “torpedoes”—the filing of declaratory judgment suits in slower jurisdictions in an attempt to inhibit parallel infringement suits in the courts of more expeditious jurisdictions.<sup>27</sup> While *GAT* and *Roche* were perhaps understandable as attempts to

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<sup>21</sup> See Case C-4/03, 2006 E.C.R. para. 13.

<sup>22</sup> *Id.* para. 25.

<sup>23</sup> See Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, June 10, 2009, 2009 O.J. (L 147) 1–44 [hereinafter Lugano II Convention]; STEFAN LUGINBÜHL, EUROPEAN PATENT LAW: TOWARDS A UNIFORM INTERPRETATION 50 (2011).

<sup>24</sup> Lugano II Convention, *supra* note 23, at 2, 12. See also Fausto Pocar, *Explanatory Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, Dec. 23, 2009, O.J. (C 319) 27. The Lugano II Convention became effective on January 1, 2010. *Summary of Treaty*, EUROPA.EU, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=7481> (last visited Jan. 30, 2013) (listing the “Date of Entry into Force” for the Lugano II Convention).

<sup>25</sup> Brussels I Regulation (recast), *supra* note 19, arts. 24(4) & 81.

<sup>26</sup> Case C-539/03, 2006 E.C.R. I-6569.

<sup>27</sup> See TRIMBLE, *supra* note 2, 48–49, 54–57 (including a discussion of “torpedoes”).

circumscribe national court jurisdiction in patent matters, the decisions were criticized for failing to eliminate the possibility of undesirable litigation practices, and for preventing any effective concentration of the litigation of multiple national parallel patents in one court.<sup>28</sup>

Disappointed by the CJEU's curtailing of the jurisdictional flexibility that would have permitted a centralization of patent litigation, experts working at the intersection of intellectual property and conflict of laws (private international law) proposed several solutions to the centralization problem. These projects, such as those spearheaded by the American Law Institute and the Max Planck Institute Group on Conflict of Laws in Intellectual Property, scrutinized the existing judgments, evaluated the chances that the decisions could be overruled or their effects changed legislatively, and offered solutions to the centralization of patent litigation based on their perceptions of the chances for changing the results of the judgments.<sup>29</sup> Several experts also authored studies about the problems associated with exclusive jurisdiction in intellectual property cases.<sup>30</sup> Recently, Professor Benedetta Ubertazzi devoted an entire monograph to the problems associated with exclusive jurisdiction, concluding that:

[E]xclusive jurisdiction rules related to [intellectual property rights] cases are not only insufficiently supported by any of the arguments usually invoked in their favor, but actually are also contrary to the public international rules on the avoidance of a denial of justice and on the fundamental human right of access to a court.<sup>31</sup>

In addition to searching for a proper balance between exclusive jurisdiction and jurisdictional flexibility, the experts also attempted to fill in gaps that existing judgments on the matter left open. Indeed, *GAT* itself left several

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<sup>28</sup> *Id.*

<sup>29</sup> See, e.g., INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (Am. Law Inst., West, Westlaw, 2008); PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY (European Max Planck Grp. on Conflict of Laws in Intellectual Prop. 2011), [http://www.cl-ip.eu/files/pdf2/Final\\_Text\\_1\\_December\\_2011.pdf](http://www.cl-ip.eu/files/pdf2/Final_Text_1_December_2011.pdf); Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 CHI.-KENT L. REV. 1065 (2002); *Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property*, in INTELLECTUAL PROPERTY IN THE GLOBAL ARENA 394 (Jürgen Basedow et al. eds., 2010); Korean Private International Law Association, *Principles on International Intellectual Property Litigation* (Mar. 26, 2010) (on file with author); see also TRIMBLE, *supra* note 2, at 59–64.

<sup>30</sup> E.g., Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 WM. & MARY L. REV. 711, 788–91 (2009).

<sup>31</sup> BENEDETTA UBERTAZZI, EXCLUSIVE JURISDICTION IN INTELLECTUAL PROPERTY 295 (2012).

questions unanswered. The CJEU did not specify how national courts should proceed when invalidity is counterclaimed or raised as a defense. Courts could stay infringement proceedings and wait for the courts or patent offices of the various countries that granted the patents to decide patent validity, or courts could dismiss infringement cases altogether and refer parties to the courts of the countries where the patents were granted.<sup>32</sup> Another unanswered question concerned court approaches to cases involving the validity of patents granted in countries outside the EU.<sup>33</sup> As commentators have observed, it remains an open question whether a national law on jurisdiction should determine which country's courts have jurisdiction to decide the validity of patents—even if jurisdiction over a defendant is based on one of the provisions of the Brussels I Regulation—or whether the exclusive jurisdiction provision of the Brussels I Regulation should be interpreted as encompassing foreign patents notwithstanding the clear language of Article 22.4, which refers to patents granted *in or for* the EU member states.<sup>34</sup>

## II. THE JUDGMENT IN *SOLVAY*

One of the questions that *GAT* left unanswered concerned the potential effect of Article 22.4 on the jurisdiction of courts in granting provisional measures under Article 31 of the Brussels I Regulation. Article 31 contains a special jurisdictional rule for provisional measures, allowing parties to apply for provisional measures in a court in any EU member state, “even if, under [the Brussels I] Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.”<sup>35</sup> *GAT* did not address the question of whether jurisdiction for provisional measures exists even where a case concerns a patent, patent validity is raised, and the court that is asked to grant provisional measures is not a court of the country where the patent was granted. In July 2012, the CJEU answered this question in *Solvay* in response to a reference for a preliminary ruling submitted by a Dutch court. The CJEU ruled that the preliminary assessment of validity that the Dutch court must

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<sup>32</sup> See FAWCETT & TORREMANS, *supra* note 12, at 360–65 (discussing the approach to this problem taken by courts before *GAT*); see also TRIMBLE, *supra* note 2, at 51–52.

<sup>33</sup> TRIMBLE, *supra* note 2, at 46–47.

<sup>34</sup> See Brussels I Regulation, *supra* note 19, art. 22.4; Brussels I Regulation (recast), *supra* note 19, art. 24(4); see also Marko Schauwecker, *Die Entscheidung GAT gegen LuK und drittstaatliche Patente*, 2009 GRUR INT. 187.

<sup>35</sup> Brussels I Regulation, *supra* note 19, art. 31 (“Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.”); see also Brussels I Regulation (recast), *supra* note 19, art. 35.



make in interim proceedings before deciding whether or not to grant a preliminary measure does fall within the provisional measure jurisdiction of Article 31, and that therefore the Dutch court may make an assessment of patent validity—even if the assessment concerns a foreign patent.<sup>36</sup>

The CJEU put forth two arguments to support the portion of its judgment in *Solvay* that pertain to the effects of the exclusive jurisdiction provision of Article 22.4.<sup>37</sup> The first argument relies on the texts and objectives of Articles 22.4 and 31 and their positions in the structure of the Brussels I Regulation.<sup>38</sup> While Article 22.4 qualifies any jurisdictional ground in the Regulation, it does not limit the jurisdiction that a court may exercise under Article 31, which “regulate[s] different situations.”<sup>39</sup> Because the jurisdiction to issue provisional measures under Article 31 is without limits, any court may issue provisional measures, even if it is a court in a country other than the country of the patent grant.<sup>40</sup> The position of Article 31 in the scheme of the Brussels I Regulation supports the interpretation that Article 31 should be read independently from the preceding jurisdictional provisions: Article 31 is in a separate section from the other jurisdictional provisions and appears after the exclusive jurisdiction provision of Article 22.4 (Article 31 is in Section 10 of Chapter II of the Regulation, while the other jurisdictional grounds are in Sections 1–7 of the same chapter).<sup>41</sup>

The second CJEU argument concerns the problem of the application of Article 25 of the Brussels I Regulation, which requires that a court reject the exercise of jurisdiction over a claim that “is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction” under Article 22.<sup>42</sup> The CJEU had to explain whether Article 25

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<sup>36</sup> See Case C-616/10, *supra* note 15, paras. 31–51.

<sup>37</sup> *Id.* Another portion of the judgment concerns the interpretation of Article 6.1 of the Brussels I Regulation. *Id.* paras. 17–30.

<sup>38</sup> *Id.* paras. 36–40.

<sup>39</sup> *Id.* para. 36.

<sup>40</sup> *Id.* paras. 36–37.

<sup>41</sup> *Id.* paras. 38–40. The position of the corresponding article is the same in the Brussels I Regulation (recast). See Brussels I Regulation (recast), *supra* note 19, art. 35 (placing the corresponding article in Section 10 of the document).

<sup>42</sup> Brussels I Regulation, *supra* note 19, art. 25 (“Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.”); Case C-616/10, *supra* note 15, para. 10. For a discussion of the difference among the various language versions, see Opinion of Advocate General Geelhoed, *supra* note 20, para. 34. See Brussels I Regulation (recast), *supra* note 19, art. 27.

mandated dismissal in proceedings on provisional measures under Article 31.<sup>43</sup> Although the CJEU could have easily referred to the same arguments concerning the language and the scheme of the Regulation, the Court instead argued that the particular nature of the decision on foreign patent validity that was at issue in the Dutch proceeding did not trigger the application of Article 25.<sup>44</sup>

Arguments against the application of Article 25 in proceedings on provisional measures in which jurisdiction is based on Article 31 would have been straightforward for the CJEU to construct. As the Court did when it analyzed the applicability of Article 22.4, when discussing the applicability of Article 25 the Court could have pointed to the clear language of Article 31, which expressly grants jurisdiction for provisional measures without regard to other jurisdictional grounds in the Regulation.<sup>45</sup> If Article 31 does not yield to Article 22.4 because of the unequivocal language of Article 31, then Article 31 should also not yield to Article 25. Similarly, looking at the structure of the Brussels I Regulation, there appears to be no difference between the relationships of Article 22.4 to 31 and Article 25 to 31; in both instances the provisions appear in separate sections of Chapter II of the Regulation and in both instances Article 31 follows the other two provisions, with the order suggesting that Article 31 takes precedence over the earlier provisions.<sup>46</sup> Perhaps an argument could have also been made that an application for a provisional measure is not “a claim which is *principally concerned* with a matter over which the courts of another Member State have exclusive jurisdiction,”<sup>47</sup> meaning that the application for a provisional measure does not present the kind of claim for which a dismissal is mandated by Article 25.

The CJEU could have relied on textual and structural arguments similar to those that served the Court well when it explained the relationship between Articles 22.4 and 31. And yet in arguing that in the case of the Dutch interim proceedings “the specific binding effect”<sup>48</sup> of Article 22.4 did not trigger the application of Article 25, the CJEU abandoned textual and structural arguments and instead focused on the nature of the particular decision on patent validity that was at issue in *Solvay*. The CJEU explained that in the

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<sup>43</sup> See Case C-616/10, *supra* note 15, paras. 41–51.

<sup>44</sup> *Id.*

<sup>45</sup> See Brussels I Regulation, *supra* note 19, art. 31.

<sup>46</sup> See *id.* arts. 22.4, 25, 31.

<sup>47</sup> *Id.* art. 31 (emphasis added).

<sup>48</sup> Case C-616/10, *supra* note 15, para. 47.

interim proceedings at issue, the Dutch court makes only “an assessment as to how the court [in the country of the patent grant] would rule” on patent validity,<sup>49</sup> and that such an assessment “will not in any way prejudice [any potential] decision to be taken on the substance by [a] court”<sup>50</sup> in the country of the patent grant. The particular nature of the Dutch court’s assessment of patent validity means that even if a court in the foreign country where the patent was granted later decides “on the substance,” the earlier Dutch interim decision and the later foreign decision would not be inconsistent.<sup>51</sup> The provisional nature of the Dutch decision means that the decision is not a final conclusion on validity; a final conclusion can later be made by a court or patent office in the country of the patent grant.<sup>52</sup> Because there is no risk of conflicting decisions by courts in various EU member states, which is a risk that the Brussels Convention “seeks specifically to avoid”<sup>53</sup> and that Article 22 addresses,<sup>54</sup> there is no requirement that Article 25 be applied and that Article 31 be “disapplied”<sup>55</sup> in “a case such as that in the main proceedings.”<sup>56</sup>

### III. IMPACT OF *SOLVAY* ON OTHER PRELIMINARY ASSESSMENTS OF PATENT VALIDITY

The three paragraphs that the CJEU devoted to analyzing the effect that the nature of the Dutch court’s decision on patent validity had on the application—or rather non-application—of Article 25<sup>57</sup> raise the question of whether other preliminary decisions on the validity of foreign patents could also be affected by the CJEU’s reasoning in *Solvay*. For instance, if *Solvay* could be extended to cover preliminary assessments of patent validity made by German courts in patent infringement proceedings, the extension could open the possibility that German courts could adjudicate foreign patent infringements without having to stay or dismiss cases each time a defendant raises the issue of the validity of a foreign patent.

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<sup>49</sup> *Id.* para. 48.

<sup>50</sup> *Id.* para. 50.

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> *Id.* para. 46.

<sup>54</sup> *See id.* para. 47 (referring to the predecessor of Article 22.4, which was Article 16.4 of the Brussels Convention).

<sup>55</sup> *Id.* para. 50.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* paras. 48–50.

The possibility of centralization of proceedings would permit natural centers of patent litigation to emerge and serve litigants who fight infringements of multiple national parallel patents.<sup>58</sup> If German courts had jurisdiction over a defendant, a plaintiff could bring a patent infringement action against that defendant concerning patents granted in multiple countries without the danger that the defendant's counterclaim or defense of foreign patent invalidity would cause the case to be stayed or dismissed. Although the resulting centralization of patent litigation would have one major limitation (German courts would still have to be able to assert personal jurisdiction over the defendant), the centralization would be an undeniable improvement over the fragmented patent litigation situation that currently exists in the EU.

German patent infringement court assessments of patent validity are similar to the assessments in the Dutch interim proceeding that was at issue in *Solvay*. In the German bifurcated system, final decisions concerning patent validity and patent infringement are made separately by different bodies and courts; the issues may eventually meet before the German Federal Supreme Court if both issues proceed to that point.<sup>59</sup> Notwithstanding the separation of functions, infringement courts often must address the issue of patent validity. When the issue is raised in an infringement proceeding, the infringement court follows the rule of civil procedure that allows a court to stay a proceeding if the court's decision depends "wholly or in part on the question of whether a legal relationship does or does not exist."<sup>60</sup> The infringement court typically assesses whether there is a likelihood that a claim of invalidity of a patent would be successful before the Patent Office and the Federal Patent Court, who decide on the validity of German patents.<sup>61</sup> If the infringement court finds it likely that an invalidity claim will succeed, the court may stay the infringement proceedings, but is not required to do so.<sup>62</sup> According to at least one commentator, "German infringement courts quite rarely stay the infringement case," and "[a] stay of patent infringement proceedings is normally only granted if the invalidation action/opposition is very likely successful."<sup>63</sup> While

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<sup>58</sup> See *supra* note 6.

<sup>59</sup> For a discussion of German proceedings, see TRIMBLE, *supra* note 2, at 69–72.

<sup>60</sup> *Id.* at 69; ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, BUNDESGESETZBLATT [BGBl.] §148 (Ger.), translated in *Code of Civil Procedure*, BUNDESMINISTERIUM DER JUSTIZ, [http://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html#p0581](http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0581) (last visited Jan. 30, 2013).

<sup>61</sup> TRIMBLE, *supra* note 2, at 69.

<sup>62</sup> *Id.*

<sup>63</sup> Peter Mes, *Reflections on the German Patent Litigation System*, in PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 401, 406 (Wolrad Prinz zu Waldeck und Pymont et al. eds., 2009).

German courts continue to make preliminary assessments with regard to German patents, after *GAT* the courts cannot make assessments with regard to patents granted in other countries, and certainly not those granted in other EU countries.<sup>64</sup>

There are a number of similarities between Dutch court preliminary decisions and German preliminary assessments concerning patent validity. As with the Dutch court decisions on patent validity in the interim proceedings at issue in *Solvay*, German infringement court assessments concerning patent validity do not resolve the issue of patent validity with finality.<sup>65</sup> Neither the Dutch nor the German preliminary decisions cause national patent offices to cancel any patents at issue, and neither the Dutch nor the German decisions foreclose any final decisions on patent validity by competent bodies or courts.<sup>66</sup> The decisions in both cases are binding only *inter partes*—binding only on the parties in the interim proceedings and the infringement litigation—and are only temporary until a final decision on validity is made by a component body or court.<sup>67</sup> If the interim proceedings result in the grant of provisional measures and the infringement proceedings in the award of remedies, and later a final decision on patent validity reveals that the earlier decisions were based on an incorrect assessment of patent validity, the injured party can seek to remedy the situation and obtain redress.<sup>68</sup>

Certainly, limitations as to the parties affected and as to the duration of the effects of preliminary decisions and assessments concerning validity are often illusory; the effect of a preliminary assessment concerning patent validity may extend well beyond the immediate proceedings and impact third parties and their conduct. Similarly, it could be argued that the temporary effects of a preliminary assessment may extend for a significant period of time if validity proceedings are lengthy, or the effects may continue indefinitely if the parties do not pursue the validity issue in separate validity proceedings and instead allow the preliminary assessment to govern the validity issue between them permanently.

A difference between Dutch interim proceedings and German infringement proceedings that is important for the purposes of *Solvay* is the different

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<sup>64</sup> For discussion regarding the debate about the applicability of the Brussels I Regulation on patents granted in countries outside the EU, see *supra* notes 33–34 and accompanying text.

<sup>65</sup> Compare text accompanying notes 59–64, with text accompanying notes 49–52.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

jurisdictional grounds on which Dutch and German courts rely in the proceedings. While Dutch courts base their jurisdiction for interim proceedings on the special provision of Article 31 of the Brussels I Regulation for proceedings concerning provisional measures,<sup>69</sup> German infringement courts base their jurisdiction on either general jurisdiction (Article 2) or one of the special jurisdictional grounds (such as Article 5.3 or 6.1).<sup>70</sup> If exclusive jurisdiction under Article 22.4 supersedes general and special jurisdictional grounds but does not affect jurisdiction under Article 31, the different result is inevitable: German infringement courts are bound by Article 22.4, while Dutch courts are not.

However, the difference in the Dutch and German courts' jurisdictional grounds might be irrelevant if Article 25 is declared moot in cases in which there is no danger that decisions resulting from the proceedings "will . . . in any way prejudice the decision to be taken on the substance by the court having jurisdiction under Article 22(4)."<sup>71</sup> As long as "the decision on the substance" refers to a decision on patent validity, that decision can be made by a competent court after the provisional decision or assessment of validity, and although the final decision might be contrary to the earlier preliminary decision or assessment, the final decision will not conflict with the preliminary decision or assessment.<sup>72</sup> While the final and the preliminary decisions might co-exist with respect to their determinations that pertain to the validity of patents, the party harmed by an earlier preliminary decision or assessment that is inconsistent with a final determination of patent validity may seek redress and remedy the inconsistency.<sup>73</sup>

There is another difference between Dutch interim proceedings and German infringement proceedings that could be important if Article 25 is considered moot for both Dutch and German preliminary decisions on patent validity that are made in the proceedings. Dutch interim proceedings under Article 31, unlike German infringement proceedings, are not likely to result in a decision that would require recognition and enforcement in another country. The purpose of Article 31 is to allow a plaintiff to seek provisional measures where such measures are available, and while the possibility certainly exists

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<sup>69</sup> See text accompanying notes 36–40; see also Brussels I Regulation (recast), *supra* note 19, art. 35.

<sup>70</sup> Brussels I Regulation, *supra* note 19, arts. 2, 5.3, 6.1; Brussels I Regulation (recast), *supra* note 19, arts. 4, 7(2), 8(1).

<sup>71</sup> Case C-616/10, *supra* note 15, para. 50.

<sup>72</sup> See text accompanying notes 48–56.

<sup>73</sup> See *id.*

that the enforcement of the measures issued in the proceedings under Article 31 could require the assistance of another country's judicial system, it is probably unlikely.<sup>74</sup> By contrast, infringement decisions arising from German infringement proceedings might have to be enforced, fully or partially, in another country and therefore will be subject to scrutiny under that country's rules on recognition and enforcement of judgments.<sup>75</sup>

The difference in the possible need for cross-border enforcement in the decisions of Dutch and German courts is important because the Brussels I Regulation includes two tools to prevent courts from violating the exclusive jurisdiction rule of Article 22.4. One tool is the obligation imposed on a court in Article 25 to dismiss a case if the courts of another EU member state have exclusive jurisdiction under Article 22.<sup>76</sup> The second tool is embedded in the system of recognition of judgments where, under Article 35.1, a court shall not recognize a foreign judgment if it conflicts with the exclusive jurisdiction provision of Article 22.<sup>77</sup> Even if a German infringement court were to decide that Article 25 did not apply to its proceedings and that, therefore, it could conduct a preliminary assessment of the validity of a foreign patent based on the arguments in *Solvay*, it is unclear whether the court could rely on the courts of other EU countries, particularly the countries whose patents were at issue, to respect the German court's final decision on infringement issued after the preliminary assessment of validity.

The connection between Articles 25 and 35.1, although largely immaterial in the context of proceedings on provisional measures, is important in the context of infringement proceedings, and this connection calls for a single approach throughout the EU on the interpretation of the applicability of the exclusive jurisdiction provision of Article 22.4. For the private international law system to function, both the infringement court making the preliminary assessment of the validity of a foreign patent and any other court in the EU that might be asked to recognize an infringement decision by the infringement

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<sup>74</sup> See *id.*

<sup>75</sup> E.g., UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005); see also *Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited Feb. 6, 2013).

<sup>76</sup> Brussels I Regulation, *supra* note 19, art. 25; Brussels I Regulation (recast), *supra* note 19, art. 27.

<sup>77</sup> Brussels I Regulation, *supra* note 19, art. 35.1 ("Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72."). Article 22 is in Section 6 of the Brussels I Regulation. See *id.* art. 22. Brussels I Regulation (recast), *supra* note 19, art. 45.1(e)(ii).

court would have to agree on whether Article 22.4 applies to preliminary assessments of patent validity.

Since the CJEU apparently envisioned in *Solvay* that provisional measures issued in Dutch interim proceedings following a preliminary decision on foreign patent validity could be recognized and enforced in other EU countries based on the Brussels I Regulation, German court decisions on patent infringements made following a preliminary assessment of foreign patent validity should receive the same treatment.<sup>78</sup> Only if Article 22.4 is held inapplicable generally to preliminary assessments of patent validity in interim proceedings on provisional measures can Article 25 permit courts to make such assessments and Article 35.1 allow other courts to recognize any provisional measures that may be issued. And if such a general inapplicability exists, Article 22.4 should be inapplicable to German provisional assessments of patent validity as well.

#### IV. READING *GAT* IN LIGHT OF *SOLVAY*

Those who might oppose an extension of *Solvay*'s Article 25 argument to preliminary decisions on patent validity, beyond the decisions that are made in proceedings on provisional measures, might be concerned that *GAT* would have to be overruled in order for *all* preliminary decisions on patent validity, such as German infringement courts' assessments of patent validity, to be excluded from the exclusive jurisdiction provision of Article 22.4. This concern is warranted because *GAT* involved a German infringement court decision and therefore addressed a preliminary assessment of validity of foreign patents.<sup>79</sup> Nevertheless, a particular reading of *GAT* in light of *Solvay* suggested below might permit the two decisions to coexist.

In *Solvay*, the CJEU focused on one objective of the exclusive jurisdiction provision (avoiding the risk of conflicting decisions), while in *GAT* the Court discussed three objectives of Article 22.4. The first objective discussed in *GAT* is the objective to "ensure that jurisdiction rests with courts closely linked to the proceedings in fact and law."<sup>80</sup> Undeniably, courts with exclusive

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<sup>78</sup> The facts in the *Solvay* case suggest that enforcement of provisional measures outside the Netherlands could indeed be an issue. See Case C-616/10, *supra* note 15, paras. 12–14.

<sup>79</sup> Case C-4/03, 2006 E.C.R. para. 10.

<sup>80</sup> *Id.* para. 21; see also P. Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 1979 O.J. (C 59) 1, 22 (discussing the need for a "close connecting factor between the dispute and the court with jurisdiction to resolve it").



jurisdiction under Article 22.4 will be the courts “best placed to *adjudicate*” issues of patent validity.<sup>81</sup> However, a preliminary assessment of the likelihood that a validity claim will be successful is not an *adjudication* of patent validity and arguably does not “*establish*, indirectly, the invalidity of the patent at issue.”<sup>82</sup> Decisions on patent validity, and certainly final decisions on patent validity, continue to be made by competent bodies of the countries where patents were granted or by courts in those countries under Article 22.4.

The second objective of the exclusive jurisdiction provision that the CJEU discussed in *GAT* is the objective of limiting “the heads of jurisdiction” and promotion of “the predictability of the rules of jurisdiction” and “the principle of legal certainty.”<sup>83</sup> Allowing preliminary assessments in German infringement courts to proceed does not seem to be contrary to these objectives. There will be only one “head of jurisdiction” for decisions on patent validity—exclusive jurisdiction based on Article 22.4. Rules of jurisdiction will not be less predictable, and the patent owner and the alleged infringer may still expect to litigate infringement in the courts of the countries where jurisdiction lies based on Articles 2, 5.3, and 6.1,<sup>84</sup> and to seek final decisions on patent validity in courts with exclusive jurisdiction under Article 22.4.<sup>85</sup> Predictability will be increased for plaintiffs in infringement actions; they will be able to select a forum within the jurisdictional constraints of the Brussels I Regulation and will not have their cases stayed or dismissed because defendants counterclaim invalidity of a foreign patent or raise invalidity as a defense.<sup>86</sup> Legal certainty will not suffer more than when the infringements of a country’s own patents are litigated; problems with post-infringement findings of patent validity are foreign to neither bifurcated nor non-bifurcated systems.

The third objective discussed in *GAT* by the CJEU was the desire to avoid conflicting decisions.<sup>87</sup> The Court did not note the limited effect of German infringement court decisions on patent validity in terms of their temporary

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<sup>81</sup> Case C-4/03, 2006 E.C.R. para. 22 (emphasis added); *see also* Case C-288/82, *Duijnste v. Goderbauer*, 1983 E.C.R. 3664, 3668 (CJEU) (“In order to maintain the link between the substantive law applicable and its procedural implementation, preference must . . . be given to the . . . place in which the courts are to have exclusive jurisdiction.”).

<sup>82</sup> Case C-4/03, 2006 E.C.R. para. 26 (emphasis added).

<sup>83</sup> *Id.* para. 28.

<sup>84</sup> *See* Brussels I Regulation, *supra* note 19, arts. 2, 5.3, 6.1.

<sup>85</sup> *See id.* art. 22.4.

<sup>86</sup> *See* Opinion of Advocate General Geelhoed, *supra* note 20, para. 23 (“If the claimant in a private action can easily determine the court to which he can apply and if the defendant can easily determine in which court he can be sued, then the interests of both legal protection and legal certainty will be served.”).

<sup>87</sup> *See* C-4/03, 2006 E.C.R. para. 29.

nature, but focused only on the limited effect on the parties bound by the decisions, and pointed out that while under German law the effects of a decision are limited to the parties to the infringement proceedings, court decisions on patent validity in other countries have *erga omnes* effects.<sup>88</sup> The CJEU rejected the argument that *inter partes* and *erga omnes* decisions could be treated differently, and explained that a different treatment of the decisions “would . . . lead to distortions, thereby undermining the equality and uniformity of rights and obligations arising under the [Brussels I Regulation] for the [member states] and the persons concerned.”<sup>89</sup> If the right of a plaintiff in a patent infringement action consists of a limited choice between several possible fora (such as under Articles 2, 5.3 and 6.1),<sup>90</sup> and if a member state’s obligation is to assure that only courts in the country where a patent was granted decide patent validity, then the German infringement court’s preliminary assessment of validity of a foreign patent fosters the right while not breaching the obligation.

At least two criticisms can be made of any attempt to read *GAT* as allowing preliminary assessments of validity of foreign patents in infringement proceedings. First, it can be argued that a plausible reading of *GAT* is merely semantic, replacing the word “decision” with the word “assessment.” Second, regardless of how *GAT* is interpreted today, it is undeniable that the CJEU considered in *GAT* precisely the preliminary assessments of patent validity that are at issue in German infringement proceedings, and that the CJEU rejected the proposition that the preliminary assessments could be excluded from the scope of Article 22.4.<sup>91</sup> The Court even rejected the argument that Article 25 could delineate the scope of jurisdiction under Article 22.4.<sup>92</sup> As the Advocate General in the case, the late Professor Geelhoed noted in his opinion to *GAT* that “the provisions of Article [25] of the Brussels [I Regulation] were thoroughly discussed during the proceedings before the Court and it was made clear that Article [25] is not a rule of jurisdiction and that its interpretation cannot determine the interpretation of Article [22].”<sup>93</sup>

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<sup>88</sup> See *id.* para. 30.

<sup>89</sup> *Id.*

<sup>90</sup> Cf. Brussels I Regulation, *supra* note 19, at 2 (noting in recital 12, that “there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.”).

<sup>91</sup> See C-4/03, 2006 E.C.R. para. 31.

<sup>92</sup> Cf. *id.* para. 28.

<sup>93</sup> Opinion of Advocate General Geelhoed, *supra* note 20, para. 34.

## CONCLUSION

*Solvay* and the considerations of its effects, if any, on other preliminary decisions on or assessments of validity of foreign patents, reopen a crucial question that needs to be answered so that countries can decide whether concentrating patent litigation is feasible, and if so, what form it should take. The question pertains to the true reason or reasons why countries oppose or hesitate about permitting courts to decide the validity of foreign patents. If the primary reason is the act of state doctrine and the desire to respect the sovereignty reflected in a country's grant of a patent, it may be that preliminary assessments of the validity of foreign patents, which do not result in the cancellation of patents, could be acceptable. If the concern is that courts in foreign countries cannot be entrusted with elaborate decisions that combine the complexities of patent law and modern technology, perhaps foreign courts should not even make preliminary assessments.

Uncovering the real reason or reasons for countries' reluctance to permit courts to decide the validity of foreign patents should also help in identifying acceptable solutions for centralizing patent litigation. If the act of state doctrine defines the debate, a multinational court that would arise out of an international treaty might be the only viable solution. If a lack of sufficient technical expertise worries countries, such worries might be allayed if natural centers of patent litigation were allowed to emerge in national courts that deal with large patent dockets and therefore have significant expertise in both patent law and a wide range of technologies.

Professor Ubertazzi's book<sup>94</sup> could serve as an excellent guide to discussing the true reasons for countries' hesitations about allowing courts to decide the validity of foreign patents; she provides a detailed analysis of the various arguments that have been made in support of the exclusive jurisdiction rule for intellectual property cases. If her work—and the work of other experts who have argued in favor of abolishing or softening the rule of exclusive jurisdiction—is successful in changing the opinions of those who believe in the necessity of the expansive exclusive jurisdiction rule, then EU law must change, either legislatively or through a reconsidered interpretation of the Brussels I Regulation. To extend *Solvay* to German infringement court assessments of patent validity, the CJEU would probably need to overrule

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<sup>94</sup> UBERTAZZI, *supra* note 31.

*GAT*, which might be difficult given that the recast of the Brussels I Regulation incorporates language importing the holding in *GAT*.

If German courts were to have the opportunity to emerge as natural centers for litigating the infringements of patents of multiple countries, this development could promote the effective enforcement of patents until a unified EU patent litigation mechanism becomes operational and afterward a centralization in national courts would permit the unified litigation of multiple national parallel patents. A discussion of whether and to what extent a centralization of patent litigation would be truly beneficial—and to whom—is beyond the scope of this article. This article also does not consider what the wisdom of centralizing patent litigation in a bifurcated system, as opposed to a non-bifurcated system, might be. Clearly, these issues deserve further discussion.

