

# The New Swiss Patent Litigation System

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**Abstract:** Switzerland is about to implement a completely new patent litigation system, following the establishment of a new specialized federal patent trial court and the replacement of twenty-six cantonal codes of civil procedure with a single uniform federal code of civil procedure. This article pro-

vides an overview of the general structure and the most important features of the new patent litigation system that may be of interest to international patent litigants and litigators.

**Keywords:** Patents; Litigation; Switzerland; Patent Court; Specialized Courts; Preliminary Injunctions; Provisional Measures; Civil Procedure; Expert Opinions; Jurisdiction; Remedies; Descriptive Seizure; Saisie Helvétique; Zurich Route

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## A. Introduction

- 1 As of 2012, for the first time in history, patent litigation in Switzerland will be governed by a single set of procedural rules applied by a single first instance patent court with nationwide jurisdiction over virtually all civil patent matters.
- 2 While substantive patent law has been uniform federal law since the enactment of the first Swiss Patent Act in 1888, the new federal patent litigation system constitutes a fundamental shift in procedure compared to the previous system that was based on the federalist idea of having twenty-six different non-specialist cantonal courts adjudicate an estimated combined average of thirty patent cases a year<sup>1</sup> on the basis of twenty-six remarkably different cantonal codes of civil procedure.<sup>2</sup> Most courts, with the exception perhaps of the four cantonal commercial courts,<sup>3</sup> simply did not have a sufficient caseload to develop any patent expertise.
- 3 This state of affairs opened the system up to the strategic use and abuse of forum shopping by potential defendants, who could file preemptive declaratory judgment actions in notoriously inexperienced courts in order to delay the judicial resolution of conflicts or in order to avoid litigation in more experienced and faster courts, either elsewhere in Switzerland or abroad, most notably in Germany.<sup>4</sup> Moreover, many judges who were actually assigned patent cases had a hard time grappling with the issues and were all too often tempted to defer their judgment to the opinion of court-appointed experts in technical and sometimes, as troublesome as it is, even in legal matters.<sup>5</sup> In addition, any factual errors on the trial level could not (and cannot) be remedied on appeal to the Swiss Supreme Court, which is the second and final instance in patent and other intellectual property cases, because Supreme Court review is, in principle, limited to legal issues only.<sup>6</sup> This further increases the importance of improving trial-level judicial expertise in patents.<sup>7</sup>

- 4 Although only now being implemented, neither the idea of a federal code of civil procedure nor the idea of specialized courts in the field of intellectual property law is new for Switzerland. In fact, proposals for specialized nationwide intellectual property courts go back as far as 1906.<sup>8</sup> The specific idea of establishing a federal patent trial court was further discussed in the context of patent reform beginning in the 1940s,<sup>9</sup> but was subsequently dropped over concerns about its constitutionality in view of cantonal sovereignty in matters of civil procedure and court organization.<sup>10</sup> The adoption of a new Swiss Constitution in 2000 and the following constitutional reform of the federal judiciary<sup>11</sup> paved the way for both the creation of new first instance federal trial courts and the enactment of a uniform federal code of civil procedure, leaving only the organization of cantonal court systems to the limited discretion of the cantons.<sup>12</sup> On the basis of this revised constitutional framework, the new federal Code of Civil Procedure (*Zivilprozessordnung*)<sup>13</sup> was adopted in 2008 and entered into force on January 1, 2011, along with the revised Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.<sup>14</sup>
- 5 Parallel to the work on unifying the law of civil procedure, the Swiss government, supported by parliamentary initiatives and by Swiss business and intellectual property lawyers' associations, prepared a draft statute on a specialized federal first instance patent court whose slightly amended final version was adopted by parliament in 2009. The court, established by the new Act on the Federal Patent Court (*Patentgerichtsgesetz*),<sup>15</sup> was originally planned to become operative along with the entry into force of the new Code of Civil Procedure on January 1, 2011. However, while the provisions necessary for the election of the federal patent judges entered into force as planned on March 1, 2010, and although the patent judges have since been elected as planned, the starting date of the Federal Patent Court had to be postponed for organizational reasons. It is currently expected that the Court will begin its work on January 1, 2012.
- 6 Along with the Patent Court comes a new statute governing patent agents who are customarily referred to as patent attorneys (*Patentanwälte*) in Europe, even though they typically do not have law degrees. In Switzerland, patent attorneys may advise clients in patent matters and represent them before administrative bodies such as the Swiss Federal Institute of Intellectual Property (the Swiss Patent and Trademark Office), but they are generally not allowed to professionally represent clients before courts, unless they are also fully qualified lawyers and members of a Swiss bar. In Europe, law degrees are first university degrees rather than professional degrees (as is the case in the United States), and it is quite rare for someone to possess both a university degree in law and in the hard sciences, because the investment of time necessary to acquire both degrees is often excessive, given that the European educational system is not designed to support dual majors. Prior to the enactment of the new Act on Patent Attorneys (*Patentanwaltsgesetz*),<sup>16</sup> which is currently planned to enter into force on July 1, 2011, there were no specific rules governing the profession of patent agents or the use of the title "patent attorney" in Switzerland. This will be changed by implementing a system that limits the use of the professional title "patent attorney" to those who (i) have a recognized degree in the natural sciences or engineering, (ii) have passed a Swiss or recognized foreign patent attorney exam, (iii) have a minimum of three to four years of practical experience, and (iv) are registered with the Swiss Federal Institute of Intellectual Property.<sup>17</sup> This change is relevant to future patent litigation in Switzerland, because registered patent attorneys will be allowed to represent clients before the Federal Patent Court in cases regarding patent validity and will also be given the opportunity to be heard with regard to the technical aspects of the facts of a case in all hearings before the Federal Patent Court.<sup>18</sup> As a result, professional representation before the Federal Patent Court will not be exclusively reserved to legally trained attorneys, although it is clear that the current practice of using teams consisting of both legally trained attorneys and patent attorneys will be continued.
- 7 The following is an overview of the new Swiss patent litigation system, consisting of a review of the structure and organization of the Patent Court, an analysis of selected procedural aspects, and a short conclusion.<sup>19</sup>

## B. The New Swiss Federal Patent Court

### I. Background

- 8 Despite the obvious shortcomings associated with a highly fragmented patent litigation system of the kind described above, it was not necessarily clear at the outset that the urgency of creating a nationwide patent court on the trial level could easily be conveyed to decision-makers in the political process, especially in view of the general availability of Supreme Court review of issues of law in patent matters and given the relatively low number of patent cases tried in Switzerland.
- 9 First, the Swiss patent litigation system differs significantly from systems practiced in other countries in that it consists of two levels only, namely one trial level and one appellate level. Prior to the creation of the Federal Patent Court, patent cases were tried

before one of the twenty-six cantonal trial courts<sup>20</sup> whose decisions are subject to appellate review by the Supreme Court as a matter of right without exception.<sup>21</sup> In other words, unlike in Germany or in the United States, the Swiss Supreme Court had to hear any and all appeals of patent cases from the cantonal trial courts. While Supreme Court review is generally limited to issues of law, this system still guaranteed the uniformity of patent jurisprudence no matter how differently the Patent Act was applied on the trial level. As a result, the purpose of replacing twenty-six cantonal trial courts with a single federal patent court is not so much to create uniformity in the adjudication of patent cases,<sup>22</sup> but rather to professionalize the handling of patent matters on the trial level in order to make Switzerland more attractive as a venue for international patent litigation.<sup>23</sup> This was a harder sell politically, because there are other areas of law with higher caseloads that might benefit from a professionalized judiciary as well.

- 10 Second, limiting the new court's jurisdiction to patent law, to the exclusion of other fields of intellectual property, inevitably reduces the number of relevant proceedings to be tried before the court, leaving it with a fairly generous current estimate of thirty patent cases annually.<sup>24</sup> The need for establishing a separate court for a comparatively low number of cases was also not necessarily self-evident, especially because most of the problems that plagued the previous patent trial system, such as the legal and technical complexity of cases, the dependence on court-appointed experts, the lack of judicial expertise in view of a low volume of relevant cases, the sometimes excessive duration of court proceedings, and the lack of *de novo* appellate review of findings of fact<sup>25</sup> are not limited to patent cases.<sup>26</sup> The same concern exists in other areas, for example, in software copyright or antitrust cases.<sup>27</sup> However, within the Ministry of Justice, which was in charge of drafting the Act on the Federal Patent Court, it appears that the Justice Department's typically Swiss federalist concerns ultimately prevailed over the Federal Institute of Intellectual Property's originally more encompassing views on the scope of jurisdiction of the Court.<sup>28</sup> Interestingly, it turned out that restricting the jurisdiction of the new court to patent matters enhanced its chances of political success, given that it was easier to finance and that most cantonal courts were quite happy to give up their jurisdiction over patent cases, while they were less inclined to do so in other fields of intellectual property law.
- 11 Against this background, the factor that likely tipped the balance in favor of the establishment of the Federal Patent Court was the concomitant movement towards a unified patent litigation system on the European level,<sup>29</sup> whose implementation would also be relevant to Switzerland as a signatory of the European Patent Convention. At the time the Federal Patent Court was conceived, the project of a common

European patent judiciary was once again gaining strong political support and a breakthrough seemed imminent. Both the now defunct draft European Patent Litigation Agreement (EPLA),<sup>30</sup> under the umbrella of the European Patent Organization, and the most recent proposals with regard to the creation of a European and European Union Patents Court (EE-UPC) on the basis of an international agreement<sup>31</sup> would enable the establishment of decentralized regional chambers as part of a unified European patent judiciary. It was clear to the Swiss government that if Switzerland wanted to play any role in the future of patent litigation in Europe, be it as a preferred forum of choice or as a seat for a regional chamber within the framework of a future European system (for example in conjunction with Austria and Liechtenstein), it could not credibly do so without the track record and the expertise that only a specialized national patent trial court can provide.<sup>32</sup>

## II. Court Structure and Organization

- 12 With a view towards keeping costs low, the Court will share infrastructure and administrative personnel with the Federal Administrative Court.<sup>33</sup> It will be financed by court fees and part of the yearly patent fees collected by Swiss Federal Institute of Intellectual Property.<sup>34</sup> The Court will generally hold its hearings at the location of the Federal Administrative Court,<sup>35</sup> which will move from Bern to St. Gallen in 2012. This is unfortunate given Bern's central location within Switzerland, but the Patent Court is also entitled to hold hearings at a different location if the case so requires and may use the infrastructure of cantonal courts for this purpose free of charge.<sup>36</sup>
1. Selection of Judges
- 13 In order to address the shortcomings of the previous system, the Federal Patent Court will consist of both legally and technically trained judges, all of whom must have a demonstrated knowledge of patent law.<sup>37</sup> Aside from the legal expertise of the judges, however, a significant factor in measuring the future success of the Federal Patent Court will be the average duration of the proceedings, which in part depends on the degree to which it will be necessary to rely on court-appointed experts. Since maximizing the substitution of outside experts with technical judges requires a sufficiently large pool of technical judges in all relevant technical fields and ideally in all official Swiss languages (in particular German, French, and Italian),<sup>38</sup> the parliament has elected 21 technical judges<sup>39</sup> to supplement the 12 elected legally trained judges. This may seem like overkill at first sight given the estimated annual load of thirty patent cases, but only two judges are full members of the Federal Patent Court, while all other judges hold

outside jobs and will only act as judges on a case-by-case basis. Moreover, only one of the two full members of the Court, namely the legally trained President of the Court (the Chief Judge),<sup>40</sup> will work full time, while the second full member, a technically trained judge,<sup>41</sup> will dedicate half of his time to extra-judicial activities. All patent judges are elected for a term of six years and may be re-elected.<sup>42</sup>

- 14 Because the court will rely on a relatively large pool of judges and on a high number of part-time judges and because patent expertise is needed, special measures were taken in organizing the election of the judges to the Court.<sup>43</sup> The Committee on Courts, a parliamentary body that formally proposes all judicial candidates for what is generally a rubber stamp election by the Swiss Parliament, normally considers political party affiliation when nominating candidates. This political litmus test rules out the majority of highly qualified potential candidates for the positions to be filled. However, in the case of the Federal Patent Court, an exception was made and party affiliation was not taken into account, because the Committee simply could not afford to deter any qualified candidates with patent expertise if it did not want to run the risk of not having enough viable candidates. As an additional quality assurance mechanism, the Committee on Courts was statutorily authorized to consult with the Swiss Federal Institute of Intellectual Property, professional associations active in the patent field, and other interested parties during the selection process.<sup>44</sup> Not surprisingly, the Committee made ample use of this rather exceptional statutory authorization,<sup>45</sup> and the Swiss Parliament elected all of the judges proposed by the Committee on Courts on June 16, 2010.
- 15 Regarding ethical concerns, while the two full members of the Federal Patent Court will not be allowed to professionally represent third parties in court proceedings at all,<sup>46</sup> the same prohibition does not apply to the rest of the judges, many of whom will continue to pursue their jobs as attorneys and patent attorneys and who are also likely to continue to represent clients before the Federal Patent Court in the future. This comparatively generous rule was deemed necessary in order to attract qualified judges, but it raises legitimate concerns about conflicts of interest and impartiality. In order to alleviate these concerns, in addition to the general grounds for recusal established by the new Code of Civil Procedure,<sup>47</sup> patent judges must recuse themselves not only if they have a personal interest or stake in a particular proceeding,<sup>48</sup> but also if another person working for the same firm or the same employer represents a client before the Federal Patent Court.<sup>49</sup> Moreover, following Supreme Court precedent, a patent judge will have to recuse himself or herself in cases that give rise to the same legal issues as the ones at stake in a pending case in which the judge acts as a party representative, at least if the decision in which the

patent judge participates as a judge has a precedential effect on the pending case the judge handles as a party representative.<sup>50</sup> The problem of potential conflicts of interest inevitably associated with a court system relying on part-time judges is an additional reason why it was necessary to have a large pool of judges on the Federal Patent Court.

## 2. Composition of Panels

- 16 Cases before the Federal Patent Court will typically be heard by panels of three judges.<sup>51</sup> If the development of the law or the uniformity of the case law so requires, the President of the Court may order that a case be decided by a panel of five judges instead,<sup>52</sup> which will likely be the standard during the beginning phase in order to establish a solid body of case law and to train some of the patent judges without previous judicial experience. In cases that involve multiple technical fields, the President of the Court may even order that a case be tried before a panel consisting of up to seven judges.<sup>53</sup>
- 17 All panels must consist of a mix of legally and technically trained judges, whereas technical judges are selected on the basis of the technical field relevant to the case at hand.<sup>54</sup> It is further required that each panel include a full member of the Court.<sup>55</sup> The details of case distribution and the composition of the panels are subject to internal regulations to be determined by the court management consisting of the two full members and an additional member of the Court.<sup>56</sup> The underlying idea of this system is that each panel will be tailored to the individual case to be decided, while still maintaining institutional knowledge and continuity due to the mandatory participation of one of the two full members of the Court in each case.
- 18 Not all decisions relevant to a pending case must be taken by panels. Most importantly, requests for provisional measures such as preliminary injunctions are generally decided by the President of the Court alone.<sup>57</sup> However, if required by legal or technical circumstances, the President of the Court *may* order that the decision be made by a panel of three judges, and if the understanding of the technical background of the case is of particular importance to the decision on provisional measures, the decision *must* be made by a panel of three judges.<sup>58</sup> In addition to requests for provisional measures, the President of the Court decides (i) about the dismissal of actions that are obviously inadmissible, (ii) about requests for the waiver of court fees, (iii) about the formal disposition of pending actions in case of mootness, withdrawal, acknowledgement, or settlement, and (iv) about actions regarding the granting of compulsory licenses for the purposes of production of a pharmaceutical product and its export to eligible importing countries.<sup>59</sup> Note, however, that the applica-

ble rules provide that some or all of these decisions may be delegated by the President of the Court to another legally trained member of the Federal Patent Court.<sup>60</sup>

### 3. Law Clerks and Publication of Opinions

- 19 Law clerks generally play a comparatively important role in Swiss courts, because they not only prepare draft materials such as bench memoranda for the judges assigned to a particular case, but they also participate in internal judicial deliberations (without casting a vote) and actually draft the opinions of the court. The Federal Patent Court will be no exception to this rule,<sup>61</sup> which is why the selection of adequately trained law clerks by the court management<sup>62</sup> is important in ensuring the quality of the case law available to those who are not parties to the proceedings and who are left to read the written opinions generated by the Federal Patent Court.
- 20 The Court is required to inform the public about its opinions,<sup>63</sup> and it is likely that it will do so by publishing them on the Internet, which is important if the Court wants to avoid the impression of generating insider knowledge in favor of attorneys and patent attorneys who happen to be part-time judges at the expense of those who are not. Judging from the Swiss government's administrative statement,<sup>64</sup> the public can be hopeful that the Federal Patent Court will not engage in the often unjustified practice of anonymizing its published written opinions, which is still the norm today, even in intellectual property and other commercial law cases. This would greatly enhance transparency for all involved in patent litigation and patent law research, as opposed to the current practice in which courts typically (i) try to hide the ball by deleting patent numbers, party names, and product names from the opinions they release to the public and (ii) make those requesting copies of unpublished opinions pay a fee for having them anonymized.

## III. Subject Matter Jurisdiction

- 21 The subject matter jurisdiction of the Federal Patent Court is limited to *civil* patent matters, that is, disputes between private litigants with regard to Swiss patents, European patents granted under the European Patent Convention and effective in Switzerland, and national supplementary protection certificates.<sup>65</sup> Moreover, the Federal Patent Court may also adjudicate disputes with regard to foreign patents, foreign parts of European patents, or foreign supplementary protection certificates, always provided that the Federal Patent Court has international jurisdiction under the applicable rules of international civil procedure.<sup>66</sup>

- 22 By contrast, the jurisdiction of the Federal Patent Court does not extend to the adjudication of *criminal* patent infringement nor does it include *administrative* patent matters. Therefore, contrary to patent courts in other countries, the Swiss Federal Patent Court will not have any jurisdiction over appeals from the Federal Institute of Intellectual Property in patent prosecution matters or in proceedings regarding the granting of supplementary protection certificates, because these appeals will continue to be heard by the Federal Administrative Court,<sup>67</sup> subject to further review for legal error by the Swiss Supreme Court.<sup>68</sup>

### 1. Non-Patent Intellectual Property Cases

- 23 Due to the complex jurisdictional interrelationship between the Federal Patent Court and the cantonal court systems to be discussed further below, the subject matter jurisdiction of the Federal Patent Court in civil patent matters must be viewed against the backdrop of the general system of jurisdiction for intellectual property matters in Switzerland.
- 24 Under the new Code of Civil Procedure, the basic principle remains that each of the twenty-six cantons must designate a "sole cantonal instance court" for the adjudication of all civil intellectual property matters.<sup>69</sup> This sole cantonal instance court may be a commercial court, where such courts exist.<sup>70</sup> Compared to the old system, the exclusive subject matter jurisdiction of these twenty-six cantonal courts has been significantly expanded to include all disputes in connection with intellectual property law, including issues of infringement, validity, ownership, assignment, and licensing,<sup>71</sup> subject only to the exclusive jurisdiction of the Federal Patent Court (see Section 2 below).<sup>72</sup> Moreover, the sole cantonal instance courts now also have exclusive jurisdiction over disputes relating to antitrust law, the law of company names, and – if the amount in controversy exceeds CHF 30'000 or if the plaintiff is the federal government – the law of unfair competition.<sup>73</sup> In addition, these sole cantonal instance courts also have exclusive jurisdiction with regard to provisional measures prior to the pendency of a lawsuit in these matters,<sup>74</sup> which is a major improvement compared to the previous system under which the cantons were free to have different courts for proceedings on the merits and proceedings regarding provisional measures.
- 25 The question of which of the twenty-six sole cantonal instance courts can be chosen by the plaintiff to hear a particular intellectual property case is a matter of territorial jurisdiction under the applicable rules of the Code of Civil Procedure,<sup>75</sup> the Code of International Private Law,<sup>76</sup> and/or the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.<sup>77</sup>

## 2. Exclusive and Concurrent Jurisdiction

- 26 A key feature of the new Federal Patent Court is that its subject matter jurisdiction in civil patent matters is in part exclusive and in part concurrent with the jurisdiction of the twenty-six sole cantonal instance courts.<sup>78</sup>
- 27 The Federal Patent Court has *exclusive* nationwide jurisdiction<sup>79</sup> with regard to (i) infringement actions, including actions for declaratory judgment of non-infringement, (ii) invalidity or nullity actions, including actions for declaratory judgment of patent validity, (iii) actions requesting the granting of compulsory patent licenses, and (iv) requests for provisional measures relating to any of these three types of actions if requested prior to their pendency.<sup>80</sup> Contrary to the German system, there is and will be no bifurcation between validity and infringement proceedings in Switzerland.
- 28 By contrast, the Federal Patent Court and the sole cantonal instance courts have *concurrent* jurisdiction regarding civil actions that are closely related to patents or supplementary protection certificates, in particular disputes about ownership, assignment, and licensing,<sup>81</sup> and also regarding controversies involving contractual issues relating to patents or inventions that may arise in the context of research and development agreements or consulting agreements if the services rendered under such agreements include inventive activities. In all of these cases of concurrent jurisdiction, the plaintiff may choose to file his or her actions *either* with the Federal Patent Court *or* with one of the sole cantonal instance courts (provided that the cantonal court of choice has territorial jurisdiction).<sup>82</sup>
- 29 The rationale underlying this system of subject matter jurisdiction is that the Federal Patent Court's technical expertise may not be needed in patent disputes that are not about validity, infringement, or the scope of compulsory licenses. While it is generally left to the plaintiff to make that call, the Swiss legislature recognized that technical expertise may well be necessary depending upon the arguments put forward by the defendant, for example, if an action for payment of outstanding patent licensing fees brought before a cantonal court is countered with the argument that the licensed patent is invalid or that the product sold by the defendant is not covered by the licensed patent.<sup>83</sup> In order not to leave the adjudication of these defenses to the cantonal courts in a system of concurrent jurisdiction, the Swiss legislature devised a fairly complex procedural mechanism for transferring all or part of a case properly filed with a cantonal court to the Federal Patent Court depending upon the defendant's reaction to the lawsuit in question.
- 30 There are two possible courses of action once a lawsuit that falls within the scope of concurrent jurisdiction is filed with one of the twenty-six cantonal courts rather than the Federal Patent Court. If the defendant reacts by filing a *counterclaim* for invalidity or infringement with the cantonal court, the cantonal court will have to transfer both the original action and the counterclaim to the Federal Patent Court for exclusive adjudication.<sup>84</sup> By contrast, if invalidity or non-infringement is merely pleaded as a *defense* or if questions of validity or infringement arise as *preliminary questions* relevant to the resolution of the plaintiff's action, the cantonal court will not permanently transfer the case to the Federal Patent Court but will instead set a deadline for the defendant to file an invalidity or infringement action with the Federal Patent Court and will continue its proceedings only after a final judgment<sup>85</sup> has been handed down by the Federal Patent Court on the issue of invalidity or infringement.<sup>86</sup> If the defendant fails to file such action with the Federal Patent Court by the deadline set by the cantonal court, the cantonal court will continue its proceedings on the plaintiff's action and disregard any defense or preliminary question regarding validity or infringement.<sup>87</sup>
- 31 This rather complicated mechanism<sup>88</sup> could have been avoided if the Federal Patent Court had been given exclusive jurisdiction over all actions relating to patents and supplementary protection certificates<sup>89</sup> or if the permanent transfer rule regarding counterclaims had also been applied to defenses or preliminary questions.<sup>90</sup> Instead, the system chosen was undoubtedly inspired by the "Zurich Route", developed by the Zurich Commercial Court in response to the European Court of Justice's unfortunate judgment in *GAT v. LuK*.<sup>91</sup> In essence, the Zurich Commercial Court, faced with a request for cross-border injunctive relief on the basis of two Community trademarks and a defense of invalidity, concluded that it did not have international jurisdiction to rule on the issue of validity under *GAT v. LuK*<sup>92</sup> and decided to suspend its proceedings and set a deadline for the defendant to initiate nullity proceedings with a competent European court, indicating that it would disregard the invalidity defense if no action was filed and that it would keep the proceedings suspended until the final resolution of the question of invalidity by a competent European court if such action was filed within the deadline.<sup>93</sup>
- 32 The obvious problem with the Zurich Route now codified by the Act on the Federal Patent Court is that, if taken at face value, the defendant will be forced to file an action before the Federal Patent Court even though the defendant chose not to take the counterclaim route, but instead to invoke the issues of validity or infringement as a mere defense *inter partes*. Whether the Federal Patent Court will follow thoughtful suggestions in legal scholarship<sup>94</sup> on how

to exert its jurisdiction while avoiding the potentially significant procedural and substantive ramifications of requiring the filing of a counterclaim<sup>95</sup> remains to be seen.

### 3. The Patent/Other IP Intersection

33 A potential drawback<sup>96</sup> of the establishment of a specialized patent court as opposed to a court with subject matter jurisdiction over all intellectual property cases is that patent validity or infringement actions cannot be joined with actions based on other intellectual property rights or based on a claim of unfair competition or antitrust law, because under the general rules of civil procedure the joining of actions requires the same court to have jurisdiction over all actions.<sup>97</sup> Therefore, an action relating to patent law may only be combined with other intellectual property, unfair competition, or antitrust claims against the same defendant if the Federal Patent Court does not have jurisdiction, namely if the patent side of the dispute does not involve issues of infringement or validity, in which case one of the twenty-six sole cantonal instance courts may hear all the actions in one proceeding.

34 It has been pointed out in the legal literature<sup>98</sup> that the strict jurisdictional separation between patent matters and other intellectual property matters does not apply to counterclaims under the general rules of civil procedure because, if read literally, they do not require a court to have subject matter jurisdiction over a counterclaim in order to adjudicate it, provided that both the main action and the counterclaim are subject to the same type of proceedings.<sup>99</sup> In other words, if a patent infringement action were filed with the Federal Patent Court, the Court would also have jurisdiction to decide non-patent counterclaims, such as a counterclaim for copyright or trademark infringement. Whatever the merits of a specialized patent court are and however much one may have preferred to have an intellectual property court instead, it makes little sense to have technically trained judges without adequate legal training outside patent law participate in deciding copyright, trademark, design, unfair competition, or antitrust counterclaims. There is also no meaningful analogy to the Swiss commercial courts, even though these courts also consist of mixes of legally trained judges and lay judges, because the latter typically represent different fields of trade and business and are generally assigned to individual cases on the basis of their relevant industry expertise.<sup>100</sup> While a banker participating in a lawsuit involving banks may well add value to the decision-making process, it is somewhat difficult to imagine that to be the case if a chemist participates in the adjudication of a software copyright claim. After all, the Federal Patent Court is purposely designed to address specific problems that arise in patent litigation, and the composition

of the panels is tailored to the particular technical needs of the individual case at hand. If the idea underlying the limited jurisdiction of the Federal Patent Court is that its jurisdiction ought to be limited to patents, because this is where the participation of technical judges is beneficial, then there is no reason to deviate from this principle in the context of non-patent counterclaims before the Federal Patent Court. These points should be taken into consideration when interpreting the general rules of civil procedure on counterclaims, which means that the Federal Patent Court should find that non-patent counterclaims fall outside the scope of its subject matter jurisdiction.

35 Conversely, if a plaintiff files a trademark infringement claim before a sole cantonal instance court, for example, and the defendant subsequently files a counterclaim for patent infringement, the sole cantonal instance court should *not*, as suggested by other authors,<sup>101</sup> transfer *both* actions to the Federal Patent Court, but instead deny jurisdiction for the patent counterclaim and proceed with the main trademark claim, as inefficient as this may seem. As is clear from the context of the relevant provision, the transfer rules contained in the Act on the Federal Patent Court<sup>102</sup> only apply to cases of concurrent jurisdiction under the same Act,<sup>103</sup> that is, to cases in which the main action is an action relating to *patents* rather than to intellectual property rights in general.<sup>104</sup> By contrast, if a patent counterclaim before a sole cantonal instance court does not involve issues of infringement or validity, the cantonal court may hear *both* actions on the basis of its concurrent jurisdiction over patent matters.<sup>105</sup>

### 4. Transitional Rules

36 The transitional rules of the Act on the Federal Patent Court are an additional source of uncertainty. As a general matter, the rule is that cases pending before cantonal courts will be transferred to the Federal Patent Court upon its coming into existence, provided that the “main hearing” has not yet taken place.<sup>106</sup> Aside from the fact that a number of cantonal codes of civil procedure did not provide for a main hearing in the sense of the new federal rules on civil procedure,<sup>107</sup> the statute is unclear about (i) who will decide about the transfer of a pending case, (ii) whether the Federal Patent Court, if the case is transferred, will have to continue to apply the various pre-existing cantonal procedural laws,<sup>108</sup> and (iii) whether a transfer is only possible if the case falls within the exclusive rather than the concurrent jurisdiction of the Federal Patent Court. Moreover, it is uncertain whether the parties will be able to conclude binding and enforceable agreements with regard to the issues of transfer and the applicable procedural law. Perhaps the most troublesome development for litigants is that this transfer provi-

sion seems to have led a number of cantonal courts to stall the patent cases currently pending before them in order not to advance the case beyond the point of transfer to the Federal Patent Court. It remains to be seen how the transitional provisions will be handled by the courts.

## C. Selected Procedural Aspects

37 As a general matter, the proceedings before the Federal Patent Court are governed by the new federal Code of Civil Procedure, except where the Act on the Federal Patent Court or the Patent Act contain specific rules deviating from those prescribed by the Code of Civil Procedure.<sup>109</sup> In the following, I will highlight a few special procedural points regarding the proceedings on the merits and provisional measures.

### I. Proceedings on the Merits

#### 1. General Rules

38 Proceedings on the merits in patent cases are initiated like in any other civil case, namely by the plaintiff's filing of a court action<sup>110</sup> by submitting a brief containing the names of the parties and their representatives, the requests for relief, the amount in controversy, the statement of facts, the identification of the pieces of evidence supporting the statement of facts, and the date and signatures.<sup>111</sup> Statements as to the law are not required,<sup>112</sup> but are virtually always included in the brief in a section following the statement of facts. Upon receipt, the court will forward the plaintiff's brief to the defendant and set a deadline for the filing of a response brief, which will again be forwarded to the plaintiff upon receipt.<sup>113</sup>

39 If necessary under the circumstances, which is often the case in patent matters,<sup>114</sup> the court may order the exchange of further briefs,<sup>115</sup> that is, a reply by the plaintiff followed by a rejoinder by the defendant. In terms of case management, the court may, at any time, hold hearings to discuss the case, learn more about the facts, attempt to settle, take evidence, or prepare the main hearing.<sup>116</sup> It was standard court practice, at least at the Zurich Commercial Court, that a hearing was held after the first round of briefs in which a member of the court gave a preliminary assessment of the case and tried to get the parties to settle early on. It is likely that the Federal Patent Court will adopt a similar case management strategy, given its considerable success rate in practice and given that the new President of the Court previously sat on the Zurich Commercial Court. Note that there are no jury trials in civil matters in Switzerland and that courts are generally bound by the

facts and requests for relief submitted by the parties without having the power to investigate the facts on their own or to go beyond any party requests in adjudicating a civil case, which is particularly important in validity proceedings.<sup>117</sup>

40 Following the briefing phase and, if necessary, the phase of taking evidence, the parties will be invited for a main hearing in order to plead their case orally<sup>118</sup> or to take evidence if it was not done so at a prior hearing.<sup>119</sup> The parties are free to waive the main hearing if they both agree.<sup>120</sup> After the main hearing, if any, the court will render its decision, which can then be appealed to the Swiss Supreme Court as a matter of right without regard to the amount in controversy.<sup>121</sup> The Supreme Court reviews lower court decisions *de novo* with regard to legal issues.<sup>122</sup>

### 2. Special Rules for the Federal Patent Court

41 In view of the flexibility of the general procedural rules outlined above, there are only three notable deviations that were deemed necessary in the context of proceedings on the merits before the Federal Patent Court.

42 First, cases will always be managed by the President of the Federal Patent Court or a legally trained judge assigned by the President<sup>123</sup> rather than by a panel of judges as provided by the default rule under the general rules on civil procedure.<sup>124</sup> The underlying idea is to enable flexible case management despite the large number of part-time judges who will be more difficult to coordinate efficiently than full-time judges who have no professional obligations outside their judicial duties.<sup>125</sup> Note that the judge in charge of case management may, at his or her discretion, consult with technically trained judges who will act as advisors without the right to vote or decide on matters of case management.<sup>126</sup>

43 Second, being a nationwide court in a country with multiple official languages (specifically German, French, and Italian), the Federal Patent Court will have to determine the language of the proceedings in each case,<sup>127</sup> and it will do so by considering the language of the parties provided that it is one of the official languages.<sup>128</sup> Most likely, the language selection process will be regulated in more detail in the court rules that are currently being drafted. What is unusual about the language regime before the Federal Patent Court is that each party may still use a different official language in its briefs and oral presentations than the one selected by the court for the proceedings.<sup>129</sup> If the court and the parties agree, it is even possible to use the English language, but with a view towards potential appellate proceedings before the Supreme Court,<sup>130</sup> the Federal Patent

Court's opinions and orders will always have to be rendered in an official language.<sup>131</sup> In order to reduce costs and improve efficiency, the court will only order translations when necessary. With regard to foreign language documents, the Federal Patent Court, with the consent of the opposing party,<sup>132</sup> may waive the translation requirement, even if documents presented are not in one of the official languages (or in English, if English was chosen as the language of the proceedings).<sup>133</sup> The ability to present documents in English without translation is especially useful in cases involving European patents protected in Switzerland that were issued in English, but not translated into any official Swiss language.<sup>134</sup>

- 44 Third, there is a special provision with regard to comments on the evidence in cases before the Federal Patent Court. Under the general rules of civil procedure, it is possible for evidence to be taken during the main hearing and for the parties to be required to comment on the evidence orally at the very same hearing unless both parties request that written submissions be made instead.<sup>135</sup> Given that the subject matter of evidence in patent matters is often complicated and highly technical, forcing the parties to comment on such evidence immediately after its presentation will hardly ever be feasible, which is why the Act on the Federal Patent Court provides that parties be given the opportunity to comment on the evidence in writing upon a reasoned request.<sup>136</sup>

### 3. Technical Judges and Expert Witnesses

- 45 As explained above, one of the foundational characteristics of the new Swiss patent litigation system is the idea that the technical expertise required to resolve patent disputes should be provided by technically trained judges rather than by outside court-appointed experts, who were a major source of delay in patent proceedings under the old system.
- 46 Of course, this general shift towards internalizing technical expertise does not mean that the Federal Patent Court is not allowed to rely on court-appointed experts, but it is expected that the need for doing so will be significantly reduced by virtue of the existence of technically trained judges, who are assigned to each case on the basis of their expertise. Should outside experts nevertheless be necessary, their expert opinions must be provided in writing and the parties must also be given the opportunity to comment in writing on the expert opinions,<sup>137</sup> which is a deviation from the general rule that courts may order expert opinions to be rendered orally (as opposed to being submitted in writing and then being explained orally at a hearing).<sup>138</sup>
- 47 When there is no need for outside court-appointed experts due to the expertise of technical judges, a remaining concern is to keep the infusion of expert

knowledge into the judicial process transparent. In order to guarantee adequate transparency with regard to internal technical knowledge that might influence the outcome of the proceedings, the general rules of civil procedure require the court to disclose internal expert knowledge in order for the parties to comment on it.<sup>139</sup> In addition, a special provision requires the Federal Patent Court to take minutes of expert statements by technically trained judges and to allow the parties to comment on them.<sup>140</sup>

- 48 With regard to party expert opinions (as opposed to court-appointed expert opinions), the state of affairs is rather unfortunate under Swiss law, because party expert opinions will likely not be admissible into evidence,<sup>141</sup> as difficult as it may be in practice to rebut an opinion by a court-appointed expert without being allowed to submit a party expert opinion. It remains to be seen whether cutting and pasting a party expert opinion into a party brief and then offering the party expert as an expert witness to corroborate the technical allegations in the brief<sup>142</sup> will be a viable workaround.

## II. Provisional Measures

- 49 In most patent cases, the proceedings on the merits described above will be preceded or at least accompanied by motions for provisional measures, in particular for preliminary injunctions. In this regard, the new Swiss patent litigation system creates a beneficial set of uniform general rules and introduces new devices for the pretrial taking of evidence.<sup>143</sup>

### 1. General Rules

- 50 As a general matter, courts will order the provisional measures they deem necessary if the moving party shows the likely existence (i) of an actual or impending act of infringement of its legal rights and (ii) of irreparable harm resulting from such infringement if a provisional measure is not granted.<sup>144</sup> Under the general rules of civil procedure, courts may order any provisional measure suitable to avoid the irreparable harm in question,<sup>145</sup> and the intellectual property statutes specify that these provisional measures may, *inter alia*, consist of orders securing evidence, orders aimed at determining the origin of goods violating intellectual property rights, orders conserving the status quo, and – most importantly – preliminary injunctions or seizure orders.<sup>146</sup> In proceedings before the Federal Patent Court, the default rule is that motions for provisional measures before and during the pendency of a patent action will not be decided by the panel of judges to whom a particular case has been or will be assigned, but rather by the President of the Court or a legally trained judge selected by the President.<sup>147</sup> However, if prompted by particular le-

gal or technical circumstances, the judge in charge may ask for two additional judges to join him or her in deciding the motion for provisional measures in question as a three-judge panel.<sup>148</sup> Moreover, if the understanding of the technical facts is particularly important for the decision on provisional measures, the motion in question *must* be decided by a three-judge panel.<sup>149</sup>

51 Generally, the adverse party will be given the opportunity to be heard prior to any ruling on motions for provisional measures, always provided that the motion in question is not obviously inadmissible or obviously unfounded, in which case it would be dismissed or denied without first hearing the adverse party.<sup>150</sup> However, in cases of particular urgency, provisional measures may be ordered without prior notice to the adverse party (*ex parte* orders).<sup>151</sup> This will typically be done only if immediate and irreparable harm will result to the moving party before the adverse party can be heard in opposition. If so, a hearing must be held without delay, or the adverse party must be given the opportunity to comment in writing on the motion, before a decision is made on whether to grant the motion and uphold any *ex parte* provisional measures pending the outcome of the proceedings on the merits.<sup>152</sup> If no patent action is pending at the time the motion for provisional measures is granted, the moving party must file such patent action before the deadline set by the judge; failure to do so will result in the automatic lifting of the provisional measure.<sup>153</sup> The granting of motions for provisional measures may be conditioned on the moving party's giving of security if the adverse party may suffer any damage as a result of a provisional measure, and the moving party is liable for any damages caused by wrongfully ordered provisional measures, although the compensation of damages may be reduced or waived if the moving party proves that its motion was made in good faith.<sup>154</sup> Provisional measures issued by the Federal Patent Court may be appealed to the Swiss Supreme Court, but review is limited to the violation of constitutional rights.<sup>155</sup> Note, however, that provisional measures may be modified or lifted at any time if the circumstances change or if they turn out to be unjustified.<sup>156</sup>

52 Given the significant ramifications of *ex parte* orders of provisional measures for the party affected by them, the general rules of civil procedure have codified a defense mechanism developed in practice in order to reduce the information deficit judges may have when ruling on motions for *ex parte* orders. Any party which has reason to believe that a motion for an *ex parte* order of provisional measures may be filed against it is entitled to the preemptive filing of a protective brief containing its views on the matter in dispute.<sup>157</sup> In order not to provide the other party with a checklist for the filing of its motion for provisional measures, protective briefs will only be dis-

closed to the other party if that party actually files a request for an *ex parte* order.<sup>158</sup> Protective briefs older than six months will be disregarded.<sup>159</sup> While it was possible to file protective briefs with some cantonal courts prior to the establishment of the new patent litigation system,<sup>160</sup> that mechanism was not as frequently used in patent practice as one might imagine, in part because the fragmentation of jurisdiction and the availability of forum shopping made it difficult to predict which court would ultimately have jurisdiction. This may well change in the future given the Federal Patent Court's nationwide jurisdiction,<sup>161</sup> provided that the Court's approach to granting *ex parte* orders for provisional measures is not as restrictive as it traditionally has been in Switzerland.

## 2. Pretrial Taking of Evidence

53 The establishment of new procedural avenues to obtain evidence prior to the filing of a court action brings about significant changes both in Swiss civil procedure in general and in patent matters in particular.<sup>162</sup>

54 While there is no common law style pretrial discovery in Switzerland, it has always been possible to file pretrial motions for provisional measures regarding the securing of evidence, including the precise description of allegedly infringing processes or products, but such motions have only been granted when the moving party could show both the likely existence of an actual or impending violation of a legal right and the likely unavailability of a particular piece of evidence unless it be provisionally secured. However, this procedural device could not be used to obtain evidence for the purpose of assessing the merits of a case prior to filing a court action, which made patent litigation a risky business in a loser-pays system where patent holders were unable to obtain evidence to verify the existence of potentially infringing acts. This was particularly true in cases involving process patents.<sup>163</sup> Both the new Code of Civil Procedure and a provision in the Patent Act newly amended by the Act on the Federal Patent Court mitigate the problem of imperfect information and lack of evidence during the pretrial phase.

55 More specifically, under the new general rules of civil procedure, it is possible to have a court take evidence as a provisional measure at any time prior to the commencement of a court action not only for purposes of securing evidence upon a showing of the likely unavailability of the evidence at trial, but also upon the moving party's showing of a mere legitimate interest in the pretrial taking of evidence.<sup>164</sup> The purpose of assessing the merits of a case qualifies as a legitimate interest, if the moving party shows the likely existence of a legal claim for which the evidence to be taken may serve as proof.<sup>165</sup>

56 Moreover, under the Patent Act as amended by the Act on the Federal Patent Court, the requirements for obtaining a precise description of allegedly infringing processes, products, and means of production have been further relaxed. Under the new rule that was in part modeled on the French “saisie-description” (descriptive seizure order)<sup>166</sup> and for which the term “saisie helvétique” has been adopted in the Swiss legal literature,<sup>167</sup> a moving party may request a court to order the making of a precise description solely by showing some likelihood of infringement.<sup>168</sup> In other words, while mere suspicions of patent infringement are not sufficient, all that is needed is a substantiated allegation of infringement with a certain level of evidentiary support.<sup>169</sup> By contrast, a showing of unavailability of the evidence or of specific legitimate interests justifying the pretrial taking of evidence is not required, which is a significant exception from the general rules of civil procedure. Note, however, that orders for the actual seizure (as opposed to the description) of allegedly infringing goods or of the means for producing such goods are still subject to the general requirement of a showing of irreparable harm, namely that the products or means for production are about to be sold or destroyed or modified unless they are seized prior to the commencement of any patent action.<sup>170</sup>

57 Once ordered, the “saisie helvétique” is carried out by a member of the Federal Patent Court who may consult with an expert and cooperate with the cantonal authorities, in particular the police.<sup>171</sup> The party requesting the description is allowed to participate in the process,<sup>172</sup> unless the opposing party shows that business or manufacturing secrets may be disclosed as part of the description, in which case the party requesting the description may be excluded from the process. As an additional safeguard for the protection of business and manufacturing secrets,<sup>173</sup> the opposing party will be given the opportunity to comment on the results of the description process prior to the moving party’s gaining access to these results,<sup>174</sup> which may prompt the court to restrict access to or redact part of the results.<sup>175</sup> Aside from these statutory rules, the procedural details of the “saisie helvétique” are not yet entirely clear, and it is one of the many tasks of the Federal Patent Court to devise a workable system in this regard.

## D. Conclusion

58 While the establishment of a specialized nationwide trial court for patent matters holds the promise of professionalizing the adjudication of patent cases in Switzerland, it is unclear as of yet whether international patent litigants will see the Swiss Federal Patent Court as an attractive venue for patent disputes. Much will depend on the reliability of its case dispositions and the duration of its proceed-

ings, which should not exceed twelve to eighteen months for proceedings on the merits, including two to six months for proceedings regarding provisional measures.<sup>176</sup> However, the strategy of replacing outside experts with technically trained judges alone is hardly enough to guarantee speedy trials, given that part-time judges with demanding attorney work schedules may not always be able to prioritize their judicial duties. Tight case management will be indispensable. Moreover, the flipside of having a sole nationwide patent trial court instead of several cantonal courts is that litigants will no longer be able to forum shop and will have to rely on the Federal Patent Court no matter how well it performs. It remains to be seen whether a professional patent court with a few procedural assets such as the combination of validity and infringement proceedings, the use of technical judges instead of outside experts, the availability of the remedy of precise description, and the possibility to use English as the language of the proceedings, will turn Switzerland into a prime venue for European patent litigation.

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- 1 Botschaft zum Patentgerichtsgesetz, BBl 2008, 455, 461.
- 2 Note that, much like Germany or the United States, Switzerland is a federalist country consisting of twenty-six Cantons (states) that were – with a few exceptions – relatively autonomous in matters of civil procedure and court organization until the entry into force of the new federal Code of Civil Procedure on January 1, 2011. By contrast, virtually all of Swiss private law, including all Swiss intellectual property law, has been a matter of uniform federal legislation for at least the past 100 years.
- 3 Commercial courts currently exist in the four Cantons of Aargau, Bern, St. Gallen, and Zurich. They typically have jurisdiction over commercial disputes between companies registered in the commercial register, and they also had exclusive cantonal jurisdiction over intellectual property matters and will continue to have such jurisdiction except in cases that will fall within the jurisdiction of the newly created Federal Patent Court.
- 4 See, e.g., BGE 129 III 295; see also generally Botschaft zum Patentgerichtsgesetz, BBl 2008, 455, 464.
- 5 See also *Weibel*, Bundespatentgericht unerwünscht, NZZ No. 106 of 9 May 2005, p. 9; *Bircher/Thouvenin*, Ein eidgenössisches Patentgericht erster Instanz, sic! 2002, 650 (reporting a statement by Martin Lutz); *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 183.
- 6 The Supreme Court is generally bound by the findings of fact by the lower instance court; see Art. 105 para. 1 BGG. Therefore, a claim of erroneous fact-finding will only be heard by the Supreme Court (i) if the facts found by the lower court were either obviously wrong or based on legal error and (ii) if correcting the erroneous fact-finding may be outcome-determinative; see Art. 97 para. 1 BGG (Bundesgesetz vom 17. Juni 2005 über das Bundesgericht, SR 173.110). Note that prior to January 1, 2007, the Supreme Court had the power to review the cantonal court’s findings of fact in technical matters on the basis of Art. 67 OG (Bundesgesetz vom 16. Dezember 1943 über die Organisation der Bundesrechtspflege in der Fassung vom 1. Januar 1956), but the Supreme Court hardly ever exercised this power; see *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 181.

- 7 Botschaft zum Patentgerichtsgesetz, BBl 2008, 455, 461; see also *Stieger*, Bundespatentgericht ante portas!, in Festschrift für Alfred Bühler, Zurich 2008, 179, 184.
- 8 See *Guyer*, Ein schweizerisches Fachgericht zur Beurteilung von Patent-, Muster-, Modell- und Marken-Prozessen, SJZ 1906/1907, 33, 46, 58; *Weiss*, Ein schweizerisches Fachgericht für Patent- u. Streitigkeiten und die Stellung des Bundesgerichts, SJZ 1906/1907, 109; *Guyer*, Ein schweizer. Fachgericht für Patent-, Muster- und Marken-Prozesse, SJZ 1906/1907, 146.
- 9 See Botschaft über die Revision des Bundesgesetzes betreffend die Erfindungspatente vom 25. April 1950, BBl 1950 I 977, 992-993; Ergänzungsbotschaft zur Vorlage über die Revision des Bundesgesetzes betreffend die Erfindungspatente vom 28. Dezember 1951, BBl 1952 I 1, 20-21.
- 10 For contemporary discussions of the various proposals, see *Troller*, Setzt die Einführung eines Schweizerischen Patentgerichtes eine Revision der Bundesverfassung voraus?, (Schw.) Mitt. 1944, 93; *Winter*, Über ein eidgenössisches Gericht für Patent-Nichtigkeitsklagen, (Schw.) Mitt. 1945, 217; *Müller*, Patentgerichtshof, (Schw.) Mitt. 1946, 27; *Giacometti*, Die Verfassungsmässigkeit des eidgenössischen Patentgerichtshofes, (Schw.) Mitt. 1946, 256; *Giacometti*, Die Verfassungsmässigkeit des eidgenössischen Patentgerichtshofes, Ergänzungsgutachten, (Schw.) Mitt. 1947, 134; *Justizabteilung*, Bemerkungen zum Ergänzungsgutachten Giacometti über die Schaffung eines schweizerischen Patentgerichtshofes, (Schw.) Mitt. 1947, 169; *Perrin*, Considération concernant une nouvelle organisation de la juridiction en matière de brevets, (Schw.) Mitt. 1948, 8; *Fritzsche*, Über die Schaffung eines eidgenössischen Patentgerichtes als separate Kammer beim Bundesgericht, (Schw.) Mitt. 1948, 15; *Brack*, Das Patentgericht, Diss. Bern 1950; *Weidlich*, Buchbesprechung Brack, GRUR 1951, 336.
- 11 For a brief English language overview of these developments, see *Rigamonti*, The New Swiss Constitution and Reform of the Federal Judiciary (May 4, 2000), <http://jurist.law.pitt.edu/world/swisscor1.htm>.
- 12 Art. 191a para. 3 BV and Art. 122 BV (Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999, SR 101 [the Swiss Constitution]); see also *Bosshard*, Le nouveau Tribunal fédéral des brevets et les juridictions cantonales, SZP 2010, 191, 192-193.
- 13 Schweizerische Zivilprozessordnung (Zivilprozessordnung, ZPO) vom 19. Dezember 2008 (SR 272), AS 2010, 1739.
- 14 Übereinkommen vom 30. Oktober 2007 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen (Lugano-Übereinkommen, LugÜ) (SR 0.275.12). Note that Art. 22, no. 4 of the Lugano Convention basically codifies the widely criticized cross-border judgment of the European Court of Justice in *GAT v. LuK*, Case No. C-4/03, OJ C 224 of 16 September 2006, 1. For an analysis of this topic from a Swiss perspective, see *Hess-Blumer*, Crossborder Litigation – und sie lebt doch!, sic! 2006, 882.
- 15 Bundesgesetz über das Bundespatentgericht (Patentgerichtsgesetz, PatGG) vom 20. März 2009 (SR 173.41), AS 2010, 513. For a brief overview of the developments leading up to the enactment of this statute, see *Bosshard*, Le nouveau Tribunal fédéral des brevets et les juridictions cantonales, SZP 2010, 191, 193-194.
- 16 Bundesgesetz über die Patentanwältinnen und Patentanwälte (Patentanwaltsgesetz, PAG) vom 20. März 2009 (SR 935.81), BBl 2009, 2013.
- 17 Art. 2 PAG.
- 18 Art. 29 PatGG.
- 19 Readers should also note the availability of overviews of the new Federal Patent Court and the proceedings before it in the German and French language legal literature; see *Holzer*, Das neue Bundespatentgericht, sic! 2009, 744; *Stieger*, die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3; *Stieger*, Prozessieren über Immaterialgüterrechte in der Schweiz – ein Quantensprung steht bevor, GRUR Int. 2010, 574; *Bosshard*, Le nouveau Tribunal fédéral des brevets et les juridictions cantonales, SZP 2010, 191; *Legler*, Sind in Zukunft Patentstreitigkeiten in der Schweiz *de lege lata* nicht mehr schiedsfähig?, ASA Bulletin 2010, 253; *Gick-Komondy*, Schweizerische Patentgerichtsbarkeit im Vergleich mit der europäischen Entwicklung, Diss. Bern, Zurich 2010, 189-213. For views and background information on the topic prior to the adoption of the final statutory text, see also *Hilti*, Ein eidgenössisches Patentgericht (EPG) 1. Instanz in greifbarer Nähe?, sic! 2002, 283; *Bircher/Thouvenin*, Ein eidgenössisches Patentgericht erster Instanz, sic! 2002, 650; *Brändle*, Eidgenössisches Patentgericht erster Instanz – Fluch oder Segen?, in Festschrift für Gert Kolle und Dieter Stauder, Cologne 2005, 301; *Weibel*, Bundespatentgericht unerwünscht, NZZ No. 106 of 9 May 2005, p. 9; *Stieger*, Bundespatentgericht ante portas!, in Festschrift für Alfred Bühler, Zurich 2008, 179; *Weissenberger/Aschmann*, Bundespatentgericht auf der Zielgeraden? Fragen zum Gesetzesentwurf, sic! 2008, 846.
- 20 Each Canton had to designate a sole cantonal instance court to handle civil patent cases as a matter of federal law. The legal basis for this requirement used to be Art. 76 para. 1 PatG (Bundesgesetz über die Erfindungspatente vom 25. Juni 1954 [Patentgesetz, PatG], SR 232.14), which was deleted from the Patent Act once the more general, but substantively equivalent, Art. 5 para. 1 lit. a ZPO entered into force on January 1, 2011.
- 21 Art. 72 para. 1, Art. 74 para. 2 lit. b, and Art. 75 para. 2 lit. a/b BGG.
- 22 But see Botschaft zum Patentgerichtsgesetz, BBl 2008, 455, 463.
- 23 See also *Holzer*, Das neue Bundespatentgericht, sic! 2009, 744.
- 24 On this issue, see also *Weissenberger/Aschmann*, Bundespatentgericht auf der Zielgeraden? Fragen zum Gesetzesentwurf, sic! 2008, 846, 848.
- 25 See *Stieger*, Bundespatentgericht ante portas!, in Festschrift für Alfred Bühler, Zurich 2008, 179, 182-184; *Stieger*, Prozessieren über Immaterialgüterrechte in der Schweiz – ein Quantensprung steht bevor, GRUR Int. 2010, 574, 576.
- 26 See also *Weissenberger/Aschmann*, Bundespatentgericht auf der Zielgeraden? Fragen zum Gesetzesentwurf, sic! 2008, 846, 851.
- 27 It is no surprise that, following the successful creation of the Federal Patent Court, the Swiss government has recently proposed the creation of a Federal Competition Court in explicit analogy to the Federal Patent Court; see Erläuternder Bericht zur Änderung des Bundesgesetzes über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG), 12. For a recent discussion of this topic, see, e.g., *Rizvi/Babey*, Braucht die Schweiz ein Bundeswettbewerbsgericht?, AJP 2010, 1585. It is interesting to note that only three years ago, the Swiss government responded to opponents of the Federal Patent Court (who claimed that the creation of one specialized court would encourage the creation of other specialized courts, thereby jeopardizing the unity of the law in the long run) by arguing that patent law was an exceptional case; see Botschaft zum Patentgerichtsgesetz, BBl 2008, 455, 467.
- 28 Note that during the constitutional reform of the federal judiciary, the Swiss government, when considering the potential for the creation of additional federal courts with nationwide jurisdiction to supplement the existing Federal Criminal Court and Federal Administrative Court, specifically cited the need for a federal intellectual property court, not a patent court; see Botschaft über eine neue Bundesverfassung vom 20. November 1996, BBl 1997 I 1, 540.

- 29 See also *Hilti*, Ein eidgenössisches Patentgericht (EPG) 1. Instanz in greifbarer Nähe?, sic! 2002, 283; *Stieger*, Bundespatentgericht ante portas!, in Festschrift für Alfred Bühler, Zurich 2008, 179, 181.
- 30 The drafts are available at <http://www.epo.org/patents/law/legislative-initiatives/epla/latestdrafts.html>.
- 31 The prospects for such plans are not particularly rosy, due to the recent CJEU Opinion 1/09, issued on March 8, 2011, which found the EEUPC project incompatible with primary EU law.
- 32 See Botschaft zum Patentgerichtsgesetz, BBl 2008, 455, 469; see also *Stieger*, Bundespatentgericht ante portas!, in Festschrift für Alfred Bühler, Zurich 2008, 179, 181.
- 33 Art. 5 PatGG.
- 34 Art. 4 PatGG.
- 35 Art. 6 PatGG.
- 36 Art. 7 PatGG.
- 37 Art. 8 para. 1 PatGG.
- 38 See Art. 9 para. 3 PatGG.
- 39 The Swiss Parliament's Committee on Courts is currently advertising four to five more positions for part-time technical judges with a chemistry background; see NZZ Executive of December 11/12, 2010, p. 8.
- 40 The first President of the Court is Dr. Dieter Brändle, a former judge on the Zurich Commercial Court with significant patent experience. He has also been a regular participant in meetings of European Patent Judges.
- 41 The second full member of the Court is Dr. Tobias Bremi, a technically trained judge and registered European Patent Attorney.
- 42 Art. 13 para. 1 PatGG.
- 43 For a detailed description of the standard process for the selection of federal judges for election by the Swiss Parliament, see *Marti*, Die Gerichtskommission der Vereinigten Bundesversammlung, in «Justice-Justiz-Giustizia» 2010/1.
- 44 Art. 9 para. 4 PatGG.
- 45 See, e.g., INGRES News 9/2010, 5.
- 46 Art. 10 para. 4 PatGG.
- 47 See Art. 47 ZPO.
- 48 Art. 22 para. 4 PatGG.
- 49 Art. 28 PatGG.
- 50 See, e.g., BGE 133 I 1, BGE 128 V 82, BGE 124 I 121.
- 51 Art. 21 para. 1 PatGG.
- 52 Art. 21 para. 2 PatGG.
- 53 Art. 21 para. 3 PatGG.
- 54 Art. 21 para. 4 PatGG.
- 55 Art. 21 para. 5 PatGG.
- 56 Art. 20 para. 3 lit. a PatGG.
- 57 Art. 23 para. 1 lit. b PatGG.
- 58 Art. 23 para. 3 PatGG.
- 59 Art. 23 para. 1 lit. a, c-e PatGG.
- 60 Art. 23 para. 2 PatGG.
- 61 Art. 24 paras. 1 and 2 PatGG.
- 62 See Art. 20 para. 3 lit. b PatGG.
- 63 Art. 25 PatGG.
- 64 See Botschaft zum Patentgerichtsgesetz, BBl 2008, 455, 482.
- 65 Supplementary protection certificates are not explicitly mentioned in the Act on the Federal Patent Court, but given their close interrelationship with patents, there is no doubt that they must be treated just like patents in terms of jurisdiction of the Federal Patent Court; see also *Stieger*, Prozessieren über Immaterialgüterrechte in der Schweiz – ein Quantensprung steht bevor, GRUR Int. 2010, 574, 580-581.
- 66 See also Botschaft zum Patentgerichtsgesetz, BBl 2008, 455, 461, 482; *Stieger*, die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3, 4-6.
- 67 See Art. 31 VGG (Bundesgesetz über das Bundesverwaltungsgericht [Verwaltungsgerichtsgesetz, VGG] vom 17. Juni 2005, SR 173.32) in conjunction with Art. 5 VwVG (Bundesgesetz vom 20. Dezember 1968 über das Verwaltungsverfahren, SR 172.021). Note, however, that this limitation is not particularly significant in practice, given that the Federal Administrative Court appears to have had only five cases on appeal from the Federal Institute of Intellectual Property since the court's inception on January 1, 2007; see Federal Administrative Court Cases Nos. B-7477/2006, B-7478/2006, B-3064/2008, B-1729/2009, and B-1019/2010. One of the reasons for the low volume of appeals to the Federal Administrative Court is that far more than 90% of the patents valid in Switzerland are European patents examined and issued by the European Patent Office in Munich and that national Swiss patent applications are not examined for novelty or nonobviousness by the Federal Institute of Intellectual Property; see Art. 59 para. 4 PatG.
- 68 Art. 72 para. 2 lit. b no. 2 BGG in conjunction with Art. 75 para. 1 BGG.
- 69 Art. 5 para. 1 ZPO.
- 70 Art. 6 para. 4 lit. a ZPO in conjunction with Art. 5 para. 1 ZPO.
- 71 Art. 5 para. 1 lit. a ZPO.
- 72 Note that the general rules on jurisdiction in intellectual property cases also apply to patent cases until the Federal Patent Court becomes operative in 2012.
- 73 Art. 5 para. 2 lit. b-d ZPO.
- 74 Art. 5 para. 2 and Art. 6 para. 5 ZPO.
- 75 In particular Art. 10 and Art. 36 ZPO.
- 76 Art. 109 IPRG (Bundesgesetz vom 18. Dezember 1987 über das internationale Privatrecht [IPRG], SR 291).
- 77 In particular Art. 2, Art. 5 no. 3, and Art. 22 no. 4 of the Lugano Convention.
- 78 For a detailed discussion of the Federal Patent Court's subject matter jurisdiction, see *Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3. See also *Bosshard*, Le nouveau Tribunal fédéral des brevets et les juridictions cantonales, SZPP 2010, 191.
- 79 It goes without saying that the term "exclusive" relates to state courts only and does not have any bearing on the jurisdiction of arbitral tribunals. There is no question that arbitration continues to be available in patent matters under Art. 354 ZPO or, regarding international arbitration, under Art. 177 IPRG. See also *Legler*, Sind in Zukunft Patentstreitigkeiten in der Schweiz *de lege lata* nicht mehr schiedsfähig?, ASA Bulletin 2010, 253; *Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3, 6.
- 80 Art. 26 para. 1 lit. a-b PatGG. Moreover, the Court has exclusive jurisdiction with regard to the execution of its own judgments rendered in adjudicating any of these actions; Art. 26 para. 1 lit. c PatGG.
- 81 Art. 26 para. 2 PatGG.
- 82 Note that given the all-encompassing subject matter jurisdiction of the sole cantonal instance courts in intellectual property cases, it is impossible that any court other than the sole cantonal instance courts will have concurrent jurisdiction in patent matters, even though the Act on the Federal Patent Court does not actually use the expression "sole cantonal in-

- stance courts”, but instead uses the seemingly more general term “cantonal courts”; see Art. 26 para. 2 PatGG.
- 83 See *Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3, 12, 14.
- 84 Art. 26 para. 4 PatGG. In this case, the cantonal court ceases to have jurisdiction contrary to the general rule of civil procedure, according to which counterclaims can be filed before the same court if the counterclaim is subject to the same type of proceedings as the main claim; see Art. 224 para. 1 ZPO.
- 85 Final judgment means *res judicata*, that is, adjudication of the issue by the Federal Patent Court possibly followed by Supreme Court review.
- 86 Art. 26 para. 3 PatGG.
- 87 Art. 26 para. 3 PatGG.
- 88 For a critique, see *Weissenberger/Aschmann*, Bundespatentgericht auf der Zielgeraden? Fragen zum Gesetzesentwurf, sic! 2008, 846, 851.
- 89 See also *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 195.
- 90 See also *Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3, 17.
- 91 ECJ, Case No. C-4/03, OJ C 224 of 16 September 2006, 1.
- 92 While Switzerland is not a member of the European Union and therefore generally not bound by judgments of the European Court of Justice, its case law on international jurisdiction is nevertheless relevant for Switzerland because Swiss courts have to consider ECJ case law in applying the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters; see Art. 1 para. 1 of Protocol No. 2 on the uniform interpretation of the Lugano Convention.
- 93 Zurich Commercial Court, Case No. HG050410, Order dated 13 October 2006, sic! 2006, 854; for a detailed review of this case, see *Hess-Blumer*, Crossborder Litigation – und sie lebt doch!, sic! 2006, 882.
- 94 See *Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3, 16; *Stieger*, Prozessieren über Immaterialgüterrechte in der Schweiz – ein Quantensprung steht bevor, GRUR Int. 2010, 574, 584.
- 95 On these ramifications, see *Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3, 14-15.
- 96 See also *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 195.
- 97 See Art. 90 lit. a ZPO.
- 98 *Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3, 18-19.
- 99 Art. 224 para. 1 ZPO.
- 100 See, e.g., *Brunner*, Zur Auswahl der Handelsrichter nach ihrem Fachwissen, SJZ 105 (2009), 321.
- 101 See, e.g., *Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3, 19.
- 102 Art. 26 paras. 3 and 4 PatGG.
- 103 Art. 26 para. 2 PatGG.
- 104 The transfer rule for counterclaims contained in Art. 26 para. 4 PatGG uses the term “the cantonal court” rather than the expression “a cantonal court”. It is difficult to make sense of the use of this particular language other than by reading it as a reference to the definition of concurrent jurisdiction in *patent* matters under Art. 26 para. 2 PatGG. In principle, the same is true for the rule codifying the “Zurich Route” for defenses and preliminary questions (Art. 26 para. 3 PatGG), but it may make sense for cantonal courts faced with patent issues as a defense to a non-patent action or as a preliminary question in the context of a non-patent action to go down the “Zurich Route” by applying Art. 26 para. 3 PatGG by analogy.
- 105 Art. 26 para. 2 PatGG.
- 106 Art. 41 PatGG.
- 107 See also *Bosshard*, Le nouveau Tribunal fédéral des brevets et les juridictions cantonales, SZP 2010, 191, 197.
- 108 It is unclear whether Art. 404 para. 1 ZPO, which provides that cantonal procedural law will continue to be applicable until the conclusion of the proceedings before the “instance concerned”, is applicable in case of a transfer to the Federal Patent Court, that is, whether the Federal Patent Court is such an “instance concerned”. But see *Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3, 21.
- 109 Art. 27 PatGG.
- 110 Art. 220 ZPO.
- 111 Art. 221 para. 1 ZPO. For the required exhibits (powers of attorney, documentary evidence, list of evidence), see Art. 221 para. 2 ZPO.
- 112 Art. 221 para. 3 ZPO.
- 113 Art. 222 paras. 1 and 4 ZPO.
- 114 See, e.g., *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 197.
- 115 Art. 225 ZPO.
- 116 Art. 226 ZPO.
- 117 See also *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 200-203.
- 118 Art. 228 ZPO.
- 119 Art. 231 ZPO.
- 120 Art. 233 ZPO.
- 121 Art. 74 para. 2 lit. e and Art. 75 para. 1 BGG; Art. 1 para. 2 PatGG.
- 122 Art. 97 BGG.
- 123 Art. 35 para. 1 PatGG.
- 124 Art. 124 para. 1 ZPO.
- 125 See *Botschaft zum Patentgerichtsgesetz*, BBl 2008, 455, 488.
- 126 Art. 35 para. 2 PatGG.
- 127 Under the general rules of civil procedure, proceedings are held in the official language of the canton in question, whereas the cantons determine which official language is to be used if multiple languages are spoken in that particular canton; see Art. 129 ZPO.
- 128 Art. 36 para. 1 PatGG.
- 129 Art. 36 para. 2 PatGG.
- 130 English is not allowed as a procedural language before the Swiss Supreme Court; Art. 54 para. 1 BGG.
- 131 Art. 36 para. 3 PatGG. Note that proceedings before the Swiss Supreme Court will typically be in the language of the decision that is appealed; Art. 54 para. 1 BGG.
- 132 For a critique of this regime as too restrictive given the consent requirement with regard to both parties, see *Weissenberger/Aschmann*, Bundespatentgericht auf der Zielgeraden? Fragen zum Gesetzesentwurf, sic! 2008, 846, 852.
- 133 Art. 36 para. 4 PatGG. The same rule applies to proceedings before the Swiss Supreme Court; Art. 54 para. 4 BGG.
- 134 Following the entry into force of the London Agreement on the application of Article 65 EPC (OJ EPO 2001, 549), Switzerland no longer requires the translation of European patents issued in English into an official Swiss language; see Art. 1 para. 1 London Agreement (Übereinkommen über die Anwendung

des Artikels 65 des Übereinkommens über die Erteilung europäischer Patente [Sprachenübereinkommen], abgeschlossen in London am 17. Oktober 2000 [SR 0.232.142.202]).

- 135 Art. 232 ZPO.
- 136 Art. 38 PatGG.
- 137 Art. 37 paras. 1 and 2 PatGG. In addition, the parties must be given the opportunity to request the court to order an oral or written explanation of the expert opinion by the expert or the submission of additional questions to the expert; see Art. 187 para. 4 ZPO.
- 138 Art. 187 para. 1 ZPO.
- 139 Art. 183 para. 3 ZPO.
- 140 Art. 37 para. 3 PatGG.
- 141 Art. 168 para. 1 in conjunction with Art. 183 et seq. ZPO. See also BGE 132 III 83.
- 142 See Art. 175 ZPO.
- 143 For a general overview, see *Willi*, Vorsorgliche Massnahmen nach der Schweizerischen Zivilprozessordnung (ZPO), sic! 2010, 591.
- 144 Art. 261 para. 1 ZPO. Note that the courts may refrain from ordering provisional measures if the adverse party provides adequate security (Art. 261 para. 2 ZPO), but given the importance of preliminary injunctions in patent matters, this option should be confined to rare exceptions; see also *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 214.
- 145 Art. 262 ZPO.
- 146 See Art. 59 MSchG, Art. 38 DesG, Art. 65 URG, and – as of 2012 – Art. 77 para. 1 lit. a PatG i.V.m. Art. 66 lit. b PatG; see also *Willi*, Vorsorgliche Massnahmen nach der Schweizerischen Zivilprozessordnung (ZPO), sic! 2010, 591, 596.
- 147 Art. 23 para. 1 lit. b PatGG in conjunction with Art. 23 para. 2 PatGG.
- 148 Art. 23 para. 3 PatGG.
- 149 Art. 23 para. 3 PatGG.
- 150 Art. 253 ZPO.
- 151 Art. 265 para. 1 ZPO.
- 152 Art. 265 para. 2 ZPO.
- 153 Art. 263 ZPO.
- 154 Art. 264 ZPO.
- 155 Art. 98 BGG.
- 156 Art. 268 para. 1 ZPO.
- 157 Art. 270 para. 1 ZPO.
- 158 Art. 270 para. 2 ZPO. Note that this provision is the exact opposite of the previous practice of the Zurich Commercial Court, which, invoking the constitutional law principle of equal treatment, used to forward protective briefs to the other party prior to the actual filing of a motion for an *ex parte* order of provisional measures; see Zurich Commercial Court, Order of April 6, 2009, ZR 108 (2009), No. 46.
- 159 Art. 270 para. 3 ZPO.
- 160 See, e.g., Zurich Commercial Court, Presidential Order of May 2, 1997, ZR 96 (1997), No. 46.
- 161 See also *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 217-218.
- 162 For general reviews of these developments, see *Calame*, Beweissicherung im Zusammenhang mit Patentverletzungsklagen in der Schweiz ab 2011, in *Liber Amicorum für Rudolf Tschäni*, Zurich 2010, 485; *Schweizer*, Vorsorgliche Beweisabnahme nach schweizerischer Zivilprozessordnung und Patentgesetz, ZZZ 2010 No. 21/22, 3.
- 163 See also *Calame*, Beweissicherung im Zusammenhang mit Patentverletzungsklagen in der Schweiz ab 2011, in *Liber Amicorum Rudolf Tschäni*, Zurich 2010, 485, 487-488; *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 216-217.
- 164 Art. 158 para. 1 lit. b ZPO.
- 165 See also *Schweizer*, Vorsorgliche Beweisabnahme nach schweizerischer Zivilprozessordnung und Patentgesetz, ZZZ 2010 No. 21/22, 3, 8-9.
- 166 See Art. L. 615-5 of the French Code de la propriété intellectuelle; see also Art. 7 of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157 of April 30, 2004, 45.
- 167 *Stieger*, Bundespatentgericht ante portas!, in *Festschrift für Alfred Bühler*, Zurich 2008, 179, 216; *Calame*, Beweissicherung im Zusammenhang mit Patentverletzungsklagen in der Schweiz ab 2011, in *Liber Amicorum Rudolf Tschäni*, Zurich 2010, 485; *Schweizer*, Der Anspruch auf genaue Beschreibung gemäss Art. 77 PatG, sic! 2010, 930, 931.
- 168 Art. 77 para. 1 lit. b PatG in conjunction with Art. 77 para. 2 PatG (as amended by the Act on the Federal Patent Court).
- 169 See *Calame*, Beweissicherung im Zusammenhang mit Patentverletzungsklagen in der Schweiz ab 2011, in *Liber Amicorum Rudolf Tschäni*, Zurich 2010, 485, 497.
- 170 See also *Schweizer*, Der Anspruch auf genaue Beschreibung gemäss Art. 77 PatG, sic! 2010, 930, 932.
- 171 Art. 77 para. 4 PatG (as amended by the Act on the Federal Patent Court).
- 172 See also Art. 155 para. 3 ZPO.
- 173 See also Art. 68 PatG and Art. 156 ZPO.
- 174 Art. 77 para. 5 PatG (as amended by the Act on the Federal Patent Court).
- 175 See also Botschaft zum Patentgerichtsgesetz, BBl 2008, 455, 495.
- 176 See also *Hilti*, Ein eidgenössisches Patentgericht (EPG) 1. Instanz in greifbarer Nähe?, sic! 2002, 283.