



HOUSE OF LORDS

Select Committee on the European Union

Justice Sub-Committee

Uncorrected oral evidence: Intellectual Property (IP) and the Unified Patent Court (UPC)

Tuesday 30 October 2018

10.40 am

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Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Anderson of Swansea; Lord Cashman; Lord Cromwell; Lord Judd; Earl of Kinnoull; Baroness Ludford; Baroness Neuberger; Lord Polak; Lord Wasserman.

Evidence Session No. 2

Heard in Public

Questions 12 - 20

Witnesses

I: Mr Kevin Mooney, Simmons & Simmons; Mr Stephen Jones, President, Chartered Institute of Patent Attorneys (CIPA).

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Examination of witnesses

Mr Kevin Mooney and Mr Stephen Jones.

Q12 **The Chairman:** It is very good of you to give us your time. First, I invite you to introduce yourselves, starting with Mr Mooney.

Mr Kevin Mooney: I am a partner with Simmons & Simmons. I have spent most of my professional life involved in the litigation of patents, and for the past 10 years at least the UPC has been a major preoccupation of mine.

The Chairman: The general public will eventually be watching this. Can you tell us what the UPC is?

Mr Kevin Mooney: It is the Unified Patent Court. I would like to place on record that during that period of 10 years I have been supported by my firm and I am very grateful to it.

The Chairman: That is great; I am glad to hear that. Mr Jones?

Mr Stephen Jones: I have practised in intellectual property as a patent attorney and an IP solicitor mainly in private practice, including with some international law firms. I had a relatively brief spell in-house. I am president of the Chartered Institute of Patent Attorneys, which is the professional body for patent attorneys in the UK. That was founded in 1882 with a royal charter since 1891. Most patent attorneys in the UK are also qualified as European patent attorneys and practise before the European Patent Office, which I am sure we will talk about later. Many of them practise in trademarks and designs as well. I started in the field in 1978, which happens to be the year the European Patent Office itself started operations, and I have been involved in all aspects of intellectual property during my career.

The Chairman: A lifetime in this field.

Mr Stephen Jones: I am afraid so.

Q13 **The Chairman:** It is obviously true of both of you. Mr Mooney paid tribute to his own law firm for giving him the space and time to be a representative or ambassador for Britain in the relationships across Europe in the development of a unified court. That is the sort of invisible stuff—the general public often do not realise the ways in which British lawyers have contributed to the development of law across all the fields in which we have common interests. It has not all been a flood of law coming at us from Europe, but we have contributed quite considerably because law is one of those things that Britain is rather good at—I would say that. The contribution of British lawyers, law firms and judges has been considerable, and I pay tribute to both of you for the work you have done.

That is really why you are here today. This session is open to the public, and a webcast of it goes out live and is subsequently accessible via the parliamentary website. A verbatim transcript is made of the session; it records everything you say, and that too will be put on the parliamentary website. A couple of days after today

you will receive a copy of the transcript to check its accuracy. If there are any corrections that you want to make, please take advantage of that moment. If after this session you think of things that you feel you did not have the opportunity of saying, or you think would assist us and the Government as they go forward, do send us any supplementary written evidence and it will be included in the body of any report that we may do. Thank you for being here; I am really grateful to you.

I will start by asking about the relationship between the European Patent Convention, European Union law and the Unified Patent Court. Why was the Unified Patent Court agreement pursued outside the normal European Union formal structures? Mr Mooney may have the answer to that.

Mr Kevin Mooney: To give a brief bit of history, the European Patent Convention came into effect, as Stephen has said, in 1978. It was always contemplated that there would be a single court in Europe to enforce European patents. Unfortunately, there were a number of failed attempts.

We come to 2000, when there were two competing proposals on the table. One came from the Commission, which proposed a very centralised court within the Union's judicial structure. It would be part of the General Court in Luxembourg as a specialist chamber. An alternative, borne out of frustration, was proposed by the European Patent Organisation, essentially under the EPC. That wanted a distributed single court with local divisions close to the people who would be using that court.

The Chairman: A kind of devolution.

Mr Kevin Mooney: Yes. That court would be staffed by existing specialist judges and would be completely outside the Union's normal judicial structure.

There was a dispute. They competed for some years, and finally in 2006 judicial opinion across Europe said it preferred the distributed approach; industry said it preferred the distributed approach; and, believe it or not, the Commission listened and commenced the drafting, under a very formidable friend of mine, Dr Fröhlinger, of an international agreement that is now the UPC.

The Chairman: That was really interesting. Perhaps a similar kind of distributed system should have been worked out in that way in other disciplines of the law. Perhaps, Lord Cashman, you would like to follow up on this with your experience.

Q14 **Lord Cashman:** Since the referendum of 2016 the Government have emphasised their commitment to the UPC but also noted its establishment by an international treaty falling outside. Could you explain to me why participation in the Unified Patent Court is limited to EU member states?

Mr Kevin Mooney: That is the big question: is it? At the moment as a matter of fact it is, because, if you look at the agreement, it talks about contracting member states, but after the referendum Stephen's organisation and some of those I represent asked whether that is right. Is it possible for a non-EU member state to be a party? We commissioned an opinion from two very eminent barristers and came

to the conclusion that yes, indeed, it was. That remains our belief. I can go into detail about that if you wish, but there is strong academic and professional opinion that non-EU member states may participate in the project.

Mr Stephen Jones: It might be useful to take a little step back and look at the European Patent Convention itself because, as you say, this is a public hearing. First and foremost, the European Patent Convention is not an EU institution; it is an international treaty that dates from 1973, but, as we have said, it came into effect in 1978. Therefore, there is no direct relationship between the EU and the European Patent Convention, which I will call the EPC.

At the moment there are 38 members of the EPC, so you can see that it includes 10 that are not even members of the EU. They include Switzerland, Norway, Turkey and several others. The law of the EPC is not EU law, and the tribunals that determine patent law under the EPC are the Boards of Appeal and the so-called Enlarged Board of Appeal.

The Chairman: In case somebody has wandered in with a cup of tea and turned on the parliamentary channel and is wondering what all this is about, would you briefly explain what the European Patent Convention deals with and why it is valuable to ordinary people doing bits of business, who might not be grand corporates? It is important for the general public to know why this is an incredibly useful thing in trading across borders.

Mr Stephen Jones: I would be happy to do that. The European Patent Convention covers 38 countries and some other countries as a kind of extension to it, so it is very widespread. It allows you to make a single application for a patent based on a single document that you file in one place, which happens to be the European Patent Office. It has its main office in Munich and it has satellite offices. It has another big office in The Hague as well. You file your single application there; it will be processed by that patent office, and at the moment it is issued in the form of a bundle of patents for the countries that you have designated under the European Patent Convention. You do not have to designate all 38 if you do not want to because the cost increases the more you designate, but it is possible to designate all or some of them as you wish. Therefore, it is a very flexible system.

The Chairman: What sort of thing would require a patent? If I am sitting in my attic designing something, would I need a patent for that?

Mr Stephen Jones: A misconception about patents is that, somehow, they give you the right to do something and that if you have them people will beat a path to your door. That is the old adage. In reality, patents prevent other people encroaching on the space that is covered by the patent you have taken out. The idea is that it would incentivise somebody who is working in their attic, or in a big company research laboratory, to put the necessary money, effort and time into that research and development work in the knowledge that they will be able to get back at least some of that money, and hopefully more of it, when they eventually sell and market that

product. Patents can apply to all kinds of things from chemicals, pharmaceuticals and nutcrackers to lawnmowers.

The Chairman: Widgets.

Mr Stephen Jones: Lots of things. Patents are really about how things work. When we look at trademarks—perhaps we will talk about them later—they are about what you call things, and designs are about what things look like, very broadly speaking. Patents are about how things work. Probably the best example is pharmaceuticals.

A pharmaceutical product could be an important drug for curing a very serious disease. The research and development that you would put into that as a company, science institution or university, with lots of people involved, would require a colossal amount of investment, but once you know how to make that drug—you have to disclose what is in it once you put it on the market—generally it is incredibly easy for people to reproduce it for very little money.

The Chairman: The Chinese are doing it all the time.

Mr Stephen Jones: Anybody can do it. I do not single out anyone in particular. Once you know that that drug is successful, in principle, you can copy it very easily and get it through the necessary regulatory processes, but the patent gives you a period of time, which is strictly limited by the patent system, in which you can seek to recoup the effort and money that you have put into it.

The Chairman: After the time has run out, it becomes a commons; it is available more widely.

Mr Stephen Jones: Then it becomes what you would normally refer to as a generic product, which other people can produce. Nobody will tell you that patents are an absolutely perfect system, but nobody has thought of a better way of enabling this kind of research, as far as I know.

Mr Kevin Mooney: Stephen has given a masterful explanation about the way patents are granted. How does the UPC fit into that story? Basically, the patents that are granted by Munich are national rights. Therefore, if you are an inventor and you have patents, you have to enforce them separately in each and every country. There are different courts, different languages, different procedures and different timetables.

The Chairman: Financially, it is very costly.

Mr Kevin Mooney: Financially it is ridiculous. We have been doing that for almost 50 years, and that is what the UPC is designed to avoid. You go to one court and have one procedure, one set of lawyers and one result for all your patents.

The Chairman: It sounds eminently sensible to me.

Baroness Ludford: I ought to know this because I was in the European Parliament

when the UPC went through, but I am afraid I did not do any civil law and I have entirely forgotten. Is there any organic relationship between the European Patent Convention and the Unified Patent Court, because the EPC comprises 38 countries, including 10 non-EU states, but the restriction of the UPC to EU member states is a moot point, as we have heard? I cannot remember why it was limited to EU member states if it is enforcing a convention that has 10 non-EU states in it.

Mr Kevin Mooney: Originally, the draft agreement creating it, which I spoke about, included non-EU states. Indeed, the Union was part of the original agreement; it is not now. It decided at a late stage to refer that agreement to the CJEU to see whether it was compatible with the treaties. The CJEU decided that it was not compatible. We can go into the reasons why it was not compatible, but it did not expressly say that it was not compatible because non-EU member states were involved. There were more technical reasons, but, as a practical matter, after the opinion of the CJEU non-EU member states withdrew.

Baroness Ludford: So, if you are in Norway, you cannot go to the UPC to enforce a right under the EPC.

Mr Kevin Mooney: Yes, you can. A company in Norway can go to the UPC; a company in America can go to the UPC, but you will not have a division of the UPC; you will not be part of the judicial system. Patentees around the world will be able to enforce all their European patents in this court irrespective of their nationality. That is why the system is so much in favour everywhere in the world.

Lord Cromwell: I am now confused, and I think I am not alone in this. My original understanding was that the UPC comprised 38 plus extension.

Baroness Ludford: No.

Lord Cromwell: That was my original understanding.

The Chairman: You were wrong.

Lord Cromwell: I am used to that. I have evolved. Let me reverse it. How many can apply to the UPC? Apparently, everybody can. The EPC has 38-plus members. Is that correct?

Mr Stephen Jones: By the way, the Unified Patent Court has not started yet, so we are dealing with something that does not yet exist. We will come to this. One thing we have not talked about yet is the unitary patent. I think we ought to throw that in at this point.

The Chairman: Please throw all the balls into the court.

Mr Stephen Jones: I have mentioned the European Patent Convention. When you say EPC and UPC quickly, you get mixed up. Let us say it in full. The European Patent Convention, which started in 1978, now covers 38 countries, including non-EU as well as EU countries. Through the European Patent Office in Munich, it grants a

bundle of separate patents for up to 38 countries. If you compare that with the trademark system, which I know you were discussing last week, that is different. Because that is an EU-only thing, it is able to grant a single trademark registration covering all 28 countries of the European Union. The European Union has always wanted to do something like that for patents. The unitary patent would be a unitary right—one patent, in principle, for the 28 countries, at the moment, of the European Union. The problem with it was that certain countries did not want to do that; they did not want to participate in that, the main one being Spain.

Baroness Ludford: Was that not about the language?

Mr Stephen Jones: It was about the language. The European Patent Office has always operated in three official languages: English, French and German. The European Union Intellectual Property Office, which is the trademarks and designs office, operates in five languages because it also includes Spanish and Italian. Originally, Spain and Italy, perhaps understandably, said they would like any unitary patent system to cover their languages as well. The unitary patent is going to be granted through the European Patent Office system; it will just be an extension of that system, if you like, whereas, as well as getting this bundle of individual patents, if you tick the right box you will be able to get a single patent for the European Union. Unfortunately, some of those countries—the main outstanding one being Spain, but there are some others—have not signed up to that. I believe Italy now has.

I need to take a step back. If you have one single patent, how are you going to enforce that against people? How will you do that through different courts in different member states, which is the way the trademark system operates because you have different courts in different member states enforcing trademark registrations? Suffice it to say that for patents that probably would not work terribly well. So, the thought was that a single court was needed to enforce these unitary patents as a single right, and there was a need to set up a separate unified court. For some reason we always call it a unitary patent and a unified court.

Lord Wasserman: Why would it not work?

Mr Stephen Jones: For example, a patent could cover a very important drug, and you could find that your single patent for the whole of the European Union was then challenged by a particular court. I do not want to mention any particular country, but it could be one whose courts, you may feel, are not the most appropriate forum for adjudicating on whether or not your patent is valid, the language in which that would operate and so forth. You could find that a very valuable right for the whole of the European Union was rendered invalid by an outlier jurisdiction.

The Chairman: Where the standards might not be appropriate.

Mr Stephen Jones: I am not singling out any particular country.

The Chairman: We are talking here about the setting of evidential standards and so on. They may be different; they may not be meeting those standards. That is what the work across Europe has been about; it has been about standards setting and mutual recognition. Mutual recognition is not just, “I’ll recognise your court if you recognise mine”; it is about standards.

Mr Stephen Jones: You have a single court. Mr Mooney has been very instrumental in drafting the rules and regulations under which this court will operate so you can have confidence that that common standard is being applied by that court.

Mr Kevin Mooney: The procedures in common-law courts are very different from civil courts. We have had to create a single court with a single procedure. We try to adopt the best from the civil law side and the common-law side. We may have created a racehorse or a camel, but opinion is generally in favour of the racehorse.

The Chairman: Let us say it is a racehorse. Lord Cromwell, are you satisfied? Do you understand now?

Lord Cromwell: I am never satisfied.

Mr Stephen Jones: To answer Lord Cromwell’s point, you asked how many countries are going to take part in the Unified Patent Court—the UPC. As we said, it has not started yet. It is able to start when a minimum of 13 countries have ratified the agreement, but there is a stipulation that of those 13 countries three of them must be the UK, France and Germany. I am not quite up on the total number of ratifications yet, but I know that it has risen to over 13, so that part has been fulfilled. The UK has ratified, Brexit notwithstanding, and so has France. The one that has not ratified yet so far is Germany, the most immediate reason being that there has been a constitutional challenge to the validity of the United Patent Court system under German law. That matter is now before the German constitutional court. There may be various opinions on when that will be resolved.

The Chairman: Those issues have arisen around constitutionality in relation to the European Court of Justice as well. Methods have been found by which to even it out, but it went through a process of ensuring that Germany’s constitution does not feel undermined by its engagement with European projects.

Mr Stephen Jones: That is right.

The Chairman: Mr Mooney said that a country outside of this set-up could use the unified court. That puzzled me, because I could not understand why a country that was not part of this network of nations, which through a spirit of mutuality registered patents in a particular place, would be able to use the unified court system. Why is it that, say, a Latin American country could use this court?

Mr Kevin Mooney: To explain, it is not a country; it is a business. For example, an American pharmaceutical company wishes to obtain patents in Europe. They all do because Europe is a very important market. The issue is: how does it enforce those patents? It is an American company; it has come to Europe to enforce its patents.

Currently, it has to enforce them in each and every country, often in languages it does not understand and often according to procedures that are not common law procedures and that it does not like. It would be a tremendous benefit to American, Japanese and Korean companies that wish to enforce their patents if they could come to a single court that will predominantly operate in English.

The Chairman: They have indicated that already in the negotiations for the creation of a unified court. Have those views been expressed by patent law organisations in those nations?

Mr Kevin Mooney: Yes, indeed. I travel to the States. As a preoccupation, I give lectures on the UPC wherever I am invited to.

The Chairman: Is it met with enthusiasm?

Mr Kevin Mooney: Absolute enthusiasm.

Mr Stephen Jones: One factor we have missed out is that this is a tremendous advantage to British companies as well, whether the UK is in or out of the EU or in or out of the UPC. Let us say the UPC is effective for Germany. If you are a company in Japan, the US, or wherever, and you want to obtain an injunction or take action against somebody who is infringing your patent in Germany—likewise, in France and so forth—you could do it through the UPC system once that comes into effect. Therefore, British companies can take advantage of that as well, whether or not the UK eventually is part of it. If you take Norway as an example, because Norway is not going to be in it, you could not get an injunction affecting Norway through the UPC.

The Chairman: I am going to say this to both of you because it is important for people listening to understand it. This would essentially be an international court.

Mr Kevin Mooney: Yes.

Mr Stephen Jones: Yes.

The Chairman: There is a general feeling out there and people say, “We don’t want to be involved in an international court. That’s the whole point; we are bringing everything back home. We have great courts in Britain. Why should we be going to international courts?” There are times when you have to go to international courts if you are involved in international connections and potential international disputes.

Mr Kevin Mooney: This is the first international court that will settle disputes between private parties.

The Chairman: Very interesting.

Mr Kevin Mooney: It is a great coup if we can achieve it, and possibly a model for other courts.

The Earl of Kinnoull: As a point of clarification, I want you to assume that I am a British company that has invented a nutcracker; that I suspect there has been an

infringement in France and in Switzerland; and that the UPC is now up and running. I have been to the European Patent Office and have ticked all 38 boxes for my nutcracker. Clearly, France is inside the UPC, which has started. What about the Swiss infringement?

Mr Kevin Mooney: No.

The Earl of Kinnoull: I have to go to the Swiss court to do that.

Mr Kevin Mooney: You have to go to the Swiss court.

The Earl of Kinnoull: The second question of clarification is that I go to the court and establish that the French have infringed my patent and I am angry about it. The court judgment is clear. What do I do about enforcing it?

Mr Kevin Mooney: In France?

The Earl of Kinnoull: Yes.

Mr Kevin Mooney: The court will grant an injunction, and if the injunction is disobeyed the court will ask the domestic French court to enforce it.

The Chairman: Enforcement happens at a national level; it automatically respects the judgment of the international court.

Mr Kevin Mooney: Exactly.

Mr Stephen Jones: A point worth noting is that the opinion obtained from UK barristers to which Mr Mooney referred, in which we participated, talks about whether a non-EU country could be part of the Unified Patent Court system. The answer is basically yes, as long as everybody, including the EU, agrees to that. We think that it should not just be the UK. It would be extremely useful and advantageous to everybody, including British businesses, if the UPC also included countries such as Switzerland.

The Earl of Kinnoull: The opinion is probably publicly available, but it would be very helpful for us to have a copy of that opinion.

Mr Stephen Jones: You may well have been sent it by Daniel Alexander from last week, but we can certainly also submit a copy.

The Chairman: It may have arrived. I have not yet looked through everything.

Mr Stephen Jones: I know it was referred to last week and he may have sent it in.

The Chairman: This is the one prepared by two distinguished academics.

Mr Stephen Jones: No. This was an opinion by two English barristers, a QC and a junior barrister, who were briefed by the Chartered Institute of Patent Attorneys and the IP Federation.

The Chairman: You instructed them.

Mr Stephen Jones: That is right.

Mr Kevin Mooney: That opinion was obtained almost immediately after the referendum. It analyses the legal position very thoroughly and, I believe, correctly. It also refers to the political difficulties, but I think those have now been overcome; there is a will.

The Chairman: I have found this elucidation really helpful, and I hope the rest of the Committee has too.

Baroness Ludford: I am sorry to ask this again. I think I am being particularly dense this morning; I got up too early. I want to hone in on what we miss out on if we cannot belong to the UPC after Brexit. I do not want to shoot myself in the foot. I put my cards on the table. I am a fervent remainer, who does not want any of this to happen. Obviously, we would lose the life sciences division, which was a key coup. We fought very hard to get the life sciences division in the UK.

The Chairman: I am sorry; I did not hear what you said.

Baroness Ludford: What will we miss out on? British companies will be able to enforce their rights under the UPC system even if the UK is not a party. If we are not a party, we will obviously lose the location of the life sciences division of the UPC in London, which we and the UK Government fought very hard for. That is a tragedy, just as everything about science research is a tragedy. We would not be able to enforce rights under the UPC in British courts. What else do we lose by the UK not being a party to the UPC if non-EU states continue to be excluded? I am trying to understand the extent of the damage.

Mr Kevin Mooney: I think the damage to the UPC will be very considerable. For a start, English judges will not be able to sit as part of this international court. I as an English solicitor will not be able to represent my clients in that court.

The Chairman: You would not have rights of audience.

Mr Kevin Mooney: I would not. Peculiarly, Stephen's patent attorneys do have rights of audience, but I would not, and English barristers would not as matters stand.

The Chairman: Stephen, is that because your remit runs across Europe?

Mr Stephen Jones: Mr Mooney is referring to the fact that those patent attorneys are European patent attorneys. There would be damage. I agree with Mr Mooney that if the UK was not part of that it would lessen the effectiveness of the court. I think there would be less confidence in the court as a tribunal, because the addition of UK judges and the expertise there will be beneficial to that institution. The UK, therefore, gains benefit from that.

The Chairman: Of course.

Mr Kevin Mooney: It is very difficult to overestimate the influence of UK judges and professionals in the creation of this court. I have just come back from the annual meeting of senior patent judges in Venice. These are the most senior patent judges in Europe. All they want to be assured of is that there will be an orderly withdrawal and we can participate in the court alongside their brethren.

The Chairman: One thing that is poorly understood is that the reach of British lawyers, law and judges in the systems that run across Europe has been considerable. I do not think that has been understood even by people who you would think would understand it—politicians and so on. I do not think the extent of the influence, or how invaluable it is, has ever been fully understood.

Mr Kevin Mooney: I agree.

The Chairman: I am here expressing a view and I should not do that.

Q15 **Lord Anderson of Swansea:** Gentlemen, you have been extremely helpful in giving us the background to the formation of the court. It is outside the formal structures of the European Union, and of course it is not comprehensive. You have already said that for reasons of language sensitivity Spain is not a member, but language sensitivity cannot be a reason for the self-exclusion of Poland and Croatia. Perhaps you would explain why they are not members. Is there any nexus—any relationship—between the UPC and the Court of Justice of the European Union?

Mr Kevin Mooney: Croatia acceded to the EU too late to sign the agreement. That is relatively straightforward.

Lord Anderson of Swansea: There were no formal reasons why it should not.

Mr Kevin Mooney: There is no formal reason at all, and we expect Croatia to sign and ratify the agreement in due course. Poland is rather unusual. I was present at various meetings during the Polish presidency when the agreement was being discussed. It was very positive about it. It decided not to sign the agreement for internal political reasons. One can only speculate about what they were.

The Chairman: I suspect they were issues to do with sovereignty.

Lord Anderson of Swansea: And the Court of Justice of the European Union.

Mr Kevin Mooney: The relationship is fairly straightforward. Although there is very little Union law relating to patents, it will have to apply that law; it will apply EPC law; and when it comes to infringement it will apply what is essentially domestic infringement law. Therefore, it is Union law, EPC law on the validity of the patents, and essentially national law on infringement. It will have to make references if the necessity arises with regard to EU law, and it will have to abide by the decisions of the CJEU.

Lord Anderson of Swansea: If we were to apply successfully to remain a member of the court, even though we were outside formal EU structures, we would to that extent still be subject to the Court of Justice of the European Union.

Mr Kevin Mooney: This international court will still be subject to the decisions of the CJEU to some extent. I stress “to some extent”, because it is limited in terms of the amount of law that the European Union has passed in the area of patents.

Lord Anderson of Swansea: Although the volume of relevant law is small at the moment, clearly this will evolve over time.

Mr Kevin Mooney: It is conceivable.

Mr Stephen Jones: Perhaps not as much as that, because the courts, if you like, that govern European law under the European Patent Convention are not called courts, but they are in effect courts; they are the Boards of Appeal of the European Patent Office. There is something called the Enlarged Board of Appeal that deals with difficult and important areas of law. For most of the law of patents, we have been observing and harmonising ourselves with it for 40 years.

Lord Anderson of Swansea: And framing it.

Mr Stephen Jones: Yes. For example, recently when cases have gone to the Supreme Court, very much of the argument there turns on the compatibility of the law with decisions of the European Patent Office Boards of Appeal and Enlarged Board of Appeal. If you like, there is already a body of law that is independent of the European Union but to which we already subscribe and have done so, effectively, for 40 years. That is the main body of patent law to which we will still be subject.

The Chairman: That is likely to continue.

Mr Stephen Jones: That will continue despite Brexit. As Kevin has already said, the influence of the CJEU is rather peripheral; it is only in certain areas where the EU has specific legislation in relation to things such as supplementary patent certificates. We will introduce our own system of that, which will have to be aligned with the European system anyway because it needs to work together with it.

The Chairman: We find in lots of different areas of law that there has been a magnification in the public’s imagination of the role the CJEU plays in legal areas. It is very rarely called upon to contribute to any of these issues. That is the reality.

Mr Stephen Jones: I agree.

Q16 **Lord Cromwell:** I think I speak for many of us in thanking you for building the wiring diagram and the plumbing valves in our heads as to how all of this works. It has also been a bit of an emotional rollercoaster, because one minute it feels as if this is fine and it will all work anyway, but then we say, “Ah, but not quite”. I guess that is the challenge.

Can we look a little more at the impact of Brexit on the UK and UK businesses? In our discussion you have drawn a distinction between them in their ability to participate in the UPC. If I have this right, assuming we leave under Brexit, UK businesses, even if the UK is no longer a member, can still apply to the court.

Mr Kevin Mooney: Yes.

Lord Cromwell: That is the upside of the emotional rollercoaster, if you like. Can you envisage a deal still being struck whereby we could leave and somehow the UK could remain in membership and even host one of the devolved bodies in London?

The Chairman: And have—

Lord Cromwell: Steady; one thing at a time. It is not Christmas yet. That is two requests.

Mr Kevin Mooney: The answer is yes.

Lord Cromwell: Could you fill out how that deal could work?

Mr Kevin Mooney: I am very happy to. Let us make the assumption that there is a withdrawal agreement.

Lord Cromwell: Yes; I am with you so far.

The Chairman: Let us go with this thought process.

Mr Kevin Mooney: Let us make that assumption. Under the terms of the withdrawal agreement as it stands, the UK will remain a contracting member state for the whole of the transitional period, so our status as a contracting member state of the UPC agreement has not changed.

The Chairman: It remains.

Mr Kevin Mooney: If the UPC comes into effect during the transitional period—we can talk about the timetable in a moment, but the likelihood is that it can—we will participate in the court; judges will participate; the lawyers will participate. The problem will be at the end of the transitional period. There has to be a mechanism for ensuring that at the end of the transitional period we remain as permanent members of the UPC project. That is what the Government have committed to explore. They use the word “explore”. I understand why they use that word because the mechanism for ensuring that is not entirely clear, but there is the political will to do it.

A different situation arises if there is no withdrawal agreement because, in March, we will cease to be a contracting member state. The likelihood is that the UPC will come into force at the end of 2019 after we have left with no withdrawal agreement, so the challenge for the Government is a different one. The challenge is to seek to agree with the Union and other member states a mechanism by which as a self-contained object we can remain in the project. I suspect that will be much more difficult.

Lord Cromwell: If I summarise correctly, with the withdrawal agreement there is the willingness to explore remaining pretty much as we are now.

Mr Kevin Mooney: Yes.

Lord Cromwell: In the event of no deal, British businesses could still go to the UPC, but that's your lot, we will lose the judges, the hosting and all of that.

Mr Kevin Mooney: Exactly.

Lord Cromwell: Is that a correct layman's summary?

Mr Kevin Mooney: Exactly right.

Mr Stephen Jones: Deal or no deal, if other member states and the EU agree that it would be better that we, and potentially other countries such as Switzerland, should participate in this international court, and that would be to the greater good of all those participants, the legal opinion that we have obtained indicates that there is no legal obstacle to that as such. If there is political will to do that, it can be done. In this area of law, which is focused on the benefits it would bring to businesses both domestically and internationally—and to inventors—there is a lot to be said for moving in that direction and trying to achieve that, whatever happens and whatever your view is about other aspects of Brexit.

The Chairman: Have you put your cards on the table of those involved in negotiating and those advising those who are negotiating—on the table of the Sherpas? Do they all know that this is the view shared by all of you?

Mr Stephen Jones: Very much so.

Mr Kevin Mooney: Very much so. We have regular meetings with the IPO, which is advising the Minister. Let me place on record that I think the Ministers responsible for this area have been very positive.

The Chairman: They understand this.

Lord Cromwell: We touched on the CJEU—the bogeyman, in so many of our meetings—and the perforated red line/pink line, call it what you will. How much blowback are you getting on that? “If we could get out of the CJEU connection, it would be a lot easier”. Or is it really not an issue in the patent world?

Mr Kevin Mooney: It is not really an issue. The simple answer to the red line—it may be too simple—is that it applies only to domestic UK courts, and this is not a domestic UK court. This happens to be an international court that is geographically situated, in part, within the UK.

Lord Cromwell: It is a neat solution; I give you that.

Mr Kevin Mooney: It is a very simple response.

The Chairman: It is the best way to answer it. That is going to be my answer from now on. Lord Judd would like to come in.

Lord Judd: This point seems to be central to all that is going on with the EU at the

moment. Is there not a sense building in the EU that we are just exasperating, because everybody else is involved in building a sense of common interest and what works in the common interest? We come along and say, “We’ll have a look at this and see whether there is something in it for us”. Does that not just aggravate people?

Mr Kevin Mooney: There are people who are really quite angry because there is a severe risk that, if we do not participate in the project, it will fail—a real risk.

The Chairman: Yes.

Mr Kevin Mooney: Without the English judges and their influence, and—I will be frank—without the economic contribution towards the budget of the court, which is not inconsiderable, my personal view is that there is a real risk that it will not go ahead. That would be a tragedy.

The Chairman: That would be a tragedy. I can see that. You have been so helpful already and so descriptive of some of the things that we were struggling with that many of the questions we had lined up for you have been incorporated into answers you have already given. I want some discipline from my Committee in recognising that their questions may have been answered.

Lord Kinnoull, your question has been answered. You can come in on other things. Yours also, Lady Neuberger. I will turn to Lord Polak.

Q17 **Lord Polak:** My question has been covered, really. What positive opportunities can come from Brexit?

The Chairman: Lord Polak is ever the optimist. There has to be a good side to it.

Lord Polak: This is the question that landed on my table. It is going to happen, so let us make the best of it.

Lord Cashman: Or can we make the best of it?

Lord Polak: We will make the best of it.

Mr Kevin Mooney: Let us try to understand what “it will happen” means. We can remain in the project, as we have already discussed, in which case I am extremely happy: we have a very valuable international court, and industry is content.

Lord Polak: Did you not say that the Government were looking at it? What was the word you used?

Mr Kevin Mooney: Explore.

Lord Polak: They are exploring it. My view is that common sense will prevail. Let us hope that they feel part of the thing you are creating and on we go.

Mr Stephen Jones: Can I make a comment in relation to that question?

The Chairman: Yes, please.

Mr Stephen Jones: It is important to see that intellectual property, as we have discussed, is subject already to so many international agreements. They go back 100 years or more.

Lord Polak: Before the EU then.

Mr Stephen Jones: Well before that. We have the international Paris Convention for the Protection of Intellectual Property dating from 1883, of which practically every country in the world is a member nowadays. It is really not possible in this day and age, and has not been for a long time, to operate in an intellectual property system that is independent of everybody else's intellectual property system.

The Chairman: You cannot put national boundaries on it.

Mr Stephen Jones: Without getting into the pros and cons of leaving the EU, it is quite difficult to see that specifically leaving the EU would leave the UK free to do anything in the intellectual property space that it cannot already do, because it will continue to be bound by these international agreements, which operate to our benefit as well as everybody else's.

The Chairman: It is not a question of, with one spring, we are free. In fact, it will carry on as is but without our being a great contributor to the advancement of the arrangements internationally.

Mr Stephen Jones: In terms of the international elements, yes. These go way beyond the EU. They encompass countries all over the world.

Mr Kevin Mooney: I have been trying to think of any development in patent law that we are prevented from carrying out as a result of our membership, and I honestly cannot think of anything where I can say, "This would be a benefit. If we weren't there, we could change this, and that would be a good thing". Hand on my heart, I really cannot think of anything.

Q18 **Lord Judd:** Following on from this, if this dreadful thing is to happen, what would you, with all your background and experience, see as the best way of protecting British interests in the context of what has emerged?

Mr Kevin Mooney: Without a doubt, the best thing would be for the Government to succeed in their exploration, if I can put it that way. We become a fully participating member in both the court and the unitary patent, as Stephen has indicated. That is what I would say.

The Chairman: And that the argument is made clearly to people that this is beyond the European Union. This is actually a bigger project, and it is one that advances our trading capacity, our inventiveness, our creativity, and so on. Therefore, being part of the whole project is absolutely vital to our well-being and it need not be bogged down in the stuff to do with the European Union at all.

Mr Kevin Mooney: Exactly.

Baroness Neuberger: Or the court.

The Chairman: Or the court, save in the most minor of ways, and that is the reality of it.

Q19 **Baroness Ludford:** Turning to supplementary protection certificates for pharmaceuticals, in their patents no-deal technical notice, the Government said something that seems a little contrary. The existing system of supplementary protection certificates for pharmaceuticals “will ... remain in place, operating independently from the EU regime with all the current conditions and requirements”. This appears to be the recurring problem we have about reciprocity.

Under the EU withdrawal Act we can retain all we like of EU law, but if we are not in the EU and if we are not in the UPC, even if we Brexit, we will have an independent, self-contained UK system that will not be plugged into any reciprocal EU regime. So, there appears to be a little bit of smoke and mirrors going on there. Is there something I have not understood?

Mr Kevin Mooney: The UPC will have jurisdiction over SPCs as well as patents. If there is no deal, it will still be possible for the UK Intellectual Property Office to grant SPCs and for those SPCs to be enforced in our domestic courts. But it will not be possible to enforce a UK SPC in the UPC because we will be gone.

The Chairman: We will be out of it.

Mr Kevin Mooney: That is it.

Mr Stephen Jones: To add to that, the Government are saying that we will have to have an SPC regime. Broadly speaking, the supplementary protection certificate is that which in certain very particular areas, of which the most prominent one is pharmaceuticals, gives an extended term to the patent to compensate for delays in regulatory approvals. Because that is a system that operates throughout Europe, we are saying, as with many other things, that we are going to replicate that system domestically. It will be necessary for us to make sure that it has the same attributes and operates in the same way as the EU system, because it needs to deal with the same things and operate in the same way, but it will necessarily have to be a different thing.

Baroness Ludford: Sure, but, on its own, the statement that the existing systems will therefore remain in place is not true, because the existing systems depend on reciprocity and enforceability of our SPCs in courts in other member states. So, that statement on its own is a misnomer.

Mr Kevin Mooney: I am not sure that is fair. It is a UK right that is enforced in a UK domestic court. That situation will continue.

Baroness Ludford: Yes, but it is not the existing system, which is an EU system.

Mr Stephen Jones: Can I offer to write in about that, because we have some experts in SPCs?

The Chairman: It is a very particular subject

Mr Stephen Jones: It is quite complex. We can answer that question and it might be easier to do so if we write in, as you have invited us to do, after the session.

The Chairman: As a supplementary.

Mr Stephen Jones: We can specifically address how we see that working in the context of the Government's notice.

Mr Kevin Mooney: I think that is a very good idea, Stephen. I would add one thing for the future. You talked last week about unitary trademark rights and registered designs. There is a proposal to have a single unitary SPC. The problem is, if we are out, that we will have no part in the negotiation of that unitary SPC.

The Chairman: It is coming back to that absence of influence.

Mr Stephen Jones: Can I crave your indulgence to use that as a segue to talk briefly about trademarks and designs? Baroness Neuberger asked a question last week about whether it would be a good thing if we could add the EUIPO—the institution that grants trademarks and designs for the EU—to the list of European agencies in which we would like to participate after Brexit.

In fact, CIPA—the chartered institute—has written to the Government urging that very thing. We have written to the Prime Minister and to other Ministers. We would like the UK to be able to continue to participate. That would allow the current unitary systems for the protection of trademarks and designs to continue to operate after Brexit with the inclusion of the UK. Again, we think that would be in the best interests of business and the objective of the continuation of frictionless trade between the UK and the countries of the EU, because trademarks are obviously an important part of frictionless trade. The responses we have had to that indicate that it is certainly not something that the Government have ruled out. It is something that would have to be agreed on by the EU.

The Chairman: It is on the table.

Mr Stephen Jones: We think there would be advantages all the way round. Very importantly, if we are not part of the EUIPO, there is the question of representation rights of UK lawyers, trademark attorneys, patent solicitors, before the EUIPO. We think it is very important for British businesses to be able to continue to use UK practitioners before the EUIPO.

The Chairman: Their own lawyers. I can understand that.

Baroness Neuberger: As you are going to send us other stuff, could you send us a note about that?

Mr Stephen Jones: Absolutely.

Baroness Neuberger: It would be quite helpful to attach it to last week's evidence.

The Chairman: I am increasingly feeling that there is a very discrete little debate that we could have in the House in which we pushed the argument for this being dealt with as a very separate and pressing issue, and there is a role for us in that.

Lord Wasserman: We have discussed this. There is not an answer yet, which means it is all to play for.

The Chairman: It is all to play for. This has been a very useful session.

The Earl of Kinnoull: Going back to something Lord Judd said, there are two problems and I would like to understand how scared you are of them. The first is where we negotiate a deal and the European Court of Justice says, "Unfortunately, your membership of the UPC would not be compatible with the treaties". The second problem is nothing to do with us negotiating a deal but is simply that the German federal constitutional court had another go at the Grundgesetz, its loathing of delegation of power and says, 'Actually, the whole of the UPC is not compatible with the Grundgesetz'. Could you give us some view about how likely, with those two riders, which would be game over for all of this, they are to—

Mr Kevin Mooney: Let me deal with the constitutional complaint. It has been very disappointing that that has delayed the court coming into effect. The rumours that I heard in Venice over the weekend are that we hope to expect a decision in December and that it is likely to be favourable. I stress they are rumours, gossip and nothing concrete from the court.

The Earl of Kinnoull: But you are not very worried about it.

Mr Kevin Mooney: If that were to happen, the timetable for the court coming into effect could begin, and I believe the court would come into existence at the end of next year.

So far as the CJEU is concerned, there are academic views to say that it is impossible for a non-member state to participate in this project. I believe you were referred to two opinions from German academics last week. They take the view that it is not possible. They take 170 pages to express the view. If it were a simple matter that only EU member states can participate, I would not expect to have to read 170 pages. I understand they are going to be sent to you.

The Chairman: I might delegate the reading of that.

Mr Stephen Jones: Equally, there are opinions that say something different.

Mr Kevin Mooney: You will also get opinions to the contrary. It is not possible for somebody to say to the CJEU, "Is UK membership compatible with the treaty?", because that can happen only if there is an agreement between the EU and third states, and this is not such an agreement. So that is not something that can happen,

but if we have to come out after the court has come into existence we get into a very interesting situation. The court is in existence, we have participated, but we are no longer a contracting member state. I really do not know what is going to happen. The UK could voluntarily withdraw, or, I suppose, the Commission could compel the other member states to force us out. Neither is a very attractive prospect, frankly.

Mr Stephen Jones: Somebody else said earlier on, "Let's hope common sense prevails". I will stick with that.

The Chairman: Let us pray for common sense.

Q20 **Lord Judd:** As a complete layman, would I be wrong if I went away from this meeting saying that nothing I have heard from the two distinguished experts has reassured me that, if we were to come out of the European Union, there is any way in which the protection of patents will have been enhanced?

Mr Kevin Mooney: I would entirely agree. It will not be enhanced—rather the reverse.

Mr Stephen Jones: I think that is right. I would like to reinforce the fact that, fundamentally, the way we apply for patents at the moment and obtain them through the European Patent Office will not be affected, because, as we have said, that is not an EU thing. That is going to continue. That is, if you like, the good news.

The Chairman: That is a safety net.

Mr Stephen Jones: We maintain the status quo there. What we are talking about here is whether we can add on these other advantageous aspects of the Unified Patent Court and the unitary patent, and that is where there are uncertainties in the road ahead.

The Chairman: Let us imagine that situation. We leave but we are still part of the European Patent Convention. What is the final court of resolution if there is a dispute? You mentioned the different committees and the different quasi-courts that exist to deal with a contest of any kind. There is an appeal process to a bigger and grander committee.

Mr Stephen Jones: That is right.

The Chairman: Is that the final court?

Mr Stephen Jones: That is it. It is internal to the European Patent Office itself. It is established as an intergovernmental organisation in that sense. It is a pan-European organisation.

The Chairman: Do we have any British lawyers involved on it?

Mr Stephen Jones: Yes, absolutely. There are British members of the Boards of Appeal and British people working throughout the European Patent Office. It is a truly international organisation.

The Chairman: People will just sigh with relief, “At least it takes us outside the European Court of Justice. We can all pretend that there is not an international court involved”. Is that the reality?

Mr Stephen Jones: There is not, in the sense that those matters of substantive patent law that are within the European Patent Convention are adjudicated on by the Boards of Appeal of the European Patent Office, and their decisions are generally followed by the national courts, including our Supreme Court.

The Chairman: They are respected. There is, if you like, a convention of respecting the final decision.

Mr Stephen Jones: That is right.

The Chairman: I am really grateful. This has been a very interesting session. There was a politician who once said, “We’ve had enough of experts”. We have not had enough of experts: we need experts. The world needs experts because, by God, we would be in a bad place if we did not have them. Thank you both for your hard-earned expertise over many years. It has been very helpful to us; thank you.