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Fordham Conference 2015 – Global Patent Developments

Daniel Byrne (Bristows) · Wednesday, April 8th, 2015

The **Hon. Ryuichi Shitara** (Chief Judge, Intellectual Property High Court, Tokyo, Japan) gives an insight into the practice in Japan of Court-encouraged settlement. He explains that it is not compulsory for the parties to settle and the Court (composed of three judges) can attempt to encourage it at any stage. Late stage settlement is relatively common in patent actions in Japan where the Court is of the view that the patent is infringed and not invalid and expresses this view in private The Court may propose a settlement plan and, if the parties agree, the clerk will record the judicial settlement agreement and it will have the same standing as a judgment (although it will not be public). The headline rate for judgments is that 25% of patentees win their cases, but this does not take into account a win by way of settlement which pushes the figure to 45%. It is not clear to this blogger why some cases proceed to settlement and others proceed to judgment in favour of the patentee; what is it that distinguishes these two cases, given that the judges must be in favour of the patentee in both? Judge Shitara mentioned that the parties and attorneys have trust in the judges otherwise the system would not work, which it apparently appears possible to make progress even without both parties being in the room for the settlement discussions.

The **Hon. Roger T Hughes** from the Federal Court of Canada spoke about a peculiarly Canadian issue. He sketched out the example of leave to appeal being refused and a tenacious (pharmaceutical company) party who wants to blame someone and ends up blaming Canada. Not the courts or anyone else, but “Canada”, for not having jurisprudence which they regard as being helpful and in line with those of other countries. That party has tried to use international treaties as the hook to hang this on. It is currently up in the air and potentially arbitrated by people who do not know what they are doing. [Eli Lilly using NAFTA to claim CAN$500m]. In Canada there is a legal point about what is promised to be done with second medical uses and if the promise is not kept the patent is invalid.

Annabelle Bennett (Australian judge) mentioned that a similar thing had happened in Australia in relation to blank packaging where a supreme court decision went against the relevant party and now there is an international arbitration and Judge Bennett even suggested that the party had transferred rights to Hong Kong so as to be able to take advantage of the treaty.

Robin Jacob (declaring an interest as an expert witness for Eli Lilly) says that there must be a way to enforce the contract (the international treaty if it is for the benefit of a party).

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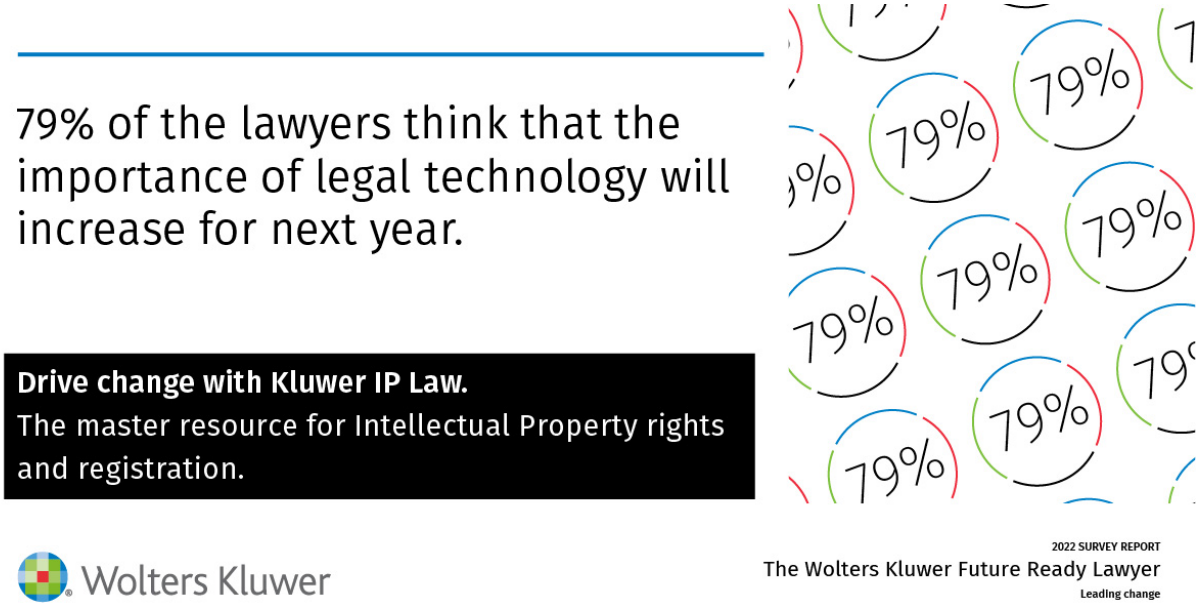

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