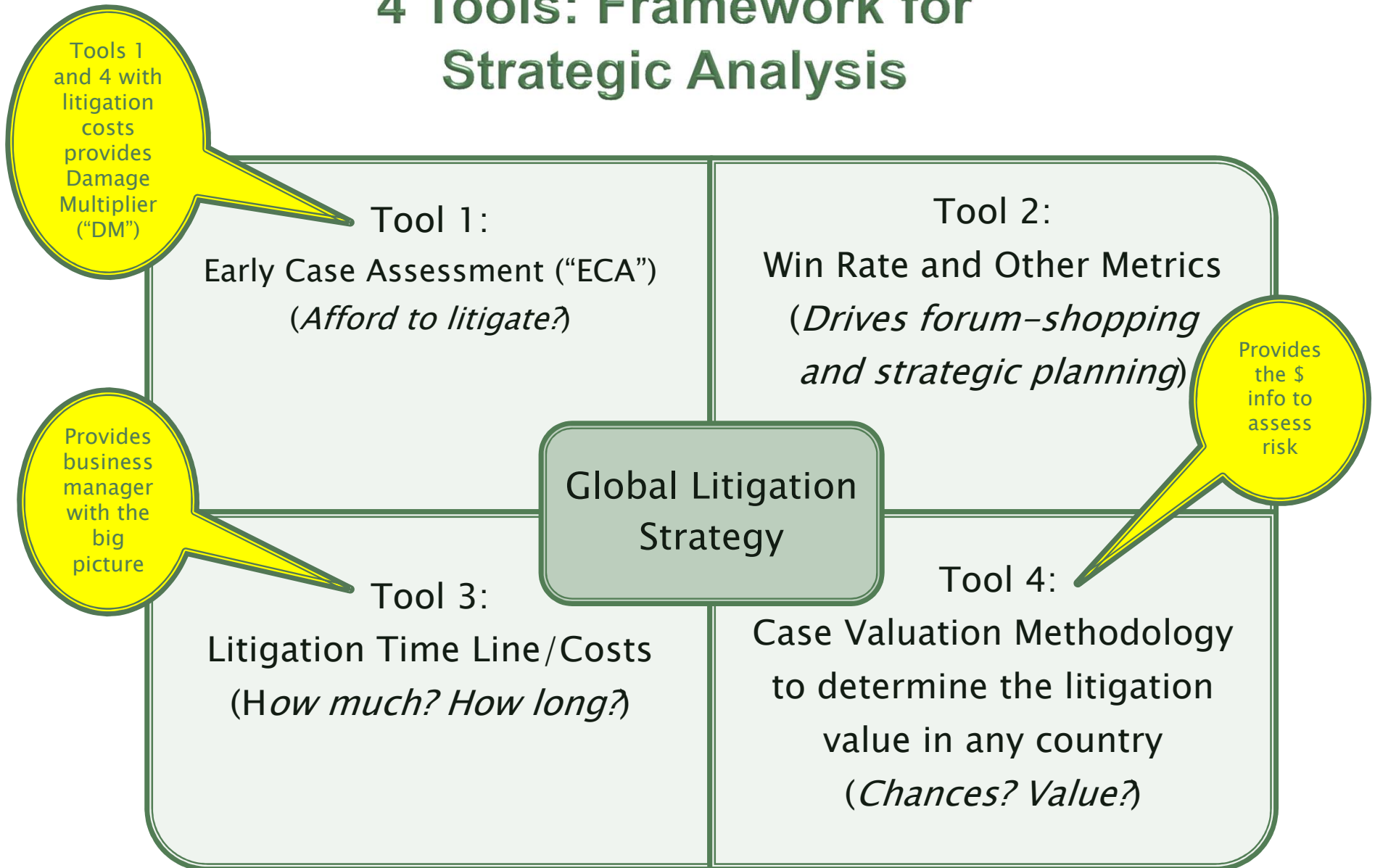


4 Tools: Framework for Strategic Analysis



Global Case Study – Applying 4 Tools

▶ **Patentee NetUS**

- California company that sells wireless phone chipsets worldwide
- Owns a key chipset patent that is believed to be literally infringed by ChinaWireless, NetUS's biggest competitor
- Has a licensing program for the patent; license rates are 10% of the net selling price of the entire chipset
- Has sales offices worldwide
- Has a 35% profit margin; has an incremental profit margin of 50%
- Is willing to assert its patent in all countries
- Would sue on January 1, 2013; Patent expires January 1, 2018

▶ **Infringer China Wireless**

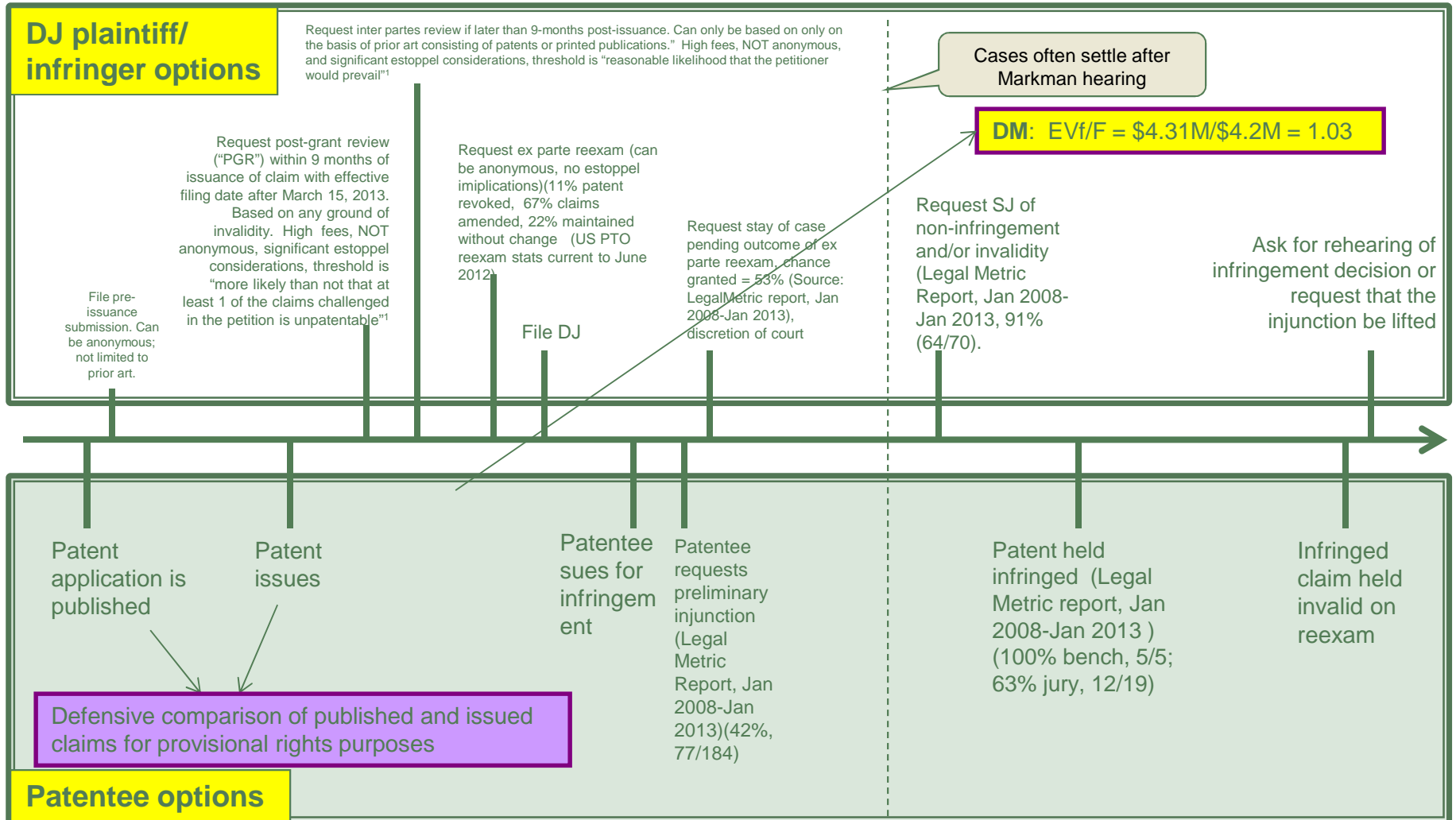
- Beijing company for whom litigation costs are not an issue
- Has an office in each of the countries where NetUS has a patent
- Has been selling the accused chipsets for at least 6 years
- Has a profit margin of 40%; has an incremental profit margin of 50%

▶ **Non-Infringing Alternative**

- London company which makes non-infringing chipsets
- Sales in all countries where NetUS has a patent

- ▶ **NetUS believes that ChinaWireless is infringing the NetUS patent. ChinaWireless has knowledge of NetUS patent worldwide, but has refused to take licenses.**

Tool 1: U.S. Early Case Assessment (ECA) for NetUS in CD CAL

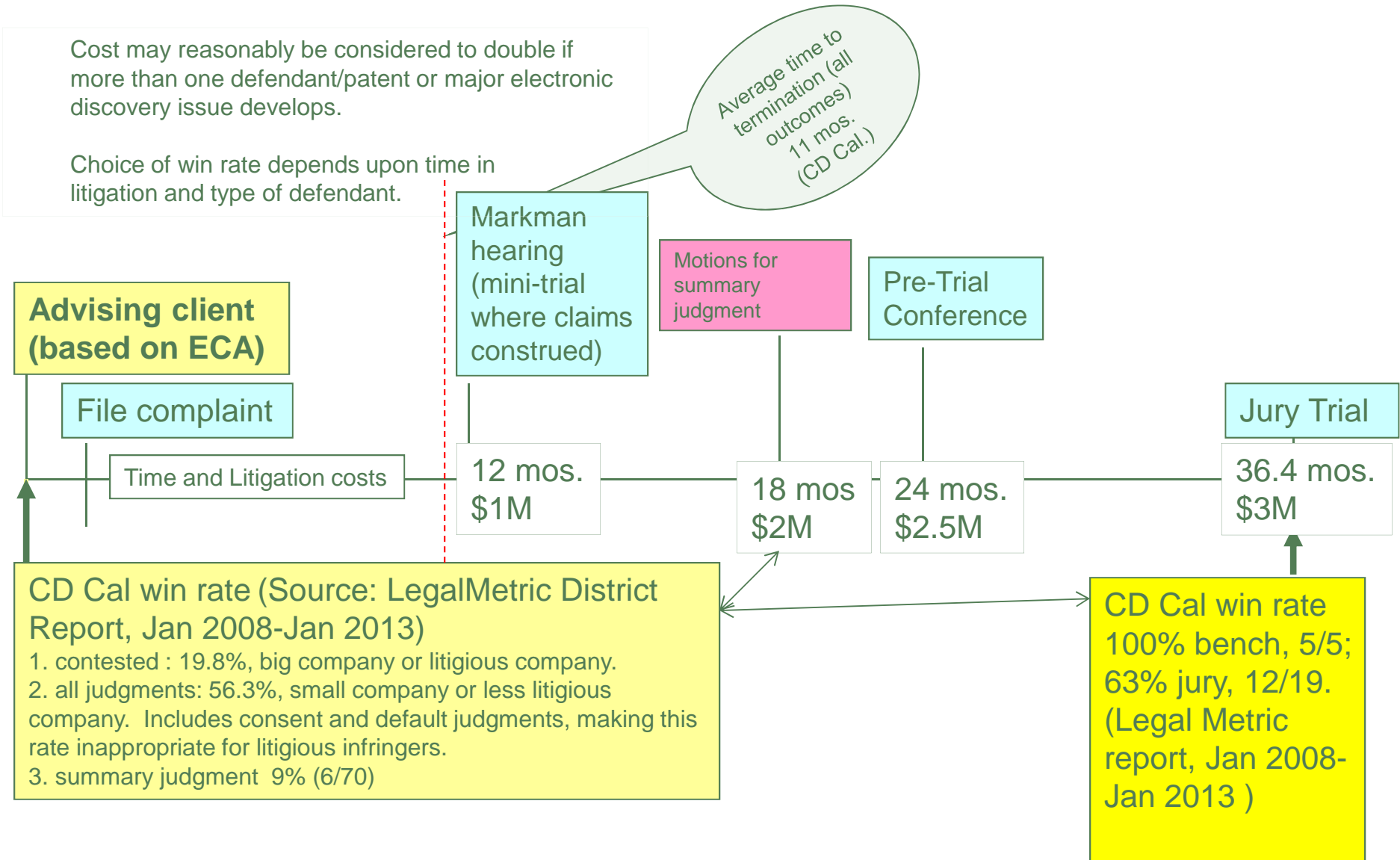


¹ No IPR/PGR if petitioner had previously filed a civil action challenging validity. (315(a)(1)/ 325(a)(1)). Civil action challenging validity filed by petitioner on or after date IPR/PGR petition is filed automatically stayed unless: Patent owner moves to lift the stay; Patent owner files action or counterclaim for infringement; or Petitioner moves to dismiss civil action. 315(a)(2)/ 325(a)(2). Counterclaim of invalidity does not qualify as a civil action challenging validity (315(a)(3)/ 325(a)(3)).

Tool 2: Win Rate and Other Global Metrics

Country (U/B CI/CO #trials for V/I/D)	Patentee win rate on first-instance decisions on the merits (2006–2011)	% of filed cases terminated by trial on the merits	Average time (months) from filing to first-instance decision on the merits	Average cost of first- instance proceeding (in U.S.\$)
China (B, CI, 2)	Design patents 85% (811/951); Invention patents 68% (188/277); Utility models 73% (321/439) (infringement only) (2007–2011)	Inf. Cases \approx 36% (890/2467)(2010– 11) Val. Chall. \approx 67%	9.9 infringement (2011 data from 6 sample courts) validity est. < 12	\$50,000–\$200,000
United Kingdom (U, CO, 2)	22% (20/92)	16%	16.2 (2006–2011)	\$1 million
France (U, CI, 1)	41% (146/360)	34%	30.26 (2006–2011)	\$150,000
Germany (B, CI, 3)	66% (494/746) (Düsseldorf only) (2007–2011) (infringement only)	Inf. Cases \approx 40%; Validity challenges at FPC \approx 90%	10–14 infringement 22 validity (2006–2011, FPC)	\$ 100,000 – \$500,000 infringement action and defending parallel nullity action
Japan (U, CI, 1)	22% (48/215)	26%	30 (2010–2011)	\$300,000–\$500,000
United States (C.D. Cal.) (U, CO, 1)	Overall win rate: 56.3% Contested win rate: 19.8% Bench trial win rate: 100% (5/5) Jury trial win rate: 63.2% (12/19) (Combined trial win rate 70.8%) (17/24) Winning: 100% Nationwide average: overall win rate 59%; contested win rate is 25.1%	2% (24/1385)	35.8 (2008–2013, 10 most active by 2012 filings, which account for 70% of the litigation filings)	\$3 million

Tool 3: NetUS v. ChinaWireless Timeline CD CAL Suit



Tool 4: The EV Equation

Expected Value = Win Rate x (A+B+C) – Lose Rate x (D+E) – F

- Win Rate = Probability Patentee Will Win
 - A = Expected Value of Past Damages Award
 - B = Expected Value of Future Remedy
 - C = Expected Value of Reimbursed Litigation Costs
- Lose Rate = Probability patentee will lose
 - D = Expected Value of Lost Licensing Revenues
 - E = Expected Value of Reimbursing Opposing Party Costs
- F = Costs of Going to Trial

EV Equation

Variables to be Considered

- Chances of Winning in Each Country
- Value of Winning in Each Country
 - Availability of different types of awards
 - Value of lost profits, reasonable royalties, injunctions
 - Probability of being awarded each option
- Costs of Litigation in Each Country
 - Average court costs and attorneys fees
 - Possibility of reimbursements of costs
 - Possibility of paying opposing party's costs
- Pre- and Post-judgment Interest
- Licensee Effects
 - Increased licensing revenues if win
 - Lost licensing revenues if lose

Strategic Analysis for NetUS Using ECA for Europe

Effectively single court:
Patent Court, London
(95% of cases)
annual patent litigation filings
~100

Single court: Paris
annual patent litigation filings
~350

12 courts for infringement
Dusseldorf
annual patent litigation filings
~1000 (but includes utility
models and unique German
filing system)
3rd busiest patent litigation
country behind China and US

1 court for validity
Federal Patent Court in
Munich

*Unified Patent Court may change everything.
Approved by European Parliament Dec 12, 2012, creates pan-European court system through which that right may be enforced in a single proceeding. 25 countries. Parties can opt-out for transition period. Must be ratified by at least 13 countries, which much include UK, Germany, and France. Central division (Paris, London, Munich) as well as local and regional divisions. Court of Appeal in Luxembourg.*

“First-Strike” Strategy

- ▶ **IN THEORY:** No *res judicata* effect of litigation outcome in one country on litigation outcome in another country (limited collateral estoppel).
- ▶ **IN PRACTICE:** Leverage power of first litigation outcome to settle disputes globally/other jurisdictions. Clients generally want to settle conflict globally.
 - Leverage historical win rate to increase case value.
 - First litigation outcome to settle dispute globally.



Develop patent enforcement strategies (“where sue first”) with patentee win rate in mind.

