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Patent Protection for Surgical Methods Under the European Patent Convention**

I Introduction

Article 52(4) of the European Patent Convention (the "EPC") excludes, *inter alia*, "methods of treatment of the human and animal body by surgery" from patent protection.¹ This exclusion, more so than any of the other methods of medical treatment exclusions, arguably, cuts right at the heart of why the exclusion exists in the first place. The Technical Boards of Appeal of the European Patent Office (the "EPO") have stated that generally the exclusion exists to free from restraint the activities of physicians (and, of course, veterinary practitioners) by patent monopolies when they treat their patients.² If one accepts this, then, the case is a fortiori for excluding methods of treatment via surgery from patent protection, because it is difficult to conceive of a surgical treatment that does not actively require the presence and, of course, intimate involvement of a surgeon (or surgeons) in the surgical procedure.³

However, inventors have still sought to patent surgical procedures notwithstanding the existence of the exclusion.⁴ The thorny issues relating to methods of treatment by surgery inevitably revolve around a consideration of whether the following, among other things, are excluded from patent protection: (a) a method of treatment that involves the death of the subject; (b) second medical uses of surgical instruments;⁵ (c) surgical methods of treat-

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1 See generally, D. THOMAS, "Patentability Problems in Medical Technology", 34 IIC 847 (2003); and R. MOUFANG, "Methods of Medical Treatment under Patent Law", 24 IIC 18 (1993).

2 This was first articulated by the TBA in T 116/85 *WELCOME/Pigs I*, at para. 3.7, [1988] EPOR 1, 20 IIC 188 (1998). The EBA in *EISAI/Second medical indication*, at para. 22, [1979-85] B 241 also pointed out that the intention behind the exclusion was only to prevent non-commercial and non-industrial medical and veterinary activities from being limited by patent monopolies.

3 See generally, P. LACON, "Patentability in the Field of Therapy and Diagnosis", 22 IIC 893 (1991); W. DE SMET, "Patentability in the Area of Therapy and Diagnosis under Belgian Law", 22 IIC 888 (1991); K.E. PANCHEN, "Patentability in the Field of Therapy and Diagnosis", 22 IIC 879 (1991); P. PENNANT, "Patentability of Medical Treatment", [1981] 2 EIPR 64 and D. THOMAS, "Patentability Problems in Medical Technology", 34 IIC 847 (2003).

4 R. MOUFANG, *supra* note 1, at 36-40.

5 This aspect will not be discussed in this article. However, for an exhaustive consideration of this issue, see E.D. VENTOSE, "No European Patents for Second Uses of Devices or Instruments", (forthcoming in the EIPR).

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