

CEIPI Colloque 2012

What kind of Representation before the UNIFIED PATENT COURT?

To start with, a few answers:

A first answer: The best possible

Another answer: The representation the party wishes for.

A third answer: An experienced attorney who knows the court and its rules of procedure well.

What do the statutes of the Unified Patent Court say on Representation?

Article 28

- (1) Parties shall be represented by lawyers authorized to practice before a court of a Contracting Member State.
- (2) Parties may alternatively be represented by European Patent Attorneys who are entitled to act as professional representatives before the European Patent Office pursuant to Article 134 of the EPC and who have appropriate qualifications such as a European Patent Litigation Certificate.
- (2a) Representatives of the parties may be assisted by patent attorneys who shall be allowed to speak at hearings of the Court in accordance with the Rules or Procedure.
- (3) The requirements for qualifications pursuant to paragraph 2 shall be established by the Administrative Committee. A list of European Patent Attorneys entitled to represent parties before the Court shall be kept by the Registrar.

It should be noted first of all that patent infringement cases as well as patent invalidity cases will be heard before a new type of specialised European Patent Court, with international panels of judges, also technical judges. This is the more relevant, because it is envisaged that before the new court infringement and validity issues, also in the form of invalidity counter-claims, will be dealt with together, in order to expedite the proceedings. The court will also deal with a number of legal issues, such as licensing, however not with ownership issues.

The number of cases heard before this court in the beginning will not be very high, perhaps one third of the about 1200 cases we nowadays have in Europe. There will be time to gather experience. On the other hand multiple litigation and associated costs will be avoided.

As regards representation, paragraph 1 is straightforward: Any lawyer practising in a Contracting State irrespective of his expertise in patent dispute matters. The clause mirrors today's situation in the Member States. In litigation proceedings before national civil courts – if we disregard criminal proceedings which are possible in some countries - representation by an attorney at law is up to now mandatory, for historical reasons due to national civil laws, the only exception being the Patents County Court in the UK. Before this court patent attorneys can represent parties on their own.

Paragraph 2 of Article 28 refers to an *alternative*, allowing European Patent Attorneys to represent a party on their own, however demanding an appropriate qualification, such as a European Patent Litigator's Certificate. The requirement for the qualification will be established by a Mixed Committee on the basis of proposals from the Commission of the European Communities. A list of qualified European Patent Attorneys shall be kept by the Registrar.

Why is this possibility foreseen for the Unified European Patent Court? It is well known that patent attorneys, due to their basic scientific-technical background and their additional legal training required for the patent attorney's examination, play a major role in litigation proceedings. It is current practice in most countries today that patent attorneys accompany attorneys at law during the whole proceedings, from the drafting of an opinion on the alleged infringement, via the procuring of evidence, the preparation of the writ, the participation in oral court hearings, and so forth. The alternative representation is of advantage also because parties can remain with their attorney who knows the case already and will not have to instruct another attorney from the scratch.

In those countries where patent attorneys moreover enjoy a statutory Right of Audience, as provided for in paragraph (2a) of Article 28, patent attorneys can address the court in oral proceedings. Although they are not allowed to plead and as a rule cannot examine witnesses, or only if allowed by the judge, practice has shown that involvement of patent attorneys render these the proceedings more effective, especially in complex technical cases. In The Netherlands and Austria for example, the right of audience is a statutory right in the patent

attorney's law. It goes without saying that the right of audience for European Patent Attorneys should be observed by all national courts in Europe.

Moreover, in a number of Member States of the European Union (European) patent attorneys have traditionally and by law been able to represent on their own, not only in invalidity proceedings, but for example also in actions for declarations of non-infringement, before national courts or court like authorities. To mention a few examples: in Germany patent attorneys can act before the German Federal Patent Court and in Austria before the Patent Office and the Supreme Patents and Trademarks Senate which is accepted as a court by the Court of Justice. Representation rights also exist in other countries, such as Hungary, Poland and the Netherlands, to name a few.

Now, turning to the *European Patent Litigators Certificate*, this means that European Patent Attorneys may acquire additional skills to perform representation. Additional skills, however, will only be the minimum requirement. Experience and continued professional education will have to come with them.

Currently about 10.000 European Patent Attorneys active in industry and in the free profession are registered as professional representatives before the European Patent Office. They represent parties before the Boards of Appeal, whose Chambers act according to common Rules of Procedure, hear witnesses and experts, like other civil courts, and conduct the proceedings in any of the three official languages. The Boards of Appeal moreover have an international composition from a pool of independent judges, also technical judges that cannot be removed from office. Thus, the Boards of Appeal form a unique court-like pan-European institution. We might even consider them a sort of first instance Unified European Patent Court, when it comes to ruling on the validity of European and future unified (Community) patents. It is envisaged that members of the Boards of Appeal will become technical judges in the new European Court.

It is quite evident, on the other hand, that not all of these European Patent Attorneys will be interested in acquiring a Litigator's Certificate, but only those who have a keen interest in dispute proceedings. We face a similar situation today as concerns attorneys at law. Although theoretically any one can act in patent litigation disputes, in practice we see only a relatively

small number of attorneys at law specialising in this field in which they have to master the technical complexity of the patents involved, moreover in perhaps three different languages, if we take documents relating to European patents into account, which is not to everybody's liking.

Now, if patent attorneys are to conduct proceedings on their own, also as regards pleading, contractual matters and hearing witnesses, they will quite clearly not only have to master the Rules of Procedure of the Unified European Patent Court, but also evidence an appropriate additional legal training, and perhaps thereafter regular continued professional education, in order to maintain the required level of qualification.

How would one go about the training for a litigator's certificate from the practical side?

First of all, I should mention that Litigator Certificates for non-lawyers are not new; such Certificates already exist for patent attorneys, for example in the UK, where CIPA Fellows, i.e. full members of CIPA, can take the appropriate training and examination at the Nottingham Law School (University).

Training for the European Union Patent Litigator's Certificate will have to encompass knowledge of all relevant European and international laws governing patent infringement, a thorough knowledge of European Procedural Laws as well as basics of civil, contractual and competition law.

The CEIPI and the epi, the representative body of all European Patent Attorneys, are organising a Diploma Course on Patent Litigation in Europe, which now is in its 9th year. Up to now more than 300 European Patent Attorneys have taken the course. The aim is to acquaint Patent Attorneys on the list before the EPO with all aspects of patent litigation procedures in Europe and of the future centralised proceedings, as well as with the related civil laws and rules of procedure. This knowledge is of benefit for EPO proceedings too.

The Course which at present comprises seven modules of training at the CEIPI in Strasbourg ends with a Diploma of the University of Strasbourg after a Control of the knowledge acquired. It could be considered the basic training for obtaining a European Patent Litigator's

Certificate. The Curriculum of the Course includes knowledge of the fundamental principles of EU law and EU Harmonisation, such as the analysis and application of various Directives and Regulations, the Relations between national IP rights and EU Law, the structure and working of the European Court of Justice, EU Law on Enforcement, the draft European Union Patent Court Statute and its draft Rules of Procedure, the principles of Continental Law and Common Law, and practical procedures across Europe, to name just a few of the topics.

In addition to the foregoing other topics will in the future have to be included, such as EU Principles on applicable laws, case law analysis regarding the free movement of goods, competition law, laws on counterfeiting, the European Human Rights Convention as well as case law of the European Court of Human Rights in Strasbourg, Rules concerning Professional Rights of Litigators / Representatives on EU level as well as concrete case law relating to existing Patent Litigation in Europe.

The CEIPI has in the past already discussed the issue with the European Commission and would be in a position to draft and provide the appropriate Curriculum for a European Union Patent Litigator's Certificate. It could also organize relevant courses and seminars to obtain the Certificate. It goes without saying that the former participants of the Litigation Course expect that the Mixed Committee will take into account their Diploma when establishing the bar for the European Union Certificate. Undoubtedly, the Mixed Committee will also take into account competence acquired elsewhere.

As mentioned in the beginning, paragraph (2a) of Article 28 comprises the right of audience for patent attorneys. This right will allow patent attorneys to become active in patent disputes by assisting the party's representatives, who may be an attorney at law or a European Patent Attorney Litigator, and to speak in hearings of the court. The right according to the Draft Rules of Procedure will be accorded to all European Patent Attorneys on the list before the EPO.

Rule 336 refers to the Patent Attorney's right of audience.

1. For the purpose of Article 28 (2a) of the Agreement, the term "patent attorneys" assisting the representative referred to in Article 28 (1) of the Agreement shall mean persons meeting the requirements of Articles 134 (1) or (3) (a) to (c) of the EPC.

2. Such patent attorneys shall be allowed to speak at hearings of the court subject to the representative's responsibility to coordinate the presentation of the party's case.

This right is of decisive importance. As the future international court panels will avail themselves of technical judges, who are considered the counterpart to the patent attorneys in the hearings, the involvement of patent attorneys in oral hearings guarantees that all technical aspects of the case can be discussed in depth. After all, any legal argument must be based on the underlying technical facts of the case. The situation can be compared to the appearance of European Patent Attorneys before the Boards of Appeal of the EPO. In general, the active participation of European Patent Attorneys in infringement proceedings increases legal certainty and shortens proceedings, which in turn reduces costs.

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