

First year of the Unified Patent Court

Interview with **Klaus Grabinski, President of the Court of Appeal** and
Florence Butin, President of the Court of First Instance



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President of the Court of Appeal



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How would you sum up the first year of activity of the Unified Patent Court and what are the highlights for you?

Klaus Grabinski: The central function of the UPC is to adjudicate disputes concerning European patents. It was a personal highlight to have been the judge rapporteur and the presiding judge in the first appeal proceedings of a preliminary injunction case of the Court. Working with the other judges on the bench who come from different European jurisdictions and have different backgrounds,

both legal and technical, was very pleasant and effective. Additionally, the interaction with the parties and their representatives during the written procedure and the oral hearing worked quite well given the fact that an action for a preliminary injunction is adversarial litigation.

Florence Butin: For me the moment from this starting period that I will always remember is the oath-taking ceremony. It really was a “team-building” process for all of us, reflected by the very encouraging messages we received after that event. It remains a strong source of energy and inspiration. As is the case for any

organisation, the human component is definitely the most important.

The latest caseload figures indicate that the new court is a success. However, were there times when the legally qualified judges and technically qualified judges faced specific challenges?

FB: Of course, there were and still are. It is a continuing process of improvement. The judges had to first familiarise themselves with a completely new framework, and – for most of them who are appointed on a part-time basis – to combine it with their respective national activities. For those who have been allocated to panels in several divisions, it means a lot of travel time, and conflicting schedules and commitments. Regarding these managerial aspects, together we tried out the most suitable solutions to make the system work. I have extensive discussions – within the Presidium and with the judges – before taking certain decisions, and this consultation is always very helpful. For those divisions faced with a particularly heavy caseload, the challenge of course is to handle these cases in such a way that the expectations of the users are met. More specifically with the TQJs, the first step was to implement an efficient process for assessing the technical field required for the case and for the conflict-of-interest checks, which is now in place.

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KG: The latest caseload figures are indeed encouraging as they reflect the willingness of stakeholders to use the UPC to assert their rights. However, I would not consider this to be the decisive criterion for the success of the court. For me, the crucial factor is rather whether the UPC will succeed in developing a body of case law that will provide clarity and certainty in European patent matters for all stakeholders and any other members of the public who are interested in these matters. I would consider this to be one of the main challenges for both the legally and technically qualified judges of the UPC.

Some divisions of the Court of First Instance have a significant number of cases, while others are still awaiting their first case. How do you see this disparity and what should we expect in the future?

KG: The UPC Agreement provides that actions for infringement can be brought either in the Local or Regional Division at the place where the defendant has its seat or at the place where the infringement has occurred or may occur. Given that infringements of European patents may occur in multiple or all Contracting Member States, patent proprietors can often choose in which Local or Regional Division they wish to bring the infringement action. In practice, they often seem to prefer Local or Regional Divisions at places where they had brought infringement actions in the respective national courts before the UPC was operational. However, as judges from Contracting Member States where few patent infringement cases have been brought in the past gain more experience within the UPC, I am confident that future claimants will also bring infringement actions in Local or Regional Divisions located in these Contracting Member States.

FB: This situation actually reflects to some extent the caseload of national courts before the UPC began operating. So, it is not a

surprise. We can expect developments in that regard because the rules of procedure offer some flexibility regarding the competence of the respective divisions. It may therefore be that in the future claimants consider the option of bringing their action in divisions that have a lower caseload. The operation of the Court is under observation, and the users' strategies will evolve in response to these early experiences.

A few important decisions have been issued by the Court of Appeal. Do you feel that there is a certain amount of pressure on the UPC to clarify its practices, both in terms of substantive patent law and procedural practices?

KG: It is the role of the Court of Appeal to ensure a uniform application of the UPC Agreement and the Rules of Procedure across all Divisions of the Court of First Instance. Procedural appeals under Rule 220.2 and discretionary reviews under Rule 220.3 enable the Court of Appeal to make decisions even before cases have been adjudicated on the merits at first instance. In this way, the application of certain procedural provisions could already be clarified by the Court of Appeal in the UPC's first year of existence. I would not characterise this mechanism as "pressure" but rather as the legitimate use of a remedy provided by the UPC Agreement and the Rules of Procedure.

FB: It is in the interests of the system that clarification be provided, especially where different views are possible – regarding for example access to files, confidentiality, extension of time limits, competence issues – which is very often the case in any newly implemented legal framework. It shouldn't be regarded as pressure. Rather, it is the usual process that we have all experienced in our national activities. The Court of Appeal will provide the necessary guidelines and interpretation to harmonize our caselaw in particular regarding the application of the

Rules of Procedure. While it is true that the RoP are being used for the first time, substantive patent law has already started to be harmonized as part of our European legal environment (EU regulations and the EPC). But procedural steps are often crucial in a dispute, and so these first decisions from the CoA are eagerly anticipated.

The language of proceedings has been a "hot topic" for some time. What is your view on current trends regarding the language of proceedings, and do you anticipate a significant increase in the use of English in the near future?

KG: Claimants in infringement actions currently can opt in all Local Divisions for the official language of the Member State hosting the Division or for English as language of proceedings. As the decision to designate English as alternative language was taken in some Member States only a few days before 1 June 2023 when the court became operational, many claimants initially filed their infringement actions in the official language of the hosting Member State to remain on the side of caution as they could not be sure whether English would also become an option. Since then, the situation has changed and a slow but steady tendency to choose English as language of proceedings has been noted. If defendants do not agree with a claimant's choice of the language of proceedings, they may require the President of the Court of First Instance to decide on the use of the language of the patent on grounds of fairness and considering all relevant circumstances. The Court of Appeal has recently issued a decision clarifying the application of the respective provision in the UPC Agreement.

FB: If we consider the sum total of proceedings currently being handled, 50% are in English while the most frequent "local" language is German (44%). If we disregard actions that must be brought in the language of the patent before the Central Division, approximately 40% are in English, 53% in German and the last 7% in French, Dutch and Italian. In comparison

with the same items registered in December 2023, 31% of the infringement actions were lodged in English at that point in time, so we can already see some changes, which should become more apparent over the coming months. The parties will also determine the language of their proceedings with regard to the current case law on language change requests, and in particular to the first decision rendered by the Court of Appeal in this matter on 17 April 2024 which provides clarification on valid reasons for allowing such a change. I would expect a more widespread use of English because any circumstance facilitating the functioning of the Court also serves the interests of the parties and in particular the claimant, who has first to choose the language of the case. English indeed means that the constitution of the panel – including the TQJ should one be needed – will potentially involve any judge of the pool and consequently ensure a better distribution of the workload among them, along with a broader choice regarding the field of technology.

Looking ahead to the future, what are your hopes and aspirations for the UPC in the upcoming months and years?

FB: At the first-instance level, my wish is to build a complete administrative framework including all the support the judges can expect to make their judicial work easier, and to ensure that their working time can be adjusted when necessary. To me it is also very important that the UPC be perceived as an international court, rather than being composed of “national” divisions. Maybe the implementation of other regional divisions in the future would contribute to this process.

Finally, it would make me very happy to see the UPC illustrate the strength of European Union, and to see other Member States join us.

KG: It has only been a year since the UPC Agreement entered into force. Since then, a considerable number of orders and decisions have already been published on the Court’s

website. I expect the court to develop a body of case law that will aim at providing greater clarity and certainty in the field of patent law in the years to come. The further harmonization of European patent law is another important point of reference to be mentioned in this context.

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