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Hybrid Status of Foreign Court Expert Opinions in Swiss Patent Litigation

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The *numerus clausus* of legally permissible pieces of evidence in the new Swiss Civil Procedure Code (CPC) – unlike in many other codes of civil procedure – does not provide for private expert opinions. Only court-appointed expert opinions are foreseen in the CPC. The question therefore arises, how the new Swiss Patent Court should deal with court-appointed expert opinions requested by a foreign court (mostly, they originate from foreign legal disputes concerning the same subject matter) submitted by the parties: Are such expert opinions merely allegations of the parties, though thoroughly substantiated ones, or can they be accepted as valid pieces of evidence under certain conditions?

In a recent case the Swiss Federal Patent Court had to evaluate two court-appointed expert opinions requested by a foreign court from foreign parallel proceedings which had been submitted by the defendant. From the 300 pages thick expert opinions the defendant had only inserted some portions of the conclusions into its brief.

The Swiss Patent Court held that foreign court expert opinions have a hybrid status between mere party expert opinions and court-appointed expert opinions. However, as a general principle, court expert opinions from foreign litigation shall be treated like party expert opinions. They do not have full probative value.

In the decision of 3 May 2012 (BPatGer [O2012_022](#)) the Swiss Patent Court held that the submitted opinions do not constitute mere party-appointed expert opinions as they were not commissioned by the defendant. Neither do they constitute tribunal-appointed expert opinions in the sense of the CPC since the opinions were not ordered by the tribunal which had been invoked by the parties in the present case.

Although the Swiss Federal Patent Court qualified the expert opinions requested by a foreign court as documentary evidence, the court stated that it is important to insert all the facts described in the opinions into the respective brief, otherwise the defendant cannot refer to them. Consequently, the foreign-court requested expert opinions were only admitted with regard to the conclusions which the defendant had inserted into its submission.

Although in this case expert opinions from foreign parallel proceeding were to be assessed, the Swiss Federal Patent Court mentioned several times that as a general principle the rules governing party expert opinions also apply to expert opinions requested by foreign courts.

If an expert opinion should be required in a Swiss patent case, a court expert has to be appointed. Private and foreign-court requested expert opinions can only be introduced into the litigation if their wording of these opinions has been inserted into the briefs. It is not sufficient to generally refer to the content of the expert opinions. The disputed facts have to be inserted and described as concrete as possible. Even if a foreign-court requested expert opinions cannot be formally accepted as a form of evidence, they can nevertheless help to raise doubts e.g. about an opinion rendered by a court expert. Finally, in many cases the statement of the facts remains uncontested and only the legal conclusion will be disputed. In such a case, a foreign expert opinion can be helpful as well.

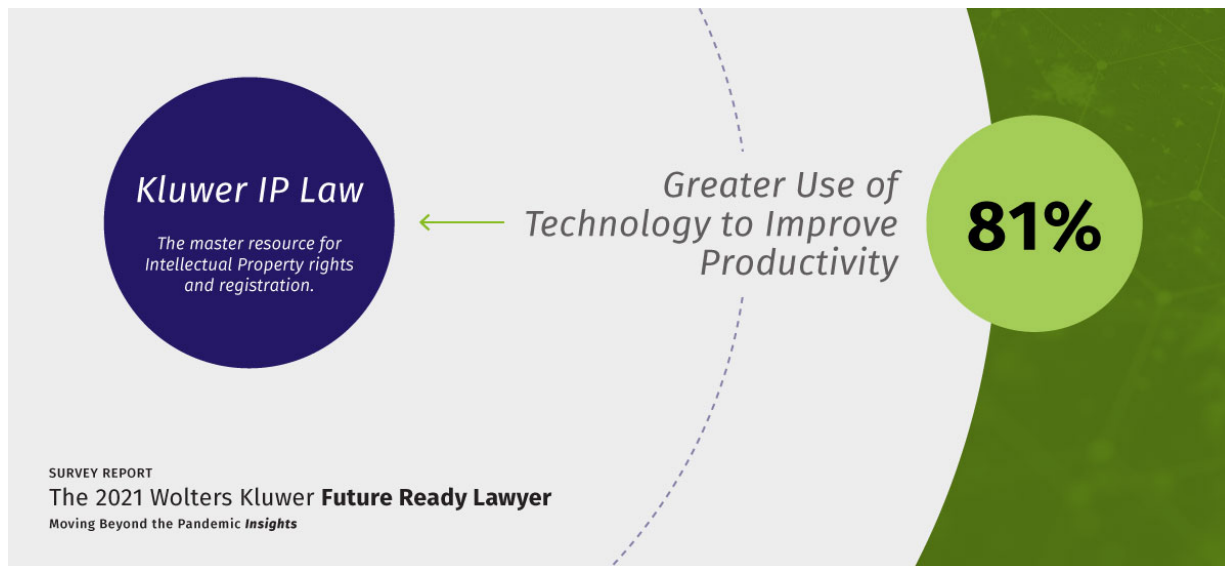
In short, party expert opinions as well as expert opinions requested by foreign courts are not recognized as pieces of evidence with full probative value in Swiss patent matters. However, under certain circumstances they can still be useful.

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