

Chairman Between the Chairs -The Decision of the Enlarged Board of Appeal R0012/19-

Kluwer Patent Blog
July 18, 2014

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Please refer to this post as: Thomas Musmann, 'Chairman Between the Chairs -The Decision of the Enlarged Board of Appeal R0012/19-', Kluwer Patent Blog, July 18 2014, <http://patentblog.kluweriplaw.com/2014/07/18/chairman-between-the-chairs-the-decision-of-the-enlarged-board-of-appeal-r001219/>

Almost everyday someone posts something about the Unified Patent Court or a seminar is offered about the "newest" developments. In fact nobody is able to predict whether the system will "work". It is said that in order "to be successful" the system needs to be efficient, speedy and affordable. It is also said that it will largely depend on the qualification and experience of the future UPC judges whether the UPC will be accepted by its "customers". While this is certainly true to some extent one should keep in mind that it is up to the lawmaker to provide the rules for the proceedings balancing efficiency with justice and -at least evenly important- to provide sufficient funds for the system. Making a system popular is a matter of policy and/or marketing. Judges should not be involved in this. They should not consider the interest of "the system" in making a decision but only rules of law governing the case and the facts.

A recent interlocutory decision of the Enlarged Board of Appeal (EBA) provides an opportunity to remember this and to consider a reform of the EPC institutions.

It has been practice for years that the duty of chairing the Enlarged Board of Appeal must be carried out the Vice- President of the Directorate General 3. The Vice-President of GD3 appears on EPO's website as a member of the Management Committee.

A petitioner filed a petition for review of a decision of the Technical Board of Appeal with the EBA arguing a fundamental violation of its right to be heard. At the same time the petitioner objected to the Chairman of the Enlarged Board of Appeal on grounds of suspected partiality under Article 24(3) EPC.

In its interlocutory decision R 0019/12 the EBA agreed with this objection. The reasoning is quite remarkable. It considers not only the dual function of the Chairman as member of the Management Committee and Chairman of the EBA as sufficient reason to suspect partiality of the Chairman, but criticizes constitutional deficiencies of the organization as such which are well founded.

The EBA stated that

"It cannot be refuted that the integration of the board of appeals in the Office in terms of organization, location and with the dual function of the VP3 also in terms of staff indeed shows a certain constitutional deficit compared to the requirements of legal systems of democratic states for the status that must be granted to courts and their judges to ensure the fundamental right of the citizens to effective legal protection against actions of executive powers by courts independent thereof."

In its conclusion the EBA found:

"If one must tolerate, notwithstanding the existing reservations, the structural weaknesses of the organization of the Boards of Appeal with their integration in the Office, which cannot be changed according to the present-day configuration of the EPC, then it appears all the more necessary to release as far as possible the direction of the judicial institution embedded in the Office from active involvement in management panels of the Office, in particular of the President, to avoid as far as possible the impression of the judicial instance intermingling with the actions of the Office or a participation in the implementation of interests and goals of the Office. In this respect, however, with the VP3 participating in the GAC and his participation without any proviso in the MAC, one can rather observe a trend in the opposite direction."

The EBA concludes that

"A reasonable, objective, and informed person might rather have good reason to fear that the Chairman might possibly not exercise his judicial functions without being influenced by requirements which are referred to him being the VP3, in particular in the scope of his participating in the panels indicated."

The criticism of the EBA should be taken serious. The constitutional deficiencies of the office organization and the integration of the TBA may sooner or later be challenged in front of national constitutional courts. They also play a certain role in Spain's challenge of the UPC-system. Let us hope that at least the UPC system will not suffer from comparable constitutional deficiencies and that judges will only be required to apply the law and not to attract customers.