

Kluwer Patent Blog

Quo usque tandem, Battistelle

Thorsten Bausch (Hoffmann Eitle) · Monday, December 11th, 2017

The European Patent Office has been established by an international agreement, the European Patent Convention. All functioning patent systems that I am aware of are based on a structural principle that is basically simple: There is a patent office that receives and examines patent applications and grants patents for those that satisfy the requirements of the applicable patent law, e.g. the EPC. And there is a court or a court-like instance that checks whether the patent office has done its job right. This is classic separation of powers and ensures that everybody lives under the rule of law, rather than under the rule of a king, a dictator, or an authoritarian President who understands his powers as absolute and detests control by whomsoever. Unfortunately, our world is quite full of the latter sort.

Control by others, e.g. courts, media, or the public, is not always easy to accept for those in power. But it is inevitable if we want to live a civilized life. Control by a court or a court-like instance, such as the Administrative Tribunal of the International Labour Organisation (ILO), may sometimes be particularly difficult to accept, particularly if and when you believe that you are right and no one else is. I have some sympathy with this feeling, but not too much. As a European Patent Attorney, I am also occasionally confronted with decisions that I find utterly wrong and sometimes even unfair to the party I have been representing. But such is life as a representative before the (European) Patent Office or before court. Even being a successful attorney implies that you must learn to lose. Justice and civilization cannot properly function if you always win. Of course, I want to win each of my cases, but in the long run we all have to learn to live with being defeated, whether we like it or not.

The President of the European Patent Office is a powerful person, no doubt. But he is not above the law, and he should not be. It must be possible that courts or tribunals set limits to his powers and at times even vacate decisions that he has made. The same is true for the Administrative Council. Both the President and the AC are bound by the European Patent Convention, which has to be interpreted, as the case may be, by an independent court or tribunal.

Let us now turn to a practical example. Art. 13 EPC stipulates the following:

- (1) Employees and former employees of the European Patent Office or

their successors in title may apply to the Administrative Tribunal of the International Labour Organization in the case of disputes with the European Patent Organisation, in accordance with the Statute of the Tribunal and within the limits and subject to the conditions laid down in the Service Regulations for permanent employees or the Pension Scheme Regulations or arising from the conditions of employment of other employees.

What does this mean? Does this mean that employees have the right to apply to the Administrative Tribunal, but once the Administrative Tribunal has issued a judgment in their favour, the EPO does not need to care about it?

In my humble opinion, this cannot be right and is certainly not what the contracting states had in mind. If a case is brought before the ILO, the ILO's judgment has to be observed, full stop. Otherwise, we need no ILO and Art. 13 would be toothless, empty and nonsensical.

However, if a most recent report by Kieren McCarthy on theregister.co.uk is correct (which has meanwhile been confirmed by the Staff Union of the EPO (SUEPO), the [Irish Times](#) and others), the President of the EPO has refused to allow the Board of Appeal member whom he had "banned" from the office, access to the EPO premises and, presumably, all the other remedies ordered by the Administrative Tribunal of the ILO, despite the decision by the Administrative Tribunal of the ILO to reinstate him immediately, on which I reported [last week](#).

I respectfully submit that this is nothing less than a scandal.

To be clear, I have no view about what Mr. Corcoran (identified by McCarthy and the [Irish Times](#) as the Board Member in question) actually did and whether he would have deserved such a penalty. Maybe his [house ban](#) might even have been justified, maybe not. This does not matter. What matters is that proceedings have been instituted and the matter has been brought before a neutral tribunal, exactly as provided in Art. 13 EPC. This tribunal annulled the decisions by the Administrative Council and the President against Mr. Corcoran and ordered the EPO to immediately reinstate him in his previous position.

The tribunal's decisions must now be observed and executed!

My recent [Nicholas blog](#) about the most recent ILO decisions included a caveat which I thought was perhaps a bit naughty. I wrote that "the EPO will now have to reinstate the Board Member in its previous position and pay him moral damages totalling at 25,000 EUR. Provided that it observes the ILO's verdict."

When I wrote this, I felt that one could not rule out that the EPO would NOT observe the two judgments from the ILO, but had you asked me, I would have told you that, nevertheless, I did not seriously believe that an EPO President could go as far (and as low) as this.

In my personal view, this amounts to an open breach of the European Patent

Convention by the President of the EPO, for which the President should be held accountable.

The EPO's Administrative Council has also not covered itself in glory by ordering the "suspension" of Mr. Corcoran in 2014 and confirming it in 2015 up to the end of "disciplinary proceedings". At least in my humble opinion, a suspension for a time period of several years is tantamount to and indistinguishable from a "removal from office", particularly if one takes into account that EPO Board of Appeal members are only appointed for an (extendable) term of five years. For a removal, Art. 23 EPC requires a decision by the Administrative Council "on a proposal from the Enlarged Board of Appeal". However, the Enlarged Board of Appeal [has never made](#) such a proposal.

Be that as it may, at least for now, i.e. after the ILO Administrative Tribunal's decision, there is no legal basis for sustaining the Administrative Council's decision for the suspension of Mr. Corcoran one more minute; on the contrary, it should be immediately lifted. In fact, the AC should never have made such a decision without a proposal by the Enlarged Board of Appeal.

If a recent report by [JuVe](#) is correct - and they are normally well informed - then Mr. Corcoran has not only won his cases before the ILO, but also before the Regional Court of Munich and the Office of the State Prosecutor in Munich. This is at least what Mr. Corcoran's attorney told JuVe: "Denn durch die beiden ILOAT-Urteile und diverse Entscheidungen des Landgerichts München und der Staatsanwaltschaft München wurde nun von dritter Seite zweifelsfrei bestätigt, dass die Vorwürfe von Herrn Battistelli gegen meinen Mandanten unbegründet sind" (in English: "The two ILOAT judgments and several decisions of the Regional Court of Munich and the State Prosecutor of Munich have confirmed without any doubt that Mr. Battistelli's accusations against my client are unfounded.") - If the EPO has different facts to report, then let us hear them. Otherwise I hope that the decisions by the Munich court will become public some day. They could be interesting.

In any case, the plot seems to thicken. Maybe Mr. Battistelli is really a case for „[Krampus](#)“. If he does not change course now and if he continues refusing to do what the ILO ordered the EPO to do, he should be sacked. Otherwise, the Administrative Council risks a serious loss in reputation of the European Patent Office, and I cannot imagine that the German Federal Constitutional Court would firmly close its eyes to such a [breach of the constitution and the EPC](#). Let it not be forgotten that the rule of law is the fundament of the EPO member states' constitutions and the European patent system as a whole.

And, *ceterum censeo*, dear Administrative Council, please finally fill the [gaps in the technical members of the Boards of Appeal](#)! There are still more than 20 unoccupied positions shown in the business distribution scheme and the duration of appeal proceedings has become truly unbearable.

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