Plausibility to be debated by AIPPI at London meeting in September 2019

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Miquel Montañá (Clifford Chance)

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One of the actors that has been seeking to pop-up in the European patent theatre in recent decades is plausibility. As readers will be aware, the debate around plausibility initially arose at the European Patent Office in the mid-1990s (T 939/92, AgrEvo) at a time when applications with extremely broad claims were in vogue, particularly in the field of biotechnology. The term "plausibility", as such, was used for the first time in T 1329/04 (John Hopkins). Since then, while in some English and Dutch theatres plausibility has gained some popularity, it has been less acclaimed elsewhere. Over the years, this divergent state of affairs has been a source of legal uncertainty, which has not done patent owners and the public in general any good. Against this background, one must congratulate AIPPI for having chosen "Plausibility" as one of the "Study Questions" to be discussed at the forthcoming London meeting in September 2019.

If one thing is clear from the "Study Guidelines" circulated by AIPPI, it is that nothing appears to be clear. In part, this lack of clarity is due to the absence of a definite legal basis for plausibility as such, the dearth of precedents across Europe, and the fact that the few precedents available have been very much driven by the specific facts of each case. Among the issues that will keep the delegates who attend the London meeting busy, are stand-out topics such as whether "plausibility" should be a patentability requirement at all; if so, whether it should be a "standalone" requirement or a condition linked to inventive activity, sufficiency or even industrial application; whether this requirement is required at all, or should satisfy a "credibility" test and/or other tests; if a "credibility" test is chosen, for whom should the invention be "credible" (the person of ordinary skill in the art? an expert in the field?); what should the relevant date for assessing plausibility be (the priority date, the filing date, any other date?); are "prophetic" examples acceptable?; should there be different "plausibility" tests for different types of claims (e.g. compound claims v. second medical use claims); who should bear the burden of proving plausibility / non plausibility?; would harmonization in this field be desirable? If one may comment on the wording of the questions circulated with the Study Guidelines, it would appear that the language of some of the questions could have been written using a more "neutral" wording; word has gotten around that the way some of the questions were crafted assumes things that should not have been assumed.

All in all, a lot of food for thought! As is often the case with complex and controversial patent matters, there is a possibility that the debates may ultimately raise more questions than answers. That would be fair enough, as further debates would probably be preferable to a voyage into the unknown.