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Preliminary technical assessment in Italian patent cases

Daniela Ampollini (Trevisan & Cuonzo) · Friday, November 26th, 2010

In Italy, patent cases are heard by judges of the IP Chambers of 12 district courts distributed in the Italian territory. Italian judges are therefore IP specialists, but they have a merely legal, and not technical, background. This is why in all patent cases judges appoint court experts to review the technical issues at stake (validity and infringement). A so called “technical phase” therefore takes place in practically all patent cases during which the parties appoint their own technical experts and make submissions to the court expert who will eventually submit a (non binding) report to the judge. Technical phases on average last from 4 to 8 or even 10 months depending on the complexity of the case and the amount of evidence and /or experiments that the court expert is required to review or carry out. Court experts are very often appointed also in the course of preliminary injunction proceedings, even though in these cases the time-frame is generally shorter. The technical phase is crucial to Italian patent litigation: although the report of the court expert is not binding for the judge, it has a considerable influence on the outcome of the litigation. Legislative Decree no. 131/2010 has recently introduced a new procedural tool (new Art. 128 of the Italian IP Code), which allows the conduction of a “preliminary technical assessment”. In practice, as an alternative to commencing ordinary proceedings or preliminary injunction proceedings, the claimant has the option of requesting the court to immediately appoint a court expert to assess the technical matter of the case. Once a reports has been prepared by the court expert, the latter will ask the parties whether, in light of the outcome of the technical assessment, they have the intention to settle the dispute. In case of a settlement, this will be formalised and will acquire the efficacy and enforceability of a ruling. In case no settlement is reached and proper validity and/or infringement proceedings are commenced, any of the party may request that the report of the urgent technical assessment be used by the judge in adjudicating the case. As opposed to preliminary injunction proceedings, there are no requirements such as urgency or prima facie case that need to be met in order for a party to request the conduction of a preliminary technical assessment. This tool may therefore prove useful in cases in which a party for instance believes that the clarification of the technical questions at issue may lead to negotiations and ultimately to a settlement. It may also be useful in order to try and reduce the length of patent litigation in certain cases.

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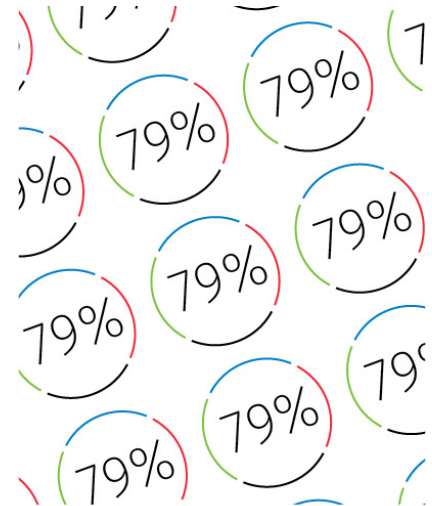
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