

Kluwer Patent Blog

'It is a missed chance that Unified Patent Court judges cannot act as mediators'

Kluwer Patent blogger · Saturday, April 9th, 2016

If conflicts arise under the Unitary Patent system, parties have the option to go to the Unified Patent Court (UPC), or they can agree to go the court's Patent and Mediation Centre (PMAC). In their current version, the Rules on Arbitration and Mediation do not provide for the possibility of Judges of the UPC to act as mediators themselves. Judge Dr. Elke Schwager of the High Court of Munich (Landgericht München I) in Germany – speaking in a personal capacity – thinks this is a missed chance. Over the last years, she has successfully acted as a mediator in patent cases at the Munich court. Kluwer IP Law spoke to Dr. Schwager.

Could you explain how the system in Munich works?

'According to § 278 section 5 of the German Rules of Civil procedure, the court may refer the parties to a conciliation hearing, as well as to further attempts at resolving the dispute. By doing so, the court is submitting the case to a so called *Güterichter*, conciliation judge, who is not authorised to take a binding decision on the case. Whilst this judge may use all methods of conflict resolution, in almost all of the cases he or she holds a mediation.

Parties can ask to get transferred to the mediator (more precisely: a conciliation judge who has been trained to act as a mediator as well), or the court proposes a mediation to the parties.



Dr. Elke Schwager

In contrast to the court proceedings, mediation at the court is voluntary. Parties have to agree to submit their case to mediation. There are other differences as well: mediation is not public, the parties are not allowed to disclose the content of the mediation and the judge, as mentioned, handling the mediation is not competent to rule upon the case.'

Is mediation in patent conflicts popular in Munich?

'It is too much to say that a lot of patent cases are being solved by mediation. But we have indeed seen an increase in court mediation since the rule mentioned above was introduced in the German Rules of Civil Proceedings in 2012. Last year, for example, I alone settled two patent cases as a mediator at the court. And the cases referred to mediation do not only concern the question of

damages after a violation has been established, but also concern the issue of violation of a patent itself, e.g. standard-essential-patents where the FRAND defense is raised.

At the High Court in Munich, we have the special situation that, since 2013, the judges handling patent cases by means of mediation are not only qualified judges and trained mediators, but are also specialized in patent law, as they belong to one of the two chambers at the court dealing with patent cases. In order to avoid any bias, patent cases of one chamber will be mediated by a judge from the other patent chamber.'

The specialization is important, as only a judge with experience in hearing patent cases will be able to explain to the parties the Best Alternative To a Negotiated Agreement, the so called BATNA, and make a proper risk assessment with the parties – both tools that are being used in a mediation.'

What are the advantages for the parties?

'There are many. Just to mention a few: The parties are deciding their conflict themselves and according to their terms.

Also, the proceedings are much quicker. In approximately 73 percent of the cases, the mediation ends with a settlement, which is, as it is recorded by a judge acting as a mediator, a title and therefore directly enforceable. Instead of fighting a case throughout all instances, which takes approximately four years in Germany, the parties have an ending to their case in a few months.

Obviously, the mediation is much cheaper as well, as parties have to spend less money on court and lawyers' fees – mediation does not incur any additional court fee. Besides, the parties to the case may invite other persons to join the mediation process.

Finally, whilst the language of the court in Germany is German, the mediation can be conducted in English or any other language the parties desire and the judge acting as a mediator is able to speak.'

Are there advantages for the judges as well?

'The advantage for the judge acting as a mediator is that he or she is not only looking at a case from a legal point of view, but can also take into account economic, personal and other aspects.'



If this mediation by patent judges works so well, why is Munich the only court with this system?

'Mediation is offered everywhere in Germany. Munich is only special inasmuch as patent law is concerned; we are the only court, according to my knowledge, providing the possibility to have a judge acting as a mediator to patent cases who is normally working in a patent chamber. We have this possibility, as the majority of our patent judges were willing to undergo the additional

training to become a mediator and take on mediation cases.'

Are you happy with the rules and regulations of the UPC, in particular those regarding the PMAC?

'Unfortunately, the rules do not provide the possibility for the judges at the UPC to act as mediators themselves. But the Rules on Arbitration and Mediation are not finally agreed by the

Preparatory Committee yet. The experience suggests that parties have confidence in judges acting as mediators and are therefore more inclined to try mediation, as there is the presumption that judges are neutral.’

Critics say the UP system is tailor-made for big international companies, from inside and outside Europe, but that it is too expensive and doesn't have many advantages for SMEs. What is your opinion?

‘The question for patent holders is, independent on whether they are a big or a small company or not a company at all, which territorial scope they would like to cover with the patent. If they want to cover more than four countries, the UPC seems to be a very good alternative under the proposed set of rules concerning the costs. Besides, the UPC will have some discretion in determining the value of the litigation, which is, to some extent, decisive for the costs.’

For regular updates on the UP system, subscribe to this blog and the free [Kluwer IP Law Newsletter](#).

To make sure you do not miss out on regular updates from the Kluwer Patent Blog, please [subscribe here](#).

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.

Drive change with Kluwer IP Law.

The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Saturday, April 9th, 2016 at 12:42 pm and is filed under [European Union](#), [Germany](#), [Unitary Patent](#), [UPC](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. Both comments and pings are currently closed.