Kluwer Patent Blog

The EPO and the Problem of the Right Speed (IV) – Appeal Proceedings

Thorsten Bausch (Hoffmann Eitle) · Friday, April 7th, 2017

The duration of proceedings before the Boards of Appeal (BoA) currently is the EPO's biggest problem in regard to speed. According to the latest Annual Report by the Boards of Appeal, the average length of inter partes proceedings is 37 months (up 1 month from 2015), i.e. more than three years. In 2016, two appeals were pending that were filed in 2008, six that were filed in 2009, and 33 were filed in 2010, that was eight (!), seven or six years pendency before the decision date. This is clearly not acceptable.

One should assume that this problem, which has been around for at least 15 years, cannot have escaped the EPO management. In view thereof, it is beyond comprehension why several EPO Presidents and the EPO Administrative Council, which is supposed to supervise the EPO management, have not done more in the past to tackle this real problem, and why the current EPO management is instead occupying itself with acceleration measures that the majority of stakeholders do not need or want.

LJ Robin Jacob wrote as early as in 2005 in the *Festschrift* for Gert Kolle and Dieter Stauder (Heymanns Verlag, 2005) that the EPO opposition and appeal procedures have become so "slow and cumbersome" that, "sooner rather than later, it will be subject to successful attack for breach of Art 6 of the European Convention on Human Rights. I think it is high time that the whole procedure was reviewed from the top to bottom." Indeed, new Rules of Procedure were introduced in 2007, but the important fact to appreciate is that procedural law is only able to some extent to help reduce the huge backlog of cases and the BoAs' fundamental problem, i.e. that more appeals are filed every year than settled: According to the Annual Report, 2387 new cases were filed in 2015 and 2287 cases were settled. In 2016, 2748 (!) new cases were filed (up by almost 400), but only 2229 were settled, i.e. fewer than in 2015.

Rather than addressing the cause of the problem, i.e. serious understaffing of the BoA's, the current EPO President has even further aggravated it by apparently failing or even refusing to appoint additional technical BoA members in 2016. This led to a reduction of the technical members of the Boards of Appeal from 97 to 96 and to an astonishing and deeply worrying number of 23 (!!!) vacant positions for Technical Members on the Boards of Appeal by the end of 2016, according to the Annual Report 2016. In particular, TBA 3.3.02 now seems to be completely dysfunctional, with only one technical member left. This was at least the status by end of 2016; I was not able to find more up-to-date figures on the EPO website.

Of course, I cannot exclude that something close to a miracle happened in the March 2017 meeting of the Administrative Council and that a substantial re-staffing of this and other Boards has meanwhile occurred. But as much as I would wish so, I take little hope from the official communiqué on this meeting, which is as bland and uninformative as always: "The council (…) made a number of appointments and reappointments to the Boards of Appeal". Why does the Administrative Council not tell the public how many appointments were made and who was appointed or reappointed? I would consider this important information for the public. And why does the Administrative Council not hold the EPO management accountable for the unacceptable duration of appeal proceedings and insist on a reasonable staffing of the EPO's top judicial deciders?

To be fair to the EPO management, the number of legal BoA members slightly increased in 2016, but this does little, if anything, to solve the problem since usually the technical members act as *juges rapporteurs* in opposition appeal cases and draft the decisions.

One should expect a competent Office President to take decisive action against the BoAs' serious understaffing, yet in lieu of that the President seems to be obsessed by the idea that the problem can be tackled by "measures to increase efficiency" (whatever this may mean), including the appointment of a new President of the Boards of Appeal and (again) amended Rules of Procedure:

> It will therefore be one of the primary tasks of the President to take the necessary measures to increase the efficiency of the Boards, in order to reduce the backlog in appeals, and safeguard legal certainty for users. The review of the appeal procedure will focus on a revision of the Rules of Procedure to enable proceedings with greater efficiency and consistency. The user community will be involved in this review process through user consultations. Overall, the reform will therefore not only enhance the independence of the Boards, but will also bring about significant improvements for users. It will further trigger a quality review process, ensuring clear and consistent decisions are delivered on time.

I am afraid that this approach is bound to fail almost with certainty. Parties are certainly interested in speedy decisions, yet they also have certain fundamental rights, e.g. the right to be heard and to present their case, as enshrined in Art 113 EPC. And they request and deserve a fair hearing and carefully reasoned and well-drafted decisions. Limiting a party's right to submit evidence (such as prior art documents) and/or means of attack or defense (e.g. auxiliary requests) may seriously interfere with such fundamental rights and may damage the quality of the decisions and the EPO's reputation. There is simply a limit to what rules of procedure or "efficiency measures" can do to accelerate proceedings.

In this blogger's view, the situation is as simple as this: If the number of new appeals increases, we need more BoA members to deal with them. And if there is a substantial backlog of appeal cases, yet more BoA members should be hired at least for a couple of years until this backlog has been reduced to a reasonable level. The EPO should aim for an average duration of appeal proceedings of about 18 months. Yet, as of to date, there is no such official commitment from the EPO management, and the reality is 3-4 years on the average.

Bearing this overriding objective in mind, it also makes no sense whatsoever to have the Boards of

Appeal move to new and even smaller (!) premises in the outskirts of Munich. This move, which has been scheduled for September 2017, should in my view be postponed or cancelled altogether.

> The Boards of Appeal need more members and larger premises so that they can hold more hearings per time unit. This is the only realistic way to reduce the backlog of decisions and the inacceptable long duration of appeal proceedings.

Given that moving the BoA to different and even smaller premises does nothing whatsoever to increase efficacy – if anything, it does the opposite – one may wonder why moving the BoA was considered necessary at all. The official EPO reasoning is this:

> In order to maximise the positive effects of the perception of independence, the Boards of Appeal will also be physically separated from the administrative parts of the EPO.

For the life of me, I do not understand this. I cannot see that a Board of Appeal would be perceived more (or less) independent if it is physically separated from the EPO administration by 12 km or so. Whenever I was concerned about the Boards' independence in the last few years, this was due to certain actions by the current Office President against one BoA member in breach of the procedure prescribed in Art 23 EPC and against the Enlarged Board's order to hold a public hearing in this case. Moving the Boards to a different location does not cure this problem; moving instead the President to a place outside the EPO would certainly be much more effective and (probably) also cheaper.

Searching for some more optimistic news from the EPO on this topic, I found the following piece of prose:

> Together with other measures, such as a new location, rules on conflict of interest for its members, a specific career system and better cost coverage, the tools are now in place for the BoA to carry on their role as a highly respected, independent and efficient judiciary. There is now every chance that the Boards can better address some concerns of users regarding timeliness, predictability and consistency of the appeal procedure expressed during the reform process. The BoA, of course, has not been alone in facing such issues; judiciaries across the world have faced increased demand for their services and pressure to deliver more judgements while ensuring quality of work. However, every effort has been made so that the EPO BoA are now better equipped and will continue to play an important role in European patent litigation.

Therefore, rest assured, dear readers, that all is well with the BoA. They are now "better equipped". You wonder, how that? The answer is, by a new BoA President and "a new location, rules on conflict of interest for its members, a specific career system and better cost coverage"? Do you still have doubts? It is certainly a step in the right direction that the BoA now have a new and formally more independent President, Mr Josefsson, who assumed office on 1 March 2017. But will he also have the budget to employ more deciders, particularly technical members?

Let us hope so, and let us, for once, dispel the skepticism expressed – in a different context – in footnote 8 on page 273 of the truly inspirational book “IP and Other Things” by the honorable Lord Justice Robin Jacob, who wrote in the year 2015:

> A realist would ignore the pompous, own-trumpet-blowing self-congratulatory stuff which appears from time to time on the EPO President’s blog.

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

This entry was posted on Friday, April 7th, 2017 at 9:00 am and is filed under EPC, EPO, Opposition, Procedure
You can follow any responses to this entry through the Comments (RSS) feed. Both comments and

pings are currently closed.