

Kluwer Patent Blog

‘Future judges of the Unified Patent Court will be very motivated to make the court work’

Kluwer Patent blogger · Thursday, September 14th, 2017

In the first period of functioning of the Unified Patent Court, the judge-rapporteur – who has important powers in the new system – should as much as possible revert issues to the panel of judges as a whole. This is beneficial for the system and can prevent forum shopping, according to the Belgian judge Sam Granata*. He has been involved for years in the creation of the Unified Patent Court (UPC) and is co-author of the book ‘**The Unitary Patent and the Unified Patent Court**’, which was published earlier this month by Wolters Kluwer. In an interview with Kluwer IP Law, he also discusses the consequences of the Brexit and the German Constitutional complaint.

Could you give a short impression of the process of establishing the UPC?

‘From its outset, this process – and this before I was active in the Rules of Procedure and Mediation and Arbitration working-group – was and is led by specialist patent lawyers and judges. This was in particular the case when the Rules of Procedure were drafted.



The aim was to set up a court system which could repair shortcomings of the existing system and at the same time integrate national elements which had proven their value in patent litigation.

For the founding fathers of the UPC Rules of Procedure and from a legislative point of view, it was a difficult task to design this new judicial system. On the one hand it couldn't be too revolutionary for its users (it had to provide them the confidence they needed); on the other hand it had to result in a comprehensive framework, streamlining national elements with a civil and common law background.

Designing such a framework was an intellectual exercise for the drafters of the Rules of Procedure, during which these national elements were examined and re-examined in order for them to interact smoothly. If the designers altered one rule in the framework, they had to be aware of potential effects on interacting rules.’

The articles in the Unified Patent Court Agreement (UPCA) relating to the structure and

procedure of the Patent Mediation and Arbitration Centre (PMAC) are very limited. How did the working arbitration and mediation group handle this?

‘Developing a flexible structure and providing a first draft of mediation and arbitration rules (which will be re-examined by the PMAC after its establishment and before actual publication) in line with the duties of the judge-rapporteur to try and reach settlements between the parties, was a complicated but worthwhile task.

Most of the member states had alternative views on the role of alternative dispute resolution (ADR) within a court system and the importance which should be awarded it. I believe the scarcity of articles in the agreement was used to its advantage to design a flexible ADR-centre, making the UPC as whole into a unique real one-stop-shop for patent dispute resolution.’

Are the recent delays caused by the Brexit and the recent German constitutional complaint bad for the UP system?

‘Any delay hinders the momentum. However, the delays, at least that of the Brexit, created openings for states to try to adhere to the agreement (and I specifically refer to Spain). Unfortunately, this did not materialize, but at least the opening was there. The delay may have as a consequence that when the UPC is finally established, more states will have ratified the agreement.

Regarding the German constitutional complaint – and as the agenda to deal with that complaint is not public for the moment – I cannot foresee whether this action is bad for the system as such. Should the complaint be dismissed, I think the system is that robust that this delay will not hinder its establishment. I should point out in this regard that the stakeholders of the UPC, and especially the Preparatory Committee, were and still are very effective in keeping the momentum alive.’

Can the UK still participate in the Unitary Patent system despite the Brexit?

‘As I believe that the UPC is an international court based on an international agreement, I believe the Brexit would not hinder the participation of the UK, if the latter ratifies the agreement.

Of course, the position of the CJEU may demand some creative thinking, but I believe that solutions can be found. Should the Brexit take place, probably meaning that UK judges will not be part of the CJEU, one could think for instance of a system of a (UK) enlarged CJEU in cases involving European patents (for which the UPC is competent) and Unitary Patents.’

Recently it became clear what arguments are behind the [German Constitutional complaint](#) against the UP system. The first is about the voting procedure in German parliament, the other arguments concern democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC; the independence of UPC judges and irreconcilability of the UPC with European Union law. Do you think the complaint has any chance of success?

‘First of all, I would like to point out that it is not appropriate to have an opinion regarding issues which colleague-judges have to decide upon or have decided upon. Secondly, it goes beyond my abilities as a Belgian judge to have an opinion regarding a complaint based on German constitutional law.

The issue regarding the democratic deficit and deficits in rule of law regarding the regulatory powers seems similar to allegations regarding the structure and the powers of the administrative

powers of the EPO and the complaints are probably not that revolutionary (see also [this post](#) on the Kluwer Patent Blog).

Regarding the independence of the judges related to the non-automatic and non-guaranteed re-appointment of judges of the UPC, I can only refer to certain non-automatic and non-guaranteed renewable positions which judges take in our national systems (e.g. Belgium where *juges d'Instruction* are appointed for one, three and later five-year terms).'

As a judge, do you see 'weak spots' in the system?

'The so-called weak spots are at the same time its advantages. UPC judges will have to reach pragmatic solutions for legal procedural issues.

On the other hand, such pragmatic approach, together with a lack of legislative preparatory work, might make it burdensome to decide on the lawfulness of a specific rule. Rule 1.1. of the Rules of Procedure makes it very clear that the court shall conduct proceedings in accordance with the UPCA, the Statute and these Rules and that in the event of a conflict between the provisions of the UPCA and/or the Statute on the one hand and of the Rules on the other hand, the provisions of the UPCA and/or the Statute shall prevail.

Further, on a procedural level, important powers have been awarded to the judge-rapporteur. In order not to promote "*division*" shopping, or should I say "*judge-rapporteur*" shopping, it would be beneficial for the system as such that, at least until some legal certainty is reached, the judge-rapporteur reverts issues to the panel as a whole, unless of course the dynamics of the proceedings would not allow this.

Generally, I think any legal system is alive and not static. Any legal system, and specifically its rules on certain procedural issues, are questioned even if they exist more than decennia. The UPC is and will not be different. I believe that the rules of the UPC were drafted in such a way that the court is in a position to answer any legal procedural issues with sound arguments.'

What will it be like for UPC judges to start working for a completely new court?

'I believe that the mixture of an international and multi-lingual environment, the requested managerial efforts, the specialized field of law and the pioneering role the judges have to play, will create a very exciting environment. It would seem that most of the judges applying for a position have a strong will to work in such environment and are motivated to make the court work.

I believe that bringing together such judges will lead to a court in which its users will have a strong confidence. And it is this confidence that is essential. I agree that for the moment there exists some uncertainty regarding the quality of judgments and whether substantive decisions will be in line with the existing doctrine, but having the right judges in the right place will take away a lot of this uncertainty.

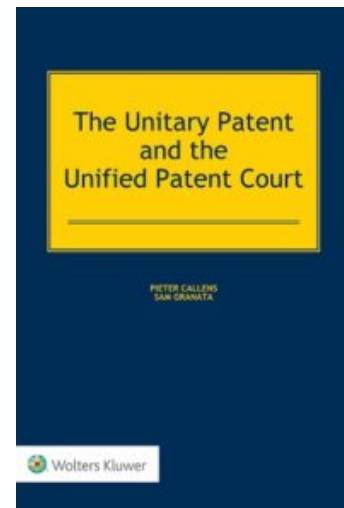


An important task for the judges will be to try to take off their national glasses entirely and increase their openness to alternative approaches by fellow judges. The UPC must prove to be the international court it is. A court in which neither the nationality of its judges neither the language of the proceedings play a role.

We might expect, at least in the beginning years a certain *couleur locale*, though this will fade away the more case law develops. After a while, the *couleur locale* should be limited to whether biscuits, panini, croissants or Pretzels are being available in the surroundings of the local, at the local, regional or central division during a recess.’

**The answers provided by Mr. Granata are personal views and opinions. In no way does he have the capacity nor authority to bind the UPC and/or any of its organs.*

Pieter Callens, Sam Granata; *The Unitary Patent and the Unified Patent Court*. Available at Wolters Kluwer, September 2017.



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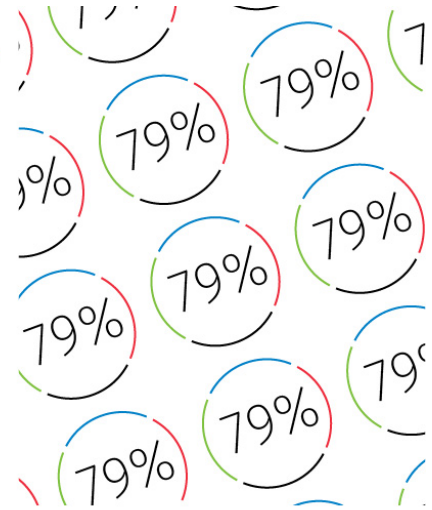
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