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# Kluwer Patent Blog

## German Federal Constitutional Court Dismisses Appeals against the EPO's System of Appeals

Thorsten Bausch (Hoffmann Eitle) · Thursday, January 12th, 2023

*Damocles*, so tells us an ancient legend (reported [here](#)) was a favorite of President Dionysios II. of Syrakus in Sicily, who lived during the first half of the 4th century BC. His story was succinctly told by none other than Marcus Tullius Cicero in his *tusculanae disputationes* 5, 61–62. Hoping that Cicero will forgive me, I will tell it again here yet in a slightly modernized version.

According to the legend, Damocles was pandering to Dionysius, exclaiming that the President was truly fortunate as a great man of power and authority without peer, surrounded by magnificence. In response, Dionysius offered to switch places with Damocles for one day so that Damocles could taste that very fortune firsthand. Damocles quickly and eagerly accepted the king's proposal. Damocles sat on the king's throne, surrounded by countless luxuries. There were beautifully embroidered rugs, fragrant perfumes and the most select of foods, piles of silver and gold, and the service of attendants unparalleled in their beauty, surrounding Damocles with riches and excess.

But some evil parties hostile to the President and his organisation had arranged that a sword should hang above the throne, held at the pommel only by a single hair of a horse's tail to evoke the sense of what it is like to be king: though having much fortune, always having to watch in fear and anxiety against dangers that might try to overtake him. Namely, had the sword fallen down, it might at least have severely wounded the President's organisation and/or have forced one of its most important members to withdraw therefrom entirely.



By Richard Westall, Ackland Museum, Chapel Hill, North Carolina, United States of America, Public Domain, [Link](#)

Damocles finally begged the king that he be allowed to depart because he no longer wanted to be so fortunate, realizing that with great power comes great responsibility. And so it happened and the President entered the throne again.

But the story did of course not end there. It turned out that the President also was not too happy with the sword hanging over the throne, so he asked his Guardians of Justice to remove it. And he made it palatable for them to comply with his wish by conceding a few changes to the judiciary,

which some viewed as a rectification of alleged deficiencies in the separation of powers (a concept the President never really believed in), whereas others viewed it as mostly camouflage.

The Guardians of Justice deliberated on the Sword and the President's wish for a couple of centuries (according to the legend, of course; in reality it was much faster, in fact only 12 years). But today the festive day finally came and the sword was safely stowed away. **The Justice** mainly responsible for the decision received the great cross of merit with star and shoulder ribbon and was gladly allowed to retire.

And Dionysius the President happily leaned back on his throne and continued to benignly rule over his island realm as he did in the past, at least according to the opinion of his Council of Electors. And they all lived happily ever after.



Großes Verdienstkreuz mit  
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For a more serious reading on a completely unrelated subject, please turn to today's press release of the German Federal Constitutional Court, which is available both in [German](#) and in [English](#). You may also wish to directly study the unanimous [decision](#) of the 2nd Senate of the Federal Constitutional Court dismissing the various appeals challenging the court-like character of the EPO's Boards of Appeal and several of its decisions. Particularly parties not domiciled in Germany may possibly be surprised that Germany's fundamental rights are not applicable to them. I am no constitutional lawyer, just a humble patent attorney, but I query whether it is really right that fundamental substantive and procedural rights only apply to Germans, not to foreign parties who seek justice before a German (constitutional) court. To be perhaps a bit blunt, I find this a bit appalling for a modern democratic country. Germans in turn may be somewhat surprised that the right to one's lawful judge and the right to be heard can only be violated by German courts, not by the EPO as such. In regard to the EPO and other international organisations to which Germany has acceded, only a „minimum standard of effective legal protection“ is required by the Basic Law. And this minimum standard seems to have been met by the EPO, at least after the 2016 reform of the Boards of Appeal. My simple take on this is that Germany has acceded the EPO and the UPCA with the requisite 2/3 majority of MPs, now we are stuck to it. Later complaints to the

Bundesverfassungsgericht are more or less undesired „buyer’s remorse“.

Two main consequences arise from today’s decision. Firstly, and this is certainly satisfactory and relieving to the EPO itself and its many customers (including my own firm), there will be no disruption of the existing system, and the EPO may continue to examine and grant patents as in the past. Secondly, any improvements in the structure, democratic and judicial oversight, and/or separation of powers within the EPO can only be achieved politically, if at all.

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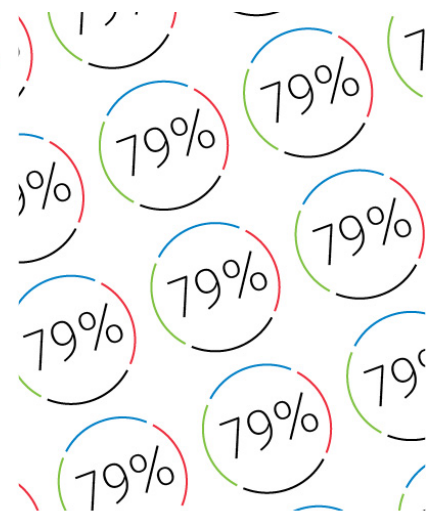
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