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Some light for the sunrise: 5 questions for 5 French UPC Judges

Matthieu Dhenne (Ipsilon) · Wednesday, March 1st, 2023

Although the sunrise period starts today, the UPC remains in the shadows for the moment. Thus, it seemed appropriate to me, in the meantime, to try to bring some light by interviewing 5 French judges who will participate in the new Court.

Many thanks to the judges who accepted my invitation: Ms. Florence Butin (President of the Court of First Instance), Ms. Françoise Barutel (judge at the Court of Appeal, Luxembourg), Ms. Camille Lignières and Ms. Carine Gillet (judges at the Court of First Instance, local division in Paris) and Ms. Mélanie Bessaud (judge at the Court of First Instance, central division Munich).

In your opinion, what is the future of a local particularism such as the “saisie-contrefaçon” within the UPC?

In the French IP Code (under Art. L 615-5), “saisie-contrefaçons” are specific *ex parte* proceedings in which an order can be requested as an evidential measure prior to any proceedings on the merits, with the judge being able to order guarantees to the applicant.

The UPC agreement (Art. 60 UPCA) provides for an order to preserve evidence (“saisie”) if the claimant presents reasonably available evidence to support their allegations of infringement.

The “saisie” is one of the tools allowing the patent holders to preserve evidence and to protect their rights before the UPC. The rules of procedure are very comprehensive and result from a multinational compromise. It is significant that the term mentioned in the UPC RoP be the French term “saisie”. This stems from a genuine choice from the RoP authors to propose a highly effective tool for the right holders in their infringement action. Thus, Rules 196 *et seq.* provide for the possibility of ordering the preservation of evidence by detailed description, physical seizure of allegedly infringing goods, preservation and disclosure of digital media and data, with the result of evidence preservation measures being used only in related proceedings on the merits.

According to UPC Rules, a “saisie order” is issued without hearing the defendant, exclusively in such cases where the need for *ex parte* proceedings has been demonstrated: in particular, where any delay is likely to cause irreparable harm to the applicant or where there is a demonstrable risk that the evidence may be destroyed or may no longer be available (R 192.3 and 197.1 RoP).

If the UPC judge decides not to hear the defendant, the latter must always be notified immediately at the time of enforcement. A revocation of an order to preserve evidence is possible under Rule 198.

A UPC judge may, upon reasonable request from a party, order an inspection of products, devices, methods, premises or local situation *in situ*. In view of protecting confidential information, the Court may order a disclosure to certain named persons only. (R. 199 RoP)

Orders for preserving evidence may immediately be appealed, as they fall within the scope of so called “privilege orders” under Rule 220.1 (c).

In practice, although French or Italian judges are more familiar with “saisies-contrefaçons” than German judges, for example, the fact remains that all designated UPC judges, acting either as judge rapporteur, presiding judge, single judge or standing judge (depending on the stage in the proceedings at which the measure is requested or on the urgency of such a request) shall apply the RoP, regardless of the practices in their own national courts or of their past experience.

As demonstrated by the constitution of the panels in each division, the UPC will effectively be an international court. It will be more of a melting pot than an addition of different particularisms.

As matters currently stand, one could consider the “saisie” as being a “local particularism” but once the UPC has been set up, it will be a unitary “saisie-contrefaçon”. It shall not only be the French judges ordering a “saisie”, but indeed all the UPC judges. A new way of dealing with this possibility may emerge. The conditions or the content of the order may differ from what is usually known in France. Nevertheless, European judges have common backgrounds. Mock trials often reflect a convergence of views on many points, such as the assessment of the proportionality of the measure. Moreover, as European judges, we are used to dealing with the same notions, such as trade secrets, the adversarial principle... and the trainings provided to UPC judges offer the opportunity to discuss such topics.

Above all, the procedure will be in the hands of the parties. Of course, in the local division of Paris, there will be French judges who are used to dealing with “saisie-contrefaçon”. However other European judges will also rule on this measure, in Munich as well as in Ljubljana. It is up to the parties to explore every point of the rules of procedure before each local division. If some divergences emerge in the case law, the court of appeal will harmonize the practices.

How will it be possible, from the outset, for the UPC to give rise to a pan-European jurisprudence that disregards the different national approaches according to the respective local divisions?

UPC rules, which are not a copy of one or another national law but rather – as previously mentioned – a compromise between the various European patent laws, create a new legal framework for dealing with patent litigation.

The application of these new rules should lead to a harmonised practice between the different local, regional and central divisions.

It should be pointed out that these UPC judges will sit in each of the local divisions in panels that

have a multinational composition, comprising judges from the same pool, who will be required to sit in different divisions.

Moreover, the UPC Court of Appeal located in Luxembourg, itself composed of multinational panels in which the legally qualified judges are French, Italian, German, Swedish and Dutch, will play a decisive role in this harmonisation of the law as being interpreted within the UPC and the setting of case law. Indeed, within the UPC there is no supreme court (such as the “Cour de Cassation”) above the Luxembourg Court of Appeal. As regards substantive law, it is essentially European law supervised by the CJEU that will be applied within the UPC.

Lastly, during our recent UPC Judges training session (for legally and technically qualified judges), as well as during the last UPC mock trials settled in Paris or in Budapest, a strong concern for harmonisation emerged, which extended well beyond national practices. During these exchanges, it became apparent that a common position can often take shape.

How do you envisage cooperation with the technical judge?

According to Article 15 UPCA, technically qualified judges shall have the highest standards of competence and shall have proven experience in the field of patent litigation. Technically qualified judges shall “have a university degree and proven expertise in a field of technology. They shall also have proven knowledge of civil law and procedure relevant in patent litigation”.

Under Article 17 UPCA, like all the legally qualified judges, the technically qualified judges enjoy judicial independence. In the performance of their duties, they “*shall not be bound by any instructions*”.

The technically qualified judge will be part of the Court panel and will participate fully in the deliberation of panel decisions. He will be systematically present in the Central Division and in the Court of Appeal for panel decisions on the merits and will be called upon when necessary, either on the request of a party or at the legal judges’ own motion, in case of actions other than those relating to the validity of the patent in the local divisions.

We, as legal judges, are convinced that having one or more technical judges sitting alongside us the earliest as possible will constitute a valuable contribution, thanks to their scientific knowledge and their concrete experience in industrial property. This collaboration, which already exists in Sweden for example, is eagerly awaited by the French judges of the UPC who have been asking for technical support in their national practice.

Moreover, the “Mock trial” exercises undertaken during our training as future UPC judges at the end of January in Budapest proved to be very positive, and the fact of working in small groups of 3/4 persons comprising legal judges and technical judges was particularly fruitful, offering a wide array of exchanges. The presence of technical judges during our deliberations largely facilitated our understanding of technical problems. These workshops made us highly optimistic about our future teamwork with the technical judges, their presence at our side will significantly contribute to the quality of future decisions ruled by the UPC.

French judges are already used to sitting with non-lawyer judges in other areas of law. One of the strong assets of the technical judges at UPC, beyond their undeniable technical knowledge, is their

experience in industrial property litigation.

To conclude, we would say that technical judges will be judges like any other and will participate in the deliberation and drafting of decisions.

How can you guarantee that the judges will respect the strict timetable as proposed by the preamble of the rules of procedure?

It is said in the Considering 6 of UPCA that *“the Unified Patent Court should be devised to ensure expeditious and high-quality decisions, striking a fair balance between the interests of right holders and other parties and taking into account the need for proportionality and flexibility”*.

Aiming to rule a decision in 12 months is one of the main objectives of the UPC.

The UPC has been created in particular to achieve this purpose: the procedure is mainly in written form, and the documents are filed in the Register in electronic form. The principle of concentration of means (“concentration des moyens”) is mentioned in the preamble of the Rules of Procedure: *“The parties shall cooperate with the Court and present their case as a whole as early as possible in the proceedings”*.

Moreover, hearings will not exceed one day, and the possibility to allow additional written submissions and hear the parties will be provided within a strict framework.

With the same aim in mind, UPCA and ROP give UPC judges the power to enforce deadlines and, if necessary, to impose sanctions. For example, under Rule 9 of the ROP “The Court may disregard any step, fact, evidence or argument which a party has not taken or submitted in accordance with a time limit set by the Court or these Rules”.

According to Article 37 UPCA and Rule 355 ROP, non-compliance by a party with the rules of procedure, including time limits, may be sanctioned by a decision by default.

Communication between the parties, between the court and the parties, and between the Registry and judges will be facilitated by the Case Management System (CMS). The UPC presents itself as a “digital court”. Thus, servicing of judicial documents will be mainly done by electronic means via the CMS.

UPC rules require that the judge-rapporteur become acquainted with the case from the very beginning of the procedure and be fully aware of its issues before the oral hearing.

The effectiveness and credibility of the UPC will depend on the speed of the decisions ruled. The 12-month period is a timeline that should be aimed for, but not at the expense of the quality of the decisions ruled, the respect for the adversarial principle nor the right to appeal.

Can you tell us when the Paris local division will officially announce the official languages accepted under Rule 14 of the Rules of Procedure?

Concerning the central division, the languages of procedure will be the three official languages of

the UPC, i.e., English, French and German pursuant to Article 49.1 of the Agreement.

In the case of local divisions, the final choice of the languages of proceedings is still under discussion and will be the subject of a decision by the Contracting Member states in the very near future.

Again, thank you to the judges for agreeing to participate in this interview, to shed some light on this sunrise period.

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