

The Preparatory Committee for the Unified Patents Court
c/o Johannes Karcher, Chair of the Legal Working Group
By email: Karcher-jo@bmjv.bund.de

7 May 2021

Dear Committee Members

Use of video conference technology in hearings before the Unified Patent Court (“UPC”)

I write as President of the European Patent Lawyers Association (“EPLAW”). EPLAW is an association of over 300 qualified patent practitioners from all over Europe who have each demonstrated an established track record of patent litigation in order to qualify for membership. The association therefore believes it is well qualified to comment upon proposals for the operation of the new Unified Patent Court system, and in particular the utility and appropriateness of remote hearings within that system.

I start by noting that EPLAW is looking forward with great anticipation to the hoped for commencement of the new Unified Patent Court system. The Association is aware that one of the UPC Working Groups has been considering an amendment to the Rules of Procedure to enable the court to permit oral hearings remotely rather than in-person. That consideration is, of course, entirely appropriate, not least because of the recent difficult circumstances caused by the COVID-19 pandemic. EPLAW is aware that such remote hearings have been used in recent times by a number of national courts to keep matters progressing in those circumstances. The association is, though, concerned that such remote hearings should not in normal times be imposed upon parties against their will, and is, therefore, writing to share its observations concerning the use of remote hearings in the new UPC system.

Summary of EPLAW position

EPLAW sees the potential value and utility of remote hearings, particularly for short interim or procedural hearings. For final hearings, however, it believes that in-person representation should be the default. If both parties, and of course the Court, are content with a remote hearing then it makes sense for that to be an available option. If only one party wants to appear remotely and a ‘hybrid’ hearing is possible, then the court may choose to respect that party’s choice for itself, but again the default for the other party and the Court should be in person. Remote hearings of the main trial of an action should not, however, be imposed by the Court itself over the wishes of either party.

Utility of Remote Hearings

Remote hearings are, perhaps particularly useful to enable short interim hearings and discussions concerning procedural issues without all parties being summoned to a central location. In this respect, Rule 105 (Holding the interim conference), Rule 178 (Hearing of witnesses) and Rule 264 (An opportunity to be heard) already contain provisions that EPLAW feels appropriate in that respect.

Similarly EPLAW appreciates that there can be advantages in a hybrid facility whereby clients situated far afield can attend an otherwise in-person hearing rather than having to travel a long way.

EPLAW obviously wishes to support measures that enhance the efficiency and utility of the new Court, but is concerned that such measures do not compromise the quality, fairness and justice of the new system.

The Challenges of Remote Hearings

Despite the advances in remote conferencing technology in recent years, it is apparent to anyone that has used those systems that they are inevitably to some degree inferior to face-to-face communication. That in itself is indicative of the fact that virtual hearings cannot and should not be a default in the new system, nor impossible over the will of a party involved in the proceedings, at least not for the final trial hearing.

The very purpose of oral proceedings is to enable parties to effectively communicate their arguments to the arbiter deciding the case. It has, therefore, always been the case to date that oral proceedings have required a participating speaker to be able to face their interlocutors. For all its convenience, remote conferencing is not a good facsimile of face-to-face interaction. Participants are generally only able to see only small image of other parties, the link between the visual and audio content is often disjointed or out of sync, and voices are not necessarily well modelled and may carry interference either from the communication channel or from microphone inadequacies or artefacts. It is not, therefore, possible for the speaker to convey the full force of their arguments in the same way as if they were there in person.

It is also often said that much communication is non-verbal. Depriving an advocate, or indeed judge, of the ability to appreciate and respond to the subtle nuances of those non-verbal cues inherently degrades the quality of the advocacy process.

All the above is true even when systems are ostensibly working at their optimum. As we all know from experience, however, in reality any remote conference will inevitably involve one or more speakers suffering a sub-optimal experience at some point; freezing, drop out, loss of audio and such. These issues are multiplied with the more parties that are involved and are potentially significant, in that even a short interruption – which may not actually be apparent to a listener or speaker – may be enough to alter the apparent import of arguments being made.

Confidence in the new system

It is a fundamental principle of natural justice that proceedings, particularly those actually determining the parties legal rights and obligations, should be conducted in a manner which does not prejudice either party's right to a fair and effective hearing of their arguments. Further the new UPC system provides a unique opportunity to select the best practices currently seen in national proceedings to provide a world leading forum for patent dispute resolution. With that in mind it is especially important that parties will have the right to be heard in a face-to-face hearing, as is the general practice of European courts, if they wish to do so.

Given all the above inherent limitations of remote hearings, EPLAW does not believe that parties should be compelled to have final trial hearings, or any appeals to the new Court of Appeal, heard remotely unless both parties to the proceedings consent to the arrangement.

It further does not believe that it would be appropriate to leave the imposition of remote hearings entirely to the discretion of the Court. This is particularly important in a new system where there is no body of guiding precedent or historic practice to guide the tribunal, and the parties' legitimate expectations, as to the use of that discretion. EPLAW believes that the parties and their advisors are in the best place to know whether or not in a given case a remote final hearing is appropriate or not. Where the parties have concerns about such a hearing, those concerns should not be over-ridden for fear of damaging the credibility, and hence uptake by stakeholders, of the new Court.

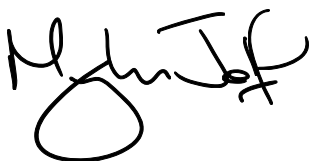
While a number of national Member State courts have accommodated some remote hearings to keep matters running during the current crisis, EPLAW is not aware of any that have indicated that remote trials will become a new norm, or will be imposed against the will of parties, going forward. It is particularly important therefore that the new court, which it is hoped will be a viable alternative to those national systems, does not put itself at a disadvantage to those systems by potentially unilaterally imposing remote hearings.

Given the territorial scope of the new system, the potential value of cases coming before the Court may be of a scale previously unseen in national proceedings. That, together with the fact that patent cases are by their very nature complex, both technically and legally, means that any imperfection – or even perceived imperfection – in the quality and nature of such proceedings could be highly detrimental to the successful uptake of the new system.

Conclusion

EPLAW and its members remain committed to the new system and available to assist and consult with the Preparatory and Administrative Committees in the development and implementation of the rules, procedures and practices necessary to make it a success. EPLAW feels strongly though that to give the system the best start and to generate early confidence, those rules and procedures should not be framed so as to remove either party's right to an in-person hearing at the main oral hearing or appeal of disputes before the new Court.

All kind regards

A handwritten signature in black ink, appearing to read 'Myles Jelf', with a large, stylized loop at the bottom.

Dr Myles Jelf
(EPLAW President)

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