WITTEWELLER News I/2020

Client Information and News

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PATENTANWÄLTE

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1. German Federal Constitutional Court “topples” the Unified Patent Court

By a decision of 13 February 2020 (2 BvR 739/17) the German Federal Constitutional Court has declared the approval act passed by the Bundestag for ratification of the Agreement on the Unified Patent Court to be incompatible with German constitutional law and thus null and void.

The Unified Patent Court is part of the long-planned unitary patent system, which is intended to grant patent protection by means of a patent with direct effect in all participating EU states (EU patent). An indispensable requirement for the unitary patent system to function is a unified judicial procedure applicable in all contracting states, as well as harmonized case-law. This is (or was) intended to be created by a European court, i.e. the Unified Patent Court. EU states participating in the unitary patent system must be subject to the case-law of that court. Ratification of the agreement by at least 13 countries, including the three countries with the greatest number of valid European patents, namely Germany, France and United Kingdom, was made a condition for the entry into force of the unitary patent system.

For the German approval act relating to this ratification to be effective, the German Federal Constitutional Court believes that a constitution-amending majority in the Bundestag should have been required, that is to say a two-thirds majority of all members of the Bundestag. The Court took the view that the transfer of the sovereign rights of the Federal Republic to an international institution like the Unified Patent Court as provided for by the approval act goes beyond the existing delegation of powers. The transfer of sovereign rights would, on the basis of their content, therefore lead to an amendment of the constitution.

The approval act was passed in the Bundestag by the representatives present at the session (only approx. 35 out of 709!) in a simple voting procedure. In view of the German Federal Constitutional Court, however, a qualified voting procedure should have been required for this act, i.e. a vote with a two-thirds majority of all members of the Bundestag.

In theory, the legislative procedure in the Bundestag could now be repeated and the approval act could thus be effectively passed in a procedure in accordance with the constitution. However, it is doubtful whether the act is currently still capable of obtaining a majority. Doubt has been cast on the sense of the EU patent not only by German parliamentarians, following Brexit and the declaration by the British that they definitively will not be participating in the Unified Patent Court. Many people do not see the point in an EU patent without the involvement of the British.

The first voices are already calling for the Agreement on the Unified Patent Court to be completely renegotiated. For example, not least also with a view to Brexit, it has been suggested to also enable the countries of the European Economic Area, and perhaps even other countries, to accede to the agreement.

According to a survey by the journal JUVE a relatively large group of patent attorneys and other stakeholders in the patent system now no longer advocate the Unified Patent Court. By contrast, however, industry still appears to support the Unified Patent Court, and thus the EU patent.

On several occasions the unitary patent system has already failed just before reaching the finishing line, whether due to Spain and Italy's opposition to the translation rules for the unitary patent, the withdrawal of the UK from the EU, or even now due to an incorrect legislative procedure in Germany. So it still remains uncertain when and whether a Unified Patent Court and an EU patent can become a reality.

JUDGMENT OF THE GERMAN FEDERAL CONSTITUTIONAL COURT OF 13.02.2020

PRESS RELEASE OF THE GERMAN FEDERAL CONSTITUTIONAL COURT OF 20.02.2020 (IN GERMAN)

PRESS RELEASE OF THE GERMAN FEDERAL CONSTITUTIONAL COURT OF 20.02.2020 (IN ENGLISH)

JUVE PATENT - DARK DAY FOR UPC - 20.03.2020

LTO – EVEN MORE SCRUTINY FROM KARLSRUHE - 21.03.2020

JUVE PATENT - PATENT COMMUNITY LOSING APPETITE FOR UPC - 17.04.2020

2. Oral proceedings via videoconferencing – “Boosted” by Covid-19?

More or less involuntarily, oral proceedings before German courts in the form of videoconferencing are currently experiencing a boom. Due to the hygiene and distancing regulations required because of Covid-19, it is almost impossible for normal oral proceedings before the courts to take place – or they can only do so under very difficult conditions. The Courts are now trying to prevent a backlog of proceedings through the use of videoconferencing. Such a course of action has for a long time been hardly conceivable in the German judicial system.

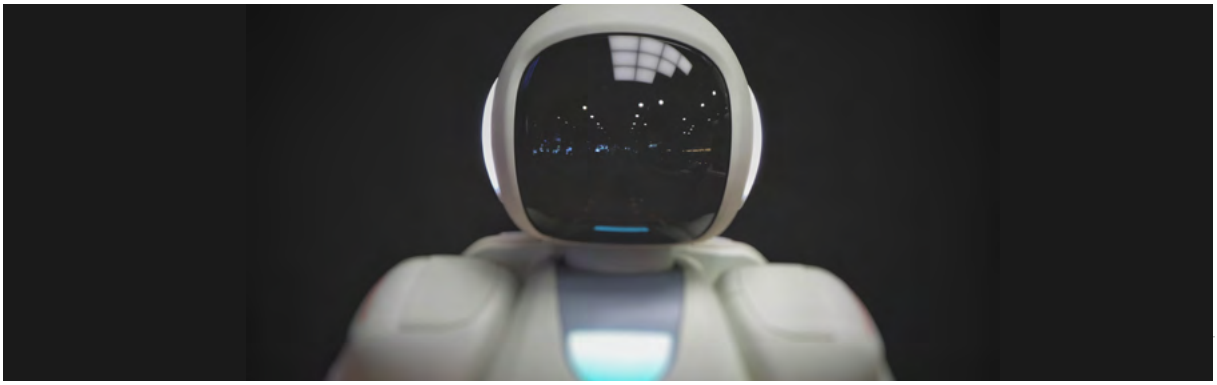
By contrast, in the patent sector, proceedings in the form of videoconferences have been trialled for some time now, for example in unilateral application proceedings before the European Patent Office (EPO). The EPO has recently also launched a pilot project for bilateral opposition proceedings. The ordinary German courts are now following suit.

Accordingly, the German Federal Court of Justice is for example at present conducting many video proceedings on account of the very tight scheduling and is also planning to continue video proceedings irrespective of Covid-19 and after the distancing regulations are lifted. The opportunity to take part in proceedings without time-consuming and expensive travel and from different locations is welcomed by judges and participants. Due to the saving on time and costs, conducting the proceedings by video is an option that should be taken into consideration in many cases.

The technical requirements are usually simple to comply with. The proceedings are generally held using software that is available in a free version and can be run on all common devices.

Witte Weller has had at its disposal a fully equipped video conferencing room since many years and participated successfully on many occasions in such video proceedings with the EPO.

3. Machines cannot be inventors



Machines cannot be inventors, as ruled firstly by the European Patent Office (EPO) and shortly thereafter also by the United States Patent and Trademark Office (USPTO).

In both of the “DABUS decisions” of the EPO of 27 January 2020, a machine called DABUS was named as an inventor in the underlying application. In the second application it was moreover argued by the applicant that he had acquired the right to the European patent as legal successor of the inventor DABUS.

The EPO rejected both applications. Under the European Patent Convention (EPC) the applicant must be a human, i.e. a natural person. A machine has no legal personality and therefore also cannot hold and exercise any rights and thus also cannot assign any rights to a human.

The decision of the USPTO was likewise given in relation to an application in which a machine “DABUS” was named as inventor. The USPTO made the same arguments as the EPO. The applicable law requires that an inventor is a natural person and the concept of “inventor” cannot be misconstrued as also encompassing machines.

DABUS 1

DABUS 2

DABUS 3 - USPTO

EPO COMMUNICATION OF 28.01.2020

HEISE NEWSTICKER OF 28.04.2020

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