



EUROPEAN PATENT LITIGATORS ASSOCIATION (EPLIT)

EPLIT'S 8TH ANNUAL MEETING

27. MAY 2021

EUROPEAN PATENT LITIGATORS ASSOCIATION, 8th Annual Meeting

- Session on “Oral Hearings by Videoconference in National Proceedings across Europe”
 - Michael Wallinger (DE)
 - Michael Silverleaf (UK)
 - Elise Mellier (FR)
 - Bernard Ledeboer (NL)
 - Marek Łazewski (PL)



**ORAL HEARING BY
VIDEOCONFERENCE
IN GERMANY**



EPLIT 8th Annual Meeting

May 27, 2021

Dr. Michael Wallinger

§ 128a ZPO - Verhandlung im Wege der Bild- und Tonübertragung

1) 1Das Gericht kann den Parteien, ihren Bevollmächtigten und Beiständen auf Antrag oder von Amts wegen gestatten, sich während einer mündlichen Verhandlung an einem anderen Ort aufzuhalten und dort Verfahrenshandlungen vorzunehmen. 2Die Verhandlung wird zeitgleich in Bild und Ton an diesen Ort und in das Sitzungszimmer übertragen.

(2) 1Das Gericht kann auf Antrag gestatten, dass sich ein Zeuge, ein Sachverständiger oder eine Partei während einer Vernehmung an einem anderen Ort aufhält. 2Die Vernehmung wird zeitgleich in Bild und Ton an diesen Ort und in das Sitzungszimmer übertragen. 3Ist Parteien, Bevollmächtigten und Beiständen nach Absatz 1 Satz 1 gestattet worden, sich an einem anderen Ort aufzuhalten, so wird die Vernehmung auch an diesen Ort übertragen.

(3) 1Die Übertragung wird nicht aufgezeichnet. 2Entscheidungen nach Absatz 1 Satz 1 und Absatz 2 Satz 1 sind unanfechtbar.

German Civil Procedural Law § 128a

Hearing by means of video and audio transmission

1) The Court may, on request or of its own motion, allow the parties, their representatives and advisers to be present at a different place during oral proceedings and to perform procedural acts there. The proceedings shall be transmitted simultaneously in sound and vision to that place and to the courtroom.

2) The court may, on request , allow a witness, an expert or a party to be present at a different place during a hearing. The hearing shall be transmitted simultaneously in sound and vision to that place and to the courtroom. If parties, authorised representatives and assistants have been permitted to be at a different place in accordance with subsection 1 sentence 1, the hearing shall also be transmitted to that place.

(3) The transmission shall not be recorded. Decisions under subsection (1) sentence 1 and subsection (2) sentence 1 shall be final.

In force since January 1, 2002

Court Hearings by Videoconference in Germany

- Since 2002 regulated in the German Code of Civil Procedure by § 128 a ZPO
- The court sits - as usual - in a courtroom to which the parties, their representatives and the public have access.
- At the request of a party or by its own decision, the court allows the parties and their attorneys to be present at a different location and to attend the hearing by video conference.
- However, the parties and their attorneys have the right to attend the hearing in the courtroom.

Court hearings by Videoconference at the German Federal Court of Justice I

- The Federal Supreme Court is responsible for:
- Legal appeals in patent litigation matters (legal review only)
- Appeal proceedings in patent nullity cases (2. instance of facts)
- Legal appeal proceedings against decisions of the Federal Patent Court in granting and opposition proceedings (legal review only).

Court hearings by Videoconference at the German Federal Court of Justice II

- During the corona pandemic, only 9 persons are allowed to be present in the hearing room of the X. Civil Senate.
- As the court sits with five judges, two attorneys may be present in the courtroom for each party (if only two parties attend).
- If requested, the attorneys can also be connected via videoconference; there have already been hearings that were held only via videoconference.
- For the other participants, the hearing is transmitted by video.

Court hearings by Videoconference at the German Federal Court of Justice – Technical Aspects

- The BGH uses a self-planned system that is constantly being improved.
- The technical basis is MS Teams, which is appreciated for its constant development and improvement.
- Depending on the size of the courtroom, 2 or 4 Logitech Meeting wide-angle cameras are used. All judges and attorneys are always visible.
- Usually 8 condenser microphones are used, as USB microphones have proven to be too poor in quality. The images of the videoconference are transmitted to 4 65” screens, 2 for the attorneys to see, 2 for the judges.
- On the day before the actual trial, a mock trial is held, where staff from the Federal Court of Justice take over the part of the judges, so that the technology can be set up properly.

Thank you for your attention!

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EUROPEAN PATENT LITIGATORS ASSOCIATION, 8th Annual Meeting

- Session on “Oral Hearings by Videoconference in National Proceedings across Europe”
- Michael Silverleaf (UK)
 - Remote hearings in the Business and Property Courts in England
 - Links to relevant documents
 - Protocol regarding remote hearings

https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1-1.pdf

- Practice Direction 51Y

<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>

- Chancery Bar Association EBundling Guide

<https://www.chba.org.uk/news/ebundling-guide>



Video-hearings in France



Video-hearings May 2021

At the Paris court of first instance: a fledgling experiment



- Video-hearings authorized for civil matters by the ordinances adapting the proceedings during the Covid-19 pandemic (already used for criminal hearings in certain circumstances)
- Only possible with both parties agreement
- At the Paris court of first-instance, approximately 10 hearings held remotely during June 2020
- Among them, 4 held by the 3rd chamber (specialized in IP matters), but only for copyright, designs and trademarks cases (for patents, hearings postponed on the parties request)
- Since last September, back to “normal” for civil proceedings despite the new lock-downs, i.e. mainly physical hearings (different for criminal hearings); on two occasions, patent cases handled in a mixed way: lawyers and/or parties on-site / parties and interpreters on remote

A mitigated feeling/result



- The tool worked well (no issues of sound / image)
- Both parties lawyers satisfied, despite the fact they were not able to “catch” the judges’ eye and see if their arguments “hit the target”
- From my side: less interactive, harder to stay focus, especially for long hearings; Submission of seals less attractive than IRL (jogging pants worn by the law firm’s intern); questions of public attendance and security (video recordings prohibited, but how to ensure?)
- Cost-saving proceedings (traveling), allowing more concerned people to attend (especially parties outside Paris/abroad), easier to find a suitable date

At the Paris court of appeal: « proceedings without pleading »



No video-hearings, but a specific process: the French government issued a Decree implementing a specific process called « proceedings without pleading »

- For civil matters (not criminal) cases which hearings were cancelled or postponed due to the first lockdown (March and April 2020)
- Written procedure
- With the agreement of all the parties

At the Paris court of appeal: Practical results



- Nearly 25 cases/ chamber have been examined under this specific process
- Positive aspect: a lot of decisions handled more quickly
- Negative aspect: frustrating for lawyers and boring for judges

At the French National Institute of Industrial Property (INPI)



- Since the Covid-19 crisis, hearings for trademarks oppositions (non public) only held remotely; 1 or 2 hearings per week = probably the “new normal”
- For nullity and cancellation proceedings on the ground of non-use: less frequent public hearings, held physically (question of the network capacity to manage hundreds of virtual attendees)
- Practitioners enthusiasm: time and cost savings

Court hearings & COVID

The Netherlands

activate
your
ideas

EPLIT 8th Annual Meeting
May 27, 2021
Bernard Ledeboer



Court hearings in The Netherlands during COVID

Court hearings in Dutch patent cases may temporarily take place by Video Conference (VICO)

Legal basis:

Art 2.1 temporary law COVID-19: court hearings may take place via 2-way electronic communication means

*Confirmed by Supreme Court of The Netherlands on September 25, 2020
(ECLI:NL:HR:2020:1509)*

At the first instance, almost all hearings in patent cases are by VICO

At the second instance, some physical hearings and some VICO hearings

Examples: 1st instance proceedings (on the merits and summary), and 2nd instance (merits)

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Standard patent case 1st instance

Accelerated proceedings on the merits before the patent chamber of the The Hague District court

Case profile:

-front loaded

-fixed time table of deadlines for submissions and hearing set by the court

-panel of 3 specialized Judges

-full presentation of case at hearing

-'hands on'

Written phase

Statement of claim, statement of reply + optional counterclaim, reply to counterclaim, final exhibits, reactive exhibits.

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Standard patent case 1st instance: Hearing

Normal schedule

e.g. pleadings 90 min plaintiff, 90 minutes defendant, 20 min rebuttal, 20 min rejoinder, questions Judges

Documents with pleadings in writing handed over to court and counterparty immediately prior to start pleading.

Temporary COVID schedule

e.g. 2 days before hearing; simultaneous submission of pleadings in writing by e-mail, max. 45 pages

1 day before hearing: e.g. max. 5 pages written response defendant to claimant's pleadings (out of the 45)

VICO hearing: questions from Judges, 20 min rebuttal, 20 min rejoinder.

Summary proceedings (1st instance)

Preliminary injunction proceedings before the provisions Judge of the patent chamber of the The Hague District court

Case profile

- front loaded*
- short term hearing date*
- 1 specialized preliminary provisions Judge*
- full presentation of case at hearing*
- ‘hands on’*

Written phase

Statement of claim, optional statement of reply defendant, optional second round of written submissions.

Summary proceedings (1st instance): Hearing

Normal schedule

e.g. pleadings 60 min plaintiff, 60 minutes defendant, e.g. 15 min rebuttal, 15 min rejoinder, questions Judges.

Documents with pleadings in writing handed over to court and counterparty immediately prior to start pleadings.

Temporary COVID schedule

e.g. 2 days before hearing; simultaneous submission of pleadings in writing by e-mail, max. 20 pages

1 day before hearing: max. 5 pages written response defendant to claimant's pleadings

VICO hearing: 20 min rebuttal, 20 min rejoinder, questions preliminary provisions Judge (order may vary)

Standard patent case merits 2nd instance

Proceedings on the merits before the patent chamber of the
The Hague Court of Appeal

Case profile

- front loaded
- semi flexible process schedule
- panel of 3 specialized Judges
- full presentation of case at hearing
- ‘more formal’

Written phase

e.g. Statement of grievances, statement of reply and counter grievances, optional other written exchanges, final exhibits, reactive exhibits.

Standard patent case merits 2nd instance: Hearing

Normal schedule

e.g. pleadings 60 min plaintiff, 60 minutes defendant, 15 min rebuttal, 15 min rejoinder, questions from Judges.

Documents with pleadings in writing handed over to court and counterparty immediately prior to start pleadings.

Temporary COVID schedule

VICO hearing: e.g. 60 min plaintiff, 60 minutes defendant, 15 min rebuttal, 15 min rejoinder, questions from panel.

Submission of pleadings in writing by e-mail by plaintiff and defendant immediately prior to start of respective pleadings (allowing a few minutes for distribution and printing).

Validity advice proceedings Dutch Patent Office (extra)

Case profile

-semi front loaded

-fixed time table

-panel of 3 Patent Office Members

-full presentation of case at hearing

-‘hands on’

Written phase

Advice request, reply patentee with main request & possible auxiliary request, response requester in view of auxiliary request, final written submissions

Hearing

Normal schedule

e.g. pleadings requester, patentee (no time limit), questions panel

COVID schedule

Written simultaneous exchange of pleadings by e-mail 2 days in advance of hearing (no page limit)

e.g. 5 min rebuttal requester, 5 min rejoinder patentee, questions panel, final remarks requester, final remarks patentee

Observations on COVID VICO hearings

-Court of Appeal: as close to regular physical hearing as possible

-District Court / Dutch Patent Office: pleadings in writing to allow for in depth of discussion at VICO

Exchange of pleadings in writing:

- + Focus on salient points, in depth discussion
- + More time to think through response
- + Less 'posturing', more substance

- Less interjection / adrenaline
- More time consuming process /costs
- Risk of too little discussion in case of few questions

Thank you for your attention!

Questions?

V.O.

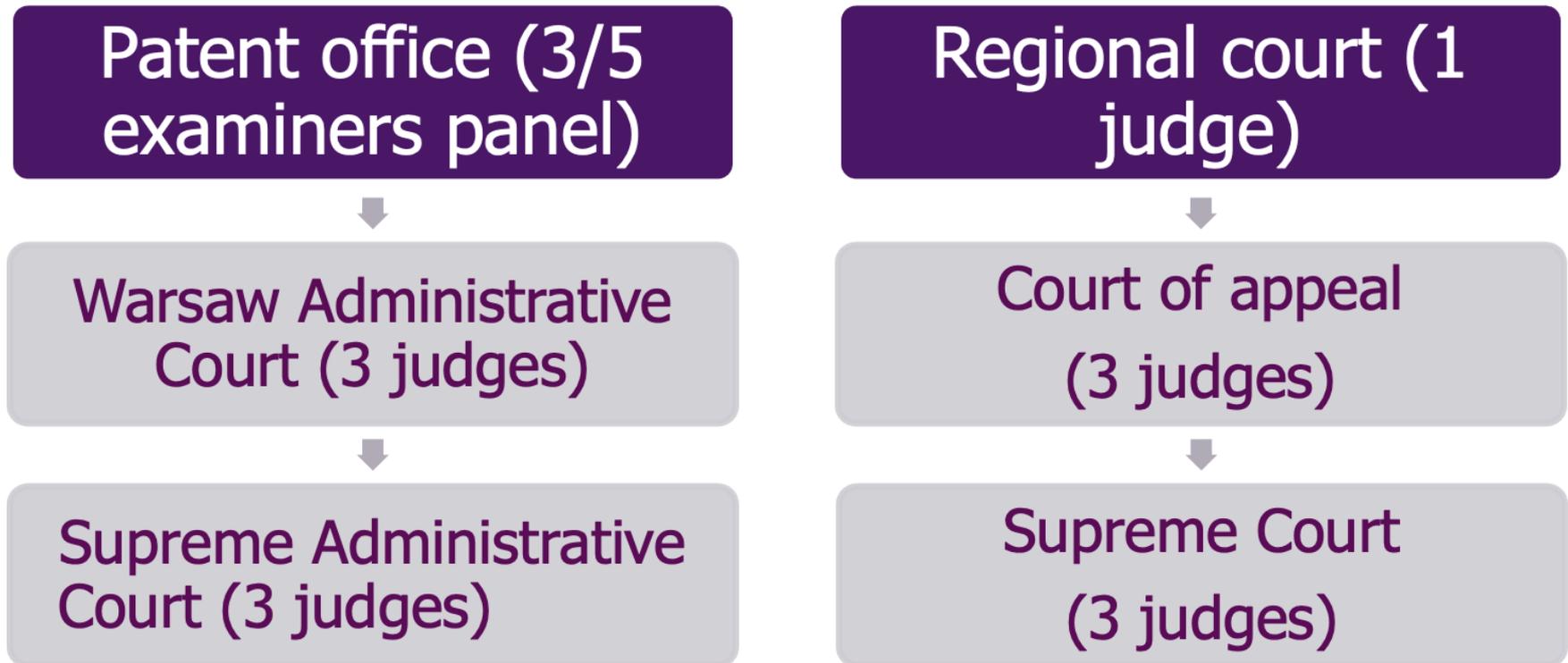
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IP COURT SYSTEM IN POLAND



Pre-pandemic status in civil courts

- Art. 151 sec. 2 CPC – ViCo hearing
- Art. 235 sec. 2 CPC – taking of evidence online
- Parties/witnesses in different court buildings(in a different city)
- Technical norms specified in an order of MoJ
- Not often used
- Role of a hearing in Poland not key and varied

„SHIELD 3.0” ACT – 2 MARCH 2020

- E-hearing – as default
- In-person hearing if „no excessive danger to the health of the persons participating in such hearing”
- During state of pandemic and 1 year following it
- Requirement to have technical possibility of ViCo
- Persons participating in hearing can be present in any location as long as it is not offensive to the court
- Judge rapporteur and presiding judge need to be present in the court building

IN CAMERA (NO PARTY PARTICIPATION)

- In administrative-court proceedings:
 - When no technical possibility exists for e-hearing
 - There a excessive health and safety risk
- In civil proceedings
 - parties do not object
 - or
 - All evidence has been taken
 - Parties file written briefs
 - The proceedings are to be concluded during the hearing

 - More freedom for in camera on appeal

CURRENT PRACTICE

- Patent Office - traditional hearings
- Warsaw Administrative Court – no hearings
- Supreme Administrative Court – extremely rare hearings
- Civil Courts
 - Initially mostly preference for traditional hearings
 - Moving slowly over to e-hearings
 - Internal court instructions issued forcing more e-hearings -> moving to mostly e-hearings

THREAT OR OPPORTUNITY

- Fast scheduling, broad participation
- Possibly more opportunity to comment for parties
- Relatively limited technical problems
- Technical inequality of parties affecting outcome?
- Technical issues as bases for delay?
- Minimalistic regulation, varied interpretation, variety of technical tools – objections as to party rights violation?

FURTHER REFORM PLANNED SOON

- E-hearing obligatory during pandemic
- In person hearing
 - only when it is indispensable
 - will not create threat for health and safety
 - requires consent from the president of the court
- In camera hearing whenever:
 - No technical possibility for e-hearing
 - Hearing is not indispensable



**Please
use the
Q&A
function!**



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