

## **The New Munich Patent Litigation Procedure: First Feedback after One Year**

*Sabine Rojahn* \*

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### I. INTRODUCTION

Under the German patent litigation system, infringement and validity are dealt with separately: in the first instance, infringement suits are heard by the civil divisions of the regional courts, while invalidity actions fall within the exclusive jurisdiction of the Federal Patent Court in Munich.

Infringement litigation is concentrated among 12 regional courts. Most infringement actions are brought to the Regional Courts of Düsseldorf, Mannheim and Munich.

In the Regional Court Munich, two civil divisions are in charge of patent infringement cases. The presiding judge of the 7<sup>th</sup> Civil Division, Dr. Peter Guntz, has streamlined the procedure of civil infringement suits so as to speed cases up and provide the parties with sufficient time to optimally prepare for the trial. The goal is to have a judgment handed down within seven to eight months after the lawsuit was filed.

The key points of the new structure:

- The early first hearing is dedicated to questions of fact and legal issues (not only case management).
- Judicial mediation is offered, if requested.
- The parties' written submissions are subject to strict deadlines.

At the Regional Court Munich, the new "Munich procedure" has been practiced for eighteen months by the 7<sup>th</sup> Civil Division and also by the 21<sup>st</sup> Civil Division, which is presided by judge Thomas Kaess.

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\* Dr. iur., Attorney-at-law, Munich.

## II. THE MUNICH PROCEDURE: TIMELINE

The complaint is served on the defendant with the following procedural orders:

- A time limit of approximately eight weeks is fixed for the response to the complaint.
- The date of the early first hearing is communicated, usually within two to three weeks after the deadline for the response to the complaint.

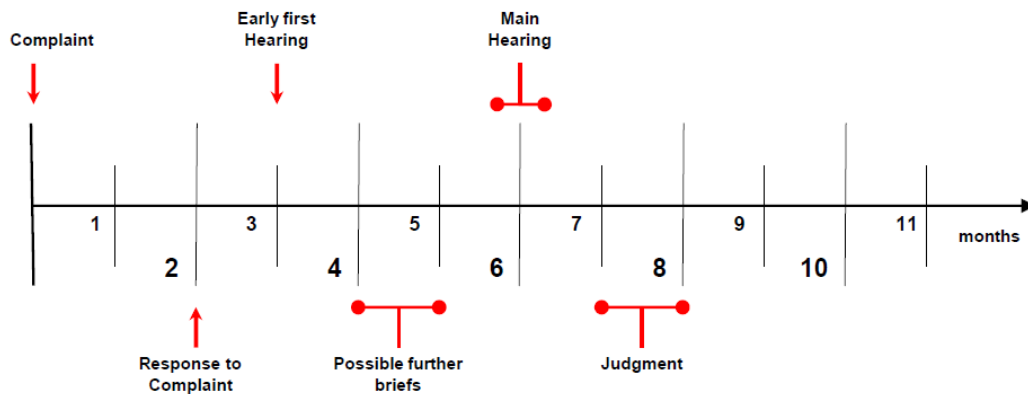
Upon the defendant's request, the time limit for the response to the complaint may be extended for legitimate reasons, including a complicated technology of the patent. An extension will normally also be granted if the defendant is a foreign company and the case involves extensive translations and/or travelling.

In the early first hearing, the court will fix the time limits for the replication and rejoinder submissions jointly with the parties. The time limits normally are one month each. In complex cases, additional written arguments may be filed or longer time limits may be agreed.

Compliance with the agreed deadlines is mandatory. The court will disregard late submissions unless there is a justifiable reason for the delay.

The main hearing date will be agreed with the parties in the early first hearing as well. The main hearing takes place approximately two weeks after the last deadline for written submissions, which is usually five to six months after the lawsuit was filed.

The judgment is pronounced about six weeks after the main hearing.



### III. PURPOSE OF THE EARLY FIRST HEARING

Based on the available written submissions, the court will give the parties first directions in the early first hearing, as well as a first prognosis for the outcome of the case. Of course, this will only reflect the court's preliminary opinion.

The representatives of the parties are summoned to attend the early first hearing in person. The court sets great store by discussing the technology and the economic interest behind the patent lawsuit directly with the parties. In the court's experience, it is helpful for the parties to have an expert present who can answer any technical questions the court may have. This concerns the technology of the invention as such, but also, on the defendant's side, the alleged infringement.

As a result, the remaining disputed issues can be identified in the early first hearing as well as any aspects that are no longer controversial between the parties. Based on the results of the discussion, the court will point out the questions of fact or law that should be addressed in additional briefs to be filed by the date of the main hearing.

The advantage offered by the early first hearing is for the parties to become acquainted with the court's interpretation of the facts and legal issues at an early stage and be enabled to systematically prepare for the trial, concentrating their arguments on the issues considered relevant by the court.

For the court, the early first hearing involves the advantage that issues can be addressed in a timely manner. Procedural orders, which otherwise would be issued in the main hearing and delay proceedings, can be avoided.

It is also important for the court to clarify with the parties in the early first hearing whether an amicable settlement would be an option. Mediation will be discussed as a potentially reasonable option for the particular case. The Munich court offers a separate mediation proceeding for intellectual property matters, without pressuring the parties to avail themselves of this offer. If the parties inform the court that contentious proceedings are preferred, the court will not try to settle the case.

### IV. SIDE NOTE: MEDIATION IN THE MUNICH COURTS

If the parties decide to attempt resolving their dispute through mediation, the infringement proceeding will be suspended. The Munich courts offer a judicial mediation procedure. Mediation is referred to the other patent litigation division of the District Court if the parties opt for judicial mediation. The Munich judges undergo additional training as mediators. As the mediation hearing is subject to confidentiality, the aspects discussed therein cannot be introduced in any contentious proceeding later. The judges conducting the mediation are subject to nondisclosure undertakings as well, and the files are managed separately.

In judicial mediation proceedings before the Munich courts, a judge from the Federal Patent Court may be involved as co-mediator on the parties' request.

The parties are at liberty to agree on a different mediator instead of judicial mediation proceedings. Mediation takes approximately two to four months.

#### V. THE MAIN ORAL HEARING

In the main oral hearing, the case is heard on the basis of the further written arguments filed by the parties. Given the thorough preparation for the early first hearing and the parties' additional written submissions, expert witnesses need to be consulted in the hearing only in exceptional case. The purpose of the main hearing is to fully discuss all issues of fact and law. If the defendant has brought an invalidity action in the meantime, this will include a discussion of staying the infringement suit until the Federal Patent Court hands down a decision on invalidity. All German infringement courts apply the same criteria in deciding whether or not to stay infringement proceedings. It must be established, to the conviction of the court, that in all likelihood the patent-in-suit will be revoked. For example, this is fulfilled if additional material prejudicial to novelty is presented which the European or German Patent Office has not examined. If, by contrast, the nullity action rests only on a lack of the inventive step, the infringement suit will normally not be stayed.

A judgment usually is pronounced six weeks after the closing of the oral proceedings.

#### VI. SHARING EXPERIENCES WITH JUDGES, ATTORNEYS AND PATENT ATTORNEYS

On 9 December 2010, the Union of European Practitioners in Intellectual Property<sup>1</sup> jointly hosted a legal forum on the new Munich procedure with the Bavarian Ministry of Justice. The panel discussion was attended by the two presiding judges of the patent litigation divisions at the Regional Court Munich I, Thomas Kaess and Dr. Peter Guntz, as well as by attorneys-at-law, patent attorneys and one in-house counsel. With more than 200 guests, the event attracted a lively interest.

Both judges reported that attorneys and parties accept the strict deadline regime. The time limits normally proved to be sufficient; extensions were requested only in exceptional cases. Experience also shows that, after the main hearing, the case is ready to be decided. No further delays occurred. Although the court has to invest a considerable effort in the early first hearing, the extra work does pay off: since technology, patent construction and infringement are discussed at an early stage, the trial can be concentrated on the essential issues, and a decision can be taken promptly after the main hearing without any delays by court expert opinions.

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1 [www.union-de.com](http://www.union-de.com)

In the attorneys' experience, the early first hearing is very helpful, and the strict deadline management is appreciated. It prevents the filing of extensive briefs shortly before the hearing, which causes unnecessary extra work and is not conducive to the actual case-work.

The offer of mediation proceedings is also regarded positively. One attorney reported about a case that was successfully concluded as a result of the mediation.

In the panel discussion, the judges clarified that summoning the parties is not mandatory in every case, especially where it requires travelling from abroad. Whenever it seems impossible or unreasonable for the parties to attend, the attorneys should contact the court well in advance.

## VII. SUMMARY

The new Munich procedure offers a fast, effective judicial proceeding. Within seven to eight months a judgment is handed down that allows the claimants to enforce their claims on a provisional basis after posting a security. The concept of an early first hearing provides the parties with sufficient time to discuss the technical issues with the court prior to the main hearing and to optimally prepare for the trial.

As another benefit of the early first hearing, the parties and court agree on the timeline and the number of written submissions, avoiding time pressure and unfair "surprise" statements shortly before the hearing. Judging from the experience accumulated in the first year, attorneys-at-law and patent attorneys highly appreciate the strict deadline management.

Furthermore, the option of judicial mediation offers to the parties the opportunity to avoid lengthy lawsuits through successful mediation.