

Patent Litigation under the “Munich Procedure”

Kluwer Patent Blog

March 15, 2017

Thomas Musmann (Rospatt Osten Pross)

Please refer to his post as: Thomas Musmann, 'Patent Litigation under the “Munich Procedure”’, Kluwer Patent Blog, March 15 2017, <http://kluwerpatentblog.com/2017/03/15/patent-litigation-under-the-munich-procedure/>

As some of you may know, the Munich District Court has a special approach concerning the procedure for patent infringement proceedings since late 2009, called the “Munich Procedure”. The members of the two patent litigation panels just recently had the opportunity to commit themselves to a slightly modified procedure and to render more precisely how this procedure should work. They also demonstrated what risk the parties take if they do not stick to the court’s rules.

The main distinctive feature of the “Munich Procedure” is the existence of **two hearings in which the merits of the case are discussed**. The two hearings are embedded in a fixed schedule, including the filing of submissions by both parties within strict deadlines.

Originally, the schedule was planned as follows:

- filing of the complaint and payment of advance court fees by plaintiff
- 2-3 days later: service of the complaint on defendant (when service abroad: 2-3 months later)
- 2 months later: statement of defense by defendant
- 1 month later: **first hearing**
- 2 months later: counterplea by plaintiff
- 1 month later: rejoinder by defendant
- 2 weeks later: submission of summary of arguments by plaintiff and defendant
- 2 weeks later: **second and final hearing**
- 1 month later: judgment

Total length of procedure: app. **8-9 months**.

This schedule has proved to be too ambitious in the meantime. In practice, the actual deadlines and hearing dates are delayed by 3-6 months, sometimes even more. This was admitted by one of the presiding judges in a recent presentation as being a partial failure of the “Munich Procedure” in the past. The current aim of the court is to achieve a schedule as follows in the future:

- filing of the complaint and payment of advance court fees by plaintiff
- 2-3 days later: service of the complaint on defendant (when service abroad: 2-3 months later)
- 3-4 months later: statement of defense by defendant
- 2 month later: **first hearing**
- 2 months later: counterplea by plaintiff
- 2 month later: rejoinder by defendant
- 2 weeks later: submission of summary of arguments by plaintiff and defendant

- 2 weeks later: **second and final hearing**
- 1 month later: judgment

Total length of procedure: app. **12 months**.

The court urges plaintiffs to explain the scientific background of the patent and the invention in detail already in the **complaint** brief, including a **full elaboration on claim construction**. The statement of **defense** shall contain a **full rebuttal** on all relevant aspects. If the defendant also pleads for a stay of the infringement proceedings until the validity of the patent is resolved in opposition or nullity proceedings, the statement of defense must also contain all the relevant arguments in this respect and the defendant must **initiate separate invalidity proceedings** at least at this stage.

The **first hearing** then serves the purpose to give the parties a first indication of how the case currently stands on the **infringement** side, and to give the court the opportunity to identify particular issues on which further information is deemed to be required. Both parties have the opportunity to provide additional explanations on these issues during the first hearing or in their later briefs. The hearing lasts for app. one hour.

The first hearing shall **not** cover the question of **validity**, as the plaintiff did not have the opportunity to file a rebuttal on the defendant's position at this stage. The discussion on validity is reserved for the second hearing.

In a first hearing just a few weeks ago, one of the panels made clear which consequences the plaintiff has to face if he chooses to file the **counterplea** not after but **before the first hearing** (or, as he put it in this case, to file a **short first counterplea** before the first hearing, the full counterplea to follow later after the hearing). Under these circumstances, the plaintiff is considered to have **waived his right to be heard again**. The court then reserves the right to dismiss the case right away, without a second hearing, if it comes to the conclusion that the patent is not infringed. Otherwise, it will not grant the plaintiff another term for an additional counterplea, but continue the proceedings directly with the defendant's rejoinder. In this particular case, the plaintiff actually "withdrew" his latest brief (the "short counterplea") and requested the court to hand him back the written submission in order to avoid these consequences. The court agreed and, in fact, handed the original brief back to him, stating to the defendant that it had not read the brief and will therefore not consider the arguments contained in this brief. All this is very unusual under German law on civil procedure!

Back to the "Munich Procedure" as it is supposed to work: At the end of the first hearing, the court sets the deadlines for **another round of briefs** (counterplea and rejoinder) and schedules the second oral hearing. The briefs are supposed to focus on the particular issues of interest as identified in the first hearing. In addition, they should cover the question of validity, if relevant.

The **summary of each parties arguments**, filed shortly before the second hearing, shall provide the judges with a short overview and is not supposed to contain any new arguments.

While the "Munich Procedure" does not allow either party to file **additional extracurricular briefs**, it would be extremely difficult for the court to ignore such additional filings for constitutional reasons (there is very strict jurisdiction on when a court violates the constitutional "right to be heard"). It has proved in the past that either or both parties often do file additional briefs, and the the court is willing to take these into consideration anyhow. However, if the plaintiff chooses to make a late filing, he not only risks that the court will grant the defendant leave to file a **post-hearing brief**, but also that the litigation is heavily delayed.

During the **second hearing**, the case is discussed again under all aspects. The parties do their

pleadings, and the court often enters into vivid discussions on particular factual or legal aspects. The second hearing usually also lasts one hour.

The Munich court very much endeavours to come to a **judgment** within one month after the second hearing. The court also endeavours to avoid the appointment of technical experts. The plan is to render down a judgment as quickly as possible.

According to our firm's experience, the "Munich Procedure" has advantages and disadvantages for both parties. We saw that it was hardly ever possible for the court to maintain the original schedule under the old regime. We are keen to learn how the "modified" procedure with a less strict schedule and with more flexibility on the court's side will work out in practice and how it will stand the test against the UPC procedure.

Dr. Henrik Timmann

rosnatt ostn pross - Intellectual Property Rechtsanwälte

