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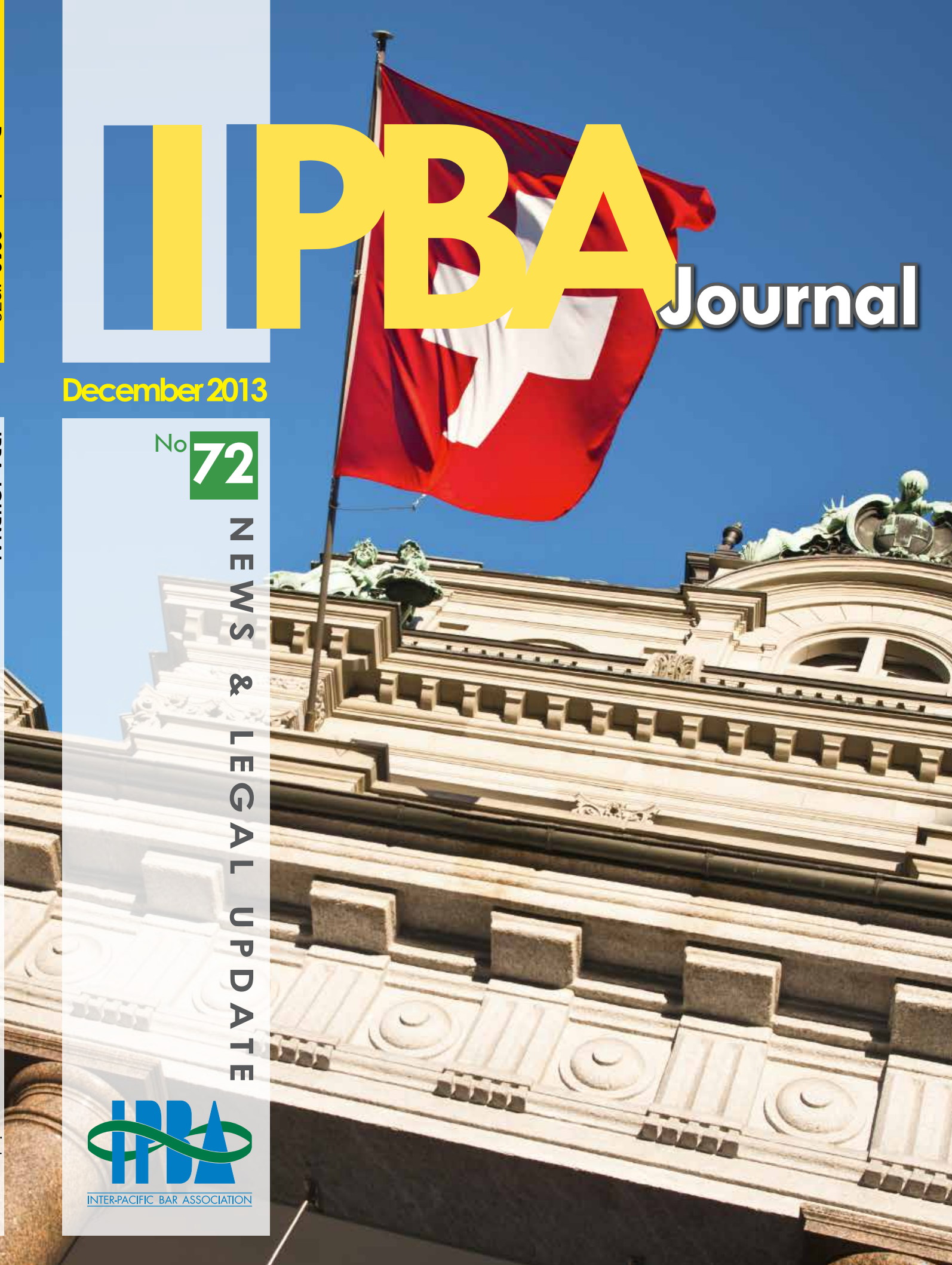

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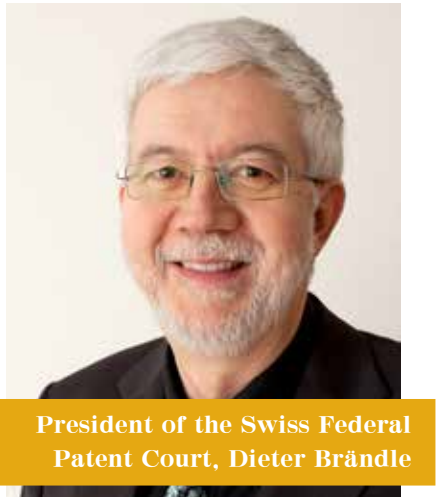
Interview with Dieter Brändle, President of the Swiss Federal Patent Court

On 28 October 2013, Caroline Berube, the Chair of the Publications Committee of the IPBA, was honoured with an opportunity to interview Dieter Brändle for the IPBA Journal. Below is a summary of the interview.



President of the Swiss Federal Patent Court, Dieter Brändle

Dieter Brändle studied law in Zurich and wrote his thesis an human rights in Strasbourg, France. He was a clerk at a district court in Zurich and was then admitted to the bar. In 1984 he joined the commercial court in Zurich where he began to work on patent cases. Since 1992, he has been spending most of his time on patent cases as a judge. Overall, he has been working with patents for more than 25 years.

1. **Before being appointed as President of the newly created Swiss Federal Patent Court, you had been working for a Zurich District Court since 1984. Since 1992, you were focusing mainly on patent disputes. Before the creation of the Swiss Federal Patent Court, the Zurich commercial court was handling 50 per cent of the patent cases in Switzerland. Why was a new court set up? Were there discrepancies in expertise and how cases were handled across Switzerland?**

There were about 30 patent cases a year in Switzerland. About 50 per cent of cases were handled by the court in Zürich. The other 50 per cent of cases were spread out across the country and were sometimes handled by courts without experience. The incentive for the new Swiss Federal Patent Court was to have all the cases heard by one court to allow for a more uniform judicial review and process. The courts with less experience in patent cases would sometimes rely on a court appointed expert's opinion as the basis of their decision. The new Federal Patent Court opened in January 2012 and since then all cantonal courts transfer patent cases to the Federal Patent Court.

2. **The 2012 Activities Report of the Federal Patent Court states that the resolution rate in 2012 was 52 per cent, which is lower than the rate at other federal courts. However, the whole process is four times faster than the average time required before the district courts having jurisdiction before. What explains these numbers?**

I do not want to focus on statistics and averages. Our own procedural system differs from those of other courts given the specific nature of the legal matters we come across. Because the bench of judges is a mix of technicians and lawyers, it becomes easier for the parties to come to an agreement. We often have settlements at the first hearing with the parties, where a technical judge informs the parties about his provisional opinion of the case in view of what the parties have brought forward so far. If there is no settlement after the first appearance, the parties exchange further pleadings. Within six weeks of the pleadings, the technical judge then issues a formal

technical opinion provided to the parties to highlight his assessment of the technical issues. Before the Patent Federal Court was set up, the process to obtain an expert opinion – from an external expert – could take about one year. The new procedure is faster compared to the previous system even though many parties still chose to go to trial.

3. **There were 54 procedures filed in 2012. What is the trend this year regarding the number of cases filed?**

There were 33 cases filed from January to October 2013. We anticipate an increase in the overall number of cases this year.

4. **The rate of cost versus claim amount is higher than the rate observed for other federal tribunals. Are the higher costs due to the appointment of technical judges while a traditional tribunal appoints experts whose costs are borne by the parties?**

The higher cost is due to the fact that we have higher disputed amounts than those in other courts. We compare ourselves favourably to regular courts given the higher amounts of damages in question. I might add that except for two full time judges all judges work on a part-time basis and are paid salaries that are significantly less than those of practising lawyers or patent attorneys in private practice.

5. **As the President of the Federal Patent Court, you are in charge of making decisions over the composition of the chamber. How do you decide the make-up of the chamber?**

For ordinary procedures, the tribunal is composed of either three, five or seven judges. The President decides the number of judges for each case based on the complexity of the matter. For a trial, the standard bench is made up of five judges. There has to be at least one technical judge who is a patent attorney and at least one qualified barrister on the bench. The judges are called in for each case according to their technical skills and work experience.

For a summary procedure, the President decides as a single judge. But it is a legal requirement to have a bench made up of three judges when the matter is highly technical. In practice, there are almost always three judges appointed for a summary procedure made up of a mix of qualified barristers and patent attorneys.

6. **Technical judges are experts in various fields of technology and the parties have the choice of being heard in four languages (German, French, Italian and English). This may limit the number of skilled technical judges to hear a certain matter. The fact that the technical judges are part-time judges could also raise the optic of conflicts of interest. How do these issues affect the composition of a bench to hear a case?**

Judges are either qualified barristers or patent attorneys. There are 25 patent attorneys and 11 qualified barristers. Judges are elected by the Swiss Federal Parliament for six years and they are paid according to the number of days they sit as judges. Swiss law is flexible as judges can work in private practice during their term. Some of the judges can also be experts or attorneys representing parties before the Federal Patent Court. This flexibility was necessary in order to attract talent to the Federal Patent Court. Indeed, this works pretty well.

Because of the nature of the court, we are careful to limit any potential conflict of interest. Each of the judges must clear a conflict check before being appointed to a case. As the president of the Federal Patent Court, I create a list of names according to the dispute matter and required expertise. Proposed judges then reply to me whether there is a conflict of interest. The appointment of judges usually takes two days and we have never been short of technical judges thus far.

For language issues, we also have not encountered any problem as of now. Most of the cases are heard in German even though the parties are from foreign countries – two thirds of our cases involve foreign parties. We suspect that the parties agree on German in order to create a layer of neutrality. I can think of a case between two United States based companies who pleaded in German. Even though we are

supposed to be able to handle cases in French, German, English and Italian, I must admit that it would be difficult to offer a hearing in Italian. Handling cases in English is also very common as everyone practising patent law is comfortable in English.

In addition to the language of the proceedings, that is to say the language the court uses in a given case, the parties are free to choose any official language of Switzerland to submit their pleadings without any requirement to submit translations except if requested by the other party. In such an event, translations are borne by the court.

7. **We understand that there is cooperation between Liechtenstein and Switzerland for patent applications meaning that when applying for a patent in Switzerland, the patent granted extends to Liechtenstein. Is there any kind of cooperation at a judicial stage between Liechtenstein and Switzerland to avoid a double procedure or discrepancies in solutions given for the same dispute? For example, if there is a claim for nullity filed in Switzerland against a patent granted in the Switzerland-Liechtenstein zone, is the nullity decision effective in both countries or must the claimant run two trials?**

Yes, there is cooperation in many fields between Switzerland and Liechtenstein. For example, Liechtenstein uses the Swiss Franc as its currency. There is also cooperation in the field of patents as patents granted in Switzerland extend to Liechtenstein. Liechtenstein and Switzerland are one patent region. For patents disputes, Liechtenstein and Switzerland are also one patent region. There is no risk of double trial or discrepancy as patents disputes actually end up in Switzerland and the decisions made are valid for both countries.

8. **In Switzerland, the application procedure does not include a material review of the applications regarding novelty and inventive step. However, this step is generally required in other countries and is necessary for a European patent. Do you think the law should be amended to be on the same page as the European patent procedure? Is this attracting more applicants to Switzerland or is it a disadvantage?**

For companies that are only interested in the Swiss market, there is no issue for them to apply for a Swiss patent according to the Swiss procedure. For bigger companies, there is practically no case where the applicant applies according to the Swiss procedure. The applicant would apply for a European patent, which also includes Switzerland.

However, the legislators in Switzerland are thinking about introducing the same application procedure as for the EPC. This was previously the procedure in Switzerland and we have kept novelty and inventive step checks only for some specific fields like watches and textiles. Checking novelty and inventive steps does not change anything for disputes. When there is a claim regarding infringement, the defence will usually plead invalidity of the patent in suit.

9. **On February 19 2013, 25 countries in the European Union have signed an agreement to create the Unified Patent Court. This is the culmination of a long process. The cases involving EPC patents represent more than 80 per cent of the total cases submitted to the Federal Patent Court. Is there competition between both courts? Or will there be cooperation in the future?**

I think we need to wait and see if this will really happen and how it will work. The time frame for operation has not been finalised nor has the commencement date of the Unified Patent Court, right now estimated at some time in 2015. There is still a lot of work to be done before it happens. I foresee several challenges including languages issues.

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Caroline Berube is a managing partner of HJM Asia Law & Co LLC and focuses on Chinese corporate law and commercial practice. She has advised clients in various industries such as manufacturing, energy (oil, gas and mining), technology and services. Caroline is also a regular speaker at many international conferences and is an arbitrator approved by the Chinese European Arbitration Centre.