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SESSION 7: COMPETITION & FOUR CONCURRENT SESSIONS

7E. IP and Courts: Current and Future Challenges

Moderator:
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***Speakers*:**
Klaus Grabinski
Federal Court of Justice, Karlsruhe
How the Pandemic Has Affected Patent Litigation at the Bundesgerichtshof and What Might Remain Once the Pandemic Has Been Overcome

Carl Josefsson
Boards of Appeal of the European Patent Office, Haar
The Boards of Appeal of the EPO – Judicial Authority of First and Final Instance: Recent Developments in the Appeals Procedure

Annabelle Bennett
Former Judge of the Federal Court of Australia, Sydney; Bond University, Robina, Queensland
Which Courts; Which Judge; Which System?

F. Scott Kieff
Kieff Strategies LLC, Washington, D.C.
Options for IP Dispute Settlement

***Panelist*:**
Oliver Jan Jüngst
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STEVAN MITCHELL: Thank you all. Good morning, good afternoon, and good evening, depending on where you are currently. I'm Steve Mitchell and I direct the Office of Standards and Intellectual Property for the International Trade Administration, which is part of the U.S. Department of Commerce. I want to welcome you to a panel that is quite compelling even in an ordinary year when we hear from leading jurists and judicial administrators about how they're navigating challenges that have arisen from changes in prevailing IP law and policy, procedures, and litigation practice.

This year, we have another overlay to navigate, that one being the challenges presented to jurists and judicial systems by COVID-19. When I think about how my agency has navigated these challenges, I think we're at something of an advantage because we're already a highly decentralized agency with dozens of offices throughout the United States and in dozens of countries as well.

By contrast, I can't imagine a function that is traditionally more centralized and less distributed than giving litigants access to their day in court or to confront face-to-face other claimants in an arbitration proceeding. I'm very excited to hear from leaders in their respective fora about how they have addressed these and other challenges in the past year. Beginning with Dr. Klaus Grabinski who is from the German Federal Court of Justice, the BGH,[1] in Karlsruhe. Without further delay, let me turn things over to Dr. Grabinski for his presentation on how the pandemic has affected patent litigation at BGH and what might remain once the pandemic has been overcome.

KLAUS GRABINSKI: The topic of my speech is how the Federal Court of Justice is trying to cope with the COVID situation and restrictions and what may remain when COVID is gone. As you know, in German patent litigation, the written procedure is important, but also, of course, the oral hearing is very important.

Written procedure is important because judges very carefully read what party representatives have written and form a preliminary opinion and then communicate this opinion to the lawyers and to the parties at the beginning of the hearing followed by the pleadings of the lawyers. The lawyers, particularly the lawyer to whose detriment this preliminary opinion is, have the chance to respond and state what they think is right.

Also, oral hearing is very important in German patent litigation. In the courtroom, not only party representatives but also the parties, and this can also be in-house counsel, executors, interpreters, everyone may attend. There may be a lot of people in the courtroom. Usually, there is one hearing per week and sometimes even two hearings in less complex cases. The hearings never take longer than one day, and it's not very often, but sometimes witnesses are also heard and experts may also be heard in patent validity cases.

When the COVID situation came up in March, April of last year, of course, this caused a lot of problems. The court was contacted by the party representatives, and they were saying, "Well, the party cannot travel because of travel restrictions and cannot come to Karlsruhe. Hotels have been closed; they cannot stay in Karlsruhe. Also, the courtroom capacity has been reduced due to COVID restrictions."

[1] Bundesgerichtshof.

There were also parties asking to cancel hearings, and actually, three or four hearings had been canceled. Of course, a solution had to be found because the show had to go on. In that situation, the Court looked into the rules of procedure and in the rules, there is a section that was introduced into the rules of procedure some years ago but was never of great importance that became central.

This section allows the court to permit parties, representatives, and assistants to join the hearing and also have expert witnesses or party hearings to take place by video transmission. The only thing that is not permitted is recording the video transmission. The Court decided to make extensive use of this section. Since then, almost all hearings are hybrid hearings.

Pursuant to the rules of procedure all judges of the panel, which means all five judges, have to be in the courtroom at all times during proceedings. Representatives are only allowed in a small number, so usually one or two representatives — normally a lawyer who is presenting the legal aspects and the patent attorney who is presenting the technical aspects. And all other people, parties, and other representatives join by video. Public access is also guaranteed but only in a small number.

What you can see here is one of our courtrooms, the larger courtroom, and what you can see in the middle is the camera tree. The camera tree has four cameras which go in each of the four directions so that one camera goes in the direction of the bench of judges, two cameras in the direction of each side of the parties, and one camera is for the audience. When you look at the lower picture to the right side, there you have the perspective, the angle of the court, and you see these little screens. In the screens, the judges can see all other participants that join by video, and then also the lawyers have the same kind of screens.

Here, you see big screens where you can also see the participants by video from the audience's perspective. Now, how did it work in the past? It worked pretty well. Usually, how to participate is very similar to participating in any other video conference. Usually, you're given an invitation link, and there is a rehearsal session, usually one day before the hearing. During that rehearsal session, all technical problems are fixed.

The system proved to be very reliable. The court usually uses a video platform that everybody else uses, and it is very helpful also for uploading documents. When a judge or one of the lawyers is referring to a certain document, simultaneously, this document is uploaded and appears on the screen. When a certain citation is made, for example, from the patent specification column 4, line 32, this particular part of the patent specification appears on the screen, and that can make the discussion easier and also focus on the documents and on the parts of the documents that really matter.

What has been the user feedback since then? The vast majority of participants have been grateful for not having to travel, in particular, in the COVID situation. Litigators usually prefer not to join by video, but still be on-site. This is particularly the case when the litigator on one side wants to appear, then normally also the litigator on the other side wants to appear.

Since litigation is very international before the Federal Court of Justice, very often both parties are not from Germany or one of the parties is not from

Germany. Also, the issue of interpreters is important, and interpreters like the system because they have an extra line between the party and themselves, and they do not interfere in any way with the running of the hearing.

The question is, what will remain after COVID-19? My expectation is that we will see a hybrid format. Lawyers, litigators normally want to be on-site. They want to be in the courtroom in order to bring forward their case, and this, of course, is still at least to some extent easier than by video. However, my expectation is that parties, particularly when they come from far away, prefer to join by video because it's much easier. It's also possible, if necessary, that there is an exchange of views between those who join by video and those who are in the courtroom.

My résumé is that we will see these kinds of hybrid hearings in the future with part of the party representatives and parties in the courtroom, but others joining by video, and this is something we learned from the COVID situation. Thank you very much for your attention.

STEVAN MICHELL: Thank you very much, Judge Grabinski for a terrific overview of intensely practical considerations, which I'm sure face other similar fora as well. Let me turn quickly to our other speakers and our commentator, Mr. Jüngst, to see if you have any quick-hitting observations and also ask those in the audience to contribute any questions to the Q&A as we'll be turning over to the next speaker rather quickly. Sir?

OLIVER JAN JÜNGST: Yes, Steve. Thank you. My name is Oliver Jüngst. I'm a partner with Bird & Bird in Germany, and thank you so much, Klaus, for your presentation. That was excellent. I also want to thank you and the whole Senate, basically, for making this possible on such a short timing. Nobody should believe that the other courts, the lower courts, first instance or second instance, are able to match what Klaus Grabinski just kindly explained. That's not because the judges do not want to do this, but it's the technical equipment. It's the ability to use the systems.

Klaus nicely reported about several cameras, several screens and actions. I think this is very important to make it happen. By comparison, I've been before other courts where basically there was only one little screen where you could see, and as Klaus has kindly explained, it's important that the judges are sitting together as a panel. If you have a three-judge panel or even a five-judge panel, everybody has to be on the screen, and then you have to take into account the social distancing rules that currently apply, so people are sitting far apart, and you can see them as very, very small persons basically.

This is totally different before the Federal Supreme Court because of the technical system that they can use and the ability of using that, but the willingness of using these kinds of systems is very important. I totally agree with Klaus' observation that the hybrid system is a good system for many, in particular those that have to travel from Australia, New Zealand, and the U.S. to come to the hearings. It's pretty easy, and clients love that. I have also to say that, unfortunately, some courts do not allow hybrid systems at all, such as the Federal Patent Court at this stage, but it remains to be seen whether this would change going forward. Thank you.

STEVAN MITCHELL: Thank you. Any additional questions, observations, or comments from the speakers? Well, if there are none, and seeing no questions in the Q&A box, we'll proceed to the next speaker, Mr. Carl Josefsson. Let me turn to the next speaker, Mr. Carl Josefsson, the president of the Boards of Appeal of the European Patent Office in Haar, Germany. He will speak to recent developments in the appeals procedure for the Boards of Appeal of the EPO.[2] Sir?

CARL JOSEFSSON: Thank you very much. I hope you hear me well. I'm very happy to have the opportunity to speak to you. Today, I am speaking on the Boards of Appeal of the EPO. In U.S. terms, we would be something of a combination between the PTAB[3] and the Courts of Appeal of the Federal Circuit. We are formally a part of the European Patent Office, but we are a separate and autonomous unit.

I am the President of the Board of Appeals, and I report to the Administrative Council, which is on the highest body in the European Patent Organization. There is also a Boards of Appeal Committee, which supervises and advises me and the Boards of Appeal, and that committee includes three senior patent judges from the contracting States of the European Patent Convention. For the time being, it is Sir Colin Birss, Mr. Klaus Bacher, and Mr. Are Stenvik from the UK, Germany, and Norway respectively. There are also representatives from the delegations of the Contracting States sitting in the Administrative Council, in this committee.

The structure of the Boards, the core of the work and the Boards. The Technical Boards settle some 3,000 technical cases a year. There are 28 Technical Boards, and that guarantees a very high degree of specialization technically in the Boards of Appeal. The Enlarged Board of Appeal is not an appeal body within the boards, and the Enlarged Board has mainly two functions. It makes determinations on important points of law, which are referred to the Enlarged Board, either by the President of the European Patent Office or by one of the Technical Boards or by the Legal Board. It also deals with petitions for review when there are alleged fundamental procedural violations from parties after deciding cases, but these are limited tasks, and it's not possible to appeal to the Enlarged Board of Appeal.

The Boards of Appeal — we are first and final judicial instance, and we try both points of law and fact. The judicial character of our proceedings has been underlined in the recent revision of our rules of procedure. The revised rules came into force on the 1st of January last year. They focus on efficiency in two meanings. Enhanced efficiency in our case management; importantly, communications are now mandatory for the Boards in preparing the oral proceedings. Efficiency also in the sense that the purpose is to reduce the number of issues dealt with on appeal. Another important part is to increase the predictability for the parties — of what will happen in the proceedings, and of course, to increase harmonization between the Boards in the way we treat procedural matters.

Amendments. It is possible to amend patent claims on appeal, but this is getting stricter. That is one important part of these revised Rules of Procedure, which then codify practices established and makes clear that the onus to justify

[2] European Patent Office.

[3] Patent Trial and Appeal Board.

amendments of the cases is on the parties, that the amendment should narrow down the scope of the case and that the admittance is in the discretion of the deciding Board. We have something called the convergent approach, which means that the possibilities to amend become increasingly limited as the case progresses before the Boards.

This is shown with this picture here, and the first level is at the stage of admittance of grounds and reply. The second level, before we summon, and the final third level then after the summons to oral proceedings, and at that level, there needs to be exceptional circumstances in order to amend a patent claim. Of course, a party's rights to be heard and their right to fair proceedings needs to be respected in the application of all this.

A bit of advice then to parties — with the stricter application of admitting amended claims, front-load your cases, substantiate the cases already completely before the examining division or as may be before the opposition division. When on appeal, present the complete case in the first submission before the Board, and bring any claim and amendments as early as possible, at the earliest possible point in time, and justify amendments made.

We had, in the Boards of Appeal also, of course, like all of you, important developments during the pandemic. We introduced proceedings conducted by videoconference in both ex parte and inter-partes cases and also with the possibility of interpretation. There was also a new article of the Rules of Procedure adopted and eventually approved, which came into force a week ago on the 1st of April, according to which, in the first paragraph, it is in the discretion of the Board to hold oral proceedings via video conference. In deciding so, all relevant factors would be taken into account.

It is according to this provision, then, possible to have the mixed-mode or the distributed mode, so there is a physical presence hearing as a basis, but parties may attend them via video conference. This possibility is also there. It's also possible and it is of particular importance now during the pandemic also for Board members to participate remotely.

Now, we have used some different techniques, but mainly for the oral proceedings we started with "Skype for Business" and now we use "Zoom," which also enables deliberation between the parties, internally in separate rooms and you can also, like here, share the screen to do presentations, et cetera.

Final remarks with first and final instance. It is getting stricter to amend claims under the new rules of procedure, and we have gained a lot of experience with video conferencing due to the pandemic so far. Thank you so much for your attention.

STEVAN MITCHELL: Thank you, sir. I must admit, I'm truly impressed by the speed with which these various remote access opportunities were created and put into place. My question for the panel is a general one, which is: What has been the overall impact on your ability to manage cases over the past eight or nine months when these options have been available? Do you find that it has actually expedited your ability to efficiently process cases, or is it really about the same as before?

CARL JOSEFSSON: If I might. Yes, thank you very much, Stevan. Well, I would say it has been essential for the Boards. We, for a couple of months, a year ago, we had to restrict our activities and stopped holding oral proceedings because of the restrictions imposed by the pandemic. Then we took a lot of measures in order to enable, in a limited way — similar as Klaus has explained for the Bundesgerichtshof — to have physical presence here, but only in a limited way. Then, of course, colleagues and parties used to travel to Munich for our hearings. The development of the videoconferencing technology has been essential for us to be able to continue with the administration of justice during the pandemic.

STEVAN MITCHELL: Any other observations from the speakers or the panel? Mr. Jüngst, do you have a practitioner's perspective on the question?

OLIVER JAN JÜNGST: Thank you, Steve. Thank you so much Carl for your observation. I could see a lot of your slides and your thoughts and comments. That was very helpful. Steve mentioned at the beginning that you are located in Haar, and perhaps you wanted to explain the discussion that was there about whether Haar is Munich or not, and whether this is not solved, because people might not know where Haar is located.

CARL JOSEFSSON: Now, Haar is a location a number of stations away from the city center with public transportation. It's about 20 minutes from the city center of Munich. Indeed, we answered in the Enlarged Board a question in 2019 about the compatibility with the location here, on the holding of hearings here with certain provisions in the Convention. We found that there was no infringement of the Convention with holding all the proceedings also at this distance from the city center of Munich, so to speak, in short.

I should add a few words for completeness. I am President of the Boards of Appeal and I am also Chairman of the Enlarged Board of Appeal. There is a referral now pending on the legality of oral proceedings being conducted with the use of videoconferencing technology if parties have not given their consent to this. Being chairman of the Enlarged Board, I will and must refrain from commenting anything on this pending referral.

KLAUS GRABINSKI: If you will allow me to weigh in, there's I think an interesting aspect. As I mentioned, there are not often witness hearings at the Federal Court of Justice, but actually, we had one in the last year and this was done by video. However, I can also imagine witness hearings that should not take place by video if, alternatively, the witness can also be heard in the courtroom There is a risk that when the witness is not present in the courtroom people on-site may influence the witness during the interrogation. I think this perhaps is one situation where you can see the limits of video.

I think for the time being it will not be online hearings only. The hybrid format, however, has advantages. I would even say, leave it to some extent where possible to allow the parties the way they prefer. If they don't want to travel from Korea to Germany, then why not have them by video? But for the main players in the litigation, it might be preferable, particularly when we no longer have COVID restrictions in place, to be in the courtroom. My suggestion would be a rather flexible one and also taking into consideration the needs of the parties and of course also the needs of the litigation itself.

STEVAN MITCHELL: I thank you, Judge, for those very helpful observations. It's now our pleasure and privilege to turn to the next speaker, the Honorable Dr. Annabelle Bennett, who is the eighth chancellor of Bond University and a former judge of the Federal Court of Appeal in Sydney, Australia and who I believe has also made the greatest time of day sacrifice to be with us today. Thank you very much for that, Judge Bennett.

ANNABELLE BENNETT: Thanks, Stevan. Well, first I have to say that it's a thrill to be here, in a way. It's 3:00 AM. I'm loving every second of it. It only goes to show how much I think that I, like so many others, really have a special place in our heart for Fordham and the experience of being together and with all of the wonderful people. It's lovely to share the panel with people that I've met at Fordham and continued in friendships with, like Klaus and some people on the screen whom I love dearly. I think that's the reason why I'm here.

I guess what you said before — and I didn't answer in the panel in the intervening comments because some of it I thought I'd save for this part of my own presentation. Why? Because this topic is about challenges to the courts. I'm not currently sitting as a judge. However, just to clarify one thing, for the Federal Court in Australia, we sit both at first instance and on appeal but, as I often point out, not in the same case.

I know that the Federal Court has also taken up this challenge of dealing with matters remotely, because our judges also sit all over the country and travel was not possible because, as a country, we divided up and we had state border closures everywhere like I'm sure other countries did. The remote system had to work, and it had to work in order to enable judges to sit together. For appeal purposes, they also had to sit as a panel but remotely.

But I had a couple of other experiences during this time as well. I was appointed a Royal Commissioner to inquire into national natural disasters in Australia, which included, but was not limited to, the bush fires. You may have heard about the bush fires we had last year, which were appalling. That Commission started before COVID, and we were in a very tight timeframe, so we had to move seamlessly into a video hearing.

I've also done arbitrations and things like that now internationally with people on different time zones. Australia always misses out. They started every day for me at 4:00 AM, which was a lot of fun. That was to accommodate the United States, London, and Italy. We found that it works. What I found in both of those cases was that it works best when there are people to help with the video linkages, and it may be that within the court systems you've now taken on people who can help with that.

In each of the cases where I've had really big hearings, we've had professional people come in to manage the videos, and that has actually minimized the consequences for the parties, like being able to screen share, Klaus, so having to have it work. What happens is then you have outside people doing it and that makes an enormous difference. I think that is one way that it makes it a far better system.

In the matters that I've been in, we've taken a fairly strict approach. It's a bit like Christopher Floyd's comment with regard to Klaus's, which is that if one side

cannot appear, then nobody appears in person. So, it's one in, all in. You can't have one lawyer or one set of witnesses in the courtroom with the judges and not the representatives of the other side. That we've applied as well.

What I wanted to raise, though — about the fact that the courts have been very flexible in adopting these hybrid models, or first all video and then perhaps hybrid models, and that's a wonderful thing. I think for the reasons that have already been given, a lot of that will continue. I haven't been able to attend all of the papers because really, I've needed to get some sleep, but I saw from some of the summaries that other people have raised similar issues that have come up.

I see that Colin Birss made a comment on his little summary thing. I don't know if he actually spoke to it because we all give summaries and then change our minds about what we're going to say when we get it. He actually made the comment about how things are going to be so much more online. That is also good news, bad news. I mean, it's terrific if people can get online determinations. Very convenient, very efficient for the parties.

My thought when I read his little summary was: how boring for the judges. I mean, are we going to attract people who want to be judges if everything you do is online, because part of the fun, I mean, one of the reasons you changed and, in the common law world, you'd give up being an advocate, which is the fun part, is then when you become a judge. I don't want to spend my whole life sitting there just reading material. It's bad enough with those countries that have enormous written briefs and almost no oral hearings.

I'm glad to hear Klaus emphasize the oral hearings in Germany because they're the fun bit. They're also the bit that really enables you to come to grips with the issues. I think it is a challenge for the courts and for the judges to keep themselves loving it and engaged and having the parties feeling as if they're getting that interaction. At the same time, you have, by necessity, hybrid models. I don't know about your countries, but I know that in our country we are finding it hard to get people back to work physically in the city. Everyone loves this idea of working from home. It's terrific because it's much more efficient. You don't have traveling time, commuting time. You can go and do other things on the side. In countries where you've got to robe, what I love, I'm hearing this from counsel, is that people robe like from the waist up. It's very convenient. You put on all the formal gear, and you might have shorts underneath.

That makes life a lot easier. Then the question that arises for me is what then happens with the comparison, with, say, arbitrations? Why would people go to the courts then? If the courts have been flexible and arbitration is being flexible, won't they then turn around and maybe look at other methodologies for resolving cases, to deal with other issues that are coming up, such as secrecy and privacy questions.

Then I bring up the other challenge, which is that some of the judges in courts now around the world are taking actions that a lot of other countries and other judges are not happy with. All the ideas of orders that can have cross-border enforcement issues that some parties may not want. You might have issues with some judges looking to determine validity issues for other countries' patents because there are a lot of activist judges. Is this something that the parties want?

Will the parties turn to other forms of determination other than the courts? That's one issue. On the other side, we have something that I saw Darren Tang raise, which is that traditionally you had certain jurisdictions that were well known for doing IP cases. What's happening now is that IP cases are proliferating all over the world in countries where there are judges that do not necessarily have the expertise, who are having to develop the expertise, and who are hearing cases.

Starting off, perhaps with copyright and trademark, but moving certainly into patents and SEPs[4] and all of the more complex cases. These judges are having to deal with these cases without having come from a tradition of IP litigation. You've got that challenge for the courts, as well. Some of that is being helped because WIPO[5] has now got judges meeting as an advisory group of judges from all over the world, bringing together judges from all over the world.

We had to do that meeting remotely last year, but otherwise it is in person, which is fantastic. That also means that judges of less experience are able to talk to judges of more experience from other countries about how they decide cases and the sorts of cases. Then you have a fabulous interaction. What happens after that, of course, is WhatsApp groups develop. The judges can then ask each other questions, not to have another judge determine the case, but to say, "Does anyone know about this issue? Has anyone had cases involving that issue?" That also becomes a really good system. That is a separate challenge for the courts.

Now, the separate challenge for the courts and for the litigators is, “What happens if you're with a judge where it’s their first case, and they’ve never done a complex IP case before? How do you educate them? What do you do? Is that what you want? Then, if you're going to have that situation, do you then stay with the judicial system of the country, or do you choose an alternative way of going?"

I think the courts are going to face challenges both from within, with their own methodologies of how they deal with things, and also from without, from litigators around the world and parties who are going to balance up the different ways in which you can have cases heard more flexibly, so more able, perhaps, to forum shop between jurisdictions for the court system. Because now you don't have to travel, and can have hearings remotely, it becomes a lot easier.

If you are then choosing a different court system, do you stay with the court system or do you look at alternatives? Forget even mediation because that's actually a different thing altogether but determining alternatives like arbitrations and the ability to choose arbitrators can be important such as former judges perhaps, or expert arbitrators, experts in the field from all over the world who can now come together remotely, which affects both the costs and the flexibility of those hearings.

If you want confidentiality or other matters with which the court can deal, such as looking at competition law‘s intrusion into IP, whether or not some of those issues will also impact upon the way things run will also be relevant. I see my time has run out, so I'm going to stop.

STEVAN MITCHELL: Thank you, Judge Bennett. Let me turn it back to the speakers and panelists to see if there are any observations about some of the

[4] Standard essential patents.

[5] World Intellectual Property Organization.

many consequences that Judge Bennett was able to underscore about our increasingly digital lives. Mr. Josefsson.

CARL JOSEFFSON: Thank you so much, Annabelle. Extremely interesting, and I have a couple of comments from my side immediately. Collegiality in court. I'm in the midst of this now. We have had these experiences now after a year working — teleworking, it's called in our context. At the same time, we have had comparatively many new colleagues taking up office recently or during the pandemic. Of course, this poses challenges.

I see that as a main challenge for us now and also in the future. I think, realistically, there will be long-term consequences of the changes in many ways, for society overall, but also for the courts, and a lot of it is beneficial. But for me, one key question is that we must not jeopardize the collegiality in our courts and in the Boards. How do we do that? That is to me, one of the leading important questions.

ANNABELLE BENNETT: Carl, I agree with you a hundred percent, I agree with you a hundred percent. There's no doubt that you can do certain things. First, bringing judges together at conferences or get-togethers like the WIPO and like you have in Europe — you have the wonderful Venice one. That is important. It's also important for judges to be able to sit in the same courtroom if they possibly can, because you have an interaction you don't have otherwise.

It's interesting. I've done lots of Zoom things — we all have now over the last year and not just this — I chair boards and things now, so I have to do board meetings. There's no doubt you can do other things, getting onto a Zoom meeting 15 minutes before and just having that chat with each other, even on Zoom makes all the difference. You get a chance to talk about the case, but also just to chat, just to create that level of comfort with each other.

That is fantastic. At the same time, I have to tell you that I've chaired board meetings this year with board members I'd never met. Then when I finally got around to meeting in person, it's not the same. I hardly recognized a couple of them, even though I'd been talking to them for a year on Zoom. You're right. It's wonderful as far as it goes. You can create the collegiality. You can easily do that by having informal conversations.

At the same time, it doesn't actually replace that bit, what I would call the water cooler conversations — the ability to have those informal conversations in the corridors before you go in and out of court and matters such as that. It's up to the experienced IP judges now to bring in as much as possible. That's what WIPO was doing, for example, bringing in these judges from all over the world who are not already part of that international IP vibe like here at Fordham.

I think Hugh has to put out an invitation now to the hundreds of judges from all over the world and bring them in. This is one of the ways in which they can interact and develop collegiality with other judges, but also with other people. There are people outside the judiciary, lots of wonderful people like on this panel.

STEVAN MITCHELL: If Hugh is listening, I volunteer to moderate such a session. [laughter] Any other comments or observations?

OLIVER JAN JÜNGST: Yes, Dr. Bennett, Annabelle, thank you so much for this fascinating speech. My main question is, how can you be so active and

energetic at three o'clock in the morning? [laughter] I would never be able to do something like that, remarkable.

ANNABELLE BENNETT: It's obviously the vibe I'm getting from the rest of you even over the camera.

OLIVER JAN JÜNGST: Thank you so much. No, I like your point in particular about whether it's still attractive for the younger generation and the younger judges to handle hearings on video. By way of an anecdote, my 16-year-old son, like many other kids these years, he loves basically his smartphone, he loves PlayStation, but he doesn't like online schooling at all.

It's so interesting to see that. I'm getting tired of that. I cannot sit at the screen the whole day, and it's all right. I fully see your point that might apply also to younger judges in particular. We are all attracted by the technology at some point, it's important in the COVID-19 situation, it's indispensable, but whether going forward, we will want to talk to a screen all the time, I doubt it. I'm looking very much forward to seeing you all next year.

KLAUS GRABINSKI: If I now may weigh in, I think we should be cherry-picking a bit. We should take the good things from what we learned during the pandemic with the video system but go back, return to the things that are not equally served by video, once the pandemic has been overcome. Probably that's the best way to deal with this. I also might be a bit of a heretic. I think Hugh is listening to this.

I think we all also experience a different situation — Fordham like it used to be on-site in New York, Fordham like it is right now — it's fully understood that this is the only way it can happen. That's wonderful that it’s going to happen this way. But next year, if the pandemic no longer is there or, at least, is allowing these kinds of conferences to take place on-site, well, it might be a better choice or even to develop some hybrid thing. Let's come together in reality and not only virtually.

ANNABELLE BENNETT: The trouble with hybrid things is that this is fine when you've got individual people on computers. There is nothing worse than looking into a room, where people are sitting all together in a room, you're on the big screen and they're like ants. That is one thing Klaus that — your camera system looks very good that everybody comes up on the bigger screen. I don't think the technology is yet good enough to — they know it's meant to go to the speaker, but it doesn't work well enough yet. You need to allow for the fact that everyone has to be equal, I think, or when you're speaking at least.

STEVAN MITCHELL: Well, in introducing a dispute settlement perspective into the discussion, we're very lucky to have the Honorable F. Scott Kieff, as our next speaker, former Commissioner with the U.S. International Trade Commission, and currently of Kieff Strategies. Sir.

F. SCOTT KIEFF: Thank you so much. What a pleasure to join each of you. I echo the great thanks to each of you as well as to Hugh and the other organizers for bringing us all together. On the chance that it might be helpful, I thought what I would do is cover some slightly more substance-oriented topics rather than try to add to what is already an excellent discussion of much of the process in this space. I want to highlight some work I've been doing with my colleague Tom in this space.

We, of course, are all interested in the future. This is where we get to spend the rest of our lives, so it's an exciting place for us. For Tom and myself, we've been working on these issues for about 30 years, as academics, in the government, and then in the private sector. To give you a little sense of background, for me, it's crazy. It's absolutely nuts. When I think about my contribution to health care, it's really probably best stated as curing insomnia, writing books and articles that can put anyone to sleep.

Tom is very much the same way, lots of books and articles. For me, most of the work has focused on commercializing intellectual property, for Tom, most of the work has focused on International Law. We came together and we have been thinking about this world we look at. For those of us who were consumers of U.S. public television, there used to be this really nice guy who would get on TV and teach people how to paint trees. Happy little trees, he used to call them.

When you look out on the world map, you used to think about a bunch of happy little countries. Of course, by 2014, the language in international settings had changed to not just competition but great power competition. It's politically quite diverse. These are remarks by people in the U.S. who are on the left and the right, both seeing this as great powers' competition. I think we all know the narrative.

One of the things we see over the last year in our work as academics, as well as our work through Kieff Strategies, is that we see there's such an effort that has gone to such good use and comes from such a good place to notice how great, fair and accurate, and professional adjudication has been occurring in China. It really is spectacular to see world-class adjudication in a system that, as recently as several decades ago, was thought of by so much of the world as not doing this kind of world-class adjudication.

One of the things we have been trying to help people notice across governments, as well as the private sector, is the conclusion that there is well-earned respect for the professionalism and fairness that we see within Chinese courts and agencies. There's an important context standing behind the Chinese courts and agencies that is, unfortunately, too often overlooked.

It is the recognition of this context that puts things into a very different perspective. This context of an authoritarian central state, operating a self-described strategy of military-civil fusion, means that when Party A and Party B adjudicate in front of this court, or this agency, it may very well be fair as between A and B. At the same time, the military-civil fusion concept means that you have a very coordinated set of activities going on behind the scenes that is coordinated with not only the military operations but the domestic manufacturing high-tech operations as well, then coming back out into the world, the rest of the world, through the Belt and Road Initiative.

Fairness and professionalism normally lead to a sense of ease and comfort, especially for those in IP adjudication. We think that this insight means a degree of context and concern that is also important to keep in mind. We think that this context matters also when looking at the interfaces between how different parts of the U.S. system handle IP and antitrust.

The idea here is to just notice, that on average, on the left side of the slide, for good reasons, we operate part of our government in ways that are, by design,

very responsive to political influence — that's our executive branch. On the other side, by design, on purpose, we operate other parts of our government in ways that are either more removed from political influence or more designed to maintain political opposition and tension — that is a check on political influence.

At the same time, there's another thing that changes as you move across the slide. On the one side, you're usually talking about one issue at a time, like patent validity, or anti-competitive effect, whereas on the other side, you're talking about a set of issues at the same time. When you are talking about only one of these issues one at a time, it's quite easy to be very hyperbolic in your own argument, whereas when you're talking about the set of issues, you have selfish reasons to be more self-disciplined.

The combination of self-discipline and political tension gives rise to more neutral and more transparent adjudication. What we're seeing is the same kind of tensions in Europe, as well as in the U.S. That gives rise to some practical solutions. What we see, whether it's through our neutral work doing mediations or compliance monitoring, or our party work where we are helping teams build strategies, is that they have a lot of opportunity to manage all of these issues, and that over the time of COVID, they are managing these issues.

In fact, we're noticing a slight uptick in demand and practice despite COVID. It's really thanks to the many great ideas and techniques that our colleagues have already described for coping with the remote procedures. The ITC 337 docket is one, for example, that has been operating quite on-schedule and quite actively despite COVID, as well as other parts of the ITC docket. Let me pause there to invite comments and questions.

STEVAN MITCHELL: Thank you. I'll note we're right up against our allotted time but have about a two-minute question period for questions of Mr. Kieff, or for that matter, comments on any of the topics that were touched upon this afternoon, today I should say.

ANNABELLE BENNETT: I have a question for Scott. That was a fascinating outline of the China context, looking at the efficiency they cause. So, if you're choosing to litigate now in multinational patent litigation, for example, which country would you go to?

F. SCOTT KIEFF: We find that a mix is the best choice, but it involves a lot of places, usually, outside of China, even if it involves activity in China. The good news is there are a lot of wonderful courts and agencies, and jurisdictions all around the rest of the world. There are lots of ways to do business with and resolve conflicts involving China, without putting quite as much risk as one has to put on the table if one wants to actually go into a Chinese court or agency and engage directly in that kind of dispute. Accommodation entities is an alternative strategy where you have an operating entity and then a related entity, and the related entity is doing the litigation. That is the alternative strategy.

KLAUS GRABINSKI: I also have a question for Scott. This might be the $100 question. You have SEP litigation in a number of countries going on in parallel. Who should decide? Let's say the U.S. Let's say UK. Let's say Germany. Let's say China. Let's say India, and anybody else who wants to join this club.

F. SCOTT KIEFF: I think it matters much less, who, than it does, how. What you see in each of these examples you've given is that you can find full and fair and transparent adjudication venues. It is the fullness and the fairness and transparency that is most effective in getting a most enduring solution.

ANNABELLE BENNETT: What about expertise, though? It's interesting. Klaus mentioned SEPs. That is a prime example of what you do about the expertise of a judicial officer.

F. SCOTT KIEFF: Expertise as a single good, I think has to be traded with transparency and completeness. By that, I don't mean to suggest all experts are biased. What I mean to suggest is something else. If we think back to the example of the slide of the many agencies in the U.S. system, I assure you, my colleagues in the other parts of the government had wonderful expertise and kindness, each of them.

The central difference is the incentive structure of the parties placing the argument before the tribunal and the internal responsiveness to politics within the tribunal. If you can put those things into check by putting multiple conflicting issues on the table at the same time, then the self-interest of both the parties and the adjudicators becomes more nuanced and more reasoned.

STEVAN MITCHELL: I just want to thank you all for your contributions to a very informative and very enjoyable panel.