



Fundamental Rights of Staff

User-Guide Part II

Points to consider in Preparation of proceedings before
the ILOAT



Points to consider in Preparation of proceedings before the ILOAT

The following points are provided as a guide to applicants to the ILOAT. Please note that most of these points are ILOAT specific but care should be taken to ensure that any claim of substance is raised adequately in the internal appeals procedures in order to ensure its admissibility in ILOAT proceedings. Points that must be raised in internal appeal proceedings are indicated in the following list. Draft texts for the application itself and the letters for the proposed requests to the court are included in annexes to this document. Annex A includes a timeline explaining the procedure and when the various actions should be undertaken.

During the last two years, SUEPO has been trying to improve the legal protection of the Staff through publications, participation in the ILOAT Reform process, as well as challenging the EPO legal system through appeals with national and international courts. The goal of this document is to specify the legal requirements that each case brought before the ILOAT should meet in order to support those initiatives.

Wherever possible, where a claim is brought before the ILOAT against a decision on employees' rights or any other decision of the President or the Administrative Council of the European Patent Office, it is recommended that the application always be made in such a manner that the possibility of review of the ILOAT judgment, or a general review of the judicial activity of the ILOAT is maximized. A second related goal is to systematically demonstrate fundamental weaknesses in the system of legal protection provided with the view to motivating general improvements to the system of legal protection provided.

In order to achieve these goals, in addition to the requesting fundamental rights are applied, it is important to systematically request the ILOAT address a number of important points. Some of the points are procedural steps needed to ensure minimum standards of justice (due process), others relate to the fundamental rights themselves. In this way, not only will the chance of an effective review of the ILOAT decision be increased, but systematically requesting basic rights and due process rights will apply pressure to the ILOAT to meet these standards.

1. Submission of Claims

When submitting claims, attention should be paid to ensure the claims are clear, specific and itemized. When making claims for procedural requests (for example requests for provisional orders, hearings, or summoning of witnesses) these should be clearly indicated as such and not confused with substantive claims. The purpose of this is to be able to determine which claims were addressed by the ILOAT and which have not been addressed. It is important to be clear about procedural requests to demonstrate the failure of the ILOAT to comply should it not implement the request. Therefore claims should be itemized as far as possible and not lumped together into general claims.



2. Oral Hearings

Always apply for an oral hearing before the ILOAT unless this is specifically not desired. Oral hearings are an essential element of a fair trial and the failure of the ILOAT to provide for hearings is a breach of this principle. It is important that as many applicants as possible request oral hearings to demonstrate the failure of the ILOAT. An example text for this request can be found in Annex B.

The ILOAT has systematically refused to hold hearings for the last 10 years. Prior to this there some hearings were held by these were limited. It is unlikely that your requests will be granted, however, in case hearings are held you are strongly advised to seek representation and legal support. Do not hesitate to contact the LSWG in such cases. Also do not forget to claim all costs associated with hearings.

3. Submission of Fundamental Rights Arguments

Where appropriate, plead that specific interests or rights which are protected by fundamental or human rights are prejudiced by the decision of the EPO. These interests should be clearly identified indicating which rights are claimed and how the action of the EPO has infringed these rights. Reference should be made for example to the basic rights set out in the Basic Law of Germany, or alternatively to the guarantees of the European Convention on Human Rights (See User Guide Part I). These arguments do not need to be presented in the Internal Appeal proceedings since they relate to the law to be applied rather than the relief claimed.

4. Submission and Taking of Evidence

Submit concrete evidence or testimony supporting the application by which the claim can be practically supported and proved. Where this is not available submit evidence supporting that such evidence exists and request that the court orders this evidence to be presented (See Point 5 below).

It is of special importance that the application to the ILOAT is so worded that evidence is taken by the ILOAT itself, and reliance is not placed only on evidence collected by the internal appeals committee or other internal body within the European Patent Office. It is also important that the evidence be taken at an oral hearing or in the presence of the parties.

Example wordings are provided at annex B

5. Requests for Further Evidence

Apply for an order for the production of any evidence or testimony which not available to you but which is decisively relevant to the case. This may include specific files, documents or other materials in the possession of the European Patent Office, or specific persons who are able to provide testimony relevant to the case.

6. Normative and Democratic Control



Where the legality or appropriateness of the article or provision of the service regulations itself is challenged, there are two elements that are important.

1. The first is whether or not the resulting legislation (Service Regulation) is consistent with fundamental rights and this is partly covered in point 3 above. User Guide I provides an overview of rights protected by the ECHR and the German Basic Law. It is not necessary to argue the point in detail but the articles of the ECHR and German GG which it is alleged are violated should be specifically stated.
2. The second is the process by which the legislation was effected. There are outstanding questions regarding the legality of the unlimited legislative power and lack of democratic control on the Administrative Council. In such cases an application should also be made for review of the legality of the legislation process. This is a complex matter and you are requested to contact the Legal Studies Working Group through your local staff representation for advice on how to prepare such arguments.

7. Admissibility

In all proceedings, should the ILOAT doubt the admissibility or substance of any claim, an application should be made for appropriate judicial guidance before a decision is made to reject the claim. Due to the proceedings of the ILOAT this must be made pre-emptively in the written application. A statement to this effect should be introduced in the written application. For an example text see Annex B.

8. Inspection of Court File

In good time before a decision has been made by the Tribunal an application should be made to inspect and review the court file.

After judgment has been given, a further application should be made to have access to the court file to ascertain whether the judgment was actually signed by the judges involved and how their participation in reaching the decision has been documented.

It is highly likely that both these requests will be refused by the Tribunal; however, access to this information is an important element of due process and fair procedures. The failure of the ILOAT to meet these standards can only be demonstrated if it can be shown that it systematically refuses such requests. In the unlikely event that access is granted you are advised to contact the LSWG immediately via your local staff representation.

An example letter is provided at Annex C. This also includes the request of point 10 below. An example letter for the post decision request is provided in Annex D.

9. Application for Review



If making a request for review of a ILOAT decision, it should always be requested that the judges who were party to the decision appealed against should be disqualified from acting in the review proceedings in any capacity. Reasons must always be given for an application to disqualify or reject a judge. It should be argued that these judges have already been officially or professionally involved in the matter and are therefore biased. An example text covering this aspect is provided in Annex B.

10. Composition of the Bench / Appointment of Judges

In all proceedings an application should be made for the claimant to see the ILOAT case allocation plan, so as to determine whether the composition of the court (in the sense of the bench of judges sitting) reflects the principles of natural justice. Furthermore a copy of the rules of procedure containing the provisions governing the formation of the bench should be requested. In particular check whether and / or how the composition of the bench was ascertained and recorded in the files.

If a problem is identified, for example, if it can be demonstrated that one of the judges appointed to the bench is biased, then an application should be made to disqualify this judge.

An example letter is provided at Annex F, however, disqualification of Judges is a complex matter and you are strongly recommended to contact the LSWG through your local staff representation.

11. Provisional Order / Injunction

Should there be appropriate grounds for doing so, for example where delay may lead to irreparable harm, an application should be made for an interim injunction (provisional order). Any such application should state explicitly the nature of the irreparable harm, and what interim measures are required. Where more than one measure is requested these should be itemised.

12. Time Limits

An applicant should always ensure that application to the ILOAT and IAC are made in good time so as not to lose the right to appeal. In cases where negotiations with the defendant organization or appointing authority are still running, an application for a suspension of proceedings may be made once receipt of the application has been acknowledged. An alternative can be to ask for a written statement from the administration that no final decision has been taken. Care needs to be taken with this approach and if you want to be certain that you do not lose the right to appeal a decision the only certain way is to file it within the time limits.

An example letter requesting suspension of procedure is provided at Annex E.

13. Costs



An application should always apply for the respondent organization to pay the claimant's legal costs of the proceedings.

An applicant should also apply for the respondent organization to indemnify the claimant against his other expenses, giving concrete details and proof of these.

Costs which relate to IAC proceedings must be claimed within the proceedings to be admissible in front of the ILOAT. Costs relating to the ILOAT proceedings cannot be foreseen in the IAC therefore can be made directly at the ILOAT. It is important in both cases to claim costs in the initial application. If the costs are not known at the time the application is submitted, state that details will be provided later when the exact costs are known. In all cases the source of the costs must be identified, for example costs of legal representation, costs of travel to the ILOAT for hearings, costs of translations into the language of proceedings should this not be supported by the EPO etc.

14. Damages

An application should always request damages.

Were the damages are of a **compensatory nature**, for example loss of earnings or injury, these should be clearly supported by facts or documentary evidence.

Moral damages should be claimed where psychological harm, or harm to a persons image or reputation, has taken place. Where such harm has resulted in illness or required medical treatment, evidence of this should be submitted and claim made for compensation made rather than moral damages.

Punitive damages are sometime awarded in national courts to prevent repetition of the behaviour that led to the claim. Where wilful disregard can be demonstrated punitive damages can be very high. Some national legal systems and courts employ different mechanisms to prevent the unwanted behaviour and therefore do not award punitive damages however, the ILOAT does not have any alternative mechanisms. If an applicant wishes to claim punitive damages, they should assess the risk of repetition and submit evidence which supports this, for example previous transgressions of the organization related to the claim. If possible demonstrate the failure of the defendant organization to observe due care.

Damages should always be claimed realistically and if possible identify models for compensation used in national contexts (for example the ADAC Compensation Tables). Do not limit claims to what the defendant organization or the service regulations state they are willing to pay, or what has been indicated by ILOAT case law. Much more relevant is what the actual damages are and the levels/norms for such awards in a national context.

NB: All claims for damages and any costs specific to the IAC procedure must be raised in internal appeal proceedings in order to be receivable in front of the ILOAT. Costs specific to the ILOAT application can be claimed directly with the ILOAT.



15. General Points

Be **CONCISE** and **CLEAR**. Your case is much more likely to be understood if it is easy to read and your arguments are precise and well formulated. If you must submit large documents, then indicate specifically which parts are relevant. Avoid unnecessary details, evidence should speak for itself and not require lengthy explanations. Bear in mind that should it be decided to take the case to a constitutional court following the ILOAT decision, translation may be required. Unnecessarily lengthy documents and arguments will increase costs and cause delay.

Keep a detailed case file containing all submissions, communications, and documents. Note of telephone conversations and minutes of meetings should be included where appropriate. The file should be opened as soon as you decide to make an internal appeal. Once the ILOAT case has been concluded this file will be an invaluable resource for future reference.

16. Compiling data and informing staff representations

After judgment has been given in the ILOAT, the staff representation of the European Patent Office should be informed on the above points so that they may take note of them and take steps accordingly. It should be borne in mind that the staff representation does not have access to internal information relating to a case unless one of the parties so informs them. The publication of the decisions of the ILOAT may not have addressed important aspects. It should be further noted that the findings of the IAC are not published at all so it cannot be assumed that the staff representation is aware of the case.

If you have any questions on these matters, the staff representation invites any staff member who intends to file an appeal to contact one of our experts. You may do this directly by sending a mail to contact-lswg@suepo.org, or through your local staff representation.

When ILOAT judgments are given, a note should always be made as to which elements of the decision are supported by reasoned statements and which are not.



SUEPO – Fundamental Rights of Staff - **User-Guide Part II**

Preparation of proceedings before the ILOAT

Annex A - Description of proceedings and timeline

The basic procedure for the ILOAT is a series of letters.

The first step is to make an application setting out your claims, and providing arguments and evidence. Application forms can be downloaded from the ILOAT website at www.ilo.org/tribunal .

The registrar of the ILOAT forwards a copy of your application to the Office.

The Office makes a reply and the Registrar forwards a copy of this to you asking you to respond. Normally the Court set a time limit for reply to be 2 months.

You are then provided the opportunity to respond, and this is called a rejoinder. You are not obliged to provide a response, but it is usually advisable to at least address any points and counter-arguments raised by the Office.

The rejoinder is forwarded to the Office, and they are invited to submit a co-rejoinder. Again a 2 month time limit.

Once the co-rejoinder is received by the ILOAT, you will be sent a copy, and the file is forwarded to the judges for consideration.

Any request made during the above procedure that requires a judicial decision, is usually made by the President of the Tribunal who is a permanent member.

The Bench (court) sits twice a year, one between April and June and once between October and December. There are no public proceedings, twice a year in late Jan/early Feb and in July/August the decisions of the court for the preceding session are announced in public. The decisions are usually published 2-3 weeks later on the Tribunals website. If you are the appellant or a person officially representing the appellant, you will receive a paper copy of the decision by post within a few days of the public announcement.

The time between filing your application, and the case being submitted to the judges, you can anticipate to be around 6 months. Depending on the timing you can then expect judgment in a further 2-6 months. Please bear in mind that all the time limits for submissions may be extended but this is not normally permitted without good reason unless agreed by both parties.



Request for Oral Hearings

"The applicant requests an oral hearing to:

1. Present arguments in support of the application
2. To address any questions of the Tribunal regarding the case.
3. The applicant requests that the court hears the following witnesses in support of the application:
 - a. Mr. A N Other: who will provide testimony supporting ...
 - b. Mrs. J Smith etc Who was witness to ...
4. The applicant also request the right to cross-examine any witnesses called by the defendant organisation.

"

Request for Judicial Guidance regarding admissibility

"... Should the Tribunal consider any part of the application to be receivable, judicial guidance is requested from the Tribunal, as the following:

- 1) the specific defects which in the Tribunals opinion render each specific element irreceivable,
- 2) upon which specific law and jurisprudence the opinion of the tribunal regarding admissibility is based.
- 3) what action is required on the part of the applicant to remedy any such defects.

"

Taking of Evidence

When a court reviews evidence, it is important that they do not unduly rely upon a source which does not meet requirements of a judicial instance. The applicant should therefore challenge all cases where evidence is submitted by the Office, which relies on the opinions of others, or which was gathered by a person or persons whose independence and competence cannot be guaranteed, including the Internal Appeals committee

Application for Review

"The review of Judgement no. XXXX is requested. In consideration of the case it is requested that Judges who were involved in Judgement No. XXXX , specifically NAME 1, Name 2, Name 3, are disqualified from hearing the request for review since their prior knowledge brings into question their impartiality and independence"



SUEPO – Fundamental Rights of Staff - **User-Guide Part II**
Preparation of proceedings before the ILOAT
Annex C - Draft letter to ILOAT - Inspection of Court File

Registrar
Administrative Tribunal
International Labour Organisation
CH1211 Geneva22

<ANOther>
<Street name>
<CITY Post code>
>Country>

<DATE>

Dear Mrs Comtet,

<Case Number XXX-XXXX> - Request for Procedural Information and Inspection of Court File

Inspection of the Court file on case number XXX-XXXX is requested.

Once the Tribunal has received the co-rejoinder from the EPO and it is clear which Judges will hear the case, but prior to them hearing the case, you are requested to provide the following:

- A photocopy of the case file – or failing this information as to when I or my representative may attend the ILOAT to inspect the file in person.
- a detailed case allocation plan which indicates which Judges will hear the application and when the bench will sit.

Please forward the requested documents to the address above [or other address if required]:

Yours sincerely,

A N Other



SUEPO – Fundamental Rights of Staff - **User-Guide Part II**
Preparation of proceedings before the ILOAT
Annex D - Draft letter to ILOAT - Inspection of Court File (Post Decision)

Registrar
Administrative Tribunal
International Labour Organisation
CH1211 Geneva22

<ANOther>
<Street name>
<CITY Post code>
>Country>

<DATE>

Dear Mrs Comtet,

<Case Number XXX-XXXX> - Request for Procedural Information and Inspection of Court File

Following Judgement inspection of the Court file on case number XXX-XXXX is requested.

You are requested to provide notification of when final judgement has been taken on this matter and immediately following judgement you are requested to provide a photocopy of the case file – or failing this information as to when I or my representative may attend the ILOAT to inspect the file in person.

Please forward the requested documents to the address above [or other address if required]:

Yours sincerely,

A N Other



SUEPO – Fundamental Rights of Staff - **User-Guide Part II**
Preparation of proceedings before the ILOAT
Annex E - Draft letter III - Suspension of Proceedings

Registrar
Administrative Tribunal
International Labour Organisation
CH1211 Geneva22

<ANOther>
<Street name>
<CITY Post code>
>Country>

<DATE>

Dear Mrs Comtet,

<Case Number XXX-XXXX> - Request for Suspension of Proceedings

A suspension of proceedings is requested for case number XXX-XXXX.

Select as appropriate.

The applicant (applicants representative) is unable to prepare his/her case due to
....

The applicant is negotiating a settlement with the EPO and it remains unclear what
the outcome of this negotiation may be ...

In order to present evidence translations are required. These translations are not
complete.

Evidence vital to the case is being collected by ... and is not available at this time.

Yours sincerely,

A N Other

Yours sincerely



SUEPO – Fundamental Rights of Staff - **User-Guide Part II**
Preparation of proceedings before the ILOAT
Annex F - Draft letter IV - Disqualification of Judges

Registrar
Administrative Tribunal
International Labour Organisation
CH1211 Geneva22

<ANOther>
<Street name>
<CITY Post code>
>Country>

<DATE>

Dear Mrs Comtet,

<Case Number XXX-XXXX> - Request for Disqualification of Judge -

This text is still being discussed in the working group,

Please contact the LSWG directly if you need to request the disqualification of a judge.