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Legal Protection of the Staff of the EPO

Summary
Since the EPO legal system was created considerable changes have been made in the outside world whereas the legal system in the EPO has stood still. This document explains the background to, and discusses the problems with the present EPO legal system. To address these problems and bring the EPO legal protection into line with modern standards worthy of a Model Organisation the staff representation has requested the creation of a joint working group. SUEPO has also recently submitted an appeal to the German Constitutional Court in order to clarify the question of whether the level of legal protection provided by the ILO-AT meets the minimum standards required by the German Constitution.

Introduction

In the last century a substantial number of International Organisations were created, including the EPO. These International Organisations have been granted a high degree of autonomy and employ staff in order to carry out their functions, i.e. they hire, remunerate, promote and occasionally fire staff. Such activities of an international organisation require a legal framework to define and protect the rights of the staff, and limit the power granted to the organisations. A transparent legal framework with an independent and impartial judicial instance providing effective legal protection is particularly important for the weaker party: the staff.

When creating a legal framework the question arose as to which employment law should be applied. One solution would have been to apply the law of the host country, and this solution has been applied to some of the first international organisations, and still applies to some of the smaller ones[1].

However, it is generally considered that in order to guarantee the independence of an international organisation and avoid undue influence of a member state, it is necessary to grant a degree of immunity from national jurisdiction to the organisation.
The extent of immunity of an organisation is usually defined in the convention which establishes it; details are usually covered in a bilateral agreement with the host state. In the EPO's case, this is the Protocol on Privileges and Immunities (PPI[2]), and a headquarters or seat agreement with each of the host states, Germany, The Netherlands and Austria.

Immunity from National Law and/or Judicial Proceedings

It is often assumed that immunity of International organisations is absolute, that is to say, national law does not apply, or cannot be adjudicated or enforced, in any circumstance. This is not necessarily the case. “Immunity” in fact does not mean that the national law does not apply, but that it cannot be adjudicated or enforced. Agreements between the organisation and the Contracting State usually refer to the notion of functional immunity – i.e. the organisation is only

[1] *C. F. Amerashinge “The Law of the International Civil Service” (1994)*

[2] *EPC and Section 16 of the Codex*

immune for acts falling under its official activities. Article 19 of the EPO PPI states that the immunity is not intended to prevent the course of justice, and that the President has the duty to lift the immunity in such a case unless this would prejudice the interests of the organisation. Article 20 of the PPI places a requirement on the organisation to co-operate at all times with the host state to ensure the proper administration of justice and the application of relevant labour regulations. The Staff representation and administration disagree, for example, as to whether this it to be interpreted to mean that national health and safety law applies in the EPO. There are some more concrete limitations to immunity. For example, the PPI states explicitly that "..immunity [from jurisdiction] shall not apply,.., in the case of a motor traffic offence.." (Article 14a of the PPI). The interpretation of the extent of immunity in different circumstances is also different in different countries, making generalisation difficult. Decisions of the administration concerning individual conditions of employment, e.g. level of remuneration, transfer to another place of employment etc. are considered to be decisions taken by the Office in the exercise of its function. Consequently national courts have no jurisdiction in employment disputes at the EPO. A separate legal system thus had to be created.

The Law applicable to the Staff of the EPO

The law applicable to the staff of the EPO is defined in the Service Regulations and associated terms and conditions of employment. Legal Protection of the staff is provided through access to the Administrative Tribunal of the International Labour Organisation (ILO-AT), which it guaranteed in Article 13 EPC.

The ILO-AT statute specifically limits its jurisdiction to disputes relating to the application of the terms and conditions of appointment of staff members or ex-staff members. The ILO-AT also applies some general principles of international administrative law. However, the law applicable to the staff, which would fit in one relatively modest binder, is obviously not the equivalent of the national law, which would apply to an employment relationship. The latter includes: employment law, civil law, national civil service regulations and criminal law, which would fill an entire bookshelf.

Therefore the question remains how legal protection related to matters not covered in the Service Regulations is to be provided.

A further very important question, is how protection of fundamental rights is provided. The member states have binding obligations to protect fundamental rights. These obligations limit state power and authority. The question is how these obligations are met within the EPO.

On page 2 of the Service Regulations it is stated that "*when reviewing law applied to EPO staff, the ILO Tribunal considers not only the legal provisions in force in the EPO but also general legal principles, including human rights"*. It is not clear exactly what effect this statement has. When pushed on the subject in a recent internal appeal the administration argued that although the *principles* of the European Convention on Human Rights apply to EPO staff, this does not imply that the Convention *itself* applies. In a number of decisions, the ILO-AT has made it clear that it does not consider itself bound, in any way, to apply either the European Convention on Human Rights or the Universal Declaration on Human Rights (UN). The ILO-AT prefers to apply its own standards of fundamental rights protection, which are undefined. **The questions are: which fundamental rights and principles apply; who defines them; and who decides whether or not they have been correctly applied?**

Given the above, it is vital for the legal protection of EPO staff that the Tribunal meets acceptable standards. **Studies undertaken by SUEPO and the staff associations of other international organisations have found that the standard of legal protection provided by the ILO-AT does not meet the criteria required by national and international law**.

Summarising:

- The EPO enjoys a degree of immunity from national jurisdiction,
- The law applied within the EPO is largely limited to the Service Regulations and the (undefined) fundamental rights standards applied by the ILO-AT.
- There are disputes as to the interpretation of the PPI, and as to how matters not covered in the Service Regulations are to be dealt with.
- It is not clear how the obligations of the member states to protect fundamental rights are met within the EPO.

SUEPO holds the view that these matters must be addressed. The following sections outline the main issues and problems with the legal protection system of the EPO. The steps taken by SUEPO to address these matters are also described.

Obligations to protect fundamental rights.

The European Court on Human Rights has made a number of decisions which have clearly stated that protection of fundamental rights must be provided within international organisations. In one decision, the Court made the following statement:

``*The object and purpose of the [ECHR[3]] Convention as an instrument for the protection of individuals requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Therefore the transfer of [sovereign] powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.*''

In a series of decisions, the German Constitutional Court has also applied similar arguments[4] [5]. In a recent decision of the European Court of Human Rights relating to the actions of the EU, the court made it clear that the state (in this case the UK) remains responsible for fundamental rights protection despite the autonomy of the international organisation (EU).

The principles applied by the German Court, and the European Court are very similar. Both courts have made it clear that although they consider the EPO to be outside their jurisdiction, the member states are not. The member states remain responsible for ensuring that equivalent protection of fundamental rights is provided within international organisations, and both courts will review this if it is challenged.
There should therefore be little dispute about the legal route and the obligations of the member states, the question that remains is: **Does the level of legal protection within the EPO meet the requirements of the ECHR or other national legislation?**

Summary of the options for review for the Staff of the EPO

The options open to staff for review of decisions of the administration of the EPO and the legal protection system is described below. This is followed by a summary of the problems.

Internal review

If an EPO employee disagrees with a decision of the administration he/she can appeal the decision via an internal appeal procedure. Practical advice on how to handle the appeal procedures can be found in a number of SUEPO publications[6].

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[3] ECHR – European Convention on Human Rights (Also refers to European Court of Human Rights)
[4] BVerfG, 2 BvR 2368/99 vom 4.4.2001
[5] BVerfGe 37,271/Solange I - a decision of the German Court, which criticised the legal protection system of the European Union for not adequately protecting fundamental rights, played an important role in introducing reform of the EU legal protection system, which resulted in the EU recognising its obligations to maintain fundamental rights protection within the EU..
[6] SUEPO The Hague publication: "Dura Lex, sed Lex: Legal Matters in The Hague" with an appended "Memorandum: How, When and Where to file and Internal Appeal".
SUEPO Munich publications: "A Beginner's Guide to the Codex" and "A User's Guide to Van Breda".
***All documents are available from the SUEPO websites: Thehague.SUEPO.org and Munich.SUEPO.org**.*

Internal Appeals Committee

The internal appeal route involves the Internal Appeals Committee (Art. 108 ServRegs, see also pages 23-24 of part 1a of the Codex). The Committee consists of five members: two members and a chairman appointed by the President and two members appointed by the Staff Committee (Art. 37 and 110 ServRegs).
The Committee hears the submissions of both parties and conducts any further investigations if deems necessary. The Committee presents its findings and recommendations to the President. The opinion is not binding, and it is not uncommon for the President to reject the findings of the Committee. It is also important to note that the filing of an appeal does *not* suspend the appealed decision.

External review: Administrative Tribunal of the International Labour Organisation (ILO-AT)

If the decision of the President (or the Administrative Council), after consultation of the respective Internal Appeals Committee, is unfavourable, the staff member may lodge a complaint with the Administrative Tribunal of the International Labour Organisation (ILO-AT[7], Art. 13 EPC, Arts. 107-109 ServRegs). A complaint at ILO-AT may also be lodged if the President refuses to forward the complaint to the Internal Appeal Committee or if the internal appeal is not treated within a reasonable time.

The ILO Tribunal was established in 1947, to review employment disputes between ILO staff and the ILO administration. The statute of the ILO-AT was later amended to permit other international organisations access to the Tribunal, and presently 41 organisations recognise its jurisdiction. The ILO-AT has 7 judges who are nominated by the ILO Congress (equivalent to our Administrative Council) upon suggestion of the ILO Director General (equivalent to our President) for a period of 3 years and normally reappointed for further 3 year terms.

The procedure is a written one consisting of a complaint by the staff member, a reply by the administration, if so desired another submission by the staff member, with the administration having the final submission.

Legal protection in the EPO: the main problems

The above text already identifies a number of problems in the EPO legal system, in particular a *lack of clarity about the applicable law*. There are, however, other systemic problems, and these are listed below.

1. Problems with the Functioning of the Internal Appeals Committee:

- The President does not always give full reasons for a decision (Art 106(1)).
- The IAC is not a judicial instance, it merely advises the President.
- The composition of the Appeals Committee provides a bias towards the administration since the President appoints 3 of the 5 members.
- Disclosure of information. The IAC has limited powers to order disclosure of information relevant to a case. This problem is not unique to the EPO, but it provides an unfair bias towards the administration.
- The formal legal skills of the IAC are usually limited to the chairman. No specific legal training is provided, for their role as judges in staff disputes.
- Some appeals are not forwarded to the President immediately – at some sites there are standing instructions to the post room staff to forward appeals to the administration first. This practice it brings into question the independence of the process.
- Cases have taken up to 3 years to reach a conclusion in the IAC.

[7] *See http/:www.ilo.org/public/english/tribunal/stateng.htm for the ILO-AT Statute.*

2. Problems with the Functioning of the ILO-AT:

There are a number of areas where the legal protection provided by the ILO-AT does not meet expected standards. In 2001 the ILO Staff Union (ILOSU) presented a list of 39 points to the ILO Administration proposing reform of the ILO-AT[8]. Nine of these were agreed in principle but only 2 were considered by the ILO to justify changes to the statute of the ILO-AT. Of these it is likely that only one will be forwarded to the ILO Congress in 2004 for consideration.

The 39 points address a number of aspects including; Standards of Justice, Application of Case Law (legal certainty), Reasoning of the Judgments, Standards of Proof, Staff Representation as a friend of Court, Privileges and Immunities, Interlocutory Redress, Disclosure of Evidence, Testimony of Witnesses, Class Action, Time Limits and Sanctions.

In addition to the 39 points raised by the ILO Staff Union, SUEPO has identified the following problems:

- The ILO-AT relies heavily on the Internal Appeals Committee for collection of evidence and hearing of witnesses. Since the IAC is not a legal body this practice does not conform to accepted judicial practice since the tribunal is relying on another body which does not fulfill the requirements of a judicial instance in respect of independence and impartiality.
- In general the ILO-AT limits it's jurisdiction to matters relating the Service Regulations or other terms and conditions of appointment. In addition to these it applies some general principles of international administrative law. It does **not** however, apply similar standards of fundamental rights as for example set out in the European Convention on Human Rights.
- Further to this there is the matter of the law which would normally be applicable to employment situations in a national context, which does not apply in the cases heard before the ILO-AT. Yet much this national legislations derives directly from fundamental rights. An example is that no clear legal basis exists to bring a case of harassment in front of the ILO-AT[9], neither does a catalogue of human rights apply to the EPO [10].
- Normative control of the legislative actions of the organizations is very limited. The ILO-AT has shown that it will intervene on some matters, for example acquired rights; however, the ILO-AT normally limits itself to the application of the Service Regulations.
- The jurisdiction of the ILO-AT does not include any means to enforce its decisions.
- The ILO-AT does not have any means to enforce investigation or examinations of witnesses.
- International Organisations have on occasion ignored or circumvented ILO-AT decisions. The EPO has also encountered difficulties in enforcing ILO-AT jurisprudence on third parties involved in EPO procedures.
- The article and rules of the ILO-AT limit access to a judicial instance for certain groups of individuals, e.g. job applicants.
- There are serious doubts about the independence and impartiality of the ILO-AT due to the manner in which the Judges are nominated. Judges are nominated (re-nominated) by the ILO Congress upon recommendations of the Director General of the ILO. The Director General is a defendant in those cases involving ILO staff. This interest in the outcome of cases is a taint to the nomination of the Judges and brings the independence and impartiality of the tribunal into question.
- There is a marked lack of equality in the ILO-AT proceedings. The procedure is very heavy and formalistic and requires extensive

[8] *http//:www.ilo.org/public/english/staffun/info/iloat/bulletpoints.htm*

[9] *There is neither is any internal legislation relating to harassment, nor any effective means of redressing this via the ILO-AT. There have been large advances on this matter in national contexts, and in many member states there exists a legal requirement to provide effective means of protection from harassment.*

[10] *In a foreword to the Service Regulations, a statement indicating that the ILO-AT applies human rights has been added. It is not clear if this statement has any legal effect, nor is it clear if this is intended to simply state that in the opinion of the EPO it is the case, or the EPO wishes the ILO-AT to apply human rights. In either case no indication is given as to which human rights should apply.*

preparation of written evidence and documentation. The applicant's access to documents and evidence is severely limited by the reluctance of the ILO-AT to hear witnesses and oral testimony, or to order disclosure by the EPO. On the other hand, the administration has at its disposal all documentation and the services of DG5. The practice of permitting the administration the "last word" in the proceedings has often been used to introduce "new" evidence that the applicant is not permitted to challenge.

- The Tribunal usually applies time limits strictly, this can lead to the tribunal failing to address substantive aspects and leaves the proceedings open to abuse by the administration.

3. General Issues:

Apart from the above problems specific each part of the appeal process, there are other more general problems with the use of appeal procedures:

- *The administration exhibits an over-reliance on quasi-judicial and judicial procedures.* Many appeals are the result of simple mistakes and/or misunderstandings. Many of these could be avoided through better communication with the staff members and a more open and pragmatic attitude by the administration. [Recently there have been indications that the administration is seeking to address this issue.]
- *There is a general lack of reasoning and transparency at various levels.*
  E.g. decisions of the Personnel Department are not always comprehensible. The President's reasoning for deviating from an opinion of the Internal Appeals Committee is often limited. The ILO Tribunal offers no reasoning whatsoever for many of its decisions, for example, it's systematic rejection of requests for oral proceedings and/or hearing of witnesses.
- *There has in the past been a tendency towards unfavourable interpretation of the service regulations.* Where the Service Regulations are ambiguous, the administration and to a certain extent also the ILO-AT, has tended to interpret the regulations against the staff.
- *The appeal process can be excruciatingly slow, which is often a serious disadvantage for the staff.* In one case it took the administration 3 years to produce a position paper. In general the overall process takes between 2-5 years.
- *Procedures are not always transparent*, in particular: documents used in the procedure are not always made available to the staff member. The Internal Appeals Committee and the Invalidity Committee have sometimes withheld important information. Similarly ILO-AT has refused access to documents known to exist.
- *The appeal process is by nature an adversarial one. The process encourages the parties to take opposing positions instead of trying to deal with the underlying problems. Making an appeal can (and usually does) considerably damage working relationships.*

The way ahead?

When the EPO legal system was created it was considered more or less appropriate for the small, fledgling, organisation it was. Since then EPO has grown to an Organisation of some 6000 staff. Considerable progress has been made in the outside world, e.g. in the interpretation of the European Convention on Human Rights, and its application to international organisations. During this time the legal system in the EPO has stood still.

This paper has shown that there are grounds for concern over the standard of Legal protection provided for the EPO staff. Within the limits of our work capacity we try to help and advise individual staff members who find themselves in conflict with the administration. Where possible we try to do this without recourse to the appeal procedure, however, when the use of the appeal system becomes necessary, we believe that **the Staff of the EPO have a right to expect that the system meets commonly accepted legal and judicial standards**. Work undertaken by SUEPO has shown that the standard of legal protection provided within the EPO is significantly below that provided within most member states.

As indicated above we have published a number of papers trying to inform staff about their rights and obligations, and on how to handle conflicts[11].

In the last 1-2 years we have also increased our efforts to improve the system as a whole.

- We are co-operating with the staff representation of ILO and the staff representations of other International Organisations who have accepted the jurisdiction of the ILO-AT in an attempt to reform the Tribunal.
- We have commissioned legal studies on various aspects of the EPO legal system.
- We are studying the possibilities for changing the EPO legal system through appeals with national and international courts.
- We are investigating the "constitutional" obligations upon the EPO and the member states
- We have submitted an appeal to the German Constitutional Court and are considering further appeals.

We have also requested a paritary working group with the Management to work together to address these problems. The requested Legal Protection Working Group should attempt to make a complete list of the problems , and compare the level of legal protection provided by the EPO with that of the Member States and other International Organisations. As a second step the Working Group could consider possible solutions and make recommendations to the administration. Given the nature and complexity of the subject, expert legal advice would need to be provided.

In response to our request the management has stated that they would prefer to wait until our appeal has been decided with the German Constitutional Court before forming such a working group. We do not anticipate a decision of the German Court before July 2004, and feel that the establishment of a working group should not be delayed until then. We have communicated this to the management and asked them to reconsider their decision.

We would much prefer to achieve improvements in the EPO legal system *together with* the EPO administration rather than *despite* the EPO administration.
This approach seems to be producing positive results on other topics for example the long-term sickness and invalidity working group. The staff representation is confident that similarly positive results can be obtained in a Joint Legal Protection Working Group.

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[11] *SUEPO The Hague publication: "Dura Lex, sed Lex: Legal Matters in The Hague" with an appended "Memorandum: How, When and Where to file and Internal Appeal".*
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