

right holders must also provide very detailed and specific information to the customs authorities. The statistics show that this legislative possibility especially in connection with actions based on the requests of IP right holders is growing in practice, and more cases may be expected in the future following the customs seizures of IP infringing products at the Baltic countries' borders<sup>203</sup>.

#### *IV. The national judicial systems in view of IP rights enforcement*

1. Competence to hear IP rights infringement cases and jurisdiction
  - a) General structure of the court systems

Needless to say, one of the main challenges for an effective implementation of the IP legislation concerns the establishment and proper functioning of independent civil, administrative, and criminal courts<sup>204</sup>. Judges undoubtedly play one of the most important roles in making the implemented legal provisions effective, especially in the period when the state faces the transformation of its legal system, when the new legislation is to affirm the social and economic changes in the countries<sup>205</sup>.

In Article 111(1) of the Lithuanian Constitution, it is established that the courts shall be the Supreme Court of Lithuania (*Lietuvos Aukščiausiasis Teismas*, lt.), the Court of Appeal of Lithuania (*Lietuvos Apeliacinis Teismas*, lt.), regional courts (*apygardų teismai*, lt.), and local courts (*apylinkių teismai*, lt.). This four-level court system comprises the system of general jurisdiction which is to create preconditions for courts of higher instances to correct any mistakes of the fact (*i.e.* the establishment and assessment of legally significant facts) or of the law (*i.e.* of the application of law) and not to allow that injustice is executed in any civil, criminal, or other case. It is also to ensure the uniformity (regularity, consistency) of the practice of courts of general jurisdiction, so that the jurisprudence of the courts of general jurisdiction is predictable and the constitution principles of a state under the rule of law, justice, and equality of people before the court are not disregarded. Any deviation from the previous court precedents which had been binding on the courts by then must in all cases be properly (clearly and rationally) argued in the corresponding decisions of the courts of general jurisdiction, *i.e.* no creation or reasoning of a new court precedent may be determined by accidental legal factors. Constitutionally, no court of general jurisdiction of lower instance is subordinate, neither administratively nor organizationally, to any court of a higher instance. The courts of lower in-

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1383/2003, the precise information provided by the right holders regarding counterfeits and legal products and the provision of their samples are very helpful in terms of successful application of the border measures.

203 See *refs.* to statistical data, also to the recent cases in *infra* § 5G.II.

204 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, p. 879.

205 Many scholars and practitioners emphasize this importance while exploring the actual application of the implemented and transposed legal provisions; see more in *Heiss (Hrsg.)*, *Zivilrechtsreform im Baltikum*. pp. 141-144.

stance are only bound by the higher instance precedents in the cases of the same categories and obey the law only, but not any obligatory or recommendatory instructions from the higher instance courts, which could be considered *ultra vires* activities.

Similar constitutional principles of judicial power are to be applied for the functioning of the national courts in Estonia and Latvia. Article 148(1) of the Estonian Constitution establishes a three-level court system (city, county, and administrative courts as the first instance, circuit courts (*Tallinn, Tartu* and *Viru*) as the appeal instance, and the Supreme Court (*Riigikohus*, est.) as the third instance). In Latvia, the court system of general jurisdiction is comprised of local courts, regional courts, and the Supreme Court (*Augstākā Tiesa*, lv.). Thus, the three-level system is established under Article 82 of the Latvian Constitution as well<sup>206</sup>.

In the context of the establishment of the four-level general jurisdiction, the constitutional principles, the scope of competence, and judicial power, which are thoroughly explored in the Ruling of the Constitutional Court of Lithuania and mentioned in the set-forth paragraph, respectively<sup>207</sup>, and also in the context of the three-level general jurisdictions in Estonia and Latvia, the competence of the national courts of general jurisdiction to hear IP cases should be addressed.

In Lithuania all civil IP cases are to be heard by the local courts (there are 54 local courts), except the cases relating to trademarks and patents, which are to be considered by the district courts situated in Vilnius, Kaunas, Klaipėda, Šiauliai, and Panevėžys (there are 5 of them) as the first instance<sup>208</sup>, one of which – the Vilnius District Court (*Vilniaus Apygardos Teismas*, lt.) – has an exclusive jurisdiction over the appeals from the decisions of the Patent Office<sup>209</sup>.

The appealed first instance cases are to be considered by the Court of Appeals of Lithuania, situated in Vilnius, or by the district courts, when the local court's case is appealed (when the facts that are important to the decision of the case are, *inter alia*, investigated and assessed anew) and, in case the cassation appeal is submitted, the case is exclusively considered by the Supreme Court of Lithuania (when the issues of law are decided anew), also situated in Vilnius. As far as IP criminal and adminis-

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206 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, pp. 885, 900.

207 See Ruling of the Constitutional Court of the Republic of Lithuania (Case No. 33/03) on the compliance of item 2 of paragraph 1 of Article 62, paragraph 4 (wording of 11 July 1996) of Article 69 of the Republic of Lithuania Law on the Constitutional Court and paragraph 3 (wording of 24 January 2002) of Article 11, paragraph 2 (wording of 24 January 2002) of Article 96 of the Republic of Lithuania Law on Courts with the Constitution of the Republic of Lithuania, 28 March 2006 (hereinafter – the “*Constitutional Court of Lithuania, Case No. 33/03, 2006*”).

208 Before the amendments to the 1999 Lithuanian Law on Copyright and Related Rights had been adopted in 2003, the courts that heard copyright and related rights cases were the district courts. Considering the fact that the judges at the district courts are more experienced ones, and hear relatively less cases than the judges at the local courts per year, it could be also argued that it had an implicit influence on the IP cases and the quality of their decisions.

209 See also *refs.* in *supra* § 3C.II.3.

trative cases are concerned, they are firstly heard by the local courts and can be appealed to the district courts and the Supreme Court of Lithuania respectively<sup>210</sup>.

In Latvia, the IP cases are to be considered by the local courts (there are 34 of them), except when they are exclusively heard by the regional courts (cases concerning patents and trademarks)<sup>211</sup>. Those regional courts (there are 5 of them) are also assigned to hear the appealed cases from the local courts, whereas their own decisions are to be considered by the Supreme Court of Latvia, situated in Riga, as the appellate instance. The Senate of the Supreme Court (consisting of 25 Justices) considers the matters on law on the basis of errors of procedural or substantive law, or the lower instance court acting *ultra vires* as the cassation instance<sup>212</sup>. The administrative and criminal cases against the infringers of IP rights are considered by the local courts as the first instance courts and can also be appealed to the regional courts and the Supreme Court of Latvia<sup>213</sup>.

Similarly, in Estonia civil, criminal and administrative IP cases are heard by the city and county courts (there are 18 of them), the decisions of which can be appealed to the circuit courts (there are 3 of them) and, in case the cassation appeal is submitted, to the Supreme Court of Estonia (17 Justices) in Tartu as the cassation instance<sup>214</sup>. As a rule, the cases in the first instance court are considered by one judge, in the appeal and cassation proceedings by three judges or justices, respectively, and in cases of the enlarged boards in the Supreme Courts of Lithuania and Latvia by seven justices. Moreover, supplementary steps to be taken prior to the civil procedure have been established in Estonia and Lithuania (such steps, however, are not applied in Latvia)<sup>215</sup>.

#### b) Role of the national Supreme Courts

The national Supreme Courts are to be specifically mentioned, as far as the continuity of the jurisprudence of the national courts of general jurisdiction and the predictability of the court decisions is concerned. The national Supreme Courts function not only as the cassation instances in the Baltic countries<sup>216</sup>, but also play an important

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210 It should be additionally noted that in the end of 2007, according to the information provided in the *Report on the Activities of the Courts of the Republic of Lithuania (2007)*, p. 6, there were 745 judges in Lithuania in total. 464 of them worked in the local courts, 152 in the district courts, 30 in the Court of Appeals and 33 in the Supreme Court of Lithuania.

211 As reported, in practice it basically means the Riga Regional Court which also has an exclusive jurisdiction over any counterclaim requesting the invalidation of industrial property rights, also for cases filed by foreigners. See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, p. 903.

212 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, pp. 900-901.

213 According to the Latvian Ministry of Justice Information as of 2001, there were 423 judges in Latvia, see *Latvian Ministry of Justice Information (2008)*.

214 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, p. 886. According to *Estonian Supreme Court Information (2008)*, there were 245 judges in Estonia in total.

215 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, p. 887 et seq.

216 Notably, the national Supreme Courts hear the cases on the issues of law within the limits of the cassation appeals, except when public interests are concerned, as repeatedly described in,

role in the formation of the consequent and consistent national court practice in the form of preparing *the legal reviews* and issuing *the consultations* to the courts of general jurisdiction<sup>217</sup>. In this respect, it should be mentioned that some consultations of the Supreme Court of Lithuania, for example, the consultation in regard to an adjudication of compensation (by submitting a civil claim) in criminal IP rights infringements cases, created a barrier to the effective protection of the rights of right holders as a result of the excessive time and costs involved, since the possibility of submitting a civil claim by asking for an adjudication of compensation in the IP criminal case was denied<sup>218</sup>.

On the other hand, a few comprehensive elucidations regarding the national court practice prepared by the Supreme Court of Lithuania can be considered a very positive step in forming a constituent and consistent practice relating to IP infringement cases. The significant elucidation concerning the term of ‘a price of a legal sale of a copyright subject-matter’ as a basis for calculating compensation in civil IP cases should be mentioned in this regard<sup>219</sup>. When deciding on the mentioned issue, the Supreme Court of Lithuania solved the inconsistent practice of calculating damages in the form of compensation, thus enabling the right holders to predict the established principles of adjudicating remedies in the civil cases of the IP rights category.

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e.g., Decision 21 June 2006 of Lithuanian Supreme Court, Civil Case No. 3K-3-422/2006, *Autodesk, Inc. vs. UAB “Arginta”*.

- 217 Judgments of the Estonian Supreme Court are published in Part III of the Official Gazette (“*Riigi Teataja*”) in Estonian, and they are also available on the website of the Supreme Court, see *Estonian Supreme Court Information* (2008). Only the judgments of the Constitutional Review Chamber are available in English. In Lithuania the legal reviews and consultations by the Supreme Courts are not, however, available in English. They are regularly published in the Supreme Court publications (“*Teismų praktika*”) and they can be found at the court website, see *Lithuanian Supreme Court Information* (2008). The court practice of Latvian Supreme Court is published in resumptive books for certain period of time (e.g., one or couple of years), on website of the court, see *Latvian Supreme Court Information* (2008), as well as collected by public fee-paying database as Lursoft. All publications are available in Latvian only.
- 218 See *Supreme Court of Lithuania, Consultation No. B3-25, 27 September 2001*; for the analysis on the national court practice in regard to the compensation institute and the relevant court practice see more in *infra* § 5F.I.1.
- 219 The Supreme Court of Lithuania interpreted that ‘*a price of a legal sale*’ of a copyright subject-matter is the basis to calculating compensation as provided in the 1999 Law on Copyright and Related Rights. Such criteria has been confirmed in a row of subsequent civil cases, in one of the last of which the Supreme Court also referred to ‘*a legal sale price*’ as a criteria in calculating this compensation under the current Law on Copyright and Related Rights as amended on 12 October, 2006. See Lithuanian Supreme Court, Consultation No. A3-64 on aspects of the application of some provisions of the Law on Copyright and Related Rights, 22 February 2002 (hereinafter – the “*Supreme Court of Lithuania, Consultation No. A3-64/2002*”).

## 2. Establishment of specialized courts: a solution for the Baltic countries?

In Article 111(2) of the Constitution of Lithuania, it is established that for the consideration of administrative, labour, family, and cases of other categories, specialized courts *may be* established according to the law. The systematic application of the constitutional principles of judicial power also implies that the instance system which ensures a right to appeal, a formation of a uniform court practice, a binding the courts by existing precedents, and an organisational and other insubordination of the courts should be established for the specialized courts as well. However, as noted in the Ruling of the Constitutional Court of Lithuania<sup>220</sup>, the specialized courts might have certain particularities which are not listed in the Ruling.

As regards the competence of such specialized courts, the division of legal matters to be heard by the specialized courts and/or courts of general jurisdiction could be solved, *inter alia*, by the clear specification of matters to be considered by a specialized court or a court of general jurisdiction, or by clear assignments of the categories of the cases to be considered by the mentioned courts. In Lithuania only the specialized administrative courts have been established so far. Similarly as in Estonia, they consider administrative matters<sup>221</sup>.

As follows from the analysis of the national constitutional provisions regarding the establishment of the specialized courts, the national legislators have broad discretion in establishing the courts assigned for consideration of each category of cases which, as might follow from the wording of such provisions, could cover the IP cases as well. The question would be if such specialized courts, which would only consider IP cases, are actually needed. In this context, some empirical data concerning IP cases heard by the national courts could help provide a reasonable answer.

In 1997 – 1999, the Lithuanian Supreme Court heard 6 IP-related cases; in 2000, 10 cases. There were 9 trademark cases that reached the Supreme Court of Lithuania in 2003, and 10 trademark cases in 2004 and 2005<sup>222</sup>. In 2000, 39 IP cases were brought before the national courts in Lithuania, 30 of which concerned trademarks. During 2004 – 2007 there were in total 29 of IP cases heard by the Supreme Court, 77 cases by the Court of Appeal, and 146 cases by Vilnius District court in Lithuania. Many cases were related to invalidation of the Lithuanian Patent Bureau decisions regarding the registration of trademarks, also copyright and trademark infringement cases, and very minor number of patent cases<sup>223</sup>. In comparison, during 1994 – 2001, 5 civil IP cases, 3 criminal cases, and 4 administrative cases (all in regard to copyright and related rights) were decided, whereas there were only a few

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220 See *Constitutional Court of Lithuania, Case No. 33/03, 2006*.

221 The administrative courts, which function since 2001, also consider the appeals against the decisions of the Patent Office, as referred in *Heath, Dietz et al., Enforcement of IPRs in Eastern Europe*, p. 886.

222 See *Ibid*, p. 914; also *Klimkevičiūtė, Trademark Protection (Lectures, 2006)*.

223 The numbers are taken from *Questionnaire Regarding Implementation of the Enforcement Directive in Lithuania in 2005-2008. Answers by Lithuanian Supreme Court, the Court of Appeal and the Vilnius District Court (unofficial publication)*.

cases relating to industrial property rights in the Supreme Court of Estonia<sup>224</sup>. In Latvia, in 2007 – 2008 there were in total 25 copyright cases and 34 trademark cases, and only 1 case regarding patents and 1 industrial design received by all courts as first instance<sup>225</sup>.

Thus, in this empirical context, the efficacy of establishing IP specialized courts is considered questionable, as the establishment of such specialized courts would bring a higher than necessary cost to the states. Instead, creating a corps of judges specialized in hearing IP cases, especially, civil ones, should be considered. This would also support the view of the specialized IP courts being unnecessary for the time being.

Some practical observations with regard to an actual focus on hearing IP cases in one court, for example, in the Riga Regional Court<sup>226</sup> with its specific exclusive jurisdiction, in the Vilnius District Court<sup>227</sup>, or the Tallinn Administrative Court<sup>228</sup>, supports the assumption that the specialization of a few judges is a positive factor in IP cases, even though this view has also faced some criticism<sup>229</sup>. Such consistent practical specialization has not been observed in the Supreme Courts. However, there are a few specialized judges who are often appointed by the Chief Justices to hear IP cases. It is believed that such practical specialization helps to educate and train judges in IP-related legal matters<sup>230</sup> by making a positive impact on the quality of decisions, judgments, or orders in IPR infringement cases. In this area of educating and training judges in IP-related legal issues, many positive steps have already been made<sup>231</sup>. This progress has always been considered a core factor in the improvement of the application of intellectual property laws<sup>232</sup>. One may agree that such education has positively influenced the decisions and judgments adopted by the national courts, in the form of higher quality and speedier legal processes. The demand for a larger number of judges competent to consider IP cases is still evident, though.

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224 See *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, p. 891.

225 Following the information provided in *Latvian Ministry of Justice Information (2008) (unofficial information)*.

226 See *supra* Ft. 211 herein.

227 Importantly, the appeals of the decisions taken by the Appeal Divisions of the State Patent Bureau of Lithuania can be appealed to the Vilnius District Court. Such exclusive competence allows the mentioned court and some of its judges actually to specialize in patent-related cases.

228 See *Heath, Dietz et al.*, Enforcement of IPR in Eastern Europe, p. 892.

229 *Ibid.*, p. 903.

230 As an example, the District Court of Ljubljana, Slovenia, is often mentioned. This court has an exclusive jurisdiction for IP cases, as referred in *von Lewinski*, Copyright in Central and Eastern Europe, p. 60.

231 The seminars for the Baltic judges who deal with IP cases are to be particularly mentioned.

232 See *von Lewinski*, Copyright in Central and Eastern Europe, p. 61.

### 3. Common judiciary in the framework of community rights: Baltic perspective

The possibility of a common regional jurisdiction in the Baltic countries is to be addressed, especially when discussing the adjudication of cases regarding community rights<sup>233</sup> as well as European patents. After some recent discussions on this point, the concerns expressed concerning, *first*, a requirement that judges of such a court have a technical education, and, *second*, a language issue that could impose the need to change the national constitution, which currently clearly states that all legal processes must be held in the national language, could be reasonable.

It should be pointed out, however, that the main reason for not establishing a regional specialized court in the Baltic countries is a lack of cases in regard to European patents<sup>234</sup> and, moreover, a modest number of patent cases in Lithuania in general. A modest number of patent cases has been also reported in Latvia and Estonia<sup>235</sup> with a reference to the non-specialization of judges or a lack of qualified judges. This could also be supported by the currently observable fact that the so-called innovation performance in the Baltic countries is still either “catching up” (for Lithuania and Latvia) or “trailing” (for Estonia)<sup>236</sup>.

## *V. IP practitioners and their role in IP enforcement-related processes: professionalism as the key factor*

### 1. Legal representation

A number of local specialists and scholars have correctly stated that professional preparation, experience, and passion for IP cases by IP professionals – patent and trademark attorneys and attorneys-at-law – is an important ‘human’ factor which plays a significant role in the quality and success of IP cases. The professional qualifications<sup>237</sup>, competence and relevant experiences of local patent attorneys and attor-

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233 Community Trade Marks (Council Regulation 40/94/EC); Community Designs (Council Regulation 6/2002/EC).

234 Such concerns and arguments have been expressed in the public discussion held on 11 July, 2007, in Vilnius with regard to an official position of Lithuania related to the patent system in Europe, see more in the *Report of the Council of the European Union Work Group on Intellectual Property (Patents)* (2007), due to the Commission of the European Communities Communication from the Commission to the European Parliament and the Council on Enhancing the Patent System in Europe, Brussels, 3.4.2007 COM(2007) 165 final. *Note*: see also *refs.* to statistical data in previous section.

235 See *Ibid.*

236 See Annex III, Commission of the European Communities Communication from the Commission to the European Parliament and the Council on Enhancing the Patent System in Europe, Brussels, 3.4.2007 COM(2007) 165 final.

237 See more on the requirements to become a patent and trademark attorney as well as an attorney-at-law in the Baltic countries in *Heath, Dietz et al.*, Enforcement of IPRs in Eastern Europe, pp. 888-890 (for Estonia), pp. 901-902 (for Latvia), pp. 915-916 (for Lithuania).