Monday, November 28, 2016

The announcement on Monday afternoon by the UK Government that it intended to proceed with the ratification of the Unified Patent Court Agreement (UPCA) took almost all commentators by complete surprise. It was commonly believed that Brexit would either completely destroy, or at least significantly delay, the introduction of the Unitary Patent and the Unified Patent Court. After all, the UK was going to leave the EU and it seemed nonsensical that it would continue to play an active role in supporting treaties that would have a profound effect on the EU just at the time that it was planning to leave the party.

However, 2016 is the year in which if something appears to be impossible, then it is frankly an odds-on certainty.

The announcement, by Baroness Neville-Rolfe, the UK Minister of State for Intellectual Property, was couched in decidedly soft and co-operative terms:

“As the Prime Minister has said, for as long as we are members of the EU, the UK will continue to play a full and active role. We will seek the best deal possible as we negotiate a new agreement with the European Union. We want that deal to reflect the kind of mature, cooperative relationship that close friends and allies enjoy. We want it to involve free trade, in goods and services. We want it to give British companies the
maximum freedom to trade with and operate in the Single Market – and let European businesses do the same in the UK”.

So what might this mean in practice? Of course, it is very early to say. One way of looking at the announcement is that it represents nothing more or less than a pragmatic decision not to be seen to block a process. But it is also quite possible to read more. The Unified Patent Court in the UK was to be the central hub for determining life sciences and pharmaceutical patent disputes – a highly lucrative branch of patents and one in which the UK bar and judiciary had considerable expertise. So one can well see the UK government (and the pharmaceutical and life sciences industries) trying to protect such a centre of excellence (not to mention avoiding the difficulty of finding an alternative venue in another EU member state).

Further, assuming that the Government does intend to proceed with the establishment of the UK branch Court for the Unitary Patent, it would seem inconceivable that such a Court would be asked to decide disputes covering a jurisdiction of which it was not itself a part. It is noteworthy that the UPCA is only one of three legal instruments in the process; the other two instruments are EU Regulations, namely on Unitary Patent protection and on the translation arrangements. The UPCA is an international treaty among EU member states. Whereas the EU Regulations would cease to be applicable to the UK after its withdrawal from the EU, the UPCA is not an EU treaty as such and could remain binding (opening the possibility of states withdrawing from the UPCA invoking a fundamental change of circumstances pursuant to Article 62 of the Vienna Convention on the Law of Treaties).

The logical conclusion is that what is intended by the UK Government (or at least an option which is being protected) is that the UK will remain a signatory to and member of the Unitary Patent and Unified Patent Court, notwithstanding that it may not be part of the EU. Opening UPCA membership to non-EU member states, however, raises the question whether the Unified Patent Court is compatible with the EU judicial system as interpreted by the Court of Justice of the EU (CJEU) in its Opinion 1/09. Furthermore, the EU and UK would have to come to an agreement to extend the Unitary Patent to the UK following Brexit, perhaps on the basis of Article 142(1) of the European Patent Convention. But would the UK Government accept the jurisdiction of the CJEU, which is an EU institution?

There is, of course, still a great degree of uncertainty around the UK Government’s approach. However, does the announcement perhaps signal a similar approach to other unitary rights – such as the EU Trade Mark and Community Registered Design? It is still very early to start making predictions* but it does seem that the case for unitary IP rights to include the UK in a post-Brexit world has been given a significant boost.

(*Please note that the authors have a 100% record on predictions relating to Brexit this year – they have all been wrong!)

© Copyright 2020 Squire Patton Boggs (US) LLP

Source URL: https://www.natlawreview.com/article/patents-novel-and-inventive-approach-to-brexit