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UPC: four reasons on why the PPA is not legally in force

Miquel Montaña (Clifford Chance) · Thursday, April 21st, 2022

Having been teaching Public International Law since 1990 and being a tenured professor of this field of law, this author has some difficulty in understanding the state of collective nirvana that the UPC Preparatory Committee has instilled amidst the UPC community, by causing them to believe that the “Protocol to the Agreement on a UPC on Provisional Application” (the “PPA”) came into force on 19 January 2022, after Austria became the 13th Member State to express its consent to be bound by the PPA. For the reasons summarised below, if one thing is clear about the UPC, it is that the PPA is not *legally* in force.

For the readers’ benefit, it is worth remembering one of the Recitals of the PPA:

“CONSIDERING that provisional application should only come into force when 13 Signatory States of the Agreement on a Unified Patent Court have approved this protocol and only among those Signatory States where the Governments have received parliamentary approval to ratify the Agreement on a Unified Patent Court.”

As readers may have noted, the PPA requires the approval of national parliaments, which is the mechanism whereby external governmental action is controlled, in modern democracies.

Elaborating further on the Recital transcribed above, article 3 of the PPA states that:

“Article 3 - Entry into force

(1) This Protocol shall enter into force the day after 13 Signatory States of the Agreement on a Unified Patent Court including Germany, France and the United Kingdom, have either ratified, or informed the depositary that they have received parliamentary approval to ratify, the Agreement on a Unified Patent Court and have

a. signed in accordance with Article 2(2)a. or signed, and ratified, accepted or approved this Protocol in accordance with Article 2(2)b.; or

b. declared by means of a unilateral declaration or in any other manner that they consider themselves bound by the provisional application of the articles of the

Unified Patent Court Agreement mentioned under Article 1 of this Protocol.

(2) In respect of any Party which subsequently after the entry into force of this Protocol completes the procedure referred to in (1), this Protocol shall have effect on that Party from the date when the Party has completed the said procedure.

(3) This Protocol and the provisional application it prescribes shall have effect only with regard to Parties having completed the requisite procedure referred to in (1).“

Since article 3.1 requires the ratification of the PPA by 13 Signatory States, including Germany, France and the UK, one of the collateral damages of Brexit has of course been that, since, for obvious reasons, the UK's ratification is now absent, the conditions required in article 3 for the PPA to come into force have not been fulfilled. It is as simple as that. So, after 19 January 2022, following Austria's ratification of the PPA, we are at exactly the same place as on 17 January 2022, before that ratification had taken place.

As all UPC *aficionados* will be well aware, the UPC Preparatory Committee, at its 21st meeting, held in Luxembourg on 27 October 2021, in an attempt to bypass the requirement of article 3, proposed that the representatives of the governments that have consented to be bound by the PPA sign a “declaration” stating that the “authentic interpretation” of article 3 of the PPA is that this article should be read in the context of article 89 of the UPC Agreement (“UPCA”) of 19 February 2013. This morning the UPC's Secretariat has kindly confirmed that this “declaration” has not been signed yet.

Readers will remember that article 89 states that:

“1. This Agreement shall enter into force on 1 January 2014 or on the first day of the fourth month after the deposit of the thirteenth instrument of ratification or accession in accordance with Article 84, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place or on the first day of the fourth month after the date of entry into force of the amendments to Regulation (EU) No 1215/2012 concerning its relationship with this Agreement, whichever is the latest.”

Since article 89 of the UPCA, in contrast to article 3 of the PPA, does not mention the UK explicitly, the Preparatory Committee proposed to interpret article 89 as requiring the ratification of 13 Member States, including Germany, France and, after Brexit, Italy. The next mortal jump to try to circumvent the requirements of article 3 of the PPA is to “interpret” that it does not say what it says, but what article 89 of the UPCA would say, according to the interpretation of the Preparatory Committee.

For the reasons summarised below, this “interpretation” would be at odds with very basic principles of public international law.

First, it ignores the so-called Vattel's Rule, widely accepted by international courts,

whereby clear provisions do not need to be interpreted (*"in claris non fit interpretatio"*). Interpretation presupposes an ambiguity in the text of the treaty. Ambiguity is the prerequisite of interpretation. This was already highlighted by the Permanent Court of International Justice (the predecessor of the International Court of Justice) exactly 100 years ago in its *Opinion on the Competence of the ILO to Regulate Agricultural Labour*:

"If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty."

Certainly, there is no ambiguity in a provision that states that *"This Protocol shall enter into force the day after 13 Signatory States of the Agreement on a Unified Patent Court including Germany, France and the United Kingdom, have either ratified, or informed the depositary that they have received parliamentary approval to ratify, the Agreement on a Unified Patent Court [...]"*. The reader of this provision must simply verify whether or not 13 Signatory States, including Germany, France and the UK, have ratified it. Within non-interested public international law circles, the proposition whereby the "interpretation" route would allow one to read "Italy" where it says "United Kingdom" would be perceived as amusing, to say the least.

Second, the "declaration" proposed by the Preparatory Committee would deprive national parliaments of the mechanism of control required in the Recitals of the PPA. The proposal that the representatives of Member States, during a coffee break of one of their COREPER meetings, should sign a declaration amending what their parliaments allowed them to ratify, will not rank very highly in the handbooks of European democracy. The Preparatory Committee does not seem to be taking into account that international treaties have a dual nature. On the one hand, they are agreements between states. On the other hand, as with any other type of law, they confer rights and obligations on citizens. Hence the importance of not disparaging their representatives by trying to find cunning ways to circumvent national parliaments.

Third, from the perspective of articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT") of 1969, proposing that a later treaty (the PPA, which was signed on 1 October 2015) should be interpreted in the context of a previous treaty (the UPCA, which was signed on 19 February 2013), is a very odd proposition indeed. For article 31 of the VCLT states that it is the later agreements which may be used, if needed, to interpret the meaning of the provisions of a previous international treaty. So, it is undeniably article 3 of the PPA (2015) and article 18(1) of the Protocol on Privileges and Immunities, which was signed on 29 June 2016 and which also requires the ratification of the UK for coming into force, which may be used to interpret article 89 of the UPCA (2013). Not the other way round.

Fourth, and in line with the last part of the previous point, leaving aside article 3 of the PPA, from the perspective of public international law, it is not even safe to conclude that article 89 of the UPCA may be interpreted as requiring the ratification of Italy in lieu of the UK. According to article 31.1 of the VCLT, which enshrines the so-called "*golden*" (i.e. primary) rule of interpretation:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Beginning with the “*good faith*” requirement, I leave it to the readers to judge for themselves whether reading “Italy” where it says “UK” overcomes this first hurdle.

Moving on to “*context*”, the references to “Paris”, “London” and “Munich” in article 7(2) of the UPCA confirm that, as everyone familiar with the genesis of the UPC project is well aware, article 89 is implicitly referring to France, the UK and Germany. According to paragraph 2 of article 31, the “*context*” mentioned in paragraph 1 comprises any subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions. Hence, article 3 of the PPA (2015) and article 18(1) of the Protocol on Privileges and Immunities (2016) form part of the context that, together with article 7(2) of the UPCA, confirm that the countries implicitly referred to in article 89 of the UPCA are Germany, France and the UK.

Finally, regarding the “*object and purpose*”, the last interpretative element in article 31.1 of the VCLT, as is well known, the purpose of the UPCA was to establish a unified patent court for the settlement of disputes relating to European patents and European patents with unitary effect (article 1) with a central division that would have its seats in Paris, London and Munich (article 7.2). This further confirms that, as already mentioned, the three Member States implicitly referred to in article 89 of the UPCA are Germany, France and the UK. The fact that the latter has in the meantime ceased to be a Member State is no reason to try to make article 89 say what nobody intended it to say and, more importantly, what it effectively does not say. It is a reason for amending article 89 and article 7.2 of the UPCA following the procedure established for the amendment of treaties in Part IV of the VCLT.

In conclusion, this author finds it fascinating that the patent community is entertaining itself discussing the nitty gritty technicalities (bifurcation, forum shopping, will the Court of Appeal allow appeals against interim orders, etc.) of this project when, in reality, the big picture is still entirely up in the air.

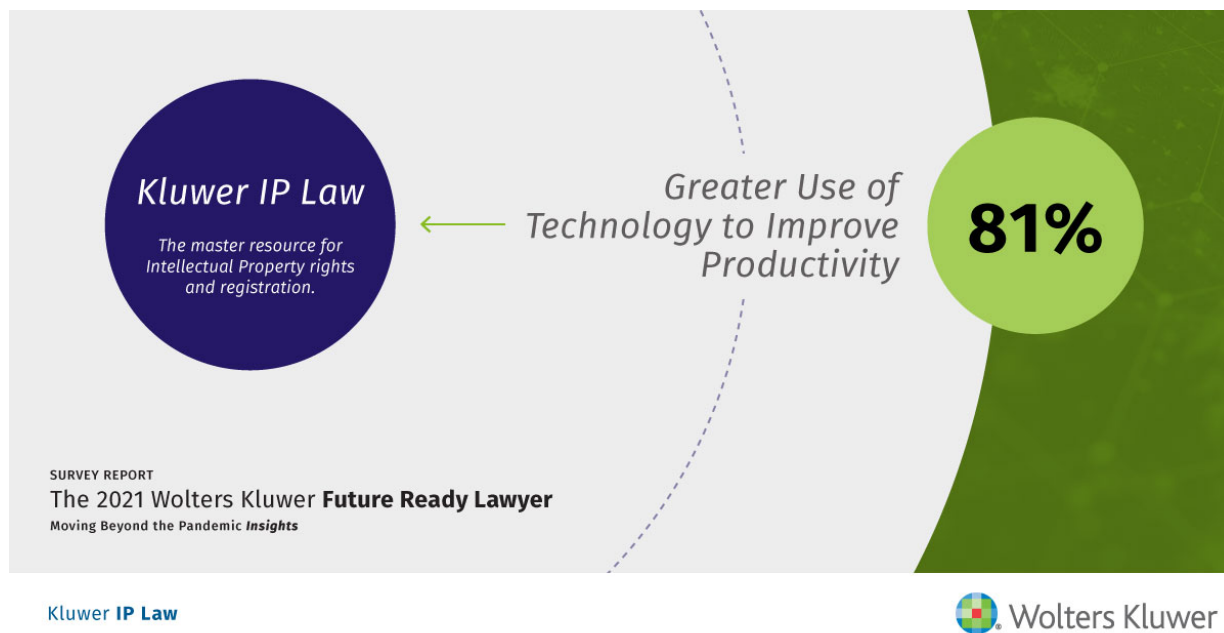
The fact that amending the UPCA and related agreements may take time and that this would further delay the coming into force of this long-awaited project, does not justify the lack of respect for the rule of law and for the democratic principle. Neither the eagerness to see the UPC in place without further delays, nor the likelihood or unlikelihood of being caught, justify the blatant disrespect for the fundamental principles on which the European Union is supposed to be founded.

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