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UPC: Why has the Preparatory Committee thrown expressions of interest sent by Spanish candidate judges into the bin?

Miquel Montaña (Clifford Chance) · Thursday, November 13th, 2014

As readers will no doubt be aware, earlier this year the Preparatory Committee of the Unified Patent Court (“UPC”) drew up a short-list of candidate Judges after selecting them from an overwhelming raft of more than 1300 applications. This author knows of at least one Spanish candidate Judge whose expression of interest was discarded on the grounds that Spain is not a “*signatory*” state. Is this really a sound legal reason to throw the applications sent by Spanish candidate Judges into the bin? In my respectful view, it is not.

The reason is that according to the “Call for Expression of Interest” published by the Preparatory Committee in September 2013, one of the prerequisites was to be a national of a “*Contracting Member State*.” According to Article 2 (c) of the Agreement on a UPC, a “*Contracting Member State*” is “*a Member State party to this Agreement*.” And according to paragraph (g) of article 2.1 of the Vienna Convention on the Law of Treaties of 23 May 1969 “*party means a State which has consented to be bound by the treaty and for which the treaty is in force*.” It follows that the Preparatory Committee required successful applicants to be nationals of States for which the Agreement on a UPC was in force. In other words, mission impossible.

The definition of “*Contracting Member State*” used in the Agreement on a UPC is very odd indeed, as it deviates from the definition of “*Contracting State*” used in the mother of all treaties, that is, the aforementioned Vienna Convention on the Law of Treaties, which defines “*Contracting State*” as “*a State which has consented to be bound by the treaty, whether or not the treaty has entered into force*” (Article 2.1 (f)). It is also very odd for the Preparatory Committee to have stipulated a condition (being a national of a “*Contracting Member State*”) which no candidate would be able to fulfil. The reality is that on 15 November 2013, the deadline to send expressions of interest, not one single candidate out of the 1300 applications received by the Preparatory Committee fulfilled the conditions established in the “Call for Expression of Interest.”

Why should the expressions of interest sent by Spanish candidates be discarded then?

Because the Preparatory Committee understood that the condition required by the “Call for Expression of Interest” was to be a national of a “*signatory*” state. Dear readers, may I suggest that you please carefully review the “Call for Expression of Interest” and form your own judgement on whether the Preparatory Committee, by having discriminated against Spanish candidate Judges without legal grounds, may have laid another dangerous legal mine on the path leading to the UPC.

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