Kluwer Patent Blog

UPC without UK: ‘Opportunity to create a unique hybrid of common law and civil law traditions was lost’

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If everything goes according to the most recent plan, the Unified Patent Court will finally open its doors on 1 June 2023, with the sunrise period starting the first of March. The UK, initially one of the driving forces behind the Unitary Patent system, will not join the opening party, as it withdrew its membership in the aftermath of the Brexit. What will the role of the UK patent courts be in the future? What will UPC litigation bring? Kluwer IP Law interviewed Brian Cordery, partner at UK law firm Bristows, about his expectations.

As a patent litigator and lawyer operating from the UK, how do you feel personally about the start of the Unified Patent Court?
‘Very excited – change is always interesting for lawyers and being part of arguably the biggest change in the global patent landscape for decades is a unique opportunity. We’re obviously disappointed that we won’t have a local division to appear before, but in some ways that may end up being an advantage for UK practitioners in the system, as we can genuinely advise clients of the merits or otherwise of the possible venues without having to filter out any ‘home field’ preconceptions or prejudices.’

What do you see as the biggest disadvantage of the UK not being a member state of the Unitary Patent system?
‘I think the main thing I feel sad about is the lost opportunity to have created something truly unique in the global patent marketplace; a hybrid of common law and civil law traditions that could have brought the best aspects of each to the fore. The rules of procedure obviously still have a number of features stemming from the UK’s traditional approach and that is something as UK lawyers we will be looking to use to bring some extra value for clients.’

What do you see as the biggest disadvantage of the Unitary Patent system without the UK participating?
‘It may be a bit parochial but I personally feel sad about the loss of the UK judges and judicial thinking to the development of the new system. There are some great judicial names that are already part of the system, but it would have been awesome to have them joined by the likes of Sir Christopher Floyd if that had been possible (other English judges are of course also available!). ’

Will it affect the popularity of the Unitary Patent and/or the UPC?
'In terms of popularity, I think the lack of UK coverage may have some effect but it's obviously a different counterfactual to ever really know about – and in any event I think there is still plenty in the system for patentees to get excited about.'


Brian Cordery

Do you expect many cases to be brought before the court in the beginning? Or will everybody wait until there is more clarity about the court's jurisprudence?
'There's certainly a great sense of excitement (and possibly apprehension for some) as the start of the new system moves towards us. I think it will be a good while before the new Court becomes a default replacement for national litigation, but at an earlier stage we may well see it becoming a relatively regular parallel forum, certainly where multiple patents are in play.'

What are the issues concerning the UPC you're most curious about? Do you expect cases in which the basic principles of the court will be tested, the compatibility with EU law for example? Or Rule 5, for instance, which your colleague Myles Jelf has described as alarmingly vague?
'The UPC is, in some ways, a unique experiment – constructing a new court and highly complex set of procedural rules and then setting them going in a big bang all across Europe. I think most observers expect, therefore, that pretty much every single aspect of the operation of the new system is going to be challenged from the outset. Ultimately, the interesting issues are probably going to be how the various traditions and approaches to the substantive law questions of infringement and validity end up being harmonised across the Contracting Member States.

Myles' point about rule 5, I think, is not so much about the substance of the rule change (allowing, or possibly requiring, the 'opting out' of all European Patents even those in territories ostensibly outside the territory) but the logic which supposedly underlies that change; that the new Court has jurisdiction over patents in territories beyond those who chose to join, such as Spain and Poland and even territories outside the EU, such as Switzerland and the UK. Obviously that's a pretty controversial claim that will lead to some pretty complex jurisdictional battles and even the complications of international anti-suit actions. The new world certainly won't be dull though!'

You can litigate at the UPC, can't you?
'Yes, I can – although the UK's withdrawal has not made life easier for us, of course, as the rules require representatives to be authorised to practice before a Contracting Member State which means UK practitioners have to be prepared to re-qualify. We at Bristows, though, are investing heavily in being ready in that respect for the start of the new system.'

Do you think UK patent attorneys will make sure they get the European Patent Litigation Certificate, so they can represent clients at the UPC? How will this work?

'UK based EPLC courses will only be accepted on a historical basis up to the cut-off date of the UK leaving the European Union – after that date UK based attorneys will need to find alternative

institutions.'

In an interview, Georg Rauh and Richard Ebbink of Vossius and Brinkhof UPC Litigators told this blog they expect a concentration of patent litigation firms. Do you agree? Where do the UK firms fit in?

'I think in some ways it will be very difficult to see how the litigation landscape will play out. One hears quite a lot of speculation that the German divisions will be very busy and that German practitioners will, therefore, be very busy. That may well be true, but equally the fact that other divisions now have access to all the same rules and procedures that the German divisions do may ultimately lead clients to embrace those divisions – particularly where they can bring potential wider experience and perspectives.

The UPC judges in Paris and the Netherlands are all very experienced in balancing the merits of infringement and validity arguments in the same action, something which the German judges have not historically done – and similarly judges from the Nordic tradition have much greater experience of evaluating expert evidence through live cross-examination which their German colleagues will not. Apart from anything else, it would be a great shame if that diversity did not end up being a feature of the new system.

In terms of consolidation, the UPC was of course trailered as a cost effective solution that might be attractive to SMEs. In reality, the consequences of almost pan-European injunctions and damages will mean that cases are incredibly valuable and hugely significant for all commercial clients – against that backdrop we are expecting to see larger teams rather than smaller. The diverse nature of the Court will, we think, mean that co-counselling is going to become much more commonplace, with clients looking to put together wider teams to represent them and perhaps not put all their eggs into the basket of any one firm.'

Litigation in the UK is very expensive. What will the role of the UK patent courts be in the future?

'I think firstly that the 'the UK is so expensive' is a bit of a trope that is not as true as our foreign colleagues sometimes make it out to be. As you know, in German national litigation for example, each 'case' cost covers a single patent looked at for infringement only; for significant disputes with multiple patents where validity is in play for all of them the overall costs are not as far apart as they may initially appear to be and I think clients are increasingly aware of that. Further, the UK Courts have for the last decade or so been very active in developing more streamlined, faster and cheaper judicial possibilities for patent dispute resolution; obviously the Intellectual Property and Enterprise Court for smaller scale disputes, but also the Shorter and Flexible Trial Schemes in the main patent court are all aimed at pushing down costs and time to trial.'

Do you expect UK courts to be influenced by decisions of the UPC, and vice versa?

'There has been a growing tradition of respect as between the various European patent jurisdictions over the last decades; perhaps driven by the greater engagement that events like the Venice EPLAW judges conference enable. While national judges obviously don't blindly follow the parallel decisions of their foreign peers, they do now certainly read them with great interest.

In terms of substantive law, I think you can see that trend in the UK's embracing finally of a doctrine of equivalence – and from the discussion in the Supreme Court's Actavis decision which was quite clear in its emphasis that a higher degree of European harmonisation in that respect was

in itself a valuable objective. I think that the UPC will be another forum that will join that growing culture of judicial respect.'

Is there anything else you'd like to mention?
'Only to reiterate my sadness at the UK not being a part of the UPC and to express a hope that one day that might change now that the stark reality of post-Brexit UK is here. Notwithstanding my disappointment about the UK not being in the system, I think that the UK lawyers and Courts have a very significant role to play on the European patent landscape both within and outside of the UPC. The English have a saying "May you live in interesting times" which is, apparently wrongly, attributed to an ancient Chinese curse. Well, this lawyer is excited to be living in such times and looks forward to the future with optimism.'

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