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Conflicts between UPCA and national laws: a dangerous riddle?

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"One person's happiness is another person's misfortune" (i.e., "le bonheur des uns fait le malheur des autres")… This French proverb could easily be applied to the subject I'm dealing with today: conflicts between UPCA and national laws, which will undoubtedly be a joy for legal Counsels and a misfortune of the system's users, mostly because of the resulting legal uncertainty.

I'll confine myself here to the case of French law, in keeping with my role here as French referent of this blog, but it should be noted that this problem is not particular to France; we also find, for instance, numerous disparities between the UPCA and preexisting German law (one need only compare Section 10 of the *Patentgesetzt* with Article 25 UPCA to see this).

Firstly, without claiming to be exhaustive, either on the differences or on their analysis, we can quickly identify some examples. Firstly, Article L. 613-3 of the French Intellectual Property Code prohibits export, which is not covered by Article 25 of the UPCA. Ordinance No. 2018-341 of May 9, 2018, that amends French law to bring it into line with the UPCA, modifies Article L. 613-3, but merely replaces "*mise dans le commerce*" (i.e., "*put on commercial sales*") with "*mise sur le marché*" (i.e., "*placing on the market*").

Regarding exceptions to infringement, UPCA gives a stricter definition of the "Bolar" exception (generic drugs, European Union MA) than French law (any drug, MA for any territory). There is also a more singular exception, known in French law (and not in the UPCA), for "*objects intended to be launched into outer space and introduced into French territory*". Under this exception, there is no infringement of a foreign satellite launched from France (including French Guiana from where Ariane launchers are launched) which contains components likely to infringe a patent having effect in France.

Secondly, with regard to the interpretation of these conflicts of laws, three possible approaches: Distinguishing according to the type of title involved (a different law for a French patent than for a unitary patent, for example), applying the Agreement to all titles, or the application of national law by national courts and of the Agreement by the UPC.

The last position has been adopted by the Preparatory Committee. On January 29, 2014, the Preparatory Committee of the Unified Patent Jurisdiction published an interpretative note under which national courts seized during the transitional period must apply their national law. Thus, according to this interpretation, national courts should apply their national law, while the UPC

should apply the Agreement. As a result, the law applicable to a case would depend on the court seized, so that the outcome of a case could be totally different depending on the said court (e.g. Bolar exception, or export, etc.).

However, the position adopted by the interpretative note is perplexing. I fail to see how it can be legally founded, either in terms of the UPCA or the fundamental principles recognized by European law. In any case, it will undoubtedly be up to national courts to decide, since they will be the only ones in a position to do so.

At the end of the day, we can only conclude that there is no clear answer to the question of the applicable law in the event of a difference between national law and the UPCA. Perhaps the possibility of a interlocutory ruling from the Court of Justice of the European Union could provide a solution to this difficulty?

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