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The UPC is dead. Long live the UMC!

Miquel Montaña (Clifford Chance) · Monday, December 11th, 2023

When the Unified Patent Court (“UPC”) endeavour was in the process of being designed back in the day, its architects presented the project as an example of a one-in-a-kind cosmopolitan litigation forum, the seat of patent judges and litigators from all cultures, skills, backgrounds, languages and walks of life. A cosmopolitan court that would set the benchmark for the quality of justice internationally across the board. Word was going around that the Babylonian 7-day week would be enlarged with an extra day, a new 8th day aimed at honouring the day when the UPC saw the light after an incredibly difficult gestation process.

After the first 6 months of the UPC ‘s operation, we have not seen that Alice in Wonderland vision but, instead, a rather patchy landscape. In reality, we are not seeing a cosmopolitan court but a German court or, to be more precise, a Munich court, which begs the question as to whether the UPC should be renamed the Unified Munich Court (“UMC”).

The objective data speak for themselves:

Of the 78 decisions approved by the end of November, half came from the Munich Central and local divisions. If one adds the decisions from other German local divisions (7 from Hamburg and 6 from Düsseldorf), it turns out that the German divisions have issued two thirds (i.e. 66 %) of the total decisions. The imbalance in comparison to the central and local divisions hosted by other countries is absolutely awesome, albeit not unexpected by those who were observing the UPC architecture from outside the building. For example, France (i.e., Paris), which aspired to be one of the three poles on which the UPC tripod would stand, has not seen the cases it wanted to see. By the end of November, the Paris central division had only issued 1 decision in relation to a preliminary objection and 3 decisions in three cases dealing with revocation actions (in fact, 2 of them should be counted as 1).

Milan, which, as a result of an ultra vires manoeuvre of the Administrative Committee was assigned a decaffeinated version of the list of competences initially assigned to the London central division, is not faring any better. By the end of November, the Milan central division had not issued any decisions. In turn, the Milan local division had formally issued 9 decisions, although they referred to just 4 cases.

Moving North, the Helsinki local division had formally issued 5 decisions, but all relating to the same case. For its part, the Nordic Baltic Regional Division had issued 2 decisions.

The Hague local division had issued only 2 decisions and in relation to the same case. Likewise,

the Vienna and Brussels local divisions had issued just 1 decision each.

Finally, by the end of November, 4 local divisions had not yet issued any decisions (Mannheim, Copenhagen, Lisbon and Ljubljana).

In addition to the dramatic imbalance in the distribution of cases, another salient feature of the first 6 months of operation of the UPC has been the preponderance of German as the language of the proceedings (more than 50 % of cases). Although many stakeholders would like to see English playing a more prominent role, as it would raise the cosmopolitan allure that many, including some UPC judges, would desire for the UPC, the choice of the language is really up to the parties. In this regard, the Order of 18 October 2023 from the President of the Court of First Instance, which accepted a petition filed by a defendant based in Viladecans (Barcelona) to replace Dutch with English as the language of the proceedings is very encouraging, as it might contribute to paving the way towards cosmopolitanism in future cases. It is an irony of destiny that the company that triggered the change of language in that case is domiciled in a non-UPC territory.

All in all, the teaching after the first 6 months of operation of the UPC is very clear: the UPC is dead but long life to the UMC!

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