**Patent Uniformity in Europe: What to Expect from the Unified Patent Court Agreement**

A long-anticipated overhaul appears to finally be on the doorstep of the European patent system. Talk of this change has been ongoing for decades, with many hypothesizing the overhaul would never materialize. However, with the approval of the Unified Patent Court Agreement (UPCA) as well as two new associated European Union (EU) regulations, the Unitary Patent System and the Unified Patent Court (UPC) were approved. The UPC Preparatory team anticipates the UPCA to enter into force on June 1st, 2023. Deposit of the UPCA ratification instrument by Germany triggers a sunrise period, with the UPCA entering into force three months thereafter.

Many practitioners have long awaited the Unitary Patent System and the UPC for its many potential benefits. However, some practitioners are now reading the fine print and having second thoughts.

Unitary Patents are a major step toward uniformity. Prosecution of European patents will remain unchanged, with applicants continuing to prosecute applications before the European Patent Office. However, once granted, applicants will have a choice. They can select either a Unitary Patent, a bundle of traditional European patents, or a mix of the two. The Unitary Patent’s territorial scope includes each state that has ratified the UPCA. Worth noting, the geographic scope of a Unitary Patent is fixed in time, meaning it does not expand each time an additional state ratifies the UPCA. Therefore, there will likely be several generations of Unitary Patents. One of the benefits of electing for a Unitary Patent is streamlined formal requirements. For instance, a patentee will only need to pay a single annual renewal fee for each Unitary Patent, as opposed to fees for each country in which the patent is validated under the current system. Further, translations will only be required during the first seven years of the Unitary Patent System, called the transitional period.

A patentee electing to pursue a Unitary Patent may also obtain protection in European countries that have not ratified the UPCA. In this instance, the patentee must validate the patent in each non-UPCA European country for which they desire protection. These European patents would require separate enforcement from the corresponding Unitary Patent.

The UPCA also establishes the UPC. The UPC will be a court common to those states that ratified the UPCA and will have exclusive jurisdiction with respect to both traditional European patents and Unitary Patents. Therefore, actions involving injunctions, infringement, damages, revocation, and declaratory judgments will all be adjudicated centrally at the UPC. Defendants will also have single-jurisdiction invalidity potential. One feature of the UPC is that enforcement of patents will come with a fee dependent on a preliminary valuation of the case. Just how this new fee system will change the calculus to litigation remains to be seen.

There is some flexibility with implementation of the new system. Patentees will have the option to opt out of the UPC’s jurisdiction entirely, with the option to subsequently opt back in. However, once an action concerning the patent has commenced before either the UPC or a national court, the patentee can no longer change their opt-out status. Uncertainty concerning implementation and unintended consequences of the Unitary Patent System and the UPC has led some prominent patentees to at least publicly express wariness in being test subjects.

For those that do opt in, the UPC Courts of First Instance are separated into three divisions: a local division, a regional division, and a central division. Each local, regional, and central division court will feature a multinational panel of judges. The local and regional divisions will be the main divisions for patent infringement claims, with each court consisting of three legal judges and one technical judge. The central division will be the primary division for revocation actions and declarations of noninfringement, with each court consisting of two legal judges and one technical judge. The UPC will also feature a Court of Appeals located in Luxembourg and composed of three legal judges and two technical judges. Final decisions are appealable to the Court of Justice of the European Union.

Even though Germany has not yet ratified the UPCA, preparation for the Unitary Patent System and UPC should begin promptly. Consideration should be given as to whether a Unitary Patent is advantageous for your clients. What geographic scope of protection is desired? Are the potential cost savings worth the looming uncertainty? Another consideration is whether opting out is in your client’s best interest. The UPC is a new court that lacks precedent, and that can be expected to experience an initial period of uncertainty. As a result, a conservative approach might be the best course of action. The decision to opt out of the UPC could give clients a chance to observe the UPC and then decide at a later date whether they would like to opt back in. It is important to note that a patentee wishing to opt out must ensure their chain of title is in place with all assignments in order. Patentees may opt out during the sunrise period prior to the UPCA going into effect and during the transitional period.

In summary, the Unitary Patent System is intended to provide uniformity and alleviate some of the problems with the current system. However, it is a new system with inherent uncertainty that may take time to operate effectively. The best approach for client support with regard to this system might be a conservative one since the option to opt back into the system is available.