

ARTICLE

UNIFIED PATENT COURT: FOR BADLY BORN TREATIES, ENTRY INTO FORCE AWAIT THE PASSING OF THE YEARS. NO REVIEW IN 2021 OF THE CORRESPONDING GERMAN UNCONSTITUTIONAL APPEALS

Patent Law | 09/03/21 | François Pochart Lionel Martin

The Unified Patent Court (UPC) is postponed until after 2021 and certainly for many years to come.

The German Constitutional Court has just published the list of cases it plans to deal with in 2021. However, the two recent unconstitutionality appeals following the second German ratification law are not among these cases.

Thus, the finalization of the German ratification process is still pending to the processing of these appeals, after the German Constitutional Court asked the Federal President not to sign the ratification law .

The feeling of *déjà vu* is very strong.

In 2018, when France adopted itself its law of ratification of the *UPC agreement*, we were writing that the *UPC agreement entry into force only awaits ratification by Germany, which will not take place before the decision of the German Constitutional Court, which must rule on the conformity of the agreement with the constitution* . German Constitutional Court was examining the appeal against a first UPC agreement ratification German law. Following this appeal, a 2020 decision held law was anti-constitutional as the 2/3 majority rule was not met) but left fundamental questions of unconstitutionality open. The German parliament then adopted a second ratification law with the required majority on December 18, 2020, which was appealed for unconstitutionality two times on the same day .

The processing of the 2017 appeal took 3 years, so these two new appeals are not expected to be decided in the short term, unless special and expedited treatment are provided. But the German Constitutional Court implicitly indicates that UPC agreements unconstitutionality appeals will follow the usual track. It can thus be estimated that these appeals will not be dealt with before 2023. UPC will wait...

if it remains relevant until then!

As a reminder, the Unified Patent Court agreement (UPCA) was signed in 2013 after a real obstacle course. It was only signed by 25 of the European Union member states under the enhanced cooperation, since the unanimity of EU member states was not reached, Spain and Italy having refused it for language issues.

Then, after long diplomatic negotiations with the British, at the time member of the EU, the signature of the agreement was finally obtained at high cost as regards concessions.

In particular, UPC agreement sealed the split of the central division's jurisdiction between branches in Paris, Munich and London .

The agreement now suffers from this congenital affection, revealed by Brexit: even if the UPCA were to survive the (long) German constitutional appeals, attribution of jurisdiction to the London branch still remains a pending issue.

New struggles are foreseeable in case the London branch reallocation requires a renegotiation of the entire agreement with unanimity of the parties involved, instead of a simple modification by the administrative committee of the UPC .

Finally, an(other) additional obstacle to this agreement, is the loss of the British market in the scope of UPC, which greatly diminishes the interest of a centralized patent litigation.

Firstly the British market is certainly not negligible and secondly British litigation is one of the most expensive. Therefore, the advent of the UPC covering the United Kingdom could have advantageously concentrated some multi-jurisdictional litigation in Europe (which may exist for a small number of patents). It would have even been possible to reduce costs by dealing only with British infringements of European patents directly with the UPC.

All in all, independently of the German ruling, Brexit may eventually get rid of this attempt of European harmonization regarding patent,

