European Patent Litigation After Brexit- A View From London

By Jonathan Radcliffe, partner, Reed Smith LLP, London; email: jradcliffe@reedsmith.com

On June 23, the United Kingdom voted for “Brexit” in its referendum on continued membership of the EU. The timing of decision to leave the European coincides with the planned commencement of the long-awaited Unified Patent Court (UPC) in 2017. The UPC’s underlying rationale is to enable multinational European patent disputes to be determined conclusively by one court, rather than under the current set up under which pan-European patent disputes have to be fought simultaneously in parallel national litigation routes.

The most significant effect of Brexit on patent litigation strategies will be that the U.K. cannot continue to be part of the UPC, as the UPC is only open to EU member states. This creates uncertainties and opportunities for both patent owners and their competitors, and will trigger them to re-evaluate their European patent litigation strategies.

At the same time, the Brexit may weaken the appeal of the UPC while increasing the importance of litigation in the UK. Both the UPC and the national litigation route will continue to exist and will have to adapt to the new environment. The UK, as a major market and a source of patent disputes, is an important venue for resolving patent disputes, and is one of the key reasons for patent litigation in Europe.
The UPC – An Overview.

The UPC is, broadly, a new court established with jurisdiction in patent disputes for all participating EU member states, together with pan-European damages, as well as to determine a patent’s validity.

The UPC instrument of establishment, the UPC Agreement, was expected to receive the requisite number of ratifications in early 2017. Importantly, for patent proprietors, the UPC system began to operate on 1 July 2016, subject to any opt-out provisions.

The UPC Agreement, which seems unlikely, the U.K. continued to be part of the EPC, Brexit will have no effect on the UPC Agreement, which is not now participate in the UPC, and will have to relinquish jurisdiction. Unitary patents (UPs) will automatically do so from grant, without any ability to opt them out of the UPC’s jurisdiction.

The UPC Agreement, which regulates the EPO and European patents – the European Patent Office can continue to grant European patents or by adopting national instead of European patent filing programs across Europe.

Which Countries are Part of the UPC?

Which Countries are Part of the UPC?

What Patents are Governed by the UPC?

Jurisdiction of the Court of First Instance

The UPC Court of First Instance has a Central Division, which is seated in Paris with sections in London and Munich. It is expected that the majority of cases where there are revocation counterclaims will be referred to the Central Division. It is expected that the majority of cases where there are revocation counterclaims will be referred to the Central Division.

The Brexit may increase the attractiveness of the current litigation venue than it would have been as merely part of the EPC system. The U.K.’s commercial significance is central to developing pan-European litigation strategies.

Certain features of the UPC are central to how companies will approach post-Brexit strategy setting. Certain features of the UPC are central to how companies will approach post-Brexit strategy setting.

Brexit will have a significant effect on patent litigation strategies. Companies are already giving active consideration to developing pan-European litigation strategies to avoid the jurisdiction of the EPO in whole or in part, either by opting out of existing European patents, or by opting out of the UPC Agreement, which seems unlikely, the U.K. continued to be part of the EPC, Brexit will have no effect on the UPC Agreement, which is not now participate in the UPC, and will have to relinquish jurisdiction. Unitary patents (UPs) will automatically do so from grant, without any ability to opt them out of the UPC’s jurisdiction.

How will Brexit affect the UPC?

The Brexit may make the U.K. a more important patent litigation venue than it would have been as merely part of the EPC system. The U.K.’s commercial significance is central to developing pan-European litigation strategies.

Brexit will have a significant effect on patent litigation strategies. Companies are already giving active consideration to developing pan-European litigation strategies to avoid the jurisdiction of the EPO in whole or in part, either by opting out of existing European patents, or by opting out of the UPC Agreement, which seems unlikely, the U.K. continued to be part of the EPC, Brexit will have no effect on the UPC Agreement, which is not now participate in the UPC, and will have to relinquish jurisdiction. Unitary patents (UPs) will automatically do so from grant, without any ability to opt them out of the UPC’s jurisdiction.

The Brexit may increase the attractiveness of the current litigation venue than it would have been as merely part of the EPC system. The U.K.’s commercial significance is central to developing pan-European litigation strategies.
As matters currently stand, Spain, Poland and Croatia are not members of the EU. While one thinks that the U.K. will appeal against the decision of the U.K. to leave the European Union, it is unknown whether other member states will follow suit. The U.K. will no longer have the ability to change its laws as part of the EU, and will have to implement its own laws and regulations. The U.K. will lose some autonomy since the U.K. has no right to determine the laws it will follow. The UPC will have to change its system to accommodate the new situation, which may affect the future of the UPC.

Consequently, companies are already giving active consideration to developing a new strategy for their European intellectual property (IP) rights. This is not to say that the national litigation strategy will be abandoned entirely, but rather that the UPC will become an important part of the strategic landscape. Counterintuitively, Brexit may have shifted the strategic balance in favor of the UPC, as companies consider the advantages of the new system.

The introduction of the UPC is undoubtedly the most significant change in the European patent landscape since the European Patent Convention of 1973. It will have a profound effect on how companies manage their IP rights. The UPC will be a critical factor in determining the strategic landscape for companies seeking to enforce their patents across Europe.

For companies with patents in multiple countries, the UPC offers a significant advantage over the current system, which requires separate lawsuits in each country. The UPC will allow for a single lawsuit that can be brought in a single jurisdiction, which will simplify the enforcement process. This is particularly important for companies with significant operations in multiple countries, as it will reduce the cost and complexity of enforcing their patents.

The UPC has also been praised for its efficiency and predictability. Under the current system, the enforcement of a patent can be costly and time-consuming, with each country having its own set of rules and procedures. The UPC, on the other hand, will have a single set of rules that apply to all cases, making it easier for companies to manage their IP rights.

Companies are already considering how to best use the UPC to enforce their patents. Some companies may choose to use the UPC exclusively, while others may continue to use the current system in certain cases. The decision will depend on a number of factors, including the size of the company, the scope of its patents, and the countries in which it operates.

The UPC is not without its challenges, however. There are concerns about the ability of the UPC to handle large numbers of cases, and the potential for delays in decision-making. Additionally, there are concerns about the ability of the UPC to handle cases from countries that are not members of the EU.


Brexit will not have an immediate effect on patent owners. The UPC is not yet operational, and there is no indication that it will be before 2018. However, there is a significant amount of uncertainty surrounding the future of the UPC, and companies are already considering how to best use the UPC to enforce their patents.

The UPC will likely become an important part of the strategic landscape for companies seeking to enforce their patents across Europe. Companies will need to consider how to best use the UPC to enforce their patents, and how to use the current system in conjunction with the UPC.

Companies are already considering the potential impact of Brexit on their IP strategies. The UPC will likely become an important part of the strategic landscape for companies seeking to enforce their patents across Europe. Companies will need to consider how to best use the UPC to enforce their patents, and how to use the current system in conjunction with the UPC.
The decision to leave the EU will not affect access to the European Patent Office. European patents that designate the U.K. will therefore continue to be granted irrespective of Brexit.

However, Brexit will prevent the U.K. from being part of the proposed new unitary patent, as participation is limited to EU member states. But the impact of this will be diluted by the ability of U.K. businesses to obtain UPs in those other EU member states that are part of the system at the relevant time. This is because the process for obtaining such patents via the EPO will be the same as that already in place for the EPO grant of the existing European patents, and because at grant the applicant can elect whether to receive the European patent bundle of national patents or the proposed UP.

Patentees should already be working on the basis that the advent of the UPC advances the decision point for European patent litigation to the time of filing the patent application, as this dictates which courts will have jurisdiction over any subsequent litigation. Concerns in some industries about the ability of the UPC to revoke all protection across all signatory states has already suggested that companies are already considering filing national patents to avoid the UPC's reach.