

Comments on the Draft Rules of Procedure for the Unified Patent Court

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1. Bristows is one of the longest established specialist IP practices in London. The firm was formed in 1837 and has specialised in intellectual property and in particular patent litigation work throughout that time. A number of the more senior partners particularly concerned with patent litigation started practising at about the time when the 1977 Patents Act (giving effect to the EPC in the UK) came into force. Accordingly, we have experienced first-hand one major change in patent litigation in the UK. It is interesting to note that several important questions as to the true effect of the 1977 Act (and the EPC/CPC on which it is based) have still not yet been clearly determined through litigation before the English Courts.
2. Those same partners have also been very closely involved in a number of reforms to the operation of the English Patents Court and Patents County Court over the past 20 years which has given us particular insight into the procedural issues which users in industry view as critical to the improvement of the English system. The reforms to the Patents County Court were directed at increasing efficiency and reducing cost. They included use of more detailed pleadings, hearings on the merits of one or two days only, and little or no discovery or cross examination.
3. Bristows fully supports the UPC initiative. We believe that an effective system which users will value can be implemented. The remarks in this paper are intended to help ensure that the court is a success from the outset.
4. A number of Bristows' partners in the patent litigation group have been very closely involved in the review of the proposals for the UPC. This has involved active involvement in the CCBE, EPLAW, AIPPI, the UK's Intellectual Property Lawyers Association, the Law Society of England and Wales, the IPO Focus Group, the IP Federation, and the Patents Court Users' Committee.
5. As a result we are well aware of the views of many UK (and indeed European) Judges and also of a large number of companies of all sizes who are current users of patent systems around the world, both as claimants and defendants. Further, as a result of

Bristows' practice for a large number of multinational companies, including regular occasions on which we coordinate patent litigation for a client around the world, we are familiar with patent litigation procedures not only throughout Europe and the USA but in virtually every significant jurisdiction of the world.

General comments

6. Through our close involvement, both directly with clients and through the various groups mentioned above, we have heard first hand from the intended users of the system (patent owning companies and others active in high technology fields) what their concerns are. Whilst any significant change will, of course, be important for the intended users of the patent system, it has become very clear to us that the concerns of many clients (who are typical of those who will form a large part of the user base of the UPC) go well beyond nervousness at the introduction of a new and untried system. If their fears cannot be allayed there is a real risk of the system falling a long way short of its potential and users simply avoiding the system as far as they can, both with opt outs of EPs and national patent filings.
7. Those discussions have indicated that users of the system (patentees and those who might be accused of infringement of patents) have the following views on the new system:
 - a) The current arrangements for patent litigation around Europe have been criticised for the significant variations between national court systems.¹ There is a risk, for example, that different Courts will arrive at different conclusions on the same patent and the same facts. It would be most unfortunate if users of the UPC believed that they might get a different result in one Division compared with another due to differences in the application of procedural rules;
 - b) For many businesses achieving a timely final outcome of disputes is as important as getting the right result in every case. They appreciate that the outcome of patent litigation can be finely balanced. Businesses can plan around a limited degree of uncertainty. Disputes in which the uncertainty drags on year after year impede business planning and may deter economic development. Many clients

¹ See the second recital to the UPC Agreement

are highly critical of the possibility for patents to remain under opposition in the EPO for many years, on occasion even until after expiry of the patent.

The recital in the preamble to the draft Rules of Procedure indicating that proceedings shall be conducted so as normally to allow the final oral hearing on both infringement and validity at first instance to take place within one year has been widely welcomed. It is critical to the success of the system (and thus its widespread adoption) that those words in the preamble do not prove to be simply a pious hope. An effective set of rules, coupled with effective implementation of those rules by the Judges charged with operation of the UPC, must ensure that aim becomes the reality. Experience in the UK has shown that even the most complex patent litigation can be concluded at first instance within about 12 months². Under no circumstances should the rules be applied to allow parties to “play the system” to extend the 12 month target beyond about 15 or 16 months, however complex the dispute, and should ensure that both infringement and validity are always determined within that time. All but the most exceptional cases should be disposed of within 10 to 14 months.

To achieve this, the timings specified, and number of steps parties may take under the Rules, should be amended. We propose that the interim procedure commence immediately following the time for lodging the reply and defence to counterclaim (Rule 29(1)(a)). The allowability of further written statements of case should be dealt with at the interim conference rather than permitted as a matter of course. Current rules envisage no effective case management by the Court until the start of the interim stage, which in some cases will be more than 7 months after commencement of infringement proceedings; this is inconsistent with the objective of cases being determined within about one year;

- c) Procedural Fairness.
 - a. Clients want to be confident that evidence can be tested and challenged effectively. This may not require cross examination but they do not want decisions to be made merely on the basis of assertions by lawyers or the untested opinions of a court expert or technical Judge. The court’s authority

² In one case a final ruling by the Court of Appeal was given only a little more than 7 months after the dispute started.

and the respect in which it is held will depend on users believing that it achieves justice.

- b. Limiting representation, especially in the early years, to lawyers with substantial experience of patent litigation, and ensuring that their behaviour is to a consistent and high standard, will also do much to enhance the court's credibility and encourage its use. This will also help the panels of judges as they get to grips with a new system.
- c. It is important that the Court can deal with issues as a matter of urgency (e.g. the grant of a preliminary injunction) but equally important that anyone against whom such an injunction is obtained has the right to challenge it immediately. The defendant should be notified and heard in all cases, with the only exceptions being where dishonesty is credibly alleged and/or, in a case of extreme urgency, if giving notice is (as a practical matter) impossible.
- d. It is important that each action is not seen in isolation but is managed under the rules as part of the overall dispute between the parties.
- e. It should be possible for any material change of circumstances to be properly taken into account and decisions revisited if necessary.
- f. Defendants should be properly protected. The Defendant does not, at least initially, have a say in where or in what language the proceedings are commenced. Given that trade is international and electronic means of offering products (e.g. through websites) are ubiquitous, in most cases a Claimant will have an option as to the Division in which to commence proceedings. Further, the Claimant can spend as long as it wants preparing its case but the Defendant is then, under the Rules, faced with a firm deadline mandated by the Rules. Judges should be required to look outside the parameters of the particular dispute in front of them so that the broader dispute between the parties is effectively and fairly managed. It is noted that the sixth recital to the Agreement emphasises the need to strike a fair balance between the interests of right holders and other parties.

- d) Clients are understandably concerned that the costs of the system be proportionate (both the Court fees and the likely costs of the lawyers who represent them). Whilst Legal Aid provisions may go some way towards alleviating difficulties for impecunious parties, in particular for natural persons who may find themselves as Defendants, it is important that even such persons and small SMEs should be able to defend themselves effectively in whatever division of the UPC they are sued and without undue reliance upon Legal Aid.
- e) Ensuring that the pool of judges is well trained in the Agreement and Rules of Procedure and, before the court even hears its first case, have an agreed approach to case management as well as substantive patent law, will go a long way to ensuring early success. By the same token failure in any of those areas, which could easily lead to unsatisfactory experiences for court users could very seriously undermine their confidence before the court has been established. The initial failures when the English Patents County Court was established graphically illustrate the importance of getting the right judges with the right experience and approach.
8. In addition to these general comments we set out in the next three sections our specific comments relating to: forum shopping (location and language), promoting harmonisation in the exercise of discretion; and Legal Aid. We also have some comments on the opt-out provisions provided for by Article 83 and Rule 5. However, we will be writing to the Preparatory Committee separately on this issue.

Forum Shopping – location and language

9. One of the greatest concerns among potential defendants (which by definition includes all companies which offer products and services, even if also patent owners) is that the UPC should not provide the Claimant patentee with an unfair advantage by reason of the Claimant's ability to choose its forum for infringement proceedings under Art 33(1). The unfair advantage may arise in one of three broad ways:
- First, that a defendant may potentially be disadvantaged by fighting a case in a division geographically distant from its headquarters;
 - Second, that different divisions may differ as to the language of the case;

- Third, that the procedures of the Court (mainly attitude to bifurcation and grant of injunctions) may differ.
10. In theory, the UPC should not differ in its procedural approach from division to division, save as to the language used in the division. It is very much hoped that this will be the case, and our proposals to ensure procedural harmonisation address this issue. On the basis however that, as with the US District Court system, even small differences in approach by different divisions will be perceived to be important, and with the unavoidable geographic and language issues, it is essential to make the system balanced as between Claimants and Defendants from the perspective of which division hears the case. These concerns are most acute for SMEs, which the recitals to the Agreement specifically refers to as being entities which the UPC should serve. However, the concern is prevalent among all companies which are potential defendants.
 11. The UPC agreement (Art 33(1)) gives Claimants a wide choice of forum in many cases where a defendant trades in more than one state. By contrast, in only one case under Art 33(2) can the Defendant insist on a change of forum. (This is the case of an infringement claim started in a Regional division and, assuming there are at least three Regional divisions, infringement is widespread.) This arrangement may cause a defendant to have an objectively legitimate concern that the Claimant has chosen a particular division because it perceives it to be advantageous to it, rather than because it is the natural forum for the case. We believe that Art 33(1) was intended to prescribe where Claimants are permitted to bring actions, but not to give them a choice for the purpose of oppressing defendants. Hence we believe that fairness requires that any defendant should be able to challenge the appropriateness of the division chosen by the Claimant except where the Agreement is prescriptive (i.e. where it is a revocation or declaratory claim, or where only one division has competence under Art 33(1)).
 12. **In other words the rules should provide not only mechanisms for ensuring harmonisation, but provide also for the ability to request a change of division so that the choice by a Claimant of an objectively inappropriate division is made less likely, and to give defendants the reassurance that they will not be significantly disadvantaged by a Claimant's choice.**

How to decide if a division is inappropriate?

13. We suggest that the ability to challenge forum should be dealt with under r.19, so that the matter is determined at an early stage. Consistent with the objective to prevent abuse, we believe that the burden should be on the defendant to show that the division chosen by the Claimant is objectively inappropriate (rather than merely that on balance another division would be more appropriate). In this way, applications of this nature may be kept to a minimum, and be reserved for cases where the Claimant has chosen a division having regard mainly for its own convenience and without proper regard to the interests of the Defendant. We suggest that the decision should be taken by the Judge-Rapporteur, and be subject to appeal, with, if necessary, permission being given by either the Court of First Instance or the Court of Appeal under r.220.
14. In the UK, the so-called “Spiliada” factors apply to the determination of forum conveniens. We suggest the following criteria, ranked in order of importance, be used to decide “inappropriateness” of forum:
 1. The place where the defendant (or in relevant cases its parent company) is mainly based (habitually resident);
 2. The place where the infringements mainly took place, which in the case of goods manufactured in the EU should be the place of manufacture rather than the main place of sales (if there is a difference);
 3. The place where the Claimant (or in relevant cases its parent company) is mainly based (habitually resident);
 4. The impact of the language regime in the local divisions concerned, and the language criteria given below in the sub-section on language.
15. These criteria (or whatever criteria in whatever order are thought relevant) should be set out in the Rules of Procedure.

Language

16. As is apparent from the above criteria, the impact of language is inextricably connected with the forum shopping issue, and the matter needs (in many cases) to be looked at holistically.
17. We suggest that from the defendant's perspective, the ability to argue for a transfer of division will often be the most effective way of ensuring that there is not "language shopping". However, we also suggest that the language in which the proceedings are conducted is capable of being the subject of such a r.19 objection even if there is no request to transfer the case to another division. The language proposed by the Defendant in these circumstances would be limited to the language of the patent or an alternative language of the division in which the claim is commenced or the division to which the claim is sought to be transferred. This would be preferable to the regime contemplated in r.323 for a number of reasons. Firstly, it would mean that the issue of choice of language and forum would be considered together. Secondly, it would avoid the need for the Defendant to lodge the Defence in the language that is being objected to; and finally, it would provide an earlier determination of the appropriate language for the proceedings.
18. Two examples may be illustrative.
19. *First situation – change of division is appropriate:* Suppose a Japanese company wishes to sue a SME German company under a German language patent. Suppose it has a choice of divisions because acts of infringement have been conducted throughout the EU. Suppose it decides that it would suit its purposes not to fight the case in German, because as native German speakers it would be easier for the German company to conduct the case in German. The Japanese company can equally well conduct its case in English, and hence the Japanese company decides to sue in London, even though only a few infringing acts have occurred in England.
20. In this case it is obvious that German is the more appropriate language of the case. However, the English division is unlikely to have German as a working language and absent the agreement of the parties to have German as the language of the case would not be able to conduct the case in German. In such a situation it is appropriate that the English division should transfer the case to a German division where the case can be

heard in German. Note that even if the case is bifurcated, the language of the revocation part would be German, whereas if the English division bifurcated, the result would be a case in two languages.

21. *Second situation – no change of division required:* Suppose a SME English Claimant with an English language patent has identified an infringing act committed by a German subsidiary of a large Japanese company in only one state, namely Germany. Suppose also that the Japanese subsidiary has a place of business in Europe only in Germany and that subsidiary operates in German, albeit that it is also well able to operate in English. Suppose also (as we understand likely) that at least one German division nominates English as well as German as a working language. As presently drafted, the rules would require German to be the language of the proceedings. In this example the parties may agree English as the language of the case, but the Japanese company may prefer German simply because it has local employees who speak German, and will be aware that the small English company will have difficulties operating in German. Should in this case the Claimant really be required to bring its case in German? We believe that overall justice would best be served by allowing the Claimant the option of starting the case in English.
22. To achieve this, r.14.1(b)(ii) of the 14th draft rules should be reinstated, allowing the Claimant to lodge the claim in the language of the patent together with an application that that language should be the language of the proceedings. Further, if the German subsidiary was genuinely handicapped by operating in English, it should be able to object using r.19 and argue for German as the language of the case.
23. The concern from the perspective of defendants that a defendant may potentially be disadvantaged by fighting a case in a language which it does not understand, or which is inconvenient, ("language shopping") has been addressed by the Rules Committee in the present version of r.14 by taking a prescriptive approach to the language of the proceedings. We suggest, however, that this is not the best approach, since this does not have proper regard to what language is, in the overall context of the dispute, the most appropriate, and the limitations in the working languages of the various different divisions. It takes no account of competing factors such as whether one party or another is really disadvantaged as against the availability of translations into the Defendant's preferred working language, as well as the prima facie desirability of

conducting the case in the language of the patent especially so as to avoid bifurcated cases being heard in two different languages which is perhaps the worst of all worlds. Inevitably, in many cases the Court will wish to consider the patent or at least the claims in the original language of the patent in any event.

24. We therefore suggest that a different approach would best serve the interests of procedural efficiency and fairness as between the parties. As indicated above, we believe that disputes may be of two types. First, where the defendant is content with the division in which it has been sued, but wants to fight in a different language of that division; and second, where the defendants wants to fight in a language which is not a working language of the relevant division, and which thereby requires a change of division.
25. We suggest that, in addition to having the question of language as one of the criteria for disputes as to forum, there be criteria, ranked in order of importance, provided as to the factors which should be taken into account when deciding what is the most appropriate language where there is no application to transfer from one division to another. As above, if our criteria are considered sub-optimal, other criteria may be used, but the important point is consistency of approach among divisions. We suggest:
 1. The language of the patent;
 2. The working language of the Defendant (or its relevant parent company);
 3. The working language of the Claimant;
 4. The ability of the Defendant (or its relevant parent company) to work in the language chosen by the Claimant
 5. The ability of the Claimant to work in the language requested by the Defendant
 6. The language of documents likely to be in issue in the proceedings;
 7. The language of witnesses likely to be involved in the proceedings.
26. These criteria reflect Article 49(5) of the Agreement, which requires the decision to be made on grounds of fairness and taking into account all relevant circumstances, including the position of parties, in particular the position of the defendant.
27. If the Defendant requests a change of division, the criteria mentioned in the previous section should be applicable, but with point 4 (languages) being expanded per the seven criteria above.

28. Having protected the interests of defendants by allowing the possibility of an early consideration of both choice of forum and choice of language, the language rules need not be so prescriptive as regards the language of the proceedings and the language which the claimant must use in its statement of claim. The Claimant should be permitted to use as the language of the proceedings any of the languages designated by the relevant local or regional division, provided the defendant has the right to apply for a transfer of divisions, or to have another language of the division or the language of the patent as the language of the action. We also believe that due regard may in that way be had to issues such as the language of the patent, the prior art, the documents in or likely to be in issue, and the native language of likely witnesses.

Promoting harmonisation in the exercise of discretion

29. In order to promote harmonisation and minimise the scope for divergence of approach in different divisions of the UPC it would be beneficial to set out criteria against which divisions of the UPC may exercise discretion. In terms of ensuring a harmonised approach, the key areas in which discretion is given by the Agreement are the ordering of bifurcation, stays, permanent injunctions and provisional measures.

Bifurcation

30. According to Article 33(3) of the Agreement the local or regional division in which an infringement claim is brought has the discretion to deal with a revocation counterclaim by handling both aspects of the proceedings or bifurcating the proceedings. The same discretion arises where an infringement claim is brought and a revocation claim is pending in the central division (Article 33(5)). Rule 37(1) deals with the application of Article 33(3) of the Agreement. No guidance is provided in the draft Rules of Procedure other than specifying that the parties may make submissions in writing and orally on the issue.

Stays

31. Discretion to grant a stay arises in a number of different contexts. If proceedings are bifurcated by the local or regional division according to Article 33(3)(b), Rule 37(4) provides for discretion to stay proceedings and a mandatory stay where there is a high likelihood that the relevant claims of the patent or patents will be held invalid. According to Rule 118(3)(b), a further discretion arises in circumstances where a

decision on the merits is to be rendered in an infringement claim and there is a revocation claim pending in the UPC. As drafted, Rule 118(3)(b) operates in the same manner as Rule 37(4) with the exception that reference is also made to a final decision of the European Patent Office.

32. Rule 295 also provides for discretion to stay proceedings in specific circumstances. This includes, for example, where the patent in issue is the subject of opposition proceedings before the European Patent Office. The wording of Rule 295(a) should reflect Article 33(10) of the Agreement which limits the exercise of the Court's discretion to circumstances where a "rapid decision may be expected from the European Patent Office".
33. Rule 70(3) provides for a mandatory stay of revocation proceedings where an infringement claim is brought in respect of the same patent in a local or regional division. There does not appear to be any basis for a mandatory stay in Article 33(5) of the Agreement, the only circumstances in which a mandatory stay is contemplated being in the context of Article 33(6). It follows that the Rules of Procedure should provide for discretion in this instance, particularly since delay would be likely to unnecessarily prejudice a defendant.
34. Rule 136 provides for discretion to order a stay of an application for determination of damages, and Rule 266(5) provides for discretion to order a stay of proceedings pending a ruling of the CJEU. In this last case, there ought, under EU law, to be no discretion, but rather there should always be a stay.

Permanent injunctions

35. Article 63 of the Agreement provides for discretion to grant permanent injunctions. Rule 118(2) provides for specific circumstances in which the Court may award damages instead of the usual orders (such as a permanent injunction). Specifically, a Court may order damages instead of an injunction if the person (defendant) acted unintentionally and without negligence, if execution of the orders and measures in question would cause such party disproportionate harm and if damages appear to be reasonably satisfactory.

Provisional measures

36. Article 62 of the Agreement provides for discretion to grant provisional and protective measures including a preliminary injunction. Article 62(2) provides that the Court shall have discretion to weigh up the interests of the parties and in particular to take into account the potential harm for either of the parties resulting from the granting or refusal of the injunction. Rule 211 makes reference to the exercise of this discretion without making reference to the factors in Article 62(2) or any other guidance.
37. Rule 209(1) further provides for discretion, for example, as to whether to inform the defendant about the application for provisional measures. Rule 209(2) provides some factors for the Court to take into account in the exercise of its discretion, but does not adequately protect the interests of the defendant.

Criteria for the exercise of discretion

38. Establishing a set of criteria for the exercise of discretion is of primary importance. This is particularly so in a new system which is to operate across a number of jurisdictions where there exists a varying degree of similarity with the pre-existing legal systems and a wide divergence of practice with regard to the exercise of discretion (or the lack of it) in the key areas identified above. In the absence of some criteria there is a high risk that there will be a significant divergence in approach between divisions, or even between panels.
39. While the Court of Appeal should play a role in harmonisation, that does not justify missing an opportunity to support the goal of harmonisation and the avoidance of forum shopping in the Rules of Procedure. Promoting harmonisation in the Rules of Procedure has the advantage of being effective immediately. Relying on the Court of Appeal introduces an undefined delay before harmonisation can be effected.
40. There is no apparent disadvantage in setting criteria in the Rules of Procedure other than the necessity of drawing up and agreeing appropriate criteria. If the criteria set out are not found to be effective in practice they may be changed. The mechanism for doing so is set out in Article 42 of the Agreement and may be instigated on the basis of a proposal from the Court.

41. While the precise form of the criteria are of lesser importance, some proposals and discussion are provided below.

General points on the exercise of discretion

42. The recitals to the Agreement contain principles of relevance to the exercise of the Court's discretion. The second recital states:

“CONSIDERING that the fragmented market for patents and the significant variations between national court systems are detrimental for innovation, in particular for small and medium sized enterprises which have difficulties to enforce their patents and to defend themselves against unfounded claims and claims relating to patents which should be revoked;”

43. This recital identifies the primary problems with the existing patent system in Europe that the UPC seeks to address. Recitals 5 and 6 to the Agreement outline in general terms how this should be achieved:

“WISHING to improve the enforcement of patents and the defence against unfounded claims and patents which should be revoked and to enhance legal certainty by setting up a Unified Patent Court for litigation relating to the infringement and validity of patents;

CONSIDERING that the Unified Patent Court should be devised to ensure expeditious and high quality decisions, striking a fair balance between the interests of right holders and other parties and taking into account the need for proportionality and flexibility;”

44. In order to ensure that the procedure of the UPC is implemented in a manner consistent with these recitals, the Rules of Procedure should be supplemented to expressly require that the following should be taken into account in any exercise of the Court's discretion:

1. The need to strike a fair balance between the interests of rights holders and other parties;
2. The need for proportionality and flexibility;
3. The desirability of expeditious and high quality decisions;
4. The desirability of enhancing legal certainty; and
5. The desirability of harmonising procedures throughout the divisions of the UPC.

45. These factors are also reflected in the preamble to the Draft Rules of Procedure. In addition to these general factors, the discussion below considers some specific factors in the context of ordering bifurcation, stays, permanent injunctions and provisional measures.

Bifurcation

46. The following factors are proposed as factors that should be taken into account in the exercise of the Court's discretion under Article 33(3) in addition to the general factors set out above:

1. Whether the Defendant consents to bifurcation;
2. Whether a technical judge is required for the purposes of the infringement claim according to r.33;
3. Whether bifurcation would give rise to the possibility of the case proceedings in different languages;
4. Whether, on making enquiries of the appropriate sub-Registry of the Central Division, bifurcating the case would be likely to give rise to a delay between the decision on infringement and revocation (though this could be dispensed with if Rule 40(b) of the 14th Draft of the Rules of Procedure is reinstated);
5. Whether dealing with both infringement and validity together would jeopardise the hearing date in the local or regional division;
6. Whether the hearing of both infringement and validity can be accommodated by the local or regional division in no more than one day;
7. Whether there is any interaction between the case on infringement and the case on validity in the parties' statements of case;
8. Whether the Claimant in the infringement claim is in a position to provide security in accordance with Rule 352 against orders and measures made pending resolution of the revocation counterclaim;
9. Whether the Defendant would be likely to suffer irreparable harm in the event that orders and measures were made pending resolution of a revocation counterclaim, i.e. harm that could not be compensated by way of security given in accordance with Rule 352;
10. Whether there is either a high likelihood or a low likelihood that the relevant claims of the patent will be held invalid; and

11. The likely impact of bifurcation on the costs of the proceedings and the use of the Court's resources.

Stays

47. The following factors are proposed as factors that should be taken into account in the exercise of the Court's discretion in respect of any decision to stay proceedings, or an aspect of the proceedings, in addition to the general factors set out above:
 1. The length of and degree of certainty associated with the delay that may be caused by the stay and the likely overall time between the start of the dispute and its final resolution;
 2. The likely impact of the stay on the overall costs of the proceedings;
 3. The likely impact of the stay on the use of the Court's resources; and
 4. Whether and the extent to which the ability of one or both of the parties to obtain commercial certainty is prejudiced by the stay.
48. It is noted in respect of the first factor that Article 33(10) of the Agreement states that the "Court may stay its proceedings when a **rapid** decision may be expected from the European Patent Office". The Rules of Procedure should, therefore, be amended so that a stay pending resolution of proceedings in the European Patent Office is only contemplated when a rapid decision may be expected from the European Patent Office.

Permanent injunctions

49. Some revision of rule 118(2) is proposed for the following reasons. Firstly, the creation of a defence to an injunction based on lack of intention is illogical since continued use of the patent following the decision will inherently be intentional and this is the period of time to which an injunction relates. Secondly, the determination of whether a defendant has acted negligently is itself a substantial legal exercise. The application of such an assessment as a condition on a patentee's entitlement to an effective monopoly, creates substantial legal uncertainty and places a restriction on the enforcement of patents unrelated to validity, contrary to the fifth recital to the Agreement.
50. It is proposed that the words "if that person acted unintentionally and without negligence" be deleted from Rule 118(2) and the exercise of discretion be made subject to the general factors set out above.

Provisional measures

51. It is proposed that a new rule is inserted after Rule 209(2) in the following form:

The defendant shall be informed about the Application and provided with an opportunity to make submissions in accordance with Rule 209(1)(a) unless the Court considers that dishonesty on the part of the defendant is credibly alleged and/or giving notice is impossible as a practical matter in a case of extreme urgency.

52. Rule 211, concerning the discretion to order provisional measures, should expressly incorporate the wording of Article 62(2) as well as a reference to the general factors to be taken into account on the exercise of the Court's discretion, set out above.

The role of Guidelines in the promotion of harmonisation

53. It is further proposed that the availability of a set of guidelines for the application of the Agreement and the Rules of Procedure would assist in the promotion of harmonisation in the UPC. A set of guidelines could be prepared in advance of the Agreement entering into force³. The Rules of Procedure should provide for the drafting and maintenance of such guidelines as well as a summary of case law in the UPC.

Legal Aid

54. Finally, we have the following observations concerning Legal Aid.

55. The ability of Legal Aid to cover the costs of the successful party if the Applicant loses the action (Rule 376.2) should be resolved by the Administrative Committee under Article 71(3) as soon as possible, since parties adverse to individuals receiving Legal Aid must be reassured that they will receive their costs if they win.

56. Under Rule 379.3, it is the judge-rapporteur in the case who decides whether Legal Aid is granted in cases where the application is made after commencement of proceedings. We propose instead that a judge **not** involved in the proceedings decide the issue, so as to avoid the perception on the part of the opposing party that the judge-rapporteur has already decided the case in favour of the Legal Aid applicant.

³ The authors would be happy to assist in the preparation of appropriate guidelines.