

# Finalized Rules of Procedure of the UPC: analysis of the last modifications

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On 19 October 2015 the Preparatory Committee of the UPC has adopted the final 18th draft of the Rules of Procedure (RoP) of the Unified Patent Court. This means that the Committee ends its work regarding the Rules of Procedure. There is only one subject that still needs to be included in the RoP and that is everything which has to do with Court fees. This sensitive issue is still in negotiation. For the rest, the draft RoP can be considered as finalized.

In July 2015, a version of the 18th draft with certain technical and substantive amendments was already submitted to the members of the Preparatory Committee. The majority of the then proposed amendments were finally adopted by the Committee in October 2015. Besides the amendments of July, the Committee also added in final reading certain last modifications. Hereafter we will briefly address the amendments of July and October that now form the final 18th draft of the RoP.

Big congratulations go out to the Legal working group of the Preparatory Committee, to the previous informal drafting committee and to all people from the member states and from the European Patent Office that contributed to the gigantic work of preparing the RoP. The work has resulted in a marriage between common law and continental law.

The proof of the "RoP pudding" will of course be in the eating. Therefore, the Preparatory Committee has announced that all preparations for the UPC shall end in 2016, so that in the beginning of 2017 the Court could start its new task.

Together with co-author Sam Granata I am following all latest developments regarding the UPC in order to prepare a second edition of our Kluwer book "Introduction to the Unitary Patent and the Unified Patent Court". The second edition of our book shall be available in 2016 once all issues regarding the Unitary Patent and the UPC are finally decided.

Opt out applications

The sunrise period which was announced for opt-outs of the Court, is now confirmed by paragraph 13 of Rule 5. Applications accepted by the Registry before the entry into force of the Agreement, shall be treated as entered on the register on the date of entry into force of the Agreement.

Written procedure?

Rule 10 (c) provides that the Court may dispense with the oral hearing with the agreement of the parties. This means that if all parties agree not to have an oral hearing (e.g. to save costs), the Court can decide not to hold an oral hearing. However, it seems unlikely that in many cases all parties will agree to have a decision of the Court without an oral hearing.

Use of languages in proceedings:

In Rule 14 the Preparatory Committee has adopted the proposition of Germany to provide panels of regional or local divisions with the possibility to use the official language(s) of the division for oral proceedings and for rendering orders or decisions, even if the parties themselves have chosen to use an additional language of the EPO (for e.g. English in Germany) as the language of proceedings. It is up to the Judge Rapporteur to order this exception to the language regime. He may only do so "in the interest of the panel". In practice, this will mean that although – besides the official national language – a local division has English as an additional language (e.g. English for the local division in Belgium or the Netherlands), the Judge Rapporteur may still decide that it's better for the panel to use the official national language (e.g. Dutch) in oral proceedings and for drafting orders and decisions. However, in case the official language is used over the chosen language, each order and decision shall be accompanied with a certified translation for enforcement. This paragraph was added because certain member states fear that not all judges of their local divisions would be able to hold oral proceedings and write decisions in English.

Distribution of actions between the seat of the central division and its sections

Rule 17.3. provides a solution for the allocation of cases to the three different seats of the central division. The UPC agreement provides that the competence is determined by the classification of the patent. Rule 17.3.c) provides a solution for the situation in which the action involves a single patent having more than one classification or where the action involves more than one patent and no majority of the patents have a single classification corresponding to the seat or to one of the sections of the central division. In such case the Registry shall assign the action to the panel at the seat or the section appropriate to the first classification of either the single patent or, where the action involves more than one patent, the patent first listed in the Statement of claim. If the presiding judge of the respective panel considers that the reference of the action is appropriate, he shall accept. If he considers otherwise, he shall instruct the Registry to refer the action to the presiding judge of a panel of the section of the central division he considers appropriate, who shall likewise consider if the allocation is appropriate. If the latter considers otherwise, the President of the Court of First Instance (i.e. a French President), shall finally allocate the action.

Decision by default in case of no security for costs

At any time during proceedings and following a reasoned request by one party, the Court may order a party to provide a security for the legal costs and expenses incurred or to be incurred by the requesting party. Paragraphs 4 and 5 of Rule 158 clarify that if a party fails to provide adequate security the Court may give a decision by default.

Letters rogatory

In Rule 202 the drafting committee has extended the possibility of the Court to issue letters rogatory for the production of documents by other competent courts or authorities outside the EU. In previous versions of the RoP the letters rogatory were only possible for the hearing of witnesses or experts by such courts.

Appeals not respecting the time requirements

Rule 229 provides that if an appeal is lodged outside the time limits set for appeal, the President of the Court of Appeal shall reject the appeal as inadmissible. Furthermore, the rule provides that the President "may" give the appellant an opportunity to be heard beforehand. Since there is no obligation for the President to hear late appellants and it is provided that the President "shall" reject the appeal if lodged too late, it will be very important to lodge an appeal within the time limits.

Insolvency of a party

Rule 311 now provides that the Court shall stay proceedings up to three months if a party is declared insolvent under the law applicable to the insolvency proceedings. Proceedings may also be stayed at the request of a temporary administrator who has been appointed before a party is declared insolvent.

Allocation of judges to panels by the President of the Court

Rule 345 clarifies that it is the task of the President of the Court of First Instance (or a judge to whom he has delegated this task) to allocate the judges to the panels of the local or regional divisions, the seat of the central division and its sections. In previous versions of the RoP this task was given to the "presiding judge of each local or regional division or the seat of the central division or one of its sections". However, the UPC-agreement did not define such function. Furthermore, other rules of the RoP use "presiding judge" as the judge presiding a panel. Therefore, the Preparatory Committee decided to allocate the important task of allocating judges to the President of the Court. The President of the Court will be an important function within the new system.