

CMS Response to Consultation on the UPC Rules of Procedure (the “Rules”)

CMS is an international law firm with an extensive presence in Europe. With 2,800 legal and tax advisers in 54 offices, we are the largest provider of legal services in Europe. Our international Intellectual Property team consists of approximately 150 lawyers located across Western, Central and Eastern Europe and beyond.

We have been following the proposals relating to the Unified Patents Court and Unitary Patent and the drafting of the Rules with interest, and have spoken to clients to gather their views.

These comments reflect our internal and external discussions in general, and do not represent the views of any particular client of CMS.

1. Rule 2 – Supplementary protection certificate

1.1 Definition

1.1.1 Rule 2 refers to the definition of a supplementary protection certificate (“SPC”) provided in the Agreement on the Unified Patent Court, namely: *“Supplementary protection certificate” means a supplementary protection certificate granted under Regulation (EC) No 469/20091 or under Regulation (EC) No 1610/962.’*

1.1.2 The use of the word “granted” implies that SPC applicants are not included in this definition. We would suggest that the definition should be extended to include SPC applicants.

2. Rule 5 – Lodging of an Application to opt out and withdrawal of an opt-out

2.1 Supplementary protection certificates

2.1.1 Article 83(3) of the Agreement states:

“Unless an action has already been brought before the Court, a proprietor of or an applicant for a European patent granted or applied for prior to the end of the transitional period under paragraph 1 and, where applicable, paragraph 5, as well as a holder of a supplementary protection certificate issued for a product protected by a European patent, shall have the possibility to opt out from the exclusive competence of the Court.” (emphasis added)

2.1.2 Similar to the point made at paragraph 1.1.2 above, the current drafting does not grant an SPC applicant the right to apply to opt out. It has been suggested to us that this should be amended to reflect the position for patent applicants.

2.1.3 Further, if a proprietor opts out its European patent, it is unclear whether this automatically includes the subsequent SPC for that patent. Such a consequence would be preferred. It would avoid a second fee being due and also prevent an SPC applied for after the European patent has been opted out from becoming automatically subject to the UPC, if that were possible (which is not clear).

2.2 Exclusive licensees

2.2.1 Under the current wording of Rule 5.1, it is not clear who has the right to opt out if there is an exclusive licence, even if the licence contains specific provisions to this effect.

2.2.2 Article 47 of the Agreement permits an exclusive licensee to bring actions before the Court as if he were the patent proprietor, provided the proprietor is given prior notice.

2.2.3 We would like to see a similar right granted to the exclusive licensee (being an exclusive licensee of all rights under the patent) in relation to the decision whether to opt out or in. It would be inconvenient and impractical for a licensee to have to request the proprietor (who may be, for example, a non-commercial entity) to make the application. Instead, the exclusive licensee should be able to submit an application on his own behalf, after providing prior notice to the proprietor, subject to the additional issue of the need for all relevant right holders to opt out together where different interests are separately held. This could be structured so that the licensee should first make a request to the proprietor for the latter to opt out. If the proprietor fails to do so within a given timeframe, the licensee could opt out in his own right. Provided that the same party remains an exclusive licensee, they should have the exclusive right to opt back in, or to have the proprietor do so at their request.

2.3 Joint ownership

2.3.1 Rule 5.1 states that where a patent or application is owned by two or more proprietors, all proprietors shall lodge the application to opt out. However, the position as regards SPCs is unclear.

2.3.2 The wording of Article 83(3) of the Agreement grants SPC holders the right to apply to opt out of the jurisdiction of the UPC. However, it is not explicitly stated that the authorisation of the patent proprietor is required. If the holder of the SPC is not the same entity as the patent proprietor, there could be a situation where the SPC holder has opted out of the UPC's jurisdiction, but the proprietor of the underlying patent has not, or vice versa. This would undoubtedly give rise to situations presenting complex issues of jurisdiction.

2.3.3 In order to avoid this, we would suggest that the nexus between SPC holder and patent proprietor and their respective roles in relation to opting out should be clarified.

2.4 Fees

2.4.1 Rules 5.3 and 5.6 state that the applicant must pay a fee when applying either to opt out, or to withdraw a previous opt-out.

2.4.2 We consider it reasonable for the applicant to be required to pay a fee, even a fairly large one, if he decides to withdraw an opt-out, reflecting the administrative burden that this might entail.

2.4.3 However, our clients have expressed concerns in relation to a fee for opting out of the system. The companies and individuals who are patent proprietors are not the ones who have chosen the new system, yet under the current proposals they will be financially penalised if they want to opt out. Those who do not wish to be a part of the system also do not feel that it is fair to be obliged to pay towards the cost of funding it.

2.4.4 The process for opting out electronically should be relatively straightforward and not especially resource intensive. At the most, only a small notional fee should be applied. The cost of opting out should not be so high as to leave proprietors with no choice but to use a system they do not want.

2.5 Effect of opt-out

2.5.1 It is apparently still not clear to practitioners that the application of the transitional period, during which national infringement and revocation actions remain possible, does not depend on whether the patent has been opted out. The effect of opt-out could be clarified in the Rules.

2.6 “Sunrise” provision

2.6.1 We note that this draft of the Rules contains a “sunrise” provision, which allows applications for opt-out to be lodged prior to the Agreement coming into effect. These applications will be treated as effective from the date the Agreement comes into force.

2.6.2 Our clients in general welcome this provision, which it is considered will help to alleviate any administrative burden and ensure that there is no risk of a delay in applications being entered into the register.

3. Rule 7 – Language of written pleadings and written evidence

3.1 Translations

3.1.1 Rule 7.2 states that in some circumstances, the Rules of the Court may require a pleading to be translated. We believe our clients would like to see some wording within the Rules to provide that translations will only be required where absolutely necessary, in light of the potentially significant costs that would be incurred in producing translations of complex documents.

4. Rule 11 – Settlement

4.1 Patent Mediation and Arbitration Centre

4.1.1 Rule 11.1 states: *“If the Court is of the opinion that the dispute is suitable for a settlement, it may propose that the parties make use of the facilities of the Patent Mediation and Arbitration Centre (the “Centre”) in order to settle or to explore a settlement of the dispute.”*

4.1.2 At present it is unclear whether the parties can refuse the proposal that they use the Centre. The relationship between parties is not always conducive to effective ADR. Wording requiring the parties to consider, but not necessarily accept, any suggestion of ADR may be helpful.

5. Rule 14 – Languages

5.1 Language in local and regional divisions

5.1.1 Article 49 of the Agreement presents a flexible system in relation to the language of proceedings at the Court of First Instance. The language of proceedings can either be: the official language of the Contracting Member State hosting the local division; the official language or languages designated by two Contracting Member States sharing a regional division; or any of the official languages of the EPO (English, French or German). The choice of languages available should serve to open up the system to companies and lawyers across Europe and promote harmonisation.

5.1.2 However, the wording of Rule 14.2 could be interpreted as limiting this flexible regime. It states that if a local or regional division has designated two or more

languages, the claimant shall provide the statement of claim in the language in which the defendant normally conducts its business in its Contracting Member State.

- 5.1.3 If this goes further than a mere requirement to provide a translation into such language, it is too limiting. In any event it seems unnecessary and impractical, and does not take into account the nature of the defendant or its business. For example, if the defendant is part of a multi-national company adept at operating in other languages outside of its national territory, and the claimant is an SME whose activities are restricted to a particular region, or language, it is disproportionately burdensome for the claimant to have to lodge the claim in a language with which it is not familiar, not to mention the additional translation costs that will be incurred. There will also be confusion and disputes about how to ascertain the correct language.
- 5.1.4 In addition, obliging the claimant to use the language of the defendant may limit the claimant to a smaller pool of local advisors, which goes against the aim behind the UPC of opening up patent litigation across Europe.
- 5.1.5 If the effect is to force the claimant to litigate in the language of the defendant, this negates the power conferred on the Contracting Member States in Article 49 to select an alternative language.
- 5.1.6 If, as has been reported, this provision arises from national law in Belgium, a solution would be simply to retain, to a very limited degree as strictly necessary, such national requirements on top of the Rules. Otherwise, it is suggested that where a Contracting Member State has designated more than one language of proceedings, for example its official language along with one of the EPO official languages, the claimant should still clearly be allowed to conduct proceedings in the chosen official language of the EPO.

6. Rule 18 – Designation of the judge-rapporteur

6.1 Panel composition

- 6.1.1 Article 8(1) of the Agreement states that any panel at the Court of First Instance shall be made up of three judges, with a multinational composition. Those countries with most patent litigation historically can have a majority local panel, which will tend to entrench local practices at the expense of harmonisation. Rule 18 provides that one of the judges be designated as rapporteur. There is no guidance as to which of the three judges should be selected.
- 6.1.2 It is clear from the Rules, particularly Rule 334 – Case management powers, that the role of the judge-rapporteur is an important and influential one, encompassing powers such as extending the time period for compliance with specific Rules, excluding issues from consideration and dismissing a pleading summarily.
- 6.1.3 We would suggest that, if a local division has two judges from the Member State hosting the division and one from another, the “non-local” judge from the other Member State should be primarily considered as candidate for the judge-rapporteur role.
- 6.1.4 The rationale behind this is to promote harmonisation of practice as rapidly as possible. This in turn will reduce forum shopping. There is a concern that if the two local judges have too much influence, there will be less harmonisation across the Contracting Member States. As a practical matter, many cases settle after first instance so an appeal cannot always be relied on to introduce harmonisation.

7. Rule 22 – Value-based fee for the infringement action

7.1 Value-based fees

- 7.1.1 Rule 22 introduces the concept of a value-based fee for an infringement action, to be paid in addition to a fixed fee.
- 7.1.2 We have concerns that the complexity of value-based fees could lead to different courts taking different approaches, which could in turn lead to forum shopping.
- 7.1.3 As the value of a claim will be assessed according to the damage across all relevant Contracting Member States rather than on a national level, as is currently the case, it is likely that the Court will be dealing with uncharacteristically high-value claims. Our clients are naturally concerned that these fees may become prohibitively (and unpredictably) high in complex cases and act as an obstacle to the effective use of the new system.
- 7.1.4 These comments apply equally to the other value-based fees referred to in Rules 31 (Value-based fee for the dispute including the Counterclaim for revocation); 57 (Value-based fee for the revocation action); 58 (Value-based fee for the dispute (including the Counterclaim for infringement)); and 69 (Value-based fee for the action for a declaration of non-infringement).

8. Rule 25 – Counterclaim for revocation

8.1 Action by licensee

- 8.1.1 Article 47(5) of the Agreement states:

“The validity of a patent cannot be contested in an action for infringement brought by the holder of a licence where the patent proprietor does not take part in the proceedings. The party in an action for infringement wanting to contest the validity of a patent shall have to bring actions against the patent proprietor.”
- 8.1.2 According to Rule 25.3, in the event of an infringement claim brought by an exclusive licensee, any counterclaim for revocation would be served on the proprietor by the Registry as soon as practicable, and the proprietor will become a party to the revocation proceedings.
- 8.1.3 We and our clients would appreciate some clarification as to the relationship between Article 47(5) and Rule 25.3. Article 47(5) could be interpreted to mean that a counterclaim for revocation can never be brought in an action against a licensee, and a separate revocation action must be brought against the proprietor; or that a counterclaim for revocation can be brought in proceedings against the licensee, but the patent proprietor must simply be joined to the proceedings as well.
- 8.1.4 Rule 25.3 seems to follow the latter interpretation. However, even if this interpretation is the “correct” one, Article 47(5) implies that the obligation to include the patent proprietor in the proceedings falls on the party bringing the counterclaim for revocation, while Rule 25.3 refers to it as more of an administrative task that will be undertaken by the Registry. It would be useful to receive some guidance on this point.

9. Rule 26 – Fee for the Counterclaim for revocation9.1 Mandatory fee

9.1.1 Particularly in light of the fact that it is mandatory to raise a counterclaim for revocation when raising invalidity by way of defence, it seems unjust to demand payment of any fee for such a counterclaim.

10. Rule 34 – Request by the judge-rapporteur for allocating a technically qualified judge10.1 Nationality of the technically qualified judge

10.1.1 Rule 34.1 allows a judge-rapporteur to request a technically qualified judge to be added to the panel.

10.1.2 In line with our comments made in relation to Rule 18 – Designation of the judge-rapporteur, it has been suggested by our clients that in situations where a technical judge is required, efforts should be made to ensure that the technical judge is of a different nationality from the local judges. The technical judge is highly influential, and ensuring a mixture of nationalities will be more conducive to harmonisation.

10.1.3 These comments apply equally to Rule 33 - Application by a party for allocating a technically qualified judge.

11. Rule 37 – Application of Article 33(3) of the Agreement11.1 Bifurcation of the proceedings

11.1.1 Article 33(3) of the Agreement relates to a counterclaim for revocation. It enables the local or regional division to decide whether to (a) proceed with both claims; or (b) refer the revocation claim to the central division and then proceed with the infringement claim themselves, or suspend it pending the outcome of the revocation proceedings.

11.1.2 Rule 37.4 reiterates the ability of the panel to stay the infringement proceedings if it decides to refer the revocation claim to the central division, in accordance with Article 33(3)(b) of the Agreement. However, it goes a step further than Article 33(3) by introducing an obligation to stay the infringement proceedings in certain circumstances:

“...the panel...shall stay the infringement proceedings where there is a high likelihood that the relevant claims of the patent (or patents) will be held to be invalid on any ground by the final decision in the revocation procedure.” (emphasis added)

11.1.3 We believe that our clients are in general in favour of this mechanism in cases of bifurcation. If there is a genuine possibility that the patent could be held to be invalid, it is clearly illogical to proceed with the infringement claim at the risk of an adverse decision and accompanying remedies before validity has been determined. We believe that this point accords with the concerns about parallel infringement and EPO opposition proceedings raised by the Supreme Court in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46, which we expect to have broader policy implications (at least in the UK) than the specific facts of that case.

11.1.4 It is not clear from the wording whether the panel is required to give a reasoned decision on why it considers there to be a high likelihood of the patent claims being

invalid. Our clients have suggested that such a decision would be useful for the parties, even if not binding regarding validity, and it may be helpful if wording were inserted to this effect.

- 11.1.5 However, it has been suggested that the threshold of “high likelihood” will be hard to satisfy, and will require the panel to make a detailed assessment as to the validity of the patent, which is precisely the matter it has to decide whether to refer to the central division. It may be that the necessity to conduct such assessment will deter courts from bifurcating in the first place. However, this is by no means guaranteed. We consider that lowering the threshold somewhat to a “clear possibility” will enable the court to come to a faster decision on whether or not to stay an infringement claim, without being required to analyse validity in depth at this stage, which the panel cannot do in advance of allocation of a technical judge. It will also assist in the decision as to whether or not to bifurcate.
- 11.1.6 Rule 37 only refers to revocation proceedings and does not refer to decisions of the EPO, as in Rule 118. This eliminates the risk that lowering the threshold for a mandatory stay of infringement proceedings would significantly delay the proceedings while a decision of the EPO is awaited.
- 11.1.7 It would also be helpful to have some guidance as to what kind of factors the panel will take into account when coming to a decision on bifurcation. This would contribute to harmonisation of the process, particularly in those Member States where bifurcation is a new concept.

12. Rule 60 – Declaration of non-infringement

12.1 Role of the licensee

- 12.1.1 Rule 60.1 permits the Court to make a declaration of non-infringement if the person doing or proposing to do an act has applied in writing to the proprietor or licensee for a written acknowledgement that there is no infringement, and the proprietor or licensee fails to give such an acknowledgement within one month.
- 12.1.2 Our clients have expressed some concern that the licensee has the power to give an acknowledgement to such a request. Given the critical consequences that such an acknowledgement could have for the patent proprietor, it would be more appropriate if only the proprietor himself were able to give an acknowledgement.
- 12.1.3 Similarly, the resulting action for a declaration anticipated under 60.2 should be directed against the patent proprietor.

13. Rule 70 – Revocation actions and subsequent infringement actions in a local or regional division (Article 33(5) of the Agreement)

13.1 Stay of revocation proceedings

- 13.1.1 Under Article 33(5) of the Agreement, if a revocation action is pending before the central division, an infringement action between the same parties relating to the same patent can be brought before any division. According to Rule 70.3, when this occurs, the Court will require the panel to stay all further revocation proceedings pending a decision of the panel hearing the infringement action as to whether or not to bifurcate or transfer the proceedings, unless otherwise agreed by the parties.

- 13.1.2 A mandatory stay of a revocation action due to the initiation of an infringement claim seems to be an unnecessary step that will cause unnecessary delays. It does not fit with the discretion granted to the local or regional division in Article 33(5). Revocation proceedings take longer and are more technical, and the general consensus from our discussions is that it would be more logical to allow them to proceed.
- 13.1.3 We agree with other commentators that a more logical approach would be for the stay in Rule 70.3 to be triggered only by the filing of a counterclaim for revocation, and not a claim for infringement, so as to avoid any unnecessary delay.

14. Rule 118 – Decision on the merits

14.1 Damages to be paid to the injured party

- 14.1.1 Regarding Rule 118(2), it may be helpful to have some clearer wording as to when the Court will order damages to be paid to the injured party instead of applying the orders and measures referred to in 118(1).
- 14.1.2 In particular, at present it is arguably not clear whether the three conditions, “*if that person acted unintentionally and without negligence, if execution of the orders and measures in question would cause such party disproportionate harm and if damages and/or compensation to the injured party appear to the Court to be reasonably satisfactory*”, should be understood cumulatively or are sufficient individually. We would also query how an act can be done “unintentionally”; what is the reason for referring to “negligence” (and what does that concept mean in this context?), and what is added by the pre-condition, “in appropriate cases”.

14.2 Infringement claim

- 14.2.1 It may be helpful to include in the first line of Rule 118.3 some clearer wording (rather than relying on the Rule heading) confirming that Rule 118.3 refers only to the end of proceedings, i.e. the decision stage, in particular to aid interpretation of 118.3(b).
- 14.2.2 Rule 118.3 provides that if a revocation action is pending before the central division (after having been referred to the central division in accordance with Article 33(3) of the Agreement), the local or regional division has two options. It can either hand down its decision on the merits of the infringement claim, and any relevant orders, based on the condition subsequent that the patent will be found to be valid; or it can stay the further infringement proceedings pending the decision in the revocation proceedings or a decision of the EPO.
- 14.2.3 If the panel decides to hand down its decision, along with appropriate remedies, it is unclear exactly how this would work in practice. For example, if damages were payable, would the defendant have to pay the monies to the claimant on the basis that the claimant would reimburse the defendant as necessary depending on the outcome of the validity proceedings?
- 14.2.4 It seems to us that it would be inequitable to penalise the defendant where there is an ongoing challenge to validity that has not yet been determined. In the recent English case of *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46 before the Supreme Court, the Court said that it is highly undesirable to penalise a defendant based on the vagaries of timing in parallel proceedings. We believe that this is a broad policy issue based on the *in rem* nature of a validity determination, and not limited to cases where a second validity decision is made (by the EPO), and we believe that insufficient comfort is to be gained from the potentially conditional nature

of any remedies. It would be helpful to insert wording to clarify the position in relation to Rule 118. For example, remedies should be postponed where there is a “clear possibility” that the patent will be found invalid (as discussed above).

14.2.5 It is hoped that, in the case of a bifurcation of proceedings, the infringement proceedings at the local or regional division and the revocation proceedings at the central division will proceed at a similar pace. Any stay invoked under Rule 118.3 pending the decision in revocation proceedings would hopefully be relatively minor.

14.2.6 However, Rule 118.3(b) also introduces the ability to stay proceedings pending the outcome of an opposition at the EPO. Our clients have expressed concerns that the time required to obtain a decision from the EPO could produce a significant delay to the infringement decision. It has been suggested that some account should be taken of the likely timing of receiving an EPO decision when the decision is made as to whether to grant a stay or render the decision based on a condition subsequent. If an EPO decision is not expected in the reasonably near future, the decision on the infringement proceedings should not be stayed pending the outcome. Nevertheless, we are concerned that the condition subsequent procedure is unclear, for example as to whether a defendant would be required to pay damages prior to the EPO outcome, or should merely be under an obligation to pay if the opposition fails.

15. Rule 133 - Value-based fee for the determination of damages

15.1 Assessment of damages

15.1.1 Our clients have expressed concerns that the system for paying a fee for the determination of damages is rather circular. The applicant is seeking a decision from the court as to how much damages should be, yet in order to do so he must himself assess the damages in order to determine the applicable fee. It may be helpful to have some clarification as to how this will work in practice.

16. Rules 150 and 151 – Procedure for cost order

16.1 Separate proceedings for a cost order

16.1.1 According to Rule 150(1), a cost order may be the subject of separate proceedings following a decision on the merits and, if applicable, a decision for the determination of damages. However, according to Rule 151, a successful party wishing to seek a cost order shall within one month of service of the decision lodge an application for a cost order. Thus, the Rules of Procedure seem to make separate proceedings for a cost order mandatory.

16.1.2 It is arguable that separate proceedings for a cost order should be avoided where possible, rather than being obligatory. The assessment of costs between parties is best conducted when the case is tried on the merits without being postponed to later separate proceedings. At the end of the proceedings, both parties can submit their respective substantiated claims for legal costs and other expenses at the trial, or reach agreement.

17. Rule 185 – Appointment of a court expert

17.1 Right of the parties to object

17.1.1 Rule 185 allows the Court to appoint a court expert to resolve a specific technical question. The parties are permitted to put forward suggestions as to the identity of the

expert and his background. However, as drafted, the parties are not provided with an opportunity to object to the expert selected by the Court.

- 17.1.2 We would appreciate the insertion of wording granting the parties the ability to object to proposed experts on reasonable grounds.

18. Rule 207 – Protective letter

18.1 Information to be provided in a protective letter

- 18.1.1 Rule 207 only makes it obligatory to include information such as the names of the parties and the patent numbers in a protective letter. However, such information does not enable a court to decide whether to give the defendant a chance to be heard.
- 18.1.2 It would be helpful if the defendant were required to put forward, perhaps only in summary form, an indication of the facts relied on, its primary arguments of law (including any infringement/invalidity defence), and the essential available written evidence relied on. In order to achieve this, the phrase “The Protective letter may contain” could be deleted or moved, so that all or some of the sub-paragraphs (g) – (i) are also made obligatory (“shall contain”), insofar as such information is available to the defendant.

19. Rule 211 – Decision on the Application for provisional measures

19.1 Requirements for provisional measures

- 19.1.1 Rule 211.2 sets out the requirements an applicant may have to fulfil in order for the Court to grant provisional measures, stating that the applicant may be required to “*satisfy the Court with a sufficient degree of certainty ... that the patent in question is valid and that his right is being infringed, or that such infringement is imminent.*”
- 19.1.2 Having to satisfy the Court as to the validity of the patent seems a premature hurdle to have to fulfil at this stage. It has also been suggested that it would be more helpful to have some guidance as to what factors the Court will take into account when considering whether to grant provisional measures, particularly injunctions. In most jurisdictions the applicant is required to demonstrate urgency, and we would suggest that this requirement at least should be included in the Rules.
- 19.1.3 In addition, the wording “*sufficient degree of certainty*” is not entirely helpful, as it is unclear what exactly a sufficient degree of certainty is. Amending the wording to “*an appropriate degree of certainty*” would be preferred.

19.2 Interests of the parties

- 19.2.1 Rule 211.3 states:

“In taking its decision on the Application for provisional measures, the Court shall have the discretion to weigh up the interests of the parties.”

- 19.2.2 We consider that the wording is not helpful in simply repeating Article 62(2) of the Agreement. Although we understand the element of discretion is set out in Article 62(2), it would be preferable if the Court were required to weigh up the interests of the parties, rather than simply having the option to. It would be surprising if the Court did not do so when considering an application for provisional measures.

19.2.3 In addition, it would be helpful if this Rule were to highlight the procedure for the parties to present the details of their interests to the Court.

20. Rule 220 – Appealable decisions

20.1 Role of the Court of Appeal

20.1.1 It is preferable to expressly state that the Court of Appeal can grant leave to appeal on procedural issues, and should do so rapidly. This is important on grounds of harmonisation.

21. Rule 222 – Subject-matter of the proceedings before the Court of Appeal

21.1 New submissions

21.1.1 Rule 222.2 sets out the position of the Court of Appeal in relation to new submissions which were not submitted during proceedings before the Court of First Instance. The Court of Appeal has discretion as to whether or not these submissions should be permitted.

21.1.2 Although we appreciate that Rule 222.2 sets out the factors the Court of Appeal will take into account when coming to this decision, we consider that, in the interest of efficiency and costs, the default position should be more clearly that new submissions are not permitted. For example, by stating that new submissions “will normally be disregarded”. Otherwise there is a significant risk of a retrial. Although there may be some cases where new submissions may be appropriate, and therefore the Court of Appeal should retain its discretion, these should only be in exceptional circumstances, and we understand that this is the intention.

22. Rule 376 – Costs eligible for legal aid and Rule 377 – Conditions for granting legal aid

22.1 Availability of legal aid

22.1.1 It is surprising to see provisions for legal aid in respect of patent litigation. Our clients have expressed concerns that parties interested in enforcing patents, such as non-practising entities, could attempt to initiate proceedings by hiding behind an individual who could apply for legal aid. For example, a patent proprietor could grant an exclusive licence to an individual so that the individual can bring proceedings in their own name, and qualify for legal aid.

22.1.2 In order to avoid these situations, the individual should be required to sign a declaration fully disclosing the details of all persons with an active interest or role in the proceedings.