

EIP

Terminology at the Unified Patent Court

The UPC is a new legal system, and it is not to be expected that its terminology should follow any single national system. When we look at the UPC Agreement itself, and the Rules of Procedure and the Case Management System, some issues of terminology are clear, but others are rather ambiguous.

It is clear, for example, that the person bringing an action is a **Claimant** (not Plaintiff), and the document filed is a (Statement of) **Claim** (even though in the German language the term used is Klage, which is more cognate with Complaint). The later rounds of written procedure, consistently across all types of action, are **Defence, Reply, and Rejoinder**.

Within an action, procedural and other requests are made in an **Application** by an **Applicant**, and the rulings that determine applications and other issues in the course of the proceedings are **Orders**. There may not be a bright line between an Order and a Decision. Article 73(1) UPCA implies that the term **Decision** refers (only) to the substantive determination of eg infringement or validity following the main hearing, and in conjunction with Article 73(2) UPCA suggests that any ruling prior to that is an Order. But other usage suggests that the issue is not so clear-cut. Within the section on the UPC website “Decisions and Orders”, all of the published documents so far are labelled “Order”; however some use the term “Decision” within the document itself. The Rules of Procedure are not entirely consistent and imply some interchangeability – for example Rule 20 refers to “**Decision or order** on a Preliminary objection”. This remains to be completely clarified, and perhaps some overlap in the use of the terminology will continue.

Article 32(1)(c) of the UPC Agreement gives the Court exclusive competence over “actions for provisional and protective measures and injunctions”, but it is unclear whether there

is any clear delineation between a “provisional” and a “protective” measure. Together with Article 62, entitled “Provisional and protective measures”, it is tolerably clear that an injunction ordered before determination of the substantive dispute is properly termed a “provisional injunction” (and not for example a preliminary or interim injunction). But what of the orders referred to in Art 59 (Order to produce evidence), Art 60 (Order to preserve evidence and to inspect premises), and Art 61 (Freezing orders)? Are these “provisional”, “protective”, or are they all together called “provisional and protective” without distinction? It’s not entirely clear.

Most of those Articles also refer to such orders being obtainable “even before the commencement of proceedings on the merits of the case” and “if necessary without the other party having been heard”. A commonly accepted term for the latter possibility is “ex parte”, although now referred to in applications in England as “without notice”. However, the UPC Agreement itself does not use the term “ex parte”, and the Rules of Procedure, apart from one occurrence at Rule 278, use it in a different sense, referring to cases where there is only one party involved in the proceedings, namely where the UPC is acting as an instance of appeal against a decision of the European Patent Office with regard to a Unitary Patent.

After the decision on the merits of the case, Article 63 provides for the grant of “Permanent injunctions”, so it is evident that final equivalent of the “provisional” measures is “permanent”.

It is doubtful that users and practitioners will completely adapt their vocabulary to the UPC, and so it is to be expected that synonyms more familiar from various national practices will continue.