



Reference no.:
UPC_CoA_207/2024
APL_24598/2024

Order
of the Court of Appeal of the Unified Patent Court
issued on 5 September 2024

HEADNOTE

1. The fact that the parties are domiciled in countries where the language of the proceedings chosen by the claimant is an official language is an important factor in the decision on an application to use the language of the patent as the language of the proceedings.
2. Art. 49(5) UPCA does not require the application for a language change to be included in the Statement of defence. Against this background, R. 323.3 must be interpreted in such a manner that it does not preclude the lodging of the application before the Statement of defence. Lodging the application before the Statement of defence is generally even more expedient, since it ensures that, if the application is successful, the language change can be implemented at an early stage of the proceedings.

KEYWORDS

Appeal; Application to use the language of the patent as the language of the proceedings

APPELLANTS (DEFENDANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

1. **ADVANCED BIONICS AG**
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2. **ADVANCED BIONICS GMBH**
Max Eyth Straße 20, 70736 Fellbach-Oeffingen, Germany
3. **ADVANCED BIONICS SARL**
9 rue Maryse Bastié, CS 90606 - 69675 Bron Cedex, France

hereinafter: Advanced Bionics,

represented by attorneys-at-law Miriam Kiefer and Carsten Plaga (Kather Augenstein)

RESPONDENT (CLAIMANT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

MED-EL ELEKTROMEDIZINISCHE GERÄTE GESELLSCHAFT M.B.H.

Fürstenweg 77a, 6020 Innsbruck, Austria

hereinafter: MED-EL

represented by attorney-at-law Dr. Michael Rüberg (Boehmert & Boehmert)

PATENT AT ISSUE

EP 4074373

PANEL AND DECIDING JUDGES

Panel 1c:

Klaus Grabinski, President of the Court of Appeal

Peter Blok, Legally qualified judge and judge-rapporteur

Emanuela Germano, Legally qualified judge

LANGUAGE OF THE PROCEEDINGS

German

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- Order of the President of the Court of First Instance of the Unified Patent Court, dated 15 April 2024
- Reference numbers: App_12139/2024
ACT_585052/2023
UPC_CFI_410/2023
ORD_13321/2024

FACTS AND REQUESTS OF THE PARTIES

1. On 27 September 2023, Advanced Bionics AG commenced an action for revocation of European Patent 4074373 (hereinafter: the patent at issue) against MED-EL before the Court of First Instance of the Unified Patent Court (hereinafter: UPC), Central Division, Paris seat (ACT_576555/2023 UPC_CFI_338/2023) (hereinafter: the revocation action). The language of the proceedings in the revocation action is English as the language of the patent at issue.
2. On 2 November 2023, MED-EL commenced an action for infringement of the patent at issue against Advanced Bionics before the Court of First Instance of the UPC, Mannheim Local

Division (ACT_585052/2023 UPC_CFI_410/2023) (hereinafter: the infringement action). The language of proceedings in the infringement action is German.

3. On 5 March 2024, Advanced Bionics lodged an application in the infringement action requesting that the President of the Court of First Instance (hereinafter: the President) determine that the language of the patent be used as the language of the proceedings.
4. In the impugned order, the President rejected the application and declared that the order is not conditional on specific translation or interpretation arrangements. The reasoning of the President can be summarised as follows:
 - The application is admissible. MED-EL argues that pursuant to R. 323 of the Rules of Procedure of the UPC (hereinafter: RoP) an application to use the language of the patent as the language of the proceedings must be included in the Statement of defence. However, Art. 49(5) of the Agreement on a Unified Patent Court (hereinafter: UPCA) does not specify a time limit for submitting a language request. MED-EL's interpretation is also contrary to the general aims outlined in the Preamble of the RoP, which refer to flexibility. The obligation to apply for a language change in the Statement of defence would be unnecessarily restrictive and likely to slow down the course of the proceedings;
 - The principles of proportionality, flexibility and equity dictate that the decision to change the language of the proceedings to the language of the patent must be made in relation to the respective interests at stake. It may be sufficient to justify a change if the language initially chosen significantly disadvantages the applicant;
 - The factors put forward by Advanced Bionics, which relate to parallel proceedings and the involvement of an English patent attorney, stem from strategical choices made by Advanced Bionics itself. Parallel proceedings do not necessarily affect the conditions under which the defence is conducted in the present action;
 - Furthermore, it should be noted that two of the defendants are domiciled in Germany and Switzerland respectively, where German is the, or an, official language, while the third defendant is an affiliated entity; this facilitates easier access to the content of the case file and streamlines subsequent communications;
 - None of the applicants have invoked an imbalance of financial resources or any particular circumstance likely to create a significant disadvantage for them. The mere inconvenience and additional costs incurred in the event of parallel proceedings in different languages are not sufficient to justify the requested change.
5. Advanced Bionics lodged an appeal against the impugned order, requesting that the Court of Appeal revoke the impugned order and designate the language of the patent at issue as the language of the proceedings. The grounds of appeal can be summarised as follows:
 - The President applied overly stringent criteria for changing the language of the proceedings. For a change of language it is sufficient that the outcome of the balance of interests is equal. A significant disadvantage to the applicant is not required;
 - The President either failed to consider or insufficiently considered the following factors:
 - English is the language which is generally used in the field of technology;
 - MED-EL chose English as the language of the patent. As a consequence, the language of proceedings in the revocation action is English. To ensure a consistent construction of the patent claims in both actions, English should also be the language of the proceedings in the infringement action;

- MED-EL had the advantage of choosing the division and the language of the proceedings, and benefited from drafting the Statement of claim without time constraints;
 - Advanced Bionics is part of the Sonova Group, which operates in 100 countries worldwide and has its main centre of activities in the United States.
6. MED-EL lodged a response to the appeal, requesting that the Court of Appeal dismiss the appeal. Its response can be summarised as follows:
- The appeal is unfounded. Advanced Bionics failed to demonstrate that their interest in a change of language outweigh the interests of MED-EL;
 - Relevant factors include the proficiency of the parties in a particular language, as determined on the basis of the domicile of the party, and the size of a party and in particular its legal department. The language of the patent and the claimant's opportunity to select the division and the language of the proceedings are not relevant. These factors merely explain why the defendant's position deserves particular consideration;
 - It is arbitrary to determine the linguistic proficiency of a group of companies on the basis of the location of one of its offices, rather than the head office of the group. According to its website, the head office of the Sonova group is in Stäfa, Switzerland. Moreover, only the linguistic skills of the parties to the proceedings are relevant, not those of other group companies;
 - The time limit for lodging the Statement of defence does not justify the requested language change;
 - MED-EL and the appellants sub 1 and 2 are domiciled in countries where German is an official language;
 - MED-EL is significantly smaller in terms of number of employees, and in particular those within the legal department, and in fact, MED-EL does not have a legal department;
 - While English is the standard language in any field of technology, this factor should carry little weight in the balance of interests;
 - The language of proceedings in other actions is not a relevant consideration. Moreover, the use of the language of the patent in the revocation action does not justify the requested change of language;
 - The President's discretionary decision can be reviewed by the Court of Appeal to a limited extent only. In this case, no significant new circumstances were submitted before the Court of Appeal;
 - The application is inadmissible since it was not included in the Statement of defence.
7. The Court of Appeal consulted the panel of the Mannheim Local Division handling the infringement action regarding the language change request. In response, the panel informed the Court of Appeal that it is of the opinion that German should remain the language of the proceedings, having regard in particular to the fact that two defendants are based in Germany and Switzerland.

GROUNDS FOR THE ORDER

8. The appeal is admissible but unfounded.

No change of language

9. The President of the Court of First Instance has a margin of discretion under Art. 49(5) UPCA to decide on a party's request to use the language of the patent as the language of proceedings, based on grounds of fairness and considering all relevant circumstances, including the position of the parties, and in particular the position of the defendant.
10. The appeal failed to demonstrate that the President, in the case at hand, rejected Advanced Bionics' request to change the language of proceedings on the basis of an incorrect understanding of what constitutes fairness and what circumstances are relevant under Art. 49(5) UPCA.
11. In the order of 17 April 2024, the Court of Appeal set out the principles for deciding an application to use the language of the patent as the language of the proceedings (UPC_CoA_101/2024 Apl_12116/2024, *Curio Bioscience Inc. v. 10x Genomics, Inc.*). Applying these principles to the present case, the Court of Appeal is of the opinion that the President rightly rejected Advanced Bionics' request for a language change, having regard to the circumstances outlined below.
12. An important factor is the fact that the claimant and two of the three defendants are domiciled in countries where German is an official language. MED-EL, Advanced Bionics AG and Advanced Bionics GmbH are domiciled in Austria, Switzerland and Germany respectively, while Advanced Bionics SARL has its domicile in France. Therefore, conducting the proceedings in German aligns with MED-EL's legitimate interests. Conversely, changing the language to English is not necessary to achieve a fair outcome for the defendants, as the official languages of their countries of domicile are German or French, not English.
13. Another relevant factor is the size of the parties relative to each other. Advanced Bionics is a multinational company belonging to a group of companies which, according to its own submissions, operates in 100 countries worldwide. It has a substantial patent law department. MED-EL is a much smaller company with fewer employees. It does not have its own legal department or patent department. As a result, Advanced Bionics has more resources to manage and coordinate international disputes in different languages than MED-EL. This supports the conclusion that grounds of fairness do not necessitate a change of language in this case.
14. Furthermore, due consideration should be given to how a change of language would affect the course of the proceedings. In the infringement action, all written statements have already been filed. Therefore, changing the language now would either necessitate translating all written statements into English or result in the use of two languages within a single case. Both options present drawbacks.
15. Advanced Bionics' assertion that the Sonova group of companies, to which it belongs, operates in 100 countries worldwide, conducts business in English and has a central hub of activities in the United States does not change this assessment. In its response to Advanced Bionics' submissions regarding the Sonova group, MED-EL pointed out that the head office of the Sonova Group is in Switzerland. Advanced Bionics did not dispute this assertion. This further supports the conclusion that the use of German is not unfair to the defendants. Companies

belonging to a group with its head office in a country where German is an official language are or should be able to conduct proceedings in German.

16. The fact that English is the language which is generally used in the field of the technology concerned does not outweigh the relevance of the circumstances described above, in particular the domiciles of the parties.
17. For similar reasons, the fact that MED-EL selected the language of the patent and the language of the proceedings in the infringement action does not change the assessment. These circumstances explain why the position of the defendants deserves particular attention, but as such do not require a change of the language of the proceedings in the language of the patent.
18. Advanced Bionics' submission that a number of other proceedings worldwide are pending between the parties, including a revocation action before the UPC, also does not change the assessment. These facts are not directly related to the specific case and are therefore less relevant.

Admissibility of the application to change the language of proceedings

19. As set out, the appeal is unfounded. Consequently, there is no need to decide on the complaint of MED-EL that Advanced Bionics failed to include the application for a language change in the Statement of defence and that the application is therefore inadmissible pursuant to R. 323.3 RoP.
20. The complaint would, in any case, be unfounded because Art. 49(5) UPCA does not require the application for a language change to be included in the Statement of defence. Against this background, R. 323.3 must be interpreted in such a manner that it does not preclude the lodging of the application before the Statement of defence. Lodging the application before the Statement of defence is generally even more expedient, since it ensures that, if the application is successful, the language change can be implemented at an early stage of the proceedings.

Conclusion

21. It follows that the appeal must be rejected. The President rightly dismissed the application for a language change.

ORDER

The appeal is rejected.

This order was issued on 5 September 2024.

Klaus Grabinski President of the Court of Appeal	
Peter Blok Legally qualified judge and judge-rapporteur	
Emanuela Germano Legally qualified judge	