Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

No. ACT_574494/2023
UPC_CFI_239/2023

ORDER
of the President of the Court of First Instance
in the proceedings before the Local Division THE HAGUE

Pursuant to R. 323 RoP (language of the proceedings)
Issued on 18/10/2023

APPLICANT (DEFENDANT IN MAIN PROCEEDINGS):

1. Arkyne Technologies S.L.
Calle de la Tecnología 17 - 08840
Viladecans, Barcelona – Spain

Represented by:
Mr. A.P. Meijboom, Mr. J.R.Spauwen Mr. M.Rondhuisen (Kennedy Van der Laan N.V) and X. Fábrega (Rousaud Costas Duran S.L.P)

RESPONDENTS (CLAIMANTS IN MAIN PROCEEDINGS):

1. Plant-e Knowledge B.V.
2. Plant-e B.V. Vertegenwoordigd door: mr. ir. O.V. Lamme
Beukenlaan 52 6871 CL Renkum Netherlands

Represented by:
Mr O.V. Lamme, Mr R.D. Verweij, Mr D.M. Termeulen and Dr P. Meyer (Simmons&Simmons LLP)

PATENT AT ISSUE:
Patent n°EP2137782

SUMMARY OF FACTS - SUBJECT-MATTER OF THE PROCEEDINGS:

By statement of claim lodged on 12 July 2023, Plant-e Knowledge B.V. and Plant-e B.V. have brought an infringement action against the Applicant - thus defendant in the main proceedings – based on EP 2137782 entitled *"device and method for converting light energy into electrical energy".*

By application dated 21 September 2023, the Applicant referring to both R. 322 and R. 323 RoP, has asked for a change of the language of the proceedings from Dutch into English as the language in which the patent has been granted (hereinafter the Application). Further to the Order issued by the Judge rapporteur dated 25 September 2023 - announcing that the Application will be forwarded to the President of the Court of First Instance in the absence of agreement between the parties - the claimants in the main action (UPC_CFI_239/2023 - ACT_549536/2023) have been invited in accordance with R. 323.2 RoP to indicate within 10 days their position on the admissibility of the Application and on the use of the language in which the patent was granted (namely English) as language of the proceedings.

The Respondents – claimants in the main proceedings – have submitted written comments on the Application on 13 October 2023.

The panel of the LD The Hague has been consulted in accordance with R. 323.3 RoP.

INDICATION OF THE PARTIES' REQUESTS:

The Applicant argues that the Application is admissible and requests the UPC to:
- change the language of the proceedings into English;
- order that Plant-e Knowledge B.V. and Plant-e B.V. jointly and severally have to pay the costs of the Application.

The Respondents reply that there is no reason to change the language of the proceedings.

POINTS AT ISSUE:

The Applicant bases his request for change of the language of the proceedings on a *"reasonable interpretation"* of the Preamble and Rules 14, 321, 322 and 323 RoP along with Art. 41, 49 and 52 UPCA, arguing that Art. 49.5 UPCA does not require such application being brought by statement of defence.

According to the Applicant, this added condition primarily, is in contrast to R. 321 and 322 RoP which provide that both parties and judge-rapporteur can propose *"at any time during the written procedure (…)"* to adopt the language in which the patent was granted - arguing that the UPCA shall prevail in case of a conflict between the provisions of the Agreement and the Rules - and alternatively, runs counter to the principles of proportionality, flexibility, fairness and equity referred to in the second recital to the RoP as the parties are not treated equally, if the defendant in the main proceedings shall draft the main procedural submission in a language he does not master.

Regarding the merits of the Application, the Applicant contends that he is a small Spanish company being still in the start-up phase and forced to incur considerable translation costs which causes disproportionate and unnecessary financial burden whereas one of the purposes of the UPC system is to make European patent litigation affordable for small and medium-sized enterprises. He states that the requested change is in contrast not objectionable to the Respondents, being together an international company that uses English as working language. He also argues that the original language in which the patent was granted is the primary source of the legal discussion including the grant file.
Finally the Applicant refers to previous correspondence between the representatives of both parties and most recent summons being all written in English, and states that the reasons given by the claimants in the main proceedings - here the Respondents - for not translating their productions in Dutch are all valid and therefore support the Application.

The Respondents refer to the judgment of the Court regarding the admissibility of the Application.

On the merits they argue that there is no disproportionate, unnecessary burden and disadvantage suffered by the Applicant, recalling as a preliminary point that the claimant has the option to choose the language in which he wants to litigate and that this choice was obvious in the context of Dutch parties and representatives acting before the Dutch local division of the UPC.

According to the Respondents, the position of the Applicant is fundamentally financial by nature while the translation costs are limited due to efficient tools providing fairly accurate texts and the entire panel of judges have a command of the Dutch language as well as three of the four representatives on the Applicant's side. They conclude from the above that the oral proceedings should also be conducted in Dutch and thus costs for interpretation are not disproportionate.

GROUNDS FOR THE ORDER:

1- Admissibility of the Application

The admissibility of the Application is not explicitly challenged by the Respondents. According to R. 323.1 RoP, *"If a party wishes to use the language in which the patent was granted as language of the proceedings, in accordance with Article 49(5) of the Agreement, the party shall include such Application in the Statement of Claim, in the case of a claimant, or in the Statement of Defense, in the case of a defendant. The judge-rapporteur shall forward the Application to the President of the Court of First Instance".*

Pursuant to Art. 49 (5) UPCA *"at the request of one of the parties and after having heard the other parties and the competent panel, the President of the Court of First Instance may, on grounds of fairness and taking into account all relevant circumstances, including the position of parties, in particular the position of the defendant, decide on the use of the language in which the patent was granted as language of proceedings. In this case the President of the Court of First Instance shall assess the need for specific translation and interpretation arrangements".*

In the present situation, the Applicant bases its request on both R. 322 and 323 RoP in the event where the claimants in the main proceedings do not consent to the requested change.

As R. 323 RoP refers to Art. 49 (5) UPCA abovementioned which - as well as for the case of the initiative coming from both parties, one party or the judge-rapporteur addressed in Art. 49 (3) and (4) UPCA - does not specify any timeframe for such request possibly made *"at any time during the written procedure",* it shall not be interpreted as precluding that an application to use the language in which the patent was granted can be lodged before the statement of defense is lodged in accordance with Rule 23 RoP.

Besides its lack of relevance with regard to the whole legal frame constituted by Art. 49 UPCA and R. 321 to 323, such interpretation would in addition be counter to the general aims as mentioned in the Preamble of the RoP which provide in particular in Point 4 that *"Flexibility shall be ensured by applying all procedural rules in a flexible and balanced manner with the required level of discretion for the judges to organize the proceedings in the most efficient and cost effective manner"* considering indeed that the obligation for the defendant to apply for

a language change at the occasion of the statement of defense is likely to slow down the course of the proceedings.

Taking notably into account the aim of efficiency and the general obligation for the parties to set out their case as early as possible, the requirement stated by R. 323.1 RoP is to be understood as a time-limit for the Applicant thus requested to ask for a change of the language of the proceedings at the latest when lodging the statement of defense in accordance with Rule 23 RoP. This time-limit is not inconsistent with regards to the situation addressed by R. 321 and 322 RoP, where there is an agreement between the parties.

2- <u>Merits of the Application</u>

According to Art. 49 (5) UPCA, the use of the language in which the patent was granted as the language of the proceedings can be decided *"on grounds of fairness and taking into account all relevant circumstances including the positions of parties in particular the position of the defendant".* R. 323.2 and .3 RoP provide next that*: "The President shall invite the other party to indicate, within 10 days, its position on the use of the language in which the patent was granted as language of the proceedings"* and *"having consulted the panel of the division, may order that the language in which the patent was granted shall be the language of the proceedings and may make the order conditional on specific translation or interpretation arrangements".* Finally pursuant R. 324 RoP, an Application under Rule 321.1 or 323.1 *"shall specify whether existing pleadings and other documents should be translated and at whose cost. If the parties cannot agree the judge-rapporteur or the President of the Court of First Instance, as the case may be, shall decide in accordance with Rule 323.3".*

The Respondents merely object that the inconvenience raised by the Applicant is neither disproportionate nor disadvantageous with regard to the low translation costs and the possibility to use the Dutch language for the oral hearings without interpretation needs.

In the present case, it is not disputed that both parties have a good command of English, which is one of their working languages and also the language in which the exchanges prior to the infringement action have been conducted, as it appears from the list of productions submitted along with the statement of claim and through the links cited in the request.

Consequently, the use of English would not affect the interests of the Respondents, who have already provided a translation of the statement of claim which was served on 10 August 2023.

Furthermore, it follows from Art. 49 (5) UPCA that the decision to change or not to change the language of the proceedings into the language in which the patent was granted shall be

determined with regards to the respective interest at stake without it being necessary to constitute a disproportionate disadvantage. As a result, it may be sufficient that - amongst all relevant circumstances also to be considered - the language initially chosen is significantly detrimental to the Applicant.

In that regard, being sued before the Court in a language that they do not master is an important inconvenience for the Applicant even if being assisted by Dutch representatives. It indeed implies that all the preparatory discussions and work are handled in English whereas the whole submissions have to be translated, which represents considerable time and costs even if facilitating solutions can be used. In addition, it has to be taken into consideration that the Respondents did not put forward a particular justification for not agreeing to the requested change.

Finally, the Applicant doesn't request that existing documents already submitted in Dutch language should be translated pursuant to R. 324 RoP so that adopting the language of the patent doesn't result in any further detrimental consequence for the Respondents.

3- Costs

The Applicant asks the Court to order that the costs of this Application will be paid jointly and severally by the Respondents. Taking into account the absence of arguments supporting this request and the general principle whereby cost decisions shall be taken at the last stage of the main proceedings, it shall be proceeded as specified in the operative part of this order without being necessary to refer to the additional written comments submitted by the Respondents on 18 October 2023 (App_580938/2023 UPC_CFI_239/2023).

FOR THESE GROUNDS,

It is ordered that:

1- The application shall be granted and the language of the proceedings changed into the language in which the patent at issue has been granted, namely English.
2- The present order shall not be conditional on specific translation or interpretation arrangements.
3- The costs incurred by the Applicant shall be dealt with in the main proceedings.
4- An appeal may be brought against the present order within 15 calendar days of its notification to the applicant pursuant Art. 73. 2 (a) UPCA and R.220 (c) RoP.

INSTRUCTIONS TO THE PARTIES AND TO THE REGISTRY:

The next step shall be the lodging of a statement of Defence by the Defendant in the main proceedings within the time period as defined by the Judge-rapporteur.

ORDER

Issued on 18 October 2023

NAME AND SIGNATURE

Florence Butin
President of the UPC Court of First Instance

FLORENCE ANNE BUTIN

Signé numériquement par FLORENCE ANNE BUTIN
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Date : 2023.10.18 19:04:30 +02'00'