



No. ACT_590837/2023
UPC_CFI_373/2023

ORDER
of the President of the Court of First Instance
in the proceedings before the Local Division DÜSSELDORF
pursuant to R. 323 RoP (language of the proceedings)
issued on 16/01/2024

APPLICANT (DEFENDANT IN MAIN PROCEEDINGS):

Aarke AB

Östgötagatan - 100, 11664 Stockholm, Sweden

Represented by: Advokaterna Jens Olsson, Magnus Dahlman and Emelie Rexelius,
Advokatbyrån Gulliksson AB, P O Box 4171, SE-203 13 Malmö, Sweden

RESPONDENT (CLAIMANT IN MAIN PROCEEDINGS):

SodaStream Industries Ltd.

1 Atir Yeda Street, Kfar Saba 4464301, Israel

Represented by: Rechtsanwalt Dr. Andreas von Falck, Dr. Alexander Klicznik, Hogan Lovells
International LLP, Kennedydamm 24, 40476 Düsseldorf, Germany

PATENT AT ISSUE:

Patent n° EP1793917

SUMMARY OF FACTS - SUBJECT - MATTER OF THE PROCEEDINGS:

By Statement of Claim filed on 17 October 2023, SodaStream Industries Ltd. (hereinafter “SodaStream” or “the Respondent”) has brought an infringement action against the Applicant – thus defendant in the main proceedings – based on EP1793917 entitled “*A device for carbonating a liquid with pressurized gas*”.

By application dated 4 December 2023, the Applicant – referring to R. 323 RoP – has asked for a change of the language of the proceedings from German into English (hereinafter the Application). The Application has been forwarded by the judge-rapporteur to the President of the Court of First Instance of the UPC pursuant to R. 323.1 RoP.

By order dated 7 December 2023, the Claimant in the main action (580849/2023 – CFI_373/2023) has therefore been invited in accordance with R. 323.2 RoP to state within 10 days its 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 Respondent – claimant in the main proceedings – has submitted written comments on the Application on 18 December 2023.

The panel of the LD Düsseldorf has been consulted in compliance with R. 323.3 RoP.

INDICATION OF THE PARTIES’ REQUESTS:

The Applicant argues that the Application is admissible and:

- requests the President of the Court of First Instance to order that the language in which the patent was granted, i.e. English, be the language of the proceedings;
- does not seek any translation of existing documents already lodged in German pursuant to R. 324 RoP.

The Respondent requests the Court to reject the Application as being inadmissible and alternatively unfounded.

POINTS AT ISSUE:

In support of the admissibility of the Application, Aarke argues in substance that:

- It follows from the Preamble of the RoP and the relevant provisions governing the whole process of language change request, that art. 49.5 UCPA should not be interpreted as precluding that an application pursuant to R. 323.1 RoP can be filed before the statement of claim, such interpretation being in conflict with R.321 and R. 322 RoP which provide that the parties and the judge-rapporteur may propose this change *“at any time during the written procedure”*;
- Art. 49.5 UCPA – which doesn’t specify any timeframe within which such application should be lodged – shall prevail in the event of a contradiction between the Agreement and the RoP;
- Another interpretation would contravene the principles of proportionality, flexibility, fairness and equity referred to in the second recital to the RoP, and moreover would be counter to the general aim of efficiency that shall be pursued in the management of the case.

On the merits of the Application, Aarke refers in particular to recitals 2 and 6 UCPA and outlines that the President of the Court of First Instance should consider when determining the language of the proceedings, the principles of fairness, equity and proportionality especially in the event where the Applicant – defendant in the main proceedings – is a SME [small or medium-sized enterprise] for which the language chosen by the claimant raises a specific challenge.

As regards the respective situations of the parties, the Applicant argues that they are a small Swedish company which was founded in 2013 and launched its first product in December 2016 while the Claimant was purchased by giant PepsiCo for 3.2 billion USD in 2018. Aarke AB concludes from this background that SodaStream Industries Ltd is likely to be well equipped to conduct the main proceedings in English – language in which the statement of claim was translated and in which several exhibits are provided, along with a statement suggesting that there is no need for German translations – and as a consequence that the requested change would clearly not be to its detriment.

Aarke outlines that the interests at stake shall be weighed without it being necessary to highlight a disproportionate disadvantage faced by one of the parties and that the significant inconvenience for the Applicant being sued in a language that they do not master, which is the required standard to be considered, results from the context of the case as the preparatory work is handled in English and all the submissions need to be translated. They argue that the Claimant has chosen the language of the proceedings in order to incur considerable translation costs, which causes a disproportionate and unnecessary financial burden for the Applicant while the purpose of the UPC System is to make European patent litigation affordable and available for SMEs.

Lastly, the Applicant contends that it is advantageous to use the original language in which the patent was granted for the legal discussion in the infringement proceedings.

Aarke AB concludes from the above that adopting English would ensure a fair playing field for each party while the German language instead, impairs the ability of the less resourceful one to oppose an effective defence.

The Respondent states first that the Application is inadmissible as being filed in English and not in the current language of the proceedings in compliance with art. 7.1 UPCA and R. 14.4 RoP. It argues that R. 323 RoP does not provide for any exception to this principle and recalls that such request, in the present case submitted separately by way of a procedural application, can – if not must – also be filed together with the Statement of Defence which shall necessarily be in the language of the main proceedings. According to the Respondent, both applications should equally be subject to the abovementioned requirement and the original language chosen by the Claimant continues to exist until the request for its change is granted, which also holds true for the Application itself being part of the proceedings.

On the merits of the Application, the Respondent contends that it shall be rejected as the Applicant's interest in changing the language of the proceedings does not prevail in the present case. SodaStream argues that the advantages of retaining the current language must be weighed against the inconveniences for the respective parties as part of an overall assessment, and that the requested change can only be decided under very particular circumstances and exceptional situations.

It states that the parties are not confronted with infringement proceedings handled in the language of their choice but rather that of the Local Division having jurisdiction, which results from the circumstances of the case and in particular the area where the incriminated products are distributed. It argues that according to Rule 14.2 (a) UPC RoP, it is left to the applicant alone to choose between the languages of the proceedings allowed under art. 49 (1) and (2) UPCA and to concurrently determine the same for all parties. It adds that the protection from which SMEs benefit cannot apply to entities active all over Europe as it is the case for Aarke which sells the embodiments attacked in more than 30 countries worldwide and offers information and support in the respective official languages of these markets including German. According to the Respondent it results from the latter that the assertions regarding the Applicant's ability to litigate in this language are not plausible. SodaStream further argues that the aim of the Unitary Patent system is not to provide exclusively for English as the language of proceedings of the UPC but instead to provide a multilingual regime, and that the

Altor group – which invested in Aarke AB in November 2020 – has financial and organisational resources which are accessible to the Applicant.

Finally SodaStream states that German is a foreign language for both parties thus equally affected, the fact that a suitable translation of the statement of claim was provided doesn't mean according to the Respondent that it would be advantageous for them to use the language in which the patent was granted.

Further facts and arguments as raised by the parties will be addressed below if relevant for the outcome of this decision.

GROUNDINGS FOR THE DECISION:

1- Admissibility of the Application:

According to the Respondent, the Application to use the language in which the patent was granted is supposed to be filed together with the Statement of defence as foreseen by R. 323.1 RoP and primarily shall in any event, be submitted in the language of the main proceedings.

Pursuant to R. 323 RoP *“1. 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. 2. 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. 3. The President, 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”.*

As this provision refers to Art. 49 (5) UPCA which – as for the case of the initiative coming from either parties or the competent panel 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”* pursuant to R. 321.1 RoP and during the interim procedure according to R. 322 RoP, it cannot be interpreted as precluding that an application to use the language in which the patent was granted is filed earlier before the Statement of Defense is lodged. Rather it is

to be understood as a time-limit for the Applicant being requested to ask for such change of the language of the proceedings at the latest when lodging the Statement of Defence in accordance with R. 23 RoP (UPC CFI 225/2023 LD The Hague, order of 18 October 2023).

The interpretation suggested by the Respondent would in addition be counter to the general aims as mentioned in the Preamble of the RoP, which provides in particular (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 organise the proceedings”*. The obligation for the defendant to apply for a language change at the occasion of the statement of defence would indeed be unnecessarily restrictive and likely to slow down the course of the proceedings.

Pursuant to R. 7.1 RoP - *“language of written pleadings and written evidence”* - *“Written pleadings and other documents, including written evidence, shall be lodged in the language of the proceedings unless the Court or these Rules otherwise provide”* and according to R. 14.4 *“The Registrar shall return any pleading lodged in a language other than the language of proceedings”*.

As previously mentioned, an application to use the language in which the patent was granted can be included in the Statement of Defence or alternately apart from the main proceedings. The latter applies to the case at hand where in any event, the submission although lodged in English was manifestly not returned by the Registry as forecasted by the RoP which don't envisage any other consequence in the situation at stake. As provided by R. 7.1 RoP, it is for the Court to decide on a case-by-case basis whether an application pursuant to R. 323 lodged in a different language is to be rejected or not. In the present context, there is no further relevant reason to reject the submission at this stage.

The Application shall thus be declared regularly submitted and admissible.

2- Merits of the Application

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”*.

The Rules of procedure of the UPC are governed by the principles of *“proportionality, flexibility, fairness and equity”*, the latter being ensured by *“having regard to the legitimate interests of all parties”* (Preamble – points 2 and 5).

It follows from art. 49 (5) UPCA that the decision whether or not to change the language of the proceedings into the language in which the patent was granted shall be determined with regard to the respective interests 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 (UPC CFI 225/2023 LD The Hague, order of 18 October 2023).

In support of the Application, Aarke puts forward that the above-mentioned provisions are particularly relevant for SMEs as the proceedings take into account the specific needs and challenges faced by such parties having to defend themselves against right holders. The Applicant – without being challenged regarding this point – indicates an annual turnover of approximately 21.5 M EUR and 45 employees in 2022. This is to be compared with the situation of the Claimant describing itself as part of a group of companies that is one of the leading manufacturer and distributor of home drinking water sparkling systems that sells its products in 46 countries and holds a portfolio of 65 patents and 198 trademark registrations (SoC point 2).

An important goal of the UPCA is indeed to take into account the situation faced by small and medium-sized enterprises which have difficulties to enforce their patents and to defend themselves. This aim to ensure a fair access to justice for these entities is also reflected by the financial provisions of the Agreement pursuant to which the Court fees shall grant *“a right balance between the principle of fair access to justice, in particular for small and medium-sized enterprises”* and adequate contributions for the costs incurred by the court and *“targeted support measures for small and medium-sized enterprises (...) may be considered”* (Considering 2 and art 36.3 UPCA).

The situation of the Defendant requires a particular consideration in the event that a SME is sued before the court in light of this legal frame.

In the case at hand, the respective position of both parties – as known given the information provided at this early stage – is likely to create a significant imbalance in the way they can organise their defense and access to the Court although they are equally confronted with a foreign language they don't use in their respective daily activities.

Finally, the nationality and native language of the judges in charge of the case in relation with the quality of the decision to be delivered cannot be considered either as also suggested by the Respondent, with regard to the general framework of the UPC where English is an official language of the Division and the one most generally used by the judges to communicate and work as can also be expected from the users in any supranational environment.

It follows from the above that the Application shall be granted and that the present order shall not at this stage be conditional on specific translation or interpretation arrangements.

FOR THESE GROUNDS

- 1- The application shall be granted and the language of the proceedings shall be 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- 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 Defense by the Defendants in the main Proceedings within the time period as defined by the Judge-rapporteur.

ORDER

Issued on 16 January 2024

NAME AND SIGNATURE

Florence Butin
President of the UPC Court of First Instance