

Case no. 549550/2023 UPC- CFI 240/2023

No. App\_562298/2023 UPC\_CFI\_240/2023



LOCAL DIVISION OF MILAN

UPC CF1 240/2023

ORDER TO REJECT THE REQUEST PURSUANT TO ART 262.1. ROP

OF THE COURT OF FIRST INSTANCE OF THE UNIFIED PATENT COURT ISSUED

ON 27.9.2023

Headnotes: the rule referred to in the art. 262.1. (ROP) requires that the application be carried out by a third party – private or public - with respect to the parties to the proceedings.

A lawyer who declares himself as the defender of the defendant, claiming to be authorized to participate only in the litigation to access the documents of the proceedings but not to appear in court, and requests access to the file before finalizing the notification of the proceedings, is not a third party. writ of summons to know the documents in advance.

Keywords:

Rule 262 1.(B) RoP requested (rejected): Non-third party.

Reference Code ECLI: not provided

APPLICANT

Lawyer X, advocate of Himson Engineering PVT. LTD for the sole purpose of accessing documents

PARTS OF THE PROCEDURE

Oerlikon Textiles GmbH & Co KG

actress

Himson Engineering Private Limited

defendant

PATENT IN QUESTION

EP 2.145.848

#### JUDGE DECIDING

Judge Rapporteur Alima Zana

#### LANGUAGE OF ACTS

Italian

#### OBJECT OF THE PROCEEDING

Article no. 262.1 (b) RoP

#### PROCEDURAL EVENTS

In the context of case no. 549550/2023 on 24.8.2023 a request was filed pursuant to art. 262.1. (B) of the Regulations of the Unified Patent Court by the lawyer Fabrizio X who requests access to the contents of the file.

The request is motivated by the fact that the defender - equipped with a mandate issued by the defendant for the sole purpose of accessing the file but not with the power to appear and defend himself - intends in this way to have prior knowledge of the file before notification of the introductory document of judgment.

On 1.9.2023 the judge-rapporteur adopted a preliminary order, in which he invited the parties to submit observations.

Within the time periods assigned by the Office, the plaintiff filed his defense note, criticizing the irregularity of the request formulated by the party, but did not object as long as the deadline for the defendant's appearance was not changed with respect to the established time frames from the art. 23 of the RoP

The applicant, in turn, within the deadline assigned to him, did not oppose this last request, insisting on his request.

#### APPLICANT'S ORDER FORM

The applicant requests access to the contents of the file, consisting of the document initiating the proceedings and all the attached documents.

#### REASONS FOR THE DECISION

##### *General consideration*

The judge-rapporteur, having read the request and examined the observations of the parties, believes that the request cannot be accepted.

The reasons for the rejection require a brief investigation into the *rationale* of the instrument invoked here, and its prerequisites.

Rule 262 of the ROP regulates public access to the register of the Unified Patent Court.

This provision is part of my broad regulatory framework which regulates access to the documents of the European Institutions, to implement the principle of transparency (art. 1 TEU) aimed, ultimately, at strengthening the

democratic principle, as a means of information aimed at guaranteeing control over the work of public authorities.

This general power of control of the public has a particular declination - having regard to the specific function and interests involved - with respect to judicial bodies, unlike legislative and administrative ones.

In particular, the right of access of third parties is regulated before the Unified Patent Court - required to respect and apply Union law, see, among other things, Recital n.9 Agreement on TUB - from art. 262 of the ROP, placing itself within the system which provides - as a general rule - the publicity of both the proceedings (art. 45 Agreement) and the decisions and orders adopted by the Court (art. 262, paragraph 1. 1 RoP) and whose Register kept by the Registry is accessible to the public (art. 10 Cited Agreement)

As already specified in a recent precedent of this Office (see decision of the Unified Patent Court, Central Section of Munich, 20.9.2023), the request for access under investigation here concerns only the written pleadings and evidence deposited in the file (art. 262, 1. RoP), since decisions and orders are automatically public, as mentioned above (art. 262.1.a RoP).

To access the written pleadings and the evidence deposited in the register, the interested party must formulate a reasoned request, based on concrete, verifiable and legally relevant reasons that can be examined by the Court.

The Court evaluates the request after cross-examination with the parties to the trial. The latter may request that confidentiality be maintained with respect to certain confidential information contained therein (see art. 262 paragraph 2, RoP).

However, this last relevant profile is not the only one that the Court - in its position of impartiality and neutrality of the role - must evaluate. Other potentially conflicting interests also come into play which could lead to denying access. This principle is crystallized by art. 45 of the Agreement, which refers among the reasons for refusing access, both profiles of a public nature (such as matters of public order and the superior interests of justice) and profiles of protection of third parties (when there are other persons involved).

It can therefore be deduced that the possible consent of the parties to the proceedings already constituted may not be sufficient - in the cases mentioned above - to determine the acceptance of the request for access.

From the above observations it follows that:

- the notion of "*Public*" includes all third parties - public or private - different and distinct from the parties to the process (who must be heard following the request); - the request must be supported by a precise, concrete and current motivation relating to access to the written pleadings and evidence of a trial already pending between other subjects, to whom the applicant is extraneous; - the parties to the process may raise reasons of confidentiality with respect to certain information contained
- in the file; the
- consent of the parties to the process - in certain circumstances - may not be sufficient to allow access.

#### *The case in question*

Having said this in general, the request cannot be accepted as it is not homogeneous both from a subjective and objective point of view and from the point of view of the rationale of the institution whose application is invoked.

As for the subjective profile, the party who formulates the request does not qualify as a third party with respect to the proceedings. This is a defender who:

- declares to act as representative of the defendant, before the notification of the application;
- specifies that he received the mandate to litigate only to access the file, but not to appear in court;
- bases his request on the need to be able to examine the file before notification of the application.

From a subjective point of view, therefore, the applicant does not qualify as a third party, private or public, unrelated to the dispute, to whom the RoP attribute the right to use the instrument referred to in the art. 262.1. (b).

The applicant is therefore not entitled, by his own presentation, to use the instrument used.

Symmetrically, from an objective point of view:

- the applicant has not expressed its own independent legitimate, concrete and verifiable interest different from the position of the defendant company; - the reason for the request consists - indeed - in Himson's interest in having more time available to prepare its defenses, compared to that which elapses between the notification of the application and the deadline prescribed by the art. 23 of the R.oP. for the purposes of its constitution.
- Therefore, it is an internal interest in the procedural dialectic between the parties which is not projected externally, as it is not reflected in the sphere of the public and the community in general.

As for the *rationale* of the institution, its purpose - that is to allow the greatest possible transparency of the Court's activity with respect to third parties - is not requested here and would not be achieved if the request were accepted, remaining knowledge of the documents and of documents internal to the procedural relationship between plaintiff and defendant.

Finally and for the sake of completeness: as mentioned, the consent of the parties to the proceedings already constituted is not sufficient to determine the acceptance of the request, where other and different interests are identified, referred to in the art. 45 of the Agreement, to deny access.

Even if in the case in question the plaintiff does not declare himself against access in principle, except for the protection of the established procedural rules, the Court must take into account the position of the "*other parties involved*", here the defendant. Indeed, there is no proof that Himson - currently unincorporated - granted a mandate to the petitioner, since:

- the power of attorney for the disputes has not been filed (which in any case the applicant declares to possess only for access to the file but not for valid appearance in court);
- the applicant does not have the access code to the CMS system given to the defendant at the time of notification of the document initiating the proceedings.

The rule set out in art. does not prevent this assessment. 285 RoP and the relative power of the Court to ask the lawyer to prove the representative power (in the different case in which following the appearance in court the relative power is contested by the opposing party): the appellant has in fact already anticipated that he has not received the was the mandate for litigation by the defendant

## CONCLUSIONS

The applicant did not provide any allegation of being a third party to the process, entitled to access by reason of a legitimate, concrete and verifiable - independent from that of the parties in dispute - to access the register for the infringement action.

For this reason the application must be rejected.

PERMISSION TO APPEAL

The importance of correct interpretation for the system of Article 262.1. (b) of the RoP, in light of the *rationale* underlying the Institute, highlighted above, suggests admitting the appeal, also in light of the need for a coherent interpretation, within the system, as expressly indicated by Preamble no. 8 of the RoP

The appeal against this decision is therefore allowed.

ORDER

For these reasons, having consulted the parties constituted, the judge-rapporteur

rejects the application.

Order number 569313 in case no. 549550/2023

UPC number CFI 240/2023

Type of action: counterfeiting

Related proceeding no. 562298/2023

Type of application: application pursuant to art. 262 RoP

Thus decided in Milan, 27 September 2023

The judge-rapporteur

*Alima Zana*

Chancellor

Information about the appeal

Appeal is permitted. This order can be appealed within 15 days of notification of this order, which must be considered in this sense as a decision of the Court, (art. 73, paragraph 2, letter b, point ii) of the UPCA and 220.2. , 224.1. letter b) of the Rop.