



Reference nos:
UPC_CoA_335/2023
APL_576355/2023
App_6601/2024

**Order
of the Court of Appeal of the Unified Patent Court
issued on 26/02/2024
in the proceedings for granting provisional measures
concerning EP 4 108 782**

HEADNOTE

In accordance with the principles of procedural economy and cost efficiency as well as a fair balance between the legitimate interests of the parties, which must be considered in the interpretation of the Rules of Procedure pursuant to Article 41(3) UPCA, the proceedings are not required to be stayed under Rule 311.1, first sentence RoP, if a party is declared insolvent only after the oral proceedings have concluded and the dispute is ready for a decision.

KEYWORDS:

Appeal, Insolvency of a party.

DEFENDANTS and APPELLANTS

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Represented by: Oliver Jan Jüngst, Attorney-at-law, Bird & Bird LLP

APPLICANTS and RESPONDENTS

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2. **President and Fellows of Harvard College**
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Represented by: Prof Dr Tilman Müller-Stoy, Attorney-at-law, Bardehle Pagenberg Partnerschaft mbB

PATENT AT ISSUE

EP 4108782

PANEL AND DECIDING JUDGES

First Panel

Klaus Grabinski, President of the Court of Appeal and Judge-Rapporteur

Françoise Barutel, Legally qualified Judge

Peter Blok, Legally qualified Judge

Rainer Friedrich, Technically qualified Judge

Cornelis Schüller, Technically qualified Judge

LANGUAGE OF PROCEEDINGS

German

IMPUGNED ORDER

Order ("Decision and Orders") of the Court of First Instance (Munich Local Division) of 19/09/2023 - UPC CFI 2/2023

FACTS AND REQUESTS OF THE PARTIES

The Applicants and Respondents (hereinafter the Applicants) are seeking injunctive relief against the Defendants and Appellants (hereinafter the Defendants) for direct and indirect infringement of the European patent with unitary effect (unitary patent) 4 108 782 (patent at issue). The Defendants are affiliated as a group of companies, consisting of the American parent company, the German sales and marketing company and a Dutch company, which also maintains the European headquarters of the group of companies.

The Court of First Instance largely granted the Applicants' corresponding request. The Defendants have lodged an appeal against this Order. The Applicants have defended the Order.

Following written proceedings, the oral hearing on the appeal was held before the Court of Appeal of the Unified Patent Court on 16 December 2023.

On 4 February 2024, all Defendants filed a joint petition with one of their sister companies in the US Bankruptcy Court for the District of Delaware to open insolvency proceedings under Chapter 11 of the Bankruptcy Code.

At the Defendants' request, on 6 February 2024, the same court granted an Order confirming, restating and enforcing the worldwide automatic stay, anti-discrimination provisions and *ipso facto* protection of Sections 362, 365, 525 and 541(c) of the Bankruptcy Code, subject to certain conditions (see US Bankruptcy Court for the District of Delaware, order of 6 February 2024, B39).

In light of this development, the Applicants request that the proceedings be stayed for a period to be determined by the Court.

The Defendants consent to the request that the proceedings be stayed in all respects, including, but not limited to, the issuance of a Decision by the Court of Appeal.

GROUND FOR THE ORDER

The parties' applications for a stay of the proceedings lack merit.

Pursuant to Rule 311.1, first sentence, RoP the Court shall stay the proceedings for up to three months if a party is declared insolvent under the law applicable to the insolvency proceedings.

According to the American law applicable as *lex fori concursus*, Chapter 11 Bankruptcy Code (Chapter 11) proceedings have been opened regarding the assets of the Defendants. Pursuant to Sections 301 and 362 of the Bankruptcy Code, the opening of the proceedings was effected by the application filed by the Defendants on 4 February 2024. In addition, the US Bankruptcy

Court for the District of Delaware has confirmed the automatic worldwide enforcement, the anti-discrimination provisions and the *ipso facto* protection of Sections 362, 365, 525 and 541(c) of the Bankruptcy Code - subject to certain conditions - and thus the opening of insolvency proceedings by Order dated 6 February 2024.

Chapter 11 proceedings aim to reorganise and restructure a company by drawing up a reorganisation plan, which must be accepted by the creditors and confirmed by the court. For the duration of the proceedings, the debtor generally retains the power of administration and representation under the *ipso facto* protection of Sections 362, 365, 525 and 541(c) of the Bankruptcy Code and an administrator is appointed only in exceptional cases.

Whether the opening of proceedings under Chapter 11 can be regarded as a declaration of insolvency within the meaning of Rule 311.1, first sentence, RoP, irrespective of the Defendants' continued ability to trade, does not require a final decision (see on the one hand the judgement by the BGH (German Federal Court of Justice) of 13 October 2009 - X ZR 79/06, GRUR 2010, 861 on Sec. 240 ZPO (German Code of Civil Procedure); on the other hand see EPO Legal Board of Appeal Decision of 13 October 1998 - J 26/95, on Rule 90(1)b) [now Rule 142.(1)b)] of the Implementing Regulations to the Convention on the Grant of European Patents (IR EPC)).

Even if this is affirmed and thus the requirements for the applicability of Rule 311.1, first sentence, RoP are met, there is nevertheless no reason to stay the proceedings.

According to the wording of Rule 311.1, first sentence, RoP a stay is provided for if a party has been declared insolvent.

However, the Rules of Procedure are to be interpreted in accordance with Art. 41(3) UPCA so as to ensure a fair balance between the legitimate interests of all parties, that the proceedings are conducted in the most efficient and cost effective manner and that the required level of discretion of judge is provided without impairing the predictability of proceedings for the parties. However, it would not be compatible with the principles of procedural economy and cost efficiency if the proceedings had to be stayed even in a case in which a party was only declared insolvent after the oral hearing had concluded and the legal dispute was ready for a decision. At this stage of the proceedings, the parties have already taken all procedural steps and all costs have already been incurred by the parties. If the decision or order has an effect on the insolvency estate, it does not differ from the effect that a decision or order issued before the declaration of insolvency would have had. Furthermore, the interest in a timely order weighs particularly heavily in proceedings aimed at provisional legal protection, as is the case here. Furthermore, it leads to a fair balance between the legitimate interests of the parties if events that only occurred after the conclusion of the oral hearing are also no longer to be considered in the decision-making process.

The fact that in particular the principles of procedural economy and cost efficiency as well as a fair balance between the legitimate interests of the parties speak in favour of not staying the proceedings if a party is declared insolvent after the oral hearing has concluded and the legal dispute is ready for a decision is confirmed by comparable provisions in the national civil procedural law of several contracting Member States to the Agreement.

According to the French and German codes of civil procedure, the opening of insolvency proceedings regarding the assets of a party generally results in the interruption of the civil proceedings; however, this does not apply if the insolvency proceedings are only opened after the conclusion of the oral hearing (Art. 369, 371 *Code de procédure civile*; §§ 240, 249(3) *Zivilprozessordnung*). In Italy, the interruption occurs if the representative of the party whose assets are subject to insolvency proceedings (Art. 300 *Codice di procedura civile*) declares this at the hearing or notifies the other parties; however, according to the case law of the *Corte di Cassazione*, this is no longer possible after the conclusion of the oral hearing (*Corte di Cassazione*, 3 March 2022 - 7076/2022). In the Netherlands, the proceedings for payment claims are stayed with the declaration of insolvency, while for other claims the claimant may request a stay in order to involve the insolvency administrator in the proceedings (Art. 28 and 29 *Faillissementswet*); however, these provisions are not applicable if the case is already ready for a decision (Art. 30 *Faillissementswet*).

In view of the above, the decision not to stay the proceedings in the present case is justified because the Chapter 11 proceedings concerning the Defendants' assets were not opened until after the conclusion of the oral hearing.

ORDER

The requests by both parties for a stay of proceedings are dismissed.

Klaus Grabinski President of the Court of Appeal and judge-rapporteur	
Françoise Barutel legally qualified judge	
Peter Blok legally qualified judge	
Rainer Friedrich technically qualified judge	
Cornelis Schüller technically qualified judge	
Eurico Igreja Employee of the Registry	