



Call n°: APL_16749/2025
UPC_CoA_327/2025

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 15 July 2025
concerning an application for review of an evidence preservation order

EN-TETE

- (i) When examining the request for preservation of evidence, the Court exercises its discretion by taking into account the urgency of the case (R. 194.2(a) RoP) in order to determine whether, and to what extent, it wishes to hear the defendant (R. 194.1(a) RoP), summon the parties to a hearing (R. 194.1(b) RoP), summon the applicant to a hearing without the presence of the respondent (R. 194.1(c) RoP), or decide the application without hearing the respondent (R. 194.1(d) RoP).
- (ii) The time limit within which the applicant submitted his application for preservation of evidence is not such as to call into question the urgency of the case (R. 194.2(a) RoP).
- (iii) The assessment of urgency in the context of an application for preservation of evidence (R. 194.2(a) RoP) must be distinguished from that to be assessed in the context of an application for provisional measures (R. 209.2(b) RoP). In exercising its discretion as to whether provisional measures should be ordered, the court must take into account any undue delay in the application for provisional measures (R. 211.4 RoP). There is no such requirement in the UPC Agreement or in the Rules of Procedure when it comes to assessing whether an application for preservation of evidence should be granted.
- (iv) The risk of the disappearance or unavailability of evidence must be assessed by reference to the probability (R. 194.2(c) RoP) or demonstrable risk (R. 197.1 RoP) that the evidence may be destroyed or that it will no longer be available, and not by reference to the certainty of the disappearance or unavailability of the evidence.
- (v) Unlike in the case of provisional measures (Part 3 of the Rules of Procedure), for which one of the conditions required is that the Court must be convinced, with sufficient certainty, that the patent is valid (R. 211.2 RoP), no such criterion is required in the context of the Court's power to assess measures to preserve evidence. At the stage of examining a request to preserve evidence and to visit the premises, the Court does not have to assess the validity of the patent in dispute, this question remaining solely within the jurisdiction of the judge hearing the case on the merits or dealing with provisional measures, except where the presumption of validity is clearly likely to be called into question, for example, following a decision by an Opposition Division or a Board of Appeal of the European Patent Office in parallel opposition proceedings or invalidity proceedings before another court concerning the same patent.
- (vi) The assessment of the relevance of a prior art remains within the competence of the trial judge or, to a different extent, of the judge competent to rule on requests for interim measures. Accordingly, it is not for the applicant for evidence preservation measures, at the application stage, to identify and communicate any prior art of which he may be aware, unless such prior art, for particular reasons, is of such a nature as to influence the *ex parte* decision to be taken. Nor is it for the judge responsible for ordering the preservation of evidence and the inspection of the premises to examine the antecedents communicated to him, unless these, for obvious reasons, are of such a nature as to influence his decision.

TAGS

Measures to preserve evidence and to enter premises without the defendant being heard; application for withdrawal.

APPELLANT (DEFENDANT IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

MAGUIN SAS, 2 rue Pierre Semard, 02800 Charmes, France (hereinafter referred to as "**MAGUIN**")
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CASALONGA SAS

INTIMEE (PLAINTIFF IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

TIRU SAS, 7 rue du Docteur Lancereaux, 75008 Paris, France (hereinafter referred to as "**TIRU**")
represented by Mr Cyrille AMAR, Avocat au Barreau de Paris, Amar Goussu Staub

PATENT AT ISSUE

EP 3 178 578

COMPOSITION OF THE CHAMBER

Chamber 1b, composed as follows:

Klaus Grabinski, President of the Court of Appeal,
Emmanuel Gougé, legally qualified Judge and Judge-Rapporteur, Emanuela
Germano, legally qualified Judge,
Koen Callewaert, technically qualified Judge, Frédéric
Gaillarde, technically qualified Judge.

LANGUAGE OF PROCEEDINGS

French

CONTESTED ORDER OF THE COURT OF FIRST INSTANCE

- ☐ Order of the Paris Local Division of 24 March 2025 in the main proceedings ACT_66560/2024
UPC_CFI_813/2024
- ☐ References:

UPC_CFI_813/2024 ACT_66560/2024
App_7220/2025 ORD_9276/2025

DATE OF HEARING

3rd June 2025

FACTS AND PROCEDURE

1. TIRU is the owner of European patent EP 3 178 578 (hereinafter referred to as the "disputed patent" or "EP'578"), the application for which was filed on 8 December 2016 and the grant of which was published on 1st August 2018, entitled "Waste incineration plant and associated process". It is in force in France, Poland and the United Kingdom. This patent has not been the subject of any opposition proceedings and, at the date of commencement of the proceedings which are the subject of this appeal, has not, according to the parties, been the subject of any legal proceedings seeking a declaration of its invalidity.
2. The patent at issue comprises two independent claims: claim 1, relating to an installation for the incineration plant and claim 15, relating to a waste incineration process.
3. MAGUIN is the manufacturer of a waste incineration furnace located in Montbéliard (France), operated by VALINEA ENERGIE (hereinafter "VALINEA") which, according to TIRU, implements patent EP'578 (hereinafter the "disputed furnace").

Measures of preservation of evidence and inspection of the premises ordered at first instance

4. On December 17, 2024, prior to any proceedings on the merits relating to the EP'578 patent, TIRU filed two requests before the Paris Local Division of the Unified Patent Court (hereinafter the "Local Division") for measures of preservation of evidence and inspection of the premises relating to the disputed oven to be ordered without the defendants being heard (Rules 192.3 and 197 of the Rules of Procedure, hereinafter "RoP"), one against MAGUIN (ACT_66560/2024 UPC_CFI_813/2024), the other against VALINEA (ACT_66573/2024 UPC_CFI_814/2024).
5. By two orders issued on 23 December 2024, the Local Division authorised TIRU to preserve evidence relating to the disputed oven and to carry out an on-site raid on the premises of VALINEA and MAGUIN, as well as several additional measures, including detailed descriptions and the physical and digital seizure of documents (TIRU v MAGUIN, ORD_67655/2024 UPC_CFI_813/2024; TIRU v VALINEA, ORD_67654/2024 UPC_CFI_814/2024).
6. The measures ordered were carried out simultaneously on 14 January 2025 at the VALINEA (France) site, where the disputed furnace is located, and at the MAGUIN (France) site, followed by the submission of the report by each expert appointed in accordance with the provisions of Rule 196.4 RoP and the implementation of confidentiality measures relating to the information obtained in the course of carrying out these measures.
7. TIRU brought two infringement actions before the Local Division on 18 February 2025 against MAGUIN (ACT_7999/2025 UPC_CFI_132/2025) and VALINEA (ACT_7950/2025 UPC_CFI_130/2025).

The application for withdrawal and the contested order

8. On 12 February 2025, MAGUIN requested, pursuant to Rules 197.3 and 197.4 RoP, the Local Division's order of 23 December 2024 to preserve evidence and enter the premises should be revoked and, in the alternative, the measures ordered should be reviewed, arguing in particular that (i) there was no urgency justifying the measures ordered, (ii) there was no risk that the evidence would be lost or destroyed, and (iii) TIRU had breached its duty of loyalty by withholding information that could influence the *ex parte* measures (App_7220/2025 UPC_CFI_813/2024).
9. The Local Division ordered the dismissal of the application for revocation of the order made on 23 December 2024 (order of 24 March 2025, ORD_9276/2025 ACT_66560/2024 UPC_CFI_813/2024, hereinafter "the contested order") and in particular noted the following points.
 - (i) TIRU cannot be accused of a lack of loyalty with regard to the alleged concealment of information relating to its knowledge of the characteristics of a furnace dating from 1987, present on VALINEA's site, which would be of such a nature as to call into question the validity of the contested patent on the grounds of lack of novelty and, consequently, of such a nature as to influence the granting of *ex parte* measures.
 - (ii) The risk of destruction of evidence justifying an *ex parte* measure is sufficiently demonstrated; it is not necessary to show that the evidence will disappear (R. 197.1 RoP). It is necessary for the operations to take place simultaneously at MAGUIN and VALINEA, the manufacturer and operator respectively of the disputed oven, given the obvious links between the persons seized and their converging interests, in order to ensure the effectiveness of the evidence preservation measures. With regard to the risk of losing digital data, the judge made an overall assessment in light of the imminent risk of the oven being put into operation and the risk of losing technical documentation that could be held digitally on the VALINEA site.
 - (iii) The lack of urgency justifying the measures ordered has not been established. TIRU did not delay in requesting the measures sought. It presented the evidence that was reasonably accessible within two months of obtaining it (report by a court commissioner dated 11 October 2024 noting the existence of a video on the YouTube platform publishing images of the disputed furnace and indicating that the furnace would be commissioned in the 1st quarter of 2025).

The appeal procedure

10. MAGUIN appealed the impugned order (APL_16749/2025 UPC_CoA_327/2025).
11. MAGUIN asks the Court to (i) set aside the impugned order insofar as it rejected MAGUIN's application to revoke the order to preserve evidence and raid the premises made on 23 December 2024, (ii) revoke in its entirety the order to preserve evidence and raid the premises made by the Local Division on 23 December 2024, (iii) order MAGUIN to hand over all of the items seized during the evidence preservation and site inspection operations of 14 January 2025, (iv) order TIRU to pay MAGUIN all of the sums deposited as security and to reimburse MAGUIN for the costs incurred by the evidence preservation and site inspection measures.
12. MAGUIN contests the absence of an adversarial procedure and the choice of an *ex parte* procedure (Art. 60(5) of the Agreement on a Unified Patent Court - hereinafter "UPCA", R. 197.1 RoP), on the grounds in particular that there is nothing to establish that an adversarial procedure could not have been organised before the disputed furnace was put into service. The arguments put forward by MAGUIN in its statement of grounds for appeal relate mainly to the following points.
- (i) Lack of urgency : the start-up of the disputed furnace in the 1st quarter of 2025 is not sufficient to justify the urgency, on the grounds in particular that this start-up in no way prevented the facts criticised from being established; as regards the technical documentation relating to the disputed furnace, this remains accessible at all times under the public contract in which this furnace is operated, so that there is no risk of evidence being lost; the same is true of the disputed oven itself, which cannot disappear because it must be kept in place and in operation for the entire duration of the performance of the public contract.
 - (ii) Absence of risk of destruction of evidence: TIRU merely asserts the existence of a risk of destruction of evidence but does not demonstrate it. It is not enough to assert that evidence - in particular documents and/or digital data - can be easily destroyed: additional factual elements must be provided to convince the court that such destruction could indeed occur if the defendant were to be informed of an imminent operation to preserve the evidence. As far as the oven itself is concerned, its operation would not in fact have entailed any risk of evidence disappearing.
 - (iii) Lack of loyalty: TIRU failed to disclose to the Tribunal important facts of which it was aware and which were likely to influence the court in its decision whether or not to make an order without hearing the defendant (R. 192.3 RoP).
13. In its statement of defence, TIRU asked the Court to
- dismiss MAGUIN's claims in their entirety;
 - confirm the order of 24 March 2025 of the Local Division (ORD_9276/2025);
 - order MAGUIN to pay TIRU the sum of € 38,000 in legal costs, subject to adjustment in accordance with the scale in force on the date of its decision.
14. The arguments developed by TIRU in its statement of defence relate mainly to the following points.
- (i) The *ex parte* measures ordered are justified and the contested order complies with the principles of effectiveness and proportionality in that it enabled TIRU to obtain the evidence it lacked quickly while reducing the scope of the investigations initially requested and framing the measures ordered by sufficient guarantees for MAGUIN.
 - (ii) The urgency of the case justifies that the measures were ordered *ex parte* :
 - the deadlines for an *inter partes* procedure would not have made it possible to organise a visit to the disputed furnace before it was commissioned, scheduled for the beginning of 2025, whereas the search for evidence required an inspection of the furnace when it was shut down and not operating, which, during a period of normal operation of the furnace, would have required several days' interruption of the installation ;
 - the search for evidence could not have been carried out solely on the basis of documentary research, as this alone was not sufficient to establish the reality of the infringement;

- the concomitance of the evidence preservation operations on the MAGUIN and VALINEA sites respectively was necessary, in particular to prevent the risk of disappearance of the evidence held by MAGUIN if the latter had been informed, prior to the execution of the evidence preservation measures on its site, that measures targeting it were likely to be carried out;
 - as soon as it became aware of the elements that made infringement of patent EP'578 likely, i.e. the YouTube film that was the subject of the official report of October 11, 2024 (TIRU exhibit no. 10) containing information on certain technical characteristics of the oven at issue, TIRU prepared its request for the preservation of evidence (seizure) and for a visit to the site, which it submitted within two months of that date, far from constituting a faulty delay.
- (iii) The risk of the disappearance or unavailability of evidence, particularly digital evidence concerning MAGUIN, justifies the fact that the measures were ordered without MAGUIN and VALINEA having been heard.
- (iv) As regards the alleged lack of fairness (R. 192.3 RoP), TIRU points out that the judge hearing the application for preservation of evidence is not the judge of validity, so that arguments relating to its validity are not likely to influence his decision to issue the order sought without hearing the defendant. In this respect, TIRU rejects the arguments of invalidity for lack of novelty, presented by MAGUIN and VALINEA, based on an earlier patent (Laurent Bouillet patent FR 2350136, cited in the state of the art presented in the patent at issue in § [0003]) and on the technical documentation for the original oven dating from 1987 (the so-called "Laurent Bouillet" oven), which is based on a prior art patent (Laurent Bouillet patent FR 2350136, cited in the state of the art presented in the patent at issue in § [0003]).
- "Laurent Bouillet" oven), which was covered by a confidentiality agreement.

GROUND

15. The appeal is admissible but dismissed.

Admissibility

16. In accordance with the provisions of R. 220.1(c) RoP, an appeal may be lodged by any affected party against the orders referred to in Article 60 UPCA (relating to orders for the preservation of evidence and raids on premises).
17. The impugned order relates to measures for the preservation of evidence and a raid on the premises against MAGUIN and affects the latter.
- MAGUIN. The appeal is therefore admissible in this respect.

Measures to preserve evidence and raid the premises

18. Pursuant to Article 60 UPCA, at the request of an applicant who has presented reasonably available evidence to support his allegations that his patent has been infringed or that such infringement is imminent, the Court may, even before the institution of an action on the merits, order prompt and effective provisional measures to preserve evidence relevant to the alleged infringement, provided that the protection of confidential information is ensured (Art. 60(1) UPCA).
19. According to Art. 60(5) UPCA, measures may be ordered without hearing the other party, in particular where any delay is likely to cause irreparable prejudice to the patent proprietor or where there is a demonstrable risk of destruction of the evidence.
20. These provisions of the UPCA are supplemented by those of the Rules of Procedure of the UPC, under its Part 2 (Evidence), Chapter 4 relating to the order for the preservation of evidence (seizure) and the order to enter premises (R. 192 to 199 RoP).
21. An application for preservation of evidence (R. 192 RoP) may be made before or during the commencement of the action on the merits and, at the request of the applicant, the preservation of evidence measures may be ordered without the other party (hereinafter referred to as "the respondent") being heard, in which case the application for preservation of evidence sets out the reasons for not hearing the respondent having regard in particular to Rule 197 (R. 192.3 RoP, first sentence). In this case, the applicant must disclose any material facts of which he or she is aware that could influence the Court's decision whether or not to make an order without hearing the defendant (R. 192.3 RoP, second sentence).

22. When examining the application for preservation of evidence (R. 194 RoP), the Court has a discretion - even when the application is based on Rule 192.3 - to, in particular, inform the defendant of the application or not or to decide on the application without having heard the defendant (R. 194.1(d) RoP). In exercising its discretion, the Court will take into account: a) the urgency of the case; b) the apparent merits of the reasons given for not hearing the defendant [Rules 192.3 and 197]; c) the likelihood that the evidence may be destroyed or may no longer be available [Rule 197] (R. 194.2 RoP).
23. Finally, in the case of an order to preserve evidence without hearing the defendant, the Court may order measures to preserve evidence [R. 196.1] without hearing the defendant, in particular where any delay is likely to cause irreparable prejudice to the applicant or where there is a demonstrable risk that the evidence may be destroyed or may no longer be available (R. 197.1 RoP).
24. These provisions should be read in conjunction with those of Directive 2004/48 EC of 29 April 2004 on the enforcement of intellectual property rights (hereinafter "Directive 2004/48"), in particular Article 7 relating to measures for the preservation of evidence, according to which, even before the commencement of an action on the merits, measures for the preservation of evidence must be able to be ordered, where appropriate, without the other party being heard, in particular where any delay is likely to cause irreparable prejudice to the right holder or where there is a demonstrable risk of destruction of the evidence.
25. The application of these provisions must comply with the general principles set out in the UPC Agreement and the Rules of Procedure as well as in the above-mentioned Directive, in particular the principles of proportionality and effectiveness.
26. Pursuant to the aforementioned texts, the Court of First Instance has a discretionary power, in particular when examining the request for preservation of evidence (R. 194 RoP), and it is for the Court of Appeal to ascertain whether the limits of that power have been exceeded or whether, in exercising that discretion, the Court of First Instance erred in law.

The urgency of the (ex parte) measures sought

27. When examining the request for preservation of evidence, the Court exercises its discretion by taking into account the urgency of the case (R. 194.2(a) RoP) in order to determine whether, and to what extent, it wishes to hear the defendant (R. 194.1(a) RoP), summon the parties to a hearing (R. 194.1(b) RoP), summon the applicant to a hearing without the presence of the respondent (R. 194.1(c) RoP), or rule on the application without having heard the respondent (R. 194.1(d) RoP).

In exercising its discretion, the Court will consider the grounds on which the proposed measures are necessary to preserve the relevant evidence (R. 192.2(c) RoP) and the facts and evidence relied on in support of the application (R. 192.2(d) RoP).
28. The necessity of the measures ordered must be assessed at the date of the contested order.
29. In the present case, TIRU communicated, in its request to preserve evidence, elements (in particular TIRU's exhibit 10, a YouTube film presenting the disputed oven) making it possible to establish that certain characteristics of the disputed oven, in particular the means of supplying combustion and/or cooling air and the circulation of air in the hollow envelope of the oven, were capable of reproducing claims 1 to 15 of patent EP'578.
30. TIRU also reported, according to the information presented in the aforementioned YouTube film, that the disputed furnace was due to be commissioned in the first quarter of 2025, which is not disputed by MAGUIN. This commissioning implied that the furnace would be fired up as early as January 2025, which was also confirmed by the expert appointed (Mr Sartorius) to inspect the disputed furnace at the VALINEA site, who reported, when carrying out his mission on 14 January 2025, that the measures to preserve evidence and to visit the site had been carried out the day before the first tests of the disputed furnace, scheduled to start on 15 January 2025 (TIRU exhibit no. 21, p. 2).

31. In these circumstances, given that the measures to preserve the evidence required inspection of the inside of the furnace, its operation would have prevented the descriptive seizure requested. Only if the incinerator had been shut down for a period of several days would it have been possible to carry out the measures ordered, given the immobilisation constraints that made it unlikely that the plant would be shut down in the short term.
32. In view of the foregoing, the urgency of the measures requested without hearing the defendant was clearly demonstrated by TIRU with regard to the need to inspect the disputed furnace.
33. The effectiveness of the measures requested also required that access to, and preservation of, the technical documentation relating to the operation of the contested oven or to any device infringing patent EP'578 or to the use of the said device, including in digital format, be ordered at the same time at VALINEA and MAGUIN. There was therefore an urgent need to order these measures against MAGUIN as well.
34. With regard more specifically to the digital data accessible at MAGUIN, the urgency of ordering the *ex parte* measures sought is also established by the risk of loss of digital data relating to technical documentation. In the context of the measures under consideration for the preservation of evidence and the visit to the premises, a risk of the disappearance of the evidence available at MAGUIN could not be ruled out in the event that these measures were ordered after the measures aimed at first gaining access to the disputed oven at VALINEA. The urgency of establishing these measures with the other measures ordered was therefore well justified.
35. Contrary to MAGUIN's assertions, the time limit within which TIRU submitted its request for preservation of evidence is not such as to call into question the urgency of the case (R. 194.2(a) RoP). The decisive factor that allowed TIRU to suspect that the oven in question had actually reproduced the characteristics of its EP'578 patent was the YouTube video recorded in the official report of 11 October 2024 (TIRU exhibit no. 10). In considering that the two-month period that followed, to allow TIRU to prepare and file its applications before the Local Division on 17 December 2024, appeared reasonable in view of the facts of the case (contested order, §36), the Local Division did not exceed the limits of its discretion.
36. In this respect, a distinction must be drawn between the assessment of urgency in the context of an application for preservation of evidence (R. 194.2 a RoP) and that to be assessed in the context of an application for interim measures (R. 209.2(b) RoP). In exercising its discretion as to whether to order provisional measures, the Court must also take into account any undue delay in the application for provisional measures (R. 211.4 RoP). There is no such requirement in the UPC Agreement or in the Rules of Procedure when it comes to assessing whether a request for preservation of evidence should be granted.
37. In the light of the foregoing, the Court of First Instance correctly applied its discretion as to the urgency of the measures requested and, in the light of the facts of the case, correctly reasoned its decision to derogate from the principle of adversarial proceedings.

Risk of destruction or unavailability of evidence

38. The risk of destruction or unavailability of evidence as a criterion for assessing whether *ex parte* measures are justified (R. 194.2(c) and 197.1 RoP) concerns both access to the disputed oven and to the associated technical documentation. The reality of the risk in question must be assessed by reference to probability (R. 194.2(c) RoP) or the demonstrable risk (R. 197.1 RoP) that the evidence could be destroyed or that it is no longer available, not the certainty of the disappearance or unavailability of the evidence.
39. With regard to the disputed furnace, the Local Division rightly exercised its discretion in considering that its operation would have made it extremely difficult to carry out the measures, so that, since the preservation of evidence required access to the interior of the disputed furnace, the evidence would no longer have been available, unless a complete shutdown of the furnace had been scheduled - which, it is undisputed, would have required several days of downtime - or unless the next scheduled maintenance period had been awaited.

40. As regards the technical documentation, the Local Division did not exceed the limits of its discretion in considering that the risk of their destruction could not be ruled out if the measures concerning MAGUIN had not been ordered at the same time as those ordered against VALINEA. Moreover, the fact that the furnace at issue was operated under a public service concession, which, according to MAGUIN's unsubstantiated assertions, meant that the technical documentation was kept available to the public grantor and handed over to the latter at the end of the concession, was not such as to rule out a risk of destruction or unavailability of the evidence.

The applicant's duty of loyalty when submitting the request

41. Where the applicant requests that evidence preservation measures be ordered without the other party (hereinafter referred to as "the respondent") being heard, the application for preservation of evidence must set out the reasons for not hearing the respondent, having regard in particular to Rule 197 (R. 192.3 RoP, first sentence). He must disclose any important facts of which he is aware and which could influence the Court in its decision whether or not to make an order without hearing the Respondent (R. 192.3 RoP, second sentence).

42. The applicant must therefore, in his application, bring to the attention of the court the material facts relating to the assessment criteria that the Court must take into account in deciding on the request, i.e.

- (a) the urgency of the case, (b) the apparent merits of the reasons given for not hearing the defendant, (c) the likelihood that the evidence may be destroyed or may no longer be available (R. 194.2 RoP).
(c) the likelihood that the evidence may be destroyed or may no longer be available (R. 194.2 RoP).

43. Unlike in the case of provisional measures (Part 3 of the Rules of Procedure), for which one of the conditions required is that the Court must be convinced, with sufficient certainty, that the patent is valid (R. 211.2 RoP), no such criterion is required in the context of the Court's power to assess measures to preserve evidence. At the stage of examining a request for the preservation of evidence and a visit to the premises, the Court does not therefore have to assess the validity of the patent at issue, as this question remains solely within the jurisdiction of the judge hearing the case on the merits or dealing with provisional measures, as the Local Division rightly pointed out (contested order, §18), except where the presumption of validity is clearly liable to be called into question, for example following a decision by an Opposition Division or a Board of Appeal of the European Patent Office in parallel opposition proceedings or invalidity proceedings before another court concerning the same patent.

44. Accordingly, TIRU cannot be criticised for not having addressed, at the stage of presenting the measures requested, in anticipation of a hypothetical substantive debate, a discussion relating to the validity of its title. This is all the more true since MAGUIN has not established that the patent at issue was the subject of opposition proceedings before the European Patent Office or that it was the subject of legal proceedings for its revocation. Nor does MAGUIN report any exchanges (letters, reports of meetings or other) between it and TIRU alerting the latter to the alleged invalidity of its title, so that it does not establish that TIRU was aware of a risk to the validity of its patent, such as to constitute a "material fact" capable of influencing the Court in its decision whether or not to make an order without hearing the defendant (R. 192.3 RoP).

45. The prior facts which, according to MAGUIN, should have been brought to the attention of the Court at the stage of the presentation of its application by TIRU, in fact constitute information which did not have to be communicated to the Court under Rule 192.3 RoP.

46. This mainly concerns (i) an earlier patent cited in the contested patent and (ii) the technical specifications relating to the old incineration furnace which was replaced by the contested furnace on the same operating site.

47. The earlier patent, FR 2 350 136, filed on 5 May 1976, is cited in the contested patent (§ [0003]) as an example of known prior art for oscillating furnaces for burning solid waste with variable energy characteristics. Apart from the fact that this question is part of a substantive discussion relating to the assessment of the validity of the title, a document expressly cited in the contested patent cannot be considered as having to be disclosed in application of the principle of fairness set out in Rule 192.3 RoP.

48. As regards the old incineration furnace, dating from 1987 and referred to by the parties as the "Laurent Bouillet" furnace (MAGUIN exhibit no. 22), according to MAGUIN, it teaches the characteristics of the patent at issue, which is disputed by TIRU. However, the assessment of the relevance of a prior art remains within the jurisdiction of the trial court or, to a different extent, of the court competent to rule on applications for interim measures. Accordingly, it is not for the applicant for evidence preservation measures, at the application stage, to identify and communicate any prior information of which it may be aware, unless that information, for particular reasons, is of such a nature as to influence the *ex parte* decision to be taken. Nor is it for the judge responsible for ordering the preservation of evidence and the inspection of the premises to examine any prior information communicated to him, unless, for obvious reasons, it is of such a nature as to influence his decision.
49. The mere fact that TIRU was aware of the existence of the Laurent Bouillet oven, the accessibility of which to the public is also a matter of debate, is not sufficient to establish that the oven's characteristics - which, according to MAGUIN, are likely to predate the EP'578 patent - constitute a "material fact" (R. 192.3 RoP) that should have been disclosed by TIRU at the stage of its application. Notwithstanding MAGUIN's detailed arguments regarding the lack of novelty of patent EP'578, MAGUIN has not demonstrated any particular circumstances that could justify that the existence and characteristics of the Laurent Bouillet oven should have been disclosed by TIRU.
50. It follows from the foregoing that MAGUIN fails in its application to set aside the contested order.

Reimbursement of costs

51. As this order does not put an end to the case, it is not for the Court of Appeal to rule on the reimbursement of costs incurred by the parties.
costs incurred by the parties in the present order.

FOR THESE REASONS

The Court of Appeal dismisses the appeal.

Order given in Luxembourg on 15 July 2025.

**Emanuela
GERMANO**

Digitally signed by Emanuela GERMANO
Date: 2025.07.11 22:23:50
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For and on behalf of the President of the Court of Appeal Klaus Grabinski, in his absence

**EMMANUEL
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Emmanuel Gougé, legally qualified Judge and Judge-Rapporteur,

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Emanuela Germano, legally qualified Judge,

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