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Trolls Get Ease on Collaterals under German Procedural Law

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The Federal Supreme Court just handed down a long-expected judgment on the prerequisites under which a plaintiff has to provide a collateral for legal expenses. The result may encourage further trolls to use the German litigation system.

Background

Under Sec. 110 German Code of Civil Procedure (ZPO), a person who files a civil suit in Germany has to provide a collateral for legal expenses upon request of the defendant if the plaintiff does not have his main residence with the EU or the EEA. The purpose is to protect the defendant from **financial risks** that are typically involved in **collecting reimbursements** from plaintiffs outside the EU/EEA if the complaint is dismissed by the German courts.

Facts of the Case

In the case at hand, which concerns an NPE that sued a manufacturer of mobile devices for the alleged infringement of standard essential patents, the defendant had pleaded that the plaintiff did not have his **real place of business** inside the EU/EEA, even though his **formal registered domicile** was in Ireland. The parent company who eventually controlled the NPE's business was domiciled in the US. It had been subject to controversy whether the plaintiff performed at least some kind of administrative duties in Ireland or at other places within the EU/EEA.

In the second instance proceedings, witnesses were heard on miscellaneous issues. The witness testimony revealed that

– it is possible to **serve documents** on the plaintiff at its registered address in Ireland (the address of a law firm);

– the plaintiff has one **managing director** who lives in Finland and who claims to work for the company in his home office;

– the plaintiff originally had one additional managing director who lived in the US and acted as director only pro-forma;

– the plaintiff replaced the second managing director by another person in the course of the appeal proceedings; this other person lives in the city of the registered address in Ireland;

– originally, the plaintiff had rented a small flexible **office** inside a business center in the city of its registered domicile, which it used, inter alia, to forward mailings and packages; in the course of the appeal proceedings, the plaintiff rented a real office at another address, which it claims is used for the second managing director and other staff that has been hired in the meantime;

– it remained unclear how the **responsibilities** within the plaintiff were actually divided between the two managing directors and its parent company.

Decisions of the Lower Courts

The District Court and the Higher Regional Court both dismissed the defendant's request for a security.

The **District Court** simply referred to the **registered address** in Ireland which undisputedly actually existed and could be used to serve documents. According to the court, this was sufficient to have a domicile within the EU/EEA.

The **Higher Regional Court** took a closer look at the circumstances. It assumed that the existence of the registered EU-address as such would not be sufficient to establish a domicile in the sense of Sec. 110 ZPO. Instead, one would have to determine the **place of effective management**. Furthermore, if the registered place of business and place of actual administrative activity would diverge, as was the case with the registered domicile (Ireland) and the domicile of the first managing director (Finland), no real place of effective management in the terms of Sec. 110 ZPO would exist, thereby obliging the plaintiff to provide the requested security. However, in the case at hand, the witness testimony demonstrated that in the meantime at least one of the real managing directors was now working at a real office in the city of the registered address, which was located within the EU/EEA. The Higher Regional Court opined that this was sufficient to avoid the collateral obligation, no matter how much responsibility the second managing director actually had been attributed and whether this address could be considered to be the real center of administration.

Decision of the Federal Supreme Court

The **Federal Supreme Court** confirmed that the plaintiff was not obliged to provide a security for legal expenses. Irrespective of the registered domicile, which was not decisive for Sec. 110 ZPO, **all places** where **effective management** might be present (domicile / office of the first managing director or domicile / office of the second managing director) were **located within the EU**. The defendant's request was therefore unfounded irrespective of which of these two places would be the center of administration.

The Federal Supreme Court explicitly quashed the Higher Regional Court's approach that no place of effective management according to Sec. 110 ZPO might be present if the registered place of business and the actual place of business diverted. Accordingly, it is not necessary to perform the effective management at the registered domicile in order to escape the security obligation.

The decision leaves a number of questions unanswered, in particular how much responsibility needs to be borne inside the EU/EEA in cases where part of the management is domiciled outside. But the decision certainly **alleviates the burden for any plaintiff**, in particular for NPE's, when they try to establish a cheap and simple domicile just for litigation purposes.

Federal Supreme Court (BGH), decision of 21 June 2016, docket No. X ZR 41/15

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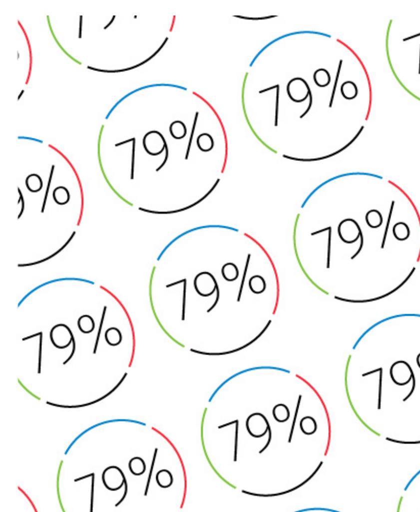

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