

Litigation in Germany - A Troll's Paradise?

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In Germany, the winning party is able to recover a significant amount of its costs from the losing party. This cost reimbursement, which is based on a statutory fee schedule, depends on the value of the case. The amount of recoverable fees can be quite significant; the maximum in infringement proceedings would be around slightly above 450,000 Euro in attorney's fees and court fees of 330,000 Euro. Thus it is not only important to win, but also to be able to successfully enforce the cost reimbursement claim after a victory. The winner typically could face two problems, often simultaneously. The enforcement may be difficult or even impossible if the losing party is domiciled abroad. Enforcement may be pointless, if the losing party has no significant funds or assets.

The winning party will be confronted with both problems in combination if the losing party is a limited liability company having a registered office abroad, in particular if it is merely a letterbox company with no significant funds. Such companies are often used by non-practicing entities (NPEs) exploiting patent portfolios.

Whereas the plaintiff is able to choose whom he sues, a defendant has no choice who to defend against. Since it is usually necessary as part of the typical defense to file a separate nullity action against the patent, the problem is even greater, as the fees in nullity proceedings are at least as high as in infringement proceedings, quite often even higher.

So there seems to be a misbalance here which could be seen as an invitation in particular for so-called trolls to litigate in Germany. If the NPE prevails, cost reimbursement is the cherry on the cake. If defendant prevails, it is unlikely that there will be a cherry on the cake; the cake will rather resemble a collapsed soufflé once plaintiff has filed for bankruptcy. Is there anything a defendant can do, if sued by a NPE with no apparent assets other than the patent?

Under sec. 110 German Code of Civil Procedure (ZPO), a plaintiff filing a civil suit in Germany has to provide a security for costs upon request of the defendant if the plaintiff does not have his main residence within the EU or the EEA. In one of our previous posts (September 1, 2016), we discussed a recent decision of the Federal Supreme Court (judgment of June 21, 2016, docket no: X ZR 41/15) in this respect, essentially paving the way for letterbox NPEs but still leaving some questions unanswered.

Now the first decision taking into account this ruling was rendered by the Appeal Court of Düsseldorf (judgment of March 16, 2017, docket no.: I-15 U 67/16).

The case is interesting because it shows on the one hand that Section 110 ZPO is not suitable to effectively protect defendant against asset-less plaintiffs but on the other hand could nevertheless be a significant obstacle for a letterbox company in German patent litigation. Plaintiff, a British limited liability NPE, had sued defendants for alleged patent infringement before the District Court of Düsseldorf in January 2015. The plaintiff's formal registered office - along with 22 other companies - was located at a residential house in London, UK, while its managing director permanently resided in Stockholm, Sweden. Defendants made a request for cost security to be provided by the plaintiff pursuant to sec. 110 ZPO, pleading that despite the plaintiff had its formal registered office within the EU, it did not have its center of effective management there. The defendants argued that the latter would determine the plaintiff's "main residence" within the meaning of sec. 110 ZPO; management activities could not be performed at the London letterbox-address due to lack of business premises and the fact that the managing director lived abroad.

The plaintiff argued that the business would mainly be run from Stockholm, where the plaintiff would also rent business premises. Its registered office in London would serve the purpose of providing an address where documents could be served, which would be the only legally relevant address for service.

By interim judgment, rendered prior to the Federal Supreme Court's decision, the District Court granted the defendants' request for cost security (750,000, 00 Euro!). The Court held that it could not establish a center of effective management within the EU/EEA. Such would require a certain organizational infrastructure, which could only be assumed where (i) there are premises where management bodies make actual business decisions and (ii) service of documents can be affected. Those prerequisites were not cumulatively met by either of the locations in dispute.

The plaintiff subsequently refused to comply with the interim judgment. Upon expiry of the set deadline to provide security, the District Court thus handed down a judgment declaring the plaintiff's action abandoned pursuant to sec. 113 sentence 2 ZPO.

Plaintiff successfully appealed. Although it was apparent from the published annual financial statements that the company did neither have assets nor liabilities and further facts indicated that the company was solely set up as Ltd. to mitigate the significant financial litigation risks, defendant's motion eventually failed, since he was not able to prove that the center of management was not in Sweden, the domicile of a sister company. However, the indications were significant enough for the court to hear a witness offered by defendant about the details of the arrangements made in Sweden. Since the witness confirmed some activities in Sweden, defendant lost the case, since both, the registered office and plaintiff's center of its effective business activities were located within the EU/EEA. Since the Federal Supreme Court had decided previously that the potential place of service and the domicile must not be the same, the Appeal Court reversed the first instance decision and remitted the case back to the first instance.

While defendant had eventually lost the procedural dispute, it was nevertheless worth the effort giving plaintiff a hard time. The case had been filed beginning of 2015. The Appeal Court rendered its decision in March 2017. Thus it took more than two years to resolve the procedural issue alone. It would have taken even longer, if defendant would have filed a further appeal with the Federal Supreme Court. In the meantime the nullity action progressed and is likely to be decided prior to the infringement case. Plaintiff could have easily avoided these delays if he had agreed to provide the security in the first place. This however, would have provided the desired protection for defendant.

It seems that it is rather pointless to raise such defense in future since the most important legal questions have been decided by the Federal Supreme Court and the Appeals Court. However, the Court left open whether the "main residence" of a company according to Section 110 ZPO is the registered office or the place of its effective management. The answer to this question is quite relevant for all companies having one of the two outside the EU/EEA which will soon be relevant for UK based companies, too.

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