

Will Brexit have an effect on pending litigation?

Kluwer Patent Blog
March 19, 2019

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Please refer to this post as: Thomas Musmann, "Will Brexit have an effect on pending litigation?", Kluwer Patent Blog, March 19, 2019, <http://patentblog.kluweriplaw.com/2019/03/19/will-brexit-have-an-effect-on-pending-litigation/>

It seems to be a more and more realistic scenario that the UK may leave the European Union on March 29, 2019 without an agreement. A lot has been written about the effect of such a "hard Brexit" on trade in general and –more interesting to us working in the patent field- on the future of the Unified Patent Court. But what effect, if any, will it have on litigation, in particular litigation which is already pending in Germany? In Germany, the losing party has to reimburse the winner the costs of the litigation i.e. statutory attorney's (and patent attorney's) fees and court fees. Although in comparison to other jurisdictions German the costs of patent infringement litigation is considered to be rather reasonable, nevertheless the overall exposure to costs over three instances can be quite significant, it can exceed 1 Million Euro.

The cost award as such is part of a judgement on the merits. The sum to be reimbursed will be determined in a separate cost reimbursement proceeding which eventually will result in an enforceable court order (Kostenfestsetzungsbeschluss).

Since it might be pretty difficult to enforce a cost award abroad, for instance in North Korea, German procedural law provides that plaintiffs from certain countries (such as North Korea) will have to provide a security for costs.

The relevant section of the German Code of Civil Procedure (ZPO) reads as follows:

(1) Plaintiffs who do not have their habitual place of abode in a Member State of the European Union or in a signatory state of the Agreement on the European Economic Area shall provide security for the costs of the proceedings should the defendant so demand.

(2) This obligation shall not be given:

- 1. Where, due to international treaties, no such security deposit may be demanded;*
- 2. Where the decision as to the defendant's reimbursement of the costs it has incurred in the proceedings would be enforced based on international treaties;*
- 3. Where the plaintiff possesses real estate assets, or claims secured in rem, in Germany that suffice to cover the costs of the proceedings;*
- 4. Where countercharges are brought;*
- 5. Where proceedings have been brought in the courts based on public notice given by a court.*

Provided the United Kingdom is leaving the EU on March 29, 2019 without a transition agreement, a plaintiff having its seat in Great Britain will no longer have its registered office in the EU or the EEA and thus will be liable for a security for costs, if none of the exemptions is applicable.

An exemption under no. 1 of paragraph 2 of Section 110 would be an agreement under international law. The Hague convention on Civil Procedure is such an agreement, which provides in Article 17 an exemption of the necessity to provide a security for costs (Hague Convention on Civil Procedure of 1 March 1954 (Federal Law Gazette II 1958, p. 576)). However, Great Britain is not a contracting state of the Hague Convention.

2) It is a question of quite practical relevance, how court orders, in particular monetary awards can be enforced in Great Britain after a "hard Brexit". If such claims would be enforced according to an international agreement in place with Germany (respectively the EU), the exemption of No. 2 would apply.

However, the Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001 Brussels Regulation) or the Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels Regulation) will no longer apply in case of a hard Brexit, as the UK is not a member state any more.

Maybe the UK would at least be treated like Switzerland or Norway. These countries, although not member of the EU, are covered by the Lugano convention, which provides basically the same status as the Brussels Regulation. However, the EU and the EEC member states are contracting parties of this convention, the UK is not.

Eventually one may consider whether old international agreements of the UK which have been concluded prior to the UK becoming a member of the EU would be applicable. With respect to the enforcement of civil court decisions this would be the German-British Agreement of 14.07.1960 on the mutual recognition and enforcement of judgments in civil and commercial matters (published in Federal Law Gazette, BGBl. II 1961, p. 301). However, this agreement was replaced by Brussels Regulation (EU) No 1215/2012. The same is true for the previous Brussels Convention, which was only applicable to member states anyway.

Therefore plaintiffs having their registered office in the UK will have to provide a security for costs if they are plaintiff in a German Civil Procedure. This will also apply to nullity actions filed with the Federal Patent Court.

Defendants can request a security for costs in already pending proceedings. Since hard Brexit is a serious option, such requests can already be filed now.

There are certainly more important consequences of a hard Brexit than the necessity to provide a security for costs in German litigation. However, it is sad that after a hard Brexit our friends and partners from UK are treated like North Korea, at least when it comes to the security for costs.