

Deckblatt Übersetzung

Daten der Übersetzung:

Court/Gericht:	Bundesgerichtshof
Date of Decision / Datum der Entscheidung:	2020-11-17
Docket Number / Aktenzeichen:	X ZR 132/18
Name of Decision / Name der Entscheidung:	Kranarm



Arbeitskreis
Patentgerichtswesen
in Deutschland e.V.



FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

JUDGMENT

X ZR 132/18

Pronounced on:
17 November 2020
Zöller
Judicial Secretary as
Clerk of the Court
Registry

in the matter

Kranarm/Crane arm

Patent Act Sec. 14; EPC Art. 69(1); Protocol on the interpretation of Article 69 EPC Art. 2

An embodiment which has a deviating design instead of a feature provided for in the patent claim cannot, without further ado, be regarded as having the same effect because the protection of a hose line sought by the patent is not achieved in the section of the line provided for in the patent claim, but is achieved in another section.

Federal Court of Justice, judgment of 17 November 2020 – X ZR 132/18 –
Higher Regional Court of Munich
Regional Court of Munich I

ECLI:DE:BGH:2020:171120UXZR132.18.0

The X. Civil Senate of the Federal Court of Justice, following the oral hearing on 17 November 2020, attended by the presiding judge Dr. Bacher, the judges Dr. Grabinski and Hoffmann, the judge Dr. Kober-Dehm and the judge Dr. Rensen

ruled that:

On appeal by the defendant, the judgment of the 6th Civil Senate of the Higher Regional Court of Munich of 17 May 2018 is set aside on the issue of costs and insofar as it was found against the defendant.

The matter is referred back to the Court of Appeal for a new hearing and decision, including on the costs of the appeal.

By operation of law

Facts of the case:

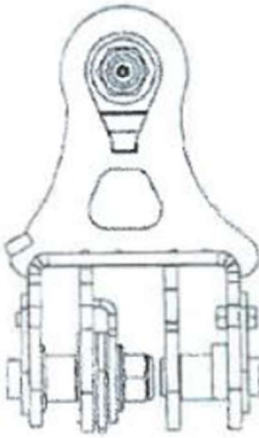
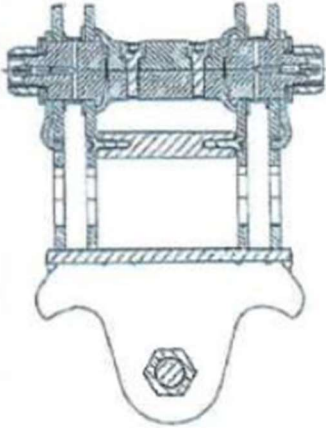
- 1 The plaintiff is the proprietor of European patent 1 889 808 (patent in suit), filed on 3 April 2006, and granted on 9 September 2009, with effect in the Federal Republic of Germany, which relates to a crane arm with an attachment device for work equipment. The sole claim of the patent in suit reads in the language of the proceedings:

Crane arm with a fastening device for implements, wherein the fastening device has pivot joints spaced along a vertical axis with a pivot joint on the crane arm side and a pivot joint on the implement side in the manner of a cardan joint, the axes of rotation of which are arranged perpendicular to one another, wherein hose lines lead from the crane arm to connections on a rotator arranged between the implement and the implement-side swivel joint, and wherein the crane-arm-side swivel joint has two spaced-apart swivel bearings along its axis of rotation, and the hose lines run from the crane arm to the connections between the two swivel bearings, characterized in that the connections (8) for the hose lines (7) are arranged on the side (1a) of the fastening device (2) facing the crane arm (1), and the hose lines (7) run past this swivel joint offset in the direction of the axis of rotation of the swivel joint on the implement side.

- 2 Defendant 1, whose managing director is Defendant 2, sells crane arms in Germany.

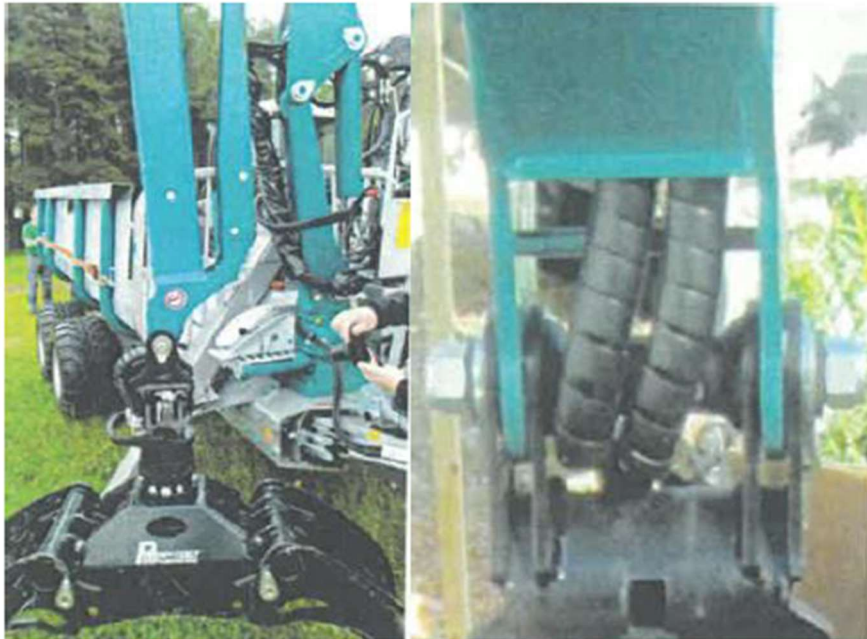
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A crane arm (attached embodiment 1) offered, inter alia, at the Interforst 2014 trade fair, has a swivel joint shown in the photographs and schematic drawings reproduced below.



4

A crane arm (attacked embodiment 2) offered, inter alia, at the Elmia 2013 trade fair, has a swivel joint shown in the photographs reproduced below.



5 In both embodiments, the space between the two bearing bushings of the swivel joint on the crane arm side is occupied by a component - referred to by the plaintiff as a rotary axis or cylindrical element and by the defendants as a sleeve - which connects the two swivel bearings and tapers towards the center from both sides. The challenged embodiment 1 also has, below the component connecting the two pivot bearings, another component referred to by the plaintiff as a sleeve and by the defendants as a pin. The hydraulic hose lines, which are sheathed in the challenged embodiment 2, are routed around the component connecting the two pivot bearings in both embodiments. In this section, the lines run on the side of the attachment device facing away from the crane arm (outside). Following this, they continue on the side of the fastening device facing away from the crane arm (inside). In embodiment 1, they run on this side past the sleeve located below the swivel joint.

6 The plaintiff has argued that the challenged embodiments realize all features of the claim of the patent in suit literally, or at least by equivalent means.

7 The Regional Court dismissed the action for injunctive relief, rendering of accounts, reimbursement of pre-judicial attorney's fees, determination of the obligation to pay damages and, against the first defendant, additionally for destruction and recall. On appeal by the plaintiff, the Court of Appeal essentially ruled in favor of the defendants. The defendants have appealed against this ruling in an appeal allowed by the Senate, which the plaintiff opposes.

Grounds of the decision:

8 The admissible appeal is well-founded and leads to the case being referred back to the Court of Appeal.

9 I. The patent in suit relates to a crane arm with an attachment device for implements.

10 1. According to the statements in the patent in suit, such crane arms are typically used in mobile applications for loading bulky cargo such as tree trunks or pipelines and in stationary applications often in scrapping plants, waste incineration plants or in the construction industry.

11 In most cases, the rotator and work equipment would be operated by a hydraulic device. Therefore, hydraulic hoses lead from the crane arm to the rotator, while the actual control unit, hydraulic reservoir, hydraulic pumps and other components of the device are located at the other end of the crane arm, from where control by a user also takes place. The advantage of the crane arm disclosed in U.S. patent application 2005/0017528 is that the hose lines leading from the crane arm to the rotation device cannot easily be damaged from the outside, thus preventing leakage of the hydraulic fluid and the associated impairment of the function of the crane arm.

12 2. The patent in suit concerns the technical problem of making the universal joint as stable as possible overall and making the connections for the hose lines easily accessible without impairing the protection of the hose lines from external damage.

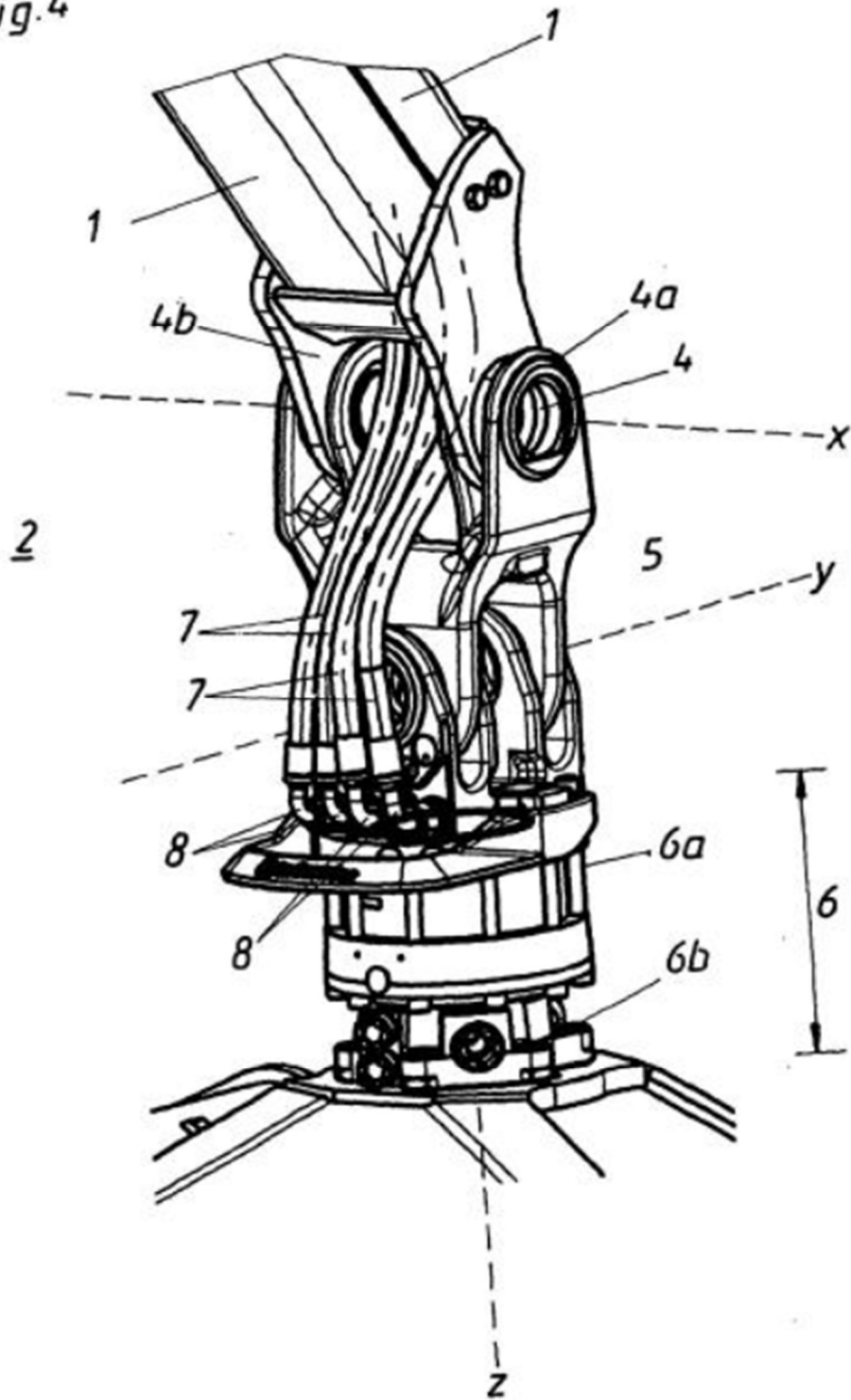
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3. To solve this problem, the patent in suit proposes a crane arm whose features can be structured as follows (deviating structure of the Court of Appeal in square brackets):

1. the crane arm [0] has an attachment device for implements [1].
2. the attachment device has:
 - 2.1 a swivel joint on the crane arm side and a swivel joint on the implement side in the manner of a cardan joint [2.1; 2.2; 2.3],
 - 2.1.1 which are spaced along a vertical axis [2],
 - 2.1.2 whose axes of rotation are perpendicular to each other [2.4],
 - 2.1.3 the rotator joint on the crane arm side having two spaced rotator bearings along its axis of rotation [4];
 - 2.2 a rotator arranged between the implement and implement-side swivel joint [3];
 - 2.3 connections for hose lines arranged on the side of the attachment facing the crane arm [6];
3. hose lines run from the crane arm to the connections on the rotator [3], namely
 - 3.1 between the two pivot bearings of the rotator joint on the crane arm side [5] and
 - 3.2 offset in the direction of the axis of rotation of the swivel joint on the working side past this swivel joint [7].

4. An example of an embodiment is shown in the following Figure 4.

Fig.4



15 The description of the patent in suit attaches particular importance to the arrangement of the connections for the hose lines and the passing of the hose lines on the side facing the crane arm, i.e. features 2.3 and 3.1, in order to shield the hose lines from external influences and to protect them, for example, from getting caught on a tree or being damaged by a sharp object (para. 6).

16 II. The Court of Appeal has justified its decision essentially as follows:

17 The Regional Court had correctly denied a literal infringement of the patent in suit. In the challenged embodiments, the hose lines did not run - as required by feature 3.1 - between the two pivot bearings of the pivot joint on the crane arm side. The skilled person would, even if the arrow of the reference sign 4b in Figure 4 of the patent in suit was not clear in this respect, refer to the term "pivot bearing" to the actual pivot bearing of the pivot joint, i.e. only to the component which enabled the rotational movement of the link plate and rod about a rotational axis, and not also to further components such as the plate-shaped support devices which ran vertically to the rotational axis of the pivot joint. Thus, in claim 1 as well as in the description of the patent in suit, a differentiation is made between the terms rotary axis, rotary joint and rotary bearing. According to the task of the patent in suit, the hose lines should be guided as centered as possible - as exemplarily shown in figures 3 and 4 of the patent in suit - and at the same time it should be avoided that the hose lines run on the side facing away from the crane arm in order to protect them from damage by external influences. Accordingly, feature 3.1 was to be interpreted functionally with the Regional Court to the effect that the hose lines had to run through the area determined by the cross-section of the two spaced pivot bearings of the pivot joint on the crane arm side and extending as a cylindrical space from one pivot bearing to the other. The skilled person would also take this from the description of the patent in suit, where it is stated with reference to Figure 3 that the hose lines protrude or run between the two pivot bearings arranged on the axis of rotation of the pivot joint on the crane arm side. This is not to be equated with the lines projecting or running between the rest of the swivel joint, including its plate-shaped support devices or lugs. In the challenged embodiments, the hose lines are routed around the component located in the space between the two pivot bearings - referred to by the plaintiff as the pivot

axis and by the defendants as the sleeve. Thus, they did not run through this space itself.

18 The challenged embodiments, however, realized claim 1 of the patent in suit by equivalent means. The required equivalent effect was - contrary to the assumption of the Regional Court - present. The fact that in the challenged embodiments the hose lines are routed around the separate component between the two pivot bearings limits the protection of the hose lines intended, inter alia, by feature 3.1, insofar as the hose lines are routed over a short distance on the side of the fastening device facing away from the crane arm. Also, the advantage of the solution according to the invention, according to which the hose lines guided between the two pivot bearings are freely movable and flexible in order to be able to better avoid obstacles and to escape imminent damage, is achieved only to a limited extent, since the hose lines in the challenged embodiments are not flexible. However, this does not prevent the affirmation of a simultaneous effect, since the effect of improved accessibility according to the invention, while maintaining the protection of the hose lines from damage by external influences, is still achieved in the challenged embodiments in a decisive manner by the fact that the hose lines, after being guided around the component between the pivot bearings, are subsequently guided again on the side of the fastening device facing the crane arm between the two plate-shaped support devices running vertically to the axis of rotation. Contrary to the opinion of the Regional Court, the fact that in the challenged embodiments the hose lines were not shortened to the maximum achievable dimension and the loop formation during rotary movements was not minimized as far as possible did not lead to a different assessment, since these advantages were not reflected in the patent in suit.

19 The skilled person had been able to find the modified embodiments at the time of priority without inventive considerations as having the same effect. He had been able to take from US patent application 2005/0017528 that the guidance of the hose lines on the side of the fastening device facing the crane arm contributed to its protection. It was therefore obvious to him to achieve the effects of the patent by first guiding the hose lines around the component connecting the pivot bearings, but otherwise, as provided in the patent in suit,

on the side of the fastening device facing the crane arm. The challenged embodiment 1 realizes this particularly conspicuously in that the sleeve enables counterguidance and thus ensures particularly tight guidance of the hoses on the side facing the crane arm. However, the challenged embodiment 2 also shows a radially and axially narrow guidance of the hose lines on the side of the fastening device facing the crane arm.

20 The required equivalence of the means is also given. The challenged embodiments were oriented to the teaching protected in the patent claim, since they had adopted the solution according to the invention of providing both the guidance of the hose lines and the arrangement of the connections on the rotator on the side of the fastening device facing the crane arm in order to protect the hose lines from external damage.

21 The "molded stone" objection raised by the defendants was unfounded. The witness V. had not been able to provide any information from his own perception regarding the defendants' claim, which had been put in evidence, that the harvester A91 with the features of the challenged embodiments had been publicly exhibited at a trade fair in Lucerne in August 2003. As far as the witness had referred to statements of employees of M. AG concerning the design of the Harvester A91, these statements - assuming that the witness V. had also perceived these statements - could have an indicative effect for the fact to be proven as hearsay statements. However, there were insufficient additional connecting factors to support such an indicative effect. The defendants had not submitted any documents which documented the design of the harvester A91 before the priority date of the patent in suit. Neither the documents submitted by the defendants at first instance nor the appendices B3 and B4 submitted in the appeal proceedings show how the harvester A91 was designed in the features that are decisive in the dispute. Insofar as the defendants had made the content of the statement of the employee L. of M. AG submitted by the witness V. in the oral hearing the subject of their presentation, this was also not sufficient to prove that the Harvester A91 had been exhibited at the trade fair in 2003 and had been designed according to the alleged features, since the plaintiff had denied this. It is true that the statement of a witness can be used and evaluated by way of documentary evidence. However,

the probative value of such a statement was low if it reflected a statement made by a witness not in formal proceedings but to a party. If the document was drawn up for the purpose of submission to the court, the statement could not replace the witness evidence anyway. The defendant had not named any employees of M. AG who could be considered as direct witnesses.

22 III. This assessment does not withstand review under the law of
review in one decisive point. 1.

23 1. The Court of Appeal did not err in law in denying a literal
infringement of the patent in suit.

24 a) According to the established case law of the Senate, the decisive
factor for the interpretation of a patent is not the linguistic or logical-scientific
meaning of the terms used in the patent claim, but their technical meaning,
which is to be determined taking into account the task and solution as they
objectively result from the patent (cf. only Federal Court of Justice, judgment of
November 12, 1974 - X ZR 76/68, GRUR 1975, 422, 424 - Streckwalze;
judgment of March 2, 1999 - X ZR 85/96, GRUR 1999, 909, 912 -
Spannschraube).

25 The decisive factors are the meaning of a patent claim in its entirety and
the contribution of the individual features to the performance result of the
patented invention. In determining the meaning of the patent claim, the
description and the drawings must also be taken into account (Art. 69(1) EPC),
which explain and illustrate the technical teaching of the patent claim (see
Federal Court of Justice, judgment of July 17, 2012 - X ZR 117/11, BGHZ 194,
107 marginal no. 27 = GRUR 2012, 1124 - Polymerschaum I; judgment of
September 24, 2019 - X ZR 62/17, GRUR 2020, 159 marginal no. 18 -
Lenkergetgetriebe).

26 b) The interpretation of the patent claim by the Court of Appeal meets
these legal requirements.

27 The Court of Appeal rightly took into account that both the claim and the
description of the patent in suit differentiate between the terms pivot bearing,
pivot joint and pivot axis and that the term pivot bearing merely designates a

component of the pivot joint, which may also comprise other components such as lugs, rods and bolts. It correctly deduced from this that only the actual bearing and thus the component of the swivel joint that enables the rotational movement of the link and rod about a rotational axis is to be regarded as a swivel bearing within the meaning of these explanations.

28 The Court of Appeal was also correct in taking into account the information contained in the patent specification concerning the task and the function of the features. Its conclusion derived from this that it is not sufficient for the realization of feature 3.1 if the hose lines do not run between the two pivot bearings, but only between other components of the pivot joint on the crane arm side, is not objectionable against the background shown.

29 Moreover, this understanding is consistent with the drawings in the patent application, in which the hose lines run without exception through the area between the two bearing bushings.

30 Against this background, the Court of Appeal rightly did not attach any decisive significance to the fact that in Figure 3 of the patent application the arrow of reference numeral 4b and in Figure 4 the lines of reference numerals 4a and 4b are not drawn through to the bearing bushes. The form of representation chosen in the drawings offers no indication for the assumption that each arrow or line leads exactly to the part marked with the respective reference sign.

31 c) Contrary to the opinion of the appellate opposition, the Court of Appeal did not need to obtain the expert opinion offered by the applicant on the question of how feature 3.1 is to be interpreted.

32 How a patent is to be interpreted is a question of law. Therefore, the interpretation is fully reviewable by the appellate court (see only Federal Court of Justice, judgment of May 18, 1999 - X ZR 156/97, BGHZ 142, 7, 15 - Räumchild). The judge of fact may not leave the judicial task of interpreting the patent claim to a judicial expert.

33 As the appellant correctly argues, the understanding of the skilled person of the terms used in the patent claim and of the overall context of the patent

claim does form the basis of the interpretation. However, this only means that the judge of fact may have to call upon expert assistance when considering the question as to which objective technical circumstances, which prior understanding of those skilled in the relevant field, which knowledge, skills and experience and which methodical approach of these skilled persons may determine or at least influence the understanding of the patent claim and the terms used therein (Federal Court of Justice, judgment of October 11, 2005 - X ZR 76/04 - BGHZ 164, 261 = GRUR 2006, 131 marginal no. 19 - Seitenspiegel).

34 In the case in dispute, the Court of Appeal deviated from the submissions submitted in evidence only with regard to the question whether the term "rotary bearing" is used in the patent in suit in a sense deviating from the basic understanding of the skilled person. This question is a question of law and therefore not amenable to expert evidence.

35 d) The appeal objection is likewise wrong in claiming that it does not follow from the findings of the Court of Appeal that in the challenged embodiments the space between the two pivot bearings is completely filled by the pivot axis or sleeve.

36 The Regional Court, which the Court of Appeal agreed with in this respect, already found that the component in question completely fills the space between the two pivot bearings.

37 Contrary to the opinion of the appellant, this finding is consistent with the photographs reproduced above. It is indeed evident from these that the diameter of the component connecting the two pivot bearings, described by the plaintiff as the pivot axis and by the defendants as the sleeve, tapers towards the center. From this, however, the conclusion cannot be drawn that the diameter of the pivot bearing corresponds to the diameter that the pivot axis or sleeve has at its two ends. On the contrary, all illustrations indicate that the rotary axis or sleeve covers the rotary bearing in this area, i.e. it has a larger diameter.

38 2. The reasoning with which the Court of Appeal affirmed an infringement of the patent in suit by equivalent means is, however, not capable of supporting the contested decision, as the appeal rightly asserts.

39 a) For an embodiment deviating from the literal sense of the patent claim to fall within its scope of protection, three requirements must be fulfilled as a rule:

40 The embodiment must solve the problem underlying the invention by modified but objectively equivalent means. Furthermore, the skilled person must be able to identify the modified embodiment with its deviating means as having the same effect. Finally, the considerations which the skilled person must make in this respect must be oriented to the meaning of the teaching protected in the patent claim (see only Federal Court of Justice, judgment of March 12, 2002 - X ZR 168/00, BGHZ 150, 149, 154 - Schneidmesser I; judgment of April 17, 2007 - X ZR 1/05, GRUR 2007, 959, 961 - Pumpeinrichtung).

41 b) In the case in dispute, an objective equal effect cannot be affirmed with the reasoning given by the Court of Appeal.

42 aa) For the question of equal effect it is decisive which individual effects the features according to the patent provide - individually and as a whole - for solving the task underlying the patent claim and whether these effects are achieved by other means in the attacked embodiment.

43 Accordingly, it is necessary to examine the patent claim to determine which of the effects that can be achieved with its features must come together in accordance with the patent in order to solve the underlying problem. This totality represents the patented solution and therefore constitutes the relevant effect for the comparison to be made (Federal Court of Justice, judgment of June 28, 2000 - X ZR 128/98, GRUR 2000, 1005, 1006 - Bratgeschirr; judgment of July 17, 2012 - X ZR 113/11, GRUR 2012, 1122 marginal no. 19 - Palettenbehälter III). An embodiment can only be considered to have the same effect if it not only essentially achieves the overall effect of the invention, but also achieves precisely that effect which the feature not realized according to the literal meaning is intended to achieve (Federal Court of Justice, GRUR 2012, 1122 marginal no. 26 - Palettenbehälter III).

44 bb) The overall effect to be achieved by the patent in suit consists in the improved accessibility of the connections for the hose lines and the protection of the lines from damage by external influences.

45 This effect is achieved, on the one hand, by the fact that the connections for the hose lines according to feature 2.3 are arranged at a location which is easily accessible but nevertheless protected against external influences, and, on the other hand, by the fact that the hose lines according to feature group 3 are guided through areas which also offer protection against external influences, namely at the locations designated in features 3.1 and 3.2, i.e. in the area of the two swivel joints.

46 cc) Against this background, contrary to the opinion of the Court of Appeal, it is not sufficient for a simultaneous effect that the hose lines are protected against external influences only in the further course by components of the crane arm, but not in the area of the swivel joint on the crane arm side.

47 However, an embodiment which has a deviating design instead of a feature provided for in the patent claim does not fall within the scope of protection of a patent only if it achieves the effects according to the invention without any limitation. Rather, it may be sufficient for an equal effect that an effect required by the patent claim is achieved by modified means only to a limited extent. From the point of view of appropriate reward of the inventor, inclusion in the scope of protection of a patent may already be appropriate if the effects according to the invention are essentially achieved, i.e. to a practically still considerable extent. This depends on the effect according to the patent and a weighting of the deficiencies found in the challenged embodiments based on this (Federal Court of Justice, judgment of 2. March 1999 - X ZR 85/96, GRUR 1999, 909, 914 - Spannschraube; Federal Court of Justice, GRUR 2005, 1005, 1006 - Bratgeschirr; Federal Court of Justice, GRUR 2012, 1122 marginal no. 27 Palettenbehälter III; judgment of January 13, 2015 - X ZR 81/13, GRUR 2015, 361 marginal no. 25 - Kochgefäß).

48 In the case in dispute, the required effects include not only that the hose lines are protected from external influences at individual points by components

of the crane arm, but also that such protection exists precisely in the area of the swivel joint on the crane arm side.

49 That this effect occurs in the challenged embodiments does not result from the findings of the Court of Appeal. On the contrary, the Court of Appeal found that the hose lines in the area of the swivel joint on the crane arm side are located on the side facing away from the crane arm and are only passed through between components of the crane arm in the further course. Protection at other points cannot replace the protection provided by feature 3.1 in the area of the slewing joint on the crane arm side. It is therefore not sufficient to affirm a simultaneous effect.

50 IV. The case is not ready for final decision.

51 1. On the basis of the findings of the Court of Appeal, it cannot be ruled out that sufficient protection of the hose assemblies for a simultaneous effect is also achieved in the area of the swivel joint on the crane arm side in the challenged embodiments.

52 The aforementioned finding that the hose lines are located in the area of the crane arm-side swivel joint on the side facing away from the crane arm does indeed indicate that there is insufficient protection in this area. However, the Court of Appeal did not deal with this question conclusively - logically from its point of view - because it considered protection in other areas to be sufficient.

53 2. In this initial situation, a new assessment by the court of facts is required.

54 a) A statement as to whether a deviating design falls within the scope of protection can regularly only be made if the judge of the facts has dealt with the relevant issues. This is because the question of equal effect is a question whose answer requires an assessment by the judge of the facts and findings which cannot be made up for in the appeal instance. The question of the equivalence of the deviating means does indeed concern a question of law that is amenable to review on appeal. However, it depends decisively on the factual basis to be initially clarified in the court of fact (Federal Court of Justice,

judgment of 14 December 2010 - X ZR 193/03, GRUR 2011, 313 marginal no. 36 - Crimpwerkzeug IV).

55 It is true that a remittal is not necessary if the party suing for patent infringement cannot show in the appeal proceedings that it would have presented the factual prerequisites of an equivalent infringement in response to a corresponding reference in the appeal proceedings and is thus in a position to present and, if necessary, prove these prerequisites in reopened appeal proceedings (Federal Court of Justice, GRUR 2011, 313 marginal no. 40 - Crimpwerkzeug IV). In the case in dispute, however, the appeal rejection has shown circumstances that make a renewed factual assessment appear necessary.

56 b) The appellant claims that in the area of the swivel joints on the crane arm side, the hose lines are protected in both challenged embodiments by the fact that they are placed closely against the cylindrical component arranged between the swivel bearings and connecting them and therefore do not protrude far beyond both swivel joints. In the challenged embodiment 1, additional protection is achieved by the further component inserted below the component connecting the pivot bearings, by means of which the hose lines are led directly to the connections on the rotator.

57 aa) As the Court of Appeal correctly pointed out in another context, this design cannot be regarded as having the same effect simply because it permits short routing of the lines.

58 A short length of the lines may indeed contribute to a protection of the lines. However, this aspect is not reflected in patent claim 1. Moreover, as the Court of Appeal also correctly pointed out, the cable routing provided for in feature group 3 does not lead to a maximum shortening of the cable length.

59 bb) However, an equal effect can be considered because the close contact of the lines with the component arranged in the area of the pivot bearing, which in the challenged embodiment 1 is additionally supported by the additional component arranged below this component, could have the effect that the hose lines are sufficiently protected against external influences. Such an embodiment

could possibly be oriented to the patent claim because it also makes use of the circumstance that individual components of the swivel joint offer good protection against external influences.

60 cc) Whether the additional sheathing of the hose lines in the challenged embodiment 2 provides comparable protection does not need to be decided.

61 Even if this question were to be answered in the affirmative, there would in any case be no orientation to the patent claim, because the protection is not achieved by the course of the lines and certain components of the crane arm, but by a special design of the hose lines themselves.

62 3. Should the Court of Appeal again come to the conclusion that feature 3.1 is realized by equivalent means, it will have to deal again with the objection raised by the defendant that the attacked embodiment is anticipated by the state of the art.

63 Contrary to the opinion of the Court of Appeal, the written statement submitted by the witness V. and taken up by the defendant is not per se unsuitable as evidence.

64 In principle, a party is free to select the means of evidence with which it wishes to prove an assertion. This includes the possibility of not calling a third party as a witness, but instead relying on his statement recorded in another proceeding or on a written statement made by him by way of documentary evidence - even if the statement was made for presentation in the pending legal dispute. The possibly lower probative value in comparison to witness evidence, which is based, among other things, on the lack of the possibility of inquiries, remonstrances and, if applicable, connecting factors for an assessment of credibility, must be taken into account within the framework of the assessment of evidence. In addition, the other side is free to offer to examine the third party as a witness for the purpose of counter-evidence. Only in the latter constellation can written statements or statements recorded in other proceedings not replace the examination of the witness (see only Federal Court of Justice, judgment of 13 February 2007 - VI ZR 58/06, NJW-RR 2007, 1077 Rn. 16 ff; judgment of 30

November 1999 - VI ZR 207/98, NJW 2000, 1420, 1421; judgment of 13 June 1995 - VI ZR 233/94, NJW 1995, 2856, 2857; judgment of 22 October 1969 - VIII ZR 221/67, MDR 1970, 135).

65 In the case in dispute, the Court of Appeal would therefore have had to deal with the question of whether the written statement provided sufficient indications of the truth of the allegations put in evidence. In doing so, it could and had to take into account that the probative value of a document is often low if it reflects the statement of a witness made to a party rather than obtained in formal proceedings (Federal Court of Justice, judgment of 13 February 2007 - VI ZR 58/06, NJW-RR 2007, 1077 margin no. 17). However, this aspect does not justify disregarding the document from the outset because it was only drawn up for submission to the court and the person making the statement was not named as a witness.

66 V. Accordingly, the judgment on appeal must be set aside and the case referred back to the Court of Appeal.

Bacher

Grabinski

Hoffmann

Kober-Dehm

Rensen

Previous instances:

Regional Court of Munich I, judgment of 3 February 2017 – 21 O 23358/14 –
Higher Regional Court of Munich, judgment of 17 May 2018 – 6 U 997/17 –