

Deckblatt Übersetzung

Daten der Übersetzung:

Court/Gericht:	Bundesgerichtshof
Date of Decision / Datum der Entscheidung:	2020-01-14
Docket Number / Aktenzeichen:	X ZB 33/19
Name of Decision / Name der Entscheidung:	Akteneinsicht XXIV



Arbeitskreis
Patentgerichtswesen
in Deutschland e.V.



FEDERAL COURT OF JUSTICE

ORDER

X ZR 33/19

of

14 January 2020

in the matter

Akteneinsicht XXIV/
Inspection of files XXIV

Code of Civil Procedure Sec. 299(1)

- a) In principle, all pleadings and documents kept by the court in connection with the legal dispute belong to the case files within the meaning of section 299 (1) Code of Civil Procedure.
- b) An exception to this rule shall apply if the court has refrained from disclosing the documents to the other party in view of a reservation made by one of the parties when the documents were lodged.

Federal Court of Justice, order of 14 January 2020 - X ZR 33/19 –

Higher Regional Court of Düsseldorf

Regional Court of Düsseldorf

The X. Civil Senate of the Federal Court of Justice ordered on 14 January 2020 by the judge Dr. Bacher, the judges Dr. Kober-Dehm, Dr. Marx and Dr. Rombach as well as the judge Dr. Rensen,

that:

The defendant's appeal against the refusal of access to the documents referred to in the applicant's pleading of 2 September 2019 is dismissed.

Grounds:

- 1 I. The plaintiff claims the defendants for infringement of a patent relating to a mobile radio system.
- 2 The Regional Court granted the claim for information, rendering of accounts and determination of the obligation to pay damages in its entirety. The Court of Appeal dismissed the action with regard to part of the claim for accounting and dismissed the further appeal of the defendant (Higher Regional Court of Düsseldorf, judgment of 22 March 2019 - 2 U 31/16; GRUR-RS 2019, 6087). The parties and the intervener of the plaintiff object to this with an appeal and a complaint of non-admission.
- 3 In the files sent by the Court of Appeal there is a volume of documents marked 'confidential' which contains a pleading and annexes submitted by the applicant as part of its response to the appeal. The plaintiff has marked some pages of that pleading and some of those annexes as 'strictly confidential'; at the same time, it has asked, mutatis mutandis, that the parts so marked be passed on only to certain persons and that they be bound to confidentiality.
- 4 The Court of Appeal rejected this request by order of 14 December 2016 and ordered the plaintiff to exchange the submitted documents for a partially redacted copy. The plaintiff then stated that - in addition to the complete version - it had already submitted a partially redacted copy of the documents in question to the court.
- 5 By order of 17 January 2017, the Court of Appeal ordered that the parts

marked as strictly confidential should only be brought to the attention of the intervener's legal representatives and that those representatives should also be obliged to maintain confidentiality vis-à-vis the intervener, and that a confidentiality agreement with a more detailed content seemed appropriate with regard to the defendants. Such an agreement was not subsequently concluded and the unredacted documents were not handed over to the defendants.

6 At the plaintiff's request, the registry of the Federal Court of Justice made the court files available to the plaintiff's counsel, together with the unredacted documents. The plaintiff opposed the provision of these documents to the defendant's counsel. The court registry provided the defendant's representative with the files without these documents after enquiring with the presiding judge.

7 The defendants request that they be granted access to the documents, which have not yet been submitted. The plaintiff opposes this.

8 II. The defendant's application is admissible pursuant to Sec. 573 Code of Civil Procedure and is also admissible in other respects. It is unsuccessful on the merits.

9 1. The application is admissible as a reminder against the decision of the court registry pursuant to Sec. 573(1) sentence 1 and (3) Code of Civil Procedure.

10 The admissibility of the reminder is not precluded by the fact that the decision of the Registry was made by order of the presiding judge of the Senate. Admittedly, according to Sec. 573(1) Code of Civil Procedure, a reminder is only admissible against decisions of a delegated or requested judge or of the clerk of the court, but not against decisions of the presiding judge. According to this, a reminder against the decision to grant file inspection only at the court's premises is not admissible because the decision to send it to another place is left to the discretion of the presiding judge (Federal Court of Justice, order of 1 February 2012 - V ZB 254/11, BeckRS 2012, 3792). By contrast, the decision on whether to grant access to the file at all is incumbent

on the court registry in cases under Sec. 299(1) Code of Civil Procedure. The possibility of a reminder thus opened is not eliminated by the fact that the registry obtains an order of the presiding judge prior to its decision.

11 It can be left open whether something different applies if the presiding
judge issues a decision directly to the applicant. In the case in dispute, the
order of the presiding judge was not notified to the respondents. Rather, the
decision was issued to them by the office.

12 2. The reminder is unfounded.

13 The defendants have no right to inspect the documents at issue
because they have not become part of the court file and the plaintiff has not
consented to their disclosure to the defendants without specific confidentiality
measures.

14 a) Pursuant to Sec. 299(1) Code of Civil Procedure, the parties may
inspect the case files. Pursuant to Sec. 555(1) Code of Civil Procedure, this
provision applies mutatis mutandis in appeal proceedings.

15 In principle, all pleadings and documents kept by the court in
connection with the legal dispute belong to the case file. In the appellate
courts, this also includes the documents produced in the lower courts to which
this requirement applies. These are essentially the pleadings submitted by the
parties together with annexes and the documents produced in the court itself.
Files from other court or official proceedings, however, do not belong to the
case files (Federal Court of Justice, judgment of 18 October 1951 - IV ZR
152/50, NJW 1952, 305, 306).

16 b) In the case in dispute, it is not a question of files that have been
subpoenaed, but of documents that the plaintiff has submitted. Nevertheless,
these do not fall under the facts of Sec. 299(1) Code of Civil Procedure
because the plaintiff only submitted them with reservation and the Court of
Appeal refrained from passing them on to the defendants with regard to this
reservation.

17 Pursuant to Sec. 299(1) Code of Civil Procedure, a party's right of inspection does not depend on the consent of the other parties or other parties to the proceedings. However, a distinction must be made between this and the upstream question of the conditions under which a document submitted by a party is to be included in the trial file and thus covered by the subject-matter of the right of inspection.

18 The question as to which documents are to be included in the case file is in principle not subject to the decision of the parties, but to that of the court. The court, in turn, must in principle include in the case file all documents submitted by a party or other persons in connection with the proceedings in question. However, if a party indicates when submitting documents that they are to be made accessible to the opposing party only under certain conditions, these do not become part of the case file if the court refrains from disclosing them to the opposing party with regard to this reservation.

19 However, a party who wishes to provide certain information to the opponent only if special measures are taken to maintain secrecy has the option to initially submit only a partially blackened version of the relevant documents and to request the court to order appropriate secrecy measures (Higher Regional Court of Düsseldorf, judgment of 25 April 2018 - 2 W 8/18, juris, margin no. 7). If it submits the documents without appropriate security measures, it must generally expect that these will be made available to the other parties to the proceedings irrespective of its own trade and business secrets contained therein (Higher Regional Court of Düsseldorf, 2 W 8/18, juris, marginal no. 8; cf. also OLG Munich, Order of 8 November 2004 - 29 W 2601/04, NJW 2005, 1130, 1131).

20 In principle, however, a party has also taken sufficient security precautions in this sense if, in addition to a partially blackened version intended for the case file and for service on the opponent, it at the same time submits a complete version and makes it clear that this is only to be made accessible to the opponent under certain conditions. This procedure is not very expedient because the court may not take into account the redacted passages to the disadvantage of another party without granting him a hearing (Higher Regional Court of Munich, NJW 2005, 1130). However, this circumstance does

not justify the documents being added to the case files contrary to the expressly expressed will of the submitting party.

21 As a matter of principle, procedural acts may not be made subject to a condition. A violation of this principle generally results in the act being considered invalid or inadmissible (see, for example, Federal Court of Justice, judgment of 11 July 1995 - X ZR 99/92, BGHZ 130, 259 = GRUR 1996, 109, juris, marginal no. 95 - Klinische Versuche; order of 1 June 2017 - V ZB 106/16, NJW-RR 2017, 1145, marginal no. 11). In accordance with these principles, it cannot generally be assumed that a party wishes to submit documents to court proceedings if it makes their forwarding to the opponent dependent on a condition. It can be left open whether the submission of pleadings or other documents qualifies as an act of trial. As in the assessment of procedural acts, there must in any case be clarity from the outset in the assessment of the question whether certain documents are to be included in the case file. As a rule, this clarity exists if documents are submitted without reservation for a certain procedure. It is lacking, however, if the submitting party makes the forwarding to the opponent dependent on conditions.

22 c) The refusal to allow access to the documents in question does not violate the defendant's right to be heard.

23 However, Art. 103(1) of the German Constitution would have been violated if the Court of Appeal had based its decision to the disadvantage of the defendant on the documents in question without giving the defendant an appropriate opportunity to comment. Such a violation can, however, be complained of in the context of an appeal or appeal against non-admission. It is not necessary for the defendant to inspect the relevant documents for this purpose, because the infringement may consist precisely in the fact that the contested decision has no basis in the contents of the case files.

Bacher

Kober-Dehm

Marx

Rombach

Rensen

Previous instances:

Regional Court of Düsseldorf, judgment from 19 January 2016 - 4b O 49/14 – Higher

Regional Court of Düsseldorf, judgment of 22 March 2019 - I-2 U 31/16 -