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First French anti-anti-suit injunction: Don't tell me what I can't do!

Following on from the first German anti-anti-suit injunction issued a few weeks ago in the *Nokia v. Continental* case, the Paris First Instance court did just the same in *IPCom v. Lenovo*.

The background

After negotiations failed to lead to the conclusion of a licence agreement, Lenovo brought action against IPCom in March 2019 in the U.S. District Court for Northern California, seeking the setting of FRAND terms for IPCom's worldwide portfolio of patents declared essential to 2G, 3G and 4G standards. In the context of this action, it filed a motion for an anti-suit injunction in September 2019, seeking a broad prohibition on IPCom to act for infringement against Lenovo companies or their distributors anywhere in the world. That motion was scheduled to be heard on 14 November 2019. After the initiation of the U.S. action, but before the filing of Lenovo's motion for an

anti-suit injunction, IPCom brought action for infringement of a 3G patent before the English courts. In October 2019, IPCom also initiated summary proceedings in France, seeking a preliminary injunction for infringement of the same 3G patent.

At the end of October, IPCom sought emergency relief from the President of the Paris court, in summary proceedings, in the form of an anti-anti-suit injunction. IPCom sought a prohibition against Lenovo from pursuing the motion for an anti-suit injunction that was planned to be heard on 14 November. The hearing on this application took place on 6 November, and an order was issued on 8 November.

The order

The order starts by dealing with a number of procedural matters. In relevant parts, it holds in particular that French courts have jurisdiction to decide IPCom's motion for an anti-anti-suit injunction, because the damage from the anti-suit injunction would be suffered in France insofar as the assertion of the French part of IPCom's patent is concerned. It also considers that the arguments of *lis pendens* and related actions raised by Lenovo fail. Indeed, according to the Court, the subject matter of the actions differ, insofar as the anti-anti-suit injunction simply seeks to preserve the freedom of action of the patentee concerning the French part of the European patent; in addition, the U.S. District Court would not be well-placed to decide an application to withdraw, insofar as France is concerned, a motion for an anti-suit injunction that is itself pending before the U.S. District Court.

On the substance, the Court rules that anti-suit injunctions are not only contrary to EU law (which it rules not to apply here as the parties involved are French and American), but also to French public order, unless the anti-suit injunction is intended to seek compliance with a choice of court or arbitration clause, which is not the case here. Indeed, the Court says, "*an anti-suit injunction (outside these cases) constitutes an interference into the jurisdiction of courts and has the effect of indirectly breaching the exclusive power that each country has to freely decide the international jurisdiction of its courts*". In the present case, according to the order, the anti-suit injunction sought in the U.S. against IPCom encroaches on the latter's fundamental rights under the laws granting property rights, the procedural laws governing fair trials, and intellectual property laws.

On this basis, the Court granted the anti-anti-suit injunction sought by IPCom, ordering Lenovo to immediately withdraw the motion for an anti-suit injunction pending in the U.S. District Court insofar as

it relates to (current or future) proceedings before French courts for infringement of the 3G patent at stake. It further prohibited Lenovo from filing any future anti-suit injunctions seeking the same relief.

Next steps

From publicly available information, it appears that Lenovo did in fact partially withdraw its U.S. motion for anti-suit following this order. Appeals by either party against this order remain possible.

As far as the French proceedings are concerned, the next step should be a hearing on IPCom's application for a preliminary injunction, which is scheduled to be heard on 2 December.

Significance

If not overturned, this is an extremely significant decision. Indeed, the principles it lays down, appear transposable to most if not all cases where an anti-suit injunction would be sought (other than on the basis of contractual choice of court or arbitration clauses) that would impede a patentee's ability to act in France for infringement of a French patent or the French part of a European patent.

The first battleground, in global patent disputes, is often the choice of forum, which both the patentee and the alleged infringer seek to play to their advantage. This decision brings an important contribution to how these battles are fought, although it does not solve all of the issues, as its scope is limited to anti-suit injunctions only. That still leaves multiple procedural options to both sides.

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