



Local Division Munich

UPC_CFI_508/2023
ACT_597609/2023

Order
of the Court of First Instance of the Unified Patent Court
Local Division Munich
issued on 21 January 2025

Headnotes:

1. The rules on service in the Rules of Procedure must be interpreted in accordance with the principle of effective legal protection. It must therefore always be possible to establish good service, at least in accordance with Rule 275.2 of the Rules of Procedure.

2. Where it has not been possible to serve the application for a provisional measure in accordance with Rule 274 of the Rules of Procedure and where there is no indication that the decision by default, which is issued subsequently in the same proceedings, can be served in accordance with Rule 274 of the Rules of Procedure, it is not necessary to attempt to serve the decision by default in accordance with Rule 274 of the Rules of Procedure before an order is made under Rule 275.2 of the Rules of Procedure.

APPLICANT

air up group GmbH, Friedenstraße 22a, 81671 Munich, Germany

represented by: Jan Boesing (Bardehle Pagenberg)

DEFENDANT

Guangzhou Aiyun Yanwu Technology Co., Ltd., A09-3, No.9, Chentian
Dashigang S.Road, Huangshi Street, Baiyun District, Guangzhou, China

PATENT AT ISSUE

EP 3 655 341

PANEL/DIVISION

Panel 1 of the Local Division Munich

DECIDING JUDGE/S

This order has been issued by the Presiding Judge Dr. Matthias Zigann and the legally qualified judges Pierluigi Perrotti and Tobias Pichlmaier

LANGUAGE OF THE PROCEEDINGS

English

SUBJECT-MATTER OF THE PROCEEDINGS

Service of a decision by default

SUMMARY OF FACTS

The proceedings concern an application for provisional measures. The defendant is domiciled in China. The applicant has not requested for an ex-parte proceeding. Therefore, the service of the application at the defendant's domicile was arranged.

The **history of service** is as follows:

- 27/12/2023 Applicant files application for interim measures and pays court fees
- 04/01/2024 Court's registry starts preparations for the formal service of the application in China according to Article 5 (1) of the Hague Service Convention.
- 02/02/2024 In order to expedite service, the applicant, at the suggestion of the Registry of the Court, asks Mr Andy Long by e-mail whether informal service of the application by e-mail would be accepted on a voluntary basis (Article 5(2) of the Hague Service Convention); based on the pre-litigation correspondence with Mr Andy Long, this approach was promising; the e-mail remains unanswered.
- 21/02/2024 In order to expedite service, the Registry of the Court of First Instance asks Mr Andy Long by e-mail whether service of the application by e-mail is accepted on a voluntary basis; this e-mail also remains unanswered.
- 07/03/2024 Court registry requests for necessary copies and translations for formal service in China
- 02/05/2024 Submission of the requested copies and translations by the applicant, after significant difficulties in translating all the documents in a short period of time.
- 24/05/2024 Posting of the service documents by registry requiring the defendant to lodge an Objection to the Application for provisional measures within a time limit of two weeks from the service of the documents
- 11/06/2024 Receipt of the service documents by the competent authority in China according to the tracking number

- 04/07/2024 Court's registry sends an inquiry to the competent Chinese authority regarding the status of service; no answer from the Chinese authority received
- 11/07/2024 Court's registry informs Applicant about the date of service of the application to the Chinese authorities (11/06/2024).
- 23/10/2024 Court's registry sends another inquiry to the competent Chinese authority regarding the status of service
- 24/10/2024 Request from the competent Chinese authority to send the service documents for these proceedings again by email
- 08/11/2024 Court's registry sends the service documents combined with another request for further feedback on the status of service
- 18/11/2024 Information from the competent Chinese authority that the service documents have been submitted to the Supreme Court for further process. Since then, the Unifies Patent Court has not received any notification from the competent Chinese authority.
- 09/12/2024 Order of the Court declaring good service of the application for interim measures pursuant to Rule 275.2 RoP (App_64018/2024)
- 09/01/2025 Court renders a decision by default; the decision by default is published on the Court's website with the names of the parties and the file number, so that the decision can be found under the decisions published on the website

REQUEST

The Applicant has made the following requests concerning service of the decision by default:

- I. The steps ordered to bring the decision by default in the proceedings ACT_597609/2023 to the attention of the Defendant constitute good service pursuant to R. 275.2 RoP.
- II. The order according to item I. is published on the Court's website with the names of the parties and the file number, so that the order can be found under the decisions published on the website.

GROUND FOR THE ORDER

According to the case law of the Court of Justice of the European Union (ECJ C-222/84) the guarantee of effective legal protection is a general principle of law that underlies the common constitutional traditions of the Member States and is reflected in Articles 6 and 13 of the ECHR. Effective legal protection means that an existing legal claim can be enforced in court. It would be incompatible with the principle of effective legal protection if the enforcement of an existing legal claim could fail because a court order cannot be served.

Consequently, neither the ordering nor the enforcement of provisional measures under Article 62 UPCA can be frustrated by the fact that an application for a preliminary injunction or a court order issued in accordance with such an application cannot be served. The rules on service in the Rules of Procedure must be interpreted in accordance with the principle of effective legal protection. It must therefore always be possible to establish good service, at least in accordance with Rule 275.2 of the Rules of Procedure.

1. New service attempt under Rule 274 not required

The court states that service of the application for a preliminary injunction could not be effected under Rule 274, so that an order under Rule 275.2 had to be

issued in respect of the service of the application for provisional measures (see App_64018/2024).

Service of the application for provisional measures with the assistance of the competent Chinese authority was unsuccessful, although the application could be served on the competent Chinese authority by post and the court registry was in e-mail contact with the competent Chinese authority on this matter. However, the Chinese authority did not process the service for more than six months without any apparent reason. The Chinese authority thus seriously and definitively refused service. Under the Hague Service Convention, it is not at the sole discretion of the Chinese authority to decide whether or not to forward a duly completed request for service to the defendant. Otherwise, the Chinese authority would be able to determine whether or not the UPC could issue an order.

Pursuant to Rule 6.1 RoP, the decision by default must also be served. However, where it has not been possible to serve the application for a provisional measure in accordance with Rule 274 of the Rules of Procedure and where there is no indication that the decision by default, which is issued subsequently in the same proceedings, can be served in accordance with Rule 274 of the Rules of Procedure, it is not necessary to attempt to serve the decision by default in accordance with Rule 274 of the Rules of Procedure before an order is made under Rule 275.2 of the Rules of Procedure. It is not compatible with the principle of effective judicial protection to force a claimant or even the court to take steps to effect service which are clearly futile. This is particularly true in proceedings for interim relief. Service of the judgment by default in accordance with Rules 270-274 of the Rules of Procedure must be regarded as impossible.

2. Alternative attempt of service under Rule 275.1 RoP

If service in accordance with Rules 270-274 RoP is to be considered impossible, an attempt must be made, if possible, to effect service by an alternative method or at an alternative place (Rule 275.1 RoP). Rule 275.1 RoP also applies if the foreign authority refuses service seriously and definitively.

The Rules of Procedure do not provide for an exception to the requirement of alternative service (Rule 275.1 RoP). Such an exception would also not be in line

with the apparent intention of the provisions on service to exhaust all available options to give the defendant the opportunity to take note of the application and to defend himself (LD Mannheim UPC_CFI_219/2023). In view of this, it seems inappropriate to penalize the defendant by not making further service attempts if the foreign authority refuses service in violation of the Hague Service Convention.

However, a prerequisite for further attempts to effect service is that such attempts are possible in the first place. To qualify as an alternative method of service (Rule 275.1 RoP), the method must be factually and legally possible. An alternative method of service can only be dispensed with if there is no legally and factually possible alternative method of service.

- a. **Service at another place** is also not possible. No other place is known where the decision could be served.
- b. **Service by an alternative method**

Both the applicant and the court have tried unsuccessfully to effect service of the application for a provisional measures both formally and informally.

There are no other admissible alternative means of service of the default judgment; in particular, China has objected to judicial documents being sent directly to persons in China by post (Article 10(a) of the Hague Service Convention; see UPC_CoA_69/2024).

The only way to bring the decision to the attention of the defendant is to publish it on the UPC website and to notify the defendant of this publication by e-mail (andy-long@joy-fit.cn). Both parties to the dispute actively corresponded via this e-mail address prior to the proceedings.

In this context, reference is made to Rule 275.4 of the Rules of Procedure, which does not allow for an alternative method of service to be ordered which allows service in a manner contrary to the law of the State in which service is to be effected. The Court does not know, nor could it reasonably be expected to know in an interim relief proceeding, whether other methods of service, such as service

by publication (a method provided for, for example, by German national law but not by the RoP), are compatible with Chinese law. However, the court currently has no reason to believe that an order for public notice - for example, via a website - would be inconsistent with Chinese law.

3. Confirmation of good service

On the assumption that the rules of service of the Rules of Procedure must be interpreted in accordance with the principle of effective judicial protection, and that it must always be possible to establish good service under Rule 275.2 of the Rules of Procedure, the Court declares that the publication of the decision on the Court's website, of which the defendant had been notified by e-mail at andy-long@joy-fit.cn, constitutes good service.

Order

1. The publication of the decision by default in ACT_597609/2023 dated 09/01/2025 on the Court's website with the names of the parties and the file number, so that the order can be found under the decisions published on the website, constitutes good service pursuant to Rule 275.2 RoP.
2. Service of the decision by default shall be deemed effective as of the date of this order.
3. The Registry shall publish this order (including the names of the parties and the file number) on the Court's website.

Dr. Zigann Presiding Judge	
Pichlmaier Judge-Rapporteur	
Perrotti Legally qualified judge	