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Managing Intellectual Property

The Global IP Resource

THE RULES ON RECOVERING COSTS

23 March 2015

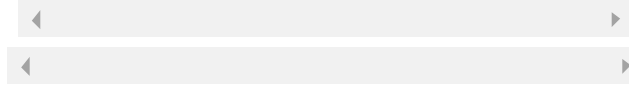
The possibility to recover costs in IP cases can be an important consideration in your litigation strategy. Correspondents in Brazil, Canada, China, France, Germany, India, the United Kingdom and United States answer six questions about their jurisdictions

COSTS RECOVERY

- 1 Can costs be recovered from a party to litigation? Does the losing party generally pay the winner's costs?
- 2 On what basis are costs recoverable? Does the amount of recoverable costs relate to the sum in dispute?
- 3 If costs can be recovered, what exactly can be recovered? What about interest?
- 4 Where costs are determined by the Court, how does it assess costs and what factors are taken into account? Can the Court's decision on costs be appealed?

5 Can an award of costs be increased or decreased as a result of a party's conduct of the litigation? How do you enforce a costs order if it is not paid?

6 Are there any other issues or tips relating to costs that parties should bear in mind when embarking on litigation?



GERMANY

1 Yes: the general rule is that the losing party has to bear the costs of the winning party pursuant to Section 91 (1) German Civil Procedure Code (CPC). In case of a split decision, the court may determine that the costs will be (a) cancelled against each other, or (b) shared proportionately (for example, 60/40) pursuant to Section 92 (1) CPC. If the costs have been cancelled against each other, the parties shall bear their own costs and half of the court fees.

Furthermore, the court may impose the entire costs on one of the parties pursuant to Section 92 (2) CPC if: (i) the amount the other party claimed in excess was relatively small, or has resulted in only slightly higher costs; or (ii) the amount of the claim brought by the other party depended on the judges' determining it at their discretion, on the assessment by experts, or on the parties settling their reciprocal claims.

2 Generally, the recoverable costs are determined by the court pursuant the provisions of the German Law on Court Costs and the German Act on Legal Fees for Lawyers. The amount of court fees and lawyers' fees relate to the value of the dispute (see below). Thus, each party generally can calculate the cost risk, due to the transparency of the statutory fees. However, it is of course possible for the parties to submit to the court an agreement regarding the costs. Generally, the court will accept such joint declarations.

According to Section 91 CPC the costs are subject to recovery to the extent these costs were *necessary* in order to bring an appropriate action or to appropriately defend against an action. Which costs are required has to be assessed by the court in each case individually.

3 Generally acknowledged are the following costs: court fees; attorneys' fees (limited to the amount pursuant to the German Act on Legal Fees for Lawyers. Therefore, if the clients have agreed to pay their lawyers on hourly rates or on a flat-fee basis, the cost reimbursement might only cover part of the actual costs); travel and accommodation expenses; and costs for experts' opinions (if requested by the court).

The claim for cost recovery does not include the costs for sending a cease and desist letter to the other party before starting the litigation. Such costs have to be claimed as part of damages in the main proceedings.

4 The determination of the recoverable costs is divided into two phases in Germany:

- In a first step, the judges determine the allocation of the costs (see question 1 above) as part of the judgment (so-called "basic decision on costs").
- Such decision on costs can only be appealed within the scope of an appeal against the judgment itself and not separately.

Furthermore, the judges determine the value of the dispute at their sole discretion on basis of the information received from the parties pursuant to Section 3 CPC in conjunction with Section 39ff German Act on Court Fees. Standard values for claims of cease and desist in IP matters in Germany are €100,000 (equals about €3,000 court fees for the first instance) up to €500,000 (equals about €10,000 court fees for the first instance). For claims for payment or damages, the claimed amount is relevant.

The decision regarding the value of the dispute can be appealed separately.

On basis of the basic decision on costs, the court clerks decide on the precise amount of cost recovery in a separate procedure pursuant to Section 104ff CPC at the request of at least one party. The court clerk calculates court fees and lawyer's fees on the basis of the value of the dispute, adds the required costs for an appropriate action or an appropriate defence against an action (see question 3), and issues a so-called decision on determination of costs. From the date on which the request for determination of costs was filed, the costs assessed are to bear interest at five percentage points above the base rate of interest in accordance with Section 247 of the German Civil Code.

The decision on determination of costs can be appealed separately.

5 The award cannot be increased or decreased. The only chance for the court is to use its discretion when assessing the cost ratio or the reimbursement of specific costs items.

The decision on the determination of costs is an enforceable title and can be immediately enforced against the losing party, for example by attachment of bank accounts. Furthermore, the decision can be used to apply for a European Enforcement Order according to Regulation (EC) 805/2004 of April 21 2004 to enforce the decision in other EU member

states.

6 As a claimant, you are required to pay the provisional court fees when filing the lawsuit (except in preliminary injunction proceedings). Claimants without residence or a registered office within the EU/EEA are further obliged to provide security for the costs of the proceedings at the request of the defendant, pursuant to Section 110 CPC. However, this obligation does not apply where, due to international treaties, no such security deposit may be demanded or where the decision as to the defendant's reimbursement of the costs would be enforced based on international treaties. Nevertheless, defendants may use such a request to delay the proceedings.



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