A U.S. View on the UPC – Part 5: Of Costs and Fees (and Getting Them Back)

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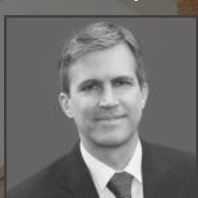
Article By



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On June 1, 2023, the new European Unified Patent Court (UPC) will open its doors, and enforcement of European patents in (currently) 17 contract member states will be possible with one action. This series of articles – directed at U.S. practitioners trying to familiarize themselves with the basic features of the UPC – aims to provide a high level view on the key aspects of the UPC system, compare them to patent litigation in the U.S., and consider their implications on U.S.-European parallel patent litigation.

To read other articles in this series, see here.

This part of the series takes a closer look at the costs of litigating, including court and lawyer fees, and whether the losing party has to reimburse the winner's costs.

One of the first questions every (potential) party to a patent litigation asks itself – or more often, its counsel: What will it cost me in the end? While a party's ultimate litigation costs will depend, of course, on the complexity of the case and the attorneys, experts, and other providers involved, they are in large part driven by statutory court fees, the procedural structure of proceedings, as well as the question whether and to what extent the losing party has to reimburse the winner's costs. As discussed below, the contrast between the U.S. and the UPC on these issues is stark.

COURT FEES, ATTORNEY FEES, AND OTHER LITIGATION COSTS

In the U.S., the filing fee for bringing a patent infringement action in district court is currently a modest

$402[1] – a trivial amount, compared to the overall costs of litigating a patent case. Conceptually, the low amount of the filing fee (which is not specific to patent cases, but the general filing fee for civil cases) is mainly driven by the goal of fair access to justice; financing the court's costs is not a significant factor. A defendant in a U.S. patent litigation need not pay a separate fee, even if challenging the validity of an asserted patent. Only a patent challenge in the U.S. Patent and Trademark Office (PTO) comes with more significant fees; *inter partes* review proceedings, the most widely used proceedings to attack the validity of a patent, currently come with fees of at least $41,500.[2] Unlike in district court, financing the PTO's operations is a key factor for the fee level: The Director of the PTO is required to consider the "aggregate costs of the review" when setting the fee.[3]

With the UPC Agreement expressly stating that the level of the court fees shall "ensure a right balance between the principle of fair access to justice … and an adequate contribution of the parties to the costs incurred by the Court,"[4] the UPC court fees[5] are significantly higher than in a U.S. district court. They consist of a fixed fee, and an additional fee if the "value of the action" (described in more detail below) is above €500,000.[6] For an infringement action, the fixed fee is €11,000; the additional fee starts at €2,500 if the value of the action is between €500,000 and €750,000, and goes up to €325,000 if the value of the action is above €50 million. If the value of the action is, for example, €15 million, an additional fee of €75,000 is due, for a total fee of €86,000.[7] Further, if the defendant brings a counterclaim for revocation, it has to pay the same fee the plaintiff paid for the infringement action, up to a cap of €20,000.[8] The full list of court fees is accessible here.

Consistent with the concept that these high court fees are designed to cover (at least some of) the court's costs, they are partially reimbursed if the case concludes by way of withdrawal or settlement during the case. 60% of the fees are reimbursed if the case is withdrawn or settled before the closure of the written procedure, 40% if withdrawn or settled before the closure of the interim procedure, and 20% if withdrawn or settled before the closure of the oral procedure.[9] "Small enterprises" (defined as "an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million"[10]) and "micro-enterprises" (defined as "an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million"[11]) are required to pay only 60% of the regular fees.[12]

The "value of the action" is decided by the court.[13] In particular, after the parties can address the value in their Statement of claim and Statement of defence, respectively,[14] the judge-rapporteur determines the value of the action during the interim procedure.[15] In doing so, she may take into account specific guidelines the UPC's Administrative Committee issued ("Guidelines").[16] The Guidelines recommend, as the most practicable method in most cases, a "valuation based on an appropriate licence fee."[17] The valuation, the Guidelines state, "should relate to the summed up values of the main remedies claimed (injunction for the future, damages for the past)." In an infringement action, the calculation should be based on a royalty calculation: The defendant's turnover for the accused product, for the past and the future (up to expiration of the patent), should be calculated based on existing turnover or existing or estimated market share. To that turnover, a royalty rate should be applied, based on the existing royalty rate for the same invention charged by the plaintiff, the generally accepted industry rate for the type of invention in question, or a royalty rate determined by the court after hearing the parties. If the action involves more than one patent or more than one defendant, the value should be calculated on the basis of a combined license for all patents and all defendants.

1 *See* 28 U.S.C. § 1914 ($350 plus additional fee prescribed by the Judicial Conference of the United States, currently $52).
2 Assuming the petition for review is granted. *See* 37 CFR § 42.15.
3 *See* 35 U.S.C. 311(a).
4 *See* UPC Agreement, Article 36(3).
5 *See* UPC Agreement, Article 70 for the parties' general obligation to pay court fees.
6 *See* UPC Agreement, Article 36(3); UPC Rules of Procedure (RoP), Rule 370(3).
7 *See* UPC Administrative Committee, Table of Court Fees (8 July 2022), Sections I and II.
8 *See id.*
9 *See* UPC RoP, Rule 370(9).
10 *See* Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC, Annex, Title I, Art. 2.
11 *See id.*
12 *See* UPC RoP, Rule 370(8).
13 *See* UPC RoP, Rule 370(6).
14 *See* UPC RoP, Rules 13(1)(p) and 24(i).
15 *See* UPC RoP, Rules 22(1).
16 *See* UPC RoP, Rule 370(6); Decision of the Administrative Committee of 24 April 2023 on the Guidelines for the Determination of Court Fees and the Ceiling of Recoverable Costs of the Successful Party ("Guidelines").
17 *See* for the following Guidelines at 3–4.

From a U.S. perspective, the concept of addressing these factors in the course of the procedural and ancillary issue of determining the value of the action—before the oral hearing, the decision on the merits, and the separate determination of damages—is remarkable. On the damages-related side of a U.S. patent litigation, most of these factors are subject to extensive fact and expert discovery and vigorous litigation culminating in a jury trial to determine damages, with plaintiffs often modifying their list of accused products in the course of the case, defendants reluctant to disclose financial information, damages experts routinely disagreeing on issues like industry-accepted royalty rates or combination rates for multiple patents, and courts often having to address whether prior license agreements can properly provide an existing royalty rate. Indeed, as discussed in part 2 of this series, in a typical U.S. patent case, the dueling experts will provide detailed reports and testimony addressing the fifteen so-called "Georgia-Pacific" factors used to determine a reasonable royalty, including their analysis of the royalty to which the patent owner and infringer would have agreed had they negotiated a license at the time the infringement began.

It remains to be seen how the judge-rapporteur will implement the Guidelines and determine the value of the action during the interim procedure without creating a protracted side show, and whether the valuation will really be as straightforward as the Guidelines contemplate. Parties in the UPC will have to bear in mind that any positions they take in the context of the valuation of the UPC action may resurface in not only the damages determination phase of the UPC case but also in U.S. (or other) patent litigation. For example, a party's position on an industry-accepted royalty rate for the type of invention in question may very well be used by an opponent in U.S. litigation, potentially even with respect to a different patent in the same field. Parties in the UPC may seek to avoid all of this (or at least defer it to the damages determination phase) by trying to reach an agreement on the value of the action during the interim procedure.

Litigation expenses other than court fees depend, of course, highly on the complexity and importance of the case, and the attorneys, experts, and other providers involved. That said, the costs of litigating a U.S. patent case are notoriously high. As discussed in part 1 of this series, the typical features of the lengthy U.S. pretrial phase – including extensive fact and expert discovery, the claim construction process, summary judgment motions, pretrial disclosures, as well as a host of ancillary disputes on discovery and other issues like protective orders or attorney-client privilege – are extensive and expensive. And trials, in particular jury trials, take anywhere from several days to weeks and come with numerous disputes, mostly about evidence issues. The median total costs for litigating a U.S. patent case, with one patent at issue and $15 million at risk, was estimated by participants in the AIPLA's "Economic Survey" of 2021 at $3 million, including attorney fees, expert fees, and travel expenses.[18] Attorney fees undoubtedly make up the lion share of those total costs.

The procedural differences in the UPC compared to a U.S. patent litigation can be expected to result in lower total costs. As described in more detail in part 1 of this series, while UPC proceedings are "front-loaded," *i.e.,* the parties exchange numerous detailed briefs in the beginning of the case, the remainder of the proceedings is streamlined and speedy. There is only very limited "discovery," no separate claim construction procedure, no pretrial disclosures, no complicated evidence rules, and no jury trial. Instead, after the initial written procedure, there is a three-month interim procedure, mainly driven by the court and focused on preparing the case for the oral hearing, and an oral procedure that mainly consists of a one-day oral hearing. All of these procedural characteristics can be expected to result in lower overall costs than in the U.S. And while actual costs, of course, remain to be seen at this point, the court issued a table of "ceilings" for attorney fees a prevailing party can recover, as described in detail below. For example, if the value of the action is €15 million, the "ceiling" for recoverable representation costs is €800,000.[19] Those ceilings can be expected to function as somewhat of a guidepost – clients will presumably expect that their counsel not exceed the "ceiling" by too much.

REIMBURSEMENT OF LITIGATION COSTS

Just as important as the amount of the litigation costs is the question whether the successful party can get them back.

In the U.S., the typical reimbursement of a prevailing party's litigation expenses is modest. Based on Rule 54

[18] AIPLA 2021 Report of the Economic Survey at 60.
[19] Decision of the Administrative Committee of 24 April 2023 on the Scale of Recoverable Cost Ceilings ("Scale of Ceilings"), Annex.

of the Federal Rules of Civil Procedure,[20] under which the court may award "costs," and 28 U.S.C. § 1920, which "defines the term 'costs' as used in Rule 54(d) and enumerates expenses that a federal court may tax as costs under the discretionary authority found in Rule 54(d),"[21] the court may order reimbursement of a fairly limited set of expenses, including the court fees discussed above, statutory witness fees, and certain deposition and copying expenses.[22] Overall, these "costs" usually make up only a very small part of the prevailing party's litigation expenses. Expert fees, beyond the small statutory attendance fee, are not recoverable under these provisions. And most importantly, the biggest expense item of the prevailing party is not either: attorney fees.

"Under the bedrock principle known as the 'American Rule,' each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."[23] As a rationale for the American Rule, "it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."[24] However, on an international level, the American Rule is the exception rather than the rule.[25]

The UPC follows the rule of most other countries: Loser Pays. Under the UPC Agreement, "legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party."[26] Of note, attorney fees as well as other expenses, including witness and expert fees and the court fees discussed above, are covered by the UPC's Loser Pays rule.[27]

While the general rules of the U.S. and the UPC – American Rule v. Loser Pays – are diametrically opposed, neither of them is categorically implemented. Both are softened by exceptions and limits – conceptually from different directions, of course: In the U.S., reimbursement of attorney fees is usually denied, but ordered in narrow circumstances;[28] in the UPC, reimbursement of costs is the rule, but has some limits.

In the U.S., the most important exception in the area of patent law is Section 285 of the U.S. Patent Act, which provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party."[29] "[A]n 'exceptional' case," the U.S. Supreme Court explained, "is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated," and "[d]istrict courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances."[30] The Supreme Court stressed that "there is no precise rule or formula for making these determinations," but pointed to a "nonexclusive list of factors," "including frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence."[31] As for the amount of attorney fees awarded under Section 285, courts usually use the so-called "lodestar" approach, *i.e.*, "multiplying the number of hours reasonably expended by the reasonable hourly rate."[32] In determining the reasonableness of the award, there must be some evidence to support the reasonableness of the billing rate charged and the number of hours expended.[33] In exercising its discretion, the court can award

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[20] Fed. R. Civ. P. 54 ("Unless a federal statute, these rules, or a court order provides otherwise, costs–other than attorney's fees–should be allowed to the prevailing party.").
[21] *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 437 (1987).
[22] *See* 28 U.S.C. § 1920.
[23] *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013); *see also, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").
[24] *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).
[25] *See* Pfennigstorf, The European Experience with Attorney Fee Shifting, 47 Law and Contemporary Problems 37, 37 (1984); Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke Law Journal 651, 651 ("… this country stands in a small minority among the industrialized democracies.").
[26] *See* UPC Agreement, Article 69(1) .
[27] *See* UPC RoP, Rule 151(d).
[28] *See Checkpoint Systems, Inc. v. All-Tag Security S.A.*, 711 F.3d 1341, 1345-46 (Fed. Cir. 2013) ("The American Rule is not absolute, for the policy of avoiding undue burden on access to judicial remedy gives way when litigation is devoid of any justification, or is tainted by grievous misconduct.").
[29] 35 U.S.C. § 285.
[30] *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749, 1756 (2014).
[31] *Id.* (internal quotation marks omitted).
[32] *View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 987 n.7 (Fed. Cir. 2000).
[33] *See Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1068 (Fed. Cir. 1983).

the prevailing party attorney fees for the entire case or part of it, depending on the circumstances of the case.

Apart from Section 285, courts sometimes award attorney fees in patent cases on the basis of a violation of Rule 11 of the Federal Rules of Civil Procedure, which requires evidentiary support for factual contentions made in court – including, in the patent context, a reasonable pre-filing infringement analysis before bringing an infringement claim.[34] Typically a Rule 11 award of fees is limited to the fees incurred by the other party due to the misconduct. Further, "federal courts have inherent power to award attorney's fees in a narrow set of circumstances, including when a party brings an action in bad faith."[35] Based on this "inherent power," a court can also award expert fees, which cannot be awarded under Section 285.[36] A court may also order a party's counsel who "so multiplies the proceedings … unreasonably and vexatiously" to pay the other party's attorney fees and other costs "reasonably incurred because of such conduct."[37]

In practice, none of the above exceptions to the American Rule is used often. Attorney fees are rarely awarded in U.S. patent litigation. A 2013 study concluded that between 2003 and 2013, "fees were awarded in about 6 percent of all patent cases ending in judgment (208 of 3400 cases), or 0.6 percent of all patent cases (208 of 32,570 cases)."[38] While we are not aware of any comparable empirical study after the Supreme Court's 2014 *Octane* decision, which is mostly seen as making a fee award under Section 285 easier than before, it is safe to say that attorney award fees in patent cases remain rare.

In the UPC, the general "Loser Pays" rule is subject to various limits in the UPC Agreement. To begin with, the costs must be "reasonable and proportionate."[39] Similarly, "[a] party should bear any unnecessary costs it has caused the Court or another party,"[40] "which means that even the successful party has to reimburse costs caused that are deemed unnecessary by the Court."[41] Furthermore, the court has discretion to modify or suspend the Loser Pays rule. Costs are to be borne by the unsuccessful party "unless equity requires otherwise."[42] Further, "[w]here a party succeeds only in part or in exceptional circumstances, the Court may order that costs be apportioned equitably or that the parties bear their own costs."[43]

The most concrete limit is that costs are to be borne only "up to a ceiling set in accordance with the Rules of Procedure."[44] Called upon by the Rules of Procedure to "adopt a scale of ceilings for recoverable costs by reference to the value of the proceedings,"[45] the UPC's Administrative Committee set those ceilings.[46] It stressed, however, that only the recoverable costs established in compliance with the above-described limits of proportionality, necessity, and equity are measured against the ceilings, and that the ceilings "are only to be regarded as a safety net, i.e. an absolute cap on recoverable representation costs applicable in every case."[47] Notably, the ceilings for recoverable costs only "apply to representation costs"[48] (although the wording of the UPC Agreement is not so restricted).[49] The ceilings depend on the value of the action

[34] *See, e.g., View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 986-88 (Fed. Cir. 2000); *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1328-29 (Fed. Cir. 2011).

[35] *Marx v. General Revenue Corp.,* 133 S.Ct. 1166, 1175 (2013).

[36] *See, e.g., MarcTec, LLC v. Johnson & Johnson,* 664 F.3d 907, 921 (Fed. Cir. 2012); *Takeda Chemical Industries, Ltd. v. Mylan Labs., Inc.*, 549 F.3d 1381, 1391 (Fed. Cir. 2008).

[37] *See* 28 U.S.C. § 1927.

[38] Mark Liang & Brian Berliner, *Fee Shifting in Patent Litigation*, 18 Va. J.L. & Tech. 59, 86–87 (2013) ("In the vast majority of patent cases, attorneys' fees are not shifted under § 285. One article states that only 1 percent of all cases that ended by pre-trial motion or trial were found to be 'exceptional' under § 285. An investigation conducted by the authors suggests this 1 percent figure understates § 285's use, but is nevertheless correct in that fee awards are rarely awarded. Fees are only awarded when the case ends with a judgment; they are not awarded in cases that end in settlement or voluntary dismissal. Between the year 2003 and May 15, 2013, about 3400 cases ended in a judgment. In this time period, fees were shifted in only 208 cases under § 285. Thus, fees were awarded in about 6 percent of all patent cases ending in judgment (208 of 3400 cases), or 0.6 percent of all patent cases (208 of 32,570 cases).").

[39] *See* UPC Agreement, Article 69(1); UPC RoP, Rule 152(1).

[40] *See* UPC Agreement, Article 69(3).

[41] Scale of Ceilings, Preamble (1).

[42] *See* UPC Agreement, Article 69(1).

[43] *See* UPC Agreement, Article 69(2).

[44] *See* UPC Agreement, Article 69(1).

[45] UPC RoP, Rule 152(2).

[46] *See* Decision of the Administrative Committee of 24 April 2023 on the Scale of Recoverable Cost Ceilings ("Scale of Ceilings").

[47] *See* Scale of Ceilings, Preamble (1).

[48] *See* Scale of Ceilings, Art. 1.

[49] *See* UPC Agreement, Article 69(1) ("Reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity requires otherwise, up to a ceiling set in accordance with the Rules of Procedure.").

determined by the judge-rapporteur during the interim procedure, as described above. The ceilings start at €38,000 if the value of the action is up to €250,000, and go up to €2 million if the value of the action exceeds €50 million. If the value of the action is, for example, €15 million, the ceiling for recoverable attorney fees is €800,000.[50] The full table is accessible here.

"In limited situations, such as the particular complexity of the case or multiple languages used in the proceedings," the court may raise the ceiling upon party request, by up to 50% if the value of the action is up to €1 million, by up to 25% if the value of the action is up to €50 million, and up to €5 million if the value of the action exceeds €50 million.[51] Conversely, upon request of a party, the court may lower the ceiling with regard to that party "if, in the event that the requesting party is unsuccessful, the amount of recoverable costs of representation to be awarded to the successful party would threaten the economic existence of the requesting party, in particular if the latter is an SME [small or medium-sized enterprise], non-profit organisation, university, public research organisation or natural person."[52]

Apart from attorney fees, the successful party is also entitled to recover other expenses, including the costs of experts, witnesses, interpreters, and translators.[53] Expert fees "shall be based on the rates that are customary in the respective sector, with due regard to the required expertise, the complexity of the issue and the time spent by the expert for the services rendered."[54]

Procedurally, costs are decided in a separate proceeding, following the decision of the merits and, if applicable, the decision for the determination of damages.[55] The successful party must file an Application for a cost decision within one month after the decision on the merits or decision on damages, respectively.[56] After giving the losing party an opportunity to "comment in writing on the costs requested," the judge-rapporteur decides the amount of costs to be awarded.[57]

While costs are decided after the merits and damages, during those earlier proceedings the court may, upon a request by one party, order the other party "to provide adequate security for the legal costs and other expenses incurred and/or to be incurred by the requesting party;" the court can order the security by deposit or bank guarantee.[58] Similarly, the court can order the provision of adequate security to cover costs of the court itself.[59] The rules provide no further details on when such security orders might be issued, or what a party will need to show in a respective request.

The different approaches of U.S. courts and the UPC to reimbursing litigation costs will likely have profound implications on patent litigation strategy. We will focus on a phenomenon familiar to U.S. patent practitioners, but less prevalent – so far – in Europe: patent-assertion entities.

In the U.S., a defendant sued for patent infringement must expect to bear its own, significant litigation costs, win or lose; a victory is therefore often a Pyrrhic one. Plaintiffs – in particular, patent-assertion entities, which are usually not exposed to counterclaims of infringement – can exploit this dynamic by offering an early settlement for less than the defendant's expected litigation costs. Faced with the dilemma between a *potential* victory at a high litigation cost and a settlement at an (often significantly) lower price, many defendants choose the lesser evil of the settlement, as weak as the plaintiff's case may be.

The UPC's Loser Pays system does not allow for the same playbook. If their case is weak, plaintiffs and defendants alike have to expect to be liable for both their own and their opponent's litigation costs. This presumably should foster an outcome that is based – at least more than in the U.S. – on the merits (be it by judgment or settlement), as opposed to litigation costs being a key driver of how and when cases are resolved. Compared to the U.S., plaintiffs in the UPC should be more cautious in bringing suit, and defendants who are convinced of their position less willing to give in.

It is notable, however, that the UPC's "ceilings" of recoverable costs should make litigation costs a predictable risk factor, at least once the "value of the action" and the corresponding ceiling are known. As we discussed in part 2 and part 4 of this series of articles, the specter of a large cross-border damages award and/or injunction in all the contracting member states should make patent litigation in the UPC attractive to patent-assertion entities. While the riskier Loser Pays system may dampen that attraction, the fact that

[50] *See* Scale of Ceilings, Annex.
[51] *See* Scale of Ceilings, Art 2(1).
[52] *See* Scale of Ceilings, Art 2(2).
[53] *See* UPC RoP, Rules 153-155.
[54] *See* UPC RoP, Rule 153.
[55] *See* UPC RoP, Rule 150(1).
[56] *See* UPC RoP, Rule 151.
[57] *See* UPC RoP, Rule 156.
[58] *See* UPC RoP, Rule 158; UPC Agreement, Article 69(4).
[59] *See* UPC RoP, Rule 159.

the potential liability for litigation costs is, at least at some point, a known quantity should make a financial risk-benefit analysis easier, in particular for patent-assertion entities that are, in essence, sophisticated investment companies (or have such companies as financiers behind the scenes).

CONCLUSION

Unlike court fees in a U.S. district court, court fees in the UPC are intended to finance the court's operations and are therefore much higher than in the U.S. But since proceedings in the UPC are more streamlined than U.S. patent litigation and lack some of the latter's costliest features, such as extensive discovery and jury trials, the overall costs of litigation in the UPC can be expected to be significantly lower than in the U.S. Moreover, unlike in the U.S., where litigants usually pay their own attorneys' fees, the UPC follows the Loser Pays rule, whereby the successful party's attorneys' fees are, with certain limits and exceptions, borne by the unsuccessful party. The stark difference in whether the losing party has to reimburse the winner's costs can be expected to result in quite different litigation strategies. Plaintiffs in the UPC will have to be more cautious than plaintiffs in the U.S. in bringing suit and will not be able to use litigation costs as leverage to negotiate a favorable settlement in the same way as they often do in the U.S. Defendants in the UPC, on the other hand, have less incentive than in the U.S. to agree to a settlement if the plaintiff's case is weak, since if they prevail, most or all of their litigation costs will be covered by the losing plaintiff.

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