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IP Value 2012

For your billing consideration: the *Rechtsanwaltsvergütungsgesetz*

COHAUSZ & FLORACK

10th Edition

Part of The IP Media Group

*Published by Globe White Page, publishers of **Intellectual Asset Management** magazine*

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Germany
For your billing consideration: the *Rechtsanwaltsvergütungsgesetz*

This chapter is a testimonial to the alternative fee arrangement adopted by German law decades ago — and gives us the chance to promote the quality of (some) government regulations.

In most jurisdictions, lawyers' fees are calculated using billing by the hour. However, this is not the only method, nor necessarily the best. Particularly in regard to litigation, alternative fee arrangements are becoming increasingly popular.

Mixed results: use around the world

According to the 2011 Litigation Trends Survey, from 2009 to 2011 the percentage of US companies which relied on alternative fee arrangements in calculating the fees of their legal counsel in litigation rose from less than 50% to more than 60%. In the United Kingdom, this trend was even more pronounced, with two-thirds of surveyed companies now relying on alternative fee arrangements. In addition, it appears that alternative fee arrangements are particularly in demand among smaller companies, presumably because they allow the client to control costs more closely.

Under the definition used in the survey, any arrangement that differs from hourly billing, whether at a regular or a discounted rate, is seen as an alternative fee arrangement.

While the growing popularity of alternative fee arrangements is clear, what is less discernible is a consensus among clients as to the most effective type of alternative fee arrangement. In this regard, the survey results are decidedly mixed.

In the United States, fixed fee and conditional fee arrangements have a joint lead, although both methods poll at less than 30%. Compare this to the United Kingdom, where a blended rate fee is slightly more popular than a conditional fee, and both methods have approval ratings of more than 75%.

The perfect fee arrangement?

It appears that if there is an optimal alternative fee arrangement for litigation, clients have been unable to agree on it. A workable fee arrangement must integrate the interests of both clients and their lawyers and, while there may be a greater or lesser overlap in their interests — such as seeing their side win — there is also an inherent conflict between the client's wish to spend less and the lawyer's desire to earn more.

But what if a specific alternative fee arrangement were prescribed by law, thereby making any deliberations regarding further fee arrangements moot? Of course, lawyers and clients are used to having the freedom to identify the best choice after careful deliberation, and nobody likes being dictated to. Yet sometimes a prescribed, imposed solution may be better than the solution which the parties could have reached through negotiation. If that solution had been used for decades and had never been found wanting, perhaps it would solve the problem for good.

Enter the *Rechtsanwaltsvergütungsgesetz* (RVG), — the Lawyers' Compensation Act. The act presents a comprehensive rulebook for calculating lawyers' fees for all kinds of situations, not solely restricted to litigation. It also prohibits lawyers from charging less than the calculated amount. In practice, the minimum fee prescribed by the RVG often becomes the actual fee.

To understand the working and implications of the RVG, it is important to look not only at the RVG itself, but also at the Code of Civil Procedure, which codifies reimbursement in litigation, and the Court Fees Act, which quantifies court fees.

The interplay of these laws results in three principles which together not only stipulate a particular fee arrangement between the lawyer and the client, but also more generally provide a comprehensive determination of both the total costs of litigation and the extent to which they must be borne by the parties involved.

The three principles are as follows:

- The legal representatives of a party in litigation are entitled to (minimum) compensation according to the value of litigation.
- The court fees are calculated based on the value of litigation.
- To the extent that a side has lost in litigation, that side must bear the combined court and lawyers' fees.

The 'value of litigation' is the value under dispute. In cases where a party sues for a certain amount of money, the amount sued for is the value of litigation. In cases where no money is sought, or where the plaintiff seeks something in addition to money, the financial value of further objectives (eg, a claim for an injunction) is used as, or is added to, the value of litigation.

For the typical value of litigation in IP cases (ie, more than €1 million), the RVG provides that the lawyer's fee amounts to about 1% of the value of litigation. In patent litigation cases, both the plaintiff and the defendant will — in addition to having an attorney at law each — appoint a patent attorney as a further representative. Since the RVG also applies to patent attorneys, their separate fee (which is also a minimum fee) is set at the same amount.

Finally, the Court Fees Act stipulates that the court fees amount to approximately 1.5% of the value of litigation.

As to who picks up the tab, the Code of Civil Procedure states that the total costs of litigation (ie, the court costs and the legal representation costs according to the RVG) must be paid by the losing party to the degree that it loses. In other words, if the plaintiff succeeds on all counts, the defendant must pay its own costs, the plaintiff's costs and the court fees. If the plaintiff's suit is rejected on all counts, the same costs must be borne by the plaintiff. Any other proportional allocation is possible if the plaintiff's suit achieves mixed results.

Thus, even though the individual provisions and calculation tables of the various acts may be rather complicated, their combined effect is surprisingly straightforward.

In summary, in a patent litigation suit in which both parties are represented by an attorney at law and a patent attorney, total costs of about 5.5% of the value of the litigation must be borne by each side to the extent that it loses. That is about as pithy as compensation rules get.

There are some additional rules that are worth knowing. For the appeal procedure, the same principle applies, with slightly higher adjustment factors for legal representation fees and court costs (nearly 7% in total). Since Germany implements the principle of separation, according to which patent infringement and patent validity are handled by different courts, there are also separate proceedings with regard to compensation and cost allocation.

As an infringement suit almost inevitably triggers a parallel revocation suit — in which the roles of plaintiff and defendant are reversed — this must also be considered for the fee calculation. The value of litigation in revocation proceedings is usually set at 1.5 times the value of litigation in the infringement proceedings. Revocation proceedings are heard by a special federal court and the share of the revocation court fees is higher than for the infringement proceedings. The total costs at stake for the revocation suit add up to 9.5% of the value of litigation in the infringement suit. Thus, the total costs to be distributed between the parties add up to 15%.

To complete the picture, the attorneys' settlement fees must also be mentioned. If a case is settled, according to the RVG, each attorney is entitled to an additional settlement fee of about 1% of the value of litigation. If a settlement is reached before the verdict, the court fees are reduced by approximately 2% of the value of litigation.

Impact of the RVG on IP proceedings

Now that the numerical results of the prescribed rules have been considered, the next issue to look at is the implications of these results. In other words, does this alternative fee arrangement encourage certain behaviour while discouraging other behaviour, and is this encouragement targeted correctly?

At a superficial level, the most obvious merit of the RVG from a lawyer's perspective is the binding regulation of minimum compensation, thereby limiting price competition. However, the act has many more important aspects, particularly as it relates to IP litigation.

When applied in the IP field, the RVG is based on the idea of a party being represented by an attorney at law and a patent attorney in its scheme of fees. The two are comparable to a barrister and solicitor team, with transposed roles in infringement and revocation proceedings. Of course, either party is free to reach a fee agreement above the minimum fees — based, for example, on billing by the hour once the minimum fees are exceeded. In the case of larger teams of lawyers (eg, as seen in proceedings in the United States and the United Kingdom), this can easily happen. However, the losing side must bear only the minimum legal representation costs set by the RVG. Any billing beyond this amount is at that party's own expense.

This clearly encourages small legal teams in patent litigation, regularly consisting of only one attorney at law and one patent attorney. In practice, that is nearly always sufficient. Such a team has one dedicated expert for procedural and general legal matters and another for the

technology at hand. Of course, both patent litigation attorneys at law and patent attorneys are experts in patent law. The complexity of a case does not necessarily result in enlarging such a team, as demonstrated by the observation that the most respected German IP attorneys at law and patent attorneys regularly work on several cases at once, much like their colleagues in other countries. It further helps that German IP proceedings do not also involve discovery, extensive case management or legal side issues (eg, antitrust, company responsibility or licensing), as may happen in some other jurisdictions.

With regard to the minimum fee specified by the RVG, which in practice becomes a fixed fee, the effect is that a speedy resolution is in the best interests of all parties, and particularly in the best interests of the legal representatives involved.

Another effect of the RVG is that it discourages the piling up of arguments without regard to their relevance. Everybody involved in either patent litigation or litigation in general is aware of a certain kind of argument. Although they are not central to the issue, they provide talking points which can be combined, at best amounting to a barrage of legal 'pinpricks'. However, like pinpricks, they are rarely decisive.

When billing is done by the hour and large legal teams must be kept occupied, arguing at length about insignificant points may be rather tempting; But this fails to serve the best interests of the client. While the number of arguments made in the represented party's favour may increase through this strategy, the quality of those arguments does not. Nor does this improve the party's standing with the court. The writs in patent litigation are always long and complex, even when kept as short as possible; making them longer than they need to be does not help judges to do their job.

Under a negotiated alternative fee arrangement, a client may be reluctant to pay his or her lawyer a high fee if there is a realistic chance that the case may involve relatively little work. On the other hand, a lawyer operating under a negotiated fixed fee must also consider that the opponent's lawyer may be operating on an hourly rate. In such cases, the incoming writs are likely to be much heftier and to require lengthier responses. When the fee is fixed – and its circumvention is penalised– by the law for both parties, they can rest assured that they need not match an opposing lawyer who is charging his or her client based on the weight of the documents that he or she produces.

Furthermore, the provision of the settlement fee, as mentioned above, promotes the assimilative capacity of the system. It is obvious that the system encourages settlements: it is cost-neutral for clients, the bonus motivates counsel not to overstretch cases; and settling saves the court time and work. Everybody wins.

Comment

Although the provisions of the RVG are prescribed by law, rather than being chosen by the parties, in practice its approach has been shown to be very effective and in the best interest of all stakeholders. What better praise is there for an imposed solution than that it is better than any solution with which the same people could have devised on their own? It is hard to tell whether such a model will ever become popular abroad, but, in Germany, there is little reason to start looking for an alternative to the system already in place.

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