



Reference numbers:

APL_23095/2025

UPC_CoA_431/2025

ORDER
of the Court of Appeal of the Unified Patent Court
concerning a request for security for costs
issued on 9 July 2025

HEADNOTE

- The finding that – due to the recent establishment of this Court – there is currently no experience with enforcing costs decisions of this Court in a particular country, does not rule out the possibility that enforcing a cost decision in that country may prove to be impossible or unduly burdensome. In the absence of such experience, the Court must examine the likelihood of successful enforcement on the basis of other facts and circumstances.
- In the context of the assessment of the likelihood of successful enforcement of a cost decision, the fact that a party has its registered office in a country that is not a Member State of the European Union or the European Economic Area, is a relevant factor. Whereas Union law guarantees the recognition and enforcement of judgements of courts of Member States, including this Court, in other Member States, similar guarantees may not be in place for the recognition and enforcement in states that are not members of the European Union or the European Economic Area.

KEYWORDS

Appeal; security for costs; time limit statement of response

APPELLANTS (DEFENDANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

1) CHINT NEW ENERGY TECHNOLOGY CO., LTD.

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5) ASTRONERGY SOLAR NETHERLANDS B.V.

Transformatorweg 38 – 1014 AK Amsterdam – The Netherlands

6) CHINT SOLAR NETHERLANDS B.V.

Transformatorweg 38 – 1014 AK Amsterdam – The Netherlands

hereinafter jointly: Chint

represented by Jan Phillip Rektorschek and other representatives of Taylor Wessing PartGmbB

RESPONDENT (CLAIMANT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

JINGAO SOLAR CO., LTD.

Jinglong Street, Ningjin County – 055550, Xingtai City – Hebei Province – People’s Republic of China

hereinafter: JingAo

represented by Christopher Maierhöfer and other representatives of Bird & Bird LLP

PATENT AT ISSUE

EP 4 092 759

PANEL AND DECIDING JUDGES

Panel 1a

Klaus Grabinski, President of the Court of Appeal

Peter Blok, legally qualified judge and judge-rapporteur

Emanuel Gougé, legally qualified judge

LANGUAGE OF THE PROCEEDINGS

English

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- ☐ Order of the Hamburg Local Division, dated 9 May 2025
- ☐ Reference numbers:
 - App_18705/2025
 - ACT_42773/2024
 - UPC_CFI_429/2024
 - ORD_19226/2025

FACTS AND REQUESTS OF THE PARTIES

1. JingAo is the registered proprietor of European patent 4 092 759 (hereinafter: EP 759) relating to a solar cell.
2. JingAo started an infringement action against Chint before the Hamburg Local Division on the basis of EP 759 (ACT_42773/2024 UPC_CFI_429/2024).
3. Chint lodged an application for security for costs. By order of 2 April 2025, the judge-rapporteur of the Hamburg Local Division dismissed the application. The request by Chint for review of this order was dismissed by the panel of the Hamburg Local Division by order of 9 May 2025 (hereinafter: the impugned order). The panel was of the opinion that Chint had failed to present concrete evidence that could support its allegation that enforcing a cost order in the People's Republic of China (hereinafter: China) will be impossible or unreasonably burdensome. There is no experience with enforcing cost decisions of this Court in China. The experience of national courts is not sufficient, in the opinion of the Hamburg Local Division.
4. Chint lodged an appeal against the impugned order, requesting that the Court of Appeal revoke it and order JingAo to provide security for costs and to bear the costs of the appeal proceedings. In its statement of grounds of appeal Chint argues – in summary – that the Hamburg Local Division failed to take into account the Court's own negative experiences with the service of document by the Chinese authorities.

GROUND FOR THE ORDER

Statement of response filed too late

5. JingAo failed to lodge its Statement of response within the time limit of R. 235.2 of the Rules of Procedure of the Unified Patent Court (hereinafter: RoP). Under this Rule, the Statement of response must be lodged within 15 days of service of the grounds of appeal. The computation starts on the day following the day on which JingAo received the Statement of grounds of appeal (R. 300(a) RoP). As the Statement of grounds of appeal was served on JingAo on 21 May 2025, the Statement of response should have been filed by 5 June 2025. JingAo however lodged the Statement of response on 6 June 2025.
6. Under R. 235.3 RoP, the Court of Appeal may give a reasoned decision if the respondent fails to lodge a Statement of response. The Court may apply this Rule on its own motion (CoA 5 May 2025, UPC_CoA_636/2024 APL_58935/2024), but is not required to do so, as is apparent from the wording of the provision ("may"). In this case, the Court of Appeal decided not to give a reasoned decision but to have an oral hearing, as a combined oral hearing had already been scheduled in both the present appeal proceedings and the appeal proceedings regarding an

order by the Munich Local Division concerning the same issue and the same parties (APL_23093/2025 UPC_CoA_430/2025).

7. Under R. 9.2 RoP the Court may disregard any step, fact, evidence or argument which a party has not taken or submitted in accordance with a time limit. Since JingAo failed to provide a justification for not meeting the time limit, the Court of Appeal shall disregard the Statement of response.
8. However, the Court of Appeal will have to examine whether the grounds of appeal are well-founded and shall in this context consult the file of the proceedings before the Court of First Instance (R. 222.1 RoP). This means that the Court of Appeal should take the facts, evidence and arguments which JingAo submitted in first instance into account in assessing the grounds of appeal.

Appeal well-founded

9. The appeal against the impugned order is admissible and well-founded.
10. When exercising its discretion under Art. 69(4) of the Agreement on a Unified Patent Court (hereinafter: UPCA) and R.158 RoP, the Court must determine, in the light of the facts and arguments brought forward by the parties, whether the financial position of the claimant gives rise to a legitimate and real concern that a possible order for costs may not be recoverable and/or how likely it is that a possible order for costs by the Court may not be enforceable, or that enforcement may be unduly burdensome. The burden of substantiation and proof of why an order for security for costs is appropriate in a particular case is on the party applying for security for costs (CoA 17 September 2024, UPC_CoA_218/2024 APL_25922/2024, Audi v NST). To this end, the applicant shall not only provide evidence as to the foreign law applicable in the territory where the order is to be enforced, but also on its application (CoA 29 November 20204, UPC_CoA_548/2024 APL_52969/2024, Aarke v Sodastream).
11. The Court of First Instance has a margin of discretion when deciding on a request for security for costs. On appeal, the review is consequently limited (CoA 17 September 2024, UPC_CoA_218/2024 APL_25922/2024, Audi v NST).
12. In the present case, it is not in dispute that the financial position of JingAo does not raise concerns on the recoverability of a possible costs order.
13. For the following reasons, the Court of First Instance exceeded the boundaries of its discretion in finding that Chint had not presented sufficient evidence to support their statement that enforcing a cost decision against JingAo would be unduly burdensome. In particular, the Court of First Instance's finding that – due to the recent establishment of this Court – there is currently no

experience with enforcing costs decisions of this Court in China, does not rule out the possibility that enforcing a cost decision against JingAo may prove to be impossible or unduly burdensome. In the absence of such experience, the Court must examine the likelihood of successful enforcement on the basis of other facts and circumstances.

14. In this context, the fact that JingAo has its registered office in a country that is not a Member State of the European Union or the European Economic Area, is a relevant factor. Whereas Union law guarantees the recognition and enforcement of judgements of courts of Member States, including this Court, in other Member States, similar guarantees may not be in place for the recognition and enforcement in states that are not members of the European Union or the European Economic Area.
15. It is not in dispute that, under Chinese law, the Chinese courts may be requested to recognise and enforce foreign civil and commercial law judgements on the basis of bilateral treaties on the recognition and enforcement of judgements or the principle of reciprocity. However, Chint presented evidence supporting its submission that enforcement of a cost decision of this Court in China would be unduly burdensome in practice. It referred to the difficulties experienced by this Court in serving the statement of claim and other documents in China. Chint described a number of cases where the competent Chinese authority failed to serve the documents despite this Court having fulfilled all the formal requirements under the Hague Service Convention (LD Mannheim 31 July 2024, App_43960 UPC_CFI332/2024, Panasonic v Xiaomi; LD Munich 21 January 2025, ACT_597509 UPC_CFI_508/2023, Air up group v Guangzhou Aiyun Yanwu Technology; LD Munich 21 January 2025, ACT_597615/2023 UPC_CFI_509/2023, Air up group v Guangzhou Aiyun Yanwu Technology). JingAo did not contest the submissions by Chint regarding these negative experiences and failed to present any case in which this Court successfully served a document in China.
16. Moreover, it is not in dispute that national courts of Member States party to the UPCA have encountered comparable difficulties with the service of documents in China under the Hague Service Convention. The Court of Appeal agrees with Chint that the experiences of this Court and the national courts with the service of documents provide an indication of the difficulties which Chint may face when enforcing a possible cost decision against JingAo. This is sufficient to support the submissions by Chint, given that it is currently impossible to provide evidence relating to the actual enforcement of decisions of this Court in China.
17. JingAo's reference to a webpage containing a list of cases concerning the recognition of foreign judgements in China (Exhibit K20) is insufficient to refute the submissions of Chint. JingAo has not demonstrated or stated that the list provides a comprehensive overview or a representative selection of Chinese decisions on the recognition of foreign judgements in China. Moreover, the fact that, according to this list, some foreign judgements have been recognised by Chinese courts, may be sufficient to rebut the *impossibility* of recognition. The list is however not

sufficient to undermine the Court's finding that the enforcement of a cost decision may be *unduly burdensome*, given the described difficulties with service and the fact that the list indicates that recognition was refused in a considerable number of cases.

18. JingAo's reference to the fact that Chint is also established in China, does not alter the assessment. JingAo referred to this fact to counter "a latent accusation of a protectionist attitude on the part of China". The findings of the Court of Appeal are however not based on such an accusation, but on the difficulties this Court and courts of Contracting Member States have actually experienced.
19. JingAo's submission on the implementation of a simplified procedure for service by electronic means in China, does not lead to a different assessment either. JingAo presented no evidence to suggest that this procedure would increase the likelihood that a possible cost decision will be enforceable in China.
20. The Court of Appeal dismisses JingAo's argument that requiring a security would severely limit its right of access to justice and its ability to enforcement its patent. JingAo failed to state and demonstrate that its financial resources are such that the difficulties in providing a security should outweigh the legitimate interest of Chint in obtaining a security for costs.
21. On the basis of the submission by the parties, the Court of Appeal must therefore revoke the impugned order and substitute it with an order granting the application for security for costs. The security will be set at € 200,000, i.e. the ceiling for recoverable costs based on a value of the proceedings of € 2,000,000, which is not in dispute.
22. As this order is not the final order concluding the action, the Court of Appeal will not issue an order for costs.

ORDER

The Court of Appeal

- I. revokes the impugned order;
- II. orders JingAo to provide security for costs to Chint in the amount of € 200,000 by way of deposit on the bank account of the Court set up for this purpose, or by way of a bank guarantee provided by a bank licensed in the EU, within one month from the date of service of this order; and
- III. informs JingAo that a decision by default may be given in accordance with R. 355 RoP if JingAo fails to provide the ordered security within the time stated.

This order was issued on 9 July 2025.

Klaus Grabinski
President of the Court of Appeal

Peter Blok
Legally qualified judge and judge-rapporteur

Emmanuel Gougé
Legally qualified judge