

THE NIGHTMARE OF MISSING A DEADLINE - SPECIAL FOCUS ON THE 30-MONTH DEADLINE FOR ENTERING A NATIONAL PHASE OF THE PCT.

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Canada, China, Germany, India, South Korea, Latvia, Mexico, New Zealand, the Philippines, and Poland. What do all these countries have in common?

Beyond being some idyllic destinations to visit, they all share having made a declaration reserving rule [49.6\(f\) of the PCT](#). What does this imply?

Rule 49.6 of the Regulations under the PCT set forth the “*Reinstatement of Rights after Failure to Perform the Acts Referred to in Article 22*”, which means when an application has not entered the national phase within 30 months from the priority date. It states that, upon the request of the applicant, and subject to certain requirements, the designated Offices may reinstate the rights of the applicant with respect to that international application.

The requirements outlined in Rule 49.6 are essentially that the failure to meet the deadline was **unintentional** or, at the option of the designated Office, it occurred despite the **due care** required by the circumstances.

Rule 49.6 also establishes a timeframe for filing the request for reinstatement, which is that the request may be submitted within whichever of the following periods expires first:

- (i) Two months from the date of removal of the cause of the failure to meet the applicable time limit under Article 22, or*
 - (ii) Twelve months from the date of the expiration of the applicable time limit under Article 22;*
- provided that the applicant may submit the request at any later time if permitted by the national law applicable by the designated Office.*

This Rule 49.6 of the PCT sets a minimum obligation, meaning that within this minimum framework, each country may have specific regulations and criteria for interpreting the standards that their regulations establish to make the reinstatement of rights provision work. For instance, in relation to the causes, the type of evidence, and the circumstances that meet the requirement set out in the rule regarding unintentional or due care.

So far, so good, because -almost- all PCT member states have rules for reinstating rights when, among others, the deadline for entering a national phase is missed. We are in a favorable position if we are still on time of requesting the restoration and if our actions or omissions meet the minimum requirements of the aforementioned rules, which depending on the country, may include unintentional omissions and/or acting with due care.

However, the same Rule 49.6 establishes that if the above is not compatible with the national legislation of any country, the previous rules on the reinstatement of rights will not apply, provided that the corresponding Offices have reported it by January 1, 2003.

[The Offices that have reported such incompatibility and, therefore, there is a reservation regarding rule 49.6\(f\) of the PCT](#) are Canada, China, Germany, India, South Korea, Latvia, Mexico, New Zealand, the Philippines, and Poland.

Thus, is it not possible to recover rights if the applicant fails to meet the national phase deadline in those countries?

No, in those where the provision does not exist, the consequence will be the loss of protection in that country if you do not enter within the 30-month timeframe from the priority date of that PCT.

Yes, if the national legislation provides for some other provision or a possibility to recover the rights.

Because remember, these Offices that have made the reservation are not obligated to reinstate rights in accordance with Rule 49.6(a) of the PCT, so any request for reinstatement against them will be processed in accordance with the applicable national law, which may be more or less favorable than the provisions of the mentioned rule.

Consequently, in the countries mentioned above, you can find some that do not have the provision and, therefore, do not accept it, and others not only accept it but also have specific national procedures to justify delays and have made reservations because their laws are more permissive than Rule 49.6 of the PCT.

Some examples can help illustrate the different approaches and casuistry by country, from the more lenient to the stricter:

In Canada, you can submit an application to reinstate the rights of the applicant regarding that international application within **12 months** following the national phase entry deadline, subject to the payment of an additional fee and a statement that the failure was **unintentional**.

In China, you have an additional 2 months to file for national phase entry with the payment of an additional fee. However, after 32 months, the local legislation stipulates that the applicant can request the reinstatement of rights within **2 months** from the date the impediment preventing the entry is removed, or, at the latest, within **2 years** from the expiration of the deadline. However, in this country, the bar is set higher, as the cause must be **force majeure**, not unintentional or due care, and the applicant must prove it.

In Mexico, there is **no provision for the restoration of rights** once the 30-month deadline has passed. In such case the rights are considered abandoned, and any late entry would be rejected by the Mexican Patent Office.

Hence, it is crucial to seek advice in each country from an expert who can guide you in analyzing the circumstances of the case and the evidence to anticipate whether a request for reinstatement of rights or the recovery of rights for a national/regional phase of a PCT that, for any reason, was not filed within the deadlines set out in the PCT will be possible.