

COST AND FEE ALLOCATION IN CIVIL PROCEDURE

Austria

Reporter: *Marianne Roth*
University of Salzburg

Questionnaire

I. The Basic Rules: Who Pays?

1. What is the basic rule of cost and fee allocation? Does each party bear its own costs or does the loser pay all? Are attorneys' fees and court costs treated differently? What is the principal justification for this rule?

The basic rule of cost and fee allocation in Section 41(1) of the Austrian Code of Civil Procedure (*Zivilprozessordnung*) sets forth that the loser has to pay all – court fees, attorneys' fees, experts' fees, and costs of the parties – but only as far as these costs have been reasonable and necessary for adequate proceedings.

For the loser to bear the costs, the law doesn't treat attorneys' fees and court costs differently. The amount of these expenses, however, is regulated in two specific statutes in distinct ways: according to the Court Fees Act (*Gerichtsgebührengesetz*), the court charge is a flat fee, depending on the amount in dispute; according to the Attorneys' Tariff Act (*Rechtsanwaltstarifgesetz*), the attorney has to be paid for each individual performance he/she makes in the course of the proceedings.

The principal justification for the basic rule can be seen in the fundamental principle that the winning party should not have to suffer any losses out of the proceedings, and that the party prevailing should not be burdened by any court costs or fees.¹

2. If the loser pays all, are all of the winner's costs and fees reimbursed or just a part (e.g., a reasonable amount)?

Generally, the losing party has to reimburse all the winning party's costs and fees, as long as these costs were reasonable and necessary, such as not incurred because of excessive caution.² For example costs for consulting an attorney or a detective are necessary costs, whereas, costs arising from filing a law suit with an incompetent court or for correcting a written pleading are considered to be not necessary and therefore won't be reimbursed.³

The amount of the attorneys' fees is calculated according to the Attorneys' Tariff Act. If the winning party has negotiated another amount with its attorney (which may be higher or lower than provided by the Act) the losing party nevertheless has to pay the tariff (refer to IV 2).

3. Are there special rules for appeals? How are the additional costs and fees allocated?

According to Section 50 of the Austrian Code of Civil Procedure, the rules of cost and fee allocation are also applicable for appeals in the court of second instance or third instance. Thus, the losing party of the court of last instance has to pay the entire legal costs, regardless of whether he/she has won in a court of lower instance.

4. Who pays for the taking of evidence, especially the costs of (expert and other) witnesses? Are such costs a significant factor in the overall costs of litigation?

Under Austrian law, every witness and expert has the right to claim the necessary travel costs, accommodation costs, and loss of profit. According to the basic rule that the loser pays all, the

¹ *Chvosta*, Prozesskostenrecht, Manz 2001, 13 et seq.

² *Rechberger and Kodek* in *Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 66.

³ *Fucik* in *Rechberger* (Ed), Kommentar zur ZPO, 3rd edition, Springer Verlag 2006, § 41 marg. No 5.

losing party has to bear these costs, together with all other costs of litigation, at the end of the proceedings. However, during the course of the proceedings, the party who offers evidence of a witness or expert has to pay for the expenses of the witness or expert in advance if these costs are likely to exceed \$ 280 (€200).⁴ If both parties offer the evidence of the same witness or expert, each party has to pay half the costs in advance.⁵ Whether or not the costs for the taking of evidence are a significant factor in the overall costs of litigation, depends on the kind of evidence as well as on the particular case. Obtaining an expert opinion, e.g., might be expensive.

5. How are costs and fees typically allocated if the parties settle their dispute? What percentage of civil suits is typically settled?

If parties settle their dispute, they generally come to an agreement that each party has to bear its own expenses. Moreover, the parties frequently agree that as the plaintiff has to pay the entire court fees in advance, the defendant will reimburse half the fees to the plaintiff on an amortized basis. In case of a settlement, if the parties to the settlement do not agree on an allocation of costs, Section 47(1), Sentence 2, of the General Austrian Civil Code sets forth that the entire costs offset each other.

In practice, quite a number of proceedings are settled: according to statistics for the year 2008, 16,965 out of 120,407 proceedings before the district court (*Bezirksgericht*) and 4,108 out of 20,807 before the regional court (*Landesgericht*) were settled.⁶ According to a study by *Stomper and Stomper*,⁷ a settlement of the dispute or controversy depends on the matter under dispute and on whether the parties are individuals or companies (companies are more likely to reach a settlement than are individuals).⁸

⁴ Exchange rate at the time of assimilation of data: €1 = \$ 1.4.

⁵ Sections 40, 365, and 332 of the Austrian Code of Civil Procedure (cf. *Obermaier*, *Das Kostenhandbuch. Kostenersatz im Zivilprozess und im Verfahren außer Streit*, 57 et seq).

⁶ Statistics provided by the Ministry of Justice in August 2009.

The data refer to proceedings that are not part of an order for payment procedure (*Mahnverfahren*). Such orders for payment procedures are obligatory for monetary claims at all district courts and regional courts, up to an amount in dispute of \$ 42,000 (€30,000). A recent reform in 2009 increased this amount to \$ 105,000 (€75,000).

⁷ *Stomper and Stomper*, *Unterschiede im Prozessverhalten von Unternehmen und Privatpersonen in Lewisch and Rechberger (Eds)*, 100 Jahre ZPO. Ökonomische Analyse des Zivilprozesses, Manz 1998, 39 et seq.

⁸ *Stomper and Stomper*, *Unterschiede im Prozessverhalten von Unternehmen und Privatpersonen in Lewisch and Rechberger (Eds)*, 100 Jahre ZPO. Ökonomische Analyse des Zivilprozesses, Manz 1998, 49.

Moreover, the Austrian Code of Civil Procedure gives judges ample opportunities during the entire proceedings to try arranging a settlement between the parties, for example, in the preliminary hearing (*Vorbereitende Tagsatzung*), according to Section 258(1), subparagraph 4, of the Austrian Code of Civil Procedure.

II. Exceptions and Modifications

1. Are there exceptions (statutory or otherwise) to the basic rule (e.g., for specific kinds of situations, cases, or parties)?

There are certain statutory exceptions to the basic rule so that the party who is responsible for the respective act of court has to bear the costs, irrespective of the outcome of litigation:

Regardless of fault, the cost of restitution to the previous state or the costs of an objection against a judgment in default have to be paid by the responsible party itself. In other cases, a party may be liable on grounds of his/her culpability: if the litigation becomes more costly because the party filed an application or other brief out of time or protracted proceedings maliciously, he/she has to bear the costs by himself/herself (*Kostenseparation*, Section 48 of the Austrian Code of Civil Procedure).

Moreover, in cases where a party has not given reasonable cause to be sued, and recognizes the claim of the plaintiff on the first occasion in the proceedings, the plaintiff has to bear all costs (Section 45 of the Austrian Code of Civil Procedure).⁹

2. Are there any mandatory pre-litigation procedures (e.g., mandatory mediation) with an impact on cost and fee allocation?

There is nothing equivalent to a pre-trial in Austrian procedural law, although sometimes the first part of the ordinary proceedings – until the defendant decides to defend the claim – is called ‘pre-trial’ (*Vorverfahren*). At this stage, the court basically examines the admissibility of the

⁹ *Rechberger and Kodek in Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 66.

complaint, and the defendant can deliberate over wanting to contest the claims made in the complaint. Nevertheless, this is part of the proceedings, as it includes the filing of the complaint, the examination of the complaint by the court, service to the defendant, etc. It doesn't bear any resemblance to the pre-trial stage in Anglo-American law. In other words, in Austrian law, there is nothing comparable to mandatory pre-litigation procedures under American law.¹⁰

There are a few regulations that don't have an impact on cost and fee allocation, such as in the law concerning the respective interests of neighbors,¹¹ which obliges the parties to try for a settlement or mediation prior to the start of proceedings. In such cases, the parties may resort to litigation only if the neighbors fail to find any solution within three months.

3. Are party agreements (in a contract) allocating costs and fees in case of litigation common? To what extent are such agreements enforceable (e.g., even against consumers)?

Party agreements allocating costs and fees in case of litigation are not at all common in Austria. Such agreements are only valid between the parties. Therefore, if one party wants to enforce the agreement, that party has to pursue the suit separately, after the proceedings on the merits of the case.

4. Are parties allowed to represent themselves? If they are, can they do so in all cases or only in some? How common is self-representation?

Under Austrian law, there are only few exemptions whereby the parties are allowed to act for themselves before the court, but predominantly they must be represented by an attorney.

According to the rules of representation (Sections 26 et seq of the Austrian Code of Civil Procedure) the parties are obliged (*absoluter Anwaltszwang*) to be represented by an attorney¹² in cases before all regional courts, and in cases before district courts if the value of the case exceeds

¹⁰ *Rechberger and Kodek in Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 41.

¹¹ Section 364 of the General Austrian Civil Code.

¹² Under Austrian law, in terms of representation by an attorney, there is no distinction made between barristers and solicitors. Moreover, an attorney has the right to advise his/her clients in all legal matters and to represent them before any court or administrative authority within the country (*Heller in Colman (Ed)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.1 and A3.19).

\$ 7,000 (€ 5,000). Moreover, the parties are not allowed to represent themselves before an appellate court and the Supreme Court.

There are only a few exceptions to the mandatory employment of an attorney, which are however of minor importance.¹³ A few examples follow.

An application for legal aid does not require the representation by an attorney before labor and social courts; the parties may instead be represented by an employee of the Chamber of Commerce (*Wirtschaftskammer*) or the Chamber of Employees (*Kammer für Arbeiter und Angestellte*) for the conclusion of a settlement before the district court with an amount in dispute over \$ 7,000 (€5,000).¹⁴ In cases where the parties are free to represent themselves (for example, in district courts if the value of the case does not exceed \$ 7,000), they can either do so in person or appoint a non-professional representative, who is not allowed to take any fee.

Moreover, in some other cases – for example, under the marriage law – a party can choose to either represent himself/herself or to be represented. However, if representation is the choice, the representative has to be an attorney, provided that two attorneys are registered in that location (*relativer Anwaltszwang*).

Regarding the frequency of self-representation, no official statistics providing concrete numbers or percentages exist.¹⁵

III. Encouragement or Discouragement of Litigation

1. Are the rules governing cost and fee allocation designed to encourage or to discourage litigation in general, or in particular kinds of cases?

In general, litigation costs and fees have the function of preventing careless and unnecessary civil proceedings. The risk of losing a case has a deterrent effect – especially for the plaintiff – and can be seen as impeding access to justice. The likelihood of this increases with the amount in

¹³ *Heller in Colman (Ed)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.25.

¹⁴ *Heller in Colman (Ed)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.25.

¹⁵ Information provided by the Ministry of Justice (August 2009).

dispute: the higher the amount in dispute is, the higher the legal costs are and the greater the economic imbalance between the parties, especially between consumers and companies.¹⁶

However, for indigent parties legal aid provisions bring some relief (refer to VI). Moreover, it is possible to insure against legal costs, either by legal protection insurance or by coverage in other policies (for example, automobile liability coverage). For parties in such cases, the costs are not a barrier to filing a lawsuit.

2. How much do parties (especially plaintiffs) typically have to pay up front, e.g., in the form of court costs (in court), as attorneys' fees (retainer), or as costs for taking evidence? Do up-front payment requirements have a deterrent effect on potential litigants?

Generally, each party has to bear its own costs provisionally during the proceedings, and the winning party can only subsequently claim compensation from the losing opponent.¹⁷ Moreover, on filing a lawsuit, the plaintiff has to pay the court fees in advance. Paying attorneys fees a priori, especially a retainer, is not mandatory by law. However, an attorney may demand that his/her client pay a certain amount up front, prior to the proceedings.

During the pending proceedings, the party who will take the evidence of a witness or expert has to pay the expenses of the witness or expert in advance, if these costs are likely to exceed \$ 280 (€200). If both parties take the evidence of the same witness or expert, each party has to bear half the costs.¹⁸ Potential litigants could be deterred if the party doesn't get legal aid or have any insurance against costs.

IV. Determination of Costs and Fees

1. What factors determine the amount of court costs – the type of court, the amount in dispute, or other factors?

¹⁶ *Wagner*, Rechtsprobleme der Fremdfinanzierung von Prozessen (I), Juristische Blätter 2001, 416.

¹⁷ *Rechberger and Kodek* in *Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 66.

¹⁸ Sections 40, 365, and 332 of the Austrian Code of Civil Procedure (cf *Obermaier*, Das Kostenhandbuch. Kostenersatz im Zivilprozess und im Verfahren außer Streit, 57 et seq).

Court costs are in the form of a flat fee, and are calculated according to the amount in dispute. They are regulated in the Court Fees Act (*Gerichtsgebührengesetz*), which stipulates that when the amount in dispute is under approximately \$ 509,000 (€363,360) the fee is a lump sum, and that over this amount of approximately \$ 509,000 the fee is calculated at 1.2 per cent of the value of the case, which amounts to a minimum fee of \$ 6,104 (€4,360), plus approximately \$ 2,500 (€ 1,754).

2. Are attorneys' fees determined by statute (schedule), or by the market? If determined by statute, are the rates binding, or can clients and their attorneys agree to increase or decrease them? If determined by the market, what are the main criteria?

Attorneys' fees are determined by statute: the Attorneys' Tariff Act (*Rechtsanwaltstarifgesetz*). Under this law the attorneys' fees depend on the amount in dispute: the higher the amount in dispute, the higher the attorneys' fees.. However, attorneys' fees in Austria are not a lump sum; rather, attorneys are paid for their individual performances. Hence the ultimate sum depends, inter alia, on the number of written statements, and on the number and length of the hearings.¹⁹ The tariff is always used to calculate the compensation of attorneys' fees by the losing party. Beside the tariff, attorneys and clients are free to enter into any form of fee arrangement that is not totally beyond the scope of what is usually charged. Therefore, the rates can be increased or decreased by their consent. However, the Bar Association exercises some control on fee arrangements; in particular, it protects inexperienced clients. If no arrangement was made, reasonable fees may be charged.²⁰

If a special rate between a client and an attorney is negotiated, the main criteria for increasing or decreasing the rate are the market, business competition, as well as the status of the attorney (for example, seniority or success rate in court proceedings).

¹⁹ *Heller in Colman (Ed)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.33.

²⁰ *Heller in Colman (Ed)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.30.

3. Who finally determines the concrete amount to be awarded to the party/parties? Does the decision-maker have discretion? What form does the decision take (integral to the judgment, separate court order, etc.)?

It is the court that finally determines the concrete amount to be awarded to the parties. However, to obtain a refund of costs, each party has to file a breakdown of its costs until the end of the oral proceedings (Sections 52 and 54(1) of the Austrian Code of Civil Procedure).²¹ If the counterparty does not accept the other party's calculations, it has to file a protest within 14 days (Section 54(1a) of the Austrian Code of Civil Procedure). Based on this, the court rules on the costs by means of a decision (*Beschluss*).²² This decision is integral to the judgment (Section 52(1) of the Austrian Code of Civil Procedure). However, in cases where the parties have to bear their own expenses regardless of the outcome of litigation (refer to II 1.), a separate decision by the court will be awarded. The court has discretion as to what extent the costs were necessary, but it is bound by the tariff as to the amounts awarded.²³

V. Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims, and Litigation Insurance

1. Are success-oriented fees allowed – in particular, contingency fees (a percentage of the sum won), no win-no fee arrangements, success premiums (higher fees in case of a victory), or other fees depending on the outcome of the litigation? If allowed, are such fees a recent development (since when), are they regulated by law (e.g., capped), does the loser have to pay the enhanced (success) fee? Are such fees common across the board or in particular cases only?

²¹ *Rechberger and Kodek in Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 67.

²² *Rechberger and Kodek in Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 67.

²³ *Rechberger and Kodek in Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 66.

For the protection of clients, success-oriented fees such as contingency fees are basically forbidden according to Section 879(2)(2) of the General Austrian Civil Code (*quota litis*).²⁴ However, a success premium or a lump sum fee (calculated as a percentage of the amount in dispute) is allowed, as long as it is not calculated as a percentage of the sum won.²⁵

If the winning party has negotiated a special fee with his/her attorney (which may be a higher or a lower fee), the losing party nevertheless has to pay the tariff.

2. Is it permissible to sell claims for purposes of litigation (i.e., can a plaintiff subrogate his claim to an attorney, a law firm, or an entrepreneur who finances the litigation and thus assumes the litigation risk)?

It is not permissible to sell claims for purposes of litigation to an attorney (Section 879(2)(2) of the General Austrian Civil Code). However, private corporations, such as Advofin, do finance litigation and assume the litigation risk. Though, Advofin for example, will finance litigation only if the amount in dispute is over \$ 70,000 (€50,000); in such cases, the clients have to pay a contingency fee of 20 – 50 per cent of the sum won. It should be noted that such agreements are legal under Austrian law and not subsumed under *quota litis*, as Section 879(2)(2) of the General Austrian Civil Code only addresses attorneys and not corporations such as Advofin.²⁶

3. Are there special rules for class actions, group litigation, or other types of lawsuits (e.g., actions brought by consumer organizations)?

Currently, class actions or group litigations – comparable to those in the United States – cannot be filed in Austria. Under Austrian law, proceedings with one plaintiff representing many clients against one or more defendant(s) (*Sammelklagen*) are merely conducted under the regulation of Section 227 of the Austrian Code of Civil Procedure. This regulation only sets forth that the

²⁴ *Apathy and Riedler* in *Schwimann*, Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch, vol IV, 3rd edition, LexisNexis 2006, Section 879 of the General Austrian Civil Code, marg. No. 16; also refer to Section 16(1) of the Attorneys' Tariff Act.

²⁵ *Krejei* in *Rummel*, Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch, 3rd edition, Manz 2000, Section 879 General Austrian Civil Code, marg. No. 209.

²⁶ Refer to Judgment of 23 February 1999, Austrian Supreme Court, 5 Ob 28/99z; RS 0016814 T 2.

court should be competent to try all the separate cases, and that the same form of action has to be applied (*objective Klagenhäufung*). However, there are no further specific regulations for such proceedings. Detailed provisions for group litigations (*Gruppenverfahren*) were discussed in a legal draft in 2007,²⁷ as some proceedings concerning a lot of parties were pending with a court, such as the *Kaprunprozess*.²⁸ Austrian scholars such as *Klauser* and *Maderbacher*²⁹ see a positive effect on finally regulating such proceedings. However, this draft has not yet come into effect.

Concerning the interests of consumers or fair competition, special actions can be brought to court: according to Section 14 of the Unfair Competition Law (*Gesetz gegen den Unlauteren Wettbewerb*) and Sections 28 – 30 of the Consumer Protection Law (*Konsumentenschutzgesetz*) particular organizations – for example, the Austrian Federal Economic Chamber (*Österreichischer Gewerkschaftsbund*) and the Consumer Protection Board (*Verein für Konsumenteninformation*) – are allowed to file for injunctive relief to guarantee fair competition or the interests of consumers. On behalf of a company or an individual, the organization conducts a lawsuit on its own (*im eigenen Namen über fremde Interessen*). Therefore, consumers have to assign the debt to the Consumer Protection Board.

4. Can one insure against the costs (including fees) of litigation, such as by buying specific litigation insurance or by buying coverage in other policies (e.g., automobile liability or homeowners insurance)? Is such insurance common? How does it work in practice?

Insurance against the costs of litigation (including fees) is possible. According to statistics provided by the Austrian Underwriting Association (*Österreichischer Versicherungsverbund*), a total number of 2,975,359 insurance contracts for legal protection existed in 2008.³⁰ However, individuals – in contrast to companies – are not very likely to be insured against costs, though

²⁷ Zivilverfahrensnovelle 2007, 70/ME 23. GP.

²⁸ 70/ME 23. GP, 2.

²⁹ *Klaus and Maderbacher*, Neues zur “Sammelklage”, *ecolex* 2004, 170.

³⁰ This is an overall amount including individuals as well as companies, but excludes legal protection in connection with automobile liability insurance.

this practice is becoming increasingly more common. In most cases, however, persons who are filing a lawsuit carry legal cost insurance.³¹

It is also possible for automobile insurance or homeowners insurance to cover legal assistance (for litigations in that particular area). However, in most cases, one has to buy coverage separately. In recent years though, a few companies providing automobile liability insurance include automatic legal protection.

In practice, the attorney or the plaintiff has the onus of informing the insurance company, so the company can verify whether the case in question is covered by the respective policy and whether or not the total amount insured is exceeded. If all terms and conditions are fulfilled, the insurance company gives a cover note to its client. Depending on the insurance contract, clients can choose their own attorney or may be obliged to use an attorney provided by the insurance company. As a rule, the former case is often agreed if the party has general legal protection insurance, the latter if legal protection is automatically included, such as in automobile liability insurance.

If the insured client is the plaintiff, the insurance company covers court fees at the beginning of the process, so the client doesn't have to bear any expenses in advance. If the client loses the case, all legal costs – including attorneys' fees and court costs – are billed directly to the insurance company.

VI. Legal Aid

1. Is there a publicly funded legal aid system? If so, how does it generally work (through financial support, court-appointed counsel, or otherwise)?

Legal Aid (Sections 63 – 73 of the Austrian Code of Civil Procedure) consists of the appointment of an attorney by the Bar Association and a waiver of court fees by the state.³² Therefore, legal aid is not offered by a special organization, but rather by each attorney, free of charge. Each of the attorneys is assigned between five and ten legal aid cases each year.³³ The

³¹ *Hausmaninger*, The Austrian Legal System, 3rd edition, Manz 2003, 222.

³² *Heller in Colman (Ed)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.27.

³³ *Heller in Colman (Ed)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.7.

court decides whether or not legal aid should be granted. If the court grants free representation by an attorney, the Bar Association assigns one according to a special system; an attorney so assigned may not refuse the case without good cause. Therefore, Austrian attorneys have an obligatory duty to provide free legal assistance within the system of legal aid. If the judgment is rendered in favor of the indigent party, his/her attorney is entitled to payment of his/her fees, whereas on losing, the indigent party only has to pay the opponent's expenses.³⁴ However, legal aid is only a provisional measure. In three years' time, the party has to repay the money, if possible.³⁵

Besides, it should be noted that free legal advice is provided by the district courts (called *Amtstag*) or the Bar Association on special days of the week.

2. Is there privately organized help for indigent or other clients (e.g., through pro bono work)?

There is no privately organized help for indigent or other clients in civil procedures.

3. Is legal aid generally available to all parties in need, or is it awarded/available selectively?

Legal aid is generally available to any party that is unable to bear the expenses of participation in legal proceedings without endangering his/her livelihood, regardless of whether the applicants are plaintiffs or defendants, nationals or aliens.³⁶ However, only natural persons (and not legal persons) can make an application for legal aid.³⁷ A person who applies for legal aid has to prove

³⁴ *Rechberger and Kodek in Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 153.

³⁵ *Rechberger and Kodek in Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 152.

³⁶ *Rechberger and Kodek in Blanpain, Colucci, and Taelman (Eds)*, International Encyclopaedia of Laws. Civil Procedure. Austria, Kluwer Law International 2005, 152.

³⁷ Until 1 July 2009, legal aid was available to natural and legal persons alike.

that his/her income is too low to employ an attorney and that he/she owns no property. In such a case, the judge has to grant legal aid, unless the party obviously cannot win the case.³⁸

4. Are litigation costs and fees considered a serious barrier excluding certain parties from access to justice?

In general, litigation costs and fees have the function of preventing careless and unnecessary civil proceedings. The risk of losing a case is a specific deterrent and may be seen as impeding access to justice. According to the legal aid provisions, however, the law considers the parties' funds and financial options. In this way, equality before the law and a fair trial, as set forth in Article 6 of the European Convention on Human Rights, are definitely fulfilled.³⁹

5. Are litigation costs a barrier to bringing certain kinds of cases (e.g., because the amount in controversy is too low to make litigation economically feasible)?

As stated above, litigation costs and fees serve the purpose of discouraging careless and unnecessary civil proceedings, so they may also be seen as a barrier to bringing certain types of cases to court, such as those with a very small amount in dispute. For instance, if the amount in dispute is \$ 100 (approximately €72), the court fees are \$ 28 (€20) and attorney's costs for only writing the statement of claim are \$ 72.52 (€51.8).

VII. Examples

1. Please state, or provide a good faith estimate of, the sum total (for each party) of costs and fees of litigating a routine private or commercial case (e.g., contract, tort, or property) to final judgment in a court of first instance.

³⁸ *Heller in Colman (Ed)*, Encyclopedia of International Commercial Arbitration. Austria, Wolters Kluwer 2009, A3.26.

³⁹ *Chvosta*, Prozesskostenrecht, Manz 2001, 14 et seq.

Concerning attorneys' fees in the following examples, it has to be noted that the tariff is not based on a certain percentage of the value. Therefore, a prediction of the ultimate sum of the attorneys' fees is impossible, as it depends on the number of written statements and on the number and length of hearings, which are charged on the half-hour in Austria. Moreover, the number of witnesses and experts and their expenses also have to be factored into the total sum. Therefore, in each of the following examples, the model case can only provide the estimated costs for each claim.⁴⁰

Small claim, e.g., (the equivalent of) \$ 1,000 (approximately €714)

- The court fees for a \$ 1,000 claim are \$ 77 (€55).
- If the plaintiff and the defendant are represented by an attorney, the fees will be as follows:
 - Attorneys' fees for plaintiff: \$ 673 (€481), composed of written claim, other written pleadings, hearing of two hours, including each with a standard fee (*Einheitssatz*).⁴¹
 - Attorneys' fees for defendant: \$ 673 (€481), composed of written defense (although there is no requirement for a written pleading by the defendant, in practice one is frequently submitted), other written pleadings, hearing of two hours, including each with a standard fee.
- Thus, the total costs in this sample case are \$ 1,423.⁴²

Small to medium claim, e.g., \$ 10,000 (approximately €7,140)

- The court fees for a \$ 10,000 claim are \$ 379 (€271).
- Attorneys' fees for plaintiff: \$ 3,392 (€2,423), composed of written claim, other written pleadings, preliminary hearing, hearing of two hours, including each with a standard fee.

⁴⁰ For this model case no fees for experts and witness are calculated, as they are different in each individual case.

⁴¹ *Einheitssatz*: Under Austrian law, ancillary performances (e.g., telephone calls, letters, and conferences) can either be charged separately, or as a standard fee including all these performances. The standard fee has been applied to this model case.

⁴² All tariffs exclude purchase tax, which is 20 % in Austria. Including the tax, the costs add up to \$ 1,707.6.

- Attorneys' fees for defendant: \$ 3,392 (€ 2,423), composed of written defense, other written pleadings, preliminary hearing (*Vorbereitende Tagsatzung*), hearing of two hours, including each with a standard fee.
- Thus, the total costs in this sample case are \$ 7,163.⁴³

Medium to large claim, i.e., \$ 100,000 (approximately €71,400)

- The court fees for a \$ 100,000 claim are \$ 1761 (€1,258).
- Attorney's fees for plaintiff: \$ 9,598.7 (€6,856.21), composed of written claim, other written pleadings, preliminary hearing of half an hour, hearing of three hours, including each with a standard fee.
- Attorney's fees for defendant: \$ 9,598.7 (€6,856.21), composed of written defense, other written pleadings, preliminary hearing of half an hour, hearing of three hours, including each with a standard fee.
- Thus, the total costs in this sample case are \$ 20,962.8 (€14,973.42).⁴⁴

Large claim, e.g., \$ 1,000,000 (approximately €714,000)

- The court fees for a \$ 1,000,000 claim are \$ 14,450 (€10,322).
- Attorneys' fees for plaintiff: \$ 16,338 (€ 11,670), composed of written claim, other written pleadings, preliminary hearing of one hour, hearing of three hours, including each with a standard fee.
- Attorneys' fees for defendant: \$ 16,338 (€11,670), composed of written defense, other written pleadings, preliminary hearing of one hour, hearing of three hours, including each with a standard fee.
- Thus, the total costs in this sample case are \$ 47,126.8 (€33,662).⁴⁵

⁴³ All tariffs exclude purchase tax, which is 20 % in Austria. Including the tax, the costs add up to \$ 8595.6.

⁴⁴ All tariffs exclude purchase tax, which is 20 % in Austria. Including the tax, the costs add up to \$ 25,155.4.

⁴⁵ All tariffs exclude purchase tax, which is 20 % in Austria. Including the tax, the costs add up to \$ 56,552.

2. If a plaintiff loses a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be?

- The court fees for a \$ 100,000 claim are \$ 1,761 (€1,258).
- Attorneys' fees for plaintiff: \$ 9,598.7 (\$ 6,856.21 €), composed of written claim, other written pleadings, preliminary hearing of half an hour, hearing of three hours, including each with a standard fee.
- Attorneys' fees for defendant: \$ 9,598.7 (€6,856.21), composed of written defense, other written pleadings, preliminary hearing of half an hour, hearing of three hours, and including a standard fee.
- As the plaintiff has lost the case, his/her cost and fee liability in this sample case is \$ 20,962.8 (€14,973.42).⁴⁶

3. If a defendant loses a \$ 100,000 claim after litigation, what would be a rough estimate of his/her cost and fee liability?

- The court fees for a \$ 100,000 claim are \$ 1,761 (€1,258).
- Attorneys' fees for plaintiff: \$ 9,598,7 (€6,856,21), composed of written claim, other written pleadings, preliminary hearing of half an hour, hearing of three hours, including each with a standard fee.
- Attorneys' fees for defendant: \$ 9,598,7 (€6,856,21), composed of written defense, other written pleadings, preliminary hearing of half an hour, hearing of three hours, including each with a standard fee.
- As the defendant has lost the case, his/her cost and fee liability in this sample case is \$ 20,962,8 (€14,973,42).⁴⁷

⁴⁶ All tariffs exclude purchase tax, which is 20 % in Austria. Including the tax, the costs add up to \$ 25,155.4.

⁴⁷ All tariffs exclude purchase tax, which is 20 % in Austria. Including the tax, the costs add up to \$ 25,155.4.

In Conclusion:

Please comment on other issues that are not covered by the questionnaire but are a concern in your country or jurisdiction. Please provide possibly pertinent information about current developments or future perspectives, especially about the direction in which the cost and fee allocation rules are currently developing and are likely to develop in the foreseeable future.

There are no modifications of Austrian general cost and fee allocation rules planned for the near future.⁴⁸ Besides, it should be mentioned that from 1 July 2009,⁴⁹ court fees were increased; before, there had been no adoption since 1 January 2002.⁵⁰

⁴⁸ Information provided by the Dr. Barbara Kloiber on behalf of the Ministry of Justice on 14 August 2009.

⁴⁹ The *Budgetbegleitgesetzes 2009*, modifying the Court Fees Act, came into force.

⁵⁰ *Mayr*, *Zivilverfahrensrechtliche Neuerungen des Budgetbegleitgesetzes 2009*, *ecolex* 2009, 563.