

COST AND FEE ALLOCATION IN CIVIL PROCEDURE

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Introduction

1. The rules on judicial expenses and costs and their recoverability are laid down in the Judicial Code (hereafter: J.C.), in the Articles 1017-1024. Articles 1018-1019 and 1022 J.C. give an overview of the recoverable costs. Articles 1020-1021 J.C. concern the payment of and the decision upon the costs. Article 1023 J.C. introduces a prohibition of ‘increase clauses’. Article 1024 J.C., finally, deals with the costs of enforcement.

As it will emerge from the answers to the questionnaire, the current rules have been subject to a major statutory amendment in 2007, introducing a (fixed) recoverability of lawyers’ fees.

I. The Basic Rules: Who Pays?

1. *What is the basic rule of cost and fee allocation - that each party bears its own or that the loser pays all? Are attorneys' fees and court costs treated differently? What is the principal justification for this rule?*

2. According to article 1017 J.C., each final judgment refers – even *ex officio* - to the expenses at charge of the party found to be in error of put in the wrong by the judgment (the forfeiting party). In other words, the forfeiting party has to pay / reimburse the costs mentioned under question 2 to the winning party. As the referring to the costs is a legal consequence of the basic judgment, the court or tribunal must not give a specific motivation for the indictment of the charge, except if a party has expressly argued on this point (in which case the arguments must be answered).¹ The referring in the costs is not based on a liability.² It is based on the principles of procedural

¹ Supreme Court 11 May 1989, *Arresten van het Hof van Cassatie* 1988-89, 1059; Supreme Court 18 October 1985, *Arresten van het Hof van Cassatie* 1985-86, 228; J. LAENENS, K. BROECKX, D. SCHEERS & P. THIRIAR, *Handboek gerechtelijk recht*, Antwerp, Intersentia, 2008, 490; D. MAES, “Artikel 1017 Ger.W.”, in X., *Artikelsgewijze commentaar: Gerechtelijk recht*, Mechelen, Kluwer, p. 103, n° 2.

² Supreme Court 15 May 1941, *Pasicrisie* 1941, I, 192; G. DE LEVAL, *Eléments de procédure civile*, Ghent, Larcier, 2005, 453.

risk and policy: each party starting legal proceedings bears the risk that his claim or defense will be dismissed.³

3. Two conditions have to be met in order to refer the forfeiting party to the expenses: it has to be a *final* judgment and there has to be a forfeiting (*losing*) party. A *final* judgment is each judgment in which a Court or Tribunal depletes its power to decide on a litigated aspect, except the means to appeal against this decision (Article 19, par. 1 J.C.). An intermediate judgment will adjourn the issue about the expenses until the final judgment. The *forfeiting* party is the party which has been condemned against the other party.⁴

There is legal debate on the indictment of the expenses in *summary proceedings*, which only aim at the obtaining of provisional injunctions. A judgment in a final proceeding is a final judgment in the sense of article 19, par. 1 J.C.. However, summary proceedings may not bring any harm to the situation of the parties, as only provisional injunctions can be rendered. During the parliamentary debate preceding the Judicial Code, it has been argued that the indictment of the expenses would harm that particular party.⁵ This view has been contested by leading scholars and practitioners.⁶ The Belgian Supreme Court ruled that if the claim in summary proceedings is dismissed, the court or tribunal has to condemn the claimant to those expenses.⁷ However, a majority of legal scholars continue to argue that the judge has the freedom in summary proceedings whether or not to put at charge the expenses of the losing party.⁸

If the Public Prosecutor, acting as principal party in civil matters, is the losing party, the judicial costs and expenses mentioned under question 2 are to be borne by the State.⁹

4. According to Article 1024 J.C., the costs of enforcement of a title (*e.g.* judgment) are to be borne by the party against whom the enforcement is claimed.

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)?*

2.1 General overview

5. Article 1018 J.C. contains an enumeration of the recoverable judicial expenses and costs:

1° the various court fees (*griffierechten/droit de greffe*) and registration duties (*registratierechten/droit de régristration*), as well as the stamp duties (*zegelrechten*) paid before the abolition of the Code on Stamp Duties;¹⁰

³ B. DE TEMMERMAN, "Rechtsvergelijkende variaties op een heikel thema", in F. EVERS & P. LEFRANC (eds.), *De verhaalbaarheid van de kosten van verdediging: en wat met de toegang tot de rechter?*, Bruges, Die Keure, 2005, 25 and 29.

⁴ Belgian Supreme Court 26 September 1983, *Arresten Cassatie* 1983-84, 72; J. LAENENS, K. BROECKX, D. SCHEERS & P. THIRIAR, *Handboek gerechtelijk recht*, Antwerp, Intersentia, 2008, 490.

⁵ C. VAN REEPHINGEN, *Verslag over de gerechtelijke hervorming*, Belgian Official Gazette, 1964, 393.

⁶ D. LINDEMANS, *Het kort geding*, Antwerp, Kluwer, 1985, 144-146; D. MAES, "Artikel 1017 Ger. W.", in X., *Artikelsgewijze commentaar: Gerechtelijk recht*, Mechelen, Kluwer, p. 4, n° 7.

⁷ Supreme Court 29 April 1982, *Arresten Cassatie* 1981-82, 1058; Supreme Court 9 February 1984, *Arresten Cassatie* 1983-84, 703.

⁸ D. MAES, "Artikel 1017 Ger. W.", in X., *Artikelsgewijze commentaar: Gerechtelijk recht*, Mechelen, Kluwer, p. 4, n° 6.

⁹ Supreme Court 11 May 1922, *Pasicrisie* 1922, I, 285.

- 2° the price and the emoluments and wages for the judicial deeds;
- 3° the price for the authenticated copy (*uitgifte/expédition*) of the judgment;
- 4° the expenses concerning all investigation measures, amongst others the expenses for witnesses and experts;
- 5° the expenses for travelling and residence of judges, clerks of the court and the parties, when their trip has been imposed by the judge, and the expenses of deeds which have been drafted with regard to the legal proceedings;
- 6° the expenses of judicial procedure (*rechtsplegingsvergoeding/indemnité de procédure*), as stated in Article 1022 J.C.;
- 7° the fees, the emoluments and the costs of the mediator, nominated according to Article 1734 J.C.

6. The enumeration in Article 1018 J.C. is not exhaustive.¹¹ As can be deduced from parliamentary documents, the judge has a certain freedom of appreciation towards costs not included in the list of Article 1018 J.C.¹² Additional expenses and costs can be, for instance, the expenses made to obtain a certificate of the defendant's domicile or a copy of a criminal file (e.g. needed to sustain a divorce claim).

7. The amount of judicial expenses and costs can give cause to delay interests. As it is the final judgment which decides upon the referring of the expenses and costs, payment is only due starting from this final judgment and interests can only yield from this same date, after a proof of default.¹³

In the following analysis, we will deal more in detail with each of the enumerated posts of expenses.

2.2. Court fees, registration duties and stamp duties

2.2.1 Court fees

8. Court fees are fees for the following acts accomplished by the judicial services:

a. The inscription of the case on the role of the court or tribunal (*rolrecht/droit de rôle*). In principle, this 'role fee' depends upon the court or tribunal before which the case is introduced and upon the way the case is introduced (by citation, request or summary proceedings).¹⁴

	Justice of the peace	Tribunal of first instance	Industrial Tribunal	Commercial Tribunal	Court of Appeal	Industrial Court of Appeal	Supreme Court
General	35€	82€	-	82€	186€	-	325€

¹⁰ The Code on Stamp Duties has been abolished by an Act of 19 December 2006, *Belgian Official Gazette* 29 December 2006, date of entry into force: 1st of January 2007.

¹¹ J. KERKHOFS, "Uitgaven en kosten", in G. VAN MELLAERT (ed.), *Praktijkboek gerechtelijk recht*, Bruges, Vanden Broele, 22; J. LAENENS, K. BROECKX, D. SCHEERS & P. THIRIAR, *Handboek gerechtelijk recht*, Antwerp, Intersentia, 2008, 484.

¹² F. MEERSSCHAUT, "Draaglast van de gedingkosten", *Jura Falconis* 1986-87, 277.

¹³ Supreme Court 30 March 2001, *Arresten Cassatie* 2001, 547 and *Pasicrisie* 2001, I, 541.

¹⁴ Article 269 Code of Registration Duties.

role fee							
Request	27€	52€	-	52€	-	-	-
Summary proceedings	-	69,50€	-	69,50€	139€	-	-

b. The writing by the clerks of the deeds which have been passed before them or certain deeds of judges and officers of the prosecutor (*opstelrecht/droit de rédaction*). These expenses give rise to a lump sum of €30 (same amount for each court or tribunal).

c. The handing over of an authenticated copy of a deed or judgment and of other copies which are being kept at the clerck service (*expeditierecht/droit d'expédition*).¹⁵

	Justice of the peace	Tribunal of first instance	Industrial Tribunal	Commercial Tribunal	Court of Appeal	Industrial Court of Appeal	Supreme Court
Expedition duties	1,50 / page	2,85 / page	0,75 / page	2,85 / page	2,85 / page	0,75 / page	4,83 / page

2.2.2 Registration duties

9. According to Article 1019 J.C., recoverable registration duties also include the general fixed rate, the specific fixed rates and the rates owed on judgments leading to a condemnation, a taxation or a transfer of amounts or movables values. These are tax charges which are due pursuant to each final, provisional, subsidiary or principal or conditional condemnation with regard to movable amounts or values (*i.e.* money debt). The tax charge amounts up to 3 percent of the amount of the money debt which is declared by the court or tribunal.¹⁶ If, however, the amount of the condemnation does not exceed €12.500, no tax charge will be levied.

2.2.3. Stamp duties

10. Stamp duties are charges for the stamp figuring on the deeds which are passed (€5). We will not analyze them any further as they have been abolished by an Act of 19 December 2006.

2.3 The price and emoluments and wages for the judicial deeds (bailiff)

11. The terms ‘wages and emoluments’ are dated, but they are nevertheless kept in the Judicial Code of 1967. Wages mean fees and emoluments mean expenses. In general, the expenses meant under this category, are the expenses of the bailiff. The recoverable amounts are fixed in a Royal Decree of 12 September 1969.¹⁷ Recoverable are, for instance, costs made to obtain information or to search the defendant’s domicile, moving expenses...¹⁸

¹⁵ Article 270 and 271 Code of Registration Duties.

¹⁶ Article 142 Code of Registration Duties.

¹⁷ J. LAENENS, K. BROECKX, D. SCHEERS & P. THIRIAR, *Handboek gerechtelijk recht*, Antwerp, Intersentia, 2008, 485.

¹⁸ D. MAES, “Artikel 1017 Ger. W.”, in X., *Artikelsgewijze commentaar: Gerechtelijk recht*, Mechelen, Kluwer, p. 53, n° 5.

2.4 The price for the authenticated copy of the judgment

12. Each party is entitled to obtain an enforceable title. Thus, each winning party has the right to recover the price for the authenticated copy of the judgment.¹⁹ This is even the case if the other party is prepared to execute the judgment voluntarily.

2.5 The expenses concerning all investigation measures, amongst others the expenses for witnesses and experts

See *infra*, n° 22 ff.

2.6 The expenses for travelling and residence of judges, clerks of the court and the parties

13. These expenses must only be taken in charge by the forfeiting party when they have been imposed by the judge, and the expenses of deeds which have been drafted with regard to the proceedings. This can also provide for a compensation of the travel expenses for the personal presence of one of the parties at the proceedings, which can have been imposed by the judge.

2.7 The expenses of judicial procedure (lawyers' fees)

14. Article 1018 J.C. enumerates 'the expenses of judicial procedure, as stated in Article 1022 J.C.'. Article 1022 J.C. had recently been drastically amended by the important Act of 21st April 2007.²⁰

15. Before the 2007 amendment, Article 1022 J.C. only covered the costs of 'material acts' accomplished by a lawyer. The amounts of the recoverable sums according to Article 1022 J.C. were fixed in the Royal decree of 30th November 1970.²¹ They did not refer to the lawyers' fees.²² Each party (the losing as well as the winning party) had to pay his own lawyers' fees, which were irrecoverable. The amounts of the expenses depended upon (1) the court or tribunal before which the case was brought and (2) the value of the claim, but were generally rather limited. Additional expenses of judicial procedure could be rewarded when additional judicial acts had to be accomplished, for instance personal appearance, reopening of debates, expert investigation, witness interrogation, etc.²³

The 2007 amendment has inverted the concept of expenses of judicial procedure: it now covers what was previously excluded: lawyers' fees. The new Article 1022 J.C. defines the expenses of judicial procedure as 'a fixed compensation for the expenses and fees of the lawyer of the winning party'. The term 'fixed' shows that not the actual fees are recoverable, but they are limited to a fixed amount, related to the amount of the claim. The word 'lawyer' shows that

¹⁹ J. LAENENS, K. BROECKX & D. SCHEERS, *Handboek gerechtelijk recht*, Antwerp, Intersentia, 2008, p. 432, n° 917.

²⁰ Act of 21 April 2007 concerning the recoverability of fees and costs related to a lawyer's assistance, *Belgian Official Gazette* 31 May 2007.

²¹ Royal Decree 30 November 1970, *Belgian Official Gazette* 3 December 1970, erratum 12 February 1971.

²² G. DE LEVAL, *Eléments de procédure civile*, Brussels, Larcier, 2003, 431; B. DE TEMMERMAN, "De verhaalbaarheid van kosten van juridische of technische bijstand", *Tijdschrift voor Privaatrecht* 2003, p. 1016, n° 2.

²³ View Article 4 Decree of 30 September 1975.

the winning party is only entitled to expenses of judicial procedure if he is assisted and/or represented by a lawyer. Hence, a party which defends its own legal interest during a judicial proceeding or which is assisted by another person (e.g. a trade union representative before the industrial courts or a public servant in tax matters), is not entitled to these expenses. The Constitutional Court judged several times that this distinction is not contrary to the constitution non-discrimination provision.²⁴ A lawyer acting *qualitate qua* as tutor *ad hoc*, provisional administrator or trustee in bankruptcy is neither entitled to expenses of judicial procedure, unless he is represented by another lawyer.²⁵

The amount of the judicial expenses, which must be determined by the King, cannot depend any longer upon the court or tribunal before which the case is brought. The legislator has provided that, with specific motivation, the judge can increase or diminish the basic amount at the request of one of the parties, as the occasion arises after interpellation by the judge (not *ex officio*), without exceeding fixed minimum and maximum amounts. He has, in increasing or decreasing the basic amount, to take into account: the financial abilities of the forfeiting parties (in order to diminish the amount); the complexity of the litigation; the contractually agreed compensation for the winning party; the manifestly unreasonable nature of the situation.

16. The King has, on the basis of these statutory rules, decreed a Royal Decree of 26 October 2007, in which he has determined a basic amount, maximum amount and minimum amount in function of the value of the litigation.

	Basis amount	Minimum amount	Maximum amount
Up to 250,00 €	150,00 €	75,00 €	300,00 €
From 250,01 € up to 750,00 €	200,00 €	125,00 €	500,00 €
From 750,01 € up to 2.500,00 €	400,00 €	200,00 €	1.000,00 €
From 2.500,01 € up to 5.000,00 €	650,00 €	375,00 €	1.500,00 €
From 5.000,01 € up to 10.000,00 €	900,00 €	500,00 €	2.000,00 €
From 10.000,01 € up to 20.000,00 €	1.100,00 €	625,00 €	2.500,00 €
From 20.000,01 € up to 40.000,00 €	2.000,00 €	1.000,00 €	4.000,00 €
From 40.000,01 € up to 60.000,00 €	2.500,00 €	1.000,00 €	5.000,00 €
From 60.000,01 € up to 100.000,00 €	3.000,00 €	1.000,00 €	6.000,00 €
From 100.000,01 € up to 250.000,00 €	5.000,00 €	1.000,00 €	10.000,00 €
From 250.000,01 € tot 500.000,00 €	7.000,00 €	1.000,00 €	14.000,00 €

²⁴ Constitutional Court 5 May 2009, n° 73/2009, www.grondwettelijkhof.be, r.o. B.4.3; Constitutional Court n° 182/2008, 18 December 2008, *Belgian Official Gazette* 22 January 2009, *Rechtskundig Weekblad* 2008-09, 1217 and www.grondwettelijkhof.be.

²⁵ J. LAENENS, K. BROECKX, D. SCHEERS & P. THIRIAR, *Handboek gerechtelijk recht*, Antwerp, Intersentia, 2008, 488.

From 500.000,01 € up to 1.000.000,00 €	10.000, 00 €	1.000,00 €	20.000,00 €
More than 1.000.000, 01 €	15.000,00 €	1.000,00 €	30.000,00 €

17. No party can be charged to pay additional compensation for the lawyer's intervention of the other party, above the amount of the expenses of judicial procedure (Article 1022 *in fine* J.C.). Since the Act of 21 April 2007, the part of the lawyers' fees of the winning party, exceeding the fixed expenses, cannot longer be claimed to the losing party on another basis, e.g. the rules on contractual or extra-contractual liability.

It remains questionable whether these amounts can be cumulated with damage for vexing or foolhardy proceeding in case of manifestly inadmissible, disallowed or redundant proceedings. A proceeding is not only vexing if a party has the intention to harm the other party, but also if the procedural behavior contravenes that of a prudent and careful person.²⁶ The victim of vexing or foolhardy proceeding can not only claim damage on the basis of liability for wrongful act, but Article 780*bis* J.C.²⁷ allows the judge to award a civil penalty, on the level of first instance as well as the level of appeal. Although many legal scholars have argued that these damages and penalty cannot be accumulated with the judicial expenses²⁸, the Constitutional Court has made allusion to a different view.²⁹

18. Article 1022 J.C. and the Royal Decree provide some exceptions on the general rule:

- If the forfeiting party can appeal to gratuitous legal aid, the recoverable lawyers' fees are automatically reduced to the minimum amount, unless the case of a manifestly unreasonable situation.
- No lawyers' fees are due for acts made before a court to which the case has been withdrawn by decision of the district court.
- If the defendant pays the debt which is the object of the claim before submission of the claim on the list of cases in the court or tribunal, no expenses of judicial procedure are due. If payment intervenes after submission on the list, only ¼ of the basis amount with a maximum of €1.000,00 is due.
- In case of default of appearance (i.e. a party was never present in court), the amount of expenses of judicial procedure is automatically the minimum amount (the legislator deems that these cases do not have any complexity).

19. Last but not least, an exception on the general rule applies to 'commercial transactions', regulated by the Act of 2 August 2002 on the combating of late payment in commercial

²⁶ Supreme Court 31 Oktober 2003, *Arresten van het Hof van Cassatie* 2003, 2011, *Journal des Tribunaux* 2004, 135, note J.-F. VAN DROOGHENBROECK.

²⁷ This provision has been introduced in the Judicial Code by Act 26 April 2007: "The party who manifestly uses judicial proceedings with delaying or illegal purposes can be condemned to pay a pecuniary offence from €15 up to €2500, without prejudice to claimed damages (...)."

²⁸ *Report of the Senate, Parliamentary Documents* 2006-07, n° 3-1686/5, p. 27; P. LEFRANC & F. EVERS, "'Leidt de verhaalbaarheid van de advocatenkosten tot een meer toegankelijke justitie?', *Tijdschrift voor Mensenrechten* 2007, afl. 4, p. 9; J.F. VAN DROOGHENBROECK & B. DE CONINCK, "La loi du 21 avril 2007 sur la répétibilité des frais et honoraires d'avocat", *Journal des tribunaux* 2008, (37) nr. 5.

²⁹ Constitutional Court 18 December 2008, *Belgian Official Gazette* 22 January 2009, 3343 and www.grondwettelijkhof.be, B.10.2.

transactions.³⁰ This Act deal with all payment obligations due to the delivery of goods or accomplishment of services between professionals or between a professional and a public authority. According to Article 6 of this Act, except if parties have agreed otherwise, the creditor is entitled in case of late payment by his debtor and without prejudice to the provisions of the Judicial Code, to a ‘fair compensation’ to be paid by the debtor for all relevant expenses of recovery of the claim which have been made because of the late payment, including lawyer’s costs and fees. The compensation must be in line with transparency and proportionate to the debt at stake. Thus, in commercial transactions, the creditor is not bound by the fixed amounts of the expenses of judicial procedure: he can ask a fair compensation for his lawyer’s fees. The creditor who obtains such compensation, cannot claim expenses of judicial procedure any more.

Article 6 of the Late Payment Act transposed European Directive 2000/35 of 29 June 2000 into Belgian law, at a moment at which no general rule provided for the recoverability of lawyers’ fees in the Judicial Code. When introducing the general rule in in the Act of 21 April 2007, the legislator lacked the opportunity to abolish the *lex specialis* on commercial transactions. Waiting for a correction of this lacked opportunity, judges seem to take the fixed amounts of the expenses of judicial procedure as guidelines.

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

20. The general rule of Article 1017 J.C. applies per instance and applies also in the degree of appeal, in such way that we can refer to the second question. If a judgment of the first instance is being reformed or annulled in the degree of appeal, the party who has been put in the wrong will be charged with the judicial expenses of both instances. If a judgment of the first instance is being confirmed in the degree of appeal, the appealing party will be charged with the judicial expenses of the degree of appeal.³¹

21. It is possible to appeal against the indictment of the expenses. However, this possibility is only open to parties which has interest to appeal against the substance of the litigated object itself.³²

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?

22. Article 1018, 4° J.C. provides that the expenses for the investigation measures, amongst others the expenses for witnesses and experts, belong to the recoverable costs. We will deal with these categories below.

4.1 Witnesses

³⁰ *Belgian Official Gazette* 7 August 2002.

³¹ J. LAENENS, K. BROECKX, D. SCHEERS & P. THIRIAR, *Handboek gerechtelijk recht*, Antwerp, Intersentia, 2008, 490; D. MAES, “Artikel 1017 Ger. W.”, in X., *Artikelsgewijze commentaar: Gerechtelijk recht*, Mechelen, Kluwer, p. 6, n° 11.

³² J. LAENENS, “Appellabiliteit van een vonnis over de kosten”, *Rechtskundig Weekblad* 1981-82, 1683; D. MAES, “Artikel 1017 Ger. W.”, in X., *Artikelsgewijze commentaar: Gerechtelijk recht*, Mechelen, Kluwer, p. 6, n° 10.

23. Persons who witness before a court or tribunal according to Article 953, par. 1 J.C., are entitled to a compensation. The party who has asked for the witness, must pay this amount in advance, but the sum will be settled after the judgment. The compensation amounts up to approximately €5 plus travel expenses (€0,0868 per kilometer).³³ Trips up to 10 kilometers are not compensated.

4.2 Experts

24. The rules in the Judicial Code governing the expert investigation have been recently changed by Act of 15th Mai 2007. The expert's costs and fees are governed by the Articles 987-991*bis* J.C., showing three stadia: the retaining fee, the taxation after the end of the investigation and the final settlement. An expert is only paid after the end of the investigation. In order to secure the effective payment and to protect the expert against the parties' insolvability, a retaining fee has to be consigned at the clerck's service. The amount of the retaining fee is fixed during the meeting in which the expert investigation is launched (Article 972, second par. J.C.). According to Article 987 J.C., the judge can decide – if necessary – on the apportionment of the retaining fee between the parties, taking into account one restriction: if a party, according to Article 1017 J.C. cannot be charged to pay the judicial expenses and costs, the judge can't charge this party either to pay the expert's retaining fee. In social security proceedings for instance, the State will have to pay the expert's retaining fee.

25. The taxation, as a general rule, is made by the expert himself, with respect of Article 990 J.C. This provision obliges the expert to make a detailed taxation, mentioning separately: hour wages, moving expenses, residence expenses, general expenses, amounts paid to third parties and prepayments. There are no fixed legal scales for the expert's expenses. According to Article 991, second par. J.C., the taxation has to be based on three elements: the diligence with which the work has been carried out, the compliance with the planned deadlines and the quality of the investigation. The amount at stake is not an element.

26. The judge, taking his decision upon the judicial expenses and costs in the final judgment, decides also on the attribution of the expert's costs. As said, the list of judicial expenses in Article 1018 J.C. also enumerates the costs of an expert investigation. As said (*supra*, n° 7), interests only start to yield from the final judgment referring in the costs. Therefore, the winning party who has paid a (part of the) provision can't claim interests for the period preceding the judgment.³⁴

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

27. We do not have any specific figure of the number of proceedings ending up in a settlement between the parties. If, however, they settle their dispute, the settlement must cover also the judicial expenses. The judge will not have to render a final judgment, or he will merely

³³ Article 953 J.C. and Royal Decree 27 July 1972, *Belgian Official Gazette* 31 August 1972.

³⁴ Supreme Court 30 March 2001, *Rechtskundig Weekblad* 2001-02, 699; Supreme Court 24 September 1953, *Pasicrisie* 1954, I, 36.

act in his judgment that parties have reached an agreement, so that he will not have to apportion the judicial costs.

II. Exceptions and Modifications

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

28. The general rule of Article 1017 J.C. is subject to several exceptions.

1.1 Specific rules (Article 1017, first par. J.C.)

29. According to Article 1017, first par. J.C., the general rule applies, unless specific laws state otherwise. The examples of *leges speciales* are numerous, e.g.:

- Article 801 J.C. provides that the expenses for proceedings (successfully) aimed to the correction of a purely material mistake or interpretation of a judgment are always at charge of the Belgian State;
- Article 827 J.C. provides that when a party renounces to a judicial action which has been initiated, that party will have to take at charge the judicial expenses;
- An interesting exception is made in case of divorce by permanent breakdown of marriage. Article 1285 J.C. states that the costs are divided between the parties, unless the judge or the parties state otherwise, if the divorce is claimed by both parties together. If only one party claims the divorce by permanent breakdown of marriage, the costs have to be borne by the claimant. The Constitutional Court has judged that this distinction is discriminatory. As the legislator considers both ways of divorcing as faultless, the measure in case of unilateral request can't be considered as a financial sanction for the claimant.³⁵ More fundamentally, one can ask if the condition of Article 1017 J.C. to have a 'losing party' is met in case of faultless divorce...³⁶
- The Act of 21 February 2005 has introduced a new chapter on mediation in the Judicial Code, regulating judicial and extrajudicial mediation (Articles 1724-1737 J.C.), in order to encourage mediation. A mediator tries to settle the dispute by agreement. The costs of *judicial* mediation (contrary to the costs of *extrajudicial* mediation) make part of the judiciary expenses and costs, enumerated in Article 1018 J.C. and are to be borne by the losing party. However, Article 1736 *juncto* 1731 J.C. seem to be considered as *a lex specialis* to Article 1017 J.C. Article 1736 J.C. on judicial mediation refers to and declares applicable Article 1731 J.C. on extrajudicial mediation, stating that both of the parties have to bear together the costs of the mediation, unless they agreed otherwise.³⁷ Therefore, the costs of (a non succesful) mediation have only to be borne exclusively by the forfeiting party if parties have agreed so. Article 1731 J.C. states further on that the

³⁵ Constitutional Court 21 October 2008, *Rechtskundig Weekblad* 2008-09, 1341, note F. SWENNEN & S. EGGERMONT.

³⁶ See also: F. SWENNEN & S. EGGERMONT, "Kosten en rechtsplegingsvergoeding bij de echtscheiding op grond van onherstelbare ontwrichting op basis van art. 229, § 3, B.W.", *Rechtskundig Weekblad* 2008-09, 1343-1344.

³⁸ Supreme Court 15 May 1941, *Pasicrisie* 1941, I, 192.

mediation protocol must clearly state the manner of taxation of the mediator's fees, the rates and the payment conditions. The rules on legal aid are extended to judicial and extrajudicial mediation.

- The most important *lex specialis* is Article 1382 Civil Code (the general rule on tort law). According to the Supreme Court, the rules on judicial expenses do not exclude the application of the rules on tort law.³⁸ According to the principles on tort law (Article 1382 Civil Code), a party can be charged to pay the costs, if the costs are caused by his wrongful act, even if he is the winning party.³⁹ In other words, expenses for redundant acts or useless expenses have to be borne by the party who has accomplished the act, even if this party is followed in its arguments afterwards. This is an application of the general liability rule that a victim has to take all reasonable measures in order to limit its damages.

1.2. Agreement between the parties (Article 1017, first par. J.C.)

30. We can refer to *infra*, n° 35 ff.

1.3. Proceedings with regard to social security law (Article 1017, second par. J.C.)

31. A major exception, provided in article 1017, second par. J.C., applies to certain judicial proceedings with regard to social security. In those proceedings, independent who is claimant or defendant and independent of the result, the judicial expenses and costs (including costs of enforcement) have to be taken at charge by the Belgian State, except for 'vexing and foolhardy proceedings' (see on the concept: *supra*, n° 17). The legislator found it advisable to provide more cost-efficient proceedings to social secured persons. This rule does not make exception to the general rule of Article 1382 Civil Code and to the duty of the victim to take all reasonable measures in order to limit its damages (see *supra*, n° 30). If a social secured person disposes expenses for redundant acts, he can be condemned to pay damages, consisting of having to bear the judicial expenses and costs. Such condemnations are rare.

1.4. Apportionment of the costs (Article 1017, third par. J.C.) (*omslaan van de kosten/répartition des coûts*)

32. According to Article 1017, third par. J.C., a judge can – even *ex officio* - apportion ('*divide*') the judicial expenses and costs in two cases: that is the if both parties are to be considered as 'partly losing parties' or if the parties are spouses, family members in the ascending line, brothers or sisters or family members in the same degree. In the latter case, the apportionment of the costs is optional, not an obligation.⁴⁰

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

³⁸ Supreme Court 15 May 1941, *Pasicrisie* 1941, I, 192.

³⁹ Supreme Court 14 May 2001, *Pasicrisie* 2001, 852; Supreme Court 24 April 1978, *Pasicrisie* 1978, I, 955.

⁴⁰ Supreme Court 17 March 1966, *Pasicrisie* 1966, I, 920.

33. According to article 731 J.C., each party which has the capacity to enter into a settlement can, with regard to an issue which can be the object of a settlement, submit a litigation with the aim of a contractual settlement. He can do so on an unilateral basis or on the basis of consent between the parties. The judge may even take an active role, and even provide parties with information in order to enhance the possibilities to reach an agreement.⁴¹

34. However, the attempt of a contractual settlement can not be obligatory, except in statutorily provided situations:

- Litigation with regard to land lease (*'pacht/bail rural'*), pre-emption rights in favor of lessees, servitudes to pass on another's land (Article 1345 J.C.);
- Litigation with regard to the lease of houses. The judge must obligatorily make an attempt in order to reconcile parties (Article 1344 *septies* J.C.);
- Litigation and forfeiture proceedings with regard to Mortgage Credit (Article 59, § 1 Act of 4 August 1992);
- Divorce because of permanent breakdown of the marriage: parties must compare *in personam* and the judge makes an attempt in order to reconcile the parties (Article 1255, §6 J.C.);
- Most cases before the labour tribunals and courts – such as cases with regard to individual or collective labour agreements, discriminatory labour policy, violence or sexual aggression on the work - must be preceded by an attempt of the tribunal or court to reconcile the parties (Article 578 J.C. *jo.* Article 734 J.C.).

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)?

35. According to Article 1017, first par. J.C., parties can enter into a different agreement upon the bearing of the judicial expenses and costs, which will be ratified by the judge. Parties can agree to waive any claim for judicial expenses and costs, to waive any derogation from the basic amount of the expenses of judicial procedure, that some optional costs are to be borne by the losing party (e.g. costs of a reminder, moving expenses...), etc.

36. However, Article 1017, first par. J.C. has to be read together with Article 1023 J.C. According to this provision all contractual stipulations providing that the amount of the claim will increase if the claim should be enforced in a law suit, is void. According to the Belgian Supreme Court, this provision is of public order.⁴² Any contractual derogation is hence absolutely void, which can be argued at any stage of the law suit and which should even be raised *ex officio* by the court or tribunal. The underlying justification is to be found in the preservation of the right of each party to defend itself. The possibility to contractually increase the compensation would tend to make the defendant waive his right of defense, in order to get rewarded for that.⁴³

⁴¹ Supreme Court 24 June 1993, *Arresten van het Hof van Cassatie* 1993, 626.

⁴² Supreme Court 7 April 1995, *Pasicrisie* 1995, I, 403.

⁴³ A. VAN OEVELEN, "De ongeldigheid van het beding tot verhoging van de schuldvordering ingeval deze in rechte wordt opgeëist en de toepassing ervan op de invordering van advocatenhonoraria", (case note of Supreme

37. Historically, Article 1023 J.C. was inserted in the draft of the Judicial Code, together with a possibility to recover the attorney fees. Although this latter possibility was abolished during the parliamentary debate, the prohibition of increasing clauses of Article 1023 J.C. has been maintained. Therefore, this provision is often interpreted in the following manner: contractual clauses which aim to change the legal rules with regard to judicial expenses *before* a legal proceeding has been initiated, are deemed to be (absolutely) void. Once a legal proceeding has been initiated however, such clause should be considered as valid according to Article 1017, first par. J.C.. The High Council of Justice has also advised in favor of the possibility to contractually derogate to the statutory rules.⁴⁴

*4. Are parties allowed to represent themselves? If yes, in all cases or only in some?
How common is self-representation?*

38. According to Article 728 J.C., parties can appear at the moment of the introduction of the claim before courts or tribunals *in personam* or represented by a lawyer. Except some specific situations (which will be dealt below), a party which does not defend itself, must be represented by an attorney, who has the exclusive right to represent third parties before tribunals and courts (Article 440 J.C.).

39. However, before some tribunals (commercial tribunal, family and land court, labour tribunal), parties can be represented by their spouse, relative or in-law if they have an express mandate and have been admitted by the tribunal (article 728, §2 J.C.). In tax litigation, the tax payer can ask that its account or financial controller are being auditioned, if the judge thinks that this could be useful.

Moreover, it has to be taken into account that, mostly in labour disputes (Article 528, §3 J.C.), the employee may be represented by a representative of the trade union who has an express mandate.

The ‘gestor negotiorum’ can not act as representative. An express mandate is thus required.

40. According to Article 758 J.C., parties can develop their arguments and means of defence themselves, except if the law provides otherwise. The Judge can however deprive the parties of this right if he finds that the excessive temper or lacking of skills prevents them to discuss their position with the necessary decency or clarity.

41. Although official figures lack, parties in civil proceedings most often are represented by lawyer before tribunals and courts.

III. Encouragement or Discouragement of Litigation

1. Are the rules governing cost and fee allocation designed to encourage or to

Court 7 April 1995), *Rechtskundig Weekblad* 1995-96, 190; E. WYMEERSCH, “Toetsing van verhogingsbedingen”, *Rechtskundig Weekblad* 1976-77, 137-138.

⁴⁴ Hoge Raad voor de Justitie, <http://www.hrj.be>, 24.

discourage litigation

42. The issue of cost en fee allocation in civil procedure is, in Belgian law, situated in a field of tension between two conflicting starting points. On the one hand, litigation in Belgium is for free, in the sense that litigating parties do not have to pay the wages of the judges or their affiliates.⁴⁵ On the other side, parties exercising their right of access to justice have the obligation to make expenses in order to obtain a final judgment. The answers to the questionnaire show more in depth the way in which the Belgian legislator has balanced these two conflicting starting points, and the developments which this balance has been subject to.

The rules with regard to the expenses of Judicial procedures of 21 April 2007 has been subject, from the real beginning to criticism on the basis of access to justice. The professional lawyer's organization has made a professional inquiry which seems to confirm the concerns. 60% of the lawyers which responded found that the Act was a impediment to the access to justice. However, this is especially the case if the client has not a strong legal position (92%). Only one third of the lawyers found that the Act resulted in a reduction of the number of cases which had been introduced. 43% of the respondents thinks that the Act will result in an increase of the alternative dispute regulations.⁴⁶

2. How much do parties (especially plaintiffs) typically have to pay up front?

43. We refer to what we have said above. Lawyers' fees must always be paid up front by each party. Court costs must only be paid at the moment of the final judgment (*cf. supra*, n° 2-3). Costs of taking evidence will give rise to a retaining fee which will be determined by the judge (*cf. supra*, n° 24).

IV. The Determination of Costs and Fees

1. What determines the amount of court costs - the type of court? The amount in controversy? Other factors?

44. We have mentioned the amounts in answering the second question. We can refer to *supra*, n° 8 ff.

2. How are lawyers' fees determined? By statute (schedule), and if so, are the rates binding or can clients and their attorneys agree to in- or decrease them? By the market? What are the main criteria?

45. Belgian law does not have a fixed system of lawyers' fees. The Belgian legislator has discussed upon it, when he has introduced the recoverability of lawyers' fees. But finally he has decided not to introduce fixed lawyers' fees, in order (1) not to break the competition rules and (2) not to infringe the independence of the profession of attorneys. Thus the mentioned amounts

⁴⁵ See L. VAN BAUWEL, *Handboek voor het burgerlijk procesrecht*, Antwerp, Standaard, 1934, I, p. 425, n° 761.

⁴⁶ The full inquiry can be found at:

<http://www.advocaat.be/UserFiles/PressItems/Persbericht%20bevraging%20erelonen%2018%2005%2006.pdf>.

with regard to the recoverable basic amounts, gives no indication with regard to the actual amount which has to be paid by the client.

46. The former paragraph does not mean that lawyers have full freedom in the determination of their fees. They can determine, by way of party-decision, the fees in accordance with the modesty which can be expected of their profession (Article 446ter J.C.). If it exceeds the equitable modesty, the professional organization of lawyers can, taking into account the importance of the litigation and the nature of the accomplished services, reduce the fee.

47. In an inquiry amongst lawyers, it has emerged that 40,35% of the lawyers determines its fees on the basis of an hourly rate. For one third of the lawyers, the hourly rate is between 75-99 € 27% asks between 100 and 149 € Only 1/7 lawyers calculate its fees on the basis of the value of the litigation.⁴⁷

*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.)?*

48. Article 1021 J.C. deals with the taxation and payment of the expenses and costs. Parties can hand in a detailed specification of their costs, including the expenses of judicial procedure. In that case, the costs are settled in the judgment. If the costs are not settled in the judgment or only partly settled, the decision upon the costs is considered to be adjourned. The settlement will intervene on request of the 'most interested' party, by the judge who dealt with the case, unless his decision is appealed.

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

1. Are success-oriented fees allowed?

49. It is admitted in Belgian law to agree upon a success fee in favor of the lawyer. However, this agreement can never lead to the result that the lawyer will not be entitled to a fee if the process is not won. An agreement between a lawyer and a client which determines the fees exclusively in relation to the result of the litigation, is prohibited (Article 446ter, par. 2 J.C.). Thus, "no win no fee" cannot be stipulated in Belgian law. In this way, the Belgian legislator aims to prevent that the lawyer becomes himself party in the litigation.

2. Is it allowed to sell claims for purposes of litigation?

50. In Belgian law, there is no practice to assign the judicial claim to third parties who will assume the risk of the litigation. However, it is possible (and frequent, especially in financing practice) to assign the substantive right, to which the judicial claim is connected. Moreover, a third party can be subrogated in the rights of the initial creditor (which is frequent in insurance practice). The assignment of the right or subrogation into the right automatically entails the transfer of the judicial claim. If the judicial claim was already brought before court, the assignee

⁴⁷ The results can be found at www.advocaat.be.

or subrogee will have to re-initiate the legal proceedings or to agree upon a clause of *prête nom* (an application of indirect representation). In case of *prête nom*, the legal proceedings will be continued in the name of the initial party, but on behalf of the assignee or subrogee.⁴⁸

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

51. In the current state of Belgian law, there are no specific rules on class actions. The interest of each party to initiate legal proceedings must thus be controlled on an individual basis. If parties aim to “bundle” their claims, they have to take recourse to imperfect techniques, such as (1) connectivity and (2) intervention in a pending litigation.

Connectivity means that a party in a litigation can ask to the judge that its litigation would be treated together. This could be done if the cases are so closely connected that there is a risk that different judgments in both cases would be irreconcilable (Article 30 J.C.). A second technique which can be used to ‘bundle’ affairs is the forced or voluntary intervention of a third party in a litigation. Third parties can intervene in a judicial proceeding in which they are not party at the moment of the initiation, in order to prevent that their interests are put in danger or in order to join the claims which are brought before court.

However, there has been a huge doctrinal debate on the introduction of class actions in Belgian law.⁴⁹ According to a current draft Act, it would be possible to introduce class actions before Courts of Appeal. However, the current draft is confronted to criticism, especially from consumers’ organizations.

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

52. It is possible, and in certain branches current practice, to cover the risk of litigation through an insurance agreement. The Belgian legislator has recently chosen to use the legal expenses insurance as instrument to promote access to justice by installing a tax advantage. A Royal Decree of 15 January 2007⁵⁰ fixes the conditions that are to be met in the insurancy policy, to be exempted from the annual tax of 9,25 % imposed to insurance policies in view of Article 173 of the Code of various duties and taxes. The purpose of the Royal Decree is not to fix the contents of a legal expenses insurance policy, nor to determine minimal conditions. The only purpose is to encourage to take such insurance and, indirectly, to ameliorate access to justice by installing, under certain conditions, a fiscal advantage for individuals who take legal expenses insurance.

⁴⁸ K. BROECKX, “De vertegenwoordiging in rechte en naamgeving in het geding”, *Rechtskundig Weekblad* 1994-95, 252; S. ROLAND, “Subrogatie van verzekeraars en tenaamstelling van proceduredocumenten”, in X., *Liber amicorum Lionel Tricot*, Antwerp, Kluwer, 1988, 460 and 462-463; M.E. STORME, “Rechtsopvolging onder bijzondere titel tijdens het burgerlijk geding in België en Nederland”, *Rechtskundig Weekblad* 1993-94, 173.

⁴⁹ M.E. STORME & E. TERRY, “Belgian Report on Class Actions”, in *The Globalization of Class Actions Oxford Conference of 13 & 14 December 2007*, to be found at <http://webh01.ua.ac.be/storme/ClassactionsBelgium.pdf>; G. CLOSSET & J. VAN COMPERNOLLE, *Naar een class action in het Belgische recht/ Vers une class action en droit belge?*, Bruges, Die Keure, 2008.

⁵⁰ *Belgian Official Gazette* 27 February 2007.

53. The Act of 21 April 2007 on recoverability of lawyers' fees and the Royal Decree of 16 October 2007 are expected to have important effects on the practice of legal expenses insurances. On the one hand, it opens possibilities for the insurer to reclaim partially or totally his payments. On the other hand, the amendment is expected to cause an adaptation in the offers of legal expenses insurances, covering the new risk for the losing party of having to pay the lawyers' fees of the other party.⁵¹

VI. Legal Aid

54. Article 23, par. 3, 2° of the Belgian Constitutional Act guarantees each Belgian citizen 'a right to judicial aid'. Judicial aid contains two aspects: judicial costs (legal aid) and the lawyers' fees (*pro deo*-lawyer, judicial assistance).⁵² The term legal aid can also be used to cover both aspects.

55. The rules on judicial costs (legal aid) are laid down in Articles 664-669 J.C. Article 664 J.C. provides that legal aid consists in the possibility to discharge fully or partially persons who do not dispose of sufficient income in order to cover the expenses of judicial or even extra-judicial proceedings and of the payment of different expenses, registration duties, courts fees, the price for the authenticated copy of the judgment and other expenses which are due pursuant to the litigation. It is also possible to be awarded free assistance by a technical expert. Legal aid is accorded for several judicial and extra-judicial acts and procedures, including acts of enforcement of judgments and judicial and extrajudicial mediation (Art. 665 J.C.).

Legal aid is restricted to Belgian citizens whose claim seems legitimate and who can prove that their income is insufficient (Art. 667 J.C.). Persons not having the Belgian nationality can be accorded legal aid, under the same conditions, if they fall within the categories enumerated in Art. 668 J.C.

The request must be brought before the office of the Court or Tribunal before which a judicial proceeding would be initiated or of the place where the act has to be performed (Art. 670 J.C.). In case of urgency, the judge of the pending litigation can, even on oral demand, accord legal aid for the acts he determines.

56. The rules on judicial assistance guarantee a free lawyer. Since 31st December 1999, the rules are integrated in a broader system of 'judicial assistance' (Articles 446*bis* J.C. and Articles 508/1-23 Book III*bis* Judicial Code). A distinction is made between the first line judicial assistance (Art. 508/1-6 J.C.) and the second line judicial assistance (Art. 508/7-13 J.C.).

The first line judicial assistance is delivered as practical information, legal information, a first legal advice or the referring to a specialized body or organisation, e.g. legal shops, tenants' organisations, syndicates, health services, etc.

The second line judicial assistance is delivered to a natural person as an elaborate legal advice, legal assistance and representation to a law suit (so called *pro Deo*-lawyer). A request to obtain a free lawyer has to be directed to the Office of judicial assistance (*Bureau voor juridische*

⁵¹ See on this expected evolution: E. JACQUES & R. D'HONDT, "Actualités en matière d'assurance protection juridique: évolutions normatives", *Droit de la Consommation/Consumentenrecht* 2007, 3-27.

⁵² B. ALLEMEERSCH, M. BOES & P. VAN ORSHOVEN, *Beginselen van gerechtelijk recht*, Leuven, Acco, 2008, 349.

bijstand). The lawyer receives a compensation from the State which is determined according to the acts he has accomplished (each act is awarded a certain number of points). There is a list of lawyers who present themselves in order to act as pro Deo-Lawyer. All trainees, e.g. lawyers during their first three year professional experience are *ex officio* mentioned on the list.