COST AND FEE ALLOCATION IN CIVIL PROCEDURE

(China)

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I. The Basic Rules: Who Pays?

In China, litigation costs include court costs and the parties’ expenses, but attorney’s fees are generally not included in the parties’ expenses. Specifically, the following costs and fees are included: charges for acceptance of the case; application fees; traveling expenses, accommodation expenses, living expenses and stipends for leaving from work of witnesses, verification experts, translators and adjutors for presenting themselves in the court on the date specified by the court; and costs incurred in the litigation process for verification, public announcement, inspection and examination, translation, evaluation, auction, sale, storage, custody, transportation, vessel supervision, etc. 1 According to the Measures on Payment of Litigation Fees promulgated and implemented by the State Council on April 1, 2007, the principle for allocation of litigation costs and fees is that the loser pays all. In China, attorney’s fees are excluded from the scope of litigation costs and fees, and are allocated pursuant to a basic rule different from that for litigation costs and fees, i.e., in principal, the attorney’s fees are born by the parties on their own account separately, and neither party could get reimbursement from the counterparty. The principal justifications for establishing such a rule include: (1) as the loser is not required to reimburse the counterparty’s attorney’s fees, and the litigation costs are low, it is more convenient for people in disputes to litigate, which is an illustration of the culture of “making the judiciary more close to the people”; (2) if the loser has to pay the winner’s attorney’s fees, the poor may not be willing to sue and protect their own rights due to fear of losing the case, and this would impair their right to sue; (3) there is uncertainty in the outcome of civil actions; no person should be punished merely for suing or defending; (4) it could be a heavy burden for the court to verify the attorney’s working time and expenses and to determine the reasonable amount of attorney’s fees; furthermore, the lawyer’s independence might be impaired having the court determining the amount of attorney’s fees; (5) representing by a lawyer is not mandatory in China; treating attorney’s fees as part of litigation costs and fees and requiring the loser to bear is not in accordance with the principle of self-representation.

In China, “loser pays all” is legally and practically restricted as follows: (1) the loser is not required to bear the winner’s attorney’s fees; (2) the winner should bear the fees incurred for verification carried out by a verification organization engaged by it without the consent of the loser or approval of the court; (3) as to traveling expenses, accommodation expenses, living expenses and stipends for leaving from work incurred by witnesses for presenting and testifying in the court, the loser only pays the reasonable part thereof; 2 the court has the discretion to decide whether the amount is reasonable based upon factors such as local economic development, the loser’s economic affordability, etc.; (4) traveling expenses, accommodation expenses, living expenses and stipends for leaving from work incurred by witnesses for presenting and testifying in the court, the loser only pays the reasonable part thereof; 2 the court has the discretion to decide whether the amount is reasonable based upon factors such as local economic development, the loser’s economic affordability, etc.; (4) traveling expenses, accommodation expenses, living expenses and stipends for leaving from work incurred by witnesses, verification experts, translators and adjutors engaged by the winner upon approval of the court for presenting on the date specified by the court, are included in the litigation costs fees, and should be born by the loser in accordance with laws. However, in practice, unless the plaintiff specifically demands in the claims that the defendant pays such costs and fees, and provides receipts, invoices or other relevant proofs to demonstrate the actual expenditures, the court will not decide on such costs and fees, or decide against the winner.

There are special rules for appeals. Specifically, it can be analyzed from the two aspects of court costs and attorney’s fees. First, the special rules for court costs in appealing proceedings include the following: (1)

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1 See Article 6 of the Measures on Payment of Litigation Fees.

2 See Paragraph 3 of Article 54 of the Provisions regarding Evidence in Civil Litigation of the Supreme People’s Court.
for appeals in property cases, the court charges case acceptance fees based on the difference between the amount determined in the trial judgment and the amount claimed by the appellant; 3 if there are multiple claims, the charges will be calculated separately for each object of the claims, and the aggregate amount will be charged. 4 If the appellant claims for specific performance for the contract in dispute, the charges will be calculated based on the amount claimed by the appellant, i.e., the value of the outstanding part under such contract; 5 (2) if the appeal is ruled to be dismissed, the appellant does not need to pay any fee or charge; 6 (3) for appeals against a non-acceptance ruling, dismissal ruling or ruling on jurisdiction challenge, if the appellate court sustains the original ruling of the court of original instance, the latter court should refund the acceptance charges paid by the parties; 7 (4) if only one party appeals from the original judgment and the appellate court dismisses the appeal and sustains the original judgment, the costs for the appeal shall be born by the appellant; (5) if both parties appeal from the original judgment, and the appellate court, after hearing the case, decides to dismiss the appeal and sustain the original judgment, the costs for the appeal shall be born by the parties respectively; (6) for cases remanded by the appellate court for rehearing by the court of original instance, the appeal acceptance advances paid by the appellant shall be refunded; (7) if the appellate court, after hearing the case, enters a new judgment against the original judgment entered by the court of original instance, in addition to determining the allocation of costs and fees incurred in the appealing proceeding between the parties, the appellate court shall also correspondingly change the trial court’s decision regarding the allocation of litigation costs and fees. In addition, the special rules for attorney’s fees in appealing proceedings are as follows: lawyers representing in both the trial and the appeal shall provide a 50% discount for representation in the appealing proceeding on the basis of the rates applied for representation in the trial proceeding; lawyers only representing in the appealing proceeding shall charge fees based on the rates applicable in the trial proceeding. 8

There is no general rule on allocation of costs and fees for taking of evidence. First, if the plaintiff collects evidence on its own, but fails to request in its complaint that the counterparty bears such costs or fails to provide valid proof for such costs, the plaintiff should assume such part of costs on its own account. Second, if the defendant collects evidence on its own, unless otherwise provided in the law, the court will not make the plaintiff pay for such costs, even if the plaintiff loses the case. Third, if the parties request the court to obtain or preserve evidence, normally the court will not charge any fee, therefore there is no allocation problem. Finally, if the parties request the court to obtain evidence, and the court delegates a third party institution to conduct the verification, inspection and examination and otherwise, the party to which the verification or inspection and examination conclusion is unfavorable shall pay for the relevant costs; if the conclusion is favorable or unfavorable to both parties, the court shall determine the respective allocation ratios of the parties. In most cases, the costs for taking of evidence are not a large proportion of the entire litigation costs and fees, and the litigation costs incurred by the parties principally consist of attorney’s fees and case acceptance charges.

In China, judicial policies encourage the parties to reach settlement/ mediation agreements in order to accelerate the development of diversification of solution mechanisms. Courts stick to the principles of “mediating as much as possible, judging when appropriate, combining mediation and judgment, and settling dispute at closing of the case”; and mediation runs through the entire litigation process. There are two

3 See Article 17 of the Measures on Payment of Litigation Fees.
4 See the Replies to Certain Issues of Charges in Civil Litigation of the Supreme People’s Court (June 21, 1986).
5 See the Replies regarding How to Determine Acceptance Charges of the Supreme People’s Court (January 6, 1988).
6 See Item 2 of Article 8 of the Measures on Payment of Litigation Fees.
7 See Item 2 of Article 8 of the Measures on Payment of Litigation Fees.
8 This is an industry-wide practice of the lawyer community in China. Please see also Shanghai Government Guide Price Standards for Lawyers’ Service Fees (Hujiafei No. (2009) 004) which provides that lawyers who have represented in the first phase shall provide a 50% discount for representation in the second phase. Guangdong Government Guide Price for Lawyers’ Service, the attachment to the Guangdong Implementation Measures on Administration of Lawyers’ Service Fees (Yuejia No. (2006) 298), provides that lawyers who are representing in the appealing proceeding after having represented in the trial shall halve the applicable rates based on the rates for representation in trial. Beijing Government Guide Price Standards for Attorney’s fees for Representation in Litigation (Interim) (Draft for Comments) also provides that one single law firm representing in different phases of one single case shall provide discounted rates as of the second phase as appropriate.
methods for the parties to reach a settlement/mediation agreement and close the case: the first is that the parties ask the court to produce a mediation notification, and the second is that the plaintiff withdraws its complaint. According to the statistics of the Supreme People’s Court, during the five years from 2003 to 2007, the Supreme People’s Court heard 3,196 civil cases, and local courts all across the nation heard and closed 22,145,000 civil trial cases, of which cases closed through mediation and withdrawal amounts to 50.74%.9

As for case acceptance charges, in order to encourage the parties to settle the case by themselves or accept mediation, Article 15 of the Measures on Payment of Litigation Fees specifically provides that, if a case is closed via mediation or the plaintiff withdraws the complaint, the case acceptance charges will be halved. Furthermore, for cases in which agreement is reached through mediation guided by the court, allocation of litigation costs and fees shall be determined through discussion between the parties; if no agreement can be reached, the court shall determine the allocation.10 For appeals heard by an appellate court in which agreement is reached upon mediation, after the mediation notification is served, the judgment of the court of original instance is regarded as being reversed. In such case, allocation of all litigation costs and fees incurred in the trial and the appeal shall be determined through discussion between the parties; if no agreement can be reached, the appellate court shall determine the allocation.11

As for attorney’s fees, in China, there is no regulatory provision specifically requiring lawyers to reduce their charges because of mediation or withdrawal of complaints. The major reason is that if lawyers are required to reduce charges for these cases, it is highly possible that they may intentionally prevent settlement/mediation, which will have unfavorable effect on the development of alternative dispute resolutions. On the contrary, in China, lawyers are encouraged to take part in settlement/mediation, and this is deemed as part of lawyers’ work.12 In order to inspire their activeness in mediations, lawyers are permitted to charge their clients on an hourly rate basis when representing in mediations.13

II. Exceptions and Modifications

There are numerous exceptions to the basic rule which can be summarized as follows: (1) according to Article 12 of the Measures on Payment of Litigation Fees, judicial verification fees should be born by the party applying for verification;14 (2) The winner may pay such fees if it is willing to;15 (3) If a party wins in some claims and loses in others, the court shall decide the respective amounts of litigation costs and fees to be born by each party taking into account of the specific circumstance of the case;16 (4) If the joint litigants are the losing side, the court shall decide the respective amount of litigation costs and fees to be born by each joint litigant based on the interest of such joint litigant in the subject matter;17 (5) The debtor shall assume attorney’s fees, traveling expenses and other requisite fees incurred by the creditor for exercising its right of revocation; third party in fault shall assume the costs as appropriate;18 (6) In intellectual property litigations, the indemnification for infringement of intellectual property shall also include reasonable expenses of the

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9 See 2008 Work Report of the Supreme People’s Court. In judicial practice, the percentage of cases closed through mediation in basic people's courts at districts and counties of China is even higher, up 70% or even above. According to certain reports of the People’s Court Newspaper, in courts of certain regions, the ratio of cases closed through mediation amounts up to over 90%.
10 See Article 31 of the Measures on Payment of Litigation Fees.
11 See the Replies to Certain Issues of Charges in Civil Litigation of the Supreme People’s Court (June 21, 1986).
13 See Paragraph 3 of Article 12 of Shanghai Implementation Measures on Administration of Lawyers’ Service Fees (Hufagaijiafei No. (2009) 004).
14 It should be mentioned that according to Paragraph 1 of Article 29 of the Measures, judicial verification fees as part of litigation costs and fees shall be born by the loser. However, there is no uniform practice in reality. Some courts decide losers pay such fees, some decide that the party against which the verification conclusion is unfavorable pay such fees while some others decide that the applicant bears the cost.
15 See Paragraph 1 of Article 29 of the Measures on Payment of Litigation Fees.
16 See Paragraph 2 of Article 29 of the Measures on Payment of Litigation Fees.
17 See Paragraph 3 of Article 29 of the Measures on Payment of Litigation Fees.
18 See Article 26 of Interpretation I of the Supreme People’s Court of Certain Issues on Application of the Contract Law of the People’s Republic of China.
owner for refraining the infringement, including reasonable costs of the owner or its agent for investigation and
evidence collection related to the infringement. In addition, the court may also include the attorney’s fees
which are in conformity with rules promulgated by relevant authorities in the scope of indemnities to the
parties’ claims and the specific circumstance of the case;¹⁹ (7) In principle, no litigation fees will be charged
for retrial cases, unless the relevant party applies for retrial on the ground of new evidence or the relevant party
has not gone through appeal proceedings and apply for retrial directly;²⁰ (8) If case acceptance charges are
applicable in a retrial case, the relevant litigation costs and fees shall be born by the party applying for retrial.
If both parties apply for retrial, the allocation shall follow the principle of “loser bears all”;²¹ (9) in divorce
cases, the allocation of litigation costs and fees shall be determined through discussion between the parties.
If no agreement can be reached, the court shall decide the allocation;²² (10) in civil cases, if the plaintiff or
appellant applies to withdraw the claim, and such application is approved by the court, the acceptance charges
shall be born by the plaintiff or the appellant, as the case may be;²³ (11) if a party requests to reduce the
amount claimed after the court investigation is completed, the case acceptance charges related to the reduced
amount shall be born by such party requesting for such change of claims;²⁴ (12) enforcement application fees
shall be born by the party subject to the enforcement. However, if the parties reach a settlement agreement
during the enforcement process, the allocation of application fees shall be determined through discussion
between the parties; if no agreement can be reached, the court shall decide the allocation;²⁵ (13) if the debtor
does not raise any objection to the supervision procedure, the application fees shall be born by the debtor.
If the debtor raises objection to the supervision procedure, which terminates the supervision procedure, the
application fees shall be born by the applicant. If the applicant files an action separately, such application
fees can be included in the claims; (14) the application fees for public notice for assertion of claims shall be
born by the applicant; (15) the application fees for pre-action maritime preservation or maritime injunctions
shall be born by the applicant. If the applicant files an action in connection with relevant maritime claims, such
application fees may be included in the claim;²⁶ (16) the application fees for pre-action preservation of
maritime related evidence shall be born by the applicant;²⁷ (17) the application fees for establishment of funds
for limitation of liability for maritime claims, registration of debts and indemnification to creditors, and
assertion of maritime liens and the publication cost for establishment of funds for limitation of liability for
maritime claims and assertion of maritime liens shall be born by the applicant;²⁸ (18) if a party fails to present
evidence within the time frame due to its own fault, and presents new evidence in the appealing proceeding or
retrial proceeding, which results in increase in litigation costs, such increased costs should be born by such
party.²⁹ Furthermore, the judicial relief system in China also provides necessary supplements to the rules for
allocation of litigation costs and fees.

Although there are such various exceptions to the basic rule as discussed above, in China, there is no
mandatory pre-action procedure with general applicability to all types of civil and commercial litigations that
may affect the allocation of litigation costs and fees. Current applicable mandatory pre-action procedures

¹⁹ See Paragraph 1 of Article 56 of the Trademark Law of the People’s Republic of China, Article 17 of the Interpretation of the
Supreme People’s Court of Certain Issues on Law Application in Hearing Trademark Related Civil Disputes, Paragraph 1 of
Article 48 of the Copyright Law of the People’s Republic of China, Article 26 of the Interpretation of the Supreme People’s
Court of Certain Issues on Law Application in Hearing Copyright Related Civil Disputes, Paragraph 1 of Article 65 of the Patent
Law of the People’s Republic of China and Article 22 of the Provisions of the Supreme People’s Court on Law Application Issues
in Hearing Patent Related Disputes.
²⁰ See Article 9 of the Measures on Payment of Litigation Fees.
²¹ See Article 32 of the Measures on Payment of Litigation Fees.
²² See Article 33 of the Measures on Payment of Litigation Fees.
²³ See Paragraph 1 of Article 9 of the Measures on Payment of Litigation Fees.
²⁴ See Article 35 of the Measures on Payment of Litigation Fees.
²⁵ See Article 38 of the Measures on Payment of Litigation Fees.
²⁶ See Item 1 of Article 39 of the Measures on Payment of Litigation Fees.
²⁷ See Item 2 of Article 39 of the Measures on Payment of Litigation Fees.
²⁸ See Items 4 and 5 of Article 39 of the Measures on Payment of Litigation Fees.
²⁹ See Article 40 of the Measures on Payment of Litigation Fees.
mainly apply to the following two circumstances: First, the following disputes shall be mediated first if summary procedures are applied: marriage and family relationship disputes, inheritance disputes, labor contract disputes, damages claims resulting from traffic accidents or on-job injuries where the rights and obligations are relatively clear, housing land and neighboring relationship disputes, partnership agreement disputes and disputes with relatively small amount in question, but with the exception of those cases which cannot be mediated or there is obviously no necessity to mediate based on the nature of the dispute and the actual situation of relevant parties. Second, in labor disputes, pre-litigation arbitration is mandatory. It should be mentioned that, although the Law on Mediation and Arbitration of Rural Land-Contract Disputes of the People’s Republic of China approved by the ninth session of the standing committee of the eleventh National People’s Congress on June 27, 2009 has established the mediation and arbitration regime for disputes regarding rural land contracting, according to Article 4 of such law, the parties “may” rather than “must” select mediation or arbitration, and they may also file an action with the competent court directly.

Party agreements allocating litigation costs and fees are not common. Typical examples are as follows: (1) when the parties enter into a settlement/mediation agreement regarding the dispute, they may agree on the allocation of litigation costs and fees in the agreement; and (2) when the court enters judgment regarding allocation of litigation costs and fees, the parties may reach agreement as to the allocation under guide of the court. In China, parties are not prohibited from reaching agreements on allocation of litigation costs and fees. Such agreements will be valid as long as the requirements for a valid contract are satisfied. However, in order to protect consumers’ rights, to determine the legal effect of provisions related to allocation of litigation costs and fees in standard-form contracts, or standard-form contracts regarding allocation of litigation costs and fees, the Contract Law of the People’s Republic of China shall apply; when interpreting such standard terms, Article 41 of the Contract Law shall apply: “When the parties have disputes on standard terms, the terms shall be interpreted according to a general understanding. If there are two or more interpretations to a standard term, it shall be interpreted against the provider of such term”.

The China civil procedure law follows the doctrine of self-representation rather than the doctrine of mandatory lawyer representation. Accordingly, in all types of civil and commercial cases, the parties may represent themselves as long as they have full civil right capacity. If the parties commission other person to represent them, according to Paragraph 2 of Article 58 of the Civil Procedure Law of the People’s Republic of China, besides hiring lawyers, the parties may also authorize their relatives, related social institutions or persons recommended by their employers, or other citizens approved by the court to act as their representatives in the litigation. In judicial practice, it is very common that one party or both parties represent themselves in civil actions, especially in relatively undeveloped areas. The major reasons include: (1) Due to limitations on the resource allocation between judges and lawyers as legal profession in China, and the unbalanced regional distribution of lawyers, in many cases, the parties are not able to find a lawyer to represent them. As of the end of 1997, there were over 170,000 judges in all levels of courts in China and 79,000 qualified lawyers. The number of judges was approximately two and a half times of that of lawyers. In the succeeding 10 years, the scale of lawyers expanded significantly. As of 2010, the aggregate number of lawyers in China will reach 200,000. At the same time, the number of judges will be over 200,000. However, most prominent lawyers in China are based in central cities such as Beijing, Shanghai and Guangzhou. There are either no or very few lawyers in small towns and rural areas. (2) Among the over 8,000,000 civil cases in China every year, most are closed through summary procedures or mediation. Summary procedures or mediation procedures demand less in formality, professionalism and technicality. In addition, judges extensively exercise their power of interpretation in civil actions. All these make it possible for the parties to represent themselves. (3) In a few cases, the parties are too poor to hire lawyers to represent them. (4) Some lawyers intentionally

30 See Article 14 of the Provisions of the Supreme People’s Court on Application of Summary Procedures in Civil Cases.
31 See Article 5 of the Labor Disputes Mediation and Arbitration Law of the People’s Republic of China.
32 See Paragraph 1 of Article 29 of the Measures on Payment of Litigation Fees.
35 See the whitebook: Construction of Political Democracy in China.
provocate disputes, charge clients in violation of relevant laws and regulations or have other conducts in breach of their professional ethics, which makes a few clients lose trust on lawyers and rather choose self-representation.

III. Encouragement or Discouragement of Litigation

With the advancing of the rule-by-law process of market-oriented economy and the awakening of people’s consciousness of rights, there is a trend in China that people seek to protect their rights through litigation, and filing actions in courts has become one of the most important approaches for the parties to protect their rights. In general, the civil procedure theory in China has always been advocating encouragement of litigation; although the judicial practice is relatively more conservative compared with the theory world, as civil litigations are aimed to resolve disputes on private rights, judicial policies are quite tolerant on civil actions, and the rules on litigation cost and fee allocation also incline to facilitate litigation. In particular, in the 2007 Measures on Payment of Litigation Fees, the starting rate of charges in property disputes is reduced from the original 4% to 2.5%, other litigation fees and out-of-pocket expenses for enforcement are abolished, the starting amount of aggregate property value for charging additional fees related to property allocation in divorce cases is raised from RMB10,000 to RMB200,000; case acceptance charges are half reduced for cases where summary procedures are applied; acceptance charges for appealing cases regarding property disputes is calculated based on the difference between the amount claimed and the amount in the original judgment; for qualified parties, the litigation costs and fees may be reduced, postponed or even exempted. All these provisions significantly reduced the charging rates of litigation costs and fees, and facilitated common people in China to access judiciary resources. Above provisions can be regarded as a signal for encouraging litigation. Nonetheless, while there are general rules for encouraging litigation, there are also certain allocation rules of litigation cost and fee that discourage litigation and these rules have general applicability, too. For instance, in order to encourage the parties to settle disputes or accept mediation, it is provided that the litigation charges are half reduced for cases closed by withdrawal of complaint or through mediation. In addition, for collective civil disputes in which one party or both parties are a large group of people, sensitive disputes which may affect the stability of the society, or disputes arising from the grey area between state laws and folk laws during the society transition period of China, although there is no specific cost and fee allocation rule discouraging litigation, as judicial policy and in practice, courts generally take such attitude and actions that discourage and deter litigation, e.g., courts will not accept such types of cases.

Generally, the plaintiff has to pay all the court costs up front. According to Article 13 of the Measures on Payment of Litigation Fees, based upon the claimed amount or property value in property cases, the acceptance charge is calculated with the following progressive rates on a cumulative basis: if the amount or value is less than RMB10,000, the acceptance charge is RMB50 for each case; for amount exceeding RMB10,000 but not exceeding RMB100,000, 2.5% of the exceeding part; for amount exceeding RMB100,000 but not exceeding RMB200,000, 2% of the exceeding part; for amount exceeding RMB200,000 but not exceeding RMB500,000, 1.5% of the exceeding part; for amount exceeding RMB500,000 but not exceeding RMB1,000,000, 1% of the exceeding part; for amount exceeding RMB1,000,000 but not exceeding RMB2,000,000, 1% of the exceeding part; for amount exceeding RMB2,000,000 but not exceeding RMB5,000,000, 0.9% of the exceeding part; for amount exceeding RMB5,000,000 but not exceeding RMB10,000,000, 0.8% of the exceeding part; for amount exceeding RMB10,000,000 but not exceeding RMB20,000,000, 0.7% of the exceeding part; for amount exceeding RMB20,000,000, 0.6% of the exceeding part; for amount exceeding RMB20,000,000, 0.5% of the exceeding part. The acceptance charge of non-property cases is calculated as follows: (1) RMB50 to RMB300 for each divorce case. In cases involving property allocation, no additional fee if the property value is no more than RMB200,000; if the property value exceeds RMB200,000, an additional fee amounting to 0.5% of the exceeding part will be charged; (2) RMB100 to RMB500 each for cases related to infringement of name right, portrait right, reputation right, honor right and other personality rights. In cases involving claims for damages, no additional fee if the damages claimed is less than RMB50,000; for amount exceeding RMB50,000 but not exceeding RMB100,000, an additional fee equal to 1% of the exceeding part will be charged; for amount exceeding RMB100,000, 0.5% of such exceeding part will be charged; (3) RMB500 to RMB1,000 each for
intellectual property cases without disputed amount or value; (4) RMB10 for each labor dispute; (5) RMB50 to RMB100 for each case where a party challenges the court’s jurisdiction but fails; and (6) RMB50 to RMB100 for other non-property cases. As for attorney’s fees, whether there is any retainer and its percentage depend on the agreement between the relevant law firm and its clients. According to our survey and research, in over 50% cases, law firms charge retainer amounting to 50% or more of the total attorney’s fees. Costs for taking evidence, such as verification fees, evaluation fees, reimbursement to witnesses for presenting in court, etc., should also be pre-paid by the party applying for such taking. Any party applying with the court to preserve evidence shall pay a fee calculated according to the following rates based on the value of the property actually preserved: (1) RMB30 for each case if the property value is no more than RMB1,000 or no value is involved; (2) for amount exceeding RMB1,000 but not exceeding RMB100,000, 1% of the exceeding part, (3) for amount exceeding RMB100,000 but not exceeding, 0.5% of the exceeding part. However, the total preservation fee shall not exceed RMB5,000 at most.36 No fee will be charged for application for inspection and examination by court. In different types of cases, up-front payment requirements affect the litigation in different ways. In commercial cases, up-front payment requirements almost have no effect of discouraging litigation; while in ordinary civil cases, for the relatively poor group, up-front payment requirements may discourage litigation to certain extent. In addition, for enforcement application to court, under the principal of “payment after enforcement”,37 up-front payment requirements do not affect the relevant parties in applying for enforcement.

IV. The Determination of Costs and Fees

China follows the doctrine of “judiciary with compensation”. The amount of litigation costs and fees is determined mainly by the following two factors: first, whether it is a controversy or non-controversy case; second, whether it is a property or non-property case. A non-controversy case refers to a case where there is no civil right dispute between the parties, and the parties merely request the court to confirm if certain fact should exist, and further establish, change or extinguish certain legal relationship. A non-property case means a case where the civil rights in dispute are not directly related to property, but rather indispensable from to the subject’s personality or identity. As it is usually impossible to quantify the exact economic value of the rights and benefits involved in non-controversy and non-property cases, the acceptance charges for such cases are calculated under the principle of “flat fee for each case”. As for property cases and litigation cases, the acceptance charges are calculated based on the amount in controversy in a progressive way and on a cumulative basis. In addition, the complexity of the procedures, the level of the procedures, the phase of the procedures, whether the case is closed by judgment, settlement or mediation, are also important factors for determining the amount of litigation costs and fees. Court costs other than the acceptance charges will be charged on an out-of-pocket basis.

In China, the National Development and Reform Commission and the Ministry of Justice promulgated the Administration Measures on Lawyers’ Service Fees on April 13, 2006 which regulates lawyers’ charging of service fees. It is provided that: law firms shall refer to the government guide price when charging service fees for representing clients in litigations; the basic rate and the floating range of the government guide price shall be determined by the government authority in charge of pricing of each province, autonomous region or municipality together with the judiciary administrative authority at the same level.38 Theoretically, these standards are regarded as mandatory. The reason is, according to Article 26 of the Administration Measures on Lawyers’ Service Fees, the government authority in charge of pricing may impose administrative penalty on fee charging activities in violation of above provisions, such as charging at a rate above the floating range of the government guide price, increasing charging rates indirectly by dividing items of charge, duplicating charging or extending the range of charging, charging at a rate obviously lower than cost for the purpose of

36 See Article 14 of the Measures on Payment of Litigation Fees.
37 See Paragraph 2 of Article 20 of the Measures on Payment of Litigation Fees.
38 See Articles 5 and 6 of the Administrative Measures on Lawyers’ Service Fees (Fagai Pricing No. (2006) 611).
unfair competition, etc. Nonetheless, law firms have different understanding of the Administration Measures on Lawyers’ Service Fees. In practice, the government authorities in charge of pricing rarely intervene in law firms’ fee charging activities, and the rates at which lawyers charge fees are relatively flexible. Above provisions are merely for reference purpose and are not strictly implemented and the borderlines may be crossed. Actually, it is very common for clients and attorneys to negotiate and increase or decrease above rates. When negotiating on the lawyers’ fees, law firms and their clients principally consider the following factors: (1) time spent; (2) complexity of the underlying legal affairs; (3) clients’ affordability; (4) potential risk and responsibility the lawyers may be exposed to; and (5) the reputation and capability of the lawyers. As for the form of charging, it can be a flat fee, a fee in proportion to the value of the object or a fee calculated on an hourly rate basis. Charging on an hourly rate has been applied in non-litigation legal services for many years, but not in litigation representing services until recent two or three years. This form of charging is principally used by some high-end law firms in large cities such as Beijing, Shanghai and Shenzhen, and very seldom in other regions. The hourly rates are different in various regions. In Beijing, senior partners generally charge RMB3,000 per hour, and leading associates (with five or more years of professional experience) generally charge RMB2,000 per hour.

In China, there are two ways to identify the party bearing litigation costs and fees: (1) the allocation of court acceptance charges to be specifically decided by the court in the body of the judgment. The plaintiff will normally include in the complaint as a claim that the defendant pay the acceptance charges and request the court to make a decision in the judgment after hearing the case. Therefore, at the end of the judgment, the court will decide on the allocation of acceptance charges according to the outcome of the case. If it is clear who is the winner and who is the loser, the court has no discretion, and it shall determine that the loser shall pay the acceptance charges according to law. In the case of partially winning and partially losing, the court will have certain discretion on allocation of litigation costs. According to the uniform format of judgments in China, the decision on acceptance charges is attached to the judgment itself and included in the body of the judgment, and no separate court order will be issued. (2) Allocation of attorney’s fees generally does not fall into the scope of court ruling, except in cases such as intellectual property disputes where the plaintiff requests in the complaint the court to rule that defendant pays the plaintiff’s attorney’s fees. According to Article 30 of the Administration Measures on Lawyers’ Service Fees, any dispute arising out of service fee charging by lawyers shall be resolved through negotiation between the relevant law firm and its clients. If no agreement can be reached through negotiation, the disputes may be submitted for mediation to the local bar association, justice administrative authority or pricing supervision authority at the domicile of the law firm, or arbitration or litigation at the court. Accordingly, when there are disputes on lawyers’ charging of fees, the decision maker might be the local bar association, justice administrative authority or pricing supervision authority at the domicile of the law firm, or the arbitration institution, or the court, as the case may be. Under such circumstance, the decision maker shall exercise their discretion in accordance with the Administration Measures on Lawyers’ Service Fees; and if the dispute is submitted to a court, the court shall enter separate judgment on the dispute related to lawyers’ charging of fees.

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

Success-oriented fees are allowed under China laws on a limited basis, and the limitation depends on the particular form of success-oriented fees. Even before the promulgation of the Administrative Measures on Lawyers’ Service Fees, there have existed success-oriented fees in practice, including contingency fees in percentage of the amount granted by the court, fee arrangements with “no fee if losing” provisions, fee agreements with success premium arrangement, fee agreements in which certain parts of the attorney’s fees are conditioned on the outcome and other forms in which fees are charged depending on the outcome. The Administration Measures on Lawyers’ Service Fees explicitly affirms such arrangements and classifies them as “contingent representations”, but also imposes on them certain limitations.39 Under the Measures, the

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39 See Articles 11-13 of the Administrative Measures on Lawyers’ Service Fees.
following general conditions shall be satisfied for success-oriented fees: (1) applicability is limited to civil cases involving property disputes; (2) the client agrees to accept contingent representation even after being informed of the government guide price; (3) contingent representation shall not be applied to marriage cases, inheritance cases, claims for social insurance or basic living security, claims for alimony, comfort funds, poverty relief payments, on-job injury damages cases, claims for salary payment, and group civil cases; (4) under contingent representation, the relevant law firm and its client shall enter into contingent representation fee agreements which shall provide the risk and responsibility assumed by both parties, fee calculation and the amount or percentage of the fees; and (5) the success-oriented fees shall not exceed 30% of the total amount agreed in the fee agreement. In principle, a party shall pay its own attorney’s fees. Even in intellectual property cases, the loser will only assume such attorney’s fees as provided by competent authorities, and the court will decide on the reasonable amount of such fees. As a result, the loser will not be required to pay the part increased due to contingent representation arrangement.

There are two circumstances in which claims are sold for the purpose of litigation: (1) transfer of substantive rights. This is permitted under PRC law. The right owner may transfer its substantive rights according to the Contract Law of the People’s Republic of China, and the transferee may file an action in its own name after the transfer; (2) Transfer of the right to sue. Transfer by a right owner of merely the right to sue rather than the substantive rights will constitute litigation entrustment which is prohibited by PRC law. Article 11 of the Trust Law of the People’s Republic of China provides that a trust established solely for the purpose of litigation or debt recovery shall be invalid. It is illegal if the right owner transfers its right to sue to lawyers, law firms, or any other person taking it as a job who invests in the litigation and assumes the risk. Nonetheless, there are a few cases in practice in which agreements on transfer of rights to sue were recognized as valid, such as (2006) Haiminchuzi No. 24968 Civil Judgment of the People’s Court of Haidian District of Beijing.

Under PRC law, there are no special rules for representative actions for group disputes, group actions filed by trade unions, real property owners’ committee, copyrights collective management organizations, etc., or other types of civil actions. However, in judicial practice, some local normative documents provide that the courts shall not charge any fee for environmental public interest suits filed by People's Procuratorate or environment protection institutions. But this is not common.

There is no particular litigation insurance in China. However, the litigation costs and fees may be covered by certain liability insurance, for example, third-party automobile liability insurance. As third-party automobile liability insurance is mandatory, it is quite common and it is implemented very well. It shall be

40 See Articles 11-13 of the Administration Measures on Lawyers’ Service Fees (Fagai pricing No. (2006) 611).
41 The Supplement Agreement entered into by Jiebao Limited (Party B) and Zhongkai Limited (Party A) provided that, during the term in which Party B has exclusive rights to the information network of Wuji, in the action filed by Party A against Zhongsou Limited for infringement of rights in Wuji, as agreed by both parties, Party A would act as the subject party to the action and Party B should cooperate with Party A to collect evidence and provide required materials. Indemnities obtained upon victory of the litigation, after deducting necessary expenses, should be shared by the parties on an equal basis. Other than agreed in such agreement, Party A would be solely responsible sue for tort liability against any infringement to the right to spread Wuji on information network, including collection of evidence, issuance of lawyer’s letters, filing of actions and other legal proceedings and Party A should be entitled to the indemnities. The People’s Court of Haidian District of Beijing stated in the judgment that in order to solve the conflicts between the respective tort action filed by the parties separately, the parties entered into the Supplement Agreement which provided for the infringement claims made by Zhongkai against Zhongsou and other infringement claims of the parties. According to such agreement, Zhongkai would have the right to sue. The court was of the opinion that the agreement between the parties in connection with how to actively claim for remedies against infringements to their rights and how to share benefits upon indemnification neither violated any law or regulation nor would necessarily affect the court’s judgment and the Supplement Agreement is legal and valid.
42 In June, 2006, the High Court of Yunnan Province provides for in one of its Conference Memorandums (Huiyi Jiyao) that, acceptance fees will not be charged for environment related public interests suits initiated by people’s procuratorates or environment protection groups. See Zhu Yuchen & Wang Qingpu, Environment Related Public Interests Suits: How Far is it From the Reality?, on http://www.legaldaily.com.cn/zmbm/2009-06/18/content_1109986.htm (2009-8-23)
mentioned that, the litigation costs and fees covered by liability insurance are very limited, and for most civil and commercial cases, there is no insurance mechanism covering litigation costs and fees.

**VI. Legal Aid**

At the beginning of 1994, the Ministry of Justice started to explore the establishment of legal aid system. In September 2003, the Central Government published and implemented the *Regulation on Legal Aid*, which symbolized that the establishment of the legal aid system in China. In order to carry out the Regulation, eight government departments including the Ministry of Justice, the Ministry of Civil Affairs, the Ministry of Finance, the Ministry of Labor and Social Security jointly issued the *Opinions about Implementing the Regulation of Legal Aid and Solving the Difficulties of the Poverty to File Suits*. Thereafter, the Ministry of Justice and the Ministry of Finance jointly issued the *Interim Measures on the Management of the Special Subsidies from Central Government to Local Legal Aid Cases*, which clarifies that the legal aid funds shall be included in the financial budget of all levels of governments, and the establishment of special funds for legal aid at the central and provincial levels. This solved the problem of obtaining assistance and support from departments and institutions in charge of as labor arbitration, land and resources, construction, public health, industry and commerce, archive management, etc. when investigating in legal aid cases. In 2005, the Ministry of Justice and the Supreme Court jointly issued the *Regulation on Legal Aid Work in Civil Litigation*, which realized the connection of legal aid and judicial aid at the policy level, and actually expanded the scope of legal aid. Currently, a complete legal aid system sponsored by the government has already been established in China. The *Regulations on Legal Aid* promulgated by the State Council in September 2003 provides that legal aid is the responsibility of the government; the governments at or above county level shall take active actions to facilitate legal aid work, provide financial support to legal aid, and ensure the legal aid career to develop in line with economy and the society. The funds for legal aid shall be used for its specified purpose only, and shall be subject to supervision by finance authorities and audit authorities. Parties with financial or other difficulties may apply with legal aid institutions for free legal services such as consulting and representing to be provided by lawyers, notaries and legal workers at the grassroots level. Law firms shall accept legal aid cases assigned to them. Legal aid institutions shall pay allowances to lawyers or social organization personnel who are designated to deal with legal aid cases upon closing of the cases. The standard of allowance shall be determined by the judicial administrative authority at the provincial level together with the finance authority at the same level, by taking into account the development level of local economy and making reference to the average costs of legal aid institutions when dealing with various legal aid cases; and such standard may be adjusted as necessary. For citizens with financial difficulties who do not fall into the scope of legal aid, law firms may reduce or exempt legal service fees as appropriate. In addition, all levels of courts in China have established judicial relief system. Judicial relief means the rules under which the court may postpone, reduce or exempt litigation fees for parties with financial difficulties in civil cases who have adequate evidence to prove that their legal rights are impeded.

Aids offered to parties with financial or other difficulties by private organizations have been encouraged and existing for long time in China. On one hand, Article 15 of the *Civil Procedure Law* establishes the principle of providing support for lawsuits, i.e., for conducts infringing the civil rights of the State, a group, or an individual, a State organ, social organization, enterprise or institution may provide support to the infringed entity or individual to file actions with the court. There are various forms of such support. For example, they may educate the entity or individual whose interest is harmed of legal knowledge, provide legal consulting services and make them familiar with the rights and obligations provided by law, improve their legal sense, strengthen their legal concept, and encourage them to protect their legal rights with the weapon of law; they may also represent such entity or individual with their consent, or recommend lawyers as their representatives in order to protect their legal rights; and they may also provide them with financial aid, such as paying the litigation costs and fees and attorney’s fees for them. Such system of providing support for lawsuits system can be also found in Paragraph 2 of Article 88 of the *Law of Prevention and Control of Water*

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43 See Article 3 of the *Regulation on Legal Aid*. 
Pollution, Article 78 of the Labor Contract Law, Paragraph 4 of Article 21 of the Trade Union Law, Article 30 of the Labor Law, Paragraph 2 of Article 52 of the Law of Protection of Women's Rights, Paragraph 3 of Article 84 of the Law on the Prevention and Control of Environmental Pollution Caused by Solid Wastes, Article 23 of the Product Quality Law and Paragraph 6, Article 32 of the Law on Protection of Consumer Rights. On the other hand, in China, social organizations and institutions are encouraged to provide legal aid to citizens with financial difficulties with their own resources, and the entire society is encouraged to donate to legal aid activities. Organizations and individuals who make outstanding contribution to legal aid work will be commended and honored by relevant government authorities and judicial administrative authorities. Actually, there are a large number of civil organizations which are involved in public interest legal services in China, such as Oriental Public-interest Legal Aid Law Firm, Women's Rights Legal Service and Research Center of Peking University, Pollution Victim Legal Aid Center of China University of Political Science and Law, Disabled Rights Protection Legal Research and Service Center of Remin University of China, Beijing Juvenile Legal Aid and Research Center, Beijing Present Worker Legal Aid Working Station and the Small Bird organization, etc.

Generally, legal aid may provide help to all parties in need, and there is no obvious limitation on the qualification of receivers. In the past, many local rules required that legal aid may only be provided to permanent or temporary residents. But currently, there is a trend of canceling such limitation in local rules.

The Measures on Payment of Litigation Fees of 2007 has substantially reduced the standards of litigation costs, and the purpose is to “solve the problem of ‘non-affordable litigation’ which has been strongly complained by common people”. In other words, in the past, there did exist such problem that high litigation costs and fees excluded certain common people from access to justice. But currently, such situation has been obviously improved.

Generally, litigation costs and fees shall not be considered a serious barrier for certain parties to access to remedies. However, in certain specific cases, the litigation costs and fees may constitute a barrier to litigation. For instance, small amount consumer disputes. The amount in controversy is small, and litigation is consuming too much time, energy and cost. Therefore the consumer may give up litigation, swallow the anger and accept the unfair treatment by the seller.

### VII. Examples

<table>
<thead>
<tr>
<th>Amount in Controversy ( $1= ¥ 70 )</th>
<th>Acceptance Charges (Flat)</th>
<th>Attorney’s Fees (Beijing Standard)</th>
<th>Enforcement Fees (Flat)</th>
<th>Total (Estimated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>RMB7,000</td>
<td>RMB50</td>
<td>RMB3,000/Party</td>
<td>RMB50</td>
<td>RMB6,100</td>
</tr>
<tr>
<td>RMB70,000</td>
<td>RMB1,500</td>
<td>RMB7,000/Party</td>
<td>RMB900</td>
<td>RMB16,400</td>
</tr>
<tr>
<td>RMB700,000</td>
<td>RMB11,300</td>
<td>RMB41,400/Party</td>
<td>RMB9400</td>
<td>RMB103,500</td>
</tr>
<tr>
<td>RMB7,000,000</td>
<td>RMB61,300</td>
<td>RMB304,000/Party</td>
<td>RMB62,400</td>
<td>RMB731,700</td>
</tr>
</tbody>
</table>

Notes: Acceptance charges and enforcement fees are calculated according to the standard provided by the Measures on Payment of Litigation Fees, and Attorney’s fees are calculated according to the standard provided by the Beijing Government Guide Price Standards for Attorney’s fees for Representation in Litigation (Interim) (Draft for Comments).

In cases other than intellectual property infringement cases, if the plaintiff lost a RMB700,000 (approximately $100,000) claim, his/her costs and fees will vary depending upon whether he/she appeals: if such plaintiff lost in trial but did not appeal, his/her costs and fees to be paid would be approximately RMB62,700; if such plaintiff lost in trial and appealed and lost in the appeal again, it is difficult to predict his/her costs and fees, because the case acceptance charges for the appealing proceeding could be various.

44 See Articles 7-9 of the Regulation on Legal Aid.
depending upon the claims of the appellant. Assuming the appellant appeals for the full amount claimed in trial and continue engaging the same law firm to represent him/her, his/her costs and fees would be approximately RMB94,700.

A losing plaintiff and a losing defendant assume almost the same amount of litigation costs and fees. However, if the losing defendant does not implement the effective judgment, he/she will have to pay for the enforcement fees. In a RMB700,000 case, the enforcement fees may amount to RMB103,500.

**VIII. Conclusion**

As an overall analysis, the costs and fees in civil and commercial litigations in China have the following trends: first, as to the allocation of litigation costs and fees, most scholars stand for such opinion that the scope of litigation costs and fees to be allocated to the loser should be expanded. Second, in terms of legal aid, the scope of legal aid has been expanding, and substantially all limitations on the qualification of receivers have been abolished; the providers of legal aid are more diversified, and it is more and more common for non-government organizations to provide legal aid. Last, in terms of the payment of attorney’s fees, there is a diversification trend; charging on an hourly rate basis has been developing fast in the past a few years; in large cities such as Beijing, Shanghai and Shenzhen, not only foreign clients, but also domestic clients (including state-owned enterprises) incline to choose the means of charging on an hourly rate basis. While the prospect of contingent representation is not optimistic, in order to eliminate financial risks and moral risks, law firms organized in quasi-corporate form usually decline to provide contingent representation service.