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COST AND FEE ALLOCATION IN CIVIL PROCEDURE

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A. Introduction

The German system of civil litigation costs is based on the principle that the loser of the litigation must compensate all costs and fees incurred by the winner (sec. 91 and 788 German Code of Civil Procedure (ZPO), sec. 113 Code of Family Proceedings and Non-Contentious Proceedings (FamFG) of 2009). The allocation of costs is based on mandatory legal provisions which exclude any discretionary fee shifting by the court. Despite some recent deregulations, the German system is based on a highly regulated framework of legal provisions which mainly provide for fixed tariffs for all major cost positions. This approach is deeply rooted in Germany's legal culture and tradition, it entails a high predictability of the costs (and the risk) of the litigation..

Abbreviations:

Abbreviation	Full Term (German)	Translation
AktG	Aktiengesetz	Stock Corporation Act
BGB	Bürgerliches Gesetzbuch	Civil Code
BGH	Bundesgerichtshof	Federal Court of Justice
BRAO	Bundesrechtsanwaltsordnung	Federal Attorneys Code
BVerfG	Bundesverfassungsgericht	Federal Constitutional Court
EGZPO	Gesetz, betreffend die Einführung der Zivilprozessordnung	Introductory Law to the Civil Procedure Code
FamFG	Gesetz über das Verfahren in Familiensachen und den Angelegenheiten der freiwilligen Gerichtsbarkeit	Code of Family Proceedings and Non-Contentious Proceedings
FamGKG	Gesetz über Gerichtskosten in Familiensachen	Family Matters Court Charges Act
GG	Grundgesetz	Federal Constitution (Basic Law)
GKG	Gerichtskostengesetz	Court Charges Act
GVG	Gerichtsverfassungsgesetz	Court Organization Code
JVEG	Justizvergütungs- und Entschädigungsgesetz	Judicial Remuneration and Compensation Act
KapMuG	Kapitalanleger-Musterverfahrensgesetz	Act on the initiation of Model Case Proceedings in respect of Investors in the Capital Markets (Capital Markets Model Case Act)
RDG	Rechtsdienstleistungsgesetz	Legal Services Act
RVG	Rechtsanwaltsvergütungsgesetz	Attorney Remuneration Act
UKlaG	Unterlassungsklagengesetz	Code of Injunctive Relief Filings
ZPO	Zivilprozessordnung	Civil Procedure Code

B. Answers to the Questionnaire

I. The Basic Rules: Who Pays?

1. Question: 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?

Answer: The losing party must bear all statutory costs of the litigation in civil and commercial matters, including the costs incurred by the opponent, sec. 91 (1) ZPO (“loser pays” rule¹ and indemnity principle). If each party is successful in part and fails in part, costs are mutually cancelled or proportionally divided, sec. 92 (1) ZPO.

For the reimbursement of costs, attorneys’ fees and court costs are not treated differently.

The German system is designed to provide equal access to justice of a high standard at reasonable costs. As an additional objective, the “loser pays” rule shall encourage potential claimants to pursue valid claims. On the other hand the rule is to discourage the pursuit of unmeritorious claims. Thus, it also promotes the efficient use of the judiciary. Altogether, the basic rule corresponds to the general procedural objective² of protecting and implementing substantive private rights. However, the basic rule has also constitutional underpinnings as it is closely related to the constitutional guarantee³ of free access to justice, articles 2 (1), 20, 3 GG.⁴ Accordingly, the constitutional guarantee prohibits any unnecessary and unproportional costs in civil litigation – although leaving much discretion to the legislator when elaborating a cost system.

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

¹ *Murray/Stürner*, German Civil Justice (2004), p. 341.

² Cf. *Hartmann* in: Baumbach/Lauterbach/Albers/Hartmann, ZPO⁶⁶ (2008), Einl III, 9 (p. 9).

³ Cf. BVerfG, December 12, 2006 - 1 BvR 2576/04, BVerfGE 117, p. 163 (186 et seq.); also cf. *Brehm* in: Stein/Jonas, ZPO²² (2003), vor sec. 1, 287-288 (p. 103 et seq.).

Answer: Only the necessary costs of the litigation are recoverable, sec. 91 (1) ZPO. The term necessary – where applicable – refers to the statutory costs. Consequently, a winning party that agreed to pay more fees to its attorney than provided for by the Attorneys Remuneration Act (RVG), gets only a reimbursement of the legally fixed fees, not of the additional agreed costs. This limitation renders the system fairly calculable and shall thus reduce the financial risk of civil litigation. Especially the losing party is protected by limiting the recovery to necessary costs.

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

Answer: Appellate proceedings entail additional and higher costs. These costs are allocated according to the general principles with minor exceptions, see section 97 ZPO. According to section 97 (1) ZPO, the losing party must pay the whole costs of the litigation and reimburse the costs of the winning party – even if the losing party won in the first instance.

4. Question: 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?

Answer: The costs for the taking of evidence are finally borne by the losing party, sec. 91 (1), 92 ZPO.⁵ The reimbursable costs include not only court appointed expert witnesses⁶ but also expert witnesses hired by the prevailing party as long as the hiring of the expert was necessary under sec. 91 (1) ZPO.⁷ If the court appoints an expert, parties have to advance the costs according to the burden of proof.⁸ These advance payments are later recoverable according to the general principles (sec. 91 ZPO).

The amount of costs for the taking of evidence largely depends on the subject matter and the complexity of the litigation. For example, medical liability cases usually entail significant costs

⁴ Cf. *Hartmann* in: Baumbach/Lauterbach/Albers/Hartmann, ZPO⁶⁶ (2008), Grdz § 128, 14 (p. 619).

⁵ Also see *Bork* in: Stein/Jonas, ZPO²² (2004), sec. 91, 32 (p. 421).

⁶ As a rule, the court selects and appoints the expert, see sec. 404 ZPO.

⁷ *Bork* in: Stein/Jonas, ZPO²² (2004), sec. 91, 42 (p. 425) and 79 et seq. (p. 440 et seq.).

⁸ For acts of the court requested by a party cf. sec. 17 GKG, 379, 402 ZPO. For ex officio acts of the court cf. *Zimmermann* in: Binz/Dörndorfer/Petzold/Zimmermann, GKG, JVEG, sec. 17 GKG 16, 17.

for the taking of evidence by experts. Generally, the remuneration of court appointed experts (and interpreters) is governed by law (JVEG). As these persons are paid on an hourly basis (but at low rates), the financial risks can only be assessed by estimating the time they will have to devote to the dispute.

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

Answer: In case of a settlement, each party bears its own costs and court costs are divided equally among the parties unless the parties agree otherwise, sec. 98 ZPO. Statistics on the percentage of settlements in civil cases are contained in **Appendix I** to this report.

II. Exceptions and Modifications

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

Answer: There is a wide ranging exception for some family proceedings and non-contentious proceedings, sec. 81 FamFG. The most important family proceedings (marital matters and contentious family matters) are however governed by the general rules of the ZPO as described above, sec. 112, 113 FamFG. Non-contentious proceedings most prominently comprise of matters concerning the supervision of natural persons and the confinement of supervised persons and the mentally ill, (*Betreuungs- und Unterbringungssachen*), bequest and bequest division matters (*Nachlass und Teilungssachen*), matters concerning public registers and specific company law matters (*Registersachen und unternehmensrechtliche Sachen*). Where applicable, sec. 81 FamFG gives the court wide discretion when allocating the costs among the parties.⁹ The court may also decide that no one shall be charged for the proceedings. However, limiting the court's discretion, sec. 81 (2) enumerates several situations where the court shall allocate the costs to a specific party.

⁹ Also see the materials of the German Federal Parliament (*Bundestags Drucksache*) BT Drs. 16/6308, p. 215 et seq.

According to a general objective, the German cost system tends to encourage the parties to abstain from litigation – even after the pendency of the litigation. Accordingly, several provisions permit a reduction or even a shifting of the costs if one or both parties terminate the litigation. Specific provisions address the discontinuation of the proceedings (“Erledigung der Hauptsache”, sec. 91a ZPO¹⁰) and the immediate acknowledgment of the claim by a defendant who gave no incentive for the litigation (sec. 93 ZPO¹¹).

An additional guiding principle of the German cost system tends to sanction procedural misbehavior by (rather limited) sanctions. If a party fails to observe a time limit and the hearing is adjourned, the negligent party must bear the additional costs – irrespective of the outcome of the litigation (sec. 95 ZPO). If a party prevails on appeal by presenting new facts - which by negligence were not presented at the first instance - the court may (at its discretion) order the prevailing party to reimburse fully or partly the cost of the appeal (sec. 97 ZPO¹²). Additional costs for unsuccessful or unnecessary motions (sec. 96 ZPO) can also be allocated to the responsible party. As far as the allocation of (additional or unnecessary) costs is concerned, German law provides for a limited discretion of the court. However, the court is not permitted to deviate from the general rule in section 91 ZPO – its discretion is limited to the allocation of additional costs. In this context, the principle guiding the discretion provides that the party who caused additional costs (cf. sec. 96 ZPO) must compensate these costs.

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

Answer: Sec. 15a EGZPO (“Einigungsversuch vor Gütestelle”) provides that individual Federal States may introduce mandatory mediation proceedings as a prerequisite of civil litigation. However, the scope of sec. 15a EGZPO is limited to very few claims, mainly to small claims not exceeding the amount of € 750. Only eight of Germany’s sixteen Federal States introduced mandatory mediation. The failure of mandatory mediation attempts does not influence the

¹⁰ In this case there will be no judgment on the merits. Moreover, as the parties no longer seek such judgment, the court will only decide on the costs, based on the information brought forward until that moment.

¹¹ This provision is intended to prevent claimants from pursuing undisputed claims in court.

¹² Additionally, unsuccessful appeals have to be paid for by the party that appealed (sec 97 (1) ZPO).

allocation of costs. Sec. 91 (3) ZPO and 15a (4) EGZPO provide that the costs of these procedures are considered as necessary costs of litigation.¹³

3. Question 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)?

Answer: Party agreements allocating costs and fees are very uncommon unless parties reach a settlement of the dispute. For settlements, sec. 98 ZPO explicitly provides for agreements on fees and costs.¹⁴ Such costs agreements are enforceable, if they are a part of the court acknowledged settlement.

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

Answer: Parties may only represent themselves in the local courts (*Amtsgerichte*), sec. 78, 79 ZPO.¹⁵ In district courts (*Landgerichte*), family courts (*Familiengerichte* – departments of the local courts), higher regional courts (*Oberlandesgerichte*) and in the Federal Court of Justice (*Bundesgerichtshof*) parties must be represented by a lawyer, sec. 78 ZPO, 114 FamFG.

Consequently, self-representation is limited to litigation in the local courts as defined in sec. 23 GVG. The main competences of these courts contain monetary claims of no more than 5,000 EUR and – regardless of their value – disputes arising from residential tenancy.

Civil litigation in Germany is dominated by lawyers: In most of the proceedings in the local courts at least one party is represented by a lawyer. In 2007, an overall of 1,276,426 proceedings in civil matters took place in the local courts, in 546,198 proceedings both parties were represented by lawyers; in 550,986 only the claimant was represented by a lawyer, in 34,889

¹³ See *Bork* in: Stein/Jonas, ZPO²² (2004), sec. 91, 46 (p. 427).

¹⁴ For further information see *Bork* in: Stein/Jonas, ZPO²² (2004), sec. 98, 11 et seq. (p. 559 et seq.).

¹⁵ See *Bork* in: Stein/Jonas, ZPO²² (2004), sec. 79, 1 et seq. (p. 314 et seq.).

only the respondent was represented by a lawyer and in 144,353 cases (about 12%) neither party was represented by a lawyer.¹⁶

III. Encouragement or Discouragement of Litigation

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

Answer: In general, cost rules shall encourage parties to bring valid lawsuits and to discourage parties from pursuing unmeritorious claims. In addition, German law provides for two major incentives to encourage settlements. Firstly, the renouncing of litigation – including settlements – entails considerably lower court charges, cf. appendix 1 to sec. 3 (2) GKG, KV 1211, 1222, 1232. Secondly, lawyers receive an additional settlement fee, cf. appendix 1 to sec. 2 (2) RVG, VV 1000, 1003, 1004, providing for an incentive to encourage their clients to agree on the settlements.

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

Answer: For most of the litigation costs, advance payments are either necessary (court charges and expenses¹⁷, cf. sec. 12, 17 GKG) or admissible (attorney remuneration, cf. sec. 9 RVG¹⁸) if necessary upon request of the court (witnesses of fact and court appointed experts, cf. sec. 379, 402 ZPO). The actual amount usually depends on the amount in controversy (court charges, attorney fees) or the complexity of the work to be performed (court charges, attorney fees, taking of evidence) and cannot be specified in general terms.

¹⁶ Federal Statistics Agency, Report on the Civil Judiciary 2007 – Statistisches Bundesamt, Statistik Rechtspflege (Zivilgerichte) für 2007, Fachserie 10, Reihe 2.1, p. 30.

¹⁷ Court charges include the remuneration of court appointed translators and experts, cf. KV 9005 of appendix 1 to the GKG.

¹⁸ Lawyers regularly requests an advancement of the remuneration from the client.

No reliable data are available to the authors on a possible deterrent effect of up-front payments. However, it can be assumed that although such effects cannot be denied, they are mitigated by the legal aid system and the comparatively widespread existence of legal expenses insurance in Germany.

IV. The Determination of Costs and Fees

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

Answer: Court charges are generally calculated on the basis of the amount in controversy, sec. 3 GKG and sec. 3 FamGKG. The amount in controversy is defined by sec. 39-65 GKG, sec. 2-9 ZPO and sec. 33-56 FamGKG.

Appeal proceedings entail higher fees than first instance proceedings.

As the court fees are solely based on the amount in controversy, they do not depend on the work efforts undertaken by the Court. Both length and difficulties of the proceedings are not taken into account. Court fees rise with the amount in controversy on a diminishing scale. The diminution is based on the consideration that the workload of the court does not usually increase proportionally to the amount in controversy. Therefore, in comparison to the workload, court charges are comparatively little for small claims and rise strong enough to constitute a system of cross subsidization in which large claims financially subsidize the pursuit of small claims.¹⁹ Since 2002, the amount in controversy is capped at a maximum of EUR 30 million, sec. 39 (2) GKG, 33 (2) FamGKG²⁰. There are also lower caps to the amount in controversy for some special types of proceedings.

¹⁹ While usually small claims are less complex to pursue and thus also require less work, the work required for the pursuit of larger claims on average does not increase proportionally to the value in dispute. Rather, the workload usually increases slower than the value in dispute. This finding is also the reason for the declining design of the amount in controversy based cost structure, cf. sec. 34 GKG, 13 RVG. Hence the subsidies result from a – on average – lower than adequate decline of the costs in comparison to the (typical) actual workload of a rising value in dispute. Cf. *Hommerich/Kilian/Jackmuth/Wolf*, *Anwaltsblatt* 2006, p. 406 (406).

²⁰ This legislative change immediately increased the number of high value litigation in Germany.

2. Question: 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?

Answer: Lawyers' fees are also regulated by statute. According to the Attorney Remuneration Act (RVG) the remuneration of lawyers is regularly fixed according to the amount in controversy. However, lawyers are permitted to negotiate higher fees, sec. 2, 3a RVG. On the contrary, a negotiated decrease is not permitted for court related attorney work, sec. 49b (1) BRAO, 4 (1) RVG. Sec. 4a RVG, a provision enacted in 2008, permits success fees under specific and very restricted circumstances. However, as a rule, German law does not permit contingency fees, cf. sec. 49b (2) BRAO (also see below **V.I.**).

The calculation of the amount in controversy is defined by sec. 22-33 RVG which largely refer to the GKG and ZPO (see above **IV.1.**). There is a cap of EUR 30 million to the amount in controversy here, too.

3. Question: 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.)?

Answer: In contentious proceedings, courts decide on the allocation of costs among the parties in the judgment, cf. sec. 308 (2) ZPO (*Kostengrundentscheidung*²¹). The amount in controversy will also be calculated and fixed by the court. This decision will – at the latest – be made together with the decision on the material claim but in a separate court order, cf. sec. 63 (2) GKG. The taxation of potential reimbursement claims however is determined in completely separate proceedings, sec. 103-107 ZPO, 85 FamFG (*Kostenfestsetzungsverfahren*).

²¹ Usually the last part of the decision. An exemplary decision deviding the costs could be: *Von den Kosten des Rechtsstreits trägt der Beklagte 4/5 und die Klägerin 1/5* (Of the litigation costs, the respondent bears 4/5 and the claimant 1/5).

With the exception of some family proceedings and non-contentious proceedings (for details see above **II.1.**), sec. 81 FamFG, there is no or very little discretion of the court concerning the allocation of costs and the taxation of reimbursement claims. However, with regard to the decision on the amount in controversy, there is some discretionary margin for the court, cf. sec. 3 GKG, 3 FamGKG. This discretion is owed to the factual difficulties of assessing non-monetary claims.

In some cases concerning the violation of intellectual property rights²² or competition laws, amounts in controversy are assessed generously on a rather abstract calculation of possible damages. As a result, high court and attorney fees are used by claimants as a threat against the alleged violators. For example, most recently, a producer of plastic toys with a turnover of approximately 100 million EUR sued the one woman producer of handmade teddy bears over the use of her last name as a trademark she had registered. The business of the woman has a yearly profit of 500-700 EUR. However, the amount in controversy sought by the plastic toy producer is 250,000 EUR.²³

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

Insurance

1. Question: Are success-oriented fees allowed? In particular contingency fees (a percentage of the sum won), no win-no fee arrangements success premiums (higher fees in case of a victory) and/or other fees depending on the outcome of the litigation?

If yes, are such fees a recent development (since when)? Are they regulated by law (e.g., capped)? Does the loser have to pay the enhanced (success) fee? Are such fees allowed or common across the board or in particular cases only?

Answer: Traditionally, success oriented fees were not permitted by the German lawyers' remuneration laws, cf. sec. 49b (2) BRAO. In 2006, the Federal Constitutional Court (*BVerfG*) ruled that the ban on success oriented fees was partially not in accordance with the German

²² E.g. illegal downloads of music, cf. Tyra, ZUM 2009, 934 (940 et seq.).

²³ Cf. <http://www.spiegel.de/wirtschaft/unternehmen/0,1518,671570,00.html> (2010-01-15).

Constitution (*GG*).²⁴ The constitutional guarantee of access to justice would require the ban to allow for exceptions in cases in which parties could be deterred from pursuing their rights unless they had the possibility to negotiate a contingency fee. With very reluctant changes to the RVG, effective since July 1st 2008, the legislation tried to implement the standards demanded by the *BVerfG*. Still, the regulation on success oriented fees is criticized for both its consequences²⁵ and its reach²⁶. Some critics fear that contingency fees will be a substantial step towards an unwelcome Americanization²⁷ of German procedural law.²⁸

The German legislator endorsed these critics and permitted success fees in a very restricted fashion. According to sec. 4a RVG, success oriented fees are only permitted in case the client would otherwise be deterred from pursuing his or her right because of his or her economic situation. Consequently, success oriented fees can be only agreed on a case by case basis. If these conditions are met, different types of remuneration can be agreed on. Accordingly, the parties can agree on contingency fees (a percentage of the sum won), no win-no fee arrangements, success premiums (higher fees in case of a victory) and other arrangements.²⁹ Success oriented fees and higher than statutory remuneration cannot be recovered from the losing party under section 91 ZPO. These costs are – in general – not necessary to pursue a claim in the sense of this provision.³⁰

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

Answer: Claims can be *sold and transferred* for purposes of litigation within the limits of substantive law. Sec. 398 BGB determines that all claims can be subrogated unless a special provision prohibits the cession of the claim. The two most important of these limiting provisions

²⁴ BVerfG, 12.12.2006 - 1 BvR 2576/04, BVerfGE 117, p. 163 et seq.

²⁵ Cf. e.g. *Mayer*, *Anwaltsblatt* 2008, p. 473 (477) criticizing changes on the consequences of a lack of form in remuneration agreements.

²⁶ Cf. e.g. *Hartung*, *Anwaltsblatt* 2008, p. 396 et seq.

²⁷ Cf. *Hartung*, *Anwaltsblatt* 2008, p. 396 (398) on what is understood as Americanisation in Germany.

²⁸ Cf. e.g. *Stiier*, *Anwaltsblatt* 2007, p. 431 et seq.

²⁹ Cf. *Mayer*, *Anwaltsblatt* 2008, p. 473 (474, 475); materials of the German Federal Parliament (*Bundestags Drucksache*) BT Drs. 16/8384, p. 10 et seq.

³⁰ *Herget* in: *Zöller*, *ZPO*²⁷ (2009), sec. 91, 13 (p. 376); *Giebel* in *MünchKomm-ZPO*³ (2008), sec. 91, 49 and 105.

follow immediately. Sec. 399 BGB excludes claims from transfer if the parties agreed to a prohibition of any transfer or if the claim cannot be ceded without a change of its content. Sec. 400 BGB defines that a claim cannot be transferred to the extent it is not subject to pledge.

However, if claims shall be (collectively) collected for account of a third party, such business is restricted by sec. 2 (2) and 3 RDG. Under these provisions only persons who got a license to offer legal services and some exempt organizations such as consumer protection agencies (sec. 8 (1) No. 4 RDG)³¹ may engage in such business. At the litigation stage, sec. 79 (1), (2) ZPO reflect these restrictions. Otherwise, the transfer of the claim is considered as void (section 134 BGB).

Recently, the BGH permitted an action brought by a Belgian stock company (CDC) against several German corporate defendants for the collection of damages caused by a cartel.³² The plaintiff had bought the claims from several German companies which had been victims of the cartel. The defendant relied on sec. 8 (1) No. 4 RDG and argued that the assignment of the claim to the plaintiff was void and null. The BGH did not directly decide the issue but held that the lawsuit was admissible. This judgment demonstrates a growing willingness of permitting innovative forms of litigation financing.

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

Answer: There are several special rules for class actions, group litigation and actions brought by minority shareholders, consumer organizations or private competition law enforcement organizations

Class actions of American style are unknown to the German civil procedure system. Yet, since 2005, investors can collectively sue companies under the KapMuG (Capital Markets Model Case Act)³³ for certain violations of capital market rules.³⁴ Under the KapMuG, individual

³¹ Also cf. Hess in: Mansel/Dauner-Lieb/Henssler, *Zugang zum Recht*, 2008, p. 61 (67 et seq.). Please note that at the time the RDG was not yet in force. The RDG replaced the RBG that covered the same topic.

³² BGH, 20.4.2009,

³³ English translation available (2010-01-15) on the webpage of the Federal Ministry of Justice: http://www.bmj.bund.de/files/99b2aac17586d332e27af5a02684d31b/1110/KapMuG_english.pdf

proceedings are temporarily merged to one model case to resolve the issues common to all the individual claims.³⁵ The KapMuG contains two special provisions on litigation costs for model cases, sec. 17 and 19 KapMuG. Pursuant to sec. 17 KapMuG, costs of the model case are part of the costs of the following continuation of individual proceedings (dealing exclusively with the particularities of each individual case). The costs are allocated to the individual proceedings according to the proportion of the net worth of each individual claim in comparison to the overall net worth of all claims merged. Sec. 19 KapMuG in contrast to sec. 17 KapMuG is a separate rule on the allocation of costs in case of an appeal against the decision made in the model case: Whereas the costs of the original model case become part of the costs of the individual proceedings (sec. 17 KapMuG), costs of an appeal against the model case are allocated among the parties of the appeal (sec. 19 KapMuG). Despite being a special provision to sec. 91 et seq. ZPO, sec. 19 KapMuG roughly follows the same principle of allocating the costs to the loser of the appeal.³⁶

Despite the traditional concept of two parties litigating against each other, either side can actually consist of more than one party (*Streitgenossenschaft* – group litigation), sec. 59-63 ZPO. In that event, sec. 100 ZPO provides a special rule on the allocation of litigation costs among the group. Sec. 100 (1) provides as the general rule, that costs are shared equally among the members of the group. Only if the extent of the involvement in the litigation is considerably unlike, the court can allocate the costs among the members of the group according to its discretion, sec. 100 (2) ZPO.

Consumer protection organizations and certain other certified organizations (qualified entities) are allowed to bring lawsuits for injunctive relief against businesses they believe are using unlawful standard business conditions or are engaging in other conduct violating consumer protection provisions, sec. 1 and 2 UKlaG (Unterlassungsklagengesetz). The same applies for violations of intellectual property rights, sec. 2a UKlaG. For filings under the UKlaG sec. 48 (1) GKG stipulates a cap to the amount in controversy of only EUR 250,000 instead of the common EUR 30 million.

³⁴ For details on the proceedings consult *Hess*, in *Hess/Reuschle/Rimmelspacher*, KapMuG (2008), Einl. (p. 3 et seq.).

³⁵ Cf. *Kruis* in: *Hess/Reuschle/Rimmelspacher*, KapMuG (2008), sec. 17, 1-2 (p. 547).

³⁶ Cf. *Kruis* in: *Hess/Reuschle/Rimmelspacher*, KapMuG (2008), sec. 19, 1-3 (p. 561).

Finally, sec, 12 (4) UWG (Act against Unfair Competition Practices) opens some discretion to the court when fixing the amount in controversy. According to this provision, the court may reduce the amount of value according to the financial strength of the parties. The aim of this provision is obvious: It shall ensure that the high costs of the proceedings do not deter parties from bringing lawsuits against unfair competition,

4. Question: 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?

Answer: In Germany, 90% of funds for civil procedure costs emanate from three sources:

- (1) Self-financing of the client (47%),
- (2) Legal Expenses Insurance (LEI) (35%) – approximately 43 % of the German population hold a LEI policy³⁷,
- (3) Legal aid (8%).³⁸

This data demonstrates that Germany can be considered as a stronghold of Legal Expenses Insurance. During the two last decades, legal expense insurances have become widespread in Germany.³⁹ These insurances usually cover specific risks such as legal costs arising out of motor accidents. The main advantage of these insurances, compared with legal aid, is that the insurance covers the risk of losing the lawsuit: The typical legal cost insurance reimburses the whole litigation costs which include the representation by lawyer and the obligation to pay the opponent's cost should the lawsuit be lost. This growth of legal cost insurances has been criticised by judges: They complain about a "litigation explosion" in Germany and the bringing of lawsuits without serious chances of success.⁴⁰ Insurers are not legally bound to offer only specific types of LEI. The freedom of contract leaves them many options for designing their

³⁷ Cf. *Hommerich/Kilian/Jackmuth/Wolf*, *Anwaltsblatt* 2006, p. 200 (200).

³⁸ Cf. *Hommerich/Kilian/Dreske*, *Statistical Yearbook of the Lawyers Profession 2007/ 2008*, p. 139.

³⁹ In 2002, German insurance companies earned approximately €2.8 billion in LEI premiums from issuing about 25 million policies (the total amount of the German population is about 80 million people).

⁴⁰ Statistics did not confirm these critics, *Murray and Stürner*, *German Civil Justice*, p. 124.

policies. However, insurers offering LEI usually use the uniform conditions on legal expenses insurance (*Allgemeine Bedingungen für die Rechtsschutzversicherung – ARB 2000*).⁴¹

Legal expenses insurance can also be included in various types of liability insurances. However, liability insurances usually offer only passive protection. This means that the insurer will only pay for the costs of a defense against claims the insurer believes to be invalid.

VI. Legal Aid

1. Question: Is there a publicly funded legal aid system? If yes, roughly how does it work (through financial support, court appointed counsel, or otherwise)?

Answer: Sec. 114-127a ZPO and sec. 76-78 FamFG provide for general and publicly funded legal aid. Legal aid is available to individuals who are unable to pay for parts or all of the procedural costs at all or at once, sec. 114 ZPO, sec. 76 FamFG. As a second condition, the applicant's claim or defense has to have an adequate chance of success. If these conditions are met, legal aid is granted either as an interest-free loan⁴² (sec. 114, 115 and 120 (1) ZPO) or as a full grant without any repayment obligation (sec. 127 (III) 1 ZPO⁴³) depending on the ability of the applicant to financially contribute to the litigation. Interest-free loan legal aid has to be repaid in monthly installments (sec. 120 (1) and 115 ZPO).

Applications for legal aid have to be filed with the same court deciding on the merits of the case, sec. 117 (1) ZPO. Legal aid is granted or denied without an oral hearing, but the opposite party is heard, sec. 127 (1) ZPO. The decision can be appealed, sec. 127 (2), (3) ZPO. Legal aid is granted independently in every instance of the proceedings, sec. 119 (1) ZPO.

If parties are required to be represented by a lawyer (see above **II.4.**), the court regularly appoints the lawyer chosen by the party, sec. 121 (1) ZPO. Representation based on legal aid is however less attractive for lawyers as their statutory compensation is significantly reduced, cf. sec. 49 RVG.

⁴¹ Available online (2009-09-28): http://www.gdv.de/Downloads/allg_Bedingungen_pSV/ARB_2000_06_Juni.pdf.

⁴² Note: The applicant never receives any payment, rather the state pays the costs on behalf of the applicant.

⁴³ Cf. *Philippi* in: Zöller, ZPO²⁷ (2009), sec. 120, 7 (p. 565), sec. 127, 14 (p. 605).

Legal aid also carries significant risks for its recipients. If the recipient of legal aid loses the litigation, he must reimburse the necessary costs of the prevailing party, cf. sec. 91 (1), 123 ZPO, sec. 76 (1) FamFG.

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

Answer: Privately organized help is available on a case by case basis. Because of the widespread existence of legal expenses insurance coverage and the comparatively available legal aid, there does not seem to be a strong need for more organized forms of privately organized help.

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

Answer: In theory, legal aid is generally available to all parties in need, cf. sec. 114 ZPO. Courts have little discretion with their decisions on legal aid. Yet, a reliable answer on the effective availability of legal aid to parties in need is hardly possible. Statistics available on the issue reveal only how many applications were filed and how many of them were either turned down or succeeded.⁴⁴ Such data does not show how many applications were turned down unjustified or how many persons refrained outright from applying for legal aid.

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

Answer: Given the comprehensive system of litigation financing opportunities in Germany, litigation costs are not considered a serious barrier excluding certain parties from access to justice in a generally perceivable way. However, the decision of the *BVerfG* on success oriented

⁴⁴ Federal Statistics Agency, Report on the Civil Judiciary 2007 – Statistisches Bundesamt, Statistik Rechtspflege (Zivilgerichte) für 2007, Fachserie 10, Reihe 2.1, p. 26 et seq., 50 et seq., 70 et seq., 88 et seq.

fees⁴⁵ and some comments in literature criticizing a lack of discussion on the topic of access to justice⁴⁶ suggest that this perception does not adequately reflect the current situation in Germany.

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

Answer: Traditionally, the German civil litigation costs system is designed to constitute no barrier to bringing any kind of lawsuit. E.g., to enable the pursuit of small claims, court costs and attorney fees follow a concept of cross subsidization (see above **VI.1./2.**) in which larger claims overcompensate the low revenue of small claims. However, as far as attorney remuneration is concerned, this concept has been shaken by developments on the lawyers' market.⁴⁷ This overall trend is likely to make the pursuit of small claims more difficult in the future.

VII. Examples

1. Question: Please state, or provide a good faith estimate of, the sum total (i.e., for both sides) of costs and fees of litigating to final judgment in the first instance a routine private or commercial (e.g., contract, tort, or property) small claim, e.g., (the equivalent of) \$ 1,000; small to medium claim, e.g., \$ 10,000; medium to large claim, i.e., \$ 100,000; - large claim, e.g., \$ 1,000,000.

Answer: When considering the following examples, one has to bear in mind, that the calculation of the amount in controversy can be very complex when claims have no face value. In addition costs of the taking of evidence can hardly be calculated abstractly – especially because they are not calculated on the basis of the amount in controversy. However, the examples can convey an idea of the costs level in German civil litigation. Costs are calculated on the assumption that parties litigate to final judgment in first instance.

⁴⁵ BVerfG, 12.12.2006 - 1 BvR 2576/04, BVerfGE 117, p. 163 et seq.

⁴⁶ *Kilian*, Anwaltsblatt 2008, p. 236 et seq.

⁴⁷ Cf. *Hommerich/Kilian/Jackmuth/Wolf*, Anwaltsblatt 2008, p. 406 et seq.

a) Small claim, **EUR 1,000** amount in controversy: Court charges amount to EUR 165. According to No. 1210 of annex 1 to sec. 3 (2) GKG, they consist of 3 fee units with each amount in controversy based fee unit being worth EUR 55, sec. 34 GKG and annex 2 to sec. 34 GKG.

Lawyers' remuneration amounts to EUR 272.38 for each lawyer, totalling EUR 544, 76 in case both parties are represented. In first instance proceedings, lawyers receive a 1.3 fee units common proceedings fee (No. 3100 of annex 1 to sec. 2 (2) RVG – EUR 110.5) and a 1.2 units court hearing fee (No. 3104 of annex 1 to sec. 2 (2) RVG – EUR 102). In addition lawyers can ask for reimbursement of their expenses according to No. 7000 et seq. of annex 1 to sec. 2 (2) RVG. At least, these will consist of a flat expenses charge of 20% of the remuneration but no more than EUR 20 (No. 7002 – EUR 20) and – if applicable – 19 % VAT on the remuneration (No. 7008 – EUR 40.38). Each fee unit is worth EUR 85, sec. 13 (1) RVG and annex 2 to sec. 13 (1) RVG.

Added up but not including any costs for the taking of evidence, total litigation costs for a small claim of EUR 1,000 amount to **EUR 709,76** (71% of the claim) when both parties are represented. If non of the parties was represented, costs would only consist of the EUR 165 court charge.

b) Small to medium claim, **EUR 10,000** amount in controversy: Court charges amount to EUR 588. According to No. 1210 of annex 1 to sec. 3 (2) GKG, they consist of 3 fee units with each fee unit being worth EUR 196, sec. 34 GKG and annex 2 to sec. 34 GKG.

Lawyers' remuneration amounts to EUR 1,465.85 for each lawyer, totalling EUR 2,931,7. The remuneration consists of a 1.3 fee units common proceedings fee (No. 3100 of annex 1 to sec. 2 (2) RVG – EUR 631.8) and a 1.2 units court hearing fee (No. 3104 of annex 1 to sec. 2 (2) RVG – EUR 583.2). In addition, minimum expenses will consist of a flat expenses charge of 20% of the remuneration but no more than EUR 20 (No. 7002 – EUR 20) and – if applicable – 19 % VAT on the remuneration (No. 7008 – EUR 230.85). Each fee unit is worth EUR 486, sec. 13 (1) RVG and annex 2 to sec. 13 (1) RVG.

Added up but not including any costs for the taking of evidence, total litigation costs for a small claim of EUR 10,000 amount to **EUR 3.519,7** (35.2% of the claim).

c) **Table of examples:**

Examples - Table			
Amount in controversy	10.000,00 €	100.000,00 €	1.000.000,00 €
Court charges - single fee unit	196,00 €	856,00 €	4.456,00 €
1st instance - 3 units	588,00 €	2.568,00 €	13.368,00 €
Attorney remuneration - single fee unit	486,00 €	1.354,00 €	4.496,00 €
Proceedings fee - 1.3 units	631,80 €	1.760,20 €	5.844,80 €
Hearings fee - 1.2 units	583,20 €	1.624,80 €	5.395,20 €
flat expenses charge	20,00 €	20,00 €	20,00 €
19% VAT on remuneration	230,85 €	643,15 €	2.135,60 €
Total attorney remuneration	1.465,85 €	4.048,15 €	13.395,60 €
2 attorneys	2.931,70 €	8.096,30 €	26.791,20 €
Total Costs	3.519,70 €	10.664,30 €	40.159,20 €
Costs in percent of claim	35,20%	10,66%	4,02%

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

Answer: If a plaintiff lost a EUR 100,000 claim after litigation, his/her cost and fee liability would roughly be EUR 10,664.30 plus any negotiated higher than statutory lawyer fees of his/her own.

3. Question: If a defendant lost a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be?

Answer: If a defendant lost a EUR 100,000 claim after litigation, his/her cost and fee liability would roughly be EUR 10,664.30 plus any negotiated higher than statutory lawyer fees of his/her own.

C. Conclusion:

Due to its high level of regulation, civil litigation costs in Germany are comparatively predictable. This predictability of the costs is perceived as a strong advantage of the German litigation system⁴⁸. Yet, there are two factors that may lower the predictability in specific cases: Firstly the costs incurred by the taking of evidence – although they are also highly regulated – cannot be calculated easily in complex cases. This applies especially when court appointed experts are involved. These experts are paid on an hourly basis. Secondly, statutory costs are sometimes insufficient for rewarding sophisticated legal advice. Then, parties have to negotiate a higher remuneration. However, under the compensation regime of sections 91 et seq. ZPO, a negotiated higher remuneration cannot be recovered.

The basic concept of the loser pays rule which does not leave any discretion for the court entails an effective deterrent for unmeritorious lawsuits. It also promotes the access to justice for valid claims: Finally, the winning party does not incur any costs for the vindication of a valid claim

The German system of the remuneration of lawyers is based on the idea of a cross subsidization (among lower and higher claims). However, this basic assumption has considerably lost momentum due to growing specialization within the German bar. It is foreseeable that the pressure to change the whole system is growing. In a close future, the elaboration of adequate remuneration structures for small claims allowing qualified service to the clients will be a major challenge. (see above **B.VII.**).

During the last years, the legal framework of attorney remuneration has been deregulated. The relatively low costs level and the high transparency of costs are major economic advantages of the regulated system compared with the situation in less or even unregulated markets.⁴⁹ Deregulation may entail adverse effects e.g. a lack of transparency or an insufficient protection of inexperienced parties.⁵⁰

⁴⁸ Cf. “Law – Made in Germany”, p. 29, the booklet is available on the website (2009-09-28) <http://www.lawmadeingermany.de/>.

⁴⁹ Von Seltmann, BRAK-Mitteilungen 2008, p. 118 (119).

⁵⁰ Von Seltmann, BRAK-Mitteilungen 2008, p. 118 (119).

It can be concluded that the present cost system in Germany seems to be well suited and competitive, at least at the European level. Its basic structures guarantee a comparatively efficient and highly qualified judicial system. The predominant legal literature suggests to preserve the present system which is based on two basic principles: the loser pays rule and the lack of judicial discretion with regard to the allocation of costs.

APPENDIX I - Importance of settlement – statistical data

The following statistical data will show the number of disputes resolved in German courts by settlement in comparison to all disputes resolved (2007 data):

Local Courts – first instance (*Amtsgerichte*)⁵¹:

Total No. of resolved disputes:	1,276,426
Disputes resolved by settlement:	181,762
Settlement share:	14.2 %

District Courts – first instance (*Landgerichte*)⁵²

Total No. of resolved disputes:	377,779
Disputes resolved by settlement:	90,102
Settlement share:	23.9 %

District Courts – second instance (*Landgerichte*)⁵³

Total No. of resolved disputes:	61,357
Disputes resolved by settlement:	7,442
Settlement share:	12.1 %

Higher Regional Courts (*Oberlandesgerichte*)⁵⁴

Total No. of resolved disputes:	54,184
Disputes resolved by settlement:	9,187
Settlement share:	17.0 %

⁵¹ Federal Statistics Agency, Report on the Civil Judiciary 2007 – Statistisches Bundesamt, Statistik Rechtspflege (Zivilgerichte) für 2007, Fachserie 10, Reihe 2.1, p. 18, 22.

⁵² Federal Statistics Agency, Report on the Civil Judiciary 2007 – Statistisches Bundesamt, Statistik Rechtspflege (Zivilgerichte) für 2007, Fachserie 10, Reihe 2.1, p. 42, 46.

⁵³ Federal Statistics Agency, Report on the Civil Judiciary 2007 – Statistisches Bundesamt, Statistik Rechtspflege (Zivilgerichte) für 2007, Fachserie 10, Reihe 2.1, p. 58, 62.

⁵⁴ Federal Statistics Agency, Report on the Civil Judiciary 2007 – Statistisches Bundesamt, Statistik Rechtspflege (Zivilgerichte) für 2007, Fachserie 10, Reihe 2.1, p. 80, 84.

The proportion of disputes resolved by settlement has continually risen over past years. At present, German judges are using sophisticated mediation techniques for the promotion of settlements.