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## **COST AND FEE ALLOCATION IN CIVIL PROCEDURE**

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### *Introduction*

The following questionnaire is intended to cover civil procedure only, i.e., cases brought under private and commercial law. It does not intend to address criminal, constitutional, administrative proceedings, and arbitration. It consists of 25 questions organized under seven main headings.

In answering them, please distinguish, as far as appropriate, what is usual, what is unusual but permitted, and what is prohibited. If there are readily available statistics, please provide them (in an appendix or otherwise).

Please strive to be clear and concise and stay as close to the substance and sequence of the questions as possible so as to ensure the comparability of answers across a large number of countries. If a question does not make sense in the context of your legal system, briefly say so; if other issues are pertinent, please mention them.

### *Questionnaire*

#### **I. The Basic Rules: Who Pays?**

#### **II.**

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

**There isn't an overarching principle / justification for the manner in which costs and fees are allocated.**

**The statutory provisions governing the costs of legal proceedings are found in the Code of Civil Procedure 1908. Cost allocation is in the discretion of the deciding court, which has 'full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid.'** Therefore, the

deciding court has full jurisdiction to determine who pays, and how much is to be paid, in terms of court costs.

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

It depends on the discretion of the court. Attorneys' fees are rarely ever awarded at actuals. The court often identifies an *ad hoc* and mostly nominal amount.

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

There are no special rules for appeals.

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

The party calling the witness pays. The court may ask the losing party to indemnify such costs, but most often this will only be a nominal amount. In addition, the court may call an expert, or appoint a commissioner for the taking of evidence, and direct the parties to share costs, or one party to bear all costs.

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

It is difficult to identify percentage of settled suits in India – its generally a very low number. Typically courts will not award any costs in settled cases. Parties may include cost allocation in their settlement agreement. If court decrees in terms of the settlement agreement, costs are enforceable as an order of the court. Plaintiff may get a refund of part or whole of fees depending on the stage at which the suit was settled.

## II. Exceptions and Modifications

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

Order 25 Rule 1 of the Code of Civil Procedure provides that the Court may, *suo motu* or on application by the defendant, order the plaintiff to give security for all costs incurred / likely to be incurred by the defendant. In addition, it is mandatory that such an order be made in cases where the plaintiff(s) are not resident in India, and do not possess sufficient immovable property in India other than the property in suit. If such security is not furnished within the prescribed time, the Court may order that the suit be dismissed.

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

There are no mandatory pre-litigation procedures. Section 89 was introduced into the Code of Civil Procedure in 1999 with the object of promoting alternate means of dispute

resolution - it merely provides that *'where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of possible settlement and refer the same for arbitration, conciliation, judicial settlement or mediation.* But since the section is unclear as to whether the reference by the Court to alternative methods of dispute resolution is discretionary or mandatory, and as to at what stage of the proceedings the reference is to be made, it has not had much of an impact, including on cost and fee allocation.

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

This practice is not uncommon, however the unpredictability of litigation in India discourages such agreements. The agreements themselves may or may not be enforced by a court on equitable considerations.

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

Yes, in all cases, unless s/he is of unsound mind. However, it is very uncommon for parties to do so.

### **III. Encouragement or Discouragement of Litigation**

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

It is difficult to say if the rules have been designed with either of these policy considerations in mind. In practice, it is the reluctance of courts to award actual costs that encourages litigation.

2. How much do parties (especially plaintiffs) typically have to pay up front, e.g., in the form of

- court costs (into court)

Court fees are charged on an *ad valorem* basis, and vary from state to state. Typically, court fees would be levied in reducing slabs from 8 to 0.5 percent of the value of the subject matter of dispute.

- attorneys fees (retainer)

Attorneys' fees, -including the manner of payment- depends on the arrangement / contract entered into between the client and individual attorneys.

- costs of taking evidence –

Commissioners fees would have to be paid, but this would not be a significant amount.

Do up-front payment requirements have a deterrent effect on potential litigants?

No.

#### **IV. The Determination of Costs and Fees**

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

Both do. The amounts / slabs vary from state to state.

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

There was a move to legislate rates of fees payable to lawyers, but as may be imagined, this was met with widespread protests from the legal community. Lawyers' fees are typically determined by the experience and repute of the lawyer, the jurisdictions they practice in, etc.

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

The court has the final say.

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

1. Are success-oriented fees allowed? In particular

- contingency fees (a percentage of the sum won)?
- no win-no fee arrangements?
- success premiums (higher fees in case of a victory)?
- other fees depending on the outcome of the litigation? Not allowed

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?

The Bar Council of India's Standards of Professional Conduct and Etiquette ("BCI Rules") prescribes an advocate's duty to her clients, and prohibits the stipulation of fees contingent on the results of litigation; or any agreement to share the proceeds of litigation. Advocates cannot buy / traffic in / stipulate for / agree to receive any share or interest in any actionable claim.

Her duty to her colleagues includes not accepting a fee less than the fee taxable under the rules when the client is able to pay the same.

2. 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?)

No. The BCI Rules prohibits advocates from acting or pleading in any matter in which he himself is pecuniarily interested. Neither is subrogation to an entrepreneur possible since champerty is prohibited. However, devices like assignment of contract, sale of business, sale of land etc that are sometimes used. Court will examine whether these arrangements were executed in good faith.

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

Nothing specific.

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

Such insurance is available, however, not in the nature of specific litigation insurance policies. Popular insurance products such as Errors and Omissions Policies, etc typically contain provisions to cover litigation costs. In practice, the insurer will cover upto a specified limit of costs in the event of litigation. For example, a buyer of engineering services /products from an engineering firm will want to ensure that the firm has procured an Errors & Omissions Policy from a reputed insurance company. In the event that there is a defect in the engineering product, which defect forms the basis of a claim by a third party against either the buyer or the firm, the insurance company will step in to cover the costs of litigating such suit (upto the contractually agreed limit).

## VI. Legal Aid

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

The Indian Constitution has mandated that the State '*secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure*

*that opportunities for securing justice are not denied to any citizen by reason of economic or other disability.*' Accordingly, India has enacted the Legal Services Authorities Act, 1987 (brought into force 1995) and constituted the National Legal Services Authority as well as State Legal Services Authorities.

The mode of providing legal aid varies from state to state within the country, as well as from practice area to practice area. In Karnataka, legal aid is delivered to the categories of persons mentioned below in (a) through the modes set out in (b). There is a general dearth of good, capable / competent lawyers in the legal aid system, since it is not as lucrative as private practice.

a) Persons qualifying for legal aid:

- A member of a Scheduled Caste or Scheduled Tribe
- A Woman or a child
- A victim of trafficking in human beings
- A person under circumstances of undeserved want such as victims of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake, or industrial disaster.
- An industrial workman
- A mentally ill or otherwise disabled person
- A person in judicial custody, including custody in a protective home or a juvenile home or a mental asylum
- Inmates of psychiatric hospitals or psychiatric nursing homes
- Any person whose annual income does not exceed Rs.50,000/- (The Means Test) However, irrespective of the means test, legal aid may be granted in cases of great public importance; or in a special case, reasons for which are to be recorded in writing, considered otherwise deserving of legal aid or advice.

b) Legal aid is delivered through the provision of free legal as well as the appointment of an advocate at the cost of the Legal Services Authority to defend his right / to procure his right. The Legal Services Authority also bears court fees, typing charges, costs of obtaining copies of documents and so on.

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

Yes. Some lawyers and law firms do pro bono work. A few law schools have legal aid cells too.

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

There is a general dearth of good lawyers in the legal aid system, since the remuneration offered (Indian Rupees 2,000 per case, which is roughly United States Dollars 50 at a

conversion of 1 USD = 40 INR) is too low to attract capable and competent lawyers. In addition, if the person requesting legal aid is doing so on the ground that his income is below the prescribed threshold, he must satisfy the Legal Services Authority that he has a *prima facie* case.

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

Attorneys' fees can be prohibitively expensive, and do dissuade potential litigants. Courts have the discretion to waive court fees for indigent persons.

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

Delays and a slow-moving court system are more of a barrier than costs.

## VII. Examples

1. 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.
2. If a plaintiff lost a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be?
3. If a defendant lost a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be?

It is, unfortunately, impossible to make a generic estimation: since it would depend on the state in which the suit was brought, the type of attorney engaged, the facts and circumstances of the individual cases (which last would guide the court's discretion!)

### *In Conclusion:*

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

In the context that it is not solely the costs of going to court that deters potential litigants, but the certainty that such litigation can take years to reach any sort of conclusion, one interesting development is the proposed creation of a Commercial Division in the High Courts of states with jurisdiction over solely commercial disputes (i.e, disputes between merchants) over a certain value (the proposed figure is Indian Rupees Five Crores i.e United States Dollars 12,500

(assuming an exchange rate of 1USD = 40INR)). It is worth quoting from the 188<sup>th</sup> Report of the Law Commission of India<sup>1</sup> that recommended this proposed legislation:

*“There is a recent trend in the judgments of UK and US courts of selectively applying the principle of ‘forum non-conveniens’ and staying actions filed by aliens and refusing to apply the same norm when actions are filed in these countries against aliens. To explain, where a foreign entity is doing business in India with an Indian entity, the said foreign entity is today being permitted by Courts in New York and London to file claims in courts in New York or London, on the assumption that there are extraordinary delays in Indian Courts. This is being done even if no part of the cause of action has arisen in those countries. Where an Indian entity has a branch in US or UK, it is now held by the Courts in those countries that such entities are amenable to the jurisdiction of foreign courts though no part of the cause of action might have arisen in those countries. The Courts abroad have held that UK or American courts could, in cases filed against Indian entities in those countries, refuse stay of the cases on the broad generalization that, if the cases were filed in India, they would take at least “twenty-five years” for disposal.”*

While no rules regarding cost and fee allocation have yet been framed since this legislation is still to be passed by Parliament, it will definitely be interesting to see what developments will result, since the last thing India will want to do is frighten off foreign investors with the prospect of never-ending litigation.

The other concern is that precisely because of this fear, parties prefer, invariably, to include an arbitration clause providing for arbitration in London or Singapore. Because of arbitration becoming the preferred method of dispute resolution, courts in India are being deprived of an opportunity to develop Indian case law / jurisprudence on contract law. Things may change if the Commercial Divisions are indeed constituted.

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<sup>1</sup> Available at <http://lawcommissionofindia.nic.in/reports/188th%20report.pdf>, last accessed March 2, 2010.