

International Academy of Comparative Law
18th World Congress
Washington D.C.
July 21-31, 2010

Topic II.C.1

COST AND FEE ALLOCATION IN CIVIL PROCEDURE

General Reporter:
Mathias Reimann
University of Michigan

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?

- 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?**

The cost of litigation consists of court fee (*saiban hiyo*) and party fee (*tojisya hiyo*). The court fee consists of payment to the court for sue and the cost of taking of the evidence. The party fee consists of traveling and necessary cost of party and representative.

The basic rule of cost allocation is that the losing party shall bear the cost of litigation (Art.61 of Code of Civil Procedure).

As the attorney's fee is not included in the cost of litigation, each party generally bears its own fee. The principal justification for this rule is as follows.

The first it is difficult to predict the outcome of litigation in advance.

The second the cost of litigation including attorney's fee is benefit for the public, each party should bear its own fee.

The third the representation by the attorney is not compulsory in Japan, it is not regarded as the necessary cost.

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)?

The court only decides which party should pay the cost in Judgment. It is necessary to fix the amount of total cost to reimburse the loser. But the application to the decision on imposition of court cost (Art.71 of Code of Civil Procedure) is not widely used. That is why the winner does not reimburse the cost and fees in practice. The lawyer usually explains the client that each party bears its own cost in advance.

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

The court fee of appeal for the High court (*Koso*) is one point five as expensive as that of first instance. The court fee of appeal for the Supreme Court (*Zyokoku*) is twice as high as that of first instance.

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

As the taking of evidence is included in court fee, it is necessary for the claimant to pay in advance. In medical malpractice, for example, it is difficult for the patient or the family of the patient to find proper expert witness. The cost of the expert generally take 300,000JPY(3,000USD). It is also necessary to apply the preservation of evidence such as medical records before litigation in order to prevent the cover-up. It will generally cost from 200,000JPY(2,000) to 3,000JPY(3,000USD).

In complex litigation, it is necessary to balance the amount of the damages and the necessary cost whether to litigate. Therefore the taking of evidence is a significant factor in overall costs of litigation.

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

If the party settle, each party generally bears those costs which they have individually incurred including lawyers' fee unless any particular arrangement with regard to the imposition of the costs of settlement have not made(Art.68 of Civil Procedure).

In 2007, 36percent of cases in the district court(*Chihosaibannsyo*) is settled. 20percent of cases in the summary court (*Kanisaibannsyo*)is settled. The jurisdiction of the district court is beyond 1,400,000JPY(approximately 14,000USD) on the claim in the action.

42percent of small claim cases in the summary court is settled. The small claim is the claim the payment of money which has a value of no more than 600,000JPY(approximately 6,000USD).

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)?

The exceptions to the basic rule are as follow.

First is the exceptional case such as the litigation itself is abuse, the attorney's fee of defendant is regard as the necessary cost.

Second is the tort cases(ex. traffic accident) which the representation by attorney is regarded as necessary expense, the 10percent of amount of damages is usually regarded as necessary cost.

Third is the cases where the court prohibited the making of a statement , it may order a lawyer to assist upon determining such assistance to be necessary(Art.155 of Code of Civil Procedure). If the party appoints the lawyer according to the court order, the properly amount of attorney fee is regarded as a necessary cost.

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

The mediation in advance is generally mandatory in the dispute of land tenancy fee and divorce case. The court fee of mediation is half of litigation.

If the one party is not cooperative in mediation, the court may impose a cost order. But the court generally do not make such order because the judge generally respect the will of the party. It will be less expensive to settle the cases by the mediation than by the litigation. But the lawyer's fee is not so different. Therefore the cost and fee allocation do not make a strong impact whether to use mediation or litigation.

It is easier to discuss each other with mediator who is generally specialized in issues. That is more important whether to use litigation or mediation.

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)?

The effectiveness of agreements allocating costs and fees in advance is controversial issue. The agreement is effective in theory, but the predictability of cost is difficult, It is necessary to fix the amount of total cost to reimburse the loser. But the application to the decision on imposition of court cost is not widely used(see I 2).

The agreement upon the jurisdiction between the party(Art.11 of Code of Civil Procedure) in advance is sometimes used to discourage litigation. For example, agreement of jurisdiction in Tokyo district court, it is difficult for the consumer living in rural area outside Tokyo to litigate because of t cost.

4. Are parties allowed to represent themselves? If yes, in all cases or only in some?

How common is self-representation?

Parties who are majority(20yers old)are allowed to represent themselves in all cases. The court may prohibit a party who is unable to make a statement necessary for clarification of the relationships involved in the litigation from making a statement.

In cases where the court prohibited the making of a statement , it may order a lawyer to assist upon determining such assistance to be necessary(Art.155 of Code of Civil Procedure).

According to the Judicial Statistics in 2008,
In 2007, the proportion of both-side of party is self-representation in district court is 23.7 percent.

In 2007, the proportion of both-side of party is self-representation in summary court is 71.0 percent.

In 2007, the proportion of both-side of party is self-representation in small claim court is 90.1 percent.

In 2007, the proportion of one-side of party is representation in district court is 43.6 percent (plaintif:39.4 percent, defendant:4.2 percent).

In 2007, the proportion of one-side of party is representation in summary court is 13.4 percent(plaintif:10.9 percent, defendant:2.5 percent).

In 2007, the proportion of one-side of party is representation in small claim is 6.3 percent. (plaintif:4.2 percent, defendant:2.1 percent).

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?

The court may, depending on the circumstances, charge the winning party with all or a part of court costs incurred by acts which were unnecessary for the assertion or defense of such party's rights(Art.62ofCode of Civil Procedure) to discourage litigation.

2. 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)

- costs of taking evidence

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

Plaintiff has to pay up front in the form of court costs, attorneys and costs of taking evidence.

The court costs is not fixed fee. It is basically determined by the amount in controversy.

The each party has to pay the attorneys fees. It generally consists of handling charge(*chakushukin*)and contingent fee(*housyuukin*). The handling charge is basically the 10per cent of claim. The contingent fee is also basically the 10per cent of recovery costs.

Some law firm or lawyer charge lawyer's fee on time charge.

The costs of taking evidence varies case by cases. The complex litigation such as medical malpractice and construction dispute, it is necessary to pay the cost of expert witness.

Up-front payment requirements sometimes have a deterrent effect on low income party and small claims.

If the prospect of success is high, the lawyer does not charge handling cost (no win-no fee) or set it lower and charge higher contingent fee only if the client is successful in order to take the case.

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?

The amount of court cost is basically determined by the amount in controversy. If the dispute is difficult to estimate or not regarded as the financial dispute, the amount of dispute is regarded as 1,600,000JPY (approximately 16,000USD).

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?

Lawyers' fees were generally determined by the schedule of the Japan Bar Association (*bengoshihosyu kitei*). It was abolished on April in 2003, as it prevented the fair competition among the attorney.

The fee is decided by the agreement of client and lawyer. Lawyers' fee should be decided just and appropriate depend on the economical profit, difficulty of the issues and efforts (Art.2 of the schedule of lawyers' fee). Some lawyers still use the former schedule to decide the lawyer's fee.

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 concrete amount of the court cost is determined by the court clerk in the court of the first instance upon a motion after the decision in which the imposition was decided has become executable (Art.71 of Code of Civil Procedure). The court clerk does not have discretion.

The decision take separate court order(ketei). The application of the cost order is not generally used. The number of the case is very rare.

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?

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?

Success-oriented fees are allowed. Lawyers' fee generally consists of handling charge and contingency fee(usually 10 percent of recovery cost(see III2) .

No win-no fee is also enforceable(see III 2). Contingency fee is generally decided by the difficulty and the amount of cases. It is not regulated by the law.

Success-oriented fees are quite common in Japan and it is difficult to specify the origin.

Each party generally bears its own lawyer's fee(see I 1). The exceptional case such as the tort cases, the loser does not have to pay the enhanced fee even if the party had a such arrangement.

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?)

The attorney is not allowed to be subrogated the claim(Art 28 of Lawyer's Law and Art 17of lawyer basic office regulation(*bengoshi shokumukihonkitei*) .

The Decision at the Supreme Court in 2009 is that a plaintiff subrogate his claim to an attorney is enforceable unless it is against the public policy.

3. Are there special rules for class actions, group litigation or other types of lawsuits

(e.g., actions brought by consumer organizations)?

There is no special rules for group litigation,

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?

One can insure against the costs including attorney's fee of litigation by buying coverage in other policies. Automobile liability is very common in Japan. In 2007, 77.5 percent of the owner of private-owned- car buys private insurance. The litigation cost(including negotiation, mediation and settlement) and lawyers' fee is usually covered by up to total 3,000,000JPY(30,000USD). The insurance company nominates a lawyer and a client accept the offer, the lawyer will negotiate the other party, usually the lawyer nominated by the insurance company.

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)?

Yes, there is a publicly funded legal aid system.

The Japan Legal Aid Association(*horitsufuzyokyoukai*), the origin of legal aid was established in 1952. The scope of legal aid was the financial support to the attorney fee in civil cases. It is mainly run by the Japan Bar Association. Since 1958 the Japanese Government financially supported it.

In 2000, the Civil Legal Aid Law (*minjihoritsu fuzyoho*)is established in order to clear the duty of Japanese Government is to secure the proper management of civil legal aid and proper development. The scope of civil legal aid was expanded from the financial support to the attorney fee in civil cases to writing of application to the curt and the legal advice.

In2001, the Final Report of the Legal Reform Committee(*shihoseidokaikaku shingikai*) recommend the development of civil legal aid, establishment of the public defender and the legal help in order to improve the development of access to justice.

The proposals outlined in the recommendation of the Committee were incorporated in the Comprehensive Legal Support Act (*sougo horitsu shienho*). The Law established in 2004 to provide the legal information and legal services to settle the legal dispute.

The role of new public funded legal aid is as follows. The first is to provide the necessary information in order to settle the dispute. The second is the civil legal aid through financial support to the attorney fee in civil cases. The third is the establishment of the public defender who is publicly funded salaried defender. The fourth is the legal services in the rural area where there are no private attorneys. The fifth is the support of the criminal victim.

The Japan Legal Support Center (*nihon shiho shien center*) was established in 2006 to organize the legal aid promptly and properly.

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

There is privately organized help for indigent clients through pro bono work.

The specific amount of pro bono work is mandatory as a public interest in some Bar Association in Japan.

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

Civil Legal aid is awarded selectively based on financial eligibility of the client regarding income and capital and sufficient prospects of the client being successful (merits of the case).

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

They might be a serious barrier excluding low income parties from access to justice.

The court may, upon motion, render a ruling to grant aid in litigation for a person who does not possess the means to pay cost necessary for preparation and conduct of a suit, or who will incur extreme hardship in life by paying such costs. However this shall be limited when it cannot be stated that there is no prospect of success in the suit (Art.82 of Code of Civil Procedure).

The lawyers' fee is not included (The scope of civil legal aid is only the lawyers' fee and the litigation cost is not included) and grant of aid (*soshokuyujyo*) is not exemption but only a delay of payment.

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?

They might be a serious barrier to bringing the amount in controversy is too low to make litigation.

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

The court fee is 1,000JPY(10USD). The lawyer's fee of each party costs generally from 10,000JPY (100USD) to 20,000JPY(200USD) depends on difficulties of cases.

The claim of the unjust enrichment to the consumer lending company(*sarakin*) which the consumer has paid high interest for long time even after the payment in full is quite common in Japan, it will be easy for the plaintiff to find the lawyer. But in other cases, it will be difficult for the party to find the lawyer because the lawyers' fee is too low.

- small to medium claim, e.g., \$ 10,000**

The court fee is 10,000JPY(100USD). The lawyer's fee of each party costs generally from 100,000JPY(1,000USD) to 400,000JPY(4,000USD) depends on difficulties of cases.

- medium to large claim, i.e., \$ 100,000**

The court fee is 50,000JPY(500USD). The lawyer's fee of each party costs generally from 200,000JPY(2,000USD) to 800,000JPY(USD) depends on difficulties of cases.

- large claim, e.g., \$ 1,000,000.**

The court fee is 320,000JPY(3200USD). The lawyer's fee generally from 2,000,000JPY(20,000USD) to 5,900,000JPY(59,000USD) depends on difficulties of cases.

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

The court fee is 50,000JPY(500USD).The lawyer's fee is generally from 200,000JPY to 800,000JPY depends on difficulties of cases.

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

The lawyer's handling fee generally from 200,000JPY to 800,000JPY. It depends on the difficulty of the cases. The loser should pay the cost, the court fee is 50,000JPY(500USD). But in most cases the winner does not claim the cost.

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.

Little attention has been given to the litigation costs and attorney's fee in Japan because they are thought to be a technical issues. But litigation costs and fees considered a serious barrier excluding low-income parties from access to justice. Especially whether the attorney's fee should be included in cost or not is one of the most controversial issues.

The discussion of implementation of lawyer's fee to court cost is related to the mandatory of lawyers and fix fee of lawyers' fee. It was discussed in Judicial Reform Committee(*shihoseido chosakai*) from 1967 to 1969. But the lawyers' fee was not included in cost.

In 1995, The study group of civil cost (*minsohiyoseidotoukenkyukai*) was established to research the amount of the court fee and implementation of some part of attorney's fee in cost. The report of the study group was published in 1997. The majority of study group supports the implementation of lawyer's fee to court cost in near future, but the conclusion of the study group is it is too early to legislation.

In 2001, the Final Report of the Legal Reform Committee(*shihoseidokaikaku shingikai*) recommended the implementation of the loser pays some part of lawyer's fee in order to increase the access to litigation. The Committee also mentioned that it is necessary not to give chilling effect to litigation.

The Access to Justice Committee(*akusesu kentoukai*) was established to discuss the court fee and the attorney's fee. The scope of the exclusion of the implementation of the lawyers' fee and amount of the lawyer's fee are mainly discussed.

The opinion of the Committee is divided. One is some part of lawyers' cost is regarded as a necessary cost because it is necessary for ordinary people to appoint a lawyer. Therefore it is

necessary to implement the lawyers' fee to court cost and the loser should bear some part of lawyers' fee

The other is that the implementation of some part of lawyers' fee will still give a chilling effect.

The Final Report of the Legal Reform Committee recommended the some part of the lawyer's fee is to bear the losing party if the both party appointed the lawyers and agree to bear lawyer's fee after the litigation. It is necessary for both party to apply the court cost.

The amount of lawyers' fee which the loser should bear is decided on the amount of claim.

1,000,000JPN (100,000(USD)is 100,000JPN(1,000USD)

5,000,000 JPN(50,0000USD) is 200,000JPN(2,000USD)

10,000,000JPN (100,000USD)is 300,000JPN(3,000USD)

1,000,000,000(1,000,000USD) is 3,270,000JPN(32,700USD)

The proposal of the amount of lawyer's fee is much lower than the real amount of the lawyer's fee which the party generally pays(see VII). But Japan Federation of Bar Associations and the consumer group strongly criticize the proposal because it may have an impact to deny the access to justice.

The proposal of implementation of the lawyer's fee was abandoned.

It will necessary to discuss about the Lawyer's fee and contingent fee near future.

Discussing about the cost and fee internationally will be a first step for the reform.

I wrote this report in cooperation with Mr. Tomoki Ikenaga who is a lawyer specialized in legal aid and cost.

Manabu WAGATSUMA

Professor of Law

Tokyo Metropolitan Law School

Chuoku Harumi 1-2-2,Tokyo,JAPAN

FAX:+81-3-3533-6980

wagatsum@tmu.ac.jp