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Topic II.C.1

COST AND FEE ALLOCATION IN CIVIL PROCEDURE

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Introduction

- A. Macau, including the Macau Peninsula, Taipa Island and Coloane Island, since 20th December 1999 has been a Special Administrative Region of the People’s Republic of China¹, authorized by the National People’s Congress to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication², under the principle “one country, two systems”.
- B. Considering some of the questions raised in the questionnaire below, it is relevant to stress that Macau Special Administrative Region legal system is a civil law system, and its Portuguese roots have been the inspiring model of the People’s Republic of China and Taiwan legal systems.
- C. Considering the establishment of the Macau SAR as very recent (ten years), some data on the reporting subject will therefore be somewhat scarce, concerning either bibliography or legal opinions.
- D. Nonetheless, there is specific domestic legislation: **i.** On costs and fees in Civil Procedure, the Decree-Law no. 63/99/M, dated 25 of October (Arts. 1 to 50)³ and, of course, some regulations in the Macau Civil Procedure Code⁴ (Decree-Law no. 55/99/M, dated 8 of October), *maxime* Arts. 376 to 384, 565, 2 and 232, 2 *in fine*⁵; **ii.** The Law no. 21/88/M, of 15th August, and the Decree-Law no. 41/94/M, dated 1 of August (general regulations on legal aid); as well as **iii.** The special rules on attorney’s fees, mainly the Decree-Law no. 31/91/M, of 6th May (Lawyers’ Statute), the Rules on Legal Opinions of the Macau Lawyers’ Association⁶.

¹ In short **MSAR** or **Macau SAR**.

² See Art. 2 of the Macau SAR Basic Law.

³ Here referred as **CCR** (Court Costs Regime).

⁴ In short **CPC**.

⁵ Website: <http://www.imprensa.macao.gov.mo> or <http://www.io.gov.mo/> or <http://www.court.gov.mo>

⁶ Website: <http://www.informac.gov.mo/aam/portuguese/legisla.html>

The 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 attorney’s fees and court costs treated differently? What is the principal justification for this rule?

Firstly, court costs and attorney’s fees are treated distinctly indeed, because they refer to different types of amounts of money related to the judicial procedures.

But there are some legal rules either on the costs allocation or on the allocation of the amount of money named (in Portuguese) “procuradoria” (like attorney’s fees) to be received by the winner(s) from the loser(s), together with the court costs⁷.

However it is necessary to highlight that the concept of “court costs” has a broad meaning in the domestic legal regime of the Macau SAR, since it includes various amounts of money, namely reimbursements, transportation expenses and compensations⁸.

With the exception of legally free civil and labor disputes⁹ whose parties are the authorities, as well as the official organizations and the government departments or similar (e.g., the municipalities), **or** the victims of a labor accident, **or** in some species of procedures (e.g., on adoption)¹⁰, **the basic, basic rule of court cost and fee allocation is that the loser pays the total amount, including the costs and fees of the successful party¹¹, however determined according to some special rules of CCR (please refer to answers to questions IV. 1., 2. and 3.).**

But there are a lot of exceptional situations: for example, the plaintiff will be responsible for the total paying amount whenever the civil procedure finishes due to the subsequent inutility or impossibility of the lawsuit – except if that situation is due to the defendant fault¹² –; so as in case of not responded litigation on non-enforceable obligations (i.e., obligations which maturity date is not yet reached), although the plaintiff is the winner¹³. And, if the procedure finishes due to a subsequent arbitration agreement, each party will pay an half of the costs amount¹⁴.

In general terms, we can say that whenever the law do not expressly stipulates who pays, the payment of the court costs depends on the adaptation by the judge to the circumstances of the case *sub iudice* of some legal concepts – such as “dar causa à acção” (meaning to cause a needless litigation), or “ficar vencido na acção” (to be the unsuccessful party), or “tirar proveito da acção”¹⁵ (the party who achieves certain advantages through the judgment)¹⁶.

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)?

⁷ See Art. 26 of the CCR.

⁸ See Art. 21 of the CCR.

⁹ See Arts. 2 and 3 of the CCR.

¹⁰ See Arts. 2 and 3 of the CCR.

¹¹ See CPC, Art. 376.

¹² See CPC, Art. 377,1.

¹³ See CPC, Art. 565, 2 *in fine*.

¹⁴ See Art. 232, 2 of the CPC.

¹⁵ Please note that Macau SAR legislation is written both in Chinese and Portuguese, the two official languages of the Region. Any available English version is an unofficial translation, for reference only.

¹⁶ See, e.g., Arts. 376, 1, 2 and 3 to 382 of the CPC.

It depends on the concrete situation, namely on the requested judicial proceedings during the civil procedure and the respective petitioner. The court decides case-by-case, but sometimes the winner's costs and fees are not totally reimbursed.

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

Yes, there are special rules for appeals, but no additional costs and fees. On the contrary, there are some reductions of the general amounts, depending whether on the species of the appeal (in the domestic legal system of the Macau SAR there are two main species of appeals) or on the litigation subject¹⁷.

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?

In general, the costs of those judicial proceedings are paid by the loser. But there are exceptions, whenever some winner's proceedings are considered by the court not useful for the judgment¹⁸. In this case, the winner bears its own.

The answer to the second question depends on the circumstances of the case, namely on the kind and location of the evidences.

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

In that case, each party pays the half of the costs and fees amount, unless they agree differently upon¹⁹.

There are no available statistics on the percentage of settled civil suits.

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?)

Please refer to answer to question I. 1.

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

In Civil Procedure, no rulings have been issued in the Macau SAR concerning mandatory pre-litigation procedures, namely mandatory mediation.

Just in certain species and phases of the civil procedure, depending on the litigation subject, the CPC imposes the conciliation attempt of the parties before the judge²⁰.

On the impact on cost and fee allocation in case of successful conciliation attempt, please see answer to question number I. 5.

¹⁷ See CCR, Arts. 17 and 18.

¹⁸ See Art. 378, 1 of the CPC.

¹⁹ See Art. 380, 2 of the CPC.

²⁰ See Arts. 428 and 555, 2 of the CPC.

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)?

There are no available data on the first issue.

Regarding to consumers disputes, they will be decided through the Arbitration Centre of the Consumers Council according to its own Regulations.

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

The Macau Civil Procedure Code includes general rules on this matter. The parties are allowed to represent themselves except in the situations referred as of mandatory attorney's representation, depending on the species and on the economic value of the suit²¹, **namely: when that value is higher than \$50,000.00 patacas; in the appeal proceedings; as well as in the judgments enforcing proceedings.**

In the Macau SAR practice it is not common the self-representation indeed.

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?

In general terms, we can say that the existing rules governing cost and fee allocation are not intended neither to encourage nor discourage civil litigation; as well as it seems highly improbable that someone gives litigation up just because of the cost and fee allocation.

But the crucial issue under consideration is, in fact, a very complicated and broad one, the answer of which depends on a careful analysis of many inter-related issues and on a clear distinction among several procedural matters, considering the heterogeneous composition and the very specific characteristics of the Macau SAR society.

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

- court costs (into court)

- attorney's fees (retainer)

- costs of taking evidence?

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

Regarding the court costs as well as costs of taking evidence, there are legal rules²² on the payment made in advance; but their amount depends on the value of the suit subject and on the litigation species as well.

Regarding the attorney's fees, retainers are allowed. There are some rules on this issue in the Rules on Legal Opinion of the Macau Lawyers' Association; but the

²¹ See Art. 74 of the CPC.

²² See CCR, Arts. 28 to 35.

respective amount is determined on the basis of the *usus fori* and considering various factors, namely the amount in controversy.

Regarding the second question: that's right, sometimes the up-front payment can have a deterrent effect on potential litigants; but may be not frequently in the practice of the Macau SAR.

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?

According to MSAR legal regime, various factors determine the amount of court costs, such as: the type of the dispute (e.g., family disputes, commercial disputes, labor disputes); the respective value; if it is a question of appeal; and others, like the type and quantity of the proceedings requested by the parties during the litigation process²³.

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?

In general, we can say that there are schedules on the determination of lawyers' fees **paid by the clients to them**, but the rates are not strictly binding. So, it is a normal practice to determine lawyers' fees by the market.

However, there are rules on the determination of the part of the attorney's fees awarded to the successful party of the litigation: the court decides considering the value and complexity of the suit subject, **usually** around a half of the legal judiciary rate²⁴. **According to art. 12 of the Decree-Law no. 63/99/M, dated 25 of October (CCR), the judiciary rate in civil litigation is determined by a statutory schedule, an Annex of that DL, on the basis of the lawsuit value.**

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.)?

Yes, the decision maker has discretion to determine the concrete amount to be awarded to the party/parties. **When exercising judicial discretion as to costs, the court should take into account the concrete circumstances of the case, including the conduct of the parties.**

The decision on this matter is an integral part of the judgment.

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)?***

²³ See Arts. 5 and 6 of the CCR.

²⁴ See Art. 27 of the CCR.

- *other fees depending on the outcome of the litigation?*

No, success-oriented fees are not allowed indeed, neither in terms of court fees nor as arrangements between clients and their attorneys. Either the Rules on Legal Opinions of the Macau Lawyers' Association (Art. 3, 4) or the Lawyers' Deontological Rules (Art. 18) forbid those kinds of agreements. Namely, it is expressly forbidden the *quota litis* agreements.

2. *It is 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 specific rulings have been issued in the Macau SAR concerning directly this matter.

But any agreements on the issues the lawyers are entrusted with are expressly forbidden whenever those agreements are done for their own advantage (see Art. 17 of the Lawyers' Deontological Rules).

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

According to the CCR are costs-free the class actions and the lawsuits brought by the official departments and organs referred in the Articles 2 and 3 of the CCR.

Please refer to answer to question I. 1.

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?*

The Macau Insurance Companies Ordinance (Decree-Law no. 27/97/M, of 30 June²⁵) foresees one class of non-life insurance concerning legal expenses, meaning the possibility of effecting and carrying out contracts of insurance against risks of loss to the persons insured attributable to their incurring legal expenses, including costs of litigation.

There are no reliable statistics for the number of this kind of contracts of insurance; but probably they are not common in the practice of the Macau SAR.

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)?*

Sure, in the Macau SAR legal system there is a publicly funded legal aid system.

On legal aid, there are either general rules (see Art. 36 of the Basic Law of Macau SAR and Art. 1, 1 of the Civil Procedure Code – access to justice, including legal advice) or specific legislation (the Law no. 21/88/M, of 15th August, and the Decree-Law no. 41/94/M, dated 1 of August). Besides, the legal aid includes as well the case-by-case decided total or partial exemption from the payment of costs and fees, including

²⁵ Available on <http://www.asianlii.org/mo/legis/laws/micodl2797368>.

free attorney's representation (the Macau Lawyers' Association provides free aid service as well).

Legal aid system works, *grosso modo*, for any kind of litigation, through an *ante causam* or *lite pendente* party request. The court decides before the proof of the lack of the petitioner's economic resources.

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

Yes, there are in the MSAR some local non governmental organizations, namely Foundations and Associations, providing relief for people who are very poor and for low-paid people.

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

Yes, legal aid is generally available to all parties in need, since they are Macau SAR residents²⁶.

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

According to the legal regime of Macau SAR, nobody is excluded from the access to justice; however, we may exceptionally find some difficulties in the Macau SAR practice, due to different concrete reasons, namely because of considering litigation costs and fees a serious barrier.

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?

No notice of such a situation as common in the practice of the Macau SAR courts. Even there is a special court for the low value disputes judgment.

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.*

Firstly, it is important to stress that costs and fees in the domestic Macau SAR courts are determined in "patacas", the own Macau SAR currency.

Secondly, please note that, because of the various species of legally imposed elements for the determination of the sum of costs and fees of litigating to final judgment in the first instance, as well as the mandatory discrimination of some of those

²⁶ See Art. 36 of the Macau SAR Basic Law and Art. 4 of the CCR.

elements, and due to different concrete circumstances to be considerate case-by-case by the court, it is very difficult, practically impossible, to provide a general reliable statement, even a good faith estimate of.

Besides, the statistical information on this matter is not published.

But, no doubt, the claims and appeals on the above matters are relatively frequent, some of them reaching the Last Instance Court²⁷.

Actually in the field of claims and appeals we can find in the Macau SAR practice a lot of various judicial orders on the amount and allocation of costs and fees in the first instance courts; consequently, the existing fluidity of this matter.

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

N/A.

Please refer to the answer to the question I.1.

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

N/A. Not even roughly.

Please refer to the precedent answer.

Macau Special Administrative Region of the People's Republic of China, on 30th Sept. 2009.

The National Reporter,

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²⁷ The Macau SAR Judiciary Organization is comprised of three levels of courts: The Judicial Basis Court, the Second Instance Court and the Court of Final Appeals, named Last Instance Court (see Law no. 9/1999, dated 20 of December – www.court.gov.mo).