

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.

### **Norway**

By Anna Nylund  
University of Tromsø  
Associate Professor of Law

### *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 basic rule of cost and fee allocation in Norway is loser pays all costs and fees. This rule applies to attorneys' fees and court cost, and costs related to producing evidence, *i.e.* primarily compensation to witnesses and expert witnesses. The principal justification is that a party who needs to resort to the courts in order to make another person respect his or her legal rights, is entitled to compensation for the costs incurred.

- 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 basic rule is that the winning party is awarded full compensation. The opposite party can be exempted from the liability in some cases when reasonable on “weighty grounds”. This rule might apply when the case was legally or factually unclear, or when the winning party can be blamed for the court proceedings, or he or she has rejected a reasonable settlement offer.

When deciding whether a case is “unclear” the law must be difficult to interpret, or the case offers other kind of legal challenges. In cases where the facts only become clear during the court proceedings, e.g. as new evidence is obtained or expert witnesses make their final conclusions, can also be considered to qualify for exemption. The “blame” can be on the winning party especially in consumer cases, where the provider of services or goods has not honored a decision by a consumer dispute board, or when the main issue is principles, not rights and obligations. Other examples are cases involving environmental pollution.

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

No, the rules are the same. When winning on appeal, the winning party gets costs for all (two or three) levels of courts, regardless of the result in the earlier stages. The appellate courts have the same jurisdiction on costs as they have in the substantial matter.

*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 basic rule is that the loser pays. In some cases the opposite party might be obligated to pay for witnesses that were clearly superfluous, or the court (state) might pay for the expert witness. In most cases costs for evidence are not significant, but this varies greatly.

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

The parties generally pay their own costs, but they can find other solutions as well. About 10-20 % of all cases settle, depending on how settlements are counted.

## **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)?*

There are several exceptions to the basic rule. A party may be awarded costs in full or in part irrespective of the outcome of the case, if the action has been brought for no good reason, and the party accepts the claim at the earliest opportunity; the action has been quashed due to circumstances outside the control of the party, and there is no doubt that the party would otherwise have succeeded; or the costs have arisen due to the negligence of the opposite party.

The parties must inform each other of their claims and of any evidence available before the case is brought to court. The parties must also try to find an amicable solution by negotiation or mediation before going to court. The plaintiff must also inform the defendant of his or her intentions and the main content of the summons.

There are special rules for cases tried by the Conciliation Boards<sup>1</sup> and for small claims. Cost in the Conciliation boards are limited to court costs (\$ 150), travelling costs, and limited costs for attorneys' fees (maximum of \$ 750), plus VAT. In small claims cases the costs are limited to the same as in Conciliations Boards, except the maximum for attorneys fees is 20 % of the amount in dispute but never more than about 4,200 \$, and the parties can claim costs for necessary and proportionate evidence, plus VAT.

In cases concerning administrative decisions relating to coercion, the state generally pays its own costs regardless of the outcome. In many family cases involving children both parties pay their own costs, but the costs of expert witnesses are paid by the state.

If the court grossly violates basic procedural rules, the state pays for the cost for appealing the case.

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

The Conciliation Boards have own cost rules (see above), but they are strictly speaking part of the court system.

Before bringing legal action the parties must try to find an amicable settlement, i.e. negotiate or mediate. A breach of the duty might impact the cost and fee allocation. A breach of the duty to provide information on the claim and evidence might also have such consequences.

*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)?*

These are not common, and would be considered unlawful in certain cases, e.g. against consumers..

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

Parties may choose to represent themselves in all cases. It is not common, except in the Conciliation Board stage of the procedure and in small claims procedure.

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

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

Cost and fell allocations rules should generally neither encourage nor discourage litigation. However, costs and fees are generally considered a problem, as they might be discouraging.

---

<sup>1</sup> The Conciliation Boards (Forliksråd) are a Norwegian specialty. They are considered courts in the legal system, and cases generally have to start in a Conciliation Board. However, they are not strictly speaking courts, as they can not decide all cases. They can only decide cases when both parties agree, small claims (under 21,000 US \$) when one of the parties request it, when a default judgment can be used, or the claim is of pecuniary nature and the only objection raised is the inability to pay. There are several exemptions to the rules that cases should start in the Conciliation Board: claims against the state and public agencies, claims above the small claim limit when both parties have an attorney, family cases etc.

- *in particular kinds of cases?*

The rules for Conciliation Board and small claims discourage the parties using costly forms of legal aid and the attorneys using more than strictly necessary time and resources on the cases. This encourages parties to use courts as a dispute solving mechanism.

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

- *court costs (into court)*

The parties pay \$ 150 up front regardless of the case, and as the case proceeds to trial, they will have to pay more.

- *attorneys fees (retainer)*

Depends on the attorney, but generally afterwards or in installments.

- *costs of taking evidence*

No

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

Probably not, as they are quite small. Only in some few cases.

#### **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?*

In the Conciliation Boards the plaintiff pays only a basic fee of \$ 150.

Court costs are generally determined by the days spent in court. The basic fee (\$ 150) is the same for all cases. When a case reaches the trial stage the cost is 5 times the basic fee (\$ 750) for the first day, and 3 times the basic fee each for the next 4 days. For trials lasting longer than 5 days the fee is 4 times the basic fee for any additional day. There is a reduction for cases tried at the Conciliation Board.

If the case is solved before the trial, the court fee is 2 times the basic fee (\$ 300).

In the courts of appeal the amount is 24 times the basic fee (\$ 3,600), plus 3 times the basic fee for any additional day.

In some cases no court costs are paid, these include cases involving the custody, living arrangements, parenting, parenthood for children, and rental of apartments.

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?*

The fees are determined by the market. Usually the attorneys charge by the hour. If the client is not satisfied, he or she can complain to the Disciplinary Board for Attorneys, which will determine the 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 court decides the concrete amount. Full compensation should be awarded unless the sum is clearly higher than usual. The decision is generally integrated to 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)?*

These are considered unlawful.

- *no win-no fee arrangements?*

Generally also considered unlawful.

- *success premiums (higher fees in case of a victory)?*

This would be lawful, at least to some extent.

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

This would also be lawful, to some extent.

*If yes,*

- *are such fees a recent development (since when)?*

Success premiums are unofficial, and have been known to be used for a long time. However, they tend not to be very significant.

- *are they regulated by law (e.g., capped)?*

No

- *does the loser have to pay the enhanced (success) fee?*

Only within “normal” costs for the litigation of such a case. The opponent is generally unaware of such an agreement.

*Are such fees allowed or common across the board or in particular cases only?*

They are more acceptable when there is no “weak” party involved, but as mentioned, they are usually not brought to the attention of the court or the opposite party.

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 plaintiff must him/herself be the person who is entitled to the claim against the particular defendant.

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

No.

*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?*

Many insurance policies include an insurance against the costs of litigation relating to the policy. There are no general litigation cost insurances available. The cost of litigation is included in the policy. The insurance holder must contact the insurance company prior to any litigation. Only items covered by the insurance can be covered in litigation.

## **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)?*

There is a publicly funded system for legal aid. There is financial support for people with low income and assets and for certain kinds of cases. Those in need of legal advice or court counsel, go to an attorney. The attorney helps them filing an application for legal aid, when needed, and they are then awarded free aid or prorated fees.

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

There are several agencies offering help. The largest network is the partly state-funded student networks at the three law schools (Oslo, Bergen, and Tromsø). The City of Oslo has a service of its own as has the Bar Association.

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

It is generally available to everyone having a low income and otherwise low assets, but only some types of litigation is included.

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

Generally not. But recently there has been a discussion on the topic, with some initiatives making legal aid more available to middle-income families.

*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, the new rules on small claims litigation have reduced the problem.

## VII. Examples

Nota bene: there are no statistics available, no recommendations or other guidelines from the Bar Association or any other organization, neither has any research been done on the topic. In fact, the Ministry of Justice admitted that any statements on the costs of litigation are just educated guesses, and that it will not be able to actually tell whether the new civil procedure rules (from Jan. 1<sup>st</sup> 2008) have or will have any impact on costs and fees. Thus, these are just educated guesses from some brief discussions with several colleagues.

Also, the costs tend to vary according to the difficulty of the case and especially how much and what kind of evidence is produced. Every day of trial significantly adds the fees of the parties. Expert witnesses also tend to be costly. Having many witnesses tends to make the trial longer, thus adding to the fees charged by the attorneys.

- 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*

Probably about \$ 100-200 as the parties would seldom engage lawyers. In most cases the use of witnesses would also be limited to an absolute minimum.

*- small to medium claim, e.g., \$ 10,000*  
\$ 2,000 per party + costs = total of ≈ 5,000

*- medium to large claim, i.e., \$ 100,000*  
\$ 7-8,000 per party + costs = total of \$ 18-20,000 depending on the kind of evidence

*- large claim, e.g., \$ 1,000,000.*  
Large claim cases amounting to \$ 1,000,000 are seldom litigated in Norway, therefore this is a mere estimate. The total cost would probably be somewhere between \$ 50-75,000.

- 2. If a plaintiff lost a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be?*  
\$ 7-8,000 for the opponents attorney fees and some \$ 2-3,000 for other costs = total of \$ 10,000

- 3. If a defendant lost a \$ 100,000 claim after litigation, what would his/her cost and fee liability roughly be?*  
\$ 7-8,000 for the opponents attorney fees and some \$ 2-3,000 for other costs = total of \$ 10,000

### *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.*

As mentioned above, there has recently been a discussion about legal aid and reducing the limits of access to court for low- and middle-income families and small businesses. For low-income families free or subsidized legal aid is available, but many people do not know how to do things, for instance where to go to find help, which attorney to engage etc. For many middle-income families and small businesses litigation is very expensive and the cost are in fact an obstacle of access to court.

The government intends to make the following changes:

- Giving everybody regardless of income a right to one hour of free legal consultation and aid in non-business related issues.
- Extending free or partly free legal aid to about half of the population. The maximum fee to be paid for legal services would be about \$ 140 plus VAT (total of about \$ 180) per hour. This would be limited to a number of cases related to everyday life and consumer issues (landlord-tenant issues, sale of housing, neighbor related minor disputes, consumer rights, social benefits, health-related issues, education, etc.)