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Topic II.C.1

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?

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?
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)?
3. Are there special rules for appeals? How are the additional costs and fees allocated?
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?
5. How are costs and fees typically allocated if the parties settle their dispute? (and what percentage of civil suits is typically 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)?
2. Are there any mandatory pre-litigation procedures (e.g., mandatory mediation) with an impact 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)?
4. Are parties allowed to represent themselves? If yes, in all cases or only in some? How common is self-representation?

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?
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?

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?
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?
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.)?

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

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?

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)?
2. Is there privately organized help for indigent or other clients (e.g., through pro bono work)?
3. Is legal aid generally available to all parties in need or is it rather awarded/available selectively?
4. Are litigation costs and fees considered a serious barrier excluding certain parties from access to justice?
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?

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?

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.