

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**

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### **SWEDEN**

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#### *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 losing party shall reimburse the opposing party for litigation costs unless otherwise provided.” This is the clear main rule according to Chapter 18, section 1, of the Code of Judicial Procedure.<sup>1</sup> Attorneys' fees and court costs are treated in the same way.

There are historical reasons for this rule. In the 1734 Code of Judicial Procedure, there was an exception for cases where the outcome was so dubious, that the losing party had had a reasonable cause for getting the case tried by a court.<sup>2</sup> In such cases, each party paid his costs. This meant, that the liability to pay the costs of the other party depended on the degree of culpability of the losing party in relation to the fact that a trial had been needed. Allocation of costs was considered in a similar way as liability to pay damages. Although the ‘loser pays’- rule was the main rule, the courts did not order the loser to pay unless it was clear that he had no reasonable cause to get the case tried.

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<sup>1</sup> The present Code of Judicial Procedure (*Rättegångsbalken*, below: *Code of Judicial Procedure*) was promulgated in 1942 and came into force January 1st, 1948. It replaced the Code of Judicial Procedure from 1734 (below: *1734 Code of Judicial Procedure*).

<sup>2</sup> 1734 Code of Judicial Procedure, Ch. 21, section 3.

In the present Code of Judicial Procedure, the main rule that the loser pays does not have a similar exception. The reason behind this is the principle that the trial should protect rights. If the costs were not allocated according to how the court finally determined the rights and duties in the case, this principle would not be completely set into force. An additional reason for the rule was that it would prevent unjustified trials.<sup>3</sup>

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)?

In all cases which are governed by the general rules, thus cases that are not subject to the exceptional rules for lesser cases, the winner has a right to full reimbursement of the costs for preparation and performance of the trial including the attorney's fee.<sup>4</sup> The attorney's fee is generally the most important part of the cost. However, the reimbursement is restricted to an amount that is "reasonably required for the protection of the party's rights". Unless the losing party has accepted the reasonableness of the required amount, the court has to try this issue.

In the case NJA 1997 p. 854 the Supreme Court made some general statements clarifying the application of this rule: The cost must be reasonable if the losing party shall pay all of it; it is not enough that the cost is not unreasonable. The cost of the attorney's fee – when legal aid is not involved – shall not be decided according to the amount of time the attorney has used but according to the character and extent of the case and the care and skill of the attorney. The value of the dispute and its importance to the party may also be considered. A party is not required to specify in detail the work done by himself or the attorney, neither as regards the amount of time used nor the specific measures taken.

The facts deciding this case, however, were that the winning party had specified the measures taken, approximated the time used and specified the cost per hour, all as regards both the work done by the party and the attorney. Further on, the case had been pending for eight years, regarded a considerable amount of money, contained several alternative sets of facts and was problematic regarding what law should govern different parts of the case. The winning party thus got full reimbursement of his costs.

These assessments must be done from case to case, so the value as precedent of this case is limited. However, it is a good illustration of the factors used by the courts in Sweden to assess the reasonableness of costs.<sup>5</sup>

For lesser cases, there is a special limit. If the amount at issue is less than 21 400 SEK (2009) – approx. 3 000 \$ – the winning party only has a right to reimbursement for the cost of legal advice

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<sup>3</sup> Preparatory works in SOU (*Statens offentliga utredningar*) 1938:44 p. 230-231.

<sup>4</sup> Code of Judicial Procedure, Ch. 18, section 8.

<sup>5</sup> Historically, this type of criteria has a long tradition on the European continent. The four criteria that were defined by Ulpian as regards the size of a fee were the amount at issue, the difficulty of the case, the skill and reputation of the advocate, and the customary fee levels at the relevant court. See *Dig.* 50.13.1.10, cf. James A. Brundage, *The Medieval Origins of the Legal Profession. Canonists, Civilians, and Courts*, Chicago/London 2008, pp. 37-38.

given under maximum one hour (according to the fees of legal aid; 1 104 SEK, approx. 150 \$), the court fee, the cost of the journey of the party or an attorney, witness costs and translation costs. The rules regarding culpable parties are, however, applied also in these cases.<sup>6</sup>

If the case originally has been entertained in a summary process at the Enforcement Service (this type of procedure is designed for undisputed claims; if the claim turns out to be disputed it will be referred from the Enforcement Service to the appropriate District Court), the costs for that part of the case will follow the rules for the summary process.<sup>7</sup> Similarly, if the winning party has started a trial in spite of the fact that the case was suitable for a summary process – i.e. the defendant had never opposed the claim – the cost rules of the summary process will prevail.<sup>8</sup> In summary process, reimbursement of costs is restricted to 340 SEK (approx. 47 \$) for the party's work with the case.

The court fee for giving in an application for a writ of summons is 450 SEK (approx. 62 \$). The fee for an application in a summary process is 300 SEK (approx. 41 \$).

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

If a case is appealed as regards the matter tried in the lower court *and* the costs, all costs – i.e. also the costs in the lower court – will be allocated according to the outcome in the superior court.<sup>9</sup> If only the decision on the costs is appealed – e.g. as regards the reasonableness of the amount –, the costs will be decided according to the outcome in the lower court.

This is also a change made with effect from 1948. According to the older rules, each party should bear his costs if the lower court and the appeal court came to different decisions in the case.<sup>10</sup> The reason for the change is the principle that the trial should protect rights and that the costs should be allocated according to how the court finally determined the rights and duties in the case (cf. above I, 1).

### 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 which calls the witness or the expert witness pays his or her costs in the first place.<sup>11</sup> If the party wins the case, the cost will be reimbursed by the loser.

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<sup>6</sup> Code of Judicial Procedure, Ch. 18, section 8 A, subsection 1-5.

<sup>7</sup> Code of Judicial Procedure, Ch. 18, section 8 A, subsection 6.

<sup>8</sup> Code of Judicial Procedure, Ch. 18, section 3 A.

<sup>9</sup> Code of Judicial Procedure, Ch. 18, section 15.

<sup>10</sup> 1734 Code of Judicial Procedure, Ch. 21, section 4.

<sup>11</sup> Code of Judicial Procedure, Ch. 36 section 24 and Ch. 40 section 17.

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 parties settle the dispute, the main rule is that each party bears his own costs.<sup>12</sup> The parties have the possibility to agree on another allocation of the costs, but they seldom do.

## 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 main rule is that the winner is fully reimbursed. The exceptions – “... unless otherwise provided”<sup>13</sup> – concern some specific situations. The court may, e.g., order each party to bear his costs if the case concerns a legal relationship that may not be settled by other means than a judgment,<sup>14</sup> e.g. divorce cases. In cases regarding custody of children, each party bears his or her costs, unless a party has acted culpably.<sup>15</sup>

If the winning party has initiated an unnecessary trial, the court may order the winner to pay the loser’s costs or each party to pay his own costs.<sup>16</sup> If the circumstance which dictated the outcome of the case was not known and should not have been known by the losing party before the trial, the court may decide that each party should bear his costs.<sup>17</sup> This exception only concerns the facts in the case. There is, however, no exception for cases where the main issue regards interpretation of law, how unpredictable the outcome might be. Also in cases where, e.g., the Supreme Court in plenary repeals older precedents or where judicial review of legislation is performed, the loser pays.<sup>18</sup> This means, that the idea that the trial should protect rights, and that the effect of that view would be weakened if the party whose rights were eventually protected should not also have his costs paid by the other party, is very rigidly enforced. In labour cases, however, there is an exception for cases where the losing party had a reasonable cause for having the case tried; in such cases the court may order each party to bear his costs.<sup>19</sup>

If there are several claims in the same case, and one party wins some of them and the other some, each party shall bear his costs or one of the parties shall have an adjusted compensation for his costs. If different parts of the costs can be determined for the different parts of the case, the liability of costs may be determined accordingly. A party may be granted full compensation if what he has lost is not significant in relationship with the case in total.<sup>20</sup>

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<sup>12</sup> Code of Judicial Procedure, Ch. 18, section 5, subsection 3.

<sup>13</sup> Code of Judicial Procedure, Ch. 18, section 1.

<sup>14</sup> Code of Judicial Procedure, Ch. 18, section 2.

<sup>15</sup> Code of Parental Care (*Föräldrabalken*), Ch. 6 section 22.

<sup>16</sup> Code of Judicial Procedure, Ch. 18, section 3, subsection 1.

<sup>17</sup> Code of Judicial Procedure, Ch. 18, section 3, subsection 2.

<sup>18</sup> An exception for doubtful issues regarding law exists in Norway, see the Norwegian Code of Civil Procedure (*Tvisteloven*) Ch. 20 section 2.

<sup>19</sup> Act regarding procedure in labour cases (*Lag 1974:371 om rättegången i arbetstvister*) Ch. 5 section 2.

<sup>20</sup> Code of Judicial Procedure, Ch. 18, section 4, subsection 1.

These principles should be applied also in cases where there is one claim which is partly approved.<sup>21</sup> If different parts of the costs cannot be determined for the different parts of the case, or if the court cannot find that one part of the case has required more evidence of more argumentation than another part, the liability for costs is determined proportionally. The point of departure is that a party who fully wins his claim shall be fully compensated. If the plaintiff wins half his claim, each party bears his own costs. Consequently, a party who wins three quarters of his claim will have half his costs reimbursed. A party who wins one quarter of his claim will have to pay half the other party's costs.<sup>22</sup>

An exception, which is rather unique, is that civil claims in Sweden are often brought within criminal proceedings. The prosecutor has a duty to act as a counsel for the injured party as regards civil claims, if such claims are not so complicated that this will cause problems. Thus, prosecutors generally claim, as counsel for the injured party, damages for infringement of the injured party's integrity, pain and suffering or the right to stolen property. If the claim is too complicated to be handled by the prosecutor, a special counsel for the injured party – who is an advocate or other lawyer – is appointed by the court. Also in these cases, the civil claim is entertained within the criminal proceedings. Only if it would be unproportionally complicated to entertain the civil claim in the criminal case – e.g. because the civil claim is legally doubtful or requires additional evidence – it will be transferred to a civil trial.

As regards the costs, a civil claim within criminal proceedings follows the criminal procedural rules. If the injured party is to be interrogated in the criminal case, his or her costs are paid by the state. If the defendant is convicted, he or she has to pay the cost of the counsel for the defendant and the special counsel for the injured party; albeit only to an amount considered reasonable regarding his or her income etc. Only if the injured party puts forward his or her claim without being heard in the criminal case the cost rules from civil procedure will be used. The cost will then be determined according to these rules only as regards the injured party's part of the case.<sup>23</sup>

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

No. If the trial is unnecessary, the winning party may have to pay the loser's costs, see above II,1.

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)?

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<sup>21</sup> Code of Judicial Procedure, Ch. 18, section 4, subsection 2.

<sup>22</sup> This can also be expressed  $R=2xK-1$ , where R= is the right to reimbursement and K is to what extent the claim has been approved. If the claim is approved with 75%,  $R=2x0,75-1$ ,  $R=0,5$ : The winner gets half his costs reimbursed. If the claim is approved only with 25%,  $R=2x0,25-1$ ,  $R=-0,5$ : The winner has to pay half the losers costs.

<sup>23</sup> Code of Judicial Procedure Ch. 31 section 11 subsection 4.

No. If there would occur such an agreement, it would probably be set aside as unreasonable if it was to be applied against a consumer.

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

Yes. Parties are allowed to represent themselves in all cases. It is more common in minor cases and less common the higher value the case considers. An exception is group actions, where an advocate should represent the plaintiffs.

### **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 aim is that unnecessary litigation should be avoided and that the bearer of the legal right should be fully reimbursed. The most important exception regards custody of children which is explained by the social interests in those 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?

The court fee for giving in an application for a writ of summons is 450 SEK (approx. 62 \$). The fee for application in a summary process is 300 SEK (approx. 41 \$). There are no other court costs.

Attorneys generally require an à-conto-payment initially. The amount varies.

### **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?

There are no other relevant court costs than the fees, see III, 2.

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?

Generally, lawyers' fees are determined by the market.

Only where legal aid applies, there are fees. The fee per hour is 1 104 SEK (150 \$).

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 that gives judgment also decides the issue of costs. Within the criteria set up by the Code of Judicial Procedure and the Supreme Court, the court has rather wide discretion, since the question of the amount must be decided according to what is reasonable in each case, see above, I, 2-3. The decision is integral 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)?
  - no win-no fee arrangements?
  - success premiums (higher fees in case of a victory)?
  - other fees depending on the outcome of the litigation?

According to the ethical standards of the Bar Association (Sveriges Advokatsamfund), an advocate may only agree upon a contingency fee or other risk agreement if there are special reasons, and this agreement may not lead to that the advocate gets an unproportional interest in the outcome of the case.<sup>24</sup> This is understood as that contingency fees are generally seen to be unethical. The exceptions regard primarily group actions, proceedings which have international connections and where the Swedish advocate must follow a foreign agreement on contingency fee, and cases in which a contingency fee is necessary if the party is to have access to justice.<sup>25</sup>

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?

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<sup>24</sup> Guidelines for the ethical standards of advocates (Vägledande regler för god advokatsed), January 1<sup>st</sup>, 2009, section 4.2, [www.advokatsamfundet.se](http://www.advokatsamfundet.se).

<sup>25</sup> Commentary to the guidelines (Kommentar till Vägledande regler för god advokatsed), April 16<sup>th</sup>, 2009, section 4.2, [www.advokatsamfundet.se](http://www.advokatsamfundet.se).

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

Fees depending on the success in the case are uncommon for advocates. Since the winner's right to be reimbursed is restricted to an amount that is "reasonably required for the protection of the party's rights",<sup>26</sup> it is difficult to see how such fees could ever come before a court. Cf. V, 3 below.

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?)

There are entrepreneurs and law firms – other than advocates – who buy claims and bring them to court. This is allowed.

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

There are special rules about group action. A party who has an interest in the action, a consumer or employee organization or an authority may start a group action, if the members of the group have similar cases and it is more convenient that the cases are determined in one trial. Only parties who have consented to the action are considered as parts of the group.

In group actions, contingency fees and other risk agreements are allowed, albeit under certain restrictions. If the plaintiff has made such an agreement with his advocate, and he wins the case, he may not get a higher reimbursement from the loser than that which is reasonable according to the main rules (see I, 2 above).<sup>27</sup> The rest is to be paid by the members of the group proportionally and to a maximum of what the members have gained through the trial. If the loser cannot pay his part of the cost, the members of the group should reimburse the plaintiff his costs proportionally to a maximum of what the members have gained through the trial.<sup>28</sup> A risk agreement may only be applied against the group members if the court has approved it as reasonable in regard to the case, and the fee may not be solely depending on the value of the object of the dispute.<sup>29</sup>

4. Can one insure against the costs (including fees) of litigation? By buying specific litigation insurance? By buying coverage in other policies (e.g.,

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<sup>26</sup> Code of Judicial Procedure, Ch. 18, section 8.

<sup>27</sup> Law regarding group trial (*Lag 2002:559 om grupprättegång*), section 41.

<sup>28</sup> Law regarding group trial, section 34.

<sup>29</sup> Law regarding group trial, section 38-40.

automobile liability or homeowners insurance)? Is such insurance common? How does it work in practice?

It is generally expected that every person with a home has a home insurance. It is not practically possible to have a home insurance without also having covering of legal costs. Legal aid may not be granted if the applicant has such insurance. If he has not but ought to have had it, legal aid may not be granted unless there are special reasons regarding the importance of the claim for the applicant. When deciding this, the courts have given legal aid only to persons with very low income or who just have arranged their own living.

## **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 legal aid system follows a special act.<sup>30</sup> A person who wishes to apply for legal aid must firstly get legal advice from an advocate or an assistant lawyer of an advocate for maximum two hours. Legal aid may be granted, if the income – defined according to also maintenance of children, fortune, debts, etc. – of the person is less than 260 000 SEK per year (35 500 \$). It is also required that the court finds that the person needs legal assistance, that other means of legal assistance – such as a counsel for an injured party in a criminal case – cannot be arranged, and that the court finds that it is reasonable that the state covers part of the costs. If the applicant has an insurance covering legal costs or ought to have had such an insurance, legal aid may not be granted. Legal aid is generally only granted to private persons, but persons who have small businesses may in exceptional cases be granted legal aid.<sup>31</sup>

If legal aid is granted, the state pays the work of the lawyer with 1 104 SEK per hour (2009, 150 \$) for an amount of work which is considered reasonable. Normally, there is a maximum of 100 hours work. The state also pays the costs for evidence.<sup>32</sup>

The person who is granted legal aid pays part of the costs of the counsel, depending on his income. If the case is such that the loser pays, the loser has to pay the winner what he has paid to the counsel and the rest of the costs to the state.<sup>33</sup>

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

At some of the Law Faculties, the students provide legal advice for free.

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<sup>30</sup> Act regarding legal aid (*Rättshjälpslagen* 1996:1619).

<sup>31</sup> Act regarding legal aid, sections 4, 6-9 and 13.

<sup>32</sup> Act regarding legal aid, sections 15-16 and 27.

<sup>33</sup> Act regarding legal aid, section 30.

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

See V,1.

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

No, since parties are allowed to represent themselves, insurance generally covers legal costs and counsel and legal aid is available in many other cases, the costs are not in themselves 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?

What is discussed in this regard is that more case-law from the Supreme Court would be needed to develop law above all in private law. In cases which are unpredictable because law is unclear, a precedent would be needed, but the financial risk of the parties as regards legal costs gives them a reason to settle the case. This means, that the Supreme Court does not get the chance to give the precedent that would make law clearer. Some lawyers, thus, criticize the rigid 'loser pays'-rule and argue that the state should pay the costs in cases where law is unclear and where a precedent is needed or that the Supreme Court should have the possibility to order each party to pay his own 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

This would follow the rules for lesser claims, see I, 2.

- 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?

Generally, loser pays. In the determination of the reasonableness of the winner's costs, the court often reflects upon the relation between the cost and the object of the dispute, often saying that it is not reasonable to use more money on litigation than what the value of the object is. This is, however no general rule, since other factors can also be relevant. Therefore, I cannot answer this

question in a meaningful way.

*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.

I think Swedish law has been fully presented through the answers above. I foresee that the fundamental principles will be maintained. What I think is a special feature in Swedish law, which gives certain parties an access to justice that they would not have had in ordinary civil procedure, is that most claims that are consequences of crime are entertained within criminal procedure. E.g., a person who has been hit in the face or threatened may have a right to damages for infringement of the integrity with approx. 5 000 or 10 000 SEK. Such an injured party would probably not have sued the defendant in a civil case, would not have had access to a professional counsel according to the civil procedural rules, and would – if he appointed a counsel in a small case – have had to pay the cost of the counsel himself. Since the case is handled within criminal procedure, in most cases the injured party will have access to a counsel – the prosecutor or another counsel –, the decision on damages will be combined with the criminal judgment, and there will be no costs for the injured party.