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COST AND FEE ALLOCATION IN CIVIL PROCEDURE

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I Introduction

Cost and fee allocation in Venezuelan civil procedure is governed first and foremost by express provisions of the Code of Civil Procedure and a number of relevant provisions in a handful of laws and regulations. Although there is not a complete legal characterization on costs, traditionally Venezuelan scholars and jurisprudence converge on three categories of recoverable costs: (i) court fees; (ii) ancillary expenses; and (iii) legal fees. More recently, with the entry into force of the 1999 Venezuelan Constitution¹, judiciary services are provided entirely free of charges and parties are not required to make any payments to the courts, cutting down the recoverable expenses to ancillary expenses and legal fees.

II The Basic Rules: Who Pays?

a. The basic rule

Loser pays all. The basic rule of cost and fee allocation in Venezuela is that the loser pays all. Its application is, nevertheless, subject to a very high standard: to bear with the costs and fees of a civil proceeding, the losing party must have been fully defeated². The latter means that, each and all requests made by plaintiff in its claim for relief must have been either: (i) granted by the court and thus the defendant gets to pay; or (ii) denied by the court and thus the plaintiff gets to pay. This standard is generally regarded as a matter of public order, thus it cannot be contractually modified and the court must *ex officio* allocate the obligation to bear with the costs and expenses of the proceeding to the loser party.

¹ 1999 Venezuelan Constitution, articles 26 and 254.

² Venezuelan Code of Civil Procedure, article 274.

Cross-allocation of costs and fees. The alternative to a flawless victory is characterized as a *reciprocal defeat*. In other words, a plaintiff that fails to prevail on all accounts is deemed as partly defeated by the defendant. The applicable rule to this case is not that each party bears its own costs and fees. Conversely, there is a cross-allocation of costs and fees between the parties³. According to the express provisions of the Code of Civil Procedure, in case of reciprocal defeat, should there be any balance on behalf of one party after setting off their respective costs and fees, the resulting difference must be allocated to the other party.

b. Recoverable categories: content and scope

Court fees. Although court fees are no longer enforceable, they used to be by and large calculated on standard basis and were fully recoverable. This category was very rarely a matter of dispute. In fact, court fees were based on express legal provisions, liquidated by the court and paid up-front by the relevant party. But more importantly they were relatively small amounts of money. Beyond any complain regarding a material error in the calculations, there was little room for disputes on this account.

Ancillary expenses. Ancillary expenses include different categories, some of which are regulated by law (e.g.: judicial depositories), customarily (court expenses for the service of process) and others are left to the parties' autonomy. Among those expenditures subject to the parties' autonomy are the fees of expert witnesses. Ancillary expenses, including without limitation the fees of expert witnesses, must be fully reimbursed and are not capped by law, as it is the case with legal fees. Should there be a disagreement between the parties as to the fees of an expert witness or other ancillary expenses the court retains the final authority to prudentially fix the recoverable amount⁴.

Expenses incurred in the production of evidence also fall within this category. The party producing a piece of evidence must bear the associated costs, which would be eventually recovered, should that party prevail in the litigation. The cost of expert witnesses has become over the years a very important factor in the overall cost of litigation in Venezuela, to an extent comparable at times to the legal fees.

Legal fees. Legal fees incurred in litigation are recoverable to a maximum amount equal to thirty percent (30%) of the value of the claim. When costs and fees are allocated, whether by cross-allocation between the parties (reciprocal defeat) or by full allocation to one party (total defeat), the payor is entitled to a formal review of the legal fees of the attorneys of the payee called "retasa" (re-appraisal). It is a summary incidental proceeding and its findings are final. The 30% cap on the legal fees abovementioned limits the right of the winning party to obtain reimbursement from the other party, but it does not constitute a limitation on the fees that attorneys may in fact charge to their clients.

c. Applicable rules to multiple incidences and instances

³ Venezuelan Code of Civil Procedure, article 275.

⁴ Venezuelan Code of Civil Procedure, article 648 (applied by analogy).

Costs and fees on incidental proceedings, multiple instances and on the merits of the dispute must be allocated severally and are recoverable only upon issuance of a final decision⁵. Thus, a prevailing party on the merits may still have to bear fully with the costs and fees of an unsuccessful incidence or recourse (e.g.: appeal of an interlocutory decision, appeal of final judgment, cassation, etc.). As mentioned above, whenever the costs and fees are cross-allocated as per the rules of the Code of Civil Procedure, there will be a set off and only the resulting balance would be allocated to the relevant party. The 30% cap on the legal fees has been recognized as a general rule applicable to a dispute disregarding the number of incidences or instances it may have and it is exclusively applicable to the legal fees of the attorneys of the party entitled to recovery and not to the ancillary expenses.

d. Special cases

The allocation of costs and fees is also subject to a number of special provisions that are generally aimed at regulating situations of multiple parties and the termination of the proceedings for causes other than a final judgment. Among others, it is worth mentioning:

- Multi-party litigation⁶:
 - All members of a *litis consortium* share the costs in proportion to their share in the claim.
 - Costs are borne jointly or severally following the nature of the underlying claim.
 - Costs associated with specific actions or exceptions brought by a single member of the *litis consortium*, are borne severally by the relevant party.
- Voluntary termination of the proceeding:
 - Withdrawal⁷:
 - Of the complaint, plaintiff bears the costs and fees.
 - Of a recourse, the relevant party bears the costs and fees.
 - Admission of the complaint by the defendant⁸:
 - At the outset of the proceeding, respondent shall bear costs and fees if it gave rise to the proceedings.
 - At any other time during the proceeding, respondent shall bear with them save an agreement of the parties to the contrary.
- Mandatory termination of the proceeding⁹:
 - In case of mandatory termination due to the failure of the parties to pursue the proceedings, each party bears its own fees and expenses.

⁵ A judicial decision is final when all recourses to set it aside are unavailable due to exhaustion, expiration of time or other reasons.

⁶ Venezuelan Code of Civil Procedure, articles 278, 279 and 280.

⁷ Venezuelan Code of Civil Procedure, article 282.

⁸ Venezuelan Code of Civil Procedure, article 282.

⁹ Venezuelan Code of Civil Procedure, article 283.

- Settlement¹⁰:
 - The default rule is that each party bears its own costs and fees. The parties are free to agree otherwise in the terms of the settlement. At the time being, there are no reliable databases that may shed some light on the percentage of civil suits typically settled.

III Exceptions and Modifications

a. Exceptions

The most important *de facto* exception to the regime outlined in the Code of Civil Procedure is the fact that, if there has been a reciprocal defeat, Venezuelan courts would typically declare that there are no grounds to allocate cost and fees and each side would end up bearing its own. Such practice is possibly against the law but it is generally followed and has not been successfully subject to judicial scrutiny before the Supreme Court¹¹.

There are a number of specific circumstances and parties, with respect to which the regime as to the allocation of cost and fees differs:

- i. Public entities¹²:
 - There are no costs against the Republic whether it appears as plaintiff or respondent. The Supreme Tribunal has held different views on the constitutionality of such privilege, but it is currently in force.
 - Costs are recoverable, nevertheless, against all other public entities¹³ (states, municipalities, public enterprises, agencies, etc.). However, the application of this rule has been restricted in recent years by the Supreme Tribunal, in an effort to enforce the privileges of the Republic with respect to those public entities that, by express provisions of the law, are entitled to the same privileges and exemptions granted to the Republic.
- ii. Judicial aid (access to justice)¹⁴:
 - A party that has not enough resources to afford litigation, can apply for a judicial aid benefit that would exempt her from payment of court fees and ancillary expenses, and would also entitle her to free legal counsel, appointed by the court.

¹⁰ Venezuelan Code of Civil Procedure, article 277.

¹¹ This practice may have developed as a shortcut to setting off the costs and fees of parties that would generally break even due to the cap on the recoverable legal fees, historically the most important expense. Nowadays this approach may prove to be wrong for it completely underestimates the value of ancillary expenses incurred by the parties and those regarding multiple incidences and instances.

¹² Venezuelan Code of Civil Procedure, article 287.

¹³ Venezuelan Code of Civil Procedure, article 288.

¹⁴ Venezuelan Code of Civil Procedure, articles 175 to 182.

- Should the complaint be entirely dismissed, the plaintiff would have to cover the costs and expenses of the counter-party, on the grounds of the *loser pays all* rule.
- In case of a reciprocal defeat, although a set off would not be possible, the chances are that a Venezuelan court would declare –as per the current practice– that there are no grounds to allocate costs and fees between the parties.

b. Mandatory pre-litigation procedures

There are no mandatory pre-litigation procedures in civil and commercial matters at the time being, thus they have no impact on the overall value of the litigation.

c. Contractual agreements allocating litigation costs and fees

In certain civil and commercial contracts it is typical for parties to agree that costs and expenses incurred by one of them during the course of litigation will be borne by the other party. Classic examples of those are loan, sale and lease agreements. The burden generally falls upon the party performing the outstanding obligations (buyer, borrower, tenant, etc.). However, such contractual agreement cannot modify the standard of application of the *loser pays all* rule (the loser must still be fully defeated) and therefore it becomes not more than a contractual restatement of the law.

d. Self-representation

Any party appearing before a Venezuela court must be assisted or represented by an attorney admitted to practice in Venezuela. This is the so called *ius postulandi* requisite and it is a rule of mandatory application¹⁵. Self-representation is only admitted if the party herself (plaintiff or defendant) is admitted to the practice of law in Venezuela¹⁶.

IV Encouragement or Discouragement of Litigation

a. Discouragement of frivolous claims and appeals

As noted before, the requisite that a party be fully defeated in order to apply the *loser pays all* rule points towards discouraging plaintiff from bringing frivolous claims. Likewise, a party appealing a decision that turns out to be entirely confirmed by the superior court shall bear the costs and fees of such second instance, as a mean to discourage frivolous appeals. Unfortunately, the 30% cap on the recoverable legal fees in case of success, has become a discouraging factor inversely proportional to the value of the claim, making access to justice generally burdensome and unsustainable for most small and medium claims.

b. Fee arrangements, up-front costs of litigation

¹⁵ Venezuelan Attorneys Act (*Ley de Abogados*), article 4.

¹⁶ Venezuelan Attorneys Act (*Ley de Abogados*), article 12.

Attorney fees will always depend on the specific arrangements made by and between the client and its counsel. They could agree on an hourly rate, on a certain percentage to be paid in installments –each installment corresponding to each important stage of the proceeding– or a combination of both, etc. Such arrangements are open to the freedom of contract of the parties, with few limitations arising out of the Attorneys Code of Ethics and a general prohibition on the *pactum de quota litis* by virtue of which attorneys cannot acquire in advance a direct interest in the dispute neither as payment nor as security of their fees.

However, it is not forbidden to accept an assignment of rights as payment for accrued legal fees, so long as it is not an assignment of the rights under litigation. It has also been established that, since money is fungible, the *pactum de quota litis* prohibition would not affect a fee arrangement to collect a certain percentage of an underlying dispute where the claim for relief is payment of a liquid amount of money.

Currently, due to the length of proceedings before Venezuelan courts litigants may be required –more often than not– to make advanced payments to their attorneys in order to cover the expenses of legal research and preparing the case and the fees corresponding to the elaboration and filing of the complaint, which in Venezuelan civil procedure represents the single most important opportunity to state the case and ask for relief. Although it can only be determined on a case-by-case basis, those advanced payments may reach at times a 50% of the overall fee estimate.

If the plaintiff is a foreign entity or a foreign national not domiciled in Venezuela and the claim is civil in nature, the plaintiff will have to post a bond with the court as security for payment of the potential costs and fees of the defendant, should the claim be totally dismissed (*cautio judicatum solvi*). If the claim is commercial in nature, such bond is not required.

Finally, the cost of taking evidence is borne by the party interested in the production of any piece of evidence. For instance, in the case of expert witnesses their fees are often paid 50% up front and 50% upon delivery of the expert's inform.

V The Determination of Costs and Fees

As explained before, recoverable costs and fees in Venezuelan current civil procedure are limited to ancillary expenses and legal fees. With the exception of certain expenses regulated by law, the amount of legal fees and most ancillary expenses are based upon the agreement of the parties.

Ancillary expenses must be fully reimbursed, when applicable, and very often they involve expenses entirely subject to the agreement reached by and between a party and a third party, such as an expert witness. Those services are generally priced at market rates but the court retains discretionary powers to prudentially fix the amount actually recoverable. The latter is typically exercised whenever the payor challenges the amount of ancillary expenses allocated to him.

In the case of legal fees, despite any agreements between a party and its counsel, the right to recover legal fees from the counter-party is statutorily limited to a 30% of the value of

the complaint. However, the final amount of legal fees that a party may have to pay to its own counsel will largely depend on the duration of the proceedings, the complexity of the case, the seniority of the attorney, the relationship between them, among other factors, and is not subject to the aforementioned 30% cap.

In addition to the 30% cap on recoverable legal fees, the payor is entitled to challenge the requested legal fees of the payee, by means of an incidental proceeding called re-appraisal, aimed at evaluating and confirming or adjusting the legal fees payable to the attorney of the party entitled to recovery.

The fee estimates would normally be inversely proportional to the amount of the complaint. The larger the complaint the smaller percentage corresponding to legal fees. That, which is probably true for every other jurisdiction, has become an insurmountable obstacle for small and medium size claims in Venezuela, which frequently go unsettled.

On the other hand, there is a regulation aimed at fixing the minimum fees that an attorney admitted to practice in Venezuela should charge¹⁷ but it is rarely taken into account for it neither does not reflect accurately the economic circumstances of the venue nor the common practice in Venezuela.

A very peculiar feature of the Venezuelan framework, when it comes to legal fees, is the role played by certain bar associations. Each state has a bar association, the largest one being that of the metropolitan area of Caracas. With the exception of the Caracas bar association, many other bars in Venezuela retain, by their charters, the right to collection of any amounts owed to an attorney for services rendered in their circuit, which are finally paid to the attorney after withholding a quota for the bar association (up to 10% of the invoiced fees).

VI The decision on cost and fees

When applicable, the final judgment must expressly award cost and fees allocating its payment to the loser, or to both parties in cases of reciprocal defeat. It cannot be done through a separate court order. If not expressly awarded in the final judgment they are not recoverable. A failure to award cost and fees when applicable renders the judgment defective and subject to appeal and even cassation, where available, in order to remedy the lack of application of an express and mandatory provision of the law.

VII Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims, Class Action and Litigation Insurance

From the perspective of civil and commercial litigation the freedom of contract is still the controlling rule when it comes to the amount and structure of legal fees. Success fee, contingency fees, no win – no fee arrangements, success premiums and other fees depending on the outcome of the proceedings are generally allowed and frequently used by Venezuelan counsels. As mentioned earlier, so long as the agreement does not contravene ethical duties of the attorney and the prohibition of the *pactum de quota litis*, the freedom of contract would be the main source of regulation. Although there might be

¹⁷ Venezuelan Regulation on Attorneys' Minimum Fees.

a few questions raised under the Code of Ethics applicable to Venezuelan attorneys and certain types of arrangements, they are rarely –if ever – discussed in the context of a civil proceeding. If the party to whom cost and legal fees are allocated has any complaints, she is entitled to apply for a re-appraisal (*retasa*) of those legal fees –a summary incidence – and the findings are final and binding.

It is not usual to find an assignment of contentious rights although both the Code of Civil Procedure and the Civil Code expressly provide for it. In any event, with the exception of the endorsement for collection of a bill of exchange, clients cannot subrogate their claims to their attorneys for collection under Venezuelan law.

Despite the fact that the 1999 Venezuelan Constitution does provide grounds for class actions this area of practice has not taken off and there are no special rules concerning cost and fee allocation for such types of claims.

There are no insurance products specially crafted to cover the risk of any litigation. Conversely, automobile liability or homeowners insurance would typically include as part of the risks covered, the cost and fees of litigation related to events under coverage.

VIII Legal Aid

Litigation costs and fees are a tremendous barrier excluding, as a matter of fact, most small and medium size claims from access to justice. Pursuant to the Code of Civil Procedure a litigant may apply for judicial aid, under certain conditions, that would entitle him to free legal representation, an exoneration of ancillary expenses and, when applicable, of court fees. Nevertheless, its implementation in practice is far from helpful and it does not alleviate the cost of litigation before Venezuelan courts.

IX Examples costs

It is not possible to present a broad picture ~~with an~~ estimate of costs and fees to litigate a civil or commercial case to a final judgment in the first instance, for both sides, before Venezuelan courts. This is an exercise that must be done on a case-by-case basis and subject to a large number of qualifications, but it can be ~~generally~~ affirmed that small to medium size claims are generally unsustainable. **Notwithstanding the foregoing, it is safe to conclude that litigation costs and fees are among the main obstacles, as a matter of fact, limiting small and medium claims' access to justice in Venezuela.**

X Conclusions

Access to justice has diminished over the years in Venezuela mostly due to systemic reasons. Among other contributing factors the ever increasing costs of litigation, the ~~demanding~~ standard for the application of the *loser pays all* rule, the fixed cap on recoverable fees and the practice of Venezuelan courts of not cross-allocating costs and fees in cases of reciprocal defeat, have all combined making judicial settlement of commercial and civil disputes unaffordable. There are no discussions on the topic going on in Venezuela and little is being done on the account of the enforcement of judicial aid rules. Unfortunately, yet other variables add up to the equation reducing predictability

and reliability of the system as a whole and substantially increasing the costs in non-recoverable ways.