

Mathias Reimann *Editor*

# Cost and Fee Allocation in Civil Procedure



Springer

# COST AND FEE ALLOCATION IN CIVIL PROCEDURE

A COMPARATIVE STUDY

Edited by  
MATHIAS REIMANN



 Springer

*Editor*  
Mathias Reimann  
University of Michigan  
Law School  
625 South State Street  
Ann Arbor  
Michigan 48109-1215  
USA

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# Preface

In the last five or so years, the costs of civil litigation and their allocation between the parties have become a major topic of discussion in many jurisdictions. Several countries have enacted new legislation liberalizing the market for legal services; international tribunals such as the European Court of Justice and the European Court of Human Rights have struggled with issues of access to justice; experts have been tasked with the writing of Reports on civil litigation costs to guide further reform; and scholars have published books and papers. Almost suddenly, it seems, lawmakers, legal practitioners, and academics have come to realize that few, if any, factors shape civil litigation as strongly and pervasively as who pays for what and how much.

This volume presents a thoroughly comparative approach to the topic. It contains a broad study on “Cost and Fee Allocation in Civil Procedure” drawing on data from almost 40 jurisdictions in six continents. This study is based on the General Report commissioned by the International Academy of Comparative Law and written for the XVIIIth World Congress of Comparative Law in Washington, DC, in the summer of 2010. The volume also presents 25 chapters on cost and fee allocation in particular systems around the globe, covering civil law, common law, and variously mixed jurisdictions in Europe, North and Latin America, Asia, and Australia. These chapters are derived from the National Reports presented at the XVIIIth World Congress but they were written specifically for inclusion in this book and with a view to highlighting the particular characteristics of the respective systems. Some National Reporters chose not to participate in this endeavor; all National Reports are accessible under [http://www-personal.umich.edu/~purzel/national\\_reports/](http://www-personal.umich.edu/~purzel/national_reports/).

The picture that emerges is one of great complexity but it also shows several pervasive features and trends: an almost ubiquitous struggle with the high costs of civil litigation and often with problems of access to justice for most of the population; an increasing liberalization of the rules governing lawyer fees and a concomitant rise of success oriented modes of remuneration; and a growing reliance on methods of cost spreading through legal

insurance, class actions, outside litigation financing, and other means. On the whole, the study suggests, the problems with high civil litigation costs and their allocation between the parties are more severe and pervasive in common law system than in civil law jurisdictions, and it proffers a few explanations for that observation.

I am grateful to all contributors to this volume most of whom had to put up with my repeated demands for revision, clarification, and amendment of their chapters, and I thank them for their cooperation and patience. I am also indebted to my research assistants Sarah Bullard and Alexander Fiedler who provided much background information. Finally, my secretary Cynthia Bever helped to keep track of the many contributions and to enforce the inevitable deadlines.

Ann Arbor  
June 2011

Mathias Reimann

# Contributors

**Neela Badami** Senior Associate at Narasappa, Doraswamy and Raja, Bangalore, India; University of Michigan Law School, Ann Arbor, MI, USA, neela@narasappa.com

**Alexandre Alcino de Barros** Senior Associates ad L.O. Baptista Advogados Associados, Sao Paolo, Brazil

**Nina Betetto** Supreme Court of the Republic of Slovenia, Ljubljana, Slovenia, nina.betetto@sodisce.si

**Camille Cameron** Melbourne Law School, Melbourne, VIC, Australia, c.cameron@unimelb.edu.au

**Nicolas Cayrol** l'Université de Paris II (Panthéon-Assas), Paris, France, nicolas.cayrol@univ-tours.fr

**Talia Fisher** Buchmann Faculty of Law, Tel Aviv University, Tel Aviv, Israel; Harvard Law School, Cambridge, MA, UK, tafisher@post.tau.ac.il

**Greg Gordon** University of Aberdeen, Aberdeen, UK, law339@abdn.ac.uk

**Burkhard Hess** University of Heidelberg, Heidelberg, Germany, hess@ipr.uni-heidelberg.de

**Rudolf Huebner** University of Heidelberg, Heidelberg, Germany

**Jan Hurdík** Masaryk University, Brno, Czech Republic, jan.hurdik@law.muni.cz

**Gyoocho Lee** Chung-Ang University School of Law, Seoul, Republic of Korea, ghlee@cau.ac.kr

**Marco B.M. Loos** University of Amsterdam, Amsterdam, The Netherlands, M.B.M.Loos@uva.nl

**Alessandra De Luca** Comparative Law, Faculty of Law, University of Florence, Florence, Italy, adeluca@unifi.it

**Kalliopi Makridou** Aristotle University of Thessaloniki, Thessaloniki, Greece, lioka2004@yahoo.gr

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# **Part I**

## **General Report**



# Chapter 1

## Cost and Fee Allocation in Civil Procedure: A Synthesis

Mathias Reimann

### 1.1 Introduction: The Topic and Its Limits

This chapter provides a comparative study of the principles and rules governing costs and fees in civil litigation. It is based on the General Report written for the XVIIIth World Congress of Comparative Law held in Washington D.C. in the summer of 2010. It thus draws heavily (albeit by no means exclusively, see *infra* Section 1.1.4) on the respective National Reports contributed to this Congress<sup>1</sup> Most, though not all, National Reporters also contributed chapters to this book.

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Thanks to Sarah Bullard (J.D. University of Michigan 2010) and Alexander Fiedler (LL.M. University of Michigan 2011) for effective research assistance and to my colleagues Jody Kraus, Kyle Logue, and Mark West for helpful comments on an earlier draft.

<sup>1</sup> The General Report is published in Karen B. Brown and David Snyder (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (2011). National Reports on Cost and Fee allocation in Civil Procedure were written by Camille Cameron (Australia), Marianne Roth (Austria), Ilse Samoy and Vincent Sagaert (Belgium), Silvia Julio Bueno de Miranda and Alexandre Alcino de Barros (Brasil), Patrick Glenn (Canada), Tang Xin and Xiao Jianguo (PR China), Jan Hurdik (Czech Republic), Richard Moorhead (England and Wales), Jarkko Männistö (Finland), Sophie Gjidara-Decaix (France), Burkhard Hess and Rudolf Hübner (Germany), Kalliopi Makridou (Greece), Thorgerdur Erlendsdottir and Sigridur Ingvarsdottir (Iceland), Neela Badami (India), Talia Fisher and Issi Rosen-Zvi (Israel), Alessandra Luca (Italy), Manabu Wagatsuma (Japan), Gyooho Lee (Korea), Candida Silva Autunes Pires (Macau SAR, PRC), Carlos Sanchez-Mejorada (Mexico), Marco Loos (Netherlands), Anna Nylund (Norway), Andrzej Jakubecki (Poland), Alena Zaytseva (Russian Federation), Greg Gordon (Scotland), Marko Knezevic (Serbia), Nina Betetto (Slovenia), HJ Erasmus (South Africa), José Angel Torres Lana and Francisco Lopez Simo (Spain), Martin Sunnqvist (Sweden), Caspar Zellweger (Switzerland), Fu-mei Sung and Taisan Chiu (Taiwan), Ayse Saadet Arikan (Turkey), James Maxeiner (United States), and José Tadeo Martinez (Venezuela).

M. Reimann (✉)

University of Michigan Law School, Ann Arbor, MI, USA

### ***1.1.1 The Significance of Cost and Fee Rules***

The law of costs and fees is a major factor in the decision whether a dispute will result in litigation. In fact, in civil and commercial matters where money is usually the primary object, the financial burden of litigation may well be the single most important consideration in deciding whether to fight in court. Even if a matter is deemed important enough, and even if the chances of success are considered high, a party may not be able or willing to bear the cost of litigation.

In addition, the financial burdens of suing influence litigation strategy. In deciding exactly how to proceed, how much to invest, what risks to take, whether to appeal or not, etc., parties must take into account who will ultimately pay for it all. Thus, an understanding of the rules governing costs and fees is essential for an understanding of the dynamics of civil litigation.

Last, but certainly not least, financial costs and risks of litigation determine who has, and who is being denied, access to justice. Parties who cannot afford to sue (or to defend in court) are effectively excluded from the litigation system. They may well have valid substantive rights or viable defenses but cost barriers can render these rights and defenses practically useless. As we will see, this problem plagues many jurisdictions, albeit to varying degrees.<sup>2</sup>

### ***1.1.2 The Importance of Comparative Perspectives***

Practically speaking, understanding the rules governing litigation costs is most important at home. Yet, when transboundary litigation is growing fast, and when changes have been in the air in many systems, it is becoming increasingly important also to look beyond one's own jurisdiction. This is true for practitioners and lawmakers as well as for academics.

For legal counsel in transboundary cases, comparing rules on litigation costs is (or at least should be) an important element in choosing a forum (and sometimes the applicable law).<sup>3</sup> This is especially true when drafting a forum selection clause but it also matters more generally when deciding where to file (or whether actually to defend against) a lawsuit.<sup>4</sup> For legislators and policy makers, understanding how other systems deal with

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<sup>2</sup> *Infra* Section 1.3.4.

<sup>3</sup> See Stefan Vogenauer, *Perceptions of Civil Justice Systems in Europe and their Implications for Choice of Forum and Choice of Contract Law: an Empirical Analysis*, in Stefan Vogenauer and Christopher Hodges (eds.), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* (Oxford 2011, forthcoming).

<sup>4</sup> Assuming a choice, it would be an egregious mistake, for example, to file a clear winner in a jurisdiction where each party bears its own costs as opposed to a jurisdiction where the loser has to make the winner whole. In a similar vein, it would be a bad move to file

litigation costs is valuable when evaluating their own jurisdiction's regime. This is particularly salient if major reforms are being undertaken, as in most recently in Belgium (2007) and Portugal (2008) or considered, as is currently the case in the United Kingdom.<sup>5</sup> Finally, for legal scholars, especially those studying international civil litigation, the similarities and differences between the respective rules promise valuable insights. Comparison can indicate common problems (e.g., regarding certain claims), suggest a spectrum of solutions (e.g., ways to improve access to justice), and reveal worldwide trends (e.g., towards deregulation of lawyers' fees). It can even speak to the sense or non-sense of grouping legal systems into families or traditions (e.g. by looking at the degree of correlation between basic cost rules and membership in a particular legal family).

The purpose of this study is primarily to gather and organize data and to make sense of them by showing major commonalities and differences across jurisdictions. It is not to advocate concrete solutions to specific problems. While comparison includes pointing out pervasive questions and possible responses, how actually to resolve concrete issues usually involves political choices that comparatists are, contrary to what many of them believe, rarely competent to make.

### *1.1.3 From Obscurity to Prominence*

For many years, there were precious few studies of cost and fee rules from a comparative (and foreign law) perspective<sup>6</sup> – a situation which actually provided the motivation for suggesting the topic to the International Academy of Comparative Law in 2007 for its 2010 Congress. In the meantime, that has changed. Today, there is a growing literature in this field.

Much of the initiative has come from European institutions. Most importantly, as part of the EU Civil Justice Project, a major comparative study of cost and fee rules has recently been undertaken at the University of Oxford.<sup>7</sup> In addition, the Council of Europe and the European Commission

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a weak case (perhaps with a view of extracting a settlement) in a jurisdiction where the losing party pays all the costs rather than in system without cost shifting.

<sup>5</sup> See *infra* note 9.

<sup>6</sup> A major exception was Charles Platto, *Economic Consequences of Litigation Worldwide* (London: International Bar Association, The Hague, Boston 1999). The book provides valuable data about 20 systems (or regions) some of which were included in writing this General Report. The main problem with the book is that much of the information it provides has already become dated.

<sup>7</sup> Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Perspective* (Oxford and Portland/Oregon 2010) (hereafter cited as *Oxford: Costs and Funding*). While the book contains only 23 National

both solicited extensive studies related to this area in recent years.<sup>8</sup> Another, separate, impetus came from the current English reform debate which has resulted in a comprehensive review of the English system.<sup>9</sup> Finally, there are also quite a few recent publications in English addressing various key jurisdictions, such as England,<sup>10</sup> France,<sup>11</sup> Germany,<sup>12</sup> and Japan,<sup>13</sup> as well as occasional comparative studies on a limited scale.<sup>14</sup>

In addition, cost issues have increasingly occupied even international tribunals in recent years. Before the European Court of Human Rights as

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Reports, the original Study conducted at the University of Oxford included 34 countries, see Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study*, University of Oxford Legal Research Paper Series Paper No. 55/2009 (December 2009), available at <http://ssrn.com/abstract=1511714> (hereafter cited as Oxford: Comparative Study). These countries overlap considerably with the jurisdictions covered in this chapter but each project also considers many jurisdictions not addressed by the other. The Oxford Study encompassed eleven systems not considered here: Bulgaria, Denmark, Estonia, Hong Kong, Hungary, Ireland, Latvia, Lithuania, Portugal, Romania, and Singapore; conversely, this General Report includes twelve systems not addressed by the Oxford Study: Brazil, Iceland, India, Israel, Korea, Macao, Mexico, Serbia, Slovenia, South Africa, Turkey, and Venezuela. Together the two projects thus draw on a total of 46 jurisdictions. The Oxford Study and the present chapter also overlap with regard to the questions they pursue but again, there is enough difference in coverage and thrust for one to complement the other. Overall, the focus of this General Report is somewhat narrower because it deals principally with the *allocation* of costs while the Oxford Study is concerned with *Costs and Funding of Civil Litigation* more broadly.

<sup>8</sup> See especially European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems: Edition 2006* (2004 data) and *European Judicial Systems: Edition 2008* (2006 data) – Efficiency and Quality of Justice (2008); and Jean Albert, *Study on the Transparency of Costs of Civil Proceedings in the European Union: Final Report* (2007).

<sup>9</sup> Rupert Jackson, *Review of Civil Litigation Costs, Final Report* (Norwich 2010) (hereafter cited as Jackson Review).

<sup>10</sup> Peter Gottwald (ed.), *Litigation in England and Germany* (Bielefeld 2010).

<sup>11</sup> Dominique Menard, *The Costs Battle: Cost Awards in France after the Enforcement Directive*, *Patent World* 173 (2005) 13–15.

<sup>12</sup> Gottwald, *supra* note. 10; Gerhard Wagner, *Litigation Costs and Their Recovery: The German Experience*, *Civil Justice Quarterly* 28 (2009) 367–366.

<sup>13</sup> Matthew Wilson, *Failed Attempt to Undermine the Third Wave: Attorney Fee Shifting Movement in Japan*, *Emory International Law Review* 19 (2005) 1457–1488.

<sup>14</sup> See Markus Jäger, *Reimbursement for Attorney's Fees. A Comparative Study of the Laws of Switzerland, Germany, France, England and the United States of America*; *International Arbitration Rules and the United Nations Convention on Contracts for the International Sale of Goods (CISG)* (2010); David Root, *Attorney Fee-shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, *Indiana International & Comparative Law Review* 15 (2005) 583–617; see also Andrew Cannon, *Designing Cost Policies to Provide Sufficient Access to Lower Courts. Australia/German/Netherlands/Northern Ireland/England*, *Civil Justice Quarterly* 21 (2002) 198–253; Francesco Parisi, *Rent-Seeking through Litigation: Adversarial and Inquisitorial Systems Compared*, *International Review of Law and Economics* 22 (2002), 193–216.

well as the European Court of Justice, litigants have claimed – at times successfully – that high court costs or the denial of legal aid violated their fundamental rights under European law.<sup>15</sup> At least the member states of the European Union and of the Council of Europe thus operate under external constraints when regulating litigation costs, as well as, incidentally, public legal aid.<sup>16</sup>

### ***1.1.4 The Database – The Developed Part of the World***

As mentioned, this study is indebted to the National Reports from 35 jurisdictions.<sup>17</sup> It also draws – to a more limited extent – on the existing studies on costs and fees in civil litigation just mentioned.<sup>18</sup> Additional research provided occasional information on specific points.

The almost three dozen jurisdictions covered by the National Reports represent a substantial portion of the world's legal systems: they hail from all continents; represent civil law, common law, and Asian legal systems as well as various mixed regimes; and they include all major law exporting countries. They are also quite diverse: some are huge (like Russia), others tiny (like Macau); some are highly centralized (like France), others have a federal structure (like Canada); some are liberal and capitalist (like the United States), others authoritarian and socialist (like China). Together, they comprise over 60% of the world population and ca. 90% of the global GDP.

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<sup>15</sup> *Teltronic-CATV v. Poland* (ECHR 10 Jan. 2006, Application no. 48140/00); *DEB v. Germany* (European Court of Justice, 22 Dec. 2010, C-279/09); see also *Granos Organicos Nacionales v. Germany* (European Court of Human Rights, Application 19508/07 – not decided on the merits), and *Kottke v. Präsidial Anstalt and Seetly Stiftung* (EFTA Court 17 Dec. 2010, E-5/10, concerning security for litigation costs before national courts).

<sup>16</sup> See *infra* Section 1.4.1.1.

<sup>17</sup> Australia, Austria, Belgium, Brazil, Canada, PR China, Czech Republic, England and Wales, Finland, France, Germany, Greece, Iceland, India, Israel, Italy, Japan, Korea, Macau (SAR PRC), Mexico, The Netherlands, Norway, Poland, Russian Federation, Scotland, Serbia, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, United States of America, and Venezuela. These Reports are on file with the General Reporter; they are accessible, together with the Questionnaire, under [http://www-personal.umich.edu/~purzel/national\\_reports/](http://www-personal.umich.edu/~purzel/national_reports/). With a few exceptions, this study does not provide pinpoint citations to the National Reports.

<sup>18</sup> Information on four additional jurisdictions, for which I had no National Report, was drawn from Platto, *supra* note 6, i.e., on Hong Kong, Denmark, New Zealand, Singapore. Since Portugal enacted major reforms in 2008, I also occasionally drew on the Portuguese Reports obtained by the Oxford group, *supra* note 7, from Barrocas Sarmento Neves, *Sociedade de Advogados* (Lisboa), available at <http://www.csls.ox.ac.uk/documents/PORTUGAL.doc> [cited as *Oxford Portuguese Report/Barrocas*] and from Henrique Sousa Antunes [cited as *Oxford Portuguese Report/Antunes*], available at <http://www.csls.ox.ac.uk/documents/PORTUGALAC.doc>. These additional five jurisdictions bring the number of systems considered to a total of 40.



Still, the systems included here do *not* represent the whole world. Serious gaps remain, largely as a result of institutional problems and resource limitations. Islamic systems are missing, Africa is severely underrepresented, and seriously poor countries are virtually absent.<sup>19</sup> In other words, the picture is by and large limited to the developed part of the globe.<sup>20</sup> To be sure, this is where most civil litigation takes place; it is also likely that most other systems in the world follow any of the major models included here, be it as a result of colonial imposition or post-independence borrowing. Still, it is important to keep in mind that the picture emerging from the present study shows mainly the situation in the rich and industrialized countries, and that it tells us very little, if anything, about the developing world.

### **1.1.5 Overview**

Beyond this Introduction, this study consists of three main sections followed by a Conclusion. Section 1.2 deals with the issue of who pays; it outlines the basic approaches to cost shifting, considers the most important modifications and exceptions, and looks at the underlying policies. Section 1.3 turns to the question of how much?; it looks at the three major items – court costs, lawyer fees, and evidence expenses<sup>21</sup> – and conveys a sense of the overall financial burden of civil litigation. Section 1.4 then considers whose money actually pays for litigation costs; in particular, it surveys a variety of special mechanisms that distribute the financial risks of litigation, such as legal aid, litigation insurance, collective actions, success-oriented fees, and third party investment in lawsuits. The Conclusion suggests various groupings of legal systems with regard to cost and fee allocation in civil procedure.

## **1.2 Who Pays? The Basic Rules and Their Reasons**

In looking at cost and fee allocation in civil procedure, the first question must be which of the parties has to bear which kinds of litigation expenses.<sup>22</sup> This depends primarily on the basic rules about cost shifting

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<sup>19</sup> In terms of per capita GDP, no country covered belongs to the poorer half of the world.

<sup>20</sup> Other available studies do not remedy this problem because they suffer from exactly the same limitations.

<sup>21</sup> Throughout this study, these terms – costs, fees, and expenses – are used consistently to refer to courts, attorneys, and evidence taking respectively. They are not, however, fixed terms of art, and many National Reports and studies use them differently, e.g., in the sense of “court fees”, “costs of evidence” or “expenses of legal representation”.

<sup>22</sup> A separate question not pursued here is how much of the actual expenses are borne by the parties and how much is paid by the state (i.e., the taxpayer), but see *infra* Section