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**REPLIES OF SPANISH REPORTERS
TO THE QUESTIONNAIRE ABOUT
*COST AND FEE ALLOCATION IN CIVIL PROCEDURE***

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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?

– Under Spanish Law, attorneys' fees are considered cost when attorney have to take part in a litigation in a mandatory way, because there is a rule which states it (when the amount of the litigation is over 900 €: art. 31.2, 1º, of Spanish Civil Procedure Law –*Ley de enjuiciamiento civil*– , ahead CPL).

– The basic and general rule about cost is that the loser pays all (art. 394.1 CPL).

– As we have just said, attorneys' fees and court cost follow the same way. Usually, attorney's fees are the most important part of the cost.

– This rule is justified in the principle that there is no reason for the winner has to suffer any kind of damage or economic loss which may decrease the total amount of his right established by the judgment.

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)?

– As a general rule, the loser pays all the cost. But there is a limit, which is referred only to the fees of attorneys and experts. The loser has to pay the fees of the attorneys and experts of the winner to the third part (33 per 100) of the total amount of litigation (art. 394.3 CPL). It is not very common to reach this amount. There is an exception to this rule. When the Court has included in the judgment that the loser has

behaved recklessly, this limit is suppressed and, in that case, the loser has to pay the total amount of the fees even it is over the third part of the amount of the litigation.

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

— Yes; there is a little different rule. When the appellant loses all his petitions, he has to pay all the cost of appeal. In any other case, the cost are shared between the parties, half and half , end each one pays their own fees (art. 398 CPL).

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 amount of the taking of evidence are considered cost (art. 241, 4°, CPL) and follow the rules established by CPL in the articles 394 and following.

— The answer is negative. As a general rule, the fees are the most significant factor of the cost in a litigation. Exceptionally, the fees of an expert, when needed in a process, can reach high amounts, but it does not happen usually.

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

— CPL has not any particular rule about cost and fees in this case. The basic rule is the agreement between the parties and usually this agreement involves the allocations of the cost. The usual agreement is that each party pays the fees of their own attorneys and experts and the court costs fifty-fifty.

— The percentage of litigations ended with a settle is very low. And this it is referred only to that cases in which settle is possible, because they are several kinds of litigation nearly linked to the person as ability, children, marriage, minority, in which

settle is not permitted, because they involve a public interest (arts. 19.1 and 751.1 CPL). We can establish a 10 per 100, more or less.

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)?

— Yes, there are several specific rules which involve exceptions to the basic rule:

1. When the matter of the litigation is dark, very complicated or involves serious doubts of fact or Law, the cost are allocated between the parties and each has to pay their own court costs and the fees of their own attorneys and experts (art. 394.1, *in fine*, CPL).

2. In the case that the petitions of the plaintiff are not totally, but only partially, satisfied. Same solution that number 1 (art. 394.2 CPL).

3. For specific cases:

— For the case that the defendant admits the suit, before replying it (art. 395 CPL). In that case, every party pays their own cost.

— For the case that the plaintiff withdraws the process: he has to pay all the cost, unless the withdrawal has been accepted by the defendant (art. 396 CPL).

4. For specific parties:

— Public Attorney has never to pay the cost, even if he loses the litigation (art. 394.4 CPL).

— The person who has the right of “free justice”, because he has been declared poor, is not obliged to pay the cost unless he gets a better economic situation (394.3, last paragraph CPL).

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

— The only mandatory procedure previous to any civil litigation is, from 1984, the so called “previous claim before Public Administration” which is only compulsory to claim against one Public Administration, national or local. Regulation of this kind of previous claim is included, not in CPL, but in the Law 30/1992, of common administrative procedure, contains no provisions about cost. That means that the general rules of CPL are applicable and the result is that the expenses originated by this previous claim cannot be considered cost of litigation, because there are not born directly and immediately in the existence of the process (art. 241.1, 2d paragraph), because the process does not yet exist.

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)?

— No, they are not common. But judges in any case are linked by these agreements, because the rules about cost are mandatory, and oblige in every case to the parties and to the judges. This rules must be applied *ex officio* by the judge, that is to say, even no one of the parties have made any petition in this sense.

A claim on the basis of this kind of agreements cannot be successful because it is an agreement against a mandatory rule, and subsequently void (art. 1255 of Spanish Civil Code).

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

— PCL allows only in a few cases to one party to represent himself, that is to say without the legal direction of an attorney. This cases are included in the art. 31.2 CPL, and it is a closed list. For example, it is not necessary that an attorney takes part in a litigation when the total amount of the claim is not over 900 €.

Self-representation is very rare. The usual practice is that the party, even an attorney is not necessary, makes a contract with one, because of the high level of complication of the legal processes.

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?

— On a general basis the Spanish system —from 1984, date of settlement of the rule the loser pays all— tries to discourage people that are not sure to be right, that have doubts about the final result of the litigation. On the opposite, it encourages to the plaintiffs or defendants who are sure to win, because they will win without any expense which diminish the right of the winner, declared in the judgment.

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

- court costs (into court)

— As a general rule, the costs of the litigation (fees, taking of evidences), including the court costs (taxes), have to be paid by each party at the time they are generated (art. 241.1 of CPL), without waiting to the end of the litigation (art. 241.2). That means that the winner —by applying the rule “the loser pays all”— obtains, at the final moment, that is to say at the end of the litigation, a reimbursement of the amounts he has paid up front.

There is a special rule about taxes, because particulars, non-benefit entities and small entities, according to the companies tax, are exempted of paying taxes. Taxes represents a very small amount. They are integrated by a fixed amount of about 150 € (depending of the class of the process) and a variable amount according to the amount of litigation, but they are a very small percentage of this amount (0,5 per 100, up to 1,000,000 €; 0,25 up from 1,000,000 €) . For appeals this amounts are the double ones. These amounts are not established in CPL, but in arts. 5 and 6 of Spanish Law 53/2002, of Dec. 30.

- attorneys fees (retainer)

— There is not a mandatory rule neither a fixed criteria. It is not common, but attorneys may ask an amount paid up front, which cover until 100 per 100 of their fees.

- costs of taking evidence

— As we have just said, this kind of costs have to be paid in the moment they are produced (art. 241 of CPL). The particular amount depends of the kind of the evidence. As a general rule, an expert (i. e., an engineer, an architect or a doctor) has the right to receive their own fees and these are determined freely by each experts, according to their own professional rules. The evidences of experts, are, no doubt, the most expensive evidence and one of the most in the litigation, with the fees of attorneys. Witnesses have only the right to receive a compensation for the damages which can suffer (absence of their work place, traveling costs), which has to be paid by the party which have called him; the total amount of this compensations is fixed by the Court, attending to the circumstances alleged and proved by each of the witnesses (art. 375 of CPL).

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

— Yes, of course, specially for people who cannot dispose of this money to be paid up front, even the can be reimbursed, because this reimbursement can delay more than a year in the first instance an another year in appeal.

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?

– As we have just said, the amount of court costs is basically determined in order to the amount of the litigation. When it is not possible to fix the amount, it is established in the sum of 18,000 €. It also depends on the kind of the process and also the type of court. The said amounts are fixed for the first instance processes before a Court of instance. For appeals, before another type of Courts—called “Tribunal” in Spanish legal language, which means High Court, with at least three Judges—, the amounts are the double than for the first instance. When litigation reaches the Supreme Court, the amount is double than that for appeal, that is to say, four times more than that for first instance courts.

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?

– They are determined by a free agreement between the attorney and his client. Nevertheless, if there is not a express agreement, the attorney can apply the statutory rules of his own Bar; but this rules are not mandatory, they do not bind to the attorney and only are useful as an orientation to determine the fees (*Vid.* art. 44.1 of General Statute of Spanish Advocacy, approved by Real Decreto (Royal Decree) 658/2001, of June, 22). This rules were binding rules, as a “minimum rule” in the former Statute (approved in 1982); that meant that an attorney cannot determine his fees under this minimum, because it was unfair competition. Nevertheless, currently, the attorney and his client can agree to increase or decrease this fees fixed by the rules of the Bar, because, as we have said, they are not mandatory.

So, the laws of the market are the only social forces in order to determine the fees of attorneys. Nevertheless, attorneys never determine their fees with total freedom, but they use to have in account several important criteria. These criteria may consist of a price or amount per hour, or, more frequently in the case of litigation, the amount of controversy and its level of complexity. It also very common to use a mixed criterion, which consists of establishing two items: a fixed amount and a percentage of the final

result of the litigation if the client has wined it (arts. 44.2 and 44.3 of current Statute of Advocacy).

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.)?

— If there have not been any winner in the process, because each party has got partially his petitions, there is not necessary to determine the amount of the costs, because each of them has been paying in advance all the costs caused by themselves. In other words, there is not any kind of reimbursement from one party to the other. There is a particular case in which one of the parties can be condemned to pay all the costs even he has not lost the litigation. It is the case in which the Court has appreciated recklessness or bad faith (*mala fides*) in the behavior of this party.

In other case, when the judgment includes a condemnation to one of the parties to pay all the costs, this party can pay them voluntarily. If not, the Secretary of the Court makes a valuation of the costs, but this valuation has to be approved by a separate Court order to be enforceable (art. 242 of CPL).

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?

— CPL say nothing about all the cases of the question, because they belong to the private and contractual relation between clients and attorneys and have to be regulated by the statutes of each Spanish Bar (There is, at least, a Bar in each Spanish province). The statutes of the different Bars have not any special rule about this matter. Statutes understand that they are questions to be solved by private agreements between attorneys and clients. There is an exception of the so-called *contingency fees*, which is described under Spanish and latin Law (France, Italy, Portugal) with the latin expression of *quota litis* (part of the advantage obtained by the winner). The strict *quota litis* agreement between the attorney and his client is formally forbidden by all the particular rules of the statutes of the different Spanish Bars and also by the General Statute of Advocacy (art. 44.3). Nevertheless, from more or less ten years ago, this kind of agreements had begun to be allowed by the different Bars (vg., the Bar of Balearic Islands).

The no win-no fees arrangements are strictly forbidden. The services of the attorney have to be paid even he loses the litigation because they are the matter of a contract which involves the activity and the effort of the attorney, but not the final result (arts. 1583 and following of Spanish civil Code, which contain the regulation of the contract of services).

Nevertheless, *success premiums* are very common from long time ago. They are agreements which involve a previously fixed amount and another one if litigation is won. Usually this second amount consists of a percentage —which has to be reasonable— of the benefit or advantage got by the winner. These have been and still are private agreements between attorneys and clients, and consequently cannot be considered cost neither paid by the loser.

All this kinds of fees are not regulated by the General Statute of Advocacy, but only allowed. As we have said, Spanish Law considers that they are free agreements regulated by the private Law rules and these are the rules which have to be applied.

The loser has only to pay the costs which have been valued by the Court Secretary, and these item includes the bill of the winner attorney. This bill can include, and this is what usually happens, part of the supplementary amount agreed with the winner client. But, as we have said, there is a limit: the third part of the amount of litigation, unless the loser has behaved with recklessness; in this case, there is no limit, but recklessness has to be expressly declared by the Court (art. 394.3 CPL).

All these special kinds of fees are generally allowed and there are not permitted only for particular cases.

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?)

— Yes; it is possible. Art. 17 of CPL regulates the change of the parties, nominated as succession of parties. One of the causes may be the transmission of the matter or object under litigation and it can involve the change of both parties, plaintiff and defendant. The transmission of the object under litigation is a private question, which has been also a matter of regulation by Spanish civil code: arts. 1526 and following, particularly art. 1535: purchase of credits under litigation. We have to say that a credit under litigation is not a *res extra commercium*, a thing excluded or forbidden as a matter of contract. So, the subrogation begins out of the process, in the contract Law area, and then can enter the process and operate a change of one of the parties. The change of one or both parties in the process must be notified to the other party and finally approved by the Court (same art. of CPL).

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

— Current CPL include many special rules referred to class actions and consumer organizations, but no one of them is referred specially to the matter of cost or cost condemnation in the process.

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?

— In Spain does not exist any kind of insurance system only dedicated to cover the cost of litigation, neither to particulars nor enterprises. Nevertheless, it is possible, and common, to include it into the legal aid system of other policies, specially in the insurances of automobile liability, but also in homeowners'. This last kind of coverage is very common. The insurance company assumes all the risks of legal defense, including eventually the cost of the 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)?

— Yes. There is a constitutional rule (art. 119 of Spanish Constitution) which estates that justice will be free in the cases settled by Law (ordinary Law, approved by Parliament). This rule is repeated by the Judicial Power Law and developed by the Free Legal Aid Law, 1/1996, January, 10 (FLAL). That Law estates that the free legal aid is a “public service”. This means that it is paid by the Public powers, particularly by the Ministry of Justice.

The system also involves the Bars, who receive the sums from the Ministry of Justice and pay the fees of the attorneys included in the system. It is important to remark that attorneys do not work free or *pro bono*. They have the right to receive their fees, which are fixed in a list of prices, usually lower than those for particular clients, but, as we have said, paid by the Ministry of Justice. This payment is settled through mixed commissions, located in each Spanish province or island, integrated by two members designated by the Autonomous Communities, by the Chairman of the Bar or the province and by a representative of General Attorney of the State. There is also a central Commission, located in Madrid, to solve the questions of free legal aid referred

to the Courts with competence in all Spanish territory (Supreme Court and National Court).

The person who tries to become a beneficiary of the system has to send an application form to the Bar of the province where litigation will take place. He has to give evidence that he has got the requirements legally established, principally, in the case of particulars, Associations or Foundations, that they have lack of economic funds to present a claim and follow the litigation. The Bar designates an attorney —called attorney *ex officio*— for the petitioner, but this is an urgent and provisional designation. The local commission has the last word to confirm or revoke this provisional designation, after examining the presented evidences, in a term of 30 days (arts. 12-18 of Free Legal Aid Law).

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

— The answer is negative. The only existing system is the public just described in the former reply. The Bars are Corporations submitted to the Public Law ante the rest of free legal aid has a public nature, as we have seen.

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

— To get the legal aid one must accomplish the legal requirements. The possible beneficiaries are the following persons or entities, mentioned by art. 2 of FLAL. That is to say:

1. Physical persons: Spanish citizens, citizens of the rest of the European Union countries and foreigners who live in Spain when they present evidences that they have no money to maintain a litigation.

2. Associations, foundations and consumers organizations in the same case, that is to say, when they have no funds to begin and follow a litigation.

3. Entities who manage the social security system, with no other requirements.

4. Spanish Red Cross, with no other requirements.

5. Public utility associations created to protect disabled people.

FLAL settles in its art. 3 that “lack of economic funds”, in the case of persons, not to earn the double of minimum salary fixed yearly by Spanish Government in the Law of Budgets (currently, between 600 and 700 € per month for Spain). This minimum is referred to all the family of the applicant.

For the case of entities included in number 2, the lack of funds is established when their year earnings do not exceed three times the minimum salary.

This legal aid is supplied very widely. A Sentence of Spanish Constitutional Court (95/2003) suppressed the requirement that foreigners had “legal residence” in Spain, and currently it is only necessary to have residence in Spain, even illegal. As an example, the real case of many illegal immigrants who use to apply for a free legal aid to defend themselves in the deportation procedure (which is not a civil procedure, but administrative). But this examples surely would allow to an illegal resident the possibility to apply for the system and present a civil claim in Spain.

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

— Yes. There are two cases. First one, is referred to persons the earnings of which are only slightly over the amount which makes available the free legal aid. They lack of funds, and cannot be helped with the legal aid. Second one is referred to the cases —more and more common- which have “serious doubts of facts or Law” (art. 394 CPL). In that cases, as we have said, it is possible to win the litigation but not to obtain a costs condemnation. In this last case, costs may represent a great barrier, specially if the amount of the litigation is high.

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?

— This question is very linked to the other. The low amount discourage to make a claim, because of the risk to lose the litigation and condemned to pay all the cost. The best examples are the small claims of consumers, from one to one. In that cases litigation is not feasible. Other case is that in which consumers con joint and make a collective claim (*class action*). Another case is related to litigations outside the country.

Costs strongly grow up and the level of the amount from which the litigation is feasible reaches very high amounts.

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)

— Previously, we want to make an advertisement. We will take in account only the most important items of the costs, which are usually represented by the fees of attorneys and of experts. In Spanish litigations is also compulsory the participation of another legal expert, called “procurador” (Spanish word), who has only the representation of each party. He acts before the courts on behalf of the parties, but does not assume the legal defense. Their fees will also be included. We will design them as “solicitor”. Remember that the fees are established freely by the professionals.

The expressed amounts below are referred only to litigations of a medium degree of difficulty and only to one party, and must be multiplied by two. Amounts are expressed in euros.

- small claim, e.g., (the equivalent of) \$ 1,000

- Attorney: 200 €
- Solicitor: 70 €
- Expert: 150 €
- Total: 420 € (580 \$, approx.)

Under Spanish procedural system, these small claims do not need the participation neither of attorney, nor of solicitor (art. 31 and 23 CPL). Consequently, these amounts are never included in the cost condemnation. They are costs of the litigation (general expenses), but not court costs, and, due to this reason, they are not included in the final result of the litigation. That is the reason because this kind of very small claims

discourage plaintiffs to claim them. If the plaintiff wins he will get 700 € but will have to pay 420 €. If he loses he will receive nothing but have to pay 420 € to the defendant who has win.

- small to medium claim, e.g., \$ 10,000

- Attorney: 1,000 €
- Solicitor: 250 €
- Expert: 200 €
- Total: 1,450 € (1,900 \$, approx.)

- medium to large claim, i.e., \$ 100,000

- Attorney: 6,000 €
- Solicitor: 600 €
- Expert: 1,000 €
- Total: 7,600 € (10,000 \$, approx.)

- large claim, e.g., \$ 1,000,000

- Attorney: 30,000 €
- Solicitor: 3,000 €
- Expert: 4,500 €
- Total: 37,500 € (55,000 \$, approx.)

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?

— The answer will be the same in both cases.

There is not any significant difference between procedural positions of the plaintiff and the defendant. Nevertheless, usually, the plaintiff has to support more costs, because of the principle of the burden of the proof (art. 217 CPL), he is linked to give the best evidence possible of the facts which are the basis of their petitions.

As we have just said, in a litigation of an amount of 100,000 \$, the court costs for each party would be the amount of 10,000 \$ more or less. So that, if the plaintiff loses, he gets nothing and has to pay the double of the said amount (his costs and the costs of the defendant), that is to say, 20,000 \$. And when defendant loses, he has to pay the claimed amount of 100,000 \$, plus 10,000 \$ of court costs of the plaintiff , and another similar amount for his own court costs.

Nevertheless, usually, the attorney of the loser decreases his bill in an important amount (between the 20-25 per 100), due to courtesy and ethical reasons.

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.

Spanish regulation about costs in civil process has been introduced in the year 2000. That is the reason why there is not any movement neither in the Ministry of Justice nor in the Government to modify these rules. At least, we do not know anyone.

Nevertheless, there are several points which can be improved. One of them , is the strange and non logical interpretation made by the Supreme Court of the rules about costs, that exclude of the consideration of court costs the expenses not made inside the process. CPL only estates a few particular rules on the matter, about fees of the experts and valuation of costs and says nothing of another expenses. Nevertheless, the Supreme Court does not consider court costs many expenses caused outside the process, but directly depending and linked to it: travels of attorneys, previous preparation of evidences, before presenting the lawsuit, like getting of certificates or reports of experts. Spanish Supreme Court has a very restricted concept of court costs, which has no legal justification. It would be necessary to widen this idea and include into the court costs,

payable for the loser party, the expenses which are necessary or useful for the final result of the litigation, even they are not produced inside the process, but outside it and indirectly generated by it (i. e., an expert report, made previously to the lawsuit, which currently is excluded by Spanish legal system).