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Loos, M.B.M.

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NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Cost and Fee Allocation in Civil Procedure

M.B.M. Loos

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1. 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 starting point is that the loser pays all costs (Article 237 para. 1, first sentence, Code of Civil Procedure). This is considered to be justified on grounds of procedural risk and policy.¹ This also applies in cases where the losing party was not assisted by an attorney or when he was provided with legal aid on behalf of the state. However, in normal cases, the fees of the other party's attorney(s) will be compensated only in accordance with the so-called liquidated tariff.² This prevents the making of excessive costs.

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 principle, all costs are compensated, provided that they are reasonable. However, with regard to the costs of attorneys, the scheme for liquidated costs indicates that a reward for specific services and acts of the attorney only. Additional costs, for instance based on the fact that in reality, the attorney had to spend an extra amount of time on the case without performing additional procedural acts, are not compensated by the losing party.

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

No, the same rules apply.

¹ Snijders, Ynzonides & Meijer 2002, No. 117.

² Ingelse & Mölenberg 1998, p. 1141.

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?

Witnesses are entitled to be compensated for the costs of travelling and, if need be, of accommodation, as well as for the loss of income. These costs are to be advanced by the party that has summoned them.³

As regards expert opinions that are requested by the court (usually upon a request by one of the parties), the court determines that one or both parties are required to pay an advance of the costs of the expert opinion (Article 195 Code of Civil Procedure). Starting point is that these costs are to be advanced by the claimant, but the court may derogate from this, in particular when facts are to be established for which the defendant bears the burden of proof.⁴

Both the costs of expert opinions and of witnesses are ultimately to be borne by the losing party. The costs involved will depend on how complicated the case is, in particular with regard to the taking of evidence, but are usually only a fragment of the overall costs of litigation. These overall costs are dominated by the attorney fees.

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

The division of costs in case the parties settle, is normally kept secret from the outside world. In practice, the parties will often make an estimate on the chances of winning and losing, and apportion the costs accordingly, or simply agree that each party bears its own costs.

2. Exceptions and Modifications

1. Are there (statutory or other) exceptions to the basic rule (e.g., for specific kinds of situations, cases or parties)?

Article 237 para. (1), second and third sentence, Code of Civil Procedure provides that the court may compensate the costs in full or in part if the parties are married to each other or each other's registered partners or otherwise live together, if they are family in the direct vertical relation, or each other's siblings or the partner thereof. Similarly, the court may compensate the costs in full or in part if the parties have both won and lost aspects of the case

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

No.

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. Where such agreements would be included in standard contract terms that are invoked against a consumer the terms may be considered unfair under standard contract terms legislation. In this regard, such a term may have the effect that consumers are deterred from litigating, implies that it may withhold consumers from invoking their contractual rights or

³ Art. 182 Code of Civil Procedure.

⁴ D.J. Beenders 2009 (*T&C Rechtsvordering*) Art. 196, aant. 2.

from opposing a claim by the other party, which means that the term falls within the wording of point q of the annex to the unfair contract terms directive.

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

Parties are free to represent themselves if the claim is within the competence of the *kantonrechter* (subdistrict court, justice of the peace). This is the case if the claim is no more than € 5,000 (including the interest accumulated until the date of the summons), cases of undetermined value, if there are clear indications that the value is below that amount. Moreover, all cases pertaining to labour law, collective labour agreements, commercial agency, rental contracts and hire-purchase contracts are within the competence of the *kantonrechter*. According to a bill pending before Parliament, in the future all cases with a value up to €25,000, all cases on the basis of a consumer sales contract and all cases on the basis of the Consumer credit act will belong to the *kantonrechter*'s competence.

3. 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 system of liquidated costs is, among other things, designated to discourage excessive litigation. Moreover, according to Article 237 para. (1), last sentence, the court may leave costs that were spent or caused needlessly, outside the normal allocation of costs on the basis of the 'loser pays' principle, implying that such costs will always have to be borne by the party who has incurred them, even if that party has won the case. Where a claim is submitted to the court without prior communication between the parties (*rauwelijkse dagvaarding*), the court may determine that the summons was premature (as the defendant may have been willing to voluntarily perform his obligations and/or to settle the claim). In such case, the court may determine that the costs of the procedure have needlessly been made and refuse to award the compensation of these costs by the defendant.⁵

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?

As of 1 January 2009, the cost of bringing a summons was €72.25.⁶ The court fees depend on the value of the claim and the question which court is competent. Where the *kantonrechter* is competent, the court fees vary (as of 1 January 2009) from € 36 (in case of a claim for payment in a labour case) or €63 in the case of another monetary claim with a value of no

⁵ Stein & Rueb 2007, p. 202-203.

⁶ Cf. *Besluit tarieven ambtshandelingen gerechtsdeurwaarders* of 4 July 2001, *Stbl.* 2001, 325, as amended by the *Regeling wijziging tarieven ambtshandelingen gerechtsdeurwaarders 2009* of 25 November 2008, *Stcr.* 2008, 246.

more than €90, up to €297.⁷ Where the *sector civiel* (the ‘normal’ court for civil cases) is competent (i.e. when the *kantonrechter* is not competent, see above), the fees vary from €110 (in the extraordinary case where the normal court are competent to hear a labour case) to €4,941 in a case of expropriation, where the party is not a consumer.⁸ These amounts are amended yearly. In the case of appeal, higher court fees apply.⁹ Where the competent court is the *kantonrechter*, the defendant need not pay any court fees, in other cases the defendant is required to pay the same amount if he opposes the claim.¹⁰

The costs of witnesses are to be advanced by the party that has summoned them.¹¹ The costs of expert opinions that are requested by the court are to be advanced by the party indicated by the court, usually the claimant (Article 195 Code of Civil Procedure).

Attorney fees are advanced by the party that has incurred them, subject to the contractual arrangement between that party and the attorney. As these costs are generally considerable, these costs may operate as a deterrent for submitting a case to court or opposing such a claim, in particular where the value of the claim is relatively low. In this respect, it should be noted that *Klaassen*, in her national report to the European research project of *Hodges, Vogenauer* and *Tulibacka* indicated that the hourly fees in the Netherlands vary from €75-700.¹² Even the most simple procedure will take several hours (including the time spent at the intake of the case and the preparation of the trial), implying that the hourly would have to be multiplied by at least 3 or 4 to give an impression of the costs of legal assistance. Indicative is the research by Van der Torre, dating back to 2005. He estimated the costs for legal assistance between €979-1,400 for a commercial lawyer in an ordinary case, where the total amount of time invested in the case does not exceed 6.6 hours.¹³ This would imply an hourly fee of (on average) €180.

4. The Determination of Costs and Fees

1. What determines the amount of court costs - the type of court? The amount in controversy? Other factors?

The court fees are primarily determined on the basis of the value of the claim, but specific (relatively lower) court fees are charged in the case of labour cases and in family law cases.

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?

The fees of attorneys are to be determined on the basis of the contractual agreement between the parties. Where the parties have not determined the amount of the fee, the client is required to pay the ordinary fee charged by the attorney, or – if no such fee may be established – a reasonable fee, cf. Article 7:405 para. (2) Civil Code.

⁷ Cf. Art. 2 para. (2) sub 1° *Wet tarieven in burgerlijke zaken*.

⁸ Cf. Art. 2 para. (2) sub 2° *Wet tarieven in burgerlijke zaken*.

⁹ Cf. Art. 2 para. (3) *Wet tarieven in burgerlijke zaken*.

¹⁰ Cf. Art. 2 para. (1) *Wet tarieven in burgerlijke zaken*.

¹¹ Art. 182 Code of Civil Procedure.

¹² Hodges, Vogenauer & Tulibacka 2009, p. 55 (Annex III).

¹³ Van der Torre 2005, p. 55.

In practice, several ways of calculating the fee are used. Most common is a fee based on an hourly tariff. It is allowed to agree to a different hourly tariff in a case where the case is won and the case where the client loses the case. Parties may also agree to a fixed price for the services of the attorney. It is not allowed to agree to a tariff based on 'no win, no fee'.

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 ultimately decides on the amount of the costs that the losing party is to compensate the winning party. As indicated above, the court has some discretion. The decision is an integral part of the judgment.

5. 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?

Contingency fees and no win-no fee arrangements are not allowed in the Netherlands. Article 25 para. (1) of the *Gedragsregels 1992* determines that the attorney is required to demand payment of a reasonable fee, taking into account all circumstances. Para. (2) adds that the attorney may not agree that the client is only required to pay if a certain result is achieved (no win, no fee). Moreover, the attorney may also not agree to a fee determined as a percentage of the result achieved in court (para. (3)). The *Orde van Advocaten*, the organisation of attorneys, which has regulatory powers in this matter, contemplated an experiment with 'no win, no fee' in of personal injury cases, but the Dutch Council of Ministers (cabinet) declared that it would forbid the experiment in a press release of 4 March 2005, as the experiment was seen as contrary to the principle of good professional practice, which requires the attorney to avoid any risk of a conflict of interest. According to the responsible Minister of Justice, in the case of 'no win, no fee', the attorney has an important financial interest in the outcome of the case, which results in a clash between his financial interest and his obligation to properly represent the client. Moreover, it may lead attorneys to only litigate cases with a high chance of success or cases with a high financial value, and to disregard cases with a lower chance of success or with a lower financial value, as the chance of a (sufficient) financial reward would become too low.¹⁴ The experiment never took place.

¹⁴ Ministry of Justice, *Kabinet geen voorstander van no cure no pay*, press release 4 March 2005, available at http://www.regering.nl/Actueel/Persberichten_ministerraad/2005/03/Kabinet_geen_voorstander_van_no_cure_no_pay (in Dutch; lastly checked on 30 March 2010).

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?)

A client may sell a claim, as the claim represents monetary value. In practice, companies often sell their claims to attorneys or to bailiffs, who then claim the amount themselves in their own name.

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

The *Wet collectieve afwikkeling massaschade* provides the possibility of a collective settlement being declared binding on all victims of the party or parties liable for a damage, but an individual may opt out of the settlement.¹⁵ The individual consumers that are represented by a consumer organisation bear no costs for the procedure to declare the settlement binding. However, in practice the consumer organisation negotiating the settlement is created ad hoc to represent the interests of its members and is financed by a (relatively modest) membership fee. These membership fees serve to facilitate the process of negotiating the settlement (and thus to pay for the attorney costs on the part of the ad hoc consumer organisation). Often, a settlement also includes an arrangement for the compensation of these costs.

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?

Legal aid insurance is freely available in the Netherlands and becoming increasingly popular. In the highest income classes, in 2003 53.6% of all respondents to an enquiry into the manner how disputes are settled, indicated they have legal aid insurance, as against 22.6% in the lowest income class.¹⁶

6. 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)?

Under Dutch law, the starting point is that each party bears its own costs during the court procedure.¹⁷ For financially less prosperous consumers (citizens), these costs weigh more heavily than for parties that have sufficient finances. As a result, there is a risk that such consumers for no other than financial reasons abstain from defending their rights in court. This obviously puts these consumers access to the court system in jeopardy.¹⁸ The Legal aid act (*Wet op de rechtsbijstand*) aims at securing the access to the court system of consumers with a low income. On the basis of this act, a consumer is eligible for legal aid if his yearly income in 2007 was no more than €23,800 before income tax, but after deducting the costs of interest for the mortgage for a house, in case the consumer was single and does not have a

¹⁵ See extensively Loos 2008.

¹⁶ Van Velthoven & Ter Voert 2003.

¹⁷ Hugenholtz & Heemskerk 2006, No. 128.

¹⁸ *Ibidem*.

patrimony of more than € 20,661. (For consumers that are married or live together, other amounts apply.) The monetary ceiling for people eligible for legal aid is only slightly above the minimum wage, which amounts to €18,000 on the basis of a fulltime employment (as of 1 January 2009). Moreover, each consumer that wishes to invoke legal aid is required to pay a contribution to the costs of legal aid. The amount of the contribution depends on the income and resources of the consumer and varies (as of 1 January 2009) from €98 for the poorest of consumers to a maximum of €732 for the party with the highest income and patrimony who is still eligible for legal aid. Drastic financial cutbacks on the money invested in the legal aid system have already been announced, restricting the access to legal aid even further.

When a consumer who is awarded legal aid loses the case, he is nevertheless required to pay for the (liquidated) costs of the other party.¹⁹ Given the risk of having to pay a high amount of costs, such a consumer may hesitate to submit a claim to the court or to defend his position against such a claim.

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

In particular law students offer legal assistance free of charge through *rechtswinkels* and *wetwinkels* (legal aid clinics). Law firms may offer pro bono services, but only relatively few lawyers do so on a regular basis. In fact, 'pro bono' implies that they offer their services on the basis of the Legal aid act, which means that they will receive a (rather modest) remuneration from the state.

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

An application for legal aid is evaluated by the *Raad voor de Rechtsbijstand* (Council for Legal aid). The Council determines whether the consumer is eligible for legal aid and whether the claim of the consumer justifies the involvement of legal aid by an attorney or mediator.

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

Yes. In consumer cases, the value of the claim in practice prevents consumers from going to court.²⁰

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?

See under 4.

¹⁹ Hugenholtz & Heemskerk 2006, No. 129; Stein & Rueb 2007, p. 204.

²⁰ Cf. Loos 2010, par. 3.5.

7. Examples

1. small claim, e.g., (the equivalent of) €1,000

- Summons €72.25²¹
- Court fee for plaintiff €158
- No attorney necessary

Total amount of costs: € 230.25 if neither party makes use of an attorney, otherwise the amount of the costs will probably be higher than the claim itself is, plus the costs of gathering evidence.

2. small to medium claim, e.g., €10,000

- Summons €72.25
- Court fee for plaintiff €313
- Court fee for defendant €313
- Fees for attorneys: on the basis of an hourly fee of €180 and the involvement of 2 lawyers, each working 6.6 hours on the case:²² €2376

Total amount of costs: €3,074.25, plus the costs of gathering evidence.

3. medium to large claim, i.e., €100,000

- Summons €72.25
- Court fee for plaintiff €2,200
- Court fee for defendant €2,200 (€1,185 if the defendant is a natural person)
- Fees for attorneys: same calculation as above; if one assumes that for such a case, the double amount of time is needed to prepare and try the case, the amount of attorney fees is €4,752.

Total amount of costs: €9,224.25, plus the costs of gathering evidence.

4. large claim, e.g., €1,000,000.

Idem, but again the amount of attorney costs will probably rise again as well.

²¹ All figures apply as for 2009. More recent figures are not available to me at this moment, but are expected to be slightly higher.

²² See on the calculation of these numbers above, under 3.2.

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