

At what cost?

**A Lovells multi jurisdictional
guide to litigation costs**



About us

Operating from 29 offices in Europe, Asia, the Middle East and the United States, Lovells is one of the world's leading international law firms. We advise many of the world's largest corporations, financial institutions and governmental organisations.

We regularly act on complex matters involving a client's regulatory affairs, multi-jurisdictional transactions and business ventures as well as some of the most high-profile commercial disputes.

With over 115 partners and 400 associates with litigation capabilities operating from 22 offices in 17 jurisdictions, the Lovells' Dispute Resolution group is a truly global practice. Lovells is recognised as one of the leading international law firms for all major litigation, international arbitration and dispute resolution work. Our Dispute Resolution practice is unmatched in terms of its size, international reach and breadth of experience.

Subject to regulatory clearance, from 1 May 2010 we will be combining with US-based international law firm Hogan & Hartson to form a new firm, Hogan Lovells. The new firm will have around 2,500 lawyers operating out of more than 40 offices around the world. We believe that it will build on the recognised and highly-regarded strengths of both Hogan & Hartson and Lovells.

Hogan Lovells will offer:

- a unique, high quality transatlantic capability, with extensive reach into the world's financial and commercial centres
- particular and distinctive strengths in the areas of dispute resolution, regulatory, antitrust, corporate, finance, intellectual property and real estate
- access to a significant depth of legal knowledge and resource in many key industry sectors, including energy, financial services, telecommunications media and technology, life sciences and pharmaceuticals, consumer goods, real estate, transport, natural resources and infrastructure.

For existing clients of Lovells, the combination will bring either new or greater access to legal advice across the US in cities such as Washington DC, New York, Houston, Los Angeles and San Francisco as well as new markets around the world including Abu Dhabi, Berlin and Caracas.

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Foreword

The cost of litigation is undoubtedly one of the greatest factors in persuading litigants either to settle, or just stay away from the courtroom altogether.

All judges are fallible, and no prudent litigant will go to law (or arbitration) with a belief in a guarantee of success. Costs, however, like death and taxes, are an inevitable consequence of suing or being sued.

So it is perhaps surprising that the incidence of costs in jurisdictions other than one's own home state is frequently so poorly understood by litigants – and their advisers.

I started my career in a field of marine insurance which was rather specialised. "F.D&D.", or "Freight, Demurrage and Defence" cover offered by a mutual insurer: a P&I Club. The claims involved requests for advice and support from the Club's in-house lawyers, but, more substantially, for coverage of legal costs incurred in disputes associated with the shipping industry. Freight and demurrage certainly formed a substantial part of the range of issues that gave rise to disputes, but by no means the whole picture. Disputes with insurers, agents, charterers, suppliers, port authorities, directors, surveyors, classification societies and all the rest spawned a huge volume of contentious activity; since the vessels concerned went all over the world, so did the claims. Within two years, my portfolio of active claims exceeded 2,000 files, on which lawyers all across the world were busily generating fees, invoicing the insured members, who passed the legal bills to the Club for settlement under their "Defence" coverage.

The lawyers' billing practices were many and varied; as was the quality and the frequency of proper advice, in many cases.

The costs, however, were invariably very active, as the members of the Club spurred on their lawyers to greater and faster efforts in the pursuit or defence of the claims. Bills of substantial proportions would build up. My job was to approve the claim for payment, but also to give direction where the economics or the merits of the dispute made no sense or were otherwise not in the interests of the Club's membership as a whole. It was a full time job in all senses.

Looking back, however, 30 years on, it is striking that I had no guidance or reference book whatsoever that could help me understand the basis on which these exotic foreign legal enterprises were entitled to bill their clients; court costs were regarded as a tax on litigation; and recovery of costs from the other side a rare and celebrated event. The costs of pursuing or defending claims were usually, if not always, ascertained only after they had been incurred, and with dozens of very active jurisdictions around the world's coast-lines, any attempt at a comprehensive analysis of costs regimes would have been a hopelessly expensive exercise. We flew by the seat of our office chairs, and by the life-long experience of our weary colleagues. By the end of two years, I had a working knowledge of the costs regimes of no more than a dozen overseas jurisdictions; but even with these, the depth and detail was patchy, and much of the learning anecdotal rather than studied.

I suspect that there are still today many risk managers, claims handlers, finance directors and entrepreneurs who find themselves embroiled in occasional or persistent bouts of litigation in the places of the world with which they are least familiar. Some will have studied the incidence of costs in great detail in some, but not all, of these jurisdictions. But a wide-ranging and systematic treatment of the issue of litigation costs around the world is unlikely to be available to the average litigant.

Prompted by the comprehensive study of the current regime of costs in England and Wales conducted by Lord Justice Rupert Jackson, it occurred to me and some of my litigation colleagues that there was an untapped fount of knowledge as regards costs, in the form of the network of legal experts with whom we were all regularly in touch, both through our own overseas offices or in correspondent law firms.

We determined to draw some of this learning together, and to explore the basics, the peculiarities and the similarities between litigation costs regimes in a wide range of jurisdictions, both those of a "common-law" or "Anglo-Saxon" ethos as well as "civil law" and codified regimes.

We were surprised and relieved in equal measure to learn of the similarities and the oddities that occurred around the world; many prejudices were confirmed; a few pre-conceptions overturned; much solid detail was garnered and collated by a team of contributors, correspondents, sub-editors and editors.

The results are contained in the volume you have before you:

At what cost? A Lovells multi jurisdictional guide to litigation costs

The Guide covers 56 jurisdictions. Its contents, methodology of analysis and some resulting themes and conclusions are summarised in the overview of findings on pages 4 – 7.

We offer it as a pilot study, albeit one of substantial proportions; we propose to extend the global coverage to other key jurisdictions in subsequent editions, and to deepen and broaden the range of topics by reference to the reactions of and feedback from our readership.

I should like to thank all of the contributors, their colleagues and firms who have allowed them to spend the time and effort in contributing to this report. For editorial infelicities, I offer our apologies; for any misunderstandings and persistent emails chasing for drafts, and comments, our thanks for your patience and persistence.

In particular, I should like to thank Graham Huntley, my co-editor and partner, but most of all, Sara Bradstock, the producer and director of this publication.

Peter Taylor, partner

Introduction and approach

The credit crunch sparked anticipation in many countries of an increased level of disputes. It also sharpened the attention in the business and legal worlds about the expense of litigation.

Our 2008 survey *The Shrinking World* showed that even before the onset of the credit crunch, General Counsel were concerned about the increasingly global nature of disputes. In particular, one-third of respondents (31%) noted a trend towards more multinational disputes. A slightly smaller number (25%) cited a lack of information about the relevant law and procedures across jurisdictions as one of the most significant issues facing them when managing such disputes.

It is therefore clear that businesses, and lawyers advising them, need to grapple with the expense of litigation as well as the variations in the costs regimes around the world designed to manage and enable recovery of the expense. This is so not only for corporations faced with often complex variations in the rules concerning recovery, funding opportunities, predictability and enforcement, but also for smaller claimants who can face an increasingly changing consumer scenario in different jurisdictions in which they may operate.

A comprehensive survey into the legal and procedural regimes for funding and recovering costs in all the major business jurisdictions is thus overdue and more needed now than ever before. It is therefore hoped that the Lovells' survey will be of real and practical assistance to businesses and lawyers around the world. Our aim is to provide a tool which will enable informed decisions to be taken as to where to conduct litigation in cases where costs are a central issue, and which exist. The choice is not a real choice without information and clarity, and our report has been structured in a way to achieve this.

The report therefore covers over 50 jurisdictions and benefits from input from expert lawyers to enable a comparison to be made of issues such as:

- the recoverability of litigation costs by both claimants and defendants
- the manner in which costs are recovered, if at all
- factors taken into account where fixed costs are recoverable only
- what "costs" are for the purposes of recoverability
- the enforcement of costs orders
- the setting off of costs orders
- interest on costs
- the types of permitted costs arrangements between client and lawyer
- the funding arrangements available in each jurisdiction – such as insurance, legal aid and third party funding.

The publication of this report in England and Wales comes hard on the heels on the review of costs carried out by the Right Honourable Lord Justice Jackson. As part of the research carried out, he and his team travelled to major jurisdictions to learn how costs were controlled and managed. The result of that was the most comprehensive review of costs ever carried out in England

and Wales, and a set of proposals which will mark the first truly significant attempt to manage costs through the procedural vehicle of litigation and the environment of regulation that is growing up in this country. If nothing else, this report will enable readers to compare how the developing regime in England and Wales compares to the major international jurisdictions.

Our basic approach was to compile information from and relating to each jurisdiction in response to a standard list of questions. We obtained input from each jurisdiction from two sources: the Dispute Resolution practices in each of Lovells' global offices, and from other jurisdictions we obtained answers to the standard questions from leading and senior litigation practitioners in law firms with known Dispute Resolution capability and reach. A full list of the law firms who participated in the project is set out later in the document.

Some countries have separate jurisdictions for separate states, most notably Australia, Canada and the United States. In those instances we have identified the key jurisdictions and obtained a similar level of input from leading practitioners. Despite the variations across each jurisdiction, broadly there is a common position throughout the country.

In some countries, such as the United Arab Emirates and the Ukraine, there are distinctly separate litigation jurisdictions. Therefore, in these instances the input has been obtained and reported on separately.

The input from each jurisdiction was obtained by using a standard questionnaire. This ensured consistency of approach. Lovells then assimilated the answers to the questions and issues raised into a common style and format, producing for each jurisdiction:

- very summary answers to questions seeking an affirmative or negative response, for example, "yes" or "no", which were then cross-referenced to:
- more detailed explanations for the answers applying to that jurisdiction which were then rechecked by the relevant practitioners in each jurisdiction.

The result is the quick reference table (pages 8 – 26), cross referenced to the country by country detailed responses (pages 28 – 193).

In order to ease review and assimilation of the information, the Guide uses common terminology to identify specific topics, issues or parties, even though different terminology is used across the jurisdictions. Thus, and by way of example, in both the questionnaire and this Guide:

- "**Costs**" means the costs incurred by a party during the course of litigation in connection to that litigation, and which include, but are not limited to, costs that the party has paid to its lawyers (including solicitors, counsel and advocates) to agents, to courts, to process servers and in respect of disbursements (for example, photocopying, expert witness, travel, translation, notarial services and witness attendance etc.)

- **“Lawyer”** is used to describe the legal adviser, including the solicitor, counsel, barrister, advocate, attorney or other legal practitioner
- **“Claimant”** is used to describe the party bringing the claim, including the plaintiff

unless the term is otherwise defined or specified within the relevant country commentary.

This Guide is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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The information contained in this report is current as at February 2010.

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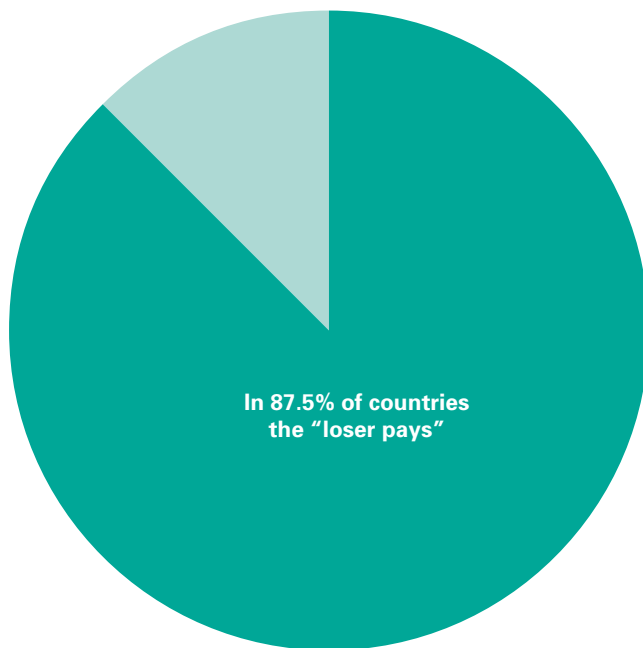
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Overview of findings

Figure 1: Jurisdictions where the “loser pays”



Surveyed jurisdictions where the “loser pays”

The global costs review reveals that some of the central features of the costs regime in England and Wales are present across the many of the world’s main business jurisdictions. Perhaps the most important feature is the general principle that the “loser pays”. This generally applies in 49 of the 56 surveyed jurisdictions (Figure 1). In a few others very limited costs may be “shifted” to the loser.

Perhaps the best known perceived example of a jurisdiction without a loser pays rule is the USA, but even this has to be treated with caution given that damages in that jurisdiction are often inflated to levels that more than compensate the costs incurred. Japan is a less well understood example of the jurisdiction where lawyers’ fees are not recoverable in any event. As a further contrast, in Taiwan, the fees are recoverable only when the lawyer has been appointed by the court.

In about 75% of jurisdictions the costs that can be recovered include most of the range of items that would normally be included within the recovery in England and Wales. Thus, lawyers’ fees, counsels’ fees, agency fees and disbursements such as copying charges and witness expenses are recoverable in the majority of instances where costs are permitted to be recovered (Figure 2).

As to the level of costs which may be recovered, here the variation is greater. Businesses will therefore wish to pay more attention to jurisdictions where costs recovered are closer to the full costs incurred by the business, in comparison to those jurisdictions where costs may be fixed or capped.

The survey established that in just under 40% of jurisdictions reviewed, the amount of costs recovered are fixed by reference to the value of the amount in dispute. In those instances there is a direct correlation between the value and the amount recovered.

Many other jurisdictions (around 32%) treat the value in dispute, or the issues at stake, as a relevant factor in determining the amount of recoverable costs. However, in these additional instances for the most part those factors have relatively little weight in determining the overall reasonableness of costs.

England and Wales falls into this latter category. But even here, there is a growing trend towards emphasising the value of a dispute in determining the level of recoverable costs. This features highly in the list of conclusions and recommendations in the report of Lord Justice Jackson dated 14 January 2010. It is clearly a growing trend worldwide, albeit one which at the present time is having less impact on the largest and most complex business disputes than in smaller lower value cases.

Of particular interest for businesses is the widespread scope for a client to agree a special costs arrangement with its own lawyer, irrespective of the regulation of recoverable cost. This is permitted in around 89% of the jurisdictions reviewed (albeit with some limitations and/or restrictions). This includes, in nine jurisdictions, the scope for variations of “no win, no fee” arrangements (Figure 3).

Given the increasingly rigorous financial disciplines applying to businesses, it is notable that interim awards of costs can be obtained in 46% of jurisdictions, and to a more limited extent in a further 12% of jurisdictions. This leaves at least one-third of jurisdictions where costs can be recovered only when proceedings come to an end. But it will be of some comfort that in at least three-quarters of jurisdictions the conduct of a party can lead to costs being increased or decreased from the levels that would otherwise be recovered.

Figure 2: Jurisdictions allowing the recovery of the range of items normally recoverable in England and Wales

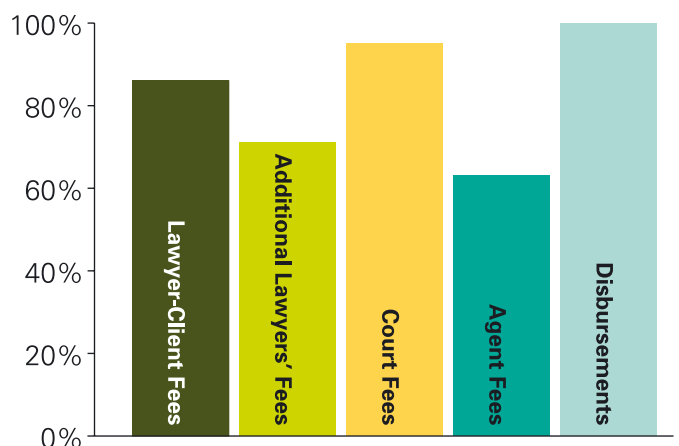


Figure 4: Is interest payable on unpaid costs?

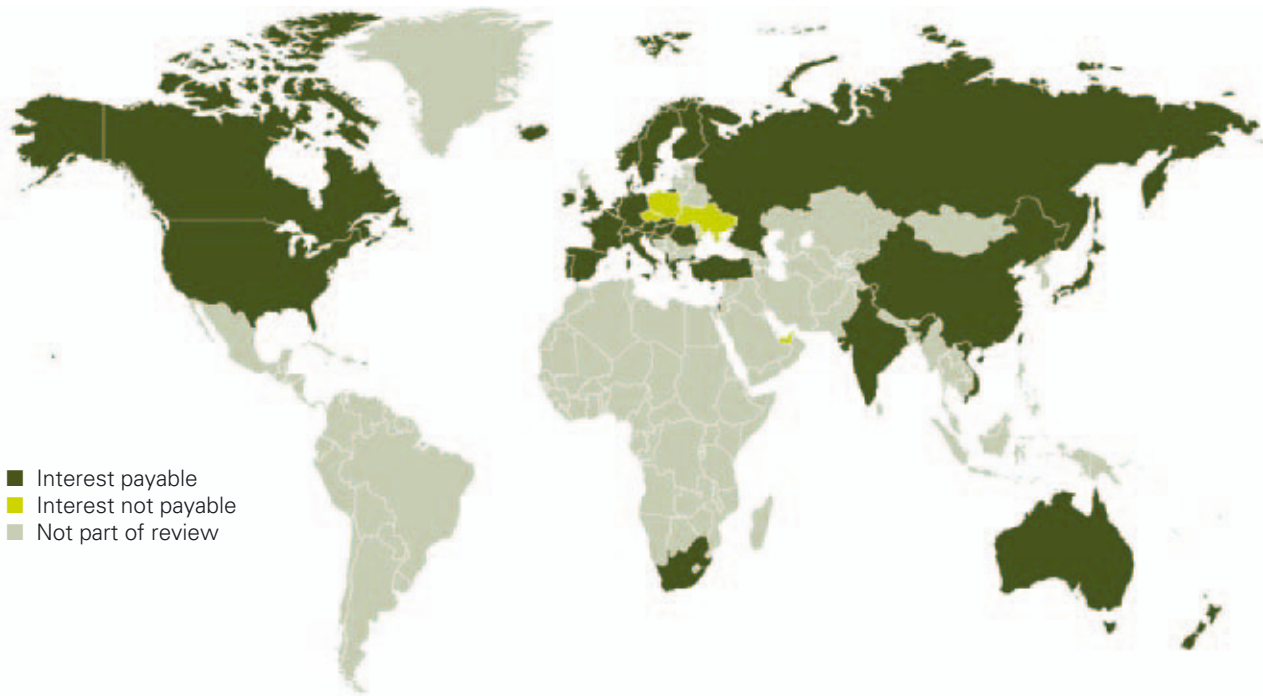


Figure 5: Can costs be insured?

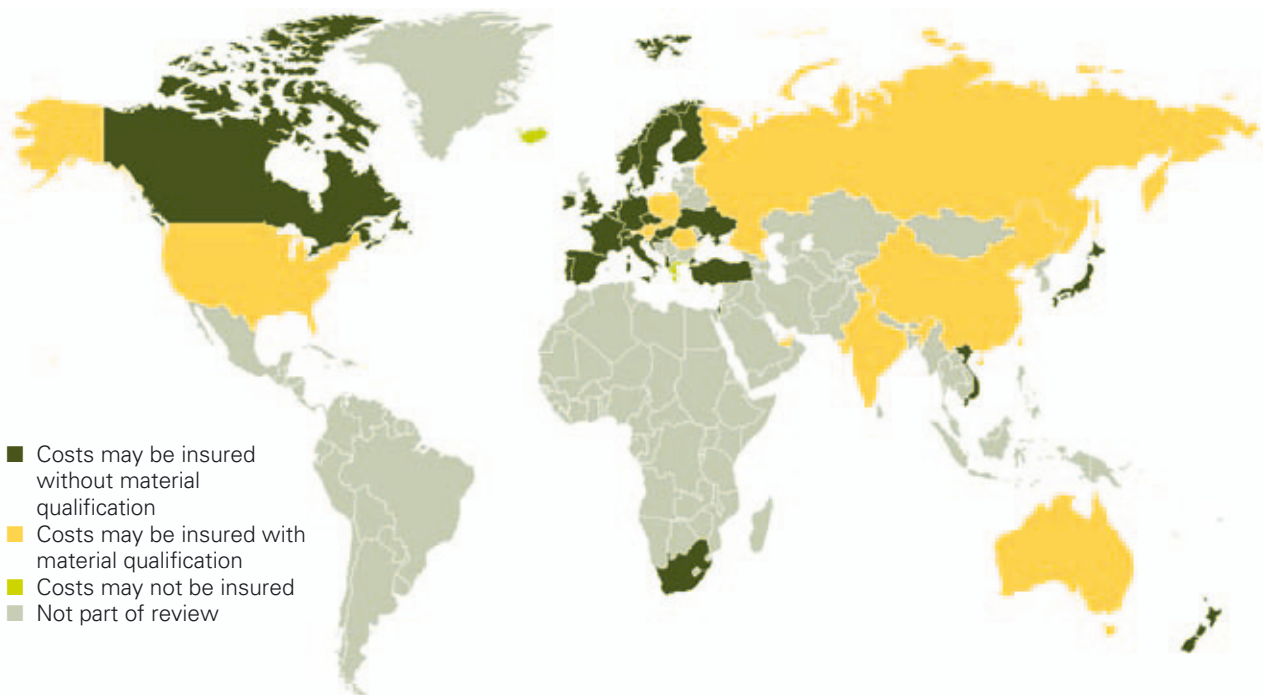
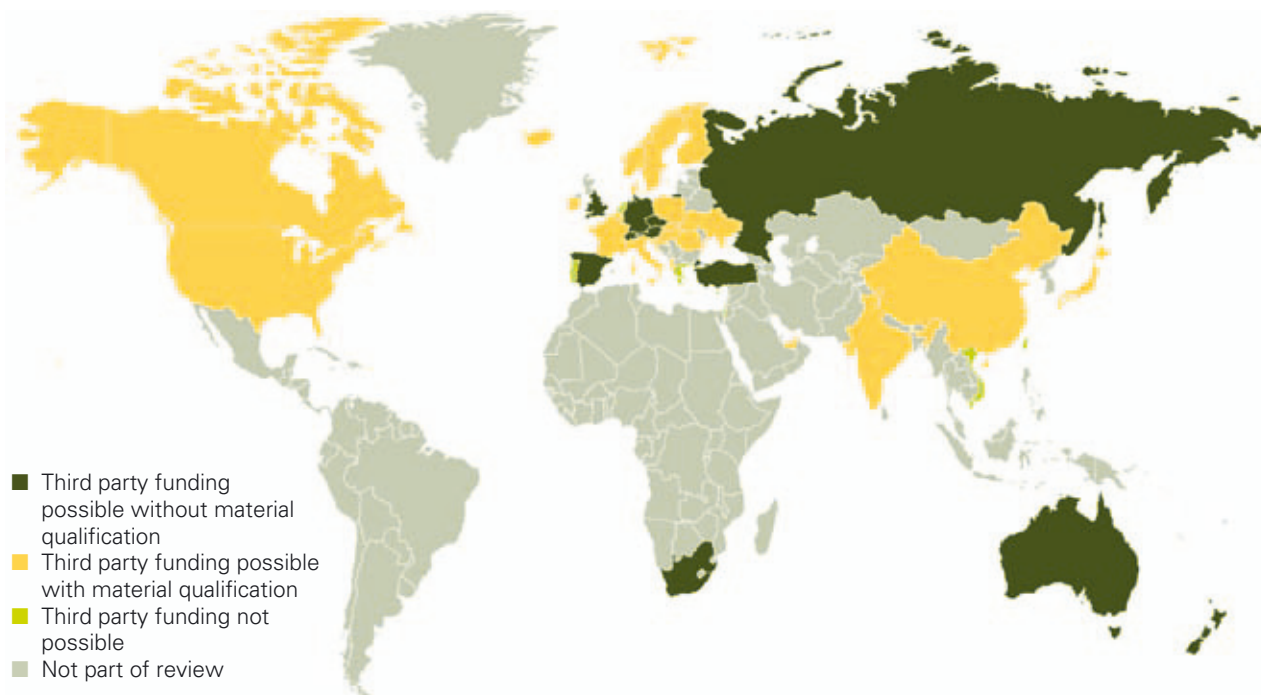


Figure 6: Is third party funding of claims available?



Malta

1. Recoverability of costs

1.1 Can costs be recovered by a party to civil litigation?

Yes.

Only lawyers' fees, legal procurators' fees, court expenses and any other court approved expenses that may be recovered.

1.2 Does the losing party usually pay the successful party's costs?

Yes.

Generally, the successful party recovers costs from the losing party. The court may also award a percentage of the total costs, for example, costs may be borne one-third by the claimant and two-thirds by the defendant.

1.3 Can costs be ordered to be paid to, or by, a non-party?

No.

2. Details of recoverability of costs

2.1 On what basis are costs recoverable?

Costs are established by law in a tariff. The tariff is found as a schedule to the Code of Organisation and Civil Procedure.

The tariff is applicable, although the court may apportion costs at its discretion. Apportionment generally takes place in tort-based actions where the court has the discretion to share costs on the basis of the fault of each party. For example, in a case regarding a traffic collision, the injured party may be required to pay a third of the costs if his actions contributed to the collision in question.

2.2 Is the amount of recoverable costs fixed?

Yes, in part (see question 2.3).

It is fixed according to the tariff.

2.3 Is the amount of recoverable costs calculated by reference to the amount in dispute?

Yes.

A tariff is set out in the Code of Organisation and Civil Procedure.

2.4 What can be recovered as "costs"?

Lawyer – client fees	Yes, however these are limited to those applicable under the tariff and as billed by the Court Registry. Lawyer's and legal procurator's fees, as established by tariff, are both recoverable.
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Additional lawyer fees (for example, counsel fees or trial advocate fees)	No.
Agency fees (for example, London agents, local agents, appellate lawyer, bailiff/process-server)	No.
Court fees	Yes.
Disbursements (including, but not limited to, photocopying, expert witness, travel, translation, notarial, witness attendance etc.)	Court expenses, photocopying, expert witness, translations are all recoverable. Any expense is recoverable so long as such expense is ordered by the court.

3. Particular costs issues

3.1 Can a party agree with its own lawyer, a special costs arrangement?

Yes.

Hourly or other fixed rates may be agreed, however no stipulations "quotae litis" may be made (that is, fees cannot be agreed on a contingency, or percentage of recovery basis).

3.2 Which tribunal resolves costs disputes and how?

The same court which decides the matter being litigated.

3.3 Can a party be required to provide security for costs (or some other sum) in advance of costs being decided?

Yes.

Security for costs is only required in the case of an appeal from a judgment given by the First Hall Civil Court, and therefore on an appeal before the Court of Appeal as a superior jurisdiction.

Security for costs shall be in an amount determined by the registrar on a case by case basis, after taking into consideration the claims made in the sworn application, the claims made in the appeal application and also the taxed bill of costs for the first instance case. There is therefore no strict formula used for this type of security.

Security for costs is to be produced and deposited in court within 12 months from the date of the notification of the amount to be deposited or, if the appeal is to be heard earlier than 12 months from the notification herein mentioned, not later than two days before the date set for the hearing of such appeal.

4. Costs awards

4.1 Can interim awards of costs be obtained?

No.

4.2 Can an award of costs be increased or decreased by reference to such matters as a party's conduct of the case?

No.

A judge may not vary costs, although he may apportion them (see question 2.1).

4.3 How are costs awards enforced?

In the same manner as enforcement of the judgment, including executive warrants.

4.4 Can a costs award be set off against a monetary judgment?

Only after a judicial intimation for payment of unpaid costs and claiming interest thereon.

4.5 Is interest payable on unpaid costs?

No. Unless a judgment specifically states so (which is unusual) interest does not automatically accrue on unpaid costs.

5. Costs of an appeal

5.1 Are costs of an appeal treated differently?

Yes.

Costs for an appeal are fixed according to Article 2(2) of Tariff A.

6. Funding of civil and commercial claims

6.1 Can costs be insured?

There is no specific insurance for judicial costs. However, in certain circumstances where an insurer has been subrogated in the rights of the insured for purposes of litigation, the insurer will incur the risk relating to such costs.

6.2 Is legal aid available?

Yes, for a natural person only.

Appointment of a lawyer and legal procurator to represent the applicant can be made.

It is available from the Advocate for Legal Aid.

All costs of the trial are covered, for civil matters.

Article 912 of the Code of Organisation and Civil Procedure provides certain restrictions. These are:

- that the applicant does not possess property of any sort the net value of which exceeds circa €7000
- that the applicant's yearly income is not more than the national minimum wage.

6.3 Is third party funding of claims available?

No.

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