Lovells

At what cost?

A Lovells multi jurisdictional guide to litigation costs

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 over-turned; 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 infelicitudes, 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.

The content of this publication has been created by the individual contributors. The views expressed are theirs and unless specifically stated are not those of Lovells LLP. Whilst every care has been taken to ensure the accuracy of this work, it is not intended to replace legal advice and no responsibility for claims, losses or damages arising out of any use of this work or any statement in it can be accepted by the authors or Lovells LLP.

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

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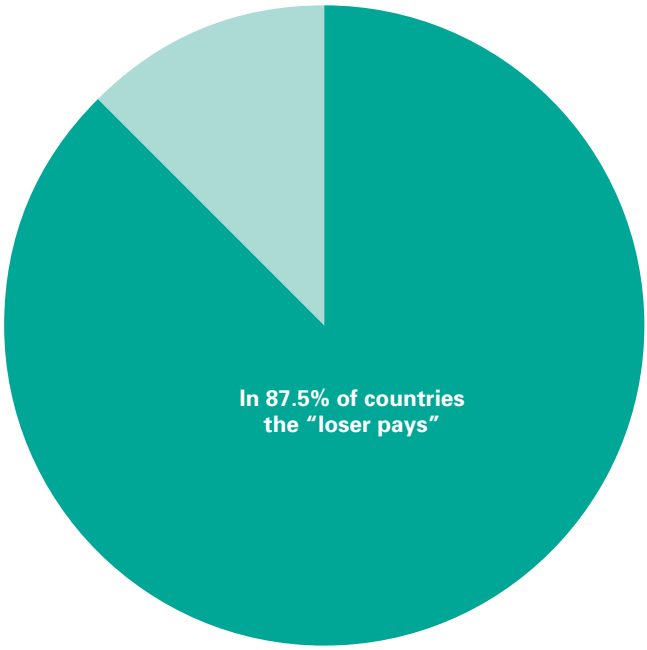
Overview of findings

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.

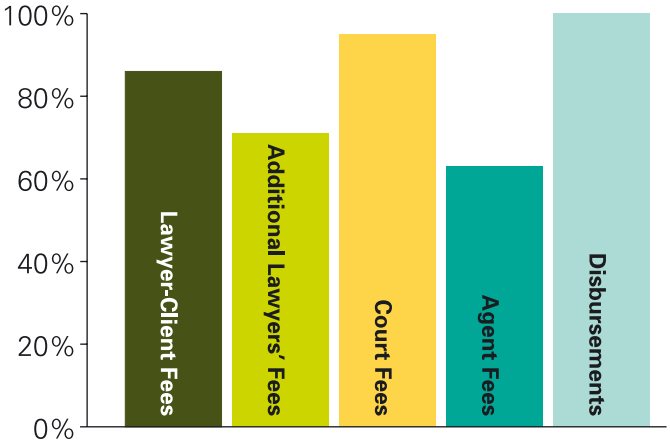
Many other jurisdictions (around 32%) treat the value in dispute, or the issues at stake, as a relevant factor in determining the amount of recoverable costs. However, in these additional instances for the most part those factors have relatively little weight in determining the overall reasonableness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



More worryingly, in around 16% of jurisdictions it would appear that interest is not payable on unpaid costs orders (Figure 4). This creates potentially serious business issues for parties unable to obtain the fruits of their litigation labour. Businesses should therefore make use of the information in our report on how costs awards are enforced globally.

Businesses wishing to enter into partnering relationships with third party funders to support litigation would be interested to note that over half of jurisdictions surveyed permit costs to be insured by a third party. In around 38% of further jurisdictions there is limited scope for this. The trend towards worldwide insurance costs is therefore strong and apparent (Figure 5). That said, our research establishes that in practice the market for insurance and the ability of the legal profession to take advantage of it means that the level of take-up is much more limited.

Outside insurance, there is more qualified scope for third parties to fund litigation claims. In around one-quarter of jurisdictions third parties are permitted to do so without significant qualification. In just under half of the jurisdictions surveyed the scope to do so exists, but is heavily qualified by what would appear to be appropriate levels of regulation (Figure 6).

These are some of the key findings which emerge. The review provides scope for many other themes and conclusions to be extrapolated.

Figure 3: Can a party agree with its own lawyer, a special costs arrangement?

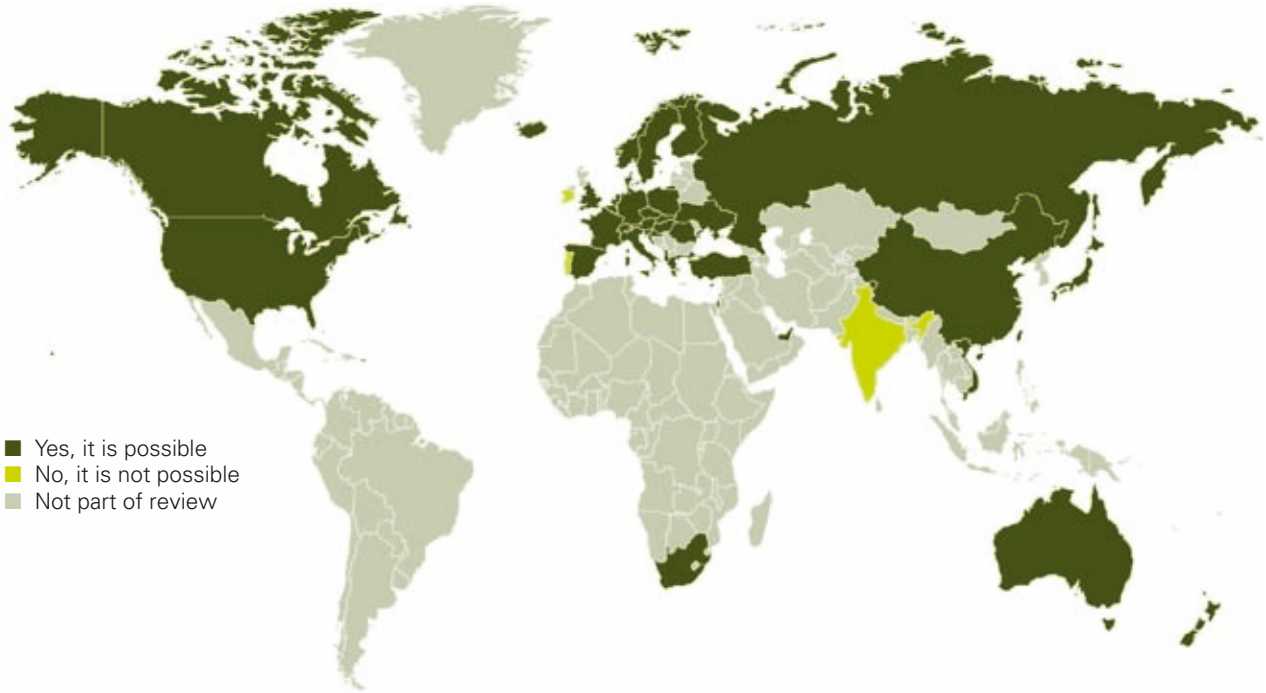


Figure 4: Is interest payable on unpaid costs?

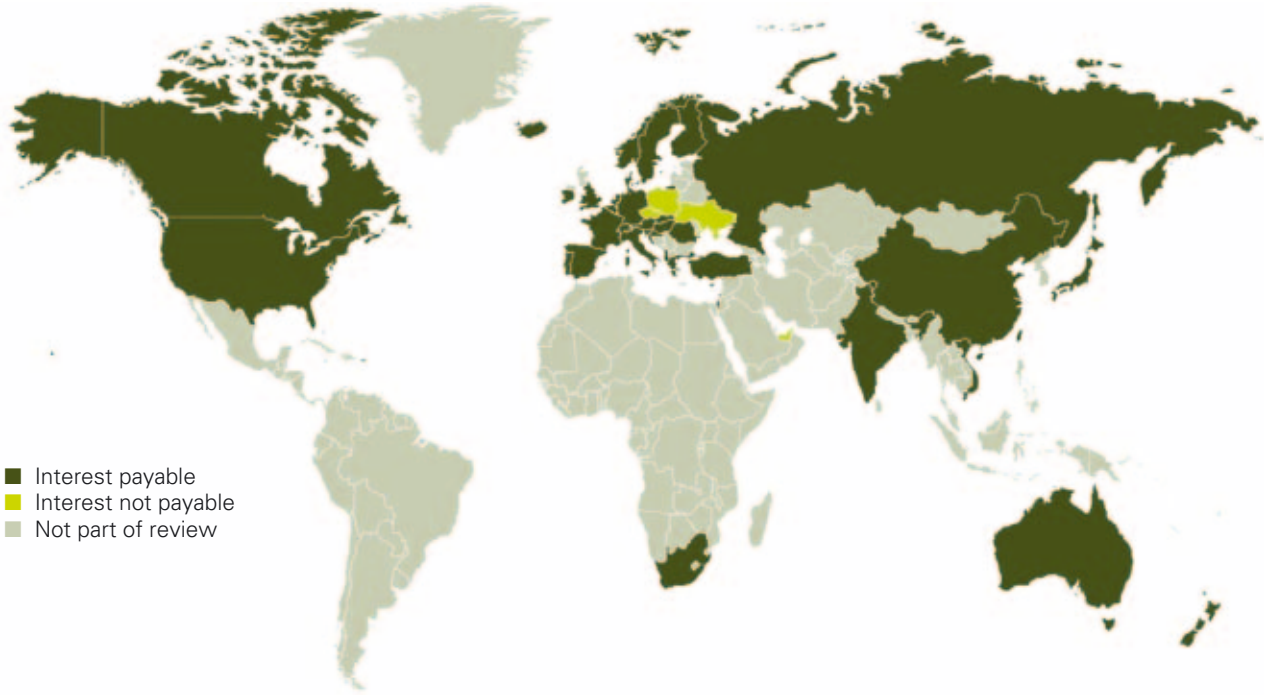


Figure 5: Can costs be insured?

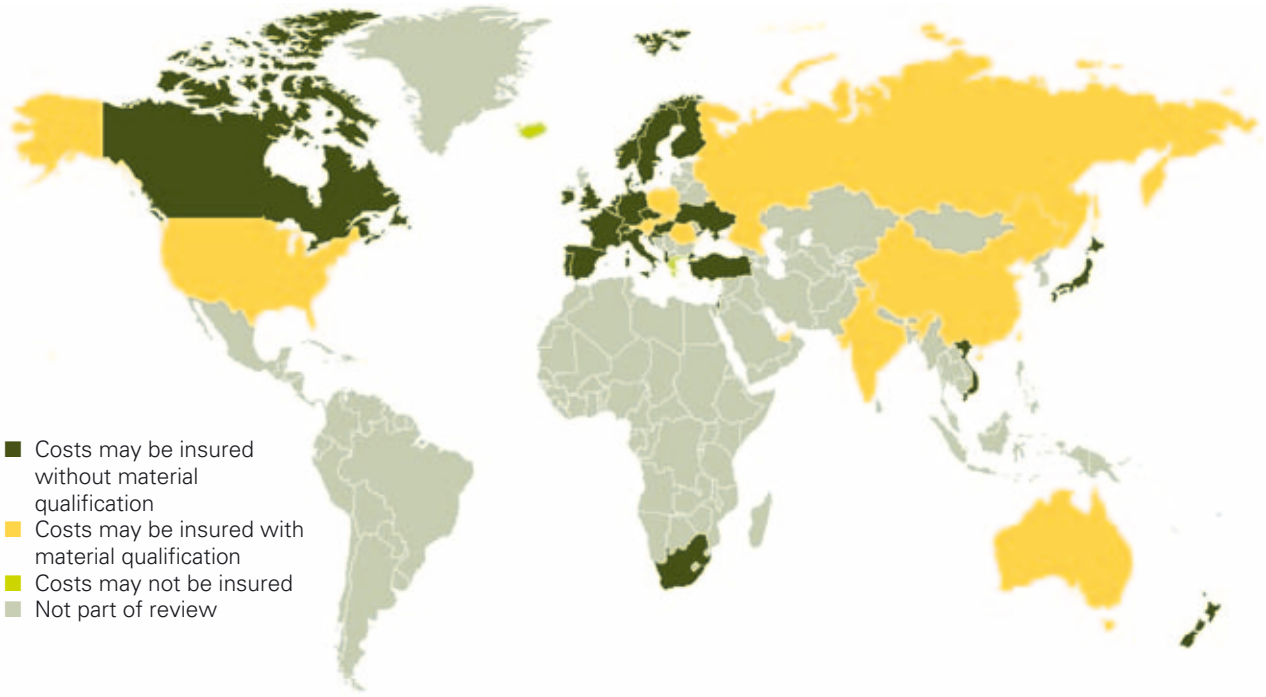
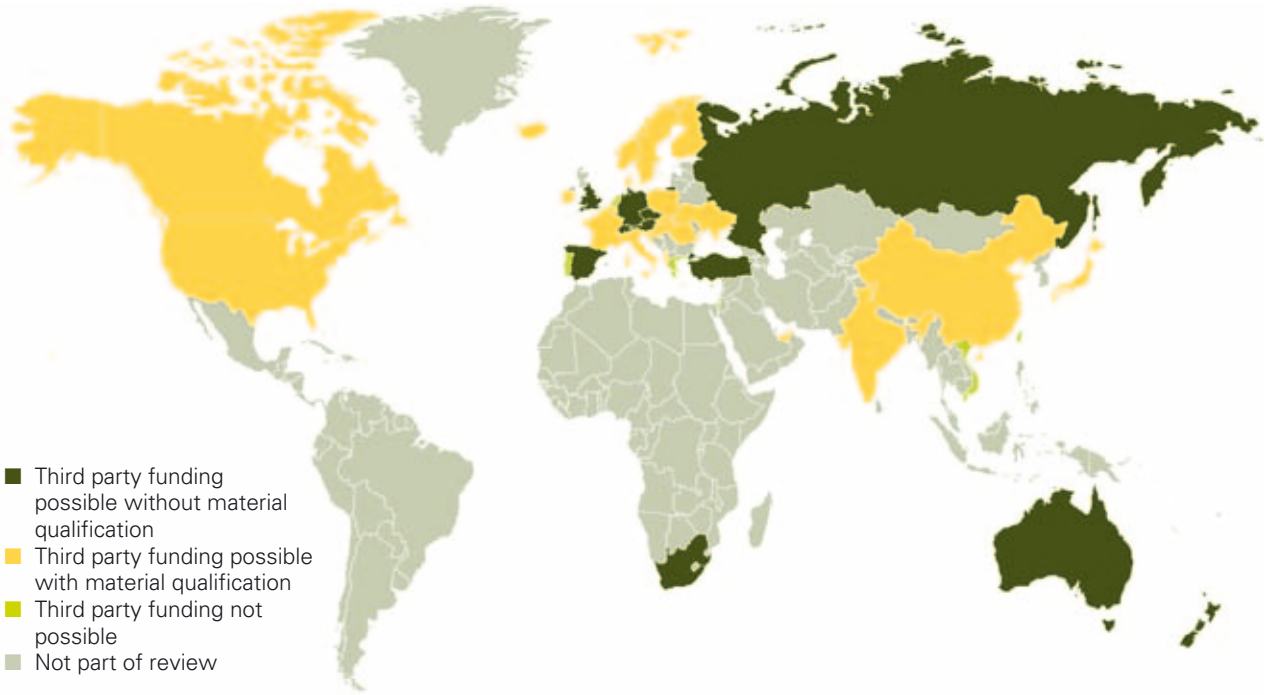


Figure 6: Is third party funding of claims available?



Country-by-country detailed responses

The following pages list our country-by-country findings in alphabetical order. Countries covered are:

NOTES

In the following sections, the term "**costs**" (unless otherwise specified within a country section) is used to describe 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.).

The term "**lawyer**" (unless otherwise specified within a country section) is used to describe the legal adviser, solicitor, counsel, barrister, advocate, attorney or legal practitioner.

The term "**claimant**" (unless otherwise specified within a country section) is used to describe the party bringing the claim, including the plaintiff.

Switzerland

Switzerland consists of 26 cantons, each of which has its own civil procedure rules. This questionnaire provides answers that are general to all the cantons, although a number of significant differences that exist in Zurich, Bern and Basel have been noted.

1. Recoverability of costs

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

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

The losing party will usually be ordered to pay the successful party's costs.

Claimants with a similar case against a defendant may proceed jointly, provided that certain conditions are met. All of these joint litigants are entitled to lead the proceeding independent of each other. The court can decide the share of each joint litigant in the costs depending on the individual amount in dispute in respect of the joint litigants.

1.3 Can costs be ordered to be paid to, or by, a non-party?
Not in principle. However, witnesses and court-appointed expert witnesses may claim their expenses and costs.

2. Details of recoverability of costs

2.1 On what basis are costs recoverable?
The courts usually award costs by reference to a cantonal tariff. It is common for the costs awarded to be less than the successful party's actual costs. The courts have discretion to vary the amount payable under the tariff by reference to a number of factors such as:

- the complexity of the case
- the number of hearings
- the number of documents processed.

2.2 Is the amount of recoverable costs fixed?
Normally, yes.

According to the applicable cantonal tariff.

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

The court will have regard to the amount in dispute when applying the tariff.

2.4 What can be recovered as "costs"?

Lawyer – client fees	Yes.
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.)	Yes.

3. Particular costs issues

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

The fee agreement between clients and lawyer can be made without regard to the cantonal tariffs and provisions. It is most common to agree on an hourly rate.

Clients and their lawyer are permitted to agree on a lump-sum fee as long as such fee is in line with the estimated services being rendered by the lawyer.

Lawyers are prohibited from agreeing fees which do not cover their own actual costs.

Pure "no win, no fee" arrangements are also not permitted.

Success fees are only permitted if there is an agreed hourly fee (which must cover at least the lawyer's costs) and an incentive payment in addition to the hourly rate.

The lawyer is not permitted to act on the basis that he or she will waive his or her fees in the event that he or she is unsuccessful.

3.2 Which tribunal resolves costs disputes and how?
In principle, the court which decides the case also decides on costs issues. Final judgments normally contain (besides the judgment on the merits) a decision on the costs of the court and an indemnity for the opposing counsel.

Basel, however, has a different regime. Although the court, in rendering judgment on the merits, also decide on the costs of the court, they only decide on the indemnity for legal fees if the requesting party submits an invoice (based on the cantonal tariff) at least 14 days prior to the final hearing.

If the parties do not submit their invoices in advance, the competent court only decides in principle which party has to indemnify the other for its own legal fees.

If the parties cannot agree on the exact amount, the court of first instance is competent to resolve cost disputes in an informal procedure.

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

Yes.

Each canton has its own regime but it is common to oblige the claimant to provide security for costs:

- if it is not domiciled in Switzerland (or in a country that is party to the Hague Convention on Civil Procedure or to a treaty with Switzerland which requires its residents to be treated in the same way as Swiss residents); or
- if there is reason to believe that the claimant is in financial difficulties and might not be able to pay the court costs and the defendant's costs.

In the Canton of Zurich the following additional rule applies: If the defendant is abroad, the claimant usually has to provide security for the costs of the court (but not for the defendant's costs).

The courts in Basel always require the claimant (irrespective of its domicile or its financial status) to establish a bond as security for the costs of the court. The defendant can request security only if the claimant is based abroad and not in a Hague Convention country or in a country that has a treaty with Switzerland which requires its residents to be treated in the same way as Swiss residents.

Bern has the very unusual rule that both claimant and defendant have to establish a security for the costs of the court. The defendant can request the claimant to establish security in the above-mentioned circumstances.

A party relying on a witness of fact or an expert witness usually has to post security for the witness's expenses and/or fees. The losing party will be ordered to reimburse those costs.

4. Costs awards

4.1 Can interim awards of costs be obtained?

Yes.

There is no general rule. Costs may be awarded for interim applications, but if the interim application is being made during a pending procedure, many cantonal courts postpone their judgments on costs for their interim awards to the end of the proceedings on the merits.

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

Yes.

If a party unnecessarily incurs costs the court may oblige such party to pay for those costs irrespective of the outcome of the case.

If a party loses the case the courts are also entitled to deviate from the general principles (as explained in question 1.2 above) if such party honestly and reasonably felt compelled to initiate such proceedings or challenge any action.

4.3 How are costs awards enforced?

Costs awards are part of the judgment and enforceable in the same manner as a monetary judgment. Monetary judgments are enforced through debt enforcement proceedings based on the Swiss Federal Debt Enforcement and Bankruptcy Act.

Foreign awards must be declared enforceable (by debt enforcement procedures or in advance) by a judgment in summary proceedings. The Lugano Convention and the Swiss Private Law Act also need to be considered.

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

Yes.

4.5 Is interest payable on unpaid costs?

Normally not on court costs, but yes, on the lawyer's indemnity.

In Swiss debt enforcement proceedings, unpaid claims are subject to statutory interest of five per cent per annum. Such rate is normally calculated as of the day when the award becomes final.

5. Costs of an appeal

5.1 Are costs of an appeal treated differently?

No.

6. Funding of civil and commercial claims

6.1 Can costs be insured?

Yes.

Before the event insurance (BTE) is permitted and available. After the event insurance (ATE) is not permitted. In addition, legal protection insurance in Switzerland usually provides a waiting period of three months or more.

6.2 Is legal aid available?

Yes.

Aid to cover court fees and legal representation may be available if:

- the case of the party seeking the aid is "not without merit"
- the party does not have sufficient means to pay for the court fees as well as his or her personal upkeep.

If the person seeking aid wins, the losing party pays the successful party's legal fees. If the person seeking aid loses, his legal fees will be paid by the canton. An indemnity for the opposing party, if any, still has to be paid by the person seeking aid.

Companies have not been entitled to legal aid to date. The Supreme Court of Switzerland held recently in an obiter dictum, however, that exceptions may be made where the company is unable to pay for the court and/or the legal fees and the only asset of the company is the subject matter of the proceedings.

Partnerships ("associations") may be entitled to legal aid if both the association and all unlimited liable partners are unable to pay for the court and/or legal fees.

6.3 Is third party funding of claims available?
Yes.

The Supreme Court of Switzerland held in 2004 that third party funding is not unlawful.

Third party funding is not regulated in Switzerland as such but, depending on the contractual agreement, might be regarded as "insurance" and would thus fall under the Swiss Insurance Supervision Act.

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