

# Chapter 16

## Recent Issues of Cost and Fee Allocation in Japanese Civil Procedure

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### 16.1 Litigation Costs and Attorney Fees

In Japan, the cost of litigation consists of court fees (*saiban hiyo*) and party costs (*tojisyu hiyo*). The court fee comprises a filing fee and the costs of taking evidence. The party costs consist of expenses, such as for traveling, and the cost of hiring a lawyer. The amount of court costs is basically determined by the amount in controversy. If the dispute is difficult to estimate or not regarded as a financial dispute, the amount of the dispute is regarded as 1,600,000 JPY (ca. \$16,000 USD).

The concrete amount of the court costs is determined by the court clerk in the court of the first instance upon motion after the decision to impose costs has become executable (Art. 71 of Code of Civil Procedure). The court clerk does not have discretion. The cost decision takes a separate court order (*ketei*). Yet, the application of the cost order is not generally used. That is why the winner does not reimburse the costs and fees in practice. The lawyer usually explains to his client that each party bears its own cost in advance.

The basic rule is that the losing party shall bear the cost of litigation (Art. 61 of Code of Civil Procedure). This, however, only applies to court fees. Attorney fees are not included in the reimbursable cost of litigation so that as a general matter, each party bears its own.

The exclusion of attorney fees is justified in various ways. To begin with, it is to predict the outcome of litigation.<sup>1</sup> When making a judgment, the court must decide, according to its free determination, whether the factual allegations presented by the parties are true and whether their legal arguments are convincing, in light of the entire presentation of the case at

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<sup>1</sup> T. Tanase, The Cost of administration of justice, *Koza Minji soshoho*, Vol. 1, p. 216 (Japanese).

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oral argument and as the result of the examination of evidence (Art. 247 of Civil Procedure). This suggests that it may not be fair to shift the entire cost, including attorney fees, to the loser simply based on the outcome of the litigation.<sup>2</sup> Furthermore, the resolution of a dispute benefits not only the parties but also helps to maintain peace in society; thus, the cost of litigation, including attorney fees, can be regarded as an administrative cost that each party must bear for itself. Finally, representation by the attorney is not compulsory in Japan; it is the choice of a party whether to hire an attorney. As a result, attorney fees are not strictly speaking necessary costs.

There are several exceptions to the general rule. First, if the suit is frivolous, i.e., essentially an abuse of the court system, the attorney fees necessary to defend oneself are regarded as necessary cost.<sup>3</sup> Second, in tort cases for personal injury (e.g., traffic accidents), representation by an attorney is regarded as necessary expense in order to protect tort victims;<sup>4,5</sup> about 10% of the amount of damages is usually regarded as appropriate and thus reimbursable. In addition, tort plaintiffs do not have to pay the defendant's attorney's fee even if they lose; such a rule of one-way fee shifting is supported, inter alia, by Professor Kojima,<sup>6</sup> although others have argued that it is not rational to distinguish between, e.g., tort and contract cases in this fashion.<sup>7</sup> Third, attorney fees are regarded as necessary if incurred by local residents against local government (Art. 242-2 of Local Administrative Law) and by shareholders against a corporation (Art. 852 of Commercial Law). Again, if the plaintiff loses, she does not have to pay the defendant's attorney fees. These exceptions are justified mainly by the public interest inherent in such litigation. Fourth, if the court prohibited the making of a statement, it may order an attorney to assist the opposing party upon determining that such assistance is necessary (Art. 155 of Code of Civil Procedure); if the party then hires the attorney according to the court order, the proper amount of attorney fee is regarded as a necessary cost (Art. 2 of Civil Cost Law).

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<sup>2</sup> M. Ito, The burden of litigation cost and compensation of attorney fee, *Hanrei Minsjisoshyo no hori*, Vol. 2, p. 93 (1995) (*Japanese*).

<sup>3</sup> In 1984, the Tokyo High Court made a decision to recognize the litigation itself as abuse and admit the defendant's attorney's fee as a necessary cost. In 1988, the Supreme Court reversed the decision and declared that it is necessary for the plaintiff to file a case knowing that there is no legal basis to recognize the litigation as an abuse. (Decision of the Supreme Court, January 26, 1988, *Minshu* Vol. 42, No. 1, p. 1.).

<sup>4</sup> Decision of the Supreme Court, February 27, 1969, *Minshu* Vol. 23, No. 2, p. 441.

<sup>5</sup> T. Sono, Damage claim of attorney's fee, *Shin Jitsumu Minji Soshoho*, Vol. 4, p. 104 (1982) (*Japanese*); M. Tamura, Attorney's fee, *Jitsumu Minnji Soshoho* Vol. 2, p. 158 (1969) (*Japanese*).

<sup>6</sup> T. Kojima, Review of Decision of the Supreme Court, February 27, 1969, *Hanrei Hyakusen*, 2nd (1982) (*Japanese*).

<sup>7</sup> Ito, supra note 2 at 101; Y. Hirai, *Saiken Soron*, 2nd, p. 95 (1994) (*Japanese*).

## 16.2 Representation by an Attorney and Self-Representation

Whether or not to shift attorney fees is one of the most controversial issues in Japanese reform debates about civil litigation. This is because civil litigation is becoming more complex and technical and thus increasingly difficult to handle without an attorney. If a plaintiff's fees are not shiftable to the loser, a plaintiff's ability to pursue his rights will be diminished.<sup>8</sup>

The discussion about including attorney fees in the shiftable costs is related to the issues of mandatory use of an attorney and of fixed attorney fees. These matters were discussed already by the Judicial Reform Committee (*shihoseido chosakai*) from 1967 to 1969, but attorney fees were not included in the necessary costs.

Parties who have attained the age of majority (20 years) are allowed to represent themselves in all cases. This rule reflects in part the fact that the number of attorneys in Japan has been very small. In addition, most attorneys are concentrated in the big cities, especially in Tokyo (48.5%) and Osaka<sup>9</sup> (13.5%).<sup>10</sup> The number of new registered attorneys also focuses on Tokyo and Osaka so that in rural area self-representation is often simply inevitable. This situation is slowly changing, however. In 2004, the new law school system was established to improve legal education and to increase the number of practicing lawyers. There are currently 74 such law schools,<sup>11</sup> and the number of graduates passing the bar exam has increased.<sup>12</sup> As a result, the number of attorneys in Japan has been increasing: from 21,185 in 2005 to 28,789 in 2010 – in increase of 36%.

Nonetheless, self-representation remains fairly common, especially in bad loan and debt collection cases, or where consumers sue lending companies to return the payment of interests above the permissible rate.<sup>13</sup> Here, the issues are often mainly prescription and scope of lending contract. More

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<sup>8</sup> T. Nakano, The cost shifting rule, *Kashitsu No Suinin*, p. 256 (1978) (*Japanese*).

<sup>9</sup> Before 1975, the number of attorneys was less than 10,000 (White Paper on Attorneys by Japan Federation of Bar Associations in 2010, p. 60 (2010)).

<sup>10</sup> *Id.* at 98.

<sup>11</sup> Law schools in Japan provide a two-year curriculum mainly for pre-law graduates and a three-year curriculum mainly for other undergraduates.

<sup>12</sup> The number of successful takers of the bar exam more than doubled from 1,009 in 2006 to 2,079 in 2010. The success rate, however, dropped quite dramatically from 48% in 2006 to 25.4% in 2010. The main reason for that is that the number of people trying to pass it increased dramatically from 2,091 in 2006 to 8,163 in 2010. One can try to pass the bar exam three times.

<sup>13</sup> The largest lending company applied for Chapter 11 (Corporate Reorganization) in September of 2010. The number of creditors will be 1 million and the total amount of claims will reach around 1 trillion JPY (ca. US \$10 billion). The number of bad loan cases will be decreased.

generally, in 2009, in about a quarter of all cases (25.3%) before the district courts (*chihosaibannsyō*) both parties represented themselves;<sup>14</sup> in summary court (*kanisaibannsyō*) that was even true in almost two thirds (63.8%) of all cases.<sup>15</sup> Most companies are represented by an employee with permission of a summary court (Art. 54 of Code of Civil Procedure). In 2009, in another 16.1% of all cases, only one side was represented by an attorney (plaintiff: 13.4%, defendant: 2.7%) in summary court.

Critics have argued that attorney fee shifting may be unfair vis-à-vis parties representing themselves (especially in rural areas)<sup>16</sup> because a self-represented party will not be able to shift any of the costs of representation that a represented party would be able to. In response, Dr. Nakano has proposed partial attorney fee shifting, and only in large cities.<sup>17</sup> If the self-represented party wins, a specific amount of her cost would be regarded as necessary and thus would be shifted, which would help to treat self-represented parties more fairly.<sup>18</sup>

The amount of attorney fees is determined by the agreement with the client. Attorney fees should be just and appropriate, and depend on the economic profit at stake, the difficulty of the issues, and the attorney's efforts (Art. 2 of the schedule of attorney fees). Some attorneys still use the formerly official schedule to determine their fees.

Attorney fees generally consist of a handling charge (*chakushkuin*) and a contingency fee of usually 10% of recovery (*hoshu*). The amount of success premiums (uplift) is thus very low compared with other countries, especially the US.<sup>19</sup> The contingency fee also depends on the difficulty of the case as well as on the amount in controversy. It is not regulated by law.

If the parties settle, each side generally bears its own costs, including attorney fees, unless a different arrangement has been made (Art. 68 of Civil Procedure). In 2010, 28.6% of cases in the district courts, and 14.0% of cases in the summary courts, were settled.

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<sup>14</sup> District courts have jurisdiction over claims where the value of the subject matter exceeds 1,400,000 JPY (ca. US \$14,000).

<sup>15</sup> Summary courts have jurisdiction over claims where the value of the subject matter does not exceed 1,400,000 JPY (Art. 33 of Court Act).

<sup>16</sup> Tabe, Attorney fees, *Jitsumu Minji Soshohō*, Vol. 2, p. 175 (*Japanese*).

<sup>17</sup> For example, only the retainer fee (T. Nakano, The Cost shifting rule of attorney fees, *Jurist No.* 388, p. 83 (1968) (*Japanese*)).

<sup>18</sup> The special provision for litigation in person is implemented in England and Wales (Rule 48.6 of Civil Procedure Rule 1998).

<sup>19</sup> M. Reimann, Cost and Fee Allocation in Civil Procedure, *General Report III.4.c* (2010).

### 16.3 The Reform of Litigation Cost Shifting

In 1995, the Study Group on the Cost System of Civil Procedure (*minso-hiyoseidotou kenkyukai*) was established to consider the current amount of court fees and the implementation of some part of attorney fees shifting.<sup>20</sup> Its report was published in 1997. The majority of the Study Group supported the inclusion of attorney fees in the amount of shiftable costs in the near future. Yet, the Study Group also concluded that it is first necessary to increase the number of attorneys and to extend legal aid to all people lacking the resources for civil litigation.

It is difficult to decide the proper amount of shiftable attorney fees. The bar is also in part opposed because determining that amount will lead to regulation of attorney fees by the courts and thus infringe the autonomy of attorneys.

It is difficult to reach an agreement to support the necessary legislation. In 2001, the Final Report of the Legal Reform Committee (*shihosei-dokaikaku shingikai*) recommended the implementation of the loser pays rule for part of the attorney fees in order to increase access to litigation. The Committee also mentioned, however, that it is necessary to avoid a chilling effect on litigation. In addition, the Access to Justice Committee (*akusesu kentoukai*) was established to discuss court fees and the attorney fees. The opinion of the Committee is divided. One view is that part of the attorney fee must be regarded as a necessary cost because it is often necessary for ordinary people to hire an attorney; thus, the loser should bear some part of attorney fees. The other view is that shifting even part of the attorney fee to the losing party will have a chilling effect on litigation because it may deter people from bringing a lawsuit. It is difficult to decide how broad an exception from a loser-pays rule should be in order to avoid a chilling effect. Should it, for example, apply to small claims or to administrative litigation?

The Final Report of the Legal Reform Committee recommended that the basic rule remain that each party bears its own attorney fees but that some part of the attorney fee must be borne by the loser if the both sides appoint an attorney and if they agree that the loser must bear also the winner's attorney fees. The amount of attorney fees shifted to the loser depends on the amount in controversy. For example:

- For 1,000,000 JPY (ca. US \$100,000) it would be 100,000 JPY (ca. US \$1,000).
- For 5,000,000 JPY (ca. US \$50,000) it would be 200,000 JPY (ca. US \$2,000).

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<sup>20</sup> The chairman is Professor Aoyama.

- For 10,000,000 JPY (ca. US \$100,000) it would be 300,000 JPY (ca. US \$3,000).
- For 1,000,000,000 JPY (ca. US \$1,000,000) it would be 3,270,000 JPY (ca. US \$32,700).

Note that these amounts are considerably lower than the real attorney fees a party must usually pay. Still, the Japan Federation of Bar Associations and consumer groups strongly criticize the proposal because it may have the impact of denying access to justice to certain parties for financial reasons. As a result, the current proposal of shifting attorney fees was abandoned.

If the shifting cost rule were to be implemented, it would also influence an attorney's decision whether to settle or continue litigation (for average settlement rates, see *supra*. (II.)). It will also be necessary to discuss the issue of litigation insurance.

The current discussion of cost and fee determination and shifting in many countries around the world may provide important information for the reform efforts in Japan as well.