

# Chapter 17

## Attorney Fee Arrangements Really Matter in Terms of Access to Justice in Korea

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### 17.1 Introduction

Korea is one of the most litigious societies on earth. In other words, the Korean legal community has witnessed an “epidemic of hair-trigger suing”<sup>1</sup> like the United States in the closing decades of the twentieth century.<sup>2</sup> As of 2002, the number of court filings per 100,000 persons in civil cases in Korea is more than those of the states of California, Illinois, and Texas, although it is lower than in the state of New York. The statistical data is shown in Fig. 17.1.

Also, the number of civil cases exceeding 100,000,000 Korean won [roughly US \$88,650] is steadily increasing in Korea, which is among the main reasons why the Korean courts are choked by a heavy caseload.<sup>3</sup> The increase of court filings in terms of civil cases that exceed 100,000,000 Korean won can be attributed to the rapid growth of the Korean economy.<sup>4</sup> None of this, however, means that the Korean legal community offers easy access to justice. For example, Korea has a much higher incidence of pro

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<sup>1</sup> Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274, 275 (1982).

<sup>2</sup> Gyooho Lee, *A Model as to Whether to Bring or Settle a *Læxsuit* and an Economic Analysis of Litigation Explosion in Civil Cases*, Civil Procedure, Vol. 8, No. 2, at 12–16 (2004) (hereinafter referred to “Lee, *Litigation Explosion*.”).

<sup>3</sup> The National Court Administration (NCA) of the Supreme Court of Korea ed., *Future of Civil Procedure*, Journal of Korean Judicature, Vol. I, at 732–33 (2008).

<sup>4</sup> *Id.* at 733.

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Country's or state's name	Total no. of court filings	No. of court filings per 100,000 persons
California	1,569,672	4,470
Illinois	712,727	5,656
New York	2,326,378	12,143
Texas	1,022,919	4,697
Republic of Korea	3,210,247	6,981 <sup>a</sup>

**Fig. 17.1** Number of court filings per 100,000 persons in civil cases in California, Illinois, New York, Texas, and Republic of Korea in 2002

<sup>a</sup>Statistics Korea has surveyed the population of Korea for every 5 years. Hence, the number of court filings per 100,000 persons in 2002 in Korea was calculated at the total number of court filings in 2002 divided by the population of Korea in 2000.

Source: [http://ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_SCCS\\_Tables9.pdf](http://ncsconline.org/D_Research/csp/2003_Files/2003_SCCS_Tables9.pdf) (last visit on June 8, 2010).

Court of Court Administration, Annual Judicial Report for Year 2002, available at <http://www.scourt.go.kr/justicesta/JusticestaListAction.work?gubun=10> (last visit on June 8, 2010).

se participation than do either the United States or Germany. Even in substantial cases it is common that one or both parties are without a lawyer. In 2005, lawyers represented both parties in fewer than 20% of cases initiated in the District Court or Branch Court.<sup>5</sup> This suggests that attorney fees can be one of the most important obstacles to access to justice in Korea.

The overall increase of court filings in civil cases in Korea is the result of factors external to the courts, as well as of the costs parties incur as they directly use the courts.<sup>6</sup> The external factors may include the increase in the number of disputes resulting from the Korean economy's rapid growth and the increasing weakness of traditional dispute resolution mechanisms such as families, churches, and neighborhoods. The internal costs may include litigation costs.

In order to improve access to justice in Korea, the Article mainly focuses on how attorney fee arrangements affect a litigant's incentive to bring a lawsuit.

The Article explains the basic rules as to who pays fees and costs in a lawsuit. In this regard, it discusses in particular whether the one party can be ordered to pay the opposing party's attorney fees. It then delves into the basic mechanism of attorney fee arrangements in Korea. Afterwards, it deals with special issues including success-oriented fees, litigation insurance, and legal aid in terms of attorney fee allocation rules. In the Conclusion, I propose that in the context of civil litigation, both the Filing Fees Act and the Rules Regarding Attorney Fees as part of the litigation costs be

<sup>5</sup> See Hyun Seok Kim, *Why do We Pursue "Oral Proceedings" in Our Legal System?*, 7 J. KOREAN L. 51, 71–73 (2007).

<sup>6</sup> Lee, *Litigation Explosion*, *supra* note 2, at 12.

incorporated in to Rules of Costs for Civil Procedure. Afterwards, I make some comments on contingency fee arrangements and pro se litigation.

## 17.2 The Basic Rules: Who Pays?

Litigation costs are one of many significant factors to determine whether a potential litigant brings a suit or settles a case.<sup>7</sup> Litigation costs refer to costs prescribed by laws and regulations as part of the expenses incurred by parties to an action and by the court.<sup>8</sup> In Korea, litigation costs are mainly governed by the Civil Procedure Act (hereinafter referred to “KCPA”), the Act on Costs for Civil Procedure, the Rules of Costs for Civil Procedure, the Act on the Stamps Attached for Civil Procedure, etc. (hereinafter referred to Filing Fees Act), the Rules on the Stamps Attached for Civil Procedure, etc. (hereinafter referred to Filing Fees Rules), the Rules regarding Attorney Fees Included in Litigation Costs, the Securities Class Action Act, and the Securities Class Action Rules.

The KCPA prescribes the basic rule and its exceptions and modifications as to who pays litigation costs. The Act on Costs for Civil Procedure and the Rules of Costs for Civil Procedure stipulate the general rule as to how to compute all types of litigation costs. The Filing Fees Act and Filing Fees Rules govern the calculation of court filing fees as part of the litigation costs in civil cases, administrative cases, non-litigation cases, and others. The Securities Class Action Act and Securities Class Action Rules determine court filing fees with respect to a securities class action. A part of fees paid to lawyers are included in litigation costs as determined by the Rules Regarding Attorney Fees Included in Litigation Costs.<sup>9</sup>

The Korean legal system compels the losing party to pay for all litigation costs incurred by both sides in accordance with Article 98 of the KCPA. The basic rule in Korea is that the losing parties must bear the winning parties’ legal expenses. This rule is not intended to employ fault liability but to follow the principle under which the losing party shall bear the litigation costs incurred by both parties.<sup>10</sup> This is regardless of the cause of the defeat, and regardless of whether he or she intentionally or negligently lost

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<sup>7</sup> James Fleming, Jr., et al., CIVIL PROCEDURE § 1.21 (4th ed. 1992).

<sup>8</sup> Si Yoon Lee, NEW CIVIL PROCEDURE 600 (Pak Young Sa, 2009); Ki Taek Lee, *Burden of Litigation Costs*, at A COMMENTARY TO NEW CIVIL PROCEDURAL LAW(II) 61 (Sang Won Kim et al. eds. 2004); Dong Yoon Chung and Byung-Hyun Yoo, CIVIL PROCEDURE 1015 (Beop Mun Sa, 2005).

<sup>9</sup> Supreme Court Rules No. 2116, amended on November 28, 2007, effective on January 1, 2008.

<sup>10</sup> Judgment rendered by the Korean Supreme Court on June 30, 1995, Case No. 95Da12927; Gyooho Lee, In Search of the Optimal Tort Litigation System: Reflections

the case. The rationales for the basic rule cannot be found in Korean legal literature.<sup>11</sup> In my view, this basic rule is judicially fair.

However, the basic rule does not necessarily mean that the KCPA follows the English Rule under which the losing party pays for all costs and fees incurred by both parties.<sup>12</sup> Article 109 (1) of the KCPA provides as follows:

A fee paid or to be paid by a party to his or her attorney, who institutes a lawsuit on behalf of the party, shall be the cost of lawsuits up to the limit of the amount as determined by the Supreme Court Rules.<sup>13</sup>

Therefore, only a part of the fee of a winning party's attorney must be directly reimbursed by the losing party. In other words, only a part of the fees paid to lawyers are included in litigation costs as determined by Rules Regarding Attorney Fees Included in Litigation Costs.<sup>14</sup> As shown in Fig. 17.2, the attorney fees included in litigation costs are determined in proportion to the amount in controversy.

### 17.3 Attorney Fee Arrangements

To curtail excessive retainer fees and contingency fees, the Korean Bar Association originally established the Rules of Standards on Attorney Fees as the Korean Bar Association Rules No. 19 on May 21, 1983. Yet, the Rules were abolished as of January 1, 2000 because they violated the unfair competition law in Korea. Even though the Rules were effective from 1983 to 2000, attorneys were not strictly bound by the Rules; these rules were merely standards that the attorneys could take into account if they chose.

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on Korea's Civil Procedure Through Inquiry into American Jurisprudence 179 [J.S.D. dissertation (Washington University School of Law)(1998)].

<sup>11</sup> See, e.g., Si Yoon Lee, *supra* note 8, at 602; Dong Yoon Chung and Byung-Hyun Yoo, CIVIL PROCEDURE 1026 (Beop Mun Sa, 2009); Moon Hyuk Ho, CIVIL PROCEDURE 574 (Beop Mun Sa, 2009).

<sup>12</sup> In England, the practice is that the loser often pays only part of the winner's costs.

<sup>13</sup> The official English version of Civil Procedure Act in Korea, available at <http://elaw.klri.re.kr/> which has been run by the Korea Legislation Research Institute, prescribes as follows:

A fee paid or to be paid by a party to a lawyer who performs a lawsuit on behalf of the party shall be admitted as the costs of lawsuit within the limit of the amounts as prescribed by the Supreme Court Regulations.

However, the term, "Supreme Court Rules," is preferable as compared to the word, "Supreme Court Regulations," because the rules have been enacted and amended by the Supreme Court rather than the Executive branch. Hence, my translation of Article 109(1) of Korean Civil Procedure Act is a little different from that of its official English version.

<sup>14</sup> Supreme Court Rules No. 2116, amended on November 28, 2007, effective on January 1, 2008.

Amount in controversy (Unit: Korean won(hereinafter referred to "KW"))	Percentage of attorney fees included in litigation costs (%)
Up to 10 million KW	8
Amount exceeding 10 million KW up to 20 million KW [800,000 KW + (amount in controversy – 10 million KW) × 7/100]	7
Amount exceeding 20 million KW up to 30 million KW [1,5 million KW + (amount in controversy – 20 million KW) × 6/100]	6
Amount exceeding 30 million KW up to 50 million KW [2.1 million KW + (amount in controversy – 30 million) × 5/100]	5
Amount exceeding 50 million KW up to 70 million KW [3.1 million + (amount in controversy – 50 million KW) × 4/100]	4
Amount exceeding 70 million KW up to 100 million KW [3.9 million KW + (amount in controversy – 70 million KW) × 3/100]	3
Amount exceeding 100 million KW up to 200 million KW [4.8 million KW + (amount in controversy – 100 million) × 2/100]	2
Amount exceeding 200 million KW up to 500 million [6.8 million + (amount in controversy – 200 million KW) × 1/100]	1
Amount exceeding 500 million KW [9.8 million + (amount in controversy – 500 million KW) × 0.5/100]	0.5

**Fig. 17.2** Annexed Chart 3 in accordance with Article 3 of the rules regarding attorney fees included in litigation costs

Today, attorney fees are determined by an agency contract between a client and an attorney under the principle of freedom of contract. The attorney fee arrangement usually consists of initiation fees (retainer) and contingency fees.

Initiation fees normally range from 2 million to 5 million Korean Won (roughly US \$1,770–4,424). Initiation fees are non-refundable unless an attorney fails to perform his/her duty based on the agency contract with the client.

A court finally determines the concrete amount to be awarded to the parties to an action according to the table above. A court shall, in the final judgment on a case, render *ex officio* a decision on the entire litigation costs in each specific instance.

## 17.4 Success-Oriented Fees and Litigation Insurance

Contingent fee arrangements are common in Korea.<sup>15</sup> They are allowed in civil cases, including family disputes, and even criminal cases. There are no ceilings for contingency fee arrangements since the Rules of Standards on Attorney Fees were abolished in 2000. Hence, such arrangements are

<sup>15</sup> Jae Won Kim, *The Ideal and the Reality of the Korean Legal Profession*, 2 ASIAN-PACIFIC L. & POL'Y J. 45 (2001).

permitted even in criminal cases unless the arrangements are unfair legal acts. In 2007, the Korean National Assembly introduced a bill to revise the Attorney Act by restricting contingency fee arrangements in criminal cases. However, several members of the Judiciary Subcommittee reviewing the bill, including a number of former judges and public prosecutors, opposed its adoption. Thus, the use of contingency fee arrangements in criminal cases survived, mainly because many of the former judges and public prosecutors wanted to take advantage of their former status even though that is not permitted by law. In contrast to contingency fees, however, no win-no fee arrangements are not available because, as mentioned, attorneys in Korea are usually paid retainer fees in advance, i.e., before commencing a lawsuit.

Contingency fees are determined on the basis of all circumstances of the case, including the importance and difficulty of the case in question, the amount in controversy, the location of evidence, and the parties' residence. Normally, contingency fees are set between 5 and 10% of the amount awarded to the winner in litigation or in settlement.<sup>16</sup> The attorney will not receive contingency fees, however, in "unimportant cases", such as litigation about provisional disposition or provisional seizure.<sup>17</sup>

A client may reduce attorney fees by shopping online for favorable fee arrangements. For example, a client may sign up on the website <http://www.lawmarket.co.kr> and propose the amount of attorney fees that he or she wishes to pay, and then an attorney can accept the offer via an Internet auction for attorney fees.<sup>18</sup> As of June 1, 2009, approximately 2,300 cases were posted by clients on the website and auctioned for attorney fees. Normally, contracts created through this website are 20–50% cheaper than ordinary offline contracts between an attorney and a client.<sup>19</sup>

A plaintiff is not permitted to subrogate his claim to an attorney, a law firm, or an entrepreneur who finances the litigation, and thus assumes the litigation risk, in Korea.

The public had long called for legal costs insurance, but it was only introduced in October of 2009. Legal costs insurance was first offered by D.A.S., a subsidiary of Munich Re Group in Germany. It covers legal costs, such as lawyer fees, stamp fees, fees for service of process, all up to 50 million Korean won (approximately US \$44,235)<sup>20</sup> Also, LIG Insurance Co., Ltd, one of Korea's domestic insurance companies, has been selling legal costs

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<sup>16</sup> [http://www.oseo.com/people/qna/view3.asp?bd\\_cd=CM120&sp=1&cp=1&no=5293&s\\_chk=N](http://www.oseo.com/people/qna/view3.asp?bd_cd=CM120&sp=1&cp=1&no=5293&s_chk=N) (last visit on March 15, 2011).

<sup>17</sup> Id.

<sup>18</sup> [http://www.lawmarket.co.kr/auction/auction\\_guide.asp](http://www.lawmarket.co.kr/auction/auction_guide.asp) (last visit on March 10, 2011).

<sup>19</sup> Id.

<sup>20</sup> See <http://www.das.co.kr/MainServ?emd=homepage> (last visit on March 4, 2011).

insurance since October 19, 2009. Its policy covers attorney fees, filing fees, and the fees for service of process in civil cases except domestic relations disputes, especially divorce cases.<sup>21</sup>

## 17.5 Legal Aid

The KCPA allows, but does not require, courts to provide civil litigation aid. Aid is usually provided in the form of deferment of payment rather than as a free service.<sup>22</sup> Under certain conditions, the court provides financial assistance to a person who cannot afford to pay the attorney fees. In other words, a court may grant litigation aid, either *ex officio* or upon request of a person who falls short of the solvency threshold, unless he or she will obviously lose the case.<sup>23</sup> A motion for litigation aid shall be in writing in accordance with Article 24(1) of the Civil Procedure Rules. The motion shall also include a statement that states the financial abilities of the movant and his or her cohabitants.<sup>24</sup>

The movant must demonstrate need for litigation aid.<sup>25</sup> The court that keeps the record of litigation shall render judgment on the motion.<sup>26</sup> Litigation aid is awarded only for deferral of litigation costs, deferral of fees payable to a lawyer and an enforcement officer, exemption from security for the litigation costs, and deferral or exemption from other expenses as prescribed by the Supreme Court Rules.<sup>27</sup> The court can also limit litigation aid to a part of these costs for appropriate reasons.<sup>28</sup> When a person who has been granted litigation aid is found to have the solvency to pay the litigation costs or when he or she becomes solvent, the court keeping the record of litigation may cancel the aid at any time, either *ex officio* or upon request of an interested person, and order the aided party to pay all deferred litigation costs. Those deferred costs may be collected directly from the aided party, who is obligated to pay them pursuant to the court's ruling.<sup>29</sup>

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<sup>21</sup> [http://www.lig.co.kr/product/p\\_03/p\\_0303/p\\_0303\\_01.shtml](http://www.lig.co.kr/product/p_03/p_0303/p_0303_01.shtml) (last visit on March 1, 2011).

<sup>22</sup> Articles 128 and 129 of KCPA.

<sup>23</sup> Article 128(1) of KCPA.

<sup>24</sup> Article 24(2) of KCPA.

<sup>25</sup> Article 128(2) of KCPA.

<sup>26</sup> Article 128(3) of KCPA.

<sup>27</sup> Article 129(1) of KCPA.

<sup>28</sup> Article 129(1) of KCPA.

<sup>29</sup> Article 132(1) of KCPA.

Only 5,155 of the 1,314,833 civil cases filed in 2008 were financed by litigation aid.<sup>30</sup> It is fair to say that litigation aid is not generally available to the public in need, but only in cases where a party to an action meets certain requirements mentioned above.

In Korea, the legal aid currently available is largely provided by the Korea Legal Aid Corporation, which was established pursuant to Legal Aid Act of 1987. As a public interest organization, the Korea Legal Aid Corporation is under the supervision of the Ministry of Justice. Some scholars criticize that governmental support for legal aid by private organizations such as the Korean Legal Aid Center for Family Relations is trivial. The private sectors' legal aid is independent from the legal aid provided by courts and the public interest organizations.

## 17.6 Conclusion

As mentioned above, litigation costs are mainly governed by a variety of statutes and rules: the KCPA, the Act on Costs for Civil Procedure, the Rules of Costs for Civil Procedure, the Filing Fees Act, the Filing Fees Rules, the Rules Regarding Attorney Fees Included in Litigation Costs, the Securities Class Action Act, and the Securities Class Action Rules. The complexity and multiplicity of the laws and rules hardly permits lay persons to understand the system. Hence, I propose first that the Filing Fees Act be incorporated within the Act on Costs for Civil Procedure. I next propose that both the Filing Fees Rules for Civil Procedure and the Rules Regarding Attorney Fees Included in Litigation Costs be incorporated within the Rules of Costs for Civil Procedure.<sup>31</sup> According to my proposal, the Act on Costs for Civil Procedure and the Rules of Costs for Civil Procedure can cover litigation costs including filing fees and some portion of attorney fees. This would provide some of the much needed clarity.

In my view, contingent fee arrangements should not be permitted in criminal cases in Korea because those cases are related to the public interest. Also, contingency fee arrangements for domestic relation cases should not be allowed because it can encourage the dissolution of families.

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<sup>30</sup> Office of the National Court Administration of the Supreme Court of Korea, Annual Judicial Report for Year 2008. <http://www.scourt.go.kr/justicesta/JusticestaListAction.work?gubun=10> (last visit on March 8, 2011).

<sup>31</sup> Cf. HANKUK MINSASOSONGBEOP HAKHOI [KOREA ASSOCIATION OF THE LAW OF CIVIL PROCEDURE], MINSASOSONGJEDO UI JEONGBIBANAN YEONGU [A STUDY ON THE REFORM OF THE LAWS ON CIVIL LITIGATION COSTS] 286–288 (2009); Byungseo Chon, *Sosongbiyong Jedo ui Gaeseon e ganhan Yeongu* [A Suggestion on the Improvement of Civil Litigation Costs], 14-1 MINSASOSONG [CIVIL PROCEDURE] 313–325 (2010).



Pro se actions in small claims cases have resulted from the fact that the parties are reluctant to pay attorney fees. Pro se actions can encourage a court to look primarily for justice in the concrete case rather than worry about legal consistency and certainty. In other words, individual justice<sup>32</sup> sometimes prevails over legal certainty in Korea because in pro se litigation, courts may function as quasi-arbitrators *ex aequo et bono*. One should hope, nonetheless, that even litigants in small claims cases can be represented by a lawyer. The problem is partially solved by the legal aid system and will be somewhat alleviated by the ongoing increase of the number of attorneys as well as by the increasing availability and popularity of legal service insurance.

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<sup>32</sup> Chaewoong Lim, *A Study on the Target of Avoidance in Korean Bankruptcy Law: When There is No Debtor's Action*, Journal of Korean Law, Vol. 7, No. 2, at 344 and n. 24 (2008) (Saying that “*The appropriate in the concrete* is an important word in legal practice in Korea, especially for the judges. Put it simply, it is the question who must win the case. New comers are taught to consider it when they make a decision. They are told to think of who must win apart from the superficial logic. If *the appropriateness in the concrete* is not agreed to the superficial logic, for example in the case that the plaintiff would win by the latter, but the defendant should win by the former, they are asked to give it a second thought and to seek a new logic. To understand the Korean judges' behavior on the work, it is necessary to understand the role of *the appropriateness in the concrete*.”)