

European Civil Justice Systems

Findings of a Major Comparative Study on Litigation Funding and Costs

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Executive Summary

- Costs and funding are assuming far greater importance as keys to evaluating and providing access to justice. Whilst the traditional focus has been on the rules of civil procedure, governments increasingly see a need to ensure that money is spent on the most cost-effective pathways for dispute resolution, whether through courts or alternative solutions.
- A team at Oxford University has carried out a study into litigation costs and sources of funding in thirty-five countries, with an additional overview of fourteen Latin American jurisdictions.¹ The findings were drawn upon by the influential Jackson Costs Review in England and Wales in January 2010.
- For low-value claims where the costs of litigation might be disproportionate, pursuing a claim through the civil court system was not the recommended or most popular route for obtaining redress, and alternative solutions are preferred. These might include administrative (use of special tribunals, ombudsmen, or regulatory officials) or insurance solutions, since they involve little or no cost to claimants, and the state or business bears the cost of investigation.
- Historical objections to third-party funding (maintenance and champerty) have crumbled in view of the perceived need to enable continued access to justice. Third-party litigation funding raises a number of policy issues concerning practice and ethics that are still being debated, and further regulation is likely. Considerable developments are occurring in the mechanisms for funding litigation. This is a time of major change, that is unplanned, market-driven, and where the future is uncertain.
- It is a fundamental feature of justice and a justice system that access to justice should be equal for all. The problems of maintaining fair and equal access to justice for all, and of controlling cost and delay in courts, have long been recognized but remain unresolved in many jurisdictions. Governments are set to impose significant cuts in public expenditure as a consequence of the financial environment, and civil justice is not a high priority for spending. Governments, businesses, and citizens will be looking for ways of reducing costs.
- Those responsible for courts, including judges and lawyers, increasingly need to respond by streamlining procedures, increasing predictability of costs, and delivering speedy services at costs that are proportionate to amounts in dispute.
- If governments wish to deliver wider access to justice in those cases where proportionate cost is particularly important, they should introduce tariffs for lawyers' fees, introduce efficient case management techniques in the civil courts, and devise alternative pathways for dispute resolution that deliver cheaper or more efficient solutions. This is not to say that justice will always come cheap. There will always be cases in which access to factual and/or expert evidence is viewed as important, and this necessarily involves a certain level of expenditure.

1. Hodges, C., Vogenauer, S., and Tulibacka, M. (forthcoming, October 2010) *The Funding and Costs of Civil Litigation: A Comparative Perspective*. Oxford: Hart Publishing.

Findings of a Major Comparative Study on Litigation Funding and Costs

An internationally increased focus on costs

Costs and funding are assuming far greater importance as keys to evaluating and providing access to justice. The traditional focus has been on the rules of civil procedure. But governments increasingly see a need to ensure that money is spent on the most cost-effective pathways for dispute resolution, whether through courts or alternative solutions (mediation, ombudsmen, advice centres, business schemes, public schemes, tribunals etc.),² and that costs should be as low as possible.³ This has implications for the choice and range of dispute resolution pathways, and for the efficiency and cost-effectiveness of procedures, which must not be unnecessarily complex, nor costs disproportionate to the value in dispute.

Research streams

The European Commission for the Efficiency of Justice (CEPEJ), an initiative of the Member States of the Council of Europe, published reports in 2006 and 2008⁴ that contain data for the evaluation of judicial systems in Europe, with a focus on judicial and quasi-judicial institutions and their funding. They also include some information on court fees and legal aid. The European Commission obtained a large comparative study of litigation costs as part of its policy of building a European space of freedom, security, and justice, published in 2007.⁵ It found

great variations in the costs and funding regimes of the Member States of the European Union.

Since 2006, the 'Measuring Access to Justice Project', a joint initiative of The Hague Institute for the Internationalisation of Law, Tilburg University and Utrecht University, has published a number of studies with the common goal of developing a standard methodology for measuring the costs and quality that users of justice may expect.⁶ As a part of the project, a detailed analysis of litigation costs in the Netherlands, Bulgaria, and Bolivia was undertaken. Its methodology includes not just the easily quantifiable costs but also aspects of time, delay, psychological, and business cost. From the perspective of users, these 'costs' may be significant.

In 2008 the Oxford Civil Justice Survey examined to what extent businesses in Europe were influenced by their perceptions of national civil justice systems and contract laws when choosing the applicable law and the forum of litigation for cross-border transactions. It emerged that the perception of costs was one of the important factors that influenced such choices, albeit slightly less important than might have been expected.⁷

A team at Oxford University led by Dr Christopher Hodges of the Centre for Socio-Legal Studies and Professor Stefan Vogenauer of the Institute for

2. Ongoing research at Oxford is evaluating a wide range of these pathways.

3. See the Australian Government, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009.

4. European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems: Edition 2006 (data 2004) and European Judicial Systems: Edition 2008 (2006 data) – Efficiency and Quality of Justice*, (Strasbourg, Council of Europe, 2008), available at <www.coe.int/T/dghl/cooperation/cepej/default_en.asp>. See also Albers, P. (2008) 'Judicial Systems in Europe Compared'. In: C. H. van Rhee and Uzelac (eds) *Civil Justice between Efficiency and Quality: from Ius Commune to the CEPEJ*. Antwerp: Intersentia, 9.

5. Albert, J. (2007) *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union: Final Report*. Brussels: Hoche, Demolin, Brulard, Barthélémy, available at <http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm>

6. <www.measuringaccesstojustice.com/index.php/Publications>. See Gramatikov, M., Laxminarayan, M., and Barendrecht, M. (2010) 'Assessment of the Validity and Reliability of a Methodology for Measuring the Costs and Quality of Access to Justice', TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No. 003/2010, available at: <<http://ssrn.com/abstract=1559782>>.

European and Comparative Law has carried out a study into litigation costs and sources of funding in thirty-five countries,⁸ plus an overview of fourteen Latin American jurisdictions by Professor Manuel Gomez of Florida University. The study is based on national reports by practitioners and academics, available on the project website,⁹ in addition to which, detailed chapters on nineteen jurisdictions will be available in a forthcoming book.¹⁰

The findings were drawn upon by the influential Jackson Costs Review in England and Wales, which, in January 2010, reported its recommendations to retain the 'loser pays' rule and deconstruct the ten year English experiment of shifting the cost onto defendants of the success fee element of conditional fee agreements (CFAs) and after-the-event (ATE) insurance premiums, by making these items payable by claimants out of damages recovered.¹¹

The consequence is that common law jurisdictions, and maybe others, are likely to investigate further means of private funding for litigation, such as lawyer funding (including contingency fees) and third-party funding. The researchers are undertaking a further study on litigation funding, and initial results indicate that independent funding gives rise to fewer conflicts of interest than lawyer funding, provided there is clear separation of control and the roles of the various intermediaries and clients.

The 2010 Oxford study on the costs and funding of civil litigation is part of the EU Civil Justice Project, which is a new pan-European academic initiative to research dispute resolution issues, whether using courts or alternative procedures and techniques, and

build up an evidence-basis to support policy decisions on best practice in dispute resolution for the twenty-first century.¹²

Findings of the Oxford study *Overview of costs systems*

The litigation system in every jurisdiction studied gives rise to the same basic elements of costs: charges for use of the court and its personnel, evidential costs for witnesses and experts, and lawyers' fees. In other words, there are costs for the use of the litigation process and costs for the services of intermediaries.

Almost every country levies some charge for use of its courts. The charge is always based on fixed rules, involving a tariff system, so is fully predictable. The charge usually varies with the sum in dispute, which introduces an element of proportionality, and tapers off as fees rise. The leading exception, where almost no cost is levied for access to the courts, is France. Most countries do not seek to recover the full economic cost of the public justice system from user fees, but provide some funding from general taxation, although the proportion between user and general funding is rarely clear.

Witnesses of fact are reimbursed their expenses, but rarely otherwise paid. Expert witnesses are paid for their time, usually on an hourly rate basis regulated by the court. Lawyers' fees to clients are almost always subject to open negotiation rather than regulation. Billing is frequently based on hourly rates, and whilst some civil law jurisdictions have tariffs, they are rarely binding. Tariffs set by local Bars have been banned almost everywhere as anti-competitive.

7. Vogenauer, S. (forthcoming, March 2011) 'Perceptions of Civil Justice Systems in Europe and their Implications for Choice of Forum and Choice of Contract Law: an Empirical Analysis'. In: S. Vogenauer and C. Hodges (eds), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law*. Oxford: Hart Publishing, Ch. 1.

8. The thirty-five countries studied were Australia, Austria, Belgium, Bulgaria, Canada, China, Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Scotland, Singapore, Spain, Sweden, Switzerland, Taiwan, and the United States.

9. <www.csls.ox.ac.uk/COSTOFLITIGATIONDOCUMENTSANDREPORTS.php>.

10. Hodges, C., Vogenauer, S., and Tulibacka, M. (forthcoming, October 2010) *The Funding and Costs of Civil Litigation: A Comparative Perspective*. Oxford: Hart Publishing.

11. Jackson, R. (2010) *Review of Civil Litigation Costs: Final Report*. The Stationery Office, available at: <www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>.

12. See summary at: <www.csls.ox.ac.uk/european_civil_justice_systems.php>.

Cost shifting

In almost all jurisdictions, the general position is that the loser pays the costs of the court, evidence, and lawyer. However, the court often has discretion over awarding costs in cases where each side wins some points. Court discretion is also intended to preserve the possibility of sanctioning poor behaviour during the litigation process. Some jurisdictions have rules on how costs are split when both sides have some success. Certain jurisdictions have exceptions to the general 'loser pays' rule in order to overcome funding barriers or encourage certain types of claims.

The United States is almost alone in maintaining a rule that each side pays their own costs, save where one-way cost shifting has been expressly provided by Congress under a range of statutes that encourage private enforcement.

Actual costs incurred: quantitative findings

The following are the empirical findings from data supplied by leading practitioners in the target jurisdictions to questions on the level of costs in nine case studies:

1. Small claim: repayment to a consumer of €200 price paid for product not delivered.
2. Family: divorce between husband on average income (c.€50,000 pa), wife with no income, two children, living in an average home.
3. RTA: road traffic accident collision, in which the rear of the claimant's car and the front of the defendant's car are moderately damaged; cost of repair and replacement car €6,000.
4. Employment: wrongful loss of employment by a middle-ranging manager (salary c.€50,000 pa).
5. Medical negligence: doctor's error results in permanent (a) loss of ability to walk (b) paraplegia, for male claimant aged 25 on salary of €25,000 pa, no current dependents, but likelihood of marriage and two children.
6. SME: small company claim for unpaid debt of €8,000.
7. Large commercial case: substantial and complex breach of contract claim between two large companies over supply of defective machinery worth €2 million, with €5 million loss of profit.

8. Injunction – consumer: against neighbour to stop noise.
9. Injunction – commercial: prevent illegal breach of intellectual property in commercial information between two substantial companies.

Variation in litigation costs

The total costs of litigation can vary widely among the jurisdictions included in this study. A frequent pattern is that costs (whether in total, or for court or lawyers' fees) may have a broadly similar level in the majority of jurisdictions (which some may interpret as being at a 'low' level) but some jurisdictions have costs that are very considerably higher than the general level of the majority.

Lawyers' fees are the major component of total costs

Lawyers' fees are in almost all cases higher than court fees, and comprise the major element in total costs. This is generally the case irrespective of whether or not jurisdictions impose tariffs for lawyers' fees.

The highest lawyers' fees can be observed in Australia, England and Wales, and Denmark. Germany, Austria, and Greece have relatively low lawyers' fees; similarly, those in central and Eastern European are comparatively modest overall. Lawyers' fees are usually subject to VAT, which can cause significant variation between countries, as rates range from between no charge and 30 per cent.

Court costs are predictable

Court costs are predictable in almost all jurisdictions, and are based on published tariffs. Where the amount in dispute is certain, the court costs varied with the amount in dispute. Where the amount is unquantifiable, such as for a claim for injunctive relief, the tariff denotes a particular set fee. In some cases where the claim is for damages but is not quantifiable in advance, claimants may specify a particular amount claimed, which will usually be a modest sum so as to avoid incurring unnecessarily large court fees.

In the majority of jurisdictions, court costs were relatively low compared with the amount in dispute, once that amount was over a certain size. The significant outlier is Singapore, which has notably higher court costs than other states for most of the case studies. In France court fees are effectively nil, whilst in Germany, Austria, and Greece, they are generally low. Beyond Europe, they are quite low in Taiwan and China.

Central and Eastern European states (such as Latvia, Estonia, Poland, Bulgaria, or the Czech Republic) have relatively high court fees proportionate to the value of the case, and proportionate to the level of lawyers' fees, but a different way of looking at this might be that lawyers' fees are low in those states and hence the court costs appear proportionately higher than in other jurisdictions. Hungary is a notable exception to this pattern, having relatively high lawyers' fees as well as relatively high court fees in many of the case studies.

Court costs for some case studies tend to be high in England, Ireland, the Netherlands, and Norway (the available information indicates that the position is generally similar in Canada). However, these states often have another 'preferred dispute resolution route' for some types of claims. Court costs appear high in comparison with total costs and lawyers' costs in Singapore (case studies 2, 3, 4, 8) and (on a far lower scale) in Poland (case studies 5, 7, 9).

Some court fees include VAT, while others do not. In some states VAT is not charged on court costs, in others it is; the rates of VAT applied also differs.

Lawyers' costs are frequently unpredictable

The countries in which reporters stated that it was either straightforward or difficult to predict the total costs fell into a consistent pattern. The pattern depended upon whether lawyers' costs were or were not regulated by a tariff. Accordingly, where no tariff or ceiling applied, and lawyers' fees were based upon hours worked, this produced both unpredictable fees and levels of fees which, in low-value claims, were high compared to the value at stake (cases 1, 3, 4, 6,

and 8) and, in high-value claims, could be potentially very high (cases 2, 5, 7, and 9).

High-cost jurisdictions

The countries that have notably higher total costs than others for each case study are: Hungary and Australia (case 1); Hungary, Romania, and Singapore (case 2); England and Wales and Singapore (case 3); Singapore (case 4); England and Wales and Japan (case 5); Singapore and Hungary (case 6); England and Wales, Canada, Romania, Hungary, Japan, and China (case 7); Singapore and Australia (case 8); and Denmark, Spain, and England and Wales (case 9).

Overall, the countries that have the highest total costs in the largest number of case studies are Singapore (five cases) and England and Wales (four cases). It should be noted that the United States was not included in the data, and that data for Canada was not available for all of the case studies.

This does not mean that costs in the countries identified above are higher in all cases, but it does indicate that costs are very high in a number of specific types of case in those countries. However, several other jurisdictions would be included in that list if, firstly, claims were to be pursued through the courts rather than through alternative pathways and, secondly, if the amount of work done by lawyers in a given case were to be large and fees were based on hourly rates, or where the lawyers' fee were to be based on a success fee and the amount recovered was to be significant.

The most salient common feature of the abovementioned countries is that in their jurisdictions, lawyers' costs are not generally regulated by tariffs.

Costs-to-case value ratio: proportionality

In most states included in this study, the costs of litigation are high in relation to the value of the case; in some instances costs even exceed the value of the case. Western European states such as Denmark, England and Wales, and Ireland provide particularly striking examples, but the problem also exists in Hungary and some other central and Eastern

European countries, as well as Singapore and Australia. China and Taiwan have more proportionate costs.

There is a clear link between the predictability and proportionality of lawyers' fees: where lawyers' fees are predictable they tend to be more proportionate to the value at stake, and vice versa. In other words, the key factor is whether or not lawyers' fees are subject to a tariff.

However, in states where costs are sometimes high, not all cases are necessarily expensive or disproportionate. An example of this can be seen from the results for the nine case studies in Australia, New Zealand, and England and Wales. The results for the small claim, divorce, employment, debt and consumer injunction case studies indicate comparatively low costs, whereas those for the road traffic, medical negligence, large commercial dispute and intellectual property injunction case studies are comparatively far higher. This may reflect the fact that different costs rules, or cost shifting rules, or alternative dispute resolution (ADR) pathways, are available for some types of claims. Such a finding may indicate that future work on providing particular pathways, procedures, and costs regimes for particular types of cases may be fruitful, in order to address those cases where costs are high.

Existence of a cost recoverability gap for winners

It is extremely rare for all lawyers' fees to be recoverable by the winning party. The recoverability gap exists everywhere and applies in almost all types of case. The gap can be very high in some states and cases, requiring a winning party to have considerable financial resources.

Alternative solutions for low-value cases

For those disputes that involve low amounts and where the costs of litigation might be disproportionate (cases 1, 3, 4, and 6), reporters in many jurisdictions indicated that pursuing a claim through the civil court system was not the recommended or most popular route for obtaining redress in the given situation, and that alternative solutions are preferred.

Thus, for low-value claims that proceed in court, a number of jurisdictions have small claims procedures involving simplified procedures or rules, such as excluding the involvement of lawyers (and hence the costs incurred by their involvement) and/or prohibiting cost shifting.

Sometimes extra-court procedures are preferred, such as administrative (use of special tribunals, ombudsmen, or regulatory officials) or insurance solutions, since they involve little or no cost to claimants, and the state or business bears the cost of investigation. A tribunal or official may be able to exert some pressure to resolve issues more informally and quickly than the careful forensic approach of courts. Mediation or arbitration procedures were frequently mentioned (notably case 2 on divorce) in preference to court proceedings. Labour disputes are frequently brought in specialist tribunals (case 4).

However, such alternative approaches were mentioned less frequently in those jurisdictions where the court procedures are efficient and the costs predictable (such as those based on the German model).

Funding

There are several potential sources of funding for litigation, although options in individual cases may be limited. The options can be categorized by the origin of the funding: personal resources of the litigant, funds provided by an independent source (insurance, bank, trade union or association, funder), or financing from the legal intermediary involved in the case (through pro bono waiver of fees, deferral until resolution, or charge dependent on outcome, i.e., waiver in the event of loss, perhaps with enhancement in the event of success, such as a success fee or uplift).

Legal Expenses Insurance (LEI) has developed widely as a principal source of litigation finance in many civil law states as a result of the lower cost of their civil procedures and the predictable cost based on tariffs.

Almost every jurisdiction has some form of independent support funding that is referred to as

'legal aid' but the modes of operation differ widely. Almost all state funding is subject to merits and means tests. Government funding for court and lawyers' fees is generally contracting, and this is placing greater emphasis on methods of funding by lawyers or others, especially in resolving low-value disputes.

Success fees are widely permitted, but there is strong resistance to fees in which damages are reduced. American-style contingency fees form the established funding mechanism in the United States but are far more controversial and, currently, fairly rare from a global perspective. The reliance on contingency fees in the United States is one of a number of features of its almost unique policy of reliance on private enforcement of both private and (in particular) public law.

Independent commercial funders have emerged recently in some states, principally Australia, Canada, Germany, the United States, and the United Kingdom. Historical objections to third-party funding (maintenance and champerty) have crumbled in these jurisdictions in view of the perceived need to enable continued access to justice. Third-party litigation funding raises a number of policy issues concerning practice and ethics that are still being debated, and further regulation is likely. It is unclear to what extent, if any, a funder should control or influence strategic decisions in the litigation of others. However, independent funding is currently only commercially viable for commercial claims of significant size, so are largely restricted to litigation between companies, although some jurisdictions are experimenting with funding of class claims. A comparison of funding from independents and from lawyers suggests that conflicts of interest are more likely to arise in the latter case than the former, assuming the roles of client, funder, and lawyer are separate and distinct.

Considerable developments are occurring in the mechanisms for funding litigation. This is a time of major change, that is unplanned, market-driven, and where the future is uncertain.

Conclusions

Costs and access to justice

The amount payable by litigants in costs is frequently high in relation to amounts in dispute. This situation raises issues over whether justice can be accessed, and hence whether the rule of law can be maintained. The largest element of such costs is almost always lawyers' costs.

In low-value claims, costs are frequently both high and disproportionate to the amount in dispute. This can be so irrespective of whether or not costs are controlled by a tariff. In other words, all court-based dispute resolution systems have an inherent level of costs that produces a threshold of cost proportionality: below the threshold, cases may not be worth pursuing and must either be dropped or pursued through alternative means.

In high-value claims, costs can be very high where lawyers' fees are based on hourly rates. The same would be the case where amounts recovered are large and lawyers' fees are based on success fees or percentages of the sum recovered. In high-value claims where costs are large, they do not exceed the sums at stake, unlike in low-value claims, so are not disproportionate in that sense. However, where lawyers' fees comprise intrinsically very high sums, the issue arises of whether the cost is excessive.

Costs are fully predictable only where *ex ante* tariffs exist for all costs (court, process, and lawyers). Court costs are always predictable through tariffs, and such tariffs exist in almost every jurisdiction, but, broadly speaking, lawyers' costs are regulated by tariffs in civil law jurisdictions but not in common law jurisdictions. Hence, costs are more proportionate in civil law jurisdictions. This is because cases in common law systems can involve a variable amount of work by intermediaries that incurs variable and hence unpredictable costs. Such systems have not yet found ways through case management or other techniques of controlling costs or delivering predictability.

The architecture of systems of civil procedure

The existence of tariffs for lawyers' fees is related to the model of civil procedure that applies in a jurisdiction. The level of litigation costs is related to the amount of work done by the non-party actors in the litigation process, notably lawyers, judges, and experts. Common law and civil law jurisdictions have distinct architectural features of civil procedure, which give rise to different roles for lawyers and judges, and hence, typically, to significantly different levels of cost between the two broad traditions.

In the civil law tradition, typified by Germany, judges have comparably more work to do than judges in common law jurisdictions, with lawyers bearing the greater share of the workload in the common law tradition. Hence the balance between court fees and lawyers' costs is, as a general proposition, different between the two traditions: the percentage of total costs attributable to court fees is higher in most civil law jurisdictions, whereas lawyers' costs are usually significantly the more expensive element in common law systems.

Most civil law systems (with the notable exception of France) tend to shift costs to the unsuccessful litigant, according to a tariff based on the amount in dispute. This provides *ex ante* regulation of the level of costs and a relatively high level of predictability for all parties to litigation. This, in turn, facilitates the provision of legal expenses insurance (LEI), and LEI is widespread in Western European countries (it has yet to develop within the emerging new legal systems of central and Eastern Europe).

By contrast, in common law jurisdictions, lawyers' fees will be variable, and hence often unpredictable, and can be high. In those jurisdictions (except the distinctive system of jurisdictions of the United States, apart from Alaska) the usual determining factor in such costs is the time spent on a case.

In many jurisdictions, lawyers' fees do not operate on normal market principles where individual claimants are involved. Market behaviour applies in setting the

level of legal costs essentially only for large repeat players, such as insurance companies and major corporations.

There is an inherent conflict in civil procedure between providing a just result and providing a result at proportionate cost. Resolving this conflict involves a level of compromise over the extent of access to appropriate evidence. The ways in which the civil procedure systems of, for example, Germany and England, deal with evidence constitutes fundamentally different approaches. Shifting costs on a tariff basis provides predictability, albeit not necessarily proportionality, especially given the recoverability gap.

Meeting concerns about high costs

The high level of lawyers' costs and the procedural architecture in some systems produce significant challenges for delivery of access to justice at proportionate cost through courts.

In considering provision for systems of dispute resolution, especially through courts, governments have an overriding concern with ensuring justice. It is a fundamental feature of justice and a justice system that access to justice should be equal for all.

However, it is recognized that litigation and justice come at a price, and that some citizens and entities have greater resources than others. The problems of maintaining fair and equal access to justice for all, and of controlling cost and delay in courts, have long been recognized but remain unresolved in many jurisdictions.

Governments are set to impose significant cuts in public expenditure as a consequence of the financial environment, and civil justice is not a high priority for spending. Governments, businesses, and citizens will be looking for ways of reducing costs.

Adoption of a principle of proportionality

Few jurisdictions have historically applied a principle of proportionality to litigation costs or to lawyers' costs, but such an approach is now gaining ground,

especially in common law jurisdictions. The importance of such a principle has become particularly relevant where lawyers' costs have become too high, notably for small cases and very large cases. However, there is no consensus on what it is that costs should be proportionate to (the amount of work done, the value of the case to the party, or the amount at stake) and how proportionality should be achieved in practice.

Adoption of case management techniques

Special techniques are being created, such as procedure-light tracks, (e.g., small claims or pre-action protocols) mediation, or fixed-cost regimes.

Those responsible for courts, including judges and lawyers, increasingly need to respond by lowering costs, streamlining procedures, simplifying unnecessary procedures, increasing predictability of costs, and delivering speedy services at costs that are proportionate to amounts in dispute. Questions arise over the duplication of functions, for example where lawyers work in a split profession. Applying case management techniques which attempt to ensure that procedural steps are minimized consistent with delivery of fair procedures and just results, is an important approach for larger cases, but does not itself deliver cost management or proportionality of costs to the value of cases. There is not much evidence that many short-cuts in procedure are being taken that would threaten due process or delivery of justice through court procedures.

Adoption of alternative dispute resolution pathways

Outside courts, and sometimes in co-ordination with them, new pathways are being found for particular types of disputes and for lower value claims. Such pathways might not involve lawyers, or involve lawyers to a lesser extent. Many jurisdictions are encouraging settlement through mediation, other modes of ADR, small claims procedures, or other streamlined approaches. Techniques involving ombudsmen, business complaint systems and involvement of regulators are also being more widely examined. There is evidence of continuing

experimentation with a range of techniques, and diversification is far from complete.

A small number of governments are beginning to take an overview of all dispute resolution pathways, especially, but not limited to, those funded by public revenues, so as to evaluate all options and build an integrated framework of pathways for dispute resolution that are appropriately focused on particular types of disputes.

Recommendations

If governments wish to deliver wider access to justice in those cases where proportionate cost is particularly important, they should introduce tariffs for lawyers' fees, introduce efficient case management techniques in the civil courts, and devise alternative pathways for dispute resolution that deliver cheaper or more efficient solutions. This is not to say that justice will always come cheap. There will always be cases in which access to factual and/or expert evidence is viewed as important, and this necessarily involves a certain level of expenditure.

The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

European Civil Justice Systems

The European Civil Justice Systems programme aims to evaluate all options for dispute resolution in a European state, and to propose new frameworks and solutions. It encompasses a comparative examination of procedural, funding, and other mechanisms within civil justice systems, including alternative dispute resolution systems. It aims to analyse the principles and procedures that should, or do apply, and to evaluate effectiveness and outcomes.

The programme also involves research into substantive EU liability law, notably consumer and product liability law, harmonization of laws in the European Union, and in particular the changes taking place in the new Member States of central and Eastern Europe.

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