

COST AND FEE ALLOCATION IN CIVIL PROCEDURE:

CHINA NATIONAL REPORT

Xiao Jianguo and Tang Xin

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*Xiao Jianguo and Tang Xin***Abstract*

This article discusses the practice of allocation of litigation cost in the People's Republic of China. It examines the basic rule under which the losers pay all, as well as the exceptions thereto. The article also discusses the social background for self-representation in China. In addition, it evaluates the effectiveness of legal aid in alleviating the parties' financial burden. By evaluating the acceptance charges and the mandatory pre-ation procedures, the article also studies the legislative attitude towards litigation.

I. THE BASIC RULES: WHO PAYS?

In China, litigation costs include court costs and party expenses, but generally, attorney's fees are not included in the latter. The following is included in litigation costs: charges for accepting the case; application fees; travel/accommodation expenses, and compensation for forgone wages of witnesses, experts, translators and adjustors; and costs incurred in the litigation process for verification, public announcement, inspection and examination, translation, evaluation, auction, sale, storage, custody, transportation, and vessel supervision.¹ According to the *Measures on Payment of Litigation Fees* promulgated and implemented by the State Council on April 1, 2007, the overarching principle for allocation of litigation costs is that the "loser pays all".² However, since attorney's fees are excluded from the scope of general litigation costs, they are allocated pursuant to a scheme different from that for litigation costs.

Generally, in China, attorney's fees are borne by the parties on their own accounts separately, and neither party can get reimbursements from the counterparty. There are a number of justifications for such an arrangement. First, as the losing party is not required to reimburse the counterparty's attorney's fees, litigation

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¹ See Susong Feiyong Jiaona Banfa (诉讼费用交纳办法) [Measures on Payment of Litigation Fees] (promulgated by the St. Council, Dec. 19, 2006, effective Apr. 1, 2007). ST. COUNCIL GAZ., Feb. 10, 2007, at 4., art. 6 (China) [hereinafter Measures on Payment of Litigation Fees].

² See *id.* art. 29.

costs are generally low, which brings greater convenience and accessibility for people to litigate, thereby furthering the virtue of “making the judiciary closer to the people”. Second, if the losing party has to pay for the winning party’s attorney’s fees, the poor may not be willing to sue to protect their rights owing to fear of losing the case. Third, there is uncertainty in the outcome of civil actions; no person should be punished merely for suing or defending. Fourth, a heavy burden will befall the court in verifying the attorney’s expenses in determining a reasonable amount, and furthermore, lawyer independence may be impaired if the court were to determine the attorney’s fees. Fifth, representation by a lawyer is not mandatory in China; treating attorney’s fees as part of litigation costs and requiring the losing party to bear the attorney’s fees is not in accordance with the principle of self-representation.

Despite the aforementioned overarching principle of “loser pays all”, in China, such arrangement is limited both legally and practically. First, as discussed above, the losing party is not mandated to bear the winning party’s attorney’s fees. Second, the winning party bears any fees incurred for verification carried out by a third-party entity without the consent of the losing party or the court’s approval. Third, as for the travel and accommodation expenses, and compensation for forgone wages of the witnesses, the losing party only pays for a reasonable portion thereof,³ and the court has the discretion to decide whether the amount is reasonable based upon various factors such as the extent of the local economic development and the parties’ economic affordability. Fourth, travel and accommodation expenses, and compensation for forgone wages of the witnesses, experts, translators and adjustors employed by the winning party with the court’s approval are included in the litigation costs, and shall be borne by the losing party in accordance with laws. Note that in practice, unless the plaintiff specifically demands that the defendant pays such costs and fees, and provides receipts, invoices or other relevant evidentiary documentation to demonstrate the actual expenditures, the court will not impose such costs on the losing party.⁴

³ See *Zuigao Renmin Fayuan Guanyu Mingshi Susong Zhengju de Ruogan Guiding* (最高人民法院关于民事诉讼证据的若干规定) [Provisions regarding Evidence in Civil Litigation of the Supreme People’s Court] (promulgated by the Sup. People’s Ct., Dec. 21, 2001, Apr. 1, 2002) SUP. PEOPLE’S CT. GAZ., Jan. 1, 2002, at 19, art. 54, § 3 (China).

⁴ See generally Liu Guoqiang (刘国强), *Woguo Zhengren Chuting Zuozheng Zhidu Lifa Quexian de Yuanyin* (我国证人出庭作证制度立法缺陷的原因) [*Cause of the Legislative Defects in the Chinese System of Witness Testimony*], NANDU XUETAN (南都学坛) NANDU ACADEMIC FORUM, Nov. 10, 2004, at 96 (explaining the historical background of the current testimony system).

Additionally, there are special rules for appellate procedures, which can be analyzed from the two areas of court costs and attorney's fees. Special rules for court costs in appellate proceedings include the following. First, for appellate procedures of property cases, the court charges case acceptance fees based on the difference between the amount determined in the trial judgment and the amount claimed by the appellant;⁵ if there are multiple claims, such charges will be calculated separately for each of the claims, and then aggregated at the end.⁶ If the appellant claims for specific performance under a contract in dispute, the charges will be calculated based on the amount claimed by the appellant, i.e., the value of the outstanding part under such contract.⁷ Second, if the appeal is dismissed, the appellant does not need to pay any fees.⁸ Third, for appeals against a non-acceptance or dismissal ruling, or ruling on jurisdiction challenges, if the appellate court sustains the original ruling of the court of original instance, the latter court should refund the acceptance charges paid by the parties.⁹ Fourth, if only one party appeals from the original judgment and the appellate court sustains the original judgment, the costs for the appeal shall be borne by the appellant. If both parties appeal from the original judgment, and the appellate court, after hearing the case, decides to dismiss the appeal and sustain the original judgment, the cost of appeal shall be borne by both of the parties. Fifth, for cases remanded by the appellate court for rehearing by the lower court, the appellate acceptance advances paid by the appellant shall be refunded. Sixth, if the appellate court, after hearing the case, enters into a new judgment against the original judgment entered by the court of original instance, in addition to the determination of the allocation of costs incurred in the appealing proceeding between the parties, the appellate court shall also correspondingly change the lower court's decision regarding the allocation of litigation costs and fees.

The special rules for attorney's fees in appellate proceedings are as follows: lawyers representing both the trial and the appeal shall

⁵ See Measures of Payment on Litigation Fees, *supra* note 1, art. 17.

⁶ See Guanyu Minshi Susong Shoufei Jige Wenti de Pifu (关于民事诉讼收费几个问题的批复) [Replies to Certain Issues of Charges in Civil Litigation] (promulgated by the Sup. People's Ct., June 21, 1986, effective June 21, 1986) SUP. PEOPLE'S CT. GAZ., Sept. 20, 1986, at 18, para. 2 (China) [hereinafter Replies Regarding Charges in Civil Litigation].

⁷ See Zuigao Renmin Fayuan Guanyu Ruhe Heding Anjian Shouli Fei Wenti de Pifu (最高人民法院关于如何核定案件受理费问题的批复) [Replies regarding How to Determine Acceptance Charges of the Supreme People's Court] (promulgated by Jan. 6, 1988, effective Jan. 6, 1988) (Chinalawinfo).

⁸ See Measures of Payment on Litigation Fees, *supra* note 1, art. 8 (2).

⁹ See *id.*

provide a 50% discount in the appealing proceeding on the basis of the rates applied for representation in the trial proceeding; lawyers only representing the appellate proceeding shall charge fees based on the rates applicable in the trial proceeding.¹⁰

There is no general rule for allocating the costs for taking of evidence. First, if the plaintiff collects evidence on its own, but fails to request in its complaint that the counterparty bears such costs, or fails to provide valid proof of such costs, the plaintiff should assume such costs on its own account. If the defendant collects evidence on its own, unless otherwise provided by the law, the court will not make the plaintiff pay for such costs, even if the plaintiff loses the case. Second, if the parties request the court to obtain or preserve certain evidence, normally, the court will not charge any fees, and thus, there will not be any allocation issues. Finally, if the parties request the court to obtain evidence, and the court delegates a third party to conduct the verification, inspection and examination processes, the party to which the conclusion of these processes is unfavorable shall pay the relevant costs; if the conclusion does not favor one party over another, the court shall directly determine the allocation. Generally, in most cases, the costs for the taking of evidence do not take up a large portion of the entire litigation costs, which consists primarily of attorney's fees and case acceptance charges.

In China, judicial policies encourage the parties to reach settlement/mediation agreements in order to accelerate the development of diversification of dispute resolution mechanisms. Courts stick to the principle of "mediate as much as possible, judge only when appropriate, combine mediation and

¹⁰ This is an industry-wide practice of the lawyer community in China, see, e.g., Shanghai Shi Lüshi Fuwu Shoufei Zhengfu Zhidao Jia Biaozhun (上海市律师服务收费政府指导价标准) [Shanghai Government Guide Price Standards for Lawyers' Service Fees] (promulgated by Price Bureau of Shanghai and Bureau of Justice of Shanghai, May 13, 2009, effective July 1, 2009) (Chinalawinfo) ("Lawyers who have represented in the first phase shall provide a 50% discount for representation in the second phase."); Guangdong Sheng Lüshi Fuwu Shoufei Zhengfu Zhidao Jia Biaozhun (广东省律师服务收费政府指导价标准) [Guangdong Government Guide Price for Lawyers' Service] in Guangdong Sheng Wujia Ju, Sifating Lüshi Fuwu Shoufei Guanli Shishi Banfa (广东省物价局、司法厅律师服务收费管理实施办法) [Implementation Measures of the Guangdong Province on Administration of Lawyers' Service Fees] (promulgated by the Price Bureau and the Department of Justice of Guangdong Province, Dec. 25, 2006, effective, Jan. 10, 2007), (Chinalawinfo) ("Lawyers who are representing in the appealing proceeding after having represented in the trial shall halve the applicable rates based on the rates for representation in trial."); [Beijing Government Guide Price Standards for Attorney's fees for Representation in Litigation (Interim) (Draft for Comments)] (promulgated by the Beijing Municipal Comm'n of Development and Reform, May 5, 2010, effective May 30, 2010), Beijing Shi Fazhan he Gaige Weiyuanhui (北京市发展和改革委员会) Beijing Municipal Comm'n of Development and Reform, <http://www.bjpc.gov.cn/tztg/201005/t590190.htm> ("One single law firm representing in different phases of one single case shall provide discounted rates as of the second phase as appropriate.") (China).

judgment, and settle the dispute at the closing of the case.” As such, mediation runs through the entire litigation process. There are two methods for the parties to reach a settlement/mediation agreement and close the case – the parties may ask the court to produce a mediation notification, or alternatively, the plaintiff may withdraw its complaint. According to statistics provide by the Supreme People’s Court, during the five years from 2003 to 2007, the Supreme People’s Court heard 3,196 civil cases, while various local courts across the nation heard 22,145,000 civil cases – among these, cases closed through mediation/withdrawal amounted to 50.74%.¹¹

As for case acceptance charges, in order to encourage the parties to settle by themselves or accept mediation, Article 15 of the *Measures on Payment of Litigation Fees* specifically provides that, if a case is closed through mediation or the plaintiff withdraws the complaint, the case acceptance charge will be halved.¹² Furthermore, for cases in which agreements are reached through mediation guided by the court, allocation of litigation costs shall be determined through discussion between the parties; if no agreement is reached, the court shall intervene to determine the reasonable allocation.¹³ For appeals heard by an appellate court in which an agreement is reached through mediation, after the mediation notification is served, the judgment of the court of the original instance is regarded as reversed.¹⁴ In such a case, allocation of all litigation costs and fees incurred in the original trial and the appeal shall be determined through discussion between the parties; again, if no agreement is reached, the appellate court shall determine the allocation.¹⁵

As for the attorney’s fees, there is no specific regulatory provision requiring lawyers to reduce their charges if the dispute ends in mediation or withdrawal of complaints. The major reason for this arrangement is the possibility that lawyers may intentionally prevent settlement/mediation if they are required to reduce charges

¹¹ See Zuigao Renmin Fayuan Gongzuo Baogao (最高人民法院工作报告) [Working Report of the Sup. People’s Ct.], SUP. PEOPLE’S CT. GAZ., Apr. 1, 2009, at 3 (China). In judicial practice, the percentage of cases closed through mediation in basic people’s courts at districts and counties of China is even higher, reaching 70% or even above. According to certain reports of the People’s Court Newspaper, in courts of certain regions, the ratio of cases closed through mediation amounts up to over 90%.

¹² See *Measures of Payment on Litigation Fees*, *supra* note 1, art. 15.

¹³ See *id.* art. 31.

¹⁴ See *Minshi Susong Fa* (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm., Nat’l People’s Cong., Oct. 28, 2007, effective Apr. 1, 2008) 2007 STANDING COMM., NAT’L PEOPLE’S CONG. GAZ. 702, art. 155 [hereinafter Civil Procedure Law].

¹⁵ See *Replies Regarding Charges in Civil Litigation*, *supra* note 6.

for these cases. In fact, in China, lawyers are encouraged to take part in the settlement/mediation procedures, which is deemed as an integral part of the lawyers' work.¹⁶ In fact, in order to encourage their active involvement in these proceedings, lawyers are permitted to charge their clients on an hourly rate basis when representing them in mediation proceedings.¹⁷

II. EXCEPTIONS AND MODIFICATIONS

There are numerous exceptions to the aforementioned set of basic rules which can be summarized as follows. (1) According to Article 12 of the *Measures on Payment of Litigation Fees*, judicial verification fees shall be borne by the party applying for such verification.¹⁸ (2) The winning party may pay such fees if it is willing to.¹⁹ (3) If a party prevails in some claims and loses in others, the court shall decide the respective amounts of litigation costs by taking into account the specific facts and circumstance on a case-by-case basis.²⁰ (4) If there are joint litigants on the losing side, the court shall decide the respective amount of litigation costs to be borne by each joint litigant based on each of their interests in the subject matter.²¹ (5) The debtor shall assume attorney's fees, travel and other requisite fees incurred by the creditor for exercising its right of revocation; third parties in fault shall assume such costs as appropriate.²² (6) In intellectual property litigations, indemnification for infringement of intellectual property shall also include reasonable expenses of the owner for defending against the infringement, including reasonable costs of investigation and

¹⁶ See *Lüshi Fa* (律师法) [Lawyers Law] (promulgated by the Standing Comm., Nat'l People's Cong., May 15, 1996, effective, Jan. 1, 1997). 2007 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 734, art. 28 (5) (amended 2007).

¹⁷ See *Shanghai Shi Lüshi Fuwu Shoufei Zhengfu Zhidao Jia Biaozhun* (上海市律师服务收费政府指导价标准) [Shanghai Government Guide Price Standards for Lawyers' Service Fees] (promulgated by Price Bureau of Shanghai and Bureau of Justice of Shanghai, May 13, 2009, effective July 1, 2009) art. 12, § 3 (Chinalawinfo)

¹⁸ It should be mentioned that according to Paragraph 1 of Article 29 of the *Measures*, judicial verification fees as part of litigation costs and fees shall be born by the loser. However, there is no uniform practice in reality. Some courts decide losers pay such fees, some decide that the party against which the verification conclusion is unfavorable pay such fees while some others decide that the applicant bears the cost.

¹⁹ See *Measures of Payment on Litigation Fees*, *supra* note 1, art. 29, § 1.

²⁰ See *id.* art. 29, § 2.

²¹ See *id.* art. 29, § 3.

²² See *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo HetongFa Ruogan Wenti de Jieshi* (Yi) (最高人民法院关于适用《中华人民共和国合同法》若干问题的解释(一)) [Interpretation I of the Supreme People's Court of Certain Issues on Application of the Contract Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Dec. 19, 1999, effective, Dec. 29, 1999) art. 26 (Chinalawinfo).

evidence collection related to the infringement. The court may also include the attorney's fees which are in conformity with rules promulgated by relevant authorities in the scope of indemnities to the parties' claims and the specific circumstance of the case.²³ (7) In principle, no litigation fee will be charged for retrials, unless the relevant party applies for retrial on grounds of new evidence or the relevant party has applied for retrial directly without appellate proceedings.²⁴ (8) If case acceptance charges are applicable in a retrial case, the relevant litigation costs shall be born by the party applying for a retrial. If both parties apply for retrial, the allocation shall follow the principle of "loser bears all."²⁵ (9) In divorce cases, the allocation of litigation costs shall be determined through discussion between the parties; if no agreement is reached, the court shall decide the allocation.²⁶ (10) In civil cases, if the plaintiff or appellant applies to withdraw the claim, which is then approved by the court, the acceptance charges shall be borne by the plaintiff or the appellant.²⁷ (11) If a party requests to reduce the claim amount after the completion of court investigations, the case acceptance charges related to the reduced amount shall be borne by the party requesting the changes.²⁸ (12) Enforcement application fees shall be borne by

²³ See, e.g., Shangbiao Fa (商标法) [Trademark Law] (promulgated by Standing Comm., Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983) 2001 SUP. PEOPLE'S CT. GAZ. 188, art. 56, § 1 (amended 2001) (China) [hereinafter Trademark Law]; Zuigao Renmin Fayuan Guanyu SHenli Shangbiao Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti de Jieshi (最高人民法院于审理商标民事纠纷案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court of Certain Issues on Law Application in Hearing Trademark Related Civil Disputes] (promulgated by the Sup. People's Ct., Oct. 12, 2002, effective Oct. 16, 2002) 2002 SUP. PEOPLE'S CT. GAZ. 188, art. 17 (China) [hereinafter Trademark Interpretation]; Zhuzuo Quan Fa (著作权法) [Copyright Law] (promulgated by the Standing Comm., Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) 2010 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 158, art. 48, § 1 (amended 2010) (China) [hereinafter Copyright Law]; Zuigao Renmin Fayuan Guanyu Shenli Zhuzuoquan Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti de Jieshi (最高人民法院于审理著作权民事纠纷案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court of Certain Issues on Law Application in Hearing Copyright Related Civil Disputes] (promulgated by the Sup. People's Ct., Oct. 12, 2002, effective Oct. 15, 2002) 2002 SUP. PEOPLE'S CT. GAZ. 186, art. 26 (China) [hereinafter Copyright Interpretation]; Zhuanli Fa (专利法) [Patent Law] (promulgated by Standing Comm., Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985) 2009 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 27, art. 65, § 1 (amended 2008) (China) [hereinafter Patent Law]; Zuigao Renmin Fayuan Guanyu Shenli Zhuanli Jiufen Anjian Shiyong Falü Wenti de Ruogan Guiding (最高人民法院于审理专利纠纷案件适用法律问题的若干规定) [Provisions of the Supreme People's Court on Law Application Issues in Hearing Patent Related Disputes] (promulgated by the Sup. People's Ct., June 22, 2001, effective July 1, 2001) 2001 SUP. PEOPLE'S CT. GAZ. 130, art. 22 (China) [hereinafter Patent Interpretation].

²⁴ See Measures of Payment on Litigation Fees, *supra* note 1, art. 9.

²⁵ See *id.* art. 32.

²⁶ See *id.* art. 33.

²⁷ See *id.* art. 9, § 1.

²⁸ See *id.* art. 35.

the party subject to the enforcement. However, if the parties reach a settlement agreement during the enforcement process, the allocation of application fees shall be determined through discussion between the parties; again, if no agreement is reached, the court shall decide the allocation.²⁹ (13) If the debtor does not raise any objections to the supervision procedure, the application fees shall be borne by the debtor.³⁰ Meanwhile, if the debtor does raise objections to the supervision procedure, which terminates the supervision procedure, then the application fees shall be borne by the applicant.³¹ If the applicant files a separate action, such application fees can be included in the claims.³² (14) The application fees for public notice for assertion of claims shall be borne by the applicant.³³ (15) The application fees for pre-action maritime preservation or maritime injunctions shall also be borne by the applicant. If the applicant files an action in connection with the relevant maritime claims, the application fee may be included in the claim.³⁴ (16) The application fees for pre-action preservation of maritime related evidence shall also be borne by the applicant.³⁵ (17) The application fees for the establishment of funds for limitation of liability for maritime claims, registration of debts and indemnification to creditors, and assertion of maritime liens and the publication cost for establishment of funds for limitation of liability for maritime claims and assertion of maritime liens shall also be borne by the applicant.³⁶ (18) If a party fails to present evidence within the time-frame due to its own fault, and presents new evidence in the appellate or retrial proceeding, which then results in the increase in litigation costs, such increase shall be borne by the party.³⁷ Furthermore, the judicial relief system in China also provides necessary supplements to the rules for the allocation of litigation costs and fees.

Although there are various exceptions to the basic rules, in China, there is no mandatory pre-action procedure with general applicability to all types of civil and commercial litigations that affect the allocation of litigation costs and fees. The current applicable mandatory pre-action procedures apply to the following two circumstances. First, the following disputes shall be mediated first if summary procedures are applied: marriage and family relationship

²⁹ *See id.* art. 38.

³⁰ *See id.* art. 36.

³¹ *See id.* art. 37.

³² *See id.* art. 39 (1).

³³ *See id.* art. 39 (2).

³⁴ *See Measures of Payment on Litigation Fees, supra* note 1, art. 39 (1).

³⁵ *See id.* art. 39 (2).

³⁶ *See id.* arts. 39 (4) & 39 (5).

³⁷ *See id.* art. 40.

disputes, inheritance disputes, labor contract disputes, damages claims resulting from traffic accidents or on-job injuries where the rights and obligations are relatively clear, housing land and neighboring relationship disputes, partnership agreement disputes and disputes with relatively small amount in question, with the exception of those cases which cannot be mediated or there is obviously no necessity to mediate based on the nature of the dispute and the situations of relevant parties.³⁸ Second, in labor disputes, pre-litigation arbitration is mandatory.³⁹ It should be noted that, although the *Law on Mediation and Arbitration of Rural Land-Contract Disputes of the People's Republic of China* approved by the ninth session of the standing committee of the eleventh National People's Congress on June 27, 2009 established the mediation and arbitration regime for disputes regarding rural land contracting, according to Article 4 of such law, the parties "may", rather than "must", select mediation or arbitration, and may directly file an action with the competent court.⁴⁰

Party agreements allocating litigation costs and fees are uncommon. Typical examples are as follows: (1) when the parties enter into a settlement/mediation agreement, they may agree on the allocation of litigation costs and fees in the agreement; and (2) when the court enters a judgment regarding allocation of litigation costs and fees, the parties may reach an agreement as to the allocation under the guidance of the court. In China, parties are not prohibited from reaching agreements on the allocation of litigation costs and fees. Such agreements will be held valid as long as the requirements for a valid contract are satisfied.⁴¹ However, in order to protect consumers' rights, in determining the legal effect of provisions in connection with the allocation of litigation costs in standard-form contracts, the *Contract Law of the People's Republic of China* shall apply; when interpreting such standard terms, Article 41 of the *Contract Law* shall apply: "when the parties have disputes on standard terms, the terms shall be interpreted according to a general

³⁸ See *Zuigao Renmin Fayuan Guanyu Shiyong Jianyi Chengxu Shenli Minshi Anjian de Ruogan Guiding* (最高人民法院关于适用简易程序审理民事案件的若干规定) [Provisions of the Supreme People's Court on Application of Summary Procedures in Civil Cases] (promulgated by the Sup. People's Ct, Sept. 10, 2003, effective Dec. 1, 2003) SUP. PEOPLE'S CT. GAZ., May 1, 2003, at 7, art. 14 (China).

³⁹ See *Laodong Zhengyi Tiaojie Zhongcai Fa* (劳动争议调解仲裁法) [Labor Disputes Mediation and Arbitration Law] (promulgated by the Standing Comm., Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) 2008 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 18, 18, art. 5.

⁴⁰ See *id.* art. 4.

⁴¹ See *Measures on Payment of Litigation Fees*, *supra* note 1, art. 29, § 1.

understanding. If there are two or more interpretations to a standard term, it shall be interpreted against the provider of such term”.⁴²

III. THE DETERMINATION OF COSTS AND FEES

China follows the doctrine of “judiciary with compensation”.⁴³ The amount of litigation costs is mainly determined by the following two factors: first, whether it is a controversial or non-controversial case, and second, whether it is a property or non-property case. A non-controversial case refers to a case where there is no civil right dispute between the parties, and the parties merely request the court to confirm if certain facts should exist, and further establish, change or extinguish certain legal relationships. A non-property case refers to a case where the civil rights in the dispute are not directly related to any property rights, but rather, indispensable to the subject’s personality or identity. As it is usually impossible to quantify the exact economic value of the rights and benefits involved in non-controversy and non-property cases, the acceptance charges for such cases are calculated under the principle of “flat fee for each case”.⁴⁴ As for property cases and litigation cases, the acceptance charges are calculated based on the amount in controversy in a progressive way and on a cumulative basis.⁴⁵ In addition, the complexity of the procedures, the level of the procedures, the phase of the procedures and whether the case is closed by judgment, settlement or mediation, are important factors for determining the amount of litigation costs.⁴⁶ Court costs other than the acceptance charges will be charged on an out-of-pocket basis.

In China, the National Development and Reform Commission and the Ministry of Justice promulgated the *Administration Measures on Lawyers’ Service Fees* on April 13, 2006, which regulates lawyers’ charging of service fees. It is provided that law firms shall refer to the government-suggested prices when charging service fees when representing clients; the basic rate and the floating range of the government-suggested price are determined by the government

⁴² See Hetong Fa (合同法) [Contract Law] (promulgated by the National People’s Congress, March 15, 1999, effective October 1, 1999). 1999 STANDING COMM., NAT’L PEOPLE’S CONG. GAZ. 104, 105, art. 41.

⁴³ Civil Procedure Law, *supra* note 14, art. 107; see XU Shengping (徐胜萍), *Lun Minshi Susong Feiyong de Chengben Buchang* (论民事诉讼费用的成本补偿) [Studies of the Cost Compensation of Civil Lawsuit Fees], SHANXI DAXUE XUEBAO (ZHEXUE SHEHUI KEXUE BAN) (山西大学学报(哲学社会科学版)) [JOURNAL OF SHANXI UNIVERSITY (PHILOSOPHY AND SOCIAL SCIENCE EDITION)], July 15, 2006, at 133, 133.

⁴⁴ See Measures on Payment of Litigation Fees, *supra* note 1, art. 13, § 2.

⁴⁵ See *id.* art. 13, § 1.

⁴⁶ See *id.* art. 15.

authority in charge of pricing for each province, autonomous region or municipality, together with the judiciary administrative authority at the same level.⁴⁷ Theoretically, the standards are regarded as mandatory – according to Article 26 of the *Administration Measures on Lawyers' Service Fees*, the government authority in charge of pricing may impose administrative penalties for violations of the above provisions, such as charging at a rate above the floating range of the government suggested price, increasing charging rates indirectly by dividing the chargeable items, duplicating charging or extending the range of charging, and charging at a rate obviously lower than the cost for the purpose of unfair competition.⁴⁸ Nonetheless, law firms have different understandings of the *Administration Measures on Lawyers' Service Fees*, and in practice, government authorities rarely intervene in the law firms' fee charging activities, and the rates at which lawyers charge fees are relatively flexible. Thus, the aforementioned provisions are merely for reference purposes and are not strictly implemented. In fact, it is very common for clients and attorneys to negotiate and increase or decrease the above rates.

When negotiating the lawyers' fees, law firms and their clients principally consider the following factors: (1) time spent; (2) complexity of the underlying legal affairs; (3) clients' affordability; (4) potential risk and responsibility the lawyers may be exposed to; and (5) the reputation and capability of the lawyers.⁴⁹ As for the fee structure, it can be a flat fee, a fee in proportion to the value of the object or a fee calculated on an hourly rate basis. Charging an hourly rate has been applied in non-litigation legal services for many years, but not in litigation services until the past two or three years. In fact, this form of pricing arrangement is principally used by some high-end law firms in large cities such as Beijing, Shanghai and Shenzhen, but very seldom in other regions. Also, the hourly rates are different in various regions. In Beijing, senior partners generally charge RMB 3,000 per hour, and leading associates (with five or more years of professional experience) generally charge RMB 2,000 per hour.⁵⁰

⁴⁷ See *Lüshi Fuwu Shoufei Guanli Banfa* (律师服务收费管理办法) [Administrative Measures on Lawyers' Service Fees] (promulgated by the Nat'l Development & Reform Comm'n & the Ministry of Justice, Apr. 13, 2003, effective Dec. 1, 2003) arts. 5, 6. (Chinalawinfo) [hereinafter *Administrative Measures on Lawyers' Service Fees*].

⁴⁸ See *id.* art. 26..

⁴⁹ This data is obtained by the authors through teleconferences with lawyers of five law firms.

⁵⁰ This data is obtained by the authors through teleconferences with lawyers of five law firms.

In China, there are two ways to identify the party bearing litigation costs. First, the allocation of court acceptance charges is decided directly by the adjudicating court. The plaintiff will normally include in its complaint that the defendant pay the acceptance charges, and request the court to include an appropriate judgment upon the closing of the case. If it is clear who the losing party is, the court has no discretion, and must rule that the losing party shall pay the acceptance charges in accordance to the law.⁵¹ Otherwise, the court will have discretion to directly allocate the litigation costs.⁵² According to the uniform format of judgments in China, the decision on acceptance charges is attached to the judgment itself and included in the body of the judgment, and no separate court order will be issued.⁵³

Second, allocation of attorney's fees generally does not fall within the scope of court ruling, except in certain cases, such as those implicating intellectual property disputes where the plaintiff requests that the court mandate the defendant to pay the plaintiff's attorney's fees.⁵⁴ According to Article 30 of the *Administration Measures on Lawyers' Service Fees*, any dispute arising out of service fees charged by lawyers shall be resolved through negotiation between the relevant law firm and its clients.⁵⁵ If no agreement is reached through negotiation, the disputes may be submitted for mediation before the local bar association, justice administrative authority or the pricing supervision authority at the domicile of the law firm, or arbitration or litigation at the court.⁵⁶ Accordingly, when there are disputes on lawyers' charging of fees, the decision-maker might be the local bar association, justice administrative authority or pricing supervision authority at the domicile of the law firm, or the arbitration institution, or the court, as the case may be. Under such circumstances, the decision-maker shall exercise their discretion in accordance with the *Administration Measures on Lawyers' Service Fees*; and if the dispute is submitted to a court, the court shall enter a separate judgment on the dispute in connection with the lawyers' charging of fees.

⁵¹ See Measures on Payment of Litigation Fees, *supra* note 1, art. 29 § 1.

⁵² See *id.* art. 29, § 2.

⁵³ See *id.* art. 43.

⁵⁴ See Trademark Law, *supra* note 23; Trademark Interpretation, *supra* note 23; Copyright, *supra* note 23; Copyright Interpretation, *supra* note 23; Patent Law, *supra* note 23; Patent Interpretation, *supra* note 23.

⁵⁵ See Administration Measures on Lawyers' Service Fees, *supra* note 47, art.30.

⁵⁶ See *id.* art. 30.

IV. EXAMPLES

Amount in Controversy (\$1= ¥70)	Acceptance Charges (Flat)	Attorney's Fees (Beijing Standard)	Enforcement Fees (Flat)	Total (Estimated)
RMB 7,000	RMB 50	RMB 3,000/Party	RMB 50	RMB 6,100
RMB 70,000	RMB 1,500	RMB 7,000/Party	RMB 900	RMB 16,400
RMB 700,000	RMB 11,300	RMB 41,400/Party	RMB 9,400	RMB 103,500
RMB 7,000,000	RMB 61,300	RMB 304,000/Party	RMB 62,400	RMB 731,700

Notes: Acceptance charges and enforcement fees are calculated according to the standard provided by the *Measures on Payment of Litigation Fees*,⁵⁷ and Attorney's fees are calculated according to the standard provided by the *Beijing Government Guide Price Standards for Attorney's fees for Representation in Litigation (Interim) (Draft for Comments)*.⁵⁸

In cases other than those implicating intellectual property infringement, if the plaintiff loses a RMB 700,000 (approximately \$100,000) claim, fees will vary depending on whether it chooses to appeal: if the plaintiff loses in trial but does not appeal, its fees will be approximately RMB 62,700; if the plaintiff loses in trial, appeals and loses again in the appeal, it is difficult to predict its costs because the case acceptance charges for the appellate proceeding may vary depending on the appellant's claims. Assuming the appellant appeals for the full claim amount in trial and continues employing the same law firm, its fees will approximately be RMB 94,700.

A losing plaintiff and a losing defendant assume almost the same amount of litigation costs. However, if the losing defendant does not implement the effective judgment, he/she will have to pay for the enforcement fees. In a RMB700,000 case, the enforcement fees may amount to RMB103,500.

⁵⁷ See *Measures on Payment of Litigation Fees*, *supra* note 1, arts. 13, § 1, 14, § 1.

⁵⁸ See Beijing Shi Lüshi Susong Daili Fuwu Shoufei Zhengfu Zhidaojia Biaozhun (Shixing) (Zhengqiu Yijian Gao) (北京市律师诉讼代理服务收费政府指导价标准(试行) (征求意见稿)) [Beijing Government Guide Price Standards for Attorney's fees for Representation in Litigation (Interim) (Draft for Comments)] para. 2 (Jan. 7, 2009), Beijing Shi Fazhan He Gaige Weiyuan Hui (北京市发展和改革委员会) [Beijing Municipal Comm'n of Development and Reform], <http://www.bjpc.gov.cn/zmhd/myzj/zxjz/201009/t689262.htm>.

V. SPECIAL ISSUES: SUCCESS-ORIENTED FEES, CLASS ACTIONS, SALE OF CLAIMS, AND LITIGATION INSURANCE

Success-oriented fees are allowed under Chinese laws on a limited basis, and limitations depend on the particular form of success-oriented fees. Even before the promulgation of the *Administrative Measures on Lawyers' Service Fees*, success-oriented fees existed in practice, including contingency fees in percentage of the amount granted by the court, fee arrangements with "no fee if losing" provisions, fee agreements with success premium arrangements, fee agreements in which certain parts of the attorney's fees are conditioned on the outcome and other forms in which fees are charged depending on the outcome. The *Administration Measures on Lawyers' Service Fees* explicitly affirms such arrangements and classifies them as "contingent representations", but also imposes certain limitations on them.⁵⁹ Under these measures, the following general requirements must be satisfied for success-oriented fees: (1) applicability is limited to civil cases involving property disputes; (2) the client agrees to accept contingent representation even after being informed of the government-suggested price; (3) contingent representation shall not be applied to marriage cases, inheritance cases, claims for social insurance or basic living security, claims for alimony, comfort funds, poverty relief payments, on-job injury damages cases, claims for salary payment, and group civil cases; (4) under contingent representation, the relevant law firm and its client shall enter into contingent representation fee agreements which shall outline the risk and responsibility assumed by both parties, fee calculation and the amount or percentage of the fees; and (5) the success-oriented fees shall not exceed 30% of the total amount agreed in the fee contract.⁶⁰ In principle, a party shall pay its own attorney's fees. Even in intellectual property cases, the losing party will only assume such attorney's fees as provided by competent authorities, and the court will decide on the reasonable amount.⁶¹ As a result, the losing party will not be required to pay the portion increased due to the contingent representation arrangement.

There are two circumstances in which claims are sold for the purposes of litigation: transfer of substantive rights and transfer of the right to sue. Transferring substantive rights is permitted under

⁵⁹ See *id.* art. 11-13.

⁶⁰ See *id.* art. 11-13.

⁶¹ See Trademark Law, *supra* note 23; Trademark Interpretation, *supra* note 23; Copyright Law, *supra* note 23; Copyright Interpretation, *supra* note 23; Patent Law, *supra* note 23; Patent Interpretation, *supra* note 23.

the Chinese law. The right-holder may transfer its substantive rights according to the *Contract Law of the People's Republic of China*, and the transferee may file an action in its own name after the transfer. Meanwhile, a transfer of the right to sue involves a transfer by a right-holder of just the right to sue, rather than litigation entrustment, which is prohibited by law.⁶² Article 11 of the *Trust Law of the People's Republic of China* provides that a trust established solely for the purpose of litigation or debt recovery shall be invalid. It is illegal if the right-holder transfers its right to sue to lawyers, law firms, or any other persons taking it as a job which invests in the litigation and assumes the risk. Nonetheless, there are a few cases in which agreements on transfer of rights to sue were recognized as valid, such as the Haiminchuzi No. 24968 Civil Judgment of the People's Court of Haidian District of Beijing in 2006.⁶³

Under the Chinese law, there are no special rules for representative actions for group disputes, group actions filed by trade unions, real property owners' committee, copyrights collective management organizations, or other types of civil actions. However, in judicial practice, some local normative documents provide that the courts shall not charge any fees for environmental public interest suits filed by the people's procuratorate

⁶² See Xintuo Fa (信托法) [Trust Law] (promulgated by the Standing Comm., Nat'l People's Cong., Apr. 18, 2001, effective Oct. 1, 2001) 2001 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 311, art.11 (China).

⁶³ Guangdong Zhongkai Wenhua Fazhan Youxian Gongsi Su Beijing Zhongsou Zaixian Ruanjian Youxian Gongsi Qinfan Zhuzuo Quan Jiufen An (广东中凯文化发展有限公司诉北京中搜在线软件有限公司侵犯著作权纠纷案) [Guangdong Zhongkai Cultural Development Ltd. v. Beijing Zhongsou Online Software Ltd.], Court of Haidian District, Beijing, Apr. 22, 2007 (Chinalawinfo). The Supplement Agreement entered into by Jiebao Limited (Party B) and Zhongkai Limited (Party A) provided that, during the term in which Party B has exclusive rights to the information network of Wuji, in the action filed by Party A against Zhongsou Limited for infringement of rights in Wuji, as agreed by both parties, Party A would act as the subject party to the action and Party B should cooperate with Party A to collect evidence and provide required materials. Indemnities obtained upon victory of the litigation, after deducting necessary expenses, should be shared by the parties on an equal basis. Other than agreed in such agreement, Party A would be solely responsible sue for tort liability against any infringement to the right to spread Wuji on information network, including collection of evidence, issuance of lawyer's letters, filing of actions and other legal proceedings and Party A should be entitled to the indemnities. The People's Court of Haidian District of Beijing stated in the judgment that in order to solve the conflicts between the respective tort action filed by the parties separately, the parties entered into the Supplement Agreement which provided for the infringement claims made by Zhongkai against Zhongsou and other infringement claims of the parties. According to such agreement, Zhongkai would have the right to sue. The court was of the opinion that the agreement between the parties in connection with how to actively claim for remedies against infringements to their rights and how to share benefits upon indemnification neither violated any law or regulation nor would necessarily affect the court's judgment and the Supplement Agreement is legal and valid.

or environment protection institutions.⁶⁴ However, note that this is uncommon.

In addition, there is no particular litigation insurance in China. However, the litigation costs may be covered by liability insurance, such as third-party automobile liability insurance. As third-party automobile liability insurance is mandatory,⁶⁵ it is quite common and implemented effectively. It should be noted, however, that the litigation costs covered by liability insurance policies are rather limited, and for most civil and commercial cases, there are no such insurance mechanisms.⁶⁶

VI. SELF-REPRESENTATION IN LAWSUITS

The Chinese civil procedure law follows the doctrine of self-representation rather than that of mandatory third-party representation. Accordingly, in all types of civil and commercial cases, parties may represent themselves as long as they have full civil capacity. If the a party wishes to designate other persons to represent it, according to Paragraph 2 of Article 58 of the *Civil Procedure Law of the People's Republic of China*, besides hiring a lawyer, the party may also authorize its relatives, related social institutions or persons recommended by its employer, or other citizens approved by the court. In judicial practice, it is very common for one party or both parties to represent themselves in civil actions, especially in relatively undeveloped areas.⁶⁷ A handful of reasons underlie such a phenomenon. First, due to the general imbalance in the number of judges and lawyers in the various regions of China, in many circumstances, parties are unable to find lawyers to represent them. As of the end of 1997, there were over 170,000 judges at all court levels in China and 79,000 qualified lawyers.⁶⁸ The number of

⁶⁴ In June, 2006, the High Court of Yunnan Province issued *Summary of Minutes of the Symposium on Construction of Environmental Protection Tribunals and Hearing Cases Relate to Environmental Protection* (全省法院环境保护审判庭建设及环境保护案件审理工作座谈会纪要), which provides that, acceptance fees will not be charged for environment related public interests suits initiated by people's procuratorates or environment protection groups. See Zhu Yuchen (朱雨晨) & Wang Qingpu (王清普), *Huanjing Gongyi Susong: Juli Xianshi Haiyou Duoyuan* (环境公益诉讼: 距离现实还有多远?) [*Environment Related Public Interests Suits: How Far is it From the Reality?*], FAZHI ZHOUMO (法制周末) [LEGAL WEEKEND], June 18, 2009.

⁶⁵ See *Daolou Jiaotong Anquan Fa* (道路交通安全法) [Road Traffic Safety Law] (promulgated by the Standing Comm., Nat'l People's Cong., Apr. 22, 2011, effective May 1, 2011) 2011 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 418, 419, art. 17.

⁶⁶ Yuan Bin (袁彬), Susong Baoxian, *Ershiyi Shiji Xinxing Susong Jiuzhu* (诉讼保险: 二十一世纪新型诉讼救助) [*Insurance of litigation: New Litigation Aids in 21 Centuries*], GUANGXI ZHENGFA GUANLI GANBU XUEYUAN XUEBAO (广西政法管理干部学院学报) [JOURNAL OF GUANGXI ADMINISTRATIVE OFFICERS INSTITUTE OF POLITICS AND LAW], Mar. 5, 2004, at 107, 108.

⁶⁷ See Civil Procedure Law, *supra* note 14, art. 58, § 2.

⁶⁸ See *Zhongguo Falü Nianjian* (中国法律年鉴) [Legal Yearbook of China] at 71, 179 (1998).

judges was over twice of that of lawyers. In the following 10 years, the scale of lawyers expanded significantly, and as of 2010, the aggregate number of lawyers in China will have reached 200,000.⁶⁹ However, at the same time, the number of judges has also reached around 200,000.⁷⁰ Furthermore, there is an added problem of the most prominent lawyers being concentrated in big cities like Beijing, Shanghai and Guangzhou. There are very few lawyers in small towns and rural areas. Second, among the over 8,000,000 civil cases adjudicated in China every year, most are closed through summary procedures or mediation.⁷¹ Summary procedures or mediation procedures demand less formality, professional knowledge and technicality, rendering it easier for the parties to represent themselves. In addition, judges extensively exercise their power of interpretation in civil actions, all of which make it easier for the parties to represent themselves, further diminishing the need for attorney representatives. Third, in a few cases, the parties are too poor to hire lawyers to represent them. Fourth, there is a general distrust of the lawyers in the Chinese society, which is aggravated by recurring news of lawyers intentionally provoking disputes, charging clients in violation of relevant laws and regulations,⁷² and committing other violations or breaches of professional ethics.

VII. LEGAL AID

At the beginning of 1994, the Ministry of Justice started to explore the establishment of a legal aid system. In September 2003, the central government published and implemented the *Regulation on Legal Aid*, signaling the establishment of a legal aid system in China. In order to carry out the Regulation, eight government departments including the Ministry of Justice, the Ministry of Civil Affairs, the Ministry of Finance, and the Ministry of Labor and Social Security jointly issued the *Opinions about Implementing the*

⁶⁹ See Liu Yong (刘涌), *Wu Lüshi, Bu Fazhi* (无律师, 不法治) [No Lawyer, No Rule of Law], 21 SHIJI JINGJI BAODAO (21世纪经济报道) [21ST CENTURY ECON. NEWS], Mar. 4, 2011, at T07.

⁷⁰ 2006 Nian – 2010 Nian Shenzhijie Anjian Shuliang Yu Faguan Renshu Zoushi Qingkuang (2006年-2010年审执结案件数量与法官人数走势情况) [Statistics on the number of adjudicated cases and the number of judges in 2006-2010], Zuigao Renmin Fayuan (最高人民法院) [Supreme People's Court] (Mar. 24, 2011, 16:20:00), http://www.court.gov.cn/qwfb/sfsj/201103/t20110324_19082.htm (China).

⁷¹ See Renmin Fayuan Gongzuo Niandu Baogao (2010) (人民法院工作年度报告(2010)) [People's Court Annual Report (2010), Zuigao Renmin Fayuan (最高人民法院) [Supreme People's Court], (May 25, 2011, 11:18:00), http://www.court.gov.cn/qwfb/sfsj/201105/t20110525_100996.htm (China).

⁷² See Wang Xin (王鑫) et al., *Dailiren Eyi Tiaosong, Shenpan Zhixu Bukanqirao* (代理人恶意挑讼 审判秩序不堪其扰) [Lawyers Maliciously Stir up Litigations: A Pain in the Neck for Trial Order], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT NEWS], Dec. 15, 2009, at 8.

*Regulation of Legal Aid and Solving the Difficulties of the Poverty to File Suits.*⁷³ Thereafter, the Ministry of Justice and the Ministry of Finance jointly issued the *Interim Measures on the Management of the Special Subsidies from Central Government to Local Legal Aid Cases*, which clarifies that the legal aid funds shall be included in the financial budget of all levels of governments, and outlines the establishment of special funds for legal aid at the central and provincial levels. This solved the problem of obtaining support from departments and institutions in charge of labor arbitration, land and resources, construction, public health, industry and commerce, and archive management, when investigating in legal aid cases. In 2005, the Ministry of Justice and the Supreme Court jointly issued the *Regulation on Legal Aid Work in Civil Litigation*, which realized the connection of legal aid and judicial aid at the policy level, and actually expanded the scope of legal aid.

Currently, a complete legal aid system sponsored by the government has been established in China. The *Regulations on Legal Aid* promulgated by the State Council in September 2003 provides that legal aid is a responsibility of the government; the governments at or above the county level shall take active actions to facilitate legal aid work, provide financial support to legal aid, and ensure that the legal aid program develops in line with the economy and the society.⁷⁴ The funds for legal aid shall be used for its specified purpose only, and subject to supervision by finance and audit authorities.⁷⁵ Parties with financial or other difficulties may apply for free legal services, such as consultation and representation provided by lawyers, notaries and legal workers at the grassroots level. Law firms shall accept legal aid cases assigned to them. Legal aid institutions shall pay allowances to lawyers or social organization personnel who are designated to deal with legal aid cases. The standard of allowance shall be determined by the judicial administrative authority at the provincial level together with the financial authority at the same level, by taking into account the level of development of the local economy and by making reference to the average costs of legal aid institutions when dealing with various legal

⁷³ Guanyu Guanche Luoshi Falü Yuanzhu Tiaoli Qieshi Jiejue Kunnan Qunzong Da Guansi Nan Wenti deYijian (关于贯彻落实《法律援助条例》切实解决困难群众打官司难问题的意见) [Opinions on Implementation of the Legal Aid Regulation and Resolving the Difficulties of the Poor in Lawsuits] (promulgated by the Ministry of Justice, St. Council, Sept. 6, 2004, effective Sept. 6, 2004) (Chinalawinfo).

⁷⁴ See Falü Yuanzhu Tiaoli (法律援助条例) [Regulation on Legal Aid] (promulgated by the St. Council, July 21, 2003, effective Sept. 1, 2003) ST. COUNCIL GAZ., Aug. 30, 2003, at 7, art. 3 (China) [hereinafter Regulation on Legal Aid].

⁷⁵ See *id.* art. 3 § 2.

aid cases; and such a standard may be adjusted as necessary.⁷⁶ For citizens with financial difficulties who do not fall into the scope of legal aid, law firms may reduce or exempt legal service fees as appropriate.⁷⁷ In addition, all levels of courts in China have established the judicial relief system,⁷⁸ which refers to the set of rules under which the court may postpone, reduce or exempt litigation fees in civil cases for parties with adequate evidence to prove that their legal rights are impeded due to financial difficulties.

Aid offered to parties with financial difficulties by private organizations has been encouraged and existed for long time in China. On the one hand, Article 15 of the *Civil Procedure Law* establishes the principle of providing support for lawsuits, i.e., for conducts infringing the civil rights of the state, a group, an individual, a state organ, social organization, enterprise or institution may provide support to the infringed entity or individual in filing legal actions with the court.⁷⁹ Various forms exist for such support. For example, they may educate the entity or individual whose interest is harmed on certain legal knowledge, provide legal consulting services and familiarize them with their rights and obligations, improve and strengthen their grasp of the legal, and encourage them to protect their legal rights with the weapon of law; they may also represent such entities with their consent, or recommend lawyers or provide financial aid, by paying for their litigation costs and attorney's fees.⁸⁰ Such arrangements for providing support for lawsuits can also be found in Paragraph 2 of Article 88 of the *Law of Prevention and Control of Water Pollution*⁸¹, Article 78 of the *Labor Contract Law*⁸², Paragraph 4 of Article 21 of the *Trade Union Law*⁸³, Article 30 of the *Labor Law*⁸⁴,

⁷⁶ See *id.* art. 24.

⁷⁷ This data is obtained by the authors through teleconferences with lawyers of five law firms.

⁷⁸ See Measures of Payment on Litigation Fees, *supra* note 1, arts. 44-51.

⁷⁹ See Civil Procedure Law, *supra* note 14, art. 15.

⁸⁰ See MaYonglong (马永龙) & Cao Shihai (曹世海), *Zhichi Qisu Chutan* (支持起诉初探) [Preliminary Study on Supporting Prosecution], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT NEWS], Aug. 19, 2003.

⁸¹ Shui Wuran Fangzhi Fa (水污染防治法) [Law of Prevention and Control of Water Pollution] (promulgated by the Standing Comm., Nat'l People's Cong., Feb. 28, effective June 1, 2008) 2008 STANDING COMM., NAT'L PEOPLE'S CONG., GAZ. 315, art. 88, § 2.

⁸² See Laodong Hetong Fa (劳动合同法) [Labor Contract Law] (promulgated by the Standing Comm., Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) 2007 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 401, art.78.

⁸³ See Gonghui Fa (工会法) [Trade Union Law] (promulgated by the Standing Comm, Nat'l People's Congress, Oct. 27, 2001, effective Oct. 27, 2001) ST. COUNCIL GAZ., Dec. 10, 2001, art.81 § 4 (China).

Paragraph 2 of Article 52 of the *Law of Protection of Women's Rights*⁸⁵, Paragraph 3 of Article 84 of the *Law on the Prevention and Control of Environmental Pollution Caused by Solid Wastes*⁸⁶, Article 23 of the *Product Quality Law* and Paragraph 6⁸⁷, Article 32 of the *Law on Protection of Consumer Rights*⁸⁸. On the other hand, in China, social organizations and institutions are encouraged to provide legal aid to citizens with financial difficulties with their own resources, and the entire society is encouraged to donate to legal aid activities. Organizations and individuals who make significant contributions to legal aid work will be commended and honored by government authorities and judicial administrative authorities.⁸⁹ In fact, there is a large number of civil organizations that are involved in public interest legal services in China, such as the Oriental Public-interest Legal Aid Law Firm, Women's Rights Legal Service and Research Center of Peking University, Pollution Victim Legal Aid Center of China University of Political Science and Law, Disabled Rights Protection Legal Research and Service Center of Remin University of China, Beijing Juvenile Legal Aid and Research Center, Beijing Present Worker Legal Aid Working Station, and the *Small Small Bird* organization.

Generally, legal aid may provide help to all parties in need, and there is no obvious limitation on the qualifications of the beneficiary. In the past, many local rules required that legal aid may be provided only to permanent or temporary residents. However, current, there is an increasing trend of eliminating such limitations in local rules. Also, the *Measures on Payment of Litigation Fees* of 2007 have set out to "solve the problem of 'non-affordable litigation' that has been strongly complained by common people" and have substantially reduced the standards of the provision of litigation costs

⁸⁴ See *Laodong Fa* (劳动法) [Labor Law] (promulgated by the Standing Comm, Nat'l People's Cong., July 5, 1994, effective May 1, 1995) 1994 SUP. PEOPLE'S CT. GAZ. 3, art. 30 (amended 2009) (China).

⁸⁵ See *Funü Quanyi Baozhang Fa* (妇女权益保障法) [Law of Protection of Women's Rights] (promulgated by the Standing Comm, Nat'l People's Cong., May 28, 2005, effective Dec. 1, 2005) 2005 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 480, art. 52, § 2 (China).

⁸⁶ See *Guti Feiwu Wuran Huanjing Fangzhi Fa* (固体废物污染环境防治法) [Law on Prevention and Control of Environmental Pollution Caused by Solid Wastes] (promulgated by the Standing Comm., Nat'l People's Cong., Dec. 29, 2004, effective Apr. 1, 2005) 2005 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 5, art. 84, § 3 (China).

⁸⁷ See *Chanpin Zhiliang Fa* (产品质量法) [Product Quality Law] (promulgated by the Standing Comm., Nat'l People's Cong., July 8, 2000, effective Sept. 1, 2000) 2000 STANDING COMM., NAT'L PEOPLE'S CONG. GAZ. 292, art. 23 (China).

⁸⁸ See *Xiaofeizhe Quanyi Fa* (消费者权益保护法) [Law on Protection of Consumer Rights] (promulgated by the Standing Comm., Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994) 1994 SUP. PEOPLE'S CT. GAZ. 130, art. 32, § 6 (China).

⁸⁹ See Regulation on Legal Aid, *supra* note 79, arts. 7-9.

in legal aid actions. In other words, in the past, high litigation costs barred many commoners from gaining access to the court system; however, gradually, such barriers have been dramatically eliminated.

Generally, litigation costs shall not be considered as a serious barrier for certain parties to access legal remedies. However, in certain specific cases – such as in small amount consumer disputes – the litigation costs may constitute a significant barrier. With a small amount in controversy and relatively high costs of litigation in time, energy, and fees, the consumer may forego litigation, swallow the anger and accept the unfair treatment by the seller.

VIII. ENCOURAGEMENT OR DISCOURAGEMENT OF LITIGATION

With the development of the rule-of-law governing scheme, growth of the market-oriented economy and the awakening of the people's consciousness of their rights, among Chinese people, there has been a growing trend to protect their individual rights through litigation. Filing actions in courts has become one of the most important approaches for the people to protect their rights. In general, the civil procedure theory in China has advocated for the encouragement of litigation.⁹⁰ Although judicial practice is relatively more conservative compared with these theories, actual policies are quite tolerant on civil actions, and rules on litigation cost and fee allocation also tend to facilitate litigation.

In particular, in the *Measures on Payment of Litigation Fees* of 2007, the starting rate of charges in property disputes has been reduced from the original 4% to 2.5%, other litigation fees and out-of-pocket expenses for enforcement have been abolished, and the starting amount of aggregate property value for charging additional fees related to property allocation in divorce cases has been raised from RMB 10,000 to RMB 200,000. Case acceptance charges have been halved for cases where summary procedures are applied. Acceptance charges for appealing cases regarding property disputes is now calculated based on the difference between the amount claimed and the amount in the original judgment. Also, for qualified parties, the litigation costs and fees may be reduced, postponed or even exempted.⁹¹ All these provisions have

⁹⁰ See Qi Shujie (齐树洁), Suquan Baozhang: Minshi Susong Fa de Zuigao Mubiao (诉权保障: 民事诉讼法的最高目标) [Protection of Right of Action: The Highest Goal of the Civil Procedure Law], in 8 Sifa Gaige Lunping (司法改革论评) [Judicial Reform Review] pmb. (Zhang Weiping (张卫平) & Qi Shujie (齐树洁) eds., 2008).

⁹¹ See Measures of Payment on Litigation Fees, *supra* note 1, arts. 44-51.

significantly reduced litigation costs, and have allowed the Chinese public to access the courts with greater ease. All of these measures can be viewed as means to encourage litigation.

Nonetheless, despite such measures to encourage litigation, there are certain allocation rules of litigation costs that discourage litigation. For instance, in order to encourage the parties to settle disputes or accept mediation, it is provided that the litigation charges are halved for cases closed by withdrawal of complaint or through mediation.⁹² In addition, for collective civil disputes in which one party or both parties are a group of people, sensitive disputes which may affect the stability of the society, or disputes in the grey area involving state and folk laws during the transition periods of China, although there is no explicit cost and fee allocation rule discouraging litigation, courts generally adopt measures that deter litigation, by refusing to accept such types of cases, for example.

In China, the plaintiff generally has to pay all the court costs up front. According to Article 13 of the *Measures on Payment of Litigation Fees*, based on the claim amount in property cases, the acceptance charge is calculated with the following progressive schedule on a cumulative basis: if the amount or value is less than RMB 10,000, the acceptance charge is RMB 50 for each case; for amount exceeding RMB 10,000 but not exceeding RMB 100,000, 2.5% of the exceeding part; for amount exceeding RMB 100,000 but not exceeding RMB 200,000, 2% of the exceeding part; for amount exceeding RMB 200,000 but not exceeding RMB 500,000, 1.5% of the exceeding part; for amount exceeding RMB 500,000 but not exceeding RMB 1,000,000, 1% of the exceeding part; for amount exceeding RMB 1,000,000 but not exceeding RMB 2,000,000, 0.9% of the exceeding part; for amount exceeding RMB 2,000,000 but not exceeding RMB 5,000,000, 0.8% of the exceeding part; for amount exceeding RMB 5,000,000 but not exceeding RMB 10,000,000, 0.7% of the exceeding part; for amount exceeding RMB 10,000,000 but not exceeding RMB 20,000,000, 0.6% of the exceeding part; for amount exceeding RMB 20,000,000, 0.5% of the exceeding part. The acceptance charge of non-property cases is calculated as follows: (1) RMB 50 to RMB 300 for each divorce case; in cases involving property allocation, no additional fee if the property value is no more than RMB 200,000; if the property value exceeds RMB 200,000, an additional fee amounting to 0.5% of the exceeding part will be charged; (2) RMB 100 to RMB 500 each for cases related to infringement of name right, portrait right, reputation right, honor right and other personality rights. In cases involving claims for

⁹² See *id.* art. 15.

damages, no additional fee if the damages claimed is less than RMB 50,000; for amount exceeding RMB 50,000 but not exceeding RMB 100,000, an additional fee equal to 1% of the exceeding part will be charged; for amount exceeding RMB 100,000, 0.5% of such exceeding part will be charged; (3) RMB 500 to RMB 1,000 each for intellectual property case without disputed amount or value; (4) RMB 10 for each labor dispute; (5) RMB 50 to RMB 100 for each case where a party challenges the court's jurisdiction but fails; and (6) RMB 50 to RMB 100 for other non-property cases.

As for attorney's fees, whether there is any retainer and the percentage thereof depends on the agreement between the relevant law firm and its client. According to our survey and research, in over 50% of the cases, law firms charge retainer amounting to 50% or more of the total attorney's fees.⁹³ Costs for taking evidence, such as verification and evaluation fees and witness compensation, shall also be pre-paid by the party applying for such taking. Any party applying to preserve evidence shall pay a fee calculated according to the following schedule based on the value of the property preserved: (1) RMB 30 for each case if the property value is no more than RMB 1,000 or no value is involved; (2) for amount exceeding RMB 1,000 but not exceeding RMB 100,000, 1% of the exceeding part, (3) for amount exceeding RMB 100,000 but not exceeding, 0.5% of the exceeding part. However, the total preservation fee shall not exceed RMB 5,000 at most.⁹⁴ No fee will be charged for application for inspection and examination by the court. Also, in different types of cases, up-front payment requirements affect the litigation in different ways. In commercial cases, while up-front payment requirements have almost no effect of discouraging litigation, in ordinary civil cases, for the poor, up-front payment requirements may discourage litigation to a certain extent. In addition, for enforcement applications to the court, under the principle of "payment after enforcement",⁹⁵ up-front payment requirements do not affect the relevant parties in applying for enforcement.

IX. CONCLUSION

As an overall analysis, the costs and fees in civil and commercial litigations in China have the following trends: first, as for the allocation of litigation costs, most scholars stand for the opinion that

⁹³ This data is obtained by the authors through teleconferences with lawyers of five law firms.

⁹⁴ See Measures on Payment of Litigation Fees, *supra* note 1, art. 14..

⁹⁵ See *id.* art. 20, § 2

the scope of litigation costs allocated to the losing party should be expanded. Second, in terms of legal aid, the scope of legal aid has been expanding, and limitations on the eligibility the recipients have been substantially abolished; the providers of legal aid are more diversified now, and it is increasingly common for non-government organizations to provide legal aid. Lastly, as for the payment of attorney's fees, there is a diversified trend – arrangements to charge on an hourly basis have developed rapidly in the past few years, and in large cities such as Beijing, Shanghai and Shenzhen, not only foreign clients, but domestic clients (including state-owned enterprises) are also gradually moving on to choosing hourly fee schedules. Also, while the prospect of contingent representation is not optimistic, in order to eliminate certain financial and moral risks, law firms organized in quasi-corporate form usually decline to provide contingent representation service.