PROBLEMS, LARGE AND SMALL, IN THE FINANCING OF LITIGATION

In Marrakesh (Morocco), we decided that in 2019, our Second Study Commission will focus on problems, large and small, in the financing of litigation. We have limited the questionnaire to five questions and we expect to receive short but concise answers.

1. Who incurs the costs of civil litigation in your jurisdiction?

In the civil jurisdiction, normally the "procedural costs" (the cost of the expenses derived from the trial), is borne by the party whose claims are completely rejected, although there are exceptions, which are the following:

A) In declarative processes:

1.- The costs of the first instance are imposed on the party whose claims have been rejected, except that, by the state that the Court analyzes the case-law, consider that the exercise of the claim or opposition were reasonable. If the estimate or rejection were partial, each party pays the costs incurred at its instance and the common costs, by half. In the cases of acquiescence (full recognition of the defendant) or withdrawal (abandonment of the claim by the plaintiff), the costs will be imposed or not, depending on the moment in which such behaviors take place, and the procedural conduct that the Court values.

2.- In the second instance and the extraordinary resources, if there is full estimation or rejection, the same previous criterion is followed. If the estimate or rejection were partial, the costs will not be imposed.

3.- Particular rules: a) Costs will never be imposed on the Public Prosecutor; b) The expenses for collating a public document that is proven authentic, will be of those who
would have challenged its probative value; and c) In the procedure to challenge the assessment of costs for excessive attorney and attorney fees, if they are considered excessive, they will be paid by the professional who intends to collect them.

B) In the execution process: When expenses are incurred for the execution, the parties must advance the costs that are taking place, without prejudice to their reimbursement after it is decided on its imposition. In all other cases, they will be paid by the executing party, without the need for express enforcement. In the execution of money, even if the debtor pays in the act of the request, the costs of the execution will be borne by the debtor, unless it proves that he could not pay before the creditor urged the execution.

The assessment of the costs (the procedure by which the amount required for the costs of the process is decided) is practiced by the Lawyer of the Administration of Justice, of the Court that has known of the process and can only be challenged because it is considered improper or Excessive the games that you contemplate.

2. Are there problems pertaining to civil litigation funding in your jurisdiction?

In general, Justice is considered a public service that is defrayed with the State’s accounts. The expenses of the concrete process are addressed by the parties and are settled at the end of the lawsuit, according to the criteria that have been exposed. In several jurisdictions and for specific procedural acts certain deposits are required.

For people who do not have sufficient means to litigate there is a Law on Free Legal Assistance that provides for the way to meet the expenses charged to public funds with respect to people who lack their own economic means.

3. What resources, if any, are available to litigants in order to address financing litigation issues in your jurisdiction?

If there is a discussion about the procedural expenses, within the procedure itself, the positions of each party are argued and the judicial body decides.

The procedure to regulate the amount and the obligation of payment of the expenses of the process is called "taxation of costs" and it is done by the Lawyer of the Justice Administration, there being specific procedures to discuss its amount and the origin of the items that are included or not.

4. Are litigation funding agreements permitted in your jurisdiction?

In principle, the regulation of procedural costs results from legal imposition, but nothing prevents private agreements between the parties do not claim each other, or limit their claims to certain amounts. Such pacts have extra-procedural effectiveness and do not bind the Court, except in the case of a judicial transaction, that is, when the
parties reach an agreement and request that it be approved by the Judge in the process, granting it the efficacy of res judicata.

5. **If so, how are such agreements regulated or otherwise controlled?**

They have no other regulation or limitation -except the foregoing- than that of any private contract between parties, and what they freely agree to. Ultimately, its fulfillment would be controlled by the supervision of the Courts, a posteriori, and not in the process where the expenses occur.