

# A Comparative Study of the Reimbursement of Extrajudicial Attorneys' Fees

## Un estudio comparado sobre el reembolso de gastos extraprocesales de asistencia letrada

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**Abstract:** »Reimbursement of Extrajudicial Attorneys' Fees in Spanish Law. A Systematization of Procedural and Substantive Claims« (PhD-thesis published in German language, Duncker & Humblot, 2021, *Schriften zum Internationalen Recht (SIR)*, Volume 229.)

David Cuenca Pinkert examines the recoverability of extrajudicial attorneys' fees in cross-border civil law cases under Spanish law and thereby demonstrates structural parallels to other European legal systems and universal principles of cost recovery. This approach systematizes procedural and substantive claims, which the author sees as a key to a better understanding of reimbursability.

**Palabras clave:** Extra-procedural expenses of legal assistance, procedural and substantive reimbursement actions, costs, damages, reimbursement of expenses and costs, order to pay costs, responsibility of the succumbing party, access to justice, Roman legal systems, blocking effect, undermined procedural law.

**Resumen:** "El reembolso de gastos extraprocesales de asistencia letrada en derecho español. Una sistematización en base al derecho procesal y sustantivo" (Tesis doctoral publicada en idioma alemán, Editorial Duncker & Humblot, 2021, *Schriften zum Internationalen Recht (SIR)*, Volumen 229.)

David Cuenca Pinkert analiza cómo se reembolsan honorarios extraprocesales de asistencia letrada en litigios civiles transfronterizos según el derecho español, demostrando así estructuras paralelas con otros ordenamientos jurídicos europeos y principios universales de la compensación de gastos. El estudio está enfocado en sistematizar las posibles acciones resarcitorias procesales y sustantivas, lo cual el autor considera como elemento clave a la hora de examinar correctamente las distintas vías de reembolso.

**Keywords:** Gastos extraprocesales de asistencia letrada, acciones de reembolso procesales y sustantivas, costas, daños, reembolso de gastos y costas, condena en costas, responsabilidad de la parte sucumbiente, acceso a la justicia, ordenamientos jurídicos romanos, efecto de bloqueo, derecho procesal socavado.

**Summary:** I. Definition of extrajudicial attorneys' fees. II. Dichotomy of procedural and substantive reimbursement system. III. Procedural reimbursement claim. 1. Romanesque legal systems. 2. German law. 3. Spanish law. IV. General remarks to the relationship between procedural and substantive reimbursement system. 1. Legal systems Type 1. 2. Legal systems Type 2. 3. Classification of Spanish law. V. Arguments against the blocking effect of procedural reimbursement. VI. Further

arguments for applicability of substantive law. VII. Disadvantages of the current legal situation in Spain. VIII. Approaches de *lege ferenda*. VIII. Conclusion.

## I. Definition of extrajudicial attorneys' fees

1. Extrajudicial attorneys' fees are those attorney fees incurred before<sup>1</sup> or without a lawsuit<sup>2</sup> but are incurred due to possible court proceedings.<sup>3</sup> They are incurred outside of court proceedings in terms of time and subject matter.<sup>4</sup> Their purpose is to promote the successful assertion of the party's claims,<sup>5</sup> to prepare for a pending lawsuit<sup>6</sup> or simply to avoid litigation.<sup>7</sup> Objectively, they are not mandatory for successful litigation.<sup>8</sup> In particular, they include costs incurred in relation to pre-litigation analysis of the facts by experts (especially attorneys) or visits to relevant authorities.<sup>9</sup> The conceptual differentiation between judicial and extrajudicial attorneys' fees originates from a distinction in German doctrine.<sup>10</sup> This distinction has been adopted in the majority of Spanish court rulings,<sup>11</sup> despite isolated dissenting opinions.<sup>12</sup>

## II. Dichotomy of procedural and substantive reimbursement system

2. Extrajudicial attorneys' fees are recoverable if reimbursement is provided for either by the procedural law or by the substantive law of the relevant legal system. In this context, reimbursement according to procedural law principles must be examined first, because in some legal systems the procedural reimbursement of costs has a blocking effect (German legal doctrine uses the term *Sperrrwirkung*) vis-à-vis reimbursement under substantive law. If procedural law does not reimburse extrajudicial attorneys' fees, the relationship between the procedural and the substantive reimbursement of costs must be examined. Only when it has been established that there is no blocking effect can the question of whether extrajudicial attorneys' fees may be recoverable as damages under substantive law be usefully examined. The situations which recurrently prove difficult are structurally comparable across legal systems.

<sup>1</sup> O. FUENTES SORIANO, *Las costas en la nueva LEC*, Tirant lo Blanch, 2000, p. 24 et seq.

<sup>2</sup> J. ESCRIBANO SÁNCHEZ, *El coste de la Justicia y su vinculación con los derechos fundamentales procesales*, Madrid, Universidad de Salamanca, PhD-Thesis, 2011, p. 89.

<sup>3</sup> L. MUÑOZ GONZÁLEZ, *Las costas*, Editorial Montecorvo S.A., Madrid, 1981, p. 28.

<sup>4</sup> *Ibidem*.

<sup>5</sup> A. GUTIÉRREZ ZARZA, *Las costas en el proceso civil*, Editorial Constitución y Leyes (Colex) S.A., 1998, p. 56; L. MUÑOZ GONZÁLEZ, *op. cit.*, p. 27.

<sup>6</sup> A. TORRES LÓPEZ, en: A. TORRES LÓPEZ / A. DÍAZ BARBERO (eds.), *Las costas en el proceso civil*, 130 preguntas y respuestas, Editorial Sepin, 2009, p. 80.

<sup>7</sup> Specifically, in relation to extrajudicial legal fees J. GARBERÍ LLOBREGAT, en: J. GARBERÍ LLOBREGAT (ed.), *Los procesos civiles*, Vol. 1, Editorial Bosch, 2. Ed. 2010, Art. 241-246, I.2.A.b).

<sup>8</sup> A. GUTIÉRREZ ZARZA, *op. cit.*, p. 56.

<sup>9</sup> O. FUENTES SORIANO, *op. cit.*, p. 25.

<sup>10</sup> W. KISCH, *Deutsches Zivilprozeßrecht*, Leipzig Götschen'sche Verlagshandlung, 1911, Vol. 3, p. 136 et seq. (who speaks of „Parteikosten“). In terms of content, these costs cover the fees (Gebühren) and expenses (Auslagen) that are now subsumed under the term “extrajudicial costs”, see R. HÜSSTEGE, en: H. THOMAS / H. PUTZO (eds.), *Zivilprozessordnung*, C.H. Beck, 41. Ed. 2020, Vor. § 91, margin number 2 et seq.

<sup>11</sup> L. MUÑOZ GONZÁLEZ, *op. cit.*, p. 27 et seq.; J.F. HERRERO PEREZAGUA, *La condena en costas*. Procesos declarativos civiles, Editorial Bosch, 1994, p. 34; J. ESCRIBANO SÁNCHEZ, *op. cit.*, p. 105.

<sup>12</sup> I.E. G. CHIOVENDA, *La condena en costas*, Traducción de Juan A. de la Puente y Quijano, *Rev. Derecho Privado*, Madrid, 1928, p. 468. According to F. CARNELUTTI, *Instituciones del Proceso Civil*, Ediciones Jurídicas Europa-América, 4. Ed. 1989, Vol. I, p. 349 f. a distinction must be made between individual and general costs. J.L. VÁZQUEZ SOTELO, en: V. CORTÉS DOMÍNGUEZ (ed.), *Comentarios a la reforma de la LEC*, Tecnos, Madrid, 1985, Art. 523, para. 6 l) is of the opinion that the delimitation of compensable *costas procesales* and non-recoverable *gastos procesales* should not be made according to the expressed delimitation criteria. Instead, the delimitation should be decisive as to which cost components are or are not subject to the determination of costs; he is followed by L. MARTÍN CONTRERAS, *Las costas procesales*, Ed. Bosch, Barcelona, 2015, p. 43.

### III. Procedural reimbursement claim

#### 1. Romanesque legal systems

3. The legal systems of the romance legal family – noting that Spain is examined separately below – do not reimburse extrajudicial attorneys' fees according to procedural law principles. In *French* law, the reimbursement of legal costs is governed by Art. 700 NCPC. Art. 695 no. 7 NCPC which contains a list of all costs (*dépens*) that are recoverable in court. According to Art. 695 No. 7 NCPC, attorneys' fees are to be classified as *dépens*<sup>13</sup> making them recoverable insofar as the attorneys' remuneration is prescribed. The attorneys' remuneration is only prescribed in the case of judicial action, but not in the case of extrajudicial action. Fees incurred in the latter case are not considered legal costs and, accordingly,<sup>14</sup> not procedurally recoverable.<sup>15</sup> Under *Italian* law, the losing party is generally ordered to pay the costs of the litigation (*spese legali*) pursuant to Art. 91 *Codice di procedura civile* (CPC). The subject of the claim for reimbursement under procedural law is the costs of the legal dispute, which are to be interpreted broadly,<sup>16</sup> therefore including judicial attorneys' fees.<sup>17</sup> Earlier rulings classified extrajudicial attorneys' fees as litigation costs if the case later went to trial.<sup>18</sup> Recent Italian supreme court rulings deny the recoverability<sup>19</sup> on the grounds that extrajudicial attorneys' fees are different in nature compared to "real litigation costs".<sup>20</sup> Contrastingly, traditional Italian legal doctrine, has tended to defend the position that extrajudicial attorneys' fees are to be classified as *spese legali* and so are recoverable.<sup>21</sup> Under *Portuguese* law, attorneys' fees – whether judicial or extrajudicial – are generally borne by each party. The procedural reimbursement of costs is regulated in Art. 533 para. 2 lit. d) (*Código de processo civil*, CPC) in which judicial attorneys' fees are classed as costs of proceedings (*Custas Processuais*) in the case of losing in proceedings (*sucumbência*).<sup>22</sup> Art. 529 para. 4 CPC in connection with Art. 26 para. 3 c) of the Legal Costs Regulation (*Regulamento das Custas Processuais*, hereinafter: RCP)<sup>23</sup>, limits such costs in proceedings to a maximum of 50% of the court fees (*taxas de justiça*) paid by both parties.<sup>24</sup> In addition, the party to be paid costs is reimbursed the court fees in proportion to the extent of their success in the proceedings (Art. 26 para. 3 a) RCP) as well as the other court costs (*encargos*) according to Art. 26 para. 3 b) RCP. Moreover, extrajudicial attorneys' fees are not subject to the, albeit incomplete, procedural costs reimbursement procedure.<sup>25</sup> *Belgian* law regulates the procedural reimbursement of costs in civil

<sup>13</sup> M. JÄGER, Reimbursement for attorney's fees: a comparative study of the laws of Switzerland, Germany, France, England, and the United States of America; international arbitration rules and the United Nations Conventions on Contracts for the International Sale of Goods (CISG), Eleven International Publishing, 2010, p. 29 et seq.

<sup>14</sup> Y. STRICKLER, Procédure civile, Éditions Larcier, 4. Ed. 2013, p. 50 speaks of *honoraires de consultation*.

<sup>15</sup> Permanent jurisprudence of the highest courts, i.E. Cass. Civ. 2<sup>e</sup>, 8.7.2004, 03-15155, Bull. civ. 2004 II, n°365, 309; LE TOURNEAU, Droit de la responsabilité et des contrats – Régimes d'indemnisation, Ed. Dalloz, 11. Ed. 2007, 2124.32 and 2321.151; but, to the contrary: IPG-Gutachten 2015-2017, No. 10, margin number 100.

<sup>16</sup> M. RINALDI, in: L. D'APOLLO (Ed.), Le spese processuali, Ed. Giuffrè, 2011, p. 12 et seq.

<sup>17</sup> Cass. Civ., Sez. III, 16/06/1990, n. 6056; Cass. Civ., Sez. I, 18/07/2017, n. 16990; G. MONTELEONE, Diritto processuale civile, Vol. I – Disposizioni generali. I processi di cognizione di primo grado. Le impugnazioni, Ed. CEDAM, 8. Ed. 2018, p. 161.

<sup>18</sup> Cass. Civ., Sez. III, 14/04/1969, n. 1189; Cass. Civ., Sez. III, 12/07/2005, n. 14594; Cass. Civ., Sez. III, 02/02/2006, n. 2275.

<sup>19</sup> Cass. Civ., Sez. VI, 13/03/2017, n. 6422; more detailed Cass. Civ., Sez. I, 18/07/2017, n. 16990 (p. 11); Cass. Civ., Sez. VI, 2/2/2018, n. 2644.

<sup>20</sup> Cass. Civ., Sez. VI, 13/03/2017, n. 6422: "[...] l'attività stragiudiziale, anche se svolta da un legale, è comunque un qualcosa di intrinsecamente diverso rispetto alle spese legali vere e proprie [...]".

<sup>21</sup> A. GUALANDI, Spese e danni nel processo civile, p. 326 et seq.; M. RINALDI, en: L. D'APOLLO (Ed.), op. cit., p. 13; L. PALIERO, en: F. CARPI / M. TARUFFO, Commentario breve al Codice di Procedura Civile, Ed. CEDAM, 10. Ed. 2017, Vol. I, Art. 91, XVIII, No. 6; M. VACCARI, Le spese dei processi civili. Questioni giurisprudenziali e indicazioni operative, Giuffrè, 2017, p. 342 et seq.; contrasting R. GIORDANO, in: N. PICARDI ET AL., Codice di Procedura Civile. Vol. I – Art. 1-473, 6. Ed., Giuffrè, 2015, Art. 91, para 11, according to whom the costs must originate within the process.

<sup>22</sup> A.J. CUNHA, Direito processual civil declarativo à luz do Novo Código de Processo Civil, Quid Juris Sociedade Editora, 2. Ed. 2015, p. 46.

<sup>23</sup> Legislative Decree no. 34/2008.

<sup>24</sup> In detail S. DA COSTA, As Custas Processuais, Ed. Almedina, 7. Ed. 2018, p. 233 et seq.

<sup>25</sup> H. SOUSA ANTUNES, "National Report Portugal", en: C. HODGES / M. TULIBACKA / S. VOGENAUER (Eds.), The Costs and Funding of Civil Litigation, Ed. C.H. Beck, 2010, pp. 467, 480 et seq.; A. RATHENAU, "Gerichts- und Anwaltskosten in Portugal", *Entdecken Sie Algarve* 03/2010, p. 44.

proceedings in Art. 1.017 et seq. *Code judiciaire* (CJ) by way of *condamnation aux dépens*.<sup>26</sup> Art. 1.018 CJ contains a catalogue of the elements that conceptually define legal costs. Attorneys' fees are not listed there. They are therefore not legal costs.<sup>27</sup> However, since the introduction of the new Art. 1.022 CJ in 2008, the adjudicating judge has the discretion to order the losing party to pay the winning party a lump-sum procedural indemnity (*l'indemnité de procédure*) to partially cover legal fees. Even so, this does not result in full reimbursement of such costs.<sup>28</sup> Moreover, Art. 1.022 does not deal with the question of extrajudicial attorneys' fees. This is evident from the wording itself (i.e. *l'indemnité de procédure*), the fact that it is a procedural rule and therefore, under Belgian law, does not provide for recovery of legal costs,<sup>29</sup> and Belgian case law.<sup>30</sup> Under *Dutch* law, extrajudicial attorneys' fees are reimbursed as pecuniary loss<sup>31</sup> pursuant to Art. 6:96 para. 2 lit. c *Burgerlijk Wetboek* (BW) and, in cases without formal litigation, claimed by way of a substantive claim for reimbursement of costs.<sup>32</sup> If legal proceedings begin, part of the extrajudicial attorneys' fees are converted into litigation costs.<sup>33</sup> These costs "change colour" ("*van kleur verschieten*").<sup>34</sup> As a result of their conversion into litigation costs (*proceskosten*), they are now recoverable by way of a procedural claim for reimbursement of costs, which is regulated in Art. 237 para. 1 sentence 1 *Wetboek van burgerlijke Rechtsvordering* (Rv). However, to qualify for conversion, the legal costs must involve specific pre-trial legal services, such as studying the case file, appraising the chances of success in litigation, and gathering the factual material and evidence.<sup>35</sup> However, even following conversion, the amount invoiced will not be reimbursed; only a lump sum constituting the liquidation tariff, that is a non-binding, points-based calculation method (*liquidatietarief*).<sup>36</sup> There is no reimbursement of full legal costs under Dutch procedural law.

## 2. German law

4. Taking *German* law as a prototype for legal systems in the Germanic legal family, reimbursement of legal costs is structurally possible according to procedural law principles, eg. §§ 91 et seq. *Zivilprozessordnung* (ZPO). The winning party in a lawsuit has a claim in procedural law for reimbursement of the "costs of the legal dispute" (*Kosten des Rechtsstreits*). The German system of reimbursement of costs under procedural law follows the principle of succumbent's liability (*Unterliegendenhaftung*), that

<sup>26</sup> Regarding in detail Art. 1017 CJ see H. BOULARBAH / C. HAUWEN, "Actualités en matière de frais et dépens: questions choisies", en: H. BOULARBAH / J.-F. V. DROOGHENBROECK (Eds.), *Actualités en droit judiciaire: un peu de tout après six pots-pourris*, Ed. Anthemis, 2018, p. 319 et seq.; to the exceptions P. MOREAU, "L'indemnité de procédure et la charge des dépens", in: JEUNE BARREAU DE LIÈGE, *Le coût de la justice, Actes du colloque organisé par la Conférence libre du jeune barreau de Liège et par la Faculté de droit de l'Université de Liège le 20 février 1998*, Liège: Jeune Barreau de Liège, 1998, p. 171, 175 et seq.

<sup>27</sup> G. DE LEVAL, *Éléments de procédure civile*, Ed. Larcier, 2. Ed. 2005, p. 456 and footnote 62; J. LAENENS / D. SCHEERS / P. THIRIAR ET AL. (Eds.), *Handboek Gerechtelijk Recht*, Ed. Intersentia, 4. Ed. 2016, margin number 1178.

<sup>28</sup> P. MOREAU, op. cit., p. 171, 194.

<sup>29</sup> D. DESSARD, "La répétibilité des honoraires et frais d'avocat: un accouchement dans la douleur...", in: G. DE LEVAL / F. GEORGES (Eds.), *Le droit judiciaire en mutation: en hommage à Alphonse Kohl*, Ed. Anthemis, 2007, p. 55, 64.

<sup>30</sup> For contractual obligations Cour de cassation, 2.9.2004, C.01.0186F, Justel-Nr.: F-20040902-8; for non-contractual obligations Cour de cassation, 16.11.2006, C.05.0124F, Justel-Nr.: F-20061116-4.

<sup>31</sup> S.D. LINDENBERGH, in: C. STOLKER / L. VALK / B. KRANS (Eds.), *Tekst & Commentaar Burgerlijk Wetboek*, Ed. Wolters Kluwer, 13. Ed. 2019, Art. 6:96 BW, margin number 4.

<sup>32</sup> IPG-Gutachten 2015-2017, No. 18, margin number 73.

<sup>33</sup> H. SNIJDERS / C. KLAASSEN / G. MEIJER (Eds.), *Nederlands burgerlijk procesrecht*, Ed. W.E.J. Tjeenk Willink, 4. Ed. 2007, margin number 124.

<sup>34</sup> C. BRUNNER, note (noot) on Hoge Raad 3.4.1986, NJ 1988/275, margin number 3; H. SNIJDERS / C. KLAASSEN / G. MEIJER (Eds.), op. cit., margin number 124; R.H. DE BOCK, in: P. VLAS / E. TJONG TJIN TAI (Eds.), *Groene Serie Burgerlijke rechtsvordering*, Kluwer, 1.12.2018, Art. 241, margin number 2.

<sup>35</sup> R.H. DE BOCK, op. cit., Art. 241, margin number 2; H. SNIJDERS / C. KLAASSEN / G. MEIJER (Eds.), op. cit., margin number 124; A.C. V. SCHAICK, in: C. ASSER (Ed.), *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 2. Eerste aanleg*, Ed. Wolters Kluwer, 2. Ed. 2016, margin number 134.

<sup>36</sup> H. SNIJDERS / C. KLAASSEN / G. MEIJER (Eds.), op. cit., margin number 121 (Court practice since 1955).

is, who loses pays.<sup>37</sup> The cause of liability is the instigation (*Veranlassung*) of the legal dispute.<sup>38</sup> Whether extrajudicial attorneys' fees are also recoverable attending to procedural law depends on how the constituent element of "costs of the legal dispute" (i.e. costs related to the process) is to be interpreted and, specifically, when the legal prosecution or defence is "necessary" within the meaning of § 91 (1) sentence 1 ZPO.<sup>39</sup> German jurisprudence and legal doctrine almost unanimously defend the restrictive interpretation of this constituent element.<sup>40</sup> Exceptionally, however, they include preparatory costs under the concept of *Kosten des Rechtsstreits*.<sup>41</sup> Extrajudicial attorneys' fees can be classified as such preparatory costs.<sup>42</sup> The prerequisite for this is that the extrajudicial attorneys' fees were incurred for the immediate preparation or conduct of a subsequent lawsuit.<sup>43</sup> In principle, a differentiation is made according to the scope of the instruction given to the attorney: if an unconditional mandate is granted for active or passive litigation all preparatory acts (including extrajudicial legal work) are included in the fee for the court proceedings.<sup>44</sup>

<sup>37</sup> B. GEHLE, in: A. BAUMBACH / W. LAUTERBACH (Eds.), Beck'sche Kurzkommentare zur Zivilprozessordnung: mit FamFG, GVG und anderen Nebengesetzen, C.H.Beck, 79. Ed. 2021, Vor § 91, margin number 2. For a relaxation of the cost reimbursement principle, cf. G. BAUMGÄRTEL, Gleicher Zugang zum Recht für alle. Ein Grundproblem des Rechtsschutzes, Ed. Heymann, 1976, p. 152 et seq.

<sup>38</sup> W. KISCH, op. cit., p. 140; H. ROTH, „Prozessualer und materieller Kostenersatz“, in: J. ADOLPHSEN (Ed.), *Festschrift für Peter Gottwald zum 70. Geburtstag*, C.H.Beck, 2014, p. 529; K.J. GÖTZ, *Zivilrechtliche Ersatzansprüche bei schädigender Rechtsverfolgung*, Ed. Duncker & Humblot, 1989, p. 110; H. ROTH, „Prozesskosten, Prozesskostenhilfe und Prozessfinanzierung“, in: G. SCHULZE (Ed.), *Europäisches Privatrecht in Vielfalt geeint. Der modernisierte Zivilprozess in Europa*, Ed. Sellier european law publishers, 2014, p. 79, 81; differently A. SIEBERT, *Die Prinzipien des Kostenerstattungsrechts und die Erstattungsfähigkeit vorgerichtlicher Kosten des Rechtsstreits: ein Beitrag zu Theorie und Praxis der Haftung für Rechtsverfolgungsmaßnahmen*, Ed. Peter Lang, 1985, p. 88 et seq., 136, according to whom it was a liability for sacrifice. For the different approaches with regard to the grounds for liability for procedural reimbursement of costs under section 91 ZPO, see C. FLEDDERMANN, *Kostenrechtliche Probleme der Beteiligung Dritter am Zivilprozeß*, Ed. Peter Lang, 1998, p. 75 et seq. with further references on p. 84 (Fn. 306).

<sup>39</sup> Cf. in extenso A. SIEBERT-REIMER, *Der Anspruch auf Erstattung der Kosten der Prozessfinanzierung*, Duncker & Humblot, 2017, p. 206 et seq.

<sup>40</sup> BGH, Beschluss v. 15. Januar 2019 – II ZB 12/17, margin number 12; K. JASPersen, in: V. VORWERK / C. WOLF (Eds.), Beck'scher Onlinekommentar zur Zivilprozessordnung, 38. Edition, 1.9.2020, § 91, margin number 93; S. MÜLLER-RABE, in: W. GEROLD / H. SCHMIDT (Eds.), *Rechtsanwaltsvergütungsgesetz*, C.H.Beck, 24. Ed. 2019, Anhang X, margin number 40, 50; R. HÜSSTEGE, in: H. THOMAS / H. PUTZO (eds.), op. cit., § 91, margin number 5, 6; A. SCHULZ, in: T. RAUSCHER / W. KRÜGER (Eds.), *Münchener Kommentar zur Zivilprozessordnung*, C.H.Beck, 6. Ed. 2020, Vol. 1: §§ 1-354, § 91, margin number 20; W. GIERL, in: I. SAENGER, *Handkommentar zur Zivilprozessordnung*, Nomos, 8. Ed. 2019, § 91, margin number 4 et seq.; F.O. FLOCKENHAUS, in: C. KERN / D. DIEHM (Eds.), *Zivilprozessordnung*, Erich Schmidt Verlag, 2017, § 91, margin number 7; N. GOLDBECK, in: H.J. MUSIELAK / W. VOIT (Eds.), *ZPO*, Verlag Franz Vahlen, 17. Ed. 2020, § 91, margin number 7; S. SMID / S. HARTMANN, in: B. WIECZOREK / R.A. SCHÜTZE (Eds.), *Zivilprozessordnung und Nebengesetze*, Vol. 2/2 – §§ 78-127A, De Gruyter, 4. Ed. 2015, § 91, margin number 6 speak of a broad interpretation, because preparatory costs are included in the cost-fixing procedure. L. HÄSEMAYER, *Schadenshaftung im Zivilrechtsstreit*, V. Decker, 1979, p. 153 considers extending procedural costs liability "equally [!] for both parties" to pre-litigation costs. For a broad interpretation K. HERGET, in: R. ZÖLLER (Ed.), *Zivilprozessordnung*, Verlag Otto Schmidt, 33. Ed. 2020, Vor § 91, margin number 9.

<sup>41</sup> BGH NJW 2003, 1398, 1399 (about recoverability of fees for a private expert report); E. SCHNEIDER, „Der materielle Kostenerstattungsanspruch“, in: *Monatszeitschrift für Deutsches Recht*, 1981, p. 353, 358; E. BECKER-EBERHARD, *Grundlagen der Kostenerstattung bei der Verfolgung zivilrechtlicher Ansprüche: zugleich ein Beitrag zum Verhältnis zwischen materiell-rechtlichem und prozessualen Kostenerstattungsanspruch*, Gieseking, 1985, p. 44; R. DITTMAR, „Die Berücksichtigung vorprozessualer entstandener Anwaltskosten im Kostenfestsetzungsverfahren“, in: *Neue Juristische Wochenschrift*, 1986, p. 2088; K. RUESS, „Anwaltsvergütung – Die Geltendmachung vorgerichtlicher Rechtsverfolgungskosten als Nebenforderungen“, in: *Monatszeitschrift für Deutsches Recht*, 2005, p. 313; R. R. HÜSSTEGE, in: H. THOMAS / H. PUTZO (eds.), op. cit., § 91, margin number 7; A. SCHULZ, in: T. RAUSCHER / W. KRÜGER (Eds.), op. cit., Vor § 91, margin number 38; W. GIERL, in: I. SAENGER, op. cit., § 91, margin number 6; N. GOLDBECK, in: C. KERN / D. DIEHM (Eds.), op. cit., margin number 8; M. JÄGER, op. cit., p. 22 et seq.; H. ROTH, „Prozessualer und materieller Kostenersatz“, in: J. ADOLPHSEN (Ed.), op. cit., p. 529, 533; B. PÜHMEYER, *Der materielle und der prozessuale Kostenerstattungsanspruch*, 1971, p. 54.

<sup>42</sup> R. DITTMAR, op. cit., p. 2088, 2089; R. HÜSSTEGE, in: H. THOMAS / H. PUTZO (eds.), op. cit., § 91, margin number 7; affirmatively M. JÄGER, op. cit., p. 22 et seq.; for a broad interpretation of § 91 (1) ZPO regarding pre-judicial attorneys' fees cf. K.V. EICKEN, „Erstattungsfähigkeit vorprozessualer Gutachten und Anwaltskosten“, in: W. RAUER (Ed.), *Kostenerstattung und Streitwert: Festschrift für Herbert Schmidt*, C.H.Beck, 1981, p. 11, 29 et seq.

<sup>43</sup> K. RUESS, op. cit., p. 313, 314; K. FISCHER, „Materieller und prozessualer Kostenerstattungsanspruch“, in: *Juristische Schulung*, 2013, p. 694, 698.

<sup>44</sup> L. THIEL, in: N. SCHNEIDER / J. VOLPERT / P. FÖLSCH (Eds.), *Gesamtes Kostenrecht*, Nomos, 2. Ed. 2017, § 19 RVG, margin number 7 et seq., 11; J. v. SELTMANN, in: J. v. SELTMANN (Ed.), Beck'scher Onlinekommentar zum Rechtsanwaltsvergütungsgesetz, 49. Edition, 1.9.2020, § 19, margin number 6.

Accordingly, the reimbursement of costs under procedural law will cover the reimbursement of extrajudicial attorneys' fees.<sup>45</sup>

### 3. Spanish law

5. In *Spanish* law, extrajudicial attorneys' fees are not recoverable under procedural law. Only *costas procesales* are recoverable and extrajudicial attorneys' fees are not *costas procesales* according to Art. 241 para. 1 subpara. 1 *Ley de Enjuiciamiento Civil* (LEC). This follows from an interpretation of Art. 241 LEC that *costas procesales* are the part of the expenses that relate to the payment of the items set out in Art. 241 para. 1 subpara. 1 nos. 1 to 7 LEC. According to Art. 241 para. 1 subpara. 1 no. 1 LEC, fees incurred in defence (by an *abogado*) and technical representation (by a *procurador*) are *costas procesales* if the defence or representation is required by law (*cuando sea preceptiva*). However, the extrajudicial assistance of an attorney is not prescribed by law. This position is supported by an analysis of Art. 6 No. 1 *Ley de asistencia jurídica gratuita*. It states that free legal assistance covers pre-trial counselling if a person seeks legal protection in court to enforce his or her rights and interests. The same wording was already contained in its Art. 6 No. 1 in the version of 12.1.1996. If the legislator had wanted to classify extrajudicial attorneys' fees as recoverable, the legislator would have added them to the catalogue items in of Art. 241 LEC.<sup>46</sup> The differing objectives of each law meant that this did not happen, however.<sup>47</sup> A historical interpretation using Art. 424 of the LEC in the version of 3.2.1881 (which, in contrast to the present-day article used an exclusive definition rather than an inclusive catalogue), also supports this result. In addition, Art. 241 LEC today enshrines the value judgement of the Spanish legislature that some items should be reimbursable as *costas procesales*, but that those items not listed should be borne by the parties themselves.<sup>48</sup> Underlying this position is the principle that no party should bear the financial consequences of another's decision, but only the consequences of their own decision on what expenses to incur.<sup>49</sup>

### IV. General remarks on the relationship between the procedural and substantive reimbursement systems

6. If extrajudicial attorneys' fees are not recoverable under procedural principles, the question arises whether they can be reimbursed under substantive law. This is because there is a danger that the rules of procedural law will be circumvented by substantive law. Such a case of circumvention would arise in a situation where, under substantive law, a claim may be made for the reimbursement of extrajudicial attorneys' fees, while procedural law rejects such reimbursement because it purports to comprehensively regulate the reimbursement of costs as a whole. If, on the other hand, the procedural provisions on the reimbursement of extrajudicial attorneys' fees are not conclusive, claims for compensation under substantive law may in turn be examined without any circumvention of procedural law. Therefore, before the prerequisites of the individual bases of claim under substantive law can be examined, it is necessary to clarify

<sup>45</sup> For the assertion of extrajudicial attorneys' fees, cf. C. TOMSON, „Ganz oder gar nicht? – Berechnung und gerichtliche Geltendmachung der anrechnungsfrei verbleibenden Geschäftsgebühr“, *Neue Juristische Wochenschrift*, 2007, 267 et seq.; M. STEENBUCK, „Geltendmachung außergerichtlicher Anwaltskosten im Zivilprozess“, *Monatszeitschrift für Deutsches Recht*, 2006, 423 et seq.

<sup>46</sup> V. MAGRO SERVET, *Guía práctica y casuística de las costas procesales en el proceso civil*, Ed. La Ley Actualidad, 2009, p. 47: “Se trata de los denominados gastos extraprocerales que, debe advertirse, no siendo reclamables en el proceso, si conforman en parte el contenido material del derecho de asistencia jurídica gratuita.”

<sup>47</sup> F. ESCRIBANO MORA, in: S: BARONA VILAR / F. ESCRIBANO MORA (Eds.), *El proceso civil. Doctrina, Jurisprudencia y Formularios*, Tirant lo Blanch, 2001, Vol II, Libro 1 (Art. 99 bis 247), Art. 243, para 2 C.

<sup>48</sup> J.M. LÓPEZ GIL, in: J.A. ROBLES GARZÓN (Ed.), *Conceptos de derecho procesal civil*, Ed. Tecnos, 2017, p. 160; M.C. CALVO SÁNCHEZ, “La doctrina de la Sala Primera en materia de costas procesales”, in: V. GIMENO SENDRA (Ed.), *El Tribunal Supremo, su doctrina legal y el recurso de casación. Estudios en Homenaje del Profesor Almagro Nosete*, Iustel, 2007, p. 705, 716.

<sup>49</sup> Sentencia Tribunal Supremo, 11.5.2012 no. 1554.

the relationship (German legal doctrine speaks of *Konkurrenz*) between procedural law and substantive law with regards to reimbursement of extrajudicial attorneys' fees. In this matter, legal systems may be divided into two groups (or "types"). Type 1 includes those legal systems in which procedural law has the effect of completely blocking reimbursement of extrajudicial attorneys' fees under substantive law. Type 2, on the other hand, includes those legal systems in which the reimbursement of extrajudicial attorneys' fees under substantive law is not blocked by the procedural reimbursement of costs.

## 1. Legal systems: Type 1

7. Type 1 includes French, Belgian and Portuguese law. In these legal systems, a reimbursement of extrajudicial attorneys' fees cannot be examined according to substantive law principles if there is a procedural reimbursement of costs. As for French law, the *Cour de cassation* ruled, contrary to the judgements of two lower instance courts,<sup>50</sup> that legal costs not included in the litigation costs (*dépens*) are not to be classified as damages (*dommage émergent*) under substantive law.<sup>51</sup> Such legal costs include extrajudicial attorneys' fees.<sup>52</sup> Therefore, according to current French supreme court jurisprudence, these fees are not damages under substantive law.<sup>53</sup> Art. 700 NCPC and Art. 695 NCPC exhaustively cover the reimbursement of costs according to procedural law principles in relation to attorneys' fees and block further reimbursement of costs according to substantive law.<sup>54</sup> In Belgian law, as explained above, since the introduction of the new Art. 1.022 CJ, the reimbursement of judicial attorneys' fees can only be made as part of a lump sum provided for in procedural law. Art. 1.022 CJ thus excludes further claims under Belgian substantive law for the reimbursement of extrajudicial attorneys' fees.<sup>55</sup> In Portuguese law, according to the case law of the supreme court, the *Supremo Tribunal de Justiça*, the reimbursement of attorneys' fees is provided for under substantive law only in cases where it is expressly provided for in law.<sup>56</sup> The paradigm case is the case of bad faith litigation pursuant to Art. 457 (1) (a) CPC. For all cases not expressly provided for, substantive law will not enable recovery of attorneys' fees. It follows that the procedural reimbursement of costs according to Art. 529 para. 4 CPC in connection with Art. 26 para. 3 lit. Art. 26 (3) (c) RCP in principle blocks the reimbursement of attorneys' fees under substantive law.<sup>57</sup>

## 2. Legal systems: Type 2

8. Type 2 includes the Italian, Dutch and German legal systems. Reimbursement of extrajudicial attorneys' fees under substantive law is not prohibited by procedural law. In Italian law, Art. 91 CPC regulates orders for losing parties to reimburse their counterparty's legal costs. The procedural claim

<sup>50</sup> The two lower courts (Cour d'appel de Rennes, 11.3.2003 n. 02/05190 and the Tribunal de Grande Instance de Quimper, 11.1.2001) allowed a claim in substantive law for the reimbursement of costs based on the general tort under clause of Art. 1.382 of the French Civil Code. According to Art. 1.382 of the French Civil Code, the person who causes damage to another must compensate the injured party for the damage. This rule also covers - in contrast to § 823 para. 1 of the German Civil Code - primary pecuniary damages.

<sup>51</sup> Cass. Civ. 2<sup>e</sup>, 8.7.2004, 03-15155, Bull. civ. 2004 II, n. 365, 309: « [...] les frais non compris dans les dépens ne constituent pas un préjudice réparable et ne peuvent être remboursés que sur le fondement de l'article 700 du nouveau Code de procédure civile [...] ».

<sup>52</sup> IPG-Gutachten 2015-2017, No. 10, margin number 97.

<sup>53</sup> For the discussion cf. M. JÄGER, op. cit., p. 151.

<sup>54</sup> A. POPOVICI, Le sort des honoraires extrajudiciaires, *Revue du Barreau*, Tome 62 (Printemps 2002), p. 53, 118 et seq.; IPG-Gutachten 2015-2017, No. 10, margin number 97.

<sup>55</sup> D. DESSARD, "La répétibilité des honoraires et frais d'avocat: un accouchement dans la douleur..." in: G. DE LEVAL / F. GEORGES (Eds.), op. cit., p. 55, 61; affirmative *IBIDEM*, "Déni de justice et répétibilité des honoraires", *Revue de Jurisprudence de Liège, Mons et Bruxelles*, 2007/20, 817, 819; IPG-Gutachten 2015-2017, No. 6, margin number 48, 57.

<sup>56</sup> Ruling of the Supreme Court (*Acórdão do Supremo Tribunal de Justiça*) of 15.7.2007 (No. 07B220), para. XIV with reference to the judgement of 28.3.1930: "Na indemnização por perdas e danos em que as partes vencidas sejam condenadas não podem ser incluídos os honorários dos advogados das partes vencedoras, salvo estipulação expressa em contrário."

<sup>57</sup> *Acórdão do Supremo Tribunal de Justiça* of 15.7.2007 (No. 07B220), para. XIV.

for reimbursement of costs under this article covers legal costs, including judicial attorneys' fees. In addition, Italian supreme court jurisprudence<sup>58</sup> and Italian legal doctrine<sup>59</sup> approve, in principle, the reimbursement of extrajudicial costs (*spese stragiudiziali*), such as attorneys' fees under substantive law. The basis of the substantive claim for reimbursement of costs is Art. 1.223 of the Italian Civil Code (*Codice Civile*, hereafter CC), according to which the damages to be paid include losses incurred (*danno emergente*) and the loss of profit (*lucro cessante*).<sup>60</sup> Extrajudicial attorneys' fees are classified as a *danno emergente* and thus covered by Art. 1.223 CC insofar as the costs incurred were necessary and justified.<sup>61</sup> The instruction of an attorney will be considered necessary and justified in cases where the damages sought are economically significant, where there is doubt regarding the origin of the damage, and where the injured party (in the case of a road traffic accident) does not receive the support owed from his own insurer.<sup>62</sup> Similarly, Dutch law does not prohibit the reimbursement of extrajudicial attorneys' fees outright. In Art. 6:96 para. 3 BW, in conjunction with Art. 241 Rv. Art. 241 Rv, it is expressly stipulated that the reimbursement of costs under substantive law is only excluded to the extent that the scope of application of the procedural reimbursement of costs extends. This is only intended to prevent double reimbursement for those expenses in which procedural and substantive claims for reimbursement of costs overlap. Conversely, it follows that expenses that are not reimbursed according to procedural principles continue to be recoverable under the head of pecuniary damage (*vermogensschaden*) by way of substantive law. If the attorneys' services involve particularly extensive pre-litigation services (i.e. more than a mere, possibly repeated, demand of payment including a warning that failure to pay will result in proceedings being brought, preparing an unaccepted settlement offer, obtaining simple information or compiling the file in the usual way), then the extrajudicial attorneys' fees are to be reimbursed in full according to substantive principles and pursuant to Art. 6:96 lit. c BW.<sup>63</sup> Pursuant to Art. 6:96 lit. c BW, the recoverability of costs presupposes their "probity" (*redelijke kosten*).<sup>64</sup> Probity must be evidenced, on the one hand, with regard to the origin of the costs and, on the other, with regard to their amount.<sup>65</sup> Probity is acknowledged if the incurrence of the costs was necessary for the enforcement of the claim and if otherwise appropriate in view of the complexity of the case.<sup>66</sup> In German law, jurisprudence and legal doctrine today – despite numerous divergences in the detail<sup>67</sup> and being in contrast to the earlier position

<sup>58</sup> Ruling of the Italian Supreme Court of 21.1.2010, n. 997 (on traffic law). In more recent case law cf. Cass. Civ., Sez. VI, ordinanza 2.2.2018, n. 2644: "Le spese sostenute dalla vittima di un sinistro stradale per remunerare l'avvocato al quale si sia rivolta per avere assistenza stragiudiziale, costituiscono una ordinaria ipotesi di danno emergente, di cui all'art. 1223 c.c." Even outside of road traffic law, confirmed in Cass. Civ., Sez. I, 18/07/2017, n. 16990.

<sup>59</sup> Cf. A. GUALANDI, op cit., p. 11; L. PALIERO, op cit., Vol. I, Art. 92, para. I, No. 4.

<sup>60</sup> Art. 1.223 CCIt: "Il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere così la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta."

<sup>61</sup> Cass. Civ., Sez. III, 29/05/2015, n. 11154; L. PALIERO, op cit., Vol. I, Art. 92, para. I, Nr. 4.

<sup>62</sup> Cass. Civ., Sez. III, 29/05/2015, n. 11154.

<sup>63</sup> R.H. DE BOCK, op cit., Art. 241, margin number 3.

<sup>64</sup> Occasionally "Vertretbarkeit" is also spoken of, cf. IPG-Gutachten 2015-2017, No. 18, margin number 76 et seq.

<sup>65</sup> S.D. LINDENBERGH, op cit., Art. 6:96 BW, margin number 3.

<sup>66</sup> S.D. LINDENBERGH, op cit., Art. 6:96 BW, margin number 4.

<sup>67</sup> O. MUTHORST, in: F. STEIN / M. JONAS (Eds.), Kommentar zur Zivilprozessordnung, Mohr Siebeck, 23. Ed. 2017, Vol 2, §§ 78-147, Vor § 91, margin number 20 wants to limit the amount of the substantive claim for reimbursement of costs "in application of § 91 [ZPO]" to the costs that were necessary for the appropriate prosecution of the action; in the same way R. HALLER, "Der materielle Kostenerstattungsanspruch", en: *JurBüro*, 1997, p. 342, 344. The case law, on the other hand, is against the substantive claim for reimbursement of costs by procedural law being limited, cf. BGH NJW 1976, 1256, 1257 and weighty voices in German legal doctrine, cf. E. BECKER-EBERHARD, op cit., p. 193; H. KONZEN, Rechtsverhältnisse zwischen Prozeßparteien: Studien zur Wechselwirkung von Zivil- und Prozeßrecht bei der Bewertung und den Rechtsfolgen prozeßerheblichen Parteiverhaltens, Duncker & Humblot, 1976, p. 208; in general also H. ROTH, „Prozessualer und materieller Kostenersatz“, in: J. ADOLPHSEN (Ed.), op cit., p. 529, 536 and T. HÖSL, Kostenerstattung bei außerprozessualer Verteidigung gegen unberechtigte Rechtsverfolgung, Heymanns, 2004, p. 160 as well as J. BAUERSCHMIDT, "Der materiell-rechtliche Anspruch auf Erstattung von Rechtsanwaltskosten", en: *Juristische Schulung*, 2011, p. 601, 602. According to B. PÜHMEYER, op cit., p. 91, 96 a limitation of the substantive claim for reimbursement of costs is already effected by § 254 BGB and thus not by procedural law. K. v. EICKEN, "Erstattungsfähigkeit vorprozessualer Gutachten und Anwaltskosten", en: W. RAUER (Ed.), op cit., p. 11, 12 speaks of an "interdependence of procedural and substantive cost reimbursement claims". On further limitations of the substantive cost reimbursement claim cf. K.J. GÖTZ, OP CIT., p. 114 ET SEQ. ACCORDING TO B.-R. SONNEN, Kostenentscheidung und materielles Recht, 1971, p. 135, strictly speaking, there are not two independent claims for reimbursement of costs, "but only a single claim founded several grounds".



of the *Reichsgericht*<sup>68</sup> – it is assumed that the reimbursement of costs under procedural and substantive law can be juxtaposed.<sup>69</sup> Procedural law does not prohibit reimbursement of costs under substantive law.<sup>70</sup> A procedural cost reimbursement claim only displaces claims under substantive law to the extent that the procedural and substantive claims overlap in scope. Procedural claims take precedence as the procedural system has priority.<sup>71</sup> This means that *Kosten des Rechtsstreits* are to be enforced primarily using procedure for the determination of costs (*Kostenfestsetzungsverfahren*) pursuant to §§ 103 et seq. ZPO.<sup>72</sup> There is no legitimate interest for a substantive claim.<sup>73</sup> In cases where it is unclear whether reimbursement under substantive law is examinable in light of the procedural law position, two criteria are used: the scope of the procedural law<sup>74</sup> and the objective to limit the cost burden.<sup>75</sup> Reading § 91 ZPO in its historical context also speaks in favour of the fundamental juxtaposition of procedural and substantive reimbursement of costs,<sup>76</sup> in addition to an *argumentum e contrario* to § 12a (1) sentence 1 of the German *Arbeitsgerichtsgesetz* (ArbGG).<sup>77</sup> This is because the explanatory memorandum to § 85 *Civilprozeßordnung* (the predecessor regulation to § 91 ZPO) points out the admissibility of examinations of substantive claims for reimbursement of costs in addition to procedural ones. The reimbursement of costs under substantive law thus closes the gap left by the procedural reimbursement system, specifically gaps regarding reimbursement of pecuniary expenses not directly related to litigation.<sup>78</sup> Together, the

<sup>68</sup> RGZ 130, 217, 219: Kosten, die nicht in dem durch die Zivilprozeßordnung geregelten Verfahren geltend gemacht oder die dort aberkannt worden sind, können somit überhaupt nicht ersetzt verlangt werden.

<sup>69</sup> BGH NJW 1976, 1256, 1257; BGH NJW 2011, 2966, 2968; BGH NJW 2013, 2201, 2202; BGH NJW 2020, 399; E. BECKER-EBERHARD, op cit., p. 139 et seq.; S. SCHNITZER, Die schadensrechtliche Ersatzfähigkeit außergerichtlicher Rechtsverfolgungsschritte, Deutscher Anwaltverlag, 2000, p. 27 et seq.; J. HAU, „The winner takes it all? – Die anwaltliche Vergütungsvereinbarung im deutschen System der Prozesskostenerstattung“, en: *JuristenZeitung*, 2011, p. 1047, 1051; F. HOFFMANN, „Defizite im Recht der Prozesskostenerstattung – Erledigung und »materiell-rechtliche« Kostenerstattungspflichten“, en: *Zeitschrift für Zivilprozess*, 2012, p. 345, 362; K. RUESS, op cit, p. 313; E. SCHNEIDER, op cit., p. 354; K. FISCHER, op cit., p. 694, 696; R. HALLER, op cit., p. 342; I. EBERT, in: H.M. WESTERMANN ET AL (Eds.), Erman Bürgerliches Gesetzbuch: Handkommentar mit AGG, EGBGB (Auszug), ErbbauRG, LPartG, ProdHaftG, VbVG, VersAusglG und WEG, OttoSchmidt, 16. Ed. 2010, § 249, margin number 94; H. OETKER, in: F.J. SÄCKER ET AL. (Ed.), Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. 2: Schuldrecht Allgemeiner Teil (§§ 241-310), C.H. Beck, 8. Ed. 2019, § 249, margin number 186; C. GRÜNEBERG, in: O. PALANDT (Ed.), Bürgerliches Gesetzbuch, C.H. Beck, 79. Ed. 2020, § 249, margin number 56; SCHIEMANN, in: J.V. STAUDINGER (Ed.), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, OttoSchmidt, 15. Ed. 2017, Vol. 2: Recht der Schuldverhältnisse (§§ 249-254), § 251, margin number 115; J. EKKENGA / T. KUNTZ, en: H.T. SOERGEL (Ed.), Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Vol. 3/2 §§ 243-304, Kohlhammer, 13. Ed. 2014, § 249, margin number 126; S. MÜLLER-RABE, in: W. GEROLD / H. SCHMIDT (Eds.), op cit., § 1, margin number 235; S. SMID / S. HARTMANN, en: B. WIECZOREK / R.A. SCHÜTZE (Eds.), op cit., Vor § 91, margin number 9; A. SCHULZ, en: T. RAUSCHER / W. KRÜGER (Eds.), op cit., Vor § 91, margin number 20; B. GEHLE, en: A. BAUMBACH / W. LAUTERBACH (Eds.), op cit., margin number 44; K. HERGET, in: R. ZÖLLER (Ed.), op cit., margin number 11; N. GOLDBECK, in: C. KERN / D. DIEHM (Eds.), op cit., margin number 14 et seq.; F.O. FLOCKENHAUS, en: H.J. MUSIELAK / W. VOIT (Eds.), op cit., margin number 13; O. MUTHORST, in: F. STEIN / M. JONAS (Eds.), op cit., margin number 19; K. JASPENSEN, en: V. VORWERK / C. WOLF (Eds.), op cit., § 91, margin number 40; R. BRIESKE, Erstattung von Anwaltsgebühren durch Gegner und Dritte, C.H. Beck, 1987, p. 109; K. ROUSSOS, Schaden und Folgeschaden: Die systematischen und die Wertungsgrundlagen der Schadenszurechnung, Heymann, 1992, p. 372; H. KONZEN, op cit., p. 205 et seq.; WOLF, „Materiellrechtliche Kostenerstattung im kostenrechtlichen Gewand“, in: W. GERHARDT (Ed.), *Festschrift für Wolfram Henckel zum 70. Geburtstag am 21. April 1995*, De Gruyter, 1995, p. 911, 912 et seq.; T. HÖSL, op cit., p. 13; B. PÜHMEYER, op cit., p. 58, 96; B. SEIDL, Anspruchsberühmung: Erstattungsfähigkeit außergerichtlicher Rechtsverteidigungskosten bei unberechtigter Geltendmachung von Ansprüchen, Herbert Utz Verlag, 2014, p. 28; H. DAHLITZ, Kostentragungspflicht im deutschen und englischen Zivilprozessrecht, Peter Lang, 2018, p. 27; L. ROSENBERG / K.H. SCHWAB / P. GOTTWALD, Zivilprozessrecht, C.H. Beck, 18. Ed. 2018, § 84, margin number 10.

<sup>70</sup> B. GEHLE, en: A. BAUMBACH / W. LAUTERBACH (Eds.), op cit., margin number 43.

<sup>71</sup> R. DITTMAR, op. cit., p. 2088, 2089.

<sup>72</sup> K. RUESS, op cit., p. 313; K. FISCHER, op cit., p. 694, 697; I. EBERT, in: H.M. WESTERMANN ET AL (Eds.), op cit., § 249, margin number 95. Critical of the principle of priority of procedural reimbursement of costs H. ROTH, „Prozessualer und materieller Kostenersatz“, in: J. ADOLPHSEN (Ed.), op cit., p. 529, 537; more on the procedure for fixing costs R. STOFFREGEN, Der zivilprozessuale Kostenerstattungsanspruch und seine Durchsetzung nach den §§ 103 ff. ZPO, en: *Juristische Schulung*, 2010, p. 401 et seq.

<sup>73</sup> K. RUESS, op cit., p. 313; R. STOFFREGEN, op cit., p. 401.

<sup>74</sup> K.-G. LORITZ, Die Konkurrenz materiellrechtlicher Ersatzansprüche und prozessualer Kostenerstattungsansprüche und -normen bei Anspruchsentstehung und -durchsetzung, Heymann, 1981, p. 132.

<sup>75</sup> K.-G. LORITZ, op cit., p. 198; B. PÜHMEYER, op cit., p. 76: „Risikoabgrenzung“.

<sup>76</sup> A. SIEBERT-REIMER, op cit., p. 97.

<sup>77</sup> J. BAUERSCHMIDT, op cit., p. 601, 602,

<sup>78</sup> H. ROTH, „Prozessualer und materieller Kostenersatz“, in: J. ADOLPHSEN (Ed.), op cit., p. 529, 537. M. WOLF, op cit., p. 911 expressly speaks of a “need for correction” of the procedural reimbursement of costs.

reimbursement systems provide for full reimbursement of costs.<sup>79</sup> Full reimbursement is also referred to as “the German cost advantage”.<sup>80</sup> With regards to the reimbursement of extrajudicial legal costs, this is demonstrated by the fact that, while extrajudicial attorneys' fees are, in principle, reimbursable as preparatory costs under procedural law, if the requisite procedural reference for § 91 (1) ZPO is not given, the reimbursement can be made under substantive law.<sup>81</sup> In the absence of litigation, the reimbursement is immediately made under substantive law.<sup>82</sup> The claim for compensation under substantive law can be brought as a primary or ancillary claim.<sup>83</sup> The basis for cost-reimbursement claims under substantive law may be: the contract, culpa in contrahendo, default (§§ 280 para. 1, para. 2, 286 of the German civil code, *Bürgerliches Gesetzbuch*, BGB) or tort law (§§ 823 et seq. BGB).<sup>84</sup> If the prerequisites<sup>85</sup> of the substantive claim for reimbursement of costs are fulfilled, the scope of the reimbursement is then determined in accordance with §§ 249 et seq. BGB.<sup>86</sup> Instructing the attorney must be necessary and expedient<sup>87</sup> (from the client's point of view).<sup>88</sup> In particular, the complexity of the case must be taken into account. In “simple” cases, the instruction is only necessary if the injured party is inexperienced or if the settlement of the claim would otherwise be delayed.<sup>89</sup> In complex cases, necessity can be assumed without further evidence or argument.<sup>90</sup>

### 3. Classification of Spanish law

9. In *Spanish* law, the procedural reimbursement of costs blocks compensation under substantive law. The *Tribunal Supremo* ruled in a 1995 judgment that:<sup>91</sup> “*No cabe incluir dentro del montante indemnizatorio el correspondiente a las costas y gastos del proceso, puesto que su imposición obedece a criterios procesales [...]*.” The *Tribunal Supremo* assumes that *costas y gastos del proceso* are not at the

<sup>79</sup> F. HOFFMANN, op cit., p. 345, 362. Decisively against L. HÄSEMAYER, op cit., p. 148 et seq., according to which litigation costs are generally incidental damages that each party (except in the case of intentional immoral damage) must bear itself. This allocation also applies to pre-litigation costs with the consequence that, according to L. HÄSEMAYER, op cit., the (substantive) obligation to compensate for pre-litigation costs must cease. According to C. WENDEHORST, *Anspruch und Ausgleich: Theorie einer Vorteils- und Nachteilsausgleichung im Schuldrecht*, Mohr Siebeck, 1999, pp. 107 et seq., 149 et seq. legal costs are a “residual disadvantage” (“Restnachteil”) and thus not a materially recoverable consequential damage. Against the extension of the obligation to pay damages under substantive law to legal costs (extrajudicial attorneys' fees) also H. STOLL, *Haftungsfolgen im bürgerlichen Recht: eine Darstellung auf rechtsvergleichender Grundlage*, Müller Verlag, 1993, p. 465 et seq.

<sup>80</sup> W.J. HAU, op cit., 2011, p. 1047.

<sup>81</sup> K. RUESS, op cit., p. 313, 314.

<sup>82</sup> K. ROUSSOS, op cit., p. 371.

<sup>83</sup> On the delimitation and prerequisites K. RUESS, op cit., p. 313, 314 et seq.

<sup>84</sup> A. SCHULZ, en: T. RAUSCHER / W. KRÜGER (Eds.), op cit., Vor § 91, margin number 19; in detail D. HUNECKE, „Ersatzfähigkeit außergerichtlicher Rechtsanwaltskosten“, en: *Neue Juristische Wochenschrift*, 2015, 3745 et seq. According to E. SCHNEIDER, op cit., p. 353 the “type and number of substantive bases for claims [...] are in principle unlimited, but have in common that they presuppose fault on the part of the debtor”. In this context, see also R. BRIESKE, op cit., pp. 118 et seq. On the question of whether a substantive claim for reimbursement of costs can be derived from *negotiorum gestio* (Geschäftsführung ohne Auftrag), cf. A. BERGMANN, „Der allgemeine materiellrechtliche Kostenerstattungsanspruch. Die Begründung eines allgemeinen materiellrechtlichen Kostenerstattungsanspruchs bei außergerichtlicher Rechtsdurchsetzung“, *Archiv für civilistische Praxis*, Vol. 211, p 803, 824 and T. HÖSL, op cit., pp. 139 et seq.

<sup>85</sup> According to T. FELDMANN, “Die Erstattung vorgerichtlicher RA-Kosten”, en: *Recht und Schaden*, 2016, p. 546 a strict distinction has to be made between the relationship between the mandate and the damage when examining the prerequisites of the substantive claims for reimbursement of costs (*Mandats- und Schadensverhältnis*).

<sup>86</sup> T. FELDMANN, op. cit., p. 546, 549. For more details on the reimbursement of extrajudicial attorneys' fees in road traffic liability claims, see W. NIXDORF, “Kostenerstattung für außergerichtliche Rechtsverfolgungskosten im Zusammenhang mit Verkehrshaftpflichtschäden”, en: *Versicherungsrecht*, 1995, p. 257 et seq.

<sup>87</sup> T. FELDMANN, op cit., p. 546, 549. See also on the necessity of the costs H. OETKER, in: F.J. SÄCKER ET AL. (Ed.), op cit., § 249, margin number 181 et seq. and S. MÜLLER-RABE, in: W. GEROLD / H. SCHMIDT (Eds.), op cit., § 1, margin number 262 et seq.

<sup>88</sup> BGH NJW 2006, 1065 m.w.N.; EKKENGA / T. KUNTZ, en: H.T. SOERGEL (Ed.), op cit., § 249, margin number 119.

<sup>89</sup> Cf. BGH NJW 2011, 296. In Detail C. WOITKEWITSCH, „Ersatzpflicht für außergerichtliche Rechtsanwalts- und Inkassokosten“, en: *Monatsschrift für Deutsches Recht*, 2012, p. 500 et seq.

<sup>90</sup> U. MAGNUS, en: B. DAUNER-LIEB / W. LANGEN (Eds.), *Nomos Kommentar zum Bürgerlichen Gesetzbuch*, Vol. 2/1: §§ 241-610, Deutscher Anwaltverein, 3. Ed. 2016, § 249, margin number 78.

<sup>91</sup> Sentencia Tribunal Supremo of 28.12.1995 (No. 8155), p. 6.

same time damages under substantive law. It follows that attorneys' fees cannot generally be classified as damages under substantive law. Strictly speaking, the judgment only makes a statement about the reimbursability of judicial attorneys' fees and not extrajudicial ones. This is because extrajudicial attorneys' fees are neither to be qualified as *costas procesales* nor as *gastos procesales*,<sup>92</sup> but sui generis as *gastos extraprocesales* because they are not incurred within the central process (*dentro del proceso*).<sup>93</sup> In another context, however, Spanish jurisprudence has judged, with the same reasoning, that extrajudicial costs are to be assessed according to procedural law principles and has thus denied them the character of damage under substantive law. Occasionally, Spanish courts have ruled, for example, in cases of a contractual agreement to cover a counterparty's extrajudicial attorneys' fees, that the allocation of extrajudicial expenses is only regulated and determined by the LEC itself and that the passing on of such expenses is therefore not able to be subject to agreement between contracting parties.<sup>94</sup> Firstly, it can be argued that the position against reimbursing extrajudicial expenses under LEC principles must not be undermined but subsequent reimbursement under substantive law. Secondly, that the supreme court jurisprudence outlined above does not only apply to *costas y gastos del proceso*, but also to extrajudicial expenses. The same reasoning is used to justify the denial of recovery of extrajudicial attorneys' fees under procedural law: the legal provision in Art. 241 LEC shows the intention of the legislator to limit the number of cost components that are reimbursable and, in any case, only to allow reimbursement in the case of a costs order (*condena en costas*). This legislative intention would be undermined if the cost components that cannot be reimbursed under procedural law were to be reimbursable under substantive law, that is, through the "back door". The legislator's intention to make *gastos procesales* and *gastos extraprocesales* non-refundable in procedural law must therefore also be reflected in substantive law. The non-recoverability of extrajudicial attorneys' fees applies both in procedural law and substantive law. Spanish legal doctrine, on the other hand, is divided. HERRERO PEREZAGUA<sup>95</sup> – in concordance with the *Tribunal Supremo* – is of the opinion that a dual character of *costas procesales* and *daños* is not possible and justifies this view with two arguments. Firstly, Spanish law explicitly distinguishes between *costas procesales* and *daños*. Secondly, damages have a different origin to *costas procesales*, since

<sup>92</sup> However, a part of Spanish legal doctrine defends that *gastos procesales* are those which arise because of the process (*por el proceso*), so that extrajudicial attorneys' fees can be qualified as *gastos procesales* as well, cf. J.F. HERRERO PEREZAGUA, *La condena en costas. Procesos declarativos civiles*, Ed. J.M. Bosch, 1994, p. 32; *IBIDEM*, *Acceso a la justicia, costas y asistencia jurídica en el proceso civil español*, Anuario de Derecho Civil, Vol. LX, 2007, fasc. II, pp. 553, 585; *IBIDEM*, "La representación y defensa de las partes y las costas en el proceso civil", *La Ley*, 2002, p. 131; *IBIDEM*, in: F. CORDÓN MORENO / T. ARMANTA DEU / J.J. MUERZA ESPARZA (Eds.), *Comentarios a la Ley de Enjuiciamiento Civil*, Arazandi, 2011, Vol. I, Art. 241, para I.; G. CHIOVENDA, *op cit.*, p. 469; J.M. LÓPEZ GIL, in: J.A. ROBLES GARZÓN (Ed.), *op cit.*, p. 160; J. BANACLOCHE PALAO, in: J. BANACLOCHE PALAO / I.J. CUBILLO LÓPEZ (Eds.), *Aspectos fundamentales de Derecho procesal civil*, *La Ley*, 4. Ed. 2018, p. 169; R. JUAN SÁNCHEZ, in: M. ORTELLS RAMOS (Ed.), *Derecho procesal civil*, Arazandi, 3. Ed. 2002, p. 692; J. VEGAS TORRES, in: A. DE LA OLIVA SANTOS ET AL (Eds.), *Derecho Procesal Introducción*, Ed. Universitaria Ramón Areces, 2. Ed. 1999, p. 388; F. RAMOS MÉNDEZ, *Enjuiciamiento Civil. Cómo gestionar los litigios Civiles*, Atelier, 2008, Vol. II, p. 832; A. GARCÍA MARTÍNEZ, "Las costas en los procesos declarativos", in: E. LÓPEZ LÓPEZ / M.E. ALEGRET BURGÚES, *La Ley de Enjuiciamiento Civil tras dos años de vigencia*, Consejo General del Poder Judicial, 2004, p. 367, 369 et seq.; O. FUENTES SORIANO, in: J.M. ASENCIO MELLADO (Ed.), *Ley de Enjuiciamiento Civil comentada y con jurisprudencia*, *La Ley*, 2013, Art. 241, para 2; *IBIDEM*, in: V. GIMENO SENDRA (Ed.), *Proceso civil práctico*, Arazandi, 3. Ed. 2008, Vol. III, Art. 241, para II; *IBIDEM*, *Las costas en la nueva LEC*, *op. cit.*, p. 22; E. CALVO ALFONSÍN, in: I. DÍEZ-PICAZO GIMÉNEZ / J. MARTÍNEZ-SIMANCAS y SÁNCHEZ (Eds.), *ESTUDIOS SOBRE DERECHO PROCESAL*, ED. BANCO CENTRAL HISPANOAMERICANO, 1996, VOL. I, p. 353; V. FAIRÉN GUILLÉN, *Doctrina general del derecho procesal. Hacia una Teoría y Ley procesal generales*, Bosch, 1990, p. 544 et seq. (related to the previous law); M.L. FREIRE DIÉGUEZ, *La tasación de costas en el orden jurisdiccional civil*, Ed. Tecnos, 2003, p. 16; F. TORIBIOS FUENTES, *Prácticum proceso civil*, Ed. Thomson Reuters, 2018, p. 154; L. MARTÍN CONTRERAS, *Las costas procesales*, Bosch, 2015, p. 41; A. DE LA OLIVA SANTOS, in: A. DE LA OLIVA SANTOS / M.A. FERNÁNDEZ, *Derecho Procesal Civil*, Ed. UNIVERSITARIA RAMÓN ARECES, 4. Ed. 1995, VOL. I, p. 535; L. PRIETO-CASTRO Y FERRÁNDIZ, *Tratado de Derecho Procesal Civil*, Arazandi, 2. Ed. 1985, Vol. II, p. 942.

<sup>93</sup> I.E. Spanish jurisprudence, cf. SAP Baleares of 17.2.1999 (No. 280) and parts of Spanish legal doctrine, cf. L. MUÑOZ GONZÁLEZ, *LAS COSTAS*, p. 28 et seq.; A. GÓMEZ RODRÍGUEZ, "Costas Procesales", in: *Diario La Ley*, núm. 8072, 29.4.2013, para. II.1.; J. MARTÍ MARTÍ, "Las costas y gastos en el proceso", *Diario La Ley*, no. 7751, 9.12.2011, para I.; A. MARTÍNEZ GARCÍA / F.J. CREMADES LÓPEZ DE TERUEL / M.M. ROMERO PÉREZ ET AL. (Eds.), *Costas y gastos procesales. Cuando el Tribunal Supremo miró a Europa*, Ed. Tirant Lo Blanch, 2014, p. 26; M. MARTÍNEZ GONZÁLEZ / L. PEDROSA PRECIADO, *Manual práctico sobre la tasación de costas procesales*, Ediciones Experiencia, 2013, p. 24.

<sup>94</sup> SAP Badajoz of 8.11.2018 (No. 988), p. 3.

<sup>95</sup> J.F. HERRERO PEREZAGUA, *La condena en costas. Procesos declarativos civiles*, *op cit.*, p. 39.

*costas procesales* arise out of the legal process itself whereas *daños* are losses originating outside the process. *Costas* and *daños* are thus two different and independent categories. The concept of damage is no broader than the concept of legal costs. Therefore, items that are not covered by the restricted concept of *costas procesales* cannot be “absorbed” by the concept of damages.<sup>96</sup> ASÚA GONZÁLEZ<sup>97</sup> on the other hand, argues that expenses incurred in preparation for proceedings that are not *costas procesales* pursuant to Art. 241 para. 1 subpara. 1 LEC are to be classified as pecuniary loss (*daño emergente*).<sup>98</sup> Formulated the other way round, this statement means that *gastos procesales* under Art. 241 para. 1 UAbs. 1 LEC and *gastos extraprocesales* are recoverable under substantive law. Since extrajudicial attorneys' fees are a component of extrajudicial expenses, it is admissible to conclude *a maiore ad minus* that extrajudicial attorneys' fees are reimbursable according to substantive law principles. Admittedly, the author, like HERRERO PEREZAGUA, believes that a cost component cannot belong to the procedural concept of costs and the material concept of damage at the same time, and that it therefore cannot have dual character. However, ASÚA GONZÁLEZ holds that cost components that are not covered by the restricted procedural reimbursement of costs can be the subject of a substantive reimbursement. According to her, there should be no blocking of the the substantive reimbursement of costs by procedural law. As a result, however, on the basis of Spanish Supreme Court jurisprudence, extrajudicial attorneys' fees in Spanish law are recoverable under neither procedural law nor substantive law.

#### IV. Arguments against procedural law blocking reimbursement under substantive law

10. There are convincing arguments against the ability of procedural law to block reimbursement of costs under substantive law. First, procedural law and substantive law are separate and have different objectives. The non-recoverability under procedural law principles makes no statement as to whether or not such costs are reimbursable under substantive law. Court orders to pay costs are based on the principle of the unsuccessful party liability (“who loses, pays”) and do not serve to enforce alleged liability which is founded in a sham claim rather than the fault of the defending party. Therefore, attorneys' fees should be classified as *costas procesales* in the context of procedural law according to Art. 241 para. 1 subpara. 1 no. 1 LEC and at the same time as compensable pecuniary loss (*daño emergente*) under substantive law. In the same way, extrajudicial attorneys' fees should be qualified as *gastos extraprocesales* under procedural law and as *daño emergente* under substantive law. The legislative decision only to reimburse *costas procesales* under procedural law does not affect substantive law. The question of whether the substantive requirements for a claim for damages are met is to be answered by substantive law, uninfluenced by procedural law. Secondly, the denial of substantive claims directed at the reimbursement of extrajudicial attorneys' fees would create a legal protection gap for the party that is financially burdened by their payment. The gap in legal protection arises from the fact that neither a procedural (factually non-existent) nor a substantive (blocked) claim for reimbursement of costs would exist. The burdened party would be left without legal protection as a result of the denial of both claims. This gap in legal protection is not filled by the reimbursement of *costas procesales* to the winning party. This is because the procedural claim for reimbursement is only directed towards the reimbursement of attorneys' fees incurred in the proceedings themselves (Art. 241 para. 1 subpara. 1 no. 1 LEC). The financial loss associated with pre-judicial attorneys' fees is therefore not fully or partially compensated for by the procedural claim. Thirdly, the displacement of substantive law causes contradictions which speak against the blocking effect of procedural law. It would be paradoxical that, in the case of a costs order, the costs debtor is exempted from the obligation to pay compensation under substantive law whereas, without litigation, there would be no blocking effect and any claims ordinarily available in subs-

<sup>96</sup> See for the whole J.F. HERRERO PEREZAGUA, *La condena en costas. Procesos declarativos civiles*, op cit., p. 39.

<sup>97</sup> C. ASÚA GONZÁLEZ, in: R. BERCOVITZ RODRÍGUEZ-CANO (Ed.), *Comentarios al Código Civil, Aranzadi*, 2013, Vol. VI, Vol. VI, Art. 1.106, para. 3.

<sup>98</sup> C. ASÚA GONZÁLEZ, in: R. BERCOVITZ RODRÍGUEZ-CANO (Ed.), op. cit., Art. 1.106, para. 3: “Los supuestos de la *pérdida* pueden ser muy diversos, por ejemplo: [...] costes [...] de preparación del proceso que no constituyan *gastos del proceso* [corrected later, meant is: *costas del proceso*] ex Art. 241.1. LEC”.

tantive law would be available to the claimant (including claims for recovery of extrajudicial attorneys' fees). In effect, the costs debtor would be benefitted by the existence of a trial.<sup>99</sup> The fourth argument against the blocking effect is that extrajudicial expenses are not explicitly mentioned by Art. 241 LEC. This rule only speaks of *costas y gastos procesales*. Thus, only two categories of costs are regulated by positive law: *costas procesales* and *gastos procesales*. The category of *gastos extraprocesales* has been developed by case law and legal doctrine and, if it exists, exists as a third category, *sui generis*. Art. 241 para. 1 UAbs. 1 LEC does not itself speak of *gastos extraprocesales*. If the law does not provide for the category of *gastos extraprocesales*, it follows that this category is not to be confined to the exclusive jurisdiction of procedural law.

## V. Further arguments for applicability of substantive law

11. In addition, there are further arguments in favour of substantive law being applicable to the question of reimbursement of extrajudicial attorney fees. Firstly, a legislative intention that extrajudicial attorneys' fees should never be reimbursed may be achieved without blocking the applicability of substantive law but by denying all claims for reimbursement of costs under substantive law. The inability to seek reimbursement of extrajudicial attorneys' fees should be based on the denial of claims for compensation under substantive law and not on an outright refusal of their examination. Secondly, the value judgement made in procedural law, according to which the prevailing party can only demand reimbursement of a limited number of costs from the cost debtor, is a valuation that cannot be justified in substantive law. In contrast, substantive civil law is based on the value judgement that the tortfeasor must in principle compensate the injured party for the damage incurred (for example, when a contractual duty is breached or there is non-contractual damage).<sup>100</sup> The grounds on which restriction of protection of a person's property is legitimate are unclear. Thirdly, it is not apparent that the procedural reimbursement of costs under Art. 241 et seq., 394 LEC is intended to protect the cost debtor from a claim for reimbursement under substantive law. The fact that legal proceedings have commenced should not serve to protect the debtor from valid claims under substantive law. If a person is liable for damages under substantive law, that person must expect to have to compensate their counterparty. The tortfeasor is not worthy of protection from their obligation to compensate in this case. Substantive law decides solely on the basis of its value judgements and its appraisal of the balance of interests whether the tortfeasor is obliged to compensate the damage. There is no reason to additionally limit their obligation to pay under procedural principles. It is true that the law governing procedural reimbursement of costs in Spanish law includes protective mechanisms to limit the cost burden of the cost debtor. These protective mechanisms include, for example, the limitation to reimbursement of *costas procesales* and not *gastos procesales*, the limitation of attorneys' and experts' fees to one third of the amount in dispute pursuant to Art. 394 para. 3 LEC and, in terms of legal protection, an intensive challenge procedure (*impugnación*) within the determination of costs framework (*tasación de costas*) pursuant to Art. 245 LEC and Art. 246 LEC. However, these protective mechanisms only limit the cost burden according to procedural law principles. The aforementioned regulations which provide protection to the cost debtor do not contain any further statement to the effect that the cost burden of the cost debtor should also be limited according to substantive law. This conclusion is also supported by the fact that procedural law and substantive law are based on different valuation standards. In procedural law, the value of procedural economy prevails, whereas in substantive law, the interest of the injured party in restitution is decisive.<sup>101</sup> In procedural law, the value placed on procedural economy means that the parameters for reimbursement of costs are narrower than in substantive law.<sup>102</sup> Contrastingly, extrajudicial attorneys' fees must be fully recovered

<sup>99</sup> However, at least with regard to Spanish law, this argumentation is unlikely to be entirely convincing, because even without a *condena en costas*, i.e. without a trial, there is probably no substantive claim for reimbursement of costs *de lege lata*.

<sup>100</sup> A. ROBERTSON, in: A. ROBERTSON / H.W. TANG, *The Goals of Private Law*, Bloomsbury Publishing, 2009, p. 1 et seq.

<sup>101</sup> K. ROUSSOS, *op cit.*, p. 374.

<sup>102</sup> K. ROUSSOS, *op cit.*, p. 376.

under substantive law because, in substantive law, the concept of compensation is paramount. Therefore, the procedural reimbursement of costs in Spanish law should correctly not lead to a limitation on the cost burden in favour of the cost debtor with regard to the reimbursement of extrajudicial attorneys' fees.

## VI. Disadvantages of the current legal situation in Spain

12. The lack of recoverability of extrajudicial attorneys' fees in Spanish law has disadvantages. Firstly, it constitutes a legal impediment to access to justice (*acceso a la justicia*). A legal impediment means the complete exclusion or at least an impediment to taking legal action, for example due to economic or sociological hurdles.<sup>103</sup> Access to justice may be impeded by, in particular, the charging of court fees or the bearing of legal costs by the parties.<sup>104</sup> In such cases, the financial burden creates a risk that the parties will refrain from asserting their rights and claims.<sup>105</sup> Impediments, such as those created by fees and legal costs is permissible insofar as it is intended to counteract excessive recourse to courts.<sup>106</sup> Generally, the impediment posed to legal action is, however, lessened by the fact that, in general, a decision on costs allows the successful party to claim reimbursement of its legal costs from its opponent.<sup>107</sup> However, the impediment remains in place in Spanish law in part because the costs order under Spanish law only covers the *costas procesales*.<sup>108</sup> In a legal system where the winning party to a dispute is unable to seek reimbursement of extrajudicial attorneys' fees, a claimant wishing to hire an attorney to appraise and enforce their claim will have to weigh up costs and benefits differently. In the case of a low-value claim, the extrajudicial attorneys' fees spent are usually disproportionately high when compared to the claim value.<sup>109</sup> Despite a possible procedural claim for reimbursement of *costas procesales*, the financial burden of extrajudicial attorneys' fees remains. There is a risk that the claims will not be asserted.<sup>110</sup> The creditor is "deprived of any reasonable legal protection".<sup>111</sup> The bar to access to justice is also not removed by the possibility of granting legal aid.<sup>112</sup> A second disadvantage of this legal arrangement is that the monies paid in extrajudicial attorneys' fees by an individual defending a sham claim, must be

<sup>103</sup> M.J. ARIZA COLMENAREJO, *Las costas en el proceso penal*, Ed. Comares, 1998, p. 9. For the distinction between a subjective-absolute cost blocking (*Kostensperre*) and an objective-relative cost blocking, cf. C. WOLF, "Steuerung des Zivilprozesses durch Streitwert- und Kostenrecht", in: *Zeitschrift für Zivilprozess*, Vol. 128, no. 1, 2015, p. 69, 79 et seq.

<sup>104</sup> M. LUPANO, *Responsabilità per le spese e condotta delle parti*, Ed. Giappichelli, 2013, p. 113 et seq.; D. DESSARD, "La répétibilité des honoraires et frais d'avocat: un accouchement dans la douleur...", in: G. DE LEVAL / F. GEORGES (Eds.), op cit., p. 55, 60; C. DREXEL, *Der Zugang zum Recht: eine Untersuchung ausgewählter Regelungen der Zivilgerichtsbarkeit am Maßstab von Art. 6 EMRK und Art. 47 GRC*, Jan Sramek Verlag, 2016, p. 116 et seq.; G. BAUMGÄRTEL, op. cit., p. 118 et seq.; J.F. HERRERO PEREZAGUA, *Acceso a la justicia, costas y asistencia jurídica en el proceso civil español*, op cit., p. 553, 578 et seq.; F. GÓMEZ DE LIAÑO GONZÁLEZ, *Abogacía y proceso*, 1988, p. 216; E. BOKELMANN, "Rechtswegsperre durch Prozeßkosten", in: *Zeitschrift für Rechtspolitik*, 1973, p. 164; B. STÄHELIN, "Prozesskostenrisiko vs. Anspruch auf Zugang zum Recht", *sui-generis* 2018, p. 20, 24 (margin number 12).

<sup>105</sup> C. CIERCO SEIRA, "Las costas procesales y el derecho de acceso a la justicia administrativa", in: J. AGUDO GONZÁLEZ (Ed.), *Control administrativo y justicia administrativa*, Ed. Instituto Nacional de Administración Pública, 2016, p. 103, 127.

<sup>106</sup> Sentencia Tribunal Constitucional of 16.2.1994 (No. 48).

<sup>107</sup> J.F. HERRERO PEREZAGUA, *Acceso a la justicia, costas y asistencia jurídica en el proceso civil español*, op cit., p. 553, 580; M.L. FREIRE DIÉGUEZ, op cit., p. 13.

<sup>108</sup> R. JUAN SÁNCHEZ, in: M. ORTELLS RAMOS (Ed.), op cit., p. 698.

<sup>109</sup> R.A. SCHÜTZE, *Rechtsverfolgung im Ausland. Prozessführung vor ausländischen Gerichten und Schiedsgerichten*, De Gruyter, 5. Ed. 2016, margin number 63 speaks of economic impossibility if costs are not reimbursed for low amounts in dispute, in the same way R.A. SCHÜTZE, "Armenrecht, Kostenerstattung und faires Verfahren", in: A. BAMMER / G. HOLZINGER / M. VOGL / G. WENDA (Eds.), *Rechtsschutz gestern – heute – morgen. Festgabe zum 80. Geburtstag von Rudolf Machacek und Franz Matscher*, Verlag NWV, 2008, pp. 919, 924.

<sup>110</sup> A. BERGMANN, op cit., p. 803, 807: „Der Ersatz der eigenen Rechtsverfolgungskosten schafft Anreiz für sein besseres Recht zu kämpfen, die Kostentragungspflicht im Unterliegensfall gemahnt gleichzeitig zur Zurückhaltung bei der Postulierung zweifelhafter Rechtspositionen.“

<sup>111</sup> R.A. SCHÜTZE, *Rechtsverfolgung im Ausland. Prozessführung vor ausländischen Gerichten und Schiedsgerichten*, op. cit., margin number 344.

<sup>112</sup> See for argumentation in German law A. SIEBERT-REIMER, op cit., p. 58 et seq.; M. REHBINDER, „Die Kosten der Rechtsverfolgung als Zugangsbarriere der Rechtspflege“, in: M. REHBINDER (Ed.), *Abhandlungen zur Rechtssoziologie*, Duncker & Humblot, 1995, p. 95, 97 et seq.

borne by that person.<sup>113</sup> This is inequitable; in the case that a party brings an unjustified claim (*Anspruchsberühmung*), they should bear the costs,<sup>114</sup> including, extrajudicial attorneys' fees. In reality, there is no claim for reimbursement against the initiator of the unjustified claim. Thirdly, the non-reimbursement of extrajudicial attorneys' fees in substantive law is inconsistent with the value judgements embodied in substantive law. This issue does not arise for procedural law because the procedural claim for reimbursement of costs is rooted in a procedural legal relationship between the parties and thus only should cover the costs that have arisen within the procedural legal relationship.<sup>115</sup> In contrast, the non-recoverability under substantive law is inconsistent with the purpose of substantive law on damages, i.e. to compensate for losses if the injured party ought not be burdened with them. Extrajudicial attorneys' fees are a loss that is not recoverable under Spanish law. They should be recoverable as consequential damages to the same extent as other secondary damage to the property of an injured party is recoverable. Furthermore, the proposition in Spanish jurisprudence that the possibility of secondary proceedings for the claim of legal fees would amount to an uneconomical concatenation of lawsuits is misled. It is in-keeping with and a natural consequence of the practice that lawsuits are open to appeal. Nor is there any inconsistency in the proposal that attorneys' costs are to be reimbursed without a cap, given the cap on costs would be limited by the possibility of challenge (*impugnación de la tasación*) by the opposing party according to procedural law principles (Art. 244 seq. LEC). This is because substantive claims for reimbursement can and should also be limited in terms of amount, for example based on a necessity evaluation. Eventually, there are two further arguments in favour of extrajudicial attorneys' fees being recoverable under substantive law. Firstly, the non-recoverability leads to the winning party in the lawsuit only being "half victorious",<sup>116</sup> i.e. only achieving a Pyrrhic victory.<sup>117</sup> Secondly, there is no objective reason for unequal treatment of judicial and extrajudicial legal (attorneys') fees.<sup>118</sup>

## VII. Approaches *de lege ferenda*

13. *De lege ferenda*, several approaches can be considered. Approaches aimed at extending the procedural reimbursement of costs to extrajudicial attorneys' fees by way of a reform or an analogous application of Art. 241 LEC must be rejected because there is no need for them. Permitting reimbursement of costs under substantive law on the basis of Art. 1.106 CC is preferable because extrajudicial attorneys' fees are then properly classified as damages under substantive law. Concerns regarding this view are expressed in European legal doctrine, for example on the basis of comparative law considerations,<sup>119</sup> because extrajudicial attorneys' fees are not a consequence of the specific risk of another party's infringement, but are part of the general risk of asserting one's own rights,<sup>120</sup> and because otherwise plaintiff and defendant are treated unequally.<sup>121</sup> However, these arguments are not convincing. Drawing analogy

<sup>113</sup> R. JUAN SÁNCHEZ, in: M. ORTELLS RAMOS (Ed.), op cit., p. 698; M.C. CALVO SÁNCHEZ, "El coste de la justicia: especial referencia a las costas en los procesos declarativos de la Ley 1/2000, de Enjuiciamiento Civil", in: S. PASTOR PRIETO / V. MORENO CATENA (Eds.), *El coste de la justicia*, Dykinson, 2002, pp. 75, 88; M.C. CALVO SÁNCHEZ, "La doctrina de la Sala Primera en materia de costas procesales", in: V. GIMENO SENDRA (Ed.), op cit., p. 705, 715.

<sup>114</sup> In the end rejecting J. VEGAS TORRES, in: DE LA OLIVA SANTOS ET AL (Eds.), op cit., p. 387.

<sup>115</sup> About the criticism G. CHIOVENDA, op cit., p. 469.

<sup>116</sup> F.-X. LICARI, « Les frais d'avocat comme dommage réparable », *Revue Lamy Droit Civil*, 10/2006, Nr. 31, p. 66, 67: « Celui qui gagne un procès en contrefaçon mais ne peut recouvrer ses frais d'avocats et d'experts souvent très élevés ne remporte qu'une demi-victoire bien coûteuse. »

<sup>117</sup> R.A. SCHÜTZE, *Rechtsverfolgung im Ausland. Prozessführung vor ausländischen Gerichten und Schiedsgerichten*, op cit., margin number 63.

<sup>118</sup> P. JÄGGI, „Rechtsgutachten Peter Jäggi zum Ersatz der vorprozessualen Vertretungskosten im Schadensfall“, *Schweizerische Versicherungszeitschrift*, 1995, p. 267, 273 et seq.

<sup>119</sup> H. STOLL, op cit., p. 468.

<sup>120</sup> C. WENDEHORST, op cit., p. 108; M. JÄGER, op cit., p. 159; I. SCHWENZER, "Rechtsverfolgungskosten als Schaden?", in: P. GAUCH / F. WERRO / P. PICHONNAZ (Eds.), *Melanges en l'honneur de Pierre Tercier*, Schulthess Juristische Medien, 2008, p. 417, 424 et seq.; H. STOLL, op cit., p. 466.

<sup>121</sup> M. JÄGER, op cit., p. 160.

to US and French law is not convincing because, in German<sup>122</sup>, Swiss<sup>123</sup>, Austrian<sup>124</sup> and Italian<sup>125</sup> law, legal costs can be damages under substantive law.<sup>126</sup> Legal costs also have the sufficient causal link to the damage and arise due to the infringement of a right.<sup>127</sup> Costs for (pre-litigation) legal action serve to avert or eliminate the detrimental consequences of the injury.<sup>128</sup> Finally, the argument regarding unequal treatment between plaintiff and defendant is countered by the fact that this alleged unequal treatment is inherent in the system of asset protection.<sup>129</sup> Thus, a substantive claim for reimbursement of extrajudicial attorneys' fees based on Art. 1.106 CC (*daño emergente*) ought to be admitted under Spanish law *de lege ferenda*. The amount of the claim should be limited to necessary and appropriate attorneys' fees.

## VIII. Conclusion

14. In conclusion, the Spanish legal system – as well as the French, Italian, Portuguese, Belgian and Dutch – is a legal system that does not reimburse extrajudicial attorneys' fees by way of a procedural claim. This is a common stance in Romanesque legal systems. Whether substantive claims for reimbursement of out-of-court attorneys' fees can be examined alongside a procedural reimbursement of costs is a question of the relationship between the procedural and substantive reimbursement systems. In the European context, some legal systems affirm a blocking effect by which procedural law precludes application of substantive law; others allow substantive claims for reimbursement of costs in addition to the reimbursement of costs under procedural law. In Spanish law, claims for the reimbursement of non-procedural attorneys' fees under substantive law cannot be examined in addition to the reimbursement of costs under procedural law. The justifications for this position, in Spain and elsewhere, are not convincing. Despite some isolated critical voices in Spanish legal doctrine, Spanish jurisprudence does not classify (extrajudicial) attorneys' fees as damages under substantive law. As explored above, the current legal situation in Spain has several disadvantages. The possibility of harmonising the law internationally with regard to the question of the recoverability of extrajudicial attorneys' fees argues in favour of allowing a substantive claim for reimbursement of costs in Spanish civil law on the basis of Art. 1.101 CC or Art. 1.902 CC and classifying extrajudicial attorneys' fees as damage (*daño emergente*) according to Art. 1.106 Alt. 1 CC. The compensation of extrajudicial attorneys' fees should be limited to necessary and appropriate costs.

<sup>122</sup> Permanent case law since BGH NJW 1959, 1631; also the prevailing doctrine, cf. SCHIEMANN, in: J.V. STAUDINGER (Ed.), op cit., § 251, margin number 120 with further references; H. LANGE / G. SCHIEMANN, Schadensersatz, Mohr Siebeck, 3. Ed. 2003, p. 383; S. MÜLLER-RABE, in: W. GEROLD / H. SCHMIDT (Eds.), op cit., § 1, margin number 238; K. ROUSSOS, op cit., p. 369 uses in this context the term of the „Aufwendungsschaden“. Against the recoverability in particular H. STOLL, op cit., p. 466 et seq.; C. WENDEHORST, op cit., p. 107 (non-recoverable „Restnachteil“) and L. HÄSEMAYER, op cit., p. 148 et seq.

<sup>123</sup> W.C. WEBER, Die Prozessentschädigung mit besonderem Bezug auf ihre Ausgestaltung im zürcherischen Zivilprozess, 1990, p. 126 et seq. With further references; P. JÄGGI, op cit., p. 267, 268.

<sup>124</sup> A. GEROLDINGER, Der mutwillige Rechtsstreit. Schadensersatzansprüche der Parteien wegen materiell rechtswidriger Prozessführung, MANZ'sche Verlags- und Universitätsbuchhandlung, 2017, p. 167 et seq.; IPG-Gutachten 2015-2017, No. 20, margin number 161, 163.

<sup>125</sup> Cass. Civ., Sez. VI, ordinanza of 2.2.2018, n. 2644; A. GUALANDI, op cit., p. 11.

<sup>126</sup> For comparative law on English and US law, see also M. JÄGER, op cit., p. 147 et seq.

<sup>127</sup> S. SCHNITZER, op cit., p. 56.

<sup>128</sup> P. JÄGGI, op cit., p. 267, 269.

<sup>129</sup> A. BERGMANN, op cit., 803, 843.