

**Jan Darpö**

Professor in Environmental Law  
Faculty of Law/Uppsala Universitet  
PO Box 512, SE-751 20 UPPSALA, Sweden  
Tel. +46 739 137824  
E-mail: [jan.darpo@jur.uu.se](mailto:jan.darpo@jur.uu.se)  
On the web: [www.jandarpo.se](http://www.jandarpo.se)  
\*\*\*\*\*

**To: Aarhus Convention National Focal Points and other stakeholders**

31 January 2011

## ***On costs in the environmental procedure***

### **Introduction**

According to Article 9.4 of the Aarhus Convention, environmental review procedures shall be “... fair, equitable, timely and *not prohibitively expensive*”. However, high legal costs have been described as one of the main barriers for the public concerned to have access to justice. This memo intends to summarize the most important costs in the procedure and to give some general reflections on a number of key issues on the subject.<sup>1</sup> In my opinion, one or two of these should be studied further. At the end of the paper, I include a list of the literature (in English) on the issue as of June 2010.

### **Definition of costs**

#### *General*

Reviewing the literature, it is interesting to note that costs can vary greatly from one country to another, even if the legal systems are relatively closely related. An overview of the Nordic Parties to the Aarhus Convention illustrates this. In Sweden, the environmental procedure in administration and courts does not entail costs for the public concerned, unless they choose to instruct a lawyer to represent them (which is not compulsory). In Finland, a modest court fee is required, 89 € (112 \$) in the first instance, 223 € (229 \$) in the Supreme Administrative Court.<sup>2</sup> In Danish courts, fees start fairly low (500 DKK (67 €, 84 \$)), but can reach as high as a maximum of 75,000 DKK (10,000 €,

---

<sup>1</sup> The paper is written from my general experience and some studies of existing material in the English language. I do not pretend to have taken part of more than a fraction of it, the literature covers at least parts of the cost issue in 27 countries, plus EU: Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Malta, Romania, Slovakia, Slovenia, Sweden, Spain and the United Kingdom. In addition to this, we have the Implementation reports from the Parties to the Convention. This paper only covers costs “normally” associated with the environmental procedure. Phenomenon such as economic harassments and SLAPPS (Strategic Lawsuits Against Public Participation) are left aside.

<sup>2</sup> Darpö, J & Kuusiniemi, K & Vihervuori, P: Miljöprövningen i vågskålen – landskampen mellan Finland och Sverige. Juridiska Föreningens Tidskrift (JFT) p. 615, at p. 629.

12,500 \$). In addition to this, the Danish Parliament recently decided to introduce a fee for administrative appeals, 500 DKK for individuals and 3,000 DKK (403 €, 503 \$) for organizations.<sup>3</sup> In Norway, environmental decisions are subject to judicial review in the ordinary courts, which can be quite expensive for the applicant. According to the literature, the minimum court fee for such a case that is appealed all the way to the Norwegian Supreme Court and takes no more than a day in court at each level, is NOK 45,580 (5,400 €, 6,767 \$). In Denmark and Norway, the losing party normally must pay the costs of the opponent, which is not the case in Sweden and Finland.<sup>4</sup> Why there are such great variations in these neighbouring countries cannot be easily explained without undertaking a deeper analysis of the different legal systems, including ways of bringing appeals, procedural order (civil or administrative), different types of courts, etc. Be that as it may, in some of our countries, the issue of costs clearly is something that the public concerned have to take into consideration before challenging environmental decisions or activities.

Therefore, one might think it surprising that there is no definition of the requirement “not prohibitively expensive” in the Convention. How costly is too costly, and should the individual litigant’s circumstances be taken into account, or should there be a set cost ceiling that applies to all situations? We have to admit that we do not know yet. In fact, there is not even a common understanding of what can be described as “costs”. However, some guidance can be found in the Implementation Guide 2000 (page 133f). In addition to this, numerous reports and articles have been written on the subject in the last couple of years.<sup>5</sup> The Compliance Committee has also decided a number of interesting cases on the issue, and so have national courts and the European Court of Justice (ECJ).<sup>6</sup> This paper adopts the approach of the Compliance Committee in case C/2007/33, namely to look at the “cost system as a whole and in a systematic manner”.<sup>7</sup> In this decision, the Committee also stated that when deciding what is “prohibitively expensive”, attention must also be paid to the uncertainty of facing an economic risk. Furthermore, it said that what is “fair” must be decided from the viewpoint of the public concerned. To this one might add, that costs must also be seen in the context of the level of costs of living in the country in question. Using this as a starting point, costs in the environmental procedure can be described as follows.

### Court fees

In several countries, the claimant must pay a fee to the court when bringing a claim, e.g. when appealing an environmental decision or challenging an activity directly to the judicial system. However, the fee system varies greatly from one country to another. Com-

---

<sup>3</sup> L 58 Forslag til lov om ændring af lov om Natur- og Miljøklagenævnet og lov om ændring af lov om naturbeskyttelse, lov om miljøbeskyttelse og forskellige andre love, see the web site of the Danish Parliament (Folketinget, <http://www.ft.dk/English.aspx>).

<sup>4</sup> Tegner Anker, H & Fauchald, OK & Nilsson, A & Suvantola, L: The Role of Courts in Environmental Law – a Nordic Comparative Study. In *Nordic Environmental Law Journal* 2009 p. 9 (at p. 18), <http://www.nordiskmiljoratt.se>.

<sup>5</sup> The list of literature in the end of the paper contains only the most important titles, written in English.

<sup>6</sup> See the listed cases on the Convention’s website: <http://www.unece.org/env/pp/a.to.j.htm>. In addition to this, questions on costs (amongst others) has recently been referred by the English Supreme Court to the ECJ in the case of *Edwards R (Edwards & Pallikaropoulos) v Environment Agency and others* [2010] UKSC 57. Judgment available at <http://www.supremecourt.gov.uk/news/judgments.html>.

<sup>7</sup> C/2008/33 United Kingdom, para 128-136.

monly, appeal within the administrative system is free of charge, but, as shown above, there are exceptions to this rule. Another common feature is that court fees increase with the instances; the higher you get, the higher the fee. In some legal systems, NGOs are exempted from paying court fees.

The amount of the fees also varies greatly. As was shown by the Nordic example, the court fee can be anything from a very small sum to a large amount of money. In some countries, the court fee is calculated from “the value of the case”, with the fee depending on the interest at stake and other similar factors. This system is used in, for example, Poland, Hungary, Austria and Germany (“Streiwert”). Using this method when a permit decision for a major installation is challenged can result in a fee of as much as 10,000 € (12,500 \$).<sup>8</sup> This can be true for many of the activities in Annex I to the Convention, due to their size and nature.

Under this headline belong also “in-court costs”, such as fees for copies and other kinds of services. In some cases, such costs can amount to large sums for the public concerned.<sup>9</sup>

The level of the court fee is clearly something the public concerned must take into account when deciding whether or not to challenge a permit or activity. Fees can also be problematic from an access to justice point of view if they have to be paid in advance. Often, they represent an “up-front” cost, which can be hard to bear (and certainly hard to find at short notice) for the public concerned, even if it may be remunerated in the end of the procedure. In some systems, there are however possibilities to have the payment of the court fee postponed for a certain amount of time.

### Loser pays principle

There is also a lot of variety across legal systems with regards to litigation costs. In some legal systems, the environmental procedure is “free”, meaning that all parties have to bear their own costs, irrespective of the outcome of the case. However, even in those systems, sometimes a party can be ordered to remunerate the opponents if he or she has acted recklessly in the procedure (“mala fide”). In other systems – both among those where environmental cases are dealt with by administrative courts and those where this is a task for the ordinary courts – the “loser pays principle” prevails. This principle – or the “costs in the cause rule” – basically means that the loser pays the winner’s costs for lawyers, witnesses etc. Even so, the rule appears in different shapes and colours. In some countries, the amounts that can be awarded are fixed. In others, the losing party has to remunerate the opponent for all, or a large proportion of, his or her costs. When the claimant is a “one shot litigant” neighbour and the opponent an authority or a big company with both experience and resources, it has been argued that such a system conflicts with the principle of “equality in arms” and, accordingly, the Convention’s requirement for the procedure to be fair. Additionally, when such a scheme for the distribution of litigation costs is applied, the uncertainty of the economic risk of bringing a case to court can be high.

An important issue relating to costs is whether assistance from a lawyer is compulsory in court. Again, the legal systems among the Parties show major differences. At one

---

<sup>8</sup> Rehbinder in Access to Justice, p. 234. The information is old (2001), but, to my knowledge, is still correct.

<sup>9</sup> See for example the well known defamation case in the European Court of Human Rights; Steel and Morris v. United Kingdom, ECHR 2005-02-15, the “McLibel case”.

extreme, there are the systems in which individuals and organizations can represent themselves in court - and commonly do so. At the other end of the spectrum, representation by a lawyer (or lawyers), or even a certain kind of barrister, can be mandatory. In the middle, there are systems in which the parties are not formally required to have a lawyer, but in reality always hire one.

There are also diverging views as to whether the authorities should have their costs remunerated if someone challenges their decisions in court and lose the case. In some legal systems, it is regarded as a democratic right to have the legality of administrative decisions tested in court, with no associated liability for costs. Others start from the principle that the administration always acts within the limits of the law, and those who fail to show the opposite have to pay the price. Obviously, these two perspectives have a great impact on the potential cost of the environmental procedure.

#### Experts' and witness' fees

The costs for experts and witnesses are closely related to the responsibility for the investigation in environmental cases. In the legal systems where the "inquisitorial principle" is applied, the court has the ultimate responsibility for this. The court must not only be knowledgeable about the legal issues, but also have all the facts in the case thoroughly investigated so that the law can be applied correctly. In some countries, courts and court like tribunals<sup>10</sup> have technicians and experts of their own. Commonly in those systems, the experts' costs are not the responsibility of the public concerned, as the experts are employed by the courts or paid from the public purse. In other countries, where civil procedural perspectives are prevalent in cases where the public concerned is challenging an administrative decision, the investigation must be furnished by the parties. Accordingly, the public concerned will have to provide experts and witnesses. At the end of the day, the costs incurred for this will be at the parties' own expense if they lose the case. It is also quite common for experts to be assigned by the court, but to be remunerated by the losing party. Alternatively, the cost is divided between all parties to the procedure.

Experts and witnesses can be quite expensive. According to some sources, the cost of an expert on noise in an environmental case can amount to somewhere between 2,000 and 3,000 € (2,500-3,750 \$), and other kinds of experts can cost as much as 15,000 € (18,800 \$).

#### Bonds for obtaining interim injunction

Another important issue is whether an appeal has suspensive effect on the contested decision when someone challenges an environmental permit or the like. Similarly, under what conditions can a court stop a hazardous activity on the application from the public con-

---

<sup>10</sup> "Court" is an autonomous expression and not depending on national labels. In fact, many administrative bodies and tribunals have been regarded as "courts" in the meaning of Article 6 in the European Convention of Human Rights. Thus the following tribunals have been accepted by the ECHR: a board for deciding compensation for criminal damage in Sweden (*Rolf Gustafsson v. Sweden*, ECHR 1997-07-01); an authority for real estate transactions in Austria (*Sramek v. Austria*, ECHR 1984-10-22); a prison board for visitors in UK, (*Campbell and Fell v UK*, ECHR 1984-06-28); and an appeals council of the Medical Association of Belgium (*Le Compte et al v Belgium*, ECHR 2000-06-22). I would guess that the new tribunals in UK also will be found to be courts, see <http://www.informationtribunal.gov.uk>. In addition to this, the ECJ has its own case law on the subject, however using almost identical criteria; see for example C-205/08, where ECJ considered the Austrian Umweltsenat to be a court according to Union law.

cerned. In those systems where an appeal has suspensive effect, this is obviously not a problem. However, sometimes even here, the applicant (operator) can obtain a “go-ahead decision”, meaning that the permit can be utilized even if it is appealed. There are also examples where the operator in those situations must pay a bond to secure the interests of the stakeholders if they appeal.

In other legal systems, an appeal does not automatically have suspensive effect. In this case, the claimant must apply for an “injunction” of the decision or activity (also called interim injunction, interim relief, injunctive relief or inhibition). The same principle applies to go-ahead decisions in systems where an appeal has suspensive effect. As was illustrated in the Compliance Committee’s case C/2008/24, the potential to obtain an injunction without delay can be crucial in environmental cases. This is due to the fact that without an injunction, the other party can undertake irreversible or significant damage to the environment while judicial review is pending. In other words, unless an injunction is granted, a later success in the outcome of the case will have little meaning.<sup>11</sup>

As the study on remedies shows, there are similarities in many legal systems in the black letter law criteria for injunctions (danger in delay, prima facie case, personal harm and weighing of interests).<sup>12</sup> However, according to the literature, case law on the matter varies from one country to another and there are countries where obtaining injunction is quite problematic. In addition to this, in some systems, the appellant must pay a bond (also called security or a cross-undertaking in damages) in order to obtain the injunction. The underlying rationale for this is that the operator shall be compensated for the costs incurred or profit lost because of the delay to a project if the appeal against the permit is subsequently unsuccessful. Clearly, such a system can be a major barrier to access to justice.

The calculation of the bonds varies. In countries where the calculation is based on the actual costs of delaying a major industrial plant or infrastructural project, the sums involved can be enormous. In other systems, the bond in the individual case is a lump sum which is decided in advance. Even so, the sums can be quite substantial.

## **Mitigating factors and financial arrangements**

### General

As discussed in this paper, contracting Parties to the Aarhus Convention offer different solutions and can make various orders to help ensure that costs in the environmental procedure are not being prohibitively expensive. Therefore, when discussing the effect of costs on access to justice, these mitigating factors should also be taken into account.

### Protective cost orders

In some legal systems utilizing the loser pays principle, the court can order a maximum amount that may be recovered by the winning party (commonly called a “Protective

---

<sup>11</sup> I guess the famous Lappel Bank case in ECJ (C-44/95) is one of the most spectacular examples of when the claimant “wins” the legal case, but loses the “asset” they seek to protect. To my understanding, the UK House of Lords (after seeking a reference to the ECJ) quashed the controversial decision, but in the intervening period, the habitat the claimant’s sought to protect had been turned into a car park.

<sup>12</sup> Access to Justice - Article 9.4 of the Aarhus Convention and the requirement for adequate and effective remedies, including injunctive relief (2011-01-24) by Ms Yaffa Epstein.

Costs Order or PCO). Capping costs reduces economic risk by making the maximum cost of litigation known in advance of trial. As such, a system in which PCOs exist has similarities with one in which all costs are based upon the “the value of the case”. This of course is of great advantage in relation to the uncertainty issue (see below). A downside of the PCO regime that has been emphasized in the debate is that the PCO is commonly set at a high level and the criteria under which they are granted are strict. Also, the cost for applying for the order is not negligible.

#### Costs under courts’ discretion

In many countries, the ultimate responsibility for the distribution of costs rests with the court. It lies within the court’s discretion to award full remuneration, to limit the amount or even to exempt a certain party from the liability. Different factors may have an influence on those decisions, including: the claimant had good reasons for bringing the case; the case was brought in the public interest; or the issues involved were of great importance, etc. I dare say that the courts’ discretion is regarded by many as quite natural. However, one must also be aware of the fact that this system also brings about uncertainty for those who wish to use legal means to defend environmental interests. And, as mentioned above, uncertainty is a factor that must be considered when deciding what is “prohibitively expensive”. If the discretion of the court is unrestricted, without any boundaries, the system may not be in compliance with the Aarhus Convention. This conclusion was drawn by the Compliance Committee in case C/2008/33, as well as the ECJ in case C-427/07.<sup>13</sup> In the latter case, the ECJ found that mere judicial discretion to decline to order the unsuccessful party to pay the costs of the procedure could not be regarded as valid implementation of an EC Directive and, in this particular case, the “not prohibitively expensive” requirement. Accordingly, the legislation must give guidance and restrictions to the courts in deciding on these matters.

#### Legal aid, pro bono services and other arrangements

Most countries offer legal aid in some situations, including – at least in theory – environmental cases. Here, the variations between the countries are significant enough to write a paper on the subject alone. The differences relate to issues such as the general criteria for legal aid, what kind of costs are covered, what percentage of remuneration, etc. Commonly, legal aid only covers the recipient’s own lawyer. However, in some systems it also has an impact on the potential for the winning party to have their costs remunerated. There are other factors governing whether organisations may obtain legal aid, e.g. whether a case in the public interest or relates to more “private” issues etc. In addition, other external factors may be of importance, e.g. if organisations are allowed to represent individuals in these cases. In those countries where the legal system offers such a possibility, there are NGOs that have specialized in representing people with limited financial resources in environmental cases.

Legal aid can be realized in many ways. In some countries, those representing recipients of legal aid are required to have a certain license or certificate. In others, there are certain law firms that have public funding for this purpose. In other legal systems, it is

---

<sup>13</sup> It is worth noting that the case concerned Ireland, which has not ratified the Aarhus Convention. However, as the EU Directive 2003/35 implements Article 9.4 of the Convention verbatim, Ireland is nevertheless bound to the cost requirement.

more or less compulsory for members of the lawyers associations to do a certain amount of “pro bono”, that is, on charity terms. Also law schools have “clinics” as part of their education, where professors and other legal professionals help students to assist people with limited financial means. Some of these clinics are dedicated to environmental cases. Another model is public funding of the environmental NGOs to enable them to take legal action in environmental cases, or state aid to networks of “public interest lawyers” (PIL).

### **Key issues for further considerations**

#### *Gaps in our knowledge and issues of general importance*

In my view, the starting point for the discussion on which issues of costs the Task Force could usefully focus on – and therefore undertake more designated studies on – is that the issue is clearly crucial to providing adequate access to justice in the environmental procedure. An additional decisive factor is that knowledge on this area is limited. From this perspective, I have identified the following five key issues in our work, in no particular order.

#### *The “value of the case”*

The system of calculating court fees from the “value of the case” seems to be quite widespread among the Parties to the Convention. At the same time, the system is not very well described or analyzed in the English literature. I think it would be very interesting to undertake a further study on the basic features of this system - the underlying principles, advantages and downfalls, etc. If I am correct, the system leads to the effect that the more important the case and larger the operation, the higher the court fees. It does not require great imagination to see that there may be a conflict between this model for calculation of court fees and the Convention’s requirement that the environment procedure not be prohibitively expensive. It is also noteworthy that in many countries, the ability to challenge decisions on large-scale operations and infrastructural projects is restricted.

#### *The loser pays principle*

What are the basic ideas behind this principle and are they compatible with the environmental procedure? Surely, in many countries, this is the most crucial question to be answered when it comes to costs in the environmental procedure. Is it reasonable that the public concerned, when challenging environmental decisions or activities, may have to remunerate the full cost for the lawyers and technicians that the authorities and the operators have hired? How big an economic risk must those who want to defend their interests face when going to court? How can the loser pays principle be restricted to be compatible with the Convention: through exemptions for certain litigants, fixed sums for the winning party, liability only when the appeal is done in mala fide, and so forth. These questions could usefully be answered, analyzed and debated.

#### *Cost recovery for authorities*

A closely related and equally interesting question concerns remuneration of costs of the authorities. It is interesting to note that the legal systems of the Parties have such differing views on this issue. We need to know more about this phenomenon, the basic ideas behind it and a discussion on its compatibility with the Convention. What are the actual

costs for the administration in these cases? Would there be a great difference for the public purse if the authorities as a general rule were not allowed to recover their costs? Are there any experiences recorded from introducing/removing this possibility? In my opinion, there are plenty of questions to be discussed/answered under this headline.

#### *Bonds for injunction*

This is another issue where we find greatly diverging views. As bonds in some systems are pointed out to be the most important barrier to access to justice, the issue needs to be studied further. This work could cover: the basic concept behind the phenomenon; are these principles relevant in environmental cases, what are the pros and cons with the system, are bonds compatible with the effectiveness requirement in the Convention, etc..?

#### *Financial arrangements, legal aid and legal assistance*

Under this headline, the issues that can be studied are almost infinite. Some of these are discussed above, but there are many others. It is easy to regard this as an issue that is most instrumental in the countries where the legal systems do not have old traditions and where democratic decision-making concerning environmental matters is fairly recent. This is, of course, true in a sense, but in my view one must not underestimate the value for the public concerned throughout the Convention's area to be able to enjoy legal aid in environmental cases. Experiences also show that financial arrangements, such as designated law firms and funds for NGOs are important features for access to justice in the Western Europe. Additionally, this headline could also cover Alternative Dispute Resolutions (ADR), a phenomenon that clearly has an interest in all legal systems. We have interesting examples in many countries, which could provide a useful basis from which to draw conclusions.

#### **Concluding remarks**

As is apparent, my knowledge is limited and this memo is not in any way exhaustive. I would therefore like to invite all National Focal Points and other stakeholders to the Convention to consider what additional cost issues might be of great interest for us and what further studies or activities merit our consideration. I also want to welcome you all to the Task Force meeting next week, and I am confident that the debate will be both lively and fruitful.

With kind regards: *Jan Darpö*



## **BIBLIOGRAPHY**

Access to Justice in Environmental matters in the EU: Editor Ebbesson, J. Kluwer Law International, The Hague, 2002.

Adebowale, M: *Using the Law: Access to Environmental Justice. Barriers and Opportunities*, Capacity Global Ltd., 2004.

Bonine, JE: *Best Practices – Access to Justice*, World Resources Institute, 2009.

Coalition for Access to Justice for the Environment: CAJE Briefing – Access to environmental justice: making it affordable, 2004.

Darpö, J: Justice through the Environmental Courts – Lessons learned from the Swedish Experience. From Environmental Law and Justice in Context. Ed. Ebbesson & Okawa. Cambridge University Press 2009, page 176.

de Sadeleer, N, Roller, G and Dross, M: *Access to Justice in Environmental Matters and the Role of NGOs – Empirical Findings and Legal Appraisal*, Europa Law Publishing, Groningen/Amsterdam, 2005.

de Sadeleer, N, Roller, G and Dross, M: *Access to Justice in Environmental Matters - Final Report*, 2002.

Hallo, R: *How far has the EU applied the Aarhus Convention?*, European Environmental Bureau (EEB), 2007.

Handbook on Access to Justice under the Aarhus Convention: Editor: Stec, S. The Regional Environmental Center for Central and Eastern Europe, Szentendre, 2000.

Kravchenko, S: *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 2007.

Jackson, R: *Review of Civil Litigation Costs: Final Report*, TSO, 2009 (“Jackson Report”).

Justice and Environment: *Selected problems of the practical application of the Aarhus Convention – based on experience and court practice of NGOs in 7 EU countries*, 2009.

Kiss, C: *Price of Justice. International Comparative Analysis on Costs of Administrative and Judicial Remedies*, Justice and Environment, 2009.

Kiss, C: *RIR in Practice. The Functioning of the Legal Instrument of Request for Internal Review under the Aarhus Convention*, Justice and Environment, 2009.

Pallemaerts, M: *Compliance by the European Community with its obligations on Access to Justice as a Party to the Aarhus Convention*, An IEEP Report for WWF-UK, 2009.

Stec, S and Casey-Lefkowitz, S (in collaboration with Jendroska, J, for the Regional Environmental Centre for Central and Eastern Europe): *The Aarhus Convention: An Implementation Guide*, United Nations Publication, New York and Geneva, 2000.

Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters: Milieu Ltd, 2007.

Tegner Anker, H & Fauchald, OK & Nilsson, A & Suvantola, L: The Role of Courts in Environmental Law – a Nordic Comparative Study. In *Nordic Environmental Law Journal* 2009 p. 9

Vera, E. P., N.-R. Masson & L. Krämer: *Summary Report on the Inventory of EU Member States' Measures on Access to Justice in Environmental Matters*, 2007.  
<http://ec.europa.eu/environment/aarhus/comments.htm>

WWF, Leigh, Day & Co and E.L.F: *Environmental Justice*, joint report 2004

Working Group on Access to Justice to Environmental Justice: *Ensuring access to environmental justice in England and Wales*, 2008 (“Sullivan Report”).