

# AWARDING ATTORNEYS' FEES BY KAZAKH COURTS: SOME AMBIGUITIES

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Almost all civil litigation incurs attorneys' fees. Accordingly, the winning party seeks compensation for its attorney's legal fees. Hence, the question of whether these expenses are subject to compensation under the law is of interest in any jurisdiction. In this article we briefly address some of the issues related to how attorneys' fees are compensated in Kazakhstan (RK).

In Kazakhstan, the general rule stemming from Article 111(1) of the RK Civil Procedure Code (CPC), is that the losing party is responsible for paying the attorneys' fees. There are nuances, however, which in certain cases make it almost impossible for the winning party to receive compensation for their incurred expenses. In addition, there is a ten percent threshold stipulated by the CPC with respect to monetary claims. This forbids the winning party from receiving compensation for attorneys' fees to an amount that exceeds ten percent of the awarded claim amount. This threshold, however, is not applicable to other, non-monetary, types of claims.

The regulations contain a number of ambiguities and contradictions leading to problems in recovering the incurred attorneys' fees. The following article is an examination of some of these issues.

## Delayed payment of fees may affect recovery

It is normal practice that a party pays for legal services rendered by its attorney after the court delivers its judgment. There are various reasons for this: it can simply be the client's inability to pay immediately, or the client and attorney may agree on a fee based on hourly billing. Alternatively, the attorney may agree to a fee payable only if there is a favorable result (the so-called "success fee"). All of these terms of payment for legal services are compliant with Kazakhstan law. However, practice shows that, depending on whether the party pays the attorneys' fees before or after the court's judgment is delivered, the party may or may not have these expenses awarded by the court.

The major hindrance in the recovery of attorneys' fees paid after the court judgment has been delivered is the official position of the Supreme Court on this issue in its *Regulatory Resolution No. 9* of 25 December 2006 (hereinafter, the *Regulatory Resolution No. 9*). In *Resolution No. 9*, the Supreme Court states that "claims for recovery of costs associated with payment for the assistance of a representative may be filed and shall be subject to consideration by the court **prior** to the delivery of the court's judgment" (paragraph 14).

Meanwhile, the CPC stipulates that the court should award to the winning party "the fees of the representative who participated in the court proceedings, in the amount of expenses **actually incurred** by the party" (Article 111(1)).

If read together, the requirements of the CPC and the *Regulatory Resolution No. 9* essentially preclude the winning party from recovering the attorneys' fees if they were paid after the court's judgment had been delivered. This is because, according to the

Supreme Court, the claims for the attorneys' fees recovery are to be filed by the party and considered by the court only prior to the delivery of the court judgment. Please note that, according to the RK Constitutional Council, the Supreme Court's Regulatory Resolutions are binding on all RK courts and are adopted in order to provide guidance to the Kazakh courts on how to apply Kazakh legislation.

The CPC states that a court may, in certain cases, issue a supplementary judgment in addition to the first one rendered on the matter. *Inter alia*, the court may, upon request of the parties or on its own initiative, render a supplementary judgment, if in the primary judgment the court costs (which include attorneys' fees) were not adjudged (Article 231(1)(3) of the CPC). Further analysis is needed as to whether the court may use this provision to award the attorneys' fees, as well as other court costs, upon a party's request.

However, in practice, Kazakhstan courts adhere to the opinion that only attorneys' fees incurred prior to the delivery of the court judgment are subject to recovery.



## The size of attorneys' fees to be awarded

The CPC does not regulate this issue. However, according to the *Regulatory Resolution No. 9*, "in case of claiming excessively high fees (confirmed by payment order or receipt) of the representative who participated in the court proceedings, the court should be guided by the criteria of good faith, fairness and reasonableness, as provided for by paragraph 4 of Article 8 of the Civil Code and part six of Article 6 of the CPC" (paragraph 14).

In practice, based on this guidance of the Supreme Court, the courts often significantly decrease the amount of attorneys' fees to be compensated without a comprehensive rationale (or any rationale at all) for reducing the fees. This approach, in our view, does not fully comply with the requirements of the Civil Code, on the basis of which the reduction is applied by the courts. For instance, the Civil Code states that "good faith, fairness and reasonableness of the participants in the civil law relations shall be presumed" (paragraph 4 of Article 8). This would indicate that the court, if it decreases the fees covered by the award, should provide a rationale for this decision. We therefore believe that this issue should be considered by the court and the rationale for the decrease should be explained and justified.