

# Chapter 7

## The Double Face of Cost and Fee Allocation in the Czech Republic

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### 7.1 Access to Justice as the General Goal of the Legislator

Access to justice – in compliance with international and European conventions on human rights – is one of the basic rights guaranteed by the Czech constitutional order. Thus one might suppose that this basic right will be applied consistently in the legal order and also in practice, particularly in court practice. Yet, one of the key preconditions of equal access to justice is the ability to pay for participating in court proceedings (court costs) and effective representation (attorneys' fees). It does the Czech lawmakers credit that they strive persistently to ensure an equal access to justice, and that they view the reimbursement and payment of procedural costs as based on that fundamental right. But in their efforts they have come across opposing interests that appear in legislation as well as in civil courts that often make achieving meaningful access difficult. This results in inconsistency and in contradictory solutions, raising doubts whether access to justice is really equal and without substantial barriers due to financial means.

### 7.2 The Pre-Velvet Revolution Foundations of the Current Regime

The existing legal regulation of cost and fee allocation in civil cases in the Czech Republic is still based on a conception coming from the time before the Velvet Revolution, i.e., before 1989. Consequently, the legal framework of Czech regulation is significantly socially determined, and it reflects a time when lawsuits were low both in number and value. Historically, this small number of low-value cases corresponded with a relatively low amount

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of up-front court costs. Advocates' services, too, were relatively affordable in relation to average wages in former Czechoslovakia. This was due in part to legally fixed advocates' tariffs and – in cities with courts – due to the local legal aid bureau's system of allocating cases. By contrast, the current situation of cost and fee allocation in the Czech Republic presents a different and more complicated picture: on the one hand we can see a socially determined striving for access to justice, and on the other hand, the practical application of principles and rules of cost and fee allocation reveal some aspects that conflict with this underlying policy.

### 7.3 General Rules on Cost and Fee Allocation

In Czech law, the court will order the unsuccessful party to reimburse the party that has fully succeeded for the costs needed to effectively enforce or defend his or her rights ("loser pays"). The court fee, as part of the parties' cash expenses, and the costs of legal representation (attorney fees and notary fees are determined by a special legal regulation) are integral parts of procedure costs, and must therefore be borne by the loser as well. As a result, the court returns to a successful plaintiff the costs he spent on an effective enforcement of his rights. In the case of a successful defendant, the court awards reimbursement of the costs she spent on her defense. As far as attorney fees are concerned, however, cost shifting is limited to the amount provided for by an official schedule which may be lower than the fee agreed upon between attorney and client.

This brings us to the question whether all of the winner's costs and fees are reimbursed or just a part of them (e.g. a reasonable amount). An unsuccessful party is obliged to pay the successful party reimbursement of the costs needed for a meaningful application or protection of law. The costs that can be awarded must thus meet the requirement of meaningfulness. If the party has only been partly successful the court proportionally divides reimbursement of the costs between the parties, or it may state that neither is entitled to reimbursement. However, even if the party has only succeeded partly, the court may award full reimbursement of his costs if he only failed in a minute part of the case or if the decision about the amount of payment depended on an expert opinion or was at the court's discretion.

Generally, the same rules apply to appeals, i.e., when making a cost determination on appeal, the court will use the same procedural regulations as the court of first instance. If the appellate court changes the decision of the court of first instance, it will include in the cost determination the costs of the appellate procedure as well. If the appellate court overturns the decision of the court of the first instance, returning the case to the lower court or referring the case to a court with proper subject-matter jurisdiction, then reimbursement of the costs of appeal will be newly decided by the court of first instance.

The cost of evidence, including the witness fee, is included in the procedure costs as well. The witness fee consists of reimbursement for the witness's cash expenses and loss of earnings. The interpreter's fee, the expert witness fee, and the witness fee are paid by the state immediately after they have been incurred. Depending on the result of the procedure, the state is entitled to reimbursement of the procedure costs it paid, provided the parties are not exempt from court costs. Costs of this type play a major part in the amount of procedure costs, especially as far as expert witness fees are concerned.

If the civil suit is settled, neither party is entitled to reimbursement of procedure costs unless the settlement agreement states otherwise. Therefore if the parties do not agree on reimbursement of procedure costs in their settlement, when approving the settlement, the court will decide that neither party is entitled to reimbursement of procedure costs. An appeal against that decision is admissible. We don't know the percentage of civil suits settled in this way because there are no official or unofficial data on that matter.

## 7.4 Legal Aid

There is a publicly funded legal aid system provided by Czech civil procedure.

In addition to attorneys, state-financed civic advisory bureaus give free legal aid to litigants. At present, the Czech Bar has also started a program of free legal aid provided by its members. As for procedure costs and exemptions, there are several relevant provisions in the most important civil procedure regulation, the Civil Procedure Code.

### (1) Exemption from Court Fees.

At a party's motion, the presiding judge of the bench deciding the case may grant the party either a complete or a partial exemption from court costs, provided that it is justified by the party's situation and that the suit is not wanton or obviously non-meritorious. (Section 138, Civil Procedure Code). The Act on Court Fees then distinguishes material, personal, and individual exemptions. Material exemptions apply to an enumerated list of cases – e.g. those concerning guardianship, judicial care of minors, mutual maintenance duty of parents and children, probate proceedings in the first instance, etc. As for the court fee, there is a rule that if the plaintiff is exempt from the fee and the court thus grants the motion, it is the defendant who pays the fee or a portion of it. Of course, the defendant is only required to pay the fee if he himself is not exempt from the court fee and does not have any right to reimbursement of procedure costs against the plaintiff.

## (2) Appointing a Legal Representative.

If a legal representative is appointed for a party that is exempt from court fees, the exemption includes cash expenses and the fee for representation to the extent of the exemption granted (Section 138, Para 3, Civil Procedure Code). Furthermore, the cash expenses and the fee for representation are paid by the state (and also reimbursement of the value added tax if needed). The state may also provide the attorney with an appropriate payment in advance if it is justified (Section 140, Para 2). If an attorney is appointed for a party, the person who is obliged to pay procedure costs will also have to reimburse the state for the attorney's cash expenses and representation fee.

Personal exemption is the exemption of certain entities – e.g. the Czech Republic and state funds, territorial self-governing units if the dispute concerns execution of the state administration, or the plaintiff in workers compensation proceedings. Courts grant exemption on a case-by-case basis upon the motion of a party, which may be submitted at the institution of the suit or anytime until judgment is final. If the plaintiff is exempt from the court fee, this fee or its proportional part is paid according to the result of the proceedings by the defendant unless he is entitled to reimbursement of procedure costs against the plaintiff or unless he is also exempt.

## (3) Privately Organized Help.

There are of course various private organizations providing legal help which litigants may consult. First, there are attorneys or notaries that provide their services principally for payment – either on the basis of a contract with the client or according to the official attorneys' tariff. However, at present there is free legal consulting provided by attorneys registered with the Czech Bar as well. It is also possible for individuals to take advantage of various legal advisory bureaus. Free legal advice is available at the so-called free civic advisory bureaus, which are non-governmental organizations providing independent, impartial and free social advice. Their target group is mainly people in a difficult financial situation but in practice anyone may address these bureaus because they do not check an applicant's financial situation. Civic advisory bureaus also provide legal aid in the form of legal advice or they may help applicants draw up petitions, etc.

## (4) General (Legal) Availability of Legal Aid to All Parties in Need.

Legal aid provided by free civic advisory bureaus seems to be generally available to everyone as explained above. As for reimbursement of civil procedure costs, as mentioned, the court may exempt a party from court fees

if it is justified by his situation (mainly social and financial factors) and it is not a wanton or evidently unsuccessful lawsuit. The court may take into account a party's financial situation at its discretion, which enables individual consideration of all circumstances of the case. However, when deciding to exempt a party from paying court fees, the court must not simply take into account the financial situation of the applicant; it must also consider the reason for which the exemption is sought, i.e. in particular, the amount of the court fee or the amount of the expected procedure costs.

Section 150 of the Civil Procedure Code constitutes a potential corrective of the general rule of reimbursement of civil procedure costs. Pursuant to that section, the court may make an exception and not award partial or complete reimbursement of costs in specific circumstances. The court's decision that a given case is exceptional and that specific circumstances apply must be based on an examination of all aspects of a case. This is not as arbitrary as it may sound because it requires a careful consideration of all decisive factors. When examining specific reasons, the court takes into account financial, social, personal and other circumstances of all parties to the proceedings. It is necessary to consider not only the circumstances of the person who should pay procedure costs but also how such a decision would affect the injured party's financial situation in particular. It is also important to take into account the reasons why a claim has been asserted and even the conduct of the parties during the proceedings.

#### (5) Litigation costs and fees as barriers to access to justice.

The willingness to bear procedural costs – or the risk of bearing them – is an expression of a genuine intention to litigate. Court fees as well as attorney's fees are calculated based on the amount for which the suit is filed. Access to justice is available even to the poorest strata of the population due to the introduction of the previously mentioned provisions: exemption from court fees, appointment of counsel, reimbursement of representation costs and cash expenses by the state, and special exceptions to costs shifting even with regard to the winner's attorney fees. Nevertheless, litigation costs can be a barrier to bringing certain kinds of actions, e.g., because the amount in controversy is too low to make litigation economically feasible. It all depends, of course, on whether the petitioner is willing to pay the necessary costs of procedure resulting from the amount for which he is litigating. For example, if a party is litigating for performance with a monetary value of 2,000 CZK, the court fee is 600 CZK and the attorney's fee – if the party wants to be represented – is 6,000 CZK (without VAT). In such a situation, litigation appears to be economically utterly useless, especially if there is a serious risk of losing the case.

## 7.5 Law on the Books v. Law in Action

One can say that the Czech legal system by and large respects and realizes the constitutional principle of access to justice:

- (a) There are two opportunities (pursuant to the Civil Procedure Code and the Bar Rules – see above) to obtain free legal aid in justified cases.
- (b) The Czech legal order allows an exemption from court taxes (fees) in justified cases.
- (c) The amount of the attorney’s fees is basically determined by the Bar Rules.
- (d) The final reimbursement of (all) costs is basically (with some exceptions) decided in favor of the winner.

This system is evidently oriented toward ensuring broad access to justice.

Yet, in real life, we witness a slightly different development that presents an obstacle to the realization of access to justice:

- (a) In reality, the principle under which the loser always pays all costs is compromised by an insufficient degree of effectiveness and predictability of the functioning of the judiciary. The Czech legislature is presently developing private substantive law through a complete re-codification of the existing civil, family and commercial codes. In addition, the legislature has had to modify civil procedure law in reaction to the new forms of substantive law. At the same time, due to the “Europeanization” of court practice (among other things), the real practice of Czech courts changes when the existing standards of decision-making are changed. Such a situation diminishes the predictability and stability of judicial decision-making. The resulting uncertainty makes the loser-pays rule harder to justify and, more generally, weakens actual access to justice by discouraging people from litigating their rights.
- (b) There is also an increasingly visible conflict between access to justice as a basic right as an object of the public interest (public policy) and its implementation through legal aid when it is carried out by private business. The influence of private business turns out to increase. This development has some serious practical consequences. While court practice relating to the allocation of costs and fees basically continues without change, the behavior of private businesses is increasingly more influenced by economic liberalism – private lawyers try all the time to increase their profits. Consequently, application of cost and fee allocations rules is undergoing several changes:
  - First, there has been a marked increase of the attorney fees charged in the contract between client and lawyer, especially in big cities.

Some attorneys charge clients thousands of Czech crowns, i.e., hundreds of US dollars, for a one-hour legal consultation. This amount cannot be compensated in the case of successful litigation because courts may award the winner reimbursement of the costs of the attorney's representation only up to the lump sum calculated on the basis of standard fees set forth in the attorney's tariff.

- Second, and as a result, there has been an increase in the disparity between contract attorneys' fees in big cities and in the country. In the country, a class of "meadow lawyers" (i.e., less affluent counsel) has reappeared, often because of the need for social aid. Legal aid provided by urban attorneys can be far more expensive than legal aid provided by their rural colleagues, i.e., "meadow lawyers". There is no corresponding difference in the quality of legal aid provided by these two groups.
  - Third, there is a problem with some attorneys receiving double fees: when the court adjudicates reimbursement of costs to the winner, many attorneys consider the reimbursement to be their own bonus even if they have been already paid by their clients. Agreements between the attorney and client often lack a clear agreement preventing this problem.
- (c) Recently, part of the adjudication process in civil cases has also been transferred to the area where both principles operate: private enterprise and public service. An example is transferring part of the judgment enforcement to the hands of private such as debt collection agencies which have their own economic interests or, pursuant to a special act (No 216/1994 Coll.), to arbitration procedures, which have been increasingly dominated by the private and special interests of the big players in the market.

These are only some examples illustrating the conflict between the public (legal) basis of the principle of access to justice and the private way of ensuring it. The Czech approach to civil litigation costs, and of access to justice, is thus Janus-faced.

## 7.6 Conclusions

Unfortunately, many of the facts mentioned in this paper cannot be sufficiently supported by a set of official statistical data. In Czech civil procedure, the possibility of collecting statistical data about payment and reimbursement of procedure costs is restricted because procedure costs and their reimbursement are decided independently by courts of the first and second instances and because an appeal of a reimbursement decision is

not admissible. Thus the Supreme Court (where most statistical evaluations are made) does not have such data at its disposal. For this reason no complete statistics are available. In our view, the justice department's approach evidences a lack of interest in relevant knowledge of financial limits of access to justice or in a more consistent regulation of its functioning.