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## **COST AND FEE ALLOCATION IN CIVIL PROCEDURE**

### **Report for Serbia**

#### **Introduction**

Respecting the given topic, it is necessary in this introduction to point out several basic issues regarding costs allocation in civil procedure.

Civil procedure is regulated in Serbia by Code of Civil Litigation of 2004.<sup>1</sup> In this comprehensive code, main and general rules on litigation costs allocation are contained. Provisions of some other statutes provide certain, in majority of cases, technical rules, though practical very important.

It should be stressed out here that the notion of litigation costs has somewhat polyvalent meaning. Both in legislation and doctrine it has broader and narrower meaning. One can describe litigation costs in broader sense as all expenses concerned with concrete litigation, regardless if they will be reimbursed to one of the parties. In that sense CCL define litigation costs as “expenses made during or regarding the litigation” (art. 146/1). Expenses made during litigation are considered those which are made from initiation of the lawsuit to the end of it, i.e. court fees, evidence taking costs, lawyers’ fees, etc. Latter expenses, those made regarding litigation, are those which were made before initiating the proceeding, though in connection of it; for example, translation of relevant documents, evidence security proceeding, etc. For this notion of litigation costs, in this paper will be used generic term expenses. Narrower meaning of this notion relates to those expenses that will be ultimately reimbursed to one of the litigants, hence for that meaning term litigation costs will be used.

Finally, CCL regulates initial payment of expenses – each party initially pays all expenses that were caused by her actions (art. 147). In some cases this up-front payment can be regarded as obligation, or in other can be seen rather as burden. Still, initial payment of expenses does not affect the final determination of them – court shall apply rules on allocation of litigation costs to ultimately determine the fate of expenses made.

#### **I. The Basic Rules: Who Pays?**

##### **1. Success Principle and Its’ Justification**

It is considered that the basic principle for litigation costs allocation in Serbian Civil Procedure is the “loser pays” principle, or as it is named in Serbian doctrine – *causae*, risk or success principle. Sole parameter for litigation costs allocation here is success in the lawsuit. This parameter is isolated from any subjective factors on the parties’ side; it is objectified in notion of success of the lawsuit. Therefore, losing party

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<sup>1</sup> Hereinafter: CCL. Articles cited in this paper without of any subsequent mark are to be assigned to CCL.

will be responsible for the litigation costs even though she thought and believed that her claim or defense was according to law.<sup>2</sup>

As success is sole parameter, in case that one party achieve complete judicial vindication of her claims or defenses, opposite party is liable for all litigation costs (art. 149.1). Consequently, if that's not the occasion, court will decide regarding every concrete case whether each party will bear her own expenses, or to losing party will be shifted proportioned amount of winner's expenses regarding his success (art. 149.2). Courts usually determine litigation costs in firstly mentioned manner when plaintiff has succeeded in ½ of his claim. Practically parties' expenses are then compensated.<sup>3</sup> When one party achieve more than ½ of her claims or defenses, court will allocate litigation costs in proportion to party's success, bearing in mind that winner should not in outcome be obligated to reimburse any costs to the loser.<sup>4</sup>

Principle justification of loser pays system lies in the very core of protecting civil subjective rights and civil justice itself. Modern state with prohibition of self-help must not only guarantee the enforcement of claim for justice performance, but must also guarantee that vindicating of rights will be ultimately free of charge. By guaranteeing that quality of protection civil subjective rights, modern state provides in fact complete and full vindication of rights. On the contrast, should winner bear even a part of his own litigation costs, then one could not talk about full vindication of his right any more – he would be deprived of his right to the extent of those costs which are not to him reimbursed. Naturally state can not guarantee the very reimbursement of winner's litigation costs – it is at the end determined by factual conditions on loser's (debtor's in this context) conditions. In the sense of state's duty to guarantee full protection of civil subjective rights, it is enough that state provide success principle for allocation of litigation costs, and of course effective Executions Procedure.

## 2. The Notion of Litigation Costs

In order to consequently achieve ultimate goal – free of charge legal protection – success principle is complemented with rules on determination of amount of litigation costs. In that sense it is stated in CCL that court shall, respecting all circumstances of each case, take into account only those expenses which where needed for conduct of the proceeding (art. 150/1). Only those expenses that where necessary for achieving the vindication of rights are to be reimbursed to the winning party. This amount represents notion of litigation costs – expenses that are to be taxed to the opposing party.

Legal standard “needed expenses for conduct of the proceeding” is interpreted in doctrine and judicature as all expenses that were necessary for effective vindication of rights through litigation.<sup>5</sup> This interpretation that emphasizes quality of needed vindication of right – effectiveness – has one very important practical value. As lawyer representation in Serbian Civil Procedure is not mandatory, without of this interpretation

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<sup>2</sup> Borivoje POZNIĆ, Vesna RAKIĆ-VODINELIĆ, Gradjansko procesno pravo [Civil Procedure Law], 15. ed., Beograd, 1999, n. 677. Hereinafter: POZNIĆ/RAKIĆ-VODINELIĆ.

<sup>3</sup> For example, when plaintiff seeks 1,200,000 Dinars and court awards him 600,000 Dinars.

<sup>4</sup> If plaintiff would succeed in upper example with 800,000 Dinars, then court would award him 1/3 of his expenses ( $2/3 - 1/3 = 1/3$ ). See POZNIĆ/RAKIĆ-VODINELIĆ n. 677.

<sup>5</sup> Srećko ZUGLIA, Siniša TRIVA, Komentar Zakona o parničnom postupku [Commentary on Code of Civil Litigation], I. svezak [I. Book], Zagreb, 1957, p. 337.

question of qualification of expenses paid for lawyer representation as needed for conduct of the proceeding could be raised.

It is up to court to decide for each expense whether it was needed for effective vindication of rights through litigation, i.e. whether it is regarded as part of litigation costs. Typically, courts recognize as necessary expenses: court fees and evidence expenses without exception; that goes also, if occurs, for expenses of pre-litigation court evidence security procedure and provisional measures procedure in connection with lawsuit. Lawyer representation is recognized as necessary, so in general expenses for lawyer representation are to be reimbursed to the winning party. However, court will decide whether each lawyer's procedural act was necessary for the effective vindication of rights, and to that extent whether expenses made for those acts will be reimbursed.

### 3. Allocation of Legal Remedies Costs

CCL sets forth special article which deals with additional expenses made in legal remedies proceedings (art. 161). However, these rules regulate how will second or third instance court technically in various procedural situations decide on additional expenses. In other words, success principle still governs allocation of these expenses.

### 4. Payment for the Taking of Evidence

General rule of initial payment of expenses applies for those made for the taking of evidence. Party which proposes any evidence initially bears the costs for taking it (art. 148). Moreover, initial payment of these expenses is primary condition for the very taking the evidence – if party fails to put into court's deposit amount for the concrete evidence taking, court shall withdraw its' order for the taking of evidence (148/4).<sup>6</sup> It should be stressed out that court can in certain situations *ex offio* take the evidence<sup>7</sup>, when expenses will be from court budget up-front paid (art. 148/5).

It can not be said with accuracy, to what extent costs for the taking of evidence participate in the overall costs of litigation. Expenses made for that purpose can vary, especially between types of the proofs. It is practical question, which defers in every concrete lawsuit.<sup>8</sup>

### 5. Court Settlement and Costs' Allocation

According to CCL parties are entitled during whole litigation to settle their dispute freely through court settlement.<sup>9</sup> Consequently *argumentum a maiori ad minus*

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<sup>6</sup> Thus this withdrawal of court order is regarded as indirect sanction for non payment of evidence taking expenses, as court can not coercively force party to pay it. Borivoj STAROVIĆ, Ranko KEČA, *Gradjansko procesno pravo [Civil Procedure Law]*, 3. ed., Novi Sad, 2004, p. 265.

<sup>7</sup> When court doubts that parties want to dispose with subject matter of lawsuit against obligatory statutory rules, public policy and moral rules (art. 7/3)

<sup>8</sup> Witness expenses are in general humble when comparing them with expert expenses. On the other hand, expert expenses can drastically vary from one to another type of expertise.

<sup>9</sup> Court settlement is settlement of the litigation parties before the court, on whole or just a part of the claim, by which the proceeding ends (arts. 332/1,2 323/3). Court settlement has same effects as *res iudicata*

parties are entitled to freely regulate litigation costs allocation in their court settlement (*arg. ex* 154/1). Should parties not agree upon this question in their settlement, every party bears its' own expenses (154/1).

CCL *explicite* states that expenses made in pre-litigation unsuccessful settlement or mediation proceedings are to be regarded as litigation costs in later lawsuit (154/2).

There are no available statistics on percentage of settled civil suits. It should be mentioned however that parties are generally encouraged to settle by judges. Also, rules on court fees are designed to promote solving the dispute through court settlement.<sup>10</sup>

## II. Exceptions and Modifications

### 1. Exceptions to the Basic Rule

Even though success principle of allocation of litigation costs is closest to postulate of full vindication of right, in many cases strict use of it would cause different, sometimes unjustifiable effects. Therefore CCL provides some exceptions and modifications of basic principle. On the other hand, nature of some lawsuits (in context of disputed material rights) demands special provisions on allocation of litigation costs.

#### a) *Culpa*e Principle

General modification of success principle in CCL is based on *culpa*e, guiltiness principle. As opposite to success principle, this principle is based on subjective factors on parties' sides – guiltiness or accident. Explicit exception of ground rule “loser pays”, governed by named principle, is regulated in art. 151, which stipulates that regardless of success in litigation, each party shall be liable for opponent's expenses caused by her guilt or accident. Normally, courts use this rule when taxing expenses for only one or more procedural actions – never for litigation costs. For example, plaintiff had a road accident on the way to the court, and main hearing had to be postponed; plaintiff is therefore liable for defendant's expenses made for postponed hearing, i.e. lawyers' fee, even if he later succeeds in litigation; it would be unjustifiable to tax those expenses to defendant.<sup>11</sup> Even party's legal representative or lawyer, can be announced liable for those opponent's expenses that were caused by their guilt (art. 151/2).

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judgment, regarding execution and *ne bis in idem* rule (*arg. ex* art. 324 and art. 30/1.1 of Execution Procedure Code of 2004).

<sup>10</sup> Court fee for court settlement is ½ of amount of fee for the contested judgment (Schedule n. 3/1 of Court Fees Act of 1994 with later amendments, hereinafter: CFA).

<sup>11</sup> In relation with postponing the court hearings, this provision is considered as powerful tool for preventing abuses of procedural rights. Namely, in Serbian Civil Procedure party can factual allegations and proof propositions bring forward through out the whole first instance proceedings. On the other hand, basic principle of due process of law requires that each party have enough time to respond to opponent's allegations. So in case when party on court hearing bring forward new factual allegations, that court hearing must be postponed and new one scheduled. If party could have this new factual allegation bring forward earlier, than she is liable for postponing, and to her will opponent's expenses regarding that be taxed.

## b) Casuistically Regulated Exceptions

Several provisions in CCL are devoted to the casuistic exceptions of the basic principle for the allocation of litigation costs.

When defendant had not given the reason for the lawsuit and when he had acknowledged the claim in his answer to the claim, plaintiff will be liable for defendant's expenses, dispute received grant for all of his relief (art. 152). It is up to court to decide in every single case, in respect of all circumstances, if defendant had or had not given the reason for the lawsuit. Doctrine suggests that court in this case should take into account provisions of material law and usual local community law's comprehension.<sup>12</sup>

When plaintiff withdraws his claim, defendant will be liable for the litigation costs, if claim withdraw was performed immediately after defendant's fulfillment of his obligation (art. 153/2).

In execution proceedings it is possible that court seizes property which is not actually debtor's. The real owner is permitted to suit creditor, requesting annulment of execution on that property. If he succeeds with his claim, litigation costs will allocated evenly (each party shall bear own costs) if creditor in execution proceedings had justifiable reasons to deem that there were no third party's right on specific property (art. 155)

In the case of joinder of parties, general rule is that all joined parties split expenses in even parts (art. 156/1). However, if there is significant disproportion of shares in subject matter of litigation, court shall according to that ratio distribute litigation costs to the each of joined party (art. 156/2). Solidarity of liability in subject matter of litigation leads to the solidarity of liability for litigation costs. For the expenses made by individual action of one of joined party, others shall not be liable (art. 156/4).

## c) Proceedings in Family Matters

Modification of success principle is prescribed for all family law litigations. According to Family Act<sup>13</sup>, in these lawsuits court shall decide on allocation of litigation costs by his discretion, taking into account reasons of equity (art. 207 FA). By the virtue of FA, family law litigation matters are: marriage matters, determination of parenthood, custody or care of the child matters, withdrawal of parental authority, annulment of adoption, alimentation matters and violence in family.

## 2. Mandatory Pre-litigation Procedures and Litigation Costs Allocation

Mandatory pre-litigation procedures are prescribed for very few specific disputes. However, even in those cases pre-litigation procedures have no impact on rules set in CCL regarding litigation costs allocation. All expenses made in these procedures are recognized as litigation costs in later lawsuit, naturally as they were necessary for vindication of rights.<sup>14</sup>

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<sup>12</sup> POZNIĆ/RAKIĆ-VODINELIĆ, n. 678.

<sup>13</sup> Family Act of 2005, hereinafter: FA.

<sup>14</sup> One example of mandatory pre-litigation procedure is citizen's claim against the state for repayment of damages caused by unjustified custody or prison. Person seeking relief for his injuries must before

### 3. Allocation of Costs in Pre-Litigation Agreement Party

It is unknown in Serbian litigation practice, as well as in contract law practice, that parties prior to their dispute, or afterwards but before they initiate proceeding, agree on allocation of eventual litigation costs. Hypothetically, that contract, or contract clause, would be most likely null and void.<sup>15</sup>

### 4. Self-representation of Parties

Serbian procedural law is among those that in general allow self-representation of the parties. Legislative changes in 2004 brought some changes in that area, though in overall procedure self-representation still prevails. Parties are able to litigate *pro se* in all first and second instance proceedings, regardless of court's jurisdiction. However, for extraordinary legal remedies (revision and legality protection request) parties must be represented by lawyer (art. 84/1,2).

There are no available statistics on self-representation of parties. The figures vary also from regions and size of the community. On the other hand, practice shows that majority of parties are represented by lawyers.

## III. Encouragement or Discouragement of Litigation

### 1. Effect of Rule on Litigation Costs Allocation

A rule on litigation costs in general, i.e. success principle, is designed to prevent unnecessary litigations, hence to promote spontaneous performing of civil obligations. Knowledge of bearing costs of unsuccessful litigation should prevent parties from reckless and capricious litigating. By same token litigation costs regulative should play significant role in promoting spontaneous performing of civil obligations, and as outcome of that smaller amount of lawsuits.

### 2. Effect of Rule on Up-Front Payment of Expenses

On the other hand, it can be clearly stated that obligation of up-front payment can have deterrent effect on potential litigants. Still, deterrent effect could be regarded in two ways: first, up-front payment has positive effect – it should *ab initio* deter abusive and reckless parties from litigating; second, up-front payment for some litigants can be seen as obstacle for access to justice (see *infra* VI.)

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litigation demand the recompensation from Ministry of Justice, in special administration proceeding. See art. 556 ff. of Code of Criminal Procedure of 2001 with later amendments.

<sup>15</sup> Rules on litigation costs allocation are regarded as procedural law rules by their nature, and thus public law rules. They are not disposable rules, permitting changing them by parties' agreement. Any contract that would imply agreement on procedural rules (so called procedural contract) must be explicitly permitted. It is, as allocation of litigation costs concerned, stated for court settlement, where parties are permitted to agree on litigation costs as well; *a contrario* it is not permitted in other situations.

It can not be said, even with the smallest accuracy, how much parties have to pay up front for the various expenses in litigation. Different criteria for determination of some costs (e.g. amount placed in controversy; see *infra* IV. 1., 2.), as well as concrete circumstances of each case, can not permit even roughly edged figures. Nevertheless, examples given in section VII. could help to display minimum amount of expenses to be up front paid.

#### **IV. The Determination of Costs and Fees**

##### **1. Determination of Court Costs**

Method of calculating court costs as well as method of taxing and collecting them is regulated by Court Fees Act. In general the amount of court costs is determined by amount placed in controversy, stage of the proceedings and type of the court. For various procedural acts is prescribed fee to be paid.<sup>16</sup> Exact amount is calculated in relation to amount placed in controversy, as fixed sum or as fixed sum combined with percentage from amount set in the claim. However amount of court fees also differs from type of the court – in general, higher amounts are prescribed for commercial courts, in contrast those prescribed for general jurisdiction courts.<sup>17</sup>

##### **2. Determination of Lawyers' Fees**

Lawyer fees are in Serbia traditionally determined by statutory provisions. Lawyers' Act sets forth right and obligation of Serbian Bar Association to enact fixed fee schedule. In this statutory fee schedule (Attorneys' Fee Schedule of 1998 with later amendments, hereinafter: AFS), lawyers' fees are determined for every procedural act that lawyer concludes. Exact amount of fee is basically calculated in the same manner as for the court costs, i.e. according to the amount placed in controversy. AFS sets forth exact number of fee units for every lawyer's procedural act, as well as value of one fee unit. As concrete amount placed in controversy is higher, more fee units are attached to concrete procedural act.

AFS on the other hand permits lawyers to fix with client higher or lower fee than prescribed by schedule.<sup>18</sup> Dispute that, court will include into litigation costs only amount of schedule fees, so party could be reimbursed only with those expenses that she would pay to the lawyer according to fixed fee schedule (art. 150/2). Because of that, parties are reluctant to agree on higher fees.

##### **3. Final Determination of Concrete Amount of the Litigation Costs**

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<sup>16</sup> E.g. fee for filing the claim, fee for filing response to the claim, fee for court settlement, fee for rendering of judgment, fee for filing appeal, etc.

<sup>17</sup> See Schedule n. 1/1,2 CFA for litigation and execution proceedings.

<sup>18</sup> Up to three times higher fee in complicated cases is permitted, as well as fee that is up to 50% lower than one prescribed by schedule (art. 4/1 AFS).

As it's stated above (see supra I. 2.), court decides which expenses are to be counted as litigation costs. It is up to court to determine the concrete amount of costs to be awarded to the parties as well. However court here is in majority of the cases governed by statute or other regulations regarding amounts of costs. It is already stated for court fees and lawyers' fees (see supra IV. 1., 2.). Experts' compensations are calculated by schedule for each type of expertise.

Court's decision on apportion and amount of litigation costs should normally be integral part of final judgment. Two things are important regarding stated. First, court shall decide on that issue only on the motion of the party – court is not allowed to do it *ex offio* (art. 159/1). Second, even though decision on litigation costs is part of judgment, it is regarded as separated court order (art. 123/5), what has practical consequences: if party is unsatisfied only with part of judgment that deals with litigation costs, she can lodge only the appeal against court order, not the appeal against the judgment (art. 162/1.). Naturally, if litigation is terminated in other way, i.e. without of judgment, decision on litigation costs will be issued in separate court order. That is case also when court exercise power to determine allocation of some expenses according to *culpa*e principle during the proceeding (see supra II. 1.).

## **V. Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims, and Litigation Insurance**

### 1. Success-Oriented Fees

Traditionally, in Serbian law lawyers' fees are calculated by fixed fee schedule. Contingency fee arrangement (*pactum de quota litis*) is prohibited by explicit rule set forth in Code of Obligation Relations (hereinafter: COR), in article 461/2. Some provisions in present AFS however are constructed in the manner that resembles the allowance of contingency fee arrangement.<sup>19</sup> Dispute that, it is clear that legal power of cited rule is weaker than one of COR, and thus they are to be interpreted in accordance with stronger powered rules. By the same token, every fee agreement which at the end will have same effect as contingency fee arrangement is prohibited.<sup>20</sup>

So called no win-no fee arrangement can be valid, as far as lawyer fees will be in case of victory calculated by fee schedule. Conclusion of this agreement might be, on the other hand, in some cases in collision with lawyers' ethic, as it could be seen as unfair competition.

### 2. Sell of Claims for Purpose of Litigation

Sell of claims for purpose of litigation, regardless of if buyer is lawyer or not, is prohibited (461/2 COR).

### 3. Protection of Diffuse Right and Litigation Costs

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<sup>19</sup> Art. 3/2 AFS provides that lawyer and client can in litigation matters agree on extra fee, which is to be determined by amount placed in controversy, up to 30% of it.

<sup>20</sup> That means that it is also prohibited success premium fee arrangement.

Types of lawsuits which involve diffuse rights, e.g. class action, group litigation or citizen action are rather rare in Serbian law. By the virtue of procedural system, it is necessary that this kind of lawsuit be explicitly permitted. Among named instruments for protection of diffuse rights, in Serbian law group litigation and citizen actions (action popularis) exist.<sup>21</sup> Still, all general rules on litigation costs allocation here are applicable as well.

#### 4. Litigation Insurance

Litigation insurance is not regulated by statute in Serbian law. Bearing in mind general freedom of contract (art. 10 COR), agreement on litigation insurance seems that it would be valid under Serbian law. However, there is no known case of one in the practice.

## VI. Legal Aid

### 1. Litigation Costs and Access to Justice

Obligation to initial payment of litigation costs can be seen as a barrier from access to justice. Parties who are in difficult economical position can be *de facto* deprived of their rights for the performance of justice and for equal legal protection. Code of Civil Litigation therefore provides instrument for fulfillment of cited constitutional human rights<sup>22</sup>, as it is prescribing types and conditions of legal aid to indigent parties. Proper functioning of this instrument could annul negative effects of initial costs payment obligation. Having that in mind, practice should pay more attention to this issue, especially to the nature, purpose and significance of legal aid.

### 2. Legal Aid System in Civil Procedure

Notion of legal aid in Serbian law is primarily linked to institute of liberating party from up-front payment of expenses (in older legislation and doctrine called poor man's right). In that sense, CCL regulates that court will liberate party from up-front payment of litigation expenses if she is not able to bear them according to her economical position (art. 164/1).<sup>23</sup> Sole condition is that party is indigent. This general rule is, concerning expenses, in later provision concretized: party will be liberated from upfront payment of court fees, evidence expenses and expenses for court annunciations (full

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<sup>21</sup> According to art. 102 of Advertising Act from 2005, various associations (e.g. consumer association) can sue for the infringement or endangerment of one's right or interest made by advertisement; Citizens' action is permitted, for example in environment lawsuits.

<sup>22</sup> Serbian Constitution in article 32/1 stipulates, among others, right for the performance of justice. Article 36/1 *inter alia* guarantees equal legal protection in court proceedings.

<sup>23</sup> It is suggested in doctrine that this, somewhat insufficient rule, should be interpreted in way that litigant meets cited criteria when he is not able to bear initial payment of litigation expenses if that would endanger his and his family's necessary support. See Aleksandar JAKŠIĆ, *Gradjansko procesno pravo* [Civil Procedure Law], 2. ed, Beograd, 2008, p. 489.

liberation). On the other hand, court can liberate party only from court fees payment (partly liberation).<sup>24</sup> In both situations, if indigent party loses, state bears these expenses.<sup>25</sup> Should indigent party wins, state would be entitled to reimburse expenses from losing party (169/2,3).

Conditions for legal aid set in CCL are designed to provide legal aid to all indigent parties. Moreover, the notion of indigent party is relativized, in that sense that condition for receiving legal aid is subjective by its' nature. It is stated that court will, when deciding upon application for legal aid, take into account parties' economical situation, number of persons that she's obligated to support, as well as amount in controversy.<sup>26</sup> It is considered that this is far better way to regulate legal aid, and by that, far closer to achieving goal of legal aid – access to justice.

If indigent party receives full liberation, court can appoint to her counsel, an attorney from list which Bar Association supplies for that purpose. Attorney representation in that situation must appear as necessary for protection of rights (art. 166/1). Attorney expenses are paid upfront by the court, while payment of attorney fees is until the end of the litigation unpredictable – if indigent party wins, attorney fees will be taxed to losing party (*arg. ex art.* 169/1,2); if she loses, attorney won't be able to collect his fees at all.

### 3. Legal Aid Provided Beside CCL Regulations

Beside legal aid regulated in CCL, which can be described as court managed legal aid, in Serbia exists out of court legal aid as well. Namely, in Autonomous Province of Vojvodina (hereinafter: AP Vojvodina), there is semi-official project for free lawyer representation for indigent parties. The project is result of agreement between Executive Council of the AP Vojvodina, Bar Association of Vojvodina and Ombudsman of Catalonia as managing partner and partly sponsor. This type of the legal aid is available only to the parties which are domiciled in AP Vojvodina and which are socially endangered.<sup>27</sup> Special Commissions in each municipality, formed from two lawyers and one representative of AP Vojvodina's Executive Council, decide on citizens' requests for granting free lawyer representation.

## VII. Examples

### 1. Scope of Example Estimation

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<sup>24</sup> Court will liberate party from court fee payment if that party's supporting means would, by fee payment, be reduced so her and her families' social security would be endangered (art. 164/1 and art. 10/1 CFA).

<sup>25</sup> Gordana STANKOVIĆ, *Gradjansko procesno pravo [Civil Procedure Law]*, Niš, 2004, p. 315; Ranko KEČA, *Gradjansko procesno pravo [Civil Procedure Law]*, Prirucnik za polaganje pravosudnog ispita [Handbook for State Exam], Beograd, 2008, p. 225.

<sup>26</sup> That means that even the party that is not considered in real life as indigent can receive legal aid – relation between amount of controversy and party's economical situation can make party indigent for concrete litigation. See STANKOVIĆ, p. 312 ff.

<sup>27</sup> Art. 5 Rules on Functioning of Service of Free Legal Representation by the Lawyers from Bar Association of Vojvodina.

Various reasons implicate unavailability of estimation of the sum total of litigation fees in the first instance common lawsuit. Even rough figures are difficult to present. Some of the reasons are previously mentioned (e.g. disproportion of expenses for various types of proofs). Others naturally concern concrete circumstances of every lawsuit. At the end, every single case is unique in its own way, hence that uniqueness reflects on litigation costs.

It is possible, however, to estimate **the very** minimum of litigation costs for the common first instance lawsuit, respecting the construction of Serbian Civil Procedure. This minimum estimation contains all costs that are necessary for rendering first instance contested judgment. It presumes procedural situation **where judgment is rendered after only one main hearing, which is well prepared with only two preparatory written actions (claim and response to the claim); this situation is meant to be ideal litigation, hence rather humble figures for sum total are shown.** Notwithstanding that, vast majority of proceeding shall be shaped in different model, namely one which means more demands, requests and proposals of parties in separate actions, **thus more than one main hearing**, which will ultimately reflect on **higher** amount of litigation costs. Still, this kind of estimation is only one possible to make.

Estimation respects practice, so it assumes that parties are represented by lawyer, thus lawyers' fees are included. On the other hand, it does not include any evidence taking costs, as it is always variable figure.<sup>28</sup>

Estimation of the minimum of litigation costs contains:

- 1) Court fees for: filling the claim, filling the response to the claim, and rendering the judgment, and
- 2) Lawyers' fees for: writing the claim, writing the response to the claim, and representation on the court hearing (for both parties).

As it can be seen bellow, minimum of the costs vary between general jurisdiction court proceedings and commercial court proceedings. Difference is due to the different fee schedule set for these proceedings.<sup>29</sup>

## 2. Estimation of Minimum Litigation Costs

	General Jurisdiction Courts		Commercial Courts	
	Sum Total	% of Claim Amount	Sum Total	% of Claim Amount
Claim for \$ 1,000	\$ 391	39.10 %	\$ 507	50,70 %
Claim for \$ 10,000	\$ 1,531	15.31 %	\$ 1,421	14.20 %
Claim for \$ 100,000	\$ 3,841	3.84 %	\$ 5,246	5.25 %
Claim for \$ 1,000,000	\$ 4,198	0.41 %	\$ 11,936	1.19 %

## 3. Example of \$ 100,000 Claim: Plaintiff's and Defendant's View

Estimation of costs which plaintiff/defendant is obliged to reimburse to the opposite party in case of losing is governed by the same principle used for previous, i.e.

<sup>28</sup> Absence of these expenses in estimation of minimum litigation costs does not making it unreal. It is possible, and rather common, that taking of evidence does not cause any expenses at all.

<sup>29</sup> Note that all figures are shown in equivalent of US Dollars.

minimum costs, with the same pattern (*supra ad VII.1.*). It is calculated in accordance to basic, success principle. **Difference between plaintiff and defendant side is due to the court costs; according to the rules on up-front payment, plaintiff has to initially pay court fees for filling the claim, as well as for rendering the judgment, thus these expenses are to be reimbursed by defendant if he loses.**

Outcome	Plaintiff Loses		Defendant Loses	
Type of Court	General Jurisdiction Courts	Commercial Courts	General Jurisdiction Courts	Commercial Courts
Sum to reimburse	\$ 1,158	\$1,439	\$ 2,682	\$ 3,806

### In Conclusion

In general, rules on allocation of litigation costs are firm and unlikely change in nearby future. Success principle which governs this issue, along with complementation of rules on amount of litigation costs, i.e. notion of litigation costs, still satisfactory serves to the idea of full vindication of substantial rights. Exception provided by statutes seems to be adequate answer to sometimes unjustifiable outcomes of success principle use.

Changes that can be foreseen relate to legal aid issues and, perhaps, litigation insurance matters. System of legal aid is still undeveloped, or at least not at the level which would be able to serve to the majority of those who need it. It is clear that upgrading of the legal aid system requires more than mere procedural rules change – it demands wide consent of the both public authorities and private institutions, namely Bar Associations, on exact model of legal aid. Nonetheless, any changes of procedural rules parties' representation, if enacted, would imply obligation for reformation of present legal aid provisions.