

International Academy of Comparative Law
18th World Congress
Washington D.C.
July 21-31, 2010

Topic II.C.1

COST AND FEE ALLOCATION IN CIVIL PROCEDURE

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Introduction

The following answers are intended to cover civil procedure only, i.e., cases brought under private and commercial law. It does not intend to address criminal, constitutional, administrative proceedings and arbitration. It consists of answers to 25 questions organized under seven main headings.

Rules on cost and fee allocation in civil procedure are found in the Civil Procedure Act (CPA).¹ Case law is not formally recognized as a source of law. In practice, an established case law is an important authority and lower courts tend to follow positions of the appellate courts and of the Supreme Court. Courts are not authorized to determine procedural rules by themselves. In the field of civil procedure, however, it is common that the opinion of the judiciary is sought with regard to draft-laws.

I. The Basic Rules: Who Pays?

1. The basic rule of cost and fee allocation

The basic rule of cost and fee allocation is that the losing party must reimburse costs to the winning party. If the party only partially succeeds in the litigation, such a party is entitled to a proportionate amount of costs. In such a case, the court may also order that each party bears his or her own costs (Article 154, CPA).

The principle justification for the rule that the losing party must reimburse costs to the winning party is that the winner deserves to have the costs of successfully claiming or defending. Besides, it deters unmeritorious claims.

Considering the success, only the final success is taken into account, not the success of individual procedural acts. For example, although the party filed a well-founded appeal and the appellate court, after having annulled the judgment, remanded the case for a retrial to the court of first instance, such a party will have to bear the costs of the winning party if the court in the retrial dismissed his or her claim.

¹ Official Gazette RS, No. 26/99 – 45/08.

Concerning the calculation of the proportion of success, usually the proportion between the amount sought and the amount granted is taken into account. For example, if the plaintiff demanded \$ 10,000 damages and the court ordered the defendant to pay \$ 5,000, the plaintiff, according to his success in the litigation, will be entitled to the reimbursement of half of his expenses; and in turn the defendant will be entitled to a reimbursement from the plaintiff of half of his expenses.

The costs of proceedings include the expenses incurred during or due to the litigation (Article 151, CPA). The major costs incurred in litigation are attorneys' fees, court fees and costs for the taking of evidence, including the costs of experts and witnesses. With regard to reimbursement of costs all of them are treated in the same way.

2. Only the expenses, which were necessary for the litigation, are refunded

The winning party is not automatically entitled to reimbursement of all costs. On deciding which costs are to be refunded, the court takes into account only the expenses, which were necessary for the litigation (Article 155, CPA). The court may, for example, find that the attorney's fee for the filing of a certain written preparatory submission cannot be considered a necessary expense because it contained nothing new or relevant to the case. However, it must be emphasized that in practice the court should use this power more often to contribute to the acceleration of the litigation.

3. Special rules for appeals

Appellate and revision (extra-ordinary legal remedy) proceedings necessarily result in additional costs. If the appellate court annuls the judgment of the first instance and remands it for retrial, this results in almost doubling the costs. With regard to appeals the same basic rule of cost and fee allocation as for first instance courts applies: the losing party must reimburse the costs of the winning party. As only the final success is taken into account (not the success of individual procedural acts), the party who successfully appealed against a judgment, is not automatically entitled to reimbursement of his or her costs. If the appellate court could make no final determination of the issue, but just annulled the judgment and remanded the case to the court of first instance, it is the final judgment of the court of first instance, which contains the decision on claims relating to costs, including the costs for appeals. If the challenged judgment is altered in favor of the appellant the appellate court decides on claims relating to costs in litigation, including costs incurred in the first instance court.

4. Costs for the taking of evidence

The court may not take evidence on its own motion, but only the evidence proposed by the parties (Article 7, CPA). The party proposing the motion for the taking of a certain piece of evidence must pay the amount necessary to cover the costs, which are envisaged to be incurred. If he fails to do so, the motion for the taking of this piece of evidence is deemed withdrawn (Article 153, CPA). After the party has proposed a certain piece of evidence and advanced the payment for the taking of evidence, the court has the responsibility for the taking of evidence. For example, it is the court (not the parties), who appoints an expert from the list of authorized experts when specific scientific knowledge is required.

Sometimes, such costs represent a significant factor in the overall costs of litigation. In a rather straight-forward personal injury case a party should count on a cost of around \$ 1,500 for the taking of evidence (cost of an expert). In a more complex case where several experts from different scientific fields are required for the purposes of determination of certain facts in dispute or the same evidence must be taken again because the information given by the expert is unclear, such cost may exceed \$ 7,500.

5. Court settlement

According to the statistical data of first instance courts in 2008 the proportion of claims which are settled in Slovenia slightly exceeds 15%. If the litigation is brought to an end by the conclusion of a court settlement, each party shall bear their own expenses of proceedings, unless otherwise agreed upon by the settlement (Article 159, CPA).

II. Exceptions and Modifications

1. Exceptions to the basic rule

A rule that represents an exemption to the basic rule (the principle of success) is that irrespective of the outcome of the litigation, the party shall refund the opposing party the costs arising due to the default of, or the accident occurring to the former (Article 156, CPA). For example, if it is the party who is responsible for an adjournment of the court hearing (he or she files an extensive written preparatory submission at the court hearing, instead of sending it to the court on time in advance and thereby enable the other party to receive it before the hearing, and it is therefore necessary to adjourn the hearing in order to enable the opponent to comment on it), the costs incurred through such an adjournment shall be borne by the party. The same rule applies in the case of an adjournment of a hearing that cannot be attributed to any lack of due care on the part of the party, but it is still a result of circumstances in this party's sphere (for example, he or she was involved in a car accident while going to the court hearing which therefore had to be adjourned).

Special rules also apply for certain specific procedural situations. If a plaintiff withdraws the claim, he must reimburse the defendant's costs, unless the withdrawal of the claim followed immediately after the defendant has satisfied the claim (Article 158, CPA). In the case of an acknowledgement of the claim, the costs must be paid by the defendant. However, if the defendant did not provide any cause for the bringing of the action and has acknowledged the claim in the defense plea or at the main hearing, before becoming engaged in the trying of the main subject of dispute, the costs of the proceedings must be reimbursed by the plaintiff (Article 157, CPA).

2. Pre-litigation procedures and their impact on cost and fee allocation

It must be emphasized that in Slovenian law, there are no formal requirements (e.g. mandatory mediation) for the plaintiff before the filing of an action.

3. Party Agreements Allocating Costs and Fees in Case of Litigation

Because of the compulsory character of the norms contained in the CPA, party agreements (in a contract) allocating costs and fees in case of litigation are not allowed and could not be enforced. The exception to the rule that it is the court (not the parties), who decides on claims relating to

costs in litigation, is the procedural situation when the litigation is brought to an end by a conclusion of a court settlement. In such a situation the parties who have resolved their substantive dispute can agree on cost and fee allocation by themselves.

4. Self Representation

Under Slovenian law, parties may represent themselves (it is common, for example, in small claims proceedings and family proceedings) or perform acts of procedure through an attorney. If a party chooses to be represented by another person such party can only authorize an attorney at law or another lawyer with a state bar exam. Only in the lowest courts (county courts) there are no limitations as to the question, to whom the power of attorney can be conferred (Article 87/1, CPA). The only exception to this rule concerns proceedings with “extra-ordinary legal remedies” (for example revision and action for annulment of a court settlement). In such a case, a party is obliged to be legally represented by an attorney at law (except if a party personally passed the state bar exam).

In spite of being represented by an attorney, a party may be ordered to produce in court a personal statement as to the facts in dispute. Besides, a party represented by an attorney may at any time appear in court and produce statements in addition to the attorney (Article 86, CPA). If, for example, a party withdraws an action, brought on her behalf by his attorney, this withdrawal shall be deemed effective.

III. Encouragement or Discouragement of Litigation

1. Encouragement or Discouragement of litigation

The basic rule of cost and fee allocation that the losing party must reimburse costs to the winning party and some special rules (see above under II.1.) are generally designed to encourage that meritorious claims are brought to court. The rule that irrespective of the outcome of the litigation, the party shall refund the opposing party the costs arising due to the default of, or the accident occurring to the former is aimed at stimulating parties to participate diligently in procedure. As noted above, on deciding which costs are to be refunded, the court takes into account only the expenses, which were necessary for the litigation. By having the possibility to deny the reimbursement of such costs, the court can contribute to the acceleration of the proceedings.

Some rules of the Court Fees Act² also have a deterrent effect on litigants. If an action is withdrawn before the main hearing, if a judgment by acknowledgement or a judgment by abandonment of the claim is rendered at the first main hearing, or if a settlement is reached, the parties are entitled to retribution of two thirds of the court fee for first instance proceedings (Tariff No 1112, Court Fees Tariff).

One of the unfortunate features of Slovenian law often resulting in dilatory tactics of attorneys and thus encouraging litigation was that an attorney at law was entitled to reimbursement for every single procedural act performed (for example, for the claim, for every written preparatory submission, for attendance of every hearing) and not for a certain phase of proceedings as a whole. The rule was recently changed by the Attorneys' Fees Act (which came into force on 1

² Official Gazette RS, No. 37/08.

January 2009)³ and a system (following the German model) where an attorney at law is entitled to reimbursement for a certain phase of proceedings as a whole was introduced.

2. Upfront Payments

The court fees are determined and calculated according to the Court Fees Act. In ordinary proceedings, court fees must be paid for each instance of proceedings (so, including access to the Supreme Court, up to three court fees; Article 18/1, Court Fees Act). For example, if the amount in controversy is \$ 1,470, a plaintiff must pay the following court fees: \$ 167 for first instance proceedings, \$ 167 for appellate proceedings and \$ 167 for filing a further appeal on points of law to the Supreme Court. If the amount in controversy is \$ 147,000, a plaintiff must pay the following court fees: \$ 2,527 for first instance proceedings, \$ 2,527 for appellate proceedings and \$ 2,527 for filing a further appeal on points of law to the Supreme Court.

Parties must advance the payment for certain procedural acts and a failure to do so has direct procedural effects. For, example, the court fee for the claim and the appeal must be paid already at the time of the filing of the claim (appeal); if the party fails to pay the court fee even after the court ordered him to do so, the claim (appeal) is deemed withdrawn (Article 105a, CPA). Also, the party proposing the motion for the taking of a piece of evidence must pay in advance the amount necessary to cover the costs, which are envisaged to be incurred in the production of such evidence. If the party fails to do so, the motion for taking such evidence is deemed withdrawn (Article 153, CPA). As to how much parties have to pay up front for the taking of evidence, see above, I.4. The advance payment of attorneys' fees is allowed (Article 10, Attorneys' Fees Act), in fact such agreements are quite common.

Regulations on court and attorneys fees and legal aid are important from the financial point of view. The Slovenian Constitutional Court dealt with the problem of the relationship between the financial burden of litigation and the right of access to court. According to the Constitutional Court the right of access to court can be violated if financial burdens of litigation form an insurmountable obstacle for the access to court for a poor party.

IV. The Determination of Costs and Fees

1. The Determination of Court Costs

The amount of court fees and attorneys' fees depends on the amount in controversy and they are calculated according to the court fees and attorneys' fees tariffs. As noted above, the court fees are determined according to the Court Fees Act. They must be paid for each instance of proceedings.

2. The Determination of Attorneys' Fees

Currently, attorneys' fees are calculated in accordance with the Attorneys' Tariff contained in the Attorneys' Fees Act. However, under strong pressure from the side of the Attorneys' Chamber, the amendment of the Attorneys' Act in 2009⁴ transferred competence to determine attorneys' fees to the Attorneys Chamber. The new Attorneys' Tariff, which is subject to approval of the

³ Official Gazette RS, No. 67/08 – 35/09.

⁴ Official Gazette RS, No. 35/09.

Minister of Justice has not been adopted yet and the Attorneys' Tariff contained in the Attorneys' Fees Act is still in force.

The amount of the attorney fees depends on the amount in controversy. In the contractual relationship between an attorney and a client, they can agree on the use of other criteria for the payment, not the application of the Attorneys' Tariff. They can agree on a contingency fee, which cannot exceed 15% or a payment of an hourly rate on the basis of the time actually spent working on the case or a payment pursuant to rates, higher or lower than those in the Attorneys' Tariff. Therefore, the tariff does not restrict the autonomous position of attorneys as private entrepreneurs.

3. The Final Determination of the Concrete Amount Awarded

The court finally determines the concrete amount to be awarded to the party/parties. The real importance of the Attorneys' Tariff is that the court's determination of cost and fee allocation is subject to the calculation method under the Attorneys' Tariff, irrespective of the actual agreement between the winning party and the attorney. Thus, for the court it will be irrelevant if the winning party agreed to pay, for example, a double fee, to his or her attorney; the losing party will be ordered to reimburse only the amount that corresponds to the fee as prescribed by the Attorneys' Tariff. The decision on costs forms an integral part of the judgment or decree by which the proceedings are completed and it can be appealed against in the same manner as the decision on the main claim.

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

1. Success-oriented Fees

As noted above, in Slovenia success oriented fees are allowed, though to limited extent. The major principle regulated by the Attorneys' Act⁵ is that in patrimonial matters an attorney and a client can agree on a contingency fee, which cannot exceed 15% or a payment of an hourly rate on the basis of the time actually spent working on the case or a payment pursuant to rates, higher or lower than those in the Attorneys' Tariff (Article 17, Attorneys' Act). The agreement determining details of the contractual relationship between an attorney and a client must be in writing. Only if no special agreement is made between the party and the attorney, the Attorneys' Tariff applies. However, when it comes to the question what costs could a winning party reimburse from the opponent, the court will calculate this amount only on the basis of the applicable Attorneys' Tariff. Therefore, if an attorney and a winning party agree on a higher fee than that in the Attorneys' Tariff, the losing party will not have to pay the enhanced (success) fee, but just the costs calculated according to the Attorneys' Tariff .

While contingency fee agreements have been common for quite a while, especially in personal injury cases and sometimes in commercial litigation, other fees depending on the outcome of the litigation (for example, no win-no fee arrangements and success premiums), though not prohibited by law, are rarely used in practice.

2. Selling claims

⁵ Official Gazette RS, No. 18/93 – 35/09.

The selling of claims for purposes of litigation is not common in Slovenia. Although it is not explicitly prohibited, any assignment of a claim to an attorney or a law firm risks being void for incompliance with the legally prescribed terms and conditions for practicing the legal profession, especially the independence and good reputation of an attorney.

3. Special Rules for Class Actions and Group Litigation

In Slovenia class actions are not regulated by the CPA or any other statute. Therefore, there are no special rules concerning cost and fee allocation with regard to class actions. However, the CPA contains a provision regarding costs if several persons sue or are sued by the same action (the so called co-litigants). In such a case, provided the court dismisses their claim, each of them must reimburse an equal share of costs to the winning party.

4. Cost Insurance

Although it is possible to insure against the costs (including fees) of litigation, it is still uncommon to have such insurance. One can insure against the costs by buying specific litigation insurance or by buying coverage in other policies (e.g., automobile liability or homeowners insurance).

VI. Legal Aid

As noted above, according to the Constitutional Court of Slovenia the financial burden of litigation must not represent an insurmountable obstacle for the access to court for a poor party. Free legal aid is regulated by the Free Legal Aid Act.⁶ Some provisions concerning free legal aid were previously contained in the CPA, but after the adoption of a comprehensive system of the Free Legal Aid Act, there is no further need to retain a parallel system in the CPA.

Legal aid is provided by attorneys at law and (except representation in courts) by private bodies and NGO's, licensed by the state. A party, to whom legal aid is granted, can choose an attorney from the list, submitted by the Attorneys' Chamber. For the accomplished services, attorneys are remunerated exclusively according to the Attorneys' Tariff. However, it must be pointed out that there is a lower fee for attorneys representing a client on a free legal aid basis than in the case of providing services for "ordinary" clients. If the applicant succeeds in litigation, the state has the right to claim costs, incurred through free legal aid, from the opponent. The granting of free legal aid does not affect the relation between the applicant and the other party in civil proceedings. If the opponent succeeds in litigation, he or she is entitled to claim costs from the losing party - free legal aid beneficiary - and the free legal aid does not cover that risk.

The application for free legal aid is decided upon by the president of the district court after the draft is prepared by the Legal Aid Services Department of the court. The rules of the Administrative Procedure Act apply. An unsuccessful applicant may bring an administrative complaint before the Administrative Court of the Republic of Slovenia. If granted, free legal aid may be conditioned with the request that a party tries to settle the case by using one of the ADR mechanisms in the first place before pursuing the case in court (Article 28, Free Legal Aid Act).

An applicant is entitled to free legal aid if he is unable to cover the costs of legal proceedings without jeopardizing the financial position of himself or his family. The detailed criteria

⁶ Official Gazette RS, No. 48/01 – 23/08.

regarding the financial eligibility are determined by the Free Legal Aid Act. Legal aid includes legal advice, representation in court proceedings through an attorney at law and partial or full exemption from payment of the costs of proceedings (for example, court fees, costs of experts, witnesses). Free legal aid may be restricted to certain phases of procedure (for example for the procedure at the first instance court). Only a natural person and certain categories of non-profit NGO's that operate in the public interest can qualify for free legal aid. If circumstances regarding the financial status of the applicant change during the procedure the decision granting the legal aid may be revoked. Pursuant to the amendment of the Free Legal Aid Act in 2004⁷ residents of other EU Member States are guaranteed the same level of access to free legal aid as Slovenian residents.

VII. Examples

The examples given below are calculated in accordance with the Attorneys' Tariff. However, as noted above (see under IV.2.) in the contractual relationship between an attorney and a client, they can agree on the use of other criteria for the payment, rather than the application of the Attorneys' Tariff.

If the amount in controversy is \$ 1,000 the estimated sum total (i.e. for both sides) of costs and fees of litigating to final judgment in the first instance is as follows:

- court fees: \$ 273
- attorneys' fees: \$ 316 (including one hearing)

If the amount in controversy is \$ 10,000 the estimated sum total (i.e. for both sides) of costs and fees of litigating to final judgment in the first instance is as follows:

- court fees: \$ 864
- attorneys' fees: \$ 1,786 (including one hearing)
- costs of an expert: \$ 1,470

If the amount in controversy is \$ 100,000 the estimated sum total (i.e. for both sides) of costs and fees of litigating to final judgment in the first instance is as follows:

- court fees: \$ 7,417
- attorneys' fees: \$ 8,560 (including two hearings)
- costs of experts and witnesses: \$ 2,940

If the amount in controversy is \$ 1,000,000 the estimated sum total (i.e. for both sides) of costs and fees of litigating to final judgment in the first instance is as follows:

- court fees: \$ 20,948
- attorneys' fees: \$ 34,214 (including three hearings)
- costs of experts and witnesses: \$ 15,000

If a plaintiff (defendant) lost a \$ 100,000 claim, he would have to bear his own costs and to reimburse them to the winning party. Provided the attorneys' fees in the contractual relationship between him and the attorney were calculated in accordance with the Attorneys' Tariff, his total costs and fees liability would be \$ 18,917.

⁷ Official Gazette RS, No. 50/04.