

COST AND FEE ALLOCATION IN CIVIL PROCEDURE

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I. The Basic Rules: Who Pays?

1. Under the Polish Code of Civil Procedure of 1964, the basic rule of cost and fee allocation in civil proceedings is based on the principle of liability of a party for the result of the proceedings (Article 98 § 1 CPC).¹ It means that as a rule the losing party is obliged to pay to the winning party the costs of proceedings necessary to achieve the purpose of vindication of claims or defense.

As provided for in Article 98 § 2 and § 3 CCP, the necessary costs of the proceedings conducted by the party in person or by a proxy holder who is not a professional attorney (barrister - advocate, legal advisor or patent agent)² include court fees (payments), expenses connected with the appearance of the party or its proxy in court as well as equivalence of the income lost as a result of such appearance. The total amount of travel expenses and lost income should not exceed the remuneration of one advocate performing his/her profession in the seat of the court. The necessary costs of the proceedings conducted by the

¹ See A. Bąk, “A Practical Aspects of Allocation of the Costs of Civil Proceedings”, *Przegląd Sadowy* 2000, No 3, p. 87. All publication cited in the footnotes are in Polish.

² A legal aid in Polish legal system is performed as a rule by advocates (adwokaci) and so called legal advisors (radcowie prawni). In patent cases a representative of a party can be a patent agent (rzecznik patentowy). The above mentioned professions should be considered as a legal counsel and herein are referred to as “attorney”.

attorney include the fee and expenses of the attorney as well as court fees and the costs of appearance of the party in court when summoned by a judge.

Necessary costs of the proceedings also include the costs of mandatory mediation commenced in compliance with an order of the court (Art. 98 (1) CCP).

2. The reimbursement includes a fee payable to only one attorney (barrister). The attorney's fee awarded to the party must not exceed a sixfold minimal fee rate provided for in the schedule and must not be higher than the amount in controversy. A fee exceeding that amount is not subject to reimbursement.³

3. The above mentioned rules apply also to appeal proceedings.

4. The costs of taking of evidence, including the costs of experts and witnesses are included in the court costs. This notion is defined in the Court Costs in Civil Cases Act of 2005. Court costs include fees and expenses. Court expenses include, in particular, the expenses of witnesses, remuneration and expenses of experts, translators and guardians, expenses of taking of evidence, costs of announcements etc.

It is a general rule that court expenses should be covered by a party who motioned them (Article 2 Court Costs Act). Under Article 130(4) of CCP, the party which applies for legal action which results in expenses is obliged to effect an advance payment. Nevertheless, if statutory regulation requires the performance of the act, the judge will order the performance, including taking of evidence *ex officio*. Under such circumstances, the required amount is temporarily covered by *Fiscus*. The reimbursement of such expenses is decided by the court in its final decision.

5. Where parties settle their dispute, each party shall bear its own costs, unless otherwise agreed by parties (Article 104 of CCP).

³ See also A. Zieliński, "A List of Costs and its Binding Character for Process Court", *Palestra* 1977, No. 8-9.

II. Exceptions and Modifications

1. There are some exceptions to the principle of liability of a party for the result of the proceedings. First of all, in a case when claims of a party were recognized by the court only in part, the costs of the proceedings are mutually cancelled out or proportionally distributed (divided) between or among the parties.

Apart from that, despite the result of the proceedings, in specific circumstances the court may not charge a losing party an obligation to pay costs to the winning party, in full or in part. The grounds for such a decision of the court may include a blatantly wrongful conduct of the proceedings by the winning party or a situation whereby a losing party could have been objectively convinced of the existence of its rights, but lost the lawsuit due to the limitation period.⁴

A defendant is also entitled to the reimbursement of the costs if he/she did not specify the cause of action to initiate a lawsuit to the plaintiff and recognized the claim upon his/her first act in the proceedings.

Moreover, irrespective of the result of the proceedings, the court may order a party to pay the costs resulting from its action that is wrongful or lacking in diligence. This refers particularly to the costs resulting from avoiding to provide statements, giving false statements, concealing evidence or delay in submitting evidence as well as unjustified refusal to enter mandatory mediation to which a party agreed on in advance.

2. Pursuant to the provisions of Article 183(8) § 1 CCP, the court may order mandatory mediation between the parties. If mediation ends up with a

⁴ See: T. Ereciński, J. Gudowski, M. Jedrzejewska, K. Weitz, *The Code of Civil Procedure with the Commentary*, Warsaw 2009, Vol. 1, p. 368.

settlement, the costs of the proceeding are borne by the parties, unless the parties agree otherwise. In this case also the costs of the mediation are mutually cancelled out.

3. The Polish Code of Civil Procedure does not establish legal grounds for parties agreements allocating costs and fees in case of litigation. The code regulations on allocation of costs of the civil proceedings are obligatory in nature and can not be excluded by the parties to a contract. No contractual provision can be accepted by the court when allocating costs and fees. It is also a commonly held view that no costs of the proceedings can be vindicated by a party against the other party after the termination of court proceedings which gave rise to such costs. Thus, an agreement concluded between parties on allocation of costs of the proceedings, although acceptable under a principle of freedom of contracts, should be deemed unenforceable. To my best knowledge, in the Polish legal practice these kinds of agreement are not observed.

4. As a rule in civil proceedings, parties are entitled to represent themselves and conduct the proceedings in person. The only exception to this rule refers to the proceedings in the Highest Court (especially in cassation proceedings which constitute an extraordinary legal measure). In more complex cases, however, it is not reasonable for a party to represent itself. Legal aid offered by attorneys is quite commonly accepted. In commercial cases the assistance of a lawyer, although not obligatory, is highly recommended due to the existence of numerous formal procedural requirements.

III. Encouragement or Discouragement of Litigation

1. It is not a task of regulations regarding cost and fee allocation to encourage or discourage a person to litigate. However, in some specific cases legal regulations provide for a statutory exemption from court costs (fees and

expenses). The exemption from court costs can be based on objective (type of the case) or personal criteria (type of party).

As far as objective criteria are concerned, by virtue of Article 96 of Court Costs in Civil Proceedings Act of 2005, a plaintiff is not obliged to pay regular court costs and fees in cases referring to the establishment of paternity or maternity and claims relating thereto, alimony cases as well as cases that fall within the terms of reference of labour law (employees). The above mentioned cases are considered to be of great social importance and a statutory exemption from court cost and fee is meant to provide easy access to the system of justice.

As regards personal (subjective) criteria, court costs are not paid by the General Attorney of Poland, public prosecutors, ombudsmen, labour inspectors and trade unions (in labour cases), guardians appointed by court and other officers. Statutory exemption from courts costs and fees is also provided for in other statutes.

A party being a natural person may also apply to the court for complete or partial exemption from court costs and fees on the basis of a court decision. The applying party must declare that it is not in a position to bear the costs without detriment to the livelihood of itself and its family. The applying party must also enclose a written statement disclosing in detail information on its family situation, property, income and means of maintenance. The court may request an oath from said party.

Obtaining an exemption from court costs does not mean, however, that the party is free from paying the costs of the proceedings to the counterparty in case it loses a lawsuit.

2. An up front payment by the plaintiff includes court fee and attorney fee (where a party is represented by an attorney).

Court fees in property cases vary significantly depending on the disputed amount. **The term “property cases” refers to cases involving property in the broad sense (contracts, torts, property etc.). It includes any case which**

relates to protection of economic interest of a party. In these cases a court fee equals to 5 percent of the amount in controversy, but not less than PLN 30.00 złoty⁵ and no more than PLN 100,000.00 (US\$ 33,300.00). In non-property cases court fees are fixed and are indicated specifically for each case. In these cases the fees are usually lower than those in property cases.

As far as attorney fees are concerned, their amount in property cases also depends on the amount in controversy.⁶ The said amount of fees is specified in a Regulation of 2002 by the Ministry of Justice, which provides for a schedule of fees. The schedule, however, determines only minimal rates to be applied. The minimal attorney's fee rates range from PLN 60.00 to PLN 7,200.00. The regulation mentioned above specifies also minimal fees in non-property cases. The actual fee is determined in an agreement concluded by a litigant and his attorney. The attorney, however, has the right to agree upon a lower rate or to waive the fee in total. **It does not mean, though, that the minimal rates have no legal importance. They are important due to a fact that the court may, at its discretion, evaluate attorney's work with a view to calculating relevant fees, which is to be awarded by the court (see below IV. 3.). In this situation the minimal rates constitute a "border line", which cannot be crossed by the court.**

The most important expense connected with taking evidence is advance payment for the remuneration of an expert witness. The said amount varies depending on the complexity of the expert opinion, but it averages PLN 1,000.00 (approx. US\$ 333.00).

IV. The Determination of Costs and Fees

⁵ US\$ 1.00 equals approx. PLN 3.00.

⁶ See P. Czepiel, "Advocates and Legal Advisors' fees in Civil Proceedings", *Przegląd Sądowy* 2002, No. 11-12.

1. The amount of court fees is determined by the amount in controversy (in property cases) as well as by the nature of a case (in non-property cases). The total amount of expenses, in turn, depends mainly on the complexity of a case, the evidence that had to be taken, and, of course, on the duration of the proceedings (including the number of instances involved).

2. Lawyers' fees, as mentioned above, are determined in an agreement concluded between the lawyer and the litigant. They are usually higher than the fees established as minimal in the schedule. It is provided for by law that a type of a case and its complexity should be taken into consideration while determining the fee of the attorney in a relevant agreement.

3. As mentioned above, the attorney's fee awarded to the party must not exceed a six fold minimal fee rate provided for in the schedule and must not be higher than the amount in controversy. It follows that the winning party in some cases may not obtain full reimbursement for the fee paid to its attorney. The maximum amount that can be awarded to the party must not exceed PLN 43,200.00. Nevertheless, this amount does not have to be that high, since the court may, at its discretion, evaluate attorney's work with a view to calculating relevant fees, which is to be awarded by the court.⁷ It is true, though, that courts very often award a party with the amount not exceeding the minimal fee.

The actual amount to be awarded to the party is determined by the court in the judgment ending the proceedings in each instance.

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

1. A contingency fee is not regulated in the Polish legal system. In fact, it is considered to be against professional ethics and, as such, it is forbidden by the

⁷ See A. Nowak, 'Practical Issues of Awarding Costs of Legal Representation in Civil Proceedings', *Przegląd Prawa Handlowego* 2006, No. 7.

code of ethics adopted by the Bar Association. In fact, a contingency fee or a success premium is used by some lawyers, but it is a marginal question in the Polish legal practice. It should be mentioned, however, that the draft law on class action in civil cases provides for a possibility to determine lawyers' fee on the success orientated basis.

2. The Polish law does not exclude selling claims for the purpose of litigation. It can sometimes be observed in practice, but it is not common.

3. A law on class action is underway on by the Polish Parliament. It is supposed to come into force in 2010. It is too early to evaluate this regulation.

4. To the best of my knowledge, insurance companies operating on the Polish market do not offer any insurance against costs of litigation. If so, it is not common yet.

VI. Legal Aid

1. The equality principle underlying the rule of law is crucial to the Polish civil procedure system. Under this principle, a litigant with limited means is entitled to appropriate legal aid. Pursuant to Article 117 of CCP, a party which is exempted from court costs may apply court appointed counsel. This institution is called *ex officio* legal aid. A counsel is appointed if the court deems it necessary for a lawyer to participate in the proceedings. In fact, the court decides only on the necessity of legal aid and a lawyer is appointed by a relevant lawyers (bar) association (advocates or legal advisors) at the request of the court. A court-appointed lawyer is entitled to collect his/her fee and expenses from the amount adjudged from the counterparty. The unpaid costs of *ex officio* legal aid are borne by the State Treasury.

Ex officio legal aid is commonly used in the Polish legal system.

According to the draft amendment to the Code of Civil Procedure, the new regulation will allow the court to appoint a lawyer for a party also irrespective of the exemption from court costs.

2. It should also be stressed that according to the Polish civil procedure there are several options to institute civil litigation by public attorney (prosecutor) (Article 7 of CCP), non-profit organizations (Article 8 of CCP), ombudsmen and other entities acting on behalf of the litigant. These regulations are inherited after the communist period and are occasionally employed.

3. It seems that Polish regulations on costs and fees do not create a serious barrier to the system of justice, although some litigants complain about the amount of court fees, especially as far as litigation in commercial cases is concerned.

4. The Polish legal system does not provide for any barriers to bringing any kind of cases before the court. The amount in controversy is not an issue in this respect. The amount in controversy is important only in the case of cassation proceedings (i.e. before the Supreme Court) and determines accessibility of cassation, which is an extraordinary legal measure against valid judgments.

VII. Examples

No statistical data are available as to the amount of costs of litigation in civil cases. A conservative estimate, based on the information obtained from lawyers, shows the following:

- small claim (equivalent of US\$ 1,000.00) - amount of costs approx. US\$ 300
- small to medium claim (equivalent of US\$ 10,000.00) – amount of costs approx. US\$ 1,700.00
- medium to large claim (equivalent of US\$ 100,000.00) - amount of costs approx. US\$ 8,400.00

- large claim (equivalent of US\$ 1,000,000.00) – amount of costs approx.
US\$ 39,000.00.

The above figures comprise total litigation costs (court costs and attorney fees) for plaintiff represented by an attorney. These amounts are to be paid, as a rule, to a plaintiff by losing defendant. In this case the defendant also covers his attorney fees.

Conclusion

In 2005 a reform of the Polish regulation on costs in civil cases was introduced . It comprised the passing of a new Court Costs Act and adopting an amendment to the Code of Civil Procedure. The reform was meant mainly to simplify the system and to decrease court fees in civil cases. The amount of court costs in civil cases was often the subject of doctrinal criticism.⁸ It was emphasized that they are higher than those in any other EEC member state.⁹ As regards a decrease in fees, the reform proved successful. However, it is said that in the property cases a fee of 5 percent of the amount in controversy appears to much when said amount is really high. This is an important issue especially in commercial cases. It is further recommended that the schedule should be based on a regressive scale. In addition to that, the new regulation resulted in an unforeseeable practical complication in calculating courts fee and in an increase in the paperwork required. This problem, however, seems to have disappeared.

⁸ M. Safjan, *Court Costs in Civil Cases*, Warsaw 1994.

⁹ K. Gonera, *Commentary on Court Costs in Civil Cases Act*, Warsaw 2007, p. 13.

