Chapter 9. Litigation

9.1 Definition

The preceding chapters mostly related to substantive law, i.e. to the law which defines rights and duties of individuals. The knowledge of substantive law is important but without the knowledge of procedural rules, it is of little practical use. In other words, you have to know what your right is but also you need to know how to enforce such right. And the set of procedural rules defining how to enforce substantive law is what we call **procedural law.** The legal proceeding in a court is then called litigation.

The purpose of litigation

The purpose of ligation is thus to enforce rights or duties stemming from substantive law.

E.g. If you enter into the loan agreement as a creditor, the loan agreement says that a debtor is obliged to return you the money in one year. That is what we call substantive law because it clearly defines your right. If, however, the debtor does not return the money to you in one year, you have to enforce your substantive right before the competent court to actually get the money back. That is what we call litigation.

From the legal point of view it is quite simple. If you have a substantive right, you can file an action before a competent court to enforce such right. Is, however, a business point of view always the same as the legal one? There are many cases where a person has a right and does not file an action. Sometimes you have to think whether it is worth to enforce your right or not from the perspective of the costs and benefits of such action. It is always the decision made under uncertainty because you never know surely if your action will be successful, what the costs of litigation will be and how much you actually get in the end. For that reason, not all substantive rights are actually enforced in practice because it is not always worth it. We can conclude that from the business point of view, the purpose of litigation is to find an efficient and fair resolution of a dispute.

The subjects of litigation

The subjects of any litigation always include a **court** with its independent position and the **parties** of a dispute. The function of the court is to hear both parties and fairly decide the case. The position of the parties is usually contradictory – they have the opposite interest. These parties are called a **plaintiff and a defendant.** The plaintiff (together with his/her solicitors) sits on the right hand side of the justices and the defendant on the left hand side of the justices.

The types of procedure in the Czech Republic and the judicial system

The basic types of procedures in the Czech Republic are civil, criminal and administrative ones and a special constitutional procedure. The court system in the Czech Republic is pretty simple. Most civil law cases start before district courts which are the lowest instances. Only more specific, complicated civil cases will start straight at the regional level (regional courts) such as intellectual property cases, disputes arising out of mergers and acquisitions, competition law

disputes etc. Similarly, most criminal cases start before a district court and again, more serious criminal cases start straight at the regional level, such as all crimes punishable by deprivation of liberty for a minimum of 5 years, crimes allowing for exceptional punishment (lifetime imprisonment), acts of terrorism, human trafficking etc. The administrative cases typically start before regional courts and rarely (matters relating to political parties or disputes about authority of different courts to resolve the case) before the Supreme Administrative Court which is a specialized court for solving administrative cases. The special constitutional law cases are resolved before the Constitutional court which is a separate judicial authority, standing outside the system of ordinary jurisdiction.

9.2 Judicial system in the Czech Republic

The judicial system in the Czech Republic consists of the "ordinary system of courts" (district courts, regional courts, high courts, the Supreme Court and the Supreme Administrative Court) and the Constitutional court which stands outside the ordinary system of courts.

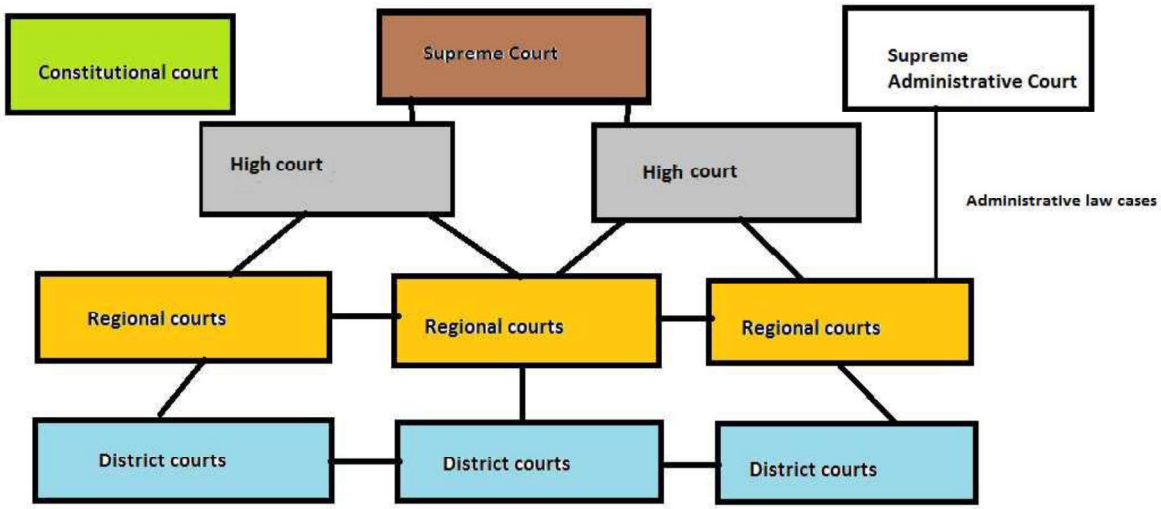

Figure 1 Judicial system in the Czech Republic

District courts

There are 74 district courts in the Czech Republic and these courts decide most civil and criminal cases as the courts of first instance. They mostly decide by a single judge and rarely by a chamber composed of one judge and two lay judges (labour law cases, criminal law cases punishable by deprivation of liberty for a maximum of 5 years).

Regional courts

There are 8 regional courts in the Czech Republic and they mostly work as appellate courts in civil and criminal law – in that case they always decide by senate composed of three judges. They, however, also decide some severe criminal cases, highly specialized civil (commercial) law cases and all administrative law cases as the courts of first instance. If a regional court is a first instance court, it usually decides in a chamber and where stated by law, it decides by a single judge (some commercial cases, insolvency cases).

High courts

There are two high courts in the Czech Republic (Prague and Olomouc) and these courts decide appeals in cases where a regional court was the first instance court. They always decide in chambers.

Supreme Court

The Supreme Court is the highest instance in all fields except for administrative law cases (for which the Supreme Administrative Court has been established). The seat of the Supreme Court is in Brno and it decides cases only in chambers. Its main function is to unify case-law by deciding about extra-ordinary remedies and writing opinions on judgements of lower courts.

Supreme Administrative Court

The Supreme Administrative Court is the highest instance in administrative law, its seat is again in Brno and it also decides in chambers. Most of its agenda is composed of extraordinary remedies in the field of administrative law (cassation complaint). It also decides some specialized administrative law cases as a first instance court (disputes relating to political parties, disputes about the authority of different courts to decide a case etc.).

Constitutional Court

As was already mentioned, the Constitutional Court is out of the ordinary judicial hierarchy. Its seat is also in Brno and it serves as the main body for the protection of the Constitution. Its tasks include the review of the constitutionality of statutes and the protection of constitutional order and fundamental rights guaranteed by the Constitution.

The Court consists of 15 Justices, all appointed by the President with the consent of the Senate. The Justices are appointed for a 10-year term of office, and there is no restriction on their reappointment.

9.2.1 Administrative justice

As is already stated in the above sub-chapters, the administrative cases are resolved by the specialized chambers of regional courts and by the Supreme Administrative Court. The aim of the administrative justice is to protect the **public** subjective rights of individuals and legal persons.

In particular, the Courts of administrative justice decide on:

a) complaints against decisions made in the sphere of public administration (these create the vast majority of the whole workload of administrative courts and they may relate to e.g. review of decisions on permanent residence, decision imposing a fine for damaging environment, decision imposing a fine for illegal employment etc.),

b) protection against the inaction of an administrative authority (e.g. you apply for building permit to the building authority and the building authority has not decided within the statutory deadline – you may file an action before the administrative court who can then issue an order to the building authority to take a decision),

c) protection against an unlawful interference of an administrative authority,

d) competence complaints (disputes over the authority of different courts to decide a case).

Courts of administrative justice furthermore decide on

a) election matters and in the matters of a local referendum, and

b) matters concerning political parties and political movements. (Act no 150 / 2002 Coll, Code of Administrative Justice).

9.2.2 The civil/commercial litigation

The aim of civil litigation is to protect, as opposed to the administrative one, **private** subjective rights of individuals and legal persons by deciding legal disputes in the field of private law (civil law, family law, commercial law, corporate law, IP law etc.).

The rules of litigation are set by the Civil Procedure Code (Act no. 99/1963 Coll.).

Such litigation is initiated upon a motion of a plaintiff who submits an action before a competent court. Thus, typically there must be a plaintiff who submits an action in order for the court proceedings to commence (with some exceptions where a court can initiate a proceedings itself, such as custody over minors' cases). The plaintiff has to pay a court fee for the initiation of the litigation (the amount differs depending on the type of proceedings – for example in case of an action for payment the fee is 5 % of the requested amount). Such fee is an income of the state budget and helps to finance the judiciary system. If the plaintiff does not pay the fee, the litigation will be stopped by the court except for cases when the plaintiff cannot afford paying it without endangering his/her sustenance (ill people who cannot work, retired people who spend most of their pension for rent etc.). In such case, the court may relieve the plaintiff of his/her duty to pay a court fee.

It is not necessary to be represented by an attorney before a court of ordinary jurisdiction except for filing an extraordinary remedy to the Supreme Court.

An action to be complete must include:

a) Name of the court it is addressed to

b) Names of both parties of the dispute and their address (including their representatives)

c) Type of the action (what is claimed)

d) Description of relevant facts

e) Description of evidence suggested by the plaintiff

f) The particular plea (a suggestion how the court should decide)

g) Date and signature

If some of these elements are missing, the court will request their completion.

How can such an action look like?

To the District Court of Prague 3

Plaintiff: Jan Novak, Italska 8, Prague 2

Defendant: David Richter, Seifertova 20, Prague 3

Action on damages

On 8 August, 2017, the defendant drove his car negligently and hit my car (Evidence: photos, testimony of a witness, a police report). He caused damage which had to be repaired and which cost CZK 20 000 (Evidence: a bill from a garage). Hereby I claim that the defendant is responsible for the damages.

I suggest that the court orders to the defendant the following:

The Defendant is obliged to pay to the plaintiff CZK 20 000 within 3 days following the legal force of this judgement.

In Prague on 25/09/2017

Jan Novak

(signature)

9.2.3 Criminal procedure

The aim of criminal procedure is to find out if a crime was committed, who is the perpetrator and then decide on guilt, impose a penalty and enforce it.

All the rules of criminal procedure are set by Criminal Procedure Code (Act no. 141/1961 Coll.).

Any criminal procedure has several stages with different prosecuting authorities involved. In the beginning of any criminal procedure, it is a police that investigates whether a crime was committed at all and looks for suspects. In this stage, a prosecutor supervises police and is allowed to instruct them. The role of the court in this stage is rather marginal – it decides on custody, approves search warrants etc.

After an investigation is finished and an individual person is charged, a second stage of a criminal procedure commences – a stage before a competent court. At this stage, the role of police is marginal and the dominant prosecuting authorities are now a court as an independent body that decides on guilt and imposes penalty, and a prosecutor who is in a contradictory position of an accused and who aims to prove his/her guilt.

After a court decides on guilt and imposes penalty, a third stage of a criminal procedure commences – an execution. An imposed penalty has to be executed, it means that a convicted person will serve a prison sentence, pay a monetary penalty etc.

9.3 Right to a fair trial

Right to a fair trial guarantees an independent and an impartial judiciary and thus belongs to the main pillars of any legal and democratic state. This right guarantees that anybody can look for protection of his/her rights before an independent court. Right to a fair trial is one of the fundamental human rights guaranteed by the Charter of fundamental human rights and freedoms and many international treaties, primarily stated in the Article 6 of the European Convention on Human Rights (ECHR) which is one of the broadest and most important articles of the whole convention. Article 6 of the European Convention on Human Rights relates not only to criminal proceedings, but also to the civil and administrative ones. It, however, establishes fundamental rights of persons charged with criminal offence and thus has a special importance in the field of criminal proceedings.

Article 6 of ECHR reads as follows:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*

- *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him*
- *to have adequate time and facilities for the preparation of his defence*
- *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*

- *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*
- *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

If any of the articles of the European Convention on Human Rights are breached, you may submit a special action before the European Court of Human Rights based in Strasbourg (for more details see the chapter 5 Czech Constitutional Law and the Protection of Human Rights of this book).

9.4 Alternative Dispute Resolution

So far we have dealt with litigation as a way of dispute resolution which is guaranteed by state and may be used for any legal dispute even without the consent of the defendant. Sometimes, however, quicker, cheaper and more flexible ways of dispute resolution may be used. We call it Alternative Dispute Resolution (ADR) which means that these methods are alternatives to litigation which is of general use.

There are several ways how to resolve a legal dispute outside the courtroom. We will shortly deal with the most popular ones – the mediation and commercial arbitration.

9.4.1 Mediation

Mediation is a method for dispute resolution using an independent and impartial mediator who tries to lead the parties to the agreement which would resolve the dispute and would be acceptable for both of them. This method, unlike litigation, is fully voluntary and is not necessarily about finding a perfectly lawful decision but rather a mediator tries to achieve a mutual consensus between parties. If a mediation is successful, both parties leave a mediator satisfied with a result while litigation usually ends with one party unhappy. Thanks to the fact that a mediator does not look for a perfect solution from the legal point of view, the whole procedure may be way quicker than litigation where all the necessary evidences must be carried out. Moreover, if a mediation leads to the satisfaction of both parties, such method is more efficient than litigation since both parties actually accept the deal and there is no space for appeals. The result of a mediation is a so called mediation agreement which is directly enforceable if approved by a court[*]. The mediation is all about building trust between the parties and a mediator, and finding the acceptable solution for all the disputed parties. A mediator does not have to be a lawyer but he/she has to have a university degree and must pass a special mediation exam and be registered in the list of mediators maintained by Ministry of Justice of the Czech Republic.

[*] In some EU Member States, such as Bulgaria, a negotiated mediation agreement is directly enforceable. This means that parties to mediation do not need to have the agreement approved by the court to have it enforced.

9.4.2 Commercial arbitration

Arbitration is another alternative to litigation which means that both parties to the dispute must agree to resolve their case before an arbitration court or before a single arbitrator.

Institutionalized arbitration

An institutionalized arbitration takes place before permanent arbitration bodies. There are currently only three such bodies in the Czech Republic – Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, International Arbitration Court of the Czech Commodity Exchange and Exchange Court of Arbitration. Such institution has its permanent arbitrators, administrative personnel, its own building etc. These institution are usually highly representative and trustworthy. Again, contrary to standard litigation before competent courts, arbitration is quicker, more efficient and also has more specialized arbitrators for commercial legal disputes as opposed to judges who have to deal with cases from different legal fields and thus they often lack specialization (especially at district courts).

Ad hoc arbitration

Arbitration may be used by the parties to a dispute also on a case by case basis. It means that parties agree in advance that in case of legal disputes between them, such disputes will be resolved by a particular arbitrator (or three arbitrators). The parties thus themselves in advance formulate the conditions of their future dispute resolution.

International arbitration

International arbitrations are more and more popular among international companies because they provide for desired independency compared to local courts. These institutions are again quick, efficient and highly specialized. Their verdict (called "award") is final and binding for both parties. One of the leading international arbitration courts is the International Court of Arbitration of the International Chamber of Commerce in Paris.

9.5 Summary

This chapter related to litigation and alternative dispute resolution. Procedural law was distinguished from substantive law and the purpose of ligation which is the enforcement of rights or duties stemming from substantive law was highlighted.

The subjects of any litigation are a **court** and the **parties** of a dispute. These parties are called **a plaintiff and a defendant.**

The basic types of procedures in the Czech Republic are a civil, criminal and administrative ones and a special constitutional procedure. The court system includes district courts, regional courts, high courts, the Supreme Court and the Supreme Administrative Court. There is also the Constitutional Court which is not a part of the ordinary court system, though.

The protection of rights of individuals by independent courts guaranteed by the state is called a right to a fair trial and it belongs to fundamental human rights guaranteed by the Charter of

fundamental human rights and freedoms and many international treaties. Article 6 of the European Charter of Human Rights which is binding for Czech Republic guarantees a right to fair trial including the principle of presumption of innocence and another minimum rights of the persons charged with a criminal offence.

Apart from litigation, the chapter dealt with Alternative Dispute Resolution, more particularly mediation and arbitration.

9.6 Self-assessment questions

1. Could you describe the hierarchy of Czech courts?
2. What does "litigation" mean?
3. Is it better to initiate standard litigation or arbitration?
4. What are the three fundamental types of procedure in Czech law?
5. What are the mandatory/necessary elements of an action?
6. What are the authorities involved in the criminal procedure?
7. In which cases is it better not to initiate a litigation?
8. What is the role of the Czech Constitutional Court?

9.7 Further reading/listening

Chapter 2.4 "The Judiciary" of An Introduction to the Czech Legal System and Legal Resources Online by Michal Bobek, available online at:

http://www.nyulawglobal.org/globalex/Czech_Republic.html

The very basics of mediation and arbitration can be listened to in the video called Alternative Dispute Resolution – What is ADR? by David P. Hersh, available at:

https://www.youtube.com/watch?v=5IfPqPIPSmI

Study resources on mediation as well as short theoretical videos and longer videos with mock mediation are available on the Online Study Mediation Platform at https://mediation.turiba.lv