

PART III

ACCESS TO JUSTICE AND COSTS OF LITIGATION

CHAPTER 4

COST EFFICIENCY AS A GUIDING PRINCIPLE IN CIVIL JUSTICE

Séverine Menétrey

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1 KEY ISSUES, SCOPE, AND STRUCTURE OF THE CHAPTER

- 1 How much does justice cost? What makes litigation costly? Even though everyone knows that lawsuits are expensive and that high costs can hinder access to justice, it is still very difficult to put a precise figure on the cost of a trial. In attempting to do so, one may think of the costs of lawyers or evidence (witnesses and experts in particular). But the cost of running the justice system itself is even more difficult to pinpoint, with judges' remuneration, building costs and administrative support among the many expenses to consider.¹ Moreover, some costs are difficult to classify such as service of documents, court fees, and *cautio judicatum*². The costs of litigation are difficult to identify, never mind quantify as outlined by the Canadian Forum on Civil Justice:

It is complex to determine what is to be defined as a cost and then derive a reliable method of measuring that cost. Furthermore, public financial investment in providing access to justice must be considered within the context of the social value of ensuring an effective accessible system.³

- 2 In all hypotheses, costs can vary significantly from one country to another to such an extent that one may wonder whether it is even possible to conduct a comparison of the costs of litigation in different jurisdictions.⁴
- 3 The first objective of this chapter is to determine what constitute the costs of litigation and to map these accordingly (2 Cost Mapping). This process of cost mapping is important, but it has several limits. First, it is very superficial because of the difficulty of accessing details of each expense for each jurisdiction and, secondly, because these costs, which vary from one system to another, have little meaning from a comparative law perspective. Indeed, except to determine 'which jurisdictions are comparatively

¹ In Quebec, according to Justice Wery - who does not hide the fact that he considers it to be an approximation - a day of hearings in Montreal, in terms of staff and judges' salaries and in terms of fixed costs of all kinds, would cost the taxpayer approximately CAD 7,500. A similar figure, from the Ministry of Justice, puts the direct and indirect cost per hour of court time in Quebec courthouses at CAD 1,400, see Y M Morissette, 'Gestion d'instance, proportionnalité et preuve civile : état provisoire des questions' (2009) 50 *Les Cahiers de droit* 405.

² *Cautio judicatum solvi* - is an old term in francophone legal systems, which can be defined as a financial guarantee that the foreigner is obliged to pay in order to initiate court proceedings on the national territory.

³ CFCJ, *The Cost of Justice*, https://www.cfcj-fcjc.org/sites/default/files/docs/2012/CURA_background_doc.pdf, 6.

⁴ 'Practically speaking, understanding the rules governing litigation costs is most important at home. Yet, when transboundary litigation is growing fast, and when changes have been in the air in many systems, it is becoming increasingly important also to look beyond one's own jurisdiction. This is true for practitioners and lawmakers as well as for academics', M Reimann (ed), *Cost and Fee Allocation in Civil Procedure - A Comparative Study*, (Springer 2012) 4.

more or less expensive'⁵ (for the parties), a comparison of litigation costs does not allow for the identification of common trends in civil procedure⁶ (2).

- 4 Going beyond the cost mapping, the second and main purpose of this chapter is to look for common trends around the concept of cost efficiency as a guiding principle in civil justice. Whatever the costs and 'the factors that have created this situation of escalating costs and delays, jurists, policy-makers and scholars seem to have seized upon efficiency as the panacea'.⁷ Even though it is very difficult to calculate the costs of litigation, and thus to demonstrate that litigation is too expensive, a general trend has emerged 'to find general solutions to the as-yet-undefined problem of too-expensive litigation'.⁸
- 5 *Cost efficiency as a guiding principle in civil justice* is linked to the notion of proportionality. C Hanycz outlined that: 'The principle of proportionality has emerged in an environment marked by a growing awareness of the shrinking access to civil justice caused by escalating fees and delays'.⁹ Proportionality is often understood as a procedural principle limited to judges and parties. Pertinently, we discuss the emergence of such a general principle (see section 4 *Towards the Principle of Proportionality: Duty to Limit the Costs of Litigation*). However, as proportionality serves, first and foremost, a policy-making purpose, we look at it 'as a guiding norm of recent civil justice reform'¹⁰ (see section 3 *Towards a Policy of Proportionality: Access to Justice at Proportionate Cost*).
- 6 There has been a policy focus on procedural and judicial cost-efficiency: civil justice reforms all around the world have been aimed almost exclusively at enhancing the cost efficiency of justice systems.¹¹ Ch Hodges outlined that:

The importance of costs issues within contemporary civil justice systems is readily apparent from the fact that several jurisdictions have given particular attention

⁵ Ch Hodges, S Vogenauer and M Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Perspective* (Bloomsbury, 2010) 3. On this topic, see S Vogenauer, 'Perceptions of Civil Justice Systems in Europe and their Implications for Choice of Forum and Choice of Contract Law: an Empirical Analysis' in S Vogenauer and C Hodges (eds), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* (Oxford, Hart Publishing, 2010).

⁶ GP Miller, 'The Legal-Economic Analysis of Comparative Civil Procedure' (1997) 45 (4) Am. J. Comp L. 905.

⁷ C Hanycz, 'More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform' (2008) 27 (1) C.J.Q 107.

⁸ E Lee II and Th Willging, 'Defining the Problem of Cost in Federal Civil Litigation' (2010) Duke Law Journal 768.

⁹ Hanycz (n 7) 106.

¹⁰ Ibid 99.

¹¹ See A Zuckerman and R Cranston (eds), *Reform of Civil Procedure. Essays on «Access to Justice»* (Oxford, Clarendon Press 1995).

during the past decade to reforming civil procedure rules so as to reduce delays and costs.¹²

- 7 These reforms of national systems are beyond the scope of this chapter.¹³ However, there has long been a trend towards designing procedures proportionate to the dispute. This cost-efficiency approach to civil justice involves both the design of accessible procedures according to the financial stakes of the dispute, and the adoption of rules designed to limit costs, such as the restriction of representation by lawyers.¹⁴ Many contemporary reforms in this regard also concern cost allocation and funding¹⁵ (3).
- 8 Within these reforms, some systems have introduced a principle of proportionality, which is another trend deserving attention. Proportionality is a fundamental concern of civil procedure, and the principle has a particularly important bearing on access to justice.¹⁶ The 2020 ELI/UNIDROIT Model European Rules of Civil Procedure enshrine the principle of proportionality, as follows: ‘The court must ensure that the dispute resolution process is proportionate’ and ‘parties and their lawyers must cooperate with the court to promote a proportionate dispute resolution process’.¹⁷ The Rules also address ‘proportionality of costs’ in Rule 8: ‘Costs of proceedings should, in so far as possible, be reasonable and proportionate to the amount in dispute, the nature and complexity of the particular proceedings, their importance for the parties and the public interest’ (4).
- 9 Proportionality has become a key notion both for policymakers and parties. ‘[I]t is accepted that it encompasses two aspects: an individual, micro-dimension of proportionality – an *inter partes* proportionality – and a collective macro-perspective which might be referred to as systemic proportionality’.¹⁸ The significance of litigation costs is not the same for service providers as it is for users of the justice system, but there is nevertheless a common trend towards proportionality to offer an affordable justice proportionate to the case (ie, proportionality as a policy – macro-perspective) and to invite parties to limit the costs of litigation (ie, proportionality as a principle – micro-perspective). ‘Proportionality involves spending the appropriate amount of judicial resources on each case so as to ensure availability of resources for other

¹² Hodges, Vogenauer and Tulibacka (n 5) 5.

¹³ See pt 11 *Special Forms of Procedures* and see pt III ch 3 *Particular Aspects of Access to Justice*.

¹⁴ See pt 11 *Special Forms of Procedures*; see also P Hannaford, ‘Benefits and Costs of Civil Justice Reform’ (2016) 54 Court Review 26.

¹⁵ See J Sorabji, ‘The Long Struggle for Fixed Cost Reform’; J Tomlinson, ‘Reforming Judicial Review Costs Rules in an Age of Austerity’, in A Higgins (ed), *The Civil Procedure Rules at 20*, Oxford Academic, 22 Oct. 2020. And see pt III ch 5, 6, 7.

¹⁶ J Pinsler, ‘Proportionality in Costs’, (2011) 23 SAclJ 125.

¹⁷ Rules 5 and 6 *ELI/UNIDROIT Model European Rules of Civil Procedure*, 2020.

¹⁸ W Voß, ‘Proportionality in Civil Procedure: A Different Animal?’ in F Bauer and B Köhler (eds), *Proportionality in Private Law* (Mohr Siebeck, Tübingen 2023) 185.

litigants'.¹⁹ This cost-efficiency approach to civil justice transforms the notion of access to justice.²⁰ X. Kramer outlined that: 'In recent years, new trends in civil justice have evolved that reveal current challenges to accessible civil justice as well as opportunities for a civil justice system of the future'.²¹ There is an ongoing evolution from access to justice to accessible or affordable justice. Some have been critical of this development, including C. Hanyecz who asserted: 'responding to rapidly rising legal costs and delays, policymakers have come to equate less process with greater access. [...] It seems clear that efficiency reforms are bringing greater access, but what of greater justice?'²² Moreover, Professor Cadiet underlined that: 'Justice should not only be carried out at the lowest cost but at a cost compatible with the requirements of a fair trial for all'.²³

2 COST MAPPING

2.1 What Are the Costs of Civil Litigation?

- 10 Costs of litigation are increasingly being studied.²⁴ This growing interest is linked to the economic analysis of law and institutions and in particular the evaluation of judicial systems.²⁵ '[S]ystems are being evaluated against criteria of speed, cost, efficiency and appropriateness of the pathway for the type of case'.²⁶ This evolution deserves attention. Twenty years ago, A. Zuckerman noted that access to justice was compromised by high litigation costs.²⁷ Fifteen years ago, the European Commission for the Efficiency of Justice (CEPEJ) published the first report on the evaluation of judicial

¹⁹ D Quek Anderson, 'Counting the Cost of Enlarging the Role of ADR in Civil Justice' (2021) 4 Erasmus Law Review 257.

²⁰ See *ibid* 258; R Macdonald, 'Access to Justice in Canada Today: Scope, Scale and Ambitions', in J Bass, W Bogart and F Zemans (eds), *Access to Justice for a New Century: the Way Forward* (The Law Society of Upper Canada, 2005) 19.

²¹ X Kramer, A Biard, J Hoevenaars, E Themeli, *New Pathways to Civil Justice in Europe. Challenges of Access to Justice* (Springer 2021) v.

²² Hanyecz (n 7) 98.

²³ L Cadiet, 'La justice face aux défis du nombre et de la complexité' (2010) *Les Cahiers de la Justice* 13

²⁴ We used the following several sources: the Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union (Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, 2007, available at <https://e-justice.europa.eu/37/EN/costs?init=true>); the EU Justice Scoreboard (https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf); the CEPEJ Evaluation Report (<https://rm.coe.int/evaluation-report-part-1-english/16809fc058>); and the World Justice Project ranking (<https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf>). The work carried out by Christopher Hodges and his team at Oxford also provided useful data for analysis (Hodges, Vogenauer and Tulibacka (n 5)). The Jackson Report, which also conducted a comparative analysis of the costs of justice, is rich in information. We are especially grateful to Petra Butler as General Rapporteur of *The financial obstacles of the access to the judge* for the International Academy of Comparative Law 2022. See also, Reimann (ed) (n 4); P Gottwald (ed), *Litigation in England and Germany: Legal Professional Services, Key Features and Funding* (Bielefeld, Giesekeing, 2010). In the United States, see JS Kakalik and RL Ross, *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act* (Rand Corporation 1996).

²⁵ See M Gramatikov, M Barendrecht, J Verdonchot, 'Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology' (2011) *Hague Journal on the Rule of Law* 349

²⁶ Hodges, Vogenauer and Tulibacka (n 5) 5.

²⁷ A Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, (OUP 1999).

systems in Europe²⁸. Ten years ago, the European Commission released the first EU Justice Scoreboard. Since then, evaluations of judicial systems have multiplied and are now expected every year²⁹. The development of data on the cost and financing of justice is itself relevant to the issue of proportionate justice.³⁰ In particular, the creation of monitoring tools and data that provide governments with accurate information about courts and their budgetary needs serves as a basis for cost-based reforms.³¹

- 11 The economic analysis of access to justice and its evaluation has become a key issue that goes far beyond a theoretical analysis of the courts.³² G.P. Miller outlined that: 'As economic modelling becomes less abstract and more related to the real world, the results become muddier and more ambiguous but more accurate and descriptive of actual practices and institutions'.³³ However, the data are difficult to analyse. Hodges considers that '[a]ll these studies seem to reflect a general concern amongst (potential) litigants, practising lawyers, judges and governments that the costs of resolving a dispute through the courts are too high'.³⁴ Justice is perceived by most as too expensive, but how much does it cost and to whom?³⁵ And how can the cost of justice be compared when the budget and financing of justice varies from one state to another? If all legal systems adopt solutions that divide the costs of litigation between the government and the litigants, 'those solutions are not usually uniform and exceptions from court fees are provided sometimes based on the disputed matter and at other times on the profile of

²⁸ CEPEJ, *European Judicial Systems: Edition 2006* available at <https://www.coe.int/en/web/cepej>.

²⁹ See for the EU, *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union: Final Report*, Brussels, 2007, available at <https://e-justice.europa.eu/37/EN/costs>; all the reports from the CEPEJ available at <https://www.coe.int/en/web/cepej>; all the reports from the World Justice Project available at <https://worldjusticeproject.org/our-work/research-and-data/global-insights-access-justice-2019>.

³⁰ See F Ferrand, 'Faut-il s'adapter ? De l'avenir du procès civil : reddition ou résistance ?' (2019) *IJPL* 253.

³¹ Ex. Cour des comptes (France), *Approche méthodologique des coûts de la justice - Enquête sur la mesure de l'activité et l'allocation des moyens des juridictions judiciaires*, décembre 2018, Rapport "Approche méthodologique des coûts de la justice" ([ccomptes.fr](https://comptes.fr)); R Caponi, 'The Performance of the Italian Civil Justice System: An Empirical Assessment' (2016) *The Italian Law Journal* 15, see below para 35.

³² Economic analysis of civil procedure presents 'a legal claim as an economic asset and the litigation process as a device by which the claim is in effect "sold" by the plaintiff to the defendant. The defendant can be said to purchase the plaintiff's promise never to sue the defendant again on the same claim; the sale price is zero if the case is dismissed or the defendant obtains judgment at trial; otherwise, it is the amount of any judgment or settlement for the plaintiff', Miller (n 6) 303. See WM Landes, 'An Economic Analysis of the Courts' (1971) 14 *J.L. and Econ.* 61; JP Gould, 'The Economics of Legal Conflicts' (1973) 2 *J. Legal Stud.* 279; RA Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *J. Legal Stud.* 399; S Shavell, 'Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs' (1982) *J. Legal Stud.* 55; R Cooter and D Rubinfeld, 'Economic Analysis of Legal Disputes and Their Resolution' (1989) 27 *J. Econ. Lit.* 1067; A Marciano, G Ramello and H Schaefer, 'Foreword, special issue: economic analysis of litigations' (2020) 50 *Eur. J.L. and Econ.* 1.

³³ Miller (n 6) 304.

³⁴ Hodges, Vogenauer and Tulibacka, (n 5) 7.

³⁵ See Lee II and Willging (n 8) 765.

the litigants'.³⁶ Cost mapping should be related to cost allocation (pt III ch 5), public funding (pt III ch 6), and private funding (pt III ch 7).

- 12 A cost-based approach to litigation is useful when it comes to identifying the different costs of litigation, including the costs of the judicial system. It is however a starting point, and is not self-sufficient. According to M. Reimann, '[i]t is impossible to provide any reliable numbers at all because litigation costs in their systems depend entirely on the circumstances of the case so that generalizations are virtually impossible'.³⁷ As A. Dori observes in her critique of the EU Scoreboard's approach to measuring the costs of judicial services, 'the idiosyncrasies of the national systems and the heterogeneity of national judicial statics do affect how individual characteristics should be measured and compared across jurisdictions' and therefore it is challenging to measure access to justice accurately.³⁸ Crucially, the aim here is to identify rather than quantify costs.
- 13 In the *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union*:

the five main sources of costs in the Member States are as follows:

- court fees,
- lawyer's fees,
- bailiffs' fees (or, when there is no status such as bailiff in the Member State, the cost for the judgement enforcement),
- expert fees, and
- translation fees.

These are the main sources of costs although they are not systematic costs. Many experts point out that some of these costs are due only for specific proceedings. That is the case not only for translation and interpretation fees, but also for experts' and lawyers' fees.³⁹

³⁶ Pt III ch 5, R Feldbrin, *Cost Allocation*.

³⁷ Reimann (ed) (n 4) 23.

³⁸ A Dori, 'In Data We Trust? Quantifying the Costs of Adjudication in the EU Justice Scoreboard' (2021) *Erasmus Law Review* 297. See also Caponi (n 31) 17: 'One should be aware, of course, that using indicators is a somewhat risky business, as the researcher (especially the scholar in civil procedure working, so to speak, in a stand-alone position) has no control over its methodological premises. However, one has to "step in", as it were, as the use of indicators for evaluating the performance of judicial systems has rapidly spread since the beginning of the twenty-first century. While it is quite possible that cultural factors difficult to reduce to quantitative data are the single most important determinant of the performance of legal systems, quantitative analysis is helpful insofar as it highlights key areas in which the legal system is under-performing and indicates where resources should be allocated.'

³⁹ *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (2007) 50, available at <https://e-justice.europa.eu/37/EN/costs?init=true>.

14 According to Hodges:

Every jurisdiction has rules that regulate the economic consequences of litigation, ie, rules on litigation costs. The basic *elements* that make up quantifiable costs (in economic terms, the cost centres) are the same in every jurisdiction. There are three elements:

- a) Charges for use of the courts and their processes, including associated officers and bailiffs;
- b) Evidential costs for witnesses and experts;
- c) Lawyers' fees, where lawyers are involved, including the lawyers' cost of obtaining documentary evidence in common law jurisdictions.⁴⁰

15 Three cost centres are worthy of attention: courts costs (2.2), costs of evidence (2.3), and lawyers' fees (2.4). They are not fixed terms of art, and terms – costs, fees, and expenses – will be used.⁴¹ Other costs exist too, such as translation and transcription costs, interpreters, service costs, personal costs, and emotional costs⁴². These different residual costs further illustrates that the very identification of costs is tricky. Quantification, meanwhile, is even more difficult. Strange as it may seem, it is difficult to say whether litigation is too expensive and what a fair price would be. As outlined by E. Lee II and Th. Willging, 'without a normative standard, it is impossible to say, in any meaningful way, that litigation is too expensive. [...] Nevertheless, there is a desire to find general solutions to the as-yet-undefined problem of too-expensive litigation'⁴³ (2.5).

2.2 Court Costs

16 Court costs are 'fees for using state power to adjudicate disputes'⁴⁴ and these exist in almost all systems.⁴⁵ In Europe, France and Luxembourg are the only two Member States in which this notion does not exist. In Spain, court fees were reintroduced in 2012 but

⁴⁰ Hodges, Vogenauer and Tulibacka (n 5) 12

⁴¹ See Reimann (ed) (n 4) 8.

⁴² In their research, M Barendrecht, J Mulder and I Giesen 'explore the possibilities of a framework in which the costs and quality of access to justice can be determined and where costs are not merely measured in terms of money, but also in terms of time and emotional costs', M Barendrecht, J Mulder and I Giesen, 'How to Measure the Price and Quality of Access to Justice?' (November 2006), available at SSRN: <https://ssrn.com/abstract=949209>

⁴³ E Lee II and Th Willging (n 8) 768.

⁴⁴ J Peysner, 'England and Wales', in Hodges, Vogenauer and Tulibacka (n 5) 289.

⁴⁵ This paragraph is a synthesis of the *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (n 39) 55 to 74.

limited by a decision of the Constitutional Court to legal persons.⁴⁶ The amount can vary dramatically from one state to another, and even from one type of litigation to another.

For a \$100,000 lawsuit, Canadian or US-American courts charge at most a few hundred dollars. File the same action in a Brazilian, Greek or Russian court, and you come closer to paying \$1,000. Take it to a Czech, German or Dutch tribunal, and you will need to put down \$3,000–6,000. Bring the case in Switzerland, and court costs will amount to over \$10,000.⁴⁷

- 17 Most of the time, court fees are calculated according to the amount in dispute and the nature of the dispute.⁴⁸ In the US, there is a flat fee.⁴⁹ In most states, the fee must be paid when the application is registered by the court or before it is filed.⁵⁰ In some states, fees may be paid afterwards. This is the case in Finland, for example, since the amount of fees is calculated according to the stage at which the proceedings ended.

In some systems, like Germany, the basic court fee covers virtually the whole proceedings at the particular level, while in others, separate fees are charged at successive stages of the litigation or, as in France and Belgium, for various acts of officials, such as filing, service of process, stamping of documents, etc.⁵¹

- 18 Court fees are usually paid to the state or directly to the court. In most states, exemptions are possible and are usually based on the income of the person. Meanwhile, in some states, exemptions are made depending on the nature of the case.⁵²
- 19 'The amount of revenues generating from court fees varies significantly among jurisdictions. Such variations depend on several factors, including the fee structures, the

⁴⁶ STC, 140/2016, <https://hj.tribunalconstitucional.es/es/Resolucion/Show/25064>.

⁴⁷ Reimann (ed) (n 4) 24.

⁴⁸ 'A court fee is payable (a) when the pre-trial questionnaire is filed or the trial date fixed (£100); and (b) upon listing (the "hearing fee"): £1,000 for a multi-track track case; £500 for the fast track and between £25 and £300 for a small claim (depending upon the quantum of damages claimed)' (LJ Jackson, *Review of Civil Litigation Costs: Preliminary Report*, (vol 2, May 2009) 446).

⁴⁹ Reimann (ed) (n 4) 23 : 'This has the effect, inter alia, that there is no penalty in terms of court costs for filing a grossly inflated claim which explains, in part, why US plaintiffs often file million dollar lawsuits where parties in other countries would be much more careful not to overstate their claim.'

⁵⁰ In Russia, there is a legally established cap on the stamp duty for filing a claim. For the arbitrazh (commercial) courts it constitutes RUB 200,000 (approximately USD 2,700), while for the courts of general jurisdiction and magistrates' courts it is 60,000 RUB (approximately USD 800). A minimum is also established for pecuniary claims. A flat fee is established for pecuniary claims that are not subject to evaluation, non-pecuniary claims, for appeal stages and are very low, less than USD 100.

⁵¹ Reimann (ed) (n 4) 23.

⁵² In Russia it depends, more broadly, on the status of the party, category of case, etc. In certain cases, state bodies, disabled persons, veterans, heroes are exempted. Also claimants in labour cases, alimony cases, adoption, consumer cases, etc. are generally exempted for claims that are less than 1,000,000 RUB (approximately USD 13,350). It is also possible to get a deferral or instalment in certain cases.

number of cases brought before a court, the value of the disputed claims'.⁵³ CEPEJ data reveal that state revenues generated by court fees vary significantly among jurisdictions, roughly from less than 1% to up to 50% of the total budget allocated to the judicial system.⁵⁴ Such discrepancies are not easy to explain. Data show that court fees are higher in systems where the judge plays a more active role (eg, Germany) than in systems characterised by a more adversarial procedure in which parties are responsible for collecting evidence (eg, the US)⁵⁵. But this explanation is not convincing, as in France, for instance, a judge takes a very active role and there are almost no court fees, unlike in the UK where court fees are relatively expensive.

Thus, other factors are at work as well. In particular, jurisdictions pursue different policies as to who should pay for the civil justice system. Many countries, such as Germany and Switzerland, but also England and Wales, apparently expect mainly the litigants to pay for using the courts; these systems charge amounts that cover at least a significant part of the civil courts' operating budget – like they would for renting out a government owned facility.⁵⁶

- 20 States spend very different proportions of their budgets on the judiciary, and there are also considerable differences in the proportion of these costs to be borne by the parties as court fees.

According to an evaluation of the European Commission for the Efficiency of Justice (CEPEJ) based on 2018 data, in Germany, the court fees and taxes cover 40 % of the judicial system budget, which is a significant part, considering that the European median is only 13 %.⁵⁷

- 21 Likewise, there are significant differences between countries when it comes to share paid in the form of tax and the share paid in the form of court costs. Political and cultural considerations are also very important. In addition, the concept of full-cost pricing means that litigants are obliged to pay for the court service they receive. However, in some countries, 'there is a strong view that it is the function of the State to provide and fund the machinery for dispute resolution'.⁵⁸ Meanwhile, answers to the question of whether the adjudication of disputes should be paid by litigants or by taxpayers 'are influenced by the political culture and by the approach that the society and its ruling

⁵³ A Dori and V Richard, 'Litigation Costs and Procedural Cultures – New Avenues For Research in Procedural Law' in B Hess and X E Kramer (eds), *From common rules to best practices in European Civil Procedure* (Nomos, 2017) 311.

⁵⁴ Ibid 314.

⁵⁵ See, R Emerson, 'Judges as Guardian Angels: the German Practice of Hints and Feedback' (2015) *Vanderbilt Journal of Transnational Law* 707.

⁵⁶ Reimann (ed) (n 4) 25.

⁵⁷ AK Mayhofer and B Gsell, 'The Financial Obstacles of the Access to the Judge', to be published, 227.

⁵⁸ Jackson (n 48) 70.

Government are willing to endorse while balancing the access to justice, on one hand, and the budget availability, on the other'.⁵⁹

The civil courts in England and Wales are predominantly self-financing and, to that end, most courts are largely funded by the fees paid by court users. The cost of operating the civil and family courts in England and Wales is currently said to be approximately £650 million per annum [costs include judicial salaries, IT costs and accommodation expenditure]. Court fees fund approximately 80% of this cost, while the remaining 20% is financed by the taxpayer (through the Ministry of Justice budget). The sums paid by the taxpayer are used to 'top up' any deficits in the fee income arising as a result of either: (a) fee income lost as a result of fee remissions; or (b) situations where the fees charged do not cover the actual costs involved (e.g. civil proceedings in the magistrates' courts). In the recent past there have been occasions when the civil justice system (if viewed in isolation from the family courts) has generated a surplus.⁶⁰

22 As underlined by Jackson:

[t]he setting of court fees is subject to various policy considerations. In particular, it is intended that court fees should be set at a level which ensures that the fees cover the full cost of the court service they relate to. This policy seeks to ensure that, as far as possible, court users pay in full for the service they receive. This is known as 'full-cost pricing'. It is a further policy consideration that, in order to safeguard access to justice, a system of fee remissions (financed by the taxpayer) should remain in place.⁶¹

23 There has been some strong criticism against cuts made to public funding in the UK.⁶² In the case of *Coventry v Lawrence*, the Supreme Court claimed that it would be impossible to deliver effective access to justice without substantial increases in public funding.⁶³ Many other systems, such as Canada, Japan or France, provide access to civil courts, essentially as a public-tax-funded service.

The plaintiff's payments represent a contribution (or a reimbursement) for the use of State courts that is paid in order to provide the resources necessary for the administration of justice. It is difficult, however, to assess whether litigants' payments equalise the costs for the use of judicial services in each specific dispute. On an aggregate basis, some notable exceptions apart (ie, Austria), States normally offer access to courts at rates that do not match the actual costs of the judicial

⁵⁹ Dori and Richard (n 53) 324. See N Andrews, 'Fundamentals of costs law: loser responsibility, access to justice, and procedural discipline' (2014) 19 Uniform Law Review 295.

⁶⁰ Jackson (n 48) 63.

⁶¹ Ibid.

⁶² See A Higgins, 'The Costs of Civil Justice and Who Pays?' (2017) 37 Oxford J. Legal Stud. 687.

⁶³ *Coventry v Lawrence*, Case 12/0076 (UKSC 50), Judgment 22 July 2015 (No 3).

system. Hence, another view of the cathedral is that court fees are a device that affects the demand of judicial services through variations in the price of access to justice.⁶⁴

- 24 Between systems where taxpayers subsidise everything (France and Luxembourg) and those where users cover everything (Austria), there are various combinations where both sides bear some costs.

2.3 Costs of Taking of Evidence

- 25 The costs of taking of evidence require separate consideration. In most jurisdictions, this is done during the trial (2.3.1), but in others it is done at least partly beforehand. Disclosure and e-disclosure can be very expensive (2.3.2). In matters of evidence and thus evidence costs, the distinction between common and civil law systems is particularly important and within common law systems, the United States are very specific.⁶⁵

In common law jurisdictions in the English tradition, the expenses of evidence taking are borne by the loser as well, albeit often only in part. As in civil law proceedings, the impact of this rule is also softened by the fact that a large chunk of these expenses is already covered: now, fact gathering is largely performed by the parties' attorneys so that much of the expense of evidence taking is already included in the lawyer fees. Thus, lawyer fee shifting already includes much (if not most) of evidence cost shifting.⁶⁶

2.3.1 Experts and Witness Statements

- 26 'The creation and allocation of evidence costs is deeply related to the mechanism that the State has selected for gathering privately held information that is crucial for resolving the dispute'.⁶⁷ Differences between inquisitorial or adversarial type of procedure is relevant but make the comparison difficult.⁶⁸ In most civil law countries, the procedure by which an expert is appointed and remunerated corresponds to the definition of an inquisitorial procedure.

The French courts will appoint an expert where it is considered appropriate, ie, where such evidence is needed to assist the court. The cost of court-appointed experts

⁶⁴ Dori and Richard (n 53) 312.

⁶⁵ See M. Adams, 'The conflicts of jurisdictions – an economic analysis of pre-trial discovery, fact gathering and cost shifting rules in the United States and Germany' (1995) *European Review of Private Law* 53

⁶⁶ Reimann (ed) (n 4) 32.

⁶⁷ Dori and Richard (n 53) 313.

⁶⁸ Y Oytana, 'The Cost of Judicial Expertise in the Inquisitorial and Adversarial Procedures' (2016) 67 *Revue économique* 5.

forms part of the *depens*, and will be ultimately payable by the unsuccessful party. It is open to parties to appoint their own experts, if they wish. However, successful parties will recover at best a very modest *frais* in respect of their own legal costs and expert fees.⁶⁹

- 27 The situation is similar in Germany. In civil law countries, the amount of the expert's remuneration is decided by the judge with a minimum of proportionality. The position of the expert is however different in common law countries where experts are appointed by the parties. In the case of the expert witness in common law systems, the judge does not intervene in the determination of the remuneration of the expert. The cost of expertise is agreed through private negotiation between the relevant party and the expert. The amounts paid to expert witnesses therefore differ substantially between civil and common law systems.⁷⁰ In France, the average cost of expertise is EUR 2,174, but the amount varies extremely from EUR 30 to over EUR 150,000.⁷¹ In Germany, the Judicial Remuneration and Compensation Act (Justizvergütungs- und -Entschädigungsgesetz, JVEG) regulates, *inter alia*, the remuneration of experts appointed by the court.⁷² Here, the JVEG sets out fee groups with associated hourly rates for the remuneration of experts. Fee groups are assigned based on a list of subject areas. In December 2017, the Federal Ministry of Justice and Consumer Protection commissioned the INTERVAL GmbH to conduct a market analysis of the Judicial Remuneration and Compensation Act.⁷³ In the course of the evaluation, a mean hourly rate in the form of a median was determined for each field with at least 25 respondents. This hourly rate ranges between EUR 85 and EUR 162, depending on the field.⁷⁴ Even though it is difficult to obtain figures for expert witnesses as their remuneration is freely chosen between the expert and the party, it would appear that the cost is higher when experts are appointed by the parties than when experts are appointed by the courts.⁷⁵
- 28 However, there is a move being made towards convergence of legislation on expert witnesses and judicial expertise. For example, the Quebec Code of Civil Procedure encourages the parties to agree to proceed by way of joint expert evidence, outlined as follows: 'The Court may also impose joint expert evidence upon the parties if it is

⁶⁹ Jackson (n 48) 572.

⁷⁰ See A Babitsky et al., *National Guide to Expert Witness Fees and Billing Procedures*, Falmouth (Mass.), 2009 and S Arnault and P Krief, « Le coût des expertises », Rapport technique, Ministère de la Justice 2003, quoted by Oytana (n 68) 5.

⁷¹ https://www.justice.gouv.fr/art_pix/infostat66.pdf.

⁷² §1 (1) Nr. 1 JVEG.

⁷³ see S Ekert and L Poel, 'Marktanalyse zum Justizvergütungs- und -entschädigungsgesetz – die Vergütung von Sachverständigen, Dolmetscherinnen / Dolmetschern und Übersetzerinnen / Übersetzern', available at <https://www.interval-berlin.de/publikationen/>.

⁷⁴ Ibid.

⁷⁵ <https://blog.seakexperts.com/expert-witness-fees-how-much-does-an-expert-witness-cost/>; WP Webster, 'Expert Witness Fees in Federal Diversity Cases' (1993) St. Mary's Law Journal 463.

necessary to do so to uphold the principle of proportionality'.⁷⁶ In all systems, there is also an emerging requirement or principle of proportionality in matters of expertise.⁷⁷ To keep the example of the Quebec Code of Civil Procedure, it requires that the parties indicate in their case protocol whether they intend to seek one or more expert opinions, specifying the nature of such opinions and their related foreseeable costs. In the United Kingdom, since the Jackson Report was published, courts are invited to make greater use of their existing power to control expert evidence, by identifying the issues which experts should address at an early stage with the clear purpose of saving costs.⁷⁸

- 29 'Costs generated by witnesses do not raise significant issues, since their amount is usually low'.⁷⁹ The majority of EU Member States consider that the witness is entitled to compensation covering costs, expenses and loss of income incurred in carrying out their task.⁸⁰ Travel expenses are generally taken into account. In addition, the witness's meals and accommodation expenses are covered. Time spent in court is also compensated and most Member States also cover the witness's loss of salary. Meanwhile, witness compensation in certain jurisdictions is based on a scale. In general, the party who asks for the witness has to bear the cost but, usually, the winning party is reimbursed for all costs relating to witnesses. An exception in this regard is Denmark where witness compensation is borne by the court, taken out of the state budget.

2.3.2 Pre-Trial Evidence (Discovery)

In common law systems parties are the responsible for the fact-gathering - a function that is usually delegated to their attorneys. Hence, lawyers' fees include evidence expenses that are a condition that can occasionally induce lawyers, if paid by hour, to indulge in excessive pre-trial discovery.⁸¹

- 30 The expense of disclosure has long been a source of concern for the litigants. In the United States, discovery is the major driver of costs in litigation in both federal and state courts.⁸²

⁷⁶ A Teasdale and D Naud, 'Quebec's new Code of Civil Procedure and expert evidence: five key changes', *Insight, Clyde and Co*, November 2015, available at <https://edoctrine.caij.qc.ca/publications-cabinets/clyde/2015/a91901/en/pc-a91930>.

⁷⁷ See below para 54.

⁷⁸ See *Focusing expert evidence and controlling costs* (11/11/2011) LJ Jackson, available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-lecture-focusing-expert-evidence-controlling-costs.pdf>, See below para 54.

⁷⁹ Dori and Richard (n 53) 313.

⁸⁰ This paragraph is a synthesis of the *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (n 39) 207 et seq.

⁸¹ Dori and Richard (n 53) 313.

⁸² See *inter alia*, M Dawson and B Kelly, 'The Next Generation: Upgrading Proportionality for a New Paradigm' (2015) *Def. Counsel Journal* 434.

Witnesses from each party are ‘deposed’ (ie; cross-examined about the available documentation) and their answers are transcribed for future reference by the court. In class actions and other substantial litigation, the deposition process can generate massive costs. The advent of electronic communication and e-disclosure has greatly increased the costs of discovery. Rule 26 of the Federal Court Rules governs discovery in the Federal Courts.⁸³

31 As is the case in the United States, courts in Australia also have restricted discovery. ‘This appears to be reducing litigation costs and generally meeting with the approval of court users’.⁸⁴

32 According to LJ Jackson:

in larger actions, disclosure of documents is one of the principal drivers of costs. It is not only the initial disclosure exercise which can be massively expensive, but also the sequelae. Witnesses, experts, solicitors, and counsel all feel the need to read the documents disclosed on both sides and then to comment upon them or to deal with their implications.⁸⁵

33 The costs of discovery (including e-discovery) fall upon the party who is disclosing. In the United Kingdom, according to LJ Jackson, disclosure appears to work ‘reasonably well’ in the majority of cases, but

disclosure appears to cause the most problems in the larger multi-track cases. The facts are often the subject of extensive dispute, and may be complicated or technical. In *Digicel*, the often-cited case illustrating the disastrous cost consequences of a mismanaged disclosure process, the cost of the initial disclosure exercise (before it was ordered to be re-done) was over £2 million.⁸⁶

34 Jackson adds:

[t]he costs incurred as a result of the disclosure process are not limited to those incurred in the initial review by the disclosing party and a review by the other side. The number of documents disclosed has a consequential effect on the rest of the process. Witness statements and cross-examination are longer as the witnesses feel the need to comment on the documents. The same applies to the experts. Counsel also look at the additional documents and deal with them in their written submissions.⁸⁷

⁸³ Jackson (n 48) 607.

⁸⁴ See Jackson (n 48), on the duty to the parties to limit costs of evidence, see below para 53.

⁸⁵ Ibid 373.

⁸⁶ Ibid 393.

⁸⁷ Ibid 394.

35 In continental Europe, no disclosure is required. In Germany:

[o]nly if facts are controverted will relevant documents need to be lodged at court. Following this, the court may order disclosure of specific documents if they seem likely to be pertinent. In France, again, there is generally no disclosure although a party may make a request to the court for a specific document if the request is legitimate and necessary. The position is similar in the Netherlands. This approach seems to be regarded as satisfactory by court users and lawyers in those jurisdictions.⁸⁸

36 From the French perspective, disclosure is regarded as expensive, time consuming, and creating a risk of exposure of confidential information and trade secrets.⁸⁹

37 To conclude on evidence costs with M Reinmann:

all civil law systems impose the costs of evidence taking on the loser. In most cases, however, the impact is relatively slight for two reasons. First, since fact gathering is largely performed, or at least closely directed, by the judge, the court does most of the work, such as ordering documents, interviewing witnesses, inspecting sites, etc.; and this judicial work is already paid for in form of the – often very substantial – court costs. In other words, court cost shifting already includes much of the expenses of evidence taking. Second, the additional and separate expenses of evidence are usually low because there is no common-law style discovery. In most cases, they only consist of fees and compensation for witnesses and perhaps the cost of copying documents. The amounts involved here are usually small and do not constitute a significant item in the overall litigation bill. The situation changes to some extent, however, if expert witnesses get involved. In civil law proceedings, expert witnesses are usually appointed by the court, and their fee will also ultimately be borne by the losing party. While expert witnesses are often paid according to an official schedule which remains below market rate, they can still be fairly expensive and thus have an impact on overall costs.⁹⁰

38 Following M. Reimann, evidence costs are higher in common law systems than in their civil law counterparts.

This is so mainly for three reasons. First, evidence gathering by the parties' attorneys is more expensive since (common law) attorneys charge more than (civil law) judges. Second, during common law-style discovery, evidence is often taken by both sides (and thus twice) rather than only once by a (civil law) judge. Third, experts tend to cost more in common law jurisdictions because they are hired by the parties and thus

⁸⁸ Ibid 397.

⁸⁹ Ibid 571.

⁹⁰ Reimann (ed) (n 4) 31.

at market rates, and because each side usually hires its own instead of relying on just one appointed by the court. As a result, the expenses incurred by evidence taking usually constitute a larger share of the total litigation bill in common law than in civil law systems – which makes shifting these expenses to the loser more crucial.⁹¹

39 Meanwhile, in the common law family

[t]he United States approach to the expenses of evidence taking is sui generis for two reasons. First, the majority of fact gathering expenses are not shifted to the loser. These expenses consist of three major items: the attorney fees generated by the discovery process – which are (under the general US American rule) borne by each party regardless of outcome; the costs of their expert witnesses – which are also not shifted; and ‘costs other than attorney fees’ – which are borne by the loser but comprise merely a variety of minor fees for (non-expert) witnesses, court stenographers, and copying.⁹²

40 In the United States, the cost of discovery or e-discovery increase dramatically the cost of legal services. Nevertheless, it is important to underline that discovery is not the only factor increasing the cost of litigation.⁹³

2.4 Lawyers’ Fees

41 Lawyer’ fees represent the lion’s share of legal costs.⁹⁴

It is clear that any complete answer to the question ‘are these costs reasonable?’ must look at how those costs are generated and what is being paid for. Some of this money ends up in the pockets of lawyers – but how much? This is not a simple calculation for the court to make when faced with the task of assessing costs in a given case. Quite apart from the fact that it usually has neither the time nor the data required to do so, historically it has not been the function of the court to assess costs between the parties by reference to the relative earnings of the lawyers in the case. Judging whether the amounts awarded by way of costs filtering down to the lawyers is reasonable or not is no easier. Nevertheless a comprehensive review of costs in civil litigation demands an enquiry of this sort. It is necessary in such a review to ask and answer the question ‘What do lawyers earn?’.⁹⁵

⁹¹ Ibid 32.

⁹² Ibid.

⁹³ E Lee II, ‘Law without Lawyers: Access to Civil Justice and the Cost of Legal Services’ (2015) University of Miami Law Review 499.

⁹⁴ Reimann (ed) (n 4) 25; G Hadfield, ‘The Price of Law: How the Market for Lawyers Distorts the Justice System’ (2000) Michigan Law Review 953.

⁹⁵ Jackson (n 48) 72.

42 However, ‘determining the amount of lawyers’ fees is a complex business’.⁹⁶ Plus:

lawyers’ costs are not predictable in most jurisdictions. This lack of predictability applies both in relation to the costs that should be paid by a client to his lawyer and to the costs that a winning party might recover from the losing party. Lawyers’ costs are only truly predictable where a straightforward tariff applies. Such (double) predictability occurs in systems like Germany.⁹⁷

43 In Germany, lawyers’ fees are regulated by the German Lawyers’ Remuneration Act (Rechtsanwaltsvergütungsgesetz)(RVG). The RVG stipulates that the fees are calculated according to the value and type of claim before the court, albeit higher fees can be agreed with the client.⁹⁸

44 A number of comparative studies on lawyers’ fees have already been published, many of which have focused on the question of whether parties can agree on contingency fees or a percentage of the amount recovered.⁹⁹ The data available are presented on an hourly basis (even if not all lawyers charge on an hourly basis) and

they can vary significantly from €14 an hour (in New Zealand) to upwards of €2,000 per hour (in the Netherlands). In countries where hourly rates were provided, it appears average hourly rates of attorneys tend to sit somewhere between €80 and €300 per hour. Factors that make such fees so variable include the experience of the lawyer involved, their reputation and whether they are employed in a law firm (and if so, the size of the firm).¹⁰⁰

45 The average hourly billable rate for lawyers in the US has been on the rise in recent years and had hit USD 300 by the start of 2021.¹⁰¹ The US rates are very specific, first because of the so-called ‘American Rule’ (according to which each party pays its own legal costs) and second because of the contingency fees. In the US, Rule 1.5 of the ABA Rules states that a lawyer shall not charge ‘an unreasonable fee’ and lists eight factors to guide the determination of ‘reasonableness’.¹⁰²

⁹⁶ Reimann (ed) (n 4) 25.

⁹⁷ Hodges, Vogenauer and Tulibacka (n 5) 35.

⁹⁸ See B Hess and R Huebner, ‘National Report for Germany’, in Reimann (ed) (n 4).

⁹⁹ M Doriât-Duban, Y Gabuthy and E Lambert, ‘Actions en justice et rémunération des avocats : une revue de la littérature’(2020) *Revue économique* 557.

¹⁰⁰ P Butler, ‘The financial obstacles of the access to the judge’ (2022) *General Report for the International Academy of Comparative Law* 12.

¹⁰¹ <https://www.law.com/nationallawjournal/2021/06/23/the-nlj-500-our-2021-survey-of-the-nations-largest-law-firms/>; <https://www.clio.com/resources/legal-trends/>

¹⁰² The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

- 46 In most jurisdictions, excessive lawyers' fees seem to be considered a major problem by litigants, with some states opting to set minimum fees in order to prevent price competition between lawyers. In many EU Member States, scales have been established, but they are generally not binding. In France, there is no publicly available information on fees charged by lawyers. By contrast, in Germany:

it is common for lawyers in litigious matters to be remunerated at a rate equal to that recoverable under the applicable costs scale. It is a relatively new phenomenon in Germany for lawyers' fees to be charged on the basis of hourly rates, leading to costs being payable in an amount exceeding the scale amount. Broadly speaking, it is medium to large size law firms who will usually charge clients on such a basis for commercial disputes. German lawyers in smaller disputes and those involving individuals will often charge their client according to the applicable scale.¹⁰³

- 47 According to a study by the Soldan Institute quoted by LJ Jackson:

hourly rates are charged the average hourly rate for German lawyers is €182.00, but figures display a wide range of hourly fees depending on the size of the law firm, the size of the firm's place of business, the age and experience of the lawyer dealing with the case and his or her degree of specialisation. In larger law firms operating an international business, fees are much higher.¹⁰⁴

- 48 It would be difficult to cover the cost of litigation and especially the lawyers' fees without addressing the question of allocation of financial risks.

The analysis of the distribution of financial risks on the demand side of the market for dispute settlement services should distinguish between the allocation of costs between the disputants (*inter partes*), on the one hand, and the 'hidden' subsidisation among all users of the system, on the other.¹⁰⁵

- 49 Further ahead, Chapter 5 is dedicated to cost allocation. However, before that, it is important to note that cost shifting is at the heart of many reforms and discussions.¹⁰⁶

-
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.

¹⁰³ Jackson (n 48) 561.

¹⁰⁴ Ibid 562.

¹⁰⁵ Dori and Richard (n 53) 317.

¹⁰⁶ Ch Helmers, 'The Effect of Fee Shifting on Litigation' (2021) 23 American Law and Economics Review 56.

Apart from the allocation of costs (or not) on the losing party¹⁰⁷, the mapping of costs reveals cross-subsidisation between all users of the judicial system and taxpayers.

The funding of judicial budgets reflects - at least to some extent - how societies and Governments conceptualise the offer of judicial services (publicly- vs. privately-funded services). The more the system is financed by the demand side, the less access to justice is perceived - from an economic point of view - as a public good.¹⁰⁸

2.5 Does Civil Justice Cost Too Much?¹⁰⁹

- 50 As stated in the *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union*, making a general assessment of the transparency of legal costs in each state is difficult because these costs have different origins.¹¹⁰ Court fees are often the most transparent among legal costs because cost levels are determined by regulation. However, it is difficult for the litigant to access, and even more difficult to understand, this information. Indeed, this legislation is sometimes scattered across many texts or is very technically drafted. Meanwhile, the legal costs that tend to be less transparent in most states are lawyers' fees and expert fees. Lawyers' fees are generally agreed between the litigant and the lawyer at the beginning of a case. However, these may vary according to numerous parameters such as the complexity of the case and/or its duration. Largely due to the impossibility of predicting in advance the duration and the difficulties inherent in any dispute, lawyers' fees are rarely published. When an expert intervenes in proceedings, the corresponding costs are also difficult to determine. Other sources of costs vary from one state to another, and it is difficult to identify a common trend.¹¹¹
- 51 The costs charged as court fees, the hourly rates charged by lawyers, or the costs of evidence do not provide us with the full picture in terms of litigation costs for either the parties or the state. It is indeed very difficult to draw any conclusion and even to demonstrate that litigation is unreasonably expensive.¹¹² Purely economic analysis of the cost of litigation does not offer a clear picture of the 'efficiency' of a justice system. Indeed, as shown by Geoffrey Miller 'any litigation system presents a trade-off between the costs of error - that is substance - and the costs of procedure'.¹¹³ Moreover, the perception of cost may differ according to the parties and the interests involved. 'The same reported costs could be both too high and too low. Costs that would seem

¹⁰⁷ Except in the United States, in most of the jurisdictions canvassed here, losing parties bear at least some, if not a large proportion, of litigation costs in civil cases, see Butler (n 100).

¹⁰⁸ Dori and Richard (n 53) 318.

¹⁰⁹ C Silver, 'Does Civil Justice Cost Too Much?' (2002) 80 Texas L.R. 2073.

¹¹⁰ *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* (n 39) 55.

¹¹¹ Ibid.

¹¹² In a study, though limited to American law, Charles Silver, in reviewing empirical studies on the costs of civil justice, finds it impossible to demonstrate that the justice system as a whole is too costly, Silver (n 109).

¹¹³ GP Miller, 'On the Costs of Civil Justice' (2002) 80 Texas L.R. 2116.

negligible to a corporate general counsel can present serious access to justice issues to low- and moderate-income [citizen]'.¹¹⁴ In addition, the costs of litigation will differ depending on the nature of the dispute and the type of litigation. Moreover, there are 'very different sets of problems related to the cost of litigation' depending on who the parties are and what economic interests are at stake.¹¹⁵

- 52 The cost as well as the '*juste prix*' of litigation are very difficult to measure. But if we examine several surveys on litigation costs, especially the recent report titled '*The financial obstacles of the access to the judge*' for the International Academy of Comparative Law it seems very clear that the cost of litigation is beyond what the ordinary citizen can afford.¹¹⁶

Where available, figures showing the average annual income of citizens indicates that [lawyers'] fees are difficult for the average citizen to pay. The average income fell somewhere between €11,345 per year (in Croatia) to €50,160 per year (in China). Several countries reported an average income for citizens of between €22,000 and €32,000 per year.¹¹⁷ Even if a citizen earns €27,000 per year, this equates to just under €13 per hour of work. That hourly average income makes it almost impossible to pay the hourly fee of an attorney.¹¹⁸

- 53 Another valuable insight from this report is that proportionality decreases as the value increases. In this regard, all of the data indicate 'a distinct lack of proportionality as between the value of claims and the costs that litigants incur in prosecuting and defending those claims. This discrepancy was especially noteworthy at the lower end of the range of claim values'.¹¹⁹ For instance, in Germany, 'in case of a 100 EUR claim, the costs exceed the dispute value by more than four times whereas in case of a 10,000 EUR claim, costs are less than half of the dispute value'.¹²⁰ It seems that litigation only becomes 'profitable' or at least 'proportional' for disputes with a high value of around EUR 100,000. Pertinently, the design of low-cost procedures for small claims is intended to address this concern.

¹¹⁴ Lee II (n 93) 502.

¹¹⁵ Ibid 503.

¹¹⁶ The International Bar Association recently labelled this group 'the forgotten middle' (A McNee *Legal Expenses Insurance and Access to Justice* (International Bar Association, London, 2019) 9). They are those 'who lack the disposable income to spend on services from a private provider at will, but earn too much money or have too many assets to qualify for legal aid or pro bono assistance. (ibid.) The access to justice concern primarily exists in relation to this group', Butler (n 100) 12.

¹¹⁷ Austria (EUR22,640 per year), Canada (EUR27,911.52 per year), Germany (EUR25,056 per year), Italy (EUR32,000), New Zealand (EUR24,544 per year), Singapore (EUR23,064 disposable income per year), and Ukraine (EUR26,480 per year).

¹¹⁸ In countries where hourly rates were provided, it appears that the average hourly rates of attorneys tend to sit somewhere between EUR80 and EUR300 per hour, Butler (n 100) 12.

¹¹⁹ Hanycz, (n 7) 106.

¹²⁰ Butler (n 100).

- 54 Even if it is difficult to provide an accurate assessment of costs, the general perception is that costs are unreasonably high for both states and parties. This has led some countries to adopt a cost-efficient approach to access to justice (3), and to implement a duty to limit the costs of litigation (4). Proportionality has become a key notion for both policymakers and parties. The significance of litigation costs is not the same for service providers and users of the justice system, but there is a common trend among judicial systems towards proportionality and to offer an affordable justice proportionate to the case (ie, proportionality as a policy) and to invite parties to limit the costs of litigation (ie, proportionality as a principle).

[T]he way litigation costs are regulated at a national level reflects also aspects of the historical context and the legal culture of a State and ultimately mirrors the social, political and economic values that underpin a society. Rules on litigation costs reveal governmental choices in policymaking, and they inevitably show an implicit or explicit preference as to the addressees of judicial services. For instance, the more expensive judicial services are, the more they are reserved to wealthier litigants. In such cases, policymakers will try to find alternative venues to satisfy the need for justice for occasional and small litigants, e.g. by removing mandatory representation by lawyers, introducing Alternative Dispute Resolution mechanisms such as mediation.¹²¹

3 TOWARDS A POLICY OF PROPORTIONALITY: ACCESS TO JUSTICE AT PROPORTIONATE COST¹²²

- 55 In response to the costs of litigation, policymakers have focused on procedural and judicial efficiency ‘culminating in significant civil justice reforms aimed solely at enhancing efficiency. The discourse that has developed around this issue has reinforced the tacit connections between judicial/procedural efficiency and meaningful access to civil justice’.¹²³ ‘Modernisation’, ‘efficiency’, ‘simplification’, ‘increasing the trust’ ... policymakers want to make civil proceedings more efficient. Everywhere ‘the idea of possible costs saving attracts a lot of interest’.¹²⁴ There is a clear trend around the world of cost-based reforms to promote justice at proportionate cost. ‘From the perspective of the government as the supplier of civil justice, measures are undertaken to ‘economise’ civil procedure, in other words to reduce costs and to generally make civil procedures more efficient’.¹²⁵ A policy of proportionality entails adapting the offer made

¹²¹ Dori and Richard (n 53) 310.

¹²² See the objective of the Jackson Report: ‘to carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost’ (n 48) 3.

¹²³ Hanycz (n 7) 99.

¹²⁴ Hau, ‘Recent German Reforms of Civil Procedure’, in *Reforms of Civil Procedure in German and Norway* (Mohr Siebeck, 2011) 67.

¹²⁵ Kramer and Kakiuchi, ‘Austerity in Civil Procedure and the Role of Simplified Procedures’ (2015) 4 *Erasmus Law Review* 143.

in dispute settlement mechanisms to the size of the dispute (3.1), while access to justice tends to mean accessible and affordable justice (3.2).

3.1 Cost-Efficient Reforms of the Civil Justice Systems

56 In 1999, the Woolf reforms in the United Kingdom were the first cost-based reforms.

In chapter 7 of his *'Final Report on Access to Justice'* (July 1996) Lord Woolf reiterated the significance of the costs problem. He identified three factors in particular:

- (i) Litigation is so expensive that the majority of the public cannot afford it without financial assistance;
- (ii) The costs incurred in the course of litigation are out of proportion to the issues involved; and
- (iii) The costs are uncertain in amount so that the parties cannot predict their ultimate liability in the event that they lose.

Lord Woolf then explained that the problem of costs would be tackled by his case management reforms and by the making of more focused costs orders. After the Woolf reforms all the work done by Lord Jackson consisted in "reforming the rules of procedure in an effort to reduce litigation costs."¹²⁶

57 The terms of reference for the Jackson Report included a requirement to: 'to make recommendations in order to promote access to justice at proportionate cost.' Since then, the trend has become widespread among all policymakers. Zuckerman already reported 20 years ago that civil justice reforms aimed to reduce costs and delays on the understanding that 'the resources devoted to resolving a dispute should be proportionate to the interests involved and that systemwide resources should be allocated fairly across all disputes'.¹²⁷

58 'As in the United Kingdom, [...] civil justice reforms are premised on the proportionality principle: they seek to achieve procedure that is proportionate to the claim value and the means of the parties, without unduly compromising justice'.¹²⁸ Austerity has increased the need for proportionality and has accelerated cost-based reforms in the

¹²⁶ LJ Jackson, 'Was It All Worth It?', Lecture to the Cambridge Law Faculty on 5th March 2008, available at <https://www.judiciary.uk/wp-content/uploads/2018/03/speech-lj-jackson-was-it-all-worth-it-mar-2018.pdf>.

¹²⁷ A Zuckerman, 'Reforming Civil Justice Systems: Trends in Industrial Countries' (2000) Note World Bank, PREM Notes, n° 46.

¹²⁸ Quek Anderson (n 19) 256.

field of civil justice.¹²⁹ For several years, monitoring tools and data have provided policymakers with accurate information about courts and their budgetary needs, and served as a basis for cost-based reforms.¹³⁰ The first EU Justice Scoreboard in 2013 included only one indicator related to the costs of litigation (the annual budget allocated to courts per inhabitant) but it has changed dramatically since then. In 2015, indicators presenting the scope, scale and state of play of judicial reforms across the EU were introduced and the number of cost-related indicators tripled.¹³¹

A new indicator presented the criteria applied to the determination of the resources invested in law courts (e.g. historic or realised costs, number of incoming and resolved cases, anticipated costs or needs and requests by a court) and the specific branch of government (judiciary, legislature and executive) deciding on their allocation.¹³²

- 59 The CEPEJ released in 2020 a study reviewing case-weighting systems (CWS) in order 'to provide judicial systems and policy makers with tools to evaluate them and choose which is best suited for their judicial systems'.¹³³ The World Bank did the same in 2017 in the study titled '*Case-Weighting Analyses as a Tool to Promote Judicial Efficiency: Lessons, Substitutes and Guidance*'.¹³⁴
- 60 Many kinds of measures have been taken to reduce expenditures.¹³⁵ Indeed, it would be impossible to review *all* civil procedure reforms, but it is still worthwhile to highlight some common trends.¹³⁶ Policymakers have introduced several reforms of civil justice systems to limit the costs of litigation, and here we look at the introduction of simplified procedures and the promotion of alternative dispute resolution procedures. More

¹²⁹ Wright, 'The Impact of Austerity and Structural Reforms on the Accessibility of Tribunal Justice' in E Palmer, T Cornford, A Guinchard and Y Marique (eds), *Access to Justice. Beyond the Policies and Politics of Austerity* (Hart 2018) 135.

¹³⁰ Ex. Cour des comptes (France), *Approche méthodologique des coûts de la justice - Enquête sur la mesure de l'activité et l'allocation des moyens des juridictions judiciaires*, décembre 2018, Rapport "Approche méthodologique des coûts de la justice" (ccomptes.fr); G Palumbo *et al.*, 'The Economics of Civil Justice, New Cross-country Data and Empirics', OECD Economics Department Working Papers, No. 1060.

¹³¹ See A Dori (n 38) 281.

¹³² Ibid 284.

¹³³ CEPEJ, *Case Weighting in Judicial Systems*, CEPEJ Studies n°28, 2020, <<https://rm.coe.int/study-28-case-weighting-report-en/16809ede97>>.

¹³⁴ World Bank Group, *Case-Weighting Analyses as a Tool to Promote Judicial Efficiency: Lessons, Substitutes and Guidance*, 2017, <<https://documents1.worldbank.org/curated/en/529071513145311747/pdf/Case-weighting-analyses-as-a-tool-to-promote-judicial-efficiency-lessons-substitutes-and-guidance.pdf>>.

¹³⁵ F van Dijk and H Dumbrava, 'Judiciary in Times of Scarcity: Retrenchment and Reform' (2013) *International Journal for Court Administration* 15; X Kramer and S Kakiuchi, 'Relief in Small and Simple Matters in an Age of Austerity', General report for the XV World Congress of Procedural Law in H Pekcanitez, N Bolayir and C Simil (eds), *XV International Association of Procedural Law World Congress* (Istanbul: Oniki Levha Yayıncılık 2016) 121.

¹³⁶ Hannaford (n 14) 26.

specific reforms on proportionality such as controlling the unpredictable and disproportionate costs of disclosure will be examined in Section 4 as part of the principle of proportionality because these reforms are not reforms of the justice system itself, but rather of procedural rules. It must be added that this cost-based approach to civil procedure has led to the promotion and regulation of new financing methods (eg, private funding (see pt III ch 7)) and to 'reform the rules on litigation costs to make them more predictable, transparent and proportionate. Reforms to costs rules include the introduction of fixed recoverable costs (FRCs), costs shifting rules and the greater use of costs sanctions by the courts' (see pt III ch 5).¹³⁷

3.1.1 Design of Proportionate Procedures

- 61 Following the example of the European Small Claims Procedure, many systems have set up specific procedures for better and more cost-efficient access to justice for small claims. Such a small claims procedure exists almost everywhere (EU countries, the UK, Canada, Japan, the United States, Russia¹³⁸). Here, it is important to understand the economic factors leading states to adopt such procedures. Briefly put, they are a direct response to the need for inexpensive procedures. But inexpensive for whom? 'An inexpensive procedure for litigants is generally, but not necessarily, cheap for the state, and vice versa'.¹³⁹ In practice:

the availability of such procedures may evidently contribute to easier and cheaper access to justice, as they usually have a lower threshold and require less formalities (e.g. lower court fees, no legal representation, less documentation). Also for governments, these types of procedures may be attractive from the viewpoint of austerity as those procedures generally require lesser use of resources.¹⁴⁰

- 62 Cost reduction is a political goal that can be achieved by the implementation and development of 'cost efficient proceedings'.¹⁴¹
- 63 'Although it is true that, in most cases, a simplified procedure costs less than a fully-equipped procedure, both for litigants and the states, how far costs can be reduced

¹³⁷ M Ahmed and X Kramer, 'Global Developments and Challenges in Costs and Funding of Civil Justice' (2021) 4 Erasmus Law Review 81

¹³⁸ In Russia there is a simplified (summary) written procedure for small claims. Russian procedural law also knows writ proceedings. In commercial courts they cover, in particular, contractual claims that are substantiated by documents and claims based on a notary's submission of bills for non-payment, non-acceptance, or failure to date acceptance both for up to approximately EUR 6,250. small claims for the recovery of mandatory payments and penalties for up to approximately 1,250 EUR. There is currently a proposal to increase (double) these thresholds and to extend application of simplified proceedings to more types of cases.

¹³⁹ Kramer and Kakiuchi (n 125) 140.

¹⁴⁰ Ibid 139.

¹⁴¹ See Mayhofer and Gsell (n 57) 237 and 240.

depends on the concrete technique of simplification'.¹⁴² Small claims procedures are cheaper because they do not offer the same procedural steps as ordinary civil proceedings. In addition, when it comes to the design of low-cost procedures, there is a need to balance between cost efficiency on the one hand and procedural justice on the other. It starts with the definition of what constitutes as 'small' claim. Most of the time, it refers to a low monetary amount but what is deemed low varies from one system to another (usually around EUR 5,000-15,000).¹⁴³ In civil law countries and Members States of the EU, they are simplified unilateral procedures such as orders for payment that are not limited to the amount at stake. In any case, simplified procedures are less expensive because unlike an ordinary procedure, they are not 'fully equipped'. In the United Kingdom, 'Small claims proceed upon the small claims track, where hearings are conducted with a measure of informality'.¹⁴⁴ There is, as a rule, no preliminary hearing, the rules of evidence are relaxed. In particular LJ Jackson states that '[t]he costliest provisions (ex. Part 31 disclosure and inspection, Part 32 Evidence, Part 35 expert evidence, ...) have no application on the small claims track'.¹⁴⁵ In Canada, as under EU law, the use of standardised forms is obligatory. In Quebec, for instance, there is an online application form at the Small Claims Division, while in the same jurisdictions, parties cannot be represented by lawyers. The promotion of low-cost procedures proportionate to the amount at stake does not imply the prohibition of legal representation. However, usually, parties present their cases without the assistance of lawyers. In the United Kingdom, a party may engage a lawyer if they wish, but generally cannot recover the costs of such representation. 'Because the small claims track is intended primarily for litigants in person, the costs of each side are generally modest. The right of the winning party to recover costs is limited to such an extent that, effectively, there is no cost shifting on the small claims track'.¹⁴⁶

The actual use of simplified small claims procedures varies considerably per country. There are some countries where the procedure is used often. In [the United Kingdom], the vast majority of civil claims are dealt with in the small claims track. The same applies to several major states in the United States, where a significant use of the small claims model is reported. In contrast to these jurisdictions, in Japan, there were 12,109 filings in the small claims procedure in 2013, representing a decrease compared to the 23,584 filings in 2005. It should be noted that the number of filings does not always correspond to the attractiveness of the procedure, because it depends to a great extent on whether the procedure is mandatory or optional. In

¹⁴² Kramer and Kakiuchi (n 125) 140.

¹⁴³ In the UK, small claims are generally claims up to GBP 5,000 in value. The European small claims procedure is limited to EUR 5,000. The Small Claims Division at the Court of Québec hears applications where the amount in dispute is USD 15,000 or less.

¹⁴⁴ However, personal injury claims are excluded from the small claims track if general damages claimed for the injury exceed GBP 1,000, (n 48) 499.

¹⁴⁵ Jackson (n 48) 501.

¹⁴⁶ Ibid 499.

many jurisdictions the small claims procedure is considered to be effective, including in particular England, Israel, Japan, and the United States.¹⁴⁷

- 64 In Russia in 2021 50% of all cases were considered by arbitrazh (commercial) courts in simplified proceeding.¹⁴⁸

3.1.2 Diversification of Justice Offers

- 65 x. Kramer and S. Kakiuchi outlined that:

In most countries, alternative dispute resolution (ADR) has been actively promoted in recent years. [...] mediation and other forms of out-of-court dispute resolution play an increasingly important role. This is triggered by developments at the EU level, where a Mediation Directive for cross-border cases was adopted in 2008, followed by a Directive on Consumer ADR and a Regulation on Consumer ODR (online dispute resolution) in 2013.

- 66 In the United Kingdom:

small claims are automatically referred to mediation, while retaining the voluntary nature of mediation. In Belgium, for small consumer disputes, an ADR and ODR system (BelMed) was introduced in 2011 with a view of keeping these disputes out of the court system. In Spain, way is made to mediation and consumer arbitration as well. In other countries, ADR is also on the rise or had acquired a steady position already, such as in the United States, Canada, and Japan. [...] In Canada various forms of court-ordered and court-assisted mediation have emerged as well as court-assisted court settlement schemes (pre-trial mediation conferences; judicial dispute resolution, or judicial-assisted dispute resolution).¹⁴⁹

- 67 Would be beyond the scope of this chapter to discuss the advantages of ADR procedures, but it is important to underline that for policymakers ADR is directly relevant to cost efficiency. Lord Justice Jackson stated that '[t]he use of ADR is relevant in two ways to the costs of litigation. First, ADR (and in particular mediation) is a tool which can be used to reduce costs. [...] Secondly, an appropriately structured costs regime will encourage the use of ADR'.¹⁵⁰ Reforms promoting ADR tend to introduce compulsory ADR or penalise parties for unreasonably refusing to engage with ADR. The courts have an important role in ensuring that the parties genuinely consider the option of ADR (eg,

¹⁴⁷ Kramer and Kakiuchi (n 125) 142.

¹⁴⁸ Пленум ВС одобрил серьезные изменения в АПК РФ — Верховный Суд Российской Федерации (supcourt.ru).

¹⁴⁹ Kramer and Kakiuchi (n 125) 144.

¹⁵⁰ *The role of ADR in furthering the aims of the Costs Review* (8/3/2012) Jackson LJ, available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf>.

Quebec, UK, Belgium, and Luxembourg). In the United Kingdom, '[t]he courts also give practical encouragement to parties to use ADR by imposing adverse costs rulings if a party unreasonably refuses to undertake ADR'.¹⁵¹ However, the attempts made to determine whether a party's refusal to engage with ADR was unreasonable 'brought about greater complexity in the cost-effectiveness of ADR'.¹⁵² In addition, it is difficult to assess the impact of ADR on the costs of litigation, while determining its effect on the notion of access to justice is also a complex task. However, amid these complexities, what is certain is that an excessive association of ADR with cost savings would neglect other significant dimensions of access to justice.

3.2 Re-Conceptualisation of Access to Justice

- 68 Many countries are reforming their procedures to make them more proportionate to the stakes of the given dispute. The aim of such reforms is to reduce the cost of procedures, which in principle facilitates access to justice. At the heart of cost-based reforms is the assumption

that enhancing efficiency results in enhanced access to justice. It is this central, largely untested assumption that is most problematic. Certainly, providing less costly and time-consuming procedural mechanisms would seem logically connected to improving the access of citizens to that procedure. However, the bigger question remains as to whether that same procedure, in the light of its reduced processes, retains the ability to deliver just, accurate outcomes.¹⁵³

- 69 All reforms designed to reduce the costs of justice also decrease its funding either by abolishing legal aid or by privatising the methods of dispute settlement. Often, legal aid is excluded for small claims and self-representation becomes the norm (see pt III ch 6). Effective unavailability of legal representation (as a result of financial inability to afford a lawyer) must be examined with the principle of equal access to justice in mind (see part III ch 2).

The reduction of state funding of the civil justice system by successive governments and, in particular, the substantial increase in the number of individuals who are forced to litigate, if they do, without legal advice or representation, has put unprecedented pressure on the courts to continually ration their limited resources in managing cases.¹⁵⁴

¹⁵¹ Ibid.

¹⁵² Ahmed and Kramer (n 137) 186. *Halsey v. Milton Keynes General NHS Trust*, Case B3/2003/1458, B3/2003/1582 (Court of Appeal (Civil Division), England and Wales), Judgment 11 May 2004 [EWCA Civ 576], see M Ahmed, 'The Merits Factor in Assessing an Unreasonable Refusal of ADR: A Critique and a Proposal' (2016) 8 Journal of Business Law 646; Quek Anderson (n 19) 256.

¹⁵³ Hanycz, (n 7) 103.

¹⁵⁴ Ahmed and Kramer (n 137) 181.

- 70 In this context, cost efficiency seems to become an end in itself. 'Clearly accessibility and the minimisation of costs are important requirements in any system of civil procedure.' However, should cost efficiency be the main purpose of civil procedure?¹⁵⁵ '[R]ecent changes in civil procedures may be similarly counter-productive to the *raison d'être* of the procedures sought to be reformed, rather than supportive of their ideals'.¹⁵⁶
- 71 'Although the principal policy rationale underpinning procedural reforms is to increase access to justice by controlling costs, there are potential dangers that those reforms may inadvertently undermine access'.¹⁵⁷ If we look back to the Woolf reforms, admittedly, these have introduced fast tracking which has led to lower value cases being brought to trial quickly, with trial costs being fixed as well.¹⁵⁸ However, '[d]espite the general success of the Woolf reforms, the costs of civil litigation [have] continued to rise' mainly because of the introduction of conditional fee agreements¹⁵⁹. 'Measuring the extent to which revised procedures enhance or reduce meaningful access to justice is empirically challenging. Alongside this ascendancy of efficiency has developed the justification that disputants are happier with 'efficient' systems of justice'.¹⁶⁰ In practice, statistics from the UK Ministry of Justice show that the vast majority of civil litigation takes place in county courts. English civil litigation in the High Court is very residual.¹⁶¹ This trend towards fewer trials being held is not new in common law systems, but it is increasing.¹⁶² It is much less significant in civil law systems, but these are seeing an increase in alternatives to litigation. Effective access to the judge (ie, the possibility of debating and obtaining a decision that adjudicates a case) occurs statistically in just over 3% of cases in England and the United States, compared with around 75% of cases in France.¹⁶³
- 72 It is clear that 'access to justice' is not limited to access to courts. Indeed, the latter, once the rule, is now the exception.

This approach transforms the notion of justice to include a variety of dispute resolution methods, including the civil courts and ADR procedures. In doing so, it

¹⁵⁵ A Barker, 'Ideas On The Purpose Of Civil Procedure' (2002) N.Z. L. Rev 441.

¹⁵⁶ M Woo, 'Manning The Courthouse Gates: Pleadings, Jurisdiction, And The Nation-State' (2015) Nev. LJ 1264.

¹⁵⁷ Ahmed and Kramer (n 137) 185.

¹⁵⁸ Jackson (n 48) 1.

¹⁵⁹ Ibid.

¹⁶⁰ Hanycz, (n 7) 104.

¹⁶¹ M Haravon, 'Quel procès civil en 2010 ? Regard comparé sur l'accès à la justice en Angleterre, USA et France' (2010) 4 RID comp. 895.

¹⁶² RL Marcus, 'Malaise of the Litigation Superpower' in *Civil Justice in Crisis* (1999) Oxford University Press 82; H M Kitzer, 'Disappearing trials? A comparative perspective' (2004) Journal of Empirical Legal Studies 752.

¹⁶³ M Haravon (n 161) 906.

broadens the nature and characteristics of a civil justice system that goes beyond simply perceiving it as court adjudication and access to the civil courts.¹⁶⁴

- 73 The cost-based reforms of the justice systems have changed the very concept of access to justice but ‘an excessive association of [reforms of justice systems] with cost-savings will neglect other significant dimensions of access to justice’.¹⁶⁵ It is important to reshape ‘the concept of access to justice, resulting in an emphasis not only on cost-effective justice but also on tailoring the characteristics of each case to the appropriate dispute resolution process’.¹⁶⁶ If not limited to a short-term objective of cost reduction, small claims procedures, fast tracking, and ADR have ‘the potential to transform the nature of civil justice by creating a justice system with diverse dispute resolution options and helping disputants to find the most suitable forum to fit their needs’.¹⁶⁷

The multidimensional nature of civil justice has emerged amidst recognition of the practical obstacles to accessing the civil courts. While the primary duty of the courts used to be the pursuit of accurate judgments, the costs and time of obtaining justice have been gradually perceived as critical components of the definition of justice, thus transforming the very concept of justice.¹⁶⁸

- 74 Cost efficiency is part of the very concept of access to justice since access to justice requires proportionality¹⁶⁹. This cost-efficiency approach to civil litigation tends to ‘split the dual functions of the system—rule clarification on the one hand, and dispute resolution on the other’.¹⁷⁰ Access to justice at proportionate cost can be very convincing in theory. Indeed, it would be reasonable to ‘distribute the means of the national justice systems proportionally, on the basis of the importance and social value of the matters at stake’.¹⁷¹ But measuring the importance of this in practice remains very difficult. Meanwhile, the emergence of the principle of proportionality raises the same type of practical question: compared to what is proportionality measured? The amount of money involved? The importance of the case? The complexity of the issues at hand? The financial position of each party? Or the public interest?

¹⁶⁴ Ahmed and Kramer (n 137) 183.

¹⁶⁵ Quek Anderson (n 19) 256.

¹⁶⁶ Ibid.

¹⁶⁷ Ahmed and Kramer (n 137) 186.

¹⁶⁸ Quek Anderson (n 19) 257.

¹⁶⁹ A Higgins, ‘Keep Calm and Keep Litigating’, in A Higgins (ed.), *The Civil Procedure Rules at 20* (OUP, 2021) 44; R Assy, ‘The Overriding Principles of Affordable and Expeditious Adjudication’ in A Higgins (ed.), *The Civil Procedure Rules at 20* (OUP, 2021) 280

¹⁷⁰ Higgins (n 169) 44.

¹⁷¹ A Uzelac and C H van Rhee, ‘The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms – Unity and Diversity’, in A Uzelac and C H van Rhee (eds), *Transformation of Civil Justice* (Springer 2018) 13.

4 TOWARDS THE PRINCIPLE OF PROPORTIONALITY: DUTY TO LIMIT THE COSTS OF LITIGATION

4.1 Is Proportionality a Principle?

- 75 Proportionality is a very ‘fashionable’ concept and an accurate one to describe the trends of the reforms. It is, however, difficult to define proportionality as a procedural principle. The preamble of ELI / Unidroit’s Model European Rules of Civil Procedure states that ‘the general principle of proportionality in dispute resolution, has itself become an increasingly important procedural principle across Europe since the start of the 21st century.’ This is not so clear in comparative law. In 2010, Christopher Hodges summarised the situation as follows:

Few jurisdictions have formally codified the principles on which their rules on costs are based. Indeed, many jurisdictions have no readily-identifiable general theory on litigation funding and costs. [...] Similarly, very few jurisdictions have expressly adopted a policy principle that costs should be *proportionate*, England and Wales being the leading example, followed recently by Canada (although it remains to be seen whether the reforms will have an impact). [...]. Concern over cost proportionality has emerged in Australia but only some of the English-style cost management techniques have yet been adopted there. Of course, in some jurisdictions the application of the costs rules deliver a result that is in line with the principle of proportionality without that principle being stipulated in legislation.¹⁷²

- 76 Clearly, proportionality has become more and more important in the last 10 years and the prominence of proportionality in the Model European Rules of Civil Procedure deserves attention. Rule 5 states:

(1) The court must ensure that the dispute resolution process is proportionate. (2) In determining whether a process is proportionate the court must take account of the nature, importance and complexity of the particular case and of the need to give effect to its general management duty in all proceedings with due regard for the proper administration of justice.

- 77 Rule 6 then turns to the duties of the parties and their lawyers: ‘Parties and their lawyers must co-operate with the court to promote a proportionate dispute resolution process.’ The comments of the Model rules indicate that the aim of these provisions is

committed to the trend towards embedding proportionality as a general procedural principle and does so primarily through general rules rather than ones focused on individual cases. This commitment is substantiated, to varying degrees, within the following: Rules 9, 10, 49(1), 51, 53(2)(e), 57 and following, 221 and following, 229

¹⁷² Hodges, Vogenauer and Tulibacka (n 5) 12.

and following, and 241(2), which regulate the promotion of settlement and the use of ADR by courts and parties, even though such processes are not, as such, a part of these Rules.

- 78 Thereafter, Rule 8 deals directly with costs, stating: ‘Costs of proceedings should, in so far as possible, be reasonable and proportionate to the amount in dispute, the nature and complexity of the particular proceedings, their importance for the parties and the public interest.’ According to the comments of the Model rules, this provision

summarises the criteria that define proportionality of costs. It makes it clear that the amount in dispute cannot be the sole, decisive, criterion determinative of the appropriate and desirable level of costs incurred in prosecuting civil proceedings limits. To limit costs by the amount in dispute would result in injustice, as it would preclude citizens with limited financial resources from availing themselves of the regular civil process in cases of major significance for their daily lives. The same can be said for public interest litigation, which may concern a small amount that is in dispute but is of wide public importance. In such cases, those wider factors, amongst others, can properly justify the parties incurring a higher level of costs than an assessment based purely on the dispute’s financial value might justify.

- 79 If proportionality is progressively ‘enshrined in procedural laws around the world’,¹⁷³ the very definition and content of this principle remain vague. ‘There is real difficulty in giving concrete definition to the concept, and it may be better comprehended as an aim rather than as a tool in itself’.¹⁷⁴ Even when embedded in the legislation, the ‘principle’ remains a general and vague objective rather than a technical rule. For example, Art 8 of the Brazilian Code of Civil Procedure states that when applying the law, the judge is to pay heed to social purposes and meet the demands of the common good, safeguarding and promoting human dignity and observing the principles of *proportionality*, reasonableness, legality, publicity, and efficiency. Proportionality is often one of the underlying objectives of civil procedure and civil justice reforms, as seen in Hong Kong and Singapore.¹⁷⁵ ‘Proportionality is, in that case, a principle applicable to all procedures chosen by the parties, but no actor is specifically designated to enforce its existence, or made responsible or sanctioned for disproportionate procedures’.¹⁷⁶ Some systems like those of the United Kingdom, Quebec, Ontario, and British Columbia ‘introduced the

¹⁷³ C Piché, ‘Comparatives Perspectives, Figures, Spaces and Procedural Proportionality’ (2012) *IJPL* 153. For example, Ukraine, where new rules implemented in 2017 introduced the principle of ‘proportionality’ to civil litigation costs, see Butler (n 100).

¹⁷⁴ Tronson B, ‘Towards Proportionality – The ‘Quick, Cheap and Just’ Balance in Civil Litigation’ in C Picker and G Seidman (eds), *The Dynamism of Civil Procedure – Global Trends and Developments*, *Ius Gentium, Comparative Perspectives on Law and Justice* 48 (Springer 2016) 201.

¹⁷⁵ ‘In Hong Kong, one of the underlying objectives of the civil procedure and civil justice reform rules is to merely “promote a sense of reasonable proportion and procedural economy in the conduct of proceedings”’, *Judiciary, Civil Justice Reform* quoted by Piché (n 173) 153. For Singapore, see Quek Anderson (n 19) 256.

¹⁷⁶ Piché (n 173) 153.

requirement of proportional procedures into their laws to palliate access to justice issues'.¹⁷⁷ Moreover, the Canadian Supreme Court clearly stated that: 'the principle of proportionality is not limited to a principle of interpretation that confers no real power on the courts in respect of the conduct of civil proceedings in Quebec'.¹⁷⁸ The Supreme Court added in *Hryniak* that 'the proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice'.¹⁷⁹ 'The court must itself take an active role in assisting the parties in their efforts to keep litigation costs proportionate. It may do so, for instance, by making appropriate proposals for the effective management of the claim by the parties and their lawyers'.¹⁸⁰ Under certain rules, parties have a duty to limit costs, and disproportionate costs are not subject to reimbursement. Clearly, some cultural changes towards proportionality have occurred, but it is still difficult to define it as a principle and concrete rules on duty of courts (4.2) or duty of parties (4.3) to limit costs are not easily identified.

4.2 Duty of Courts

80 In Quebec, Art 18 of the Code of Civil Procedure states that judges must

observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice.

81 The same solution is available in Ontario.¹⁸¹ In Australia, since 1987, the *Supreme Court Rules 1987* (NT) have included r 1.10, which provides that 'the Court ... shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined'. In 2009, the High Court of Australia in *Aon Risk Services Australia Ltd v Australian National University* held that case management principles permit courts to take into account the impact of litigation on public resources and 'the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification'.¹⁸² Australia's Civil Procedure Act also stipulates that

in any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the

¹⁷⁷ Ibid.

¹⁷⁸ *Marcotte c. Longueuil*, Case 32214, 32213 (Supreme Court, Canada), Judgment 8 October 2009 [2009 SCC 43] para 42.

¹⁷⁹ *Hryniak v. Mauldin*, Case 34641 (Supreme Court, Canada), Judgment 23 January 2014 [2014 SCC 7] para 30.

¹⁸⁰ Comment under Rule 8 of the ELI/Unidroit Model European Rules of Civil Procedure.

¹⁸¹ Rules 1.04 (1.1) CPC 'In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.'

¹⁸² [2009] HCA 27; (2009) 239 CLR 175 (*Aon v ANU*), see Tronson (n 174) 189.

cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.¹⁸³

- 82 In the United States, the *Federal Rules of Civil Procedure* 'should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding'.¹⁸⁴ The US Supreme Court underlined that rule 1 reflects a 'national policy to minimize the costs of litigation'.¹⁸⁵ However, the duty of the courts to administer inexpensive justice is rather a political statement than a concrete rule. 'One explanation for FRCP 1 failing to play the central role that is seen in the UK and Australia is that the objectives are seen as vague, conflicting and failing to provide guidance to the parties, lawyers or judge'.¹⁸⁶
- 83 More than a policy, in the United Kingdom, under the Civil Procedure Rules, proportionality is a guiding *principle* for all litigation 'with the overriding objective of enabling the court to deal with cases justly and at proportionate cost'.¹⁸⁷ It refers to the idea of obtaining a just result in litigation at appropriate speed and expense.¹⁸⁸

The content of the overriding objective was principally inspired by a recognition that English judges had been preoccupied with delivering justice on the merits, without

¹⁸³ P Brereton, *Costs – The Proportionality Principle*, Paper delivered to the CLE Legal Conference, Sydney, New South Wales, 31 August 2007, <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Brereton/brereton310807.pdf>

¹⁸⁴ FRCP rule 1.

¹⁸⁵ *Farmer v Arabian Am. Oil Co* 379 US 227, 234 (1964) quoted by M Legg and A Higgins, 'Responding to Cost and Delay Through Overriding Objectives – Successful Innovation?' in C Picker and G Seidman (eds), *The Dynamism of Civil Procedure – Global Trends and Developments*, Ius Gentium, Comparative Perspectives on Law and Justice 48 (Springer, 2016) 177.

¹⁸⁶ *Ibid* 177-178.

¹⁸⁷ CPR 1.1 Procedural Rules, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01>

(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

¹⁸⁸ See P Hurst, S Middleton and R Mallalieu, *Costs and Funding Following the Civil Justice Reforms: Questions and Answers* (Thomson and Reuters 2021) Chapter 2 on Proportionality, 93.

due regard to the deleterious effects of costs and delay on individual cases and the civil justice system as a whole.¹⁸⁹

- 84 CPR 1.2(b) states that the court must seek to give effect to the overriding objective when it interprets any rule. In addition, CPR 1.3 imposes a duty on the parties to help the court to further the overriding objective.¹⁹⁰ In the context of the resolution of civil disputes, the governing principle behind court rules is to deal with cases justly and *at proportionate cost*.¹⁹¹
- 85 In the United Kingdom, CPR rule 1.1 imports two essential overriding objectives which directly lend themselves to costs management: saving expense and dealing with cases in ways which are proportionate. Within these two overriding objectives underpinning the court's case management powers, it is axiomatic that the court has the jurisdiction to manage costs actively. Indeed, active case management is a court's duty, forming part of the overriding objective of the CPR, but it is not a specific rule and thus no duty of proportionality is imposed on courts. Meanwhile, the question of whether cost management amounted to such a rule was covered by Lord Jackson, who stated: '[C]ourts should undertake costs management in conjunction with case management'.¹⁹² Since 2013, multi-track cases have been subject to cost management¹⁹³. First, parties are required to prepare a costs budget, which the court then has to approve. 'So far as possible, the court manages the case so that it proceeds within the approved budgets. At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget'.¹⁹⁴ The purpose of costs management is to ensure that the court has active control over costs.

Specific approval or sanction of the incidence of costs at stated or approved levels throughout the life of the case ought to have the effect of removing or reducing the need for an ex post facto examination of whether the costs incurred should have been incurred or were reasonably incurred.¹⁹⁵

- 86 Costs management is part of case management, with costs capping being a key illustration thereof. 'One of the pre-conditions for a costs capping order is that the court must not be satisfied that the protection against disproportionate costs cannot be effected by costs budgeting'.¹⁹⁶ All of these rules demonstrate the court's ability to

¹⁸⁹ Legg and Higgins (n **Fehler! Textmarke nicht definiert.**) 159.

¹⁹⁰ Ibid.

¹⁹¹ N Andrews, 'On Proportionate Costs', (2014) 22 University of Cambridge Faculty of Law Research Paper 1.

¹⁹² LJ Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) 400.

¹⁹³ CPR 3.12(1A)).

¹⁹⁴ Jackson (n 192) 400.

¹⁹⁵ Jackson (n 48) 485.

¹⁹⁶ 'Costs Capping, Budgeting, Proportionality And Cases Of Wider Importance', <https://tmcls.co.uk/thomas-v-pgi-group/>.

manage costs, and are certainly related to proportionality but are not sufficient to confirm the existence of rules imposing proportionality on judges and parties.

4.3 Duty of the Parties

- 87 According to the CPR, ‘the parties are required to help the court to further the overriding objective’. The ELI/Unidroit rules are similarly vague, stating: ‘Parties and their lawyers must co-operate with the court to promote a proportionate dispute resolution process.’ In Quebec, Art 18 of the Code of Civil Procedure states that:

the parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.

- 88 Parties can be sanctioned for disproportionate procedures as abusive procedure¹⁹⁷. Meanwhile, proportionality is often related to the controlling of costs of evidence¹⁹⁸ but it applies at all steps of the proceedings.

Parties and their lawyers are, therefore, required to be able to justify each decision, strategy and choice in the management of their file. They must always consider the following considerations: will the procedures I have chosen allow my case to be ready for a court hearing after the Code-prescribed 180-days delay for inscription of the case for trial? Are judicial and extrajudicial costs high? What kinds of recourses, procedures and interests are at stake? Are the substantive law and evidence more complex than usual? What are this procedure’s principal objectives and uses? How will the chosen procedures advance the case? Are the chosen procedures truly necessary for the advancement of the case?¹⁹⁹

- 89 Several common law countries impose a rule on proportionality in discovery, which can generate disproportionate costs.²⁰⁰ In Ontario, the Rules of Civil Procedure provide that ‘[i]n applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding’. Rule 29.2 makes proportionality specifically applicable to discovery. In New Zealand, High Court Rules 8.8. states that a ‘tailored discovery must be ordered when the interests of justice require an order involving more or less discovery than standard discovery would involve’. Amendments to the Federal Rules of

¹⁹⁷ *Charland c. Lessard*, Case 500-09-022827-125 (Court of Appeal, Quebec), Judgment 12 January 2015 [2015 QCCA 14], EYB 2015-246657 ; *Marcotte c. Longueil* (n 178).

¹⁹⁸ *Grenier-Cliche c. Belanger*, 2011 QCCS 3732.

¹⁹⁹ Piché (n 173) 156.

²⁰⁰ *Controlling the costs of disclosure* (28/11/2011) Jackson LJ, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/controlling-costs-disclosure.pdf>.

Civil Procedure expressly define discoverable information as that which is 'relevant to any party's claim or defense and proportional to the needs of the case'.²⁰¹ To determine whether a matter is proportional, Rule 26(b)(1) includes a list of the following factors to consider:

the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

- 90 Expertise has also come to be regulated by a duty of proportionality. Even in civil law systems, the judge has to choose the most proportionate measure. In the United Kingdom, as stated by LJ Jackson:

[t]he best way to control the cost of expert evidence is by setting a budget in advance. Of course, circumstances may change and the budget may need to be revised. But participants in litigation, like the participants in any other major project, should at all times be working within set financial limits.²⁰²

- 91 Based on the model of the United Kingdom, other common law systems set out that parties have to estimate in advance the costs of their proposed expert evidence.²⁰³
- 92 Budgeting costs is a duty of the parties under the control of the court. In the United Kingdom, '[e]ach side sets out a summary of its costs in advance of any hearing where costs are likely to be summarily assessed'.²⁰⁴

Effective management of claims by lawyers and the courts during the pre-trial stage will require consideration of whether certain steps can be achieved at proportionate cost and, if not, whether the client is willing to pay for it knowing that the cost will be irrecoverable. At case management and cost management hearings, the court will have to decide the cost of certain steps, and whether that cost is proportionate.²⁰⁵

²⁰¹ ED Laporte and JM Redgrave, 'A Practical Guide to Achieving Proportionality under New Federal Rule of Civil Procedure 26' (2015) *Federal Courts Law Review* 19.

²⁰² See *Focusing expert evidence and controlling costs* (11/11/2011) Jackson LJ, available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-lecture-focusing-expert-evidence-controlling-costs.pdf>.

²⁰³ See Morissette (n 1) 405.

²⁰⁴ *Assessment of costs in the brave new world* (26/1/2012) Jackson LJ available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-8th-lecture-implementation-programme-25012012.pdf>

²⁰⁵ *Proportionate costs* (30/5/2012) Lord Neuberger MR, available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/proportionate-costs-fifteenth-lecture-30052012.pdf>

- 93 In practice, the parties have to prepare and exchange litigation budgets and the courts state the extent to which those budgets are approved.

And '[a]t the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget'.²⁰⁶

- 94 Art 44.3 on General Rules about Costs, where the court assesses the amount of costs it must do so on a standard or indemnity basis. However, the court will not in either case allow costs which have been unreasonably incurred or are *unreasonable* in terms of amount.

Where the amount of costs is to be assessed on the standard basis, the court will – (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.²⁰⁷

- 95 In Spain, according to Art 241 of the Code of Civil Procedure (*Ley de Enjuiciamiento Civil*) on Payment of the costs and expenses states that each party shall pay the costs and expenses of the proceedings caused at their request as and when they are incurred. According to Art 243 of the Code, fees corresponding to pleadings and proceedings that are useless, superfluous, or not authorised by law shall not be included in the assessment. Moreover, the assessment of costs by the Legal Adviser of the Administration of Justice may be challenged. According to Art 245, the challenge may be based on the grounds that undue fees or expenses were included in the assessment. However, as regards the fees of lawyers, experts, or professionals not subject to a statutory fee, the appraisal may also be challenged on the grounds that the amount of such fees is *excessive*. Even if proportionality is not mentioned as such and 'despite the distinctions that can be drawn, whether considered by reference to costs or conduct, proportionality and reasonableness often go together'.²⁰⁸

Proportionality has a holistic element, whereas the concept of reasonableness in relation to costs is generally considered on a case by case basis, that is, whether a particular item of expenditure was reasonably incurred. The assessment of

²⁰⁶ Costs management: a necessary part of the management of litigation, available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/costs-management-sixteenth-implementation-lecture-300512.pdf>.

²⁰⁷ '(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;
(b) the value of any non-monetary relief in issue in the proceedings;
(c) the complexity of the litigation;
(d) any additional work generated by the conduct of the paying party,
(e) any wider factors involved in the proceedings, such as reputation or public importance; and
(f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.'

²⁰⁸ B Tronson (n 174) 185.

reasonableness generally requires a consideration of the circumstances at the time, including the knowledge of the parties and their legal representatives, without any need to give consideration to an overall balance.²⁰⁹

- 96 Proportionality is an ‘overriding objective’ and a broad principle both for parties and courts, but it is still far from being enshrined in specific rules with recent exception of the allocation of costs of lawsuits and their recoverability.²¹⁰
- 97 **Conclusion:** The mapping of litigation costs does not provide a clear picture of the affordability of justice. In all systems, justice is perceived as being too expensive even in those that do not set any court fees. Moreover, various methods are used to calculate such costs, (cost based on the parties, cost based on the taxpayer, distribution of costs, etc.), but none appear satisfactory to either the users or the providers of justice services. Cost-based reforms constitute a response to the ‘as-yet-undefined problem of too-expensive litigation’.²¹¹ Against this backdrop, two trends based on proportionality are emerging. The first concerns reforms of civil justice systems, with the introduction of procedures for small claims and, more broadly, of alternative procedures to litigation. The second trend concerns the duty, in ordinary law procedures, of courts and parties to limit the costs of the trial. This brings us back to the dual relationship between proportionality and justice. As Aristotle pointed out: ‘proportion is a means and justice a proportion’. Proportionality has become a means through which policymakers implement affordable justice according to the issues at stake in the given case. There is also a duty on the part of the courts and the parties to reach a reasonable solution at the most proportionate cost. ‘This has resulted in a re-conceptualisation of justice as entailing proportionality of costs’.²¹² Cost efficiency transforms the notion of access to justice, with affordable, rather than equal, access to a dispute resolution mechanism being the main goal.²¹³ ‘While the primary duty of the courts used to be the pursuit of accurate judgments, the costs and time of obtaining justice have been gradually perceived as critical components of the definition of justice, thus transforming the very concept of justice’.²¹⁴ Because cost efficiency in civil litigation is economic by nature, it would be wise here to refer back to a basic economic analysis of civil procedure²¹⁵:

from an economic point of view, litigation generates two costs: the direct cost of litigation (attorneys’ fees, expert witnesses, discovery, judicial time, and so on) and error costs. Error costs are often neglected, but they are real: if a court fails to resolve disputes accurately, the negative social effects could be substantial. For instance, we can devise a very cheap process for resolving disputes – such as flipping a coin – but

²⁰⁹ Ibid.

²¹⁰ See pt III ch 5.

²¹¹ Lee II and Willging (n 8) 768.

²¹² Quek Anderson (n 19) 257.

²¹³ On equal access to the justice system, see DL Rhode, *Access to Justice* (OUP 2004) 5.

²¹⁴ Quek Anderson (n 19) 257.

²¹⁵ Posner (n 32) 399.

the errors that would result would be socially disastrous: why would anyone engage in productive activity that amasses wealth if I can take that wealth away with a ginned-up claim and a lucky flip of the coin?²¹⁶

98 Meanwhile, according to Catherine Piché:

one can wonder whether proportional justice and proportionate procedures lead to greater confidence in the civil justice system. This issue must be situated within the contemporary crisis of civil justice and lack of confidence felt by the users of the system who react by deserting the courts. One may argue that the lower costs of procedure will bring greater confidence in the system. Court users will then believe that their file was managed more efficiently (and costs efficiently) and they may then have greater confidence in the system because it will appear more just and equitable. Another challenge with procedural proportionality is its difficult application in certain kinds of litigation such as litigation involving higher stakes or important rights and interests. In this case, higher costs of litigation may appear ‘necessary’, to the detriment of parties with lesser resources.²¹⁷

²¹⁶ J Tidmarsh, ‘Shifting Costs in American Discovery’ (2021) 4 Erasmus Law Review 250.

²¹⁷ Piché (n 173) 164.

ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
ALI	American Law Institute
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
ch	chapter
CJEU	Court of Justice of the European Union
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
JVEG	Justizvergütungs- und -Entschädigungsgesetz
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PDPACP	Pre-Action Conduct and Protocols
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press

USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes
WB	World Bank

LEGISLATION

National

Brazilian CPC (Art. 8).

Ontario CPC (Art 1.04).

Quebec CPC (Art 18).

Spanish CPC (*Ley de Enjuiciamiento Civil* Art 241 seq).

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