



Obstacles to achieving in-court settlements: Perspective of Czech judicial practice

OÑATI SOCIO-LEGAL SERIES VOLUME 13, ISSUE 5 (2023), 1817–1840: LOS CONFLICTOS COMO PERTENENCIA: EXPLORACIONES ACERCA DE LAS FORMAS DE RESOLUCIÓN ALTERNATIVA AL CASTIGO LEGAL

DOI LINK: [HTTPS://DOI.ORG/10.35295/OSLS.IISL.1696](https://doi.org/10.35295/OSLS.IISL.1696)

RECEIVED 11 JANUARY 2023, ACCEPTED 28 JULY 2023, VERSION OF RECORD PUBLISHED 3 OCTOBER 2023

JAN HOLAS* 

PETR LAVICKÝ* 

Abstract

In-court settlement is often considered not only socially but also economically advantageous resolution of legal disputes as it is typically less costly for governments and parties to the dispute than a judgment. Using data from a questionnaire administered via computer assisted web interviews with 450 judges and 500 attorneys, we investigate reasons for the low settlement rate and appropriate procedures to increase this rate. We find that a significant factor influencing the settlement probability is the type of case (e. g., passenger transport, loan contracts, insurance). We also find that oral preparation of court hearing, making the parties to the dispute acquainted with the legal opinion of the court as well as the attorney's support for the parties to settle the dispute have an impact on settlement probabilities.

Key words

Civil proceedings; litigation; mediation; settlement; settlement rate; judge; attorney

Resumen

A menudo se considera que la resolución de litigios mediante acuerdo judicial no sólo es ventajosa desde el punto de vista social, sino también económico, ya que suele ser menos costosa para los gobiernos y las partes en litigio que una sentencia. A partir de los datos de un cuestionario administrado mediante entrevistas web asistidas por ordenador a 450 jueces y 500 abogados, investigamos las razones del bajo índice de

* Jan Holas, Masaryk University, Faculty of Law, Department of Civil Procedure. E-mail: Jan.Holas@law.muni.cz.

* Petr Lavický, Masaryk University, Faculty of Law, Department of Civil Procedure. E-mail: Petr.Lavicky@law.muni.cz

resolución judicial y los procedimientos adecuados para aumentar este índice. Encontramos que un factor significativo que influye en la probabilidad de acuerdo es el tipo de caso (por ejemplo, transporte de pasajeros, contratos de préstamo, seguros). También observamos que la preparación oral de la vista, el conocimiento por las partes del dictamen jurídico del tribunal y el apoyo del abogado a las partes para resolver el litigio influyen en las probabilidades de acuerdo.

Palabras clave

Procedimiento civil; litigio; mediación; transacción; tasa de transacción; juez; abogado

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1. Introduction

There is a society-wide interest in settling civil litigation amicably.¹ This way of terminating a case may be favorable from the economic as well as the societal views. From the economic perspective, achievement of an in-court settlement can be advantageous for the parties to the dispute as well as for the State. The parties to the dispute may avoid significant costs of the proceedings and save a considerable amount of time and effort that would be associated with hearing on the merits (Elkins-Elliott and Elliott 2004, Blake 2009, Bone 2017). For a taxpayer-funded judicial system, a settlement reduces the time and financial burden associated with the conduct of proceedings, the written preparation of the judgment and potential appellate proceedings (Berlemann and Christmann 2019). From the societal perspective, in-court settlement contributes to the creation of a culture of amicable settlement of disputes (Andrews 2008), to a positive tendency of leaving the responsibility for dispute resolution in the hands of the parties (Blake 2009) and to re-establishment and preservation of the legal peace (Rechberger 2016).

However, despite all the positives of in-court settlement, it would seem that the proportion of amicably terminated cases in the total number of cases settled by the courts in the Czech Republic is not very high. A statistical overview by the Czech Ministry of Justice of the course of civil proceedings before district and regional courts in 2019 showed that of the total number of 411,214 terminated cases, 9,826 were closed by in-court settlement, which only represents about 2.4% of the total number of cases resolved.²

Our research will address in particular the two following areas: (a) causes of the low settlement rate and (b) procedures appropriate to increase this rate. The research focuses only on cases heard in civil contentious proceedings, not on non-contentious, enforcement or insolvency proceedings, in which the possibilities of achieving a settlement are either completely ruled out or very limited. This paper aims to contribute to filling the research gap in these areas – there is a lack of interest and methodology in these areas (Eisenberg and Lanvers 2009, Barkai and Kent 2014), especially outside the common law context. At the same time, the aim is to provoke a debate on this key issue for the European civil procedural law.³

2. Civil litigation in the Czech Republic

The Czech legal order stems from the European civil legal culture primarily based on written law. The basic source of civil procedural law is the *Code of Civil Procedure* (CCP; No. 99/1963 Coll.). This regulation, which was adopted in the era of socialist law (in 1963) and is still applicable with numerous amendments, governs the procedure of the court and the parties to the dispute in civil court proceedings (Macková 2019).

¹ Lord Woolf has said: “the philosophy of litigation should be primarily to encourage early settlement of dispute” (Andrews 2003). However, some authors acknowledge that settlement may not be a more appropriate resolution than litigation in some cases (Menkel-Meadow 2021).

² A more detailed analysis of the statistics can be found in the Discussion chapter.

³ The importance of settlement is currently emphasized also in ELI/UNIDROIT Model European Rules of Civil Procedure (Uzelac 2017).

In contentious proceedings, civil courts have jurisdiction over disputes following from private law relationships (§ 7 CCP). In the Czech Republic, the system of ordinary courts deciding on civil matters consists of four levels – district courts, regional courts, high courts, and the Supreme Court. Depending on the type of the claim put forward, the court of first instance is a district court or a regional court.⁴ The court of appeal is a court one level higher in the system of ordinary courts. Therefore, if the court of first instance is a district court, the court of appeal is a regional court. Where the court of first instance is a regional court, the court of appeal is a high court. A revision – an extraordinary remedy against a final and conclusive decision of a court of appeal – is always decided on by the Supreme Court regardless of whether the court of appeal was a regional court or a high court.

If it is allowed by the nature of the case, the parties may terminate the proceedings by settlement (§ 99 CCP). The nature of the case does not prevent a settlement in all cases where mandatory norms of private law do not preclude parties from reaching an agreement. It follows from the principle of autonomy of will and from the predominantly directory nature of private law that, in the vast majority of cases, the law does not preclude achieving a settlement. The judge is to lead the parties to the dispute to a settlement from the outset of the proceedings. To this end, the judge may use oral preparation instead of written preparation (§ 114c CCP). This is an informal meeting of the parties with the judge in which an attempt is to be made to resolve the case amicably. The end of oral preparation puts an end to the possibility of presenting new facts and proposing new evidence, and failure to attend oral preparation is associated with adverse consequences for the parties under the Code of Civil Procedure.

However, the court is to seek settlement between the parties not only after the opening of the proceedings, but whenever the opportunity to do so proves appropriate (Dvořák 2016). When attempting a settlement, the judge is to discuss the case with the parties to the dispute, draw their attention to the legislation and opinions of the Supreme Court and the decisions published in the Collection of Judicial Decisions and Standpoints concerning the case and, depending on the circumstances of the case, recommend the possibility of amicable dispute resolution to them.

The parties should be led to achieving a settlement not only by the activity of the judge described above, which is required of the judge by the Code of Civil Procedure, but also by economic motivation. In addition to saving time, costs and effort, in particular the plaintiff is encouraged to achieve a settlement by the Court Fees Act (No. 549/1991 Coll.); this regulation requires the court to return to the plaintiff, in principle, 80% of the court fee paid if settlement is concluded before the court decides on the merits.

A relic of the times of socialist civil procedure is the statutory requirement that a settlement must be approved by the court (Dvořák 2018). It is not sufficient, therefore, that the parties agree on a compromise acceptable to them and achieve a settlement; the court will still consider whether the settlement is not contrary to the law. This of course

⁴ In the vast majority of cases, cases are heard by district courts (§ 9 CCP). Statistics show that 299,670 civil cases were brought before district courts and only 20,427 before regional courts in 2019, i.e., competent courts are district courts in approx. 93% of cases. The exceptions in favor of the subject-matter jurisdiction of regional courts relate mainly to commercial matters. For statistics see <https://cslav.justice.cz/InfoData/vykazy-soudu-a-statnich-zastupitelstvi.html>

means rules of a mandatory nature, not directory rules the parties may deviate from. If the court approves the settlement, an appeal against its resolution is not admissible (§ 202 CCP). A court-approved settlement has the effect of a final and conclusive judgment and may constitute an enforceable order (§ 274 CCP). A special procedure may cancel the resolution on the settlement approval only where the settlement is null according to the provisions of substantive law (§ 99 CCP). To this end, the party concerned must submit a petition for annulment of the settlement within three years after the resolution approving the settlement became final and conclusive.

Parties may also be led to in-court and out-of-court settlement by mediation, which the parties may be informed about by the judge if appropriate in view of the nature of the case (§ 99 CCP). If it proves expedite and appropriate, the judge may order the parties pursuant to § 100 of the CCP to hold a first meeting with a registered mediator totaling three hours and to suspend the proceedings for a maximum of three months. The first meeting with a registered mediator does not constitute an obligation to initiate mediation. Its purpose should be purely informative. The registered mediator provides the parties to the dispute with basic information on mediation and subsequently it is up to the parties themselves whether they decide to resolve their dispute through mediation or resume the court proceedings (Dušková and Holas 2023).

3. Methodology

Our empirical analysis is based on our own questionnaire survey conducted in August 2020. The data were collected from representatives of two groups, judges and attorneys, as these are groups directly involved in the conclusion of in-court settlements between the parties. A questionnaire was prepared for each group to identify, in accordance with the objectives of the present paper, procedures applied by the courts associated with achieving in-court settlements, obstacles to achieving settlements as well as the experience and opinions of representatives of the approached legal professions.

The questionnaires for both groups consisted of four questions. In the first two questions, respondents picked from a closed number of answers. The questions sought to identify the causes of the low proportion of cases terminated amicably and to identify measures appropriate to increase the proportion of cases terminated amicably. The third question provided a free text field for further expression of respondents and detailed specification of their answers to questions 1 and 2. Its completion was optional, unlike other questions. The fourth question inquired about the length of respondents' service for the purpose of their more detailed categorization.

Representatives of the two groups examined were sent to their business email addresses a cover letter with a link to access the online questionnaire. The CAWI (Computer Assisted Web Interviewing) method was chosen mainly due to its speed, time flexibility of completion, respondents' comfort, difficulty to reach representatives of the two busy groups, and the epidemiological situation at that time. The questionnaire was available for completion for ten days after email delivery.

Our research support for questioning judges was the work schedules of the courts,⁵ according to which incoming cases are assigned to the court departments. Judges were chosen randomly among judges deciding on first-instance matters as these judges decide on all kinds of civil disputes and approve in-court settlements most often. The sample included representatives of all district and regional courts. The number of judges selected from a particular court in the sample was proportional to the total number of judges hearing first-instance civil cases at that court. A total of 450 respondents were approached, of which 166 completed the questionnaire. Therefore, the return rate is 166/450, which is 36.9%. The optional third question allowing respondents to further express themselves and specify their answers was answered by 60 respondents from the judge group (identified as judges 1–60 in the text).

The starting point for questioning attorneys was a publicly accessible register of attorneys⁶ maintained by the Czech Bar Association, which included 12,162 active attorneys at the end of 2019. A random sample of 500 attorneys was selected from this target population, of which 138 completed the questionnaire. Therefore, the return rate is 138/500, which is 27.6%. The optional third question allowing respondents to further express themselves and specify their answers was answered by 37 respondents from the attorney group (identified as attorneys 1–37 in the text).

In connection with the recent research on mediation in the Czech Republic, Lakomý and Urbanová (2021) pointed out a decreasing questionnaire return rate when interviewing is conducted over the Internet. The decrease return rates occurs worldwide mainly due to increased mobility and employment of the population, a declining willingness to share personal information, and an overload of the population by various types of questionnaires and surveys (Sapleton and Lourenço 2016). An analysis of 37 internet surveys determined an average return rate of 27% (Lozar Manfreda *et al.* 2012). In the case of an important topic, credible contracting entity and professional form, a return rate of 30–40% can be hoped for (Callegaro *et al.* 2015). Based on these data, the return rate of questionnaires sent to attorneys may be considered standard and in the case of judges slightly above standard, which may indicate an increased interest of this group in the matter under examination.

TABLE 1

Length of service	JUDGES	ATTORNEYS
Less than 10 years	60 (36.1%)	53 (38.4%)
10–19 years	56 (33.7%)	50 (36.2%)
20 years or more	50 (30.1%)	35 (25.4%)

Table 1. Structure of respondents by the length of service.

The research managed to achieve a balanced structure of respondents by the length of their service. Categories of respondents with experience of 20 years or more are slightly

⁵ The work schedules of the Czech courts are publicly available on the website of the Ministry of Justice: <https://www.justice.cz/soudy>

⁶ The register of lawyers registered with the Czech Bar Association is available at <https://vyhledavac.cak.cz/>

less represented, especially in the attorney group, but all categories of the groups examined are represented at least partially.⁷

We analyze respondents' responses, inter alia, on the basis of data on the number of achieved settlements obtained from judicial statistics of the Ministry of Justice. In some cases, respondents' responses prompted a more detailed examination of these data, in particular to distinguish the number of settlements by type of dispute.

4. Results

4.1. Causes of the possible low in-court settlement rate as perceived by judges and attorneys

This part of the analysis is based on a closed question with the same wording for representatives of both groups: "In your view, what factors have the greatest influence on whether or not a settlement is achieved between the parties to the dispute?" Of seven factors offered, respondents were to select no more than three that in their opinion influence to the greatest extent whether a court settlement is achieved in a particular case.

According to respondents from the two groups approached, the most important factors influencing whether a settlement will be achieved in a particular dispute are the character traits of the parties and the relationship with the other party. This option was selected by 83.1% of judges and 73.9% of attorneys.

Among representatives of judges, this was followed by the selected strategy of the representatives of the parties (attorneys) in 53% of cases, the financial interests of the parties in 51.8% of cases, and the complexity (factual and legal) of the dispute and consistency of the decision-making practice or in general the interpretation of the legislation on the matter in 50.6% of cases.

Among representatives of attorneys, that was followed by the complexity (factual and legal) of the dispute and consistency of the decision-making practice or in general of interpretation of the legislation on the matter in 66.7% of cases, the financial interests of the parties in 50.7% of cases, and the formal or, on the contrary, active character of efforts of the judge to resolve the matter amicably in 47.8% of cases.

41.6% of judges and 31.9% of attorneys consider the type of claim to be the key factor influencing the achievement of a settlement. Only 9% of judges and 9.4% of attorneys rank intervention of a third party in the dispute (mediator, etc.) and only 1.8% of judges and 4.3% of attorneys rank the possibility to file an appellate remedy against the decision among the most important factors.

⁷ Recent German research on empirical data has shown that the length of service for judges is not an essential factor influencing how often they are able to bring parties to an amicable solution (see Berlemann and Christmann 2019). However, this does not necessarily apply to attorneys. The experience gained during years of legal practice can lead to a gradual dampening of the urge to win big every dispute and, on the contrary, may increase efforts to find a compromise. For that matter, it is a general life experience that youth is rather predatory and competitive while old age is more prudent. However, whether this really applies also to the effect of the length of legal practice on the number of achieved settlements is not empirically verified. Nevertheless, the responses obtained in our survey did not differ significantly according to the length of the respondents' practice.

There were no major differences between the two groups of respondents or in the categories according to the length of service.

TABLE 2

Influencing factor	Judges	Attorneys
Type of claim	69 (41.6%)	44 (31.9%)
Complexity (factual and legal) of the dispute and consistency of the decision-making practice or in general the interpretation of the legislation on the matter	84 (50.6%)	92 (66.7%)
Traits of the parties and the relationship with the other party	138 (83.1%)	102 (73.9%)
Formal or, on the contrary, active efforts of the judge to resolve the matter amicably	–	66 (47.8%)
Selected strategy of the representatives of the parties (attorneys)	88 (53%)	–
Intervention of a third party in the dispute (mediator, etc.)	15 (9%)	13 (9.4%)
Financial interests of the parties (to win the disputed item, costs of the proceedings, etc.)	86 (51.8%)	70 (50.7%)
Possibility to file an appellate remedy against the decision	3 (1.8%)	6 (4.3%)

Table 2. Factors influencing whether a court settlement is achieved.

The respondents often commented that according to experience from their practice, they did not consider the proportion of amicably terminated cases to be low (attorneys 9, 10, 14, 23, judges 11, 20, 21, 22, 27, 28). Those opinions were substantiated, for example, by the fact that in many cases terminated by action withdrawal, the withdrawal takes place precisely upon agreement of the parties (attorney 3, judges 4, 7, 21, 22, 50, 52). Others justified the low proportion of in-court settlements with the fact that in certain types of cases it is practically impossible to achieve a settlement such as disputes with insurance companies (judges 3, 11, 21, 48), loan companies (judges 3, 11, 21, 48), energy suppliers (judges 3, 11, 21, 48), telephone carriers, transport companies (judges 11, 21, 48)⁸ or the State (attorney 35, judges 10, 54), whose representatives are not allowed to achieve settlements or the opposing party does not attend the hearing (e.g., the defendant does not cooperate), therefore it is impossible to achieve a settlement; this also includes disputes involving an executive or an employee of a company who avoids achieving a settlement for fear that such a compromise will later be attributable to them as a breach of the duty of due managerial care (attorney 28).

The low in-court settlement rate can also be influenced by relatively cheap court proceedings compared to other states (attorney 20, judge 39). A possible refund of a part

⁸ These include disputes in which – as plaintiff – the insurance company seeks payment of insurance premiums from the insured, the loan company seeks payment of its claim under a loan agreement, the energy supplier seeks payment for energy supplied, the telephone carrier for telecommunications services provided, and the transport company for unpaid fares.

of the court fee or not expending further costs of legal proceedings (attorneys 3, 5, judges 4, 10, 17, 19, 23, 53), improper design of attorney compensation (attorney 32, judge 29), which does not motivate attorneys to lead the client to achieve a settlement (judge 39, 41, 44), and also insufficient legal awareness of such economic aspects (attorney 2, judge 39) may play a role. Societal causes were also mentioned – people are often not and long have not been brought up to assume responsibility for their own actions, and their skills to reach agreement in the event of conflict have not been developed (judges 5, 51). It is often a combination of several elements, settlement is a complex matter (judges 4, 19).

As regards the person of the attorney in achieving in-court settlements, too formal communication between attorneys (attorneys 6, 34), interest of attorneys to prolong the case to receive higher compensation (attorneys 14, 31, judges 5, 18, 24, 41), and inability or reluctance to explain the advantageousness of a settlement to clients (attorneys 26, 30, 36, judges 10, 14, 25, 43) were mentioned. In relation to judges, their lack of involvement or even their passivity and failure to present their view of the case (attorneys 7, 8, 14, 21, 30, 36, 37, judges 6, 19) were mentioned. Despite that, judge's activity is seen as very positive since the judge is a greater authority for the parties to the dispute than the attorney (attorney 15, 19). However, according to some respondents, judges must have certain character traits or education to use such a procedure (judges 4, 40, 51).

According to other respondents, all attempts to terminate the dispute amicably have been exhausted at the point of a court proceedings and, therefore, it is difficult to achieve a settlement (attorneys 1, 13, 29, 33, judges 13, 26, 47, 58). In already initiated legal proceedings, the time aspect is important – if a settlement is not achieved at the first or second hearing, it will probably never be achieved (attorney 5, judge 2).

4.2. Procedures appropriate to increase the in-court settlement rate as perceived by judges and attorneys

In the other part of the questionnaire, the judges were asked the following question: "Which procedure do you use in your practice to terminate cases amicably?" Attorneys were asked: "Which court procedure do you consider effective in order to achieve a settlement between the parties?" Representatives of both groups were to select one of the following options or a combination of two options:

- OPTION 1: an appeal to the parties to reconcile or a question as to whether they would consider settlement in their case;
- OPTION 2: bringing the parties to a view to amicable resolution of the case, in particular a discussion of the case with the parties, including drawing their attention to the legislation and its interpretation in the case-law, and recommendation of an amicable solution or, where applicable, presentation of the judge's preliminary legal perspective on the case;
- OPTION 3: ordering the first meeting with a mediator.

In almost half of the cases (48.8%), respondents from the group of judges indicated that they used the procedure described in OPTION 2 to achieve in-court settlement. The other half of respondents also use the procedure indicated under OPTION 2 but in combination with another option. In 24.7% of cases it is combined with the procedure under OPTION 1 and in 25.3% of cases it is combined with the procedure under OPTION

3. Only one respondent replied that they used exclusively the procedure referred to under OPTION 1 (0.6%), and likewise only one respondent indicated that they used a combination of procedures under OPTIONS 1 and 3. No respondent uses exclusively the procedure under OPTION 3 to achieve in-court settlement.

Also in the case of respondents from the group of attorneys who assessed the procedures used by the courts according to their convictions about the effectiveness of the procedure to achieve in-court settlement, OPTION 2 was selected most often. However, compared to the representatives of the group of judges, this option was selected more frequently. Respondents selected it in 65.2% of cases. A combination of OPTIONS 1 and 2 (15.2%) and a combination of OPTIONS 2 and 3 (11.6%) followed well behind. OPTION 3 was selected by 4.3% of respondents, OPTION 1 by 2.9% of respondents, and a combination of OPTIONS 1 and 3 by 0.7%.

TABLE 3

	Judges	Attorneys
OPTION 1	1 (0.6%)	4 (2.9%)
OPTION 2	81 (48.8%)	90 (65.2%)
OPTION 3	0 (0%)	6 (4.3%)
OPTIONS 1+2	41 (24.7%)	21 (15.2%)
OPTIONS 1+3	1 (0.6%)	1 (0,7%)
OPTIONS 2+3	42 (25.3%)	16 (11.6%)

Table 3. Procedures used/appropriate to increase the in-court settlement rate.

The respondents' comments showed two moments in time significantly increasing the likelihood of settlement: (1) relatively quickly after filing an action if the defendant had not taken a pre-trial notice seriously, or (2) after the judge has presented his/her legal opinion to the parties and assessed other aspects of the dispute (attorney 5). Judges should therefore be able to communicate their view of the case to the parties already before the commencement of the first hearing (judge 8). In practice, however, judges order oral preparation of hearing where they would discuss their view of the legal solution of the dispute only exceptionally (attorneys 8, 17, 21, judge 42). The regulation of oral preparation in § 114c⁹ is not suitable to this end (judge 56).

An amicable resolution of the case places greater demands on the preparation of the judge for the meeting. The judge must inform the parties of the results of the preparation of the hearing, interpret the legislation and the case-law, and give their legal opinion on the case. Until the parties to the dispute hear this from the judge, they have no interest in settlement. Unfortunately, the attorney is a very weak authority for the parties. Therefore, if the possibility of settlement is appropriately presented by the judge, the meeting may be directed towards it (attorney 19).

Controversial positions were expressed in relation to the use of mediation. Some respondents expressed support for mediation in their comments – they proposed raising awareness of mediation (attorney 1), its use directly in the courtroom (judges 34, 45), and giving mediation more space in procedural law (judge 45). However, respondents also

⁹ Explained in chapter 2.

pointed to examples of inappropriate practice in ordering the first meeting with a mediator. They criticized that the meeting was practically always ordered without oral preparation. Mediation is also ordered in matters where the parties have conducted out-of-court negotiations in the presence of legal representatives to no avail or where the defendant does not cooperate. Mediation is only appropriate for certain types of proceedings where a positive influence of an independent third party can be expected (attorney 3). This procedure was confirmed in the response of judge 4, who has stated that he orders the first meeting with a registered mediator before he even meets the parties in disputes on the settlement of the matrimonial property. The respondent also identified the imposition of the mediation obligation in disputes with the State as inappropriate in terms of the length and cost of the proceedings (attorney 35) because representatives of the State do not make use of the possibility of settlement in principle.

5. Discussion

The introduction to this paper stated that according to statistics of the Czech Ministry of Justice for 2019, only about 2.4% of cases were terminated by settlement.¹⁰ There are similar figures for 2018 and 2017,¹¹ and it can therefore be said that this is a long-term situation. That figure expresses the ratio between settlements and all cases terminated finally and conclusively, not only before courts of first instance but also before courts of appeal. If we examine the ratio between settlements and other means of termination of a case only before the court of first instance and if in doing so we focus not only on cases terminated finally and conclusively but also on all final decisions issued in the first instance, the figure will be even worse. Of the total number of cases terminated in the first instance (whether finally and conclusively or not) or in accelerated payment order proceedings, only 1.4% were resolved by settlement. This is depicted in the following table.

TABLE 4

Manner of case resolution	Number
Adversarial judgment	204,265
Judgment in default	16,566
Judgment of recognition	12,480
Settlement	8,804
Payment order	281,871
Other	84,090
Total	608,076

Table 4. Manner of case resolution before district and regional courts as courts of first instance. Source: Ministry of Justice (2019b, 2019c, 2019d, 2019e, 2019f).

¹⁰ Similar results were recorded in neighboring Slovakia: 1.56% in civil matters, 3.94% in commercial matters, 11.49% in labor matters (Ministry of Justice of the Slovak Republic 2019), where the new Civil Procedure Code entered into force in 2016.

¹¹ In 2019, 411,214 cases were terminated, of which only 9,826 were terminated by settlement (Ministry of Justice 2019a); in 2018, settlement was achieved in 9,978 of 415,647 cases, and in 2017, it was in 9,443 of 390,152 terminated cases.

As with any statistic, however, it is necessary to recall also in this case the known quote usually attributed to Benjamin Disraeli although he has probably never said it: “There are three kinds of lies: lies, damned lies, and statistics.” The numbers, therefore, need to be examined more closely to avoid erroneous conclusions.

First of all, it should be noted that these percentages (both 2.4% and 1.4%) are calculated from the ratio between settlements and all manners of termination of proceedings. In our view, however, such information is misleading since the total number of cases includes those in which, as a general rule, no dispute had arisen between the parties since the defendant had decided not to enter into a dispute (judgments of recognitions in default) or had recognized the claim (judgments of recognition) or had not opposed a payment order issued against them. In these matters, settlement is out of the question and thus it is not appropriate to include the aforementioned agendas in the total number of cases in assessing the percentage of successfully achieved settlements. For the same reason, it is of no importance to take account of other manners of termination of proceedings in which there is no decision on the merits, such as dismissal of an action due to defects or due to withdrawal of the action.¹²

For that reason, we will not examine the ratio between settlements and all other manners of termination of proceedings but only the ratio between settlements and adversarial judgments, i.e., judgments issued on the merits after a standard cause of civil contentious proceedings before a court of first instance. 204,265 judgments were issued and 8,804 settlements were achieved in the first instance before district and regional courts in 2019. This means that there are 23.2 judgments to one settlement.

However, this ratio is also distorted by the fact that the official statistics persistently keep including divorce proceedings into statistical data on the cases heard in contentious proceedings even though divorces have been heard in non-contentious proceedings since 2014. Settlement cannot be achieved in such proceedings, which is also evident from the statistics: 23,500 judgments were issued in divorce proceedings in 2019 but no settlement was achieved. Since settlement cannot be achieved at all in such proceedings, it makes no sense to include this agenda in the ratio between judgments and settlements; therefore, 23,500 should be deducted from the total number of adversarial judgments. The ratio between judgments and settlements without judgments issued in divorce proceedings is 180,765:8804, i.e., 20.5:1.

This figure is extremely low, which stands out especially if we consider the ratio between settlements and adversarial judgments in other countries. It is particularly striking compared to neighboring Austria, which is linked to the Czech Republic not only thanks to a centuries-long unity in one state but also common regulation of civil procedural law. The first codification of civil procedural law, which applied in parallel in the two countries of the Habsburg monarchy, was the General Court Order (Allgemeine Gerichtsordnung – “AGO”), issued by Emperor Joseph II in 1781. After more than a hundred years, the AGO was replaced by the modern Klein Code of Civil Procedure from 1 August 1895, which took effect on 1 January 1898, and in the Czech Lands it was applicable even after the establishment of an independent Czechoslovakia, until the end

¹² In practice, withdrawal of an action is sometimes motivated by the fact that the parties have agreed to settle their dispute out of court. However, the number of withdrawals motivated by this reason cannot be determined from the statistics.

of 1950 (Rechberger 2016). Even in the days before the Code of Civil Procedure took effect, the number of settlements was very high: in proceedings before district courts, 47.4% of cases ended amicably in 1883, 46.4% in 1884 and 45.2% a year later (Saria 2018). Austria maintains a high number of settlements to this day: in 2014, for example, the ratio between judgments and settlements in proceedings before district courts was 1.51:1 (in favor of judgments), and even 1.23:1 before regional courts (Saria 2018).

What are the reasons why every second to third proceeding is amicably closed in Austria, whereas in the Czech Republic every twenty-second to twenty-third? The investigation carried out indicates causes both objective and subjective in nature.

The objective causes of the low ratio between settlements and judgments include, first and foremost, the complexity of the dispute and the consistency of the decision-making practice or in general of interpretation of the legislation on the matter; 50.6% of judges and even 66.7% of attorneys consider it a significant factor. If a dispute is factually complex, it can be assumed that it will lead to an increased effort by the parties to achieve a settlement, thus avoiding often considerable costs of taking evidence, saving time and not leaving their fate dependent on what factual findings the court ultimately makes of the evidence made. The legal complexity of a case is very closely related to the consistency of the decision-making practice or, on the contrary, to its inconsistency. Greater stability reduces the uncertainty of the parties as to the legal assessment of the case and makes the outcome of the proceedings more predictable for them. Therefore, the lack of clarity in the legal assessment of the case should rather be – like the factual complexity – a factor leading the parties to achieve a settlement. The Czech legal system is being permanently rebuilt in the last thirty years (see Dvořák and Zoulík 2011, Dvořák 2012, Lavický *et al.* 2014): first from socialist law to a legal system of a democratic rule of law; in the field of private law, this transformation was completed by the adoption of a new Civil Code, which took effect on 1 January 2014. As a result, a number of legal issues decided upon by courts in civil proceedings are unclear or interpreted contradictorily. This instability of legislation and case-law should be an essential motive for achieving settlements but the low ratio between settlements and judgments (1 settlement to 20.5 judgments) shows that this is not really the case. Although judges and attorneys consider the complexity of the case and consistency of the decision-making practice a significant factor for achieving a settlement, the actual significance of this factor – at least from the quantitative point of view – seems to be lower than they attribute to it.

41.6% of judges and 31.9% of attorneys consider the type of claim to be the decisive factor. In this factor, objective elements are mixed with subjective ones. The substantive nature of the claim is determined by law and by the area of life in which it is made, i.e., objectively. The subjective aspect is manifested in the fact that in certain areas of dispute the parties typically prevent achieving of a settlement by their actions. The respondents point out that these are mainly disputes with insurance companies, loan companies, energy suppliers, telephone carriers, transport companies, and the State. In those cases, achieving a settlement is precluded either by the fact that the parties do not allow their representatives to achieve a settlement or by the lack of cooperation of the defendant, who is passive in the proceedings, does not attend hearings or has not been traced at all.

If we confront these observations with court statistics, we find that these agendas mentioned by the respondents represent a not negligible number of cases: of the 411,214

cases terminated finally and conclusively in 2019,¹³ 66,821 (16.2%) were disputes with insurance companies, 86,504 (21%) disputes with loan companies, 25,674 (6.2%) disputes with energy suppliers (disputes over payments for electricity, gas or heat supplies), 6,046 (1.5%) disputes with telephone carriers, and 64,230 (15.6%) disputes arising from passenger transport. The State is in the position of the defendant primarily in disputes over compensation of damage caused by an unlawful decision or maladministration (e.g., for excessive length of proceedings or for unlawful detention); 2,313 of cases of this type were terminated in 2019, i.e., 0.5%. It is clear from these disputes that especially disputes arising from insurance, bank and non-bank loans and passenger transport account for more than half of all cases terminated in civil proceedings in 2019; the entire agenda represents 61% of all cases settled that year. All remaining private law disputes represent only 39% of the caseload; these are the only ones, as follows from the survey conducted, where the actions of the parties to the dispute do not prevent achieving a settlement. It is clear from this that the number of amicable resolutions will never be very high if the variety of disputes in which the parties' position allows for a settlement is only a little more than one third of all cases.

Court statistics on cases terminated finally and conclusively do not make it possible to examine the manner of termination of proceedings in those areas; they only indicate the number of cases and not of the manner of their termination. However, it is also useful to mention it to provide an idea.

On the other hand, statistics addressing all matters decided upon in the first instance (see Table 4) expressly state the manner of termination of the case and it is therefore possible to take them as a basis for establishing the proportion of settlements in adversarial judgments. It not only shows the overall proportion but also pays particular attention to disputes with transport companies, loan disputes and disputes over broadcast receiving license fees.

As far as passenger transport disputes in which transport companies or debt collection agencies that bought receivables from transport companies act as plaintiffs are concerned, 31,252 of them were terminated by an adversarial judgment and only 37 settlements were achieved in 2019. Therefore, a settlement is achieved in every 845th proceeding (sic!).

Disputes arising from bank and non-bank loans are similar in nature to disputes arising from passenger transport. In 2019, there were 56,623 judgments and 1042 settlements, i.e., a ratio of 54.3:1.

Settlements are virtually non-existent also in disputes over due license fees for television or radio broadcasting. In 2019, there were only 4 settlements and 2547 judgments.

Court statistics do not pay particular attention to other areas that respondents rank among those in which settlements are not achieved (disputes with insurance companies, disputes with energy suppliers, disputes with telephone carriers and disputes in which the State acts as the defendant), which leads to a lack of data to establish the ratio

¹³ Here we base our thoughts on the total number of cases, i.e., not only those that were terminated by judgment or settlement. The court statistics related to the various agendas ("Overview of final and conclusive decisions of courts in civil matters according to the type of disputes") only list the number of cases and not the manner of their termination.

between judgments and settlements. But if we tried to estimate the impact of these agendas on achieving settlements, we could probably depart from the numbers we know from loan disputes, which is likely the closest category. It can therefore be estimated that 65,790 judgments were issued and 1211 settlements were achieved in insurance disputes, disputes over energy supplies, disputes with telephone carriers, and disputes with the State.

If we subtract all the above cases in which settlements are achieved rarely or not at all (disputes arising from transport, disputes arising from loans, disputes over broadcast receiving license fees, insurance disputes, disputes with energy suppliers, disputes with telephone carriers, and disputes with the State) from the agenda of civil contentious proceedings, we arrive at a ratio between judgments and settlements of 24,913 to 6510, i.e., 3.8:1. This means that there are 3.8 judgments to one settlement. This is apparently the reality of “ordinary” disputes before district courts.

FIGURE 1

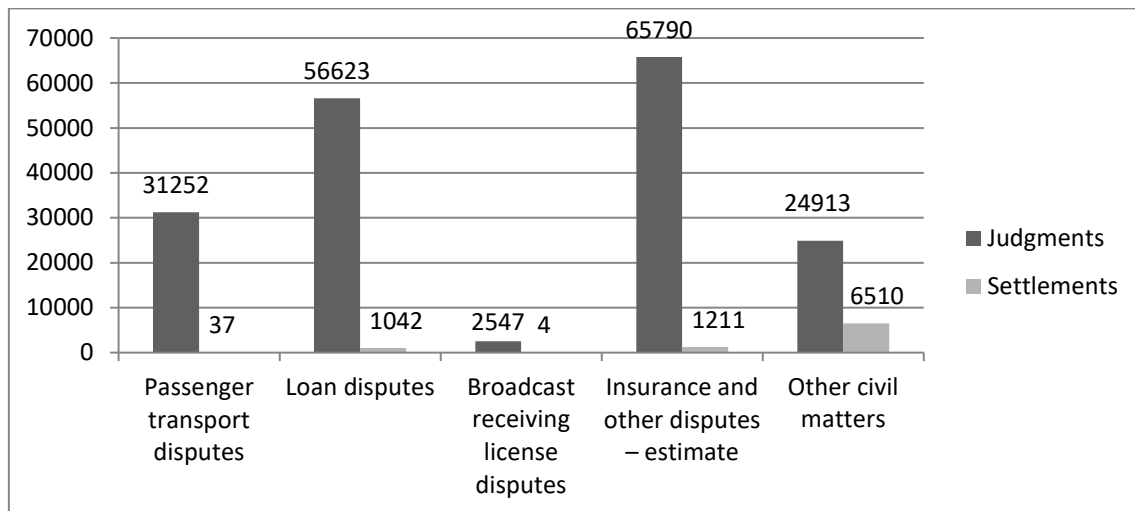


Figure 1. Number of in-court judgments and settlements in different areas.
Source: Ministry of Justice (2019b, 2019c, 2019d, 2019e, 2019f).

Both judges (83.1%) and attorneys (73.9%) see the parties’ unwillingness to achieve a settlement as a key factor. The mutual antagonism of the parties may prevent the achievement of a settlement, e.g., in neighborly disputes or disputes arising from long-term legal relations such as rent. In such cases, an explanation of the benefits of settlement by an attorney, if the party is represented,¹⁴ and, of course, an active influence of the judge on the parties could help overcome the parties’ reluctance to achieve a settlement. However, respondents themselves report that attorneys are often unable or unwilling to explain to the parties the benefits of a settlement and, as will be shown below, the active influence of the judge on the parties to achieve a settlement sometimes lags behind in practice. In this context, it is interesting that only less than a tenth of judges and attorneys consider the assistance of third parties (typically a mediator) to be the key factor.

¹⁴ The Czech Code of Civil Procedure does not prescribe compulsory representation by an attorney for proceedings in the first instance.

More than half of judges believe that achieving of a settlement is substantially affected by the strategy chosen in the case by the attorney representing the party to the proceedings (see also e. g. Elkins-Elliott and Elliott 2004). Not only judges but also attorneys themselves note in their responses that attorneys are not economically motivated to achieve a settlement. Under current law, when deciding on the compensation of the costs of proceedings between the parties, the court determines the attorney's remuneration for representation according to the number of acts of legal service performed by the attorney in the proceedings multiplied by the rate of remuneration for one act (e. g. filing an action, representation at court hearing); the rate is derived from the value of the subject-matter of the dispute. Therefore, the more acts an attorney makes in a case, the higher their remuneration will be. Of course, such a design of remuneration for each act of the attorney does not motivate them to terminate the proceedings by settlement as soon as possible, but – taken from a purely economic point of view – on the contrary, it has the opposite effect because the attorney's remuneration will increase the longer the proceeding will last and the more acts the attorney will make in it. From this point of view, a flat-rate remuneration for representation would certainly be appropriate, which would be due to the attorney irrespective of the number of acts performed in the case. A flat-rate remuneration motivates the attorney to achieve a settlement because if a settlement is achieved at the very onset of the proceedings, the attorney needs to make less effort than if the court has heard the case on the merits.

The economic motivation for achieving a settlement is important not only for the representatives of the parties but also for the parties themselves. About half of the respondents, both judges and attorneys, consider it to be an essential factor. The parties should be motivated to achieve a settlement by the very fact that a settlement rules out additional costs incurred for taking of evidence, the ever-increasing fee for each act in representation, etc., for which they may be obliged to reimburse the counterparty in the event of losing the case. Similarly, an early termination of proceedings saves the parties time and allows them to invest it in a different way than in the activities associated with hearing of the dispute. However, this general motivation is probably not quite enough. The Court Fees Act, as stated in the introductory passages of this paper, therefore stipulates that if the court approves the settlement before the court decides on the merits,¹⁵ the plaintiff will in principle be refunded 80% of the court fee. However, the low ratio between settlements achieved in the Czech Republic and judgments shows that even this motivation does not seem to be decisive. There is also a question whether parties that do not have legal education are at all familiar with the economic context of the costs of the proceedings and the possibility of refund of part of the court fee. Greater awareness might contribute to a higher number of settlements achieved.

If parties are aware of the economic benefits of settlement, they will compare it with the losses that a settlement will bring for them (Andrews 2008). The conclusion as to whether a settlement is advantageous or disadvantageous will then depend not only on purely economic aspects but also on the assessment of the prospects for success in the case. A

¹⁵ A settlement may also be achieved in appellate proceedings. However, this will already be a situation where the settlement is achieved only after a first-instance court decision of the merits, and therefore the plaintiff will not have the right to a refund of the court fee.

party whose evidence does not seem very convincing or whose claim or defence does not seem legally unambiguous will certainly be more willing to compromise. Here, too, the saying better an egg today than a hen tomorrow applies.

Almost half of attorneys believe that an important factor that influences achieving of a settlement is the fact whether the judge merely formally asks the parties if they intend to achieve a settlement or whether, on the contrary, the judge actually makes an effort towards an amicable resolution of the case (see also e. g. Roberts 2000, Cremers and Schliessler 2015, Starnes and Finman 2015). The answers to the second question have clearly shown that a mere formal attempt at settlement is not appropriate; however, nor do judges themselves – with the exception of one – admit to merely asking the parties whether settlement would be out of the question or an invitation to attempt at a settlement. For that matter, such a procedure would also be a violation of the Code of Civil Procedure, which in § 99 expressly requires the court to seek settlement and to discuss the matter with the parties in an attempt at a settlement or, where applicable, to recommend the possibility of an amicable solution to them. These statutory guidelines are consistent with the ideas of judges and attorneys on the appropriate steps of the judge in the attempted settlement, as evidenced by the research carried out. However, the respondents' responses also showed that judges are far from always proceeding in the attempt at a settlement as required by law and that they are completely passive instead, for example, they do not bother to discuss the matter with the parties. While, with one exception, judges-respondents take an active approach according to their own assessment (option 2 above), it is possible that many judges who did not participate in the research do not make sufficient efforts to achieve a settlement and their influence on the parties is only formal. This substantially reduces the likelihood that a settlement will be achieved.

Nor can a combination of options 1 and 3, i.e., a formal call upon the parties combined with a referral to the first meeting with the mediator, be considered sufficient. In doing so, the judge frees themselves of the case for some time and transfers the attempt at an amicable solution to someone else. Such a procedure not only is not compliant with the law but also, according to the experience of some respondents among judges and attorneys, need not be expedite. This is illustrated by the answer of a respondent-attorney who believes that the role of a reasonable and competent judge as an "authority" is much more effective than that of a mediator who, given the "non-binding character" of their opinion, is often not respected by the parties (attorney 5).

The underestimation of the importance of the judge's active role in achieving a settlement is also reflected in the fact that judges avoid ordering oral preparation. Instead, judges use written preparation of hearing, which does not require any direct contact. The fact that the importance of written preparation of hearing for the reconciliation of the parties is minimal is quite evident (Brink and Marseille 2014, Rechberger 2016). On the contrary, the purpose of oral preparation foreseen by law is not only to clarify the hearing agenda but primarily to attempt at an amicable resolution of the case. Judges seem to avoid ordering oral preparation not only because written contact with the parties requires less work than meeting in person but also because of the overly formalized requirements for ordering oral preparation and summoning the

parties and their representatives to it, and finally because after the oral preparation is over, the parties are no more allowed to present new facts or propose new evidence.

Whatever the reasons, if oral preparation is not held, the opportunity to try to clear the dispute as soon as possible by its amicable settlement is unnecessarily missed. Therefore, an attempt at a settlement is only postponed until the first hearing on the merits. An attempt at a settlement at that hearing may be futile because of the judge's insufficient preparedness for the first hearing on the merits. One of the respondents explicitly acknowledges this unfortunate experience – judge 23: “Due to the number of disputes and the pressure on the speed of proceedings, there is no time to pay sufficient attention to the cases before the start of the first hearing.” It is clear that a judge who is not prepared themselves cannot discuss the case with the parties as required by the Code of Civil Procedure, i.e., to analyze the factual and legal aspects of the case in a discussion with them, including the established case-law, and draw their attention to the procedural risks associated with hearing of the case on the merits (in particular the division of the burden of proof) (Mazel 2020). The very absence of a genuine legal conversation between the judge and the parties may be the key factor causing the lower settlement rate in the Czech Republic compared to neighboring Austria. In this context, there is an inspiring observation by Mazel (2020) pointing to the high settlement rates in legal cultures in which the requirement to discuss the matter with the parties has long been enshrined as opposed to the Czech Republic, where it has not been well-established yet.¹⁶

The described situation also brings another negative effect: time is running out and the possibilities of achieving a settlement are rapidly decreasing (Grajzl and Zajc 2017). A recent German research study has concluded that the length of proceedings has a negative impact on the possibility of a settlement (Berlemann and Christmann 2019), and this is also confirmed by the respondents to our survey.¹⁷

An interesting result of the survey is the fact that neither judges nor attorneys consider the possibility of challenging a first-instance judgment by appeal as a factor influencing whether a settlement is achieved. Foreign experience comes to the opposite conclusion, substantiated by the fact that “the threat of appellate review raises expected costs for the parties, thereby increasing the incentive to cooperate and settle the matter at the beginning” (Berlemann and Christmann 2019). The threat of an increase in the costs associated with the appellate procedure is apparently not that significant in Czech

¹⁶ The current court rules governing the court's procedure in an attempt at a settlement were introduced in 2005. An amendment responded to the mostly passive (formal) approach of judges to achieving settlements and, conversely, sought to encourage them to make more efforts. This was clearly inspired by § 278(2) of the German ZPO (Rules of Civil Procedure).

¹⁷ Those findings refute Drápal's (2002) recommendation that the judge consider “whether they will attempt at an amicable settlement of the case at the outset of the proceedings or whether it would be more appropriate to leave such an attempt to the hearing itself, when certain disputed facts can already be clarified, thus contributing to the amicable settlement of the case, or until time before the end of the hearing”. On the contrary, what applies here is the sooner the better. In this spirit, Myslíl (2003) confirms based on the experience from legal practice that the most suitable time to achieve a settlement is after the opening of proceedings, when the standpoints of both parties and the documentary evidence proposed by them are available (based on which the representatives of the parties may find that the “in the light of the opposing party's standpoint and evidence, allegations and beliefs of their clients need not be as bulletproof as they seemed at the beginning”).

circumstances so as to constitute a factor influencing the parties' decision to achieve a settlement.

There is no doubt that cultural and structural aspects can also influence the settlement rate (Ali 2011). It is noticeable that the respondents also have experience of this. In addition to the low economic motivation mentioned above, the lack of knowledge and skills of the disputants to reach an agreement and take responsibility for their own actions was noted. This may be connected with the fact that the traits of the parties and the relationship with the other party were seen by judges and attorneys as the most important factor affecting the conclusion of a settlement. Respondents also experienced an unsatisfactory training of attorneys and judges in amicable settlement of disputes. Therefore, the lack of education of all stakeholders in reaching settlement appears to be a significant problem in the Czech environment. The lack of acquaintance of the Czech society in the field of dispute resolution was confirmed by a recent empirical research focused on mediation. The research was conducted on a representative sample of Czech society and according to its conclusions only 33.6% of respondents understood the idea of mediation (Urbanová *et al.* 2020). This only illustrates that the area of amicable dispute resolution is not a politicized topic in the Czech Republic.

6. Conclusion

The information obtained by the questionnaire survey together with an analysis of the statistical data has showed that the number of settlements achieved and therefore the ratio between settlements and adversarial judgments varies significantly depending on the type of claim the court hears. In several areas, which, however, quantitatively account for more than 60% of cases heard in civil contentious proceedings, settlements are achieved very rarely. The causes are due either to the plaintiff's unwillingness or, on the contrary, to the defendant's lack of cooperation: for example, in disputes in which transport companies put forward claims against fare dodgers (the fare due and surcharges thereto), defendants are usually not involved in the proceedings at all (they do not take over documents from the court, do not provide their standpoints, do not attend hearings). As a standard, such cases should be resolved by payment orders or default judgments. However, both are precluded by Czech legislation, which rules out the possibility of service by depositing a document with the post office if the addressee has not been achieved (therefore, non-service implies cancellation of the payment order and hearing of the case in contentious proceedings as if a protest had been lodged). Plaintiffs do not propose that a default judgment is issued primarily because the defendant may defend himself against enforcement by objecting that the debt had extinguished, *inter alia*, on the basis of facts that occurred before the issue of the default judgment. This regulation is, of course, conceptually completely incorrect as it allows raising facts in enforcement proceedings that should have been raised in the trial proceedings and thus call into question the enforcement order. Both factors result in the fact that there are "adversarial" judgments instead of settlements or payment orders in the described area of settlements although no actual dispute has often developed between the parties. It is clear that in such circumstances there is not much room for settlement.

Without this specific group of cases, the estimated ratio between judgments and settlements is 3.8:1. This is not a downright bad ratio but it is clear from a comparison

with neighboring Austria, with which the Czech Republic had a long common history (including civil court procedure), that it could be significantly better. In our view, legislation is not to blame for this situation; this was also confirmed by the views of the respondents. Flaws should therefore be sought in practice.

The survey has confirmed that the absence of oral preparation, which is practically not used by courts and is replaced by a written form of preparation of a hearing, negatively affects the possibility of achieving a settlement, including at the very beginning of the proceedings when the situation is most favorable for this. Another factor is that an attempt at a settlement – made only at the first hearing on the merits – is often only formal, which the respondents consider an undesirable procedure. The cause of only a formal attempt at a settlement is often the unpreparedness of the judge, who only familiarizes themselves with the case at the first hearing. This failure of the judge is usually excused by the number of cases that they have to hear in parallel. But this is a vicious circle: the number of cases simultaneously heard on the merits is high, *inter alia*, because few settlements have been achieved; and vice versa, the number of settlements is low because the judge has not actually made an effort to achieve a settlement because they could not prepare for it because of the large number of cases. This can only be overcome by increased efforts.

It follows from these considerations that what would help increase the ratio between settlements and adversarial judgments is if courts made much greater use of oral preparation in the first place as oral preparation provides significantly better conditions for achieving a settlement than the court's written contact with the parties. Furthermore, the judge must prepare carefully for oral preparation and must have a genuine legal conversation about the possibility of achieving a settlement. That is, the judge must be prepared and active, not unprepared and passive.

It is also necessary to increase the motivation of attorneys representing the parties and thus promote their own interest in an early amicable termination of the case and in being able and willing to explain the benefits of settlement to the parties. In the current Czech situation, in our opinion, this primarily means the abandonment of the fee for representation by an attorney based on the number of acts performed by the attorney and its replacement by a flat-rate fee.

Finally, information and training of attorneys and judges in amicable dispute resolution options and how to conciliate disputants should be promoted. It would also seem appropriate to focus on building competence to resolve conflicts independently as part of the national education process.

These are not the only measures but the crucial ones. We believe that in aggregate they could contribute to a significant increase in the number of settlements achieved.

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