THE PROCEDURE OF REIMBURSEMENT OF THE COSTS INCURRED IN A TRIAL, IN A SUBSEQUENT TRIAL

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Abstract

Costs incurred in a dispute may be claimed in that dispute or the parties may choose to claim them separately, in another trial. Although, apparently, the claim for costs after the trial in which they were incurred is not difficult, in fact, the initiation of a new litigation determines the initiation of the entire procedural mechanism related to any trial. Thus, like any other litigation, the one having as object the obligation of the defendant to pay the court expenses incurred in another case, will start by introducing the petition. The petition will have to comply with all the conditions set out in the Code of Civil Procedure, including those relating to the payment of fees. Although many issues related to the claim for costs in another case have been clarified in case law or doctrine, further practice shows us that a legal issue can never be definitively clarified. From a logistical point of view, it would clearly be preferable for the parties to claim costs in the dispute in which they were incurred, given that the judge of the case knew all aspects of the dispute directly, but also for to avoid the agglomeration of the courts with other litigations. On the other hand, given that certain costs can be determined only after the end of the proceedings, the request for costs in another litigation may be an appropriate solution.

Keywords: *costs, trial, jurisprudence, procedural, reimbursement.*

1. Introduction

Given the fact that court costs have become very important in a lawsuit, being a real claim, this article seeks to clarify certain controversial issues related to the claim for costs in another trial, by presenting the jurisprudence or opinion of the doctrine in this matter. Also, even at the level of the European courts, there have been decisions that are relevant on the subject addressed by this article.

One aspect that is relevant to the claim for costs is that if the claim is made in the very litigation which gave rise to the costs, it is an accessory request, and if the costs are claimed in another trial, the claim is a main one, the procedural effects being significant.

Another aspect that should be mentioned is that, sometimes, court fees have a higher amount than the value of the summons. In these cases, it is necessary for the court to analyze the proportionality and reasonableness of the costs.

In doctrine and case law, it is unanimously accepted that the costs of a dispute may be claimed in a new trial. However, A controversial situation is the one in which, although the party initially requested costs in the process in which they were made, later, it changes its opinion and wants to request them in another process. Is this a waiver of this request? Or, according to art. 406 para. 4 of the Code of Civil Procedure1, the consent of the opposing party would be required in order for a waiver to be taken. Also, if the party is represented in the process, it would be necessary to have a special mandate, according to art. 406, second paragraph, of the Code of Civil Procedure, in order to make this act of disposition. In practice, however, the courts are not overly strict in this regard, being rather permissive and merely taking note of the party's request for costs separately.

Another problem that arises in practice is that some parties require certain categories of court costs in the litigation that gave rise to them (such as judicial fees) and other costs separately (such as attorney's fees). Since there is no legal rule prohibiting this practice, and civil liability for tort is based on the principle of full reparation of the damage, I consider that there is no impediment to proceeding in such a manner.

2. Legal regulation

The award of costs is governed by the provisions of art. 451-454 of the Code of Civil Procedure. According to art. 451, the court costs consist of the judicial fees, the fees of the lawyers, of the experts and of the specialists appointed under the conditions of art. 330 para. (3), the amounts due to witnesses for travel and losses caused by the need to be present at the trial, the costs of transport and, where applicable,

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[1] Art. 406 para. (4) Code of Civil Procedure: If the plaintiff waives the trial within the first term at which the parties are legally summoned or after this moment, the waiver can be made only with the express or tacit consent of the other party. If the defendant is not present at the time when the plaintiff declares that he is giving up the trial, the court will give the defendant a period within which to express his position on the request for waiver. Failure to respond by the deadline is considered a tacit agreement to waive the judgment.

accommodation, as well as any other expenses necessary for the proper conduct of the proceedings. From the very definition of costs, it can be seen that some of them, such as lawyers' final fees, transport and accommodation costs, could be known to the parties only after the dispute has been settled, so that at least those costs are justified to be requested in another trial.

2.1. Court costs consisting of lawyers' fees

According to art. 30 para. 1 of Law no. 51/1995 which regulates the organization and exercise of the profession of lawyer, for his professional activity the lawyer has the right to a fee and to cover all expenses incurred in the procedural interest of his client. Several legal provisions regarding lawyers' fees are provided in the Statute of the legal profession. Thus, according to art. 130 of the Statute, the lawyer is prohibited from fixing his fees on the basis of a *quota litis* agreement. The *quota litis* pact is an agreement concluded between the lawyer and his client before the final settlement of a case, an agreement which fixes exclusively the lawyer's total fees according to the judicial outcome of the case, regardless of whether these fees consist of a sum of money, a good or any other value. Therefore, a legal aid contract is valid, which provides for both a success fee and a fixed, pre-established fee, a conclusion also upheld by the HCCJ in resolving an appeal[2]. On that basis, if the parties provided for both a fixed fee and a success fee, the latter could be determined only at the end of the dispute, depending on the solution in question. Also, in case the parties of the legal aid contract would provide an hourly fee, per working hour, in accordance with the provisions of art. 129 of the Statute of the legal profession[3], the party has no way to prove, at the latest at the close of the debates, as required by art. 452 Code of Civil Procedure[4], of the costs, because, practically even at the last trial session, the lawyer would represent the party, so he would owe a fee for this activity as well. Moreover, if the ruling is postponed and the lawyer draws written conclusions, it is clear that the party cannot claim these costs in this first dispute. Even the provisions of art. 451 (2) of the Code of Civil Procedure[5] could not be applicable because the court did not know the total amount of the costs represented by the lawyer's fee. Regarding the provisions of art. 451 para. 2 of the Civil Code, the Constitutional Court, being notified with the exception of unconstitutionality of this provision, decided that, in connection with the obligation to pay court costs, including the lawyer's fee, by the losing party, by Decision no. 401 of 14 July 2005, the Court held that the prerogative of the court to censure, in determining the costs, the amount of the agreed legal fee, in view of its proportionality to the breadth and complexity of the activity submitted, is all the more necessary as that fee, converted in order to pay the costs, he is to be borne by the opposing party if he has fallen into claims, which necessarily presupposes that he is opposable to him. However, its opposability to the opposing party, which is a third party in relation to the agreement to provide legal services, it is the consequence of its acquisition by the court decision by the effect of which the claim acquires a certain, liquid and due character"[6].

In other decisions of the Constitutional Court, concerning the same legal provisions, it held that the lawyer, by exercising his profession, carries out an economic activity, which consists in offering goods or services on a free market (Judgment of the Court of Justice of the European Union of 19 February 2002, in Wouters and Others, para. 49), but any economic activity is carried on "in accordance with the law". Consequently, the legislature considered that the amount of the fee must be proportionate to the service provided, thus establishing the possibility of limiting it

[2] Decision no. 2131/2013, File no. 10873/63/2011.

[3] Art. 129 of the Statute of the legal profession:
(1) The fees may be set as follows:
a) hourly fees;
b) fixed fees (flat rate);
c) successful fees;
d) the fees formed by the combination of the criteria provided in letters a) -c).
(2) The hourly fee is established per working hour, respectively a fixed amount of monetary units due to the lawyer for each hour of professional services he provides to the client.
(3) The fixed fee (flat rate) consists of a fixed amount due to the lawyer for a professional service or for categories of such professional services that he provides or, as the case may be, he provides to the client.
(4) The hourly and fixed fee (flat rate) is due to the lawyer regardless of the result obtained by providing professional services.
(5) The lawyer may receive from a client periodic fee, including in the form of a flat rate.
(6) The lawyer has the right to request and obtain a successful fee in addition to the fixed fee, as a supplement, depending on the result or the service provided. The success fee consists of a fixed or variable amount set for the attorney to achieve a certain result. The success fee can be agreed with the hourly or fixed fee.
(7) In criminal cases, the success fee may be applied only in connection with the civil side of the case.

[4] The party claiming costs must prove, in accordance with the law, their existence and extent, at the latest at the end of the closing of the debate on the merits of the case.

[5] The court may, even of its own motion, reasonably reduce the part of the court costs representing lawyers' fees, when this is clearly disproportionate to the value or complexity of the case or to the work carried out by the lawyer, taking into account the circumstances of the case. The action taken by the court will have no effect on the relationship between the lawyer and his client.

[6] Decision no. 165 of March 27, 2018.

if there is no fair balance between the lawyer's service and the fee charged[7].

On the other hand, it is the court which settles the main action which is the best able to examine the merits, proportionality and reasonableness of the costs, since it is the court which, at least in the case of the fees of the lawyers, is directly aware of the work of the lawyers. However, regarding the reduction of lawyers 'fees recently, the ECtHR ruled that art. 1 of Protocol 1 to the ECHR had been violated, by the fact that the court ordered the reduction of *ex officio* lawyers' fees[8]. There are, therefore, benefits to claiming costs in the very litigation in which they were incurred, but the reality is that in many cases this is impossible. If the party is to be ordered to pay the costs of the proceedings in a new litigation, certain procedural issues need to be clarified.

3. Procedural aspects

3.1. The court fees for the claim

In the first place, if the parties request the fees from another trial, in a subsequent trial, then they have to pay another judicial fees for this second claim[9].

Obviously, the procedure chosen by the applicant is also important, as we will see below, as court fees are also determined by this choice. The HCCJ has ruled in a decision in an appeal in the interest of the law[10] that claims requiring the award of costs separately are the main claims subject to court fees, which are calculated on the basis of the amount of the claims brought before the court, even if the claims which were the subject of the dispute from which those costs came were exempted from paying fees. Thus, even if, in the situation in which the costs are required in the process which gave rise to them, it is not necessary to pay the court fee for this claim, always, if these costs are claimed separately, it is necessary to pay the fees on the grounds that the legal basis for the application for recovery of costs is distinct from that of the process were the costs incurred. As an exception, however, we mention the situation in which it is requested to award the costs separately by a public institution, among those provided in art. 30 para. 1 of the GEO no. 80/2013[11]. In this case, no legal fees will be paid in any case, regardless of the procedure followed.

The exemption from the payment of judicial fees for the accessory claim having as object the court costs, is based, mainly, on the provisions of art. 35, second paragraph of GEO no. 80/2013 which stipulate that unless the law provides otherwise, the applications submitted during the trial and which do not change the taxable value of the application or the character of the initial application shall not be taxed. Also, the HCCJ, the panel for resolving the appeal in the interest of the law, decided that in the unitary interpretation and application of the provisions of art. 28 referred to in art. 35 para. (2), art. 9 and art. 34 para. (3) of the GEO no. 80/2013 on court fees, with subsequent amendments and completions, appeals are not subject to court costs when they concern the decisions of the previous courts on the accessory request made in the process by the parties, which have as object the award of court costs[12].

3.2. The competent court

Secondly, the court which will be competent to solve the claim having as an object the fees from another trial, it is determined in accordance with the ordinary rules of jurisdiction. Thus, it is not relevant which of the courts judged the litigation that generated the court costs, but it is necessary to determine the competent court according to art. 94 et seq. of the Code of Civil Procedure. Moreover, it may even be the case that the court which will decide the case for the award of costs in another dispute is of a different degree from the one which settled the dispute where the costs incurred.

3.3. Legal basis

With regard to the legal basis of the claim, as stated in case law and doctrine, the claim for costs separately is based on civil liability for tort, being necessary to determine exactly the damage caused, compared to the principle of full reparation of damage[13].

It should also be noted that the procedure before the court may be different depending on how the plaintiff chooses to apply for costs in accordance with the common law procedure, the small claims procedure (art. 1026 et seq. of the Code of Civil Procedure) or the payment order procedure (art. 1016 et seq. of the Code of Civil Procedure). Regardless of the procedure chosen, I consider that the only useful and relevant

[7] Decision no. 471 of June 27, 2017.

[8] Case 54780/15 (Dănoiu and Others v. Romania).

[9] Art. 3 of the GEO no. 80/2013.

[10] Decision no. 19 of November 18, 2013 regarding the appeal in the interest of the law, regarding the interpretation and application of the provisions of art. 1, art. 2 para. (1) and art. 15 letter p) of Law no. 146/1997, with subsequent amendments and completions.

[11] Art. 30 para. 1 of the GEO no. 80/2013 Actions and requests are exempted from the judicial fee, including appeals formulated, according to the law, by the Senate, the Chamber of Deputies, the Romanian Presidency, the Romanian Government, the Constitutional Court, the Court of Accounts, the Legislative Council, the People's Advocate, the Ministry Public and by the Ministry of Public Finance, regardless of their object, as well as those formulated by other public institutions, regardless of their procedural quality, when they have as object public revenues.

[12] Decision no. 2 of January 20, 2020.

[13] Art. 1385 para. (1) of the Civil Code.

evidence is that of the documents, so the duration of the trial should be limited to a single session, unless other procedural incidents occur.

3.4. Costs

With regard to the costs incurred in the litigation concerning the award of costs, the HCCJ ruled that in the cases having as object the obligation of the defendant to bear the claim consisting in the court costs generated by another definitively settled litigation, the provisions of art. 453 para. (1) of the Code of Civil Procedure remain applicable[14].

In the same decision it was held that the plaintiff cannot be at fault when he exercises his right, and the defendant, who loses the lawsuit and who does not manifest himself within the limits of art. 454 of the Code of Civil Procedure, cannot be considered innocent in connection with the litigation having as object the payment of the costs related to a previous litigation. On the other hand, the costs incurred in the context of this second dispute should no longer be required in the course of a new dispute, precisely in order to interrupt an unjustified series of disputes and to prevent any abuse of procedural law. As the complexity of the case is somewhat predictable, all costs could be determined before the close of the proceedings on the merits.

Although rare, it would not be out of the question that in the main proceedings the claim was upheld in part and both parties applied for costs separately, in the dispute concerning the award of costs, the defendant may file a counterclaim claiming the costs incurred in the first proceedings.

3.5. Limitation periods

Being a main claim having as object claims based on civil liability for tort, the legal provisions regarding the limitation periods become incidental. Thus, according to art. 2528, para. 1 of the Civil Code, the limitation period for reparation for a damage caused by an unlawful act begins to run from the date when the injured party knew or should have known both the damage and the person responsible for it. In view of these provisions, we need to determine when the limitation period starts to run. However, the party is aware of the damage and the person responsible for it, from the moment of communication of the final decision by which the dispute that generated the court costs was settled. On the other hand, if certain costs are known to him later because, for example, the lawyer issues the invoice with the total amount of the fee, after the communication of the final decision, from that moment the limitation period begins to run.

4. Conclusions

Lately, judicial costs have become increasingly important as a result of the development of the legal professions, so there are few cases in which the parties are not represented by lawyers or legal advisers. Also, there are many cases where the parties try to prove their claims through the expert test.

Due to the multitude of situations in which the parties wished to obtain through another trial the costs of a first trial, it was necessary to intervene in the doctrine and case-law in order to clarify the incidents which had arisen and which were not yet settled. Although in practice there will always be problems with claiming the costs of a trial, at this time many questions have been answered, and the parties can make an informed choice as to what is most advantageous to them.

References

- Gabriel Boroi, Mona-Maria Pivniceru, Carla Alexandra Anghelescu, Bogdan Nazat, Ioana Nicolae, Tudor-Vlad Rădulescu, *Civil Law Files*, 3rd ed., Hamangiu Publishing House, Bucharest, 2018;
- Gabriel Boroi, Mirela Stancu, *Civil procedural law*, 5th ed., Hamangiu Publishing House, Bucharest, 2020;
- Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Civil law. Obligations*, 3rd ed., Universul Juridic Publishing House, Bucharest, 2020.

[14] Decision no. 59/2017.