

THE CENSORSHIP OF COURT COSTS REPRESENTED BY THE SUCCESS FEE OF THE LAWYER

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Abstract

In a democratic society marked by heightened individual liberalism, the right of access to the courts constitutes one of the axiomatic elements in the expression of citizens' prerogatives and personal freedoms, forming a fundamental basis for any legal subject's entitlement to a fair trial within Romanian society.

However, participation in judicial proceedings by a party inherently involves bearing litigation costs associated with the trial process. These costs are also reflected in the payment of fees for representation or legal assistance provided by a legal professional acting as the litigant's advocate.

Such litigation expenses, incurred by the party that prevails in court, must – as a requirement for ensuring discipline in Romanian civil proceedings – be borne by the losing party, the one whose claims were dismissed, and who, consequently, is obliged to cover all such costs for the winning side.

As for the legal fees representing attorney remuneration, these are unequivocally subject to full and reasonably justified judicial review.

However, regarding a specific and distinct component of such fees – namely, the success fee claimed by the chosen lawyer and paid by the winning party – an issue arises as to whether this may be reviewed by the court at the request of the losing party, if such fee is claimed as part of the litigation costs.

Keywords: success fee, litigation costs, judicial review, legal nature, procedural culpability.

1. Introduction

Court expenses represent those costs of the judicial procedure initiated by or against a party in a civil lawsuit and which are imposed by the necessity of supporting the judicial endeavor, from the perspective of the costs of engaging the court with a claim or a concrete defense, professionally and opportunely presented.

Therefore, it can be argued that, specifically, the ancillary request regarding the court's award of legal costs represents a claim directly related to the process of resolving the case, being entirely distinct from the principal or accessory claims that are determined by the substantive legal relationship and which do not directly depend on the manner of settling the dispute brought before the court.

The awarding of legal costs is based on the concept of procedural culpability, as a dimension of tort liability attracted by the manner of outlining an unlawful act, transposed into the way the litigation is conducted at the procedural level.

2. The legal nature of court costs

According to the provisions of art. 451 para. (1) CPC, court costs consist of judicial stamp duties and stamp taxes, attorneys' fees, fees of experts and specialists appointed under the conditions of art. 330 para. (3), amounts owed to witnesses for travel and the losses caused by the necessity of appearing in court, transportation expenses, and, if applicable, accommodation costs, as well as any other expenses necessary for the proper conduct of the proceedings.

Based on this legal provision, it follows that attorneys' fees represent a specific category of court costs, which must be borne by the party that lost the case and must be paid to the opposing party that prevailed in the legal dispute.

According to the provisions of art. 453 CPC, the party that loses the case shall be ordered, upon request of the winning party, to pay the latter's court costs. When the claim is only partially upheld, the court shall determine to what extent each party may be required to pay court costs. Where appropriate, the court may order the offsetting of court costs.

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This legal text confirms the rule that the unsuccessful party is evidently at fault in the proceedings, which, based on the general principles of tort liability, leads to holding the losing party responsible for the court costs claimed and proven before the court, under the conditions laid down in art. 452 CPC, namely, no later than the date of closing the debates on the merits of the case.

Obviously, if such proof is not produced for various legal reasons by the procedural deadline established by art. 452 CPC, and court costs were nevertheless claimed before the first instance, but proof of payment was not submitted by the close of debates, this proof may be provided through new documents in the appeal lodged against the decision rejecting the request for court costs.¹

As rightly noted in the legal doctrine², in this case „the party that lost the case bears both its own costs and the costs incurred by the winning party, as it is procedurally at fault, having caused these expenses through its conduct during the proceedings”.

As established in national case-law, „it has been consistently emphasized that the basis for ordering the payment of court costs lies in the procedural fault of the party that initiated a case or pursued a claim without legal grounds in the broad sense. In this regard, HCCJ, Panel for the Settlement of Legal Issues, stated in para. 82 of dec. no. 59/18.09.2017³ [...], that for the purpose of determining procedural fault, which is the basis for payment of court costs under art. 453 para. (1) CPC, both the outcome of the case and the conduct of the parties before and during the trial are equally relevant. The procedural fault of the losing party, as a factual basis for the obligation to pay court costs, constitutes the premise of art. 453 para. (1) CPC and is assessed by the courts concretely in each individual case, based both on the final outcome and the parties' conduct prior to and during the proceedings. The court may also assess the reality, necessity, or reasonableness of the amounts requested under this title, in order to prevent procedural abuse.”⁴

As acknowledged, „the provisions of art. 453 CPC concern the party that has definitively won the case”.⁵

3. Judicial scrutiny of legal costs

As stipulated by art. 451 para. (2) CPC, the court may, even *ex officio*, reduce in a reasoned manner that portion of the legal costs representing attorneys' fees, when such fees are clearly disproportionate in relation to the value or complexity of the case or the activity performed by the lawyer, also taking into account the specific circumstances of the case. The court's decision in this regard will have no effect on the relationship between the lawyer and their client.

It is noted that these provisions refer to the judicial scrutiny of legal costs represented by attorneys' fees, without making any distinction regarding the legal nature of such fees charged in the case by the party who won the trial.

As mentioned in legal doctrine⁶, „the reduction of legal costs represented by attorneys' fees is and should remain an exceptional measure, taken only under the conditions stipulated in art. 451 para. (2) CPC, namely when the fee is clearly disproportionate in relation to the value or complexity of the case or the activity performed by the lawyer, considering also the circumstances of the case. The mere fact that the winning party paid their lawyer a higher fee than that paid by the opposing party is not sufficient to warrant the measure provided by art. 451 para. (2) CPC.”

Regarding the possibility of scrutinizing legal costs represented by the success fee of a lawyer, the claim that the lawyer's fee must be granted in full does not take into account the provisions of art. 451 para. (2) CPC, which define the structural elements based on which the court will determine the value of these legal costs, specifically the attorney's fee.

Thus, from the correlation of art. 451 para. (2) with art. 453 para. (2) CPC, the court finds that such attorneys' fees are established by the court based on the specific circumstances of the case, which include not only the value of the claims upheld in favor of the claimant but also other elements such as the complexity of

¹ HCCJ dec. no. 34/2024, published in the Official Gazette of Romania no. 771/07.08.2024.

² G. Boroi, M. Stancu, *Drept procesual civil, Partea generală. Judecata în fața primei instanțe*, 6th ed., revised and added, Hamangiu Publishing House, Bucharest, 2023, pp. 854-855.

³ Published in the Official Gazette of Romania no. 871/06.11.2017.

⁴ HCCJ dec. no. 21/2022, published in the Official Gazette of Romania no. 1091/11.11.2022.

⁵ G. Boroi, M. Stancu, *op. cit.*, p. 855.

⁶ *Ibidem*.

the case, the actual legal representation performed by the claimant's chosen counsel, and the clearly unfounded nature of such fees.

The legal costs claimed by the claimant may therefore relate to a fee that is disproportionate considering the average complexity of the case that generated such legal costs, as this case involved copyright and related rights.

Taking into account the importance of the civil case that gave rise to these legal costs and its effects on the parties, the court may also find that the attorney's fee is excessive and unreasonable.

A disproportionate fee for resolving the merits of a civil case – where the lawyer for the winning party drafted the complaint, attended three court hearings, and made submissions on the merits – cannot be considered reasonable if that lawyer was not required to innovate legally, by structuring complex legal defenses involving in-depth and exhaustive analysis of ambiguous or complex legal provisions. Such work would have required synthesis and the development of a nuanced legal rationale across multiple deductive and inductive layers.

On the contrary, the activity of the winning party's lawyer at this stage of the trial was standard legal representation, where the defenses raised fell within the usual scope of professional advocacy in such cases – focused on invoking typical legal connections, filing procedural motions, presenting defenses, and making oral submissions that indeed require legal interpretation, but not to a degree that justifies the fee requested.

It is also true that a lawyer's work is not limited to court appearances, as attorneys often collaborate on developing legal strategies and drafting documents needed for case resolution. A lawyer's efforts include continuous work between hearings, multiple client meetings, reviewing case files, preparing documentation, and drafting all pleadings and legal documents.

Nonetheless, a reasonable and appropriately set fee can fairly compensate for the attorney's legal assistance and representation.

Moreover, in the appellate stage, it may not be justified to award legal costs corresponding to a high attorney's fee when the counsel's activity was less intensive than at trial and consisted primarily of responding to the appeal filed by the opposing party and appearing at a single hearing.

Regardless of the stakes involved for the winning party, drafting one procedural document and attending a single hearing does not justify an excessive attorney's fee in the context.

While the court does not deny the case's relative complexity or the effort made by the lawyer in ensuring professional and coherent representation, an excessively high fee may appear disproportionate and unreasonable, especially where the lawyer did not perform an indispensable act of representation, but rather a standard legal defense in the matter.

Therefore, the court's highlighting of elements for moderating legal costs and aligning them with the specific circumstances of the cases they originate from – as permitted by art. 451 para. (2) CPC – is neither incoherent, contrary, nor inappropriate.

On the contrary, the judge may persuasively correlate each procedural stage's complexity and the intellectual and physical effort exerted by the claimant's lawyer, also factoring in the lawyer's personal prestige, which can influence the amount of legal costs awarded.

Considering the total amount of legal costs, the case's complexity, and the work carried out by the winning party's lawyer, along with the need for specialized legal representation, the court may find that the reduced attorneys' fees claimed by the claimant are reasonable. Contrary to the appellant's argument, there is no basis for increasing them.

The amounts set by the court must strike a fair balance between the complexity of the cases that gave rise to the legal costs, the appellant's lawyer's work, and how these are reflected in the awarded legal costs – thus rendering the appellant's criticism unfounded.

Regarding the full award of legal costs represented by the success fee, it is first noted, as discussed in legal doctrine⁷, that a success fee refers to the fee the lawyer is entitled to request and obtain in addition to a fixed fee, based on the result achieved or the service rendered.

A success fee is a fixed or variable amount set for the lawyer's achievement of a certain outcome. It may be agreed upon together with an hourly or fixed fee.

⁷ *Ibidem*.

This type of fee represents a form of remuneration aligned with a „result-based” obligation that the lawyer assumes, and it becomes due only upon obtaining the result.

Success fees involving a share of the proceeds from a legal matter are strictly prohibited.

Nevertheless, the success fee is not a gratuitous or excessive expenditure by the claimant-appellant. Instead, it is a contractual arrangement – an aleatory agreement – through which the litigant, aiming to motivate the lawyer toward achieving the desired outcome, agrees to pay a sum (fixed or variable) that rewards the lawyer’s success in litigation.

From a legal standpoint, such an expense is not excluded from reimbursement under art. 453 para. (1) in conjunction with art. 451 para. (1) CPC.

Since the law does not prohibit this type of legal cost, it permits such claims, consistent with the principle of full reparation of damages suffered by the successful party, as enshrined in art. 1385 para. (1) CC, which imposes full liability on the party who lost the original case and thereby committed a procedural wrongful act.

However, the legal maxim *si lex non vetat, admittitur* – that which is not forbidden is permitted – also applies within the boundaries of art. 451 para. (1) CPC, in the absence of legal provisions to the contrary.

Thus, even the success fee, though a useful legal cost, is subject to proportionality review and reimbursable only if justified by the case’s complexity and the reasonable diligence required to win the proceedings that generated such legal costs.

Being a useful but conditional cost, the success fee is owed by the losing party only for the surplus legal activity undertaken by the appellant’s lawyer and for the *alea* element – the unpredictability of the court’s decision in the original cases – which necessitated a more vigorous defense by the prevailing party’s lawyer. This indicates a procedural fault by the losing party that exceeds what would be typical in setting a standard fee.

In this context, awarding a success fee in a case involving innovative claims or requiring rigorous legal argumentation – especially given strong opposition from the opposing side – is justified, as the additional remuneration reflects the opposition’s firm and laborious efforts. These would have required the winning lawyer to respond with complex and refined legal reasoning, highlighting the losing party’s procedural fault.

By contrast, a success fee awarded in a case where the outcome was predictable, anchored in consistent jurisprudence, or where success did not stem from persuasive and sophisticated legal work by the winning party’s lawyer, should not be reimbursed. Otherwise, it would impose a disproportionate burden on the losing party, who cannot be faulted procedurally for the establishment and payment of a success fee.

In this case, it appears that the latter scenario applies: the appellant’s lawyer did not exhibit a refined combination of synergistic and sophisticated legal arguments that would warrant a similarly laborious defense by the opposing party, nor did it justify the court prolonging proceedings to thoroughly clarify the matter.

Thus, the success in the primary case was due to the standard, routine activity of the appellant’s lawyer, and the uncertainty of the outcome was not out of the ordinary.

Therefore, the success fee in this case may not be justified, in relation to the work of the defending lawyer and the complexity of the primary case, which would justify the increase of the court costs imposed on the losing party with those presumed by the success fee, which is disproportionately high compared to the usual fee, with a ratio of 1 to 10 between the two fees, as claimed by the winning party.

The mere result obtained by the defending lawyer of the winning party in the original files does not justify granting the court costs representing the success fee in this case, under the conditions in which this would lead to the objective liability of the defendant, independent of a concrete analysis of their procedural fault, which is not accepted under art. 1357 CC, to which art. 453, para. (1) CPC refers, as the legal conceptual basis for the procedural liability of the defendant in terms of court costs.

Moreover, the view that, in this case, the emphasis would be placed not on the volume of work performed by the lawyer or on fulfilling their duty of diligence, but on the result obtained, cannot be upheld in this case, considering that any favorable outcome for the appellant would result in granting, in addition to the usual fee, the success fee (the amount of which can be determined by the parties to the legal assistance contract, independently of the complexity and stakes of the case for the parties involved in the litigation), as court costs, without a proportionality analysis, which is desirable and essential for a fair trial, in accordance with art. 6 ECHR.

Only the surplus of legal innovation and eloquence on the part of the lawyer justifies a success fee in the original cases, which should be translated into the granting of this type of court cost for the appellant.

Furthermore, the provisions of art. 451 para. (2) CPC would become absolutely unnecessary in this case, which cannot be accepted, as a legal norm must be interpreted in such a way as to produce effects, not in a manner that renders it ineffective or inoperative.

4. Conclusions

This principle outlines a particular aspect, in civil matters, of a broader precept of constitutional origin, namely the proportionality of the measure in determining by the court the court costs granted to the winning party in this case.

Under this axiom, the court is legally empowered to determine not only the proportional amount of the court costs represented by the usual lawyer's fee of the winning party's lawyer but also the court costs represented by the success fee of the aforementioned lawyer.

Therefore, it is the sovereign discretion of the court to determine these court costs represented by the success fee, but the reduction of these costs must be based on solid reasoning provided by the judicial body.

References

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