PROVISIONAL REMEDIES IN CIVIL LAWSUITS - AN ESSENTIAL TOOL FOR PROTECTING CIVIL RIGHTS

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Provisional remedies in civil lawsuits consist of a number of procedural measures with the purpose of safeguarding the effective enforceability of a judgment if the plaintiff's claims are recognised eventually. The importance of this specific part of the law is accentuated furthermore by the problem that exists in the minds of people, the issue of distrust, especially when they are a part of a lawsuit. The purpose of this research is to bring clarity to the issues frequently encountered in day-to-day application of this part of the law to guarantee the enforcement of the civil decision, and furthermore, to prove the effectiveness and importance of this part of the law.

Key words: *civil rights, provisional remedies in civil lawsuits, interdiction, suspension, judgement, enforceability, enforcement, trial.*

Introduction

Being a democratic country with high aspirations for European and international values, Moldova guaranteed in its Constitution free access to a trial and makes available all necessary legal measures in order to provide an effective protection of human rights and liberties, as well as a sufficient protection of people's legal interests.

The Moldovan Supreme Court of Justice, in its Plenum Decision No. 32 from 24th of October, 2003, including all later updates, *underlined that provisional remedies in civil lawsuits has its tangible effect in guaranteeing the later on court judgments and thus it is an effective instrument for protection of the rights of those involved in the lawsuit.*

Analysis of the investigated topic

The fundamental tool created for the state protection of the individuals' rights is **the civil lawsuit**.

In its broad understanding, the civil lawsuit represents all the procedural means by which a person guarantees his civil rights, which includes the provisional remedies. By submitting a claim to a court, the person wants, first of all, the reinstatements of its rights, which may sometimes be impossible without applying provisional remedies. Such situations may occur when after being summoned to appear in a court, some people, act in bad-faith, and as a result of their actions makes it impossible for the claimant to reinstate its rights. In such circumstances, the applicant may submit a claim to the court, asking for provisional measures, which includes the imposition of certain measures that have the goal to prevent the plaintiff to obstruct him in reinstating the claimed right.

The legal precedent of the European Court of Human Rights, back in 1979, found that the court is not guaranteeing theoretical or illusory rights, but efficient and useful rights. The same path is promoted by the national courts. By its judgment, a court must grant the person a real and effective possibility to enjoy its right. The written precedent of the ECtHR can serve as a foundation for arguing the necessity of existence of the provisional remedies, because quite often, it is precisely these remedies guarantee the efficient and correct rights, and not the theoretical or illusory ones.

Following the above – mentioned line of ideas, we can conclude that provisional remedies in civil lawsuits constitute an instrument used by a participant to a lawsuit to guarantee the enforcement of its claim.

We think that the best definition of provisional remedies in civil lawsuits can be found in the "Judge's Handbook", and the provisional remedies of civil lawsuits is defined by E. Belei and S. Filincova as "*a constituting part of civil procedure, consisting from a number of measures ordered by a judge or a court, having the goal of guaranteeing the effective enforcement of a final judgment".*

The main regulatory body for this can be found in the Civil Procedural Code of Republic of Moldova, which in article 174 provides that *"Following a request from the lawsuit participants, the judge or the court may take measures to guarantee the claims. This guarantee can be granted at any stage of the trial, up to the point when the judgment becomes enforceable, and in the case when non-application of provisional remedies might make impossible the enforcement of the judgment"*. By interpreting this article, we can conclude that provisional remedies is an act taken by the court, by which it, as a result of the trial participants' request, grants provisional remedies in situations when non-application of provisional remedies might make impossible the enforcement of the judgment. Without going too much into details in analysing the definition provided by law, by applying the literal interpretation, we can observe that it has an incomplete expression. Thus, given the current existing definition of the noun "judgment" in Article 174, in case of application of provisional remedies in the lawsuit, it is presumed that the judge knows what the final judgement will look like in the case, and only afterwards he or she would be able to asses if the lack of provisional remedies will make the enforcement of the judgement impossible. The effects of such a reality would not be quote acceptable in civil lawsuits and is likely to result in challenging of judges for the reason that they already made their mind and expressed it publicly, in other words they had in mind the future judgment and precisely the judgement that might be under the risk of non-enforcement in case the provisional remedies will not be applied.

Other definitions of the concept in question can be found in the legal provisions of other laws – Article 64 of the Law No. 161 of 12th of July, 2007 on Protection of Industrial Designs and Models; Article 68 of Law No. 38 of 29th of February, 2008 on Trademark Protection; Article 78 of the Law No. 39 of 29th of February, 2008 on Protection of Plant Varieties; Article 80 of the Law No. 50 of 7th of July, 2008 on Patents; Article 54 of the Law No. 66 of 27th of March, 2008 on Protection of Geographical Indications, Origin

Names and Protected Traditional Specialties; Article 22 of the Law No. 64 of 23rd of April, 2010 on Freedom of Expression.

The provisional remedies in civil lawsuits is an element of law that is intended to guarantee that the issued judgment in one case will be possible to enforce, even in the case when the respondent is acting in bad-faith. The legal essence of this concept and its legal characteristics are determined, first of all, by its objective.

The regulation of provisional remedies in civil lawsuits are not providing expressly for any legal characteristics as it happens often in case of other legal concepts of civil procedural law, but this results in the method of application and the objective formulated by the law.

Point 1 of the Supreme Court of Justice Plenum Decision No.32 from 24th of October, 2003 mentions four elements of the provisional remedies: 1. they are urgent; 2. they are temporary; 3. they are aimed to protect the pecuniary rights of the applicant; 4. Must be related to the claims brought in the lawsuit.

1. The **urgent** character of the provisional remedies are caused, obviously, by the their objective and are caused by the tight deadlines courts are facing for the decision on applying or not the preventive remedies. For example, Article 177 (part 2) of the Civil Procedural Code states that "*The claim for provisional remedies is examined by the judge or the competent court* ***within a day from the moment the claim was registered****... If the claim for provisional remedies is submitted at the same time with the basic application to court, it shall be examined* ***in the same court hearing that will decide on the acceptance the lawsuit for trial****...* ". If the claim for preventive remedies is submitted at the same time with the main application to the court, it will have more time to decide upon the acceptance of the application to court for trial, but if it decided to accept the main application for trial, it has to decide on the claim of the provisional remedies on the same day. We can notice that in both cases the court has one day to examine the claim for provisional remedies. It is relevant to mention that the procedure for the provisional remedies decision is taking place in the absence of the parties to the trial (Article 177 (part 2) of the Civil Procedural Code, Article 21 together with Article 24 of the Law on Insolvency). It makes it possible to decide rapidly on the claim, because all formalities regarding the summons of the parties, as well as it become impossible delay the examination of the claim for provisional remedies.

2. Provisional remedies have a **temporary** character, and as in the case of the previous point, this is not expressly mentioned by the law, but can be easily drawn from the pertinent legal provisions. Thus, according to art.180 of the Civil Procedural code, preventive remedies have a strictly determined period that depends on certain factors. According to part 3 of the Article 180 of the Civil Procedural Code, preventive remedies will be maintained: a) in case the claimant application will be accepted – until the enforcement of the judgment; b) in case the claim of the applicant is dismissed – until the judgment comes into force. The limitation in time of the provisional remedies is caused by the goal of applying these remedies – that is the guaranteeing of the applicant's claim. Thus, if we take the first case, when the claim was accepted and the decision was issued and enforced, therefore there is no more need for guarantees. In the second case, when the claim was dismissed by a judgment that came into force, it will be unfair and abusive to restrain the other party rights based on an action that was dismissed by a final and enforceable judgment.

3. **They have the goal to protect the pecuniary rights of the applicant**. This idea is mentioned, as mentioned above, in the Plenum Decision of the Supreme Court of Justice No.32 from 2003, is entirely reasonable from the point of view of the applicant, because in a civil process every person is fighting for to defend its rights. At the same time, since the claim for provisional remedies is submitted by an interested person, this concept stands in line with the principle of availability of rights in the civil process. However, in our opinion, these arguments cannot be applied to justify the intention of the law to introduce such an instrument, as well as the intention of the court that accepts the applicant's request. In the both cases, the rationale for creating such a legal concept and its application does not come to defend the interests of any particular person, because otherwise it would be biased, but is more to guarantee that any judgment issued

by a court will be enforceable. The Judges' Handbook for civil cases, states that *any provisional remedy in civil lawsuits present a serious discomfort to the person it was applied to, that is why the judge or* ***the court must consider the legal objective and not the applicant's goal****, as well as the total value of the claim*. This idea confirms the opinion expressed above. As a result, we are positive that the analysis of the goal must be conditioned by the party: the claimant has its own goals in looking for provisional remedies, while the court and the law must be impartial and look after a more general objective, which is the guarantee the possibility of an effective enforcement of judgements.

4. Another characteristic of provisional remedies that is mentioned by the Plenum Decision of the Supreme Court of Justice No.32 from 2003 is the fact that **it must be related to the claim**. Furthermore, this element is a mandatory requirement for accepting the claim for applying provisional remedies as it will be explained below. According to article 174 of the Civil Procedural Code *as a result of the trial participants' claim, the judge or the court may apply provisional remedies to guarantee* ***the claim***. The claim is very specific – a claimant's right that is allegedly violated. Based on that, the provisional remedies must guarantee the fact that the claimant will be reinstated in its rights if his claims will be sustained by the court. *Per a contrario* if the provisional remedies are note related to a right that is claimed in the litigation, then, the provisional remedies are not guaranteeing the litigated claim, but an alleged right that is not in litigation. This situation would question the core of the concept that allows the guarantee only of the **claim**, meaning an efficient possibility of reinstatement of an alleged violated right that is the reason for litigation in court.

We believe that the four described features in the Plenum Decision of the Supreme Court of Justice should be completed with the following ones: 5. Provisional remedies are mandatory and enforceable; 6. Provisional remedies are applied exclusively by the court; 7. Provisional remedies are exceptional. 8. Provisional remedies are secondary in relation to the main litigation claim.

5. A specific feature of the provisional remedies in civil lawsuits that we are considering is the fact that provisional remedies **are mandatory and enforceable** regarding all persons to which these have been applied. This feature is based on Article 178 of the Civil Procedural Code and assumes that no person may oppose any exception in order to avoid the enforcement of applied provisional remedies. According to the above – mentioned rule *the decision on provisional remedies is to be enforced immediately according to the procedure related to enforcement of court decisions,* and the Constitution of Republic of Moldova, in Article 120 says that – *The enforcement of court judgements is mandatory*.... There can be no exceptions from this peremptory norm and persons affected by the application of provisional remedies behave in strict compliance with the court decision, and in the case that the affected person will not comply this behaviour will forced on them by means of a bailiff that will take all necessary actions for that.

6. **Provisional remedies are applied exclusively by the court**. By analysing the law regulating provisional remedies it is impossible to conclude that there are other private or public authorities that are competent to apply provisional remedies for the parties to the litigation besides the court.

7. **The application of provisional remedies is exceptional.** In conformity to Article 55 of the Constitution, "*... any person is exercising its constitutional rights and freedoms in good faith without violating the rights of others*". According to Article 513 of the Civil Code of Republic of Moldova "*The debtor and creditor must act in good faith and with due diligence at the time of the creation of the obligation, during its existence and at the time of the execution and termination of an obligation.*" Under Article 9 of the Civil Code the good faith of persons is presumed, thus everyone is presumed to act in good faith, unless the contrary is proven, and this rule is applicable also in civil procedure. In this line of ideas, the rule consists in the fact that all participants acting in good faith, while acting in bad faith are a mere exception. Accordingly, the need for the usage of provisional remedies constitutes an exceptional measure. Having in mind that the application of provisional remedies involves certain restrictions to individual rights, it must be applied only when the situation asks for it, which is that the person against whom provisional remedies are claimed is acting in bad faith and he or she will impede the further enforcement of the judgement.

8. Provisional remedies **are secondary** in relation to the main litigation claim. This feature has been underlined by the Romanian professor of Civil Procedure, Ioan Les, but his idea was not developed by the Moldovan or Russian legal doctrine. In our opinion, the Romanian author correctly found that provisional remedies are secondary in relation to the claim submitted by the claimant against the respondent, because the lack of provisional remedies is not influencing directly the settlement of the case and not even the enforcement of the judgment. The non-application of provisional remedies does not jeopardize the legality and validity of the actions and documents of the court or of other participants to the trial. This tool is only necessary only in the situations, as mentioned above, which are exceptional, when the respondent is acting in bad-faith and will take steps to render impossible the later enforcement of a court judgement.

The procedure of application of provisional remedies in civil lawsuits

Based on the principle of availability of rights in the civil procedure and article 174 of the Civil Procedural Code, the application of provisional remedies is conditioned by submitting a written request, signed by a participant to the trial. The right to ask the judge to grant any provisional remedies is a subjective one and the person concerned is free to decide on the usage or not of this privilege. An exception from this rule are the situations when the law grants court the power to apply provisional remedies without a special claim, *ex officio*, as for example are the cases provided by Article 21 of the Law on Administrative Disputes and the Law on Insolvency. The claim for granting provisional remedies must contain *the reasons and circumstances for which a party asks for provisional remedies to be applied* - as provided expressly by article 177 (part 1) of the Civil Procedural Code. As well for special cases, the application of provisional remedies might need additional information. For example, the request for the application of sequester on goods, which are the property of the respondent, the claim must include the list of goods that have to be sequestered.

The jurisdiction examines the claim for provisional remedies exclusively in the hands of the judge or the panel of judges that examine the main litigation claim. The claim cannot be examined before the court decided on whether it has jurisdiction in the case and no later than the final judgment is issued. However, in certain types of lawsuits the interested person has the right to submit a claim for provisional remedies before filing a complete application on the main litigation to the court.

The period of time the court has to examine the claim on provisional remedies civil action is provided in part 2 of Article 177 of the Civil Procedural Code. Thus, if the claim for provisional remedies was included in the main full application to the court placed in the action, the court will decide on it at the same time it decides whether it has or not jurisdiction in the case. However, if the application was submitted separately, the court has a day in order to decide on the claim.

The provisional remedies concept is an exceptional one and is applied only when certain circumstances that are required by the law are proven to be present. Thus, in order to admit the claim of a participant and grant the application of provisional remedies, the court has to verify whether there is sufficient evidence and arguments that the application of provisional remedies are in conformity with the purpose prescribed by the law and that the requested measure is consistent within the main litigation claim. In absence of arguments or evidence, or in case there are not sufficient, the court shall reject the application of provisional remedies.

After examining the claim for provisional remedies in a civil lawsuit, the court issues a writ, by which decides on applying or refusing to apply the provisional remedies. Thus, in both cases, the court will issue a writ.

The writ on applying provisional remedies will be enforced immediately, as expressly provided by Article 178 (part 1) of the Civil Procedural Code and this fact once again proves the urgent nature of provisional remedies.

During the examination of the case, some circumstances may change and this could render the already applied provisional remedies as inefficient or useless. For these cases, the law provided in articles 179 and 180 of the Civil Procedural Code the method of substitution or cancellation of the applied provisional remedies. According to the above-mentioned rules, the substitution and cancellation of provisional remedies are carried out as a result of a request of the participants, by the court which examines the main

litigation claim, during a court hearing, after summoning the parties, but whose absence does not prevent the examination of the claim. According to article 180 of the Civil Procedural Code, the cancellation of provisional measures may be ordered *ex officio* by the court without needing an application in this regard.

The interested participant, usually the person against whom the provisional remedy was applied, has the right to appeal the writ that applied the provisional remedies. As stated in point 39 of the Plenum Decision of the Supreme Court of Justice No.32, from 24.10.2003, this writ can be of the following types: accepting the application of provisional remedies; rejecting the application for provisional remedies; cancelling provisional remedies that were previously applied; substituting of one type of provisional remedies with another. By interpreting the above-mentioned judgment and the Supreme Court of Justice Recommendation No.35 from 19th of March, 2013 all these writs can be appealed. The jurisdiction to examine the appeals against the above-mentioned writs is in the hands of the higher court in relation to the court issuing the writ.

According to the general rule mentioned in article 425 of the Civil Procedural Code, *the deadline for appeal against the writ is 15 days from its issuance*. We want to mention an important aspect provided by part 2 of article 181 of the Civil Procedural Code, which states that regarding *the writ issued without the knowledge of the appellant, the period is calculated from the day the person found out about the issuing of the writ*. Having this in mind that this last rule is special in relation with the one from article 425 of the Civil Procedural Code, it is used for calculating the appeal deadline instead of the general one.

According to article 435 of the Civil Procedural Code, the appeal will usually not suspend the enforcement of the writ, but the law provides specific exceptions from this rule. Regarding the appeal of the writ, which granted the application of the provisional remedies, this rule is provided by the first sentence of part 2 of article 181. But the situation is different concerning the appeal against the writ for the cancelation or substitution of provisional remedies that were earlier applied, for which the law expressly stipulates in the second sentence of part 3 of article 181 of the Civil Procedural Code, that *the appeal against writs for cancelation or substitution of provisional remedies will suspend its enforcement*.

The person who is not a participant to the trial, but whose goods were affected by sequester or any other provisional remedy, cannot appeal, because it is not a participant to the trial and is not mentioned in article 423 of the Civil Procedural Code. For these people, the law provided a separate method called *Sequester Removal* and it is provided by Article 164 of the Enforcement Code.

The application of provisional remedies creates some discomfort, and sometimes even serious limitations in the exercise of the respondent rights. It is possible that someone might use provisional remedies in bad faith in order to create damage to the respondent. For such cases, Article 182 of the Civil Procedural Code expressly permits the respondent to seek compensation for damages caused by provisional remedies. The authors of the "Judges' Handbook in civil lawsuits" – S. Filincova and E. Belei found four conditions that have to be met in order to fill a claim for the damages caused by provisional remedies: 1. The granting of the application for provisional remedies against the respondent and maintaining it until the judgement is final; 2. The existence of cause effect relationship between the applied provisional remedies and the caused damages; 3. The rejection of the applicant's main litigation claim by pronouncing a judgment, and; 4. The judgement in the main litigation claim must become final. It is important to note that in conformity to Article 182 (part 2); the claimant will be responsible for damages caused by provisional remedies *regardless of his intention*.

Another aspect that is in a strong relationship with the claimant's compensation for the damage caused by granting provisional remedies is the possibility of asking the court, in conformity to with Article 182 (part 1) of the Civil Procedural Code, to ask the claimant to deposit a guarantee for the damages that might be caused to the respondent. We believe that this action is similar to provisional remedies, but it will guarantee a future possible claim that still has to be submitted by the respondent to seek compensation for the damages caused by initial provisional remedies in the first case. The Supreme Court of Justice Plenum

Decision No.32 on 24th of October, 2013 provided in point 41 that *courts must interpret restrictively these provisions (meaning related to the respondent's guarantee) and apply them only when this is mentioned by the special law (for example in cases when special laws on intellectual property provides the obligation to deposit a guarantee); in other cases, courts are not bound to ask for a guarantee and the discretionary application of this procedural aspect only in specific cases may create doubts about the impartiality of the court.* We believe that this explanation offered by the Supreme Court of Justice basically means that the guarantee will be required only when the law asks specifically for that. It makes sense, because otherwise the court will guarantee a possible future claim that is still not submitted and it is still unknown if it will be ever submitted, which in the end would violate the principle of availability of the procedural rights to the parties.

Once submitted, as required by Article 182 (part 4) of the Civil Procedural Code, the guarantee will be returned only if the respondent has not filed a claim asking for damages caused by provisional remedies in a period of two months after the case when provisional remedies were applied was decided.

In addition to the civil procedure prescribed by the Civil Procedural Code that is applicable to most civil cases, there are a number of lawsuits which settlement and examination procedure, including on provisional remedies, is provided by special laws and which, in certain aspects, are differs from the general procedure provided by the Civil Procedural Code. Examples of that are insolvency cases, arbitration cases, cases related to freedom of expression, cases concerning intellectual property protection. The procedure for guaranteeing provisional remedies in these types of cases is provided by the rules fixed by the Civil Procedural Code, but with the exceptions provided by special laws.

The analysis of legal precedent proved that provisional remedies are often applied by participants to civil lawsuits. This fact should trigger an increased degree of attention to the correct application of the existing rules. Nonetheless the courts must be careful not to permit trial participants to take advantage and abuse their rights, including the possibility of asking for provisional remedies. The current facts prove that courts sometimes neglect its obligations without any reason. One of the most common violation we can mention the failure to examine the claim for provisional remedies within the period provided by law and the failure to justify or the presence of insufficient arguments for the decision grant provisional remedies. The current laws do not provide any fines for delays and in the second case – the interested party has the possibility appeal the writ granting provisional remedies. We conclude that the settlement of these cases can only be achieved through self-discipline of the courts.

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