Securing the Lawsuit in the Civil Process: Albanian Civil Procedural Law

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Received: 5 October 2024 / Accepted: 10 November 2024 / Published: 3 December 2024
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Doi: 10.56345/ijrdv11n327

Abstract

This paper focuses on dealing with the legal basis, mechanisms and importance of the institute of lawsuit insurance. The securing of the lawsuit is a temporary measure that is granted by the court, without fundamentally solving the case, when the conditions are proven by the applicant that there is a possibility of a serious and irreparable damage, from the execution of the administrative action or when it is suspected that the execution of the verdict will to become impossible or difficult . The securing of the lawsuit institute, as one of the oldest institutes of procedural law, has several characteristics that distinguish it from an ordinary judicial process. This paper will deal with the conditions of allowing, changing, appealing the securing of the lawsuit, the types and the difference between the securing of the lawsuit and temporary execution as decisions that are given by the court when it is suspected that the execution of the verdict on the plaintiff's rights would be impossible or difficult. Methodology: The scientific methodology used in this article is based on the research, analytical, comparative method. These methods have been used to study the concept of the securing of the lawsuit as part of the Albanian civil procedural law, seen in a comparative view between another civil procedural concept that of the decision with temporary execution.

Keywords: *The securing of the lawsuit, provisional execution, appeal, amendment, annulment, execution*

1. Introduction

1.1 General Presentation

The prolongation of judicial processes has often been the subject of discussions and legal changes, as it is considered a denial of justice.

For the needs of the trial, to guarantee the rights of the parties in the trial, as well as to avoid serious and irreparable damages, measures can be taken, which consist of an accelerated procedure, not in compliance with some formalities of an ordinary judicial process .

The temporary protection of rights is undoubtedly one of the general principles of law in all developed legal systems, the purpose of which is to realize the essential objective of every legal system, the effectiveness of legal

protection[1]. Without its existence, justice would not fulfill the social needs for the quick resolution of various types of urgent requests[2].

2. The Types, Conditions of Permission, Change, Appeal and Execution of the Securing of the Lawsuit

2.1 Types of the securing of the lawsuit

The legislator in Article 206 of the Civil Procedure Code provides that the securing of the lawsuit is made[3]:

> *"a) by sequestering the movable and immovable things as well as the credits of the debtor;*
> *b) by other appropriate measures taken by the court.*

The court may permit the securing of the lawsuit by some of the different types of the security measures, but always for a general amount not greater than that of the lawsuit."

In the interpretation of Article 206 point a of the Civil Procedure Code on sequestration, it finds provision in Article 530 of Civil Procedure Cide and manifests itself in two forms:

> *"1. Sequestering that aims to ensure the preservation of the item itself, in relation to which the judicial dispute takes place, by means of its preservation or eventually also by means of temporary administration.*
> *2. Sequestering that aims to preserve the creditor's guarantee on the debtor's property, against the risk of removal or alienation of this property[4]."*

In the interpretation of Article 206 point b of the Civil Procedure Code on other appropriate measures, such as the suspension of the execution of a judicial decision, administrative act, prohibition or permission to perform a certain action.

2.2 Conditions for allowing, changing and appealing the securing of the lawsuit

The cases of allowing the claimant to secure the lawsuit are clearly defined by Article 202 of the Civil Procedure Code;

> *"a) the lawsuit is based on documentary evidence,*
> *b) the plaintiff gives a guarantee, in the amount and type determined by the court, for the damage that may be caused to the defendant by securing the lawsuit".*

The existence of the determination of point a) of Article 202 requires that the claim rely on written evidence, as this is directly related to the object of the claim. Through written evidence, the court is given the opportunity to recognize the claimed right as violated.

In the determination of point b) of Article 202 of the Civil Procedure Code, it is provided that the plaintiff must, in order to request the insurance of the claim, provide a guarantee for the compensation of possible damages that may be caused to the defendant.

For the guarantee request, the court decides on the measure, type, and the term within which it must be given. The court must choose the securing of the lawsuit that it deems appropriate and useful to protect the rights of plaintiffs, but without jeopardizing at the same time the protection of the defendant's legal rights and interests[5].

For a fair and equal trial between the parties, the legislation foresees the element of guarantee, for the damage that can be caused to the defendant by securing of the lawsuit.

Compensation for damage is a right that arises to the party against whom the securing of the lawsuit is requested, through a new lawsuit, in cases where the trial has been dismissed, or the underlying lawsuit has been dismissed by a final decision, which has caused as a result the loss of the securing of the lawsuit and where the burden of proof belongs

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[1] Opinion of the General Advocate Tesauro in case 213/89 R. v. Secretary of State or Transport, ex parte Factortame Ltd, published in European Court Reports, 1990, I , 2443.
[2] Masaroni Kawano "Provisional Measures for prohibition of actions- New tendencies in Japan", published in Current Topics of International Litigation, Volume I, Problems of Transnational Civil Procedure, edited by Rolf Sturner
[3] Article 206 of Civil Procedure Code
[4] Article 530 of Civil Code
[5] Unifying Decision of the United Colleges of the Supreme Court no. 10, dated 24.03.2010; Decision of the Civil College of the Supreme Court no. 479, dated 27.10.2011

to the party to whom the securing of the lawsuit was unfairly applied, from which a damage was caused.

2.3 Revoking and changing of the securing of the lawsuit

In the law 49/2012 "On the organization and operation of administrative courts and the resolution of administrative disputes" it is provided that the court, when the circumstances change, can revoke or change the decision on the securing of the lawsuit[6].

> *"1. The court, mainly or at the request of the parties, when the circumstances change, may revoke or change the decision of the securing of the lawsuit.*
> *2. The request for revocation or change of the securing the lawsuit is not accepted for circumstances and facts that have not yet changed. The same condition applies to the resubmitted request for an securing of the lawsuit previously rejected by the court."*

Meanwhile, in the Civil Procedure Code, the cases and the time limit when the securing of the lawsuit is changed or even revoked are foreseen;

> *"At the request of one of the parties, the court may replace one ssecuring of the lawsuit with another, after having previously heard the opposing party. In this way, it is done even when the court decides to remove the securing of the lawsuit, when it considers that the cause for which it was imposed has disappeared [7]."*

In the administrative trial, even the court itself, when the circumstances change, can revoke or change the given decision, except at the request of the parties, while in civil trials, investment is required from the parties in the process for giving a complete decision that can be a revocation or change of the measure.

The competent court to decide on the revocation and change of the securing of the lawsuit, in the case where the latter was given during the trial of the underlying lawsuit, will be the same one, which is examining the foundation and has decided on the securing of the lawsuit. Meanwhile, when the measure was given by a non-competent court, the decision to revoke and change the securing of the lawsuit will be given by the court which will decide on the merits of the case.

2.4 Appeal against the securing of the lawsuit

The court's decision on the securing of the lawsuit is basically an intermediate decision, but unlike the intermediate decisions that are appealed together with the final decision, the decision on the securing of the lawsuit is an executive title and is appealed to the court of appeal , within 5 days from their announcement or notification[8].
In decision no. 145, dated 10.12.2013 of the Constitutional Court, in which the decision to dismiss the securing of the lawsuit was examined, as not based on the law and evidence, a decision which could not be appealed, stated:

> *"The panel assesses that although against the decisions on the securing of the lawsuit, article 209 of the CPC has provided for the right to appeal, and that the court of first instance has ruled against this article, from the above, decisions of this type, moreover, when the foundation process is still under trial, they cannot be called final, for the purposes of Article 131/f of the Constitution, and that it cannot be interpreted that the petitioners have exhausted all legal remedies recognized by law and sufficient to restore the violated rights in the sense of Article 131/f of the Constitution".*
> *According to the provisions of the Civil Procedure Code, the appeal against the decision allowing the securing of the lawsuit does not suspend its execution. Meanwhile, the appeal against the decision by which the securing of the lawsuit is replaced or removed suspends its execution9.*

2.5 Execution of the decision on the securing of the lawsuit

Compulsory execution can only be done on the basis of an executive title.

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[6] *Article 31 Law 49/2012 "On the Organization and Functioning of Administrative Courts and the Resolution of Administrative Disputes"*
[7] *Article 207 Civil Procedure Code*
[8] *Article 209 Civil Procedure Code*
[9] *Article 210 of the Civil Procedure Code*

> *"Executive titles are: a) final civil decisions of the court, containing an obligation, the decisions given by it for securing of the lawsuit, as well as for temporary execution10."*

The decisions of the securing of the lawsuit are executed directly, after the announcement of the decision.

The court's decision on the securing of the lawsuit and the court's fines are executed within 5 days from the date of presentation for execution[11].

The execution order is executed by the judicial, state or private enforcement service, through the judicial bailiff, based on the creditor's request.

3. The Difference Between Securing the Lawsuit and Decisions with Temporary Execution

Decisions with temporary execution may be announced and executed before the violation or violation of the right or legal interest subject to judgment is verified.

The cases of granting the decision with temporary execution are provided for in the Civil Procedure Code[12]:

> *"a) food obligation;*
> *b) for remuneration from work;*
> *c) for restoring possession of the marital residence.*
> *The decision can be given with temporary execution even when, due to the delay in execution, the plaintiff may suffer significant damages that cannot be replaced, or when the execution of the decision would become impossible, or would be excessively difficult. in this case the court may require the plaintiff to provide a guarantee."*
> *Meanwhile, in compliance with Article 202 of the Civil Procedure Code, at the request of the plaintiff, the court within 5 days allows taking measures to ensure the claim, when there is reason to suspect that the execution of the decision on the rights of the plaintiff will become impossible or difficult. Claim insurance is allowed when:*
> *a) the lawsuit is based on documentary evidence,*
> *b) the plaintiff gives a guarantee, in the amount and type determined by the court, for the damage that may be caused to the defendant by securing the lawsuit.*

The decision can be given with temporary execution, as well as the court can legislate the insurance measure of the claim, in cases where there is reason to suspect that the execution of the decision for the plaintiff's rights would become impossible or difficult.

The court, in both cases, may request that the plaintiff provide a guarantee, to the extent and in the type determined by the court, for the damage that may be caused to the other party by the securing of the lawsuit or by issuing the decision with temporary execution, this aiming to guarantee the inviolability of the rights of the other party in the trial, with the aim of a fair trial and equal treatment of the parties in the trial.

In both cases, the guarantee offered by the plaintiff for the damage that can be caused to the defendant by securing the lawsuit or by issuing the decision with temporary execution is returned to the other party, after the decision has taken its final form.

The decision with temporary execution comes as a decision-making of the review of the merits of the court case, while the purpose of the decision to allow the securing of the lawsuit is not to resolve the merits of the case, but has an urgent and urgent character.

The decision to the securing of the lawsuit can be given even if a lawsuit has been registered by the applicant, but with the condition that within 15 days from the filing of the lawsuit, the lawsuit must be filed to resolve the disagreement between the parties, meanwhile in the case of decisions with temporary execution we have a lawsuit registered and judged.

The function of decisions with temporary execution is similar to that of the securing the lawsuit. Decisions with temporary execution are measures of the process itself in which they are announced and usually they can be announced mainly by the court and therefore cannot be spoken in regarding them neither for a request nor for an independent process[13].

The difference between the decision with temporary execution and the provision of the claim in relation to the appeal lies in the fact that the appeal against the court's decision, for the acceptance, change or removal of the provision

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[10] *Article 510 of the Civil Procedure*
[11] *Article 515 of the Civil Procedure Code*
[12] *Article 317 of the Civil Procedure Code*
[13] *Alban Abaz Brati, Civil Procedure First edition, Tirana 2008, pg. 197.*

of the claim, does not prevent the continuation of the consideration of the claim. *The appeal against the decision that allows the securing of the lawsuit, does not suspend its execution. The appeal against the decision by which the securing of the lawsuit is replaced or removed, suspends its execution*[14].

4. Procedural Aspects in Taking the Securing of the Lawsuit. Examples of the National Lawyers Association of Durrës Lawyers' Positions on the Institute of the Securing of the Lawsuit.

In order to gain a deeper understanding of the concept of the institute of the securing the lawsuit, a questionnaire was conducted.Through specific questions aimed at presenting the position of ten lawyers of the National Chamber of Lawyers of Durrës, regarding several aspects of the institute of the securing the lawsuit, such as the specific deadlines for appealing against the decision to securing the lawsuit, the deadlines for executing the decision, or their position regarding the impartiality or otherwise of the panel of judges, which is their opinion on securing the lawsuit and the one that examines the base of case.

The lawyers of the National Lawyers Association of Durrës stated that throughout their professional experience, they have applied the institute of the securing the lawsuit (In 10 questionnaires, 8 of them expressed yes).

The applicability of the institute of the securing of the lawsuit was related to civil and administrative cases. (In 10 questionnaires, 7 of them have applied this institute in both cases, while 2 of them have applied it mainly in civil cases and one in administrative cases)

Among other things, the requests for the securing of the lawsuit have mainly been assessed as fair by the court. (In 10 questionnaires, 7 of them have assessed the requests for securing of the lawsuit as fair, while 3 others appreciate the subjectivity of the court, assessing it case by case)

The requests of lawyers for the securing of the lawsuit have mainly been legislated with the final decision. (In 10 questionnaires, 8 of them admitted that the securing of the lawsuit was legislated with a final decision, while 2 of them assessed that it is assessed on a case-by-case basis)

In cases where there was an appeal against the decision pf the securing of the lawsuit, according to the lawyers, the appeal was mainly reviewed within a time limit of more than 40 days. (In 10 questionnaires, 5 of them claim that the review of the appeal at the Court of Appeal required more than 40 days, 2 of them within a period of 20-30 days, 1 for 30-40 days, 2 for 10-20 days)

On the question of whether the decision to take the securing of the lawsuit was voluntarily implemented by the defendant. (In 10 questionnaires, 8 of them admitted that the securing of the lawsuit was not voluntarily implemented by the defendant, while 2 of them admitted that the defendant voluntarily implemented the decision to take the securing of the lawsuit)

The lawyers in the questionnaire admitted that the decision to take the securing of the lawsuit of the claim was executed by the judicial bailiff service. (In 10 questionnaires, 8 of them admitted that the execution of the executive title by the bailiff service, while 2 of them deny this fact)

Regarding the time limit that the judicial bailiff service needed to execute the executive title, they claim that this period is more than 40 days. (In 10 questionnaires, 8 of them admitted that the execution of the decision on the measure of securing the claim required more than 40 days, while 2 of them estimated the time limit at 20-30 days)

Mostly lawyers estimate that there should be uniformity, in relation to the judging panel, of the request for the securing of the lawsuit and the case in general. (In 10 questionnaires, 5 of them admit that there should be a fair balance between the judge who examines the general case and the request for the securing of the lawsuit, while 5 others think the opposite, different judges for the two cases)

5. Conclusions and Recommendations

1. Regarding the amendment and replacement of the securing of the lawsuit.

It is foreseen that: "The court, within the request of one of the parties, may replace the securing of the lawsuit with another, after having previously heard the opposing party. This is also the case when the court decides to lift the securing of the lawsuit, when it considers that the reason for which it was imposed has disappeared". Regarding the above, starting from the general nature, in order to avoid subjectivity, we recommend that Article 207 should be completed, by providing the reasons for which the revocation or amendment of the securing of the lawsuit is permitted.

[14] *Article 210 of the Civil Procedure Code*

2. Establishing a balance between reasonable deadlines and the execution of the securing of the lawsuit.

The practice of the European Court of Human Rights, referring to the term "reasonable deadline", considers that the duration of civil proceedings is calculated from the filing of the request or the request-claim until the completion of the execution of the judicial decision. In defining the term "reasonable deadline", the ECHR takes into account three elements: 1) the nature of the case; 2) the conduct of the parties; 3) the effectiveness of the state authorities, including the judicial apparatus, from the courts to the bodies executing judicial decisions.

The provisions in Article 208 of the Civil Procedure Code regarding the execution of the securing of the lawsuit, refer to the application of the provisions for the execution of decisions on movable and immovable property. However, there is no legal provision regarding the setting of a reasonable deadline for the execution of the securing of the lawsuit, even in the provisions on the execution of decisions on movable and immovable property referred to in Article 208 of the Civil Procedure Code.Thus, we recommend that a reasonable deadline should be provided, which should not exceed 30 days, this deadline which will be given in support of the securing the lawsuit, so that it does not lose the purpose for which it was given.

3. Lack of provisions in the law regarding appeals.

From the content of Article 209 of the Civil Procedure Code, we understand that an appeal against a court decision to accept, amend or revoke the securing of the lawsuit is a special appeal. However, the provision shows gaps in three directions:

First, regarding the lack of provisions on the possible causes that justify the exercise of an appeal against a court decision to accept, amend or revoke the securing of the lawsuit.

Second, following the fair balance between reasonable deadlines and effective adjudication, the lack of provisions regarding the time limit for reviewing an appeal of the decision on the securing of the lawsuit in the Court of Appeal.

Thirdly, this article does not provide a separate appeal against the dismissal of the securing of the lawsuit, leading us to understand that the party against whom the court has ruled to dismiss the request for securing of the lawsuit, will have to appeal the latter together with the final decision. We believe that this vacuum causes violations of a number of principles for a healthy civil process, such as that of equality of parties, equality before the court.

Regarding the above, we suggest supplementing Article 209, providing the reasons for which the appeal is justified as well as the legal deadline within, which the latter must be reviewed by the Court of Appeal.

4. Regarding the right to re-file a claim for the securing of the lawsuit.

The Law "*On the Organization and Functioning of Administrative Courts and the Resolution of Administrative Disputes*" provides for the right to re-file a claim for the securing of the lawsuit , where there is a change in circumstances or facts. Meanwhile, the Civil Procedure Code shows a vacuum regarding this fact, not providing any genuine provision for regulating such a situation.

We believe that in such situations and for legitimate reasons, when there is a change in circumstances or other legal or factual arguments, the interested party should have the right to re-file a claim for the securing of the lawsuit. However, this provision should be assessed on a case-by-case basis by the court within the legal framework.

5. Provisions regarding the jury panel that examines the request for the securing of the lawsuit and the base of case in general.

We believe that it would not always be fruitful to allow the same jury panel to assess the request for the securing of the lawsuit and to judge the base of case in general.

Regarding this fact, the Joint Panels of the Supreme Court, with decision no. 10, dated 24.03.2004, stated that:

> *"The court should not base the decision to take the securing of the lawsuit on facts or actions, as well as their legal qualification, that are related to the examination and resolution of the case on the merits. Also, the examination of the request to take the securing of the lawsuit should be treated in such a way as to avoid any perception according to which the court has prejudiced the resolution of the case on the merits, or is not impartial in the trial." In order to avoid prejudice of the case in general, or even different decisions on the securing of the lawsuit as well as the merits of the case, which are contrary to the law, we believe that such a legal presumption should be implemented.*

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