RECOVERY OF DAMAGES CAUSED IN CONNECTION WITH THE VIOLATION OF THE PROCEEDINGS WITHIN A REASONABLE TIME, A NOVELTY IN THE LEGISLATION OF THE REPUBLIC OF MOLDOVA

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RECOVERY OF DAMAGES CAUSED IN CONNECTION WITH THE VIOLATION OF THE PROCEEDINGS WITHIN A REASONABLE TIME, A NOVELTY IN THE LEGISLATION OF THE REPUBLIC OF MOLDOVA

Leonid CHIRTOACĂ¹

Abstract
In Moldova, the problem of delayed examination of cases in courts and enforcement of judgments is current as delay occurs usually due to excessive postponement of hearings; the complex nature of the dispute; misuse of appeals by parties to the proceedings; performing acts of expertise for long periods etc. Since the European Court of Human Rights in numerous decisions held that the states parties of the Convention are obliged to organize their judicial system in such a way as to enable compliance with all requirements of art. 6, par. 1 and in particular those relating to "reasonable time" and not once Moldova was sanctioned for these violations, in order to avoid infringement of the person at the trial and final judgment within a reasonable time and not to be penalized the High Court, the Republic of Moldova adopted the Law no. 87 of 21.04.2011 on the state repairing the damage caused by the violation of the right to trial within a reasonable time, or the right to cause the execution of the judgment within a reasonable time. According to this law, if any natural or legal person considers that the right for a trial within a reasonable time, or the right to cause the execution of the judgment within a reasonable time was violated, one may address the court a request for summons concerning the establishment of such violations and damages caused by the breach. This novelty in the legislation of Moldova confirms strict compliance of the state with the commitments to international treaties and care for the fundamental rights of the person.

Keywords:
Violation of proceedings, novelty in legislation, Republic of Moldova, delayed examination.

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PRELIMINARY NOTIONS

The Civil Code of the Republic of Moldova\(^2\), establishes personal liability for the caused damage, vicarious liability and liability caused by things and animals. Moldovan legislature does not base tort liability on the act causing injury itself, but its negative outcome, i.e. the damage that was created as a result of this illegal act.

According to the general provisions regarding the obligations arising from causing damage, it governs the liability for the damage caused by another person, things or animals as follows:

- The principal’s responsibility for the act of the servant (art.1403 Civil Code)
- State’s liability attributable to a responsible person, representative of the prosecution, prosecutor or court (art.1404, 1405 Civil Code)
- The responsibility of parents, guardians, educational establishments for the damage caused by minor children (art.1406, 1407 Civil Code)
- Tutor’s liability for the damage caused by the person deprived of legal capacity (art.1408 Civil Code)
- The liability of the owner of the source of increased danger for the damage caused by it (art.1410 Civil Code)
- Animal owner liability for the damage caused by it (art.1411 Civil Code)
- Building owner's liability for the damage caused by its collapse (art.1412 Civil Code)
- Building owner's liability for the damage caused by fall or leakage of construction (art.1413 Civil Code).

It should be noted that art.1404 of the Civil Code of the Republic of Moldova, proclaimed the principle of liability for the damage caused by a public authority or a person of responsibility. According to paragraph 1 art.1404 Civil Code, the damage caused by an unlawful administrative act or a failure to settle within legal a claim by a public authority or a public official person shall be fully compensated by the public authority. A responsible person shall be jointly liable for intent or gross negligence. It follows that, if a person considers to be injured in a right recognized by the law, by an administrative act or is not satisfied with the response to the previous request or has not received any response within the period prescribed by law, has the right to appeal to the competent court to set aside, in whole or in part, the act and to repair the caused damage.

Lately, The European Court of Human Rights guided by Article 6 of the European Convention on Human Rights and Fundamental Freedoms, which states that everyone has the right to a fair trial, publicly and within a reasonable of

his case by an independent and impartial court, has sentenced Moldova many times for violation of the right to judge the cause within a reasonable time and the enforcement of judgments, which prompted the state to develop effective domestic remedies. In Moldova, the problem of delayed examination of cases in courts and enforcement of judgments is current as delay usually occurs due to several factors: excessive postponement of hearings; the complexity of the dispute; abuse of appeals by the parties; performing expertise acts for long periods etc.

For lack of an adequate and effective internal legislative framework and for correcting this situation, the Moldovan Parliament adopted the Law no. 87 of 21.04.2011 on the repair by the state of the damage caused by the violation of the right to trial within a reasonable time or the right of enforcement of the decision within a reasonable time\(^3\), that if any natural person or legal person considers that the right to trial within a reasonable time or the right of enforcement of the decision within a reasonable time was violated, may address the court a request for summons on finding such a breach and repair the damages caused by the breach.

The purpose of this law was to create in Moldova an effective domestic remedy of defense of the right to trial within a reasonable time and the right to the enforcement of judgments within a reasonable time. By this law there was created an internal mechanism that tends to meet the optimal and predictable deadline for solving the trial and procedure under Law no. 87 was introduced as a consequence of the constant jurisprudence of the Strasbourg Court, which stated the need to introduce such an internal mechanism. The direct task on the application of the stated law is to establish the size of the injury and its collection for the benefit of the injured person. This is a task of the courts in each individual case, according to the rules of jurisdiction established by the Code of Civil Procedure of the Republic of Moldova.

**THE PREJUDICE CAUSED REPAIR PROCEDURE FOR THE VIOLATION OF JUDGMENT LAW OF THE CASE OR OF THE EXECUTING OF DECISION IN A REASONABLENESS TERM**

Repairing the damage caused by violation of the right to trial within a reasonable time or the right of enforcement of the judgment within a reasonable time is made only to the extent that the violation occurred for reasons not exclusively attributable to the person who submitted the request to repair the injury. The damage caused by violation of trial within a reasonable time or the right of execution of the judgment within a reasonable time shall be compensated

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\(^3\) Official Monitory of Republic of Moldavia, no. 107-109, art. no. 28, published at 01.07.2011.
regardless of the guilt of the court, the criminal prosecution body, the body responsible for the enforcement of judgments or the debtor state institution.

The damage caused by a public authority or by an authority to which the State has delegated tasks of public authority by violating the right to trial within a reasonable time or the right to the enforcement of the judgment within a reasonable time shall be compensated by the state.

The compensation is made from the state budget and other legislative novelty of this is that after the damages caused by the violation of the right to trial within a reasonable time or the right to the enforcement of the judgment within a reasonable time, the state has right of recourse against the guilty person.

Regarding the size of the repair of the damage caused by the infringement of the right to trial within a reasonable time or the right to the enforcement of the judgment within a reasonable time, it should be noted that it is determined by the court in each case, depending on the circumstances of the case in which the offense was committed and the claims raised by the applicant, the complexity of the case, the conduct of the applicant, the conduct of the criminal investigation, the court and the relevant authorities, the duration of the infringement and the importance of the trial for the applicant.

According to this law\textsuperscript{4}, the body that represents the state in court on this category of cases is the Ministry of Justice, and if after a finding that the right to trial within a reasonable time or the right to the enforcement of the judgment within a reasonable time was violated, the court decides on the granting an equitable satisfaction from the state budget as account for reparation of moral, material damage and costs.

However, the legislature left to the discretion of the court to decide even if finding violation the right to trial within a reasonable time or the enforcement of judgment within a reasonable time, not to charge the non-pecuniary caused damage, but only to decide that the simple finding of the breach of the right is in itself an equitable satisfaction for non-pecuniary damage.

The case is examined in accordance with the rules of civil procedure legislation by another panel of judges than the one that examined (examines) the main cause alleging the infringement and besides the strict observance of the procedural framework imposed by the Code of Civil Procedure and the mentioned law, requires a good knowledge by the courts adjudicating such actions and ECHR jurisprudence\textsuperscript{5}.

\textsuperscript{4} Art.2 alin.7 from Law no. 87/2011.

\textsuperscript{5} Base on decision of Constitutional Court no. 55/1999 regarding the interpretation of some settlements of article 4 from Constitution of Republic of Moldavia, the Court revel that "regarding the theory an practice of international law, by principles and norms unanimous recognized by the international law it's understand the principles and norms recognize by the international law which had an general and universal character. The norms and principles unanimous recognized of the international law are executory for Republic of Moldavia in measure
There is no doubt correct that the correct examination of claims, the legality and validity of the decision will depend largely on the training of judges, as these claims have a specific content. The content of these legal relationships differ depending on probation subject, subjects procedural term, the burden of proof (burden of proof, lack of infringement, the burden of proof bearing the material injury), including solutions derived from the ECHR jurisprudence. The court vested with examining this category of disputes is tasked to determine the subject claims, to identify the reference period and appreciate if necessary, the amount of equitable satisfaction.

The burden of proof of the lack of infringement of trial within a reasonable time or the right of enforcement of a judgment within a reasonable time and the lack of assumption of moral injury goes to the Ministry of Justice and the burden of proving the bear of material damage caused by this infringement and the assumption of costs and costs lies with the applicant.

In this regard, the Ministry of Justice to probe no infringement will urgently require the court that examines the substance, the criminal investigating body, the authority involved in the trial, the legal executor or the authority responsible for the enforcement of the judgment a reasoned report on the observance of reasonable time. The file or a copy from the fund file will be given to the court where the trial is judged. This report, attesting the compliance of the reasonable period shall be in writing and shall contain: name and surname of the judge, the representative of the authority involved in the process, the bailiff or the representative of the authority responsible for the enforcement of the judgment; data on the taken procedural actions, deadlines and their motivation; data on procedural actions taken to accelerate the procedure of trial, if applicable; other relevant data on compliance with reasonable time.

Regarding the terms of judgment of these cases, the legislature has expressly established that the application for summons shall be examined by the seized court within 3 months from its submission. Although the law distinguishes types of claims, such as: repair of damage caused by violation of the right to trial within a reasonable time, and repair of damages caused by the violation of enforcement of the judgment within a

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that she expresses the consent to be bound through the international acts". The constitutional disposals regarding the rights and liberties of the human cannot be interpreted and applied without the recognition of those principles. Without the principles and norms unanimous recognized of the international law, component part of legal frame of Republic of Moldavia are the international treaties also. Through the phrase "the other treaties which Republic of Moldavia is part" from article 4 of Constitution, in virtue of Vienna Convention from 1969 regarding treaties law closed between the states ratify by the Parliament of Republic of Moldavia through the Decision no. 1135-XII from August 4, 1992, it goes without saying the international treaties closed by Republic of Moldavia, including the international treaties to which Republic of Moldavia is part, which became executory for Moldavia.

6 Article 4, al. 4 from Law no.87/2011.
reasonable time, it is noted that the law does not define the term reasonable or unreasonable, concepts which have primal importance in giving a fair and equitable solutions by the court.

In this regard, it should be noted that neither the European Court of Human Rights in its jurisprudence does not define those concepts, although it has established some criteria in that respect.

To appreciate whether the term of the proceedings is or not "reasonable", the court shall take as base the criteria established by the ECHR in the content of the following reference decisions for cases against Moldova (case Josan\textsuperscript{7} vs. Moldova no.37431 / 02 of 21.03.2006, §18, case Maze\textsuperscript{8} a vs. Moldova no. 1115 to 1102 of 10.05.2007, §42, case Holomiov\textsuperscript{9} vs. Moldova no. 30649/05 of 07.11.2006, §137), namely:

- **the complexity of the case**, which must be appreciated in each case individually. For example, the complexity of the object of civil action or the substance of criminal charges, the need for a evidence volume, expert reports, the number of witnesses or parties to the proceedings, or foreign elements, the existence of other parallel proceedings.

- **the conduct of the parties** which includes assessing the applicant's and the authorities conduct. It will take into account the good or bad faith of the parties involved in the trial, including the existence of some unexplained delays, baseless postponements, sequence of meetings, planning an order of sessions with long pauses, etc.

- **the stake (interest) for the applicant** reveals the importance or the purpose for the person claiming violation of his right to an unreasonable time. Thus, for example, collecting salary amounts involves a higher stake for the applicant.

In examining the claims for damages caused by violation the right for a trial within a reasonable time, the court will distinguish between civil and criminal procedures. The contravention procedures are covered by the criminal nature of the procedures (Ziliberberg\textsuperscript{10} vs. Moldova no.61821 / 00; Gutu\textsuperscript{11} vs. Moldova no. 20289/02 of 07.06.2007 and they are subject to the same principles as the examination of the length of criminal procedures.

\textsuperscript{7} The Resolutions and Decisions of European Court of Human Rights in Moldavian cases, vol. IV, Chişinău, Ed. Cartier, 2007, pp. 51-63.
Also as civil procedures there will be considered the administrative cases, if ultimately they pursue a patrimonial interest of the applicant (Case Megadat.COM SRL vs. Moldova\(^\text{12}\) no. 21151/04 of 08.04.2008). The disciplinary procedures will also be appreciated as civil cases if they mainly affect a civil a patrimonial interest of the applicant (Case Cravcenco vs. Moldova no. 13012/02 of 15.01.2008\(^\text{13}\)).

As for the civil proceedings, the start date of the term flow is to be calculated from the day of submission of the summons and the deadline shall be deemed the day when the court's decision on the merits becomes final. The previous proceedings before other courts than the trial court will not be considered in the calculation of reasonable time. Also if the plaintiff doesn’t obtain a judgment on the fund for a long time is entitled to request the observation of the violation of the right to examine the case within a reasonable time. In this respect see Case Boboc\(^\text{14}\) vs. Moldova no. 27581/04 of 04.11.2008, § 25-27). So, the pending proceedings will be taken into consideration.

In case of criminal procedures, the most difficult point is the identification of two issues:

1) whether the procedures are part of the criminal domain under Article 6 of the Convention;

2) if so, when the person claiming violation of his right to the length of procedures was referred a criminal charge.

One must also consider that the violation of the duration of criminal proceedings, the victim, the petitioner who has submitted a complaint, the witness and other persons involved in the process, with the exception of the accused (suspect, accused, defendant) cannot claim violation of the right of unreasonable length of the criminal proceedings.

Article 6 § 1 of the Convention under its criminal aspect, can be invoked only by the person who is accused, excepting when the victim of a crime claims unreasonable length of criminal proceedings regarding the failure to settle the civil aspect, namely excessively long examining of the civil action within the criminal proceedings.

Whether the proceedings fall within the criminal domain meaning Article 6 § 1 of the Convention is not bound by the classification given by the national law and it constitutes an autonomous concept which is appreciated by some already well-defined criteria (Engel criteria):


\(^{13}\) The Resolutions and Decisions of European Court of Human Rights in Moldavian cases, vol. V, Chişinău, Ed. Gunivas, 2009, pp. 31-47.

• Compliance with the law;
• Nature of the offense (crime, contravention, etc.);
• The severity of the penalty that the person concerned is likely to receive.

The start date of the term of criminal proceedings will begin when submitting the criminal charge, which usually does not coincide with the day of recognition as an accused, suspected or the day of another pleading, by which a person is officially recognized another quality of accused. To the identification of the start day from which flow the guarantees of a fair trial for the accused under Article 6 § 1 will take into account the official notification from the competent authority, on suspicion relating to the commission of a criminal offense (identified according to the Engel criteria) definition which also depends on the existence or absence of "serious consequences or repercussions on the situation (of the suspect)."

Thus, during the criminal proceedings certainly will include criminal prosecutions, starting from the time the defendant was involved in the trial, whatever its status if there was a formal notice and if this had consequences for his situation. In this context, sometimes taking some explanations in the preliminary step of control, until the prosecution, can serve as a basis for the flow of the guarantee of a reasonable time.

The expiry date in the field of criminal proceedings ends along with a final decision resolving the merits of the accusation. In this period there will be included any procedure, including the extraordinary ones, the appeals used by the prosecution, including those for annulment or revision, etc.

Analog in the civil proceedings and in the criminal proceedings a person can claim violation of the right to the length of proceedings even if they have not been completed with a final decision.

The court, after identifying the reference period will appreciate the reasonable time of the proceedings, which will be made by the same criteria (stake for the claimant; conduct of the parties during the proceedings, complexity of the case).

Unlike civil proceedings in this case, for example, the stake for the claimant will increase when preventive deprivative or restrictive of liberty measures are applied to him. In criminal proceedings the stake for the claimant are practically never questioned since by definition the claimant faces a criminal penalty, namely the importance of prompt settlement of the situation for him is presumed.

The most complicated assessment in these cases is the evaluation of the complexity of the case which is usually estimated in relation to the nature and seriousness of the allegations, accusations, value and quality of accumulated and necessary to be accumulated proofs, the existence or absence of complex expertises, the existence of accomplices and co-accused, etc.
A first solution is usually the dismiss of the action as manifestly unfounded, if there is no appearance of violation of the Convention.

If the court finds that the right to a trial within a reasonable time or the right to the enforcement of the judgment was violated, it will decide on the granting of an equitable satisfaction from the state budget into the account of compensation for material, moral damage and costs.

**THE CALCULATE MANNER OF THE SIZE OF PREJUDICE**

Regarding the satisfaction of material claim the court will have to determine the causal link between the alleged violation of the right to reasonable length of proceedings and material losses due to the inability to use pecuniary rights or to enjoy the fruits thereof (see causes Cravcenco vs. Moldova; Cadet vs. Moldova, etc.).

Based on the analysis of ECHR jurisprudence in Moldovan cases of failure, it is found that the size of the damage is about 600 euros for 12 months of delay and 300 euros for each further period of six months of delay.

Even if periods shorter than a year, normally, do not lead to finding of a violation, the calculation of the moral damage takes into account the entire period, including that first year of non-execution.

Regarding the unreasonable length of judicial proceedings, the amounts awarded as non-pecuniary damage vary between 1,000 euros and 2,500 euros for 5 or 10 years. The smallest amount was granted in case Deservire SRL vs. Moldova no.17328 / 04 from 06.10.2009 ie 600 Euros for 6 years and the highest compensation was granted in the case Cravcenco vs. Moldova, 3000 Euros, for 10 years of examination of a labor dispute.

Regarding the costs and expenses are to be taken into account: a) the costs and expenses to be duly substantiated, usually by payment documents or submission of the lawyer's working hours and applicable charges, if necessary, and

b) the expenses must be reasonable as quantum (especially in the case of fees charged by lawyers) and necessary for the procedures in the case (it is not compensated, e.g., the lawyer's work that does not directly touch the process). In the Moldovan cases, the European Court granted on the average, in respect of costs and expenses, between 300 and 1500 Euro.

Regarding non-pecuniary damage it also should be noted that in Moldovan cases, the European Court awarded damages in the following ranges: for violation of Article 2 ECHR, the Court awarded compensation between 6000-30000 Euro; for violation of article 3 ECHR between 3000-20000 Euro; for violation of Article 5 ECHR between 600 to 30,000 Euro; for violation of Article 6 ECHR, the Court awarded between 1000-7000 Euro and for Article 1 Protocol 1 ECHR between 1000-6000 Euro. Also for violation of Articles 7, 8, 9, 10 and

11 ECHR, the Court awarded compensation between 1000-10000 Euro. Regarding the deadline for filing the lawsuit regarding damages caused by the violation of the right to trial within a reasonable time or the right to the enforcement of the judgment within a reasonable time is to be noted that according to Article 3 of Law No. 87 of 21.04.2011, the complaint may be filed during investigating the case on the merits or within 6 months after the entry into force of the prosecutor's order terminating the prosecution or removal from criminal prosecution or of the judicial act of disposal. In cases alleging the infringement of the right of enforcement within a reasonable time the summons may be filed in the execution of the irrevocable judiciary act or within 6 months after the termination of the enforcement procedure.

**CONCLUSIONS**

In conclusion, we mention that in Moldova a new legal institution has been created for the recovery of damages regarding with the violation of the right to a trial within a reasonable time. If any natural or legal person considers that his/her right to a trial within a reasonable time or the right to the enforcement of the judgment within a reasonable time was violated he/she may address the court a summons on finding such a breach and the repair of the damage caused by the breach. The damage caused by a public authority or by an authority which the State has delegated tasks of public authority by violating the right to trial within a reasonable time or the right to enforcement of the judgment within a reasonable time is compensated by the State, and the special law in this domain is Law no. 87 of 21.04.2011 on the repair by the state of the damage caused by the violation of the right to trial within a reasonable time or the right to enforcement of the judgment within a reasonable time.

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