SECURING EVIDENCE IN CIVIL PROCEEDINGS

Nicolae, Grădinaru[1]

Abstract

Securing the evidence is that contentious procedure in which the interested party can request to ascertain and preserve, as a matter of urgency, the evidence that he intends to use in the trial, if there is a danger that they will disappear or if it would be difficult to administer future.

Anyone who is interested in urgently ascertaining the testimony of a person, the opinion of an expert, the condition of goods, movable or immovable or obtaining the recognition of a document, a fact or a right, if there is a danger that the evidence will disappear or be difficult to administer in the future, he will be able to request, both before and during the trial, the administration of these evidences.

Key words: *securing the evidence, reporting to the court, danger, recorded, administration in the future.*

Jel Clasification: KO,K1

As a rule, the evidence is administered during the judicial debates, that is, after the court has been referred to the trial of the case. However, there are situations when a means of evidence that could be used to solve a case may disappear before the start of the trial or even during the trial, but before the phase of the proposal and administration of the evidence.

In order to prevent such a situation, the law regulated the procedure for securing the evidence.

Securing the evidence is that contentious procedure in which the interested party can request to ascertain and preserve, as a matter of urgency, the evidence that he intends to use in the trial, if there is a danger that they will disappear or if it would be difficult to administer future.

Anyone who is interested in urgently ascertaining the testimony of a person, the opinion of an expert, the condition of goods, movable or immovable or obtaining the recognition of a document, a fact or a right, if there is a danger that the evidence will disappear or be difficult to administer in the future, he will be able to request, both before and during the trial, the administration of these evidences.

If the opposing party gives its consent, the request can be made, even if there is no urgency (art. 359 of the Code of Civil Procedure).

The urgency is not of the essence of securing the evidence, the opposing party may not object to the taking of the evidence.

Even without the existence of a danger, securing the evidence can be done with the consent of the opposing party.

The provision of evidence can be requested in the main way or incidentally, that is, both before and during the trial.

The interested party shall indicate in his request for securing the evidence which are the evidence whose administration he requests, the facts he wants to prove, as well as the reasons that make it necessary to secure them or the agreement of the opposing party.

According to art. 359 of the Code of Civil Procedure, anyone interested in urgently ascertaining the testimony of a person, the opinion of an expert, the condition of goods, movable or immovable property or obtaining the recognition of a document, a fact or a right, if there is a danger in order for the evidence to disappear or be difficult to administer in the future, he will be able to request, both before and during the trial, the administration of these evidences.

If the opposing party agrees, the request can be made, even if there is no urgency.

The law outlines a condition for the admissibility of the request for evidence, namely the condition of urgency.

[1] Doctoral University Lecturer, University "Constantin Brâncoveanu" Pitesti, nicoleagradinaru@yahoo.com

The procedure for ensuring the evidence is conditioned by the urgency imposed by the existence of a danger of the evidence disappearing or of making it difficult to administer it in the future.

The urgency determined by this danger is a matter of fact, left to the discretion of the court.

In this sense, there is also Decision no. 173/2007 of the Constitutional Court, which finds that the procedure for ensuring the evidence is a special, emergency procedure, which has a limited purpose, that of preserving some evidence that is in danger of disappear or be difficult to administer in the future.

Anyone interested in urgently ascertaining the testimony of a person, the opinion of an expert, the state of things, movable or immovable, or acquiring the recognition of a document, a fact or a right, may request the administration of these evidences if there is a danger that they disappear or be difficult to administer in the future. Likewise, any person who has an interest in urgently establishing a certain state of facts that could cease or change until the administration of the evidence may ask the court in the district in which the finding is to be made to delegate a bailiff from the same district to ascertain this state of fact on the spot.

Thus, the Court finds that any interested person can resort to this procedure, the fundamental condition of such an approach being the existence of a danger in the administration of the evidence or in the ascertainment of a certain state of facts that could cease or change until the administration of the evidence, without that the criticized provisions contravene the provisions of art. 16 of the Constitution.

The Court also finds that the criticism that the criticized provisions of the law contravene the provisions of art. 21 of the Constitution. The procedure for securing the evidence has a contentious nature, the court having to adopt all measures to ensure the fundamental procedural guarantees. Free access to justice is compatible with the establishment of special procedures, for special situations, and implies the existence of unique procedures for special situations, such as that of securing evidence. Moreover, the evidence administered through the procedure regulated by the Code of Civil Procedure can also be used by the party that did not request their administration, the preservation of the evidence under these conditions does not deprive the interested parties of the right to challenge it with other evidence during the substantive trial.

Also, as a guarantee of the right to defense, the legislator provided, in the event of an emergency finding of a certain state of facts, the obligation to communicate the minutes to the person against whom the finding was made, if he was not present at the investigation.

The Court finds that the author of the exception of unconstitutionality did not indicate the international provisions considered to be violated by the provisions of the Code of Civil Procedure, so this criticism cannot be retained[1].

The urgency will not be evaluated as a condition of admissibility, and the evidence will be administered without further checks if the opposing party gives its consent, it is the party that, in an existing dispute or possible dispute with the author of the request for securing the evidence, could stands on the procedural position opposite to this one, of administering the evidence under the exceptional conditions of this procedure.

The agreement of the other party must be express, the lack of objection or effective opposition of the opposing party, cited in this procedure having no meaning.

The request for the provision of evidence can be formulated both in the main way, that is, when the process requiring the administration of the evidence has not started, but also incidentally, respectively during the process that has already started, a situation in which it has the character of an incidental request.

[1] Decision no.173/2007 of the Constitutional Court

According to art. 360 of the Code of Civil Procedure, the request will be directed, before the trial, to the court in whose district the witness or the object of the finding is located, and during the trial, to the court that hears the trial in the first instance.

The party will show in the application the evidence whose administration it claims, the facts it wants to prove, as well as the reasons that make it necessary to provide them or, as the case may be, the agreement of the opposite party.

The court will order the summoning of the parties and communicate a copy of the application to the opposing party. It is not obliged to file an objection.

The court will resolve the request in the council chamber, by conclusion.

In case of danger in delay, the court, assessing the circumstances, will be able to approve the request without summoning the parties.

From a material point of view, securing the evidence promoted in the main way is always the competence of the court[1].

Thus, if the litigation is in the appeal phase, the stage in which the party promotes a request for proof, the appellate court delegates its powers to the court that judged in the first instance.

From a territorial point of view, when the claim is promoted by the main way, it is tried at the court in the district where the witness or the object of the finding is located, and when it is promoted incidentally, there is a legal extension of the jurisdiction of the court that judges the litigation also over the incidental claim. The extension is also doubled by a delegation if the dispute is at the stage of appeals.

[1] Civil sentence 3933 /212/2015 Constanța Court
Analyzing the conditions of admissibility of the request for securing evidence in relation to the documents submitted by the parties and the factual situation presented by the parties, the court considers the following:
According to art. 359 C. proc. civ. anyone who has an interest in urgently ascertaining the testimony of a person, the opinion of an expert, the condition of assets, movable or immovable, or obtaining the recognition of a document, a fact or a right, if there is a danger that the evidence will disappear or be difficult to administer in the future, will be able to request, both before and during the trial, the administration of these evidences. If the opposing party agrees, the request can be made even if there is no urgency.
The evidence assurance procedure being special, derogating from the principle of immediacy, the court must limit its investigation to the purpose of the request, respectively only to assessing the admissibility of the evidence and to verifying the fulfillment of the requirements prescribed by law for this procedure in a restricted framework.
The legal text regulates two conditions for the admissibility of the procedure of securing the evidence that justifies the derogation from the principle of immediacy provided by art. 16 of the Civil Procedure Code, namely the urgency and possibility of changing the factual situation until the future administration of the evidence or the defendant's agreement to the administration of the evidence.
The defendant's agreement cannot be inferred from his silence or absence, but the willingness to provide evidence must be expressed clearly and not in a subsidiary manner.
Regarding the fact that the defendant in the present case did not expressly agree to the administration of the evidence consisting of the technical expertise by way of securing evidence, it follows that it is necessary for the court to examine the fulfillment of the emergency condition, as well as that of the possibility of change the factual situation of such a nature as to attract a difficulty in the administration of evidence in the future.
Urgency is based on the danger that the object of evidence will disappear even before the start of the trial according to the common law procedure, or even during the trial, but before the phase of the proposal and administration of the evidence, or it will be difficult to administer in the future so that the party no longer be able to prove their claims or defenses and assumes the existence of a constraint for the administration of the evidence at the time of the introduction of the request for securing evidence. Also, the court appreciates that urgency should not be confused with necessity.
In support of the request, the plaintiff submitted documents, as well as photos in illegible format, undated to prove the defects of the property requested to be subject to expert examination without showing the court the possible negative consequences of them that would justify the present request for evidence.
Therefore, the plaintiff neither claimed nor proved the fact that in case of non-administration of this evidence, she would be exposed to imminent damage and that any delay in the administration of the evidence would put the property to be expertized in a state of danger that would lead to its disappearance or would cause a change in the factual situation to the point of the impossibility of proving the possible claims or creating difficulties for the performance of such expertise in a common law procedure.
Therefore, the court finding that the summons request did not invoke or provide any evidence from which the interest and necessity of an urgent technical expertise with the objectives indicated by the plaintiff can emerge, will reject the request for evidence as inadmissible.

The request for securing the evidence must comply with the form and content of the summons request, with certain particularities:

a) the object of the request is the provision of proof, so the party will have to show which is the evidence whose administration it claims and the facts it wants to prove;

b) the reasons that make it necessary to ensure them, i.e. the justification of the emergency situation that justifies the incidence of the procedure or, as the case may be, the agreement of the opposing party.

The request is judged in the council chamber, as a rule with the summoning of the parties, the exceptional situation of not summoning them will be assessed by the court according to the request and the reasons to justify it.

Submission of the objection is not mandatory.

The request is resolved by conclusion, pronounced in a public meeting.

In the case of the admission of the request, the conclusion does not mean the closing of the file, because the measure of admission of the request is followed by the administration of the evidence, which is done in the same file, according to art. 362 NCPC.

With the admission of the request both from the perspective of admissibility and merits, the court will also take all necessary measures for the administration of the evidence, establishing, when necessary, the obligations of the parties in relation to it.

Regime of appeals

According to art. 361 of the Code of Civil Procedure, the decision admitting the insurance claim is enforceable and is not subject to any appeal.

The decision of rejection can be challenged separately only by appeal within 5 days from the pronouncement, if it was given with the summoning of the parties, and from the communication, if it was given without their summoning.

From the point of view of appeals, only the decision rejecting the request for the provision of evidence can be appealed within 5 days from the pronouncement, if it was given with the summons of the parties, and from the communication, if it was given without summoning them.

The decision to admit the request is not subject to any appeal and is enforceable.

Administration of insured evidence

According to art. 362 of the Code of Civil Procedure, the administration of the evidence that must be provided can be done immediately or at the deadline that will be fixed for this purpose.

The administration of the secured evidence is established by a conclusion, which is not subject to any appeal.

After admitting the request for securing the proof and taking all the measures for the administration of the evidence, the court will proceed to its administration, in compliance with all the rules for the administration of evidence, both general and those specifically regulated for each category of evidence.

The file will be finalized by the conclusion that confirms the administration of the evidence.

The decision pronounced under these conditions is not subject to any appeal.

Probative power

According to art. 363 of the Code of Civil Procedure, evidence provided under the conditions provided for in art. 362 will be examined by the court, at the hearing of the trial, under the ratio of their admissibility and conclusiveness. If it finds it necessary, the court will proceed, if possible, to a new administration of the secured evidence.

The secured evidence can also be used by the party that did not request their administration.

The expenses incurred with the administration of the evidence will be taken into account by the court that judges the case on the merits.

Emergency finding of a state of fact

According to art. 364 of the Code of Civil Procedure, at the request of any person who has the interest to ascertain urgently a certain state of facts that could cease or change until the administration of the evidence, the bailiff in whose jurisdiction the ascertainment is to be made will be able to ascertain this state of fact on the spot.

If making the finding requires the participation of the opposing party or another person, the finding can only be made with their consent.

In the absence of agreement, the interested party will be able to ask the court to approve the making of the finding. The court can approve the making of the finding without summoning the person against whom the request is made. The provisions of art. 360-363 apply accordingly.

The record of findings will be communicated in a copy to the person against whom the finding was made, if he was not present, and has the probative power of the authentic document.

According to art. 365 of the Code of Civil Procedure, in case of danger in delay, the provision of evidence and the ascertainment of a state of fact may be done on non-working days and even outside legal hours, but only with the express approval of the court.

Completing or redoing some tests

According to art. 391 of the Code of Civil Procedure, the court can proceed to complete or restore some evidence, if, from the debates, the necessity of this measure results.