



# PNSA Arbitration Bulletin

## Jurisdiction Issues when Requesting Arbitration Costs in Separate Proceedings

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In arbitrations seated in Romania it is widely accepted that the arbitral tribunal ruling on the parties' dispute also has jurisdiction over awarding arbitration costs. Articles 595-600 of the Civil Procedure Code regulate the topic of arbitration costs, the general rule being that the arbitration costs are borne by the losing party, entirely or proportionally, depending on the award.

Moreover, Article 620 of the Civil Procedure Code provides that in case of institutional arbitration the arbitration costs are set and paid according to the rules of the institution. Generally, the arbitration rules of prominent institutions expressly provide for the tribunal's power to issue an award on costs.

However, while a party may have the right to be allocated arbitration costs, the arbitral tribunal hearing the dispute is not always vested with a request for such costs. It may also happen that the tribunal does not issue a decision on the requested costs (for example, if the arbitration fees are not paid). This begs the question whether the entitled party may still request the arbitration costs separately, and if so, in which forum.

The arbitral tribunal in the file no. 60/2022 pending before the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ("CICA-CCIR") was called upon to answer this question. The claimant requested arbitration costs representing counsel fees incurred in a previous CICA-CCIR arbitration dispute, where the tribunal did not render an award on costs. The arbitral tribunal in the subsequent file dismissed the respondent's objection to jurisdiction, ruling that:

- the legal basis for requesting arbitration costs is a tort claim which the law allows to be brought in arbitration;
- there is no real distinction between requesting arbitration costs in the proceedings which determined them and requesting them separately;
- the request for arbitration costs generated by the respondent's contractual claims in the previous arbitration falls under the arbitration agreement included in the parties' contract, which encompassed also tortious or quasi-tortious claims related to the execution of the contract.

On the merits, the arbitral tribunal awarded the claimant the entire amount of requested arbitration costs. The respondent, however, filed an action to set aside the award with the Bucharest Court of Appeal. The court granted the request and set aside the award based on Art. 608 (1) b) of the Civil Procedure Code ("*the arbitral tribunal settled the dispute without there being an arbitration agreement or on the basis of a null or ineffective agreement*"). Through the Decision no. 65/08.06.2023, the court found that:

- decisively, the arbitration clause covered disputes arising from the non-performance of contractual obligations and based on contractual liability, and not also tort claims such as the request for arbitration costs arising from another dispute. The court therefore favoured a more restrictive interpretation of the arbitration clause than the one proposed by the arbitral tribunal;
- arbitral tribunals ruling upon a dispute have jurisdiction to also award costs related to that dispute because the request for arbitration costs is an accessory claim in such a case, and the tribunal's jurisdiction to rule upon the main claim also extends to the accessory claims. Conversely, the request for arbitration costs arising from a previous arbitration is a main claim (as opposed to an accessory one), so the extension of jurisdiction no longer operates;
- in absence of an arbitration agreement applicable to the subject matter of the dispute, the jurisdiction lay with the court of first instance from the place of the respondent.

The decision of the court remained final due to the request for final appeal being annulled by the High Court of Cassation and Justice on 8 February 2024, without a decision on the merits. It would have been interesting to see the High Court's analysis on the merits and if it decided to maintain the decision of the Bucharest Court of Appeal, or if it favoured a more pro-arbitration approach, closer to the one of the arbitral tribunal.

In our experience, the decision of the Bucharest Court of Appeal is in line with the case law of Romanian courts when dealing with requests for judicial costs separately from the dispute in which the costs were incurred. Romanian courts have generally held that when judicial costs are requested in the dispute in question, the request takes the form of an accessory claim which may be heard by the court ruling upon the main claim in the same proceedings. Conversely, when judicial costs from a dispute are requested separately, such request becomes a main claim in the subsequent file, and therefore the jurisdiction of the dispute may belong to another court.

Nonetheless, does this necessarily mean that the jurisdiction of arbitral tribunals is effectively excluded when dealing with requests for arbitration costs filed in separate proceedings? In principle, tort claims are not among the disputes expressly provided by Art. 542 of the Civil Procedure Code as not being subject to arbitration, so the possibility that the parties decide to submit such claims to arbitration, through a careful and purposeful drafting of the arbitration agreement, is still on the table.

## CONTACTS

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