VOICU
FILIPESCU
Attorneys at Law
News in Laws – Legal Monthly Newsletter
July 2017

cover article

Reviewing in case of discovering new documents. Conditions and practical applicability

By Victor Cochirleanu, Senior Associate Voicu & Filipescu

Along with the reason provided in art. 509 par. (1) (1) of the Code of Civil Procedure, the reason for the review discussed in this article is perhaps the most common in practice due to multiple interpretative possibilities, but also because it is apparently much more accessible than the other grounds for review, which are more rigid in interpretation. In the majority of cases, however, reviewers are basically trying to resume the fund by invoking a seemingly new document that does not meet the requirements of the law to underpin the review of a judgment.

The review provided by art. 509 par. (1) (5) of the Code of Civil Procedure takes into account the fact that, after the judgment requiring revision, evidence has been found, retained by the opposing party or which could not have been presented in the above circumstances by the will of the parties. According to art. 511 par. (1) (5) of the Code of Civil Procedure, the review period is one month, counting from the day on which the new documents relied on were discovered. The court practice has suggested the applicability of this ground for review, which raised issues first of all with regard to when new documents were or could have been discovered and when the one-month term stipulated by the law runs. Thus, the question has arisen in practice if the claimant in revision first learned of the document invoked and allowed it to go through a certain period of time until the document was in possession of the document, if it had been able to request it during the substantive proceedings or if there was a reason beyond his will that made them unable to obtain that document. As regards the time at which the document was issued, it has in practice been established that only a document existing at the date of the judgment may be relied on in support of this ground of review.

In terms of *"new"* nature of the document, Ploiesti Court of Appeal, by Decision No. 2632/2013, determined that *"a document can be invoked as a new for review of the decision only if it existed at the time when the judgment whose review is sought and that one could not present to the court because it had been retained by the adversary or under circumstances of force majeure."*

But if the document is *"in a file with a court, which was not retained by the opposing party and about which one proved inability to present, the application for revision is inadmissible because that document shall not constitute a new document under the law"*(the County court Section III Civil Decision no. 216/1990). In conclusion, the document is *"new"* if, although it existed, it could not have been used in the process in which the judgment whose revision is required (as is was retained by the opposing party, or there was a circumstance outside the will of the parties that prevented its obtaining).

The time of *"discovering"* the new document is important for calculating the one month term when the party may request a review. But how can we define *"discovery of the document by the party"*? In our opinion, the discovery of the document can not be left to the reviewer's discretion, in the sense that they can decide the moment from which the one-month term stipulated by art. 511 par. (1) point 5 of the Code of Civil Procedure runs. The situation must be analyzed from the

time the claimant in revision learned of the document, at which point they could make the necessary diligence to obtain it. Thus, in order to determine the point when the one-month period starts to run, one must also take into account the diligence that the party has done or could have done in obtaining the document and, in particular, one must prove the circumstance outside their will, which made them unable to take possession of the document.

The High Court of Cassation and Justice, Commercial Section, stated in this respect, by Decision no. 304/2010, that *"by taking note of new documents, the law maker means the moment when the existence of the document becomes known ".*

As an example, if the document was in a public archive and could be requested by a simple request, it can not be subsequently imposed in a review process as new, referring to all the grounds imposed by art. 509 par. (1) point 5 of the Code of Civil Procedure. The same is true of the case in which the file was filed in the archive of a court, where the claimant in revision was a party and could obtain it through a request. In this case, we consider that the one-month period runs from the time when the document was filed and brought to the attention of the claimant, and not from when they went to the case file and actually obtained it. Of course, if proof is provided that the document was requested, but was not made available due to circumstances beyond the will of the reviewer, the term will run from the moment of its effective possession. It is not possible to invoke the incidental discovery of a document filed as evidence in a court file to which the claimant is a party and which was filed long ago by one of the parties. Art. 150 Civil Procedure Code provides that each copy of the application shall be accompanied by copies of the documents that the party understands to be used in the trial and it is presumed that this document has been communicated to them. The same applies where the document is an expert's opinion made in a file, the term starting from the communication of the report.

In Decision no. 1964/1999 issued by Brasov Court of Appeal it was has held that in case documents were in the archives of a company, *"it cannot be deemed to have been retained by the opposing party or a force majeure."* But more interesting is the opinion of the Court of Appeal Galati highlighted in a decision older than 100 years, stating that *"it is force majeure when a document is in a public archive to which anyone has access"(C. Galati II, the decision of 28 May 1903).* As a result, the lack of diligence on the part of the claimant in revision, as well as their passivity in obtaining the document, although aware of its existence, is not likely to extend the term of review in their favor in the sense of calculating the one month period from when they came into its possession.

Another discussion in practice is related to the importance of the document, more precisely to the condition requiring the document to be conclusive, meaning that not every document can be invoked in a review process, but it must be capable of leading to a change in the solution of the judgment whose revision is requested.

The Civil and Intellectual Property Division of the High Court of Cassation and Justice established by Decision no. 5525/2007 that *"under Article. 322 pt. 5 C. proc. civ., it is necessary that new documents invoked have proving force themselves, that is likely to lead to the establishment of another situation, another application of legal texts* ".

Moreover, by Decision no. 76/2015, Ploiesti Court of Appeal held that *"for the document presented in the application for revision to be "supporting document" it is necessary for it, should it have been known to the court during the trial of the case, to have led to a solution other than the one adopted".*

According to Decision no. 1512/1992 of the Supreme Court, *"to the extent that the facts recorded in the documents relied on were analyzed during the trial and found inconclusive, such acts do not constitute "supporting documents" for the purposes of art. 322 pt. 5 C. proc. CIV* "(sn: or new documents)

We note that based on the above, the supporting document must also be *"decisive"*. Thus, in accordance with the issues stated by the Civil Division I of the High Court of Cassation and Justice in Decision no. 3145/2014, *"for the documents to be "decisive" within the meaning of art. 322 pt. 5 the old C. pr. Civil [art. 509 par. (1) (5) of the NCPC, it is necessary that they, if known by the court at the time of the trial, could have led to a solution other than that which was issued."*

Regarding the condition that the document could have been retained by the adversary or could not have been presented from a circumstance beyond the parties' will (force majeure), we consider that the burden of proving the two conditions belongs to the reviewer. The claimant in revision must therefore prove that they requested the document from the person who holds it, but have not received it, or it has been retained or has they were informed that it could not be found, since it is not enough simply to present it in court.

Also in Decision no. 3145/2014 cited above, it was determined that *"the mere fact that the party subsequently discovered certain documentary evidence, without proving that circumstances beyond its will prevented them from acquiring them during the trial, it cannot justify the admission of the claim for revision because otherwise a definitively won trial could be subject to review on the basis of documents and evidence a posteriori fabricated, and the power of case law would become illusory. By basing their request for review on these documents, the petitioner actually requests a retrial of the appeal without arguing and proving why they did not take the necessary diligence to present these documents during the resolution of the main trial proceedings, the arguments in the appeal, circumscribing actually the facts, an uncensorable situation this way. The claimant in revision has the burden of proof of either the obstructionist conduct of the adversary, of not allowing them to have possession of the document in the course of the adjudication of the trial, or of a circumstance with the same impact arising above their will. In the case before the court, the claimant in revision did not prove such a hypothesis, and there was no evidence of successive steps, made in written form, whereby the claimant in revision had tried at the stage of the court's case the obtaining of the documents they proceeded to use in the review phase, steps that they speaks about in this claim. As resulting from the brief of the case, the documents invoked as new could have been requested at any time during the first phase, nothing preventing the party from doing so, thus failure to request these documents does not constitute grounds for review."*

In line with the above-mentioned solution, we also appreciate that if the document could be procured through the diligence of the interested party and thus filed in the case, there can be no question of retaining the document by the adverse party or a circumstance outside their will which prevented them from knowing about the document.

Regarding all of the above, we conclude that the case-law played a major role in shaping the conditions for the admissibility of a claim for review based on the provisions of Art. 509 par. (1) point (5) of the Code of Civil Procedure: the new document invoked by the claimant in revision must be supporting and decisive, must have existed at the date of issue of the judgment whose revision is requested, must have been retained by the adverse party in the process or due to a circumstance beyond the will of the parties and must have not been discovered within one month before the filing of the claim for review.