DOI 10.24147/2542-1514.2019.3(2).114-123

RESPONSIBILITY FOR THE LEGAL COSTS IN CASE OF PROCEDURAL COMPLICITY IN CIVIL AND COMMERCIAL PROCEEDINGS

Julia V. Kaizer
Dostoevsky Omsk State University, Omsk, Russia

Article info
Received –
2019 April 11
Accepted –
2019 May 20
Available online –
2019 September 12

Keywords
Legal costs, legal expenses, procedural complicity, imposition the responsibility for the legal costs, proceedings costs, civil proceedings, commercial proceedings

The subject of the paper are basic principles for the responsibility for the legal costs in case of procedural complicity and consolidation of these principles in the procedural legislation. The purpose of the article is to confirm or disprove hypothesis that the basis of principles for imposing the responsibility for the legal costs on co-plaintiff or codefendant includes substantive criterion (the nature of the disputed material relationship) and procedural criterion (the procedural status of the co-participant).

The methodological basis of the research is the dialectical method of cognition and the resulting private-scientific methods, in particular: the system-structural method and the method of comparative law.

The main results and scope of their application. Civil and commercial procedural legislation does not regulate the issue of responsibility for the legal costs in case of procedural complicity. The mechanism of such a responsibility has a significant influence on the formation of legal bodies' position in resolving the issue from whom and in what amount the costs of the of the case consideration are to be recovered in the case of several claimants or defendants participating in the dispute.

The author proposed four principles to imposing the responsibility for the legal costs on the parties in civil and arbitration proceedings due to the content of the controversial material legal relationship. 1) The principle of equal share distribution of legal costs among the parties is the main principle for recovering legal costs in the case of procedural complicity. This principle is applicable in all cases arising from legal relations with a shared plurality of persons on the creditor's or the debtor's side. 2) The principle of joint collection of legal costs is applicable for disputes in which joint debtors or joint creditors take part. 3) The exclusion from the principle of equal imposing the responsibility for the legal costs is allowed by the court in case of a violation of procedural rights by one or several parties. 4) The inadmissibility of imposing the responsibility for the legal costs to the plaintiff in favor of improper co-defendant in the case when this co-defendant appeared on the court's initiative.

It is unreasonable to use the criterion of the actual procedural behavior of the parties during the imposition the responsibility for the legal costs, because this criterion is vague and evaluative, it depends on the will of the person who claims to reimburse legal costs and on the opinion of the judge resolving this issue. The proposed principle of legal costs equal sharing among the parties will not affect the adversarial character in the civil and arbitration procedure.

Conclusions. In order to unify approaches of courts and to prevent a discretionary attitude to this issue, it is necessary to develop basic principles for imposition of responsibility for the legal costs in case of procedural complicity and consolidation of these principles in the procedural legislation. The nature of the controversial material relationship is put on the basis for the joining of the parties in the civil and commercial proceedings. This criterion should also be taken into account by the court when deciding on the court costs distribution among the parties involved in the case.

ISSN 2658-4050 (Online)

1. Introduction.

One of the relevant topics in Russian procedural legislation is the distribution of court costs between the persons involved in the case, as a result of consideration of the civil dispute on the merits. The main provisions relating to this issue, of course, are contained in the Code of Civil procedure of the Russian Federation (hereinafter – CPC) and the Code of Arbitration procedure of the Russian Federation (hereinafter – APC). But the procedural law does not take into account the whole range of procedural relations in order to directly resolve all the issues that arise in the courts in the allocation of costs associated with the consideration of the case by courts of general jurisdiction and arbitration courts.

Legal costs include expenses incurred by persons participating in the case in connection with the consideration of the case in court (Article 94 of the Code of civil procedure, Article 106 of the APC).

Court costs are proposed to be considered as losses resulting from the need to go to court for the protection of their rights and legitimate interests or the initiation of unjustified proceedings [1, p. 73 - 81]. In the legal literature, the right of participants in various types of proceedings to reimbursement of expenses for the services of a representative is assessed as a component of the constitutional right to judicial protection [2, p. 48].

As correctly noted by Yusupova A. N. [3, p. 18-19], the institute of judicial expenses prevents the appeal to court of unfair claimants with the not documented requirements; encourages respondents who don't fulfill the duties before other party, in due time and on a voluntary basis to fulfill the assumed duties; encourages interested persons to participation in dispute settlement without its consideration in court on the basis of provisions of the current legislation. According to E. V. Vaskovsky, the return of legal costs by the opposing party in favor of which the case was decided is a fair remuneration for the costs incurred in the production of the case and at the same time can serve as a means to prevent groundless and wrong claims [4, p. 368].

Thus, the court costs in civil and arbitration proceedings are designed to solve the problem of both partial reimbursement to the state of costs incurred for the maintenance of the judicial system and ensuring its activities, and preventing unfounded statements to the judicial authorities [5, p. 264, 6, p. 172].

It is necessary to agree with K. L. Branovitsky, who pointed out that the issues of distribution of court costs following the consideration of the case, which in some cases are the same element of restoration of justice, violated rights and legitimate interests, as well as the resolution of the issue on the merits [7, p. 8-9], are of particular importance.

Civil and arbitration procedural legislation does not regulate the issue of the distribution of costs between the parties to the dispute in the case of procedural complicity. The mechanism of such distribution significantly affects the formation of the position of the judiciary in resolving the question of who and to what extent the costs associated with the consideration of the case in the case of participation in the dispute of several plaintiffs or defendants are subject to recovery. In order to unify the approaches of the judiciary and to avoid discretion in this matter requires the development of basic principles of distribution of legal costs in the procedural complicity and direct consolidation of the principles-rules in the procedural law. The Article will deal with the distribution by the court of the costs associated with the consideration of the case, in which several plaintiffs and (or) defendants take part.

2. Procedural complicity.

The purpose of procedural complicity is the most effective consideration of a civil case. This institution of civil procedural law contributes to the implementation of the principle of procedural economy.

Article 46 of the APC and Article 40 of the CPC provide the foundation of procedural complicity: the existence of common rights and (or) duties of several plaintiffs or defendants; the rights and (or) duties of several plaintiffs or defendants have the same base; the subject of dispute is homogeneous rights and duties. At the same time, each of the accomplices in relation to the other party acts independently in the process.

ISSN 2542-1514 (Print)

If we analyze these rules, we can conclude that the basis for the emergence of procedural complicity in civil and arbitration proceedings is based on such a criterion as the nature of the disputed material legal relationship. It is the content of the material legal relationship that determines the possibility of participation in the process of several plaintiffs and(or) defendants. We believe that this criterion should also be taken into account by the court when deciding on the distribution of legal costs among the persons involved in the case. Principles should be developed to establish a mechanism for the allocation of costs between the parties involved in the case, which should be based on both the substantive criterion (the nature of the disputed material relationship) and the procedural criterion (the procedural status of the accomplice). These two criteria are related and interdependent.

3. Principles of distribution of legal costs in procedural complicity.

The CPC and the APC do not mention how the court should distribute court costs in the case of procedural complicity. In contrast to the Russian procedural legislation, the German code of Civil procedure [8, p. 35] contains a separate paragraph on costs in the case of procedural complicity (paragraph 100).

The gap was filled by the Plenum of the Supreme Court of the Russian Federation in Resolution No. 1 of 21.01.2016 "On some issues of application of the law on compensation for costs associated with the consideration of the case", in paragraph 5 of which the Supreme Court of the Russian Federation noted that when filing a claim jointly by several plaintiffs or to several defendants (procedural complicity), the distribution of legal costs is made taking into account the peculiarities of the material legal relationship from which the dispute arose, and the actual procedural behavior of each of them (Article 40 of the RF CPC, Article 41 of the CAS of the Russian Federation, Art. 46 of the APC).

In this case, the Supreme Court of the Russian Federation specifically states that if persons are not in favor of which adopted a judicial act, are joint and several debtors or creditors, the court costs reimbursed to these persons in solidarity in order (part 4 of Article 1 of the code of civil procedure of the Russian Federation, part 4 of Article 2 the code of the Russian Federation, part 5 Article 3 of the APC RF, Articles 323, 1080 of the Civil code of the Russian Federation). A joint and several obligation or requirement arises if the solidarity of the obligation (requirement) is provided for in the contract or established by law, in particular if the subject of the obligation is indivisible. Solidarity of obligations solves the question of how much is owed to the creditor, leaving open the regulation of the distribution of the burden of performance between debtors [9, p. 80 - 106].

Thus, the Supreme Court of the Russian Federation establishes two criteria to be taken into account by the judiciary in the resolution of the question of the allocation between the partners-costs of proceedings:

- feature of the material legal relationship from which the dispute arose;

- the actual procedural conduct of each of the accomplices.

But are these criteria to be taken into account in the aggregate, or are there situations where only one of the criteria should be taken into account?

Based on the approach of the Supreme Court of the Russian Federation in relation to solidary debtors or creditors, only one criterion is to be taken into account – the nature of the disputed material legal relationship.

Accordingly, in the remaining cases, the combination of the above two criteria is applied.

As for the specifics of the substantive legal relationship, this criterion is necessary for the separation of joint and several obligations. Consequently, in relation to "non-consolidated obligations", the court must apply an additional criterion – the actual procedural conduct of each of the accomplices. On this basis, the court is entitled to award court costs in different amounts for each of the accomplices.

As Z. Artykova correctly noted, the novel of procedural law in the form of distribution of court costs based on the model and features of civil (material) legal relationship plays an important role not only for law enforcement practice, but also for procedural science [10]. The advantages of this

ISSN 2658-4050 (Online)

approach include the fact that the court is now obliged to take into account the peculiarities of the material legal relationship, since it is the nature of the relations regulated by the rules of substantive law that largely determines the relevant procedural features of the consideration and resolution of civil cases [11, p. 26, 12].

At the same time, the Supreme Court of the Russian Federation explained the order in which recovered the costs between the persons participating in business, if they are tied to the equity commitment.

The criterion proposed by the Supreme Court of the Russian Federation "the actual procedural conduct of each of the accomplices" is uncertain and evaluative, depending on the will of the person who claims compensation for legal costs, and on the opinion of the judge resolving this issue. Thus, E. V. Vaskovsky notes that when the plaintiff is awarded only half or any other part of the claim amount, then the court costs should be distributed among the litigants at its fair discretion
[4, p. 369].

But this leads to the freedom of the person claiming the costs of the accomplices to determine such amounts and, accordingly, to a rather limitless discretion of the court. To overcome the higher courts the position of the court of first instance from the point of view of the justification of the actual behavior of the partners and the allocation between them of costs is almost impossible, since the procedural law of the court of first instance is not violated, and that the court of first instance granted the right of the procedural behaviour of the partners to allocate the costs between the partners.

Unlike the Supreme Court of the Russian Federation, the procedural law uses a different criterion as a basis for the distribution of court costs. The procedural codes as a General rule proceed from the fact that the basis for the award of court costs is the conclusion of the court on the need to initiate legal proceedings to verify the legality of the claim filed by the plaintiff or the legality of the position of the defendant who refused voluntarily, without trial to fulfill the substantive requirements of the plaintiff. It therefore introduced a rule: the party in whose favor the judgment, the court awards to compensate on the other hand, all incurred in the case of legal expenses (paragraph 1 of Article 98 of the CPC, part 1 of Article 111 of the CAS), or, similarly, costs and expenses, incurred by persons participating in the case, in favor of which adopted a judicial act, the arbitral Tribunal shall be recovered from the side (part 1 of Article 110 of the APC).

Il'in V. A., analyzing explanations of the Supreme Court of the Russian Federation, came to the conclusion that, speaking about the behavior of the parties, which can result in the obligation to reimburse the legal expenses, I mean her pre-trial (or even non-procedural) behavior, and solely in respect of bringing the judicial mechanism, the behavior of which can be clearly judged by the nature of the judicial decision taken according to the results of the exited process [13, pp. 38 - 46].

It is necessary to agree that the criterion chosen by the Supreme Court of the Russian Federation "actual procedural behavior", has nothing in common with criterion by which the law operates. This criterion was needed by the Supreme Court in order to solve two important, in his opinion, problems: the fight against abuse of procedural rights and finding the possibility of reimbursement of legal costs to third parties who do not declare independent claims regarding the subject of the dispute [13, p. 38 - 46].

Thus, Ilyin A.V. reasonably notes that the actual behavior could be considered at distribution of judicial costs between accomplices, but only in the context of abuses of procedural rights by one of accomplices.

The reason for deviation from the General rule of distribution of court costs in this case may be the facts of abuse of procedural rights or passive procedural behavior of one of the procedural accomplices [14, p. 151].

According to para. 32 of the Resolution of Plenum of the Supreme Court of the Russian Federation in No. 1 of 21.01.2016 "About some questions of application of the legislation on compensation of the cost connected with consideration of the case" the persons participating in business have to use in good faith all procedural rights belonging to them in this connection the court

ISSN 2542-1514 (Print)

has the right to carry out the legal costs on the person who abused the procedural rights and didn't fulfill the procedural duties, or not to recognize the legal costs incurred by them necessary if it led to failure of court session, delaying the trial, preventing the consideration of the case and the adoption of the final judicial act.

The presence of this explanation indicates the intention of the Plenum of the Supreme Court of the Russian Federation to create an additional mechanism to ensure the fair use of procedural rights by persons involved in the case [15, p. 56].

This further confirms that the actual procedural conduct of each of the accomplices outside the context of their abuse of procedural rights should not be taken into account by the court in the allocation of legal costs in the case of procedural complicity.

How can the court correctly determine the actual procedural behavior of the accomplices, what is the expression of active and passive behavior? The Supreme Court of the Russian Federation does not answer these questions.

This, in turn, may lead to the fact that not all, but only the "selected" accomplices, which include entities that have the financial ability to reimburse court costs, the persons involved in the case, will require reimbursement of costs. That is, bad faith will be seen on the part of the applicant for reimbursement of costs.

Such unfair behavior will be typical for one of the accomplices. For example, the case involves three co-plaintiffs, two of whom ensure participation in court sessions, collect evidence, draw up procedural, adversarial documents in the case, and the third accomplice simply joins the position of other accomplices. It turns out that the costs incurred by the defendant related to the consideration of the case, in the case of a court decision to dismiss the claim, are subject to recovery only from two of the co-defendants who took an active position in the case. In turn, the third co-plaintiff, counting on obtaining judicial protection and presenting along with other co-plaintiffs claims, no procedural actions, including proof of the grounds of the claims, does not take, but understands that if, due to the activity of the other co-plaintiffs will be issued by the court a positive decision, the purpose of the treatment of the third co-plaintiff in court will be achieved, his subjective material rights will be restored. If the court will deny the claim, and here unscrupulous co-plaintiff wins – it will be impossible to impose legal costs. In confirmation of groundlessness of the approach chosen by the Supreme Court of the Russian Federation it is possible to refer to an example from judicial practice in the case No. A46-12808/2016 within which the Arbitration court of the Omsk region assigned the duty to compensate the representative expenses incurred by the third party which is not declaring independent requirements concerning a subject of dispute for two co-defendants from three, referring to the fact that active protection of the rights was carried out by these co-defendants thus that the subject of dispute were requirements for contest of trades, and all the co-authors cited the same grounds for invalidation of the auction.

But the purpose of all the accomplices is the same, their interests do not contradict each other, so the legal costs incurred by the opposite party are subject to recovery from the losing party - the accomplices in equal shares, regardless of how active each of them was. Otherwise, the more active one of the accomplices, the greater the costs will be imposed on him, rather than on an accomplice who does not Express a procedural position in the case and did not perform properly procedural duties, the main of which is by virtue of Art. 56 of the code of civil procedure and art. 65 APC RF is the obligation to prove the grounds of the claims or objections to them. After all, if one plaintiff takes part in the case, who filed a claim, but does not take any active actions to protect the violated right, in the case of a negative decision for him, the defendant has the right to recover from such a plaintiff all costs incurred.

The law should establish the principle of equal share recovery of costs associated with the consideration of the case from accomplices, except in cases where the case involves joint debtors or joint creditors, for which the principle of joint distribution of costs should be provided, or when one of the accomplices has abused procedural rights. This will be a manifestation of the principle

ISSN 2658-4050 (Online)

of equality of persons participating in the case, in civil and arbitration proceedings.

It is the principle of shared distribution of court costs as a general enshrined in paragraph 100 of the German Code of Civil procedure [8, p. 35]: if the party against whom the decision is made consists of several persons, they reimburse the costs in shares attributable to each of them (paragraph 1). At the same time, the legislator admits that with a significant difference in the degree of participation in the dispute, the court may at its discretion take as a criterion the degree of participation (paragraph 2). If one of the procedural accomplices used special means of implementation of requirements or means of protection, other procedural accomplices are not responsible for the court costs connected with it (paragraph 3). If a decision is made against several defendants as joint and several debtors, they are liable for reimbursement of expenses in the same way as joint and several debtors, regardless of the rule of paragraph 3 (paragraph 4).

The establishment in the Russian procedural legislation of the principle of distribution of legal costs between accomplices depending on the procedural behavior will lead to the emergence of a deterrent for the proper performance of procedural duties by the accomplice in the form of the possibility of recovery of legal costs from him, if he will take all measures for judicial protection, unlike other accomplices. Wouldn't that be a violation of the adversarial principle?

The procedural law encourages all persons involved in the case to take measures to prove the circumstances relevant to the case, including the collection and presentation of evidence to the court, establishing as an adverse consequence of failure to comply with this requirement the court's negative decision for the person. In particular, you can refer to the content of part 3.1 of Art. 70.1 of the APC, according to which the circumstances referred to by a party in support of its claims or objections, are considered recognized by the other party, if they are not directly challenged by it or disagreement with such circumstances does not arise from other evidence justifying the submitted objections to the substance of the claims. The passive conduct of one of the co-participants in the non-contention of the facts on which the other party bases the claims or objections, under the threat of higher court costs, will allow the arbitration court to recognize the established unprovoked circumstance. The totality of the undisputed facts will allow the arbitral to rule in favour of the party that claimed the existence of such facts. On the one hand, by virtue of the adversarial principle, the parties must be active in expressing their position with the presentation of evidence in the case, on the other hand, the existence of the principle of unequal distribution of legal costs between the parties negates the existence of the adversarial principle, which is actually suppressed by the rule considered. Therefore, if we take into account the factual procedural behavior of the accomplices, the court costs are to be recovered in a larger amount from the accomplice, who did not show activity in justifying his position in the case and did not perform properly procedural duties, allowed the abuse of procedural rights.

The principle of equal share distribution of court costs will not affect and will not affect the implementation by the parties of the adversarial principles in civil and arbitration proceedings.

Thus, taking into account the content of the disputed material legal relationship, it is possible to offer three main principles of distribution of legal costs between partners in civil and arbitration proceedings:

1. The principle of equal share distribution of legal costs between partners – the main principle of recovery of legal costs in the case of procedural complicity, to be applied in all cases of recovery of costs from partners in cases arising from the legal relationship with the share of multiple persons on the side of the creditor or debtor.

2. The principle of joint and several recovery is for disputes involving joint and several debtors or creditors.

3. Exception to the principle of equal sharing of litigation costs permitted in the case of the court of abuse of procedural rights on the part of one or more partners.

At the same time, we believe that the nature of procedural complicity – mandatory or optional-is important. The basis of necessary complicity consists

ISSN 2542-1514 (Print)

in such specificity of object of dispute which does not allow to consider a question of the right (duty) of the person without consideration of a question of the rights (duties) of other persons. the Object of dispute in this case is that the decision of a question of the right (duty) of one of accomplices depends on establishment of the rights (duties) of other respondents in the case [16, p. 256-257].

Indeed, there is one situation where the court cannot consider a dispute in the absence of an accomplice, in particular in the absence of a co-defendant, and therefore the court has the right on its own initiative to bring a person to participate in the case as a co-defendant. Another situation occurs in an optional participation, for example, when the subject of the dispute are the homogeneous rights and duties. In General, the type of procedural complicity should not affect the court's use of the principle of equal sharing of legal costs between the accomplices in the event of a decision not in their favour.

But in some cases, the court, realizing the right to involve the co-defendant in the case, may make a mistake, considering it impossible to make a reasoned court decision in the case due to the failure of the co-defendant. Even the erroneous involvement of a party in the proceedings does not prevent the court from reaching a decision in favor of the opposite party, and this, in turn, does not limit the winning party in obtaining from the improper party involved by the court to participate in the case on its own initiative, the court costs. Such an approach does not meet the principle of justice. A mistake in determining the procedural status of a person was made by the court. The plaintiff, the petition for attraction to participation in business in quality of co-defendant not consent to such involvement does not give, in this connection, in case of refusal by the court in the lawsuit brought against the defendants court costs not be recoverable from the plaintiff in favor of the defendants inappropriate. It can be suggested that such a penalty will be permissible at the expense of the budget, but not at the expense of the plaintiff. This can be seen as the fourth principle of apportionment of legal costs among accomplices.

The approach proposed by the author of the equal share distribution of legal costs between the partners can be justified from the point of view of the mechanism of recovery of the state fee from the partners as an integral part of the court costs.

So, according to the explanations given by the Supreme Arbitration Court of the Russian Federation in the Resolution of Plenum of 11.07.2014 No. 46 "About application of the legislation on the state fee when considering cases in arbitration courts" at presentation by several claimants of the statement of claim containing the uniform requirement (for example, at the statement of the claim for recovery from others illegal possession of the property which is in common property, the claim for compensation of the losses caused by non-performance or improper execution by the debtor of the obligation to joint creditors), the state fee shall be paid by the plaintiffs in equal shares in the amount established by the tax code for the said requirement (paragraph 2 of Article 333.18 of the tax code). If the amount of the claim actually consists of independent claims of each of the plaintiffs (for example, in the application of claims arising from the obligation with a share plurality of persons on the side of the creditor, claims for compensation for damage caused by a source of increased danger to the property of several persons), the state fee is paid by each of the plaintiffs based on the size of the claim (paragraph 9).

In the case where a decision is made against several defendants, the court shall recover the court costs incurred by the plaintiff for payment of the state fee from these defendants as co-obligors in a shared obligation, regardless of the plaintiff's claims to recover such costs from only one or more of them (paragraph 4).

Accordingly, due to the independence of each of the accomplices in the consideration of cases arising from legal relations with the share plurality of persons on the side of the creditor or the debtor, both the state fee and the costs associated with the consideration of the case are subject to recovery from each of the accomplices in equal shares. This statement finds its expression in judicial practice.

4. Conclusion.

The procedural law should establish as the basic principle of equal share distribution of legal

ISSN 2658-4050 (Online)

costs between the partners, to be applied in all cases of recovery of costs from the partners in the consideration of cases arising from legal relations with the share of multiple persons on the side of the creditor or debtor.

The author's conclusion would be consistent with the principles of legitimacy and balance the interests of the parties, as, making certain procedural actions, making and supporting claims, each of the partners should be aware of the statutory negative consequences of their actions, expressed including in the opportunity of laying all the losing partners in equal shares the costs of the proceedings.

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INFORMATION ABOUT AUTHOR

Julia V. Kaizer – PhD in Law, Associate Professor; Associate Professor, Department of Civil and Arbitrary Procedure
Dostoevsky Omsk State University
55a, Mira pr., Omsk, 644077, Russia
e-mail: kaijuly@yandex.ru
RSCI SPIN-code: 5491-0023; AuthorID: 678741

BIBLIOGRAPHIC DESCRIPTION

Kaizer Ju.V. Responsibility for the legal costs in case of procedural complicity in civil and commercial proceedings. *Pravoprimenenie = Law Enforcement Review*, 2019, vol. 3, no. 2, pp. 114–123. DOI: 10.24147/2542-1514.2019.3(2).114-123. (In Russ.).