JUDGMENT NO 77/2018

REPUBLIC OF ITALY

THE CONSTITUTIONAL COURT

[…]

9.- The question on the merits, raised jointly by the Court of Turin and the Court of Reggio Emilia, is well-founded.

10.- The regulation of the costs of the civil proceedings responds to the general rule victus victori established by art. 91, first paragraph, of the Civil Procedure Code, in that […] it provides that "the judge, with the judgement closing the proceeding, shall order the unsuccessful party to reimburse the costs in favour of the other party and liquidates the amount together with the attorneys' fees".

Therefore, the loss is followed, as a rule, by the order to pay the costs of the dispute. The risk of the proceeding is borne by the unsuccessful party because it is the one that has given rise to the dispute by not recognizing, or opposing to, the right of the successful party or by triggering a claim that has proved to be unsuccessful. It is fair, according to the principle of responsibility, that those who have been found wronged should, as a general rule, also bear the costs of litigation, which shall be reimbursed to the succeeding party. In this regard, the Court stated that "the cost of the proceedings must be borne by those who have made it necessary for the judge to act and have generated the costs of its proceedings" (Judgment No 135 of 1987).

[…]

However, it is not an absolute rule precisely because of the ancillary nature of the ruling on the costs of litigation, as clearly stated in the case-law of this Court. The Court has examined a case of litigation - the tax proceeding prior to the 1992 reform - in which there was no provision about the costs of litigation. Therefore, the losing party did not have to bear the costs of the proceeding and the succeeding party was not to be refunded. In fact, this Court stated (judgment no. 196 of 1982) that "the rule of the condemnation of the unsuccessful party to the payment of costs is of a general nature, but it is not absolute and without derogations ". Just as the judge is allowed to compensate between the parties the costs of the dispute by referring to the conditions set out in the second paragraph of Article 92 of the Civil Procedure Code (provision currently challenged), it falls within the discretion of the legislator to determine the application of the general rule, according to which the costs of the dispute are to be borne by the unsuccessful party. Likewise, with reference to the opposition judgement to administrative sanctions, this Court (order No. 117 of 1999) has confirmed that "the condemnation of the unsuccessful party to the payment of the expenses of proceeding, even if of a general nature, does not have an absolute and non-derogable nature, being exceptions possible both on the initiative of the judge of the single proceeding, for just reasons pursuant to Art. 92, second paragraph, code of civil procedure, and when provided by law - with regard to the type of procedure - in the presence of elements that justify the departure from the general rule". Likewise, a special provision which, on the contrary, excluded in any case the compensation of litigation expenses in case of a decision granting the application to seek damages exercised by the party in the context of a criminal proceeding under the regime preceding the reform of the Code of Criminal Procedure of 1987 (judgment No. 222 of 1985) was considered not illegitimate.

The legislator therefore enjoys a wide degree of discretion in laying down procedural rules (see, inter alia, judgments No 270 of 2012, No 446 of 2007 and No 158 of 2003) and, in particular, in deciding upon litigation costs. Therefore, as stated by this Court (judgment no. 157 of 2014) - "a departure from the rule of the condemnation of the unsuccessful party to the reimbursement of the costs of the dispute in favour of the successful one, is well possible, in the presence of elements which justify it (judgments no. 270 of 2012 and

no. 196 of 1982), since the recovery of said costs is not, therefore, essential to the judicial protection (judgment no. 117 of 1999)".

Art. 45 (11) of Law 69 of 18 June 2009 (Provisions for economic development, simplification, competitiveness and civil proceedings) reworded the second paragraph of Art. 92 as follows: "If the parties are jointly unsuccessful or there are other serious and exceptional reasons, explicitly stated in the grounds, the court may set off the costs, in part or in full, between the parties". This meant that the perimeter of the general clause had been reduced, the legislator having considered, in the exercise of its discretion - which has already been noted to be wide, according to the case law of this Court - that a more extensive application of the rule of charging the unsuccessful party the costs of litigation would reinforce the principle of the responsibility of those who initiated litigation, or resisted in court, with a consequent deflating effect on civil litigation.

13.- At the heart of this reforming context is the awareness, increasingly felt, that, in the face of a growing demand for justice, also due to the recognition of new rights, jurisdiction is a resource that is not unlimited and that measures to contain civil litigation must be implemented. Hence the adoption, in recent times, of procedural institutes aimed, as a preventive measure, at favouring the settlement of disputes in other ways, such as ADR (Alternative Dispute Resolution) measures, which include mediation procedures, assisted negotiation and the transfer of disputes to arbitration. In the same line is the general provision, in the Code of Procedure (art. 185-bis cod. proc. civ.), of a procedural moment that sees the formulation of the conciliation proposal by the judge, introduced in general by art. 77, paragraph 1, letter a), of the decree-law of 21 June 2013, no. 69 (Urgent provisions for the relaunch of the economy), converted, with amendments, into law no. 98 of 9 August 2013, universalising what had already been established, a few years earlier, for labour disputes through the amendment of article 420, paragraph 1, of the Code of Civil Procedure, introduced by art. 31, paragraph 4, of Law no. 183 of November 4, 2010 (Delegation to the Government on the subject of hard work, re-organisation of institutions, leaves of absence, expectations and permits, social security, employment services, employment incentives, apprenticeship, female employment, as well as measures against undeclared work and provisions on public employment and labour disputes). On the other hand, when at least the dispute reaches the final outcome of the judicial decision, it seems justified that the risk of litigation should then be borne by the totally unsuccessful party according to a stricter general rule, limiting to the recurrence of "serious and exceptional reasons" the judge's power to compensate the costs of litigation. However, this balance has been altered by a further, more recent amendment to the censured second paragraph of Article 92 of the Code of Civil Procedure.

14.- In fact, in 2014, following the reforming trend that began in 2005, the legislator went even further in restricting the scope of the exception to the loser-pays rule, grounding it no longer on the general clause of "serious and exceptional reasons", but on two specific situations (in addition to that of both parties losing the case, which has never changed), namely the absolute novelty of the issue dealt with and the change in the case law with respect to the key issues. This is the last provision of article 13, paragraph 1, of Decree-Law No. 132 of 2014, converted, with amendments, into Law No. 162 of 2014 (a provision which, by express provision of article 13, paragraph 2, of the aforementioned Decree-Law, applies to proceedings introduced as from the thirtieth day following the entry into force of the relevant conversion law, which took place on 11 November 2014). The Report on the draft law converting Decree-Law No. 132 of 2014 states: "Despite the restrictive amendments introduced in recent years, judicial practice continues to make very wide use of the discretionary power to offset the costs of proceedings, with a consequent incentive to litigation, given that losing the case loses one of its natural and significant costs, with equal damage to the party that turns out to have been right". This more recent legislative development, which led to the wording of the provision censured, clearly shows that the legislature intended to refer to two mandatory hypotheses, in addition to the hypothesis of mutual losing the case, which has remained unchanged over time, as both the referring judges correctly consider.

15.- However, the inflexibility of these two exhaustive hypotheses alone, in violation of the principle of reasonableness and equality, has left out other similar cases that can be traced to the same justificatory ratio. The envisaged hypothesis of a change in the case law on a decisive issue is characterised by the fact that, in substance, the reference framework of the dispute is changed in the course of the proceedings. This eventuality - which mainly concerns the jurisprudence of legitimacy, but which, failing that, may also concern the jurisprudence on the merits - is certainly not available to the parties, who find themselves having to deal with a new principle of law, so that, in cases of unforeseeable overruling, the reliance of those who have regulated their procedural conduct taking into account the orientation then disregarded and overcome, is nevertheless protected under certain conditions, specified in a well-known ruling of the civil unified sections of the Supreme Court (judgment 11 July 2011, no. 15144). 15144). The rationale behind such a hypothesis - which, even if not expressly provided for, could have been derived by subsumption from the general clause of "serious and exceptional reasons" - lies precisely in the supervening change in the reference framework of the case that alters the terms of the dispute without this being attributable to the procedural conduct of the parties. But this rationale can also be found in other similar cases where the terms of the dispute have changed without the parties being held responsible: among the most obvious, a rule of authentic interpretation or, more generally, a jus superveniens, especially if in the form of a rule with retroactive effect; or a ruling by this Court, especially if it is unconstitutional; or a decision of a European Court; or a new regulation in European Union law; or other similar events. All of which, if they concern a "decisive issue" for the purposes of deciding the dispute, are characterised by equal "seriousness" and "exceptional character", but cannot be included in a rigid catalogue of named hypotheses: they must necessarily be left to the prudent assessment of the judge in the dispute. The same can be said of the other hypothesis provided for by the censured provision - the absolute novelty of the matter - which is attributable, more generally, to a situation of objective and marked uncertainty, not guided by case law. Similarly, it is possible to envisage other similar situations of absolute uncertainty, in law or in fact, of the dispute, also attributable to "serious and exceptional reasons". Moreover, the very hypothesis of mutual lack of jurisdiction, which, together with those expressly mentioned in the contested provision, also empowers the court to award the costs of the proceedings, is by no means a rigid criterion, but implies some discretion on the part of the court, which is called upon to assess the extent to which each party is both victorious and unsuccessful, This is all the more so as case law is moving in the direction of deeming that there is a case of mutual failure to pay even in the event of partial acceptance of the only claim brought (Court of Cassation, third civil section, judgment of 22 February 2016, no. 3438). 3438). It is therefore contrary to the principle of reasonableness and the principle of equality (Article 3(1) of the Italian Constitution) for the legislature of 2014 to have excluded from the cases mentioned, which entitle the court to award the costs of litigation in the event of a total loss, the similar hypotheses of contingencies relating to decisive questions and those of absolute uncertainty, which have the same or greater seriousness and exceptionality as the typical ones expressly provided for by the provision censured. The inflexibility of such exhaustiveness is also in breach of the canon of due process (Article 111(1) of the Constitution) and of the right to judicial protection (Article 24(1) of the Constitution) because the prospect of being ordered to pay the costs of litigation even in any totally unforeseen and unforeseeable situation for the party bringing or resisting proceedings may constitute an unjustified obstacle to asserting its rights.

16.- In order to restore the legitimacy of the censured provision, it can also be considered that more recently the legislator, in line with the reform action of recent years, has returned to the regulatory technique of the general clause of "serious and exceptional reasons". In fact, after the introduction of the provision now censured, the legislator has changed some rules of the tax process. In particular, Article 9(1)(f)(2) of Legislative Decree No 156 of 24 September 2015 (Measures for the revision of the rules on interpellations and tax litigation, implementing Articles 6 and 10(1)(a) and (b) of Law No 23 of 11 March 2014) replaced the original paragraphs 2 and 2-bis of Article 15 of Legislative Decree No 546 of 31 December 1992. 546 (Provisions on the tax process in implementation of the governmental delegation in Article 30 of Law No. 413

of 30 December 1991) and has, inter alia, provided that the costs of the proceedings may be offset in whole or in part, as well as in the event of mutual failure, also "where there are serious and exceptional reasons" which must be expressly motivated. This guides the ruling on constitutional illegitimacy in the sense that the hypotheses unlawfully not taken into account by the censured provision can also be identified in those that can be traced back to this general clause and that are similar to those typified by name in the rule, in the sense that they must be of equal or greater gravity and exceptionality. The latter then - the "absolute novelty of the question dealt with" and the "change in the case law with respect to the leading questions" - have a paradigmatic character and perform a parametric and explanatory function of the general clause. It is therefore necessary to declare unconstitutional the second paragraph of Article 92 of the Code of Civil Procedure in so far as it does not provide that the judge, in the event of a total loss of the case, may nonetheless award the costs to the parties, in part or in full, even where there are other similar serious and exceptional reasons. The obligation to state reasons for the decision to award costs, either in the two cases mentioned or where there are other similar serious and exceptional reasons, follows from the general requirement of Article 111(6) of the Constitution, which requires all judicial decisions to state the reasons on which they are based.

FOR THESE REASONS, THE CONSTITUTIONAL COURT

2. declares the constitutional illegality of Article 92(2) of the Code of Civil Procedure, as amended by Article 13(1) of Decree-Law No 132 of 12 September 2014 […].

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Therefore, the constitutional illegality of Article 92, second paragraph, of the Italian Civil Code must be declared in so far as it does not provide that the judge, in the event of total loss, may not compensate the expenses between the parties, in part or in full, also when there are other similar serious and exceptional reasons.

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