SECTION III
EUROPEAN LAW AND PUBLIC POLICIES

THE PRINCIPLE NON REIORMATIO IN PEJUS IN ROMANIAN LEGISLATION

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Abstract

The principle non reformatio in peius (non-reformation for the worse, ie no one can worsen the situation through their own appeal) must be respected both when judging the appeal and at the retrial of the case, following the annulment or quashing of the decision, because retrial is the consequence exercise of the appeal, and the party must have the certainty that it will not worsen its situation, not only in the appeal it has promoted, but also in the procedural stages subsequent to the admission of this appeal.

The principle non reformatio in pejus is regulated in this way, according to art.481 of the Code of Civil Procedure, the appellant cannot be created in his own appeal a worse situation than the one from the contested decision, unless he expressly consents to this or in the specific cases provided by law.

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The principle non reformatio in pejus (non-reformation for the worse, ie no one can worsen the situation through their own appeal) is a Latin expression that expresses the principle of procedure according to which the use of an appeal can not aggravate the situation of the one who exercises it. This rule is justified by the fact that carrying out judicial review of judgments, instituted as a guarantee of compliance with the law, would be restricted if the parties face the risk of creating a more difficult situation by exercising a remedy.

This is a principle of procedural law, according to which the court cannot create a more difficult situation for the party who declared an appeal.

The principle non reformatio in peius must be observed both in the appeal and in the retrial of the case, following the annulment or quashing of the judgment, because the retrial of the case is the consequence of the appeal, and the party must be sure that it will not worsen its situation, not only in the appeal it has promoted, but also in the procedural stages subsequent to the admission of this appeal2.

Although in civil procedural matters, unlike criminal procedural law, this principle did not have an express regulation - until the adoption of GEO no. 138/2000, it was unanimously recognized in the doctrine and in the judicial practice, the necessity of applying this principle, for reasons of equity and legal logic also in this field.

The application of the principle non reformatio in peius, according to the old Code of Civil Procedure, could not be opposed by absolute exceptions, the court not being able to invoke ex officio or admit the absolute exceptions invoked by the respondent, if their admission would worsen the situation the party who brought the appeal. Only the exceptions of absolute incompetence, incompatibility or nullity of the decision regarding aspects related to the development in legal conditions of the litigation could be opposed to the principle regulated by art. 296, the second sentence of the Code of Civil Procedure, "the appellant cannot, however, create in his own appeal a situation worse than that of the contested decision".

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2 Decision no. 683 of October 4, 2004 - Civil Section IV. Court of Appeal Bucharest.

Underlying this principle are two other fundamental principles of the process, namely: the principle of ensuring for the party, the right to defense and the principle of the role of the judge in finding the objective truth, the application of which guarantees the proper conduct of the judicial process, ensuring the protection of rights and interests. the parties, the validity and legality of the solution contained in the civil court decision1.

In the absence of this principle, the parties, knowing the possibility of worsening their situation, could be determined to refrain from appealing the decision, in order not to take a risk, even if the decision would be illegal and unfounded. The role of this principle is not only to protect the particular interest of the person who declared the appeal, but also to ensure a fair conduct of the civil process, ie the issuance of a legal and sound decision. That principle is now enshrined in express provisions, according to which the use of an appeal may not create, for the party who has exercised it, a more difficult situation than that in the judgment under appeal. The judgment under appeal, if any, may be reformed only in favor (in melius) and not against (in peius) of that party. The new Code of Civil Procedure contains a different regulation of the principle non reformatio in pejus (of the non-aggravation of the situation of the party in its own appeal). The principle non reformatio in pejus is thus regulated, according to art. 481 of the Code of Civil Procedure, the appellant cannot be created in his own appeal a worse situation than that of the contested decision, unless he expressly consents to this or in the specific cases provided by law2.

The principle non reformatio in pejus has two limitations:

a) when the appellant expressly consents to the worsening of his situation in that appeal which he has used. The consent can be expressed by the appellant by means of the appeal request or by express request addressed to the court and its recording in the conclusion of the hearing. The judge must build on the manifestation of the appellant's will in this regard, pursuant to art. 22 paragraph 2 of the Code of Civil Procedure, on the role of the judge in finding out the truth, because the law requires the express consent of the appellant and not be deduced from documents and facts that would imply that agreement.

b) in certain cases provided by law. Such a situation is the exception of the res judicata authority provided by art. 432 of the Code of Civil Procedure, and as an effect of admitting the exception, the party may create in its own appeal a worse situation than that of the contested decision, without the express consent of the appellant may be required, but this rule operates against his will.

The exception of the res judicata authority is a substantive, absolute, public order exception, the exception can be invoked by the court or by the parties in any state of the process, even before the appellate court. The court has the obligation to respect and invoke the authority of res judicata, regardless of the conduct of the parties.

The exception is intended to ensure the stability of legal relations and the efficiency of judicial activity.

The effect of admitting the exception is that the parties may create in their own appeal a worse situation than the one in the contested judgment.

This effect is justified by the fact that the party intended to override the res judicata authority and initiated a new trial on a case that was definitively resolved by a previous court.

The exception of the res judicata authority is one of public order and requires the observance of a court decision and the maintenance of public order.

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1 Civil decision no. 640/2009 of the Bucharest Court of Appeal, Civil Section III and for cases with minors and family.

2 Gabriel Boroi, Octavia Spineanu-Matei, Andreia Constanda, Carmen Negri lă, Veronica Dănăilă, Delia Narcisa Theohari, Gabriela Răducan, Dumitru Marcel Gavriş, Flavius George Păncescu, Marius Eftimie - The new code of civil procedure. Comment on articles. Ed.Hamangiu. Bucureşti.2013. p.918.

The Code of Civil Procedure provides in art. 431 paragraph 1 that no one may be sued twice in the same capacity, on the basis of the same cases and for the same object.

Either party may object to a previous judgment in another dispute, if it is related to the settlement of the latter.

The res judicata authority concerns the device, as well as the considerations on which it is based, including those by which a litigious issue has been resolved (art. 430 para. 2 of the Code of Civil Procedure).

The exception of the res judicata authority can be invoked:

- in the reasoned appeal, when the exception has not been resolved by the first instance and can be invoked both by the respondent or ex officio by the court, the appellant having no interest in invoking it so as not to aggravate his situation in his own appeal .

If the exception has been debated in the court of first instance, the parties may invoke it in the appeal but not as a reason of public order, nor can the court invoke it ex officio but may re-evaluate it within the limits of the return of the appeal. According to art.477 paragraph 1 of the Code of Civil Procedure, the appellate court will proceed to the retrial of the merits within the limits established expressly or implicitly by the appellant, as well as regarding the solutions that are dependent on the part of the decision that was appealed.

The High Court of Cassation and Justice ruled that the reassessment of some findings and assessments made by the court of first instance on the evidence of the case is allowed in resolving the appeal only to the extent that the defendant, through the grounds of appeal, made criticisms of these findings. given by the first instance. In addition, even if both parties brought an appeal, the solution adopted was not permitted in resolving the applicant's appeal, as it is contrary to the principle of non reformatio in peius, (the appellant cannot be challenged in his own appeal than in the judgment under appeal). The High Court also emphasized that the provisions of C. proc. civ., allow the court to invoke ex officio reasons of public order, but in this situation, the appellate court, in order to respect the principle of adversariality and the right of the parties to defense, had the obligation to debate the parties' reason for adopting the solution, or, In the case brought before the court, the court did not exercise its active role in that sense1.

- in the unmotivated appeal, the court will rule, on the merits, only on the basis of those invoked at the first instance, so that the appellate court will not invoke the exception ex officio and will not reassess the exception of the res judicata authority debated by the court of first instance. will rule on the merits only on the basis of those invoked at first instance (art. 476 paragraph 1 of the Code of Civil Procedure). If the exception was not invoked in the first instance, the appellate court may invoke the exception ex officio, according to art. 479 paragraph 1 of the Code of Civil Procedure, the reasons of public order may also be invoked ex officio. When the court admits the appeal, retaining the grounded nature of the exception of the authority of the res judicata, it will annul the appealed decision and will reject the request as inadmissible. Likewise, according to the provisions of art. 502 of the Code of Civil Procedure, at the trial of the appeal, as well as at the retrial of the process after the cassation of the decision by the court of appeal, the appellant cannot be created in his own appeal a situation worse than that of the contested decision, unless he expressly consents to it or in the specific cases provided by law. The violation of the res judicata authority represents a reason for illegality for which the civil appeal can be promoted according to art. 488 paragraph 1 point 7 regarding the grounds for cassation, from the Code of Civil Procedure.

The High Court of Cassation and Justice ruled that, if the request for dissolution of the company has as legal basis the provisions of art. 237 of Law 31/1990, the law establishes the way of appeal, and in case the dissolution cases provided by art. 227 of Law 31/1990, the

[1] Decision no. 1265/2012 High Court of Cassation and Justice. Civil Section I.

special law does not provide the appeal, so that the common law in the matter is applied, the appeal being the appeal. In this case, by the request for summons, the plaintiffs invoked as reasons for the dissolution of the company, both the provisions of art. 227, as well as the provisions of art. 237 of Law no. 31/1990. The High Court has ruled that, since the appeal is unique, considering the more favorable nature of the provisions of common law, it is correct to apply these provisions and the cases of dissolution provided by art. 237 of Law 31/1990. In this way, the principle non reformatio in pejus is not violated, which enshrines the guarantee for the person who formulates the appeal not to create a more difficult situation in his own appeal1.

From the analysis of the texts it results that the appellant or the appellant cannot create in his own appeal a situation worse than that of the contested decision. The party challenging a decision must be assured that his action will not result in a worsening of his situation not only in the trial of that appeal, but also in the procedural steps subsequent to the admission of the appeal, which are nothing but the effect of the initiative on which played a part in exercising its right of appeal.

The principle of non reformatio in pejus is limited only in the use of its own remedy. If the same appeal is used by another party, with contrary interests, or by the prosecutor in favor of another party, the outcome of the trial may be unfavorable to the first party, by admitting the appeal of his opponent.

In criminal proceedings, the appellate court, resolving the case, cannot create a more difficult situation for the person who declared the appeal.

The principle of non-aggravation of the situation in one's own appeal applies both to the judgment of the appeal and to the trial on the merits after the quashing.

It also applies in the case of an appeal by the prosecutor in favor of a party. Therefore, the court admitting such an appeal, will not be able to quash the decision against that party. This principle also applies to the appeal.

The principle non reformatio in pejus is expressly regulated in the Code of Criminal Procedure, which is why it has been extensively examined in the doctrine of criminal procedural law. Thus, according to art. 418 of the Code of Criminal Procedure, the appellate court, resolving the case, cannot create a more difficult situation for the one who declared the appeal. Also, in the appeal declared by the prosecutor in favor of a party, the appellate court cannot aggravate its situation.

The appellate court examines the case by extension and with respect to the parties who have not filed an appeal or to whom it does not refer, and may decide on them without being able to create a more difficult situation for them.

According to the provisions of art. 444 of the Code of Criminal Procedure, the court, resolving the case, cannot create a more difficult situation for the one who declared the appeal in cassation.

In the appeal in cassation declared by the prosecutor in favor of a party, the court of appeal in cassation cannot aggravate its situation.

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[1] Decision no. 2581 of June 27, 2013 pronounced on appeal by the Second Civil Section of the High Court of Cassation and Justice having as object the dissolution of the company.