

The Supreme Court of Cassation Adopted an Interpretative Decision on Appellate Proceedings under the Existing Civil Procedure Code

Prior to the adoption of the Civil Procedure Code (CPC) in 2007 and its entry into force on 1 March 2008, the interpretation of disputes in appellate proceedings was outlined in Interpretative Decision No. 1 of 4 January 2001 under Civil Case No. 1 of 2000 of the General Assembly of the Civil College (GACC) of the Supreme Court of Cassation (SCC). As the CPC entered into force in 2008, a stage-by-stage preclusion was introduced in the first-instance proceedings and the principle of limited appeal was envisaged to bind the conclusions of the appellate court on the disputed right to the adjudicated facts established by the first-instance court.

Interpretative Decision No. 1 of 9 December 2013 (ID No. 1 of 9 December 2013) under Interpretative Case No. 4 of 2012 of the General Assembly of the Civil and Commercial Colleges (GACCC) of the SCC gave the answers to the questions concerning the implementation of the new rules of appellate proceedings and examined the effectiveness of the solutions laid down in Interpretative Decision No. 1 of 4 January 2001 (ID No. 1 of 4 January 2001) under Civil Case No. 1 of 2000 of the GACC, which was ruled in accordance with the then existing CPC of 1952.

The scope of ID No. 1 of 9 December 2013 can be subdivided into the following sets of issues:

- the competence of the appellate court in hearing and deciding the case;
- the cases in which the appellate court collects evidence ex officio;
- the effectiveness of the solutions contained in ID No. 1 of 4 January 2001 of the GACC of the SCC and ID No. 1 of 17 July 2001 of the GACC of the SCC;
- the competence of the appellate court and the court of cassation in cases of irregular claims;
- the appeal against rulings of the first-instance court and the appellate court.

The first set of issues relate to the competence of the appellate court to hear and decide cases in accordance with the provisions of Art. 269, second sentence CPC, reading that the ex officio examination by the court covers the validity and admissibility of the first-instance judgment (in its challenged part), whereas on all other issues the action of the appellate court is limited to the content of the appeal.

The provisions of Art. 269 CPC make a distinction between the competence of the appellate

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court in cases of nullity and inadmissibility and the competence in cases of wrong first-instance judgments. As far as the validity and admissibility of the judgment are concerned, the appellate court examines these aspects *ex officio*, whereas as far as the irregularity is concerned, the court is limited in its action to the assertions of the appellant. The SCC singles out two exceptions to this rule in its interpretative decision. The first exception refers to the cases in which an imperative substantive provision is applied. The aim of the *ex officio* principle laid down in Art. 7 CPC is to support the parties in the establishment of the facts and the legal aspects of the case, as well as to ensure the application of the imperative substantive provisions in deciding the case on its merits.

The SCC derives the second exception to the limitation of the appellate examination in cases of irregularity of the first-instance judgment from the choice of the lawmaker to enact explicit provisions, assigning the court with the obligation to consider the interests of some parties to the proceedings on an *ex officio* basis. Reference is made to the special ruled which guide the court in the *ex officio* collection of evidence in cases in which the law obligates the court to consider the interests of some party (with regard to the imposition of legal disability) or of minors born in wedlock in the adjudication of the exercise of parental rights, personal relationships and the support of children, as well as the use of the family home.

The interpretation of the provisions of Art. 269, second sentence CPC is that the appellate court has to consider the validity, admissibility and irregularity of the appealed judgment, where the court has to apply an imperative substantive provision or the court is obligated to consider the interests of some party to the proceedings.

Paragraphs 2 and 3 of ID No. 1 of 9 December 2013 of the SCC provide solutions to the controversial issues related to the reporting and collection of evidence by the appellate court.

The solution in paragraph 2 overcomes the inconsistent case law in the application of Art. 146 CPC and the competences of the appellate court with regard to the reporting of the case, where no report has been drawn up or the report is inaccurate or incomplete. For the purpose of ruling on the issue, the SCC has taken into account the main characteristics of appellate proceedings under the existing CPC. On the one hand, the appellate instance hears and decides the case on its merits; on the other hand, this is done on the basis of the evidence

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collected by the first-instance court. Where the procedural actions of the first-instance court are wrong, it is within the remit of the appellate court competence to remove the deficiencies through its own actions for establishing the facts and applying the law rather than to reproduce them. The provisions concerning the actions of the court for reporting the case are imperative, while the omission of the first-instance court to draw up a report or the drawing up of an incomplete or inaccurate report constitutes a material breach of procedural rules. As the reporting on the case is not intended to safeguard the validity or admissibility of the court judgment, the non-performance of the court under Art. 146 CPC does not lead to nullity or inadmissibility of the final court judgment. Given the restriction under Art. 269, second sentence, the appellate court is under no obligation to consider a violation of Art. 146 CPC ex officio; the court will do this only if there is such a complaint in the appellate claim. The SCC recognizes that the nature of appellate proceedings of limited/incomplete appeal rules out any repetition of the deficient procedural actions. The lack of a report or the submission of an incomplete/inaccurate report by the first-instance court is overcome by the appellate court by giving instructions to the parties on the opportunity they have to undertake procedural action, specifying evidence the submission of which is admissible to take place for the first time before the appellate court pursuant to the provisions of Art. 266(3) CPC.

If the first-instance court has wrongly qualified the disputed right in its report under Art. 146 CPC and, as a result, the parties have been given inaccurate instructions on the facts to meet the standard of proof, the appellate court has the obligation to ensure the proper application of the imperative substantive provisions by giving instructions on such facts, distributing the burden of proof, and instructing the parties on the need for invoking the respective evidence.

In paragraph 3 of ID No. 1 of 9 December 2013, the SCC answers the following question: "Does the appellate court have the obligation to collect ex officio the evidence which is collected by the court ex officio in principle, where such evidence is needed to elucidate the factual aspects of the case or is this admissible only if there is a complaint of a procedural violation in the first-instance hearing of the case?"

Following the rules under Art. 269, second sentence CPC, the SCC recognizes that the appellate court may consider a given factual finding of the first-instance court to be unjustified only in case of a complaint has been filed on alleged lack of justification of the first-instance

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court judgment in this part. The appellate court may collect evidence on the legally relevant facts, where the complaint alleges violation of court procedural rules, without any need for this evidence to be explicitly requested in the appellate claim of the party. It is sufficient for the appellant to invoke a procedural violation by the first-instance court so that to collect the evidence that is to be collected by the court ex officio in principle. The lack of a complaint of a violation of court procedural rules prevents the appellate court from establishing legally relevant facts ex officio.

The rule has its exception when, in the course of the examination of the correctness of the first-instance judgment, the appellate court applies an imperative substantive legal provision. Should the application of this imperative substantive provision require evidence to be collected, the court collects this evidence ex officio, even where the appellate claim does not contain a complaint of a procedural violation by the first-instance court or lack of justification of the factual findings underlying the first-instance judgment.

In paragraph 4 of ID No. 1 of 9 December 2013, the SCC examines the prerequisites for lodging objections for the first time before the appellate court, as well as on the effects of paragraphs 6 and 12 of ID No. 1 of 4 January of the GACC of the SCC.

The reasons set out in the interpretative decision of the SCC are categorized in two groups, depending on the nature of the objections. The first group includes the objections of the appellee in general and the objections invoking acquisitive and extinctive prescription, whereas the second group covers the objections related to netting and the right to retention.

The objections of the appellee based on facts existing and known to the appellee as of the date of the reply to the appellate claim are precluded upon the expiry of the time limit for filing the reply (Art. 133 in conjunction with Art. 131(2)(5) CPC). This rule pertains also to the objections invoking acquisitive and extinctive prescription.

The second group tackles the objections related to netting and the right to retention. The text outlines the specific features of the objection concerning netting against a liquid account receivable which is due; reference is made to a legal changes which has already occurred, similar to the objection for writing off and the objection for payment after the filing of the appellate claim. This objection does not alter the objects of the case since the account

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receivable is established in an enforceable judgment or writ of execution and no collection of evidence is required to prove it (ad argumentum of Ar. 371 CPC).

The objection for netting with a non-liquid account receivable would introduce a new disputed right in the objects of the case and therefore its presentation for the first time before the appellate court is inadmissible pursuant to Art. 131(2)(5) and Art. 133 CPC.

The objections invoking the right of retention for improvements under Art. 72(3) of the Ownership Act and those under Arts. 90 and 91 of the Obligations and Contracts Act constitute objections on which the court rules in the judgment and, as *res judicata*, they are estopped upon the expiry of the time limits for the submission of a reply. The SCC makes an exception to the rule in the cases, in which the account receivable of the appellee is established in an enforceable judgment or writ of execution and also where the appellee has filed a counterclaim and the objection for retention is accessory to the claim for the account receivable. In these cases, since the objection for retention does not change the objects of the case and does not lead to collection of evidence, the SCC accepts that it is admissible for the first time before the appellate court.

Guided by the rules of the early issue preclusion introduced by the new CPC, the SCC proclaims the content of paragraphs 6 and 12 of ID No. 1 of 4 January 2001 of the GACC of the SCC to have lost their effect with regard to the objections raised by the appellee against the claim, including those for acquisitive and extinctive prescription.

As far as the objections for netting and the right of retention, the text of paragraphs 6 and 12 of ID No. 1 of 4 January 2001 remains effective since it conforms to the limited appellate claim provisions introduced by the new CPC and entered into force on 1 March 2008.

In paragraph 5 of ID No. 1 of 9 December 2013, the SCC rules on the inconsistent case law with the issue concerning the competence of the court of cassation in case of an irregular claim.

The SCC examines the deficiencies of the claim in terms of the possibility for their removal by the subsequent instances. Where the irregularity of the claim due to incongruence between the circumstances and the petition has led to hearing and deciding a case involving a person

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who does not possess the characteristics of a litigant proper, the appellate judgment is inadmissible. Regardless of whether the irregularity of the claim has been established by the appellate court or the court of cassation, the case should be referred back to the first instance. The law provides for no exception to the general rule that the inadmissible first-instance judgment is invalidated and, where a non-presented claim has been examined, the case is referred back to the first-instance court to rule on the claim.

Given the introduction of the limited appeal with the CPC which entered into force on 1 March 2008 and the lack of opportunities for the appellate court to remedy irregularities related to the constitution of litigants, the new interpretative decision declared the content of paragraph 4 of ID No. 1 of 2001 of the GACC of the SCC to have lost its effect in this particular case.

As to the other cases of irregularity of the claim, the appellate court has the obligation to instruct the party and to set time limits for removal of the irregularity. In the event of failure to fulfill the instructions, the appellate court has to invalidate the first-instance judgment and to discontinue the proceedings.

Where the irregularity of the claim is established by the court of cassation and the deficiency can be removed (e.g. lack of signature on the claim form, lack of a power of attorney, or lack of a document certifying the payment of the state fee), the court may give instructions to the party to remedy the situation. In the event of failure to fulfill the instructions, the court of cassation has to invalidate the lower-instance judgments and to discontinue the proceedings. It is only in case the deficiency of the claim cannot be removed (under Art. 127(4) and (5) CPC – in the presentation of the circumstances underlying the claim and its essence) that the judgment of the appellate court is subject to invalidation and the case is referred back to this court to specify the grounds of the claim and the petition.

In the cases described above, due to lack of any difference in the provisions of the CPC which entered into force on 1 March 2008, the SCC accepts that paragraph 4 of ID No. 1 of 4 January 2001 of the GACC of the SCC is still effective.

Paragraph 6 of ID No. 1 of 9 December 2013 of the SCC offers the solution to the question whether paragraph 17 of ID No. 1 of 4 January 2001 is still effective under the existing CPC.

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Paragraph 17 of ID No. 1 of 4 January 2001 reads that “if the necessary litigation friend has not been constituted at the first-instance hearing or the party has been deprived of participation in the proceedings, the appellate court has to repeat the procedural action carried out at the first-instance court without their participation and then hear and decide the case on its merits”. Since the entry into force of the existing CPC on 1 March 2008 inconsistencies have been observed in the case law concerning the absence of a mandatory litigation friend in the course of the first-instance proceedings.

In the case of necessary friendship which is due to the nature of the disputed right or which arises ex lege, the court judgment has to be the same for all litigation friends. A litigation friend who did not participate in the first-instance proceedings has the right to appeal against the judgment, and if a necessary litigation friend files an appellate claim the appellate court is obligated to constitute also the others as main litigants.

In the case of mandatory necessary friendship, the participation of all litigation friends is a condition for admissibility of court proceedings. For this reason and also because of the action preclusions and the limited opportunities for collecting evidence in the appellate proceedings introduced by the existing CPC, the SCC accepts that paragraph 17 of ID No. 1 of 4 January 2001 has lost its effect with regard to the mandatory friendship. Where it finds that a mandatory litigation friend did not participate in the course of the first-instance proceedings, the appellate court has to invalidate the appealed judgment and to refer the case back for re-examination with the participation of the mandatory necessary litigation friend.

In paragraph 7 of ID No. 1 of 9 December 2013, the SCC examines the inconsistent case law on the issue whether first-instance rulings are subject to appeal, where these rulings refuse to admit an incidental claim of fact for joint hearing, reject a request to increase the value of the claim or deny a counterclaim due to failure to fulfill instructions on the removal of irregularities therein.

A first-instance court ruling which refuses to examine an incidental claim of fact lodged by the other litigant within the framework of pending proceedings is not subject to appeal since it does not obstruct further action, insofar as this claim may be filed in separate proceedings

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and the law does not contain specific provisions for appeal against it. Where the court has wrongly admitted an incidental claim of fact, the judgment thereon is inadmissible and subject to invalidation.

A ruling rejecting a request to increase the value of a claim which has not been filed as a partial claim is subject to appeal. The line of reasoning of the SCC is as follows: action is taken to increase the value of the claim when it has been filed as a partial claim or when the claimant has noticed an error he has committed in the calculation of its value. In case the claim has not been filed as a partial claim, the existence of a pending dispute between the parties for the same right represents a negative procedural prerequisite for claiming the balance.

A first-instance court ruling which denies a counterclaim due to failure to fulfill instructions on the removal of irregularities therein is subject to appeal pursuant to Art. 274(1)(2) in conjunction with Art. 129(3) CPC. The SCC makes a distinction between the refusal to examine the counterclaim jointly and the rejection of the counterclaim due to failure to remove irregularities. When it is not admitted to joint hearing in pending proceedings, the counterclaim is not rejected but put into separate proceedings pursuant to Art. 211(2) CPC and, in this case, the ruling is not subject to appeal. A first-instance court ruling which rejects the counterclaim due to failure to remove irregularities is subject to appeal by virtue of the explicit provisions of the law, Art. 129(3) CPC.

In paragraph 8 of ID No. 1 of 9 December 2013, the GACC of the SCC answers the question on the admissibility of cassation appeal under Art. 280(2) CPC against an appellate judgment which invalidates the first-instance court judgment and discontinues the proceedings, where the value of the claim is below BGN 5,000 in civil cases or BGN 10,000 in commercial cases respectively.

The competences of the appellate court differ, depending on whether the appealed judgment is null and void, inadmissible or wrong, but the appellate court rules a judgment in all cases. In the case of inadmissible judgment, the appellate court invalidates it and, depending on its deficiency, refers it to the competent court/sends it back to the first-instance court for hearing the claim or discontinues the proceedings. In the latter case, further action is

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obstructed but the inquiry into the correctness of the appellate judgment follows the rules of Art. 280 et seq. CPC. The judgment consists of interdependent parts which ensue from the inquiry of the appellate court into the justification of the appellate claim. Therefore the applicability of Art. 274(2) in conjunction with Art. 274(1)(1) CPC is ruled out, whereby the correctness of the appellate court in judging the admissibility of the first-instance judgment and the right of claim are to be checked in the course of the cassation proceedings. Guided by these reasons, the SCC holds that the appellate court judgment, invalidating the first-instance court judgment and discontinuing the proceedings, is subject to cassation appeal under Art. 280 et seq. CPC, without prejudice to the restriction under Art. 280(2) CPC.

In paragraph 9 of ID No. 1 of 9 December 2013 rules on the question whether the following are subject to cassation appeal: the appellate court ruling which confirms the first-instance court ruling on the refusal to admit the constitution of a helping third party; the ruling which confirms a first-instance court ruling on the refusal to constitute a main party; the ruling which confirms the first-instance court ruling on the discontinuation of proceedings on grounds of the dispute going beyond the jurisdiction of the court.

With regard to the first group of rulings, the SCC holds that they are not subject to cassation appeal because they do not fall within the scope of any of the provisions of Art. 274(3) CPC. The refusal to admit the constitution or involvement of a third party does not obstruct either the further action between the main parties or the opportunity for filing a claim by or against this party in separate claim proceedings.

The rulings from the second group, whereby the appellate court confirms first-instance court rulings on the refusal to constitute a main party are subject to cassation appeal. The reason is that the ruling obstructs any further action by the initial litigants with regard to the claims filed by the main party.

The third group of appellate court rulings includes those which confirm the first-instance court rulings on the discontinuation of proceedings on grounds of the dispute going beyond the jurisdiction of the court. These rulings are subject to cassation appeal pursuant to the provisions of Art. 274(3)(1) CPC since they are deemed to be obstructing any further action. The text of paragraph 5 of ID No. 1 of 17 July 2001 of the GACC of the SCC remains effective

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under the existing CPC which entered into force on 1 March 2008 due to the identical provisions on the right of appeal against jurisdiction rulings.

The appellate court ruling which confirms a first-instance court ruling on the rejection of a non-jurisdiction challenge is not subject to cassation appeal since it does not belong to the category of acts under Art. 274(3)(1) and Art. 274(3)(2) CPC.

The ruling under Art. 122 CPC on a jurisdiction dispute between courts is not subject to appeal since it does not belong to the category of acts under Art. 274(1)(1), Art. 274(1)(2), Art. 274(3)(1), and Art. 274(3)(2) CPC. In this particular case, the text of paragraph 5 of ID No. 1 of 17 July of the GACC of the SCC is not applicable because it holds that the grounds for the appeal are found in the discontinuation of the case or its referral to another court district, whereas the ruling under Art. 122 CPC specifies the competent court.

Paragraph 10 of ID No. 1 of 9 December 2013 of the GACCC of the SCC answers the following question: “What is the statutory composition of the appellate court when it refers back a cassation appeal on some of the grounds under Art. 286(1) CPC or a private cassation complaint on some of the grounds under Art. 262(2) in conjunction with Art. 275(2) CPC?”

The SCC holds that the statutory composition of the appellate court in these cases consists of one member and the act of the court is a ruling. The ruling is issued by a one-member court because it refers to the administration of the cassation appeal or the private cassation complaint and the court does not undertake this administrative action in its capacity of appellate instance.

The question in paragraph 11 of the proposal of the SCC President to issue an interpretative decision thereon goes as follows: “When an appellate judgment is rescinded as unjustified, should the cassation court refer the case back for re-examination by the appellate court with different composition under Art. 293(3) CPC or should the cassation court hold a cassation judgment on the merits of the case?”. This question has been declined.

The main reason lies in the absence of inconsistency of the case law on these matters. In accordance with the existing CPC, the criterion for referral of the case back to the appellate court is the need for repeating the procedural action or for undertaking another procedural

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action rather than the type of the rescission grounds. Repetition may be necessary because of an infringed right of a litigant to participate in the appellate proceedings, whereas new procedural action may be required in the case of procedural violations related to the failure to admit or to collect relevant, admissible and necessary evidence, to establish relevant facts, etc. Where the appellate judgment is wrong due to breach of substantive law, lack of justification or violation of procedural rules in the adjudication phase that can be remedied by the cassation court, the SCC, having rescinded the judgment, should decide the case on its merits. If the appealed judgment is rescinded only on grounds of lack of justification, the cassation court should re-assess the evidence presented in the case and make its own factual conclusions, while applying the relevant logical, experimental and scientific rules that do not call for new procedural action or remedy of action of the appellate court and superseding the internal conviction of the appellate court.