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## PILLAR II PRACTICAL AND ADMINISTRATIVE CASES

### *The Right to Appeal a Court Decision Refusing the Issuance of an Injunction Order* by Av. Suela Hasani

#### I. ABSTRACT

This article examines the right to appeal a court decision refusing an injunction order in a civil lawsuit. The first paragraph explains the definition of injunction and the main criteria on which to request it. The second paragraph deals with the specific appeal procedure against injunctions and in particular with the issue of appealing a court ruling that refuses the issuance of an injunction order. In the last paragraph conclusions and recommendations for the necessary legal amendments are presented.

**KEYWORDS:** *Injunctions; Fumus Boni Iuris; Periculum in Mora; Interim decision*

#### ABBREVIATIONS

**Administrative Courts Law**

law no 49/2012 “*On the organisation and functioning of administrative courts and adjudication of administrative disputes*”

**CPC**

Civil Procedure Code

**ICC**

Italian Constitutional Court

**ICPC**

Italian Civil Procedure Code

#### II. INTRODUCTION TO INJUNCTION ORDERS IN CIVIL LAW JUDGMENTS

The injunction is a legal instrument which aims to maintain the *status quo*, pending the final decision on a case, in order to avoid potential harm that may be caused to the rights of the plaintiff, by the impossibility or difficulty to execute a court ruling. The injunction is an immediate, but temporary remedy, requested by one of the parties of the trial, closely linked to the subject of the lawsuit. A temporary injunction does not decide the merits of the case, but rather prevents further harm from being caused for a period of time.

Articles 202-212 of the CPC stipulate the cases when an injunction can be issued. Article 202 CPC stipulates that: “*On the request of the plaintiff, the court allows within 5 days the granting of an injunction, when there are reasons to doubt that the execution of the decision, regarding the rights of the plaintiff, shall become impossible or difficult. The injunction is allowed when: a) the lawsuit is based on evidence in writing; b) the plaintiff gives guarantees to the degree and kind determined by the court for the damage that may be caused to the defendant by granting the injunction. The guarantee can be requested also for the case provided in the letter “a” of this article*”. The interpretation of this article points out the main conditions on which a court may grant an injunction.



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Firstly, a court may decide to grant an injunction only if such a request has been submitted, meaning that an injunction cannot be issued without a prior request<sup>1</sup>. Secondly, there are two conditions based on which a court can allow an injunction request: (i) the possibility that the right for which protection is claimed exists (*fumus boni iuris*) and (ii) when there are reasons to doubt that the execution of a ruling regarding the right to be protected, could become impossible or difficult (*Periculum in mora*).

With regards to the first condition, *fumus boni iuris*, to allow an injunction, the court should at least establish that there is a right for which temporary relief is sought. The existence of this right should not be determined fully, as this constitutes the merits of the case, but a judgment should be made regarding the likelihood of its existence based on a quick and superficial reading of the case (*summaria cognitio*), which is why the lawsuit should be based on written evidence<sup>2</sup>, as stipulated in art. 202 (a) of the CPC.

To this effect, the Joint Chambers of the Supreme Court, in their unifying decision no. 10, date 24.03.2004 state that: “*Courts should not base their decision to grant a temporary injunction on the facts and actions, or their legal definition; that has to do with the hearing and resolution of the case. Also, an injunction request should be treated in such way as to avoid any perception of prejudgment or bias on the part of the court*”.

The second condition, (*Periculum in mora*) refers to the existence of reasonable doubts that the execution of a court decision in relation to the right to be protected will become impossible or difficult. This is related to the harm that can be caused to the rights of the plaintiff. It is important to note that these are doubts based on reasons and not on complete certainty and proven facts, as it is the persuasion arising in a judge after the case is heard in its entirety<sup>3</sup>.

Art 202 (a) of the CPC also requires the plaintiff to submit written evidence, a condition without which an injunction cannot be granted. This condition serves to assess whether both aforementioned criteria are fulfilled: *fumus boni iuris and periculum in mora*. The Albanian case-law also reflects the importance of submitting written evidence. In its decision, the Supreme Court states: “*in granting an injunction pursuant to art 202 (a) of the CPC, the court should take into account the simultaneous fulfilment of two conditions: the plaintiff should submit written evidence and have the doubt that the execution of a court decision will become impossible or difficult. The court however has no right to assess the written evidence submitted by the plaintiff, because such an act would lead to the predetermination of the case, which is in breach of the important principle of a fair trial, established in art 4 of the CPC*”<sup>4</sup>.

<sup>1</sup> Dr. Flutura Kola-Tafaj , Asim Vokshi LLM , “*Civil Procedure*”, Law Faculty of Tirana University, 2011, page 164.

<sup>2</sup> Article 202 (a) CPC.

<sup>3</sup> Dr. Flutura Kola-Tafaj, Asim Vokshi LLM, “*Civil Procedure*”, Law Faculty of Tirana University, 2011, page 165.

<sup>4</sup> High College of High Court, Decision No. 227, Dated 08.05.2012.



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Letter (b) of art 202 of the CPC also stipulates that: “*the plaintiff gives guarantee to the degree and kind determined by the court for the damage that may be caused to the defendant by allowing the injunction*”. The legislator has foreseen another condition for the granting of injunctions; requiring the plaintiff to place a guarantee for the compensation of any potential damages incurred to the defendant. The kind and amount of the guarantee is left at the discretion of the court. The court also sets the deadline within which the guarantee shall be given<sup>5</sup>.

With respect to the judicial practices, interpreting letters (a) and (b) of art 202 of the CPC, the Supreme Court decision no. 227, date 08.05.2012 states: “*From the above-mentioned legal disposition, it becomes clear that the injunction is granted on two occasions; when there is written evidence and when a financial guarantee is given... when written evidence exists, the financial guarantee is not necessary, although it is at the discretion of the court whether to issue or not the guarantee*”.

### III. APPEAL PROCEDURE OF AN INJUNCTION

The appeal procedure of an injunction order is stipulated in articles 209-210 of the CPC. Article 209 states: “*A separate appeal for changing or dissolving an injunction may be made against the decision of the court which has granted the injunction request. The appeal against the above decision does not hinder the continuation of the consideration of the lawsuit*”. The code defines very clearly that only rulings granting, changing or annulling an injunction may be appealed through a separate appeal. This disposition however does not specify the case when an appeal is made against the decision to refuse the issuance of an injunction order; that is whether a separate appeal against such a decision is allowed or not.

It is important to remember that pursuant to article 125 of the CPC, an injunction order, is an interim decision. As such it is also regulated by article 470 of the CPC, which stipulates the rules and procedures for appealing interim decisions: “*Interim decisions issued by a court of first instance may be changed or withdrawn during the trial. These decisions may be subject to appeal together with the final decision. Nevertheless, in the cases expressly provided for in this Code, a separate appeal may be made to the court of appeals against interim decisions within 5 days of their announcement or communication*”.

Thus, by not explicitly mentioning in the law the right of the parties to submit a separate appeal, the interim decision rejecting an injunction can only be appealed together with the final decision. Practically, the court, faced with an injunction request can decide the following:

- (i) to grant the injunction request, in which case the party enjoined can appeal the decision within five days from its announcement;
- (ii) to reject the injunction request. In this case the party requesting the injunction does not have the right to a separate appeal within five days. Their only chance to appeal the interim decision is to file an appeal against the final court ruling, despite their claims of *periculum in mora* and *fumus boni iuris* which are the core elements of an injunction.

<sup>5</sup> Alban Abaz Brati, “*Civil Procedure*”, Dudaj Publications, 2008, page 196.



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Consequently, Article 209 of the CPC does not provide a separate appeal against a court ruling rejecting an injunction and article 470 of CPC, which provides the right to appeal such a decision, it postpones it to the final court decision. In some cases the first instance courts have acknowledged the right of appeal against a decision rejecting the injunction request, while some others have not allowed such an appeal<sup>6</sup>. Tirana Appeal Court also has conflicting case law regarding the right to appeal, as can be seen by decision no 27, date 25.02.2013, which states: *“As can be seen, from the content of the dispositions presented above, but also based on the understanding of art 125 of the Civil Procedure Code, a court ruling can be considered an interim decision to which the right of a separate appeal is foreseen within five days as stated in article 443”*. Decision no.123, date 03.04.2013 states: *“In relation to the appeal submitted by the plaintiff, without examining the reasons claimed in the complaint, the Civil College of the Tirana Appeal Court finds that the complaint submitted to the main secretary of the first instance court pertains to a ruling, that according to legal provisions, art 209 of the CPC cannot be appealed”*<sup>7</sup>.

This fact is also noted by the Civil College of the Supreme Court, which has stated that: *“... the court has not explicitly foreseen the right to appeal against an interim court ruling that has rejected the injunction request; instead the injunction refusal can be appealed only together with the final court ruling”*<sup>8</sup>.

Italian courts faced a similar phenomenon, when until 1995, Article 669-terdecies of the ICPC did not allow the separate appeal against rulings rejecting injunctions. Later on this article was considered unconstitutional by the ICC, which argued that *“based on the principles of full equality between parties, and equal treatment during a civil trial, the inability of the party requesting an injunction, to appeal against a decision rejecting it, constitutes a violation of the right to be protected by favouring the party against which the injunction is requested. This situation clearly demonstrates that parties are not in equal positions during the civil trial. A ruling allowing or rejecting an injunction order is in violation with the interest of each party; therefore it is not reasonable for the decision rejecting the injunction to be considered a priori more grounded than the decision allowing it. Allowing the right to appeal only the decision granting an injunction creates inequalities”*<sup>9</sup>.

But apart from the comparative Italian case, the most valuable example regarding the rules around injunctions is to be found in the Albanian administrative court proceedings. In 2012, the Administrative Courts Law entered into force. *“The aim of this legislative initiative was to*

<sup>6</sup> Silvana Çinari, *“Injunctions measures in courts and arbitration proceedings”*, Law Faculty of Tirana University, 2015, page 60.

<sup>7</sup> Silvana Çinari, *“Injunctions measures in courts and arbitration proceedings”*, Law Faculty of Tirana University, 2015, page 61.

<sup>8</sup> Civil College of the High Court, Decision No. 445 dated 17.04.2007.

<sup>9</sup> Italian Constitutional Court, Decision no. 253 dated 23.06.1994.



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*reform the judicial proceedings regarding the administrative disputes in terms of pace and quality by establishing an autonomous specialized court system with administrative judges*<sup>10</sup>.

What is worth mentioning in the context of this analysis, are the rules governing injunctions in administrative judicial proceedings. Article 32 of the Administrative Courts Law foresees: “A special appeal to a higher instance court may be made against a decision of the court accepting or rejecting an injunction request [or] for the removing, change or substitution of the injunction ruling”. Consequently, the administrative court proceedings, as opposed to the civil proceedings, ensure full equality in terms of legal means to appeal an injunction ruling, because the legislator has, in this case, specified the same procedure, that of a separate appeal, for appealing a court decision granting, rejecting, removing or substituting an injunction order.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

At the start of this article we explained that an injunction request was based on the argument that the execution of a court ruling with regards to a right breached can become impossible or difficult; therefore the main aim of injunctions is to prevent potential harm from being caused during the trial, until its conclusion.

Failure to stipulate the right for a separated appeal against the rulings that refuse an injunction request are in breach of the very essence of the injunction. It also creates disparity in terms of legal means available to the parties, since article 209 foresees the right to a separate appeal in case the injunction request is approved, changed or removed, but not when it is rejected, thus leading to a violation of the right to protection and above all a serious breach of the right to a fair trial. What is worth mentioning is that a crucial feature of the injunction is its emergency and the necessity to “freeze” the situation until the right is established through a fair trial. In cases when an injunction is refused, this emergency element does not find equal legal protection, resulting in potential irreparable harm being caused by the court ruling.

The logic that has led the legislator to create said disparity of legal means, aimed at protecting the rights of the parties in front of the Albanian courts is unclear and unconstitutional. In order to avoid a further breach of the right to a fair trial it is necessary to amend article 209 of the Civil Procedure Code to include the right of appeal against a court ruling rejecting the injunction by reformulating it as follows: “A separate appeal can be made against a court ruling granting, refusing, changing or removing an injunction. Said appeal does not impinge the continuation of the trial”.

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<sup>10</sup> Analysis of the Albanian justice system, Special Parliamentary Commission for the reform in the justice sector, 2015, page 52.