Theoretical and jurisprudential considerations on *res judicata* authority

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Abstract

One of the effects of judgment, established by both the old and the current Code of Civil Procedure, is res judicata authority. This prevents retrial of a dispute on the basis of the triple identity of parties, object and cause. The paper will analyse some of its aspects from the perspective of civil procedural legislation, ECHR case law and national jurisprudence.

Keywords: *judgement, effects of res judicata, exception from res judicata authority, identity of parties, object and cause, exception from res judicata authority*.

JEL Classification: K40, K41

1. Introduction

Judgement, as a final procedural act in conducting judicial activity, which terminates the dispute between the parties and enables them to protect and valorise their legitimate rights, thus helping to restore the rule of law, has certain effects, such as: disinvestment of the court after the judgment is pronounced, *res judicata* authority, enforceability, probative value, inversion of prescription, compulsoriness and challenge ability.

Res judicata is a Latin phrase, which means that which has been tried or settled. In foreign doctrine[3] it has been suggested to distinguish between two meaning of *res judicata*: the first meaning refers to the legal stage where certain litigious matters are given final judgement within a trial, where it can be stated that "the court has decided on the litigation in a final and irrevocable manner"[4]; in the second meaning, *res judicata* concerns the effects determined by certain judgements. According to this meaning, a judgement has *res judicata* authority

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[3] For details regarding the meaning of the term *res judicata*, see Emilio Alfonso Garotte Campillay, *Anything deemed constitutional sui generis and its effect on the rulings of the Constitutional Court in terms of non-applicability and constitutionality* (Cosa juzgada contitucional *sui generis* y su efecto en las sentencias del tribunal constitucional en material de inaplicabilidad e inconstitucionalidad) in "Estudios constitucionales", vol. 10, no. 2, 2012, pp. 393-398, [http://www.scielo.cl/pdf/estconst/v10n2/art10.pdf], last consultation on 26/08/2016 .

[4] Andrés De La Oliva Santos, *Sobre la cosa juzgada*, Ramón Areces, Madrid, 1991, p. 17, apud Emilio Alfonso Garotte Campillay, *op. cit.*, p. 393.

when there are no remedies allowing its modification[5]. However, differing from these meaning, the term "*sui generis res judicata"* is found in constitutional issues as a "decided thing" (cosa decidida), which can be modified[6].

In Romanian legislation, this is currently regulated in art. 430-432 of the Code of Civil Procedure, which specifies the judgements that benefit from this attribute, the effects of *res judicata*, and the exception from *res judicata* authority.

The old Romanian Civil Code and the old Romanian Code of Civil Procedure regulated *res judicata* authority in an inconsistent way: ex-art. 1201 of the Civil Code as an absolute legal presumption of conformity of the decision with the truth[7], and ex-art.166 of the Code of Civil Procedure, as a substantive, peremptory and absolute exception.

In the same context, Romanian literature, under the rule of former regulations on the matter, made a distinction between *res judicata* authority and power of *res judicata*. *Res judicata* authority was considered to be "a quality attached to the judgment, from the time of its adoption until the expiry of the term for lodging appeals for reform or retraction, or, where appropriate, until the rejection of such", whereas the power of *res judicata* constitutes "a quality attached to the judgment, which cannot be reformed or retracted"[8]. The current Code of Civil Procedure, as well as the other laws in force, uses the expression of *res judicata* authority in a consistent way, as a result of changes made by art. 14 pt. 2 of Law 76/2012.

Res judicata authority avoids pronouncing a final judgement on one claim[9] more than once, based on the presumption that a judgement expresses the truth, and for this reason it should not be invalidated by another decision (*res judicata pro veritate habetur*).

The basis for *res judicata* authority lies in the idea of immutability of the judicial act by which, in the contentious procedure, the dispute was tried and settled[10].

In the current Romanian regulation, as in the previous regulation, the existence of *res judicata* authority is determined by the triple identity of parties, object and cause, provided suggestively by art. 431 of the Code of Civil Procedure: "No one can be sued twice in the same capacity, under the same causes and for the same object".

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5 Eduardo Couture, *Fundamentos del Derecho Procesal Civil*, 4th ed., IB de F Publishing House, Buenos Aires, 2010, p. 326.

6 Among the arguments underlying "*sui generis res judicata"* one remarks: existence of a legislative gap regarding *res judicata* in constitutional matters, the dynamism and flexibility of judgements pronounced in constitutional matters, constitutional jurisprudence (Emilio Alfonso Garotte Campillay, *op. cit.*, pp. 398-399).

7 For details on *res judicata* authority in the old regulation, see Ioan Leş, *Tratat de drept procesual civil*, 5th edition, C. H. Beck Publishing House, Bucharest, 2010, pp. 478-500.

8 Ion Deleanu, Valentina Deleanu, *Hotărârea judecătorească,* Servo-Sat Publishing House, Arad, 1998, p. 72.

9 Emilio Alfonso Garotte Campillay, *op. cit.*, p. 393.

10 Ion Deleanu, *Tratat de procedură civilă*, vol. II, Universul Juridic Publishing House, Bucharest, 2013, p. 72.

Under the provisions of civil procedural law, with reference to the issue settled, *res judicata* applies, from the date of delivery, to the judgment which settles, in whole or in part, the substance of the trial, or which provides ruling on a procedural exception or on any other incident [art. 430 par. (1)].

Therefore, procedural rules also specify the time at which this authority is acquired, namely the date of its delivery; if the judgment is susceptible to appeal (can be subject to appeal), *res judicata* authority has a provisional character. It will be final only after the exhaustion of the above-mentioned remedies. Differently, however, *res judicata* authority for the judgement against which appeal for annulment or revision was exercised retains its finality until replaced with another judgment.

2. Part of the judgement that benefits from *res judicata* authority

Regarding the part of the judgement contained under the protection of *res judicata*, in Romanian and foreign literature and jurisprudence[11] two opposing views on this matter have been developed over time[12]:

a) *res judicata* authority would only apply to the operative part of the judgment, as it is the essence of the judgement;

b) in a different view, *res judicata* authority could also be attributed to the recitals of the judgment[13], on the grounds that, as their purpose is to substantiate the operative part, they form an indivisible whole with it.

Apart from these doctrinal disputes, certain authors[14] believed that *res judicata* should also apply to the decisive recitals without which it would not be possible to understand the operative part of the judgment[15], i.e. those which constitute the necessary support for the operative part, forming an indivisible whole with it, as well as decisional recitals, which are part of the substance of the dispute, but without providing the necessary support to the operative part.

However, before the entry into force of the current civil procedural law, the thesis according to which *res judicata* authority would apply only the operative part of the judgment was prevalent in doctrine and jurisprudence[16].

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[11] For doctrinal landmarks in comparative law, see Ioan Leş, *Noul Cod de procedură civilă. Comentariu pe articole. Art. 1-1133*, 2nd edition, C. H. Beck Publishing House, Bucharest, 2015, the note under art. 430.

[12] Ion Deleanu, *Tratat de procedură civilă*, vol. II, 2nd edition, C. H. Beck Publishing House, Bucharest, 2007, p. 79.

[13] Ioan Leş, *Dispozitivul hotărârii judecătoreşti şi procedura de filtrare a recursului în viziunea Proiectului noului Cod de procedură civilă,* "Dreptul", no. 10/2009, p. 12-26.

[14] Ion Deleanu, *op. cit.*, vol. II, 2007, p. 79.

[15] In this sense, by referring only to recitals, it will be possible to assess whether the court pronounced itself *minus* or *plus petita* (Supreme Tribunal, Civil Section, Dec. no. 2765/1984, in *Culegere de decizii*, 1984, p. 134).

[16] Supreme Court of Justice, Civil Section, Decision no. 2/1987, in *Culegere de.decizii*, 1987, p. 230; High Court of Cassation and Justice, Administrative and Fiscal Contentious Section, decision no. 3416/2000,*www.legalis.ro,* last consultation on 26/08/2016.

The current Code of Civil Procedure embraces the thesis according to which the recitals of the judgment are also endowed with *res judicata*, stating that: "*Res judicata* authority concerns the operative part, as well as the recitals on which it is based, including those by which a contentious issue was resolved." [Art. 430 para. (2) of the Code of Civil Procedure].

Thus taking the intermediary view expressed in the doctrine, the Romanian legislator's solution gives *res judicata* authority to the recitals of the judgment and considerations, but only those that are decisive and underlie the operative part, and those called decisional, by which a dispute is settled.

Incidentally, it is in this sense that the provisions of art. 461 par. (2) of the Code of Civil Procedure should be interpreted, which, after stating that the object of the remedy is the solution comprised in the operative part of the judgment, provide that is possible to only appeal to the recitals of the judgement: "However, if the appeal concerns only the recitals of the judgment by which solutions were given to legal matters unrelated to the judgment of that trial or which are erroneous, or contain findings of fact that are prejudicial to the party, the court, admitting the appeal, will remove those recitals and replace them with its own recitals, maintain the solution contained in the judgment under appeal."

Thus, *res judicata* authority extends to both the operative part of the judgement and its underlying recitals, which constitute the necessary support of the operative part, being integral with it[17].

Eloquent in these respect are the solutions pronounced in case law. Thus, the Supreme Court decided that there is *res judicata* authority when the court ascertains the existence of two litigations, which were conducted between the same parties and in the same capacity, with the same object, the same amount of claims, but for successive periods, on the same grounds. Litigations were finalised by judgements pronounced in appeal by the High Court of Cassation and Justice, being contrary in terms of recitals and pronounced solutions, deriving from the divergence in interpreting a clause in the contract of transaction on which the claimant based her claims. As regards *res judicata* authority from which the first of the two decisions on the court benefits, it was found to be attached to its recitals. The solution of the problem of law that the first decision settled in its recitals is imposed with power of the *res judicata*, over the second decision, which, through its recitals, gave a contrary settlement, with the consequence of adopting a contrary solution[18].

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[17] Mihaela Tăbârcă, *Excepţii procesuale în procesul civil,* Universul Juridic Publishing House, Bucharest, 2006, p. 354.

[18] The High Court of Cassation and Justice, ascertaining that the conditions of art. 322 pt. 7 of the Code of Civil Procedure (art. 509 pt. 8 of the Code of Civil Procedure) have been met, approved the request for revision and annulled the latter decision pronounced also by the High Court of Cassation and Justice. (H.C.C.J., Section II Civil, civil decision no. 1011 of 12 March 2013) last consultation on 11/05/2016.

The obligation to enforce a judgement is, therefore, not limited to the operative part, as art. 6 para. 1 of the European Convention on Human Rights makes no differences between the grounds on which the action was admitted on those on which the action was rejected, the decision being enforceable and applicable regardless of the result of the trial[19], and the authorities cannot re-open case resolved by a final judgement[20], which means that courts must consider the findings in the previous judicial procedures, as to re-open a cased that was given final settlement by another judgement would be a violation of art. 6 para. 1 of the Convention[21].

We consider that the current regulation referring to the part of the judgement benefiting from this authority is superior to previously existing rules, but we agree with the opinion that it is perfectible as, given that the drafting of recitals is carried out after the preparation and delivery of the minutes, the judges, in order to change the solution as a result of a subsequent recital, could face pressure after the delivery of the minutes[22].

3. Judgements covered by *res judicata* authority

In order to benefit from *res judicata* authority, a Romanian judgement must meet the following conditions[23]: a) to have been pronounced by a Romanian court; b) to have been pronounced as part of a contentious procedure, as art. 535 of the Code of Civil Procedure establishes that non-contentious judgements do not benefit from this authority; c) to have provided a final settlement for the substance of the case or another litigious incident.

All these conditions are self-evident, but certain specifications may lift certain conditions. In this regard, although the procedure is non-contentious, a judgement obtained following the settlement of a request to ascertain nullity of the decision to declare a person deceased, that person being alive, has *res judicata* authority. Likewise, if the case was not settled in its substance, as the court did not establish the rights of the parties, that judgement does not have *res judicata* authority.

Certain particularities can be mentioned concerning the recognition of judgements pronounced abroad, other than those recognised *ipso jure* in Romania. In order to acquire *res judicata* authority according to art. 1096 para. (1) of the Code of Civil Procedure, these judgements must be recognised in Romania; this

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19 Pilot Service v. Romania**,** *Decision of the European Court of Human Rights of 3 June 2008,* published in "Official Gazette of Romania", Part I, no. 137 din 5 martie 2009.

20 Zazanis and other v. Greece, *Decision of the European Court of Human Rights of 18 November 2004,* http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Zazanis%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22], last consultation on 12/05/2016**.**

21 Amurăriței v. Romania, *Decision of the European Court of Human Rights of 23 September 2008,* http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22amuraritei%22],%22languageisocode%22:[%22RUM%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-123954%22], last consultation on 12/05/2016.

22 Ioan Leș, *Noul Cod de procedură civilă….*, *op. cit.*, note under art. 430.

23 Ion Deleanu, *op. cit.*, vol. II, 2013, p. 113.

recognition requires meeting all of the following conditions: the judgement must be final according to the law of the state where it was pronounced; the court that pronounced the judgement must have been competent, according to the law of the state, to judge the trial without being grounded exclusively in the presence of the defendant or his property without direct connection with the litigation in the state of that jurisdiction; there must be reciprocity concerning the effects of foreign judgements between Romania and the state of the court that pronounced the judgement.

From the interpretation of legal provisions it can be concluded that *res judicata* authority applies to certain categories of judgements, such as:

- judgements through which the court settles the substance of the litigation, in whole or only in part, regardless of whether they are pronounced as such on a principal or incidental claim. For example, judgements declaring death, after becoming final, acquire *res judicata* authority[24]; likewise, judgements pronounced on the substance of the right have *res judicata* authority in relation to a subsequent request for presidential ordinance [art. 1002 para. (3) of the Code of Civil Procedure]. Other eloquent examples can be remarked in the matter of possessory actions. In this regard, judgements which settled a possessory claim benefit from *res judicata* authority in relation to a subsequent possessory claim conducted between the same parties and grounded on the same facts [art. 1005 para. (1) first thesis of the Code of Civil Procedure]. In the same vein, judgements that settled an action regarding the substance of the right have *res judicata* authority in relation to a subsequent possessory claim in relation to the same property.
- judgements by which the court decides "on a procedural exception or on any other incident";
- interlocutory orders that precede the settlement of the substance, involve judging a litigious issue, being binding on the court and the parties to the trial[25];
- decisions by which the competent court settles a prejudicial issue;
- judgements appealed by request for annulment or revision preserve their *res judicata* authority until replaced by other judgements;
- arbitral decisions. Thus, since the Code of civil procedure establishes that an arbitral decision is "a binding title and is enforceable the same as a judgement" (art. 615), it is evident that these decisions can benefit from *res judicata* authority even in the absence of an express legal provision in this regard[26].

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[24] Claudiu Constantin Dinu, *Proceduri speciale în noul Cod de procedură civilă,* Universul Juridic Publishing House, Bucharest, 2013, p. 84.

[25] Ion Deleanu, *op. cit.*, vol. II, 2013, p. 115.

[26] See Daniela Cristina Creţ, Florin Cornel Dumiter,, *Some considerations regarding the Ad-Hoc Internal Arbitration Procedure in the new Code of Civil Procedure*, in "*Studia Universitatis "Vasile Goldiş" Arad, Seria Ştiinţe economice"*, no. 4/ 2013, p. 165.

On the contrary, the following to not have *res judicata* authority:

- judgements adopting a provisional measure[27] in relation to the substance of the litigation [art. 430 para. (3) of the Code of Civil Procedure]. A particular application of this rule is found in special procedures. Thus, a presidential order does not have *res judicata* authority in relation to a claim on the substance of the right [art. 1002 para. (2) of the Code of Civil Procedure]. Nevertheless, the presidential order has *res judicata* authority in relation to another claim for presidential order, inasmuch as `the circumstance of fact that justified did not change [art. 1002 para. (1) of the Code of Civil Procedure];
- non-contentious judgements, as results explicitly from the provisions of art. 535 of the Code of Civil Procedure which mention that "judgements" in this matter "do not have power of the *res judicata*", thus the judge that pronounced on a non-contentious claim may reconsider it, under certain circumstances;
- decisions of approval in principle, pronounced in matters of division of property, in the hypothesis provided by art. 993 para. (3) of the Code of Civil Procedure, according to which, when the division cannot be achieved in any of the ways provided by the law, the court will decide on closing the case. Depriving this solution of the court from *res judicata* authority is due to the fact that it does not finalise the judgement on the substance of the case, but only ascertain the impossibility of achieving division in one of the legal ways. Likewise, it is remarked that, in the situation of introducing a new claim for division by a co-proprietor, decisions for approval in principle, provided by art. 985 and 986 do not have *res judicata* authority.
- judgements settling a possessory claim in relation to a subsequent claim regarding the substance of the right [art. 1005 para. (1) second thesis of the Code of Civil Procedure]. Thus, a similarity is observed with the effect determined by the presidential order on a claim referring to the substance of the right;
- judgements pronounced by the foreign court since, as it results from the provisions of art. 1095 of the Code of Civil Procedure, such decision, to benefit from power of the *res judicata*, must have been given prior recognition by the Romanian court, if the conditions established by the above-mentioned legal text are met;
- preparatory decisions, i.e. those by which the court organises and carries out the phases of judgement, in order to settle the substance of the litigation[28];
- decisions that would comprise an obligation referring to something that is illicit or contrary to public order.

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[27] An intermediate category of judgements consists of provisional final judgements benefitting from relative *res judicata* authority, as long as the circumstances existing on the data of their adoption are maintained. This category includes: decisions regarding support obligations, entrusting children, restriction of legal capacity etc. (Mihaela Tăbârcă, *Drept procesual civil, vol. II, Procedura contencioasă în faţa primei instanţe. Procedura necontencioasă judiciară. Proceduri speciale*, Universul Juridic Publishing House, Bucharest, 2013, p. 584).

[28] Ion Deleanu, *op. cit.*, vol. II, 2013, p. 117.

4. Effects of *res judicata*

Romanian civil procedural norms establish the effects of *res judicata* at art. 431 of the Code of Civil Procedure. By interpreting them, one concludes that *res judicata* authority pursues two objectives: one negative, referring to the parties' interdiction to pursue the same litigation again, under the reserve of exercising remedy, this being expressed by the legislator at para. (1) of art. 431 thus: "No one can be sued twice in the same capacity, on the same ground and for the same object."; the second one positive, consisting of the right of the party that won the trial to prevail in a new judgement by the right recognised by that decision, this being set forth at para. (2) of the above-mentioned legal text, under the form: "Any of the parties may enforce the item previously judged in another litigation, if it is connected to the settlement of the latter. "

As regards the negative objective, this involves the triple identity of parties, object and cause in both trials, as they constitute, in fact, elements of *res judicata* authority[29] and elements of civil action.

The first condition of *res judicata* authority – parties participating in the trial "in the same capacity" – refer to the principle of relativity of the effects of legal acts. This principle, as translated o the procedural level of the principle of civil law, according to which conventions only produce effects between contracting parties, involves the rule that the judgement can only produce effects between litigating parties. As an exception, however, the judgement will be enforceable on other persons than those who participated in the trial in a direct and immediate way.

Interpreting legal provisions leads one to the conclusion that it is the legal, rather than physical identity of the parties that is considered, even though the procedural roles of claimant and defendant were changed, i.e. it is not necessary for one person to be a claimant in both trials, and for the other person to be the defendant. Likewise, the party can participate in the judgement personally or through a representative.

Universal heirs of the parties, as well as their unsecured creditors, can also act as parties.

The second condition refers to the identity of ground. Ground, in matters of *res judicata*, means the legal basis of the claim filed in justice, or, in a different formulation, the material or legal fact that represents the legal basis or direct and immediate foundation of the right or legal benefit legal prevalent for one of the parties[30]. The identity of ground presupposes the existence of an identity of fact and rules of law applicable to these facts[31].

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29 In the sense that the other data differentiating the two cases have a formal character and are irrelevant for appreciating *res judicata* authority, see C.S.J., Administrative Contentious Section, Dec. no. 253/2001, in *Buletinul Jurisprudenţei 1990-2003*, p. 939.

30 Ion Deleanu, *op. cit.*, 2007, vol. II, p. 86 et seq.

31 Verginel Lozneanu, *Excepţiile de fond în procesul civil,* Lumina Lex Publishing House, Bucharest, 2003, p. 257.

The last condition of *res judicata* refers to the identity of object. This object consists of the claim formulated in the request brought to justice. One must consider not only the material object and subjective right referring to that object[32], but also the final purpose pursued by both actions[33].

In this context the "object" referred to at art. 431 para. (1) of the Code of Civil Procedure means both the claims invoked in the principal request, and those expressed in accessory, incidental or additional requests.

In relation to these aspects, the Constitutional Court decided that a judgement, being endowed with *res judicata* authority, meets the need for legal security, as parties are obliged to submit to the binding effects of the jurisdictional act, without the possibility of reconsidering what was already settled by means of judgement. Consequently, the judgement produces effects from the time of delivery, and after becoming final it is situated in the area of acts of public authority, being vested with specific efficiency by the constitutional normative order. On the other hand, an intrinsic effect of a judgement is its enforceability, which must be obeyed and enforced by both citizens and public authorities[34].

The provisions of art. 20 of the Romanian Constitution establish expressly that national legislation should be interpreted in accordance with human rights treaties to which Romania is a party, and, if there are any inconsistencies, international regulations have priority, except where the Constitution or domestic laws contain more favourable provisions[35].

The principle of *res judicata* authority corresponds to the need for legal stability and social order, as it is prohibited to re-open litigious issues that have already been settled in court, and does not infringe upon the right to fair trial, provided by art. 6 of the European Convention on Human Rights, since the right to access justice is not absolute – it can be subject to certain limitations, deriving from the application of other principles[36].

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[32] Viorel Mihai Ciobanu, *Tratat teoretic şi practic de procedură civilă,* vol. II, Naţional Publishing House, Bucharest, 1997, p. 274.

[33] H.C.C.J., Civil and Intellectual Property Section, Dec. no. 4525/2005, in "Dreptul", no. 6/2006, p. 236.

[34] Decision of the Constitutional Court no. 460/2013 on the application filed by the president of the Higher Council of the Magistrature regarding the existence of a constitutional legal conflict between the judiciary, represented by the High Court of Cassation and Justice, on the one hand, and the legislature, represented by the Senate of Romania, on the other hand, published in the "Official Gazette of Romania", Part I, no. 762 of 9 December 2013.

[35] See Narcisa Mihaela Stoicu, *Drept constituţional şi instituţii politice,* vol. I, Casa Cărţii de Ştiinţă Publishing House, Cluj-Napoca, 2014, pp. 222-223.

[36] See Hugo Tórtora Aravena, *Las limitaciones a los derechos fundamentales (The limitations to the fundamental rights)*, in "Estudios Constitucionales", vol. 8, no. 2, 2010, pp. 167 – 200 (the author performs and analysis of the limitations that can be applied to fundamental rights in the light of constitutional provisions and the American Convention on Human Rights, classifying such restrictions into certain categories, for example: ordinary restrictions and exceptional restrictions, depending on the circumstances under which they occur. The study proposes certain "factual limitations" of fundamental rights, such as those determined by judgements pronounced by courts recognising those restrictions with *res judicata* authority), http://www.redalyc.org/articulo.oa?id=82015660007, last consultation on 26/08/2016.

The right to a fair trial before a court of justice should be interpreted in light of the Preamble to the European Convention on Human Rights, which states the pre-eminence of right as an element of the common heritage of states parties. One of the fundamental elements of the pre-eminence of right is the principle of security of legal relations which requires, among other things, that the final solution to any litigation by courts of justice should not be reconsidered[37]. When a judicial system confers the competence to deliver final judgements to a court, and then allows them to be annulled by subsequent procedures, not only does this affect legal security, but the very existence of the court becomes questionable, as it thus has no substantive competence to give final settlements on a legal issue[38]. Complying with *res judicata* authority imposes the obligation for signatory states to strive to identify related judicial procedures and prohibit re-opening new judicial procedures regarding the same issue[39]. Reconsidering the situation settled by final judgements cannot be justified on the basis of art. 6 para. 1 of the Convention[40], so that the court must consider the evidence that was administered in previous procedures in which the matter was given a final judgement, without questioning the findings of previous jurisdictions[41].

Of course, the right of access to justice is not absolute; it can allow restrictions admitted implicitly, since, through its very nature, it is regulated by the state. By drafting such regulation, states enjoy a certain degree of appreciation. The exception from *res judicata* is a limitation of the right of access to justice, contributing to the security of legal relations, when there is reasonable proportionality between the means employed and the purpose envisaged[42]. Applied restrictions cannot, however, limit the person's access in such a way or to such extent that the right would be infringed in its very substance. Such restrictions are not in line with art. 6 para. 1 of the Convention, unless they are aimed at a

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[37] Androne v. Romania, *Decision of the European Court of Human Rights of 22 December 2004*, published in the "Official Gazette of Romania", no. 875 of 29 September 2005.

[38] Brumărescu v. Romania, *Decision of the European Court of Human Rights of 28 October 1999, http://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-123954%22]*, last consultation on 12/05/2016.

[39] Gjonbocari and others v. Albania, *Decision of the European Court of Human Rights of 23 October 2007, http://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22Gjonbocari%202007%22],%22languageisocode%22:[%22ENG%22],%22respondent%22:[%22ALB%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-82863%22]*, last consultation on 12/05/2016.

[40] Riabykh v. Russia, *Decision of the European Court of Human Rights of 24 July 2003, http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61261%22,* last consultation on 12/05/2016.

[41] Brumărescu v. Romania, *Decision of the European Court of Human Rights of 28 October 1999, loc. cit.*

[42] Stubbings and others v. United Kingdom, *Decision of the European Court of Human Rights of 22 October 1996, http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Stubbings%22],%22languageisocode%22:[%22RUM%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-123338%22]*, last consultation on 12/05/2016.

legitimate purpose and unless there is reasonable proportionality between the means employed and the purpose envisaged[43].

The application of EU legislation in the national judicial order is made directly, immediately and with priority over the national law of EU member states. The priority application of EU legislation or its supremacy over the domestic law of member states, presupposes the fact that it is applicable with priority in the national judicial order of member states, which cannot oppose contrary domestic normative dispositions to it and cannot apply their own internal norms to solve conflicts between domestic and EU laws[44]. The applicability of substantial EU law in national judicial order greatly depends on the procedural norms of EU member states, to the extent where EU legislation does not have its own procedural rules. The principle of national procedural autonomy is limited by the principle of equivalence - rules governing a conflict between a domestic norm and a EU one cannot be less favourable that those applicable to similar internal disputes – and by the principle of efficiency – exercising the rights conferred by the judicial order of the Union cannot be made practically impossible or excessively difficult by the internal procedural norms of member states. Any clash between the principle of EU law supremacy and the principle of national procedural autonomy is solved jurisprudentially by the European Court of Justice, which generally opts for one of these two principles as a starting point when answering preliminary questions regarding clashes between EU and national legislation[45]. Thus, in matters of *res judicata* authority, the European Court of Justice established that EU law opposes the application of a provision in national law seeking to consecrate the principle of *res judicata* authority, to the extent where the application of this principle prevents the recovery of a state aid that was granted by infringing on EU law and whose incompatibility with the common market was ascertained by decision of the European Commission which has become final[46]. The same was the solution of the European Court of Justice in a different case, in which it showed that EU law opposes the application in a litigation on value-added tax referring to a tax year for

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[43] Lungoci v. Romania, *Decision of the European Court of Human Rights of 26 January 2006*, published in the "Official Gazette of Romania", no. 588 of 7 July 2006.

[44] See Fábián Gyula**,** *Primordialitatea dreptului Uniunii Europene faţă de dreptul naţional al statelor membre din perspectiva statelor care vor să adere la această uniune*, "Dreptul", no. 3/1996, pp. 3-8; Manfred A. Dauses, *Prioritatea dreptului comunitar european în raport cu dreptul intern al statelor membre ale Uniunii Europene,* "Dreptul", no. 6/2003, pp. 47-64.

[45] See Rolf Ortlep, Maartje Verhoeven, *The principle of primacy versus the principle of national procedural autonomy,* "Netherlands Administrative Law Library", volume 2012, p. 1 (http://www.nall.nl/tijdschrift/nall/2012?search_date_from=2012-04-01&search_date_until= 2012-06-30), last consultation on 26/08/2016; Alexander Kornezov, *Res judicata of national judgments incompatible with EU law: time for a major rethink*, "Common Market Law Review", vol. 51, no. 3, 2014, pp. 809-842*;* Xavier Groussot, Timo Minssen, *Res judicata in the court of justice case-law: Balancing legal certainty with legality?,* "European Constitutional Law Review", vol. 3, issue 3, 2007, pp. 385-417.

[46] See ECJ Decision of 18 July 2007, pronounced in Case 119/05 (http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30ddf7c5785f4b1540278d63a392df7a5e41.e34KaxiLc3qMb40Rch0SaxuPb3z0?docid=62742&pageIndex=0&doclang=RO&dir=&occ=first&part=1&cid=456919), last consultation on 26/08/2016.

which final judgement has yet been pronounced, to the extent where this would prevent the national court seised of this litigation from considering EU laws in the matter of abusive practices related to the value-added tax[47].

5. Exception from *res judicata* authority

In the current regulation, if the same issue was brought to justice in a previous litigation, conducted between the same parties, having the same object and the same ground, was given final settlement incidentally or substantively, in a certain manner, it acquires *res judicata* authority, and the party to which the settlement delivered by the court is favourable can invoke exception from *res judicata* authority, without needing to invoke the power of the *res judicata*.

The Romanian Code of civil procedure regulates this exception at art. 432. This establishes the legal regime of the exception from *res judicata* authority and institute the principle of not worsening one's situation i one's own remedy (*non reformatio in peius)* in the matter.

On the basis of procedural norms, the exception from *res judicata* authority appears as a substantive, peremptory and absolute exception.

This exception can be invoked by the court or by the parties in any state of the trial, even before the court of appeal. Admission of the exception produces grave procedural effects, so that the party may be created, in its own remedy, a worse situation than it was dealt in the judgement under appeal.

In the same context it can be noted that in the second appeal the exception can only be invoked under the conditions of art. 247 para. (1) of the Romanian Code of Civil Procedure, second thesis, according to which absolute exceptions can be lifted before the court of second appeal only if, for the purpose of settlement, it is not necessary to administer new evidence other than new exceptions.

In the conflict between *res judicata* authority and the *non reformatio in peius* principle, priority must be given to *res judicata*, as it is based on the presumption that the judgement expresses the legal truth[48].

With regard to the fulfilment of the prescription of the right to obtain enforcement of the previous decision, in jurisprudence it was decided that the analysed exception can no longer be admitted if this prescription was fulfilled[49].

In Romanian legal literature and jurisprudence prior to the entry into force of the current Code of civil procedure, there were debates on the possibility of renouncing the invocation of *res judicata* authority. The Supreme Court decided that the *res judicata* authority "which is in favour of the party, can be renounced, either by not invoking, or by not enforcing the decision within the term of

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[47] See ECJ Decision of 3 September 2009, pronounced in Case 2/08 (http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=9ea7d2dc30ddd9d38071319c4ee2bd9acc6f5737016a.e34KaxiLc3qMb40Rch0SaxuQa3n0?doclang=RO&text=&pageIndex=0&docid=73075&cid=276503), last consultation on 26/08/2016.

[48] Mihaela Tăbârcă, *op. cit.*, vol. II, p. 594.

[49] H.C.C.J., Civil and Intellectual Property Section, Dec. no. 1653/2011, in *Buletinul casaţiei,* no. 12/2011, p. 32.

prescription"[50]. However, considering the regime of this exception, the fact that it can be invoked by the court ex officio, we believe that art. 432 of the Code of civil procedure should be interpreted in the sense that the parties cannot renounce its invocation.

In Romanian jurisprudence it was decided that bringing a separate action, for granting costs of the proceedings, if such a request was formulated in an accessory way during the trial, and it was rejected as unfounded as no evidence was made of the costs of the proceedings occasioned in the case, will be rejected by the court as a result of the intervention of *res judicata* authority[51]. Such a request could only be admitted if the courts of justice have omitted to pronounce on the accessory head of claim, i.e. on costs of proceedings, and the party did not request completion of judgement, which is not the case here.

The Romanian High Court of Cassation and Justice showed that, in its manifestation of procedural exception, which corresponds to a negative, extinctive effect, likely to stop the second judgement, *res judicata* authority presupposes the triple identity of elements (parties, object and grounds), but this does not apply when this effect of the judgement is manifested positively, demonstrating the way in which certain litigious aspects in the relations between the parties were settled previously, without the possibility of contradicting it, as it imposes itself in a second trial which is connected to the litigious issue settled previously, out of the need for order and legal stability. Consequently, since in the relation between the parties, the presumption of power of *res judicata* has an absolute character, this means that no new action can be brought claiming to establish the contrary of what was set by the court previously[52]. The principle of *res judicata* authority corresponds to the need for legal stability and social order, as it is prohibited to bring again to justice litigious issues that have already been settled[53].

A different ground for actions in justice does not justify retaining *res judicata* authority, even if the end is the same. As retained in case law, by grounds one must mean the legal basis of the right invoked in the claim, which is neither the cause of the action, nor the subjective right or the means to prove the legal basis. Incidentally, the grounds for bringing action into court must not be limited to the basis of the legal relation brought to justice, but also to the legal bases of the claim,

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[50] Supreme Tribunal, Civil Section, Decision no. 2092/1975, in Ioan Mihuţă, *Repertoriu de practică judiciară în materie civilă a Tribunalului Suprem şi a altor instanţe judecătoreşti pe anii 1975-1980*, Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1982, nr. 135, p. 303.

[51] Târgu-Mureș Court of Appeal*, Minuta întocmită în data de 03.04.2015 cu ocazia întâlnirii trimestriale a judecătorilor pentru unificarea practicii judiciare şi formarea continuă a judecătorilor*. [portal.just.ro/43/Documents/Minute/MINUTA.2015. 04.03.CIVILA1.pdf] , last consultation on 11/05/2016.

[52] H.C.C.J., Civil Section II, civil decision no. 3845 of 8 November 2013, http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery[0].Key=id&customQuery[0]. Value=82866, last consultation on 26/08/2016.

[53] H.C.C.J., Civil and Intellectual Property Section, civil decision no. 995 of 4 February 2009, http://www.dreptonline.ro/spete/detaliu_speta.php?cod_speta=69, last consultation on 26/08/2016.

as there can be no power of *res judicata* if the first judgement settled the same litigation on a different legal ground[54].

But both the presumption, and the exception from *res judicata*, are legal instruments meant to serve the institution of the power of *res judicata*, which is the most important effect of judgements and which is based on two fundamental rules, namely: a claim can only be given final judgement once, and the solution comprised in the decision, being presumed to express the truth, cannot be contradicted through another judgement. What legitimates the power of *res judicata* is not so much the final character of the judgement, but the truth which must underlie it, the truth being the basis, the reason and the social and moral foundation of this effect of the judgement. In accordance with the second rule, in domestic judicial practice it was decided that the power of *res judicata* also aims at avoiding contradictions between two judgements, in the sense that rights recognised by final judgement should not be contradicted by a subsequent judgement[55]. If a second action was brought after the first one was given final settlement, the exception from *res judicata* will be invoked.

6. Conclusions

Res judicata authority currently enjoys a regulation that is superior to the previous one in Romania. In this sense, the current Code of civil procedure clearly delineates the effects of *res judication* from the exception from *res judicata* authority and settles, to a certain extent, the doctrinal controversy regarding the part of the judgement that benefits from *res judicata*.

However, we, along with other authors, believe that the legislator could have conferred *res judicata* authority only to the operative part of the judgement, to prevent a possible change in the solution of the court, subsequent to the pronouncement of the operative, through recitals.

In the same vein, we concur to the opinions expresses in the doctrine, that any decision that is endowed with *res judicata* authority must have been verified *ab initio* by the court of judgement, by analysing the issues of law it addresses and by submitting them to contradictory debates.

Independently of such considerations, we believe that *res judicata* authority decisively and effectively contributes, through its effects, to ensuring judicial stability by avoiding the adoption of contradictory judgements.

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[54] H.C.C.J. Civil Section II, civil decision no. 3125 of 16 October 2014, http://www.scj.ro/1093/Detalii-[jurisprudenta?customQuery[0].Key=id&customQuery[0].Value=114060, last consultation on 26/08/2016.

[55] H.C.C.J., Civil and Intellectual Property Section, decision no. 4525/2005, in *B.J.C.D. 2005*, p. 521; since there was no identity in terms of object of the action, the first action being an action for declaration and not an action for achievement or constitution of rights, the conditions of *res judicata* authority are not met (Craiova Court of Appeal, http://legeaz.net/spete-civil-3/putere-de-lucru-judecat-e91), last consultation on 12/05/2016.

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