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SOME PECULIARITIES OF THE ADVERSARIAL PRINCIPLE IN THE CIVIL PROCEDURAL RELATIONS

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Abstract:

This article concerns the actual problems of the Civil Procedural Law – the adversarial principle in the civil procedural relations. Each person has the right to protect his/her infringed rights in court. In accordance with the first part of the Article 4 of the Civil Procedural Code of Georgia legal proceedings shall be exercised on the basis of the adversarial principle. The Article underlines the second part of the Article 4 according to which the court may apply the measures provided under this Code on its own initiation. In the author’s opinion, this stipulation contradicts the nature of competition. The article expresses the idea that the court should not be actively involved in gathering evidences; it must support the parties if they cannot obtain the evidence by themselves for some reason and submit a petition to the court. The court’s role is regulated differently with respect to the adversarial principle in legislations of different countries. However, the Common Law regards the trial as a kind of tournament where a judge plays a role of an arbiter. Each party shall provide the evidence.

I.

The statutes of the General Provisions of the Civil Procedural Code of Georgia concern a human right to judicial protection of infringed rights and lawful interests. An individual claims or applies a petition to court, defines himself/herself a subject of litigation.

The Article 85 of the Constitution of Georgia states that “legal proceedings are exercised on the base of equality and competition of parties”¹. The Civil Procedural Code of Georgia is based on these principles of equality and competition of parties. According to the Article 4 “Civil proceedings are performed on the ground of the adversarial principle of the parties. The parties have equal rights and possibilities to prove the circumstances which they cite as the basis of their claims and objections, to deny or refute the requirements, opinions or evidence of the opposing party. The parties themselves define which facts should form the basis of their claims or which evidence may prove these facts”. The first part of the Article 4 clearly reflects the nature of the adversarial principle that the guarantee of protection of the

¹ Art 85 of The Constitution of Georgia

rights only depends on the parties' will. Nobody may enforce them to go to court to protect their infringed rights or give the evidence during the trial. This stipulation of the adversarial principle is contradicted by the second part of the Article 4 which gives the right to the court to take the measures defined under this Code "on its own initiative". In our opinion, the aforesaid stated in the second part of the Article 4 contradicts the nature of the adversarial principle. "The court has no right to begin ascertaining those factual circumstances which the claim or the opposing party's rights are based on: such proceedings come into conflict with the adversarial principle under the Article 4".²

"The second part of the Article 4 concerns the court initiative in the proving process, but the court may take the initiative within the confines admeasured by the Civil Procedural Code". For example, the court may require the party to provide additional evidence; the court shall vindicate the evidence upon the petition of the parties (Article 103 and Article 203). Admittance of evidence depends on the court's opinion (Article 104); on its own initiative the court may determine the examination of physical and written evidence at their location place (Article 120); it may assign the expertise (Article 162), etc.³

The best determination of the court initiative is given by Tengiz Liluashvili and Valeri Khrustal that is limited only by the court's right to propound the parties to provide the additional evidence and to vindicate the evidence upon the parties' petition and so forth. The court initiative should be understood this way, otherwise, the court's intervention may arise the suspicion of the party that the court is "personally, directly and indirectly interested in the outcome of the case" and the party may put the petition in virtue of paragraph D of the first party of the Article 31 of CPC. However, as the practice shows, the party fails to prove the grounds for challenge and the petition will not be satisfied in accordance with the second part of the Article 4.

Teimuraz Todria expressed an interesting opinion in his work "The Meaning of Factual Circumstances at the Court of Cassation". Concerning the question of distribution of burden of proof, he draws the attention to the judicial practice "whether the court may require or not the presentation of the evidence to prove a certain fact". Certainly, the parties indicate the facts that they want to prove and determine by which arguments these facts should be confirmed. Namely this is the essence of the adversarial principle of the parties, but the court does not always understand this principle correctly. On the assumption of the above-

² see Hein Bolling, Lado Chanturia "The method of taking decisions in civil cases" p. 34

³ see Tengiz Liluashvili, Valeri Khrustal "The comment on the Civil Procedural Code of Georgia" p. 9

mentioned position, the following question arises: in case the court requires the concrete evidence to confirm the facts indicated by the parties, does not it mean that the court interferes roughly in the distribution of burden of proof?⁴

The Chamber of Civil Cases of the Supreme Court of Georgia explains concerning the Case #AS -211-201-2010 22 June that “the guiding principles of civil procedural law represent the administration of justice on the ground of the principles of disposition (Article 3 of the Civil Procedural Code) and competition (Article 4 of the Civil Procedural Code). The first one means the freedom of the parties to dispose their material and procedural rights; the adversarial principle means the parties’ equal possibility in protection of their rights and in fulfilment of their obligations. As the adversarial principle is a constitutional principle, such a right of an individual is guaranteed by the third part of the Article 85 of the Constitution of Georgia, according to which legal proceedings is implemented on the basis of equality of parties and their adversarial nature. According to the first part of the Article 42, everyone has the right to apply to the court for the protection of his/her rights and freedom”⁵.

Our position is expressed in the first part of the Article 102 that “each party must prove the circumstances which he/she cites as the basis of his/her claims and objections”. Also, according to the first and second parts of the Article 103 “the parties submit evidence to the court”, “if because of different reasons, the parties failed to receive the evidence directly and submit it to the court; upon the parties petition, the court may vindicate the evidence from any person’s possession”. The above-mentioned Articles prohibit the court’s right to provide the evidence at its discretion .

In accordance with the Article 135, it depends on the court’s consideration whether the evidential value will be given to document photocopies or not. Under the mentioned Article “a person may be released from submitting an original if he/she proves the impossibility of submission of such a document for some reason that the court considers reasonable”. Therefore, giving the evidential value to document photocopies does not depend on the court’s consideration. It depends on the impossibility of submission of the document for some reason.

We find pertinent the court’s initiative to verify the authenticity of the written evidence according to the Article 137. In our opinion, just only in this case, the court should have the right, if there is not a party’s petition, to verify the authenticity of the document by itself; the court “may appoint expertise, require additional or other evidence for this purpose”.

⁴ see Teimuraz Todria “The Meaning of Factual Circumstances in the Court of Cassation” p. 307

⁵ AS-211-201-2010 22 June, 2010, Tbilisi The Chamber of Civil Cases of the Supreme Court of Georgia p. 74

Also, in litigation arising from family relationships, the court should vindicate the evidence at its discretion when the case concerns a child's interests.

The Article 147 of CPC lists the grounds of interrogation of a witness about his/her residence, if:

a) he/she cannot appear in court because of illness, old age, disability or other valid reasons;

b) it is more reasonable to interrogate a witness at his/her residence based on the circumstances of a case;

c) several witnesses must be interrogated who reside in one and the same place and their summons and interrogation at court involve unreasonable expenses.

The paragraph D of the Article 147 determines other cases of the witness interrogation when the court deems appropriate. In this case, the court has the right to decide whether interrogate the witness or not.

The different opinions exist about the adversarial principle and the court initiative considered in the Civil Procedural Code. I. Merabishvili prefers the active role of the court in obtaining evidence “The court cannot be taken as an arbiter and gives an opportunity to the party to achieve a decision in his favor when it is obvious that the truth is not on his/her side”⁶. “In some procedural issues the court still remains a subject of obtaining the evidence (for example, on its own initiative, it may appoint forensic examination by a decree, vindicate evidence on its own initiative in family cases). In other cases, a judge may just support the parties in gathering the evidence”⁷.

We think that if the parties have no appropriate knowledge to protect their interests at court, they must be presented by counsels. In accordance with the second part of the Article 47 of the Civil Procedural Code of Georgia, “if the party cannot pay a counsel fee, the court has the right to appoint upon the party's petition a counsel at public expense if the counsel's participation in the litigation is recommended considering the significance and complexity of the case. In this case the counsel shall receive compensation from the state budget up to 4 per cent of the amount of a claim. In non-property litigation the counsel shall receive compensation from the state budget up to the amount of 2 000 GEL considering the significance and complexity of the case”. Although this law is stated in the Code for a long time, probably, it is not used by the court in practice.

⁶ Justice and law 4/23 I. Merabishvili “The action of the adversarial and judges' active role principles during civil proceedings”, p.23

⁷ State University of Economic Relations of Tbilisi, Collection of Scientific Works 2010 Shalva Kurdadze – “Feature of procedural action in civil court proceedings”.

At present the parties have the access to free legal service beyond the court. This should be the basis for the active implementation of our opinions in practice.

The court should not play the active role in the collection of evidence; it must support the parties if they cannot obtain the evidence for some reason and if they apply the petition seeking the court's support.

Our position is firm by the amendments of the Civil Procedural Code effectuated on January 1, 2012. According to the above-mentioned amendments, the court is required no longer to give a claim and attached materials to a defendant apart from the exceptions considered in the law. With this the legislator perhaps underlines the adversarial principle. Though, in our opinion, the delivery of the claim with attached materials should be the court's duty and not that of a claimant's. This must be the parties' right and not their duty.

The court's role in relation to the adversarial principle is understood differently in legislations of different countries.

The inquisitorial principle is stated in the Article 64 of the Civil Procedural Code of the People's Republic of China. According to this Article, the court may "investigate and collect evidence" if the court considers it necessary. Only the court may apply to an authentication department which appoints an expert under the Article 72.⁸

The complete opposite of the approach of the Civil Procedural Code of the People's Republic of China is the procedural legislation of Denmark where a judge is passive during the trial. This concerns both a criminal and civil proceedings. The inquisitorial principle of the Civil Codes of the countries of the Common Law and Continental Europe means that the court appoints an expert or calls a witness at the parties' petition or on its own initiative. It is noteworthy that in the Common Law system the court is not bound by the Rules of Evidence. This is directly considered, for example, in the Rule 104 of the Federal Rules of Evidence. The only thing confining the court is privileges. Under the paragraph B of the Rule 104 the court makes its determination with respect to privileges.⁹ Such freedom gives a wide arena for judicial lawmaking. "The Common Law regards the trial as a kind of tournament where a judge plays a role of an arbiter".¹⁰

⁸ see Articles 64 and 72 of the Civil Procedural Code of the People's Republic of China 1991.

⁹ see Rule 104 of the Federal Rules of Evidence, updated on 10 December 2010

¹⁰ see Rule 104 of the Federal Rules of Evidence, updated on 10 December 2010

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