

Concept of Decision in Absentia and its Adjudication Principles

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Abstract

Decision in absentia is the decision passed against an absent party. Such decision is based on the supposition that at the main judicial sitting the plaintiff denied the suit, and the defendant has notified it. Every person has the right to go to law in order to defend his rights or liberty. According to the 1st part of the 2nd paragraph of the Civil Procedure Code, the juridical protection is enforceable for every person. The court will start trying a case with the application of that person who applies for it in order to defend the interests, legally provided. The main point of this principle should be divided into two parts and explained. Hence, in the first case, the plaintiff is pondered who has a demand towards the defendant; he thinks that the defendant has outraged the rights and the interests protected by law and he wants these rights to be urgently rehabilitated. For this he has saved some money, time, and work, to be present at the legal trial and to give the judge the chance to rehabilitate his rights. On the stage of preliminary preparation of the case the argument is not solved essentially. Only the procedural actions, foreseen by the law are held. On the preparatory stage may be held preparation session, but in this case, the supposition of suit confession by the defendant, or the sides' agreement, defendant denial of suit may not be justified. That is why, in case of absence of any side at the main trial, as the argument decision has turned to be impossible; it is not possible to pass the absent decision. The absent decision is the presumption for the side, which has lost the case with substantive point of view because of being absent. A decision in absentia is a supposition that the plaintiff refuses the suit in case he is absent, or the defendant has confessed the action, while his absence. As this supposition was not justified at the preparation trial, it is not possible to pass the decision at this stage and the essential discussion of the case should be set at the main trial.

Keywords: The principle of disposition, decision in absentia, absence of a party

Introduction

Decision in absentia is the decision passed against an absent side. Such decision is based on the supposition that at the main judicial sitting the plaintiff denied the suit and the defendant notified it. Every person has a right to go to law in order to defend his rights or freedom. According to the 1st part of the 2nd paragraph of the Civil Procedure Code, the juridical protection is enforceable for every person. The court will start trying a case with the application of that person, who applies for it in order to defend the interests, legally provided.

The main point of this principle should be divided into two parts and explained. Hence, in the first case, the plaintiff is pondered, who has a demand towards the defendant, he thinks, that the defendant has outraged the rights and the interests protected by law and he wants these rights to be urgently rehabilitated. For this he has saved some money, time, and work, to be present at the legal trial and to give the judge the chance to rehabilitate his rights.

On the stage of preliminary preparation of the case the argument is not solved essentially. Only the procedural actions, foreseen by the law are held. On the preparatory stage may be held preparation session, but in this case, the supposition of suit confession by the defendant, or the sides agreement, defendant denial of suit may not be justified. That is why, in case of absence of any side at the main trial, as the argument decision has turned to be impossible; it is not possible to pass the absent decision. The absent decision is the presumption for the side, which has lost the case with substantive point of view because of being absent. That is why the legislator indicates, that if the side, which was sent the message with the statute-established law, and he did not come at the preliminary and main trial, with the mediation of present side, the absent decision will be passed.

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A notion of decision in absentia

Decision in absentia is the decision, passed against absent side. Such decision is based on the supposition that at the main judicial sitting the plaintiff denied the suit, and the defendant notified it. Every person has a right to go to law in order to defend his rights or liberty. According to the 1st part of the 2nd paragraph of the Civil Procedure Code, the juridical protection is enforceable for every person. The court will start to try a case with the

application of that person, who applies for it in order to defend the interests, legally provided.

“A right – this is legally provided possible rules of conduct. It means that a person, who has this or that right, is able to use this one, to enjoy this right, but he is not able to use it. The essence of civil rights consists in the fact that this right is in his full order” (15.78).

“And in case of an ordinal decision, a decision in absentia is a procedural act, with the help of which a disposition decision happens. Herewith, a decision in absentia is the result of a case treatment and decision during the absence of one side” (33.145).

As T. Liluashvili explains, “A plaintiff, as an institution of the Civil Procedural Law is an application of a person towards the court about rights defense, to discuss the demand against the defendant and to pass his judgment” (16.271).

According to Sh. Kurdadze, “A suit is a procedural means of rights defense in case there is a substantive argument between the sides, i. e. when the right is infringed or it is deniable or it is a danger of its infringement” (28.425-426).

Kleimann differentiates two types of a suit: substantive and adjective ones (13.147).

M. Gurvish considers a suit to be an adjective institution which is connected to the material regulations (8.149). According to A. Davtyan’s implication, a suit is a mediation of suer of its legal protection (5.130).

In the Soviet Juridical literature the suit was differentiated according to substantive and adjective points of view [32.106]. “The parties start prosecuting a case under the law regularities on the basis of suit and demands. They determine the subject of litigation and if it is not legally specified differently, the parties are able to finish prosecution with an agreement; they can already use demand in refusal and confession way” (9.247-248).

“The principle of disposition gives the freedom to the parties in disposition of their material and procedural rights. The particular revealing of the principle of disposition is a plaintiff’s right – a rejection on his suit, the right of a defendant – to conclude a case with an agreement in the court and so on” (10.259-260).

“The notion of disposition comes from the Latin word “Disposition” which means the written order to the troops to start the struggle. In the Civil Procedure, this principle means that the court can discuss the case if the suit or application is registered, i.e. only after the court is applied in writing (14.52-54).

“The content of disposition principle contains legal powers which are connected to the material rights of the parties and the allodia of procedural means of protecting these rights” (29.90).

“The opportunity of a decision in absentia is an expression of disposition principle, as the parties themselves have chosen to rule the self-government of their will” (7.42).

“During the ruling condition of pleading principle the judge studies not the true materials of the case, but pays special attention to the factual situation – absence (31.42).

“A decision in absentia is a decision taken only on the basis of absence foundation, when the attention to factual conditions of the case is not attracted, and the party, who did not use the chance to rule his material and procedural rights, and to solve his claim himself” (11.42).

“The institution of a decision in absentia is an indivisible part of the Civil Procedural Law. Its utilization is based on some principles. For example, the first principle is to protect the interests and duties of the party that is conscientiously present at the legal procedures” (17).

On the preparation stage, it is possible to hold preparation session if the written materials give the judge the assumption that the parties may finish the case with agreement, the defendant confesses the suit, or denies it; also, if to the judge’s supposes that the interests of proper preparation of a case demand it.

According to T. Liluashvili, “We should expediently notify the change of improper party into the proper one on the preliminary preparation stage of the case” (18.121).

On the stage of preliminary preparation of the case, the argument is not solved essentially. Only the procedural actions foreseen by the law are held. The preparation session may be held on the preparatory stage, but in this case the supposition of suit confession by the defendant or the party’s agreement defendant’s denial of suit may not be justified. That is why in case of absence of any party at the main trial, the argument decision has turned out to be impossible; it is not possible to pass the absent decision.

“Participation of some persons in plaintiff’s side, defendant’s side, or in both sides in one case is called the procedural participation, or the subjective unification of actions. The participators on plaintiff’s side are called co-plaintiffs, and the defendant’s ones are called co-defendants” (19.136-137).

The suit may be presented by several plaintiffs or against several defendants. If the essence of the suit is a common right, the plaintiff’s claims implicate from the same basis or the claims are congenerous despite the basis and essence are congenerous or not. Participation of some persons in plaintiff’s side, defendant’s side, or in both sides in one case is called the

procedural participation, or the subjective unification of actions. The participation may be obligatory, or optional.

“The participation is compulsory if it is impossible to discuss the case without the participation of all subjects of this relationship according to the substantive correlation. The participation is admissible. If one of the co-participants came to the trial, for example, the plaintiff, the court should pass not absent, but an ordinary decision according to the case materials” (20.139-140).

“We deal with the compulsory co-participation when, for example, the argument deals with share impartation from the common property. During the compulsory co-participation, presence of one of the co-participants means presence of all co-participants of the claim. So, in this case, the court should pass not absent, but an ordinary decision according to the case materials” (21.163-164).

We have an optional co-participation in case, for example, some workers have demanded a salary from the administration. During this co-participation, in Professor T. Liluashvili’s point of view “if none of the co-participants of one party is present, then the court can pass an absent decision against all absent parties” (22.125). Shalva Kurdadze has the same opinion about this issue (30.850-851).

“In the practices there is a question raised whether the court is able to pass a decision in absentia during the optional (non-obligatory) co-participation if none of the participants is present or some of them are present. During this type of co-participation, if none of the co-participants is absent, the court can pass a decision in absentia against all absent sides” (23.142).

It is not accepted when the circumstances stated by the plaintiff partially prove its claim juridical. According Professor Liluashvili, at this time the court should pass the “decision – absent decision” (24.401-402).

The same opinion has the chairman of the Civil Case Chamber of Hans Supreme Court of Bremen, Doctor Hain Bioling. In the article “Basic Principles Processes, related to a Decision in Absentia Passed against the Defendant” which was published in Bremen in May 2008, dedicated to the memory of Tengiz Liluashvili (2).

In case the circumstances stated into the suit are partially proved, we consider that “a decision - a decision in absentia” pass is wrong, as according to the first part of the Article 182 of the Civil Procedural Code, “The plaintiff can unify some claims towards the same defendant, despite different basis or not”. Therefore, we have one suit. According to the Article 232¹ of the Civil Procedural Code, despite the reconcilable has inadequate reason, if the factual circumstances do not prove the plaintiff’s claim juridical, the court passes not a decision in absentia, but it designates the main session

about which the parties will be informed with the stated rule of the Articles 70-78 of this Code.

“A decision in absentia is passed temporarily”. This means that on the basis of the claim of the party who was absent at the trial and a decision in absentia was passed against him, the process can be prolonged (3).

The basis of passing of a decision in absentia is the supposition that the plaintiff refuses the claim in case he is absent, or the defendant confesses the factual circumstances stated in the suit with his absence. So, their coming to the trial with a delay scatters this supposition. Here, the party wanted to express his consideration against another party, but because of some facts he was late for the trial.

The late coming to the main trial has scattered the supposition about the factual circumstance on suit refusal. According to the second sentence of “B” paragraph of the first part of the Article 233 of the Civil Procedural Code, in case the party’s absence, it is impermissible to pass a decision in absentia if there were cases which could obstruct the party to come to the trial on time. So, in case of gravamen of the party who came late, the court should cancel a decision in absentia according to the “B” paragraph of the first part of the Article 233 and the Article 241 of Civil the Procedural Code and renew the case administration.

In the juridical literature and the court practice, the discretion is settled according to which, a decision in absentia is a penalty for the absent party on the trial session.

In T. Liluashvili’s opinion, “a decision in absentia is far from perfection, but it is useful because it is the only one efficient tool with which it is possible to fight against unconscionable side which tries to drawl the case. With a distinct point of view, it is a penalty for the unconscientiousness and an encouragement – for the conscientiousness” (25.393-394).

“The Civil Procedure Code considers the sanction to the absent party according to the Chapter “Default Judgment”. In particular, the first part of the Article 229 of the Civil Procedure Code deals with the possible outcomes of the case when the plaintiff fails to appear at the trial; while the first part of the Article 230 deals with the possible outcomes of the case when the defendant fails to appear without a reasonable excuse” (12.45).

The Supreme Court of Georgia also considers a decision in absentia as a sanction for the party who is absent at the trial. At the same time, it does not deny that the hearing on the defendant defaulted allows us to believe that he has lost interest in the counter suit against him (6).

Default judgment is derived directly from the disposition and adversariality principles. The optional principle lies in the fact that the party decides to lodge a complaint about the case could end in a settlement or reject the claim. Therefore, the plaintiff’s failure to appear at the main

hearing is not disrespect to the court, but the rejection of the assumption. His absence at the trial is never directed to procrastination of the case as he is interested in restoring rights to sue. That is why it is presumed a waiver claim by the plaintiff during his absence.

"The optional principle of the process, which is one of the fundamental civil substantive law principles - full reflection of the will of autonomy, means the freedom of the parties to dispose their own material as well as procedural rights" (26.84-85).

Adversarial principle lies in the fact that the defendant cannot deny or rebut the plaintiff's demands, suggestions and evidences. Besides, according to the disposition principle, the defendant has the right to confess the claim. Therefore, while failing to submit the counterclaim without a reasonable excuse, if the claim is legally justified by the facts of the case, the court makes a decision in absentia to satisfy the claim.

If the defendant does not appear on the main session, the factual circumstances indicated in the complaint are deemed approved. The provision is based on the assumption of the defendant as he could refute the plaintiff's requirement, consideration or assertion in accordance to the adversarial principle, but did not use this right. Accordingly, at this stage, disrespect towards the court as well as delay of the case is impossible as in case of legal justification of the claim, the court makes a decision in absentia on satisfying the claim.

According to the Article 201 of the Civil Procedure Code of Georgia, the defendant shall file a counterclaim. "Parties to civil proceedings have imposed legal obligations either before the court or each other. They are not obliged to appear in the court, deny the opposing party's statements and opinions, to recognize the facts of the requirements, submit petitions, etc." (1.145). "The parties shall bear no legal responsibility in the process as the procedural legislation does not consider the possibility of using state coercive measures for violating such a duty" (4.231).

"The right and obligation are inseparably linked with each other. The right is always in balance with the obligation: there is no right without duties and vice versa. This means that if someone does not fulfill his/her duties, he/she violates someone's rights. If we discuss procedural duties in this regard, we can conclude that there is no such duty in really, because when a party (whether it be the plaintiff or defendant) does not comply with procedural obligations, he/she does not violate anyone's right. Therefore, there is no legal mechanism which could ensure fulfillment of procedural duties by using the state coercive measure" (27.175-179).

In case the appeal is not submitted at the preliminary hearing or the defendant does not appear on the main court session, the defendant is not published but the claim is satisfied. Making decision in absentia is not

allowed if the party notifies the court shall notify that the case be discussed without his/her participation.

An appeal must include an indication whether the applicant wants to discuss the case to without oral hearing. The same should be indicated also in the appeal of the opposing party. Therefore, it is not allowed to make a decision in absentia in the Appellate Court. In the mentioned cases, the court should make a conventional decision according to the case materials.

Conclusion

Decision in absentia is the decision made against the absent party. Such decision is based on the supposition that the plaintiff who did not appear on the main court session denied the suit, and the defendant confessed the suit.

On the stage of preliminary preparation of the case the dispute is not solved essentially. Only the procedural actions, foreseen by the law are held. On the preparatory stage the preparation session may be held, but in this session, the supposition on the defendant's denial of the claim or confession of the claim by the defendant or the parties' agreement may not be justified. That is why, in case of absence of any party on the main trial, as it is impossible to solve the dispute essentially, it is not possible to make the decision in absentia.

Decision in absentia is the presumption for the party who lost the case because of being absent. That is why the legislator indicates that if the party who was sent the notification established by the law did not appear on the preliminary and main trials, the decision in absentia can be made on the basis of the solicitation of the present party.

Decision in absentia is a supposition that the plaintiff refuses the suit in case of his/her absence, or the defendant has confessed the claim while his/her absence. As this supposition was not justified at the preparation trial, it is not possible to make the decision in absentia at this stage and the essential discussion of the case should be set at the main trial.

Decision in absentia is a supposition (presumption) that the plaintiff refuses the suit in case he/she is absent or the defendant has confessed the factual circumstances given in the claim during his/her absence. In the very case, the claim will be satisfied only if the factual circumstances indicated in the claim juridically justify the plaintiff's claim. Otherwise, the court will refuse the plaintiff to satisfy him/her with a conventional decision.

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