PARTICULARITIES OF THE OPERATION PRINCIPLE OF COMPETITION IN THE PHASE OF APPEALS

Vahe Hovhannisyan[1]

According to the Article 6 of the RA Civil Procedure Code, civil proceedings are carried out on the basis of the competition and legal equality of the parties. The civil procedure includes both the appeal and cassation proceedings, hence the operation of the principle of competition and equality of rights of the parties is applied equally also on these stages of the procedure, but their application in this proceedings cannot be assimilated to the principles which are being realized during the examination of cases in a first instance court which is conditioned by the particularities of the procedural form of appeal being implemented in Armenia.

The contents of legal literature, the principle of competition is mostly being unveiled from the perspective of the evidentiary activity of the participating persons and the role of the court in that process. In particular, in civil procedure the principle of competition supposes that the persons participating in the case must have a full possibility to participate in the examination of the case, realize an evidentiary activity and present their position in the case[2].

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[1] Candidate of Legal Sciences, Docent of the Chair of Civil Procedure of the Yerevan State University. E-mail: law-vahe@mail.ru.

[2]Civil Procedure: Textbook / M.K. Treushnikova (Ed.), Moscow 2000, P. 58; Civil Procedural Law: Textbook (Shakaryan M.S., Ed.), Moscow, 2004, P. 54; Shishkina S.A. Competitiveness in Civil and arbitral proceedings. Moscow, 1997, pp. 23, 69-103; Reshetnikova I.V. On the Way from Investigation to Competition in Civil Process: Theoretical and Practical Problems of Reforming the Civil Process. Yekaterinburg, 1998, pp.73-85; Samsonov V.V. Competition in Civil Procedural Law. Ph.D. Dissertation. Saratov, 1999, pp. 6-19. [Гражданский процесс: Учебник / Под ред. М.К. Треушникова (автор главы - М.К. Треушников). М., 2000. С. 58. Гражданское процессуальное право: Учебник / Под ред. М.С. Шакарян. (автор главы А.Т. Боннер). 2004. М., С. 54. С.А. Шишкин Состязательность в гражданском и арбитражном судопроизводстве. М., 1997. С. 23, 96-103. И.В.Решетникова. Па пути от следствия к состязанию в гражданском процессе //Теоретические и прикладные проблемы реформы гражданской юрисдикции. Екатеринбург, 1998. С. 73-85. В.В. Самсонов. Состязательность в гражданском процессуальном праве: Автореф. дис. ...канд. юрид. наук. Саратов, 1999, С. 6-19].

The content of the competition in civil procedure can be revealed based on the analysis of the legal regulation of the evidence in civil procedure.

The systemic analysis of the norms of the Civil Procedure Code of the Republic of Armenia shows that the competitive procedure in the civil procedure of Armenia implies the following:

- the burden of proof lies with the participants of the case (Article 48 of the Civil Procedure Code),
- the court does not bear the obligation of proving but in the cases envisaged by law it is entitled to obtain evidence at its own initiative, for example, when the court designates an expert examination or, in exceptional cases, calls a witness and interrogates him or her (Article 60 of the Civil Procedure Code),
- the court is responsible for the proper implementation of the proceedings of a civil case, including the organization of the process of proving with the purpose of which it supports the participants of the case to obtain evidence (Article 49 of the Civil Procedure Code), as well as it decides upon the facts essential for the resolution of the case and subject to proof (Article 48(2) of the Civil Procedure Code),
- the court is obliged to provide the participants of the case with equal conditions for the evidential activity,
- the participant of the case are obliged to present evidence, but it is their right to participate in the examination of evidence (Article 49 and Article 28(1) of the Civil Procedure Code),
- the obligation of directly examining and evaluating the evidence bears the court (Article 53 of the Civil Procedure Code).

From the perspective of the study topic, first of all it is necessary to find out in which extent the provisions of the principle of competition are implemented in the stage of appeal. The fact that the appeal proceedings are carried out on the basis of the principle of competition clearly arises from the contents of Article 6 of the Civil Procedure Code, but it must also be mentioned that during the appeal, the competition has some particularities, which require a special attention.

It should be mentioned that in legal literature sometimes there

are discussions about the necessity of limiting the principle of competition in the phase of appeal, which is justified by the impossibility of presenting new evidence by the persons participating in the case as a consequence of which unequal conditions are created in the matter[3] of profiting from means of proving in a first instance court and in presenting counter-arguments.

We find that in civil procedure any limitation of the principle of competition is inadmissible.

It must be taken into account that in the phase of appeal, the principle of competition has a limited operation, and here we do not deal with limitations of competitive procedure. In its case law, the European Court referred to the contents of the law in case examination in the conditions of competition giving importance to the implementation of the right to a fair trial, establishing that the principle of competition is one of the main guarantees[4] of trial.

The European Court mentioned that the competitive procedure law supposes the possibility of the parties to learn about the materials, evidence and remarks of the case and comment them in criminal and civil proceedings. According to the European Court, the right to a fair trial at the same time supposes a competitive nature of the procedure, which provides the principal possibility[5] of the parties to be informed about all the evidence or objections presented in the case both in criminal and civil procedures and to present their own position about them.

In this regard sufficient and equal conditions have been created in the appeals procedure to provide for the realization of the right to learn about the materials of the case and present their own position thereon. In particular, according to Article 209(1) of the RA Civil

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[3] Bazarov B. In Appellate proceedings the Principle of Competition May be Infringed. // Russian Justice. 2002, # 3, P. 42. [Базаров Б., При апелляционном производстве возможно нарушение принципа состязательности // Российская юстиция. 2002. № 3. p. 42].

[4] See the case of Kamasinski v. Austria, judgment, December 19, 1989, Point 102.

[5] See the case of Morel v. France, judgment, June 6, 2000, Point 27, Lobo Machado v. Portugal, judgment, September 1, 1996 and January 22, 1996, Point 31, case of Ruiz-Mateos v. Spain, judgment, June 23, 1993, Point 63.

Procedure Code, the appeal shall be properly filed with the Court of Appeal and sent to the persons participating in the case, and according to Article 212 of the Civil Procedure Code the person participating in the case shall, within a period of two weeks after receiving the copy of the appeal, have the right to file a response to the Court of Appeal and other persons participating in the case.

That is to say the law of procedure provides the persons participating in the case at least with the minimum conditions of learning about the appeal and the response of the appeal.

Furthermore, the competition in the appeal proceedings supposes that the appellant bears the obligation to provide substantiations of the violations of the norms of substantive or procedural law mentioned in the appeal, and the person participating in the case, who presented a response, bears the obligation of justifying his or her own standpoint on the grounds and substantiations of the appeal (Article 210(1)(5) and Article 212(2)(4) of the Civil Procedure Code). Thus, the persons participating in the case also bear negative consequences for not substantiating their own standpoint.

In the phase of appeals, the competition does not suggest the claims, the possibility of presenting evidence justifying the factual side of the case, and the persons participating in the case here do not bear the obligation of presenting evidence. In particular, by virtue of Article 219(2) of the Civil Procedure Code, the Court of Appeals shall have no right to accept new evidence, except if during the examination of the case the evidence has not been submitted in the Court of First Instance by reasons beyond the control of the parties. In this case the Court of Appeals just examines the evidence from the perspective of having essential significance for the case solution, and has no jurisdiction to confirm a new fact based on it.

It follows that in the appeals proceedings the parties do not bear the obligation of proving the facts which they invoked in a lower judicial instance but they are obliged to justify only the violations of norms of substantive or procedural law. Herewith, where the person participating in the case objects the fact confirmed by the first

instance court, the Court of Appeals simply checks the legitimacy and rightfulness of the lower instance conclusions concerning the confirmation of the fact.

Consequently, the competitive procedure in the phase of appeals supposes not the obligation of proving the facts underlying the own claims and objections but the obligation of substantiating the circumstances (violations of the norms of the law) underlying the appeal and the response of appeal.

It should be mentioned that some domestic authors criticized the Article 218(2) of the Civil Procedure Code mentioning that the procedural legislation of the Republic of Armenia does not contain enough proceeding guarantees for providing the right to examine the case in competitive conditions[6]. Thus, according to the above-mentioned article, in case of a need to give explanations, the person having lodged the appeal, as well as the persons involved in the case, may be summoned to the sitting of the Court of Appeal, who shall be in due manner notified of the time and venue of the sitting. In particular, during the proceedings of a civil case in the civil court of appeals of Armenia, in case of calling one of the procedure participants to the court to give explanations, the presence of the other party is not provided, which does not let the given party present its remark concerning what the other party told.

We find that the mentioned point of view cannot be considered as fair. First of all, in order to provide the conditions of competitive procedure, the legislation established a procedural mechanism for getting acquainted with the appeal and its response, and the court of appeals is empowered just with the positive obligation of providing the right of the persons participating in the case to learn about the materials of the case, to be informed about the venue and time of the court session.

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[6] Ter-Vardanuan H.M. The Constitutional Foundations of Fair Trial in Armenia. Ph.D. Dissertation. 2009, pp. 111-114. [Տեր-Վարդանյան Հ.Մ., Արդար դատաքննության իրավունքի սահմանդրաիրավական հիմքերը Հայաստանի Հանրապետությունում, ի.գ.թ. գիտական աստիճանի հայցման ատենախոսություն, Երևան, 2009, էջ 111-114]

That is to say the legislation stipulates a clear procedural mechanism for getting acquainted with the contents of the appeal and its response (if it was presented), and the Court of Appeal bears the obligation of notifying the persons participating in the case about the venue and time of the court session. Consequently, each party decides on its own upon the question of using their rights by discretion, at the same time bearing all the negative consequences of not using them.

If the person participating in the case is called to the court session to give explanations and the Court of Appeal bears the obligation of ensuring the presence of the other persons participating in the case, the logic and dispositivity's basic provisions of the civil procedure legislation will be violated. In our opinion, the reinforcement of the right of the persons participating in the case to learn about the contents of the appellate appeal and its response and to be present in the examination of the appeal (in the court session), which is accompanied with the positive obligation of the Court of Appeal to provide conditions for exercising that right, is sufficient. And the question about how and in what extent the persons participating in the case will use their rights is just the matter of their discretion. It is not random that there is a provision fixed in the next paragraph of the discussed article according to which the fact that the persons participating in the case are not present cannot be an obstacle for the case examination.

Herewith, from Article 218(2) it arises that in case of a need to give explanations the Court of Appeals may summon both the person who lodged the appeal and the other persons participating in the case. The obligation of the Court of Appeal to notify the persons participating in the case of the venue and time of the court sitting itself implies the provision of the conditions for exercising the right of the persons involved in the case to be present at the court sitting.

In the phase of appeal, the Court of Cassation of the Republic of Armenia[7] expressed its standpoint about providing for the principles

[7] See Decision of the Court of Cassation YeAQD/1516/02/08 of July 24, 2009 with respect to a civil case.

of competition and legal equality of the parties.

In particular as a result of a systematic analysis of Article 212(1) (response to the appeal), Article 217(4) (in the Court of Appeal, during the examination of the case, the rapporteur judge presents the arguments of the appeal and those of the response submitted against the appeal), Article 220(2)(4) (the decision of the court of appeal must contain an indication of the grounds for and substantiations of the appeal, the demand of the person having lodged the appeal, in case of availability of a response to the appeal also the standpoint and substantiations of the person having submitted the response) of the Civil Procedure Code of the Republic of Armenia, the Court of Cassation of the Republic of Armenia found that by establishing the right of the persons involved in the case to lodge an appeal, the legislator reinforced the exercise of the principle of competition and legal equality. At the same time the Court of Cassation defined that during the case examination the principles of competitive procedure should be kept.

In addition, … in legal literature it is considered as violation of competitive procedure if according to the civil procedure code regulating the legal relations of lodging appeals, the person participating in the case has the possibility to comment and express his or her position only about the grounds and justifications presented in the appeal, and what concerns the arguments mentioned in the response of the appeal, then there is no[8] possibility of commenting envisaged in the legislation for the person who lodged the appeal or for the other persons participating in the case.

In this regard, it was suggested to stipulate a legal regulation in the procedural legislation of Armenia by establishing a relevant provision or through a relevant commentary in the judicial practice according to which during the review proceedings of a judicial act no

[8] Ter-Vardanuan H.M. The Constitutional Foundations of Fair Trial in Armenia. Ph.D. Dissertation. 2009, pp. 111-114. [Տեր-Վարդանյան Հ.Մ., Արդար դատաքննության իրավունքի սահմանադրաիրավական հիմքերը Հայաստանի Հանրապետությունում, ի.գ.թ. գիտական աստիճանի հայցման ատենախոսություն, Երևան, 2009, էջ 111-114].

provision reinforcing the rights and obligations of the participants can be commented as a limitation of the possibility to present the comments of the latter concerning the remarks of the appellant's appeal or the proceedings participants which were made in oral or written form.

In our opinion the law of procedure is already based on this starting point. The grounds of the appeal are the violations of the substantive and procedural norms which were made during the case examination in the first instance court, the new or newly emerged circumstances. The necessity of providing the conditions of equal and competitive procedure orders that the other persons participating in the case also have an equal possibility of expressing their position concerning the influence of the grounds of appellant appeals and justifications, that is to say on the breach of procedural law norms and on the outcome of the case. Consequently, the basic provisions of equal and competitive procedure can be considered as kept.

Herewith, the law of procedure clearly established that both the appeal and the response to the appeal are presented in a written form. What concerns the remarks and explanations which are made orally during the court session, the rules of Article 28 of the Civil Procedure Code apply, which are general for all the stages of civil procedure and establish that the persons participating in the case may present their arguments concerning the questions which arise during the case examination as well as they may object against the arguments of other persons.

The requirement of examining the case in conditions of equality as it is fixed in RA Constitution is obligatory for all the stages of the procedure. According to the case law of the European Court, the principle of equality between the weapons (procedural means) is an element[9] of a broader notion which includes also the fundamental principles of competitive proceedings.

As we see, in the case law of the European Court, the requirements of case examination in equal conditions and competitive procedure are considered in the same context; moreover,

[9] See the case of Brandstetter v. Austria, judgment, August 22, 1991, Point 66.

the legal equality itself supposes the own position, including the possibility of presenting the evidence justifying it, which is one of the basic provisions of the principle of competition. The European Court mentioned that the principle of weapon equality in the sense of the "fair balance" between the parties requires that each party has the possibility to present its position in such conditions which will not put the latter into an essentially unfavorable or advantageous state[10].

Consequently, the legal equality of the parties supposes the possibility of exercising the institutes of competitive procedure in fair, effective and equal conditions. For example, sharing the burden of proof between the persons participating in the case in equal conditions and in correspondence with the rules of competition which in the phase of appeal is distinguished from the rules of proving which are applied in the first instance court and supposes only the obligation of justifying the grounds for the appeal, the response to the appeal and the positions existing in them.

In the practice of the RA Court of Cassation, the principles of competition and legal equality between the parties is also considered in a correlation but, in our opinion, legal equality is a broader notion and, as in its contents, it includes not only the possibility of the persons participating in the case to justify their own position and the possibility of proving equally but it includes also basic provisions of establishing equal procedural rights and obligations for the latter, providing equal conditions for exercising them.

In one of its decisions the RA Court of Cassation mentioned that the principle of legal equality between the parties in the procedure, in the sense of "fair balance" between the parties, is one of the basic elements of the fair judicial examination guaranteed by Article 6(1) of the Convention and it requires that each party be provided with a reasonable possibility to present the case in such conditions which will not put him in a less favorable state unlike the other party (the decision of the European Court in the case Ancler v. Switzerland[11]).

[10] See the case of Werner v. Austria, judgment, November 24, 1997, Point 63.
[11] See the Decision of Court of Cassation YeAQD/1516/02/08 of July 24, 2009 with respect to a civil case.

Herewith, it is necessary to differentiate the procedural and factual equality of the parties. The legal equality is manifested in giving equal possibilities to the parties (rights and obligations) and in providing them, but in what extent each party will use those possibilities is another question. As mentions G. L. Osokina: "If the person participating in the case uses the possibility of acting in the appeal through an advocate, but the other party refuses the service of an advocate by some material or other considerations, then it is inadmissible to talk about the violation of the principle of procedural-legal equality just on the grounds that the interests of one of them were defended by an advocate but the ones of the other were not. The legislation guarantees for everyone the possibility of acting in the procedure through representative (principle of legal equality), and exercising this possibility directly depends on the will's expression of the parties (the principle of dispositivity[12])".

In professional literature there is a point of view according to which in market economy each party of the procedure, taking into account his financial state, can participate in the case with or without a representative. Consequently, it is more appropriate to give the court the necessary possibilities to legislatively discover the truth of the case.

In this sense, the civil procedure must be built on the principle of competition but it should be filled by the right of the court to lead the procedure and in case of necessity also interfere in the competition. Hence, it is suggested to carry out the civil procedure including the appeal, in such a combination of competitive and investigatory procedural basic provisions where will predominate the elements of competition, but the court will meanwhile be empowered by such authorities which will be aimed to the support of evidentiary activity, the provision of legal equality and will provide necessary

[12] Osokina G.L. Civil Process. General Part/ Moscow, 2003, pp.145-146.[Осокина Г.Л., Гражданский процесс. Общая часть / Г.Л, Осокина.- М.: Юристъ, 2003, С.145-146].

conditions for discovering the objective truth[13].

We find that the mentioned point of view must not be considered as justified as in civil procedure the principle of competition supposes not the discovery of the objective truth but the discovery of judicial truth. As to the support to the evidentiary activity of the persons participating in the case, the provision of legal equality for competition, the court is empowered by sufficient procedural means envisaged by the RA legislation.

Moreover, one must talk about the objective or judicial truth in the phase of appeal with a strict derogation. In legal literature the argumentative necessity of reaching the legal truth is quite justified in competitive procedure conditions, meanwhile mentioning that the competition itself does not suppose the absence of objective or judicial truth and the procedure must be carried out by the precise or, in case of impossibility considering the legislative appropriation, by the possible confirmation way[14] of the circumstances which have essential significance for the case solution.

Disagreeing with that idea, it should be mentioned that the RA Civil procedure code clearly establishes the rules of bearing the negative consequences of sharing the burden of proof between the persons participating in the case carried out in competitive procedure, including the ones of the facts which remain disputable after the examination of the evidence.

The competitive procedure supposes the confirmation of those factual circumstances which are made on the basis of the conclusion

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[13] Chistyakova O.P. The Problem of Judicial Activism in the Civil Proceedings. Resume of Ph.D. Dissertation. Moscow, 1997, P. 6; Ryazanovskyi V.A. Unity of the Process. Moscow, 1996, pp. 66-67.[Чистякова О.П., Проблема активности суда в гражданском процессе РФ, Автореф. дис. ...канд. юрид. наук. М., 1997. С. 6. Рязановский В.А., Единство процесса. М., 1996. С. 66-67].

[14] Samsonov V.V. Competition in Civil Procedural Law. Ph.D. Dissertation. Saratov, 1999, P. 7; Krylev S.V. Understanding and Guarantees of Principle of Objective Truth. Ph.D. Dissertation. Collection of works (Shakaryan M.S., ed.), Part 51, Moscow 1977, P. 7.]Самсонов В.В., Состязательность в гражданском процессуальном праве, Автореф. дис. ...канд. юрид. наук. Саратов, 1999. С. 7. СВ. Курылев. Понятие и гарантии принципа объективной истины // Труды ВЮЗИ / Под ред. М.С. Шакарян. Том 51. М., 1977. С. 7].

concerning the admissibility, credibility and relevance of the assessment of the evidence investigation solely in the court session, which itself composes the contents of judicial truth.

Herewith, the due confirmation of factual circumstances of the case, on their basis, in accordance with the legislation, determining the material rights and obligations of the persons participating in the case is aimed at the realization of the goals of civil procedure such as the complete provision of the right to judicial defense of the persons, the due and timely examination and resolving of civil cases, that is to say the exercise of the principle of judicial economy, which first supposes the due and timely solution[15] of civil cases by court which is carried out through the most efficient use of labor resources, through the rational use of judicial means of protection of subjective rights and legitimate interests.

Consequently, the discovery of truth and the due confirmation of the factual circumstances of the case in competitive procedure conditions are guarantees of the principle of judicial economy or frugality.

The court of appeals does not directly investigate the evidence, hence, the principle of directness does not have a classic sense in this stage. In particular, during the examination of the appeal, the Court of Appeal takes as bases the facts which are confirmed by the Court of First Instance, except for the cases when in the appeal those facts are being objected (Article 219(3) of the Civil Procedure Code).

In this case the Court of Appeals checks the rightness of the conclusions made by the Court of First Instance as a result of studying and assessing the evidence, and in the cases envisaged by law also confirms new facts or considers a fact as non-confirmed based on the pieces of evidence investigated by the lower instance court (Article 219(3) and Article 219(4) of the Civil Procedure

[15] Tikhonovich V.V. On the Issue of Procedural Economy in Soviet Civil Procedural Law // Moscow, 1977, P.15; Sheglov V.P. Soviet Civil Procedural Law. Lectures for Students. Tomsk, 1976, P. 41. [Тихонович В.В., К вопросу о принципе процессуальной экономии в советском гражданском процессуальном праве // Труды. 1977. Т. 51. С. 15. Щеглов В.П., Советское гражданское процессуальное право. Лекции для студентов. Томск, 1976. С. 41].

Code).

From the logic of the law it arises that in the court session the court of appeal does not directly study the evidence, that is to say it does not interrogate the witnesses, the persons participating in the case, does not examine the material evidence, etc. And in the cases where by virtue of Article 219(1) of the Civil Procedure Code the Court of Appeal accepts new evidence, then studies and assesses the evidence from the perspective of its essential significance for resolving the case and without confirming a new fact on its basis, overturns the judicial act by remitting the case to the lower instance for new examination.

We find that it will be even more logical to establish a positive obligation of directly examining the evidence existing in the case, in case the court of appeal confirms a new fact, if the court has reasonable doubts regarding the adherence to the rules of examining the evidence by the first instance court.

From the contents of point 1 of the Recommendation No. R(95)5 of February 7, 1995 of the Committee of Ministers of the Council of Europe concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases arises that the Contracting States are obliged to provide the right of the persons participating in the case to the fair judicial examination in the instances which exercise a judicial review.

It follows that the principles of the contents of fair judicial examination law's organic and functional elements are applicable in the phase of appeal, that is to say the principle providing the rights to the case examination by a court created based on the law, the public case examination by the court, the court availability which are organizational in their nature, and the principles providing the rights to a case examination in equal conditions between the parties, a competitive examination in a reasonable period and the rights to receive a justified judicial act which are functional in their nature, have some particularities of being exercised in the appellant proceedings and foreclose the procedural form of judicial acts'

appeal.

Just the principles of dispositivity, competition and judicial-legal equality of the parties, with some reservations also the directness of case examination, are aimed at the provision[16] of the functional elements of the law of trial.

Generalizing the aforesaid, we can state that:

- ***In the stage of appeal the competitive procedure supposes not proving the facts underlying the own claims and objections, but the obligation of justifying the circumstances (violations of the norms of law) underlying the appeal and the response of the appeal;***
- ***We find that it will be even more logical to establish a positive obligation of directly studying the evidence existing in the case, in case the court of appeals confirms a new fact, if the court has reasonable doubts regarding adhering to the rules of examining the evidence by the first instance court.***

[16] Philip Leach, Taking a Case of the European Court of Human Rights, Second Edition, Oxford University Press, 2005, P. 256, Case of Beer v. Austria, judgment, February 6, 2001, Point 18, Case of Ruiz-Mateos v. Spain, judgment, June 23, 1993, Point 63, Case of Helle v. Finland, judgment, December 19, 1997, Point 60.