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Principles of competitiveness and objective truth as the fundamental sources of the enforcement practice

Abstract: It is examined a specific role of the constitutional principle of competitiveness in court proceedings. The main idea of the competitiveness is – a charging the burden of proof to participating parties on a parity basis.

Competitiveness is considered as competition participating in a case of the persons, when independent actions of ones persons are effectively limited capability of others to affect one-sided on the result of a court proceedings upon presence of active role of a court, which is authorized with functions to lead the process.

Keywords: competitiveness principle; court proceedings; enforcement practice; court; objective truth; proofs.

The Constitution of the RF (art. 18, 46) establishes not only the right to juridical defense of the rights and freedoms, but, and as the Convention on protection human rights and the main freedoms (on 1950, art. 6) (12), it foresees a number of norms guarantying the right to a fair trial: everyone is equal before law and court; no one can be deprived of his right to be his case examined in the court and the judge to jurisdiction of which it is related by the law; the right to qualified legal assistance; presumption of innocence; nobody can be twice convicted for the same crime; no one is obliges to testify against himself, his spouse and close relatives; the rights of the victims from crimes and abuses of the authorities are protected by the law; the judges are independent and are subordinated only to the Constitution and Federal law; court proceeding carries out on a base of the competitiveness and equal rights of the parties (art. 19, 47-52, 120, 123 of the Constitution of the RF).

The central place in a system of ensuring of fair justice is a principle of the

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competitiveness. Constitutional attachment of this principle (art. 123 of the Constitution of RF) have been in much predetermined its special role in the court process and influence on the legal proceeding rules. The main idea of considered principle is parity placing the burden of proving to the participants of a case. It orders to the participants of the process to assert his right through presentation of the proofs, to take part in their examination, and also to state his ideas on any issues considered the court session.

A manifestation of the competitiveness is considered to be any actions by the parties, which are met their material-legal and (or) procedural interests. So, the European Court on Human Rights in its Resolution from 15 October 2002 on the case "Canyette vs. Spain" (2, p. 11) recognized the complaint of Mrs. Canete de Goni as admissible on the base of §1 of art. 6 of the Convention on protection of the rights a man and the main freedoms in connection with that complainant did not receive call to a court as interested party and the result of the court process had unfavourable reflected on the her interests.

The North-West District of the Federal Arbitration Court by its decision from 17 June 2003 reversed the decision of the Arbitration Court of Vologda District from 11 December 2002 on the case no. A13-8087/02-03 on the claim of the "Severostal" OJSC to the "Trade House "Kemerovo-koks" about collection of debt, pointed out in the court rule on violation by the court of first instance the requirements of the part 4 of article 137 Administrative-procedural Code (APC) of the RF (4). Resolving the dispute and making a decision in absence of the defendant (which had not notified about time and place of court session), the court of the first instance violated requirements of the article 8 and 9 of APC of RF about observance of a principle of the competitiveness and equal rights of the parties in the legal proceeding. Therefore, the defendant was deprived an opportunity to use his procedural rights provided by the article 41 of the APC.

With adoption in Russian Federation of the new criminal, civil, arbitration procedural legislation the competitive process presents itself the process, in which the interested persons are active in protection of their rights and interests from the beginning up to the end of the court activity. Materials necessary for legal and fair

resolving of a case are formed by the parties and other individuals participating in the case; powers of the court are in examination and evaluation of the proofs, in subsequent application of the norms and making of enforcement act.

So, according to article 9 of the APC of RF the competitiveness can be considered as competition the individuals, who take part in a case, when the independent actions of the ones participants effectively restrict capability of others in one-side order to affect on result of the court proceeding upon presence of an active role of the court.

As a matter of fact, such initial provisions are fixed in article 15 of the CPC of RF: the functions of a prosecution, defense and resolving of criminal case are separated from each other and cannot be charged on the same bodies or the official; the parties have the equal procedural rights to implement their functions; the court takes a leading position in the process and it is not the body of criminal prosecution, and acts neither on the side of prosecution nor defense.

An effect of a principle of the competitiveness is not limited by only a sphere of proving of the circumstances, on which the parties are referred in substantiation of their demands and objections. Apart from providing of the court by the evidentiary materials, the competitiveness includes also polemics of the arguments. This side of the competitiveness had been yet reflected in the Statutes of Civil Procedure 1864 (read further-SCP) (13, p. 1-174). Article 339 of the SCP foresaw that “decision of the court should be based on the documents and other written acts submitted by the parties and also on the arguments explained in verbal competition”. Articles 361 and 365 of the SCP had regulated an order “verbal competition”, which was managed by a chairman of the court; he offered the questions to the parties for completed explanation of a case and had demanded on “positive explanations from a party, which expressed unclear and indefinitely”. According to this law the court made its decision only on the evidences “submitted by the litigators”.

In addition, the procedural competition should not be by a chaotic fight of the parties; first of all, this is an ordered process. Therefore, procedural normative acts of the states regulate in the details the process and order of the court proceedings. So, in §2 of the article 12 of the Civil Procedural Code of the RF a lawmaker indicates that

keeping an impendence, objectiveness and impartiality the court: exercises leadership of the process; explains to the individuals of the case their rights and obligations; notifies about consequences of committing or non-committing of the procedural actions; assists of the participants of the process in realization of their rights; creates the conditions for detailed and completion examination of the proofs, establishing of the actual circumstances and correct application of the legislation during examination and resolving of the civil cases.

Competition in the process is possible between the equal parties. In this essence, a principle of the procedural equality of the parties is necessary premise of a principle of the competitiveness. It is actually, they are mutually conditioned and interlinked so closely that many sources say about their aggregate. So, part 3 of article 123 of the Constitution of RF establishes that "Court proceeding carries out on the base on the competitiveness and equality of the parties", part 4 of article 15 of the Criminal Procedural Code of RF says: "The Sides of prosecution and defense are equal before the court". Nevertheless, each of the indicated principles (competitiveness and equality) has its certain content. The European Court considers the equality of the parties as independent principle and determines it as the part of right of Community (15, p. 162). In new edition of the APC of RF a principle of the competitiveness (art. 9) and principle of the equality of the sides are divided.

As matter of fact, the constitutional requirement about the equality of the parties became by a foundation stone during performance of the juridical reform in sphere of the procedural legislation. The equality of the parties is always fixed as in civil so and in criminal-procedural legislation, but in spite of formal declaration, the law noted some difference when spoken about a prosecutor. So, an appeal of a defense to the higher court had a form of the complaint, but the appeal of a prosecutor had protest. The prosecutor brought the protest not only in criminal, but in civil process. The prosecutor taking part in the one side of the civil process has the advantageous in obtaining and submitting to the court necessary proofs in compare with the other side. In the light of the Convention on protection of human rights and the principle freedoms and the legal positions of the European Court stood up an issue about

changes of the legal status of a prosecutor in the civil process and reduction of the cases of his participation in the process as the side (7, p. 110).

Currently, in the norms of the right, which regulating an order of production, appearing, for instance, from administrative and other public legal relations are fixed the particularities of implementing of the principle of the competitiveness. The law (ex. article 52 of APC of RF) takes into account initial inequality of the subjects of legal relations, when the one of the participants is the state in face of its bodies or institutions, and other - a private person (citizen or organization). The state possesses with considerable capabilities to protect its rights and legal interests. Therefore, the court should execute its powerful functions with purpose to protect a weak side of the process (1, p. 68).

As for the criminal process, the CPC of RF has foreseen mandatory participation in court proceeding as a prosecutor so and a defender and provided them with equal opportunities to protect their positions in the court (art. 15 of the CPC of RF).Part 3 of the indicated article specially emphasizes that the court is not an institution of prosecution, does not participate on the side of prosecution or defense. The court creates necessary conditions to execute by the parties their procedural obligations and fulfillment of provided by them rights.

Legal proceeding does not limited with the stage of court proceeding in the court of first instance. Procedural interests of the process participants are lasted on consequence court stages (submission of the complaints, protests, participation in appeal, cassation and supervising productions). This point has found its fixation applicably to the criminal process in resolution of the Constitution Court of RF from 14 February 2000 no. 2-P (9), where indicated that the competitiveness principle is spread at all stages of the criminal process including and supervising instance.

An issue about the principle of competitiveness of the court proceeding was examined by the European Court on the case “APBP Company vs. France” (3, p. 22). In its Decision from 21 March 2002 the Court indicated that the decision of the State Council of France about the case examination in merits without sending of the case to the inferior court for new examination according to the complaint of APBP Company was not a violation of the competitiveness principle. The arguments of a complainant

that the State Council did not rehear the opinions of the complainant were not accepted by the European Court.

Establishment of the truth in a court discussion is charged on the court. The court should manage with a process on all its stages. It is not admissible to reduce its role to a taciturn watcher for the sides' fight and pronouncement of the winner, to performing of only the technical functions on providing of the order at court session. For the court should be reserved the powers on active examination the proofs of a case submitted by the parties. The court should not be charged with the obligations on collections of additional evidences, ex. a guilt of convicted, or removal of the gaps of preliminary investigation. The powers on execution of the actions on the court initiative should be the right, but not its obligations. One of the tasks of an enforcement body in a court process has to be providing of proper conditions for realization the rights of the parties on presentation of the proofs and their fully examination in a court session. Plenum of the Supreme Court in its decision from 31 October 1985 no. 8 took attention of the courts on that "owing to the constitutional provision about implementation legal proceeding on the base of competitiveness and equality of the parties (p.3 of art. 123 of Constitution of Russian Federation) on each case the court provides the right's equality of the participants of court proceeding on presentation and examination of the proofs and submitted petitions. Upon examination of the civil cases it should proceed from the evidences submitted by a plaintiff and defendant. In addition, the court can offer to the parties to present additional proofs. In case of necessity, with considering of health, age and other circumstances (without of which it cannot properly to examine a case), on petition of the parties the court makes the measure to reclaim such evidences" (10).

In turn, competitive process is built on principle "the true is born in a dispute". Each party informs to the court about the circumstance, which are advantageous to it. In result of a legal proceeding the court obtains sufficiently full and objective picture of the parties' mutual relations, committed crime etc. Therefore, with proper and efficient organization of legal proceeding by the court the principles of competitiveness and objective truth are complemented of one another.

Establishing of the truth on a case is one of the main tasks of activity of the subjects of enforcement practice. The principle of objective truth is put in the concept of justice as the court of lawful (8, p. 77).

An appeal of a citizen or legal entity to the court for protection of violated right is an aspiration to receive an official recognition of claims to each other. The court in order to recognize is subjected to confirmation and protection the right belonging to anyone should be convinced in that.

Unfortunately, there is not a direct fixation of the principle of objective truth in the procedural legislation of Russia. Nevertheless, this circumstance is not allowed to do categorical conclusion that a lawmaker has refused from the principle of subjective truth in civil and criminal process. Principle of detailed and objective examination of the circumstances having significance for a case follows from a content of the procedural right, the goal of which is a defense of the rights and legal interests of the individuals and organizations suffered from the crimes. The bodies of preliminary investigation and prosecutor are obliged to make the measure that provided by the law in order to exposure of the crimes since a criminal activity of participants of these crimes violate the mentioned rights and legal interests. Article 2 of Civil Procedural Code of RF secures the main tasks of the civil proceeding including proper and timely examination and resolving of the civil cases with purpose of protection violated or contested rights and guarded by the law the interests of citizens and organizations. It is impossible without clear establishing of the juridical facts on the base of which are appeared the material rights and obligations.

Article 20 of the CPC of RF establishes that the court, prosecutor, investigator and inquirer are obliged to make all provided by the law measures for detailed, fully and objective consideration of the circumstances of a case. They do not have the right to shift the obligations of proving on an accused person.

In compliance with article 15 of the Civil Procedural Code of RF the legitimacy, reasonableness and motivation are the main requirements to the decisions and rules adopted by the Arbitration court. Article 270 of the Civil Procedural Code of RF indicates that the court verdict can be recognized reasonableness and motivated if the circumstances are fully clarified and proved and the conclusions of the court

corresponds of these circumstances. Violation of indicated requirements is caused of a repeal of the verdict. So, with decision of Appeal instance of the Arbitration court of Vologda District was repealed a decision of the first instance court from 22 July 2003 on the case number A13-2223/03-20 (5).

Establishing of the truth on a case is the necessary term to make fair decision. Therefore, it is necessary to explain to the participants of the case their rights and obligations, including a burden of proving on the stage of preparation to the court proceeding (art. 35, 55 of the Civil Procedural Code, art. 41, 65 of APC). During the process the participants have to have the conditions for detailed and fully examination of the proofs and establishing actual circumstances (art. 12 and 15 of the Civil Procedural Code).

According to effective procedural norms, in Russian Federation the proofs are presented, expert examination is assigned and witnesses are called on the initiative of individuals who participate in a case. On the common rule, the court does not collect the evidences, but it can assist in gathering of them for interested persons. In addition, in the cases foreseen by the law, a collection of the proofs can be also carried out by the court independent on the petitions of the interested individuals (ex. p. 3 of art. 57 of the Civil Procedural Code).

As the guarantee of establishing of the truth it can indicate on legislative fixing of a list of the admissible proofs (p. 2 of art. 64 of APC of RF), the right of a court to resume examination of the evidence on its initiative (p.1 of art. 165 and p.3 of art 168 of APC), an opportunity of repeal of a court verdict due to its groundlessness (art. 328, 361, 390 of the Civil Procedural Code).

Court evaluates not only relatedness and admissibility of evidence, but also veracity of each proof, its correspondence to the reality. So, article 4 of the Federal law from 8 January 1998 no. 6-FZ “On insolvency (bankruptcy)” (14) had established that in order to include of an applicant to a registry of the creditors is sufficient to recognize a debt by the debtor himself.

The requirement of reliability of the written proofs additionally is stipulated in article 71 of the Civil Procedural Code and article 75 of APC. Falsification of the evidence is the ground to exclude his from a list of proofs (art. 161 of APC). For the

obvious conclusion (report), deliberately falsified evidence and deliberately wrong translation correspondently an expert, witness and in translator bear criminal responsibility, and the case is subjected to reviewing in compliance with newly appeared circumstances. In conformity with article 70 of APC, the Arbitration Court does not accept recognition of the circumstances by the party if it does not possesses with the evidence giving the grounds to believe that the recognition by the party indicted circumstances had made with purpose to hide certain facts. The court cannot consider the fact as proved, which is confirmed only with a copy of the document or other written proof if an original document is lost or is not passed to the court, and copies of this document submitted by the individuals are not identical between each other and it impossible to establish an actual content of the original with help of other proofs (art. 71 of the Civil Procedural Code). The data submitted by a witness is not accepted as the evidence if he could not indicate a source of this information (art. 69 of APC).

Enumerated norms are definitely directed the court in order to establish the actual circumstances of each examined case, and is not limited with formal analysis of the proofs presented by the sides.

Some lawyers-practitioners believe that placing duties on the court to establish objective truth out of dependence on activity of the arguing parties essentially belittles of the competitiveness of the court process and finally, contradicts to article 123 of the Constitution of RF (11, p. 31-34). According to their opinion, confrontation looses its activity between two parties if the result of a process depends on the court, but not the parties themselves.

It cannot be agreed with this opinion. In any case, neither low activity of the sides in a process nor insufficient of proofs on the case does not give to the court then right to evade an examination of a case in merits (ex. art. 220 and 222 of the Civil Procedural Code, art. 148 and 150 of the APC). Court has to strive for establishing the actual circumstances of a case but only in that level, in which this is allowed by the individuals participating in this case.

In order to accomplish the justice the case's conclusions of the court should be based on undoubtedly established facts. Violation of a principle of the objective truth

is caused wrong application of the law, recognition by the court non-existed debt, declaration a legal entity insolvent (bankrupt) or assignment to a guilty of punishment not corresponding to a severity of the offense, and at worst a conviction of non-guilty which contradicts to the concept of the justice. Part 4 of the Decision of the Supreme Court's Plenum from 29 April 1996 "On a court verdict" was pointed that recognition of the convicted his guilt, if it is not confirmed with total combination of the proofs collected on the case and examined on the court session, cannot be the base for decision a verdict of guilty (6, p. 382).

Evaluating submitted proofs and undertaking measures to establish the truth on a case, a certain extent a judge is subjective when he states arguments in its decision that made him to resolve the dispute in such way. There are the reasons of subjective nature. Obviously, that subjects of enforcement practice affect on a base of understanding and application of extremely formal right containing general features of admissibility that or those social behaviour, as rule, not recognizing of individuality of situation, in which can appear deviation from normal social behaviour. This is understandable: a lawmaker cannot take into account a variety of a life. Restoring the law and order, the court is obliged to be considered with the right, and first of all, with the main guiding principles, i.e. with principles of the law among which are the principles of justice, humanism, legality, presumption of innocence, expediency etc.

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