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Principles of Bulgarian Civil Procedure Law

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Abstract: The paper analysis the basic features and general principles of the Bulgarian civil procedure.

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I. The definition of principles under Bulgarian legal doctrine and its regulation under Bulgarian law

Art. 46 of the Act on Normative Acts (ANA) and Part *One General Rules*, chapter two *Fundamental principles* of the Code of Civil Procedure (CCP) have proclaimed that *legal principles are the basis of law*. The terms “fundamental rules” and “principles” are used as synonyms in both theory and practice. This view, i.e. that they are not only theoretical principles or governing legal ideas, but also *basic governing legal norms*, is well established.[1]

[1] *See* J. Stalev, *Balgarsko grajdansko procesualno pravo*, seventh ed., pp. 88–90; J. Stalev, A. Mingova, V. Popova, R. Ivanova, *Balgarsko grajdansko procesualno pravo*, eighth ed. pp. 90–92 (the matters regarding the principles of civil proceedings are worked out under the co-authorship of J. Stalev and A. Mingova); V. Popova, Civil procedure, Bulgaria, I, Kluwer, 2007, para 50; O. Stamboliev, ‘The civil procedure’s principles’, *Legal thought,* 2008, issue 1, pp96-97; R. Ivanova, B.Punev, S. Chernev, Commentary on the New Civil Procedure Law (the matters regarding the principles of civil proceedings are worked out by R. Ivanova), p. 22; there is an isolated position laid down in the new legal literature with respect to the principles according to which “the civil procedure’s principles (the fundamental principles) are basic guiding ideas on the premise of which sets of legal norms are being build up” and that they are not basic guiding legal norms (*see* L. Kornezov, *Civil Procedure – I Claims Proceedings, 2009,* pp. 106 – 108);

With the new CCP from 2007, and more precisely with the abovementioned chapter two, entitled *Fundamental principles,* for the first time in the development of the Bulgarian civil procedure legislation the legislator proclaimed certain legal principles explicitly, aiming their comprehensive listing[2] The following nine principles are explicitly proclaimed in the said chapter of the new CCP: lawfulness (Art.5); dispositive principle (Art. 6); ex officio principle (Art. 7); adversarial principle (Art. 8); equality of the parties (Art. 9); ascertaining of the truth (Art. 10); Publicity and Immediacy (Art. 11); Inner Belief (Art. 12); Examination and Adjudication of Cases within Reasonable Time (Art. 13).

According to the legal literature these principles – oriented approach is borrowed by the French NCPC and the new Swedish CCP and actually this is the contemporary tendency in the development of procedural law[3]. Nevertheless, it is not quite sure if the legislator succeeded in the thorough regulation of the civil procedure principles. In my opinion, to avoid public discontent, the legislator intentionally did not proclaim the so-called in the theory and the practice “concentration rule” (see para XI of this article). There is also a reason in the view that by some of the principles the legislator has actually laid down purposes of the law as well as some technical norms[4]. Besides, some legal writings point to the fact that the content of the explicitly proclaimed civil procedure principles in the new CCP is wholly identical to the principles of the repealed CCP[5]. There is an impression that the phrasing of the newly proclaimed principles is directed mostly towards the action proceedings.

Since these legal principles form basic and governing legal norms, they are important for the legislative activity and the application of law. In the legislative activity, they determine the content of the legal institutes and the content of whole sets of legal norms, and due to that, the following problem arises: the legal principles should be observed in the course of changing the law or be altered if the legislator changes the governing legal ideas or objectives. The

[2] During the operation of the repealed CCP there were principles that were explicitly proclaimed as well as legal principles, expressed implicitly through the content of a set of norms at the core of which is the relevant legal principle (see V. Popova, *Civil Procedure*, Bulgaria, first ed., para 50 and cited literature there);
[3] *See* R. Ivanova, B. Punev, S. Chernev, op. cit., pp. 22- 23; L. Kornezov, *op.cit.*, pp. 104-106;
[4] *See* R. Ivanova, B. Punev, S. Chernev, op. cit., p. 26; L. Kornezov, *op.cit.*, pp. 106-108;
[5] *See* L. Kornezov, *op.cit.*,p. 108;

categorization of the principles, depending on whether they are laid down in the Constitution[6] or in procedural law, is of great practical importance for legislative activity. The legal institutes and the individual norms, as well as the legal principles in the procedural law have to comply *with the legal principles proclaimed by the Constitution*. Otherwise, the CC declares them unconstitutional[7]. If the legal principle is laid down in the procedural law, its legislative change demands the repeal or amendment of separate legal norms or whole legal institutes, or the establishment of new ones. As for the application of law, the legal principles serve as the basis for interpreting and filling in the gaps in the operative legislation (Art. 5 of the CCP). This general characteristic is valid for all legal principles, including the principles of civil procedure. Moreover, it should be mentioned that, due to the close functional connection between civil procedure and substantive law, and the protective role the latter has regarding this procedure, a change in the substantive law's legal principles frequently necessitates a legislative change in the principles of civil procedure as well.

Civil procedure is set upon a system of legal principles. Each principle has its own place in this system and becomes effective in its interaction with the other principles of the system. Moreover, a principle can constitute a guarantee of the application of another principle or a restriction of the application of third one. Furthermore, sometimes the legislator considerably changes the balance among the separate principles. It is a typical occurrence for the period

[6] The Constitution proclaims the following principles: lawfulness (Art. 4(1), Art. 117(2) C), independence of the court (Art. 117(1) C), the right of the parties to participate in all stages of the proceedings (Art. 122(1) C), equality of the parties and adversary principle (Art. 121(1) C), ascertaining the truth (Art. 121(1) C), right to defense throughout the stages of the proceedings (Art. 122(2) C) and publicity in the hearing of cases (Art. 121(3) C).
[7] With CC's Decision № 3 of constitutional case № 2/ 2008 (SG 63/ 2008) the CC proclaimed the unconstitutionality of the norm of Art. 84 (1), item 1 of the CCP in its content after being amended with the AA of the CCP (SG 50/ 2008). Initially, the text of this provision, published in SG 59/ 2007, was to the effect that payment of a court fee should be waived for the State and the government institutions, except in actions for private claims of the State and rights to chattels constituting private State property. By the AA of the CCP from 2008 the following phrase was deleted – "except in actions for private claims of the State and rights to chattels constituting private property of the State". Exactly this legislative amendment was proclaimed to be unconstitutional, contradicting in particular Art. 17 and Art. 19 of the C with regard to the principle of equal treatment of all private property and the state property division into public and private;

after 1989 with respect to the adversarial principle and the so-called in the Bulgarian theory and legislature "ex officio" principle[8].

Under the following items of this article the concrete principles will be examined[9] regarding the Bulgarian civil procedure as well as the correlation among them.

II. The principle of lawfulness (legality)

The principle of lawfulness is an essential element of the system of principles underlying civil procedure, because it provides the remedy-sanction in the event of wrongful development of civil law relationships. The Republic of Bulgaria is a law-governed State, ruled in accordance with the provisions of the C and the other statutes (Art. 4(1) C), and the rightful development of civil law relationships is a basic value. The principle of lawfulness is common for the all law branches and it is explicitly set forth in the Constitution (Art. 4(1), Art. 117(1) C). This is the first of the explicitly proclaimed fundamental principles in the new CCP[10]

Article 5 of the CPP sets forth the following: 'the court shall examine and adjudicate the cases according to the precise meaning of the laws, and where the laws are deficient, obscure or conflicting, according to the common sense thereof. In the absence of an applicable law, the court shall found its judgment on the fundamental principles of law, custom and ethics'.

In the present wording of this article of the CCP, in particular the phrase "the court shall examine and adjudicate in cases", an established in the theory and the practice concept is re-

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[8] See V. Popova, *op.cit.*, para 53, as well as a paragraph IV of this presentation;

[9] The system of principles, proclaimed in the new CCP, does not include the social justice principle, according to which civil procedure must be accessible and humane (*see* V. Popova, *Civil Procedure*, Bulgaria, first ed., para 60). It is strange but this principle is connected only with the civil procedure of the socialist system type but not with the modern civil procedure of bourgeois (capitalist) system type. In my opinion, there is a misunderstanding of this type of procedure as it also happened with the reform from 1997 wherteby the norms, regulating the active participation of the court in the process in clarifying the facts of the case, were repealed (*see* V. Popova, *Civil Procedure*, Bulgaria, first ed., para 53, 54). This concept of "wrong civilization" and the nostalgia for the old CLPA may send the Bulgarian civil procedure back to resolutions that belong to the old times and in particular the beginning of the previous century. These resolutions contravene to the contemporary tendencies in the civil procedure development of the bourgeois states, governed by law and having social- oriented policy.

[10] This principle was also the basis of civil procedure when the 1971 Constitution was operative (Arts 5, 125, 129(1), 130 C), as well as the Constitution from 1991 (Art. 4 (1) of the C) (see V. Popova. Civil Procedure. Bulgaria. First ed., para 50 and the literature cited there).

acted under which in civil procedure, the principle comprises the observance of procedural and substantive law. The observance of procedural law is a guarantee for the execution of procedural rights. It is also a means of achieving procedural discipline and normal conduct of proceedings. The procedural actions of the court and the parties should comply with the requirements of the procedural law.

Non-observance of the procedural law brings about various legal consequences depending on whether the breach was committed by the party or by the court. In the event that a procedural action of the party does not comply with the procedural law, it is invalid and the court is not entitled to consider it. However, this consequence does not automatically take effect in all cases. Chapter eleven *Procedural steps of the parties* which is found in part one of the CCP *General rules* contains Art. 101 (1) - an explicit common provision setting forth that the court, acting ex officio, observes the due performance of procedural steps and when it is necessary grants the party a period of time for correcting its actions if they do not comply with the procedural law. There are also specific norms regulating separate procedural actions as: Art. 129 (1) and (2) of the CCP in the event of improper statement of the claim; Art. 262 (1) and (2) of the CCP respectively Art. 286 (1) and (2) of the CCP - in the event of improper claim to the appellate court, or to the court of cassation.

Non-observance of the procedural law on the part of the court constitutes grounds for appeal against its wrongful actions, such as rulings barring the proceedings or those explicitly stated in the law (Art. 276, (1), items '1' and '2' of the CCP) or the decision of the court (Art. 270(3), Art. 281, items '1', '2' and '3' of the CCP). In certain cases, this non-observance of the procedural law constitutes grounds for revocation of decisions that have already taken effect (Art. 303, (1), items '5', '6' of the CCP).

In rendering its decision, the court applies the substantive law precisely (Arts 4, 117(2) C; Arts 5, 235 (2) of the CCP). If the decision is inconsistent with the substantive law, it is considered wrongful. And, because of that, the intermediate appellate court repeals it and renders a new decision upon the merits (Art. 271 (1) of the CCP). The breach of substantive law constitutes grounds for cassation of the decision of the intermediate appellate court (Art. 281,

item 3 of the CCP). The proceedings can achieve their objective only by observing the law: the restoration of rightful development of civil law relationships by providing the correct remedy-sanction.

The norm contained in Art. 5 of the CCP is much criticized in the legal literature[11]. It is said that this norm almost literally re-enacts the interpretative rule, established in Art. 46, par. 1 of the ANA: 'Provisions of normative acts shall be applied pursuant to their exact meaning; if they are not clear, they shall be interpreted in the meaning closest to other provisions, to the purposes of the act interpreted, and to the general principles of the legal system of the Republic of Bulgaria; and Art. 46, par. 2 of the ANA: 'Where a normative act is incomplete, the cases not regulated by it shall be subject to the provisions applicable to similar cases, provided that is in compliance with the objectives of the act. Should such provisions be missing, the relations shall be settled in compliance with the general principles of the legal system of the Republic of Bulgaria'.

I share to a certain extent this criticism. I would add to the abovementioned that in its present version, the rule in the context of the procedural law is in conflict with the essential requirement that civil procedure be arranged in advance. A question arises as to what would happen if a court does apply procedural rules not provided in any statutory instrument, because it has come to the conclusion that there is a statutory gap.

The principle of lawfulness also applies to security proceedings, to admission of security (Arts 389–-396 of the CCP) and to its imposition in security proceedings (Arts. 397—403 of the CCP). The observance of this principle is guaranteed by the possibility of appeal against the ruling admitting the security and the ordinance for imposing it (Art. 396 of the CCP).

Though not supported by arguments and without any doubts expressed, a view has been exposed in the legal literature that under the new CCP, the principle of lawfulness is applicable also to the enforcement procedure[12]. Art. 5 of the CCP, analysed verbatim in that part which

[11] *See* R. Ivanova, B. Punev, S. Chernev, op. cit. (the matters regarding the principles of civil proceedings are worked out by R. Ivanova), pp. 29 – 30; L. Kornezov, *op.cit.*,p. 114.
[12] See O. Stamboliev, *op.cit.*,p. 98; L. Kornezov, *op.cit.*,p. 114.

establishes that 'the court shall examine and adjudicate in cases'- can make one think that the lawfulness requirement applies only to the court in the action proceedings, security proceedings and in the complaints against the steps taken by the enforcement agent. In this relation the wording of the normative text is not precise. However, the systematical place of Art. 5 - in the part about *General rules* of the CCP which applies to all kinds of civil proceedings regulated by the CCP, as well as the abovementioned constitutional norm of Art. 4 (1) of the C (establishing a principle for all areas of law), indicate that the principle of lawfulness applies also to the enforcement proceedings.

The State or private executive (enforcement) magistrate has the obligation to observe the procedural and substantive law in performing the enforcement actions. The guarantee for observance of the law consists of the opportunity of appealing against the actions or omissions of the State or private enforcement magistrate in breach of the procedural law (Arts 435 of the CCP)[13] or the claims for remedy under Art. 440 of the CCP in the event the bailiff's actions comply with the procedural law, but affect the financial rights of third parties not involved in the proceedings. The guarantee for observance of the law also comprises the remedy that can be provided to the debtor if he/she challenges the receivable subject to the enforcement (Arts 439, 420, 438 of the CCP respectively subject to the order for payment proceeding (Arts. 414, 415, 420 of the CCP).

The principle of lawfulness would be a mere declaration if it did not have the relevant guarantees. Apart from the opportunity of appeal against the wrongful actions of the court and the enforcement magistrate, guarantees are also provided by the following:

[13] In this relation the legislator made some serious retreats from the achievements of the former CCP. In my opinion, the limitation on the actions of the bailiff subject to appeal is not justifiable (*see* also para XI below). While under the relevant provisions of the CCP all the actions were appealable (see V. Popova, op. cit., para 513; V. Popova, *Notes over concrete legal rules in the Civil Procedure Code, Legal World magazine, June 2008,* pp. 118 – 121), the legislator has taken a reverse approach under the new CCP. Only the procedural actions explicitly specified in the law are appealable. Practically, this means a serious decrease of the necessary judicial control. Unofficially, the participants of the working group which prepared the draft of the new CCP have alleged that it is compensated by the proprietary sanctions on the bailiff and the opportunity to bring an action against him for any damages, inflicted by his activity (Art. 441 of the CCP). In my opinion, however these can not be regarded as compensating the need of appealability.

(a) The independence and impartiality of the court (Art. 117(2) C, Art. 22 of the CCP) including its obligation to consider all evidence in the case and the arguments of the parties, guided by its inner belief. This procedural rule existed as well in the former CCP (Art. 188 (3) of the repealed CCP), but at present the legislator proclaimed it as a legal principle (*see* new para X of this article);

(b) The obligation of the court not to apply the instrument of subordinate legislation if it is inconsistent with the law (Art. 15(2) of the ANA);

(c) The obligation of the court to suspend civil proceedings if the applicable law is inconsistent with the Constitution and to notify the SCC authorized to seize the CC (Art. 150 (2) of the C, Art. 15 CSA, Art. 16 of the ACC, Art. 229 (1), item 6 of the CCP);

(d) Prohibition of the abuse of procedural rights on the part of the parties and their representatives in the proceedings (Art. 3 of the CCP), connected with financial liability for damages caused (Art. 3 of the CCP).

It is assumed that, from the viewpoint of the law, tardy defence, though bad and inefficient, is not unlawful[14]. In my opinion, if the tardiness and inefficiency are due either to the nature of the procedure in the procedural law or to the procedural terms. However, it is non-observance of the law that is present if the tardiness and inefficiency are due to non-observance on the part of the court, the bailiff or of the terms of time in the law. Non-observance of the terms in the law constitutes a breach of procedural law. In practice, tardy and inefficient defence might turn out to be equal to absence of defence. (For instance, if the court fails to render its decision determining the legal dispute in adversary proceedings within the term of Art. 235 (5) of the CCP, *i.e.* within one month of the session where the hearing of the case was terminated or the court fails to render its decision on the request for securing a claim on the day the request is filed, thus violating Art. 395 (2) of the CCP). Moreover, tardy defence, if it is due to the nature of procedure in the procedural law and if it is due to non-observance of the terms in the procedural law on the part of the court or the bailiff, constitutes

[14] *See* J. Stalev, *op. cit.*, seventh ed., p. 90; J. Stalev, A. Mingova, V. Popova, R. Ivanova, *op. cit.*, p. 92 (the matters regarding the principles of civil proceedings are worked out under the co-authorship of J. Stalev and A. Mingova).

a breach of Art. 6(1) of the Convention for protection of the Human Rights and Fundamental Freedoms (CPHRFF), ratified by the Republic of Bulgaria (see new para XI of this article).

III. The principle of disposition (dispositive principle)

The principle of disposition is immanent to civil procedure[15]. Accordingly, the protection of the injured right ensues from the will of the person legitimated to seek it. This principle stems from the autonomy of the will in civil substantive law and the functional connection between civil substantive law and civil procedure. This connection is manifested in the protective nature of the procedure in relation to substantive law. This principle is explicitly proclaimed under the new CCP, Art. 6 (1) and (2).

The principle of disposition is manifested in several ways. First, civil proceedings can only begin if the legitimate person filed a request[16]. According to Art. 6 (1) of the CCP, the court proceedings begin upon the request of the person concerned, and in certain cases they can begin upon the prosecutor's request. In this way, Art. 2 (2) of the repealed CCP is literally re-enacted in its former wording established after 1997[17]. The text of the provision is definitely clear – the court can not initiate any civil procedure unless it is asked to do so by a legitimate person. If the public interest requires the right to be protected regardless of its holder, the legislator establishes legal means providing this protection through the legitimization of the prosecutor in the cases explicitly listed under the law (Art. 6 (1), Art. 26 (1) of the CCP). When

[15] The principle of disposition existed in civil procedure both during the operation of the revoked CCP and even while the previous CLPA was in effect (*see* V. Popova. *Civil Procedure*. Bulgaria. First ed., para 52 and the cited literature and legal practice).

[16] This applies to the proceedings regulated under the CCP (adversary, enforcement and security proceedings) and to bankruptcy proceedings. They can only begin upon the request of a legitimate person (the debtor, or the debtor's liquidator or creditor under a commercial transaction or public law liability towards the State or municipalities. This liability stems from the commercial activity of the debtor or private claims of the State) (Art. 625 of the C. Code). However, the debtor is obliged to request that bankruptcy proceedings must instituted within 15 days of the occurrence of insolvency or overindebtedness (Art. 626(1) of the C. Code). Should he/she fail to perform this obligation, he/she is liable to the creditors for the damages caused as a result of the delay (Art. 627 of the C. Code), and also bears criminal responsibility (Art. 227'b' of the PC) (*see* V. Popova, v: *Novite polojenia v targovskoto pravo. Promenite v targonskia zakon, pod red. na O. Gerdjikov (The New Points in Commercial Law. Changes in the Commercial Law, under the editorship of O. Gerdjikov)* (Sofia, Labour and Law Publishing House, 2000) pp. 203–207).

[17] *see* V. Popova. *Civil Procedure*. Bulgaria. First ed., para 52 and the cited literature and legal practice.

the public interest requires such protection, in the cases explicitly listed under the law, the court has the duty to examine and adjudicate the respective civil law issues ex officio including: the obligation of the court to render its decision on alimony, matrimonial home and exercise of parental rights regarding minors born in the marriage along with its decision on dissolution of the marriage, even though the parties to the case did not demand it (Art. 322 (2) of the CCP), the admission of preliminary enforcement of the decision adjudicating alimony or job remuneration and compensation (Art. 242 (1) of the CCP) and securing an alimony claim on the initiative of the court (Art. 392 of the CCP).

Art. 6 (2) of the CCP proclaims that the subject matter of the case and the scope of the protection and facilitation due by the court has to be determined by the parties themselves. There is no doubt in the legal theory and practice that although it is not explicitly said, the parties to the case are also determined by the person seeking protection as it was under the operation of Art. 2 (2) of the repealed CPP. It is also clear that the dispositive principle is valid to all proceedings provided by the CCP[18].

Since there is not a change of the concept of the legislator regarding the dispositive principle in the new CCP but only the need of its explicit formulation has been met, the viewpoints in the legal theory and practice referring the principle retain their importance.

The court is obliged to provide protection only within limits. It is not allowed to uphold a claim on grounds not stated by the claimant (Decision No. 39–74–I Civil Chamber of the SC, Journal of the SC, 1993, Volume 11, No. 16; Decision No. 612–95–5 of the SC, Collection of 1995, No. 10), or on the grounds of particulars of the claim that were not stated (Decision No. 3818–81–I Civil Chamber of the SC, Collection of 1981, No. 72; Decision No. 300–89–I Civil Chamber of the SC, Journal of the SC, 1989, Volume 12, No. 21), or award more than requested (Decision No. 6–74–I Civil Chamber, Collection of 1974, No. 30). It is inadmissible that a court awards more on one of the joint claims in return for the partial satisfaction of the other claims (Decision No. 632–93–IV Civil Chamber, Journal of the SC, 1993, Volume 8, No. 14).

[18] *See* O. Stamboliev, *op.cit.*, pp. 103 –-105; R. Ivanova, B. Punev, S. Chernev, op. cit. (the matters regarding the principles of civil proceedings are worked out by R. Ivanova), pp. 31 – -33; L. Kornezov, *op.cit.*, pp. 116 – 118.

The principle of disposition is also manifested in the course of proceedings. Only the person seeking protection is entitled to make a change in the subject matter of the case (Art. 214 of the CCP regarding adversary proceedings, Art. 398 of the CCP regarding security proceedings, and Art. 426 (2), sentence 2 of the CCP regarding enforcement proceedings). At any stage of the adversary proceedings, the parties are entitled to make an agreement, approved by the court if it does not contravene the law or good morals, and hence, the proceedings are terminated. The agreement approved by the court has a decision that has taken effect (Arts 149 (1); 234 of the CCP). The court can be set aside by withdrawing (Art. 232 of the CCP)[19] or waiving the claim (Art. 233 of the CCP). In these cases, the court is obliged to suspend the proceedings without the power to check the grounds. The court is also obliged to suspend the proceedings if a request is made by both parties (Art. 229 (1), item '1' of the CCP). If the proceedings are suspended by the consent of both parties, the court reinstitutes them if a request is made (Art. 230 (1) of the CCP). The proceedings suspended upon the request of the parties are terminated if neither party requested that they are reinstituted (Art. 231 of the CCP). The bailiff suspends the enforcement proceedings (Art. 432, item '2' of the CCP) or terminates them (Art. 4330 (1), item '2' of the CCP) on request of the claimant. The bailiff also suspends the enforcement proceedings if the claimant does not request enforcement within a period of two years, with the exception of alimony cases and cases where the claimant states in writing that the debtor is making payments to extinguish his/her debt (Art. 433 (1), item '8' of the CCP).

The appeal can be filed against the decision as a whole or against separate parts (Art. 258 (2) of the CCP)[20]. With respect to the correctness of the appellate judgement the decision of the SCC concerns only the merits stated in the cassation appeal (Art. 290 (2) of the CCP). The intermediate appellate proceedings or the cassation proceedings are suspended if the appeal is

[19] If the claim is withdrawn after the first hearing of the case, the proceedings can be suspended, provided the defendant gives his/her consent (Art. 232 of the CCP). This rule is a manifestation of the defendant's right to legal defence in the course of proceedings. This right is provided by the law and the equality of the parties to the case.
[20] However, the intermediate appellate court also overrules the decision regarding the appellant's joint parties that did not appeal the decision (Art. 271 (1) of the CCP).

withdrawn and the appealed decision takes effect (Art. 264 (1) of the CCP; Art. 296, item '2' of the CCP)[21].

The admission of the claim by the claimant is also a manifestation of the principle of disposition. The legislator's concept about the admission of a claim established in the new CCP is completely changed compared to the repealed CCP. During the operation of the revoked CCP, this admission was not binding on the court and it was not obliged to uphold the claim. Art. 127(2) of the repealed CCP stipulated that the court had to consider this admission regarding all the data concerning the case. The admission of the claim had bearing on the preliminary enforcement of the decision. Art. 238(2), item 'b' of the revoked CCP provided that the court could allow the preliminary enforcement of the decision only if the awarded receivable is admitted by the claimant.

At present the dispositive principle on the part of the claimant is taken into consideration when the admission of the claim is at hand. Art. 237 of the new CCP proclaims that 'Where the respondent has assented the claim, the court, acting on a motion by the plaintiff, has to terminate the trial and render a judgment conforming to the admission (paragraph 1); It is sufficient to state in the motives to the judgment that such a judgment is based on assenting the claim'.

It means that under the new CCP assenting the claim binds the court which is obliged to uphold the claim in accordance with the assenting. Art. 237 (3) of the CCP stipulates that 'The court may not render a judgment upon assenting the claim where: the right assented to conflicts the law or good faith; or the right assented to is not subject to transactions by the party.

According to Art. 19(1) of the CCP, the parties to a dispute over property are entitled to agree it is solved by an arbitration court unless the subject matter of the case consists of property rights or ownership of real estates, alimony or rights under labour legal relationships. This opportunity, provided by law, is one of the best examples of the principle of disposition in

[21] However, the preliminary waiver of the right to appeal is invalid (Art. 264 (2) of the CCP).

civil proceedings. The arbitration award constitutes grounds for enforcement (Art. 404, item '1' of the CCP).

IV. The ex officio grounds and the principle of active participation of the court

Bulgarian legislation, theory and practice deals with the so-called '*ex officio* grounds'[22], proclaimed in Art. 7 of the CCP.

Art. 7 (1) of the CCP establishes the three ways of operation of the ex officio principle. These ways also represented the content of the principle during the operation of the revoked CCP: *ex officio* course of proceedings; the obligation of the court to observe the admissibility and the duly performance of the procedural actions on the side of the parties; the court's active participation in exploring the case[23].

Art. 7 (1) of the CCP stipulates that 'the court performs ex officio the procedural steps necessary for the progress and closing of the case'. As for its manifestation in the *ex officio* course of proceedings, this principle ensues from the very nature of civil procedure. It provides the remedy-sanction in the event of wrongful development of civil law relationships and it has never been doubt about it in the Bulgarian civil procedural law[24]. This aspect is inextricably connected with the requirement stipulated in Art. 2 of the CCP on the court - to examine and adjudicate on each claim submitted thereto for protection and facilitation of personal and property rights. The request for remedy contains the demand that the judicial body undertake

[22] *See* J. Stalev, *op. cit.*, seventh ed., pp. 101–105; J. Stalev, A. Mingova, V. Popova, R. Ivanova, *op. cit.,* pp. 104–108 (the matters regarding the principles of civil proceedings are worked out under the co-authorship of J. Stalev and A. Mingova); O. Stamboliev, *Principles…*, pp. 103 –-105; R. Ivanova, B. Punev, S. Chernev, op. cit. (the matters regarding the principles of civil proceedings are worked out by R. Ivanova), pp. 33 - 39.

[23] Regarding the issue of clarifying the case, I think it is more precise to speak about a principle of an active participation of the court in clarifying the case than about *ex officio* principle. This principle has to be examined in relation with the adversary principle – though the Bulgarian legislator was equivocal about thie relation in the past decades. (*see* V. Popova. *Civil Procedure*. Bulgaria. First ed., para 53- 54 as well as paras 54, 57 of the present work).

[24] It is the opposite of the so-called 'principle of separation', according to which the party has to bring a new, specific request for each subsequent action of the judicial body. Traditionally the principle of separation has not been manifested in the Bulgarian civil procedural law (see O. Stamboliev, *op. cit.*, p. 101; L. Kornezov, *op. cit.*, p. 120).

all procedural actions in order to prepare the act of legal remedy and its enforcement. The party is not obliged to file a request for each separate action and has the procedural right to seek and impose (by the claim a time limit to be set in case of unreasonable delay – Arts. 255--256 of the CCP) the performance of the action by the judicial body if it fails to perform, and to make the judicial body perform a legally due action or to repeal an unlawful one (by intermediate appeal, cassation appeal or by revocation of a decision that has already taken effect).

Art. 7 (1) of the CCP also proclaims that the court observes ex officio the admissibility and due performance of the procedural steps of the parties. This second manifestation of the ex officio grounds is closely bound up with the lawfulness principle (see para 51) which requires conformity with the law regarding the procedural steps both of the court and the parties. Firstly, the abovementioned aspect is manifested by an ex officio examination of the procedural steps performed by the parties.

Art. 101 of the CCP has a great importance in outlining of this aspect of the ex officio grounds. It is placed in part one of the Code *General rules*[25]. It proclaims the following: 'The court, acting ex officio, shall observe the due performance of procedural steps. The court shall instruct the party as to the nature of the non-conformity of the procedural step performed thereby and to the manner in which the said non-conformity can be cured, and shall set a time limit for the curing (paragraph 1); The cured procedural step shall be deemed conforming as from the time of performance thereof (paragraph 2); Upon failure to cure the non-conformity within the time limit set, the procedural step shall be deemed non-performed (paragraph 3).

When the non-conformity consists of inadmissibility which is due to a lack of procedural prerequisite that can not be cured, like for example - the procedural legitimacy, not only is not the court obliged but actually it can not grant an opportunity to the respective party to cure the non-conformity. When the non-conformity is a result of a lack of competence, e.g. jurisdiction

[25] This text re-enacts the understanding established in the legal theory and practice from the time of operation of the repealed CCP ensuing from Art. 4 (3). This understanding was defined as a general rule after the revocation of the article in 1997 through the interpretation of separate legal norms (*see* V. Popova. *Civil Procedure*. Bulgaria. First ed., para 53, 54, 57.

or generic cognizance, the court is obligated to terminate the proceedings and to transmit the said case ex officio to the competent court (argument from Art. 118 (2) of the CCP).

Art. 130 of the CCP stipulates that 'where, upon verification of the statement of claim, the court establishes that the action brought is inadmissible, the court shall return the statement of action'.

The aspect represented by the ex officio grounds in Art. 7 (1) of the CCP with regard to the parties' procedural steps as well as the common rule of Art, 101 of the CCP, similarly to the manner under the repealed CCP, are manifested in some concrete legal norms.

According to Art. 129 (2) of the CCP, if the statement of claim does not meet the requirements of Arts 127 (1) and 128 of the CCP, a notification is sent to the claimant and he/she is obliged to eliminate the flaws within a week term. If the claimant fails to eliminate the flaws within the term limit, the statement of claim and its attachments are reverted (Art. 129 (3) of the CCP). When the flaws in the statement of claim happen to be noticed in the course of proceedings, if the claimant fails to cure them, the proceedings are suspended (Art. 129 (4) of the CCP). The corrected statement of the claim is considered regular from the day it was filed (Art. 129 (5) of the CCP). The same rules apply to irregularity of both the intermediate appeal and the cassation appeal (Art. 262(1) (2), Art. 285 (1), Art. 286 (1) of the CCP).

The aspect explained above of the *ex officio* principle implied in Art. 7 (1) of the CCP in connection with Art. 101 of the CCP has also a bearing on the enforcement proceedings. Art. 426 (3) of the CCP stipulates explicitly that the enforcement agent has to verify the conformity of the petition in enforcement proceedings under Article 129 herein. It means that on the grounds of Art. 129 (2) in connection with Art. 101 of the CCP if the agent finds flaws in the petition he must give instructions and time limit to the claimant to cure the non- conformity. Unfortunately, in its constant practice the SCC disregards the court obligation and right to instruct the parties and to give time limits to the claimant in order to individualize his/ her receivable to the necessary extent when he/ she fails to do this with the petition for issuing of an execution order. The main argument is that no express rule exists in relation to the execution order proceedings . In this way, the explicit rule of the Art. 101 of the CCP was

ignored as well as its systematical place in the Code. This provision is situated in Part One of the CCP *General rules* and because of that in my opinion is applicable to all civil proceedings regulated by the CCP, including the execution order proceedings.

The explained aspect of the *ex officio* principle implied in Art. 7 (1) of the CCP regarding the procedural steps of the parties is not thoroughly defined in the new CCP. It is necessary to have in mind the rule of Art. 99 of the CCP (contained in part One of the CCP *General rules*) in order to determine the scope of the principle. Art. 99 establishes the common court obligation to apprise the parties of their procedural obligations as well as of the possible legal consequences upon failure to comply with them. The same provision stipulates the court obligation to apprise the parties of the opportunity to receive legal aid when it is necessary and they have the right. This court obligation is regulated by concrete legal norms (*e.g.* Art. 129 (2) of the CCP in cases of non-conformity of the statement of claim).

Art. 131 (1) of the CCP regulates the court obligation to instruct the respondent to submit a written answer within one month, specifying the mandatory content of the answer and the consequences of non-submission of an answer or of the non-exercise of rights, as well as the possibility to use legal aid, if this is necessary and if the respondent is entitled thereto.

Art. 7 (1), the second sentence provides that the court is obliged to facilitate the parties in clarifying the factual and legal aspects of the case. Thus the legislator fortunately came back to the concept he has before the repeal in 1997 of Art. 4 (2) and (3), Art. 109 (3) of the revoked CCP, in relation to the active participation of the court in clarifying the case[26].

The court is not bound by the legal qualification of the facts and applies the law at its own discretion (*see* Art. 5 and Art. 146 (1), item '2' of the CCP). The same applies to the burden of proof that depends on the substantive law. A clear expression of the above explained aspect of the *ex officio* principle is the court's obligation to make a written report on the case (Art. 146 of the CCP) (*see* item V and XI of this article)[27]. An important aspect regarding the application of

[26] S*ee* V. Popova. *Civil Procedure*. Bulgaria. First ed., para 53- 54 and para V the present work.

[27] Regarding the court's obligation to give a legal qualification of the alledged rights and the rights and obligation following the counter-claim in its report, I still doubt the correctness of the wording of the text.

the aspect of the *ex officio* principle under consideration is the obligation of the court in the report - to rule over the burden of proof as well as to instruct the parties as to the circumstances that need not to be proved (Art. 146 (1), items '4' and '5' of the CCP)[28]. Besides, with respect to the active court's participation in clarifying the case it must be noted its duty to pose questions to the parties for clarification of the facts (Art. 145 (1) of the CCP). Another important obligation of the court is in instructing the parties to particularize their allegations and to remove any contradictions therein (Art. 145 (2) of the CCP)[29].

A manifestation of the principle of the active court's participation in clarifying the case is Art. 195 (1) of the CCP which provides that: 'An expert witness shall be appointed either on a motion by a party or ex officio where special knowledge in the field of science, art, skilled crafts or another expertise is necessary for clarification of certain questions which have arisen in the case'[30].

New manifestation for the Bulgarian Procedural Law of the *ex officio* principle is the duty stipulated in Art. 7 (2) of the CCP on the court to serve upon the parties a duplicate copy of those acts which are subject to a separate appellate review[31]. This duty facilitates the party in exercising its right to appeal the relevant act.

Another manifestation of the *ex officio* principle is in the declaring of nullity and inadmissibility of the appealable judgment even where there has not been any request in this respect as well as the reversion of an incorrect judgment with respect to the necessary co-parties of the appellant who have not appealed (Art. 271 (3) of the CCP.

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[28] The view that the court bears the obligation under Art. 4(3) and Art. 109(3) of the CCP (before their revocation) is established in the theory and practice. This is valid regardless to whether a party is represented by an advocate or not.

[29] This concept was accepted by the theory and the practice during the operation of the repealed CCP on the grounds of the then Art. 109 (2) of the revoked CCP (even after the reversion of Art. 4, (2) and Art. 109 (3) of the CCP (see V. Popova, Vazrajenieto za prihvashtane v sudebnia iskov proces, C. 2001, pp. 119 - -121).

[30] The concept was established under the operation of Art. 157 (1) of the repealed CCP both before the reversion of Art.4 (2) of the CCP from 1997 and after that (S*ee* V. Popova. *Civil Procedure*. Bulgaria. First ed., para 53- 54).

[31] The repealed CCP contained a provision establishing the court's obligation only to send a notice when its relevant act has been made.

V. The principle of Assertion of the Truth

The legal proceedings assert the truth (Art. 121(2) C). Proclaimed by the Constitution, the *principle of assertion of the truth* also applies to civil adversary proceedings. These proceedings consider civil law disputes and determine them by *res judicata*.

At present, the principle is explicitly proclaimed in Art. 10 of the CCP whose title is *Establishment of the truth* and stipulates: 'the court should afford the parties an opportunity and should facilitate the parties in establishing the facts relevant to adjudication of the case'[32]. There is no doubt in the legal theory and practice that ascertaining of the truth pertains to the relevant facts of the case and not to legal rights because the latter represent a speculative concept[33].

I am inclined to share the criticism of the definition of the principle of ascertaining the truth in Art. 10 of the CCP[34] since this provision is aimed to link that principle basically with the court's participation in clarifying the dispute. This principle however cannot be isolated from the system of principles, premising the proceedings: the ex officio principle (Art.7 (1) of the CCP – *see* para IV of this article); the adversary principle (Art. 121 (1) of the C, Art. 7 of the CCP - *see* para VI of this article); the equality of the parties principle (Art. 121(1) C, Art. 9 of the CCP) (*see* para. VI, VII); the publicity and the immediacy principle (Art. 121(3) C) and Art. 11 of the CCP) (*see* para. VIII, IX of this article); the court's duty to assess all evidence in the case and arguments of the parties (Art. 12 of the CCP) (*see* para. X of this article).

[32] This principle although proclaimed to be a common rule for the civil procedure is valid only for the action proceedings but is not applicable to the enforcement proceedings where en enforcement of rights is being sought rather than resolving of a dispute. It is furthermore difficult to relate the principle to the security proceedings where no solving of a legal disputes is sought but a security for the claim. It is necessary to prove the eventual grounds of the action in order that a security be furnished (see new para??). The only elements of seeking the truth within the security proceedings can be identified in the necessity of proving the eventual grounds of the action in order to prove the need to impose a security

[33] O.Stamboliev, op. cit., p. 108; L. Kornezov, op. cit., p. 135).

[34] S*ee* L. Kornezov, op. cit., p. 134.

As for the assertion of the truth, it should be mentioned that in Bulgarian law literature the principle of the objective truth is opposed to the principle of formal truth[35]. The first corresponds to the *ex officio* principle, manifested in the active participation of the court in exploring the case, while the second corresponds to the adversary principle. It is stated that the proceedings are based on the principle of the objective truth if the court has the opportunity to participate actively in the clarification of the facts, involved in the dispute.

Until 1997 the legal literature and practice accepted the principle of 'seeking' the objective truth. Some authors assume that a principle of the formal truth was introduced by the 1997 reform that considerably limited the powers of the court to participate in the exploration of the case[36]. Art. 121(2) of the CCP proclaimed 'ascertainment' of the truth, but some authors assume that the principle of 'seeking' the truth is still valid[37].

The terms 'objective truth'[38] and 'formal truth'[39] are still used in Bulgarian legal doctrine even now when a statutory solution has been established in favour of the active court's participation in clarifying of the case.

In my opinion, the adjectives 'objective' and 'formal' inserted in front of the noun 'truth' in the above terms are only capable to blur the main point. None of the Constitutions of Bulgaria of 1948, 1971 or 1991 use such adjectives. Such adjectives are equally not used and in Art. 10 of the CCP either. In civil proceedings, the ascertainment of truth can be achieved by the procedure established under the procedural law, *i.e.* in accordance with the specific procedural rules. It is not admissible the ascertainment to be achieved following a different path. The

[35] *See* J. Stalev, op. cit., seventh ed., p. 110; J. Stalev, A. Mingova, V. Popova, R. Ivanova, op. cit., (the matters regarding proof are worked out under the co-authorship of J. Stalev and R. Ivanova) pp. 113-114; D. Silyanovski, J. Stalev, op. cit., pp. 53–54; D. Silyanovski, op. cit., vol. 2, pp. 8, 10–11; S. Rozanis, 'A limitation of the ex-officio principle in the Civil procedure', Bulgarian Statute book (Balgarski zakonnik), 1998, vol. 4, pp. 78–79; O. Stamboliev, 'Principles of the Civil procedure', Legal thought Journal , 1998, vol. 2, pp 82—83; V. Popova. *Civil Procedure*. Bulgaria. First ed., para 54.

[36] O. Stamboliev, 'Printsipi na grajdanskia protses', *Sp. Pravna Missal* ('Principles of the Civil procedure', *Legal thought Journal*), 1998, vol. 2, pp 82—83.

[37] *See* J. Stalev, , op. cit., seventh ed., p. 110.

[38] *See* L. Kornezov, op. cit., p. 134.

[39] *See* O. Stamboliev, op. cit., p. 109.

procedural paths may be different depending on the legislator's concepts and the chosen manner whereby the civil procedure's principles interrelate.

There is no doubt that the court's active participation in clarifying the disputed facts is an important contribution in ascertaining the truth. The adversary principle is also of great importance in this relation since the parties themselves are best acquainted with the actual relation. I consider that by the new CCP, the legislator has stricken a reasonable balance between the two principles.

The means by which the truth is being ascertained in the modern Bulgarian action proceedings are the following:

(a) The constitutionally proclaimed right of parties' participation in the trial (Art. 122 (1) of the CCP) and the adversary principle (see para VI) combined with the court's active involvement in the proceedings by giving instructions to the parties regarding the due performance of the procedural actions (Art. 7 and Art. 101 of the CCP – see para IV) and the recipient of legal aid;

(b) The court's obligation to participate actively in exploring the case (Art. 7 (1), the second sentence of the CCP – IV);

(c) The obligation of the court to pose questions to the parties for clarification of the facts (Art. 145 (1) of the CCP);

(d) The court's obligation to instruct the parties to specify the allegations thereof and to eliminate any contradictions therein (Art. 145 (2) of the CCP);

(e) The obligatory written report of the court on the case in the first public session with mandatory content (Art. 146 of the CCP –) and particularly the court's duty to instruct the parties how the burden of proving the facts is to be apportioned (Art. 146 (1), item '5' of the CCP) and as to which facts alleged they do not need to adduce evidence (Art. 146 (2) of the CCP;.

(f) The obligation of the parties to exercise their procedural rights in good faith and to tell the truth (Art. 3 of the CCP)[40];

(g) The right of the court to order that the party appears in court in order to be asked questions that have bearing on the case (the amended Art. 114(1) of the CCP) (the amended Art. 176 (1) of the CCP);

(h) The witness's duty to appear before the court in order to give testimony (Art. 163 of the CCP) and the criminal liability of the witnesses in the event of perjury (Art. 290(1) of the PC);

(i) The criminal liability of a translator/interpreter for inexact translation/interpretation (Art. 290(2) of the PC) and the criminal liability of experts for giving a false conclusion (Art. 291 of the PC);

(j) The court's obligation (transformed into a procedure's principle) to assess all evidence in the case and the arguments of the parties, guided by its inner conviction (Art. 12 of the CCP); 'An admission of a fact, made by a party or by a representative thereof, must be evaluated by the court considering all circumstances of the case' (Art. 75 of the CCP);

(k) The opportunity for an expert witness to be appointed ex officio where special knowledge in the field of science, art, skilled crafts and the like is necessary for clarification of certain questions which have arisen in the case (Art. 195 of the CCP)[41].

A guarantee for the application of the *principle of assertion of the truth is* the requirement for the court and the court's official to be impartial and the grounds for recusal in

[40] If a party fails to perform its obligations under Art. 3 of the CCP, it bears the financial liability for the damages caused to the opposing party. However, if the decision is in favour of one party and that decision takes effect, this liability does not arise, because Art. 224 of the CCP states that the legal dispute cannot be reexamined again if the decision has already taken effect. The only possibility for the opposing party is to seek the reversal of the decision that has taken effect (for instance, on the grounds of Art. 231(1), item 'a' of the CCP, by submitting written evidence that the party was unable to submit it, or on the grounds of Art. 231(1), item 'b', if, along with the non-observance of the obligation under Art. 3 of the CCP, the party committed a crime related to the case, the party must be sentenced for the crime and the sentence takes effect). The parties do not bear criminal liability if they fail to perform their obligation to tell the truth under Art. 3 of the CCP.

[41] It is almost impossible one to list all the concrete norms where the *principle of assertion of the truth* has been manifested.

the cases stipulated by the Code (Art. 22 and Art. 24 of the CCP); another guarantee is the *publicity and immediacy* principle set in Art.11 of the CCP (*see* para IX of this article).

The *principle of assertion of the truth* is also developed through the opportunity to reverse effective judgments on the grounds of Art. 330 (1), items 1, 2, 5, 6 of the CCP.

On the other hand however the manifestation of this principle is strongly limited within the, widely known in the theory and practice, *concentration principle* (*see* para XI of this article). The latter is not explicitly proclaimed through a CCP's provision like the other civil procedure's principles but is derived by a system of rules related to the very early preclusion of the opportunity for the party to make allegations and to present evidence before the court of first instance, as well as before the appellate court in regard to the restricted appeal.

VI. The adversary principle

The adversary principle as well as *the equality of the parties principle* are Civil procedure principles (*see* new para VII) proclaimed by the one and the same Constitutional norm – Art. 121 (1) C – 'The courts shall ensure equality and adversarial conditions to the parties in a judicial proceeding'. Both principles are closely related to each other.

Art. 8 of the CCP 'Adversary Principle' stipulates explicitly this fundamental principle.

Above all the adversary principle is related to the party's right of participation in the proceedings[42] which during the effect of the repealed CCP was accepted as a separate principle[43].The party's right to participation principle, the equality of the parties principle and the adversary principle are basic rules very closely related to each other.

According to Art. 122(1) C, individuals and legal entities are entitled to defence in all stages of the proceedings. This right is codified by law (Art. 122(2) C).

[42] *See* L. Kornezov, op. cit., pp. 128—129.
[43] . Popova. *Civil Procedure,* Bulgaria. First ed., para 55.

Civil proceedings based on the *adversary principle* can be viewed as a legally regulated way for remedy in the event of wrongful development of a civil law relationship. As a legally regulated contest between the parties it is possible to be combined with the judge's passive role or with an obligation on the court for its active participation in the clarification of the case. Fortunately under the new CCP the legislator came back to its concept before the reform in the old CCP from 1997 (see new para IV, V) and set forth the court's duty for an active participation. The new legislator's concept is the combination of the *adversary principle* with another one explicitly stipulated in Art. 13 of the CCP – *the principle of the examination and adjudication of cases within Reasonable Time*. This principle does not explicitly contain the much disputable in practice *concentration rule* (*see* para XI of this article). In that way the legally regulated contest between the parties under the new CCP has to be combined in a particular case with the principle of the active participation of the Court in the clarification of the case (*see* para VIII of this article) as well as with the preclusive time limits concerning the procedural parties' steps about fact allegations and the submission of evidence (*see* para XI of this article).

With Art. 8 of the CCP the legislator outlined three manifestations of the abversary principle:

a.) Each party has the right to be heard by the court before rendering an act relevant to the rights and interests of the said party (paragraph 1)[44].

In adversary proceedings, the substantive law dispute is to be considered orally in a court session for which the parties are subpoenaed (Art. 11, Art. 140 (3), Art. 143 of the CCP)[45]. The participation of the parties is guaranteed even where the court session is held in camera (Art. 136(2) of the CCP) (*see* paras. VIII, IX of this article). The court has the obligation to ensure the exercise of the parties' right to participate in the proceedings by observing the rules for subpoenaing the parties.

[44] During the effect of the repealed CCP this rule was accepted as a part of *the party's right to be heard by the court principle* although it was not expressed explicitly by the legislator in a provision as it is done now under the new CCP, Art. 8 (1) - *See* V. Popova. *Civil Procedure,* Bulgaria. First ed., para 55.

[45] The preparation of the case which is contained by a ruling on the preliminary procedural issues and the admission of the evidence alleged in the claim of statement and its answer, occurs in a camera – Art. 140 (1) of the CCP (see para IX of this article).

The failure of a party to appear does not constitute an obstacle to hearing the case if the party is duly served. However, the court should proceed only after considering the cases for which the parties appeared in court (Art. 142(1) of the CCP). This rule is aimed at ensuring the parties' right to participate in the proceedings. This guarantee is mentioned in Art. 142 (2) of the CCP, which states that the court has to adjourn the case if the party and the proxy thereof cannot appear due to an obstacle which the party cannot avoid. If the party is unduly subpoenaed or its participation in the case is infringed in some other way (for instance, it is infringed in the course of collecting evidence or in the course of the oral pleadings), this constitutes a considerable procedural breach as well as grounds for appeal of the decision of the intermediate appellate court (Art. 281 (1), item '3' of the CCP). The party concerned is entitled to seek reversal of the decision even if it has taken effect if that party has been deprived of the opportunity to participate in the proceedings because of a breach of the rules, it has not been duly represented, or it was not able to appear in person or via an attorney, due to special unforeseen circumstances which the said party was unable to overcome (Art. 303 (1), item '5' of the CCP); and where the party upon a breach of the respective rules, was or, respectively, was not represented by a person referred to in Article 29 of the Code (Art. 303 (1), item '6' of the CCP).

b.) An important element of the adversary principle is the stipulation in Art. 8 (2) of the CCP which says that the parties must indicate the facts underlying their demands and should present evidence supporting the said facts. This element has two aspects. The first one is consisted of the party's right to allege the facts that support its demands as well as to present proofs for establishment them. Usually this aspect of the element of the adversary principle is to be especially emphasized on. The wording of Art. 8 (2) however indicates something additional - the party bears the burden of proof or the said the party is otherwise obliged to allege the facts if he/she wants for them to be taken into consideration in the course of the case proceedings, respectively to submit evidence if he/she wishes the evidence to be collected (Art. 129, Art. 131 of the CCP). Some authors consider this postulate as an absolute obligation

of the parties[46] and others – as a burden of proof which means that if the party fails to complete the above said requirements it will not benefit from the relevant benefits from ascertainment of the facts. The provision of Art. 8 (2) of the CCP indicates that the court can neither allude to facts which are not stated by the party nor to collect evidence supporting these facts[47].

The abovementioned element of the contents of the adversary principle provided in the new CCP can not be examined in isolation of the system of principles of the civil procedure, and particularly separately from the so-called *ex officio principle*.

c.) Art. 8 (3) also stipulates that 'the court should give the parties an opportunity to familiarize themselves with the demands and arguments of the opposite party, with the subject matter of the case and the progress thereof, as well as to express a position on the said demands, arguments and subject matter'.

The effective exercise of the right of defence and the contest between the parties are closely connected with the necessity for the party to be informed about the demands, replies and the arguments of the opposing party as well as to express opinion on them. This particular obligation of the court is stipulated in a number of provisions of the CCP. It is connected with the need to submit duplicate copies of the statement of claim, the filed written answer to the claim, the intermediate and cassation appeals, the petition for reversal of effective court decision and the documents for the other party appended to them (Art. 128, item 3; Art. 131; Art. 149 (3); Art. 261, item 1; Art. 263; Art.284 (3), item 2; Art. 306 (3) of the CCP).

The element of the *adversary principle* introduced with Art. 8 (3) of the CCP concerning the court's obligation to inform the party about the demands and the objections of the opposing party is essential in the interpretation of the norms of the new CCP, particularly when the texts have different wording compared to the repealed CCP.

[46] *See* O. Stamboliev, op.cit., p. 100.
[47] The exclusion is the court's right and obligation to appoint an expert witness if special knowledge in the field of science, art, skilled crafts etc. is necessary for clarification of certain questions which have arisen in the case (Art. 195 (1) of the CCP, see paras VI, V of this article).

Art. 8 (3) of the CCP is important for those cases when it is obligatory that the respondent be served with a duplicate copy of the motion for amendment of the claim in case that he failed to participate in the court room hearing. Art. 214 of the new CCP does not re-enact the rule provided in Art. 116 (2) of the revoked CCP. The situation is similar to the filing of the incidental ascertaining action (Art.212 of the CCP in comparison with Art. 118 of the revoked CCP) as well as with the motion for impleader (Art. 219 of the CCP).

Apart from this Art. 8 (3) of the CCP stipulates that the court is obligated to let the parties get acquainted with the subject matter of the case and its progress. It concerns the court's duty which provides the conditions for the manifestation of the contest principle. An indication of this manifestation and a specific feature of the new CCP is the court's duty to make a written report on the case with an obligatory content in accordance with Art. 146 (1) of the CCP which includes exactly the right of the party to know the court's view on the subject matter from factual and legal standpoints as well as the obligation that the parties be given an opportunity to express their opinion on the report – Art. 146 (3) of the CCP.

In regard to the court's obligation to give the parties the opportunity to get acquainted with the progress of the case (stipulated in Art. 8(3) of the CCP) the provision of Art. 7 (2) of the CCP is important as an element of the ex officio principle which provides that the court should serve upon the parties a duplicate copy of the acts which are subject to appellate review by separate appeal.

The manifestation of the adversary principle is more restricted in security measures proceedings. The opposing party is not served with a copy of the request for securing the claim (Art. 395 (1) of the CCP). This request is considered in a closed session on the day it is filed (Art. 395 (1) of the CCP), *i.e.* without subpoenaing the parties. The objective is to achieve swiftness and to surprise the opposing party. It is assumed that if the opposing party is notified, it might take measures to impede the imposition of security. The adversary principle is manifested in the defendant's right to appeal against both the ruling of the court regarding the admission of security and the security order (Art. 396 (1) of the CCP). A duplicate copy of the interlocutory

appeal must be served upon the opposing party for an answer within one week. The complaint is considered in a closed session.

In enforcement proceedings, the adversary principle is evident in the appeal against the procedural actions of the executive magistrate but it is very restricted in the new CPP (Arts. 435 and 436 of the CCP).

VII. The equality of the parties principle

The equality of parties in the proceedings is a civil procedure principle which together with the adversary principle is set forth in one and the same provision of the Constitution because they are closely related - Art. 121(1) C that proclaims 'The courts shall ensure the equality and the conditions for a contest between the parties in a judicial trial[48]. There can be no adversary principle without equality of the parties in the proceedings. They are so closely tied together that it could be accepted that the equality of the parties principle is an immanent part of the adversary principle[49]. In the new CCP however the Bulgarian legislator decided to proclaim them as separate principles of the civil procedure (see para VI). The principle of the equality of parties in the proceedings is proclaimed in Art. 9 of the CCP- 'The court shall afford the parties an equal opportunity to exercise the rights conferred thereon. The court shall apply the law equally in respect of all'.

The principle of equality of the parties is typical for the civil proceedings as it provides the remedy and sanction in the event of wrongful development of civil law relationships, regulated by the method of equality of subjects. It is accepted that the principle has the following three manifestations: equal procedural rights of the parties; equal options for the latter to exercise them; equal application of the law[50].

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[48] As for these principles, *see* D. Silyanovski, *op. cit.*, vol. 2, pp. 8, 10, 11; J. Stalev, *op. cit.*, seventh ed., pp. 105–106; J. Stalev, A. Mingova, V. Popova, R. Ivanova, *op. cit.*, pp. 108–109 (the matters regarding the principles of civil proceedings are worked out under the co-authorship of J. Stalev and A. Mingova); S. Rozanis, *op. cit.*, pp. 78–81.
[49] *See* V. Popova. *Civil Procedure.* Bulgaria. First ed., para 56.
[50] *See* L. Kornezov, op. cit., p. 133.

The first manifestation of this principle[51] is the equal procedural rights of all opposing parties for the protection of their substantive rights. Each of the parties has the right (*see* also para. IV) to take part in the proceedings, to participate by a procedural representative (Art. 32 of the CCP), to be notified of the claims and challenges made by the opposing party, to be notified of the actions of the judicial body, to appeal against the procedural actions of the court and the State or private executive magistrate if they injure the party's interests.

The following manifestations of the principle of equality of the parties are incidental only to the adversary proceedings: the right of each party to be subpoenaed for attending the court's hearing (Art. 56 (5) of the CCP), to present in court their factual allegations and be heard (Arts 127, 128,131 and 143--146 of the CCP), to request that the opposing party is subpoenaed and that they reply to the questions posed (Art. 176 (1) of the CCP), to submit evidence in support of their allegations (per argument of Art. 154 (1) of the CCP), to request that a document in possession of the opposing party or a third person is submitted (Arts 190, 192 of the CCP), both to take part in the collection of evidence (Art. 148), and in the oral pleadings (respectively to present a written defence) (Art. 149 of the CCP), to claim an incidental ascertainment decree (Art. 212 of the CCP), to involve a third party-accessory - impleader (Art. 219 of the CCP), to appeal against a decision by filing an appeal either with the intermediate appellate court or the cassation court, and to seek revocation of a decision that has already taken effect if it is a wrongful and affects its rights, and to file a petition to the court to a set time limit in case of unreasonable delay (Art. 255 of the CCP).

It worth noting that the new CCP has unjustified differences in the time limits for the plaintiff and for the respondent referring all the same procedural actions. For example, the petition for the involvement of a third-party accessory as well as the filing of a reversed claim against it and the lodging of an incidental ascertaining action may be done by the respondent with the answer to the statement of claim at the latest. The plaintiff can take these procedural steps during the first court session on the case. There is unjustified diversion of the equality of

[51] Nevertheless it is not explicitly proclaimed in Art. 9 of the CCP, I share the understanding (*See* L. Kornezov, op. cit., pp. 131-132) that it is immanently in the *Equality of Parties principle* (*see* about it in relation with the effect of the old CCP V. Popova. . *Civil Procedure.* Bulgaria. First ed., para 56).

the parties in the proceedings principle in Art.66 (2) of the CCP which differs from Art. 39 (3) of the repealed CCP and let an appeal only against a ruling whereby resumption of the time limit is refused. It does not give a right of appeal when a motion for a resumption of the time limit is concerned.

It is considered that the arrangement of the court summoning in the new CCP is anothe diversion from the application of the equality of parties in proceedings principle[52].

There are some differences with respect to the parties' rights. They are necessary and corresponding with the different legal role of the both parties. Only the plaintiff can move to a refusal of the claim, withdrawal/ abandonment, a modification of the action.

Regarding the equality of parties in proceedings principle and the respondent's right to defense there are some relevant rights provided. The plaintiff may not withdraw the statement of action without the consent of the respondent if he/she wants to do this after the end of the first hearing of the case (argument of 232 of the CCP. During the first hearing for examination of the case, the plaintiff may modify the grounds of the action only if the court deems this appropriate considering the defence of the respondent (Art. 214 (1) of the CCP). Only the respondent may bring a counter action but considering the plaintiff's right of defence the counter action must be filed within the time limit for an answer to the statement of action (Art.211 (1) of the CCP).

The second manifestation of the principle consists of the court's duty to ensure the parties procedural opportunities in exercising their procedural rights which it performs in the course of its obligations (included as an element of the *ex officio principle* - *see* also para XI of this article) regarding the procedural steps of the parties, the active participation in clarifying the case, the instruction in the party about its right and the possibility to use legal aid.

On the other hand, the *ex officio principle* outlined above, combined with the requirement for independence and impartiality of the court, as well as the party's right to use legal aid, guarantee the real equality of the parties and avoids the possibility that the procedure turns

[52] *See* R. Ivanova, B.Punev, S. Chernev, op. cit. (the matters regarding the principles of civil proceedings are worked out by R. Ivanova), p. 45.

into a contest among actually non-equal legal parties where the real winner is the economic stronger party[53].

The legal norms establish equal legal opportunities for the parties, but this does not mean that the parties are equal. Usually, the financially stronger party can afford a better defence by hiring better and highly-paid attorneys. Thus, in most cases the parties in the proceedings are legally equal, but in reality they are unequal.

The third manifestation of the equality of parties principle explicitly stipulated in Art. 9 of the CCP is the court's duty to apply the law equally in respect of all. In my opinion this obligation is immanent of the legality principle. The law is common to all. It can not be applicable in different way to different people. The legal literature however claims that it is correct that the obligation be considered as a component of *the equality of parties in proceedings principle*[54].

It is also necessary to mention that *the equality of the parties principle* is closely related to the "concentration rule" which is not explicitly stipulated in Part I, Chapter II "Fundamental principals" of the CCP but it is absolutely accepted in the legal theory and practice.

In enforcement proceedings, the principle of equality of the parties is manifested in the right of both parties to be notified of the enforcement actions by the executive magistrate, their right to appeal against his/her unlawful actions (Art 435 of the CCP, and the right of the defendant to the complaint to submit written objections (Art 435 (3) of the CCP). In regard to the restriction to appeal I think that the *equality of the parties principle* in the enforcement proceedings of the Bulgarian civil procedure was contorted.

The manifestation of the principle of equality of the parties in security proceedings is limited. The opposing party does not receive a copy of the request for securing the claim. This request is considered in a closed session, without subpoenaing the parties. This session is held

[53] As it happened in the period after 1997 when a very essential element was eliminated from the so-called ex officio principle, i.e. the principle about the court's active participation in the clarifying of the factual circumstances of a dispute (*See* V. Popova. *Civil Procedure.* Bulgaria. First ed., paras 53, 56).
[54] *See* L. Kornezov, op. cit., p. 133.

on the day the request is filed (Art. 395 of the CCP). The principle of equality of the parties is apparent in the appeal of the parties against the ruling for admitting the security with an interlocutory appeal, the serving of a duplicate copy of that appeal upon the opposing party and in the appeal which is considered in accordance with the procedure mentioned in Arts 277 of the CCP (Art. 396of the CCP) as well as in the ability to change or revoke the security instrument (Arts 398, 402 of the CCP).

VIII. The publicity and immediacy principles

Art. 11 of the CCP proclaims *the publicity and immediacy principles* on the basis of which the judicial action proceedings are established. These principles are tightly linked with one another as well as with the oral examination of cases principle which is the reason for the legislator to proclaim them in one law provision (*see* also para 58 of this article).

The principle of directness entails that the parties make their claims, allegations and challenges before the court that considers and determines the case. The court also rules upon the admissibility of the evidence. In adversary proceedings, there is no assistant-judge who prepares the case himself/herself and collects the evidence. It is the judge who reports on the case in first-instance proceedings; and the panels consist of only one judge. As for the intermediate appellate court and the cassation court instance, where the panel is composed of three judges, one of the members of the panel reports on the case. The procedural actions of the parties are performed in a court session before the whole panel of the court and not just before the judge who reports on the case. The procedural actions of the court are the rendering of rulings and decisions taken by simple majority of the panel (Art. 21 (5) of the CCP). The decision is rendered by the panel that finalizes the hearing of the case (Art. 235 (1) of the CCP).

According to Bulgarian law, the cases are heard and the evidence is collected within a court session. The Bulgarian procedural legislation, theory and practice distinguish the following types of court sessions (*see* also para VI of this article): an open to the public court session, an

open sessions in camera and a closed session. The open court session is a session where the parties were subpoenaed. It has two varieties.

The open to the public court session is a session that can be attended not only by the parties, the witnesses and the experts, but also by persons not involved in the proceedings. The open sessions in camera are a specific type of a court session for which the parties are subpoenaed but the public is not accepted. When there is a closed session the parties to a case and the public are not allowed.

The principles of immediacy (directness) and orality are linked to the open court session, i.e. with the sessions when the parties are subpoenaed[55]. The procedural actions are performed orally during the court session and entries are made in the minutes of the court session (Art. 150 of the CCP).

The new CCP makes a retreat from the oral examination of the case principle regardless of the fact that it is explicitly proclaimed in Art. 7 of the CCP.

Nowadays the session for oral examination of the case (Arts. 143—150 of the CCP) is preceded by:

a.) The so-called parties' exchange of papers which is the filing of the statement of claim and the respondent's answer to it[56];

b.) The first session in the proceedings is also called "the preparatory session" and it is closed without subpoenaing of the parties (Art.140 of the CCP). The matters regarding the admissibility of the proceedings are solved in this session and all the claims and challenges are considered as well as the admissibility of the presented evidence by the parties in their respectively a statement of claim and answer to it. After this closed session the court tries the case in an open court session with subpoenaing of the parties and serving the ruling enacted in the closed session and it is possible to send also its draft of the case report (Art. 140 (3) of the CCP).

[55] *See* V. Popova. *Civil Procedure.* Bulgaria. First ed..

[56] The transmission of the duplicate copies however is done by the court and because of that the procedural relations are established among the court and each of the parties but not between the parties.

Although the legislator introduced the so called 'exchange of papers' (according to it and following Arts. 129 and 131 of the CCP, the parties are supposed to exhaustively state their demands and challenges) and a closed court session aiming at a preparation of the case, he saved rules referring the open session and typical for the court preparatory session under the repealed CCP when the session was open with subpoenaing of the parties. The Art. 143 (3) of the CCP explicitly stipulates that during the open session, which under the new CCP is about the case examination, the parties are obligated to make and justify all demands and oppositions thereof and to take a stand on the circumstances alleged by the opposing party (as it was done under Art. 109 (1) of the repealed CCP). It also provides that the court should pose questions to the parties for clarification of the facts, specifying the relevance of the said facts to the case (Art.145 (1) of the CCP as it was in Art. 109 (1) of the repealed CCP). Besides, exactly in this session the court's obligation is imposed to instruct the parties to particularize the allegations thereof and to eliminate any contradictions therein, the burden of proof and other solutions as it was under the revoked CCP).[57]

The immediacy principle is also manifested in the collecting of evidence. The testimony of the witnesses is obtained by questioning the witnesses in a court session (Arts 170--171 of the CCP). No written testimony is admissible in the first-instance proceedings or the second-instance proceeding. The conclusion of the expert is produced in writing and copies are submitted to the court and the parties no later than a week prior to the day of the court session (Art. 199) of the CCP). Also, the expert is heard in the court session to which the parties are subpoenaed and may question him/her in order the conclusion to be clear (Art. 200 (1) of the CCP).

It is not allowed for the court to render its judgement on the grounds of evidence gathered in another case. The only exception is provided for in Art. 232 of the CCP. If the case is

[57] *See* V. Popova. *Civil Procedure.* Bulgaria. First ed.

terminated due to a withdrawal of the claim, and the claimant later brings the same claim, the evidence gathered in the terminated case can be used in the new case but only if this gathering was barred by an obstacle that is hard to overcome (for instance, the witness died).

The principle of immediacy (directness) is not manifested in its pure form in adversary proceedings. Deviations can be seen in several directions:

(a) unlike in criminal proceedings, the principle of irremovability of the starting panel of judges, the panel that starts the hearing of the case, does not apply in adversary proceedings. The decision is rendered by the panel that finalized the hearing of the case (Art. 235 (1) of the CCP);

(b) if some pieces of evidence do not fall under the jurisdiction of the court and they do not necessarily have to be collected by the court itself, the court is entitled to delegate the collecting to the local regional judge (this is seldom used in practice);

(c) the evidence can be gathered according to the procedure for securing it (Art. 207 *et seq.* of the CCP);

(d) the inspection can be carried out by the whole panel, by a delegated member or by another delegated court (Art 204 (2) of the CCP);

(e) if persons are examined, the court is not allowed to damage the person's self-respect and, consequently, he/she is entitled to not be present in person at the examination provided that he/she is presented by experts (Art. 206 of the CCP);

(f) if documents are attached to the file, they can be submitted in the form of copies certified by the parties. However, the party is obliged to submit the original of the document or a certified copy if this is requested. If the party fails to do so, the copy of the document is excluded from the evidence in the case (Art. 183 of the CCP);

(g) the intermediate appellate court makes its conclusions on the grounds of the evidence collected both in intermediate appellate proceedings and in first-instance proceedings. However, the intermediate appellate court is entitled to question the witnesses and the

experts again already questioned by the first-instance court if it is necessary to hear them directly (Art. 267 (2) of the CCP).

A deviation from the *orality principle* is the option the parties to submit written defences instead of oral contest to be held foreseen in the new CCP (Art. 149 (3) of the CCP). In this way, the popular court practice at the time of the effect of the repealed CCP was regulated.

There is a deviation from the immediacy and orality principle in the special action proceedings in commercial disputes. Where all evidence has been presented by the exchange of papers[58] and if the court holds that hearing of the parties is not necessary, the court may examine the case in a closed session, affording the parties an opportunity to present written defences and replies (Art.376 (1) of the CCP). The court has to examine and adjudicate on the case in camera where the parties ask for this (Art.376 (1) of the CCP).

The principles of directness and orality create both advantages and disadvantages in the civil procedure. Considering the conditions of direct hearing of the claims, allegations and challenges of the parties, as well as the opportunity of questioning them in a court session, the panel is able to acquire a direct and truthful picture of the factual and legal issues of the dispute. If the court does a good job, the disputable and indisputable facts can be distinguished in the course of the court session and the court can determine the factual issues of the case. If the evidence is submitted in a court session, the panel of judges who determine the dispute must be more cautious in exercising this activity. Also, the direct impression enables the court to better assess the truthfulness of the evidence. In this organization of the proceedings, the achievement of a consent decree is easier. Compared with the court's decision, the consent decree is the best way of determining the legal dispute, however reasonable and motivated the decision may be.

However, these two principles also give rise to certain inconveniences. There is no guarantee of the strict and complete report of the procedural actions. They are entered into the record of the court session, written to the dictation of the presiding judge. Often, cases are

[58] A double submission of papers and a preparation of the case in camera are stipulated in the proceedings in commercial disputes (Art. 366, 367, 372, 373 of the CCP).

postponed and, consequently, the decision is delayed. Exactly these disadvantages the legislator tries to displace in the new CCP introducing the 'exchange of papers' and the closed court session aiming at a preparation of the case as well as the preclusion time limits stipulated in Arts. 131 –143 (2) of the CCP for allegations, presentation and adducing of evidence.

These provisions however, are consorted with norms, typical for the preparatory session from the repealed CCP and the requirement for an obligatory written report on the case (Art.146 of the CCP), made during the open court session and just then the court instructs the parties as to the facts alleged in respect of which they do not adduce evidence. This combination of norms raised discontent in the legal practice, especially among the judges. It is to be hoped that the following old Bulgarian proverb would not turn out to be true in the situation: 'It is impossible for too much that is good to exist at the same place and at the same time'.

IX. The principle of publicity

According to Art. 121(3) C, cases in all courts are heard in court sessions which are open to the public, unless the law states otherwise. The proceedings can be attended not only by the parties, the witnesses and the experts, but also by persons not involved in the proceedings[59].

It is in accordance with this constitutionally established principle that Art. 132 (1) and (2) of the CSA stipulates that Courts examine cases in public hearings and the publicity of trial may only be limited by law.

The principle of publicity of the civil procedure is proclaimed in Art. 11 of the CCP entitled 'Publicity and immediacy'. It is said there that cases shall be examined orally in public session, unless a law instrument provides that such examination take place in camera[60]. An analysis of the heading of the norm and its contents shows that with this provision the legislator proclaims

[59] About the types of court sessions in the Bulgarian procedural law *see* new para 57.

[60] This text is much criticized in the legal literature (R. Ivanova, B.Punev, S. Chernev, op. cit. - the matters regarding the principles of civil proceedings are worked out by R. Ivanova, p. 48) because there is a inconformity between the title of the provision and its content. The title is *Publicity and immediacy* and the content provides that cases must be examined orally in public session.

three mutually interlinked principles – the principles of orality, immediacy (directness) and publicity.

The court, acting either ex officio or on a motion by any of the parties, may decree that the case be examined or only some steps be performed behind closed doors where: the public interest so necessitates; the protection of the privacy of the parties, of the family, or of the persons under curatorship so necessitates; the case involves a trade, industrial, inventor's or tax secret and the public disclosure would impair any defensible interests; other valid reasons apply (Art. 136 (1) of the CCP). In these cases, the parties, their attorneys, the experts and the witnesses are admitted to the court room as well as those persons whom the Presiding Judge gives the permission (Art. 136 (2) of the CCP).

The comparison among Art. 121 (3) of the C, Art. 132 of the CSA and Art. 11 of the CCP brings about the conclusion that the legislator is not very consistent in applying the term of 'open court session'. With the relevant provisions of the CCP regarding the court sessions the legislator however specified the notions of an open public session, an open session in camera and a closed court session. In Arts. 134 and 136 of the CCP is accepted the view accepted in the civil procedural practice and theory that an open court session is a session with the parties subpoenaed and it can be held in public or in camera while for the closed session there is no subpoenaing. Art. 134 of the CCP stipulates the following: 'The court shall examine the cases in public sessions and in closed sessions. Hearings shall be conducted in closed sessions in the cases provided for by the law without the parties attending'. For example: the case preparation is made in closed session (Art. 140 (1) of the CCP); those appeals against the court's rulings that bar the further development of the proceedings are heard by the intermediate appellate court and the cassation court in a closed court session, unless the court holds it is necessary for the appeal to be heard in an open court session, *i.e.* with subpoenaing the parties (Arts 278 (1) of the CCP). The same applies to the parties' appeals against the actions of the executive magistrate in the enforcement proceedings (Art. 437 (1) of the CCP).

The principle of publicity of the adversary proceedings is a serious guarantee for ensuring the impartiality of the court. The situation where the judge considers the case alone in his/her chambers, without the participation of the parties and without any other individuals is quite different from the one where the judge is faced with the parties and the audience in the courtroom. This principle is also important in view of exploring the factual issues involved in the case. It seems that the witnesses find it hard to commit perjury and the experts find it harder to give false conclusions when they are in the courtroom, in accordance with the principle of publicity, even if they are 'well-prepared' by the parties as to the answers they are supposed to give The principle of publicity applies to all instances of adversary proceedings except for the abovementioned closed court sessions: about the case preparation (Art. 140 of the CCP); about the review of the claims against the rulings of the lower instance court (Art. 278 of the CCP); the session about the voting on the decision as well as the other court's acts, which are necessarily carried out in a private meeting of the panel (Art. 21 (1) of the CCP).

A deviation from the principle of publicity of the adversary proceedings is also stipulated under Art. 149 (3) of the CCP where the popular court practice during the effect of the repealed CCP was regulated, i.e. the oral competition to be replaced by written defences. Another deviation from the principle of publicity is allowed for in Art. 376 of the CCP concerning the special action proceedings in commercial disputes[61].

As proclaimed by the Constitution, the principle of publicity also applies to the pronouncement of the court's judgment. The court solves the legal dispute between the parties by a State power act. It is the will of the State that stands behind the court's judgment. It is rendered in the name of the people. Because of its great importance as a conclusive procedural action, its legal regulation is subject to the principles of the adversary proceedings. The whole activity of the court in the proceedings is accumulated in the court's decision. Its pronouncement brings about a number of procedural consequences; from that moment the decision cannot be repealed or changed by the court that rendered it (Art. 246 of the CCP), and - for non appealable decisions, it is at this moment that *res judicata* takes effect (Art. 296 (1) of

[61] *See* V. Popova, *Civil Procedure.* Bulgaria. First ed.

the CCP). According to Art. 235 (5) the court renders its decision and reasoning within one month following the day of the meeting that finalized the hearing of the case.

An achievement of the new CCP with respect to the establishment of more publicity and transparency of the civil procedure is the explicit norm of Art. 235 (5), sentence II which proclaims that the judgment must be published in the register of judgments of courts, which should be open to public inspection and freely accessible to everyone. In my opinion, a better conformity was attained regarding the *publicity principle* in comparison with the practice, established during the effect of the repealed CCP. Then, despite the explicit law provision that the judgment's announcement must happen in a court session it was replaced by an entry into the judgment docket in the court's registry[62].

The principle of public hearing of the cases would be a mere declaration if the court's judgments are not announced in public. Civil cases involve private interests. However, the constitutionally proclaimed principle of publicity does not only protect private interests, but it also serves the public interest – making the proceedings 'transparent', guaranteeing the impartiality of the court.

There is an exception to the principle of publicity in security proceedings as well. They are conducted in a closed court session and the parties do not participate. There are certain exceptions to the principle of publicity in bankruptcy proceedings as well. In the first instance, the request for instituting bankruptcy proceedings filed by the debtor is heard in a closed session (Art. 629(1) of the C. Code), while the one filed by a creditor is heard in camera and both the debtor and creditor are subpoenaed for it (Art. 629(2) of the C. Code). Unlike in other legal systems, the joining of creditors is admissible according to Art. 629(3) of the C. Code. The decision for instituting bankruptcy proceedings is entered in the Commercial register and it is promulgated in the State Gazette (Art. 622 of the C. Code), providing publicity of the decision.

The principle of publicity is also present in enforcement proceedings. The sale of movable assets (Art. 474 (1) et seq. of the CCP) as well as public sale of immovables (Art. 376 of the CCP).

[62] *See* V. Popova, *Civil Procedure.* Bulgaria. First ed.

X. The inner conviction principle

Art. 12 of the CCP proclaims the inner conviction principle. It is said that 'the court shall weigh all evidence in the case and the arguments of the parties, guided by its inner conviction'.

Until presently the rule stipulated in Art. 12 of the CCP was not considered as a separate principle of the civil procedure. It does not mean that the rule was neglected or underestimated in the theory, legislation and the practice. Art. 12 of the CCP actually re-enacts the rule of Art. 188 (1) of the revoked CCP[63].

Furthermore, during the effect of the repealed CCP it seems that the requirement for an assessment of the collected evidence and the arguments of the parties regarding the inner conviction of the court used to be broader. In the time when the repealed CCP was in force neither the admission of the facts, nor the admission of the claim did bind the court regarding its conviction. On the grounds of Art. 127 (2) of the CCP the both procedural actions are considered by the court regarding its inner conviction. Now Art. 237 of the CCP stipulates the institute of the Judgment upon Admission of Demand according to which 'Where the respondent admits the claim, the court, acting on a motion by the plaintiff, must terminate the trial and render judgment conforming to the admission. As to the reasoning of such a judgment it suffices to state that the said judgment is based on the admission of the claim. In this hypothesis it is not admissible to collect evidence but only to state that the Judgment upon Admission of Demand is duly performed. This admission however does not bind the court regarding its conviction[64].

According to Art. 175 of the CCP 'an admission of a fact, made by a party or by a representative thereof, must be evaluated by the court considering all circumstances of the case'. It means that the admission of a fact does not relieve the court of its obligation to observe and consider all evidence in the case and the admission of the fact in relation with its inner conviction.

[63] *See* V. Popova, *Civil Procedure,* Bulgaria. First ed.
[64] It is about the judicial admission of fact which is not favourable for the party.

The principle stipulated in Art. 12 of the CCP is typical for the adversary proceedings. In the legal literature it is bound to the evidence law and like a manifestation of the ascertaining of the truth principle[65]. The freely made consideration of the evidence in accordance with the inner conviction of the court is a negation of the formal evidence. As a matter of fact, only the official certifying documents have binding evidential force now. Art. 179 (1) of the CCP provides that an official document, issued by an official servant within the official responsibilities thereof in the established form and according to the established procedure, constitutes evidence of the statements made before the said official and of the steps performed by and before the said official.

Art. 12 of the CCP proclaims that the court must also assess all the arguments of the parties, guided by its inner conviction. This, in my opinion, is the second aspect of the above-mentioned principle. In relation to Art. 12 of the CCP some authors consider that 'the arguments of the parties are actually their allegations which have to be proved by the admissible legal evidence'[66].

This view cannot be accepted. The parties' arguments are their reasons. There are two types of these. The first one is the factual arguments which present the evidential conclusions of the parties regarding the facts. In their defence during the adversary proceedings the parties apply legal arguments[67] as well which also imply the court's obligation to consider them in accordance with its inner conviction. It is true that the court is obliged to apply the law and the legal qualifications of the facts made by the parties do not bind it. Nevertheless, the parties have the right to be heard not only in relation to the facts and the evidence about them but also in relation to their interpretation of the law. The fact that the legal qualifications of a party do not bind the court does not allow it to consider the legal arguments of the said party.

[65] *See* L. Kornezov, '*Grajdansko…',* op. cit., p. 143; R Ivanova, B.Punev, S. Chernev, op. cit. - the matters regarding the principles of civil proceedings are worked out by R. Ivanova, p. 49-50).
[66] *See* L. Kornezov, op. cit., p. 144.
[67] *See* V. Popova, op. cit., pp. 231- 232.

XI. The principle for examination and rendering of decisions on cases within a reasonable time limit and the concentration requirement

Art. 6 (1) of the European Convention on Protection of Human Rights and the Fundamental Freedoms (ECPHRFF) proclaims that ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. This requirement is an essential element of the human’ s right of legal defence because sometimes the slow administering of defence can be equal to lack of defence. One of the serious problems of the practice is the slow process of administering trials and the delay of rendering a decision.

The requirement of an examination and rendering of decisions on the cases within a reasonable time limit is proclaimed to be a civil procedure’s principle under the new CCP[68]. Art. 13 of the CCP in compliance with Art. 6 (1) of the ECPHRFF proclaims that the court examines and adjudicates the cases within a reasonable period of time. It is pointed out that[69] the stipulation of the principle in Art. 13 of the CCP is a mere formality because the ECPHRFF is ratified by the Republic of Bulgaria with an act of the NA from 31 July 1992 (SG 66/ 1992) and Art. 5 (4) of the C explicitly proclaims that any international treaty, which has been ratified according to a procedure established by the Constitution, which has been promulgated, and which has entered into force for the Republic of Bulgaria, are part of the state’s national law. Any such treaty must take priority over any conflicting norms of domestic legislation. The European Court in Strasbourg is a guarantee for the observing of the rule in Art. 6 (1) of the ECPHRFF. The criteria established by this Court in its practice of applying Art. 6 (1) of the Convention must be abided both – by the national courts and the legislator when stipulates the relevant processes.

[68] At the time of the repealed CCP the requirements for speed and procedural economy were regarded as purposes rather than principles of the civil procedure (see V. Popova. Civil Procedure. Bulgaria. First ed., par. 50 and the titles cited there).
[69] R Ivanova, B.Punev, S. Chernev, op. cit. - the matters regarding the principles of civil proceedings are worked out by R. Ivanova, p. 51

As a matter of fact, it is important for the principle to be implied in concrete legal norms and not just only to be proclaimed. That is why it is essential to be mentioned that the principle stipulated in Art. 13 of the CCP includes not only the examination but also the adjudication of the cases. In Art. 235 (5) it is established that the court should publish its judgment, alongside the reasoning ,within one month after the hearing at which the examination of the case was completed[70]. It is well known however that the time limit under the law for enacting and proclamation of the judicial decisions is not observed by many judges with the excuse that the court system is overburdened with cases. And this is true to some degree. If this is the reason causing the problem then the solution is the increase in the numbers of the judges and not the cutting down of time limits[71]. One of the real reason for the delay of the court decisions however is the understanding that the time limits for the procedural actions of the court are interpreted as instructive[72]. It is true that with the Petition to Set Time Limit in Case of Unreasonable Delay (Art. 255 of the CCP) the party can enforce the process of adjudication but again this will happen after the time limit set under law. Besides, it is true that the judge may be disciplined under Art. 307 of the CSA but the same judge is supposed to enact the decision on the case and it is practiclly almost guaranteed that the petition for delay and the eventually imposing of snaction on the judge will not make him/ her meticulous to the party – petitioner. On the other hand, the state's liability under the ECPHRFF is not equal to the due receipt of defence.

It is completely true that the case's examination within a reasonable time limit depends not only on well-organized procedural steps of the court but also on the diligent exercise of the

[70] Whether the deadline is a short or long one is another matter. In practice in this respect there is no change in comparison with Art.190 of CCP where after the 1997 amendments a 30 day term was established. Before that under Art.190 of the repealed CCP it was established that the declaring of the judgment had to take place in the hearing where the procedures had been closed and only in cases displaying legal or factual complexity it was possible that the judgment be declared within 14 days following the termination of the hearing. It is obvious that the legislator is moving the law regime towards a longer deadline for declaring of the judgment.

[71] It is clear that dealing with cases is being slowed down by the fact that the hearings are being scheduled many months after lodging of the claim – again – due to the fact that courts are overburdened.

[72] Naturally, it is not possible for them to be preclusive because the society does not have an interest of the preclusion of the court's obligation to render the judgment.

procedural rights of the parties as it is stipulated in Art. 3 of the CCP[73]. Since under the repealed CCP the practice diplayed many cases of the parties pettifogging their procedural steps which resulted in chicanery of the law administering, the new CCP introduced the so-called *concentration principle,* in other words the “concentration of the evidential material principle”[74]. Ultimately the legislator did not decide to proclaim explicitly this principle in Part I, chapter II of the CCP, named *Basic principles*. Reasonably, in the legal theory and practice this principle is deduced from a number of norms which secure the concentration of the evidential material[75]. In his/ her statement of claim the plaintiff should exhaust all the legal and evidential allegations relevant to the disputed facts, to indicate the evidence which will help in the ascertainment of these facts and to present the written evidence (Art. 127 of the CCP). On the other hand, in his/ her answer, the respondent is obligated to adduce the evidence and the specific circumstances which the said respondent is to prove thereby, and to present all written evidence in his/her possession. The respondent must submit the written answer within one month period (Art. 131 of the CCP). After verifying the conformity and admissibility of the claim brought, as well as the other demands and objections of the parties, including the demands on evidence, the court acting in a closed session, should render a ruling on all preliminary issues and on admission of the evidence (Art. 140 (1) of the CCP). The court schedules the hearing of the case for public session, subpoenas the parties and after addressing the preliminary issues, proceeds with clarification of the factual aspect of the dispute (Art. 143 of the CCP). According to Art. 143 (2) of the CCP the plaintiff may explain and amplify the statement of claim as well as adduce and present evidence in connection with the contestations made by the respondent, and the respondent may cite and present new evidence which the said respondent was unable

[73] See L. Kornezov, op. cit., pp. 146-147.

[74] Some ideas were adopted from the repealed CLPA effective in the period of 1930 – 1948 (L. Kornezov, op. cit., pp. 148--149; R Ivanova, B.Punev, S. Chernev, op. cit. - the matters regarding the principles of civil proceedings are worked out by R. Ivanova, p. 53; O. Stamboliev, op. cit., p. 109) and under the influence of the Austrian experts in the working group, formed for the preparation of the draft of the new CCP.

[75] Most of the authors accept that this is a separate principle (R Ivanova, B.Punev, S. Chernev, op. cit. - the matters regarding the principles of civil proceedings are worked out by R. Ivanova, pp. 52--54; O. Stamboliev, op. cit., pp. 109-111. This principle is not explicitly proclaimed but it can be accepted as an element of the principle of the Examination and Adjudication of Cases within Reasonable Time stipulated in Art 13 (L. Kornezov, op. cit., pp. 148-50).

to cite and present in the answer to the statement of claim. The respondent can also cite and present evidence referring the plaintiff's demands under Art. 143 (2) of the CCP – the argument about this opportunity is under Art. 144 (1) of the CCP[76]. The purpose of the aforesaid rules is the case's examination and the collection of evidence in the first – instance proceedings to be realized in one session only. Some authors consider this idea to be a good one but not realistic[77]. Probably this is the reason for the legislator to step aside from it and to proclaim that the obligatory written court report with its mandatory content (Art. 146 of the CCP where the instructions in the parties about the allocation of the burden of proof and about the non – presenting of evidence in relation of some facts alleged are an essential element of the report's content) must be prepared during this session but not before it[78].

The concentration principle has also a manifestation in the intermediate appellate proceedings where the party can refer only to the newly discovered or intervening facts which the appellant wishes to be taken into account in adjudication of the case by the court of intermediate appellate review instance, and in an exhaustive listing of the reasons which have prevented the appellant from citing the newly discovered facts; respectively the party can only demand new evidence which the appellant wishes to be taken upon examination of the case (Art. 260, items 5—6; Art. 263 (2); Art. 266 (1) and (2) of the CCP). In these proceedings like it is in the first-instance proceedings, the court passes its judgment on the requested evidence upon considering them in private (Art.267 (1) of the CCP) in order to be possible for the court to examine and adjudicate in a closed session.

The *Examination and Adjudication of Cases within Reasonable Time* principle with its outlined content, which includes the concentration of the evidential material, is typical for the adversary proceedings.

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[76] In accordane with Art. 144 (1) the respondent may reqest to be allowed additional time in order to take a stand on the motions for evidence made by the respondent during the hearing and to cite additional evidence in connection with the contestations made.
[77] L. Kornezov, op. cit., p. 149.
[78] This combination between an early preclusion and late court's instructions to the parties leads to a confusion in legal practice which is due not to the incapacity of the judges and the attorneys but is a result of the inner contradiction of such combination.

In my opinion, the stipulated principle in Art. 13 of the CCP referring to the Examination and Adjudication of Case is also relevant to the claim securing proceedings. Art. 395 (2) of the CCP explicitly proclaims that the petition for a security of a claim should be adjudicated in camera on the day on which the said petition is submitted[79].

The principle stipulated in Art. 13 of the CCP must be further relevant to the enforcement proceedings. The officially declared reason for the introduction of the Order for payment proceeding in the new CCP is the possibility for a fast enforcement. Under Art. 411 (2) of the CCP the court should examine the application in private deliberation and should issue an enforcement order within three days[80]. Art. 405 (6) of the CCP stipulates that a petition for an issuance of a writ of execution should be examined in closed session within seven days by a judge of the competent court. In my opinion, this time limit is not well-founded because the issuance of a writ of execution is not of a legal or technical complexity. On the other hand it is not possible for the court to impose any other securing measures. Aiming the accomplishment of a faster process of the enforcement proceedings the legislator restricted the opportunity for appeals of the acts of the enforcement magistrate (Art. 435 of the CCP). The aspiration for a quicker civil procedure is not supposed to be a detriment of the guaranteed lawful development of the procedure. The requirement of Art. 6 (1) of the ECPHRFF and Art. 13 of the CCP is not just a rule for a quicker procedure but also it stipulates the procedure to be administered and completed within a reasonable time limit which in my opinion must be combined with the lawfulness principle.

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[79] Unfortunately, in my opinion this norm, which is identical to the Art. 314 (2) of the repealed CCP, is often violated in the practice.

[80] Unfortunately this rule is much violated. There are Applications for Issuing of an enforcement order submitted before the Sofia Regional Court which are not examined within periods of whole months. They say this is because the court is overburdened with work. The legislator tried to solve the problem changing the cognizance established in Art. 411 (1) of the CCP (SG 42/ 2009) but the order for payment proceedings was not accelerate a lot and some other problems appeared.