

Preparation of Civil Case for Trial in the Russian Civil Procedure

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Abstract: Law reform, implemented in Russia, affects different aspects of legal activity. Changes also occurred in the organization and working conditions of courts and in realization of justice. The procedure of case preparation for trial had also much improved. However, changes in the legal regulation at case preparation stage date to 2002. Despite the fact that legislator gave a new meaning to this procedure stage and despite the expectation that this procedure stage would play a new role in the process as a whole, many scientists in their research repeatedly considered the preparation stage as the subject of critical analysis. Indeed, large potential of stage of case preparation for trial, as well as the experience of civil procedure in foreign countries, was omitted by legislator. And no matter how insulting it could be, this procedure stage remains to be so for already more than ten years. Therefore, it seems reasonable to consider the very key points in the formation of case preparation as the procedure stage and as an institution of civil procedural law and to indicate the tendencies in the development of rules in this area.

Key words: Law reform • Legal activity • Legal regulation

INTRODUCTION

Historical roots of case preparation stem from as early as the Roman civil law, which had been “the basis for the entire system of the civil procedural law” and which defined the main principles of civil procedure (dispositive principle, competitiveness, oral nature of judicial proceedings, publicity) [1]. It is well known that the Roman civil procedure was divided into three forms: legal suit (legis actiones = legal claims), formulary (per formulas; the main point of which was that praetor made up formula, which contained an instruction of how a juror should resolve the controversy) and extraordinary procedure.

Gnoseological analysis of the Roman civil procedure makes it possible to discern preparatory orientation of certain actions, familiar for contemporary procedure, only in the formulary procedure [2]. Firstly, at in iure stage of formulary procedure, the case was prepared for solution. This stage was obligatory [3]. Obligation of the preparatory stage today is the predetermined guarantee of timely and correct investigation and solution of the case. Secondly, parties, before composition of formula, could

ask questions regarding certain actual prerequisites. The existing Russian legislation, at the pretrial examination stage, embodies the task aimed to ascertain the actual circumstances, important for the case. Thirdly, on the preliminary procedure stage, known to the Roman formulary procedure, certain questions were solved under the sole power of praetor. At last, in this phase of the formulary procedure, at the in iure stage the legal procedure could be finished for reasons, known to the cotemporary civil procedure: settle by compromise, conformation of defendant to plaintiff claims.

Investigation and solution of case in prerevolutionary period (1864-1917) was regulated by Rules of Civil Procedure as of 1864 (henceforth, 1864 RCP). General procedure of case preparation was regulated by chapter 5 of 1864 RCP, first four sections in which established an order of defendant notice to appear (on summons or via publication in “Records”), dates for appearance in the court, the order of presenting the pleadings in the court, appearance in the court and case preparation. It was the first regulation of pleading (pretrial examination), which got its normative embodiment.

According to this regulation, the number of pleadings, presented by litigants, was no more than four, i.e., two per a party. These pleadings included point of claim, counter-plea, traverse to the answer and denial of objection.

The obligation of preparatory stage and its significance were indicated in scientific publications of those years. For instance, an author, unknown to us, by analyzing the reasons for slowness of the pre-revolutionary civil legal procedure, arguably substantiated that “the rendering of judicial solution should be preceded by pretrial stage of collecting and clarifying the evidences, which litigants use for case defense and for abatement of action; on the basis of which the court should settle the question” [4].

However, according to the Act of June 3, 1891, certain alterations were made to normative embodiment of legal procedure before hearing the case (to the case preparation stage), one of which was the abolition of compulsory appearance of parties for cases of reduced order. At the same time, all the preliminary preparation regarding the cases of general order was reduced to the written instruction, accomplished according to the free will of parties.

Those innovations were based on the combination of the written instruction of the case according to German Civil Code of 1877 (henceforth, German RCP) and resolutions of the Act of Civil Procedure of France. Unfortunately, legislator of those years did not take into account the many specific features of French legal procedures [5]. Moreover, the pretrial proceedings of the Russian civil procedure were changed without critical analysis of the diametral opposition of French and German procedures of those years: the former was based exclusively on oral nature of judicial proceedings and the latter relied exclusively upon written forms.

Of course, the occurred changes in pre-revolutionary legal procedure can hardly be called progressive. Cases of the common order of legal procedures, insufficiently explained by pleadings and, moreover, cases of reduced order (often rather serious, in their content) were coming into opening sitting, surrounded by full mystery about the directions, in which the dispute will develop as a result of objections of defendant, sometimes quite unexpected [4]. These conditions did not allow a dispute to be settled on the opening sitting of the court.

After the Great October Revolution, investigative civil procedure replaced competitive one. After total refusal of the practice of justice, developed in pre-revolutionary period, legislator envisaged no pretrial

examination at all and the case was brought into judicial sitting only on the basis of plaintiff's statement alone. In overwhelming majority of cases this method led, like in pre-revolutionary tradition, to remand: judicial sitting detected the need in evidence from plaintiff, defendant raised an objection, which also necessitated presentation of evidences in the court [6].

This situation persisted until 1929, when legislator did enter amendments into Code of Civil Procedure (CCP) of The Russian Soviet Federative Socialist Republic of 1923, which endowed the pretrial examination with significance of legal institution. Nonetheless, this pretrial examination was not obligatory for every civil case and was decided by judge.

Moreover, when developing the Code of Civil Procedure of 1964, legislator took into account neither the results of critical analysis of pretrial-stage problems, nor practitioner's appeals, essentially reducible to the need in preparation stage for every civil case, which otherwise could be lengthened in view of many delayed judicial sittings.

The pretrial stage was first normatively embodied as late as 1995.

Federal law of October 27, 1995 no. 189-FZ “On amendments to the civil procedure code of the Russian Federation” appointed the tasks of preparation and regulated the actions comprising the tasks.

The development of the institution of the pretrial examination at the stage, which began after adoption of 2002 CCP of the Russian Federation, can undoubtedly be called the evolutionary document, with special attention paid not only to the principle of competitiveness [7-8] and its realization, but also to accumulated quantitative changes in rules, regulating this stage of the procedure and quantitatively changing this stage.

Scientific Discussions: Certain present-day scientists still unambiguously claim that “with the respect to the stage of the trial, the pretrial examination is auxiliary and servicing in character” [9-10], being a procedural tool [11] of realization of civil procedural task, i.e., timely and correct investigation and resolution of civil cases.

Moreover, “it should create the basis for correct investigation and solution of the case in trial” [12-13], because it is just this “procedural knot” that is the starting point for realization of many institutions of the civil procedural law [14]. This postulate of positions of most scientists clearly sounds with echoes, inherent in this stage and highlighting its significance in pre-revolutionary and soviet process.

At the same time, there remains uncovered the sphere of legal establishments concerning the possibility of cessation of the procedure at the very beginning of the process (when parties conclude agreement of lawsuit, plaintiff refuses from suit and consequences of termination due to time limitation of suit are applied). Undoubtedly, analysis of regulations in chapter 14 of CCP of the Russian Federation also allows us to see the previously known institution of pretrial examination that have got its normative embodiment in preceding procedural laws and represents “one of the guarantees for solving the task of the civil procedure, namely, correct and timely legal investigation [15]”.

New Approach to Determining the Role of the Pretrial Examination Stage: Ontological and gnosiological analyses of normative regulation of pretrial examination quite arguably confirm the significance of “new” preparation of case for legal procedure. Now it is not restricted to just the importance of the role assigned and to traditional, but rather limited, understanding of the aim of this procedural stage (according to part 1, art. 147 of CCP of the Russian Federation, the purpose of the pretrial examination is to ensure a correct and timely investigation and resolution of the civil case).

At the pretrial examination stage, the law now envisages the possibility to accomplish procedural actions, which cannot be endowed with “preparatory purposeful orientation”.

Legislator, when making essential changes to pretrial examination of the case, first of all took into consideration “the possibility to use the preparatory stage as a tool for solving the task on optimization and even simplification of legal procedure [16]”.

For instance, the task of conciliation of parties (paragraph 6 art. 148 of CCP), previously unknown to pretrial stage, is normatively embodied in 2002 CCP of the Russian Federation. Theoreticians pay serious attention to this newly introduced task and practitioners associate great hopes with it, because the conciliation of parties is the manifestation of the dispositive principle and is the desired action of parties at any stage of the procedure, especially at the pretrial stage of the case.

Thus, it is now recognized that it is unreasonable to reduce the significance and role of pretrial examination stage to just its proper realization, because the quality of this stage heavily determines the final results of the trial. Partly, this is because of some

“understatement” in normative embodiment; however, this is in many respects due to already traditional view on pretrial examination and its role in the process as a whole, formed well before the adoption of CCP of the Russian Federation.

Certain authors, indicating that the center of gravity is shifted toward early stages of the procedure and that the legislator tends to activate the procedure at its starting point, not only characterize the pretrial examination as a basis for the trial, but also reconsider the views on the latter as a central stage of the procedure as a whole. This is primarily because CCP of the Russian Federation admits the abatement of suit (by adopting the decision on agreement of lawsuit or renunciation of suit by plaintiff, as well as by adopting the decision on refusal from the suit after facing the fact that the limitation period of the case is missed, or that the period of reference to the court is missed) and leaving the petition to court without examination.

Other individuals remain adherent to the definition of the role and the place of pretrial examination according to the formula “the higher the quality of the pretrial examination, the shorter the period of the case resolution”, according to which this stage is used in the most efficient way to ensure the conditions for successful investigation of the controversy notified, purposeful clarification of all the essential circumstances and arrival at motivated decision. Unconditionally, pretrial stage, both in theory and practice, will be considered one of the necessary [17] (though not central, as in other countries of continental and Anglo Saxon legal procedure [19-21]) elements of the mechanism of justice until most part of cases will come up to judicial proceeding.

CONCLUSION

To understand correctly the role and significance of preparation, it is necessary to present both essential and own knowledge of all changes that found their embodiment in legal regulation of this procedural institution. Therefore, it is necessary to take a complete account of new task of the case preparation, namely, reconciliation of the parties (which it put into potential) and incorporation of procedural actions that could be accomplished before only at the stage of trial.

All views on the preparation stage should be endowed with ontological union with essence of the process, legal remedy and realization of justice.

Urgent Problems Dealing with Application of Regulations on Pretrial Examination and Ways Around Them

Problem 1: Passive Relationship of Parties: By incorporating the conceptual essentials of competitiveness into the pretrial examination stage, legislator, in accordance with the mixed competitiveness form, selected for the Russian civil procedure, retained a certain activity of the court [22]. For instance, judge determines the subject for proving and distributes the load of proving among parties, approves the final range of questions during appointment of expertise (sec. 8 part 1 art. 150 and art. 80 of CCP of the Russian Federation), resolves the question about call of witnesses (sect. 7 part 1 art. 150 of CCP of the Russian Federation).

These actions of the judge prevent parties from taking total “control” over the procedure, such that the case would progress not only under their control, but also at their initiative. Moreover, legislative regulation of actions of the parties and court at the pretrial examination stage is such that parties do not hurry to accomplish preparatory actions (which are elements of proving) honestly and fully. Indeed, if exchange of documentation, declaration of evidences and presentation of new facts are hoped to be possible at the stage of trial, it is unreasonable to create beforehand the conditions such that opposite party could examine in detail my own positions.

The Ways Around this Problem: Agreeing with certain scientists who studied the procedural material of pretrial examination of case and the process of proving, we consider establishing the rigorous measures of responsibility as the only efficient method for overcoming the passivity of parties and an arousal of their interest to the pretrial stage. Presentation of evidences after the beginning of case examination per se, as well as presentation of petitions of their reclamation, should only be permitted in availability of reasonable excuse. This responsibility of a judge to decline evidence, presented too late and entailing the delay of the procedure, is embodied in the article 179 of CCP of Austria. The Russian model of competitive procedure is more similar to the model of competitiveness of the country above. The positive experience of procedural efficiency of “the search for truth [23-24]” in civil procedure, a bright example of which is article 179 of CCP

of Austria, can hardly be overestimated. Judging from ontological and gnosiological features of the Russian civil procedure, being the most important measure of borrowing the regulations, it can be hoped that Russian legislator will take into account the cited Austrian experience.

The Second Problem: the Absence (At the Pretrial Stage) of Rendition Proceeding, Containing a Number of Facts, Being a Part of the Subject of Proving, as Well as the Distribution of the Burden of Proof Between Parties Participating in the Trial: French proceduralists, after analysis of the project of CCP of the Russian Federation and thereby concluding that “the judge regulates civil procedure”, expressed their thoughts rather objectively, in our opinion. For instance, “pretrial examination of the civil case, - says Jean-Marie Coulombs, President of the Court of the Great Procedure in Paris, - proceeds almost totally independently from litigants [25]”.

Indeed, the procedural legislation establishes the actions of the judge that are not characteristic for the competitive model of legal procedure. It is well known that, according to the concept of competitive procedure, parties (plaintiff on the basis of statement of claim and defendant on the basis of his objection in response to the suit) can indicate only those circumstances, in the light of which they may lay most profitably before the court, or those circumstances, which they can conveniently confirm with evidences [27 – 30]. However, as was already indicated above, the judge is charged to define the subject of proving (part 2 art. 56 of CCP of the Russian Federation).

Scientists, who chose the process of proving in the Russian civil procedure as the subject of their thorough study and who acquired a great authority, claim that imposing an obligation on judge to define the subject of proving “is dictated by considerations of practical expedience because, for different reasons, parties are not always able to define correctly the composition and legal significance of facts (circumstances), the presence or absence of which should be proved by them to confirm that their claims and objections are justified [31]”. Such an explanation of court powers is characteristic not only for the Russian civil procedure. Identical statements can be found, e.g., in works of Hungarian [32] and Norwegian [33-34] researchers and representatives of the scientific community in other countries [35].

Thus, the judge resembles the great genius Micheangelo, who, “cutting off everything spare from the stone, created his masterpieces”. Analogously, the judge in the Russian civil procedure, after examining all the facts presented by the plaintiff for the civil case and response to the statement of claim of the defendant, (in virtue of the law) determines which circumstances will be significant for the case and which circumstances will be immaterial, despite the fact that they are confirmed by evidences. Moreover, the judge determines which party should prove them and also puts into question the circumstances, even if parties did not refer to them. This means that, no matter how hard parties tried to find evidences in support of their arguments and objections at pretrial stage of the case and no matter how much effort, money and time they spent to get the evidences, the court may, after recognizing them immaterial for the subject of the dispute, decline them all. The activity of the court in identification of the subject of the proof and in gathering the evidences also takes place in other countries of continental law (such as in German [36], Italian [37], Dutch [38] and Belgian [39] civil procedures).

The judge in the Russian civil procedure, after examining the statement of claim at the stage of initiation of proceedings and after taking it into legal proceeding, appoints preparation of the case for the legal proceeding, designed to mean that parties are instructed what will be the subject of proof for the case. However, in view of the administrative-territorial division of the country, not everybody can appear in the court at appointed time. Being at the state of ignorance, parties are forced to make useless actions, agitate, which subsequently leads to delay of the procedure. Moreover, this situation ruins the impression of positive realization of the principle of equality of arms, the main concept of which is the idea of safety of those who does not break the law.

Thus, this situation can be prevented by embodying the procedure of informing the individuals, participating in the case, about thoughts of the court regarding the subject of proof, distribution of the burden of proving among interested individuals, as well as about which evidences presented by the parties are excluded from the subject of proving. It is totally obvious that the pretrial examination of the case is potentially the most optimal for realization of this set of procedural activities (rendition proceedings, including information about evidences to be proven; submission of regulations to the parties; the receipt of notification on handing).

The Problem: the Absence of Uniform Approach to Applying the Regulations on Preliminary Judicial Sitting

The Reasons Why the Procedure of Preliminary Judicial Sitting Appeared: The institution of preliminary judicial sitting is entirely new for the civil procedure. Seeking to restore the history of appearance of this procedure in the civil procedural legislation, we can confidently state that the possibility of holding the preliminary judicial sitting at the stage of pretrial examination of the case was known neither to procedural science nor to practice. For instance, none discussion of projects of CCP of the Russian Federation by working group, which created codification regulation, ever mentioned preliminary sitting. None project (out of four in all) of CCP of the Russian Federation contained the regulations on the preliminary sitting. Like “a bolt from the blue”, a regulation on this new mechanism appeared in CCP of the Russian Federation of 2002 in the article 152. This fact alone is enough to conclude that the preliminary judicial sitting is a kind of “experimentation” of legislator, “experimentation” devoid of “attendant material” because legislator has no time for a thorough analysis required to accomplish the experiment.

However, now that certain time has elapsed, we are totally confident to *conclude*: embodying the regulatory rights of parties (renunciation of suit by plaintiff, agreement of lawsuit) entails abatement of suit. Regulated possibility of realization of such actions as early as at initial stage of the procedure confirms the desire of legislator to optimize the procedure. Efforts to keep and strengthen the procedural guarantees of procedural parties, to implement all innovations in compliance with procedural form are all the key components of any legal reform. This explains why the procedure of preliminary judicial sitting appeared.

Interrelation Between “aims” (part 1 art. 152 of CCP of the Russian Federation) and “cases” (part 4 art. 152 of CCP of the Russian Federation) of Preliminary Judicial Sitting: One of the contradictions overlooked by the legislator is the poor edition of the part 1 art. 152 of CCP of the Russian Federation, which entailed loose interpretation of the preliminary judicial sitting as a whole. According to sect. 3 part 1 art. 150 of CCP of the Russian Federation, the judge decides the time and place of the preliminary judicial sitting *in cases (italized by the author)*, envisaged in art. 152 of CCP of the Russian

Federation. The analysis of regulations in art. 152 of CCP of the Russian Federation allows us to state that the “cases” of appointment of the preliminary judicial sitting are considered by the legislator to be those:

- With the aim, embodied in part 1 art. 152 (embodiments of the regulatory actions of parties; the definition of circumstances, important for a correct investigation and resolution of the case; the determination of sufficiency of evidences for the case; examination of facts of missing the dates of reference to court and limitation period of action);
- In the presence of circumstances, envisaged in part 4 art. 152 of CCP of the Russian Federation (decision on adjournment, abatement of proceedings and termination of proceedings without prejudice).

This contradiction was not eliminated even after adoption of the Resolution of Plenum of the Supreme Court of the Russian Federation “On pretrial examination of the case” of 24/06/2008 no. 11. For instance, section 30 indicates that, during the period of pretrial examination of the case, the judge can hold the preliminary judicial sitting, which is appointed not for every civil case, but only in cases, envisaged in part 1 article 152 of CCP of the Russian Federation. For instance, Plenum of the Supreme Court of the Russian Federation, focusing on the dispositive property of the right of a judge to hold the preliminary judicial sitting, restricts him to the above-mentioned cases (aims), listed in part 1 art. 152 of CCP of the Russian Federation. Questioning of judges revealed that these regulations are used in very different ways. In the cases when the implementation of the preliminary judicial sitting only delays the procedure and does not compliment the rights of interested individuals with procedural guarantees, judges spend their procedural resource to hold preliminary judicial sitting (such as in the case of investigation or death of the defendant). Conversely, where the preliminary judicial sitting is absolutely necessary, the representatives of the judicial community refuse it (when appointing an examination or forwarding the rogatory letter).

Way Around the Problem: Necessary unified approach can be ensured either by the Supreme Court of the Russian Federation, by clarifying the order of application of part 1 and part 4 art. 152 of CCP of the Russian Federation, or by legislator through normative ascertainment of regulation.

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