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Some cultural characteristics of the new Russian code of civil procedure of 2002

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The new Russian Code of Civil Procedure, adopted in 2002 and entered into force from February 1, 2003, was a major step in the development of legal culture in Russia.

The Code combines the traditions of Russian legislation, the results of comparative studies, the developments of preceding judicial practice and the specific qualities of Russian culture. The Code of Civil Procedure (further CCP) has been created on the base of the new Russian Constitution of 1993 and the most important international acts relating to protection of civil rights (Declaration of Human Rights of 1948, European Convention of Protection of Human Rights of 1950). The practice of the European Court for Human Rights in Strasburg was also taken into account.

During its drafting, the experience of civil procedure regulation of many foreign countries, whether they have a codified system of rights or not (Germany, France, U.S.A., Great Britain, etc.), were as well subject to consideration.

The historical succession of the CCP, however can not be overseen. It is based on traditions which were earlier set by the Russian Statutes of Civil Proceedings of 1864, the Codes of Civil Procedure of 1923 and 1964, as well as on scientific concepts proposed by Russian scientists (e.g. A. F. Kleinman, M. A. Gurvich, A. A. Dobrovolsky, N. A. Chechina and others). At the same time the new code contains a number of distinctive features which are primarily dictated by the economic and social development of modern Russia, by material rights and by the cultural specifics of modern Russian society.

Two cultural models are most wide spread in the world. The first is based on individualism, the second on collectivism. We assume that Russian culture combines within itself features of both models and accordingly cannot be unambiguously related to either of them. In collectivism, the law is aimed primarily at protection of the interests of the society as a whole, the state and the achievement of collective purposes, while in the case of individualism, the laws protect, in the first place, the interests of a certain member of society and are oriented to the performance of individual purposes.

Russian lawmakers in different historical periods had opposite views on whether Russia should either belong to the one or the other model type. Therefore, the legal system in our country developed either on the basis of individualistic or on the basis of collectivistic ideology. So, for instance, at the end of the

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XIXth – beginning of the XXth century and during the last decade, the lawmaker had the aim of renewing the Russian legal system by introducing legislation created on the basis of many postulates of the ancient Roman law tradition and the "Western European" law tradition, which were basically founded on the principles of individualism. In opposition of this, the legislation of the Soviet Union was based primarily on the principles of collectivism. However, neither the first nor the second legal model corresponds by itself to the moral principles of the Russian society.

A striking example of the constantly changing viewpoints of the Russian lawmaker on the described basis of his domestic rights can be seen in the history of the creation of the CCP of 2002, which have gone on for about ten years. Most of the contributions in the process of consultation can be assigned to two different major positions. Some authors advocated the introduction of some "European principles" of law into the Russian legislation without any significant changes. Other authors, the opposed position, wanted to retain large parts of the Soviet laws, which were based primarily on collectivistic views. The Soviet CCP of 1964 was still in force and practiced for more than ten years after Russia adopted new social, economic and political conditions. The new conditions can be characterized by the fact that, in contrast to the former principles, the priority of human rights and freedom in respect to other social values was established in the Constitution of 1993 (Article 2 of the Constitution), as was the equal recognition and protection of different forms of property: private, state and municipal (Article 8 of the Constitution) etc. Under the influence of these new conditions, substantial amendments significantly renovating the Code of Civil Procedure were introduced in 1995. The main subjects of the amendments were related to the adversarial character, norms on disposition and other institutes. During the development of the new code it was possible to evaluate the effect of norms of Soviet law based on collectivism as well as norms created on the base of individualistic conception. We presume that the authors of the code were able to find a kind of "golden mean" and create an effective combination of individualistic and collectivistic viewpoints to be the base of the new code. The Russian Code of Civil Procedure of 2002 takes fully into account the main cultural specifics of Russian society.

When evaluating the development of civil procedural legislation in modern Russia, the difference between its judicial system and the judicial systems of the majority of other countries has to be considered. In the Russian Federation disputes following out of a civil legal relationship can be assigned to two types of courts: courts of general jurisdiction and commercial courts. In accordance to a general rule, disputes with the participation of natural persons are given consideration in courts of general jurisdiction, and with the participation of legal entities and disputes following entrepreneurial activity – in commercial courts. The procedure in courts of general jurisdiction is defined in the Code of Civil Procedure, in commercial courts – in the Code of Arbitral Procedure (further CAP). The

CAP was adopted and entered into force in 2002. The two judicial systems were formed in Russia in a historical manner, even though the existence of these two subsystems is not unquestionable in Russian legal science.

There are also distinctions with respect to proceedings. In Russia there is now the possibility to get reconsideration of judicial decisions, which have come into legal force, as a matter of control ("supervisory procedure"). Thereby only those judicial awards can be subject of re-examination which have come into effect. The following persons are entitled to appeal to a court within one year from the date when a judicial award came into force: parties to the case, other persons if their rights and legal interests are infringed by these judicial awards and (if a prosecutor took part in examination of the case) officials of the prosecutor's office. A case may be re-examined only by courts of Russian Federation members, the Chair of the military district court, the Panel of Civil Judges of the Russian Federation Supreme Court, and the Panel of Military Judges of the Russian Federation Supreme Court. Cases are examined by a council of judges. There are several reasons for the necessity of this stage. Courts of appeal and courts of cassation check the legality and validity of decisions appealed against by persons participating in the case. However, the time limit for making an appeal is not long. Furthermore, you may imagine a situation where an illegal decision has entered into legal force. Finally, consideration of a case by the courts of appeal and the courts of cassation does not always provide correction of a judicial error. These circumstances show that the stage of reconsideration of judicial decisions is an additional warranty of protection against infringement of the rights of persons and organizations.

During the drafting of the new CCP, lengthy discussion was conducted in respect to determination of the part played by the court in the establishment of facts of the case, especially in the process of collecting and obtaining proof. In Russia the question of the degree of activity of a court in a civil process was virtually always debatable as in science and in practice ambiguous decisions were taken. This problem is closely related to the general cultural specifics of Russian society. If the civil judicial system is built upon the individualistic conception, the activity of the court is minimal. The task of gathering evidence in that case lies on the parties, since the lawmaker assumes that the parties are able to decide on their own and, as a consequence, expects their activity in the resolution of disputes. If however the collective model lies at the base of the civil judicial system, the parties of a civil process may conduct in a rather passive manner. Therefore the lawmaker intensifies the role of the court in the collection of proof.

The Soviet CCP of 1964 regulated the process in an investigative manner. Even in the case of complete passivity of the parties, the court studied all the details of the case. The court was obliged, without limiting the studies to the presented materials and explanations, to take all measures stipulated by law to obtain a thorough, complete and objective elucidation of the real circumstances of the case, the rights and obligations of the parties (Article 14 of the CCP of 1964). In each case the court not only carried out an objective assessment of the presented

evidence but also ensured the presence of those confirmations which are necessary to issue a correct and justified decision. Thus, the court was forced to exercise on the base of an independent initative in the gathering of evidence.

The Russian Constitution of 1993 proclaimed the principle of adversarial character in civil court proceedings (Article 123). In 1995 corresponding amendments were made in the CCP, which revoked the norm obliging the court to engage in the collection of evidence without the initiative of the parties. As a result, the accents in the process of obtaining proof were shifted from the activity of the court to the activity of the parties. In the event of persons participating in the case did not perform at all or did perform in an incompetent manner their obligations in respect to obtaining proof could result in being subjected to unfavorable legal consequences. The activity of the court in the field of obtaining proof was reduced to a minimum in the Code of Arbitral Procedure of 1995. The court in that case was not supposed to manifest any initiative on its own. The only way to establish the circumstances of the case should be the presentations of the parties and the review of the evidence they brought in, without the possibility of court's intervention in the process of proof-taking. The part played by the court consisted of an unbiased guidance of the process. The practice of using these norms by the commercial courts showed that a complete refusal of the court to collect evidence may result in that the achievement of an objective truth for further proceedings is not possible. The parties are not always in a state to present the necessary evidence. The court is forced to issue a decision on the basis of insufficient confirmations and in a number of cases such a decision will be contrary to the actual situation. As a result, the main object of the civil process – real protection of an infringed right, cannot be achieved. Judicial practice has shown that realization of the idea of an adversary model with the court playing a passive role is not advisable in Russia. A court cannot be neutral, attentively listen to the parties and resolve the dispute only in accordance with the presented evidence.

The new CCP has moved slightly deviated from the principle of the court's non-interference in the evidence-collecting process. At present there is a peculiar combination of initiative of the parties and court activity, which has been established in the law. The codification of this mixed principle in concrete articles is from a juridical point of view a relatively complex problem that has become the main problem of the authors of the code. The new CCP (chapter 6) determines in the following manner the authority of the court in the process of obtaining proof. The court establishes which circumstances have a meaning for the case and which of the parties should provide the proof. The court has the right to invite the persons participating in the case to present additional evidence, verifies the relevance of the presented proof to the case under consideration, makes a final establishment of the content of the questions in respect to which a conclusion of experts should be obtained and may at his discretion assign an expert if it is not possible to resolve the case without the conclusion of experts. In the case where it is diffi-

cult for persons participating in the case to present the necessary proof, the court assists in the demand and collection thereof.

Thus, the role of the court in accordance with the new CCP is somewhat intensified as compared with the amendments of 1995, but at the same time the court does not take on itself the function of investigation in a civil process as was done in accordance with the CCP of 1964. The CCP of 2002 was developed on the base of a harmonic combination of adversarial principles with the active role of the court in the process of collecting and demanding proof.

It should be noted that the lawmakers of some countries, of which the legal systems are traditionally based on individualistic principles, are not satisfied with the existing nonparticipation of the court in the process of collecting proof. In view of this, recent attempts have been taken to cardinally change the role of the court in a civil process. Thus, the reform of civil legal proceedings carried out in 1998 in England and Wales has the necessity of intensifying the activity of the court as one of its main priorities. Some authors from other countries have also spoken in favor of presenting the court with additional functions in respect to collecting and demanding proof. In our opinion the reason for this peplacements can be seen in the change of the general cultural development of European countries, which is strongly influenced by collectivistic ideas. The legislation of these countries which intensify the role of the court has been adopted recently and it is still too early to decide whether the increase of the activity of the court will be effective in countries where the individualistic model of behavior was most widely used.

The Russian lawmakers during a lengthy period of time attempted to find a good combination of individualistic and collectivistic views in legislation on civil legal proceedings. Substantial experience has been accumulated. In different periods the court has virtually not participated in the collection of proof and all the initiative was given to the parties. Such a legal construction turned out to be ineffective. During another period of time, the role of the court was excessively increased; the court in the civil process acted like an agency of investigation. Such a variant was not favorable either. The new Russian CCP of 2002 established a kind of "golden mean" between the activity of the court and the initiative of the parties in the process of proof-taking. We hope that such a situation will in full measure take into account the social and cultural specifics of the Russian society and make it possible to protect the infringed rights of citizens and organizations in the best manner.