REOPENING OF CIVIL PROCEEDINGS IN THE LIGHT OF THE MACEDONIAN LAW ON CIVIL PROCEDEEINGS AND THE ELI/UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE

Zorica Stoileva[1], Dijana Gorgieva [2]

Ph. D student, Ss. Cyril and Methodius University in Skopje, Faculty of Law Iustinianus Primus in Skopje, stoileva_zorica@yahoo.com

Ph. D, Ss. Cyril and Methodius University in Skopje, Faculty of Law Iustinianus Primus in Skopje, dgorgieva64@yahoo.com

Abstract

Litigation is an essential method of protecting citizens' subjective rights and interests. The ultimate goal of the litigation is lawful judgment. In spite of this tendency the court may make anunlawful or incorrect judgment due to violations of the procedure, the incorrect or incomplete determination of the facts or wrong application of the substantive law. It is for these reasons the dissatisfied party, may submit ordinary or an extraordinary legal remedies, i.e. he/she may request the competent court to reconsider the judgment rendered in the particular legal matter. The reopening of civil proceedings is an extraordinary legal remedy, which is submitted after the national court's judgment has become final on grounds specifically provided in the law on civil proceedings. Such a review may, if successful, rescind a judgment that has become res judicata. This article undertakes an in-depth analysis of the provision concerning the reopening of civil proceedings in the currently valid Macedonian Law on Civil Proceedings vis-à-vis the ELI/UNIDROIT Model European Rules of Civil Procedure. It locates the discrepancy of the Macedonian legislation with the ELI/UNIDROIT Model European Rules of Civil Procedure and gives prepositions for its de lege ferada improvement and development.

Keywords: *Civil proceedings, Reopening, Judgment, Macedonian Law on Civil Proceedings, ELI/UNIDROIT Model European Rules of Civil Procedure*

Introduction

The reopening of civil proceedings is legal institute strictly regulated in the Macedonian law on civil proceedings. It is an extraordinary legal remedy, which is made after the national court's decision has become final on grounds and deadlines specifically provided in law. The purpose of reopening, if the request for reopening is allowed are annulment of the res judicata decision and a new trial where the parties may present new facts and offer new evidence.

The ELI/UNIDROIT Model European Rules of Civil Procedure is soft law and tool that can help countries with different legal cultures to harmonize their civil procedure legislation. It will be shown how the Macedonian legislator can use these rules to improve de lege ferenda the Law on civil proceedings.

In that order we will analyze the similarities and differences between the Macedonian law on civil proceedings and the ELI/UNIDROIT Model European Rules of Civil Procedure concerning the reopening of civil proceedings.

1. Reopening of civil proceedings according to the Law on civil proceedings

The reopening of civil proceedings is an extraordinary legal remedy, which is made after the national court's decision has become final on grounds and deadlines specifically provided in the Macedonian Law on civil proceedings.

Although the legislator did not divides the grounds upon which a reopening may be requested, the theory of civil procedure created thee groups of grounds. The first group consists of essential violations of provisions governing the civil proceedings. The second group comprises illegal actions committed by persons participating in civil proceedings (criminaloffences), while the third group encompasses new facts and new evidences.[1]

According to the Law on civil proceedings essential violations of provisions governing the civil proceedings exist: when the judge, i.e. lay judge rendered the decision, but he/she according to the law had to be exempted (Article 64), i.e. who with a court's determination had been exempted; a party has not been granted the possibility to discuss in court by unlawful proceeding and especially by omitting the service; the plaintiff or defendant, who could not be party in the proceedings participated in the proceedings or if the party, legal entity, was not represented by an authorized person or if a party lacking the litigation capacity was had not been represented by a legal representative, or if the legal representative, i.e. party's attorney-in-fact did not have the necessary authorization for conducting a proceedings or for certain activities in the proceedings, unless they had not been additionally approved; the party acquires a possibility to use a legally valid decision of the court that had been previously rendered upon the sameclaim among the same parties.

The second group comprises illegal actions committed by persons participating in civil proceedings (criminal offences) i.e. the court's decision is based on false statement of a witness or an expert witness; the court's decision is based on falsified document or a document containing certified false content; the court's decision resulted from a crime of the judge, i.e. lay judge, party's legal representative or attorney-in-fact, of the opposing party or of a third party;

The last group of grounds is related to the existence of new facts and new evidence. The Law on civil proceedings allows reopening of civil proceedings due to new fact and evidence when: the court's decision is based on another court's decision or on a decision of another body, and such decision is altered, abolished, i.e. annulled in a legally valid manner; the party acknowledges new facts or finds or acquires possibility to use new evidence based on which a more favorable decision could have been rendered for the party, if such facts or evidence would have been used in the previous procedure and with a decision of a competent body it has been additionally decided, in a legally valid manner, upon a previous issue, on which the court's decision is based.

The proceedings ended by a legally effective judgment based on admission of the claim, judgment based on waiver of the claim, and default judgment may not be reopened on the grounds of the third group. The proceedings ended by a legally effective judgment based on admission of the claim and judgment based on waiver of the claim may be repeated on the ground that the statement on admission or waiver was given under substantial misapprehension or under coercion or fraud.

The Law on civil proceedings also recognize one more separate ground for reopening of civil proceedings which is the reopening of civil proceedings following a judgment of the European Convention on Human Rights. Namely, the Law on civil proceedings in article 400,

[1] See, Dika, M. (2010) Građansko parnično pravo, X, Pravni lijekovi. Narodne novine, 2010.

for the first time in the history of the Macedonian civil procedural law, provided the opportunity for reopening a civil proceedings following a final judgment of the ECtHR when the ECtHR confirmed a violation of certain human right or of fundamental freedoms guaranteed in the ECHR and its additional protocols, ratified by the Republic of Macedonia.[2]

The reopening stars with a request submitted by the party that is not satisfied with the court's decision. The request for reopening of the civil proceedings shall always be submitted to the court having rendered the decision in first instance. The request, in particular, contains the basis on which the reopening is requested, the circumstances from which it follows that the request has been submitted within the statutory time limit, and evidence corroborating the party's allegations.

The party has to submit the request in a specific deadline. The Law on civil proceedings recognize two types of deadlines: subjective which is connected to the time when the party acknowledged about the ground for reopening and objective deadline which is counted from the moment when the counrt's decision had become final.[3]

The subjective deadline is 30 days and start to count from different moment which depends on ground which is a reason for reopening.

The objective deadline is five years as of the day the decision has become legally valid., except if repeating is required because a person who had no capacity of judge, i.e. lay judge participated in adopting the decision or because of the reason stated in Article 392 paragraph (1) items 2 and 3 of the Law on civil proceedings.

When party submits a request following a final judgment of the ECtHR, it has to be submitted within 30 days from the day on which the judgment of the ECtHR became final.

After the request has been received, the single judge, i.e. the President of the Chamber firstly decides whether the request for reopening is submitted timely, whether it is completed and admissible. If it is not submitted on time, if it is incomplete or inadmissible, the single judge, i.e. the President of the Chamber without holding a trial will dismissed it. If the single judge, i.e. the president of the Chamber does not dismiss the request, he will serve a copy of the request to the opposing party. The opposing party have the right to provide his or her answer to the request within fifteen days. When the court receives the response to the request or when the period for responding expires, the single judge, i.e. the President of the Chamber will schedule hearing to hear the request.

After the hearing on the request has been held, the single judge or the President of the Chamber of the court of first instance will make a decision about the request, except when the reason for reopening relates solely to proceedings before a higher court. In the ruling by which reopening is allowed, it shall be stated that the decision made in the previous trial shall be abolished. The single judge or the President of the Chamber will schedule a trial only after the ruling by which reopening is granted has become legally effective. However, in that ruling the President of the Chamber may decide that the hearing on the merits shall commence immediately. At a new trial the parties may present new facts and offer new evidence.

---

[2]See more, Cuculovska, I. (2016) Reopening of the domestic civil proceedings following a judgment of the European Court of Human Rights, Legal dialogue, No, 11,September 2016, Institute for human rights, p. 26-31. and Markoska, J. (2014) The final judgment of the European Court of Human Right as reason for reopening civil proceeding in the in the practice of courts in the Republic of Macedonia, Master thesis. Skopje, Republic of Macedonia: Ss. Cyril and Methodius University Skopje, Faculty of Law Iustinianus Primus Skopje

[3] Janevski A., Zoroska-Kamilovska T. (2009) Law on civil procedure (first book) Civil litigation, Faculty of Law Iustinianus Primus Skopje.

If the reason for reopening relates solely to the proceedings before a higher court, the single judge or the President of the Chamber of the court of first instance, after the hearing on therequest, will forward the record to that particular higher court in order that it may make a decision. When the record arrives at the higher court, it shall be acted in accordance with the provisions of Article 351 of the Law on civil proceedings. The court shall decide on the request for reopening without holding a hearing.

When the higher court establishes that the request for reopening is justified and that it is not necessary to hold a new trial, it shall abolish its own decision, as well as the decision of the higher court, if any, and make a new decision on the merits.

2. Reopening of civil proceedings according to the ELI/UNIDROIT model European rules of civil procedure

The ELI/UNIDROIT Model European Rules of Civil Procedure in the Section 6-Extraordinary Recourse regulate the extraordinary motion for review. According to the Rule 181, an extraordinary motion for review re-opens proceedings that have otherwise been finally determined either at first instance or on appeal. The rule also determines the consequences of successful motion for review, i.e. a successful motion leads to rescission of the judgment that has become res judicata. Where it does so the court will give case management directions for the future management of the proceedings.

According to the comments of Rule 181, it shall be a matter for national law to determine the appropriate court to consider applications for an extraordinary motion for review. In some European jurisdictions this is the Supreme Court, an appellate court or the court that gave the judgment that is subject to the motion for review. (ELI/UNIDROIT Model European Rules of Civil Procedure).

The grounds for submitting an extraordinary motion for review are also limited and also can be divided: as essential violations of provisions governing the civil proceedings (when the court had been wrongly constituted; a party's right to be heard had been violated severely), illegal actions committed by persons participating in civil proceedings (the judgment had been obtained by fraud or violence) and new facts and new evidences (after the judgment is issued, evidence that would have been decisive to it is recovered or obtained, and such evidence had not been available prior to judgment being given due either to force majeure or improper conduct by the party in whose favour the judgment had been made.

Another grounds for an extraordinary motion for review is that European Court ofHuman Rights has ruled that the judgment given in national proceedings infringed any of the rights established in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the infringement, due to its nature and seriousness, entails persistent effects, which can only be stopped by means of such a review; however, in no case may the review affect rights acquired in good faith by third parties.

The deadlines for submission of the motion are also subjective and objective i.e. an application by a party for an extraordinary motion for review must be made within three months from the date on which that party became aware of the grounds for review and in no case may an application be made after ten years have elapsed from the time the judgment, which is to be the subject of such a review, has become res judicata.

3. The Law on civil proceedings VS ELI/UNIDROIT Model European rules of civil procedure

The in-depth analysis of the provision concerning the reopening of civil proceedings in the currently valid Macedonian Law on Civil Proceedings vis-à-vis the ELI/UNIDROIT Model European Rules of Civil Procedure showed that the Macedonian legislation is in general in accordance with ELI/UNIDROIT Model European Rules of Civil Procedure. We can notice that some of the grounds stipulated in the ELI/UNIDROIT Model European Rules of Civil Procedure are generalized vs. the Macedonian legislation. Exempli gratia, the group of the grounds related to the existence of new facts and new evidence regulated in the Law on civil proceedings can be to diminish to only one ground new evidence according to the ELI/UNIDROIT Model European Rules of Civil Procedure. Even more, the provision of the Macedonian Law on civil procedure, which refers to the existence of new facts and evidende, should be complemented in accordance with the ELI/UNIDROIT Model European Rules of Civil Proceduree, in way that in text of the Macedonia law on civil proceedings the legislator should add that the new facts evidence was not available to party asking for reopening due either to force majeure or improper conduct by the party in whose favor the judgment was made. This limitation will restrict the unlimited opportunities of the parties to seek reopening due to new facts and evidence.

Furthermore, the group of the grounds that comprises illegal actions committed by persons participating in civil proceedings (criminal offences) from the Macedonian Law on civil procedure can be limit to only one ground in The ELI/UNIDROIT Model European Rules of Civil Procedure.

The only plus of the Macedonian legislation vs. the ELI/UNIDROIT Model European Rules of Civil Procedure is that the law allow reopening due to the fact that a person who had not been a party in the proceedings had participated in the proceedings in the capacity of a plaintiff or respondent, or if the party which had been a legal person had not been represented by an authorized person, or if a party without the capacity to litigate had not been represented by his or her legal representative, or if the legal representative or agent had not had appropriate powers to conduct litigation or to take specific actions in the proceedings, unless the conduct of litigation or taking of actions in the proceedings had been subsequently approved.

The provisions that concern the constitution of the court and the principle of right to be heard of the parties are almost the same in the both rules.

The main provision of the Law on civil procedure that should be complemented according to the ELI/UNIDROIT Model European Rules of Civil Procedure is article 400 of Law on civil proceedings, because the law simply state that the reopening could be sought when the ECHR confirmed a violation of certain human right or of fundamental freedoms guaranteed in the ECHR and its additional protocols witch creates unreasonable increase in legal uncertainty, because the law does not define the nature and the seriousness of the violations. So the Macedonian legislator should accept the solution created in the ELI/UNIDROIT Model European Rules of Civil Procedure which states that an extraordinary motion for review may only be brought against a judgment following that the European Court of Human Rights hasruled that the judgment given in national proceedings infringed any of the rights established inthe European Convention for the Protection of Human Rights and Fundamental Freedoms and itsProtocols, provided that the infringement, due to its nature and seriousness, entails persistent effects, which can only be stopped by means of such a review.

CONCLUSION

The Macedonian legislation had given the opportunity to the party who is not satisfied with a res judicata court's decision to submit a request for reopening civil proceedings due to limited reasons and limited deadlines. The ELI/UNIDROIT Model European Rules of Civil Procedure also give an example of rules how the reopening of civil proceedings should look like. In comparison with the Law on civil proceedings they are shorter but they offer new solutions that should be taken in consideration pro future when the Macedonian legislator will make changes in the Law on civil proceedings.

REFERENCES

1. Bjorge, E. (2014). A theory of national application of the European Convention on Human Rights [PhD thesis]. Oxford University, UK.
2. Convention for the Protection of Human Rights and Fundamental Freedom, https://www.echr.coe.int/Documents/Convention_ENG.pdfwork=Thesis
3. Cuculovska, I. (2016) Reopening of the domestic civil proceedings following a judgment of the European Court of Human Rights, Legal dialogue, No, 11,September 2016, Institute for human rights, p. 26-31.
4. Dika, M. (2010) Građansko parnično pravo, X, Pravni lijekovi. Narodne novine
5. ELI/UNIDROIT Model European Rules of Civil Procedure, https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules
6. Janevski A., Zoroska-Kamilovska T. (2009) Law on civil procedure (first book) Civil litigation, Faculty of Law Iustinianus Primus Skopje.
7. Markoska, J. (2014) The final judgment of the European Court of Human Right as reason for reopening civil proceeding in the in the practice of courts in the Republic of Macedonia, Master thesis. Skopje, Republic of Macedonia: Ss. Cyril and Methodius University Skopje, Faculty of Law Iustinianus Primus Skopje
8. Svilanović, G. (1996) *Predlog za ponavljanje parničnog postupka : magistarska teza*. Beograd, Srbija: Savet projekta .Konstituisanje Srbije kao pravne države u uslovima tranzicije: Centar za publikacije Pravnog fakulteta