

Role of the Perpetuation of Evidences and Claim Security in Litigation

Perpetuation of evidences and securing of claim comprise two different institutes of procedural law. According to Civil Procedure Code, the court of the first instance shall directly examine the evidences. In USA the approach to the issue of perpetuation of evidences is different.

Work provides practical approach to securing of claim – in which cases the court accepts the request of claim securing and in which cases it provides counter securing so that the adversarial and disposition principles were complied with.

Key words: *perpetuation of evidence, request of perpetuation of evidences, court decision additional perpetuation, perpetuation of evidence in the USA, claim security.*

1. Introduction

Effectiveness of the system of justice is the fundamental prerequisite for strengthening of legal order and ensuring legal security. Effectiveness of the system of justice implies independent, unbiased, fair and timely legal procedures.¹

In accordance with the Procedure Code, the court of the first instance shall directly examine the evidences. At the court session, the judge shall hear the explanations of the case participants, statements of the eyewitnesses, experts' reports, the judge shall get familiarized with the written evidences, examine material evidences. Therefore, non-compliance with the principles of directness, deviation from it is qualified in the judicial practice as the judicial error with all relevant legal outcomes.

Law assumes two exclusions from this obligation of the court. In case of such exclusion the court's familiarization with the case circumstances is mediated. We mean perpetuation of evidences and letters rogatory². Within the scopes of this study attention will be focused on the institute of perpetuation of evidences in Georgia. We shall also discuss the issue of perpetuation of evidences in the USA where, according to the established practices, the obligation of perpetuation of the material evidences may arise from specific regulatory, legislative and judicial orders providing for preserving security of the documents and information significant for the case.³ The court pays particular attention to keeping of the case materials by a person, whether the case is pending or not.

Work provides discussion of two independent institutes of procedural legislation. In particular, perpetuation of evidences and security guarantee being the components of the procedural security. Work describes perpetuation of the evidences unknown in Georgian civil procedural law and provided in the US civil procedural legislation.

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¹ *Schmit Sch., Richter H.*, Process of Decision Making by the Judge in Civil Law, GIZ, 2013, 3.

² *Kurdadze Sh., Khunashvili N.*, Georgian Civil Procedure Law, Tbilisi, 2012, 237 (in Georgian).

³ *Spencer A.B.*, The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court, 79 Fordham L. Rev., 2005 (2011), <<http://ir.lawnet.fordham.edu/flr/vol79/iss5/7>>.

The work also describes practical approach to the security guarantee, Research is oriented towards demonstration of the role of security guarantee in judicial procedures and to what extent this institute ensures balancing of the parties' interests. In which cases the court accepts the party's request dealing with preservation guarantee and in which ones it provides counter preservation so that the adversarial and optionality principle was not violated.

Study is of comparative legal nature. It is of theoretical and practical significance. With respect of the theory, the interested audience can find information about this issue. In practical context the work is of significance as it contains examples of procedural legislation of Georgia, United States and Eastern Europe.

2. Perpetuation of Evidences

No one of the lawyers can question importance of evidences in civil, administrative, arbitration or criminal procedural law. The evidences have their contents, i.e. they contain information about the facts related to the claim; procedural form called legal form of proof and finally, they are characterized with certain procedural order of obtaining and examination of evidencing information and instruments of proving. These three properties determine the legal nature of the judicial evidences. Absence of any of the listed components results in rejection of entire evidence. Evidences deprived of their cognition contents and procedural form cannot be evidences any more.⁴

Necessity of perpetuation of evidences may be caused by various reasons, e.g. illness of the eyewitness, business trip or departure to the other country for employment, perishable evidences etc.⁵ Naturally, necessity shall be assessed individually in each specific case.

On one hand, perpetuation of evidences qualitatively differs from securing of a claim and on the other – from the rogatory letters. Perpetuation of evidences is provided for the purpose of establishment of the facts important for the case while securing of a claim serves to ensuring exercising of the court decision. Thus, evidences perpetuation and securing of a claim are quite different concepts and hence, they require different procedural actions. Referring to these security measures in the law should be understood directly and their interpretation based on similarity of the qualitative sights is unacceptable.⁶ As for differentiating of the rogatory letters from the evidence perpetuation, the rogatory letters are intended for collection of evidences and their examination where their presentation and examination at the court session is difficult or impossible.⁷

Some foreign scientists see the difference in the evidence law and the procedure. In particular, the US and not only US lawyers regard that the procedure includes the rules of case consideration at the trial with the overall goal of making decision while proving is persuading of the judge, subordinating to the laws of logic.⁸

⁴ *Gagua I.*, Burden of Proof in Georgian Civil Procedure Law, Tbilisi, 2013, 22 (in Georgian).

⁵ *Liluashvili T.*, Civil Procedure Law, 2nd ed., Tbilisi, 2005, 266 (in Georgian).

⁶ Decision of the Supreme Court of Georgia of 29 May 2007 on case №AS-827-1190-06.

⁷ *Liluashvili T., Khrustal V.*, Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 215.

⁸ *Gagua I.*, Burden of Proof in Georgian Civil Procedure Law, Tbilisi, 2013, 220 (in Georgian).

Perpetuation of the evidences is a procedural action performed by the court or by the judge solely, to establish the evidences according to the rules under the civil law for their further use in substantial consideration of civil case⁹ with the purpose of ensuring establishing of the facts important for making adequate decision on case. Hence, it should be exercised before completion of the procedures and when the dispute is substantially resolved, there exists no legal basis for application of the measures for perpetuation of evidences important for given disputed legal relations.¹⁰

Unlike Georgian Civil Procedure Code, the federal rules of civil procedure in the USA allow the judges to impose the sanctions against persons that have failed to adequately preserve the documents or other evidences significant for establishing of the circumstances of case.¹¹ In accordance with Article 37(b) of Federal Regulations of Civil Procedure the court shall be entitled to impose the sanctions on a person that has failed to comply with the court order on submission or examination of evidences.¹² Though, not all county courts use similar approach to application of this provision¹³. Their position is unambiguous: undoubtedly, the sanction should be applied against the person that has intentionally destroyed the documentation significant for the case but some judges rely on Article 37(b) of Civil Procedure Regulations and some of the – with the special authorities serving to making lawful and fair decision. Though none of the evidences shall have any predetermined weight but the judges' attitude to the evidences is rather delicate as these are the evidences providing basis for establishing the circumstances specified in the claims and counterclaims,

2.1. Role of the Evidences in Formation of the Court's Moral Certainty

The judge should consider the circumstances significant for the case from the position of both parties. Only such approach allows seeing of actual circumstances and relations between the parties. Naturally, the judge is subject to powerful influence of emotional background but existence of the emotion is not a main thing, the main thing is whether such emotion is controlled or not and overall, form into the moral certainty free of any emotions.¹⁴

In accordance with Article 105 of Georgian Civil Procedure Code: no evidence shall have a predetermined weight for the court. The court assesses evidences with its mental certainty that should rely upon their thorough, careful and unbiased consideration to make decision on presence or absence of the circumstances significant for the case. The judge's task is much greater than subject-

⁹ *Liluashvili T.*, Civil Procedure Law, 2nd ed., Tbilisi, 2005, 266 (in Georgian).

¹⁰ Decision of the Supreme Court of Georgia of 10 April 2008 on case №AS-258-516-08.

¹¹ *Koppel J.M.*, Federal Common Law and the Courts' Regulation of Pre-Litigation Preservation, 5, 1 Stan. J. Complex Litig., (2012, Forthcoming), <<http://ssrn.com/abstract=2154484>>.

¹² Rule 37, Failure to Make Disclosures or to Cooperate in Discovery, Sanctions, <http://www.law.cornell.edu/rules/frcp/rule_37>.

¹³ In the opinion of most judges, sanctions against a person that have failed to properly preserve the evidences cannot be justified by Article 37(b) of Federal Common Law and Court's Regulation. In case *Capelluto v. FMC Corp*, judge of Minnesota has imposed quite strict sanctions against a person who has intentionally destroyed the evidences while he was notified about the potential dispute. The judge has stated the following: "Relying on the special authority in dispute regulation, with respect of protection of the procedure before litigation, I impose the sanction against the party." See *Koppel J.M.*, Federal Common Law and the Courts' Regulation of Pre-Litigation Preservation, 7, 1 Stan. J. Complex Litig. (2012, Forthcoming), <<http://ssrn.com/abstract=2154484>>.

¹⁴ *Gagua I.*, Burden of Proof in Georgian Civil Procedure Law, Tbilisi, 2013, 31 (in Georgian).

tive assessment of the provided legal facts (evidences). These are the objective facts that guide formation of the judge's belief.

Identification and collection of the evidences and their submission to the court is the main part of the onus of proof that finally impacts formation of the mental certainty of the court considering the case. "Onus of proof" should be defined as such procedural actions of the disputing parties, performing or, on the contrary, non-performing of which determines whether the court decision will be in favor of one of the disputing parties.¹⁵

2.2. Application on Perpetuation of Evidences

In the theory of evidences the proof is understood as the activities of evidencing performed by the court and other persons including the following stages: identification of the subject of proving, collection of evidences (identification of evidences, their collection and submitting to the court), examination of the evidences at trial, evaluation of evidences.¹⁶

According to Georgian Procedure Code, if a person reasonably considers that it would be impossible or difficult for him/her to provide required evidence in the future, may request that the court perpetuate that evidence

Evidence may be perpetuated before the claim is filed.¹⁷ At a time of case consideration at the main court session the court shall examine all evidences, those, presented by any party and collected by the court though it is not excluded that the issue of evidences perpetuation was not arose at the main session.¹⁸

Civil Procedure Code does not provide for evidences perpetuation after completion of the case consideration¹⁹ as the perpetuation purpose ceases to exist.

Petition on evidence perpetuation of whatever form, whether written or oral, shall be motivated so that the court was able to make decision whether the evidences are acceptable and attributable. Motion for evidence perpetuation by oral statement shall be included into the court record.²⁰

Request of evidences in general and especially, perpetuation of evidences is acceptable only provided that such evidence can verify some circumstances essential for the case, i.e. circumstance justifying the plaintiff's claim or the defendant's counter claim.

The fact that the evidence is essential for the case is not sufficient for taking of the evidences' perpetuation measures. It is required that there was an actual danger that submission or use of such evidence later will be difficult or impossible. If no such danger exists the court shall reject the perpetuation request²¹ as it is notable that perpetuation of evidences is the form of their registration. This implies that in taking measures for perpetuation of evidence no actions are performed to decide whether

¹⁵ *Gagua I.*, Burden of Proof in Georgian Civil Procedure Law, Tbilisi, 2013, 31 (in Georgian).

¹⁶ *Ibid.*, 25.

¹⁷ Decision of the Supreme Court of Georgia of 10 April 2008 on case №AS-258-516-08.

¹⁸ *Liluashvili T., Khrustal V.*, Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 218.

¹⁹ Decision of the Supreme Court of Georgia of 10 April 2008 on case №AS-258-516-08.

²⁰ *Kurdadze Sh., Khunashvili N.*, Georgian Civil Procedure Law, Tbilisi, 2012, 238 (in Georgian).

²¹ *Liluashvili T., Khrustal V.*, Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 219 (in Georgian).

these evidences are valid and sufficient or not. But the decision on their adequacy and acceptability shall be made before the judge performs the relevant actions for perpetuation of evidences.²²

Civil procedural legislation of the United States provides for such type of evidences as the testimony under the oath. This type of evidence is of subjective nature, i.e. the fact is evidenced by a natural person. Article 27 of Federal Regulations of Civil Procedures regulates the issue of recording of testimonials under the oath.²³ Adoption of the mentioned Article was preceded by the whole set of processes. *Hall v. Stout* is the only case where the court provides theoretical discussion that the perpetuation of evidence (recording of testimony under the oath) is required not because there is a danger of evidence destruction but because one should take into consideration the future situation of the witness. It is possible that new circumstances prevented the witness from testifying. Hence, need for perpetuation depends not on the person's physical condition but rather on whether he/she will be able to confirm the facts significant for the case in the future or not.²⁴

The situation is different in case *Arizona v. California*, with only decision of the supreme court where the court has regarded sufficient the party's statement that the witness could die before commencement of hearing to issue the order on perpetuation of evidence. Unlike *Hall* case, in case of *Arizona* the court regarded that the witness's physical condition was of significance but no court has requested from the applicant that the evidence would be lost.²⁵ In case of *Angel v. Angel* the party has reasoned necessity of perpetuation measure by the fact that the witness to be interrogated was elderly. Here again, the preference was given to the subjective argument. In our opinion, the subjective and objective circumstances should be of alternative nature and in case of even one of them the evidence perpetuation should be provided.

2.3. Application on Perpetuation of Evidences before Filing of the Claim

Collection and submission of the evidences is obligation of the parties rather than of the court by the simple reason that a party is better aware in what can confirm its claim and similarly, the other party knows better how to resist the evidences submitted by the opponent and persuade the court in lawfulness of its claims.²⁶

In practice, actions intended for collection of evidences should commence before the claim is submitted. This implies that before the procedures begin, the plaintiff or his/her representative shall

²² *Kurdadze Sh., Khunashvili N.*, Georgian Civil Procedure Law, Tbilisi, 2012, 238 (in Georgian).

²³ A person desiring to record the testimony under the oath in the US territory, shall apply to the court of the district where the person to be interrogated resides. In application submitted for issuance of the order, he/she shall specify the name of a person to be interrogated. In addition, he/she will be a party to a case subject to jurisdiction of the US court but at current stage he/she is unable to file the claim; demonstrate his/her interest and specify the facts that have caused such desire. 21 days before the hearing the applicant ensures delivery of the order to the person subject to interrogation. If delivery is impossible for good reasons, the court can undertake the obligation of publication. See Federal Rules of Civil Procedure, Rule 27, Depositions to Perpetuate Testimony, <http://www.law.cornell.edu/rules/frcp/rule_27>.

²⁴ *Hall v. Miller Stout*, 2:2004cv00184, January 24, 2004.

²⁵ *Kronfeld N.A.*, The Preservation and Discovery of Evidence Under Federal Rule of Civil Procedure 27, The Georgetown Law Journal, Vol. 78:593, 599.

²⁶ *Allen R.A., Stei A.*, Evidence, Probability, and the Burden of Proof, Arizona Law Review, Vol. 54, 2013, 557-602, <<http://ssrn.com/abstract=2245304>>.

make sure that the evidences of reasonability of claim and the facts specified therein.²⁷ In the USA, the court regards a person liable, with respect of perpetuation of evidences²⁸, if, before commencement of dispute, he/she receives notification on termination or warning from the other party.²⁹ From such moment the obligation of safekeeping of significant documents emerges. English legislation allows collection and publication of evidences even before commencement of the litigation. The burden of evidences providing is in clarification of the substance of dispute, in other words, identification of the key issues of dispute. At the preparatory stage the subject of dispute shall be established and pleadings exchanged to provide the parties' awareness and avoid effect of unexpectedness by the hearing.³⁰

According to Section 2, Article 3 of Georgian Procedure Code, evidence may be perpetuated before a claim is filed with a court. After filing of claim, the materials collected for the purpose of evidences' perpetuation shall be sent to the relevant court³¹ either by the parties' request or by the court's incentive.

Only court has the authority of perpetuation of evidences. In practice there are some cases where a party submits to the court the notarized so called testimonials and explanations. Such documents are not regarded as evidences and no decision can be made relying on them.³² Though, there are some countries where before commencement of hearing the perpetuation of evidences is provided by a notary or consulate (Article 68.2 of Civil Code of the Republic of Kyrgyzstan, Article 67.2 of Civil Code of the Republic of Kazakhstan, Article 76.2 of Civil Code of the Republic of Tajikistan, and Chapter XX of the Fundamental Principles of Notary Law of Russian Federation). According to Paragraph 2, Article 127 of Civil Procedure Code of the Republic of Moldova the notary's office and diplomatic representation office are the authorities providing pre-litigation perpetuation of evidences.³³ In Belarus and Uzbekistan, the notary provides perpetuation of evidences only if the request is from the foreign country.³⁴

Application to the court shall be formulated clearly and unambiguously. In one of the disputes a party submitted application for court's request of the evidences. This substantially differs from perpetuation of evidences. Unlike the regulations on perpetuation of evidences, request of evidences

²⁷ Decision of the Supreme Court of Georgia of 15 January 2002 on case №3K/884-01.

²⁸ In USA the approach to perpetuation of evidences is more sensitive. Irrespective of existence of judgment, a party shall properly preserve the documents substantially related to the case, for establishing of the facts significant for the case. obligation of preserving of the documents arises when the party receives notification specifying that commencement of litigation though it is not necessary to rely on preservation of evidences. See: *Spencer A.B.*, The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court, 79 *Fordham L. Rev.* 2005 (2011), 2009, <<http://ir.lawnet.fordham.edu/flr/vol79/iss5/7>>.

²⁹ *Spencer A.B.*, The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court, 79 *Fordham L. Rev.*, 2005 (2011), 2008, 2009, <<http://ir.lawnet.fordham.edu/flr/vol79/iss5/7>>.

³⁰ *Gagua I.*, Characteristics of the Burden of Proof in Common Law – Based on the UK and US Law, Magazine “Justice and Law”, (4 (27)), 24 (in Georgian).

³¹ *Liluashvili T., Khrustal V.*, Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 217 (in Georgian).

³² *Kurdadze Sh., Khunashvili N.*, Georgian Civil Procedure Law, Tbilisi, 2012, 2012, 238 (in Georgian).

³³ Civil Procedure in Cross-Cultural Dialogue: Eurasia Context, Conference Book, Edited by *D. Maleshin*, Moscow, 2012, 352, <<http://ssrn.com/abstract=2280682>>.

³⁴ Article 2342 of Civil procedure Code of the Republic of Belarus, Article 612 of Civil Procedure Code of the Republic of Uzbekistan.

is allowed only after filing of claim, i.e., in given case, request of evidences through the court would be allowed if the applicant has filed the counter claim according to the established rules.³⁵ Hence, the party's application on request of evidences was rejected.

3. Judgment on Perpetuation of Evidences, Appealing if Judgment and Terms of Appeal

Consideration of the issue of perpetuation of evidences is accompanied with the following actions: the court will inform the parties about time and place of evidences' perpetuation though their absence cannot prevent performing of the procedural actions intended for perpetuation. In extraordinary cases perpetuation of evidences is allowed without notification of the parties.³⁶

The court shall issue the judgment on perpetuation of evidence specifying the procedural action to be performed, e.g. interrogation of the witness, visual examination.

Unlike complaint against the judgment on securing of the claim, judgment rejecting perpetuation of evidence shall be subject to private complaint to be considered in accordance with articles 414-420 of Civil Procedure Code.

Procedure of complaining against refusal to perpetuate evidences before filing of the claim is of interest. A party shall file the complaint to the court delivering the judgment and together with the case materials sends to the higher court in accordance with the general rules. But the situation is different if the court refuses to perpetuate the evidences at the hearing stating that he/she has not applied for perpetuation of evidences before filing of the claim or at the preparatory stage for no good reasons, though against the refusal private complaint shall be filed this does not provide basis for deferring of the fearing and it shall be considered upon final decision, together with the decision. There is a reasonable question that this would be like a common claim to be submitted against the judgment to be appealed against together with the final decision. In our opinion, this cannot be reasoned by simple prevention of litigation delay and time saving.

Though in accordance with Section 2, Article 404 of Civil Procedure Code the subject of consideration by the court may be the judgments preceding the final decision, but only if these are specified in the cassation appeal and there is a request on cancellation of such judgment as in accordance with the first sentence of Section 2, Article 404 of Civil Procedure Code, the court of cassation shall review a decision within the scope of the cassation appeal.³⁷

4. Additional/Repeated Perpetuation of Evidences

Parties and their representatives are entitled to get familiarized with the materials collected for the purpose of perpetuation of evidences and express their opinion about these materials and generally, about procedural actions performed for the purpose of perpetuation of evidences at any stage of

³⁵ Decision of the Supreme Court of Georgia of 15 January 2002 on case №3K/884-01.

³⁶ *Kurdadze Sh., Khunashvili N.*, Georgian Civil Procedure Law, Tbilisi, 2012, 239 (in Georgian).

³⁷ Decision of the Supreme Court of Georgia of 15 January 2002 on case №3K/884-01.

litigation.³⁸ The parties, whether or not participating in perpetuation of evidences, may express their opinion and specify the gaps that, in their opinion, took place in perpetuation.³⁹ If the parties have reasonable notes, with respect of inadequacy of the perpetuation of evidences, the relevant court may decide to perform repeated or additional perpetuation of evidence.

At what stage of litigation additional/repeated perpetuation of evidences is allowed. In this respect, the Supreme Court, in one of its decisions explains that in accordance with Article 117 of Civil Procedure Code, the court may make decision on additional and repeated perpetuation of evidence at a time of hearing and not after closing of the case.⁴⁰

5. Claim Security

Together with the adversarial principle, the court has the authority of material guidance of the procedure. Though here comes about the question of proportion of these two principles, adversarial principle and principle of the court activity. To what extent these principles should be combined and applied in case consideration so that the fundamental principles of civil procedure legislation were complied with.

Adversarial principle should not be understood as extreme passive court as according to the procedural legislation the court is entitled to collect the evidences at its incentive if required by the case circumstances or requested by the parties.⁴¹ In one of the cases, the cassation court does not share the opinion of the author of complaint and explains that through Article 199 of Civil Procedure Code provides for applying of security of claim by the court based on the defendant's application but regarding the contents of the same provision, application of claim security is allowed only if the applicant proves the fact of damage expected from security measures.⁴² In addition, according to Section 1 of Article 199 of Civil Procedure Code, if the court assumes that the enforcement of measures for securing the claim will cause damage to the defendant, the court may enforce the measures for securing the claim and at the same time, request the person who applied to the court to secure the claim to provide security to compensate possible damages that the other party may incur. The court may also order the provision of security based on the application of the opposite party. Court may apply the security on the basis of the application of the opposite party. Based on the verbatim explanation of the mentioned provision it may be applied only in case of securing of the claim though regarding the negative outcomes of the damage (loss), its application shall be allowable in considering of the issue of securing execution of the decision.

In addition, the chamber of cassation regards the following explanations reasonable waiver of indemnity as such does not deprive the defendant the right to exercise his/her violated rights in case of damages in accordance with the general regulations.⁴³

³⁸ *Liluashvili T., Khrustal V.*, Comments to Civil Procedure Code, Second adjusted and re-worked edition, Tbilisi, 2007, 224 (in Georgian).

³⁹ *Kurdadze Sh., Khunashvili N.*, Georgian Civil Procedure Law, Tbilisi, 2012, 239 (in Georgian).

⁴⁰ Decision of the Supreme Court of Georgia of 10 April 2008 on case №AS-258-516-08.

⁴¹ *Gagua I.*, Analysis of Innovative Distribution of the Burden of Proof provided for by Georgian Civil Procedure Code, Magazine "Justice and Law", (1(24)10)), 75 (in Georgian).

⁴² Decision of the Supreme Court of Georgia of 26 December 2011 on case №AS-1561-1561-2011.

⁴³ Decision of the Supreme Court of Georgia of 15 October 2012 on case №AS-1338-1263-2012.

Very interesting and significant explanation is provided in the decision of the Supreme Court. The Court regards that the purpose of application of the claim security measures is to actually secure enforcing of the court decision in case of upholding of the claim and hence, avoiding of the possible obstacles to enforcement. Given the above purpose of the procedural institute of claim security, in each specific case of application of the security measures by the court, here should exist the assumption of the claim upholding and the Chamber explained that the assumption of upholding of the claim is the assumption that there is the probability that the claim will be upheld rather than the outcome of examination of reasonability of the filed claim.

The Chamber has not shared the considerations of the claimant about non-consideration of the of the main purpose of the procedural institute of claim security as the guarantee of decision enforcement and explained that in applying the claim security the court shall take into consideration the interests of both parties and thus, security measures shall be applied without unreasonable prejudice of the defendant's interests. For the purpose of equal protection of the interests of disputing parties where there is the need of application of the claim security measures but at the same time, there is assumed that application of such measures can cause damages to the defendant, the procedural legislation provides for application of the indemnity measures (Article 199 of Civil Procedure Code). Regarding the above, the Chamber has not shared the claimant's opinion that application of security is based on the assumption that the claim will not be upheld.⁴⁴ Application of the security is conditioned by equal consideration of the interests of the opposing parties at a time of one or another procedural action in litigation.

Regarding the principles of Civil Procedure Code, a person exercising any right shall evidence the factual circumstances giving rise to such right while a person preventing exercising of such right, i.e. opposing to exercising of such right shall evidence the factual circumstances preventing emergence of such right⁴⁵ as the court is not authorized to believe in statements of the parties. It cannot uphold the claim only because it regards that the claimant is an honest person unable to file (unlawful) claim and at the same time, it cannot reject the claim because the defendant's refusal regarding his/her high moral qualities is absolutely trustworthy. The court shall take into consideration the parties statements and evidences to the extent their truth can be proved (73#473).⁴⁶

6. Conclusion

Administration of justice is a set of complex procedures and it requires awareness in the approaches and mechanisms established in the developed society and oriented towards prompt and effective outcomes.

In the United States the obligation of pre-litigation perpetuation of evidences is not regulated at the level of federal legislation and nevertheless, the mentioned institute is of great significance in civil procedural legislation and it results from the magisterial law.

⁴⁴ Decision of the Supreme Court of Georgia of 1 July 2013 on case №AS-499-475-2013.

⁴⁵ *Schmit Sch., Richter H.*, Process of Decision Making by the Judge in Civil Law, GIZ, 2013, 25.

⁴⁶ *Treushnikov M.K.*, Anthology of Civil Code, Moscow, 1996, 94 (in Russian).

In Georgia, the issue of perpetuation of evidences shall be studied properly. In this respect, getting familiarized with the foreign practices, their analysis and adaptation in Georgian legislation should be provided to develop effective mechanism for perpetuation of evidences.

According to the Civil Procedure Code, a judgment on the refusal to perpetuate evidence may be appealed with a complaint subject to a time limit. Time limit of such complaint shall be twelve days and the term shall commence on the date of delivery of the judgment to a party. The higher court shall consider the complaint and make decision within two months term. There is also a decision by Supreme Court stating that through the judgment shall be appealed with the complaint subject to time limit, this shall not cause delay of the litigation and complaint shall be filed together with the final judgment. In our opinion, such approach differentiates the evidences and creates impression that the court has already made its opinion about certain evidences in advance. As the evidences are most important in making decisions, the terms of filing of complaint and consideration thereof should be shorter.

Civil procedure legislation does not provide for the terms of perpetuation of evidences. Where the claim security is provided, a party knows that it shall file the claim within ten days, otherwise, the security measure will be revoked and it even may be ordered to compensate damages caused to the other party (if any). For more effective administration of justice, it would be good to solve the issue of regulation of the terms of evidences perpetuation at the legislation level. In such cases a party will know the term of perpetuation of the required evidence. The time and human resources are spent for providing perpetuation measures. Hence, these resources should be effectively used. Otherwise many documents will remain on the shelves.