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Cross-undertaking as to Damages Resulting from a Provisional Remedy

The purpose of the institute of provisional remedy is the prevention of any potential obstacle to specific enforcement of a decision through the restriction of the right of a defendant to dispose of his property or through application of the other statutory provisional remedies. The institute of provisional remedy ensures the protection of the interests of a claimant, whilst the compensation of damages resulting from the application of a provisional remedy - guarantees the protection of the interests of a defendant. Cross-undertaking as to damages (provision for damages resulting from the application of a provisional remedy) serves the interests of a defendant and constitutes a guarantee that damages incurred as a result of restriction of a defendant's right will be compensated provided the provisional remedy proves to be unreasonable.

***Keywords**: Provisional Remedy, Cross-undertaking as to Damages, Article 199 of the Code of Civil Procedure of Georgia.*

1. Introduction

The efficiency of the system of justice is the fundamental precondition for the reinforcement of legal order and provision of legal security. The efficiency of justice is manifested in independent, impartial, fair and timely judicial procedure.[1]

No matter how expedient is justice,[2] no matter how fair and legitimate is a court decision, the purposes and goals of justice remain unattained if the decision is not enforced.[3]

The European Court of Human Justice stresses the importance of execution of a decision entered into force in many of its judgments and explains, that "The right to a court is not merely a theoretical right to secure recognition of an entitlement by means of a final decision but also includes the legitimate expectation that the decision will be executed."[4]

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1 *Schmitt S., Richter H.,* The Procedure of Making a Decision by a Judge in Civil Law, German Society for International Cooperation (GIZ), 2013, 3 (in Georgian).

2 *Sierra S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right of Effective Court Protection, A Comparative Approach, European Law Journal, Vol. 10, No 1, January 2004, 42-60.

3 *Beck'sche Kurz-Kommentare* Zivilprozessordnung mit Gerichtsverfassungsgesetz und anderen Neben-gesetzen. Begründet von Dr. Adolf Baumbach, Professor Dr. Wolfgang Lauterbach, Dr. Jan Albers, Dr. Dr. Peter Hartmann, 75.Aufl, 2016. Vorb. §704, 2046.

4 See *Apostol v. Georgia*, application №40765/02; *Burdov v. Russia,* no. 59498/00, §34, ECHR 2002-III; *Hornsby v. Greece*, judgment of 19 March 1997, Reports of Judgments and Decisions 1997-II, p. 510, §40 Hornsby; *Mutishev and Others v. Bulgaria*, 18967/03, §129, 3 December 2009; *Antonetto v. Italy*, no. 15918/89, §28, 20 July 2000).

Thus, the purpose of the institute of provisional remedy[5] is the prevention of any potential obstruction to the specific enforcement of a decision through restriction of the right of a defendant to dispose of his property or application of the other statutory provisional remedies[6]. When applying a provisional remedy, the court protects the property of the parties and their statutory interests[7]. The right to fair trial already implies the obligation of the state to develop such a regulation, which ensures the efficient enforcement of a court decision. According to theinterpretation of the Constitutional Court of Georgia "The right to a court..., guaranteed by Part 1 of Article 42 of the Constitution of Georgia, should not be an illusory one, but rather provide for actual opportunity of due re-establishment of the rights of a person and constitute the efficient instrument for the protection of rights."[8] Provisional remedies constitute one of the procedural guarantees of efficient enjoyment of the right to fair trial and, respectively, fall within the scope, protected by Part 1 of Article 42 of the Constitution of Georgia.[9]

This research is focused not on the institute of provisional remedy in general, but rather on cross-undertaking as to damages resulting from the application of a provisional remedy, what is envisaged by Article 199 of the Code of Civil Procedure of Georgia (hereinafter the "CCPG"). Scholarly examination of this question is not only of theoretical, but also of major practical importance. The problem is analysed on the basis of both comparative law method and generalisation of judicial practice of common courts and the Constitutional Court of Georgia.

2. About Provisional Remedies in General

As per Article 2 of the CCPG every person is guaranteed to judicially protect their rights. The essence of the institute of provisional remedy is to create the legal guarantees[10] for specific enforcement of the rights and legal interests of a claimant, guaranteed by substantive law[11]. The question of application of a provisional remedy arises when it becomes necessary to ensure the efficiency of law[12].

Upon deciding on the application of a provisional remedy and restriction of the rights of one of the parties, even within statutory limits[13], the court should base itself on a reasonable assumption[14] that non-

5 *Kramer X.,* Harmonization of Provisional and Protective Measures in Europe, pg. 1, Publishes in: M. Storme (ed.). Procedural Laws in Europe. Towards Harmonization, Maklu: Antwerpen/Apeldoorn 2003. ISBN:90-6215-881-1, 305-319.

6 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 299 (in Georgian).

7 *Sierra S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right of Effective Court Protection. A Comparative Approach. European Law Journal. Vol. 10, No 1, January 2004, 42-60.

8 Decision of the Constitutional Court of Georgia №3/2/577, dated 24 December 2014, II-30.

9 Decision of the Constitutional Court of Georgia N2/6/746, dated 1 December 2017.

10 *Kazhashvili G.,* Role of the Perpetuation of Evidence and Claim Security in Litigation, TSU Faculty of Law, Journal of Law, №1, 2016, 76 (in Georgian).

11 *Kurdadze Sh.,* Trial of Civil Cases at the Courts of First Instance, Tbilisi, 2006, 520 (in Georgian).

12 *Sierra S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right of Effective Court Protection. A Comparative Approach, European Law Journal, Vol. 10, No 1, January 2004, 42-60.

13 Practical Recommendations of the Supreme Court of Georgia for Judges of Common Courts on Points of Civil Procedure Law, Tbilisi, 2010, 157 (in Georgian).

application of the procedural measure concerned will make it objectively impossible to enforce the legal consequence of litigation - a court decision or will considerably complicate the process[15]. According to the judgments of the Constitutional Court, despite major importance of the right to fair trial, the latter is not an absolute right and "can be restricted under certain conditions, what will be justified in a democratic society by legitimate public interest"[16]. "Regulation, restricting a right, should constitute an instrument, useful and necessary for the attainment of worthy public (legitimate) goal. At the same time, the intensity of restriction of a right should be proportional, commensurate to public goal, that is to be attained. It is inadmissible for the legitimate goal to be attained at the expense of unnecessary restriction of a human right."[17]

The existence of provisional remedies in Germany as well is associated with the establishment of constitutional court practice, specifically, the interpretation of the right to efficient trial[18]. "The court only verifies how the application of a provisional remedy (freezing order) will promote the protection of future, presumable for the claimant decision against potential obstacles during the enforcement thereof"[19].

"An application for a provisional remedy requires due justification with material factual circumstances, which will convince the court of the necessity of application of a provisional remedy"[20], but before the realisation of this right the requirements, prescribed by procedure law, should be fulfilled.[21]

The content of the filed action should provide for high probability of assumption that the statement of claim has perspective and in the case of fulfilment of factual preconditions contained therein[22], interesting for the claimant legal consequence will occur, that is - the claim should legally justify the action[23].

The law does not always allow for a judge to make a decision, which will protect the interests of both parties: the claimant and the defendant [proportionality principle][24], the provisional remedy, applied to secure the claim of the claimant should be proportional (adequate) to this claim (subject matter of the

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14 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1165-1095-2015, dated 25 November, 2015 (in Georgian).

15 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-956-921-2016, dated 2 November, 2016 (in Georgian).

16 Decision of the Constitutional Court of Georgia in Case №1/2/466, dated 28 June, 2010 (in Georgian).

17 Decision of the Constitutional Court of Georgia in Case №3/1/512, dated 26 June, 2012 (in Georgian).

18 *Sierra S.,* Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right of Effective Court Protection. A Comparative Approach. European Law Journal. Vol. 10, No 1, January 2004, 42-60.

19 *Beck'sche Kurz-Kommentare Band1,* Zivilprozessordnung mit Gerichtsverfassungsgesetz und anderen Nebengesetzen. Begründet von Dr. Adolf Baumbach, Professor Dr. Wolfgang Lauterbach, Dr. Jan Albers, Dr. Dr. Peter Hartmann. Verlag C.H. Beck, München 2003, 2375.

20 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1135-1082-2013, dated 6 October, 2014 (in Georgian).

21 *Bolling H., Chanturia L.,* The Method of Taking Decisions in Civil Cases, Tbilisi, 2004, 37 (in Georgian).

22 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-859-825-2016, dated 28 November, 2016 (in Georgian).

23 Recommendations on Problematic Issues of Civil Law Judicial Practice, Tbilisi, 2007,41 (in Georgian).

24 Proportionality principle means that the measure, applied for the attainment of the purpose of law, should be admissible, necessary and proportionate.

action) and there should be no apparent incompatibility. "Restriction of property right[25] as a provisional remedy should be justified on the basis of proportionality principle - though mutual comparison of the public goal of the institute of provisional remedy and private interests associated with property right"[26].

Although the institute of provisional remedy aims at creating favourable conditions for specific exercise of substantive right of a claimant[27], the interests of a defendant[28] should as well be protected because of party equality principle[29].

"When applying a provisional remedy the fair balance should be stricken between the right of a claimant (ensure the exercise of judicially certified future right) and the interest of a defendant (provisional remedy should not unjustifiably violate his rights as a defendant). In the event of temporary restriction of a right, it is important to strike a reasonable balance between protected wealth and restricted right"[30].

3. Guarantee for the Protection of Defendant's Interests

The application of a provisional remedy, moreover, when this measure restricts the right of a defendant to dispose of his property or monetary resources (freezing order), may inflict certain damage on the defendant[31]. Cross-undertaking as to damages incurred as a result of provisional remedy[32] serves the interests of a defendant and constitutes the guarantee, that damage inflicted due to the restriction of defendant's right will be compensated,[33] provided that provisional remedy proved to be unreasonable. "Based on the essential principle of party equality, the institute of guaranteeing the enforcement of a decision should be evaluated from the position of both a claimant and a defendant."[34]

As per Part 1 of Article 199 of the CCPG, "If the court assumes that the defendant may suffer damage as a result of application of a provisional remedy, the court may apply a provisional remedy and, at the same time, request the person who applied to the court for a provisional remedy, to guarantee the compensation of potential damages to the other party.[35] The court may also apply the security guarantee[36] on the

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25 *Zoidze B.,* Georgian Property Law, 2nd ed., Tbilisi, 2003, 26 (in Georgian).

26 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1165-1095-2015, dated 25 November, 2015 (in Georgian).

27 *Kurdadze Sh., Khunashvili N.,* Civil Procedure Law of Georgia, 2nd ed., Tbilisi, 2015, 382 (in Georgian).

28 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 303 (in Georgian).

29 <http://ec.europa.eu/civiljustice/interim_measures/interim_measures_ger_en.htm>.

30 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-114-107-2015, dated 6 February, 2015 (in Georgian).

31 *Liluashvili T., Khrustal V.,* Commentary to the Code of Civil Procedure of Georgia, 2nd ed., Tbilisi, 2007, 355 (in Georgian).

32 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 304 (in Georgian).

33 *Bolling H., Chanturia L.,* The Method of Making Decisions in Civil Cases, Tbilisi, 2004, 142 (in Georgian).

34 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia Case №AS-859-825-2016, dated 28 November, 2016.

35 *Liluashvili T., Khrustal V.,* Commentary to the Code of Civil Procedure of Georgia, 2nd edition, Tbilisi, 2007, 354 (in Georgian).

basis of an application of the opposite party."[37] Hence, it is prescribed by civil procedure law that if a claimant requests a provisional remedy, the defendant may claim not the compensation of potential damage, he may suffer as a result of application of a provisional remedy, but rather the compensation guarantee.

Article 199 of the CCPG provides for two, interconnected legal mechanisms of protection of defendant's interests: a) compensation of damage by the claimant, which damage was inflicted to the defendant through a provisional remedy. The right to claim the foregoing is enjoyed by the defendant in the case of existence of factual circumstances like non-satisfaction of an action by the court of law (or, in the case of a provisional remedy for a yet-unfiled action, non-filing an action with the court of law within timelines, set by the court of law, because of what the provisional remedy was revoked) and inflicting damage to the defendant by a provisional remedy (the burden of proof of the existence and amount of which is vested with the defendant). (Similar provision is also contained in Paragraph 945 of German Procedure Law)[38].

b) Cross-undertaking as to damages, meaning that if a claimant requests a provisional remedy, the defendant may claim not the compensation of potential damage, but rather - compensation guarantee. This situation can be called counter security, which should be effected in accordance with the procedure, prescribed by Article 57 of the CCPG[39]. "When there is a necessity to apply a provisional remedy, but at the same time, it is probable, that a defendant may suffer damage, the procedure law provides for cross-undertaking as to damages in the case of application of a provisional remedy".[40]

"A provisional remedy, on the one part, is the guarantee for the protection of the rights of a claimant, and on the other - the instrument to restrict the right of a defendant. The protection of the interests of the claimant through the application of the above remedy may incur property damage to the defendant, consequently, in certain cases the necessity of creation of a mechanism for the protection of defendant's interests may arise. The application of a remedy ensuring the compensation of potential damage is a mechanism, that reasonably balances the interests concerned and serves the purposes of protection of defendant's rights".[41]

The institute of provisional remedy guarantees the protection of the interests of a claimant and compensation of damages incurred through the application of provisional remedies - protection of the interests of a defendant.[42]

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36 *Kazhashvili G.,* Role of the Perpetuation of Evidence and Claim Security in Litigation, TSU Faculty of Law, Journal of Law, №1, 2016, 84 (in Georgian).

37 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-114-107-2015, dated 6 February, 2015 (in Georgian).

38 *Kramer X*., Provisional and Protective Measures: Article 24 Brussels Convention (Article 31 Brussels Regulation) 5, The Application in The Netherlands, Germany and England, Paper presented at conference on the Application of the European Private International Law Conventions in a National Context at the T.M.C. Asser Institute, The Hague, The Netherlands, May 18-20, 2000.

39 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 304 (in Georgian).

40 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-499-475-2013, dated 1 July 2013 (in Georgian).

41 Decision of the Constitutional Court of Georgia in Case N2/6/746, dated 1 December, 2017 (in Georgian).

42 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 393 (in Georgian).

"Although Article 1999 of the Code of Civil Procedure provides for compensation of the damage incurred as a result of application of a provisional remedy, the court of law is required to assure itself of the reality of occurrence of such a damage. In the case concerned, the party limited itself only to mentioning, that laying freezing orders on bank accounts would have restricted LLC's access not only to disputed amount, but to all its bank accounts as well, to what the Court of Cassation cannot agree. The appealed ruling laid a freezing order on defendant's accounts only within the scope of disputed amount and consequently, it will not be obstructed in disposing of the other funds."[43]

"Foreseen cross-security is a remedy for the protection of defendant's interests, which ensures the compensation of damage, incurred through unjustified provisional measure. The court is entitled to apply a provisional remedy either on its own initiative or on the basis of an application of the opponent party. However, in either case its application is associated with the risk of occurrence of potential damage. A claim against a claimant on provision of a guarantee should be based on applicant's referral to specific circumstances and adequate justification of the necessity of provision of the guarantee."[44] The obligation to describe circumstances, which confirm the presumption of necessity to present the adequate guarantee, is vested with the applicant, what in the case concerned was not proved by the party in the case concerned commensurate with the requirements of Part 1 of Article 102 of the Code of Civil Procedure.[45] "At this stage, the complainant failed to prove the necessity of application of a security guarantee. Consequently, there do not exist the factual and legal grounds for the satisfaction of the complaint."[46]

For the enforcement of decisions, made in the name of Georgia, judiciary is supposed to apply all the available procedural and legal remedies with due consideration of the specificity of the disputed and parties thereto, on a case-by-case basis. The Court of Cassation stated, that "The Court of Appeals was correct when it charged the claimant with cross-undertaking as to damages resulting from the application of a provisional remedy and even set a period for the claimant to debit the amount on the deposit account of the courts, and after the inconclusive expiry of this period, the court has revoked provisional remedy, applied on the basis of the ruling of the court of lower instance as the claimant failed to guarantee the compensation of potential damage to the defendant (Part 2 of Article 199 of the CCPG).[47]

"The stipulation of Part 1 of Article 199 of the CCPG constitutes the protection of defendant's interests and aims at guaranteeing the interests of the defendant in the case of unreasonability of a

43 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-734-696-2013, dated 30 September, 2013 (in Georgian).

44 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-859-825-2016, dated 28 November, 2016 (in Georgian).

45 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1290-1228-2014, dated 23 January, 2015 (in Georgian).

46 Ruling of the Chamber of Civil Cases of the Tbilisi Court of Appeals on Case №2ბ/1319-14, dated 24 April, 2014 (in Georgian).

47 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №759-718-2015, dated 28 July, 2015 (in Georgian).

provisional remedy, for the latter not to suffer unjustified damage. Under Part 1 of Article 199 of the CCPG a defendant is required to duly substantiate the compensation of potential damage."[48]

The Court of Cassation upheld the opinion of the complainant, that "Applied restriction is so material, that impairs the interests of the entrepreneur and may even result in the insolvency of the company. The referral of the lower instance court to Article 199 of the Code of Civil Procedure cannot be regarded as proportional to such intervention, also the purpose of Article 191 is the protection of the interests of justice and applied provisional remedy restricted the right of the person who was not liable under the statement of claim."[49]

"A defendant, who claims cross-undertaking as to damages, is required to justify the necessity of application of a security guarantee. Furthermore, the justification should be sound; reasonable presumption implies making a decision not only on the basis of a doubt, or formal analysis, but also based on evidences and logical opinion on the soundness of the claim."[50]

It should be mentioned, that similar approaches are well-established by law and judicial practice of foreign countries.[51]

4. Application of Security Guarantee for the Protection of Defendant's Interests under the Initiative of the Court of Law

It is problematic for the court to demand security guarantee from the claimant as a cross-undertaking as to damages, that may be incurred to the defendant because of a provisional remedy, on its own initiative - i.e. when a defendant does not personally demands cross-undertaking as to damages incurred as a result of application of a provisional remedy, on the basis of Part 1 of Article 199 of the CCPG. Does such commitment of the court of law contradict the adversarial principle?

The law of a rule-of-law state is based on democratic principles, inspired by high legal culture. The principles of law stem from the Constitution of the country and are manifested in all the fields of law.[52]

The adversarial principle, along with party equality principle is guaranteed by the Constitution of Georgia, what provided for state law, i.e. constitutional importance of this law. As per Part 3 of Article 85 of the Constitution of Georgia "Legal proceedings are conducted on the basis of party equality and

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48 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-832-884-2011, dated 13 June, 2011 (in Georgian).

49 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1215-1140-2015, dated 2 February, 2016 (in Georgian).

50 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-929-879-2015, dated 6 November, 2015 (in Georgian).

51 See <www.Justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25q#5.1>; *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* (2014) EWCA Civ 1295 (09 October 2014); <https:///www.gesetze-im-internet.de/zpo/>, Section 537, 709, 945.

52 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P.,* Guidebook for Administrative Procedure Law, Tbilisi, 2010, 19 (in Georgian).

adversarial principles." "The adversarial principle is based on equal potential of the parties to be equipped with relevant procedural instruments…"[53]

One of the manifestation of this principle is to take equal account of the interests of two opponent parties during various procedural actions.[54] "In civil proceedings it is the legal burden of each party to describe and prove the facts, with the help which the parties are going to prove their statements of claim or dismiss the factual circumstances named for the justification of the statements of claim."[55]

In parallels with the adversarial principle the court of law has the authority to manage the proceedings. However, the problem of proportionality of two principles - party adversarial principle and activeness of the court of law - arises.[56] Hence, these two principles should be applied in such a manner in every specific case,[57] as not to jeopardise the correct administration of justice[58].[59] "Judicial protection is efficient when it meets the requirements of expedient/timely, fair and efficient justice. Based on the fundamental right to fair trial, a court decision is to be made within a reasonable period, without unjustified delay, as unjustified delay of administration of justice undermines public confidence in it."[60]

Under Part 2 of Article 4 of the CCPG the court of law is entitled to apply remedies envisaged by the Code of Civil Procedure on its own initiative for the establishment of the facts of the case. However the court is entitled to act on its own initiative only within the scope, prescribed by the Code of Civil Procedure.[61]

The adversarial principle should not be understood as extreme passiveness of the court.[62] The dispute should be resolved in favour of reasonable balance between the adversarial and inquisitorial principles. In one of the cases the Cassation Chamber has not upheld the opinion of the complainant and explained, that "Although Article 199 of the CCPG provides for the option of the court to apply a security guarantee, the necessity of application of a security guarantee is not proved in the case concerned."[63]

"The stipulation of Article 199 of the CCPG establishes a certain legal balance between the protection of the interests of the claimant on the one part and restricted right of the defendant on the

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53 Decision of the Constitutional Court of Georgia in Case №3/2/577, dated 24 December, 2014.

54 *Liluashvili T., Khrustal V.,* Commentary to the Code of Civil Procedure of Georgia, 2nd edition, Tbilisi, 2007, 106 (in Georgian).

55 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1673-1569-2012, dated 9 October 2013.

56 *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen Band* 3, §§ 803-1066 EGZPO, GVG, EGGVG , Internationales Zivilprozessrecht, Herausgegeben von Dr. Dr. h.c. Gerhard Lüke, Peter Wax Verlag C.H. Beck München 2001,717.

57 *Lüke,* Zivilprozessrecht, 10., neubearbeitete Aufl,. München, 2011,5.

58 *Rosenberg, Schwab, Gottvald*, Zivilprocessrecht, 17. Neubearbeitete Aufl., München, 2010,396.

59 *Andrews N.,* Fundamental Principles of Civil Procedure: Order Out of Chaos, Oxford University Press, 2006, 20.

60 Decision of the Constitutional Court of Georgia in Case №1/8/594, dated 30 September, 2016 (in Georgian).

61 *Khoperia N.,* Correlation between the Adversarial and Party Disposition Principles in Civil Procedure Law, Tbilisi, 1998,12 (in Georgian).

62 *Gagua I.,* Burden of Proof in Civil Procedure Law, Tbilisi, 2013, 159 (in Georgian).

63 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1561-1561-2011, dated 26 December, 2011 (in Georgian).

other."[64] "Waiver of cross-undertaking as to damages resulting from the application of a provisional remedy does not itself deprive the defendant of the right to exercise his breached right in accordance with general rule in the case of occurrence of damage.[65] The Cassation Chamber has not upheld the opinion of the complainant, that "Application of a security guarantee depends on the presumption of probability of non-satisfaction of the action."[66]

"The Court of Cassation reiterates, that based on established judicial practice, laying freezing orders on bank accounts of an economic unit to full extent, makes it highly probable, that its economic activities will be paralyzed. Consequently, within the framework of judicial control, with due consideration of inherent to security measure equal risks for the parties, the courts which decide on the application of a provisional remedy, should consider the application of a leverage, balancing the compensation of potential damage to the other party."[67] "Complainant's opinion, that the preconditions for application of Part 1 of Article 199 of the CCPG were not justified, specifically, what damage and to what extent would have been incurred to the LLC through laying freezing orders on the assets thereof, is not legally justified and consequently, cannot be upheld."[68]

"Part 2 of Article 199 provides, that in cases, envisaged by Part 1 of this Article a person, who applied to the court for a provisional remedy, is required to secure the compensation of potential damages to the defendant within a period of 7 days. The disputed provision provides for blanket 7-days period for the compensation of potential damage. The Code of Civil Procedure does not allow for the extension of the period, set by law, consequently, if a claimant, for objective reasons, fails to secure potential damage within a period of 7 days, the provisional remedy will be revoked. Setting a timeline in a manner as not to allow for its extension or restitution aims at the protection of defendant's interests - to insure damage, resulting from the application of a provisional remedy; however, the protection of this interest should not make illusory the right of the claimant to secure the action and to guarantee the restitution of its right in the future in this way. Blanket restriction of a right, what does not provide for taking account of individual situation of the person concerned, does not minimize the binding effect, stemming from the provision" (see: Decision of the Constitutional Court of Georgia on Case №2/4/532,533, dated 8 October, 2014).

Based on disputed provision, the judge is not able to expand or shorten the timeline, imperatively prescribed by law, through adequate assessment of factual circumstances, based on individual features of the case. Consequently, in certain cases the disputed provision excludes the possibility of determining a reasonable period for cross-undertaking as to damages, what deprives a claimant of the possibility to

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64 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-956-921-2016, dated 2 November, 2016 (in Georgian).

65 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-1338-1263-2012, dated 15 October, 2012(in Georgian).

66 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-499-475-2013, dated 1 July, 2013 (in Georgian).

67 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-956-921-2016, dated 2 November, 2016 (in Georgian).

68 Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-759-718-2015, dated 28 July, 2015 (in Georgian).

fully apply a provisional remedy to full extent. The Constitutional Court considers that 7-days period, prescribed by the first sentence of Part 2 of Article 199 of the Code of Civil Procedure for cross-undertaking as to damages does not meet the requirements of proportionality principle and restricts the rights of a person with higher intensity than necessary when the legitimate purpose concerned can be attained through less intensive restriction of the rights of the person. Hence the constitutional claim №746 should be met in the part of the statement of claim which concerns the constitutionality of the first sentence of Part 2 of Article 199 of the Code of Civil Procedure in the light of Paragraph 1 of Article 42 of the Constitution of Georgia. Protection of a defendant against a jeopardy stemming from a provisional remedy within civil proceedings is the important legitimate purpose. Although the disputed provision contradicts the right to fair trial, guaranteed by Paragraph 1 of Article 42 of the Constitution of Georgia, its immediate invalidation will leave the issue unregulated and, at the same time, the court will not be able to define the timeline for cross-undertaking as to damages resulting from a provisional remedy. Leaving the issue without legal regulation may result in breach of material private and public interests. Consequently, the Constitutional Court considers it reasonable to defer the invalidation of disputed provision until 31 March 2018 on the basis of Paragraph 3 of Article 25 of the Organic Law of Georgia on the Constitutional Court of Georgia for the Parliament of Georgia to be given a reasonable opportunity to regulate the issue according to standards, specified by the Decision of the Constitutional Court of Georgia and strike a reasonable balance between the interests of the parties to legal proceedings."[69]

According to amendments in Art. 199 (2) of Civil Procedure Code of Georgia (dated 04.04.2018) securance of potencial damage to the defendant is possible within the period determined by the court, which should not exceed 30 days.

The account should as well be taken of the fact, that a security guarantee does not mean the automatic compensation of damage incurred through a provisional remedy, but rather only the provision for compensation of damage.[70] A claimant[71] is supposed to file[72] an action[73] with the court for cross-undertaking as to damages[74] and prove both the occurrence of such damage and its amount as well.[75]

Demanding cross-undertaking as to damages resulting from the application of a provisional remedy by the court on its own initiative does not contradict the adversarial principle in the light of stipulations of Articles 4 II and 199 I of the CCPG.

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69 Decision of the Constitutional Court of Georgia in Case N2/6/746, dated 1 December, 2017.

70 *Liluashvili T.,* Civil Procedure Law, 2nd ed., Tbilisi, 2005, 305 (in Georgian).

71 *Prütting, Gehrlein,* ZPO Kommentar, 8.Aufl,. luchterhand Verlag, 2016, $945, 2378.

72 *Kemper* in *Saenger* (Hrsg) HK ZPO, 7.Aufl., Nomos Verlag, 2017,$945, 2246.

73 *Kurdadze Sh., Khunashvili N.,* Civil Procedure Law of Georgia, 2nd edition, Tbilisi, 2015, 395 (in Georgian).

74 *Seiler* in *Thomas/Putzo,* Zivilprozessordnung Kommentar, 37.Aufl., C.H.Beck, München, 2016, $945, 1335.

75 *Liluashvili T., Khrustal V.,* Commentary to the Code of Civil Procedure of Georgia, 2nd ed., Tbilisi, 2007, 335 (in Georgian).

5. Appealing a Court Ruling on Security Guarantee

Problematic is also the question of appealing a court ruling on application or refusal to apply cross-undertaking as to damages. "The Cassation Chamber reiterates, that the Court of Appeals has not evaluated: a) the soundness of the applicant's arguments in the light of Article 199 of the CCPG; b) whether or not the amount of security guarantee claimed by the applicant is based on the calculations offered in the opinion of Accountants & Business Advisers, annexed to the application. Based on the foregoing the Cassation Chamber considered that the parts of the Rulings of the Chamber of Civil Cases of the Tbilisi Court of Appeals of 16 January, 2017 and 30 March 2017 should be revoked which found inadmissible the motion/action of the JSC "T" on cross-undertaking as to damages resulting from warehousing property due to prohibition of their sale and the case was returned to the same court for re-trial thereof with a view to examination of the soundness of the applicant's claim."[76]

In the other case the Cassation Chamber explained, that "Cross-undertaking as to damages resulting from the application of a provisional remedy is subject to special regulation and it is inadmissible to apply the provisions of Article 261 of the Code of Civil Procedure for the regulation of this issue. In its turn, also worth mentioning is the fact, that none of procedural rules (Articles of the 191-199[1] of the CCPG) provide for the possibility of appealing a ruling denying cross-undertaking as to damages through private prosecution."[77] The problem is resolved in the same manner when court partially meets the claim for cross-undertaking as to damages resulting from the application of a provisional remedy.

"Regulation of issues related to appealing of a ruling on cross-undertaking as to damages does not fall within the scope of Part 2 of Article 199 of the Code of Civil Procedure. Hence disputed provision is not of such content that would have granted or restricted the right of a claimant to appeal a decision on application of a provisional remedy. Furthermore, the disputes provision does not constitute the institute of ruling on securing potential damage or/and a rule, providing for the procedure of its application either."[78]

6. Conclusion

The institute of provisional remedy ensures the protection of the interests of a claimant, whilst the compensation of damages incurred through the application of a provisional remedy - protection of the interests of a defendant.

Application of a provisional remedy may incur certain damage on the defendant. Cross-undertaking as to damages resulting from the application of a provisional remedy serves the interests of the defendant and constitutes the guarantee, that if provisional remedy turns to be unjustified, the damage incurred through the restriction of defendant's right will be compensated.

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[76] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-430-402-2017, dated 19 May, 2017.

[77] Ruling of the Chamber of Civil Cases of the Supreme Court of Georgia in Case №AS-929-879-2015, dated 6 November, 2015.

[78] Decision of the Constitutional Court of Georgia in Case N2/6/746, dated 1 December, 2017.

In the case of cross-undertaking as to damages resulting from the application of a provisional remedy by the court on its own initiative, the problem should be settled in favour of reasonable balance between adversarial and inquisitorial principles. The adversarial principle should not be understood as an extreme submissiveness of the court.

Waiver of cross-undertaking as to damages does not itself deprive the defendant of the right to exercise his breached right in accordance with general rule in the case of occurrence of damage (Article 199 III CCPG).

A security guarantee does not mean the automatic compensation of damage to a defendant incurred through a provisional remedy, but rather only the provision for compensation of damage. A claimant is supposed to file an action with the court on the compensation of incurred damage and prove both the occurrence of such damage and also its amount. However, there is no common understanding whether which provision should serve as the basis of a claim in this case: Article 199 of the CCPG of Article 992 of the CCG.

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