# GREECE

## SOME REMARKS CONCERNING THE PRE-TRIAL STADIUM AND THE PROCEEDING BEFORE THE COURT ACCORDING TO THE GREEK CODE OF CIVIL PROCEDURE

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### I. THE DOMINANT ROLE OF THE PARTIES CONCERNING THE DISPOSAL OF THEIR RIGHT IN CIVIL PROCEDURE

One of the main principles of the Greek Civil Law is the freedom which enjoy the parties to dispose their rights. The private autonomy is subjected to the limitation of art. 281 gr. C.C. according which the exercise of a right in an abusive way is considered as unlawful.[1] The Greek Code of Civil Procedure respects the main principle of the Civil Law mentioned above. Therefore the parties have to undertake the initiative for the commencement of an action. The free disposition of the parties is provided by art. 106 gr. C.C. Proc. and goes hand in hand with the principle of private autonomy prevailing the Greek Civil Code[2]. A court must not award the plaintiff's relief not formally requested not go beyond the request submitted. The plaintiff may withdraw the complaint and the defendant may acknowledge the claim (arts. 294, 296 and 298 gr. C.C. Proc.) or accept the truth of unfavorable facts (confession before the court, art. 352 gr. C.C.Proc). That means that the parties have a dominant role for the commencement and the termination of a pending case.[3] The most prominent exception to the rule of the dominant role of the parties in civil proceeding is introduced by the rules regulating the administration of provisional remedies. For example according to art. 691 C.C. Proc. the judge acting on his own motion may select all the necessary material for the decision.

### II. THE BEGINNING OF THE PENDENCY

For the commencement of an action the plaintiff has to bring a written complaint to the secretary of the court. The option of an oral commenced action is provided theoretically before the clerk of the Justice of the Peace. Before the same court the defendant is allowed to answer orally during the hearing without submitting written pleadings. Before the other courts parties have to submit written pleadings. As a rule parties do not have to disclose the means of proof. According to art. 463 gr. C.C. Proc. for the admissibility of attacks against document for falsity the party has to submit simultaneously the relative document of attestation and to nominate the witnesses and other means of proof. According to art. 468 § 1 gr. C.C. Proc. the party, who commences an action for small claims, has to refer with the submitted complaint to all the means of proof for the

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[1] *M. Stathopoulos*, Contract Law in Hellas (in English, 1995), Nr 34.

[2] *P. Yessiou - Faltsi*, Civil Procedure in Hellas (in English, 1995), p. 46.

[3] For further details, *K. Kerameus*, Judicial Organization and Civil Procedure, in: *K. Kerameus*, *P. Kozyris*, Introduction to Greek Law (in English, 1988), p. 246.

establishment of the small claim. According to art. 444 Nr. 3 gr. C.C. Proc. mechanical portrayals are to be considered as private documents. Their authenticity can be established through any kind of electronic signature. Art. 444 Nr. 3 gr. C.C. Proc. can not lead to the acceptance of electronic documents of disposal, because art. 160§1 gr. C.C. provides the handwritten signature for documents of disposal and only the advanced electronic signature has been accepted as a means of equal validity (art. 3§1 Presidential Decree 150/2001). As long as infrastructure of the courts is available, no legal barriers can prevent the production of electronic procedural acts under the conditions mentioned above.

The clerk appoints date and time of the hearing and enters the case in the docket (arts. 215 and 228 gr. C.C.Proc.). After the action has been brought to the secretary of the court, who appoints a date and time of the hearing (arts. 215 C.C.Proc. and 226§1 C.C.Proc.), the litigation has to be considered as pending (art. 221§1a C.C.Proc.).

### **III.** FORMAL REQUIREMENTS FOR THE ACTION

Actions have to fulfill the formal requirements provided for the procedural acts. The name of the court where the action is raised, names and domicile of the parties or their representatives, date and signature of the party's attorney (arts. 118 and 117 gr. C.C.Proc.) are some of the formal requirements for every procedural act also for the action.

According to art. 159 gr. C.C.Proc. violations concerning the formal prerequisites of procedural acts lead to their nullity. Procedural nullities are to be clearly distinguished from the void juridical acts. In contrary to the declaratory character of a judicial decision which determines the nullity of juridical acts, judicial decisions have to rescind void procedural acts. Until the nullity is invoked, the procedural act produces its legal effects.[4]

With the exception of signature, which is to be considered as a ground of validity for each procedural act, the lack of the rest formal requirements has the "relative nullity" of the procedural act as a consequence.[5] In such a case the pronouncement of nullity depends on whether the lack of formal requirement for the procedural act has caused concrete irreparable "detriments" to the party who demands its nullity (art. 159 nr. 3 gr. C.C. Proc.).

### **IV.** THE CONTENT OF THE ACTION

To the content of the action as a procedural document belong also the reference to the value of the object in litigation in disputes involving property and the grounds for the establishment of subject matter or territorial competence (art. 216§2b gr. C.C. Proc.). The judge exercising his duty for the collaboration with the parties (art. 227 C.C. Proc.) may invite the plaintiff to correct the omissions derived from art. 216§2 C.C. Proc.[6]

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[4] More about the topic s. *A. Sophialides*, Procedural Nullity (in Greek, 1991), pp. 291 ff.

[5] *K. Kerameus / D. Kondylis / N.Nikas* (G. Orfanides), Code of Civil Procedure. Article by Article Commentary (in Greek, 2000), art. 118 Nr.3

[6] *K. Kerameus /D. Kondylis/ N.Nikas* (K. Makridou), op. cit., art. 216 Nr.1.

According to art. 216§1 C.C.Proc. the complaint has to contain the grounds establishing the cause of the action and an unambiguous specification of the relief requested. Art. 216§1 gr. C.C. Proc. provides expressis verbis that the complaint must make a clear and unambiguous report of the facts which according to the substantive law support the action (art. 216§1a gr. C.C. Proc.) an exact description of the object in litigation (art. 216§1b gr. C.C.Proc.) and a certain relief (art. 216§1c C.C.Proc.). Failure to correspond to the duties mentioned in art. 216§1 gr. C.C.Proc. the complaint is to be rejected as inadmissible also on the court's own motion.

### **V.** LEGAL CONSEQUENCES OF AN INSUFFICIENT REPORT OF FACTS

According to the Greek case law and doctrine the reference of the factual grounds in the complaint fulfils the requirement of art. 216§1a gr. C.C. Proc. under the condition that specific facts are reported, which have taken place in concrete place and time. Distinguishing the legal relationship in litigation from other sources of liability, the individualization, in other words, of the legal relationship, is not enough.[7]An action which does not include sufficient concretization of the facts referred to is qualified as "vague" and is dismissed as inadmissible also on the motion of the court.[8]

In the complaint all facts are to be reported, so that the conditions of the legal rules, which support the relief, are to be considered as fulfill. Otherwise the action is to be dismissed as legally unfounded. Examining the legal foundation of the action the judgment produces res judicata effect as any meritorious judgment under the condition that it is no longer subject to an ordinary method of attack. On the other hand a judgment qualifing an action as "vague" based on art. 216§1a gr. C.C. Proc. dismisses it as inadmissible on procedural grounds. It becomes res judicata only in connection with the decided procedural grounds.[9] A judgment with res judicata effect on procedural grounds does not preclude a subsequent action, "if this is relieved from the previous procedural effect".[10]

### **VI.** NO ALTERATION OF THE FACTUAL BASIS AND THE REQUESTED RELIEF

Referring to legal aspects or arguments does not belong to the compulsory content of the complaint (jura novit curia). After the pendency has been entered the factual basis of an action can not be altered (art. 224 gr. C.C. Proc.) neither modification, as a rule, regarding the requested relief is allowed (art. 223 gr. C.C. Proc.). The plaintiff is not allowed to substitute with his pleading a "vague" report of facts contained in the complaint with a modified factual basis.[11] The defendant needs sufficient time-space to prepare his answer. Therefore the inadmissibility

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[7] *G. Mitsopoulos*, Gedanken zu einigen wichtigen Problemen des Zivilprozessrechts, ZZP 1978, 121; *K. Kerameus*, Manual of Civil Procedural Law (in Greek, 1986), p. 206.

[8] *Faltsi*, op. cit. (note 2), p. 185.

[9] *Kerameus*, op cit. (note 7), p. 206/207; *Faltsi*, op. cit. (note 2), p. 185 note11.

[10] Faltsi, op. cit. (note 2), p. 237.

[11] *Kerameus*, op. cit. (note 7), p. 219.

connected with the alteration of the factual basis of an action contributes to the right of defense guaranteed by the Greek Constitution (art. 20§1)[12].

**VII**. TYPES OF DEFENDANT'S NEGATIVE ANSWER (THE QUALIFIED DENIAL AND THE EXCEPTION)

The defendant, who comes to the hearing and decides to give a negative answer, can either deny the facts as reported by the plaintiff (art. 261 gr. C.C. Proc.) or exercise exceptions (art. 262 gr. C.C. Proc.) or counterclaims (art. 268 gr. C.C. Proc.). The denial of the claim may be based on new facts brought by the defendant (qualified denial, negatio per positionem alterius). The denial is accompanied by a relief with which is requested the dismissal of the action. In such a case the defendant referring to specific reasons tries to put the factual basis of the action in another context. According to art. 262§1 gr. C.C.Proc. a clear factual basis and a specific relief constitute also the prerequisites for an admissible exception.

The defendant is entitled to exercise counterclaim by commencing a cross action at the first hearing (art. 268 gr. C.C.Proc.). With the cross action the defendant has to make a clear and unambiguous report of the facts supporting his counterclaim. A connection between the counterclaim and the plaintiff's claim based on the substantive law is not required by the Greek Code of Civil Procedure. Special provision regulates the territorial competence for the cross action. Counterclaim has to belong to the subject matter competence of the same or of an inferior court in comparison to the subject matter competence provided for the plaintiff's claim (art. 34 gr. C.C. Proc.).

**VIII.** SOME REMARKS CONCERNING THE DISTINCTION BETWEEN THE QUALIFIED DENIAL AND THE EXCEPTION

Also the defendant who denies the causes of action in a qualified manner may give specific reasons by reporting facts. With both types of defense the defendant may allege that the plaintiff's right has never existed. Therefore the distinction between the qualified denial and the exception, although significant for the allocation of the burden of proof, is not theoretically always clear.

According to art. 338§1 gr. C.C.Proc. each party has to prove the facts which are required to support his independent claim or counter-claim. That means that the claim or counterclaim has to be based on independent cause both in factual and legal terms. Exceptions with their own legal and factual basis also have to produce directly separate legal consequences.

The defendant's answer to the action with its separate factual basis having no independent legal basis and producing no legal effects is to be qualified as negatio per positionem alterius because it is not sufficient to prevent the legal effects of the plaintiff's claim in the case that its legal prerequisites are present.[13] If for example in the bowels of dead cattle were found certain amounts of poisonous substances and the impaired farmers commence an action against the

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[12] *D. Maniotis* The Principle of Keeping a Preparatory Stadium before the Trial (in Greek, 1994), pp. 123/124.

[13] *G. Mitsopoulos*, Procedural Acts, Volume in Honor of *G. Rammos* II (in Greek, 1979), p. 641; *G. Nikolopoulos* About the Meaning and the Function of Exceptions (in Greek, 1987), p. 125.

producer of feeding products consumed by the cattle, the defendant may allege that noxious substances penetrated into the groundwater from a chemical factory. Such emissions have caused the damage. In this case the defendant denies the existence of the prerequisites for the establishment of the plaintiff's right. The defendant's answer produces no direct legal consequences. It is just a contradiction to the facts reported by the plaintiff by presenting another factual basis. The defendant alleges that another person is liable for the damages and denies his liability. He does not prevent the legal consequences of plaintiff's claim, because the nomination of the possible liable person done by the defendant has no direct legal effects. Besides it is possibly based on the same legal ground with the plaintiff's claim.

## **IX.** THE ROLE OF THE COURT DURING THE PROCEEDING

In the frame of the principle of free disposition of the parties and the principle of party presentation (art. 106 gr. C.C.Proc.) the Greek civil judge emerges as a more or less passive figure, with authority mainly related to the application of legal norms.[14] However the Greek Code of Civil Procedure does not ignore the principle of collaboration between the court and the parties. According to art. 236 gr. C.C. Proc. the court has the duty to intervene and help the parties to properly expose their factual statements. Scholars based on art. 236 gr. C.C.Proc. have formulated the opinion that the judge may help the party to convert a "vague" action to admissible.[15] Such an opinion has to take into account the defendant's right of defense, as guaranteed by art. 20§1 of the Greek Constitution and comes in contradiction to art. 224 gr. C.C.Proc. as mentioned above.[16] Besides art. 236 gr. C.C.Proc. has to be interpreted in the frame of the principle introduced by arts. 216§1 and 224 gr. C.C.Proc., according which the parties are free to determine the object in litigation.

The court has the authority to order the taking of evidence (art. 107 gr. C.C. Proc.), but the collection and presentation of facts belong to the duties of the parties. The court, in order to contribute to the acceleration of the procedure, may also order the procedural connection of several actions (arts. 218 and 246 gr. C.C. Proc.).

## **X.** SERVICE OF THE SUMMONS AND THE PRINCIPLES OF CONCENTRATION AND OF THE ORAL PROCEEDING

The commencement of the action opens the preparatory stadium of the trial. Service of the summons is to be completed in a time limit of thirty days after the written complaint has been brought to the court. The same time limit is sixty days for persons residing abroad (art. 229 gr. C.C.Proc.). After the service of summons parties may present their factual or eventually also legal allegations by submitting pleadings.

At the end of the preparatory stadium before the hearing parties have to submit to the court with their pleadings all factual allegations (principle of concentration provided by art. 269 gr. C.C. Proc.). After the commencement of the action, which can take place without any previous notice to the prospective

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[14] *Faltsi*, op. cit. (note 2), p. 54.

[15] *K. Makridou*, The "Vague" action, 2nd Ed. (in Greek, 1996), p.p. 244 ff.

[16] Supra in text between the exponents Nr. 11 and 12.

defendant[17], the parties are required to submit pleadings until a time limit before the hearing provided by the law. In a later time limit before the hearing each party may submit further pleadings for the denial or contradiction of his counter party's-allegations (art. 237 gr. C.C. Proc.). After this later time limit the preparatory stadium of the trial is terminated and the judge may inform himself concerning the concentrated party - allegations of the pending case. Exceptions to the principle of concentration are provided by art. 269 gr. C.C. Proc.. They concern mainly allegations considered any time on the court's own motion, also allegations submitted later due to justified subjective reasons. Art. 269 gr. C.C. Proc. introduces, therefore, the so called subjective preclusion concerning the delayed submitted factual allegations. Proceedings before the courts of first instance are oral (art. 270 gr. C.C.Proc.). The proceedings before the court of appeal as a rule are not oral. Oral proceedings are provided in the case of an attack on default judgments addressed to a court of appeal (art. 529§2 gr. C.C.Proc.). Cassation proceedings are also oral.

## **XI.** THE ADMISSIBILITY OF PROCEDURAL CONTRACTS

The Greek Code of Civil Procedure consists of compulsory and facultative regulations. Rules regulating the territorial competence, which can be modified through procedural contracts (art. 42 gr. C.C.Proc.) are an example of facultative and not rigid regulations. According to the prevailing opinion procedural contracts are allowed in the frame of Greek Civil Procedural Law under two conditions. They do not have to contradict to compulsory rules i.e. rules concerning judicial powers and duties connected with the administration of justice. Therefore procedural contracts, with which the modification of the rules concerning the binding effects of judgment or the probative effect of documentary evidence is agreed, produce no legal effects.

The second condition refers to the disposition of the parties' procedural powers. Their contractual withdrawal from the power concerning the attack on judgment produces no legal effects, if it covers in abstracto every future controversy. In contrary the withdrawal from the power of exercising an appeal on an ad hoc final judgment is regarded as a rule as admissible. Therefore the contractual restraints from the parties' powers has to be agreed only when they can determine with accuracy the legal consequences of such a behaviour at the time of the agreement.[18]

## **XII.** SETTLEMENT IN LITIGATION

The Greek Civil Procedural Law encourages the tendency for conciliation with mutual concessions between the parties. Greek judges may be occupied with conciliation efforts even before the commencement of an action. Parties can take advantage of the conciliatory intervention by the justices of the peace (arts. 209-214 C.C. Proc.). The initiative for the introduction of such an attempt at conciliation belongs entirely to the parties. It results the pendency of the case.[19]

Mandatory attempt at conciliation is provided by art. 208 C.C.Proc., according which judges of the peace must attempt conciliation between the parties

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[17] *S. Kerameus*, op. cit. (note 3), p. 248.

[18] *Mitsopoulos*, op. cit. (note 13), p. 649.

[19] *K. Calavros*, Manual of Civil Procedure (in Greek, 2003), Nr. 5.

before any hearing of the case. Another case of mandatory conciliation is provided by art. 214a. C.C.Proc. for actions belonging to the subject matter competence of the three member courts of first instance. This last attempt has to be undertaken by the plaintiff's attorney under the penalty of inadmissibility of any further proceeding. The attorney's mandatory attempt at conciliation has to take place after the commencement of the action until the hearing of the case (art. 214a § 1 C.C.Proc.). During the concrete mandatory attempt at conciliation the dispute between the parties as a whole is examined (art. 214a § 4 gr. C.C.Proc.). According to the teleological interpretation of the rule also counterclaims belong to its subject matter.[20] The attempt at conciliation provided in art. 214a gr. C.C. Proc. is permissive concerning the possible interventions or other incidental actions (art. 214a§10 gr. C.C.Proc.). In the case of necessary joinder of parties a unified conciliatory proceeding is necessary, when the matter in dispute refers to undivided rights.[21]

Although in recent years advocates are more engaged in extra judicial legal consultation, they show unwillingness to take advantage of the procedure for the mandatory attempt at conciliation in an effective manner. They may have the opinion that in this way they protect their professional reputation.[22]

The agreement for the settlement of the dispute closed by the parties after the conciliatory attempt of the judge, has the legal effect of a compromise in court (art. 212§4 gr. C.C.Proc.). Minutes are kept during the judicial attempt at conciliation (art. 212§1 gr. C.C.Proc.). They are regarded as enforceable instruments concerning the terms of the settlement.[23] Minutes are also kept during the mandatory attempt at conciliation undertaken by the plaintiff's attorney (art. 214a§5 gr. C.C.Proc.). They are regarded as enforceable instruments after they are confirmed by presiding judge of the court at which the case is pending (art. 214a§6 C.C. Proc.). The judicial conciliation and the conciliation after the mandatory attempt of the plaintiff's attorney have no res judicata effect, because no judicial decision is required for their confirmation. Consequently they don't have to hinder the parties from bringing the same claim to a new trial, during which its substantive grounds are to be examined.[24] The opinion mentioned above is not unanimously accepted.[25] Anyway the public documents, in which the terms of the compromise are recorded, have a qualified probative weight according to the Greek law of evidence. Therefore the court has to accept in a future decision the facts as they are reported in the documents. The contract of compromise is regulated by art. 871 gr. C.C.. According to the rule the parties through compromise can settle their disputes about a legal relationship with mutual concessions. Therefore the compromise may be attacked on grounds of the

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[20] *Calavros*, op. cit., Nr. 21.

[21] *Calavros*, op. cit., Nr. 17.

[22] *K. Kerameus*, The Function of Conciliation as a Means of Avoiding Litigation and Settling a Dispute (in English), Revue Hellenique de Droit Internationale 1982-1983, p. 236.

[23] *N. Nikas*, The Compromise in Court (in Greek, 1984), p. 179.

[24] *Nikas*, op. cit., pp. 252/253.

[25] *Faltsi*, op. cit, (note 2), p. 299.

substantive law. Such an opinion is also in accordance with art. 293 gr. C.C. Proc. The rule provides that compromise in court produces legal effects under the condition that it meets the prerequisites of both civil and procedural law. The compromise in court is a procedural act and at the same time a contract depending on the rules of the civil law.[26] The same art. 236 gr. C.C. Proc., which introduces the principle of collaboration between the court and the parties as mentioned above, can stimulate the court to lead the parties to a compromise. However this duty is regarded as a nobile officium, because judges do not favor such an activity. Two reasons support this tendency: The overloaded dockets and the doubts concerning judicial impartiality provoked by any activation of the judges.[27] On the other hand a successful conciliation led by the judge assumes that her/his personality is respected by the parties and has influence upon them.[28] Parties can respect the personality of the judges, if they trust their good judgment. That means that they have to be convinced that their cases are to be adjudicated by impartial judges with social experience. Parties with a strong belief upon the judicial impartiality can easily accept the active role of the judges concerning the conciliation of disputes. The methods of selection, promotion and control over judiciary can contribute essentially to the establishment of the confidence upon their impartiality.

## **XIII.** CONCLUSIVE REMARKS

During the preparatory stadium of the proceeding before the court the Greek lawgiver thorough the interdiction of the alteration of the factual basis and the requested relief, the compulsory content of the action and the principle of concentration tries to give enough time to parties in order to be informed concerning the counter party's allegations and prepare their answer. Also the judge has the possibility to collaborate with the parties, the witnesses the experts etc. during the hearing, because she/he has enough time to get knowledge concerning the grounds of the case during the pre-trial stadium. Both reasons mentioned above contribute to the protection of the parties' hearing before the court as provided by the Greek Constitution (art. 20.). With art. 236 gr. C.C.Proc. which is to be combined with art. 106 gr. C.C. Proc. the principle of collaboration between the court and the parties, which protect the later from unexpected judgment and helps them to avoid the inadmissibility of their procedural acts, is to be understood in the frame of the principle of free disposition of the parties and that of party presentation. The Greek Code of Civil Procedure favors the settlement in litigation. Judges, attorneys and parties are reluctant to take advantage of such possibilities. A characteristic feature of the Greek Code of Civil Procedure is its rigid formality. Therefore procedural contracts are to be considered as admissible under specific conditions. With the relative preclusion of facts as provided by art. 269 gr. C.C.Proc. and the relative nullity of procedural acts as provided by art. 159 Nr. 3 gr. C.C.Proc. the Greek lawgiver takes into account the principle of equity (aequitas) and tries to balance the need for legal certainty with the need for the issue of meritorious judgments and the promotion of the distributive justice. There are certain types of defendant's negative answer.

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[26] *Nikas*, op. cit (note 23), p. 393; *Kerameus*, op. cit. (note 7), p.p. 360/361.

[27] *Kerameus*, op. cit, (note 22), p. 237.

[28] *Kerameus*, op. cit. (note 22), p. 237.

The distinction between the qualified denial and the exception contributes to the allocation of the burden of proof according to art. 338§1 gr. C.C.Proc.