РОЗДІЛ 5
ЦИВІЛІСТИЧНА НАУКА: ПРОБЛЕМИ, СУТНІСТЬ ТА НАПРЯМИ УДОСКОНАЛЕННЯ

Наукове дослідження цивілістичної науки є досить важливим сьогодні, адже вивчення сучасних проблем цивільного права дасть змогу удосконалити його шляхом пошуку нових форм і методів для цього. Суспільно-правові відносини нерідко стикаються із проблемами в галузі нормативного регулювання майнових та особистих немайнових прав як фізичних, так і юридичних осіб. Чимало труднощів викликає також трактування положень договорів цивільно-правового характеру.

У зв'язку із цим актуальними є представлені в збірнику наукових праць X Міжнародної науково-практичної конференції «Інноваційний розвиток правової науки в умовах модернізації суспільства» матеріали, що присвячені як дослідженню системи цивільного права, так і правового положення осіб у ньому, реалізації норм договорів між учасниками відповідних відносин. Окрема увага приділена і питанням сімейного права та безпосередньо гендерному виміру сімейної політики.

У збірнику досліджуються питання та проблеми, що виникають у зв'язку із інтенсивним розвитком інформаційних технологій в Україні та світі. Актуальним також є дослідження елементів res judicata, як положення про обов'язковість судового рішення для сторін. Окрема увага присвячена загальним проблемам права інтелектуальної власності, зокрема регулюванню веб-сайтів як особливого типу об'єктів авторського права та доменних імен як засобів індивідуалізації учасників у цивільному обороті. Надані авторами висновки можуть бути використані для досягнення поставленої мети та завдань конференції.

Стратегічною метою удосконалення цивілістичної науки є створення в нашій державі ефективного регулювання цивільно-правових відносин, адже громадяни щоденно вступають у такі і щоденно вони потребують захисту своїх інтересів та прав. Саме тому вирішення основних проблем цивілістики та її безпосереднє удосконалення є основою її процвітання.

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ELEMENTS OF RES JUDICATA

Identification of the res judicata in the civil procedural law of the Republic of Moldova can be realized by construing some dispositions of the Civil

Procedure Code which by the art. 254, para. 3 provides that: „After the decision becomes final, the parties and the rest of participants of the process, as well as their successors in rights cannot submit summons with the same claims and the same grounds either to submit an appeal in another action the legal actions and relations set in the final court decision" [1].

The triple identity of elements – parties, object, cause – is related to the negative function of the res judicata, and namely prohibiting to initiate again the judgment of a litigation which is related to the same three elements which outlined the procedural framework with the occasion of the first trial (the identity of those three elements does not interest in the same terms when it is spoken about the positive effect of the res judicata, when the identity of litigation matter should be considered [4, p.19].

The identity of persons (eadem condicio personarum) supposes the existence of the same parties in the same legal status, because what is judged between two persons can't in fact profit or bring damage to third persons, being given expression to the principle of relativity to the effects of the court decision.

Not the physical presence of the party constitutes the interest, but his legal status (not plaintiff, defendant or intervenient, between them should not exist overlapping with the first trial, but that of the holder of the right or obligation deducted to the judgment). As a consequence of this aspect, the res judicata will manifest toward the trial parties even if they didn't stay personally in the trial, but were represented by tutor, trustee or proxy. But towards the representatives the res judicata will not manifest, although they were physically present at the trial. In this orders of ideas it was quoted by a doctrine an elder practice in which it was shown that the fact of identification of lack of status in the possessory action has the power of judged thing in other action of fruits recovery [3, p.175].

At the same time, it should be mentioned that there are categories of persons who although do not stay at the trial, they will support the effects of the court decision due to their relations with the parties who make them to be considered assimilated to them.

It is about the category of so-called ayants cause (habentes causam) and through them are: the universal successors with the universal title, successors with particular title, unsecured creditors, mortgage and privileged creditors (assimilated from the view point of procedure of effects to the successors with particular title) [5, p. 88-92].

Successors with particular title are hold by these decisions against their author, but only to those prior to the good delivery protocol. In the doctrine [6, p.238] it is also said that to the plaintiff who was rejected in the first case it can successfully be opposed the power of judged thing by the plaintiff from the second case, case identical to the first, if this the second plaintiff, different from the plaintiff of the second case, has the same legal status with the first plaintiff. This solution is motivated by the fact that the plaintiff cannot claim, because he

being a party, he defended in both cases; and the solution is justified on the reason of avoiding some contradictory solutions and it is supported by the principle of the active role of judge and finding out the truth. The plaintiff of the second case if even is related to the first plaintiff by solidarity relations or due to the indivisible character of the process object, can't be held by the first decision, because he didn't participate to trial and couldn't defend himself, thus not being respected the principles of the right to defense and contradictory.

In our opinion, if this theory is limited to the solidarity and indivisibility relations, the extension of the res judicata can be extended in the mentioned above meaning. Overcoming this sphere however could mean not respecting the law, leading to a more large claim, even unforeseen for the justice seekers of the court of the res judicata.

Object identity (eadem res) refers both to the material good about which the claim is formulated and the subjective right which bears on it (for instance, if the first time the trial referred to a property right on real estate, the fact that further it is invoked a usufruct right makes a judged thing not existing and the new claim to be able to be examined on merits).

It cannot not say, as often wrongly happens, in the doctrine [6, p.275] that it should exist the object identity and then when the deducted claim to trial is different in comparison to the first trial "if following the same goal" because such an approach of the issue of the object identity ignores in fact the distinction between the positive and negative effect of the res judicata.

In reality, if a previous trial took place within which it was solved a law issue having a relation to the trial debate of the new trial; the fact which will be imposed to the further trial will be the positive effect of the judged thing.

There is no res judicata because it cannot be withheld the object identity if the first decision settled only the existence or inexistence of an accessory right. Thus, if in the first decision the claim was rejected consisting only in penalties and interests, in a second claim referring to the principal debt the res judicata cannot oppose. If in the first decision incidentally it was analyzed the validity of the title, establishing for instance that it is hit by nullity, than it was stated that there is res judicata [5, p.73].

The cause identity (eadem causa petendi) sees the basis (judicial or material action or fact) on which is based the right whose capitalization is followed through the action together with the in fact circumstances which generated the promotion of action. In the law of the Republic of Moldova it is regulated the term of the action ground and not that of cause, but the doctrine operates more frequently with the last concept, fact we will prevail in this paper work.

The cause of claim is not confused with the civil subjective right or of another nature whose capitalization is followed by the judicial demarche, it being represented by the title, the source of this right (there are so many actions as causes of obligations, as in the matters of real rights the number of cases is the same with the number of grounds of the right which can be invoked) [4,

p.20].

It was remarked that [5, p.77] there is a cause identity when the basis of the pretended right is the same and the basis was not related only to the legal ground invoked by the plaintiff, but eventually also to the legal grounds invoked ex officio by the court and which created the object of the contradictory debates. We do not agree totally this opinion, because the civil process is a process of private nature, in the meaning that it is applicable to the principle of availability which ensures in law and in fact the legal equality between the parties and represents the limit of the active role offered by the law to the judge. The court can bring to discussion for the parties any in law or in fact aspects, but finally it should pronounce on the heads of claims, with which it was vested by the litigation parties on the principal, incidental or accessory manner. In other words, the court cannot ex officio exchange the ground (cause) invoked by the plaintiff and it should pronounce on the plaintiff claim related to the cause invoked by him, eventually changed during the trial.

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ПРАВО СОБСТВЕННОСТИ В МЕЖДУНАРОДНОМ ПРАВЕ

Первые шаги в отношении международно-правовой защиты права собственности были предприняты в XIX веке. Следует напомнить, что в указанный период защита права собственности регулировалась, прежде всего, нормами национального законодательства. И суверенное право государства самостоятельно устанавливать стандарты в области права собственности и регулировать вопросы, связанные с защитой данного правомочия, не подвергались сомнению. В указанный период поднимался