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QUESTION OF CERTAIN PROVISIONS EFFICIENCY OF THE DRAFT OF THE ECONOMIC PROCEDURE CODE OF UKRAINE

The article is devoted to the analysis of the Draft of the Economic Procedure Code of Ukraine which is published for discussion on the Council (Rada) Internet-site on the questions of judicial reform which is consultative and advisory body to the President of Ukraine. The scientific article presents the author's points as for expediency of introducing some institutions of commercial procedure law.

Keywords: *Draft of the Economic Procedure Code of Ukraine; jurisdiction; evidence and proof; effectiveness of procedure law; appeals against court decisions; economic procedure legislation.*

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Вопросы эффективности отдельных положений проекта Хозяйственного процессуального кодекса Украины

Статья посвящена анализу проекта Хозяйственного процессуального кодекса Украины, опубликованного для обсуждения на интернет-сайте Совета по вопросам судебной реформы, являющейся консультативно-совещательным органом при Президенте Украины. Автор аргументирует целесообразность внедрения тех или иных процессуальных институтов и обращает внимание на изменение структуры хозяйственного процессуального законодательства в связи с возможным принятием и вступлением в действие в качестве нормативного акта данного законопроекта. Указывается на эффективность внедрения новых производств в хозяйственное судопроизводство, а также круг дел, которые предлагается передать на рассмотрение судам хозяйственной юрисдикции. Подданы критике предложения о расширении субъектного состава иных участников судебного процесса экспертом по вопросам права и внедрения «процессуального фильтра» при

обжаловании судебного решения исходя из цены иска. Обосновывается отсутствие какой-либо смысловой нагрузки некоторых положений проекта указанного нормативного акта.

Ключевые слова: проект Хозяйственного процессуального кодекса Украины; юрисдикция; доказательства и доказывание; эффективность процессуального законодательства; обжалование судебных решений, хозяйственное процессуальное законодательство.

Problem setting. The objective to improve the efficiency of court proceedings necessitates updating procedure law. Economic Procedure Code of Ukraine, in contrast to the Administrative Procedure Code and the Civil Procedure Code of Ukraine, with numerous changes and amendments in them, is in force since the early nineties of the last century. Considering this, we offer our own comments and arguments as for certain provisions of the Draft of the Economic Procedure Code of Ukraine (hereinafter - the D. of the EPC) in order to discuss the proposed by the Council judicial reform, which is an advisory body to the President of Ukraine [1].

Unlike the existing need for a fundamental renewal of economic procedural legislation before the 25th anniversary of the economic jurisdiction in Ukraine (the event was discussed at the national level [2]), introduction of equal changes to other procedure codes, can hardly be considered necessary. This thesis can be explained by the lack of practical need for significant reforming the methodological principles of civil procedure and administrative procedure law.

Recent research and publications analysis. The analysis of the literature sources allows stating the availability of scientific research as for improving the economic procedural legislation in general. For a long time O.V.Bryntsev, Yu. V. Bilousov, V. V. Komarov, M. I. Cherlenyak [3; 4, p. 66-71; 5, p. 171-174; 6, p. 306-336; 7, pp. 97-185] and other professional lawyers pointed out the need to improve the efficiency of economic procedural legislation.

However, still on the pages of professional literature there is the lack of legal discussion of the stated above the D. of the EPC introduced by the Council, the legal status of which is defined by the Decree № 826/2014 of the President of Ukraine of 27 October 2014 «The question of the Council on Judicial Reform» [8]. At the same time there is an open opportunity to speak in order of discussion regarding these Draft regulations by sending proposals electronically to the Council on Judicial Reform.

Paper objective. The purpose of this article is to make a research and analyze possible ways of improving the effectiveness of Draft regulations of the Economic Procedure Code of Ukraine.

Paper main body. The Draft of the Economic Procedure Code of Ukraine (hereinafter – the D. of the EPC) [1] aims to improve the regulation of relations in economic sphere. Several provisions of the stated Draft introduces significant changes to the structure of economic procedural legislation, but the content of some of them needs to be clarified. In this work such Draft regulations of the EPC, which, in the author's opinion, do not contain any semantic load, are going to be discussed.

The principal novelty of the Draft is economic forms amendment process while implementing, alongside with existing action proceedings and proceedings

before the bankruptcy, the prescript proceedings and the possibility of implementing «e-Justice». Protection of rights, freedoms and interests, according to the D. of the EPC, will be based on the rule of law (Art. 12 of the Draft), according to which a person, his/her rights are recognized as the highest values and determine the content and direction of the policies of the state. The D. of the EPC does not foresee restrictions on the use of possible remedies by providing, with this freedom of realization by court the sphere of court jurisdiction as a set of powers for the administration of justice. Performing the latter, the economic court will protect the rights and interests of individuals and legal entities, state and public interests in a way, defined by law or by contract. If the law or a contract does not determine an effective way to protect the violated right or interest of a person who has addressed to court, the court, at the request of a person, can identify in its decision such way that is not contrary to the law.

Regulation of the adversarial principle of economic justice in the Art. 14 of the Draft lacks, as it is seen, the provision about facilitation in collecting evidence to the court from persons involved in the proceedings, if there is a difficulty in its collecting and providing corresponding application to the court by those stated persons.

As it is seen, the provisions of paragraph 11 part 1 Article 21 of the Draft which attribute cases as for the recovery of wages of the debtor in bankruptcy cases, reinstatement officials and employees of the debtor do not correspond to the substantive jurisdiction of the economic courts. Alongside with this, the Draft of the regulation does not specify under which proceedings the mentioned cases could be decided. Paragraph 14 part 1 of Art. 21 concerning cases of appeal against decisions of arbitration and the issuance of writs for the enforcement of decisions of arbitration established under the Law of Ukraine «On arbitration courts» needs to be clarified, because, as in the Draft the stated rule is not defined, that the nature of the dispute, which was considered by the economic court should have economic and legal nature and arise between business entities. This author's proposal complies with the Art. 22 of the Draft relating to that combining several requirements, which are under the rules of the various legal proceedings, into one proceedings is not allowed. As a proof of the stated thesis, the content of the Art. 23 of the Draft can be given, which fixes the rule that the dispute which is referred to the jurisdiction of the economic court can be referred to the arbitration.

Much attention in the Draft, unlike currently existing EPC, is given to the rules of delimitation jurisdiction of cases to economic courts. However, some remarks should be given to the content of the Draft of p. 2 Article 24 of the EPC which provides the possibility of proceedings against the enforcement of the decisions of arbitration courts and the writs of execution by appellate economic courts. We consider, that providing economic courts of appeal the possibility to hear cases as the courts of first instance does not correspond to the functional competence of the courts of appeal, the activity of which is to supervise local economic courts as for legality and validity of their judicial decisions.

Much attention in the Draft, unlike currently existing EPC of Ukraine, is given to the institute of jurisdiction of economic cases. However, the content of p.12 Article 27 of the Draft of the EPC raises remarks because of the presence in the text of the Draft a number of evaluation rules which can be interpreted differently by the courts. It goes, for example, about closer link with the territory, to which the jurisdiction of another court extends, and also exceptions to this rule, to which the Draft regulation links complications to protect the rights and interests of the plaintiff, which he wants to be protected when he addressed to the court.

An objection is provoked about the provisions of part 3 of Art. 31 of the D. of the EPC on the possibility to decide a case by the court of appeal solely in cases decided in a summary procedure action, and appeals to the decisions of the court of first instance. This attitude is explained by levelling of the collegiate signs in an appellate court activity.

The question of abuse of the law, including abuse of the right to withdrawal (Article 36 p. 9 of the Draft) is conceived as such from which it is difficult to conclude that it is the fact of abuse of the law, but not the realization by the interested parties their procedural rights they are provided with. Following this, the rule p. 9 Article 36 of the Draft is seem not to bear any semantic load. That is why, it should not be the reason of the onset of a statutory responsibility.

«Article 39 of the D. of the EPC does not include representatives of the parties and third parties to the list of the parties to the case. Due to this fact there is a question about the possibility of representatives of the parties and third parties to use Article 40 of the Draft «Rights and obligations of parties to the case».

Paragraph 1, Part 2, Article 41 of the Draft estalishes the possibility to recognize by the court the fact of abuse of procedural rights (presentation of intentfully unjust claim, the existence of «obviously artificial nature» has, as it seems, purely declarative character, because it does not provide any criteria for these features. In this regard, one can hardly speak of the possibility of involvement of arbitrary person as a defendant (co-defendant) to change the jurisdiction of the case.

Article 60 of the the D. of the EPC foresees a range of other trial participants, but it seems unnecessary to consider an expert in law as one of the subjects. Specification of the civil procedural legal subjectivity of such person is given in Art. 68 of the Draft. Only a person who has a scientific degree and who is a recognized expert in the field of law, may be considered as an expert in law. The decision on admission of such person to the case and his/her conclusion about the case is decided by the court. Legal upholding of such entity and the use of his/her conclusion is levelled by the requirements of p. 1 Part 1 Art. 95 of the Draft, where as a prerequisite for appointment of an expertise by the court is the clarification of all circumstances meaningful to the case through the necessary special knowledge in the other than law sphere, without which establishing the circumstances is impossible. This rule is contrary to the provisions of the Draft regarding possible presence of the expert's in the field of law conclusion.

If to base on the regulation of procedural and legal status of the specified person the value of his/her conclusion in establishing the circumstances of the case is unclear. The conclusion of the specified person as an individual means of proof is not provided by p. 1 p. 2, Art. 71 of the D. of the EPC, which foresees such methods of proof, as both testimony, physical evidence and other materials, specified in the Draft of the Code.

Establishing grounds for exemption from proving, Art. 73 of the Draft creates some inconsistency. Thus, establishing the signs of prejudicial facts, Part 8 of the Draft specified provision fixes the provision that the legal assessment given by the court to certain facts when considering another case is not binding for economic court. It seems that such contradictions of sections 4-6 of Part 8 Art. 73 of the D. of the EPC level the value and the signs of facts that are not to be proved.

While characterising the evidence and proof, one can hardly agree with the content of Art. 77 of the Draft, which describes establishing such signs of evidence as their adequacy and accuracy. We believe that these concepts should be covered by the relevance of the evidence and admissibility of methods of proof.

What deserves critical evaluation is the rules for setting up the obligation to supply proofs (other than evidence) from the person who submits them, to other participants of the proceedings (p. 9 Article 78 the D. of the EPC). It seems that the implementation of this provision will reconcile the duty of one entity to submit evidence with the right of another with the opposite interest to get acquainted with the case files.

Characterising such means of proof as a witness testimony we should consider the following. The content of Articles 86 and 87 of the Draft does not allow to make a conclusion about the means of obtaining witness' testimony: from the statements of the witness certified by a notary or from testimony of the stated person during interrogation.

However, the D. of the EPC (Art. 88) refers so-called electronic evidence as written evidence without considering their characteristics and the need, in connection with this, to fix in the draft regulation it as a separate means of proof. Defined in Art. 88 of the Draft the possibility of submitting electronic evidence and setting out special rules for their submission contradicts the content of Art. 93 of the Draft. In the sense of the latest electronic evidence is related to the so-called other materials that can be used as evidence, while the Draft Art. 88 refers electronic evidence to written one.

When considering an economic case proper informing of the subjects to the economic proceedings about the time and place of the hearing is important. In this regard, Part 2 Art. 117 of the Draft needs clarification, since it does not foresee regulating procedures of adequate informing the subjects of the economic process to a clear measure about the date and time of the trial.

A novelty of the D. of the EPC is setting up the possibility of consideration of economic case in order of the writ proceedings. As one of the grounds for refusal

to issue a writ the Draft foresees filing an application for a court order by incapacitated person. In this regard, we note, that both economic and civil procedural law do not provide the mechanism for establishing a measure of capacity of a person who appeals to the court in deciding whether there are grounds for a refusal to initiate proceedings on the case. Similarly, the issue of establishing a measure of the capacity of a person applying to the court, is not resolved when submitting final appeal by the latter (p. 1 Part 1, Art. 254 of the Draft).

Article 158 of the D. of the EPC establishes the rule that all statements on the merits should be submitted in writing. This approach, we believe, needs to be clarified, since a number of statements on the merits of the case (explanations, arguments, objections) from the participants of the case should be given the opportunity to provide, along with written, also in oral and electronic form.

The possibility to settle a dispute with the participation of a judge and by entering into a settlement agreement is certainly a positive aspect of the Draft law. In this regard, noteworthy the provisions of sections 2, 3. Art. 190 of the Draft regarding guidelines to the mechanisms of the conditions of the settlement agreement execution, which the current legislation lacks. These provisions of the Draft specify, that the parties can reach the settlement agreement and inform the court about it by making a joint statement. If the settlement agreement or notice about it, addressed to the court, is stated in a written statement of the parties, this statement is attached to the case file. Before a judgment is made on the grounds of settlement agreement by the parties, the court shall explain to the parties the consequences of this decision, and will check whether a representative of the party, who expressed the intention to perform such action, has the authority to do this.

Considering the economic and legal dispute, in case of need for a delay of the proceedings the court shall question the witnesses who appeared. Only in exceptional cases by the court order witnesses are not questioned and summoned again. However, p. 7 Art. 199 of the Draft does not contain the requirements for the possibility to attach witness' statement instead of his/her questioning. At the same time the order of questioning of a witness is provided for by Art. 208, and the possibility to use the written statements by a witness is provided for by Art. 209 of the Draft of the EPC.

As the duty of the court to stop proceedings in the case of objective impossibility to review this case before another case is decided which is reviewed in civil, economic, criminal or administrative proceedings involving the same parties is foreseen. Revision of this reason of suspension of the proceedings, as it seems, limits the possibility of court to make objective decision as the result of the proceedings of the case. The subject matter in this case, for example, is about the reviewing the related case as for the subject of a dispute among other subjects or only with one of the party's participation. On the basis of the stated rule in the text of the Draft, this part of the sentence «involving the same parties» is offered to be deleted.

Article 232 of the draft provides for the legality and reasonableness as the demands to the court of first instance decision. In this regard, if defining the boundaries of review an economic case in the appellate court, the edition of Part 1 Art. 260 of the Draft, that the appellate court reviews, the case for existing in it and additionally submitted evidence and verifies the legality and validity of the trial court decision within the arguments of appeal, deserves support. It seems that this version of the Draft regulation, unlike the previous one, defines the essence of the appellate proceedings as the checking stage of economic justice, but not as it is defined in the amended preliminary version retrial. At the same time, contradictory regulatory provisions of the first and fourth parts of the Draft should be noted because they provide for naturally different models of appeal. At the same time, Part 3, Article 267 of the Draft includes mandatory grounds for repealing the judgment only because of procedural violations. In this regard the provisions Part 4, Art. 260 of the Draft seems devoid of semantic load as for possibility of the appellate court not to be limited with appeal arguments if it was established that the proceedings that substantive law regulations were applied wrongly as they are mandatory grounds for cancelation of court decision.

What causes comments is possible limitations to consider appeals and cassations against decisions of economic courts in cases with the price action is less than twenty minimum wages (appeal proceedings) and one hundred minimum wage when submitting a cassation. Similar comments arise on the provisions of the Draft on the possibility of appeal without notice to persons involved in the case. It seems that such a procedure for checking legality and validity of the decision of economic court of first instance does not meet international legal standards of justice, which is in the right to be heard by the court.

In implementing powers of the Court of Appeal the Draft of the EPC, by providing in the Art. 265 their circle, does not specify further cases as recognition void the decision of the trial court and invalidation of the own ruling. Similar powers of the court of cassation, specified in Part 1, Art. 292 of the Draft of the EPC of Ukraine, also cause remarks.

Conclusions of the research. Questions on requiring judicial review by the Supreme Court of Ukraine and because of the new circumstances, as well as enforcing regulatory acts of economic courts and other issues, which are not covered in this scientific article, need separate research. The author believes that the above procedures are beyond the «classical» form of economic consideration of the case, including checking the legality and validity of acts of justice, and they may be the subject to further scientific research.

Summarising the written above, we can state the expediency to work out the Draft of the EPC of Ukraine considering submitted proposals. Alongside with this, as it was indicated at the beginning of this work, a fundamental change of civil procedure and administrative procedure law, unlike commercial procedure, we consider inappropriate.

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Питання ефективності окремих положень проекту Господарського процесуального кодексу України

Стаття присвячена аналізу проекту Господарського процесуального кодексу України, котрий опублікований для обговорення на інтернет-сайті Ради з питань судової реформи, яка є консультативно-дорадчим органом при Президентові України. Упродовж тривалого часу на необхідність удосконалення ефективності господарського процесуального законодавства вказували О. В. Бринцев, Ю. В. Білоусов, В. В. Комаров, М. І. Черленяк та інші правники. Проте на сторінках фахової юридичної літератури бракує обговорення вказаного проекту ГПК, внесеного зазначеною Радою.

Автор аргументує доцільність запровадження тих чи інших процесуальних інститутів. Звертається увага на зміну структури господарського процесуального законодавства у зв'язку з можливим прийняттям та набранням чинності як нормативного акта цього законопроекту. Указується на ефективність уведення нових проваджень у господарське судочинство, на коло справ, що пропонується передати на розгляд судам господарської юрисдикції.

Підаються критиці пропозиції щодо розширення суб'єктного складу інших учасників судового процесу експертом з питань права та запровадження «процесуального фільтра» при оскарженні судового рішення, виходячи з ціни позову. Аналогічні зауваження викликають положення законопроекту щодо можливості розгляду апеляційної скарги без повідомлення осіб, які беруть участь у справі. Уявляється, що такий порядок перевірки законності та обґрунтованості рішення господарського суду першої інстанції не відповідає міжнародно-правовому стандарту правосуддя, яким встановлено право бути вислуханим судом.

Обґрунтовується також відсутність будь-якого сенсового навантаження окремих положень проекту вказаного нормативного акта. Поряд із цим зазначається, що, на відміну від існуючої необхідності кардинального оновлення господарського процесуального законодавства напередодні 25-річчя господарської юрисдикції в Україні, внесення рівнозначних змін до інших процесуальних кодексів навряд чи можна визнати актуальним. Це пояснюється відсутністю практичної необхідності у істотному реформуванні методологічних засад цивільного та адміністративного судочинства.

Ключові слова: проект Господарського процесуального кодексу України; юрисдикція; докази та доказування; ефективність процесуального законодавства; оскарження судових рішень, господарське процесуальне законодавство.

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