Commercial justice in the system of justice in Ukraine: general theoretical study

Господарська юстиція в системі правосуддя в Україні: загальні теоретичні дослідження

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Key words:

general theoretical law, legal philosophy, commercial law, commercial justice, justice, justice in commercial affairs, justice in Ukraine.

Ключові слова:

загальнотеоретична юриспруденція, теорія держави та права, господарське право, господарська юстиція, правосуддя, судочинство у господарських справах, судочинство в Україні.

In view of the chosen theme of dissertation research, it appears to be reasonable to make a general theoretical analysis of peculiarities of activity of commercial courts and their implementation of justice, justification of patterns of separation of the judicial system in Ukraine in view of modern organization and specialized courts' structures' activity. Remain relevant to the research the correlation of notions of "justice" and "justice" (as lat. iustitia), "justice" and "judicial process", "justice" and "court proceedings" in view of the regulation of mechanism of realization and protection of rights and legal interests of subjects of commercial relations.

Within last three years among a number of enacted laws a special place occupy those relating to the reforming of the judicial system, establishing justice in Ukraine, creating new opportunities for judges self-government, renewing trust to national courts[1, c. 35]. The need to reform the national judicial system today is caused by unbelief of the society and foreign investors in the Ukrainian judicial bodies' ability to fully carry out their functions. Ukraine is no stranger to "small" and "large" reforms of justice (1992, 2001 and 2010), each of which were structural adjustment, eliminating of some and formation of other courts, the redistribution of powers, adding of formal rights and freedoms of judicial process' participants, expansion or narrowing of the functions of the Supreme Court of Ukraine and so on.

At present stage of the judicial reform the significant importance have following laws: "On Amendments to some Laws of Ukraine on certain issues of justice and judicial system" (23/02/2014), "On Restoration of Trust in the Judicial Power in Ukraine" (08/04/2014, the 1st law of lustration), "On Lustration" (16/09/2014, the 2nd law of lustration), "On ensuring the right to fair trial" (12/02/2015), Strategy of reforming the judiciary, justice system and related legal institutes in 2015–2020 enacted by decree of President of Ukraine (20/05/2015).

The aim of the Strategy of reforming the judiciary, justice system and related legal institutes in 2015-2020 was "<...>setting priorities of reforming the judiciary, justice system and legal institutes related to practical implementation of the rule of law and the functioning of judicial power that meets public expectations concerning independent and fair trial and to European values and standards of human rights" [2]. Key roles in the development of these laws have played international and European legal standards, recommendations of Council of Europe and Venice Commission.

At the current stage the constitutional reform in part of justice has finally gained real features. Established under the President of Ukraine Constitutional Commission during the next year prepared a draft Law of Ukraine "On Amendments to the Constitution of Ukraine (on justice)," endorsed by the Commission in November 2015 and immediately made in order of the legislative initiative of the President of Ukraine to the Verkhovna Rada of Ukraine. After the positive conclusion of the Constitutional Court on the conformity of the bill with Articles 157 and 158 of the Constitution of Ukraine, Verkhovna Rada on February, 2, 2016 approved the draft amendments to the Law № 3524, and June 2, 2016 by a constitutional majority – 335 votes approved the relevant law. Even though there are substantial observations to the procedure of its approval as well to its content, it should be noted that this Law is a significant step forward in reforming the judiciary. It contains a number of provisions,

which, in case of their consistent implementation to the Law of Ukraine "On the Judicial System and Status of Judges" and procedural codes and strict fulfillment, are able to contribute to the achievement of expected results – the establishment of an independent, fair and virtuous justice in accordance with European standards [3].

September 30, 2016 the Law of Ukraine "On Amendments to the Constitution of Ukraine (on justice)" № 1401-VIII and the Law of Ukraine "On the Judicial System and Status of Judges" № 1402-VIII entered into force.

According to Art. 124 of the Constitution of Ukraine, justice in Ukraine is carried out exclusively by the courts [4]. Delegation of court functions, and also their usurpation by other agencies or officials are not allowed. Courts have jurisdiction over any legal dispute and any criminal charges. In cases stipulated by law courts hear other cases. The law may determine a mandatory prejudicial dispute settlement procedure. The people directly involved in the administration of justice through jury. In certain article of the Constitution stated that Ukraine may recognize the jurisdiction of the International Criminal Court under the conditions defined in Rome Statute of the International Criminal Court.

The new Law of Ukraine "On the Judicial System and Status of Judges" № 1402-VIII [5]contains provisions whereby justice in Ukraine is administered exclusively by the courts and in accordance with the judicial procedures established by law (Art. 5). The delegation of court functions, and also their usurpation by other agencies or officials are not allowed. Persons who have appropriated the function of the court, are responsible according the law. The norm on the participation of people in the administration of justice is similar to the constitutional.

Today the judicial system in Ukraine consists of local courts; appellate courts; The Supreme Court of Ukraine. According to Article 125 of the Constitution the judicial system in Ukraine based on the principles of territoriality and specialization and by law. Article 17 of the Law of Ukraine "On the Judicial System and Status of Judges" expands the list of principles that underpin the judicial system in Ukraine, adding the principle of instance.

Under reformed law, a court is formed, reorganized and liquidated by law, a project of which is contributed to the Verkhovna Rada by President of Ukraine after consultations with the Higher Council of Justice. According to the law high specialized courts may operate. However, the creation of extraordinary and special courts is not permitted.

Courts in Ukraine under the current legislation specializing in civil, criminal, commercial, administrative cases and cases of administrative offenses (Article 18. Law of Ukraine "On the Judicial System and Status of Judges"). In the cases determined by law, as well as by decision of the meeting judges of the relevant court, the specialization of judges of specific categories of cases may be introduced.

Today, local commercial courts are district commercial courts (para. 2, Art. 21 Law of Ukraine "On the Judicial System and Status of Judges"). Local commercial courts consider the cases arising from commercial relations as well as other cases ascribed to their jurisdiction. However, it should be noted that they have not created, nor made any warning to the transitional period on the functioning of the courts with the old names. And the lack of mention of the commercial jurisdiction in Constitution, as opposed to administrative, admits the idea of special status of such courts.

Appellate courts act as courts of appeal instance, and in cases prescribed by the procedural law – as courts of first instance for civil, criminal, commercial, administrative cases and cases of administrative offenses. (Para. 1, Art. 26 Law "On judicial System and status of judges"). In the appellate court chambers on particular categories of cases can be formed.

Appellate courts in economic cases, as also appellate courts of administrative cases are accordingly appellate commercial courts and appellate administrative courts, which are formed in the respective appellate circuits (para. 3, Art. 26 "On the Judicial System and Status of Judges"). In the Supreme Court there are: Great Chamber of the Supreme Court; Administrative Court of Cassation; Economic Court of Cassation; Criminal Court of Cassation; Civil Court of Cassation. Thus, in every Court of Cassation chambers on particular categories of cases in view of specialization of judges must be formed. In particular, the Commercial Court of Cassation must provide special chambers to consider cases of (about): bankruptcy; protection of intellectual property and related antitrust and competition law; corporate disputes, corporate law and securities. Other chambers of courts of cassation created by the decision of the meeting of judges of the court of cassation.

In the judicial system there are high specialized courts as courts of first instance on different categories of cases. High specialized courts are: the High Court on intellectual property; High anti-corruption court.

It can be noted that today during the reforming of the judicial system held the procedure of simplifying of judicial system by reducing the number of specialized courts.

It should be mentioned that the draft law "On Amendments to the Law of Ukraine" On the Judicial System and Status of Judges "and other legislative acts on improving the basics of organization and functioning of judicial power in line with European standards" developed by the Ministry of Justice by the public participation at all supposed Local commercial courts reorganize district courts in civil and criminal cases, which will consider, in addition to civil (commercial) cases also certain categories of criminal cases. One of the developers of the draft law R. Kuibida in justification of this provision of the bill noted that commercial courts hear the same private-law disputes and courts of civil jurisdiction, dedicated primarily by the subjective grounds. In his view the procedure of commercial and civil proceedings should not have fundamental differences. However, in Opinion on the draft Law of Ukraine "On Amendments to the Law of Ukraine "On the Judicial System and Status of Judges" and other legislative acts on improving the basics of organization and functioning of the judiciary in line with European standards" [6] was rightly stated that even if we consider the statement that set out in the explanatory memorandum to the draft, which coincide with the opinion of R. Kuybida, is true, it cannot be overlooked that over the period of Ukraine in a separate level of commercial courts appeared certain specialization of judges and a better knowledge of the specifics of certain categories of cases.

Obviously, in the case of liquidation of commercial courts all positive factors arising from such specialization will be lost.

According to the O. Podtserkovnyi, the prevalence of system of specialized judiciary in cases with economic features in world is driven by the needs of economic development and states' focus to stimulate rapid and professional resolution of certain categories of disputes. In fact, we are talking about economic justice, which may be based on a special competence on commercial disputes generally or related to one or more categories of economic affairs [7]. The experience of specialized commercial (economic) courts of Europe shows that their existence does not contradict the "European standards".

The constitutional definition of specialization as the foundation of the system of courts of general jurisdiction necessitates separation of the signs, which may include the following: 1) inherency to all spheres of public life, including the field of administration of justice; 2) a form of social relations that is displayed on one side in narrowing of range of human activities, limiting the functional load, and the second – mobilizes and concentrates in a specified direction; 3) professional, efficient and low-cost solution of the problems (in our case – the administration of justice). In this approach, the aim of specialization in judicial activities is to cover all the features, novelty and dynamics of social change [8].

Specialization does not appear by itself, because it is the result of necessary division of labor. Thus, the subject (sectoral) specialization is formed on the basis of sectoral legislative differentiation, in result of which a certain ranges of public relations are separated.

Based on this based on the concept of unity of court jurisdiction S.V. Glushchenko argues that specialization in the field of justice can be realized with the following criteria: branch, under which certain courts' structures are formed; of subject, under which the courts are formed, and the basis of which competence is justice on clearly defined relationships' subject; specialization of judges within one court, allowing or identify individual judges to resolve specified categories of cases or form legal units (chambers, senate, warehouses) competent to consider only certain categories of cases; mixed, under which used two or more criteria or used all [9].

In scientific researches prove that the essence of the specialization of courts is the possibility of creating of judicial bodies (types of courts, or system, or subsystem) competent to resolve certain types of disputes under the rules of appropriate judicial procedures. The correct position is that the concept of unity of court jurisdiction, coupled with major judicial activities can form structures using specialized courts and branch criteria to distinguish certain categories of cases that are resolved by these courts.

Thus, we can say that only institutional (i.e. at the level of judicial bodies) specialization of judges on economic disputes can achieve the unity of practice and creates a basis for monitoring the efficiency of proceedings. Specialization of judges within courts of general naturally cannot accomplish this task, as evidenced by the current problems with the organization of proceedings in general courts as well as grounded explanation in the legal literature [10, c. 5]. The confirmation of validity of these statements can be seen the leaving the commercial courts in reformed judicial system of Ukraine.

Justice (Justitia) is a complex and multifaceted phenomenon in respect of which the current development of legal science there are gaps in the scientific understanding of content relationships, functions of justice, it features in different legal families, modern trends, etc., which leads actuality scientific and practical significance of research of this issue.

The analysis of sources, that provide information about the historical development of justice, lets say that some aspects of understanding of this phenomenon radically changed (we are talking about theoretical concepts, organizational principles, functionality of Justice, etc.). But is still unchanged the premise under which justice primarily perceived as institution equity, with the only reservation that in today's world, fairness is also expressed through various forms of law (principles, regulations, enforcement decisions, etc.) [11].

In general, analyzing the meaningful justice properties proposed by domestic and foreign researchers, it should be noted that they greatly differ even in the same area. For example, the same kind of justice can be seen as part of the legal system as a function of the state, as a system of judicial bodies or their activities, as a kind of functional and organizational structure, whose task is to ensure the rights of citizens.

This situation can be explained by pluralism of methodological approaches to the study of justice. Although authors use different methodological approaches to explain the term "justice", but almost all of them take on the basis of such key concepts as the court, judicial authorities, judicial activity, fairness and justice.

A definite step in the development of theoretical ideas about justice can be regarded the work of scientists of the Institute of State and Law of National Academy of Legal Sciences named after V.M. Koretsky, who expanded and offered a common vision of justice as the system of judicial and related activities' institutions, combining principles for which are their vocation to serve the supremacy of justice, law and fairness, ensuring the rights of citizens [12] . Thus, the authors went beyond the conventional understanding of justice or the identification of it with judicial institutions, judicial activities, including to this term prosecution authorities, investigation authorities, notaries, advocacy and others.

In dissertation research of authors such as Yu. Pedko [13], E. Cherniak [14] justice is seen mostly as a set of judicial bodies and their activities. This position found acceptance in New legal dictionary, edited by A. Azriliyan [15] . The same definition is offered in Big legal encyclopaedical dictionary edited by A. Baryhin [16], Legal Encyclopedia, edited by M. Tikhomirov [17].

Attempts by various authors to understand the essence of justice, its meaning and value are reflected in the relevant scientific research, where these issues were formulated as a subject of knowledge. Thus, studying administrative justice, such authors as I. Koliushko and R. Kuibida offer to consider it as the judicial protection of rights, freedoms and legal interests of participants of relationships [18]. In turn, I. Borodin understands this term as activity of courts to protect the rights of citizens [19]. Analysis of dissertation researches of Yu. Georgievsky allows to get an idea of justice as the procedure for consideration[20] and resolution of disputes, and V. Herheliynyk – as a legal institute, whose work is to ensure the rule of law, law [21].

Commercial justice has an important function to protect the violated or disputed rights and interests of protected business entities through the use of appropriate procedural forms in the system of commercial justice. It is naturally released in the independent judicial branch that deals with the consideration of disputes arising in business relations.

Even traditional for the science of commercial procedural law became the understanding of the commercial process as a kind of legal activity which is regulated by the respective field of law (as established by norms of procedural law form of activity of commercial courts, which aims to protect violated or disputed rights and legitimate interests of business entities).

At the same time, as rightly draws attention to this O. Podtserkovnyy, such approaches significantly narrow the understanding of the commercial process and commercial procedural relationship, because ignored the possibility of realization of procedural behavior outside the direct participation of commercial (arbitration) court: a) narrowed approach to the commercial process contradicts the conclusions of the authors that it is positioned – in all relevant books to the system of commercial (arbitration) procedural law included relationships sold out the direct participation of commercial courts: pre-court settlement of commercial disputes, the procedure for compulsory execution of decisions of commercial (arbitration) courts, consideration of commercial disputes by commercial arbitrations (arbitration courts) etc. b) the activities of members of business relation-

ships that have a procedural form, ordered by the procedural law and is an indispensable element of dispute resolution, for which the central element of serving justice are commercial courts, cannot be separated from the commercial process [22, c. 5].

Current legislation of Ukraine does not contain the notion activity of commercial court. In norms and provisions of certain normative acts regulating various aspects of courts' activity and in the special legal literature terms "judicial activity", "judges activity", "justice", "law enforcement activity court" are used, and are used as equivalent.

Any activity always includes the purpose, means and results [23].

Of course, the purpose of activity of commercial courts depends on the purpose of the proceedings. However, in the current Commercial Procedural Code (hereinafter – the CPC), it is not marked.

Exercising court proceedings in commercial relations, according to existing doctrinal developments, commercial courts as specialized organs of justice of Ukraine are called not only to hear cases in disputes in order to protect the rights and legal interests of participants of commercial relations, but also strengthen the rule of law in commercial relations.

In Article 1 CPC also declared that persons are eligible to apply to court, seeking to protect their violated or disputed rights and interests protected by law and to prevent their violation. That is, In case of recognition as common goal of commercial judicial proceedings the protection of rights and legal interests it automatically becomes the main goal of the activity of commercial court.

Means is possibility, measure, actual conditions for realization of anything. Of course, the law defines certain procedural means of activities of commercial courts. These are: hearing and resolution of disputes in the first instance; review of judgments in appeal, cassation. First of all such instance of remedies caused by the structure of the judicial system, which is set by national legislation of Ukraine.

The result of activity of commercial courts expressed in judicial decisions, adopted by it, in which ends the proceedings in the respective court. Judicial decisions which have come into force are binding on all state authorities, local governments, their officials and employees, individuals and legal entities and their associations across Ukraine. The binding consideration (prejudicialness) of judgments for other courts determined by procedural law.

Decisions without solving the dispute in fact, also the result of activity of commercial courts, which manifests itself through the deposition of the case, suspension, termination of the proceedings, leaving the claim, etc.).

Sometimes the result is negative, when judicial acts canceled or replaced by higher authorities in case of judicial miscarriage. However, as marks N.V. Ivaniuta, in finding a unified concept of activity taking into account the allocation in the Constitution such provision, we may suggest that this is a tool (function), not the activity.

In the dictionary of D.N. Ushakov under judgment both "activities of judicial authorities, based on the law" and "the judicial activity of the state (justice)" are generally understood [24]. S.I. Ozhegov defined justice more restrictive – as "activities of judicial authorities" [25]. In legal theory and in the law justice is often interpreted broadly and means all judicial system, including procedural and executive activities. However taking into account cited provisions of the Constitution and the law is necessary to understood "justice" in narrow sense, limited to the activities of judicial bodies.

Despite the existing normative certainty in understanding the category "justice" there is a little illogicality. Thus, I.L. Samsin defined justice as fairness in action [26], identifying it with the principle that alone raises some debates. Some researchers equate fairness with the right, others emphasize their relationship; in some right recognized phenomenon that is derived from justice, others, on the contrary, justice is seen as a product of law [27]. The Constitutional Court of Ukraine (hereinafter – CCU) in its judgment of 2 November 2004 r. № 15-rp / 2004 defined fairness as one of the fundamental principles of law that is crucial in defining it as a regulator of social relations, one of the human dimension of law. It seems wrong to consider "justice" as a principle of judicial proceedings.

In the decision of the Constitutional Court of 30 January 2003 № 3-rp / 2003 states that justice is inherently acknowledged only if it meets the requirements of justice and provides effective renovation of rights. Assuming

that justice and commercial courts' activities are synonymous terms, it is not clear in this case, the definition of actions, such as court of first instance, in case of revealing by a higher instance court a miscarriage of justice in a judicial act. It turns out that in the first instance court justice was not realized, but there is a judicial act that can only take place as a result (maybe not qualitative) of the court's activity.

This antinomy leads to the conclusion that the most, justice and the activity are different in nature categories. D. Prytyka notes that the administration of justice is the basic function of any court, so all the other functions that it performs are derived from it [28]. We can conclude that justice is the main feature that distinguishes activity of courts (including commercial) and the other is the need to review and solving court cases within its competence to justice. Thus, justice includes court proceedings as an activity of the court, but court proceedings are not justice. That is, this is not about any activity of court, but one that meets particular purpose [29]. Justice carried out through the court proceedings as procedural form of activity.

V.I. Tertyshnikov believes that justice is different from the activity of other government agencies that legal disputes are resolved and carried out the protection of the rights and legal interests: 1) only by the court; 2) the name of and on behalf of the state; 3) through the consideration and resolution of cases in court; 4) protection of the rights is carried out in procedural form definitely; 5) with pronouncement of compulsory judicial decisions; 6) with a priority of court jurisdiction in cases where a possible dispute resolution by other body [30].

In view of the above named, returning to the concept of the commercial process, we can conclude that commercial process is a unity of procedural rights and obligations of the commercial court, the parties and other participants. So sometimes it is interpreted as a system of consistently implemented commercial court proceedings and other participants in judicial proceedings in connection with the consideration and resolving of the case. The ultimate goal of the process is restoration of the right.

V. Reznikov determines commercial process as regulated by the procedural rules of procedural commercial order (system of interrelated legal forms) of activities by authorized entities, as reflected in the administration of justice in economic matters, protection of rights, freedoms and interests of participants of commercial relations. We can add that the administration of justice is through judicial proceedings [31, c. 40].

As rightly noted by S. Bigun, functional understanding of justice identifies it with the proceedings in the trial, while the second focuses on meaningful understanding of internal characteristics of judicial work, which is expressed in law enforcement, based on strict compliance with the law. If the first focuses on the functions and activity of subject composition, the second focuses on the sense of a trial and its aims, including fairness. Not coincidentally English-language equivalent of the term justice translated as fairness, Justitia. So logical is the understanding of justice as fairness in the sense of purpose of judicial proceedings as judicial activities.

Thus, commercial justice is a part of the judicial system of Ukraine extent that it is implemented in the courts within the commercial process aimed at the administration of justice in commercial affairs through judicial proceedings.

Summary

A general theoretical analysis of the characteristics of commercial courts and their implementation of justice in Ukraine is carried out. The patterns of their separation in the judicial system in Ukraine in view of modern organization and activity of the specialized courts are analyzed. Proved, that commercial justice is a part of system of justice of Ukraine to the extent, that it is realized in the courts within the commercial process, aimed at execution of justice in commercial cases by implementing justice.

Анотація

Здійснено загальнотеоретичний аналіз особливостей діяльності господарських судів і здійснення ними правосуддя в Україні. Проаналізовано закономірності їх виокремлення в судовій системі України з урахуванням сучасної організації та діяльності структур спеціалізованих судів. Обґрунтовано, що гос-

подарська юстиція є частиною системи правосуддя України тою мірою, якою вона реалізується у судовому порядку в межах господарського процесу, спрямованого на здійснення правосуддя в господарських справах шляхом здійснення судочинства.

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