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## ЗАПРОВАДЖЕННЯ ВРОПЕЙСЬКИХ ПРИНЦИПІВ СУДОВОГО РОЗГЛЯДУ СПОРІВ ЯК ВАЖЛИВИЙ НАПРЯМОК ВДОСКОНАЛЕННЯ ГОСПОДАРСЬКОГО ПРОЦЕСУ

*Анотація.* Принципами називають внутрішні переконання людини, ті практичні, моральні та теоретичні засади, якими вона керується в житті, в різних сферах діяльності. У науці принципи – це основні засади, загальні вимоги до побудови теорії, сформульовані як те первинне, що лежить в основі певної сукупності фактів. При характеристиці різноманітних систем принципи відображають ті суттєві характеристики, що відповідають за правильне функціонування системи, без яких вона не виконувала б свого призначення.

Щодо судочинства, то тут розрізняють принципи, які визначають організацію, устрій суду (організаційні принципи) та принципи, що регулюють його діяльність (процесуальні принципи). До останніх (а саме вони є предметом нашого дослідження) відносяться: доступність судового захисту прав і законних інтересів; рівноправність сторін господарського процесу; свобода надання ними своїх доказів і доведення перед судом їх переконливості; законність; усність; безпосередність; змагальність; диспозитивність; розгляд справи одноособово або колегіально) та специфічні або спеціальні (перегляд судових рішень тощо).

Аналіз нового процесуального законодавства дозволяє зробити висновок про наявність одних і тих самих принципів у різних процесуальних кодексах. Це пояснюється тим, що їх готували різні групи фахівців локально, без попередніх узгоджень концепцій змін до процесуальних кодексів України. Тобто, йдеться про неконтрольоване дублювання норм у процесуальному законодавстві. Було б доцільно вилучити принципи, що повторюються у різних процесуальних кодексах і включити їх (як універсальні принципи) до більш загального нормативно-правового акту. До цього нормативно-правового слід також включити ще один принцип, який міг би стати як один з найважливіших. Це принцип суспільної поваги до судів і суддів з боку суспільства. Зазначений принцип впливає з презумпції безсторонності суддів, і полягає у доброзичливому, лояльному ставленні до органів судочинства та їх працівників, довірі до їх професійних знань та усвідомленні рішучості судді додержуватися морально-етичних норм.

**Ключові слова:** господарський процес, процесуальні принципи, законність; усність, безпосередність, змагальність, диспозитивність, принцип суспільної поваги.

*Annotation.* Principles are called internal beliefs people, those practical, moral and theoretical ambush, which are seen in life, in various spheres of activity. In scientific principles, there are the main ambush, wildly requirements until the theory, formulated as the first thing that underlies the singing totality of facts. When characterizing different systems, it is important to consider those essential characteristics, which

*are responsible for the correct functioning of the system, without which they would not win their recognition. In the case of judiciary, then there are different principles that regulate yoga activity (procedural principles). To the rest (and the stink itself is the subject of our research) we can see: the availability of the judicial protection of rights and legitimate interests; equal rights of the parties to the state process; freedom of giving them their own evidence and bringing before the court their conflicts; legality; sleep; lack of mediation; competitiveness; dispositivity; look at the right one-specially or collegially) and specific or special (review of the court's decisions etc. ). The analysis of the new procedural legislation allows us to draw conclusions about the presence of some and the same principles in different procedural codes. This is explained by the fact that they were prepared by different groups of fahivtsiv locally, without any prior restrictions on the concept of change to the procedural codes of Ukraine. Tobto, there is a lack of control over the duplication of norms in procedural legislation. It would be necessary to increase the principles that are repeated in different procedural codes and include them (as a universal principle) to a larger normative legal act. Before any normative-legal sequence, it also includes one principle, which is, for the most part, one of the most important. This is the principle of public respect to judges and judges by society. This principle stems from the presumption of impartiality of judges and consists in a friendly, loyal attitude towards judicial authorities and their employees, trust in their professional knowledge and awareness of the judge's determination to comply with moral and ethical standards.*

**Keywords:** *economic process, procedural principles, legality; orality, immediacy, competition, dispositivity, principle of public respect.*

**Relevance of the topic.** In light of the obligations undertaken by Ukraine in connection with its future accession to the EU to improve the judicial system and bring it into line with the norms and standards of the European Union, we believe that improving the judicial process is of great importance. Let us consider these issues related to improvement of the economic process, protection of rights and legitimate interests in the field of business. The application of judicial precedent in resolving a case can be seen as the main direction of this improvement, and judicial precedent can be seen as a principle of judicial proceedings, a procedural principle.

The issues of improvement of the economic process were considered in the works of V.E. Belyanevych, S.F. Demchenko, L.M. Nikolenko, D.M. Prytyka, Y.D. Prytyka, E.I. Kharytonova, V.S. Shcherbyna and others. At the same time, the issues of application of judicial precedent in case resolution are not sufficiently tied to the tasks of judicial reform. This is evidenced by the fact that at the 24th EU-Ukraine Summit, in which our country participated as a candidate for membership in the European Union, the European Commission's recommendations referred to "adoption and implementation of legislation on the procedure for selecting judges", their evaluation, etc. At the same time, it would be advisable to focus not on finding honest judges, but on creating conditions in which it would be impossible to act dishonestly or break the law. Such conditions include the introduction of the European principles of judicial review of disputes and the mandatory application of judicial precedent in resolving cases. This makes the topic of this article "introduction of the European principles of dispute resolution as an important area of improvement of the economic process" quite relevant.

**Summary of the main material.** In everyday life, principles are internal beliefs of a person, those practical, moral and theoretical foundations that guide him/her in life and in various fields of activity. In science, principles are the basic foundations, general requirements for building a theory, formulated as the primary thing that underlies a certain set of facts. When characterizing various systems, principles reflect those essential characteristics that are responsible for the proper functioning of the system, without which it would not fulfill its purpose.

With regard to judicial proceedings, there is a distinction between principles that determine the organization and structure of the court (organizational principles) and principles that regulate its activities (procedural principles). The latter (and they are the subject of our study) include: accessibility of judicial protection of rights and legitimate interests; equality of the parties to the commercial process; freedom to present their evidence and prove their convincing nature before the court; legality; oral; direct; adversarial; dispositive; consideration of the case by a single or collective) and specific or special (review of court decisions, etc.).

Some of these principles are contained in regulations. For example, the availability of judicial protection of rights is guaranteed by Article 8 of the Constitution of Ukraine (the right to apply to the court for the protection of constitutional rights and freedoms of a person and citizen directly on the basis of the Constitution of Ukraine is guaranteed).

This principle is also interpreted as the right to justice, the right to judicial protection. The right of everyone to judicial protection has become one of the fundamental human rights guaranteed by the constitution. The content of this right, as noted in the literature, is reflected in the basic principles of judicial proceedings and consists of such elements as access to justice; the right to appeal and cassation of a court decision; independence and impartiality of the court; equality of all participants in the trial before the law and the court; the right to defense; publicity of the trial; consideration of the case within the shortest time provided by law [1, P. 19].

Ensuring access to justice means, according to the European Court of Human Rights, that the consideration of a dispute should not be hindered by excessive legal or practical obstacles: complicated or formalized procedures for accepting and considering claims; high court fees; inaccessibility of legal aid; lack of simplified procedures for consideration of simple cases, as well as cases on rights requiring prompt (urgent) protection. At the same time, the European Court allows, in exceptional cases, limited access to court for individuals, for example, for mentally ill persons during treatment; for persons prone to litigation. At the same time, any restriction of the right of access to court must pursue a specific purpose and be reasonably proportionate to that purpose. Analyzing the principle of accessibility of justice, we should agree with M. Pototskyi, who notes that procedures related to the protection of intellectual property rights should not be unreasonably complicated, the cost of their implementation should not be high or accompanied by significant material costs, contain unreasonable time limits or unreasonable delays. We believe that this statement of the TRIPS Agreement is part of the content of the principle of access to justice.

The main core of the principles is contained in the reformed and unified procedural legislation, in particular, in the Commercial Procedural Code of Ukraine. Let us consider some of them on the basis of the Law of Ukraine "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts", which set out the procedural codes in a new version.

Thus, according to part 3 of Article 2 of the Commercial Procedural Code "Objectives and Basic Principles of Commercial Proceedings", the basic principles of commercial proceedings are: 1) the rule of law; 2) equality of all participants in the trial before the law and the court; 3) publicity and openness of the trial and its full recording by technical means; 4) adversarial nature of the parties; 5) dispositivity; 6) proportionality; 7) binding nature of the court decision; 8) ensuring the right to appellate review of the case 9) ensuring the right to cassation appeal against a court decision in cases specified by law; 10) reasonableness of the timeframe for consideration of the case by the court; 11) inadmissibility of abuse of procedural rights; 12) reimbursement of court costs to the party in whose favor the court decision was made.

In our opinion, the principles also include the objectives of commercial court proceedings, such as "fair, impartial and timely resolution of disputes related to the conduct of business activities by the court". These objectives should be the determining factors in the conduct of court proceedings. It would be advisable to distinguish as a separate principle "oral", which is mentioned in part 1 of Article 8 of the EPC "Publicity of the trial" (Consideration of cases in economic courts is conducted orally and openly, except as provided by this Code).

The principles of economic proceedings should also include "the absence of a pre-established force of evidence for the court" and the assessment of evidence by the court according to its internal conviction (Article 86 of the Commercial Code). There are good reasons to distinguish the principle of immediacy as an independent principle, which determines the procedure for the study and perception of case materials by the court.

The Code of Commercial Procedure mentions this principle in a number of articles. These are Art. 80(1) "Submission of Evidence" (1. The parties to the case shall submit evidence in the case directly to the court), 86 "Evaluation of Evidence" (1. The court shall evaluate the evidence according to its internal conviction based on a comprehensive, complete, objective and direct examination of the evidence available in the case) and 210 "Examination of Evidence" (1. During the hearing of the case, the court must directly examine the evidence in the case: familiarize itself with written and electronic evidence, expert opinions, explanations of the parties to the case set forth in the statements on the merits of the case, witness testimony, and examine material evidence).

An analysis of the new (essentially) procedural legislation leads to the conclusion that the same principles are present in different procedural codes. It is clear that they were prepared by different groups of specialists and, most likely, locally, without prior approval of the concepts of amendments to the procedural codes of Ukraine. In other words, we are essentially talking about uncontrolled duplication of rules in the procedural legislation. For example, the principle of orality is also enshrined in the Civil Procedure Code.

Pursuant to Article 7(1) of the Civil Procedure Code of Ukraine, civil cases in all courts shall be heard orally and in public.

The oral form of communication between the court and the parties to the proceedings provides the most complete examination of all the circumstances of the case. The significance of the principle of directness, which determines the procedure for the study and perception of civil case materials by the court, is that during the trial there should be no intermediate links between the persons submitting evidence and the court. Thus, the explanations of the parties to the proceedings should be addressed only to the court.

The principle of good faith fulfillment of procedural obligations, prevention of abuse of rights and prevention of unlawful obstacles in the conduct of legal proceedings is enshrined in Art. 143 of the Code of Civil Procedure, etc. In our opinion, it would be advisable to remove the principles that are repeated in different procedural codes and include them (as universal principles) in a more general legal act, for example, the Law of Ukraine "On the Judicial System and Status of Judges". Incidentally, this document also contains provisions that are interpreted as principles of judicial proceedings. Such a step seems justified from the standpoint of lawmaking technique and improving the convenience of using the codes. Certainly, this document (the Law "On the Judicial System and Status of Judges") should include the most successful wording. But the quality of wording of some principles varies from code to code. For example, in our opinion, the principle of immediacy, which determines the procedure for studying and perceiving case materials by the court, was most successfully formulated in Article 213 of the Code of Civil Procedure of Ukraine: "1. The court shall directly examine the evidence in the case during the hearing of the case. 2. The case shall be considered by the same court. In case of replacement of one of the judges during the trial, the case shall be considered initially, except in cases established by this Code", etc.

In the same general document, it would be necessary to indicate the priority of using the principles in the course of the judicial proceedings, similar to the way it is written in Article 2 of the Code of Civil Procedure with regard to the tasks of the judicial proceedings: "2. The court and the participants of the court proceedings are obliged to be guided by the task of economic proceedings, which prevails over any other considerations in the court proceedings".

The importance of adherence to procedural principles has been repeatedly emphasized in the decisions of international courts. Thus, one of the most important problems in ensuring the independence of judges in the administration of justice is the interference of public authorities in court proceedings. This problem, in particular, was pointed out by the European Court of Human Rights in its judgment of July 25, 2002 in the case of *Sovtransavto-Holding v. Ukraine*. In this case, the European Court drew attention to "numerous cases of interference in judicial proceedings by Ukrainian state authorities at the highest level. Whatever the reasons given by the Government to justify such interference, the Court considers that, in view of its content and manner of implementation, it is contrary to the principle of the administration of justice by an impartial and independent tribunal", enshrined in Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. These cases of interference by the state executive authorities also reflect a lack of respect for the very functioning of the judiciary."

The central idea of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms is the implementation of the principle for both civil and criminal proceedings: "a trial ... by an independent and impartial tribunal established by law". The same article also stipulates the principle of access to justice, the right of access to court. This right includes three elements. First of all, it is the existence of a "court" established by law, and one that meets the criteria of independence and impartiality. It should be noted that the nature of the court is not regulated in the Convention. It can be either a state or non-state court, as long as it is established by law. Secondly, the court must have sufficiently broad powers to decide on all aspects of the dispute or charge. In addition, and thirdly, a person must have the right to appeal to the court.

As for the existence of a court that must meet the criteria of independence and impartiality. This was emphasized, in particular, in the judgment of the European Court of Human Rights, which considered the right to an independent court, in the case of *Belios* (A 132, paragraph 64). It was noted that "...the court (...) must meet a number of (...) requirements - independence, especially from the executive branch, impartiality...".

Let us consider these requirements in more detail. Regarding independence. The notion of court independence is associated with independence from the executive branch, and impartiality - with independence from the parties to the dispute. The European Court's recommendations relate to both the first and second requirements: "... in determining whether a body can be regarded as independent, the court must consider the manner in which the members of the court are appointed, the length of their tenure, the existence of safeguards against external pressure on them and whether the body constitutes a manifestation of independence" (*Findlay v. the United Kingdom*, judgment of February 25, 1997, para. 73, Reports of Judgments and Decisions 1997-I...).

With regard to the independence of the court in relation to the parties (its impartiality), we believe that this refers to the non-corruption of judges. The European Court's judgment in one of the cases states that the court must be subjectively free from bias or interest in the outcome of the case, and secondly, it must also be impartial from an objective point of view, i.e., it must offer sufficient guarantees to exclude any reasonable doubt about its impartiality (*Findlay*, op. cit). To satisfy these requirements, a court must meet both the subjective and objective test: "The existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, i.e., on the basis of the personal conviction of the individual judge in the case, and also according to an objective test, i.e., whether the judge has guarantees sufficient to exclude any legitimate doubt as to his impartiality" (*Piersak*, A 53, para. 30).

In order to provide guarantees to exclude any reasonable doubt as to the impartiality of the court, we believe that it is necessary to move to the unification of judicial practice and introduce (gradually) case law.

Judicial precedent means a decision of a certain higher judicial body in a particular case, which is necessarily taken as a model in subsequent similar cases. Judicial practice usually precedes judicial precedent. It is the result of uniform application of the law and serves as the main argument in the system of proof and dispute resolution, and therefore can be a sufficient guarantee for the court to exclude any reasonable doubt about its impartiality.

In Ukraine, there is still a debate about the feasibility of introducing case law into legal practice, although in practice it has been put into effect by the Law of Ukraine No. 3477-IV of 23.02.2006 "On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights". Article 17 of the said Law directly states that: "...Courts shall apply the Convention (995\_004) and the Court's case-law as a source of law when considering cases...".

The Resolution of the Plenum of the Supreme Court of Ukraine of February 27, 2009, No. 1 "On judicial practice in cases of protection of dignity and honor of an individual, as well as business reputation of an individual and legal entity" [] states that, taking into account the provisions of Article 9 of the Constitution and taking into account the ratification of the Convention and the adoption of Law No. 3477-IV, the courts must apply the Convention and the judgments of the European Court as a source of law.

There are many examples from the cases considered by the European Court of Human Rights when the Court refers to judicial precedents and sets the task of studying the practice of application of norms. Thus, para. 41 of the Judgment of the European Court of Human Rights (*Mushta v. Ukraine* (Application no. 8863/06) Strasbourg, November 18, 2010) states: The Court considers that it is "necessary to examine" whether the application of the rules of national procedural law in the present case can be considered "foreseeable from the applicant's point of view". And the application may be foreseeable if there are decisions on similar situations that must be applied to similar incidents. If there are dichotomous decisions in similar cases, the parties to the dispute should have the right to appeal only if such decisions are available. If there is a decision on the subject matter of the dispute under consideration, then, as practice shows, court decisions become quite predictable, which allows avoiding unpromising cases and appeals against decisions. This is the first thing. Secondly, the field for corruption is leveled, as the court decision becomes predictable.

The principles of the judicial process also include the presumption of impartiality of judges. The European Court made a statement in this regard in one of its cases: "... a judge is impartial until the contrary is proved" (Case of *le Compte, van Leeuwen and de Meijer*, A 43 paragraph 58).

It is from this statement that we can derive another principle that we would consider one of the most important. This is the principle of public respect for courts and judges by the public. This principle essentially stems from the presumption of impartiality of judges and consists in a friendly, loyal attitude to the judiciary and its employees, trust in their professional knowledge and awareness of the judge's determination to adhere to moral and ethical standards.

There are many more principles of judicial proceedings that ensure their quality, and their application makes it impossible to act in bad faith. These include the prohibition of denial of justice and ensuring a fair trial. A trial is recognized as fair if the parties involved in the dispute are treated equally. The absence of procedural and factual privileges for the parties, the actual competitiveness of the parties in the process, the independence and legality of the appointment of experts and examinations, the legality of the methods of obtaining evidence, the motivation of decisions, the procedure and actual possibility of appealing court decisions by the parties, as well as the impossibility of interference with the procedure for appealing court decisions by persons not involved in the dispute and whose rights are not affected by court acts, and the actual

possibility of participation of the parties at all stages of the case are also checked. Procedural requirements for court proceedings include the principles of fairness, publicity of hearings and the duration of court procedures, and the requirement of a reasonable time limit for consideration of the case. In particular, Art. 6 of the Convention establishes the right to a public trial and public pronouncement of the court decision, which ensure that the proceedings can be conducted in the presence of all persons defending their rights, as well as interested parties. The European Court of Justice has noted that the publicity of court proceedings is aimed at protecting the parties from secret justice that is not subject to public scrutiny, and that it is also a means of maintaining confidence in the courts at all levels (Axen of 8 December 1983, Series A # 72, p.12, §25). The principle of publicity is guaranteed by the court's obligation to notify the parties of the time and place of the trial, which is provided for in all procedural codes of Ukraine and EU countries.

The duration of court proceedings is limited by the requirement to observe a reasonable time limit for the consideration of the case. The requirement to hear a case within a "reasonable time" raises two main questions: what time limit(s) should be taken into account and whether it can be considered reasonable. It should be noted that this period includes not only the entire period of consideration of the claim of a person defending his/her rights both in administrative and judicial authorities of a Council of Europe member state, but also the period of actual execution of the decision.

The reasonableness of the time limit in court proceedings is determined depending on the specific circumstances of the case, the complexity of the dispute, the behavior of the parties in the process, and the good faith of the judicial structures that consider the dispute and issue enforcement documents. At the same time, the European Court, as a rule, excludes from this period the periods when the delay in the proceedings was initiated by a private person (the motions filed by a private person, the grounds for changing his/her lawyer, the reasons for the unmotivated absence of the parties from the trial, etc. are examined).

Among the important principles introduced by the Convention into the national system of law is such an interesting principle as the requirement of limited positive state obligations. According to this principle, a state party to the Convention must refrain from interfering in certain areas of public life.

Unreasonable actions of state bodies to refuse to accept complaints, delay their consideration, as well as courts (refusal to accept statements of claim, biased consideration of cases, unjustified consolidation of cases, change of judges, suspension and suspension of proceedings, etc.) are regarded as facts indicating a violation of the principles of access to court, reasonableness of the term of consideration, etc.

The analysis of the Ukrainian legislation on guarantees of judicial independence and non-interference in the process of consideration of cases leads to the conclusion that the current legislation of Ukraine clearly provides for the necessary scope of guarantees ensuring the independence of judges in the conduct of judicial proceedings, however, the practical implementation of these guarantees depends on clear and strict compliance with the relevant legislation by officials of all branches of government.

**Conclusion.** Failure of a court to fulfill its legal obligation to apply the European Convention and the case law of the European Court as a source of law in the course of consideration of cases will mean that Ukraine

does not comply with its international obligations, and will impede our country's entry into the European legal space and the establishment of the legality and fairness of judicial proceedings.

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