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RIGHT TO AN EFFECTIVE REMEDY AND NON-DEFINED REMEDIES UNDER THE CIVIL LAW OF UKRAINE

The article is concerned with the right to an effective remedy under the caselaw of European Court of Human Rights and national courts of Ukraine. An effective remedy is defined by author as such remedy which shall comply with the nature of violated right, nature of violation wich had been committed and consequences caused through violation of a person's right. The attention of the author is paid to lack of legislation regarding the special shape of remedy under the article 13 of Convention thus on the back of what existence of certain discretion of a State which comes down to possibility of selection of remedy for performance of a state's obligation. The author's monitoring covered the content of theoretical consept of the term "efficiency". The author has been conducted the notion of the term "efficiency" under the caselaw of European Court of Human Rights and meaning of the term "efficiency" by the national courts of Ukraine. The attention of the author is paid to comparison of provisions of legal acts of Ukraine which determine substance remedies of civil rights under the Article 13 of Convention and caselaw of European court. The article also considered the legal precendents of non-defined remedies of protection of subjective rights and statutory interests by national courts of Ukraine.

Key words: Convention for the protection of human rights and fundamental freedoms, effective remedy, non-defined remedies.

The problem statement. Under the circumstances of European integration it is extremely important to implement provisions developed by European court of human rights (hereinafter – European court).

One of the primary tasks in this direction is an implementation of effective mechanism of the protection of rights and statutory interests by ensuring effective remedy for a person.

The right to an effective remedy established by Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms [1] (hereinafter – Convention) is vitally important to ensure compliance and proper protection of human rights.

The research of the defined scientific problem has been authoring by V.G. Butkevych, T.I. Dudash, V.I. Manukyan, P.M. Rabinovich, S.V. Shevchuk, A.G. Yarema and other researchers.

The purpose of the article is integrated scientific analyses with right to an effective remedy under the caselaw of the European court and national courts of Ukraine.

In order to reach out named above object the author puts towards the following **goals:** 1) to define notion of an effective remedy, its signs and features of its legal nature; 2) to research content of the notion "efficiency" under the caselaw of the European court and understanding of "efficiency" by the national courts of Ukraine; 3) to research correlation between provisions of legal acts of Ukraine which define the substantive legal remedies of civil rights under the Article 13 of Convention and caselaw of the European court; 4) to analyze the legal precendents of non-defined remedies of protection of subjective rights and statutory interests by national courts of Ukraine.

In the scientific literature the components of the right to an effective remedy are defined as a right to appeal to national authority in case of violation by them of rights and freedoms provided by Convention as well as examination of such appeal on its merits [2, p.285].

As it is reasonably stated by A.G. Yarema, the problem of ensuring an effective protection of civil rights, freedoms and interests of a person is one of the main among the problems of real implementation into social relations of principle of rule of the law stipulated by Article 8 (1) of the Constitution of Ukraine [3, p.195].

The term "effective" must be understood as such remedy, which leads to ultimate results, consequences and has the greatest impact. Therefore, an effective remedy shall provide for restitution of violated right, and in case of impossibility of such restitution guarantee person possibility of receiving respective compensation.

In the context of the above-mentioned, attention is attracted to position of the Constitu-

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tional court of Ukraine shown in the conclusion no.3-rp/2003 dd January 30, 2003 [4]. In named conclusion the Constitutional court of the Uktaine hold that justice in and of itself is determined as such only on conditions that it complies with requirements of justice and provides for effective restoration in rights[1].

Quite important issue within the context of issues under investigation is comparison of provisions of legal acts of Ukraine, which determine substance remedies of civil rights under the Article 13 of Convention and caselaw of European court.

One of the basic warranties of an efficiency of remedial device of civil rights is inexaustability of remedies. Thus, Civil Code of Ukraine [6] (hereinafter CC of Ukraine) provides for possibility of determination of remedy for protection of subjective civil rights and statutory interests in the agreement by its parties.

In compliance with paragraph 2, Article 16 (2) of the CC of Ukraine court may protect civil right or interest in other way established by agreement or law.

It should be noted that Economic Code of Ukraine (hereinafter – EC of Ukraine) does not provide parties for possibility to independently determine remedy for protection of rights in the agreement. Thus, Article 20 (2) of EC of Ukraine provides parties for possibility of protection of rights and statutory interests in other ways stipulated by law [7].

We believe that we must agree with O.O.Kot who deems that development of law in the researched area as well as development caselaw must be performed in the direction of expansion of remedies for protection of violated rights. The main purpose of legislator in this direction must be a creation of respective mechanisms of protection rights of private law relations which, from one side, shall provide the widest range of instruments for protection of rights, and from the other side – shall provide for efficient restrictions which would disable or materially minimize risks of an abuse of rights by unscrupulous parties [8, p. 203-210].

Provision of CC of Ukraine that addressed the possibility of establishment of a remedy by the agreement has an extraordinarly importance for law enforcement practice. Named opens a possibility of implementation new and efficient mechanisms for protection of violated civil rights and statutory interests.

A remedy for protection of civil rights can be defined as substantive measure of compulsory nature leading to restoration of violated rights.

It should be pointed out that CC of Ukraine has deprived the freshness and urgency a doctrinal discussion of actuality regarding inexaustability of remedies and qualitatively distanced himself from provisions of CC of USSR of 1963 [9], which in Article 6 contained exhaustive list of remedies by providing possibility of determining remedies for protection of civil rights by agreement.

Considering inexaustability of remedies for protection of civil rights, one may come to conclusion that court is obliged to examinate any claim regardless of how plaintiff has formed petitioning part of statements of the case.

Establishing by Article 16 of CC of Ukraine an inexaustability of remedies is directed, first of all, at widest renewal of violated rights. This is the reason for provision parties for possibility of remedy determination different from list specified by Article 16 of the Civil Code of Ukraine by an agreement at their own discretion.

General theory of universally recognizes provision for possibility of each person to defence by any remedy, which is not prohibited by law. Thus, in compliance to Article 55 (5) of the Constitution of Ukraine, each person has right to protect their rights and freedoms using all remedies not prohibited by laws against violations and illegal infringements. Therefore, it may be concluded that Fundamental law restricts possibility of remedy selection subject to condition of direct prohobotion of remedy by law.

In the Judgement [10] of High Economic Court of Ukraine (hereinafter HECU) dd December 24, 2014 on a case no. 910/287/14 it is specified that legal restrictions of substantive law and remedies for protection of civil right or interest are subject to use in compliance with provisions of Articles 55, 124 of the Constitution of Ukraine and Article 13 of the Convention based on which each person has a right to an effective remedy not prohibited by the law.

In our opinion, possibility of using non-defined remedies entirely compatible with provisions of Article 13 of the Convention.

In very general terms the respective principle may come down to following provisions: 1) remedy chosen by plaintiff must have real recovery of violated rights as a consequence; 2) selection of remedy must be performed considering nature and consequences of respective offence.

Frequently, courts occupy conservative position and refuse in upholding a claim consid-

[1] In the Judgement [5] dd November 11, 2014 on the case no.21-405a14 the Supreme Court of Ukraine has noted that a remedy shouldnot be recognized as an effective one because of action on annulment of act considered on the case cannot be upheld as its annument does not give rise to consequences for plaintiff, *the elected remedy does not provide for real protection of violated rights.*

ering absence of remedy selected by plaintiff under the laws (see for example, Judgement [11] of HECU dd April 28, 2015 on the case no. 921/759/14-г/4).

Classic example is refusal of court to uphold a claim regarding recognition of deed null and void. Legal position regarding recognition of deed as null and void in the system of protection of civil rights was set forth in particular in Judgement of the ruling of Supreme Court of Ukraine dd November 06, 2009 no. 9 "On judicial practice of consideration of civil cases on recognition of deeds as null and void" [12] (hereinafter Ruling of Plenum of SCU) and ruling of Plenum of HECU dd May 29, 2013 no.11 „On some issues of recognizing deeds (commercial agreements) null and void" [13] (hereinafter – Ruling of Plenum of HECU).

In compliance with paragraph 8 of Clause 2.6 of Ruling of Plenum of HECU the claim on recognition of deed as null and void does not comply with remedies for protection of civil rights and statutory interests as it provided by laws and, therefore, claim shall be rejected; in named cases claims may be stated as provided by Chapter 83 of CC of Ukraine.

Recognition of deed as valid in cases which not provided by 2, Article 218 (2), Article 219 (2), Article 220 (2), Article 221 (2), Article 224 (2) and Article 226 (2) of the CC of Ukraine is also may be considered as a non-defined remedy.

In compliance with paragraph 4 of item 13 of Ruling of Plenum of SCU on grounds of incompliance with legal requirements of notarization of a deed, Agreement may be accepted as valid and binding only on basis as established by Articles 218, 220 of CC of Ukraine, other claims regarding acceptance of agreements as valid and binding, including those stated in counterclaim in the cases on annulment of agreements do not comply with possible remedies. Such claims shall not be upheld.

In particular, acceptance of a deed with real estate which is subject to mandatory state registration as valid and binding should be regarded as unnamed remedy for protection of rights considering that the rule of Article 220 (2) of CC of Ukraine does not apply to deeds which are the subject to both notarization and state registration, since the comitting of such deeds pursuant to Articles 210, 640 of CC of Ukraine is related to state registration and that is why they are considered to as unconcluded and do not give rise to rights and obligations for the parties (see, for example paragraph 2 of item 13 of Ruling of Plenum of SCU).

Alogside with that, applying rules of Chapter 83 of CC of Ukraine, a court in the statement of reasons of judgement should make a conclusion regarding absence of execution of specific deed and, therefore, confirm absence of contractual relation between parties.

In such case, fact of establishing an absence of concluded agreement in statement of reasons of judgement by a court may be considered on prejudicial circumstances and promote restoration of violated right.

It should be specified that any remedy (including non-defined ones) should be provided a means for its enforcement. Therefore, Due to the selection of an appropriate remedy the provisions of the Law of Ukraine "On enforcement proceeding" [14], Law of Ukraine "On guarantees of state regarding execution of judicial decisions" [15], other acts of special legislation must be taken into consideration.

The issue of acceptaility of remedy which is not provided by Article 16 of the CC of Ukraine and Article 20 of EC of Ukraine was resolved by economic courts in consideration on case no. 909/854/14.

In particular, plaintiff has chosen as remedy an obligation of defendant to perform separate provisions of decision of general meeting of shareholders (decision on payment of dividends to state– M.Kh.).

Courts of first and appeal instances rejected named claim.

In particular, decisions on rejection of claims by the courts of first [16] and appeal [17] instances were based on assumption that plaintiff has chosen remedy which was not provided by Articles 14, 16 of CC of Ukraine.

In particular, the appeal court in its decree stated that remedies as provided by Article 16 (2) of CC of Ukraine have universal nature and may apply to all *or majority* (italics are ours – M.Kh.) of respective subjective rights.

The court of appeal referred to item 10 of Ruling of Plenum of Supreme Court of Ukraine dd October 24, 2008 no. 13 „On practice of consideration by courts of corporate disputes" [18] which had a conclusion as to impossibility of application of remedies of rights and legal interests of persons not provided by applicable laws, in particular, Article 16 of CC of Ukraine and Article 20 of EC of Ukraine and which do not issue as if under the laws in resolving by courts of corporate disputes.

Furthermore, courts of first and appeal instances came to conclusion that claim of plaintiff does not contain any obligation of defendant to perform any acts which could be enforced.

Alongside with that HECU in the Judgement [19] dd June 10, 2015 stated that it deemed as erroneus referrals of economic courts to previous instances in decisions concerning choice by plaintiff of such remedy which was not provided by requirements of Articles 14, 16 of CC of Ukraine.

Thus, on the basis of Article 20 (2) EC of Ukraine and paragraph 5 of Article 16 (2) of CC of Ukraine named normative and legal acts provide for such remedy by awarding enforcement of obligation in kind.

Therefore, plaintiff's requirement on execution of respective items of decision of general meeting which had to be executed by defendant in favour of plaintiff comply with requirements set forth by Article 20 (2) of EC of Ukraine and paragraph 5 Article 16 (2) of CC of Ukraine.

The case was remitted for new examination[2] in part of obligation to execute decision of general meeting of shareholders by the specified Judgement of HECU.

In the context of the above-mentioned the consideration by economic courts on the case no. 922/2814/14 also attracts attention.

In particular, plaintiff in this case chose two remedies – termination of action on prevention of installation of back-up unit for registration of natural gas and obligation of defendant to recognize unit for registration of natural gas as back-up unit by signing bilateral certificate of commissioning.

As of the judgement of court of first instance [22] the claims were fully upheld. As of the judgement of appeal court [23] the appeal was partially granted (rejected in upholding claims regarding obligaation of defendant to recognize unit of registration of natural gas as back-up unit by way of signature of bilateral act of commissioning).

The appeal court specified that named remedy cannot be provied by law for several reasons: first of all, formation of will of an entity which consists in "recognition of unit of registration as back-up is capacity of the entity itself which cannot be impacted by methods of enforcement; secondly, decision in this part cannot have capacity for enforcement as procedure established by laws of Ukraine for compulsory execution of judicial decisions does not foresee neither for possibility for compulsory formation of will of an entity nor forcing officials of an entity to certify with its signature any document.

Alongside with that, HECU in the judgement on this issue [24] specified that applicable laws as well as conditions of agreements executed between parties provided for obligation of defendant not to counteract plantiff in exercise of measures on improvement of gas registration performed during gas supply for exactness of its measurement including installation of back-up registration units. Therefore, absence of signed bilateral commissioning certificate leads to violation and impossibility of exercising plaintiff's rights, specifically: use of results of measurement of volumes of natural gas.

In view of the above-mentioned HECU has reached a conclusion that claim on defendant being binding to accept natural gas registration unit as back-up one by way of signature of bilateral commissioning certificate is such which corresponds to remedies estalished by law for protection of rights and interests. At that, judgement of appeal court regarding impossibility of compulsory of performance of judicial decision of non-property (moral) character which provides for obligation to sign certain act is erroneous as particulars of execution of decisions based on which debtor is obliged to perform certain actions personally or withhold from doing it are specified by Article 75 of the Law of Ukraine "On executive proceeding".

Alongside with that, in resolving other case the HECU reached contrary conclusion regarding possibility of compulsory performance of obligation to sign certificate. Thus, in the judgement [25] dd July 17, 2014 on a case no. 910/1148/13 court has stated that decision regarding obligation to sign decision certificate can not be performed in compulsory order as there is no mechanism for performance of such decision.

In compliance with Article 275 (1) of CC of Ukraine protection of personal moral right is emade by ways as established by chapter 3 of this Code. Simultanously, Article 275 (2) of CC of Ukraine established that protection of personal moral right can be exercised also by other remedy in compliance with content of this right, way of its violation and consequences caused by this violation.

In view of A.G. Yarema, the specified provision must be extended to all civil and other legal relations: a violated right or interest must be protected by remedies as it provided by law or agreement but comply with content of violated right, way of its violation and consequences caused by this violation [3, p.198-199].

Therefore, provisions of Article 16 of the CC of Ukraine, Article 20 of EC of Ukraine should be used considering Article 13 of the Convention. Court may protect right of person in a way as provided by law also in a way not provided by law but which is efficient, therefore, such which is adequate to content of violated right, character of violation and consequences entailed by such violation.

[2] Due to the re-examination a court of first instance made a conlusion on compliance of a remedy chosen by plaintiff under the applicable laws of Ukraine, having specified in such a case that proper remedy for protection in this case is not obligation to execute decision of general meeting of shareholders but charging of dividends from defendant [20]. The appeal court due to the named re-examination on case retained in force a judgement of the court of first instance [21].

Summarizing the above-mentioned it should be noted that rule of paragraph 2 of Article 16 (2) of the CC of Ukraine allows to determine remedies in case of their violation tothe participants of contractual legal relationship at their discretion. Possibility of determination of a remedy different from directly provided by the law by an agreement is aimed an exercise of right to effective remedy as it guaranteed by Convention for the protection of human rights and fundamental freedoms.

Further research in this direction, in our opinion, must be aimed at detailed research of unnamed remedies and scientific analysis of practice of European Court of Human Rights.

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У статті досліджується право на ефективний засіб юридичного захисту в практиці Європейського суду з прав людини та національних судів України. Ефективний засіб захисту визначається автором як такий, що повинен відповідати природі порушеного права, характеру допущеного порушення та наслідкам, які спричинило порушення права особи. Звертається увага на відсутність у ст.13 Конвенції особливої форми правового захисту і, як наслідок, наявність у держави певної дискреції, яка зводиться до можливості вибору способу виконання свого зобов'язання. Досліджено зміст поняття «ефективність» у практиці Європейського суду та його розуміння національними судами України. Звертається увага на співвідношення положень законодавчих актів України, що визначають матеріально-правові способи захисту цивільних прав, зі ст.13 Конвенції та практикою Європейського суду. Досліджено практику застосування національними судами України непоіменованих способів захисту суб'єктивних прав та охоронюваних законом інтересів.

Ключові слова: Конвенція про захист прав людини і основоположних свобод, Європейський суд з прав людини, ефективний засіб юридичного захисту, непоіменований спосіб захисту права.

В статье исследуется право на эффективное средство юридической защиты в практике Европейского суда по правам человека и национальных судов Украины. Эффективное средство правовой защиты определяется автором соответствующим природе нарушенного права, характеру нарушения и последствиям, повлекшим нарушение права лица. Внимание автора обращено на отсутствие в ст.13 Конвенции особой формы правовой защиты и, как следствие, наличие у государства определенной дискреции, состоящей в возможности выбора способа исполнения своего обязательства. Исследовано содержание понятия "эффективность" в практике Европейского суда и его понимание национальными судами Украины. Определено соотношение положений законодательных актов Украины, предусматривающих материально-правовые способы защиты гражданских прав, со ст.13 Конвенции и практикой Европейского суда. Исследована практика применения национальными судами Украины непоименованных способов защиты субъективных прав и охраняемых законом интересов.

Ключевые слова: Конвенция о защите прав человека и основных свобод, Европейский суд по правам человека, эффективное средство юридической защиты, непоименованный способ защиты права.