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Вимоги до обґрунтованості рішень на прикладі рішення Київського апеляційного господарського суду

ГАНС-ЙОАХІМ ШРАММ
доктор юридичних наук, професор Університету Вісмар
Вісмар, Німеччина

Анотація: Правосуддя у цивільних справах здійснюється шляхом їх розгляду та вирішенням у судовому порядку. Тому це питання є центральним у дослідженні в рамках науки про процесуальне право. Головна мета роботи полягає в аналізі вимог до обґрунтування судження на прикладі судового акта Київського апеляційного господарського суду. Для досягнення цієї мети були використані методи, які дали можливість вивчати поставлене питання з різних точок зору. Використовуючи методи порівняння та аналізу, автором було вивчено судові рішення та отримано відповідні висновки. Автор знайшов невтішні висновки суду. Визначено складність виконання статті 216 Цивільного кодексу України щодо статті 1212 Цивільного кодексу України. Юридичне значення судового рішення полягає в тому, що з його прийняттям вирішується суть справи, відносини між сторонами набувають ознак впевненості та стабільності, що сприяє нормальному виконанню зобов'язань сторонами та здійсненню їх суб'єктивних цивільних прав.

Ключові слова: майно, реєстр, Верховний Суд, фактичні питання, публічне право.

Требования к обоснованию решений на примере решения Киевского апелляционного хозяйственного суда

ХАНС-ЙОАХИМ ШРАММ
доктор юридических наук, профессор Университета Висмар
Висмар, Германия

Аннотация: Правосудие по гражданским делам осуществляется путем рассмотрения и разрешения в судебном порядке. Поэтому данный вопрос является центральным в исследовании в рамках науки о процессуальном праве. Основная цель работы заключается в анализе требований обоснования суждений на примере судебного акта Киевского апелляционного хозяйственного суда. Для достижения этой цели были использованы методы, позволяющие изучить поставленный вопрос. Используя методы сравнения и анализа, были рассмотрены судебные решения и сделаны соответствующие выводы. Автор установил неосновательные выводы суда. Выявлена сложность в применении статьи 216 Гражданского кодекса Украины в отношении статьи 1212 Гражданского кодекса Украины. Правовая значимость судебного решения заключается в том, что с его принятием существенный спор разрешен, отношения между сторонами приобретают признаки уверен-

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ности и стабильности, что способствует нормальному выполнению обязательств сторонами и осуществлению их субъективных гражданских прав.

Ключевые слова: собственность, реестр, Верховный Суд, фактические вопросы, публичное право.

Requirements to Judgment Rationale on the Example of Judgment of Kyiv Economic Court of Appeal

HANS-JOACHIM SCHRAMM
Doctor of Juridical Science, Professor at Wiesmar University
Wiesmar, Germany

Abstract: Justice in civil cases is carried out through their consideration and resolution by judicial procedure. Therefore, this question is central in the study within the framework of procedural law science. The main purpose of the work is to analyze the requirements for judgment rationale using the example of judicial act of the Kyiv Economic Court of Appeal. To achieve this goal, methods have been used that have made it possible to study the raised question from various angles. Using the methods of comparison and analysis, the court judgments were studied and the corresponding conclusions were drawn. The author found the flimsy conclusions of the court. The complexity in the enforcement of Article 216 of the Civil Code of Ukraine regarding Article 1212 of the Civil Code of Ukraine is fixed. The legal significance of court judgment lies in the fact that with its adoption a substantive dispute is resolved, relations between the parties acquire signs of certainty and stability, which contributes to the normal fulfillment of the obligations by the parties and the exercise of their subjective civil rights.

Key words: property, registry, the Supreme Court, factual issues, public law.

Introduction

Strengthening the third branch of power in Ukraine refers to the central elements of the process of reforms in the state. This is reflected not least in the justice development strategy for 2015–2020, which was developed jointly with the European Union [1]. The goals formulated in the strategy, among other things, are increasing the transparency of justice and improving the professionalism of the legal staff. A clearly expressed sign by means of which it is possible to evaluate objectively the mentioned points is the quality of judicial acts adopted by the courts. This raises the question of how the quality of the relevant court judgments can be measured [2].

The author believes that the first starting point should be drawn from the jurisprudence of the European Court of Human Rights concerning Article 6 of the European Convention for the Protection of Human Rights.

The European Court of Human Rights, on the basis of this provision of the international judicial act, stated that the parties to the trial had the right to disclose in the court judgment sufficient legal grounds and arguments for its adoption [3]. At the same time, the European Court of Human Rights recognizes that the degree of this duty depends both on the specific case and on the traditions of the state as to the way of judgment rationale. At the same time,

the European Court of Human Rights unequivocally clarifies that the courts are obliged to consider all relevant arguments of the parties.

The German Constitutional Court in its conclusions on the quality of court judgments goes even further [4]. Referring to the principle of equality enshrined in Article 3 of the Basic Law for the Federal Republic of Germany, the court stated its position that: *"an objectively arbitrary court judgment violates the basic human right to equal treatment*.

An objectively arbitrary court judgment is in the event that it can not be justified at any conceivable aspect and, in this connection, it is hard to escape a conclusion that the court judgment is based on considerations that are irrelevant.

The erroneous judicial enforcement does not at the same time make the court judgment arbitrary. The arbitrariness takes place only if the appropriate norm is not explicitly taken into account, the content of the norm is clearly misunderstood or the norm is applied in an inexplicable manner".

From this judgment it becomes clear that two aspects are of importance to the Constitutional Court of Germany.

Firstly, the judge's task is to find the norm on which the court judgment is based.

Secondly, the application of the legal norm by the court in explicable, i.e. in understandable manner.

The Constitutional Court of Germany also calls arguments, why it is not enough to rely on the presumption of a fair judicial act. It is decisive that an uninterested outsider can understand how the court came to its judgment to exclude a judgment on the basis of arguments that are not relevant to the case, since it will be nothing more than a polite rewriting of actual circumstances that in some other place may fall under description of corruption [5].

At present, the civil procedural and economic procedural codes should be reformed in Ukraine. Therefore, the main provisions of these judicial acts will be examined below for the extent to which the above thoughts have been realized in their provisions.

Materials and Methods

Various methods of the empirical level were used to investigate this problem, among which methods of observation, analysis, comparison were used. The method of comparison is one of the most common methods of investigation. As a result of the comparison, the general is established that is inherent in two or several objects, and the identification of the general, repeating in the phenomena, as is known, is a step towards the knowledge of the law [6].

With the help of these methods of research work, specific phenomena are studied on the basis of which hypotheses are formed.

Article 224 of the Civil Procedure Code of Ukraine (hereinafter – CPC of Ukraine) and Article 233 of the Economic Procedure Code of Ukraine (hereinafter – the EPC of Ukraine) fix provisions that determine the content of court judgments. The requirements of Article 237 of the EPC of Ukraine and Article 242 of the CPC of Ukraine, which regulate the legality and validity of court judgment are of particular interest. At the same time, both norms largely correspond to each other, the only difference being that Article 242 of the

CPC of Ukraine does not contain paragraphs 3 and 4 of Article 237 of the EPC of Ukraine.

Philosophical, logical, general scientific, private scientific, legal and interdisciplinary methods of cognition were also considered in scientific publication. Since philosophical methods define the strategy of legal cognition, logical methods provide for its rational transparency, general scientific methods determine the principles of scientific cognition as such and the scientific status of jurisprudence, the private scientific methods characterize the specificity of cognition of social phenomena, the proper legal methods are oriented toward the consideration of actual legal phenomena and processes. Particular attention is paid to the coverage of the problem of the method in modern domestic literature on legal issues.

Results and Discussion

Characteristics of the provision of the procedural legislative acts of Ukraine regarding the requirements for the content of judicial acts

The provisions of laws regarding the content of court judgments should include the following information:

[1] Court judgments must comply with the substantive law norms;

[2] Court judgment is consistent with the substantive law only if the plaintiff claim is covered by the legal consequence of the norm, the objective requirements of the norm are met, and the respondent has no counter rights;

[3] Distinction of legal and factual issues;

[4] The judgment rationale requires the comprehensive establishment of facts;

[5] Taking into account the legal positions of the Supreme Court of Ukraine.

Further, the authors justified the indicated information.

With regard to *court judgments that must comply with the rules of the substantive law*, the most interesting is, first of all, the provision of paragraph 2 of these articles of procedural legislative acts, according to which court judgments must be made in accordance with the norms of substantive law [7]. This provision follows directly from the Constitution of Ukraine. So, according to Article 1 of the Constitution of Ukraine, Ukraine is a legal state, which means that all power is exercised on the basis of the law.

In accordance with Article 6 of the Constitution, it is stipulated that the justice exercises its powers on the basis of the law, and from the provisions of Article 129 of the Constitution of Ukraine it follows that: *"The judge exercising justice, is independent and guided on the basis of the law"*.

These provisions are fundamental for the activities of judges in Ukraine, since they establish a distinction between the judicial and legislative branches of power. Unlike the Common Law, for example, judges do not have a law establishing function. Their task is to resolve legal disputes on the basis of the current law [8]. At the same time, the improvement of the law by analogy is fully covered by these powers. At that the provision of basic human rights, as enshrined in Article 3 of the Constitution of Ukraine is of paramount importance for the improvement of the law.

The most important consequence of this provision is that the court has the right to satisfy the claim only if the law contains a norm that as a legal consequence pro-

vides exactly what the plaintiff wants to achieve with his/her statement of claim. If there are several norms that provide for the legal consequences desired by the plaintiff, the judge's task is to establish a correlation of these norms among themselves (competition of norms or requirements). It is necessary to find out whether they can be applied simultaneously or they exclude each other. The latter, in particular, is possible in the case when one norm is more special in relation to the other [9].

This strict dependence of the judge on the law is of paramount importance for ensuring the principle of equality of all citizens among themselves. Ideas for the protection of law have special importance in the public law. On the contrary, the private law of Ukraine is based on the principle of equality of citizens. The citizens themselves are primarily responsible for protecting their rights. The task of the court is to establish whether a citizen has the declared right and, if so, to apply this right. At the same time, Article 15 of the Civil Procedure Code of Ukraine states that the task of courts is the protection of the law, which shifts the emphases in the law enforcement activities of the court [10].

The court judgment is consistent with the substantive law only if the plaintiff's claim is covered by the legal consequence of the norm, the objective requirements of the norm are met, and the respondent has no counter rights. The norms on the basis of which the parties want to obtain an advantageous result for themselves consist of the legal consequences and conditions in the presence of which this legal consequence comes (elements of the norm disposition). The task of the judge is first to establish in each norm, which he/she intends to apply, individual elements of the disposition, and the next step is to check each individual element of the disposition. To determine whether the actual circumstances actually fall under these elements of the dispositions of the legal norm in the case under consideration. This process is rather difficult, but only if both these steps have been taken in good faith, it is possible to unequivocally establish whether the court judgment corresponds to the law or not [11]. This process has a great advantage, since in this way it is possible to differentiate the arguments that are important and unimportant, which are brought about by the parties in the process. Only those arguments are important for decision-making in the case, which relate to the norm and to the elements of its disposition.

The difference between legal and factual issues. In addition, in applying the norm it is necessary to separate legal questions and questions about actual circumstances. If, for example, Article 640 (1) of the Civil Code of Ukraine (hereinafter referred to as the CC of Ukraine) states: *"A contract is concluded upon receipt by the person who sent a proposal to conclude a contract, a response about the acceptance of this proposition"*. Then the question of when the e-mail arrived at the recipient's computer and at which point the recipient read this letter is a question of actual circumstances.

This issue must be resolved by examining evidences. On the contrary, the issue of which of these two points is decisive for establishing the moment of entering into a contract is a legal issue. At that it is the issue of what is meant by *"receiving an answer about acceptance"*.

This legal issue must be resolved by the judge by interpreting the norm, which must have a proper justification. At the same time, only certain methods of interpretation are recognized. It means that the court must also justify in the enacted judicial act how it reached the interpretation of a specific norm [12] *(Dakolias, 2014)*.

The judgment rationale requires a comprehensive determination of the facts. Article 237 (5) of the EPC of Ukraine establishes that the court in its judgment must evaluate the evidences. This point for the court judgment has a value that can not be underestimated, since in a large number of cases in the foreground there are not legal issues, but issues about actual circumstances. The court in its judgment must show why it decided to follow the factual circumstances of one side of the process, not the other.

Taking into account the legal positions of the Supreme Court of Ukraine. Article 237 (4) of the EPC of Ukraine also establishes that courts when applying the law must take into account the legal position of the Supreme Court of Ukraine when considering similar disputes. In this place it is important to note that according to the prevailing tradition in Germany, unlike the Common Law, judgments of the highest court do not have binding force for lower courts. However, it is true that lower courts in their argument must take into account the judgments of the Supreme Court. At the same time, the reference to judicial acts of the highest court means first of all the facilitation of the work of lower courts, since they do not need to give their justification on the merits of the dispute. They can in their justification refer to the relevant legal position of the Supreme Court. This, however, does not mean that the lower court is prohibited from deviating from the Supreme Court's opinion. The only decisive factor is the justification on the basis of which they will achieve a different result.

The second question is whether the judgments of the Supreme Court of Ukraine are the only source of opinions that should be taken into account in judgment rationale? According to the German legal tradition, it is entirely permissible or even desirable if not only the judicial acts of the Supreme Court, but also the judgments of lower courts, the opinions of scientists published in articles and textbooks will be cited as a source of opinions and arguments, as well as the ones presented in other states will be adopted when deciding specific legal cases.

Application example

The above reflections will be presented further with the help of the specific court judgment of the Kyiv Economic Court of Appeal of 19 January 2017 (case No. 911/3866/15). This judgment was chosen due to the fact that it is one of the last and is based on the norm that can be found in all legal systems and which originates even in Roman law: this is the norm of the formation of the vindicatory action structure. At the same time, the question at the forefront is whether the court has justified its judgment by understandable way for an outsider.

The judgment was based on the following factual circumstances: *"The plaintiff requests several real estate items (apartments) from the respondent bank (Bank-2). On 13.08.2009 the plaintiff concluded with another bank (Bank-1) a notarial contract on the exchange of various real estate*

items. Due to the fact that the value of real estate items that the plaintiff transferred to Bank-1 was much higher than the value of the real estate items that Bank-1 promised to transfer to the plaintiff in return, the contract provided that Bank-1 undertakes to pay the plaintiff UAH 19.8 million as the compensation. In the contract it was established that the property must pass to Bank-1 on the basis of the notarial contract. As far as can be seen from the actual circumstances of the case, the re-registration of ownership of the apartment in favor of Bank-1 in the registry was not made. Only an "act of acceptance-transfer" was drawn up. Bank-1 has not fulfilled its payment obligation. Instead, in 2010, Bank-1 pledged the acquired real estate in favor of the National Bank of Ukraine (mortgage) and filed a notice of claim in court to recognize the exchange contract as invalid. In 2012 the court sustained the claim. The judgment came into force.

Within the framework of measures to restructure the banking sector, Bank-1 apartment was sold to the respondent bank (Bank-2) on the basis of the contract of June 1, 2015, although the plaintiff on June 13, 2015 pointed both to Bank-1 and Bank-2 to the fact that Bank-1 is obliged to return the apartment to it. On June 20, 2015, Bank-2 was entered in the registry as the owner of the real estate, and on June 24, 2015, a bankruptcy procedure was initiated against the property of Bank-1".

Further it is necessary to point out some formal aspects.

The first comment concerns the classification of judgments [13] and the problem of finding a specific court judgment in a single state registry of court judgments. The court judgment under consideration is placed under such a criterion as "conclusion, execution and termination of the contract". This classification is correct. However, it will not help the user to determine what legal problem in this case a judgment was made. He/she will need to read the court's judgment to find out what the problem is about. Therefore, when publishing court judgment in Germany, an annotation of the court judgment is given ahead. In this case, the thesis may sound as follows: *"The rights of a person who considers himself/herself to be the owner of a property can not be protected by satisfaction of a claim to a bona fide acquirer using the legal mechanism specified in Articles 215, 216 of the Civil Code of Ukraine. In case of establishing the existence of property and legal relations, a binding method of protection shall not be applied to such relations".*

The second point refers to the additions with which the user can facilitate the reading of a court judgment. This is primarily a clear division of the judgment into parts: *the narrative, the motive part and the operative part*. Now the reader is forced to read the entire judgment, even if he/she is interested only in one specific issue that he/she could easily find when using intermediate headings [14].

The third point refers to references to other sources. While the court judgment of the resolutions and the judgments of the Supreme Court of Ukraine are cited, but in addition to them, no other sources, such as articles, comments, or comparative aspects are indicated. Thus, the discussion on legal issues is limited only by judges. It would be advisable to take into account the opinions of all lawyers who participate in the scientific discussion, by citing them in making a judgment.

Search for substantive law norms

The court begins the motivating part of its judgment from checking which norm containing the claim is appropriate in this case. It initially investigates Article 216 of the Civil Code of Ukraine and concludes that this norm can not be applied, and that it should answer the question whether the plaintiff has the right to demand the property on the basis of Article 387 of the Civil Code of Ukraine. The decisive argument of the court here is the reference to Article 330 of the Civil Code of Ukraine, according to which a bona fide acquirer becomes the owner.

The German court would argue in this place in a similar way. At the same time, the court will say that here it is a question of competition between the claim for the return of unjust enrichment (§ 812 of the Civil Code of Germany) and the compulsory demand (§ 985 of the Civil Code of Germany) and that the compulsory demand being more special is of paramount importance. In Germany, this conclusion follows from the law, because the owner that lost his/her right in accordance with § 816 of the Civil Code of Germany has the right to demand that an unauthorized person only return all received as a result of this order.

In Ukrainian law, the legal situation seems to be a bit more complicated, as here the demand stipulated by Article 216 of the Civil Code of Ukraine is considered an independent demand (the restitutionary claim) along with the demand to return the unjust enrichment provided for in Article 1212 of the Civil Code of Ukraine. In German law, in the case if the contract is null and void, only return of unjust enrichment is provided as a compensation mechanism.

In addition, according to Article 1212 of the Civil Code of Ukraine, the owner retrieves the thing from the unauthorized owner. However, in the case of Article 330 of the Civil Code of Ukraine, the former owner lost his/her right of ownership and the right to claim with it.

Ultimately, according to the Ukrainian law, and according to the German law, the deciding ground for the claim is a compulsory demand.

Application of substantive law norms

It is methodologically correct to check by the next step the demand disposition. They sound like in German law:

The owner (1.) has the right to claim (4.) his/her property (2.) from a person who illegally, without proper legal basis, possessed it (3).

(1) The decisive question of the case whether the plaintiff at the time of lodging a claim was the owner of the apartments. For it, two questions should be clarified: (a) Was the plaintiff originally the owner? and (b) Has he/she not lost ownership before claim submission?

The court, when answering sub-question a) indicates that the plaintiff has provided copies of the certificate of ownership of the real estate.

Sub-question b) is problematic. The respondent claims, as a counter-right, that he/she acquired property on the basis of Article 388 of the Civil Code of Ukraine. The court dismisses this objection, arguing that the Bank-1 had no right to dispose of real estate and therefore the thing dropped out of the plaintiff's possession against his/her will [15].

Consequently, taking into account that the evidences available in the materials of the case show that the second respondent, as the person who transferred the property of the plaintiff to the property of another person – the first respondent, has no authority, the property is considered to have disappeared from the possession of the owner (the plaintiff) not from his/her will, but through unlawful actions of the person (the second respondent) who unreasonably assumed the powers of the owner of the property.

This argument is not convincing. If it were true, then on the basis of Article 330 of the Civil Code of Ukraine, it would never be possible to acquire the right of ownership. However, the judgment is ultimately not wrong, as the application of Article 338 of the Civil Code of Ukraine can be justified in a different way. The decisive here is the formulation: *"that had no right to alienate it, about which the acquirer did not know and could not know (a bona fide acquirer)"*. The court does not discuss the problem, whether the respondent was bona fide with respect to the powers of Bank-1 for the sale of the real estate. From the actual circumstances of the case in this regard, firstly, that the seller bank (Bank-1) confirmed its authorities by documents by providing the contract with the plaintiff. The question is, was it enough. From the provisions of Articles 182, 334 of the Civil Code of Ukraine it follows that the rights to the real estate must be registered. At the same time, it is additionally necessary to take into account that by the time the contract was concluded between the plaintiff and the Bank-1, another version of the norm was in force. The truth in both editions was prescribed that in the state registry it is necessary to make either a real estate contract or a real estate right. In our case, with the help of the established factual circumstances, it is impossible to understand whether the contract or Bank-1 as an owner were entered in the registry [16].

Assuming that there was no entry in the registry, the question arises whether it is possible under such circumstances to say that the acquirer did not know and could not know who is the real owner. In countries with a similar registration system, it is undeniable that the acquirer must obtain information in the registry regarding persons entered into the registry as authorized persons to dispose of the property.

It means that on the basis of another interpretation of Article 388 of the Civil Code of Ukraine, it can be concluded that the acquirer was male fide, since he did not apply for information in the registry. And according to the registry it was obvious that the seller was not registry ed in the registry as the owner. And if the acquirer was male fide, then he/she could not acquire the right of ownership. The registration in the registry itself without the necessary grounds is not sufficient to acquire property rights.

In this case, the circumstance that the plaintiff, even before the conclusion of the contract, informed the respondent that the Bank was not authorized to sell the real estate, does not matter anymore.Items 2 and 3 seem less problematic. The real estate is the property that the respondent has seized. It is worth considering, however, the question of whether it was illegal. After all, the respondent refers to the contract

of sale with Bank-1. But the court's arguments in the other part of the judgment that the contract only establishes the obligation relations that do not concern the owner lead to the correct conclusion. From the contract concluded with Bank-1 the respondent cannot establish any rights in relation to the plaintiff.

Conclusions

In conclusion, the last question remains regarding the content of the claim. According to Article 387 of the Civil Code of Ukraine, the plaintiff can claim his/her property. The problem here is that the respondent is listed as the owner in the registry of proprietary rights. From the legal point of view, the respondent, however, did not become the owner, since he/she was male fide acquirer. In this regard, the plaintiff's interest is directed at restoring the corresponding registry as the actual owner. The question is whether this interest is covered by the norm provided for in Article 387 of the Civil Code of Ukraine. In German law there is a special norm for this (§ 894 of the German Civil Code). While there is no such norm in the Civil Code of Ukraine, much says in order to interpret the phrase "claiming own property" so that it covers consent to the removal from the appropriate registry of improperly entered record of the owner.

It leads to the final conclusion that although the court did not solve all the problems in a methodically perfect manner, it came to the same conclusion with the help of another justification.

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