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CHALLENGE AS A GUARANTEE OF THE PROTECTION OF RIGHTS OF THE PARTICIPANTS OF COMMERCIAL COURTS PROCEEDINGS

Based on analysis of national procedural law the analysis of the challenge as a guarantee of defense of rights for participants is carried out in the economic legal proceedings. Direct connection of the challenge and the level of protection of rights for the participants of economic process is examined in the article.

The right of the challenge of judge is an inalienable right of participants of the legal proceedings. It means that a person has the opportunity to express incredulity to a judge or other participant of legal proceedings, disagreement with his participation in the case.

In the Economic Procedural Code of Ukraine (hereinafter — the EPC of Ukraine) e, in contrast with other procedural branches, possibility of challenge is foreseen only for a judge and a court expert.

The possibility of challenge not only of a judge and of a court expert but also of defense counsel and representative, court clerk, prosecutor, specialist and translator will give the additional guarantees of defense of rights for the participants of process.

It is suggested to select the subjects of realization of separate procedural rights and to expand their circle.

Key words: challenge, economic trial, defense of rights, economic trial participants.

Problem statement. The equitableness of the litigation as a criterion of the proper court proceedings is provided inter alia by the legal institute of the challenge of a judge and other persons promoting justice. The reason is that challenge is a plea of distrust for the certain person because of doubt about its fairness and impartiality.

Analysis of researches and publications. Some perspectives of the challenge have been investigated by O. V. Anufrieva, V. G. Zaderako, A. T. Komziuk, H. A. Magomedova. The timeliness of the topic of investigation results from the fact that there are no investigations of the challenge at the commercial court proceedings.

Paper purpose. Neither of procedural branches of law of Ukraine defines the notion of «challenge». That's why a purpose of the article is an investigation of the institute of challenge as well as problems of its implementation at the commercial court litigation and offering of proposals for improvement of the legislation of commercial court litigation in this field.

Paper main body. One may find a number of definitions of the term of challenge depending on the alternative characteristics provided therein at

legal literature. The investigation of the dictionaries of the legal terms allows one to summarize that challenge may be understood as an institute of the procedural law and mean of securing of the fairness and impartiality of the court litigation providing removal of the person from the participation at the court proceeding because of its personal direct or indirect interest of the outcome of the case as well as the other reasons causing doubts of the impartiality of the person [1, c. 43]. So challenge as a procedural institute provides grounds for the person to be not admitted to take part at the concrete case.

The historical roots of the institute of challenge may be found as early as in Ancient Rome. The Roman law provided right of the defendant to challenge the judge in order to guarantee equitable decision as well as a general rule on the common approval for the choice of the trial juror by the parties.

There was a rule for the appointment of a judge on the basis of agreement at the early stage of the genesis of the Roman law. Parties agreed for a person of a judge and accepted to obey the future decision on their own free will. The right and procedure of the challenge of the judge (recusatio) have been provided as well. There were grounds for challenge and self-challenge.

At the current stage of the development of the procedural branches the independence and impartiality of the judges are guaranteed by the legal institutes of challenge, provided by the corresponding rules of procedure.

The investigation of rules of legislation and studies of legal scholars allows one to make conclusion on the main features and characteristics of the challenge.

Firstly the challenge is a mean securing fairness and impartiality of the court. The essence of this feature means that challenge is a plea of distrust for the composition of the court of trial or persons promoting justice on the grounds that there is doubt about their fairness and impartiality.

The challenge may prevent possible unjust and unfair proceedings in a case or falsification of evidences because of objective or subjective circumstances because the challenge is one of the instruments providing legality and validity of the court decisions. The challenge is designed to protect court and other participants of proceedings from the impact of the external forces.

Secondly the challenge is a merely procedural institute. The instruments of challenge are provided at the all of procedural branches of law as a guarantee of the equitable settlement of the dispute but there is no anything like challenge at any branch of material law.

It means that the challenge is necessary only for the legal relations with an impartial decision-maker person as a main actor.

Also one should pay attention to the fact that the legal institute of challenge is provided at all procedural branches of law. The laws of commercial, civil, administrative and criminal procedure provide legal institute of challenge. It stipulates the inter-branch nature of the aforementioned institute.

Thirdly the challenge is a right of the participants of legal relations but not the obligation. In concrete case the subject of challenge depending on its purpose and confidence in justification of statement about challenge decides a question about expedience of using such a right. The point of this feature is

that at presence of grounds, the challenge can both declared and not declared, if the subjects of the challenge will consider that these grounds will not interfere with impartial consideration of court decision. However, in order to protect the interests of the parties interested in fair court decision a law provides the institute of self-challenge that, unlike challenge, is obligatory condition for a judge at presence of grounds.

The fourth feature is that challenge must be motivated. Motivation of challenge is guaranteed by the list of reasons which exclude possibility of consideration of this case by particular judge or participation of this court expert in proceedings. In an economic procedural law list of grounds of challenge of the judge is inexhaustible, taking into account formulation «if other circumstances which raise doubts in his impartiality will be set». On the other hand, grounds for challenge of court expert in Par. 5 of Art. 31 of the EPC of Ukraine are more concretized because of the absence of the formulation «and other circumstances». However, such grounds of challenge as «personally, directly or indirectly interested in a result of consideration of case» are interesting also. In a statement about the challenge must be noticed concrete reference and demonstrated the possibility of influence of subjective factors on the decision of particular economic trial. A court, making decision about challenge of judge or court expert from the grounds of bias, personal interest, and others like that, can reject a statement, explaining that it is not motivated and groundless. Following specific feature: procedure of challenge has its own special, statutory mechanism. Every procedural law sets the order of realization of right to challenge, which must be followed to achieve the desired result — statement of the challenge and its satisfaction. A failure to comply in prescribed manner does not entail the legal consequences of statement of challenge.

Challenge procedure has several aspects.

I. Under Par. 4 of Art. 20 of the EPC of Ukraine writing form is obligatory for the declared challenge. It means that concrete real facts, which add a doubt about impartiality of judge (or judges) which examine a concrete case, must be recorded in writing. Like in accordance with Par. 6 of Art. 31 of the EPC of Ukraine written form is necessary for the statement of challenge of the court expert. By the information letter of the Supreme Economic Court of Ukraine «On Some Issues Raised in the Memorandums of Economic Courts of Ukraine in the First Half of 2009 about the Application of Standards of the Economic Procedural Code of Practice of Ukraine» dated 29.09.2009 № 01–08/530 it is set that if challenge is declared orally, an economic court must offer to the declarant to provide it in a writing form (at a necessity, giving to the declarant time for this purpose), and in the case of refusal of statement of challenge in such form — to continue its consideration in essence [2].

II. Challenge must be declared only on the certain stage — before beginning of dispute resolution, and after it — as an exception — only in case if a declarant learned about grounds of challenge after the beginning of consideration of economic trial in essence.

III. Order of consideration of challenge. In accordance with Art. 20 and Par. 7 of Art. 31 of the EPC of Ukraine a question about a challenge of the

judge is decided in a deliberative room by court in that complement, which considers a case; the resolution should be announced. Statement about a challenge for a few judges or composition of court is decided by a majority vote.

Instead, before (before the entry into legal force of the Law № 2453-VI dated 07.07.2010) quite another order was set in the EPC of Ukraine, according to which a question about a challenge of the judge was decided by the chairman of economic court or vice-chairman of economic court.

Because of presence of such changes in legislation the discussion about the appropriateness of changes was very heated. After all, in fact, adoption of such a challenge would be the same as a mistake of the judge (an unstatement of self-challenge before a challenge), which disgraces honor and dignity of the judge, diminishes an authority of judicial department and can cause unpleasant consequences in relation to the judge, sometimes even termination of powers. And that is why it is easy to predict the judge's decision about the challenge.

IV. The final procedural document on the results of the application about the challenge is the determination of the economic court.

The last feature of this institute is a presence of the special subjects. It should be noted that the subjects of challenge are appropriate to consider two aspects: subjects that can declare about the challenge, and subject which may be declared. For the first group there is the exhaustive list of persons, which have a right to declare challenge in procedural law. These lists are not subject to free interpretation and expansion. A right of the challenge of the judge is the inalienable right of participants of the legal proceedings. The right of the challenge of the judge means that the person has the opportunity to express incredulity to the judge or other participant of the legal proceedings, disagreement with his participating in case. There are such subjects of initiation of the challenge in the EPC of Ukraine (Par. 3, Art. 20): parties, prosecutor, participating in a trial, third persons which take part in a trial and use rights for a party (p. 1 art. 22 of the Code on Civil Procedure of Ukraine establishes the right of the parties on the statement of petitions and their arguments and considerations about all issues, including the right to a challenge). According to Par. 5 of Art. 31 of the EPC of Ukraine the challenge in a case can be declared by the sides and the public prosecutor, participating in case. We consider that the third persons, who have rights for sides, are the subjects of statement of challenge to a court expert. Information about inclusion of the declarants of challenge of the third persons is indicated in Par. 1.10. of the Resolution of the Plenum of the Supreme Economic Court of Ukraine № 18 dated 26.12.2011.

In relation to the subjects of the second group in the EPC of Ukraine, in contrast to other procedural branches, possibility of the challenge is foreseen only for a judge (Art. 20) and court expert (Par. 6 of Art. 31).

It should be noted that they are entitled to challenge only to that judge (chamber), in which they are participants. An important condition of the challenge of these subjects is their participation in the proceedings. So, it is impossible to challenge, for example, a judge, which works in the court, but does not

consider the particular case. The challenge of the judges who do not participate in the consideration of the particular case is not foreseen. And application for a challenge must be rejected. Similarly, challenge may be declared only for that court expert who takes part in a particular case as a court expert.

Let's analyze the subjects of the second group.

According to Art. 1 of the Law of Ukraine «On the Judicial System and Status of Judges» the judicial power in Ukraine in accordance with the constitutional principles of separation of powers is carried out by independent and impartial courts educated in obedience to the law [3]. This right is also presented in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 10 of the Universal Declaration of Human Rights, Art. 14 of the International Pact about Civil and Political Rights. Basic principles of the independence of the judiciary were also internationally accepted. They were adopted by the 7th Congress of UNO on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985, and approved in resolutions of the General Assembly of UNO 40/32 from November, 29, 1985 and 40/146 from December, 13, 1985. This act contains the section «The Independence of Courts» and in Par. 1 states that the independence of the judiciary is guaranteed by the state and stated in the constitution or laws of the country. All state and other institutions have to respect and support independence of the judiciary [4].

So, Art. 126 of the Constitution of Ukraine states that inviolability of judges' independence ensured by the Constitution and the laws of Ukraine. An influence on the judges in any way is forbidden in P. 2 of the same article of the Constitution.

Part 1 of Art. 47 of the Law of Ukraine «On the Judicial System and Status of Judges» states that the judges are independent in their activity. Realization of any actions is forbidden in regard to judges regardless of form of their display from the side of state institutions, establishments of local self-government, their public and official persons, establishments, organizations, citizens and their associations, juridical persons in order to prevent the execution of professional duties by the judges or to persuade them to the perversion of justice. It is forbidden to influence judges in any way at all time of their employment. Art. 47 of this Law also forbids the interference in the activity of judge in realization of justice and warns about the responsibility in case of violation of rules.

According to Par. 1.2.5 of the Decision of Plenum of the Supreme Economic Court of Ukraine «On Some Issues of Practical Application of the Arbitration Procedure Code by Courts of First Instance» № 18 from 26.12.2011 the right to the application about the challenge of the judge is one of the guarantees of justice objectivity and impartiality of the proceedings. As in Art. 6 of Convention for the Protection of Human Rights and Fundamental Freedoms basic judicial guarantees are stated. And a person can avail them during considering his case in a national court [5].

However, without the proper system of selection the judges it is impossible to provide independence of judicial branch of power, as a level of education of

judges determines the quality of the legal proceedings. Specific requirements for judges of commercial courts are not provided, and therefore the requirements for judges of economic courts are regulated by the Constitution and the Law of Ukraine «On the Judicial System and Status of Judges». The list of requirements for the judge depends on the department of the court, in which a candidate applies.

As a judge of a local court may be recommended a citizen of Ukraine not less than twenty-five years, which has a university law education and work experience in the field of law not less than three years, living in Ukraine for at least ten years and native language speaking.

Part 4 of Art. 64 of the law explains the meaning of the terms «university law education» and «work experience in the field of law». In particular, university law education is considered to be a law education received in Ukraine by the qualification level of specialist or master, as well as a law degree at the appropriate level of the qualification received in foreign countries and recognized in Ukraine in accordance with the law. Experience in the field of law is considered to be a person's experience as a specialist after receiving the university law education by the not less than professional qualification level.

It is important to note that, together with the requirements for judges there are some conditions for persons, which cannot be recommended as a judge (Par. 2, Art. 64 of the law). So, cannot be recommended as judge those persons, which have been recognized legally incapable or partly capable, or those which have chronic mental or other diseases that interfere with the duties as a judge, or persons with an outstanding conviction.

It is considered to be that the requirements for the judges are not only the requirements for the candidates for the post of judge. These requirements include the judge's rules and restrictions set for the judges after taking the oath. Par. 4 of Art. 54 of the law sets requirements for the judge to follow these duties: 1) timely, fairly and impartially consider and decide a case in accordance with the law, in compliance with the principles and rules of the court; 2) to comply with the rules of judicial ethics; 3) to show respect to the trial participants; 4) to observe the oath of judge; 5) not to disclose a secret information protected by the law, including the secret of the retiring room and closed judicial session; 6) to comply with the requirements and adhere to the restrictions stated by the Law of Ukraine «On Principles of Preventing and Counteracting Corruption» [6]; 7) to file annual income-tax, property, charges, obligations of financial character return (by April 1) in the form and manner established by the Law of Ukraine «On Principles of Preventing and Counteracting Corruption».

The requirement about a necessity of training at the National School of Judges of Ukraine is regulated in accordance with Par. 6 of Art. 54 Law of Ukraine «On the Judicial System and Status of Judges». For a judge appointed as a judge for the first time, such training should be annual and lasts for two weeks, and for a judge which holds a position of judge permanently — two weeks, but not less than once per three years.

Also there are the requirements about incompatibility the post of judges with other activities (Art. 53 of the Law). So, staying in position of judge is incompatible with employment in any other governmental authorities, establishments of local self-government and with a representative mandate. Also a judge shall not combine the activity with entrepreneurial or advocate activity, any other paid work (except for teaching, scientific and creative activities), as well as being a member of the government authority or employment in the company or organization for the purpose of making a profit. A judge can not belong to a political party or trade union, show favor to them, to participate in political actions, rallies, strikes.

Thus, the legislation establishes a list of requirements for the judges to ensure professionalism, independence and impartiality of the proceedings. Requirements are submitted both to the candidates in the judges of economic court and to the employed judges. Requirements for candidates for judge's post depend on the court level. An additional requirement for the judge of higher courts is a presence of large work experience in the field of law.

There is also a challenge of the court expert but not only challenge of the judge in the economic legal proceedings.

In accordance with Art. 7 of the Law of Ukraine «On Forensic Examination» forensic activities are carried out by state specialized institutions, as well as in cases and under conditions specified in this Law; and those court experts which are not employees of these institutions [7].

European continental theory defines the legal status of the expert as a judge's assistant; the Anglo-American theory defines him as a witness. Domestic legislation defines the legal status of an expert as an independent subject of the process that has its own procedural rights and duties that distinguish it from other subjects of procedural activities. We can see in this case, that a court expert in the economic proceedings is a person, promoting the administration of justice [8].

Completeness, correctness, validity and adequacy of the expert's opinion, as well as its independence and confidentiality are provided by a number of procedural rules and the so-called «expert oath» — warning that is criminally responsible for knowingly giving false evidence and refusal to fulfill obligations without justifiable reasons, and also by possibility of setting of the duplicative forensic examination. The guarantees of independence of the court expert and correctness of his conclusion are expounded in Art. 4 of the Law of Ukraine «On Forensic Examination».

Court experts in accordance with Art. 9, 10 and 16 of this law may be specialists having professional university education, educational qualification level not less than professional, trained and qualified as a court expert in a particular field, and registered in the State Register of Certified Court Experts. In accordance with P. 1, Art. 16 of the Law of Ukraine «On Forensic Examination», depending on the areas of practice they are conferred the qualification of the court expert with the right of a certain kind of examination. Awarding procedure for those court experts who are not employees of the state specialized institutes is determined by the order of the Ministry of Jus-

tice of Ukraine dated 09.08.2005 № 86/5 «On Approval of the Qualification Commissions and Certification of Court Experts» [9].

For getting the qualification of the court expert those specialists who are not employees of the state specialized institutes should have the appropriate university degree, an educational qualification level of not less than specialist, trained at research establishments of judicial examinations of Ministry of Justice of Ukraine, as a rule, in the zones of regional services, know methodical requirements and their actual use and know the forensic examination legislation.

After practical study those specialists who are not employees of the state specialized institutes and independently or as a member of a corporation are going to work as a court expert, should confirm their qualification and get the certificate of the court expert in the Central Expert Committee at Ministry of Justice of Ukraine.

According to Par. 4 of Art. 10 of the Law of Ukraine «On Forensic Examination» court experts mustn't use their powers for the purposes of obtaining illegal benefit or promising and offering such benefits for themselves or other persons.

According to Art. 11 of the law cannot be employed as a court expert the person who was found legally incapable by the court, or person with outstanding conviction, or with administrative sanction for corruption offenses over the year or disciplinary sanction as a deprivation of the court expert qualification.

In Art. 12 of the law established the duties of the court expert regardless of the type of proceedings. Court expert should examine case in depth and give an informed written report, as well as declare about the self-challenge if there are legal grounds of non-participation in the case.

So, we see that for subjects of the challenge in the economic process — for judges and court experts — there are specific skill requirements, requirements concerning incompatibility and other requirements that ensure and guarantee generally qualified, correct and impartial consideration of economic affairs.

Comparing the subjects of the challenge (self-challenge) in the economic process with other procedural branches, one can see that their list in the economic legal proceedings is most narrow. In criminal proceedings one can see challenge declared for investigating magistrate, judge or jury, prosecutors and investigators, trial lawyer and representative ad litem, specialist, interpreter, expert, court clerk. In civil and administrative proceedings the list of candidates for challenge is narrower: judge, court clerk, expert, specialist, translator [10; 11].

In the economic proceedings is not possible to challenge an expert because this member is absent in the EPCU standards; it is impossible to challenge prosecutor, court clerk.

The possibility of challenge of the counsel at law is interesting. In the Ukrainian legislation the institute of the challenge of the representative ad litem (defense counsel, counsel at law) exists only in criminal proceedings. According to the EPC, the Criminal Procedure Code of Ukraine (herein af-

ter — the CPC of Ukraine), the Administrative Procedure Rules the challenge of the representative ad litem is impossible. According to Art. 78 of the Criminal Procedure Code of Ukraine defense counsel has no right to be a person who participated in the same proceeding as another party, if he provides or has previously provided legal assistance to a person whose interests conflict with the interests of the person appealing with a request at aid and advice in legal matters; in the case of the expiration of the certificate of admission or its cancellation; if he is a relative or a family member of investigator, public prosecutor, complainant or anyone else from the composition of court [12]. The necessity of the institute of challenge of the trial lawyer for criminal proceedings is necessary for excluding cases of its possible orientation on preferred or simultaneous satisfaction during the proceedings in matters when interests don't coincide with interests of the defendant [13, p. 628].

A challenge of a defender effectively works in criminal proceedings at the present time. We will consider the positive and negative aspects of introduction of institute of challenge of trial lawyer in the economic proceedings.

Currently, in the economic process of resolve disputes in private law relations the responsibility for the objectivity of the representative lies on a side choosing the particular trial lawyer as their representative ad litem. As well as his impartiality is further provided by the contract, the Law of Ukraine «On Advocacy and Legal Practice» and the Code of Legal Ethics. Thus, according to Paragraphs 1, 3 of Part 1 of Art. 21 of the act, during the practice the lawyer is obliged to observe the oath of advocates of Ukraine and the rules of legal ethics, to notify the client about the conflict of interest without delay [14]. And according to Par. 2 of Art. 21 of the act it is forbidden for counsel to hold a position in defiance the client's will. For failure to perform legal duty a counsel will be responsible in accordance with Section 6 of the law.

In addition, an agreement sets out the obligations with counsel lawyer to represent parties on behalf and in its interests. And the breach of contract obligations as provided in the agreement will entail the legal responsibility of a counsel.

On the one hand, the legal essence of a counsel in the case is to act on behalf of and to represent the interests of the parties in the case. That is, in fact — to be that party whose interests he represents. And the parties, as is generally known, cannot be challenged, in fact exactly concerning their rights and duties there is a necessity of judicial trial. Thus, if a counsel is a relative of someone from composition of court, we consider that this judge should be challenged.

On the other hand, it must be admitted that the challenge is the way of customer's response in case of detection or suspicion of the interest of the counsel, and it will be an additional guarantee for a client.

We should not forget about the free secondary legal aid, as a client cannot influence on the assignment of counsel according to the Law of Ukraine «On Free Legal Aid».

Taking in consideration the above we consider that the possibility of the challenge not only of the judge and of the court expert but also of defense

counsel and representative, court clerk, prosecutor, specialist and translator will give the additional guarantees of defense of rights for the participants of process.

As mentioned above, together with the institute of the challenge the legislator provides the institute of the self-challenge. I. Y. Fridman, O. V. Batanov determine the self-challenge in the proceedings as the self-elimination of some participants in the criminal, civil and economic proceedings or the self-challenge of the criminal proceedings with the aim not to participate in the proceedings in cases where direct or indirect interests in the trial are present or there are the reasons to doubt in their objectivity, with an explaining of the reasons of this self-elimination [15].

Particularly, Art. 20 of the EPC of Ukraine states the duty of judge to declare about the self-challenge at presence of some grounds, which are also the grounds for the challenge.

The duty of the challenge of the court expert in the EPC of Ukraine is not set. However, we can find the legal regulation of the activities of the court expert in the special law «On Forensic Examination», which contains such an obligation. Thus, according to Paragraph 3 of Part 1 of Art. 12 of this law the court expert must declare the self-challenge if there are legal grounds of non-participation in the case.

This position is supported by Par. 13 of the Act of the Plenum of Supreme Economic Court of Ukraine «On Some Issues of Assignment of Forensic Examination» № 4 dated 23.03.2012, according to which «expert in accordance with Paragraph 3 of the first part of Art. 12 of the law has a right to declare about the self-challenge at presence of legal grounds that eliminate his participation in the case. Such grounds are provided, in particular, in the Part 6 of Article 31 of the EPC» [16].

Unlike the challenge, subject of the initiation of self-challenge can be only the person that has already been challenged (that is, according to the EPC Ukraine this is the judge or the court expert). Together with setting of a duty to declare about a self-challenge, the legislative lays a moral debt to recognize possible bias in the proceedings and to refuse to participate in it. A problem, as many scientists consider, follows exactly because of this feature of the challenge. In particular, L. Saykin and B. Gruzd noted the evidence that if the judge is really interested in the outcome of the case or if there are other circumstances causing doubts about his objectivity, fairness and the ability to examine the case in accordance with the law, he cannot deal with a matter without prejudice and will not declare its impartiality [17]. We consider that like from point of physiologic characteristics of a human the institution of the challenge will work, or rather won't work, in case with the court expert in the economic proceedings and in general for any person in any proceedings.

The grounds of challenge and self-challenge can be divided into objective and subjective. Objective grounds are clearly listed by the procedural law and in practice do not cause problems with the implementation, as opposed to the subjective grounds. In particular, the formulation of «the grounds» in Art. 20 of the EPC of Ukraine «other circumstances that cause doubt in his

impartiality», and in Art. 31 of the EPC of Ukraine — «personally, directly or indirectly interested in a result of the proceedings» creates an uncertainty. Such circumstances are not legal facts and often do not have documentary proof. A man, which brought to a judge many personal troubles, friend, long-time foe of father etc., can appear in sides of proceedings. Here we can see the moral barrier, which the judge must overcome, understanding the availability of the official duties. This is the ability to rise above personal interests in the name of honor of the profession and its own post or to declare about the self-challenge.

The difference between the challenge and self-challenge is an obligatoriness for the subjects of challenge. According to Par. 2 of Art. 20 of the EPC of Ukraine and Art. 12 of the Law of Ukraine «On Forensic Examination» the judge and court expert has no choice if there are grounds for a self-challenge, and absence the intention to challenge may lead to prosecution. According to the Law of Ukraine «On the Judicial System and Status of Judges» the Supreme Qualifying Commission of Judges of Ukraine and Supreme Council of Justice of Ukraine is engaged in the aspects of disciplinary responsibility of judges, where the violation of fair trial, in particular the violation of rules of the challenge (or self-challenge) is one of the grounds of application of such a liability (Art. 83, 85). In accordance with Art. 14 of the Law «On Forensic Examination» the court expert can be brought to the disciplinary, financial, administrative or criminal amenability.

Another difference lies in the implementation of the procedure. Particularly, the forms of statement of the challenge of judge are not provided by procedural law. So, it is enough to point about it in an appropriate act handed down in accordance with Part 5 of Art. 20 of The EPC of Ukraine, and in keeping with the requirements of the Art. 86 EPC of Ukraine. And in the event of examination of cases by several judges the adjudication may be preceded by a written statement to the judge with pointing the reasons of the challenge.

A statement of judge's challenge by submitting an application for the challenge was appropriate to the reform, when the chairman of economic court decided the question about the challenge. There was an application for a challenge as a procedural document that was the cause for the replacement of the judge in the case when the application is satisfied by the judgment of the chairman of the economic court. At present, we don't need to consider this application due to changes in the subject. However, the phrase in Art. 20 of the EPC of Ukraine «the judge must declare» suggests an idea that in keeping with the EPC of Ukraine such a statement should be documented. And in accordance with Paragraph 1.2.2 of the Resolution of the Plenum of the Supreme Economic Court of Ukraine «On Some Issues of Practical Application of the Arbitration Procedure Code of Ukraine by the First-Instance Courts» № 18 dated 26.12.2011 in the case of examination of cases by several judges there can be a written statement of the judge with the reasons of the challenge.

Conclusions. Thus, the institution of the challenge and self-challenge has three differences on the subject of the initiation, voluntariness and procedure of realization.

It should be noted that during the implementation of the mechanism of challenge and self-challenge as for the judge «suffers» subjective component of the procedure, as the judge must accept and consider its own challenge (self-challenge). It breaks the rules of subordination of participants of the economic proceedings. Indeed, in case of the self-challenge the subsequent consideration of its own statement makes no sense, since the decision about satisfaction of this application actually taken. On the contrary, in the case of initiation of the challenge of a judge one should not leave a single chance that the information in the application is unknown to the judge, who will consider this statement. And the satisfaction of the application will mean that the judge hasn't made a statement of challenge, although there were lawful grounds (that makes violation, the above mentioned). Thus, the logical next step from his side will be denial of the satisfaction of the application, and it can be appealed in higher authorities, where the personal interest of the judge will be excluded. On the ground of mentioned above it is useful to return to the previous edition of Par. 5 of Art. 20 of the EPC of Ukraine: «The question about the challenge of a judge should be decided by the chairman of the economic court or the deputy chairman of the economic court, which renders a determination within three days from the date of receipt of the application».

It is also necessary to summarize that one can notice the subjects of the implementing of certain procedural rights in the theory of procedural law. Trial participants don't have identical rights. Some of them have a certain range of rights, and others — don't have some or all of the rights that belong to the first category. For example, currently only plaintiff, defendant, third parties with their own requirements on the subject of the dispute, third parties without independent requirements on the subject of the dispute and the prosecutor have the right to the challenge, in accordance with the rules of the EPC of Ukraine. And only the judge and court expert have the right to the self-challenge. And the range of subjects of each group, at first, does not depend on each other, and secondly, these lists independently of each other may be widened or narrowed without changing the rights of subjects in another group in wide sense (right to the challenge and self-challenge).

In other words, the expansion of the range of subjects of the challenge by the adding, for example, the court clerk, the prosecutor, the representative ad litem (counsel) and an interpreter does not change the legal status of other trial participants, including the legal status of the prosecutor as the subject of the initiation of the challenge. The right to challenge of plaintiff, defendant, prosecutor and third parties will remain static.

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ВІДВІД ЯК ГАРАНТІЯ ЗАХИСТУ ПРАВ УЧАСНИКІВ ГОСПОДАРСЬКОГО ПРОЦЕСУ

Резюме

На основі аналізу національного процесуального законодавства здійснюється аналіз відводу як гарантії захисту прав учасників у господарському судочинстві. Обґрунтовується, що інститути відводу і самовідводу мають три відмінності за критеріями суб'єкту ініціювання, добровільності та процедури реалізації. Розглядається прямий зв'язок відводу та рівня захисту прав учасників господарського процесу. Також розглядаються суб'єкти та підстави для відводу, які закріплені в законодавстві та які відсутні у нормах Господарського процесуального кодексу України. Виявляється, що в ході реалізації механізму відводів та самовідводів відносно судді «страждає» суб'єктна складова процедури, оскільки суддя повинен прийняти та розглянути заяву про відвід (самовідвід) на самого себе, що порушує правила субординації учасників процесу при розгляді господарської справи в суді. Обґрунтовується, що не всі учасники процесу мають однакові права. Одні з них мають певне коло прав, а інші — не мають деяких або всіх прав, що належать першій категорії. Пропонується виділяти суб'єктів реалізації окремих процесуальних прав та розширити їх коло. Доводиться, що коло суб'єктів кожної групи не залежить один від одного, а вказані переліки незалежно один від одного можуть бути розширені або звужені без зміни прав суб'єктів іншої групи в широкому сенсі.

Ключові слова: відвід, господарський процес, захист прав, учасники господарського процесу.

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ОТВОД КАК ГАРАНТИЯ ЗАЩИТЫ ПРАВ УЧАСТНИКОВ ХОЗЯЙСТВЕННОГО ПРОЦЕССА

Резюме

На основе анализа национального процессуального законодательства осуществляется анализ отвода как гарантии защиты прав участников в хозяйственном судопроизводстве. Обосновывается, что институты отвода и самоотвода имеют три отличия по критериям субъекта инициирования, добровольности и процедуры реализации. Рассматривается прямая связь отвода и уровня защиты прав участников хозяйственного процесса. Также рассматриваются субъекты и основания для отвода, которые закреплены в законодательстве и которые отсутствуют в нормах Хозяйственного процессуального кодекса Украины. Оказывается, что в ходе реализации механизма отводов и самоотводов в отношении судьи «страдает» субъектная составляющая процедуры, поскольку судья должен принять и рассмотреть заявление об отводе (самоотводе) на самого себя, что нарушает правило субординации участников процесса при рассмотрении хозяйственного дела в суде. Обосновывается, что не все участники процесса имеют одинаковые права. Одни из них имеют определенный круг прав, а другие — не имеют некоторых или всех прав, принадлежащих первой категории. Предлагается выделять субъектов реализации отдельных процессуальных прав и расширить их круг. Доказывается, что круг субъектов каждой группы не зависит друг от друга, а указанные перечни независимо друг от друга могут быть расширены или сужены без изменения прав субъектов другой группы в широком смысле.

Ключевые слова: отвод, хозяйственный процесс, защита прав, участники хозяйственного процесса.