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THE COURT ORDER PROCEEDINGS OF CIVIL PROCEDURAL LAW OF UKRAINE: SCIENTIFIC ISSUES AND PRACTICES

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Шабалін А. Наказне провадження в цивільному процесі України: наукові питання та практика. Стаття присвячена дослідженню процесуальних аспектів інституту судового наказу в українському цивільному процесуальному праві. У статті досліджуються підстави запровадження наказного провадження в цивільний процес України, серед яких є й європейський правовий досвід щодо запровадження спрощених судових процедур. Також у статті вказується, що на сьогоднішній день у країнах Європейського Союзу діють єдині спрощені судові процедури (Регламент ЄС 861/2007 — єдиний європейський судовий наказ; Регламент ЄС 861/2007 — єдина європейська судова щодо вирішення невеликих (дрібних) спорів). У зв'язку із тим, у роботі вказується, що перед Україною стоїть питання пов'язане з необхідністю адаптацією національного процесуального законодавства до вказаних єдиних європейських судових процедур, особливого значення дане питання набуває у світі підписання Угоди про асоціацію між Україною та ЄС (2014 р.).

У статті детально досліджуються структура наказного провадження. Так, зокрема, структура наказного провадження складається з стадій та етапів. Саме етапи і складають основний зміст наказного провадження. Зазначається, що саме етапи наказного провадження саме реалізуються на першій стадії цього провадження. У цій статті вказується, що серед науковців існують різні точки зору щодо основних стадій та етапів наказного провадження. Так, О. Штефан виділяє 3 етапи наказного провадження, а А. Шабалін виділяє саме 3 стадії наказного провадження, до яких вказаних автор відносить і стадію виконання судового наказу, що не виділяють інші дослідники-процесуалісти, зокрема й О. Штефан.

У роботі досліджуються порядок подачі заяви для видачі судового наказу, встановлюються підстави видачі судового наказу (ст. 96 ЦПК України). Зазначається, що цей перелік підстав є вичерпним.

Розглянута процедура повідомлення боржника про виданий судовий наказ. Вказується, що боржник повідомляється письмово судом про виданий судовий наказ, разом із судовим наказом боржник повинен отримати й копію заяви про видачу судового наказу та додані до неї документи.

Досліджена процедура апеляційного оскарження у справах наказного провадження. Аргументується, що така процедура оскарження судового наказу в апеляційному порядку має свої особливості, з урахуванням особливості наказного провадження (ст. 103 ЦПК України).

Автором наголошується, що набрання судовим наказом законної сили залежить від строків його оскарження.

У статті досліджуються також й практичні аспекти наказного провадження. Так, зокрема зазначається, що на сьогоднішній день існує необхідність меж застосування наказного провадження. Судовий наказ може бути досить ефективним при стягненні фінансової заборгованості, поверненні банківського депозити, ліцензійних виплат пов'язаних з використанням об'єкта інтелектуальної власності. Такий підхід є викраденим з токи зору української судової практики.

Вказується, що запровадження процедура спрощеного судочинства повною мірою відповідає єдиній європейський правовій політиці.

Ключові слова: справи наказного провадження, судовий наказ, цивільний процес, наказне провадження, спір про право

The court order proceedings (writ proceedings) fully corresponds with the European judicial system.

Today, Ukraine needs to adapt its own legislation in accordance with European law. Especially it is relevant in view of the Agreement of Ukraine and the European Union — 21.03.2014 and 27.06.2014).

Europe has the European Federal court order proceedings: Regulation (Directive) EU 1896/2006 and Regulation (Directive) EU 861/2007 — small litigation.

Ukraine has the national court order proceedings of civil procedural law. Let's look at this type of the procedure.

Part 1 of Article 124 of the Constitution of Ukraine stipulates that justice in Ukraine is administered exclusively by the courts. Part 2 of the mentioned constitutional provisions says: the jurisdiction of the courts shall extend to all legal relations that arise in the State. [1] Part 1 of Article 2 of the Law of Ukraine «On the Judicial System» provides that the court shall administer justice based on the rule of law, ensure everyone's right to a fair trial and respect for the rights and freedoms guaranteed by the Constitution and laws of Ukraine, as well as international treaties ratified by the Verkhovna Rada of Ukraine.

The formation of Ukraine as a social, democratic and based on the rule of law principles state is not possible without an effective mechanism for the protection of rights and freedoms, rights and interests of legal entities, as well as the interests of the state. Constitution of Ukraine adopted in 28.06.1996, and the Law of Ukraine «On the Judicial System and Status of Judges» of 07.07.2010 № 2453-VI gives a significant role in this mechanism to justice as to the most effective and democratic way of protecting the rights and interests secured by law.

It should be noted that for a long time civil litigation proceedings were made in Ukraine by the Civil Procedure Code of the Ukrainian Soviet Socialist Republic in edition of 1963 (hereinafter — the CPC 1963.), that led to inconsistent legal standards, inconsistencies to realities and needs of their political and socio-economic life and complications of litigation. In this connection in 18.03.2004 the Verkhovna Rada of Ukraine adopted a new Civil Procedural Code of Ukraine (hereinafter — the CPC of Ukraine), which came into force on 01.09.2005. It was the result of a long legislative process, incorporated the latest achievements of domestic and foreign legal thought and jurisprudence [2, 3].

According to the CPC of Ukraine amendment to rules and availability of new procedural institutes unknown in the CPC 1963 are characteristic features of legal regulation of civil proceedings. One of such institutes is writ proceedings (court order proceedings).

In modern national legal literature court order proceedings is defined as an independent kind of civil procedure, performed by courts of general jurisdiction and aimed to enact the court order (a writ) [3, 315].

Consolidation in the current civil procedural legislation of Ukraine of the institute of simplified proceedings is fully consistent with modern European legal practice and the objectives set by the Law of Ukraine «On the National Program for Adaptation of Ukraine to the legislation of the European Union» of 18.03.2004 № 1629-IV, and Article 12 of the Law of Ukraine «On the basis of domestic and foreign policy» 01.07.2010 № 2411-VI. In particular, the Recommendation № R (81) 7 of 14.05.1981 of the Committee of Ministers to member states on measures facilitating access to justice and Recommendation № R (84) 5 of 28.02.1984 on the principles of civil procedure designed to improve the functioning of justice listed that for cases related to an undisputed right should be provided particular rules for accelerated litigation of civil cases.

At present, the issuing of a writ has certain stages. Thus, in the theory of modern civil procedure of Ukraine such stages inherent to acting institute pro-

ceedings are following: 1) logging of application for a writ, and 2) consideration of the application for the writ, and 3) the abolition of a writ (court order) [4, 140].

We must say that in modern legal science of Ukraine there are other positions about the stage of court order proceedings. Thus, A. Shabalin specifies the target at such stages: 1) the court for issuance of the court order (a writ); 2) the court of appeal court order; 3) execution of court order (a writ) [5, 9].

Let us consider the procedure for issuing court order (a writ) more detailed.

Legal regulation of the writ proceedings was provided in Chapter II of the CPC of Ukraine.

Thus, according to Article 95 of the CPC of Ukraine a writ court order is a special form of the judgment, issued after consideration of requirement under Article 96 of the CPC of Ukraine. Part 2 of this procedural rule provides that an application for a writ may be filed by the person who has the right to claim, as well as agencies and persons who legally have the right to protect the rights and interests of others. The list of reasons for issuing a writ is mentioned in Article 96 of the CPC of Ukraine. Thus, under this provision a writ can be issued, if there is: 1) the claim for the recovery of accrued but not paid amount of wages, and 2) the claim for compensation costs for the detention of a defendant, a debtor, a child or vehicles of a debtor; 3) the claim on debt recovery for housing and communal services, telecommunications services, TV and radio broadcasting services based on inflation and 3 % per annum, accrued by an applicant on debts, and 4) the claim to award child support in the amount of thirty percent of the subsistence minimum for children of appropriate age, if this requirement is not related to the establishment or contesting paternity (maternity) and the need to involve other stakeholders, 5) the claim for refund defective goods, if there is an adjudication which came into force , establishing the fact of selling defective goods, which was adopted in favor of an indefinite number of consumers [6].

An application for a writ court order shall be lodged according to the general rules of jurisdiction (Article 97 of the CPC of Ukraine).

According to Part 2 of Article 102 of the CPC of Ukraine delivering of a writ is made without court sitting and summons of the debtor for hearing of their explanations. Just these procedural rules show the main features of simplicity of this form of civil proceedings.

Issued by a court, a writ must have a form and content provided by Article 103 of the CPC of Ukraine. In particular, a writ must state: 1) the date of a writ delivering; 2) the name of the court, the name of the judge who issued the writ (court order); 3) name (title) of a creditor and a debtor and their place of residence or location, and 4) reference to the law under which subject the claim shall be met, and 5) the amount of funds to be recovered, and the account of a debtor (legal entity) in a banking institution, who must pay the costs, if it was notified by the applicant; 6) the amount of costs paid by the applicant and subject to forfeiture in its favor of the debtor; 7) information about the order and timing of application for cancellation of a writ (court order).

Part 2 of Article 103 of the CPC of Ukraine contains a provision according to which the writ must comply with the enforcement document, established by the Law of Ukraine «On Enforcement Proceedings» At the same time, according to paragraph 3 part 2 of Article 17 of the Law of Ukraine «On Enforcement Proceedings» a writ is mentioned in the list of executive documents subject to enforcement by the state enforcement service (bailiffs) [6].

Thus, we can say that a writ combines procedural features of adjudication and of an enforcement document simultaneously.

Prescription of Article 103 of the Civil Procedure Code of Ukraine stipulates that a writ is composed and signed by a judge in two copies, one of each remains

in the file of the case, and the second one is sealed and issued to the plaintiff after its entry into force [6].

The procedure is following.

According to the prescriptions of paragraph 1 of Article 104 of the CPC of Ukraine, after the delivering of a writ, a court shall no later than the next day send a copy to the debtor by a registered letter with notification. Part 2 of this article states that with a copy of a writ the debtor shall receive a copy of the application of a plaintiff with copies of documents attached to it. The CPC of Ukraine establishes clear requirements on fixing the receipt of a copy of a writ by a debtor and the enclosed documents. Thus, in accordance with paragraph 4 of Article 104 of the CPC of Ukraine the day of receiving of a writ copy by the debtor is considered to be the date specified in the notice of postal delivery. Another provision of the stated procedural rule stipulates that if a debtor refuses to receive a copy of a writ or is missing by the mentioned address, the day of receiving of a writ copy by the debtor is considered to be the date written in a mail message of note about the refusal of the debtor to obtain a copy of a writ or a note about the absence of debtor by the specified address.

The debtor, who does not agree with an issued writ, within ten days after receiving a copy of a writ and the enclosed documents, may apply for its cancellation. This statement shall be filed to the court which issued the writ in writing (Part 2 of Article 105 CPC of Ukraine). Procedural law provides that the application for cancellation of a writ shall include: 1) name of the court to which application is made, and 2) the name (title) of the claimant and the debtor and the name (title) of a representative of the debtor if the statement is filed by a representative, their place / residence or location, and 3) the writ that is challenged, and 4) a reference to the circumstances indicating a complete or partial invalidity of plaintiff's claims; 5) reference to evidence that the debtor proves his objection to the plaintiff's claims, and 6) list of documents attached to the application.

The court fee for filing an application for cancellation of a writ should not be paid.

Procedural law sets deadlines for a decision on acceptance or not by a court an application for cancellation of a writ — one day after the acceptance (Part 4 of Article 105-1 of the CPC of Ukraine). Part 3 of Article 105-1 of the CPC of Ukraine stipulates that the submitted application for cancellation of a writ is not considered, if it does not comply with the law, and if an application is accepted for consideration the court issues a ruling. A court shall send to a creditor and debtor a copy of the court ruling on the adoption of an application on the abolition of a writ not later than the next day after its adoption, both parties shall be notified of the time and place of consideration of this application (Part 5 of Article 105-1 CPC of Ukraine) [6].

Application for cancellation of a writ shall be considered by the court within ten days of the enactment of the court ruling of adoption of this application for consideration in open court hearing (Part 6 of Article 105-1 CPC of Ukraine). The procedure for the examination of the application is provided by Section 7 of Article 105-1 of the CPC of Ukraine. Thus, in accordance with this provision a chairman opens the hearing and finds out who of the summoned persons are present, establishing their identity, examines the credentials of representatives and then notifies about the content of the application for cancellation of a writ and listens to opinions of the persons involved in considering of such an application. From the above mentioned it is not difficult to see that the phase of cancellation of a writ is the only stage of acting proceedings in which there is a trial.

According to the results of consideration of the application for cancellation of a writ the court may make such decisions (judgments): 1) to leave the application on cancelling of a writ without satisfaction; 2) to cancel the writ and explain

that requirements stated by a plaintiff can be considered in action proceedings in compliance with the general rules on filing a claim, and 3) to change a writ. This list is exhaustive.

The current procedural law provides for the possibility of an appeal in cases of writ proceedings the civil cases.

The right of appeal is provided by the Constitution of Ukraine, in particular, paragraph 8 of Part 2 of Article 129. Article 125 of the Basic Law stipulates that appellate courts act under the law. Appellate courts constitute the second tier of the system of courts of general jurisdiction.

At the same time the procedure of appeal in writ proceedings has its own characteristics. According to the CPC of Ukraine, a collector and a debtor have the right to appeal. The objects of appeal in simplified proceedings include: 1) a ruling to refuse to accept the application on delivering of a writ, and 2) a ruling to refuse to accept the application on cancellation of a writ, and 3) a writ with a court ruling on refusal to cancel a writ, and 4) an amended writ (court order).

A form and a content of the complaint must comply with the article 295 of the CPC of Ukraine. The appeal shall be filed by the trial court to the Court of Appeal within five days of the trial court proceeding ruled on writ proceeding.

General criteria on which the Court of Appeal issues a ruling extend to the proceedings of the writ proceedings except for the grounds for cancellation of a writ, which were separately regulated. Thus, part 1 of Article 309-1 of the CPC of Ukraine stipulates that a writ shall be cancelled in appeal if the Court of Appeal finds no legal dispute between a creditor and a debtor, by which the claim was made under the first paragraph of Article 96 of the CPC of Ukraine. In this case a writ is cancelled on the basis of studying of substantive and legal composition.

The ruling of a court of appeal on a writ shall come into force upon its adoption (declaration), as in other types of civil proceedings. According to the CPC of Ukraine, appeal ruling is final in simplified proceedings.

The law on civil procedure establishes a special moment of a writ entry into force. Thus, in the case of filing of an appeal, a writ (an amended writ) shall come into force after the adjudication of such complaints, if not cancelled (part 2 of Article 106 of the CPC of Ukraine). At the same time, part 1 of Article 106 of the CPC of Ukraine stipulates that in case of non receipt of the debtor's application for cancellation of a writ within three days after the expiration of the filing, a writ shall come into force and the court issues it to a collector to further its implementation.

Describing the court order proceedings in Ukraine, it is worth saying that there are differences between the European court order proceedings Regulation (Directive) EU 1896/2006 and Regulation (Directive) EU 861/2007 — small litigation). The European court order proceedings contains no court of appeal, there is no accurate list of judicial decisions for the sharing of the court order proceedings. The issues of implementation of procedures of European law are needed to be studied.

It is necessary to increase the number of reasons for issuing of court order. These lawsuits may be financial debts, the return of the bank deposit, license fee (pay for a license for the intellectual product). Ukrainian court practice itself shows relevant court order proceedings in such court cases.

Summarizing all the above mentioned, we would like to emphasize, the institute of court order proceedings raised the priority of the judicial forms of defense and considerably simplified the procedure of civil rights protection. The court order proceedings (writ proceedings) included in the one orbit with European legal policy and the fundamental objectives of democracy. Heightening of the case of court cases examined in order court order proceedings (writ order proceedings) increases the efficiency of protection of the rights and economic rights. ◆

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Шабалин А. Приказное производство в гражданском процессе Украины: научные вопросы и практика. В статье исследованы теоретические вопросы приказного производства, в частности генезис приказного производства в украинском процессуальном законодательстве.

Отмечается, что в ЕС приказное производство идёт по пути унификации, что обусловлено действием единых европейских судебных процедур (Регламент ЕС 861/2007 — единый европейский судебный приказ; Регламент ЄС 861/2007 — единая европейская судебная процедура относительно разрешения небольших (мелких) споров).

Отмечается, что в структуре приказного производства выделяются как стадии (рассмотрения дела судом первой инстанции, пересмотр судебных решений по делам приказного производства, исполнения судебного приказа), так и этапы, которые проявляют свою особенность и реализуются исключительно на первой стадии, являющейся стадией рассмотрения дел в суде первой инстанции. Отмечается, что на сегодняшний день в процессуальной науке существует несколько подходов в вопросе модели приказного производства, а именно его структуры. Так, одни ученные указывают на существования трёх этапов приказного производства (Е. Штефан), другие указывают на наличие трёх стадий данного производства (А. Шабалин), к которым относится и стадия исполнения судебного приказа.

В работе непосредственно исследованы процессуальные особенности возможности разрешения дел приказного производства, а именно: порядок подачи заявления о вынесении судебного приказа, открытия приказного производства, выдача и отмена судебного приказа судом первой инстанции, а также уделено внимание особенностям пересмотра судебных решений, постановляемых судом в делах приказного производства.

Также в статье были исследованы и практические вопросы приказного производства, в частности возможности применения судебного приказы к взысканию финансовой задолженности, взысканию лицензионных платежей за использования объекта интеллектуальной собственности, возвращения банковского депозита.

Ключевые слова: дела приказного производства, судебный приказ, гражданский процесс, приказное производство, спор о праве

Shabalin A. The court order proceedings of civil procedural law of Ukraine: scientific issues and practices. In the article the theoretical issues of court procedure, in particular the genesis of the court order in Ukrainian procedural legislation are investigated.

It is noted that in the court order proceedings of the EU is moving towards unification, which is caused by the action of the common European judicial proceedings (EU Regulation 861/2007 — European single judicial order; ЄS Regulation 861/2007 — European single judicial procedure for resolution of small (small) disputes).

It is noted that in the structure of the court order procedure stand out as stages (examination of the case by the court of first instance, the revision of judgments in cases of court order procedure, the court order of execution), and steps that show the feature and implemented exclusively in the first stage is the stage of consideration of cases in court of first instance. It is noted that today in the procedural science, there are several approaches to the issue of court order procedure models, namely its structure. For example, some scientists point out the existence of the three stages of production clerk (O. Shtefan), others point out the presence of three stages of production (A. Shabalin), which include the stage of execution of a court order.

The article directly investigates the procedural peculiarities of the possibility of solving cases of court order procedure, namely, the order of submission of the application for a court order, the opening of court order procedure, issuance and cancellation of a court order by the court of first instance, but also focus on the peculiarities of judicial review of decisions, decides court in matters of court order procedure.

Also in the article it has been investigated practical issues of court order procedure, in particular the possibility of using court orders to collect financial debt collecting royalties for the use of intellectual property, the return of the bank deposit.

Keywords: civil cases of the court order proceedings, court order proceedings (writ proceedings), court order (a writ), doctrines of civil procedure, controversy about claim