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CIVIL PROCEDURAL CAPACITY AND CAPABILITY OF FOREIGN PERSONS IN UKRAINIAN CIVIL PROCEDURE

The paper investigates the issue of civil procedural legal capacity and legal capability of foreign persons in the civil procedure of Ukraine. The essence of the concept of "foreign element", "international civil process" is considered. The general rules for civil proceedings in relation to foreign entities are presented. The sources of foreign entities legal personality is considered. An institution representation as a special mechanism of civil legal personality realization of the state is considered. The peculiarities of national treatment distribution to foreign persons in civil proceedings is shown.

Keywords: international civil process, capacity, capability, foreign element, proceeding, institute of representation, legal personality.

A prerequisite for entry into the legal status of civil procedure, as well as one of the grounds of civil legal proceedings are civil capacity and civil capability. It is inherent in all subjects of civil procedural law. Because of this, the civil legality is an essential legal feature of the foreign entities involved in Ukrainian civil proceedings. Under Article 74 of the Law of Ukraine "On International Private Law" procedural capacity and capability of foreign citizens in Ukraine are determined according to the law of Ukraine.

Problematic aspects of foreign persons participation in the civil procedure has always been the subject of attention of procedural scientists. Scientific exploration of that problem was carried by T. Neshatayeva, L. Fedenyak, W. Begun, M. Bohuslav, V. Komarov, L. Luntz, L. Fedynyak, S. Fursa, M. Shakaryan, M. Stephan, W. Yarkov etc.. However, the researches of these scholars are primarily devoted to the study of general aspects of the foreign persons participation in civil proceedings without focusing on problematic aspects of their legal authority, both civil procedural capacity and capability of foreign persons in a civil proceeding Ukraine.

The above determines the relevance of the research topic, which aims to study the legal nature of civil legal capacity and capability of foreign persons in a civil proceeding of Ukraine.

The internationalization of social life, the development of international cultural and other relations, migration and other reasons lead to an increase in the number of civil cases involvement of foreign elements.

The term "foreign element" refers to a legal phenomenon, belonging to another national legal system. In the legal literature and law. Scientist M. Brun was one of the first invented the concept of "foreign element", which is widely used today. He argued that "along with the relationships that with all elements are tied to one area of law, there is a variety of others that separate its elements simultaneously and affect several law enforcement of several states: legal entity may be a foreigner, object of rights is being abroad, subjective right arose in one state, but its implementation is carried out on the territory of another state " [1, p.7].

Looking at different angles on the phenomenon of foreign element scientist T. Varadi specifies that if viewed from the standpoint of concrete relations of one state, it should be noted that these relations besides domestic (national) characteristics and elements, will also contain a foreign element. If we consider this example not in terms of a particular state, but in general terms, it can be concluded that these relationships contain international specifications meaning include an international element [2, p. 26].

International civil procedure is a form of realization of civil rights and at the same time can be carried out only as a public relationship. Its provisions are aimed at regulating international relations [3, p. 364]. The term "international civil procedure" is arbitrary, since there is no universal international organization, that could consider disputes between subjects (parties) of the various states.

International civil procedure is not a set of international civil procedure norms, but a number of procedural issues, the specifics of which is due to the international civil and commercial circulation [4, p. 12]. The norms governing the procedure of the proceedings in disputes arising out of legal relationships, complicated by foreign element contains civil procedural law of a particular state [5, p. 59].

Civil Procedural Code of Ukraine (CPC) [6] stipulates that everyone has the right to the procedure established by this Code, apply to the court to protect their violated, unrecognized or disputed rights, freedoms and legitimate interests (Part 1, Art.3). This Code also defines general rules for the implementation of civil litigation, including: civil procedural capacity, i.e. the ability to have civil procedural rights and obligations of the parties, third party, the applicant, the concerned person shall be recognized by all natural and legal persons (Art. 28); civil procedural capability as the ability to personally perform civil procedural rights and perform duties in court, recognized by all individuals who have reached the age of majority and legal persons (Art. 29). Art. 29 of the CPC of Ukraine also defines the peculiarities of civil capacity realization by minors (under the age of fourteen to eighteen years of age) and persons whose civil capability is limited.

In accordance with Part 2 Art. 74 of Law of Ukraine "On International Private Law" [7] proof of the legal rights of a foreign entity is a document certifying its origin and legal status. In this document, including the certificate of registration, an extract from the trade (banking) register that is made and issued by competent authority under the law of a foreign country in which this entity was created (registered). In Ukraine the following documents recognized as valid if they are legalized, unless otherwise provided by law or an international treaty of Ukraine, Art. 13 [7]. In a case involving

a foreign entity at the request of the latter by court seise must submit the following completed documents .

In Ukraine there are two ways of official documents legalization: consular legalization and apostille stamp (apostille). The procedure of consular legalization for public documents established by the Vienna Convention "on Consular Relations" 1963 p. [8], International treaties and laws of Ukraine, as well as the Regulations on the procedure of consular legalization for public documents in Ukraine and abroad, approved by the Ministry of Foreign Affairs of Ukraine dated June 4, 2002 № 113 and registered with the Ministry of Justice of Ukraine on June 26, 2002 under number 535/6823 .

From 22 December 2003 in Ukraine entered into force Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 May 1961 [9], whereby official documents used in the states - parties to the Convention must be certified by a special stamp «Apostille» affixed to the competent authority of the State in which the document was drafted. This Convention apply in their relations with states that have not raised an objection to the accession of Ukraine to the Convention (Germany) [10]. Otherwise, continue to apply the requirement of consular legalization procedures.

In Ukraine, the authorities empowered to issue the certificate under the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents defined by the Cabinet of Ministers of Ukraine dated October 18, 2003 № 61. The order of the certificate is in accordance with the Rules of the certificate on official documents for use in other states, approved by joint order of the Ministry of Foreign Affairs of Ukraine, Ministry of Education and Science of Ukraine and the Ministry of Justice of Ukraine on December 5, 2003 № 237/803/15/5, which was approved by the Ministry of Justice of Ukraine on December 12, 2003 under number 1151/8472 .

Compliance with the formalities for the legalization of public documents is not required in the case when the Treaty entered into between two or more Contracting states, whose position is clear of any other certification of foreign official documents if they were drawn or accepted by the institution of one of the contracting parties, bound stamped and certified by a competent person. Thus, Ukraine signed several international agreements to eliminate the legalization of foreign public documents, including the multilateral Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 22 January 1993 [11] (Article 13), and also bilateral agreements on legal assistance with such states [10]: the Socialist Republic of Vietnam (2000), the Republic of Georgia (1995), the Republic of Estonia (1995), the Republic of Latvia (1995), the Republic of Lithuania (1993), the Republic of Moldova (1993), Poland (1993), Republic of Uzbekistan (1998), Hungary (2001), Czech Republic (2001).

The peculiarity of the civil legal personality implementation of the state is a mechanism of representation institute, which is the way of the internal organization of the state: in civil relations personalized carrier of civil and civil procedural rights and obligations is a state, but spokesmen for the state interest – are competent and

authorized persons required to perform public functions [12 , p. 60]. In order to implement the civil procedural personality the state institution uses representation of the state and its authorized public authorities, individuals and legal entities that carry out their duties in accordance with the laws, or within the special errand. Authorities, acting in civil proceedings on behalf of the state do not use the status of an independent legal entity even if there is such.

An issue of civil process participant's capacity and capability has to be solved according his nationality law. The complexity is to determine the procedural position of the state: whether it is a legal person or any particular subject. In legal literature, there is no single approach. According to the theory of civil law, all members of civilian traffic - people, including the state, the status of which is endowed with attributes of a legal entity. Thus the science of private international rights, developing the theory of functional immunity is bound by the statutory principle of absolute immunity [13, p. 28]. So there comes the question about the need for clear delineation of state action as a powerful sovereign with immunity and actions of the state in private relationships. The criterion for determining the nature of state involvement is a legal nature and character of the action: the state operating under private law and as a private person (legal or as such) .

From a scientific point of view, the legal concept of "civil procedural capacity" of the state (as opposed to other subjects of civil law) from category "possible" transforms into a proper category "mandatory" – the obligation to state on behalf of the authorized person to act as subjects of the state and public interests [14 , p. 644]. Hence, the involvement of the state in civil proceedings should be assessed through the legal category of "civil procedural legal personalit " of the state, practical implementation of which should be realized by the enforcement mechanisms through the institute legal and contractual representation.

In the context of national law and issue on the extent of the spread of state immunity to economic actors through the exercise of sovereign functions of the state should be decided. We are talking about public company that, as a general rule, in economic exchange are legal entities [10 , p. 89]. The inclusion of such entities in the scope of immunity should assume the starting position in the plane of national regulations, for example, referring to the category of public enterprise strategic assets and the adoption of the state over civil liability for its obligations in economic activity to the extent specified by law .

Together with this the international private law can use mechanism of reduction the security of immunity. So, if the government decided to voluntarily issue of waiver of immunity in respect of themselves or agents and thus determined the plane of their participation, then it can not in these relationships by governed by private law, to restore their privileges, citing immunity (principle of irreversibility waiver of immunity) [10, p. 91].

In general, the issue of the state participation in international civil procedure in terms of reforming the legal system of Ukraine requires a deep theoretical understanding of what needs to be focused on the development of effective

mechanisms for regulation of state participation in international public circulation while providing a fair trial to all participants protect their subjective rights and legitimate interests.

Under Part 2 Art. 410 of CPC of Ukraine [6] foreign persons have procedural rights and obligations along with physical and legal entities of Ukraine, with the exceptions established by the Constitution and laws of Ukraine, as well as international treaties ratified by the Verkhovna Rada of Ukraine. This provision establishes a general rule to ensure foreign persons in Ukraine civil procedural protection of the rights, freedoms and legitimate interests on the basis of national treatment prescribed for the citizens of Ukraine.

At the same time we point attention that in case when solving issue of civil procedural capacity and capability regarding participant of the process there come questions of his civil capacity and capability, which are under the regulation of substantive law, should apply the general choice of law rules to determine the personal law of the person (Art. 16-18, 25-27, Law of Ukraine "On international Private Law" [7]).

Distribution of national treatment in civil proceedings on foreigners based on the principle of unconditionality [15 , p. 645] and is not associated with the fact of residence or location of the person in Ukraine. This means that the rules of civil procedural law, establishing the rules of procedural legal capacity and capability, jurisdiction, venue, the procedural position of the persons involved in the case, and other rights and guarantees applicable to foreign persons, regardless of whether or not the law of the state equivalent rights for individuals and legal entities in Ukraine [10, p. 95]. However, if the foreign state admitted limitation of procedural rights for citizens and legal entities of Ukraine, laws of Ukraine can be set appropriate procedural restrictions on foreign citizens of those countries in which there has been such restrictions.

In private international law there exists the limitation of the rights of foreign entities used by the state on its territory in response to unjustified restrictions on the rights of natural and legal persons in a foreign country that has the character of discriminatory measures called negative consequences. The use of negative consequences is based on the principle of reciprocity and aimed at creating the conditions for cancellation of a foreign country established its limitations. Under the provisions of international law limits the use of state-of-order negative consequences is not constituted as a breach of the principle of non-discrimination. This rule, in particular, stipulates Part 2 Art. 47 of the Vienna Convention on Diplomatic Relations of 18 April 1961 p. [8], which provides that discrimination is not the action when state of stay applies any of the provisions of the Convention is limited due to the limited application of that provision to its mission in that state that accredited .

The legislation of Ukraine also contain provisions that allow the use of negative consequences to foreign persons. Part 3. Art. 410 of Civil Procedure Code of Ukraine [6] stipulates that the law of Ukraine can set appropriate limits on individuals and entities on those states that have allowed special restrictions of civil procedural rights

of persons and entities Ukraine.

In accordance with Part 3 Art. 2 of the Law of Ukraine "On Legal Status of Foreigners and Stateless Persons" [16] in the issue when a foreign state restricts on the rights and freedoms of citizens of Ukraine, the Cabinet of Ministers of Ukraine may decide to set an appropriate manner the rights and freedoms of the citizens of this state in Ukraine. This decision may be reversed if the grounds on which it was taken.

Thus, as a result of the research certain findings can be brought. Civil procedural legal personality of foreign entities is their legal property, which is structurally consisting of legal capacity and legal capability, manifested in the ability of foreigners to engage in civil legal proceedings, acquiring relevant civil procedural status of civil procedure participant (e.g. party, third party, representative, etc.).

Civil procedural legal personality is inherent to all foreign persons, without exception, including foreign states and international organizations.

Civil procedural capacity and capability of foreign citizens in Ukraine are determined under the law of Ukraine, that operates under so-called rule of "national treatment" of "national law".

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Жданова О.С. Цивільна процесуальна правоздатність і дієздатність іноземних осіб у цивільному процесі України.

У статті досліджено питання цивільної процесуальної правоздатності та дієздатності іноземних осіб у цивільному процесі України. Розглянуто сутність поняття «іноземний елемент», «міжнародний гражданський процес». Представлені загальні правила здійснення цивільного судочинства по відношенню до іноземних особам. Розглянуто джерела правосуб'єктності іноземних юридичних осіб. Розглянуто інститут представництва як особливий механізм реалізації цивільної правосуб'єктності держави. Наведено особливості поширення національного режиму на іноземців в цивільному судочинстві.

Ключові слова: міжнародний цивільний процес, правоздатність, дієздатність, іноземний елемент, судочинство, інститут представництва, правосуб'єктність.

Жданова О.С. Гражданская процессуальная правоспособность и дееспособность иностранных лиц в гражданском процессе Украины.

В статье исследованы вопросы гражданской процессуальной правоспособности и дееспособности иностранных лиц в гражданском процессе Украины. Рассмотрена сущность понятия «иностранный элемент», «международный гражданский процесс». Представлены общие правила осуществления гражданского судопроизводства по отношению к иностранным лицам. Рассмотрены источники правосубъектности иностранных юридических лиц. Рассмотрен институт представительства как особый механизм реализации гражданской правосубъектности государства. Приведены особенности распространения национального режима на иностранцев в гражданском судопроизводстве.

Ключевые слова: международный гражданский процесс, правоспособность, дееспособность, иностранный элемент, судопроизводство, институт представительства, правосубъектность.