UDC 346.91
DOI https://doi.org/10.32849/2663-5313/2021.12.06

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Baliuk, Iryna, Namiasenko, Olga, Shcherbakova, Olena (2021). Legal expert in commercial proceeding in Ukraine. *Entrepreneurship, Economy and Law*, 12, 35–41, doi https://doi.org/10.32849/2663-5313/2021.12.06

LEGAL EXPERT IN COMMERCIAL PROCEEDING IN UKRAINE

Abstract. ***The purpose of the article*** is to clarify the concept and legal nature of an expert in the field of law in commercial litigation, his authorities; justify the difference in the role of an expert and legal expert in commercial proceedings; identify shortcomings and possible advantages of including a legal expert in the litigation experience.

Research methods. The work is performed on the basis of philosophical, general and special scientific methods of cognition. Historical, logical, dialectical, comparative-legal, system-structural and some other methods were used in the process of work.

Results. Because of the legal unification of the commercial, civil and administrative proceedings, a new participant in the judicial proceeding has appeared for the first time – a legal expert, which is named in the Commercial Procedure Code of Ukraine as an expert in the field of law (expert in law). The legal position of the expert in the field of law and procedural issues of his participation, authorities, etc. are considered. It is important to study the related issues, such as the analogy of law, the legal expert concludes about. Attention is also paid to the comparison of Ukrainian and European norms regulating the participation in the trial of a legal expert and attorneys general to provide qualified legal assistance to a judge.

Conclusions. Problems related to the participation of the legal expert can be divided into two groups. The first one includes the shortcomings of the legislation in determining the requirements for the identity of an expert in the field of law: education, professionalism, citizenship, and etc. The second group of problems deals with the powers of a legal expert in litigation. In particular, we are talking about the expert conclusions about the application of the analogy of law. Most objections are due to the fact that the application of law and analogy of law has always been considered as the prerogative of the court, so the involvement of an expert into these issues is inappropriate. Inadequate legal regulations of the institute of legal expert cannot ensure its proper functioning.

Key words: lawsuit, legal expert, expert in law, expert in the field of law, attorney general, qualified legal assistance to a judge.

1. Introduction

The main purpose of justice is to restore the violated right. The entire trial is designed to ensure that a lawful and reasoned judgment is reached. The emergence of new types of business relationships and the constant complication of their legal regulation have led to conflicts and difficulties for judges to apply legal rules. The judge, as the main participant in the trial, is obliged not only to make a fair and lawful

decision in a timely manner but also to ensure a lawful procedure for its adoption. In such circumstances, the judge requires professional legal assistance in the application of law when resolving a complex dispute. This approach is reflected in the emergence of a completely new concept in procedural law – the legal expert (the expert in the field of law).

In 2017, the Ukrainian procedural legislation was substantially changed and unified that resulted in the adoption of the new version of the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, and the Code of Administrative Procedure of Ukraine. In accordance with the law and judicial practice, one used to consider inadmissible to adress legal questions to court experts, in particular, about the compliance of certain normative acts with the requirements of the law, the legal evaluation of the parties' actions, since such matters are exclusively under court jurisdiction. The updated Commercial Procedure Code of Ukraine (Art. 70) (Hospodarskyi protsesualnyi kodeks Ukrainy, 1991), the Civil Procedure Code of Ukraine (Art. 73) (Tsyvilnyi protsesualnyi kodeks Ukrainy, 2004) and the Code of Administrative Procedure of Ukraine (Art. 69) (Kodeks administratyvnoho sudochynstva Ukrayiny, 2005) in the wording of the Law of Ukraine № 2147-VIII of October 3, 2017 (Pro vnesennia zmin do Hospodarskoho protsesualnoho kodeksu Ukrainy, Tsyvilnoho protsesualnoho kodeksu Ukrainy, Kodeksu administratyvnoho sudochynstva Ukrainy ta inshykh zakonodavchykh aktiv, 2017) provide for the inclusion of a law expert in litigation participants. The content of all the mentioned articles regarding the procedural status of a legal expert is identical in all codes. The provisions of the articles on the content of the expert's opinion in the field of law and the assessment of the expert's opinion in the field of law by the court are also identical (Art. 108, 109 of the Commercial Procedure Code of Ukraine, Art. 114, 115 of the Civil Procedure Code of Ukraine, and Art. 112, 113 of the Code of Administrative Procedure of Ukraine). In addition, his position is also governed by the provisions of the articles of the relevant codes regarding the general rights and obligations of all parties to the trial.

Significant changes in the understanding of the role and importance of the judge, as well as the appearance in the trial of an expert in the field of law, led to numerous controversies. When discussing the emergence of a new litigant, scholars and practitioners tend to be critical of its legal certainty.

The goal of this publication is to clarify the concept and legal nature of an expert in the field of law in commercial litigation, analyze his powers, compare the concept and meaning of an expert and a legal expert in the commercial process, identify the disadvantages and possible advantages of including a law expert in trial participants, and study foreign experience.

2. The status of a legal expert in commercial proceeding

The analysis of the rules of the Commercial Procedure Code of Ukraine indicates that there are some shortcomings in the regulation of the status of an expert in the field of law, including the use of definitions. Thus, in the text of the Commercial Procedure Code of Ukraine and other procedural codes, the terms "law expert" and "expert in the field of law" are used. At first glance, such inconsistency is not fundamental, but in the case of divergent interpretations, this may raise controversy over the identification and involvement of experts for examination. In our view, the definitions used are not identical.

The concept of an "law expert" is broader than an "expert in the field of law", since a law expert can be a specialist both in the field of law and other areas of dispute. Thus, an expert in the field of law can only be a lawyer. For example, when settling economic disputes, issues of economics, management, finance, etc. may arise. In such a case, it is necessary to contact not only lawyers but also to involve specialists in the relevant field. In our opinion, the authority of the expert to draw conclusions about the analogy of law and the content of foreign law indicates the need to use a single term "expert in the field of law" in the procedural codes.

Other scientists also support this approach and point out that, in spite of giving an opinion exlusively on specific issues, such a person should be an expert in the field of law in general, and not only on the issues about which the conclusion is drawn. In view of the above, the person should be referred to as an "expert in the field of law" and not a "law expert" (Riabchenko, 2017).

Another drawback of the legal regulation of the procedural status of an expert in the field of law is the uncertainty of his legal nature in an economic litigation. According to Art. 70 of the Commercial Procedure Code of Ukraine, only a natural person can be an expert in the field of law. In Ukraine, legal expertise is currently carried out by legal entities, research institutes and universities, etc. We believe that the judge should be empowered to formally involve the above bodies and organizations acting by their representatives for expert examination in the field of law.

An individual, who is an expert in the field of law, must simultaneously meet two conditions:

1) have a scientific degree; 2) be recognized as a specialist in the field of law. These requirements are not clearly stated. The degrees of Candidate of Science (PhD (Law)) and Doctor of Science are awarded in Ukraine. Therefore, given the legislature's ambiguity and the fact that the decision to admit an expert in law is taken by a court, it is likely that the judge can decide on the rank of the expert's science degree. The second condition is that such a person must be a recognized legal practitioner. The ambiguity of the criteria and the evaluative nature of such a requirement raises even more questions. Who should be considered as a specialist: a scientist with experience or more publications, a practicing lawyer with a recent degree, or a lawyer of a well-known organization?

The following issues are of interest: whether it is necessary to take into account that a specialist practices within one field of law, but he obtained a scientific degree in another, or many scientific papers have been published in one field of law, but specialist has become a famous only for a single expression of his own opinion in another field etc.

The procedural codes also do not specify whether the parties' consent is required for a specialist to be recognized as an expert in law. In addition, the issue of who will determine such professionals is not regulated: the judge personally, or the judge should refer to scientific, higher education institutions, or to a specially established organization. Alternatively, it is possible to provide for a court appeal to the Scientific Advisory Board at the Supreme Court. The Scientific Advisory Board is composed of highly qualified legal experts to prepare scientific opinions on the Supreme Court's activities. The Scientific Advisory Board may draw up a recommended list or register of professionals who may participate in the litigation as experts in the field of law.

The issue of creating expert registers is relevant to all European countries. The study "Civil-law expert reports in the EU: national rules and practices" emphasizes that public registers must become more widespread in order to enable experts to be appointed by judges from outside the country where a given expert usually works (Nuée, 2015). The legislation of Ukraine does not set clear requirements for the citizenship of legal experts. However, scholarly publications suggest that foreign law professionals be involved in drawing conclusions about the true content of foreign law (Butyrska, 2018).

The decision on the engagement of an expert in the field of law to the participation in the case, as well as the attachment of his opinion to the case file, is taken by the court. However, the judge and any participant in the case may initiate the involvement of such an expert in the case. The participant in the case submits such a proposal to the court or an appeal executed as a statement (written or electronic), which is submitted to the judge hearing the case. In addition, according to Art. 108 of the Commercial Procedure Code of Ukraine, the parties in the case have the right to submit the opinion of an expert in the field of law, who did not participate in the trial.

Regardless of who initiated the involvement of the expert in the field of law in the case, the final decision on his participation is made by the judge. Regardless of whether an expert in law was involved in the case, the judge may not take his opinion into account in the final decision on the case, if he has a different reasoned opinion on the matter for which such expert was involved. However, if the expert in law participated in the case and the judge rejected his opinion, it should remain in the case file.

The rights and responsibilities of an expert in the field of law are set out in Art. 70 of the Commercial Procedure Code of Ukraine, as such, which are inherent only to him, in reality they are characteristic of some other participants in the lawsuit (specialist, translator). Responsibilities include: appearing at a court summons, answering court questions, providing explanations. The rights of an expert in law include: the right to know the purpose of his call to court, to refuse to participate in a trial if he does not have the appropriate knowledge. An expert in law is also entitled to the payment of services and compensation for costs associated with subpoena. In the absence of objections from the parties to the case, an expert in law may participate in the video conference way.

The results of the legal expert's litigation are drafted in a written opinion. An expert in law is involved in the case in two instances: 1) the need to apply the analogy of law (analogy of legal act); 2) in terms of the content of foreign law rules in accordance with their official or generally accepted interpretation, practice, doctrine in the foreign country concerned.

The analogy of legal act is understood as the possibility of applying acts of legislation governing similar in content relations in case they are not regulated by the normative legal act on a specific situation. The analogy of law applies where it is impossible to use the analogy of legal act to regulate such relations. In this case, the unregulated legal relations are governed in accordance with the general principles of law. Applying the analogy of law or the analogy of legal act is a part of the competence of any lawyer, and even more so of a judge. That is why we believe that empowering an expert in law to rule on the analogy of law is false: it degrades

the status of judges and provokes disrespect for judicial professional competence. The judge is the bearer of legal knowledge. The training of judges is aimed at obtaining them the skills to apply the law in a particular case, including the law by analogy (Baliuk et al., 2021; Baliuk, Namiasenko, 2019).

If a question arises as to the content of the rules of a foreign law according to their official or generally accepted interpretation, practice of application, doctrine in the respective foreign country, there may indeed be a need for the assistance of a specialist, especially in a court of first instance.

The assessment of the expert's opinion in the field of law is carried out by the court under the norms of Art. 109 of the Commercial Procedure Code of Ukraine. Pursuant to the article cited above, the opinion of an expert in the field of law is not evidence but has an auxiliary (advisory) character and is not binding on the court.

In its decision the court may refer to the expert's opinion in the field of law as the source of the information and must draw its own conclusions on the relevant issues. The opinion of the legal expert cannot contain an assessment of the evidence, an indication of the reliability or inaccuracy of one or the other evidence, of the advantages of one evidence over the other, of what decision should be taken as a result of the case. Therefore, the legislator has made it clear that an expert in the field of law is not involved in the process of judicial evidence and that his opinin is not one of the means of proof and has nothing to do with the decision-making process.

3. Legal expertise in the Court of Justice of the European Union

Some domestic scholars consider the activity of an expert in the field of law in Ukraine similar to that of the Advocate General in the Court of Justice of the European Union (Zozulia, 2017). We partially agree with this statement. If one considers the activity of an expert in the field of law as an activity of interpretation of law, then his function is similar to that of the Advocate General in the Court of Justice of the European Union. However, the legal certainty of the status of domestic experts in the field of law differs significantly from that of Advocates General.

The primary purpose of the Advocates General is to ensure that the Community law is maintained in the interpretation and application of European Union rules in the most complex of cases. It is the duty of the Advocate General to submit in open court a fully impartial, independent and reasoned opinion on a case before the Court of Justice of the European Union. Whereas judges, first and foremost, ensure that the rules of procedure are adhered to and make the final decision, taking into account the views of the Advocates General.

The Advocates General and the Judges of the Court of Justice of the European Union are appointed by the governments of the Member States, by common accord, in accordance with Art. 139 of the Treaty establishing the European Atomic Energy Community (Dohovir pro zasnuvannia yevropeiskoho spivtovarystva z atomnoi enerhii, 1957). They are recruited from persons with impeccable reputations and independents who possess the qualities necessary for the performance of official functions in high judicial positions in their countries, or are legal experts of high and generally recognized competence. The term of their activity is set by the EU legislation, and it is stipulated that the composition of the Judges and the Advocates General will be renewed periodically. When the term of office expires, such a person may be reappointed. In addition to periodic renewal and death, their functions may be terminated individually by resignation. The number of Judges is almost double that of Advocates General.

Both the Advocates General and the Judges are selected by the same criteria, and their activities are secured and guaranteed in the same way; it is not surprising that the Advocate General's Opinion almost always form the basis of a judgment of the Court of Justice of the European Union. The Court of First Instance (formerly the Tribunal) has no Advocates General, but judges themselves may be involved in the performance of the functions of Advocate General. A judge involved in the role of Advocate General in any case may not participate in the determination of the case.

In addition, Advocates General have some influence over litigation. In the process, of course, the status of Advocates General and Judges is somewhat different. According to Art. 16 (5) of the Protocol (№ 3) on the Statute of the Court of Justice of the European Union judges may seek the advice of the Advocate General, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate General, to refer the case to the full Court (Protokol (№ 3) pro Statut Sudu Yevropeiskoho Soiuzu (Protokol pro Statut Sudu Yevropeiskoho ekonomichnoho spivtovarystva), 1957).

At the same time, following Art. 20 of the Protocol (№ 3), the oral procedure includes, inter alia, the hearing of the submissions of the Advocate General. However, where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General,

that the case shall be determined without a submission from the Advocate General.

Advocates General are also vested with supervisory functions and can interfere with litigation on their own initiative. According to Art. 62 of the Protocol (№ 3) in the cases provided for in the Treaty on the Functioning of the European Union, where the First Advocate General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court. The Court of Justice shall decide whether or not the decision should be reviewed.

4. The essence of the legal nature of the person providing legal assistance to the judge

Comparing the legal nature of the Advocate General and the legal expert in Ukraine, we seek to find out the legal support for the functioning of the legal expert according to the purpose of his appearance in the domestic litigation.

The legal nature of the Advocates General lies in their similarity to the status of judges of the Court of Justice of the European Union. A legal expert is a participant in the trial, he may be involved in litigation under conditions determined by the procedural law at the discretion of the judge.

In most cases, the Court of Justice of the European Union considers cases with the assistance of the Advocates General. The Advocate General's Opinion is not binding on the Court in its decision, but in practice the Court generally always takes into account the Opinion of the Advocate General. At the same time, the involvement of an expert in law in litigation is not necessary in the current legislative certainty, and at the same time it degrades the status of a judge. The legislator does not state that the experts in the field of law are involved in the most important cases, but outlines the focus of their involvement.

It is common ground that the Advocate General, as well as the legal expert in Ukraine, provide legal assistance to the court in the form of its own opinion in a particular case.

5. Conclusions

The result of changes in the procedural codes in Ukraine was the emergence of a new participant to the case – a legal expert (an expert in the field of law). Issues related to the involvement of the legal expert can be divided into two groups. The first one is the shortcomings of the legislation in determining the requirements for the personality of the legal expert: education, professionalism, citizenship, etc. The second group of problems relates to the competence of an expert in the field of law in litigation. In particular, it is an expert's opinion on the application of the analogy of law and legal act. The fact that the application of law and legal act by analogy has always been considered a prerogative of the court, and therefore the involvement of an expert in law in these matters is inappropriate, is most objectionable. The imperfect legal regulation of the expert in law institute cannot ensure its proper functioning.

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ЕКСПЕРТ ІЗ ПИТАНЬ ПРАВА В ГОСПОДАРСЬКОМУ ПРОЦЕСІ УКРАЇНИ

Анотація. ***Мета статті*** – з'ясувати поняття та правову природу експерта в галузі права в господарському судочинстві, його повноваження; обґрунтувати різницю у значенні в господарському процесі експерта та експерта в галузі права; визначити недоліки й можливі переваги включення до складу учасників судового процесу експерта в галузі права; дослідити іноземний досвід із відповідного питання.

Методи дослідження. Роботу виконано на підставі філософсько-світоглядних, загальнонаукових та спеціально-наукових методів пізнання. У процесі роботи використовувалися історичний, логіко-юридичний, діалектичний, порівняльно-правовий, системно-структурний і деякі інші методи.

Результати. Унаслідок уніфікації правового регулювання господарського, цивільного та адміністративного процесів уперше з'явився новий учасник судового процесу, якого назвали експертом у галузі права (експертом із питань права). Розглянуто правове становище експерта в галузі права, його повноваження та процедурні питання його участі тощо. Важливим є дослідження пов'язаних питань, зокрема аналогії права й закону, про що експерт у галузі права приймає висновок. Увагу приділено також порівнянню українських і європейських норм регулювання участі в судовому процесі експерта в галузі права та генеральних адвокатів для надання кваліфікованої правової допомоги судді.

Висновки. Проблеми, які стосуються участі експерта в галузі права, можна умовно поділити на дві групи. До першої належать недоліки законодавства у процесі визначення вимог до особи експерта в галузі права: освіта, професійність, громадянство тощо. Друга група проблем стосується повноважень експерта в галузі права в судовому процесі. Зокрема, йдеться про висновки експерта з питань застосування аналогії закону та права. Найбільше заперечень викликає той факт, що засто-

сування права та закону за аналогією завжди вважалося прерогативою суду, а тому залучення експерта із цих питань є недоречним. Недосконала правова регламентація інституту експерта в галузі права не може забезпечити належне його функціонування.

Ключові слова: позов, експерт із права, експерт у галузі права, експерт із питань права, генеральний прокурор, кваліфікована юридична допомога судді.

The article was submitted 16.12.2021
The article was revised 06.01.2022
The article was accepted 26.01.2022