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LOSS ADJUSTING FOR BREACH OF THE OBJECT SAFEGUARDING AGREEMENT (ON THE EXAMPLE OF THE PROTECTION POLICE OF UKRAINE)

Abstract. ***Purpose.*** The aim of the Article is provide a comprehensive analysis of the issue of loss adjusting for breach of the Object Safeguarding Agreement by the Protection Police of Ukraine. For this purpose, a set of legal acts of Ukraine regulating this issue have been processed, as well as scientific works of Ukrainian and foreign scholars concerning this problem have been studied. ***Research methods.*** The research used general scientific and special methods of legal science, in particular, dialectical method, analysis and synthesis method, logical and semantic method, hermeneutic method, normative and dogmatic method, statistical method. ***Results.*** As the result of the study, it has been established that currently the Ukrainian legislation does not provide for standard Object Safeguarding Agreement. Thus, in order to properly protect the rights and interests of the parties to this agreement, we have analyzed the current legislation of Ukraine and the case law to determine what types of harm and to what extent are they subject to compensation. It has been substantiated that the Protection Police of Ukraine is responsible only for damages caused in certain ways (theft, robbery, etc.) and compensate only direct damage; the loss of profit and non-pecuniary damage are not subject to compensation. By relying on the research, it has been proved that full responsibility on the Protection Police would be an obstacle to the conclusion of the Object Safeguarding Agreement. ***Conclusions.*** As Ukrainian law does not enshrine a standard contract for the protection of the object, the parties are entitled to specify its terms on their own, including the features of bringing the parties to responsibility in case of non-performance or improper performance of the contract. The magnitude of the damage to be reimbursed is limited by the amount of direct damage caused to the owner of the protected property. The limited liability of the Protection Police is due to the impossibility of establishing full control over the protected property, the risky nature of the contract, the transfer of the object under protection without prior inspection of the property.

Key words: Object Safeguarding Agreement, Protection Police of Ukraine, improper performance, damage, compensation, direct damage, non-pecuniary damage, loss of profit.

1. Introduction

According to Article 41 of the Constitution of Ukraine (Law of Ukraine 1996), everyone has the right to own, use and dispose his (her) property, the results of his (her) intellectual, creative activities. No one can be unlawfully deprived of property rights. The right to private property is inviolable.

Thus, the protection of material values of individuals and legal entities is one of the priority tasks of the State, which is implemented within its competence by all its agencies, including law enforcement ones. Indeed, according to paragraph 20, Part 1, Article 23 of the Law of Ukraine "On the National Police of Ukraine" (Law of Ukraine 2015), the police protect indi-

viduals and objects of private and communal property on a contractual basis. To perform this task, the Protection Police began its activities, which, following Article 13 of the above Law, operates as part of the National Police of Ukraine.

Therefore, the Protection Police is a territorial body of the National Police of Ukraine, which, in accordance with its tasks, protects objects of State property, individuals and objects of private law and communal property in cases and in the manner prescribed by law.

Today, the Protection Police guard individuals and objects of the State, communal and private property on a contractual basis. The powers most inherent in the Protection Police in the area of contractual relations can be highlighted by referring to Article 23 of the Law of Ukraine "On the National Police of Ukraine":

1) protection of objects of State property in cases and in the manner prescribed by law and other regulations, as well as participation in the implementation of State protection (Paragraph 19);

2) protection of individuals and the objects of private and communal property on a contractual basis (Paragraph 20).

The Protection Police guard the property of citizens and individuals on the basis of an agreement concluded in accordance with the requirements of the Civil Code of Ukraine (Law of Ukraine 2003). Accordingly, the Protection Police will be held liable for breach of contract. As the law does not currently provide for standard contracts for the protection of objects, the parties have the right to determine its terms, including the conditions of bringing the parties to civil liability in case of non-performance or improper performance of the Object Safeguarding Agreement. Thus, the parties to the contract establish the grounds for civil liability, the amount of damages to be reimbursed, the conditions of release from liability, etc. However, in order to prevent abuses by either party and to properly protect the property, it is necessary to determine the conditions and the procedure for compensation of damage caused by the Protection Police of Ukraine.

A set of foreign and domestic scholars have devoted significant attention to the issues of safeguarding agreement in their research papers.

In particular, S. P. Dovbii (2013) carries out in his work the legal analysis of theoretical and practical issues that arise in connection with the paid provision of property protection services. The study defines the scope of the contractual form of regulation of the relations under investigation, comprehensively examines the civil law contract for the protection of property as a legal model of behavior of participants in these relations, which reflects their specifics and characteristics. The author investigates the essence of the safeguarding agreement, its legal nature, its place in the system of contract law and proposes his own concept of the Safeguarding Agreement. Attention is paid to the peculiarities of concluding and executing this contract, as well as the grounds and conditions of liability under the agreement.

The aim of the study by M. A. Lytvynova (2007) is to determine the legal nature of the Safeguarding Agreement and clarify the features of its conclusion, its content, the peculiarities of execution and liability of the parties to the contract. In addition, the author analyses the issues of the legal status of the organizations engaged in protection activities.

The purpose of the research by A. M. Liniev (2009) is to solve civil law problems arising from the conclusion of the safeguarding agreement, to create and justify a scientific basis for the legitimate application of legal norms relating to the obligation to protect property.

O. V. Milkov (2007) carries out scientific substantiation of the civil law nature of the Safeguarding Agreement, a scientific analysis of theoretical and practical problems that arise in the performance of the agreement, develops the proposals for the regulation of security relations, generalizes regulatory and doctrinal provisions with regard to the safeguarding agreement.

However, the issue of loss adjusting for breach of Safeguarding Agreement received little attention in the scientific literature, so this problem will be the subject matter of our study.

The methodological basis of the study is the dialectical method and other methods and techniques of scientific knowledge. With the help of the logical and semantic method the conceptual apparatus was expanded (in particular, the concepts of Safeguarding Agreement, losses, direct damage, loss of profit, non-pecuniary damage, etc.). Using the method of analysis and synthesis, the characteristics of the Safeguarding Agreement were determined and the grounds and conditions for compensation of damages caused by the Protection Police for non-performance or improper performance of the contract were established. Using the hermeneutic method and normative and dogmatic method, the provisions of the regulations governing compensation for damages for non-performance or improper performance of the Safeguarding Agreement (Civil Code of Ukraine, Law of Ukraine "On Security Activities", etc.) were studied. The statistical method

was used in considering the Ukrainian jurisprudence on the issue under consideration, as well as the case law of the European Court of Human Rights.

2. Contracts for the provision of protection services

The contracts for the provision of services for the protection of property and individuals are concluded following the provisions of the Civil Code of Ukraine (Law of Ukraine 2003). According to Article 978 of this legal act under the contract of protection, the security guard, which is a business entity, undertakes to ensure the integrity of persons or property, which are protected. Thus, based on the content of this article, there are two types of Safeguarding Agreement: the agreement on protection of an individual and the agreement on the protection of property (Object Safeguarding Agreement).

In accordance with paragraph 4, Article 1 of the Law "On the Security Activity" (Law of Ukraine, 2012) protection of property is the activity on establishment and practical implementation of security measures aimed at ensuring the inviolability, integrity of the owner and his (her) buildings, structures, territories, waters, vehicles, currency values, securities and other movable and immovable property, in order to prevent and / or stop illegal actions against this property, to preserve its physical condition, to terminate unauthorized access to it.

Protection of an individual is the activity on establishment and practical implementation of protection measures aimed at ensuring the personal safety, life and health of an individual (group of individuals) by preventing the negative direct impact of factors (acts and omissions) of illegal nature.

3. Specifics of the responsibility of the Protection Police

The specifics of the responsibility of the Protection Police is manifested in the fact that they are not responsible for all damages caused by improper performance of the terms of the Object Safeguarding Agreement, but only for those caused in certain ways: theft by hacking locks, windows , shop windows and fences; in other ways as a result of failure to provide proper protection or as a result of non-compliance the procedure for export (import) of inventory kept at the protected object; thefts committed as a result of robbery or burglary; by destruction or damage caused to property by third parties who broke into the protected object, or because of other reasons due to the fault of the officers of the Protection Police (Abramov, 2001, p. 90).

In N. P. Voloshin's opinion "the guard is liable only for stolen property; if the thieves damaged the property as a result of theft, the guard is not responsible for these damages" (Voloshin, 1962, p.55).

Their views are shared by S. P. Dovbiy, who believes that the mechanism of compensation for damages under the Object Safeguarding Agreement would be fairer to design not on the principle of liability for the offense, but on the principle of risk- sharing. In this case, it is possible to expand the responsibility of the guard for the accident, i.e. without taking into account the guilt, but only in the case of property damage caused by criminal encroachment (Dovbii, 2013, p. 88).

This point of view is criticized by E. D. Sheshenin, who believes that such a statement is contrary to the principles of civil liability. The guard should be held accountable for all damages caused by burglary. Establishment of this rule will allow to use the civil and legal form of protection of property in full (Sheshenin, 1964, p. 320).

Yu. P. Kosmin adheres to the opposite point of view: "the failure to receive income has a negative effect on the planned and financial indicators of the owner, on the amount of contributions to premiums and other funds of the enterprise. Therefore, the Object Safeguarding Agreement should be supplemented with an indication that the losses to be reimbursed also include the income not received by the owner. Full property liability, the potential possibility of its application will be an important incentive for the proper organization and implementation of protection of objects (Pidopryhora & Bobrova, 1997, p. 324).

In his turn, O. V. Milkov argues that liability in any case arises only in the event of non-performance or improper performance of the obligation to protect. The form of expression of non-performance or improper performance depends on the characteristics of the subject of a particular contract, the content and specifics of the security service provided under the contract. Based on this, the specific method of inflicting damages under the Object Safeguarding Agreement does not matter. The main thing is that the damages are in causal relationship with the non-performance or improper performance the obligations under the agreement (Milkov, 2007, pp. 21 – 22).

We share the first point of view of scientists and believe that the Protection Police should compensate only for damage caused by the theft of inventory items and other property transferred to protection, during the protection of the object, committed by theft, robbery, robbery, as a result of failure to ensure proper protection. After all, Article 978 of the Civil Code of Ukraine states that under a security

contract, a security guard, which is a business entity, undertakes to ensure the integrity of an individual or property, which is protected. The inviolability of property can be violated by strangers entering the premises where it is kept during the protection period by breaking, opening or destroying windows, doors and other structures blocked by technical means of alarm and committing the above illegal acts as a result of improper performance of the Protection Police of their contractual obligations (Panchenko 2017, 100).

4. Compensation for damages in case of breach of the contractual obligation

In case of breach of the contractual obligation, there are legal consequences established by the contract, including compensation for damages. According to the legislation of Ukraine, losses are: direct damage and loss of profit (Article 22 of the Civil Code of Ukraine). It should be noted that only direct damage is subject to compensation under the Object Safeguarding Agreement; loss of profit, as a component of losses, is not reimbursed.

This rule is universal and is of imperative nature. Two views are expressed in the scientific legal literature in this regard: some scholars argue for limiting the amount of liability of the Protection Police, while the others propose to proceed from the general rule on the full compensation of damages, i. e. not only direct damage but also loss of profit should be compensated. Thus, G. P. Chub understands under the concept of loss the damage caused by theft of property. In her opinion, the Protection Police is not liable for damage or destruction of property inside the guarded apartment, and for losses caused to the owner by damage to the premises. According to the author, the methods used to protect apartments do not prevent the intrusion of outsiders. Therefore, the Protection Police cannot be blamed for damage to property. Security alarms, by reporting the violation of the integrity of the protected object, contribute to the detention of persons who entered the object, and consequently – the theft of property. Timely identification of these persons provides an opportunity for the owner, in case of damage to the apartment and property, to sue the direct perpetrators of damage (Chub, 1973, pp. 13 – 14).

V. I. Smirnov does not agree with her statement, because then the issue remains unresolved: whom to sue in case of damage or destruction of property, if the direct perpetrators of the damage are not detained due to the fault of the guard? The scientist believes that the Protection Police should compensate the owner not only for damage caused by theft due to their fault, but also for damage caused by damage or destruction of property in the apartment, except for damaged doors and windows blocked by alarm, because the operation of the burglar alarm is connected with their damage (Smirnov, 2001, pp. 139 – 140).

In practice, there is also a dual approach to addressing this issue: some customers of security services restrict the guard's liability for damages by a certain amount, including the value of stolen or damaged property, damaged inventory, as well as the costs spent on the restoration of damaged property, i.e. only by direct losses. The others insist on the full financial liability of the security guard.

However, according to S. P. Dovbiy, the imposition of responsibility on the guard in full will not contribute to the development of this socially necessary sphere of services. This will lead to the fact that when agreeing on the terms of the contract, the security guard will have to choose the most effective, but also the most expensive method of protection to minimize the level of risk. One way or another, the guard has to form a kind of fund or to insure their civil liability. In this case, the high cost of the service may be an obstacle to the conclusion of the agreement. Secondly, it should be borne in mind that the security service is provided in respect of property that remains in the possession of the owner (i.e. without transferring it into the possession of the guard), and therefore the guard is unable to establish full control over it, and, consequently, to guarantee a positive result. Thirdly, the protection of property is carried out, as a rule, without prior inspection, description and assessment of its value. The guard does not always have information about the changes that have occurred in the composition of the protected property, although these changes can significantly increase the risk of illegal encroachment, and hence the need for additional protection measures (Dovbii, 2004, p. 42).

In our opinion, in resolving this issue, it will be sufficient to provide the parties with the opportunity to envisage the penalty or otherwise to define the limits of liability in case of breach of an obligation in a particular Object Safeguarding Agreement. In so doing, the rules set out in Article 6 of the Civil Code of Ukraine regarding the correlation of the acts of civil law and the contract must be taken into account.

This point of view is also supported by M. Litvinova, who believes that, as a general rule, this type of contract is characterized by limited liability of the security organization, which is due to the following circumstances: the inability to establish full control over the protected property; risky nature of the contract; transfer of the object under protection

without prior inspection of the property kept on the protected object. In connection with the above, the full liability of the security organization under the contract is possible only if such liability is established in the agreement itself (Litvinova, 2007, p. 16).

It should be noted that there is also a tendency to deviate from the principle of full compensation for damage towards the establishment of maximum limits of property liability in the legislation of Western European countries. The main reason for this trend is that today many economic activities are associated with the danger of causing severe losses, which far exceed the financial capabilities of the entrepreneur.

5. Proving the amount of damage caused to the customer of security services

Proving the amount of damage caused to the customer of security services due to improper performance of the terms of the Object Safeguarding Agreement is another problematic issue. If the customer is a legal entity, the establishment of the amount of damages can be carried out on the basis of the following documents: the act of inventory of property signed by the authorized representatives of the parties; information on the book value of the stolen property at the time of the accident; copies of the description of the property kept in the premises, which was taken under protection; an act on the opening of the protected premises, signed by the authorized representatives of the parties; act from the relevant police department on the initiation of a criminal case on the fact of theft; set-off act (compensation for damages at the expense of the cost for security services provided).

But how to find out the magnitude of the damage, if the customer of security services is an individual, who cannot prove the value of stolen or damaged property, which was in the guarded apartment (private house)? After all, only a few people keep checks and receipts for all purchases, and some valuables can be donated or bequeathed, so the victim does not even imagine their approximate value.

Civil law enshrines the principle according to which the burden of proving damages caused by breach of obligation rests with the creditor (Part 2, Article 623 of the Civil Code of Ukraine). Therefore, the magnitude of the damages caused by improper performance of the Safeguarding Agreement is proved by the customer of security services. If he (she) has no evidence to support the scope of the claims, the court has the right to deny the claim. There is a situation when the fact of inflicting damages is not in doubt, but there is no proper evidence to confirm their magnitude, and therefore, it is impossible to obtain adequate compensation for these losses.

One of the options for resolving this issue is found in paragraph 3, Article 7.4.3 of the "Principles of International Commercial Contracts", which states that where the magnitude of the damage cannot be established with a sufficient degree of certainty then, rather than refuse any compensation or award nominal damages, the court is empowered to make an equitable quantification of the harm sustained (UNIDROIT, 2016).

According to most researchers, the guard is liable to the customer for damages within the value of the property assessed by the customer at the conclusion of the contract. In this case, the magnitude of the damage should be confirmed by the relevant documents drawn up involving the guard (Bychkova, 2014, p. 272).

A. Linev emphasizes that it is not a specific property but a certain room in which this property is located is transferred under protection. Depending on its overall monetary value and the percentage of the value of the stolen (destroyed or damaged) the amount of compensation should be determined. In other words, compensation must be made in the amount of the direct actual damage caused as a result of improper performance of the contractual obligations. Thus, the value of the property, which is kept in the guarded objects, can vary significantly in each case. In this regard, the content of contracts concluded often includes a condition regarding the total value of the property placed under protection, according to which the amount of payments for protection services may vary (Liniev, 2009, p. 18).

The value of stolen property from the premises of citizens is determined based on current retail prices, taking into account depreciation and amortization. Losses to be reimbursed include the value of stolen or destroyed property, the amount of reduction in the price of damaged inventory, the costs incurred to restore damaged property, the amount of stolen money, as well as jewelry. At the same time, the guard's liability for stolen cash and jewelry made of precious metal or stone is usually limited to ten and, respectively, twenty times the minimum wage, which should encourage the customer to store valuables in specially adapted places (such as bank or safes). The guard is also responsible for the stolen antiques, but provided that the customer gave him a notarized, compiled by competent specialists, description and assessment of the value of antiques at the time of concluding the contract.

In our opinion, the customer of security services should independently or with the help of third parties assess the property that will be transferred for storage, and indicate its price in the Object Safeguarding Agreement. The Pro-

tection Police will be liable for non-performance or improper performance of the agreement within this amount. This approach is the most applicable in practice, because it allows the owner to cover all or a part of direct losses and the amount of loss profits in the event of damage.

However, as Ye. A. Kharytonov correctly notes, the rule that the guard's liability is limited by the value of the deposited property specified in the relevant document does not waive the right of the customer of security services to insist on reimbursement of the value of the guarded property above the assessment specified in the document, if he (she) is able to prove higher value of lost, missing or damaged property (Kharytonov, 2007, p. 872).

It has been suggested in the scientific literature that when concluding an Object Safeguarding Agreement, in which the owner of the property is an individual, the latter is a weak party to the contract. In order to protect his (her) property interests, it is necessary to establish the rule, by which in case of non-performance or improper performance of security obligations and the fact of causing damage to an individual, the amount of damage may be determined by the court taking into account the facts of the case (Litvinova, 2007, p. 16).

We believe that such a practice may exist in the relevant legal relationship between an individual and the Protection Police, as in some cases the intangible value of the property to the owner significantly exceeds its real value and damage resulting from its theft or damage. For example, a stolen painting that has been passed down from generation to generation may not have significant material value, but it can be extremely pricey for its owner.

However, this rule should not apply to legal entities, as the establishment of a legal entity should be subject to the presumption of proper training of its staff to participate in civil turnover. Therefore, conscientious legal entities should independently calculate the amount of their losses, while the absence of such a calculation should be classified as dishonesty.

6. The issue of compensation for non-pecuniary damage

The issue of compensation for non-pecuniary damage caused to the customer by the Protection Police under the Safeguarding Agreement is also important. As a general rule, a person has the right to compensation for non-pecuniary damage caused as a result of a violation of his (her) rights. A case-law study shows that breach of any contractual obligation may give rise to non-pecuniary damage in proceedings before a court of first or appellate instance.

Unfortunately, the courts of cassation have come to the opposite opinion: in case, in which compensation for non-pecuniary damage is not directly enshrined in the agreement, and there is no law providing for compensation of non-pecuniary damage in the legal relationship between the parties, the claim for compensation for non-pecuniary damage should be denied. The view of the Supreme Court of Ukraine on the possibility of compensation for non-pecuniary damage caused by non-performance of an obligation arising from the contract is similar (Supreme Court of Ukraine 2008).

At the same time, the possibility of compensation for non-pecuniary damage for violations of the terms of the contract are enshrined in articles 611, 700, 1076 of the Civil Code of Ukraine. Based on the content of Article 611 of the Civil Code of Ukraine in case of breach of obligation there are legal consequences established by contract or law, including compensation for damages and non-pecuniary damage. Thus, today there is a difference in opinions, both in the literature and in practice on compensation for non-pecuniary damage in cases of breach of contract.

The case law of the European Court of Human Rights significantly differs from the Ukrainian one regarding this issue. As an example, let us cite the Judgement of the European Court of Human Rights in the case of "Novoseletsky v. Ukraine" of 22 February 2005 (paragraphs 22, 76). According to this decision the ECHR was "particularly struck by the fact that the court rejected the applicant's claim for damages, on the ground that the law made no provision for compensation in respect of non-pecuniary damage in landlord-tenant disputes". The indicated determines the conditions of application of Articles 23, 1167 of the Civil Code of Ukraine and recognizes compensation for non-pecuniary damage as a general method of protection, regardless of the predictability of this right in special laws.

However, nowadays non-pecuniary damage caused by improper performance of the Object Safeguarding Agreement by the Protection Police is not compensated.

Finally, it should be noted that the damages caused by improper performance of the obligations under the concluded civil law contracts by the Protection Police of Ukraine are compensated at the expense of the funds received from the performance of these contracts.

7. Conclusions

Thus, currently the Ukrainian legislation does not provide for standard Object Safeguarding Agreement, and therefore the parties have the right to determine its terms on their own, including the grounds for bringing the parties to responsibility in case of non-performance or improper performance of this agreement, the amount of compensation for damage caused

by improper performance of contractual obligations, etc. In order to properly protect the rights and interests of the parties to the Object Safeguarding Agreement, we have analyzed the current legislation and case law in order to determine what types of harm and to what extent are subject to compensation.

Besides, it has been substantiated that the specifics of the responsibility of the Protection Police of Ukraine is that they are not responsible for all damages caused by improper performance of the terms of the Object Safeguarding Agreement, but only for those caused in certain ways (theft, robbery, etc.).

It has been proved that the magnitude of the damage to be reimbursed is limited by the amount of direct damage caused to the owner of the protected property; the loss of profit and non-pecuniary damage are not subject to compensation, unless specifically provided by contract or law. If, in addition to compensation for damages, the parties to the contract stipulate the payment of a penalty, it is subject to recovery in full.

The limited liability of the Protection Police is due to the impossibility of establishing full control over the protected property, the risky nature of the contract, the transfer of the object under protection without prior inspection of the property. Imposing full responsibility on the Protection Police will lead to the choice of the most effective but also the most expensive method of protection in order to minimize the risk of incurring the damages. In this case, the high cost of the service may be an obstacle to the conclusion of the agreement.

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ВІДШКОДУВАННЯ ШКОДИ ЗА ПОРУШЕННЯ ДОГОВОРУ ОХОРОНИ ОБ'ЄКТА (НА ПРИКЛАДІ ПОЛІЦІЇ ОХОРОНИ УКРАЇНИ)

Анотація. ***Мета.*** Метою статті є комплексний аналіз питання відшкодування збитків за порушення договору охорони об'єкта поліцією охорони України. Із цією метою опрацьовано низку нормативно-правових актів України, що регулюють це питання, а також досліджено наукові праці українських та зарубіжних вчених з цієї проблематики. ***Методи дослідження.*** У дослідженні використовуються загальнонаукові та спеціальні методи юридичної науки, зокрема: діалектичний метод, метод аналізу і синтезу, логіко-семантичний метод, герменевтичний метод, нормативно-догматичний метод, статистичний метод. ***Результати.*** У результаті дослідження встановлено, що наразі законодавством України не передбачено типового договору про охорону об'єкта, тому з метою належного захисту прав та інтересів сторін цього договору ми проаналізували чинне законодавство України та судову практику з тим, аби визначити, які збитки та в якому обсязі підлягають відшкодуванню. Обґрунтовано, що поліція охорони України несе відповідальність лише за збитки, завдані певним чином та відшкодовує лише пряму шкоду; втрачена вигода та моральна шкода відшкодуванню не підлягають. На основі проведеного дослідження доведено, що повна відповідальність поліції охорони була б перешкодою для укладення договору охорони об'єкта. ***Висновки.*** Оскільки українське законодавство не передбачає типового договору про охорону об'єкта, сторони мають право самостійно визначати його умови, в тому числі особливості притягнення сторін до відповідальності у разі невиконання або неналежного виконання цього договору. Розмір шкоди, що підлягає відшкодуванню, обмежується розміром прямої шкоди, заподіяної власнику майна, що охороняється. Обмежена відповідальність поліції охорони пов'язана з неможливістю встановлення повного контролю за охоронюваним майном, ризикованим характером договору, передачею об'єкта під охорону без попереднього огляду майна.

Ключові слова: договір охорони об'єкта, поліція охорони України, неналежне виконання, шкода, відшкодування, пряма шкода, моральна шкода, упущена вигода.

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