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Model of Review on Newly Discovered or Exceptional Circumstances in the Civil Proceedings of Ukraine

1. Introduction

Building the rule of law in Ukraine has the task of ensuring the rights, freedoms and legitimate interests of people. With this aim the Constitution of Ukraine enshrines the right of everyone to judicial protection and the possibility to appeal in court against decisions of public authorities, including judicial ones. The institute of appealing court decisions really allows to ensure the making of a lawful, reasonable and fair decision. At the same time, situations when it is necessary to review court decisions not for a judicial error, but in the presence of other grounds exist. In view of this, the procedural legislation of our state enshrines the institution of the review of court decisions that have entered into force, based on newly discovered or exceptional circumstances. Thus, such review is an additional guarantee of making a fair judicial decision.

The relevance of the review of court decisions is resulted from the importance of realization of the right to a trial and from the significance of the correct resolution of the civil cases. Considering that, procedural scholars devote their work to the study of this topic, in particular: I. An-

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dronov, I. Bondar, K. Husarov, V. Komarov, N. Sakara, H. Tymchenko, O. Tkachuk, and others.

The aim of this study is to determine the features of the review of court decisions that have entered into force on newly discovered or exceptional circumstances, to discover the differences between this institution and the institution of appeal, and to analyse the review procedure by newly discovered or exceptional circumstances in the civil proceedings of Ukraine.

2. The review of court decisions as the procedural guarantee

The essential importance of the possibility of judicial protection of the rights, freedoms and legitimate interests of individuals is evidenced by the normative consolidation of the right to a fair trial at the international level, in particular in Art. 6 of the European Convention on Human Rights²; and by a number of normative acts of domestic legislation, namely in Art. 55 of the Constitution of Ukraine³; in Art. 7 of the Law of Ukraine «On the Judiciary and the Status of Judges»⁴; in Art. 4 of the Civil Procedure Code of Ukraine⁵.

The content of the right to a fair trial is considered a multifaceted category, opinions on the elements of which differ at the doctrinal level. However, taking into account a broad approach, it should be noted that the components of the right to a fair trial include the entry into force of a court decision, which in turn determines its finality and binding nature, also meaning the impossibility of its review⁶. This is due to the principles

² Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.1950 [in English].

³ Constitution of Ukraine no. 254k/96-vr. (1996, June 28). Vidomosti Verkhovnoi Rady Ukrainy, 30, 141 [in Ukrainian].

⁴ Law of Ukraine on the Judiciary and the Status of Judges no. 1402-VIII. (2016, June 2). Vidomosti Verkhovnoi Rady, 31, 545 [in Ukrainian].

⁵ Civil Procedural Code of Ukraine no 1618-IV (2004, March 18). Vidomosti Verkhovnoi Rady Ukrainy, no. 40–41, 42, 492 [in Ukrainian].

⁶ See, for instance, Tkachuk O. (2016). Problemy realizatsii sudovoi vlady u tsyvilnomu sudochynstvi [Problems of realization of judicial power in civil proceedings]. Kharkiv: Pravo [in Ukrainian]; Pohoretskyi M., Hrytsenko S. (2012). Pravo na spravedlyvyi sud [The right to a fair trial]. Visnyk Kyivskoho natsionalnoho universytetu imeni Tarasa

of legal certainty and *res judicata*, which are the basis for the establishment of the rule of law.

In view of the above, it seems that the review of court decisions that have entered into force violates their finality. However, in the legislation of many democratic countries the legal framework for reviewing judicial decisions that have entered into force exist to ensure the rights and freedoms of individuals. The civil procedure legislation of Ukraine also provides for the possibility of reviewing decisions that have entered into force in cassation and on newly discovered or exceptional circumstances. Although these two mechanisms are guarantees of the administration of civil justice, they differ in legal nature as they have different tasks and their own characteristics.

Thus, when it comes to detecting and eliminating a judicial error, a court decision that has entered into force is reviewed by a court of higher instance in cassation. In this case, the correctness of the application of substantive law and/or compliance with procedural law in the consideration and resolution of the case by the courts of previous instances is checked. Instead, while reviewing a court decision on newly discovered or exceptional circumstances the court, taking into account certain circumstances that objectively could not be taken into account when considering and resolving the case on the merits, may change the court decision, which has entered into force to achieve goals of civil proceedings. Therefore, when reviewing on newly discovered or exceptional circumstances, the judgment is not examined for judicial error, but for certain circumstances that could significantly affect the judgment if they were known at the time of the civil case's resolving.

Consequently, the review on newly discovered or exceptional circumstances is an effective mechanism to ensure the right to a fair trial and should be considered as an additional guarantee of civil proceedings, as it allows to establish the true circumstances of the case in full, which existed but were not known at the time of the trial and as a result ensures that a reasoned decision is made after the review. Equally important

Shevchenka. *Yurydychni nauky*, no. 91, pp. 4–8 [in Ukrainian]; Trehubov E. (2010). *Pravo na spravlyvyi sud v praktytsi yevropeiskoho sudu z prav liudyny* [The right to a fair trial in the practice of the European Court of Human Rights]. *Forum prava*, no. 1, pp. 358–363 [in Ukrainian].

that case law of the European Court of Human Rights determines such review of court decisions as one that does not contradict the principle of legal certainty, if it takes place in compliance with national law⁷.

3. The features of the institution of review of court decisions on newly discovered or exceptional circumstances

When regarding the specifics of the review on newly discovered or exceptional circumstances, it should be noted that the object of such review is the decisions that have entered into force. So, it can be all court decisions defined by part 1 Art. 258 of the Civil Procedure Code of Ukraine: decree; decision; resolution; court orders, which finally record the case resolving results. The fact that the court decision has entered into force is evidenced by the presence of certain features, which in the theory of civil procedural law are defined as: exclusivity, irrefutability, immutability, prejudicial, binding and enforceable⁸.

Simultaneously, given the fact that decisions that have entered into force may be reviewed in cassation, one of the defining features that distinguishes the institution of cassation appeal and the review on newly discovered or exceptional circumstances is the determination of the court authorized to review the decision. As a general rule, the review of decisions on newly discovered or exceptional circumstances of the first instance is carried out by the same court, and the decision of appeal and cassation reviewing in accordance with the instance that changed or adopted a new court decision. An exception is the consideration of an application for review by the Grand Chamber of the Supreme Court of an international court decision whose jurisdiction is recognized by Ukraine, for Ukrainian's violation of international obligations in resolving a case, due to the importance of international obligations for our country as a state governed by the rule of law.

⁷ See, for instance, *Bochan v. Ukraine* no. 22251/08 (ECHR, 5 February 2015); *Zheltyakov v. Ukraine* no. 4994/04 (ECHR, 9 June 2011); *Ponomaryov v. Ukraine* no. 3236/03 (ECHR, 3 April 2008).

⁸ Havrik R.(2008). *Sutnist ta zmist zakonnoi syly rishennia sudu u tsyvilnii spravi* [The essence and content of the legal force of a court decision in a civil case]. *Universytetski naukovy zapysky*, no.2(26), pp.79–86 [in Ukrainian].

Due to the importance of reviewing a court decision, reviewing on newly discovered circumstances has been known for a long time. In each historical period there were special grounds and the specifics of the revision procedure were determined. The need to ensure the rights, freedoms and interests of the individuals, led to constant legislative changes in order to find the most successful mechanism for reviewing court decisions that have entered into force. Amendments to the Law of Ukraine «On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts» divided the grounds for reviewing a court decision that entered into force into newly discovered and exceptional circumstances⁹.

Therefore, the current civil procedural legislation of Ukraine refers to the newly discovered circumstances the following grounds: essential to the case circumstances that were not and could not be known to the person filing the statement during trial; established by the court sentence which entered into the force, deliberately false testimony, knowingly incorrect expert opinion, deliberately wrong translations, false documents or physical evidence that caused the adoption of illegal or unreasonable decision; cancellation of a court decision, which became the basis for a decision or resolutions that are subject to revision.

Whereas the exceptional circumstances by the Civil Procedure Code of Ukraine are: established by the Constitutional Court of Ukraine unconstitutionality (constitutionality) of the law, other legal act or its separate provisions applied (or not applied) by the court in deciding the case, if the court decision is pending; recognition of judicial decisions of the international judicial institution, whose jurisdiction is recognized by Ukraine, as that violates the international obligations of Ukraine; established by the court sentence that has entered into force, the judge's guilty of a criminal offense, as a result of which a court decision was approved.

⁹ Law of Ukraine on amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts no. 2147-VIII (2017, October 3). Vidomosti Verkhovnoi Rady, 48, 436 [in Ukrainian].

4. The procedure of the review on newly discovered or exceptional circumstances

The current Civil Procedure Code of Ukraine does not divide the civil procedural form of review of court decisions separately on newly discovered and exceptional circumstances. In fact, Chapter 3 of Section 5 of the Civil Procedure Code of Ukraine contains rules governing the consideration of cases on newly discovered and exceptional circumstances in general. Undoubtedly, there are certain peculiarities in the procedure of reviewing a court decision in certain newly discovered or exceptional circumstances, taking into account the distinctness of such grounds. However, in general, the procedure is as follows.

The subjects of appeal with a request for review on newly discovered circumstances or exceptional circumstances are participants in the case, under which, in accordance with Art. 42 Civil Procedure Code of Ukraine understand the parties (plaintiff and defendant), third parties in the proceedings (third parties who claim independent demands on the subject of the dispute and third parties who do not claim independent demands on the subject of the dispute); the applicant and the debtor in the injunction proceedings; applicants and interested persons in cases of separate proceedings; as well as agencies and persons who by law have the right to go to court in the interests of others.

Additionally, public authorities, local governments, individuals and legal entities may apply to the court to protect the rights, freedoms and interests of others and participate in civil cases. In particular, the right to apply for a review of a court decision on newly discovered or exceptional circumstances is enshrined in the Ukrainian Parliament Commissioner for Human Rights, the prosecutor, and the National Agency on Corruption Prevention.

Furthermore, it should be noted that an application for review of the court decision on newly discovered or exceptional circumstances may be filed by the successor of the person involved in the case, in event of death, termination of the legal entity, replacement of the creditor or debtor or in other cases of replacement of a person in a relationship in respect of which a dispute has arisen, if such succession is possible. In

this case, the succession may occur regardless of the type of proceedings and as determined by the law at any stage of the trial (Art. 55 of the Civil Procedure Code of Ukraine).

With regard to the deadlines for filing an application for review of a court decision on newly discovered or exceptional circumstances, it should be noted that civil procedural law distinguishes between general and special deadlines, and sets a different time limit depending on the circumstances that justify such review.

Thus, an application for review on newly discovered circumstances in the case of identification of essential for the case circumstances, which were not established by the court and were not and could not be known to the person filing the application at the time of the case – may be filed within thirty days from the date when the person has learned or could have learned about the existence of circumstances that became the basis for review of court decisions, but not later than three years from the date of entry into force of such a court decision.

The procedural term for applying for a review on other newly discovered circumstances is also thirty days. In this case, this period may be deducted from the moment of entrance into force of the sentence (decision) in criminal proceedings; or from the date of entry into force a decision revoking the judgment which became the basis for the decision to be reviewed.

The term for filing an application for review on exceptional circumstances is thirty days, which, depending on the grounds for review, are determined: from the date of official publication of the relevant Constitutional Court of Ukraine decision; or from the day when the person learned or could have learned that the decision of the international judicial institution, the jurisdiction of which is recognized by Ukraine, had have the status of final; or from the day when the verdict in the criminal proceedings came into force.

Concurrently, the general term for filing an application for review of a court decision in the specified circumstances is ten years from the date of entry into force of the relevant court decisions. The establishment of a general term is an important condition for compliance with the principle of legal certainty, so p. 3 of Art. 424 of the Civil Procedure Code of Ukraine enshrines the impossibility of renewing such a term, and the

Secretary of the High Specialized Court of Ukraine for Civil and Criminal Cases once pointed out that regardless of the validity of the pass, violation of the general procedural term is grounds for refusing to open proceedings, in contrast with special term, which can be renewed at the request of the party to the case to renew the missed term (paragraph 13 of the Resolution of the Secretary of the Supreme Specialized Court of Ukraine for Civil and Criminal cases № 4 from 2012, May 30¹⁰, which is still using by courts while the review on newly discovered or exceptional circumstances).

Part 2 of Art. 426 of the Civil Procedure Code of Ukraine determines the content of the application, which, given the specifics of the review of the court decision on newly discovered or exceptional circumstances, in addition to general details, should indicate: date and content of the court decision which is asked to review; newly discovered or exceptional circumstances that substantiate the request for review of the court decision, the date of their opening or establishment; references to evidence confirming the existence of newly discovered or exceptional circumstances. The list of obligatory supplements to the application for review of the court decision on newly discovered or exceptional circumstances, which includes: copies of the application according to the number of participants in the case; document on payment of court fee; evidence confirming the existence of newly discovered or exceptional circumstances; a document confirming the authority of the representative of the person submitting the application, if the application is signed by such a representative; in case of missing the term for submission of the application – a request for its renewal.

Certain peculiarities have also been established with regard to the application for review on the basis of the establishment by an international judicial institution whose jurisdiction is recognized by Ukraine of Ukraine's violation of international obligations in resolving a case by a court. If the applicant does not have an appropriate decision, a request for a copy of the decision of the international institution shall be made from the body responsible for coordinating the execution of the

¹⁰ Resolution of the Secretary of the Supreme Specialized Court of Ukraine for civil and criminal cases «On the application of civil procedural law in the review of court decisions on newly discovered circumstances» no. 4 (2012, March 30) [in Ukrainian].

decisions of the international judicial institution (currently such a body for the judgements of European Court on Human Rights is the Ministry of Justice of Ukraine in accordance with paragraph 1 of the Cabinet of Ministers Resolution from 31 May 2006 № 784 «On measures to implement the Law of Ukraine “On the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights»¹¹).

Within five days after the receipt of the application for review of the court decision on newly discovered or exceptional circumstances, the judge or judge-rapporteur (in case of filing an application with the court of appeal or cassation) checks it for compliance with the law requirements in form and content and decides to open the proceedings on newly discovered or exceptional circumstances or to leave such application without motion. The decision to leave the application without motion shall indicate the shortcomings of the application and the term for their elimination, which may not exceed ten days from the date of delivery of such decision. In case of non-payment of the court fee, the decision also sets the exact amount of the court fee to be paid. After the opening of the proceedings, the court sends the parties application copies and appoints the date, time and place of the hearing, about which notifies the parties.

The stage of consideration of the application for review of the court decision is regulated by Art. 429 of Civil Procedure Code of Ukraine and determines that the application for review on newly discovered or exceptional circumstances is considered by the court in court within thirty days from the date of initiation of proceedings. In determining the review procedure, the provisions of the Civil Code of Ukraine on proceedings in the court of the instance that carries out the review shall apply. In turn, in the court of first instance such consideration is carried out in the order of simplified claim proceedings with the notification of the participants in the case.

In general, analysing the consideration of the application for review of the court decision on newly discovered or exceptional circumstances, and taking into account the case law, it can be concluded that the stage of consideration of the application for review has two stages. Firstly,

¹¹ Resolution of Cabinet of Ministers of Ukraine On measures to implement the Law of Ukraine “On the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights, no. 784 (2006, May 31) [in Ukrainian].

the court should establish the fact of existence of newly discovered or exceptional circumstances. Secondly, the court decision should be reviewed taking into account such circumstances (paragraph 17 of the Resolution of the Secretary of the Supreme Specialized Court of Ukraine for Civil and Criminal cases № 4 of March 30, 2012).

One of the peculiarities of reviewing a court decision on newly discovered or exceptional circumstances is also that when reviewing a court decision, the court may not go beyond those requirements that were the subject of consideration when making a judgment under review, consider other claims or other grounds of the claim (P. 5 Art. 423 of the Civil Procedure Code of Ukraine). This provision is also a direct guarantee of the principle of legal certainty and eliminates the possibility for unscrupulous participants in the case to abuse procedural rights.

Therefore, in accordance with Art. 429 of the Civil Procedure of Ukraine, based on the results of review of the court decision on newly discovered or exceptional circumstances, the court may: refuse to satisfy the application for review of the court decision on newly discovered or exceptional circumstances and leave the relevant court decision in force; satisfy the application for review of the court decision on newly discovered or exceptional circumstances, cancel the relevant court decision and make a new decision or change it; cancel the court decision and close the case or leave the claim without consideration. The Supreme Court has also power to cancel a judgment (or judgments) in whole or in part and remand the case to a court of first or appellate instance. Besides, the court decision made as a result of review of the court decision on newly discovered or exceptional circumstances may be reviewed on general grounds in the appellate or cassation procedure.

Conclusions

To summarize, the features of reconsideration on newly discovered or exceptional circumstances are that the object of review is a court decisions in a broad sense (which must meet two conditions: such decisions must finally record the outcome of the case, and such a court decision must enter into force); applications for review of decisions that have entered into force shall be considered by the same court that issued the

court decision for review of which the applicant requests; there should be special circumstances as grounds for review, the list of which is clearly provided by law, and is exhaustive; the review of newly discovered or exceptional circumstances has specific civil procedural form, expressed through the term of appeal for review, determination of the subjects of appeal to the court with a request for review of the court decision, the form and content of such application, the procedure for refusing the application, the procedure for opening proceedings, consideration and resolving of the case of the review on newly discovered or exceptional circumstances.

Last but not least, separately such a feature of review of a court decision on newly discovered or exceptional circumstances was defined as the aim of review, because it, in contrast to review of a decision that has entered into force, by a higher court, is not to identify and eliminate the judicial error. This is argued by the fact that in the absence of newly discovered or exceptional circumstances, which became known after the entry into force of the court decision, it is legal and reasonable, such that it was adopted on the basis of full clarification of the circumstances of the case. Thus, the discovery of specified circumstances does not call into question of the legality and validity of the court's decision, but only indicates that, in the presence and taking into account such circumstances, the court could have decided the case differently.

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Summary

The article is devoted to the institution of review of court's decisions on newly discovered or exceptional circumstances, which is considered as a mechanism to ensure the right of everyone to a fair trial. The key features of the institution of review of court decisions on newly discovered or exceptional circumstances, which distinguishes such review from the review by courts of higher instances are considered, such as aim, object and subjects of review. In particular, it was

determined that the object of review may be court decisions that have entered into force and which have completed the proceedings; the subject of review is the court of the instance that made the decision, for review of which the applicant requests; the grounds for review may be only the grounds defined by law as newly discovered or exceptional circumstances, and decisions are reviewed not on the subject of judicial error, but in connection with the identification of the outlined circumstances. The general characteristic of the procedure of review of court decisions on newly discovered or exceptional circumstances in the civil process of Ukraine is given.

Keywords: fair trial, civil process, judicial error, procedural guarantee, a fair judicial decision