

АКТУАЛЬНА ПРОБЛЕМА

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COURT PROTECTION GUARANTEES OF FOREIGN CITIZENS' PROPERTY RIGHTS

The article is dedicated to the issue of the specifics of legislative regulation and practice of foreign citizens' protection of their constitutional property rights in Ukrainian courts. The problem is analyzed in terms of the issue of foreign investments protection guarantees as one of the directions of current reforms in Ukraine.

Key words: court protection, foreign citizens, constitutional property rights, enforcement procedure, judgment.

Problem statement. According to the recently approved Strategy of Sustainable Development «Ukraine-2020» «Deregulation and Enterprise Development» And «Program on Attraction of the Investment» were proclaimed as one of the 62 reforms, which should be performed in Ukraine. Under this reform in order to support the investment activity and investors' protection it is necessary based on best world practice to ensure the effective protection of private property, including by means of the judiciary, to harmonize the provisions of the legislation of Ukraine on protection of national and foreign investors and creditors, protection of economic competition with the EU legislation, to introduce the incentive mechanisms of investment activity. Also according to the Strategy Ukraine should be promoted under the brand message: «Ukraine — is a hub for investments» [1].

Thus the Strategy identifies the judicial protection of property rights of foreign nationals as one of the most important steps towards ensuring of the investment climate and business development in Ukraine.

Analysis of recent researches and publications. Some theoretical aspects of judicial protection of foreign citizens' rights are covered in the works of the civil law scientists, particularly Bigun V. [2; 88], Fedyniak L. [3; 15], Yakimenko A. [4; 80] as well as the experts in private international law, such as Boguslavskiy M. [5; 345], etc. However, in constitutional law there is no complex study devoted to the analysis of legislative guarantees of foreign nationals' constitutional right to judicial protection of their property rights.

Paper purpose. Given the before-mentioned reasoning the purpose of the article is to figure out the condition of guarantees of judicial protection of foreign nationals' property rights, to define the most important problems that hinder their protection as well as possible solutions of such problems.

Paper main body. The rules on the free access of foreign citizens to the justice are provided for in international treaties of Ukraine. According to Art. 1 of The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, concluded between the countries — members of the CIS, the citizens of each state as well as those who live in its territory enjoy in the territory of other states — parties to the Convention the same legal protection of their personal property rights as well as the citizens of the state. The citizens of each state, as well as other persons living on its territory, have the right freely and easily to go to court, prosecutors and other agencies of other countries, whose competence includes civil, family and criminal cases, can act in such bodies, present petitions, file lawsuits and perform other procedural acts on the same conditions as nationals of that state. These provisions also apply to legal entities established under the laws of each state [6].

Thus, the procedural protection is provided for the citizens and legal persons of the contracting party, and in accordance with the Art. 1 of the Convention — persons residing in the territory of each country. The volume of legal protection is determined by national regime.

The similar provisions are usually stated in the bilateral international agreements. For example, Article 1 of the Agreement on Legal Assistance in Civil and Criminal Cases between Ukraine and China provides that citizens of one state shall enjoy in the territory of the other state the same legal protection of their personal and property rights, as well citizens of their own country. They have the right to go to court and other agencies, whose competence includes civil (commercial, business, marriage and family, labor) and criminal cases, and may present the petitions and carry out other proceedings under the same conditions as the citizens of their own country. This provision shall also apply to legal entities established in the states in accordance with their legislation [7]. Similar rules are stipulated in the Agreement between Ukraine and the Republic of Georgia on Legal Assistance and Legal Relations in Civil and Criminal Cases [8] and other bilateral agreements.

As for the national legislation of Ukraine, it does not set any restrictions of legal protection to foreign citizens' rights, they are guaranteed the right to free and unimpeded protection in the courts of Ukraine.

According to Art. 26 of the Constitution of Ukraine, foreign citizens and stateless persons who reside in Ukraine on legal grounds enjoy the same rights

and freedoms and bear the same responsibilities as citizens of Ukraine, with some exceptions established by law [9]. Part 1 of Art. 73 of the Law of Ukraine «On International Private Law» stipulates that foreign persons have the right to apply for protection of their rights, freedoms and legitimate interests in the courts of Ukraine [10].

In particular, according to Art. 410 of the Civil Procedure Code of Ukraine foreign natural and legal persons, stateless persons, foreign governments (their bodies and officials) and international organizations have the right to apply for protection of their rights and legal interests to the courts of Ukraine and can be subjects of civil legal proceedings [11].

Thus, the law of Ukraine establishes the national legal regime for the protection of the rights and interests of foreigners, which means that foreign citizens, stateless persons, foreign organizations are applied the same treatment as for individuals and legal entities of Ukraine and they have the same procedural rights. With that the spread of the national regime principle on the above persons is based on the principle of absoluteness, that is not associated with any mandatory requirements for their residence in the territory of Ukraine and others.

Civil and commercial procedural capacity and capability of a foreign citizen are determined by the law of the state of which he is. However, even if the person under the law of his own state is not procedurally capable, it can be recognized as such on the territory of Ukraine, if he has civil procedural capability in accordance with the procedural legislation of Ukraine. Legal capacity of the foreign legal entity is determined by the law of the state in which it is registered. Because of this the legal standing of this category of procedural relations participants must be confirmed by documents of the appropriate state, which have to be legalized with the features defined in the convention abolishing the requirement of legalization for foreign public documents [12].

Consequently, the Ukrainian national law, which determines the procedural legal rules, subject-matter jurisdiction and jurisdiction of cases with a foreign element, procedural status of the case participants, applies to natural and legal persons of foreign states regardless of the presence in their state of law, which determines the equivalent rights for individuals and legal entities of Ukraine.

However, it should be noted that declarative equality of procedural rights of Ukrainian citizens and foreign citizens, unfortunately, is not always a guarantee of protection of their rights in practice.

Thus, the foreign national having passed all the complexity of the formal judicial process in Ukraine and received the judgment faces the necessity of its enforcement, which in the property disputes often means the necessity of the recovery of a certain amount of money from the defendant. Herewith often in the cases with a foreign element the amount, which has to be recovered, is determined in the judgment according to the currency of the infringed obligation, which is usually stated in a foreign currency.

If the foreign citizen reside in Ukraine, has a bank account in national currency and has no objections against the receipt of the recovered amount in

national currency (despite the fact that according to the judgment the amount should be recovered in the foreign currency), then he unlikely will face the bureaucracy of the State enforcement office of Ukraine and in general will be satisfied with the justice and state bodies of Ukraine.

However, the situation described above generally in practice is more the exception than the rule, because most of the foreign citizens and legal entities want their funds to be returned back on their personal bank accounts abroad, because usually they do not have any accounts in the national currency in Ukraine.

But it is necessary to point out that since 2011 in terms of the Law of Ukraine «On Enforcement Proceedings» this situation should not cause any problems in practice, because Art. 53 provides that when the amount of debt should be recovered in the foreign currency enforcement officer in case of presence of the debtor's funds in the relevant currency is obliged to collect the funds in foreign currency to the accounts of the state enforcement office for their further transfer to the bank account of the plaintiff. In the case of presence of the funds in hryvnia or other currency the enforcement officer instructs the bank to purchase the relevant currency purchase and transfer of foreign currency to the account of the state enforcement office [13].

However, the practice in Ukraine shows that enforcement officers do not act under the law automatically, but only in case of active position of foreign citizens, which are forced to fight for their constitutional rights for the appropriate judgment enforcement.

In most cases, due to the incompetence and relative vulnerability of foreign nationals, enforcement officers collect the funds in national currency and ignore their statutory obligations on the purchase of currency. After that, during a year the enforcement officers formally requested from the creditor his bank account in hryvnia details, which often does not exist. For example, if the creditor is a foreign legal entity, in order to open an account in the national currency it needs to register in Ukraine an official representation, which is very complex, time-consuming and expensive procedure.

If within one year since the funds were collected the creditor did not submit the details of his bank account in local currency, under Art. 45 of the Law of Ukraine «On Enforcement Proceedings» the funds are automatically transferred to the state budget, and enforcement proceedings are closed [13].

In some cases, during the year the foreign citizens manage to force the enforcement officers to comply with the requirements of law. Usually this can be achieved by judicial appeals against the actions of the enforcement officer, or by complaints to the higher authorities, appeals through diplomatic channels and raising the issue in the media.

It is needless to say that this experience of return of the investments, moreover by means of judicial protection, for a long time discourages the investors' interest in Ukraine, and in some cases even leads to a baseless state appropriation of foreign investments.

Conclusions. To conclude the article we would like to emphasize that despite the presence of some gaps in legislation as well as conflicting rules, to-

day the problem in law enforcement practice make even explicitly prescribed and just obligatory for regulation of investment relations standards. It is obvious that the situation of nihilism by public authorities of their duties, which all by itself constitute not only guarantees of the constitutional right to court protection, but also the constitutional right to private property, is simply not acceptable in the light of the global legal reform in Ukraine.

Impeccable execution of such an important stage of justice as the enforcement of the judgment should become an integral feature of the Ukrainian justice, and do not leave any opportunity for corruption and abuse. Confidence in the ability to protect through the court the property rights, namely investments, should be a signal for the growth of the activity of foreign investors in Ukraine.

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ГАРАНТІЇ СУДОВОГО ЗАХИСТУ МАЙНОВИХ ПРАВ ІНОЗЕМНИХ ГРОМАДЯН

Резюме

У статті досліджено актуальні питання стану гарантій судового захисту майнових прав іноземних громадян в Україні, передусім з точки зору захисту іноземних інвестицій, що є однією з основ інвестиційної привабливості держави. На підставі аналізу норм Конституції та прийнятих на її виконання законів зроблений висновок про те, що декларативні гарантії судового захисту, закріплені в Основному законі, часто не знаходять своєї реалізації на практиці у зв'язку із недотриманням державними органами норм закону, зокрема, на етапі виконання рішення суду, що призводить до порушень прав іноземних громадян, створює умови для корупції і зловживань, що, у свою чергу, негативно впливає на умови ведення іноземними громадянами бізнесу в Україні.

Ключові слова: судовий захист, іноземні громадяни, конституційні майнові права, виконавче провадження, рішення суду.

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**ГАРАНТИИ СУДЕБНОЙ ЗАЩИТЫ ИМУЩЕСТВЕННЫХ ПРАВ
ИНОСТРАННЫХ ГРАЖДАН**

Резюме

В статье исследованы актуальные вопросы состояния гарантий судебной защиты имущественных прав иностранных граждан в Украине в первую очередь с точки зрения защиты иностранных инвестиций, являющейся одной из основ инвестиционной привлекательности государства. На основании анализа норм Конституции и принятых во имя ее исполнения законов сделан вывод о том, что декларативные гарантии судебной защиты, закрепленные в Основном законе, зачастую не находят своей реализации на практике в связи с несоблюдением государственными органами норм закона, в частности, на этапе исполнения решения суда, что приводит к нарушениям прав иностранных граждан, создает условия для коррупции и злоупотреблений, что в свою очередь негативно влияет на условия ведения иностранными гражданами бизнеса в Украине.

Ключевые слова: судебная защита, иностранные граждане, конституционные имущественные права, исполнительное производство, решение суда.