INTERPRETATION OF CONTRACT: ENGLISH-UKRAINIAN CONVERGENT PARALLELS

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SUMMARY

The article deals with the problem of contractual interpretation in the Ukrainian civil law. Findings of investigation demonstrate that the main cause of conflict between the legislation and judicial practice is the absolutization of the literal interpretation doctrine in Ukraine. Encouraged to promote the convergence of the English and Ukrainian jurisprudences. The comparative analyses leads to the conclusion that in order to harmonise the contract interpretation rules in force in Ukraine with European law, first of all it is necessary to remove the found differences.

Key words: Ukrainian civil law, judicial practice in Ukraine, contractual interpretation, literal interpretation doctrine.

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В статье рассматривается проблема интерпретации договоров в украинском гражданском праве. Результаты исследования показывают, что основной причиной конфликта между законодательством и судебной практикой является абсолютизация доктрины буквального толкования в Украине. Рекомендуется содействовать сближению доктрин английского и украинского права. Сравнительный анализ приводит к выводу, что в целях гармонизации действующих в Украине правил толкования договора с европейским правом, в первую очередь, необходимо устранить выявленные различия.

Ключевые слова: гражданское право Украины, судебная практика в Украине, интерпретация договоров, доктрина буквального толкования.

A. Introduction: Interpretation-free Contracts

According to the historical tradition in Ukraine and other post-Soviet countries, the concept of 'Legal Interpretation' means statutory interpretation of only law not that of contracts.

This thesis is confirmed by the most authoritative in Ukraine 6-volume 'Juridical Encyclopaedia' (editor-in-chief - academician Iuriy S. Shemshuchenko; 1998—2004). The entry 'Interpretation of Contracts' or 'Contractual Interpretation' is absent from the edition. This makes an impressive case in favour of the reality of the legal interpretation tradition now.

Like in other countries there are three basic interpretation theories in Ukraine,: (1) literalism, (2) objectivism, (3) subjectivism [1, p. 17-34]. It is the first (literalism) that is leading. Let us examine this using the material of Ukrainian legislation.

B. Transactional Interpretation Rules: Legal novelsor 'Old Maid'

Notes of historical interest are appropriate here. It is generally known, that the previous Ukrainian codified civil acts, namely the Civil Code of the Ukrainian Soviet Socialist Republic (Ukr.SSR) of December 16, 1922 (brought into force on February 1, 1923) and Civil Code of the Ukr.SSR of July 18, 1963 (brought into force on 1 January 1964) did not contain principles and rules of contractual interpretation.

For the first time during the Soviet period, the order of contractual interpretation was provided for by Soviet Model Civil Code, that was entitled as 'Fundamentals of Civil Legislation of the USSR and the republics' (May 31, 1991). The term 'interpretation of contract' was given in article 59 of this Act. As a result of the collapse of the Soviet Union, 'Fundamentals - 1991' were not officially implemented in the legislation of Ukraine.

Ukrainian legislative terms 'interpretation of the contents of a transaction' and 'interpretation of the agreement provisions' were introduced by the creators of the Civil Code of Ukraine on January 16, 2003, which came into force on 1 January 2004. So this Code establishes very important legislative innovations - the rules of interpretation of transactions (Article 213) and contracts (Article 637, which makes reference to art. 213) [2].

Parts One and Two of Article 213 outline a range of persons who are competent to interpret transactions (contracts):

1. The contents of a transaction can be interpreted by a party (parties).

2. At the request of one or both parties, a court may take a decision on the interpretation of the contents of a transaction.

Analysis of the follow content of this article (parts 3 and 4) clearly indicates that this norm is based on the literalism theory.

3. In the interpretation of the contents of a transaction, the meaning of words and expressions uniform for the whole content of the transaction and the meaning of terms generally accepted in the appropriate field of relations shall be taken into account.

In case the literal meaning of words and expressions as well as the meaning of terms generally accepted in the appropriate field of relations does not allow establishing the content of certain parts of the transaction, the content shall be established by comparing the relevant part of the transaction with the content of other parts thereof, its general content and intentions of the parties.

4. Where it is impossible to establish the true will of the person that concluded the transaction on the basis of regulations set forth in paragraph 3 of this Article, the

purpose of the transaction, the contents of previous transactions, the established practice of relations between the parties, business circulation customs, subsequent conduct of the parties, the text of a typical contract and other circumstances that are of considerable importance shall be taken into account.

For reasons of space we omit the proof of the true sources of these legislative approaches to the interpretation of contracts. Suffice it to say that Article 213 of the Civil Code of Ukraine nearly verbatim et literatim (word for word) duplicates Article 426 ('Interpretation of a contract') of the model of Civil Code for the States of CIS, which was adopted by the Inter-Parliamentary Assembly of the Commonwealth of Independent States in 1994-1995 and then enacted by most States, sometimes with certain modifications.

Other acts of the Ukrainian legislation do not regulate the interpretative process. For example, the Economic Code of Ukraine (January 16, 2003 # 436-IV) does not contain any rules of interpretation.

It is fair to it has to add that principles and rules of interpretation of contracts have a different conceptual basis in the current legislation of Moldova, which, unlike Ukraine, is an official member of the Commonwealth of Independent States (CIS).

Thus, the Civil Code of the Republic of Moldova, which contains specific Chapter VI ('Interpretation of a contract' art. 725-732), states that (1) The contract must be interpreted in accordance with the principle of good faith. (2) The contract shall be interpreted according to the common intent of the parties, without confining them to the literal meaning of the terms used. (Article 725. Principles of Contract Interpretation) [3].

C. Brief theoretical notes: The formal resemblance

There is one remark of particular significance – literality is the first criterion for the authentic understanding of the legal text in English law too.

Nothing can be said against it. As early as the 17th century, in Confession of Faith Ratification Act 1690 (law in force) was prescribed:

AN oath is to be taken in the plain and common sense of the words without equivocation or mentall reservation It cannot oblige to sin but in any thing not sinfull being taken it binds to performance although to a mans own hurt nor is it to be violated although made to hereticks or infidels [4].

Whatever the appearances, such legislative innovations (as those in the Ukrainian Civil Code) give rise to questions, rather than answers.

The fact is that the Ukrainian *literal interpretation rule* is not balanced by other principles, the *golden rule* [5] and *mischief rule* [6] in particular as is the case in English law.

Such a coherence of these three ways combines modes of contextual and purposive interpretations on the basis of common sense. As is often the case a combination of different rules compensates for the main drawback of the principle of literal or textual interpretation – its tolerance for absurdity [7].

There is no need to delve into the theoretical aspects of the choice of the dominant interpretation theory. But there is a nature-imposed necessity for investigation of the applicability of the literal interpretation doctrine in the context of Ukrainian reality.

D. Alarm situation: Litigation v. Legislation

It is a safe bet, that among all the contractual issues of hermeneutics the interpretation of the arbitration clause by the courts of Ukraine is the most difficult problem.

What is the reason for that?

It appears that the similar situation develops for one simple reason. In accordance with the prevailing legal doctrine in Ukraine, epy jurisdictional monopoly is the exclusive competence of the state and traditionally refers to the sphere of vital interests of the government.

In this connection it should be noted that in 2005 the Ukrainian Legal Group for the World Bank under the grant of the Government of the Netherlands proposed many amendments, which should be made to the Civil Code, primarily the following:

- to add provisions that allow for the protection of civil rights not only in the courts of the state court system, but also in arbitration tribunals and international commercial arbitration;

- to limit the right of the courts (the state court system), stipulated in Article 213 of the Civil Code, to make decisions concerning the interpretation of the contents of a production-sharing agreement [8].

These proposals have already been implemented, but only partially.

Cautious optimism is largely related to a set of laws introducing amendments to the procedural legislation of Ukraine in arbitration-related matters.

These laws ware adopted by The Ukrainian Parliament at the beginning of 2011 and the amendments have filled many gaps in Ukrainian legislation.

Ukrainian lawyers point out that the provisions of the laws raise certain concerns: 'The imperfect wording of the said laws provides an opportunity for ambiguous interpretation of their provisions. Only with progression of time and through formation of court practice in this regard will real meaning and significance of these provisions for arbitration in Ukraine be established' [9].

However, there is conflicting case law on this issue in our country, as noted by Ukrainian experts and practitioners in the field of arbitration.

The illustrative cases for that are controversial decisions of the Supreme Court of Ukraine and one of the Regional Commercial Court. Back in October 2010, the highest court in Ukraine refused to recognize an award because of ambiguities in the wording of the arbitration clause. On the other hand, just several weeks before the Supreme Court's decisions came out, the Regional Commercial Court of Cherkassy upheld an arbitration clause providing for arbitration 'at the claimant's location'[10].

This thereby introduces doubts about sufficient predictability of judicial decisions by the Ukrainian courts on recognition and enforcement of foreign arbitral awards.

In these cases the unification of legislative acts does not help, because the state courts in our country have the opportunity to hide behind the letter of the law and the contract and to realize

their own interests legally, calling that 'protection of the public interests of the state'.

Thus the problem of application of law is not just a matter of legal technique, but a question of legal interpretation or understanding of the law.

E. Conclusion: How could it be otherwise?

Ukrainian civil and procedure laws are certainly changing and will change, but a more modernistic view of legislators and the judicial community does not seem to be developing in the near future in our country. At least, it is not to happen by itself, without any influences or interference from the outside.

Of course, there is an all-sufficient way, which was given by the great Confucius: 'It does not matter how slowly you go so long as you do not stop'. Unfortunately, it requires unlimited resources of time and people.

However, there is a proven way toward Supreme Justice, which gives the necessary result just now. That is the use of common case law by Ukrainian persons.

So, English law provides all the necessary procedural grounds for consideration of international contractual disputes in the courts of common law. In this context we must refer to the ancient general legal principle *jura novit curia* (the court knows the law) and the three modern common law *presumptions of the foreign law* [11]. Thus in a deeper sense, this principle and the presumptions allow any combination of foreign and English laws to resolve conflicts of jurisdiction and qualifications.

Incidentally, the Ukrainian legislator recognizes the unpopular in continental Europe, but implemented in Britain, idea of 'legal biotechnology', meaning the possibility of 'dividing' a legal act into parts, these to be governed by different legal systems [12]. This technique is provided by Law of Ukraine 'On Private International Law' (Article 5) [13].

Oscar Wilde cleverly said: 'Experience is simply the name we give our mistakes'. European experience of justice shows that the English courts are more suitable for merchants than consumers. This attitude contrasts with the Ukrainian courts and arbitral practice and it should be interesting for our business. It is surprising why this interest is not realized widely enough? The unconscious behavior is caused by the *path dependence* of Ukrainian businessmen. Threats and difficulties cause people to do what they repeatedly did in the past.

This leads to the conclusion that there is a need for more study and promotion of the English law in Ukraine. This should be joint work for the British and Ukrainian lawyers. That is not 'child's play', but it can give a solid, fundamental result - the real coming into effect of the contractual freedom in our country.

And finally, one of the first steps in this direction is the establishment of the new academic discipline 'European contract law' at Kyiv National Economic University named after Vadym Hetman in 2008. Of course, the English law of contracts is a common thread in this course.

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