ущерб, причиненный вследствие неисполнения или ненадлежащего исполнения своих прав и обязанностей.

Выводы. Для более эффективного воздействия организационно-правовые средства обеспечения законности должны быть объединены во взаимосвязанную единую систему. Часть организационно-правовых средств обеспечения законности прямо закреплена в законодательстве, а некоторые из них выведены теоретически и требуют своего практического применения. Усовершенствованию их системы и повышению эффективности поспособствует реализация предложенных нами дополнительных мер, а именно: введение обязательного периодического внешнего аудита финансовой деятельности; предусмотрение в локальных нормативно-правовых актах системы санкций за нарушения должностными лицами правил и обязанностей; а также создание производственной комиссии как специального контролирующего органа в с/х перерабатывающих кооперативах.

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THE LITERAL SENSE OF TEXT AND COMMON SENSE IN CONTEXT: THE CONTRACT INTERPRETATIONS IN UKRAINE AND OTHER COUNTRIES

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SUMMARY

The article addresses the problem of compliance of the Civil Code of Ukraine (art. 213 and art. 637) with the European tradition of interpreting international transactions, international trade law and the legislation of the European Union. The comparative analyses leads to the conclusion that in order to harmonize the contract interpretation rules in force in Ukraine with international and European law, first of all it is necessary to remove the found differences. If this suggestion is accepted, the criteria of objectivism and subjectivism will take precedence over the criteria of literalism in our country.

Key words: interpretation, transaction, contract, civil law, harmonization of legislation.

* * *

В данной статье рассматривается проблема соответствия норм Гражданского кодекса Украины (ст. 213 и ст. 637) европейской традиции интерпретации международных сделок, международному торговому праву и законодательству Европейского Союза. Сравнительный анализ приводит к выводу, что в целях гармонизации действующих в Украине принципов и правил толкования договора с международным и европейским правом в первую очередь необходимо устранить выявленные различия. Если это предложение будет принято, то критерии объективизма и субъективизма наконец-то будут иметь необходимый приоритет над критерием литерализма в нашей стране.

Ключевые слова: интерпретация, сделка, договор, гражданское право, гармонизации законодательства.

Introduction. The aim of this paper is to dicovers the content of the contract interpretation rule in the civil legislation of Ukraine in the context of various European legal systems.

The present day theses and monographs on the problems of legal interpretation in Ukraine provide evidence that there has not been sufficient scientific research into the issues of contract interpretation of this country's civil law. Developing this area of research is necessary taking into account the fact that it is interpreting international contracts which involves interconnected issues of overcoming the differences in language, legal technique and style that has become a burning problem.

GOOD FAITH IN ANTIQUE CONTEXT: INTERPRETATION EX FIDE BONA V INTERPRETATION EX STRICTO IURE

All roads lead to Rome. Since ancient times Private Law has followed the European tradition of broad contract interpretation. In Ancient Rome, a long-standing concept called *iudicia stricti iuris (strict actions)* existed in parallel with iudicia bonae fidei *(actions of good faith)*, the latter being different from the former in that they judged the claims of the parties by using the good faith criterion *(oportere ex fide bona)* and thus judges being more flexible about legal interpretation.

They chose the head of an ordinary family – the good family man (lat. *bonus pater familias*) who was a man of common sense and rational by nature (lat. naturalis *ratio*) to be an example of bona fides (Gai. D. 9. 2. 4). Examples of such natural rationalism were the so called judgments of a bona fide person

or arguments of a good-natured man (*lat. boni viri arbitratu*) that seem similar to the maxims of common sense or rules of logic.

Primary sources of the Roman Private Law provide convincing evidence that in interpreting the contents good faith agreements (lat. *contractiones bonae fidei*) the Romans chose to take into account the will of the parties rather than adhere to the strict letter of the law. It was prescribed that more attention be given to what was meant than to what was said in contracts of that kind (Pomp. D. 18. 1. 6. 1).That famous Roman lawer Papinian formulated this conception as follows: *In conventionibus contrahentium voluntatem potius quam verba spectari placuit* – it was determined that the will of the contracting parties rather than their words should be taken into consideration (Pap. D. 50. XVI. 219).

Modern western scientists researching the civil law pay particular attention to contract interpretation. There are three competitive theories of contract interpretation in Europe: (1) *literalism* which states that the interpretation should be strictly limited to the lexical meanings of the words in the contract; (2) *objectivism* which requires that the document be examined as a whole, taking into account the objective circumstances and conclusions, among which are the subject of the contract, the trade customs, and the law in force; (3) *subjectivism* which makes essential the parties' own intentions and carrying them out during negotiations prior to conclusion of the contract [1, XIII].

NEW UKRAINIAN INTERPRETATION RULES: ONE STEP FORWARD, TWO STEPS BACK

An analysis of the law in force in Ukraine shows that literalism lays the base for Article 213 of the Civil Code of Ukraine. For instance, Part 3 of this article clearly states that

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.

Further, in order that there should be no doubt about priority of literalism in interpreting the Civil Code further provides:

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

Article 637 of the Civil Code of Ukraine has the reference point, Part 1 of which states that the contract interpretation shall be performed according to Article 213 of this Code' [2].

Article 213 of the Civil Code of Ukraine in many ways repeats Article 426 of the Model of Civil Code for the States of CIS, Part One (1994) which states, in particular, that in interpreting the terms of a contract the court shall take into account the literal meanings of the words and expressions which the contract contains. In case the literal meaning of a contract term is unclear it shall be interpreted by matching it to other terms and the content of the contract as a whole.

NEW CONTEXTS FOR OLD RULES: ROMAN-GERMAN MODE OF INTERPRETATION

Substantive rules of European countries' private law reflect the aforementioned conceptions of interpretation in different ways. To establish which of the mentioned theories is preferable in European Contract Law, one must refer to the acts of Civil Law in force in European countries.

For example, the basic principles of interpreting agreements are provided for in Section V – Of the Interpretation of Agreements (art. 1156 to 1164) of the Civil Code of France[3]. Article 1156 of this Code gives evidence that the legislature denies literalism and states that: 'One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms'.

Clearly objectivist instructions are provided for the Article 1161 of the Civil Code of France according to which: 'All the clauses of an agreement are to be interpreted with reference to one another by giving to each one the meaning which results from the whole instrument'.

The corresponding *doctrine misinterpretations (*fr. *dénaturation)* of a contract on the basis of judicial application of this article through the judges' inability to consider all the elements of the agreements concluded by the parties was developed. Misinterpretations should be considered separately from incorrect interpretation as well as incomplete consideration of all the circumstances of a case should be separated from misjudgement about the circumstances. It produces the corresponding procedural results – misinterpretations may be subject to trial by the court of last resort, correctness of the interpretation is established by the court of the first instance[4].

To establish the true will of the parties French judges sometimes employ the declarative interpretation (fr. *l'interprétation déclarative*; lat. *interpretatio deeclarativa*).This type of interpretation makes it possible to correct mistakes in the wording of the text such as inaccuracy, incompleteness and ambiguity.

German Law takes a similar approach. For example, in Book 1 (General part), Division 3 (Legal transactions), Title 2 (Declaration of intent) of German Civil Code (BGB, 1896) provides that interpretation corrective (baronages) should be established on the basis of the following rule: a mistake in the text of a legal transaction shall not result in the demonstration of the false will (lat. falsa demonstration non nocet). Under such conditions interpretation is to be corrective and to make it possible to set the wrong definitions in the text of a transaction right. Such corrections will be legally acceptable if it is proved that mutual consent on the matter in question has been reached (lat. consensus ad idem) but not mentioned in the text of the transaction. In this case the true will of the contracting parties is considered to be above the literal meaning of the text. If it is impossible to establish the true will, a 'hypothetical' will is considered. It follows from Section 133

BGB (Interpretation of a declaration of intent): 'When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration'[5].

COMMON LAW & COMMON SENSE: ENGLISH RULES OF INTERPRETATION

There is no doubt that the literal rule must take the first place in the English Law when applying interpretation procedures to the contents of contracts and other legal documents. The meaning of this rule is clearly stated in the well-known speech made by Lord Esher (William Baliol Brett, 1st Viscount Esher; 1817 – 1899) when the case *R. v. Judge of City of London Court* was being tried:

If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity [6]. The court has nothing to do with the question whether the legislature has committed an absurdity.

This statement is considerably softened by other statutory interpretation rules and also by the golden rule of interpretation. When trying the case *Grey v Pearson* (1857) the judge Lord Wensleydale (James Parke, 1st Baron Wensleydale; 1782–1868) defined this «universal rule» as follows: «the ordinary sense of the words is to be adhered to, unless it would lead to absurdity, when the ordinary sense may be modified to avoid the absurdity but no further» [7].

In the late XX century the issue of refusal to follow the literal rule was raised when trying the cases *Prenn v. Simmonds* (1971) and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* (1976). Almost winged became the phrase of Lord Reid (or James Scott Cumberland Reid, Baron Reid; 1890–1975), which he used in November 1973: «The life blood of the law is not logic but common sense» [8].

However, a critical point in this process was the case *Investors Compensation Scheme v. West Bromwich Building Society* (1997) the decision on which was taken on June 19, 1997 [9]. When the case was being tried in court, Lord Hoffmann (or Leonard Hubert Hoffmann, Baron Hoffmann; born in 1934) representing the majority of the House of Lords told the court that the contract interpretation principles had been 'fundamentally changed' and

'The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of «legal» interpretation has been discarded'.

Not a long time ago, on November 2, 2011 the *Supreme Court of the United Kingdom* created a legal precedent by taking the decision on the case *Rainy Sky S.A. v. Kookmin Bank* [10].

This newly established precedent is frequently associated with the so called *Business Common Sense* in juridical periodicals in English because this decision forms the basis of a universal interpretation rule the main idea of which is as follows:

'where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense' [11].

Despite some criticism of an interpreter's adherence to commercial reality or common sense Lord Hoffmann's approach was acknowledged on the whole by the House of Lords during the trial of BCCI *v Ali* [2001]. Particular attention was given to the fact that there had developed a 'modern English tradition' according to which the parties use their common sense to *avoid grosser excesses of verbiage*. It should be noted that the result was that the mentioned precedent and the rule of *Business Common Sense* became legally enforceable [12].

To sum up a brief analysis of Private European Law it must be emphasized that literalism, which had been followed mainly by English common law courts for many years, lost the leading position in the process of harmonization of the contract interpretation procedure throughout Europe. In their interpretation sand decisions, European judges (English justices in particular) are trying to find a palliative between objectivism and subjectivism, supported by the conception of common sense systematically developed in the XVIII century by Thomas Reid (1710-1796) and other Scottish Common-Sense scholars [13].

HARMONIZATION OF INTERPRETATION: INTERNATIONAL AND TRANSNATIONAL EXPERIENCE

What plays an important role in the process of harmonization of interpretation procedures is one of the most significant acts of European lex mercatoria – the Principles of European Contract Law – 'the common core of European contract law'[14, 109], established as a result of almost 20-years work done by academic lawyers in 1995-2002.

This document provides *General Rules of Interpretation* which reject dogma of literalism outright, Article 5:101 (Ex art. 7.101/ 101A) of which states as follows:

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.

(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances [15].

Further convergence of the contract law of the EU countries will be carried out by means of the so called 'Common Frame of Reference [CFR]', a document including provisions for conclusion, performance and interpretation of a contract. This Frame of Reference is based on «Draft Common Frame of Reference (DCFR)» drawn up by the Study Group on a European Civil Code and the Research Group on EC Private Law [Acguis Group].

In Chapter 8 (Interpretation), Section 1(Interpretation of contracts), Art. II. – 8:101 (General rules) of this document, the general contract interpretation rules are basically the same as the rules stated in Art. 5:101 of Principles of European Contract Law. For instance, Paragraph 1 of this article practically reproduces the subjectivism maxim of interpretation: 'A contract is to be interpreted according to

the common intention of the parties even if this differs from the literal meaning of the words' [16, 216].

This approach has been adopted not only in the legislations of most European countries and the EU Law but also in universal international conventions which are valid in Ukraine. For instance, Article 8 of United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG] brought into force in Ukraine on February 1, 1991 stipulates that interpretation is to be based not on the literal meaning of legal facts but on common sense as the bona fide criterion. Thus, of all the criteria used to interpret any statements and conduct of a certain party, priority is to be given to a party's intention known to the other reasonable party. But if the other party did not and could not know the intention, the interpretation of statements and conduct is to be done according to an understanding that might be shown by a sensible person acting under the same circumstances [17].

ONE PROPOSAL INSTEAD OF A CONCLUSION

Taking into account that (a) the requirement of adaptation of the Ukrainian legislation to the legislation of the European Union has been accepted at state level and included in the corresponding state programn [18], (b) the existing international contracts are not only part of the Civil Law of Ukraine, but also, in case their provisions are not compliant with the provisions of certain civil acts, have priority over them (art. 10, Civil Code of Ukraine), and considering that article 213 of the Civil Code of Ukraine provides the opposite procedure for interpreting the contents of the transactions which is completely opposite to that stipulated in the EU Law as well as in International Law, it is suggested that part 3 of this article should read as follows:

3. In determining the intent of a party or the understanding a reasonable person would have had due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

If this suggestion were accepted it the criteria of objectivism and subjectivism would have priority over criteria of literalism. This is quite necessary, since the history of Private European Law gives evidence that absolutisation of literal interpretation of law and fact was often instrument for abusing the law.

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