

**THE RIGHT TO A FAIR TRIAL
THROUGH THE PRISM OF PROVING WHILE
CONSIDERING COMMERCIAL DISPUTES**

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Abstract. Fair consideration of commercial disputes ensures the interests of entrepreneurs and the interests of the state in the proper and legal conduct of business. For the correct application of the rule of law, it is necessary to establish all the circumstances that are subject to legal assessment. This is precisely what the process of judicial evidence exists for. The purpose of this publication is to analyze recognized scientific approaches, current judicial practice and modern legal regulation in the procedure for submitting evidence in the consideration of commercial disputes. Using the methods of comparison and juxtaposition, the types of evidence known to procedural science and their significance for the validity of judicial decisions are analyzed. It is upon the application of a person, within the limits of the requirements stated by him and on the basis of evidence that a trial in commercial cases takes place. To reveal this issue the dialectical method uses at the work. The methods of abstraction, analysis and synthesis, induction, deduction were used to study the process of proving and its legal significance, the role of the court in this process; the issues of submitting and securing evidence. The predictive method allowed us to understand the significance of evaluating evidence. The results of the research are based on the essence of the proof and establishment of the object of proof. The features of this object are determined. Taking into account the scientific and legally found classifications, the types of evidence are defined in the work. It was identified that the court is the central subject in the evidentiary process. It is the court that coordinates the procedure for submitting, securing and requesting evidence. The practical significance of the obtained research results makes it possible to understand the order and

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significance of evidence evaluation. The work establishes the role of the institution of evidence in ensuring everyone's right to a fair trial, including when considering commercial disputes. This study can be the basis for further searches in the field of evidence, compliance with the principles of the judiciary, determination of the role of the court in ensuring justice.

Introduction

A strategic priority of the policy of modern Ukraine is the establishment of the right to a fair trial as a real guarantee of the protection of human rights and fundamental freedoms and the restoration of public trust in the courts [1, p. 187].

Legal entities and individual entrepreneurs, natural persons who are not entrepreneurs, state bodies, local self-government bodies have the right to apply to the commercial court for the protection of their violated, unrecognized or disputed rights and legitimate interests in cases attributed by law to the jurisdiction of the commercial court, as well as to take measures provided for by law aimed at preventing offenses.

In order to ensure judicial justice, the procedural legislation of Ukraine, among other things, establishes the dispositive principle. It is upon the application of a person, within the limits of the requirements stated by him and on the basis of evidence that a trial in commercial cases takes place. Submission of evidence in the manner established by law is in the personal interests of each of the participants in the case. And as the European Court of Human Rights emphasized, “the correct application of the legislation is undoubtedly a “public interest” [2]. The Code of Commercial Procedure of Ukraine (CCPU) contains a separate Section, the norms of which relate to the institution of evidence.

The purpose of this publication is to analyze recognized scientific approaches, current judicial practice and modern legal regulation in the procedure for providing evidence in the consideration of commercial disputes. At the same time, the objectives of the study are to establish the essence of providing evidence; to determine the types of evidence, taking into account scientific classifications and those enshrined in law; to analyze judicial practice regarding the role of the court in the evidentiary process; to establish the procedure for submitting, requesting and securing evidence; to investigate the procedure and significance of evaluating evidence;

to highlight the role of the institution of evidence in ensuring everyone's right to a fair trial, including when considering commercial disputes.

The court evaluates the adequacy, admissibility, reliability of each singular evidence separately, as well as the probability and mutual relationship of the evidence in their entirety. The correctness of the court's actions affects the correctness of the decision made.

Each person, when applying to the court, expects a fair decision for himself, and the mission of the court is to make the most objectively fair decision.

1. Theoretical and Applied Grounds of Proving

The task of commercial litigation is the fair, impartial and timely resolution of disputes by the court (Article 2 of the CCPU [3]). Litigation in commercial courts is carried out on the basis of adversarial proceedings. Each party must prove the circumstances that are relevant to the case and to which it refers as the basis for its claims or objections, except in cases established by law (Article 13 of the CCPU).

For the correct application of the rule of law, it is necessary to establish all the circumstances that are subject to legal assessment. The truth in the process can only be objective, and at the same time its objectivity is the result of the subjective activity of a person.

Before the court comes to a conclusion about the existence of a subjective right or interest protected by law, it must accurately establish the facts on which the right or interest is based. Legally significant facts, with which the norms of substantive law associate legal consequences, arise and exist, as a rule, before the process, so the court cannot obtain knowledge of them directly, without resorting to evidence and proving [4, p. 12].

The search for objective truth in a judicial process occurs through the knowledge of the actual circumstances of the case. It is the court that is obliged to establish these circumstances. As M. Shtefan also noted, cognition consists of the dialectical unity of the mental and procedural activity of the court and the persons participating in the case, which occurs in the process of submitting, requesting, researching and evaluating the case materials. The scientist divided cognitive procedural activity into types: proving factual circumstances that are clarified during the consideration of the case; establishing by the court of some factual circumstances during

the consideration of the case, through direct observation by the judges in the court session; cognition by the court of the disputed legal relations of the rights and obligations of the parties; cognition, which is carried out by higher judges, in the process of verifying the legality and validity of the court decision [5, p. 264].

According to V. Babenko, *proving in a commercial process* is a logical and practical activity of the court and persons participating in the process to establish the presence or absence of factual circumstances that are important for the correct resolution of the case using means determined by law [6, p. 9]. It is important to note that the process of judicial proving is a set of cognitive activities and procedural actions established by procedural legislation. Here rightly summarizes by T. Stepanova that proving is limited to certain terms, that is, it is impossible to learn the event of an offense endlessly or indefinitely; the object of research is of the so-called "retrospective" nature; the results of knowledge in a commercial process must be placed in the procedural form established by law; it necessarily ends with the adoption of a decision that has legal consequences [4, p. 16].

Evidence is any data on the basis of which the court establishes the presence or absence of circumstances (facts) that substantiate the claims and objections of the participants in the case, and other circumstances that are important for resolving the case (Article 73 of the CCPU).

Despite the rather clear legislative definition of evidence, this concept should be interpreted through the set of certain elements. Without it, certain data will not be considered evidence. Evidence in legal proceedings is characterized by the unity of content, procedural form and procedure for obtaining it. The content of evidence is information that indicates circumstances that are important in considering the case. Procedural form is a means of proof, that is, the form of evidence that properly reflects its content. The requirement for the procedure for obtaining it concerns the proper, from the point of view of procedural legislation, procedure for submitting, requesting, researching and evaluating the relevant information. An error in any of the above elements may be grounds for not recognizing data as evidence.

In legal literature, evidence is classified according to many criteria.

According to *the process of formation*: primary evidence (formed through the direct influence of the sought fact on the information carrier – for

example, the original contract, poor-quality goods, etc.); derivative evidence (the content of which reproduces information obtained from other sources, for example, a copy of the contract, a photograph of poor-quality goods, etc.) [7, p. 14].

According to *the nature of the connection with the circumstances of the case*: direct (directly related to the circumstances that are established (for example, a contract as written evidence directly confirms the presence or absence of certain conditions); indirect (with the help of which it is not possible to make an unambiguous conclusion about the presence or absence of a certain fact, for example, a letter requesting the shipment of goods does not confirm the presence of contractual relations) [4, p. 37].

By source: personal (explanations of the parties, statement of witnesses, etc.); material (written and physical evidence); obtained using technical means (audio-video recordings); mixed (expert opinion) [8, pp. 127-128].

The Code Of Commercial Procedure Of Ukraine groups all evidence based on *the means of proof*: written, material, electronic, expert opinions, witness statements.

Written evidence (Articles 91-92 of the CCPU) is documents (except electronic documents) that contain data on circumstances that are important for the correct resolution of the dispute.

Written evidence is sometimes classified according to the following features: 1) by the subject from which written evidence is received: official and unofficial (private) written evidence; 2) by content: administrative and informational (reference and informational); 3) by form: documents of simple and qualified written form; 4) by the nature of the source of formation: originals and copies. A copy can be simple or certified [9, pp. 136-137].

Participants in the case have the right to submit written evidence in electronic copies certified by an electronic digital signature, equivalent to a handwritten signature in accordance with the law. An electronic copy of written evidence is not considered electronic evidence.

Documents received by facsimile or other similar means of communication shall be accepted by the court for consideration as written evidence in cases and in accordance with the procedure established by law or agreement.

A foreign official document subject to diplomatic or consular legalization may be written evidence if it is legalized in accordance with the established

procedure. Foreign official documents shall be recognized as written evidence without their legalization in cases provided for by international treaties, the consent to which has been granted by the parliament – Verkhovna Rada of Ukraine.

Electronic evidence (Article 96 of the CCPU) is information in electronic (digital) form that contains data on circumstances that are relevant to the case. In particular, these are electronic documents (including text documents, graphic images, plans, photographs, video and sound recordings, etc.), websites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form. Such data can be stored: on portable devices (memory cards, mobile phones, etc.), servers, backup systems, other places (including the Internet), etc.

If a copy (paper copy) of electronic evidence is submitted, the court, at the motion of a party to the case or on its own initiative, may request the relevant person to provide the original of the electronic evidence. If the original of the electronic evidence is not submitted, and the party to the case or the court questions the correspondence of the submitted copy (paper copy) to the original, such evidence shall not be taken into account by the court.

Article 8 of the Law of Ukraine “On Electronic Documents and Electronic Document Management” [10] stipulates that the legal force of an electronic document may not be denied solely because it is in electronic form. The admissibility of an electronic document as evidence may not be denied solely on the basis that it is in electronic form.

The original of an electronic document is considered to be an electronic copy of the document with mandatory details. This includes the author's electronic signature or a signature equated to a handwritten signature in accordance with the Law of Ukraine “On Electronic Digital Signature” [11].

The Supreme Court of Ukraine also draws attention to the fact that the current legislation defines cases when the use of an electronic signature is mandatory and in the absence of such a signature the document will not be considered received from a certain person. However, these cases do not cover commercial, business or personal correspondence by e-mail between private individuals (unless otherwise established by agreement between the parties). In such relations, it is presumed that the message is sent to the person indicated as the sender of the e-mail or who signed the text of the

message itself on his behalf. The absence of a qualified electronic signature on a message does not indicate that a person cannot be identified with a sufficient degree of certainty as the sender of such a message sent by e-mail, that is, the disseminator of information [12]. Correspondence by sending e-mails has long become part of business customs in Ukraine, and electronic correspondence has become an *established custom* of business turnover in Ukraine [13].

Material evidence (Articles 93-95 of the CCPU) are objects of the material world, which by their existence, their qualities, properties, location, and other characteristics allow establishing circumstances that are important for the case.

Material evidence is stored in the case files until the decision becomes legally binding or is transferred to the court's evidence storage room under a separate description. The court takes measures to ensure that material evidence is stored in an unchanged condition. The acceptance, accounting, and storage of material evidence in court cases is regulated by the Instructions on Office Management in Local and Appellate Courts of Ukraine [14].

Material evidence may, under certain circumstances, be inspected by its location, including due to its perishability (Articles 82-83 of the CCPU). Material evidence that cannot be delivered to the court is stored by its location.

A statement of witness (Articles 87-90 of the CCPU) is a report of circumstances known to him that are important for the case. It is not evidence of the testimony of a witness who cannot name the sources of his knowledge of a certain circumstance, or which are based on the reports of other persons.

The peculiarity of the participation of witnesses in a commercial process is that the witness's testimony is set out in writing in the witness's statement. The witness's statement must be submitted to the court within the time limit established for the submission of evidence.

The witness's statement shall indicate the name (surname, first name and patronymic), place of residence (stay) and place of work of the witness; postal code, registration number of the witness's taxpayer registration card, if any, or the number and series of the passport; numbers of means of communication and e-mail addresses (if any); circumstances known to the

witness, sources of the witness's knowledge of these circumstances, as well as the witness's confirmation of his/her awareness of the content of the law on criminal liability for giving false testimony and of his/her readiness to appear in court upon his/her summons to confirm his/her testimony.

The witness's signature on the statement shall be certified by a notary. Notarization of the signatures of the parties, third parties, or their representatives who have consented to their questioning as witnesses is not required.

A witness is summoned by the court for questioning on the initiative of the court or at the request of a party to the case. In particular, if the circumstances stated by the witness in the statement contradict other evidence or raise doubts in the court about its content, reliability or completeness.

In the ruling on the summoning of a witness, the court warns the witness about criminal liability for knowingly false testimony.

2. An Expertise In Commercial Disputes Consideration

The appointment of an expertise is the right, not the obligation of the commercial court. The issue of the appointment of an expertise is decided by the court in each specific case, taking into account the subject matter, grounds for the claim and circumstances of the case. A judicial expertise is appointed only in the case of a real need for special knowledge to establish the factual data included in the subject of evidence. That is, in the case when the expert opinion cannot be replaced by other means of evidence [15].

An expert opinion is a detailed description of the studies conducted by the judicial expert, the conclusions drawn as a result of them and substantiated answers to the questions posed to the expert, drawn up in accordance with the procedure established by law. It is set out in writing and attached to the case file.

The subject of an expert's opinion may be the study of circumstances that are included in the subject of proof and the establishment of which requires the expert's special knowledge, but these cannot be questions of law.

If, during the preparation of the opinion, the expert establishes circumstances that are relevant to the case, about which he was not asked questions, he has the right to include his considerations about these circumstances in the opinion.

Article 98 of the Code of Commercial Procedure of Ukraine also establishes the mandatory awareness of judicial expert about criminal liability for a knowingly false conclusion, and in the case of an expert's appointment by a court, also about liability for refusing without good reason to fulfill the duties assigned to him.

An expert is prohibited (Article 102 of the CCPU) from disclosing information that has become known to him in connection with the conduct of an examination, or from informing anyone, except the court and the party to the case, at whose request the examination was conducted, about its results. An expert appointed by the court does not have the right to communicate with the participants in the trial outside the court session.

An expertise may be carried out at the initiative of a party to the case in an extrajudicial manner (Article 101 of the CCPU), at the initiative of the court during the consideration of the case, as well as at the initiative of a party to the case who has submit a motion (Article 99 of the CCPU). Thus, an expert's opinion may be provided at the request of a party to the case or on the basis of a court ruling on the appointment of an expertise.

The Supreme Court notes that the procedural law does not provide for the obligation of courts of first and appellate instance, in the event of rejection of the expert opinion provided by a participant, to appoint another judicial expertise on their own initiative [16].

An expert who has drawn up an opinion at the request of a participant in the case has the same rights and obligations as an expert who carries out an expertise on the basis of a court ruling.

Article 99 of the Code of Commercial Procedure of Ukraine establishes the rule according to which the court appoints an expertise in a case under a set of the following conditions:

- 1) to clarify the circumstances that are relevant to the case, special knowledge in a field other than law is necessary, without which it is impossible to establish the relevant circumstances;

- 2) no party has provided an expert opinion on the same issues or the expert opinions provided by the parties raise reasonable doubts as to their correctness, or at the request of a participant in the case, motivated by the impossibility of providing an expert opinion within the time limits established for submitting evidence, for reasons recognized by the court

as valid, in particular due to the impossibility of obtaining the materials necessary for conducting an expertise.

The court shall issue a ruling on the appointment of an expertise and shall send it to the persons entrusted with conducting an expertise and the participants in the case. The ruling shall indicate the grounds for conducting an expertise, the issues on which the expert must provide the court with an opinion, the person(s) entrusted with conducting an expertise, the list of materials provided for examination, and other data that are important for conducting an expertise. If the court entrusts conducting an expertise to several experts or expert institutions, the court shall appoint a leading expert or expert institution in the ruling. Objects and materials to be examined are sent to the person entrusted with conducting an expertise (the lead expert or expert institution).

According to Article 228 of the Code of Commercial Procedure of Ukraine, the court may, by a ruling, upon the application of a party to the case, as well as on its own initiative, suspend the proceedings in the case, in the event of the court's appointment of an expert examination. Suspending the proceedings in the case in connection with the appointment of an expertise is only the right of the court, for the exercise of which the court must provide reasonable grounds for the need to perform such a procedural action [17].

The materials necessary for conducting an expertise are provided to the expert by the court, if an expertise is appointed by the court, or by the party to the case, if an expertise is carried out at his request. The expert does not have the right to collect materials for conducting the expert examination on his own initiative. Copies of the materials provided to the expert may remain in the case files.

The expert must ensure the preservation of the object of expertise. If the expert examination appointed by the court is associated with the complete or partial destruction of the object of expertise or a change in its properties:

- 1) the expert appointed by the court must obtain the appropriate permission of the court to conduct it, which is formalized by a ruling;
- 2) the expert involved by a participant in the case must notify the relevant participant in the case of the consequences of conducting the expert examination and obtain written permission from such participant to conduct it.

In the case of an out-of-court expertise, an expert opinion drawn up based on the results of such an examination, when the object of the examination was completely or partially destroyed or its properties were changed, shall not be accepted for consideration by the court. However, this is possible if the person submitting it proves the possibility of conducting an additional and repeated expertise on the issues examined in the expert opinion.

An expert opinion drawn up based on the results of an examination, during which the object of the examination, which is evidence in the case, was completely or partially destroyed or its properties were changed, shall not replace the evidence itself and shall not be a basis for exemption from the burden of proof.

Thus, a judicial expertise takes place according to the following algorithm: identifying the need for an expertise (a participant's request, the court's initiative); issuing a ruling in accordance with the requirements of the Code of Commercial Procedure of Ukraine; conducting an expertise and drawing up a conclusion; attaching the expert opinion to the materials of the court case and examining it on a par with other evidence in the case.

The court has the right, at the request of the participants in the case or on its own initiative, to summon an expert to provide oral explanations regarding his conclusion. If necessary, the court may hear the expert on the formulation of the issue that requires clarification, and at his request, provide appropriate explanations regarding the issues raised. The court notifies the participants in the case of the commission of an actions, but their failure to appear does not prevent the commission of these actions.

In legal literature, one can find a whole range of classifications of expertises that can be appointed in court. Some of them are based on types that are clearly defined in the legislation, and some on types of expertises that are typically appointed in certain cases.

The Instruction on the appointment and conduct of judicial expertise and expert examinations [18] determines that the main types (subtypes) of expertises are: criminalistics; engineering and technical; economic; commodity; expertise in the field of intellectual property; psychological; art; military; forensic veterinary; gemological; historical and archaeological. It is also possible to conduct other types of expertises (except forensic medical and forensic psychiatric), including those that are in the stage of

scientific development. It is believed that today in the commercial process in Ukraine, the most common practice is to appoint such an expertise as: examination of documents on financial and credit transactions and economic activities of business entities, intellectual property objects (industrial designs, inventions, utility models, marks for goods and services, trade names, etc.), the quality of goods and performed works (commodity, automotive, construction and technical expertise, etc.) [19].

According to the procedural legislation of Ukraine, experts perform primary, additional, repeated, commission and comprehensive expertise.

Primary is an expertise when the object is examined for the first time [18]. *An additional expertise* (Article 107 of the CCPU) is appointed at the request of a party to the case or on the court's own initiative if the expert's conclusion is incomplete or unclear. Such an expertise is assigned to the same or another expert (experts). Also, additional is understood as an expertise that is appointed when it is necessary to conduct additional studies or examine additional materials (samples for comparative research, source data, etc.) that were not provided to the expert during the primary examination, to resolve issues regarding the object that was examined during the primary expertise [18].

A repeated expertise is assigned to other experts if there are doubts about the correctness of the expert's opinion (unfoundedness, contradiction with other case materials, etc.), at the request of a party to the case or on the court's own initiative (Article 107 of the CCPU). During the repeated expertise, the same objects are examined and the same issues are resolved as during the primary expertise (previous examinations) [18].

A commission expertise (Article 107 of the CCPU) is conducted by at least two experts in the same field of special knowledge. According to the Instructions [18], this examination is conducted by two or more experts who have the qualification of a court expert in one expert specialization (specialists in one field of knowledge). A commission of experts may be formed by the body (person) that appointed the examination (involved the expert), or by the head of the expert institution.

If, according to the results of the conducted research, the conclusions of the experts coincide, they sign a single opinion. An expert who disagrees with the conclusion of another expert (experts) provides a separate opinion on all issues or on issues that caused disagreements.

A comprehensive expertise (Article 108 of the CCPU) is conducted by at least two experts from different fields of knowledge or from different areas within the same field of knowledge. It is conducted using special knowledge from different fields of science, technology or other special knowledge (different areas within the same field of knowledge) to solve one common (integrative) task (issue). If necessary, experts from expert institutions, as well as specialists from institutions and services (divisions) of other central executive bodies or other specialists who do not work in state specialized expert institutions are involved in conducting such examinations [18].

The expert opinion states what research and to what extent each expert conducted, what facts he established and what conclusions he reached. Each expert signs that part of the opinion that contains a description of the research he conducted, and bears responsibility for it. As a result, a single opinion or separate conclusions are formed, as in the case of a commission examination.

The information provided by a specialist and expert in the field of law *is advisory, not evidentiary*.

A specialist is appointed by the court to provide consultations and technical assistance during the performance of procedural actions related to the use of such technical means (photographing, drawing up diagrams, plans, blueprints, sampling for examination, etc.) (Article 71 of the CCPU). For example, in one of the bankruptcy cases, specialists were involved to inspect evidence by location and conduct video recording; the participants in the case involved three specialists (a real estate inventory engineers). Two specialists provided the court with an explication of the premises of the residential building and a floor plan of the premises of the residential building. In turn, the third specialist provided the court with blueprints of the internal measurements of the residential building, a floor plan and an explication of the premises of the residential building. Thus, based on the results of the inspection of the residential building, which belongs to the debtor on the right of ownership, the total area of the residential building was determined by specialists involved both on the part of the debtor and the arbitration manager [20].

The court considering the case must assess the work of the specialist and establish the significance of his participation in the case. The Supreme Court quite often draws attention to this. In particular, when considering

one of the cassation appeals of the Supreme Court of Ukraine, the Supreme Court noted that when considering the case, the court of first instance did not give an appropriate legal assessment to the conclusion of the specialist patent attorney and the advisory conclusion based on the results of the analytical study of the opinion of the judicial expert and did not eliminate the contradictions that exist between the conclusions of the specialist patent attorney and the advisory conclusion based on the results of the analytical study of the opinion of the judicial expert. The court of appeal in this case also did not establish the factual circumstances of the case on which its correct resolution depends, did not examine the evidence related to this and did not provide the relevant circumstances and evidence with a proper legal assessment [21].

The importance of proper legal assessment of conclusion of the specialist is also revealed when a participant in the case justifies his own position on the basis of the conclusion. Thus, during the consideration of one of the bankruptcy cases, it was established that in the court of first instance the liquidator had engaged a specialist to analyze the financial condition of the bankrupt, and subsequently the liquidator attached the relevant conclusion of the specialist to the application for the imposition of subsidiary liability for the obligations of the LLC on its founder (participant) and manager in connection with the bankruptcy. The court of appeal in this case noted that the specialist is not a participant in the bankruptcy case and is not endowed with the powers and competence of the arbitration manager (liquidator) in the case, therefore the conclusion of the specialist attached to the case materials by the liquidator cannot be considered as proper and admissible evidence and be a sufficient basis for imposing subsidiary liability on the manager of the debtor. In response to the cassation appeal, the party also believed that “the liquidator had no legal grounds to delegate (transfer) his powers to a specialist.”

The Supreme Court of Ukraine in this case noted that the fact of the presence of signs of bankruptcy of the debtor must be confirmed by evidence, and therefore, of course, *it was inappropriate for the court of first instance to rely only on the conclusion of a specialist*. The norms of the Code of Ukraine on Bankruptcy Procedures allow that the arbitration manager has the right to involve other persons to ensure the performance of his powers on a contractual basis. On the other hand, the court of appeal

also had to check whether the conclusions set out by the specialist in the specified document about the presence of signs of bankruptcy of the LLC are confirmed by the relevant evidence [22]. When analyzing the resolution of the Supreme Court of Ukraine on the review of this case, it is worth highlighting several important positions: first, one should remember about the properties of evidence, secondly, the right to involve a specialist is established by procedural legislation, thirdly, the assessment of evidence is the duty of the court.

The opinion of an expert in the field of law (Articles 108-109 of the CCPU) is not evidence, is of an auxiliary (advisory) nature and is not binding on the court. The opinion of an expert in the field of law cannot contain an assessment of evidence, instructions on the reliability or unreliability of a particular piece of evidence, on the advantages of some evidence over others, on what decision should be made based on the results of the case. The court may refer in its decision to the opinion of an expert in the field of law as a source of information contained therein, and must make independent conclusions on the relevant issues.

The participants in the case have the right to submit to the court the *opinion of an expert in the field of law* on:

- 1) the application of analogia legis, analogia iuris;
- 2) the content of the norms of foreign law in accordance with their official or generally accepted interpretation, practice of application, doctrine in the relevant foreign state.

In one of the cassation appeals considered by the Supreme Court of Ukraine, the party noted that “the legal justification of the decision of the courts of first and appellate instance is completely refuted by the comprehensive opinion of experts in the field of law”, which was submitted to the Supreme Court of Ukraine. The court responded to this statement as follows: first of all, it drew attention to the norms of Articles 108 and 109 of the Code Of Commercial Procedure Of Ukraine on the non-evidentiary nature of the opinion and the fact that *the court independently draws conclusions* on certain issues. The opinion of experts in the field of law is not a sufficient basis for departing from the legal Opinions of the Supreme Court and cannot take on the function of interpreting legal norms when resolving disputes, but is of an auxiliary (advisory) nature. At the same time, the opinion of experts in the field of law was submitted to the Supreme

Court not in response to the application of the judge-rapporteur (as provided for in Article 303 of the CCPU), but was provided at the request of one of the parties [23].

The opinion of an expert in the field of law is not evidence in the case, but is *a source of information that the court can use in forming its conclusions* [24]. This provision is important and reveals the essence of the practical use of such an opinion.

3. The Procedure For Submitting, Requesting And Securing Evidence

According to the general rule established in Article 74 of the Code of Commercial Procedure of Ukraine, evidence is submitted by the parties and other participants in the case. However, this article also contains other important provisions.

First, the party is obliged to submit evidence proving the circumstances to which it refers as the basis for its claims or objections.

Secondly, the court may oblige a party to the case to provide relevant evidence of the performance of actions or the existence of a certain event, if the party to the case refers to this. In the event of failure to provide such evidence, the court may recognize the fact of failure to perform relevant actions or the absence of an event as established. Also, the court may not collect evidence relating to the subject of the dispute on its own initiative, except for the court's request for evidence in the event that it has doubts about the good faith exercise by the parties to the case of their procedural rights or the fulfillment of obligations regarding evidence.

Thirdly, in cases of failure by the debtor to fulfill the terms of a lease, sublease, emphyteusis, or superficies agreement, if such a violation may result in the termination of the right to use the land plot specified in the agrarian note as a place for growing, harvesting, producing, processing, storing, and/or maintaining future agricultural products, the person who transferred such a land plot to the debtor under the agrarian note must provide the court with evidence of its implementation of pre-trial dispute settlement measures provided for by the Law of Ukraine “On Agrarian Notes.”

The need to prove the circumstances to which the party to the case refers as the basis for his claims and objections in the commercial process is a component of the obligation to support the comprehensive, complete and

objective determination of all the circumstances of the case [25]. To do this, the evidence must meet the requirements of adequacy (Article 76 of the CCPU), admissibility (Article 77 of the CCPU), reliability (Article 78 of the CCPU) and probability (Article 79 of the CCPU). It should be noted that the category of “probability” of evidence is somewhat new for the commercial process. This concept appeared to replace the sufficiency of evidence, which meant evidence that in its entirety allows one to conclude about the presence or absence of the circumstances of the case that are part of the subject of proof.

The replacement of these concepts took place by making changes to the Code Of Commercial Procedure Of Ukraine, which, according to the legislator, should contribute to stimulating investment attractiveness [26]. The feasibility of such reform raises some doubts, since, firstly, the assessment of any evidence still occurs according to the internal conviction of the court, and, secondly, probability is not so much about the property of the evidence as about assessing its weight.

Regarding the emergence of the criterion of probability of evidence, V. Reznikova notes: “probability of evidence” is a standard of proof.

It is impossible to ignore the fact that the vast majority of standards of proof, characteristic of common law countries (United States of America, Great Britain), are focused on the conviction not only and not so much of the court, but of the jury, which are absent in the domestic commercial process. This is to some extent an obstacle to their authentic development in the domestic system of commercial justice. The use of the a priori probability approach is closely related to the intuition, life and professional experience of the judge, which forms an initially different starting point on the probability scale and, as a result, an initially different amount of evidence is required to prove identical circumstances, violating the principle of equality and uniformity of practice [27, p. 67].

The participants in the case submit evidence in the case directly to the court.

The Code Of Commercial Procedure Of Ukraine (Article 75) defines the cases when a person is exempted from the obligation to provide evidence. The following are not subject to proof:

circumstances recognized by the participants in the case, if the court has no reasonable grounds to consider them unreliable or recognized in

connection with coercion. Circumstances recognized by the participants in the case may be indicated in the statements on the merits of the case, explanations of the participants in the case, their representatives. Refusal to recognize the circumstances shall be accepted by the court if the party refusing proves that it recognized these circumstances as a result of a material mistake, fraud, violence, threat or grave circumstance, or that the circumstances were recognized as a result of a malicious agreement of its representative with another party. The court shall issue a ruling on the acceptance of the party's refusal to recognize the circumstances.

In the event that the court accepts the party's refusal to recognize the circumstances, they shall be proved in the general procedure, while the court may establish a deadline for submitting evidence regarding such circumstances.

Circumstances recognized by the court as generally known. For example, when considering one of the cases, the court recognized as known to the parties to the dispute, which are contained on the Internet and covered in the media, the circumstances regarding the damage from the beginning of the full-scale invasion of the Russian Federation into the territory of Ukraine, the defendant's energy infrastructure facilities, electrical network facilities and their components in conditions of ongoing hostilities, which does not stop and does not even allow predicting the possible losses of the defendant and its expenses [28].

The general knowledge of the fact is relative and depends on various factors, including the time that has elapsed since the event. As L. Nikolenko rightly notes, after the expiration of a certain period of time, a simple reference to these facts will no longer be enough and it will be necessary to provide evidence that these facts existed at this time [29, p. 80].

praejudicialis. Circumstances established by a court decision in commercial, civil or administrative case that has entered into legal force shall not be proven in the consideration of another case in which the same persons or the person in respect of whom these circumstances were established participate, unless otherwise established by law. A court verdict of conviction in criminal proceedings or a court resolution by which a person is brought to administrative responsibility in a case of an administrative offense that has entered into legal force shall be binding on the commercial court considering the case on the legal consequences of the actions or

inaction of the person in respect of whom the verdict or court resolution was passed, only in the question of whether these actions (inaction) took place and whether they were committed by this person.

Circumstances established in respect of a certain person by a court decision in an commercial, civil or administrative case that has entered into legal force may be generally refuted by a person who did not participate in the case in which such circumstances were established.

Prejudice is formed strictly by those circumstances that were directly investigated and established by the court, which was reflected in the motivational part of the judicial act. Only those circumstances that are mentioned, but have not been assessed by the court, cannot be considered as established by the court and do not acquire the property of *praejudicialis*. That is, prejudicial facts should be distinguished from the assessment of certain circumstances by another court [30]. The legal assessment given by the court to a certain fact when considering another case is not mandatory for the commercial court.

All other circumstances are subject to proof in the appropriate manner. In particular, circumstances established by a decision of an arbitration court or international commercial arbitration, an acquittal of a court in criminal proceedings, a resolution on the closure of criminal proceedings and the release of a person from criminal liability are subject to proof in the general manner when considering a case by a commercial court.

Article 80 of the Code Of Commercial Procedure Of Ukraine establishes the procedure and deadlines for submitting evidence: the claimant, persons who are granted the right by law to apply to the court in the interests of other persons, must submit evidence together with the submission of a statement of claim; the defendant, a third party who does not declare independent claims regarding the subject of the dispute, must submit evidence to the court together with the submission of a response or written explanations of a third party.

Evidence not submitted within the time limit established by law or by the court shall not be accepted for consideration by the court, except in the case when the person submitting it has justified the impossibility of submitting it within the specified time limit for reasons beyond his control. If evidence cannot be submitted within the time limit established by law for objective reasons, the participant in the case must notify the court in

writing and indicate: the evidence that cannot be submitted; the reasons for which the evidence cannot be submitted within the specified time limit; evidence confirming that the person has performed all actions dependent on him aimed at obtaining the specified evidence.

If the circumstances subject to proof have changed with a change in the subject or grounds of the claim, or the filing of a counterclaim, the court, depending on such circumstances, establishes a deadline for submitting additional evidence.

Evidence that is not attached to the statement of claim or to the counterclaim, unless otherwise provided for by the Code Of Commercial Procedure Of Ukraine, shall be submitted through the court office, using the Unified Judicial Information and Communication System or at a court hearing with a request to attach it to the case materials.

In the event that the reasons for the failure of a participant in the case to submit evidence within the time limit established by law are recognized as valid, the court may establish an additional time limit for submitting the specified evidence.

Evidence that was not submitted to the court of first instance is accepted by the appellate court only in exceptional cases, if the participant in the case has provided evidence of the impossibility of submitting it to the court of first instance for reasons that were objectively beyond his control (Article 269 of the CCPU). However, as the Supreme Court notes, the absence of evidence at the time of consideration of the case by the court of first instance generally excludes the possibility of the court of appellate instance accepting additional evidence in accordance with the procedure of Article 269 of the Code Of Commercial Procedure Of Ukraine, regardless of the reasons for the plaintiff's failure to submit such evidence [31].

Copies of evidence (except for material evidence) submitted to the court are sent or provided in advance by the person submitting them to other participants in the case. The court does not take into account the relevant evidence in the absence of confirmation of sending (providing) copies of them to other participants in the case, except for the case where such evidence is available to the relevant participant in the case or the volume of evidence is excessive, or it is submitted to the court in electronic form, or is publicly available.

If it is impossible to provide evidence on their own, a participant in the case may apply to the court for assistance. In this case, as regulated in Articles 81-85 of the Code Of Commercial Procedure Of Ukraine, depending on the circumstances, the court may request evidence, instruct another court to collect evidence, or conduct an on-site inspection of evidence.

Thus, a participant in the case, if it is impossible to provide evidence on their own, has the right to file a motion (Article 81 of the CCPU) to request evidence from the court. If such a participant is a plaintiff or a person who is granted the right to apply to court in the interests of other persons by law, the motion is filed together with the statement of claim. The defendant, a third party who does not declare independent claims regarding the subject of the dispute, files such a motion together with the submission of a response or written explanations of a third party, respectively. Without substantiating the reasons for the validity of the missed deadline, the court leaves such a motion without satisfaction.

If the motion is granted, the court shall by its ruling request the relevant evidence and may also authorize the interested party to obtain the evidence requested by it. Any person in possession of the evidence must produce it at the court's request, otherwise the court shall apply procedural coercion measures to the relevant person. However, persons who are unable to submit the evidence requested by the court or are unable to submit such evidence within the established time limits shall be obliged to notify the court thereof, indicating the reasons within five days from the date of delivery of the ruling.

According to the rules provided for requesting evidence, the court shall, in necessary cases, decide on the request for relevant materials to be provided to the expert or expert institution for further examination.

Evidence (written, material and electronic) that cannot be delivered to the court shall be inspected at its location. The participants in the case shall be notified of the date, time and place of inspection of evidence at its location. The failure of these persons to appear shall not be an obstacle to the inspection, and the procedure for such inspection shall be determined by Article 82 of the Code Of Commercial Procedure Of Ukraine. Perishable evidence shall be inspected in the same manner. However, Article 83 of the Code of Commercial Procedure of Ukraine establishes the immediacy

of such inspection and the obligation to return perishable evidence to the persons from whom it was obtained.

The court hearing the case, in the event of a need to collect evidence outside its territorial jurisdiction, may instruct the relevant court, in accordance with Articles 84 and 85 of the Code of Commercial Procedure of Ukraine, to perform certain procedural actions.

The ruling on the judicial order briefly sets out the essence of the case under consideration, indicates the persons participating in it, the circumstances to be clarified, the evidence that the court executing the order must collect, in particular, a list of questions posed by the participants in the case and the court to the witness.

The ruling on the judicial order shall be immediately executed by the court to which it is addressed, in accordance with the rules of the Code Of Commercial Procedure Of Ukraine on the procedure for performing relevant procedural actions. If necessary, the execution of judicial orders to collect evidence shall be carried out in a court session, in accordance with the procedure established by the Code of Commercial Procedure of Ukraine. The participants in the case shall be notified of the date, time and place of the performance of the procedural action by the court executing the order, however, their failure to appear shall not be an obstacle to the execution of the order.

A ruling shall be issued on the execution or impossibility of execution for objective reasons of a judicial order, which shall be immediately sent to the court considering the case, together with the protocols on the performance of procedural actions and all materials collected for the execution of the judicial order.

The court shall be obliged to provide the necessary conditions for a comprehensive and complete investigation of the circumstances of the case. While maintaining impartiality, it shall nevertheless assist the persons participating in the case in exercising their rights. At the motion of a participant in the case or a person who may acquire the status of a claimant, the court is authorized by the norms of the Code of Commercial Procedure of Ukraine *to secure evidence* if there are grounds to assume that the means of proof may be lost, or the collection or presentation of relevant evidence will subsequently become impossible or difficult.

The procedural manner for securing evidence is defined in Articles 110-112 of the Code of Commercial Procedure of Ukraine. A request for securing evidence may be filed with the court both before and after the filing of a claim. The person who filed a request for securing evidence is obliged to compensate for court costs, as well as losses incurred in connection with securing evidence, in the event of failure to file a claim within the specified period, as well as in the event of a refusal of the claim. The request is considered no later than five days from the date of its receipt by the court. A court fee shall be paid for filing request for securing evidence in the amount established by law.

The applicant and other persons who may obtain the status of participants in the case shall be notified of the date, time and place of the court session, but their failure to appear shall not prevent the consideration of the submitted request. The court, at the request's motion, may secure evidence without notifying other persons who may obtain the status of participants in the case:

- 1) in urgent cases;
- 2) if it is impossible to establish who such persons are or will become;
- 3) if notifying the other party may make it impossible or significantly difficult to obtain the relevant evidence.

The methods of securing evidence by the court are: questioning witnesses; ordering an expertise; requesting and (or) inspecting evidence, including by their location; prohibition of performing certain actions with respect to evidence and obligation to perform certain actions with respect to evidence; other methods of securing evidence determined by the court.

A decision on securing evidence (except for securing evidence by questioning witnesses, ordering an expertise, inspecting evidence) is an executive document and is executed immediately in accordance with the procedure established for the execution of court decisions.

4. Evaluation of Evidence in the Consideration of Commercial Disputes

Evaluation of evidence is the determination of its objective validity, truthfulness and reliability [32]. No evidence has a pre-established force for the court. The court assesses both the evidence collected in the case as a whole and each piece of evidence (group of similar evidence) contained in

the case, motivating the rejection or consideration of each piece of evidence (group of evidence).

The court evaluates the evidence according to its internal conviction, which is based on a comprehensive, complete, objective and direct study of the evidence available in the case (Article 86 of the CCPU).

In procedural science, a judge's internal conviction is considered as his own attitude to a certain object, that is, a specific feeling or a set of feelings of the judge that arise in the process of considering and resolving a case regarding certain objects that are important for the case [33, p. 142]. Internal conviction has a complex multi-level structure and complex content, in which objective and subjective factors dynamically interact. Regarding the judge's personality, important reference planes are: a) cultural level; b) ideological level; c) legal awareness. These characteristics are objectified in the judicial corps as a whole and specifically in a particular judge's personality [9, p. 180].

Internal conviction, as a psychological state of a person evaluating evidence, is a feeling of confidence in the correctness of conclusions about the circumstances of the case. In this capacity, it is an important volitional stimulus that encourages practical actions, the grounds of which are well-founded and motivated [34, p. 56]. At the same time, a judge must be free from any external influence, persuasion, pressure, threats or interference, both direct and indirect, regardless of the source and motives. In addition, a judge is also obliged to maintain impartiality both towards society as a whole and towards individual participants in the trial [35, p. 17].

The objective criterion on the basis of which the court evaluates evidence to establish the facts in the case is the standard of proof.

V. Reznikova, studying world standards of proof, draws attention to the fact that in England the "balance of probabilities" is used in "civil" cases, which requires recognizing a fact as proven when the complex of evidence presented by the party allows the judge to conclude that the disputed fact more likely exists than not. In the USA, a similar procedural standard of "prevalence of evidence" is used in "civil" cases. However, their dominance is not in quantitative terms, but in qualitative terms (i.e., the influence of all the evidence in their complex on the conviction of the jury or the court in a greater probability of the existence of the fact than its absence) [27, p. 70].

In 2019, the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Stimulating Investment Activity in Ukraine” came into force, which introduced the standard of proof “probability of evidence” into the commercial process, which also determines the property of evidence. According to the requirements of the Code of Commercial Procedure of Ukraine, the court assesses the adequacy, admissibility, reliability of each piece of evidence separately, as well as the probability and interrelationship of the evidence in their entirety.

Proper evidence shall be those, on the basis of which it is possible to establish the circumstances that are the subject of proof. The court shall not consider evidence that does not relate to the subject of proof. The subject of proof shall be the circumstances confirming the stated claims or objections or having other significance for the consideration of the case and being subject to establishment when approving a judgment.

Admissible is evidence which under the law must be confirmed by certain means of proof may not be confirmed by other means of proof. Evidence obtained in violation of the law is not accepted by the court.

Reliable is evidence created (obtained) in the absence of influence aimed at forming a misconception about the circumstances of the case that are relevant to the case. At the same time, Article 80 of the Code of Commercial Procedure of Ukraine establishes that in the event of filing a statement that a document attached to the case or submitted to the court by a participant in the case for review raises doubts about its authenticity or is forged, the person who submitted this document may request the court, before the end of the preparatory meeting, to exclude it from the evidence and consider the case on the basis of other evidence.

Probable is evidence on the basis of which the circumstance to which the party refers as the basis for its claims or objections will be considered proven, rather than evidence provided to refute it. The question of the probability of evidence for establishing circumstances that are important for the case is decided by the court in accordance with its internal conviction.

From the position of the Supreme Court of Ukraine, the standard of proof of “probability of evidence”, in contrast to “sufficiency of evidence”, emphasizes the need for the court to compare the evidence provided by the claimant and the defendant. That is, with the introduction of the new standard of proof, it is necessary not to provide enough evidence to confirm

a certain circumstance, but to provide exactly the amount of evidence that can outweigh the arguments of the opposing party to the legal process [36].

The expert opinion does not have a pre-established force for the court and is assessed by the court together with other evidence according to the rules established by Article 86 of the Code of Commercial Procedure of Ukraine. The court's rejection of the expert opinion must be motivated in the court decision. At the same time, the assessment of such evidence as an expert opinions, if they contain contradictory conclusions, cannot be based on the principle of probability, since expertise result is, by its very nature, a conclusion based on certain scientific knowledge. Only after assessing each of the examinations for their compliance with Article 98 of the Code of Commercial Procedure of Ukraine, the court must analyze them in conjunction with other evidence, taking into account the criterion of probability [37]. The court's rejection of the expert opinion must be motivated in the court decision in accordance with the requirements of the Code of Commercial Procedure of Ukraine.

Conclusions

Legislative consolidation of the procedure of proof undoubtedly serves to achieve the goal of judicial proceedings. This process is a set of cognitive activities and procedural actions established by procedural legislation. The object of such activity is evidence. Despite the rather clear legal definition of evidence, this concept should be interpreted through a set of certain elements.

It has been proven that in legal literature, evidence is classified according to many criteria: according to the process of formation; the nature of the connection with the circumstances of the case; by source; on the basis of means of proof. It is obvious that further scientific research encourages scientists to form their own classification approaches.

At the current stage of development of business relations both in Ukraine and abroad, electronic communication is becoming widely used. The implementation of electronic correspondence can be considered as an established custom of business turnover. Therefore, electronic evidence already occupies an important place in proof.

As for an expertise, it should be appointed only in case of real need for special knowledge. For proper implementation, in the legal literature it can

be found a whole series of classifications of expertises that can be ordered in court.

It is also important to focus on the information provided by a specialist and legal expert. In this regard, it should be emphasized that their advisory, not evidential nature.

Regardless of the type, the evidence must meet the requirements of adequacy, admissibility, reliability and probability. It should be noted once again that the category of "probability" of evidence is somewhat new for the commercial process. But now it is necessary not to provide enough evidence to confirm a certain circumstance, but to provide exactly the amount that will be able to outweigh the arguments of the opposite side of the court process.

From the above, it becomes clear that all legislative changes are primarily aimed at ensuring the availability of legal protection and the impartiality of the court when considering each case. It is hoped that further scientific research in the field of evidence will help confirm the approach of the judiciary in considering commercial disputes to ensuring the right to a fair trial or will highlight the problems that still exist.

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