

SECTION 5. THE CIVIL PROCESS

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5.1 Crisis-management for the judicial system of Ukraine

Ukraine is currently at war. The Russian attack also posed enormous challenges to the administration of justice in Ukraine. The main task was to ensure a minimum of justice despite the war situation. This has been largely successful so far, but there are still many tasks to be completed. Immediately after the beginning of the war, problems arose in the administration of justice for a number of reasons: the rapid military advance into some regions led to chaos among the court staff (judges and employees), who first had to bring their families to safety. It was similar with the public prosecutors and lawyers. In this respect, it was not possible in many cases to hold court hearings and take other judicial measures.

Another problem was that there were no detailed instructions for the judges to act in such situations. After a week or two, when the initial panic subsided, the judges and court staff returned to their jobs (as far as this was still possible). The President of the Supreme Court Vsevolod Knyazev issued several orders on the further operation of the courts. In particular, priority procedures were defined, which were to be dealt with first and foremost - above all criminal procedures in which the accused was subject to measures restricting his freedom, as well as other criminal procedures with critical deadlines and applications by the accused.

Furthermore, the President of Ukraine issued an ukaz on the possibility of releasing people with combat experience from detention who wanted to enlist in the army. There were numerous such requests for release for mobilization. Each person had to be checked carefully to see whether they met the requirements for release from prison in accordance with the decree. Since the courts were unable to deal with these applications quickly, the Code of Criminal Procedure was amended in order to transfer certain competencies of the investigating judge to the public prosecutor. Other cases were practically never tried in courts in south-eastern Ukraine. In western Ukraine, on

the other hand, the situation allowed the courts to continue their work largely normally. However, there were restrictions on the operation of the necessary registers and the electronic court system. The courts in the rapidly occupied areas were unable to salvage the files of all cases. The electronic court system has only been fully implemented since October 2021. Therefore, the courts still kept many court files in paper form. The situation was somewhat better in criminal cases, where the transition to the digitization of criminal proceedings had already begun in 2012. In other cases, paper letters continued to be filed with the court. It was not until October 2021 that the files began to be kept electronically at the same time.

The jurisdiction of courts in areas of active hostilities has been transferred to the nearest court outside the combat zone by decision of the President of the Supreme Court. Unfortunately, the issue of transferring judges to these courts, which are now competent, was not resolved at the same time, which led to staffing problems. Another consequence was that courts in largely safe areas no longer conducted any proceedings other than criminal cases. In addition, there was a lack of synchronicity between the changed court competences and the organization of work, particularly that of the public prosecutor's office and other law enforcement agencies.

Unfortunately, neither the outbreak of war in 2014 nor the Covid situation have led to the creation of the necessary legal basis for the introduction of a video court procedure. This is particularly noticeable at present with the need to allow collegiate decision-making (on appeal and cassation) and to ensure the safety of judges and court staff. A bill was drafted at the time and introduced to Parliament, but was sent back for revision. The issues of equal exercise of rights by those involved in the process, their identification, determination of the permissible territory for the stay of the judge and court staff, coordination of their activities and administration of the server for recording are still controversial.

Unfortunately, the organization of the Ukrainian judiciary was not prepared to work in such extraordinary conditions. There were no plans for evacuation, server protection, and employee safety. There were only isolated requirements of individual

courts due to personal initiatives of their directors. There was no systematic and common practice for all court staff to act in a coordinated manner in such situations².

Thus, the Ukrainian judicial system saw its problems from the point of view of being able to maintain its functioning in emergency conditions. Solving the identified problems will allow creating a more stable and secure system for protecting rights and interests.

Obviously, the Ukrainian economy was also badly damaged. According to official information, more than 200 factories have been destroyed on the territory of Ukraine at the moment. Moreover, the losses of small and medium-sized businesses are now difficult to calculate. Already, the World Bank has estimated the fall in Ukraine's GDP by 45%. In a recent interview, the Minister of Finance of Ukraine Marchenko noted that the revenue part of the Ukrainian budget does not cover even 30% of its needs. Obviously, after the victory of Ukraine in the war against Russia, the support of its Western partners and friends will be needed. At the moment, many foreign countries provide and guarantee in the future support and assistance to Ukraine. But it is also obvious that any partnership, especially financial relations, requires a certain degree of transparency and guarantees. It is unlikely that future investors will consciously take financial risks. Therefore, already now, when the war is still going on, Ukraine should think about how it will attract investors to its economy, what guarantees of security and business attractiveness it can offer them.

But one must understand that one of the indicators of a country's investment attractiveness is the quality of its human rights institutions. That is, when evaluating the risks of capital investments, the investor will expect reliable legal protection of his interests. And the primary role in this process belongs to the court. Therefore, now it is extremely relevant to conduct a diagnostic of the judicial system of Ukraine for compliance with the ideas of potential investors about the reliability of the legal mechanism for protecting their rights and interests.

² For more details see: Moskvych L. Rechtspflege in der Ukraine unter Kriegsbedingungen. *Ukraine-Krieg und Recht – UKuR*. 8/2022. S.325-328.

I think that in this case it is not worth wasting time searching for and developing a special methodology for such diagnostics. For many years, the World Bank, within the framework of the Doing Business project, has already been using a methodology for assessing the investment attractiveness of a particular country. In particular, in relation to the assessment of the criterion "enforcement of contracts", the World Bank uses the following indicators:

- litigation (the quality of legal regulation, the number of stages (procedures, actions) in the consideration of a case; the timing of legal proceedings; the cost of judicial services; the procedure for the execution of a court decision)
- human potential (qualification level of judges; guarantees of independence and fairness of judges; predictability of judicial decisions);
- infrastructure (quality of judicial infrastructure; its compliance with modern European standards; guarantees for the functioning of the court in non-standard conditions)
- alternative ways of settling disputes (traditional and innovative institutions).

It is clear that these 4 criteria for diagnosing the judicial system of Ukraine look rather simplistic, but I am sure that it is the simplicity, clarity and consistency of any methodology that guarantees the relevance of the results and their predictive value.

Obviously, for a full diagnosis, numbers are needed - statistical indicators. But within the time allotted for me for the report, I will try to present to your attention a simplified express diagnostic of the quality of the Ukrainian judicial system in terms of assessing its investment attractiveness for our potential donors.

Litigation.

According to the World Bank's latest 2020 Doing Business database, it takes 360 days to enforce a simple debt collection contract in Ukraine's courts and the cost is about 40.0 percent of the debt. This is a positive result compared to regional rates of 425 days and 23.4 percent in Eastern Europe and Central Asia. However, this is a simple debt collection case. More complex business cases wander through the judicial system of Ukraine for a longer period of time and, accordingly, legal costs also

increase, since they also include payment for the services of a professional representative of the company in court.

It is obvious that justice cannot be cheap, therefore, in my opinion, ways to optimize the judicial procedure should be sought in ways to reduce the time of judicial proceedings and reduce the number of operations required to start, conduct and end the hearing of the case.

It should be noted that, compared with the data of 2019-2020, Ukraine has taken a number of steps to optimize the judicial procedure. In particular, the Unified Judicial Information and Telecommunication System was developed and began to be implemented, which, among other things, provides for exclusively electronic document management in legal proceedings, which significantly reduces the time and material costs of the court and the parties to the dispute. But we also cannot fail to note the rather protracted period of the introduction of this system into the administration of the judicial process, although it was the economic jurisdiction of more other courts that was predisposed to this.

In my opinion, at the moment the main procedural problem is the delay in the consideration of court cases. And if earlier one of the reasons for delaying the terms of the trial was ineffective notices and subpoenas, now the inadequate qualifications of the representatives of the parties come to the fore. The parties incorrectly define the subject of the dispute and file claims without observing the rules of jurisdiction and arbitrability, and this leads to the fact that cases are returned to the parties without consideration. At the moment, court cases are "managed" simply through a series of court hearings, many of which are canceled or delayed as a result of lack of preparation. In this case, the USITS module, which provides management of the progress of the case in court, can become a high potential for improving the efficiency of legal proceedings - the case is scheduled for hearing only after the parties have provided all the necessary evidence, expert data, etc.

Perhaps it would be a positive practice to introduce the institution of "Pretrial Consultation or Preventive Litigation", allowing a preliminary assessment of new cases

before filing them for registration, thus reducing the number of cases that a judge can dismiss as a result of shortcomings in the filing process.

It is recommended that courts aim to minimize the total number of trials in all but the most complex cases to avoid the additional delay associated with multiple trials. In this context, the issue of the quality of the judgment is also updated. Obviously, the reason for appealing the decision of the court of first instance and, as a result, the delay in the execution of the restoration of the violated right is also the insufficient quality of the court decision, its inconsistency with the criteria of “legal expectation” or the unity of judicial practice, as well as the ambiguity of understanding the right of the judge to discretion. In this part, as it seems, it would be positive to develop a unified methodology for making a decision - an algorithm for the actions of a judge to conduct an analysis of the circumstances of the case, followed by a presentation of this assessment in accordance with a uniform form. In this regard, it is worth noting the developments of the judges of the Supreme Court regarding the structure of the judgment, which imitates the structure of the judgment of the European Court of Human Rights. However, to date, this positive practice has not been extended beyond the Supreme Court. Although, in my opinion, it is primarily important for the courts of first instance - a high-quality court decision can become the tool that will stop the filing of an appeal. However, as well as the compliance of its uniform judicial practice in similar cases.

Human potential.

Unfortunately, at the moment we are forced to state a deep personnel crisis in the judicial system as a whole. And the reasons are not only in the military situation in Ukraine, but also in the previous situation. In particular, since 2019, the High Qualifications Commission of Judges of Ukraine, a key institution of personnel policy in the judiciary of Ukraine, has not actually been functioning; As a result, today there is a huge shortage of judges, and as a result, an increase in the workload on acting judges, which affects both the quality of a court decision and the timing of the trial. Of course, it has a negative effect. Without delving into the problem, since it is quite large-

scale, I will express a few theses that, from my point of view, can significantly affect the timing of resolving the personnel crisis in the judicial system of Ukraine:

- in relation to five-year judges whose powers have ended, but who remain in their positions pending a decision on their indefinite appointment, while receiving a judicial salary, but not performing professional functions. That is, for several years in a row, the efficiency of these judges is equal to zero, while the state budget incurs serious costs. I believe that these judges, like others with an unlimited status, went through the same procedures, thereby legitimizing their single status. I believe that there are no reasonable prohibitions regarding the issuance of an act on their status as a judge with indefinite powers. In my opinion, the existing mechanism “prior to recognition” of their status as a judge has a number of corruption risks. And I think that a mechanism for subsequent control over the professional discipline of acting judges by the relevant body would be much more effective and cost-effective.

- Special training of candidates for the position of judges is important. But it takes enough time, which in the current conditions of a total shortage of judges also negatively affects the efficiency of the courts. Given that from 2023 law graduates will have to take a unified final exam for access to the legal profession (which includes the profession of a judge), I consider it necessary to abolish the institution of special training for judges, leaving only the practice of advanced training for judges.

- Another important issue I see is the problem of ensuring the “unity of the status of judges”. In particular, in the context of the topic of the report, we are talking about improving the institution of transfer of judges in accordance with the needs and interests of the judiciary. I will briefly outline two theses: 1) the difference in the financial assessment of the work of a judge of the first instance and the cassation instance cannot be 5 times. Also, there cannot be a huge gap in the financial assessment of the work of a judge and representatives of other socially significant professions - teachers, doctors, civil servants, etc. I believe that the policy in this matter should be reviewed from the point of view of compliance with the principle of social justice. This is especially important in the context of a serious drop in Ukraine's GDP and growing unemployment. 2) the judiciary should be able to respond quickly to the need, albeit

temporary, but timely replenishment of the staff of the court, in order to exclude a complete stoppage of the work of the court and continue to ensure the principle of accessibility of the justice system. This is possible, in my opinion, by improving the institution of transferring a judge, including from a higher instance to a lower one, in particular, by maintaining guarantees of the level of judicial remuneration for such a judge.

There are many questions about the judicial personnel policy in Ukraine, I think some of the problems will be voiced by the next speakers, so I will move on to the third indicator of the quality of the judicial system.

Infrastructure.

Unfortunately, at the moment the reality is that more than 100 courts in Ukraine are destroyed or robbed as a result of the actions of the Russian army. And unfortunately, we are forced to state that Ukraine and its judicial system was not ready for such an emergency as a war. And unfortunately, the geopolitical position of Ukraine cannot be changed either – Russia, with its potential for aggression, will always be on the border with Ukraine. It is a utopia to expect that Ukraine will move its borders with Russia to Siberia, at least in the near future. Therefore, Ukraine needs to learn how to live with such a neighbor and use the negative experience gained for good, which means modernizing its courts so that any emergency event could not stop effective justice. Therefore, the key issues that should be worked out in the modernization of the judicial system should be:

- the developed algorithm of actions of the court team in a state of emergency;
- full electronic business management, which involves the modernization of server storage of documentation into a cloud storage system;
- introduction of the institution of remote judicial proceedings, which, by the way, can also become an alternative to the institution of temporary transfer of judges to other courts to meet operational needs.

The Chairman of the Supreme Court has already announced the consolidation of judicial districts. In general, this decision is justified in today's conditions, although it carries risks of violating the principle of access to justice. Therefore, these measures

should be associated with strengthening the security mechanism for guaranteeing access to justice.

As for the optimization of the system of economic jurisdiction, I personally support the idea of a single court of this jurisdiction with the subsequent right to appeal its decision to the Supreme Court. The competence of such a court should include only disputes with a large claim value, including those involving a foreign investor, while other economic disputes should be referred to the jurisdiction of general courts. To improve the quality of judicial acts, internal specialization in general courts should be encouraged. In addition, based on the relatedness of economic and civil jurisdictions, as well as the physical infrastructure of economic courts, the unification of economic and general jurisdiction can solve a number of operational personnel problems in the judicial system.

Alternative dispute resolution methods.

It should be noted that all over the world litigation is one of the most expensive ways to resolve a legal conflict. Therefore, Western investors will obviously evaluate the development of the infrastructure of alternative dispute resolution mechanisms. In Ukraine, the institution of mediation is quite young, but it has all the prospects for development, in particular, in resolving economic disputes. I believe that companies providing such services also have good prospects, the best European practices in this matter should be studied and implemented. It is also possible that the market for such services will be filled by foreign companies.

Regarding the creation of legal conditions for the development of alternative methods of resolving legal disputes, I propose to introduce the institution of "mandatory mediation" as a mandatory pre-trial procedure. For example, the trial court may be appointed to pass a court rule that would require the parties to participate in the mediation process as a precondition for their applications to be heard by the court. Under such a system of compulsory mediation, all disputes before the courts are automatically referred to mediation, provided that they do not fall under the category of exceptions, such as, for example, bankruptcy and cases involving the government. There should be no leeway in the referral mechanism, otherwise the parties may corrupt

the system to keep cases in the courts. If the dispute is not resolved through mediation, then the case goes back to court. If the dispute resolution rate through mediation is between 60 and 70 percent, then parties will be encouraged to bring cases to mediation before the court, on the assumption that the dispute will be resolved through mediation before returning to the judiciary. Examples in other countries (Argentina, Philippines, Canada and the United States of America) show that the mandatory mediation program is over 70 per cent successful. Compulsory mediation is not a panacea. Disputes between parties can be serious and complex, but examples show that mediated solutions are highly satisfactory, as both parties feel that their interests have been protected by the settlement. Contracts concluded through mediation should be recognized as binding and legally enforceable. If the agreements concluded through mediation are not voluntarily performed by the parties, then the parties should be able to reapply to the courts and request their enforcement. Judges should not have the power to overrule "mediated settlement decisions" unless there has been a serious legal error. In this part, the Law of Ukraine "On Mediation" should be finalized to better implement the practice of mediation in the judicial procedure, for example, by amending the procedural codes of Ukraine.

Intermediaries should enjoy legal immunity from criminal or civil prosecution. Mediation legislation should ensure confidentiality and non-disclosure of information about the mediation process and protect mediators from subpoenas and other legal mechanisms.