Alternative Dispute Resolution

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The issue of challenging decisions of the National Bank of Ukraine and the Deposit Guarantee Fund of Ukraine has been acute since 2014, when banks were massively recognized insolvent due to social and political developments of that time. That process, which became known as the fall of banks, marked the withdrawing of almost 100 financial institutions from the market.

Of special significance in this story are judicial proceedings related to the withdrawing from the market of PrivatBank, which is the biggest bank of Ukraine (hereinafter referred to as the Bank). It must be noted that the Bank was not actually withdrawn from the market as 100% of its shares were nationalized after it was recognized insolvent.

In December 2016, having changed its owner, the Bank continued operating in the market. Along with this, a bail-in procedure of converting deposits into the shares of the Bank and further selling them for free to the state was used in respect of a certain category of the clients that the NBU had found to be the Bank-related persons. According to the NBU and the Bank's new management, this procedure made it possible for the state to "save" funds on nationalization of the biggest financial institution.

Taking into account unfairness and illegality of such measures, a group of claimants whose money was converted into the capital of the Bank filed a claim to have the said measure canceled and to have their money returned in the administrative court proceeding. Following two positive court decisions, the case was sent to the Grand Chamber of the Supreme Court in cassation.

Thus, on 15 June 2020, the Grand Chamber of the Supreme Court made a landmark ruling in case No. 826/20221/16, which changed legislation approaches to contesting decisions of the NBU and Deposit Guarantee Fund.

As we have already mentioned, the factual ground for resorting to the bail-in was the fact that the clients had been referred to as the Bank-related persons, which was made not by the Bank itself but by the NBU. Therefore, the subject of the dispute in case No. 826/20221/16 was illegality of the NBU decision on the Bank-related persons and, consequently, insufficiency of all the following procedures regarding the conversion of money. As the nationalization of the Bank and the bail-in were made by the public bodies of Ukraine, the proceeding was initiated in administrative courts resolving disputes with public authorities. The court of first instance and appellate court granted the claims: the decision to find the claimants related persons and, consequently, the bail-in procedure made in their respect were reversed.

Meanwhile, the given case being heard by the court of cassation, the case was sent to the Grand Chamber of the Supreme Court which, in its ruling of 15 June 2020, set a number of fundamental positions:

- the dispute over challenging the acts of the above-mentioned public bodies is of a private law nature, for this reason it is to be heard by a civil or commercial court
- the decision on finding persons related may not be heard by court in any jurisdiction since it has exhausted its validity. It can be explained by the fact that as of the moment when the case was being heard and court decisions were being made in connection with the nationalization of the bank, the list of its shareholders had already been changed and the claimants were no longer considered related persons
- Decisions and orders of the Deposit Guarantee Fund made during the bail-in procedure may not be challenged in court since these are internal documents of the bank and are mandatory only for the bank employees without creating any legal effects for the claimants.

It is worth noting that this legal position relates not only to the given dispute. Under Ukrainian legislation, conclusions regarding applicability of legislative acts expressed in rulings of the Supreme Court are mandatory for all authorities and must be taken into account by other courts in their case considerations. Thus, the said ruling of the Grand Chamber of the Supreme Court has changed rules of the game in disputes with the state regulator and the Fund completely and for everyone.

Regarding a Private Law Nature of the Given Dispute

As noted above, factual ground for the bail-in was referring the claimants to the list of related persons upon the decision of the NBU. In other words, the subject of the given dispute was directly connected with the decision of the authority — the National Bank of Ukraine. It is for the purpose of challenging the actions and decisions of the authorities, and compensation of damage sustained in the result of such actions and decisions that administrative justice exists in the Ukrainian judicial system.

Contrary to this, the Grand Chamber of the Supreme Court reached the conclusion that the given dispute had merely a private law nature and was related to the claimants' property right to the bank deposit, rejecting all the arguments that it was the decision of the authority that was at the core of the dispute. Under such circumstances, the Grand Chamber of the Supreme Court reached the conclusion that such disputes are to be resolved in courts of civil and commercial jurisdiction.

It is worth noting that until now there has existed absolutely opposite legal position of the Cassation Administrative Court in rulings of 20 May 2018, in case No. 826/20288/16 and 4 September 2018, in case No. 826/20239/16.

Having such totally opposite approaches to the jurisdiction of the given disputes gives rise to legal uncertainty which, by its nature, is a restriction of a person's right to judicial protection. It has been numerously stated by the European Court of Human Rights, particularly in its decisions regarding Ukraine.

In particular, by its decision of 17 January 2013, in the case *Mosendz v. Ukraine* (application No. 52013/08) the European Court of Human Rights stated that the applicant was deprived of effective national legal remedy guaranteed by Article 13 of the Convention due to jurisdictional conflicts between civil and administrative courts (para 116, 119, 122, 125).

Apart from this, by its decision of 21 December 2017 in the case *Shestopalova v. Ukraine* (application No. 55339/07) the European Court of Human Rights concluded that the applicant was deprived of the right to access the court in contravention of Article 1 of the Convention since national courts had provided her with controversial interpretations as to the jurisdiction (para 13, 18, 24).

Moreover, the Grand Chamber of the Supreme Court itself reached similar conclusions in its rulings in case No. 752/10984/14-ц of 16 October 2019, and in case No. 243/5078/17 of 21 November 2018.

Regarding the Impossibility to Challenge the Decision on Related Persons made by the NBU and the Decisions by the Deposit Guarantee Fund

Thus, the Grand Chamber of the Supreme Court points out that when the court made the decision in the case, the disputed decision on related persons had already exhausted its validity, since the register of the bank shareholders had been changed by the time the case was considered and the court decisions on the nationalizations of the bank were delivered; for these reasons, the claimants were no longer considered to be related persons.

What surprises is that only 8 days passed between the date when the claimants were recognized related persons and the date when the shareholders of the bank were changed (nationalization). During those 8 days, the temporary administration of the bank converted the claimants' deposits into the shares of the bank whereby it actually interfered with the claimants' rights. However, the position of the Grand Chamber of the Supreme Court implies that the decision on related persons could have been canceled by court only within those 8 days (before

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making changes to the register of shareholders), when it had not yet "exhausted" its validity. There is no point explaining here that it is absolutely unrealistic not only for Ukrainian but also for European courts to make a decision on the merits of the case to cancel the NBU decision within 8 days after making this decision.

Apart from this, in its ruling the Grand Chamber of the Supreme Court stated that both decisions and orders of the Deposit Guarantee Fund made during the bail-in procedure also may not be challenged in court since these are internal documents of the bank and are mandatory only for the bank employees, and do not create any legal effects for the claimants.

It is worth noting that such conclusions of the Supreme Court collide with both the Constitution of Ukraine, particularly in light of its interpretation by the Constitutional Court of Ukraine, and international standards in terms of effective remedy and restoration of the violated rights.

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It is known that general provisions on the right to judicial protection are guaranteed by the Constitution of Ukraine (part 1-2, article 55 of the Constitution of Ukraine and the Convention on human rights and fundamental freedoms (the Convention) — Article 6.

This implies that any person whose rights and freedoms have been violated by actions and decisions of the NBU has the right to challenge such actions and decisions in court.

However, the stance of Supreme Court set out in ruling No. 826/20221/16 means that the notion of dispute not subject to administrative legal proceeding must be interpreted in a broad sense, that is as the notion relating to disputes not subject to administrative legal proceeding and relating to those which are not subject to legal proceeding at all.

It is worth noting that it was for the first time the Supreme Court expressed its position regarding the category of disputes that are not subject to legal proceeding at all. Undoubtedly, it is a precedent which will lead to respective consequences later on. Particularly, in view of the broadness of such position and the fact that it was stated by the Grand Chamber of the Supreme Court, there are preconditions for such approach to gain popularity and to be used not only to challenge decisions of the NBU and the Deposit Guarantee Fund, but to go far beyond such a category of disputes.

Regarding the Position of the Constitutional Court

In its turn, the Constitutional Court of Ukraine expressed its fundamental position in its decision No. 6p(II)/2020 of 24 June 2020, which was formally made in 9 days after drafting and announcing the introductory and operative part of the Grand Chamber ruling in case No. 826/20221/16, but almost three months before its full text was announced.

In the given decision the Constitutional Court of Ukraine pointed out that "... legislative regulation should avoid prohibitions and restrictions with regard to exercising by a person of the right to challenge decisions, acts or omissions of authorities, particularly in the way of determining at the legislative level an exhaustive list of persons who have the right to such a challenge in court, since non-inclusion of a person into this list makes it impossible for him to prove in court his assurance in the need to protect his rights, freedoms violated by these decisions, acts or omissions. It is having this assurance that is an essential attribute of the person's right to address the court with the view to challenging decisions, acts or omissions of authorities, and, therefore, an essential prerequisite of exercising such a right".

Conclusion

That is, notwithstanding the fact that the NBU decisions in regard to bank-related persons were the grounds for writing off the deposits of the persons listed therein and their conversion into the bank shares through so called bail-in procedure, which was documented by the above-mentioned documents of the Deposit Guarantee Fund, the Grand Chamber of the Supreme Court is of opinion that:

(1) such relations are of a private law nature
(2) having exhausted its validity after the change of the shareholders, the NBU decision may not be challenged
(3) decisions of the Fund may not be challenged in court either since they are internal documents of the bank which exhaust their validity after their implementation.

Thus, the Supreme Court's legal position is a law application precedent that creates some collisions with provisions of the Constitution of Ukraine and the Convention in the part of standards with regard to effective remedy and restoration of violated rights. Notably, there is a risk of such an approach going beyond this kind of disputes posing threat of restriction of the right of people to effective judicial remedy and restoration of violated rights.

Under such circumstances, the current situation is to be resolved by submitting another similar case to the Grand Chamber of the Supreme Court to solve the issue of derogation from the conclusion of the Grand Chamber of the Supreme Court regarding applicability of the rule of law set out in the ruling of 15 June 2020 in case No. 826/20221/16.