

UDC 347.4

DOI <https://doi.org/10.32849/2663-5313/2021.11.02>**Valentyna Vasilieva,***Doctor of Law, Professor, Honored Lawyer of Ukraine, Director, Law Institute of Vasyl Stefanyk Precarpathian National University, 57 Shevchenko street, Ivano-Frankivsk, Ukraine, postal code 76018, lawdept@pu.if.ua***ORCID:** orcid.org/0000-0002-9385-6275**SCOPUS:** <https://www.scopus.com/authid/detail.uri?origin=resultslist&authorId=57210387434>**Alla Zelisko,***Doctor of Law, Professor, Professor at the Department of Civil Law, Law Institute of Vasyl Stefanyk Precarpathian National University, 57, Shevchenko street, Ivano-Frankivsk, Ukraine, postal code 76018, alla.zelisko@pnu.edu.ua***ORCID:** orcid.org/0000-0002-1899-407X**SCOPUS:** <https://www.scopus.com/authid/detail.uri?authorId=57209985037>

Vasilieva, Valentyna, Zelisko, Alla (2021). An investment contract in the private law of Ukraine. *Entrepreneurship, Economy and Law*, 11, 11–16, doi <https://doi.org/10.32849/2663-5313/2021.11.02>

AN INVESTMENT CONTRACT IN THE PRIVATE LAW OF UKRAINE

Abstract. The *purpose of the article* is to conduct a detailed consideration of the nature of an investment contract as a private-law construction and specify particularities of its generic definition in the system of civil law contracts.

Research methods. When developing the paper, the authors relied on general scientific and special methods of scientific cognition. Analysis and synthesis helped identify elements and particularities of an investment contract as a private-law construction, consider it through the prism of civil-law contracts, and provide a promising outlook of its application as a regulator of private law relations. The methods of classification and systematization used in the research allowed generalizing doctrine and the current legislation of Ukraine, eliciting challenges of interpreting the nature of an investment contract through its subject.

Results. The article conducted a detailed consideration of different approaches to the nature of an investment contract available in doctrine. Consequently, they were conditionally divided into public-law and private-law concepts interpreting an investment contract. It was established that the latter approach is top-priority in modern science and practice. The thesis relies on a criterion of the contract's subject matter – investments as capital expenditure. The latter means action. This action is legitimate, initiative – the outcome of a free expression of the will and focused on achieving a legal result. Being an initiative, lawful act of a person's free expression of the will, capital expenditure is conducted on the basis of the discretionary nature of civil-law regulation. The social and economic effect as a result of capital expenditure allows interpreting it as widely as possible. Thus, to attribute an investment contract to a particular type seems debatable from the perspective of the complexity of its separation from related contractual structures.

Conclusions. An investment contract is immanently characterized by the private-law nature driven by its legitimate essence as a free, initiative, lawful act focused on the dynamics of civil relations and governed by the mechanisms of dispositive legal regulation. The analysis of legal regulations does not allow limiting it to a specific range of subjects that may act as investors. An investment contract is a through concept by nature, and the presence of its special features does not negate the affiliation of a particular contractual structure to some type in another system of classifications established by law or doctrine.

Key words: contract, investment, private law, transaction, investment contract.

1. Introduction

Despite the intense development of modern social relations in all their manifestations driven by global integration processes, the convergence of legal systems, digitalization, the basic structures underlying the legal regulation

of these relations remain the same. In particular, this is about contract design. The above-mentioned confirms universality, the flexibility of such design, which, based on the principles of dispositive contractual regulation of relations, tends to get through all those socio-economic

and legal transformations taking place in society. The most effective applicability of the contract as a form of regulation of social relations is manifested in doctrinal developments of the contract as a source of civil contract law. Nowadays, the interpretation of the contract as an act of individual lawmaking is ubiquitous in domestic science and practice.

The use of contractual construction to regulate different spheres of public relations determines the generation of a large variety of contracts, which are marked by their inherent legal characteristics and specifics of the subject, object, and content. At the same time, the development of social, economic, and legal conditions in society also determines the availability of such contractual structures, which are difficult to distinguish from each other.

These two trends in designing different types of contracts in society ascertain the static demand in the doctrine and practice of developments on the nature of such contracts, the problem of their correlation or differentiation. Studies of the nature of an investment contract are among the above scientific and applied problems. The contractual construction is characterized by the drives for growing relevance in the modern context, as the intensification of investment attractiveness of states is becoming almost the top-priority area of their strategy and tactics.

The issues of contract law and some of its aspects have been studied by a cohort of prominent modern scientists: T.V. Blashchuk, A.H. Biriukova, T.V. Bodnar, M.I. Brahinskyi, O.A. Belianevych, S.M. Berveno, V.A. Vasylieva, A.B. Hryniak, S.D. Hryenko, N.Yu. Holubieva, O.V. Dzera, I.R. Kalaur, V.M. Kossak, V.V. Luts, V.V. Rieznikova, N.V. Fedorchenko, O.S. Yavorska, O.Yu. Cherniak (Dyminska), Zh.L. Chorna, and others. Specialized scientific investigations of subject investment contracts have been carried out by the following scientists: O.M. Antypova, V.V. Kafarskyi, O.R. Kibenko, V.M. Kossak, O.E. Simson, O.M. Chaban, and others. However, different approaches to the interpretation of the nature of an investment contract and its attributes keep actualizing scientific inquiry in the relevant legal dimension. Given the above, *the purpose of the scientific article* is to conduct a detailed examination of the nature of an investment contract as a private-law construction and specify particularities of its generic definition in the system of civil law contracts.

2. Private law nature of the structure of an investment contract

Modern doctrine is full of different approaches to the nature of the contractual structure

under study, the maximum generalization of which allows the authors to conditionally divide them into supporters of public-law and private-law essence of an investment contract. It is worth noting that interpreting it as private-law, in particular, civil contract, is more common. For example, V.V. Kafarskyi regards an investment contract as a transaction between two or more persons, under which the parties establish rights and obligations for a defined period within the relations between the parties regarding investment of all types of property and intellectual assets in objects of business and other activities to generate profit or a social effect (Kafarskyi, 2006, p. 106). O.M. Chaban in his research also concludes that an investment contract is an independent type of civil contract, which focuses on investing in investment object, emphasizing that it is required to exclude the possibility of applying civil acts concerning other civil contracts to the relations it regulates (Chaban, 2013, p. 3). Leading scientists of commercial law also define an investment contract through the concept of a civil contract and transaction. Thus, O.M. Vinnyk interprets an investment contract as the contract of property-organizational nature concluded by an investor or his authorized representative with other parties, which stipulate the implementation of practical actions to provide specific investments for an object defined by the contract which have to produce a socio-economic effect expected by the investor (Vinnyk, 2009, p. 68). O.Ye. Simson defines the concept of an investment contract as a joint venture agreement, or any other civil agreement under which one party (investor) transfers property, property rights and/or other valuables, which have a market value, in possession or for use to the other party (investment recipient), and the investment recipient, in exchange, undertakes to pay the investor a share of the profit (income), specified by the contract, of business in the form of periodic payments or one-time payment (Simson, 2000, p. 222).

Therefore, the consideration of the main legal features of such contracts should be carried out by relying on the criterion that identifies the generic attribution of any contract – the subject-matter of the contract. Thus, according to para. 1 of Art. 638 of the Civil Code of Ukraine, the subject-matter of the contract is an absolutely essential condition for any type of contract (Zelisko et al., 2019, p. 916). In terms of specifying the subject matter of any contract, it should be emphasized in view of the availability of different concepts. As already mentioned, the essence of an investment contract is capital expenditure, which by its

legal nature, is the action of legal entities. The very actions of legal entities in most cases are the basis for the origin of relevant legal relations. The acts of external conduct of people are a subject of legal regulation (Vasilieva, 2006, p. 161). Therefore, since there is no legally defined subject matter of an investment contract, it would be appropriate to proceed from the fundamental concept in the area under study – “investment”. Its nature determines the legal characteristics of an investment contract.

3. Capital expenditure as the subject matter of an investment contract

According to art. 1 of the Law of Ukraine “On Investment Activity”, investments are all types of property and intellectual values invested in objects of entrepreneurial and other activities, which generate profit (income) and/or social and environmental effects (Zakon “Pro investytsiynu diialnist”, 1991). Thus, one can invest anything (except for the restrictions prescribed by current legislation) in anything, as the Law does not limit investment only to entrepreneurial activities. Both the social and economic effect as a result of investment expenditure allows it to be interpreted as broadly as possible. Consequently, from the perspective of the external form, investment expenditure can be manifested in any civil contract (Zelisko, 2021). This conclusion is confirmed by para. 2 of Art. 5 of the Law, under which investors can act as depositors, creditors, buyers, as well as perform the functions of any participant in investment activities.

The very essence of the definition of investment is limited to the etymological origin of this concept – investment expenditure. When transferring this concept to the legal realm, it is obvious that capital expenditure means an action. This action is legitimate, proactive – the outcome of a free expression of the will, and focused on achieving a legal result. These features correspond to Art. 202 of the Civil Code of Ukraine, which states that a transaction shall be an action of a person aimed at acquiring, changing or terminating civil rights and obligations. In O.A. Pidopryhora’s opinion, the legitimacy of actions aimed at achieving a particular legal result (the emergence, change or termination of rights and obligations) initially reveals the nature of the transaction (Pidopryhora, 1995, p. 215). Thus, investment expenditure as the essence of an investment contract is fully consistent with the structure of the transaction. Being an initiative, lawful act of a person’s free expression of the will, capital expenditure is conducted on the basis of the discretionary nature of civil-law regulation, which, inter

alia, is manifested in legal equality, freedom of expression, and property independence of participants in legal relations.

In science, there are positions according to which the involvement of public-law entities in the investment contract establishes the public-law nature of the investment contract. The authors believe that the applicability of the above dispositive legal regulatory mechanisms to the investment contract is one of the arguments, which indicate that the participation of a public entity in the contract under study does not affect the private-law nature of the investment contract. If such contractual relations are regulated by legal equality and free will of their participants, then public-law entities realize their so-called “private legal capacity” acting legally equal to other participants in civil relations. In this regard, it is worth supporting available in the literature developments of the so-called dual legal capacity of public-law entities (in particular, the conceptual developments by O.O. Pervomaiskyi) (Pervomayskyi, 2003, p. 8; Klymenko, 2006, p. 9). The state realizes its public legal capacity by establishing rules for regulating relations in society. However, when entering into property and non-property relations, the state acts within its private legal capacity and is legally equal to other participants in relations. Therefore, the participation of public-law entities in the investment contract does not transform its private-law nature.

According to the provisions of the Civil Code of Ukraine (p. 4 of Art. 11), an administrative act may be the basis for the emergence of private law relations, but it causes the dynamics of civil relations rather than administrative ones as public. As O.S. Yoffe, the classic of civil law, rightly notes, the body committing an administrative act aimed at establishing civil law relations never becomes a party to the legal relations. The contract is concluded by subjects of civil law (Yoffe, 2004, p. 109). According to V.V. Vasilieva, in contrast to an administrative act, transactions are made to generate exclusively civil effects, while administrative acts also generate the occurrence of administrative effects (Vasilieva, 2016, p. 45). Thus, the statutory and practice-based option of the origin of civil relations pursuant to an administrative legal act cannot be a ground for doubts in the private law nature of the investment contract as a transaction.

There is no doubt, the main subject-matter of regulation of the investment contract with its legal nature is property relations. At the same time, its feature entails the inclusion of a significant segment of the so-called organizational relations in its regulatory scope. The complex nature of investment relations, which mediates the process of capital expenditure,

is reflected in organizational relations. Those that have an organizational nature seems to be an undoubted characteristic of civil relations today. In particular, R.A. Maydanyk elucidates the nature of civil organizational relations as jurial relations of a legal procedure focused on the emergence and adjustment of actions of participants in organized legal relations following the rights and obligations that constitute the essence of these relations (Maydanyk, 2012, p. 106–107). Thus, supporting the fact that organizational relations are immanently peculiar to investment contracts and, at the same time, one can present another argument in favor of the private-law nature of the investment contract.

Among the potential factors that may provoke attempts to interpret the investment contract as public-law, the authors stress its distinct focus on meeting the public interest of the state and society as a whole. It appears that the category of interest in terms of the differentiation of private-law or public-law nature of the investment contract cannot be an independent and unconditional criterion. In the modern context, there are such areas of public relations in which the coherence of public and private interests is so strong that it is difficult to separate them from each other for sure. This feature is most prominent in the realm of the issue under consideration. The very definition of the subject-matter of the investment contract as capital expenditure, the purpose of which is to make a profit or achieve other social and economic effects, proves the above. Thus, even if it concerns the satisfaction of private interest of an individual under capital expenditure, it is beyond controversy that separate capital expenditure is an activating factor for the state economy. In the very context of capital expenditure, it becomes clear the dominant role of private interest in specifying and affecting the public interests of society as a whole. Therefore, the design of an investment contract, remaining private-law by its nature, is distinguished by the maximum impact on the satisfaction of public interests.

4. Generic characteristics of an investment contract

Both social and economic effect as a result of capital expenditure allows it to be interpreted as broadly as possible. From the perspective of the external form, capital expenditure can be manifested in any civil contract. The conclusion is supported by para. 2 of Art. 5 of the Law,

investors can act as depositors, creditors, buyers and perform the functions of any participant in investment activities.

Given the above, it seems debatable to attribute an investment contract to the specific type of contract given the complexity of its separation from related contractual structures.

The mentioned feature of investment contracts is rendered in the scientific developments. R.B. Shyshka emphasizes that this is a collective concept for a group of contracts that mediate legal relations between participants in the investment process using the provisions of investment law (Shyshka, 2014, p. 117). Indeed, one can discuss the existence of so-called “integrated” contracts which also comprise investment contracts in addition to foreign economic, business, consumer or commercial (Vasilieva, 2016, p. 130). This concept embraces a range of long-known and relatively new, even unnamed, contracts which lay groundwork for investments. It likely refers to the characteristic algorithm of such contracts following their purpose and scope than a special subtype or even type (Shyshka, 2014, p. 118).

Thus, based on the characteristics of the subject-matter of investment contracts – capital expenditure, they can be manifested in any civil-law contracts focused on achieving social or economic effect by investing material benefits in the object of any activity.

5. Conclusions

By relying on the above, the authors hold that an investment contract as an act of investing is immanently characterized by private-law nature driven by its legal nature as a free, proactive, lawful act aimed at the dynamics of civil relations and governed by mechanisms of dispositive legal regulation. The latter are manifested in the established categories of legal equality, freedom of expression and property independence, which are unconditional for the doctrine of civil law.

The analysis of legal regulations does not allow limiting it to any type of activity (entrepreneurial or non-entrepreneurial) or a certain range of entities that can act as an investor. An investment contract is a through concept in its essence, and the presence of its features does not negate the attribution of a particular contractual structure to some type in another system of classifications established by law or doctrine.

References:

- Chaban, O.M.** (2013). Investytsiini dohovory [Investment agreements] (*PhD thesis*). Kyiv, 200 p. (in Ukrainian).
- Kafarskyi, V.V.** (2006). Investytsiini dohovory v Ukraini: poniattia, vydy, zmist, pravove rehuliuвання [Investment agreements in Ukraine: concept, types, substance, legal regulation] (*PhD thesis*). Kyiv, 220 p. (in Ukrainian).

Klymenko, O.M. (2006). Osoblyvosti pravovoho stanovyshcha derzhavy yak subiekta pryvatnoho prava [Peculiarities of the legal status of the state as a subject of private (civil) law] (*PhD author's abstract*). Kyiv, 22 p. (in Ukrainian).

Maidanyk, R.A. (2012). *Tsyvilne pravo: zahalna chastyna* [Civil law: the general part], in 2 vol. Kyiv, vol. 1: Vstup u tsyvilne pravo [Entry into the civil law], 472 p. (in Ukrainian).

Pervomaisky, O.O. (2003). Uchast terytorialnoi hromady u tsyvilnykh pravovidnosynakh [Participation of the territorial community in civil legal relations] (*PhD thesis*). Kharkiv, 220 p. (in Ukrainian).

Pidopryhora, O.A. (1995). *Tsyvilne pravo: navchalnyi posibnyk* [Civil law: textbook]. Kyiv: Venturi, 416 p. (in Ukrainian).

Pro investytsiinu diialnist (1991) [On investment activities], Zakon Ukrainy vid 18 veresnia 1991 r. № 1560-XII. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1560-12#Text> (in Ukrainian).

Shyshka, R.B. (2014). Investytsiini dohovory: kharakterystyka ta sposoby klasyfikatsii [Investment agreements: characteristics and classification attempts]. *Yurydychyi visnyk*, vol. 4(33), pp. 118–122 (in Ukrainian).

Simson, O.E. (2000). Pravova pryroda dohovoriv investytsiinoho kharakteru [Legal nature of investment agreements]. *Visnyk Kharkivskoho natsionalnoho universytetu vnutrishnikh sprav*, no. 10, pp. 218–223. Retrieved from: http://nbuv.gov.ua/UJRN/VKhnuvs_2000_10_43 (in Ukrainian).

Vasilieva, V.A. (2006). *Tsyvilno-pravove rehuliuвання diialnosti z nadannia poserednytskykh posluh: monohrafiia* [Civil-legal regulation of intermediary services: monograph]. Ivano-Frankivsk, 346 p. (in Ukrainian).

Vasilieva, V.A. (2016). Doktrynalni pytannia systematyzatsii dohovoriv [Doctrinal issues of systematization of treaties]. *Dohovir yak universalna forma pravovoho rehuliuвання: monohrafiia* / ed. by V.A. Vasilieva. Ivano-Frankivsk, pp. 126–143 (in Ukrainian).

Vaslieva, V.V. (2016). Dohovir yak yurydychyi fakt [Treaty as a legal fact]. *Dohovir yak universalna forma pravovoho rehuliuвання: monohrafiia* / ed. by V.A. Vasilieva. Ivano-Frankivsk, pp. 29–47 (in Ukrainian).

Vinnyk, O.M. (2009). *Investytsiine pravo: navchalnyi posibnyk*. [Investment Law: textbook]. Kyiv: Pravova yednist, 616 p. (in Ukrainian).

Yoffe, O.S. (2004). *Izbrannyye trudy: sovetskoie hrazhdanskoie pravo* [Selected works: Soviet civil law]. Saint Petersburg, 511 p. (in Russian).

Zelisko, A.V. (2021). Investytsiinyi dohovir v systemi tsyvilnykh dohovoriv: vydovi kharakterystyky [Investment agreement in the system of civil treaties: specific characteristics]. *Desiati yurydychni dysputy z aktualnykh problem pryvatnoho prava, prysviacheni pamiaty Y.V. Vaskovskoho: materialy Mizhnarodnoi naukovo-praktychnoi konferentsii* (Odesa, May 28, 2021) / ed. by V.I. Truba. Odesa: Feniks, pp. 91–95 (in Ukrainian).

Zelisko, A.V., Vasylyeva, V.A., Malyshev, B.V., Khomenko, M.M., Sarana, S.V. (2019). Civil law regulation of contracts for joint activity in Ukraine and other post-socialist states. *Asia Life Sciencis: The Asian International Journal of Life Sciencis*, issue 2, pp. 913–925. Retrieved from: <http://emtpub.com/wp-content/uploads/2019/12/Supplement-21-No-2-2019.pdf> (in English).

Валентина Васильєва,

доктор юридичних наук, професор, заслужений юрист України, директор, Навчально-науковий юридичний інститут Прикарпатського національного університету імені Василя Стефаника, вулиця Шевченка, 57, Івано-Франківськ, Україна, індекс 76018, lawdept@pu.if.ua

ORCID: orcid.org/0000-0002-9385-6275

SCOPUS: <https://www.scopus.com/authid/detail.uri?origin=resultslist&authorId=57210387434>

Алла Зеліско,

доктор юридичних наук, професор, професор кафедри цивільного права, Навчально-науковий юридичний інститут Прикарпатського національного університету імені Василя Стефаника, вулиця Шевченка, 57, Івано-Франківськ, Україна, індекс 76018, alla.zelisko@pnu.edu.ua

ORCID: orcid.org/0000-0002-1899-407X

SCOPUS: <https://www.scopus.com/authid/detail.uri?authorId=57209985037>

ІНВЕСТИЦІЙНИЙ ДОГОВІР У ПРИВАТНОМУ ПРАВІ УКРАЇНИ

Анотація. Метою статті є комплексний розгляд природи інвестиційного договору як приватноправової конструкції та окреслення особливостей його видового визначення в системі цивільно-правових договорів.

Методи дослідження. Роботу виконано на підставі загальнонаукових і спеціальних методів наукового пізнання. За допомогою методів аналізу та синтезу виявлено ознаки й особливості інвестиційного договору як приватноправової конструкції, здійснено розгляд його крізь площину системи цивільно-правових договорів та окреслено перспективність його застосування як регулятора приватних відносин. Використані в дослідженні методи класифікації й систематизації дали змогу провести узагальнення доктрини та чинного законодавства України, виявити основні проблеми трактування природи інвестиційного договору через поняття його предмета.

Результати. У статті розглянуто всебічно представлені в доктрині різні підходи до природи інвестиційного договору, за результатами чого умовно поділено їх на публічно-правові та приватноправові концепції трактування інвестиційного договору. Констатовано, що саме останній підхід є пріоритетним у сучасній науці і практиці. В основу обґрунтування наведеної тези покладено критерій предмета договору – інвестиції як капіталовкладення. Останнє за своїм змістовим навантаженням є дією. І ця дія є правомірною, ініціативною – є результатом вільного волевиявлення особи та спрямована на досягнення правового результату. Як ініціативний, правомірний акт вільного волевиявлення особи, капіталовкладення здійснюється на основі диспозитивності цивільно-правового регулювання. Соціальний та економічний ефект як результат капіталовкладення дає змогу максимально широко його трактувати. Таким чином, віднесення інвестиційного договору суто до якогось виду договору видається дискусійним із позиції складності його відмежування від суміжних договірних конструкцій.

Висновки. Для інвестиційного договору іманентно характерна приватноправова природа, зумовлена його правочинною сутністю як вільного, ініціативного, правомірного акта, спрямованого на динаміку цивільних правовідносин та регульованого за допомогою механізмів диспозитивного правового регулювання. Аналіз законодавчих норм не дає змоги обмежити його певним колом суб'єктів, які можуть бути інвесторами. Інвестиційний договір є наскрізним за своєю суттю поняттям, і наявність його спеціальних ознак не нівелює належність певної договірної конструкції до якогось виду в іншій системі класифікацій, ustalених у законодавстві чи доктрині.

Ключові слова: договір, інвестиція, приватне право, правочин, інвестиційний договір.

The article was submitted 15.11.2021

The article was revised 06.12.2021

The article was accepted 27.12.2021