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LEASE AGREEMENT IN MODERN NATIONAL AND EUROPEAN LEGISLATION

Abstract. *The purpose* of this research is to clarify particularities of the regulation of a lease agreement under national law and as compared to the current experience of European countries. **Research methods.** The author used general scientific and special methods of scientific cognition. **Results.** The state of legal regulation of leasing in Ukraine is analyzed taking into account the latest innovations. In addition, the author highlights challenging issues in the use of the leasing institution and gives the general characteristic of the peculiarities of national leasing laws. By relying on the study of the provisions of legislative instruments of European countries related to the regulation of leasing, the basic approaches to the definition of leasing in other countries are identified. The peculiarities of modern legislative regulation of contractual leasing relations in European countries are outlined by comparison with national legal regulation. **Conclusions.** According to national laws, the legal structure of a lease agreement is quite complex because it combines the elements of purchase and rent agreements. The definition of a lease agreement available in Article 806 of the Civil Code of Ukraine renders a model which provides for relations of direct and indirect leasing as opposed to the statutory definition of leasing of the better part of the studied European countries. The specific nature of contractual leasing relations and the need to apply the provisions on related types of agreements lead to a different interpretation of the essence of the relevant legal institution and create problems in practice, as evidenced by case law. It is established that in European countries, there is a common approach under which the issues of leasing activities and, in particular, the definition of the contractual structure of leasing are primarily regulated by civil laws, which consolidate the original conceptual models of leasing, basic principles, the content of obligations, the status of the contracting parties, as well as other issues elaborated in special legislation.

Key words: lease agreement, European legislation, civil legislation.

1. Introduction

It is well known that leasing transactions are an essential and widespread tool of economic activity in many countries, and the leasing services market is sufficiently advanced today in the USA and many countries of the European Union. Dynamic development and growing attention to the leasing sector is driven by the fact that leasing is one of the key means of optimizing production capacity and renewing fixed assets of enterprises, which, in turn, improves the quality and efficiency of manufacturing, progress of many industries, and the economy in general.

Studies on the practical realization of leasing in Ukraine and the world allow concluding that leasing is a powerful tool that has significant potential (Cherep, Koshkarbaev, Mendyhal'yev, 2016; Karintseva, 2016). At the same time, it is obvious that the condition for the proper functioning of the leasing market in Ukraine involves ensuring effective statutory regula-

tion of this legal institution. It provides for complete settlement of relevant legal relations, identification of the legal status of the parties to the lease agreement, requirements for content and form, standardizing types and forms of leasing, and the consequences of breach or undue fulfilment of the terms of the lease agreement.

Some aspects of the legal regulation of leasing relations in Ukraine, the general characteristics and legal nature of leasing, and the analysis of contractual leasing relations with the participation of some special entities are covered in the contributions by many domestic researchers, whose best practices lay groundworks for further scientific activities in a theoretical and practical realm of the operation of the leasing institution in Ukraine (Bielousova, 2009; Ukhanova, 2009; Sichko, 2006; Lovynchuk, 2008; Osadko, 2016; Lepekh, 2021). However, considering the dynamic changes, enhancement, and expansion of international commercial cooperation, tendencies towards intensification, develop-

ment, and complication of contractual relations, including with the participation of foreign entities and because scientific literature mostly deals with general issues of legal characteristic of leasing and leasing entities in Ukraine, the author holds the analysis of the national legal regulation of contractual leasing relations **relevant** and necessary for the doctrine of civil law and law enforcement practice in the context of reviewing a foreign experience of statutory regulation of the relevant legal institution. The abovementioned will provide insight into current practices and approaches to the application of a lease agreement and allow identifying ways to improve national legislation. **The purpose** of this research is to clarify features of the regulation of a lease agreement following national law and compared to the current experience of European countries in this area.

2. Leasing in national legislation and challenges of its application. At the level of national legislation, obligations arising under a lease agreement are generally regulated by the Civil Code of Ukraine (hereinafter – CC of Ukraine), which comprises the main provisions of this contractual structure. Moreover, the relevant legal relations are governed by special legislation. First of all, it is about the Law of Ukraine “On Financial Leasing”, which was adopted in a new wording as of 04.02.2021.

In the legal doctrine and world practice of leasing activities, the separation of different types of leasing depending on the selected criteria (the scope of the obligation, the purpose of the entities of leasing, etc.) (Kulyniak, 2008), which is also conveyed at the level of legal systems of each state taking into account the peculiarities of the country’s economy, social needs and legal traditions, is a matter of general observation.

However, when studying the particularities of national and European leasing laws, first of all, it is worth paying attention to the civil legislation of Ukraine, which fixes the original unified principles of the regulation of contractual relations emerging based on lease agreements. Thus, according to Article 806 of the Civil Code of Ukraine (hereinafter – CC of Ukraine), under a lease agreement, one party (a lessor) shall transfer or shall be obliged to transfer for use to another party (a lessee) the property owned by the lessor under the ownership right and acquired without any preliminary agreement with the lessee (direct leasing), or the property specially acquired by the lessor from the buyer (a supplier) in compliance with the specifications and conditions set out by the lessee (indirect leasing) for a definite time and fixed charge (lease payments).

Following the above legal construction, general provisions on purchase and sale and provisions on the supply agreement, unless otherwise provided by law, shall be applied to civil legal relations based on a lease agreement, considering its unique nature. The provisions on rent are also applied to the lease agreement considering the particularities established by the law.

The analysis of the mentioned provisions of civil law shows that the legal structure of a lease agreement is quite complex that causes a somewhat ambiguous interpretation of the essence of the legal institution and creates problems in law enforcement, misunderstandings between participants of civil law relations, which are grounded on lease agreements. In domestic contractual practice, there are known cases when the parties do not have a single interpretation of the nature and consequences of the concluded lease agreement. In particular, it is about the erroneous perception of the leasing obligation exclusively as an obligation arising from an agreement of sale, lease, loan, etc., that leads to erroneously expected legal consequences that are not provided for the contractual leasing relations.

A striking example of challenging issues in the application of a lease agreement is litigation, which is also a result of incomplete statutory regulation of the relevant binding legal relations based on the lease agreement.

For example, in terms of one of the lawsuits concerning the invalidity of a financial lease agreement, the object of which was a car, and the recovery of funds paid under such an agreement, the Supreme Court had to clarify the legal nature of the financial lease agreement and the requirements for a form of its conclusion. Therefore, the court of cassation noted that “the financial lease agreement is mixed by its legal nature and contains elements of the agreements on lease (rent) and purchase-sale of a vehicle that follows from the agreement according to Article 628 of CC of Ukraine (Judgement of the Supreme Court in the case No. 404/4702/18- II as of 01.04.2020).

In another case, a plaintiff filed a lawsuit in court to recognize the agreement valid and declare the ownership of the leased item, believing that he acquired ownership of the leased item by fully complying with the agreement terms for lease payments. When revising the judgment of the appellate court to dismiss the claim, the court of cassation noted that “...Under the lease agreement, the lessor’s property interest means investment and future profitable payback, and the lessee’s property interest – the ability to use and acquire the title to the leased object. The Supreme Court also pointed out that because the finan-

cial lease agreement is subject to the rules of CC of Ukraine, which regulate sale and rent relations, the financial lease agreement, the subject of which was the car, had to be concluded not only in writing but also notarized – the parties did not take into account this fact when concluding the agreement (Judgment of the Supreme Court in the case No. 694/523/18 as of 03.02.2021).

Consequently, the synergy between the state of statutory regulation of leasing relations and the efficiency and stability of the application practice of this civil law institution is apparent.

In this context, it is worth mentioning that statutory regulation of the leasing services market in Ukraine has recently been improved. As mentioned above, the new version of the Law of Ukraine “On Financial Leasing” was adopted on 04.02.2021. The explanatory note to the draft emphasizes that amendments are triggered by an urgent need to bring the legislation in line with modern practices and the best world experience of leasing functioning as one of the most common methods of financing technical re-equipment, eliminating contradictions between definitions, overcoming conflicts between general civil and specific financial laws.

Scientific literature has already paid attention to the need for more detailed regulation of leasing in the Civil Code of Ukraine, laws or bylaws to ensure the specification and unification of terms, taking into account the features outlined in international acts on financial leasing, and address the gaps elucidated by case law (Habriadze, 2019, p. 51).

In particular, among other things, a significant step in ensuring the unity and stability of the leasing practice in Ukraine was the amendment of Chapter 58 of the Civil Code of Ukraine, Art. 809-1, which regulates the relations between the lessee and the lessor in case of invalidation of the lease agreement or the establishment of its nullity, stipulating the lessee’s obligation to redeliver the property to the lessor in the manner and under the conditions fixed in the mentioned article, and determines the obligation and conditions for reimbursement of the amount of lease payments to the lessor for the entire period of use.

However, the author believes that both the 1997 version of the Law and the new version contain a quite imperfect definition of the category “financial leasing” as it does not fully reflect the essence of this legal institution in various aspects of its application and does not comprise clear criteria for distinguishing this contractual construction from related types of agreements. It is worth agreeing with the reasonable comments of the Central Legal Department, proposed towards the 2019 draft law “On Financial

Leasing”, about the vague and too generalized nature of the definition of the mentioned term.

3. Foreign experience of the legal regulation of contractual leasing relations exemplified by European laws. In this regard, the practice of other countries in the legal regulation of contractual leasing relations in general and the legislative definition of the leasing contract in particular sparks interest.

The EU accounting rules on leasing, part 2 of paragraph 3, contain the wording of the generalized concept of leasing as an agreement under which the lessor (owner) transfers to the lessee (renter) the right to use the asset in exchange for payment or a number of payments. The document also provides definitions of financial and operating leases.

Article 361 of Chapter 17 “Lease agreement” of the Law of Obligations Act of the Republic of Estonia defines a lease agreement as that under which the lessor undertakes to purchase the leased item specified by the lessee from a specific seller and deliver possession to the lessee, and the lessee undertakes to pay for the use of the leased object.

An analysis of this contractual structure allows the author to conclude that unlike national legislation, which consolidates direct and indirect leasing, Estonia does not fix direct leasing for the statutory regulation of legal relations based on a lease agreement. This is confirmed by the fact that the legislative formulation of the lease agreement has a direct reference to the formula “the lessor undertakes to purchase and deliver...”, while the CC of Ukraine does not restrict the contracting parties from identifying the leased item as the property which belongs to the lessor on the right of ownership and has been acquired by him without prior agreement with the lessee.

Compared to national legal regulation, the transfer of the risk of accidental destruction and accidental damage of the leased object is also determined more bindingly. In particular, Article 364 of the above Law sets forth that the relevant risks pass to the lessee during the transfer of the leased object. As opposed to Article 809 of CC of Ukraine, the mentioned legislative provision directly indicates the moment of transfer of risks and prevents exceptions to general rules and attributing this issue to the discretion of the parties.

The provisions of Chapter XVII “Lease Agreement” of the Civil Code of the Republic of Poland (hereinafter – CC of Poland) regulate the contractual leasing relations in detail. Thus, Article 709-1 stipulates that the financing party undertakes, in the course of its business, to purchase the goods from the specific supplier under the conditions fixed in this agreement and trans-

fer the item to the user for use to receive benefits for some time, and the user undertakes to pay to the financing party the agreed sum – a monetary reward which at least is equal to the price or payment for the purchase of the goods by the financing party.

Therefore, as well as under Estonian law, the rules of CC of Poland do not provide for direct leasing. In addition, it is interesting that in contrast to the provisions of CC of Ukraine, the legislator specifies the sum payable for the use of the leased object within this article when formulating the definition of the lease agreement. Such an approach is reflected in paragraph 2 of Article 5 of the Law of Ukraine “On Financial Leasing” as one of the features that allows one to define leasing as financial, i.e., when concluding a financial leasing contract, the amount of lease payments is equal to or exceeds the initial cost of the object of financial leasing.

In Hungary, the issue of leasing relations is also regulated by the Civil Code. In particular, according to Article 409 of Section LIX “Financial leasing”, under a financial lease agreement, the lessor is obliged to transfer the thing or right (leasing object), which he owns, for use for a specified period, and the lessee is obliged to accept the leasing object and cover payments if: following the agreement, the lessee gains the right to use the leased asset until the end of its economic life or after its completion; or, if the use is agreed upon for a shorter period, the lessee gains the right to buy the leased asset after the agreement’s expiration without any consideration or at well-below market price at the time of entering into the agreement; or the total sum of lease payments reaches or exceeds the market value of the leased asset that was available at the time of contracting.

If in the mentioned states codified civil acts determined the basic principles of regulation of contractual leasing relations, and, for example, the Civil Code of Spain does not fix separate regulation of leasing at all by permitting special legislation to standardize this issue. Thus, the Law on management, control and solvency of credit institutions 10/2014 as of June 26, 2014, attributes to financial leasing transactions those agreements the sole purpose of which is to deliver possession of movable or immovable property acquired for any given purpose in accordance with the specifications of the future user in exchange for compensation consisting

of periodic payments. Leased-out objects must be used exclusively for agricultural, fishing, industrial, commercial, craft purposes, in service or professional activities. At the same time, the financial lease agreement shall consolidate provision for the user’s right to repurchase the leased asset after agreement expiration.

In the Portuguese Republic, leasing relations as an individual and special type of obligation in a group of lease agreements is not regulated by of the Civil Code. They are regulated by special legislation on financial leasing and the activities of leasing companies.

The analysis of national legislation and experience of legal regulation of contractual leasing relations in other European countries allows concluding that there is a more widespread approach under which the issue of leasing activities and, in particular, the contractual structure of leasing is primarily regulated by civil law rules, which fix the original conceptual models of leasing, the basic principles, the essence of binding legal relations, the status of the contracting parties, as well as other matters worked out in special legislation.

4. Conclusions. Under national law, the legal structure of a lease agreement is quite complex as it combines the elements of purchase and lease (tenancy) agreements. The definition of the lease agreement available in Art.806 of CC of Ukraine reflects the model which provides for relations of direct and indirect leasing, compared to the laws of studied European countries. The special nature of contractual leasing relations and the need for application of provisions on related types of contracts for their settlement cause a somewhat ambiguous interpretation of the essence of the mentioned legal institution and generates problems in law enforcement, misunderstandings between participants in civil law relations, as evidenced by judicial practice.

Analysis of the legal regulation of leasing in European countries allows the author to conclude that there is a more common approach under which the issue of leasing activities and, in particular, the definition of the contractual structure of leasing is primarily regulated by civil laws, which fix the original conceptual models of leasing, fundamental principles, essence of obligations, status of contracting parties, and others issues that are elaborated within special legislation.

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ДОГОВІР ЛІЗИНГУ В СУЧАСНОМУ НАЦІОНАЛЬНОМУ ТА ЄВРОПЕЙСЬКОМУ ЗАКОНОДАВСТВІ

Анотація. *Метою* дослідження є з'ясування особливостей регламентації договору лізингу за національним законодавством та з огляду на сучасний досвід країн Європи в цій сфері. **Методи дослідження.** Під час дослідження окресленої проблематики застосовано загальнонаукові та спеціальні методи наукового пізнання. **Результати.** Проаналізовано стан правового регулювання лізингу в Україні з урахуванням останніх нововведень, охарактеризовано проблемні питання в застосуванні інституту лізингу та надано загальну характеристику особливостей національного законодавства про лізинг. На підставі вивчення положень законодавчих актів країн Європи щодо регулювання лізингу окреслено основні підходи до визначення поняття лізингу в інших країнах, особливості сучасної законодавчої регламентації договірних лізингових відносин у європейських країнах порівняно з національним правовим регулюванням. **Висновки.** За національним законодавством юридична конструкція договору лізингу є досить складною, оскільки поєднує в собі елементи договорів купівлі-продажу та найму (оренди). У визначенні договору лізингу, що міститься у статті 806 Цивільного кодексу України, відображено модель, яка передбачає відносини прямого та непрямого лізингу, на відміну від законодавчого визначення лізингу в більшості досліджуваних країн Європи. Особлива природа договірних лізингових відносин і необхідність застосування положень щодо суміжних видів договорів зумовлює дещо розрізнене трактування сутності зазначеного правового інституту та проблеми у правозастосуванні, про що свідчить судова практика. Встановлено, що у країнах Європи поширений підхід, за якого питання лізингової діяльності, зокрема визначення договірної конструкції лізингу, унормоване насамперед на рівні актів цивільного законодавства, які встановлюють вихідні концептуальні моделі лізингу, основні засади, зміст зобов'язальних правовідносин, статус сторін договору, а також інші питання, які знаходять свій розвиток у спеціальному законодавстві.

Ключові слова: договір лізингу, європейське законодавство, цивільне законодавство.

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