

Artículo de investigación

Rent Contract under the Legislation of Ukraine

Договір ренти за законодавством України

Contrato de alquiler bajo la legislación de Ucrania

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This article is aimed at studying some certain aspects of new contract institute of Ukrainian civil law – the institute of rent. The subject of the study is the civil legal relations concerning the conclusion, execution and termination of the rental agreement. The subject of the research is the legislation base of Ukraine.

Legal definition of the rent contract is analyzed in the paper. The object of the contract, its form and its parties are also studied. Types of rent contract are distinguished. Besides, the authors analyze the questions of origin and development of various aspects of rent relations; they give legal characteristic of rent contract according to Civil Code of Ukraine, reveal drawbacks of the rent regulation in Ukrainian legislation and give suggestions on improvement of current civil legislation in the sphere of rental relations.

The authors have come to conclusion that the practice of applying of the legal construction of rent contract, which have been being formed during the 15 years of the Civil Code, proves that the rent institute is not deprived of certain problems, influencing the legal enforcement.

So provided that the legal loopholes and enforcement deficiencies are eliminated, the construction of rent contract will be used more frequently by participants in the civil turnover.

In order to achieve this goal it is extremely important to offer clear proposals to the national parliament for improvement of the current

Анотація

Наукова стаття має на меті дослідити деякі аспекти нового договірної інституту цивільного права України – інституту ренти. Об'єктом дослідження є цивільно-правові відносини щодо укладання, виконання та розірвання договору ренти. Предметом дослідження виступає нормативно-правова база України.

У статті аналізується легальне визначення договору ренти, досліджуються предмет договору, форма договору, суб'єкти, які можуть виступати сторонами за договором, виділяються окремі різновиди договору ренти. Серед іншого, автори торкаються питань виникнення та розвитку рентних відносин, дають юридичну характеристику договору ренти у відповідності до Цивільного кодексу України, виділяють недоліки законодавчого закріплення інституту ренти, висувають свої пропозиції щодо вдосконалення цивільного законодавства у сфері рентних відносин.

Автори дійшли висновку, що практика застосування юридичної конструкції договору ренти, що формується протягом 15 років чинності Цивільного кодексу, доводить, що інститут ренти не позбавлений певних проблем, що впливають на правозастосування.

Таким чином, за умови усунення правових прогалин та недоліків у практиці

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legislation regarding the regulation of public relations related to the use of the rent agreement.

Keywords: Civil Code, consensual contract, personal estate, property, rent contract, rentee, rentor.

правозастосування, договір ренти буде використовуватися частіше учасниками цивільного обороту.

Для досягнення цієї мети надзвичайно важливо запропонувати національному парламенту чіткі пропозиції щодо вдосконалення чинного законодавства щодо регулювання суспільних відносин, пов'язаних із використанням договору ренти.

Ключові слова: Цивільний кодекс, консенсуальний договір, особисте майно, майно, одержувач ренти, платник ренти.

Resumen

Este artículo tiene como objetivo estudiar algunos aspectos del nuevo instituto contractual del derecho civil ucraniano: el instituto de alquiler. El tema del estudio son las relaciones jurídicas civiles relativas a la conclusión, ejecución y rescisión del contrato de alquiler. El tema de la investigación es la base legislativa de Ucrania.

La definición legal del contrato de alquiler se analiza en el documento. El objeto del contrato, su forma y sus partes también se estudian. Se distinguen los tipos de contrato de alquiler. Además, los autores analizan las cuestiones de origen y desarrollo de varios aspectos de las relaciones de renta; dan características legales del contrato de alquiler de acuerdo con el Código Civil de Ucrania, revelan inconvenientes de la regulación del alquiler en la legislación ucraniana y dan sugerencias sobre la mejora de la legislación civil vigente en el ámbito de las relaciones de alquiler. Los autores llegaron a la conclusión de que la práctica de aplicar la construcción legal del contrato de alquiler, que se formó durante los 15 años del Código Civil, demuestra que el instituto de alquiler no está privado de ciertos problemas, lo que influye en la aplicación de la ley. Por lo tanto, siempre que se eliminen las lagunas legales y las deficiencias de cumplimiento, los participantes en la rotación civil utilizarán con mayor frecuencia la construcción del contrato de alquiler. Para lograr este objetivo, es extremadamente importante ofrecer propuestas claras al parlamento nacional para mejorar la legislación actual con respecto a la regulación de las relaciones públicas relacionadas con el uso del contrato de alquiler.

Palabras clave: Código civil, contrato consensuado, bienes personales, propiedad, contrato de alquiler, arrendatario, rentista.

Introduction

The Civil Code of Ukraine, dated January 16, 2003, which came into force on January 1, 2004, among other types of contractual obligations, provides for the existence of a contractual institution named Rent Institute. The Rental agreement institute provided in Chapter 56 of the Civil Code of Ukraine (2003) is quite new to Ukrainian civil law. At the same time, in Europe, the rent agreement gained its legal prominence in the Middle Ages.

It is believed that there are two causes for a rental agreement. The first of these is the lack of cash, which has led to the emergence of rental property (rent). The modern concept of private law was formed at the end of the nineteenth and early

twentieth centuries (Kharytonov, Kharytonova, Kharytonova, Kolodin, & Tolmachevska, 2019). Returning to history, it should be noted that according to the French civilian L.J. Morandiere, “an owner who wanted to sell his property could more easily find a buyer who was willing to pay a lifetime rent than the one who would agree to pay a capital sum. The second reason for the emergence of a rental agreement is the ban on interest-bearing loans. One way of circumventing this ban was a rent contract. The borrower who received the capital sum was not obliged to pay interest on that amount and to repay it, but an indefinite obligation to pay the lender an annual amount” (Morandiere, 1961, p. 37).

Moreover, according to Kharytonov, Kharytonova, Tolmachevska, Fasii and Tklich (2019) modern civil society is created with the help of certain forms of self-constitution and self-mobilization.

Concerning that research on the rental agreement issue has been conducted for a long time, concerning the changing political situation in the country, as well as the development of information technology and legal doctrine, the question arises of considering this problem from a new perspective.

Methodology

In order to achieve the goals of the scientific research, general and special methods of cognition were used in the research process.

In particular, the dialectical (philosophical) method of cognition used throughout the study made it possible to find out the essence of such concepts as contractual obligations, rent relations, rent contract, civil liability and so on. The concept and content of the rent legal relations, as well as the legal consequences of the parties' breach of their obligations were carried out using the analytical and synthetic method.

The method of analysis and synthesis was used while researching of the peculiarities of different kinds of rent contracts, while establishing the content, procedure for concluding and executing a rent contract, as well as in a comprehensive study of the features of the legal status of the parties to the contractual relationship.

The comparative legal method revealed the peculiarities of the legal regulation of the rent contractual relations in the Civil Code of Ukraine and Civil Codes of other countries, including EU and CIS countries.

The modeling method was used to formulate appropriate proposals and recommendations for improving current Ukrainian legislation and practice of its application.

Analysis of recent research

Many domestic and foreign scholars touch upon the problems of the rental agreement; among them are Apanasyuk, M., Eismont, O., Golubeva, N., Kalitenko, O., Kharytonov, E., Kharytonova, O., Kharytonova, T., Markova, O., Morandiere, L.J., Novikova, V., Ozkniuk, G., Tkalych, M., Yavorskaya, O. In general, they studied the problems of rental agreement in

general and the order of their conclusion. The purpose of such research is to solve the following problematic issues: the moment of the emergence of rent legal relations, the study of different points of view regarding the consensual or real nature of the rental agreements, determining the order of their execution, submission of proposals for improvement of the current legislation. All the works of the mentioned scientists will be analyzed in the article.

Presentation of key research findings

Today, the legal definition of a rental agreement is given in Part 1 of Art. 731 of the Civil Code of Ukraine (2003). Under the rental agreement, one party (the rent recipient) transfers the property to the other party (the rent payer), and the rent payer in return undertakes to pay the rent recipient periodically in the form of a certain amount of money or another form (The Civil Code of Ukraine, 2003).

Novikova, V. (2006) notes that it would be possible to change the design of the rent agreement and make it consensual and reciprocal: to pay the received property periodically to the recipient of the rent in the form of a certain amount of money or to provide funds for its maintenance in another form.

The parties of the rental agreement are the recipient of the rent – a person who transfers his property to another person to receive from the last one the specify rent in the form of money or in another form, and a rent payer – a person obliged to pay for the property received.

Moreover, it should be noted, that according to Art. 733 of the Civil Code of Ukraine (2003), parties of the rental agreement may be natural or legal persons. The subject matter of the rental agreement is quite generalized: it is stated that the recipient of the rent transfers the property to the payer of the rent (Part 1 of Article 731 of the Civil Code of Ukraine, 2003). The specific composition and types of property that may be the subject of an annuity contract can only be determined by a doctrinal interpretation of the applicable rules of civil law, taking into account trends in law enforcement practices.

What is important, according to Art. 190 of the Civil Code of Ukraine under the notion of «property» includes individual things, the totality of things, as well as property rights and obligations. Some types of property that can also be subject to a rental agreement are money and securities. However, it should be also noted that

non-negotiable annuities, which are digital records of circulating cash and non-documentary securities, are just a special way of securing rights.

Besides, according to the opinion of prof. Ye. Kharitonov, “transfer of information, intellectual property results, exclusive rights to them, the performance of works and provision of services for the same purpose is possible” (Kalitenko, & Kharytonov, 2004).

During the transfer of the rent from the recipient of the rent to the rent payer, the money is paid under the rental agreement, which is similar in nature to the loan agreement. But it has a significant difference from the latter: the rent payer cannot be obliged to repay the rent to the recipient. Under Art. 732 of the Civil Code of Ukraine (2003) the rent agreement is concluded in writing and is subject to a notarial certificate, and the contract on the transfer of immovable property for the payment of rent is also subject to state registration. Increased requirements of the legislator to draw up a rental agreement are intended to guarantee the interests of the rent recipient as much as possible. The rental agreement is assigned to a group of contracts that provide for the alienation of property. On this basis, it is similar to contracts of sale, mine, gift. However, it is an independent form of contract. The rental agreement differs from a grant agreement because the person who made the alienation of property for the benefit of another person has the right to demand a counter-payment – rent payment.

According to the method of legal regulation, most of the rules governing rent relations are dispositive, which provides sufficient regularity of the relations of the parties, even in cases where certain issues are not stipulated in the contract itself. The issues related to the form of an annuity contract, the form and amount of rent payments, liability for late payment of rent, and others, are regulated by the imperative method.

Pursuant to Section 9, Section II of the Regulation on the Fundamentals of Interest Rate Policy of the National Bank of Ukraine, approved by the Resolution of the Board of the National Bank of Ukraine No. 277 of 21.04.2016 (as amended), the National Bank publishes daily the amount of the discount rate in the mass media regular sources of information, including on the official website (<https://www.bank.gov.ua/>) of the National Bank (Guidelines, 2017).

At the same time Part 1 of Art. 734 of the Civil Code of Ukraine (2003) provides for the possibility of concluding a free rental agreement. In our opinion, such an agreement is absolutely identical to the gift agreement. Unless when concluding a gift contract, one party (the donor) intends to gift the other party (the gifted one), and when concluding a rental agreement, such a goal is absent. Therefore, the expediency of legislating the possibility of concluding a free rental agreement is highly doubtful.

A rental agreement differs from a contract of sale and an exchange contract by the nature of the counter-indemnity given to the recipient of the rent for the alienated property. Under the contract of sale, the buyer pays a certain price for the product. Similarly, under the exchange agreement, the parties alienate property for a specific, pre-determined compensation. Under the rental agreement, the amount of rent payments to be paid to the recipient is uncertain, as the obligation to pay the rent is valid indefinitely (an indefinite rental agreement).

At the same time, the legislator envisaged the existence of a fixed-term rental agreement, the utility of which is also very doubtful. It is difficult to find significant differences between such a contract and a deferred purchase agreement. As in the case of a deferred purchase contract, a fixed-term rental agreement determines the price of the transferred property, which is rented out and paid in installments periodically, over a certain period of time. According to Apanasyuk, M. (2011) a fixed-term rental agreement is similar to a loan agreement with interest payments, not a contract of sale in which no settlement between the parties is required for its termination. In order to return the property transferred underpayment of a perpetual rent, the Civil Code of Ukraine (2003) provides for a special procedure for settlements between the parties in the event of its termination (Article 741 of the Civil Code of Ukraine, 2003).

The rental agreement is an independent contract, but concerning it, it is possible to apply in a subsidiary manner the rules on contracts of sale and donation. This is because, theoretically and practically, the alienation of rented property can be done in two ways. Part 1 of Art. 734 of the Civil Code of Ukraine (2003) stipulates that the property which is alienated under the payment of the rent can be transferred to the recipient of the rent by the renter for a fee or free of charge. Due to Part 2 of Art. 734 of the Civil Code of Ukraine (2003), if the rent agreement establishes that the recipient of the rent transfers the property to the

payer of the rent for payment, the general provisions on the sale of property apply to the relations of the parties to the transfer of property, and if the property is transferred free of charge, the provision of the gift contract, if not contradicts the essence of the annuity agreement. Prescriptions of Part 2 of Art. 734 of the Civil Code of Ukraine (2003) should be borne in mind when deciding on the reality or consensual nature of the rental agreement. The free movable property rental agreement is real if the time of the contract and the time of the transfer of the property coincide, and it will be consensual when the contract is concluded, but the property will be transferred in the future. This follows from Part 1 of Art. 717 of the Civil Code of Ukraine (2003), since in this case, the rules of Chapter 55 of the Civil Code of Ukraine (2003) on the contract of donation apply to the transfer of property relations.

Furthermore, the rental agreement is consensual when the transfer of movable property is made for a fee. In these cases, the provisions of Chapter 54 of the Civil Code of Ukraine (2003) on the contract of sale are applied to the relations concerning the transfer of property. Thus, the rental agreement made during the alienation of movable property can be real and consensual, depending on whether the movable property is rented or disposed of free of charge. Accordingly, the rental agreement may be one-sided or reciprocal. A real rental agreement under which the transfer of movable property into the property of the rental payer is modeled as one-way, are unilateral, and the consensual rent under which the transfer of movable property to the rental payer is modeled on a contract of sale. If real estate is transferred for the payment of rent, consideration should be given to the need for state registration of real estate rights.

Also interesting is the issues of the relationship between rental agreement and life support contract, they have a lot in common (for example, both relate to property transfer contracts, form of contract - written with a notarization certificate, and if real estate is transferred - state registration is required, form of payment is monetary, naturally and working) (Golubeva, 2001).

As Markova, O. (2003) points out, the reasons for notarization of rental contracts are as follows: first, the contract is concluded for a long term, which implies long-term performance, so such contracts require more careful registration; secondly, due to the risky nature of the parties' rights, they are particularly needed the

protection. On the one hand, the protection of the rent recipient is needed as a weaker party, and on the other hand, the notarial form of the contract allows to assert the rights of the payer of the rent. Moreover, according to Eismont, O. (2004) contesting a notarized transaction is more complicated than contesting a transaction in a simple written form. The analyzed legislative approaches and application practices indicate that there is a problem of inconsistency between the moments of notarization and/or state registration of the contract with the moment of transfer of property. And in the context of the analysis of the rules of Art. 334 of the Civil Code of Ukraine (2003) – problems of the inconsistency of the moment of acquisition of the ownership right and the transfer of property under contracts, which are subject to notarization and/or state registration. Undoubtedly, the legal uncertainty of these points affects, first and foremost, the clarity of the parties' relations in contracts that are constructed as real (Yavorskaya, 2008). According to G. Ozerniuk (2010), since rent contracts are subject to a notarization certificate, and in the case of transfer of real estate even to state registration, this is sufficient to guarantee the fulfillment of obligations and protection of the rights of the parties in the future.

Following Part 2 of Art. 732 of the Civil Code of Ukraine (2003), the contract for the transfer of real estate for rent is subject to state registration. As a consequence, the rights and obligations of the payee and the payer only arise after state registration. In this case, there is no need to talk about the consensuality or reality of the rental agreement. The rental agreement is paid. This is manifested in the need to provide the payer with rent to the recipient of rent payments in exchange for the property received in the property. The right to receive rent payments arises from the recipient of the rent only after the transfer of the property for rent. Accordingly, the obligation to pay the rent payments to the rent payer arises from the same moment. Rent payments can be made in cash or by transferring property, performing works or providing services (Part 1 of Article 737 of the Civil Code of Ukraine, 2003).

Tkalych (2005) points out that the legal structure of the rent contract in the form contained in Chapter 56 of the Civil Code of Ukraine is dualistic in nature and may cause certain problems when applied in practice, and therefore needs improvement.

Conclusions

Thus, it can be noted that the existence of rent contract in the Civil Code of Ukraine is an absolute success, regarding the absence of this legal construction in domestic legislation before the adoption of current Civil Code.

However, the practice of applying of this legal framework, which was formed during the 15 years of the Civil Code, proves that the rent institute is not deprived of certain problems, which have been emphasized above.

In particular, there is considerable doubt about the need to legislate the construction of free rent, since in this case the rent contract will be no different from other types of contracts, regulating free transmission of property. Moreover, such a design only confuses the regulation of the type of long-term commitments.

On the other hand the traditional construction of rent contract whereby a property is transferred for payment of a sum of money or for the transfer of property in another form is demanded by the participants of the civil turnover and needs further research and improvement.

Therefore, we have no doubt that, provided that the legal loopholes and enforcement deficiencies are eliminated, the rent contract will be used more frequently by participants in the civil turnover.

Further scientific research into the problems of the application of the rent contract will help the legislator to improve current legislation in this area.

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