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## **NORMATIVE AND INDIVIDUAL REGULATOR IN THE MECHANISM OF REGULATION OF LEGAL RELATIONS UNDER TRANSFER OF PROPERTY IN USE**

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**ABSTRACT.** *The present scientific work is devoted to research of structural norms of relations in temporary use of property as a part of the mechanism of legal regulation and contract roles in this mechanism. The legal sense of general provisions on lease in Art. 58 of the Civil Code of Ukraine within the legal framework of the studied relationship has been determined. It is established that these provisions are designed to unify the rules for the temporary use of property regardless of the factor of payment. They also organise these kinds of lease (rent) contracts on a single legal basis, as defined in Art. 58 of the Civil Code of Ukraine. In practice, the general conditions of lease form statutory basis of regulating the leasing relationship for which the law does not set features of signing and implementation of the contract. Doctrinal approaches and position of the higher courts to economic criteria and harmonisation of civil law in the regulation of rent relations have been defined. Based on semantic analysis of the provisions of Art. 5(30) of the Economic Code of Ukraine, two groups of the of features of regulation of relations were distinguished. The first group consists of provisions that determine the characteristics of the lease as a whole. The second group contains the rules that set features of lease in state and municipal property. It has been proposed to reform economic legislation of Ukraine by removing the provisions of the lease from Art. 5(30) of the Economic Code of Ukraine, keeping the principles of lease in state and municipal property in this codified Act.*

**KEYWORDS:** agreement, civil law, lease (rent), economic legislation of Ukraine.

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## **Introduction: Problems of Civil and Economic Legislation Harmonization in the Sphere of Regulation of Relations under Transfer of Property in Use**

The law on any public relations cannot be implemented without the mechanism of their regulation. The mechanism of legal regulation has fundamental significance for the civil regulation of contractual relations because it provides a systematic approach to the analysis of legal regimentation. This category allows identifying all legal means, other objects (phenomena) involved in the legal regulation of contractual relations, and to consider them in conjunction with each other as the only legal mechanism.

The purpose and objectives of the study are to determine the functional load of the general provisions of Chapter 58 of the Civil Code of Ukraine in the normative regulation of relations under the transfer of property in use, to develop ways to harmonize economic and civil legislation in the regulation of these relations and clarify the role of the contract in the mechanism of their legal regulation.

For the first time “the concept of the mechanism of legal regulation, its stages and elements (which are legal norms, individual provisions of law (optionally), legal acts, implementing subjective rights and duties) was formed in the Soviet period in the context of legal positivism” (Belianevych, 2006). It is also a key point in modern jurisprudence, where the essence of the said phenomenon and its elemental composition are determined in the light of modern trends in legal way of thinking. However, analysis of the scientific achievements in different historical periods of the legal doctrine on general theoretical and sector focus allows to assert that “the mechanism of legal regulation should not be seen as a set of separate legal means, but as a dynamic system of interacting legal phenomena that can regulate public relations only as a complex. ... Each of them “does not work” independently without regard to the other elements and actually loses social significance. Having been taken together they can create new phenomena i.e. an important institution of social control” (Koretsky, 2001).

The mechanism of regulation of contractual civil relations is a consistent chain of changes in individual legal phenomena: the rule of law governing civil relationships; legal fact; rights and responsibilities that exist in civil matters that arose on its basis; realisation of civil rights and duties, and if necessary, it includes the protection of rights and interests (Pohribnyy, 2004).

This concept of the mechanism of legal regulation of contractual relations is generally a reflection of the general theory of law and understanding of regulation as the ongoing process under the influence of the right to social relations. It contains three sections (stages):

- 1) legal norms;
- 2) legal relations and, in particular, subjective rights and legal obligations of their members;
- 3) acts of the rights and duties.

However, the selection of individual stages of the process regulation is rather subjunctive because legal reality is not always possible to trace the precise boundaries of the process passing on its separate stages. We agree with the opinion of many authors that the mechanism of regulation includes a much broader range of legal means (acts of law, definitions, fictions, presumptions, etc.) (Luts, 2006).

Investigating the mechanism of civil legal regulation of contractual relations, legal literature divides the main elements of this mechanism into three groups: means of legal regulation (a law (norm), a civil legal contract, an administrative legal act, a judicial legal act); legal facts (other than the contract); legal relationship (Kazantsev, 2008).

An important role in the mechanism of regulation of legal relations under assignment is played by the institutional sources (forms) of contract law, i.e. laws and other regulations.

Lease relationships are regulated by different normative sources in the law and order of different European countries. In particular, in civil law countries the Civil Code or other codified acts are their main source. For example, in France –the French Civil Code (Chapter I and Chapter II, Section III), in Germany – paragraphs 535-597 of the German Civil Code 1896 (“Bismarck Code”), in Austria – the twenty-first section of the second universal civil code of Austria, in Switzerland – Section eight of the Swiss law of obligations.

In Ukraine, the regulation of relations in the transfer of property in use (assignment) is governed by a range of significant regulations. The hierarchy of their application towards these legal relations is a subject to these legal precepts that are defined in Art. 4 of the Civil Code of Ukraine. Of course, the rule of law is given to the Constitution of Ukraine as directly applicable norm. An example of such norms in the basic law, which indirectly serves as the constitutive principles of legal regulation of temporary use of property on the agreed principles, is Art. 41 that determines the use and disposal of the property for each owner, because the transfer of property in use is a form of property disposal; as well as Art. 47 which guarantees each state an assistance in the construction of housing, purchase as property, or taking on lease.

The Civil Code of Ukraine ranks as a major act of civil law among regulations governing the researched relationship. Considering the fact that the elements of the mechanism of legal regulation of contractual relations are rules, definitions, the Civil Code of Ukraine reflects the traditional definition of lease (rent) contract, contract of housing rent and loan contract, expressing their continued essence. Each segment mediates a separate legal transfer of property in use, and the Civil Code of Ukraine devotes a separate chapter to each of them. Therefore, the regulatory framework of property temporary use in this codified act is represented by three institutions of contracts: the lease (rent) contract, contract of housing rent and loan contract.

The common focus of contractual structures, which mediated the relationship on transfer of property in use, provides an opportunity to unify their legal regulation. As basic ones for this process, the national legislators elected position on the lease (rent) contract, which regulates relations of property use for a fee and determines that civil legal regulation of rent (Art. 810(3) of the Civil Code of Ukraine) and loans (Art. 827(3) of the Civil Code of Ukraine) subsidiary admit the possibility of applying the provisions of Ch. 58 of the Civil Code of Ukraine to the abovementioned contract structures. This approach to unification of legal regulation of the researched relations is consistent with the enshrined presumption of paying ability of civil contracts in Art. 626(5) of the Civil Code of Ukraine and justified from the perspective of contractual practice.

The specifics of functional and regulatory capacity of these provisions in the legal regulation of the relations of property temporary use as seen in the methodological approach of the legislator to order their placement in Ch. 58 of the Civil Code of Ukraine. According to the structural principle of the Civil Code in general, the first paragraph of this chapter models general regulations on lease (rent), and the following five paragraphs give the special rules devoted to rent, leasing of land, rent of a building or other capital facilities, lease (rent) of a vehicle. The basis of their cooperation is the principle of subsidiary application, i.e. that general provisions of the lease (rent) are applied only if the special rules for certain types do not provide the other ones.

The need for modelling general provisions for lease (rent) is reasoned by the following factors: first, the need to unify the rules of property transfer for temporary use regardless of

the ability of paying for use, because the civil law regulates most of the financial relationships. In particular it was noted that Art. 827(3) of the Civil Code of Ukraine stated the applicability of the provisions of Ch. 58 of the Code to the loan contract, which mediates the relations of free transfer of things in use for a certain period; secondly, certain types of lease (rent) contract, referred to the next paragraphs of Ch. 58 of the Civil Code of Ukraine, have their own peculiarities, caused by the type of property that is transferred to the user, the purpose of its use and the subject composition of these relations. However, special provisions for the settlement of individual lease (rent) contracts can be fixed in other regulations. Despite having different features, everyone is an element of one contract type and should obey the single legal basis. Its functions are performed by general provisions on lease (rent), which are standardised and applied to all lease (rent) contracts provided in the Civil Code of Ukraine. This approach has dismissed legislators from repeating the same rules in the codified act of the sections devoted to rent agreement, lease contract, land lease agreement, rent contract of a building or other capital facilities, lease contract of a vehicle; thirdly, the general provisions of the lease (rent) are used to regulate those contractual relations in rent where the law does not give the characteristics of signing and performance of the contract. Property leasing right is an example of such relations and it is a novelty in civil legislation of Ukraine. Meanwhile, today in practice typical contracts are signed concerning temporary paid use not only of an object in general but also of its structural elements (walls, roofs), land (share of land), communication channels, etc. Typically, these contractual structures are modelled on the basis of general provisions on lease (rent).

Lastly, it is necessary to emphasise the fact that the general provisions of lease (rent) are applied to certain types of temporary property use in connection with the general provisions of the agreements, general provisions of the obligations and provisions of the First Part of the Civil Code of Ukraine.

While analysing the institutional sources regulating the use of property relations, the question of harmonisation of civil and economic legislation in this area gains the practical interest and, as a result, it needs the elimination of duplication and inconsistencies in their legal norms.

Art. 9 of the Civil Code of Ukraine sets the main features of the law regulating property relations in the economic sphere. According to professor Dovgert (2004), “we are talking only about the features rather than establish an entirely different legal framework to regulate relations in the private business sector. While establishing these features, the basic principles of civil law cannot be violated, thus distorting the basic categories of private law. It should be stressed again that the laws (including codes) in the area are not applied if they contradict the relevant provisions of the Civil Code”.

A counter order concerning the application possibility of relevant provisions toward leasing relations was made in Art. 283(6) of the Economic Code of Ukraine, but with the warning about the need for taking into account the specifics provided for in the Economic Code of Ukraine. A good example of these economic and regulatory warnings on the stage of lease contract termination is given in Art. 291(3) of the Economic Code of Ukraine, according to which the lease may be terminated prior to the planned termination date at the request of one of the parties pursuant to the provisions of the Civil Code regarding the termination of the lease contract, but in the manner prescribed by Art. 188 of the Economic Code of Ukraine. However, while solving the question of the legal consequences of lease contract termination, civil legal regulation of leasing should be applied without any precautions (Art. 291(4) of the Economic Code of Ukraine).

Representatives of economic and legal doctrine defend the idea that there is a “civil matter of a special law in the regulation of property relations, for which the total value of the law is the Civil Code of Ukraine”(Naukovo praktychnyy Komentar, 2004). These rules of “coexistence” for both codified acts have been negatively assessed by jurist, taking into consideration the fact that the rules of the Economic Code of Ukraine “almost everywhere replace” the norms of the Civil Code of Ukraine. “That is, civil norms are so pressed that the way out for their actions is limited to the so-called “household legal acts” (agreements)... if you want, your sale of an apartment or a house can be equal to economic agreement” (Spasibo-Fateeva, 2014).

Higher Economic Court of Ukraine expressed its opinion on this issue in the Information letter No. 01-8 / 211 of 07/04/2008 “On Certain Issues of Application of the Civil and Economic Codes of Ukraine” (Pro deyaki pytannia, 2008), and later in its Resolution No. 12 of 29/05/2013 “On Some Issues of Practice of the Law on Leasing (Rent) of Property” (Pro deyaki pytannia, 2013). Higher Economic Court of Ukraine claimed that under the content of requirements in Art. 1(2), Art. 9(2), Art. 759(3), Art. 760 of the Civil Code of Ukraine and Art. 4(2), Art. 283(6) of the Economic Code of Ukraine it is stated that the Civil Code of Ukraine establishes general provisions of the lease (rent), but the peculiarities of regulations of property relations that arise among economic entities related to the conclusion, execution and termination of leases are suggested by the Economic Code of Ukraine. So, if the latter does not contain such peculiarities, relevant provisions of the Civil Code of Ukraine shall apply.

However, while answering the question in its newsletter “Do the Civil and Economic Codes of Ukraine relate as general and special laws?”, Higher Economic Court of Ukraine claimed that its decision should be based on the fact that the enforcement is not generally used as a regulatory law or a legal act, but on relevant legal provisions, the content of which is determined by whether the rule (of it) is general or special part.

It is supposed that Higher Economic Court of Ukraine adopted the approach proposed by legal science where “the distinction between codes should not be made according to the principle “general” Civil Code and “special” Economic Code but due to the rival rules of the separate norms of these codes. “General” Civil Code may contain special rules and “special” Economic Code may have general norms”.

The majority of norms of Civil and Economic Codes of Ukraine were studied for searching the peculiarities of legal regulation of lease relations and it was found that “Articles 283–291 of the Civil Code, dedicated to the issues of legal regulation of lease, contain a relatively small number of significant differences in the legal regime of this kind of business obligations in comparison with the legal regulation of relations in the Civil Code” (Spasibo-Fateeva, 2014).

Analysing the content of the provisions of Art. 30(5) of the Civil Code of Ukraine in order to find the definition of regulation of lease relations, the legal norms of structural units of the Economic Code of Ukraine can be divided by the criterion of features into two groups: those that determine the characteristics of the lease, and norms that set features of lease in state and municipal property. The first group consists of the rules of Art. 283 (except for the first paragraph of Ch. 3, Ch. 4 and Ch. 5), and Art. 284–286 and Art. 291 of the Economic Code of Ukraine.

One of the characteristics of economic and legal regulation of lease discussed in legal literature refers to the possibility (besides the subject) of other material terms of the lease, a comprehensive list of which is given in Art. 284(1) of the Economic Code of Ukraine. They are as follows: lease object (composition and value of the property considering its indexation),

the period of the lease contract; rent charge considering its indexation; procedure of using depreciation; restoring of the leased property and the conditions for its return or buyout. The Plenum of Higher Economic Court of Ukraine noted that “only if the contract contains some essential terms, which are not regulated by the current legislation, the contract of the property leasing can be considered valid”.

The Civil Code of Ukraine, in contrast to the Economic Code of Ukraine, does not have the norm which would directly call essential terms of the lease contract. However, summarising the contents of Art. 638 and Art. 759–762 of the Civil Code of Ukraine we can say that such conditions for this type of contract are the terms of the contract, payments for the use of property and period of use, because under any circumstances the use of property is carried out for a fee and is limited in time. Freedom for tenant and landlord in defining these essential contract terms is reflected in the fact that, by concluding an agreement, they may determine the time limits and the amount of payment in the agreement or in the contract. In the first case their agreements are formalised in the contract, as it is said by the legislator in Art. 762(1) and Art. 763(1) of the Civil Code of Ukraine. If the lease contract does not stipulate contract terms and (or) the fee, it is presumed that there is a mutual consent of both parties to define the contract terms for the property in a legally established manner. In particular, if the fee is not stipulated by the contract, it is determined by the quality of consumer items and other circumstances that are essential (Art. 762(1)(2) of the Civil Code of Ukraine). If the contract does not set the time terms, the contract is concluded for an indefinite period, and each of the parties of the lease contract may withdraw from the agreement at any time by sending a written note to the other party within the time specified in Art. 763(2) of the Civil Code of Ukraine. Thus, in this case the tenant and the landlord carry out their rights and fulfil their responsibilities until one of them terminates the relationships.

It should be noted that Article 5(30) of the Economic Code of Ukraine does not provide the peculiarities of the behaviour of the landlord and tenant in case when the lease contract does not set its termination date and (or) the rent charge. Accordingly, within the exclusive economic legal regulation, such agreement should be regarded as not concluded, following general provisions on the economic agreement.

According to their legal significance, the provisions 762(1) (2) of the Civil Code of Ukraine are special norms that determine their priority application to the relevant general provisions of the contract in general and economic contract in particular. Thus, there are no obstacles to the application of lease provisions as both norms of both codified acts, as products of legislative activity of the state should primarily serve the stability of property turnover.

In legal literature, an example of such conclusion is given regarding the value of norms of the Civil and Economic Codes of Ukraine in terms of rejection of the lease. It is called the act of Higher Court of Ukraine of 08/05/2012, case No. 3-26hs12, which states that “Art. 782 of the Civil Code suggests the possibility of lease rejection as a special case of contract termination and in this perspective it completely fits the construction of Art. 188 and Art. 291(3) of the Economic Code” (Spasibo-Fateeva, 2014).

As for the other provisions of the Economic Code of Ukraine on lease, it should be noted that most of the provisions of the Economic Code of Ukraine coincide with the relevant provisions of the Civil Code of Ukraine. This conclusion was made by the researchers of the subject who compared the provisions of codified acts.

Therefore, we consider it necessary to support and clarify doctrinal opinion on the need to reform economic legislation of Ukraine by extracting the provisions of the lease in

Art. 5(30) of the Economic Code of Ukraine, preserving the principles of state and municipal property leasing in this codified act.

The conceptual approach, which suggests the unity in the regulation of civil (private law) relationship wherever they act, provides distribution of the basic civil law principles and individual institutions of these relations (Naukovo-praktychnyy komentar, 2005). The Civil Code of Ukraine defined the basic legal principles of lease (rent) contract of land for the first time, pointing out that the relations in leasing of land are regulated by law. Currently, regulatory basis of these relations is Art. 93 of the Land Code of Ukraine (Zemelnyy kodeks, 2002) and the Law of Ukraine “On Land Lease” of 02/10/2003. If a ban on leased certain categories of land is absent in these regulations, all land categories specified in Art. 19 of the Land Code of Ukraine can be transferred for temporary use. Thus, water objects are available for use together with the land under lease contract (Art. 51 of the Water Code of Ukraine), the forests are transferred for the long-term temporary use on a contractual basis together with forest areas (Art. 18 of the Forest Code of Ukraine) and the land for the needs related to subsoil use is transferred in the manner prescribed by the land legislation (Art. 18 of the Code of Mineral Resources of Ukraine).

These contractual structures in the doctrine of law are classified as leases of natural resources. Substantiating distinction of the scope of civil and special legislation regarded the regulation of contracts for the use of natural resources, in legal literature it is noted that “the norms of land law are special rules regarding the Civil Code of Ukraine which have priority use, at the same time they are general rules on regulatory and legal acts of minerals, forests, water, flora and fauna, the atmosphere in the relationship of the objective existence of natural objects with the ground” (Semkiv, 2013).

Summing up the issue of regulatory relations with the transfer of property in use, it must be said that the current state of legal regulation in relations of temporary property use shows the legislator attempts to simulate detailed legal regulation for these relationships. However, details are not levelling in this area of property turnover action as one of the principles of civil law – freedom of contract, as most of the rules that govern private sector of the researched relations are dispositive.

## **2. Civil Legal Agreement in the Mechanism of Legal Regulation of Relations under the Transfer of Property in Use**

In legal literature, the principal characteristics of the regulation of the mechanism of contractual relations is identified as the presence of a contract and the nature of its interaction with the law. In the mechanism of legal regulation, the contract, on the one hand, acts as a legal fact in relation to the law, on the other hand, it regulates the contractual relationship as a law (Kazantsev, 2008).

The question of law, contract roles and their relationship with infrastructure regulation of contractual relations is in the centre of the rule of law during all historical stages of the development of economic relations and in the field of contract research.

Exploring the value of civil law and contract, M. Sibilov noted that “in the legal field, where the predominant place is occupied by a country with an authoritarian regime, the only regulator of social relations were norms of legislation, which were mostly mandatory. The role of the treaty as a regulator of social relations (especially in economics) was reduced by increasing role of administrative (government) acts, including acts of planning. Contents of contracts concluded on the basis of planned acts had to meet these acts in full” (Sibilov, 2014).



Under the present circumstances, when the main credo of private life is freedom, the dispositive approach to the regulation of civil relationships has become dominant, and it ultimately has led legislators to think over the role and regulation of individual regulators in the mechanism of legal regulation. In the Civil Code of Ukraine (Art. 6), the relationship between these two regulatory factors was solved for the first time at the level of the main act of civil law. In particular, the parties may enter into contracts not provided for in acts of civil legislation if they comply with the general principles of civil law (i.e. to conclude nameless contracts). However, the parties entering into a named contract can settle this contract in its relations not covered by the acts of civil law, and they may derogate from the provisions of civil law and regulate their relations at their own discretion. However, the parties may not derogate from the provisions of civil law if these acts clearly state this, and if the parties are bound by provisions of civil law that stem from their content or from the nature of the relationship between them. “

Thus, in the Civil Code of Ukraine “the law ceases to be the ultimate truth” (Romovska, 2000), and the contract is presented as a means of contractual regulation of conduct of the parties in civil matters. As the legal control of persons, who enter into contractual relations, the contract “in the name” of their interests provides an objective opportunity to resolve the areas of their contractual cohabitation that are not mediated by normative regulation. In these cases, it is about the internal regulation of the rules of social relations laid down in the contract that are referred to as self-regulation in legal literature.

Thus, “there are two basic models of legal regulation for contractual relations – internal control (self-control) and external (imperative, government regulation)” (Sibilov, 2014). The first one is reasoned by generally recognised principles of civil law, because “unlike the fields of public law, civil law priority in choosing behaviours must usually belong to the same subjects”. As for external regulation, the law establishes the general rules of conduct for all, except mandatory, they are legally relevant to both parties if they have not set another variant of possible behaviour.

The trend to increased functional load of the contract in the mechanism of legal regulation of contractual relations, a separate form which is the relationship of the transfer of property use, allows to assure that in the present legal order contract has a dual function in the mechanism of legal regulation of the past: on the one hand, it serves as a legal fact, as the momentum of the dynamics of the relationship between the parties, on the other, it regulates these relations. Since the contract can be regarded as static, i.e. an assessment of the contract as a legal fact and a dynamic aspect as a regulator investigated relations.

As a legal fact, a contract (of lease (rent), loans), considering the binding nature of its implementation, is an important tool for implementing rights of relationships that are mediated, because social and legal significance of this agreement is a voluntary exercise of the conditions for transfer, use of property and its returning to the owner. However, the main feature of the contract as a legal fact, compared to other legal facts, is the agreement which “does not simply transfer requirements into exact legislation of those relationships, and creates the conditions under which the contract subjects themselves would create subjective rights and obligations, even if the legislation does not specify the content of the acts or provides only general direction and limits of regulation, allowing precise relationship to the discretion of counterparties” (Marchenko, 2000). This peculiarity is not only retained at the stage of the emergence of legal transfer for property in use, but also at the stage of change or termination. However, the contract only leads to the emergence of relations on the transfer of property in use. Their further development is due to the onset of other legal facts (transfer of property in the possession of the user, state registration for rights of use, etc.).

The regulatory importance of the agreement in the legal regulation of relations for the transfer of property in use is expressed in terms of the normative value and controllers of personal relations. It should be noted that most of the rules for governing the private sector of the studied relations are dispositive, as evidenced by the use legislator when modelling their content with such phrases as: “established by contract”, “the contract can be established”, “at the option of the parties”, “determined by appointment”, “unless otherwise provided by contract”, “with consent”. They are showing dispositive legal regulation of relations for the transfer of property in use and confirming the possibility for the contractual parties to retreat from legislative regulations and establish a rule of conduct agreed by them or the possibility of one of them for discretion in the circumstances specified in the hypothesis standards. Thus, the “law defines the rights and obligations of the parties which entered into a contract only in cases where they are not defined by their own terms and conditions” (Boldurev *et al.*, 1985).

Model contracts play a significant role in the legal regulation of relations for the transfer of property in use, eligibility of which is defined in Art. 630(1) of the Civil Code of Ukraine. According to this provision, the contract can establish that its individual terms are defined in accordance with standard terms of certain kind of contracts, published in a proper order. For example, the landlord for the rent contract, considering the fact that this agreement is a contract accession, sets common conditions of this agreement, which cannot violate the rights of a renter by law (Art. 787(2) of the Civil Code of Ukraine). Meanwhile, Art. 179(2) of the Economic Code of Ukraine observes that in the cases determined by law the Cabinet of Ministers of Ukraine and the authorised bodies of executive authorities approve model contracts and recommend tentative terms of business agreements (model contracts). Typical agreements may take the form of self-regulation or act as a supplement to the regulations and reproduce their provisions.

Model contracts are advisory by their nature and define the desired contractual model. In the field of legal regulation of relations in the transfer of property in use, a model contract of owner’s reimbursement for the maintenance of the leased property and provision of tenant’s utilities was approved by order No. 1774 of the State Property Fund of 23/08/2000, and a model contract of financial leasing was approved by order No. 59 of the Ministry of Science and Technology of 03/03/1998.

We agree with the point of view that if the authority, which approved the type, model or standard contract, is not reserved for mandatory or recommendatory actions of their conditions, the presumption should operate requirement of the terms of those agreements to parties signing the contract (Berveno, 2006). However, such a warning may be provided in the normative act, which determines approval of the model contract. For example, according to Art. 10(2) of the Law of Ukraine “On Lease of State and Municipal Property”, the lease contract signed by the parties must meet the requirements of the typical lease contract for the proper property.

In summary, we should note that the organisation guide aimed at modern legal order of property relations on freedom of contract extended functional load of this phenomenon in the mechanism of legal regulation of relations in the transfer of property in use. Today, the contract performs not only the role of the legal fact, which is the primary “momentum” in the dynamics of these relations, but also the substantive regulation of the segment of individual private law instruments of the studied areas in property turnover. As the legal control for people, who enter into contractual relations, the contract “in the name” of their interests provides an objective opportunity to resolve the areas of their contractual cohabitation that are not mediated by normative regulation.

## Conclusions

The basis of the legal regulation of temporary property use relations constitute provisions of Ch. 58 of the Civil Code of Ukraine, the structure of which is built on the principle of “from general to specific”. The general provisions of this chapter were designed to unify the rules of temporary property use, regardless of payment ability factors, to subordinate the types of lease (rent) contract to the unified legal framework, as defined in that chapter, and to regulate the relationship of leasing (rent), where the law does not have the features of conclusion and execution agreement.

In the context of harmonisation of economic and civil law for the regulation of rent relations it is necessary to reform the economic legislation of Ukraine extracting the provisions of the lease from Article 5(30) of the Economic Code of Ukraine, keeping the principles of lease in state and municipal property in this codified Act.

Discretionary nature of the majority of modern norms regulating relations with the transfer of property in use proves the expansion of functional sense of contract in the mechanism of their regulation. Today its importance in the system of legal phenomena relationship is not limited to the impact of these relations on the dynamics, but considering the declared principle of freedom of contract, it was assigned the role of regulating private law instruments' segment of the studied areas of property turnover. However, in the legal literature it is an open issue of the legal nature of conduct that establishes individual contracts.

## References

- Belianevych O.A. (2006), *Hospodarske dohovirne pravo Ukrainy (teoretychni aspekty)*, Kyiv: Yurinkom Inter [Economic Contract Law of Ukraine (theoretical aspects), in *Ukrainian*].
- Koretsky A.D. (2001) *Teoretyko-pravovye osnovy ucheniya o dohovore*, StPetersburg: Yurydychnyy tsentr Press, available at, <http://pravouch.com/dogovornoe-pravo/sovremennoe-sostoyanie-dalneyshee-razvitiye-12326.html>, [Theoretical and Legal Aspects of the Contract, in *Russian*], referred on 21/06/2017.
- Pohribnyy, S.O. (2004), *Mekhanizm ta pryncypy reguluvannia dohovirnyh vidnosyn u cyvilnomu pravi Ukrainy*, Kyiv: Pravova yednist, p.43, [Mechanisms and Principles of the Contractual Relations' Regulation in the Civil law of Ukraine, in *Ukrainian*].
- Luts, V.V. (2006), *Deyaki aspekty pravovoho reguluvannia dohovirnyh vidnosyn u hospodarskyy diyalnosti*, Ivano-Frankivsk: Institute of Law, Carpathian National University, pp.32-33, [Some Aspects of the Legal Regulation of Contractual relations in Economic Activity, in *Ukrainian*].
- Kazantsev, M.F. (2008), *Koncepcia hrazhdansko pravovoho dohovornoho regulirovania*, Doctor's thesis. Yekaterinburg: Ural State Law Academy, p.155, [Conception of Public Legal Contractual Regulation, in *Ukrainian*].
- Tsyvilnyy Kodeks Ukrainy: Naukovo praktychnyy Komentar* (2004), Kyiv: Istyna, p.6, [Civil Code of Ukraine: Scientific Practical Commentaries, in *Ukrainian*].
- Naukovo praktychnyy Komentar hospodarskoho Kodeksu* (2004), Kyiv: Yurinkom Inter, p.16, [Scientific Practical Commentaries of the Economic Code of Ukraine, in *Ukrainian*].
- Spasibo-Fateeva, I. (2006), *Vplyv stroku na dohovirne zobovjazannia*, available at, <http://yurradnik.com.ua/stati/d0-b2-d0-bf-d0-bb-d0-b8-d0-b2-d1-81-d1-82-d1-80-d0-be-d0-ba-d1-83-d0-bd-d0-b0-d0-b4-d0-be-d0-b3-d0-be-d0-b2-d1-96-d1-80-d0-bd-d0-b5-d0-b7-d0-be-d0-b1-d0-be-d0-b2-d1-8f-d0-b7-d0-b0-d0-bd/>, [Influence of the Terms on the Contractual Obligation, in *Ukrainian*], referred on 21/06/2017.
- Pro deyaki pytannia praktyky zastosuvannia norm tsyvilnoho I hospodarskoho kodeksiv Ukrainy* (2008), available at, [http://zakon4.rada.gov.ua/laws/show/v\\_211600-08](http://zakon4.rada.gov.ua/laws/show/v_211600-08), [Some Issues of the Practice in Using Norms of the Civil and Economic Codes in Ukraine, in *Ukrainian*], referred on 21/06/2017.
- Pro deyaki pytannia praktyky zastosuvannia zakonodavstva pro orendu (naym) mayna* (2013), available at, <http://document.ua/pro-dejaki-pitannja-praktiki-zastosuvannja-zakonodavstva-pro-doc144975.html>, [Some Issues of the Practice in Using the Law about Lease (Rent) of Property, in *Ukrainian*], referred on 21/06/2017.

- Spasibo-Fateeva, I., Krat, V., Mytsa, Yu. (2014), *Tsyvilnyy I hospodarskyy kodeksy 2004-2014*, Kharkiv: Pravo, pp.185-188 [Civil and Economic Codes: 2004-2014, in Ukrainian].
- Naukovo-praktychnyy komentar Tsyvilnoho Kodeksy Ukrainy* (2005), Kyiv: Yurinkom Inter, p.26, [Scientific practical Commentaries on Civil Code of Ukraine, in Ukrainian].
- Zemelnyy kodeks Ukrainy* (2002), *Vidomosti Verkhovnoyi Rady N3-4*, [Land Law of Ukraine, in Ukrainian].
- Pro orendu zemli (2004), *Vidomosti Verkhovnoyi Rady, N10*, [About Land Lease, in Ukrainian].
- Semkiv, V.V. (2013), *Dohovory u sferi vykorystannia pryrodnyh resursiv: tsyvilno pravovyy aspekt*, Extended abstract of candidate's thesis: Kyiv, p.5, [Agreements in the Field of Natural Resources Use: Civil Legal Aspect, in Ukrainian].
- Sibiliyov, M.M. (2014), *Tsyvilno-pravovyy dohovir yak regulator suspilnyh vidnosyn*, Pravo Ukrainy, p.38, [Civil Legal Agreement as a Regulator of Social Relations, in Ukrainian].
- Romovska, Z. (2000), *Problemy zahalnoyi teoryy u proekti CC Ukrainy*, in: Dohert A. (ed.), p.42, [Problems of the Basic Theory in the Bill of the Civil Code of Ukraine, in Ukrainian].
- Sibilov M.M. (2014), *Spivvidnoshennia aktiv tsyvilnoho zakonodavstva I dohovoru ta bazovi modeli reguliuvannia dohovirnyh vidnosyn za chynnym Tsyvilnym kodeksom Ukrainy*, *Kmelnytskyy*, p.58, [Correlation of Civil Legal Acts and Contract with Basic Models of Contract Relations' Regulation due to the Civil Code of Ukraine, in Ukrainian].
- Marchenko, N.M. (2000), *Istochniki prava*, available at, [https://books.google.com.ua/books?id=PT\\_gImmvUV4C&pg=PT284&lpg=PT284&dq=%C2%A7+3.#v=onepage&q=%C2%A7%203.&f=false](https://books.google.com.ua/books?id=PT_gImmvUV4C&pg=PT284&lpg=PT284&dq=%C2%A7+3.#v=onepage&q=%C2%A7%203.&f=false), referred on 15/08/2017, [Sources of Law, in Ukrainian].
- Boldurev, E., Bratus, S., Vengerov, A., Vojevodin, L. (1985), *Pravoprимineniye v Sovetskom Gosudarstve*, Moscow: Yurid. Lit, p.190, [The Use of Law in the Soviet State, in Ukrainian].
- Znamenskiy, G., Belyanovich, O., Vinnyk, O., Shcherbyna, V. (2008), *Naukovo-praktychnyy komentar Hospodarskoho Kodeksy Ukrainy*, Kyiv: Yurinkom Inter, p.317, [Scientific practical Commentaries on Economic Code of Ukraine, in Ukrainian].
- Berveno, S.M. (2006), *Problemy dohovirnoho prava Ukrainy*, Kyiv: Yurinkom Inter, p.81, [Problems of Contractual Law in Ukraine, in Ukrainian].
- On Lease of State and Municipal Property (1995), *Vidomosti Verkhovnoyi Rady No15*, [About Land Lease, in Ukrainian].

## **NORMATYVINIS IR INDIVIDUALUS TEISINIŲ SANTYKIŲ PERDUODANT NUOSAVYBĖS NAUDOJIMO TEISĖ REGLAMENTAVIMAS**

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### **SANTRAUKA**

Straipsnis skirtas ištirti su laikinojo turto naudojimo teisiniais santykiais susijusias struktūrines normas, kurios traktuojamos kaip teisinio reglamentavimo mechanizmo dalis. Taip pat aiškinamasi, kokį vaidmenį šiame mechanizme atlieka sutartys. Straipsnyje apibrėžta bendrųjų Ukrainos civilinio kodekso 58 straipsnio nuomos nuostatų teisinė reikšmė analizuojamų teisinių santykių kontekste. Nustatyta, kad šiomis nuostatomis siekiama suvienodinti laikinojo turto naudojimo taisykles neatsižvelgiant į mokėjimo veiksnį. Pagal šias nuostatas nuomos sutartys sudaromos remiantis vienu teisiniu pagrindu, numatytu Ukrainos civilinio kodekso 58 straipsnyje. Praktikoje bendrosios nuomos sąlygos reglamentuoja nuomos santykius, kuriems įstatymas nenustato sutarties pasirašymo ir įgyvendinimo ypatybių. Buvo nustatytas doktrininis aukščiausiųjų teismų požiūris ir pozicija dėl ekonominių kriterijų bei civilinės teisės suderinimo nuomos santykių reglamentavimo atžvilgiu. Remiantis semantiniu Ukrainos ekonominio kodekso 30 straipsnio 5 dalies nuostatų analize, buvo išskirtos dvi nuomos santykių reglamentavimo grupės. Pirmąją grupę sudaro nuostatos, numatančios bendruosius nuomos santykių ypatumus. Antrąją grupę sudaro nuostatos, numatančios valstybei ir savivaldybei priklausančios nuomos ypatumus. Siūloma reformuoti Ukrainos ekonomikos teisinį reglamentavimą pašalinant ekonomikos kodekso 5 straipsnio 30 dalies nuomos nuostatas ir šiame kodifikuotame teisės akte palikti valstybei ir savivaldybei priklausančio nekilnojamojo turto nuomos principus.

*REIKŠMINIAI ŽODŽIAI:* sutartis, civilinė teisė, nuoma, Ukrainos ekonomikos teisinis reglamentavimas.