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THE FORM OF EASEMENT AGREEMENT UNDER THE CIVIL LEGISLATION OF UKRAINE

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Statement of the Problem. The agreement is a universal legal category and a unique means of legal regulation. As an agreement aimed at establishing, changing, and terminating civil rights and obligations, it can create a variety of relationships. These legal relations stipulated by the agreement include the right to use someone else's property, referred to in civil law as an easement. At the same time, the issues of form of these agreements are of particular importance, both in the context of the legal consequences of its non-compliance, and in view of the importance of proper fixation of the agreements reached between the parties. At the same time, as can be seen from the Decision of the Supreme Court as part of the Civil Court of Cassation in case No. 303/2983/19, private law is a priori characterized by dispositivity, which is manifested, in particular, in the fact that a person independently decides to make or not to make a certain transaction taking into account the principle of freedom of transaction [1]. The relevance of this issue is also confirmed by amendments to Part 1 of Article 638 of the Civil Code of Ukraine (hereinafter referred to as the CC of Ukraine), which excluded the phrase «in the proper form» from the rule on concluding an agreement [2].

Analysis of Recent Researches and Publications. Many scientists have devoted their works to the study of this issues, including: O. V. Ilkiv, V. M. Martyn, R. I. Marusenko, Ye. O. Michurin, T. V. Predchuk, H. V. Sosnina, T. Ye. Kharytonova and others. Since, in the context of recodification and updates in the civil legislation of Ukraine, the need for its further study is beyond doubt.

The aim of this scientific article is a comprehensive theoretical analysis of the provisions on the form of an easement agreement under the legislation of Ukraine and the development on this basis of the author's vision of the prospects for legal regulation of private relations in this area.

Statement of Basic Materials. There are no special requirements in civil legislation for the form of an easement agreement. Consequently, the general rules regarding the form of the transaction (articles 205-210 of the CC of Ukraine) and the form of the agreement (article 639 of the CC of Ukraine) apply hereto. Based on the analysis of Article 206 and Article 208 of the CC of Ukraine [3], it can be concluded that this agreement shall be concluded in writing.

It is worth noting that the requirements of Part 2 of Article 402 of the CC of Ukraine [3] and Part 2 of Article 100 of the Land Code of Ukraine (hereinafter referred to as the LC of Ukraine) [4] contain a rule on mandatory state registration of land easement in accordance with the procedure established for state registration of rights to real estate. According to Paragraph 1 of Part 1 of Article 27 of the Law of Ukraine «On State Registration of Corporeal Rights to Real Estate and Their Encumbrances», the agreement is one of the grounds for state registration of property rights and other real estate rights, including the right of use (easement) [5]. Concluding agreement on establishing a land easement in oral form will make it impossible to further register the right of use (easement). The above further confirms the conclusion that the easement agreement shall be concluded in writing.

The legislative regulations do not contain the direct instructions regarding the mandatory notarization of an easement agreement. However, in scientific sources it was noted that the consolidation by law of the mandatory notary form of the agreement on establishing the right to use someone else's property (easement) would be the most optimal [6, p. 42]. Such an agreement should be subject to mandatory notarization, since these relations are associated with the real estate rights restriction, primarily to immovable property, as well as due to the fact that such agreements are not common in practice and their conclusion is associated with an increased risk of misunderstanding of its terms on the part of ordinary citizens [7, p. 792]. Although R. I. Marusenko, on the contrary, notes that the easement agreement does not require notarization, since the mandatory registration of a land easement, where the verification of the concluded agreement is carried out, is a self-sufficient fact of official legalization of an easement legal relationship by the state on the basis of documents submitted to the registration authority [8, p. 102].

The law of Ukraine No. 340-IX of 05.12.2019 «On Amendments to Certain Legislative Acts of Ukraine on Countering Raiding» [9] introduces the institution of mandatory transaction notarization for the first time in the legislation of Ukraine as a tool for countering raiding. To this end, the above-mentioned law amended the CC of Ukraine, the LC of Ukraine, the Economic Code of Ukraine and the Law of Ukraine «On Land Lease».

In particular, according to the adopted legislative amendments, the owner of immovable property has the right to establish (cancel) the mandatory agreement notarization (making changes to the agreement), the subject of which is such property or part thereof, except in cases where, according to the law, such an agreement is subject to notarization (Article 209 of the CC of Ukraine [3]).

The land plot owner may establish a requirement for the notarization of a land easement agreement, agreements on granting the right to use a land plot for agricultural needs (emphyteusis) or development (superficies), a land lease agreement, and also cancel such a requirement (articles 100, 102-1 of the LC of Ukraine [4], Article 14 of the Law of Ukraine «On Land Lease» [10]).

The establishment (cancellation) of a requirement is a unilateral transaction that is subject to notarization. By its legal nature, such a requirement is an encumbrance of real estate rights to immovable property and is subject to state registration in accordance with the procedure established by the Law of Ukraine, with corresponding legal consequences.

It is worth paying attention to the fact that according to the requirements of Part 3 of Article 202 of the CC of Ukraine, the rights under a unilateral transaction may arise both for the person who made it, and for third parties for whose interests it was made. As for obligations, they can usually be created under a unilateral transaction only for the person who made it. A unilateral transaction can create the obligations for other persons only in cases stipulated by law, or by agreement with these persons [11, p. 197].

Because of this, the norms regulating the institution of the mandatory notary certification of the deed are clearly erroneous from the point of view of legal construction. In fact, the owner sets the

corresponding requirement for himself. Therefore, the introduced institution of the mandatory transaction notarization, in its essence, does not bear any changes. After all, as correctly stated in the Conclusion of the Chief Scientific and expert Department on the draft «Law of Ukraine «On Amendments to the Land Code of Ukraine and Some Other Legislative Acts of Ukraine on Countering Raiding» draft dated 02.04.2018, it repeats the provisions of Article 209 of the CC of Ukraine, according to Part 1 of which a transaction made in writing is subject to notarization only in cases established by law or with the agreement of the parties, and according to Part 4 of this article, at the request of an individual or legal entity, any transaction with its participation can be notarized [12].

Obviously, when introducing the institution of requiring transaction notarization, it was necessary to provide that third parties would have obligations under such a requirement as a unilateral transaction. For example, if the owner establishes (cancels) a requirement for notarization of a land easement agreement, there will be an obligation, in particular, for the emphyteuta, the superficiary, who, in accordance with the law, can conclude it.

Taking into account the above, we believe that it is necessary to provide in Article 209 of the CC of Ukraine, article 100, 102-1 of the LC of Ukraine and Article 14 of the Law of Ukraine «On Land Lease» that in the event of establishing such a requirement, the obligations to notarize the agreement, the subject of which is real estate, the easement agreements, agreements on granting the right to use a land plot for agricultural needs (emphyteusis) or for (superficies) development, the land lease agreements will arise for third parties who have the right to conclude these agreements.

Also, unfortunately, the mechanism for implementing such a requirement has not found a legislative consolidation yet. In particular, it is not regulated when such encumbrance can be established before or after the agreement conclusion, on the basis of which a third party has the right to conclude an easement agreement. If before the agreement conclusion, then the question is if the owner is obliged to notify the other party of this. If after conclusion, then do we need to specify this provision in the agreement? And whether the right to use

someone else's property (easement), which arose on the basis of a court decision, can be registered, if such a requirement is established.

At the same time, the nature of the very concept of «requirement» is not taken into account. «Establishment (cancellation) of the mandatory notarization of the agreements» does not take into account the fact that in the civil doctrine «requirement» is associated with a certain civil law, in particular, the right of requirement arises in the binding relationship between the debtor and the creditor. For example, according to Part 2 of Article 527 of the CC of Ukraine, each of the parties to the obligation has the right to demand a proof that the obligation is performed properly by the debtor or that the performance is accepted by the proper creditor or an authorized person, and bears the risk of consequences of non-declaration of such a requirement; according to Part 2 of Article 530 of the CC of Ukraine, if the term (period) for performance by the debtor of the obligation is not established or determined by the moment of filing the requirement, the creditor has the right to demand its performance at any time, etc. [12].

The opinion expressed by practicing lawyers is also valid, which does not take into account the provisions of Article 654 of the CC of Ukraine, according to which the amendment or termination of the agreement shall be made in the same form as the agreement itself. The unilateral establishment of an encumbrance in the form of a requirement by the owner of immovable property contradicts the principle of freedom of agreement stipulated in Article 627 of the CC of Ukraine. As a result, this will violate the principle of equality of the parties when entering into a civil contract or making changes thereto in the future [13].

Conclusions. Summing up the above and specifying some aspects, it is worth noting that as of today, the easement agreement is subject to conclusion in writing and, under certain conditions defined by the legislation of Ukraine, it should be notarized. Certainly, as far as immovable property is concerned, the notarial form is also due to the fact that in accordance with the Law of Ukraine «On State Registration of Property Rights to Immovable Property and Their Encumbrances», the notaries perform the functions of the state registrar of property rights and can ensure state registration of the right

of the easement as a property right. On the other hand, according to the current legislation of Ukraine, it is possible to certify transactions in those areas where there are no notaries, by means of other bodies and officials (for example, officials of local self-government bodies) and this certification will be equal to the notarial one. However, in these cases, the problem of registering property rights under an easement is still unresolved. Therefore, in our opinion, within the framework of the existing legal regulation, in order to balance public and private interests, the broadest introduction of the current system of e-notaries and its further improvement can be a worthy alternative and means of relief.

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Цитульський В.І. Форма договору про встановлення сервітуту за цивільним законодавством України.

Договір як універсальна правова категорія та унікальний засіб правового регулювання породжує різноманітні відносини, в тому числі і право користування чужим майном, іменоване у цивільному праві сервітутом. Тому особливого значення набувають питання форми таких договорів, як у контексті правових наслідків її недодержання, так і зважаючи на важливість належної фіксації досягнутих між сторонами домовленостей.

Стаття присвячена аналізу форми договору про встановлення сервітуту за цивільним законодавством України. Окрему увагу приділено питанню інституту вимоги нотаріального посвідчення правочину, зокрема встановлення (скасування) вимоги власником щодо нотаріального посвідчення договору про встановлення земельного сервітуту.

Зроблено висновок, що станом на сьогодні договір про встановлення сервітуту підлягає укладенню у письмовій формі та, за певних, визначених законодавством України передумов, нотаріальному посвідченню. Безумовно, що стосується нерухомого майна, нотаріальна форма обумовлена також тим, що нотаріуси відповідно до Закону України «Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень» виконують функції державного реєстратора речових прав та можуть забезпечити державну реєстрацію права сервітуту як речового права. З іншого боку, відповідно до чинного законодавства України визначено можливість посвідчення правочинів у тих місцевостях, де немає нотарі-

усів, іншими органами та посадовими особами (наприклад, посадовими особами органів місцевого самоврядування) і таке посвідчення прирівнюватиметься до нотаріального. Проте, у цих випадках не вирішеною залишається проблема реєстрації речових прав за сервітутом. Тому у межах існуючого правового регулювання, з метою збалансування публічних і приватних інтересів, достойною альтернативою та засобом полегшення може виступити якраз якнайширше запровадження чинної системи е-нотаріату та її подальше вдосконалення.

Ключові слова: договір, форма договору, сервітут, право користування, письмова форма, нотаріальна форма.

Tsytulskyi V. I. The form of easement agreement under the civil legislation of Ukraine.

The agreement as a universal legal category and a unique means of legal regulation gives rise to a variety of relations, including the right to use someone else's property, called an easement in civil law. Therefore, the issues of form of these agreements are of particular importance, both in the context of the legal consequences of its non-compliance, and in view of the importance of proper fixation of the agreements reached between the parties.

The article is devoted to the analysis of the form of an easement agreement under the civil legislation of Ukraine. A special attention is paid to the issue of the institution of the requirement for transaction notarization, in particular, the establishment (cancellation) of the requirement by the owner for notarization of a land easement agreement.

It is concluded that as of today, the easement agreement is subject to a conclusion in writing and, under certain conditions defined by the legislation of Ukraine, it should be notarized. Certainly, as far as immovable property is concerned, the notarial form is also due to the fact that in accordance with the Law of Ukraine «On State Registration of Property Rights to Immovable Property and Their Encumbrances», the notaries perform the functions of the state registrar of property rights and can ensure state registration of the right of the easement as a property right. On the other hand, according to the current legislation of Ukraine, it is possible to certify transactions in those areas where there are no notaries, by means of other bodies and officials (for example, officials of local self-government bodies) and this certification will be equal to the notarial one. However, in these cases, the problem of registering property rights under an easement is still unresolved. Therefore, within the framework of the existing legal regulation, in order to balance public and private interests, the broadest introduction of the current system of e-notaries and its further improvement can be a worthy alternative and means of relief.

Keywords: agreement, form of agreement, easement, right of use, written form, notarized form.