

THE CONTRACT AS THE GROUND FOR THE EMERGENCE OF RIGHTS AND OBLIGATIONS REGARDING RESTRICTED TURNOVER OBJECTS IN CIVIL TRADE

UDC 347.2

Statement of the problem. Due to rapid social development, contractual obligations that arise in relation to restricted turnover objects have recently become widespread in practice. Despite this, the specifics of the procedure for concluding, changing or terminating such transactions have not been clearly defined at the legislative level. In addition, the peculiarities of the contractual alienation or transfer of objects restricted in turnover have remained poorly studied by the scientific community.

Purpose. The purpose of this scientific article has been to characterize contracts as the basis for the emergence of rights and obligations regarding restricted turnover objects in civil trade and to find out the specifics of their conclusion.

Analysis of recent researches and publications. Some issues related to the contractual involvement of restricted turnover objects in civil trade were the subject of research by such scientists as I. Spasybo-Fatieieva, K. Zubenko, V. Skrypnyk, O. Lisnycha and others.

Statement of Basic Materials. The importance of a civil legal contract as one of the main regulators of private law relations is difficult to overestimate. Thanks to the possibility to enter into contracts fixed at the legislative level, subjects of civil law are able not only to establish, change or terminate their civil rights and obligations, but also to involve in civil trade various objects of civil law, including those that have been limited in turnover.

The national legislator allows the use of contractual constructions of various kinds to ensure the turnover of objects of civil rights. This has been directly indicated by the content of Art. 178 of the Civil Code of Ukraine. Its systematic analysis has proved that objects restricted in turnover can be alienated, that is, they can be transferred from the

ЗІПРІКНАУКОБИХСТАТЕЙ

ownership of one person to another with the help of contracts of sale, donation, exchange, etc.

In addition, this article of the Civil Code of Ukraine established the ability of objects restricted in turnover to pass from one person to another otherwise [1]. Some scientists emphasized that the law-making technique used in the formation of the norm of Part 1 of Art. 178 of the Civil Code of Ukraine in combination with the absence of a legal definition of the meaning of the words «to move ... otherwise» created a false impression that things restricted in turnover can not be freely transferred between participants of legal relations on the basis of property rights, but can be freely transferred on the basis of derived property rights. At the same time, it was emphasized the need to consider civil turnover in a broad and narrow sense. In the first case, it refers to the change of owner, the transfer of ownership and the facts of the occurrence, transfer, change and termination of derivative real rights to the relevant objects of legal relations. In the second case, we only mean changing the owner of the object of legal relations [2, p. 117-118].

In our opinion, the wording «to transfer ... in another way» used in the analyzed norm indicates nothing more than the availability of subjects of civil legal relations with the option to enter into other types of contracts, the transfer of the object under which is not associated with the loss of the right of ownership by one subject and the emergence of such a right by another. If the relevant wording had not been applicable for this purpose, then it was not clear for what purposes the legislator had used it at all.

Civil law contracts that are concluded regarding limited negotiable objects are characterized by certain features that are associated with the narrowing of the scope of one of the main principles of civil law – freedom of contract.

Thus, according to the general rule established by the Part 1 of the Art. 627 of the Civil Code of Ukraine, the parties are free to enter into a contract, choose a counterparty, and determine the terms of the contract. However, if the subject of the contractual obligation is a restricted turnover object, they must take into account the special legal regime established by the legislator for this type of civil rights object.

The latter is a set of specific rules on the procedure for acquisition, use, alienation and transfer of the objects under study, which, when applied, may limit freedom of contract. The imperativeness of the specified rules is unquestionable.

When concluding a contract, its parties can't ignore the law's requirement that certain objects of civil rights can be in civil trade only with a special permit. Under this condition, the subject composition of contractual obligations is limited to holders of state-sanctioned permits (licenses), which significantly narrows the possibility of free choice of a counterparty.

The corresponding requirement can apply equally to both the person who proposes to enter into a contract and the person who accepts the offer. For example, a contract for the purchase and sale of weapons may be concluded only between a seller who has received a permit to sell weapons from the police and a buyer who is the owner of a permit to purchase them.

Permits issued by the state, in the vast majority of cases, have a validity period during which the object of civil rights will be allowed to be in turnover. In particular, permits for the purchase of explosive materials are granted for a period of up to 6 months [3]. Expiry of the permit deprives the person of the right to take any legally significant actions regarding the corresponding object of civil rights.

The parties must also take into account the requirement of the Art. 178 of the Civil Code of Ukraine, which states that some objects of civil rights can belong only to certain participants in the turnover. In particular, the Art. 77 of the Land Code of Ukraine provides for the exclusive ownership of defence lands by the state [4].

Thus, the possibility of contractual alienation by the state of lands with the specified purpose into private or communal ownership is excluded.

At first glance, it seems that the established restriction makes it impossible to conclude contracts for the sale of limited turnover objects. Instead, the methods of involving them in civil turnover include, in particular, contracts of use.

At the same time, we are convinced that the corresponding statement is not an axiom and can be disproved. These are, for example,

contracts for the purchase and sale of agricultural plots of land. The circulation of such lands is limited, since they can be acquired only by those subjects, the list of which is defined in the Art. 130 of the Land Code of Ukraine [4], and their contractual transfer to ownership by foreigners is excluded.

Taking into account the cancellation of the moratorium, the alienation of agricultural land plots is possible under a sales contract, if the parties to it are citizens of Ukraine.

The impact of restrictions on the turnover of the investigated objects introduced by the legislator on the possibility of the parties to choose a contractual structure that will regulate their legal relations is quite significant. Speaking in this context, let's recall human donor organs, which, as V. Skrypnyk rightly points out [5, p. 67] and O. Lisnycha [6, p. 174], should be considered objects of civil rights, a specific independent subject of civil legal contracts, limited in civil turnover.

Acts of an international nature quite unambiguously resolve the issue of commercial turnover of human organs. The Declaration on Transplantation of Human Organs, adopted at the 39th World Medical Assembly in Madrid (Spain) in October 1987, has condemned the sale and purchase of human organs for transplantation [7].

Also, the resolution of the World Health Assembly WHA 63.22 «Transplantation of human organs and tissues» dated 05.21.2010, adopted at the 63rd session of the WHO, approved the updated WHO Guidelines for transplantation of human cells, tissues and organs. One of the main tasks of this resolution is to prevent harm caused for the purpose of receiving financial or other similar benefits when conducting operations with parts of the human body, including organ trafficking and transplant tourism [8].

As for domestic legislation, the current version of the Law of Ukraine «On the Application of Transplantation of Anatomical Materials to Human» also established a ban on concluding or offering to conclude contracts involving the purchase and sale of human anatomical materials [9], although very recently this law allowed the possibility of exchanging human anatomical materials through their purchase and sale within the framework of international cooperation.

Taking into account the moral and ethical side of the issue, we consider the existence of a ban on receiving material benefits from the trade in human organs to be fully justified. In this situation, the restriction of the principle of freedom of contract is the result of the legislator's observance of the balance between public and private interests, which is a positive example of the implementation of the social function by the state.

It should be taken into account that the above prohibition does not mean the complete deprivation of the participants of private law relations of the possibility of contractual involvement of human organs in civil turnover. It is worth agreeing with the opinion of I. Spasybo-Fatieieva, who noted that removed human organs as objects of law can be used in one way or another (for transplantation and for other medical purposes). Along with this, they can be subject to scientific developments, which indicates their application in the field of intellectual property [10, p. 15].

Conclusions. Summarizing, we note that the contract is one of the main legal means of attracting restricted turnover objects of civil rights to trade. The legislator envisages the possibility of subjects of obligation law to use various types of contracts to settle legal relations that arise in relation to restricted objects.

The influence of the studied objects on the principle of freedom of contract can't be denied. It manifests itself in limiting the range of subjects of contractual obligations, the terms of existence of contractual relations, the possibility of choosing the type of contract that will mediate the mutual rights and obligations of the parties, etc.

In general, the topic of contractual obligations arising from limited turnover objects requires more attention from the scientific community and requires further development.

1. *Civil Code of Ukraine No. 435-IV as of January 16, 2003. Official website of the Verkhovna Rada of Ukraine. URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text> (date of application: 25.11.2022).*
2. *Zubenko K. Introduction into civil turnover of movable things to which the legal regime of real estate is extended. Jurnalul juridic national: theory and practice. 2016. No. 20.4. P. 116-120.*
3. *On the approval of the Instructions on the procedure for the manufacture, acquisition, storage, accounting, transportation and use of firearms,*

- pneumatic, cold and cooled weapons, devices of domestic production for firing cartridges, equipped with rubber or similar in their properties metal projectiles of non-lethal action, and cartridges for them, as well as ammunition for weapons, main parts of weapons and explosive materials: Order of the Ministry of Internal Affairs of Ukraine No. 622 as of 21.08.1998. Official website of the Verkhovna Rada of Ukraine. URL: <https://zakon.rada.gov.ua/laws/show/z0637-98#Text> (date of application: 11/25/2022).*
4. *Land Code of Ukraine No. 2768-III as of October 25, 2001. Official website of the Verkhovna Rada of Ukraine. URL: <https://zakon.rada.gov.ua/laws/show/2768-14#Text> (date of application: 25.11.2022).*
 5. *Skrypnyk V. Donor bodies as objects of civil legal relations. Entrepreneurship, economy and law. 2018. No. 5. P. 62-67.*
 6. *Lisnycha O.M. Human organs and tissues as special objects of civil law. Comparative and analytical law. 2020. No. 1. P. 172-174.*
 7. *Declaration on Human Organ Transplantation, adopted by the 39th World Medical Assembly Madrid, Spain, October 1987. URL: <http://hrlibrary.umn.edu/instree/organtransplantation.html> (date of access: 25.11.2022).*
 8. *Resolution WHA 63.22 Human organ and tissue transplantation, adopted by the World Health Assembly on 21.05.2010. URL: http://apps.who.int/gb/ebwha/pdf_files/WHA63/A63_R22-en.pdf (date of access: 25.11.2022).*
 9. *On the application of transplantation of anatomical materials to humans: Law of Ukraine No. 2427-VIII as of 05.17.2018. Official website of the Verkhovna Rada of Ukraine. URL: <https://zakon.rada.gov.ua/laws/show/2427-19#Text> (date of application: 11/25/2022).*
 10. *Spasybo-Fatieieva. Types of objects of civil rights. Journal of Civil Studies. 2015. No. 18. P. 13–18.*

Shliakhovska I. M. The contract as the ground for the emergence of rights and obligations regarding restricted turnover objects in civil trade

Contractual obligations that arise in relation to restricted turnover objects have recently become widespread in practice, which is due to rapid social development. Despite this, the specifics of the procedure for concluding, changing or terminating such transactions have not been clearly defined at the legislative level. In addition, the peculiarities of the contractual alienation or transfer of objects restricted in turnover have remained poorly studied by the scientific community.

The importance of a civil legal contract as one of the main regulators of private law relations is difficult to overestimate. Thanks to the possibility to enter into contracts fixed at the legislative level, subjects of civil law are able not only to establish, change or terminate their civil rights and obligations, but also to involve in civil trade various objects of civil law, including those that have been limited in turnover.

The national legislator allows the use of contractual constructions of various kinds to ensure the turnover of objects of civil rights. This has been directly indicated by the content of Art. 178 of the Civil Code of Ukraine. Its systematic analysis has proved that objects restricted in turnover can be alienated, that is, they can be transferred from the ownership of one person to another with the help of contracts of sale, donation, exchange, etc.

The contract is one of the main legal means of attracting restricted turnover objects of civil rights to trade. The legislator envisages the possibility of subjects of obligation law to use various types of contracts to settle legal relations that arise in relation to restricted objects. The influence of the studied objects on the principle of freedom of contract can't be denied. It manifests itself in limiting the range of subjects of contractual obligations, the terms of existence of contractual relations, the possibility of choosing the type of contract that will mediate the mutual rights and obligations of the parties, etc.

Key words: contract, object, restricted turnover object, obligations, thing, property, alienation.

Шляховська І. М. Договір як підстава виникнення прав та обов'язків щодо обмежено оборотоздатних об'єктів у цивільному обороті

Договірні зобов'язання, які виникають щодо обмежено оборотоздатних об'єктів набувають все більшого поширення на практиці, що обумовлено швидким суспільним розвитком. Не зважаючи на це, на законодавчому рівні чітко не визначено особливостей порядку укладення, зміни чи розірвання таких правочинів. Крім цього, особливості договірної відчуження або передачі об'єктів, обмежених в обороті залишаються малодослідженими науковою спільнотою.

Значення цивільно-правового договору, як одного із основних регуляторів приватноправових відносин важко переоцінити. Завдяки закріпленій на законодавчому рівні можливості укладати договори, суб'єкти цивільного права здатні не лише встановлювати, змінювати чи припиняти свої цивільні права та обов'язки, але й залучати до цивільного обороту різноманітні об'єкти цивільного права, в тому числі й ті, які обмежені у обороті.

Національний законодавець допускає використання договірних конструкцій різного роду для забезпечення оборотоздатності об'єктів цивільних прав. На це безпосередньо вказує зміст ст. 178 Цивільного кодексу України. Її системний аналіз засвідчує, що об'єкти, обмежені в оброті можуть відчужуватися, тобто переходити із власності однієї особи до іншої за допомогою договорів купівлі-продажу, дарування, міни та інших.

Договір є одним із основних правових засобів залучення обмежено оборотоздатних об'єктів цивільних прав до обороту. Законодавець передбачає можливість суб'єктів зобов'язального права послугоуватися різними видами договорів задля урегулювання правовідносин, які виникають щодо обмежених у обороті об'єктів. Вплив досліджуваних об'єктів на принцип свободи договору неможливо заперечити. Він проявляється у обмеженні кола суб'єктів договірної зобов'язання, строків існування договірних правовідносин, можливості оби-

рати вид договору, що опосередкуватиме взаємні права та обов'язки сторін тощо.

Ключові слова: договір, об'єкт, обмежено оборотоздатний об'єкт, зобов'язання, річ, власність, відчуження.