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Contractual Regulation of Relations of Joint Ownership of Individuals in Ukraine (on the Example of Agreements on the Transfer of Property into Ownership)

Reglamentación contractual de las relaciones de propiedad conjunta de personas en Ucrania (sobre el ejemplo de los acuerdos sobre la transferencia de bienes a propiedad)

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ABSTRACT

The article is devoted to the theoretical analysis of legal regulation of contractual relationships related to the acquisition a right of common property by individuals in Ukraine. A civil contract as a regulator of relations common property of individuals is analyzed. The place and role of civil contract among the grounds of the appearance of a right of common property of individuals are found out. The author notion of a civil contract as a regulator of owners' relations of property is proposed and its essential terms are singled out.

Keywords: Civil legal contract; hereditary contract; life abstinence; right of common property.

RESUMEN

El artículo está dedicado al análisis teórico de la regulación jurídica de las relaciones contractuales relacionadas con la adquisición de un derecho de propiedad común por parte de personas físicas en Ucrania. Se analiza un contrato civil como regulador de las relaciones de propiedad común de los individuos. Se determina el lugar y la función del contrato civil entre los motivos de la aparición de un derecho de propiedad común de las personas. Se propone la noción de autor de un contrato civil como regulador de las relaciones de propiedad del embajador y se señalan sus términos esenciales.

Palabras clave: Contrato civil legal; contrato hereditario; abstinencia de vida; derecho a la propiedad común.

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INTRODUCTION

The importance of scientific development on the meaning and role of civil contract law in the occurrence of common property of individuals is caused, above all, by the integration of Ukraine into the European and world community and the need of taking account of the positive foreign experience in these matters. The success of implementation of these tasks at this stage primarily depends on how civil legislation of Ukraine meets modern tendencies of development of contract law of the European Union, its adaptation to the current economic and political conditions and integration processes related to the signing of the Ukraine Association Agreement with the European Union.

The importance of civil contract directly reflected in the Civil Code of Ukraine (hereinafter – CC) (Dovgert, 2004), where among other grounds of the occurrence of civil rights and obligations a contract is specified, and freedom of contract is one of the general principles of civil law. Therefore, the study of new doctrinal position contract as a legal fact that underlies the acquisition of common property and complex scientific research of civil contracts, legal result of conclusion of which is the acquisition of common property are relevant.

CIVIL CONTRACT AS A REGULATOR OF RELATIONS OF COMMON PROPERTY OF INDIVIDUALS IN UKRAINE

Civil contract is an effective regulator of relations common property of individuals in Ukraine, which took an independent place in the mechanism of legal regulation. In the works of the modern period of contract law the term “contractual regulation” is used increasingly. Contractual regulation of relations of common property is individual, because it provides binding nature to specific order to acts of counterparties concerning committing of which they agreed. The contract is concluded between equal subjects and aimed at mutual satisfaction of their needs at the expense of each other. Since one of the essential characteristics of any agreement is absence of possibility of either party to impose its terms to other party, the conclusion of the contract is only possible when each party considers fair contractual terms for them. Upon reaching this agreement, the parties are guided by the understanding of justice that is generally accepted in society. That is actually very civil contract is one of the ways of objectification of imperatives that are the essence of natural law of a society. In this understanding, an agreement is a way of legal regulation of conduct of the parties in civil obligations, because the will of the parties is fixed in the contractual terms, in accordance the conditions for contractors are flush with dispositive legislative provisions (Wilkinson-Ryan and Hoffman, 2015).

In this regard, it is advisable to state that the legislator in Art. 6 Civil Code of Ukraine recorded a provision that civil contract has acquired the status of an independent regulator of property relations of co-owners between themselves and with third parties, thus giving to the regulation of contractual relations of common property prevailing value comparing to statutory regulation. According to p. 3 of the Art. 6 of Civil Code of Ukraine civil relations can be regulated not only by the acts of civil law, but also by their participants - subjects of these relations. That is in the relations associated with the emergence of common ownership of individuals the shift from their legislative regulation to contractual determination can be traced. However, civil contract must meet the rules that are mandatory for the parties and valid at the moment of the conclusion. Thus the legislator in par. 2 of p. 3 of Art. 6 of Civil Code of Ukraine emphasizes the objective headship of the imperative rules of the law above contract. It can be concluded that the equality of dispositive provisions of Chapter. 26 of Civil Code of Ukraine and terms of the contract is possible when this equality is assumed by discretionary norm. However, with entering into force of a new law that regulates the common property of individuals differently, the conditions of previously concluded civil contract remain in force, unless otherwise will be provided by law. It should be understood that the rights and obligations of the contracting parties are

related directly to the rules of Ch. 26 of Civil Code of Ukraine, as they are defined by the parties aiming at regulating their actions on pre-defined rules of conduct (contractual terms). Therefore, the contract is not just an agreement between the contractors, but primarily an individual regulator of relations between owners and third parties. Instead, the law acts as a general normative regulator of the relations of common property.

Therefore, it can be concluded that the contractual regulation by its impact on the relations of common property is wider than the statutory as legal regulation is aimed to managing the co-owners of property relations and contractual – to their organization and formation. Therefore, the contract serves the one unique social and legal structure of private law that determines its specificity and at the same time gives the parties the widest freedom of actions, provides the opportunity to become a sort of «legislators» for themselves, but in the limits defined by law.

The relationship arising from conclusion of the contract are recognized not only legal and not so much because they are directly regulated by rules of positive law, but because there is close legal connection between contractors. Law recognizes the rules of a contract created by the parties (subjective rights and obligations), that is it ensures their forced realization and protection. As a striking example of the recognition of legal relations arising from the contract may serve a deed of gift of shares in the right of common property under which the rights and obligations for contractors occur not by transferring the prescriptions of the law on the real situation through their voluntary actions, but directly from the agreement of the parties. In the process of concluding of such a treaty legal norms of individually direction are created, i. e. concerning specific and well-defined subjects and are designed for them.

Thus, contractual regulation in mechanism of legal regulation of property relations co-owners occupies a special place, forming a separate subsystem – a set of elements that form in their systematic unity mechanism contractual regulation of relations of common property of individuals. It appears that aforesaid subsystem of contractual regulation has determining value for the mechanism of legal regulation of relations of common property, since it establishes the content of other elements, and, consequently, the mechanism of regulation of private relations in general. The mechanism of regulation of contract is formed by model of contractual relationships approved by positive law; principles of contract regulation, contracting manners. Thus, the mechanism contractual regulation, the core of which is a civil contract, is an integral component of the mechanism of regulation of private relationships. Contractual regulation of property relations of co-owners and third parties performs the following functions:

- law-making (is shown in shaping the content of the agreement, which serves as the basis of occurrence, change and termination obligations);
- organizational (organizing a self-regulation of property relations between owners and third parties);
- informative (containing information about the content of a civil contract);
- preventive (prevents conflicts of interests of participants);
- ensuring compliance with the law terms of a civil contract and the legality of action for its implementation.

THE CONCEPT AND THE ESSENTIAL TERMS OF THE CONTRACT AS A REGULATOR OF RELATIONS OF PROPERTY CO-OWNERS

In civil literature the position of the multiple meaning of the term “the contract” is predominant, which covers such legal phenomenon as legal fact (bilateral or multilateral transaction), which is the basis of civil rights and obligations; contractual obligations (relationship) arising from the concluded contract; a document that fixes the fact of establishing binding relationship between contractors (Dzera *et al.*, 1998; Yoffe, 1975).

It should be noted that the concept of multiple meaning of the concept of a contract has found its realization in the civil codes of many countries, built on pandectists (Germany, France, the Netherlands). It is adopted in contemporary Ukrainian legislation too.

Among general contractual provisions, the defining place certainly belongs to the definition of the concept of a contract by the Civil Code of Ukraine. According to p. 1, Art. 626 of the Civil Code of Ukraine the contract is defined as an agreement between two or more parties aimed at the establishment, modification or termination of civil rights and obligations. We cannot argue that this definition is completely new for the jurisprudence because before the adoption of the Civil Code of Ukraine in 2004 sufficiently established views on the concept of civil contract had evolved in the legal doctrine. Analyzing this definition contract, V.V. Luts says that the agreement is not limited to the fact that it affects the dynamics of civil relations (creates, modifies or terminates them), but also determines the content of specific rights and obligations of the participants of contractual obligations according to legal requirements, business traditions and requirements of reasonableness and fairness. In this sense the contract is a means of regulating the behavior of parties in civil relations (Luts, 2001). So the contract is also a legal fact and form of existence of relationship, and a document that fixes rights and obligations of the parties, and a regulator of property relations, herewith co-owners are recognized as the subjects of the contractual regulation that allows to establish criteria for their possible behavior. Taking into account that civil contract is aimed at regulating property relations of co-owners and third parties such its meaning fully covers all the above roles because as a regulator of property relations the contract may take different forms: in some cases, it is a commitment, in others – legal fact, action, transaction or document containing conditions for the regulation of property relations of co-owners.

Considering the above, as regulator property relations of co-owners civil contract is system of actions fixed in statutory form and achieved by the parties to meet their own interests by the mutually agreed will of both counterparties of the future contract aimed at emergence, modification or termination of their right to common property. I. e. the legal model of a civil contract as a regulator of relations of property of co-owners and third parties is that it is:

- legal fact (legitimate action – legal act) upon which obligations of the parties arise;
- a document containing the conditions for legal regulation of property relations;
- the form of existence of property relations of co-owners and/or third parties (commitments).

To become a civil contract legal, it must meet certain requirements, compliance with which is necessary (West, 2017). Before adopting of the Civil Code of Ukraine validity of the contract terms were taken from the norms of civil law by doctrinal means. Today these general requirements for transactions are provided at legislative level in art. 203 of the Civil Code of Ukraine and are reduced to the thesis that the agreement does not contradict a number of criteria. First, the content of the contract cannot contradict the Civil Code of Ukraine, other acts of civil law and the interests of the state and society and its morals. We can see that the legislator in one norm actually combined two conditions: legality and morality. According to art. 628 of the Civil Code of Ukraine contents of the contract terms are points determined at the discretion of the parties and agreed by them, and conditions that are binding under civil law. In other words, the content of the contract is a set of conditions under which mutual rights and obligations are fixed.

Regarding such a condition as the compliance of the content of the transaction (contract) with the interests of the state and society, its morals, it is appropriate to note that the accordance of the content of transaction to these requirements is novel among the conditions of its validity and caused by increasing of moral justification of legal regulations (Bell and Parchomovsky, 2005). The literature on philosophy of law it is rightly noted that in terms of overall value system that have been developed in modern society, law must comply with morality. However, the right should comply not with all requirements, and even more – not

ideological (such as the requirement of “communist morality”), but with generally accepted, universal, basic ethical requirements, the basic principles of Christian culture or a culture that is the same with Christian, including the culture of Buddhism, Islam. Analyzing concrete examples of interaction between morality and law, S.S Alekseev concluded that “the right in its organic is a phenomenon of deeply moral order and its functioning is impossible without direct inclusion into the fabric of the right moral criteria and assessments” (Alekseev, 1999). It can be concluded that the category of morality (the moral principles of society) is used in the context of the “inner sanctum” of civil rights, namely the right of property, contract law, the legal capacity of individuals and entities and more.

The second condition for the validity of a civil contract as a regulator of relations of property of co-owners is sufficient amount of legal personality of them and of third parties who want to acquire a share in the right of common ownership. Thus, the right to conclude contracts is an element of civil legal personality of individuals, legal entities of the state, local communities and others. These persons acquire and exercise civil rights (and therefore – perform obligations) by the implementing legitimate acts, among which the prominent place is occupied by agreements. Taking into account that scientific interest in this work is devoted to the common ownership of individuals, it should be noted that invalidity of contracts the parties of which are the individuals is based on the same criteria as the general rules of the appearance of capacity, namely age and mental attitude to committed actions. According to these criteria, the Civil Code of Ukraine has formulated such of invalid transactions:

- transactions committed by juvenile person outside of the civil capacity;
- transactions committed by minor person outside of the civil capacity;
- transactions committed by an individual, whose civil capacity is limited outside of the civil capacity;
- transactions committed by incompetent individual.

On the basis of the analysis of norms of the Civil Ukraine it can be concluded that neither individuals who have partial capacity, nor individuals who are recognized as incapable, do not have the required volume of civil capacity to be a party to the contract under which joint ownership of individuals arise or terminate. However, minors and individuals who have limited capacity may be parties to such agreements. We can make such a conclusion, given that according to Art. 32, 37 of Civil Code of Ukraine minors and individuals whose capacity is limited may perform other transactions, except those which are provided by the noted articles, with the consent of the parents (adoptive parents) or trustees. So they can enter into a contractual relationship regarding the occurrence or termination of their common ownership on the property with the consent of their parents or guardians. In some cases, according to Art. 35 CC under which full civil capacity can be provided to an individual who has attained the age of sixteen and works under an employment contract or wants to do business; such person acquires full civil capacity since the state registration as a business entity (entrepreneur). That is quite possible that the party of the contract of sale of shares in the right of common partial ownership may be minor who has legally acquired the entire volume of civil capacity. The same applies to such ground of providing full civil capacity (p. 1 of the Art. 35 of Civil Code of Ukraine) as a fact of recording a minor as mother or father of the child. Thus, depending on the volume of capacity of an individual he or she can take part in a contractual relationship involving the appearance and transfer of ownership from one person to another. One of the conditions of validity of a civil contract is compliance of outward expression of the will of the participant (expression) to his or her true inner freedom. The will of the party of the agreement should be freely, without any pressure from the counterparty or others and meet his or her inner freedom. The unity of the will and its detection is the basis for the legal assessment of the behavior of the subject and the recognition of this behavior as such that has legal value. There is no unity of will and determination, if the contract is concluded under the influence of fraud, violence, threats or due to

malicious agreement of a representative of one party with another party or coincidence of difficult circumstances. Such agreements are declared invalid because the will of the person to commit the transaction is absent, and will reflects not the will of the party of the agreement, but the will of other person who has influence on party of a transaction.

Another criterion of the validity of a civil contract is compliance with the statutory form. The form of contract is a way of expressing the will of the parties, aimed at the entry and staying in contractual relations; that is, for the receiving by the will of a person as a subjective phenomenon a legal matter, it is necessary to provide some objective expression, i. e. some form. Art. 205 of Civil Code of Ukraine discloses the contents of objective expression of the form that simultaneously reflects means of the external expression of will of the subject of a transaction. Civil law of Ukraine provides for two forms of committing transactions: oral and written (simple or notarial).

In the Civil Code of Ukraine (p. 1, 2, Art. 639) the general rule is fixed according to which a contract may be concluded in any form if the form requirements of the contract aren't provided by law. In general, the practice of concluding of agreements that are the basis of the right of common ownership written form of their conclusion prevails.

Particular requirements for the registration of the contract in a written form are provided to individuals who owing to illness or physical defect cannot personally subscribe. On instructions from such a person contract is signed in the presence of another person. Signature of another person in the text of the transaction, which is notarized, is certified by a notary or an official who has the right to commit such notarial acts with reasons of which the text of the transaction cannot be signed by the person who commits it (p. 4 of Art. 207 of the Civil Code of Ukraine).

Notarization of contracts is mandatory only in cases when the right of common ownership of real estate is transferred under the contract or the parties themselves insist on such certificate. Notarization of contracts is mandatory only in cases when under the contract is transferred to joint ownership of real estate or insist on such certificate the parties themselves. Notarization of the contract means that its content, time and place of, the intentions of the parties, its compliance with the law and other circumstances are inspected and officially fixed by a notary, and therefore are regarded as established and reliable (Kharytonov and Saniakhmetova, 2003). In case of failure of the requirement for notarization of the contract by the parties, such contract is invalid. However, there are exceptions to the rule, namely, if the parties have agreed on all essential terms of the contract and there was a full or partial implementation of the contract, but one of the parties avoided its notarization, the court can recognize the contract valid. In this case, the following notarization of the agreement is not required.

Among the general requirements, compliance with which is necessary to force civil contract, an important role plays the requirement that the transaction should be directed to the actual occurrence of legal consequences that are conditioned by it (Cassier, 2002). Earlier this condition actually was not isolated separately, though the Civil Code of the Ukrainian SSR in 1963 envisaged the invalidity of the imaginary and fictitious transactions, in which there was no focus on the occurrence of legal consequences. On this occasion, it was stated that such a condition actually does not need legislative consolidation as in legal practice, such transactions are rarely concluded and their members do not have normal mental abilities (Meyer, 1997). In modern investigations, legal parties of the contract are required to have a serious intention to achieve a particular legal result that is allowed by law. Persons who enter into a contract should understand what their action would cause, that is they should understand the aims and nature of their actions. Therefore, the court recognizes as invalid fictitious transaction that is committed without the intention to create legal consequences that are conditioned by this transaction.

Another criterion of validity of a civil contract is compliance with conditions of consistency of contract exerted by parents (adoptive parents) to rights and interests of juveniles, minors or disabled children. As it was noted above, the volume of civil capacity of juvenile children is that such persons can independently

perform only small domestic transactions and exercise moral rights on results of intellectual activity protected by law. Minors (aged 14 to 18) can independently conclude agreements related to the management of their earnings, scholarships or other income, as well as can independently enter into a contract of bank deposit (account) and manage deposits made by them in their name. Other transactions should be concluded by these persons with the consent of the parents (adoptive parents) or trustees. Of course, at the conclusion of transactions by minors with the consent of the parents (adoptive parents) they shall primarily take care of the interests of their children.

Thus, compliance with general requirements for of validity the transaction mentioned in Art. 203 of the Civil Code of Ukraine is important first of all for contracts aimed at transferring ownership from one person to another, because only valid transaction may create legal consequences that are conditioned by this agreement.

THE MOST WIDESPREAD TYPES OF CONTRACTS ON THE TRANSFER OF PROPERTY IN COMMON OWNERSHIP (SALE, EXCHANGE, PERMANENT ALIMONY, GIFTING, HEREDITARY CONTRACT)

The most widespread kind of agreements on the transfer of property in common ownership is a contract of sale, which is used in realization of sales for production purposes, on the wholesale market of consumer goods, particularly through commodity exchanges, wholesale fairs, exhibitions, sales, etc., retail and catering, in implementing agreements of commission and consignment, in the privatization of state and municipal property, foreign trade turnover, etc (Merrill and Smith, 2001).

From enshrined in Art. 655 of the CC Ukraine determination of the sales contract it is shown that this contract is always compensated, bilateral, and may be as consensual (the seller is obliged to transfer, and the buyer is obligated to accept property) and real (the seller gives and buyer takes property). That is, in any case, the basic and defining feature of all types of sales contracts are compensatory and irreversible alienation by the seller the property (goods) and transfer it in the property of the buyer – otherwise the contractual relationship is no longer possible to qualify as a sale.

One of the main features of contracts of sale is the fact that they mediate the transfer of ownership from alienator to the acquirer. That is, they are legal mechanism that ensures the dynamics of the fullest property right as the legal fate is determined by the property owner, he has the right to sell (of course, with the abidance to general rules of civil law about the legal capacity and capability). This fact is reflected in the art. 658 of the Civil Code of Ukraine, which states that the right to sell the goods belongs to the owner, except the cases of forced sale and other cases established by law.

Parties of the contract of sale may be any subject of civil legal relations – individuals and legal entities, municipalities, the state, but the conditions of participation of each of these subjects in these contracts are not always the same, since they depend in particular on volume of legal capacity of every specific subject of civil relations. Thus, the possibility of conclusion by individuals of certain kinds of purchase agreements also depends on if they have the status of a business entity, inasmuch as only an entrepreneur can be, for example, seller (supplier) in the contract of retail sale, delivery and more.

During a conclusion of a contract of sale, the type of ownership of the alienated property is important. According to Art. 361 of the Civil Code of Ukraine each participant of common partial ownership owns particle in ownership of the common property, according to this each owner independently manages his share in the right common property. I. e. each participant of common property has the right to compensation or donation of his share to others. In this case, we aren't talking about transfer of the part of the property in kind, but about share in the right of ownership. This transfer of the share may be done by the owner by conclusion of the contract of sale. Choosing of the way of disposition of shares in common partial ownership of the property depends entirely on his will, discretion and interests (Krupchan, 2005).

In civil law some guarantees of protection of the rights of co-owners who are not interested in the alienation of shares in the common property to third parties are established. Thus, in accordance with Art. 362 of the Civil Code of Ukraine in case of sale of the right of common property by one of its members to a third person other co-owners have the right on preferred purchase of the particle at the price at which it is sold, and at other equal conditions except the sale by public auction. It is important to determine the moment of transition of the share in common partial ownership to the purchaser under the contract. Inasmuch as we are talking about the share in right, common rules for the moment of transfer of ownership from the moment of transfer of things in this case cannot be applied, and the principle enshrined in Art. 363 of the Civil Code of Ukraine acts. Share in the common partial ownership is transferred to the acquirer from the date of conclusion of the agreement unless other is provided by agreement of the parties. Exceptions to this rule are cases when the contract should be notarized. Share in the right of common partial ownership under the contract, which must be notarized, passes to the purchaser upon notarization or since a court decision on the recognition of a valid contract enters into force, and (or) state registration of rights.

Providing for co-owners a preferred right of buying is caused by several factors. First, they may be interested in acquiring the alienated particle to satisfy their material and cultural needs. Also, they care about the person who will become participate in the right in common partial ownership, how he or she will perform obligations of maintenance of the common property, using it. Given these circumstances, the seller must notify in a written form the other participants of common ownership its intention sells the share indicating the price and other terms on which he sells it.

In case of refusal of co-owners from the preferred right of buying or their failure of the right to immovable property, within one month, and in respect of movable property - within 10 days from notification the seller may sell the share to any person (p. 2, Art. 362 of the Civil Code of Ukraine). This is a specific term and it cannot be renewed or extended. If several co-owners claim the share, the seller can sell his part of each of them. Other co-owners cannot hinder it from doing it, even if they have more need for the acquisition of the said share.

The issue of guarantees of realization by the participants of common partial ownership a preferred right of buying is important for the cases of sale, particularly in the case of violation of the right and sale to third party. Limitation of action for such claims is set by of the Civil Code of Ukraine at one year. Transfer of rights and obligations of the buyer to co-owner, as it arises from the content of the law, is carried out without preliminary recognition of the transaction on the alienation of the share in common property to a third person invalid. Under violation of the right of a preferred buying we should understand the cases of transmission of the preferred right of purchase in common partial ownership by co-owner to others.

Sale of property that is in common joint ownership can be made only with the consent of all co-owners. Spouses as a subject of civil relations may also acquire and dispose of property by a contract of sale on the right of joint ownership, unless otherwise provided in their agreement. Thus, in accordance with Art. 65 of the Family Code of Ukraine wife, husband manage the property that is the object of joint ownership, by mutual agreement. During the conclusion of an agreement by one of the spouses it's considered that it acts with the consent of other spouse. The same rule is provided concerning disposal of property that is the object of joint ownership. That is, each of the owners is entitled to perform various transactions concerning joint property, that is significantly different from the rights of common partial ownership, where each of the owners has the right to dispose of only his share with the compliance to preferential right of purchase and sale of shares, while in common joint ownership the disposing of joint property is made with the consent of all co-owners. In the case of conclusion of a contract of sale by one of the spouses under Art. 657 of the Civil Code of Ukraine consent of the other spouse must be submitted in a written form and notarized.

The ground of acquiring by an individual the right of common ownership on the property can be barter; its main difference from the contract of sale is that the transfer of property ownership is not mediated by movement of funds. According to p. 3 Art. 715 of the Civil Code of Ukraine in case of inequality of

exchanged property agreement can install additional payment for goods of greater value that is exchanged on commodity of lower value. Moreover, this cost difference can be compensated by performing certain works or provision of services – there are no legislative obstacles for the implementation of such calculations under the contract of barter.

According to p. 1, Art. 715 of the Civil Code of Ukraine under the agreement of exchange (barter) each party undertakes to transfer the other party into the ownership one commodity in exchange for other. Each of the parties of barter contract is the seller of the commodity which he or she transmits to the exchange and the buyer of the goods which he or she receives in return. That is the legislator considers the concept of “exchange” and “barter” as synonyms. We immediately express that our disagreement with this identification, as opposed to of exchange contract, barter is a business transaction and may include non-monetary exchange of goods based on the results of work, services etc., while exchange according the Art. 715 of the Civil Code of Ukraine means the exchange of one property (thing) in kind to another property.

One of the characteristics of exchange contract is the moment of occurrence of the right to joint ownership in the contracting parties on the exchanged property. According to p. 4, Art. 715 of the Civil Code of Ukraine the right to ownership on the exchanged goods passes to both sides after the execution of obligations on transfer of property by both parties, unless otherwise is provided by contract or law (one of the examples of the other case is the exchange of real estate, joint ownership on which arises from the moment of notary license of contract and state registration of rights owners).

The issue of liability of the seller in case of recovery of goods from the buyer by third party is quite original and at the same time not regulated. According to the fixed in the Art. 661 of the Civil Code of Ukraine general rule, in case of withdrawal by court order goods from the buyer to a third person on the grounds that arose before the sale of goods, the seller must compensate the damages to the buyer if the buyer did not know or could not know about the presence of these bases. However, sometimes members of civil relations recourse to an exchange contract when there is a mutual interest of each of them in the property of his counterpart, and the exchange carried out on condition of the transfer of the same property, but not the other. The application of the legal consequences in this case under the Art. 661 of the Civil Code of Ukraine would mean that property which the owner exchanged only on the condition of the purchase of the property of counterpart cannot be returned, as the latter only covers the damage. It seems that in this case it would be appropriate to consolidate in the Civil Code of Ukraine a special rule that party of the contract of exchange, whose goods have been removed by a third party, would be entitled to claim, along with compensation of his or her losses, returning the commodity which has been passed for exchange, because the application of such legal consequences will allow to protect adequately the rights of counterparties of the contract.

Civil law of Ukraine, in contrast to the of the Civil Code of the Russian Federation, rather advisable does not allow the use of rules for the preferential right of purchase of the share in common partial ownership during the alienation of a particle under the contract of barter, because in this case participants of the joint property will need to assume all obligations on granting equal property provided under the contract of exchange, and it, of course, will complicate, the preferential right of purchase shares in common property. Preferential right of buying will not be applied in case of exchange of things defined by individual characteristics, that is, if such things are endowed with unique characteristics that distinguish them from others of similar things (Prostybozhenko, 2005). Thus, if the share in common partial ownership to car is exchanged, for example, to land, in this case it is nearly impossible to implement preferential right on purchase of a particle. Because the things with individual characteristics are irreplaceable, so a co-owner cannot meet the interest of the other co-owner (seller). Thus, during the concluding a contract of exchange concerning the share in the right of common partial ownership it's necessary to pay attention to the object of exchange. If this thing is expressed by individual features, it is necessary to give possibility the other co-owner to exercise the preferential right on purchase such shares.

However, the participants of joint property (such as spouses) as subjects of civil relations may also acquire and alienate property under a contract of exchange on the right of joint ownership. Thus in accordance with Art. 65 of the Family Code of Ukraine wife, husband manage the property that is the object of joint ownership, by mutual agreement. During the conclusion of an agreement by one of the spouses it's considered that it acts with the consent of other spouse. The same rule is provided concerning disposal of property that is the object of joint ownership (p. 2, Art. 369 of the Civil Code of Ukraine).

A contract of exchange of property can be certified without the consent of the other spouse if the latter is not a resident at the location of the property and place of residence is not known, or if the property is acquired by one of the spouses during the separation of the second spouse due to actual termination of marriage. The conclusion of a contract by one of the spouses with third party concerning the exchange of his share in joint matrimonial property is possible only in case of its definition and separation in kind or determining the order of use of property. A contract of exchange which is concluded between the spouses and the subject of which is the share in right of common compatible property of one spouse may be certified by a notary without separation of a particle in kind.

A contract of lifetime maintenance is quite common in practice of contractual regulation of relations of common ownership. In the Civil Code of Ukraine this contract is placed after a contract of sale, gifting and rent. This, in our view, underscores the fact that the contract of life maintenance (care) mediates the transfer of ownership from alienator to the acquirer.

Unlike of the Civil Code of Ukraine of 1963 under which the alienator could act only person who is unworkable because of age or health status (Art. 425), according to the Civil Code of Ukraine an alienator in a lifetime maintenance contract may be an individual regardless of age and health (p. 1, Art. 746 of the Civil Code of Ukraine). The purchaser may be capable adult person or entity. In this regard it is advisable to emphasize quite controversial legal positions assigned in Art. 3. 746 CC of Ukraine that in some cases when acquirers are individuals they become co-owners of the property transferred to them under a contract of life maintenance (care) on the right of joint ownership. The expressed position causes criticism because if the acquirers want to obtain property not into joint compatible property, but into joint partial property, and alienator doesn't deny, the question appears if there may be some obstacles to the solution of this issue. It seems that for avoiding all sorts of misunderstandings in p. 3 Art. 746 of the Civil Code of Ukraine it makes sense to consolidate discretionary rule, which will provide that if the acquirers are several individuals, they become co-owners of the property transferred to them under the contract of life maintenance (care) on the right of joint compatible ownership, unless otherwise is provided in their agreement. If recipients are several individuals their duty before the alienator is solidary.

In the Civil Code of Ukraine some features are provided concerning conclusion of the contract of life maintenance in regard of the property that is in common joint property of individuals. Thus, according to Art. 747 of the Civil Code of Ukraine property belonging to the co-owners on the right of common property, including property owned by spouses also can be alienated by them under a contract of life maintenance. In the case of death of one of the co-owners of property which was alienated under a contract of life maintenance, the amount of liabilities of the acquirer shall be reduced accordingly. However, the legislator does not regulate the widespread situation when one spouse wants to enter into a contract of life maintenance (care), and another – no. In this regard it is advisable to note that if the alienator is the member in rights of joint ownership, the contract of life maintenance can be signed after determining the share of the co-owner in the common property or determining the order of using this property between owners. If the object of contract of life maintenance is a house or part of it, the allotment of the share in common partial ownership is possible if separate part of the house with independent access can be allocated for each party. Allotment may also occur when it is technically possible to convert premises into isolated apartments.

The contract of gifting also belongs to a group of agreements on the transfer of property ownership under which common ownership rights may occur. It aims to irreversible termination of ownership regarding the giver and emergence of property rights regarding gifted individuals.

Parties to the contract of gifting can be individuals, legal entities, state Ukraine, Crimea, local community. Property under this agreement can be gained by individuals both into the right of private and of common ownership. However, each co-owner according to Art. 361 of the Civil Code of manages his or her own share in common partial ownership. I. e. under the contract of gifting, a participant of the joint property is entitled to free alienation his share in the common property to others. In this case, other participants of common ownership don't have preferential right to obtain this share.

The subject of the contract of gifting can be not only moving things, including money and securities and immovable property, but property rights – both those which the giver already has and those which may occur in his future. Of course, during gifting it is also necessary to comply special rules established for acquiring the right of property by individuals regarding certain types of property (for example, objects restricted in turnover).

Analyzing a hereditary contract as the basis of emergence of the right of common ownership of individuals, it is appropriate to emphasize that it is relatively new for the Ukrainian legal system of civil contract because it was not provided nor by the Civil Code the Ukrainian SSR in 1922, nor by the Civil Code the Ukrainian SSR in 1963, or other laws in the field of regulating of hereditary relationship. We should note that a hereditary contract is a special type of binding relationship. Relations between the alienator and the acquirer of under the contract are binding in their nature. A thesis that a hereditary contract can be regarded as one of the possible types of inheritance is contentious. The very definition of hereditary contract is very similar to the definition of individual contracts (rent, life maintenance). Thus, binding nature of these relationships can be traced from a legal definition of hereditary contract. In our view that is why the issue of structural place of hereditary contract remains debatable: leaving it in the Book of inheritance of the Civil Code of Ukraine or placing it after the contract of life maintenance and rent.

To our mind, given the binding legal nature of a hereditary contract there are all reasons for allocating of this contract in a group of agreements on the transfer of property ownership. We come to this conclusion given that it's inappropriate to talk about the possibility of legal regulation of hereditary relations by this contract because it does not belong to species of inheritance. In addition, a hereditary contract in its content provides acquisition of certain rights and obligations during the life of alienator that contradicts to the legal nature of inheritance because acquisition and implementation of the hereditary rights is possible only with the prerequisite - the death of the testator (Zaika, 2007).

Under a hereditary contract purchaser undertakes to fulfill the order of the alienator and in case of his death acquires ownership to his property. An alienator may be one or more individuals – spouses, one spouse or another person. A purchaser may be individuals or entities. During the conclusion of a hereditary contract a purchaser, if he is the heir by will or by law, does not lose the right to inherit property in the same proportion that was not mentioned in the hereditary agreement.

The subject of the hereditary contract is both an acquisition of property of the alienator and acting (works, services) of the acquirer. Moral rights, property rights over another's property (perpetual lease, superficies, servitude) etc. may not be the subject of the contract.

A hereditary contract with the participation of spouses has essential features. In this case the subject of the contract may be property belonging to the spouses on the right of common property and property that is private property of any of them. Regarding the conclusion of the hereditary contract by spouses, there should be noted that at the conclusion of each contract regarding joint marital property requiring notarial form there must be written consent of the other spouse. If the contract was concluded without the consent of the other spouse, it causes an invalidity of a contract.

A hereditary contract may be certified without the consent of the other spouse, unless the legal documents, marriage certificate and other documents show that stated property is not common but private property of the other spouse, and when the latter is not residing in the location of the property and his place of residence is unknown. A copy of the court decision, which became final, should be given to confirm this fact.

However, another situation can arise when one of the spouses wants to conclude a hereditary contract, and another – no. In case when both spouses as alienator are not agree with the inclusion of joint property into a hereditary contract or the spouses did not reached agreement on this property, one spouse may judicially establish his or her share in the common property and then enter into a separate hereditary contract. Also it can be established by a hereditary contract that in case of death of one spouse inheritance is transferred to another, and in the case of death of the other spouse his property passes to the of the acquirer under the contract. However, as it is rightly pointed by S. Fursa, p. 2, Art. 1306 of the Civil Code of Ukraine should be taken on the subject of hereditary contract, and not as the concept of “heritage” that has a different meaning and has no relation to of hereditary contract (Fursa, 2007).

If there is the marriage contract, which defines the rights and responsibilities of spouses on property acquired before marriage as well as during the latter, received as a gift or inherited by one spouse, a notary during the certificate of hereditary contract is obliged to be managed by the terms defined by a marriage agreement. If at the conclusion of a hereditary contract the conditions of previously concluded marriage contract were violated by the alienator, it is a ground to declare contract invalid.

Summing it is advisable to note that a hereditary contract as a relatively new legal institution is not yet widespread in practice. And the legal nature of hereditary contract, its place in civil law with its inclusion into the Civil Code of Ukraine, has become the subject of diverse scientific debate, which should further promote the development of the institute of hereditary agreement and the positive application of the rules into court and notarial practice in Ukraine.

CONCLUSIONS

In conclusion it is advisable to note that self-regulation of property relations of owners is an important personal right of participants of common ownership, which is realized by them at their own discretion regardless of normative regulation of these relations. Contractual regulation of relations of common ownership is significantly different from the independent regulation of such relations that occurs under the relevant rules within the discretionary regulatory of Ch. 26 of the Civil Code of Ukraine and Ch. 8 of the Family Code of Ukraine. The legal model of a civil contract as a regulator of property relations is that it is:

- legal fact (legitimate action – legal act) upon which obligations of the parties arise;
- a document containing the conditions for legal regulation of property relations of co-owners;
- the existence of a form of property relations of co-owners (obligations).

Contractual regulation of property relations of co-owners executes the following functions:

- law-making (shown in the shaping of the content of the agreement, which serves as the basis of occurrence, change and termination obligations);
- organizational (self-organizing of property relations);
- informative (containing information about the content of the contract);
- preventive (prevents conflicts of interests of participants);
- ensuring compliance with the law and the legality terms of the contract action for its implementation.

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BIBLIOGRAPHY REFERENCES

- Alekseev, S.S. (1999). *The philosophy of law*. NORMA, Moscow.
- Bell, A., Parchomovsky, G. (2005). Of property and federalism, *Yale Law Journal*. 112: pp. 72-115.
- Cassier, M. (2002). Private property, collective property, and public property in the age of genomics, *International Social Science Journal*. 171: pp. 83-98.
- Dovgert, A.S. (2004). *The Civil Code of Ukraine: Scientific Practical Comment*. Istyna, Kyiv.
- Dzera, O.V., Kuznyetsova, N.S., Luts, V.V. (1998). *Contractual Law: Theory and Practice*. Yurinkom Inter, Kyiv.
- Fursa, S.Ya. (2007). *A Hereditary Contract: Notary. Advocacy. Court*. Vydavets Fursa S.Ya., Kyiv.
- Kharytonov, Ye.O., Saniakhmetova, N.O. (2003). *Civil law of Ukraine*. Istyna, Kyiv.
- Krupchan, O.D. (2005). *Recent methodological problems of private law*. Research Institute of Private Law and Entrepreneurship of National Academy of Legal Sciences of Ukraine, Kyiv.
- Luts, V.V. (2001). *Contracts in business practice*. Yurinkom Inter, Kyiv.
- Merrill, T.W., Smith, Y.E. (2001). The property/contract interface, *Columbia Law Review*. 4: pp. 773-852.
- Meyer, D.Y. (1997). *Russian civil law (in 2 parts)*. Statut, Moscow.
- Prostybozhenko, O. (2005). *A contract of exchange*. Vydavets Fursa S.Ya., Kyiv.
- West, R. (2017). The new legal criticism, *Columbia Law Review*. 117(5): pp. 144-164.
- Wilkinson-Ryan, T., Hoffman, D.A. (2015). The common sense of contract formation, *Stanford Law Review*. 67: pp. 1269-1301.
- Yoffe, O.S. (1975). *Contractual law*. Yuridicheskaya Literatura, Moscow.
- Zaika, Yu.O. (2007). *Hereditary law in Ukraine: Incipience and development*. KNT, Kyiv.