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Civil law regulation of contracts for joint activity in Ukraine and other post-socialist states

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This article considered theoretical and applied issues of regulation of contracts for joint activity in Ukraine and the states connected with it by the socialist past. The authors focused on the issues of the concept of the studied contracts, their qualification features and classification into types. The article was based on the statement on the insufficiency of general provisions on contracts for joint activity existing in the current Civil Codes of the states under research. Therefore, the position on the need to detail the special legal regulation of contracts for joint activity existing in domestic science is supported. Based on comparative and legal analysis of the Civil Code of Ukraine and a number of post-socialist states, it was found that the domestic codified act provides the most universal approach to understanding of the studied contracts since it defines the possibility of existence within this generic category not only the contract for joint venture but also the contract for joint activity not related to pooling the contributions of parties.

Keywords: contract, joint venture, joint activity, parties, contributions, essential terms, Ukraine, post-socialist states

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INTRODUCTION

The basis of legal regulation of civil relations is, of course, dispositivity. In the theory and practice of modern civil law, dominant is the position on natural inclination of civil law relations to dispositivity because it is simply impossible to model all probable situations in the sphere of private law relations, having settled them completely. Dispositivity is manifested in many legal phenomena, but an undeniable fact is that its brightest manifestation is the use of the contractual structure for the legal regulation of civil law relations. The importance of the contract, as one of the fundamental categories of civil law in Ukraine and other CIS countries, encourages scientists and legal practitioners to constantly keep in view the issues of contractual regulation of relations.

One of the certain types of contracts in the Civil Codes of post-socialist states is the contract for joint activity, which in modern social conditions is becoming more universal, extending to all spheres of legal relations. It is indisputable that the main sphere of application of this contract is entrepreneurial activity, however, practical application of the contract for joint activity is not limited to it. In particular, according to Part 2, Article 1130 of the Civil Code of Ukraine On Joint Activity, parties undertake to work together without establishing a legal entity to achieve a specific goal that does not contradict the law (Civil Code of Ukraine: Law of Ukraine of January 16, 2003). One should note that just like in the Civil Code of Ukraine, contracts for joint activity found their normative reflection in the codified civil acts of most post-socialist states. In particular, we are talking about the relevant regulations of such states as the Civil Code of the Republic of Moldova (2002), the Civil Code of the Republic of Armenia (1998), the Civil Code of the Republic of Kazakhstan (1999), the Civil Code of the Republic of Belarus (1998) and the Civil Code of the Republic of Georgia (1997).The analysis of the Civil Code of these states will allow to reveal the features of regulation of contracts for joint activity in their provisions and form general tendencies of regulation of these contracts in the states united by post-socialist status (Marcinkevičius & Rauleckas 2016, Poškiene & Norvile 2016, Yastrebova et al. 2016, Ciocoiu 2016, Pivoras & Gonciarova 2017, Vaidelyte & Sodaityte 2017, Drozd 2017, Cepeliauskaite & Petrauskiene 2017, Melnikov et al. 2017, Inshakova et al. 2017, Lutsenko 2017, Abashidze et al. 2017, Kostruba 2017, 2018a, 2018b).

The Civil Codes of the above states, like the Civil Code of Ukraine, is based on the universal nature of the contracts under research, indicating the possibility of their application in both entrepreneurial and non-entrepreneurial sphere. According to the analysis of the above articles, the purpose of the contract can be any, both entrepreneurial and non-entrepreneurial. Dispositivity with respect to the purpose and terms of the contract determines the maximum period of sustainability of its use by the parties of relations for the settlement of their joint activity. Another factor in favour of the mobility of the use of such contracts in the field of entrepreneurial or non-entrepreneurial activity is the absence of need to perform additional actions for registration of an individual subject of relations as it happens when establishing a legal entity (except the cases stipulated by law).

Contracts for joint venture have traditionally been and are a popular object for scientific research. The topic of civil and legal regulation of contracts for joint activity does not lose its relevance. The rapid spread of these contracts in different spheres of public relations determines the need for their further research. Given the above, the purpose of this article is to consider the main features of the regulation of contracts for joint activities in Ukraine and other post-socialist states, identification of the features which are defining for them, their delineation from related contractual structures, clarification of the features of the concept of the contract for joint activity and its types in individual post-socialist states (Danilin et al. 2015, 2016; Lurie et al. 2015, 2017; Kuznetsova et al. 2015, 2018; Formalev & Kolesnik 2017, Kakhramanov et al. 2017, Lomakin et al. 2017, 2018; Akhmetshin et al. 2018, Bulychev et al. 2018).

MATERIALS AND METHODS

The main method used in preparing the article was comparative. It was the comparative and legal analysis that allowed to form the features of regulation of the contracts under research in Ukraine and post-socialist states (for examples, the Republic of Moldova, the Republic of Belarus, the Republic of Kazakhstan, the Republic of Armenia and Georgia). The result is an opportunity to identify the advantages and disadvantages of the regulation of these contracts in the Civil Code of these states.

With the help of methods of analysis and synthesis, the signs and features of the contract for joint activity were identified, its delineation from related contracts was done, as well as outlined its prospects for the development of economic relations in post-socialist States, in particular in Ukraine. The methods of classification and systematisation used in the research allowed to generalize the current legislation of Ukraine, identify the main problems of regulation of contracts for joint activity and their division into types (Ilaeva et al. 2018, Belikova et al. 2018, Netishinskaya et al. 2018, Akhmetov et al. 2018, Prokofiev et al. 2018, Voronin 2018, Stačinskaitė & Petrauskienė 2018, Druskienė & Šarkiūnaitė 2018, Vitkauskas & Junevicius 2018, Novelskaite & Pucetaite 2018).

RESULTS AND DISCUSSION

▪ ***Qualifying signs of the contract for joint venture.*** The general definition of the contract for joint activity in the domestic legislation is contained in Article 1130 of the Civil Code of Ukraine (2003). The content of the legal definition of this contract is based on the recognition of the obligation of the parties to act together without establishing a legal entity and with the aim that does not contradict the law. The analysis of Article 1339 of the Civil Code of the Republic of Moldova (2002), Article 1026 of the Republic of Armenia, Article 228 of the Civil Code of the Republic of Kazakhstan (1999), Article 911 of the Civil Code of the Republic of Belarus (1998) and Article 930 of the Civil Code of Georgia (1997) suggest that the definition of the contract for joint venture is reduced to the fact that it recognises the contract for joint venture between two or more persons (parties) who undertake

to pool their contributions and act together without establing a legal entity for profit or for another purpose that does not contradict the law.

Despite the similarity of the main features, we can observe a significant difference between the understanding of such contracts in Ukraine and other post-socialist states. In all of these Civil Codes, the contract for joint activity and the contract for joint venture are used as absolutely identical concepts. This conclusion is confirmed by the very definition of the contract for joint activity which contains the obligation of the parties to pool their contributions. The definition of the contract for joint activity in Part 1, Article 1130 of the Civil Code of Ukraine does not stipulate such an obligation of the parties, and Part 2 of this Art. specifies that joint activity can be carried out on the basis of pooling the contributions of parties (joint venture) or without pooling the contributions of parties (Civil Code of Ukraine: Law of Ukraine of January 16th 2003).

Thus, the Civil Code of Ukraine stipulates the contract for joint activity as a general concept and the contract for joint venture as its type. They are interrelated as general and special that is typical only of domestic legislation. The Civil Code of Ukraine includes a much broader meaning in the contract for joint activity than that of other post-socialist states. This feature is already in the plane of division of contracts for joint activity into types which has its own specifics in each of the states under research, compared with Ukraine. These issues will be discussed in more detail below in this article. As for common features of these contracts, despite the post-socialist state in the Civil Code of which they are identified, these are the main features that qualify them. These features are typical of these contracts and distinguish them from similar contracts in the system of contractual obligations (Kapitonov 2018, Kapitonov et al. 2018).

Therefore, the consideration of the main legal features of such contracts should be carried out on the basis of the criterion that determines the types of any contract – the subject of the contract. According to Part 1, Article 638 of the Civil Code of Ukraine, the subject of the contract is an absolutely essential term for any type of contract. As for the concept of the subject of the contract, civil science has developed several conceptions. The analysis of the existing theoretical approaches to the interpretation of the subject of the contract allows to single out the following main ones: (1) the subject of the contract as a material object. In particular, Agarkov (2002) noted on this issue that the subject of the contract was a certain thing in relation to which the contract is concluded. (2) the subject of the contract as an action; Meier (2003) in his research papers noted that the subject was actions required under the contract, determining the desired result for the parties. His position was based on the understanding of the contract as a legal fact, and the subject pointed to what the parties had agreed upon (Meier 2003), and (3) a compromise position, according to which the subject of the contract can be both a material thing and an action. In particular, Braginskiy and Vitrianskiy (2002) believed that contracts aimed at the transfer of property have a complex subject which covers both the actions of the obligated parties to transfer and accept the property and the property itself.

Without going into controversy about the absolute validity of one or another position, it should be noted that the diversity of modern social relations determines, in our opinion, the need to join the concept of the possibility of the existence of the contract's object both as an action that is the content of the obligation and as a material thing. On this issue it should be given the statement of Bodnar (2017) who believed that it is the subject of the performance of a contractual obligation that is the qualifying criterion that allows to distinguish one obligation from another. According to this scientist, the subject of the contract is the obligation as a legal relation and the subject of the latter is actions. At the same time, the scientist does not deny the possibility of the existence of such a subject of the contract as property (Bodnar 2017). This approach seems to be the most acceptable in modern social conditions of technology development. One should agree with Hudyma (2013) about the fact that the recognition of exclusively material world as the subject of the contract will lead to the following: the object will cease to perform its individualising function, that is, will cease to determine the difference between one type of contract from another.

Yaroshevska (2006) emphasised that the subject allows not only to determine the specific type of contract but also to choose the appropriate rules that are adequate for the settlement of certain relations with the help of the contract. A typical example of a contractual structure, in which the subject is the actual actions of obligated persons, is contracts for joint activity. The Civil Code of Ukraine does not specifically define the subject of this Contract and does not stipulate a list of its essential terms by law. The conclusion on them can be made based on the analysis of Article 1130 of the Civil Code of Ukraine: subject (joint activity). One should note that such legislative practice is typical of not all post-socialist states. However, Article 1340 The Civil Code of the Republic of Moldova "Subject of the contract for joint venture" stipulates that this contract must have the subject which does not contradict the law and which is determined in the common interests of parties. "The determination of the subject in the common interests of the parties" indicates that the establishment of a common goal for all participants in a certain way in the contract is also an essential term (Civil Code of the Republic of Moldova of June 6, 2002).

The same codified act in Part 2, Article 1341sets out the terms which such a contract must contain: name and place of residence of the parties; rights and obligations of each of them; order of establishment of management authorities and their functions; order of distribution of profit and losses between parties; order of expulsion from the parties; the period of time for which the company is established; the procedure for termination of the contract for joint venture and the division of property between the parties. The same binding terms for the contract for joint activity are stipulated in Article 931 of the Civil Code of Georgia (1997).The analysis of the content of these terms and the content of such a concept as the contract for joint activity as the contract of joint venture cause the question of why among the binding terms of the contract, there is no information about the contributions of the parties which are obligatory according to the definition of the contract for joint activity in the Civil Code of these states. As for the establishment of a special norm

with binding terms for the contract under research, it should be taken positively because this formulation allows to clearly conclude that the absence of these terms in the contract will make its conclusion impossible.

As for the signs of joint activity, it should be noted that mainly those, which are singled out in the literature, have character. However, among them are those that reflect the legal nature of the phenomenon under research. The main features of joint activities were singled out by Reznikova (2013). According to this scientist, they include such as common goal and motivation for all parties; division of a single process of activity into functionally related elements, the implementation of which is assigned to the parties; uniting the efforts of individual participants and their coordinated implementation; management; the beginning of common deliverables; a single space-time stay and functioning of all parties (Reznikova 2013). This suggests that the basis of joint activity is the agreed will and will expression of all parties; in the result, the commission of actions based on both organisational and property relations of the participants is agreed; unity of purpose for all parties which is based on the common interests. These features not only reflect the content of the subject of the contract, that is, joint activity. They are projected onto the legal nature of contracts for joint venture as a whole. Thus, such qualifying criterion as a subject is not enough for individualisation of the contracts under research.

The statements about the importance of the subject for the identification of the contract considered by us in the article (in this case, the contract for joint activities) are substantiated and applies to most civil law contracts. At the same time, one should note that sometimes the subject of the contract allows to single out not a specific type but establish its belonging to a certain generic category of contracts. However, as noted by Shymon (2011), the theoretical meaning of singling out such a phenomena as subject should lie in the fact that the latter should be a criterion of the classification of contracts, singling out one contract from another. Given this fact, the scientist joins the position of Berveno (2006), according to which, crucial for the classification of contracts is the focus of the obligation generated by contract. So, we are talking about a sign of the purpose of the contract (Berveno 2006). However, this fully applies to the contracts, the subject of which is joint activity. For example, joint activity is also characteristic of pre-incorporation contract. Thus, in this case, taking into account only the subject of the contract is not a sufficient qualifying feature of contracts for joint venture. Another feature that makes it possible to delineate contracts for joint activity from related contractual structures is the purpose of such a contract. At the same time, in case of contracts for joint activity, it is a sign of purpose, as its commonality for all parties to the contract. This is the very sign that is called qualifying for these contracts and allows to identify a feature of its type.

The purpose of such a contract, as noted by Reznikova (2013), is to satisfy property (economic) interest of each of the parties. This scientist interpreted such a sign as a criterion of payment of the contracts under research (Reznikova 2013). Blazhivska (2007) characterized this particularity of the contracts under research by the term "generally profitable contract". This scientist emphasized that each of the parties to the contract receives certain benefits under the contract, but they arise

not in the result of the action of the other party, but are acquired in the result of joint activity. This argument gave the basis for the scientist to argue that contracts for joint activities do not belong to payable or free – their nature is different and has a special character (Blazhivska 2007). It is expedient to recognize this position as convincing and substantiated. The common purpose of such contracts determines their belonging to multilateral contracts, as has been repeatedly noted in the literature. When delineating bilateral and multilateral contracts on the example of contracts for joint activity (in this case, a contract for joint venture), Taran (2011) noted that ‘’an essential feature of bilateral contracts is that the rights and obligations of the parties are reciprocal and each party pursues his own aim’’. Under the contract of joint venture, parties undertake to act jointly with the aim of making a profit or achieving any other goal, that is, the aim of the parties to such a contract is the same (Taran 2011).

The consideration of provisions of Civil Code of Ukraine and the specified post-socialist states testifies that the traditional feature for them is recognition of contracts for joint activity as an individual type of contractual obligations, the essential terms of which are the terms on the subject and a common goal for all parties. It should be noted that not all codified acts of these states, including in Ukraine, contain a list of terms essential for such contracts. At the same time, without specifying these terms, contract for joint activity should be considered as not concluded. It is the subject and the common goal for all parties that are the main qualifying features that allow to delineate contracts for joint activity from related contractual structures. The analysis of Civil Codes of these states suggests that individual provisions have special rules regarding the subject and essential terms of the contract (for examples, Part 2, Article 931 of Civil Code of Georgia (1997) and Part 2, Article 1341 of the Civil Code of the Republic of Moldova (2002)). These legislative provisions need to be considered on the possibility of their implementation in the norms of the domestic Civil Code of Ukraine.

▪ ***Contracts for joint activity as a generic category.*** The Civil Code of both Ukraine and other post-socialist states imply in their norms the possibility of the existence of varieties of contracts for joint activity. At the same time, the types of these contracts in Ukraine and post-socialist states studied in this article are singled out by one, significantly different principle. We are talking about the differences in the understanding of the concept of contract for joint activity which were partially discussed above. This difference lies in the fact that in Ukraine, contract for joint activity has a generic character and can be based on pooling the contributions of parties (joint venture) and without pooling the contributions of parties. In fact, The Civil Code of Ukraine in further articles of Chapter 77 governs only joint venture (contract for joint venture) while ignoring the other type of these contracts. This is due to the fact that the legislator combined these provisions in para. 1, calling it “General provisions on joint activity”. Thus, functional load regarding the regulation of contracts for joint activity without pooling the contributions is vested in the special legal regulations. The task of the Civil Code of Ukraine in this case is to establish the possibility of concluding such contracts. In principle, such legislative provisions follow from the general ideology of the Central Committee of

Ukraine, that is, the ability to conclude any contracts that are not directly regulated in the Civil Code, but not prohibited by it.

At the same time, it should be noted the need for the legislator to clarify certain general provisions regarding the contract for joint activity without pooling the contributions of the parties. After all, the norm of the Civil Code of Ukraine is limited only to the mention of the possibility of concluding these contracts. It appears that the absence of the obligation of the parties to pool the contributions defines a special subject of the contract – organisational relations aimed at streamlining the relations between the parties to achieve a common mutually beneficial goal for every one of them. This feature also defines the exclusive joint and several liability of all parties by the obligations and even distribution of profits between them (if the purpose of the contract is of entrepreneurial character). It also seems that it requires clarification of the position of the legislator regarding the scope of application of this type of contract in the field of entrepreneurship.

The Civil Codes of other post-socialist states do not, as we have already noted, stipulate such a division of contracts for joint activity, reducing them purely to contracts for joint venture. At the same time, in individual states, the Civil Code stipulates another specific division of contract for joint venture into types. However, Part 2, Article 1026 of the Civil Code of the Republic of Armenia makes it possible to assert the existing division of contracts for joint venture into two types – for entrepreneurial and non-entrepreneurial purposes. According to this article, exclusively commercial legal entities and natural person-entrepreneurs can conclude a contract with the entrepreneurial purpose of activity (Civil Code of the Republic of Armenia of July 28, 1998). The same kind of provisions are stipulated by the Civil Code of the Republic of Belarus (1998).

This division is not typical of other states under research, but their legislation allows to assert the existence of other special varieties of contract for joint venture. For example, Part 2, Artcle 228 of the Civil Code of the Republic of Kazakhstan determines that the contract for joint venture can be concluded by citizens, citizens and legal entities and legal entities (consortium) (Civil Code of the Republic of Kazakhstan of July 1, 1999). Thus, in Kazakhstan, the Civil Code establishes consortiums and contractual associations of legal entities. But such associations, proceeding from the same Civil Code, are based on contract for joint venture, the participants of which must make contributions to joint activity. While Article 233 of the Civil Code of Kazakhstan defines the consortium as a temporary voluntary equal union based on contract for joint activity in which legal entities combine certain resources and coordinate efforts to solve specific problems. It appears that the definition of a consortium in Article 233 of the Civil Code of Kazakhstan goes beyond a typical contract for joint venture since its parties can not only pool the contributions, but also unite other efforts, for example, of organisational character. In this context, the conception of the domestic legislator is relatively broader than the contract for joint venture, the understanding of the contract for joint activity is more optimal for the considered special types of contracts between legal entities.

For the Civil Codes of the states connected with Ukraine through the socialist past, a characteristic feature is singling out more types of contracts for joint activity,

not typical of the Civil Code of Ukraine. Namely, we are talking about so-called silent partnership. For example, this type of contract for joint venture is stipulated in Article 924 of the Civil Code of the Republic of Belarus, according to which, it may stipulate that its existence is not disclosed to third parties. In relations with third parties, each of the parties of the silent partnership is responsible for all his property under the contracts concluded by him on his own behalf, but in the interests of the joint venture (Civil Code of the Republic of Belarus of December 7, 1998). One should note that this contractual construction was borrowed in due time from the provisions of the French Civil Code and the German Civil Code. However, in other post-socialist states and in Ukraine (except the Russian Federation), silent partnership in the Civil Code is not established.

▪ ***Problems of application of contracts for joint activity.*** The problem of application of contracts for joint activity is not their structure, but the regulation of their general provisions of Chapter 77 of the Civil Code of Ukraine – in the norms of the Civil Code of other states studied in this article is defined purely regarding contracts for joint venture. Returning to the problems of regulation of contracts for joint activity in Ukraine, one should definitely agree with Reznikova (2013) regarding the need for special legal regulation of such activity. However, this scientist, when investigating these problems from the perspective of economic law, insisted on the establishment of special regulation in the norms of the Civil Code of Ukraine and the norms of tax legislation. Without denying the proposal of the scientist, it should be added that there is a need to detail at the regulatory level not only the issues of public law (connected with tax and accounting legislation) but also private sphere of regulation of such contracts as classical private law structures.

Returning to the comparative plane of the research of the regulation of contracts for joint activity, one should note that the features of their regulation significantly affect the features of socio-economic relations in the state. This is most clearly manifested, for example, in the norms of the Civil Code of the Republic of Belarus, according to Part 2, Article 911 of the Civil Code, a contract for joint activity for entrepreneurial purposes may be concluded exclusively by commercial legal entities and natural person-entrepreneurs. While the analysis of the relevant articles of the Civil Code of other states and Ukraine studied in this article indicates the absolute dispositivity of the legislator regarding the parties to such contracts.

Parties to contracts for joint activity in these states may freely be both natural and legal persons, regardless of the entrepreneurial or non-entrepreneurial common purpose of the parties. It is this level of dispositivity with respect to the contracts under research that reflects their private law nature and certifies the universality of this contractual structure. The latter approach that the regulation in the Civil Code of the subject of these contracts should be defined as priority and one that should be recognised as absolutely appropriate. At the same time, one should note too narrow legislative interpretation of contract for joint activity in the Civil Code of post-socialist states studied in the article (of the Republic of Moldova, the Republic of Armenia, Belarus, the Republic of Kazakhstan, Georgia) unlike Ukraine.

CONCLUSION

The consideration of the provisions of the Civil Codes of Ukraine and specified post-socialist states indicates that a common tendency for their legislation is the recognition of contract for joint activity as an individual type of contractual obligations, the essential terms of which are the terms of the subject and the common goal for all parties. In this regard, the article substantiates borrowing the experience of the states whose Civil Code stipulates special rules on the list of terms, without specifying which contracts are invalidated (we are talking about Georgia and the Republic of Moldova). The subject and common goal for all parties are the main qualifying features that allow to delineate contracts for joint activity from related contractual structures. Given the above said in the article, the experience of such states as Moldova and Georgia regarding the establishment of provisions on the essential terms of the contracts under research, in the absence of which they will be considered not concluded, are taken positively.

The comparative analysis of the provisions of the Civil Code of Ukraine and the Civil Code of other post-socialist states suggests that domestic legislation follows from the universal legal nature of the contract for joint activity, not reducing it only to contract for joint venture as stipulated by the Civil Codes of the Republics of Moldova, Armenia, Kazakhstan, Belarus and Georgia. The Civil Code of Ukraine defines at the regulatory level the possibility of concluding contracts for joint activity without pooling the contributions of parties. The basis of such contracts are organisational relations. Undoubtedly, the approach stipulated in the Civil Code of Ukraine to a broader interpretation of the types of contracts for joint activity should be evaluated as such which creates the basis for more effective application of such contracts in various spheres of public relations. It is a different matter that contracts for joint activity without pooling the contributions received in the Civil Code of Ukraine only fragmentary settlement which requires improvement of the norms of the codified act.

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