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LEGAL REGULATION OF FINANCIAL LEASING IN UKRAINE

Abstract. The necessity of updating the regulatory framework for leasing is due to the fact that, firstly, the latest amendments to the Law of Ukraine “On Financial Leasing”, which had expired on June 13, 2021, were made in 2004; and, secondly - the need to bring leasing activities in Ukraine in line with international practice. The new Ukraine-EU agreement has become the associative agreement of the “fourth generation”. It will be supported by the EU’s previous experience, however, it will go beyond it in terms of promoting the political and economic reforms needed for Ukraine in order to meet European standards, which will largely coincide with the criteria for membership in the European Union. The leasing market, like any other one, has undergone a certain process of its formation - from the emergence (the first lease documents date back to about 2000 BC) to full development. Until 1997, the term “leasing” did not officially exist in Ukraine, although leasing companies were established in 1994. The new Law of Ukraine “On Financial Leasing”, adopted on February 4, 2021, should address the issues and introduce a number of innovations, through which the coordination with other legislation is conducted. State regulation and state supervision of the financial leasing market is carried out by the National Bank of Ukraine in accordance with the Law of Ukraine “On Financial Services and State Regulation of Financial Services Markets”, the Law of Ukraine “On Financial Leasing” and other legislative acts. At the same time, the legislator does not provide clear and understandable mechanisms for independent control of the market of financial leasing services by its participants. Also, the status of self-regulatory authorities that could supervise market participants has not been determined yet. However, taking into consideration the current realities, the new Law of Ukraine “On Financial Leasing” is a prerequisite for expanding its scope as an alternative to long-term financing the purchase of transport, equipment, other machinery and real estate.

This legal act defines the general principles of financial leasing in Ukraine in accordance with international law; after all, it will create new opportunities for leasing companies, stimulating the development of this market. The Law of Ukraine “On Financial Leasing” will protect the rights of leaseholders, lessors, create a competitive environment in this area and harmonize the legislation of Ukraine with the law of the European Union.

Keywords: financial leasing, leasing activity, leaseholder, legislation, lessor, leasing companies, innovations.

Problem statement. The necessity of updating the regulatory framework for leasing is due to the fact that, firstly, the last changes in the expired Law of Ukraine “On Financial Leasing” [1] were introduced in 2004, and, secondly, the need to bring leasing activities in Ukraine in accordance with international practice.

Currently, the Association Agreement [2], introduced into the national legal system, ensures its operation as an act of national law, in parallel with its operation and application as a source of European law in international relations.

The new Ukraine-EU agreement has become the associative agreement of the “fourth generation”. It will be supported by the EU’s previous experience, however, it will go beyond it in terms of promoting the political and economic reforms needed for Ukraine in order to meet European standards, which will largely coincide with the criteria for membership in the European Union. However, such actions will not provide for the beginning of the process of acquiring the latter, which in a practical sense is an element of developing new formats of cooperation by Brussels with the countries of the European East [3, p. 100].

The conclusion of the Association Agreement is aimed at strengthening Ukraine’s position in the European system and fulfilling the priority strategic objectives of Ukraine’s foreign and domestic policy. Consequently, the provisions of the Agreement require Ukraine to take decisive steps in adopting new or amending existing laws and other regulations.

Therefore, taking into account the realities of nowadays, the economic and legal development of our state is impossible without improving the institution of financial leasing.

Analysis of recent studies and publications. Numerous scientists have worked and continue working on the study of the issues of legal regulation of leasing, in particular, financial leasing. In particular, A. Barabash, R. Boichuk, N. Vnukova, Y. Illarionov, N. Mentukh, O. Smirnova, O. Shevchuk, I. Yakubivskyi, etc. carry out fundamental investigations in this direction.

However, as studies show, the issues of legal regulation of financial leasing from the standpoint of new legislative and legal documents are not fully disclosed.

The purpose of the academic paper. The purpose of the academic paper lies in revealing the features of the legal regulation of financial leasing from the

standpoint of new legislative and regulatory documents.

Presentation of the main material. According to article 125 of subsection 6 of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand [2], financial leasing is a type of financial services. In the European Union member states, the largest development leasing markets have been revealed in Germany, Britain and Poland. In these countries, leasing is used more often than traditional bank lending [4]. Leasing companies are one of the main subjects of financial institutions. At the same time, financial institutions are enterprises that are not banking institutions, but operate in one of the areas listed in Annex 1 to Directive 2006/48 / EC of the European Parliament and of the Council on the taking up and pursuit of the business of credit institutions [5]. A financial institution in accordance with Article 4 of Directive 2006/48 / EC is an institution which has its permanent establishment in another country, that is, a member of the European Community; along with this, it has the right to carry out any or all of the activities listed in Annex 1 throughout the Community, by establishing branches or providing services [5].

The leasing market, like any other one, has undergone a certain process of its formation - from the emergence (the first lease documents date back to about 2000 BC) to full development. Specialists distinguish six stages of leasing development, in particular: 1) rent; 2) simple financial leasing; 3) comprehensive financial leasing; 4) packaging of services (operating leasing); 5) new leasing products; 6) the stage of maturity [6, p. 170-181].

Until 1997, the term “leasing” did not officially exist in Ukraine, although leasing companies were established in 1994. Despite the loss of effect of the Law of Ukraine “On Financial Leasing” in 1997 [1], the market grew slowly. In 2000, the total share of leasing assets in GDP was the lowest in Europe - 1%. By 2003, according to the State Statistics Committee, about 60 leasing companies were registered in Ukraine. Most leasing companies were created by banking structures in order to optimize the property management of insolvent borrowers [7].

According to the provisions of Chapter 58 of the Civil Code of Ukraine, which was adopted on January 16, 2003 [8], leasing is a type of lease agreement along with the lease and / or rental of a land plot, building or other capital facility or a vehicle. In accordance with the lease agreement, the lessor transfers or undertakes to transfer the property to the leaseholder for use for a fee for the relevant period (Part 1 of Article 759 of the Civil Code of Ukraine [8]).

According to the norms of the Economic Code of Ukraine, the legal regime of leasing is established as one of the types of economic activity, regulated by the norms of Chapter 30 of Section VI, and the specifics of regulating property relations of business entities are determined (Part 2 of Article 4 of Economic Code of Ukraine [9]).

The Law of Ukraine “On Financial Leasing” [1] actually formed the concept of leasing on a purely civil legal basis. Primarily contractual relations were the subject

of leasing. In this case, it is worth noting the need to regulate leasing activities as one of the types of economic activity, namely as a type of investment activity carried out by financial services market participants. According to the content of the leasing relationship, leasing is a business activity only for the lessor. For other participants of leasing (leaseholders, sellers, etc.) leasing is a business transaction. The chief problem of the relationship between civil and economic - legal approaches to the regulation of leasing is aimed at the fact that the Civil Code of Ukraine is limited by the regulation of leasing as one of the types of obligatory contractual relations regarding the transfer of property for temporary use, which, in turn, is of a personal property nature. The Commercial Code of Ukraine establishes a comprehensive regulation of leasing relations as one of the types of economic activity, covering in the aggregate economic, organizational, economic and internal economic relations [9].

The new Law of Ukraine “On Financial Leasing” [10] should address these issues and introduce a number of innovations, through which the coordination with other legislation is conducted.

Currently, the rapid and stable growth of the market, even within the conditions of the coronavirus pandemic and economic recession, makes it necessary to have a clear legal regulation of leasing activities. Therefore, on February 4, 2021, the Law of Ukraine No. 2011201-IX “On Financial Leasing” was adopted [10].

According to Article 1 of the Law of Ukraine “On Financial Leasing” [10], financial leasing should be understood as “a type of legal relationship under which the lessor undertakes, in accordance with the financial leasing agreement, for a period and for a fee specified in such agreement, to transfer to the leaseholder the property, owned by the lessor and acquired by him, without prior agreement with the leaseholder in possession and use as an object of financial leasing, or the property, specially purchased by the lessor from the seller (supplier), in accordance with the specifications and conditions established by the leaseholder, and provides for the presence of at least one of the features of financial leasing established by this Law” [10].

Therefore, this Law harmonizes and generalizes the definition of the essence of financial leasing, which is used in various acts of legislation, strengthening the legal certainty in the regulation of financial leasing.

According to Article 3 of the Law of Ukraine “On Financial Leasing” [10], relationship arising between the lessor and the leaseholder are based on a financial leasing agreement regulated by the provisions of the Civil Code of Ukraine [8], the Commercial Code of Ukraine [9] taking into account the features established by the laws of Ukraine on the regulation of financial services, this Law, as well as other laws of Ukraine adopted for their implementation by relevant regulations [6].

State regulation and state supervision of the financial leasing market is carried out by the National Bank of Ukraine in accordance with the Law of Ukraine “On

Financial Services and State Regulation of Financial Services Markets” [11], the Law of Ukraine “On Financial Leasing” [10] and other legislative acts.

According to Article 5 of the Law of Ukraine “On Financial Leasing” [10] “leasing is considered financial if all risks and rewards (benefits) for the use and ownership of the object of financial leasing are transferred to the leaseholder and at least one of the following features (conditions) is met”, namely:

1) the object of financial leasing is transferred for a period during which it is depreciated not less than 75% of its original value, and the leaseholder undertakes, on the basis of a financial leasing agreement or other contract, specified in the financial leasing agreement, during the term of the financial leasing agreement to acquire the object of financial leasing with the subsequent transfer of ownership of such object from the lessor to the leaseholder at the price and on the terms provided by such financial leasing agreement or other contract specified in the financial leasing agreement;

2) the amount of leasing payments at the stage of concluding a financial leasing agreement is equal to or exceeds the initial value of the object of financial leasing;

3) the balance (residual) cost of the financial lease object at the stage of expiration of the financial leasing agreement provided for by such a contract is no more than 25% of the initial value (price) of such a financial lease object as of the beginning of the financial leasing agreement, etc.

The object of financial leasing may be the property that has individual features and meets the criteria of fixed assets in accordance with the law; it is not prohibited by law on free circulation in the market and for which the law does not impose restrictions on the transfer of such property to leasing [10].

The law stipulates that the objects of financial leasing may not be land plots, or other natural objects, or objects that are defined in Part 2 of Article 3 of the Law of Ukraine “On Lease of State and Municipal Property” [12].

In order to harmonize the above mentioned Law of Ukraine “On Financial Leasing” [10], appropriate amendments have been made to the Criminal Code of Ukraine, the Economic Code of Ukraine, the Civil Code of Ukraine, the Code of Ukraine on Bankruptcy Procedures, the Law of Ukraine “On Road Traffic” and the Decree of the Cabinet of Ministers “On State Customs Duty”.

The Law of Ukraine “On Financial Leasing” [10] as of February 4, 2021 not only brings leasing activities to a qualitatively new level, but also minimizes some of the risks existing for leasing companies. The favourable amendments made to this law are those presented thereafter.

Firstly, these are clear definitions of the terms “object” (Article 6 of the Law of Ukraine “On Financial Leasing” [10]) and “term” of financial leasing, as well as “financial leasing” (Article 1 of the Law of Ukraine “On Financial Leasing”) [10]), which will prevent their ambiguous interpretation in the future. In the previous version of the law, the definition of the object of leasing was indistinct, which often

led to the transfer of the object of financial leasing in the operational one. This created confusion when considering disputes in court.

Secondly, Article 8 “Protection of the leaseholder’s rights to the object of financial leasing” of the Law of Ukraine “On Financial Leasing” [10] refers to strengthening the liability of the supplier, both to the client and to the lessor. In the new version of the above Law, the supplier is liable to the leaseholder for breach of obligation regarding the timing, quality, completeness, serviceability of the subject of the financial leasing agreement, its delivery, replacement, gratuitous elimination of defects, installation and commissioning, etc.

Third, the issue with the consequences of declaring the agreement invalid has been resolved. Insufficient clarity in these legal relations in the effective law caused significant damage to the interests of the lessor, put the parties in an unequal position, and allowed free actual use of the leased object for a long time.

Fourthly, the settlement of the issue of the notarial form of contracts for vehicles with individuals (Article 15, Clause 3 of the Law of Ukraine “On Financial Leasing”) has been achieved [10]).

Fifthly, according to the new Law of Ukraine “On Financial Leasing” [10], namely Article 7, paragraph 2, the basis for the acquisition of ownership of the leased object is the proper full unconditional performance by the leaseholder of his obligations, in particular, on payment of leasing and other payments, on payment of penalties, etc. The client has the right to purchase the object of leasing only if all the terms of the agreement are fully fulfilled. Previously, the relevant legislation did not work in terms of protecting the rights of the lessor, and in fact put him in an extremely difficult position when the leasing agreement was declared invalid.

Sixthly, at the legislative level, it is stipulated that the advance payment is not the attracted means of the lessor (Article 16, Clause 3 of the Law of Ukraine “On Financial Leasing”) [10]). Intermediary and support services for the lessor are identified, corresponding to the approaches established by the NBU in the White Paper on non-bank leasing regulation.

Seventhly, the functions of control and supervision over financial leasing are transferred to the National Bank of Ukraine and other state bodies that control the activities of the financial leasing market (Article 4 - State regulation and supervision of the financial leasing market) [13].

Thus, among the innovations of the Law of Ukraine “On Financial Leasing” [10] it is appropriate to highlight as follows: 1) strengthening the requirements for the protection of the consumers’ rights of financial leasing services; 2) providing a clear definition of the financial leasing agreement; 3) regulation of the procedure for the leaseholder on acquiring ownership of the leased asset at the end of the lease term. The document also establishes the procedure for termination of the financial leasing agreement in case of significant overdue lease payments. This provides grounds for ensuring the protection of the rights and interests of the bona fide parties to the

agreement. In addition, the Law of Ukraine “On Financial Leasing” [10] defines the possibility of subleasing the subject of leasing and regulates the rules for such transfer. This Law also eliminates contradictions regarding the form in which a financial leasing agreement must be concluded, as well as the requirements of the law are harmonized with the requirements of the legislation on financial monitoring.

Herewith, the legislation does not provide clear and understandable mechanisms for independent control of the market of financial leasing services by its participants. Also, the status of self-regulatory organizations that could supervise market participants has not been determined yet.

Currently, indirect leasing, which is the cheapest for the leaseholder, cannot function under the Ukrainian law. The financing model, according to which the leaseholder in his absolute discretion establishes the subject of the lease and its supplier, exposes the lessor to significant unjustified risks.

Part 1 of Article 808 of the Civil Code of Ukraine [8] provides that in accordance with the indirect leasing agreement, the choice of seller (supplier) of the subject of the lease is made by the leaseholder, whereby the seller (supplier) is liable to the leaseholder for cases of breach of the obligation regarding as follows: a) quality; b) completeness; c) serviceability of the subject of the leasing agreement; d) its delivery; e) replacements; f) gratuitous elimination of shortcomings; g) installation and commissioning, etc. However, the legislator did not state anything about the risk of non-delivery.

Practice shows that lessors in pursuance of indirect leasing often fall victim to fraud. For instance, a conventional client turned to the lessor with a request for financing specific equipment or machinery, in addition, he independently indicated the seller of this leased asset [14]. Having concluded an agreement, the seller sells and lessor buys goods and transfers the funds. The whole trick lies in the fact that the seller disappears “out of sight” and there is no delivery. There are cases when the lessor can sue for a refund of the subscription; however, such a process is time-consuming, for instance, a court decision is often impossible to enforce. This especially occurs in cases when the seller is not accidentally chosen by the leaseholder [14].

The new Law of Ukraine “On Financial Leasing” [10] stipulates that the choice of the seller (supplier) of the subject of the financial leasing agreement is carried out by the lessor; moreover, the seller (supplier) and the lessor are jointly and severally liable to the leaseholder. This, in turn, constitutes a delivery obligation as such and a refund obligation in a form of an advance payment in most cases.

It should be borne in mind that the liability is not assumed from the lessor for the delivery of the leased asset during the selection of the seller by the leaseholder. Taking this into consideration, the legislator does not take into account the principle of release of the lessor from liability, which is enshrined in the provisions of the UNIDROIT Convention “On International Financial Leasing” as of 28.05.1998 [15].

Thus, according to Article 8 (1) (a) of the Convention [15], “unless otherwise provided by this Convention or provided for in the lease agreement, the lessor shall not assume any obligations to the leaseholder in respect of the equipment, except where the leaseholder has suffered losses as a result of relying on the lessor’s experience and opinion and as a result of the lessor’s interference in the choice of supplier or the technical requirements of the equipment”. Article 10 (1) of the Convention [15] provides that the supplier’s obligations under the supply contract also apply to the leaseholder. One of the main provisions of the Convention concerning the liability of the lessor is part 5 of Article 12, according to which the leaseholder has no right to make any claims against the lessor regarding non-delivery of equipment or its delivery with a delay or delivery of equipment that does not comply with the supply contract, except that this is the result of action or inaction of the lessor [15].

It should be noted that in 2006 Ukraine acceded to the Convention on International Financial Leasing. On January 11, 2006, the Verkhovna Rada of Ukraine adopted the Law of Ukraine “On Ukraine’s Accession to the UNIDROIT Convention on International Financial Leasing” [16].

In addition, almost identical provisions were provided for in the Model Law on Leasing, adopted at the twenty-fifth plenary meeting of the Inter-Parliamentary Assembly of the Member States of the Commonwealth of Independent States (Resolution No. 25-6 as of May 14, 2005) [17].

Pursuant to Part 2 of Article 14, the risk of default by the seller under the lease agreement is borne by the party choosing the seller, except as otherwise provided in the leasing agreement [17].

However, this provision is not reflected in the current legislation of Ukraine. It is also not reflected in the new Law of Ukraine “On Financial Leasing” [10].

Conclusions. Thus, not all gaps are taken into account by the new Law of Ukraine “On Financial Leasing”.

Nevertheless, taking into account current realities, the new Law of Ukraine “On Financial Leasing” is a prerequisite for expanding its scope of use as an alternative to long-term financing of the acquisition of transport, equipment, other machinery and real estate. This legal act defines the general principles of financial leasing in Ukraine in accordance with international law; consequently, it will create new opportunities for leasing companies, stimulating the development of this market. The Law of Ukraine “On Financial Leasing” will protect the rights of leaseholders, lessors, as well as create a competitive environment in this area and harmonize the legislation of Ukraine with the law of the European Union.

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