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ПОНОВЛЕННЯ ДОГОВОРУ ОРЕНДИ ЗЕМЛІ: ПРОБЛЕМИ ТЕОРІЇ ТА СУДОВОЇ ПРАКТИКИ

Анотація. *Землі виступають найважливішим об'єктом навколишнього природного середовища, є незамінним засобом виробництва в сільському господарстві, територіальним базисом для розміщення різноманітних об'єктів. Стверджується, що належне функціонування відносин щодо оренди земель є запорукою сталого господарського обігу, гарантією реалізації прав та виконання обов'язків як орендодавцем, так і орендарем відповідної земельної ділянки. Дискусійним є питання поновлення договору оренди землі по закінченню строку його дії. Метою дослідження є окреслення існуючих теоретичних та правозастосовчих проблем щодо поновлення договору оренди землі, внесення пропозицій з усунення останніх. Для досягнення цієї мети використано системно-структурний метод наукового пізнання, за допомогою якого проаналізовано приписи законодавства щодо поновлення договору оренди землі, висвітлено їх співвідношення та взаємодію. Доведено, що переважне право орендаря існує щодо поновлення договору оренди землі лише на той самий строк і на тих самих умовах і за відсутності заперечень щодо такого поновлення з боку орендодавця. При намаганні орендаря змінити істотні умови договору оренди землі й за відсутності згоди орендодавця на такі зміни переважне право орендаря на укладення договору оренди землі на новий строк припиняється. Наголошено, що в кожному спорі слід встановлювати добросовісність дій орендодавця щодо відмови в поновленні договору оренди землі з однією особою (орендарем) й наступного укладення договору з новим орендарем. Видається дискусійним застосування в земельних орендних правовідносинах категорії «мени захищена» сторона, оскільки залежно від суб'єктного складу сторін цих правовідносин такою стороною може виступати як орендар, так і орендодавець. Підсумовано, що Верховний Суд має уніфікувати практику застосування приписів законодавства щодо поновлення договору оренди землі (лише у комплексі з іншими нормативними приписами або автономно, з використанням принципу «мовчазної згоди»). На можливість автономного застосування таких приписів вказують норми Закону України «Про внесення змін до деяких законодавчих актів України щодо протидії рейдерству». Виявлені недоліки правового регулювання поновлення договору оренди землі після спливу його строку вказують на напрями вдосконалення законодавства у сфері оренди земель, що має практичну значимість.*

Ключові слова: земельна ділянка, законодавство, правові відносини, особливий вид нерухомості, речові права.

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RENEWAL OF THE LAND LEASE AGREEMENT: PROBLEMS OF THEORY AND JUDICIAL PRACTICE

Abstract. *Land is the most important object of the environment. It is an indispensable means of production in agriculture, the territorial basis for the location of various objects. It is argued that the proper functioning of land lease relations is a guarantee of sustainable economic circulation, a guarantee of the exercise of rights and performance of duties by both the lessor and the lessee of the land. The issue of renewal of the land lease agreement after its expiration is debatable. The purpose of the study is to outline the existing theoretical and law enforcement problems regarding the renewal of the land lease agreement, to make proposals to eliminate the latter. To achieve this purpose, a system-structural method of scientific knowledge was used, which helped analyse the prescriptions of the legislation on renewal of the land lease agreement, their relations and interaction were highlighted. The study proves that the lessee's pre-emptive right exists to renew the land lease agreement only for the same period and on the same terms and in the absence of objections to such renewal by the lessor. If the lessee tries to change the essential terms of the land lease agreement and in the absence of the lessor's consent to such changes, the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated. It is emphasised that in each dispute it is necessary to establish the good faith of the lessor's actions to refuse to renew the land lease agreement with one person (lessee) and the subsequent conclusion of the agreement with the new lessee. The use of the category of "less protected" party in land lease legal relations appears debatable, because depending on the subject composition of the parties to these legal relations, such a party can be both a lessee and a lessor. It is concluded that the Supreme Court should unify the practice of applying the provisions of the law on the renewal of the land lease agreement (only in combination with other regulations or autonomously, with the use of the principle of "tacit consent"). The possibility of autonomous application of such instructions is indicated by the provisions of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Counteraction to Raiding". The revealed shortcomings of the legal regulation of the renewal of the land lease agreement after its expiration indicate the directions of improvement of the legislation in land lease, which has practical significance.*

Keywords: land plot, legislation, legal relations, special type of real estate, property rights.

INTRODUCTION

Land is the most important object of the environment, is an indispensable means of production in agriculture, the territorial basis for the placement of various objects. The use of land can take place on various legal titles, a prominent place among which is the right to lease land (land plot). This right is based on the agreement term paid possession and use of land necessary for the lessee to conduct business and other activities (Part 1 Article 93 of the Land Code of Ukraine of October 25, 2001 No. 2768-III¹, Article 1 of

¹ Land Code of Ukraine. (2001, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/2768-14#Text>

the Law of Ukraine of 6 October 1998 No. 161-XIV "On Land Lease"¹ (hereinafter referred to as "the Law No. 161-XIV"). The lessee is obliged to use the land in accordance with the terms and conditions of the agreement and the requirements of land legislation. The lease agreement is described by, among other things, maturity, as the date and term of the lease agreement is one of its essential conditions. Due functioning of relations regarding the land lease is a guarantee of fulfilment of the rights and performance of duties both by the lessor and the lessee of the corresponding land plot.

Legal issues of leased contractual land relations were the subject of scientific research by scientists V. M. Yermolenko, I. I. Karakash, P. F. Kulinich [1], V. V. Nosik, V. I. Semchyk, V. D. Sydor [2], M. V. Shulga, Y. Mirwati [3], J. Lee, D. Rodriguez [4], A. Popov, O. Knyaz [5], N. Akram [6], M. R. Taylor [7], G. Lyakhovich [8], M. Matveeva [9], V. A. Mayboroda [10], F. Lazar [11], etc. However, there are still unresolved issues, and a number of issues have not yet been properly regulated, resulting in difficulties in law enforcement. One of the debatable issues is the renewal of the land lease agreement after its expiration. Thus, some researchers generally deny the need for regulations on such renewal of the land lease agreement, while others outline the shortcomings of regulations and abuse that occur in the practical implementation of the lease, both on the part of the lessor and the lessee.

The issue of renewal of the land lease agreement after its expiration has gained new relevance due to the adoption of the Law of Ukraine of December 5, 2019 No. 340-IX "On Amendments to Certain Legislative Acts of Ukraine on Combating Raiding"² (hereinafter referred to as "the Law No. 340-IX") by the Verkhovna Rada, which introduced regulations on the renewal of the land lease agreement. This statutory act re-regulated the issue of renewal of the land lease agreement, introduced the conditions for the application of such a procedure, regulated the specific features of entering information on the renewal of the agreement into the State Register of Real Property Rights, and prevented such renewal of state and communal land plots.

The purpose of the study is to outline the existing theoretical and law enforcement problems regarding the renewal of the land lease agreement, to make proposals to eliminate the latter. The objectives of the study are to investigate the views of scholars on the essence of renewal of the land lease agreement, their critical analysis, and study the existing case law of the Supreme Court (Grand Chamber and individual courts of cassation, functioning in its composition) on the application of the legislation on renewal of the land lease agreement after its expiration.

1. MATERIALS AND METHODS

The study of lease contractual relations and the issue of renewal of the land lease agreement required the application of a system-structural method of scientific knowledge. This method analyses the provisions of the legislation on the renewal of the land lease agreement, highlights their correlation, the corresponding internal relations. In

1 Law of Ukraine No. 161-XIV "On Land Rent" . (1998, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/161-14#Text>.

2Law of Ukraine No. 340-IX "On the introduction of amendments to acts of legislation of Ukraine for anti-raiding". (2019, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/340-IX#Text>.

particular, this refers to the provisions of the Land and Civil Codes of Ukraine¹, the laws of Ukraine No. 161-XIV² and No. 340-IX³ in their interaction.

The method of analysis and synthesis was used to establish the content of the law on the renewal of the land lease agreement, the implementation of their interpretation. The use of the method of analysis contributed to the acquisition of knowledge about the individual elements of the object of knowledge, and the method of synthesis contributed to the development of an idea of its structure and system features. Thus, the requirements of Art. 33 of Law No. 161-XIV⁴ with a distinction of the relevant grounds for termination of the lessee's pre-emptive right to enter into a land lease agreement for a new term. The content of the new Article 126-1 "Renewal of land lease agreement, land easement agreement, agreements on granting land use rights for agricultural purposes or for development" of the Land Code of Ukraine has been clarified, which allowed to formulate certain rules for renewal of land lease agreement.

The empirical basis of the study included the judgements of the court of cassation on lease agreements and renewal of the land lease agreement, in particular, the Grand Chamber of the Supreme Court, its Commercial Court of Cassation, and the Civil Court of Cassation. An analysis and synthesis of the composition of court decisions in Ukrainian judicial institutions was conducted. It is found that the imperfection of the legislative regulation of relations for the renewal of the land lease agreement after its expiration causes a significant number of problems in law enforcement.

The basis for studying the subject of renewal of land lease agreements was the combination of basic methods of scientific knowledge. A set of methods allowed to consider the main provisions and legislation on the renewal of the land lease agreement in Ukraine. An analysis of legal provisions, which are the main source of regulation of relations between the parties to renew the land lease agreement, was carried out. The main legal document regulating legal relations regarding land lease in Ukraine is the Land Code of Ukraine and the Law of Ukraine "On Land Lease".

General scientific methods of cognition were used in studying the basic issues of legal regulation of land lease. These methods include dialectical method, Aristotelian method, systematic data analysis, methods of information analysis and synthesis. The formal legal method, the method of legal modelling and the comparative legal method were also used.

The dialectical method of scientific knowledge was used to specifically and objectively consider legal phenomena on land lease in Ukraine, as well as on the renewal of land lease agreements. Dialectical method helped identify the main provisions, as well legal regulation of land lease in terms of qualitatively and quantitatively. The basic methods of cognition of information by the dialectical method are the principle of

¹ Land Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2768-14#Text>; Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15/page20#Text>.

² Law of Ukraine No. 161-XIV "On Land Rent" . (1998, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/161-14#Text>.

³ Law of Ukraine No. 340-IX "On the introduction of amendments to acts of legislation of Ukraine for anti-raiding". (2019, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/340-IX#Text>.

⁴ Law of Ukraine No. 161-XIV "On Land Rent", op. cit.

ascension from abstract concepts to concrete, as well as the synthesis and analysis of information. The Aristotelian method was used to study the legal regulation of land lease more accurately and specifically. This method is based on a set of laws and techniques of correct thinking. Synthesis of information is another method of scientific cognition used in this study. It involves the material or imaginary integration of the features and parameters of a particular object, such as combining the properties and characteristics that have been determined by data analysis into one system. Systematic data analysis or a systematic method of scientific knowledge is used in the study for a more detailed acquaintance with the system of land legal regulation. With the help of a systematic analysis, the legal aspect of land lease in Ukraine, the components that describe this process, the land lease agreement and the legal aspects of renewal of the land lease agreement are considered. The system method is one of the basic methods of studying state and legal phenomena, regulations and laws. The analysis of relevant legal facts and regulations on land lease agreements in force in Ukraine was performed by applying the formal legal method. This method is based on a consistent and logical study of legal provisions and laws. A common method for studying legal provisions is the method of legal modelling. This method allowed to construct models of theoretical legal situations, and the search for ways to solve them in the future is performed. This method involves solving hypothetical legal situations. The final method of scientific knowledge in this work was comparative law. This method involves comparing and studying different legal documents and court decisions.

Thus, the conclusions on the application of the rules of law of the Grand Chamber of the Supreme Court on the binding nature of the additional agreement on land lease for a new term (renewal of the land lease agreement), the Commercial Court of Cassation within the Supreme Court on the content of the lessee's letter, the good faith of the lessor in resolving the issue of renewal of the land lease agreement, the use of "tacit consent" in the renewal of such an agreement, the procedure for objection in the renewal of the agreement on the part of the lessor. The legal positions of the Civil Court of Cassation in the Supreme Court on the legal facts required for the renewal of the land lease agreement also eased the investigation of the subject under study.

2. RESULTS AND DISCUSSION

The special legal literature indicates that the lease of land is described by the following important components: the allocation of land as an object of lease; contractual terms of the lease; restriction of land lease for a certain period; paid rent; the existence of only the right to own and use land; provision of land for certain activities, etc. [2]. It is the land lease agreement that serves as the basis for acquiring the right to lease a land plot in case of mutual expression of will by both parties. Such an agreement is a document certifying the right to lease land and the basis for state registration of the right to lease land [12].

Article 13 of the Law No. 161-XIV¹ stipulates that a land lease agreement is an agreement under which the lessor is obliged to transfer the land plot to the lessee for possession and use for a certain period, and the lessee is obliged to use the land plot in

¹ Law of Ukraine No. 161-XIV "On Land Rent". (1998, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/161-14#Text>.

accordance with the terms and conditions of the agreement and requirements of land legislation. The statutorily essential conditions of the land lease agreement define: (a) the leased object (cadastral number, location and size of the land plot); (b) the date of conclusion and term of the lease agreement; (c) rent indicating its amount, indexation, method and conditions of calculations, terms, procedure for its payment and revision and liability for non-payment (Part 1 of Article 15 of the Law No. 161-XIV).

Considering the subject matter, the study will highlight the legal aspects of the renewal of the land lease agreement (extension of the lease agreement of land after the expiration of the relevant lease agreement). General provisions on the lease (rent) of property are contained in Paragraph 1 Chapter 58 "Rent (lease)" of the Civil Code of Ukraine of January 16, 2003 No. 435-IV¹, which refers, inter alia, to the pre-emptive rights of the lessee of the corresponding thing. Thus, Part 1 of Art. 777 of the Civil Code of Ukraine contains the following provisions: (a) the lessee, who duly performs their duties under the lease agreement, after the expiration of the agreement has a pre-emptive right over other persons to enter into a lease agreement for a new term; (b) the lessee, who intends to exercise the pre-emptive right to enter into a lease agreement for a new term, is obliged to notify the lessor prior to the expiration of the lease agreement within the period specified in the agreement, and if it is not established therein – within a reasonable time; (c) the terms and conditions of the new lease agreement shall be established by agreement of the parties. In case of failure to reach an agreement on payment and other terms and conditions of the agreement, the lessee's pre-emptive right to enter into the agreement is terminated. Notable, these general approaches to the lessee's pre-emptive right over other persons to enter into a lease for a new term are applied in case of renting both movable and immovable property.

Considering that land plots are a special type of real estate, described by a specific legal regime, the issue of the lessee's pre-emptive right to enter into a land lease agreement for a new term (renewal of such an agreement) is regulated by special legislative provisions on land lease. Thus, Law No. 161-XIV² holds a separate Article 33 on the renewal of the land lease agreement.

At one time P.F. Kulinich expressed a well-founded opinion about the inappropriateness of this article, which should regulate the issue of renewal of the right (and not the agreement) of land lease [1]. This idea was supported by other researchers, noting that the exclusion of Article 33 "Renewal of the land lease agreement" from the Law No. 161-XIV³ is justified. This would lead to the fact that the procedure for renewal of the agreement would be applied to Article 764 of the Civil Code of Ukraine⁴[13].

Despite this, Article 33 "Renewal of the land lease agreement" of the Law No. 161-XIV⁵ (before its amendment by the Law No. 340-IX⁶) regulated the considered public

¹ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15/page20#Text>.

² Law of Ukraine No. 161-XIV "On Land Rent". (1998, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/161-14#Text>.

³ *Ibidem*, 1998.

⁴ Civil Code of Ukraine, op. cit.

⁵ Law of Ukraine No. 161-XIV "On Land Rent", op. cit.

⁶ Law of Ukraine No. 340-IX "On the introduction of amendments to acts of legislation of Ukraine for anti-raiding". (2019, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/340-IX#Text>.

relations as follows.

Thus, according to Part 1 Article 33 of the No. 161-XIV¹, the lessee has a pre-emptive right to extend the contractual lease of land (to conclude a land lease agreement for a new term, renewal of the land lease agreement – as this right is called by the legislator). The precondition for the emergence of such a pre-emptive right of this person is the proper performance of obligations by the lessee under the land lease agreement. Such proper performance of obligations by the lessee is named by some researchers to be the main requirement of the law, which gives the lessee the right to renew (extend) the land lease agreement [14]. The lessee may exercise this pre-emptive right only after the expiration of the land lease agreement.

In turn, Parts 2-5 Article 33 of No. 161-XIV² hold the conditions for the exercise of the outlined pre-emptive right of the lessee, which include:

a) lessee's notice to the lessor about the intention to exercise the pre-emptive right before the expiration of the term of the land lease agreement. The term of such notice must be established in the land lease agreement, but in any case, it must be made not later than one month before the expiration of the land lease agreement;

b) such notice must be made in writing by the lessee sending a letter to the lessor. The obligatory appendix to such letter-notice on renewal of the land lease agreement is the draft of the additional agreement to the land lease agreement;

c) after receiving a notice with a draft additional agreement, the lessor must consider them within a month, verify for compliance with the law, agree with the lessee (if necessary) the essential terms of the agreement and, in the absence of objections, decide to renew the land lease (in relation to state and communal lands), to conclude an additional agreement with the lessee on renewal of the land lease agreement.

Therewith, it is statutorily stipulated that an additional agreement to the land lease agreement on its renewal must be concluded by the parties within one month. Both refusal and delay in concluding an additional agreement to the land lease agreement may be appealed in court (parts 8, 11 Article 33 of Law No. 161-XIV). Notably, the need for an additional agreement on the conclusion of a land lease agreement for a new term (renewal of the land lease agreement) has been confirmed by judicial practice. Thus, the Grand Chamber of the Supreme Court, deciding the dispute on the renewal of the land lease agreement, in paragraph 61 of the decision of May 26, 2020 in the case No. 908/299/18 (proceedings No. 12-136rc19) indicated that Article 33 of the Law of Ukraine "On Land Lease"³ defines both the conditions and grounds for renewal of the land lease agreement, and the obligation of the parties to enter into an additional agreement to the land lease agreement on its renewal⁴.

It should be emphasised that the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated on the following grounds:

a) the lessor's objection to the renewal of the lease agreement. In this case, the

¹ Law of Ukraine No. 161-XIV "On Land Rent". (1998, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/161-14#Text>.

² *Ibidem*, 1998.

³ *Ibidem*, 1998.

⁴ Judgment of the Grand Chamber of the Supreme Court in case No 908/299/18 (proceedings No 12-136gs19). (2020, May). Retrieved from <http://www.reyestr.court.gov.ua/Review/89825064>

lessor must send the lessee a letter of notice of objection to the extension of the land lease agreement;

b) failure to reach an agreement between the lessee and the lessor on the rent and other essential terms of the land lease agreement (Part 4 of Article 33 of the Law No. 161-XIV).

In other words, the lessee's pre-emptive right exists to renew the land lease agreement only for the same period and on the same terms and conditions and in the absence of objections to such renewal by the lessor. Therefore, if the lessee attempts to change the essential terms and conditions of the land lease agreement and in the absence of the lessor's consent to such changes, the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated.

Notably, the application of the above legislative provisions on the renewal of the land lease agreement raises several issues that are not regulated. In such circumstances, the answers to them are developed in the process of law enforcement. Thus, the Commercial Court of Cassation within the Supreme Court in paragraph 5.3 of the decision in the case No. 908/2314/18 dated September 16, 2019 indicated that the lessor's objections regarding the inconsistency of the letter-notice of the lessee with the draft supplementary agreement to the law cannot be submitted without giving reasons, but must be substantiated and contain specific references to violations of the law, specified in the letter of notice or draft supplementary agreement, or contain specific essential terms and conditions of the agreement, in respect of which the lessor proposes changes¹. Sometimes there are situations when the lessor first objected to the renewal of the land lease agreement with a particular lessee (indicating the relevant reasons), and then after some time entered into a new lease agreement with another person. Again, the current legislation does not regulate this situation.

Instead, the Commercial Court of Cassation within the Supreme Court in paragraph 5.7. of the resolution in the case No. 920/739/17 dated September 10, 2018 indicated that in accordance with Article 3 of the Civil Code of Ukraine², the principles of justice, good faith, and reasonableness constitute the fundamental principles of civil law, aimed, inter alia, at establishing the rule of law in the legal system of Ukraine. In this case, good faith means the desire of a person to honestly use civil rights and ensure the performance of civil duties, which is confirmed in particular by the content of Part 3 Article 509 of this Code. Thus, citing this principle in the text of the Civil Code of Ukraine, the legislator established a certain limit of behaviour of participants in civil relations, so that each of them is obliged to honestly exercise their civil rights and perform civil obligations, including the possibility of their actions (inaction) harming the rights and interests of others. This principle is not purely formal, as its non-compliance leads to a violation of the rights and interests of participants in civil turnover. That is why in specific legal relations, in particular regarding the renewal of the land lease agreement based on Article 33 of the Law of Ukraine "On Land Lease", the good faith of the landlord in essence constitutes a guarantee of compliance with the rights of the less protected party, which in

¹ Resolution of the Commercial Court of Cassation of the Supreme Court in case No 908/2314/18. (2019, September). Retrieved from <http://www.reyestr.court.gov.ua/Review/84944522>

² Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15/page20#Text>.

the disputed legal relations is the lessee¹.

The above should be generally supported and, notably, in each dispute it is necessary to establish the good faith of the lessor's actions to refuse to renew the land lease agreement with one person (lessee) and the subsequent conclusion of an agreement with a new lessee. Unfairness of the lessor's actions may serve as grounds for recognition and protection of the lessee's pre-emptive right to continue the contractual lease of land in court as violated and, accordingly, to conclude that the new land lease agreement is invalid.

Notably, in the above court decision, the court of cassation applied the category of "less protected" party, which in the disputed land lease is determined by the lessee. Such an approach requires additional consideration, is debatable, and may be justified in the presence of the following contractual structure: the lessor – a public authority or local government, the lessee – a legal entity under private law, an individual – an entrepreneur, an individual. However, when considering a lease where the lessor is an individual as the owner of the land, and the lessee is a legal entity (farm, agricultural holding, other business entity), it is possible to draw the opposite conclusion about the "less protected" party in such contractual relations, which is likely to be the lessor.

A considerable number of questions arise in connection with the implementation of the provisions of Article 33 of the Law No. 161-XIV² (until amendment by Law No. 340-IX), according to Part 6 of which if the lessee continues to use the land after the expiration of the lease and in the absence of a lessor's letter-notice one month after the expiration of the agreement on the objection to the renewal of the land lease agreement, such an agreement is considered renewed for the same period and on the same terms and conditions as provided by the agreement. Some researchers consider this provision discriminatory against the landlord of the land [15], while others point out that it contradicts Article 31 of the Law No. 161-XIV, which determines the expiration of the term for which the agreement was concluded, as one of the grounds for its termination [16]. Furthermore, in this case the law makes provision for the conclusion of an additional agreement on the renewal of the lease of state-owned land, which is performed by the authorised head of the executive body, determined by the decision of this body, without the decision of the executive body to renew the land lease. N.V. Ilkiv thinks that there is an increase in the term of the lease of state-owned land due to improper performance of obligations by the lessor to dispose of state property and avoid the procedure of land auction [17].

There are various approaches to the application of Part 6 of Article 33 of Law No. 161-XIV³. Thus, according to one of them, it should be applied only together with other provisions of Article 33 of the Law of Ukraine "On Land Lease". That is, the lessee may not continue to use the land after the lease agreement if they, intending to exercise the pre-emptive right to enter into a land lease agreement for a new term, failed to timely notify the lessee in writing (letter-notice with a draft supplementary agreement). In other

¹ Resolution of the Commercial Court of Cassation of the Supreme Court in case No 920/739/17. (2018 September). Retrieved from <http://www.reyestr.court.gov.ua/Review/77748947>

² Law of Ukraine No. 161-XIV "On Land Rent" . (1998, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/161-14#Text>.

³ *Ibidem*, 1998.

words, according to this approach, Part 6 of Article 33 of Law No. 161-XIV may be applied only in combination with other provisions thereof, in particular, with parts 2-5. Confirmation of this position can be found in case law. Thus, for example, the Civil Court of Cassation of the Supreme Court in the decision of June 27, 2019 in the case No. 312/275/17 noted that to renew the land lease agreement on the grounds stipulated by Part 6 of Article 33 of the Law of Ukraine "On Land Lease" requires the following legal facts: the lessee duly performs its duties under the lease agreement; before the expiration of the agreement, they timely notify the lessor of their intentions to exercise the preemptive right to enter into an agreement for a new term; the lessee added a draft additional agreement to the letter-notice; the lessee continues to use the allocated land plot; the lessor failed to notify the lessee in writing of the refusal to renew the lease agreement¹.

According to another approach, the provisions of Part 6 Article 33 of Law No. 161-XIV can be applied autonomously, they enshrine the principle of "tacit consent". According to this opinion, the lessee's notice to the lessor about the intention to exercise the right to renew the land lease agreement on the grounds stipulated by Part 6 Article 33 of the Law of Ukraine "On Land Lease" is not required. The essence of the renewal of the lease agreement under this part of the article is that the lessee continues to use the land after the lease, and the lessor, accordingly, does not object to the renewal of the agreement, in particular in connection with the proper performance of the land lease. The absence of such an objection may manifest itself in "tacit consent". These legal conclusions are formulated by the Commercial Court of Cassation of the Supreme Court in paragraph 5.2. of the resolution in the case No. 920/739/17 dated September 10, 2018².

In another case, the Supreme Court further emphasised that the construction of Part 6 Article 33 of the Law of Ukraine "On Land Lease" stipulates the absence of a written notice of the lessor to object to the renewal of the lease agreement, i.e. crucial for the renewal of the agreement for the same period and on the same terms and conditions is only the fact of the lessor's objection to renewal, without any substantiation (paragraph 27 of the decision of the Commercial Court of Cassation of the Supreme Court in the case No. 912/1712/17 dated November 29, 2018³).

Discussing the content of Part 6 Article 33 of Law No. 161-XIV⁴, some researchers note that it launched a mechanism of continuous renewal of the agreement through prolongation without the actual possibility of terminating the agreement. According to O.I. Baran, the rules of procedural law cannot limit the rules of substantive law, which is the right of ownership of land. Therewith, the refusal to extend solves the main problem of the lessor – eliminates the complex mechanism of returning the land in its use [18]. However, it is hardly possible to agree with the above considerations.

Thus, Part 6 Article 33 of the Law No. 161-XIV makes provision for the possibility

¹ Resolution of the Civil Court of Cassation of the Supreme Court in the case No 312/275/17. (2019, June). Retrieved from <http://www.reyestr.court.gov.ua/Review/82798011>

² Resolution of the Commercial Court of Cassation of the Supreme Court in case No 920/739/17. (2018, September). Retrieved from <http://www.reyestr.court.gov.ua/Review/77748947>

³ *Ibidem*, 2018.

⁴ Law of Ukraine No. 161-XIV "On Land Rent" . (1998, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/161-14#Text>.

of preventing the "automatic" renewal of the land lease agreement by the lessor – they only need to object (without any justification for such objection) in the renewal of the agreement. Moreover, it is hardly correct to assume that Part 6 Article 33 of Law No. 161-XIV contains the rules of procedural law. After all, the provision of procedural law is considered to be the rule of law that regulates social (procedural) relations between the court, on the one hand, and the participants in the trial, on the other hand, and aims to address procedural and organisational issues of substantive law to protect rights and legitimate interests of the subjects of material legal relations [19]. Part 6 Article 33 of Law No. 161-XIV does not comply with such attributes.

Instead, O.V. Kot is correct in pointing out that it cannot be considered that the continuation of the lease is possible against the will of the lessor, as it would violate the basic principles of civil procedure, including the principle of freedom of agreement and free will. Currently, the will of the lessor is manifested in the form of silence [20].

The possibility of autonomous application of the regulations on the renewal of the land lease agreement is indicated by the latest amendments introduced by Law No. 340-IX. Thus, this regulation, which will enter into force on July 16, 2020, changed the name of Article 33 of the Law No. 161-XIV to "The pre-emptive right of the lessee to enter into a land lease agreement for a new term", as well as introduced a new wording of its text, excluding the provision on the renewal of the land lease agreement. In other words, Part 6 was excluded from Article 33 of the Law No. 161-XIV while leaving other regulations in force.

Furthermore, a new Article 32-2 "Renewal of land lease agreements" was added to the Law of Ukraine "On Land Lease", according to which the renewal of land lease agreements is performed in accordance with the procedure prescribed by Article 126-1 of the Land Code of Ukraine. That is, these changes differentiate the categories of "pre-emptive right to continue the contractual lease of land" and "renewal of the land lease", which should be assessed positively. Therewith, the Law No. 340-IX¹ supplemented the Land Code of Ukraine with a new Article 126-1 "Renewal of land lease agreement, land easement agreement, agreements on granting the right to use land for agricultural purposes or for construction", which contains, in particular, the following rules for renewal of land lease agreement:

a) the condition for renewal of the land lease agreement may be established in such an agreement. That is, the lessor and lessee must agree on the possibility of renewing the land lease agreement and enshrine it directly in the text of the agreement;

b) such a condition may be contained only in the lease agreement of private land. Conversely, such a condition cannot be established in the lease agreement of land plots of state and communal property. However, there are exceptions, such as placement of buildings or structures owned by the user or acquirer of the right to use the land on state or communal lands;

c) the land lease agreement may be renewed only for the same term and under the same conditions.

The following mechanism was introduced to renew the land lease agreement after its expiration: renewal of the agreement is considered as such without the parties to the

¹Land Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2768-14#Text>.

same performing a written transaction on its renewal in the absence of a statement of one of the parties to exclude information from the State Register of Real Rights to Immovable Property. Thus, performance of other actions for its renewal by the parties to the agreement is not required. It is obvious that the basis for renewal of the land lease agreement is the proper performance of the terms of such agreement by the lessee during its term.

The right of the parties to the lease agreement to refuse to continue further contractual relations is also statutorily regulated. Thus, Parts 3 and 4 of Article 126-1 of the Land Code of Ukraine¹ stipulate that a party to the agreement who wishes to exercise the right to refuse to renew the agreement no later than one month before the expiration of such agreement, submits to the State Register of Real Rights to Immovable Property an application for exclusion of agreement renewal information from this register. In the absence of such a statement prior to the expiration date of such agreement after the relevant expiration date of the agreement, the state registration of property rights is extended for the same period.

Relevant changes to this procedure for renewal of the land lease agreement and possible waiver of this have been introduced to the legislation on state registration of real rights to immovable property. Thus, in the current wording of Part 1 Article 26 of the Law of Ukraine No. 1952-IV of July 1, 2004 "On state registration of real rights to immovable property and their encumbrances"² stipulates that in case the party submits an application for exclusion of information on renewal of the agreement from the State Register of Real Rights to Immovable Property, the state registrar excludes such information from the State Register and, after the expiration of the agreement, the state registration of the property right derived from the right of ownership shall be terminated by software for register accounting. In the absence of such a statement, subject to renewal of the agreement after its expiration, the state registration of real rights is extended for the same period by software of the above State Register.

In the legal literature, some critical remarks have been made about these new regulations. Thus, L.V. Leiba points out that the innovations provided in Law No. 340-IX are not indisputable. For example, the provisions of Article 126-1 of the Land Code of Ukraine to some extent contradict the provisions of Article 33 of the Law "On Land Lease", which in turn further reduces the guarantees of enjoyment of the pre-emptive right of the lessee. These provisions are entirely aimed at protecting the interests of lessors. For example, in a situation where the lessee intends to exercise their pre-emptive right, they apply to the lessor with a letter notifying on the extension of the lease, meanwhile, the lessor, based on the provisions of Article 126-1 of the Land Code of Ukraine³, applies to the State Register of Real Rights to Immovable Property to exclude information about the renewal of the lease agreement. Thus, the unprotected party is the lessee, who cannot be sure of the effectiveness of guarantees of enjoyment of the pre-emptive right to enter into a lease of land for a new term [21].

Additionally, attention should be paid to the inconsistency of the provisions of

¹ Land Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2768-14#Text>.

² Law of Ukraine No 1952-IV "On state registration of real rights to immovable property and their encumbrances". (2004, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1952-15#Text>.

³ Land Code of Ukraine, op. cit.

Article 126-1 of the Land Code of Ukraine that the renewal of the agreement is considered as such without the parties to the same performing a written transaction on its renewal in the absence of a statement of one of the parties to exclude information from the State Register of Real Rights to Immovable Property and Part 1 of Article 26 of the Law of Ukraine "On state registration of real rights to immovable property and their encumbrances"¹ to extend the state registration of real rights for the same period with the use of software tools of the State Register of Rights in the absence of such application and only if the agreement is renewed after its expiration. After all, in itself, the absence of a statement from the lessee or lessor to exclude information about the renewal of the agreement from the State Register of Real Rights to Immovable Property will indicate the renewal of the land lease agreement, and hence there is no need for additional confirmation of renewal.

CONCLUSIONS

The imperfection of the legislative regulation of relations on the renewal of the land lease agreement after its expiration raises numerous issues in law enforcement. When renewing the land lease agreement, the conclusion of an additional agreement between the lessor and the lessee is mandatory. The lessee's pre-emptive right to renew the land lease agreement exists only for the same period and on the same terms and conditions and in the absence of objections to such renewal on the part of the lessor. If the lessee attempts to change the essential terms and conditions of the land lease agreement and in the absence of the lessor's consent to such changes, the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated. The actions of the lessor to refuse to renew the land lease agreement must be bona fide. Unfairness of the lessor may serve as grounds for recognising and protecting the violated lessee's pre-emptive right to continue the contractual lease of land and, accordingly, to conclude that the new land lease agreement is invalid.

The use of the category "less protected" party in land lease legal relations appears to be disputable, as depending on the subjective composition of the parties to these legal relations, such party may be both the lessee and the lessor. The Supreme Court must unify the practice of applying Part 6 Article 33 of the Law No. 161-XIV (only in combination with other regulations or autonomously, with the use of the principle of "tacit consent"). The latest procedure for renewing the land lease agreement is also not without flaws. In particular, the rights of the land lessee are in fact unprotected in case the lessor applies to the State Register of Real Rights to Immovable Property to exclude information on the renewal of the lease agreement when agreeing on an additional agreement to such an agreement between these parties.

Elimination of the identified shortcomings of the legal regulation of renewal of the land lease agreement after its expiration will contribute to the proper functioning of relevant public relations, and these shortcomings themselves indicate areas for improvement of legislation in land lease, which has practical significance.

The study of the experience of legal regulation of renewal (prolongation) of a land

¹ Law of Ukraine No 1952-IV "On state registration of real rights to immovable property and their encumbrances". (2004, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1952-15#Text>.

lease agreement after its expiration in other countries should be considered as promising.

REFERENCES

- [1] Kulinich, P.F. (2018, May). Land lease law and land lease agreement: controversial issues of legal theory and practice. *Paper presented at International scientific-practical conference "Development of agrarian, land and environmental law at the turn of the millennium"* (pp. 62-67). Kyiv: National University of Life and Environmental Sciences.
- [2] Sidor, V.D. (2019). The right to lease land. M.V. Shulga (Ed.), *Grand Ukrainian legal encyclopedia: in 20 volumes. In Land and agrarian law* (pp. 485-489), Vol. 16. Kharkiv: Pravo, National Academy of Legal Science of Ukraine, V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, Yaroslav Mudry National Law University.
- [3] Mirwati, Y., Mirwati, Y., & M. Yakub. (2018). The legality of land lease by the state-owned company pt. kai (persero) / Mirwati, Y., Mirwati, Y., & M. Yakub. *International Journal of Engineering and Technology (UAE)*, 7(2), 157-160.
- [4] Li, J., Rodriguez, D., & Tang, X. (2017). Effects of land lease policy on changes in land use, mechanization and agricultural pollution. *Land use Policy*, 64, 405-413.
- [5] Popov, A., Kniaz, O., Koshkalda, I., & Trehub, O. (2019). Land fragmentation of agricultural enterprises in the context of administration of land. *Economic Annals-XXI*, 176(3-4), 80-90.
- [6] Akram, N., Akram, M. W., Wang, H., & Mehmood, A. (2019). Does land tenure systems affect sustainable agricultural development? *Sustainability (Switzerland)*, 11(14), Article number 3925
- [7] Taylor, M. R., & Featherstone, A. M. (2018). The value of social capital in farmland leasing relationships. *Agricultural Finance Review*, 78(4), 489-496.
- [8] Liakhovych, G., Pavlykivska, O., Marushchak, L., Kilyar, O., & Shpylyk, S. (2019). The organizational-economic aspects of land relations provision by administrative-territorial reform in Ukraine. *Problems and Perspectives in Management*, 17(2), 479-492.
- [9] Matveeva, M., & Kholodova, O. (2018). Comprehensive description of the matter of land lease. *Paper Presented at the MATEC Web of Conferences*, 212, Article number 09011.
- [10] Mayboroda, V.A. (2018). On inequality of rights in agricultural land privatization. *International Journal of Engineering and Technology (UAE)*, 7(4), 342-346.
- [11] Lazar, F., & Prisman, E. Z. (2018). Valuing historical claims of loss of use of land with sparse data. *Journal of Business Valuation and Economic Loss Analysis*, 13(1), Article number 20170007.
- [12] Ilkiv, N.V. (2019). Land lease agreement. M.V. Shulga (Ed.), *Grand Ukrainian legal encyclopedia: in 20 volumes. In Land and agrarian law* (pp. 138-143), Vol. 16. Kharkiv: Pravo, National Academy of Legal Science of Ukraine, V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, Yaroslav Mudry National Law University.

- [13] Kruk, P.B. (2011). Application of the principle of tacit consent in the renewal of the land lease agreement. *University Scientific Notes*, 3(39), 95-101.
- [14] Yurchenko, E. (2016). Realization of the preemptive right of tenants to prolong lease agreements of agricultural lands. *Entrepreneurship, Economy and Law*, 9, 71-75.
- [15] Marinova, B., & Moteva, M. (2019). Issues in creation and use of roads in agricultural areas. Paper presented at the *International Multidisciplinary Scientific GeoConference Surveying Geology and Mining Ecology Management, SGEM*, 19(5.4), 493-500.
- [16] Ilkiv, N.V. (2008). *Lease of agricultural lands in Ukraine: theoretical and practical aspects*. Lviv: LvDUVS.
- [17] Ilkiv, N.V. (2018). Terms in the lease agreement of state-owned land. *Scientific Bulletin of Lviv State University of Internal Affairs*, 2, 116-125.
- [18] Baran, O.I. (2015). Changes in the legal regulation of the land lease agreement: an attempt at scientific analysis. *Law and Society*, 5, 97-105.
- [19] Nikolenko, L.M. (2013). Material and procedural norms and legal relations: their relationship in commercial litigation. *Our Law*, 10, 148-154.
- [20] Kot, O.V. (2012). Problematic issues of renewal of lease agreements of land plots of state and communal property in judicial practice. *Bulletin of Commercial Litigation*, 2, 277-285.
- [21] Leiba, L.V. (2020, May). The preemptive right to enter into a lease of land for a new term: legal guarantees of implementation. Paper presented at *Scientific and practical conference "Actual legal problems of land, agrarian and ecological relations in the conditions of modern land reform"* (pp. 173-177). Kharkiv: Yuraït.

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