

**LACK OF REGULATION IN DETERMINING THE
MOMENT OF CONCLUSION OF THE LAND LEASE
AGREEMENT**

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Abstract: *During the formation of a democratic, social, and constitutional state, the institution of the right to land use constitutes a parallel plane of those social values that are organically combined with rights and legitimate interests, inalienable to the normal functioning of life, and therefore requiring objective and secured expression in legislation, especially in the context of legal protection during the exercise of the rights of participants in leasehold land relations. Currently, the topic of leased land use and the necessity of investigating the issue of the moment of conclusion of the land lease agreement is getting increasingly pressing and requires to align legislative texts with the practice of enforcement of the right. In the course of the research the following objectives were completed: 1) the issues of concluding the land lease agreement in Ukraine were found; 2) doctrinal and legislative approaches to determining the moment of conclusion of the land lease agreement were analysed; 3) the judicial practice of domestic judicial authorities was studied with regard to the above issue; 4) the author's definition of the concept of "the moment of conclusion of the land lease agreement" has been formed; 5) it was established that the moment of acquiring the right to use the land plot, including the resolution of the conflict between the two leases (registered and unregistered) depends on the moment of conclusion of the land lease agreement; 6) it is stated that, within a short period of time, the Supreme Court has repeatedly modified its conclusion regarding the determination of the date from which a lease of a land plot is concluded, becoming an instrument of legal uncertainty.*

Keywords: land plot, land law relations, moment of conclusion of agreement, land reform, law enforcement practice.

Lease is one of the means to solve economic problems, and in this context it is somewhat complementary to other means and methods of

social, economic and industrial development^{1,2,3,4,5,6}. During the formation of a democratic, social, and constitutional state, the institution of the right to land use is a parallel plane of social values that are organically combined with rights and legitimate interests that are inalienable to the normal functioning of life, and therefore require objective and secured expression in legislative acts, especially in the context of legal protection during the exercise of the rights of participants in land lease relations⁷. The uniqueness of the lease is that it actually accompanies and completes the system of property relations⁸, to some extent harmonizing economic relations in cases where rigid construction of the property right does not allow to successfully and promptly dispose of financial and production resources⁹. In addition, according to international experts, revenues from land lease agreements account for about 35% of developed countries'

¹ D. Ushakov, I. Elokhova, E. Kozonogova, "Post industrialization prospects in the dynamics of socioeconomic transformations: Cluster approach", in *International Journal of Ecological Economics and Statistics*, 2017, vol. 38, no. 2, p. 23-32.

² D. Ushakov, S.G. Akhmetova, L.V. Nevskaya, "Economic growth and environmental performance: Correlation issues and future priorities", in *International Journal of Ecological Economics and Statistics*, 2017, vol. 38, no. 4, p. 164-172.

³ H.T. Van, I. Onyusheva, D. Ushakov, R. Santhanakrishnan, Impedimental policies impacting shrinking world solar industry eco-economic development, in *International Journal of Energy Economics and Policy*, 2018, vol. 8, no. 4, p. 21-27. Elmira Failovna Gumerova, Natalya Anatolyevna Yushchenko, Dinara Anvarovna Musabirova, Legal regulation of commercial concessions (franchising) in accordance with Russian and foreign law," in *Astra Salvensis*, V (2017), no. 10, p. 32.

⁴ D.S. Ushakov, O.I. Khamzina, R.A. Karabassov, I.A. Zaiarnaia, V.A. Gnevasheva, Countries' competitiveness as a factor of MNCs' global expansion, in *Journal of Advanced Research in Law and Economics*, 2018, vol. 9, no. 6, p. 2169-2175.

⁵ N.S. Plaskova, N.A. Prodanova, E.I. Zatsarinnaya, L.N. Korshunova, N.V. Chumakova, "Methodological support of organizations implementing innovative activities investment attractiveness estimation", in *Journal of Advanced Research in Law and Economics*, 2017, vol. 8, no. 8, p. 2533-2539.

⁶ N.A. Prodanova, L.B. Trofimova, A.A. Adamenko, E.A. Erzinkyan, N.V. Savina, L.N. Korshunova, "Methodology for assessing control in the formation of financial statements of a consolidated business", in *International Journal of Recent Technology and Engineering*, 2019, vol. 8, no. 1, p. 2696-2702.

⁷ M.I. Ermilova, D. Ushakov, S.V. Laptev, "Financing the Russian housing market: Problems and the role of the state", in *Opcion*, 2018, vol. 34, no. 17, p. 1074-1087.

⁸ I. Kalaur, N. Fedorchenko, "Normative and individual regulator in the mechanism of regulation of legal relations under transfer of property in use", in *Transformations in Business and Economics*, 2018, vol. 17, no. 1, p. 38-49.

⁹ S.V. Naumenkova, "Financial inclusivity: Economic contents and the approaches to its assessment", in *Actual Problems of Economics*, 2015, vol. 166, no. 4, p. 363-371. Cf. J. Kolesnikova, Anastasia V. Kamasheva, „The alienation of the rights to life and health: the institutional dimension,” in *Astra Salvensis*, V (2017), no. 10, p. 60.

national income¹⁰. One of the most common forms of land use in the territory of Ukraine is land lease, which is carried out on the basis of the relevant agreement. Currently, the possibility of land plot lease is an effective factor in increasing the size of agrarian formations, which is also a significant factor in the development of infrastructure of the territories and the improvement of territorial units. It may potentially serve the development of tourism; it constitutes an influential factor in the state of the environment¹¹, including the ecology of the country, etc.^{12,13} It can be stated that land lease is directly related to private and public relations. Moreover, in view of the ongoing prolongation of the land market opening in Ukraine, land lease remains a leading form of exercising the economic and legal rights to land plots, especially of agricultural designation^{14,15}. Undoubtedly, the relevance of the subject matter and the discussions around it produce a multivariate approach to its solution, which will be investigated in the paper.

It is noteworthy that the definition of the moment of conclusion of the land lease agreement, as of today, is not regulated at the legislative level. Thus, legislative transformations, legalized by the Law of Ukraine No. 191-VIII of February 12, 2015 “On Amendments to Certain Legislative Acts of Ukraine on Simplifying Business Conditions

¹⁰ G. Liakhovych, O. Pavlykivska, L. Marushchak, O. Kilyar, S. Shpylyk, “The organizational-economic aspects of land relations provision by administrative-territorial reform in Ukraine”, in *Problems and Perspectives in Management*, 2019, vol. 17, no. 2, p. 479-492.

¹¹ A. Chechel, “Ecological component alignment of balance of industrial regions”, in *Skhid*, 2013, vol. 4, no. 124, p. 98-103. <http://skhid.kubg.edu.ua/article/view/16950>

¹² O.Y. Voronkova, L.A. Iakimova, I.I. Frolova, C.I. Shafranskaya, S.G. Kamolov, N.A. Prodanova, “Sustainable development of territories based on the integrated use of industry, resource and environmental potential”, in *International Journal of Economics and Business Administration*, 2019, vol. 7, no. 2, p. 151-163. Dinara Anvarovna Musabirova, Natalya Anatolyevna Yushchenko, Elmira Failovna Gumerova, Radik Nakimovich Hamitov, Irina Viktorovna Kostyuk, „Peculiarities of legal status of civil legal communities in housing legal relations,” in *Astra Salvensis*, V (2017), p. 53.

¹³ N.V. Zakharchenko, S.L. Hasanov, A.V. Yumashev, O.I. Admakin, S.A. Lintser, M.I. Antipina, “Legal rationale of biodiversity regulation as a basis of stable ecological policy”, in *Journal of Environmental Management and Tourism*, 2018, vol. 9, no. 3, p. 510-523.

¹⁴ P.F. Kulynych, “Land lease rights as an object of market circulation in Ukraine: status and prospects”, in *Journal of Kiev University of Law: Ukrainian Scientific-Theoretical Journal*, 2016, no. 2, p. 7-11.

¹⁵ N. Batyrova, T. Fatih, R. Yermankulova, “Economic efficiency of means for mechanization in agricultural complex”, in *Journal of Advanced Research in Law and Economics*, 2018, vol. 9, no. 6, p. 1893-1902.

(Deregulation)”¹⁶, significantly reduced the list of essential terms and conditions of the land lease agreement. Thus, the previous version of the Law of Ukraine “On Land Lease” contained 13 essential terms and conditions of such an agreement¹⁷. However, despite the novelties, the validity of the contract remains an essential condition, in the absence of which, according to the prescriptions of part 1 of Article 638 of the Civil Code of Ukraine, the contract is considered not concluded¹⁸. It should be noted that the previous wording of the cited law associated the absence of a condition regarding the term with the refusal of the state registration for the agreement and its recognition as invalid. At the same time, in practice the determination of the maximum and minimum terms of validity of certain types of land lease has a major problem characteristic, which lies in the establishment of the beginning of such term. Sometimes, this renders impossible the determination of the end point of the agreement, when the lessee is obliged to return the land to the owner. It should be noted that the imperfection of land lease relations, especially in domestic agriculture, causes the spread of destructive models of economic behaviour¹⁹, the gap between private and public interests in land use, violates the system of stimulating productive work on land. Apart from a fundamental study of the general patterns of evolution and functioning of land lease, features of their manifestation at the stage of market land relations, identification of the sources of reserves for improving the socio-economic efficiency of land use in Ukraine also requires analysis and legalization of the moment of conclusion of the land lease agreement. In consideration of the foregoing, the subject matter of leased land use and the necessity of investigating the issue of the moment of conclusion of the land lease agreement gains more traction and necessitates the alignment of legislative texts with the practice of right enforcement. Considering the current realities of the law enforcement and legal regulation of land lease, the purpose of the paper is to comprehensively analyse issues in the field of determining the moment of conclusion of a land lease agreement and

¹⁶ On amendments to some legislative acts of Ukraine on simplification of business conditions (deregulation): Law of Ukraine No. 191-VIII of February 12, 2015. Available at: <https://zakon.rada.gov.ua/laws/show/191-19>.

¹⁷ On land lease: Law of Ukraine No. 161-XIV of October 6, 1998. Available at: <https://zakon.rada.gov.ua/laws/show/161-14>.

¹⁸ Civil Code of Ukraine: Law of Ukraine No. 435-IV of January 16, 2003. Available at: <https://zakon.rada.gov.ua/laws/show/435-15>.

¹⁹ E.I. Zatsarinnyi, N.I. Malykh, Y.N. Severina, A.L. Gendon, A.Y. Minnullina, K.A. Malysenko, “Current trends in the financial market development”, in *Journal of Advanced Research in Law and Economics*, 2017, vol. 8, no. 8, p. 2629-2635.

finding effective ways to solve them. The achievement of the outlined purpose is considered possible provided that the following tasks are solved: 1) issues of concluding a land lease agreement in Ukraine are established; 2) doctrinal and legislative approaches to determining the moment of conclusion of the land lease agreement are analysed; 3) the judicial practice of domestic judicial authorities on this matter is investigated; 4) substantiated amendments to the current legislation of Ukraine are formed and proposed.

Land lease relations have always been in sight of domestic scientists and practitioners. In particular, research has taken into account differing approaches to the subject matter. Authors of these approaches are the following representatives of ecological and legal doctrine: A.H. Brun, V.I. Semchyk, O.O. Pohribnyi, M.V. Shulga, N.I. Titova, P.F. Kulynych, V.Z. Yanchuk, V.V. Nosik, I.I. Karakash, V.V. Fedorovich, V.L. Muntyan, V.K. Gurevsky, V.I. Andreitsev, N.R. Malysheva, A.K. Sokolova, N.V. Ilnytska, Yu.S. Shemshuchenko, and others. The paper also considered the positions of domestic and foreign civilians, namely: V.V. Luts, Ya.M. Shevchenko, D.V. Bobrova, K.I. Kucheruk, I.V. Borshchevskiy, A.H. Brun, V.A. Vasilyev, V.V. Vylezhhanina, M.K. Galiantych, O.V. Hlotova, V.V. Musiienko, R.A. Maidanyk, Ye.O. Michuryn, O.V. Nazarenko, V.Ya. Romaniv, I.V. Spasybo-Fatieieva, and others. At the same time, most of the research is fragmented. Therefore, it should be noted that in spite of the large number of scientific researches and developments of various scientific schools, the question of determining the moment of conclusion of the land plot lease agreement remains uncertain. In addition, law enforcement practices and the differing positions of the judiciary do not allow for a unified integrated approach to the subject matter.

Materials and methods

The basic principles presented in the paper and the results obtained in the process of scientific research were substantiated through the use of general scientific and special methods of scientific knowledge. Thus, to form a generalized view of the prerequisites for the formation of scientific opinions at the moment of conclusion of the land lease agreement, pre-revolutionary and Soviet scientific works, Soviet civil and land law were investigated with consideration of historical and comparative legal methods. The comparative method has also been used in comparing the positions of the scientific literature with the rules of civil and land law.

The dialectical method contributed to the research of the development of ideas about the agreement as a phenomenon at large and the land lease agreement in particular. Using the system-structural method provided the possibility of determining the place and role of the land lease agreement among other civil agreements related to land use, including the legal value of the moment of the land lease agreement for the further development of the relevant legal relations. The systematic analysis method was used to comprehensively investigate the signs of the moment of conclusion of the land plot lease agreement. The method of interpretation (literal, logical, systematic) came in handy in the process of analysing the content of acts of civil and land legislation and practice of their application.

The method of abstraction and generalization was used in the formation of the author's definition of the concept of "the moment of the conclusion of the land lease agreement". The prediction method was tested during the formation of the author's positions on the further reformation of the land lease legal relations. The application of the formal legal method was made in the process of creating proposals for improvement of the current legislation of Ukraine. Structural and functional method was used as a universal means of argumentation of scientific conclusions and development of scientifically grounded proposals for improvement of national legislation in the context of the outlined subject matter.

Results

The formation of private land ownership in Ukraine does not fully address the existing problems in land use; a large number of individuals and organizations, public entities – there is always a need to temporarily own land plots or lease them for income (compensation for maintenance costs)²⁰. That is why land lease has remained a popular form of organization of production and economic process. Modern reform processes in Ukraine provide opportunities and mechanisms for the formation of the land lease market as an integral segment of the common market for goods, works and services, and carry out a range of measures to expand land leasing opportunities²¹. In the legal aspect, the lease

²⁰ I.R. Kalaur, *Contractual obligations on the transfer of property for use in civil law of Ukraine: thesis of the doctor of law sciences*, Kyiv, 2015.

²¹ O. Khatniuk, "The dualism of the legal nature of land leases", in *Viche*, 2014, no. 14, p. 27-30.

relations are mediated, above all, by the provisions of the legal institution of the lease agreement. At the same time, the law enforcement practice in the field of land leasing shows that one of the most important problems in the agricultural field remains to be the issue of determining the moment of conclusion of a land lease agreement. The ambiguity of the identified issue leads to difficulties in interpreting the rules of law, variability of enforcement, facilitates raider attacks, minimizes guarantees of legal protection²², and is a prerequisite for other negative phenomena in law enforcement.

Despite the fact that the land has always had a special economic value, for a long time the national civilistic science has only fragmentarily studied the relations that exist regarding the land. During the formation of the newest civil and land law it was not possible to avoid collisions in the regulation of the same relations²³. The standards of these industries are not co-ordinated and contain some gaps and differences. The above confirms that the problems of legal regulation of the lease of land are relevant and practically significant for the national legal science, for the legislative regulation of the outlined relations, economic practice. As already mentioned, the moment of conclusion of the lease of the land plot is of great importance for the further construction of legal relations of the parties to such contract. Therefore, this issue requires urgent regulation at the legislative level. Phasing scientific and legal research requires urgent reference to the current legislation of Ukraine on the outlined issue. Since the investigated agreement is a transaction in which the parties define mutual rights and obligations, its validity requires observance of all legal requirements and the procedure of conclusion stipulated by the current legislation of Ukraine^{24,25}. Thus, the general procedure for concluding an agreement is regulated by the Civil Code of Ukraine (Articles 638-654 of the Civil Code of Ukraine)²⁶. At the same time, a special procedure for

²² N.Y. Iakymchuk, O. Vaitsekhovska, L.M. Kasianenko, A.O. Monaienko, A.K. Ilyashenko, "Legal frameworks and basic models of local guarantees: A comparative legal analysis", in *Asia Life Sciences*, 2019, vol. 21, no. 1, p. 509-526.

²³ V.Ya. Romaniv, *The lease of real estate under the civil law of Ukraine*, Ivan Franko National University of Lviv, Kyiv, 2015.

²⁴ V.V. Vylehzhnanina, "The order of conclusion of the land plot lease agreement and the moment of transfer of the leased object", in *Topical Issues of Public and Private Law*, 2015, vol. 3, no. 11, p. 82-90.

²⁵ N. Fedorchenko, I. Kalaur, "Legal regulation of obligations on service delivery in the context of the development of Ukraine's economy", in *Transition Studies Review*, 2017, vol. 24, no. 1, p. 71-85.

²⁶ Civil Code of Ukraine: Law of Ukraine No. 435-IV of January 16, 2003. Available at: <https://zakon.rada.gov.ua/laws/show/435-15>.

concluding a land lease agreement is regulated by Article 16 of the Law of Ukraine “On Land Lease”. In addition, Article 17 of the Law of Ukraine “On Land Lease” defines the procedure for the transfer of a leased property under an agreement. Furthermore, as defined in part 3 of Article 16 of the Law of Ukraine “On Land Lease”, the conclusion of a land lease agreement may be made on the basis of a civil contract or by way of inheritance. It is worth noting that the legislative definitions do not include references at the time of such a contract. To form your own position on this point, it is advisable to resort to doctrinal approaches on the outlined issue.

According to O.S. Borodovskiy, the process of concluding a civil law agreement is reduced to the legal and logical sequence of stages of establishing civil rights and responsibilities, which are realized through the actions of persons against each other and expressed in various ways of harmonizing the content of the agreement²⁷. From the standpoint of other scholars, the procedure of conclusion of the agreement is the sequence and methods of contractual relations stipulated by legal provisions, where, in their turn, a certain kind of actions become the means by which mutual agreement of the will of the parties is reached²⁸. Other sources refer to statutorily consolidate mutual actions of the parties to the other party, aimed at establishing contractual relations and determining the content of the contractual obligation²⁹. Therefore, the legal nature of the procedure for the conclusion of the contract lies in the recognition of its process of formation of will and its stipulation in the terms and conditions of the agreement as an arrangement. In the literature, the arrangement is considered as a joint volition (act of will)³⁰ or as an agreement of the will of the parties³¹. Thus, the specificity of the agreement is that it expresses not a sole or single (merged) will, but a certain multiplicity of separate

²⁷ S.O. Borodovskiy, *Conclusion, amendment, and termination of the agreement in the civil law of Ukraine: thesis of the candidate in law sciences*, Yaroslav Mudryi National Law University, Kharkiv, 2005.

²⁸ O.Yu. Yermakov, “Development of lease land relations of agricultural enterprises”, in *Land Management, Cadastre And Land Monitoring*, 2012, no. 1-2, p. 71-78.

²⁹ N.V. Ilkiv, “State registration in the field of land relations”, in *Public Law*, 2012, vol. 3, no. 7, p. 76-82.

³⁰ I.R. Kalaur, *Contractual obligations to transfer property for use in civil law of Ukraine: thesis of the doctor of law sciences*, Research Institute of Private Law and Entrepreneurship named after Academician FG Burchak of the National Academy of Sciences of Ukraine, Kyiv, 2015.

³¹ O.V. Shkilov, O.Yu. Yermakov, V.A. Yaroslavskiy, V.A. Tkachuk, O.D. Balan, M.I. Ibatullin, A.V. Kravchenko, L.V. Boyko, O.B. Shishova, *Rental relations in agricultural production*, Chetverta Khvylya, Kyiv, 2009.

wills, which are agreed in the act of agreement³². Pursuant to part 2 of Article 631 of the Civil Code of Ukraine³³, an agreement enters into force upon its conclusion. In accordance with paragraph 43 of the Model Lease Agreement, such an agreement shall enter into force upon signature by the parties. If the parties have agreed on the notarization of the agreement, such agreement shall be concluded from the moment of its notarization. It should be noted that in the old version of the Model Agreement, prior to the amendment by Resolution of the Cabinet of Ministers of Ukraine No. 843 of November 23, 2016 “On Amendments to the Model Land Lease Agreement”, there was a different position of the legislator, namely that the land lease agreement shall enter into force after signature by the parties and its state registration (paragraph 43).

It can be stated that the changes to the standard form of the contract produced more opportunities for the formation of differing approaches at the time of conclusion of the land lease agreement. O. Martynovskyi quite fairly points out that the fundamental date for the implementation of the terms and conditions of the agreement is not the date of agreement between all parties on all essential issues, but the moment of beginning and the end of the term (period in time) during which the parties are able to exercise their rights and perform obligations under such agreement. The outlined position is covered not by “the moment of conclusion of the contract”, but by the legal concepts “the entry into force of the contract” and “the contract is concluded for a term”³⁴. Considering the legislative regulation, it is worth noting that the land lease agreement is a consensual agreement, which is considered concluded since the moment of reaching agreement on all essential terms and conditions in the form stipulated by the current legislation of Ukraine. Therefore, it is advisable to factor in the division of agreements into real and consensual ones upon enforcement, which is essential for land lease agreements. Therefore, the entry of the agreement into force is a moment in time when the rights and obligations under the agreement take effect, that is, when the agreement (as the basis for the legal relationship and the written form in which the terms and conditions of the contract are consolidated) becomes the legal relationship, at the emergence of which the parties’ will was directed,

³² O.M. Nesterenko, “Problematic issues of lease land use”, in *State and Regions. Series: Law*, 2009, no. 4, p. 22-27.

³³ Civil Code of Ukraine: Law of Ukraine No. 435-IV of January 16, 2003. Available at: <https://zakon.rada.gov.ua/laws/show/435-15>.

³⁴ O. Martynovskyi, Some aspects of the legal regulation of the term of the land lease agreement, 2016. Available at: <https://sud.ua/ru/news/blog/98312-deyak-aspekti-pravovogo-regulyuvannya-stroky-d-dogovory-orendi-zeml>.

which is further consolidated in the terms and conditions of a specific agreement. It can be stated that the land lease agreement has been concluded since the moment of signing this agreement, but at the same time, it comes into force at the moment of registration of the land lease right. Therefore, the counting of the term of the land lease agreement begins after it enters into force, that is, after the state registration of the land lease right, and not from the moment of the conclusion of this agreement.

Evidence from the law enforcement practice, after the moment of conclusion of the agreement, the rights under the agreement may for various reasons not be registered for a long time, at the same time, the land can be cultivated, payment under the agreement be carried out, etc.³⁵. Obviously, in this regard, actions aimed at performing the agreement should be considered as such that confirm the conclusion of the agreement. Pursuant to the provisions on the freedom of agreement, the parties may, on their own initiative and by common agreement, settle the issue of determining the moment of the conclusion of the land lease agreement: either from the moment of signing, or from the moment of registration of rights or other action aimed at performing the agreement³⁶. If such a condition is not specified, then, proceeding from the foregoing, the agreement is concluded from the moment of registration or commission of actions under the agreement – payment or other actions for the performance of the agreement. However, in practice, cases often exist where the same person signs several agreements for the same land plot with different persons. Such cases have negative legal consequences, predominantly, for potential tenants, and therefore require a set of preventive measures while reforming the legislative provisions.

Thus, the definition of the term “moment of conclusion of a land lease agreement” is required, which in practice means the moment of signing such an agreement in view of its consensuality. It is advisable to emphasize that in the practice of domestic courts, cases of claims for violation of legislatively established or contractual terms upon concluding, performing, amending, and terminating the above agreements are not uncommon and are closely related to the determination of the moment of

³⁵ N.O. Kuchakovska, “Concerning the moment and legal consequences of invalidation of the land lease agreement”, in *Bulletin of the Ministry of Justice of Ukraine*, 2012, no. 8, p. 55-63.

³⁶ P.F. Kulynych, “Legal regulation of agricultural land leases on the basis of public-private partnership: ways to improve”, in *Agrarian, Land and Environmental Law*, 2013, no. 7, p. 76-82.

conclusion of the land lease agreement, and the judicial practice in such cases is formed by the court's unequal application of the same rules of civil law in similar legal relations. The issue of the moment of conclusion of the land lease agreement has differing approaches of the higher court, which indicates that there is no agreed position.

Thus, in 2013, the Supreme Court of Ukraine, in a decree of December 18, 2013 (Case No. 6-127цц13), clearly distinguished between the moment of conclusion of the agreement and the moment of its entry into force, noting that at the time of state registration the agreement enters into force (takes effect), the conclusion of which has already taken place, and such registration cannot change the moment of conclusion of the agreement³⁷. This position does not appear to be sufficiently substantiated and has repeatedly been criticized by jurists. The overwhelming majority of legal relations that are governed by the rules of civil law are relations wherein the legitimate behaviour of their subjects is ensured along with duly and complete performance of their subjective rights and their subjective obligations. Therefore, the terms in the relevant legal relations are the terms of the exercise of subjective civil rights and performance of obligations, which is why the agreement enters into force from the moment of its conclusion. Upon referring to the general rules of law, it should be noted that the moment of conclusion of the agreement is stipulated in Article 640 of the Civil Code of Ukraine and is related not only to the parties reaching an agreement on all its essential conditions and compliance with certain requirements, such as the transfer of property or other clearly defined action, but also to its notarization or state registration, if such a requirement is contained in special acts of legislation. Thus, the special Law of Ukraine "On Land Lease" states that a land lease agreement enters into force after its state registration (Article 18³⁸). In view of the above, it can be concluded that the parties to the land plot lease agreement had a direct right to indicate the moment of commencement and termination of the agreement under consideration, given the legal assertion of such rights in the general rules of national civil legislation.

However, if the parties do not stipulate such a condition as the moment of conclusion of the agreement, the land lease relations shall become subject to the rules of special legislation, which stipulates that the lease of the land plot comes into force after its state registration, which,

³⁷ Resolution of the Supreme Court of Ukraine of December 18, 2013 in the case No. 6-127цц13. Available at: <http://www.reyestr.court.gov.ua/Review/36475633>.

³⁸ On land lease: Law of Ukraine No. 161-XIV of October 6, 1998. Available at: <https://zakon.rada.gov.ua/laws/show/161-14>.

accordingly, will act as the moment of conclusion of the land plot lease agreement in accordance with part 3 of Article 640 of the Civil Code of Ukraine³⁹. It can be accepted as an axiom that to determine the beginning of the term and expiration of the land plot lease, not the moment of its signing is important, but the moment of registration actions, that is, entering the relevant data in the State Register of Rights to Immovable Property and Their Encumbrances as a unified state information system to which the law directly binds the entry into force of the agreement, namely the possibility of the parties exercising their subjective rights and obligations. As the moments of conclusion of the agreement and its entry into force coincide, then, in accordance with part 3 of Article 631 of the Civil Code of Ukraine⁴⁰, the moment of the conclusion of the land plot lease is its state registration or state registration of the lease right, unless otherwise provided for by the parties to the agreement. Thus, in the above-mentioned ruling of 18 December 2013 in case No. 1106/2791/2012 (proceedings No. 6-127HC13)⁴¹, the Supreme Court of Ukraine issued a conclusion which did not correspond to other legal positions of this court set out in cases concerning similar legal relations. Furthermore, such position constitutes a confirmation of the multivariate interpretation of substantive law regarding the moment of the conclusion of the land lease agreement and negates the attempts to build a harmonized law enforcement practice. A similar position was expressed in the opinion of O.M. Sytnyk, the judge of the Grand Chamber of the Supreme Court of Ukraine dated 15.02.2020⁴². It should be noted that the Supreme Court of Ukraine has repeatedly changed its opinion on determining the moment of conclusion of the land lease contract within a short period of time. At the same time, the European Court of Human Rights noted that one of the fundamental aspects of the rule of law is the principle of legal certainty, which, above all, requires that there is no doubt as to the final decision of the court (*Brumarescu v. Romania*, No. 28342/95, § 61, ECHR, 28 October 1999⁴³). Where differing practice occurs within one of the highest judicial authorities in the country, that court itself becomes a source of

³⁹ Civil Code of Ukraine: Law of Ukraine No. 435-IV of January 16, 2003. Available at: <https://zakon.rada.gov.ua/laws/show/435-15>.

⁴⁰ *Ibidem*, 2003.

⁴¹ Resolution of the Supreme Court of Ukraine of December 18, 2013 in the case No. 6-127HC13. Available at: <http://www.reyestr.court.gov.ua/Review/36475633>.

⁴² Separate Opinion of Judge of the Grand Chamber of the Supreme Court O.M. Sytnyk, 2020. Available at: <http://www.reyestr.court.gov.ua/Review/87888402>.

⁴³ *Brumarescu v. Romania*, No. 28342/95, 1999. European Court of Human Rights. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58337%22%5D%7D>}.

legal uncertainty, thereby undermining the fundamental principle of legal certainty and weakening, and in some places cancelling public confidence in the judicial system (Lupeni Greek Catholic Parish and Others Romania, No. 76943/11, § 123, ECHR, November 29, 2016⁴⁴. Court decisions must be reasonably foreseeable (S.W. v. The United Kingdom, No. 20166/92, § 36, ECHR, 22 November 1995⁴⁵). Therefore, an additional factor of actualization is the formation of a differing “authoritative interpretation” by the Supreme Court.

Thus, at first the Supreme Court of Ukraine stated that the conclusion of the court of first instance, with which the courts of appeal and cassation instances agreed, was erroneous, that the moment of conclusion of land plot lease agreements is the date of their state registration, since according to the said provisions of lease agreements and the Law Of Ukraine No. 161 XIV “On Land Lease” dated October 6, 1998⁴⁶, at the moment of state registration, an agreement, which has already been concluded, shall enter into force, and such registration cannot change the moment of conclusion of the agreement (Resolution of the Supreme Court of Ukraine dated 19 February 2014 in case No. 6-162ц13). Subsequently, in the ruling of the Supreme Court of Ukraine dated June 13, 2016 in case No. 6-643ц16 it concluded that the civil rights and obligations to which the parties had expressed their will during the conclusion of lease agreements were acquired after the relevant state registration. In view of the provisions of Article 638 of the Civil Code of Ukraine, Articles 125, 126 of the Land Code of Ukraine, the lease of the land plot comes into force from the date of its state registration⁴⁷. The opinion of the Supreme Court of Ukraine, cited in the last-mentioned resolution, has been repeatedly challenged by the Supreme Court, in particular, in the Supreme Court’s judgments within the panel of judges of the First Judicial Chamber of the Civil Court of Cassation dated 13 February 2018 in case No. 140/960/15-ц and of 15 March 2018 in Case No. 136/2211/15-ц. The Supreme Court ruling in the panel of judges of the Civil Court of Cassation of January 29, 2019 in case No.

⁴⁴ Lupeni Greek Catholic Parish and Others v. Romania, No. 76943/11, 2016. European Court of Human Rights. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-169054%22%5D%7D>.

⁴⁵ S.W. v. The United Kingdom, No. 20166/92, 1995. European Court of Human Rights. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57965%22%5D%7D>.

⁴⁶ On land lease: Law of Ukraine No. 161-XIV of October 6, 1998. Available at: <https://zakon.rada.gov.ua/laws/show/161-14>.

⁴⁷ Resolution of the Supreme Court of Ukraine of June 13, 2016 in the case No. 6-643ц16. Available at: <http://www.reyestr.court.gov.ua/Review/58434343>.

917/108/18⁴⁸ stated that the entry into force of the agreement is the moment when the rights and obligations under the agreement take effect, i.e. when the agreement, as the basis for the origin of the legal relationship and the written form in which the terms of the agreement are consolidated, becomes the legal relations at which the parties' declaration of will was directed. In the legal opinions of the Supreme Court of Ukraine set out in the rulings of February 19, 2014 in case No. 6-162цc13 and of June 13, 2016 in case No. 6-643цc16, which are also factored in and referenced in the Supreme Court ruling of March 15, 2018 Case No. 136/2211/15-ц (proceedings No. 61-5839цв18) also states that the moment of the conclusion of the lease of the land plot is the day when the parties reached an arrangement on the essential terms and conditions of the agreement and affixed it with their signatures, but the agreement shall enter into force at the time of its state registration. The Supreme Court of Ukraine has also substantiated another conclusion that the term of the disputed land plot lease agreement begins after it enters into force, and not from the moment of its conclusion (ruling of the Supreme Court of Ukraine of January 18, 2017 in case No. 6-2777цc16 and from June 07, 2017 in Case No. 6-872цc17).

However, given the controversial findings of the Supreme Court of Ukraine, the Grand Chamber of the Supreme Court departed from the findings of the Supreme Court of Ukraine and formed its own view of the issues outlined. Thus, the ruling of the Grand Chamber of the Supreme Court of January 15, 2020, in case No. 322/1178/17⁴⁹ stated that the land lease was actually concluded in 2007, however, it passed the mandatory registration procedure only in 2011, thereby causing the dispute over the term of the agreement, factoring in the moment of the lease of the land plot. In the specified circumstances, the court of first instance, with which the Court of Appeal agreed, stated that since the term of the lease of land concluded between the parties is calculated from the moment of its conclusion (from 2007) and not from the moment of its state registration (from 2011) year), after the expiration of this period the land shall be subject to return at the request of the owner. At the same time, in view of the specific provisions of the legislation, the Supreme Court stated that the contract shall expires from the moment of state registration.

⁴⁸ Resolution of the Supreme Court within the Board of Judges of the Commercial Court of Cassation of January 29, 2019 in case No. 917/108/18. Available at: <http://www.reyestr.court.gov.ua/Review/79657565>.

⁴⁹ Resolution of the Grand Chamber of the Supreme Court of January 15, 2020 in case No. 322/1178/17. Available at: <http://www.reyestr.court.gov.ua/Review/87857824>.

To determine the beginning and the expiry of validity of this agreement, of importance is not the moment of its signing, but the moment of committing registration actions, i.e. entering into the State Register of Rights to Immovable Property and Their Encumbrances as a single state information system containing information on real rights to immovable property, their encumbrances, subjects of property rights, technical characteristics of immovable property objects. This position is also correlated with the position stated in other Supreme Court rulings, stating that the moment when the agreement enters into force is the moment when the rights and obligations under the agreement take effect, that is, when the agreement, as the basis for the legal relationship, is expressed (executed) in writing, which consolidates the terms and conditions of the agreement, gives rise to legal relations, at the origin of which the will of the parties was directed upon concluding this agreement. Considering the sound scientific positions and practices of the judicial authorities, to avoid variant approaches to interpreting the legislative text and eliminating abuse of rights, it is appropriate and urgent to legalize the definition of “the moment of conclusion of the land plot lease agreement” at the legislative level, by which it is necessary to understand the moment the parties reach an agreement, in the form provided for by applicable legislation, for all the essential terms of the agreement, unless the parties have provided otherwise.

Discussion

In today’s context of increasing debate, the role of “exemplary decisions” of the Supreme Court in matters directly related to the determination of the moment of conclusion of the land lease agreement becomes more important. In particular, the positions of scholars and practitioners differ substantially, considering legal convergence, the latest tendencies in law enforcement practices and the necessity of ensuring uniform application of current legislation in the implementation of human and citizen rights protection. First of all, it is worth noting that judicial precedent as a source of law is not officially recognized in our country, the recent changes to the domestic procedural codes suggest the introduction of such a term as an “exemplary decision” of the Supreme Court. Thus, the Advisory Council of the European Courts also emphasizes that, regardless of whether precedents are considered as a source of law and whether they are binding, justification for their application, as compared to previous court decisions, is a powerful tool for the courts both in the

common and continental law system⁵⁰. The judicial practice of the domestic courts and the variability of the Supreme Court's positions have also gradually introduced the term "authoritative interpretation". According to the well-known American professor Frederick Schauer, such an interpretation of the law answers the request as to how the text of a regulatory act should be applied to specific facts and specific legal disputes⁵¹. Therefore, the question of how the Supreme Court's judgments are used in land relations is a very pressing issue. On the one hand, the "authoritative interpretation" of the current legislation by the Supreme Court introduces specifics, allows to eliminate the gaps and gradually form a unity in legal consciousness. Worthy of support is the thesis of the Judge of the Grand Chamber of the Supreme Court, D. Hudyma, who emphasizes that: "The Supreme Court, proceeding from the circumstances of the case, the substance of the disputed legal relationship and the content of the claims, provides a sample interpretation of the statutory order, which in turn, in accordance with the principle "stare decisis", requires that courts of lower levels are compulsorily included upon settling similar cases. Thus, the Supreme Court, by giving a narrow or broad interpretation of a statutory regulation, creates a new rule that has not been formalized before"⁵². Thus, the "authoritative interpretation" ensures the general binding nature of regulations in the field of land lease relations, equality before the law and legal certainty in our country, therefore, requires mandatory consideration in the law applicable, especially upon concluding land plot lease agreements.

However, this mechanism of interpretation of the rules of law also raises concern about the significant increase in the role of the judiciary in the national system of state power distribution. It also requires the flexibility of court decisions to properly ensure the declared principle of the independence of judges. Thus, in this context, it is quite reasonable to approve the case law of the European Court of Human Rights, in

⁵⁰ Consultative Council of European Judges (CCEJ). Opinion No. 20 (2017) on the role of the courts in ensuring the uniformity of the law, 2017. Available at: http://www.vru.gov.ua/content/file/%D0%92%D0%B8%D1%81%D0%BD%D0%BE%D0%B2%D0%BE%D0%BA_%D0%9A%D0%A0%D0%84%D0%A1_20.pdf.

⁵¹ F. Schauer, A critical examination of the distinction between interpretation and construction, 2019. Available at: <http://dx.doi.org/10.2139/ssrn.3356185>.

⁵² "The legislation of Ukraine does not enshrine the concept of case law, but that does not mean that it does not exist de facto", – Judge of the Grand Chamber of the Supreme Court Dmytro Hudyma, 2019. Available at: <https://court.gov.ua/press/news/659343/>.

particular in the cases of *Tomić and Others v. Montenegro*⁵³ and “*Nejdet Şahin and Perihan Şahin v. Turkey*”⁵⁴. In the last case, the court stated that different courts may reach differing, but no less rational and well-founded conclusions on a similar legal issue and in similar factual circumstances. Therefore, developing an effective mechanism for correcting the identified differences in legal positions and clearly regulating the “precedent interpretation of the law” in the current legislation will in their unity lead to a quality assurance of uniform application of the laws and the use of sustainable practice in land lease relations. In consideration of the foregoing, it can be stated that there is no single and substantiated position regarding the positive or negative nature of the Supreme Court’s “model decisions” in determining the moment when the land lease contract is concluded. At the same time, fears of scientists and practitioners regarding the transfer of the powers of the legislator to the judiciary in the disputed land law relations appear to be reasonable.

With the restoration of the civil law institution of private property, including land ownership, the transition of Ukraine to market economic relations significantly increased the role of agreements, which led to the emergence of new phenomena that intensified the use of modern legal mechanisms for regulating social relations, and, at the same time, complicated the problem of ensuring sustainability of land-related property turnover. Currently, our country faces the difficult task of completing land reform and creating a national land use system that would not only combine freedom of land ownership, its efficient use for its intended purpose, but also consolidate an effective legal mechanism for its distribution based on the principle of social justice. The study of law enforcement practice has demonstrated that in connection with the renewal of the system of legislation there is an objective necessity of theoretical analysis and scientific generalization of those legal mechanisms and specific legal provisions that are characteristic of a market economy. Among them, undoubtedly, one of the leading places belongs to land plot lease agreements. Characteristics of land lease, both in land and in civil legislation, make it possible to argue that the content of civil relations in

⁵³ Case of *Tomić and others v. Montenegro*. (Applications no. 18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09 and 7316/10). Judgment of European Court of Human Rights, 2012. Available at: <https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/18650-09-tomic-inni-v-czarnogora-wyrok-europejskiego-521241666>.

⁵⁴ Case of *Nejdet Şahin and Perihan Şahin v. Turkey*. (Application no. 13279/05) Judgment of European Court of Human Rights, 2011. Available at: <https://www.legal-tools.org/doc/d7b771/pdf/>.

the land sphere is of significant importance, and a comprehensive approach with the application of the rules of not only land law is needed to resolve issues of certain land use. This is especially concerns the determination of the moment of conclusion of the land plot lease agreement. The study of doctrinal and legislative approaches to determining the moment of conclusion of the land plot lease gives grounds to establish the existence of a gap in the legislation and the multivariate scientific approaches to the outlined problematics. In particular, recent legislative reform tendencies, including changes to special laws and the typical form of a land lease agreement, have complicated modern law enforcement and led to legal uncertainty and the promotion of abuse of land rights by their owners. Such a negative feature of modern leasehold land relations has become the subject of many lawsuits aimed at protecting the violated rights of land users.

The analysis of the judicial practice in the analysed category of cases indicates that the issue of the moment of conclusion of the lease agreement becomes relevant, as it depends on the moment of acquiring the right to use the land plot, including the resolution of the conflict between the two leases (registered and unregistered). At the same time, the study demonstrates that, over a short period of time, the Supreme Court has repeatedly modified its conclusion to determine the date from which a lease of a land plot is considered to be concluded, becoming an instrument of legal uncertainty. The lack of a unified and substantiated position regarding the positive or negative nature of the Supreme Court's "model decisions" in determining the moment when the land lease is concluded also remains debatable. At the same time, there appears to be a justifiable fear regarding the transfer of powers of the legislature to the judiciary in disputed land relations. Proceeding from the results of the conducted research and analysis of the law enforcement practice, it is proposed to legalize the author's definition of the term "moment of conclusion of the land plot lease agreement" in the special legislation so as to avoid differing approaches to the interpretation of the legislative text and eliminate the abuse of rights.