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Yuriy Fedkovych Chernivtsi National University, Chernivtsi

THE LEGAL REGULATION OF RETENTION UNDER THE NORMS OF CIVIL LAW IN UKRAINE AND OTHER COUNTRIES

In the article the basic states of national and foreign civil law, which regulates the legal nature of retention and its implementation as a kind of provision in fulfillment of obligations, are investigated.

Keywords: retention, obligations, enforcement of obligations, provision in fulfillment of obligations, civil law.

Formulation of the Problem. The requirements of modern civil society forced its members to use a significant number and variety of civil means to ensure their property interests and subjective rights and, ultimately, to the satisfaction of their material needs. The choice of a particular legal protection remedy of subjective civil rights is determined by a combination of various characteristics of such measures, the most important of which are efficiency, reliability, completeness, security, as well as the possibility of achieving the final purpose of the obligations – its fulfillment in kind. Achieving this purpose is intended to serve a subjective right of retention, which originates from the classic civil law formerly, and through the implementation of which the lender encourages the debtor to fulfill financial obligations and may even foreclose on the retained thing.

In the context of the study produced an equally important role and comparative legal analysis of legislative regulation of retention in the civil law of foreign countries, which determines the increase of international contacts among various participants of civil relations. Thus critical, complex and multidimensional assessment of the foreign law and the unified international standards will be useful to domestic legislation, ensuring the effectiveness of security obligations.

The analysis of recent research and emphasizing of unresolved problems. Among the modern jurist various aspects of retention in civil relationships, as a way to enforce the fulfillment of obligations, studied M. M. Agarkov, Ch. M. Azimov, M. I. Bragins`kyy, S. N. Bratus`, A. V. Venediktov, V. V. Vitryans`kyy, B. M. Honhalo, V. P. Gribanov, O. V. Dzera, T. M. Karnaukh, V. M. Kossak, N. E. Kuznetsova, I. M. Kucherenko, V. V. Lutz, D. Yu. Makarov, O. A. Pidoprygora, S. V. Sarbash, I.V. Spasibo-Fateeva, R. O. Stefanchuk, Ju. K. Tolstoy, S. Ya. Fursa, E. O. Kharitonov, Ya. M. Shevchenko, G. F. Shershenevich and many others. Despite the fact that modern researchers are paying attention to the investigation of retention institute, but there are still too many theoretical and practical problems associated with the implementation of this mean of enforcement in fulfillment of obligations in civil law. In addition, the complexity of the procedure of foreclosure of the subject on retention creates barriers to the effective application of security norms in general civil activities.

In view of the above, the **purpose** of this article is to mention the main shortcomings of the legislative regulation of the retention rights in civil legal relationships.

Presentation of the basic material. Circulation in civil law appears as a set of relations that exists within the subject of that branch in legal system, not only regulated with certain limits and ordered from the outside, but also mutual-connecting, self-organizing, tending forward to overcome their own instability. It can be argued that this is a consequent of the wide discretionary in contemporary civil regulation. Obviously, the secured obligations of separate participants in legal relationships has a positive effect on the civil turnover as a whole. And because of this, civil circulation is directly interested in the maximum security involvement all the possible legal means to ensure the fulfillment of obligations. It is very important that in the mechanism of civil regulation all the law measures are utilized according to their structures, which are set up in different legal systems specifically for the enforcement of obligations in legal civil contacts and usually are combined in a special institute of retention.

The modern institute of retention until recently was not directly regulated with the norms of civil law in Ukraine, but some of its elements can easily be found in other regulations, for instance, art. 163 Merchant Shipping Code of Ukraine contains the right of carrier to hold the cargo in case the other party avoids paying the bill. Incidentally, a similar approach knows Georgian legislature which is textually fixing retention (დაკავების) in the form of negation. Thus the art. 565 CC of Georgia (საქართველოს სამოქალაქო კოდექსი) states that the tenant of certain land has no right to retent it in order to satisfy his requirements *(დაკავების უფლების დაუშვებლობა მიწის ნაკვეთის*

დამჭირავებელს არა აქვს მისი დაკავების უფლება თავისი მოთხოვნების დაკმაყოფილების მიზნით) [5]. From reverse in the coverage of these issues goes the Swiss legislator, who in art. 716 CC of Switzerland (Schweizerisches Zivilgesetzbuch) provides that the items, that have been transferred with retention of title, may be returned to their owners only on a condition that they have paid a reasonable fee to the recipients and appropriate compensation (*Gegenstände, die mit Eigentumsvorbehalt übertragen worden sind, kann der Eigentümer nur unter der Bedingung zurückverlangen, dass er die vom Erwerber geleisteten Abzahlungen unter Abzug eines angemessenen Mietzinses und einer Entschädigung für Abnützung zurückerstattet*) [14].

The modern legal science knows several approaches to understanding the category "retention" in civil law that regards as different, sometimes opposite meanings: as mean of enforcement in fulfillment of obligations [13], as an institution of civil law [9, p. 85-88], as a subjective right [15, p. 24], as a one-way transaction [16, p. 10-11], as a means of operational impact [10, p. 9], as the only way of providing that arise directly from the law [1, p. 148] and others.

Common to all of these scientific understandings is that possession of retentional subject is actually the untitle property. Nevertheless the civil retention constantly follows the ownership of the retained thing and that's why the object of this right is always a certain individual thing. In this regard, there is obviously the need to expand legislatively the subject of retention to the category of "property" while the valid legal identification the subject of retention with the "thing" significantly narrows the scope of this method of enforcement in fulfillment of obligations.

In general the retention is initially programmed to claim unjurisdictional, operational and its independent implementation by the subjects of civil relations themselves. Civil court only plays the role of an official controller for the correctness of creditor actions post factum and only in the event of dispute.

As a way of ensuring the implementation of the commitments, retention can be applied cumulatively in conjunction with other types of inforcement of fulfillment of obligations. As a subjective right, the retention is characterized by the rights on their own and others' actions arising from the legal capacity of the participant in civil lawful relationships. In the interim limited capable and incapable persons can not be carriers of retention rights because they can not act as a creditor in commitments. In any case the retention is impossible if the thing stays at the debtor's possession.

Because this civil institute is characterized by unpredictability of its application by the retentor, based on the fact of default by the debtor to fulfill obligations in time, the right of retention is established directly in the norms of civil legislature and can be used outside of a individual agreements.

And international legal doctrine is also characterized by a wide variety of approaches to defining and understanding «retention» in public relations. Thus in civil law of the Netherlands the retention is used without prejudice to the possibility of an extended retention of title on the general conditions [8, p. 37]. Such a scientific understanding provides the possibility to compare the right of retention in the civil law with all relevant material and approximate institutes of Holland legal system, including the right to arrest a person for an offense committed, which was conducted by two Dutch researchers Constantijn Kelk and Miranda Boone [7, p. 325].

In the United States the complex phenomenon of retention is also studied from different points of view (not only from the legal jurisprudence) and can be analyzed like a short-term act in individual verbal items [11, p. 193-198] and a coercive retention in civil commitment evaluation [12] at the same time.

Unlike the wide-spread theoretical disputes, acting civil legislation of Ukraine contains an unequivocal understanding of retention institute, which notes that in case of a debtor's non-fulfillment in time of his obligation to pay for an object owned by a creditor, or to compensate to a creditor all the expenses thereof and other losses, a creditor that lawfully owns an object eligible to transfer to a debtor or to another person indicated by a debtor, shall have has the right of retaining an object until a debtor executes his obligation (p. 1 art. 594 CC of Ukraine).

The civil institute of retention is well known in the doctrine and legislature of foreign countries. In fact the RF Civil Code of Russian Federation (Гражданский кодекс РФ) contains the identical definition to domestic term. That`s why the art. 359 of which governs the retention (*удержание*) as follows: a creditor, who legitimates the object to be transferred to the debtor or to the person, which was specified by the debtor, is entitled to keep it up as long as the relevant obligation is not fulfilled by the debtor, in case of the default by the debtor to comply with obligations in due time or within the time for payment of compensation to the creditor its associated costs and other damages (*Кредитор, у которого находится вещь, подлежащая передаче должнику либо лицу, указанному должником, вправе в случае неисполнения должником в срок обязательства по оплате этой вещи или возмещению кредитору связанных с*

нею издержек и других убытков, удерживать ее до тех пор, пока соответствующее обязательство не будет исполнено) [4].

In addition, the art. 273 of German Civil Code (Bürgerliches Gesetzbuch) establishes the basic content of this institute (*Zurückbehaltungsrecht*) as the right of a party in civil relationships to hold the fulfillment of this obligation untill the execution will be received in his favor (*Hat der Schuldner aus demselben rechtlichen Verhältnis, auf dem seine Verpflichtung beruht, einen fälligen Anspruch gegen den Gläubiger, so kann er, sofern nicht aus dem Schuldverhältnis sich ein anderes ergibt, die geschuldete Leistung verweigern, bis die ihm gebührende Leistung bewirkt wird*) [2].

The regulations of a similar content are presentes in the Polish civil law (*prawo zatrzymania*). So, § 1 art. 461 the Civil Code of the Polish Republic governs that a person, who is bound to give someone else's object, can keep it until the satisfaction or securing of obligstions with asserting their claims for reimbursement of expenses in favor and damages caused by the thing (*Zobowiązany do wydania cudzej rzeczy może ją zatrzymać aż do chwili zaspokojenia lub zabezpieczenia przysługujących mu roszczeń o zwrot nakładów na rzecz oraz roszczeń o naprawienie szkody przez rzecz wyrządzonej*) [6].

However, many official sources of civil law in the foreign countries demonstrate the different approaches to textual regulation of this type of enforcement obligations from the standpoint of legislative technique, which helps to regulate the basic content and features of retention institute in civil law system of that particular commonwealth. Thus, the right of retention (droit de rétention) by the French civil code (Code civil Français) is determined through the list of people, who can implement a detention of such things in their lawful possession. Within the meaning of art. 2286, the retention right belongs to a number of people: 1) the one to whom the thong was referred until payment of the debt (*Celui à qui la chose a été remise jusqu'au paiement de sa créance* (тому, кому річ була передана до сплати боргу); 2) the one who has not received a payment under the contract on delivery of the thing (*Celui dont la créance impayée résulte du contrat qui l'oblige à la livrer*); 3) the one whose unpaid claims have arisen in connection with keeping things (*Celui dont la créance impayée est née à l'occasion de la détention de la chose*); 4) the one to whom belongs the right of a non-possessory pledge on this estate (*Celui qui bénéficie d'un gage sans dépossession*) [3].

Despite of textual and semantic similarity of retention in post-soviet and foreign countries there is still one important difference between them, which fundamentally changes the role and importance of this legal institute in various civil commonwealthes. The main fact here is that the doctrine of national civil law clearly understands retention as the part of the obligational law, while abroad this legal institute belongs to the estate rights in rem. From our point of view, these two approaches are not really contradictory or mutually exclusive, - such an ambiguous interpretation of investigated legal phenomenon is redundant confirmation of dualistic nature of retention in civil law, which makes this institute a universal mean of security.

Conclusions. Summarizing the analysis, conducted above, we believe that there are sufficient grounds to assert that despite minor differences in textual fixing of retention iInstitute in the civil codes of different countries (including Georgia, Germany, Netherlands, Russia, France, Switzerland, etc.), everywhere it has been used for a long time and plays an important role in the regulation of civil relationships. However, there is a great conceptual approach to the legislative regulation of the legal institute, which in the post-Soviet countries belongs to the law of obligations, and in the states of classical Roman-Germanic legal system is located largely in the field of property law, which makes a number of significant differences.

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О.В. Кіріяк

Правове регулювання притримання за нормами цивільного права України та зарубіжних країн

Аннотація

Розглядаються основні положення вітчизняного та зарубіжного цивільного права, які регламентують правову сутність і особливості застосування інституту притримання як різновиду забезпечення виконання зобов'язань.

Ключові слова: притримання, виконання зобов'язань, забезпечення виконання зобов'язань, цивільне право, цивільні правовідносини.

О.В. Кирияк

Правовое регулирование удержания нормами гражданського права Украины и зарубежных стран

Аннотация

Исследуются основные положения отечественного и зарубежного гражданского права, регламентирующие правовую сущность и особенности применения института удержания как разновидности обеспечения исполнения обязательств.

Ключевые слова: удержание, исполнение обязательств, обеспечение исполнения обязательств, гражданское право, гражданские правоотношения.