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PROBLEMS OF IMPLEMENTATION OF THE LESSOR'S SOME OBLIGATIONS UNDER THE LEASE AGREEMENT

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ABSTRACT

According to its subject, the history of the regulation of the leasing contract, which belongs to one of the types of contracts on the use of property, in the legislation and practice of Azerbaijan, is still short. So, when the Republic of Azerbaijan was part of the Soviet Union, this agreement was not in our legislation. This contract, which was implemented after Azerbaijan gained independence, was previously regulated by the Law on "Leasing Service" dated 1994. In practice, the first Azerbaijani leasing companies were established in those 90s. However, the law intended for the transitional period did not meet all the requirements, so it was soon repealed, that is, in the early 2000s. Currently, this contract is regulated by norms systematized in a separate chapter of the Civil Code of the Republic of Azerbaijan.

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Introduction.

As in any contract, the content of the lease agreement consists of the set of rights and obligations agreed upon by the parties in the contract. In the process of performance of duties arising from the leasing contract, a number of problems are revealed, and the legislator does not provide a clear answer to all of these problems. One of the first problems encountered is the fact that the responsibility for the ownership and use of the leased object by the lessee is the responsibility of the seller, not the lessor. In addition, it is also emphasized that the local legislator does not answer the question of what legal consequences the leased object is not given to the lessee for possession and use at the time stipulated by the contract. Another problem is the research conducted in the direction of answering the question of whether the contract price is one of its important conditions.

Methods of the paper.

Analysis, synthesis, induction, deduction, comparative analysis methods were used while writing the article.

Analysis of recent studies and publications.

During the research, a comparative analysis of normative-legal acts was carried out. For example, the relevant norms of the Civil Code of Azerbaijan with the legislation of the post-Soviet countries such as Russia, Ukraine and Kazakhstan, as well as the relevant legislation of the Netherlands, Spain and other European countries and the norms of the Ottawa Convention on International Leasing transactions were studied in a comparative manner. In addition, a number of legal scholars, for example:

Braginskiy M.I., Vitryanskiy V.V., Ugolnikova Y. V., Yegorova A. A., Belyayeva I. A., Seleznev M.D. etc. works were referred to.

Discussion.

There are various types of contracts in commercial circulation. Some of these agreements have been familiar to our national legislation since the last century, and some of them have been regulated in legislation and widely used in practice after Azerbaijan gained independence. The lessor and the lessee are the main participants in the relationship under the lease agreement. Article 748-1 of the Civil Code of the Republic of Azerbaijan is an article devoted to the rights and duties of the participants of the leasing contract.

As the first duty of the lessor in subsection 1 of that article:

1) the duty to present the leased property to the lessee in accordance with the terms of the lease agreement and the purpose of that property. In fact, Article 747 of the Civil Code, which provides for the concept of leasing, provides the following broad content: according to the leasing contract, the lessor is obliged to provide a certain item for the use of the lessee for a certain fee stipulated by the contract, for a certain period of time and under other conditions. As it can be seen, Article 747 of the Civil Code, unlike Article 748-1 of the Code, specifies the conditions under which the lessor must give the leased object to the lessee. In another norm of the Civil Code, i.e. Article 747-1.2, unlike the previous two norms, the duty of the lessor to give the thing as a leased object to the lessee for temporary possession or use is indicated. We think that the transfer of the object of the lease agreement from the lessor to the lessee during the period of validity of the agreement reflects the essence of the lease agreement. Providing the leased object for the sole use of the lessee does not fully reflect the nature of this contract.

There are interesting ideas in the legal literature about the rules for making the leased object available to the lessee. For example, M.I. Braginskiy and V. V. Vitryanskiy note that one of the most important terms of the leasing contract is the order of the leased object to the lessee (Брагинский М. И., Витрянский В.В, 2000, 601). That is, in the content of the contract, the duty of the lessor or the seller, who has signed a direct contract with the lessee, to hand over the leased object to the ownership and use of the lessee should be clear. Thus, the fact that the object of the contract was not given to the possession and use of the lessee, or that it was not given on time, would allow us to come to the correct conclusion as to who did not fulfill the contractual obligation. The Russian author Y. V. Ugolnikova, comparing the differences in the content of the private law on leasing with the Civil Code of the Russian Federation, notes that, depending on the mutual agreement of the parties, according to the private law, the seller is obliged to hand over the leased object either to the lessor or to the lessee in accordance with the terms of the contract. If such conditions are not defined, then the object must be handed over by the seller to the lessee at its location in accordance with the rules of the Civil Code on sale and purchase (Ugolnikova E. B. 2005, 22).

A. A. Yegorova also emphasizes that the obligation to transfer ownership and use of the leased object to the lessee is the responsibility of the seller, not the lessor (Egorova A. A. 2007, 28).

I. A. Belyayeva notes that since the leasing contract is a type of consensual contract, the obligation to transfer the leased object to the possession and use of the lessee arises when the lessor signs the contract with the lessee (Belyayeva I. A. 2005, 30).

Another Russian author I. V. Torres Ortega notes that under the lease contract, the lessor fulfills the contractual obligation to transfer the property to the lessor's ownership and use by purchasing the property from the seller, and thereby emphasizes that the obligation to give the property to the lessee belongs to the lessor. However, the same author adds in the next sentence that the lessor (purchaser of the sale) and the lessee act as a party to the obligation to the seller under the purchase and sale agreement of the leased property (Torres Ortega I. V. 2011, 20).

The Azerbaijani legislator has a clear position on this issue. According to Article 748-1.1 of the Civil Code of the Republic of Azerbaijan, the lessor must present the leased property to the lessee in accordance with the terms of the lease agreement and the purpose of that property. Therefore, according to the national legislation, the duty of giving the leased object to the possession and use of the lessee falls on the lessor.

Taking into account that the objects that are the object of the leasing contract are individual-specific items, it would be appropriate to pay attention to the norm on the consequences of non-fulfillment of the obligation to provide the individual-specific item in the general part of the Civil Code,

Article 452. According to that article, if the obligation to give the property of the creditor to the creditor or for its replacement use is not fulfilled, the creditor can demand that the property be taken from the debtor's hands and given to him/her under the conditions stipulated in the obligation. This right disappears if the property is transferred to a third party with the right of ownership. If the property has not yet been transferred, the creditor in favor of which the obligation arose earlier is preferred, and if it cannot be determined, the earlier claimant. The creditor may demand compensation for damages instead of demanding the delivery of the property that is the subject of the obligation.

From the content of the above final norm, it can be concluded that the lessor or seller who has not fulfilled the obligation to put the leased object into use by the lessee must give the object to the lessee upon the first demand of the lessee. If the leased object has been transferred to the ownership of a third party, then the claim will not be satisfied. In such a case, it can be assumed that the lessee is justified in demanding compensation for the damage caused to him/her for the period when the property was not given to him/her. According to Article 748-1.5 of the Civil Code of the Republic of Azerbaijan, when the leasing contract enters into legal force, the lessee (respectively, the lessor) must demand from the lessor (respectively, the lessee) the fulfillment of his/her obligations under the leasing contract, and if they are not fulfilled, the damage caused during the preparation for the acceptance of the leased object, if expenses were directly incurred for this preparation, the lessor (respectively, the lessee) has the right to demand payment through the court. It is clear from this norm that certain preparatory work is done when the lessee accepts the use and possession of the leased object. If this if the preparatory work is accompanied by a certain loss of time for the lessee or other organizational expenses related to the reception of the object, s/he can request them from the lessor.

However, it should be emphasized that the local legislature does not specify any norms in the relevant chapter about the legal consequences of not giving the leased object to the ownership and use of the lessee at the time stipulated by the contract. Considering this gap, we suggest adding a second sentence in the following version of 748-1.1 of the Civil Code: "if the obligation of the lessor to provide the object for the use of the lessee is not fulfilled, the lessee may demand that the property be taken from him/her and the compensation of the benefit lost" .

In general, in Article 748-1.1 of the Civil Code of the Republic of Azerbaijan, there are certain notes about some conditions that the leased object must meet for the use of the lessee. Thus, as specified in that norm, the lessor must present the leased property to the lessee in accordance with the terms of the lease agreement and the purpose of that property. In our opinion, the conditions to which the leasing object must meet can be considered as one of the important conditions of the leasing contract. As is known, every contract has important conditions. Article 405.1 of the Civil Code of the Republic of Azerbaijan states that the contract is concluded when the parties agree on all the important terms of the contract in the required form. Conditions related to the subject of the contract, conditions designated as important or necessary for contracts of that type in the Civil Code, as well as all conditions on which an agreement should be reached at the request of one of the parties are considered important. The conditions to which the leasing object must meet are also one of the conditions specified in Article 405.1 of the Civil Code, on which an agreement must be reached at the request of one of the parties.

The Russian author Y. V. Ugolnikova notes that if the terms of the leasing object's transfer to the lessee are not specified in the leasing contract, then the relevant norms of the Civil Code regarding the purchase contract can be applied (Ugolnikova Y. V. 2005, 22). Based on the content of Article 581.1 of the Civil Code of the Republic of Azerbaijan, we can point out the following demand made by the seller regarding the quality of the item to be given to the buyer:

First of all, the seller is obliged to provide the buyer with an item whose quality corresponds to the purchase agreement. If there are no conditions on the quality of the goods in the purchase contract, the seller is obliged to provide the buyer with goods suitable for the purposes for which such goods are normally used. If the buyer has informed the seller about the specific purposes of acquiring the item at the time of concluding the contract, the seller is obliged to provide the buyer with an item that can be used for those purposes. When selling an item based on a sample or description, the seller is obligated to provide the buyer with an item that corresponds to that sample or description.

In fact, there is a similar norm in the general part of the Civil Code. Thus, according to Article 364 of the Civil Code of the Republic of Azerbaijan, if the quality of performance is not defined in detail in the contract, the debtor must perform at least medium-quality work and provide medium-quality goods. It seems that according to the position of the Azerbaijani legislator, an item suitable for ordinary

use is considered as an item of average quality. However, in such a case, if the object that is the subject of the contract is of average quality, it will raise the question of whether it is in the interests of the buyer or the consumer. In our opinion, the legislator's position on an average quality item or an item suitable for ordinary use may not always correspond to the interests of the buyer (or consumer). Because the concept of an average quality item does not mean that the item is completely free from defects. It should also be added that the presence of some, even insignificant, defects or deficiencies in the item may lead to incurring certain costs related to its current repair in the near future. And if the legislator provides the party giving the item with the opportunity to give an item of average quality, then the buying party will completely deprive the seller of the opportunity to involve the seller in incurring costs related to the elimination of some defects that have arisen in the process of normal use of the item in the future. In our opinion, the legislator should add some specificity to Article 364 of the Civil Code. This issue is regulated in different ways in the legislation of other countries.

For example, according to Article 7:204 of the Civil Code of the Netherlands, defects in the leased object mean defects that hinder the purposes of its use, which the lessee hoped for when concluding the contract. Article 7:206 of the same source states that if defects are found in the item used under the lease agreement, the lessee may request the lessor to eliminate them or to incur costs for eliminating these defects. If the defects in the item belong to insignificant defects or arise as a result of the lessee's own actions, then the lessor has no obligation to eliminate these defects. (Dutch Civil Code).

The Spanish Civil Code also stipulates requirements that the leased object is suitable for the purpose of use under the contract. According to Article 1554 of that source, the lessor is obliged to carry out all the repair works required to keep the leased object in a usable condition for its purpose at its own expense. (Spanish Civil Code).

The Ukrainian legislator has established more specific rules regarding the quality of the leasing object. So, according to Article 808 of the Civil Code of that country, if the lessee has chosen the seller under the leasing contract, then the seller will be directly responsible to the lessee for defects or deficiencies in the leased object, otherwise, if the seller is found by the lessor, then the lessee will be responsible for the defects or deficiencies in the leased object. Both the lessor and the seller are jointly and severally liable to the lessee for defects (Гражданский Кодекс Украины).

Article 572 of the Civil Code of Kazakhstan regulates this issue in a completely different manner than the Civil Code of Ukraine. According to Article 572 of the Civil Code of Kazakhstan, even if the lessee is not a party to the purchase agreement concluded with the seller, s/he can file a claim directly against the seller due to the defects of the leased object. (д.ю.н., профессор К. М. Ильясова, А.Е. Дуйсенова Комментарий к § 2 «Лизинг» главы 29 Гражданского кодекса Республики Казахстан (Особенная часть)). In Article 641 of the Civil Code of Belarus, a norm with the same content as the norm provided for in the Civil Code of Kazakhstan is provided. (Гражданский Кодекс Республики Беларусь).

According to Article 8 of the Ottawa Convention on International Leasing Transactions, the lessor is liable to the lessee in the following case due to the poor quality of the leased object, i.e. if the lessee has been damaged as a result of choosing the seller or equipment by relying on the experience or information provided by the lessor or with his/her intervention is responsible. However, it should be added that the norm we refer to from the Convention is dispositive. (Unidroit Convention on International Financial Leasing).

The lessor is also obliged to give the object to the lessee free from the rights and claims of third parties. Thus, according to Article 8 of the Ottawa Convention on International Leasing Transactions, the lessor must guarantee to the lessee that during the contract period his/her ownership right will not be violated by another person who has a superior right of possession or claim. As an exception, such right or claim does not arise as a result of the lessee's own act or omission. (Unidroit Convention on International Financial Leasing).

The obligation of the party to provide the object free from the rights and claims of third parties under the contract is provided for in several chapters of the Civil Code of Azerbaijan. One of such norms is provided in the chapter regulating the purchase and sale contract. Thus, according to Article 572.1 of the Civil Code, the seller is obliged to provide the buyer with an item free from the rights of third parties, unless the buyer agrees to accept the item loaded with the rights of third parties. A breach of duty by the seller allows the buyer to choose one of the following two defenses:

- 1) reducing the price of the item or

2) gives the right to request the cancellation of the purchase agreement, provided that it is not proven that the buyer knows that third parties have rights to that item.

A similar norm is also reflected in the chapter regulating the contract of the Civil Code. Thus, according to Article 762.1 of the Civil Code of the Republic of Azerbaijan, the contractor is obliged to hand over to the customer the result of the execution, which is free from the rights and claims of third parties. In paragraph 4 of that article, the legislator emphasizes which item is free from the rights and claims of third parties. That is, if third parties cannot claim any rights against the customer, the result of the contract is considered exempt from the rights and claims of third parties.

Russian author M.D. Seleznev emphasizes that the price of the leased object is one of the important conditions in the contract (Seleznev M. Д. 2007, 26).

The issue of the price as one of the important terms of the contract could be explained from different positions. Considering that some contracts are gratuitous in nature, the stipulation of price in these contracts is not only not an essential condition, but its stipulation would be contrary to the nature of this type of contract, for example in a contract of donation or a contract of gratuitous use of property. In substitute contracts, the price must be agreed upon between the parties. As a general norm on the price of the contract, it is possible to refer to paragraph 1 of Article 398 of the Civil Code of the Republic of Azerbaijan. According to the mentioned norm, the performance of the contract is paid at the price determined by the agreement of the parties. In the cases provided by the law, the prices (tariffs, norms, rates, etc.) determined or regulated by the relevant executive authority are also applied. That is, the legislator considers it possible to determine the price under the contract both on the basis of the free will of the parties, as well as in some cases on the initiative of the relevant executive bodies. Taking into account that the uniform tariffs related to the price of leasing objects have not been determined by the relevant executive authorities, this issue is not relevant in this contract. In the other case, considering that the contract is the result of a mutually agreed expression of will of the parties, the price should be the amount offered by one party, and the other party unconditionally agrees to it. It is somewhat difficult to imagine situations in which the parties do not agree on the price in the leasing contract. However, even if such a situation has arisen, the legislator regulates such situations in Article 398.3 of the Civil Code. According to that norm, if the price is not specified in the exchange contract and cannot be determined according to the terms of the contract, the money for the performance of the contract should be paid at the price usually received for similar goods, works or services in comparable circumstances. In general, the agreement on the price of the leased object under the leasing contract goes through two stages between the parties. At the first stage, the sale price of the leased object is determined between the seller and the lessor, and at the next stage, the price at which the object is given to the lessee is agreed between the lessor and the lessee. However, taking into account that it is the lessee's responsibility to pay the usage (service) fee to the lessor for the leased object, we will examine this in more depth in the following pages.

One of the important conditions for the performance of the duty of the lessor to give the thing to the lessee under the leasing contract is to give the thing to the use of the lessee for a certain period stipulated by the contract.

The term category is a category of special importance in civil and especially contractual legal relations. Duration is also considered as a legal fact that can create legal consequences. So, in one case or another, the subject's failure to comply with the term requirement may result in the loss of certain rights. Azerbaijan Civil legislation clearly defines the times that indicate the beginning and end of the term. The time indicating the beginning of the period is defined in the Civil Code in two ways: by the calendar date, or by the day after the event determined for the beginning of the period. The expression of the occurrence of the event used in this norm also includes the performance of a certain action. In other words, the parties can predetermine in the text of the contract the exact calendar date indicating the conclusion of the contract or the exact date of the performance of a certain task under the contract. Or this period can be associated with the occurrence of a certain event (action). The expiry date can be calculated in years, months, quarters, weeks and days.

The term of validity of the contract is of special importance, since the leasing contract is also related to the types of contracts for the transfer of property from one subject to another subject, such as rent, lease, and property use contracts. In the leasing contract, the condition of the leased object being used for a certain period is specified in Article 747.1 of the Civil Code, which provides for the understanding of the leasing contract, as well as in Article 747-1.2. That is, the period of use of the

leased object by the lessee under the contract must be clearly defined in the contract. According to Article 748.2.5 of the Civil Code, the term of the lease agreement must be determined in the lease agreement along with other conditions.

In the 1990s, when leasing contracts were newly introduced in the territory of the former USSR, there was a tendency in the legislation to stipulate the period of commissioning of the object under the leasing contract with its depreciation period, which was ineffective. In such a case, the term of use of the leasing contract lasted for a very long time, and the number of persons wishing to enter into such a contract as a lessee was also very small. Such a trend was criticized in the legal literature. For example, the Russian author Y. Ugolnikova noted that not stipulating the period of use of the lease agreement with the depreciation period of the object would have increased the interest of the lessors in the direction of converting long-term loans into medium-term loans, and would have reduced the risks of the lessees under this agreement (Ugolnikova E. B. 2005, 22 p.).

Conclusion.

The Azerbaijani legislator does not specify any norm in the relevant chapter about the legal consequences of not giving the leased object to the ownership and use of the lessee at the time stipulated by the contract. Considering this gap, we suggest to add a second sentence in the following edition of 748-1.1 of the Civil Code: "If the lessor does not fulfill his obligation to provide the object for the lessee's gratuitous use, the lessee may demand that the property be taken away from him/her and that s/he be compensated for the lost benefit." Also, in the legislation of the Civil Code of Azerbaijan, providing the party giving the item with the opportunity to give an item of average quality will completely deprive the buyer of the opportunity to involve the seller in incurring expenses related to the elimination of some defects that have arisen in the process of normal use of the item in the future. In our opinion, the legislator should add some specificity to Article 364 of the Civil Code.

Declaration of Interest Statement.

The author declare that she has no conflict of interest.

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