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CONCEPT AND FEATURES OF THE MANAGEMENT AGREEMENT OF THE PROPERTY COMPLEX OF THE ENTERPRISE

Tetyana Mykolaivna HNATIUK[1]

Abstract

The article deals with the analysis of the concept of a management agreement with the property complex of an enterprise. It is also noted that the property management contract is a form of transfer of ownership of the owner, which constitutes the content of property rights (this is a feature of the contract). It was concluded that the contract of management of the enterprise as the only property complex is mutual, bilaterally binding, since the rights and their corresponding responsibilities are both sides - the steward and the founder of management.

Keywords*:*

The management contract; the property complex of the enterprise; property rights; the owner of the property; the manager; the manager of the management.

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Problem solving: In today's conditions for solving problems of economic reform, the importance of the study of the economic essence of transactions in the transfer of property to management. Proceeding from the fact that the Central Committee of Ukraine envisioned as the subject of a contract of management of property and enterprise, it should be considered that, by its typical affiliation, an enterprise management agreement is a kind of property management contract. There is even a point of view that from all objects of civil rights the enterprise is the most adequate for property management relations. today in practice it is relevant to conclude a contract of management of the business - the only property complex, since the subject of the contract is complex, covers all types of property intended for business purposes, including land, buildings, structures, equipment, equipment, raw materials, products, rights claims, debts, as well as trade mark rights, or other designations and other rights, unless otherwise provided by an agreement or law, therefore there is a need for more detailed interpretation and analysis of the concept of this agreement and the allocation of its features, which is the main problem in this article.

Analysis of recent research and publications. The given problem was engaged by scientists - lawyers, doctors of sciences and professors. It was studied in the writings of such famous Russian scholars as A. H. Golmsten, O. I. Kamink, G. F. Shershenevich, J. O. Pokrovsky, D. I. Meyer, P. P. Tsitovich, V. V. Rosenberg, whose views on the essence of the management contract of the property complex of the company did not always coincide, and sometimes characterized by uncertainty In Ukraine, this issue is very relevant and is being studied by such persons: Fedchyshina VV, SV Krivobok, Zinoviev Anna Vasilivna, Maydanik R.A., Kurpas Yu.V.

[1], Kossak V.M., Venediktova I. IN. and many others. All of them made a significant contribution to the jurisprudence, but the clear features of this contract are not fully disclosed.

Setting objectives. The purpose of the article is to reveal the essence of the concept of a management agreement with the property complex of the enterprise and to distinguish the features of this agreement and their partial characterization.

Presentation of the main research material. Property, as you know, loves the owner. But the owner and the owner are not the same, sometimes it is more profitable for the owner to transfer their property to the management of those who are well-aware in this business and to receive a guaranteed profit.In a market economy, the owner of a property complex of an enterprise does not always have the opportunity and relevant experience for the direct implementation of functions related to its use for business purposes. Civil law introduces a new type of contracts, through which the powers of ownership, use and disposal can be transferred to another person, remaining de jure owner of the property complex of the enterprise as an object of civil rights. The issue of involving a manager (managing company) in managing real estate objects is relevant in the event that such an asset is not a profile asset and if the owner of such property, for any reason, can not or does not want to engage in management property belonging to him. For example, many owners of trading, office and / or entertainment centers for various reasons, such as the reluctance to hold a large staff to manage such centers, prefer to assign responsibilities to their management in specialized companies. in real estate management.

The concept of a property management agreement is contained in the provisions of Art. 1029 of the Central Committee of Ukraine. Under the property management contract, one party (the manager of the management) submits to the other party (the manager) for a certain period the property in management, and the other party undertakes to pay for the payment on behalf of the management of this property in the interests of the manager of the manager or the person specified by him (the beneficiary).

From this definition one can distinguish the features inherent in the property management contract. Firstly, the contract of property management is a form of transfer of powers of the owner, which constitutes the content of property rights: the right to own, use the property to the proper owner.

Taking into account the peculiarity of the property complex of the enterprise as an object of civil legal relations, it may be the subject of contracts that mediate the transfer of property into ownership, use, management, etc. In this case, the transfer of property complex is de jure and de facto. The legal basis for the civilian turnover of the property complex of the enterprise is the contracts (transactions). Accordingly, the provisions of the law regulating certain types of contracts and transactions are valid for the turnover of a single property complex of the enterprise.

The features of a single property complex of an enterprise as an object of civil legal relations will predetermine the possibility of being the subject of contracts in the field of civilian turnover. The specifics of the company as a single property complex has an impact on the formation of the content of contractual relations. The subject of not all contracts may be

an enterprise as the only property complex. This is due to the characteristics of a single property complex as an object of civil legal relations. The subject of a property management contract may be an enterprise as the only property complex (Part 1 of Article 1030 of the Civil Code of Ukraine). Specific features of the enterprise as an object of civil rights require the definition of special rules on the turnover of such an object, including its transfer to management. Typically, an enterprise management contract is a type of property management contract, in which the manager manages the property in accordance with the terms of the contract, that is, it carries out legally significant actions in relation to it.

But before moving on to the characteristics of the contract for enterprise management, it should be noted that not all enterprises can be transferred to management. Thus, the integral property complexes of state unitary enterprises (state commercial and state enterprises) and communal unitary enterprises (communal commercial and municipal non-profit enterprises) can not be subject to the management agreement. This is explained by the fact that although there are different legal constructions in law, with which one can achieve the same result, but the use of any construction paralyzes the possibility of simultaneous application of another. The owner (a state, a territorial community) can dispose of its property, using all existing legal constructions for this purpose. However, by creating a state or communal enterprise, the owner already thus exercises the powers regarding the disposal of his property, incorporating it into a single property complex of a certain enterprise, choosing a way to manage a certain share of state or communal property. The relevant bodies, which are representatives of the owner (state, territorial community), perform their functions within the limits established by law (Articles 73, 74, 78 of the Civil Code of

Ukraine). Therefore, it is impossible to conclude a management agreement on the property complexes of the indicated enterprises, looking for effective managers, when there are already legitimate representatives for this. To conclude a management agreement is possible only after the termination of the activity of a state or communal unitary enterprise as a legal entity, but the subject of such a contract will no longer be an enterprise as the only property complex, but property that will belong either to the state or to a particular territorial community.

Legal form of transfer of property rights to a single property complex of an enterprise is a contract (transaction). The subject of the contract is an essential condition of any contract. As part of the legal relationship that arises on the basis of the contract, the regulation of relations with the transfer of property rights to the company as a single property complex is carried out. With the subject are certain features of civilian turnover.

Enterprise as the only property complex can not be transmitted as a single thing in kind. After all, this concept covers a set of property and non-property components that create a holistic object of legal relations. Therefore, the term of the transfer of the company as a single property complex is to some extent the nature of the fiction. Since such an act, the content of which is the transfer of rights, is reduced to the presentation of the relevant documents certifying the eligibility of the new right holder. In this case, the act of transferring property complex is based on the will of both parties to the contractual relationship. Given the presence of property and non-property elements of the company as a single property complex, the transfer of rights to it is associated with the moment specified in the contract or established by law.

The contract management of the property complex of the enterprise is characterized by the following features:

1) the transfer of an enterprise as a single property complex to another person is a form of exercise of the powers of the owner. The relationship between the property manager and his counterparty-manager is trusting and mediated by the management agreement: 2) the contract is the basis for the obligation relationship between the manager and the manager; 3) the manager owns, uses, disposes of the enterprise as the only property complex within the legal regime of trust property; 4) the manager can exercise the actual and legal actions for management of a single property complex of an enterprise in the interests of the manager of the installation or the beneficiary.

In general, the owner (authorized body) transfers to the manager, together with the enterprise as the only property complex, their powers of possession, use and disposal, the limits of which are defined in the management contract. The existence of the right of trust in the framework of the contractual structure of property management determines the need to clarify the legal nature of these relations. According to R.A. Maidan, trust management of property is a veryvariety of rights to someone else's thing, burdened with civil liability. Relations between the manager and the manager of the management are relative, because they are due to the existence of a binding legal relationship. However, since the trustee carries out the transferred property in the interests of the owner of the delegated powers to him, respectively, the relationship becomes a sign of absolute. It is hardly possible to agree with the fact that between the parties to this treaty there is a high degree of trust in each other, since the consolidation of the possibility of transferring the right to manage property to another person is destroyed

by the existence of a close personal relationship between the parties to this obligation.

IV Venediktova [2] attributes the features of this contract to the possibility for counteragents themselves to decide how to design a specific property management contract: payable or free, real or consensual, in favor of the manager of the installation or in favor of a third person. We believe that it is impossible to build a property management contract based on the model of a free-of-charge contract, as this contradicts the provisions of the current Central Committee of Ukraine, which provides for the payment of this contract (Article 1029 of the Civil Code of Ukraine).

According to V.V. Vityanskaya in case of transfer of the owner of the property in the management of the property management contract, the owner thereby implements his powers of possession, use and disposal. In this case, we are talking about the content of the authority of the manager. The conclusion of the owner of the property of the property management agreement and the transfer of property to management is a form of realization by the owner of his powers. At the same time, the owner does not transfer his powers to the manager, but only assigns him a certain range of responsibilities, concluding a contract management of property. At the same time, transferring property to management, the owner retains not only the right of ownership, but also all the powers. However, such an owner concluding the contract undertakes not to create obstacles to the manager in the performance of his duties under the contract.

Assessing the possibility of existence in the law of Ukraine of the Institute of Trust Owners IV Thank-Fateyev stresses that the design of trust is alien to domestic law, and the introduction of trust in the law destroys the

general principles of legal regulation of property rights as a single monolithic absolute right and serves as the basis for the concept of split property.

With such categorical conclusion can not agree. The right of trust is derived from the category of "property right". Passing the company as the only property complex in management, the owner transfers the authority to own, use the order. But the limits of the exercise of these powers are determined by the treaty. Therefore, the installer of management and the manager are in binding relationships. At the same time, the management agreement is a legal fact on the basis of which the transfer of ownership right to the trustee (trustee) takes place. As R.A. Maiden by nature, trust property is a proper trust owner with a dualistic title determined for the purpose of the real right to a trusted property fund burdened with an obligation to implement it exclusively or mainly in another's interest.

In our opinion, it is impossible to oppose the absolute and relative criteria for assessing the legal nature of relations with the management of the property complex of the enterprise. In the framework of the contractual construction of property management, the owner (authorized body) transfers to the manager the authority of ownership, use and disposal of a single property complex of the enterprise. The interest of the installer of management is to obtain for himself the maximum benefit from the functioning of the enterprise as a single property complex.

At the same time, the limits of the exercise of powers of the manager, concerning the possession, use and disposal of the enterprise as the sole property are determined in the management contract. But the contract can not envisage all the nuances of the current operation of the company as a single property complex with the greatest benefit to the manager of the installation or the beneficiary. Realization of powers of the

manager is carried out taking into account the legal regime of the object transferred to management. In this case, it is a matter of the real right of trust, which arose on the basis of a management agreement with the property complex of the enterprise. Such a design allows for the existence of two different types of real rights - the ownership of the manager of the trust and the trust of the manager in the same object of civil legal relations. This is due to the fact that under the contract of management of the enterprise as the only property complex it is impossible to allocate all issues of management of property and intangible components of a single property complex of the enterprise.

The contract of management of the enterprise as the only property complex is mutual, bilaterally binding, since the rights and their correspondent duties are both parties - the manager and the manager of the management. Traditionally, in the science of civil law, the exercise of subjective civil rights is seen as the realization of opportunities within the limits prescribed by law and the contract. In the exercise of subjective civil rights, the owner of the property complex of the enterprise has the right to independently or by providing the appropriate authority to the designated authority to conclude a management agreement. Subjective civil rights are the content of civil legal relations and belong to specific subjects - in our case - the head of the management and the manager. Elements of the mechanism for the implementation of civil rights are obligations that correspond to them.

The contract of management of the enterprise as the only property complex is the legal fact of the occurrence of a binding relationship between the owner (the authorized body) and the manager. The management agreement establishes a mechanism for the exercise of rights and obligations

of the parties on the basis of reciprocity. Thus, the contractual design implies the bilateral (reciprocal) nature of the exercise of subjective civil rights on the basis of the fulfillment of the corresponding right of duty.

In the Central Committee of Ukraine, a contract for the management of property is contained in the contracts for the provision of services. The service is inseparable from the activity of the person of the service provider (manager), since the useful effect of such activity does not appear in the form of a concrete materialized result, as is the case in contracts for the execution of works.

The contract of property management is an independent contractual way of realization of the right of ownership in someone else's interest, which is inherent in the trust relationship. It combines material and binding relationships. The relationship between the manager and the manager is obligatory. But as a result of the transfer to the manager of the company as a single property complex, the manager is delegated absolute legal relations, which are derived from the powers of the ownership of the founder of management. Civil law form of transfer of property in trust management is a contract of property management, which is an independent contractual type. The powers of the manager are determined not only by law but also by the contract with the manager of the management, which is the owner of the single property complex of the enterprise or its authorized person.

In the legal literature, the position that the property management contract is real is dominant. It is based, in particular, on the views of Russian experts in the field of trust management. Yes, MI Braginsky and V.V. Vitryansky, in his fundamental work on contract law, notes that if real estate is transferred under a contract, the moment of the conclusion of the contract is connected with the moment of the state registration of the

contract. The actual nature of the property management agreement is of some significance for the qualification of an existing obligation as an obligation to provide a service, since the scope of this obligation does not include the responsibilities of the head of the management to transfer the property to the manager, as is the case in all obligations aimed at the transfer of property: purchase, sale, donation, mine, loan, etc. According to L.Yu.Miheyev, this contract could not be constructed as consensual, since its subject is the actions of the steward, the realization of which is impossible without the possession of the property itself.

Thus, R.A.Maydnyk believes that the trust trust management agreement is real, unless otherwise provided by law or does not arise from the essence of these relations. In particular, the consensual, in his opinion, is a contract of trust management of state corporate rights, a contract of trust management of immovable property.

This position is respected by IV Venediktova, arguing that the property management contract is real, at the same time, it permits the possibility of recognizing a property management contract consensual, depending on the object over which the trust management is established, for example, the contract of trust management of state corporate rights, the contract of trust management of the property. In addition, it notes that the Central Committee of Ukraine does not contain norms that would provide that the transfer of property is a mandatory legal fact, which will be the basis for the emergence of legal relationships in trustee property management.

As we see, these authors do not exclude consensual criteria for characterizing a property management contract. But in Article 62 of Ukraine, as in most of the Civil Codes of European countries, the principle of consensual contractual law has been reflected. That is, the main precondition

for the conclusion of any agreement is to reach agreement (consensus) between the parties. In accordance with the provisions of the Central Committee of Ukraine, the manager has no right to demand from the installer of the management of the transfer of property to management. But this only indicates that he does not have such a right in accordance with the content of the contract and the provisions of the law.

Conclusion. Consequently, the Enterprise Management Agreement is a kind of asset management agreement characterized by the fact that its conclusion is preceded by an inventory of the enterprise, and the documents confirming the composition of this property complex are: an act of inventory, balance sheet, the conclusion of an independent auditor about the composition and value of the enterprise, and Also, a list of all debts (liabilities) that are included in the company, with indication of creditors, the nature, size and terms of their claims.The features of a single property complex of an enterprise as an object of civil legal relations will predetermine the possibility of being the subject of contracts in the field of civilian turnover. The specifics of the company as a single property complex has an impact on the formation of the content of contractual relations. The enterprise as the only property complex extends the general mode of turnover. Enterprise as the only property complex can not be transmitted as a single thing in kind.

The contract management of the property complex of the enterprise is characterized by the following features:

1) the transfer of an enterprise as a single property complex to another person is a form of exercise of the powers of the owner. The relationship between the property manager and his counterparty-manager is trusting and mediated by the management agreement: 2) the contract is the

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