

Tupitska Yevgenia

*Ph. D. in Law, Associate Professor,
Yaroslav Mudryi National Law University, Ukraine;
e-mail: evgeniya.ta@gmail.com; ORCID ID: 0000-0002-7484-9723*

Piddubna Viktoriia

*Ph. D. in Law, Associate Professor,
Yaroslav Mudryi National Law University, Ukraine;
e-mail: vitapdd@gmail.com; ORCID ID: 0000-0001-6532-9884*

Riabchenko Yaroslava

*Ph. D. in Law, Associate Professor,
Yaroslav Mudryi National Law University, Ukraine;
e-mail: slavohka@ukr.net; ORCID ID: 0000-0002-3132-3799*

GENEZIS OF LEGAL REGULATION OF CREDIT RELATIONS IN THE CONDITIONS OF TRANSITIVE ECONOMY OF UKRAINE

Abstract. The purpose of the paper is to analyze the genesis of credit legal relationship as the notion in Civil law as well as historical transformations of its legal regulation at the different stages of Ukraine's development. The survey is based on the use of a comparative method, the application of which allows us to compare Ukrainian laws with international crediting standards. The theoretical and practical recommendations on the improvement of law implementation and legal credit regulation are made. Results of the survey showed that the domestic legislation regulates the relations of consumer lending are more perfect in the field of consumer rights protection in comparison with other countries of the post-Soviet area. As for the EU countries, the legal regulation and practical application of the credit institution used by the participants in civilian circulation to meet their economic needs is deprived of those gaps existing in the domestic legal system. In particular, it is a question of the uncertainty in the Ukrainian legislation of issues related to the use of misleading advertising by banks concerning lending conditions, incomplete disclosure of information, difficulties encountered in assessing the borrower's creditworthiness, the status of a credit intermediary, establishing unfair terms of consumer credit agreements, imposing by banks and other institutions of additional and related services, lack of equal requirements to creditors, etc.

The change in the political and economic situation in Ukraine directly influenced the legislator's approach to the legal regulation of credit relations. The transition of social relations to the market economy has led to increased acquisition by the subjects of the civilian turnover of goods and services on credit. However, the current legal credit regulation does not always meet the requirements of practice. Ukrainian legislation has legal acts that regulate lending relations, but foreign practice of the separate credit institution has already deprived of those gaps that Ukrainian legal system still need to fill up. In order to eliminate the problems of legal consumer credit regulation it is necessary to bring the legislation of Ukraine into conformity with the best international practice.

Keywords: debt, debt liability, money, credit, bond, loan, credit relationship.

JEL Classification G28, K12

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 14.

Туницька Є. О.

*кандидат юридичних наук, доцент,
Національний юридичний університет імені Ярослава Мудрого, Україна;
e-mail: evgeniya.ta@gmail.com; ORCID ID: 0000-0002-7484-9723*

Піддубна В. Ф.

*кандидат юридичних наук, доцент,
Національний юридичний університет імені Ярослава Мудрого, Україна;
e-mail: vitapdd@gmail.com; ORCID ID: 0000-0001-6532-9884*

Рябченко Я. С.
кандидат юридичних наук, доцент,
Національний юридичний університет імені Ярослава Мудрого, Україна;
e-mail: slavohka@ukr.net; ORCID ID: 0000-0002-3132-3799

ГЕНЕЗИС ПРАВОВОГО РЕГУЛЮВАННЯ КРЕДИТНИХ ВІДНОСИН В УМОВАХ ТРАНЗИТИВНОЇ ЕКОНОМІКИ УКРАЇНИ

Анотація. Проаналізовано генезис кредитних відносин, а також історичні перетворення їх правового регулювання на різних етапах розвитку України. Дослідження базується за допомогою порівняльного методу, застосування якого дозволяє провести паралель українського законодавства з міжнародними стандартами кредитування. Результати дослідження показали, що вітчизняне державне регулювання кредитних відносин є більш досконалим у порівнянні із законодавством інших країн пострадянського простору. Що стосується країн Європейського Союзу, отримано висновок, що практика використання кредитування, яка здійснюється суб'єктами господарювання для задоволення своїх економічних потреб, уже позбавлена тих прогалин, які існують у національній системі. Зокрема, йдеться про невизначеність в українському законодавстві питань щодо наслідків використання фінансовими установами недостовірної інформації під час формулювання умов кредитування. Так, частими є випадки поширення несправедливої реклами банківських продуктів, неповного розкриття чи приховування певних умов кредитування, невизначеності статусу кредитного посередника, нав'язування банками додаткових та супутніх послуг до основного кредитування, відсутності рівних вимог до споживачів фінансових послуг тощо.

На підставі проведеного дослідження доведено, що зміна політико-економічної ситуації в Україні безпосередньо вплинула на підхід законодавця до правового регулювання кредитних відносин. Перехід суспільних відносин до ринкової економіки призвів до посилення придбання суб'єктами господарювання товарів і послуг у кредит, що, у свою чергу, вимагає приведення українського законодавства у відповідність з найкращою міжнародною практикою. Надаються науково-теоретичні та практичні рекомендації щодо вдосконалення застосування норм права, присвячених регулюванню відносин позики і кредиту на сучасному етапі розвитку вітчизняної економіки.

Ключові слова: заборгованість, боргове зобов'язання, гроші, кредит, облігація, кредит, кредитні відносини.

Формул: 0; рис.: 0; табл.: 0; бібл.: 14.

Тушицкая Е. А.
кандидат юридических наук, доцент,
Национальный юридический университет имени Ярослава Мудрого;
e-mail: evgeniya.ta@gmail.com; ORCID ID: 0000-0002-7484-9723

Поддубная В. Ф.
кандидат юридических наук, доцент,
Национальный юридический университет имени Ярослава Мудрого;
e-mail: vitapdd@gmail.com; ORCID ID: 0000-0001-6532-9884

Рябченко Я. С.
кандидат юридических наук, доцент,
Национальный юридический университет имени Ярослава Мудрого;
e-mail: slavohka@ukr.net; ORCID ID: 0000-0002-3132-3799

ГЕНЕЗИС ПРАВОВОГО РЕГУЛИРОВАНИЯ КРЕДИТНЫХ ОТНОШЕНИЙ В УСЛОВИЯХ ТРАНЗИТИВНОЙ ЭКОНОМИКИ УКРАИНЫ

Аннотация. Проанализирован генезис кредитных отношений, а также история развития их правового регулирования на разных этапах развития Украины. Исследование базируется с помощью сравнительного метода, применение которого позволяет провести

параллель украинского законодательства с международными стандартами кредитования. Результаты исследования показали, что отечественное государственное регулирование кредитных отношений является более совершенным по сравнению с законодательством других стран постсоветского пространства. В сравнении с законодательными системами стран Европейского Союза Украина отстает в практике использования кредитования, осуществляемого субъектами хозяйствования для удовлетворения своих экономических потребностей.

На основании проведенного исследования приводятся научно-теоретические и практические рекомендации по совершенствованию применения норм права, посвященных регулированию отношений займа и кредита на современном этапе развития отечественной экономики.

Ключевые слова: задолженность, долговое обязательство, деньги, кредит, облигация, кредит, кредитные отношения.

Формул: 0; рис.: 0; табл.: 0; библи.: 14.

Introduction. Economy of the developed countries is characterized by the domination of credit relationships. Embracing the total system of social reproduction, including production, distribution, exchange and consumption, they have penetrated deeply into international economic relations. The proper legal regulation of debt liabilities and the financial and credit system on the whole is a guarantee of the stability of the market economy as well as commodity-money circulation of any developed country in the world. Today there is a rapid development of lending, its volume increase and distribution in society. The said factors require a comprehensive research of the genesis of credit legal relations in Ukraine and the development of scientific recommendations for the improvement of domestic legislation in this area. The development of legal credit regulation in Ukraine is an integral part of the world historical transformation of credit relations; therefore, it is logical to begin studying the issue under discussion with the origin of this institution in the world economic systems.

Target setting. Taking into account the modern globalization of economic system of all countries, it is reasonable to study the best international practices of legal regulation in this sphere, to implement international crediting standards into Ukrainian laws.

Actual scientific researchers and issues analysis. The issues of improving the legal regulation of relations with the provision of financial services in Ukraine were highlighted in the writings of O. Baranovsky, N. Vnukova, O. Vovchak, O. Gamankova, V. Goncharenko, O. Zaletov, V. Levchenko and others. C. Gudhart, C. Ingves, C. Lentner, D. Matolchi, E. Niras, D. T. Tosomocos and others studied the study of the development of this institute in foreign law.

Uninvestigated parts if general matters defining. The research of these scholars does not allow us to conclude about genesis of the concept of credit relations, the historical transformation of their legal regulation at different stages of economic development of Ukraine, as well as the compliance of the norms of Ukrainian legislation with international standards in the field of provision of credit services.

The research objective. The article is intended to reveal the positive experience of economic-legal regulation of financial services in other countries of the world, the state of these relations at different stages of development of Ukraine, development of scientific and practical recommendations for improvement of the state policy in this sphere.

A prerequisite for the development of credit relations in their modern economic-legal sense can be considered the origin of borrowing relations (*mutuum*) in Roman private law. Banks currently engaged in providing financial services did not initially perform such functions. For example, in ancient Rome there were *argentarii*, i.e. a union of trading owners who set off mutual debt liabilities between customers and kept records of deposits and cash provided on loan (Shirshenevich, 2003). The transformation of banks directly into lending institutions dates back to the Middle Ages, in particular to the opening of the Amsterdam Bank in 1609. Consequently a real and unilateral loan agreement no longer met the purpose of banking service to administer credit

relations. It resulted in development of a complicated bilateral obligation, which involves not only the borrower's obligation to return the loan amount, but also the obligation of the bank to grant a loan. G. Dernburg commented thereupon, "loans are often preceded by contracts for loan transfer – *pacta de mutuo dando* and *pacta de mutuo accipiendo*. Both transactions are usually united in the one, but each of them has its own peculiarities. *Pactum de mutuo dando* – a contract for the transfer of things on loan – is based on the silently acknowledged condition that a borrower must be creditworthy when receiving it. Thus, this condition was provided for by the contractor, who promised to conclude a loan agreement, since the latter intended to grant a money loan, rather than lose it at all" (Denburg, 1904).

As for the promise of loan issuing, it should be noted that this transaction was eventually transformed into a loan agreement. The credit opening (*sui generis*), in the narrow sense of the word, is a promise to transfer, upon request and at the disposal of the counterparty, the funds specified in the agreement. So, the credit opening should be considered as an agreement on the implementation of a loan in the future, or a grant of loan on the specified terms (Shirshenevich, 2003).

Over time, in 1922 the Central Committee of the Ukrainian SSR adopted Article 218 stipulating a preliminary loan agreement. The credit reform of 1930-1931 led to introduction of the concept of a credit contract as an independent transaction in the civilian turnover, which differed from the loan agreement. Thus, Article 382 of the Central Committee of the Ukrainian SSR (hereinafter referred to as CC, USSR), 1964 regulated the lending to state organizations, collective farms and other cooperative and public organizations. This activity was carried out in accordance with the approved plans and by issuing purpose term loans by the State Bank of the USSR and other banks of the USSR as provided for by the legislation of the USSR. And in this, mutual lending to organizations in kind or in cash, including the issuance of advances, was allowed only in cases established by the legislation of the USSR. The conditions and procedure for lending by one collective farm of another for providing production assistance were authorized by the Council of Ministers of the Ukrainian SSR.

As we see, not excluding entirely the construction of a loan agreement for regulating credit relations, the legislation of the Soviet period compiled the disposition of Independent legal institutions, Art. 382, CC, USSR, 1964. As for lending to individuals, the relevant relations were regulated by Bank loans to citizens, Art. 383, CC, USSR, 1964 with a reference provision prescribing that loans granted to citizens are issued by banks of the USSR in compliance with the laws of the Union of Soviet Socialist Republics.

Significant changes in the development of the legal regulation of credit relations was significantly changed due to the adoption of [3] the Fundamentals of Civil legislation of the USSR and the republics (*Osnovi zcivilnogo zakanadelstva*, 1991). Accordingly, Art. 113 of the Fundamentals stated that under the loan agreement (credit contract), the lender (creditor) transfers possession of money or things determined by generic features (full economic management or operational management) to the borrower (debtor), and the latter undertakes to return the same amount of money or the same number of things of the same kind and the same quality in due time.

In the case of business loan the interest was charged as agreed upon by the parties. In the absence of the agreement, it was determined by the average interest rate of the bank at the location of the creditor. The loan to individuals was interest-free. All of this points to the fact that the terms of loan and credit were used as synonyms in the Soviet period. Over time, however, the independent legal nature of the credit contract and its distinction from the loan agreement has been increasingly supported in scientific legal publications. In particular, there are the following distinctive features of a credit contract: a special entity; the presumption of payment of credit services; the moment of occurrence of the parties' rights and obligations under the contract. Furthermore, a credit contract does not lose its generic relation to a loan agreement that allows of applying the general provisions on the loan agreement to the credit relations. Gradually, the approach was implemented for drafting the relevant chapters of the Civil Code of Ukraine in 2004 (*Zcivilny kodeks Ukrainy*, 2004). In this regard, it seems logical that Chapter 71 lacks for provisions on financial services.

Also, the Soviet period can be marked by the development of consumer lending (Postanova, 1954). The vast majority of loans were granted directly in kind owing to the instable financial system. The payment by installment for the purchase of housing was a common practice. One of the most common types of consumer lending was the sale and purchase of durable goods under the payment by installment. By contracting, citizens acquired household items, professional devices, agricultural equipment, and houses, cooperative and small enterprises.

Consumer cooperatives played a significant role in satisfying the lending needs of the population. There were two types of credit: small and long-term ones. Small consumer credit was granted for the purchase of food products and necessities, for a period not exceeding one month and at a rate not exceeding fifty percent of the salary. The responsibility for timely repayment of credit indebtedness was relied on the administration of the enterprise under the relevant agreement with the consumer cooperative. Accordingly, the debt repayment was at the expense of payments deducted from the borrower's wages and transferred to the consumer cooperative. Long-term credit was intended for persons who had shares in consumer cooperatives. At the expense of their funds, individuals satisfied their needs in consumer goods and household goods. Long-term consumer credits were issued by banks as well as by state-owned industrial enterprises. The latter provided a credit in commodity. The credit amount did not exceed one and a half months' earnings and six months of the repayment term (Postanova, 1958).

The cash credit was not common in the socialist period. In fact, the funds were granted for the construction and major repairs of individual dwellings, houses, cottages and improvement of individual holdings, for the purchase of livestock, etc. Banks lent at the expense of their available credit resources. It is important that the size of credits was approved in the annual long-term lending plans by the Council of Ministers of the USSR. However, the main resource of bank consumer lending was the return of previously granted credits. Accordingly, the Council plans provided for the terms and amounts of credit repayments.

It should be noted that consumer lending by banks was of a slightly different nature, since they rarely independently issued loans to citizens. There were always three parties where intermediaries were trade organizations, collective farms, state agricultural enterprises, and others. Savings banks were authorized to issue credits to citizens at the expense of available deposits. Nevertheless, under their agreements, the borrower did not obtain the funds in cash, but in the check of standard sample, that entitled the consumer to buy goods allowed for sale on credit within the credit limits.

As a result of independence of Ukraine and its transition to the market economy along with reforming of the banking system legal regulation of lending relations have undergone radical changes. At present, Ukraine has a developed banking system, including the National Bank of Ukraine; other banks (residents and non-residents, registered in accordance with the law of Ukraine); non-bank financial institutions exclusively authorized to accept deposits, make loans or keep customer accounts; Deposit Guarantee Fund; banking infrastructure, as well as relationships and agreements between them. It was the law of the USSR on banks and banking, 1991 that launched legislative support for the functioning of the Ukrainian banking system, although commercial banking institutions at the territory of Ukraine had operated even before that.

The essential point is that the Ukrainian legislation, in comparison with other post-Soviet countries, is characterized by regulation and development of the relations at issue. In particular, credit relations are regulated by the provisions of the Civil Code of Ukraine and the Laws of Ukraine "On Banks and Banking", "On Credit Unions", "On Financial Services and State Regulation of Financial Services Markets" (Zakon, 2002), and "On Protection of Consumer Rights" (Zakon, 1991), by the resolutions of the National Bank of Ukraine "On Approval of the Rules of Providing by Banks of Ukraine Information to the Consumer on the Conditions of Credit and Total Credit Value", to name a few. A special achievement of domestic legislation is the Law of Ukraine on Consumer Lending, November 15, 2016 (Zakon, 2017) aimed at establishing a mechanism of protecting the rights and legitimate interests of the participants in the relevant relations, creating

proper competitive environment at the financial market, increasing the level of public confidence in it, and providing favorable conditions for the development of Ukrainian economy.

The formation and development of legal science in Ukraine is integral and essential part of the world experience in the establishment of the rule of law. Today, there is an objective tendency for international cooperation to intensify and deepen in economic, political, cultural and other spheres. This necessitates mutual study of the experience of legal credit relations regulation taking into account the peculiarities of social development in certain states. In this regard, it is considered necessary to analyze the procedure of consumer credit regulation in the legislation and law practice of foreign jurisdictions.

In 1987, the special EU directive on consumer credit came into force, which sets requirements for the content of the credit agreement. So, in order to protect the rights of participants in these relationships, the contract must contain conditions for the actual amount of interest per annum, the conditions for their change, the terms of the amount, the number and frequency of payments, other costs that may be incurred in connection with the conclusion and performance of the contract, the information on the total amount of all specified payments, the terms of the elements of expenditure not taken into account when calculating the actual annual percentage, but subject to compensation by the consumer in the event of certain circumstances, and a list of such circumstances. Annex 1 of the Directive details the standard terms of various credit contracts as recommended for application in the national legislation of the EU Member States. For example, the indispensable terms of a credit contract concluded for acquiring goods and services are: the description of the goods and services being the subject matter, the price, the amount of the first payment, the total cost of the credit, number, frequency and amount of subsequent payments, indications that entitle the consumer to discharge the obligations before the date of expiry and therefore, obtain a proportional reduction in the cost of the credit, the name of the person who possesses the goods, on the conditions and the term when the consumer becomes the owner of the goods, the detailed methods of securing the credit obligation, the time limits for the consumer's withdrawal of the contract, etc. The overdraft credit agreements must also specify the maximum amount of the credit or the procedure for its determining, the conditions for its using and repayment, the time limits for the agreement withdrawal, etc. The Directive focuses on credit agreements aimed at purchasing goods, works and services by consumers. The detail regulation is provided for the case when the consumer obtains a credit under a pre-existing agreement between the creditor and the seller (supplier) of the goods (services) that prescribes granting credits to the consumers of the specified seller (supplier) in order to acquire the goods (services) of the latter. If the contractual goods (services) are not supplied to the consumer or their quantity or quality is not in compliance the contract terms, the consumer is entitled to apply to the creditor for redress (Article 11 of the Directive) (Direktiva, 2008).

Subsequently, many EU member states have implemented the Directive in national legislation by adopting special laws or amendments to the current regulations. Nevertheless, it should be noted that to date, the lending market in most European states has some pronounced domestic peculiarities owing to the national lending culture.

A pan-European feature of the credit regulation is that special legal acts embrace contractual obligations under mortgage credits. Moreover, it is common practice to formulate so-called general conditions of the contract, which become the key instrument for regulating the consumer services supplied by both financial institutions and non-financial organizations. The EU Directive and national laws set forth the requirements for the "general conditions".

The theory of general credit conditions dominates mostly in Germany, where the relevant law (*Allgemeine Geschäftsbedingungen der Banken*) was adopted in 1974. The law contributed to generalizing the established court practice of resolving credit-related disputes as well as established the standard wording of void contract terms. It is the Federal Union of German Banks, a non-profit organization uniting various credit institutions that develops general conditions of credit agreements in Germany. Most German banks apply the general conditions as their own local legal acts.

Having significant features of legal credit agreements regulation English law differs from respective legal acts in other jurisdictions. The law of 1974 thoroughly and sufficiently regulates every detail of a credit transaction. To take an illustration, it stipulates the title of the document, the print size, the degree of contrast between the print and the paper on which a contract is printed. In accordance with English law, a credit agreement must contain the conditions of the total credit amount, annual interest rate, credit repayment schedule, etc. Moreover, the specified items cannot be "mixed" with others, but should be located next to the document field intended for its signature by the debtor. In certain cases violations by the creditor of the legal requirements for the form and content of the contract entails the inability to enforce the credit agreement.

The essential thing about the law of United States of America (hereinafter referred to as USA) is that it has its own peculiar features of the legal credit regulation. The US banking regulation has a special sub-sector, Consumer Protection law, including four primary laws: the Uniform Consumer Credit Code (UCCC), The Truth in Lending Act (TILA), the Fair Credit Reporting Act (FCRA), and the Law on Equal Credit Opportunities (Equal Credit Opportunity Act (ECOA)). The laws establish "fair" rules for granting a credit and the maximum amount of credit payments as well as the sale of goods rules of installment and deferred payment, and special contract clauses, etc. A particular focus is on the methods of judicial protection of the creditor, and the cases where the court is empowered to discharge foreclosure and distress. The laws also secure the consumer rights of the advanced credit repayment without any extra charges or penalties; whereas, if all contractual charges have already been paid, they are subject to corresponding reduction. The US laws guarantee the right of the consumer to receive complete and accurate information on the credit terms. Specifically, the text of the contract must be clear and unambiguous.

The analysis above proves that the legislation of Ukraine regulating bank services is decades behind the leading countries of the world. All of this explains an appropriate desire of domestic legislators to bring legal regulation of the relations at issue in line with the European standards that is essential for implementing the national EU-integration policy.

Conclusions. All things considered are evident that the change in the political and economic situation in our country directly influenced the legislator's approach to the legal regulation of credit relations. The transition of social relations to the market economy has led to increased acquisition by the subjects of the civilian turnover of goods and services on credit. However, the current legal credit regulation does not always meet the requirements of practice. To date, Ukrainian legislation has legal acts that regulate lending relations, while in the EU countries, credit agreements have been regulated at the level of separate legislative acts since the previous century. Therefore, the foreign practice of the separate credit institution has already deprived of those gaps that Ukrainian legal system still need to fill up. In particular, it is a question of the uncertainty in the Ukrainian legislation of issues related to the use of misleading advertising by banks concerning lending conditions, incomplete disclosure of information, difficulties encountered in assessing the borrower's creditworthiness, the status of a credit intermediary, establishing unfair terms of consumer credit agreements, imposing by banks and other institutions of additional and related services, lack of equal requirements to creditors, etc. Analyzing these provisions, it should be noted that the legislation of Ukraine in the field of providing banking services lags behind the leading countries of the world for several decades. It is quite clear from this that the desire of domestic legislators to bring legal regulation of the studied relations closer to the European level is especially understandable today, when the implementation of the national strategy of European integration takes place. In order to eliminate the problems of legal consumer credit regulation it is necessary to bring the legislation of Ukraine into conformity with the best international practice.

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Рябченко Я. С.

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The article is recommended for printing 15.02.2019

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