

UDC 347.772

JEL Classification: D 23, E 22, K 11, L 21, O 34

*Khridochkin Andrii, Harmider Larisa, Lomakina Anastasia, Ivanova Marina***PROBLEMS OF APPLICATION OF A COMMERCIAL CONCESSION AGREEMENT IN THE PROCESS OF IMPLEMENTATION OF RIGHTS TO INTELLECTUAL PROPERTY OBJECTS IN BUSINESS ACTIVITIES****Ukrainian State University of Chemical Technology (Educational Scientific Institute "Ukrainian State University of Chemical technology"), Dnipro, Ukraine**

The article analyzes the actual problems of applying the commercial concession contract in the process of realizing rights to intellectual property objects in entrepreneurial activity. The theoretical principles regarding the determination of the legal nature of the commercial concession contract and the features of its application in the process of realizing rights to intellectual property objects in entrepreneurial activity are analyzed. An analysis of the current domestic legislation was carried out to determine the legal nature, purpose, essential features, subject matter and parties of the commercial concession agreement. It has been established that the purpose of concluding a commercial concession contract in the process of realizing rights to intellectual property objects in entrepreneurial activity is to assist in the promotion of goods (works, services) on the market by manufacturing and (or) selling a certain type of goods and (or) providing services. It is proved that the subject of the commercial concession contract is two-level – at the primary level, the element of the subject of the commercial concession contract is the actions of the right holder, aimed at providing the user with the opportunity to use the intellectual property rights belonging to the right holder in his entrepreneurial activity, and at the second level, the subject commercial concession agreement includes the right to use the object of intellectual property, which the right holder grants to the user. Attention is focused on the fact that an object of intellectual property becomes the subject of a commercial concession contract due to its own marketability, and its marketability is manifested in the consumer and exchange value of the object of intellectual property (private component), as well as in the presence of a legal regime defined by legislation of intellectual property objects, which establishes the rules for alienation of these objects, their circulation in the commodity turnover, which ensures a balance of private and public interests (public component). It is emphasized that under a commercial concession contract, the right holder does not lose his own intellectual property rights, but only transfers one of his own property rights – the right to use the object of intellectual property rights – to another person – the user. It was concluded that the establishment of legal relations resulting from the conclusion of a commercial concession agreement creates favorable conditions for the development of small and medium-sized enterprises and the attraction of investments in the national economy.

Keywords: commercial concession agreement, contractual relations, commercial concession, user, object of intellectual property, entrepreneurial activity, legal regulation, right holder.

DOI: 10.32434/2415-3974-2025-21-1-60-71

© Khridochkin Andrii, Harmider Larisa, Lomakina Anastasia, Ivanova Marina, 2025



This article is licensed under Creative Commons Attribution 4.0 International License (CC-BY)

Khridochkin Andrii, Harmider Larisa, Lomakina Anastasia, Ivanova Marina

Introduction and statement of the problem

Today's realities dictate the need to improve the process of legal regulation of various types of business activity in order to help domestic business recover in the post-war period and attract additional investments into the economy of Ukraine. A commercial concession has already proven its own profitability and is one of the most successful and profitable forms of business. The relevance of the development of commercial concession relations is determined by the fact that the use and spread of such a form of economic contractual structure as a commercial concession creates favorable conditions for the development of small and medium-sized enterprises, since the institution of a commercial concession is one of the most progressive forms of attracting investments and introducing innovations into the economy country. Due to these characteristics, the commercial concession contract has become widely used in international practice and is a recognized economic and legal mechanism for the activation of investment relations and an important tool for the implementation of the state's innovation and investment policy. Today, the commercial concession contract is gaining special importance in connection with its use as a way of commercializing objects of intellectual property rights, which, along with traditional goods and services, are becoming more and more relevant on the international and national markets. However, many issues regarding the legal nature of the commercial concession contract are still debatable today, and the institution of commercial concession in Ukraine itself needs a thorough rethinking and significant reformation, both theoretically and practically.

Analysis and research of publications

Many scientists, in particular, V. M. Alieva-Baranovska, T. V. Bachynskyi, V. S. Dmytryshyn, O. I. Ilyash, O. Yu. Kashintseva, I. I. Kylimnyk, O. M. Kucherenko, T. V. Malanchuk, N. F. Mentukh, Yu. S. Panina, O. O. Pidoprigora, V. F. Poddubna, A. S. Tsesliv, I. S. Yakubovskyi. In addition, the research of G. O. Androschuka, O. V. Hladkoi, O. M. Davidiuk, L. V. Erofeenko, O. Yu. Kariakina, H. V. Kikot, I. F. Koval, O. O. Ponomaryova, G. O. Sliadneva and others. However, despite the presence of a significant mass of scientific literature, the problems of implementing a commercial concession contract, unfortunately, have not been the subject of a special study. Existing scientific works reveal these issues only with a narrow branch purpose, without applying a corresponding complex approach. Therefore, the insufficient level of development of this problem at the theoretical level, as well as the absence of a corresponding comprehensive study,

determine the relevance of such research.

The purpose of the article

Study of topical issues of application of the commercial concession contract in the process of realization of rights to intellectual property objects in entrepreneurial activity and provision of relevant recommendations regarding the improvement of the current legislation.

Presenting main material

The majority of modern researchers recognize the commercial concession contract as an independent type of civil law contract [1; 2]. The very term "commercial concession" can be interpreted simultaneously as a commercial concession of the right to use objects of intellectual property rights, and as a commercial permission (analogous to a license) to use objects of intellectual property rights. Such a different content load of this term in practice can lead to different interpretations of the norms of the Civil Code of Ukraine, since the transfer of the right and the license according to the current national legislation are not one and the same. Meanwhile, from the content of part. 1 Art. 1115 of the Civil Code of Ukraine, it is clear that one party (the right holder) undertakes to grant the other party (the user) the right to use the set of rights belonging to it on the objects of intellectual property rights, and the second party – the user – must pay the right holder for the provided use of the right and use them in business activities for the production and (or) sale of a certain type of goods and (or) provision of services [3]. At the same time, the legislator established several essential features of a commercial concession contract. Therefore, the first sign of a commercial concession agreement should be recognized not as the transfer of rights, but as the "right to use" a certain object of intellectual property.

The second essential feature of a commercial concession contract is the transfer of the right of use for a fee. At the same time, the legislator does not specify the form of such payment, thereby giving the parties the right to resolve this issue by an agreement on virtually any form of payment. The practice of applying a commercial concession agreement shows that there are several ways to pay the remuneration (fixed one-time payment (lump sum payment), initial (advance) payment that is paid in installments, fixed periodic payments, deduction from the revenue received by the user, mutual accruals on the wholesale price of the goods sold by the right holder and the user, remuneration for advertising and promotion of goods and services on the relevant market, compensation for specific services of the right holder, etc.). At the same time, a lump-sum payment provides

for the right holder to receive a one-time payment for the right to use objects of intellectual property rights transferred to him. This payment actually represents a payment for services provided by the right holder for training and upgrading the qualifications of the user's employees. An initial payment can be used instead of a lump sum (which can include, for example, 20% of payments upon signing the contract and 20% after the completion of staff training). Fixed periodic payments are paid, as a rule, in the amount determined by the contract during the entire term of the contract in the form of royalties or service payments. Royalties, as the practice of applying a commercial concession contract proves, are quite often the main source of income received by the right holder. Deduction from revenue as a type of payment has its own advantages, allowing to bring the interests of the parties closer together, since, unlike a lump sum payment, with this method of calculating the remuneration, the rights holder's income directly depends on the user's activity in the exercise of intellectual property rights. This type of payment looks the fairest from the point of view of the user's interests as a method of calculation, because unlike a lump sum payment, which can have a significant amount, deductions from revenue do not require a significant use of the user's capital. At the same time, if the user is sure of successfully achieving a commercial goal thanks to the conclusion of the contract, he should avoid interest charges as a form of settlement under the contract. Reciprocal charges on the wholesale price of goods are one of the methods of settlement, if, for example, the patent owner receives his remuneration due to the sale of the user's goods at a higher price. This method of calculations can be unprofitable if the user has to pay high customs fees from the value of the goods imported from the country [4, p. 71]. Remuneration for advertising and promotion of goods or services on the market is used as an additional method of settlement with the right holder. For the successful operation of the user when using objects of intellectual property rights, the rights to which belong to the right holder, advertising becomes an important factor. That is why the commercial concession contract, as the practice convincingly proves, usually stipulates the obligation of the user to make appropriate expenses for advertising and promotion of goods or services in the relevant market.

Payments for advertising and promotion of goods and services on the market are essentially the use of a certain amount of money in order to ensure constant demand for the rights holder's goods and services. Provided that there is a system of contracts for the

use of relevant objects of intellectual property rights, the specified amounts can be distributed among users depending on the activity on the relevant market (local, regional, national or international). Remuneration for specific services of the right holder must be stipulated in the contract itself if the latter provides the user with additional services. These can be technical consultations, consultations on management organization, regarding the form and content of advertising. Sometimes in international commercial concession agreements, more specialized payments may be applied, which reflect the specifics of a particular agreement. It should also be borne in mind that the right holder not only receives income, but also bears certain expenses according to the legislation of Ukraine. They can be expenses for state registration of the contract, training of the user's employees, payment of supervisory staff, advertising, as well as payment of income tax and payment of value added tax, as well as advertising tax (as, as a rule, it is the right holder who is responsible for advertising his own trademark). Accordingly, he is the advertiser.

The third qualifying feature of the commercial concession contract, which allows it to be distinguished as an independent type of contract, is characterized by the transfer of a set of exclusive rights as the only subject of the contract aimed at achieving the purpose of the contract. Thus, the right holder, together with the right to use such a means of individualization as a trademark, also transfers the right to use the image, corporate style (brand complex of colors, the method of applying trademarks to goods, advertising, decoration of premises, etc.). The right to determine the requirements (conditions) under which the user acquires the right to use objects of intellectual property rights belongs to the right holder (the subject of intellectual property rights). At the same time, the current legislation of Ukraine does not specify the requirements (conditions) under which the right holder transfers his rights to objects of intellectual property rights for use. Information on the content of such requirements is contained in the articles of Chapter 76 of the Civil Code of Ukraine, although it is not exhaustive, since the legislator gave the parties the right to independently regulate relations between themselves. The requirements stipulated in the law and which can be included in the contract include instructions regarding the territory of use, the sphere of economic turnover, the right to enter into a commercial sub concession contract, the obligation to carry out state registration of the contract, the transfer of technical and commercial documentation, control over quality of goods, etc.

Having established the content of the commercial concession contract, the legislator also determined the purpose of its conclusion – assistance in the promotion of goods (works, services) on the market through the manufacture and (or) sale of a certain type of goods and (or) provision of services, that is, the scope of the contract can be both the sphere of production and the sphere of services. The user is usually the manufacturer of the specified goods and services.

Thus, the commercial concession contract acquires special importance, since it is designed to serve the process of production, trade and provision of services. In fact, it complements sales contracts, commissions, etc. Along with the right to use objects of intellectual property rights, and above all the commercial designations of the right holder, the user also receives his goods, production experience, etc. The right holder, in turn, expands the scope of sales, creates conditions for himself in the future to sell new batches of goods through the user. At the same time, the close connection of the commercial concession contract with other contracts does not mean that it is accessory to them. The derivative nature of the commercial concession contract has not a legal, but an economic meaning.

At the same time, the commercial concession contract certainly has many features in common with other contracts. Yes, the most similar to it is the license agreement on the transfer of the right to use objects of intellectual property rights. The main difference between them is that the purpose of the commercial concession agreement is the creation of new business complexes either for production and sale, or only for the sale of goods or the provision of services. License agreements are aimed exclusively at the use of individual objects of intellectual property law, regardless of the purpose of such use [5, p. 302]. In addition, the content of the commercial concession contract is not limited to the transfer of rights to the use of intellectual property rights, but additionally includes such elements as the provision of additional services to buyers (customers) that they could count on when purchasing (ordering in other words) goods (works, services) directly to the right holder. In contrast to the usual license agreement, in the case of a commercial concession agreement, the user in mutual relations with consumers actually becomes identical to the right holder.

Since the commercial concession contract formalizes the transfer of rights from one person to another, it is necessary to determine the differences between this contract and the transfer of rights.

Assignment of rights is a universal institution of obligation law and is used to secure the obligation's claim in the event that such claims can be separated from the creditor. However, the transfer of an absolute right by the specified institution is not formally covered. At the same time, the commercial concession agreement is a legal form of providing for the use of objects of intellectual property rights, which is inextricably linked to the person of the right holder. Transfer, as a rule, means the assignment of rights to the same extent as they existed with the creditor, therefore it is irrevocable. The concession of the claim for a certain period under the commercial concession agreement is not provided for – on the contrary, it is assumed that the right holder has a certain set of rights that are not transferred to the user. The rights transferred to the user belong to him within the term of the commercial concession agreement, and after the expiration of the commercial concession agreement, the transferred rights “return” to the right holder.

If payment in the form of a fixed one-time payment was chosen as the form of settlement in the commercial concession contract, it can be perceived as a sales contract. The difference between these contracts will be that, firstly, the subject of the contract of sale is things [6, p. 83], while the subject of a commercial concession agreement is the right to use objects of intellectual property rights. And secondly, under a sales contract, the object of the contract is always alienated, and under a concession contract, the rights remain with the right holder and do not pass to the user. If periodic payments are chosen as the form of payment under the commercial concession contract, it becomes similar to the property lease (lease) contract, since in both cases the objects of civil rights are transferred for temporary use for a fee. However, the subject of a lease agreement, unlike a commercial concession agreement, is things [7, p. 128], and not objects of intellectual property rights. In addition, the relationship between the lessor and the lessee is built according to a simple scheme - use for a fee, while the relationship between the right holder and the user is much more diverse in its content. But it can happen that the objects of intellectual property rights can indirectly become the object of a lease agreement - when leasing an enterprise, if the commercial designations of the enterprise are also transferred as part of the latter. However, in this case, we are talking about the lease of enterprises as a complete property complex, if the rights to objects of intellectual property rights are not an independent subject of the contract. Thus, the use of the subject criterion when

distinguishing commercial concession and lease agreements is fully justified. Similarly, according to the subject and content of the contract, a commercial concession contract should be distinguished from an assignment contract and a commission contract.

The subject of a commercial concession agreement is the right to use objects of intellectual property rights, commercial experience and business reputation [8, p. 128]. Accordingly, the subject of the performance of the concession agreement should be understood as intangible goods (objects of intellectual property rights, in connection with the transfer of the right to use which obligations arise). The complex of property rights of intellectual property transferred under a commercial concession contract may include both intellectual property rights to objects certified by a patent, certificate or other method (conventionally speaking, objects, the rights to which are registered), and objects, the acquisition of the right to which is not connected with their registration. These can be, in particular, commercial names, trademarks, inventions, utility models, industrial designs, objects of copyright and related rights, commercial experience and business reputation.

Since the right to use various objects of intellectual property rights can be transferred under a commercial concession contract, different conditions for acquiring legal protection and features of the protection of rights to such objects should also be taken into account, as well as their relationship with the right holder. For example, when transferring an intellectual property right to a commercial name, it should be taken into account that according to Art. 8 of the Paris Convention on the Protection of Industrial Property, legal protection of commercial names is carried out without registration of rights to them [9]. As for the trademark, the latter receives legal protection mainly on the condition that the rights to it are registered. The same applies to inventions, utility models and industrial designs. And such an object of intellectual property rights as a commercial secret cannot be the object of a commercial concession contract, since it can exist only within the limits of a specific enterprise, otherwise the information that constitutes it loses the status of a commercial secret. In view of what was stated in Art. 1116 of the Civil Code of Ukraine should be amended by removing the words “commercial secret” from the text. As for such an object as commercial experience provided to the user, it usually includes professional training of personnel, special instruction during the term of the contract on various issues related to economic activity and management, operation of equipment, management accounting and reporting, customer service, etc.

Business reputation cannot also be the subject of a commercial concession contract, as it is inseparable from the right holder, and only rights that have the status of alienation can be transferred under a commercial concession contract. Therefore, to the text of Art. 1116 of the Civil Code of Ukraine should be amended and the words “business reputation” removed. Such objects of intellectual property rights as a commercial name, which directly follows from part. 2 Art. 490 of the Civil Code of Ukraine, and geographical indication.

In accordance with the current legislation of Ukraine, the granting of the right to use objects of intellectual property rights may be the subject of other contracts that do not require registration. At the same time, an appropriate agreement between the parties is sufficient. A commercial concession contract as a legal form of transfer of the right to use objects of intellectual property rights, on the contrary, requires registration [10, p. 132]. The above indicates the existence of a certain conflict of legal norms regarding the requirements for the legal registration of the transfer of the right to use objects of intellectual property rights and the need to specify in Art. 1116 of the Civil Code of Ukraine is the subject of a commercial concession contract. In addition, between the provisions of Art. 1115 and part. 1 Art. 1116 of the Civil Code of Ukraine there is also a certain inconsistency. For example, when defining a commercial concession contract, we are talking about the transfer of a complex of powers, and in Art. 1116 of the Civil Code of Ukraine - only about the right to use objects of intellectual property rights. This inconsistency also requires a solution. Part. 1 Art. 1116 of the Civil Code of Ukraine does not contain instructions regarding types of commercial concession contracts. However, taking into account the fact that the direct subject of the contract may be rights to various objects of intellectual property law, which significantly affects the content of the contract (rights and obligations of the parties), there is a need to consider the main possible types of commercial concession contract. The first type of commercial concession contract concerns the sphere of product sales and, accordingly, is a form of conducting business activities related to the sphere of civil turnover. In this case, the specified contract can be used by the manufacturer of goods when building an extensive distribution network of such goods, the functioning of which is under his control. A commercial concession agreement can also be used for the transfer of exclusive rights to the sale of products produced by the right holder under its trademark in a specified territory - this is the second type of commercial concession

agreement. The main condition of this contract is the user's obligation to buy products only from the right holder and to completely refuse to sell similar products of other companies – competitors of the right holder. This type of contract is characterized by narrow specialization and receiving a fixed share of the total sales volume. The specified types of commercial concession contracts are used for the purpose of selling a certain type of goods. Today, the practice of using a commercial concession agreement as an agreement on the transfer of the right to manufacture and sell products, providing services under the trademark of the right holder with the use of patented production technology, materials, raw materials, etc. is well known – this is the third type of agreement that is widely used in the production of soft drinks. Another type of commercial concession contract, depending on the subject of the contract, is a contract that provides not only for the transfer of the right to use a trademark, but also for business technology that has been developed and tested by the right holder. This is the so-called "business complex" transfer agreement. The use of this type of contract ("business format") is more typical for enterprises of public catering, household rental, business consulting services for the public. In this case, the user undertakes to act in accordance with the market strategy of the right holder, while applying its rules of planning, management organization, compliance with technical requirements, standards and other conditions for ensuring the quality of the services provided, participation in production development programs, dissemination of experience, taking full responsibility for the results of one's own activities. The specified type of commercial concession contract provides for closer contact between the right holder and the user, constant exchange of information, careful regulation of the user's activities and a high degree of his responsibility. The transfer of the user's "business complex" involves not only his use of the objects of intellectual property rights, but also imposes on him the obligation to preserve the property rights of the intellectual property of the right holder and to protect against violations of these rights by third parties. Despite the fact that the use of the right holder's trademark also involves the use of his business reputation, the business reputation in itself cannot be the object of a commercial concession agreement, as it is by its nature an inalienable personal non-property right of the right holder.

It is known that trademarks have the ability to restrict competition: trademark protection is gradually shifting from preventing consumer entanglement to protecting the presumed interests of firms. The legal and economic aspects of excessive trademark protection

are discussed in [11]. The particular danger of these misapplication, associated with the restriction of competition, lies in the risks of monopolization under conditions of high prices for licensing the relevant intellectual property objects. In contrast to these trends, in our opinion, the transfer of a "business complex" under a commercial concession agreement to a user should stimulate the promotion of innovations and improve the business environment. Such unconditional macroeconomic advantages, however, are the basis for the emergence of other specific risks between the contractual partners regarding intellectual property rights [12]. In such circumstances, it is the commercial concession agreement (or franchise) that acts as a means of minimizing risks. The compensatory effect of the franchise lies in the interorganizational cooperation of the contractual partners, where control acts as a tool for joint economic decision-making and problem solving.

A commercial concession contract may provide for the use of the subject of the contract in a certain area of economic turnover, with or without specifying a certain territory of use [13, p. 54]. The inclusion of such restrictions in the text of the contract allows the right holder to use his intellectual property rights independently or with the help of a concession contract concluded with other subjects outside the sphere of activity (territory) of the user determined by the contract.

The parties to the commercial concession contract are the right holder and the user. The circle of persons who can act as a party to the specified contract is limited. One of the features of the commercial concession contract is that only business entities – commercial organizations and citizens registered as individual entrepreneurs – can be parties to the contract. According to the current legislation of Ukraine, entrepreneurial activity is an activity aimed at obtaining profit. Individuals with full civil legal capacity and legal entities have the right to carry out business activities that are not prohibited by law. Restrictions on the implementation of entrepreneurial activity are established only by the Constitution of Ukraine and the laws of Ukraine. A natural person is recognized as an entrepreneur, and accordingly exercises his own right to entrepreneurial activity, only on condition of his state registration in accordance with the procedure established by law. In the absence of state registration, a person who has started a business and entered into a commercial concession contract does not have the right to challenge this contract on the grounds that he is not an entrepreneur, and the contract itself may be declared invalid as contrary to the requirements of the law. since in this case one of

the parties will be recognized as inappropriate. Legal entities that carry out business activities for the purpose of obtaining profit and its subsequent distribution among the members of the company can be created only as economic companies or production cooperatives. Based on the content of Art. 1117 of the Civil Code of Ukraine, parties to the contract cannot be legal entities that are non-entrepreneurial societies that do not have the purpose of obtaining profit for its subsequent distribution among participants. Legal entities that have the status of non-profit organizations, such as scientific institutions, cultural institutions, educational institutions, should also be included among the subjects that cannot be a party to a commercial concession agreement. The legislation of Ukraine allows non-entrepreneurial societies (consumer cooperatives, associations of citizens, etc.) to carry out entrepreneurial activity, but such activity is carried out alongside their main activity, provided that the law does not contain a direct prohibition of its implementation, and entrepreneurial activity corresponds to the purpose for which non-entrepreneurial societies were created and contributes to the achievement of such a purpose. Institutions created by one or more persons (founders) who do not take part in its management by combining (separating) their property to achieve the goal determined by the founders at the expense of this property. Thus, parties to a commercial concession contract can only be such legal entities that carry out entrepreneurial activity and belong to legal entities under private law. The right to conclude a contract arises from the moment of state registration of a legal entity or an individual entrepreneur.

If it is assumed that the subject of a commercial concession agreement may be rights to works, i.e., copyright objects, then the party to the commercial concession agreement will be a secondary subject of intellectual property rights. Regarding the right to objects of intellectual property rights, in respect of which the law does not provide for the right of authorship, the parties to the commercial concession contract will be legal entities that are the primary subjects of intellectual property rights [14, p. 119].

The right holder is the person who owns intellectual property rights to the objects of intellectual property rights, which he allows the user to exercise. Undoubtedly, such a person must be legalized in a certain way as a subject of intellectual property rights. The right holder must be an entrepreneur, which involves the use of objects of intellectual property rights in the course of his commercial activity. However, the law does not require that the rightsholder acquires rights to objects of intellectual property rights

if he already has the status of a business entity.

In fact, the user looks more "weak" in legal terms as a party to the commercial concession agreement. To strengthen his position, the current legislation of Ukraine establishes certain restrictions that apply to the right holder both during the conclusion of the contract and during its execution. For example, in the event of termination of the contract, the user may suffer significant losses. In order to protect his property rights, the Civil Code of Ukraine established a number of guarantees. In particular, the transfer of the right to objects of intellectual property rights defined in the commercial concession agreement from the right holder to other persons is not a reason for changing or terminating the commercial concession agreement. In the event of a change in the trademark or other commercial designation of the right holder, the commercial concession agreement applies to the new commercial designation, unless the user requests termination of the agreement. Finally, the user, who has properly fulfilled his duties, after the expiration of the commercial concession contract, has the right to conclude a contract for a new term and on the same conditions. At the same time, the legislation also established separate guarantees for the protection of the rights of the right holder. For example, since the user carries out business activities under the name of the right holder, which may, under certain conditions, harm his business reputation, the Central Committee of Ukraine provided an imperative norm, which established the user's duty to ensure the appropriate quality of the product, as well as to follow the instructions of the right holder.

The legislation of Ukraine provides for special requirements for the conclusion of contractual relations, the fulfillment of which is mandatory. The purpose of establishing these requirements is to ensure that in the future there are no grounds for disputes regarding the very fact of concluding the contract and its content, as well as to provide greater certainty and clarity to the relations of the parties. The first requirement for the execution of a commercial concession agreement is to adhere to a simple written form of the agreement. The contract is considered to have been concluded in writing if its content is recorded in one or more documents, letters, telegrams exchanged by the parties, or if the will of the parties is expressed using teletype, electronic or other technical means of communication. General requirements for the written form of the deed are established by Art. 207 of the Civil Code of Ukraine, which equally apply to the form of commercial concession agreement. The conclusion of a contract in oral form is excluded, since in this

case the contract will be recognized as null and void, that is, one that does not generate any legal consequences for the parties. However, according to part 2 Art. 218 of the Civil Code of Ukraine, if the deed in violation of the requirements of the law is concluded orally, not in writing, and one of the parties has committed the act, and the other party has confirmed its commission, in particular by accepting execution, such a deed may be recognized by the court as valid in the event of a dispute. The requirement regarding the written form of the commercial concession agreement is connected, firstly, with the fact that its parties are the subjects of entrepreneurial activity – participants in civil turnover, who are obliged by law to ensure accounting of all economic transactions they have made [15, p. 127], and secondly, the commercial concession contract is subject to state registration.

The second requirement for the registration of contractual relations is the mandatory state registration of the commercial concession contract. The legislation defines the registering body as the body that carried out the state registration of the right holder. Enshrined in Art. 1118 of the Civil Code of Ukraine, the provisions on state registration of a commercial concession contract give the fact of contract fixation a public character. State registration of a commercial concession agreement should ensure state control over compliance with the requirements of a transaction in the interests of third parties and assistance to the parties in understanding the legal consequences of their actions, as well as obtaining information by interested parties about concluded commercial concession agreements.

At the same time, the procedure for state registration of a commercial concession contract has negative features – it leads to an extension of the terms of contract execution and imposes additional costs on the parties. This part of Art. 1118 of the Civil Code of Ukraine, in our opinion, is not sufficiently clearly formulated, as it does not contain any indication of which body should be taken into account. Is it about the registration of a legal entity or a natural person – an entrepreneur, or is it about the registration of rights to objects of intellectual property rights, and, accordingly, the issuance of security documents to the person identified in the application as the applicant? Subjects of law are recognized as the proper party to the commercial concession contract, provided that they are registered as an individual entrepreneur or as a legal entity engaged in entrepreneurial activity. It can be assumed that in Art. 1118 of the Civil Code of Ukraine, the legislator

had in mind the bodies of the executive power, which carry out exactly such registration of legal entities – parties to the contract. In favor of this hypothesis, the provision of part. 3 Art. 1118 of the Civil Code of Ukraine, according to which, if the right holder is registered in a foreign country, the registration of the commercial concession contract is carried out by the body that carried out the state registration of the user. If the right holder must have the status of the subject of intellectual property rights, then the user may not have such status before concluding the commercial concession agreement. That is, one can speak only about the bodies of registration of business entities. At the same time, the subject of the commercial concession agreement is the right (complex of rights) to use objects of intellectual property rights, and in this case, it is logical to assume that in Art. 1118 of the Civil Code of Ukraine refers to the state registration of a party to a commercial concession contract as a subject of intellectual property rights. State registration of subjects of intellectual property right actually takes place upon receipt of a protective document for the object of intellectual property right – a patent or a certificate. At the same time, the subject of a commercial concession contract may be rights to works, which is already a branch of copyright, the primary subject of which is the author (creator) of the work. But, as we have already noted, the party to the commercial concession contract can be only entrepreneurs who are not just natural persons – creators, but can acquire intellectual property rights to the corresponding work under the contract. However, the legislation of Ukraine does not establish the rule of mandatory registration of the contract according to which the interested person acquires intellectual property rights to the work. Nor does the provision of Art. 210 of the Civil Code of Ukraine, which by its nature is blanket and only indicates that the list of bodies that carry out state registration, the procedure for registration, as well as the maintenance of relevant state registers is established by law. From this it can be concluded that part. 2 Art. 1118 of the Civil Code of Ukraine requires clarification at the legislative level. The relevance of the settlement of the specified problem is also due to the fact that changes to the commercial concession agreement and the sub concession agreement are also subject to state registration [16, p. 228].

The legislation of Ukraine should regulate not only issues related to the definition of the registration body, but also the procedure for state registration, including the conditions for its refusal. Ch. 2 Art. 1118 of the Civil Code of Ukraine establishes the

rule of registration of a commercial concession contract, which differs from the similar rule established by part 2 Art. 1118 of the Civil Code of Ukraine. If, in accordance with this part of the article of the Civil Code of Ukraine, the obligation to register a commercial concession contract is assigned to the right holder, according to part 3 Art. 1118 of the Civil Code of Ukraine, such an obligation rests on the user, but under certain conditions. For example, if the right holder is registered in a foreign country, the registration of the commercial concession contract is not carried out by the body that carried out the state registration of the right holder, but by the body that carried out the state registration of the user. According to Art. 1117 of the Civil Code of Ukraine, the user can be a natural person - an entrepreneur or a legal entity registered in the form of a business partnership or a production cooperative. According to the content of part 3 Art. 1118 of the Civil Code of Ukraine, the authorities of the state registration of the commercial concession contract will be the bodies of the executive power, which carry out the registration of legal entities and natural persons of entrepreneurs.

Part 4 Art. 1118 of the Civil Code of Ukraine establishes a rule according to which a commercial concession contract will be recognized by third parties as having legal consequences only from the moment of its state registration. This rule means that in the event of a dispute regarding intellectual property rights transferred under a commercial concession contract, third parties will take into account only contracts that have state registration and from the moment of such registration. That is, the parties to the commercial concession contract are not entitled to refer to it in relations with third parties [17, p. 228]. Thus, the lack of state registration of a commercial concession contract does not affect its validity in the relationship between the right holder and the user. At the same time, the above does not give grounds for considering the registration of a commercial concession agreement as optional, since in its absence the legislation establishes two negative consequences at once, which may result in the parties being prohibited from referring to the commercial concession agreement in their relations with third parties, which may lead to Undesirable property consequences for the parties, as well as non-fulfillment of the requirements for registration of the commercial concession contract, are violation of the contract, which entails the responsibility of the offender, who, as a general rule, is the right holder.

Conclusions

Thus, the commercial concession agreement has a complex legal nature, it is an independent complex agreement that includes elements of many contractual structures, in particular, purchase and sale, supply, license agreement, investment agreement, service provision agreement. At the same time, the commercial concession contract is one of the forms of conducting business, which is considered the most successful and profitable form. Thanks to the establishment of legal relations arising from the conclusion of a commercial concession contract, favorable conditions are created for the development of small and medium-sized enterprises and the attraction of investments in the national economy, which subsequently leads to increased competition in the markets. In the course of the scientific research, a conclusion was made about the identity of the concepts of commercial concession and franchising. It is necessary to improve the current domestic legislation that regulates legal relations arising from the conclusion of a commercial concession agreement by making appropriate changes to the Civil Code and the Economic Code of Ukraine. It is the proposed changes, in our opinion, that will be able to facilitate the process of applying the commercial concession agreement between national entrepreneurs and foreign counterparties. And therefore, the specified improvements can significantly reduce the risks of disputes between the parties to the specified contract and will contribute to the formation of an established practice of regulating commercial concession relations.

REFERENCES

1. Poddubna, V. F. (2017). Shchodo pytannia pravovoi pryrody dohovoru komertsii noi kontsesii (franchaizynhu) [Regarding the issue of the legal nature of the commercial concession (franchising) contract]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu – Scientific Bulletin of the Uzhhorod National University. Series: Law*, 47(1), 152-154 [in Ukrainian].
2. Yakubivskyi, I. (2006). Pravova pryroda dohovoru komertsii noi kontsesii (franchaizynhu) [Legal nature of the commercial concession (franchising) contract]. *Naukovi notatky universytetu – University scientific notes*, 3-4, 177-181 [in Ukrainian].
3. Tsyvilnyi kodeks Ukrainy : pryiniaty 16 Jan. 2003 roku № 435-IV [Civil Code of Ukraine: Law of Ukraine dated January 16, 2003 No. 435-IV. URL: <http://www.zakon.rada.gov.ua/go/435-15> [in Ukrainian].
4. Kucherenko, O. M. (2022). Dohovir komertsii noi kontsesii: pytannia poniatiino-katehorialnoho aparatu [Commercial concession contract: the issue of the conceptual and categorical apparatus]. *Naukovyi visnyk Dnipropetrovskoho derzhavnoho*

universytetu vnutrishnikh sprav – Scientific Bulletin of the Dnipropetrovsk State University of Internal Affairs, 1, 69-73 [in Ukrainian].

5. Pecherova, N. G. (2024). Osoblyvosti litsenziinoho dohovoru na vykorystannia ob'ektiv sumizhnykh prav [Peculiarities of the license agreement for the use of objects of related rights]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu – Scientific Bulletin of the Uzhhorod National University. Series: Law*, 85(1), 300-308 [in Ukrainian].

6. Anatiychuk, V. (2022). Sposoby zakhystu prav storin dohovoru kupivli-prodazhu mainovykh prav na ob'ekt budivnytstva [Ways of protecting the rights of parties to a contract of sale of property rights to a construction object]. *Yurydychnyi biuleten – Legal Bulletin*, 4, 81-87 [in Ukrainian].

7. Wise, O. (2023). Zahalna teoretychna kharakterystyka hroshovykh zoboviazan, shcho vynykaiut za trudovymy dohovoramy (orendoiu) [General theoretical characteristics of monetary obligations arising under employment contracts (lease)]. *Aktualni problemy yurysprudentsii – Actual problems of jurisprudence*, 2, 127-134 [in Ukrainian].

8. Kikot, P. V. (2022). Predmet dohovoru komertsiiinoi kontsesii na vykorystannia ob'ektiv intelektualnoi vlasnosti u pidpriemnytstvi [Subject of the commercial concession contract for the use of intellectual property objects in entrepreneurship]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu – Scientific Bulletin of the Uzhhorod National University. Series: Law*, 73(1), 129-133 [in Ukrainian].

9. Paryzka konventsiiia pro okhoronu promyslovoi vlasnosti vid 20 bereznia 1883 roku [Paris Convention for the Protection of Industrial Property of March 20, 1883]. (n.d.). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/995_123#Text [in Ukrainian].

10. Alieva-Baranovska, V. (2015). Nedoliky derzhavnoi reiestratsii dohovoriv komertsiiinoi kontsesii (subkontsesii) [Disadvantages of state registration of commercial concession (subconcession) contracts]. *Yevropeiskii perspektvyv – European perspectives*, 1, 130-135 [in Ukrainian].

11. Wang, J., & Yan, X. (2024). The role of trademark rights expansion in the formation and abuse of market power. *International Review of Economics & Finance*, 95, 103496 DOI: <https://doi.org/10.1016/j.iref.2024.103496> [in English].

12. Ramirez-Garcia, C., Ramon-Jeronimo, M. A., Garcia-Alvarez de Perea, J., & Velez-Elorza, M. L. (2024). Risk sources and the effectiveness of the control system in the franchisor's risk perception management. *Industrial Marketing Management*, 117, 202-219 DOI: <https://doi.org/10.1016/j.indmarman.2023.12.024> [in English].

13. Paduchak, B., & Talda, M. (2013). Problemni aspekty vyznachennia predmeta dohovoru komertsiiinoi kontsesii [Problematic aspects of determining the subject of a commercial concession contract]. *Teoriia ta praktyka intelektualnoi vlasnosti – Theory and practice of intellectual property*, 6, 51–56 [in Ukrainian].

14. Koval, I. F. (2018). *Komertsializatsiia prav intelektualnoi vlasnosti: navchalnyi posibnyk [Commercialization of intellectual property rights: a study guide]*. Kyiv: Yurinkom Inter [in Ukrainian].

15. Erofeenko, L. V. (2022). Pravovyi analiz dohovoru franchaizynhu u sferi intelektualnoi vlasnosti [Legal analysis of the franchising agreement in the field of intellectual property]. *Mizhnarodnyi naukovyi zhurnal «Internauka» - International scientific journal «Internauka». Series: Legal sciences*, 11, 124-133 [in Ukrainian].

16. Chernega, V. (2018). Dohovir komertsiiinoi kontsesii za tsyvilnym ta hospodarskym zakonodavstvom Ukrainy (porivnialno-pravove doslidzhennia) [Commercial concession contract under the civil and economic legislation of Ukraine (comparative legal study)]. *Pidpriemnytstvo, ekonomika ta pravo – Entrepreneurship, economy and law*, 10, 84-88 [in Ukrainian].

17. Bachynskiy, T. V. (2014). Shchodo pytannia dohovoru komertsiiinoi kontsesii (franchaizynhu) ta deiakykh zmin do yoho reiestratsii [Regarding the issue of the commercial concession (franchising) agreement and some amendments to its registration]. *Visnyk Natsionalnoho universytetu "Lvivska politekhnika" – Bulletin of the Lviv Polytechnic National University. Legal sciences*, 810, 226-230 [in Ukrainian].

Received 11.03.2025.

Revised 19.03.2025.

Accepted 24.05.2025.

Published 25.06.2025.

ПРОБЛЕМИ ЗАСТОСУВАННЯ ДОГОВОРУ КОМЕРЦІЙНОЇ КОНЦЕСІЇ В ПРОЦЕСІ РЕАЛІЗАЦІЇ ПРАВ НА ОБ'ЄКТИ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ В ПІДПРИЄМНИЦЬКІЙ ДІЯЛЬНОСТІ

Хрідочкін Андрій, Гармідер Лариса, Ломакіна Анастасія,
Іванова Марина

У статті аналізуються актуальні проблеми застосування договору комерційної концесії в процесі реалізації прав на об'єкти інтелектуальної власності в підприємницькій діяльності. Проаналізовані теоретичні засади стосовно визначення юридичної природи договору комерційної концесії та особливостей його застосування в процесі реалізації прав на об'єкти інтелектуальної власності в підприємницькій діяльності. Виконаний аналіз чинного вітчизняного законодавства щодо визначення юридичної природи, мети, суттєвих ознак, предмету та сторін договору комерційної концесії. Встановлено, що метою укладання договору комерційної концесії в процесі реалізації прав на об'єкти інтелектуальної власності в підприємницькій діяльності є сприяння в просуванні на ринку товарів (робіт, послуг) шляхом виготовлення та (або) продажу певного виду товарів та (або) надання послуг. Доведено, що предмет договору комерційної концесії є дворівневим – на первинному рівні елементом предмета договору комерційної концесії є дії правоволодільця, спрямовані на надання користувачеві можливості використання в його підприємницькій діяльності прав інтелектуальної власності, які належать правоволодільцеві, а на другому рівні предмет договору комерційної концесії включає в себе право на використання об'єкта інтелектуальної власності, яким право-

володільця наділяє користувача. Акцентовано увагу на тому, що об'єкт інтелектуальної власності стає предметом договору комерційної концесії завдяки власній оборотоздатності, а його товароздатність виявляється у споживчій та міновій вартості об'єкта інтелектуальної власності (приватна складова), а також у наявності визначеного законодавством правового режиму об'єктів інтелектуальної власності, який встановлює правила відчуження даних об'єктів, їх обігу в товарному обороті, що забезпечує баланс приватних і публічних інтересів (публічна складова). Наголошено, що за договором комерційної концесії правоволодільця не втрачає власних майно-нових прав інтелектуальної власності, а лише передає одне із власних майно-вих прав – право на використання об'єкта права інтелектуальної власності іншій особі – користувачеві. Зроблено висновок про те, що встановленням правових відносин, що виникають внаслідок укладання договору комерційної концесії, створюються сприятливі умови для розвитку малого і середнього підприємництва та залучення інвестицій в національну економіку.

Ключові слова: договір комерційної концесії, договірні відносини, комерційна концесія, користувач, об'єкт інтелектуальної власності, підприємницька діяльність, правове регулювання, правоволодільця.

PROBLEMS OF APPLICATION OF A COMMERCIAL CONCESSION AGREEMENT IN THE PROCESS OF IMPLEMENTATION OF RIGHTS TO INTELLECTUAL PROPERTY OBJECTS IN BUSINESS ACTIVITIES

Khridochkin Andrii, Harmider Larisa, Lomakina Anastasia, Ivanova Marina*

Ukrainian State University of Chemical Technology (Educational Scientific Institute "Ukrainian State University of Chemical technology"), Dnipro, Ukraine

*e-mail: garm@ukr.net

Khridochkin Andrii ORCID: <https://orcid.org/0000-0001-9387-8864>

Harmider Larisa ORCID: <https://orcid.org/0000-0001-7837-2734>

Ivanova Marina ORCID: <https://orcid.org/0000-0003-2620-7168>

The article analyzes the actual problems of applying the commercial concession contract in the process of realizing rights to intellectual property objects in entrepreneurial activity. The theoretical principles regarding the determination of the legal nature of the commercial concession contract and the features of its application in the process of realizing rights to intellectual property objects in entrepreneurial activity are analyzed. An analysis of the current domestic legislation was carried out to determine the legal nature, purpose, essential features, subject matter and parties of the commercial concession agreement. It has been established that the purpose of concluding a commercial concession contract in the process of realizing rights to intellectual property objects in entrepreneurial activity is to assist in the promotion of goods (works, services) on the market by manufacturing and (or) selling a certain type of goods and (or) providing services. It is proved that the subject of the commercial concession contract is two-level – at the primary level, the element of the subject of the commercial concession contract is the actions of the right holder, aimed at providing the user with the opportunity to use the intellectual property rights

belonging to the right holder in his entrepreneurial activity, and at the second level, the subject commercial concession agreement includes the right to use the object of intellectual property, which the right holder grants to the user. Attention is focused on the fact that an object of intellectual property becomes the subject of a commercial concession contract due to its own marketability, and its marketability is manifested in the consumer and exchange value of the object of intellectual property (private component), as well as in the presence of a legal regime defined by legislation of intellectual property objects, which establishes the rules for alienation of these objects, their circulation in the commodity turnover, which ensures a balance of private and public interests (public component). It is emphasized that under a commercial concession contract, the right holder does not lose his own intellectual property rights, but only transfers one of his own property rights – the right to use the object of intellectual property rights – to another person – the user. It was concluded that the establishment of legal relations resulting from the conclusion of a commercial concession agreement creates favorable conditions for the development of small and medium-sized enterprises and the attraction of investments in the national economy.

Keywords: commercial concession agreement, contractual relations, commercial concession, user, object of intellectual property, entrepreneurial activity, legal regulation, right holder.

REFERENCES

1. Poddubna, V. F. (2017). Shchodo pytannia pravovoi pryrody dohovoru komertsii (franchaizynhu) [Regarding the issue of the legal nature of the commercial concession (franchising) contract]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu – Scientific Bulletin of the Uzhhorod National University. Series: Law*, 47(1), 152-154 [in Ukrainian].
2. Yakubivskiy, I. (2006). Pravova pryroda dohovoru komertsii (franchaizynhu) [Legal nature of the commercial concession (franchising) contract]. *Naukovi notatky universytetu – University scientific notes*, 3-4, 177-181 [in Ukrainian].
3. Tsyvilnyi kodeks Ukrainy : pryiniaty 16 Jan. 2003 roku № 435-IV [Civil Code of Ukraine: Law of Ukraine dated January 16, 2003 No. 435-IV. URL: <http://www.zakon.rada.gov.ua/go/435-15> [in Ukrainian].
4. Kucherenko, O. M. (2022). Dohovir komertsii (franchaizynhu) [Commercial concession contract: the issue of the conceptual and categorical apparatus]. *Naukovyi visnyk Dnipropetrovskoho derzhavnoho universytetu vnutrishnikh sprav – Scientific Bulletin of the Dnipropetrovsk State University of Internal Affairs*, 1, 69-73 [in Ukrainian].
5. Pecherova, N. G. (2024). Osoblyvosti litsenziinoho dohovoru na vykorystannia ob'ektiv sumizhnykh prav [Peculiarities of the license agreement for the use of objects of related rights]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu – Scientific Bulletin of the Uzhhorod National University. Series: Law*, 85(1), 300-308 [in Ukrainian].
6. Anatiychuk, V. (2022). Sposoby zakhystu prav storin dohovoru kupivli-prodazhu mainovykh prav na ob'ekt budivnytstva [Ways of protecting the rights of parties to a contract of sale of property rights to a construction object]. *Yurydychnyi biuleten – Legal Bulletin*, 4, 81-87 [in Ukrainian].

7. Wise, O. (2023). Zahalna teoretychna kharakterystyka hroshovykh zobov'язan, shcho vynykaiut za trudovymy dohovoramy (orendoiu) [General theoretical characteristics of monetary obligations arising under employment contracts (lease)]. *Aktualni problemy yurysprudentsii – Actual problems of jurisprudence*, 2, 127-134 [in Ukrainian].
8. Kikot, P. V. (2022). Predmet dohovoru komertsii noi kontsesii na vykorystannia ob'ektiv intelektualnoi vlasnosti u pidpriemnytstvi [Subject of the commercial concession contract for the use of intellectual property objects in entrepreneurship]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu – Scientific Bulletin of the Uzhhorod National University. Series: Law*, 73(1), 129-133 [in Ukrainian].
9. Paryzka konventsiia pro okhoronu promyslovoi vlasnosti vid 20 bereznia 1883 roku [Paris Convention for the Protection of Industrial Property of March 20, 1883]. (n.d.). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/995_123#Text [in Ukrainian].
10. Alieva-Baranovska, V. (2015). Nedoliky derzhavnoi reiestratsii dohovoriv komertsii noi kontsesii (subkontsesii) [Disadvantages of state registration of commercial concession (subconcession) contracts]. *Yevropeiski perspektyvy – European perspectives*, 1, 130-135 [in Ukrainian].
11. Wang, J., & Yan, X. (2024). The role of trademark rights expansion in the formation and abuse of market power. *International Review of Economics & Finance*, 95, 103496 DOI: <https://doi.org/10.1016/j.iref.2024.103496> [in English].
12. Ramirez-Garcia, C., Ramon-Jeronimo, M. A., Garcia-Alvarez de Perea, J., & Velez-Elorza, M. L. (2024). Risk sources and the effectiveness of the control system in the franchisor's risk perception management. *Industrial Marketing Management*, 117, 202-219 DOI: <https://doi.org/10.1016/j.indmarman.2023.12.024> [in English].
13. Paduchak, B., & Talda, M. (2013). Problemni aspekty vyznachennia predmeta dohovoru komertsii noi kontsesii [Problematic aspects of determining the subject of a commercial concession contract]. *Teoriia ta praktyka intelektualnoi vlasnosti – Theory and practice of intellectual property*, 6, 51–56 [in Ukrainian].
14. Koval, I. F. (2018). *Komertsializatsiia prav intelektualnoi vlasnosti: navchalnyi posibnyk [Commercialization of intellectual property rights: a study guide]*. Kyiv: Yurinkom Inter [in Ukrainian].
15. Erofeenko, L. V. (2022). Pravovyi analiz dohovoru franchaizynhu u sferi intelektualnoi vlasnosti [Legal analysis of the franchising agreement in the field of intellectual property]. *Mizhnarodnyi naukovyi zhurnal «Internauka» - International scientific journal «Internauka». Series: Legal sciences*, 11, 124-133 [in Ukrainian].
16. Chernega, V. (2018). Dohovir komertsii noi kontsesii za tsyvilnym ta hospodarskym zakonodavstvom Ukrainy (porivnialno-pravove doslidzhennia) [Commercial concession contract under the civil and economic legislation of Ukraine (comparative legal study)]. *Pidpriemnytstvo, ekonomika ta pravo – Entrepreneurship, economy and law*, 10, 84-88 [in Ukrainian].
17. Bachynskyi, T. V. (2014). Shchodo pytannia dohovoru komertsii noi kontsesii (franchaizynhu) ta deiakykh zmin do yoho reiestratsii [Regarding the issue of the commercial concession (franchising) agreement and some amendments to its registration]. *Visnyk Natsionalnoho universytetu “Lvivska politekhnika” – Bulletin of the Lviv Polytechnic National University. Legal sciences*, 810, 226-230 [in Ukrainian].