ON THE ISSUE OF DEFINITION OF THE IMMOVABLE PROPERTY CONCEPT IN FOREIGN LEGISLATIONS

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The scientific approaches to the realization of immovable property are considered in the paper. The provisions of foreign legislations, which contain the concept of immovable property, are analysed. The comparison study of these provisions is offered. Keywords: immovables, immovable property, immovable property regime.

The issue of defining the concept of immovable property in the legislation of foreign countries has always occupied an important place in public circulation. The evidence of this is the large amount of scientific works related to this issue not only in jurisprudence, but also in economics, architecture and other fields of science. As the immovable property requires some long time for building, it has quite a high price. Such legal institutions as the place of residence, registration, notarization of immovable property transactions and their state registration, state registration of rights to immovable property and so on are closely related to immovable property. Besides, immovable property is under the special protection of the law, as evidenced by the prohibition of unlawful entry into a dwelling or other property rights, the rights of property owners to defend themselves against unlawful entry, including the use of weapons, etc. Today, however, the legal systems of foreign countries have different definitions of the term "immovable property", what makes the study of the issue and the need to summarize the various approaches to its definition in order to formulate proposals for further improvement of the national civil law more significant. The issue of defining the concept of immovable property is covered in the writings of such domestic and foreign scholars as: M.I Bragina, V.I. Borisov, V.V. Vitrynsky, A.V. Dzera, I.V. Zhilinkova, N.S. Kuznetsova, V.V. Lutz, K.P. Pobedonostsev, I.V. Spasibo-Fateeva.

The aim of this article is to define the meaning of immovable property in the civil law, as well as to analyze the provisions of the civil legislation of foreign countries related to its definition.

The immovable property is the only part of the country's wealth, which will never leave its borders, and will always be the basis for the formation of all other types of property in the state. According to the dogmas of Roman law the category of property (res immobiles, res soli) includes not only the land (solum) and any restricted part of the land (fundus, praedium), but also the buildings (aedes and vilae), as well as all the things that were created with the help of law of nature or human labor on the owner's land. The concept of immovable property was organically and inextricably related to such ground-based things (res soli) as buildings, structures, trees, plants, fruits, unharvested grain, minerals and fossils. Components of the land or buildings in the case of separation from them (sand, chalk, wood, coal) lost quality of the fixed things and did not pass to the buyer of the land plot. At the same time, neither agricultural implements (instrumentum fundi), nor tools for the use of construction (instrumentum aedium) were recognized as a part of the land or farm land [1, p. 110–111]. The modern interpretation of the concept of immovable property has quite a long history of formation. Most countries of the world have adopted the provisions of the Roman law, but the approaches to understanding of the immovable property have changed a bit. Nowadays each legal system, despite its own legal traditions and the level of development of social relations, determines things (property) that are fixed or covered by the regime of real property. This approach to the definition of real property in different legal systems is reflected in the legal acts regulating the private-law relations, and therefore, the same thing can have different statuses: in some countries it can be immovable, and in the others - mobile.

In jurisprudence, there are three classic definitions of immovable property. Representatives of the first theory (K. Pobedonostsev, E. Vas'kovsky, Y. Qambarov) offer to consider things, that have a strong connection to the land, immovable. Representatives of the second theory (G. Shershenevich, K. Malyshev, I. Frantsesson) offered to determine the sign of the immovable property on the basis of the criterion of "a legal link with the rights of the owner of the structure of the land on which it is built," believing that we should not consider structures built on foreign land, and temporary ones as the immovable property. The first group of scientists considered the physical criterion (nature of relations between the thing and the ground) to be at the heart of determining the nature of things. A second group understood the nature of things through the legal criterion - the legal relationship between the law of the land and the right to a thing that is on it. There is a compromise position. Its representatives (A. Worms, W. El'yashevich, A. Dumashevsky) believed that the structures built on the foreign land, by virtue of the law of obligations must be regarded as things moving, and the structures created by the proprietary right to this land – are fixed things [2, p. 19-20].

Here are some examples of laws of foreign countries. Thus, according to Art. 43 of the Civil Code of Brazil, 1920, immovables are: 1. Soil with its surface, the natural amenities, trees, the vine fruits, ground space and subsoil. 2. Things that a person attaches to the ground for a long time, crops in the land, buildings and structures that cannot be moved without damage, alteration, demolition or any harm to them. 3. Everything that relates to the property of the owner in connection with the use of industrial production, decoration or comfort [3, p. 15].

The Civil Code of the Republic of Cuba, 1987 (Part 2 of Art. 46.1) determines that material things can be immovable property or personal property; here
Immovable property is understood as land and other things attached to it so firmly that it makes it impossible to use them separately or for some primary purpose [4, p. 11]. Portuguese Civil Code specifies that certain types of immovable property are those in close connection with the land [5, p. 34]. This analysis of the definitions shows that they are fundamentally different when talking about the concept of "immovable property". Thus, the Civil Code of Brazil (Part 1 of Art. 43) refers to the natural property; in Part 2 of this article - the artificially created real property, and in Part 3 "immovable property" is defined as the mode of the immovable.

We consider this approach to be consistent and fully classifying the immovable property. It also describes the immovable property and things being in the regime of common property. This approach is enshrined in the domestic law (Art. 181 CC). Civil Code of the Republic of Cuba provides the following definition of property, based on a single principle - the use of things for their designated purpose. This criteria is changed in some ways in every legal systems of both countries - a physical link between the things and the ground. This approach is also used in the Philippine civil law, defining immovable property as the land and the things that are on it; the physical property is determined as the material unity of instruments and improvements that are on the ground, under or over it.

A fundamentally different approach is in the U.S. law. Thus, the Law "On licensing and registration of immovable property" (1980) determined that the immovable property is any property right for a land or property on the ground, regardless of whether it is tangible or intangible, conditional or unconditional, located within the Federation or elsewhere, including the leasehold interest; the same way the property rights are described. The selling of the campervan will be the transition of the property from the right to the real property, if such an operation is accompanied by the transfer of the license or selling of the land on which the van stands [7, p. 5]. The concept behind this act aimed at the settlement of private law relations to immovable property has a complex character, which certainly can be attributed to its benefits. The determining factor is the legal criteria, i.e. the right to property, not the property as the object of private law relations. It is based on the inherent right to the land. At the same time, it can be confirmed that this approach is the most similar to the second theory of G. Shershenevich, K. Malyshev and I. Frantsesson, which is based on existence of the legal rights of the owner of the structure due to the land on which the building is constructed. However, this definition has its drawbacks. After equating the rights to immovable property, the immovable property can cause significant difficulties in aspect, for example, of its inventory. How is it possible to inspect the property law? Such equalization can lead to the division of ownership for immovable property, resulting in the concept of immovable property and rights to it, formalizing the notion of property and bringing it into the civil turnover.

From the point of view of international law, real property is defined without territorial restrictions. This means that according to the U.S. legislation the above mentioned rights and objects will be considered as the immovable property regardless of the place and country of their location -i.e. regardless of the jurisdiction of other subjects of public international legal relations on the territory of their location. A similar approach to the definition of real property is used in the commercial and civil code of Thailand. Article 139 of the Code provides the following definition: "immovable property is land, as well as things which are securely attached to it and forming the whole with it. Property also includes proprietary rights associated with the land or things forming the whole with it". [8] However, unlike in the U.S. approach, Thailand has the advantage of the concept of property rights to land and property which make the organic whole together - as the basis for determining the things.

Almost all of the above said definitions of real property in some way fit into one of the three concepts, presented at the beginning of this paper. However, in some jurisdictions, the concept of immovable property has its own characteristics, which are fundamentally different from the others, even if they fall within the same approach. Sufficiently peculiar and even unique, in our opinion, is the approach used in the Civil Code of the Republic of France. This Code divides the immovable property into property in nature, the target and the object to which the property belongs. It is noted that the land and buildings are fixed in nature. The growing crop and fruit trees are fixed as long as they are not collected.

Civil Code of the Republic of France includes the following in the category of immovable property: animals that are kept in order to be engaged in farming activities (Article 522); the things, despite the fact that they can be actually moved, which are fixed to the real property and cannot be separated from it without causing damage or destruction. Such property can include pictures, mirrors and other things used to decorate property [9, p. 89-90]. It is at this example of legislation which can show the maximum coherence with Roman law, as we mentioned earlier in this paper. In a number of countries, including Ukraine, it's difficult to include natural resources into the list of objects of civil transactions because their civil tradability is provided by isolation and individualization, and the conduct of economic evaluation. Otherwise, they will be a part of the natural ecological system, "natural object" that cannot be called the property [10, p. 20].

Almost the same approach to the definition of property was used in the law of post-Soviet Republics of Eastern Europe. Thus, the Civil Code of Ukraine 2003 (Article 181) contains the following definition of property: "Immovable things (immovable property, immovables) shall include land parcels and the objects located on them, which cannot be moved without their devaluation and change of their target use. The regime of an immovable thing can be also extended by the law to aircrafts and sea crafts, inland-navigation vessels, space objects and other things the rights thereto shall be subject to state registration". [11] The Civil Code of the Republic of Belarus, 1998 (Article 130) states: "l. Land plots, subsoil plots, surface water objects, and all that is firmly connected with the land, that is, objects whose movement without incommensurate damage to the purpose thereof is impossible, including forests, perennial plantings, permanent constructions (buildings, structures), unfinished permanent constructions prepared for preservation, isolated premises, car parking lots shall be relegated to immovable things (immovable property, immovable). The enterprise as a whole (as the property complex), the aircrafts and
sea vessels subject to the state registration, inland vessels, river-marine vessels, and space objects shall also be relegated to immovable things. Other property also may be relegated by the legislation to immovable things. 2. Things which are not relegated to immovable, including money and securities, shall be deemed to be movable property. The registration of rights to movable things shall not be required except for instances specified in a law.”

The following approach to the concept of immovable property is defined in Article 130 of the Civil Code of the Russian Federation in 1994: “1. To the immovables (the immovable property, realty) shall be referred the land plots, the land plots with mineral deposits, the set-apart water objects and everything else, which is closely connected with the land, i.e., such objects as cannot be shifted without causing an enormous damage to their purpose, including the forests, the perennial green plantations, the buildings and all kind of structures. To the immovables shall also be referred the airborne and sea-going vessels, the inland navigation ships and the space objects. The law may also refer to the immovables certain other property” [13]. According to these approaches, the legislator may expand the list of real and other objects can be related to the immovable property in order to equate their legal status in the regime of immovable property. Accordingly, we can use the term “movable property” [14, p. 81].

Analysing the above said definitions, we can note one more difference - the legislation of some countries provides more extensive list of property that is immovable property, and in other laws and regulations it is not existing at all. But, as the legal practice shows, particularly in Ukraine, this is not enough in order to enforce characteristics distinguishing the real property from the movable [15, p. 179].

To summarize, we can make the following conclusions:

1. The only thing that is indisputably recognized as property under the law of the studied countries is land;

2. Provisions of the legislation of some countries do not provide the possibility to extend the regime of movable property for items, such as, for example, ships, aircrafts, and space objects;

3. In different countries a "real property" is defined in different ways. The legislation of some states may define property on the basis of the rights to it; in other countries it may be related to physical properties (the ability to move, the use for the intended purpose, etc.).

This study confirms our earlier conclusion that the real property defines the country's wealth, as it never leaves its borders. Such feature of the immovable property cannot affect its turnover. In this regard it can be confirmed that nowadays the turnover of immovable property between the countries of the world does not exist. Each country sets its own rules for the traffic within its legal system, and this makes it impossible to develop global property market. However, its development and globalization can contribute to another feature of immovable property - the nature of ownership or possession. Having a proprietary nature, such rights may be in free circulation at the level of property. In this regard we can assume that the continuing influence of globalization on the world economic processes can promote the creation of the property rights market.

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