

УДК 346.3(477)

DOI: <https://doi.org/10.33216/2218-5461/2024-47-1-181-195>

**FOREIGN ECONOMIC ACTIVITY AND FOREIGN ECONOMIC CONTRACT:  
PROBLEMS OF LEGISLATIVE REGULATION**

*Milash V. S., Matvieieva A. V.*

**ЗОВНІШНЬОЕКОНОМІЧНА ДІЯЛЬНІСТЬ ТА ЗОВНІШНЬОЕКОНОМІЧНИЙ  
КОНТРАКТ: ПРОБЛЕМИ ЗАКОНОДАВЧОГО РЕГУЛЮВАННЯ**

*Мілаш В. С., Матвєєва А. В.*

*An important task of the state and, above all, of its legislative body is the improvement and further development of the conceptual and categorical apparatus of economic legislation in accordance with the modern realities of economic development. This task acquires special urgency and urgency in the conditions of the strengthening of the European integration processes of Ukraine.*

*The vast majority of normative legal acts in the field of regulation of economic relations contain separate articles, which provide a list of definitions of the terms used in this normative legal act. This significantly simplifies the problem of law enforcement. However, only if, with the help of the norms of legislative technique, the definitions of terms and concepts are written correctly and do not contradict the definition of similar concepts already contained in other normative legal acts.*

*There are a number of factors that negatively affect the uniform interpretation of legislative norms and the formation of a uniform law enforcement practice, as well as the final results of law enforcement and, as a result, the possibility of effective protection of the rights and freedoms of business entities. These include violations of the rules for constructing legislative definitions, as well as the legislator's use of imprecise, abstract, ambiguous terms (categories), which actually nullifies the implementation of their instrumental function. Making changes to the content of legislative definitions (concepts) that are basic for the relevant field of regulation significantly affects the general vector of its regulation, in some cases - radically changes it, and sometimes, unfortunately, creates numerous collisions in the regulation of this field.*

*The results of the study were the identification of problematic aspects of the qualification of foreign economic activities and foreign economic contracts, related to the defects of the legislative definitions of the specified terms, as well as the provision of some proposals for their elimination.*

*An important issue is the development of unified approaches regarding the understanding of the essence and legal nature of economic activity with a foreign element (foreign economic activity) for the correct application of the norms of foreign law in the event that they are determined as applicable law by the conflict of laws provisions of the relevant agreements or by the parties themselves in accordance with the principle of the autonomy of the will of the parties.*

**Keywords:** legislative definition (term); foreign economic activity; foreign economic agreement; commercial enterprise; compensation (offset) contracts.

**Coverage of the problem in general and its connection with important scientific and practical tasks.** The creation of an effective mechanism for the regulation of any type of legal relationship requires the establishment of a position of legal certainty. This is especially relevant for the field of legal support of economic relations. This is due to that the implementation of economic activity is closely interconnected with various spheres of the economy: trade, transportation, financial markets, agricultural production, construction, etc. Of course, each sector of the economy contains its own specific terms that reflect its features. And accordingly, the adequacy of legal regulation of one or another sphere depends on whether the legislator coped with the task of accurately conveying the essence of legal relations. In addition, today the issue of defining unified approaches to the understanding of certain terms is quite relevant not only at the level of Ukrainian legislation, but also their understanding in EU legislation and certain international acts of a universal nature.

**Analysis of recent studies and publications which initiated the solution to this problem and which the author relies on.** Almost every economic and legal study analyzes the legislative approach to the definition of certain terms and provides their author's definitions. Scientific research on economic and legal support of foreign economic activity is no exception. In this area, it is worth mentioning the scientific works of O. Belyanevych, A. Bobkova, D. Zadykhailo, O. Vinnik, H. Znamenskyi, V. Mamutov, O. Podtserkovnyi, V. Reznikova, V. V. Reznikova, V. A. Ustyomenko, V. S. Shcherbyna, etc.

**To identify the previously unresolved parts of the general problem to which this article is devoted.** A number of scholars have studied the content of certain economic and legal definitions, their features, and comparative legal analysis of certain similar concepts. However, today the problems of terminology unification in

the field of economic relations regulation are coming to the fore, and this is a rather difficult task due to the large number of economic regulations and the ambiguity of their interpretation by both legislators and scholars.

**Formulation of the article's aims and objectives.** The purpose of the article is to study the content of the legislative definitions of the terms "foreign economic activity" and "foreign economic agreement" with due regard for the approaches to the international (foreign economic) nature of contractual relations contained in international conventions and agreements, and also for the latest amendments to the current legislation on foreign economic activity in terms of expanding the subject matter of such activity.

**Presentation of the main research material with full justification of the scientific results obtained.** Foreign economic relations are the subject of foreign economic activity, which, in accordance with the provisions of Art. 18 of the Constitution of Ukraine, aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial cooperation with members of the international community according to generally recognized principles and norms of international law. This relationship, like any other, requires settlement, which is carried out using a set of prescribed measures and methods. The international level of legal regulation of foreign economic relations is formed by norms of various directions, which cover trade, labor, and production, financial and other legal relations.

These norms find their formation within the functional activity of international organizations and receive a corresponding potential perspective of integration into the norms of national legal systems. The interdependence of such processes creates the need for a theoretical study of separate groups of norms that are formed within international organizations and their correlation with the national legislation of Ukraine

A significant complication, and sometimes the complete impossibility of personal meetings for signing contracts, as well as some difficulties in the work of the post office and courier services, should not become an obstacle to their conclusion. For most enterprises, electronic document management has become an indispensable part of work, especially in recent years of the pandemic. Many services provide this opportunity simply and safely. In addition, international customs of commerce are much more loyal to forms of concluding contracts, including international ones. You can literally reach an agreement on all the essential terms of the agreement on a napkin.

Article 2.1. The Principles of International Commercial Contracts (the UNIDROIT Principles) stipulates that a contract can be concluded by accepting an offer or as a result of the parties' conduct that sufficiently indicates agreement. By the way, the most popular written form of contract in Ukraine according to the same Principles is defined as any - any kind of message that preserves a record of the information contained in it and can be reproduced in a visual form. And therefore, in fact, even the exchange of electronic messages in which the parties agree on the essential terms of the contract is sufficient for its conclusion.

However, it is still necessary to present the content of contracts, the implementation of which is somewhat delayed in time, in the classic form of a single document. This will avoid difficulties with the controlling bodies in Ukraine, the activities and interaction with which may be complicated in the conditions of a special period. And signing contracts using an electronic digital signature will significantly reduce the likelihood of further disputes regarding the fact of their conclusion.

The conclusion of a foreign economic agreement (contract) is the most important element of a foreign economic transaction, it depends on the fact that the contract itself

regulates the terms of the foreign economic transaction, its rights and obligations of the parties, as well as their responsibility in case of non-fulfillment of the contractual terms. Provisions on the conclusion, essential terms and forms of the contract are defined in Articles 638–647 of the Civil Code of Ukraine.

A foreign economic agreement (contract) is concluded by a subject of foreign economic activity or its representative in a simple written or electronic form, unless otherwise stipulated by an international agreement of Ukraine or the law. In the case of export of services (except for transport), a foreign economic agreement (contract) can be concluded by accepting a public proposal for an agreement (offer) or by exchanging electronic messages, or in another way, in particular by issuing an invoice, including in electronic form, for services rendered (Part 2 of Article 6 of the Law of Ukraine "On Foreign Economic Activity").

The adoption of a large number of regulatory legal acts in the field of economic activity, as well as amendments and additions to economic legislation, necessitate the actualization of the issue of conceptual and terminological unity related to the use of the same legislative terms, their correct understanding and unambiguous interpretation. Experts in terminology consider a mandatory feature of a legislative term (from the Latin terminus – boundary, border) to be its clearly defined content in the form of a legislative definition, which is considered to be a legally institutionalized (codified) term. The legislative definition should be formulated taking into account all potential questions and conflicts that may arise during the interpretation and practical application of the provisions of the legislative act(s). This requires the identification of the most essential features of the concept (definition) and their arrangement in a logical sequence (from general to specific, from the main / primary / to less important / secondary /), which is important

for law enforcement practice [1, p. 39-44]. At the same time, discrepancies in the terminology of the text of both one normative act and general and special laws are considered unacceptable. As I. I. Onyshchuk rightly states, in laws regulating a single area of legal relations or bound by blanket rules, the unity of terminology is mandatory; in bylaws, the terms are used within the terminology of laws regulating the relevant area [2, P. 155].

For the sphere of economic and legal regulation of foreign economic relations, the basic (systemic) term is "foreign economic activity", the legislative definitions of which are simultaneously contained in the Commercial Code of Ukraine and the Law of Ukraine "On Foreign Economic Activity". According to the analysis of legislative definitions, both of the above legislative acts define foreign economic activity (hereinafter - FEA) as a type of economic activity, but distinguish different criteria (signs) for its qualification as foreign economic activity.

According to Part 1 of Art. 377 of the Economic Code of Ukraine [3], the main qualification criterion for foreign economic activity as a type of economic activity is territorial, associated with the mandatory crossing of the customs border by the property specified in Part 1 of Art. 139 of this Code and/or labor. According to Articles 9, 10 of the Customs Code of Ukraine [4], the customs border of Ukraine is the boundaries of the customs territory of Ukraine occupied by land, as well as the territorial sea, inland waters and airspace, territories of free customs zones, artificial islands, installations and structures created in the exclusive (maritime) economic zone of Ukraine, which are subject to the exclusive jurisdiction of Ukraine.

According to the provisions of the Commercial Code of Ukraine, the absence of crossing the customs border of Ukraine by the property specified in part 1 of Article 139 of the Commercial Code of Ukraine and/or labor force in the course of business activities makes it

impossible to qualify it as foreign economic activity, regardless of whether its entities are business entities of different countries, etc.

Article 139 of the Commercial Code of Ukraine lists property in the field of business depending on the economic form it acquires and defines property values related to fixed assets, current assets, funds, goods, including manufactured products (inventory), performed works and services, and does not contain any mention of digital goods. Today, however, one of the directions of development of modern business relations is their universal digitalization and development of the digital economy. In the classical sense, the term "digital economy" means an activity in which the main means (factors) of production are digital (electronic, virtual) data (both numerical and textual).

The digital economy is based on information, communication and digital technologies, the rapid development and spread of which is already affecting the traditional (physical-analog) economy. Data is the key resource of the digital economy; it is generated and ensures electronic communication interaction through the functioning of electronic and digital devices, tools and systems [5]. The result of digital production is digital goods (multimedia content; programs; files in the form of texts for reading or data for use in any information and reference systems) that can be delivered to customers only via the Internet (received by e-mail or downloaded from the relevant websites).

In contrast to domestic legislation, in EU e-commerce, "digital goods" ("e-goods") is a general term used to refer to any goods and services that are provided, stored, delivered and used in electronic form. Examples of digital goods include webinars, videos, training programs, e-books, music files, text information (PINs, codes for online games), internet radio, internet television and streaming media; software, fonts and graphics; digital

subscriptions; online advertising, online ads (paid for by the advertiser); online coupons; e-tickets; online casino tokens; financial instruments in electronic form; downloadable software (Digital Distribution) and mobile applications; social media accounts; cloud-based applications and online games; virtual goods used in the virtual economy of online games and communities; tutorials; worksheets; membership programs; desktop wallpapers, mobile phone backgrounds; online organizers; e-learning (online courses); interviews; blog posts; internet maps; labels; patterns; printed materials; clip art (sets of graphic design elements); gift tags; website themes; photo galleries; web graphics; web templates and any other element that may be in electronic form (stored in a file or several files) [6].

However, when providing electronic services and/or selling electronic goods, there is no crossing of the customs border, since the Internet is an information space. Therefore, the question arises as to whether economic activities carried out exclusively on the Internet can be qualified as foreign economic activity, given the fundamental architectural feature of the Internet - the absence of geographical boundaries.

At present, the current legislation in the field of foreign economic activity proceeds only from the possibility of concluding foreign economic agreements in electronic form and/or through the exchange of electronic messages (see: Article 6 of the Law of Ukraine "On Foreign Economic Activity"), but does not raise issues related to the implementation of foreign economic activity on the Internet and, accordingly, the execution of agreements that mediate it within the virtual space.

According to Art. 1 of the Law of Ukraine "On Electronic Commerce" [7] The provisions of this Law shall apply to the activities of foreign e-commerce entities in terms of their sale of goods, work performed, and provision of services to buyers (customers, consumers) in Ukraine. If one

of the parties to an electronic transaction is a foreigner, stateless person or foreign legal entity, the provisions of this Law shall be applied subject to the provisions of the Law of Ukraine "On Private International Law".

However, Section VI of the Law of Ukraine "On Private International Law", which defines conflict-of-laws rules regarding contractual obligations (in particular in the field of foreign economic activity), does not contain any special conflict-of-laws provisions regarding the choice of law as a regulator of rights and obligations of the parties to an agreement concluded on the Internet in the absence of the parties' agreement to choose such law. The CIS Model Law on the Basics of Internet Regulation [8] "grounds" virtual interaction of participants in Internet relations, which does not mean that the subject or object of relations crosses the customs border.

Thus, according to Art. 11 of the CIS Model Law on the Basics of Internet Regulation, legally significant actions performed using the Internet are recognized as performed on the territory of a state if the action that caused legal consequences was performed by a person during his/her stay on the territory of that state.

In contrast to the Civil Code of Ukraine, the Law of Ukraine "On Foreign Economic Activity" names the main criterion of this type of activity as its subject composition in the form of the mandatory presence of the so-called "foreign element" on the part of one of the participants in foreign economic activity, and considers the crossing of the customs border by goods and/or labor as a possible additional feature. According to Art. 1 of the Law of Ukraine "On Foreign Economic Activity" [9], foreign economic activity is the activity of economic entities and foreign economic entities, as well as the activity of state customers for defense procurement in cases determined by the laws of the country, based on the relationship between them, which takes place both on the territory of Ukraine and abroad.

Similarly, a foreign economic agreement is defined as an agreement between two or more foreign economic entities and their foreign counterparties aimed at establishing, changing or terminating their mutual rights and obligations in foreign economic activity. The Law defines the moment of export (import) as either the crossing of the customs border of Ukraine or the transfer of ownership of the exported or imported goods from the seller to the buyer.

Pursuant to Article 334 of the Civil Code of Ukraine [10], the right of ownership of the acquirer of property under the contract arises from the moment of transfer of the property, unless otherwise provided by the contract or law. The transfer of property is considered to be the delivery of the property to the transferee or to a carrier, communication organization, etc. for shipment, forwarding to the transferee of property alienated without the obligation to deliver. Delivery of a bill of lading or other document of title to property is equivalent to the transfer of property. Ownership of property under an agreement subject to notarization shall be acquired by the acquirer from the date of such notarization or from the date of entry into force of a court decision recognizing an agreement not notarized as valid. Rights to real estate subject to state registration arise from the date of such registration in accordance with the law. The above provisions indicate the variability of the sign of crossing the customs border by goods during both the qualification of export-import operations and foreign economic activity and the commercial agreement that mediates it as international (foreign economic).

It is also worth noting that the list of subjects of foreign economic activity contained in the Law of Ukraine "On Foreign Economic Activity" is wider than in the Civil Code of Ukraine due to the inclusion of, firstly, associations of individuals, legal entities, individuals and legal entities that are not legal entities under the laws of Ukraine, but which have a permanent location

in Ukraine and are not prohibited from conducting economic activity by the civil laws of Ukraine; secondly, structural units of foreign economic entities that are not legal entities under the Civil Code of Ukraine.

At the same time, Article 5 of the said Law establishes the right to conduct foreign economic activity only by individuals and legal entities, and does not mention the right of other entities to conduct foreign economic activity at all. Individuals have the right to engage in foreign economic activity from the moment they acquire civil capacity in accordance with the laws of Ukraine. Individuals with permanent residence in Ukraine have this right if they are registered as entrepreneurs. Individuals who do not have a permanent place of residence in Ukraine have the said right if they are business entities under the law of the state in which they have a permanent place of residence or of which they are citizens. Legal entities have the right to engage in foreign economic activity in accordance with their statutory documents from the moment they acquire the status of a legal entity. Pursuant to the same article, all foreign economic operators of Ukraine have the right to open their representative offices in other states in accordance with the laws of those states, and foreign economic operators engaged in foreign economic activity in Ukraine have the right to open their representative offices in Ukraine.

Part 3 of Article 68 of the Commercial Code of Ukraine provides for the right of a company engaged in foreign economic activity to open representative offices, branches and production units outside Ukraine, which are maintained at its expense. Article 95 of the Civil Code of Ukraine defines a branch as a separate subdivision of a legal entity located outside its location and performing all or part of its functions, and a representative office as a separate subdivision of a legal entity located outside its location and representing and protecting the interests of the legal entity. According to this article, branches

and representative offices are not legal entities, they are endowed with the property of the legal entity that established them and act on the basis of the regulations approved by it. The heads of branches and representative offices are appointed by the legal entity and act on the basis of a power of attorney issued by it. The Instruction on the Procedure for Registration of Representative Offices of Foreign Economic Entities in Ukraine [11] uses the term "representative office" ("permanent establishment") for separate subdivisions of foreign economic entities.

Pursuant to the Instruction, a representative office of a business entity is not a legal entity and does not carry out business activities independently; in all cases, it acts on behalf of and on behalf of the foreign business entity specified in the registration certificate and performs its functions in accordance with the laws of Ukraine. A representative office of a foreign business entity in Ukraine may perform functions related to the provision of representative services only in the interests of the foreign business entity specified in the Certificate. If a representative office carries out business activities in Ukraine, such a representative office must be registered with the tax authority at its location in accordance with the procedure established by the central tax authority of Ukraine and acquire the status of a permanent establishment, or, in the terminology of the Civil Code of Ukraine, a branch of a foreign business entity.

The Tax Code of Ukraine [12] (Article 14.1.193) defines a permanent establishment as a permanent place of business through which a non-resident's business activities in Ukraine are carried out in whole or in part, in particular:

- a place of management;
- branch;
- office;
- factory;
- workshop;

installation or structure for the exploration of natural resources;

mine, oil/gas well, quarry or any other place of extraction of natural resources;

warehouse or premises used for the delivery of goods;

server.

This approach is fully consistent with the provisions of the Association Agreement between Ukraine and the European Union, according to clause 8 of Article 86 of which the term "branch" of a legal entity means a place of business without legal personality, which has signs of permanent organization, i.e. is a continuation of the parent company, has a management structure and is adapted for economic cooperation with third parties in such a way that the latter, although they know that, if necessary, there may be a legal connection with the parent company whose head office is located abroad, should not deal directly with such parent company. Thus, as a general rule, when concluding foreign economic agreements and applying the provisions of international conventions (agreements) to the relevant contractual relations, separate subdivisions are not foreign economic entities (respectively, not parties to a foreign economic agreement), but one of the regular places of conducting foreign economic activity of the business entity to which they belong.

It is worth noting that many international conventions (treaties, agreements), including those with the participation of Ukraine, provide that one of the qualifying features (criteria) of the "internationality" (foreign economic nature) of commercial contracts is the different location of commercial enterprises - parties to such a contract, which determines the use of sources of conventional regulation of contractual relations. For the first time, the term "place of business of the parties in different countries" appeared in the Hague Conventions of 1964 (Convention on Uniform Law on the International Sale of Goods,

Convention on Uniform Law on Contracts for the International Sale of Goods). However, in addition to the main criterion, these international acts required one of three additional criteria: crossing the border, making an offer and acceptance in different countries, transfer of goods in a country other than the place of offer and acceptance.

According to experts in private international law, the application of these criteria is unjustified, as it does not allow qualifying some agreements (contracts) as foreign economic. Therefore, in the following international conventions, it is sufficient to qualify a sales contract as an international (foreign economic) contract if it meets a single criterion - the location of the commercial enterprises of the parties to the contract in different countries.

This criterion (feature) is enshrined in the New York Convention on the Limitation Period in the International Sale of Goods of 1974, the Vienna Convention on Contracts for the International Sale of Goods of 1980, the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1986), the Ottawa Convention on International Financial Leasing (1988), the Ottawa Convention on International Factoring (1988), the Inter-American Convention on the Law Applicable to International Contracts of 1994, the UN Convention on the Use of Electronic Communications in International Contracts of 2005, etc. However, most conventions that use the concept of "commercial enterprise" do not disclose its essential content, but their content and/or official comments to them allow us to assert that it is the place of commercial activity (business relations) of the parties to the contract.

Analysis of the works of scholars gives grounds to assert that one foreign economic operator may have several "commercial enterprises" (places of business), one of which is the main one (the place of registration of the business entity and location of its supreme

management body), while others are regular places of business of the party, which in most cases are separate subdivisions of a legal entity located in other countries. At the same time, the conclusion of a commercial agreement between business entities of different countries through their commercial enterprises (including representative offices and branches) located in the same country excludes the application of the provisions of the relevant conventions and makes it impossible to qualify such an agreement as a foreign economic agreement.

*The concept of "commercial enterprise" can also be used in relation to individuals - business entities, since an individual - a business entity - may also have representatives who perform representative functions on the territory of other states on a contractual basis for a long period of time. Pursuant to Part 2 of Article 6 of the Law of Ukraine "On Foreign Economic Activity", actions performed on behalf of a foreign entity by a duly authorized Ukrainian entity shall be considered to be the actions of that foreign entity. In addition, at the doctrinal level, there is a view on the possibility of creating structural subdivisions also by individuals - individual entrepreneurs. Thus, M. P. Rudenko [14, p. 11] argues that individual entrepreneurs are not deprived of the right to create their own management and production structure. At the same time, this feature is not mandatory for individual entrepreneurs and has a variable nature, which makes it possible to distinguish two categories of individual entrepreneurs by the criterion of the internal structure:*

*a) those who do not have an internal structure;*

*b) those who have such a structure.*

*The activities of a sole proprietorship may be carried out in several countries, and its property base may be geographically dispersed. As already mentioned, tax legislation defines an office, workshop, warehouse or premises used for the delivery of goods, etc. as a permanent place of*

business through which business activities, in particular of an individual entrepreneur, are fully or partially conducted and is his "commercial enterprise" in the context of understanding the applicable international acts, including those with the participation of Ukraine.

Recently, the Law of Ukraine "On Foreign Economic Activity" and the Commercial Code of Ukraine have been amended in terms of understanding foreign economic activity and its subjects (see The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on the Procurement of Defense Products, Works and Services by Import" No. 2672-VIII dated January 17, 2019). In particular, this refers to the recognition of defense procurement activities of state customers as foreign economic activity in cases specified by the laws of the country. Part 1 of Art. 139 of the Commercial Code of Ukraine defines foreign economic activity of business entities and qualifies it as economic activity. At the same time, the legislator (Article 378 of the Commercial Code of Ukraine) classifies (but does not equate) state defense contracting authorities as foreign economic entities along with business entities. The following questions arise: why did the legislator not reformat the definition of foreign economic activity in view of the changes in its subject composition and what is the nature of foreign economic activity of state customers for the state defense order, taking into account the following factors. Firstly, according to the Law of Ukraine "On State Defense Order", the central executive authorities designated by the Cabinet of Ministers of Ukraine (CMU), other state bodies as the main spending units of budget funds, and military formations established in accordance with the laws of Ukraine are state defense order customers. The Commercial Code of Ukraine expressly stipulates that the state, state authorities and local self-government bodies are not business entities (Article 8(1) of the Commercial Code of Ukraine) and establishes a direct prohibition on these bodies to carry out

both commercial and non-commercial economic activities (Article 43(4) of the Commercial Code of Ukraine, Article 52(3) of the Commercial Code of Ukraine). Secondly, the content of foreign economic activity as a type of economic activity is active actions in the form of manufacturing and sale of products, performance of works or provision of services of a costly nature that have price certainty, and not individual economic transactions, including those related to government procurement. Thirdly, commercial legislation includes the state order in the list of the main means of regulatory influence of the state on the activities of business entities (Article 12 of the Commercial Code of Ukraine, Article 1 of the Law of Ukraine "On the State Defense Order") by forming the composition and volume of products (works, services), necessary for priority state needs, placement of state contracts for the supply (purchase) of these products (performance of works, provision of services) among business entities (Article 13 of the Civil Code of Ukraine).

At the same time, the state contract for the defense order and the offset agreement are represented by domestic legislation as satellite contracts. Yes, according to Part 3 of Art. 8 of the Law "On State Defense Order" [15] in case of purchase of defense products from a foreign legal entity (manufacturer or supplier of such products, works and services) for the amount, exceeding five million euros, a mandatory condition for such a purchase is that Ukraine, in the person of the offset beneficiary, receives the corresponding compensations. The offset beneficiary receiving compensation can be a state customer or another subject of state-owned relations, chosen by the offset commission at the request of the state customer.

The procedure for concluding compensation (offset) contracts and types of compensation are determined by the CMU. In order to resolve issues related to the organization and coordination of activities related to conducting

negotiations with a foreign legal entity on the receipt of compensation by Ukraine, the conclusion and execution of compensation (offset) agreements, the CMU forms a permanent offset commission in the composition of representatives of state customers, other state bodies, enterprises, institutions, organizations. The following types of compensation can be provided under compensation (offset) contracts: performance of works related to maintenance and repair of military and special equipment and military property; provision of services, in particular for the improvement of the qualifications of specialists in the field of defense and security; provision of investments; transfer of intellectual property rights; conducting scientific applied research and design developments in Ukraine; purchase of goods or services from economic entities of Ukraine for an amount corresponding to the partial or full value of the exported goods (reciprocal trade); providing Ukrainian industrial enterprises with additional export opportunities; provision of technical assistance for reforming the defense and security sector, etc. Obtaining the above-mentioned compensations is carried out by concluding and executing a compensation (offset) contract, which the current legislation defines as a foreign economic contract. At the same time, the offset agreement cannot be concluded earlier than the date of conclusion of the state contract and without the approval of the offset commission, which will monitor the implementation of such an offset agreement in the future.

The offset beneficiary prepares a report on the fulfillment of the terms of the offset agreement once every six months and submits it to the offset commission. The offset agreement is considered fulfilled from the date of confirmation by the offset beneficiary of the fulfillment of the offset obligation by the foreign legal entity. All the above-mentioned legal features of the compensation (offset) contract, in our opinion, call into question its foreign economic nature and

allow it to be considered as one of the contractual forms of public-private partnership.

In national legislation, in relation to foreign economic agreements, such a concept as "contract" is used (Articles 382-383 of the Civil Code of Ukraine; Article 1 of the Law "On Foreign Economic Activities"). Usually, this term is most often applied to contracts for which the written form of conclusion is mandatory. According to the norms of Ukrainian legislation, the signs of international commercial contracts as a separate type of economic contract are:

1. The system of Ukrainian legislation, which determines the terms of international commercial contracts. In connection with the fact that the foreign economic agreement/contract belongs to the group of economic contracts, which in turn are a type of civil law contracts, their settlement is carried out on the basis of civil, economic legislation and separate, specialized contracts (in particular, the Law of Ukraine "On foreign economic activity", the Law of Ukraine "On private international law" and "other normative legal acts of national legislation, as well as international treaties, agreements, conventions, etc., consent to the bindingness of which has been given by the Verkhovna Rada of Ukraine" (Article 9 of the Constitution of Ukraine ).

2. Special scope of foreign economic agreements/contracts. The scope of foreign economic agreements/contracts is foreign economic activity. According to Article 1 of the Law of Ukraine "On Foreign Economic Activity", foreign economic activity is "the economic activity of economic entities of residents and non-residents of Ukraine";

3. Special subject composition of contractual relations of international commercial contracts. Subjects of contractual relations of international commercial contracts include subjects of foreign economic activity and foreign counterparties. The Economic Code (Article 378) established the following range of subjects of

economic activity: "economic organizations with the status of a legal entity, created in accordance with the legislation of Ukraine and citizens of Ukraine, foreigners and stateless persons who carry out economic activities and are registered in accordance with the law as entrepreneurs". On the basis of this provision, the following are not included in the FEE subjects:

- industrial and financial group;
- share investment fund;
- branch, representative office, other separate subdivisions;
- non-resident economic organizations.

4. Specific requirements regarding the form of the contract of international commercial contracts. Written form is mandatory when concluding international commercial contracts, because this form allows you to avoid mistakes when checking the powers of future counterparties, concluding the contract, making changes and additions to it, as well as during its execution.

5. Features of the content of the contract. According to Part 1 of Art. 628 of the Civil Code of Ukraine "the content of the contract consists of conditions (clauses) determined at the discretion of the parties and agreed upon by them, and conditions that are mandatory in accordance with acts of civil legislation. At the same time, the contract is concluded if the parties have reached agreement on all essential terms of the contract in the proper form". A foreign economic agreement must contain the following elements:

- name of the agreement, its number, date and place of conclusion;
- the names of the parties and the powers of their representatives if they enter into relations;
- the subject of the contract (including its name, assortment, nomenclature, characteristics of the quality and quantity of the goods);
- volume of works and services;
- term of validity of the contract itself;
- the total amount and price of the contract;
- settlement conditions;

- order of acceptance and delivery of goods;
- responsibilities of the parties;
- force majeure;
- arbitration clause;
- legal address of the parties, their payment and postal details.

The theory and practice of concluding foreign economic contracts pays special attention to the procedure and content of the arbitration agreement, which are defined in the New York Convention, the European Convention on Foreign Trade Arbitration, the UNCITRAL Model Law on International Commercial Arbitration, and the Law of Ukraine "On International Commercial Arbitration". These legal acts establish the following types of arbitration agreements: a separate arbitration agreement and an arbitration clause defined in the contract.

6. Special requirements for applicable law. Regarding the determination of the law of the country under which the contract is concluded, the law is chosen during the determination of the content of the contract (including the rights and obligations of the parties to the contract) by the parties during its conclusion and/or during its subsequent agreement. Art. 4 of the Law of Ukraine "On Private International Law" defines that "on the basis of the sources of law named in it, it is impossible to determine the law that is subject to application to private law relations with a foreign element, then the gap that arises in the conflict of laws regulation is supposed to be filled with the help of an appeal to the conflict of laws norms referring to the law of the country with which the relevant relationship is most closely connected".

In the conflict regulation of foreign economic agreements, the rule of "the closest connection" ("the most significant connection", "the strongest connection", "the most reasonable connection") is applied, which is expressed in the following way: "the law of the state with which a more closely related deed, unless otherwise stipulated or does not follow from the conditions,

the essence of the deed or the totality of the circumstances of the case, the law of the state in which the party that must carry out the performance, which is of decisive importance for the content of the deed, has its place of residence or location". In the event that the parties did not reach an agreement on the definition of the country's law, which will be applied when concluding a foreign economic agreement, Art. 44 of the Law of Ukraine "On Private International Law", which defines the law applicable to the contract in the absence of agreement of the parties on the choice of law.

7. Special procedure for consideration of contractual disputes. The procedure for consideration of contractual disputes from foreign economic agreements is determined by the agreement of the parties, with the corresponding confirmation in the contract or a separate agreement of the jurisdictional body. The dispute can be considered in the following judicial bodies:

- state courts of Ukraine or another state;
- international commercial/arbitration, which was established on the territory of Ukraine or another state: a) institutional permanent arbitration; b) ad hoc arbitration. International commercial arbitration in accordance with Art. 28 of the Law of Ukraine "On International Commercial Arbitration" must resolve the dispute "in accordance with such rules of law that the parties have chosen as applicable to the substance of the dispute." The law of the country chosen by the parties to resolve the dispute must be substantive, in the event that the parties have not determined such a law, then the international commercial arbitration shall apply conflict of law bindings in accordance with the circumstances of the case.

As we noted above, the foreign economic agreement belongs to the group of economic agreements. This thesis presupposes the application of the general legal conditions

inherent in these contracts, namely, the rules of law regulate:

- 1) which legislation determines the terms of validity of international commercial contracts;
- 2) foreign economic activity as the scope of foreign economic agreements/contracts;
- 3) special subject structure;
- 4) a special form of foreign economic agreements/contracts as a general rule;
- 5) content of the contract;
- 6) requirements for the law applicable to the contract;
- 7) the procedure for consideration of disputes in the field of foreign economic activity.

The qualification of economic activity as foreign economic and the contracts mediating it as foreign economic has important legal consequences related to:

the application of the appropriate legal regime for its implementation, the basis of which are the principles (main principles) of the legal regulation of foreign trade;

the presence and priority value during the legal regulation of relations that arise in connection with the implementation of FTAs of the convention level of regulation (we are talking about international conventions, treaties and agreements);

using, along with the material and legal method of regulating contractual relations in the field of foreign trade, the collision method;

by the effect of the principle of the autonomy of the will of the parties to the foreign economic agreement, related to the possible choice of foreign law as the regulator of the rights and obligations of the parties to the foreign economic agreement;

the possibility of selection for making calculations under a foreign currency foreign economic contract;

the possibility of consideration of disputes in international commercial arbitrations, etc.

The lack of a single legal basis for defining the terms "foreign economic activity" and

"foreign economic contract" causes problems in law enforcement. The formation of such a basis should take place taking into account the general principles of legal regulation of relations in the field of foreign trade, provisions of acts of international legal unification in this area, as well as modern trends in its development. Thus, the rapid development of e-commerce and all-encompassing digitalization require a clear answer from the legislator to the question of the possibility of qualifying economic activity as foreign economic, provided that the only place of business contacts of one or both counterparties is the Internet (multinational segments of such a network and/or business partners are by business entities of different countries), while there is no crossing of the customs border.

We see as doubtful the protection of the domestic defense-industrial complex from corruption schemes and embezzlement due to the expansion at the expense of state customers from the state defense order of the subject composition of foreign economic activity, the legislative concepts of which have been the subject of discussions for a long time and give rise to many questions.

**Prospects for further exploration in this direction.** The most important issue for the implementation of legal regulation of any sphere of legal relations is the availability of general approaches to the understanding of certain concepts, their unified definitions in various normative legal acts. At the same time, such an understanding of one or another concept must meet the requirements of today.

Economic activity and, accordingly, economic legislation is one of the most dynamic branches of legislation. Therefore, the development of an effective mechanism for the unification of the definition of basic concepts is an urgent issue of our time.

It should be important for further scientific research to focus on European legislation, to develop joint approaches to the definition of

certain concepts. Also, the issue of harmonizing the definitions of the same concepts contained in various normative legal acts is still a very relevant problem.

#### References:

1. Hospodarskyi kodeks Ukrainy: Zakon Ukrainy [Law of Ukraine] vid 16 sichnia 2003 r. № 436-IV. Vidomosti Verkhovnoi Rady Ukrainy. 2003. № 18, № 19-20, № 21-22 (02.05.2003). St. 144. (in Ukrainian).
2. Mytnyi kodeks Ukrainy: Zakon Ukrainy [Law of Ukraine] vid 13 bereznia 2012 r. Vidomosti Verkhovnoi Rady Ukrainy. 2012. № 44 - 45, № 46 - 47, № 48 (09.11.2012). St. 552. (in Ukrainian).
3. Kontseptsiiia rozvytku tsyvrovoi ekonomiky ta suspilstva Ukrainy na 2018, skhvalena rozporiadzhenniam Kabinetu Ministriv Ukrainy vid 17 sichnia 2018 r. № 67-r. Ofitsiinyi visnyk Ukrainy. 2018. № 16 (23.02.2018). St. 560. – S. 70. (in Ukrainian).
4. Pro elektronnu komertsiiu: Zakon Ukrainy vid 3 veresnia 2015 r. № 675-VIII. Vidomosti Verkhovnoi Rady. 2015. № 45 (06.11.2015). St. 410. (in Ukrainian).
5. Modelnyi zakon SND pro osnovy rehuliuвання Internetu. URL: [https://zakon.rada.gov.ua/laws/show/997\\_o14](https://zakon.rada.gov.ua/laws/show/997_o14) (accessed: 10.05.2019).
6. Pro zovnishnoekonomichnu diialnist: Zakon Ukrainy [Law of Ukraine] vid 16 kvitnia 1991 r. № 959-XII. Vidomosti Verkhovnoi Rady URSR. 1991. № 29 (16.07.1991). St. 377. (in Ukrainian).
7. Tsyvilnyi kodeks Ukrainy: Zakon Ukrainy [Law of Ukraine] vid 16 sichnia 2003 r. № 435-IV. Vidomosti Verkhovnoi Rady Ukrainy. 2003. №№ 40-44 (03.10.2003). St. 356. (in Ukrainian).
8. Instruksiia pro poriadok reiestratsii predstavnytstv inozemnykh subiektiv hospodarskoi diialnosti v Ukraini, zatv. Nakazom Ministerstva zovnishnikh ekonomichnykh zviazkiv i torhivli Ukrainy vid 18.01.96 № 30 (u red. nakazu Ministerstva ekonomiky Ukrainy vid 15.06.2007 № 179. URL: // <https://zakon.rada.gov.ua/laws/show/z0034-96> (accessed: 10.04.2024) (in Ukrainian).
9. Podatkovi kodeks Ukrainy: Zakon Ukrainy [Law of Ukraine] vid 2 hrudnia 2010 r. № 2755-VI.

Vidomosti Verkhovnoi Rady Ukrainy. 2011. № 13-14, № 15-16, № 17 (08.04.2011). Ст. 112. (in Ukrainian).

10. Uhoda pro asotsiatsiiu mizh Ukrainoiu, z odniei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony. URL: [https://zakon.rada.gov.ua/laws/show/984\\_011](https://zakon.rada.gov.ua/laws/show/984_011) (accessed: 10.06.2019).

11. Pro derzhavne oboronne zamovlennia: Zakon Ukrainy [Law of Ukraine] vid 3 bereznia 1999 r. v red. ZU vid 23 veresnia 2010 r. № 464-XIV. Vidomosti Verkhovnoi Rady Ukrainy. 2011. № 6 (30.04.1999). Ст. 45. (in Ukrainian).

12. Velyka ukrainska yurydychna entsyklopediia: u 20 t. – Т. 15: Hospodarske pravo. Kharkiv: Pravo, 2019. 784 s. (in Ukrainian).

13. Artykutsa N. V. Zakonodavchi terminy ta yikh vyznachennia. Naukovi zapysky. – Tom 90. Yurydychni nauky. 2009. S. 39 - 44. (in Ukrainian).

14. Onyshchuk I. I. Terminolohiia ta zakonodavchi definitsii u normatyvno-pravovykh aktakh. Naukovo-informatsiyni visnyk. Seriia Pravo. 2012. № 6. S. 154 -160. (in Ukrainian).

15. Rudenko M. P. Pravove rehuliuвання vnutrishnohospodarskykh vidnosyn: avtoref. dys. ... kand. yuryd. nauk: 12.00.04. Kharkiv, 2017. 20 s. (in Ukrainian).

#### **Література:**

1. Господарський кодекс України: Закон України від 16 січня 2003 р. № 436-IV. Відомості Верховної Ради України. 2003. № 18, № 19-20, № 21-22 (02.05.2003). 144. (укр.).

2. Митний кодекс України: Закон України від 13 березня 2012 р. Відомості Верховної Ради України. 2012. № 44 - 45, № 46 - 47, № 48 (09.11.2012). Ст. 552. (укр.).

3. Концепція розвитку цифрової економіки та суспільства України на 2018 рік, схвалена розпорядженням Кабінету Міністрів України від 17 січня 2018 року. № 67-р. Офіційний вісник України. 2018. № 16 (23.02.2018). 560. – С. 70. (укр.).

4. Про електронну комерцію: Закон України від 3 вересня 2015 р. № 675-VIII. Відомості Верховної Ради. 2015. № 45 (06.11.2015). Ст. 410. (укр.).

5. Модельний закон СНД про основи регулювання Інтернету. URL: [https://zakon.rada.gov.ua/laws/show/997\\_o14](https://zakon.rada.gov.ua/laws/show/997_o14) (дата звернення: 10.04.2024).

6. Про зовнішньоекономічну діяльність: Закон України від 16 квітня 1991 року. № 959-XII. Відомості Верховної Ради УРСР. 1991. № 29 (16.07.1991). Ст. 377. (укр.).

7. Цивільний кодекс України: Закон України від 16 січня 2003 р. № 435-IV. Відомості Верховної Ради України. 2003. №№ 40-44 (03.10.2003). 356. (укр.).

8. Інструкція про порядок реєстрації представництв іноземних суб'єктів господарської діяльності в Україні, затв. Наказом Міністерства зовнішніх економічних зв'язків і торгівлі України від 18.01.96 № 30 (у ред. наказу Міністерства економіки України від 15.06.2007 № 179. URL: [https://zakon.rada.gov.ua/laws/show/z0034\\_-96](https://zakon.rada.gov.ua/laws/show/z0034_-96) (дата звернення: 10.04.2024) (укр.).

9. Податковий кодекс України: Закон України від 2 грудня 2010 р. № 2755-VI. Відомості Верховної Ради України. 2011. № 13-14, № 15-16, № 17 (08.04.2011). 112. (укр.).

10. Угода про асоціацію між Україною, з однієї сторони, та Європейським Союзом, Європейським співтовариством з атомної енергії і її державами-членами, з іншої сторони. URL: [https://zakon.rada.gov.ua/laws/show/984\\_011](https://zakon.rada.gov.ua/laws/show/984_011) (дата звернення: 10.06.2019).

11. Про державне оборонне замовлення: Закон України від 3 березня 1999 р. в червоній. ЗУ від 23 вересня 2010 р. № 464-XIV. Відомості Верховної Ради України. 2011. № 6 (30.04.1999). 45. (укр.).

12. Велика українська юридична енциклопедія: у 20 т. / ред. – Т. 15 : Господарське право. Харків: Право, 2019. 784 с. (українською мовою).

13. Артикуца Н. В. Законодавчі терміни та їх визначення. Наукові записки. – Том 90. Юридичні науки. 2009. С. 39 - 44. (укр. мовою).

14. Онищук І. І. Термінологія та законодавчі дефініції у нормативно-правових актах. Науково-інформаційний вісник. Серія Право. 2012. № 6. С. 154 -160. (українською мовою).

15. Руденко М. П. Правове регулювання внутрішньогосподарських відносин : автореф. дис. ... канд. юрид. наук: 12.00.04. Харків, 2017. 20 с. (українською мовою).



**Мілаш В. С., Матвєєва А. В.,  
Зовнішньоекономічна діяльність та  
зовнішньоекономічний контракт: проблеми  
законодавчого регулювання.- Стаття.**

Важливим завданням держави і передусім її законодавчого органу є удосконалення й подальший розвиток поняттєво-категоріального апарату господарського законодавства відповідно до сучасних реалій економічного розвитку. Особливої гостроти та актуальності це завдання набуває в умовах посилення євроінтеграційних процесів України.

Переважає більшість нормативно-правових актів у сфері регулювання господарських відносин містить окремі статті, в яких надано перелік визначень термінів, що використовуються в цьому нормативно-правовому акті. Це суттєво спрощує проблему правозастосування. Проте лише у тому разі, коли за допомогою норм законодавчої техніки визначення термінів та понять прописані коректно та не суперечать визначенню аналогічних понять, що вже містяться у інших нормативно-правових актах.

Є ціла низка факторів, які негативно впливають на одноманітне тлумачення законодавчих норм та формування єдиної правозастосовчої практики, а також на остаточні результати правозастосування і, як наслідок, можливість ефективного захисту прав і свобод суб'єктів господарювання. До них відносяться порушення правил побудови законодавчих дефініцій, а також використання законодавцем неточних, абстрактних, двозначних термінів (категорій), що фактично зводить нанівець реалізацію їхньої інструментальної функції. Внесення змін до змісту законодавчих визначень (понять), які є базовими для відповідної сфери регулювання,

значним чином впливає на загальний вектор її регулювання, у деяких випадках – кардинально змінює його, а інколи, на жаль, породжує численні колізії в регулюванні цієї сфери.

Результатами дослідження стало виявлення проблемних аспектів кваліфікації зовнішньоекономічної діяльності й зовнішньоекономічних договорів, пов'язаних з вадами законодавчих дефініцій указаних термінів, а також надання деяких пропозицій щодо їх усунення.

Важливим питанням є вироблення єдиних підходів щодо розуміння сутності та правової природи господарської діяльності з іноземним елементом (зовнішньоекономічної діяльності) для коректного застосування норм іноземного права у разі визначення їх як застосовного права колізійними нормами відповідних угод або ж самими сторонами відповідно до принципу автономії волі сторін.

**Ключові слова:** законодавча дефініція (термін); зовнішньоекономічна діяльність; зовнішньоекономічний договір; комерційне підприємство; компенсаційні (офсетні) договори.

*Авторська довідка:*

**Мілаш В. С.** – д.ю.н., доцент, професорка кафедри господарського права Національний юридичний університет імені Ярослава Мудрого, [mvss150510@gmail.com](mailto:mvss150510@gmail.com)

**Матвєєва А. В.** – к.ю.н., с.н.с., доцент кафедри цивільного судочинства, арбітражу та міжнародного приватного права Національний юридичний університет імені Ярослава Мудрого, [avmatveeva2016@gmail.com](mailto:avmatveeva2016@gmail.com)

Стаття надійшла до редакції 22 березня 2024р.