

## Ground is a tenancy

The Polish legal system provides for a broad catalog of named contractual relations concerning the right to use the property of the third party. Among the most popular are lease (PL: najem) and tenancy (PL: dzierżawa) agreements. What primarily distinguishes a lease from a tenancy is the right to collect benefits from the object provided for use. However, as it turns out, these contracts are mistakenly used interchangeably.

Let us take photovoltaic and wind projects as an example. Investors usually decide to build photovoltaic or wind farms on agricultural land, owned by private individuals. Such investments are costly and the operational phase of the projects is often planned for several decades. Investors therefore seek to secure the title to the land for as long as possible. The choice then falls on tenancy agreements, which can be concluded for a fixed term of up to thirty years, whereas in the case of a lease agreement concluded with an individual, the maximum is ten years. After these periods, the contracts become contracts concluded for an indefinite period and, unlike contracts concluded for a fixed period, can be easily terminated. Concluding a contract for an indefinite period is therefore not a good alternative for an investor interested in a long-term and stable title to the land.

The second reason why the tenancy agreements appear to be so over extensively used is their origin. Tenancy was originally a contract used to rent and cultivate agricultural land and to collect benefits in the form of crops. Therefore, in the collective consciousness a tenancy agreement concerns the use of land. In reality, however, the provisions of the Civil Code do not limit the scope of the subject matter of a tenancy agreement to land only.

What distinguishes a tenancy from a lease is first and foremost the tenant's entitlement to - in addition, to use - derive benefits from the rented property (or right). Seemingly, in the context of photovoltaic and wind projects, everything fits. After all, by entering into a tenancy agreement, the investor intends not only to use the property but also to derive benefits in the form of revenues from the sale of electricity. However, the Supreme Court, in a 2012 ruling, determined that the energy does not constitute a benefit from a real estate, but from the installation that is only sited on the land.

There are many similar rulings and they have one common thesis, according to which, we are dealing with a tenancy agreement only in the case where the benefit comes "directly" from the leased property (or right). In cases in which the property serves only indirectly to generate benefits or is only one of the elements allowing to obtain them, the legal relationship between the parties should be qualified as a lease.

This issue is a common sector risk that is known to investors who try to mitigate it. Contracts often provide for the entitlement of the tenancies to draw benefits (including natural benefits) from the property, even if the entitlement is not to be exercised. A temporary postponement of the date of commencement of the 'tenancy' period, to the date of the final construction permit for the project or even to the date of its actual 'commissioning', is also used. However, these measures appear to be attempts to circumvent the regulations and therefore do not completely mitigate the risk that tenancy agreement can be qualified as leases that convert into contracts of indefinite duration as soon as 10 years after their conclusion. At this point, business advisors come to the aid of the 'clinging' lawyer with one compelling argument: "Everyone does it". And this is hard to deny. The only entity that would seek to deprive the landowner of the income from the "lease" - i.e. the neighbor - has no standing in the case. Therefore, as long as the owners of the property (because it often happens that the property is owned by several family members) are in agreement about letting the property for use, the "Everyone does it" argument may protect investors from the materialization of the risk of losing the title to the land.

From the perspective of a legal purist who cannot accept the "Everyone does it" argument, it would make sense to introduce an institution that would make it possible to secure titles to land for many years and in an effective manner, for purposes other than deriving benefits directly from the leased property. We hope that the spring which has just arrived, and which is invariably associated with new sowings aimed at producing the only true benefits of agricultural land, will also bring new and, above all, beneficial solutions. We will not cease to follow how these sowings emerge.

## Do you want to know more? Contact us!

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