

## Tenancy-free period

In our practice, we often encounter lease agreements made to secure legal title to land for solar or wind farms.

A lease is a type of obligation where one party gives another party the right to use an asset. However, specific conditions that distinguish it from other usage agreements must be met for such an agreement to be considered a lease. Every named contract regulated in the civil code has key elements essential for its legal qualification, known in legal terminology as "essentialia negotii." For lease agreements, rent is one of these crucial elements, making the lease inherently payable.

In the renewable energy project market, it is common to delay rent payments until the tenant obtains construction permits or other necessary documents, concludes a connection agreement with the relevant operator, starts construction, or even until the installation produces electricity. A symbolic one-time rent is sometimes set for this period, after which regular rent payments start. These arrangements make business sense for investors to minimize costs during the project's preparatory phase when its completion is still uncertain.

Delaying rent payments effectively allows the tenant to use the property for free for a certain period of time. This lack of an essential element from the contract's start raises questions about its qualification as a lease during this rent-free period. There might be a temptation to consider this initial period as a lending for use [użyczenie] (a type of agreement characterized by non-payment).

These seemingly academic considerations can have significant practical implications. A fixed-term lease agreement is very stable, with limited termination options. In contrast, if the asset becomes necessary for the lender due to unforeseen reasons, with a lending for use, they can demand its return even if the contract is for a fixed term. If the agreement is considered a lending for use during the "free" period, the property owner could terminate it early and reclaim the property, causing the tenant to lose their legal title to the land due to the owner's unilateral decision.

To avoid such risks to the project's feasibility, it is essential to ensure the legal qualification of the agreement from the start. Various constructions can faithfully reflect the parties' business arrangements without explicitly qualifying the usage period as free. Avoiding symbolic rents is also advisable

to prevent giving the landlord grounds for arguing that the agreement circumvents the law.

Investors' desire to minimize costs can make them less vigilant when negotiating and drafting these critical provisions. Such arrangements work as long as both parties are satisfied with the agreement and no disputes arise (most commonly about money). However, given the significant consequences of potentially classifying such an agreement as non-paid, it's worth recalling the old lawyers' wisdom that contracts are written primarily for bad times.

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

Karolina Pacholska, Associate  
[karolina.pacholska@ngllegal.com](mailto:karolina.pacholska@ngllegal.com)

Natalia Cytlak, Associate  
[natalia.cytlak@ngllegal.com](mailto:natalia.cytlak@ngllegal.com)