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INVALID TRANSACTIONS IN PRIVATE LAW DOCTRINE

Abstract. ***Purpose.*** This article studies legal features of invalid transactions in private law doctrine. The author explores different approaches to determining the place of invalid transactions in the system of legal facts. Particular attention is paid to the separation of invalid transactions from torts, as well as the study of the relations between transactions and invalid transactions. The works of the founders of the doctrine of pandects are highlighted. The genesis of the doctrines of invalid transactions and their place in the doctrine of private law of Ukraine is discussed.

Research methods. Scientific investigations have focused broadly on the analysis of the relevant literature. The author has used a number of general and special methods of scientific cognition. Thus, logical, quantitative, comparative, historical and sociological methods have been used.

Results. The article analyses the invalidity of transactions in the context of the doctrine of private law. The author compares invalid transactions with other legal categories: transactions, torts, and legal facts. The author draws conclusions about the place of invalid transactions in the system of legal facts and determines their legal nature.

Conclusions. Based on the study, the author establishes the legal nature of invalid transactions. In particular, the paper concludes about the inadmissibility of identifying invalid transactions and torts. A distinction should also be made between invalid transactions as a category contrary to the provisions of private law and other legal facts that do not meet the requirements of public law. At the same time, there is no reason to talk about any special nature of invalid transactions. The application of the notion of invalidity to a certain legal category does not change the legal nature of a legal fact but means that the rule of law does not recognize the ability to create legal consequences that are typical of "normal" legal facts. Invalid transactions cannot create their own, specific legal consequences, because trust under such a transaction takes place within the framework of the construction of restitution.

Key words: invalid transactions, private law doctrine, distinguishing between transactions and torts, void and voidable transactions.

1. Introduction

In the doctrine of private law, an important place is occupied by the study of the legal nature of legal facts, especially those that are components of private law tools for regulating public relations (Tatsiy et al., 2017). This thesis is especially relevant to invalid transactions, because their place in the system of legal facts was the subject of numerous scientific discussions. In this regard, V. Tarkhov noted that the concept of invalid transactions is contradictory in terms of logic, and transactions are always a legal action and therefore, transactions cannot be invalid (Tarhov, 1997).

This issue has been the subject of many scientific contributions: D. Genkin, Yu. Gambarov, H. Dernburg, V. Isakov, A. Kosruba, O. Kot, I. Novitskiy, I. Peretersky, N. Rabinovich, V. Ryasentsev, I. Spasybo-Fatieieva, F. Heifetz, V. Shakhmatov, S. Ernst, S. Raschke, S. Medina, B. Windscheid, and others.

The analysis of scientific researches allows highlighting some points of view concerning the legal nature of invalid transactions.

2. Invalid transactions as civil offenses

Lawyers use different terms – "offenses", "wrongful acts", "illegal acts", "torts", but they are united by the emphasis on such a feature of an invalid transaction as non-compliance with legal requirements.

One of the founders of this concept was I. Peretersky, who pointed out that an action is not a transaction if it creates legal consequences, but not those that the participants had in mind (Goykhbarg, Pereterskiy,1929).

F. Kheifets stated in this regard that an invalid transaction should be classified as a civil offense (Kheifets, 2007). V. Shakhmatov singled out the category of "unprohibited actions" as intermediate between legality and illegality that reflects the non-compliance of the subject's behaviour with statutory requirements, which the state both does not approve and does not consider illegal. Such actions create socially undesirable consequences. At the same time, the researcher singled out the composition of the illegal transaction as part of the offense. V. Shakhmatov actually equated illegal transactions and torts, which led to the application of provisions on torts – composition, aggravating features, etc. In conclusion, the researcher pointed out the requirement for the subjects of illegal transactions guilt in the form of direct intent or negligence (Shakhmatov, 1967).

I. Matveyev marked that the court's decision which declares the transaction invalid, and the application of the consequences of its invalidity according to their guilty counterparties imposes the civil liability on them (Matveyev, 2002).

I. Spasybo-Fatieieva notes that entering into transactions which have some defects is an abnormal legal phenomenon to which the law should respond in some way. The scientist believes that the concept of invalid transactions was introduced for the above purpose and deals with transactions with some defects of will, subject composition, form, content, which does not meet the requirements specified in Art. 203 of the Civil Code of Ukraine (Spasybo-Fatieieva, 2007).

Similar vision has O. Kot. The scientist substantiates his own point of view by the fact that the norms of law in all cases directly indicate the illegality of invalid transactions. At the same time, O. Kot says that illegality does not always mean an offense: the issue of causing harm by making an invalid transaction and the option of compensating it by applying the consequences of the invalidity of the transaction is the Achilles tendon of the concept, which interprets an invalid transaction as a civil offense. However, such cases, according to the author, are rather exceptions (Kot, 2009).

It seems that this latter is a weak point of such a vision. In fact, it is extremely difficult to "fit" all invalid transactions in the Procrustean bed of torts. Even transactions violating public order are controversial. Thus, is it possible at all, for example, to say that a transaction concluded with the violation of the requirements for its notarization is an offense? It is hardly appropriate even to propose such a question (Hameau et al., 2016).

The recognition of invalid transactions as offenses in the context of the doctrine of private law has serious effects: in deciding on the invalidity of a particular transaction, one should establish the composition of the civil offense. In this regard, O. Kot rightly notes that the court, considering the dispute over the claim for invalidation, does not investigate (and should not investigate!) the issue of the subjective attitude of the parties to their actions, which are qualified by the court as invalid transaction (Kot, 2009).

There is no doubt that it is necessary to distinguish between obvious torts, which only outwardly resemble transactions (for example, an agreement on tax evasion, fees (mandatory payments) within the meaning of Art. 212 of the Criminal Code of Ukraine) and on the other hand, transactions that are invalid, but which are clearly not torts. Minor's transactions are also difficult to recognize as offenses, because they do not have the fault of at least one party.

It draws attention that part 2 of Art. 216 of the Civil Code provides for the possibility of compensation for property and moral damage, which, at first glance, indicates the illegal nature of the invalid transaction. However, at the same time, the legislator does not mention compensation for damage caused by an invalid transaction, but compensation for damage "in connection with the commission of an invalid transaction", which is fundamentally different. It should be noted that the Civil Code of Ukraine uses different terms in this regard.

Thus, the Civil Code of Ukraine further marks compensation of the losses caused by the entering into invalid transaction (part 4 of item 221 of the Civil Code) that is already obviously closer to the losses caused by the transaction. Part 4 of Art. 226 of the Civil Code deals with compensation for non-pecuniary damage, but it does not specify what exactly it is caused (apparently, by concluding a transaction with an incapable person). Finally, Part 2 of Art. 227 of the Civil Code directly speaks of causing moral damage by the transaction. Part 2 of Art. 229 of the Civil Code provides for compensation for damages caused by error of the person in the transaction, part 2 of Art. 230 of the Civil Code, part 2 of Art. 231 of the Civil Code, part 2 of Art. 232 of the Civil Code, part 2 of Art. 233 of the Civil Code – damages and non-pecuniary damage caused entering into the transaction. Accordingly, it is difficult to follow a single approach. Undoubtedly, damage may be caused during the conclusion and execution of the transaction, but it is challenging to determine from the text of the Civil Code whether it is caused directly

by the transaction (action) or other acts of conduct (influence on the expression of will, malicious agreement). Two things can be said for sure. First, the legislator assumes the possibility of causing harm directly by the transaction, but this is not noticed as a rule. Secondly, one can conclude that an invalid transaction creates legal consequences, which allows us to unambiguously attribute it to the system of legal facts.

It is important to keep in mind the cases when an invalid transaction violates the requirements of public law. For example, the parties entered into an agreement to evade taxes, fees (mandatory payments), as provided for in Art. 212 of the Criminal Code of Ukraine. In this case, such an agreement will really no longer be a transaction, but a criminal act. However, its legal nature is due not to the prescriptions of civil but criminal law.

3. Invalid transactions are transactions

One of the founders of this approach is considered to be Yu. Gambarov, who attributed invalid transactions to transactions because they cause liability for damages and therefore, "cannot be attributed to facts that have no legal existence" (Gambarov, 1911). V. Shakhmatov, who once noted that not only valid transactions are aimed at establishing, changing or terminating civil rights and obligations – every action that has such a direction, the law recognizes as the transaction (Shakhmatov, 1966). Accordingly, the emphasis is on the focus on achieving legal consequences, rather than on the real, actual achievement.

D. Genkin also considered invalid transactions to be transactions. According to the researcher, the transaction as a legal fact, in contrast to the tort, is characterized by the presence of an action (will) aimed at establishing, changing or terminating civil relations, while in a tort the person who committed it does not want the occurrence of certain legal consequences. The fact of concluding a transaction does not turn it into a tort if there is no result in the legal consequences to which the parties sought to achieve. Legality or illegality is not a necessary element of the transaction as a legal fact, but determines only certain consequences of the transaction (Genkin, 1947).

I. Samoshchenko noted that an offense differs from an invalid transaction, in particular, in the fact that the offense is always a guilty act, while the invalidity of transactions is often established by relying on one objective basis – non-compliance with the law (Samoshchenko, 1963). I. Novitskiy had similar views using the term "illegal transaction", noting that it has some legal consequences, but these consequences are different from those desired by the parties (Novitskiy, 1954). V. Ryasentsev had the same opinion, pointing out that it is impossible to identify the actual composition of the transaction with its consequences and such proposals are not justified by factual considerations (Ryasentsev, 1974).

This point of view is still actively supported today. Thus, among modern researchers, such views are held by A. Kostruba, who notes that an invalid transaction is an action that is not similar to the model defined by law. However, since the Civil Code is guided by the general permissive principle, i. e. everything is allowed that is not expressly prohibited by law, it turns out that in the absence of a real and directly established prohibition not to perform certain actions (for example, not to comply with the transaction form), the latter are legitimate or at least those that are not clearly regulated by law.

In understanding of the invalidity of the transaction A. Kostruba proposes to focus in the direction of the will, because by concluding a transaction the legislator understands the expression of the subject of civil turnover of his will, i. e. the expression of will. If the expression of will is aimed at establishing, changing or terminating civil rights and obligations, then such expression is necessarily recognized as a transaction (Kostruba, 2012).

V. Kucher holds a close position pointing out that civil offenses should include only those insignificant transactions that contain all the elements of a civil offense, as well as objectively illegal insignificant transactions (Kucher, 2004). Obviously, all other invalid transactions should be recognized as transactions.

In our opinion, one should agree with such vision. Indeed, it can be considered that the conclusion of a contract in violation of the law on notarization in itself causes something negative to its participants? Of course, we can talk about the violation of the relevant provisions of the law, but the very fact of such a conclusion does not mean the existence of specific damage.

In this context, it is worth referring to the experience of classical German jurisprudence. Thus, Bernhard Windscheid (this eminent jurist is the author of several fundamental works, among which are "The Doctrine of the Invalidity of Deeds in the Napoleonic Code" of 1847, and "Will and Expression of Will" of 1878) equated the invalidity of the deed to his non-existence (non-existence). In his apt words, an invalid transaction is "a body without a soul, but nevertheless a body" (Medina, 2015; Scalise, 2019).

Among modern researchers, the author cites the opinion of Professor Martiny Stefanie Raschke, who notes that insignificant transactions exist as acts, but do not lead to the desired legal consequences. However, they can lead to other consequences, such as paying a damage (Raschke, 2008).

4. Invalid transactions as some special legal acts

In the literature, one can identify another point of view on the nature of invalid transactions, the proponents of which insist on their specific legal nature, a special place in the system of legal facts. This also includes attempts to find in invalid transactions both features of both transactions and illegal actions.

Thus, V. Isakov attributed invalid transactions to special "defective" legal facts (Isakov, 1984). N. Rabinovich believed that an invalid transaction is a transaction in its content, form, direction, but at the same time is an offense, but an offense of a special order, in a broad sense (Rabinovich, 1960).

Quite conditionally, this includes the position of M. Agarkov, who noted that the expression of will of an incapable citizen, or one who did not realize the nature of their actions, as well as the expression of will of the parties without the intention to generate legal consequences are legally indifferent actions. Accordingly, they are not illegal because they do not violate the law. However, they cannot be considered legitimate, as they do not create legal consequences (Agarkov, 1946).

In this context, the following should be stated. The concept of invalidity is used not only in relation to the transaction. Only the Civil Code uses "invalidity" in relation to more than ten categories – rights, certificates, acts, marriage, adoption, decisions of legal entities. And if one raises the issue that an invalid transaction has a fundamentally different legal nature than a valid one, and thus, one should talk about a different nature of all other invalid rights, acts, decisions, and so on. However, according to the author, an invalid right remains a right, an invalid decision – a decision. The issue is different – the current system of law deprives these phenomena of legal force, does not recognize them as legally significant and does not establish their protection. In addition, the recognition of the role of any special legal significance in invalid transactions will lead to the dispersion of the system of legal facts and is unlikely to have any scientific and practical value.

It is also worth mentioning the view that invalid transactions are not legal facts at all. Today, this view is not common in the literature, the main argument of its supporters is that the legislator "deprives" invalid transactions of the option to create legal consequences. The founder is D. Meyer, who believed that illegal transactions are not recognized as valid, and therefore, they are not existing (Meyer, 2000).

Heinrich Dernburg had a similar vision. In his in work "Pandects" as of 1884, he distinguished between the non-existence and invalidity of the transaction. The deed exists only when all its essential elements are observed. If one of the required elements is missing, it is only the visibility of the transaction. Since "being" and "non-being" are mutually exclusive concepts, invalidity leads to non-existence. Accordingly, absolutely invalid (insignificant) transactions are completely absent, non-existent (Medina, 2015).

Among modern researchers, Professor Stefan Ernst (Germany) points out that the void transactions are invalid from the beginning; this means that they do not exist (Ernst, 2013).

This concept is opposed, first of all, by the fact that, although invalid transactions do not create the legal consequences to which they are intended, this does not preclude the possibility of other consequences, first of all, the obligation to compensate the damage.

5. Conclusions

The invalidity of the transaction does not mean a fundamental change in the legal nature of this legal fact. It is the issue of deprivation of this act of legal force and option of judicial protection of the relevant rights. However, invalid transactions are transactions. In addition, this conclusion can be extended to other legal facts to which the category of invalidity applies.

Based on the study, the author established the legal nature of invalid transactions. In particular, the author concluded about the inadmissibility of identifying invalid transactions and torts. A distinction should also be made between invalid transactions as a category contrary to the provisions of private law and other legal facts that do not meet the requirements of public law. At the same time, there is no reason to talk about any special nature of invalid transactions. The application of the notion of invalidity to a particular legal category does not change the legal nature of a legal fact, but means that the rule of law does not recognize the option to create legal consequences that are typical of "normal" legal facts. Invalid transactions cannot create their own, specific legal consequences, because trust under such a transaction takes place within the framework of the construction of restitution.

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НЕДІЙСНІ ПРАВОЧИНИ В ДОКТРИНІ ПРИВАТНОГО ПРАВА

Анотація. ***Мета.*** У статті досліджуються особливості недійсних правочинів у доктрині приватного права. Автор розглядає різні підходи до визначення місця недійсних правочинів у системі юридичних фактів. Особливу увагу приділено відмежуванню недійсних правочинів від деліктів, а також дослідженню співвідношення правочинів і недійсних правочинів. Автор провів аналіз праць основоположників учення про пандекти. Досліджено генезис доктрин про недійсні правочини та їх місце в доктрині приватного права України.

Методи дослідження. Наукове дослідження сфокусоване на емпіричному аналізі наукових робіт у цій сфері. Автор використав низку загальних і спеціальних методів наукового дослідження. Для цього використовувалися логічний, кількісний, порівняльний, історичний та соціологічний методи.

Результати. У статті аналізується недійсність правочинів у контексті доктрини приватного права. Недійсні правочини автор порівнював з іншими юридичними категоріями: правочинами, деліктами та іншими юридичними фактами. Зроблено висновки про місце недійсних правочинів у системі юридичних фактів та визначено їхню юридичну природу.

Висновки. На основі проведеного дослідження автором встановлено правову природу недійсних правочинів. Зокрема, зроблено висновки про неприпустимість ототожнення недійсних правочинів та деліктів. Варто також розрізняти недійсні правочини як категорію, що суперечить положенням приватного права, та інші юридичні факти, які не відповідають вимогам публічного права. Водночас немає підстав говорити про якийсь особливий характер недійсних правочинів. Застосування поняття недійсності до певної юридичної категорії не змінює юридичну природу юридичного факту, а означає, що правопорядок не визнає здатність створювати юридичні наслідки, характерні для «звичайних» юридичних фактів. Недійсні правочини не здатні створити власні, конкретні правові наслідки, оскільки повернення отриманого за таким правочином відбувається в межах конструкції реституції.

Ключові слова: недійсні правочини, доктрина приватного права, розмежування правочинів і деліктів, нікчемні та оспорювані правочини.

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