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GENERAL CHARACTERISTICS OF FICTITIOUS TRANSACTION

Research problem statement. Transaction as an institution of civil law has been known since Roman law. Subsequent to those times, approaches to the definition and nature of transaction have changed, forasmuch as economic relations that are mediated by the rules of transactions have changed themselves.

Transactions are the main ground for establishment of civil rights and obligations. They are so common in practice that the concept of «transaction» may apply to almost any action related to the movement of goods in the market.

It should be noted that the transactions' result often differs from the one its participants intended to achieve. The transaction may be contrary to the rules of law established by legislation. Under noncompliance of particular conditions, the transaction may not take place and the desired legal and economic effects may not be achieved.

Contradiction between transaction and legislation, no matter what rules of law are violated, is an extremely negative phenomenon for the society. Therefore, the study of issues related to contradiction between transaction and legislation, in particular with fictitious transactions, is relevant and justified both from the theoretical and practical point of view.

Analysis of recent research and publications.

The issues of invalid transactions, alleged in particular, were studied by M. M. Agarkov [1], D. M. Genkin [2], V. I. Zhekov [3], V. O. Kucher [4], I. V. Matveev [5], I. B. Novitsky [6], I. B. Rabinovich [7], O. N. Sadykov [8], K. I. Sklovsky [9], I. V. Spasybo-Fateeva [10], D. O. Tuzov [11], N. S. Hatnyuk [12], and others.

Invalidity of the transaction is determined by imperfection of any of its elements. Thus, the study of law distinguishes between invalid transactions with defects of entity, will, form, and content [13; 14].

Main findings. Invalid transactions include the so-called fictitious transactions – where the parties to the corresponding transaction conclude it with no

intention to create any legal consequences, being aware in advance that it will not be executed. When making such a transaction the parties have other purposes than those stipulated therein. The mentioned objectives may be illegal, or may not have a legal goal at all. According to existing civil legislation, such a transaction shall be recognized as invalid by a court.

According to current civil law (Art. 234 of the Civil Code of Ukraine) a transaction is fictitious in case it is concluded without intention to create legal consequences stipulated therein [15]. Such a transaction is recognized as invalid by a court.

It should be noted that the mere fact of failure to satisfy the transaction conditions by parties does not make it fictitious. Fictitious transactions are the actions undertaken in order to trick certain individuals involved therein, by creating a false picture of its members' intentions. This is done, for example, in order to: make a fictitious rent for registration of a legal entity, make a fictitious sale of property under the threat of bankruptcy or confiscation for a crime, or make a fictitious purchase with the intention of obtaining credit.

Thus, fictitious transactions are concluded to evade liability under the law, and in some cases it is stipulated in the contract. For example, there is a fictitious division, donation or sale of marital property with the purpose of illegally hiding it in order to protect it from confiscation. Fictitious can be not only agreements but other legal actions as well: a fictitious act of obtaining goods, technical inspection, premises measurement or property valuation, etc. A fictitious transaction is characterized by bad faith of its participants; however, this ground is still not enough for declaring the transaction void.

It should be pointed that according to N. V. Rabinovich, a fictitious transaction contains essentially only one expression, based on the will to implement the present transaction «not fully or truly». Since the will is critical here, the existence of such a

«blank» expression thereof shall not have any legal force.

Alternatively, D. N. Genkin believes that fictitious transactions have no will at all and therefore with the absence of factual structure the transaction shall be deemed to have been concluded.

A fictitious transaction is void. It does not generate any legal consequences. However, the parties still carry out some actual actions that simulate its implementation such as the transfer of property, filing required documents, etc. These actions are covered by general provisions on the consequences of the transaction's invalidity. When entering a fictitious transaction, in any event, the parties pursue unlawful purpose. To recognize the transaction fictitious its characterizing feature of «not true or full commitment» shall be inherent in the actions of both parties thereto. In case only one party acted not in good faith, and the other – tried to achieve a legal result, a transaction shall not be considered fictitious.

Fictitious transactions may also be concluded to evade liability under the law, and in some cases it is stipulated in the contract. For example, there is a fictitious division, donation or sale of marital property with the purpose of illegally hiding it in order to protect it from confiscation. Fictitious can be not only agreements but other legal actions as well: a fictitious act of obtaining goods, technical inspection, premises measurement or property valuation, etc. A fictitious transaction is characterized by bad faith of its participants.

Methods of embezzlement by concluding fictitious agreements are very diverse, and in most cases illegal acts aim at causing harm to third parties.

The most common real estate fictitious transactions include:

1) Real estate is registered using a front-man, which is fairly common for the purchase of expensive objects (luxury apartments, houses) by persons who, under certain circumstances (eg, civil service) cannot place them in the property «for themselves.» This also includes cases of possible non-fulfillment of family responsibilities and fear of confiscation of property acquired by criminal means. Only in the latter case, there is a real possibility to recognize the corresponding scheme as fictitious and only on condition of bringing the real property owner to criminal responsibility.

2) Re-registering an object using a front-man, which differs from the previous case in that the real owner originally registered his\her ownership, but then – often upon the occurrence (or fear of occurrence) of some emergency – re-registered the object to a third party. Such cases are easy to detect

and prove, especially when transferring the property right to the front-man was made «de facto» (for example, after the initiation of criminal proceedings against the owner or causing by the latter the major property damage to a third party).

3) Donation instead of nundination or vice versa: gratuitous transactions instead of retaliation (in the described case donation instead of nundination) are often used to evade the right to bulk purchase and violate the mode of joint matrimonial property.

The Civil Code of Ukraine does not provide the range of persons who have the right to claim for recognition of fictitious transaction invalid. This right has the party of fictitious transaction or other interested persons. Since the parties do not take any actions to make a fictitious transaction, the court decides on the recognition of the transaction's invalidity without any other consequences (restitution). In case pursuant to the transaction property or property rights were transferred, such a transaction cannot be classified as fictitious.

The main features of a fictitious transaction are:

1) misleading (before or at the time of transaction) the other party or a third person on the factual circumstances of the transaction or the true intentions of the participants;

2) committing a transaction by a person not entitled to do so (a fictitious company, a non-existent organization, a front-man, etc.);

3) the deliberate intention to breach the contract;

4) concealing the true intentions of the transaction participants.

Art. 216 CC of Ukraine states the legal consequences of committing fictitious transactions, namely, by the use of bilateral restitution, i.e. in case of invalidity of the transaction, each party is obliged to return the other in nature everything it received in respect of the mentioned transaction. In case of failing such a return – to reimburse the cost of that obtained at prices existing at the time of reimbursement. The peculiarity of the abovementioned transactions is that the individual and legal persons entering into them do not intend to transfer anything under the terms of contracts and eventually do not transfer. Thus because the conditions are not fulfilled, the only sanction for the participants may be recognition of the transactions void.

Therefore, it shall be noted that a fictitious transaction is always void; the parties only seek to simulate its conclusion. Hence the mentioned transactions are called fictitious. The form of certification thereof does not matter. Fake nature of the transaction can be confirmed by all means of proof permitted by civil procedural law.

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GENERAL CHARACTERISTICS OF FICTITIOUS TRANSACTION

Transactions are the main grounds for the origin of civil rights and duties. They are so common in practice, so that practically any action related to the movement of goods in the market can be put on the concept of «transaction».

Non-statutory transaction, no matter what rules were violated, is the extremely negative for society phenomenon. Invalid transactions also include the so-called sham (simulated) transactions, such as where the parties commit corresponding transaction with no intention to create any legal consequences, that is committed to its kind, knowing that it will not be transacted. When committing the transaction parties have different goals than those provided in transaction. These goals may be illegal or may not have any legal purpose. According to current civil law such transaction is recognized invalid by a court.

Sham transactions entered into for the purpose to evade property liability under the law, and in some cases it is stipulated in the contract.

The main features of a sham transaction are: 1) to mislead (before or at the time of the transaction) of the other party or a third party on the factual circumstances of the transaction or the true intentions of the participants; 2) committing a transaction by a person not entitled to do so (through fictitious company, non-existent organization, shell, etc.); 3) conscious intention breach a contract; 4) concealing the true intentions of the participants of the transaction.

Keywords: transaction, the invalidity of the transaction, a sham transaction, the origin of invalidity, the consequences of invalidity.

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ЗАГАЛЬНА ХАРАКТЕРИСТИКА ФІКТИВНОГО ПРАВочИНУ

В статті розглядається сутність фіктивних правочинів, їх складові, наслідки вчинення тощо. Приділено увагу аналізу точок зору науковців та судової практики з даного питання. Також, виділені основні риси фіктивних правочинів.

Ключові слова: правочин, недійсність правочину, фіктивний правочин, підстава недійсності, наслідки недійсності.

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ОБЩАЯ ХАРАКТЕРИСТИКА ФИКТИВНОЙ СДЕЛКИ

В статье рассматривается сущность фиктивных сделок, их составляющие, последствия совершения. Уделено внимание анализу точек зрения ученых и судебной практики по данному вопросу. Также выделены основные черты фиктивных сделок.

Ключевые слова: сделка, недействительность сделки, фиктивная сделка, основание недействительности, последствия недействительности.