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THE LEGAL CONSEQUENCES OF CONCLUDING SHAM CONTRACTS

Abstract. A contract is a unique and universal mechanism for regulating private legal relations in Ukraine, which are based on the free expression of will, financial independence and legal equality of the parties involved. Against the backdrop of the development of market relations, europeanisation and the modernisation of the regulation of the specific legal institutions, it is important to clarify the characteristics and legal consequences of concluding the contracts involving defects of intent and expression of intent. At present, issues relating to the study of sham contracts and the determination of prospects regarding the practical application of their consequences following their conclusion are becoming particularly relevant.

A transaction is deemed to be a sham if it is entered into by the parties for the purpose of concealing another transaction which they have in fact entered into. If it is established that the transaction was entered into by the parties for the purpose of concealing another transaction which they have in fact entered into, the relations between the parties shall be governed by the rules applicable to the transaction which the parties have in fact entered into. The view that not the entire transaction may be a sham, but only in respect of one of the parties, directly contradicts the wording of the Article 235 of the Civil Code of Ukraine. It is necessary to ascertain whether, on the date of conclusion of the disputed contracts, all legal (for example, full legal capacity) and organisational prerequisites and grounds were present. Unlike a sham transaction, a fictitious transaction is one entered into without the intention of creating the legal consequences intended by that transaction. A fictitious transaction is declared invalid by the court. Furthermore, the legal consequences of declaring a fictitious transaction invalid are established by law.

An example of the correct application of the provisions of the Article 235 of the Civil Code of Ukraine is the interpretation according to which, in a sham transaction,

the parties intentionally formalise one transaction, but in reality a different legal relationship is established between them, as a result of which rights and obligations arise for the parties to the transaction, but not those arising from the content of the concluded transaction.

Keywords: transaction, contract, sham transaction, fictitious transaction, invalidity, nullity.

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ПРАВОВІ НАСЛІДКИ УКЛАДЕННЯ УДАВАНИХ ДОГОВОРІВ

Анотація. Договір є унікальним та універсальним механізмом регулювання приватних відносин в Україні, які ґрунтуються на вільному волевиявленні, майновій самостійності та юридичній рівності їх суб'єктів. В умовах розвитку ринкових відносин, європеїзації та новелізації регламентації окремих правових інститутів, важливим є з'ясування особливостей та правових наслідків укладення договорів з дефектами волі та волевиявлення. Станом на сьогодні, особливої актуальності набувають питання дослідження удаваних договорів та визначення перспектив щодо практики застосування їх наслідків за результатами укладення.

Удаваним є правочин, який вчинено сторонами для приховання іншого правочину, який вони насправді вчинили. Якщо буде встановлено, що правочин був вчинений сторонами для приховання іншого правочину, який вони насправді вчинили, відносини сторін регулюються правилами щодо правочину, який сторони насправді вчинили. Точка зору, що удаваним може бути не весь правочин, а лише в частині когось із учасників, прямо суперечить змісту ст. 235 Цивільного кодексу України. Необхідно з'ясовувати чи були на дату укладення оспорюваних договорів наявні усі правові (наприклад, повна цивільна дієздатність) та організаційні передумови та підстави. На відміну від удаваного, фіктивним є правочин, який вчинено без наміру створення правових наслідків, які обумовлювалися цим правочином. Фіктивний правочин визнається судом недійсним. Також, правові наслідки визнання фіктивного правочину недійсним встановлюються законами.

Прикладом правильного застосування норм ст. 235 Цивільного кодексу України є тлумачення, відповідно до якого за удаваним правочином сторони умисно оформляють один правочин, але між ними насправді встановлюються інші правовідносини, внаслідок чого права та обов'язки у сторін правочину виникають, але не ті, що випливають із змісту укладеного правочину.

Ключові слова: правочин, договір, удаваний правочин, фіктивний правочин, недійсність, нікчемність.

The statement of the problem. A contract is a unique and universal mechanism for regulating private legal relations in Ukraine, which are based on the free expression of will, financial independence and legal equality of the parties involved. Against the backdrop of the development of market relations, europeanisation and the modernisation of the regulation of the specific legal institutions, it is important to clarify the characteristics and legal consequences of concluding the contracts involving defects of intent and expression of intent. At present, issues relating to the study of sham contracts and the determination of prospects regarding the practical application of their consequences following their conclusion are becoming particularly relevant.

The analysis of recent studies and publications. Many scholars have devoted their works to the study of the legal regulation of the consequences of entering into sham contracts, including V.M. Kossak, O.O. Kot, V.I. Krat, V.O. Kucher, Ya.M. Romaniuk, Yu.M. Yurkevych and many others. Despite this, a number of issues still require further study and substantiation.

The purpose of this article has been to conduct the detailed theoretical analysis of the legal consequences of entering into sham contracts and to present the author's view on how to resolve the aforementioned practical issues.

The presentation of the main content. In the context of a multi-sector market economy, a contract serves as one of the primary and the most effective legal instruments for regulating civil and economic relations [1, p. 30]. The Civil Code of Ukraine has provided that a contract is an agreement between two or more parties aimed at establishing, amending or terminating civil rights and obligations. In accordance with the Article 6 of the Civil Code of Ukraine, the parties are free to conclude a contract, choose a counterparty and determine the terms of the contract, subject to the requirements of the Civil Code of Ukraine, the other acts of the civil legislation, customs of business practice, and the requirements of reasonableness and fairness. The content of a contract consists of terms (clauses) determined at the discretion of the parties and agreed upon by them, and terms that are mandatory in accordance with the civil legislation. The parties have the right to conclude a contract containing elements of different contracts (a mixed contract). The provisions of civil legislation on contracts, elements of which are contained in the mixed contract, shall apply to the relations between the parties in the mixed contract in the relevant parts, unless otherwise provided for in the contract or implied by the nature of the mixed contract. According to the Article 235 of the Civil Code of Ukraine, a transaction is deemed to be a sham if it is entered into by the parties to conceal another transaction which they have in fact entered into. If it is established that a transaction was entered into by the parties to conceal another transaction which they actually entered into, the relations between the parties shall be governed by the rules applicable to the transaction

which the parties actually entered into [2]. It is worth noting that, as can be seen from the wording of the Article 251 of the draft Civil Code of Ukraine (Code of Private Law), which was submitted to the Verkhovna Rada of Ukraine on 22nd of January 2026, it is similarly stated that a contract is deemed sham if the parties entered into it to conceal another contract which they actually entered into; if it is established that the parties entered into the contract to conceal another contract actually entered into by them, the relations between the parties shall be governed by the provisions relating to the contract which the parties actually entered into [3].

Unlike a sham transaction, a fictitious transaction is one entered into without the intention of creating the legal consequences intended by that transaction. A fictitious transaction is declared void by the court. Furthermore, the legal consequences of declaring a fictitious transaction void are established by law [2].

O.O. Kot has noted that an analysis of the long-standing discussions regarding the legal nature of invalid transactions (agreements) in dozens of in-depth monographic studies suggests that there is no unequivocal solution to this academic problem. At the same time, the scholar has concluded that classifying a void transaction as a type of legal fact such as a civil offence is not sufficiently justified and requires deeper consideration [4, pp. 108, 118].

According to V.O. Kucher, there is no doubt that, by virtue of their legal nature, fictitious and sham transactions cannot, in any case, give rise to civil rights and obligations for the parties involved; consequently, they cannot be regarded as valid or subject to challenge. They must be classified as void [5]. On the other hand, as Ya.M. Romanyuk has pointed out, the fictitious and sham transactions are invalid in the context of non-compliance with the requirements of the law [6, p. 137]. At the same time, the consequences of invalidity provided for in the Article 216 of the Civil Code of Ukraine may be applied to sham transactions only if the transaction actually entered into by the parties is void, or if the court declares it invalid as a disputable transaction [6, p. 140].

According to the paragraph 25 of the Resolution No. 9 of the Plenum of the Supreme Court of Ukraine dated 6 November 2009 'On Judicial Practice in Civil Cases Concerning the Invalidation of Transactions', in a feigned transaction the parties intentionally formalise one transaction, but in reality a different legal relationship is established between them [7]. Thus, unlike a fictitious transaction, in a sham transaction the rights and obligations of the parties do arise, but not those arising from the content of the transaction.

V.M. Kossak correctly pointed out that the subjective right to protection encompasses procedural and legal remedies and that this constitutes a specific procedure for seeking protection of a violated right, as directly defined by law [8, p. 250].

At the same time, there have been decisions in judicial practice that run counter to this interpretation. For example, there was the next case in the judicial practice. O_3 brought an action before the court against O_4, third party O_5, and a private notary

of the Lviv City Notarial District as the third party, seeking a declaration that the contract of purcase and sale was a sham. He based his claims on the fact that the contract for the sale and purchase of the flat had been concluded between O_4 and O_5, which was notarised by a private notary of the Lviv City Notarial District. On the basis of this contract, the defendant O_4 had the title to the disputed flat registered in his name. He had purchased the flat during a period of the rapid growth in property prices with the aim of investing funds. The defendant, who is the plaintiff's daughter, had no objections to the conclusion of this particular contract, although everyone understood that the plaintiff was in fact the purchaser under this contract, as he had sought out the said flat, agreed the price with the seller, agreed on the other essential terms of the sale and purchase agreement, and paid the funds for the purchase of the flat. Following the conclusion of the disputed sale and purchase contract, it was he who carried out the renovation works and paid for them. He purchased the flat with the intention of using it as a temporary accommodation for his business partners, who frequently visited the city of Lviv. Subsequently, O_8 moved into the flat; the claimant entered into a de facto marital relationship with her, and they had the son, O_9; thereafter, he also lived there with O_8 and their son, O_10. Furthermore, at the time of concluding the disputed agreement, the understanding with the defendant, who is his daughter, was that she would not prevent him from possessing and using the flat at his own discretion and that, at his first request, he would be able to dispose of the said flat at his own discretion. He purchased the flat in his daughter's name so that, in the event of the sale of two flats within one year, he would not incur unnecessary tax liabilities. By the decision of the Lychakiv District Court of Lviv in case No. 463/820/14-ц, the claim of O_3 was upheld: the contract of sale of the flat between O_4 and O_5, certified by a private notary of the Lviv City Notarial District, was declared sham insofar as it designated O_4 as the buyer under that contract; O_3 was recognised as the buyer under the contract of sale of the flat [9].

In turn, O_3 was not a party to the disputed contract, and a finding that the transaction was a sham could only indicate the existence of other relations (unrelated to the contract of sale) between him and one of the defendants in this case, which in no way affects the claimant's rights and interests. Consequently, the court's conclusion in this case that not the entire transaction may be deemed fictitious, but only in respect of one of the parties, directly contradicts the provisions of the Article 235 of the Civil Code of Ukraine.

The characteristic features of a sham transaction include: the dual nature of the agreement, involving an external (sham) and a hidden (genuine) transaction; an internal legal link between these two elements; and the parties' intent to create the appearance of a transaction; case law and doctrinal sources emphasise that, in order to classify a transaction as a sham, it is necessary to establish the parties' actual motives, examine the circumstances of the agreement's conclusion, and ascertain the interconnection between the external and hidden transactions [10, p. 380].

Finally, in the Case No. 346/2238/15-ц, the Supreme Court clearly held that:

- a transaction is deemed to be a sham if it is entered into by the parties to conceal another transaction which they have in fact entered into, rather than the parties to the transaction themselves. In other words, by entering into a sham transaction, the parties deliberately express an intention that does not actually exist. Consequently, the parties enter into two transactions: one sham, intended to 'mask' the parties' true intention; the other – the hidden one – from which they expect legal consequences, rather than 'concealing' a party to the transaction;

- the provisions of the Civil Code of Ukraine do not permit a legal construct such as an action to declare a contract void in respect of a party to the contract. The Article 235 of the Civil Code of Ukraine cannot serve as a basis for declaring a transaction sham in respect of a party, as this would be contrary to its provisions [11].

As it has been noted in the legal literature, the establishment of the fundamental principles for the development of a market economy in Ukraine is closely linked to the legal reforms that have been implemented in recent times. Ukrainian civil legislation has provided for various ways in which participants in civil and commercial transactions may acquire rights to property (things). All these methods, by their legal nature, constitute distinct legal facts, the existence of which determines whether a person may acquire a specific subjective right of ownership [12, p. 50]. Consequently, it is necessary to ascertain whether, on the date of conclusion of the disputed contracts, all legal (full legal capacity) and organisational (for example, the availability of own funds) prerequisites and grounds were present. We also consider that it is appropriate to draw attention to the explanations of the Supreme Court of Ukraine provided in its case law on the consideration of civil cases concerning the invalidation of transactions, according to which a transaction is deemed to be a sham if it is entered into with the aim of concealing another transaction which the parties actually entered into. Therefore, when a sham transaction is entered into, the rules governing the transaction that the parties actually intended (which they concealed) apply to the relations between the parties. A party seeking to have a transaction declared void on the grounds that it was entered into for the purpose of concealing another transaction must prove that the transaction was entered into for that purpose. The intention of the parties in a sham transaction is to establish civil-law relations other than those provided for by the transaction (for example, a contract for the sale of a flat which is in fact a pledge agreement to secure the repayment of a loan, or which was concluded with the aim of avoiding the enforcement of a judgment against the pledged property). In this case, the claimant must specify which other transaction is being concealed by means of the concluded transaction. Most often, a contract of sale was concealed behind a fictitious contract of gift. This was done primarily to prevent another co-owner from exercising their right of first refusal, as well as to conceal actual income derived from prohibited activities. The legislation does not provide for the invalidity of a sham transaction, but merely proposes that the rules governing the transaction which the parties actually intended should be applied to the relations between the parties [13].

V.I. Krat has also examined this issue [14] and noted that the Supreme Court's ruling in Case No. 607/5148/20 concluded that the interpretation of Part 2 of Article 7 of the Civil Code of Ukraine, taking into account the principle of reasonableness, indicates that the legislature has imposed restrictions on the application of a custom that conflicts with a contract or acts of civil legislation. In other words, the existence of a custom contrary to the law (contra legem) is not permitted. The conclusion of a sham transaction cannot be classified as an established rule of conduct not laid down by civil legislation, as it is subject to detailed legal regulation in the provisions of the Civil Code of Ukraine (the Article 235 of the Civil Code of Ukraine) [15].

The conclusion. To summarise the above, it is worth emphasising that an example of the correct application of the provisions of Article 235 of the Civil Code of Ukraine is the interpretation according to which, in a sham transaction, the parties intentionally formalise one transaction, but in reality a different legal relationship is established between them, as a result of which rights and obligations arise for the parties to the transaction, but not those arising from the content of the concluded transaction.

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