

FEATURES OF REGULATION OF INVALIDITY OF THE AGREEMENT IN THE CIVIL CODE OF UKRAINE

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Abstract: This article is devoted to the peculiarities of regulating the invalidity of the agreement in Ukraine. The Central Committee of Ukraine embodies an approach in which the provisions on invalid transactions (§ 2 of Chapter 16) are general in nature, and they should apply to both unilateral transactions and contracts. Moreover, there is no doubt that most of these rules are designed to apply to an invalid contract [for example, paragraph 2 of Art. 216(1) of the Civil Code of Ukraine, hereinafter CCU]. In turn, certain norms devoted to certain agreements (subsection 1 of section III of book 5 CCU) provide grounds for challenging the condition [Art. 668(1) CCU], the invalidity of the contract [Art. 661(2), Art. 698(4) CCU, etc.], the grounds for contesting (Art. 998) or the invalidity of the contract [Art. 719(3), Art. 981(2), etc.], the legal consequences of the invalidity of the contract or condition [Art. 1057-1, Art. 1111(2), Art. 1119(4) CCU]. The Supreme Court of Ukraine noted the difference between the invalidity of the contract and the obligation, emphasizing the admissibility of the invalidity of the obligation. He pointed out that the invalidation of the contract and the invalidation of the obligation are not identical concepts, because, by the direct indication of the law, the contract declared invalid by the court is invalid from the moment of its conclusion, and invalidation of obligations under this agreement such an agreement. The decision of the Commercial Court of Cassation of the Supreme Court in case № 201/8412/18 (March 10, 2021) states that the existence of grounds for invalidation of the contract should be established by the court at the time of its conclusion, and not as a result of non-performance or improper performance. Failure to perform or improper performance of obligations arising under the disputed contract is not grounds for its invalidation.

According to Articles 16, 203, and 215 of the Civil Code of Ukraine, for a court to declare a disputed transaction invalid, it is necessary to sue one of the parties to the transaction or another interested person; the existence of grounds for contesting the transaction; establishing whether the subjective civil right or interest of the person who applied to the court is violated (not recognized or disputed). This understanding of invalidating a transaction as a means of protection is well-established in judicial practice. According to Art. 263(4) Civil Procedure Code of Ukraine when choosing and applying the rule of law to the disputed legal relationship, the court takes into account the conclusions on the application of the relevant rules of law, set out in the decisions of the Supreme Court. The decision of the Supreme Court of the Joint Chamber of the Civil Court of Cassation of 5 September 2019 in case № 638/2304/17 concluded that ‘the invalidity of the contract as a private law category designed

to prevent or suppress violations of civil rights and interests or in essence, initiating a dispute over the invalidity of a contract not to protect civil rights and interests is unacceptable’.

Keywords: *invalidity, contract, parties, consequences, obligations, disputability, nullity*

1. INTRODUCTION

In the civil law of Ukraine, there is the concept of a transaction, which is a broader concept than the concept of contract, as the latter is the basis for the transaction. Art. 215 CCU defines the grounds for invalidity of the transaction, which are non-compliance at the time of the transaction by the party (parties) requirements for: the content of the transaction, which may not contradict the Civil Code of Ukraine, other acts of civil law; expression of the will of the participant of the transaction, which must be free and correspond to his inner will; the focus of the transaction on the actual occurrence of the legal consequences caused by it; transactions committed by parents (adoptive parents) may not contradict the rights and interests of their minor, underage or disabled children.

In Ukrainian law, a transaction is invalid if its invalidity is established by law (a void transaction). In this case, the recognition of such a transaction as invalid by the court is not required. In cases established by the Central Committee of Ukraine, a void transaction may be recognized by a court as valid. If the invalidity of a transaction is not directly established by law, but one of the parties or another interested person denies its validity on the grounds established by law, such a transaction may be declared invalid by a court (disputed transaction).

The purpose of this article is to reveal the peculiarities of recognizing contracts as invalid under the civil law of Ukraine.

Issues related to the recognition of agreements (contracts) as non-concluded and their invalidity were raised in the scientific works of many domestic civilians of different times, in particular, D. Meyer, D. Genkin, I. Novitsky, O. Gutnikov, S. Berveno, T. Bodnar, V. Vitryansky, O. Kucher, O. Zozulyak, S. Borodovsky, S. Podoliak, S. Potopalsky and others (Davidova, 2011; Smola, 2016; Guk, 2013; Bezzubov and Armash, 2017).

2. CONCEPTS AND TYPES OF INVALID CONTRACTS

It should be noted that in Ukraine the concept of ‘invalidity of the contract’ is absent in the Civil Code and other acts of civil law. However, the case law of national courts in this regard indicates that the invalidity of a contract means that a transaction entered into in the form of that contract does not give rise to legal consequences, i.e., does not contribute to the emergence, modification, or termination of civil rights and obligations. The agreement (contract) is declared invalid, loses its legal force from the moment of its conclusion, and therefore, the legal

grounds, for example, obtaining property or acquiring ownership of it under such an agreement do not occur.¹

In private law, invalidity (nullity or disputability) may relate to or ‘affect’ a contract, transaction, act of a legal entity, state registration, or document.²

At the same time, the contract as a document can not be considered in terms of validity or invalidity. The document, i.e., the physical side of the action, performs in this case only one function — makes the will of the person available for perception, i.e., is a means of expression, the bearer of legal content (Tuzov, 2007, p. 54). The legislation does not contain and cannot contain requirements for the validity of the document. A document as a tangible medium of information either exists or does not exist. A similar situation arises regarding a legal fact, which is also a fact of reality and which is given a certain legal meaning. As a fact, it may or may not exist, so you can not talk about its invalidity, as you can not say ‘invalid flood’, or ‘invalid fire’ — such phrases are meaningless and contrary to the laws of formal logic (Lavrinenko, 2012, p. 60).

To resolve the issue of the validity of the contract, the priority is to resolve the issue of its conclusion (Ponomaryova, 2016, p. 37). As only the concluded contract can be recognized as invalid. In particular, contracts are not considered concluded in which: there are no conditions provided by law, necessary for their conclusion (no agreement has been reached on all the essential conditions for this transaction); acceptance was not received by the party that sent the offer; the property has not been transferred if its transfer is required by law; the state registration or notarization necessary for its commission, etc. has not been carried out. Having established the relevant circumstances, the commercial court refuses to satisfy the claims both on the invalidation of the transaction and on the application of the consequences of the invalidity of the transaction.³ If the party prematurely transferred property for the performance of a non-concluded contract, legal relations arise between the parties as a result of the acquisition, and preservation of property without sufficient legal basis (Generalization, 2008, p. 22; Art. 1212–1215 CCU).

Art. 204 of CCU⁴ determines that the transaction is lawful if its invalidity is not expressly established by law or if it is not declared invalid by a court. This presumption means that the transaction is considered lawful, i.e., that it gives rise to, alters, or terminates civil rights and obligations until this presumption is rebutted, in particular, based on a court decision that has entered into force or by direct reference

¹ Decision of the Kirov District Court of Donetsk of 25 April 2014 in case No. 258/4225/14-п. Available at: <https://reyestr.court.gov.ua/Review/38954048> (Accessed: 8 September 2022).

² Resolution of the Supreme Court dated 27 October 2021 in case No. 346/6034/13-п. Available at: <https://reyestr.court.gov.ua/Review/100704340> (Accessed: 8 September 2022).

³ Resolution (2013 of the Plenum of the Higher Economic Court of Ukraine dated May 29, 2013, No. 11.

⁴ Civil Code of Ukraine of 16 March 2003 p. 435-IV. *Official Gazette of Ukraine*, 2003, No. 11, p. 461.

to the law.⁵ In case of non-refutation of the presumption of legality of the contract (for example, in connection with the cancellation of the court decision) all the rights acquired by the parties to the transaction under it, should be carried out without hindrance, and the created duties are subject to the performance.⁶

Note that an invalid contract is an agreement between two or more persons that does not create legal consequences, except for the consequences associated with its invalidity. It means that this agreement does not meet the requirements of the law.

Scholars propose the following classification of invalid contracts:

- 1) the contract is invalid from the very beginning of its existence;
- 2) a contract that becomes invalid over time, whereas it was originally valid;
- 3) the contract is valid in itself but may be terminated by court decision (Meyer, 2000, pp. 203–204).

National courts determine that, as seen from the content of Art. 215 CCU (invalidity of the transaction), it is necessary to distinguish between the types of invalidity of transactions, namely:

- void deeds, the invalidity of which is established by law;
- disputed, the invalidity of which is not directly established by law, but one of the parties or another interested person denies their validity on the grounds established by law.⁷

A void transaction is invalid due to its non-compliance with the requirements of the law and does not require its recognition by such a court. The disputed transaction may be declared invalid only by a court decision. Therefore, in resolving the relevant requirements, it is important to distinguish between null and void transactions, as each of the types of invalidity of transactions provides different ways to protect civil rights and interests.⁸

Null and void contract. As we have already noted, a void transaction, in contrast to the disputed one, is invalid regardless of the presence or absence of a relevant court decision. Therefore, the lawsuit to protect the right by invalidating the void transaction is not provided by law and is not an effective way of protection and such that will have a real restoration of the violated rights of the plaintiff.⁹

Since the consequences of the nullity of the transaction occur for the parties due to the law, if one of the parties voluntarily disagrees that the transaction is null and void, the person has the right to go to court to apply for the consequences of the

⁵ Separate opinion of the judge of the Great Chamber of the Supreme Court, Rogach, L.I. dated October 31, 2018 in case No. 465/646/11. Available at: <https://reyestr.court.gov.ua/Review/81287693> (Accessed: 8 September 2022).

⁶ Resolution of the Supreme Court of June 19, 2019 in the case No. 643/17966/14-п. Available at: <https://reyestr.court.gov.ua/Review/82997488> (Accessed: 8 September 2022).

⁷ Resolution of the Supreme State Court of Ukraine of 18 July 2010 in case No. 12/71. Available at: <https://reyestr.court.gov.ua/Review/12382794> (Accessed: 8 September 2022).

⁸ Resolution of the Supreme Court of 2 June 2021 in case No. 916/154/20. Available at: <https://reyestr.court.gov.ua/Review/97735186> (Accessed: 8 September 2022).

⁹ Resolution of the Supreme Court of 3 October 2018 in case No. 369/2770/16-п. Available at: <https://reyestr.court.gov.ua/Review/77181171> (Accessed: 8 September 2022).

nullity of the transaction.¹⁰ For example, if the plaintiff claims that the contract on termination of the pledge agreement is null and void, the consequence of such nullity will be the validity of the pledge agreement. Recognition of the right of pledge will be an appropriate way to protect the interests of the plaintiff in such a case.¹¹

At the same time, case law indicates that the fact that a void transaction is invalid regardless of the presence or absence of a relevant court decision, this does not preclude the possibility of filing and satisfying a claim for invalidation of a void transaction (agreement) (Resolution, 2013).

In this case, the person applies for the annulment of the disputed contract.¹² Such a requirement shall be considered in the event of a dispute. Such a claim may be filed separately, without applying the consequences of the invalidity of a void transaction. In this case, in the operative part of the court decision, the court indicates the invalidity of the transaction or refusal to do so (Resolution No. 9, 2009).

In this case, the court does not declare the transaction invalid, but only confirms its invalidity by law in connection with its challenge and non-recognition by others. However, to establish the invalidity of such a transaction, it is not necessary to assess any circumstances under which it was committed. It is achieved by comparing the content of the transaction and the provisions of applicable law.¹³

In the event of a dispute over the legal consequences of an invalid transaction, one of the parties to which or another interested person considers it null and void, the court checks the relevant arguments and in the motivating part of the judgment, applies the relevant provisions of substantive law, confirms or denies the invalidity of the transaction.¹⁴ Such legal consequences of the invalidity of a void transaction, which are established by law, may not be changed by the agreement of the parties. The requirement to apply the consequences of the invalidity of a void transaction may be filed by any interested person, and the court may apply the consequences of the invalidity of a void transaction on its own initiative. (See Article 216(4)(5) CCU)

In addition, if the plaintiff refers to the invalidity of the transaction to substantiate another claim, the court may not refer to the lack of a court decision to establish the invalidity of the transaction and must assess such arguments of the plaintiff.¹⁵

¹⁰ Resolution of Supreme Court of 12 June 2019 in case No. 761/13371/18. Available at: <https://reyestr.court.gov.ua/Review/82637240> (Accessed: 8 September 2022).

¹¹ Resolution of Supreme Court of 4 June 2019 in case No. 916/3156/17. Available at: <https://reyestr.court.gov.ua/Review/82424016> (Accessed: 8 September 2022).

¹² Resolution Supreme Court of 7 February 2018 in case of 357/3394/16-П. Available at: <https://reyestr.court.gov.ua/Review/77801192> (Accessed: 8 September 2022).

¹³ Separate opinion of judges of the Grand Chamber of the Supreme Court: O.M. Sytnik, V.V. Britanchuk, M.I. Hrytsiva, N.P. Lyashchenko, O.B. Prokopenko, dated June 4, 2019 in case No. 916/3156/17. Available at: <https://reyestr.court.gov.ua/Review/82968335> (Accessed: 8 September 2022).

¹⁴ Resolution of Supreme Court of 10 April 2019 in case No. 463/5896/14-П. Available at: <https://reyestr.court.gov.ua/Review/82065661> (Accessed: 8 September 2022).

¹⁵ Resolution of Supreme Court of 24 October 2018 in case of 755/6287/16-П. Available at: <https://reyestr.court.gov.ua/Review/77684845> (Accessed: 8 September 2022).

Thus, the person filing the lawsuit is determined independently with the violated, unrecognized or disputed right, or legally protected interest that requires judicial protection. However, care must be taken before going to court, as the plaintiff's choice of an inappropriate way to protect his rights is an independent ground for dismissing the claim¹⁶.

In our opinion, it is expedient to agree with V. Proroka, who in a separate opinion of the judge noted that if the law or contract does not determine an effective way to protect the violated right or interest of the person who appealed to the court, such a person may determine in his decision a method of protection that does not contradict the law.¹⁷ Therefore, domestic justice, denying the lawsuit due to the election of an improper method of protection, forgets about the Constitution, which guarantees everyone the right to protect their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law.¹⁸ And if there is no direct prohibition on the person's chosen method of protection, the person can count on a fair and impartial resolution of the case.

The disputed contract. If the invalidity of a transaction is not directly established by law, but one of the parties or another interested person denies its validity on the grounds established by law, such a transaction may be declared invalid by a court (disputed transaction) [Art. 215(3) CCU]. A transaction, the invalidity of which is not established by law (disputed transaction), gives rise to legal consequences (acquisition, change, or termination of rights and obligations), to which it was directed until it is declared invalid on the basis of a court decision. Disputing the transaction occurs only on the initiative of his party or another interested person by filing claims for invalidation of the transaction (lawsuit to challenge the transaction, recourse claim).¹⁹

The invalidity of the contract as a private law category is designed to prevent or suppress violations of civil rights and interests or to restore them.²⁰ This is manifested in the fact that the parties to civil relations, as a rule, independently initiate the application of the rules on the invalidity of the contract and its legal consequences. The invalidity of the contract is reflected (or may be reflected) on the rights and interests of other participants in civil relations, and therefore there must

¹⁶ Resolution of Supreme Court of 2 February 2021 in case No. 925/642/19. Available at: <https://reyestr.court.gov.ua/Review/95439652> (Accessed: 8 September 2022).

¹⁷ Separate Opinion of Judge of the Grand Chamber of the Supreme Court, Proroka, V.V.B., dated 2 February 2021 in case No. 325/642/19. Available at: <https://reyestr.court.gov.ua/Review/96406954> (Accessed: 8 September 2022).

¹⁸ Article 55 of the Constitution of Ukraine of June 28, 1996, No. 254k/96-VR. *Голов України*, 1996, No. 128.

¹⁹ Resolution of Supreme Court of 27 October 2021 in case No. 346/6034/13-П. Available at: <https://reyestr.court.gov.ua/Review/100704340> (Accessed: 8 September 2022).

²⁰ *Ibid.*

be certain legal grounds and consequences of invalidity, including for ‘related’ participants in civil relations.²¹

This provision follows from the logical thesis that the task of civil proceedings is to effectively protect violated, unrecognized or disputed rights, freedoms, or interests (Art. 2(1) of the Civil Procedure Code of Ukraine). Such protection is possible provided that the rights, freedoms, or interests are violated, and the participants in civil traffic use civil proceedings for such protection. Private law tools (in particular, initiating a dispute over the invalidity of a contract not to protect civil rights and interests) should not be used by civil traffic participants for failure to perform public duties, release property from arrest in public relations or create a preliminary court decision for public relations.²² For example, if in a dispute over the invalidation of the land lease agreement, the person refers to the fact that the agreement does not specify all the essential terms of the agreement (cadastral number of land, conditions for maintaining its condition), but the rights and interests of the plaintiff violated (lease of the same plot agreed upon by the parties) the claim for invalidation of such an agreement is inadmissible and must be rejected.²³

Invalidation of a contract means its invalidation as a legal fact, which also results in the invalidity of the obligations of the parties arising from such a contract. In this regard, the Grand Chamber of the Supreme Court notes that in accordance with the norms of the Central Committee of Ukraine, only a contract as a transaction can be declared invalid. The contract as a document, as well as a duplicate or copies of such a document, cannot be declared invalid. Therefore, challenging a duplicate agreement that fully corresponds to the original has no independent meaning and force on the transaction, as its publication does not establish, change or terminate civil rights and obligations, but is a document that only duplicates, reproduces the content of the agreement, and may not violate the rights of the individual. Therefore, the possibility of declaring it invalid due to non-compliance with the procedure of its issuance is not provided by any law.²⁴

The claim for invalidation of the transaction is identified among the main ways of judicial protection of civil rights and interests [paragraph 2 Art. 16(2) of CCU]. For the court to declare the disputed transaction invalid, the existence of the following conditions²⁵:

²¹ Separate opinion of the judge of the Civil Court of Cassation as part of the Supreme Court of Krat V.I. dated January 20, 2021 in case No. 127/14089/18. Available at: <https://reyestr.court.gov.ua/Review/94490087> (Accessed: 8 September 2022).

²² Resolution of the Supreme Court of September 5, 2019 in case No. 638/2304/17. Available at: <https://reyestr.court.gov.ua/Review/84152558> (Accessed: 8 September 2022).

²³ Resolution of Supreme Court of 27 November 2019 in case No. 685/261/17. Available at: <https://reyestr.court.gov.ua/Review/86070428> (Accessed: 8 September 2022).

²⁴ Resolution of Supreme Court of 14 November 2018 in case No. 161/3245/15-п. Available at: <https://reyestr.court.gov.ua/Review/78192852> (Accessed: 8 September 2022).

²⁵ Resolution of Supreme Court of of 22 June 2020 in case No 205/8732/15-п. Available at: <https://reyestr.court.gov.ua/Review/90073669> (Accessed: 8 September 2022).

1) *Filing a lawsuit by one of the parties to the transaction or by another interested person.* In addition to the parties to a contract, it can also be challenged by a person who was not a party to the transaction (interested person), at the time of the court has no property rights or property rights to the transaction and/or does not claim that the property in kind was transferred to her possession. The requirements of the interested person, who in court seeks recognition of the transaction, are aimed at bringing the parties to the invalid transaction to the state that they, the parties, had before the transaction. The self-interest of the interested person means that the subject of the transaction is owned by a particular person or that the party (parties) to the transaction is in a certain legal position, as it depends on the further possibility of the lawful exercise of the rights of the interested person.²⁶ At the same time, the Civil Code of Ukraine does not contain a definition of ‘interested person’, so the range of interested persons should be clarified in each case depending on the circumstances of the case and legal norms applicable to the disputed relationship unless otherwise provided by law.²⁷

2) *The existence of grounds for contesting the transaction.* Such grounds are established by law, and they include requirements for: the content of the transaction, which may not contradict the Central Committee of Ukraine, other acts of civil law, the interests of the state and society, and its moral principles; subjects of the transaction, which must be endowed with the necessary amount of civil capacity; unity of will and expression of will; the focus of the transaction on the actual occurrence of the legal consequences caused by it; protection of socially vulnerable categories of persons, namely – transactions committed by parents (perpetrators) may not contradict the rights and interests of their minors, underage or disabled children (Art. 203 CCU).

3) *Establishing whether the subjective civil right or interest of the person who applied to the court is violated (not recognized or disputed).* As an example, we can point out that missing preliminary permission of the body of guardianship and custody required by law at the time of conclusion of the disputed transaction is not the unconditional basis for recognition of the invalidity.

Since, in order to invalidate, for example, a real estate gift agreement where the donee is a minor, it is necessary to establish whether such an agreement contradicts his rights and interests, does not reduce the scope of existing property rights, and does not violate the lawful interests of the child. restricts the rights and interests of the child about housing.²⁸

In Ukraine, a void agreement declared invalid by a court is invalid from the moment of its conclusion. If under an invalid contract the rights and obligations were

²⁶ Resolution of Supreme Court of 15 May 2019 in case No. 462/5804/16-ц. Available at: <https://reyestr.court.gov.ua/Review/82246769> (Accessed: 8 September 2022).

²⁷ Resolution of Supreme Court of 16 April 2019 in case No. 916/144/17. Available at: <https://reyestr.court.gov.ua/Review/81266214> (Accessed: 8 September 2022).

²⁸ Resolution of Supreme Court of 30 June 2020 in case No. 199/8820/17. Available at: <https://reyestr.court.gov.ua/Review/90202382> (Accessed: 8 September 2022).

provided only for the future, the possibility of their occurrence in the future ceases. In addition, the invalidity of a particular part of the transaction does not result in the invalidity of other parts and the transaction as a whole, if we assume that the transaction would have been committed without the inclusion of the invalid part (Art. 217 CCU). Terms of the contract that significantly worsen the situation of one of the parties may be declared invalid, including the condition of releasing the party from liability for failure to perform its civil duties (Articles 661, 698, 780, 787, 1056-1, 1137 Central Committee of Ukraine).

In practice, void and disputed transactions differ in the following criteria:

- the degree of importance of defects in the transaction;
- the nature of the rights and interests that have been violated in connection with the conclusion of the transaction;
- judicial procedure for establishing the invalidity of the transaction and the independence of establishing the invalidity of the transaction from the court decision;
- the statute of limitations set for appealing to the court to declare the transaction invalid (Generalization, 2008).

To the last point, we can note that the statute of limitations on the requirements for the application of the consequences of a void transaction begins from the day when its implementation began [Art. 261(3) CCU].

3. GROUNDS FOR INVALIDATION OF THE CONTRACT

Since contracts are bilateral transactions, the conditions of their invalidity follow from the conditions of invalidity of transactions.

Article 203 of the Civil Code of Ukraine provides for general requirements, compliance with which is necessary for the validity of the transaction, including the contract, namely:

1) the content of the transaction may not contradict the Central Committee of Ukraine, other acts of civil legislation, as well as the interests of the state and society, or its moral principles [Art. 203(1) CCU];

2) the person who commits the transaction must have the necessary amount of civil capacity [Art. 203(2) CCU];

3) the will of the participant in the transaction must be free and correspond to his inner will [Art. 203(4) CCU];

4) transactions must be made in the form prescribed by law, i.e. according to Art. 205(1) of CCU transactions may be made orally or in writing (electronically). In writing in accordance with Art. 208 of the Civil Code of Ukraine should be made: a) transactions between legal entities; b) transactions between an individual and a legal entity, except for transactions that are fully executed by the parties at the time of their commission, except for transactions subject to notarization and (or) state registration, as well as transactions for which failure to comply with written form invalidates them; c) transactions between individuals in the amount exceeding

twenty times or more the amount of the non-taxable minimum income of citizens (0.56 euros); d) other transactions for which the law establishes a written form;

5) the transaction must be aimed at the actual occurrence of the legal consequences caused by it. The absence of the parties' intention to actually arise, change or terminate the rights and obligations stipulated by the transaction is the basis for the application of the established Art. 234–235 CCU on the consequences of committing fictitious and fictitious transactions;

6) transactions committed by parents (adoptive parents) may not contradict the rights and interests of their minor, underage or disabled children.

Thus, the invalidity of the transaction is due to the presence of defects in its elements:²⁹

1. *Defects (illegality) of the content of the transaction.* The content of the transaction consists of rights and obligations, the acquisition, change, or termination of which the parties to the transaction have agreed. The content of the contract or other transaction is fixed in its articles (items) (Generalization, 2008). From the content of Art. 203 of the Civil Code of Ukraine it follows that the content of the transaction must comply with: the Central Committee of Ukraine; other laws of Ukraine adopted in accordance with the Constitution of Ukraine and the Central Committee of Ukraine; acts of the President of Ukraine in cases established by the Constitution; resolutions of the Cabinet of Ministers of Ukraine; acts of state authorities of Ukraine, authorities of the Autonomous Republic of Crimea, issued in cases and within the limits established by the Constitution and the law; as well as the moral principles of society.

Transactions that do not meet the requirements of the law do not generate any desired results for the parties, regardless of the will of the parties and their fault in the transaction. The legal consequences of such transactions occur only in the forms prescribed by law – in the form of returning the situation to the original state (restitution) or in others. It should be borne in mind that the court's invalidation of the contract is a consequence of its commission in violation of the law, and not a measure of responsibility of the parties. Therefore, for such recognition, it usually does not matter whether the parties were aware (or should have been aware) of the illegality of their conduct during the transaction (exceptions to this rule are possible if they derive from the law) (Resolution, 2013).

Article 6 of the Civil Code of Ukraine provides for the right of the parties to enter into an agreement that is not provided by acts of civil law, but meets the general principles of civil law; the parties have the right to deviate from the provisions of the contract from the provisions of civil law and to settle their relations at their discretion; the parties to the contract may not deviate from the provisions of civil law, if these acts explicitly state this, as well as if the parties are bound by the provisions of civil law follows from their content or the nature of the legal relationship of the parties. Thus, the contradiction of a transaction with acts of

²⁹ Resolution of the Supreme Court of December 18, 2019 in case No. 916/2194/18. Available at: <https://reyestr.court.gov.ua/Review/86660800> (Accessed: 8 September 2022).

legislation as a ground for its invalidity must be based on fully and reliably established by the courts the circumstances of the case of violation of a transaction (or part of it) imperative prescription of the law or the conclusion of a transaction in itself, the deviation of the parties from the provisions of the law, regulating them otherwise, does not indicate a contradiction in the content of the transaction to this Code, other acts of civil law, as well as the moral principles of society.³⁰

2. *Defects (non-compliance) with the form.* In Ukraine, as a general rule, non-compliance with the written form of a transaction established by law does not result in its invalidity, except as established by law. The objection is made with the page of the fact of commission of the transaction or dispute of its separate part can be proved by written proofs, using video-audio recording, and other proofs. The court's decision cannot be based on the testimony of witnesses. And, according to which law establishes its invalidity in case of non-compliance with the requirements for written form, concluded orally and one of the parties performed the action, and the other party confirmed his deed in accordance with the performance, such in case of dispute may be recognized by the court valid (Art. 218 CCU).

Thus, violation of the requirements for the proper form of law is not in all cases to its invalidity, except in cases established by law [for example, cf. Art. 547, Art. 719(3), Art. 981, 1055, 1059, 1107 CCU].

Notarization of transactions (contracts) is mandatory without conditions or when the parties have agreed on the notarization of the contract, requirements of the obligatory notarization, the obligatory confirmation of the right established for the power of attorney, issued by way of transfer, the mortgage agreement, the contract of sale of the object of privatization of state property, the contract of hire of transport concerning the participation of the physical person, etc. Due to non-compliance with the requirements for notarization of transactions, only such transactions are null and void, in accordance with current legislation are subject to mandatory notarization or such, and the conditions provide for mandatory notarization (Resolution, 2013).

In cases when the state registration mandatory for such types of agreements has not been carried out, these agreements are considered not concluded at all [for example, Art. 577(2) CCU]. Although, if the parties to the agreement related to the transfer of ownership of immovable property do not comply with the rules on the state registration of rights to such property, this circumstance alone is not grounds for invalidating such an agreement, as such registration is not an element forms of contract. At the same time, it should be borne in mind that according to Art. 334(4) of the Civil Code of Ukraine, rights to immovable property subject to state registration arise from the date of such registration in accordance with the law.

3. *Defects of the subject composition.* Such transactions include those committed by a natural person outside his/her civil capacity and/or a legal entity without a relevant permit (license) (e.g. gambling permit, tour operator activity, security

³⁰ Resolution of the Higher Economic Court of Ukraine dated December 14, 2011 in case No. 3/164. Available at: <https://reyestr.court.gov.ua/Review/19943091> (Accessed: 8 September 2022).

activity, etc.)³¹, or by the head of a legal entity under he does not have the authority to commit a transaction (for example, the commission of a transaction of one or more requires the consent of the General Meeting of the legal entity, etc.).

The rules of civil law also stipulate that a representative may not enter into transactions on behalf of the person he represents, in his own interests or in the interests of another person whose representative he is at the same time. This norm prohibits the conclusion of a transaction in which one representative acts simultaneously on behalf of several counterparties (except for commercial representation). The interpretation of this provision shows that a representative should be understood as a legal representative (in particular, a father, or guardian) and a person acting on the basis of a power of attorney issued on the basis of an act of a legal entity or contract. For example, if an agreement is concluded between an individual on the one hand and the director of a legal entity on the other (who is also a representative of this legal entity), this is the basis for invalidating such an agreement.³²

4. Defects of will – inconsistency of will and expression of will. In a transaction, the external will of a person must correspond to his inner will, which must be aimed at achieving the appropriate legal consequence. Therefore, those actual actions of a person that do not directly lead to the emergence, change, or termination of civil rights and obligations cannot be considered as transactions. On these grounds, Ukrainian civil law distinguishes transactions committed under the influence of fraud, violence, difficult circumstances, and on extremely unfavourable terms, as well as a result of a malicious agreement.

A mistake is a person's misperception of the facts of the transaction, which affected his expression of will, in the absence of which it could be assumed that the transaction would not have been committed. The reasons for the error, in this case, do not matter. For a transaction to be declared invalid under the influence of an error, the error must be significant, i.e. an error regarding the nature of the transaction, the rights and obligations of the parties, such properties and qualities of the thing that significantly reduce its value or intended use. Significant is an error, the consequences of which can not be eliminated at all or to eliminate which the wrong party must incur significant costs. Error regarding the motives of the transaction is not significant, except in cases established by law (Art. 229 CCU). For example, operating one of the basic principles of civil law – freedom of contract – is not considered a mistake to formulate in the lease of property clause on its safekeeping, because in such a contract there was a unity of will and expression of rights and obligations of the parties under such agreement. the parties themselves have not

³¹ On licensing of types of economic activity: Law of Ukraine dated March 2, 2015, No. 222-VIII. Information of the Verkhovna Rada of Ukraine, 2015, No. 23, Art. 158.

³² Separate opinion of the judge of the Civil Court of Cassation as part of the Supreme Court, Krat V.I. dated November 25, 2020 in case No. 639/5187/17. Available at: <https://reyestr.court.gov.ua/Review/93564537> (Accessed: 8 September 2022).

proved that in the absence of the disputed clause, the contract would not have been concluded.³³

Fraud occurs when one party intentionally misleads the other party about the nature of the transaction, rights, and obligations. In addition, deception occurs when the party to the transaction denies the existence of circumstances that may prevent the transaction or conceals their existence, because knowledge of which may prevent the transaction (Art. 230 CCU). For example, a court will invalidate a contract as an error if one party was not informed of all material terms of the contract and the negative consequences of involving the other party in the performance of the contract, including the provision of services to purchase of a specific indefinite product, on the terms set out vaguely and incomprehensively, without providing available information necessary for the customer to make an informed choice when concluding the contract. The arguments of the opposing party about the plaintiff's negligence were not taken into account by the court.³⁴

In the case of a transaction under the influence of violence (Art. 231 CCU) the formation of the will of the person committing the transaction is due to the intervention of an external factor – physical or mental pressure from the counterparty or another person to motivate would do without the presence of such physical or mental suffering.³⁵ It should be expressed in illegal, not necessarily criminal, actions. To invalidate a transaction, the plaintiff must prove the following circumstances: (1) the fact that physical or psychological pressure from the other party or a third party was applied to him (to the injured party to the transaction); (2) committing a transaction against one's true will; (3) the existence of a causal link between the physical or psychological pressure and the commission of the contested transaction.³⁶

In practice, such an outside influence is quite difficult to prove, as not only the testimony of witnesses, but even forensic handwriting and forensic linguistic examinations do not prove that the disputed contract was made '*precisely due to external physical or mental pressure*'.³⁷

The representative must act in the interests of the person he represents. Therefore, if he entered into a malicious agreement with the other party to the contract, and acted in his own interests, neglecting the interests of the person he represented, such a contract is invalid by the court (Art. 232 CCU).

³³ Resolution of the Kyiv Commercial Court of Appeal dated December 14, 2017 in case No. 910/15401/17. Available at: <https://reyestr.court.gov.ua/Review/71169223> (Accessed: 8 September 2022).

³⁴ Decision of the Shevchenkivskiy District Court of the city of Kyiv. Kyiv of 27 March 2013 in case No. 761/4329/13-ц. Available at: <https://reyestr.court.gov.ua/Review/30289980> (Accessed: 8 September 2022).

³⁵ Resolution of the Supreme Court dated January 23, 2020 in case No. 484/3809/16-ts. Available at: <https://reyestr.court.gov.ua/Review/87144759> (Accessed: 8 September 2022).

³⁶ Resolution of the Supreme Court of June 30, 2021 in case No. 556/2085/19. Available at: <https://reyestr.court.gov.ua/Review/98083363> (Accessed: 8 September 2022).

³⁷ Resolution of the Supreme Court dated April 21, 2021 in case No. 601/1083/16. Available at: <https://reyestr.court.gov.ua/Review/96631445> (Accessed: 8 September 2022).

A malicious arrangement is a deliberate collusion of a representative of one party to a transaction with the other party, resulting in adverse consequences for the person on whose behalf the transaction is made. In declaring a transaction invalid on the relevant grounds, it is not the presence of the principal's will to prove the transaction, but the existence of the intention of the representative, who is aware of the transaction against the principal's interests, presupposes (Resolution, 2013). According to this provision of the law, the necessary features of a transaction committed as a result of a malicious agreement between the representative of one party and the other are: 1) the presence of an intentional agreement between the representative of the injured party and the other party; (2) the occurrence of negative consequences for the principal and his disagreement with such consequences; (3) the actions of the representative were carried out within the powers granted to him.³⁸

An example of an agreement concluded as a result of a malicious agreement between a representative of one party and the other party may be a lease agreement on behalf of a person on extremely unfavourable terms, taking into account: the term of the agreement (5 years), setting a disproportionately high penalty termination of the contract on his initiative (\$300,000), as well as excessively low rent (UAH 6,000 per month for renting a 3-room apartment). These circumstances do not meet the interests of the principal and such a lease agreement is declared invalid by the court³⁹.

The transaction, the recognition of which is invalid under Art. 233 of the Civil Code of Ukraine, is characterized by the fact that a person commits it voluntarily, aware of their actions, but forced to make transactions due to difficult circumstances and extremely unfavourable conditions, and therefore the will of the person is not considered free and does not meet his inner will. The grounds for declaring a transaction invalid in the following circumstances and the subject of proof in the case are: (1) the existence of a serious circumstance in which the person was and which forced him to make the transaction; (2) the transactions were made on extremely unfavourable terms.⁴⁰

Severe circumstances may include the serious illness of a person, members of his family or relatives, the death of a breadwinner, the threat of losing his home or the threat of bankruptcy, and other circumstances to eliminate or reduce such a transaction.⁴¹

For example, if a person donates his property to close relatives, and invalidates the contract on the grounds that he is an elderly person and in need of constant

³⁸ Decision of the Pechersk District Court of Kyiv dated July 31, 2013 in case No. 757/2091/13-ts. Available at: <https://reyestr.court.gov.ua/Review/32849702> (Accessed: 8 September 2022).

³⁹ Resolution of the Kyiv Court of Appeals dated September 20, 2018 in case No. 753/886/18. Available at: <https://reyestr.court.gov.ua/Review/76612288> (Accessed: 8 September 2022).

⁴⁰ Resolution of the Supreme Court of 5 February 2020 in case No. 462/3280/17. Available at: <https://reyestr.court.gov.ua/Review/87517105> (Accessed: 8 September 2022).

⁴¹ Resolution of the Supreme Court of 16 October 2019 in case No. 333/1238/16-II. Available at: <https://reyestr.court.gov.ua/Review/85238411> (Accessed: 8 September 2022).

support for health, he must provide evidence to prove that it is unsatisfactory health and his unfavourable financial situation could be eliminated or improved as a result of concluding such an agreement.⁴²

It is not a serious circumstance to conduct criminal proceedings against a person with the threat of confiscation of housing, as further actions of the person to donate such real estate indicate the presence of his will to avoid possible confiscation of property belonging to him to continue using it with the defendant. After the conclusion of the contract, they continued to live in the disputed housing.⁴³

The will of the party to the transaction must be free and in accordance with his inner will. An expression of will, which is expressed without the intention to create civil rights and obligations, but only for the form or to cover up another agreement, is not the implementation of the agreement.⁴⁴

Indeed, Art. 234 CCU stipulates that a transaction is fictitious, which is committed without the intention to create legal consequences, which were due to this transaction. The fictitious transaction is declared invalid by the court. To recognize the obligation as fictitious, the law requires the following conditions: the fault of persons, manifested in the form of intent, which is aimed at committing a fictitious contract; such intention must arise in the parties before the conclusion of the contract; the purpose of concluding such an agreement is the absence of legal consequences stipulated by the agreement.⁴⁵

Under a fictitious transaction, the rights and obligations of the parties arise, but not those arising from the content of the transaction (Art. 235 CCU). Having established in the case that a certain transaction was made to conceal another transaction (pretended transaction), the court must assume that the parties committed exactly the transaction they meant, and consider the case on the merits with the rules governing this last transaction. If it contradicts the law, decides to declare it invalid with the application, if necessary, of the relevant legal consequences (Resolution, 2013). The consequences of invalidity provided by the Ukrainian legislation can be applied to the pretended transactions only in the case when the transaction which the parties made is null and void or the court recognizes it as invalid provided it is disputed (Resolution, 2009).

4. LEGAL CONSEQUENCES OF INVALIDATION OF THE CONTRACT

The lawful consequence of the invalidity of the contract is restitution (the main consequence) and damages (additional consequence).

⁴² Resolution of the Supreme Court of February 5, 2020 in case No. 462/3280/17. Available at: <https://reyestr.court.gov.ua/Review/87517105> (Accessed: 8 September 2022).

⁴³ Resolution of the Supreme Court dated October 2, 2019 in case No. 646/1916/18. Available at: <https://reyestr.court.gov.ua/Review/84876680> (Accessed: 8 September 2022).

⁴⁴ Resolution of the Higher Economic Court of Ukraine dated February 3, 2009 in case No. 6/370d/08. Available at: <https://reyestr.court.gov.ua/Review/4033833> (Accessed: 8 September 2022).

⁴⁵ Court order of the Supreme Court of May 7, 2019 in case No. 910/4994/18. Available at: <https://reyestr.court.gov.ua/Review/82294086> (Accessed: 8 September 2022).

Participants in civil relations may not, at the level of a contract (including an amicable agreement), qualify a contract as invalid (void or disputed), determine the legal consequences of the nullity of the transaction, or agree on the application of restitution. By the agreement of the parties, only the legal consequences of the disputed transaction may change. In essence, the application of the design invalidity of restitution, as well as the invalidity of the contract itself is not to protect civil rights and interests unacceptable.⁴⁶

Interpretation of Art. 216 CCU (legal consequences of the invalidity of the transaction) shows that it is necessary to distinguish between the legal consequences of the invalidity of the transaction and the legal consequences of the invalid transaction. Thus, the legal consequences of the invalidity of the transaction include the fact that it does not create any legal consequences. In addition, if in connection with the commission of an invalid transaction the other party or a third party has suffered damage and non-pecuniary damage, they are to be compensated by the party at fault.

The legal consequences of the performance of a bilateral invalid transaction (agreement) include bilateral restitution. Restitution is a special obligatory way of protection of the property right which can be applied only in case when the subject of the invalid transaction of the time of the decision of the corresponding question is in that party of the invalid transaction to which it was transferred.⁴⁷

Restitution as a way to protect civil rights is used only if there is an agreement between the parties, which is void or is declared invalid.⁴⁸ The purpose of restitution is to restore the status quo between the parties in the factual and legal situation that existed before the transaction, by, so to speak, the absolute destruction of the legal significance of any actions taken by the subjects – participants in the invalid transaction.⁴⁹

Prescriptions of Art. 216(1) CCU are not used as a basis for a claim for the return of property transferred for the execution of an invalid transaction, which was alienated to a third party. Claims of property owners for invalidation of subsequent transactions concerning the alienation of this property, which were made after the invalid transaction, cannot be satisfied. The rights of a person who considers himself the owner of the property are not protected by satisfying the claim against a bona fide purchaser using Articles 215 and 216 CCU. Such protection is possible by satisfying the vindication claim, if there are grounds for this, provided by Art. 388 CCU, which gives the right to claim property from a bona fide purchaser.⁵⁰ In this

⁴⁶ Resolution of the Supreme Court of 27 October 2021 in case No. 346/6034/13-II. Available at: <https://reyestr.court.gov.ua/Review/100704340> (Accessed: 8 September 2022).

⁴⁷ Resolution of the Supreme Court of 9 September 2021 in case No. 925/1276/19. Available at: <https://reyestr.court.gov.ua/Review/99612754> (Accessed: 8 September 2022).

⁴⁸ Resolution of the Supreme Court of 11 July 2018 in case No. 910/5221/17. Available at: <https://reyestr.court.gov.ua/Review/75298668> (Accessed: 8 September 2022).

⁴⁹ Resolution of the Supreme Court of 9 September 2021 in case No. 925/1276/19. Available at: <https://reyestr.court.gov.ua/Review/99612754> (Accessed: 8 September 2022).

⁵⁰ Resolution of the Supreme Court of 28 November 2018 in case No. 504/2864/13-II. Available at: <https://reyestr.court.gov.ua/Review/81842010> (Accessed: 8 September 2022).

case, the property may be claimed from a person who is not a party to the invalid transaction, in particular from a bona fide purchaser, by filing a vindication claim.⁵¹

Thus, if the property was purchased under a contract from a person who had no right to alienate it, the owner has the right under Art. 388 CCU to sue to recover property from a bona fide purchaser, not a claim for recognition of the contract of alienation invalid⁵² (Resolution, 2014, 27).

Rule of Art. 216 CCU applies only to the parties to the transaction. This concept is operated by Art. 1212(1) CCU, which states that a person who acquired property or kept it at the expense of another person (victim) without sufficient legal basis (unreasonably acquired property), is obliged to return the property to the victim. The person is obliged to return the property even when the basis on which it was acquired, later disappeared. In accordance with paragraph 1 of Art. 1212(3) CCU, the provisions of this chapter also apply to claims for the return of an invalid transaction.⁵³

The list of consequences of invalidity of transactions is not exhaustive, and the person concerned has the right to make any claim to apply the consequences of such a transaction, based on the principle of restoration of its violated rights and legally protected interests.

A special legal consequence of certain types of invalid contracts is, for example, the cancellation of the entry from the State Register of real rights to immovable property and their encumbrances.⁵⁴ However, the court's decision on the invalidity of the transaction does not entail the obligation to cancel the decision on state registration of ownership of the object. To do this, a person whose rights have been violated by such an invalid transaction applies to the court with a request to cancel the decision on state registration of rights.⁵⁵

In our opinion, this definition of the Grand Chamber of the Supreme Court is incorrect, because if the root cause is rejected (invalidation of the contract), all its further consequences should be cancelled, including the cancellation of the decision on the registration of property rights, which, in turn, was adopted on the basis of the same invalid contract. In our opinion, taking into account the principle of procedural

⁵¹ Separate opinion of judges of the Grand Chamber of the Supreme Court: Sytnik, O. M., Britanchuk, V. V., Lyashchenko, N. P., Prokopenko, O. B. dated November 28, 2018 in case No. 504/2864/13-ts. Available at: <https://reyestr.court.gov.ua/Review/82316149> (Accessed: 8 September 2022).

⁵² On judicial practice in cases on the protection of property rights and other property rights: Resolution of the Plenum of the Higher Specialized Court on Consideration of Civil and Criminal Cases dated February 7, 2014, No. 5, Business-Accounting-Law, Taxes, Consultations, 2014, No. 35, p. 27.

⁵³ Resolution of the Supreme Court of 9 September 2021 in case No. 925/1276/19. Available at: <https://reyestr.court.gov.ua/Review/99612754> (Accessed: 8 September 2022).

⁵⁴ Resolution of the Supreme Court of 24 April 2018 in case No. 910/7606/17. Available at: <https://reyestr.court.gov.ua/Review/73793155> (Accessed: 8 September 2022).

⁵⁵ Resolution of the Supreme Court 11 September 2018 in case No. 909/968/16. Available at: <https://reyestr.court.gov.ua/Review/76860058> (Accessed: 8 September 2022).

economy, in case of invalidation of a contract, the court decision should indicate the cancellation of all further consequences related to the subject of such a contract (except for the transition of the subject to a bona fide purchaser).

In such cases, the appropriate defendant will not be the state registrar, but the opposite party to the contract.⁵⁶ And, given all the procedural possibilities of delaying the case (which, in our opinion, in the study should not be mentioned), a person under such an invalid contract should wait a long time to return to his position in what was before the contract.

5. CONCLUSIONS

Both in the domestic doctrine of civil law and at the level of the Central Committee of Ukraine, it is traditional to divide invalid transactions into insignificant and disputed, which allows it to be used in the context of invalidity of the contract. The disputed agreement is declared invalid by a court if one of the parties or another interested person denies its validity on the grounds established by law [Art. 215(3) CCU]: error (Art. 229), deception (Art. 230), violence (Art. 231 CCU) and other defects. The Central Committee of Ukraine regulates certain grounds for contesting transactions separately (Art. 222, 223, 225, 227, 229–233, 234, 235 CCU), but does not contain an exhaustive list of grounds. This means that any contract can be challenged if it does not meet the general requirements of the transaction (Art. 203 CCU). The challengeability of the contract is embodied in the so-called ‘virtual’ invalidity, when only the most typical grounds for challenge are listed. In this case, it is allowed to challenge the contract by filing a claim for invalidity and on other grounds. Sometimes they are additionally indicated [for example, Art. 668(3) CCU], but in general, it is allowed in case of violation of mandatory norms enshrined in acts of civil law, the interests of state and society, its moral principles. The decision of the Supreme Court in the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation of June 22, 2020 in case № 177/1942/16-ts states that ‘the existence of grounds for invalidating the contract must be established by the court at the time of its conclusion. The contract must exist at the time of its conclusion, and not as a result of non-performance or improper performance of obligations arising under the contract.’

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⁵⁶ Resolution of the Supreme Court of 12 December 2018 in case No. 570/3439/16-ц. Available at: <https://reyestr.court.gov.ua/Review/78977528> (Accessed: 8 September 2022).

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