PROBLEMS OF DEFINITION «WILL» AND «WILLABILITY» IN CIVIL LAW OF UKRAINE

Demchuk A. M.
Senior lecturer,
Lesya Ukrainka Eastern European National University
Lutsk, Ukraine

Actuality of theme. One of the main requirements of transaction is the fact, that the will of the user must be free and meet its internal freedom. The existence of different defects of will are the basis for nullity in court (for example, mistake, fraud, violence, coincidence of serious circumstances etc.) according to provisions of the Civil Code of Ukraine. Practice of consideration these cases about recognition of transactions void discovers ambiguity of some legislative provisions, which establish the legal consequences of the invalidity transactions with will defects. So the courts apply the same rule of substantive law ambiguously in disputes that follow from such relationships. The judicial practice not fully solves this problem which is defined in the explanation of high specialized courts.

Such condition of regulation leads to the problems of the will determination. Therefore, we need amendments to the civil law of Ukraine based on a comprehensive scientific research and legal consequences of invalidating of transactions committed because of will defects. The issue of the will has particular importance in civil legal relations.

The research of the problems has been done by such scientists as: M. Agarkov, A. Ioffe, Y. Karapekin, I. Novitsky, M. Rabinovich, K. Razumova, N. Shestakov and others. Research purpose is the necessity to define will and willability for the validity of contracts.

The problems of the will and willability correlation is the fact, that they don`t always harmoniously combine for giving a result that was expected. There can be various reasons. For example, when the parties have different understandings of each other; when the person`s willability does not comply with her will (transaction has committed with violence, threats, in severe circumstances) and for other reasons.

There are different views in the literature, as to which element of the transaction should be given advantage: will or willability.

The first group of scientists` opinion is based on the «theory of liberty». They recognized the need to consider first a real will of the person and the attempt to reveal it [5, p. 7]. The second group of scientists follows the «theory of willability,» based on the fact that participants of civil circulation have to deal first of all with the will and it is difficult to determine the true will of the person in most cases [3,p.22]. Finally, researchers included in third group say, that the will and willability have the same value, they emphasize the need for mutual solution [2, p. 223]. Y. Karpekin prefers the will. If the entity of civil law has the will to commit the transaction but does not commit due to the purpose of the transaction actions such a transaction is not committed [1, p. 15]. Therefore, we affirm that willability prevails over the will of the transaction.

Preference of the will over the willability is debatable and requires clarification regarding the issue of unilateral transactions. Thus in the CC unilateral transactions

include testament drawn up with the will of the testator. The contents of the will be known after his death. It should be noted that the will of the testator can change at the last moment of his life and his willability can be expressed in the testament.

The will can be not installed in unilateral transaction but this fact does not affects and cannot influence the transaction. If the testator, for example, does not have time to change testament, it is still valid and there is no reason to doubt in the authenticity of the will, which is embodied in the testament. Because the will of the testator was indeed real at the time of committing that as embodied in the will. Therefore, the transaction contesting does not have a ground. Whereas the will relates to the internal mental world of the person and can be movable and changeable, the positive result of such objections will be only in certain cases.

V.A. Oyhenzyht analyzes a legal construction and claims that the lack of willability of some individuals is replaced by other persons` actions. In such cases, he says, we can speak about «will replacement» but only in case with incapable persons as the conclusion regulation and implementation of agreements, which are entirely «replaced» by their lawful representatives.

The minors and the mentally ill persons are not capable, but the lack of willability is replaced by the will of other persons. Their own free will, mental adjusting, own behavior are determinated with the interests of incapable persons [4, p. 109]. I.A. Biryukov agrees with V.A. Oyhenzyht, noting that the trustee representation arises independently from the ward will [6, p. 269]. One of the transaction force conditions is compliance the willability with not inner freedom, as provided in p. 3, 203 CC of Ukraine, but with his well-formed will.

In our opinion, the individual will to commit the transaction is an internal mental process which is focused on committing legal actions aimed at emergence, modification or termination the civil rights and obligations. The willability is external manifestation of liberty by methods that are not prohibited by law, making it available to others to achieve purpose of legal transaction.

The problem of the will formation remains one of the most important in science. It must be solved to recognize the transaction invalidated, basing on the will defect. Researchers disagree with the contract interpretation, how it should be considered – as will or willability.

If we support the concept of will it can be affected the interests of the counterparty and generally it has a negative impact on public circulation. If we put forward a formal element – the willability, in this case, it may affect weaker party transaction, for example, if it was honestly mistaken. Thus we must take into consideration the internal will of person in determining the invalidity of contracts which are specified in Articles 229, 230, 231, 233 Civil Code of Ukraine [7].

The fact that the transaction, which is based on the will defect in terms of willability, usually contains all the necessary «attributes» of the legal relationship. But this transaction performs with illegal purposes or contrary to the intentions of the actual will of the other transaction party. Before the dispute the legal action of the party or other interested person is considered valid and generates all the consequences that are expected from the commission of the transaction. Transaction with significant disabilities of will is externally valid because there is a presumption of the transaction reality.

All these examples demonstrate that the question of preference between will or willability must proceed from the position of each specific case of the transaction. For the will detection we must not only accept certain behavior of the person committing the transaction using conclusive action but also analyze it considering the circumstances, which are indicative, that a person intends to commit transaction.

The person`s true will installation is complicated compared with verbal means of willability in each case, when will is clearly formulated through words (orally or in writing).

Thus, the will and the willabillity are two sides of the same process, namely the mental attitude of the person to their perpetrated transaction. Obviously, they must comply each other. The lack of these components unity is the basis for recognition the transaction invalid.

References:

1. Karpekyn Y.B. The will and willability in transaction // Judicial practice. – 2002. – № 12. – P. 17.

2. Ioffe O.S. Soviet civil law. – L .: Izd. University Press, 1958. – P. 443

3. Novitsky I.B. Transactions. Limitation of actions. – M .: Gos. publ jurid. lit., 1954. – 248 p.

4. Oygenziht V.A. The will and the will: Essays on the theory, philosophy and psychology of law. – Dushanbe Donish, 1983. – 256 p.

5. Rabinovich N.V. Invalidity of transactions and its consequences. – L.: Publishing House of Leningrad University, 1960. – 166 p.

6. Family law of Ukraine: Textbook. / Ed. V.S. Hopanchuka. – K .: The Truth, 2002. – 304 p.

7. Civil Code of Ukraine on January 16, 2003 // Supreme Council of Ukraine. – 2003. – № 40-44. – Art. 356.

ЩОДО ПИТАННЯ ПРАВОВОЇ ПРИРОДИ СКЛАДСЬКИХ СВІДОЦТВ

Донець А. Г.
асистент кафедри цивільного права № 1
Національного юридичного університету імені Ярослава Мудрого
м. Харків, Україна

Виникнення такого правового явища, як складські свідоцтва слід співвідносити з історичним процесом розвитку ринкових відносин у світі, а саме з необхідністю розвитку більш оперативного руху товару на ринку, а в подальшому – біржі. Слід зазначити, що прямими попередниками складських свідоцтв є коносамент і вексель. І вже значно пізніше, в кінці XVI – початку XVII ст., починає формуватися практика застосування подвійних складських свідоцтв. Саме в цей час, з розвитком колоніальної і зовнішньої морської торгівлі отримує розвиток промислова підприємницька діяльність по зберіганню партій товарів, які або прибули по морю в порт призначення, або чекають відправки на судні. До кінця XVII ст., коли виникла потреба зберігати партії товарів – предмет біржових то-