JURISPRUDENCE

PRIMARY FORMS OF EXPRESSION OF FALSE TRANSACTIONS IN THE CIVIL LAW OF THE REPUBLIC OF AZERBAIJAN

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Abstract

Transactions, particularly contracts, play an important role as one of the bases for the formation of civil law relations. However, not every transaction is capable, in every case, of producing the corresponding legal consequences. In certain circumstances, the invalidity of transactions arises, and in such cases the transaction does not create the corresponding legal consequences. One of the grounds for such invalidity is provided in the Civil Code of the Republic of Azerbaijan in the form of false transactions. In the present article, such transactions are examined by the author, and an analysis is conducted as to the forms in which they most frequently manifest in practice.

Keywords: false transaction, contract, Civil Code, invalidity, concealment

Transactions play a special role as the principal means of the formation of civil law relations. A transaction is such a declaration of will that pursues the purpose of producing a legal consequence, and on the basis of this declaration of will, the legal norm realizes the legal consequence corresponding to the expressed will [13; p.84]. In transactions, the legal consequence arises because the parties so desire.

A transaction is constituted by one or more declarations of will directed towards a specific legal consequence. The essential element of a transaction is the will aimed at the conclusion, modification, or termination of a transaction. This will must be disclosed to the external world and intended in such a manner as to ensure the occurrence of the legal consequence [15; p.30].

According to Article 324.1 of the Civil Code of the Republic of Azerbaijan, a transaction is a unilateral, bilateral, or multilateral declaration of will directed at the creation, modification, or termination of a civil law relation [2].

However, sometimes the expression of will by only one party is not sufficient for the establishment of a legal relation, and the corresponding acceptance of the other party is also required. Contracts may be cited as an example of the latter. Article 324.4 of the Civil Code further provides that, for the conclusion of a contract, the coordinated declaration of will of two parties (bilateral transaction) or the coordinated declaration of will of three or more parties (multilateral transaction) is necessary [2].

As one of the fundamental principles of the civil legislation of the Republic of Azerbaijan, the principle of freedom of contract is enshrined in Article 6.1.5 of the Civil Code [2]. Pursuant to Article 390.1 of the Civil Code, natural and legal persons are granted the right to freely conclude contracts, to determine the content of such contracts, and to conclude contracts not provided for in the Civil Code, provided that they are not contrary to it. The freedom of contract established by Article 390 of the Civil Code operates as one of the elements in the realization of property rights envisaged in Article 29 of the Constitution and Article 152.1 of the Civil Code, as well as the right to free entrepreneurship enshrined in Article 59 of the Constitution [1].

In granting the freedom of contract to the participants of civil circulation, the legislation has proceeded from the presumption that they act in good faith, in accordance with the general principle of law [7]. On the other hand, the freedom to determine the content of a contract by no means implies that the validity of all agreements reached in a contract concluded between the parties may not be called into question (in this regard, the provisions of Articles 339–342 and 344 of the Civil Code concerning the invalidity of transactions, as well as the provisions of Articles 417–420 concerning standard terms of contracts, must be taken into account) [6].

If transactions constitute one of the most common legal facts, the contract of sale is a type of transaction. For the validity of any transaction (including a contract of sale), it is essential that the necessary subjects (authorized persons) participate in its conclusion, that there exists unity between the will and its expression among them, and that the form and content of the transaction comply with the requirements of the legislation [8].

Invalidity of a transaction means that it is incapable of producing the desired legal consequences, and the conditions for the validity of transactions are determined by the Civil Code [9].

Professor M. Demirchiyeva, based on the provisions enshrined in Article 337 of the Civil Code, provides the following definition of the invalidity of a transaction: by an invalid transaction is meant a transaction concluded in violation of the conditions established by the Civil Code, which does not create the civil-law relations envisaged in its content, but may only give rise to consequences connected with its own invalidity [11; p.292].

Invalidity in civil law is a general concept denoting all cases in which a transaction does not produce legal consequences due to its contradiction with the legislation. From the perspective of transactions, invalidity expresses the general state and consequence. However, the grounds giving rise to such a consequence, namely the state of invalidity, differ in nature and characteristics. In civil legislation, the legal regime and conditions governing the cases leading to invalidity are regulated in different ways. For example, while it is legally impossible to render a void transaction valid, transactions subject to challenge may be declared invalid within cesrtain time limits through contestation; if they are not contested, the legal situation that has been valid since the moment of conclusion of such a transaction remains unchanged [4].

Although in most cases the determination of the desired legal consequences at the time of the conclusion of a transaction is clear from the content of the transaction, a number of transactions may be defective in terms of content. Such transactions do not pursue the purpose of creating the civil-law relations envisaged in their content. Several types of transactions defective in content are provided for in our civil legislation. One of the types of such transactions envisaged in the civil legislation of the Republic of Azerbaijan may be distinguished as false transactions.

According to Article 340.2 of the Civil Code, a false transaction is a transaction concluded for the purpose of concealing another transaction [2].

S.Suleymanli states that transactions resulting from a declaration of will made solely for the purpose of concealing another transaction and without the intention of producing legal consequences corresponding to their apparent meaning are called false transactions [12; p.306].

M.K.Oguzman notes that a false transaction is a transaction concluded by the parties through their agreement that not the legal consequences of the apparent contract, but those of another contract, shall arise [16; p.132].

In order to speak of the existence of a false transaction, the following conditions are required: the existence of two transactions between the parties (the concealing transaction and the concealed transaction); the parties' agreement that the ostensibly concluded transaction shall not create any legal consequences for them; and the conclusion of the ostensibly concluded transaction for the purpose of deceiving others.

The Plenum of the Constitutional Court of the Republic of Azerbaijan, in its decision dated 18 March 2022, also stated that a false transaction possesses the following essential elements:

- The ostensibly concluded transaction, or the concealing transaction, creates the impression for third parties that the parties have entered into a lawful and valid contract. However, the declarations of will reflected by the parties in this contract do not correspond to the legal consequence they actually desire. With respect to this contract, which the parties concluded merely for appearance's sake, they have no intention of giving rise to legal consequences, rights, or obligations;

- The secretly concluded transaction, or the concealed transaction, is the contract hidden behind the ostensibly concluded transaction and expresses the true intentions of the parties. This constitutes the essential feature that distinguishes a false transaction from a fictitious transaction;

- The intention to create a false impression is expressed in the parties' concealment of their true intentions in order to obtain a certain benefit, by forming an opinion among third parties to that effect and by creating such an appearance [5].

As can be seen, two types of transactions exist as constituent elements of a false transaction:

1) the ostensibly concluded transaction, or the concealing transaction;

2) the secretly concluded transaction, or the concealed transaction.

In a case in which we also acted as an expert, the Plenum of the Constitutional Court noted that a false transaction possesses the following characteristics:

- With respect to the concealing (false) transaction, there exists no intention or purpose to produce any legal consequence; the legal intention of the parties, by concealing their true will, is directed towards the establishment of civil-law relations under the concealed (hidden) contract;

- The concealing transaction is encompassed by the direct intent of both parties;

- In both the concealing and the concealed transactions, it is possible not only for the same subjects to participate as parties, but also for the subject composition of these transactions to differ. Thus, in some cases, although a party to the concealed transaction does not participate in the concealing transaction, he is aware of the purpose hidden by the latter and assists in its conclusion [3].

In general, the contract of sale, by virtue of its legal content and characteristics, is considered one of the most commonly used types of contracts capable of functioning as a component of a false transaction. This can be established both through the analysis of scholarly literature and through judicial practice. When the contract of sale operates as a component of a false transaction, it may manifest either in the form of an ostensibly concluded transaction or in the form of a secretly concluded transaction.

According to Article 567 of the Civil Code of the Republic of Azerbaijan, under a contract of sale the seller undertakes to transfer the item into the ownership of the buyer, while the buyer undertakes to accept the item and to pay the monetary amount (price) determined in return. [2]. Alongside the legal definition set forth in the Civil Code, we consider it appropriate to provide the following theoretical definition of the contract of sale: 'A contract of sale is a type of contract under which the seller, in return for a sum of money that the buyer undertakes to pay, undertakes to deliver to the buyer the property which is the subject matter of the sale and thereby to transfer ownership to the buyer'. From this perspective, it can be determined that the contract of sale belongs to the category of contracts relating to the transfer of property into ownership. The practical significance of such a definition lies in the fact that it enables a more precise determination of which types of contracts may be concealed by a contract of sale and which types of contracts may conceal it. From this perspective, in cases where the contract of sale functions as a constituent element of a false transaction, it is most often the contract of gift that serves as the other constituent element.

First of all, it should be noted that there must be a property which constitutes the subject matter of the contract of sale. According to Article 135.2 of the Civil Code, property is a set of any things and intangible property benefits [2]. From this perspective, both movable and immovable things, as well as intangible property benefits permitted to be sold, may serve as the subject matter of a contract of sale. The subject matter of the contract of sale gives rise to certain differences in the legal regulation regime of the sales contract to be concluded in respect thereof. Therefore, alongside the general rules applicable to all, specific regulatory mechanisms have also been provided for each of the respective types of contracts of sale.

Among the various types of contracts of sale, it is most often contracts of sale concluded with respect to immovable property that operate as a constituent element of a false transaction. In such contracts, it is possible to encounter either simulation with respect to the price, or situations where the contract of sale is concealed by a contract of gift, or conversely, where it conceals a contract of gift.

It is necessary that the sale price of the immovable property, which is the subject of the contract of sale, be explicitly indicated in the contract and reflect its actual amount. In practice, it is observed that the parties, for various reasons, indicate the sale price as either less or more than its actual amount. Where the sale price in the contract is indicated as less or more than its actual amount, a situation arises that is referred to as 'simulation of the price.' It is a matter of debate whether such a situation, due to non-compliance with the requirements of form and content, results in the invalidity of the contract.

In a contract of sale of immovable property in which simulation of the price has taken place, the other essential terms reflect the true intentions of the parties [14; p.370]. Only with respect to the term concerning the price does a difference exist between the apparent transaction and the concealed transaction. In such cases, where partial simulation exists, the ostensibly concluded transaction and the concealed transaction are in fact transactions of the same type. Thus, in these circumstances, the contract continues to be a contract of sale of immovable property, and, as in most false transactions, there do not exist two separate contracts differing in their legal nature and characteristics between the concealing transaction and the concealed transaction.

We consider that even if simulation of the price takes place in the sale of immovable property, the seller’s will to transfer the immovable property into the ownership of the buyer still exists, and the buyer accepts that property. This situation means that at least one of the parties, and in most cases both, perform their obligation. The fact that performance of the obligation has taken place constitutes an important criterion in determining whether there has been an abuse of right when the parties invoke the invalidity of the contract. Therefore, in our view, when the parties to the contract bring a claim for invalidity of a contract of sale of immovable property in which the price has been simulated, such a claim would constitute an abuse of right. Indeed, pursuant to Article 560.3.4 of the Civil Code, the exercise of a right contrary to prior conduct in which the other party had placed trust and reliance is considered an abuse of right [2]. Since the simulation of the price results from the parties’ agreement, reached either prior to or at the time of the conclusion of the contract of sale of immovable property, through the simulated transaction, it follows that the parties have relied upon each other’s prior conduct, and in such a case, the exercise of conduct contrary to that prior conduct by a party to the contract would lead to a significant infringement of the rights of the other party. The position that it would not be correct to deem a contract of sale between the buyer and the seller invalid on the grounds of simulation of the price is also accepted in the scholarly literature [17; p.67].

In a contract of sale of immovable property, indicating a price higher than the price actually agreed upon by the parties serves the purpose of creating difficulties for persons holding a pre-emptive right to exercise that right.

The civil legislation of the Republic of Azerbaijan does not grant persons holding a pre-emptive right the right to invoke the invalidity of a contract of sale of immovable property in which simulation of the price has taken place, but rather grants them the right to demand the transfer to themselves of the rights and obligations of the buyer under that contract. Thus, pursuant to Article 218.3 of the Civil Code, where a share is sold in violation of the pre-emptive right of purchase, any other participant in the shared ownership has the right, within three months, to demand through the courts the transfer to himself of the rights and obligations of the buyer [2]. At present, this approach is also upheld by the decision of the Civil Chamber of the Supreme Court of the Republic of Azerbaijan, which determines judicial practice [10]. On the basis of the foregoing, we may conclude that in cases of simulation of the sale price in a contract of sale of immovable property, the purpose of the parties is to conclude the contract at the secretly agreed price; there exists no will directed at preventing the contract from producing legal consequences, nor any will directed at concealing another contract of a different nature. To reach the conclusion of invalidity of such contracts would not correspond to the true intentions of the parties; therefore, partially false transactions in which the price is simulated should not be confused with entirely false transactions, and it must be taken into account that the legal consequences of each are different from one another.

Since all essential terms agreed upon must be indicated in a contract of sale, the true intentions of the parties concerning the transfer of immovable property in exchange for a certain sum of money must be reflected in the contract. Where the true intentions of the parties are not directed towards the sale of property — for instance, in the case of a gift of immovable property — and it is sought to present the transaction to third parties as a contract of sale, with the donor appearing as the seller and the donee as the buyer, the concluded contract of sale will be invalid, as it does not embody the genuine intentions of the parties relating to the reciprocal exchange of property for money. In fact, in such cases where a contract of gift has been concluded but the appearance of a contract of sale is created, the contract of sale operates as a false transaction. In such circumstances, that contract of sale is void pursuant to Article 340.2 of the Civil Code. At the same time, the continuation of that Article stipulates that, taking into account the nature of the false transaction, the rules applicable to the transaction actually intended by the parties at the time of its conclusion shall apply. In such a situation, it is required to recognize that the contract of sale of immovable property is invalid, while the secretly concluded contract of gift is valid. However, in this case, an assessment must be made as to whether the conditions of validity prescribed by legislation for contracts of gift have been complied with. Considering that contracts providing for the transfer of ownership of immovable property require compliance with the requirement of official form, in such circumstances the contract of gift cannot be deemed valid. Accordingly, the contract of sale will be invalid as a false transaction, and the contract of gift will also be invalid due to non-compliance with the requirement of form.

Just as the parties may conceal a contract of gift with a contract of sale, they may also conceal a contract of sale with a contract of gift. Such contracts are most often concluded either to evade paying higher taxes or to prevent persons holding a pre-emptive right of purchase from exercising that right. For example, when a person sells his property or a share in common ownership, persons holding a pre-emptive right of purchase acquire the possibility to exercise that right; however, if the person donates his property or share to another person, no such pre-emptive right arises.

Unlike contracts of sale of immovable property, in the case of the sale of movable things it is not so easy to determine whether or not the contract constitutes a component of a false transaction. It should be taken into account that, with the exception of movable things required to be registered in the official register, contracts relating to other movable things may be concluded in any form agreed by the parties, without a mandatory form requirement. However, as a rule, in the case of contracts of sale of movable things for which no written form is required, it is rather difficult for third parties to prove that the contract is a false transaction. If, in relation to immovable property, where a gift is presented in the form of a contract of sale, the contract of sale is deemed invalid as a false transaction and the contract of gift is deemed invalid for non-compliance with the requirement of form, then in cases where the donation of movable things is presented in the form of a sale and is proven, different regulations are provided. Thus, when it is proven that the contract of sale of a movable thing is a false transaction, it shall be deemed invalid as a void transaction, and pursuant to Article 340.2 of the Civil Code, the rules applicable to the transaction actually intended by the parties at the time of its conclusion shall apply, taking into account the nature of the transaction. In such circumstances, since the primary intention of the parties when concluding the transaction was the donation of movable things, the rules applicable to contracts of gift shall apply, and because no written form is required for the donation of such things, there will be no obstacle to its validity. The identification of such situations is of considerable practical significance. For instance, where the donor has died and his property has passed to his heirs by inheritance, persons entitled to a compulsory share of the inheritance shall acquire the right to demand an increase of the compulsory share at the expense of the donated thing. Thus, pursuant to Article 1200 of the Civil Code, if the testator has donated a thing to a third party, a person entitled to a compulsory share may demand completion of his compulsory share to the extent that it would have increased had the donated thing been included in the estate. If two years have passed from the time of the donation until the opening of the inheritance, the donation shall not be taken into account [2].

Summarizing the above, it may be concluded that the contract of sale, as the most frequently encountered component of a false transaction, may operate both as the ostensibly concluded transaction and as the secretly concluded transaction. In such cases, it must be taken into account that, depending on the characteristics of the subject matter of the contract of sale, different legal regulations are envisaged and their practical legal consequences may differ from one another.

References:

1. Azərbaycan Respublikasının Konstitusiyası: [Elektron resurs] – URL: https://www.e-qanun.az/framework/897

2. Azərbaycan Respublikasının 28 dekabr 1999-cu il tarixli 779-IQ nömrəli “Azərbaycan Respublikası Mülki Məcəlləsinin təsdiq edilməsi, qüvvəyə minməsi və bununla bağlı hüquqi tənzimləmə məsələləri haqqında” Qanunu ilə təsdiq edilmiş Azərbaycan Respublikasının Mülki Məcəlləsi: [Elektron resurs] – URL: https://e-qanun.az/framework/46944

3. “Azərbaycan Respublikası Konstitusiyasının 13-cü maddəsinin I hissəsinin və 29-cu maddəsinin I və II hissələrinin tələbləri baxımından Azərbaycan Respublikası Mülki Məcəlləsinin 329, 340.2 və 661-ci maddələrinin əlaqəli şəkildə şərh edilməsinə dair” Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun 20 iyun 2025-ci il tarixli Qərarı: [Elektron resurs] – URL: https://constcourt.gov.az/az/decision/1476

4. “Azərbaycan Respublikası Mülki Məcəlləsinin 337, 339.6, 346.1 və 354-cü maddələrinin əlaqəli şəkildə şərh edilməsinə dair” Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun 2

aprel 2021-ci il tarixli Qərarı: [Elektron resurs] – URL: https://constcourt.gov.az/az/decision/1226

5. "Azərbaycan Respublikası Mülki Məcəlləsinin 340.2-ci maddəsinin şərh edilməsinə dair" Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun 18 mart 2022-ci il tarixli Qərarı: [Elektron resurs] – URL: https://constcourt.gov.az/az/decision/1274

6. "Azərbaycan Respublikası Mülki Məcəlləsinin 399.3, 399.4, 445 və 449-cu maddələrinin bəzi müddəalarının şərh edilməsinə dair" Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun 24 dekabr 2014-cü il tarixli Qərarı: [Elektron resurs] – URL: https://constcourt.gov.az/az/decision/305

7. "Azərbaycan Respublikası Vergi Məcəlləsinin 14-cü və Azərbaycan Respublikası Mülki Məcəlləsinin 390-cı maddələrinin şərh edilməsinə dair" Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun 12 mart 2012-ci il tarixli Qərarı: [Elektron resurs] – URL: https://constcourt.gov.az/az/decision/231

8. "Ə.Ə.İbrahimovun şikayəti üzrə Azərbaycan Respublikası Ali Məhkəməsinin Mülki İşlər üzrə Məhkəmə kollegiyasının 11 iyul 2003-cü il tarixli qərarının qanuniliyinin yoxlanılmasına dair" Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun 12 aprel 2004-cü il tarixli Qərarı: [Elektron resurs] – URL: https://constcourt.gov.az/az/decision/86

9. "Ş.Əliyevanın şikayəti üzrə Azərbaycan Respublikası Ali Məhkəməsinin Mülki Kollegiyasının 23 dekabr 2016-cı il tarixli qərarının Azərbaycan Respublikasının Konstitusiyasına və qanunlarına uyğunluğunun yoxlanılmasına dair" Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun 11 oktyabr 2019-cu il tarixli Qərarı: [Elektron resurs] – URL: https://constcourt.gov.az/az/decision/1094

10. Azərbaycan Respublikası Ali Məhkəməsinin Mülki Kollegiyasının 29 fevral 2024-cü il tarixli, 2(102)-781/2024 saylı qərarı: [Elektron resurs] – URL: https://sc.supremecourt.gov.az/storage/Mulki/2024/2_781+29.02.2024.pdf

11. Dəmirçiyeva, M.D. Mülki hüquq [2 cilddə] / M.D.Dəmirçiyeva. – Bakı: Zərdabi LTD, - c.1. – 2015. 695 s.

12. Süleymanlı, S.S. Mülki hüququn əsasları / S.S.Süleymanlı. – Bakı: AMADE Group Yayınları, – 2019. – 500 s.

13. Borçlar hukuku. Genel bölüm / N.Kocayusufpaşaoğlu, H.Hatemi, R.Serozan [və b.] – İstanbul: Filiz Kitabevi, – c.1, – 2017. – 824 s.

14. Eren, F. 6098 Sayılı Türk Borçlar Kanununa göre hazırlanmış Borçlar hukuku. Genel hükümler / F.Eren. – Ankara: Yetkin Yayınları, – 2016. – 1363 s.

15. Furrer, A. Borçlar hukuku. Genel hükümler / A.Furrer, M.Muller-Chen, B.Çetiner. – İstanbul: Oniki Levha yayınları, – 2021. – 799 s.

16. Oğuzman, M.K. Borçlar hukuku. Genel hükümler: [2 cilddə] / K.M.Oğuzman, M.T.Öz. – İstanbul: Vedat kitapçılık, - c.1. – 2019. – 692 s.

17. Zevkliler, A. Borçlar hukuku. Özel borç ilişkileri / A.Zevkliler, E.Gökyayla – İstanbul: Vedat Kitapçılık, – 2021. – 824 s.