# ГОСПОДАРСЬКЕ ПРАВО

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## PLACE OF LEGAL TRANSACTIONS IN SYSTEM OF CIVIL LAW

*The article deals with the confusion in the current acts of legislation and prospect of the legal transactions' institution in the system of civil law with the full adaptation of Ukrainian's civil legislation to the demands of EU countries' legislation. Attention is drawn to the contradictions in the institution of transaction itself, its sub institutions, unconformity with the institution of commercial obligations and contracts. The author believes that the legislature should change the approach in favor of one justified and proven historically and stop the experiment.*

**Keywords**: law, the obligation, the institution of law, the transaction.

The convergence of Ukraine with the EU exacerbates the issue of speeding up the adaptation of its legislation to the legislation of that entity. At least that's due to the Law of Ukraine "On the National Program for Adaptation of Ukrainian legislation to the European Union's legislation" of 18 March 2004 and the strategic direction of Ukraine's rapprochement with the EU. A priori, if we enter into one already relatively established socially, economically and politically stable space, we must adhere to those rules that have been established in it. Hopes for further multi-directional in foreign economic policy don't have sufficient grounds and надалі will only harm. It threatensthe economic and political pressure on Ukraine that is growing every year, especially on the part of Russia.

Definitely Ukraine joining the EU means faster harmonization of its legislation and especially the legislation that regulates relations in the private area where retaliations are not provided, or it is minimized because it is dissonant with the principles of civil law and enshrined in international instruments freedoms. In their perspective, in the EU took place known movements: people, goods, investment and intellectual property. To accomplish this there should be united laws that: provides a unified legal space, simplifies the implementation of civil rights and enforcement of legal obligations in foreign countries by individuals and legal entities, forms the unity of law and litigation.

EU legislation has a number of features that were formed over the centuries, is stable, even if they are behind the modern factors of its formation. Sometimes in its certain provisions, it is even retrograde. In this part, it definitely needs to be improved. Nevertheless, even in spite of justified novels of modern codifications of civil law, and the benefits of legal techniques, the direction of the national legislation is defined by its adaptation.

At the same time, in our view, this does not prevent its further improvement, taking into account the latest economic, technological and social processes. Specificallythis refers to the extension of the contractual regulation, including information relationships on the Internet, the transfer of social security for self-regulatory framework.

One of the problematic, taking into consideration the prospect of national legislation's adaptation to the EU legislation, is the institution of contracts:

1) in most EU countries, they do not have such independent system-forming sense (particularly for civil contracts) as in the general provisions of Ukrainian civil legislation and other former Soviet countries;

2) epistemologically, from the time of Roman private law, legal transactions are related to the basic provisions of contract law;

3) in BGB (Germany) they are stipulated in section 3 as capacity, will expression, contract terms and conditions, previous and subsequent agreement; in the French Civil Code provisions on legal transactions dispersed and more associated with the agreements.

The purpose of the paper is to determine the place

of the institutions of legal transactions in the system of civil legislation. The problem was discussed many times by Ukrainian leading jurists (O.V. Dzera, J.O. Zaika, N.S. Kuznyetsova, R.A. Maidanyk, I.V. Spasybo-Fateeva, and others.), but their relevance is not lost (sub 'subjective criterion), and as shown by law enforcement and especially judicial practice (objective test) this relationships need a balanced approach. At least should be suspended different positions of judges on court decisions in similar cases by the plot, manipulating the positions of the parties in the courts.

The object is legal relations, regulated on the basis of the legal transaction, and the subject is acts of legislation on the legal transactions, law enforcement and judicial practice, scientific doctrine.

The main material. In the Civil Code of Ukraine (CCU) provisions on the legal transactions are drafted as part of General section of civil legislation and its self-sufficient institution. In such a way the provisions that were in the Civil Code of the USSR (CC of USSA) 1963 are still kept. Further legislator even turned some of its provisions in this institution, including the notarization of contracts at the request of the party, unilateral restitution.

In the current design it is common for particular institutions of civil law. In particular, the institution of power of attorney is drafted with regard to the provisions of the legal transactions. We're not talking about contracts that are under Part 2 of Art. 202 CCU [19] are bilateral and multilateral legal transactions. But if it is so, with regard to the economy of legislative means, the recovery of the definition of the legal transaction in the article 626 CCU is not clear. Isn't it easier to write: the contract is bilateral and multilateral legal transaction?

Regulation on the legal transactions relate to other sub-branches of civil legislation: inheritance, family and housing. With the advent of the term the legal transactions (Article 202 CCU) instead of agreement as a synonym to Russian "deal" (Article 41 of CC of USSR 1963 [18]) and close to them contracts and in particular obligations (Articles 207-208 of the Commercial Code of Ukraine [3]) scientific interest in them has increased significantly. Studies of invalidity of the legal transactions and their consequences both in general and their particular kinds became particularly relevant. No wonder I.V. Spasybo-Fateeva stresses onmulti aspect of the legal transactions phenomenon and complexities concerning them in legal theory and in practice [16, p. 413].

At the methodological level, further we adhere that despite the resemblance and continuity in the legal regulation, category "legal transactions" and synonymously close to it "deal" does not coincide with a more semantically categorical category – "legal transaction." This term "... is purely Ukrainian term that was previously used in the Ukrainian legislation in 20 – 30 years, and is identical to the term" agreement "that was used in the CC of USSR 1963" [2, p.698].

Legal relationships emerged from agreements and their consequences were studied in the works of prominent representatives of Soviet and modern Russian school of civil law. Among these and other works with specified issues N.V. Rabinowitz' work is worth special attention [11]. In It she researched the nature of agreements and their components, expressions of unlawfulness and the grounds for recognition of the legal transactions invalid and consequences, in particular seize of that is received without legal reasons, determining the fate of the remote ones, the distribution of losses while the transaction is invalid.

In general methodological level the scientific works of famous civil jurist V.P. Shahmatov are quite interesting. Perhaps, he was the first after N.V. Rabinowitz who approached comprehensively to adjustment of agreements in general and the establishment of their legal nature and essence. [22] His achievements became leading for subsequent researchers of the invalid legal transactions issues for a long time.

Analysis of the content of these and other works gives us reason to believe that great attention to the controversial provisions of the legal transaction still remains and is focused on establishment of their legal nature where the approaches are reduced to establish their place in the system of civil law on the basis of main approaches: a) they are part of contracts; b) have relatively independent inter institutional sense, b) are a component of certain sub-branches and institutions of civil law, and c) concern contracts and obligations.

Another paradox is to the institution of legal transactions as they are applied to commercial obligations (Articles 207 – 208, CCU). Here, even the higher courts do not sort out: What could be

declared invalid: commercial obligations, as stated above, the agreements as in the resolution of High Commercial Court of Ukraine "On some issues of resolving the disputes related to the recognition of agreements invalid" or the legal transactions and contracts.

One of the grounds for the emergence of civil rights and obligations are legal transactions and contracts (the paragraph 1 of Part 2 of Art. 11 of CCU). There is a special chapter 16 in the CCU on the legal transactions and the mentioning of them in other articles. There is even a concept of capacity to legal transactions as part of capacity [20, p.132]. In practice, the legal regulation of the legal transaction and contract as its kind is not clearly carried out in the current legislation, leading to confusion and inconsistency in the rule-making, legal enforcement and judicial practice.

On the axiomatic level the category of "legal transactions" owes evolution of private law and the reception of some of its institutions from Roman private law. Still there were formed the main approaches or requirements for their construction in the perspective of contracts or general requirements for contracts: legal capacity of parties to legal transactions, form of contract, free will of the parties, compliance of will with the will-expression, determination of the subject of the contract, the ability to perform [15, p.175]. In sciencegraphy of the legal transactions it is stated that the derivation of their net construction as a universal institution in civil law is the result of a later legal analysis [4, p.6]. But some civil lawyers [1, p. 333] believed that the Roman jurists used the term "negotium" and understood by it not only "action", but also "legal transaction" (which is not equivalent to the present essence of this word in the legal terminology). Professor I.B. Novitsky believed that Roman law dealt with the legal transactions that were manifested as nullum (not concluded), nullius (void) and resindere (invalid), dissolvere (broken), distrahere (such that is deprived of legal validity) [4].

There is no mentioning of the legal transactions in Roman law in the works of prominent Romanists who developed romance philology at Kyiv University of St. Volodymyr [8, p. 91 – 93] (K.A. Mitukov, L.N. Kazantsev [7], Y.O. Pokrovsky [10], V.I. Synaisky [13]. Neither Milan Bartoshek nor other foreign novelists mention about them. Wishful thinking and the legal transaction as an independent institution is mentioned only in modern interpretations of Roman private law.

At a certain stage of development of private law appeared category, which is close to the modern concept of the legal transactions as: legitimate legal actions committed by one or more persons who are subjects of property (civil) rights, and they establish, alter, suspend civil relationship, to what they are directed [1, p. 360]; legal phenomenon [5, p. 40], which is characterized by the presence of a legal structure that includes a set of features provided by law, necessary for recognition of performed action as a legal transaction [6, p. 62]; lawful legal action of one or more persons at law of civil (property) rights committed in statutory form or the form of the legal transaction that meets a real will of aperson at law and entails legal consequences (creation, modification or termination of civil rights and obligations ), for the achievement of which it is directed. [17, p. 36].

Quite interesting is the suggestion of I.V. Davidova "... the term "legal transaction " can be interpreted as a source, a factor that creates opportunities to do something, enjoy something, to behave in a certain way. At the same time this factor operates independently of whether there were actions of one or a few individuals. Therefore, the term "transaction" is a broader then the term "agreement", which means "arrangement" of two or more persons "[4, p. 12 – 14]. We cannot strongly agree with that, as the agreements and their varieties – arrangements may be illegal, especially do not meet the requirements of law, but they can result in legal consequences because of the presumption of legality of the legal transaction.

In the CCU the legal transactions are specified as the basis of the emergence of civil legal relations ( a).1 Part 2 of Art. 11), the element of volume of the legal capacity's content (Art. 26) and capacity (Article 30) of legal entity, small transactions that can perform minor (Section 1, Part 1, Art. 31), other legal transactions that may commit person under the legal age (Article 32), the result of civil capacity restriction (Part 2 of Article 37), the element of capacity of legal entity (Article 92), self-sufficient legal institution (Section IV, first book) as its kinds – contracts (sections 2 and3 of book 5) and kind of non-contractual obligations (section 2), the will (Chapter 85 CCU), acceptance of heritage. We didn't try to find out the features of the legal

transactions in other institutions of civil law, but argue that a priori their elements may be seen in other books, chapters and sections of the CCU and other acts of civil law.

Legal transactions are kind of legal facts, in particular lawful acts of willful behavior (legitimate acts), which binds creation, modification and termination of legal relationships [14, p. 606]. In the current Civil Code of Ukraine the term "legal transaction" was introduced instead of the term "agreement" (Russian – "transactions") as an offer of professor O.A. Pidoprigora . He has strong epistemological and praxeological roots and doesn't fail his position, what is reflected in acts of civil and other legislation and legal literature. Even in the compilation "The practice of courts in civil cases on recognition of legal transactions invalid "it is rather doubtfully pointed out that the emergence of the term "legal transaction" does not preclude the use of the term – "agreement" within the meaning of the arrangement between at least two parties. The first of them is much broader and includes the terms "contract" (according to Art.11, CCU and Art. 626), "agreement" and "arrangement". To avoid confusion of rules on the legal transactions in the practice of the courts, it should be noted that the contract and the agreement is identical to the concept, as bilateral and multilateral transactions are at the same time contracts as well as agreements, and the term "arrangement" should be understood as a contract or agreement , if such agreement is reached according to all the requirements established for the contract.

At the same time the configuration causes bewilderment in positive law:

1) the Chapter 16 of the CCU doesn't deal with any invalid agreement or an invalid contract, but rather an invalid legal transaction. So litigation departs from the applicable legislation and if it finds contracts invalid, it is the output of the CCU terminology. In any case, we must adhere to the requirements of the applicable legislation. Normally one would offer the construction of invalid contract under the Part 2 Art. 202 CCU as a type of the legal transaction, but still we have to stick to a clear understanding of what is common and if the legal transaction does not correspond to the requirements, it shall not have special features in particular – of contract;

2) if to accept the concept of invalidity of the contract, it should not be done in the framework of the European contract doctrine, where the legal transactions are written as general provisions or requirements to contracts: Chapter 15 (Article 15:101 – 15:105) of the Principles of the European Contract Law (UNIDROIT): the rules on the recognition of contracts invalid are set. There are these provisions in other European contract law rules , in particular the General Conditions for the Supply of Plant and Machinery for Export ( UNECE , ECE/ME/574, 1955 ): General Conditions for Export and Import of Sawn Softwood (United Nations Economic Commission for Europe ECE / ME/410 1956 ): Convention on the Contract for the International Carriage of Goods by Road (CMR); Geneva, May 19, 1956 : UN Convention on the Carriage of Goods by See, Hamburg, March 31, 1978 : UNIDROIT Convention on International Factoring, Ottawa , May 28, 1988 : the UNIDROIT Convention on international Financial leasing , Ottawa, May 28, 1988, the model law on Electronic Commerce by the United Nations Commission on international trade law on 16 December 1996 , and others. Thus the direction of adjustment of invalidity relations of the contract is clear and the international community has long determined in the location and direction of regulation of legal relations of invalidity.

We think everything is going to include Chapter 16 of the CCU to the general provisions on the contracts. At least judicial practice shows that the majority of the legal transactions acknowledged as invalid are contracts. But then how to deal with the unilateral legal transactions? In future to leave them in the form they are is currently impossible due to the adjustment of contract law of Ukraine to the requirements of EU contract law. Future demonstrates the need for such a step, or moreover, we are destined to do this. Then you can apply the legal analogy and recognize unilateral actions illegal according to the rules of invalid contracts.

Conclusion. The point is what roots keep the term "agreement" in the heart of the legislation, practices and even science and why it is so difficult for the term "legal transaction" to spread? In our opinion, the main reason in the properties of the human consciousness that habituate to the mechanical renaming of terminology without qualitative changes in their content. If it is so, then, at once the rejection and question appear about the appropriateness of the made decision. No wonder at once it is pointed out that the definition of the legal transaction in Part 1 of Art. 202 CC of Ukraine is

almost the same, which was enshrined in the Art. 41 CC of the USSR in 1963 [21, p. 502]. If so, was it necessary to introduce a new term?

With the Ukraine-European Union association these issues will escalate into practice and require immediate intervention. One should be prepared to this and rebuild the beliefs and perceptions of the system of civil law.

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**Р.Б. Шишка**

Місце правочинів в системі цивільного права.

В статті йдеться про непорозуміння в актах чинного законодавства стосовно правочинів та перспективу цього інституту у системі цивільного права при повній адаптації цивільного законодавства України до вимог законодавства країн ЄС. Звертається увага на суперечності у самому інституті правочину, його субінститутах, нестиковці із інститутом господарських зобов'язань та договорів. Автор вважає, що слід змінити підхід законодавця на виправданий і перевірений історично тривалою практикою і припинити експеримент.

**Ключові слова:** законодавство, зобов'язання, інститут права, правочин.

**Р.Б. Шишка**

Место сделок в системе гражданського права.

В статье речь идет о недоразумении в актах действующего законодательства относительно сделок и перспективу этого института в системе гражданского права в случае полной адаптации гражданского законодательства Украины к требованиям законодательства стран ЕС. Обращается внимание на противоречия в самом институте сделок, его субинститутах, нестыковке с институтом хозяйственных объязательств и договоров. Автор считает, что необходимо изменить подход законодателя та оправданный и проверенный исторически длительной практикой, прекратить эксперимент.

**Ключевые слова:** законодательство, обязательство, институт права, сделка.