Legal Consequences of Mock Transactions

Volodymyr Kossak*, Ihor Yakubivskyi, Mykola Oprysko, Volodymyr Tsikalo and Yulian Bek

Department of Civil Law and Procedure, Ivan Franko National University of Lviv, Lviv, Ukraine

Abstract: In order to increase the material benefits, in order not to pay taxes or to pay less, in order to conceal information and for other purposes, the parties entering into legal relations become participants in mock transactions. The practise of mock transactions is to replace the conclusion of a single document, such as a sale one, with the conclusion of a contract of charitable contribution. The practise of using mock transactions is quite common and it is almost impossible to prove the nature of the transaction. Therefore, this work is aimed at investigating the institution of the mock transaction, as well as to develop recommendations for the practical application of the rules governing this institution. To conduct this study, the materials of the practise of dispute resolution on the application of the consequences of fictitious transactions by the courts of Ukraine, the dialectical method of cognition, the formal-legal method, the hermeneutic-legal method were used. As a result of research the signs of mock transactions, approaches of detection of fictitious transactions are established. It can be concluded that the distinguishing feature of fictitious and mock transactions is the orientation of the will of the parties to the transaction on the occurrence of legal consequences.

Keywords: Legislative regulation of transactions, expression of parties will, legal consequences, court decision, methods of protection in court.

INTRODUCTION

One of the most common grounds for the emergence, change and termination of civil rights and obligations are transactions. The legislation establishes the conditions of validity of transactions, which, in particular, include the conditions that the will of the party to the transaction should be free and in line with its internal will, and the transaction itself should be aimed at the actual occurrence of legal consequences. The legal consequences of non-compliance with the requirements of the law by the parties when making a transaction are provided for in paragraph 2 of Chapter 16 of the Civil Code of Ukraine (hereinafter – the CC of Ukraine). Among them, a special place is occupied by provisions relating to the category of mock transactions (Article 235 of the CC of Ukraine). The vague legal regulation of this type of transaction raises in judicial practise a significant number of problems related to the establishment of the pretension of the transaction, the choice and application of methods to protect the rights and interests of the parties to the transaction, the circumstances to which the pretext may apply.

In the literature, the issue of fictitious transactions is also revealed superficially. Mostly, issues related to the nature and legal consequences of fictitious transactions are indirectly addressed in the study of general issues regarding the validity of transactions and the consequences of non-compliance. In Ukrainian civil science, this issue has been covered in the works of R.V. Alesiy (2020), I.V. Davydova (2018), O.I. Dlugosh (2013), Ya.M. Romanyuk (2010), Z.V. Romovska (2005), V.I. Borisova, I.V. Spasibo-Fateeva and V.L. Yarotsky (2011). At the same time, both in the literature and in law enforcement practise, there are still no common approaches to understanding the legal nature and legal consequences of fictitious transactions. Therefore, it is important to further study the institution of the sham transaction and develop recommendations for the practical application of the rules governing this institution.

MATERIALS AND METHODS

The normative and legal basis for writing this article was the provisions of the CC of Ukraine, which regulate the legal consequences of fictitious transactions. The empirical basis of the study was the materials of the practise of dispute resolution on the application of the consequences of mock transactions by the courts of Ukraine. The dialectical method of cognition accompanied the whole process of scientific research and allowed to consider the tendencies of development of the mechanism of protection of the rights of the parties to transactions in the conditions of European integration. The formal-legal method was used in the analysis of legal norms governing the conditions of validity of transactions and the consequences of non-compliance, and the practise of their application. The hermeneutic-legal method was used in the process of interpreting the norms that define the concept of a fictitious transaction and the legal consequences of its commission.

RESULTS AND DISCUSSION

General requirements, compliance with which are necessary for the validity of the transaction, are

*Address correspondence to this author at the Ivan Franko National University of Lviv, Ukraine; Tel: (032) 239 42 60; E-mail: kossak15@tanu.pro

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provided in Art. 203 of the Civil Code of Ukraine. In accordance with Part 3 of this article, the will of the party to the transaction must be free and in accordance with his inner will. Also, Part 5 of the same article establishes the condition that the transaction must be aimed at the actual occurrence of the legal consequences caused by it. If the process of forming the will of the party to the transaction was not formed freely, but under the pressure of external circumstances, or if the expression of will, objectively expressed in the form of a transaction, did not correspond to the internal will, such transactions are transactions with will defects. These defects can be caused by various circumstances: error, deception, violence, etc. However, there are cases when the parties to the transaction themselves, under an objectively expressed expression of will, disguise the will to commit a completely different transaction, thereby causing a discrepancy between the will and the will expression in the transaction.

The CC of Ukraine in Art. 235 calls a transaction made by the parties to conceal another transaction that they actually committed, a fictitious transaction and determines the legal consequences of its commission: if it is established that the transaction was committed by the parties to conceal another transaction that they actually committed, the relationship is governed by the transaction that the parties actually committed. The complexity of the legal nature of a mock transaction is that for an outside observer who perceives information about a transaction from its objectively expressed form, it has one legal nature and its characteristics, and for the parties to a transaction – completely different, hidden. So, I.V. Spasibo-Fateeva notes that a fictitious transaction, existing "in pair" with another transaction that covers, is always invalid. The second transaction ("covered") can be both valid and invalid, depending on how it meets the requirements of the validity of transactions contained in Art. 203 of the Civil Code of Ukraine (Borisova, Spasibo-Fateeva and Yarotsky 2011). A.P.Sergeev (2011) also believes that in a mock transaction a distinction should be made between two transactions: a) the actual mock transaction, which is made "about the human eye" ("masking transaction"); b) a transaction that is actually committed by the parties (a "masked transaction"). Moreover, the first transaction as unfounded is always invalid (insignificant), and the validity of the second transaction is assessed from the standpoint of the law applicable to it (Sergeev 2011).

The insignificance of the sham transaction is recognised by most German scholars because of the inconsistency of the will of the parties, because they have no will to commit the transaction (Brox and Walker 2014). The position about the insignificance of the mock transaction is also found among Ukrainian civilians. Thus, A.O. Kharitonov emphasises that in such cases there is always a conclusion of two transactions:

1) a real transaction committed in order to create certain legal consequences;

2) a transaction committed to conceal a real transaction. The scientist considers a mock transaction to be insignificant and such that in itself does not give rise to any legal consequences. In his view, the parties, in making a fictitious transaction, disguise another legal action and another purpose that they actually had in mind (for example, a transaction of general authorisation for a car with the right to sell it may conceal the sale of a car) (Kharitonov, Kharitonova and Golubova 2008).

I.V. Davydova (2014) on the analysis of Part 2 of Art. 235 of the Civil Code of Ukraine sees the possibility of classifying mock transactions as null and void, because to recognise a transaction as mock a court decision is not required, and relations between the parties will be governed by the rules of the transaction they actually committed. However, given the norm of Part 2 of Art. 215 of the CC of Ukraine, which states that a transaction is null if its invalidity is established by law, it is difficult to agree with this position. After all, Part 2 of Art. 235 of the CC of Ukraine does not provide for the nullity of the fictitious transaction, but only indicates the necessity to apply to the legal relations of the parties the rules of the transaction, which the parties actually committed.

R.V. Aleksiy (2020) takes a rather contradictory position, according to which a mock transaction, depending on the legal relationship that applies in each case, can be both disputed and null, because it hides another transaction that may be valid (Aleksiy 2020). Some German civilians do not consider a mock transaction to be null. Thus, D. Leenen (2015) believes that in a fictitious transaction there is not even a composition of the will to commit a transaction, because at the will of a person who performs a will expression and with the consent of a person who accepts such a will, a transaction should not be carried out 2015). A similar position was expressed at one time by D.M. Genkin (1947), who noted that in illusory and

mock agreements there is no will to implement them and, accordingly, there is no actual composition of an agreement at all. On this basis, the scientist considered such transactions non-concluded, that is, those that did not take place (Genkin 1947). The position according to which, in a mock transaction there is a conclusion of two transactions (a real transaction committed in order to create certain legal consequences, and a transaction committed to conceal a real transaction), was adopted in judicial practise (On judicial practise… 2009; Resolution of the Supreme Court of January 22… 2020).

At one time V. Tolstoy (1971) noted that in a mock transaction, some of the conditions coincide with the terms of a transaction, which the parties actually did, but the other part, which does not match, makes it possible to reveal the concealment of the content of a second transaction (Tolstoy 1971). The same position is expressed in the modern literature (Nyzhnyi, Khodakivskyi and Yurovska 2020). Indeed, "masking" and "covert" transactions cannot but have common features and conditions, because otherwise they would have to be considered as two independent transactions. For example, if a contract of gift conceals a contract of sale, then, except for the condition of the existence of a counter-property provision under a contract (price conditions), these contracts will coincide (in particular, in the condition of the subject). Thus, when considering a mock transaction, it is necessary not to divide it into two transactions, but to identify the real and hidden conditions and apply the relevant rules to the actual content of the transaction.

A.P. Sergeev (2011) identified the main features of mock transactions. First, in a sham transaction, the parties seek to disguise their true intentions by committing it. Secondly, parties to a mock transaction do not perform actions provided for by it. Third, in most cases, mock transactions are made for illegal purposes. Fourth, mock transactions, as a rule, are characterised by the coincidence of parties in a covering transaction and a transaction that is covered. Fifth, it should be borne in mind that some transactions, in particular, mediation, due to their legal nature lead to a mismatch of external and internal relations of parties and create the appearance of a mock transaction (Sergeev 2011). One of the first attempts to systematise the features of a mock transaction and to create a guide for courts in this category of cases was made by the Supreme Court of Ukraine in a decision of September 7, 2016 in case No 6-1026tss16, which concluded that the parties intentionally draw up one transaction, but other legal relations are actually established between them. (Resolution of the Supreme Court of Ukraine of September 7… 2016) In contrast to an illusory transaction, the rights and obligations of parties arise under a mock transaction, but not from the content of a transaction. Having established during the proceedings that a transaction was made to conceal another transaction, the court on the basis of Article 235 of the Civil Code of Ukraine must recognise that the parties committed this transaction and resolve the dispute using the rules governing this transaction. If a transaction, which is actually committed, contradicts the law, the court decides to declare it null and void or to declare it invalid. The plaintiff, declaring the recognition of a transaction as mock, must prove:

1) the fact of the transaction, which, in his opinion, is mock;

2) the orientation of the will of the parties in a fictitious transaction to establish other civil relations than those provided by the actually committed transaction, i.e. the parties have no other purpose than the intention to hide the actually committed transaction;

3) the occurrence between the parties of other rights and obligations than those provided by the fictitious transaction (Supreme Court Resolution… 2016).

The illusory and mock transaction is united by the fact that in both cases the parties to the transaction do not intend to create the legal consequences that are declared in the transaction. That is, the will of the participants in the transaction does not correspond to their actual will. L.L. Chanturia (2006) analyzing Art. 56 of the Civil Code of Georgia which provides for the same legal consequences of the fictitious transaction as Art. 235 of Ukraine, concludes that the sham transaction is nothing but a kind of fictitious (Chanturia 2006). Z.V. Romovska (2005) calls a common feature of a fictitious and feigned transaction that the discrepancy between the will and its external manifestation is the result of conscious actions of its participants (Romovska 2005). According to I.V. Spasibo-Fateeva, a mock transaction is made only for the purpose, without the intention to create legal consequences that would logically follow from this transaction. Thus, there is only an "imitation" of a transaction. The will of the parties to a mock transaction is not adequate to the expression of will (external expression), which is only a cover for the real

purpose of the parties. All participants in a transaction should intend to avoid the consequences of a transaction they enter into (Borisova, Spasibo-Fateeva and Yarotsky 2011). A.P. Sergeev (2011) notes that illusory transactions are concluded only in order to create in third parties a misconception of the intentions of the parties to a transaction, while mock transactions are made not only for appearance, but to cover up another transaction that the parties really intend to do (Sergeev 2011).

The Plenum of the Supreme Court of Ukraine in paragraph 25 of the decision of November 6, 2009 No. 9 "On judicial practise of civil cases on invalidation of transactions" provided the courts with explanations, according to which using a mock transaction (Article 235 of the CC) the parties intentionally draw up one transaction, but other legal relations are actually established between them. In contrast to a mock transaction, the rights and obligations of the parties arise under the fictitious transaction, but not those arising from the content of the transaction (On judicial practise… 2009). A similar interpretation of the essence and legal consequences of a mock transaction takes place also in Supreme Court practise (Resolution of the Grand Chamber… 2019a). Based on the above, it can be concluded that the distinguishing feature of illusory and mock transactions is the orientation of the will of the parties to the legal consequences: when concluding an illusory transaction, the parties do not aim to create legal consequences; when concluding a mock transaction, parties' will aims at occurrence of legal consequences, however, other than those provided by a transaction.

An illusory transaction is declared invalid by a court, which also applies the consequences of invalidity established by law. At the same time, the fictitious transaction is governed by the legal rules governing a transaction that the parties actually committed. It is clear that the legal qualification of a transaction as a mock may make sense only in the case of further application of an appropriate method of protection of one of the parties to such a transaction, for example, invalidation if it contradicts the law. In practise, there are many problematic issues in the choice and application of methods to protect the rights and interests of parties to a mock transaction. The Plenum of the Supreme Court of Ukraine in paragraph 25 of the decision of November 6, 2009 No. 9 "On the judicial practise of civil cases on invalidation of transactions" provided the courts with explanations, according to which establishing during a case that a transaction was committed to conceal another transaction, the court on the basis of Article 235 of the Civil Code of Ukraine must recognise (selected by co-author) that parties committed this transaction, and resolve the dispute using the rules governing this transaction. If a transaction, which is actually committed, contradicts the law, the court decides to declare it null and void or to declare it invalid (On judicial practise… 2009). The same position was expressed by the Supreme Court (Resolution of the Grand Chamber… 2019a).

As is known, Art. 16 of the Civil Code of Ukraine, which contains a list of ways to protect civil rights and interests, does not specify such a way as the recognition of ф transaction as mock. This method of protection is not provided by other acts of civil law. Clause 8 of the above-mentioned resolution of the Plenum of the Supreme Court of Ukraine states that the requirement to declare a transaction (agreement) non-concluded does not correspond to the possible ways of protecting civil rights and interests provided by law. The courts must dismiss a claim. In this case, only the requirements provided for in Chapter 83 of Book Five of the CC of Ukraine may be declared. In this case, the question arises as to how the court should decide a case, if during its consideration it is established that the parties made transactions to conceal another transaction that they actually did: in the operative part of a decision to declare a transaction mock and apply the relevant legal consequences or limit to recognising a transaction mock in a motivating part of the decision and apply to the legal relations of the parties rules that apply to the actual legal relationship and on this basis to resolve a dispute? The Summary of Judicial Practise of the Supreme Court of Ukraine of November 24, 2008 "Practise of civil cases on recognition of transactions as invalid" states the following position: "The law does not provide for the invalidity of a mock transaction but only proposes to apply to the parties the rules governing a transaction the parties really meant" (The practise of consideration… 2008). I.V. Spasibo-Fateeva although considers a mock transaction invalid (or rather, the transaction that is "masking" in a mock one's composition) but takes the same position regarding the consequences of its commission: the only legal consequence of qualifying a transaction as mock is the application to legal relations, which arose on the basis of the rules governing this transaction (Borisova, Spasibo-Fateeva and Yarotsky 2011).

The necessary element of the content of the court decision is its basis, which includes established by the

court the factual circumstances of a case (factual basis) and the legal qualification of these circumstances and the disputed legal relationship in general, on which the court came to a final conclusion on satisfaction of the claim or its rejection as well as the chosen method of protection of the right (legal basis). The basis of the court decision corresponds to the basis of a claim with which a person appealed to the court to protect his violated right or interest. The composition of the factual basis includes the legal facts established by the court and the factual circumstances with which a plaintiff connects his claims, and a defendant his objections, the composition of the legal basis – substantive law, which were applied by the court. The Commercial Court of Cassation of the Supreme Court in its decision of February 20, 2020 in the case No. 908/225/19 noted in this regard that the requirement to declare a transaction to be mock is an ineffective means of protection in understanding the above provisions, because, even in the case of recognition of a transaction as mock, this fact will not restore the rights of the plaintiff in their actual violation, as will result only in the establishment of a legal fact. In itself, the requirement to recognise a transaction as mock is aimed at establishing the circumstances that are the basis for resolving a dispute, in particular in the case of a claim for invalidation of a transaction, and such a dispute in this case is absent, so the plaintiff's choice of protection of his violated rights or legal interests is not effective, as it will only result in the relationship of the parties to such a transaction being governed by the rules on a transaction actually made by the parties, these rules will also apply to resolving a dispute under or in respect of such transaction (Resolution of the Commercial Court… 2020a).

In the authors' opinion, the current state of legal regulation of the procedure and grounds for applying the consequences of a mock transaction suggests that the requirement to recognise a mock transaction is not in itself an effective civil remedy, as it does not restore the violated right. The court, having established that a transaction is mock, must reflect this in the motivating part of a decision and apply the appropriate method (methods) of protection of the violated right. The latter will depend on whether a transaction, which the parties actually committed, contradicts the law or not. In this regard, it should be noted that the recognition of a transaction as mock will not necessarily result in its invalidity. Thus, paragraph 25 of the resolution of the Plenum of the Supreme Court of Ukraine dated November 6, 2009 No. 9 "On the judicial practise of civil cases on invalidation of transactions" states that the consequences of invalidity provided for in Article 216 of the Civil Code of Ukraine may be applied only in case, when a transaction, which the parties actually committed, is null and void or the court declares it invalid as disputed. A similar position was expressed by the Supreme Court, noting that a hidden transaction is always subject to assessment in terms of compliance with its general conditions of a transaction and the very fact of covering it with another transaction cannot be grounds for its invalidity. The law does not provide for the invalidity of the fictitious transaction, but only proposes to apply to the relations of the parties the rules governing a transaction that the parties really meant (Resolution of the Commercial Court… 2020b).

Therefore, if a transaction, which the parties actually committed, meets the requirements of Art. 203 of the Civil Code of Ukraine, such a transaction is valid and will give rise to legal consequences. Accordingly, in such a case, the appropriate method of protection would be a requirement arising from the provisions provided by law for this type of a transaction. For example, if the parties have entered into a gift agreement to conceal the contract of sale, a party who alienated a property under such an agreement may request recovery of the property value from the other party. If a transaction, which is actually committed by the parties, does not meet the statutory conditions of validity, then, in accordance with Art. 215 of the Civil Code of Ukraine, it is either null and void. Regarding the nullity of such a transaction, it is worth noting the contradictory practise of the Supreme Court on this issue. Thus, in a number of rulings, the Supreme Court reproduces the position expressed by the Supreme Court of Ukraine in the above-mentioned resolution of the 2009 plenum: if a transaction actually committed contradicts the law, the court decides to declare it null or invalidate it (Resolution of Grand Chamber… 2019a; Resolution of the Commercial Court… 2020b). However, the decision of the Grand Chamber of the Supreme Court of Ukraine of June 4, 2019, expressed another position – that such a method of protection as the invalidity of a transaction is not a way to protect the rights and interests established by law (Resolution of the Grand Chamber… 2019b). In view of this, if a transaction actually committed by the parties is null by law, the appropriate remedy will be to require the application of the consequences of a null transaction. If a transaction actually committed by the parties is disputed, then the appropriate means of protection will be the requirements to declare such a transaction

invalid and apply the consequences of the invalidity of a transaction.

However, in some cases, in order to effectively protect the rights of a party to such a transaction, it will be necessary to use other means of protection that correspond to the content of the relevant right or interest, the nature of its violation, non-recognition or challenge and the consequences. Although in Art. 235 of the Civil Code of Ukraine as a consequence of the qualification of a transaction as a mock provided only the application to the legal relations of the parties rules on a transaction, which the parties actually committed, in practise a mock character applies not only to the legal nature of a transaction but also to its subject composition and conditions. This approach is supported by many civilians. Thus, according to Z.V. Romovska (2005) a mock character may relate not only to the legal nature of a transaction, but also to the party or one of the terms of a contract (Romovska 2005). A similar position on the possibility of partial mock character of a transaction is expressed by L.L. Chanturia (2006). However, in the literature there is often a denial of the possibility to consider the consequence of a mock transaction its invalidation it in part of a subject. I.B. Spasibo-Fateeva justifies this impossibility clearly outlined in Art. 235 of the CC of Ukraine, without the possibility of an expanded interpretation, the consequences of a mock transaction – the extension of rules to parties of a transaction they actually committed, as well as the necessity to take into account the invalidity of a particular part of a transaction given its invalidity on the part of a party (Borisova, Spasibo-Fateeva and Yarotsky 2011).

The possibility of declaring a transaction mock on the part of the parties on the basis of the CC of the USSR in 1963 was discussed in the generalised legal positions of the Supreme Court of Ukraine, according to paragraph 45 of which if the decision to declare the contract of sale invalid because actually a buyer is another person, the court finds that the property was actually purchased at her expense and for her and that there are no other grounds for invalidation of this agreement; this contract in accordance with Articles 58, 60 of the CC is invalid only in part concerning a buyer and under this contract a buyer is the person at whose expense and for whom this agreement was actually concluded (Shevchuk 2002). Supreme Court recognises the possibility of mock transaction in part of its side, which in its decision of January 16, 2019, in the case No. 521/17654/15-ts noted: "Having established that the plaintiff implemented the obligations of the buyer under the contract of sale, he agreed on the essential terms of the contract of sale of the apartment, and the defendant pretends to be the buyer, being only formally specified in the contract, the court recognises the plaintiff as the buyer under the contract in the case". However, as can be seen, the Supreme Court interprets the legal nature of the "masking transaction" somewhat differently: it does not mention the necessity to invalidate the contract in this part, but only the recognition of another person as a buyer under the contract. This approach of the Supreme Court does not seem to be entirely correct, as in appropriate cases it should not be a matter of recognising the plaintiff in the contract as a buyer, but of recognising the rights and obligations of the buyer as a party to the contract.

The authors believe that a transaction may mock in terms of any of the conditions. For example, if parties to a contract of sale in order to reduce the amount of state duty and other costs stated that it was concluded at a price lower than the one they actually agreed, then such an agreement is mock in terms of price. Of considerable practical interest is the possibility of committing a unilateral mock transaction. At first glance, based on the literal meaning of the norm of Art. 235 of the CC of Ukraine, only bilateral or multilateral transactions can be mock. However, there are cases of concealment of a contract of sale of a car by committing a unilateral transaction – the issuance of a general authorisation to dispose of it, concealment of a contract of sale by drawing up a will for the alienated property and so on. Therefore, the authors believe that a mock transaction may be unilateral. The possibility of unilateral fictitious transactions is fixed by judicial practise, in particular, in the field of corporate relations (Resolution of the Grand Chamber… 2019c). At the same time, members of a company that has been deprived of a subjective right (for example, for special subsoil use) are currently not able to use such a method of protection of their corporate rights as the invalidation of a transaction made by a company. The relevant legal position is reflected in p. 8.3. and 8.4. of the decision of the Grand Chamber of the Supreme Court of October 8, 2019, in case No. 916/2084/17, according to which under the contract concluded by the company, such company acquire rights and obligations as a party to the contract. At the same time, the legal status (set of rights and obligations) of the members of this company does not change in any way. The signing of the disputed agreements by the CEO may indicate a violation of the rights and interests of the company

itself, not the corporate rights of its member, as the CEO acted on behalf of the company and not its members (Resolution of the Grand Chamber… 2019d).

The Commercial Court of Cassation of the Supreme Court tried to derogate from this legal opinion of the Grand Chamber of the Supreme Court, arguing that its application would lead to the loss of the essence of the participant's right to manage a company when a participant cannot defend it by going to court. However, the possible consequences of inefficient activities of a director, in particular the conclusion of unprofitable contracts on behalf of a company, may worsen the financial condition of a company. It should be borne in mind that when acquiring ownership of a share in the authorised capital, a participant is obviously interested in making a profit from the activities of such a company (Resolution Commercial Court of Cassation… 2019). However, the Grand Chamber of the Supreme Court returned the case to the relevant panel of the Commercial Court of Cassation of the Supreme Court on the grounds that the contracts concluded by an official of the company do not violate the rights and interests of members of the company (Grand Chamber of the Supreme Court… 2019).

This legal position of the Grand Chamber of the Supreme Court, among other things, due to the provisions of Part 1 of Art. 54 of the Commercial Procedural Code of Ukraine, according to which a participant (shareholder) of a legal entity, which owns 10 percent or more of the authorised capital of a company, may file in the interests of such legal entity a claim only for damages caused to the legal entity by its official. In other words, a claim for invalidation of a transaction made by a company, its participant cannot file. However, in accordance with Part 3 of Art. 215 of the Civil Code of Ukraine, a transaction may be declared invalid by a court not only if its validity is denied by one of the parties to the transaction, but also by another interested person.

CONCLUSION

In the authors' opinion, the approach according to which two transactions should be distinguished in a mock transaction is controversial. In fact, the parties do not enter into two independent transactions, one of which must be declared invalid or declared null and void. One transaction is made in which, in addition to its real features, the parties add or hide a number of features that are designed to hide from third parties the true nature, subject composition or conditions of a transaction. Thus, when considering a fictitious transaction, it is necessary not to divide it into two transactions, but to reveal the real and hidden conditions of a single transaction committed by the parties and to apply the relevant rules to the actual content of this transaction. The requirement to recognise a transaction as fictitious is not in itself an effective way of protecting civil rights and interests. The court must not recognise, but establish that a transaction was committed by the parties to conceal another transaction that they actually committed, and apply the relevant legal norms. The legal qualification of a transaction as a sham may make sense only in the case of further application of the appropriate method of protection of one of the parties to such a transaction, for example, invalidation if it contradicts the requirements of the law.

The court, having established that a transaction is fictitious, describes these circumstances in the motivating part of a decision, as they are an element of the basis of such a court decision and apply the method of protection requested by a plaintiff: if a transaction meets the law and the other party violates the obligation – a method of protection that will restore the violated right (debt collection, enforcement of voluntarily unfulfilled duty, etc.); if a transaction is null – the consequences of null are applied; if a transaction is disputed – it declared invalid and the consequences of the invalidity of a transaction are applied. A transaction may be mock in nature, in respect of a party to a transaction and in respect of its terms (one or more). Both a contract and a unilateral transaction can also be pretended. This article will be useful for lawyers, judges, scholars whose research interests are civil law, as well as anyone interested in protecting the rights of participants in civil law.

REFERENCES

Aleksiy, Ruslana. 2020. Deeds with Will Defects: Problems of Theory and Practise. Ivano-Frankivsk: King Danylo University.

Borisova, Valentyna, Inna Spasibo-Fateeva and Vitalii Yarotsky. 2011. Civil Law of Ukraine. Kharkiv: Law.

Brox, Hans. and Wolf-Dietrich Walker. 2014. Allgemeiner Teil des BGB. München: Verlag Franz Vahlen München.

Chanturia, Lado. 2006. Introduction to the general part of civil law (comparative legal study, taking into account some of the features of post-Soviet law). Moscow: Statut.

Davydova, Iryna. 2014. "The invalidity of a mock transaction: problems of theory and practise". Journal of Civilisation 16: 118–121.

Davydova, Iryna. 2018. Transactions and their Invalidity in the Information Society. Odessa: Odessa Law Academy.

Dlugosh, Oksana. 2013. Invalidity of Deeds with Will Defects. Kyiv: National Academy of Legal Sciences of Ukraine.

Genkin, Dmytrii. 1947. “Invalidity of transactions made with a purpose contrary to the law”. Scholarly Notes VIUN 5: 40–57.

Kharitonov, Evhenii, Olena Kharitonova and Nelli Golubova. 2008. Civil Code of Ukraine: Science-Practical Commentary. Kyiv: All-Ukrainian Association of Publishers “Pravova Iednist”.

Leenen, Detlef. 2015. BGB Allgemeiner Teil: Rechtsgeschäftslehre. Berlin: Walter de Gruyter. https://doi.org/10.1515/9783110321524

Nyzhnyi, Andrii, Maksym Khodakivskyi and Halyna Yurovska. 2020. Invalidation of Transactions: Fundamentals of Theory and Judicial Practise. Guide for Judges. Kyiv: Alert.

On judicial practise of civil cases on invalidation of transactions. 2009. Retrieved June 17, 2020 (https://data.rada.gov.ua/laws/show/v0009700-09#Text).

Resolution of the Commercial Court of Cassation of the Supreme Court of January 22, 2020 in case No. 925/1199/18. 2020b. Retrieved June 17, 2020 (https://goo.su/1SEA).

Resolution of the Commercial Court of Cassation of the Supreme Court of February 20, 2002 in case No. 908/225/19. 2020a. Retrieved June 17, 2020 (https://goo.su/1Seb).

Resolution of the Grand Chamber of the Supreme Court of January 23, 2019 in case No. 522/14890/16-ts. 2019a. Retrieved June 17, 2020 (http://reyestr.court.gov.ua/Review/80857584).

Resolution of the Grand Chamber of the Supreme Court of June 4, 2019 in case No. 916/3156/17. 2019b. Retrieved June 17, 2020 (http://reyestr.court.gov.ua/Review/82424016).

Resolution of the Grand Chamber of the Supreme Court of November 26, 2019 in case No. 910/20261/16. 2019c. Retrieved June 17, 2020 (http://www.reyestr.court.gov.ua/Review/86333859).

Resolution of the Grand Chamber of the Supreme Court of October 8, 2019 in case No. 916/2084/17. 2019d. Retrieved June 17, 2020 (http://www.reyestr.court.gov.ua/Review/84911545).

Resolution of the Supreme Court of January 22, 2020 in the case No. 925/1199/18. 2020. Retrieved June 17, 2020 (http://reyestr.court.gov.ua/Review/87329283)

Resolution of the Supreme Court of Ukraine of September 7, 2016 in the case No. 6-1026tss16. 2016. Retrieved June 17, 2020 (http://www.reyestr.court.gov.ua/Review/61718485).

Romanyuk, Yaroslav. 2010. Grounds and Civil Legal Consequences of Invalidation of a Deed. Kyiv: National Academy of Sciences of Ukraine.

Romovska, Zoryslava. 2005. Ukrainian Civil Law: General Part. Academic Course. Kyiv: Attica.

Sergeev, Oleksandr. 2011. Civil Law. Moscow: RG-Press.

Shevchuk, Petro. 2002. Application of Civil and Civil Procedure Legislation by Courts. Kyiv: In Jure.

The practise of consideration by courts of civil cases on recognition of transactions as invalid: Generalisation of judicial practise of the Supreme Court of Ukraine of November 24, 2008. 2008. Retrieved June 17, 2020 (https://data.rada.gov.ua/laws/show/n0003700-08#Text).

Tolstoy, Viktor. 1971. “Mock and illusory transactions”. Socialist Legality 12: 35–36.

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