RELATION OF MISCONCEPTION AND FRAUD AS CONDITIONS FOR INVALIDITY FOR LEGAL TRANSACTONS

Irina DAVYDOVA,
Candidate of law, Associate professor of Civil Law department, the National University «Odessa Academy of Law»

SUMMARY

The article is dedicated to the issue of correspondence of an error and a fraud as the conditions of transaction invalidity. The review of theoretical approaches to defining the differences between an error and a fraud is presented. Special features of a fraud as the condition of transaction invalidity are defined. Ultimately it is noted that a fraud can be considered as a separate case of an error which is committed consciously.

Keywords: error, fraud, cause of invalidity, transaction, suppression.

АННОТАЦИЯ

Статья посвящена проблеме соотношения ошибки и обмана как условий недействительности сделок. Приводится обзор теоретических подходов к определению отличий между ошибкой и обманом. Определены характерные черты обмана как условия недействительности сделки. В заключение отмечается, что обман может рассматриваться как частный случай ошибки с той разницей, что его совершают осознанно.

Ключевые слова: ошибка, обман, основание недействительности, сделка, замалчивание.

Legal problems of deals and their invalidity have always been a focal point for representatives of civil jurisprudence. One of the problem issues that require special attention is invalidity of deals resulted from misconception or fraud. There are frequent cases of making deals by persons, who, due to lack of relevant knowledge or willful misconduct by the other party, make deals, subject matter of which do not conform with their ideas. In such cases it means discrepancy between persons' true intentions and results of deals made, which gives ground for challenging of those deals and holding them invalid.

Problems of invalidity of deals are considered in many research works by N. Agarkov, M. Blinova, D. Genkin, V. Zhekov, I. Peretersky, N. Rabinowich, K. Razumov, N. Khatnyuk, V. Shakhmatova and others. However, some issues require additional attention, particularly, the issue of difference between misconception and fraud.

The problem of relation between misconception and fraud as conditions for invalidity of deals has both theoretical and practical meaning as it allows us to ascertain legal effects of invalidity of deal. Thus, the object of this article is ascertaining similarities between misconception and fraud as conditions for invalidity of deals.

Likeness of misconception and fraud was pointed out by such well-known German scientists as K. Zweighert and H. Ketz [1, p. 137], who noted that misconception and fraud (or willful misrepresentation) are allied to each other, i.e. the victim can also enter an agreement by misconception. At fraud such misconception is willfully provoked by the other party to the agreement. So fraud can be considered as a special kind of a "provoked" mistake. Similarly, in English Law, under this category falls a mistake resulted under the influence of deceitful claims purposefully made before making of agreement in order to induce the other party to enter into it.

Innocent or negligent claims that lead to misconception, as well as willful ones, are distinguished. In Britain it is defined as fraudulent misrepresentation. In France and other countries of Romance legal system this means fraud (dol or dolo), in Germany and Switzerland – malevolence (arglistiger) or willful fraud, in Austria – abstruseness (list), in Holland - fraud (bedrog).

The difference between misconception and fraud is that the latter is caused by willful misconduct of the counter party or third parties. The more exact definition for such activities would be not "willful" but "guilty", as it is guilt, which acts as the criterion distinguishing between misconception and fraud [2, p. 144-145].

In a different way, but also taking forms of guilt for the basis, speaks about the difference between misconception and fraud N. Rabinowich. In her opinion this difference lies not in a person's passive position at mistake or at active willful misconduct. Misconception may also occur, when a party has misled the other party by accident or by negligence. Fraud also takes place at purposeful misrepresentation regardless of the will of a party to the deal [3, p. 70].

The English Civil Law is the best-reasoned on the issue. It acknowledges that misrepresentation can be recognized either as innocent or as willful, fraudulent. In both cases a party enters into an agreement following provision by the other party of information, which is not true. Presence of innocent misrepresentation or fraud is defined with regard to behavior of the counter party, which provides wrongful or false information.

If a party providing such information is sure in good faith of its accuracy and has sufficient ground for such faith, misrepresentation is recognized as innocent. However, if a party has provided wrongful information knowing it to be false, such an agreement is acknowledged as one made under fraud. Cases are also treated as fraud when a party providing wrongful information although being unaware of their falseness still leaves open such a possibility. Finally, a party providing wrongful information is also held responsible for such negligence.

R. Khalfina assumes that existence of guilt in any form (intent, negligence etc.)

of a party that provides false information gives ground for such actions to be determined as fraudulent and, therefore, agreement can be declared voidable due to fraud [4, p. 247].

Innocent misrepresentation, as alleged by R. Khalfina, may serve ground for invalidity of an agreement only under certain conditions. First of all, a false statement that misleads a party in agreement must refer to certain facts, presence or absence of which is essential for an agreement. Any inaccurate statement that concerns rights or particular terms is not essential for an agreement [4, p. 247].

A. Joffe wrote: "If any specific circumstances witness that with the right idea of issues taken in the wrong light due to fraud the counter party would not enter into an agreement such an agreement should be acknowledged as the one made under fraud" [5, p. 279].

Fraud (Article 230 of Civil Code of Ukraine [6]) is understood as intentional misrepresentation by a party to the other party of circumstances, which are essential and whose content is determined by Part 1 of Article 222 of Civil Code of Ukraine, with the purpose of making a deal. For deal to be acknowledged as made under fraud (Article 230 of Civil Code of Ukraine), it must be proved that misconception has to do with the nature of the deal, rights and obligations of the parties, such properties or qualities of a thing, which considerably reduce its value or decrease possibility of its use for intended purpose. However, misrepresentation with regard to motives of the deal does not qualify a party for application of legal norms to the party, which gave such misrepresentation.

Fraud also occurs in case when a party denies presence of any circumstances that may prevent the parties from making a deal or when it suppresses the fact of their existence.

Fraud as ground for holding a deal invalid is distinguished from misrepresentation, which is quite essential. O. Dzera and O. Otradnova point out the differences between these legal terms, which come to the following:

"Fraud is certain guilty and willful actions by a party trying to convince the other party of such properties or results of a deal, which, in fact, cannot be true. A mistake, however, is a result of the wrong impression of circumstances of a deal; at fraud the results of deal are known and desired for one of the parties, while at mistake both parties may misunderstand circumstances of a deal [7, p. 13].

One should differ from a mistake cases when the wrong impression about properties of something has been formed under the influence of the other party's intentional actions. In such a case the ground for invalidity of agreement will not be a mistake but fraud. Therefore graver consequences of invalidity may occur. Two cases are defined by the second paragraph of Part 1 of Article 230 of Civil Code of Ukraine, when a party's actions can be treated as fraud.

Firstly, if a party denies any circumstances that may prevent a deal from being made.

Secondly, if a party conceals existence of the specified circumstances.

In the first case, ascertaining the very fact of denial of circumstances that may prevent the parties from making a deal is not enough to prove fraud.

A party's intention of misrepresentation of information to the counter party also needs to be proved, particularly the case when a party is aware of circumstances that may prevent deal from being made but willfully denies their existence. Any factual circumstances that testify to the fact of the respondent's awareness of providing the counter party with false information can serve the proof of the respondent's intent of misrepresentation.

If the circumstances testifying to the seller's awareness of any defect of the sold thing have not been proved, his intention of misrepresentation is also considered unproved. In this case, however, agreement may be held invalid as one entered into under the influence of misconception by both parties with regard to quality of the sold thing.

More complicated is the process of proving of the other case, i.e. suppression of facts. Here, one should consider that in conceptual interpretation of Part 1of Article 230 of Civil Code of Ukraine it must be only willful suppression. Silence (non-disclosure) of itself can be erroneous, i.e. unintentional or negligent. In such a case agreement should still be held invalid as one resulted from a mistake, and consequences provided by the second paragraph of Part 2 of Article 229 of Civil Code of Ukraine should be applied, according to which a party, whose negligent behavior has provoked a mistake shall reimburse the other party for the incurred losses.

So, unintentional non-disclosure of information must not be treated as a case of suppression as neither party intends to form misconception of the counter party of essential conditions of the agreement. [8, p. 33-34].

The most common approach in the Theory of Civil Law was the one according to which fraud as ground for invalidity of agreement can encompass a wider range of circumstances than just a mistake. In particular, fraud about motives of making an agreement is also treated as ground for invalidity of the latter. [3, p. 71, 1, p. 138].

However with the passing of Civil Code of Ukraine the rightness of such assumptions has been put in doubt. Thus, Article 230 of Civil Code of Ukraine assumes that ground for holding invalid a deal made under fraud is the essential meaning of circumstances due to which a party has been misled. Furthermore, there is a reference to Part 1 of Article 129 of Civil Code of Ukraine (misconception of essential circumstances).

Whereas according to Article 229 of Civil Code of Ukraine, misconception as to motives of deal is not essential, it can virtually be claimed that Article 230 of Civil Code of Ukraine (fraud) is also not applicable in such cases.

According to Article 230 of Civil Code of Ukraine, one of conditions for holding invalid a deal made under fraud is that misleading of a party can be a serious reason for a deal not to be made. This regulation is also a criterion for defining of essential circumstances fraud includes.

As stated above, fraud can take forms both active i.e. a form of message, and passive i.e. suppressing of information. Thus, F. Selivanov states that fraud may

have forms of lies, willful concealment of some facts or certain deliberate acts [9, p. 9-10]. I. Novitsky believes that fraud also occurs when there are fraudulent actions by a third party in collusion with a party to the deal or when the latter only uses such actions of a third party, who has acted independently for it is unacceptable to use somebody else's misconception with the hope that the fact of its existence will serve ground for making a deal [10, p. 761]. By Y. Gambarov a reason for fraud may be not only some guilty activity or inactivity but also any dishonest action – here such an action has the meaning of the Roman word 'dolus' – besides, only in one of its various applications. In this case 'dolus' is opposed to 'bona fide', good faith, and means not only fraud or a lie but also any immoral and mean behavior intended to misleading of somebody's will by forming wrong ideas. This also includes any case of disinformation as well as suppression of the truth if such suppression contradicts good faith and civil conventions. But this suppression concerns only the parties to the deal and no other third party, and, with regard to the parties, it is distinguished by whether they enter a deal, which represents a third party's interest or one of such ego-type as sales, lease etc. And if in this case, to summarize all such actions, there is no word other than 'fraud', in order to avoid confusion with criminal fraud one should be speaking of civil fraud – at least in cases, when it goes about attracting of somebody by not only criminal but also plainly dishonest actions contradicting good faith [11, p. 761].

Besides, it is common to think that fraud can be expressed in just a lie. Fraud, first of all, is willful disinformation by the counter party or a third party. Fraud is a broad concept, which includes not only wrong information but the very fact of suppression of the truth or other essential information [12, p. 30].

There is an opinion that fraud as suppression occurs depending on whether the law requires clarification of any questions concerning the deal or not.

Y. Shapp states that a mistake has to result from some intentional action or non-action and have causal relation to fulfilled will. Misrepresentation can be practiced by taking some action or by non-fulfillment of will, if there is legal duty to give clarifications [13, p. 199].

As for Civil Law one can also observe other violations of the Law 'On disclosure of information' in the case if a party is bound to such disclosure. Such situations must provide for special norms concerning certain kinds of deals. If, for instance, a consumer has been provided with incomplete information about the goods, or if no information has been disclosed at all, he can use the rights provided by Article 4 of the Law of Ukraine 'On consumer protection'.

It is quite fair, and it concerns not only pre-contractual phase, A. Kucher notes. Usually fraud means providing of false information about circumstances of the deal or some facts essential for one of the parties when making a deal. It is more difficult to determine whether non-disclosure should be treated or not as fraud (for instance, non-disclosure of circumstances, which have changed compared to the ones declared by a party earlier). In countries, which accept general principle of bona fide behavior at negotiation phase, disclosure of such information is a binding element of bona fide behavior at pre-contractual phase [14].

Settlement of disputes related to finding of deals invalid (as the ones made under misconception of character of action, which leads to corruption of will) faces the same problems as in case of deals made under fraud, but with some peculiarities. A mistake may be caused by lies, silence, non-disclosure of information and other circumstances [9, p. 9].

Finally, it should be noted that fraud can be treated as an instance of a mistake with the difference that fraud is practiced consciously, willfully, with malicious intent. Fraud, as well as mistake, is treated as ground for invalidity of a deal only if it concerns any essential circumstances of the deal. Another important point is that fraud should be understood not only as communication of false information to a party but also willful suppression of facts that may prevent the deal from being made.

Literature

1. Цвайгерт К. *Введение в сравнительное правоведение в сфере частного права*: в 2–х т. К. Цвайгерт, Х. Кетц. [пер. с нем.] М.: Междунар. Отношения. Т. 2. Основы, 1998, 480 с.

2. Коломиец Евгений Александрович Заблуждение и обман как условия недействительности сделок: дис. … канд юрид наук: 12.00.03 / Краснодар, 2005, 179 с.

3. Рабинович Н. В. *Недействительность сделок и ее последствия*. Л.: Изд-во Ленинградского университета, 1960, 171 с.

4. Халфина Р. О. *Договор в английском гражданском праве*. Р. О. Халфина. М., 1959, 319 с.

5. Германское право. Часть I. Гражданское уложение. М.: Международный центр финансово-экономического развития, 1996, 552 с.

6. Цивільний кодекс України. В: Відомості Верховної Ради України, 2003 р., № 40-44, ст. 356.

7. Дзера О., Отраднова О. *Недійсність правочину (угоди) за новим цивільним кодексом України.* В: Юридична Україна, 2003, № 10, с. 5-18.

8. Потопальський С. С. *Деякі аспекти недійсності договору, укладеного під впливом помилки, обману та насильства – Адвокат*, 2006, № 1, с. 32-35.

9. Селиванов Ф. А. *Заблуждение и пороки.* Томск, 1965; 130 с.

10. Новицкий И. Б. *Недействительные сделки.* Вопросы советского гражданского права. Изд-во АН СССР, 1945.

11. Гамбаров Ю. С. *Гражданское право. Общая часть* / Под ред. и с предисл. В. А. Томсинова. М.: Зерцало, 2003, 816 с.

12. Сергеев В. И. *Обман в предпринимательской деятельности. История вопроса и понятие.* Юрист, 2001, №11, с. 26-30.

13. Шапп Я. *Основы гражданского права Германии. Учебник.* М., 1996, 304 с.

14. Кучер А. Н. *Ответственность за недобросовестное поведение при заключении договора.* Законодательство, 2002, № 10, с. 17-25.