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REGULATION OF INVALID CONTRACTS UNDER ARMENIAN LEGISLATION

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In this article we will study the regulation of void contracts under the legislation of the Republic of Armenia (hereinafter – RA). We shall discuss how the Civil code of RA defines invalid, void and voidable contracts, and some issues pertaining thereto.

In general, the civil legislation of RA follows the traditions of continental legal system. The textbook on civil law contains a pretty simple definition of invalid contracts, which can be summed up as follows: the contract has four validity condition – those relate to subjects, expression of will, content and form, and if those conditions are not met then the recognizing the contract invalid is at issue[2]: However, the invalidity is not only connected with the flaws of the contract. It is the consequence that is caused by those flaws. Though, in some cases presence of such flows may not bring to the invalidity of the contract.

Important to note that in the framework of the Armenian civil code one can raise the issue of invalidity of the contract only if the flaw is present *ab initio,* at the time of the conclusion of the contract, unlike some other legal systems, where the violation of the law during the execution of the contract can entail the invalidity of the

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[2] See Բարսեղյան Տ. Կ. Հայաստանի Հանրապետության քաղաքացիական իրավունք: Առաջին մաս, Երևանի պետական համալսարանի հրատ., Երևան, 2000 (Barseghyan T.K. Civil Law of RA. First Part. Yerevan State Universit, 2000) P. 209, Гражданское право: в 3 т. Том 1: под ред. Сергеева А. П., Толстого Ю. К., Изд-во Проспект, Москва, 2005 (Civil Law. in three parts, Sergeev A.P., Tolstoi U.K. Moscow 2005), p. 297.

contract in some cases.[1] According to the Armenian legislation the invalidity should arise at the time of the concluding the contract. If there is a violation of rights or lawful intrests of a person or any provision of legislation throughout the contract execution, one cannot claim the invalidity, rather can terminate the contract, which is different from invalidity by the consequences it brings to.

Article 303 of the Civil Code of RA stipulates two different concepts – void and voidable contracts. Even though these two concepts have similarities, still there is an institutional difference between them.

Void and voidable contracts cannot be deemed as types of invalid contracts, rather both are two different procedures leading to invalidity. In accordance with the Article 303 (1) of the Civil Code of RA: "A contract is invalid on the bases established by the present Code by virtue of its declaration as such by a court (voidable contract) or independent of such declaration (void contract)".

Therefore, the consequence of both void and invalidated contract is the same- invalidity. In both cases the contract is not recognized as legal fact by the legislator and cannot create the legal consequence anticipated by the parties. [2] Valid contract is always a legal fact, a certain reality, which, according to legislation, gives rise to legal relations.[3]

However, the legislator mentions it clearly that the void contract is invalid from the beginning (*ab initio*). Namely, there is an occurrence in the world, there is a certain act or certain agreement between the parties, and that agreement can be worded in a document

[1] See McKendrick E. Contract Law, Macmillan Press LTD, Houndmills, Basingstoke, Hampshire and London, 1997թ., p. 288.

[2] See Гражданское право. В 4 т. Т. 1: Общая часть: отв. ред. Суханов. Е.А., Волтерс Клувер, Мосвка, 2006 (Civil Law. in 4 parts, Part 1: General Part. Sukhanov E.A. Eds. 2006), P. 480.

[3] See Красавчиков О. А. Юридические факты в советском гражданском праве, Госюриздат, Москва, 1958 (Krasavchikov, O. A. Legal facts in Soviet Civil law, Gosyurizdat, Moscow), P. 116.

called “contract”, however there is no contract from the point of view of the civil law (the Civil Code). In such case, one cannot talk of a contract, that is to say, no talk about legal fact, the existence the abovementioned is not recognized legally - *nihil actum est*[1].

In such terms, the invalid contract is a certain fact through which parties intend to establish legal consequences, however that fact is not considered as legal fact from the legislator’s point of view. In other words, it is not deemed as an activity the implementation, realization or preservation of the consequence thereof could be guaranteed by the government. In case if parties conclude a sales contract of immovable property without a public notary, and if one party refuses to transfer the property, the government cannot guarantee the legal possibility of receiving the asset. That opportunity by its nature cannot be considered as subjective right.

It must be mentioned that the invalid contracts are interpreted in a different way in the literature. Some scholars are of the opinion that the invalid contracts can be considered as contracts independent from the flaws, while some other scholars consider the invalid contracts as an offence.[2] However, we are of the view that invalid contracts should be considered not as an offence, rather as a result of non-observance of legislative requirements, because of which the consequence of an action is not considered as legal.

In the case of a void contract, it is evidence that it isnot considered as a legal fact and the governemtn does not guarantee it’s

[1] See Мейер Д.И. Русское гражданское право / Чтения Д.И. Мейера, изданные по запискам слушателей, Издание Николая Тиблена, Санкт-Петербург, 1864 (Meyer D.I. Russian civil law / Readings D.I. Meyer, published according to the notes of listeners, Nikolay Tiblen's Edition, St. Petersburg, 1864), pp. 189-190.

[2] See Кот А. А. Категория недействительности сделок и её место в системе способов защиты гражданских прав// Гражданское общество и развитие гражданского права: сборник статей к юбилею Н. С. Кузнецовой, Юридическая практика, Киев, 2014 (Kot A. A. Category of Invalidity of Transactions and its Place in the System of Methods of Protection of Civil Rights // Civil society and the development of civil law: collection of articles for the anniversary of N. S. Kuznetsova, Legal Practice, Kiev, 2014), pp. 386-387.

execution. The contract is void *ipso jure*. If the decision of the court is a necessary condition for invalidating the voidable contract, different from that in case of a void contract any interested person can reject it and treat the void contract as non-existent.[1] The void act can be denied by any person, to whom there is a demand addressed to in it.[2]

The regulation of a voidable contract requires a different approach. Such contract is not invalid *per se*, and should be declared as invalid by the court.[3] That is to say, in any case the voidable contract should be deemed a valid, unless there is a judgement of a court on that contract.[4] Thus, if according to a regulation the contract shall be deemed as voidable in case if it is contrary to law, then one should bear in mind that the contract shall be considered as existing from the moment of conclusion and creates the consequences, for which the contract was foreseen.[5] That is to say, if there is no judgment of a court recognizing the contract as invalid, the contract will still be considered as conditionally lawful.[6]

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[1] See Тузов Д. О. Иски связанные с недействительность- сделок: теоретический очерк, Пеленг, Томск, 1998 (Tuzov D. O. Claims Related to Invalidity of Transactions: Theoretical Essay, Peleng, Tomsk, 1998), p. 15.

[2] See Победоносцев К. П. Курс Гражданского права, ч. 3, Статут, Москва, 2003 (Pobedonostsev KP Civil Law Course, Part 3, Statute, Moscow, 2003), p. 36.

[3] See Рабинович Н. В. Недействительность сделок и её последствия, Издательство Ленинградского университета, Ленинград, 1960 (N. Rabinovich. Invalidity of Transactions and Consequences Thereof, Leningrad University Press, Leningrad, 1960) p. 14.

[4] See Рабинович Н. В. Недействительность сделок и её последствия, Издательство Ленинградского университета, Ленинград, 1960 (N. Rabinovich. Invalidity of transactions and its consequences, Leningrad University Press, Leningrad, 1960), p. 16.

[5] See Тузов ДО. Теория недействительности сделок: опыт российского права в контексте европейской правовой традиции. М., 2007 (Tuzov D.O. The Theory of Invalidity of Transactions: Russian Law Experience in the Context of the European legal Tradition. Moscow, 2007) P. 155.

[6] See Ульянов И. А. Влияние законодательства о защите конкуренции на гражданско-правовые сделки, дисс. … к.ю.н., Москва, 2010 (Ulyanov, I. A. The Impact of Competition Laws on Civil-Legal Transactions, Ph.D. Dissertation, Moscow, 2010) P. 44.

In other words, the government guarantees the execution of the contract before there is such a judgment. All what has been executed by such contract should be considered as lawful. The voidable contract is valid until the moment when it is recognized as invalid.

There are number of consequences stemming from the mentioned logic. Including, that in most of countries' legislations the "presumption of being void" is applied for contracts contradicting the law, according to which the contract contradicting the law is void, unless there is another consequence prescribed by law. In particular, Sergeev points out, that all contracts contradicting the civil code[1] according to the general rule are void, and a contract is voidable only in cases directly provided in the law.[2] Enekcerus stresses, that according to German civil code the contract is void, if it has any content contradicting the legislation.[3] In a work devoted to the civil law of France Morrandier also argues, that impermissible basis of the contract leads to exclusive invalidity,[4] i.e. the contract is void.

It must be pointed out that the civil code of RA has a pretty unique approach with regard to the mentioned question. The "presumption of voidability" is applied in Armenia, i.e. if the contract is not void, then it is voidable.[5]

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[1] It is true that after the amendments of the Article 168 of the Russian Civil Code the "presumption of voidability" of the unlawful contracts was enshrined, however, it was also stated that the contract which violates the rights and interests of third persons, as well as public interests, are void.

[2] See Гражданское право, под ред. Сергеева А. П., Толстого Ю. К., Том 1, Проспект, Москва, 2005 (Civil law, ed. A. P. Sergeeva, Yu. K. Tolstoy, Volume 1, Avenue, Moscow, 2005), p. 310.

[3] See Эннекцерус Л. Курс германского гражданского права, полутом 1, Издательство иностранной литературы, Москва, 1950 (Enneccerus L. German Civil Law course, half-time 1, Foreign Literature Publishing House, Moscow), p. 118.

[4] See Морандьер Л. Гражданское право Франции, том 2, Издательство иностранной литературы, Москва, 1960 (Morandier L., French Civil Law, Volume 2, Foreign Literature Publishing House, Moscow, 1960) p. 280.

[5] See the decision of the Court of Cassation dated 26.10.2006թ, no. 3-1628(ՎԴ) in a civil case.

Such approach cannot be justified. If the contract contradicting the law is voidable, it means that on the one hand the government will guarantee the execution of the contract and will deem all actions carried out in the framework of the contract as lawful before the contract is recognized invalid, and on the other hand, however, the state prohibits the mentioned activity.

The mentioned in reality can lead to absurd consequences. For example, euthanasia is prohibited in Armenia. [1] However, since the presumption of voidability of contracts contradicting the law is applied in Armenia, hence if the person concludes a contract creating an obligation to deprive another person of life, the government shall deem that contract as lawful and will guarantee its execution. As a consequence, if the party executes the obligation and deprives the other party of life, it would be difficult to hold the person accountable, since the party can claim that he has performed an action, which, though conditionally, but is deemed as lawful by the state, moreover, the person who has deprived the other party of life can claim compensation for his actions.

The example above is pretty extreme, however, we wanted to illustrate that the contract which is in contradiction with the law cannot be considered voidable, otherwise the functioning of the legal system is corrupt.

Other issues are arising apart from the mentioned. The Civil code of the RA provides that only persons directly authorized by the law can bring claim for invalidating a voidable contract. And, befacuse of the fact that the law does not list any such person, hence no one can bring claim for invalidating the contract contradicting the law. The decision # 133 of the Council of the chairmen of the courts

[1] See the Law of the RA № ՀՕ-42, ՀՀՍԺՏ 1996/7-8, adopted on 04.03.1996 on "Medical assistance and service of the population.

dated 03.05.2013[1] attempts to solve the mentioned issue. In particular, the decision mentions that the interested person can bring claim in that case.

The latter is not a complete solution, since Council of Chairmen of the Courts does not have the power of issuing binding interpretations of the legislation.

Based on the aforementioned, we are of the view that the "presumption of being void" should be enforced for the contracts contradicting the law in the Republic of Armenia.

[1] See the decision # 133 of the Council of Chairmen of the Courts adopted on 03.05.2013 on "The judicial practice of application of the Article 305 of the Civil Code"
http://www.court.am/files/news/2521_am.pdf