

Contractual Relations in the Information Sphere

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ABSTRACT

The article is devoted to the consideration of theoretical aspects of determining the possibility of concluding transactions with information. The widespread involvement of intangible assets into the real economic turnover and the emergence of a mass market for such products, combined with the "explosive" development of digital technologies, creates the conditions in which intangible assets become viable. Such development of technologies, global computerization, international trade has led to the widespread use of information, which has become one of the main and significant objects of the market and civil turnover. From the point of view of legal doctrine, the authors analyse the peculiarities of committing such transactions, outline the concepts and methodologies of civil law regulation of such relations.

Keywords: Right; turnover; information; access; economic turnover; constitutional right.

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INTRODUCTION

In the context of the formation of the modern legal system of both Ukraine and the European Union countries, it is important to rethink the traditional legal categories of civil law, which include transactions. A transaction is one of the most common legal acts to which the law connects the emergence, change, and termination of civil legal relations.

Transactions are used in various spheres of public life and allow to coordinate the interests of participants in civil circulation: individuals and legal entities, the state and other socio-public entities. The transaction as an act of will has the following inherent properties that characterize the intentions and actions of the subjects of civil relations. This explains the fact that the validity of the transaction is made dependent on the validity of the elements that make it up. The commission of a transaction that has a defect in one of the elements of its composition may not create legal consequences.

In civilization, the point of view that transactions are the regulator of binding legal relations is traditional. Accordingly, binding legal relations are the relations of property circulation, and it allows to argue that in civil law the transactions are dogmatically considered to be the regulator of only property relations.

MAIN TEXT

Thus, some scholars state that the personal nature of personal non-property rights is characterized by the impossibility of concluding any agreements on their intangible assets [8], therefore, all administrative agreements with them are invalid [2]. Based on the specified preconditions, it is possible to conclude about the impossibility of participation in civil turnover of absolutely all personal non-property rights. However, the analysis of the current legislation of Ukraine shows that this is not the case [9].

As S.N. Berveno writes, referring to the works of G. Dernburg and K.F. Chillarge, many scholars justify only the property nature of the duties, as the latter formalize the process of trade and therefore must belong to the group of property relations [1].

The main feature of the objects, which are associated with the main difficulties of perception of them by the civil law, is that these objects are intangible.

It is possible to conclude that nowadays the scientists only in certain works directly or indirectly state the possibility of concluding transactions with intangible assets. It is not impossible to mention that, as noted by S.N. Berveno, analysing transactions with intangible assets, the question of the admissibility of non-property nature of actions as a subject of contractual duties is the subject of scientific discussions.

The lack of a comprehensive study, despite the coverage of some aspects of concluding transactions with intangible assets by some scholars, leads to uncertainty of the theoretical and methodological basis, contradictory law enforcement practice regarding such transactions. The research in this area does not reveal all the existing problems, but in some of them some aspects of this issue were highlighted, which belong to the representatives of mainly Russian legal science or scholars from other countries, in particular M.I. Braginsky, V.V. Vitryansky, M.N. Maleina, and some others.

As the law connects the implementation of the transaction with acquisition, change, or termination of civil rights and duties, transactions belong to the category of legal facts that cause the occurrence of the corresponding legal consequences. As legal facts, they are the most common and natural group of lawful actions, i.e. actions that meet the requirements of laws and other regulations, that is why the concept of transaction is one of the basic concepts of civil law.

Transactions are used in various spheres of public life and allow to coordinate the interests of participants in civil relations: individuals and legal entities, the state and other socio-public entities. The transaction as an act of will has the following

inherent properties that characterize the intentions and actions of the subjects of civil relations. This explains the fact that the validity of the transaction is made dependent on the validity of the elements that make it up. It is traditionally believed that transactions can be concluded only in relation to the creation of property legal consequences, that the agreement is a regulator of only property relations.

Along with that, the wide development of legal relations on non-property benefits leads to the need to study the possibility of creating through legal transactions, legal personal non-property relations. In the civil law science, different views are expressed in this regard.

The theory of law states that the personal nature of personal non-property rights is characterized by the impossibility of concluding any transactions concerning their intangible objects [8]. Therefore, all administrative transactions with them are invalid [2]. Based on the specified preconditions, it is possible to conclude about the impossibility of participation in civil turnover of absolutely all personal non-property rights.

On the other hand, V.V. Luts, examining the relationship between acts of civil law and treaties, emphasizes that the Art. 6 of the Civil Code does not disclose all the diversity and completeness of the relationship of the law with the contract, which exists in the field of contractual regulation of certain property and personal non-property relations. From the aforementioned it follows that V.V. Luts does not exclude the contractual regulation of personal non-property relations. Thus, M.F. Kazantsev, who studied the basic provisions of the concept of civil law contractual regulation, draws attention to the fact that in addition to binding legal relations, the subject of regulation may be personal non-property relations [5].

A similar approach is common to other researchers as well. So, O.V. Kokhanovska notes that the grounds for the emergence of informational civil relations are the legal facts with which the civil law associates the corresponding legal consequences. According to the Civil Code of Ukraine, the main legal facts that may be the basis for the emergence of civil rights and duties include: agreements and other transactions; creation of literary, artistic works, inventions and other results of intellectual creative activity; assignment of property (material) and moral damage to another person, etc. Thus, one of the most widespread agreement in the field of information is the Agreement on information and reference services. Agreements in the field of intellectual property, by local, can be also included in the grounds for the emergence of civil information relations. These include, in particular, a number of copyright agreements, a license agreement, and so on [6].

The theoretical uncertainty of transactions with intangible assets creates a contradictory approach.

In Ukraine, a single approach to understanding the legal nature of information (confidential information) has not been developed. This is partly due to the fact that information is not a classic object of civil law. In this regard, it should be noted that information in the Ukrainian doctrine of law, especially civil law, is currently studied conditionally in three guises. Thus, the Civil Code of Ukraine define information as a separate object of civil rights (Art. 200 of the Civil Code of Ukraine); in Book II of the Civil Code of Ukraine it is considered as an object of personal non-property rights of an individual; in Book IV – as an object, which is characterized by an additional creative element. In addition, the whole sphere of contractual relations is actually pierced by the

informational component, including the most studied agreement for the provision of various information services in home science – in legal relations with the media, archives, libraries, reference activities, advertisements, etc. [2].

So, some scholars and practitioners question the categorical theory of contractual regulation of property relations only. A common phenomenon in contractual practice has been the inclusion in traditional agreements (purchase and sale, suborder, etc.) of the confidentiality of certain information that is transferred, arises or is created in accordance with such agreements. So, L.V. Fedyuk does not rule out the relationship between personal non-property rights and contractual duties. She notes that individuals may enter into agreements that are not regulated by law, provided that they do not contradict it, so there may be a situation where the agreement is related to personally non-property rights [7].

Let us note that the Civil Code of Ukraine, in contrast to the Civil Code of the Russian Federation, contains an indication that virtually any person may become the owner of a trade secret under a civil agreement concluded by them with another person: for example, under an agreement of purchase and sale, granting, suborder, contract for research, development, and technological works, etc.

So, for example, as a result of the conclusion of an agreement on transfer of a trade secret, the previous owner should, so to speak, forget the information which has been transferred under the agreement. It is in fact a conclusion of an agreement that provides for the owner to refuse information.

As noted by O.V. Kokhanovska, the ability to conclude any agreement has in this case a certain restriction and the restriction is due to the specifics, the intangible nature of any information, not just trade secrets. A special case is only a confirmation of the specificity, peculiarities of information in civil law circulation. Thus, when a trade secret is transferred, the previous owner is aware of its content, but their rights to this secret acquire certain restrictions, and in some cases the restrictions practically lead to the absence of the right. A person owns what they have no right to use [6].

Significant when concluding a transaction are the conditions of its subject, as well as the conditions that are specified in the law or other legal acts as essential or necessary for this type of transaction. The conditions of the validity of transactions were discussed by S.N. Landkoff as well, naming among them: 1) form; 2) subject; 3) will – real, free and conscious [3]. Significant conditions of the content of the transaction can be divided into three types: 1) general for all transactions; 2) special, i.e. provided by law for a particular type of transaction; 3) individual, arising in each case as a result of the will of one of the parties. The general condition for all types of transactions is the presence of the subject [4]. Nowadays in the civil law theory researchers understand the following under the subject of transactions: the actions of the parties, the material benefit due to which the transaction is concluded, or actions and material benefits in the complex, or rights and duties, or objects of civil law and law, or legal consequences, that is, there is no single point of view at present.

Paying attention to the types of agreements in the information sphere tested in practice also ambiguously determine what is the subject of such agreements.

Moreover, the position that the subject of transaction are rights and duties, is embodied in the current civil

legislation of Ukraine (Part 1 of Art. 202 of the Civil Code of Ukraine). If a transaction is an action that aims to create, change, or terminate the rights and duties, and the philosophical concept of the subject says that subject is what the action is aimed at, in our case the subject of the transaction is rights and duties. Thus, if the subject of the transaction is a civil legal relationship, and civil legal relations are certain subjective rights and duties (content of legal relations) that arise, change, or terminate between certain subjects (subjective composition of legal relations) in relation to certain objects (object of legal relations), then, in essence, these elements of the structure of legal relation in unity constitute the subject of the transaction. In turn, subjective law is a way to meet needs, and the means of meeting them are tangible and intangible benefits, therefore, we hold the viewpoint that *the subject matter of information transactions is the rights and duties regarding the intangible benefits.*

CONCLUSION

Thus, analysing the legislation and judicial practice, we can conclude that the doctrinal theory does not recognize this problem, and the works that nowadays have touched on personal non-property rights and transactions in general, have only partially touched on it.

In connection with the outlined problems, I believe that the possibility of solving them by checking (auditing) existing knowledge, for example, if the transaction is a voluntary action aimed at the emergence of certain consequences, then such consequences could only be the emergence, change, termination of property and non-property rights. If the exercise of any subjective rights is possible not only through actual but also legal actions, is it possible to exercise the non-property rights personally through legal actions? Thus, we respond to the possibility of transactions with intangible assets, namely with information, if such may exist, then there is a need to systematize, analyse, establish a relationship between the right to enter into transactions with intangible assets, determine the terms of such transactions with intangible assets, conditions of validity and invalidity of such transactions.

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