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FRAUD IN BUSINESS: FROM ROMAN LAW TO THE PRESENT

Formulation of the problem. Despite the fact that deception is an invariable companion of commercial turnover, it is a condition under which the transaction can be declared invalid. In the conditions of a market economy, the detection of transactions committed under the influence of deception is of great practical importance, since the commission of this category of transactions allows to recognize it as invalid and ensure the protection of the interests of the deceived person. Therefore, the definition of the concept of deception and its signs is quite relevant.

The state of research on the topic. The works of such Ukrainian scientists as V.M. Zubara, V.I. Zhekova, I.V. Davydova, N.S. Khatnyuk, E.O. Kharitonova and others. At the same time, for a more complete and in-depth study of the category of "deception", we consider it necessary to consider in detail the ideas of Roman jurists regarding the meaning of deception in transactions and its consequences, which, in fact, are the basis of modern civil law and had a significant impact on civil thought and legislation, in particular, of our state.

The purpose of the article is to define the concept and signs of deception as a basis for the invalidity of the deed.

Presenting main material. Fraud has always been considered an unconditional reason for invalidity of the deed. Most often, deception is understood as the intentional mislead of one party by another in order to induce it to commit a deed. At the same time, the formation of the subject's will is influenced by another person, that is, it is not free. The motive of the deception is, obviously, the creation by the person who commits the deception in the victimized party of a false idea about some circumstances, due to which he is forced to commit an act that is actually disadvantageous for him.

It should be noted that the concept of deception, as a legal category, was the subject of quite careful research even in Roman private law, where it was used not only to denote a defect of will, but also in relation to a number of other legal situations.

Thus, in Book IV of Guy's Institutes "On Lawsuits", deception is mentioned as a ground for objection to a lawsuit. In particular, in Art. 117 of this book states that objections also take place in those lawsuits that are not directed at a person. If you, for example, through fear or an evil intention, induced me to give you some property by way of mancipation and you will demand it from me, then I am given an objection, with the help of which you are eliminated, if I prove that you forced me to agree under the influence of threats or deception [1, p. 305]. Thus, against contracts based on the norms of civil law (juris civilis), and therefore formally valid, even in the presence of fraud, the praetor, based on natural justice (naturali aequitate), granted the

deceived party the right to object to the contract (doli mali exeptio).

Deception was also mentioned in connection with determining the constitutiveness of possession. When characterizing the elements of possession, it was noted that the second element of possession (animus possessionis) after actual possession (corpus possessionis) characterizes the subjective attitude of the owner to the thing. The owner must consider the thing as his own. It was of little practical importance when the owner's will was based on a mistake or a clear deception. The buyer of a stolen thing, who did not know that he was buying someone else's thing, considers it his own, being convinced that he has acquired the right to it, is mistaken in good faith. If he knows that he owns someone else's thing, but with his attitude towards it, he tries to convince others that it is his thing – this is conscious deception. In both the first and second cases, the owners show their will to own in their own name, show that the thing belongs to them. Therefore, not every actual use of a thing was considered possession, but only that which was based on the possessive will – animus possessionis. Therefore, using a thing on behalf of another person is not ownership (hire, lease, storage, etc.). In such a case, the owner of the thing exercises (uses) ownership not in his own name, but in the name of another person, the owner. He is only the holder of someone else's thing – detentor. For legally significant ownership, the will to own on one's behalf, to treat the thing as one's own, was required. Such a will can only be possessed by the true owner or a person who, although he is not, but considers himself to be so due to a bona fide mistake. The owner's will of an illegal invader of land, who is aware of the illegality of his ownership, but hides it from others with his behavior and attitude to things, is based on an illegal title, deception [2, p. 309–310].

In § 1 of title I of book four of Justinian's Digest, the error is mentioned in the context of the characterization of the grounds for restitution as a means of praetorian protection. In particular, the statement of Ulpian is cited regarding the fact that the praetor provides assistance to people who have erred or been deceived, or suffered harm due to fear, or someone else's cunning (deception), or age, or his own absence [3; 4].

Deception is also mentioned in § 9, fragment 7, title XIV, book two of the Digest "On Agreements", where it is said that the praetor says that he will not protect a contract concluded with an evil intention. An evil intention is carried out by cunning and deception, and, as Pedias says, such a contract is maliciously concluded, in which, in order to circumvent another, one thing is done and another is pretended [3].

But deception, as a circumstance affecting the validity of the deed, was discussed in the most detailed way in title 3 of book four of the Digest "On malicious intent". In particular, Ulpian's statement is cited here that with this edict the praetor speaks against malefactors who harm others by any cunning: the treachery of the former should not benefit them, and the simplicity of the latter should not harm them. § 1. The edict says that in relation to what will be declared as a malicious act, if no other claim is filed for these cases and a just cause is clear, a claim will be filed. In § 2, the words of Servius are quoted, who defined an evil intention as a kind of trick to mislead another, when the appearance of one succeeds and the other is done [3].

It was important that the praetors did not limit themselves to the mention of "intention" ("umysel"), but also added an indication that it was an "evil" intention, since the ancients used the term "good intention (intention)». (dolus bonus) and used this word in the sense of cunning, especially if someone used it against an enemy or a robber.

At the same time, Ulpian noted that it is doubtful whether a lawsuit for malicious intent can be filed against citizens of a municipality (community). It is noted that a lawsuit cannot be filed based on their intent. But when something comes to them as a result of the intention (malice) of those who manage their affairs, then he believes that a lawsuit can be filed. As a result of malicious intent, a claim for intent (malicious intent) is filed against the decurions themselves. When something came to the owner as a result of the intention (maliciousness) of the prosecutor, then a lawsuit for maliciousness is filed against the owner in the amount of what he acquired, because the prosecutor is undoubtedly responsible for his maliciousness [3].

The presence of deception was considered as a basis for declaring the deed invalid only in the case of a collision of "right" with "wrong", due to which the mutual deception of the participants in the deed excluded such a possibility. So, Marcellus said that when two people committed (against each other) malicious intent, they cannot sue each other for malicious intent[3].

It is also necessary to pay attention to the allocation of such categories as dolus malus and fraus creditorum, which appeared as types of torts. The concept of delict in this case includes various specific types of offenses, for each of which specific legal consequences were established.

Thus, dolus malus (deceit) did not provoke a negative reaction in ancient times to the same extent as a threat. Legal response to this offense first appeared in the 1st century. BC, which is the result of the activity of the praetor. As for the threat, the sanction for deception had a protective effect for the violator. However, the compensation he undertook to pay was only equal to the one-time value of the actual damage.

Fraus creditorum ("fraud of creditors" or "to the detriment of creditors") is one of the most important torts unknown to civil law and constructed by praetorian law. The need for this construction arose due to the fact that, when the measures against the defective debtor began to be expressed not in personal restrictions, but in the foreclosure of property, there was a danger of the debtor committing gift, credit and other similar acts with the specific aim of reducing the amount of forced payments, available to its original creditors. To prevent such actions, creditors were given the opportunity to challenge property acts of the debtor that harm their interests. They could bring a lawsuit related to the commission of these acts only after the possession of the debtor's property revealed the debtor's insolvency. The lawsuit was filed simultaneously against the debtor and against those of his counterparties with whom he concluded contracts in fraudem creditorum. If the counterparties acted in bad faith, they undertook to compensate all the losses incurred by the creditors. Conscientious, and after the end of the year, any counterparties were liable to the creditor only within the limits of the non-equivalent benefits they received from the debtor [5].

It is also interesting to distinguish between "unfair advertising" and deception. In particular, the words of Ulpian are quoted, who noted that what the seller says to praise (his goods) should be considered as not said and not promised. But if this is done to mislead the buyer, then it should be considered that there is no claim based on what was said or promised, but there is a claim for malicious intent [3].

A separate rule was established regarding the consequences of cheating persons who have not reached the age of 25. Concerning them, Ulpian remarked that, according to natural justice, the praetor established this edict, by means of which he gave protection to the young, since everyone knows that in persons of this age the

prudence is weak and subject to the possibilities of many deceptions: by this edict the praetor promised them help and protection against cheating [3].

However, the approach to determining the consequences of the deed concluded by such persons under the influence of deception was quite balanced. Thus, in fragment 24 of title 4 of the same book, Paul noted that not always the contract made with a young person is subject to liquidation, but it should be considered accordingly with honesty and justice, so that greater harm is not caused to people of this age, since (otherwise) no one would enter into contracts with them and they would to some extent be prohibited from participating in circulation. Therefore, the praetor should not interfere in these matters unless there is obvious fraud or if the youths have conducted the affairs with obvious negligence [5]. In fragment 44 of the same title, Ulpian emphasized that not everything done by those under 25 is invalid, but only what should be considered invalid after the trial, for example, when they lost what they had as a result deception on the part of others or their trustworthiness, or lost the benefit that they could have acquired, or accepted burdens that should not have been accepted [3].

Cicero gave the definition of deception as follows: when one thing is done for a show, and the other is carried out (it is part of the intention) – cum esset aliud simulatum, aliud actum. The lawyer Labeon, who lived much later than Cicero, supported a principled approach to the definition of deception and offered his own, more refined definition: it is cunning, deception, trickery, carried out in order to bypass, deceive, confuse another [2].

Therefore, a review of the content of the primary sources of Roman private law allows us to conclude that it developed the basic principles of understanding the essence of deception (evil intent) when concluding transactions and its consequences. In a generalized form, they look like this.

Fraud (dolus) is the intentional misleading of the counterparty under the contract in order to induce him to show his will to the detriment of his own property interests. In the republican period, any trickery was recognized as deception, and in more developed law, it was the behavior of a person who caused the counterparty to show his will, caused by a wrong idea about his intentions. Initially, deception did not invalidate the contract, provided that the formal requirements for its conclusion were met. Over time, it began to be recognized as a "defect of the will", which is associated with negative consequences for the one who used deception. But even after that, the deed carried out under the influence of deception was not recognized as completely invalid. It had certain legal consequences, however, a person who showed his will under the influence of deception was granted an action (actio doli) to declare the contract invalid and to recover the damages caused as a result of the deception. The action had a punitive nature, since the award under this the claim was infamy for the defendant. Therefore, in practice, it was almost never used against persons respected in society, parents, patrons, etc. In these cases, it was replaced by another lawsuit [5; 6].

Conclusions. According to Roman private law, deception is the basis of invalidity of the contract, if the tricks used by one of the parties are substantial (without them, the contract would not have taken place).

The provisions of Roman private law regarding the essence and meaning of deception when concluding transactions are still relevant in this field today and are actively used in modern scientific research. Therefore, the fact that they were taken as a basis for the formation of the modern theory and practice of creating the legislation of European countries is logical. Domestic civil legislation, which contains relevant provisions, is no exception.

The article reveals the problematic issues of the concept and signs of deception as grounds for the invalidity of the deed. The concept of deception in Roman private law, which was used not only to denote a defect of will, but also in relation to a number of other legal situations, was considered and analyzed. As a result of the analysis of primary sources and scientific literature, it was established that deception meant the intentional misleading of the counterparty under the contract in order to induce him to show his will to the detriment of his own property interests. In the republican period, any tricks were recognized as delusions, and in more developed law – the behavior of a person who caused the counterparty to show his will, caused by a wrong idea about his intentions. With the development of society, deception began to be recognized as a "flaw of the will", which is associated with negative consequences for the one who used deception. However, the deed carried out under the influence of deception was not recognized as completely invalid. It had certain legal consequences, however, a person who showed his will under the influence of deception was entitled to a lawsuit to declare the contract invalid and recover the damages caused as a result of the deception. The lawsuit had a punitive nature, since the award under this lawsuit was a dishonor for the defendant.

The signs of fraud are defined, the detection of which allows us to assume that fraud has occurred, on the basis of which the deed can be declared invalid.

It was concluded that under Roman private law, deception is the basis for invalidity of the contract, if the tricks used by one of the parties are essential (without them, the contract would not have taken place).

It is noted that the provisions of Roman private law regarding the essence and meaning of deception in the conclusion of transactions are still relevant in this field today and are actively used in modern scientific research. Therefore, the fact that they were taken as a basis for the formation of the modern theory and practice of creating the legislation of European countries is logical. Domestic civil legislation, which contains relevant provisions, is no exception.

Key words: deed, invalidity of the deed, deception, contract, consequences of improper execution of the contract, Roman private law, civil legislation.

Давидова І. Обман в правочині: від римського права до сьогодення

У статті розкриваються проблемні питання поняття та ознак обману як підстави недійсності правочину. Розглянуто та проаналізовано поняття обману в римському приватному праві, яке вживалося не лише для позначення вади волі, але й стосовно низки інших правових ситуацій. В результаті проведеного аналізу першоджерел та наукової літератури було встановлено, що під обманом розумілося навмисне введення в оману контрагента за договором з метою спонукання його до волевиявлення на шкоду власним майновим інтересам. У республіканський період оманою визнавалися будь-які хитрощі, а в більш розвинутому праві – поведінку особи, яка зумовила волевиявлення контрагента, викликане неправильною уявою про її наміри. З розвитком суспільства обман почали визнавати «вадою волі», з якою пов'язані негативні для того, хто застосовував обман наслідки. Однак правочин, здійснений під впливом обману, не визнавався абсолютно недійсним. Він мав певні юридичні наслідки, проте особі, що виявила волю під впливом обману, надавався позов для визнання договору недійсним

і стягнення заподіяних збитків, що настали внаслідок обману. Позов мав каральний характер, оскільки присудження за даним позовом було безчестям для відповідача.

Визначено ознаки обману, виявлення яких дозволяє вважати, що має місце обман, на підставі чого правочин може бути визнаний недійсним.

Зроблено висновок, що за римським приватним правом обман є підставою недійсності договору, якщо хитрощі, вжиті однією зі сторін, є суттєвими (без їх наявності не мав місце і договір).

Зазначено, що положення римського приватного права стосовно сутності та значення обману при укладенні правочинів мають значення у даній сфері і на сьогодні та активно використовуються у сучасних наукових дослідженнях. Тому логічним є той факт, що вони були взяті за основу при формуванні сучасної теорії та практики створення законодавства європейських країн. Не є виключенням і вітчизняне цивільне законодавство, яке містить відповідні положення.

Ключові слова: правочин, недійсність правочину, обман, договір, наслідки неналежного вчинення договору, римське приватне право, цивільне законодавство.

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