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The contract of donation with the duty of the donee in favour of a third person in the civil law of Ukraine

The CC (Civil Code) of Ukraine unlike the CC of the Ukrainian SSR, directly provides such a donation agreement as the agreement with the obligation of the donee in favour of a third party (Article 275, CC of Ukraine).

Thus, according to Chapter 1 of this legal norm, by the donation agreement the obligation of the donee can be established to commit an action of a material nature in favour of a third party or refrain from committing such an action (transfer a sum of money or other possessions, pay cash rent, entitle usufruct of a gift or a part of it, not to bring claims against the third party such as eviction etc.). Besides, as provided in Section 2 of this article, a donor may require from a donee a performance of the assigned obligation in favour of a third party. In the event of the donor's death, the announcement of his/her death, considering him/her missing or disabled, a beneficiary is entitled to require a donee to perform the obligation to a third person.

In legal literature there is a rather ambiguous attitude to this structure of the contract, so the question is what led to the need to implement it on the legislative level and to what degree its specificity is consistent with the legal nature of the donation agreement on the whole, and with its gratuitous nature in particular. In order to answer this question we should first of all examine the doctrinal provisions which are the basis of the contract formation on the whole.

As I.V. Venedyctova states every agreement is concluded with some purpose. The legal purpose of the agreement is a part of the agreement and its material base. By the conclusion of the agreement certain interests are implemented, where the contract serves as a means to meet them. These provisions are the mononorms, that apply to certain individuals and match their interests in the implementation of specific actions, transition of benefits etc.

Therefore, the author argues that the contract is, on the one hand, always the result of an agreement on the balance of interests which the parties aim to implement, and on the other hand it is a flexible legal construction of the implementation of legal interests protected by law and reflected in specific legal relationships[1].

Besides, as the writer notes, interest is a kind of control of behaviour. The agreement is also a regulator. But at the same time the agreement is a form of expression of interest, the means of its implementation. It is almost a perfect form of the activity performed by participants of civil interaction, a form of meeting their legitimate interests[2].

It is impossible to disagree with the above description, especially with regard to contractual structures involving third parties, because due to the interest of either party of such contracts, they can be implemented by persons who are not the parties of such contracts, and do not participate in their conclusion either directly or indirectly.

Interest, as V.A. Vasilieva comments, is something the subject engaging in public relations intends to meet. The object of public relationships, that is the benefit that can satisfy the needs that arise, serves as the means of meeting public interest[3]. Interest is a need which took the form of conscious motives and manifestation of wishes in life, intentions, aspirations which are reflected in those relations that people become involved in during the process of their activities[4].

Without going into a detailed analysis of the category of 'interest', one can affirm that if an individual lacks certain benefits it leads to of a need, which passing through the consciousness of a person becomes his/her interest, and in order to meet it a person becomes involved in civil relationships. Receiving certain benefits, to meet which a person becomes involved in civil relationships, leads to the satisfaction of interest and therefore to the elimination of needs.

Therefore, understanding the nature of interest as a fundamental category which is the basis of the formation of all agreements including agreements involving third parties, as well as the structure of the donation contract with the obligation of a donee in favour of a third party, which is reflected in the provisions of Art. 725, CC of Ukraine, one can conclude that the precondition of the donee's obligation in favour of a third person is a need of the

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1 I.V. Venedyktova, *Protection of legitimate interests in civil law: monograph*, Yurinkom Inter, Kiev 2014, p. 208.

2 *Ibidem.*

3 V.A. Vasilieva, *Civil and legal regulation of the activities on mediation services: monograph*, Edition of Precarpathian National V. Stefanyk University, Ivano-Frankivsk 2006, p. 130–131.

4 V.P. Grybanov, *Interest in Civil Law*, "The Soviet State and the Law" 1967, No. 1, p. 49–56.

donor to provide relevant benefits to a third party; the appearance of this need is thus conditioned by exclusion of the donor`s property in this way. The needs of a third party determine the content of the donor's requirements as the donor is a party that enters into a contract, therefore meeting the needs of a third party means at the same time meeting the needs of the donor. Thus, the way of meeting the needs of a third party cannot contradict the legal nature of the donation contract on the one hand and the interests of the donee on the other hand.

From this perspective, the structure of the donation agreement with the obligation of the donee in favour of a third person cannot contradict the legal nature of the donation contract, including its gratuitous nature. The discussion can occur only regarding the actions that can constitute such a duty.

The above analysis also justifies the expediency of this contract being introduced on the legislative level. Moreover, taking into consideration the property status or age of the donor, he/she may not have another opportunity in the future to take care of the interests of a third party. Thus, parents giving a house to their son, because of their property status, may oblige the son as the donee of the agreement to provide a right of temporary use of one of the rooms in the house to their other child, for example before his/her marriage or before a certain age etc. Thus parents with several children, while donating their property, are able to take care of the interests of each of them. In this way the protective function of the donee's obligation in favour of a third person is fulfilled, which is why determination of this obligation while preparing contracts of donation cannot contradict their legal nature.

For these reasons, we cannot agree with the following conclusions made by V.V. Novikova. In particular, according to Novikova, it does not matter in favour of what person, the donor or a third person, a donee should transfer property. Actions in favour of a third person do not change the nature of relations appearing, and in any case thedonee is obliged to take actions regarding the transfer of property. There is no doubt, Novikova argues, that fulfilment of property obligations regarding a third party does not differ from the same fulfilment in favour of the donor. Therefore, recognizing the possibility of relying on a third person, the law in this respect should be consistent regarding the donor himself/herself[5].

In particular, if the appearance of the donee's obligation to a third person is connected with the protection of interests of a third party, then what kind of interests can we speak about from this perspective, if the obligation of a donee in favour of the donor himself/herself is fulfilled? On the other

[5] V.V. Novikova, *Gratuitous contracts in civil law of Ukraine*, Ksylon, Kharkiv 2008, p. 67–68.

hand if in case of the granting of property, the property status of the donor is impaired, then what kind of need of alienation of the property by the participants of civil relations in this way can we mean? In this case it would be more reasonable to make, for example, a contract of perpetual maintenance, lease agreement, etc.

Therefore, we can conclude that the particular nature of the contractual structure analysed is the fact that by providing the possibility of granting property by one person to another it allows the participants of civil relations simultaneously to protect the interests of a third party, particularly through the appearance of a respective obligation of the donee in favour of the latter. That is to say, the basis for the the donee's obligation regarding a third person is the need to protect the interests of the latter, the emergence of this need being caused by alienation of his/her property by a member of civil relations in this way. This is why the agreement of donation with the obligation of a donee in favour of a third person, just as any other agreement, is the agreement concluded by subjects of civil rights, solely based on their own interests. This conclusion applies to both counterparties of the agreement analysed in this article. Regarding the interests of the donor, it is expressed by the need to provide benefits, both to the person who becomes a donee and to the person who benefits from the duty of the donee. Therefore the interest, which influences the subjects of civil rights in a way that they make such agreements, is the one characterized by a dual legal nature.

Unlike other contractual structures involving third parties, namely the contract in favour of a third party and agreement on the fulfilment of certain actions for a third party, the specific nature of the contract under research is that it allows the subjects of civil legal relations to meet relevant needs of both: a counterparty of the contract (a donee) and a third party. Regarding the donee, this is property granted to him/her, as for the third person, these are corresponding actions of the donee in favour of a third party or refraining from such actions regarding property transfer.

Researching the legal nature of the contract in civil law B.L. Haskelberh and V.V. Rovnyi emphasise the fact that the idea of a contract is based on the balance of the interests of those who are party to it.[6] Agreeing with this statement, and in particular, concerning contractual structures involving third parties, one can conclude that interest is a legal category under the influence of which, on the one hand, there is a formation of contractual structures, while the balance of interests is determined between the subjects of such structures.

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[6] B.L. Khaskelberg, *Consensual and real contracts in civil law*, [in:] B.L. Khaskelberg, V.V. Rovnyi, second edition, Status, Moscow 2004, p. 48.

As for the balance of interests of the contractual structure considered here, it is above all provided by a set of rights and obligations, which are possessed not only by both parties of the agreement but also by third parties.

The obligation of the donee to a third party corresponds to donor's legal right to claim and only due to circumstances provided by Section 2 of the second part of Article 725, CC of Ukraine can such an obligation correspond to the third party's legal right to claim. Considering the fact that the basis for the appearance of the donee's obligation in favour of a third person must be the category of "acceptance" of property (the gift) rather than its "transfer" due to the legal nature of the donation contract, since the time when the contract analysed was concluded, no legal rights of the donor regarding the donee's obligation to a third party can appear. An exception to this rule can only be made while signing the contract in such a way that the time of the conclusion matches the time of the acceptance of the donee's property (the gift).

Anticipating the general provisions of the structure of the donation contract with obligation in favour of a third party the law clearly states the time when a third party can be entitled to the right of claim (Section 2 part. 2, Art. 725 CC of Ukraine). It should be noted that because of the nature of such a contract the counterparties have a limited ability to influence the time when this right of a third party appears. This conclusion is based on the fact that this right is not the one based on the agreement of counterparties that is typical for the contracts in favour of a third party. Such a right of a third party can appear according to the legislation (Section 2, part 2, Article 725, CC of Ukraine), that is a legislator links the time when third party's right to claim appears to the circumstances established by him/her (Section 2, part 2, Article 725, CC of Ukraine) and while concluding such contracts counterparties are not in the position to change this time. This indicates that the entitlement of the right to claim of the third person under no circumstances can be the purpose for concluding the contract of donation with the donee's obligation in favour of a third person.

The appearance of a third party's right to claim does not lead to the appearance of such legal rights as the right to change the contract or to terminate it. The legal rights in question are those that appear on the basis of legal facts. However, this does not mean that under the circumstances provided by Section 2, chapter 2, Article. 725, CC Ukraine, the contract under research cannot be terminated. This contract may be terminated primarily due to the circumstances provided by Art. 727 of the Civil Code of Ukraine; such cases will be discussed later.

The right to claim, which third party can be entitled to, has a binding nature. At the same time, the fact that the third party will be entitled to certain property rights may serve. as a legal consequence of its implementation.

The third party is not involved in the process of concluding the contract analysed here either directly or indirectly. Considering that this agreement does not provide for the emergence of any obligation of a third party, there is no need to obtain consent from him/her before signing such a contract.

Abstract
The contract of donation with the duty of the donee in favour of a third person in the civil law of Ukraine

The article deals with the problem of legal nature of the donation contract with the duty of the donee in favor of a third party in the civil legislation of Ukraine. On the basis of civil law and legal literature the specifics of such contract is revealed, as well as its correlation with other related contracts. Special attention is devoted to the right for claim that the third party gets entitled to due to such contracts.
Key words: a deed of a gift; donee; the third person

Streszczenie
Umowa darowizny z obowiązkiem obdarowanego na rzecz osoby trzeciej w ukraińskim prawie cywilnym

Artykuł dotyczy charakteru prawnego umowy darowizny w prawie cywilnym Ukrainy, ze szczególnym uwzględnieniem obowiązków obdarowanego na rzecz osoby trzeciej. W świetle norm prawa cywilnego i dorobku doktryny jawny jest charakter omawianych zobowiązań, jak również ich powiązania z innymi umowami. Szczególną uwagę poświęcono uprawnieniu osoby trzeciej do żądania wykonania wobec niej obowiązku nałożonego przez darczyńcę na obdarowanego.
Słowa kluczowe: akt darowizny, obdarowany, osoba trzecia