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THE COUNTERPARTY'S SUPERIOR BARGAINING POSITION AS A FACTOR SHAPING THE EXPRESSION OF WILL

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Abstract. This article explores the legal implications of a counterparty's superior bargaining position as a factor shaping the expression of will in civil transactions. Anchored in classical and modern civil law theory, the study examines how imbalances in negotiating power—rooted in economic dominance, infrastructure control, or market dependence—can distort the autonomy of will, raising questions about the validity of the resulting contracts. The Armenian legal framework, particularly the Civil Code and the Law on Protection of Economic Competition, is analyzed to demonstrate how abuse of superior bargaining position may constitute a defect of will and render a transaction disputable. Drawing on jurisprudence, legal doctrine, and regulatory practice, the article argues that such abuse, even in the absence of traditional vitiating factors like coercion or fraud, can undermine genuine consent. It concludes that transactions concluded under these conditions should be assessed through a hybrid lens of civil and competition law, particularly where an administrative act has confirmed the abuse.

Keywords - *Superior Bargaining Position, Defect of Will, Contractual Autonomy, Abuse of Economic Power, Civil Transaction Validity.*

Civil transactions are an integral part of our lives, without which not only the proper course of civil relations but also everyday life is unimaginable. Transactions are the most common legal facts that give rise to, modify, and terminate civil rights and obligations.

The widespread use and economic importance of transactions as legal facts are evident in their being the basis for a wide variety of civil legal relationships.

Civil rights and obligations arise not only from transactions provided by law and other legal acts but also from actions by individuals and legal entities that,

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while not explicitly defined by law, nevertheless create legal consequences in accordance with the principles of civil legislation[1]:

In the matter of concluding transactions, perhaps of essential importance are the principles of freedom of contract, the inadmissibility of any arbitrary interference in private matters, and the autonomy of will.

The cornerstone of the principle of freedom of contract is the party's internal will and external expression in the matter of concluding the contract. Only the correspondence of internal will and external expression indicates the existence of a valid transaction, whereas their discrepancy indicates a transaction with a defect of will.

The principle of freedom of contract ensures the possibility of concluding a contract, choosing its form and terms, and freely formulating its content.

In accordance with the above, the legislator, with the aim of ensuring the implementation of the aforementioned principles of civil legislation—autonomy of will, freedom of contract, the acquisition and exercise of civil rights by one's will and for one's benefit, the free determination of one's rights and obligations on the basis of a contract, the determination of any contractual term not contradicting the legislation—has provided for the participants (parties) of relations regulated by the Civil Code of the Republic of Armenia the possibility to conclude both contracts provided by law or other legal acts, and also contracts not provided by them, and to define the terms of the contract, except in cases where the content of the relevant term is determined by law or another legal act.

The legislator has simultaneously provided for the principle of inadmissibility of arbitrary interference in private affairs, which implies that state authorities or local self-government bodies, or any other persons, are not authorized to interfere in the affairs of civil law subjects if they are carrying out their activities in accordance with the requirements of the law.

This principle also implies that no person, including the court, has the right to arbitrarily interfere in the contractual relations of the parties by means of changing any contractual provision at their discretion.

The Court of Cassation of the Republic of Armenia, in a previously rendered decision, analyzing the above-mentioned legal norms, has stated that every transaction (contract) is, first of all, a volitional act aimed at producing certain legal consequences. For the conclusion of a transaction, the concepts of "will" and "expression of will" have primary significance. Based on this, the Court of

[1] T. K. Barseghyan, Civil Law of the Republic of Armenia (Part One), Yerevan University Press, Yerevan, 2009, 560 pages.

Cassation of the Republic of Armenia found it necessary to disclose the content of these concepts, stating that "will" is a person's internal desire, demand, aspiration, intention, purpose, consent, while "expression of will" is the external form, means, or manner of expressing the will. A transaction is the combination of the internal will and the external expression of will of the persons who concluded it. In cases prescribed by law, a discrepancy between will and expression of will in a concluded transaction may lead to the invalidity of that transaction. Such a discrepancy may be caused either by the personal characteristics of the persons who concluded the transaction, or by the influence of external interference (see, Nelli Hakobyan and others v. "Hamkhach" LLC, Civil Case No. ԵԿԴ/1013/02/13, decision of the Court of Cassation of the Republic of Armenia dated 17.07.2015).

Nineteenth-century French thinkers Jean Domat and Robert Pothier emphasized that the foundation of a transaction is the real will of the parties (volonté réelle). If the expression of will is formally correct but does not correspond to the real will, the transaction may be annulled (e.g., mistake, error, coercion)[2]:

A representative of the German civil law school, Friedrich Carl von Savigny, believed that the will (Wille) and the expression of will (Willenserklärung) must coincide. If such coincidence does not exist, the transaction has no force. However, he also accepted the theory of "noticeable will," when in certain cases the expressed will is accepted rather than the internal one.

A representative of the Russian legal school, Gabriel Feldstein, argued that the foundation of a civil legal transaction is the real will, but the law may also protect the expressed will if that is necessary for the stability of legal relations among citizens[3].

According to Sergey Alekseev, the expression of will is considered the form of a legal act, and the law gives priority to the reliable, external form, because predictability is important for legal circulation[4].

In the legal system of the Republic of Armenia as well, there are certain mechanisms for evaluating will and expression of will in the matter of concluding a transaction and for revealing defects of will.

The Civil Code of the Republic of Armenia[5] provides for several transactions concluded with a defect of will, which are either null or disputable. In particular, in

[2] Jean Domat Les lois civiles dans leur ordre naturel, Paris, 1689, Robert Joseph Pothier Traité des obligations, Paris, 1761.
[3] Feldstein G. S., The Concept and Elements of a Legal Transaction in Civil Law, Moscow, 1911.
[4] Alekseev S. S., General Theory of Law (in 2 volumes), Moscow: NORMA, 2000.

the case of a simulated transaction, when the transaction is concluded ostensibly without the intention to produce legal consequences, the correspondence of the parties' will regarding the purposes of the given transaction is emphasized. That is, in the case where it is established that there is no real will to achieve the intended purposes or consequences of the given transaction, then the transaction is qualified as a simulated transaction.

Similarly, in the case of sham transactions, when the real will of the parties is directed toward concluding a different transaction than the one actually concluded, and there exists a joint intention to conceal the real transaction along with a certain unlawful motive, such a transaction must be qualified as a sham transaction[6].

A defect of will leads to civil legal relations that are seemingly formed between the parties, but in reality and factually have not arisen or have not developed, and are therefore unlawful and prohibited.

Transactions concluded under the influence of a material mistake, fraud, violence, or threat are considered as concluded with a defect of will.

Of course, both the criteria for identifying a defect of will and the resulting legal consequences are different.

Thus, in the case of a material mistake, the mistaken party, in any case, had the will to conclude a contract with that subject, but that will was directed toward a transaction of a different nature or with a different object or object with different characteristics.

Whereas in cases of fraud, violence, and threat, the will to conclude any transaction may be absent from the very beginning.

Particularly problematic is the identification of real will in the case of oppressive transactions.

Thus, Article 313 of the Civil Code of the Republic of Armenia qualifies as oppressive such a transaction that a person was forced to conclude, due to difficult circumstances, under extremely unfavorable conditions for them, from which the other party benefited.

Thus, for a transaction to be qualified as oppressive, several requirements must be simultaneously satisfied:

- It must be established that the person was forced to conclude that transaction;

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[5] Adopted on 05.05.1998, entered into force on 01.01.1999, Official Bulletin of the Republic of Armenia, 1998.08.10, No. 17 (50).

[6] More detailed about fictitious and sham transactions A. A. Mutafyan, Theoretical and Practical Issues of the Invalidity of Sham and Simulated Transactions in the Republic of Armenia, Yerevan, "Hayrapet" Publishing House, 2020, 216 pages.

- It must be established that the person was forced to conclude that transaction due to difficult circumstances;
- It must be established that the transaction concluded under those difficult circumstances is under extremely unfavorable conditions for the person;
- And finally, it must be established that the other party to the transaction benefited from those circumstances.

In practice, the issue becomes more complicated, since the content of the above-mentioned factual circumstances or the criteria for revealing them are not sufficiently disclosed.

By its Decision ՍԴՈ-705 of 03.07.2007, the Constitutional Court of the Republic of Armenia stated that in each case, based on the circumstances of the case, it is the court that determines whether the concluded transaction is oppressive or not. In particular, the court, based on the evidence obtained during the examination of the case, evaluates whether there was fraud, violence, threat, collusion between the representative of one party and the other party, under what circumstances the transaction was concluded, whether those circumstances were severe or not, and whether the conditions of the transaction were extremely unfavorable for the claimant or not. Only after clarifying these questions can the court come to a conclusion as to whether the principle of free expression of will and of performing actions aimed at acquiring rights and obligations in one's own interest, under civil legislation, was violated.

Thus, the criteria for assessing an oppressive transaction must be developed through judicial practice.

The study of judicial practice shows that no unified approaches have been formed, and this is, to some extent, also reasonable and logical, since the characteristics of an oppressive transaction are highly factual and can be established only under very specific circumstances, in relation to a specific subject.

Also included among transactions with a defect of will are transactions concluded as a result of malicious agreement between the representative of one party and the other party, and transactions concluded with limited authority.

In all the above cases, the defect of will concerns the absence of proper will on the part of at least one party to the transaction, for the identification of which different criteria are used.

In all cases, it is essential that the defect of will leads to the invalidity of the transaction.

In all the cases already discussed in this work, there is a common criterion: the distortion of will is the result of an external expression of will that does not

correspond to the internal will, caused by unlawful influence prohibited by law or by other motives.

In other words, the legislator has prohibited all the above-mentioned cases, providing for negative proprietary consequences (restitution, compensation for damages, etc.).

In practice, however, the defect of will may appear not only due to influence prohibited by civil law or motivated by unlawful reasons, but also when the will of the stronger party to the transaction (superior bargaining position) can "shape" the expression of will of the weaker party.

Superior bargaining position is described as such a relational legal-economic situation in which one of the parties, due to its resources, market position, dependence of the partner, or other conditions, has actual influence over the formation of the latter's expression of will and the contractual content.

1. Superior bargaining position may be conditioned by several factors:
2. Market power or exclusivity (sole license, sole producer, seller, or buyer);
3. Infrastructure essential for the distribution of the given product;
4. Information possessed by the given economic operator.

In the legal system of the Republic of Armenia, the definition of superior bargaining position is provided by the Law of the Republic of Armenia "On Protection of Economic Competition and Consumer rights"[7] (hereinafter "the Law").

According to Part 1 of Article 11 of the Law, an economic entity has a superior bargaining position if:

1. due to its significant influence or infrastructure in the relevant field, it can ensure the entry of the relevant goods into the sales market, and the economic entity that has concluded or wishes to conclude a contract with it has no possibility of selling those goods to consumers without cooperation with that economic entity, or there is no economically viable alternative, or

2. four or more commercial outlets (a commercial network) are under the general management of the given economic entity, in which the annual sales revenue exceeds a total of three billion drams, or

3. four or more commercial outlets (a commercial network) operate under the same trademark or other means of individualization owned or used by the given

[7] Adopted on 06.11.2000, entered into force on 15.12.2000, Official Bulletin of the Republic of Armenia, 2000.12.15, No. 30 (128).

economic entity, in which the annual sales revenue exceeds a total of three billion drams.

Thus, the Law distinguishes both quantitative and qualitative criteria of superior bargaining position.

The quantitative criteria relate to the number of commercial outlets under the management of the economic entity and their annual turnover, while the qualitative criterion is the significant influence in the sector and infrastructure.

The latter criterion is qualitative because it shows the actual market power of the given economic entity—the advantages that determine its "dominant" role in transactional relations.

Moreover, in the case of the quantitative criterion, it turns out that superior bargaining position is presumed if the necessary indicators are met, and there is no need to assess the significant influence in the sector.

For example, a supermarket chain with more than 4 outlets and an annual turnover exceeding three billion drams is considered to have a superior bargaining position.

In the case of the qualitative criterion, what is subject to evaluation is the influence of the economic entity on the creation of the opportunity to sell a specific product or the economic impracticality of choosing alternative routes bypassing the given economic entity.

For example, if an economic entity has a large delivery network throughout the territory of the Republic of Armenia, and another entity wants to make its product available through delivery across the entire territory of the Republic of Armenia, then the entity with the delivery network may have a superior bargaining position if only it possesses the infrastructure that meets all conditions for safe and compliant transportation of that product.

Superior bargaining position as an economic-legal phenomenon is not prohibited; however, its very existence indicates that when concluding transactions, the superior bargaining position influences the process of determining the terms of the transaction.

Even if the parties to the transaction enter into contractual relations freely and voluntarily, the stronger party in the transaction can still tilt the "scales" in its favor, realizing that the counterparty has no economically viable alternative.

In practice, such "shaping" of will often remains unnoticed, since the weaker party in the transaction accepts the reality that in the absence of alternatives, it must agree even to some economically unfavorable terms in order to enter or expand within the market or sector.

At the same time, superior bargaining position, when used to restrict competition or to gain advantages in an unfair manner, is prohibited.

Such a prohibition is directly provided in Part 1 of Article 12 of the Law, according to which abuse of superior bargaining position by economic entities is prohibited.

Abuse of superior bargaining position is characterized as any action or conduct by an economic entity that is not justified by economic conditions or factors and harms or may harm the interests of the party in a weaker bargaining position.

The law must always intervene where one party, using its superior bargaining position, imposes unfair conditions on the other party, thereby violating the principle of contractual fairness[8].

Superior bargaining position, even in the absence of a dominant position, disrupts normal competition and harms market fairness[9].

The Law provides for manifestations of abuse of superior bargaining position, among which there are also manifestations that impose conditions on the weaker party to the transaction and influence its will. In particular, the following are also considered abuses of superior bargaining position:

1. Imposing the provision of benefits, including application of discounts, and provision of additional services, in return for which the economic entity holding the superior bargaining position does not perform any action;

2. Unilateral and frequent modification of the contract or cooperation terms without the consent or knowledge of the contractual party;

3. Charging unjustified additional fees for the presentation and sale of products by vendors in the commercial facility;

4. Imposing conditions on the contractual party which relate to:

a. prohibition of concluding a contract with another economic entity;

b. provision of information regarding a contract concluded with another economic entity;

c. compensation of damages by the economic entity in cases of spoilage, damage, loss, or destruction of goods considered the property of the economic entity with superior bargaining position, except when this occurred due to the latter's fault;

d. compensation by the economic entity for expenses not related to the execution of the supply contract or further sale of the goods;

[8] Chris Willett Fairness in Consumer Contracts: The Case of Unfair Terms, Routledge, 2016

[9] Niamh Dunne Competition Law and Economic Regulation: Making and Managing Markets, Cambridge University Press, 2015

e. imposing the obligation to return goods that were not sold within a specific period, except in cases where the requirement to return goods is provided by the legislation of the Republic of Armenia or by the contract;

f. selling the goods under the trademark indicated by the entity with superior bargaining position;

g. prohibition of conducting promotions, including applying discounts or offering benefits, during the sale process.

The manifestations listed above clearly relate to those contractual terms which, under normal circumstances, should be determined through mutual consent and autonomy of will. However, due to the superior bargaining position, these terms are unilaterally determined and imposed on the other party to the transaction.

The prohibition of abuse of superior bargaining position as a civil principle existed even before the formal introduction of this institution in the Law. In particular, according to the second paragraph of point 1 of Article 12 of the Civil Code of the Republic of Armenia, it is prohibited to use civil rights for the purpose of restricting competition, as well as to abuse a dominant position in the market.

That is to say, the abuse of a superior bargaining position, even before administrative consequences were established for it, was behavior prohibited by civil law, with the consequence specified in point 2 of Article 12 of the RA Civil Code—that the court or arbitral tribunal may reject a person's request for protection of their right.

Considering that abuse of superior bargaining position implies a factor that shapes the will of the party in the weaker position, it is essential to also address the issue of the validity of a transaction concluded as a result of such abuse, in the context of a defect of consent.

When comparing a transaction concluded under abuse of superior bargaining position with other transactions concluded with a defect of will, one essential difference stands out: in the case of the former, the transaction is still concluded with a certain expression of will—without violence, threat, or mistake—yet the autonomy of will is disturbed.

For instance, in the case of an oppressive transaction, it was already noted that several valid conditions must simultaneously exist, among which the extreme hardship of one of the parties can be specifically distinguished.

In entrepreneurial relations, extreme hardship has a different meaning than in ordinary civil relations. Thus, while in normal circumstances, a party's sale of property at below-market value due to financial difficulties may be considered as acting under extreme hardship, the conclusion of a disadvantageous transaction by a businessperson for the purpose of entering a market is difficult to classify as

arising from extreme hardship. This is because, despite the unfavorable conditions, the businessperson enters into the transaction with a view toward future profit and market access.

A transaction concluded under abuse of superior bargaining position differs substantially from other transactions concluded with a defect of will, because in the latter, the will is either absent or the expression of will does not correspond to the internal intent.

Under such conditions, the question arises whether a transaction concluded under abuse of superior bargaining position can be considered as one concluded with a defect of will and thus viewed as a disputable transaction.

With respect to defect of will, it is essential to reveal the consistency between the internal will of the party and the external expression of will. The abuse of superior bargaining position is inherently tied to the stronger party exploiting the situation of the weaker party to gain better entrepreneurial or transactional terms, at the cost of the weaker party's income, disproportionate expenses, or market entry under unfavorable conditions. In such a situation, it is logical to assume that the party to the transaction could not genuinely express a will to conclude such a transaction, regardless of any apparent external expression of will.

At the same time, in this case, the defect of will does not have a classical civil law content, because the discrepancy between internal will and external expression arises solely from economic disadvantage, which may be temporary in nature. After all, if a transaction is extremely disadvantageous to a businessperson both in the short and long term, then under no circumstances would the businessperson agree to such a deal.

The competent authority responsible for detecting, exposing, and imposing liability for abuses of superior bargaining position is the Competition Protection Commission of the Republic of Armenia. The fine imposed for abuse of superior bargaining position may reach up to ten percent of the violating economic entity's turnover from the previous year.

Within the framework of the presumption of legality of a final administrative act confirming the abuse of superior bargaining position, the fact of such abuse can no longer be subject to dispute when assessing the validity of the transaction; only the connection between that abuse and the transaction's validity is subject to evaluation.

These particularities are of essential importance when discussing the validity of transactions concluded as a result of abuse of superior bargaining position. Therefore, we believe that the validity of such transactions should be assessed in the context of the conditions, circumstances, and consequences of their conclusion.

Specifically, if a transaction concluded under abuse of superior bargaining position was made in the absence of real alternatives, under conditions of extreme hardship for one party, and by the imposition of economic conditions by the party holding superior bargaining position, then such a transaction, under the existence of a final administrative act confirming the abuse, may be considered disputable. This is because there is clearly a distortion of internal will and intense unlawful influence on the external expression of will.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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