Problems of Authentication of the Declaration of Intention of Co-Owners

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Doi:10.5901/ajis.2014.v3n3p205

Abstract

Co-owners must take account of various legal and factual encumbrances. One of the encumbrances is the requirement as to the agreed declaration of intention by all co-owners in transactions involving joint property. Pre-emptive rights related to the alienation of undivided interest to a person other than the co-owner should be also viewed as an encumbrance. The encumbrances take the form of a special document (consent, waiver) that would establish the intention of a co-owner. Such a document gives rise to legal consequences for both the giver and the co-owner in whose favour or against whom it is issued as well as third parties. It should be concluded that the document presenting a co-owner's intention per se is a unilateral transaction that is fully subject to the principle of freedom of contract prevailing in private law. According to the general rules, a co-owner is free to choose the form of its declaration of intention: oral or written, public or private. However, for several reasons, this matter is not as simple as it might seem. According to laws, certain types of transactions (e.g., real estate transactions) are subject to public registration and, therefore, a public document is demanded by the law-giver. Another aspect to be considered is that written documents are essential for the procedure of proof in the countries adhering to Continental European law. Consequently, the legal nature of a document establishing a co-owner's intention becomes vital. During the research, the author has analysed the form of a co-owners' declaration of intention, focusing on the possibilities and necessity of authentication. The objective of the thesis is to research the legal criteria of authentication based on the existing laws insofar as those concern the recording of a co-owner's intention. To this end, both descriptive and analytical methods have been employed to analyse the applicable legal framework. The author has relied on laws and opinions of legal scholars.

1. Introduction

Expression of intent, namely, the internal intent of a legal entity, and its materialization, is an essential component of any legal transaction. Latvian legal system is liberal on the issue of the form of expression of intent. The expression of intent may be express (in words, orally or in writing, or by signs which have the meaning of words) or implicit.

Observing the particular transaction procedure (the necessity for a written form, public registration of coherent expression of intent of co-owners), the expression of intent and its recording following the procedure as provided by law obtains particular importance in transactions of immovable property in joint ownership. Intent is a complex psychologically-legal phenomenon. The legal literature indicates that "the internal contents of the process of intent, in the mutual respect, is formed by a motif, a subjective perception of the legal objectives of transaction and the conformity of actions of an entity with the law and the requirements of law principles." (Jegorovs, 2004). Following this definition, the intent can be described as a determined and motivated legal entity's wish to achieve a particular objective. On the other hand, the expression of intent is the legal entity's public announcement of his/her internal intent, which makes the internal intent perceivable and understandable to other legal entities. Internal intent, as long as it is not publicly expressed, remains an internal thing of a legal entity, while the expression of the intent may be subject to legal analysis, and it can be assessed.

In this Section, the author focuses on the legal conditions of intent and the recording of its expression and its necessity in legal transactions with joint ownership immovable property.

2. Research

Science of civil justice has long been dealing with the issue of intent and its expression, their interaction and legal implications. Discussion is ongoing on the priority issues when assessing, which is the key in a transaction — the intent or the expression of the intent.

In some cases, the internal intent has its own conceptual meaning in the analysis of legal transactions. The author agrees with prof. K.Torgans's view that "the inner intent can play a role in establishing whether or not the legal entity's activities are perceived correctly, was it possible that it was arising from the situation that the legal entity's intent was

directed towards a particular transaction", (Torgans, 1998). However, it can be concluded that the expression of the intent is of the main legal importance.

Different scientific disciplines (psychology, law, philosophy), exploring the intent, understand it differently. Impossibility of a joint definition of intent is due to the fact that by intent each of these disciplines understands different categories. For example, intent is defined as a set of mental processes manifested in the form of motivated, determined, deliberate action to overcome some difficulties. (Joksts, Girgensone, 2011). Legal scholar S.Aleksejev (C.C.Алексеев) by intent understands an internal desire of a legal entity focused on a specific legal result.

In case law, the concept of intent is explained as follows: "a person's intent in civil relations is a subjective and indispensable the same time element for closing the transaction. It is not a formal requirement, but rather confirms the true desire of the parties to enter into business relations and his understanding of what is happening".¹

Legal doctrine may distinguish three understandings of intent and its expression. According to the first - if the intent is different from its expression, than the intent has the preference. So V.Vitryanskiy and M. Braginskiy point out that "the transaction is based on the intent. This is what sets up the transaction and therefore the transaction is an act of intent." (Брагинский, Витрянский, 2010). The second position states that the transaction is an action, and therefore the legal consequences are associated directly with the expression of the intent as an active form, which gives priority to the intent of the expression. On the other hand, according to the third position – the intent and its expression are equally important, because the law is focused on the unity of intent and its expression as an essential prerequisite for the validity of the transaction.

Assessing the positions mentioned, it can be concluded that differently from the doctrine, but today the presumption of correctness of expression of intent is prevailing.² Besides, the expression of intent shall properly and accurately reflect the internal intent of a legal entity of as well as the expression of intent should follow the form prescribed by laws and regulations.

In the shared ownership transactions, depending on the expressers of intent who is express their intent in a transaction, the author distinguishes between: common intent of all co-owners and individual intent of each co-owner. Each co-owner as a legal entity is endowed by his own intent and the sum of intents of all the co-owners forms the common intent of co-owners, which is necessary for dealing with the subject of joint ownership, i.e. a coherent intent of individual legal entities. Such an expression of intent is needed in transactions with the third parties concerning objects of joint ownership (such as the disposal of joint property subject, and leasing (renting) it) and in the event of actual conversion of the very joint ownership object (e.g., rebuilding, restoration).

Expression of individual co-owner's intent plays a role in mutual relationship of co-owners: where one of the co-owner is expressing consent, gives consents, or gives up the right of first refusal.

The real estate transactions are required to be in written form and the rights established by transaction shall be corroborated in the Land Register.³ Corroboration in the Land Registry is considered as a separate form of transaction (written form plus corroboration). (Torgans 2013)

Where, in making a transaction, a co-owner along with the others expresses his intent, which accumulates in a common co-owners' intent, or expresses his intent individually, a legal entity's intent shall be materialized into a written document.

Considering that, according to Section 1 of the Law on Land Registry, the Land Registry records have public credibility,⁴ the documents containing co-owner's intent must be such as not to cause doubt as to their authenticity, understanding by that the fact that the document is "one which is consistent with the original; is based on the source; certain, credible."⁵

How to ensure that? In Continental European countries, notary is the officer to whom the state has delegated to certify the veracity of documents or transactions and to grant their public credibility. It is also highlighted by Professor S.Osipova: "A sworn notary shall assume responsibility for law and relate the legitimate interests of various persons,

¹ Judgement to the Case No A420626810, A2156-11/6 of the Administrative District Courtrajona of 12.09.2011. Available at: http://www.tiesas.lv/files/AL/2011/09_2011/12_09_2011/AL_1209_raj_A-02156-11_6.pdf, Seen: 22.05.2014.

² This follows from Section 1427 of the Civil Law, according to which "Part of the essence of a lawful transaction is the expression of intent by the transactor, but a bilateral or multilateral transaction requires a coherent expression of intent by all the parties. As long as intent has not yet been expressed, it has no legal effect"(underlining is mine)

³ See details: The Civil Law of 01.28.1937, Paragraph Four, Liability Law (Ziņotājs, 1, 14.01.1993.) [Entered into force on 01.03.1993.] as amended Section 1483.Paragraph Three

⁴ Land Registry Law. Adopted: 22.12.1937. Entered into force: 05.04.1993. " Ziņotājs " 16, 29.04.1993.

⁵ Explanatory Dictionary. Available at <http://www.tezaurs.lv/sv/?w=autentisks>, checked up on 21.05.2014.

explaining the possible consequences to all parties to the transaction."⁶ The Constitutional Court of the Republic of Latvia has given the following assessment to the place and role of the notary in transactions: "Notary as a person belonging to the judicial system does public certification of this private intent".⁷

A document recording expression of intent must guarantee legal security without interfering with the legal entity's "internal" intent and the right to choose the way of expression of intent. Any mandatory regulation could be understood as a violation of the principle of private autonomy.

The only document in the Latvian legal system to which the legislature has clearly and unequivocally established a requirement for a notarial certification, is the request for corroboration. The first paragraph of Section 60 of the Land Registry Law provides that the "individual signatures on the requests for corroboration to be presented shall be certified by a notary public or by the custody court."⁸

For any other documents (contracts, consents, refusals), the law does not require a notarial certification, however, the author with her considerable professional experience working in the notary system can say for sure that for such documents as co-owners' consent or refusal, the notarization is always required for submission to the Land Registry, while in the case of contracts there is no such requirement. Lack of regulatory framework accounts for the conflict between legal regulation and practice. The author's view is that a document containing an expression of intent and is to be submitted to the public register (the Land Registry) must be publicly credible.

Associated professor K.Balodis states that "public credibility of legal transaction entered into notarially is manifested so that third parties can be sure that the persons mentioned in the notarial document have concluded the transaction, and have concluded it with the particular content (Balodis, 2007), i.e., the intent has been fixed truly and correctly. Private documents do not have these qualities, they lack public credibility.

From Section 82¹ of the Notary Law follows that it is the notary deed that is provided for recording of the expression of intent.⁹

The grammatical interpretation of law leads to the conclusion that for recording of the expression of co-owners' intent on issues concerning the objects of joint ownership must be in the form of a notarial deed.

The author believes that a notarial deed is the most appropriate form for recording of the authenticity of expression of co-owners' intent.

To describe notarial deed, the sworn notary L.Damane states that "a notarial deed is the certification of authenticity of expression of intent and of the fact which has legal significance. It is the notarization, which ensures the authenticity of the entire document, giving it the power of evidence and execution, in relation to which mandatory is the notary's neutral, but active counseling (counseling and explanation). A notarial deed is characterized by a mandatory document retention, repeated issuance of transcripts and copies." (Damane, 2011)

It also should be noted that "the mandatory form of notarial deed as established by the state for all the most important transactions guarantees legal protection of all the parties."¹⁰ This is one of the factors that gives priority to a notarial deed. As a further condition of priority, the author wishes to emphasize the evidential value of the notarial deed. In accordance with Paragraph three of Section 178 Of the Law on Civil Procedure, the veracity of notarial deed cannot be doubted. They can be challenged only by bringing a separate action.¹¹

3. Conclusions

Legally expressed intent is a prerequisite for the validity of the transaction. The co-owners express their intent, when making their transactions with the objects of co-ownership. In case of dispute the manner of recording of expression of intent can be legally assessed and analyzed from the point of view of the validity of the transaction.

⁶ *Functions of the Notary of Latvia and Availability of the Legal Assistance Provided, its Evaluation (Appendix 1, Appendix 2, Appendix 3, Appendix 4, Appendix 5, Appendix 6, Appendix 7)*, p. 60. Available at: <http://www.tm.gov.lv/lv/nozares-politika/petijumi>, checked up on 21/05/2014.

⁷ *Judgement by the Constitution Court of Republic of Latvia of 19 May 2009 to Case Nr.2008-40-01 "Latvijas Vēstnesis"*, 78 (4064), 20.05.2009.

⁸ *The Land Registry Law. Adopted: 22.12.1937. Entered into force: 05.04.1993. "Ziņotājs"*, 16, 29.04.1993

⁹ *The Notary Law. 01.06.1993. Entered into force: 01.09.1993. "Latvijas Vēstnesis"*, 48, 09.07.1993., "Ziņotājs", 26/27, 05.07.1993.

¹⁰ *Functions of the Notary of Latvia and Availability of the Legal Assistance Provided, its Evaluation (Appendix 1, Appendix 2, Appendix 3, Appendix 4, Appendix 5, Appendix 6, Appendix 7)*, p. 78. Available at: <http://www.tm.gov.lv/lv/nozares-politika/petijumi>, checked up on 21.05.2014.

¹¹ *Civil Law of the Law on Civil Procedure 14.10.1998. Entered into force: 01.03.1999. "Latvijas Vēstnesis"*, 326/330 (1387/1391), 03.11.1998., "Ziņotājs", 23, 03.12.1998.

Laws and regulations do not contain a clear indication of cases when the expression of intent should be fixed in the notarial deed. This leads to different interpretations of the form of expression of intent.

4. Recommendations

The author considers it necessary to include provisions in laws and regulations stating that the co-owners intent in real estate transactions (giving consent, authorization, and waiving the pre-emptive rights) is to be recorded in the notarial deed.

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