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FEATURES

OF APPROVAL OF THE REAL ESTATE GIFTING AGREEMENT IN AZERBAIJAN

CARACTERÍSTICAS DE LA APROBACIÓN DEL ACUERDO DE REGALO DE BIENES RAÍCES EN AZERBAIYÁN

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ABSTRACT

Property law is a fascinating field that has drawn the attention of jurists, philosophers and academics in general because they are a reflection of society and the relationships established in it. In this field, a striking aspect is related to gifts and donations. Although not all gifts/donations should be analyzed from a legal perspective, in some cases it is required because it conditions the dynamics of the family patrimony. Therefore, the objective of this work is to analyze how this process is carried out according to the legal framework of the Republic of Azerbaijan. As a main result, it was possible to verify that this process is well established, and that the regulatory framework is clear regarding the procedures to be followed.

Keywords: Civil Code, law, real estate, inheritance, gifting agreement.

RESUMEN

Las leyes de la propiedad es un campo fascinante que ha llamado la atención de juristas, filósofos y académicos en general pues son un reflejo de sociedad, y de las relaciones que se establecen en esta. En este campo, un aspecto llamativo es el relacionado a los regalos y donaciones. Si bien no todos los regalos/donaciones deben analizarse desde la perspectiva legal, en algunos casos sí es requerido debido a que condiciona la dinámica del patrimonio familiar. Por ello el objetivo de este trabajo es analizar cómo se realiza ese proceso de acuerdo al marco legal de la República de Azerbaiyán. Como principal resultado se pudo comprobar que este proceso está bien establecido, y que el marco regulatorio es claro respecto a los procedimientos a seguir.

Palabras clave: Código Civil, derecho, bienes raíces, herencia, contrato de donación.

INTRODUCTION

As pointed out by Hinkel (2020) the law recognizes two classifications of property: real and personal. Real property relates to land and those things that are more or less permanently attached to the land, such as homes, office buildings, and trees. Personal property is sometimes referred to as chattels or goods. Personal property has its own set of legal rules and regulations, which govern the ownership of the property, the ability to sell the property, and the ability to pledge the property to secure a debt. Personal property may include living objects, such as animals, and inanimate objects, such as a television.

According to Ramaekers (2017) property law scholars have been dealing with a number of key doctrinal questions concerning property law since the first time someone pointed at something and claimed: 'This is mine!'. Some common questions that are addressed are: What are property rights? What kind of things can we have property rights in? What role can property law play in shaping our society? But one question that seems to have drawn less attention than the others is: What is property law? Regarding this Alexander and Donahue (2018) establish that property law is understood as the principles, policies, and rules by which disputes over property are to be resolved and by which property transactions may be structured. What distinguishes property law from other kinds of law is that property law deals with the relationships between and among members of a society with respect to "things." Property law, then, deals with the allocation, use, and transfer of wealth and the objects of wealth. As such, it reflects the economy of the society in which it is found. Since it deals with the control and transfer of wealth between spouses and across generations, property law also reflects the family structure of the society in which it is found.

One of the different methods of acquiring ownership to real property is as a gift. In this regard, the history of the gift agreement which is one of the types of civil law agreements, is very old. Civil law does not cover all property relations in society, it regulates only a part of them called property-value relations. This part of property relations is considered as alternative-equivalent relations because property-value relations foremost include commodity-money relations. At the same time, the sphere of legal regulation of civil law includes property relations that are not directly related to money circulation. Therefore, these relations, by their nature and character, are not considered commodity-money relations, i.e. alternative-equivalent relations.

However, although gift agreement is not a commodity-money relationship, but it has specifics of countervalue. Thus, such relations are related to the rule of the law of value. Therefore, there are sufficient grounds for regulation of gift agreement relations by civil law (Ioffe, 1967, p. 392). Besides the equal rights of parties involved in relations of the gift deed, transfer ownership of property from one person to another via the deed of gift agreement, include the relations arising from this agreement in the subject of regulation of civil law are determined.

Throughout life, everyone receives a huge number of minor and significant gifts, and it is obvious that the subject of a gift agreement can be evaluated both in terms of value and non-property value. Gifting someone something, we often do not even think about the fact that we are making a legal act. Although not all gifts should be analyzed from this perspective, some, due to their relevance and economic value, do require this attention. Taking this into account, the aim of this paper is to analyze the legal framework of property donations/gifts, and specifically in the conditions of Azerbaijan.

DEVELOPMENT

The legal definition of the gift agreement is given in the Article 666.1 of the Civil Code of the Republic of Azerbaijan, which was adopted on December 28, 1999 and entered into force on September 1, 2000. According to the mentioned article, gift agreement is an agreement signed in lifetime of donor, based on which donor having transferred part of his property enriches donee; at the same time this kind of donation is not conditioned on any return services on behalf of donee. The gift agreement is considered completed at the moment of acceptance of gift by donee. If gifting was not conditioned by obligation it is assumed that the gift is accepted (Milli Majlis of the Republic of Azerbaijan, 1999b).

According to Allahverdiyev (2009, p. 180) this legal definition given to the gift agreement is not right because, a property transferred as a gift, does not enrich donee. This is a known issue. On the other hand, this concept does not imply the possibility of concluding the contract of gift as a consensual agreement. Therefore, the author suggests the following scientific definition to the gift agreement: According to the gift agreement one party (donor) transfers certain property to another party (donee) free of charge. As a result, the donor's property decreases, while the donee's property increases. This is one of the features of the gift agreement.

G. F. Lask (1961, p. 468) believes that the essence of the concept of gifting is that a certain person voluntarily

transfers his/her property to another person free of charge. It is understood that the donor does not receive any compensation from the donee in return for the property donated, therefore, a gift agreement is an agreement having nothing in exchange. P. L. Rykhletsy (2005, p. 3) points out that among civil law transactions, from the very moment of the rise of civil circulation, there are common transactions that, at first glance, their content contradicts the whole theory of the essence of civil law relations, as property relations of a value nature. However, throughout the existence of civil law, they occupy a significant place in the daily life of participants in civil circulation. These are gratuitous transactions, the main place among which is taken by a gift agreement.

Gratuitous transactions, by the fact of their existence, do not contradict the general features of the subject of civil law regulation, since they are property relations based on the application of common elements of the method of civil law regulation - equality of parties, autonomy of intention and independent property responsibility. It is wrong to talk about a transaction without compensation as a civil law nonsense, since these transactions are made without the influence of the value nature of the relationship. Concluded without the purpose of benefiting at least one of the parties who committed it, a gratuitous transaction is aimed at transferring a property benefit. Moreover, in any case, each of the parties to the transaction is aware of the property or non-property value of the transferred good. In addition, the gratuitousness in transaction does not mean that the person in whose interests the transaction is made is generally deprived of any obligations under this transaction (Rykhletsy, 2005, p. 10).

A. A. Kosorukov (2006, p. 7) defines gratuitous transaction as the following:

“These are contracts in which one party transfers or undertakes to transfer to the other party for ownership or temporary use a thing, money or property right, or provides a certain service, and the other party, being free from counter provision, performs the actions provided for by law in the interests of the counterparty”

M. S. Kuchmezova (2009, pp. 17–18) notes that the principles of regulation of gifting cover not only legal relations that are within the framework of certain types of obligations, but also in other parts of the civil law system: limited rights in rem (servitude for which no fee is charged), change of persons in obligations (gratuitous assignment of rights (claims) and transfer of debt without consideration from the original debtor), institutions of the general part of the rights of obligations (payment of someone else's debt not for value from the original debtor or debt release). At

the same time, the subject of donation in legal obligations cannot be expanded. Services cannot be subject of the gifting.

According to S. N. Solovikh (2003, p. 7), all five qualifying signs (gratuitousness, intention to donate, decrease in the property of the donor, increase in the property of the donee, consent of the donee to accept the gift) are important for the gift agreement as a whole, and the absence of at least one of them entails the invalidity of the gift agreement.

As established in Article 245 of the former Civil Code of the Republic of Azerbaijan of 1964, that was in force until September 1, 2000, a gift agreement could only be a real agreement. Under the current Civil Code, a gift agreement can be both real and consensual. A gift agreement is considered real at the moment of acceptance of gift by donee (Article 666.1 of the Civil Code). Thus, a real gift agreement is considered concluded from the moment the property is given to the donee. A consensual gift agreement is one in which the donor undertakes to donate property in the future. In other words, when a gift is promised in the future, a consensual gift agreement is considered concluded (Article 668.1.5 of the Civil Code).

A gift agreement is a bilateral agreement. Because the conclusion of this agreement requires an agreed intention of both parties. If the donee does not express his/her will to accept the property, there can be no question of concluding a contract. However, as a general rule, a consensual gift agreement is not considered a synallagmatic agreement. Thus, the duty of the donor participating in the conclusion of this contract is to give the item free of charge. The donee has only the right to demand (the right to accept or refuse to accept the item). The donee has no obligation under the consensual gift agreement. Unlike synallagmatic agreements (for example, a sale and purchase agreement, etc.), the parties to a consensual gift agreement have neither rights nor obligations, and cannot act as both debtors and creditors at the same time. Therefore, a consensual gift agreement is a unilateral agreement (i.e. one of the parties has only an obligation and the other party has only the right of claim).

However, in some cases the gift agreement may be bilateral. Thus, a consensual gift agreement may determine the procedure for awarding a gift depending on the fulfillment of certain conditions or obligations (Article 670.1 of the Civil Code). In this case, the other party, i.e. the donee, has the right to demand and the right of obligation. For example, a physical person donates a two-room apartment, which is considered to be a real estate, to a relative on the condition that one of those rooms is given to

him for living. In this case, the relative of the physical person is also obliged to give one of the rooms to the donor.

N.V.Sizova (2004, p. 8) states that, the gratuitousness of the gift agreement implies the absence of consideration (even obviously not equivalent to a gift) on the part of the donee, which causally determines the actions of the donor. At the same time, the feature of gratuitousness in the donation agreement allows the existence of the obligations of the donee related to the use or possession of the gift in a certain way, which is not a payment or other consideration.

The first feature of a gift agreement is that it is not a unilateral agreement. A gift agreement is a bilateral deed (contract) in terms of the division of transactions. That is, a gift agreement is not a unilateral act of the donor. The donee cannot be indifferent that someone wants to gift him something, no one may be given a gift against his/her will. In other words, a gift agreement is a bilateral agreement based on the expression of the will of the donor and the donee. Therefore, a gift deed must be distinguished from unilateral deals, such as the last will. A deed of gift differs from the last will in its content in that the amount of the donor's property decreases during the gift deed. The last will does not affect the reduction of a person's property during his lifetime. The second aspect that distinguishes a gift from the last will is that, as a result of the gift, the property becomes the property of the donee. The last will that provides for the inheritance of property may be amended or annulled. Finally, if a gift deal is a bilateral one, the last will is a unilateral deal.

Pursuant to Article 668.1.1 of the Civil Code of the Republic of Azerbaijan, a gift agreement shall be considered valid if it is notarized when transferring immovable property or rights to such property. According to the Article 144.1 of the Civil Code of the Republic of Azerbaijan, "When notarizing a real estate donation agreement, a notary or other officials authorized to perform such notarial acts in cases provided by law shall check the disposing party's right to dispose of the property and compliance of the agreement with the law. They are responsible for the unauthenticity of the agreement they have notarized."

According to the Article 139.1 of the Civil Code of the Republic of Azerbaijan "property rights and other rights to immovable property, restriction, formation, transfer and termination of these rights must be registered with the state". In accordance with the requirements of Article 46 of the Law of the Republic of Azerbaijan dated November 26, 1999 "On Notaries", the alienation (purchase, sale, donation, exchange) of property subject to registration, after the submission of documents confirming the ownership

of the alienated property, including real estate and pledge deals or pledged property are notarized (Milli Majlis of the Republic of Azerbaijan, 1999a).

The notarized consent of the other party is required for the conclusion of notarized and (or) registered transactions on the disposal of real estate of one of the spouses. When approving deals on alienation or pledge of a house, apartment, garden, cottage, garage, land plot, other real estate, it is checked whether the alienation of property is prohibited or whether the property is seized. In case of prohibition, the agreement on alienation of property can be approved only with the consent of the creditor and the recipient on the transfer of the debt to the name of the recipient of the property (Milli Majlis of the Republic of Azerbaijan, 1999a).

According to the Article 146.1 of the Civil Code of the Republic of Azerbaijan, right for ownership and disposal of immovable property is accrued from the moment of notary verification of the deal on such property (with exception of rights, which are formed on the basis of court order or other resolution in legal force and not subject to appeal). In accordance with the legislation, for gifting of the real estate to spouses, children, parents, grandparents, grandchildren, brothers and sisters, the state fee for notarization of real estate shall be 28 manats 75 kopecks and for gifting of the real estate to other persons the state fee for notarization of the real estate shall be 322 manats (this amount is about 190 US dollars).

The right to dispose of real estate arises from the date of registration of the property in the state register of real estate in the territories. Notarization of real estate contracts that not registered in the state register shall not be allowed and contracts concluded on such property shall be considered invalid. According to legislation, a notary and other officials authorized to perform notarial acts in cases established by law, and an official of the State Committee for Property Affairs of the Azerbaijan Republic bear personal court responsibility for certifying real estate contracts, and state registration of real estate gift agreements. The state acts as a legal claimant for allegations of non-registration or incorrect registration of real estate agreements in the state register of real estate, for incomplete registration.

We consider it necessary to state that in accordance with Article 673 of the Civil Code of the Republic of Azerbaijan, entitled "Renunciation of gift", the donor can renounce a gift in following cases:

- if donee has committed a grave crime against donor or his close relatives.

- if donee has breached his liabilities undertaken in respect of donor or his close relatives in accordance with family-legal relations.
- if donee does not execute liabilities regarding gift deed without providing any ground for this.

In accordance with paragraph 46 of the Instruction “On the Rules of Notarial Acts”, approved by the Decision No. 167 of the Cabinet of Ministers of the Republic of Azerbaijan dated September 11, 2000, when approving real estate disposal agreements, the notary shall verify the disposal right of the party disposing of the property and the legality of the contract, if the draft of the contract has not been prepared by a notary. According to paragraph 47 of the mentioned Instruction of September 11, 2000, when approving agreements on disposal of property subject to registration, the notary requires an extract from the relevant register on the state registration of property rights, and in the case of half-finished real estate, notary requires a certificate of preliminary registration of the right of ownership over the building and attaches the original and, in other cases, a copy of those documents under the alienation agreements to the notary’s file. In case of disposal of real estate on the basis of an extract from the state register of real estate posted on the e-government portal at the request of the right holder, an extract from the state register of real estate is obtained by a notary in real time in accordance with the Law of the Azerbaijan Republic (Cabinet of Ministers of the Republic of Azerbaijan, 2000).

Then, according to paragraph 49 of the Instruction of September 11, 2000, unless otherwise provided by the marriage contract, agreements on alienation or mortgage of property acquired after the registration of marriage and in common (joint) ownership of the spouses may be approved, in the case that the spouses have a notarized consent to dispose of the property, regardless of where the other is registered at the place of residence.

Also, to certify agreements on disposal of property, the notary shall check when the right of ownership over the real estate begins on the basis of the document confirming the right of ownership over the real estate. If the owner of the disposed property acquired the property before marriage, as well as during the marriage in the form of a gift or inheritance, by other gratuitous transactions, the consent of the husband (wife) is not required for the alienation or pledge of this property (Cabinet of Ministers of the Republic of Azerbaijan, 2000).

In accordance with the legislation, to approve the contract on gifting of a certain part of real estate, at the request of the parties the text of this agreement shall include both specific parts of the property (floor, room, living and

concrete dimensions of land) and mathematical shares. Furthermore, it is necessary to distinguish the real estate gift agreements from similar legal actions. Gifting, above all, must be distinguished from sponsorship. Sponsorship means the financing of any event, free or partially paid, by the sponsor (individual or legal entity). The renunciation of inheritance by heir in favor of any heir shall not be considered a gifting. The heir does not gift the property; he/she gives his/her share of the inheritance free of charge to another heir. In this case, the consent of the other heir is not required.

Also, various monetary rewards, financial assistance and other property payments provided to citizens by the organization in which they work are not included in the legal regulation of the gift agreement. Thus, various social security payments and benefits received by citizens cannot be considered as gifts.

CONCLUSIONS

Relationships related to the gift agreement, which is one of the oldest types of agreements. In Azerbaijan the transfer of real estate is regulated by the Civil Code of the Republic of Azerbaijan, the Family Code of the Republic of Azerbaijan, the Law of the Republic of Azerbaijan “On Notaries”, the Law of the Republic of Azerbaijan “On State Duty” and some other legislative acts which reflects the norms applied to approve a real estate gifting agreement.

It is important to highlight that a real estate gifting agreement is an agreement without compensation. The ability of an individual to act as a donor in a gift agreement is conditioned by his ability to act and legally capable individuals have the right to independently conclude a real estate agreement as a donor. On the other hand guardians without prior permission of the guardianship and trusteeship authority may not enter into a contract about gifting of real estate belonging to the ward. Also, a guardian, without the prior permission of the guardianship and trusteeship authority, shall not have the right to give consent to the donation of real estate belonging to the ward.

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