

Ivan Ruschev

PhD, DSc, Sofia University, Faculty of Law

The nullity of the transaction due to the lack of form – the exception under article 293(3) of the commercial act

1. Introduction

The general rule set in Article 26, paragraph 2 of the Obligations and Contracts Act (“OCA”), that the transaction is void when the form of validity is not observed, also applies to the commercial transactions under Article 288 of the Commercial Act (“CA”), taking into account, of course, the special rules and objectives of commercial law. Apart from that, the sanction for a void transaction due to the lack of form *ad solemnitatem* is provided for in Article 293(2) CA. An important exception to this rule, however, is contained in Article 293(3) CA, according to which the party cannot rely on the nullity if it can be inferred from its conduct that it did not contest the validity of the action/statement.

The exception under Article 293(3) CA applies only to commercial transactions and it only refers to their nullity due to non-compliant written form of validity¹. In Decision No. 94 of 9.07.2015 in case No. 2094/2014, ruled under Article 290 of the Code of Civil Procedures (“CCP”), the Supreme Court of Cassation (“SCC”) expressly accepts that the rule of Article 293(3) CA refers not only to the statutory form of the transaction but also to the form explicitly agreed by the parties for concluding an additional agreement.

The provision of Article 293(3) CA is part of the general rules laid down in Part III of the CA for the conclusion of commercial transactions. Article 293(3) CA is applicable both to objective commercial transactions under Article 1(1) CA and to unilateral and bilateral subjective commercial transactions². In its jurisprudence under Article 290 CCP et seq., the Court of Cassation agrees that *‘non-compliance with the legal form of validity of a commercial transaction does not automatically lead to its nullity, and this is one of the differences between commercial and civil law,*

¹ Decision No.14 of 04.02.2013 of the Supreme Court of Cassation in case No. 1201/2011.

² Decision No. 50 of 25.04.2012 of the SCC in case No. 95/2011, and Decision No. 66 of 05.07.2012 in case No. 376/2011, where the rule of Article 293(3) CA is also applied to an insurance contract concluded between an individual and the insurer, which in its essence constitutes an objective commercial transaction and which has an established written form for validity.

where under the latter the nullity occurs regardless of the behavior of the parties”. In commercial law, in order for the non-compliance with the form to result in nullity of the transaction, Article 293 (3) CA requires its validity to be contested. According to the SCC³, this rule approximates the nullity due to non-compliance with the form in commercial law with partial nullity in civil law (i.e. Article 27 OCA). In other words, the nullity in case of non-observance of the form of the transaction in commercial law can be remedied by the provision of Article 293(3) CA.

2. Controversies regarding the prerequisites for the application of the provision of Article 293(3) CA

In its well-established case law, the SCC accepts that the application of Article 293(3) CA cannot be based on the mere silence of the parties, without any active conduct aimed at the legal consequences of the transaction. Article 293(3) CA does mention silence assimilated to consent but instead a behavior of the party to a transaction, from which it can be concluded that it did not dispute the validity of the statement.

For example, in Decision No.529 of 14.10.2008 in case No. 240/2008, the SCC has ruled that the prohibition on reliance on the nullity of a contract is relevant for the party who, by his/her conduct, has demonstrated acceptance of the effect of the transaction. Such conduct, from which it can be concluded that there is no objection, is the acceptance of the performance of the counterparty to the contract. Therefore, in this case, the defaulting party, who in turn has to provide performance, has no objection against the nullity of the contract, but instead has to fulfill his/her obligations. The assessment of whether or not the conduct of either party gives rise to the conclusion that it did not contest the validity of the statement is decided on a case-by-case basis.

The case law shows concrete examples of conduct from which it can be concluded that the validity of the statement is not disputed. For instance, in case of a contract, which has not been signed by the insured, but the latter has nevertheless paid the initial installment and has brought action for damages in relation to the insurance coverage⁴. Based on Article 293(3) CA and in light of this case, it should be concluded that the absence of a signature does not lead to the nullity of the insurance contract and does not prevent the possibility of obtaining insurance indemnity. There are similar cases when the insurer has accepted the payment of an installment from the insurance premium, has accounted for the insurance

³ Decision No.129 of 07.01.2013 in case No. 683/2011.

⁴ Decision No. 115 of 23.07.2013 of the SCC in case No. 348/2012.

policy and has sent the data to the Information Center of the Guarantee Fund⁵, or when the insurer has accepted the payment of the insurance premium under the insurance policy and on the basis of it has incurred damages for which he has paid compensation to the insured person⁶.

3. Scope of application of the rule under Article 293(3) CA. The issue with the qualified written form and the notarial form in the context of Article 293(3) CA

The provision of Article 293(3) CA does not allow a party to a commercial transaction to rely on the nullity due to a non-compliant form under the conditions set out there. This rule is provided for the sake of security of the trade turnover⁷.

3.1 The question, which arises, is whether a party to a public procurement contract can invoke the rule of Article 293(3) CA in the case of non-conformity of the content of a public procurement contract with the provisions of Article 18 and Article 19 of the repealed Public Procurement Act (“PPA”)?

The case was as follows: On the basis of Article 266, paragraph 1 OCA, the contracting authority under a contract for execution, concluded under the PPA, was ordered by the court to pay the next remuneration to the contractor, whereby as a proof of the work performed, 19 duly adopted acts were presented. Moreover, as a proof of payment, the contracting authority has also presented invoices.

In the context of the proceedings at first instance and on appeal, the contracting authority maintained an objection of nullity of the contract in question, alleging the lack of a contractual clause for the lodgement of a guarantee by the contractor, as well as a nullity of the subsequent annexes concluded with the legal prohibition of subsequent amendment of the contract of public procurement contracts without a specified deadline – e.g. violation of the legal provisions under Article 30, paragraph 2, Article 19 and Article 17, paragraph 2, of the repealed PPA. The appeal court rejected those objections on the grounds of Article 299(3) CA, arguing that it could not be inferred from the conduct of the party that it had challenged the validity of the contract.

⁵ Decision No. 50 of 25.04.2012 of the SCC in case No. 95/2011.

⁶ Decision No.179 of 27.11.2012 of the SCC in case No. 527/2011.

⁷ Decision No. 201 of 12.02.2015 of the SCC in case No. 3351/2013.

According to the legal motives set in Decision No. 14 of 04.02.2013 of the SCC in case No. 1201/11, this conclusion is incorrect. It is precisely because of the specificity of the commercial transactions and “the duty of a good trader”, as defined by the law (Article 302 CA), that the decision-maker by virtue of Article 293(3) CA limits the ability of a party to invoke the nullity due to a defect in the form of validity of a commercial transaction, if it can be inferred from its conduct that it did not contest the validity of the statement at the very time it was agreed. When this party has accepted the counterpart performance, but refuses to fulfill his/her obligations, claiming non-compliance of the form of validity of the transaction, this is a manifestation of bad faith in commercial relations, which is not tolerated by the legislator.

In this case, however, the provision of Article 293(2) CA has been applied incorrectly because it is only relevant for commercial transactions and it only affects their nullity due to their non-compliant written form of validity. Therefore, Article 293(3) CA is inapplicable when it concerns the nullity of a commercial transaction due to its contradiction with the imperative provisions of the law. This follows from Article 288 CA, which refers to the provisions of the civil legislation in the cases not provided in the Commercial Act – i.e. Article 26, paragraph 1 OCA, according to which the contracts contradicting the law are void. In this way, the SCC has accepted that the form only covers the way in which the will of the parties has been expressed, and not its content. For comparison, in administrative law, the form is understood to mean both the way in which the will is expressed, and the rules prescribing particular requisites as part of the content of the will; such as the conditions of validity of the individual administrative act – e.g. the name of the author, the time and the place of the issuance of the act; the lack of those elements is qualified as lack of form.

Nevertheless, in commercial law, this is not always the case. And often, the legal norm requires that wills have certain content (i.e. the so-called requisites of the transaction – e.g. the bill of exchange, the check, the promissory note, the insurance policy, the concession contract, etc.). However, in the judgment mentioned above, the court of appeal seems to be guided by the logic that their non-compliance would lead to the defect “contradiction of the transaction with imperative legal norms”, and not to a lack of form. The author shares this understanding.

3.2 The question of the application of Article 293(3) CA in respect of contracts whose form of validity is more serious than the private written one

The provision of Article 293(3) CA speaks of a written form, but it is not clear whether it is the ordinary written form or whether it also applies to the qualified written form when the latter is raised as a condition for the validity of the con-

tracts. This question is of great practical value, since for a number of transactions, which may also be concluded as commercial transactions, the law provides for a qualified written form - certification of the signature as a form of validity of an immovable property in the capital of a commercial company (Article 73(1) and (5) CA), the transfer of shares (Article 129(2) CA), etc.

In one of its cases⁸, SCC agrees that despite the provision in Article 144(1) and (2) of the Road Traffic Act, a qualified form for the transfer of a motor vehicle – i.e. written form with a notary certification of the signatures – in the absence of such an agreement and in the presence of the prerequisites under Article 293(3) CA, the party which has accepted the execution cannot rely on the nullity of the contract due to the lack of form. An invoice issued by the seller (i.e. a car dealer) and signed by the manager of the company, in which the plaintiff is mentioned as the addressee, has been presented before the court. The invoice contained a complete individualization of the sold car and the price. In addition, a copy of the cash register of the company was provided for cash paid at the same date, representing the sale price of the vehicle.

In order to reach the legal conclusions, first, the SCC refers to the practice whereby the bilaterally signed invoice is treated as compliant with the form prescribed by law. Second, it is pointed out that there is a commercial transaction with regards to the seller and that the same is valid under the conditions of Article 293(3) CA, although the invoice is signed only by seller and the signature of the recipient is missing, since there was no dispute over the validity of the latter's statements. The invoice contained all the requisites of the sale, such as the type of goods, price, method of payment, description of the parties to the transaction – i.e. the statements of the parties were recorded in a way that allowed them to be reproduced (Article 293(4) CA).

Another similar hypothesis from which it can be concluded that the rule of Article 293(3) CA is also applicable in respect of transactions for which the law requires a qualified written form for validity, is examined in Decision No. 71 of 22.06.2009 in case No.11/2009. In particular, the SCC agrees that the commercial sale of self-propelled equipment within the meaning of the Registration and Control of Agricultural and Forestry Equipment Act is not null and void, although the requirement of Article 12 of the same act that a contract for the transfer of the ownership of such equipment with an engine power of more than 10 kW must be concluded in written form with notary signature endorsement was not complied with.

The SCC justified its conclusion precisely by applying the rule of Article 293(3) CA to the case, arguing it by examining the conduct of the parties to the contract. Specifically, it was found that: (i) the question of the nullity of the contract was not

⁸ Decision No. 56 of 06.10.2015 of the SCC in case No. 5143/2014.

raised by the parties because of the absence of a legally established form, nor were any evidence gathered in this respect; (ii) the seller of the self-propelled machinery has not submitted proof of compliance with the statutory form requirement but has claimed a valid contract, relied only on the invoice he has submitted and on which the parties have not disputed that it governed their contractual relations; (iii) the defendant-buyer also did not plead before the court of first instance that the contract was null and void because of a lack of form; he has merely established that he had fulfilled his obligation as a purchaser and paid in full the price stated on the invoice. In this way, the SCC has reached the well-founded conclusion that the prerequisites of Article 293(3) CA were present in the case, and as such has accepted that the transaction in question, although not concluded in the form required by law, has produced legal effect and has validly bind the parties.

3.3 The rule of Article 293(3) CA and the notarial form for the validity of the legal transactions

In its jurisprudence, the SCC has ruled on the question of whether the so-called “amorphous form” of commercial transactions, established by the norm of Article 293(3) CA, is applicable in respect of commercial transactions in which ownership rights or limited rights in rem are transferred to immovable property for the validity of which a notarial form is established by law.

In Decision No. 201 of 12.02.2015 in case No. 3351/2013, the SCC absolutely accepts that *“Article 293(3) CA does not apply to real estate transactions between traders for whose validity a notarial form is established by law”*. The reasoning of the Court is that the rule of Article 18 OCA on the notarial form of transactions concerning ownership rights or limited property rights on immovable property and the related notarial certification rules are imperative and aim to ensure the security of the civil turnover and the stability of the public relations regardless of whether the party is a trader/legal person or a natural person.

In this regard, the SCC explicitly states that: *“The security of civil and commercial turnover and the stability of public relations relate both to the acquirer, as well as to the future transfer of ownership of the property – i.e. ensuring and proving the property ownership and establishing security for the prospective acquirer that the transaction legitimizing the transferor is genuine. If it is accepted that the provision of Article 293(3) CA does not allow a party to a commercial transaction to invoke nullity on account of a non-compliant notary form, this would mean that also in the case of a written contract for the purchase and sale of immovable property, which is not concluded in notary form (i.e. without a notary deed), if the party to the commercial transaction does not oppose it, the transaction would have a transferring effect.”*

According to the SCC, *“such an understanding and interpretation of the said rule would introduce uncertainty in the civil and commercial turnover and in view*

of the provisions of Article 112 of the Property Act, as well as the Act on the Registry on Entries, the registration of the acts transferring the right to property or the establishment, transfer, alteration or termination of another right on real estate. The purchase and sale of a real estate as a commercial transaction is not subject only to the rules of commercial transactions, as the requirements for the form and entry of the notarial deed and the transaction-related effect of the transaction are provided in civil law and are aimed at protecting the security of a larger circle of public relations than the relations only in commercial transactions.’

4. Instead of conclusion

It can be inferred from the SCC’s considerations that, in order to apply Article 293(3) CA, it is not sufficient to have present its prerequisites provided therein. In particular, the effect of that provision should be seen in the context of the general rules of civil law and civil procedures which, by means of mandatory norms, require a qualified form for the validity of transactions, the order for their execution, as well as the entry requirements, the general purpose of which is to safeguard the interests of all legal subjects, whether they are commercial or non-commercial in nature.

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