**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Articles 666.1, 670.1, 670.3 and 673.1 of the Civil Code of Republic of Azerbaijan*

# 19 October, 2012 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova (Reporter-Judge), Fikret Babayev, Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Ismayil Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: Ph.JDr Bagir Asadov, Judge of the Supreme Court of Republic of Azerbaijan and Vasif Amiraslanov, senior advisor of department of economic legislation of Administration of the Milli Majlis of the Republic of Azerbaija En;

specialist: Ilgar Damirov, Judge of Baku Court of Appeal;

experts: Dr. Azad Talibov, Civil Law Board of Baku State University;

in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of the Supreme Court of Republic of Azerbaijan concerning interpretation of of Articles 666.1, 670.1, 670.3 and 673.1 of the Civil Code of Republic of Azerbaijan;

having heard the report of Judge Sona Salmanova, the reports of the legal representatives of the subjects interested in special constitutional proceedings, specialists and experts, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Supreme Court of Republic of Azerbaijan (hereinafter referred to as the Supreme Court) by a request to the Constitutional Court of Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), asks to give interpretation of Articles 666.1, 670.1, 670.3 and 673.1 of the Civil Code of Republic of Azerbaijan (hereinafter referred to as CC).

The request was based on the fact that any substantiation by any obligations in Articles and 670.3 670.1, as well as in the third sentence of Article 666.1 CC of donation, which is specified in the first sentence of Article 666.1 of this CC as the gratis agreement that is not conditioned by any service is contrary to the principle of legal certainty, which is one of the basic elements of the rule of law.

According to the conclusion of the Supreme Court the discrepancy between mentioned norms creates the difficulties in judicial practice and has a negative impact on the formation of unified court practice and the protection of the property rights of citizens.

In the request it is also noted that Article 673.1 of CC provides for waiver of gift-giving not regarding uncompleted agreement but with respect to the completed contract and advantage of the will of one party. However, the agreement of donation, being a treaty based on the will of not one but of two or more of the parties is also contrary to Articles 421-424 CC establishing the basis and rules of changing and termination of this agreement.

In connection with an inquiry the Plenum of Constitutional Court considers necessary to clarify the meaning of the agreement, as well as to draw the attention to a number of provisions of the Civil Code dealing with the legal nature of the agreement of donation.

The emergence of the rights and duties from the civil relations is directly linked to agreements (transactions). Agreement shall mean unilateral, bilateral or multilateral expression of will directed at emergence, modification and termination of civil legal relationship. Agreements may be unilateral or in contractual form (bilateral or multilateral). Conclusion of contract shall require agreed expression of will of two parties (bilateral agreement) or agreed expression of will of three or more parties (multilateral agreement). In the course of interpretation of expression of will, its true content shall be established not only in accordance with its literal meaning, but also on the basis of reasonable judgment (Articles 324.1, 324.2, 324.4.324.5 CC).

The agreements applied in the field of relations regulated by civil law, are covered by the notion of civil law contracts and shall be applied as the legal fact, an obligation under the agreement document.

According to Article 389.1 of CC, a contract shall mean an agreement between two or several parties on the establishment, modification or termination of the civil rights and obligations.

It should be noted that the freedom of agreement established Article 390 of CC is one of the elements of the realization of the right of ownership provided for in Article 29 of the Constitution of Republic of Azerbaijan and Article 152.1 of CC. The mentioned rules ensure the persons with the freedom of contract, and determination of the content of those treaties.

One of the types of agreement provided in CC is the donation agreement. The agreement of donation, as one of the existing deals implies the transition of the right to property from donator to donee. As a rule, the intention to conclude a contract of donation occurs under the influence of a personal relationship between the donor and their receivers.

According to Article 666.1, donation agreement is an agreement signed in lifetime of donor, based on which donor having transferred gratis part of his property enriches donee; at the same time this kind of donation is not conditioned on any reciprocal services on behalf of donee. The donation agreement is considered completed at the moment of acceptance of gift by

donee. If donation was not conditioned by obligation it is assumed that the gift is accepted.

One can distinguish the following features of donation:

* gratis donation agreement that is based on unselfish expression of the donator and excludes the getting of any benefits by him;
* the property of donne increases;
* the property of donee increases as a result of reduction of property of donator;
* the donor has the intention to make a gift;
* there is the agreement of the donee to receive a gift.

The subject of donation can be items or property rights (claims) regarding donor or third party, or release or duty to release donee of property obligation to donor or to third party. Execution of moral or ethical duty is not considered a donation (Articles 666.2 and 666.3 of CC).

In the civil law there are real and conceptual forms of donation agreement.

The donation agreement is considered completed at the moment of acceptance of gift by donee. If donation was not conditioned by obligation it is assumed that the gift is accepted (Article 666.1 of CC). And if the donor promises to a donne the donation in future, then there emerges the conceptual form of the contract of donation (Article 668.1.5 of CC).

As you can see from the above rules the CC provides provides for the conclusion of a treaty between the parties during the life of donor. After the death of the donor, even if notarized the contract on the State registration of the contract of donation and the gifted property ownership cannot be implemented.

In order not to create a collision with the norms of inheritance law of the civil law the legislation mandatorily prohibits the conclusion of the contract on the promise of donation after the death of the donor, the transfer of the gift to donne after the death of donor and recognizes such agreement as void. To such types of donation there should be applied the rules of inheritance law of civil law (Art. 670.2 of CC).

The retribution of the civil law transactions is defined by legislation as the presumption of retribution of each treaty. For instance, a contract, under which one party shall have to receive payment or other consideration for the performance of its obligations, shall be a toll contract. A contract shall be deemed a toll one, if nothing otherwise results from this Code or the contents of the contract (Articles 397.1 and 397.3 of the CC).

In grant transactions, the parties do not get from each other the counter-guarantees.

According to Article 397.2 of CC, a toll free contract shall be the one, under which one party shall be obliged to provide whatever to the other party without receiving any payment or other consideration. The contract of donation is the retribution free agreement in view of the fact that it is not conditioned by any counter services of donne and this agreement is considered as concluded one followed by adoption of the gift by a donne. As one can see, the legislator considers the donation agreement as concluded only from the moment of reception of the gift by donne.

The civil law rules do not give the grounds to assert that the donation contract shall be compensated and that in return for the gift the donne shall bear the obligations before donor which are aimed at his enrichment. On the other hand, the retribution free nature of donation agreement in some cases does not release the donne from the obligations and conditions before the donor. For instance, the donor can impose on donne various commitments not connected with his enrichment. Such obligations may be assigned in favour of the state, public interests, the interests of the donor or others. Here it should be borne in mind that the obligation should not contradict to the retribution free nature of donation agreement and should not be linked with enrichment or the acquisition of any material support.

It should be noted that every civil law contract has its own specific conditions (standard terms and conditions etc.) and must be in compliance with these terms and conditions. Despite the fact that according to Article 666.1 of CC the donation agreement is not generally conditioned by any kind of response services on the part of the donee, the legislator does not exclude the presence of condition in response to donation, i.e. there can be possibilities to put donation in dependence of fulfilment of certain conditions or obligations.

 According to Article 670.1 of CC, the donation can be conditioned on implementation of terms and liabilities. If the donation is not conditioned by obligation this implies the acceptance of the gift. That is, even in the case of submission of conditions within the treaties of this kind, the consent of donne to accept the gift is the necessary condition for recognition of agreement as concluded. The obligation under the contract of donation occurs during donation and shall be expressed in the transfer to donne the subject of donation.

If the circumstances of implementation of the rights and obligations under the agreement have the sign of uncertainty, the contract of donation shall be deemed concluded based on conditions. If among conditions there is stated a circumstance that is irreversibly (inevitably) arises, such a treaty can not be recognized as the contract of donation containing the conditions. It is known in advance, the simple donation agreement without conditions, reflecting a promise to make a gift within certain time.

According to Article 670.3 of CC, in accordance with donation agreement donor and his heirs can claim against donee for non-execution or incomplete execution of liabilities undertaken. If execution of liability serves social ends, then after donor’s death relevant executive authority may require execution of this liability.

Thus, if the donne have signed a donation agreement conditioned by commitments and then not renounced its execution, then he/she shall be responsible for the full and proper implementation of the contract. Non-implementation or improper implementation of such obligation entitles the donor, his or her heirs, as well as the relevant body of executive authorities (if required in the public interest) presenting a claim to seek a restoration of violated rights.

Meanwhile, it should be noted that if the donation agreement was concluded depending on the fulfillment of the conditions or commitments, then the donne should fulfill the obligations assumed under a contract. For this reason, the submission by the donor or his heirs, the relevant executive authority of the claims for fulfillment of obligations in accordance with Article 670.3 of CC or cancellation of the contract of donation in cases stipulated by Article 673.1 of this Code cannot be interpreted as a violation of the rights of the donee.

In connection with the refusal from donation the plenum of Constitutional Court considers necessary to note the following.

Articles 421-424 of CC regulate the change and cancellation of agreement. According to Article 423 of CC, The agreement on changing or dissolving the contract shall be made in the same form as the contract, if nothing otherwise results from this Code, the contract or traditions of business turnover. As we can see in the CC, treaty or customary business practice there may be established other rules concerning the change or termination of the contract.

Article 673 CC establishes the special rules and grounds, which differ from those set forth in Articles 421-424 of CC, of termination or revocation of a promise of a gift donation. The provisions of this Article in general relate to the denial of both the real and the conceptual agreement of donation.

The provision of ‘denial from donation’ provided in Article 673.1 of CC stipulates the denial from donation of property that passed into the ownership of the donee, rather than the refusal before donation of property. According to this Article, Donor can renounce donation 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 he does not execute liabilities regarding donation without providing any ground for this.

Article 673.2 of this Code regulates the cases of annulment of the promise by the donor concerning the donation and the rejection of its fulfillment within the conceptual contract of donation. Except in the cases referred to in Article 673.1 of CC in the following cases a donor can revoke or refuse execution of the promise

connected with donation: if after the promise property relations of donor have changed to a level where a donation can be unbearable; if after the promise obligations arise in family-legal relations of donor, which have not existed before or were not significant.

Restoration of the status the parties to the treaty, which was before donation agreement was reflected in Article 673.4 of CC. According to this Article, in case of renouncement of donation donee has to return a gift if it was in his possession. If the gift is lost or is not under his property, the donne shall not be obliged to return the gift or reimburse its costs, in view of the fact that such a circumstance does not correspond to the nature of the contract of donation, its element of compensation free.

According to the above-stated the plenum of the Constitutional Court comes to the following conclusion:

- the agreement of donation, provided for in Article 666.1 of CC being a gratuitous bilateral treaty shall be recognized as concluded followed by the acceptance of the gift by donne. In accordance with Article 670.1 of this Code, Donation can be conditioned on implementation of terms and liabilities not connected with the enrichment of donor;

- in accordance with Article 670.3 of CC the possibility to lodge a claim by the donor and his heirs concerning the non fulfillment or improper fulfillment by a donne of obligations undertaken under the contract of donation, as well as the possibility to require the fulfilment of such obligation, after the death of the donor, under observance of the public interest on the part of the competent executive authority derives from the concluded contract of donation;

- Article 673 CC, regardless of the form of the treaty establishes the obligations of the refusal or revocation of a promise on donation and the rejection to fulfil it and regulates the legal consequences of such a refusal.

Being guided by part IV of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 60, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The agreement of donation, provided for in Article 666.1 of CC being a gratuitous bilateral treaty shall be recognized as concluded followed by the acceptance of the gift by donne. In accordance with Article 670.1 of this Code, Donation can be conditioned on implementation of terms and liabilities not connected with the enrichment of donor.

2. In accordance with Article 670.3 of CC the possibility to lodge a claim by the donor and his heirs concerning the non fulfillment or improper fulfillment by a donne of obligations undertaken under the contract of donation, as well as the possibility to require the fulfilment of such obligation, after the death of the donor, under observance of the public interest on the part of the competent executive authority derives from the concluded contract of donation.

3. Article 673 CC, regardless of the form of the treaty establishes the obligations of the refusal or revocation of a promise on donation and the rejection to fulfil it and regulates the legal consequences of such a refusal.

4. The decision shall come into force from the date of its publication.

5. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

6. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.