CONCEPT AND LEGAL NATURE OF NON-CASH SETTLEMENTS IN THE LEGAL DOCTRINE AND CIVIL LEGISLATION OF THE AZERBAIJAN

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Abstract

The article is devoted to the study of the concept of obligations on non-cash settlements as one of the key elements of the civil law institute of non-cash settlements in a market economy. The author examines various interpretations and definitions of the concept of non-cash settlements existing in the legal doctrine. The author notes both advantages and shortcomings of the definition of non-cash settlements in the doctrine of law, given by various researchers and specialists. The review of legal doctrine, as well as legislation gives the author the basis to conclude that the legal doctrine to date lacks a comprehensive and complete definition of non-cash settlements. The author proceeds from the fact that in the legal sphere all definitions and concepts should have the character of formal certainty and be precise and clear. Indeed, the key importance of legal definitions is to legally formalize and regulate the public will. When considering the legal nature of non-cash settlements, the author notes that non-cash settlements are also characteristic to other branches of the national law system. Therefore, depending on this circumstance, the legal definition of this concept may also change. The author restricts the scope of his research to the formulation of civil law definition of non-cash settlements. He notes that in order to define a scientific definition of non-cash settlements in civil law, first of all it is necessary to determine its main features and characteristics. The author attributes such features. These are the existence of a special subject composition (banks and other credit organizations); the possibility of non-cash settlements with or without opening bank accounts; realization of non-cash settlements in accordance with the requirements of the legislation. The author offers his system of the main features of non-cash settlements. Based on the carried out analysis the author gives his own scientific definition of non-cash settlements in the civil legal system of Azerbaijan.

Keywords: *civil law, doctrine, legislation, settlement relations, banks, non-cash settlements, features of non-cash settlements, definition of non-cash settlements.*

I. Introduction

Legal regulation of non-cash settlements, which is one of the forms of settlement operations, is an important element of the mechanism of legal regulation of property relations in general. The peculiarity of the use of various non-cash forms of settlements is that they provide such significant advantages over cash settlements as convenience of use and the ability to carry out settlements between subjects of legal relations at a distance and in a quick order. Non-cash settlements also ensure the transparency of these types of transactions. These circumstances in general make the problem of studying the legal nature of non-cash settlements very actual. It should be noted that in the legal doctrine of Azerbaijan there are practically no researches devoted to the issues of defining the definition of non-cash settlements. The main purpose of this article is, to a certain extent, to fill this gap. These circumstances determine the relevance of this article.

II. Ratio of cash and non-cash settlements

According to estimates by major analytical companies, non-cash settlements dominate over cash in many countries [21]. Thus, according to some sources, in the

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modern world in the total volume of monetary turnover of states the main place is occupied by non-cash turnover, which accounts for about 90% of the total turnover of monetary funds. Most of the non-cash payments are made in developed countries. Thus, in 2017, the economies of North America, the EU and developed Asia-Pacific countries accounted for 79.5% of global non-cash transfers [22]. At present, for example, in Sweden the share of non-cash payments is 98%, in Norway 95%, in Denmark 94%, in the USA - 80%, in Germany 76%. [15] In Azerbaijan, the volume of non-cash turnover is also steadily growing. Thus, if in 2017 non-cash payments in Azerbaijan amounted to 8% of the total turnover, this figure exceeded 30% by 2020, and by 2025, it is planned to bring the volume of non-cash settlements in the country to 50%. After 2025, the goal is to increase this indicator to 80% [18]. In particular, in February 2025, the volume of non-cash payments increased by 30% compared to the same period last year and reached the figure of 7 billion 133 million manats.

III. The law "On non-cash settlements" and its influence on the development of settlement relations

It should be noted that the volume of non-cash settlements has significantly increased with the adoption of the law "On non-cash settlements" of December 16, 2016 (with subsequent amendments). This law imposed a number of restrictions on cash settlement transactions.

Thus, Article 3.3 of the law (taking into account the provisions of Article 3.5 of the law) defines a special procedure for making settlements for VAT registered taxpayers and for taxpayers engaged in trade and (or) public catering. It all depends on different criteria. Thus, if they have the volume of taxable transactions in any month (months) of consecutive twelve-month period exceeds two hundred thousand manat) or if they have the volume of the total amount of taxable transactions for goods, works and services rendered in the previous calendar month exceeds 2 percent of turnover (including VAT), they must make settlements in non-cash order. Other taxpayers, if their total amount of taxable transactions exceeds fifteen thousand manat during a calendar month, make settlements only in non-cash order.

However, it is possible that taxpayers registered under VAT and taxpayers carrying out activities in the sphere of trade and (or) public catering, 2 percent of turnover (including VAT) on goods, works and services rendered in the previous calendar month is less than thirty thousand manat. In this case, payments are made only in non-cash order.

Also, payments on settlements totaling more than thirty thousand manats during a calendar month are made only in non-cash order. But it is also possible that 2 percent of the turnover (including VAT) on goods, works and services rendered in the previous calendar month is more than fifty thousand manats. In this case, payments on settlements for the total amount exceeding fifty thousand manats during a calendar month are also made only in non-cash order.

Except that, Article 3.4 of this law provides for a number of cases when settlements must be made only a non-cash manner. These include:

- debts on leasing operations and granting loans;
- payments established by the Laws of the Republic of Azerbaijan "On Insurance Activities", "On Compulsory Insurance" and "On Enforcement Proceedings";

- payments for services and other payments made to state bodies, legal entities owned by the state and in which the controlling interest (shares) belongs to the state, budget organizations and public legal entities, as well as municipalities;
- settlements on debts on leasing deals and granting credits;
- payment for fixed telephone services and public utilities;
- payment for fixed telephone services and public utilities;
- payment and return of interest-free money (except for cases of transfer of money by persons who are not taxpayers), other withholdings;
- use (expenditure) of funds received under the state procurement contract;
- payment of tuition fees;
- payments to travel agencies;
- specialized payments for sale of cars through commission and trade organizations; payments for sale of goods (except for cars and goods specified in the law) offered for retail sale in the amount of more than four thousand manat within one transaction (one cashier's check);
- payment and return of interest-free funds;
- spending of funds received under the agreement on public procurement;
- payments to tourist agents; specialized payments on sale of cars through commission and trade organizations;
- specialized payments on sale of cars through commission and trade organizations;
- payments for sale of goods (with certain exceptions) offered for retail sale in the amount of more than 4 thousand AZN within one transaction;
- payments for medical services rendered by medical institutions and persons engaged in private medical practice in the amount of more than 500 AZN within one transaction (on one cashier's check);
- money payments (money bets) related to participation in games and winnings (prizes) totaling more than AZN 3,000 determined in relations regulated by the Laws of the Republic of Azerbaijan “On Lotteries” and “On Physical Culture and Sports”;
- payments made when buying and selling immovable property, when making a contribution to the share of a member of a housing and construction cooperative and when purchasing residential and non-residential premises from persons engaged in construction and installation activities;
- payments for the sale of precious stones, precious metals, including articles made of precious stones and precious metals, as well as cultural values;
- payments for purchase and sale of movable property registered in official registers (except for the sale of cars) for a total amount exceeding 15,000 AZN must be made in a non-cash manner.

As can be seen, these restrictions also relate to a number of non-cash settlements, which have a civil law nature. With the adoption of these kinds of measures, the turnover of cash settlements has decreased significantly. A similar tendency has been observed worldwide. The main reason for the global decline in cash payments is the desire of most countries to reduce the volume of shadow cash transactions. In addition, reducing cash payments creates obstacles to dirty money laundering and terrorist financing. Reducing cash payments also helps in the fight against corruption. The process of restricting cash settlements has become so severe that the expression “war on cash” has even been used [19].

IV. Legal acts regulating relations in the sphere of non-cash settlements

In our country, there is a certain complex of legal norms regulating relations in the sphere of non-cash settlements. Thus, the Civil Code (CC) devotes a separate chapter - Chapter 53 - to the legal regulation of settlements, including non-cash settlements. Article 971 of the Civil Code stipulates that settlements with participation of individuals, not related to their entrepreneurial activities, may be made in cash without limitation of the amount or in a non-cash order [9]. Meanwhile, as mentioned above, a number of settlement transactions should be made only in non-cash form. As it is seen, there are certain inconsistencies between the Civil Code and the Law of the Azerbaijan Republic "On non-cash settlements", which require their settlement.

V. Legal definition of non-cash settlements

Researching the institute of non-cash settlements in civil law, first of all it is necessary to dwell on its legal definition. Indeed, one of the basic elements of the study of any problem is the definition of its concept. In relation to non-cash settlements, this basic element is the existence of a legal definition of non-cash settlements. It should be noted that for a long time neither in the domestic legal doctrine of Azerbaijan nor in the civil legislation a clear definition of the concept of non-cash settlements was not formulated. Thus, neither in the textbook on civil law by S. Allakhverdiev [3, p. 783-787], nor in the textbook by R.A. Geyushev [12, p. 350-369], in which the legal aspects of cash and non-cash settlements are considered, it is not given the definition of non-cash settlements in civil law. And also the civil legislation of Azerbaijan, in particular, Chapter 53 of the Civil Code, devoted to regulation of settlement relations, does not contain a legal definition of non-cash settlements.

As L.F. Apt notes, the legislator has a need to formulate meaningful legal definitions in several cases. First, this is the case when the definition is introduced into the system of legislation for the first time and its meaning is unknown. Second, when an accurate understanding of the definition is necessary to understand correctly the meaning of the law. Thirdly, when there is not its clear definition in legal or other science [4, p. 59].

This gap in the legislation was eliminated, in a certain degree, only with the adoption of the law "On non-cash settlements". Thus, Article 3.1 of this law contains a number of elements of such definition. This article defines non-cash settlements as: settlements by transferring funds from the bank account of one person to the bank account of another person, including settlements using payment instruments (payment cards, payment orders, etc.) and payment devices (cell phones, computers and other equipment); settlements using payment terminals; settlements by transferring funds directly to the bank account of the seller.

Thus, we can distinguish the following features of non-cash settlements:

- the existence of a special subject composition (banks and other credit organizations);
- the possibility of non-cash settlements with or without opening bank accounts (e.g., transferring funds directly to the seller's bank account);
- implementation of non-cash settlements in accordance with the demands of Azerbaijani legislation.

In our opinion, this definition of non-cash settlements is not complete and requires further elaboration and clarification, as it does not fully disclose their essence and features.

In the legal literature various points of view have been expressed on the issue of the concept of non-cash settlements and its content. Thus, the term “non-cash settlements” is usually used in two meanings, in a broad and in a narrow sense. In a broad sense, non-cash settlement is the process of payment (termination) of monetary obligations without the use of cash, through the so-called transfer of “non-cash funds” [5, p. 309; 8, p. 6; 20, p. 307].

However, such interpretation of non-cash settlements seems incorrect, because these are not different meanings of the same legal category, but different legal phenomena. Indeed, settlements in the broad sense of the word mean the actions of the debtor to fulfill a monetary obligation (either by cash or non-cash payments). There are different variations of funds transfer with direct involvement of cash. Thus, banks are entitled to debit funds from the bank accounts of payers with the following: crediting of funds to the bank accounts of recipients of funds; issuance of cash to individuals; increase in the balance of electronic funds of recipients of these funds.

In the legal literature in a narrow sense non-cash settlements are considered as legal relations, the prerequisite for the emergence of which is the right of the account holder's claim to the servicing bank about the transfer from the specified bank account of a certain amount of money on the specified details in a certain period of time and for a fee, as well as the corresponding to this right obligation of the bank [6, p. 279-280]. In that case, it concerns a special type of obligations - settlement legal relations. Their object is money in the payer's bank account and used as a means of payment. In this case, the obligatory participant in such relations, in addition to the payer is also the bank, with which the payer has concluded a bank account agreement [10, p. 484]. In addition, it should be taken into account that in this case, the participation of a bank or other credit organization is not decisive in making settlements by participants in civil legal relations. Thus, in cases when banks provide services to individuals who do not have their own bank account, for example, for transferring funds or accepting various payments (for example, in favor of public utilities), despite the direct participation of the bank in such relations, no special settlement legal relations arise either.

Therefore, the determining feature in distinguishing settlement legal relations as a special type of civil-law relations is not the participation of the bank in these relations, but the nature of its obligation [10, p. 484]. Taking into account the above-mentioned different approaches to this problem, in the legal literature authors offer different definitions of non-cash settlements in civil law.

Thus, M.S. Churakov understands under non-cash settlements a system of complex obligatory legal relations. This system is based approximately the account holder to the servicing bank on the transfer of funds to the account of the recipient and assuming in the end the transformation of the monetary obligation of the payer into the obligation of the bank serving the recipient of funds [7, p. 16]. As can be seen, he proposes to expand the list of features of non-cash settlements with the following: the absence of cash in non-cash settlements; recognition of “settlements” as a process of counting monetary obligations.

At the same time, it seems that the basis for the emergence of settlement legal relations is the customer's order to transfer funds, and in the case of collection - the order to write off funds from the account of the bank customer. This feature (availability of the bank customer's order to debit funds) is one of the key features in the definition of non-cash settlements, since unjustified debiting of funds by the bank unilaterally, without the consent of the customer (payer or recipient of funds) is not permitted.

A somewhat different position is held by K.B. Razdorozhny. He interprets the institution of non-cash settlements as a complex of financial-legal norms that regulate relations arising between a special subject (e.g., a credit organization), on the one hand, and its client on the movement of non-cash funds, carried out with the use of the banking payment system according to the rules of settlements established by the Central Bank of the country, in compliance with the imperatively established requirements of the legislation governing this type of activity [16, p. 112-113]. But in this case, it's hard to agree with that view. Because the author considers settlement relations from the point of view of financial law, ignoring the civil law aspect of settlement transactions.

The definition of non-cash settlements proposed by N.M. Aliyeva is also interesting. The definition of non-cash settlements proposed by N.M. Aliyeva is also interesting. Thus, in her opinion: "*Non-cash settlements are cash settlements in which funds are debited from the payer's account and credited to the beneficiary's account on the basis of settlement documents submitted to the bank*" [2, p. 135]. Such settlement documents include payment orders, letters of credit, settlements on collection, checks, payment cards, settlements in electronic form, etc. having a strictly defined form [17, p. 409]. In fact, V.V. Vityransky takes a similar position. In his opinion, under settlement legal relations should be understood obligatory relations arising between the account holder - payer and the bank in which his bank account is opened, as well as other banks involved in the implementation of the relevant banking operation. Except it, in connection with the execution of the account holder's order to transfer (receive) funds in the bank account, in the order of non-cash settlements [10, p. 485].

These definitions do not give rise to any remarks concerning its inconsistency with the legally established beginnings and principles of non-cash settlements. However, such definition requires some clarification and addition in terms of taking into account the key elements and features of the institution of non-cash settlements. Thus, debiting and crediting of funds is not the only action within the framework of non-cash settlements. In addition, the shortcoming of the above definition is the lack of an indication of the special subject composition. It is, on the one hand, a special subject (for example, a credit organization) and, on the other hand, its clients (individuals, legal entities, individual entrepreneurs, state bodies, etc.).

The analysis of legal doctrine and legislation has shown the absence of a comprehensive and complete definition of the concept of non-cash settlements.

Certainly, different interpretations and conceptions in legal science and doctrine of scientists are important for studying and clarifying the content of cashless settlements as an institute of civil law. However, they are able to form a scientific understanding of non-cash settlements. Along with this, as V.V. Agafonov notes, in the legal field, all definitions should have the character of formal definiteness, be clear and definite, as their key meaning is reduced to one thing - the legal formalization and regulation of the public will [1, p. 88]. In this regard, the development of a legal definition and its enshrinement at the legislative level seems to be a very important and actual task.

Determination or definition is a legal prescription reflecting the key features of a phenomenon, subject. This interpretation is widely spread in legal doctrine [1, p. 88; 7, p. 16; 11, p. 12; 14, p. 182].

VI. Legal nature of non-cash settlements

The question of the legal definition of non-cash settlements is directly connected to the determination of their legal nature. The position of the institute of settlement relations, including non-cash settlements in the structure of the Civil Code in the section of the law of obligations is not accidental. It emphasizes the obligatory nature of non-cash settlements and is verified by the existence of a number of circumstances.

First, under the bank account agreement, the bank shall be obliged to accept and credit funds received on the account opened to the account holder, execute the account holder's instructions on transfer and disbursement of respective amounts from the account and conduct other operations on the account (paragraph 1 of Art. 954 of the Civil Code).

In that case there is no actual transfer of money. The term "funds in the account" does not indicate the in rem nature of the relationship.

In practice, the fact of acceptance of funds by the bank from the client within the framework of bank account relations is certified by a record on the client's account. At the moment of transfer of funds, the client acquires the right to demand the bank to pay the respective amount of money.

Non-cash funds may be held in customer accounts opened both on the basis of a bank deposit agreement (Chapter 51 of the Civil Code) and a bank account agreement (Chapter 52 of the Civil Code).

Secondly, it is necessary to take into account the absolute nature of the legal relations of ownership. But the client's rights to his funds in bank accounts can be realized by appealing to the credit organization (bank). Such credit organization is an obliged party under a bank account or bank deposit agreement. This circumstance is the main criterion for distinguishing obligatory legal relations. Thus, it is impossible to identify non-cash funds with things. The realization of the subjective right of demand for cash disbursement is possible only with the help of involvement of third parties, specifically banks, in the legal relations of non-cash settlements. Banks serve the debtor and creditor of a monetary obligation, i.e. they perform certain actions. However, third parties are not obliged to perform any act to exercise the law of property. On the contrary, the owner is entitled to demand that third parties do not violate his absolute rights.

Thirdly, an essential feature of the bank's obligation under the bank account agreement is its abstract nature. The bank's monetary obligations under the bank account agreement are abstracts. Indeed, the amount of the client's debt claim to the bank is expressed only in the form of a certain amount of money. At the same time, the grounds for its occurrence are not specified. The use of funds on accounts for settlement requires that the new acquirer of rights of claim to the bank be free from the objections that the bank had to the original client. Therefore, the transferred claim to the money must be abstract in nature.

Fourthly, the obligatory nature of relations between the bank and the client is also expressed in the protection of the rights of clients of credit organizations. They can only file claims for protection of the violated right against the credit organization as a debtor. In contrast, in rem rights are protected by filing a claim against any third parties as infringers of the right. In addition, in relation to funds it is impossible to apply such method of protection of proprietary rights as a vindication suit.

Fifthly, the procedure of recording the bank's property excludes the possibility of recognizing the in rem nature of performance of obligations on non-cash transfer of funds. The account of a credit organization reflects only the balance of temporarily free funds, and non-cash funds acting as assets of a credit organization are anonymized. Besides this, they acquire the form of either the right of demands of the credit organization to other persons or a part of the assets of the credit organization itself.

Sixth, by opening a bank account, the owner of the account transfers his funds, as well as the funds that will be transferred into his account, to the full disposal of the bank. Clearly, the right of the bank to use the funds in the client's account for its own purposes (clause 2 of Article 954 of the Civil Code) excludes the possibility of returning the same banknotes to him.

This circumstance can only be explained from the standpoint of the law of obligations. In return, the account holder receives the rights of claim against the bank regarding the execution of various banking operations by the bank in the interests of the customer and on his/her instructions. This also includes bank transfers of funds. The amount of the noted rights of claim of the account holder to the bank shall be determined by the amount of funds balances on his account.

Seventh, the rights of claim to the bank arising from the bank account agreement (or bank deposit agreement), as well as any other rights of claim, may be sold, transferred or ceded on a reimbursable basis in accordance with the norms of civil legislation.

The concept of the obligatory-legal nature of the settlement relations of the bank and the client allows to solve the problem of differentiation and classification of monetary funds. They can be divided into cash in the correspondent account in the bank, the credit organization's own funds and funds belonging to the bank's clients.

This problem is particularly acute in case of arrest of funds on the correspondent account or foreclosure on them. It should be noted that, despite the close convergence of rights in rem and rights of obligation, there is a significant difference between them. Thus, the subject of property legal relations are real things, including the exclusive right to produce them. But the subject of obligatory-legal relations are the actions of persons. These actions can also be performed in relation to property in the form of valuables. However, this does not change the legal nature of obligatory-legal relations. The essential differences between the varieties of objects of civil rights are manifested in the existence of separate types of civil law contracts.

All the above arguments support the concept that funds in bank accounts are considered as an object of obligatory rights. In essence, they are rights of demand or in the form of transfer or disbursement of these funds. In non-cash payments, property is used as a means of payment in the form of an abstract, unconditional and not time-limited right of demand to the bank to issue (pay) on first demand money. By its legal nature, "non-cash money" is a right of claim, in particular the right of claim of clients (holders of bank deposits and accounts) against the banks servicing them. In non-cash payments, the means of payment are not money, but claim rights to the bank. In civil law deals, a creditor under a monetary obligation in exchange for goods transferred to the debtor, work performed for him or services rendered to him in non-cash settlements receives from the debtor not money, but property rights of claim to the bank servicing the debtor. These property demands are converted into the rights of demands to the bank servicing the creditor. As a result of non-cash settlements, funds on the client's account decrease with a simultaneous increase in the creditor's demand rights to the servicing bank. In other words, in non-cash settlements, the creditor's assets are increased not by money received from the debtor, but by such type of assets as property rights of claim.

VII. Conclusion

Based on the analysis of the above-mentioned interpretations of the concept of non-cash settlements in the field of civil law, it is possible to identify the key features of non-cash settlements, which should be taken into account when forming its definition. Such features may include:

a) the presence of a special subject composition (banks and other credit organizations);

b) the possibility of non-cash settlements with or without opening bank accounts;

c) non-cash settlements in accordance with the requirements of the legislation;

d) the presence of an order of the bank customer (payer or recipient of funds;

e) debiting of funds;

f) compliance of settlement documents submitted to the bank with the selected form of settlements.

Speaking about the current stage of development of the system of non-cash settlements, it is necessary to note the fact that non-cash settlements have moved to a new stage of development and are often made by means of "electronic payments" [13, p. 29-30].

Thus, there appear new types of non-cash settlements, significantly different from the previously existing ones. Such electronic payment systems as Apple Pay (allowing the use of Apple devices such as iPhone, Apple Watch, iPad and Mac instead of physical bank cards) make it possible to make non-cash payments using the Internet. However, at the same time, the use of such electronic payments does not change the content and essence of non-cash payments.

To my mind, it is possible to clarify the definition of non-cash settlements in civil law and formulate it as follows. "Non-cash settlements are settlements made by transferring funds by special entities (banks or other credit organizations) from the bank account of one person to the bank account of another person on the basis of legal facts (transaction, etc.), and at the client's order, including settlements by means of payment instruments (payment cards, payment orders, etc.) and devices (payment terminals, cell phones, computers, tablets, watches, etc.)".

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