

CONTRACT FREEDOM PRINCIPLE: A RESTRICTIVE CONTEXT

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ABSTRACT

The article analyzed the principle of contract freedom in a restrictive context. The authors argued the objectivity and the substantiation of contract freedom principle limitation in modern social-economic conditions. The types of this principle limitations were singled out and characterized. A comparative legal analysis of contract freedom limitation principle was performed in the framework of civil legislation from the post-Soviet space countries.

Keywords: civil law, the principle of contract freedom, limitation of contract freedom principle, civil legislation of post-Soviet countries, dispositive norms, mandatory norms.

INTRODUCTION

For decades, the principle of a contract freedom was absent in the civil law of the former USSR republics. Accordingly, there were no significant and visible scientific studies on this issue. The reason for this lies in the specifics of the Soviet state economic system with its inherent planning and a top-down character of economic management. Let us note here that in recent years the principle of a contract freedom was developed by Russian civil scholars [1, 2].

In contrast to the Soviet science of civil law, the principle of a contract freedom had a particular attention of a foreign doctrine [3, 4, 5, 6, 7]. They studied its essence, the change in the scope of contractual freedom, the conjugation with the notion of "will autonomy", the relationship of "imperative" and "dispositive" norms that determine the possibility of contract conditions (content) development. Let us also note that the peculiarity of a contract freedom principle study in the foreign civil doctrine was the study of the problem of freedom concerning an employment contract conclusion in addition to civil contracts. At the same time, there were no unity of views concerning the limitations of contract freedom principle possibility.

Taking into account that the development of legislation in the republics of the post-Soviet space (Azerbaijan, Armenia, Belarus, Georgia, Latvia, Lithuania, Kyrgyzstan, Kazakhstan, Moldova, Tajikistan, Ukraine, Uzbekistan, Turkmenistan, Estonia) is influenced by external legal values, the study of the issue concerning the limitations of freedom principle is important and timely, taking into account the traditions of the Western legal order. At that, it should be taken into account that the approaches of the lawmakers from the post-Soviet space states to an understanding of a contract freedom principle and its limitations vary considerably, taking into account Western legal traditions and this fact can not but affect the research problem.

METHODOLOGY

Various general scientific methods and the methods of logical cognition were used in the work: analysis and synthesis, systemic, functional and formal-logical approaches. The development of conclusions was facilitated by the application of formal-legal and comparative-legal methods.

DISCUSSION AND RESULTS

The analysis of civil codes (or their analogues) of 15 countries of the post-Soviet space showed that only

three of them - the Latvian, Lithuanian and Estonian republics - do not contain any special provisions on a contract freedom, which does not mean its denial. A significant part of the post-Soviet space states provide the principle of a contract freedom directly as one of the main principles of civil legal regulation and regulate it with varying degrees of detail in their civil codes (Article 421 - Russia, Article 330 - Azerbaijan, Article 437 - Armenia, Art. 391 - Belarus, Article 319 - Georgia, Article 382 - Kyrgyzstan, Article 380 - Kazakhstan, Article 667 - Moldova, Article 453 - Tajikistan, Article 627 - Ukraine, Article 354 - Uzbekistan, Article 333 - Turkmenistan).

However, an indication of a contract freedom does not mean its infinity. In Western jurisprudence this fact is not disputed. In this regard, it seems important to consider those most significant options for contract freedom restriction, which were perceived by the legislation of the post-Soviet states.

Most of the civil laws of post-Soviet countries provide the provision according to which individuals and legal entities can freely enter into contracts, i.e. the thing is about the absoluteness of contractual freedom. However, the legislation of several countries (Georgia, Moldova, Ukraine) emphasizes that this freedom is limited by the limits established by law. At that almost all legislators are unanimous that the compulsion of a contract conclusion is not allowed (Azerbaijan, Armenia, Kyrgyzstan, Kazakhstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan), except for cases when the obligation to conclude a contract is provided by law or by a voluntarily taken obligation. Georgia and Ukraine do not specify the impossibility of compelling to a contract conclusion a treaty in connection with a contract freedom.

The possibility of a contract conclusion is an element of a person civil legal capacity. Civil capacity has a sign of abstractness, the essence of which lies in the fact that legal capacity is not a set of specific rights, but only provides an opportunity for a citizen to acquire any civil rights. Thus, a citizen decides independently whether to conclude a contract with him or not. The autonomy of his will is represented in this. In general, the abovementioned is true for a legal entity.

At the same time, the civil laws of the studied group of countries allow for some compulsion to a contract conclusion in two cases: if this possibility is provided by law; if such an opportunity arises from a voluntary commitment.

In our opinion the most striking example of compulsion to a contract conclusion, established by law, is the compulsion to conclude a public contract. Article 426 of the Civil Code of Russia establishes that a public contract is the contract concluded by a person who carries out entrepreneurial or other income-producing activities and establishes its obligation to sell goods, perform works or provide services that such a person should exercise by the nature of his activities in relation to everyone who contacts him (retail, public transport, communications, energy supply, medical, hotel services, etc.). The refusal to conclude a public contract is not allowed according to a general rule. If a refusal is unreasonable, the other party has the right to demand compulsion for its conclusion (Paragraph 3, Clause 3, Article 426, Clause 4, Article 445 of the Civil Code of Russia).

In its turn, the example of compulsion to a contract conclusion because of the voluntariness of an undertaken obligation is the conclusion of a main contract in view of evasion from its conclusion by the party that undertook this obligation by virtue of a preliminary contract.

Another and, in our opinion, a significant layer of restrictions is established in relation to the freedom of conditions determination during a contract conclusion. The terms of a contract, which form its content, are established on the basis of dispositive and mandatory rules contained in civil law. Legislators used these terms directly in the civil codes of Azerbaijan (Article 390), Armenia (Articles 437 and 438), Kyrgyzstan (Articles 382 and 383), Kazakhstan (Articles 382 and 383) and Tajikistan (art. 453 and 454). The civil codes of Belarus and Uzbekistan contain only the term "dispositive norm". Such terms are not contained in the civil codes of other post-Soviet countries concerning the characterization of a contract freedom.

However, according to M.W. Hesselink, this division has deep historical roots and is generally characteristic of European law (Germany, Italy, France) [8]. The problem of these provisions use about the imperative and the dispositive norm is that it is rather difficult to determine whether a norm is mandatory or dispositive one in law enforcement practice.

In this regard, for example, the Plenum of the Supreme Arbitration Court of Russia in its Resolution No. 16 "About contract freedom and its limits" issued on 14 March, 2014 gave the following explanation: "The rule defining the rights and the obligations of a contract parties is mandatory one if it contains an explicitly pronounced prohibition on the establishment of an agreement provision established by the agreement of parties different from the rule provided by this norm (for example, it provides that such an agreement is null and void, prohibited or not permitted, or indicates the right of the parties to withdraw from the rule contained in the norm only in one direction or another, or the named prohibition is expressed in the text of regulations explicitly)".

The analysis of this provision allows us to conclude that the attempt to formulate a definition of an imperative norm can not be considered as a successful one. This is conditioned, above all, by the presence of the wording that "the prohibition is explicitly expressed in the text of the norm otherwise". It seems that this provision contains assessment concepts, which make it "rubber" for the purposes of interpretation. Thus, the court can limit freedom of contract terms determination by parties through the indication that they used a dispositive norm, while they should have used an imperative norm. This situation is typical of other post-Soviet countries, the civil law of which contains the notion of "imperative norm".

Arguing further, I would like to draw attention to the issue of a contract freedom principle limitation in order to protect its weak side. This problem was studied thoroughly in foreign legal science. Thus, C. Edwards notes that this trend originated in the XIX-th century and exists as a form of discrimination and in the current market conditions [9]. Besides, E. Hondius notes that in recent years Europe has the extraction of consumer contracts beyond the scope of civil laws, which certainly indicates the reduction of liberal principles in European civil law [10].

Such a situation is not typical for the civil legislation of the post-Soviet countries. Here I would like to draw attention to the provision contained in paragraph 3, Art. 319 of the Civil Code of Georgia: persons who purchase or use property and services not for the purposes of entrepreneurship or for the satisfaction of their vital interests can not be unreasonably refused to enter into a contract if an other party acts within the limits of its business activity. This approach is typical for the civil legislation of all countries of the post-Soviet space, which guarantees preferential protection to consumers as the weakest side in relations with an entrepreneur.

CONCLUSIONS

The majority of laws and orders of post-Soviet countries accepted the principle of contract freedom as one of the fundamental principle of private law. This is manifested in the allocation of special provisions devoted to the principle of a contract freedom.

Given an ambiguous approach to the understanding and the content of a contract freedom principle in the activities of law enforcement agencies, the lawmakers in many countries of the post-Soviet space faced the problem of defining the limits of this principle implementation in their law enforcement activities. In particular, this is expressed in the difficulty of criteria establishment for the interpretation of "mandatory rule" notion, which is extremely important in the development of a contract contents by the parties.

We believe that in relation to the principle of a contract freedom, two main limitations can be singled out: the possibility of compelling to a contract conclusion; the restriction of condition creation freedom during a contract conclusion.

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