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CIVIL LAW CONTRACT AS A UNIVERSAL TOOL FOR SETTLING PRIVATE RELATIONS

ЦИВІЛЬНО-ПРАВОВИЙ ДОГОВІР ЯК УНІВЕРСАЛЬНИЙ ІНСТРУМЕНТ ВРЕГУЛЮВАННЯ ПРИВАТНИХ ВІДНОСИН

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Contract law is one of the main institutions of civil law and a regulator of a huge range of social relations. The participants of which are the vast majority of individuals and legal entities, who sometimes do not even realize it. The purpose of concluding a civil law contract is to regulate public relations between private participants in public relations: for the exchange of material goods, performance of work, provision of services, etc. In this case, as a result of such interaction between the parties there is a contractual relationship – a relationship that manifests itself in the form of mutual rights and obligations. Contract law, as an institution of civil law, is characterized by certain fundamental principles that enable it to function as a holistic system aimed at effective regulation of various social relations. One of them is the principle of freedom of contract. It means that individuals, as subjects of legal relations, have the right to enter into contracts at their own discretion, i.e., according to their own beliefs to choose contractors, contract terms, etc. In this way, the inner will of the subjects is manifested, and the concluded contract is the result of their free will. Compulsory conclusion of a contract is not allowed, except in cases expressly provided by law. Legal protection does not apply to cases where the contract is concluded under duress, if there is a threat to his/her life or health, or the life or health of his/her family and friends, if the contract was concluded as a result of fraud. In this case, we are talking about contracts with defects of will, that is, when the formally expressed will of the subject does not correspond to its internal one. This is a violation of a person's civil rights. However, the law may provide for cases when in order to protect public order, protect the weak side of the contract from abuse by the strong party, which is in a deliberately more advantageous negotiating position, etc., set certain restrictions on the freedom of contract.

The author of the article concludes that the contract plays a key role in settling private relations. In turn, the principle of freedom of contract permeates the entire system of contract law and is manifested in the recognition of the contract as the main form of mediation of economic relations of participants in civil relations, freedom of contract allows them to choose or create their own model of contractual relations.

Key words: civil law contract, contract law, private law, Civil Code, the principle of freedom of contract.

Договірне право, як один із основних інститутів права цивільного, є регулятором величезного кола суспільних відносин. Учасниками цих відносин виступає переважна більшість фізичних і юридичних осіб, які інколи навіть не усвідомлюють цього. Мета укладення цивільно-правового договору – врегулювання суспільних відносин між приватними учасниками суспільних відносин: для обміну матеріальними благами, виконання роботи, надання послуг тощо. При цьому, в результаті такої взаємодії між суб'єктами виникає договірне правовідношення – зв'язок, який проявляється у вигляді взаємних прав та обов'язків. Договірному праву, як інституту цивільного права, притаманні певні фундаментальні принципи, які дають можливість йому функціонувати як цілісній системі, спрямованій на ефективне регулювання різноманітних суспільних відносин. Одним із них є принцип свободи договору. Він означає, що особи, як суб'єкти правовідносин, наділені правом укладати договори на власний розсуд, тобто, відповідно до власних переконань обирати контрагентів, умови договору тощо. Таким чином проявляється внутрішня воля суб'єктів, а укладений договір – це результат їхнього вільного волевиявлення. Примусове укладення договору не допускається, крім випадків, прямо передбачених законом. Не поширюється правова охорона й на випадки, якщо договір укладено під примусом, якщо існує загроза її життю чи здоров'ю, або життю чи здоров'ю її рідних і близьких, якщо договір укладено внаслідок обману або шахрайства. У цьому випадку йдеться про договори з дефектами волі, тобто, коли формально виражена воля суб'єкта не відповідає її внутрішній. Це є порушенням цивільних прав особи. Проте в законі можуть бути передбачені випадки, коли з метою охорони суспільного правопорядку, захисту слабкої сторони договору від зловживань з боку сильної сторони, яка перебуває в завідомо більш вигідній переговірній позиції тощо, встановлюються певні обмеження свободи договору.

Автор статті доходить висновку, що договір відіграє ключову роль для врегулювання приватних відносин. У свою чергу принцип свободи договору пронизує всю систему договірного права та проявляється у визнанні договору основною формою опосередкування економічних зв'язків учасників цивільно-правових відносин, свобода договору дозволяє їм на власний розсуд вибирати чи створювати власну модель договірних відносин і самостійно вирішувати питання про укладення договору.

Ключові слова: цивільно-правовий договір, договірне право, приватне право, Цивільний кодекс, принцип свободи договору.

Private law is a system of legal rules regulaing the various social relations between equal subjects. Private law differs significantly from public law, which is aimed primarily at regulating public relations. First of all, it is a method of legal regulation: dispositive for private law and imperative for public. Accordingly, the dispositive method involves enabling the subject to independently influence social relations. The basic tool of such regulation is a civil contract. Thus, the importance of private law and contract in particular for each individual is difficult to overestimate.

The methodological basis of the study consists of philosophical, general scientific and special scientific methods. This approach is also used to demonstrate the link between the implementation of the principle of freedom of contract in practice and the factors that systematically influence it. For example, this is demonstrated in the main part of the text on the People's Republic of China and the work of its judiciary, the role of central government in this.

The application of the formal-legal method has been useful in considering the limits of freedom of contract as its constitutive features. For example, this is done in the main part of the work in the context of the study of civil law of Ukraine and China.

The hermeneutic method has been used to interpret doctrinal provisions, in particular on approaches to restricting the freedom of contract (beginning of the main part of the article), the positions of scholars, such as European, Ukrainian and Chinese legal experts. The historical-legal method showed, for example, how the doctrine of German contract law was formed in terms of the principle of freedom of contract, and demonstrated how the law of the People's Republic of China on contract law changed, in particular whether it contained a reference to the principle of freedom of contract.

Methods of analysis, synthesis, generalization are used in the study of the concepts of freedom of contract, its restrictions and related legal constructions. Generalizations are used to draw conclusions and briefly describe legal phenomena. For example, the analysis is used in the introductory part to describe the general features of freedom of contract in the context of contract law, related issues, conflicts of public and private interests. Synthesis and generalization can be found at the end of the work, especially in the conclusions.

According to Kessler, common law lawyers created a strong mechanism out of contract law that came to help maintain a free market economy based on freedom of enterprise. He notes that the classical theory of treaties in both civil law and common law countries has found its most vivid expression in the idea of freedom of contract. Accordingly, the researcher indicates that the conditions not provided for in the contract are not enforceable. The author states that contract and coercion, from this point of view, are opposite concepts. In addition, the terms of the agreement to be enforced must be clear enough for the parties to know what to rely on and for the courts to determine when the enforcement or breach occurred and what the specific remedy should be [1].

One of the basic principles on which contract law is based is the principle of freedom of contract. It can be said that in this way the inner will of the subjects is manifested, and the concluded contract is the result of their free will. Compulsory conclusion of a contract, when a person is under pressure from a subject, when there is a threat to his life or health, or the life or health of his relatives and friends, when the contract is concluded as a result of fraud or fraud, is a phenomenon undesirable, so the protection of the law does not apply to such cases. In such a situation, it is advisable to talk about contracts with defects of will, that is, when the formally expressed will of the subject does not correspond to its internal. In this case, the civil rights of the person are violated. However, there are exceptions when, in order to protect public order / public interests (morals), to protect the weak side of the contract from abuse by the strong party, which is in a knowingly advantageous negotiating position, certain restrictions on the freedom of the contract are set. This limitation may manifest itself in the form of imperative or dispositive norms of law, as well as in the form of judicial discretion: in the case of non-obvious settlement of a contract by law, the court's powers include whether to apply, for example, its reality, to interpret or change its conditions, etc. This situation often arises not only when the agreement is not clearly regulated by law, but also when the parties challenge the fairness of the terms of the agreement, for example, if under a non-equivalent loan agreement the bank reserves the right to increase interest rates unilaterally in accordance with the central rate. national bank, but when such a rate is reduced, its reduction under the contract is possible only after approval by the creditor. In this case, when considering a claim to change the terms of the contract, the court may declare the terms of such an agreement unfair and make appropriate changes to it. Accordingly, this is a separate example of a restriction on the freedom of contract in the event of a disproportionate negotiating position between the two parties, where the court intervenes to restore balance and protect the weaker from the abuse of the strong.

Therefore, in accordance with the principle of freedom of contract, the parties have the right to enter into a contract on terms that they themselves determine as necessary and profitable. The design of the coincidence of their expression of will implies that any contract is mutually beneficial. In this case, the powers of the parties include free coordination of the structure, type, conditions, terms and place of performance of the contract. That is, theoretically, for the principle of freedom of contract, the real condition is «everything is possible.» However, it is obvious that among the variety of consequences of such unlimited expression of will, negative ones would inevitably appear, as there would be, in particular, arbitrariness, abuse and illegal actions, because in the terms of the contract anything could be prescribed, including numbers aimed at undermining law and order, harming society, the state, individuals, etc. Therefore, the consequences of such unrestricted expression of will are dangerous and undesirable, so they must be rationally and fairly limited. Accordingly, a reasonable legal construction for the principle of freedom of contract should be defined as «anything that is not prohibited is possible». Thus, the central problem for jurisprudence in this context is to determine reasonable and fair degrees of freedom, which would be designed to ensure a balance of private and public interests with the maximum possible free expression of the will of the subjects while maintaining public order.

In this sense, imperative are the rules of law that explicitly prohibit certain actions, such as concluding a contract to harm the public interest, morals, life or health of individuals, and so on.Accordingly, contracts that violate the mandatory rules of law are considered null and void – they have no legal force. In contrast, invalid contracts may have legal force until their invalidity is recognized in court. Contract law is also characterized by dispositive rules, which do not contain direct prohibitions, but play a complementary role, for example, in the event that the parties did not provide for something in the contract.

The construction «everything is possible that is not forbidden» provides different levels of resistance to the illegal conditions of the contract. The basic level implies that in accordance with the mandatory rules of law, all the terms of the contract that violate them are null and void. For example, if the contract states that the party guilty of breach of obligation is released from liability under the contract, that part of the contract is void. However, the legislator cannot predict in advance and describe in detail what exactly cannot be done when concluding a contract, so in this case the principle of legal economy applies – legal regulation should consist of a minimum number of mechanisms that will ensure maximum efficiency, so the task for the legislator is not to provide everything in detail, but to create conditions for effective and fair legal regulation, using general principles. This means that even with the fluidity of public ideas about morality, about the proper and permissible; with the emergence of new types of contracts, etc., the law will stand on a solid foundation that can regulate contract law and ensure freedom of contract.

With the development of the information society, unnamed contracts are beginning to play an increasingly important role. At the same time, it becomes inevitable to return to the theoretical foundations of freedom of contract and a fair definition of its limits. Thus, the freedom of contract implies that, for example, you can not sell yourself into slavery, guided by the freedom to enter into any contract, because in this case a person refuses freedom, and the principle of freedom can not require giving a person the right not to be free. In contrast, as well as the principles of inalienable rights to life, liberty and property proposed by Locke (2001), Nozick (2008) argued that consistent application of the principles of self-ownership and non-aggressiveness would allow the application of voluntary enslavement contracts between adults. Thus, the freedom of contract in its concept is taken to the extreme, where an adult who belongs to himself and endowed with freedom has the right to voluntarily sell himself into slavery [2].

Conceptual approaches to addressing the issue of restricting the freedom of contract, which serves as a marker of the distinction between private and public, can be described by three models: paternalistic, social and perfectionist (Marella, 2006). These models are gradual and contain different degrees of freedom. Thus, if the paternalistic model indicates that the restriction of freedom of contract is the exception rather than the rule, and is carried out only when there is a threat to the public interest or the individual, for the social model restriction of freedom of contract is the rule to achieve social justice. This model is based on the fact that the classical liberal relations of private law are not able to provide a balance between strengths and weaknesses, which always exist, because there is inequality. Therefore, fair rules must be established for all, which will lead to a balance of power and be able to ensure fundamental human rights. The perfectionist model goes further: unlike the previous two, here

the interests of individuals or groups must be subject to a certain abstract ideal, ie, if, for example, the paternalistic model restricts freedom of contract due to certain misconceptions of the person, ie, the state protects public order and person, as if the state knows better (hence the name of the model from the Latin pater – father), then for the perfectionist model such ideas do not matter – all of them, not some of them, are considered false because they have a historical or cultural background, therefore, they are relative. In contrast, there is a certain abstract ideal ethical norm [3]. An example of this is the restriction of freedom of contract for ethical reasons, such as the protection of honor and dignity [4].

The jurisprudence of Western countries with a liberal market economy derived the principle of freedom of contract, as well as the principle of freedom of property, from a single principle of individual freedom [5]. Despite this, in the early twentieth century. a characteristic feature is the intervention of the state in the process of concluding agreements, as well as the spread of the so-called «formal law» of monopoly associations. As a result, accession agreements are being used. Important for the concept of freedom of contract is the thesis that the contract is primarily an agreement of equal persons endowed with property independence (ibid). The essence of the principle of freedom of contract is that a person freely and voluntarily enters into a contractual relationship; independently chooses a counterparty; independently determines the type and structure of the contractual relationship. Accordingly, from a philosophical point of view, the principle of freedom of contract implies the coincidence of the will and the inner will of the person to commit a transaction (conclusion of a contract). Therefore, contracts with defects of will which have been concluded under the influence of violence, threats or fraud should not be protected by law and should therefore be declared invalid. Individual freedom to enter into contracts is not unlimited, so the mandatory rules established by the state in the form of law are designed to protect the public interests and rights of consumers, especially in vulnerable areas of the economy, such as natural monopolies, etc.

Germany. Freedom of contract as a constitutional principle in German law

In German legal science, freedom of contract is now perceived as the most significant manifestation of private autonomy and a guarantee of personal freedom. The German Constitutional Court has long recognized freedom of contract as a constitutional principle. Recently, in one form or another (though not without some hesitation) the constitutional status of the principle of freedom of contract has been recognized by the courts of many other European countries (for example, Italy, France, etc.). However, there are opinions according to which German contract law has been controlled by constitutional law, in particular, subject to the rights and freedoms enshrined in constitutional law. Accordingly, we are talking about the decline of private law as an autonomous system and the influence of political and legal factors, especially constitutional values, principles and rights, which are the object of study of works in private and constitutional law.

Ukraine. Freedom of contract in national law

The content of the principle of freedom of contract is disclosed in Art. 627 of the Civil Code of Ukraine. It is one of the fundamental principles of the civil law principle of dispositiveness, through which subjects of civil law acquire and exercise their civil rights freely at their discretion (Part 1 of Article 12 of the Civil Code of Ukraine). Between the principle of freedom of contract, proclaimed in Art. 3 and defined in Art. 627 of the Civil Code of Ukraine, and the presumption of dispositive civil law, which as a general rule is enshrined in Part 3 of Art. 6 of the Civil Code of Ukraine, there is a close connection [5]. It is that the freedom of contract is based on freedom of expression, and the latter, in turn, is based on freedom of will, which is realized through the dispositive rules of civil law. Dispositiveness is understood as the legal freedom of a subject of civil legal relations based on the norms of this branch of law to exercise his subjective rights at his own discretion [5; 6; 7]. Accordingly, the legal means of enshrining the freedom of contract are traditionally understood as norms-principles that proclaim freedom of contract, freedom of entrepreneurial activity and dispositive norms of law, which embody this principle (ibid). Among those enshrined in law in Art. 627 of the Civil Code restrictions on the freedom of contract can be listed: other rules of civil law, customs of business, the requirements of reasonableness and fairness.

According to paragraph 5.33 of the Concept of updating the Civil Code of Ukraine, it is proposed to expand the principle of freedom of contract in connection with the actualization of individual initiative in contractual relations, shifting the emphasis from regulatory to individual regulation. Despite the fact that the authors of the Concept do not detail this provision, the analysis of the content of the document shows that first of all the expansion of contract freedom will affect unnamed contracts, as well as the latest contractual relations, which are gaining popularity under the influence of scientific and technological development. It is also proposed to extend the freedom of contract in respect of inheritance contracts (ibid).

China. Is there freedom of contract in the People's Republic of China? It is in these countries that the basis for the prosperity of trade and entrepreneurship is the free market and dispositiveness in the exchange of goods, the conclusion of agreements and the obligation to enforce them. At the same time, the basic principles of the market and civil law, in particular contract law, were not something static, so their formation depended on many factors: history, culture, legal doctrine, which was formed by educated people – philosophers and jurists; even the geographical factors that influenced the means of production [8]. Accordingly, we can say that the dominance of one or another form of contract law for a country is due to a more complex concept of historical and socio-economic development and the current system of this country. It is all the more interesting to consider the examples of states where contract law and freedom of contract, under the influence of various factors, have taken a different path from that prevailing in Western democracies. One such country is China. Prior to the adoption of the unified act – Chinese Contract Law – on March 15, 1999, there were three documents in force in China: Economic Contract Law of 1981, Foreign Economic Contact Law of 1985, and Technology Contract Law of 1987, which caused contradictions in the regulation of contract law. They could not boast that they explicitly provided for freedom of contract in their rules, because the planned economy, in essence, left little room for free will of the parties.

It was inconceivable for the average Chinese to enter into a contractual relationship, enjoying the same degree of freedom of contract that was understood to be appropriate in European countries, and even more so in the United States. Deng Xiaoping's economic reforms have diminished the role of state planning as China approaches market economy standards. This is also reflected in the provisions of the Chinese Contract Law of 1999. Accordingly, the state plan is mentioned only in Article 38, according to which the state may issue a mandatory plan or state purchase order. Thus, the purpose of Chinese Contract Law was to adapt Chinese realities to international standards and thus modernize the Chinese economy and law. Nevertheless, the very concept of freedom of contract was not included in Chinese Contract Law, which became the subject of discussion in scientific circles.

One of the arguments was that in order to build a competitive and efficient economy, the autonomy of the parties and the freedom to decide on entering into contractual relations are necessary. Although the Chinese Contract Law does not explicitly provide for the principle of freedom

of contract, it does not follow that citizens are not free to enter into contracts. Thus, freedom of contract under the Chinese version can be composed of the following principles contained in Chinese Contract Law: equality (Article 3), voluntariness (Article 4) and binding force of contracts (plainly, pacta sunt servanda) (Article 8) [9]. Restrictions on the exercise of freedom of contract provided for in these principles, according to Article 1 of the Chinese Contract Law, are always subject to a collective goal – the protection of China's social and economic system, socialist modernization [10].

Thus, we see that the Chinese model, despite the absence of the principle of freedom of contract officially enshrined in law, is characterized by the use of such elements that are common to European law [11]. Therefore, here the distinction between these jurisdictions lies rather in the nature and limits of the restrictions applied to the expression of the will of the parties to the treaty, as well as in understanding the concepts of autonomy of will and lawful interference. At the same time, it should be noted that the open wording of norms, their certain declarativeness, pose a significant problem for fair enforcement. The courts, under pressure from the Chinese Communist Party, can safely restrict freedom of contract by reinterpreting contractual positions or terminating the contract, and in the absence of a coherent and effective legal policy, extrajudicial principles play an important role, negatively affecting the rule of law (Peerenboom, 2002).

Conclusion. Thus, the treaty acts as a universal regulator of social relations and mediates the basic principles of freedom and justice for modern man. Contractors under the contract themselves form the terms of the contract on the basis of the principle of freedom of contract. At the same time, the state may impose certain restrictions that are designed to protect the public interest, such as public order. The principle of freedom of contract is key to private law, but it may manifest itself somewhat differently in the laws of individual countries. At the same time, such concepts as justice, good faith, reasonableness remain equally clear to each legal order.

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