Вестник Пермского Университета. Юридические науки. – 2016. – Выпуск 3 (33). – С. 281–285.

UDC 347.1

THE PRINCIPLE OF FREEDOM OF CONTRACT IN THE CIVIL LAW OF THE REPUBLIC OF BELARUS

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Web of Science Researcher ID: D-8364-2016

Articles in the database «Scopus»/«Web of Science»:

DOI: 10.5829/idosi.wasj.2013.24.01.13176

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Annotation: ***Introduction:*** *as the starting position, the author of the article puts forward a thesis that the principle of freedom of contract secured among fundamental principles of the civil legislation of the Republic of Belarus is not fully implemented in the current legislation.* ***Purpose:*** *identify legal rules incoherent with the requirements of the principle of freedom of contract and work out proposals for their correction.* ***Methods:*** *The methodological basis of the research is a set of universal, general scientific and specific scientific methods of cognition. The leading role for the purposes of this research is assigned to analytical, critical and systematic methods, methods of analysis and synthesis, abstraction and concretization.* ***Results:*** *The author proves that the principle of freedom of contract is not closed within the scope of law of obligation. Being a fundamental principle of civil legislation, it extends to its whole array, its manifestations being found in all branches of civil law. One should not limit the principle of freedom of contract to the freedom of entering into a contract only, because freedom of contract manifests itself at all stages of contractual relations until termination thereof. So far as the principle of freedom of contract is a base for civil law regulating in relation to rules of contract law, including the regulation on freedom of contract, the author suggests distinguishing between restriction of freedom of contract as a principle, and restriction of certain elements of freedom of contracting parties.* ***Conclusion:*** *Freedom of contract, as any freedom, should obtain guarantees. That is why it is essential for its limits to be set under the law only with the observance of balance between private and public interests.*

Key words: civil law, principles, contract, freedom of contract, legal rules, restriction of principles, mixed contracts, non-defined contracts.

Introduction. The Civil Code of the Republic f Belarus (hereinafter referred to as the CC) first mentions the principle of freedom of contract among the fundamental principles of civil law[1]. Since the principle of freedom of contract is inherent in the countries with market economy only, its statutory determination has marked beginning of a new phase of development for the Belarusian civil legislation and become testimony of its progressiveness. At the same time, legislators have faced a significant challenge – to bring the law in line with the declared principle. Regretfully, we have to state that no tangible success has been reached in this task. It is still not uncommon for this principle to be ignored when working out certain normative legal acts, which results in controversies between the requirements of the principle and the content of certain legal rules. Such "flawed" regulations can be found in abundance not only in civil legislation, but also in the text of the CC itself.

The main part. The primary purpose of a contract is to be an instrument of the most effective organization of public relations. "A contract is a binding agreement between two or more parties that usually results in some type of performance. Without doubt, trade and commerce could not thrive if freely made agreements were not normally carried out. Contract can be viewed as a method in which men bargaining with one another can make sure that their promises will last longer than their changeable states of mind" [1]. Under market conditions, regulation by contract becomes an important independent legal way of organization of economic actors' relationship existing alongside with normative and legal regulation. As for the focus of principle of freedom of contract, it is intended to stimulate contract activity of entities of civil life enabling them to define the strategy of their behavior in civil life and, in particular, define the terms and the future of the contracts concluded by them. Thus, freedom of contract if a socially significant phenomenon, because it is a prerequisite for development of entrepreneurship, it facilitates new economic ties and fosters conquering of new markets, identifying new ways to meet societal needs. As E.A. Farnsworth notices "From a utilitarian point of view, freedom of contract maximized the welfare of the parties and therefore the good of society as a whole. From a libertarian point of view, it accords to individuals a sphere of influence in which they can act freely" [2, p. 20].

Based on the content analysis of the principle of freedom of contract, freedom in civil law of the Republic of Belarus has been reduced to the sphere of contract law, which is explained by the significance and volume of institution of contract in civil legislation, to which over a half of legal rules contained in CC are devoted. However, it would be erroneous to say that the principle of freedom of contract is limited within the scope of law of obligation. Being a fundamental principle of civil legislation, it applies to the whole of its array. Manifestations of the principle of freedom of

[1] Гражданский кодекс Республики Беларусь: принят Палатой представителей 28.10.1998 г.: одобр. Советом Респ. 19.11.1998 г. // http://www.pravo.by/.

contract are found in any branch of civil law. Thus, in the institution of ownership it is implemented in the requirements of the law on enabling the owner to possess, use and dispose of its property freely. In the regulations of law of obligation it is implemented in the right of the parties of contractual relationship to ensure enforcement thereof by other means provided for by the law or the contract. In the institution of legal persons, the principle of freedom of contract guarantees the participants of civil matters a possibility to act as founders of legal entities, ensures freedom of expression in concluding articles of incorporation. All the corporate organizations emerged and function by virtue of the principle of freedom of contract. "A corporation involves a set of bilateral and multilateral agreements with parties such as workers, unions, managers, stockholders, customers, bankers, suppliers, retailers, creditors, etc." [3].

Belarusian legislator has filled the principle of freedom of contract with the following content: "citizens and legal entities are free to conclude a contract. Compulsion to conclude a contract is not allowed, except when the obligation to conclude a contract is provided for by the law or a freely assumed obligation" (Article 2 of the CC). Such wording of the law should be declared unfit. The principle of freedom of contract cannot be reduced to freedom to enter into contractual relationships only. It works at all stages of contractual relations until termination thereof. Freedom of contract enables the parties of contractual relationship to initiate succession, entering into a claim assignment or debt transfer agreement. The parties' right to limit the debtor's liability (except when the liability for a certain kind of obligation or for a certain breach is provided for by the law) shall be viewed as manifestation of the researched principle, as well as the right to early termination of the contract or repudiation of the contract.

A serious flaw of the content of the principle formulated by the legislator is the reference to admission of compulsion to conclude a contract by virtue of the law. The list of legislation embodied in Article 3 of the CC is quite large. Besides the CC and the laws of Belarusian legislation, its contents include also the orders of the President of the Republic of Belarus, regulations of the Government of the Republic of Belarus, the acts of the Constitutional and Supreme Court, the National Bank of the Republic of Belarus, as well as the Acts of the Ministries, other national bodies of state control and self-control. Thus, any of the listed regulations can contain rules that restrict application of the principle of freedom of contract, which, in our opinion, is not compliant with its fundamental nature as the core principle of the civil legislation.

Freedom of contract is enshrined twice in the CC: as a basic principle of the CC that has a comprehensive and fundamental nature in Article 2 of the CC, and in Article 391 of the CC as a legal rule. The principles and rules have a unifying base – normalization. However, the principle, as woven throughout the fabric of the civil law, has a greater normalization, sustainability and stability as compared with other legal rules and is a special institution of the civil law that allows achieving

the goals of comprehensive civil law regulating [4]. Freedom of contract as a principle (Article 2 of the CC) ensures unity of all the rules of the civil law, while the rule on freedom of contract (Article 391 of the CC) stipulates certain capacities of the entities to conclude civil contracts. Consequently, one should distinguish between restriction of freedom of contract as a principle, and restriction of certain elements of freedom of the contracting parties. With respect to the rules of the contract law, the principle is a base for civil law regulating, that is why, as Martijn W. Hesselink noticed it right, sometimes it is more sensible to refer to the principle, not the rules [4, p. 17].

The content of freedom of contract with regard to the concluded contracts is revealed by the Belarusian legislator in the text of Article 391 of the CC, which, in fact, enshrines three main capacities of the contracting parties: freedom to enter a contract, freedom to choose a contract model (though in a partial form) and freedom to determine the contract terms. Freedom to enter a contract means that the core of the contractual relations is a freely expressed will of the parties that act by virtue of their interests. Persons under civil law are entitled to make independent decisions regarding feasibility of the contractual relations. Possibility to coerce into conclusion of a contract can be envisaged by the law or by a freely assumed obligation and associated with special constructs of certain types of contracts. Conclusion of a contract is a must in the following cases: award of public contracts (Article 396 of the CC); conclusion of a contract with the entity that has won the bid (Articles 417 and 418 of the CC); in other instances provided for by the law. Claims for transfer on the claimant of a party's rights and liabilities under a contract concluded in violation of the claimant's priority right are a type of coercion into a contract (par. 3 of Article 253, par. 1 of Article 592 of the CC). Should a party, to which conclusion of a contract is mandatory, evade conclusion of the contract, the other party shall have the right to apply to the court with a claim to force conclusion of the contract.

The parties can restrict the freedom to enter a contract on their own initiative, concluding a preliminary contract, and then claim conclusion of the main contract by virtue thereof (Article 399 of the CC). The preliminary contract is an independent agreement which expresses, in the form required by the law, the parties' obligation to enter the main contract under certain conditions in the prescribed time limit. Should a party that has concluded a preliminary contract avoid conclusion of the main contract, there apply provisions set out for mandatory conclusion of contracts (par. 5 of Article 399 of the CC). It should be noted that the consequences of breach of a preliminary contract differ from the consequences of breach of the main one. Since the content of a preliminary contract is the parties' obligation to enter a certain contract in the future to transfer property, perform works or render services, the legislator assumes that the main contract shall be concluded under the terms and conditions provided for by the preliminary contract. Inasmuch as the preliminary contract predetermines the content of the main one, it must contain all the material conditions of the main

contract (par. 3 of Article 399 of the CC). Nevertheless, at the time of contract conclusion the parties cannot determine with confidence all the material conditions of the main contract, that is why we regard as more appropriate the requirement brought by the Russian legislator that alongside with the conditions on the subject, the preliminary contract shall contain the conditions of the main contract, which, at the request of one of the parties, shall be agreed on when concluding the preliminary contract (par. 3 of Article 429 of the CC of the Russian Federation)[2].

An important element of freedom of contract is the freedom to choose its model and possibility to conclude a contract that is most consistent with the interests and needs of the contracting parties. However, par. 2 of Article 391 of the CC restricts this right allowing the contracting parties to conclude only a contract that contains elements of various contracts provided for by the law (mixed contract). Combinations of "mixed" elements can be different provided that they are not in conflict with one another (for instance, a gift agreement cannot contain a provision on consideration to the gift giver) and have been taken from the contracts that are known to the legislator. These can be contracts that include elements of supply and storage agreements; supply and commission agreements; rent and storage agreements; rent, commission and fee-based services, etc. Exercising this right in civil circulation, the parties construct different variants of mixed contracts that are most compliant with the essence of the legal relationship between the counterparties. We believe that the contract constructs that have the highest demand of persons at civil law and that are most widespread shall obtain normative consolidation with a view to set uniformity in established practice in applying the law. Thus, among the mixed contracts that are well-established in the Belarusian civil circulation there is an agency contract. This contract traditionally includes elements of commission and mandate agreements, but can include elements of other contracts (for example, purchase and sale contract). The convenience of this statutory concept is that within the framework of a single contract the agent can act, simultaneously, in its own name in some transactions, and in the principal's name in the others. The agent's way of participation in relations with third parties, being a differentiation criterion for commission and mandate agreements, has no material significance for agency contract. Such activity is very common in the field of production and trade, where entrepreneurs-agents (dealers) perform, in the interests of their clients (principals), both legal and physical acts.

The commodity credit agreement also deserves legal recognition. A classical commodity credit agreement is a special "hybrid" of a credit contract and a loan agreement with elements of a purchase and sale agreement. Its content includes conditions that are most preferred by both parties based on the nature of their economic activity. That is why this form of contract is used for goods

[2] Гражданский кодекс Российской Федерации (часть первая): Федеральный закон РФ от 30.11.1994 № 51-ФЗ (ред. от 13.07.2015) // Собр. законодательства Рос. Федерации. 1994. № 32. Ст. 3301.

(raw product, materials and component parts) procurement operations on commodity credit terms that have become a frequent practice. Commodity credit agreements (unlike credit contracts) can be concluded by any entities of loan relationships, not only banks or other credit institutions that have a relevant license. Instead of money, the purchaser (borrower) obtains, under such an agreement, things with certain generic characteristics (goods). As a rule, such an agreement is concluded by the parties instead of a traditional purchase and sale agreement (supply agreement). For the supplier, such a contract is a sort of insurance in case of impossibility to receive payment for the goods supplied under the contract. Where the purchaser does not pay for the goods, the supplier (merchant) shall be entitled to claim return of the unpaid goods together with interest payable, and sell them in a different way. As for the purchaser, when facing difficulties in realization of the goods or when unable to pay, it can return the goods or the part of the goods that has not been realized. Besides, the purchaser receives a deferral of payment or an installment of date. This enables the purchaser, who lacks the necessary funds, to pay for the goods in installments, including the use of funds received from the realization of the goods. Absence of the parties' ability to enter such a contract would mean a necessity to enter a traditional supply contract. Herewith the CC has a comprehensive list of circumstances when the purchaser can refuse the goods and return them to the supplier (original owner thereof). Thus, the purchaser has no other lawful ground to return the unrealized quality goods to the seller, except by way of concluding a new supply contract. This transaction is not effective both in terms of civil circulation and tax legislation, because the parties to the contract shall have to pay again the taxes associated with realization of the goods.

Another drawback of par. 2 of Article 391 of the CC is the absence of reference to provision of the parties with the possibility to enter the contracts that are not provided for by the law but are not in conflict therewith (the so-called non-defined contracts). It appears that this legislative solution fails to meet the requirements of the principle of freedom of contract. Besides, the right to conclude contracts that are in compliance with the law, which includes also the right to create new contract models independently, follows logically from the text of par. 1 of Article 7 of the CC. The right of the parties to conclude contracts of any content and include therein any conditions that do not contradict the legislation is the gist of the principle of freedom of contract, its positive content. It stems from the purpose of the contract itself to be a form of certain private relations to serve private interests. The right to conclude non-defined contracts enables the contracting parties to express their individuality, to use their own knowledge and ideas, to unlock their potential. At present, the entities of civil circulation are faced with the problem when concluding this highly-sought but legislatively unregulated outsourcing agreement. We believe that such lagging of the legal framework behind the needs of the modern civil circulation is a severe problem of the

Belarusian legislation, all the more so because the rise of complex (mixed) and atypical contractual interrelations is one of the main global trends in development of contemporary law of obligation.

An inherent element of contractual freedom is the freedom to set certain conditions of contract. For the potential of agreement-based regulation to be realized to the full extent, the legislator has to minimize formalities that are necessary to conclude a contract, providing the contracting parties with the freedom to determine the content of their future contract. However, according to par. 1 of Article 402 of the CC, the contract is deemed to be concluded, if the parties have reached agreement on all the material conditions of the contract in the form required in the applicable circumstances. Material conditions are ones on the subject of contract, conditions that are named material in the legislation, conditions that are necessary or mandatory for this type of contract, as well as all the conditions with reference to which one of the parties has to come to an agreement. Thus, the legislator once again refers the contracting parties to the immense array of civil legislation, while the CC itself defines in sufficient detail the main material conditions of all the basic contractual constructs.

Restriction of freedom to determine conditions of the contract is possible not only in the phase of conclusion of contract, but also during its life span. Thus, par. 2 of Article 392 of the CC "Contract and Law" sets: "If, upon conclusion of a contract and before termination thereof, a piece of legislation has been passed establishing rules that are mandatory for the parties and different from the ones that were in force when concluding the contract, the terms of the contract concluded shall be brought in line with the legislation, unless it is provided for otherwise by the law". Should the parties fail to amend the contract subsequent to enactment of the piece of legislation setting mandatory rules for the parties of the contract that are different from the ones that were in force during conclusion of the contract, the court, at the suit of the interested party, affirms the necessary amendments to the contract by the judgment thereof. By doing so, primacy of legislation over a contract is formalized in the law, which is applicable to both the legislation in force when concluding a contract and legislation enacted after the conclusion thereof. This should be qualified as giving retroactive effect to legislation and a direct breach of the constitutional principle of supremacy of statute law. The law of contract provides a mechanism through which private individuals can, to a certain degree, predict, control, and stabilize the future. Contracts allow people to incur reciprocal responsibilities and commitments, to make promises others can rely on, to remove some uncertainty from life, and to establish reasonable expectations for future actions. Needless to say that provision of par. 2 of Article 392 of the CC blocks the within-named contract mechanism and destabilizes civil circulation, taking into account the above mentioned extensive list of acts of civil legislation.

It must be stressed that, proceeding from the requirements of the principle of freedom of contract, terms and conditions of the contracts cannot be "rewritten" by anyone except for the parties thereof. Legislators and judges should refrain from replacement of contract terms agreed on by the parties with their own assertions in circumstances where they believe that there is economic feasibility, inconsistence with rationality, breach of the parties' balance of interests or offence against public interests. Freedom of contract shall have primary importance.

Conclusion. Freedom of contract, as any freedom, should obtain guarantees. However, it is unacceptable to both see the principle in absolute terms and reduce it to an article of a declarative nature in the CC. In order to meet this complex challenge, it is necessary, first, when assessing each restriction of the principle of freedom of contract, to determine whether it is justifiable in terms of the balance of private and public interests. Second, any restriction of this principle shall be set only by law and in compliance with the Constitution of the Republic of Belarus.

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