

IN REFERENCE TO FREEDOM OF CONTRACT FORM AND FREEDOM OF CONTRACT TERMS

A. L. Tsygankova

Belarusian State University, Minsk;

annatsygankova98@gmail.com;

Supervisor—O. Vasuchkova, PhD in Philology, Associate Professor

The research is aimed at analyzing the theoretical and practical issues of contract freedom principle introduction in the Civil Code of the Republic of Belarus. It is argued that contract freedom is one of the main principles for the parties to a contract. The issue in question involves discussion of freedom of contract form and dispositivity presumption in the context of contract freedom principle incorporation in the civil legislation. Suggestions have been made to perfect the Belarusian civil legislation dealing with contract freedom, to introduce a new institute of dispositivity presumption in the Civil Code of the Republic of Belarus, and to broaden the use of analogues of handwritten signature.

Key words: contract freedom; freedom of contract form; contract freedom principle; handwritten signature; electronic digital signature; imperative presumption; dispositivity presumption.

The article is devoted to the issue of contract freedom in civil law. Contract freedom understanding as a principle of civil law does fully correspond to the essence of contract freedom. Legal implementation of contract freedom principle in civil law is still debatable. It is reasonable to examine this principle through the prism of current social relations. Civil law is private to the extent where it ensures private aspirations and protects private interests of the parties to a contract [4].

Contract freedom principle consists of certain elements. The main components of contract freedom are freedom to enter into contractual relations, freedom of contract form, freedom of contract type, freedom of contract terms. Freedom of contract terms provision (in particular, dispositivity presumption) and freedom of contract form are to be discussed.

Traditionally, contracts were paper based, but with the introduction of the Internet businesses depart from the notion of traditional contracts and move to online regime. Paragraphs 2 and 3 of Article 404 of the Civil Code of the Republic of Belarus have been amended with regard to the contract written form by the Law of the Republic of Belarus No. 135-Z of 17.07.2018. An agreement may be concluded by drawing up a single text document, including document in an electronic form (electronic document), or by exchanging text documents, including documents in an electronic form (electronic documents), which are signed by the parties in person or by analogues of a handwritten signature, if it does not contradict the legislation and the parties' agreement [1].

Thus, the legislator has favorably interpreted contract freedom principle by extending it to a free choice of a contract form. A written contract may be concluded by certifying an electronic document either by an electronic digital signature or an analogue of a handwritten signature.

An electronic digital signature has already been envisaged in civil legislation. The Law of the Republic of Belarus of 28.12.2009 No. 113-Z "On electronic document and electronic digital signature" provides the regulation of electronic digital signature [3]. Thus, the legislation aims at making electronic digital signature legally valid by introducing corresponding legal mechanism.

The requirements to the equivalent of a handwritten signature should be fixed in law. Legislation of the Republic of Belarus provides a detailed mechanism for checking the integrity and authenticity of an electronic document signed by an electronic digital signature. On the other hand, for a document in an electronic form to be certified by analogues of a handwritten signature statutory mechanism for the verification should be envisaged. It seems necessary to fix the mechanism to prove integrity, authenticity, and reliability of a document in an electronic form on the legislative level.

A number of clauses in the Civil Code of the Republic of Belarus do not indicate whether they are imperative or dispositive. Imperative presumption can be seen as a limitation of contract freedom in the Civil Code of the Republic of Belarus. According to civil law doctrine and foreign legislation, dispositivity presumption is understood as interpretation of civil law clauses through the prism of contract freedom principle and teleological interpretation. The purpose of both the legislator and the parties to a contract is to have a clear message in the Civil Code clause to be properly applied. Dispositivity presumption is envisaged in civil legislations in Russia, Ukraine, European countries, USA.

In particular, the Supreme Arbitration Court of the Russian Federation adopted Resolution No. 16 of 14.03.2014 "On freedom of contract and its limits". Pursuant to paragraph 1 of the Resolution, the rule determining the rights and obligations of the parties to a contract shall be interpreted by the court on the basis of its essence and the purposes of legislative regulation, i.e. the court shall take into account not only the literal meaning of the words and expressions contained in it but also the purposes which the legislator pursued when establishing the rule in question [3].

Thus, we suggest that the imperative presumption should be replaced by dispositivity presumption.

To sum up, speaking of the contract freedom principle the following conclusions can be drawn.

It seems reasonable to replace imperative presumption by dispositivity presumption when interpreting civil law clauses: the rules of contract law should

be recognized as dispositive, except for certain cases when they are considered imperative.

The requirements to contracts certified by an analogue of a handwritten signature should be developed.

Bibliographic references:

1. Civil Code of the Republic of Belarus [Electronic resource]: 07.12.1998, No. 218-Z: adopted by the Chamber of Representatives on 28.10.1998, ratified by the Council of the Republic on 19.11.1998 // ETALON. Legislation of the Republic of Belarus / National Centre of Legal Information. The Republic of Belarus. – Minsk, 2021.
2. On Electronic Document and Electronic Digital Signature [Electronic resource]: the Law of the Republic of Belarus, 28.12.2009, No. 113-Z: amended by the Law of the Republic of Belarus on 08.11.2018 // ETALON. Legislation of the Republic of Belarus / National Centre of Legal Information. The Republic of Belarus. – Minsk, 2021.
3. On Freedom of Contract and its Limits [Electronic resource]: Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation, 14.03.2014, No. 16 // ConsultantPlus.Russia / ConsultantPlusCJSC. – 2021.
4. Craswell, R. Freedom of Contract [Electronic resource]. – Mode of access: <https://core.ac.uk/download/pdf/234140206.pdf/>. – Date of access: 28.02.2021.