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ISSUES OF IMPLEMENTATION OF THE PRINCIPLE OF FREEDOM OF AGREEMENT

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Abstract

Civil law of the Republic of Kazakhstan is based on fundamental principles, among which freedom of contract occupies a special place. The principle of freedom of contract is the opportunity established by civil law for participants in legal relations to determine, at their discretion and in their interests, the conditions for concluding a civil law contract. The article explores the features of legal regulation of the principle of freedom of contract. This principle is considered as the most important beginning of the regulation of private law relations, predetermining the legal basis of a market economy. The current Kazakhstan legislation establishes guarantees of the principle of freedom of contract at all stages of the fulfillment of contractual obligations, and also sets the limits for the restriction of this principle.

This article provides a brief analysis of the current problematic issues of the principle of freedom of contract. The authors identified gaps and contradictions in civil law, formulated a number of theoretical conclusions and practical proposals aimed at resolving problems, proposed options and possible ways to consolidate norms in the legislation of the Republic of Kazakhstan.

Key words: contract, agreement, contract law, legislation, freedom of contract, autonomy of will, commitment.

ВОПРОСЫ РЕАЛИЗАЦИИ ПРИНЦИПА СВОБОДЫ ДОГОВОРА

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Аннотация

Гражданское право Республики Казахстан строится на фундаментальных основополагающих принципах, среди которых особое место занимает свобода договора. Принцип свободы договора - это установленная гражданским законодательством возможность участников правоотношений по своему усмотрению и в своих интересах определять условия заключения гражданско-правового договора. В статье исследуются особенности правовой регламентации принципа свободы договора. Данный принцип рассматривается как важнейшее начало регулирования частноправовых отношений, предопределяя правовую основу рыночной экономики. Действующее казахстанское законодательство закрепляет гарантии принципа свободы договора на всех стадиях исполнения договорных обязательств, устанавливает пределы ограничения данного принципа.

В данной статье приведен краткий анализ актуальных проблемных вопросов принципа свободы договора. Авторами обозначены пробелы и противоречия в гражданском законодательстве, сформулирован ряд теоретических выводов и практических предложений, направленных на разрешение проблем, предложены варианты и возможные способы закрепления норм в законодательстве Республики Казахстан.

Ключевые слова: договор, соглашение, договорное право, законодательство, свобода договора, автономия воли, обязательство.

КЕЛІСІМ БІЛДІРУ ПРИНЦИПІН ЕНГІЗУ МӘСЕЛЕЛЕРІ

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Аңдатпа

Қазақстан Республикасының азаматтық құқығы негізгі іргелі қағидаттарға негізделеді, олардың арасында келісім-шарт бостандығы ерекше орын алады. Келісім-шарт бостандығының қағидаты - бұл азаматтық-құқықтық қатынастарға қатысушыларға өз қалауы бойынша және олардың мүдделері үшін азаматтық-құқықтық шарт жасасу шарттарын айқындау мүмкіндігі. Мақалада келісім-шарт бостандығы қағидатын құқықтық реттеудің ерекшеліктері қарастырылған. Бұл принцип нарықтық экономиканың құқықтық негізін анықтайтын жеке құқықтық қатынастарды реттеудің маңызды бастауы ретінде қарастырылады. Қолданыстағы қазақстандық заңнама келісім-шарт міндеттемелерін орындаудың барлық кезеңдерінде келісім-шарт бостандығы қағидатының кепілдіктерін белгілейді, сонымен қатар осы қағидатты шектеудің лимиттерін белгілейді.

Бұл мақалада келісім-шарт бостандығы қағидасының қазіргі проблемалық мәселелеріне қысқаша талдау берілген. Авторлар азаматтық заңнамадағы олқылықтар мен қарама-қайшылықтарды анықтады, проблемаларды шешуге бағытталған бірқатар теориялық тұжырымдар мен практикалық ұсыныстар, ұсынылған нұсқалар мен нормаларды Қазақстан Республикасының заңнамасында шоғырландырудың мүмкін жолдарын тұжырымдады.

Түйінді сөздер: келісім-шарт, келісім, келісім құқығы, заңнама, келісім бостандығы, ерік, дербестік.

Introduction

Freedom of contract is one of the fundamental principles of civil law. It is no coincidence that this provision is considered as a principle of civil law (Article 2 of the Civil Code of the Republic of Kazakhstan) [1], the legal content of which is disclosed in Article 380 Civil Code and includes two aspects: firstly, the freedom to conclude a contract. As a general rule, coercion to conclude a contract is not allowed, unless the obligation to conclude a contract is stipulated by the Civil Code, legislative acts, or a voluntary obligation; secondly, the parties may conclude an agreement, both provided and not provided for by law.

The freedom of contract means that citizens and legal entities themselves decide whether to conclude a contract or not, choose their future counterparties [2, p. 342]. This basic principle of contract law is of great importance for market relations, it opens up wide opportunities for entrepreneurship.

Modern civilistic literature often offers a broader interpretation of freedom of contract than is done in the Civil Code. So, Yu.G. Basin speaks of four components. In his opinion, freedom of contract provides any person with the right, at his discretion and without coercion from outside:

1) to conclude (or not conclude) a particular contract;
2) choose a partner with whom he wishes to conclude an agreement;
3) choose the type of contract;
4) determine the terms of the contract [3, p. 23].

In other works, freedom of contract is defined even more broadly. For example, S.A. Denisov, in addition to these aspects, includes the following aspects in freedom of contract:

1) in the process of reaching an agreement, the parties are legally equal to each other;
2) the parties may enter into an agreement which contains elements of various agreements provided for by law or other legal acts (mixed agreements);

3) the parties are entitled to negotiate with a view to reaching an agreement by any lawful means and without any time limit, and also have the right to decide whether or not to continue negotiations with them;

4) relations of entities under an obligation are governed mainly by dispositive rules, which are valid only if otherwise is not provided for in the contract itself, developed by the parties;

5) a significant expansion of the scope of the contract and a significant increase in the range of facilities for which it is possible to conclude a contract [4].

Methods of research

The methodological basis of the study was the principles and approaches of dialectics and the theory of cognition of social phenomena used in legal science, the formal legal, comparative legal method, as well as analysis and synthesis methods.

Results of the research

In accordance with paragraph 2 of Art. 2 of the Civil Code, citizens and legal entities acquire and exercise their civil rights of their own free will and in their own interest, that is, the basis for concluding a contract is the principle of free will of a party wishing to conclude a contract. Accordingly, in order to recognize a contract as concluded properly, it is necessary to comply with the will of the party (i.e., the consequences, results that the person actually seeks) and his will (i.e. the consequences, the results that he agrees to when the transaction is concluded). If, after conclusion of the contract, it is found that the will of the party does not conform to its will (for example, the transaction under the influence of delusion or deception, violence, threat, etc.), then such an agreement will be invalidated.

The process of concluding a contract is predetermined by the very nature of the corresponding construction: if the meaning of the contract is an agreement, then its conclusion involves the expression of the will of each of the parties and its coincidence [5, p. 194].

The conclusion of the contract is the actions of the parties to reach an agreement and its execution in the prescribed manner. General provisions on the form of the contract, the procedure for its conclusion and resolution of disagreements arising from this are defined in Sec. 23 of the Civil Code of the Republic of Kazakhstan. The norms reflecting the features of the form and procedure for concluding certain types of agreements are contained in the chapters of the Civil Code on these agreements and in other laws.

When concluding an agreement, each of its parties makes a decision on whether to enter into an agreement with it, as well as on possible counterparties, the nature of the agreement and its conditions [6, p. 16]. The adoption of such decisions is connected with the economic management system and the principles enshrined in law. Under the administrative-command system, when the citizen’s ability to acquire things in personal property was limited, and legal and regulatory acts prescribed the obligation for legal entities to conclude an agreement, its basic conditions and structure of contractual relations were predetermined, as a rule, there was no freedom to make such decisions.

The transition to market relations, the economic freedom of producers, other market participants determined the consolidation of the principle of contract freedom among other basic principles of property relations in the Civil Code.

Autonomy of the will of the parties and freedom of contract are manifested in various aspects: firstly, this is the right to decide independently whether to enter into or not to enter into a contract, and, as a rule, the inability to force a counterparty to conclude a contract; secondly, giving the parties to the contract wide discretion in determining its terms; thirdly,

the right to freely choose a counterparty to the contract; fourthly, the right to conclude both stipulated by the Civil Code and contracts not named therein; fifthly, the right to choose the type of contract and conclude a mixed contract.

Freedom of the contract also means the right of the parties to the contract to choose the method of its conclusion (Article 380 of the Civil Code of the Republic of Kazakhstan); the possibility of the parties at any time by their agreement to amend or terminate the contract (Article 401 of the Civil Code of the Republic of Kazakhstan); the right to choose a method for enforcing the contract, etc.

Article 380 of the Civil Code of the Republic of Kazakhstan, securing the freedom of contract, allows its limitations. Possible exemptions from the general rule are provided for by the Civil Code.

The reservation on the possibility of exceptions to the stipulated principle of freedom of contract is stipulated by the need to protect the public interests, rights of citizens and entrepreneurs (consumers), especially in those areas of the economy that are classified as natural monopolies or in which violation of the limits of the exercise of civil rights by organizations dominant in the market is possible position i.e. in areas in which there is no competition and (or) economic equality of the parties to the contract. The tendency to restrict freedom of contract in order to protect the economically weaker and economically dependent parties is typical at the present stage for countries with developed market economies.

The rights of the parties in determining the terms of the contract are also limited by peremptory norms of the Civil Code and other laws.

Among the norms of the Civil Code limiting freedom of contract, first of all, Art. 387 of the Civil Code of the Republic of Kazakhstan, which establishes the obligation to conclude a public contract and the right of the counterparty of the obligated party to apply to the court with a claim for coercion to conclude a contract.

Freedom of contract is limited by the Civil Code, providing for a preemptive right to conclude a contract. For example, the Civil Code establishes the pre-emptive right of participants in common ownership to purchase a share in a common ownership right (Article 209 of the Civil Code of the Republic of Kazakhstan).

An exception to the principle of freedom of contract is also provided for cases when the obligation to conclude a contract is voluntarily assumed by one of the parties or by both parties to the future contract. Such an obligation arises primarily from a preliminary contract. According to paragraph 5 of Art. 390 of the Civil Code of the Republic of Kazakhstan in cases of evasion by one of the parties that concluded the preliminary contract from concluding the main contract, the second party has the right to judicially demand compelling the first to conclude the contract.

When organizing tenders in the form of a tender or auction, the subject of which was only the right to conclude an agreement, the parties to this agreement are required to conclude it. If one of the parties evades this, the other has the right to apply to the court with a demand for coercion to conclude an agreement. Since both participation in tenders and their conduct, as a rule, are voluntary, the very fact of organizing tenders and participation in them can in this case be considered as voluntary assuming the corresponding responsibility [7, p. 98].

One of the main manifestations of freedom of contract is to provide the parties with the opportunity to independently establish its terms. However, freedom in determining the content of the contract also has a number of restrictions. First of all, it is limited by peremptory norms of laws or other legal acts.

Peremptory norms are rules binding on the parties that prescribe specific behavior. The contract must comply with such standards. When the terms of the contract deviate from peremptory norms, the consequences stipulated by Art. 158 of the Civil Code of the Republic of Kazakhstan, i.e. the corresponding condition or the contract as a whole is recognized as invalid.

Dispositive norms have a different meaning for the contract, i.e. rules applicable in the absence of a relevant agreement of the parties. These rules are sometimes called supplementary, since they, without limiting the discretion of the parties in determining the terms of the contract, make up for the missing agreement. The dispositive norm is applied if a rule of behavior other than that contained in this norm is not enshrined in the contract. The parties are entitled by their agreement to exclude the application of the dispositive norm, to provide for a different condition.

The Civil Code is characterized by giving most of the rules on a contract a dispositive nature, which, without binding the initiative of the parties, simplifies and facilitates the conclusion of the contract. The parties may not include in the contract the conditions provided for by the dispositive norms if they do not want to deviate from them.

In addition to those peremptory norms that are provided by the Civil Code, a number of rules restricting the freedom of the parties in determining the terms of the contract. The inclusion of such conditions in the contract by the specified organization is considered as prohibited monopolistic activity and abuse of the right.

Thus, freedom of contract does not mean that citizens and legal entities, when concluding a contract, can act and exercise rights at their discretion without taking into account the rights of others.

The principle of freedom of contract implies that the parties to the contract act in relation to each other on the basis of equality and autonomy of will. Although they determine the terms of the contract in their interests, they must take into account the restrictions established by the Civil Code and other laws [8, p. 11].

Of course, the contract, freedom of contract have already played and will play an important and positive role in the Kazakhstani economy. At the same time, one cannot help but see the “reverse side of the coin”, the so-called the negative side of freedom of contract. The modern practice of civil circulation knows numerous examples of abuse of freedom of contract, cases where excessive liberalism in the regulation of contractual relations leads to negative consequences. For example, limiting competition, price conspiracies, promoting low-quality goods, works and services on the market, etc. In our opinion, already today there is an acute problem of limiting contractual freedom, introducing it into a certain legal framework.

It is important to note that what has been said does not mean abandoning the principles and mechanisms of the free market, belittling the role and significance of the contract in the economy of Kazakhstan. This is just the opposite – strengthening the role of the contract, the formation and development of competition, limiting monopolistic activities, developing the market for goods, works and services, protecting the rights and legitimate interests of participants in civilian traffic. It is these goals that should be the basis for the formation of a new model of contractual freedom.

It should be noted here that such problems are not unique to developing countries. They are quite relevant for developed countries with a developed market economy. This is confirmed by numerous studies of foreign civilists. For example, the well-known comparativists K. Zweigert and H. Kirtz talk about the restriction of freedom and the need for

coercion in contract law as an urgent need and a stable trend in the legislation of many developed countries, where along with the freedom of contract the term «contract fairness» is increasingly being used [9].

As an example, the Federal Republic of Germany Law «On General Terms of Transactions» [10]. R.I. Karimullin, commenting on this law, points out that the need for its adoption is due to the fact that «... it is the result of a generalization of the existing judicial practice ... The German experience in regulating local rule-making directly indicates that general principles of civil law, such as equality of arms and freedom agreement, is not always able to ensure a fair distribution of benefits under the agreement concluded in the market» [11].

Conclusion

We believe that the option of limiting the freedom of contract with the help of peremptory norms for Kazakhstan, with its belonging to the civil law tradition, is most preferable. First of all, in our opinion, it should relate to contractual relations with the participation of consumer citizens, in which civil competition is limited in competition. Moreover, options for restrictive regulation of the freedom of contract are also possible here. For example, the adoption of a separate law that would define a minimum set of requirements for the content of certain types of contract. The second is the development of the so-called standard contracts approved by the Decree of the Government of the Republic of Kazakhstan.

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