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CONTRACTS AS THE BASIS OF PRIVATE INTERNATIONAL LAW: "RIGHT TO CHOOSE" IN ACTION

КОНТРАКТИ ЯК ОСНОВА МІЖНАРОДНОГО ПРИВАТНОГО ПРАВА: «ПРАВО ВИБОРУ» В ДІЇ

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The article is devoted to research of contracts as the basis of private international law and the realization of the right to choose in the sphere of private law through contracts. Based on the conducted analysis, it was established that the parties to a contract make the law for themselves, they have "freedom of contract" which has two main aspects: the individual's choice whether or not to enter into a contract, and if so, with whom, and the freedom to decide on content of the contractual obligations undertaken. It was found that from the standpoint of the dogma of private law and its theoretical foundations, the contract is always aimed at establishing such a model of behavior of the parties, which is subject to realization within the framework of future implementation. The author emphasizes that a large amount of relations regulated by international private law is related to contracts of various types, their concluding and execution, since the very nature of private law is contractual. The author also emphasizes that one of international private law's methods is collision-legal method which means to find such a norm in native law or in a contract between parties which would answer the question what law is applicable.The author concludes that an individual and his/her right to choose should be in the first place. Except an individual the world of law is dead. All law reality is mostly a result of a choice, of the realization of the right to choose. The author emphasizes that collision norm gives the parties or the court or another appropriate organ a right to choose – to choose applicable law. And the right to choose generates from free will. The author also concludes that all legal rules, all actions are based on free will. Law itself is a choice of civilization, society; it is a will to make world and life better.

Key words: contract, international private law, civil law, private law, choice, autonomy, will, free will.

Статтю присвячено дослідженню контрактів як основи міжнародного приватного права та реалізації права вибору у сфері приватного права через контракти. На основі проведеного аналізу було встановлено, що сторони договору самі створюють право, вони мають «свободу договору», яка має два основні аспекти: вибір особи укладати чи не укладати договір, і якщо так, з ким, а також свободу вирішувати питання щодо змісту взятих договірних зобов'язань. З'ясовано, що з позиції догматики приватного права та її теоретичних засад договір завжди спрямований на встановлення такої моделі поведінки сторін, яка підлягає реалізації в майбутньому. Автор підкреслює, що велика кількість відносин, які регулюються міжнародним приватним правом, пов'язана з різного роду контрактами, їх укладенням та виконанням, оскільки сама природа приватного права є договірною. Автор також наголошує, що одним із методів міжнародного приватного права є колізійно-правовий метод, який означає пошук такої норми у національному праві або в договорі між сторонами, яка б дала відповідь на питання, яке право підлягає застосуванню. Автор робить висновок, що індивід та його право вибору має бути на першому місці. Без індивіду світ права мертвий. Вся правова дійсність здебільшого є результатом вибору, реалізації права вибору. Автор підкреслює, що колізійна норма надає сторонам або суду чи іншому відповідному органу право вибору – вибору застосовного права. А право вибору походить від свободи волі. Автор також робить висновок, що всі правові норми, всі дії засновані на свободі волі. Право теж є вибором цивілізації, суспільства, воно є бажанням зробити світ і життя кращими.

Ключові слова: контракт, міжнародне приватне право, цивільне право, приватне право, вибір, автономія, воля, свобода волі.

Formulation of the problem. People enter into contracts every day. In many cases we even don't realize that we are making a contract. But when people are engaged in trade, commerce or industry, they do realize that they carry on business by entering into contracts. Globalization and integration significantly affect the substantive characteristics of law, all its branches and legal phenomena. The law is experiencing a phase of active development in connection with modern transformational processes, which are also taking place due to the war in Ukraine. Globalization and other transformational processes strengthen the importance of international private law in the modern world, and call for the need to research new topical issues in this field. Contract law is not new, but one of the most significant parts of private international law. Some essential part of legal reality is created by contracts; they are in sense the realisation of someone's free will, choice, and autonomy.

Analysis of recent research and publications. The problem of the autonomy of will is relevant given the degree of its scientific development. Among the domestic scientists who studied individual aspects of this problem, it is worth mentioning O. Pilenko, V. M. Koretskyi, O. M. Makarov, in whose writings we find the history of the emergence and development of private international law. The problem of the autonomy of will was also widely studied by foreign collision scientists, including J. Kroffoler, J. Shapp, K. Schmighoff, O. Lando, P. Kai, R.Goldman, X. Bagifol, and others. Individual issues of the outlined problem were studied by domestic scientists V. I. Kysil, O. O. Merezhko, L. S. Dovgert, V. V. Drone. The problem of the autonomy of will was comprehensively investigated by S. M. Zadorozhnaya.

Many famous scientists have also researched and are researching various issues related to free will and the issues of choice and other important issues of international private law.

Highlighting previously unsolved parts of the overall problem. However the issues of international private law as the realisation of the right to choose in connection with contracts were not researched yet.

The purpose of the article. So, the purpose of this article is research of contracts as the basis of private international law and the realization of the right to choose in the sphere of private law through contracts.

Presentation of the main research material. The law of contracts differs from other branches of law in a very important respect. It does not lay down so many rights and duties which the law protects and enforce, it contains rather a number of limiting principles, subject to which the parties may create rights and duties for themselves, and the law uphold those rights and duties. Thus, we can say that the parties to a contract, in a sense make the law for themselves [1, p. 3], these parties have "freedom of contract".

The "freedom of contract" is now generally accepted, it became popular at a time of the swift industrialization and increasing commercialization of society, when the best way of allowing wealth to develop was to let those involved in business regulate their own affairs, with the courts simply intervening to settle disputes. The parties to a contract will be

governed by rational self-interest, and giving effect to transactions which result from this will be to the benefit of both the parties and society [1, p. 4].

"Freedom of contract" has two main aspects. At first it is the individual's choice whether or not to enter into a contract, and if so, with whom. The second is the freedom to decide on content of the contractual obligations undertaken.

The relevance of contract research is determined by its active use in civil law relations and a wide range of applications. Contract issues are the closest to civil studies. In civil studies, the idea of a contract is decisive from the point of view of understanding not only the nature of binding relations, their content and social consequences, but also the entire system of civil law [9, p. 67].

In this sense it is remarkable that in modern conditions, the theory of social values is gaining more and more importance in the understanding of a contract as an agreement between two or more parties or a promise by one party that the other party was counting on, aimed at the emergence, change or termination of civil rights and responsibilities.

As V. Luts points out, the main question is not in which specific ethos the researcher is interested in the contract as a legal phenomenon, but what transformations accompanies the development of this institution. In particular, the scientist singles out two such trends: a significant expansion of the scope of contractual legal regulation and the acquisition of contractual legal relations of an increasingly complex and long-term nature [7, p. 55].

From the standpoint of the dogma of private law and its theoretical foundations, the contract is always aimed at establishing such a model of behavior of the parties, which is subject to realization within the framework of future implementation.

As R. Barnett points out, a correct understanding of a contractual obligation requires an appeal to something more fundamental than will, trust, efficiency, honesty and agreement (in fact, these are the five concepts that are usually used to explain the legal nature of a contract within private law and general contract theory) [2].

The task of private international law is the legal regulation of private (civil) law relations of organisations and firms in various countries. Private law relations shall be understood as the relations based on the principles of legal equality, free expression of will, autonomy, where individuals and legal entities are the subjects.

In fact a large number of relations regulated by international private law is related to contracts of various types, their concluding and execution, since the very nature of private law is contractual.

In international private law the concept of autonomy of will has two subjects of regulation: contract and choice - law or court, and the methods of its implementation are the recognition of material-, conflict- and procedural- (jurisdictional-) legal freedom, respectively, while this process can be understood as mutual or "double recognition" [5].

Legal regulation of private relations with a foreign element in modern legal practice is allowed by recognizing conflict-of-law freedom or establishing formulas of conflict-of-law attachment. In the first case, we are talking about free choice of law, which is also called the problem of autonomy of will in the narrow sense, or autonomy of the parties. In a broad sense, the autonomy of the will also covers the problem of freedom of contract (agreement). The justification and legitimation of the free choice of law in international private law can be considered from philosophical, historical, comparativist, dogmatic points of view [5].

According to the prevailing opinion, freedom is freedom of will. Along with justice, good faith and reasonableness, it is the highest value of law, and the right to freedom is one of the personal non-property rights that ensure the natural existence of a natural person. It is always of great importance, especially now when the issue of determining the role of a person and personal will in all social processes of Ukrainian society requires special attention.

Such specificity is an integral part of the relations with foreign element where individuals and legal entities take part, and this generates the specificity of their legal regulation that is covered by international private law.

International private law regulates private relations between different subjects. These private relations are civil by their nature. They are family, labour, economic, civil and other types of relations which are civil in a wide sense of the word, therefore they are called private. The peculiarity of private relations regulated by private international law is the existence of an international character or the so-called foreign element.

Foreign element, in turn can be of three types: subject, object and judicial fact taking place abroad. Besides, foreign elements can also be mixed.

The existence of foreign element means that the relations between parties can be regulated by at least two orders: native and foreign. Besides that the parties can reach an agreement (contract nature of relations) where the application of the law of the third country can be prescribed. The parties can also choose one of their countries' legislation to regulate relations between them (contract again). This is the representation and realisation of the principle of parties' will autonomy that means the parties (subjects of international private law) are free to choose the right order for their private relations.

The peculiarity of international private law is that two orders – native and foreign – exist because potentially each state's law system can regulate civil relations between parties. That is why the collision exists and it's a double collision: each country can regulate the relations, and, secondly, these countries (orders) can regulate them quite differently. So, the main task is to solve the collision. Collision in law is an objective possibility to apply private law of two or more countries to these relations and surely this can have different results. The way to solve the problem is international private law itself.

One of international private law's methods is collision-legal method which means to find such a norm in native law or in a contract between parties which would answer the question what law is applicable. Collision norm designates the applicable order and sends to it for estimating the rights and duties of the parties in the law of a certain country. It doesn't regulate relations directly but calls for the applicable law [3, p. 98–100].

Furthermore this collision norm can be found in a contract between parties or in a special collision law.

So, collision norm gives the parties or the court or another appropriate organ a right to choose – to choose applicable law. And the right to choose generates from free will.

Free will is a freedom of desire, a freedom to choose one's behavior and a lack of coercion. It represents a free choice of a person (individual or legal entity).

Choice is understood in connection of the decision-making process and the objectivation of the result of such a process (decision itself) [3, p. 98–100].

Choice is considered through the categories of "will" and "freedom". Freedom of human will expresses an active, changing role of a human as for determining obstacles, individually unrepeatable expression of objective reasons in human activity. Choice is a mental, consciously-willed activity of a subject to determine his behavior in an option of a certain sphere and an objectivation of its results in subject's action.

Construction and deconstruction of the space of choice is an intellectual game that determines the directions of development, the limits of individual and collective actions [10, p. 175].

Through the prism of one or another choice, one can see a common "picture of the world" characteristic of society in the corresponding time and space. Some scientists name four causes of wrong choice: interest, bribery, passions and wrong thoughts. This applies to situations of any choice: from the everyday choice of goods or services to the "big" choice that determines the destinies of millions of people for centuries.

Choice implies the existence of a certain problem, the formulation of alternatives for its solution, and the will to choose. Choice combines individual (egoistic) and collective (political) motives.

Based on free will, the right to choose is the main side of a social (including legal) regulation of people's behavior.

The development of a democratic state as a perfect socio-ideological ideal is based on the search for optimal models of the development of socio-political processes, comprehensive stimulation of democratization processes in all spheres of social life. The question of determining the role of a person and personal will in these processes, the nature of the interaction between a person and the state in Ukrainian society requires special attention [8, p. 221]. And here again an individual and his right to choose are in the first place. We should mention again and again that except an individual the world of law is dead. Only a human (an individual) is a source and holder of all law reality. And this reality is mostly a result of a choice, of the realisation of the right to choose.

Choice shows itself in a process of legal norms realization, during connection of a state will with some subjects' will, including interactions of a state with other subjects of law. The main method of international public law is state will coordination. We think this method corresponds the coordination of wills of persons (individuals and legal entities including states) as the subjects of private international law and it has its expression both in collision-legal method which helps to resolve disputes between parties (private relations) and collisions as for the rules of public order – because different law systems pretend to regulate private relations between parties, and, secondly, material-legal method which is also the result of a choice, free will expression, because states consciously conclude treaties which have unified norms coordinating their different legal systems in some private spheres.

As for Ukraine the revival of private law of Ukraine is a long-term and rather voluminous process that includes not only the development of a system of the latest legal norms, but also involves the borrowing, processing and assimilation of the normative, ideological and theoretical content of the law, which has already passed the test of time and confirmed its vitality during thousands of years. Not only the will of legislator should be oriented on transformations, but the parties' (individuals') wills are also of the greatest importance for necessary changes as in the sphere of private law, so as in all legal system.

As an example of such a significant result of will in the sphere of contract law and regulation of relevant relations we can name the "Principles of European Contract Law", because the legal systems of modern Western European states are the result of a centuries-old historical process that was accompanied by the interpenetration of the cultures of various nations that inhabited Western Europe [4, p. 406]. At the current stage, a special place in this process belongs to the "Principles of European Contract Law" - the "common core of European Contract Law", which were created as a result of almost 20 years of work by academic lawyers. However, the main purpose of the European principles is not law-making, but unification and harmonization, ensuring the maximum flexibility of rigid norms of domestic and international contract law, and thus accelerating the improvement of EU contract law. The analysis of the latest trends in the reform of the trade and civil legislation of EU countries shows that the Principles are used as a model for improving the internal legislation of European states. Although they are neither national, nor international law, but this does not mean that their provisions do not have legal force - in the event that the parties have agreed to regulate the contract by general principles of law, lex mercatoria or similar norms, or have not chosen another system or the rules of legislation to regulate their contract - that is, they are the rules of soft law [4, p. 407] and it is also the result of the parties' free will.

After all we think not only private international law and public international law, but all legal rules; all actions are based on free will. Law itself is a choice of civilization, society, it is a desire, will to make world and life better.

Conclusions. The parties to a contract make the law for themselves, they have "freedom of contract" which has two main aspects: it is the individual's choice whether or not to enter into a contract, and if so, with whom, and also the freedom to decide on content of the contractual obligations undertaken.

From the standpoint of the dogma of private law and its theoretical foundations, the contract is always aimed at establishing such a model of behavior of the parties, which is subject to realization within the framework of future implementation.

A large amount of relations regulated by international private law is related to contracts of various types, their concluding and execution, since the very nature of private law is contractual.

One of international private law's methods is collision-legal method which means to find such a norm in native law or in a contract between parties which would answer the question what law is applicable. Collision norm gives the parties or the court or another appropriate organ a right to choose – to choose applicable law. And the right to choose generates from free will.

An individual and his right to choose should be in the first place. Except an individual the world of law is dead. All law reality is mostly a result of a choice, of the realization of the right to choose.

Not only private international law and public international law, but all legal rules, all actions are based on free will. Law itself is a choice of civilization, society; it is a will to make world and life better.

REFERENCES

1. Adamova O. S. Contract Law of England and Wales: methodical manual. Odesa, 2011. 146 p.
2. Barnett R. E. A consent theory of contract. Columbia Law Review. 1986. Vol. 86. № 2.
3. Voitovych P. P. International private law as the "right to choose" in action / Рекодифікація цивільного законодавства і система права України у контексті євроінтеграційних процесів: матер. всеукр. науково-практич. конфер. (Одеса, 8–9 листопада 2019 року) / За заг.ред. д.ю.н., проф. Є.О. Харитонова. Одеса: Фенікс, 2019. 312с. С. 98–100.
4. Акіменко Ю. Ю. Принципи зобов'язального права ЄС – орієнтир цивілізаційного розвитку приватного права України. Правові та інституційні механізми забезпечення сталого розвитку України: матеріали Міжнародної науково-практичної конференції (15–16 травня 2015 р., м. Одеса) : у 2т. Т. 1 / відп. ред. М.В. Афанасьєва. Одеса, 2015. 764с. С. 406–409.
5. Задорожна С. М. Автономія сторін у міжнародному приватному праві. Монографія. Чернівці, Технодрук, 2008. 216 с.
6. Кондорсе. Про вибори. Львів, 2004. 160 с.
7. Луць В. В. Договірне право України: сучасний стан та тенденції розвитку. *Юридичний вісник*. Повітряне і комічне право. 2009. 2. С. 55.
8. Третьякова Т. М. Управлінські аспекти освітнього процесу у ВНЗ. Правові та інституційні механізми забезпечення сталого розвитку України: матеріали Міжнародної науково-практичної конференції (15–16 травня 2015 р., м. Одеса) : у 2т. Т. 1 / відп. ред. М.В. Афанасьєва. Одеса, 2015. 764 с. С. 221–223
9. Юдін З. М. Ідея договору у догмі права / Правові та інституційні механізми забезпечення сталого розвитку України: матеріали Міжнародної науково-практичної конференції (15–16 травня 2015 р., м. Одеса) : у 2т. Т. 1 / відп. ред. М.В. Афанасьєва. Одеса, 2015. 764с. С. 66–68.
10. Яковлев Д.В. «Лицар на роздоріжжі»: вибір як елемент політичної інтеракції. Правові та інституційні механізми забезпечення сталого розвитку України: матеріали Міжнародної науково-практичної конференції (15–16 травня 2015 р., м. Одеса) : у 2т. Т. 1 / відп. ред. М.В. Афанасьєва. Одеса, 2015. 764 с. С. 175–177.