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TO THE QUESTION ON THEORETICAL ASPECTS OF CONTRACT LAW: FEATURES, SOURCES, PRINCIPLES

Dmitry Alexandrovich Turitsyn (a)*, Pavel Vladimirovich Bakhmetiev (b)
*Corresponding author

(a) Research Institute of History, Economy and Law, 16, Michurinsky Str., apt. 267, Moscow, Russia
i.am.newbie@hotmail.com,
(b) North Caucasus Branch of All-Russian State University of Justice, 187/1, Levanevsky Str., Krasnodar, Russia
p.bakhmetyev@ya.ru

Abstract

Throughout the existence of legal science, the issues of law theory occupy a key place in legal doctrine. A special place in such doctrine belongs to the theoretical reflection of the branch of civil law and the sub-section of contractual (binding) law contained therein. The contract is a common means of creating, changing and terminating legal relations between any subjects of civil-legal relations – individuals, legal entities, the state and other entities. The most difficult questions under this topic arise in the analysis of provisions on characteristics, sources, as well as principles of contracts. In this regard, the authors analyzed classical Russian and foreign works of prominent civil lawyers, as well as the foreign practice, which influenced the development of the doctrine on the contract. The analysis made it possible to draw the main conclusions on each individual element. The authors pay special attention to contracts within the international private law.

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Keywords: Contract law theory, civil law, contract, sources of contract law, principles of contract law.

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1. Introduction

At all times the issues of accumulation, distribution and redistribution of tangible assets have always been key in regulating trade. While the accumulation, as well as creation or new formation of such benefits is included in the economic block of knowledge, the aspects of their legal distribution and redistribution are the central issues of civil jurisprudence, since these processes are not possible without the use of civil legal institutions, in particular contracts.

2. Problem Statement

In order to fully understand this sub-section of law, it is necessary to consider its separate theoretical provisions, in particular those relating to characteristics, sources and principles of contracts. The issues raised by the authors of this paper are key from the theoretical perspective.

3. Research Questions

The paper explores the theoretical aspects of the sub-section of the contract law within the civil law. In particular, it studies such categories as the characteristics of contracts, sources and principles of the contract law.

4. Purpose of the Study

The purpose of the study is to analyze theoretical material on the subject under study, to draw conclusions on the legal nature of the contract.

5. Research Methods

The following methods were used in the study: system analysis, structural-functional, comparative-legal, formal-logical, dialectical.

6. Findings

Focusing on the characteristics of these contracts, it should be noted that they are concluded and executed in the process of international trade turnover, therefore, due to their nature, such contracts have a number of important features that differ them from domestic contracts. In domestic and foreign literature there are many variations of such features, but we highlight only the main ones. This limitation is caused by the excessive option of a number of features, their mediation and specifics of the individual types of contracts they characterize.

The main feature of any international trade contract is the property basis of relations between the subjects. This feature means that the relations regulated by the contract are property-related, which entails the regulation of such contract by civil (commercial) law (Galenskaya, 1983). At the same time, a number of authors understand property relations as “specific social and economic relations concerning ownership, enjoyment and disposal of material benefits” (Lunz, 1985, p. 19), while the others – as “the unity of

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material content, independent of the will and consciousness of people, and will form" (Smirnova et al., 1982, p. 72).

Sadikov (1981) limited in the most detail the range of special features inherent in international trade contracts, thus implying the special subject matter of such a contract (the presence of a foreign element), the specific list of sources of legal regulation of such transactions and the specifics of the conditions for the commitment, modification, termination and methods of dispute settlement within the contracts under study.

Cheltsov (1926) linked the features of international trade contracts with export-import relations between states. He referred to the transport of certain goods across the state border solely for the purpose of such transactions. Kanashevsky (2008) approached this issue somewhat differently noting that not all transactions involve the movement of goods across the border. In this regard, we consider this feature optional, since it is not possible to reduce any foreign trade transactions to export-import transactions as this would mean their publicity.

Foreign literature attaches particular importance to the criterion of "internationality" of contracts. It shall be noted that this criterion usually includes the fact of business location of each of the parties to the international trade contract in different states. It shall be emphasized that such criteria as the nationality of the parties to a cross-border trade contract, their domicile or residence, as well as the fact that such a contract has been concluded abroad, do not affect its qualification as an international contract (Kanashevsky, 2008). In this case the fundamental criterion for the classification of the contract as an international contract will be the performance of the contract abroad.

In particular, Nygh (1999) noted that a contract concluded between the resident parties of one state but enforceable in the territory of another was exclusively international in nature. He also argued that the choice of the law of the parties in concluding a domestic contract with a reservation to apply foreign law to the contract also led to its characterization as international (Nygh, 1999). The position of Stone (1995) is also quite interesting. He believed that contracts concluded within one state by its residents concerning goods imported into those states were international.

In the United States, the definition of internationality is based on the nationality of the parties, the subject matter of the contract, and the content of negotiations between the parties on such a transaction. In a number of cases the US Supreme Court declared the acknowledgment of an international trade contract: the existence of a link with many jurisdictions, as well as various laws, including conflict-of-laws rules on the choice of the law to settle disputes from the contract. Similarly, the issue is resolved in doctrine. For example, Delaume (1988) noted the importance of having conflict-of-laws provisions in the contract, the choice of dispute court, and the cross-border nature of contract transactions.

Another feature of the studied contracts is their commercial nature. The basic concept of this feature is that such a contract mediates business activities, excluding consumer purposes. In this regard, we shall note the position of Lunz (1972), who wrote that "daily transactions concluded by Soviet enterprises with foreigners on the Soviet territory are not foreign trade transactions; in these cases, the transactions shall reflect some commercialization nature for both parties" (p. 27).

Next, let us consider the sources of international private law contracts. At present, it is common to highlight the following: national legislation of different states, international legal acts; customs, practices

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and rules of trade turnover. These sources may include, for example, rules on the basic terms of supply, currency used, certain methods and regulated procedures for settlement of invoices, special rules for the consideration of disputes between the parties in the courts of the national judicial system and international commercial arbitration, etc. (Komarov, 2001). It shall be noted that the diversity of sources determines one of their most important features – polysystemic nature, which causes some symbiosis of domestic and international law of the contracting party.

Analyzing the national legislation, it shall be noted that in the countries of the Romano-German legal family such norms are part of independent and codified legislative acts. In the countries of the Anglo-Saxon legal family – in precedent or in separate legal acts. The application of the rules of the national law of some states to the rights and obligations of the parties under a trade contract is considered to be convenient, since such rules often do not contain strict mandatory requirements that could limit the content of the contract and deter the will of the parties, and the existence of a wide-ranging regulatory framework provides for free determination of the content, terms and conditions and other elements of such a contract (Komarov, 2001). Mainly, national legislation operates conflict-of-laws rules. Thus, the domestic doctrine solves these issues through a wide range of independent conflict-of-laws links. We cannot but agree with the opinion of Kanashevsky (2008), who notes that "the settlement of the main conflict issue in favor of foreign law does not prejudge the mandatory choice of the applicable law on the preliminary question in favor of the same foreign law, and vice versa" (p. 22). Besides, according to Sadikov (1992), "in case of legal heterogeneity of the main and preliminary questions, each of them shall be subject to the action of the conflict link established for it" (p. 36).

Concerning foreign experience, it shall be noted, for example, the formula characterizing the application of contract law in England – "proper law of the contract". This formula makes it possible to determine which law is applied by an English or other court in determining the obligations contained in the contract (Albert, 1938). In particular, English legal doctrine does not attach particular importance to the law chosen, as it perceives it as a single legal system. The law of not only one state but also two or more states may be used under a single contract (Cheshire & Nord, 1982). In particular, the provision that the regulation of certain terms of a contract by the law of one country entailed the recognition of such a law as the law of the contract as a whole was rejected by the English court (Weckstorm v. Hyson), since the parties had the opportunity to choose the law of more than one state that would be applicable to their contract, but the use of many different legal systems in a single contract is not allowed.

Another important source is international state acts – contracts, agreements, etc. Such acts may contain special conditions for regulating legal relations between resident parties of the countries that are parties to such an international act. In their nature the international contracts are an external expression of the agreement reached by different states participating in these contracts to regulate certain legal relations (Depyleva, 2009).

Custom is another source of particular interest. In the general theory of state and law, customs are understood to mean "the general rules of conduct historically formed by virtue of these factual relations and got into the habit as a result of multiple repetition" (Alekseev, 1981, p. 42). However, the legal nature of such a rule is obtained if such a rule is authorized by the state "by referring to them in law or by perceiving them by judicial or arbitral practice" (Kanashevsky, 2008, p. 30). With regard to the

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international sphere of application of customs, we note the position of V.P. Zvekov, which classifies them into international customs arising from the inter-state dialogue and the customs of international trade, the existence of which is directly linked to the activities of entrepreneurs at the transnational level, as well as to the ongoing processes of internationalization of the economic life in the society (as cited in Vlasov, 2010).

In turn, foreign researchers approach the question of understanding the essence of customs differently. According to Western researchers P. Nygh and R. Hood, international trade customs, although based on national law, are not part of the national legal system, and their adoption by the judiciary or arbitral entities leads to their separation into the so-called international customary law (as cited in Nygh, 1999). In our view, the identification of customary international law as an independent category is very important for the practical application of this institution.

A separate source of law may also be special contractual conditions, habits, established practice of relations between the parties, special provisions of arbitration and judicial practice, etc. (Zykina, 1994).

Particular attention shall be paid to non-state sources of transnational contract law. The origin of this source is directly related to the lex mercatoria doctrine, which in recent years has become quite popular. As a source of contract law, lex mercatoria is also referred to as “transnational” or “international” contract law (Jessup, 1956). The regulation of relations between international business actors in this case takes place through customs and principles of transnational law. The main ideas of dissemination of this source were its uniformity and ease of application, which leads to simplification of the judicial process, allows significantly simplifying the dialogue between the parties to the contract. However, it shall be noted that unofficial sources of transnational trade and contract law do not have the force of an international contract, hence they do not have the force of mandatory application (Novikova, 2013).

Next, let us consider the principles of contracts in the legal doctrine.

The ability to act in accordance with one’s own will in the doctrine of the civil law and the contract law in particular is called autonomy of will. The main meaning of this principle is expressed in the freedom to choose whether a party wishes to conclude a contract in principle, as well as in the freedom to choose counterparties and in the freedom to negotiate the content of the future contract, its general and special terms, etc. (Bamberg, 2011). However, the main function of this principle is that it is possible for the parties to determine the right to govern the contract between them. Let us note an interesting position of Lowenfeld (1996), which refers the principle of autonomy of will to the part of the international customary law of dispute settlement.

In the countries of the continental legal family, the autonomy of will is not contested, and the parties to international trade contracts must adjust the application of the principle of autonomy of the will of the parties (Lebedev, 2006). Despite the position of the majority of European countries to follow the doctrine of autonomy of will, there are certain differences of opinion among the authors as to the absolute nature of the concept (Cheshire & Nord, 1982). This is associated with the Bentamian laissez-faire principle of the English legal system, the leitmotif of which is the prerogative of intention (Graveson, 1952). Hence, a number of English judges expressed the need for a fair presumption of the definition of the law applicable to contractual relations, as well as the regularity of determining the applicable law

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under the contract on the basis of intentions of the parties to the international trade contract. Thus, in the English legal system the formal definition of the law applicable to the contract can be changed if it is proved that the intention of the parties was aimed at applying the law of another state.

Another principle under consideration is the freedom of contract, which consists in the freedom of the parties to an international trade contract to conclude and determine the content of the contract on their own conviction (Zenin, 2012). The principle of freedom of contract also implies that the parties have the freedom to choose the form of the contract, the procedure for changing or terminating the contract, as well as the description of liability for its violation (Hu, 1999). However, there are limitations to this principle. In particular, according to a number of Japanese authors, such restrictions are manifested in special rules for the conclusion of a contract, as well as its content. This trend is particularly strong in the sphere of price control for some goods, in the determination of land rents and housing costs, as well as in the financial and credit sphere (Zenin, 2012).

In addition to the basic principles, modern law also highlights the optional principles of contracts. Thus, the principle of honesty and trust has been particularly recognized, the meaning of which is "the obligation of the parties in the performance of acts of civil status to maintain honesty and integrity, to fulfil obligations in a well-meaning manner, not to abuse rights and not to evade obligations provided for by law or contract" (Van, 2017, p. 26). A number of countries also emphasize the principle of good faith, which relates to the fair performance of obligations assumed by the party to the contract and the integrity of their conduct in business. We may also refer to the principle of contract relativity, according to which all subjects of contractual relations are originally defined. In conclusion, it is worth noting the specific principle of the Chinese contract law – the principle of trade promotion, which implies that the state has an interest in facilitating the conclusion and proper regulation of contracts, which will lead to the enforcement of any civil transaction (Van, 2017).

7. Conclusion

The main feature of any international trade contract is the property basis of relations between the parties under the contract, the international character of such a contract, as well as its focus on commercial (entrepreneurial) activities. Among the optional features there is a special subject matter, special conditions of contract implementation, as well as a special range of sources of its regulation.

The doctrine of private international law and international contract law in particular presents a wide variety of regulation sources for the institution of international trade contracts. All sources have specific features and the choice of a suitable source for specific legal relations is the responsibility of the parties to the contract themselves.

In the legal literature of different countries, the principles of international trade contracts are quite ambiguous. On the one hand, the principles are aimed at ensuring the disposative rights of the parties under the contract, on the other – at protecting the parties through mandatory norms, which significantly restrict the freedom of conduct of the parties in the framework of preparation, conclusion, modification, termination or performance of the contract.

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