PHENOMENON OF A CONTRACT IN CIVIL LAW

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It is determined in the paper that the construction of a contract becomes one of the most notable achievements of the world culture. Provisions on contracts «seem to pierce» almost all sub-branches and institutes of civil law. Legal contract as the element of the mechanism of the legal regulation of property and to some extent personal non-property civil relations, as a legal fact influences the other elements of this mechanism: civil legal relations (obligations), acts of the realization of law, protection of violated rights and interests, etc. Some tendencies of the development of Ukrainian contract law in the current period in particular problems of its adaptation to the standards of the European Union are stressed.

Key words: mechanism of legal regulation, transaction, sense of contract, contract content, civil legal responsibility, legal fact.

The construction of a contract has become one of the most prominent achievements of the world legal culture. A contract is a unique legal construction in the mechanism of legal regulation of social relations. A contract as an instrument of legal regulation along with the traditional application in the field of private law is used in contemporary conditions in the field of public law, constitutional, administrative, ecological, financial law, etc. (public-legal contracts) [1, c. 15–16].

A unique, phenomenal role belongs to a contract in the field of private, in particular civil law. As I.V. Beklenischeva affirms, civil contract under the effect of strengthening of common to mankind humanitarian ideals and principles, the idea of human rights and the value of an individual in the modern society acquires today a new, earlier not peculiar to it meaning, in particular the meaning of the element of common European legal culture [2, c. 8].

The construction of a contract penetrates into all spheres of economic and spiritual life of society. The role of a contract as a unique and the most reasonable legal form of mediation of market relations is especially growing in contemporary conditions. The transition to the market economy and the functioning of the market mechanism itself are only possible under the condition that the main mass of commodity producers (enterprises and citizens) has the freedom of economic activities and entrepreneurship. The results of these activities are realized in the commodity market on the contractual terms. The planned-administrative influence of a state on the property relations is restricted with the transition to the market, thus, the freedom of choice of partners in economic relations and the determination of the content of contractual obligations are extended at the discretion of the parties of a contract. First of all this concerns contracts directed to ensuring the needs of legal and natural persons in material, energy, food resources (purchase and sale, delivery, contracting, energy supply etc.). The role of hiring contracts (lease, leasing, hiring out), contracts of performance of work (contracting, construction, contract of design and survey), contracts of different kinds of services provided to natural and legal persons (agency contract, commission, consignment, credit contract, transportation, insurance, etc.) is not decreased.

Material and spiritual needs of a wide range of consumers (citizens) in goods and services are secured owing to contracts which are concluded in the spheres of retail commerce, transportation by public transport, communication, medical, hotel, bank service, etc. Spiritual interests of citizens in the spheres of intellectual property, creative work are realized in particular through conclusion and performance of contracts on disposal of property rights to intellectual property (license contract, commercial concession, etc.) or contracts of research and development, design and development and technological works, etc.

A contractual form also can be used in other kinds of civil legal relations, in particular during the realization of personal intangible rights between the subjects of tortious obligations.

The rise of the role of a contract in the life of society is also stipulated by the external factors, most of all by the processes of the legal and economic integration which take place in the Western Europe. In particular the formation of the united economic space is impossible without the development of legal forms and institutions which are adequate to the character and nature of relations that emerge along with this, among which, a contract shell play the key role, taking into consideration the supremacy of liberal values in the European consciousness. In connection with this there was the necessity of creation of the common term of a contract for different legal systems. This term would satisfy the national legal doctrines of the European states as well as objects raised [3].

Among more than 1300 Articles of the Civil Code of Ukraine (CC) almost the half is dedicated to a contract, starting with the general provisions on a contract (Chapters 52 and 53) and finishing with the rules on particular kinds of contractual obligations (Chapters 54–77). This fact affirms the determinant role of a

contract among the institutions of civil law. Besides, contractual provisions of CC of Ukraine, which determine the contents and scope of civil capacity of natural, legal persons and other participants of civil circulation, rules on transactions, the right to property, representation, limitation of action, concern contractual relations. Most of general provisions on obligations and in particular on means of their security (forfeit, pledge, deposit, bailment, guarantee, retention, etc.) are grounded on the construction of a contract.

The provisions on civil contracts are located in the Family Code of Ukraine, Land, Commercial Codes, other numerous laws, decrees of the President, regulations of the Cabinet of Ministers of Ukraine, acts of other bodies of the state power, bodies of power of the Autonomous Republic of Crimea, bodies of local self-government, in articles of association of commercial partnerships, business-dealing practice and other regulators of civil relations (judicial practice, morality, etc.).

Achievement of objects determined by the participants of these relations is secured due to characteristic features of a contract as a universal legal mean of the regulation of property and to some extent personal non-property (civil) relations.

According to the Part 1 of the Article 626 of CC a contract is an arrangement between two or more parties targeted at the establishment, change, or termination of civil rights and obligations. It follows from this that a contract belongs to the legal acts of an individual character – juridical acts, in particular transactions. Under the Parts 1, 2, 4 of the Article 203 of CC a transaction is an action of a person aimed at acquisition, changing or termination of civil rights and obligations. Depending on the number of expressions of the will of parties transactions may be bilateral or multilateral (contracts). A bilateral or multilateral transaction shall be a coordinated action of two or more parties.

Such features are peculiar to civil contract as a legal fact: 1) the will of not one person (party) is manifested in a contract, but the will of two or some persons (parties), besides that the expression of the will of participants has to coincide with and correspond to each other; 2) a contract – is such joint action of persons, which is directed to the achievement of some civil legal consequences: to establishment, change, or termination of civil rights and obligation. Namely by this feature a civil contract is distinguished from contractual forms, which are used in other branches of law (labor, ecological, etc.) getting there some specific features. However, the role of a contract is not limited only by that it influences on dynamics of civil legal relations (generates, changes and terminates them), but according to the requirements of the legislation, business-dealing practice, requirements of reasonableness, good faith and fairness, it determines the contents of concrete rights and obligations of the participants of a contractual obligation. In this sense a contract appears to be the mean of the parties' conduct in civil legal relations.

The free expression of the will of a subject in a contract is one of the displays of contract freedom as one of the principles of civil legislation: parties are free in conclusion of a contract, choice of contractor and determination of contract terms accounting the requirements of Civil Code, other acts of civil legislation, business-dealing practice, requirements of reasonableness and good faith (Section 3 of the Part 1 of the Article 3, Article 627 CC).

However, the content of contractual freedom of parties is much wider. Besides the possibility of choice of a contractor and determination of the contract content, the freedom of a contract also includes: a) the free expression of person's will for entering into contractual relations; b) freedom of choice of the form of a contract by the parties, with the exceptions prescribed by the law; c) the right of parties to conclude contracts, stipulated by a law (defined contracts), as well as contracts, which are not stipulated by a law but does not contradict it (undefined contracts); d) possibility of parties to change, terminate or prolong the validity of a concluded by them contract; e) the right to establish the forms (measures) of liability for contractual delinquency, etc [4, c. 3].

But freedom of a contract is not unlimited because parties have to account the requirements of CC, other acts of the civil legislation, business-dealing practice, requirements of reasonableness and good faith concluding and performing contracts. Some limitations on the force of the principle of the freedom of a contract, stipulated by CC, are pointed out in the literature [5, c. 45–48].

Thus, the expression of the will of participants of a contract has to be formed freely, without any pressure from the part of a contractor or other persons, moreover the expressions of the will of every participant by their sense have to coincide with and correspond to each other. Attainment of a consent concerning conclusion and content of a contract occurs due to performing by them actions (offer and acceptance), which generate together such a phenomenon as a contract.

There was no extensive definition of the term «contract» in the Civil Code of USSR. It was exposed through the term «agreement» as an action of a citizen or organization directed to establishment, change, or termination of civil rights and responsibilities. A contract is a bilateral or multilateral agreement (Article 41 CC USSR). However, the term «agreement» hardly suited the definition of unilateral action, in which the will of only one party (person) is expressed and there is no agreement (consent, concordance) with any other person. That's why the term «agreement» in CC of 2003 is replaced with the word «transaction» (action

which makes law), and the term «agreement» has to be interpreted accounting its peculiar meaning as the concerted will of two or more persons (parties).

The sense of a contract in civil law is in an agreement as the concerted will of two or more parties, directed to the establishment, change, or termination of civil rights and obligations. Figuratively speaking it can be said that an agreement (consent) – is the «sole» of a contract, the «body» of which is formed by concerted in it conditions which form the content of a contract. That's why the term «arrangement» is ultimately to be replaced by the term «agreement», which reflects the sense of an agreement as a legal phenomenon.

If the sense of a contract is in an agreement of parties, then points arise: agreement on what, what is the subject matter of a contract, with what conditions is it concluded, what rights and responsibilities are established, changed, or terminated from an agreement? Thus, it deals with the content of a contract as an agreement of parties. According to definitions which are represented in philosophic sources, the content – is the aggregate of elements, processes, relations, which form the subject or phenomenon.

According to the Part 1 of the Article 628 CC the content of a contract is formed by the conditions (clauses), determined at the discretion of parties and agreed by them, which are obligatory according to the act of the civil legislation. In other words, the content of a contract is those conditions, on which the respective agreement is concluded. If a contract is legalized in writing in the form of one instrument, signed by parties, or by the way of changing the letters, or in another form (Article 639 CC), then respective conditions are fixed in the clauses of a contract, in which the references to the rule of the current legislation in this sphere may be contained.

Touch upon the correlation of conditions in a contract, which are determined at the discretion of parties (so called «initiative» conditions), and conditions which are obligatory according to the acts of the civil legislation, it is necessary to address to the general provisions on the correlation of the acts of civil legislation and a contract, fixed in the Article 6 CC. According to the Parts 2 and 3 of this Article parties have the right to settle in a contract, which is stipulated by the acts of the civil legislation, their relations which are not arranged by these acts. The parties to a contract may depart from the provisions of the acts of civil legislation and settle their relations at their discretion. But the parties to a contract may not depart from the provisions of the acts of civil legislation, if in these acts this is directly stated and also in the case of obligatoriness of the provisions of the acts of the civil legislation for the parties, which follow from the content or sense of the relations between them.

A contract is one of determinant elements of the mechanism of the legal regulation of property and, to some extent, personal non-property civil relations. Concerning the definition and the structure of the mechanism of the legal regulation of social relations, different by their content opinions are expressed in the civil literature. So, in particular, concerning the sphere of contracting contractual relations A. B. Gryniak understands under the term «the mechanism of the legal regulation of relations» the aggregate of the legal means, methods and forms with the help of which ordering of constricting relations occurs, their ideal form materializes which is stipulated in the rules of law and provisions of a contract, with which the establishment of the rights and responsibilities of concrete participants of contracting relations is connected [6, c. 17].

S. O. Pogribny considers the mechanism of the legal regulation of contractual civil relations in some another way. He considers it as a consecutive chain of changes of particular legal phenomenon: rule of law, which regulates civil relations, – legal fact – rights and obligations, which exist in the civil legal relations, which emerged on its ground, the realization of civil rights and performance of obligations, and if necessary – also the protection of a broken right or interest [7, c. 43].

Such understanding of the mechanism of the legal regulation of contractual relations is the reflection of a universally adopted in the common theory of law understanding of the legal regulation as a continuing process, in the course of which the influence of law on social relations is exercised, and which has three links (stages): 1) legal rules; 2) legal relations and in particular subjective rights and legal obligations of their participants; 3) the acts of the realization of rights and obligations.

However, the separation of particular stages of the legal regulation process is quite relative, because in legal reality the legible bounds of the course of this process cannot always be traced in its particular stages. For example, the stages of rise and realization of subjective rights and obligations of the parties by the contract can coincide under the one-time sales contract of goods which is performed when it is concluded. The idea of many authors should be agreed with. They refer much wider range of legal means: rules of morality, customs, acts of enforcement of law, legal positions, definitions, fictions, presumptions, scientific doctrines, etc., to the mechanism of the legal regulation [8, c. 19–25].

The phenomenal role of a contract consists in that its regulatory influence on other elements of this mechanism is reflected during the whole process of legal regulation of civil contractual relations. That's why the idea of A. V. Kostruba, that legal facts are bounded with each stage of the legal regulation, should be defined as a correct one [9, c. 49–50].

First of all, the legal model of the future contractual relations of persons is settled in the rules of law and other social regulators (morality, customs, business-dealing practice, religious rules, etc.). It is enough to

address to any defined contractual institution, regulated by the Civil Code and other acts of the civil legislation, and in the first articles the definition of a given contract, its parties, subject matter, form, rights and obligations of parties, consequences of the breach of a contract, etc. is given, which permit to mark off it from other (contiguous) legal constructions.

Some conditions (preconditions), adhering to which is necessary for the contract to exercise its role as a regulator of concrete relations of parties. It deals with, in particular, general requirements, adhering to which is necessary for a contract (transaction) to be valid (in force). As it is admitted in the Article 203 CC such conditions are: 1) the content of a contract cannot contradict CC, other acts of the civil legislation, interests of a state, of society, and also moral principles of society; 2) a person who concludes a contract has to have the necessary extent of a legal capability; 3) the expression of a will of a participant of a contract has to be free and correspond to his/her inner will. 4) a contract has to be concluded in the form, prescribed by the law; 5) a contract has to be directed to a real legal occurrence of consequences; 6) a contract which is concluded by parents (adopters), cannot contradict the rights and interests of their infants, minors and disable children. In civil law the presumption of lawfulness of a transaction (contract): a transaction is lawful if its invalidity is not stated directly by the law or if it is not recognized invalid by a court (Article 204 CC).

A contract is an individual legal act, in which the absolute model of persons' relations is traced in general features, is filled with a concrete content, takes its own «flesh and blood». In this sense a contract appears as a legal fact which is one of the grounds of rise of subjective civil rights and obligations (legal relations, in particular obligations). According to the Part 2 of the Article 11 and Part 2 of the Article 509 CC obligations arise from contracts and other transactions, stipulated by the law, however do not contradict with it. An obligation is a legal relation in which one party (a debtor) shall be obliged to perform an action (to transfer property, to do a job, to render service, to pay money etc.) to the benefit of the other party (a creditor) or to abstain from a certain action, while the creditor shall have the right to claim from the debtor to fulfill his obligation (Part 1 of the article 509 CC).

But the character of an action, which one party to the obligation shall perform to the benefit of another (in bilateral contracts such as sales contract, hiring, constructing, etc., each party is simultaneously a creditor and a debtor), is defined first of all by the conditions (clauses) of a contract, determined and agreed by parties, and also conditions, which are obligatory according to the acts of the civil legislation (Part 1 of the Article 628 CC). Thus, concrete rights and obligations of parties, which constitute the content of a contractual obligation, result from the conclusion of a contract as a legal fact and depend on its content. Owing to the fact of the conclusion of a contract other conditions enter into force, which are obligatory for parties according to the acts of the civil legislation.

Generated by a contract obligation acts during the period of the validity of a contract, except cases of termination of an obligation in the result of its pre-term performance or cancellation of a contract or in the result of its transformation in another kind of an obligation, for example, obligation of reimbursement for losses. So, if as a result of the debtor's delay the creditor has lost his interest in the obligation fulfillment, he can refuse from the acceptance of execution and claim to reimburse for the losses (Part 3 of the Article 612 CC).

There is the direct connection of a contract as a legal fact and other elements of the mechanism of the legal regulation of civil relations – acts of the realization of subjective rights and obligations and methods of their protection, in particular with responsibility for the contractual obligation violation. Acts of the realization of rights and obligations by the parties of a contractual obligation are their performance of actions or restriction from them, which result from the content of an obligation, for example delivery of goods by separate consignments in terms stipulated under a contract, payment of money for the performed work or rendered services, etc. And here contract conditions appear as the criteria for conformity of acts of right's realization to established requirements concerning subjects, subject matter, place, periods, methods of fulfillment of an obligation, etc. According to the Article 526 CC an obligation shall be properly fulfilled according to conditions of the contract, requirements of CC, other acts of civil law, and in absence of such conditions and requirements – according to traditions of business practice or other universally recognized requirements.

The need in the protection of civil rights and obligations appears in the case of the violation of civil contractual obligation. According to the Articles 610 and 611CC violation of the obligation shall be its non-fulfillment or fulfillment with breaking the provisions determined by the content of the obligation (undue execution). In the case of violating the obligation the legal consequences determined by the agreement or the law shall come to effect, in particular: 1) termination of the obligation due to unilateral refuse from the obligation, if it is stipulated by the agreement or the law, or cancellation of the agreement; 2) change of the obligation's provisions; 3) payment of the forfeit; 4) reimbursement for losses and moral damages.

Among the admitted legal consequences of violating the obligation, which at the same time are the means of the protection of civil rights and interests (Sections 8 and 9 of the Part 2 of the Article 16 CC), it is possible to emphasize the reimbursement for losses and moral damages as the means of civil legal liability.

The provision on the responsibility for delinquency is grounded in the works of prof. G. K. Matveyev and other civil lawyers. The ground for delinquency is the composition of a tort, which has to contain such

elements (conditions): 1) presence of tortious conduct (act or omission) of a person; 2) harmful result of such conduct (damage); 3) cause-effect relation between tortuous conduct and damage; 4) tortfeasor [10, c. 162].

A contract may stipulate sanctions (in particular forfeit, penalty or fine) for the violation of its particular conditions, if they are not stipulated in the law. By the arrangement of parties the departure from the principle of guilt as the ground for the civil legal responsibility is possible. According to the Part 1 of the Article 614 CC a person that violated the obligation shall be responsible, provided the guilt (intent or negligence) is obvious, unless otherwise is stipulated by a contract or the law. It means that the responsibility may be stipulated in a contract, regardless of the guilt (without guilt) of a person, who violated an obligation; or discharge from the responsibility with the presence of the guilt in the form of recklessness in the conduct of a person may also be stipulated. However, according to the Part 3 of the Article 614 CC a transaction terminating or restricting the responsibility for deliberate violation of the obligation is void.

The actions different by the character and often contradictory tendencies are admitted in the development of the institute of a contract, accordingly, contract law in contemporary conditions.

Thus, on the one hand, the freedom of the expression of the will in the determination of rights and obligations by parties is extended in the regulation of property relations.

Stressing the extension of the parties' freedom concluding contracts in some spheres of economic relations, in particular which were formed in the circumstances of command-administrative system on the basis of planned prescriptions, it is impossible to admit the opposite tendency which is peculiar to modern contract law of foreign states. The point is that the number of limitations of the principle of contract's freedom is set up with the aim of the protection of interests of a weak contractual party and securing of balanced development of property circulation. These limitations are displayed in particular in the intensive development of the competition legislation, legislation on the protection of consumer's rights, state regulation of pricing, regulation of the quality of goods, works and services, etc.

An important tendency of the development of civil in particular contract law is the rapprochement and interpenetration of the elements of proprietary, obligatory and other legal relations. First of all this is displayed in contracts directed to the transfer of a property right from an alienator to beneficiary of property (purchase and sale, supply, exchange, gift, lifelong maintenance, hire, etc.). The example of the contractual construction, in which proprietary and obligatory elements are combined, is the property management contract (Chapter 70 CC).

The extension and complication of economic relations in domestic and external circulation leads to the transformation of the system of contracts, appearance of new contractual forms in particular in the spheres of service rendering, compilation of information, international scientific-technological cooperation, etc. Contractual relations take a complex and long-lasting character more and more often (lease contracts of enterprises as integral property complexes, lease of accommodation with the condition of purchase, purchase and sale or lease of objects of unfinished construction, leasing, factoring, etc.).

An important direction in the development of contractual legislation of Ukraine is its adaptation to the standards of the European Union. Though, 10 years passed from the time of enactment of the National program on adaptation of the legislation of Ukraine to the legislation of the European Union, it's a pity but considerable steps in this direction were not taken at the legislative level.

At the current stage in Europe rather intensive work is conducted concerning the preparation of the Unified European Civil Code, which can become the culmination in the unification of one of the most important branches of the legislation.

The removal of duplication and discrepancy which exist in the regulation of contractual relations under the Civil and Commercial Code of Ukraine and some other acts of domestic legislation is important for the accession to the legal space of EU in particular to the sphere of contract law. The priority here has to be given to the provisions of the Civil Code, which has general character to contract law. A grate work has to be done in revision and renewal of the mass of normative-legal acts in the sphere of civil and commercial legislation and also commercial and judicial practice concerning the application of this legislation.

Correct offers concerning the improvement of the civil legislation which are declared by researchers in scientific publications, with the defense of candidate and doctor dissertations, at scientific conferences and «round tables» should be accounted in revisionary work with the normative base of contract law.

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Луць В. В. Феномен договору у цивілістиці

У статті визначається, що конструкція договору стала одним із найвизначніших здобутків світової правової культури. Положення про договори «начебто пронизують» майже усі підгалузі та інститути цивільного права. Як елемент механізму правового регулювання майнових і, певною мірою, особистих немайнових (цивільних) відносин, як юридичний факт договір впливає й на інші елементи цього механізму: цивільні правовідносини (зобов'язання), акти реалізації права, захист порушених прав та інтересів тощо. Наголошується й на певних тенденціях розвитку договірного права України в сучасний період, зокрема на проблемах адаптації його до стандартів Європейського Союзу.

Ключові слова: механізм правового регулювання, правочин, сутність договору, зміст договору, цивільно-правова відповідальність, юридичний факт.

Луць В. В. Феномен договора в цивилистике

В статье определяется, что конструкция договора стала одним из крупнейших достижений мировой правовой культуры. Положения о договорах «как будто пронизывают» почти все подотрасли и институты гражданского права. Как элемент механизма правового регулирования имущественных и, в определенной степени, личных неимущественных (гражданских) отношений, как юридический факт договор влияет и на другие элементы этого механизма: гражданские правоотношения (обязательства), акты реализации права, защиту нарушенных прав и интересов и тому подобное. Акцентируется внимание на определенных тенденциях развития договорного права Украины в современный период, в частности на проблемах адаптации его к стандартам Европейского Союза.

Ключевые слова: механизм правового регулирования, сделка, сущность договора, содержание договора, гражданско-правовая ответственность, юридический факт.

ВИЗНАЧЕННЯ КОНТРОЛЮЮЧИХ КОРПОРАЦІЮ ОСІБ КРІЗЬ ПРИЗМУ ДОКТРИНИ ЗНЯТТЯ КОРПОРАТИВНОЇ ВУАЛІ (PIERCING/LIFTING THE CORPORATE VEIL)

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У статті проаналізовано сучасні теоретичні підходи в розумінні поняття «корпорація» та визначено основні ознаки, притаманні корпоративним структурам. Дано характеристику різним критеріям, за допомогою яких встановлюється контролююча корпорацію особа. Окрему увагу приділено доктрині «зняття корпоративної вуалі» (piercing/lifting the corporate veil), як одній з моделей встановлення цивільно-правової відповідальності контролюючих осіб за зобов'язаннями корпорації.

Ключові слова: корпорація, контроль, контролююча особа, кінцевий бенефіціарний власник (вигодоодержувач), відповідальність, корпоративна вуаль (corporate veil), зняття корпоративної вуалі (piercing/lifting the corporate veil).