

THE DOCTRINE OF PROTECTION OF THE WEAK PARTY IN CONTRACT LAW

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Abstract

During recent years, one could observe intensification of processes aimed at unification and harmonization of laws in many European countries, including processes designed to reform the system of contract law. For example, significant changes were made to the contract provisions of civil codes of Russia (2015) and France (2016). Those contract law reforms are aimed at, among other things, developing more effective mechanisms of protecting weaker contractual parties from being subjected to unfair contract provisions.

With the goal of continued development and improvement of the doctrine of adhesion contracts in Russian civil law, as well as unification and harmonization of Russian contract law with the laws of European countries, this article uses comparative analysis to identify modern trends in the development of laws designed to protect a weaker contractual party in European contract law and to compare the approaches developed in the reformed Russian contract laws and modern contract laws of certain European countries.

Keywords: contract of adhesion, inequality of bargaining power, good faith, unfair contract terms, reform of French law of obligations.

1. INTRODUCTION

Currently, both the European and Russian academic literature pays particular attention to the concepts of morals and ethical behavior in contract dealings. More and more often, judges rely on the principles of fairness and fair dealings in their quest to protect the interests of weaker contractual parties in contractual relations. Academic writers contemplate whether the time is right to replace, or at least supplement, the “freedom of contract” principle with the principle of contract fairness, since modern contract law is becoming more concerned with protecting weaker contractual parties, making contractual partners pay attention to each other’s needs and

interests, and incenting contractual parties to build their contract relationships on the basis of fairness and cooperation (Braginskiy, 2000).

The concept of protecting a weaker contractual party is an essential doctrine not only in continental contract law, but also in common law. This concept is reflected, in particular, in such uniform acts as the UNIDROIT Principles of International Commercial Contracts (PICC), Principles of European Contract Law (PECL), Principles, Definitions and Model Rules of European Private Law, and Draft Common Frame of reference (DCFR).

At the same time, differences in academic viewpoints regarding the principles of fairness and fair dealings, certain incompatibility of those principles with the liberal concept of “freedom of contract,” and the lack of a settled doctrine designed to protect a weaker contractual party are all factors in the need for substantive changes in contract laws of European countries, many provisions of which laws were developed two centuries ago.

The Civil Code of Russia, enacted in 1994, was designed based on the then current civil law developments and, in this respect, was a more progressive legislative enactment than codified legislation of other European countries. In particular, the 1994 Civil Code codified the concept of an adhesion contract, and also included a general prohibition on unfair practices aimed at imposing unfair contract provisions on another party. However, Russian contract legislation was ahead of the real economic conditions in the country. Therefore, the Civil Code provisions regarding adhesion contracts essentially stayed dormant and had not been enforced by courts for the next fifteen years.

In recent years, however, courts dealing with contractual disputes have started using those statutory provisions in order to afford certain protections to weaker contractual parties. The history of judicial application of Article 428 of the Civil Code of Russia (which addresses contracts of adhesion) reveals the need for further development of this legislation, including through adoption of certain European approaches, which seems logical given the historical similarities and intertwined nature of the Russian and continental European legal systems.

2. OPINIONS AND DISCUSSION

In 2015, the Russian legislature amended the Civil Code of Russia in order to, among other goals, emphasize the principles of fair dealings in contract relationships. The amended Civil Code provisions require the parties to act in good faith, to take into consideration each other’s rights and lawful interests, to cooperate with each other, and to share necessary information when negotiating and implementing a contract, as well as after termination of the contract relationship. (Civil Code of Russia, Section 307(3).)

Although the Russian legislature retained the previous definition of “contract of adhesion,” the following statutory provisions were modified. First, if a weaker party to a contract of adhesion was subjected to unfair contract provisions, such a party may seek modification or rescission of the contract not only going forward (as allowed prior to the legislative amendment) but also retrospectively (*i.e.*, from the moment of contract formation).

Second, Section 428(3) of the Civil Code of Russia, which contains a definition of “contract of adhesion,” was supplemented with a new definition of “contract with unequal bargaining powers.” The latter term means a contract with the essential terms determined primarily by one party, while the other party’s ability to negotiate contract terms is significantly limited due to the inequality of the parties’ bargaining powers.

Third, amended Section 428 now protects both consumers and entrepreneurs if inequality of contractual bargaining powers is established. Previously, this section afforded protections to entrepreneurs only if they did not know and should not have known the actual terms of an executed contract when they adhered to such contract terms.

General provisions of the French law of contracts also underwent significant changes with enactment of Ordinance № 2016-131 on February 10, 2016. One of the goals of this enactment was simplification of certain provisions related to validity and enforceability of contracts, including issues of unfair contract terms, introduction of penalties for abusing superior bargaining power, and clarification of certain rules on interpretation and construction of contracts of adhesion. At the same time, the French legislature, like its Russian counterpart, chose to expand the application of the principle of fairness and fair dealings. Now, contractual parties are subject to this principle not only during the contract performance stage, but also during contract negotiations. (French Civil Code, Section 1104.) The principle of fairness and fair dealings in contract relationships has been recognized as part of the core law and order principles (“*ordre public*”), *i.e.* mandatory legal norms that govern the parties’ contractual behavior regardless of the parties’ consent (French Civil Code, Section 6.) In this respect, the French law of contracts is becoming similar to German contract law.

Although the definition of a contract of adhesion has existed in the Russian Civil Code since 1994, such a definition appeared for the first time in the French Civil Code only now, although the concept of adhesion contracts has been extensively studied in the French legal doctrine. (Tsyplenkova, 2002) Section 1110 of the French Civil Code defines “contract of adhesion” as a contract, the essential terms of which are drafted in advance by one party rather than being drafted as a result of contract negotiations. While assessing whether a contract of adhesion is fair, courts are not allowed to modify a contract purpose (subject) or contract price even if they find a significant imbalance between the rights and obligations of the parties. (French Civil Code, Section 1171.) By limiting courts’ authority to modify a contract in this respect, the French legislature attempted to find a balance between the freedom of contract principles and fairness of contracts of adhesion.

Modern English jurisprudence also provides examples of judicial intervention into the contents of contracts of adhesion. It is important to note that English law of contracts does not contain a definition of the principle of fair dealings or contract of adhesion. Contractual parties under English law have only those contract responsibilities that they voluntarily agreed to, unless a different result is prescribed by law. English law does not recognize a general contract duty to act “in good faith”: a party is simply required to perform its duties under the contract. Courts have the authority to modify a contract only in a very limited set of circumstances, taking into consideration the general principles of honesty and fairness applicable in business practices. At the same time, English courts traditionally take the position that the principle of *pacta sunt servanda* (“agreements must be kept”) is more important than contract fairness. For example, Lord Neuberger, in the case of *Arnold v. Britton & Ors* [2015] UKSC 36 (June 10, 2015), noted that a landlord did not have an obligation to act in good faith while negotiating a contract. If a contract provision is clear and unambiguous, the court has no authority to evaluate such a contract’s commercial fairness or reasonableness. A similar approach can be found in the case of *Marks and Spencer plc v. BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72 (December 2, 2015). Despite these examples, references to the general principles of good faith, including fairness, fair dealings, honesty, and reasonableness, are becoming more frequent in the decisions of English courts. (Berger, 2016.) A noteworthy example of this trend is represented by the judicial decision in the case of *Yam Seng PTE Ltd v International Trade Corporation (ITC) Ltd* [2013] EWHC 111 (QB), where the court held that the duty of good faith and fair dealings in contract performance almost always reflects the intention of the parties.

Accordingly, the ideas about the need to protect a weaker contractual party are developing and strengthening in both the common law and continental law, likely due to the commonality of approaches on this issue developed in the legislation of the European Union countries.

3. CONCLUSION

The comparative research summarized above shows that both the Russian and French legislatures, while reforming contract statutes, chose to place certain limitations on the freedom of contract by expanding the applicability of the principles of good faith and fair dealings, as well as codifying certain rules on adhesion contracts for the purpose of protecting a weaker contractual party in cases of unequal bargaining powers.

In this respect, assertions by some researchers that the principles of fairness and fair dealings and invalidating of contracts based on such contractors’ inconsistency with basic moral and ethical principles are simply an additional tool to control the fairness of contract terms appears to be incorrect. (Karapetov, 2012)

The majority of codified statutes regulating contracts were enacted at the end of the 19th and beginning of the 20th century, and those statutes did not provide for any special mechanisms to protect a weaker contractual party from being subjected to unfair contract terms when entering into an adhesion contract. Only during the last several decades, those legislative acts underwent substantive changes. In this respect, we agree with the statement by M.I. Kulagin that “expandable” principles requiring adherence to the norms of public morale, fairness, fair dealings, and the provisions about unfair contract terms, that exist in the laws of most Western civil law countries, did not provide the necessary level of protection to weaker contractual parties in contracts of adhesion and “in general, cannot be completely harmonized with the classical contract law principles of freedom of contract and free will of the parties.” (Kulagin, 2004)

The principle of fairness, as a core concept of civil law in general and law of contracts in particular, should be an essential and immanent feature of contracts of adhesion. (Tsyplenkova, 2002) A party’s ability to dispute certain terms of an adhesion contract on the basis of fairness essentially violates the general legal principle of «*Lex specialis derogat generali*», which principle has its roots in the Roman law and is no longer consistent with the demands of modern business practices.

The definition of a contract of adhesion in Section 428(1) of the Russian Civil Code appears to be greatly

influenced by the continental law of contracts, while the concept of contracts with unequal bargaining powers in Section 428(3) is more characteristic of English legal system. Therefore, Section 428 of the Russian Civil Code essentially contains two definitions, describing the same legal concept. An attempt to draw a distinction between these two definitions based on presence or absence of a standard offer does not sound persuasive. (Baculin, 2015)

To conclude, it is necessary to note that successful development of legal protections of a weaker contractual party in Russian contract law depends to a large extent on the existence of a comprehensive academic analysis of this legal doctrine, which doctrine was borrowed by Russian law from other legal systems, to determine whether and to what extent this legal doctrine is compatible with established legal concepts, judicial practice and other components of the Russian jurisprudence. It is also necessary to carefully analyze potential consequences of inconsistencies in and incompatibilities between legal concepts borrowed from other legal systems and existing domestic legal rules and principles. (Komarov, 2013)

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