Contractual freedom in contract law (With special emphasis on the construction contract)

Teuta Beka

Abstract

A contract is an agreement between two or more persons who intend to establish, change or extinguish a legal-civil relationship. Civil legal relations between the parties to the contractual law are regulated based on the principle of autonomy of the will of the parties. Legal entities by freely manifesting their will regulate a civil legal relationship. Regarding the autonomy of the will, the legal doctrine does not have a unique position. Voluntary autonomy is explained more as a philosophical concept. Freedom of contract represents the possibility for the parties of their own free will to regulate their mutual relations. Restriction of contractual freedom has been done with imperative norms, with rules of morality and rules of good habits. Restriction of contracting freedom is oriented in terms of the possibility of choosing the contracting party, restriction in terms of content through adhesion contracts and in formal contracts through the form of contract, which includes consent to enter into the contract. Free restriction of the contracting of the party in case of concluding the contract is mostly expressed in the construction contract. The construction contract is a very formal contract and the non-implementation of the legal provision regarding the form of the contract brings the invalidity of the contract. These contracts in contemporary law are known as standard contracts which are previously drafted by one of the parties. These contracts are known as "take it or leave it" and the contracting party is not allowed to change the content but must enter into the contract as it is.

Keywords: contract, contractual freedom, construction contract, autonomy of the will, standard contract.

Introduction

A contract is an agreement between two or more persons who intend to establish, change or extinguish a legal-civil relationship. The contract carries out the circulation of goods and services at national or international level. In addition to contracts concluded between individuals, contracts are important where legal entities are presented as a party in order to carry out economic activity. The development of the trade economy would not be possible if the contractual relationships were not regulated according to the ***pacta sun servanta*** principle.

Civil legal relations between the parties to the contractual law are regulated based on the principle of autonomy of the will of the parties as ***Jus Dispozitivum***. Legal entities freely manifesting their will regulate a civil legal relationship. In Kosovo, the principle of voluntary autonomy is regulated by Article 3 of Law on Obligations, No. 04 / L-77, which states: Participants in liability relations are free, in accordance with the ordering provisions, of public order and good habits, to regulate their relations according to their will. Participants may regulate their relationship of obligations differently from that provided by this law, unless otherwise provided by the provisions of this law or

their meaning and purpose."
According to the abovementioned provision, participants are free to regulate their relations according to their will, in order not to violate the public order, good habits and imperative character provisions. Regarding the autonomy of the will, the legal doctrine does not have a unique position. According to a research group, when discussing freedom of contract, consequently the autonomy of the will is also discussed. Voluntary autonomy is explained more as a philosophical concept. Another group of researchers interprets the autonomy of the will as a way of regulating concrete relations and the freedom of this relationship. So the principle of contractual freedom is the concrete possibility of regulating certain relations in the best possible way. The principle of contractual freedom stems from the autonomy of the will (Alishani, 2000, p.26).

Doctrine on the autonomy of the will

The doctrine of voluntary autonomy has been known since the mid of-19th century, based on the principle that voluntary autonomy is a fundamental source of the beginning of contractual obligations. The will of the parties is the basis for a contract. Hence Kant's philosophy of "autonomy of the Will" and Ruso's view of human freedom was to dispose and restrict this freedom. According to this doctrine, the contract is a phenomenon which defines (explains) the whole legal system, where the social system itself has been generated from the contract. Law is an expression of the general will of society, which turns out that the will of the individual rests on the will of the law (Blagojevic, Krulj, 1980, p. 51). According to this doctrine, the law comes into consideration only in cases when the public order is violated, which circumstances are listed by legal provisions, allowing the autonomy of the will of the parties to be expressed.
In the practice of contract law, the principle of autonomy of the will has found wide application in relation to the contractual freedom. Contractual freedom represents the possibility for the parties of their own free will to regulate their mutual relations. Subjects in a legal relationship decide whether or not to conclude a particular contract, and enjoy the right to choose the party with whom to conclude a contract. Hereof derives the right-autonomy of the will of the party, not to conclude a certain contract, if it considers that such a contract is harmful to it. A legal relationship cannot be established by force (Jashari, 2016, p. 34). With the contractual freedom, the parties freely decide on the content of the contract, as well as the rights and obligations that must generate from the concluded contract. From this principle derives the right of the parties to place clauses in a contractual report which restrict or extend their right, especially when the contract which is not regulated by law (nameless contracts).
The regulation of contractual relations through the autonomy of the will is considered as a rule of provisions ***Jus Dispozitivum***, with the exception of legal provisions which are ***Jus Imperativum,*** which the contracting parties cannot change or violate, such as the written form of the concluded construction contract, where the law has correctly defined the form **(ad solemnitatem).** From this comes the maxim that "the contract is the law for the parties".

The theory of autonomy of the will has been under numerous criticisms in French law, which support the idea of limiting the autonomy of the will and minimizing the importance of this principle in relation to other principles of contract law such as: trust, honesty, legal certainty, etc. (Blagojevic, Krulj, 1980, p.50).

Development of contractual freedom rules

Voluntary autonomy or contractual freedom is one of the basic principles of contract law. The principle of contractual freedom represents the possibility for the contracting parties to voluntarily regulate mutual relations. The principle of contractual freedom means:

• Freedom to establish legal affairs - means the freedom of the subject to establish or not a legal work;
• Legal entities decide of their own free will the choice of the entity with which they will conclude the contract;
• Independently determine the rights and obligations, the form and manner of concluding the contract;
• Legal entities voluntarily decide freely on the change and termination of the contract.
• In cases where the contract is concluded between entities with different citizenship, the legal entities can freely choose the legislation which will be applied in their contract, as well as to appoint the court in case of dispute between them (Dauti, 2013, p. 51).

The rules of the principle of contractual freedom have been developed along with the development of contract law. These rules have not had a linear development, but a development that expresses the level of development of social economic relations in it and the level of legal philosophy, because the regulation is the superstructure of the development of forms of social consciousness. There is no unique position in legal doctrine as to when the principle of contractual freedom first appeared. A research group emphasize that the principle of contractual freedom did not exist in Roman law, it was very formal and there was no room for application of this principle due to the fact that the ***forma date esse rei*** - determines the essence in the relationship of obligations and contractual freedom has been limited (Alishani, 2000, p. 36). This statement was related to the form of legal work but not with the content of the legal work, or restriction in the freedom to select the contracting party, with the criteria that the contract is not contrary to law, good habits or moral rules. - ***neque contra leges neque contra bones waters mores paciscu possumus / Paullus sententiae***-1 & 4 (Alishani, 2000, p. 36). In the period of the Roman Republic this right has recognized the following consensual contracts: ***emptio-vendio, mandatum, societas, locatio-condicio*** (Bilalli, Bahtiri, 2015, p.287). Despite the fact that Roman law has recognized the consensual ***Solo consensus obliguat***, its application in practice has been limited.

In feudal law the rules of the principle of contractual freedom have been limited, because in this period the level of economic development has been low. The influence of canonical (ecclesiastical) law has conditioned that the rights of the contracting parties have not been able to contract something that is contrary to spiritual values.

Representatives of canon law have understood the rules of good habits as ***bonni mores natyrales*** -good natural habits. According to the canonists, any contract that has been contrary to good habits is considered absolutely invalid, because it violates the public interest, and at the same time violated ecclesiastical law.

After the French Bourgeois Revolution, a new era of affirmation of the individual's will and the principle of autonomy of the will in contractual relations begins. The development of capitalist relations, the strengthening of private proof, the conclusion of contracts for the purpose of the circulation of goods and services, the growth of national and international markets, were the premises to create a new order where the autonomy of the will was primary in concluding a contractual relationship. According to French doctrine, the contract is made by the parties, their will is free and it cannot be limited, if it is limited it is done according to the will and desire of the party. The will of the parties has binding force for the contract created and for the parties themselves, the contract is above the law "***Le contract est superie-uer a la loi***" (Perovic, 1971, p.156). So according to the French individualistic doctrine the principle of autonomy of the will is understood in the abstract aspect, private property is considered unlimited, and the idea of abstract equality between the contracting parties and the concept of liberal economy was defended. Representatives of this philosophy have defended the idea that the will can be limited by the individual and not by external circumstances.

This theory, despite the positive aspects of the development of the idea of autonomy of the will, has attitudes that are impossible to realize in practice. It is known in contract law that the will of the parties may be limited by the rules of morality, good habits, and by law. Any violation of these three main pillars of a legal system causes the contract to be invalid. The influence of individualistic French doctrine on contemporary contractual right was present especially in the question of the form of contract, content, interpretation and fulfillment.

At the end of the twentieth century in the civil codes of European states, autonomy of the will becomes the basic principle of contract law. Thus, the Italian Civil Code in Article 1322 states: "The parties may freely determine the content of the contract, within the limits set by law". According to the author Francesco Galgano, autonomy and freedom of contract are manifested in a double aspect: negatively and positively. Negative contractual freedom shows that no one can be bared of his belongings or forced to enforce obligations against his will. In the negative sense the autonomy of the will is present in the general concept of the contract. The contract obliges only those who have participated in the agreement, not the third parties, only if such a thing is provided by law. On the positive side, contractual freedom determines that the subjects, through the act of their will, create, change or extinguish the obligatory relationship. Contractual autonomy is manifested in three forms: freedom of choice according to the goals that the parties want to achieve on different types of contracts; freedom of contract is defined within the limits set by law regarding the content of the contract and the third form is the freedom to conclude atypical or unnamed contracts (Galgano, 2006, p. 266).

The principle of freedom of contract is regulated by the French Civil Code, Article 1134, the Austrian Civil Code, Article 878, the German Civil Code, Article 138.

These codes rightly recognize the freedom of contract as their basic principle. This principle is limited to special article which emphasize that entities may not enter into contractual relations if the moral, good habits and public order are violated. Also, the 1962 Unique U.S. Commercial Code does not contain expressive provisions on contractual freedom, but contains legal provisions on trust and the need of respecting commercial standards for fair business (Articles 1-104) with which the contractual freedom is realized. The Swiss Code of Obligations (Article 19) specifies that the content of the contract can be freely determined with the contractors within the law. Eastern European civil codes have adopted the principle of contractual freedom. The Polish Civil Code states that when concluding a contract, the socio-economic purpose and social norms must be taken into account, while the Civil Code of Czechoslovakia regulates the principle similar to the Polish one. (Vilus, 1976, p. 64)

The Civil Code of Albania in Article 660 stipulates that the parties to the contract freely determine its content, within the limits set by the legislation in force. According to this provision, the consent of the party must be seen as closely related to the content of the contract. The party must consent to the terms of the contract (Nuni, 2012, p. 676). The Code restricts the freedom of contract within the limits set by applicable law, which implies that the parties cannot enter into a contractual relationship if they violate the implementing provisions of the Code.

The Law on Obligations of Kosovo of 1978 established as a fundamental principle the freedom to regulate the forms of relations of obligations. According to Article 10, "Circulation participants are free to regulate the relations of obligations, but they cannot regulate them contrary to the principles set out in the constitution of social regulation, the obligatory provisions and the morality of the self-governing socialist society." According to this provision, contractual freedom is regulated indirectly. This provision for the first time regulates the principle of contractual freedom throughout the Yugoslav state, whereas, the Law on Obligations of Kosovo no. 04 / L-077 stipulates the contractual freedom of the parties in an obligation relationship.[1] According to the law, the freedom to regulate the obligation relationship consists of the freedom to decide whether or not to enter into a contractual relationship, the freedom to choose the party, the freedom to choose disputes alternatively or through the courts, the freedom to determine the right to be enforced in disputes when the contract is with a foreign element. In contracts with foreign elements, the autonomy of the will of the parties represents the possibility allowed by law for the contracting parties themselves to determine the competent right, the arbitral tribunal or the court to resolve disputes that may appear during the performance of the contract - ***lex electo, lex voluntatis, lex autonomiae.*** Autonomy of the will of the parties represents one of the legal instruments for determining the competent law and the competent body regarding the rights and obligations of the parties arising from the contract with a foreign element, which the contracting parties can use, but are not obliged to law (Bilalli, Kuci, 2009, p. 287).

[1] For more see Article 3, Law on Obligations of Kosovo no.04 / L-077.

Restriction of contractual freedom

In the legal systems of different countries, freedom of contract is not unlimited. The state's interest in controlling the progress of economic and social developments is also reflected in the contract law. Restriction of contractual freedom is done with imperative norms, with rules of rules of morality and rules of good habits. Such restriction is very reasonable, because no right can absolutely exercise contractual freedom. The state, through the restriction of contractual freedom, manages to maintain the legal security of the system and in particular the protection of the interests of the individual and society. Restriction of contractual freedom is oriented in terms of the possibility of choosing the contracting party, restriction in terms of content through adhesion contracts and in formal contracts through the form of contract, which includes consent to enter into the contract.

Restriction of contractual freedom with special emphasis on the construction contract

α) *Restriction of liberty in terms of concluding the contract*

Restriction of the conclusion of the contract is regulated by the imperative provisions of the law. This form of restriction of contractual freedom is more emphasized in the practice of concluding a contract. In the case of concluding such contracts, one of the contracting parties is absolutely deprived of the right to express their will during the conclusion of this contract. These contracts are regulated by the state and their refusal to conclude a contract is sanctioned by law. These contracts are regulated by imperative provisions - ***Jus cogens***. The contracts in which the contractual freedom is restricted are: the compulsory insurance contract, the deposit contract, as well the contract on the transport of people and things. Mandatory insurance contract for vehicles is regulated by imperative provisions, while other types of insurance such as life, fire, are left at the disposal of the individual to conclude or not a contract. These contracts are known as adhesion contracts and the law recognizes them more as administrative contracts than as business contracts (Vilus, 1976, p. 68).

b) Giving consent for the conclusion of the contract

A case of restriction of contractual freedom is also the giving of consent for the conclusion of the contract. This is the most classic form of restriction of contractual freedom which is exercised by public-state entities towards the individual or private legal person. Giving permission for the conclusion of the contract may precede the conclusion of the contract (granting the construction permit) or even after the conclusion of the contract (in case of incapacity for work on the occasion of concluding the contract). In the construction contract which is concluded between the perpetrator and the consumer for the construction of the facility, the investor is obliged to provide the contractor with the construction permit allowed by the administrative bodies and the technical documentation (design program, conceptual program and main project). If the investor fails to obtain a building permit, the concluded contract does not produce legal effects, it is non-existent. However, the damaged party has the right to compensation.

Restriction of contractual freedom also appears in relation to the form of the contract. To the contracts such are: construction contracts, contracts on the sale of real estate, contracts on insurance, contracts on licenses, contracts on credit, the law imperatively provides for the written form of this contract. The conclusion of these contracts by not respecting their formal side led to the cancellation of the contract. The free contractual restriction of the party in case of concluding the contract is mostly expressed in the construction contract. The construction contract is a very formal contract and the non-implementation of the legal provision regarding the form of the contract brings the invalidity of the contract.

The Law on Obligations of Kosovo stipulates that: "the construction contract is a contract with which the contractor must, according to a certain project, build the building within the specified time, or on such land respectively in the facility already existing to perform other construction work, while the customer is obliged to pay a certain price for this. The construction contract must be in writing".[2] Thus, the legislator with legal provisions limits the will of the parties when concluding a construction contract. The free contractual restriction of this contract is expressed to such an extent that the contracting party during the fulfillment of the contractual obligations must strictly adhere to the formal side of the contract. This means that any changes or additions to the content of the contract must be made in writing. Thus, according to the Low on Obligations, for any deviation from the construction project, respectively from the contracted works, the contractor must have the written consent of the customer. According to this legal provision, the contractor will not be charged with raising the contract price for the works he has performed, unless he has previously received written consent from the investor.[3] As a consequence of the formal side of the contract, contractual freedom is extremely limited. Such a restriction in construction practice has caused many problems.

Many authors such as Goldshtajn, Vilus, Capor, Blagojevic, consider the restriction of contractual freedom in terms of the formal side of concluding contracts to be necessary in order to provide the individual and society with the highest legal security (Gojdstajn, Barbuc, Vedris, Matic, 1979, p. 368).

c) Restriction in terms of the content of the contract

The number of contracts where the legislator with legal provisions restricts the freedom of contract is large. The law determines the content of each contract separately and as such they must be respected by legal entities. They have no opportunity to change anything outside the legal provisions. In contemporary law, the restriction of contractual freedom in terms of the content of the contract is more expressed in formal contracts. According to the law, these contracts have their own content and the contracting party finds it impossible to change or supplement it. These contracts in contemporary law are known as standard contracts which are previously drafted by one party (in the most frequent cases by the state or various economic associations). These contracts are known as "**take it or leave it**" and the contracting party is not allowed to change the content but must enter into the contract as it is. These standard contracts are recognized in business law, where the autonomy of the will of one party

[2] Article 645, Low on Obligations, no.04 / L-770.

[3] Article 648, Low on Obligations, no.04/L-770.

is totally limited.
The restriction of contractual freedom in the construction contract is evident. Legislator with **cogente** provisions has made it impossible for the parties to make their change. According to the Low on Obligations, it is foreseen that the contracting parties during the conclusion of the contract must agree on the essential elements of the nature of the work: the object and the price, the deadline for completion of construction works, as well the guarantee deadlines regarding the quality of works (Vilus, 1976, p. 69).
As it mentioned above, the construction contract is a strictly formal contract and the content of the contract should be the same. The object of the construction contract according to the Low on Obligations is "Certain project, certain object, certain land, within the set deadline". So, the legislator obliges the parties to have available project in advance on the basis of which the building will be built, the place-land where the building is constructed is known in advance, as well as the time within which the construction object must be finalized. Restriction of the contractual freedom of parties, in order to decide on the content of the contract is more pronounced in cases when the contracting party - investor is the state. In these contracts the opposing party - the contractor is deprived of the right to negotiate the terms of the contract. The contract is in a standard form drawn up in advance, which after the conclusion must be strictly implemented by the contractor. From non-execution of the contract within the foreseen contractual terms, generates the right of the investor to make its settlement unilaterally, as well as the right to compensation. The law has also made restrictions on the guaranteed deadlines for the quality of work performed by the contractor. These deadlines have been set and neither side can change them.
There is the idea that the establishment of free contractual restriction by the legislator was done in order to protect the interest of the individual but also the public interest. Kosovo's case law has shown that most of the contracts concluded between public authorities in the capacity of labor costumer and economic operator in the capacity of labor contractor have ended in disputes with the judicial authorities.
Contracted freedom is significantly limited after the submission of formal contracts, as in most cases these contracts are drafted by the state or powerful economic corporations. As a result, we violate the Low on Obligations principle on the equality of the parties in a contractual relationship.

Conclusions

The scope of application of the principle of contractual freedom is first and foremost in contract law. The rules of this principle are expressly provided by legal provisions or derive from the provisions of a law. These rules have existed since ancient times, but the culmination of their own development was reached in the early 19th century, when the development of the market economy began. In Kosovo, the autonomy of the will is regulated by Article 3 of the Law on Obligations No. 04 / L-077. According to the law, the freedom to regulate the obligation relationship consists of the freedom to decide whether or not to enter into a contractual relationship, the freedom to choose the party, the freedom to choose disputes alternatively or through the courts, as well

as the freedom to determine the right to be exercised in disputes when the contract is with a foreign element. The state, through the restriction of contractual freedom, manages to maintain the legal security of the system and in particular the protection of the interests of the individual and society. Restriction of contractual freedom is oriented in terms of the possibility of choosing the contracting party, restriction in terms of content through adhesion contracts and in formal contracts through the form of contract, which includes consent to enter into the contract.

Free restriction of the contracting of the party in case of concluding the contract is mostly expressed in the construction contract. The construction contract is a very formal contract and the non-implementation of the legal provision regarding the form of the contract brings the invalidity of the contract. The restriction of contractual freedom in the construction contract is evident. Legislator with ***cogente*** provisions has made it impossible for the parties to make their change. According to the Low on Obligations, it is foreseen that the contracting parties during the conclusion of the contract must agree on the essential elements of the nature of the work: the object and the price, the deadline for completion of construction works, as well the guarantee deadlines regarding the quality of works.

References

Alishani, A. (2000) Parimet Themelore të Ligjit mbi marrëdhëniet e detyrimeve, Prishtinë.
Blagojevic, B. Krulj, V. (1980) Komentar Zakona o obligacionim Odnosima I, Beograd.
Bilalli, A. Bahtiri, B. (2015) E drejta Romake, Prishtinë.
Bilalli, A. Kuci, H. (2009) E drejta Ndërkombëtare Private, Prishtinë.
Dauti, N. (2013) E drejta e Detyrimeve, Pjesa e përgjithshme, Prishtinë.
Galgano,G. (2006) E drejta Private, Tiranë.
Goldstajn, A. Babic J. Vedris M. Matic Z.(1979) Obavezno Pravo, Prva Knjiga, Zagreb.
Jashari, A. (2016) E drejta afariste (Kontraktore) Tetovë.
Nuni, A. (2012) E drejta civile, Pjesa e përgjithshme, Tiranë.
Perovic, S. (1971) Obligaciono pravo, Beograd.
Smaka, R. Gojani, S.(2012) E drejta Biznesore, Prishtinë.
Vilus, J.(1976) Opsti uslovi formularnih ugovora, Beograd.
Ligji për Marrëdhëniet e Detyrimeve të Kosovës, Nr.04/L-077.
Kodi Civil Italian (2014) Tiranë.