DOCTRINE OF WEAK PARTY PROTECTION: REFORM OF THE CONTRACT LAW OF RUSSIA AND FRANCE

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Abstract

At present, active work is underway with the purpose of unification and harmonization of the European private law. The reform process affected, in particular, the national civil law systems of Russia and France. Significant amendments were introduced to the general provisions on obligations and contracts of the civil codes of Russia (2015) and France (2016, 2018). At the same time, the amendments aim to, among other things, create effective mechanisms for protecting a weak party to a contract from imposing unfair terms and conditions.

Based on the results of their comparative research, the authors of the article attempted to identify trends in the development of the doctrine on the protection of a weak party in the European contract law, compare the approaches developed in Russian post-reform contract law and French updated law of obligations with a view to further improving the provisions on contracts of adhesion in the civil law of Russia, its unification and harmonization with the European contract law.

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

1 INTRODUCTION

Nowadays both Russian and European literature on contract law pay special attention to moral and ethical categories of civil law. Courts increasingly turn to the principle of good faith in their efforts to protect the rights of the weak party of a contract. Legal scholars question themselves whether it is time to replace or supplement the principle of freedom of contract with the principle of its fairness, since the tasks of the modern contract law are to protect the weaker party to a contract, oblige the partners to take into account each other's interests and encourage them to build their contractual relations on the basis of cooperation and good faith (Braginskiy, 2000).

The idea of the weak party protection becomes a characteristic feature of the European contract law. Current trends of the development of the doctrine in question are reflected, in particular, in the following unified acts: UNIDROIT Principles of International Commercial Contracts (PICC), the Principles of the European Contract Law (PECL), Principles, Definitions and Model Rules of the European Private Law, Draft Common Frame of Reference (DCFR).

At the same time, diversity of scientific views on good faith and fairness that appeal to the philosophy of law, as well as the ambiguity of their relation to the liberal theory of freedom of contract, absence of a harmonious doctrine of the weak party protection – all of these have determined the need for a cardinal legislative updating of contract law for a number of countries of continental Europe.

The content of the Civil Code of the Russian Federation (hereinafter – the RF Civil Code) that was adopted in 1994, already had focus on the latest achievements of private law sphere, and thus outstripped the codified acts of other European countries in numerous ways. The RF Civil Code initially included the notion of an adhesion contract and a general ban of the mala fide conduct iming to impose unfair terms and conditions on the weak party. According to para. 1 of Article 428 of the RF Civil Code, the contract of adhesion is a contract, the terms of which are defined by one of the parties in templates or other standard forms and can be accepted by the other party only via acceding the proposed contract in its entirety. Despite some imperfections in the notion of the contract of adhesion (see Baculin, Andrey F.; Kuzmina, Anna V.; Miagkova, Olga I., 2015), it should be noted that the legislative regulation in many respects outstripped the actual development of economic relations of that time. It is for this exact reason that provisions on the adhesion contracts have in essence remained not called for in judicial practice for approximately 15 years.

Russian courts, when considering contractual disputes nowadays, quite often resort to these rules with the purpose of protecting the weak party. The practice of applying Article 428 of the RF Civil Code on the adhesion contract has revealed the need for further improvement of the legislation, including through the perception of the European legal approaches. This predetermines the historically "cognate" connection between the Russian civil law and the private law of the European states with continental legal system.

2 OPINIONS AND DISCUSSION

In 2015, the RF Civil Code introduced conceptual amendments to the general provisions of the contract law, where the main idea of the legislator was the principle of good faith of the parties to the obligation. When establishing and fulfilling an obligation as well as after its termination, the parties are obliged to act in good faith, taking into account the rights and legitimate interests of each other, mutually providing the necessary assistance to achieve the aim of the obligation, and also to provide each other with the necessary information (para. 4 of Article 1 and para. 3 of Article 307 of the RF Civil Code).

The notion of the contract of adhesion has been retained during the reform, and significant changes have affected the following provisions.

First, in case of imposition of an unfair condition, the weak party is now entitled to demand a change or termination of the adhesion contract not only for its future application, but also retrospectively, i.e. since the moment such a contract was concluded.

Secondly, the wording of para. 3 of Article 488 of the RF Civil Code became completely different. Along with the notion of the adhesion contract, the article establishes the notion of a contract with the inequality of bargaining powers, which is understood as a contract with terms determined by one of the parties, while the other party, due to the obvious inequality bargaining powers, was placed in a position that significantly impedes the negotiation of other content of separate contract terms.

Third, according to the amended version of Art. 428 of the Civil Code of RF, protection against imposition of unfair conditions is equally granted to both citizens and entrepreneurs in the event of their negotiation (procedural) inequality. Earlier, para. 3 of Article 488 of the RF Civil Code provided protection to entrepreneurs only in cases where, when joining the terms and conditions of the contract, they did not know and should not have known under what terms and conditions they are concluding the contract.

It should be noted that the amendments to the RF Civil Code were preceded by adoption of Resolution No. 16 "On Freedom of Contracts and Its Limits" of March 14, 2014 by the Plenum of the Supreme Arbitration Court of the Russian Federation, which offered a number of absolutely new legal approaches that were subsequently partially accepted by the legislator. Thus, the resolution of the highest judicial authority states that in business relations the court is entitled to protect the weak party of the transaction that has committed to it on conditions that are clearly onerous or substantially violate the balance of interests of the parties,

when the weak party was placed in a position that hampers the negotiation of the other terms and conditions. In this situation, the court is entitled to amend or terminate the contract by applying the provisions of para. 2 of Art. 428 on the contract of adhesion. The weak party can defend itself on the basis of provisions on abuse (Article 10 of the RF Civil Code) or the invalidity of such conditions because of their conflict with the foundations of law and order (Article 169 of the RF Civil Code).

At the same time, the above Resolution contains an important indication that the disputed terms should be assessed in conjunction with other provisions of the contract as related transactions. Thus, disadvantageous conditions can be compensated by advantages of other provisions of contracts. Courts, when resolving disputes, should also take into account other circumstances: the level of professionalism, competition, the opportunity to conclude an alternative transaction, and use the interpretation in the event of a vague contract

Despite the fact that the Supreme Arbitration Court of the Russian Federation is abolished and its powers are transferred to the Supreme Court of the Russian Federation pursuant to the law of the Russian Federation on the amendment to the Constitution of the Russian Federation of February 5, 2014 No. 2-FKZ, legal positions remain valid until the moment they are canceled.

With the adoption of Resolution No. 2016-131 of February 10, 2016 on reforming the contract law and general provisions on obligations, the French contract law underwent significant changes. The objectives of the French reform included, among others, simplification of the rules on the validity of contracts that also included questions related to the notion of unfair terms of contracts, as well as imposition of sanctions for the abuse of the weak position of the counterparty, and clarification of the interpretation rules for contracts of adhesion. At the same time, the French legislator, like its Russian counterpart, took the path of legislative expansion of the sphere of application of the good faith principle. At present, the parties are obliged not only to perform the contract in good faith, but also negotiate its conclusion and enter into it in good faith (Article 1104 of the French Civil Code). The principle of good faith in contractual relations is recognized as part of the "foundations of law and order" (ordre public), that is, a mandatory rule that operates independently of the contract between parties (Article 6 of the French Civil Code).

The concept of the adhesion contract has been legally enshrined in the RF Civil Code since 1994, however, the concept of this contract (le contrat d'adhésion) was mentioned for the first time in the French civil code, although this concept is well researched and known in the French doctrine (Tsyplenkova, 2002). Thus, according to Article 1110 of the French Civil Code (as amended by Resolution No. 2016-131 of February 10, 2016, effective on October 1, 2016), the contract of adhesion is understood as a contract in which the general conditions were prepared in advance by one party and were not subject to negotiations.

Taking into account the pan-European unified approaches to ensuring the balance of interests of the parties, the French legislator considered it sufficient to enshrine only the contract of adhesion. The French code does not contain other instruments like contracts with the inequality of bargaining powers, as described in Article 488 of the RF Civil Code. It seems likely that the concept of the contract of adhesion (para. 1 of Article 428 of the RF Civil Code) is a reproduction of the institution that the continental contract law is familiar with, whereas the structure of the contract with the inequal bargaining power (para. 3 of Article 428 of the RF Civil Code) is more typical for Anglo-American law. Therefore, we should agree with the opinion that Article 428 of the RF Civil Code provides two concepts that describe essentially the same phenomenon. Distinguishing these two contracts only on the basis of presence or absence of a standardized form of the offer appears unconvincing (Baculin, Andrey F, Kuzmina, Anna V, Miagkova, Olga I., 2015).

If previously protection from unfair terms was provided only to consumers, nowadays the French Civil Code has significantly expanded the scope of application of the provisions on the adhesion contract, extending their effect to contracts concluded between any persons. Thus, both in Russia and in France there is a tendency to apply the doctrine of protection of the weak side from imposition of unfair conditions (b2b) in business contracts. It should also be noted that, similarly to the Russian law, the provisions of the French Civil Code (hereinafter – the FCC) on the contract of adhesion are general rules in relation to legislation on the protection of consumer rights and competition.

Once a contract is categorized as contract of adhesion, this entails the French court to apply a special regime - namely, special rules for interpretation and finding unfair terms void. Unlike the Russian civil law, where only the judicial practice contains the interpretation of the contra proferentem, the French legislator directly stated in Article 1190 of the FCC that, in case of a doubt, the adhesion contract should be interpreted against the party that drafted it.

There are also differences when it comes both to the method of protection against the imposition of unfair conditions, as well as the establishment of limitations of judicial control over the content of the adhesion

contracts. For instance, according to Article 1171 of the FCC, any condition that creates a significant disbalance between the rights and obligations of parties to a contract of adhesion, is considered to be unwritten. When assessing the fairness of the adhesion contracts content, the court cannot review either the subject or the price of the contract due to the disbalance of the legitimate interests of the parties. When introducing such a restriction, the French legislator apparently attempted to find a correlation between the limits of the principle of freedom of contracts and the fairness of the content of contracts of adhesion.

At the same time, the legislative definition of the contract of adhesion, introduced by Resolution No. 2016-131 of February 10, 2016, caused heated discussions among French legal scholars. The notion of "general conditions" used in the definition of the adhesion contract, which the French code is not aware of (see Rapport Sénat Pillet n ° 22 du 11 octobre 2017; Rapport Assemblée nationale Houlié n ° 429 du 29 novembre 2017), was criticized. As a result, Law No. 2018-287 of April 20, 2018, which ratified Resolution No. 2016-131 of February 10, 2016, introduced amendments to Article 1110 of the FCC, according to which the contract of adhesion is a contract with a set of conditions that were developed in advance by one of the parties and were not subject to negotiations. At the same time, an editorial clarification was added to Article 1171 of the FCC, stating that a condition of the adhesion contract is considered to be unwritten if it was not the subject of negotiations between the parties. These changes come into effect on October 1, 2018.

The reasons for these legislative changes are similar to those that occurred earlier in Russian judicial practice and predetermined the need to reform the provisions of the RF Civil Code on adhesion contracts. Namely, should the terms of an adhesion contract always be designed for multiple usages and addressed to an indefinite number of persons? Does the special regime of the adhesion contract apply if one or more of the general conditions were agreed upon by the parties? If a contract was offered to a party, but the party did not take the advantage of the right to negotiate, can it still be recognized as the adhesion contract? Procedural difficulties are known to exist in proving the impossibility of the weak party to negotiate, including those cases when the weak party did not receive an official refusal from the offeror as regards changing the terms of the contract (see Rapport Sénat Pillet n ° 22 du 11 octobre 2017; Rapport Assemblée nationale Houlié n ° 429 du 29 novembre 2017, Baculin, Andrey F., Kuzmina, Anna V., Miagkova, Olga I., 2015).

It seems that these problems are largely leveled off once we assume that the offer in adhesion contracts should be standard and designed for multiple applications. In particular, the Law Commission and the Scottish Law Commission, in their opinion on the reform of contract law, when discussing the admissibility issue of granting protection to small business entities from unfair contract terms, concluded that "absence of the reference to the standard nature of contractual terms means that a business entity is entitled to challenge any condition that was developed by the other party and, as a consequence, was not subject to negotiations. This rule should apply, including cases where the contract is designed for a specific transaction. This approach appears to be inexpedient. If a contractual condition is designed for a specific transaction with a specific counterparty, the offeror by definition cannot refuse to carry out individual negotiations regarding its content solely on the grounds that the template contract contains this condition. If the acceptor refuses to discuss the contractual condition, then, probably, solely due to the fact that it is in his interests "(Unfair terms in contracts. Report on a Law of the Commissions Act 1965, 2005).

Moreover, during the National Assembly's (l'Assemblée nationale) discussion of the concept of the adhesion contract, it was suggested to keep the reference to standard conditions and explain the notion of "general conditions", indicating that it means "a set of provisions established in advance by one of the parties that were not negotiable and are intended to be applied to a multitude of persons or contracts "(Rapport Assemblée nationale Houlié n ° 429 du 29 novembre 2017). However, the final version of Article 1110 of the FCC does not contain the reference to "general conditions" and their definition.

The Russian legislator is less consistent in the use of terminology. The concept of "general conditions" is not known to the RF Civil Code. At the same time, the Federal Law "On Consumer Credit (Loan)" No. 353-FZ of December 21, 2013 (version as of December 5, 2017) provides that the consumer credit (loan) agreement consists of general and individual conditions. General conditions are established unilaterally by the creditor for the purpose of multiple applications. Moreover, the literal interpretation of Section 9 of Article 5 of the Federal Law "On Consumer Credit (Loan)" leads to conclude that the conditions specified by the legislator as individual are not subject to the special rules of para. 2 of Article 428 of the RF Civil Code on amending and terminating the contract in view of the obvious onerousness of such conditions for the borrower. At the same time, de facto credit and other financial organizations unilaterally develop not only general but also individual conditions, following the "take it or leave it" approach to the negotiating process when concluding a consumer credit (loan) agreement with the weak party – the borrowers. Given the obvious gap in this part of the current legislation, the authors of this article believe that one should proceed from the fact that Article 428

of the RF Civil Code can be applicable to the individual conditions of the consumer credit (loan) agreement if the borrower was unable to participate in developing the other content of these conditions, unilaterally proposed by the creditor, but only to that part of these conditions, which he was forced to join without negotiations.

In addition, we believe that the inequality of bargaining powers also predetermines various requirements to the standard of proof of the circumstances of the contract conclusion. The burden of proving the good faith of negotiations and the fairness of the terms and conditions of the concluded contract should be placed on the offeror who elaborated the draft contract. It should be enough for the weak party to point out the onerous conditions and confirm the impossibility of participating in the negotiation process on the disputable terms of the contract at its conclusion.

3 CONCLUSIONS

Comparison of the results of primary and final diagnosis allows to claim that without the introduction The carried out comparative research shows that both the Russian and French legislator, while reforming the contract law, took the path of restricting freedom of contract by expanding the application scope of the good faith principle, as well as enshrining in codes special provisions on adhesion contracts designed to protect the weak party in the case of inequality of bargaining powers.

In connection therewith, statements by some authors that norms on good morals and good faith, inadmissibility of abuse of rights, recognition of transactions contradictory to the foundations of morality and the rule of law can be used as a special additional tool to control the fairness of contracts' contents, look wrong (Karapetov, Saveliev, 2012).

Most civil codified acts were adopted at the turn of the 19th and 20th centuries and did not provide for a special mechanism to protect the weak party from imposition of unfair conditions when concluding the contract through adhesion to it. They were only conceptually revised in the last decade. One should agree with the opinion of M.I. Kulagin that the "elastic" provisions on the need to observe public order, good morals, good faith or clauses on unjustified contractual terms, available in the civil law of the most Western countries, did not provide the necessary protection of the weak party in the adhesion contracts and "in their entirety, are poorly consistent with the general principles of classic contract law with its autonomy of will and freedom of contract"(Kulagin, 2004).

We believe that good faith, as the fundamental principle of civil law in general and the law of obligations in particular, is inherent and inalienable in the contract of adhesion (Tsyplenkova, 2002). The possibility of challenging certain terms and conditions of the adhesion contract according to general rules on good morals violates essentially the general principle of law "Lex specialis derogat generali", which goes back to Roman law, and does not meet modern requirements of civil circulation.

In conclusion, it should be noted that the necessary condition for achieving positive results of the development of the doctrine of protection of the weak party in Russian contract law is that regulations or institutions borrowed from another legal system should be sufficiently well studied from the standpoint of their compatibility with the legal culture, legal and technical traditions, judicial practice that have crystallized in the host system as well as with other important aspects that make up this legal system. Also, possible consequences of the incompatibility of selected for adoption foreign legal concepts with existing national regulations should be carefully analyzed (Komarov, 2013).

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