

CONTRACT LAW IN UKRAINE

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I. THE TRADITION OF PRIVATE (CIVIL) LAW

The Ukrainian tradition of private law reflects the historical, geopolitical and cultural peculiarities of the development of the Ukrainian state. Due to these circumstances, Ukraine has been confronted with a need for orientation between different directions. The country is therefore sometimes characterized as a frontier state, subject to influences from the West - by the European tradition, from the East - by the Russian tradition, and from the South - by the South-West Asian tradition.

Because of competing forces outside Ukraine, established for historical reasons in the Middle Ages, Ukraine was, for a long time, politically split up between Poland and Moscow and culturally influenced by East and West. In particular, there was a considerable influence of the Greek-Byzantine East on the spiritual tradition, and of the Latin West - on the social structures of Ukraine. Although the cultural dimensions of Ukraine are seen as a synthesis between East and West, Ukraine itself is usually characterized as a European state. In the religious sphere such an approach made Ukraine the classical state for the Uniate¹ tradition. In the cultural sphere it has led to the so-called Ukrainian baroque style, which united Byzantine and western traditions. In the sphere of law this is the reason why combinatory and even eclectic methods were used.

The division of the Ukrainian culture into two branches (Eastern and Western) is mainly reflected in the development of the private law. Thus, the tradition of law of the Western Ukraine shows a considerable influence of the West, and in the Eastern part of Ukraine the East European tradition is noticeable. These influences have formed the Ukrainian private law as it is on the current stage. They explain the inconsistent attitude of the society towards the division of the law into private and public law, and the continuous discussion of lawyers on the practicability of separate economic law, i.e. the refusal to include family law in the civil law etc. These peculiarities of the Ukrainian private law tradition have influenced the development of the civil law conception of today's Ukraine as well.

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¹The term "Uniate Church" denotes Orthodox churches accepting the Catholic faith and the supremacy of the Pope but retaining their own liturgy and separate organization.

II. SOURCES AND SYSTEM OF CIVIL LEGISLATION A.

Legislative Sources

1. Constitution and International Treaties

First in the hierarchy of Ukrainian legislation comes the Constitution of 1996. It has supreme legal force. Laws and other legal acts are adopted on the grounds of the Constitution and must correspond with it (Art. 8 of the Constitution).

International treaties that have been ratified by the Ukrainian Parliament and have come into effect for Ukraine are considered an integral part of national legislation. The conclusion of an international treaty that does not comply with the Constitution of Ukraine is possible only after corresponding amendments to the Constitution have been made (Art. 9 of the Constitution).

2. The Civil and the Economic Code

Since 1 January 2004, Ukraine has two codifications regulating private law issues - the Civil and the Economic Code. The Economic Code had initially been intended as a legal act of the public law. The parallel existence of these two codes has led to overlapping and to contradictions, which is why scientists and politicians are discussing whether it is necessary to have two codes. The proposal exists to repeal the Economic Code, or at least to harmonize it with the provisions of the Civil Code, which was drafted later and corresponds better with international standards and practice. In any case, the main piece of civil legislation is the Civil Code of Ukraine. In the case that a legislative initiative intends for a draft to deviate from the Civil Code, it must simultaneously propose corresponding changes to the Civil Code itself.

3. Simple Laws

Simple laws in the field of civil law are adopted in compliance with the Constitution and the Civil Code. Among the most important of such laws are the acts "On International Private Law"², "On the International Commercial Activities", "On Companies", "On Investment Activities", "On Securities and Stock Exchange", "On Mortgage", "On Financial Leasing", etc. Currently the adoption of a Law on Joint Stock Companies is in process.

4. Subordinate Legal Rules

As regards subordinate legal rules, the acts of the President of Ukraine for cases stipulated by the Constitution should be mentioned. Some resolutions of the Cabinet of Ministers are also considered as civil legal acts. In case a resolution of the Cabinet of Ministers is contradictory to the provisions of the Civil Code or to any other law, the Civil Code or the other law shall apply. For example, legal acts of the President of

² This law came into effect on 1 September 2005. It covers not only conflict of law rules but also the law of international civil proceedings.

Ukraine, of the Ministry of Economics and of the National Bank of Ukraine regulate the requirements for international contracts, for the form of the protective stipulations, etc. However, these legal acts were adopted before the new Civil Code and the Law "On the International Private Law" came into effect, both of which have priority over the subordinate legal rules.

5. Legal Custom

Finally, civil relations may be regulated by legal custom, in particular by business practice. In this context, the Civil Code provides that custom may only apply as far as it complies with the agreement of the parties or the acts of civil legislation (Art. 7). The Resolution of the President of Ukraine "On the application of the International Rules of Interpretation of the Commercial Terms" of 4 October 1994 provides for the application of these rules to the conclusion of agreements by all subjects of commercial activities of Ukraine, including international agreements (contracts). The adoption of the Economic Code has given rise to discussions insofar as the article of the Code regulating the delivery contracts provides that the conditions of the contract be stated by the parties in compliance with the International Rules for the Interpretation of Trade Terms in International Commerce (Incoterms). In the opinion of many scientists and practitioners, the aforementioned rule signifies the mandatory application of Incoterms for both the internal and the international delivery of goods contracts.

III. THE CONTRACTUAL REGIME AS DETERMINED BY THE CIVIL CODE AND THE ECONOMIC CODE RESPECTIVELY

A. Definition of the Contract

Under Art. 626 of the Civil Code, a contract is an agreement of two or more parties with regard to the establishment, alteration or termination of their civil rights and obligations. The notions of civil and of business contracts are correlated as to kind and type, in the sense that the rules of the Civil Code rules may apply to relations arising from business contracts, whereas it is not possible to apply provisions of the Economic Code to civil relations that are not qualified as business relations.

B. Definition of the Essential Conditions of contracts, as Determined by the Civil Code and the Economic Code

The realization of mutual consent by the parties with regard to the essential conditions of the contract as provided for by the law is a complicated matter, from which contractual relations arise and with which the validity of the contract is connected. In accordance with para. I of Art. 638 of the Civil Code, a contract is considered concluded if the parties have duly achieved a consensus on all the essential conditions of the contract. Under Art. 180 of the Economic Code a business contract is considered concluded if the parties have duly achieved a consensus on all essential conditions of the contract in the order and form required by law.

To sum up, a strict definition of the essential conditions of the contract is necessary, because the conclusion of the contract depends from it. This is also an important practical task.

1. The Economic Code

Para. 2 of Art. 180 of the Economic Code provides for the essential contractual conditions to be determined by law (for business contracts in general or for certain types of business contracts only) as well as for conditions, with regard to which separate consensus is to be achieved at the request of one of the parties.

Therefore, the Economic Code classifies the essential conditions of the business contract as follows:

1. conditions determined as essential by law;
2. conditions which are required only for certain types of contracts; and
3. conditions for which a consensus must be achieved at the request of one of the parties.

The Economic Code states that the essential conditions of the business contract are ! the subject matter, the price and the duration of the contract (para. 3 of Art. 180). The subject matter of the contract includes the description and the quantity of the goods, as well as the requirements as to their quality.

2. The Civil Code

The Civil Code regulates the essential conditions of the contract in the afore-mentioned t. Art. 638. The following four groups of essential conditions may be distinguished:

- conditions on the subject-matter of the contract;
- conditions determined as essential by law;
- conditions determined by law as necessary for certain types of contracts;
- conditions for which a consensus must be achieved at the request of one of the parties.

A comparison between the concept of the Civil Code and that of the Economic Code shows that, different from the Economic Code, the Civil Code treats the subject matter of the contract as a separate group of the above-mentioned essential conditions, and it explicitly states the conditions necessary for certain types of contracts.

Since the Civil Code determines that the contract is a means for the establishment, alteration and termination of civil rights and obligations, it is obvious that, as against the Economic Code, the Civil Code considers the contract subject matter to be property, securities and other civil rights.

The scope of the essential conditions of specific contracts may be determined by Civil and Civil the Economic Code (see for example Art. 982 of the Civil Code - for insurance contracts) or in other laws. Thus, Art. 10 of the Law "On the Lease of the State and Municipal Property" determines the essential conditions of a lease agreement.

As to the conditions necessary for specific types of contracts, these are, for example, the condition with regard to the price in any contract against payment, or conditions which are provided for directly by law. For example, for a contractor agreement, the duty of providing the consumer with necessary and reliable information is required by Art. 868 of the Civil Code.

As to conditions, the consensus on which is to be achieved upon the request of at least one party, does not mean that such a condition must necessarily be included into the contract itself. On the contrary, the parties may agree not to include such a condition in the text. That is why it is recommended to stipulate in the text of the contract that the parties have agreed upon all its essential conditions.

As can be seen from the above, the provisions on the essential conditions of the contract in the Civil Code are less mandatory than the rules of the Economic Code. The Civil Code states that the only mandatory condition of the agreement is its subject matter. And, the Civil Code provides for a far-reaching freedom of contract, by stipulating in Art. 6, that the parties in the agreement may derogate from the provisions of civil legislation and regulate their relations on their own.

IV. TYPES OF CONTRACTS

The legislative acts follow the classical division of contracts into consensual and real, payable and non-payable, abstract and executed contracts, etc. The Civil Code explicitly divides all transactions into unilateral, bilateral and multilateral (Art. 202). Such a division is based on the right of demand of one party and the counter obligation of the other party to perform any actions or refrain from them. The Civil Code includes the presumption of the remunerativeness of the contract. The contract may therefore be considered gratuitous of beneficence only if this is regulated by its text or by law. The gratuity may arise from the context of the contract, as for the donation agreements and for loans.

The Civil Code, *inter alia*, also regulates the agreement of adhesion (Art. 634), the public agreement by which an entrepreneur has undertaken an obligation to sell commodities, fulfill jobs or provide services to anybody and is obliged by the law to enter into contracts provided he has possibilities to supply the respective goods to the consumer (Art. 633), the agreement to the third person's benefit (Art. 636) and interlocutory agreements (Art. 635). The Special Part of the Civil Code is devoted to the specific types of contracts: sale and purchase, loan, delivery, donation, rent, life-long maintenance, lease, contractor's agreements, services, transportation, insurance, agency, commission, property management, factoring, commercial concession, joint venture and many others.

V. THE PRINCIPLES OF OPTIONALITY AND OF FREEDOM OF CONTRACT

It should be noted that the participants in civil relations have the right to conclude contracts not regulated by the current legislation, but corresponding with its main basis. The parties are empowered to deviate from the provisions of the civil legal acts which are not mandatory. This is the principle of optionality in the civil law.

The principle of freedom of contract consists in the party's free choice of the other contracting party, in the free conclusion of the contract and in the free determination of its conditions. If the legal provisions expressly stipulate that certain rules are mandatory, or if this may be concluded from the contents of the contract or from the relations of the parties, the latter are not allowed to deviate from the civil legislation

rules. Limitations of the freedom of contract are also determined by common business practice as well as by the requirements of reasonability and justice.

The Civil Code also provides for guaranties of the freedom of contract. For example, transactions which have been concluded under the influence of deceit or violence, as a result of a malevolent agreement of the representative of one party with the other party or under the influence of difficult³ circumstances are recognized as being invalid (see articles 230-233).

Any mandatory rule means limitation of the freedom of the contract. The principle of the freedom of contract as stated in the Civil Code corresponds with the provisions of Art. 1.1. of the UNIDROIT Principles of International Commercial Contracts and with Art. 1:102(1) of the Principles of European Contract Law.

VI. THE MOMENT OF THE CONCLUSION OF THE CONTRACT

The contract is considered concluded from the moment when the person who has sent the offer to conclude the contract has received the response on the acceptance of such an offer (consensual agreements).

If, in accordance with the civil legislation, the conclusion of the contract also requires the transfer of the property or the performance of any other action, the contract is considered concluded from the moment of the transfer of the respective property or performance of the relevant action (real agreements).

A contract which is subject to notarial certification or state registration is considered concluded from the moment of its notarial certification or state registration, and in cases when both notarial certification and state registration are needed - from the moment of its state registration (formal agreements).

The above-mentioned rules, which are expressed in Art. 640 of the Civil Code, correspond with Art. 18 and 23 of the 1980 Vienna Convention on Contracts for the International Sale of Goods and with Art. 2.1 of the UNIDROIT Principles.

VII. ALTERATION OR TERMINATION OF THE CONTRACT

Under the general rule, the unilateral termination, or alteration of the condition of the contract is prohibited, except for cases that are provided for by the contract or by law. Let us now take a short look at these exceptional cases. If the contract is altered, the obligations of the parties are altered accordingly. In the case of the termination of the contract, the obligations of the parties are terminated from that moment, unless provided differently in the agreement. If the contract is altered or terminated by a court decision, it is considered terminated from the moment of the entry into effect of the respective court decision.

This relates to transactions concluded by a person under influence of a circumstance difficult for him/her and on extremely disadvantageous conditions (Art. 233 of the Civil Code).

The contract may also be altered or terminated upon the mutual agreement of the parties, or in case of a substantial change of circumstances or in the case of a serious breach of the contract's provisions by any party, as well as in other cases stipulated in the contract or by law, upon a court decision at the request of one of the parties.

VIII. TYPICAL (GENERAL) TERMS AND CONDITIONS

Para. 1 of Art. 630 of the Civil Code refers to the typical terms and conditions of specific types of agreements which shall be "promulgated per the established procedure". But as yet, no due order of promulgation of typical terms and conditions has been provided for in Ukraine. The general terms and conditions of agreements regarding the exploration of resources are stated in the Appendix to the Resolution on the order of organization and performance of tenders for the conclusion of resources exploration contracts, and in the Appendix to the Resolution on the requirements to the real estate estimation contracts of the institute of common investment, adopted by the State Commission on Securities and Stock Exchange.

The contents of Art. 630 of the Civil Code correspond by and large with the typical payment conditions for international commercial contracts as adopted by the Cabinet of Ministers under the Resolution of the President of Ukraine. It is not excluded, however, that para. 1 of Art. 630 means by the typical terms and conditions the publications of the International Chamber of Commerce (ICC) and possible similar publications of the Chamber of Trade and Industry of Ukraine. On the other hand, para. 4 of Art. 265 of the Economic Code provides that the Incoterms shall have priority; the terms and conditions of the contract are to correlate with the provisions of the Economic Code. However, it is quite possible to deviate from the provisions that have been stated under these Rules (see para. 3 of Art. 6 of the Civil Code on the principle of optionality).

As to the Uniform Customs and Practice for Documentary Credits, the Uniform Rules for Collection and the Uniform Rules on Contract Guarantees of the International Chamber of Commerce as well as to the other Rules of the International Chamber of Commerce (that is: the Rules concerned with money transfer), their provisions have mandatory legal force due to Art. 2 of the Law "On the Payment Systems and Transfer of Money in Ukraine". Those typical terms and conditions that have not become mandatory due to legal acts, may apply as the business practice, if complying with the requirements of Art. 7 of the Civil Code.

In accordance with the provisions of the Civil Code, the typical terms and conditions are binding only if stipulated directly in the contract.

IX. TYPICAL TERMS AND CONDITIONS AND SAMPLE AND MODEL AGREEMENTS UNDER THE ECONOMIC CODE

The Economic Code also does not take into consideration the practice of the promulgation per the established order of typical terms and conditions (see supra 8 with regard to Art. 630 of the Civil Code). Having recognized the right of the respective subjects to conclude business contracts based on the free declaration of intentions and

the right to agree the conditions of such contracts on their own, para. 4 of Art. 179 of the Economic Code deals with the binding force of typical terms and conditions. The law distinguishes between sample agreements and model agreements as follows: a) Sample agreements recommended by the business entity's managerial body may be used when the parties have the right to modify particular terms of their business contract by mutual consent; and b) model agreements approved by the Cabinet of Ministers or by other state authorities may be used in the cases envisaged by law, when the parties cannot deviate from the model agreement but can specify its terms.

This is one of the cases where the legislator has directly prohibited deviation from the provisions of the civil legislation acts while concluding contracts. Such an approach is the exception from the general rule stated in para. 3 of Art. 6 of the Civil Code, which has been mentioned already.

In the sphere of application of the Civil Code, to which the Economic Code does not extend, the legal force of model contracts should be determined in accordance with para. 4 of Art. 179 of the Economic Code (that is by applying the respective provisions of the Economic Code by analogy). The most commonly encountered, and de-facto mandatory model contracts in Ukraine are the agreements on the lease of state property.

X. PRICE AS AN ELEMENT OF CIVIL CONTRACTS

The Civil Code is rather permissive with regard to the determination of price in a contract. It envisages that the price shall be determined upon the agreement of the parties (para. 1 of Art. 632 of the Civil Code). But it is admissible also that the price not be determined in the agreement. In such situations, the price shall be determined based on the provisions of the agreement, and if that is not possible, it shall be determined based on regular prices for similar goods, jobs or services at the moment of the conclusion of the respective contract (para. 4 of Art. 632 of the Civil Code).

A much more severe approach is to be found in the Economic Code. For business agreements, price is considered an essential condition (para. 2 of Art. 189 of the Economic Code). The price is by law defined as a form of monetary determination of the value of products (works/services) provided by business entities.

This severe attitude of the Economic Code on the mandatory determination of the price in a contract leads to the consequence that if consent of the parties is not achieved on this essential condition of the business contract, the contract is considered as not being concluded (non-existing). Only in the case when the price has not been determined in the business contract, but the contract has been performed at least partially, would it be reasonable to apply the more permissible provisions of the Civil Code.

XL THE INTERACTION OF INTERNATIONAL CONTRACTUAL AND CUSTOMARY LAW WITH INTERNAL (UKRAINIAN) LAW

The Civil Code of Ukraine (contrary to the Economic Code) has been elaborated, and corresponds with the principles of the Vienna Convention, the UNIDROIT Principles and the Principles of European contractual law.

The conflict of laws rules concerning the law applicable to contractual obligations are to be found in the Law "On the International Private Law" which regulates the form, the contents of the contract and the scope of application of the applicable law. The law applicable for the content of the agreement determines the validity of the agreement, its interpretation and its legal consequences. For this, the parties are free to choose the applicable law unless otherwise provided by law. In case of the absence of a choice of law provision, the law with which the contract is the most closely connected shall apply. Details of the determination of the closest connection are regulated by law, taking into account the habitual residence of the party who owes the characteristic performance.

It has already been mentioned that international treaties are considered an integral part of national legislation (supra 2.1.1). Ukraine has been member-state to the Vienna Convention since 1 February 1991.

XII. CONCLUSION

The sovereign Ukraine is developing complex contractual relations with states from all over the world and is cooperating actively with universal and the European regional organizations. First, this means cooperation with the Council of Europe whose member Ukraine became in 1995, and the establishment of close relations with the European Union and with NATO. Besides this, measures are under way which are intended to prepare Ukraine for entering the World Trade Organization.

Ukraine is trying to integrate itself into Europe and apply common European values to its legal system, such as pluralistic democracy, rights and freedoms of the person and supremacy of law. This process could be accelerated if Ukraine determined in its legal system the supremacy of the international law principle. In this context, reference can be made to the Draft Resolution of the Plenary Session of the Supreme Court of Ukraine "On the application by courts of the avowed principles and rules of the international law and international treaties of Ukraine", which is now publicly being discussed by lawyers. In fact, the authors of the present Draft Resolution consider obvious the thesis that the avowed principles of the international law constitute an integral part of the internal law of Ukraine.

Thus, the adoption of the Resolution of the Plenary Session of the Supreme Court could clarify the issue of the correlating international custom and internal law and simplify the application of the avowed international legal principles and rules by the courts of Ukraine.