UDC 346.1 DOI: http://doi.org/10.31617/k.knute.2019-10-10.60

Honcharenko Olena,
PhD (Law Sciences), Associate Professor,
Kyiv National University of Trade and Economics,
19, Kyoto str., Kyiv, 02156, Ukraine
ORCID: 0000-0002-0178-2003
Researcher ID: M-2091-2016

ELEMENTS OF SELF-REGULATION OF INTERNATIONAL COMMERCIAL CONTRACT

The problems of an international commercial contract are studied through the prism of self-regulation. One of the distinguishing features of an international commercial contract is the application of the principle of the autonomous will of the parties, which is constantly expanding its content due to globalization trends of international trade. The degree of self-regulation of a commercial contract with a foreign element is much higher than the «domestic» commercial contract.

Keywords: *international commercial contract, autonomy of the will of the parties, economic contract, self-regulation, contract.*

Гончаренко Олена. Елементи саморегулювання міжнародного комерційного контракту.

Проблеми міжнародного комерційного договору вивчаються крізь призму саморегулювання. Однією з відмінних особливостей міжнародного комерційного договору є застосування принципу автономної волі сторін, який постійно розширює свій змістовний завдяки глобалізаційним тенденціям міжнародної торгівлі. Ступінь саморегулювання господарського договору з іноземним елементом набагато вище, ніж «національного» господарського договору.

Ключові слова: *міжнародний комерційний договір, автономія волі сторін, господарський договір, саморегулювання, договір.*

Relevance of research topic. The nature of self-regulation lies in multi-dimensionality, complexity, manifested through various means, types and forms. One such means is a treaty based on the freedom, equality and autonomy of its members. The purpose of this article is to identify the elements of self-regulation of an international commercial agreement (contract).

Formulation of the problem. Self-regulation in law is an opportunity for a subject to show some creativity, initiative, autonomy, to create certain rules of behavior for himself, to act at his discretion within the limits defined by the law. This is especially true of international trade relations, in which the parties seek to create the

most clear and uniform rules of conduct, regardless of the place of conclusion, execution of the treaty, or, in case of controversy, to resolve the conflict with the least undesirable features of national legislation, related to specific relationships.

Analysis of recent researches and publications. The following scientists worked on the issue of self-regulation, contractual self-regulation: V. Antoshkina (Antoshkina, 2015), O. Bakalinska (Bakalinska, 2016), O. Belyanevich (Belyanevich, 2006), M. Bonell (Bonell, 2018), A. Gavrilishin, S. Oshurko, (Gavrilishin, Oshurko, 2013), I. Dikovska (Dikovska, 2014), A. Fillipev (Fillipev, 2012), C. Emery (Emery, 2016), V. Milash (Milash, 2005), L. Logush, D. Ischenko (Logush, Ischenko, 2015), S. Pogribniy (Pogribniy, 2009), A. Pokachalova (Pokachalova, 2016), F. Vischer (Vischer, 1998-99), O. Vinnik (Vinnik, 2004), I. Schwenzer (Schwenzer, 2016), M. Zhang (Zhang, 2006), S. Zadorozhna (Zadorozhna, 2008) etc. However, the international commercial agreement (contract) has not been thoroughly explored in terms of self-regulation. Provisions concerning the autonomy of the will of the parties, certain conditions of the contract, its sources are being actively developed in Ukrainian science. A comprehensive study of the contract with a foreign element as a self-regulatory structure has not been conducted.

Presenting main material. I. Schwenzer notes that contract law is at the very heart of international trade (Schwenzer, 2016, p. 60). Contract, economic contract, international commercial contract refers to the normative forms of securing self-regulation, that is, with the help of self-regulation participants can create for themselves certain rules of behavior. O. Pogribniy writes: «… self-regulation… is carried out directly by participants in such relations as members of civil society, taking into account their own interests» (Pogribniy, 2009, p. 38).

The contractual norms of law defined by the state outline the general principles and principles, enabling the parties to self-regulate within certain limits. After all, at the legislative level, in the objective sense, the conditions, the content of binding contractual rules, which are created not by the parties to the relations themselves, but by the state, represented by the authorized bodies, are envisaged. In this situation, it is difficult to speak of the contract as a means of self-regulation, while the norms set by the state include «allowing» the parties to self-regulate, indicating that they are entitled to it. Therefore, the contract is referred to as a means of self-regulation, in which its signs are most actively manifested: the ability of the parties to develop their own rules of conduct, their own mechanisms for its implementation and protection.

Self-regulation in economic activity is defined as voluntary action by entities to organize and streamline public relations in a particular field, define rules, standards and principles to safeguard the interests of the community and the relevant community (Honcharenko, 2016, p. 29). O. Belyanevich rightly states: «The construction of the contract as a means of self-regulation of various social relations is used by different branches of law (international, constitutional, administrative, civil, economic, labor, land, environmental, etc.), regardless of the degree of imperativeness of the legal

regulation of a certain type of mutual relationship and the position of the subjects of this relationship (subordination or autonomy)» (Belyanevich, 2006, p. 12).

Legislation permits the conclusion of an unnamed contract, which is also a plane of self-regulation. Streamlining one's own contractual relationships by applying the principle of «all that is not forbidden» helps counterparties to define their own arrangements with a high degree of self-regulation. Such reciprocal arrangements will be binding not only on the parties to the dispute but also subsequently on the authorities (for example, in the event of a dispute).

The contract becomes a means of self-regulation at the level of individual law-making and enforcement, when the parties define and implement their own rules of conduct without external (public) influence, at the same time within the limits allowed by the state. O. Vinnik on the nature of the economic contract, states that the regulatory effect of the economic contract is due to two factors: a) the economic contract is an individual legal act that provides for the legal registration of complex and diverse economic relationships; b) the complexity and variety of these links requires the proper adaptation of the general guidelines of the law to the content and environment of a particular economic relationship (Vinnik, 2004, p. 219). Public influence is manifested in the activity of public authorities, local self-government, and non-state institutions. Public influence is aimed at protecting a public purpose that may not be respected in the case of self-regulation by the subjects of self-regulation at their own discretion and in their own (private) interests.

Therefore, in an objective sense, an international commercial contract actually includes two system components that are defined by public authority: the basics, imperatives, the limits of the contract, and the basics of contract self-regulation that can be applied by the parties.

The public foundations of self-regulation are implemented, as already stated, at the individual (subject) level of the parties to the relationship when the contract becomes a means of self-regulation. This is the vertical of self-regulation of the contract.

Horizontally, the essence of self-regulation of an economic contract a priori lies in the fact that self-regulation is a natural (including the property of the human psyche) process that starts from the parties to the contract, and not authorized by the state. The parties transcendentally choose the model and rules of conduct and only in case of disagreement with the state position can there be obstacles to implementation. Such a view is, in our view, more inherent in the nature of self-regulation of the contract.

The conclusion, execution, termination of the commercial contract meets the general universal requirements of the law, including the self-regulatory principles defined in the contract. Contractual regulation is the regulation at the individual level, when there is a significant detailing of the terms of the economic contract. The economic legislation provides an opportunity to harmonize different contract terms at the counterparty level, while expanding the regulatory function of the contract and the possibility of self-regulation.

An important self-regulatory principle is the freedom of commercial contract. In the freedom of commercial contract, the function of self-regulation is manifested: independently, at your own discretion, to organize activities. The ordering is manifested in the choice of the contractor, the contract (created by the normative individual provision of economic relations), the choice of ways of dispute settlement; the choice of the right to which the contract is subject; creating custom for the performance of the contract between the contractors beyond the formal expression of the contract. The freedom to enter into an commercial contract is an important component and a sign of self-regulation of the parties. It promotes the choice of the proper counterparty to the contract, harmonization of the terms of the contract at the sole discretion of the parties, ensuring their equality and independence. Therefore, it is quite reasonable to state that self-regulation serves as a guarantee of freedom of commercial contract. Empowerment of the parties to the economic agreement by the legislator is a guarantee of the rule of law.

For external transactions, there is a specificity of legal regulation by means of unified material and conflict of laws rules. The parties to an international commercial transaction, unlike the parties to domestic agreements, have the opportunity to choose the applicable law to their legal relationship. The parties are also free to choose a court (if such choice is made by the law of the state of both the «nationality» of the contracting parties and the court of choice), which will resolve the disputes that have arisen between them. In particular, they can apply both to domestic courts of a particular state and to international commercial arbitration courts, which are outside the «national register» of the parties.

An international commercial contract is generally concluded between entities of different «nationality». This complication in this case characterizes the sign of the «subject» of the relationship. The entity may be a foreign legal entity, a foreign natural person engaged in business activities.

The limits of contractual freedom, freedom to conclude and implement the contract, the limits of the subjects' own rules are determined by the possibility of self-regulation, without going beyond the «letter» of the law. The entities that conclude the contract have the right to self-regulate in those spheres, industries, types of economic activity, where such relations are not expressly prohibited by law.

An international commercial contract is the very means of minimizing state interference in relations between the parties. However, it should be. The 1980 UN Convention on the International Contract on the Sale of Goods states that its interpretation must take into account the international character and the need to promote its uniform application and to maintain fair dealing in international trade. It is honesty and good faith that is a binding global principle that combines the private and public law fields and is subject to protection by both the state and individual counterparties.

The international commercial contract is executed according to world standards: pacta sunt servanda (contracts must be fulfilled). The contract expresses the will of the parties, which is further ensured by their active actions in accordance with the agreed provisions. The dynamics of an international commercial agreement (contract) is determined by the use of exactly the means provided for its fulfillment by the conditions (for example, delivery by motor vehicles, payment on the terms of collection, etc.).

The private right, unlike the public right, is more open, the impact of globalization and other modern trends is manifesting itself more quickly and comprehensively. This thesis can be demonstrated by lengthy discussions regarding the abolition of the compulsory form of foreign trade agreement (contract) in Ukraine as dictated by the need to communicate with foreign counterparties who consider the latter too formal and significantly complicate the process of starting a business. In general, the obligation to write a foreign trade treaty contract has been significantly inferior to the oral contract form, which is less formalized, but also has its own enforcement mechanisms developed including international trade practices, which are accumulated in relevant autonomous state rules (for example, the Rules INCOTERMS and other sources of transnational trade law). Of particular importance are Principles of International Commercial Contracts UNIDROIT. F.Vischer writes: « …the Principles represent a codification of high quality and homogeneity in contents, which in many respects even surpasses the quality of traditional national legal orders … they represent a clear and stable codification created by an approved international organization» (Vischer, 1998-99, p. 211). M. Bonell notes: «Even more important, the UNIDROIT Principles prove particularly useful in cases of a so-called implied negative choice–that is, where neither party is prepared to accept the other's domestic law or any other domestic law, and, as a result, the contract is silent as to the applicable law or contains a reference to a not further defined general formula such as 'general principles of law', '*lex mercatoria*', or the like, and–as already pointed out above–the adjudicating body eventually decides the dispute on the basis of the UNIDROIT Principles, defined as a particularly authoritative expression of a genuinly a-national or transnational set of rules (Bonell, 2018). I.Dikovska notes: «The needs of international business turnover determine the need to consolidate not only the parties' right to choose non-state rules, but also the right of international commercial arbitration, to apply non-state rules as applicable law in the absence of an agreement of parties on the choice of law» (Dikovska, 2014, p. 45).

Another important feature of an international commercial contract is procedural self-regulation, that is, the parties' ability to independently choose the type of dispute settlement, its form, and the persons who will contribute to it. An arbitration agreement is a separate self-regulatory element of an international commercial contract that has certain characteristics.

Conclusion. An international commercial contract is the most optimal area of legal relations in which the impact of legal globalization is constantly expanding. One of the great features of self-regulation of an international commercial contract is the application of the principle of autonomous will of the parties, which is constantly expanding its content due to globalization trends of international trade. Self-regulation is an opportunity for participants of a commercial turnover to incorporate the standard terms of the contract and to refer to those already proposed by specialized governmental and non-governmental organizations. Participants in self-regulation can develop their own system of norms, publish them, offering them to others (INCOTERMS International Chamber of Commerce rules). Therefore, the degree of self-regulation of an economic contract with a foreign element is significantly higher than the «domestic» economic contract.

REFERENCES

1. Antoshkina, V.K. (2015). Rol pravochinu, korporativnih aktiv u protsesi samoregulyatsiyi tsivilno-pravovih vidnosin. *Chasopis Kiyivskogo universitetu prava*. Vol. 4. P. 156–161. [in Ukrainian].

2. Bakalinska, O.O. (2016). Pravove zabezpechennya dobrosovisnoi konkurencii v Ukrayini problemi teorii ta praktiki: dissertaciya doktora yuridicheskih nauk. NDI privatnogo prava i pidpriємnictva im. akademika F.G. Burchaka. K. 535 p. [in Ukrainian].

3. Belyanevich, O.A. (2006). Gospodarske dogovirne pravo Ukrayini (teoretichni aspekti): Monografiya. Yurinkom Inter, 2006. 592 p. [in Ukrainian].

4. Bonell, M.J. (2018). The law governing international commercial contracts and the actual role of the UNIDROIT Principles. *Uniform Law Revie.* Vol. 23. Is. 1. P. 15–41.

5. Dikovska, I.A. (2014). Printsipi pravovogo regulyuvannya mizhnarodnih privatnih dogovirnih zobov'yazan: teoretichni ta praktichnI aspekti. Disertatsiya doktora yurid. nauk: 12.00.03, Kyiv. nats. un-t imeni Tarasa Shevchenka. Kyiv, 2014. 500 p. [in Ukrainian].

6. Fillipev, A.O. (2012). Vibir prava ta yogo obmezhennya v dzherelah mizhnarodnogo privatnogo ES ta Ukrayini: porivnyalno-pravoviy analiz. *Advokat.* 9 (144) P. 26–28. [in Ukrainian].

7. Emery, C.R. (2016). International Commercial Contracts. GlobaLex (March 2016). Retrieved from : https://ssrn.com/abstract=2925740.

8. Gavrilishin, A.P., Oshurko, S.M. (2013). Zagalni polojennya pro gospodarski dogovori v Ukraini. *Naukovii visnik Ujgorodskogo nacionalnogo universitetu*. Seriya Pravo. 2013. Vip. 24. T. 2. P. 144–147. [in Ukrainian].

9. Honcharenko, O. (2016). Konstitutsiyni zasadi samoregulyuvannya gospodarskoyi diyalnosti. *Zovnishnya torgivlya: ekonomika, finansi, pravo*. Vol. 1 Is.84). P. 28–36. [in Ukrainian].

10. Milash, V.S. (2005). Pidpriemnicki komerciini dogovori v gospodarskii diyalnosti / V.S. Milash. Poltava. ASMI. 450 p. [in Ukrainian].

11. Logush, L.V., Ischenko, D.Yu. (2015). Pravo scho zastosovuetsya do mijnarodnih komerciinih kontraktiv u derjavah yaki є chlenami Evropeiskogo Soyuzu. *Naukovi zapiski NaUKMA.* Yuridichni nauki. 2015. T. 168. P. 89–93. [in Ukrainian].

12. Pogribniy, S.O. (2009). Printsipi ta mehanizm regulyuvannya dogovirnih vidnosin u tsivilnomu pravi Ukrayini: avtoref dis. na zdobuttya naukovogo stupenya doktora yurid. nauk: 12.00.03. Kyiv. nats. un-t imeni Tarasa Shevchenka. Kyiv, 2009. 51 p.

13. Pokachalova, A.G (2016). Avtonomiya voli yak osnovopolozhniy printsip regulyuvannya zabezpechennya zobovyazan. *AktualnI problemi mizhnarodnih vidnosin*. Vipusk 128. P. 93–104. [in Ukrainian].

14. Schwenzer, I. (2016). Global Unification of Contract Law. Uniform Law Review. Vol. 21.Iss. 1. P. 60–74.

15. Vinnik O.M. Gospodarske pravo : kurs lektsiy / O. M. Vinnik. K. : Atika, 2004. [in Ukrainian].

16. Vischer F. The Relevance of the UNIDROIT Principles for Judges and Arbitrators in Disputes Arising out of International Contracts. *European Journal of Law Reform* (1998–99). P. 203–216.

17. Zadorozhna, S.M. (2008). Avtonomiya storin u mizhnarodnomu privatnomu pravi. MonografIya. Chernivtsi. Tehnodruk, 2008. 216 p. [in Ukrainian].

18. Zhang, M. (2006). Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law. *Emory International Law Review*, Vol. 20, p. 511 Temple University Legal Studies Research Paper No. 2008-44. Retrieved from: https://ssrn.com/abstract=1084331.