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THE LIMITS OF CONTRACT FREEDOM IN THE PUBLIC PROCUREMENT

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Abstract in original language:
The study examines the well-known contract law principle, i.e. the freedom of contract in the light of private law (contract law) and public law (public procurement law) at the same time. The private law and the public law are always in interaction, since it can be seen in the case of public utility or public supply contracts. On the next few pages the author analyses the limits of contract freedom not only through private law glasses, but by the using of public law approach, considering the provisions related to the contract, which is to be concluded as a result of the successful public procurement procedure.

Key words in original language:
Freedom of contact, party autonomy, limits of freedom of contract, public procurement contract.

1. INTRODUCTION

The importance of freedom of contract (or party autonomy as it is called sometimes) can be scrutinized from several viewpoints. Under the instrumental approach contact freedom can be handled as a characteristic of economic analysis of law, since as it is featured by Michael Trebilcock in its work "The Limits of Freedom of Contract"[1], the contract law has economic functions (for example it may reduce transaction costs or fill the gaps in incomplete contracts).[2] The freedom of contract is also valuable in its own right, or might be regarded as a contract law principle.[3]

In my study, I deal with the freedom of contract from the latter approach, when I make an attempt to analyse the contract freedom and its limits in public (or partially public) law environment. The public procurement contract is an essential contract in the economic activity that I am going to examine from private law viewpoint. Although the contract (and in particular the pre-contractual procedure) has strong public law nature, with the identification and further analysis of private law elements the publication tries to prove, that the public procurement contract can be arrange in the private law contract system as an atypical contract.

Beyond the systemic arrangement, the main part of the study concentrates on the effectiveness of contract freedom as a private law principle, or to be more precise, the contract freedom limited by the contract obligation, which is appear not only in the relating private law

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[1] TREBILCOCK, M. J.: The Limits of Freedom of Contract, Cambridge, Mass. Harward University Press, 1993

[2] TREBILCOCK, p. 16-17

[3] STEWART, Hamish, Where is the Freedom in Freedom of Contract? A Comment on Trebilcock's <The Limits of Freedom of Contract>, In: Osgoode Hall Law Journal, Vol. 33., No. 2., p. 365-369

provisions, but also in several other public law regulations in the field of public utility and public procurement.

2. CONTRACT FREEDOM AS A CONTRACT LAW PRINCIPLE

The contract freedom is a basic principle of the contract law, which is related to the conclusion of the contract. It means that the will of the contracting parties is fundamentally not bounded in legal sense; the parties have the right to form independently their contracting intension, naturally within the frames of the basic provisions of the contract law. Under the principle of contract freedom four dimensions can be scrutinized[4]:

Freedom of deciding to conclude a contract or not. This dimension used to be called the narrow sense contract freedom. Under this, the contracting party freely can decide to conclude a contract or not at all. This freedom can be limited by the contracting obligation, which appears in the form of agreement in principles, call option or the obligation can be prescribed by any other law, like the Public Procurement Act.

Freedom to choose the contracting party. If the party has decided to conclude a contract, he or she can also choose the person with whom wants to enter into a mutual legal relation.

Freedom to choose the legal type of the contract. The party have a choice to choose the type of the contract, which is denominated in the civil code or any other law, or which is unspecified or has mixed nature. The restriction of this freedom is typical in the course of the formation of companies, but outside this area the law-maker rarely puts its foot in the choosing of the type of contract.

Freedom to determine the content of the contract (dispositivity). The content of the contract always depends on the intention of the parties. As a general rule, contracting parties have the right to form by selves the subject matter of the legal relation. However, in some cases – generally with reference to the social interest – norms with binding effect get a part of the contract.

The principle of contract freedom appears not only in the national private laws, but in the international private law and in the European contract law. The European contract law unification initiatives, like the "Principles of European Contract Law" (hereinafter PECL) designed by the Commission on European Contract Law and the "Draft Common Frame of Reference" (hereafter DCFR) prepared by the Study Group on a European Civil Code and the European Research Group on Existing EC Private Law (Acquis Group), acknowledge the right of citizens and their undertakings to decide with whom they will conclude their contract and to determine the contents of these contracts.

The Article 1:102 of the PECL declares, that "[p]arties are free to enter into a contract and to determine its contents, subject to requirements of good faith and fair dealing […]."[5] However,

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[4] BÍRÓ, György: Magyar Polgári Jog. Kötelmi jog. Közös szabályok. Szerződéstan, Novotni Kiadó, Miskolc, 2006, ISBN 963 85832 2 3, p. 225-226

[5] LANDO, Ole – BEALE, Hugh: Principles of European Contract Law, Commission on European Contract Law, Kluwer Law International, 2003, p. 99

there are also some restrictions, which limit the content of freedom. It is true, that parties have a right to decide the term of their contract, but they have to act under the requirements of good faith and fair dealing. In this sense, any act, which is contrary with these requirements, can be deemed as limitation of the freedom. The freedom is also restricted by the mandatory rules.

The Article II – 1:102 of the DCFR contains the party autonomy, namely that "[p]arties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules." It is obvious, that the wording of the DCFR is almost the same as the wording of the PECL. It is not surprising, since the DCFR was elaborated on the basis of the PECL.

Since the common rules of the European contract law are prepared with the comparison of the different European contract law systems, the principle of contract freedom is naturally laid down by the national civil codes. In Hungary, the Hungarian Civil Code, namely the Act IV of 1959 on the Civil Code of the Hungarian Republic (hereinafter HCC) also contains the principle, when it declares, that "[t]he parties are free to define the contents of contracts, and they shall be entitled, upon mutual consent, to deviate from the provisions pertaining to contracts if such deviation is not prohibited by legal regulation."[6] Over the fixing of contract freedom, the HCC also determines those cases, when this freedom is limited by certain rules.

The legal institution of the agreement in principle means an agreement, in which the parties agree on concluding at a later date.[7] It constitutes an obligation to the parties to conclude a contract. The agreement in principle can be based on the consent of the parties (in this case the obligation is voluntarily) or can be rendered obligatory by legal regulation. In this latter case the legal norm carries real cogency. The paragraph 5 of the related provision entitles the party to refuse the conclusion of the contract if "it provides proof of inability to perform the contract by virtue of a circumstance that has occurred after the conclusion of the agreement in principle or if the performance of the contract would be detrimental to the national economy, or if, on the basis of such a circumstance, rescission or termination of the contract might apply." This provision means the application of the Roman origin contract law principle, namely the "clausula rebus sic stantibus". It keeps an exception from the principle "pacta sunt servanda", which declares, that the agreements between the parties are legally binding. As Zimmermann worded, this binding is last as long as the matters remain the same, as they were at the time of the conclusion of contract.[8]

Beyond the agreement in principle, there is another legal institution, which is regulated in the HCC. Paragraph 1 of the Article 375 contains the call option (hereafter call), which is a financial contract, in which parties stipulates for the option holder (the buyer) the right to buy certain thing in the future. In this perspective the call is a right and not an obligation. But on the side of the obligated party (the seller), the call makes an obligation, under which the option holder can buy the thing with unilateral statement at a certain time (expiration date) for a certain price (strike price). That is, from the viewpoint of the seller, the stipulation of this

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[6] HCC, Art. 200, para 1

[7] HCC, Art. 208, para 1

[8] ZIMMERMANN, Reinhard: Roman Law, Contemporary Law, European Law: the Civilian Tradition Today, Oxford University Press, Oxford, 2001, p. 80

right is a limited-term (determined or indeterminated) restriction, which limits the freedom of contract.

With respect to the forth dimension of the contract freedom, namely the right of the parties to determine the content of the contract, we can find a restriction in the HCC. Paragraph 1 of the Article 226 limits the dispositivity, when it sais, that "[l]egal regulations can prescribe certain content elements of contracts and provide that such elements shall constitute a part of a contract even if the parties provide otherwise."

In the Hungarian law system not only the agreement in principle, but some other cases also causes obligation to conclude a contract. When a legal regulation prescribes the obligation to conclude a contract, this prescription is always based on justified public interest. This consideration appears in the case of public utility contracts, when the possibility to getting safe public utility (public service) is ensured by the obligation of conclude a contract. The obligation always encumbers the public service provider. As Vitányi mentioned, these types of contracts can be deemed as "force-contracts"[9], where – by the prescription of contract obligation – the state widely has a say in the contract.

The provisions related to the public utility contracts stretch over the field of public law, the hinter regulation of these different contracta can be found in several single law (like the acts on electricity, water or gas supply). In the case of public utility contracts three of the four dimension of the contract freedom (namely the (1), (2) and (4) cathegory of the former mentioned categorization) can be fallen under the scope of restrictions.

Beyond the public utility contract there is another area, where legal regulation prescribes the obligation to conclude a contract. It is the public procurement, namely the conclusion of public contract after the conducting of the effective public procurement.

3. CONTRACT FREEDOM IN THE PUBLIC PROCUREMENT

In the case of public procurement contract we have to face up with the limitation of contract autonomy from several viewpoints. The first dimension, i.e. the "freedom of deciding a contract or not" is limited by the contract obligation, laid down by the provisions of the Act CXXIX of 2003 on Public Procurement (hereinafter PP), since they prescribes to conclude a contract and also determines the contracting party; it is a restriction connecting to the freedom to choose the contracting party.

Basically, the provisions of contract law – apart from the exceptions – shall be applied with having the contract freedom in sight. In the public procurement law the contracting authority faces up with contract obligation, because with the elapsing of the bidding term the obligation enrols[10], and after the selection of the best tenderer the contracting authority has no right to withdraw from the contract.

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[9] VITÁNYI, György: Közüzemi szerződések, In: Ünnepi dolgozatok Dr. Szladits Károly egyetemi tanár 70. születésnapjára, Budapest, 1941, p. 348-355

[10] HCC, Art. 78, para 1

The only possibility, when a contracting authority can be exempted from the obligation, if the public procurement procedure was unsuccessful. The cases of unsuccessful procedure are fully regulated in the Hungarian public procurement act. Under the Article 92 the procedure shall be deemed unsuccessful if (1) no tenders have been submitted or (2) only invalid tenders have been submitted.

(3) There is also a possibility to deem the procedure unsuccessful, if none of the tenderers, not even the tenderer submitting the most economically advantageous tender, meets the requirements for financial cover available to the contracting authority. However, it has to be pined down, that always the contracting authority decides over the compliance of the tenders submitted. In the light of this consideration, the before mentioned provision ensures a kind of back-stair, an exception from the contract obligation for the contracting authority, who wants to acquit from this obligation.

(4) Under the incapability to conclude the contract or deliver thereunder is also enough to deem the procedure unsuccessful, and we face up with the same legal effect, if (5) any tenderer makes an action that materially damages the correctness of the procedure or the interests of the other tenderers. (In this latter case the contracting authority also has the right to decide over the inefficiency.)

The contracting authority can base its decision on (6) the results of a conciliation procedure or on the (7) decision on annulment of the Hungarian Public Procurement Arbitration Board, under which the contracting authority has a possibility to conduct a new contract award procedure or to relinquish its intention to conduct such procedure.

In the cycle of the provisions related to unsuccessful procedure a new possibility appeared with the last amendment of the Hungarian PP. Under the Article 92/A – moreover the cases regulated in the Article 92 – the contacting authority might deem the procedure unsuccessful if only one tender has been submitted, even if this only submitted tender is valid. The procedure also shall be deemed unsuccessful if more tenders have been submitted, but there is only one valid tender among the submitted tenders.

If there is no possibility to deem the contract unsuccessful, the Article 99 prescribes, that after the successful contract award procedures, the contracting authority shall conclude a contract in writing with the selected tenderer. The content of the contract shall be conforming to the contact notice, the tender documentation and the tender. The contract to be concluded is a contract for pecuniary interest[11], where the PP prescribes in writing conclusion.

There is another cogency related to the conclusion of the contract. The PP relatively determines the date of contract, when its lays down, that the planned date and time of contract conclusion shall not be earlier than the eighth or later than the thirtieth day from the announcement of results.[12] (There is an exception from this strict time interval: in the case of public works conclusion the time of contract conclusion shall not be later than the sixtieth day from the announcement of results.)

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[11] PP, Art. 2, para 1

[12] PP, Art. 99, para 2

Beyond the cases of unsuccessful procedure, there is a new possibility for the contracting authority to get out from the obligation of conclude a contract. As a result of the amendment in 2008, the well-known private law principle, namely the "clausula rebus sic stantibus", i.e. the effect of essential change in circumstances after the conclusion of contract infiltrated to the PP provisions. Under this exception (laid down in the Article 99/A) the contracting authority can refer to the change in circumstances, if (1) it ensues after the publication of the results of the selection process, (2) it was essential, (3) unforeseeable and (4) inevitable, and (5) due to this change, it is not able to conclude or perform the public procurement contract.

The application of this provision is exceptional and strongly problematic, since in the private law the principle of "clausula rebus sic stantibus" applies only after the conclusion of the contract (or agreement in principles), it is related to the performance cogency. Contrary to this, in the cited provision of the PP, this principle creates a possibility to get out from the contract obligation, before the conclusion of the contract. It does not related to the performance of the contract, but the interval between the announcement of results and the conclusion, when it is foreseeable, that the selected tenderer won't be able to conclude or perform a contract.

4. CLOSING REMARKS

Althought the freedom of contract is not a constitutional basic law, but under the decisions of the Constitutional Court of the Hungarian Republic, the limitation of the contract of freedom is an exceptional possibility, which shall be examined every single time uniquely and shall be constitutionally justified.

The market requires to limit the contract freedom as narrow as it is possible and the restrictions shall be bounded to appropriate guarantees. In the case of public utility contract and also in the public procurement the state intervenes in the private law relations, but this intervention cannot be autotelic. It is a tool, which is only usable as "ultima ratio", with the most comprehensive circumspection.

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