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Freedom of Contract and Grounds for its Restriction

Abstract

In modern times, it is almost impossible to regulate civil, commercial, labor, and other similar relations without contracts. In order to establish contracts, which serve as the primary regulatory mechanism for rights and obligations, the law grants legal subjects (natural and legal persons) a fundamental right known as contractual freedom. However, like other rights and freedoms, contractual freedom is not absolute: in certain cases, it is subject to some restrictions and prohibitions. The main objectives of these restrictions are to prevent abuse, protect the weaker party in the contract, ensure public order, maintain stability in civil transactions, and so on. In reality, as seen, these limitations serve to protect the rights and interests of both contracting parties and to safeguard contractual freedom itself. Therefore, if the parties violate the mandatory legal requirements while entering into a contract, courts reviewing disputes between them, typically, deem the contract wholly or partially unlawful and declare it invalid. (An invalid contract does not create any legal consequences). This article analyzes the concept of contractual freedom, its elements, the grounds for its restriction, and the regulation of these issues under Azerbaijani legislation.

Keywords: *freedom of contract, the elements of freedom of contract, restrictions, standard terms, balancing freedom and regulation*

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Müqavilə azadlığı və onun məhdudlaşdırılmasının əsasları

Xülasə

Müasir dövrümüzdə müqavilələr olmadan mülki, kommersiya, əmək və s. kimi münasibətlərin nizamlanması, demək olar ki, mümkün deyildir. Hüquq və öhdəliklərin əsas tənzimləyici vasitəsi olan müqavilələri formalaşdıra bilmək üçün qanun hüquq münasibətlərinin subyektlərinə (fiziki və hüquqi şəxslərə) müqavilə azadlığı kimi təməl bir hüquq verir. Lakin digər hüquq və azadlıqlarda olduğu kimi, müqavilə azadlığı da mütləq xarakter daşımır, yəni müəyyən hallarda bəzi qadağa və məhdudiyyətlərə məruz qalır. Bu qadağaların (və məhdudiyyətlər) başlıca məqsədlərini sui-istifadə hallarının qarşısının alınması, müqavilənin zəif tərəfinin qorunması, ictimai qaydanın, mülki dövriyyədə sabitliyin təmin edilməsi və s. təşkil edir. Əslində, göründüyü kimi, bu məhdudiyyətlər elə müqavilə tərəflərinin hər birinin hüquq və mənafelərinin lazımınca müdafiə edilməsinə, müqavilə azadlığının özünün qorunmasına xidmət edir. Odur ki, tərəflər müqavilə bağlayarkən qanunun bu sahədəki imperativ tələblərindən kənara çıxarlarsa, məhkəmələr onlar arasında yaranan mübahisələrə baxan zaman, adətən, müqavilələri bütövlükdə və ya qismən qanuna zidd sayaraq, etibarsız hesab edirlər (Etibarsız müqavilələr isə heç bir hüquqi nəticə yaratmır). Məqalədə müqavilə azadlığı, onun elementləri, müqavilə azadlığının (hüququnun) məhdudlaşdırılmasının əsasları və bu məsələlərin Azərbaycan qanunvericiliyində tənzimlənmə qaydaları təhlil edilmişdir.

Açar sözlər: *müqavilə azadlığı, müqavilə azadlığının elementləri, məhdudiyyətlər, standart şərtlər, azadlıq və tənzimləmənin balanslaşdırılması*

Introduction

A Contract has been defined as an agreement, enforceable by law, between two or more competent parties (legal entities) to perform or not to perform a specific act or acts for a consideration (Public Procurement Authority, 2018, p. 3). This definition highlights the essential role of mutual assent in contractual obligations, reinforcing the principle that agreements derive their binding power from the consent of the parties involved. **Consensus facit legem, or "consensus makes the law,"** encapsulates this idea, emphasizing that the will of the contracting parties forms the foundation of legally enforceable commitments. The phrase "Consensus Facit Legem" suggests that private agreements, once validly formed, carry the force of law between the parties. In many legal systems, contracts are not merely moral or social agreements but legally enforceable obligations. Courts respect this principle by enforcing agreements as they are written, unless they violate public policy or mandatory legal rules.

While parties are free to contract, this freedom is not absolute. A contract may be illegal because its formation, purpose, or performance contravenes some statute or the common law. It is difficult to generalize about the wide range of statutory prohibitions although they are often designed to secure fair trading conditions, safeguard property and personal safety, and prevent competitive markets from being undermined (Chen Wishart, 2010). However, we believe that grouping these restrictions in relation to the elements of contractual freedom would be more appropriate. Therefore, firstly. it is necessary to examine these elements.

Freedom of contract consists of three elements:

1) To conclude (or not conclude) a contract any person; 2) to determine content of the contract; 3) and to determine form of the contract.

Research

İn one of decision of Constitutional Court of Azerbaijan, Court held that among the elements that form the content of freedom of contract, one can mention the freedom to choose whether to enter into a contract with a selected counterparty (or not), to determine its type and form, as well as the terms of the concluded contract, including the relevant prices (Azərbaycan Respublikası Mülki Məcəlləsi, 2015, p. 4).

1) To conclude (or not conclude) a contract – The right to conclude a contract embodies the principle of party autonomy, meaning that individuals have the liberty to decide whether to enter into an agreement and with whom. This aspect of freedom is deeply rooted in the notion that individuals should be able to control their own affairs and make decisions regarding their property, services, or actions without interference from the state or other external authorities, as long as they comply with legal standards. But this freedom is restricted in various or different ways. The legislature has imposed a legal obligation to contract under certain circumstances so as to ensure access to important goods, e.g., in the area of transport law or energy supply (Zekoll, & Wagner, p. 208). Generally, competition (or antitrust) law ensure protection against firms with a high degree of market power. For instance, image this situation - A party who offers goods or services to the public acts contra bonos mores if he – without an objective basis– refuses to conclude a contract with a buyer who cannot otherwise procure the desired goods or services. In such a situation, the buyer is entitled to compensatory relief such that he is put in the position he would have been in but for the wrongful conduct (§ 249 I BGB). Thus, conclusion of the contract is mandatory (Zekoll, & Wagner, p. 209).

Similar provision is also stipulated in Azerbaijan Civil Code. Article 400 of Civil Code - Public Contract contain that If one of the parties of agreement has dominant market positions, it cannot unreasonably refuse to conclude a contract with counterparty in this area of activity or it cannot propose unequal terms to counterparty (Azərbaycan Respublikası, 2023).

Also, Competition Code of Azerbaijan contain similar provision. Article 16.2.6 of Competition Code say that termination of contracts concluded with the seller or customer without economic or technological grounds or refusal to conclude the contract if it is possible to provide the product (except in cases arising from the law) is considered as abuse of dominant position (Azərbaycan Respublikası, 2024).

2) Apart from a few exceptions (such as, contract for sale of land) a contract may take any form. It may be oral or in writing, and may be made as a casual statement or accompanied by anything from a handshake to an elaborate ceremony (Charman, p. 3).

Unless otherwise required by law, the general rule is that the parties may form a contract orally or they may agree to reduce their contract to writing. In some situations, a statute may require that a contract not only be written, but notarized as well. A statute may also require that a contract be in writing and be notarized and registered with a state agency. For example, all contracts involving real estate fall within this last category (Osakwe, p. 138).

According to Article 329 of Civil Code, unless otherwise provided by law, an agreement concluded without complying with the form requirements established by law or by mutual agreement of the parties is invalid. Agreements are concluded either orally or in writing (simple or notarized). An oral transaction is considered concluded when a person's intent to conclude the transaction is obvious from his behavior (Azərbaycan Respublikası, 2023).

Civil Code determine writing or notarized form requirement for some types of contracts. For example, A pledge agreement must be concluded in written form; An agreement on forfeit must be concluded in written form, regardless of the form of the primary obligation; Contracts related to the disposal of real estate objects registered in the state real estate registry must be notarized; A mortgage agreement must be notarized and etc.

Article 337 contain that Agreement concluded with violation of conditions stipulated in this Code is invalid.

3) To determine content of the Contract – One aspect of that principle is that (subject to where the consent of a party is impaired by factors such as mistake, misrepresentation, duress, undue influence, or incapacity) parties are generally free to contract on whatever terms they choose (The Supreme Court of the United Kingdom, 2024, p. 14). Because, contracts create rights and obligation for its parties and if they reach agreement on terms of contract, they must fulfill requirement of contract. Third parties may not enforce the terms of a contract to which they are not a party (however, there are many exceptions to the basic doctrine of privity of contract which have attempted to mitigate some of the potentially harsh outcomes that might result from its strict application) (Finch & Fafinski, p. 55). For example, two party conclude a purchase agreement. They are free to determine place, time of obligation performance or price of goods and so on. But as we noted, all parties of contract are not equal and in most case all parties agree on terms of contract only formally, in fact one party dictate these terms to another party. Therefore, for protection of weak party of contract law determine some requirement related with content of Contract.

Especially, many jurisdictions contain special rules for standard terms in contracts. Standard terms of contract are set by one of the parties and the other party has little or no ability to negotiate more favorable terms and is thus placed in a "take it or leave it" position.

One of the decisions of Supreme Court of Azerbaijan, court say that “However, standard contract terms are a set of pre-prepared conditions that, by their nature, put the accepting party in a position where they are compelled to comply, ensuring the benefit of performance for the offering party. The accepting party is in a weaker position and does not have the opportunity (neither in terms of time nor in terms of knowledge and awareness) to negotiate these standard terms with the other party. Even if the accepting party wishes to discuss the standard terms, the other party (for example, a bank credit specialist in credit agreement) does not have the authority or the right to alter any of the conditions. In such a case, drafting standard contract terms in this manner and imposing them in a way that is detrimental to the accepting party while invoking the principle of freedom of contract is entirely contrary to the essence and purpose of this principle” (Azərbaycan Respublikası Ali Məhkəməsi, 2020, p. 6-7).

For a standard term to become part of a contract, it must be explicitly stated in the contract, the contract must reference the standard term, the accepting party must have the opportunity to review the standard terms, and they must have expressed their agreement to and acceptance of them (Article 418). Once a standard term becomes part of the contract, it must meet the requirements of validity. The following provisions in the standard terms of a contract applied by the offering party to natural persons who are not engaged in entrepreneurial activity are considered invalid:

420.1.1. Provisions that establish an unreasonably long or excessively short period for the accepting party to accept or reject the offer or to perform a specific act (timeframes for acceptance and performance of the offer).

420.1.2. Provisions that set unreasonably long or insufficiently clear deadlines for the offering party to fulfill its obligations, differing from pre-established norms (timeframes in case of breach of obligations) and etc (Azərbaycan Respublikası, 2023).

The restriction of freedom in determining the content of a contract is not limited to the use of standard terms. Several articles of the Civil Code also contain direct provisions stating that certain contractual terms are invalid in specific cases. These cases include: A clause in the loan agreement that allows the lender to unilaterally change any term of the consumer credit agreement is invalid (Article 746-5.6); Any agreement that grants the pledgee or mortgagee the right to appropriate the pledged or mortgaged property is invalid (Article 273) and etc.

As we have noted, the purpose of these restrictions is not to unjustifiably limit the right to contractual freedom. On the contrary, the legislator aims to prevent actions that constitute abuse and could harm one party in legal relations. For this reason, if none of the aforementioned violations (such as, related with form requirements or content freedom) occur in a contract, courts generally refrain from adding or removing any terms to contracts in legal disputes. Instead, they focus on ensuring the mandatory enforcement of the concluded contract. In other word, parties are ordinarily free to contract on whatever terms they choose and the court’s role is to enforce them. This is because granting courts the authority to arbitrarily modify or cancel contractual terms could itself lead to a violation of the right to freedom of contract.

For example, RTI Ltd v MUR Shipping BV [2024] contain some interesting aspect of English contract law. This case involved a dispute over a force majeure clause in a contract of affreightment. The Supreme Court of United Kingdom held that the requirement to overcome a force majeure event by reasonable endeavours doesn’t extend to accepting non-contractual performance (The Supreme Court of the United Kingdom, 2024). This decision underscores the Court's commitment to upholding the terms explicitly agreed upon by the parties, reinforcing the principle of freedom of contract.

Conclusion

The legislator, when determining legal norms, has established the most just rules for everyone without considering special circumstances. However, freedom of contract allows civil law subjects to agree on other rules that are more advantageous to them so that they can conclude contracts that will ensure their profit in the best way. That is, such discretionary (dispositive) rules have been established to ensure the interests of the subjects more efficiently. The reason for granting such freedom to civil law subjects in the legislation is not to create conditions for one party to exploit the other, but rather to provide a legal opportunity for determining rules that best meet the mutual interests of the parties. Therefore, terms that unreasonably burden one party and lead to an abuse of rights should be considered invalid. When courts review disputes arising from contracts, they should not modify or annul contract terms solely based on formal grounds. If a contract complies with the mandatory requirements of the law, courts must ensure its enforcement as it stands. In other words, when resolving disputes, courts must avoid unjustified interference with contractual freedom and reach a lawful and fair outcome.

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