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THE PRINCIPLE OF CONTRACTUAL SECURITY IN EUROPEAN PRIVATE LAW AND ITS IMPLEMENTATION IN THE CIVIL LEGISLATION OF UKRAINE

Statement of the problem. In legal science, the role of the principles and content of each of them belongs to the debatable questions. Especially this statement is applicable to the principles of contract law, due to the fast-paced continuous development of contractual relations, expansion of the range of such relationships, thus increasing the number of sources for their regulation. Differences in the definition of the range and content of the principles of contract law results in not only terminological inaccuracies, but in doctrinally different, frequently opposite, approaches and concepts. The problem of Ukraine's joining the European legal and economic space in the context of the implementation of the EU-Ukraine Association puts on the agenda the elaboration of a common theoretical background for the legal regulation of contractual relations. The starting point in this issue should be the wording of the range and content of the principles of contract law, and the normative reference point is the document entitled Principles, Definitions and Model Rules of European Private Law (DCFR).

Analysis of recent research and publications. Studying the role of principles in regulation of contractual relations at European level have been the subject of interest of such scholars as prof. C.von Bar, prof. Bill J. Sci, E.Clive, prof. O. Lando, prof. M.V. Hezelink; at national level – prof. T.V.Bodnar, prof. A.S. Dovgert, prof. N.S. Kuznetsova, prof. N.Y. Golubeva and others. At the present stage of research the effects of the principles of private law in regulation of various civil relations in Ukraine is also studied by prof. E.O. Kharytonov, prof. O.I. Kharytonova and others.

The purpose of this article is to explore one of the fundamental principles of private law – the principle of security – in the context of its application to the regulation of civil contractual relations and its definition and content proposed by the developers of the DCFR.

The main content. The principles have always kept a significant impact on identifying areas and methods of legal regulation of civil relationships. Such principles as freedom of contract or entrepreneurship, reasonableness, justice, good faith and fair dealing, judicial protection of civil rights and interests etc., embodied in the current Civil Code of Ukraine among the general outlines of civil law and in the rules devoted to regulating certain types of civil relations, in particular, property relations or legal representation, providing legitimate business activity or responsibility for the non-fulfillment or improper fulfillment of civil obligations.

However, there are principles that are particularly important for the regulation in specific civil relations. Among those principles can be designated a fundamental principle of security, which is certainly implemented in various civil relations, but we will stop our attention on disclosure of the content of this principle precisely in contractual relations.

Leading at the present stage codified document in the field of private law in Europe – the DCFR – reveals at least five main components of the principle of contractual security: (1) the obligatory force of contracts (but subject to the possibility of challenge where an unforeseeable change of circumstances gravely prejudices the utility of the contract for one of the parties); (2) the fact that each party has duties flowing from contractual loyalty (i.e. to behave in accordance with the requirements of good faith; to co-operate when that is necessary for performance of the obligations; not to act inconsistently with prior declarations or conduct on which the other party has relied); (3) the right to enforce performance of the contractual obligations in accordance with the terms of the contract; (4) the fact that third parties must respect the situation created by the contract and may rely on that situation; and (5) the approach of "favouring the contract" (whereby, in questions

relating to interpretation, invalidity or performance, an approach which gives effect to the contract is preferred to one which does not, if the latter is harmful to the legitimate interests of one of the parties) [1, 56]. Additionally noted the importance of further ingredients of contractual security as the availability of adequate remedies (in addition to enforcement of performance) for non-performance of the contractual obligations, as well as the protection of reasonable reliance and expectations in situations not covered by the doctrine of contractual loyalty.

It should also be recalled that in the DCFR 2009 edition all the principles were divided into following groups: the underlying principles and the overriding principles. As follows from the DCFR text and comments to it by the authors, "the underlying" are those principles which should ensure the achievement of the most common goals of the DCFR. As such it is proposed principles of freedom, security, justice and efficiency (with the assumption that by them is covered the principles of contract loyalty, cooperation, etc.). The category of overriding principles of a high political nature attributed the protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare, the promotion of the internal market [2, 12]. The underlying principles served as key ideas in process of formulation of several rules in the DCFR, while the remaining principles, according to the statement of the DCFR's developers, are of a high political nature. However, according to the position of the DCFR authors, freedom, security, justice and efficiency, fulfilling a double role, also have a role to play as overriding principles. Thus, these principles are characterized by a dual nature, and this includes the principle of contractual security.

The principle of contractual security is regarded in the DCFR through disclosure of the contents of many aspects, in particular: third party respect and reliance; exclusion performance of the contract duty with substantial changes of circumstances; reasonable choice between certainty and flexibility in contractual relations; clarify the conditions and the real intentions of inappropriate behavior of a counterparty; limit enforcement through literal impossibility of performance of the obligation or its irrelevance; a full set of other remedies to protect the creditor in a contractual obligation when specific reservations.

However, such concepts as good faith and fair dealing had been removed from the content of the principle of contractual security because of their uncertainty. The reason for this approach is that really insecure conditions may be created for the person who is obliged to act in accordance with a very open and vague notions of good faith and fair dealing which are not always clearly understood in practice. Special content is proposed for the principle of cooperation, which provides that in a contract security the debtor and the creditor are obliged to co-operate with each other when and to the extent that this can reasonably be expected for the performance of the debtor's obligation [1, 60].

Analyzing the measure of implementation of these provisions in national civil legislation, in particular in the current Civil Code of Ukraine, we conclude that to a greater extent the main components of the principle of contractual security as they are defined in the DCFR, are contained in the rules of the Civil Code on common regulations for the fulfillment of civil rights and obligations, general provisions on obligations and contracts, and are duplicated or additionally disclosed in the rules governing specific kinds of obligations and types of contracts. In particular, Art. 13 of CC provides that the civil rights of a person shall be fulfilled, within the limits granted by the agreement or acts of civil legislation. Not allowed an action to be committed with intent to cause harm to another person and abuse of the law in other ways. In Art. 14 states that a person shall not be compelled to act, the commission of which is optional for her. A person may be exempted from civil obligations or its performance in cases established by treaty or acts of civil law. Article 525 established the inadmissibility of unilateral refusal to commitments and in Article 629 – the binding force of contract. Article 652 provides quarantees for the parties in case of exceptional change of circumstances, determines the order of change or termination of the contract in such case [2].

Herewith the approaches of national legislators and compilers of the DCFR to understanding certain aspects of legal regulation of contractual relationships differ significantly. Thus, in Art. 628 of CC of Ukraine is provided the existence of so-called "essential conditions" of a contract, which are binding on the parties under civil law. In this case, the contract will be considered concluded from the moment the parties reach agreement on the essential and other defined them at their own discretion as mandatory, conditions. However, in comments to the principle of contractual security the DCFR authors noted incorrectness of domestic systems of law in the approach to establishing a consequence of non-recognize the obligation between the parties, if they had not agreed on mandatory conditions of the contract stipulated by law, and if the parties actually wished to be bound and cared of being in contractual relations. In this case, the principle of maintaining the contractual relationship (the approach of "favouring the contract") implies a broader mechanism of

achieving an agreement while making the contract, when the contract is recognized concluded and valid also on the issues not covered by the parties.

Third party respect and reliance. The only aspect of contractual security which is mentioned in the Principes directeurs but which does not appear explicitly in the DCFR is the fourth one - that third parties must respect the situation created by the contract and may rely on that situation. It was not thought necessary to provide for this as it is not precluded by any rule in the DCFR and, if understood in a reasonable way, seems to follow sufficiently from other rules and essential assumptions. One case of practical importance is where a person not being a party to a contract or an intended beneficiary of it nonetheless relies on the proper performance of a contractual obligation (e.g. a tenant's visitor claims damages from the landlord as the tenant could do under the contract, because the visitor falls down the stairs as a result of a broken handrail the landlord was obliged to repair under the contract).

Protection of reasonable reliance and expectations. This is an aspect of security which appears in different parts of the DCFR. It first appears in relation to contract formation. It may happen that one party does not intend to undertake an obligation when that party's actions suggest to the other party that an obligation is being undertaken. A typical case is where an apparent offer is made by mistake. If the other party reasonably believed that the first party was undertaking the obligation as apparently stated, the other party's reliance will be protected in most legal systems. This may be achieved either by using the law on noncontractual liability for damage caused to another or, more simply, by holding the mistaken party to the outward appearance of what was said. The protection of reasonable reliance and expectations is a core aim of the DCFR, just as it was in PECL. Usually this protection is achieved by holding the mistaken party to the obligation which the other party reasonably assumed was being undertaken. Examples are the objective rules on interpretation, the restriction of avoidance for mistake to cases in which the non-mistaken party contributed to the mistake, should have known of it or shared it and the rule that imposes on a business which has failed to comply with a pre-contractual information duty such obligations under a contract as the other party has reasonably expected as the consequence of the absence or incorrectness of the information.

The principle of binding force. If the parties have concluded a contract freely and with adequate information, then the contract should normally be treated as binding on them unless they (again freely) agree to modification or termination or, where the contract is for an indefinite period, one has given the other notice of a wish to end the relationship. These rules are set out clearly in the DCFR. It also sets out rules on the termination of a contractual relationship in more detail. Examples are - besides the rules on termination for nonperformance – the right to terminate by notice where that is provided for by the contract terms and the right to terminate where the contract is for an indefinite duration. In the latter case the party wishing to terminate must give a reasonable period of notice. The principle of binding force (often expressed still by the Latin tag, pacta sunt servanda) was qualified classically only when without the fault of either party performance of the contractual obligations became impossible for reasons that could not have been foreseen. A more modern development is the right of withdrawal granted to consumers in certain situations. The reasons for this exception vary, but can be seen in the specific situations where such withdrawal rights exist. One example is the right to withdraw from contracts negotiated away from business premises (e.g. at the doorstep or at distance). In such situations the consumer may have been taken by surprise or have been less attentive than he or she would have been in a shop. A further example is provided by some complex contracts (e.g. timeshare contracts), where consumers may need an additional period for reflection. The right to withdraw gives the consumer who concluded a contract in such situations a 'cooling off period' for acquiring additional information and for further consideration whether he or she wants to continue with the contract. For reasons of simplicity and legal certainty, withdrawal rights are granted to consumers, irrespective of whether they individually need protection, as a considerable number of consumers are considered to be typically in need of protection in such situations.

Exceptional change of circumstances. Many modern laws have recognised that in extreme circumstances it may be unjust to enforce the performance of contractual obligations that can literally still be performed according to the original contract terms if the circumstances in which the obligations were assumed were completely different to those in which they fall to be enforced. As noted above, this qualification is stated in general terms in the Principes directeurs. It is also recognised in the DCFR but the parties remain free, if they wish, to exclude any possibility of adjustment without the consent of all the parties.

Certainty or flexibility. A more general question is whether contractual security is better promoted by rigid rules or by rules which, by using open terms like "reasonable" or by other means, leave room for flexibility. The answer probably turns on the nature of the contract. In contracts for the purchase of

certain commodities or types of incorporeal assets where prices fluctuate rapidly and where one deal is likely to be followed rapidly by another which relies on the first and so on within a short space of time, certainty is all important. Nobody wants a link in a chain of transactions to be broken by an appeal to some vague criterion. Certainty means security. However, in long term contracts for the provision of services of various kinds (including construction services), where the contractual relationship may last for years and where the background situation may change dramatically in the course of it, the reverse is true. Here true security comes from the knowledge that there are fair mechanisms in place to deal with changes in circumstances. It is for this reason that the default rules in the part of the DCFR on service contracts have special provisions on the giving of warnings of impending changes known to one party, on co-operation, on directions by the client and on variation of the contract. The general rules on contractual and other obligations in Book III have to cater for all types of contract. So their provisions on changes of circumstances are much more restricted. However, even in the general rules it is arguable that it does more good than harm to build in a considerable measure of flexibility because open criteria will either be disapplied by highly specific standard terms devised for fields of commercial activity where certainty is particularly important or will disapply themselves automatically in cases where they are inappropriate. The effects of terms such as "reasonable" and "fair dealing" depend entirely on the circumstances. Rigid rules (e.g. "within 5 days" instead of "within a reasonable time") would be liable to increase insecurity by applying in circumstances where they were totally unexpected and unsuitable.

Good faith and fair dealing. As the Principes directeurs recognise, one party's contractual security is enhanced by the other's duty to act in accordance with the requirements of good faith. However, the converse of that is that there may be some uncertainty and insecurity for the person who is required to act in accordance with good faith and fair dealing, which are rather open-ended concepts. Moreover, the role of good faith and fair dealing in the DCFR goes beyond the provision of contractual security. These concepts are therefore discussed later under the heading of justice.

Co-operation. Contractual security is also enhanced by the imposition of an obligation to cooperate. The Principes directeurs put it this way: "The parties are bound to cooperate with each other when this is necessary for the performance of their contract".The DCFR provision goes a little further than the case where co-operation is necessary: the debtor and the creditor are obliged to co-operate with each other when and to the extent that this can reasonably be expected for the performance of the debtor's obligation.

Inconsistent behaviour. A particular aspect of the protection of reasonable reliance and expectations is to prevent a party, on whose conduct another party has reasonably acted in reliance, from adopting an inconsistent position and thereby frustrating the reliance of the other party. This principle is often expressed in the Latin formula venire contra factum proprium. The Principes directeurs express it as follows: "No party shall act inconsistently with any prior statements made by the party or behaviour on the part of the party, upon which the other party may legitimately have relied." The Interim Outline Edition of the DCFR did not contain an express rule of this nature; it was thought that it could be arrived at by applying the general principles of good faith and fair dealing. Inspired by the Principes directeurs, the DCFR now incorporates an express provision which qualifies inconsistent behaviour as being contrary to good faith and fair dealing.

Enforcement of performance. If one party fails to perform contractual obligations, the other should have an effective remedy. One of the main remedies under the DCFR is the right to enforce actual performance, whether the obligation which has not been performed is to pay money or is non-monetary, e.g. to do or to transfer something else. This basic idea is also expressed in the Principes directeurs. The DCFR slightly modifies and supplements this principle by some exceptions as the right to enforce performance should not apply in various cases in which literal performance is impossible or would be inappropriate. However, in a change from PECL, under the DCFR the right to enforce performance is less of a "secondary" remedy, reflecting the underlying principle that obligations should be performed unless there are good reasons to the contrary.

Other remedies. In addition to the right to enforcement, the DCFR contains a full set of other remedies to protect the creditor in a contractual obligation: withholding of performance, termination, reduction of price and damages. The creditor faced with a non-performance which is not excused may normally exercise any of these remedies, and may use more than one remedy provided that the remedies sought are not incompatible. If the non-performance is excused because of impossibility, the creditor may not enforce the obligation or claim damages, but the other remedies are available. The remedy of termination provided in the DCFR is a powerful remedy which adds to the contractual security of the party faced with a fundamental non-performance by the other. The aggrieved party knows that if the expected

counter-performance is not forthcoming it is possible to escape from the relationship and obtain what is wanted elsewhere. However the powerful nature of the remedy is also a threat to the other party's contractual security and, potentially at least, contrary to the idea of maintaining contractual relationships whenever possible. Termination will often leave the other party with a loss (for example, wasted costs incurred in preparing to perform; or loss caused by a change in the market). The creditor should not be entitled to use some minor nonperformance, or a non-performance that can readily be put right, by the other as a justification for termination. The rules governing termination therefore restrict termination to cases in which the creditor's interests will be seriously affected by the non-performance, while leaving the parties free to agree on termination in other circumstances.

Conclusions. Thus, offering various aspects of the content of the principle of contractual security and exposing them, the authors of the DCFR actually created a "global" by its scale the principle, which through its multilateral content is equally important for both creditor and debtor. We can conclude that if it provided adequate implementation of the rules in national civil legislations, realization of this principle will create conditions to prevent and minimize violations of the rights and interests of the parties by preventing the use of outdated requirements on regulating contractual relations of the parties which are not constant and being transformed according to requirements of time and development of economic relations.

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The article is devoted to review of one of the fundamental underlying principles of the project DCFR – the principle of contractual security. The content of this principle is disclosed in accordance with the author's position of the DCFR's developers. The meaning and importance of the components fixed to the principle of contractual security is stated. The status of implementation of this principle in the current civil legislation of Ukraine, including the Civil Code of Ukraine, is analyzed.

Keywords: principles of private law, principles of contract law, project DCFR, contract security, European private law.

Суха Юлія Сергіївна

ПРИНЦИП ДОГОВІРНОЇ БЕЗПЕКИ В ЄВРОПЕЙСЬКОМУ ПРИВАТНОМУ ПРАВІ ТА ЙОГО ВПРОВАДЖЕННЯ У ЦИВІЛЬНОМУ ЗАКОНОДАВСТВІ УКРАЇНИ

Стаття присвячена дослідженню одного з базових основоположних принципів проекту DCFR – принципу договірної безпеки. Розкривається зміст даного принципу у відповідності до авторського бачення розробників DCFR, встановлюється значення складових принципу договірної безпеки. Аналізується стан впровадження зазначеного принципу у чинному цивільному законодавстві України, зокрема, у Цивільному кодексі України.

Ключові слова: принципи приватного права, принципи договірного права, проект DCFR, договірна безпека, європейське приватне право.

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ПРИНЦИП ДОГОВОРНОЙ БЕЗОПАСНОСТИ В ЕВРОПЕЙСКОМ ЧАСТНОМ ПРАВЕ И ЕГО ВНЕДРЕНИЕ В ГРАЖДАНСКОГО ЗАКОНОДАТЕЛЬСТВЕ УКРАИНЫ

Статья посвящена исследованию одного из базовых основополагающих принципов проекта DCFR – принципа договорной безопасности. Раскрывается содержание данного принципа в соответствии с авторским видением разработчиков DCFR, устанавливается значение составляющих принципа договорной безопасности. Анализируется состояние внедрения указанного принципа в действующем гражданском законодательстве Украины, в частности, в Гражданском кодексе Украины.

Ключевые слова: принципы частного права, принципы договорного права, проект DCFR, договорная безопасность, европейское частное право.