Freedom of contract in the digital age and its implementation in modern technologies: theory and practice

Iryna Davydova[1], Olena Bernaz-Lukavetska[2], Vira Tokareva[3], Iryna Andriienko[4], Olena Tserkovna[5],
divo-ira@ukr.net airene_2014@ukr.net elena1303@ukr.net [1,]
[2, 3]National University "Odesa Law Academy" Odesa, Ukraine
[4, 5] Odesa State University of Internal Affairs Odesa, Ukraine

Summary
Scientific and technical development, as well as the emergence of new types of contracts, which do not have their expression in current legislation, force us to explore the issues of contract law to adapt to change. In this context, the principle of freedom of contract is fundamental, which states that each person has the right to enter into a contractual relationship at his discretion. However, such freedom is not absolute, because the freedom of one person should not violate the freedom of another. Together with the conflict of private and public interests, these phenomena are a field for the study of topical issues of theory and application of the principle of freedom of contract in practice. Research methods are philosophical, general scientific, and special scientific methods, in particular, system-structural, formal-legal, hermeneutic; methods of analysis, synthesis, etc. As a result of the research, the main characteristics of the principle of freedom of contract, its role for private law regulation of contract law are given; approaches to understanding the restriction of contract freedom are analyzed; typical examples and means of such restrictions are identified; demonstrated how contract freedom is embodied in the use of IT tools, which types of contracts are most common in the digital environment.

Key words:
Private law, contract law, freedom of contract, limits of freedom of contract, mandatory rules.

1. Introduction

As a result of their interaction at the conclusion of the contract, a legal relationship arises between the subjects – a connection, which manifests itself in the form of mutual rights and obligations. In addition, contract law is characterized by certain fundamental principles that enable it to function as a holistic system designed to regulate social relations. One of these is the principle of freedom of contract. It means that people, as subjects of legal relations, have the right to enter into contracts at their discretion, that is, according to their own beliefs, to choose contractors, the terms of the contract, etc. It can be said that in this way the inner will of the subjects is manifested, and the concluded contract is the result of their free will.

With the development of the information society, post-industrial economy, bioengineering, contracts begin to appear, not directly provided by law. Accordingly, there is a need for their legal assessment. At the same time, it becomes inevitable to return to the theoretical foundations of freedom of contract and define its limits.

The purpose of the study is to characterize the theoretical and practical aspects of the principle of freedom of contract in contract law with the use of information technology.

The object of research is contract law.

The subject of the study is public relations in the field of contract law, which has developed in relation to the principle of freedom of contract, in particular, the use of information and communication technologies.

2. Methodology

The methodological basis of the study is philosophical, general scientific, and special scientific methods.

The system-structural method was used to characterize the relationship and place of freedom of contract among other principles of private law, norms of civil and contract law. This approach is also used to demonstrate the link between the implementation of the principle of freedom of contract in practice and the factors that systematically influence it.

The application of the formal-legal method was useful in considering the limits of freedom of contract as its constitutive features. For example, this is done in the main part of the work in the context of the study of civil law.

The hermeneutic method was used to interpret doctrinal provisions, in particular, on approaches to restricting the freedom of contract (beginning of the main part of the article), the positions of scholars, for example, European, Ukrainian.

Techniques of analysis, synthesis, generalization are applied in the study of the concepts of freedom of contract, its restrictions, and related legal constructions. Generalizations are used to draw conclusions and briefly describe legal phenomena.

Manuscript received December 5, 2021
Manuscript revised December 20, 2021
https://doi.org/10.22937/IJCSNS.2021.21.12.75

3. Review of the Scientific Works on the Research Topic

Freedom of contract is the focus of research by many jurists. For example, Storme (2007) [6] in his article considered general points concerning the restriction of freedom of contract in European law. The author also touched on how legal techniques make it possible to apply these restrictions under the Principles of European Contract Law, the acquis communautaire, and the Draft Common Frame of Reference. In this context, special attention is paid to anti-discrimination norms.

According to Rutgers (2009) [5], the European economy does not need freedom of contract as an absolute starting point for future legislative measures in the field of contract law. Rather, it strikes a balance between freedom of contract, on the one hand, and other public or social security interests.

Twigg-Flesner (2013) [7], in his book, considered the place of freedom of contract in European law. In this regard, the author noted that the freedom of contract was provided by the European Commission in the Draft Common Frame of Reference as a system-forming principle of contract law, along with the binding nature of the contract (pacta sunt servanda) and good faith / good faith / bona fides. At the same time, it was noted that mandatory rules would be an exception to the freedom of contract. In addition, many domestic scholars have studied the problematic issues of contracts in the digital age [20, 21, 22, 23].

4. Main Research and Findings

4.1 Theoretical Approaches to Understanding the Freedom of Contract and its Limits

The freedom of one person must not violate the freedom of another. In this sense, the freedom of contract exists within the legal field of current regulations, customs of business, morality. Accordingly, the actions of the parties to the contract must be based on the principles of reasonableness, good faith, and fairness.

Most often, there are cases when there is a restriction on the freedom of contract, the following are:

1. Mandatory conclusion of the contract. For example, it can be the basic contract which is concluded for performance of the previous, or the contract with the person who has won the auction, or the conclusion of the public contract. This also includes the conclusion of social lease agreements for residential premises or in the execution of defense, mobilization orders, etc.

2. Conclusion of a contract of a certain type by the entities in accordance with their activities. In such a situation, the conclusion of the contract by entities not authorized by law will result in their invalidation. This is especially true for banking and financial activities, when, for example, the guarantor of a transaction on the issuance of a bank guarantee can be either a credit or insurance organization; only a specialized organization can be a financial agent under a financing agreement; only banks can accept contributions and enter into a bank deposit agreement; only insurance companies can be insured under insurance contracts.

3. There is no opportunity for the parties to participate in shaping the terms of the contract. For example, this is typical of standard agreements, accession agreements, previous agreements, agreements in favor of third parties.

Therefore, in accordance with the principle of freedom of contract, the parties have the right to enter into a contract on terms that they themselves determine as necessary and profitable. The design of the coincidence of their expression of will implies that any contract is mutually beneficial. In this case, the powers of the parties include free coordination of the structure, type, conditions, terms, and place of performance of the contract. That is, theoretically for the principle of freedom of contract the real condition is "everything is possible". However, it is obvious that among the variety of consequences of such unlimited expression of will, negative ones would inevitably appear, as there would be, in particular, arbitrariness, abuse, and illegal actions, because in the terms of the contract anything could be prescribed, including numbers aimed at undermining law and order, harming society, the state, individuals, etc. Hence, the consequences of such unrestricted expression of will are dangerous and undesirable, so they must be rationally and fairly limited. Accordingly, a reasonable legal construction for the principle of freedom of contract should be defined as "anything that is not prohibited is possible". Thus, the central problem for jurisprudence in this context is to determine reasonable and fair degrees of freedom, which would be designed to ensure a balance of private and public interests with the maximum possible free expression of the will of the subjects while maintaining public order.

4.2 How is the Freedom of Contract Reflected in Modern Contracts, which are Concluded in Electronic Form?

Buying and selling through online platforms have become a common practice. Large volumes of household goods, digital appliances are now bought online. The sites of such companies as Amazon, eBay, Alibaba, Taobao, which sell a large number of different products, are gaining popularity.

The reasons for the intensification of online trade are the development of information and communication technologies, the constant presence of consumers online (digitalization of the population), competition for the consumer (Dubovik, 2013) [10].

The advantages of online trade are speed and convenience of transactions, the conclusion of sales contracts; reduction of operating costs; application of technologies for analysis of large data sets, and their application for personalized customer service (use of Big Data tools) (Sak, & Khovkhalyuk, 2020) [15]. Disadvantages are a violation, negligence, abuse by sellers; delivery problems; communication failures, and technological malfunctions.

In Ukraine, an analog of large international e-commerce companies is the company Rozetka, which is a leader in e-commerce retail in our country (Sapiton, & Shapoval, 2020) [16]. The number of products on the marketplace site exceeds 60 million items in more than 7,000 categories (RAU, 2021) [4]. The official website of the store is visited by about 5 million people daily. The COVID-19 epidemic only contributed to the growth of wealth and the development of the company.

This trend is typical not only for Ukraine. According to statistics, online trading continues to grow. For example, in 2020, retail revenues in e-commerce amounted to 4.28 trillion US dollars worldwide (Chevalier, 2021) [1]. Figures are projected to rise to 5.4 trillion US dollars in 2022.

Due to the popularity of online commerce and its use in everyday life, it is necessary to consider the civil law side of this phenomenon, in particular, electronic contracts. They most often refer to an agreement between two or more parties, which aims to establish, change or terminate civil rights and obligations. The main thing is that this agreement is concluded in electronic form. Consider the example of the Law of Ukraine "On e-commerce", what it means in practice. This legal act contains not only rules for concluding electronic contracts, but also rules for identifying sellers and buyers. Regarding the rules for concluding electronic contracts, the following is noted. First, it lists the essential and additional conditions that usually apply to such agreements (Part 2 of Article 11) (Golubeva, 2016) [8]. For example, its conditions may be the technology of concluding a contract, the procedure for certifying it, the procedure for making changes, the method of accepting a proposal, the procedure for exchanging messages, means of identification, the procedure for making changes to acceptance, etc. (Cherkashin, & Milash, 2016) [19]. Secondly, the electronic contract is concluded by offering to conclude (offer) it by one party and its acceptance (acceptance) by the other party (Part 3 of Article 11). An offer within the meaning of the Law may be commercial advertising messages to which the consumer / buyer / client agrees (Article 10). Approval / acceptance / acceptance of the offer is by means of:

1) electronic message;
2) filling in a standard form;
3) implicit actions (Filatova, 2017) [17].

Third, the Law provides for the specifics of identification of the parties to the contract. For example, the identification of the buyer is carried out using an electronic signature (Khizhniak, 2017) [18]. Its legal definition can be found in the Law on Electronic Trust Services, which replaced the Law on Electronic Digital Signature [12], which is referred to in the Law on Electronic Commerce [14]. In accordance with paragraph 12 of Part 1 of Art. 1 of the Law "On electronic trust services", an electronic signature is electronic data that is added by the signatory to other electronic data or logically associated with them and used by him as a signature.

Art. 1 of the Law "On electronic trust services" [13] contains a list of other legal definitions that are used in the identification of a person using information and communication technologies. For example, paragraph 23 of Part 1 of Art. 1 contains a definition of a qualified electronic signature, which is an advanced electronic signature that is created using a qualified electronic signature tool and is based on a qualified public key certificate. The Law "On e-commerce" itself contains the definition of an electronic signature as a one-time identifier (paragraph 6, part 1 of Article 3). Accordingly, it is data in electronic form in the form of an alphanumeric sequence, which is attached to other electronic data by the person who accepted the offer to enter into an electronic agreement and sent to the other party to this agreement. Login and password fall under these definitions and most often act as electronic signatures when concluding contracts for the sale of goods online (Golubeva, 2016) [8]. Identification is mandatory in accordance with Part 2 of Art. 8 of Law No. 675, the buyer (acceptor) is obliged to disclose the information necessary for the conclusion of the contract (Karpova, 2016) [11].

Legal regulation of electronic contracts is based on the principles of freedom of contract. In this case, individuals are free to choose a contractor, enter into contracts on their own terms, which can be changed in a more convenient way, which is a distinctive feature of electronic contracts and freedom of contract in terms of digitalization in general. This means that if you consider the contract of sale for a particular product in the basket or order the goods as a whole as a separate contract, then changing the terms of delivery, payment, termination (cancellation) are much more convenient than it would be with a written contract. However, there is another point of view, according to which electronic contracts of sale online are a kind of accession agreement (Golubeva, 2016) [8]. In addition, the freedom of contract is confirmed by the fact that the responsibility for its violation is based on similar grounds for other types of civil contracts, so we can conclude that electronic contracts are primarily in the form of their conclusion, remaining based on general principles of civil law.

4.3 Smart Contracts

Another aspect to consider is smart contracts. This topic is relevant in the context of digitalization, as it continues the above discussion of the interaction of contract law and modern technologies. In addition, smart contracts are controversial in the legal environment (Ferreira, 2021), because most often from a legal point of view, their legal nature is either uncertain or they are referred to as unnamed contracts. In the second case, it is about the fact that the parties have the right to enter into a contract not provided by law, which will comply with the principles of civil law (Denisova, 2017) [9]. In the first case - researchers do not consider smart contracts to be a type of contract at all, because their nature is technical rather than legal.

By one definition, a smart contract is a computer code that is entered into a blockchain network to complete a transaction. Usually, this transaction is expressed by agreement between the parties. From this point of view, researchers criticize smart contracts for their technicality, because, from this point of view, they are only part of the fulfillment of the obligation, one of the conditions of the contract, and not its independent form. In support of this view, it is noted that for a smart contract to become a contract, it must at least meet the conditions of validity of transactions (De Filippi, Wray, & Sileno, 2021) [2].

For example, even if you consider a smart contract as a contract for the sale of real estate (in fact, it will only be a transfer of virtual assets – cryptocurrency – as payment), it should be recognized that its characteristic feature will be the expression of conditions as a mathematical algorithm because it involves a blockchain that operates using a programming language that operates using algorithms. In addition, the smart contract will be both a contract and a way to secure itself, given the challenges of smart contract transactions in a blockchain environment, namely: autonomy, decentralization, confidentiality, security of execution and data, resource savings, convenience, accuracy, standardization (De Filippi, Wray, & Sileno, 2021) [2]. However, a smart contract does not fully reflect the will of the parties, because, in addition, to the transaction, it is often part of a broader agreement, which can be executed as a written contract. In addition, making changes to smart contracts, especially when execution is running, is a complex process, which also makes it impossible to speak of full compliance with the freedom of contract for smart contracts.

5. Conclusions

Freedom of contract is a fundamental principle of private law. Its essence is that the subjects of private relations have the right to enter into contracts at their discretion. This means that the structure of the contract, its terms, deadlines, etc. are within the scope of the parties. Each party has the right to freely choose the counterparty and the terms of the contract. However, some restrictions are designed to protect the public interest, such as public policy or the weakness of the obligation. Most often, they are manifested in mandatory rules, which contain a direct prohibition on a certain type of action concerning the contract, so the freedom of the contract is not absolute. In addition to imperative norms, the freedom of contract may be limited to public perceptions of what is proper and permissible (moral norms), customs of business, the requirements of reasonableness and justice.

The principle of freedom of contract is manifested differently in the laws of individual countries. It depends on many factors, in particular, the historical conditions of the formation of statehood and law, the geography of the region, social, economic, cultural factors. However, the common denominator is the desire to regulate the contractual relationship on the principles of equality of the parties, voluntariness, obligation to perform the contract, and good faith.

The use of modern means of communication poses new challenges to contract law, including the settlement of new types of contracts. It is seen, that this will be done, based on the principle of freedom of contract and its components, which is a fundamental principle of contract law. From this point of view, even new contracts, which have no analogues in existing legislation, will still be forced to be settled on the general principles of contract law. Electronic contracts are becoming increasingly popular for some factors, including the constant use of the Internet and the convenience of concluding electronic contracts of sale, so this area of research is promising in terms of contract law and its issues. It is recommended that further research pay attention to the implementation of the principle of freedom of contract and the conclusion of electronic contracts for specific types of goods, under special conditions, and explore the specifics of contractual practices in different environments and with the participation of different entities (parties). In this aspect, we will find it useful to study the case law on the observance/violation of the freedom of contract when concluding electronic contracts of sale in the field of e-commerce.

References

[1] Chevalier, S.: *Retail e-commerce sales worldwide from 2014 to 2024* (2021) https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/

[2] De Filippi, P., Wray, C., & Sileno, G.: *Smart contracts. Internet Policy Review,* 10(2), 13-19 (2021) https://doi.org/10.14763/2021.2.1549

[3] Ferreira, A.: *Regulating smart contracts: Legal revolution or simply evolution?* Telecommunications Policy, 45(2), 102081 (2021) https://doi.org/10.1016/j.telpol.2020.102081

[4] RAU. *How to become a leader in the e-commerce market.* History of Rozetka (2021) https://rau.ua/novyni/e-commerce-istoriya-rozetka/

[5] Rutgers, J.: *The European economic constitution, freedom of contract and the DCFR.* European Review of Contract Law, 2, 95-108 (2009) https://core.ac.uk/download/pdf/15455291.pdf

[6] Storme, M.: *Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law*. European Review of Private Law, 2(15), 233-250 (2007) https://bit.ly/34UStul

[7] Twigg-Flesner, C.: *The Europeanisation of contract law: current controversies in law.* Routledge. (2013) http://opac.lib.idu.ac.id/unhan-ebook/assets/uploads/files/71c29-071.the-europeanisation-of-contract-law.pdf

[8] Golubeva, N.Yu. *The procedure for concluding contracts in electronic form under the laws of Ukraine.* Methodological principles of improving civil procedural law, 3-10 (2016) https://bit.ly/3lih7hB

[9] Denisova, G.: *On the freedom of contract and its restrictions* (2017) https://yur-gazeta.com/publications/practice/inshe/pro-svobodu-dogovoru-ta-yiyi-obmezhennya.html

[10] Dubovik, T.: *Internet trade in Ukraine*. Bulletin of KNTEU, 1, 20-28 (2013) http://visnik.knute.edu.ua/files/2013/01/2.pdf

[11] Karpova, V.: *Internet commerce: legal aspects*. Accountant & Law, 45 (2016) https://bz.ligazakon.ua/ua/magazine_article/BZ009513

[12] On electronic digital signature. Law of Ukraine of May 22, 2003 № 852-IV (2003) https://zakon.rada.gov.ua/laws/show/852-15#Text

[13] On electronic trust services. Law of Ukraine dated 05.10.2017 № 2155-VIII (2017) https://zakon.rada.gov.ua/laws/show/2155-19#n534

[14] On e-commerce. Law of Ukraine of 03.09.2015 № 675-VIII (2015) https://zakon.rada.gov.ua/laws/show/675-19#Text

[15] Sak, T.V., & Khovkhalyuk, D.O.: *E-commerce in Ukraine: state, tendencies, prospects of development.* Marketing and digital technologies, 4(3), 73-85 (2020) https://mdt-opu.com.ua/index.php/mdt/article/view/112/105

[16] Sapiton, M., & Shapoval, K.: *Real love. How Iryna and Vladyslav Chechotkin are building the Ukrainian Amazon.* Forbes Ukraine (2020) https://forbes.ua/news/sprava-chechotkinikh-21102020-332

[17] Filatova, N.Yu.: *Regulation of peculiarities of concluding electronic contracts: comparative legal analysis*. Problems of Legality, 139, 63-77 (2017)

[18] Khizniak, O.S.: *Electronic contract: legal aspect and features of its conclusion.* Economics and Society, 10, 396-401 (2017)

[19] Cherkashin, S.V., & Milash, V.S.: *Some aspects of concluding an electronic contract.* Law and Society, 3(2), 87-91 (2016)

[20] Davydova, I., Orzikh, Y., Samoylenko, G., Andronov, I., & Pysarenko, M.: *Legal consequences of the invalidity of a transaction made by using information technology: problems of theory and practice.* Amazonia Investiga, 8(19), 613-619 (2019) https://amazoniainvestiga.info/index.php/amazonia/article/view/276

[21] Davydova, I., Didenko, L., & Tomina, V.: *Legal Nature and Inheritance of Virtual Property in Ukraine and the World: Current Status, Problems, Prospects.* Ius Humani. Law Journal, 10(2), 1-26 (2021) https://doi.org/https://doi.org/10.31207/ih.v11i2.283

[22] Lutsyuk, P., Bolokan, I., Davydova, I., Chanysheva, A., & Yakymchuk, S: *Realization of the Right to Health Protection in Insurance Medicine: The First Experience of Covid-19*. Ius Humani. Law Journal, 9(2), 341-364 (2020) https://doi.org/https://doi.org/10.31207/ih.v9i2.259

[23] Kharytonov, E., Kharytonova, O., Tkalych, M., Bolokan, I., Samilo, H., & Tolmachevska, Y.: *Intellectual Property Law in the Field of Sports: Specifics of Manifestations and Features of Legal Regulation.* Cuestiones Políticas, 39(69), 530-546 (2021) https://produccioncientificaluz.org/index.php/cuestiones/article/view/36253.

Iryna Davydova Doctor of Legal Sciences, Professor, Professor of Civil Law, National University "Odessa Law Academy". divo-ira@ukr.net https://orcid.org/0000-0001-5622-671X

Olena Bernaz-Lukavetska Ph.D., Associate Professor of Civil Law, National University "Odesa Law Academy" https://orcid.org/0000-0002-2133-1672

Vira Tokareva Ph.D., Associate Professor of Civil Law, National University "Odesa Law Academy" https://orcid.org/0000-0002-8409-1477

Iryna Andriienko Ph.D., Associate Professor, Professor of the Department of Civil Law, Odessa State University of Internal Affairs. airene_2014@ukr.net http://orcid.org/0000-0002-1056-5123

Olena Tserkovna Ph.D., Associate Professor of the Department of Civil Law, Odessa State University of Internal Affairs. elena1303@ukr.net https://orcid.org/0000-0001-7923-8553