Salavat Dilmukhametov, *doctoral candidate*
Baltic International Academy
Almaty, Kazakhstan

The system of civil contracts: its importance in Continental European system of law

Abstract. Systematic study of contract law in Continental European system of law is of great theoretical and practical importance. In this regard, the author made a brief analysis of the importance of the system of civil contracts in Continental European system of law. Such issues as systematic method, systematics of law, system approach in construction and analysis of contract law, the importance of the systematic study of contract law, systematization of contracts in Continental European system of law, system of contract law and civil contracts in Germany, Kazakhstan and Latvia are considered.

Key words: system of civil contracts, systematic method, contract law, civil law, Continental European contract law.

Салават Дильмухаметов, *PhD кандидат*
Балтийская Международная Академия
Алматы, Казахстан

Система гражданских договоров: ее значение в континентально - европейской системе права

Аннотация. Системное изучение договорного права в континентально-европейской системе права имеет большое теоретическое и практическое значение. В связи с этим, автором в статье проведен краткий анализ значения системы гражданских договоров в континентально-европейской системе права. Рассмотрены такие вопросы, как метод системности, системность права, системный подход в построении и анализе договорного права, значимость системного изучения договорного права, систематизация договоров в континентально-европейской системе права, система договорного права и гражданских договоров в Германии, Казахстане и Латвии.

Ключевые слова: система гражданских договоров, метод системности, договорное право, гражданское право, континентально-европейское договорное право.

Introduction

Among the existing legal groups, Continental European legal system plays a special part and is essential to the development of legal theory and practice. [1, p. 29].

According to R. David and K. Geoffrey-Spinoza, it is "the first system which we meet in the modern world" and which appears as continuation of Roman law, the result of its evolution, although "is in no way its copy" [2, p. 29].

In the countries with Continental European system of law, it is generally accepted that when studying law in general, as well as its branch subsystems, the method of systematics is used as one of the main methods of scientific knowledge. In turn, this is due to objective circumstances, namely, the systemic properties of the law itself.

Of course, we should agree that the systematics of law, with all its objective expressions, has the properties of subjectivity to a large extent, since it contains subjective analysis and intellectually conditioned evaluation of its elements and connections between them [3, p. 181], but at the same time a system approach to law serves to deepen the notion of the constructed nature of law, its functioning and development, and creates a theoretical prerequisite for practical improvement of such a quality of legal reality as its systematic.

The role of the system approach in the study of civil law contracts

Knowledge acquisition under system principles promotes deep knowledge of the objective nature of the surrounding world. Correctly built system reveals the most significant similarities and differences between the elements included in it, and therefore, contribute to ensuring that our ideas about the surrounding world correspond to its true content to the fullest extent [4, p. 5]. All that has been said fully applies to the formation of the system of civil contracts. The study of all contracts as a single system allows us to treat contracts not as a segmental mass of certain types of contracts, but as their certain aggregate having an internal integrated structure. System study makes it possible to understand what unites all contracts into integral whole and what, within the framework of this integral whole, differentiates them from each other.

At first, the system approach in construction and analysis of the contract law serves to the achievement of the law-making goal, which is understood as the creation of effective legislation. It helps to identify the signs of legal relations that affect the legal regulation and important connection for the law between these signs. System analysis ensures proper co-ordination of legal norms, their unification and differentiation. The scientifically grounded system of civil contracts makes it possible to reveal what signs of social relations require the application of a particular legal mechanism and to group out social relations based on these characteristics. At second, the study of the system of contracts is aimed at solving the law-enforcement problem. For effective application of civil legislation to a certain contract, it is necessary to qualify it properly. Law enforcement qualification will be correct only if it coincides with the law-making qualification. In this regard, one of the main tasks of law-enforcement is to establish what legal relations, according to the plan of the legislator, should be regulated by certain legal norms, and to develop practically convenient criterion for separating these legal relations, corresponding exactly to the legislative criterion [4, p. 6].

According to Yu.V. Romanets, "Systematic study of contract law is of great theoretical and practical importance. The theoretical importance lies in the fact that the system of contracts consists of a set of elements (types, nature, variety of contracts), each of which, having common signs of a civil contract, is characterized by specific features that necessitate special legal regulation. In other words, the system approach in the study of contract law allows us to identify the principles of its construction from general to the special, which has important law making and codification significance. The practical importance is no less significant. Correct interpretation and application of any norm of the law means its systemic application. And this means that both the norms of the General Part of the Civil Code and the special norms contained in its Special Part apply to any relation and dispute. As a rule, both these and other norms are applied taken together, since the former are concretized by the latter. If the norms of the General Part contradict the norms of the Special Part, the latter have priority, since they reflect the specifics of the regulated relations. This correlation of general and specific norms must be taken into account not only

in cases of the combined application of both these norms, but also in the application of the norms of the Special Part, since its institutions also have their own internal structure. In order to identify properly which specific norms are to be applied to regulate this relations, it is necessary to establish the type of relation and its variety, in other words, to give it a legal qualification" [4, p. 12].

In addition, the importance of systematic study of contract law is in its constant development. As rightly noted by Reiner Schulze: "Contract law is facing new challenges. They predominantly arise from the deep-seated changed currently underway in business, politics and law and which is usually summarized under the term of globalization. It not only affects cross border contractual relationship, rather in increasingly impacts on contractual practice in the national context. Certain facets of this change must be mentioned (I) technological change, (II) change in contractual language and style, (III) freedom of contract and needs of protection (IV) international and supranational law" [5, p. 3].

Ya.F. Mikolenko has a similar opinion, noting that "The system of civil law contracts should be mobile: it shall meet the level of development of civil legislation and immediately respond to each new type or kind of contractual obligation. As rightly pointed out by researchers, the systematization of legal material cannot be an end in itself, if the classification proposal does not meet practical needs, then its scientific value is highly doubtful. Systematization is not arbitrary and random; it should be based on the characteristics and signs that are rooted in the essence of systematized legal material [6].

Thus, the meaning of the systematization of civil law contracts is to divide the contracts into groups combining obligations with similar legal regulations and sharing obligations with different legal regulations based on the correctly chosen criteria (law-creating features) [4, p. 40].

The system of civil law contracts in Germany, Kazakhstan and Latvia

It is important to note that the systematization of contracts in Continental European legal system is divided into two main models: German and French. The difference between the French (classical, doctrinal) and German (pragmatic) models is that German law has modified many aspects of Roman contract law, which has remained almost unchanged in French contract law [7, p. 295].

The structure of German contract law coincides with the structure of German civil code (hereinafter – GCC), which is divided into general and special part. The general part establishes general rules for all contracts (lex generalis), and a special part regulates the requirements to individual defined contracts (there are 24 of them in GCC) [8].

Thus, the principle of singular contracts operates in the German contract law, in other words, along with the general theory of contracts, there are parallel features for certain types of defined contracts, general rules (general principle) and special rules (for defined contracts).

GCC suggests a legal classification of contracts according to the criterion of their subject: a) binding; b) property; c) marital and family; and d) hereditary contracts.

By the time of preparation of GCC in Germany in the late XIX, the issue on the right of the parties to conclude a non-defined contract in a positive law had already become so indisputable that the authors of the German codification considered it superfluous to register it directly in the GCC and only indicated such a right in the preparatory materials. Such contracts in German law are recognized and regulated, as in most countries, by general provisions on contracts and obligations [9].

In its turn, the possibility to conclude a mixed contract is not directly fixed in GCC, but it is assumed.

In Germany, the principle of dualism of contract law also applies, according to which the contract is divided into a commercial one and a civil one, and accordingly the principles applied exclusively to commercial contracts are detached from those applied to civil (non-commercial) contracts. Along with this, the principle of dualism of law governing a commercial contract also applies. In addition to GCC, the Commercial Code is in effect, in the fourth book of which certain types of trade contracts are regulated.

As a result, German contract law is governed by the following four principles: a) the dualism of the law governing a commercial contract; b) singular contracts; c) the structural division of the contractual provisions of GCC into a general and a special part; and d) the dualism of contract law.

According to the structure of contract law, modern Kazakh law is referred to the German model in Continental European law, that is, it is closer to German law rather than to French law.

The structure of Kazakh contract law

following the structure of the Civil Code of the Republic of Kazakhstan (hereinafter – the CC of RK) [10-11], is divided into a general and a special part. The general part establishes general requirements to all contracts; the special part establishes requirements to individual defined contracts.

The CC of RK provides classification of contracts according to the types of activity. Allocation of the varieties within the framework of one contractual form is, as a rule, connected with the use of a contract in entrepreneurial relations or in relations connected with meeting household (personal or family) needs of citizens.

However, such approach is criticized in Kazakh scientific literature.

In the author's opinion, M.K. Suleimenov suggests the most interesting proposal on recognition of two mutually intersecting classifications that affect the construction of institutes of the law of obligation: 1) classification by types of activity, and 2) classification by economic spheres (branches of the national economy); while the first classification shall be the major one, and the second classification – additional one.

Fundamental difference of the proposed approach from the other approaches lies in the fact that it is possible to construct a system of law in two planes intersecting one another based on these two classifications: one being the main structure of contractual institutions, – that is provided by the civil legislation, and the other one being an additional structure on the basis of which it is possible to develop normative acts on certain groups of contracts concluded in a single economic sphere [12, p. 95-96].

We may highlight the following advantages of such classification: firstly, the presence of classification according to economic spheres does not negate the basic classification by types of activity, but, on the contrary, develops and supplements it; secondly, the recognition of additional classification makes it possible to cover all existing types of contracts to the fullest extent, rather than to a limited one (the classification of contracts by types of activity contained in the Civil Code of the Republic of Kazakhstan can hardly be called comprehensive); thirdly, the development and adoption of normative acts on certain groups of contracts concluded in the economic sphere will allow to avoid gaps in the legislation. Taking into account the above, we believe that it is possible to classify contracts not only by types of activity, but also by economic spheres.

It should also be noted that when adopting the Special Part of the CC of the RK, it was not the task to include in its composition an exhaustive list of all civil-law contracts permitted by law. On the contrary, the CC of RK denies the very possibility of establishing such a list. Therefore, any agreement is permissible, provided it does not contradict the legislative prohibitions.

Moreover, participants in civil legal relations are entitled to enter into mixed contracts (Article 381 of the CC of RK), the content of which includes elements of various types of contracts, and the contract itself is of a complex nature [13, p. 4].

There are separate contractual regimes for commercial and civil contracts in both Kazakh and German law. In addition, in Kazakhstan, transactions involving consumers are regulated by the law "On Protection of Consumers' Rights". In Germany, there is no detached law on protection of consumers' rights. But based on the general provisions of GCC and EU directives related to the protection of consumer rights, there is separate legal regulation for transactions between entrepreneurs and transactions involving a consumer.

After gaining its independence in 1991, Latvia, which refused to codify the civil law, re-enacted the Civil Law of Latvia of 1937 since 01.09.1992 (hereinafter – the Civil Law) [14]. The fourth part of this Civil Law is devoted to general provisions on transactions and contracts, as well as to certain types of some defined contracts.

Although the Civil law was reinstated, it had been adopted in 1937 based on the understanding of those times about regulation of the contract law. Besides, looking from a historical perspective, one should take into account that the Civil law that was reinstated and is in force now is not a new set of civil provisions that was created in 1937 but a set of improved civil legal provisions dating back to the 19th century. Almost a 50 year break in operation of the Civil law that had to do with the loss of independence of Latvia, terminated development of this law and prevented it from improving it to correspond to the needs of the times. Also during the period of time from 1992-1993 when the Civil law was re-enacted, the provisions of this law were not actually either supplemented or improved. After reinstatement of the Civil law a continuous work of elaboration and enactment of special civil law was done, because such legal regulations as commercial activity law, competition law, safety of commodities and other areas related to contract law had to be developed completely anew [15].

New trends in business, formation of a single European and world market and particularities of commercial transactions are not reflected in part 4 of the "Law of Obligations" of the Civil Law devoted to deals and contracts. However, until 2010 Civil Law remained the only general legislative act, which summarized the basic rules for preparation, execution, and performance of transactions, including economic and commercial ones [16, p. 69].

In connection with the above reasons, on April 13, 2010 the Seim adopted the Commercial Law [17], part D of which is devoted to commercial transactions (this part entered into force on 01.01.2010). Part D establishes general rules for all commercial contracts and special requirements to some defined commercial contracts.

Also, as Kalvis Torgans notes, "In practical business in Latvia not only contracts formalized by Civil Act, but also so-called "modern" contracts are used. No law mentions contracts like franchise or monitoring, however they are used in practice. That is promoted by legal provisions of the Introductory Part of Civil Law allowing parties to choose the most appropriate solutions with one restriction – they may not contradict with imperative and prohibitive provisions of Latvian law" [18].

Conclusions

Thus, in German, Kazakh and Latvian contract law, the principle of singular contracts operates, there are parallel features for certain types of defined contracts and general rules (general principle) and special rules for defined contracts along with the general theory of contracts. In countries with the Anglo-Saxon system of law in contrast to countries with a Continental European legal system, the principle of the general contract is in force, i.e. there is a unified theory of a contract for all types and kinds of contracts, and there is no concept of a "defined contract".

In the law of Germany and Latvia, the principle of dualism of contract law operates, according to which the contract is divided into commercial and civil one, and accordingly, the principles applied exclusively to commercial contracts are detached from those applied to civil contracts. In parallel with GCC, the Commercial Code is in effect, in the fourth book of which certain types of trade contracts are regulated. In Latvia, along with the Civil Law, certain non-defined contracts are stipulated in the Commercial Law. In Kazakhstan, the system of defined contracts is formed in a special part of the CC of RK. Entrepreneurial Code of RK [19] regulates the relations arising in connection with the interaction between entrepreneurs and the state.

At the same time, in Germany, Kazakhstan and Latvia the principle of dualism of law governing the commercial contract also applied. There is a dual mode of commercial transaction that is a mode for a transaction between entrepreneurs, another for a transaction involving a consumer. In the US law, not all the consumer transactions fall under the special legal regulation of the laws on protection of consumers' rights. For example, the sale of a luxury boat exclusively for consumer entertainment purpose refers to consumer transaction, but such a deal does not apply to dual-mode commercial transaction. In this case, monism rules apply to the commercial contract (i.e. equally for entrepreneurs and consumers).

German Kazakh and Latvian contract law is divided into a common and a special part. By the nature of those categories of contracts that are allocated as defined contracts (i.e., by qualitative criterion), names of defined contracts in the CC of RK almost completely coincide with the names in GCC and the Civil Law of Latvia.

As for the quantitative criterion, the greatest number of defined contractual structures is contained in the CC of RK. This is primarily due to the fact that the special part of the CC of RK was adopted later, in 1999, and the legislator took into account all the contractual structures that corresponded to the needs of civil turnover for that period best of all.

In view of the fact that the Civil Law of Latvia was adopted in 1937, it provides a smaller number of defined contracts than a special part of the CC of RK. It also provides some contractual structures that were relevant for that period, for example, a sharecropping agreement.

GCC was adopted in 1896. The special part of GCC regulates the requirements to certain defined contracts. Section 7 of the second book of GCC provides 24 defined contracts. It should be noted that civilian scientists of that period – the end of XIX century – forecasted the process of development of contract law and rightly pointed out that in the sphere of contract law an unceasing movement is taking place, and their types will change, increase, and multiply according to the needs of civil life [20, p. 245].

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