Adhesion Contracts on Kosovo Contractual Business Law

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Abstract: A contract is the most flexible and secure legal instrument through which subjects of Law easily regulate business relations in state and internationally. Today's economic development and mobility and dynamism of business law entities necessarily have influenced in modifying and developing contracts from legal classic instruments into acts, respectively complex legal –contracting establishment. As such, now some of them have become types of contracts formulated, formalized and ratified by authorized institutions, such types of contracts to regulate a number of practical problems, giving essential emphasis on solution of possible disputes. Among traditional but modernized contracts are adhesion contracts. Their role in practice is great. Their adoptability in use differs in terms of the simple technique of binding a contract and efficiency to support the needs of parties, respectively customers. In scientific fields there are debates and opinions about the fact that in this case only one of the parties sets conditions and elements of the contract, while the other party does not have any other option but to accept it or not. Superiority of one of the parties in relation to the other party makes the principle of autonomy and equality of parties concluding the contract disputable. If this principle is violated, should relations between these parties be considered a contract.

Keywords: Contract; adhesion; law; obligations; legal system

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1. Introduction

The role and importance of contracts, particularly in the business field, is large in both our law and comparative law. Through it transfer is carried out, respectively goods circulation within the state and internationally. Besides business relation respect, through contracts ownership can be transferred. Actually, because of their importance they always should be regulated by the legal system and to have legal

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effect, however, they should always be in function of the legal system. A contract has a specified mission within legal relations. In order for this mission to be accomplished correctly, it should always be in full compliance with constitutional principles, certain legal provisions and good business traditions. Contract is law to the contracting parties which for their interest have committed and have concluded a particular agreement. Legally binding contract is when two or more persons freely enter into a particular relation of certain legal obligations between them. Legal effects may consist of the establishment of legally binding relations, by changing an existing legal relation or terminating it.

In theory and practice of business contract law, many types of contracts are recognized. One of the most important division is between general content and adhesion content. Actually, adhesion contracts are the most controversial contracts in theoretical studies due to the fact that their conditions and elements are set by one party while for the other party it remains to accept them or not. As such, adhesion contracts started to appear in the second half of the nineteenth century, but their development and mass implementation was marked in the twentieth century, continued with a dynamic growth trend. Rise and development of these contracts is a reflection of the concept of capitalist economy, with the trend of economic concentration and dominant role of trusts and cartels as strong business formations in circulation of goods and services. This theoretical and practical concept is summed up in terms of dictating contractual terms by one party and the other party's obligation to accept them. It is entirely realistic that business entities are not equal and therefore cannot even have an equal legal position. An adhesion contract, except other criteria, it is distinguished by the superiority of one party in the sense of domination in formulation, conduct and setting the terms of contract to the other weaker party, which because of needs is forced to accept and bind a contract as such.

2. Contracts and Autonomy of Party’s Will

Contract is an agreement bound between two or more persons and based on the autonomy of a certain legal will and interest they form, alter, respectively modify, or terminate their mutual relations. Due to the importance of this communication instrument between parties, each country within its legal system regulates this by ensuring to law entities a frame of freedom for individual activities, enabling them, according to their initiative and interest, to regulate their legal relations. According

to our legislation, but also in different countries, this framework of contractual freedom for interested entities is reflected in the sense of belief that entities independently and freely, but also for a certain interest, to decide whether to conclude a contract or not, the will to choose the subject, to determine the contract content, contract form, including the appointment of a competent court in case of eventual disputes.

Viewed from the historical context, previously a contract was not concluded simply based on will *(solo consesus),* or that simple will forced them (*solo consensus obliguat*). Later the principle is affirmed that a contract is concluded simply based on the will of parties. Now in modern life and global economy conditions, undoubtedly contract is an important legal act related to expression of free will and that due to technical - technological development it is possible to be done in different ways. (Alishani, 1985, p. 190)

A contract is a material source of obligation law and one of the important institutions of civil law. Analyzed in theoretical and practical terms, the most important contracts are those which create obligations. This act is highly resilient due to the fact that individuals, private and public entities, including states and international organizations, easily regulate bilateral or multilateral relations with an efficiency unseen before.

Contract Law in its core is based on the principle of contractual freedom and consent. Traditionally, the principle of contractual freedom is constituted by true freedom and conviction of parties to conclude a particular contract. In principle, initiative of parties is allowed to regulate their relations but always considering frames set by country's legal system. The legal system regulates the freedom for decision, party's selection, setting the content, form of contract, appointment of a court, and the law to be applied for any eventual dispute. Even though earlier perception of contractual freedom did not have this volume and dimension, the modern contractual law guarantees theindividual will which has to be expressed seriously. Modern legal systems are distinguished exactly for the fact whether contractual freedoms are a product of social needs, or they guarantee a high level of social - economic relations. Whether the framework of expression of contractual freedom is of quality and proper volume, what will be the individual freedom it depends on the material, political, philosophical, social base, etc., of a particular society.

It is evident that depending on the type of contract, differences are found in terms of limits of contracting freedom. If analyzed in more details it turns out that even

laws, under the influence of certain circumstances and the spirit of requirements of Contracting Parties, could not unify the volume of contractual freedom. Therefore no perception can be created that contractual freedom is completely liberal, and as such can exist outside the framework of a modern social-economic and organized system. It should actually express existing positive intentions of society exactly where applied and implemented. (Alishani, 1985, p. 191)

Contracting freedom is related to the autonomy of will of parties. The issue of autonomy of party's will within contractual relations was and still remains a debate on law philosophy. Significant space was given to this autonomy in bourgeois society when the idea of equality and freedom was substantially affirmed. In the liberal capitalism, free competition was affirmed associated with thoroughly liberal economic initiatives. Just under the influence of this logic autonomy of will was raised as an expression, or the principle of party's will by raising this as a binding force above the law. Therefore, the contracting party is free to take liabilities, which means that the binding power of a contract is established by the will of parties and not by the law. [1] It can be concluded that the autonomy of will mostly adjusts to the individualistic philosophy and liberal economy. (Alishani, 1985) Even Obligation Law in our country, in Article 2, regarding the autonomy of will, states that participants in obligation relations, in accordance with mandatory provisions of public order and good customs, are free to regulate their relations according to their will. Also participants can regulate their obligation relations differently than foreseen by this law, unless something else results from the provisions of this law, or their meaning and purpose. [2] In fact, this legal provision clearly contains in itself the possibility of restricting contractual freedom, when explicitly obligating contracting parties to act or not act in a contractual relation. We believe that such restrictions are rational because, regardless of the will, no one has the right to unlimited rights.

Consensus principle is a basic principle of contract law. This principle provides that the contract can be concluded in a simple way according to the will of parties *(solo konsensus*). Moreover, in relation to concluding a particular contract, simply will of parties is required and implementation of certain form is not a condition. This means that participants in contractual relations should express their willingness orally, in writing, directly or indirectly, and then it is considered that

[1] "Le contra est superie – uer a la loi" Contract is above law. "Qui dit de contrat dit juste" Saying contract is saying righteousness.
[2] Law on obligational relationships No. 04/L – 077.

contract is concluded. A characteristic of consensus is that a contract is concluded on the principle of understanding *(bona fides). Solo konsensus obliguat* principle means that simple will makes an obligation, which means that this principle is essential to such contracts. Given the number of contractual relations related to solo konsensus, it turns out that consensus is based above all on moral values, level of civilization and legal awareness of the contracting parties. (Nerxhivane, 2012, p. 32)

3. Legal Nature of Adhesion Contract

Division of different types of contracts is known since classical rights. Since contemporary business is very heterogeneous and above all massive, this has affected that relations between interested parties to be regulated in new forms, which consequently contributed to increase the number of contracts as new creations of the modern world, which differ significantly from traditional ones. The reason for their division is to identify them in terms of legal relations that regulate them and for easier study. It should be emphasized that division of contracts is done by using terms of types of contracts, types of obligation contracts and division of obligation contracts. Also, it is known that the criteria for their division is not unique, but is usually based on the nature of obligation, effects created by the contract, forms of contract, base of contract, subject of contract, content of contract, techniques for contract binding and execution of contract. One of the most important divisions is the one with contracts of certain content and adhesion contracts. This division treats contracts in terms of technique and its way of being concluded. Therefore, if a contract is concluded by parties which jointly determine its content, then we have to deal with a contract with certain content. If a contract is concluded between parties when one of the parties did not participate in its formation, then we have to deal with an adhesion contract.[1]

Adhesion contract is considered as such because only one party sets the elements and conditions of the contract, and the other party does not participate in drafting the contract, nor does it affect on any of the elements of such contracts. Putting communication with other parties is done through an offer, while the other party decides whether to accept the offer or not. The contracting party willing to bind such a contract could conclude it by signing it, or could refuse to conclude it. Offer in this kind of contract is specific as it is general and permanent. An offer is

[1] Law on Obligational Relationships No. 04 /L – 077.

considered general when made to undefined and unlimited individuals, which means every one can conclude them if considered of legal interest. An offer considered as general conditions has to be published in advance in a form. [1] This technique creates the possibility for such contracts to be concluded in a massive number referring to their ease of conclusion. It has to be pointed out that these contracts except being drafted in forms, there are general business conditions within them which specify in detail the rights and obligations of contracting parties in terms of their fulfillment.[2] Therefore, the general conditions for entering into such a contract have to be valid in order for them to produce legal effects. As such, general conditions of the contract have to be in full accordance with the purposes of the contract and of good business customs.

4. Approaches on the Legal Nature of Adhesion Contracts

Opinions of theorists are not the same when debating on the legal nature of adhesion contracts. There are some groups of theorists who have almost substantial differences between them on this issue. The first group of theorists specify with confidence that these contracts are no contracts at all, or they do not present a particular group of them, but in fact they are institutions of public law, such as statutes, regulations, etc., which regulate certain legal relations. According to the second opinion, it is stated that these contracts have legal- public and legal-civil elements because they contain statutory elements, but also contractual elements. This group of theorists is divided into several sub-groups and according to some of

[1] Law on Obligational Relationships No. 04/L-077, in Article 22 regulates the offer. In this provision, respectively in point 1, offer is considered as a proposal for contract binding made to a specific person and includes all essential elements of the contract, so that upon acceptance a contract could be concluded. Point 2 of provision specifies that thea contract is concluded if the contracting parties leave a secondary element agreement for later, provided that parties have agreed on essential elements of the contract. If parties can not agree on secondary elements, they will be set by the court considering the preliminary negotiations, the established practice between the contractors and customs. Whereas, point 3, the proposal for contract binding made to an indefinite number of persons, which contains the essential elements of the contract, intended to be concluded, is valid as an offer, if not otherwise derived from circumstances of the cae or customs.

[2] Law on obligational relationships No. 04/L – 077, in disposition of Article 124 that regulates the general conditions of contract, obligation is treated in four points. Point 1, considers that general conditions set by one of Contracting Party, either contained formal contract or referred to by contract, constitute a special agreement between the contracting parties in the same contract and as a rule they are equally binding. Point 2, general conditions of the contract shall be stated by the usual way. Point 3, general conditions oblige contracting party if they have been known or should have been know in case of contract binding, and point 4 in case discrepancy between the General Conditions and special agreement, the latter is valid.

them these contracts have statutory parts with only few contractual elements. Others argue that adhesion contract is composed of statutory and contractual elements, while their statutory part is its essential element, whereas the contractual part is not the essential element. Another group considers the opposite claiming that it is exactly the contractual part that is essential for the contract, whereas the statutory part is not an essential element. The third group of theorists differs from the others because it considers that these contracts are entirely special. They think that for conclusion of such contracts, parties have to agree on the essential elements, whereas for accessory elements the party should not necessarily be informed. In their interpretation, they point out that attention should be paid to not face objections when it comes to its essential elements due to the fact that based exactly on these elements validity of these contracts is determined. According to the fourth view, adhesion contracts are special contracts under obligation law due to the fact that they contain certain features, specific rules, and therefore are included in the special contract group in the circulation of goods and provision of service field.[1]

After an analysis of all essential and non-essential elements, taking into account and based on the opinion of certain theorists, we consider that there is no doubt that these contracts are special because of specifics already mentioned above. However, regarding the binding techniques, specific ways of interpretation, especially the issue of inequality of parties, we think that at this legal instrument there is a fine line that separates them from not being contractual relations – contract at all. Therefore, we align on the side of theorists who consider that these contracts are special for the sole reason that it is the interest of the accepting party for the qualities this contract offers, in terms of rapidity, saving time, work efficiency, reducing costs etc. However, there is no dilemma that there is no other contract where will of party is repressed, aims of contract being violated, and such inequality of parties being considered as equal, etc.

Science of contractual law makes a distinguishing between adhesion contracts and the so-called forms-type and fact contracts. In the above, it was clarified that in adhesion contracts one party sets contract conditions, while in type contracts, or form contracts, also one party sets conditions and its elements, but in this case the superior party is a state institution, any specialized or professional organization. Difference between adhesion contracts and fact contracts lies on the latter having a

[1] Alishani Dr. Alajdin "Obligational Law (General Part) University of Prishtina/Faculty of Law 1985 pp. 292 – 203, referring to (Petrovic, 1973, pp. 121-123).

very simple and fast technique of conclusion, and is characterized by the fact that offer and acceptance are accomplished almost at the same time (i.e. buying a ticket on the bus).

5. Importance of Adhesion-Type Contracts for Customers

According to law, the standardized or type contract is considered as means of legal communication, respectively agreement signed between one of the parties, e.g. seller or service provider as the drafter of contract, unilaterally drafting it with conditions and elements and offer is offered to the other party to accept it or not. A characteristic of these contracts is that they are formulated identically for an unlimited number of customers. The contract may contain provisions, respectively special agreements between the seller, or service provider and the customer, which refer to general conditions or standards being determined in advance by the seller, respectively the service provider. In this case, general conditions or standards force consumers, respectively consumers who have known or ought to have know them during the time the contract is being implemented. Because customers, respectively consumers are an integral part of purchase of goods with the lack of which one cannot live (e.g. power, gas, water, etc.), and use of services related to practice of vital functions (such as telephone, cable, banking, tourism, healthcare, utility services, etc.), superiority of one party is absolute. This predominance of one of the parties to the contract is justified by standardized elements that they apply standards that are in favor of the customer being accompanied with sufficient information.

6. Type Contract According to European Regulations

Due to the fact that customers in our country can and are exposed to irregularities and potential risks that often rise in binding such contracts, the judicial institutions and their makers need to be aware that when formulating they need to transform the traditional approach and now rely on European standards, namely the obligation to inform the customer on a regular basis according to Directive 93/13 EEC.[1] This directive deals with the obligation of type contract drafters, which in

[1] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts Official Journal L 095 , 21/04/1993 P. 0029 – 0034 Finnish special edition: Chapter 15 Volume 12 P. 0169 Swedish special edition: Chapter 15 Volume 12 P. 0169 taken from internet on 20.12.2013 in webpage: http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML.

some cases are not in accordance with the principle of care and loyalty. The Directive in question contains a list of terms which may be regarded as unfair. The list is not closed, but it is always met based on case by case in practice. Currently the list comprises 17 specific conditions which are marked as unfair provisions.

7. Conclusion

A contract is the most important obligation under the obligation law and also represents a central institution within the legal communication between contracting parties. It follows that a contract is a legal fact of particular importance in different ranges or different legal and economic fields, in international law, in family law, civil law, the economic law, etc. The base for contract binding is to achieve particular outcome between the contracting parties, which aims at creating, changing or terminating a particular legal relationship. In legal theory, a contract is defined as consent between two or more parties, which comes up in order to conclude, modify or terminate any legal binding relationship. This means that the contract is a result of will of the contracting parties and that they exclusively determine this will, which in legal science is called *"the principle of autonomy of will"*. Approval and execution of this principle has come to consideration as a result of parties, regarding the regulation of their affairs, being able much better to determine the conditions and circumstances under a contract, rather than the state to interfere with the legal provisions.

Among the most significant division of them is contracts with particular content and adhesion contracts. In ordinary contracts there is the will of both parties to conclude a contract. Whereas in adhesion contract this is done in particular when only one party determines the conditions and elements of contract, while the other party does not participate at all in making it but accepts the conditions (*en blac*). In adhesion contracts the following characteristics are present: one superior Contracting Party (in terms of economic power that could pose a monopolistic position in the market); In the form of a general offer, there is a proposal for contract binding to an unspecified and unlimited number of persons; Contractual clauses are a component part and unilaterally formulated (by the party in a stronger business position) for the party to accept them entirely as they are (*en blak*), or reject them entirely.

Among the most specific forms of this contract in practice is the form based on which form contracts are called. This kind of contract is made by various

organizations and economic and financial enterprises which have a large number of customers. Contracts are drafted in a rather concise and rational way based on their experience during work, in order for the business to be performed quickly, and it is important that these forms foresee numerous situations which could rise from the legal relationship with their customers in general. As a rule no exceptions are allowed from these forms (which means that client's remarks and reserves are not accepted). There are cases when certain forms enable the customers to be given the opportunity of making a choice of some options, which as well are in favor of the economically strong party. These contracts typically are used by banks, catering and travelling companies, transport companies, etc. A specific modality is also present for type contracts. Type contracts are contracts which regulate various business relations in a similar "uniform" way for any economic activity. Also fact contracts are characterized because they have a very simple and quick binding technique and are characterized by the fact that the offer and acceptance are done almost at the same moment. It should be noted that all forms of contracts mentioned here (types, forms, fact and standardized) are the result of economic development and circulation of goods with speed and rationality significantly greater than in the past. Simply said, modern economy has replaced classical forms of contracts with modern forms. Interference of state institutions to contribute in clearing uncertainties, irregularities, conditional clauses, etc. is almost logical and necessary because in this way the interest of costumers and other natural and legal persons to work with professional correctness is protected.

8. Bibliography

Aliu, Dr. Abdulla (2004). *Property Law*. University of Prishtina, Faculty of Law.

Alishani, Dr. Alajdin (1985). *Obligation Law (General Part)*. University of Prishtina, Faculty of Law.

Dauti, Dr. Nerxhivane (2012). *Contracts*. Prishtina.

Dragasevic, Dr. Momir (2000). *Novi ugovori u medjunarodnoj poslovnoj praksi/New contracts in the international business practice*. Podgorica.

Hetemi, Dr. Mehdi (1986). *Law on basic knowledge of business law*. University of Prishtina, Faculty of Law.

Vasili, Jani (2009). *Untypical civil contracts.* Tirana.

****Law on Obligation relationships* No. 04/L-077.

****Law on customer protection* No. 04-L-121.

Online sources

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML.