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Public agreement and accession agreement: similarities and differences

PUBLIC AND ADHESION CONTRACTS

Summary

The article is devoted to the public agreement and the accession agreement. The author, analyzing the similarities and differences between these two agreements, comes to the conclusion that one of the two features of these agreements is the presence of a "weak" and a strong side in the agreements. A strong side is usually a party that carries out business activities and has the ability to impose certain conditions on the other party. The author considers consumers of services to be the weak side. In conclusion, the author comes to a reasonable conclusion that both of the studied contracts represent an exception to the General dispositive principles of civil law. However, in the case of these two treaties, this exception can be explained by the constitutional principle of equality of all before the law and the granting of equal rights.

Keywords: public contract, contract of adhesion, freedom of contract, restriction of freedom of contract

Despite the fact that the norms of the Civil code of the Russian Federation (hereinafter referred to as the civil code of the Russian Federation) have existed in it since its adoption in 1994, they are still of great interest to all those who are interested in civil law in General, and freedom of contract in particular. This is primarily due to the fact that both of these rules were not known to Russian pre-revolutionary or Soviet legislation before their appearance in the civil code of the Russian Federation.

These norms were absent in the Civil code of the RSFSR of 1964, and in the Fundamentals of civil legislation of the USSR and the republics of 1991. Thus, at the time of its appearance in Russian legislation, there was a weak scientific development of these new institutions, which was natural, given their novelty. At the same time, the point of view that scientific discussions about the relationship between public and private law in the economy are dictated only, and perhaps not so much by the real needs of the latter, as by the echoes of the Soviet command system seems worthy of attention [1, 18].

Since its inception, these standards have been subjected to close attention of the scientific community. The agreement of accession was devoted to the candidate's dissertations Tsyplenkova A.V. [2], and Mechetina D. V. [3]. On General issues of public contracts, PhD theses were defended by S. N. Kostikova [4], E. A. Mishchenko [5], O. S. Levchenko [6], G. A. Kalashnikova [7], and S. K. Irdysheva's doctoral dissertation [8]. Immediately after the adoption of the first part of the civil code of the Russian Federation, there was a heterogeneity of judicial practice in this category of cases.

A large number of cases reached the highest courts, with different instances making completely opposite decisions based on the same circumstances. As a result, the Supreme commercial court [9] and then the Supreme court of the Russian Federation [10] adopted the relevant decisions in order to ensure uniformity in the interpretation and application of the agreements under consideration. It should be noted that both of these novelties of domestic legislation occupy a special place in civil law.

Both the public contract and the accession contract are exceptions to the principle of freedom of contract that is common to all civil law. Both of these agreements impose additional obligations on the "strong" parties to the agreement and grant special rights to the "weak" party. For the avoidance of confusion, hereafter, by "strong" party or supplier, we mean the

entrepreneur who is obligated to deliver goods and services in a public contract, and the party who defines the terms of the contract in their forms in the accession contract. A "weak" party or consumer is a consumer of goods and services in a public contract and a party joining the contract in an accession contract. At the moment, the relationship between the public contract and the accession agreement is discussed in the works of Seinaroev B. M., [11] Shcherbacheva L. V. [12], Shapsugova M. D. [13], Makeenkova I. A. [14], as well as Kapitsa L. S. and Bushkov D. V. [15]. At the same time, despite such attention to these two agreements by the legal community, there are still several issues that, in our opinion, require a more detailed consideration of the relationship between these agreements in order to further improve legislation and bring about uniformity in the interpretation of these rules.

Thus, both contracts are not completely free from the point of view of civil law.

Let's look at the subject matter of each agreement. By virtue of the direct indication of clause 1 of article 426 of the civil code of the Russian Federation, the "strong" party to a public contract is a person engaged in entrepreneurial activity or other income-generating activities. Article 428 of the civil code of the Russian Federation does not specify what the person who makes the contract in the forms or any other special forms should be. Moreover, the other party to the agreement can accept the terms of such an agreement only by joining this agreement. From the meaning of the law, the "strong" party to the contract can be any person, including both an individual and a non-profit organization. However, it is quite difficult to imagine a case where an individual who is not engaged in business activities draws up a contract, making its terms in a special form, and the other party to conclude the contract must sign this form, without being able to make changes to it. Less improbable is a non-profit organization in the place of this party to the agreement. It seems that, although this is not explicitly stated in the law, the "strong" party in the accession agreement is the person who carries out business activities. Otherwise, there is no need for additional protection of the party joining the agreement. Therefore, in our opinion, both of these agreements are aimed at additional protection of consumers of goods and services and impose additional restrictions on entrepreneurs. Now let's look at both of these agreements from the point of view of the "weak" side. In an accession agreement, a party joining the agreement on the terms specified in the forms may not change these terms, even if they are contrary to its interests. This is the basis of its compensatory right to terminate or change the contract after its conclusion.

But there are two questions here. First, the additional rights granted to the "weak" party would be proportionate if it did not have another opportunity to conclude a contract with the same subject, then on more favorable terms with another supplier of goods or services. We don't mean entering into a bonded transaction. Paragraph 3 of article 179 of the civil code of the Russian Federation refers specifically to extremely unfavorable conditions and the presence of difficult circumstances. At the conclusion of an accession agreement, it may happen that the "weak" party had the opportunity to conclude a similar agreement on more favorable terms, but for this purpose it was necessary to perform certain actions (go to another street or city, contact another company), but it did not do so for some reason. For example, a company that offers similar products or services, but has a less well-known brand, less positive reviews, and less quality after-sales service. Naturally, it will offer more interesting terms in its accession agreement. In this case, if the consumer has a choice of which conditions to join. And if in this case, however, he chose the "worst" conditions for himself, is there such a need to grant him additional rights listed in paragraph 2 of article 428 of the civil code of the Russian Federation? In our opinion, this state of Affairs is not just a necessary exception to the principle of freedom of contract, but puts the entrepreneur at a great disadvantage from the consumer who decides to abuse their rights. Second, it seems that an accession agreement is very similar to a public agreement from the consumer's point of view. Indeed, the whole essence of the accession

agreement is that the consumer is granted additional rights due to the fact that initially, at the time of conclusion (accession) of the agreement, he can not influence its terms in any way.

But isn't that the way things stand at the conclusion of a public contract? After all, if at least an entrepreneur has a theoretical opportunity to make changes to the agreement (form) when entering into a public agreement, then no one has such an opportunity when entering into a public agreement. This is not possible for any supplier (who, due to the direct instructions of clause 2 of article 426 of the Russian Federation, cannot change the terms of the contract for a particular consumer at will). Moreover, this is not possible for a consumer who is forced to purchase goods or services exclusively on the terms that the supplier has indicated to him (as well as to all other similar consumers). It turns out that in both of the contracts we are considering, the suppliers (the "strong" side) are entrepreneurs.

Consumers (the "weak" party) in both contracts are limited to making any changes to the contract. In this case, it does not seem important why they cannot affect the contract – because all its terms are already contained in a form prepared in advance by the supplier and cannot be changed, or because the contract is public and the terms specified by the supplier are mandatory for each consumer separately. In both contracts, we see the entrepreneur on the side of the supplier of goods or services and the consumer, who in both contracts can not affect their terms (even for different reasons). Despite this, the legislator has absolutely different approaches to protecting the "weak side". In a public contract, the consumer has the right to demand its compulsory conclusion, while in an accession contract, the consumer has greater opportunities to terminate or modify it. And in this case, the legislator cannot be denied logic.

Indeed, in a public contract, the supplier independently determines the price and other terms of the contract, and in principle, it does not care who pays for its work or service. In this case, the obligation to conclude a contract with any applicant seems to be a fair payment for the ability to determine the essential terms of the contract alone. The situation with the accession agreement is quite different. In this case, the "strong" party not only has the ability to determine the essential terms of the contract, but can also refuse to enter into the contract. Given this superiority over the consumer, it becomes clear the logic of the legislator who seeks to protect the consumer. And yet, as stated above, in such a broad interpretation, this protection is excessive. Thus, there may be (and in practice regularly are) situations when the same contract is both a public contract and an accession contract. But since these two agreements provide for different ways to protect consumers, the question arises as to which law should be applied in case of violation of their rights – a public contract or accession. Given that the entire construction of these contracts is mandatory for the sole purpose of protecting the "weak" party, it seems that in this case the consumer will be able to use both methods. This opinion is confirmed by judicial practice [16]. One of the definitions of Judicial Board on civil cases of the RF Supreme court has indicated that "the treaties of accession, with public character, is the contract of Bank Deposit with citizens (paragraph 2, article 834 of the civil code), the terms of which are determined by the Bank in standard forms. From the content of these norms in their relationship, it follows that citizens-depositors as a party to the accession agreement have the right to demand termination or modification of the agreement that does not contradict the law, on the grounds specified in paragraph 2 of article 428 of the civil code of the Russian Federation" [17].

The legislator defines the range of legal relations regulated by these two laws in different ways. So, from the meaning of article 428 of the civil code of the Russian Federation, a contract of accession can be recognized as a contract from absolutely any field of activity. A necessary condition for this is the presence of certain forms containing its terms and conditions and the inability of the acceding party to make any changes to them. A completely different approach is found by the legislator when determining legal relations that may fall under the scope of a public contract, subject to the requirements specified in it. 426 an open (which is not typical for civil

law) list of contracts is given. For all contracts that fall outside the scope of this list, the final point in the question of the applicability or non-applicability to them of the rules of a public contract is set by the court. Thus, in accordance with the court's decisions, public contracts are recognized as an air transportation contract [18], a contract for the provision of paid medical services [19], a CTP contract [20], a gas supply contract for public utilities [21], a heat supply contract [22], a contract for connecting (technical connection) capital construction projects to the gas distribution network [23], etc. Conversely, the court did not recognize the voluntary property insurance contract [24] and the loan agreement [25] as public. However, the last decree does not explain why these agreements are not public. Moreover, the personal insurance contract is recognized as public by virtue of paragraph 1 of article 927 of the civil code of the Russian Federation.

As can be seen from the number of court decisions listed above that recognize a particular contract as public or not, the construction proposed by the legislator with an open list of public contracts is not optimal. Similar court decisions are still being made and will probably not end until the fate of the last contract is decided. Based on the above, it can be concluded that the studied contracts, which are an exception to the General dispositive principles of civil law, require further study and improvement. You should also agree with expressed in scientific circles the view that these contracts are a form of manifestation of the constitutional principle of equality and the civil law principle of equality of parties to the contract, equating, on the one hand, all customers between themselves, on the other hand, equating the seller and the buyer as the strengths and weaknesses of the Treaty [13].

References

1. Zankovsky S. S. Business contracts in Russia. Problems of theory and legislation: abstract of the doctor of legal Sciences: 12.00.03 / Institute of state and law of the Russian Academy of Sciences-Moscow. 2004. p. 18.
2. Tsyplenkova A.V. The contract of accession as a special category of civil law: author. dis. ... kand. Yur. nauk: 12.00.03 / Moscow state University. the faculty of law. Acad. Moscow. 2002. 25 p.
3. Mechetin D. V. contracts of accession in civil law (questions of theory and practice): abstract of the dissertation of the candidate of legal Sciences: 12.00.03 / Russian Academy of state services under the President of the Russian Federation-Moscow. 2010. 26 p.
4. Kostikova S. N. Public contract as an institution of civil law: abstract of the dis. ... kand. Yur. nauk / Russian state Humanities. UN-t (RSUH). – Moscow. 2007.
5. Mishchenko E. A. Public contract in Russian civil law: abstract of the thesis of the candidate of legal Sciences / Institute of state and law. – Moscow. 2004.
6. Levchenko O. S. Construction of a public contract in Russian civil law: dis. ... kand. Yur. nauk / Kuban state agrarian University. - Krasnodar, 2008.
7. Kalashnikova G. A. Public contract: autoref. dis. ... kand. Yur. nauk : 12.00.03 / Kuban state University. agrarian. UN - T.-Krasnodar, 2002. - 23 p.
8. Idrysheva S. K. Public contract in civil law of the Republic of Kazakhstan: problems of theory and practice: author's dissertation of doctor of law, Moscow, 2012, 28 p.
9. Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation of March 14, 2014 No. 16 «On freedom of contract and its limits» // Vestnik VAS RF. 2014 No. 5.
10. Resolution of the Plenum of the Supreme Court of the Russian Federation of December 25, 2018 No. 49 «On certain issues of application of the General provisions of the Civil code of the Russian Federation on the conclusion and interpretation of the contract» // Rossiyskaya Gazeta of January 11, 2019 No. 4.
11. Seynaroiev B. M. Correlation of a public contract with an accession agreement // Vestnik VAS RF. 1999. no. 10.

12. shcherbacheva L. V. Public contracts and accession agreements in civil legislation// Bulletin of the Moscow University of the Ministry of internal Affairs of Russia. Legal science. 2010. no. 7. pp. 168-172.
13. Shapsugova M. D. Manifestation of publicity of a public contract in Russian law//Civil law, Moscow, 2016, no. 3, pp. 3-5.
14. Makeenkova I. A. Correlation of constructions of a public contract and a contract of accession//Bulletin of the Samara humanitarian Academy. Series "Law". 2016. no. 1-2 (18). pp. 129-131.
15. Kapitsa L. S., Bushkov D. V. Public contract and accession agreement: identity and judicial practice//Business in the law. 2014. No. 5. S. 127-130.
16. Resolution of the constitutional Court of the Russian Federation of February 23, 1999 No. 4-P «On the case of checking the constitutionality of the provision of part two of article 29 of the Federal law of February 3, 1996 «On banks and banking activities» in connection with the complaints of citizens O. Y. Veselyashkina, A. Y. Veselyashkin and N. P. Lazarenko"// Rossiyskaya Gazeta. 1999. # 40.
17. Ruling of the IC on civil cases of the Supreme Court of the Russian Federation No. 5-B11-46 dated may 10, 2011 URL: <https://demo.garant.ru/#/document/58202206/paragrap h/22:0> (accessed 05.08.2020).
18. Decision of the Supreme Court of the Russian Federation of may 28, 2014 no. AKPI14-349 URL:<https://demo.garant.ru/#/document/70685974/par agraph/16:0> (accessed 08.08.2020)
19. Ruling of the constitutional Court of the Russian Federation of June 6, 2002 No. 115-O «On refusal to accept for consideration the complaint of citizen Martynova Evgeniya Zakharovna on violation of her constitutional rights by paragraph 2 of article 779 and paragraph 2 of article 782 of the Civil code of the Russian Federation»//Bulletin Of The Constitutional Court Of The Russian Federation. 2003. № 1.
20. Resolution of the Plenum of the Supreme Court of the Russian Federation of December 25, 2018 No. 49 «On certain issues of application of the General provisions of the Civil code of the Russian Federation on the conclusion and interpretation of a contract»/Russian newspaper. 2019. # 4.
21. Decision of the Supreme Court of the Russian Federation of March 13, 2019 N AKPI19-2 URL: <https://demo.garant.ru/#/document/72224690/paragrap h/38:0> (accessed 02.08.2020).
22. Definition of SC on economic disputes of the Supreme Court of the Russian Federation of April 13, 2017 N 305-ES16-16501// Bulletin Of The Supreme Court Of The Russian Federation. 2018. № 6.
23. Decision of the Supreme Court of the Russian Federation No. AKPI14-534 of June 23, 2014.:<https://demo.garant.ru/#/document/70705852/par agraph/40:0> (accessed 02.08.2020).
24. Resolution of the Plenum of the Supreme Court of the Russian Federation of December 25, 2018 No. 49 «On certain issues of application of the General provisions of the Civil code of the Russian Federation on the conclusion and interpretation of a contract»//Rossiyskaya Gazeta. 2019. no. 4.
25. Resolution of the Plenum of the Supreme Court of the Russian Federation of December 25, 2018 No. 49 «On certain issues of application of the General provisions of the Civil code of the Russian Federation on the conclusion and interpretation of a contract»//Rossiyskaya Gazeta. 2019. no. 4.