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Conceptual Features of a Public Contract in Modern Civil Law

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Abstract. *The civil legislation reform affects the provisions on public contracts. This article deals with the issues surrounding public contract qualification under the conditions of modern regulation. A characteristic feature of modern regulation and theoretical provisions of civil law is the lack of unified approaches to defining the public contract concept, its essence, and accompanying conditions. In practice, there are various situations wherein the legislator does not give clear instructions on certain aspects of contracts that have a public character. This determines the theoretical and practical relevance of examining this area. The article analyzes the main defining features of the designated contractual structure and examines the features of expression of public-legal principles in legal regulation in these contractual relations. The methodological basis of the research is the analysis of normative material, civil law theory and certain aspects of law enforcement on public contracts norms. The article highlights the legal and conceptual aspects of public contract institution in the context of modern legal regulation. The task of further research on this issue is not so much to find one correct definition of this agreement for the legislator, but rather to fix the individualizing features in the law, by integrating them either into the conceptual apparatus or by directly fixing them in the normative act text. The author attempts to systematize the relevant features and to identify the distinct principles for differentiating a public contract with the related contractual structures. The article also presents clear criteria for differentiation and the hierarchy of the application of certain rules to relations arising from a public contract. This paper concludes by highlighting the need to proceed not only from the definition of law, but also from specific features of a public contract, when identifying the designated contractual structure.*

Keywords: *public contract, contractual construction, public character, consumer, rules competition, accession contract.*

The public contract as a legal structure was included in domestic civil legislation as one of the legal guarantees provided to consumers who purchase goods, works, or services in civil circulation [1–3]. The legislator had to introduce a special legal regime for transactions concluded by consumer citizens, on the one hand, and persons engaged in business activities, on the other.

The purpose and content load of the legal regime established for the category of contracts under consideration is expressed by the fact that the legislation establishes certain advantages for the consumer as an economically weak and dependent party [4]. The formulation of this guarantee is determined for the purpose of eliminating possible actions that suggest signs of unfair competition. The introduction of this rule means the formation and implementation by the legislator of effective guarantees in accordance with Articles 19 and 34 of the Constitution of the Russian Federation,[1] and implementation of the basic principles of legal equality for civil turnover participants in the implementation of entrepreneurial or other economic activities permitted by law [5].

[1] The Constitution of the Russian Federation (adopted by popular vote on December 12, 1993, taking into account the amendments made by the Laws of the Russian Federation on amendments to the Constitution of the Russian Federation of 30.12.2008 No. 6-FKZ, of 30.12.2008 No. 7-FKZ, of 5.02.2014 No. 2-FKZ, of 21.07.2014 No. 11-FKZ) // Official Internet portal of legal information. URL: http://publication.pravo.gov.ru/Document/View/0001201408010002 (reference date: 01.06.2020).

Legislative consolidation of public contracts in the 1994 Civil Code of the Russian Federation[2] became a new stage of Russian civil law. However, many researchers note that by the time of its adoption, a number of norms were already available in other regulatory acts concerning consumer rights. Thus, the Law of the Russian Federation of February 7, 1992, No. 2300-1, "On Consumer Protection"[3] provided for the regulation of relations with the participation of consumers, in addition to the establishment of rights to purchase certain goods, works, and services that have consumer purpose and proper quality to properly inform about such goods, as well as to form a mechanism for the exercise by such persons of the rights granted to them. The Rules of Consumer Services in the Russian Federation, adopted by the Decree of the Government of the Russian Federation No. 536 of June 8, 1993, had a similar orientation[4]. Another act contained the rules in the Decree of the Government of the Russian Federation No. 995 of October 8, 1993[5], which were later partially reproduced in Article 426 of the Civil Code of the Russian Federation. For example, the sale of goods should be executed equally on behalf of citizens. The establishment of benefits is permissible only in relation to certain categories of people, provided that such a provision is allowed by law.

The experience of applying the rules for public contracts has, on the one hand, shown their relevance as practical tools for protecting consumer rights. On the other hand, certain shortcomings in the application associated with counter-execution on the part of consumers have been identified, as has been noted in studies [6; 7].

The original definition of a public contract was not entirely accurate, and it was later subjected to reasonable criticism. The researchers paid special attention to the fact that only commercial organizations were named as one of the eligible parties to the contract. Many authors did not agree with such a narrow approach to the subject composition [8; 9]. They proposed to modify the structure of the public contract, extending its effect to any entity engaged in commercial activities, including individual entrepreneurs and nonprofit organizations, which in some cases can carry out activities related to profit-making [10].

The Federal Law No. 42-FZ of March 8, 2015, "On Amendments to Part One of the Russian Federation Civil Code"[6], introduced the changes into Article 426 of the Civil Code of the Russian Federation, which establishes a new definition of a public contract. The new version of this article regulates in more detail the relations between the participants of the public contract, removing the controversial issues that arose earlier.

In the context of the current legislation, a public contract should be recognized as an agreement concluded by persons engaged in income-generating activities to create such a model of proper behavior that would oblige them to sell their products (in whatever form) in relation to any and every person, regardless of who applies for them. In other words, in this case, based on the established nature of obstacles in the implementation of the subjective right to freedom of contract, we can talk, as S.N. Revina points out [11], about the so-called legal restrictions. A similar definition in terms of content, reflected in the contemporary legal model, was given by researchers earlier [12]. To a greater extent, this applies to the definition proposed by S.N. Kostikova in her work [13]. The main feature of a public contract is considered to be the public nature of entrepreneurial or other income-generating activities of an organization or individual. In order to identify the public nature of the organization's activities, it is necessary to establish that the activities are carried out systematically and are designed for an indefinite range of potential consumers. It is the consistency and the indefinite circle of persons [14] that are among the cornerstone factors that determine the attributive features of a public contract.

This activity is mediated by a public offer, a proposal containing all the necessary and essential conditions of a future contract, from which the intention of the person making the offer is seen to conclude the contract in the future on terms specified in the offer with any entity that responds

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[2] Civil Code of the Russian Federation (part one) [Articles 1-453]: Federal Law of the Russian Federation No. 51-FZ of November 30, 1994 (as amended). from 16.12.2019, with ed. from 12.05.2020) / / SPS "ConsultantPlus." URL: http://www.consultant.ru/cons/cgi/online.cgi?rnd=A1069325EF7DA7C8288B1D77D5C2E302&base=LAW&n=340325&dst=4294967295&cacheid=C8BC3E469B1852262A4C20B4B8FC2762&mode=rubr&req=doc#08466502899590653 (reference date:10.06.2020)

[3] Law of the Russian Federation No. 2300-1 of February 7, 1992 (as amended). from 24.04.2020) "On protection of consumer rights" / / SPS "ConsultantPlus". URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=7505485904841251628231653&cacheid=DB89CEF98D2BD664703AF407889C9AAF&mode=splus&base=LAW&n=351249&rnd=A1069325EF7DA7C8288B1D77D5C2E302#1zazgy5f1o7 (reference date: 10.06.2020).

[4] The RF Government decree of 8 June 1993 No. 536 reads, "On approval of Rules of consumer services for the population in the Russian Federation" (repealed in connection with the publication of the Decree by the RF Government of August 15, 1997 No. 1025).

[5] Resolution by the Government of the Russian Federation No. 995 of October 8, 1993 (as amended). of 17.05.1996) "On the Rules for the Sale of Certain Types of Food and NonFood products" (lost force in connection with the publication of the Decree by the Government of the Russian Federation of January 19, 1998 No. 55).

[6] Collection of Legislation of the Russian Federation. 2015. March 9. No. 10, Article 1412.

to it. However, it should be borne in mind that in some cases the ambiguity of the potential circle of consumers, as well as the systematic nature of the activities it performs, can be signs with secondary characteristics. These characteristics are not sufficient to establish the existence of a public nature in relation to a particular activity. Rather, the detection of publicity of the disputed contract law enforcers must produce a comparative analysis of all provisions, taking into account the purpose of the contract and also the interpretation with respect to the obligations [15]. E.A. Mishchenko in this regard indicates that in civil law there are situations where the contract is concluded by the subjects only once, yet it will still be subject to the provisions of Article 426 of the Civil Code [16].

Considering the above, it can be argued that at present there are three basic approaches used when referring a particular contract to a public entity. Other researchers have come to similar conclusions [17; 2; 18].

The first approach is based on the rule that if the legislator does not explicitly prescribe that a contract in a particular case is public for its purpose, there is no reason to believe otherwise. This interpretation follows from the thesis outlined by I.A. Ilyin, who pointed out that the establishment of certain limits by law forms clear contours, guaranteeing a person freedom within these limits, and therefore it is unacceptable to go beyond them [19].

Supporters of this viewpoint are A.Y. Kabalkin and L.V. Sannikova. In their view, the rules contained in Article 426 of the Civil Code, and the regulatory requirements to analyze the contract, were aired exclusively with regard to the appropriate type of contract, only if the rules of the special part from the Civil Code indicate the contract's publicity [20]. A similar position is held by Yu.V. Romanets, emphasizing that the inequality of the parties within the framework of the agreement is determined solely by the dynamics of the relations under consideration, especially the economics. The solution to the dilemma, in Romanets' opinion, is possible only through the adoption of a special law [21]. The above, as noted by D.V. Slavetsky, is a reflection of the main principles of the weak side protection in the analyzed contractual structure [22]. We believe that for the purposes of the law enforcement process, this approach is quite utilitarian and acceptable, which researchers also noted [23; 24]. However at the same time, with this approach, imperative filtering does not consider the various options that may arise in civil traffic in the presence of special circumstances.

The second approach is based on a set of disparate regulations that make up civil legislation, as well as other legal actions generally aimed at governing specific types of contracts. Since the existing regulatory system, however, which allows for the legal parity of contractual terms for an indefinite number of persons, is not unlimited in its characteristics, the legislation establishes a mandatory prohibition for an economic entity to refuse to conclude a relevant contract with the person it applied to. A.E. Sherstobitov and E.A. Sukhanov adhere to the stated point of view. So, according to A.E. Sherstobitov, the contract for the paid provision of communication services should be defined as public according to the conclusion drawn from the direct indication of the law[7] (Article 27 of the Federal Law of the Russian Federation No. 126-FZ of July 7, 2003 "On Communications"[8]). E.A. Sukhanov, analogously, draws a conclusion about the publicity of the contract for the paid provision of postal services, from the provisions of the relevant act[9] (Article 19 of the Federal Law of the Russian Federation No. 176-FZ of July 17, 1999 "On Postal Communication"[10]).

It is indisputable that when solving a particular problem, it is necessary to consider not just the literal meaning of the law, as reproduced in the first approach, but also the general principles of the disputed relations' legal regulations. At the same time, it should be noted that such an interpretation is complicated by the potential for misunderstanding of the meanings and direction of the rules, especially in isolation from the system context [25]. According to the remarks of E.S. Nikolaichuk, the discrepancy can be explained by the fact that the system interpretation is a dual process that combines the cognitive activity of the subject with the material results expressed in the external world [26].

Representatives of the third approach suggest that when solving issues, we should start directly from the norms included in Article 426 of the Civil Code of the Russian Federation, with regard to certain relationships of participants

[7] See: Civil Law: in 2 vols. Textbook. Vol. 2, part. 2. / ed. by E. A. Sukhanov. Moscow: "Statute," 2000. p. 15.

[8] Federal Law No. 126-FZ of July 7, 2003 (in the ed. from 07.04.2020) "About communication" / / SPS "ConsultantPlus." URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=49327876801330901921301102&cacheid=DD5EED87A06B7EA090E2F24CF6AB0683&mode=splus&base=LAW&n=349739&rnd=A1069325EF7DA7C8288B1D77D5C2E302#201dwoi24pd (reference date: 10.06.2020).

[9] See: Civil Law: textbook in 4 vols. Vol. 4: Law of Obligations / ed. by E. A. Sukhanov. Moscow: Volters Kluver, 2008. p. 49.

[10] Federal Law No. 176-FZ of July 17, 1999 (as amended). from 29.06.2018) "On postal communication" / / SPS "ConsultantPlus". URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=125741262508936898109484606&cacheid=68D93D3027458B187A39034F4475083F&mode=splus&base=LAW&n=301417&rnd=A1069325EF7DA7C8288B1D77D5C2E302#2l95 mg1rw38 (reference date: 10.06.2020).

in the turnover. Supporters of this approach are M.I. Braginsky and B.M. Seinaroev [27; 28]. According to M.I. Braginsky, when transferring the provisions of Article 426 of the Civil Code of the Russian Federation to the analyzed relations, there is no obstacle to defining the contract as public. Qualification-related dilemmas do not arise in cases where a particular construction of contractual relations is not provided for by the current legislation (unnamed contracts). In view of this, contracts that are not explicitly deemed public, in the special part of the Civil Code of the Russian Federation, taking into account the requirements of the general part, cannot be recognized as public contracts. This approach, as noted by O.I. Kashirin, seems to be the most classical and appropriate in relation to the meaning of Article 426 of the Civil Code of the Russian Federation [2]. We believe that the above-mentioned approach to classifying particular contracts as public, in relation to the provisions of the law, seems acceptable and unburdened by additional conflicts. However, simplified qualifications overlook the specifics of unnamed and/or mixed contracts, which can introduce complicating aspects to the qualification process. In view of that, it is not possible to estimate the complete perfection of the latter approach.

According to the current legislation, a number of contracts contained in Part Two of the Civil Code of the Russian Federation can be directly attributed to public contracts by virtue of regulatory requirements[11]. Namely, we are speaking of contracts of retail purchases and sales (paragraph 2 of Article 492 of the Civil Code); agreement of household contract (paragraph 2 of Article 730 of the Civil Code); the contracts of bank contributions (paragraph 2 of Article 834 of the Civil Code); the contracts of personal insurance (paragraph 1 of Article 927 of the Civil Code); contracts of supply (paragraph 3 of Article 13 of the Federal Law of the Russian Federation from December 7, 2011 No. 416-FZ, "On water supply and sanitation")[12]; contract of compulsory liability insurance of vehicle owners (paragraph 8 of Article 1 of the Federal Law of the Russian Federation No. 40-FZ of April 25, 2002 "On Compulsory Civil Liability Insurance of Vehicle Owners"[13]).

However, it should be stated that none of the approaches is perfect. It seems that a simultaneous amalgam of these approaches within the framework of a single systematic review makes it possible to classify certain contracts as public. That should improve legal regulation and be more justified and holistic.

In view of the above, public contracts should be understood, regardless of the direct indication of the law, to be agreements concluded by a) a consumer who purchases goods, works, or services for personal purposes, with b) another person engaged in income-generating activities, establishing a direct obligation for him to sell the relevant products or work to any person who applies to him.

A public contract contains a number of features that differentiate it from other related contracts. This conclusion follows from the analysis of the provisions of Article 426 of the Civil Code of the Russian Federation. Identification of differentiating principles has not only theoretical, but also practical significance, since it allows for more adequate law enforcement to the relevant relations. In this regard, the consideration of this aspect refers to the definitive beginnings of the issue of public contracts in modern civil law.

The starting point here should be called the subject composition of the contractual structure under consideration. According to the provisions of paragraph 1, Article 426 of the Civil Code, one of the subjects of a public contract is a person engaged in bringing income activity, whether via business or another entity permitted by law in terms of the existing civil turnover [29]. This means that the entity that sells the product, work, and/or service) is a professional participant in civil turnover. This rule indicates to us that certain provisions of a public contract do not apply to other cases defined in the legislation, whereby a person will be obliged to conclude a contract with the relevant entity, including taking into account subsequent aspects.

When qualifying the contract, it is necessary to consider the nature of the activity carried out by the person who must perform the duties for

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[11] Civil Code of the Russian Federation (part two) [Articles 454-1109]: Federal Law of the Russian Federation No. 14-FZ of January 26, 1996 (as amended). from 18.03.2019, with ed. from 28.04.2020) / / SPS "ConsultantPlus." URL: http://www.consultant.ru/cons/cgi/online.cgi?rnd=A1069325EF7DA7C8288B1D77D5C2E302&base=LAW&n=320455&dst=4294967295&cacheid=3121AE6AFF68C74CD5E4D0F40B777FD4&mode=rubr&req=doc#08207361763146535 (reference date: 10.06.2020).

[12] Federal Law of the Russian Federation No. 416-FZ of December 7, 2011 (as amended) from 01.04.2020) "On water supply and sanitation" / / SPS "Consultant-Plus." URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=16953287610192697099961052&cacheid=DAAE66C9AC127C4E8562CED360F4FE50&mode=splus&base=LAW&n=349147&rnd=A1069325EF7DA7C8288B1D77D5C2E302#1fdma4dhkzx (reference date: 10.06.2020).

[13] Federal Law of the Russian Federation No. 40-FZ of April 25, 2002 (as amended). from 24.04.2020, with ed. from 25.05.2020) "On compulsory insurance of civil liability of vehicle owners" / / SPS "ConsultantPlus." URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=31787956203780543741509865&cacheid=E8F6324C9219701A256C4AC61AD5EBF3&mode=splus&base=LAW&n=351253&rnd=A1069325EF7DA7C8288B1D77D5C2E302#3oxqu4 mv56 (reference date: 10.06.2020).

the sale of goods, works, or services. Certain types of economic activity named in paragraph 1 of Article 426 of the Civil Code of the Russian Federation are included, due to the fact that when they are fulfilled, the economic entity enters into public contracts. The legislator, in particular, refers to the following types of activities: service(s) and accommodation in hotels, medical services, transportation of passengers and cargo by public transport, retail trade, communication services, electric power supply and other similar areas. In those areas of activity, as N.A. Vnukov notes, the conclusion of contracts and the dynamics of contractual relations are characterized by a set of special procedural aspects [1].

In view of the fact that the above list is of an approximate nature, it is correct to judge that any activity related to the sale of goods and performance of works and services may have the regime of a public contract if other conditions are met [30; 31]. Note that this thesis is not an absolute rule and requires careful attention, since the omission of other circumstances and/or factors will provide the wrong qualification.

Given the indicated first and second aspects and based on the context of the modernized provisions of Article 426 of the Civil Code, it can be argued that the basic factor in the classification is not the definition of the legal person's purposes (as established in Article 50 of the Civil Code) or the content of activities that are inherently entrepreneurial, but the generating of appropriate income.

The specifics of the regulations, in terms of the subject composition, takes place not only on the implementing side, but also on the receiving end. Thus, the provisions of paragraph 1 of Article 426 of the Civil Code of the Russian Federation actually establish the equality of all consumers in relations arising from a public contract. At the same time, the legislator makes a reservation that in cases provided for by law or other legal acts, it is possible to deviate from the principles of equality [32; 33].

The next distinctive feature in accordance with paragraph 2 of Article 426 of the Russian Federation Civil Code is the price, which in the contract under consideration must be identical for consumers of the corresponding category of goods/works/services. The legislator also noted the inadmissibility of differentiated conditions for a public contract, based on the benefits provided to individual consumers or the provision of various prerogatives to them in another form. The formulation of nondiscriminatory conditions in the contract in this way, as A.S. Fedorov notes, seems to be at least partially justified [34]. The implementing party under the contract does not have the right to give preference to one person over another, which is why the terms of the contract should be the same for all consumers, assuming the contract is public in nature. However, the legislator may formulate certain exceptions when establishing benefits for certain consumer categories, which will not be recognized as violations of the basic rule on uniformity. In this state of affairs, based on the wording of the relevant rules, the established preferential status for certain persons cannot be the basis for recognizing the relevant contract (or its individual terms) as invalid at the initiative of others. It should be noted that, in accordance with paragraphs 2 and 6 of Article 3 of the Civil Code, certain preferences in the format-specified benefits cannot be established by the acts of subjects of the Russian Federation or local self-government bodies, including the reasons for the elimination of dissonance in the regulation of similar relations in different areas [35]. In addition, the subjects of economic activity do not have the right to independently introduce a gradation of consumers according to the benefits provided [36].

In our view, compliance with Section 2 of Article 426 of the Civil Code regarding price regulation ensures the implementation of the basic conditions to perform the duties of a person involving the sale of goods, performance of works or rendering of services with respect to any and all who will address for it, is constitutive and inherent to a public contract [37].

The provisions of paragraph 3 of Article 426 of the Civil Code of the Russian Federation establish a quasi-impermissible refusal to conclude a public contract with an objective possibility of its execution by an entrepreneur. At the same time, a certain reservation in the said norm, in the presence of appropriate circumstances, allows avoiding the conclusion of a public contract. In this case, the burden of proving the absence of the relevant possibility is placed on the person who should have concluded the contract[14]. Regulatory acts establish other circumstances, in addition to the actual impossibility, in which the conclusion of the contract in question will be refused. So, exceptions to the rules are cases concerning the contract of air transportation of a passenger. According to the provisions of paragraph 4 of Article 786 of the Civil Code, in cases stipulated by Article 107.1 of the Air Code of the Russian

[14] See: paragraph 20 of the resolution of Plenum of the Russian Federation Supreme Court of 25 December 2018 No. 49 "On certain issues of application of the General provisions of the Russian Federation Civil Code on the conclusion and interpretation of the agreement" // *Bulletin of the Supreme Arbitration Court of the Russian Federation*. 2019. No. 2. p. 27.

Federation[15], the carrier has the right to refuse to conclude a contract for the air carriage of a passenger if such a contract is entered into the register of persons whose air carriage is restricted by the carrier. Another act establishing cases for refusal to provide services on the basis of a public contract, in relation to financial services, is the Federal Law of the Russian Federation of August 7, 2001 No. 115-FZ “On Countering the Legalization (Laundering) of Proceeds from Crime and the Financing of Terrorism”[16].

At the same time, it should be understood that if the obligated person unreasonably refuses to conclude a public contract, the opposite party, that is the consumer, has the right to apply to the court for compulsion to conclude the relevant contract [38][17]. In this case, the requirement of compulsion can be satisfied only if the defendant has a corresponding obligation to conclude a public contract, if such is defined by the Civil Code of the Russian Federation or other federal law. The party unreasonably evading a contract in the presence of the requirements, shall compensate the other party caused by such behavior damages the rules of paragraph 2 clause 4 of Article 445 of the Civil Code [39].

In accordance with the existing regulatory framework, a public contract is based on the use of standard agreements and provisions. These must contain the necessary conditions, as well as the rights and obligations that are binding on the parties [40]. The provisions of paragraph 4 of Article 426 of the Civil Code of the Russian Federation, in order to unify and eliminate potential unequal conditions among various entities that sell identical goods (works, services), it is established that the relevant standard contract provisions can be issued only by the Government of the Russian Federation or other federal executive bodies authorized by it [41]. Similar provisions take place in the legislation of other States [42; 43].

At the same time, we believe it is possible to proceed from the fact that the public contract itself does not belong to standard contracts, as such, but is implemented through such constructions. This state of affairs gives rise to disputes regarding the correlation of the public contract norms with the norms of the accession contract. The named contractual constructions are closely related. However, their connection does not indicate their identity or interchangeability. There are significant differences in a number of positions between the structures under consideration. These include the subject structure, the grounds for concluding relevant agreements, the procedure for forming contractual terms, and the consequences of violating the obligations that have arisen [44; 45].

We believe that the key difference between a public contract and a contract of accession can be called the subject composition, whose rights are limited when concluding these contracts. In the first case, the legislator fixes the legal rights and interests of consumers, depriving the contractor of the opportunity to refuse to conclude a contract with any of them on the same terms. In the second case (the contract of accession) there are restrictions on the rights of the acceding party to the already existing contract, since this person is deprived of the opportunity to change the existing agreement [46].

In addition, the contract of accession differs from the public contract not only in the order of its conclusion, but also in the fact that the conditions in it are determined by the person selling the goods (work or service). In fact, the joining entity does not have the ability to adjust them. In contrast, in a public contract, the parties are not bound by the original conditions, except for the essential conditions on the subject, including its value, which are applied simultaneously to all at a specific time coinciding with the moment of the contract conclusion.

It should be noted that there are exceptions to the above provisions: in some cases, the contractor may deny a consumer belonging to a particular category (Section 3 of Article 426 of the Civil Code), as well as those acceding to an existing contract, can challenge his position or take the initiative on its dissolution (paragraph 2 of Article 428 of the Civil Code).

These agreements are governed by heterogeneous relations. The rules on the public

[15] Air Code of the Russian Federation: Federal Law of the Russian Federation No. 60-FZ of March 19, 1997 (as amended). from 08.06.2020) / / SPS “ConsultantPlus.” URL: http://www.consultant.ru/cons/cgi/online.cgi?rnd=A1069325EF7DA7C8288B1D77D5C2E302&base=LAW&n=354536&dst=4294967295&cacheid=89B1DFF9DFB1315B178BBAF87058A0D9&mode=rubr&req=doc#05041374741612357 (reference date: 10.06.2020).

[16] Federal Law of the Russian Federation No. 115-FZ of August 7, 2001 (as amended). from 07.04.2020) “On countering the legalization (laundering) of proceeds from crime and the financing of terrorism” / / SPS “ConsultantPlus.” URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=20613414010039663090930784684&cacheid=1F5FCCACB608BAA4848E90975C80567E&mode=splus&base=LAW&n=349736&rnd=A1069325EF7DA7C8288B1D77D5C2E302#2zhjzfnyxg8 (reference date:10.06.2020).

[17] Letter of the Federal Arbitration Court of Russia dated December 24, 2018 No. SP / 106050 / 18 "On sending clarifications on the review of law enforcement practice when considering applications and cases by antimonopoly authorities, as well as court decisions under Article 10 of the Federal Law of the Russian Federation No. 135-FZ of 26.07.2006 “On Protection of Competition" in Case of Imposing Unfavorable Conditions by a Dominant When Concluding Contracts.” / / CODIFICATION OF the Russian Federation. URL: https://rulaws.ru/acts/Pismo-FAS-Rossii-ot-24.12.2018-N-SP_106050_18/ (reference date: 10.06.2020).

contract prescribe the grounds for concluding such a contract, and the rules on the accession contract formulate the specifics of its conclusion by the interested party. If a specific contractual structure also covers the regime of Articles 426 and 428 of the Russian Federation Civil Code, then the relevant provisions of the law should be applied simultaneously. However, their application should be based on the primary importance of the rules of Article 426 of the Russian Federation Civil Code, since a person carrying out activities that bring him income, as a general rule, cannot be released from the obligation to conclude a contract, providing equal conditions to counterparties. Given the marked belief that the rules of Article 428 of the Civil Code in this case are of secondary importance and should be applied only regarding private matters, the way of concluding the contract with the public properties.

The legislator does not specify which party sets the contractual terms and which accepts them in the proposed form, despite the fact that the terms of the relevant contract are standard, defined by one of the parties. However, the law enforcement officer notes that the provisions of Article 428 of the Civil Code of the Russian Federation allow restoring the balance of the parties' interests in the future[18]. This provision is explained by the fact that the rules of accession in the contract perform a specific function that mediate control over the fairness of the contract's proposed terms [47]. Meanwhile, in the public contract, by contrast, the parties have an opportunity to some extent to set or confirm their own certain conditions that are dictated by the given circumstances. So, if the Civil Code of the Russian Federation and other laws include dispositive norms, the parties can model the conditions within the specified corridors, in particular, to determine different payment terms or different orders of the obligation performance in relation to the needs of the particular contract's subject composition. In addition, a public contract can be recognized as a contract of accession only if the terms of such a contract offered for conclusion to an unlimited number of persons have been developed by the party selling goods (works, services).

Thus, on the basis of the above, it can be concluded that the most specific and characteristic feature of a public contract is a deviation from the general rules of the contract's freedom. The legal regime of this agreement is aimed at protecting consumers as an economically weak party. It can only be concluded by a person engaged in income-generating activities (entrepreneurial or other). The type of activity carried out by its characteristics should have publicity calculated for an indefinite circle of potential consumers. A public contract is not inherently standard but is implemented through a system of appropriate standard structures developed and effected by authorized executive authorities. At the conclusion of a public contract the parties must observe the rules embodied in Article 426 of the Civil Code and other normative acts at the federal level (if any), in accordance with the requirements of subclause "o" of Article 71 of the Russian Constitution and Article 3 of the Civil Code.

[18] See: paragraph 9 of the resolution of Plenum of the Russian Federation Supreme Court of March 14, 2014. No. 16 "On Freedom of Contract and its limits". Bulletin of the Supreme Arbitration Court of the Russian Federation. 2014. No. 5. p. 90.

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Концептуальные особенности публичного договора в современном гражданском праве

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Аннотация. *Реформирование гражданского законодательства затронуло и положения о публичных договорах. В статье рассматриваются вопросы квалификации договоров, имеющих публичный характер, в условиях современной регламентации. Характерной особенностью современного регулирования и теоретических положений гражданского права является отсутствие унифицированных подходов к определению понятия публичного договора, его сущности и условий. На практике возникают различные ситуации, когда законодателем не даны четкие предписания по тем или иным аспектам относительно договоров, имеющих публичный характер. Это предопределяет теоретическую и практическую актуальность рассмотрения данной сферы. В статье анализируются основные определяющие признаки обозначенной договорной конструкции, изучаются особенности выражения публично-правовых начал правового регулирования в данных договорных отношениях. Методологической основой исследования является анализ нормативного материала, цивилистической теории и отдельных аспектов правоприменения норм о публичных договорах. В статье освещаются правовые и концептуальные аспекты института публичного договора в контексте современного правового регулирования. Задачей дальнейших изысканий по рассматриваемой проблематике является не столько отыскание одного корректного определения данного договора для законодателя, сколько закрепление в законе индивидуализирующих признаков, посредством их интеграции или в понятийный аппарат, или непосредственной фиксации в тексте нормативного акта. Автором предпринята попытка систематизации соответствующих признаков, а также выявление дифференцирующих начал для разграничения публичного договора со смежными договорными конструкциями. В статье сформулированы четкие критерии разграничения, а также определена иерархия применения тех или иных норм к отношениям, вытекающим из публичного договора. Сделан вывод о том, что при идентификации обозначенной договорной конструкции необходимо исходить не только из определения, содержащегося в законе, но и специфических особенностей публичного договора.*

Ключевые слова: *публичный договор, договорная конструкция, публичный характер, потребитель, конкуренция правил, договор присоединения.*

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