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CONTRACTUAL AGREEMENTS BASED ON PUBLIC-LAW COMPULSION: PARTY AUTONOMY ON THE DEFENCE IN GERMANY AND THE EUROPEAN UNION*

I. Problem outline

The distinction between public and private law is one of the classic dichotomies of law. Both parts of the legal order influence each other and interweave. Public law also is protecting personal interests, and (mandatory) private law is promoting public interests as well. Not least, party autonomy – the cornerstone of private law – owes its existence to its public-law foundation in the constitution's principles of freedom. Since these freedoms do not apply absolutely, party autonomy has always been subject to restrictions. Insofar as they are primarily and directly aimed at legal consequences under private law, they are usually qualified as private law, otherwise as public law, whereby the differentiation between the two legal areas is not always easy. The question to be answered here is: Where do the mandatory provision of private law end and the public-law restriction begin? In Germany, this question (which, by the way, is hardly investigated) barely plays a role in substantive law (on conflict of laws, see III.2. below) because private law contains hinges at its decisive points that open it up to consideration of public-law requirements and public law values. Examples include the invalidity of legal transactions that violate a statutory prohibition (§134 of the German civil code, Bürgerliches Gesetzbuch – BGB[2]), the concept of non-conformity of goods in sales law, liability for damages arising from unlawful conduct (§823 II BGB), or the obligation of the property owner to tolerate immissions permitted under public law (§906 BGB). However, in recent years, we have observed developments in Germany and the European Union, forcing party autonomy further and further into defensive mode. In the following, we will first provide a brief overview of the classic links between party autonomy and public law (II.),before turning to more recent developments (III.).

II. The traditional relationship between private and public law

Regarding the traditional relationships between public law and private law, two lines of influence are particularly worth mentioning

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[2] For an English translation of the BGB, see: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

here, in addition to the references of private law to public law mentioned above and the special rules concerning state-owned corporations (§393a to §395 of the German Stock Corporation Act, *Aktiengesetz* – AktG): the effects of public law requirements on the transactional practice and the traditional «duty to contract».

Examples of the former occurrence can be found in a wide variety of areas. Practitioners take the legal requirements, including the public law prohibitions, as a given and adapt their purposes to it or try to profit from the benefits of public-law privileges (e.g., tax relief) or to avoid their unpleasant consequences (e.g., taxation, capital requirements under prudential banking regulation, withdrawal of a license). On the one hand, the focus of public law rules is to create incentives for or against specific contractual clauses, contractual arrangements or transactions as the promotion of electric vehicles, the energy-efficient modernization of older buildings or the reduction fossil-fuels consumption. On the other hand, the impact on transaction practice is merely an unintended side effect of existing public law commandments, prohibitions, or benefits that serve other purposes. One example is that providers of energy conservation tools raise their prices because customers have more money to spend because of public subsidies. Another example is the emergence of the mixed legal form of the limited partnership (*Kommanditgesellschaft* – KG) with a limited liability company (*Gesellschaft mit beschrȯnkter Haftung* – GmbH) as a general partner (GmbH&Co KG), which allowed entrepreneurs to combine the advantage of limited liability in the GmbH with the benefits of tax transparency of a KG. In this context, one can also cite the classic «protective legislation» favouring persons who are typically socially inferior due to their roles, such as consumers, tenants, and employees. However, not rarely, the restrictions on freedom of contracting, which are sometimes significant in this area, can be counterproductive by increasing the costs of the other party and indirectly reducing or worsening the supply of jobs or rental housing. A current example is the conclusion of certain kinds of part-time employment contracts between universities and pre-doctoral academic staff, which is no longer possible under EU law according to recent German case law[1]. This will ultimately lead to such positions no longer being awarded at all or only much less frequently.

The public law obligations of private actors to conclude contracts with other actors, to move to the second line of influence has also long been part of the legislator's tools. In this respect, one speaks of «an obligation to contract» (*Kontrahierungszwang*). In most cases, this term refers to the (reactive) obligation addressed to market participants to accept the offer to contract of another person (entrepreneur or consumer). Less common

[1] German Federal Labor Court's (Bundesarbeitsgericht) decision of January 20, 2021, ref.: 7 AZR 193/20.

are initiative (active) obligations addressed to entrepreneurs and/or consumers to enter into a contract (i.e., to make a contract offer) with a contracting party of the obligor's choice. This relates cases where the legislator is not concerned with the protection against discrimination, but with the existence of the contractual relationship. Examples are the obligation to conclude insurance contracts, e.g. personal liability insurance for motor vehicle holders (§1 Compulsory Insurance Act, *Pflichtversicherungsgesetz* – PflVG) or an insolvency protection insurance for package travel organisers (cf. §651r BGB, art. 17 of Directive (EU) 2015/2302). In those cases, the obligation to conclude the contract is combined with an acceptance obligation for the (insurance) company requested to effect the contract (e.g. §15 of the Travel Insurance Fund Act, *Reisesicherungsfondsgesetz*).

The obligation to accept a contract offer often serves to ensure services of public interest in basic economic sectors such as health, energy, postal and financial services, carrying passengers and insurance (e.g. §22 Passenger Transportation Act, *Personenbeförderungsgesetz*; §5 II Compulsory Insurance Act), which is ultimately anchored in the welfare state principle of article 20 of the German constitution (Fundamental Law, *Grundgesetz* – GG). However, sometimes it also flanks an active obligation to contract, as has been seen. In addition, it may serve to discipline as preventive protection against companies with dominant market power. An example is §19 (2)(4) of the Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*[1]) in the event of abuse of a dominant market position. §§21 et seq. Telecommunications Act (*Telekommunikationsgesetz*), §28 Postal Services Act (*Postgesetz*) and §10 Railway Regulation Act (*Eisenbahnregulierungsgesetz*) regulate in a similar way following a slightly different approach. Here, the obligation to contract does not arise directly from the law, but only indirectly in the form of statutory authorization for the administration to force certain (usually market-dominant) actors to conclude contracts by administrative act in individual cases.

The general anti-discrimination principle under the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – AGG, §19) is also to be stated in this context. The unlawful refusal to conclude the contract gives rise to a claim for damages (§21 AGG) from which the duty to conclude the contract is derived[2].The prohibition of discrimination applies to so-called «bulk transactions» (*Massengeschäfte*) that are «typically concluded without regard to the person on comparable terms» (§19(1)(1) AGG). In contrast to the cases of compulsory contracting in the public interest services, it is significantly newer. It can certainly be understood as part of a longstanding but accelerated shift in

[1] English version: https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html.

[2] E.g. G. Thüsing, in: Münchener Kommentar zum BGB, §21 AGG, at no. 17.

private law, from the classic individualistic view towards a more and more collectivistic view, which is also referred to as the «materialization» of contract law[1]. Unlike in the cases of the business affected with a public interest, the obligation to conclude a contract in discrimination cases is not justified by its economic necessity, but by the political purpose – which is partly also underpinned by constitutional law (article 3(3) GG) – of sanctioning certain types of unequal treatment (on the grounds of race, or ethnic origin, gender, religion, disability, age or sexual identity)[2].855

III. Recent developments

In the following, we first provide, without any claim to completeness, a brief insight into recent types of regulatory interventions in freedom of contract (1.) before addressing related legal qualification problems (2).

1. Regulatory interventions of a more recent type

Among the new instruments, some only concern the procedure for concluding contracts (a)) and some entail substantive specifications for agreements to be made (b)).

a) Specifications for the conclusion of contracts

First of all, we must mention here the formal requirements (e.g. written form, notarization, registration). This instrument is by no means new; on the contrary, it is one of the classic instruments of private law that protects personal and public interests. However, what is new is that the more recent formal requirements for the conclusion of contracts, mainly in consumer protection, can no longer be undoubtedly identified as being of a private or public law nature. As a result, there is a certain degree of uncertainty to the legal consequences of violating the requirements, insofar as the law does not regulate this itself. There is also a tendency toward further diversification of the formal requirements or the legal consequences in the case of form breaches, which is traditionally the nullity of the legal transaction (§125 BGB). An example of the new diversity in this field is provided by the Ordinance on General Terms and Conditions for the Basic Supply of Household Customers and the Substitute Supply of Gas from the Low-Pressure Network (*Verordnung über allgemeine Bedingungen für die Grundversorgung von Haushaltskunden und die Ersatzversorgung mit Gas aus dem Niederdrucknetz* – GasGVV) of 2006. The contract

[1] See the basic observations of M. Auer, Materialisierung, Flexibilisierung, Richterfreiheit, Tübingen 2005.

[2] The constitutional prohibition of discrimination of article 3(3) GG, which is primarily addressed to the state, does not protect the same catalogue of criteria (namely sex, descent, race, language, homeland and origin, faith or religious or political opinions) as §19 AGG.

«shall» (not: «must») be concluded in text form. If it is only concluded orally, it is not void but can still be subsequently confirmed by the supplier in text form (§2 of the ordinance).

In addition, mainly in the area of consumer protection, there are increasingly refined information obligations of the entrepreneur prior to the conclusion of the contract in the case of certain distribution forms or contract types (e.g. distance contracts; electronic commerce; consumer credit, §§312d, 312i, 312j, 492(2) BGB), most of them are based on requirements of the EU legislator. Here, too, it is becoming increasingly difficult to distinguish between classic information duties under private law and those under public law, not least those under capital market law by the Securities Trading Act (*Wertpapierhandelsgesetz*, §§63 et seq.). Obviously, preserving the traditional structures and distinctions of national contract law systems is not a particular concern of the European Union legislator[1].

The transition from the pre-contractual information duties to the substantive requirements for contracts addressed in (b)) is incidentally fluid, as the new rules for the consumer construction contract (§650i et seq. BGB) show. According to §650k (1) BGB («Content of the Contract»), the «details of the construction description provided in advance of the contract with regard to the construction [...] become the content of the contract, unless the parties have expressly agreed otherwise». Furthermore, according to §650k(3) BGB, the construction contract «must» contain «binding information on the date of completion of the work or [...] on the duration of the construction work». If the contract nevertheless does not contain this information, «the pre-contractually transmitted information in the construction description on the time of completion of the work or on the duration of the construction work becomes the content of the contract». The sanction comes in the guise of a mere rule of interpretation, admittedly with the claim of binding force.

b) Specifications for the content of contracts

Furthermore, there is an increasing number of provisions in European Union and German law that are public law in nature and which, unlike traditional mandatory contract law, do not directly regulate the rights and obligations of the contracting parties but instead tell the parties what they must agree, leaving them only a greater or lesser degree of leeway.

Likewise, the German Minimum Wage Act of 2014 (Mindestlohngesetz) grants every employee a right to payment of wages at least equal to the minimum wage and declares agreements that fall short of the minimum wage to be «insofar invalid» (§§1 and 3 of the Minimum Wage Act). The same applies to the correspondingly constructed

[1] See on this *B. Lurger*, Die Dominanz zwingenden Rechts – die vermeintlichen und tatsдchlichen Schattenseiten des EU-Verbraucherschutzrechts, Zeitschrift für Europäisches Privatrecht 2018, pp.788 et seq.

regulations on the acceptable amount of rent at the start of the lease (§§556d, 556g BGB, called the «rent brake» by politicians). Due to its integration into the BGB, this intervention comes under the guise of private law. Also, it falls within the federal government's legislative competence for «civil law» in the constitutional (historical) sense (art. 74(1)(1) GG). However, in its most recent decision on the corresponding rent cap under Berlin Rent Cap Act (which was deemed to violate the federal distribution of legislative powers), the Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) conceded that social tenancy law can undoubtedly be assigned to public law and that «civil law» in the constitutional sense «is not to be understood as an antithesis to public law. So that objects of regulations which, according to contemporary understanding, can be assigned to public law can also fall within the scope of article 74(1)(1) 1 GG»[1].

Another example is the EU Regulation No. 531/2012 «on roaming on public mobile communications networks within the Union» in conjunction with Commission Implementing Regulation (EU) 2016/2286. The regulations require mobile operators offering roaming services to provide these roaming services «at domestic prices».

The obligation to contract with specific contents and its public law character become even clearer in EU data protection law. Article 46 of the General Data Protection Regulation 2016/679 links the permissibility of the transfer of personal data by a data controller to a third country or an international organization to the existence of «appropriate safeguards» and stipulates that such safeguards may consist, among others, in «standard data protection clauses» issued by the EU Commission. The European authority itself develops contractual clauses for this purpose and recommends them to the data protection subjects. In addition, among other things, individual contractual clauses between the data controllers and the data recipient in the third country are also possible; however, those clauses require the approval of the competent supervisory authority.

One area in which the authors are particularly aware of numerous public law requirements for exercising party autonomy is financial market law. For example, by outsourcing activities and processes, credit institutions have to conclude a «written agreement» with the outsourcing company that specifies the rights of the institution vis-a-vis the outsourcing company necessary to comply with the legal requirements, as well as the corresponding obligations of the outsourcing company (§25b(3) Banking Act, *Kreditwesengesetz* – KWG). This obligation may still be seen as an endorsement rather than a restriction of party autonomy.

However, the situation is already different with the requirements of

[1] Federal constitutional court's (Bundesverfassungsgericht) decision of March 3, 2021, ref.: 2 BvF 1/20 et al, juris, at no. 111.

Commission Delegated Regulation 2016/2251 (supplementing EU Derivatives Regulation 648/2012 – EMIR) «with regard to regulatory technical standards for risk mitigation techniques for OTC derivative contracts not cleared by a central counterparty». Article 2(2) of the Delegated Regulation requires firms to specify in advance the terms of all agreements they conclude when entering non-centrally cleared OTC derivative contracts, including the terms of the netting agreements and the terms of the collateral exchange agreement. To this end, the rule requires that those private law agreements to be entered into would have to address at least certain items, which it specifies in no less than seven bullet points.

The new understanding of contractual freedom is particularly evident in the Act on the Recovery and Resolution of Institutions and Financial Groups (*Sanierungs- und Abwicklungsgesetz* – SAG). According to §55 SAG, which refers to Article 55 («Contractual recognition of bail-in») of the EU Bank Recovery and Resolution Directive 2014/59 (BRRD), institutions and group entities are «required to agree» in their contractual provisions of financial transactions governed by the law of a third country that the counterparty recognizes that specific reorganization measures with civil law implications (write-down and conversion of liabilities, «bail-in») ordered by the German supervisory authority are recognized by the counterparty. Furthermore, under §60a SAG, institutions and group companies are required to include, in their financial contracts governed by the laws of a third country, a contractual provision by which the counterparty acknowledges that certain powers of the supervisory authority to suspend contractual termination rights and other contractual rights (for this purpose, see c)) are recognized.

c) Authorization for official intervention in the execution of contracts

The two last-mentioned examples from the SAG point to a third type of sovereign interference in the contract: the administrative order that the parties may not exercise certain contractual rights (temporarily) or that specific self-executing contractual clauses are not to take effect for a certain period (so-called resolution stay[1], e.g. §§66a, 82 to 84 SAG), as well as the officially decreed and directly effective write-down and conversion of contractual liabilities (so-called bail-in, §§89 et seq. SAG). Both instruments are not an invention of Germany or the EU but are based on a global understanding of the G20 countries following corresponding recommendations of the Financial Stability Board[2]. So-called administrative acts shaping private law (*privatrechtsgestaltende*

[1] See ISDA's multilateral solution for this purpose: https://www.isda.org/protocol/isda-resolution-stay-jurisdictional-modular-protocol/.

[2] See Cannes Summit Final Declaration of November 4, 2011: http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html

Verwaltungsakte) have been known for a long time[1]. Until recently, however, this category was essentially thought of only in the more binary form of (e.g., antitrust) approvals and prohibitions: the administration's consent as a classic prerequisite for effectiveness without the administration's ability to influence the content of the contract beyond that directly.

2. Special legal problems of the interventions

Apart from an increasing limitation and instrumentalization of party autonomy, public law interventions in private law also increasingly give rise to qualification problems, which, as already stated at the outset, are likely to impact conflict of laws.

Although at first glance they appear even «softer» than conventional restrictions that intervene directly in the contract (esp. so-called mandatory provisions, art. 9 of the regulation (EC) 593/2008), in fact, «compulsory clauses» in the manner of the cited §§55 and 60a SAG go considerably further in terms of their international effect. Indirectly, they interfere with the choice of law.

Unlike provisions that exclude the foreign choice of law or limit it to particular foreign laws, they directly affect the substantive law. By forcing the party, who is subject to German public law, to include an inevitable regulation in the international contract, which is subject to foreign law, the German sovereign succeeds in incorporating the recognition of its contract-forming administrative measures into the contract statute and, by doing this, exporting it to the foreign contract law system. In this way, the contract-modifying intervention by the German supervisory authority is immunized against the risk that the foreign forum will refuse to recognize it[2].

Whether this «trick» of the German legislator to secure its interventions in the contract across borders always works is admittedly questionable. A foreign state court that has to rule on the effectiveness of the enforced clause according to the contract statute could conclude that the enforced contract provision is not an autonomous agreement at all, but disguised foreign public law (supervisory law) that is removed from the contract statute[3].

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[1] E.g. *G. Manssen*, Privatrechtsgestaltung durch Hoheitsakt, Тьbingen 1994; *J. Schaub-Englert*, Rechtsschutz gegen privatrechtsgestaltende Verwaltungsakte im Regulierungsrecht, Baden-Baden 2020, p. 78 et seq.

[2] Cf. Federal Government Bill on the SAG, Deutscher Bundestag, printed paper (Drucksache) 18/5009 of May 26, 2015, p. 65 (on §60a SAG).

[3] Similarly, *J. Basedow*, Bail-in und internationales Vertragsrecht: kollisionsrechtliche Notizen zur Europäischen Bankenunion, in: Gedächtnisschrift Leonidas Georgakopoulos, Athens 2016, 21, at 33: the agreement is not based on the «free will of the parties», the compulsion to include hedging clauses means for the third state contracting party «subjection to the economic law of the EU».

This may be a unique question of interest only to lovers of private international law. However, it expresses the fundamental dilemma of the regulatory approach: an agreement enforced by sovereignty is not an agreement in the sense of party autonomy[1] but a sham agreement. One could almost say that the concept of party autonomy is being misappropriated to enforce national and EU laws against third countries.

III. Conclusion and outlook

For some years now, a steadily increasing number of regulations interfering with party autonomy and freedom of contract can be observed in German and European Union law. In addition to traditional instruments such as licensing requirements, prohibitions, and the obligation to conclude contracts («obligation to contract «), we are also increasingly dealing with regulations that explicitly prescribe to private actors the content of agreements they should conclude. As the examples from financial law show, this «obligation to contract on the content level», as one might say, is indeed a global trend: the paradigm of party autonomy is on the retreat worldwide. Outside of contract law, this is also evident in other areas of private law, such as corporate law, where, under the banner of corporate social responsibility (CSR), the importance of profit-making – the epitome of self-determination – as the ultimate goal of the private company is gradually being called into question. It can now be read that profit-making is no longer an end in itself but a means to the end of fulfilling tasks in the general interest (see the «Enlightened shareholder value» concept). The ESG requirements for financial service providers in the investment sector are moving in the same direction. Extra-contractually, the tendency to further restrict freedom and self-determination under the sign of «social responsibility» is evident as well. It even looks as if German case law is ready to move away from established principles of responsibility as a correlate of self-determination, namely the limitation of attribution to concrete causal contributions. According to its evidence order of 2017, the Higher Regional Court of Hamm considers it possible that the German energy provider RWE, operator of a coal-fired power plant in the Peruvian Andes, is liable (pro-rata) to a Peruvian mountain farmer and neighbour for the implementation of protective measures due to the risk of flooding caused by a swelling of the local lagoon as a result of the global (!) climate change to which it contributes[2].

[1] See also *J. Basedow*, ibid., p. 34, calling the approach a «dubious instrument».

[2] Higher Regional Court of Hamm (*Oberlandesgericht Hamm*), the evidentiary decision of November 30, 2017, ref.: I-5 U 15/17. In the international literature, there are already open calls to use private international law as an instrument to foster the UN 2030 Agenda (https://sustainabledevelopment.un.org). Following Sustainable

Obviously, the party autonomy is on the defensive side, even within the private law discourse. Michael Grьnberger, a full professor of private law at the University of Bayreuth, puts it in a nutshell: «I do [...] not belong to the private law scholars who carry party autonomy before them as a monstrance [sic!]. My concern is to extend the undoubtedly existing personal dimension of contractual freedom by an institutional and social impact. Therefore, the social function of the contract comes into focus [...]»[1].865 Definitely, party autonomy owes its existence to public law from the beginning and therefore, at the end, serves public interests. Nevertheless, it is interesting to observe that with the collapse of the Soviet Union, the great empire of unfreedom, the appreciation of freedom in the West has by no means increased but instead decreased.

Development Goal 13 («Climate Action»), *Alvarez-Armas*, for example, calls for «content-oriented» private international law rules may further foster the global enhancement of climate change mitigation and adaptation policies» instead of the conflict-of-law paradigm of political neutrality. Cf. *E. Alvarez-Armas*, SDG 13. Climate Action, in R. Michaels et al. (eds.), The Private Side of Transforming our World, Cambridge 2021. https://www.intersentiaonline.com/publication/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p/15.

[1] *M. Grünberger*, Verträge über digitale Güter, Archiv fьr die civilistische Praxis, 2018, 213, at 294.

НАУЧНО-ИССЛЕДОВАТЕЛЬСКИЙ ИНСТИТУТ
ЧАСТНОГО ПРАВА КАСПИЙСКОГО УНИВЕРСИТЕТА
ГЕРМАНСКОЕ ОБЩЕСТВО
ПО МЕЖДУНАРОДНОМУ СОТРУДНИЧЕСТВУ (GIZ)
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КАЗАХСТАНСКИЙ МЕЖДУНАРОДНЫЙ АРБИТРАЖ

ГРАЖДАНСКОЕ ПРАВО В ЭПОХУ ТРАНСФОРМАЦИИ ОБЩЕСТВЕННЫХ ОТНОШЕНИЙ

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Г 75 **Гражданское право в эпоху трансформации общественных отношений:** Материалы международной научно-практической конференции (в рамках ежегодных цивилистических чтений), посвященной 80-летию со дня рождения академика НАН РК, доктора юридических наук, профессора Сулейменова Майдана Кунтуаровича (г. Алматы, 30 сентября –1 октября 2021 г.). Отв. ред. М.К. Сулейменов. Алматы, 2022. – 688 с.

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