

Invalidity of Contracts in Violation of Mandatory Provisions of Public Law: Judicial Practice in China

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Abstract: Researchers have always favored how mandatory provisions of public law affect the validity of contracts. After the implementation of China's Civil Law, how to recognize the invalidity of contracts that violate the mandatory provisions of public law has also been hotly debated by the theoretical and practical circles. From the perspective of the Civil Law, which fully respects the concept of private law autonomy, and from the perspective of assuming the validity of a contract as a prerequisite for the application of the law in practice, a contract that violates the mandatory provisions of public law shall, in principle, be presumed to be valid. In determining whether a contract that violates the mandatory provisions of laws and administrative regulations is null and void, it is necessary to carefully analyze whether the legislative purpose of the mandatory provisions will lead to the nullity of the contract, and at the same time, pay attention to the distinction between the mandatory provisions that result in the nullity of the contract and those that result in the contract not coming into effect, being of pending validity, or being voidable. Contracts that violate the mandatory provisions of local laws and regulations or administrative rules may be invalid because they violate public order and morals, but they are not invalid because they are "against the law".

Keywords: Civil Law; Public Law; Mandatory Provisions; Public Order and Morals; Invalidity of Contracts.

1. Introduction

Public law and private law are one of the basic ways of categorizing the laws of civil law countries. The mandatory provisions of public law embody the protection of the interests of the State and the public interest of society. The mandatory provisions of public law are the limitations imposed by the State on private autonomy and can have an impact on the validity of private law acts.[1] Article 153 of China's Civil Law provides that: "A juridical act violating the imperative provisions of any law or administrative regulation shall be void, unless the imperative provisions do not result in the nullity of the juridical act. A juridical act contrary to public order and good morals shall be void." This article, together with article 143, establishes the basic norm that a civil legal act is invalid because it is "unlawful" and "contrary to public order and morals", whereby mandatory provisions of public law may affect the validity of a civil legal act.

In this paper, the most common civil contracts in practice as the object, the judicial practice of how to recognize the violation of mandatory provisions of public law contract is invalid to discuss.

2. Recognition in Principle of the Validity of Contracts That Violate Mandatory Provisions of Public Law

Literally, article 153, paragraph 1, of the Civil Law on the invalidity of "violation of law" belongs to the relationship between principles and exceptions, i.e., civil legal acts violating the mandatory provisions of laws and administrative regulations are "invalid as a principle and valid as an exception".

2.1. The Civil Law Takes a Cautious Approach to the Invalidity of Contracts that Violate Mandatory Provisions

Article 153 was highly controversial at the time of the

enactment of the General Provisions of the Civil Law, not only with regard to the formulation of the provision, but also with regard to whether it should exist at all. The Third revision of the General Provisions of the Civil Law (Draft) stipulates that "civil legal acts that violate the mandatory provisions on validity of laws, administrative regulations or are contrary to public order and morals shall be null and void." The fourth revision draft deleted it. Subsequently, there are views that civil legal acts violating the mandatory provisions of laws and administrative regulations or violating public order and morals are invalid, is an important means of preventing civil subjects from abusing their rights and safeguarding the public interests of society, and is also the main basis for judicial organs to determine the invalidity of civil legal acts, and it is recommended that the previous provisions be restored. The legislature studied the matter and eventually came up with the provisions of what is now section 153. [2] It can be seen that, to fully realize the concept of private law autonomy, the Civil Law has a rather cautious attitude towards stipulating the invalidity of legal acts, and will not easily stipulate the statutory circumstances that will affect the validity of legal acts.

Article 153 of the Civil Law, based on the concept of non-interference in civil legal acts in principle and from the perspective of preventing the abuse of rights by civil subjects and safeguarding the public interest of society, makes restrictive provisions on the acts of abuse of rights by civil subjects and acts detrimental to the public interest of society.

Therefore, from the point of view of the purpose of the legislation, a contract that violates the mandatory provisions of public law should, in principle, be valid, with nullity being the exception.

2.2. The Assumption of Validity of the Contract as a Prerequisite for the Application of the Law in Judicial Practice

The Interpretation (II) on Certain Issues Concerning the Application of the Contract Law of the People's Republic of

China and the Guiding Opinions on Several Issues Concerning the Trial of Civil and Commercial Contract Dispute Cases under the Current Situation, issued by the Supreme People's Court in 2009, categorize "mandatory provisions" into "mandatory provisions of an effective nature" and "mandatory provisions of an administrative nature". The Guiding Opinions on Several Issues Concerning the Trial of Civil and Commercial Contract Dispute Cases under the Current Situation suggests that: "Where there is a violation of a mandatory provision on validity, the people's court shall determine that the contract is null and void; and where there is a violation of a mandatory provision on management, the people's court shall determine the validity of such provision in accordance with the specific circumstances."

Therefore, the judge in determining the violation of laws and administrative regulations mandatory provisions of the contract is invalid, in fact, is to judge the contract "whether invalid", rather than "whether valid". In other words, contracts that violate the mandatory provisions of laws and administrative regulations are valid in principle and invalid in exceptional cases. This was further illustrated in the 2019 National Court Civil and Commercial Trial Work Conference, which concluded that "when hearing contract dispute cases, the people's courts should adhere to the principle of encouraging transactions and fully respect the parties' autonomy. The validity of contracts shall be determined prudently in accordance with the law." [3] In this regard, the Second Civil Division of the Supreme People's Court held that "adherence to the principle of encouraging transactions requires limiting the scope of invalid contracts as much as possible." [4]

Article 16 of the Interpretation on the Application of the General Provisions Part of the Contract Part of the Civil Law of the People's Republic of China (Solicitation of Opinions) issued by the Supreme People's Court in November 2022 stipulates, "Where a party claims that a contract is invalid solely on the basis that the contract violates a mandatory provision of a law or an administrative regulation, the people's court shall not support the claim." This also reflects that the basic position of judicial practice is to presume the validity of the contract as a prerequisite for the application of the law.

In summary, contracts that violate mandatory provisions of public law should, in principle, be presumed valid.

3. Methods of Legal Application of Invalidity of Contracts Violating Mandatory Provisions

3.1. General Principle

When the law is applied, contracts that violate the mandatory provisions of public law are, in principle, valid. Therefore, how to find the contract invalid under the assumption that the contract is valid is the difficult part. In practice, how to determine the civil legal act is invalid because of the violation of mandatory provisions of laws and administrative regulations is also a great controversy. [5]

Theoretically, there are a variety of methods used to invalidate contracts that violate mandatory provisions, including purpose interpretation, balancing of interests, and typological analysis. [6] In judicial practice, the method used to determine the invalidity of the contract in violation of mandatory provisions is still mainly based on the purpose of the interpretation of the specific method of reference to the

National Court of Civil and Commercial Trial Proceedings, Article 30. In accordance with this provision, when applying the invalid rule of "violation of law", the court shall carefully judge the nature of the "mandatory provisions", in particular, the nature of the mandatory provisions shall be determined on the basis of the type of legal interests protected by the mandatory provisions, the legal consequences of violation of law, and the protection of the security of the transaction, etc., and shall fully explain the reasons in the adjudicating documents.

First of all, the "weighing of legal interests" mainly considers whether the legal interests protected by mandatory provisions are superior to the legal interest of freedom of contract, such as basic political rights, the right to life and personality, national security, market order, public security, and so on. Secondly, the "legal consequences" should take into account whether the consequences of the violation can be rectified through other means of liability, and if the legislative purpose of the mandatory provisions is sufficiently realized through the assumption of administrative liability, the contract need not be deemed null and void. Finally, it is necessary to consider whether the determination of invalidity of the contract is conducive to the protection of the interests of the contractual counterparty, for example, the effect of contract fraud in the Contracts Part of the Civil Law is to be revocable, and in order to adequately protect the victim's legitimate rights and interests, the victim shall be given the right to revoke and to decide on the validity of the contract." [7]

In addition, the mandatory provisions of laws and administrative regulations may also have an impact on the other effectiveness of the contract state, the violation of mandatory provisions may also lead to the contract is not in force, the effectiveness of the results of the pending, not just effective and ineffective dualistic issues, when it should be specifically identified. For example, Article 505 of the Civil Law stipulates that the state of validity of contracts concluded beyond the scope of business shall be determined in accordance with the provisions of the General Part on the validity of civil legal acts as well as the relevant provisions of the Contract Part, and shall not be recognized as invalid solely on the basis of exceeding the scope of business.

Therefore, in determining whether a mandatory provision of public law invalidates a contract, it is necessary to carefully examine whether the legislative purpose of the mandatory provision will invalidate the contract, and at the same time, pay attention to the distinction between the mandatory provision that invalidates the contract and the mandatory provision that causes the contract to be ineffective, inactive or revocable.

3.2. Common Scenarios

The number of mandatory provisions of public law in China is very complicated, and the corresponding legislative purpose is not consistent, so in determining whether a mandatory provision of public law leads to invalidity of the contract is generally specific to the case to determine, it is difficult to systematize. Article 17 of the Judicial Interpretation of the General Principles of Contracts (Exposure Draft) can also only be dealt with through a general provision after listing five specific categories of circumstances leading to the invalidity of a contract. However, although it is difficult to sort out which provisions will lead to the invalidity of the contract from the perspective of

mandatory provisions of public law, it is possible to categorize and identify the key elements of the contract from the perspective of their illegality. Specifically, the following categorization can be made:

3.2.1. Unlawful Qualifications of the Parties

The mandatory provisions of public law on the qualifications of the parties concerned are mainly found in the mandatory provisions on market access in commercial activities. This type of mandatory provisions of the legislative purpose is to prohibit does not have the appropriate qualifications, qualifications of the subject for a certain legal act, from the capacity to prohibit its action, so does not have the appropriate qualifications, qualifications of the subject engaged in legal action is invalid in principle.

3.2.2. Unlawful Manner of Contracting

It is mainly the laws and administrative regulations that have mandatory requirements for the manner in which contracts are concluded. For example, article 3 of the Bidding and Tendering Law stipulates that bidding must be conducted for large-scale infrastructure projects, public utilities and other projects related to the public interest and public safety, projects invested in whole or in part with State-owned funds or financed by the State, as well as projects financed with loans or assistance from international organizations or foreign Governments. If there is no tender, then the contract entered into by the parties is null and void.

3.2.3. Unlawful of the Subject Matter of the Contract

One is that the subject matter of the contract itself is unlawful, such as the use of cultural relics, protected animals, drugs, firearms, counterfeit currency and other prohibited items as the subject matter of the contract, and the use of prostitution, child labor and other acts prohibited by law as the object of the contract. Another type of violation is the quantity of the subject matter of the contract, such as the transfer of equity by the promoter of a joint-stock limited company during the lock-up period.

3.2.4. Unlawful Performance of the Contract

One type of performance is performance outside of a place prohibited or regulated by law, such as futures trading outside of a regulated trading place. The other is performance by means of performance prohibited by law, such as performance of a contract by means of smuggling.

4. Conclusion

The mandatory provisions of public law, through the provisions of article 153 of the Civil Law, lead to the invalidation of contracts, realizing the positive interaction

between public law and private law in the law-making system. However, due to the large number of mandatory provisions of public law and the highly general nature of Article 153 of the Civil Law, it is difficult to summarize the specific circumstances in which mandatory provisions of public law render a contract invalid.

In judicial practice, judges should give priority to the concept of private law autonomy in the application of the law, maintain the validity of the contract as far as possible, and cautiously determine that the mandatory provisions of public law led to the invalidation of the contract, so as not to shake the status of the civil law as the basic law of the market economy.

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References

- [1] Huang Wei, Interpretation of the General Provisions of the Civil Code of the People's Republic of China, Law Press, 2020, p. 406.
- [2] Report of the Legal Committee of the Twelfth National People's Congress on the results of its deliberations on the General Provisions of the Civil Law of the People's Republic of China (Draft).
- [3] Supreme People's Court's Proceedings of the Working Conference on Civil and Commercial Trials in National Courts.
- [4] The Second Civil Trial Division of the Supreme People's Court: Understanding and Application of the “Proceedings of the Working Conference on Civil and Commercial Trials of the National Courts”, People's Court Press, 2019, p. 245.
- [5] The First Civil Trial Division of the Supreme People's Court: Civil Trial Guidance and Reference (General Series 85), People's Court Press, 2021, p. 65.
- [6] Wang Limin, "On the Distinction between Effective and Non-Effective Mandatory Provisions - Centering on Article 153 of the Civil Code", Law Review, No. 2, 2023, p. 26-30.
- [7] Leading Group of the Supreme People's Court for the Implementation of the Civil Code: A Complete Guide to the Application of the Chinese Civil Code -- General Provisions Volume (III), People's Court Press, 2022. p. 1348.