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CONTRACT LIABILITY IN COMMERCIAL RELATIONS IN ENGLISH-AMERICAN AND UKRAINIAN LEGAL SYSTEMS

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SUMMARY

The article is devoted to the assessment of the main legal approaches in the field of legal regulation of contractual liability for breach of the economic (commercial) contract in commercial relations in the Anglo-American and Ukrainian legal systems. Comparative analysis of the main principles and forms of contractual liability is carried out. The author suggests the directions of harmonizing of the national legislation of Ukraine with foreign legal base in this field.

Key words: breach of contract, contractual liability, losses, penalty.

ДОГОВОРНАЯ ОТВЕТСТВЕННОСТЬ В КОММЕРЧЕСКИХ ОТНОШЕНИЯХ В АНГЛО-АМЕРИКАНСКОЙ И УКРАИНСКОЙ ПРАВОВЫХ СИСТЕМАХ

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АННОТАЦИЯ

Статья посвящена оценке основных правовых подходов в области правового регулирования договорной ответственности за нарушение хозяйственного (коммерческого) договора в коммерческих отношениях в англо-американской и украинской правовых системах. Проведен сравнительный анализ главных принципов и форм договорной ответственности. Автором предложены основные направления сближения национального законодательства Украины с современной зарубежной правовой базой в данной сфере.

Ключевые слова: нарушение договора, договорная ответственность, убытки, неустойка.

REZUMAT

Articolul este dedicat evaluării abordărilor de bază în domeniul reglementării juridice de răspundere contractuală pentru încălcarea relaţiilor economice (comerciale) în sistemul juridic anglo-american şi ucrainean. Analiza comparativă a principiilor de bază şi formele răspunderii contractuale. Autorul propune direcţii de bază de convergenţă a legislaţiei naţionale a Ucrainei moderne cu cadrul juridi internaţional în acest domeniu.

Cuvinte cheie: încălcarea contractului, răspundere contractuală, daune, pedeapsa.

Formulation of the problem. The active processes of globalization that are taking place in the world and that are chosen by Ukraine's path of integration into the international community can not pass over the problem of the corresponding reformation of the legal regulation of commercial relations, one of the elements of which is the contractual liability for breach of commercial contract. The basis of the international standards of legal regulation of commercial relations is not the whole of international law, which is the result of the analysis and synthesis of national legal order, but also the national legislation of the participating countries. Principal differences between different legal systems require the study of existing legal approaches and ways of legal regulation of this problem in the territory of different countries.

The aim of the article is to carry out a comparative legal analysis of the inherent Anglo-American and Ukrainian contractual rights in the part of legal regulation of contractual liability for breach of commercial contract, the approaches and methods of legal regulation, and a determination of ways to improve Ukrainian contractual law in this part.

Presentation of the main research material. The contractual liability has several functions, each of which under certain conditions may prevail. The most common types of contractual liability are the obligation to indemnity and the obligation to pay a penalty. In the doctrine and jurisprudence of foreign countries the opposite approaches have forms as to solving the problem of the legal consequences of failure or improper performance of the contractual obligation [1, p.143]. The basic principle of Anglo-American contractual law is the concept of justice, which opposes fines, reducing them to the level of genuinely received damages, and this is different from the corresponding provisions of the countries of the continental system of law. The essential

difference lies in the opposite assessment of the conditions stipulated in the contract, which establish methods of monetary compensation: compensation for damage in the Anglo-American contract law is considered as the main means of protecting the interests of the creditor, which, in case of non-fulfillment of the contract, the debtor always has the right to monetary compensation. However, enforcement of commitment in kind is used as an additional measure of liability in the practice of justice courts. The purpose of the court's decision on monetary damages is to put the aggrieved party in the same state as it would have been if the contract had been properly executed [2, p.346]. Losses that have to be reimbursed as a result of a breach of contract are divided into nominal and actually incurred. The ideal case is where the monetary compensation would correspond to the state of the aggrieved party in case the contract had not been violated. Losses are adjudged in order to compensate the damages, but not as a punishment for the harm caused. This is the principle of compensatory contractual liability. In Anglo-American law there is an institution of "nominal" damages (nominal damage) - a symbolic amount that is levied from the debtor in favor of the creditor to confirm the formal right of the latter in cases where actual loss did not occur. The right to compensate damage in Anglo-American law is interpreted quite broadly and includes the possibility of claiming damages in the form of loss of profit, which the aggrieved party was deprived of as a result of a breach of contract. At the same time, the indemnity is analyzed in terms of the property interest of the aggrieved party. Typically, there are two types of property interest that may arise when contracting: "positive" and "negative". The protection of "positive" contractual interest is that the aggrieved party should be placed in such a situation in which it would be in the event of proper execution of the contract. The protection of "negative" contractual interests implies the realization of the right of the aggrieved party to obtain reimbursement of expenses incurred, on the basis of the fact that the aggrieved party should be placed in a position in which it would be if the contract had not been concluded at all. The aggrieved party cannot obligate to indemnity it could have avoided if it had taken the necessary steps to reduce them.

In English law, there is a provision for "pre-agreed damage", the solution of this question depends on the interpretation of a specific agreement with a court decision whether the amount of the contract is a valid assessment of "pre-agreed damage" from breach of contract or whether it has the nature of a fine. In judicial practice, a number of criteria have been developed which are used by courts in resolving the issue of "pre-agreed losses". The penalty shall be the amount of the contingent debt, the purpose of which is to prevent parties from breaching the contract and which does not correlate with the amount of damages, and it is not a consequence of a breach of contract [3, p.107-108]. If the agreed amount by parties is acknowledged, it is not subject to recovery. In such case, the aggrieved party has the right to demand reimbursement of actual damages from breach of contract, even if this amount of damages will be significantly higher than the agreed fine.

American law and jurisprudence generally use the same criteria as English law but with certain peculiarities. The highest value is given to the criterion for evaluating "pre-agreed losses", which is valid only if the agreed amount is reasonable and corresponds to the foreseeable loss. Such approach is used in the Uniform Commercial Code [4, art. 2-718] - a condition that overestimates the amount of anticipated losses and is considered legally void as a penalty. The US case law has developed and it was fixed in the Uniform Commercial Code [4, art. 1-106] the following doctrine of the reliability of damages, which is based on the protection of the "positive" interest: the amount of damage or its sum may be the subject of reasonable predictions only when the fact of damage is proved reliably. The defendant cannot invoke the unreliability of the damage if the difficulty of bringing the damage out is caused by his guilt; the difficulty in establishing the amount of damage is not decisive. It does not require mathematical accuracy to determine the actual amount of damages, it is enough to present the best possible circumstances of the case to prove the damage. The plaintiff can look for "the value of his contract" (the amount of his assessment), and this value can be determined on the basis of establishing the size of the expected benefit. If benefits are found, in cases of impossibility of their direct establishment, they can serve as proof of the existence of losses.

In cases of compulsory conclusion by the aggrieved party of a replacement contract, its losses are mainly determined by the size of the difference between the contract and the replacement contract. The Uniform Commercial Code straightly directs the contract in cases of breach of contract to enter into substitute agreements. Further expansion of this method of determining losses was the emergence of standard formulas for the determination of losses as the difference between the contract price and the market price at the time of proper performance of the contract.

The general principle of compensation to the aggrieved party of all costs in the Uniform Commercial Code is determined by the related losses as any commercially reasonable costs, expenses and commissions related to the suspension of the supply of goods, transportation, storage of goods, as well as the return and resale of goods [4, art.2-710]. Unlike the seller, the buyer has the right [4, art.2-715] to demand the collection of collateral damage. US civil law also considers another type of loss - previously agreed losses, which parties have the right to negotiate in contract

that which must be reimbursed in the event of a breach of contract [6, p.26] and this has a number of advantages. First, for both sides this may facilitate risk calculation, and secondly, for the aggrieved party, this may be the only opportunity to compensate for losses that can not be calculated with a sufficient degree of accuracy. Inclusion in the contract of the condition about the payment of a certain amount of money in case of violation of the contract will not be considered by court if the payment of such amount coincides with the amount of the fine. Often, the condition for a fine is expressed as a condition for pre-agreed losses. At the same time, in Anglo-American law there is a custom to provide in the contract a condition that in case of violation of the contract by the buyer the seller has the right to leave the deposit at the level of the penalty. Thus, the Uniform Commercial uses a legal penalty, which in fact has an appraisal character and takes on a fine that runs counter to the principles of the Anglo-American Contractual Law.

Sometimes it is quite hard to prove the size of the damage, as often the damage does not cover the interests of the lender, so sometimes it is necessary to adopt preventive measures to motivate the debtor to properly fulfill his obligations. In such cases, the contract may include a condition for payment of a certain amount - a penalty. Insolvency may be either a fixed amount of damages in advance or a fine imposed on the party who has breached the contract. In continental law, these functions are not separated. In Anglo-American law, there is a fine for breach of contract and a fixed amount of damages in advance, and whether there is a fine in the concrete agreement or a pre-agreed damage it is decided by the court on the basis of the intention of the parties on the merits of the case. Penalties forfeit's main task is to punish the offender, not to establish the aggrieved party's violated right.

In Ukrainian legislation there are two main concepts of legal regulation of economic (commercial) relations: civil and economic laws. Consequently, the legal regulation of contractual liability for breach of contract is simultaneously the subject of regulation both of the Civil Code (CC) of Ukraine and the Economic Code (EC) of Ukraine. At the same time, the CC of Ukraine considers losses as one of the legal consequences of violation of the obligation, in particular termination of an obligation as a result of unilateral refusal of an obligation if it is established by contract or law, or termination of the contract; change in terms of obligation; payment of a penalty; indemnity and non-pecuniary damage. Article 616 of the Civil Code of Ukraine establishes in the Ukrainian legislation a norm similar to the one extended in foreign law and order - the court has the right to reduce the amount of damages and penalties if the creditor deliberately or carelessly contributed to an increase of the amount of damages caused by the violation of the obligation or did not take measures for their reduction.

The Economic Code of Ukraine considers losses as a kind of economic and legal responsibility of participants in economic relations for offenses in the field of economic activity. Separately, the Civil Code of Ukraine provides a definition of the concept of loss: expenses incurred by a party, loss or damage to its property, as well as income that it has not received, which it would receive in the event of the proper performance of the obligation by the other party. The following are included in the loss: loss of lost, damaged or destroyed property, additional expenses, lost profit, material compensation of moral damage in cases stipulated by law.

In Ukrainian legislation, the Civil Code of Ukraine defines the notion of a penalty as a guarantee of the fulfillment of the obligation. In articles 549-551 it is determined that the penalty (fine, penalty interest) is a monetary sum or other property that the debtor must transfer to the creditor in case of violation by the debtor of the obligation. A fine is a penalty calculated as a percentage of the amount of unfulfilled or inadequate performance of the obligation. Penalty interest is a penalty calculated as a percentage of the amount of the untimely-executed monetary obligation for each day of delay of execution. The right for penalty arises independently from the presence of creditor losses caused by non-fulfillment or improper performance of the obligation. Interest on the penalty is not charged. The amount of the penalty imposed by law may be increased in the contract or the parties may agree to reduce the size of the penalty imposed by an act of civil law, except the cases stipulated by law. The amount of the penalty can be reduced by a court decision if it significantly exceeds the amount of damage and in the presence of other circumstances of significant significance.

The Economic Code of Ukraine provides the following general notion of penal sanctions. It is determined in Art. 230-234 that penal sanctions are the economic sanctions in the form of a monetary amount (penalty, fine, penalty interest), which the participant of economic relations is obliged to pay in case of non-fulfillment or improper performance of economic obligation. The law on certain types of obligations may specify the amount of penalties, where changes are not allowed by agreement of the parties. If the amount of penalties is not specified by law, sanctions shall be applied in the amount stipulated by the agreement. In this case, the size of the sanctions can be established by the contract in percentage terms to the amount of the outstanding part of the obligation, or in a certain monetary amount, or in percentage terms to the amount of the obligation, regardless of the degree of its implementation of the amount of the obligation, regardless of the degree of its implementation, or in a multiple amount to the cost of goods (works, services). In the event of failure to reach agreement between the parties regarding the establishment

and amount of penalties for violating the obligation, the dispute may be resolved in court. If for non-fulfillment or improper fulfillment of the obligation there are penalties, then losses must be compensated in part not covered by these sanctions. In addition, the EC of Ukraine determined that the law or contract may provide for cases where: only penalties are allowed; losses can be charged in full amount over fines; at the option of the lender may be levied or damages or penalties.

Thus the civil and economic legal concepts of legal regulation of commercial (economic) relations differ in terminology, but in general the institute of compensation of losses in the Ukrainian legislation is based on the following general principles: full compensation of damages, reliability, predictability of damage, taking measures for prevention of losses. A more detailed analysis of Ukrainian legislation proves the proximity, the notion of a penalty for a previously agreed loss with a similar approach in Anglo-American law, and also in the presumption that the parties intended to determine in advance the amount of damages that should be recovered.

Conclusions. Legal regulation of contractual liability for violation of a commercial (economic) agreement in the Ukrainian legal system differs from the Anglo-American legal approach conceptually and terminologically. The simultaneous existence of civil and economic legal concepts of legal regulation of contractual liability in Ukrainian legislation significantly impedes enforcement practice. To improve the Ukrainian contract law in this part it is proposed to focus the legal norms on the legal regulation of contractual liability for violation of the commercial contract in the EC of Ukraine, removing them from the CC of Ukraine; bring the terminology in line with international norms; to introduce a simplified way of determining the size of losses like in the Anglo-American law as the difference between the contract price and the market price at the time of execution of the contract by entering into substitute contracts.

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