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SOME ASPECTS OF LOSSES LEGAL REGULATION IN THE LEGISLATION OF FRANCE, GERMANY, AND UKRAINE

ДЕЯКІ АСПЕКТИ ПРАВОВОГО РЕГУЛЮВАННЯ ЗБИТКІВ У ЗАКОНОДАВСТВІ ФРАНЦІЇ, НІМЕЧЧИНИ ТА УКРАЇНИ

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The article conducts a comparative study of national legislation of France, Germany, and Ukrainian legislation in the field of legal regulation of commercial relations in terms of contractual liability for breach of commercial contract. It is proven that the national legislation of Ukraine primarily needs improvement in cases of non-performance and improper performance of the contract, as a consequence of the offense and contractual liability can be considered as an additional obligation, namely: additional rights of the creditor and additional obligations of the debtor.

An analysis of the main principle of continental law – the obligation to fulfill an obligation – was carried out, while the requirement for monetary compensation for damages is considered secondary. The general distribution of damages into compensatory and moratorium damages and the general procedure for their compensation were studied. Damages for compensation are divided into compensatory damages caused by non-fulfillment of obligations in general and moratorium damages caused by late performance.

For moratorium damages, the demand for the fulfillment of the obligation in kind is declared along with the demand for damages; in the case of recovery of compensatory damages, there is no requirement to fulfill the contractual obligation. In continental law, there is no concept of improper performance of an obligation, the consequences of such a violation are similar to the consequences of delay.

An analysis of existing approaches to damages in German and French law: advantages, disadvantages, risks was conducted.

In Ukrainian legislation, compensation for damages is simultaneously the subject of regulation of the Civil and Economic Codes of Ukraine and corresponds to the general principle of full compensation to the injured party without allowing him to enrich himself: reliability, foreseeability of damage, taking measures to prevent the occurrence of damages.

The analysis of the current legislation proved that the economic and legal concept of liability for breach of contractual obligations in Ukraine is generally correlated with the legal norms of continental law countries. In order to increase the effectiveness of the legal regulation of contractual liability in economic relations in Ukraine, we consider it necessary to establish in the legislative norms as a safeguard for the protection of the economically weaker party of the contract the possibility of the court resolving the excess or reducing the amount of the penalty determined by the contract.

Key words: commercial contract, contractual liability, losses, compensatory damages, moratorium damages.

У статті проводиться порівняльне дослідження національного законодавства Франції, Німеччини та законодавства України у сфері правового регулювання комерційних відносин в частині договірної відповідальності за порушення комерційного договору. Доведено, що національне законодавство України в першу чергу потребує удосконалення в випадках невиконання і неналежного виконання договору, як наслідку правопорушення і договірну відповідальність можна розглядати як додаткове зобов'язання, а саме: додаткові права кредитора і додаткові зобов'язання боржника.

Проведено аналіз головного принципу континентального права – обов'язок виконання зобов'язання, при цьому вимога щодо грошової компенсації збитків розглядається як другорядна. Досліджено загальний розподіл збитків на компенсаторні та мораторні і загальний порядок їх відшкодування. Збитки, які мають бути відшкодовані, розподіляють на компенсаторні, заподіяні невиконанням зобов'язання взагалі, та мораторні, заподіяні простроченням виконання. Для мораторних збитків вимога про виконання зобов'язання в натурі заявляється поряд із вимогою про відшкодування збитків; при стягненні компенсаторних збитків вимога про виконання договірного зобов'язання не пред'являється. В континентальному праві відсутнє поняття неналежного виконання зобов'язання, наслідки такого порушення подібні наслідкам прострочення.

Проведений аналіз існуючих підходів до відшкодування збитків в німецькому та французькому праві: переваги, недоліки, ризики.

В українському законодавстві відшкодування збитків є одночасно предметом регулювання Цивільного та Господарського кодексів України і відповідає загальному принципу повної компенсації потерпілій стороні із недопущенням її збагачення: достовірність, передбачуваність шкоди, вжиття заходів для запобігання виникненню збитків.

Аналіз чинного законодавства довів, що господарсько-правова концепція відповідальності за порушення договірних зобов'язань в Україні за загальним підходом співвідноситься із правовими нормами країн континентального права. Для підвищення ефективності правового регулювання договірної відповідальності в господарських відносинах в Україні вважаємо необхідним встановити в законодавчих нормах як запобіжник для захисту економічно більш слабкої сторони договору можливість вирішення судом надмірності або зменшення розміру неустойки, визначеної договором.

Ключові слова: комерційний договір, договірна відповідальність, збитки, компенсаторні збитки, мораторні збитки.

Formulation of the problem. The legal adjustments of commercial relations on the conditions of integration into the European community requires Ukraine to improve national legislation mainly on the part of legal adjustments of contractual responsibility for the breach of commercial contract in the cases of unfulfillment and improper implementation of agreement.

The article's purpose is a comprehensive analysis of losses under contract in the national legislation of some EU countries and Ukraine.

Presenting main material. In continental law, not taking into account the external differences in national law of foreign countries, there is a main principle: the duty to fulfil commitments and to claim pecuniary compensation as property sanction is examined in second rate. Losses that must be recovered are divided into compensative, which are caused by unfulfillment of obligation in general, and moratorium, which are caused by delay execution. For moratorium damages the claim to fulfil obligation in natural are declared together with the claim to compensate damages. For compensative losses the claim to fulfil contractual obligation is not declared. In continental law the concept of improper fulfilment of obligation is lacking, and the consequences of such violation are similar to the consequences of delay execution.

In German and French law, the compensation for losses as a variety of contractual responsibility is generally regulated at the level of general norms of obligation rights within the civil law. In German law the compensation for losses is considered as one of the aspects of compensation for damages as consequence of contract breach. The concept of damages is considered in a comprehensive sense: property destruction, and lost profit can be identified as damages. According to article 252 of German Civil Code [1], lost profit is included in the general volume

of losses. Principle of "total responsibility" is used in the German law: the aggrieved party has a right to demand compensation for all property losses in case of presence of certain cause-and-effect connection with the phenomenon that became the reason of damages. In case the aggrieved party in good time did not promptly take all possible measures for damage prevention, then they have no right to demand the compensation for this part of losses.

In French law it is worked out by judicial practice and assigned in the legislation the institute of forcing to fulfil obligation in natural: when the debtor evades execution of the court decision, the fine for each day of delay of fulfilment is imposed. The size of the fine is set by court discretion and is not limited. The compensation for losses aims to compensate creditor's losses that were inflicted by the breach of contract of debtor. Losses that must be prepaid to the creditor are determined as a loss of creditor, or benefit that they were confined.

In accordance with article 1150 of German Civil Code [1] a debtor is responsible only for losses that were foreseen or could be foreseen during the contract conclusion, except when it could not be fulfilled because of a debtor's wilfulness. In French law two types of losses are identified: the losses inflicted to the debtor from the day of delay execution – moratorium losses that must be compensated even if the obligation was fulfilled, and losses caused by obligation unfulfillment – the compensative losses. The article 1149 of French Civil Code determines the possibility to levy lost profit as direct losses.

It is possible that it will be hard to prove the size of inflicted losses and in such cases for the condition to pay some amount a forfeit is included in contract. In continental law the penalty role of forfeit is the punishment of contract violator, but not in establishing the broken right of the aggrieved party. In German legal system a forfeit is determined as a form of agreement concluded under certain conditions. In French law a forfeit is characterized by a greater compensative orientation. So in article 1229 of French Civil Code [2] it is straightly determined that a forfeit is the infliction of losses that a creditor suffers as a result of unfulfillment of main obligation. The law gives the court the right to diminish or increase the size of the forfeit set by an agreement if it is excessive or undersized, and all other grounds are declared invalid. Thus, a safety point is set for the defence of the economically weaker part of the agreement.

According to the norms of Article 28 of United Nations Convention on Contracts for the International Sale of Goods (1980) (which also is a part of national legislation of the countries, which ratified it) one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention [3]. At the same time in the Article 46 of the mentioned above Convention the buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement [3]. Besides Article 45 gives a possibility to the seller to claim damages which consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract (Article 74) [3]. Thus United Nations Convention on Contracts for the International Sale of Goods is based on the concept of liquidated damages. This concept can be also found in the commercial law of Great Britain and USA.

The variety of approaches to the determination of penalties in different states did not allow the United Nations Convention on Contracts for the International Sale of Goods to establish uniform rules about it. Even though the institution of penalty is not reflected in the United Nations Convention on Contracts for the International Sale of Goods, it does not limit the rights of the parties to establish independently a default clause in the contract. If such a condition is agreed by the parties, then the question of the application of a penalty and its correlation with losses must be resolved in accordance with the norms of applicable national law. Also, it declares that a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated (Article 77) [3].

In the Ukrainian legislation compensation for losses is simultaneously regulated by the Civil and Economic Codes of Ukraine. In article 611 of the Civil code of Ukraine [4] the losses are determined as one of the legal consequences of obligation violation: the legal consequences set by an agreement or law come in force in case of obligation violation, in particular if the obligation is terminated as a result of one side's abandonment of the obligation, if it is set by an agreement or law, or termination of contract; changing terms of obligation; payment of forfeit; compensation for damages and moral losses. But in article 216 of the Economic code of Ukraine [5] the losses are determined as a variety of economic-legal responsibility of both sides of economic relations for offence in the economic field. The cost of the damaged or destroyed property, additional charges, lost income, and material compensation for moral harm are included in the damages structure. In article 616 of the Civil Code of Ukraine foreign laws and order rule are widely set: the aggrieved party must take measures for the reduction of damage as a result of contract breach, and in another case a court has the right to reduce damages.

Thus, in Ukrainian legislation the institution of compensation for losses corresponds to the general principle of full compensation to the aggrieved party without allowance for enrichment: reliability, damages foreseen, and measures for preventing losses.

In Ukrainian legislation, forfeit as a preventive measure of stimulation of debtor is also used for proper fulfilment of obligation and by its nature is an accessory obligation whose main task is to punish the agreement violator, but not to renew infringed rights of the aggrieved party.

Civil Code of Ukraine determines the concept of forfeit as providing obligation of fulfillment (articles 549–551) and also maintains the common concept of forfeit (fine and mulct) as a money sum or other property that a debtor must transfer to the creditor in case of infringement of obligation by a debtor. Economic Code of Ukraine (articles 230–234) determines the penalty sanctions as economic sanctions in the form of money sum (forfeit, fine, mulct), that a participant of economic relations is obliged to pay in case of his infringement of the rules of realization of economic activity, unfulfillment or improper implementation of economic obligations.

Conclusions. To summarize, it is possible to note that economic-legal conception of responsibility for infringement contractual obligations in Ukraine in general is correlated with the legal norms of countries of continental law. In order to increase the effectiveness of the legal regulation of contractual liability in economic relations in Ukraine, we consider it necessary to establish in the legislation, as a means to protect the economically weaker party of agreement, the possibility for the court to decide on the redundancy or reduction of the amount of the penalty specified in the contract.

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