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EXCLUSION OF CONTRACTUAL LIABILITY IN THE ROMAN-GERMANIC SYSTEM OF CIVIL LAW

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Abstract

The article describes the problem of civil liability in contract law within the Roman-Germanic system of civil law. This aspect is essential for maintaining the business reputation and professional status of contract partners. The authors consider cases of civil liability and its variations, as well as cases of non-liability not yet adequately reflected in civil law. Non-liability may include exemption from liability and, in general, its exclusion. An important part of the study is legal clauses allowing non-liability. At the legislative level, the study revealed the concept of exemption from liability, and the conditions for exclusion of liability are indirectly derived from the codified norm. Theories and practices of contractual relationships delimit these terms inconsistently. The presented review of the problem of exemption from liability, its exclusion can be useful for a similar study on the material of domestic contract law since it allows researchers to determine the similarities and differences in the interpretation of the concepts under consideration.

Keywords: Civil law, contract law, contract partners, exclusion of contractual liability, Roman-Germanic system.

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1. Introduction

In the modern period of development of society, the global market economy, such a part of civil law as contract law plays a huge role. The globalization processes in many respects determine the development of economic interaction within the state and between different states, contractual relations are the most demanded in this area of activity.

In legal science contract law described at some length various aspects of a contract as a special form of civil legal relationship: its types, content, conclusion, execution, termination, etc. However, the institution of civil liability, especially for industrial relations, remains poorly understood in both domestic and foreign civil law for contract law.

2. Problem Statement

The problem of civil liability in contract law seems to us to be very relevant since in many respects the stability of economic and production relations, often the business reputation and professional status of partners under the contract, depends on its resolution.

The civil and industrial laws of both Russia and foreign countries described in sufficient detail cases of civil liability and contractual liability as to its part, types of liability. However, as for the aspect of the opposite side of the problem, the civil law has not yet correctly reflected the problem of non-liability.

3. Research Questions

Non-liability may include exemption from liability and, in general, its exclusion. We immediately draw attention to the fact that domestic civil law inconsistently delimits these terms. The same conditions, circumstances, can apply to both the first and second concepts (Braginsky & Vitryansky, 1997; Korshunova, 2007). Some authors, on the contrary, consider this distinction necessary and justified (Bogdanov, 2011; Ogneva, 2012).

4. Purpose of the Study

We will consider this problem in the case of states belonging to the Roman-Germanic legal family since this group of states has a long traditional contract law and has gained quite a lot of theoretical and practical experience to date.

5. Research Methods

In the states of Roman-Germanic law, civil law is an essential part of private law. Germany, France, Switzerland, Italy, Austria and other states take sources of Roman private law as a basis. The central place in the civil law system of these states belongs to the Civil Codes: German Civil Code of 1896, French Civil Code (Napoleon Code) 1804, Swiss Civil Code 1907, Italian Civil Code 1942, etc.

The works of French and German scientists extensively developed the concept of civil liability (Bohrer, 1980, Carbonnier, 1963). In its most general form, French civil law defines responsibility as an

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obligation to compensate for harm (Benabet, 2001). In the works of German scientists, despite various points of view, the main characterizing feature is legal consequences. Thus, contractual liability faces such consequences as failure to fulfil obligations, failure to fulfil obligations on time, improper performance (Bergmann, 2003). Both French and German civil laws distinguish between contractual liability and tortious liability.

It should be noted that in the relevant legislative acts and contractual practice of the states of Roman-Germanic law as well as in domestic civil law, there are no clear criteria for distinguishing the studied concepts of exemption from liability and exclusion of liability concerning contractual relations.

So, for example, German civil law has various terms: Haftungsfreizeichnung or Haftungsbefreiung meaning exemption from liability, Haftungsausschluss meaning exclusion of liability which may apply to the description of the same cases in a contractual relationship (see: Deutsche Anwaltshotline AG portal).

The civil codes of states belonging to the Roman-Germanic legal family give priority to the exemption from liability and, in rare cases, the legislator speaks of its exclusion. We will dwell on this in more detail.

As we know, responsibility occurs in the violation of obligations. The defining condition for liability in contractual relations in the states of Roman-German law is the fault of the debtor according to the Civil Codes; the creditor has to prove only the fact of non-performance or improper performance of the obligation. The debtor himself must refute the guilt (Art. 1147 of the French State Code, § 282 BGB). The legislation does not define guilt, only indicates the forms of its manifestation: intent and negligence. If the debtor wants to discharge from the liability for violation of the obligation, he must prove that there has been a case or the force majeure.

Exemption from liability, as well as its exclusion, is possible only in the presence of certain circumstances provided both at the legislative level and within the framework of a specific contract.

1. The first group of such circumstances includes circumstances upon the occurrence of which the execution of the contract is impossible. In this case, the determination of the person guilty of the impossibility of fulfilling the contractual obligation is crucial. If the person is a creditor, the debtor is relieved of liability (see § 275, § 324 BGB). If the contracting parties of the contract are not related to the occurrence of these circumstances, then the creditor and the debtor are relieved of liability (§ 275, § 323 BGB; Article 119 of the Swiss Federal Law of March 30, 1911, On Amending the Swiss Civil Code, in part five of the Code of Obligations). An example is a situation in a contract of employment: in case of fire, if both parties to the contract prove their innocence, responsibility will not come. In this case, as noted by well-known German jurists Zweigert and Kötz (1996), the principle of reasonable prudence widespread in Roman-Germanic contract law applies.

The circumstances that lead to the impossibility of fulfilling the contract in the civil law of the mentioned states include the range of circumstances with the common name insurmountable or force majeure i.e. these are unforeseen, unavoidable or inevitable circumstances as well as rare, extraordinary circumstances. Moreover, the appearance of these circumstances is external, i.e. they are not genetically related to parties to the contract. The Civil Codes have no definitions of these circumstances; however, it has developed in the practice of the courts. In their most general form, they are interpreted as certain

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events that cannot be foreseen and prevented at the present stage of the society development (Zweigert & Kötz 1996).

These circumstances include various natural disasters: earthquakes, floods, fire, etc, socially resonant events: war, strike, etc, decisions at the state power level, for example, the introduction of an economic embargo, other phenomena, events that represent an insurmountable extraneous force for participants in contractual relations. Upon the occurrence of these circumstances, there is an exemption from liability. Meanwhile, as Butenko (2002) notes, the German Civil Code also provides for situations of stricter debtor liability: he is responsible not only for guilt but also for the case, for example, an overdue debtor (§ 287 BGB), the hotel owner is responsible for the safety of guests' belongings (§ 701 BGB), etc. (p. 17).

In German contract law, the concept of care is very interesting concerning the interpretation of the discussed circumstances. The debtor is always responsible for intent and negligence; Negligence is the failure to comply with the required degree of care by the debtor (§ 276 BGB). Thus, in the case of compliance with the degree of care at the maximum level in the presence of these circumstances, responsibility does not occur.

French contract law more strictly regulated the indicated situation. For exemption from liability, the debtor must prove that the circumstances resulted in the impossibility to fulfil the contract can indeed be called insurmountable, force majeure. Signs of these circumstances are similar to the above. So, Art. 1147 of French Code Civil established the liability of the debtor for default in all cases, except when he proves that the default is due to an external cause that cannot be blamed to him, also, there is no dishonesty on his part. Art. 1148 indicates that there is no reason to recover any damages, that is, the onset of liability, if, due to force majeure or an accident, the debtor encounters obstacles to giving or doing what he was obligated to.

The Italian Civil Code reflects a position close to French contract law.

Thus, the circumstances described in this group are mainly interpreted by the legislation of the states under consideration as exempting from liability, and not as excluding it.

2. The second group of circumstances exempting from liability are circumstances that greatly complicate the performance of the obligation and can, in certain cases, lead to the elimination of the purpose of the contract, when the fulfilment of the counter obligation by the other party becomes meaningless for it with the changed circumstances.

The German legal doctrine enshrined the theory of the basis of the Ortmann transaction, in which the change of circumstances can be considered as a condition for termination of the contract if the expectations of the parties that they counted on when concluding the contract cannot come. Therefore, exemption from liability follows from it. The Imperial Supreme Court uses this theory in its practice. However, in most cases, the decision to terminate the contract, to exempt from liability to fulfil the contract as a result of unforeseen difficulties, depends more on how the parties share the risks of such circumstances in one form or another of the contract (Zweigert & Kötz 1996).

The French court practice, as already noted, considers unforeseen circumstances that are not related to the debtor, which are valid for a long time and which cannot be eliminated, as exempt from liability. Moreover, the debtor must prove the existence of these circumstances. The same tough stance

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applies to cases with dramatically changed circumstances. Even in the case of a huge degree of difficulty in the execution of the contract as a result of the changed circumstances, the cancellation of the contract and release from liability is possible only on the condition of proof of insuperable nature, in the narrow sense, of these circumstances (Zweigert & Kötz 1996).

As a result, the practice of concluding contracts reflected this rigidity in the development of the system of so-called reservations: contracts as separate provisions began to include reservations on strikes, currency clauses, etc. with the aim of a clear distribution of risks and the degree of responsibility between the parties.

Belgian contract law has a similar position. The position of Italian contract law is somewhat different. Art. 1467 and subsequent articles of the Civil Code of Italy determine the significance of the changed circumstances concerning the contract. These circumstances are relevant concerning long-term contracts or regularly valid long-duration contracts; they require consideration provided that the execution of the contract becomes extremely burdensome for any party and these circumstances are unexpected, unforeseen. In this case, the parties are exempted from liability, and the court may terminate the contract. However, there are special restrictions: difficulties associated with the execution of the contract should go beyond the usual risks, and the parties should agree to this (Zweigert & Kötz 1996).

Thus, the contract law of the states of the Roman-Germanic legal family reflected the problem of the consequences of various circumstances, their abrupt changes for the contract execution and, accordingly, for the institution of civil liability of the parties. French law adheres to the most stringent position and interprets the unforeseen circumstances rather narrowly, in particular, insurmountable circumstances not always exempt from liability (Article 1772 of the French State Code). An exception to judicial practice is only for contracts whose execution, based on the circumstances, can be stopped for a long time, and this will contradict, for example, state economic interests. As a result of consolidating such a position, the French contract law has a developed system of special reservations in the contract structure.

6. Findings

It should be especially noted that in the contract law of the studied states not only at the legislative level but also contractual practice regulates the issue of exemption from liability/exclusion of liability. So, it is quite common that the parties agree within the framework of a specific agreement on conditions that exempt from liability or generally exclude liability. Typically, in these conditions, the contracts list examples of circumstances that exempt/exclude it. Moreover, often the interpretation of these circumstances as exempting or excluding liability depends on the established tradition within the framework of a certain type of contract or the position of the parties.

For example, German practice relates the same circumstances to both exempting conditions and excluding liability, as evidenced, for example, by the information posted on legal portals, by standard models of contract designs. The conditions of a particular transaction and the assessment of the degree of probability of their occurrence by the parties to the agreement in the performance of the agreement determine in many ways the range of such circumstances.

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In the contract law of the studied states, the structure of the contract can highlight general reservations which indicate, in general, without detailing, the insurmountable nature of the circumstances that relieve the debtor from liability and special reservations that detail these circumstances. As Beitzke (1967) notes, if the parties to the contract use only the very concept of superior strength or force majeure in it, without revealing their meaning, then it is possible to apply the interpretation that has developed in judicial practice regarding the meaning of these terms. However, according to Fontane (2001), if the parties have fixed the definition of these concepts in the contract or listed the circumstances that apply to them then the agreed provisions should be guided first; the onset of other circumstances not specified in the contract will not have any significance for the exemption of the debtor from liability.

Specific reservations give more opportunities to parties of a contractual relationship in the distribution of risks relating to liability. However, if they intersect with the general concept of force majeure, then there is a danger of a narrower interpretation of the force majeure concept compared to that established by judicial practice.

German legal practice for contracts has strict legal liability. Therefore, the parties to the contract often try to agree on the reduction or even exclusion of legal liability. However, the following problem often arises here: many contracts contain only general exclusion clauses. We give an example from practice. The Higher Regional Court (OLG) of Karlsruhe gave a legal assessment to the clause of the contract on the exclusion of liability. The contract was concluded between the organizer of the driving training and the participant in the training and included, in particular, the following clause: The liability of the organizer and the executors appointed by him, except for cases of intentional and gross negligence, is excluded. During the execution of the contract, the training participant damaged his car, but neither he nor anyone else was injured. The participant demanded compensation from the organizer who refused to fulfil the requirement referring to the clause of the contract on the exclusion of liability. However, in this case, the court was guided by § 305-310 BGB and found that the clause on the exclusion of liability in the contract was formulated in the most general form without detailing the circumstances, therefore, the organizer bears full responsibility including even for minor negligence, and it does not matter that the participant was not injured at all, and only his car was slightly damaged. The clause of the contract is not valid because there is no differentiation of circumstances and the intentional and gross negligence.

Many German lawyers emphasize that such a clause of the contract as the exclusion of liability should be applied prudently. So, the contract may have a separate clause on the exclusion of liability, in particular, for slight negligence. However, they do not recommend completely excluding liability but recommend limiting it to a certain amount, for example, the total amount of the agreed costs or the insurance amount of the service provider. As a result, the contract will be more attractive in insurance coverage, there will be no risks when placing insurance expenses (Seiler, 2015).

The contract may exclude liability for indirect damages that did not arise directly from the event leading to damage in the framework of the contract.

Thus, in the contract law of the studied states, the contract designs provide for separate clauses on the exemption from liability, or, less common, on the exclusion of liability. In some cases, as shown by the materials of electronic legal portals, there is a non-distinction between these concepts.

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3. In the following group of circumstances, we will separately consider cases of exemption from contractual liability/exclusion of liability concerning certain types of contracts on the example of Germany and France.

Germany and France, like many European countries, are states with highly developed economic relations and developed mechanisms of market regulation. Accordingly, one of the most popular types of contract is the sales contract and supply contract. Many provisions of these agreements are regulated by the German Civil Code, German Commercial Code, and the Civil Code of France.

Thus, the German Commercial Code cites the following circumstances exempting/excluding liability:

1) unavoidable circumstances. Meanwhile, German law attaches decisive importance to such a feature as the care of a person who is relieved of responsibility: (1) The Commissioner is liable for the loss and damage of goods stored by him unless the loss or damage is based on circumstances that cannot be prevented by the care of a decent merchant (§ 390 HGB); (1) The carrier is liable for losses arising from the loss or damage of goods during the period from acceptance to delivery or as a result of delay in delivery, unless loss, damage or delay is based on circumstances that could not be prevented through the care of a respectable carrier (§ 429 HGB); The railway is liable for damage arising from delays in delivery unless the delay arises from an event which it could neither cause nor prevent (§ 455 HGB);

2) failure to provide the second party to the contract with the necessary information on the subject matter/product of the contract: (2) A carrier is only liable for the loss or damage of jewellery, art objects, money or securities if this property or the value of the goods were indicated to him upon delivery for carriage (§ 429 HGB);

3) force majeure, the presence of fault of another person, the shortcomings of the cargo/packaging: The railway is liable for damage resulting from the loss or damage of the cargo during the period from receipt for transportation to delivery except in cases where the damage was caused due to the fault of the railway not indicated by the person authorized to dispose of or due to force majeure, shortcomings packaging or special defects of the cargo, namely internal damage, loss, ordinary leakage § 454 HGB);

A specific contract can directly name these circumstances. So, in contractual relations regarding the mentioned countries, it is quite common to include conditions in contracts that reduce the seller's liability for the supply of goods of inadequate quality or even cancel liability.

However, contracts involving the consumer have a tougher stance. In addition to special rules aimed at protecting consumers, as an addition to contractual terms that reduce liability for breach of contract, France also has general rules on the content of obligations including a rule on the content compliance of contractual obligations with the principle of good faith (see paragraph 3 of article 1134 of the French State Code; Article 1382 of the French State Code - the general rule of responsibility). According to the French Civil Code, the seller's liability is excluded only for obvious defects, the presence of which the buyer could see for himself (Article 1642 of the French State Code).

In German contract law, legal norms determine the liability institution and the content of general terms of transactions or standard terms of contracts (see: § 305-310 BGB). In this case, we are talking about the fact that a party proposing standard terms of an agreement cannot, as a result of their use, radically change the fair balance of interests of the parties created by legislative regulation harming the

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interests of its counterparty. There is also a general rule regarding exclusion/retention of liability presented in § 444 BGB: The seller cannot refer to an agreement according to which the buyer's rights related to the defect are excluded or limited, since he fraudulently conceals the defect or assumes the guarantee of the quality of the goods, i.e. in this case, such an agreement is not valid (Lizunkov et al., 2020).

The exemption rules for sales contracts are also enshrined in an international document such as the Vienna Convention on Contracts for the International Sale of Goods, 1980. Art. 79 of this document sets forth the following rule:

1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences (Davis et al., 2017; Pereverzeva & Shamne, 2017);

2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him;

3) The exemption provided by this article has effect for the period during which the impediment exists.

7. Conclusion

Thus, the analysis of such a significant aspect in the framework of the institution of civil liability as exemption from liability/exclusion of liability concerning the contract law of the states of the Roman-Germanic legal family showed the following. Theories and practices of contractual relationships delimit these terms inconsistently (Pereverzeva & Shamne, 2017). The legislative level determines primarily the concept of exemption from liability, the conditions for exclusion of liability, as a rule, are not directly called, but derived from the codified norm. Such characteristics of the parties to the contractual relationship as care and good faith have a decisive role. France takes the tough stance on the issue of exemption from liability, its exclusion.

Contractual practice notes a confusion of the above concepts. Contract designs may have both an exemption from liability and an exclusion of liability. The clause on the exclusion of liability, as evidenced by examples from judicial practice in Germany, requires careful differentiation of the degree of negligence (Rebrina & Shamne, 2020; Rebrina & Shamne, 2019; Shamne & Shishkina, 2017).

The presented review of the problem of exemption from liability, its exclusion can be useful for a similar study on the material of domestic contract law since it allows researchers to determine the similarities and differences in the interpretation of the concepts under consideration and, possibly, consider the experience of the states of the Roman-Germanic legal family concerning, for example, characterization as the degree of care "of the participant in the contractual relationship.

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