NOVELS OF LEGISLATION ON CIVIL-LEGAL LIABILITY

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Abstract: The research objective is to analyze the changes in the Russian civil legislation regulating civil-legal liabilities. The research methods include comparative method, analysis and synthesis, induction and deduction, and formal-logic method. The authors make a deep analysis of the norms regulating the forms of civil-legal liability under fundamental reforming of the Russian civil legislation since adoption of the Conception of the Civil Legislation Development in 2009 till present. The novels related to the forms and grounds for civil-legal liability are paid special attention to. The previous and current legislation norms are compared, related to loss recovery, payment of penalty, interests for the use of monetary asserts and compensation for the moral damage. The study of the reforms' preliminary results enables to assess the efficiency of the Russian civil legislation. In particular, such complicated issues have been solved as the possibility to reduce the penalty if it is disproportionate to the consequences of a breach of law and the possibility to compensate the moral damage to juridical persons. The legal analysis of the novels of civil-legal liability forms enabled the authors to show the logic of legislation and the prospects of practical development of these norms. **Keywords:** civil-legal liability, losses, penalty, moral damage, legally valid harm-doing.

1. INTRODUCTION

Presently, the civil-legal liability, as well as the civil law in general, has undergone signification modifications due to the global changes in the civil legislation. Today, the Civil Code of the Russian Federation (further – CC RF) contains quite a lot of new norms aimed at increasing the efficiency of civil-legal liability. These changes refer to almost all aspects of civil-legal liability. The objective of this paper is to analyze the changes in the civil legislation regulating civil-legal liabilities. The paper focuses on two most relevant novels referring to the forms and grounds of civil-legal liability.

2. METHODS

The analysis of civil-legal liability is based on the works by such Russian researchers as V.V. Vitryanskiy, B.M. Gongalo, A.G. Karapetov, K.O. Pavlova, I.Yu. Safonov, A.A. Sobchak, and others. The methodological basis of the research includes such methods of scientific cognition as comparative method, analysis and synthesis, induction and deduction, and formal-logic method. The comparative method was used to compare the provisions of various normative-legal acts. The analysis and synthesis, induction and deduction helped formulate definitions of various notions. The formal-logic method was used to formulate the conclusions of the research.

3. RESULTS AND DISCUSSION

The main conclusions of the research of analysis of the novels of the civil legislation on civil-legal liabilities are the following:

1. The traditional forms of civil-legal liabilities remain in force, such as loss recovery, payment of penalty, interests for the use of monetary asserts and the loss of advance money.

2. The amount of the losses to be recovered should be determined with a reasonable degree of credibility. The court cannot refuse to satisfy the creditor's demands to recover the losses caused by non-execution or improper execution of the liabilities on the grounds that the amount of losses cannot be determined with a reasonable degree of credibility.

3. A novel of legislation is the rule that if the non-execution or improper execution of the contract by the debtor entailed its pre-term termination and the creditor signed a similar contract instead, then the creditor is entitled to demand from the debtor the recovery of losses in the amount of the difference in the price stipulated by the terminated contract and the price of the like goods, works and services on the contract signed instead of the terminated one. At that, the satisfaction of the demands to recover such losses does not exempt the party from recovering other losses caused to the other party.

4. Till now, the complicated issue has not been solved, referring to the possibility to reduce the interest if it is disproportional to the consequences of the breach. The interest stipulated by Article 395 CC RF serves as an offset to recover the losses. The losses should be recovered only if they exceed the sum of interest and only in the amount exceeding the above sum. If the contract stipulates a penalty for non-execution or improper execution of a monetary obligation, the interest cannot be exacted unless otherwise stipulated by law or contract.

5. Granting the courts the right to reduce the excess penalties is a prerogative of a legislator. It stems from the constitutional meaning of justice but is not an obligation of a court.

6. The legislator finally finished the lingering dispute on compensation of moral damage to juridical persons. Currently, it is impossible to apply the provisions on compensating moral damage for protecting the business reputation of juridical persons.

Traditionally, the forms of civil-legal liabilities are loss recovery, payment of penalty, interests for the use of monetary asserts and the loss of advance money. All these forms have undergone significant changes due to the changes in civil legislation. The main universal form of civil-legal liability is loss recovery which can be applied in all cases, unless otherwise specified by law or contract, and can be also well applied in combination with other forms of property liability. The concept of losses defined in Article 15 of the RF Civil Code remains the same. The new interpretation of application of Article 15, contained in the Statement of the Plenum of the RF Supreme Court No. 25 of 23 June 2015 "On applying some provisions of Section 1 of the first part of the Civil Code of the Russian Federation by courts" states that, when applying Article 15 of the RF Civil Code, it should be taken into account that, as a general rule, a person whose right was violated can demand complete recovery of the incurred losses. The losses can be recovered in smaller amounts in the cases stated by law or contract within the limits specified by the civil legislation. For example, the legislation on transportation imposes only the recovery of the real loss in case of damage, destruction or deterioration of cargo, while the loss of the expected gain is not recovered [1; pp. 397–427].

The general rule given in the legislation states that the losses must be fully recovered. It should be noted here that the real losses include both the costs actually incurred by a person and the costs which this person must cover to restore the infringed right. For example, the case can be that new materials were or will be used to repair the property damages of claimant despite the fact that the property price increased or can increase in comparison with its price prior to the damage. One should also consider that the claimant's property price decrease in comparison with its price prior to the liability violation or damage done by a respondent is a real damage even when this decrease can directly be seen only during the alienation of this

property in future (for instance, loss of commodity value of a car damaged in a car accident) (Clause 13, Statement of the Plenum of Supreme Court No. 25).

Loss of profit is the second type of losses. By implication of Article 15 CC RF, the loss of profit is the income, which was not obtained, by which the property mass of the person, whose right was violated, would have increased if there had not been any violation. The Supreme Court pays attention to the fact that, since the loss of profit is the income never received, and its calculation submitted by the claimant is of probable nature and typically approximate, then this circumstance cannot serve as the reason to dismiss a claim (Clause 14, Statement of the Plenum of the Supreme Court No. 25). If a person who infringed the right obtained some profit from that, then the person whose right was infringed is entitled to demand recovery alongside with other losses of profit in the amount not less than such profit obtained by the person who infringed the right. In this case, the claimant must prove that the respondent is the very person whose action or inaction entailed the damage, as well as the facts of violation of rights or incurring the damage. Loss recovery in full implies that as a result of its recovery the creditor must be put in the position in which they would have been if the liability had been properly fulfilled.

Legislation novel is the rule stated in Clause 5, Article 393 of the RF Civil Code, meaning that the amount of the recovered losses must be based on the reasonable degree of credibility. In this case the amount of the losses to be recovered is defined by the court with due regard to the circumstances of the case, based on the principles of justice and proportionality of the liability to the violation. Clause 12 of the Statement of the RF Supreme Court No. 25 contains the similar rule.

One more novel of loss recovery is the rule in the new Article 393.1 of the RF Civil Code concerning the loss recovery in case of contract termination. If non-execution or improper execution of the contract by the debtor results in the early termination of the contract, and the creditor signs a similar contract instead, the creditor has the right to demand the debtor to cover the losses in the amount of the difference between the price specified in the terminated contract and the price for the comparable goods, works or services in accordance with the terms of the contract signed instead of the terminated contract. If the creditor does not sign a similar contract instead of the terminated one, but there is the current price for the comparable goods, works or services in regard to the presupposed execution of the terminated contract, then the creditor has the right to demand the debtor to cover the losses as the difference between the price specified in the terminated contract and the current price. Today, the law defines the current price as the price taken at the moment of the contract termination for the comparable goods, works or services in the place where the contract was to be fulfilled, and in case the current price is absent in the specified place – the price which was applied in a different place and can be a reasonable substitution with the account of transportation and other additional costs. At that, the satisfaction of the demands for loss recovery does not exempt the party from the recovery of other losses incurred to the other party.

Payment of the interests for the illegal use of another person's monetary asserts is one more form of the civil-legal liability being significantly changed. The issue of the legal nature of such interests has not been unequivocally answered in the juridical literature. There is an opinion that the interests introduced by Article 395 of the RF Civil Code are a standard payment for the use of another person's money for the time of its actual use. Another point of view is that these interests should be referred to the measures of civil-legal liability [2]. However, it is also debatable what position they occupy among the measures of civil-legal liability. Some authors stick to the opinion that the interests introduced by Article 395 of the RF Civil Code are legal penalty, while others categorize them as a type of losses; still others be-

lieve them to be an independent form of the civil-legal liability alongside with penalty and losses. In our opinion, the interests introduced by Article 395 of the RF Civil Code can be considered an independent form of civil-legal liability. Unlike other objects of civil law, money has a peculiar feature under standard civil circulation, that is, to bring profit – bank interest accrual. Therefore, illegal repossession or expenditure of another person's monetary asserts mean that the creditor suffers specific negative consequences – bank interest accrual.

According to the previous legislation, the amount of bank interest accrual was determined on the basis of the Russian Central Bank discount rate for credit resources provided to commercial banks (refinancing rate) as of the day of execution of the monetary liability. The acting legislation assumes that the amount of the interests is determined by the acting bank interest average rate for private deposits published by the Bank of Russia and being active in the appropriate periods in the creditor's place of residence or in the place of creditor's location, if the creditor is a legal entity. This procedure for the interest calculation is applied unless another amount of the interest is stipulated by the law or contract. In our opinion, such calculation of interest claimed in accordance with Article 395 of the RF Civil Code is more appropriate. The interests are accrued on the main capital sum of the debt only and must not be accrued on the interests for the use of another person's monetary asserts. Clause 4 of Article 395 of CC RF stipulates that calculation of interest on interest что начисление процентов на проценты (compound interest) is not allowed, unless otherwise stated by law. For the liabilities fulfilled while the parties execute their business activity, the application of compound interest is not allowed, unless otherwise stated by law or contract.

Besides, today the complicated issue of the possibility to reduce the interests if they are disproportional to the damage consequences is solved. Earlier, the possibility to reduce these interests was not regulated by the legislation; Clause 7, Statement of the Plenum of the RF Supreme Court of the RF Supreme Arbitration Court No. 13/14, introduced the possibility to reduce the interests for the evidently disproportional consequences for the past due monetary obligations. The new revised version of the RF Civil Code presumes that if the interests sum to be paid is evidently disproportional to the consequences of the obligation violation, then the court, following the petition filed by the debtor, has the right to reduce the interest stated by contract but only to the sum not less than the one defined from the previously stated interest rate. The interests stated in Article 395 of the RF Civil Code serve as an offset to recover the losses. The losses must be recovered only when they exceed the sum of the interests and only in the part exceeding this sum. If the agreement of the parties presupposes the penalty for non-execution or improper execution of the monetary liability, the interests are not subject to recovery, unless otherwise specified by the law or contract.

Penalty is one more form of civil-legal liability which should be considered in more detail. Article 330 CC RF, which contains the notion of penalty as the monetary sum stipulated by the contract, to be paid by a debtor to a creditor in case of non-execution or improper execution of the liability, including delay of execution, has not been changed. At the same time, Article 333 CC RF, stipulating the amount of penalty, was revised. First of all, it should be noted that the possibility to reduce the amount of penalty at court is very useful and important for the following practical reasons:

1. This mechanism counteracts the groundless enrichment of one party at the expense of another. This provision was also reflected in the judicial practice. For example, the 15th Arbitration Appellation Court in its Statement of 4 July 2013 No. 15AP-6839/2013 in case No. A53-3314/2013 pronounced: "No one shall derive advantages from their illegal behavior. Penalty is the sanction for violating liability, not a preferential crediting of a respondent. In

case of groundless reduction of a penalty, the due execution of a liability becomes economically inexpedient for the debtor, as the rate for using the creditor's monetary assets will be much lower than the market crediting rate".

2. Compliance with the civil-legal principles of equality and balance of the parties' interests, as well as with the general legal principle of just and adequate balance between offense and punishment severity.

3. Compliance with the compensational nature of a penalty as a measure of liability.

4. Giving protection to the weaker party, taking into account the low legal culture of many subjects of the civil circulation, in order to prevent the dishonest use of the knowingly weak position of a party by the juridically more advanced party *pro domo sua*.

The rule on penalty reduction is included into the legislations of most developed countries, which demonstrates the importance of this mechanism for the balanced development of civil-legal relationships. However, the idea of penalty reduction has its opponents. Constitutional Court of the Russian Federation has repeatedly faced and continues to face [3] the attempts to recognize this mechanism as contradicting the Constitution, but the RF Constitution Court consistently recognizes that the fact that the courts are given the possibility to reduce the excessive penalties is the legislator's prerogative, it corresponds to the essence of the RF Constitution and is the result of the constitutional meaning of justice [4; P. 91].

When studying the norms of CC RF, one may notice that, besides Article 333 CC RF, there are a number of other legislative mechanisms with which a court may control the fairness of specific contract terms (Art. 10 CC RF demands refusing to protect the creditor's rights if the creditor abuses these rights; Art. 179 CC RF allows a court to recognize a deal or its part as invalid on the grounds of its bondage character, etc.). [4; P. 90] These mechanisms, different in their nature, though they contradict the *pacta sunt servanda* principle, are aimed at restoring justice and balance of interests of the parties.

At the end of the 1990s, there was an opinion that the reduction of penalty in cases it is evidently disproportional to the creditor's losses is an exclusive prerogative of a judge. [5] This approach was applied in judicial practice for quite a long time, and in 1997 it was stipulated by Clause 1 of the Information Letter of the General Committee of the RF Supreme Arbitration Court No. 17 of 14 July 1997 "Overview of the practice of applying Article 333 of the RF Civil Code by the Arbitration Courts". Thus, the clarifications made by the RF Supreme Arbitration Court require the courts, on their own initiative, to check the adequacy of the penalty when making the decision to recover it and, if necessary, to reduce it up to the proper amount justified by the court.

According to V.V. Vitryanskiy, although the structure of Article 333 of the Civil Code is a necessary element of the civil law, and the reduction of the penalty amount by court is "a desire to provide both legally valid and fair decisions by arbitration courts" [7; P. 35], it inevitably violates the basic civil-legal principle of discretion (the principle of the free exercise of material and procedural rights by the parties to legal proceedings) and autonomy of the parties, and very often contradicts the procedural principle of competitiveness of the parties. This factor implies that this measure must be an exception from the rules and be applied in rare cases, when the court non-involvement evidently impacts the right decision and unjustifiably violates the rights of one of the parties [8; P. 106].

However, in practice, the interpretation of Article 333 of CC RF, unfortunately, implied transformation of the court's right into its duty. But ignoring the exclusive character of penalty reduction and its interpretation as the court's duty has resulted in the opposite effect –

instead of protecting the weak party, the court started to groundlessly interfere into the private contract relations of the parties, and infringe the principle of the freedom of contract in order to reduce the amount of the penalty agreed upon by the parties in the situation when the creditor initially counted upon getting profit and wanted to obtain additional guarantees of getting the profit under any foreseeable circumstances [9].

Thus, it is extremely important to observe the balance between the principles of discretion, autonomy of the parties' wills and efficiency of the infringed rights protection, on the one hand, and the principles of justice and adequacy between the offence and punishment severity, on the other hand [pp. 213–218.]. Special attention should be paid to the issue of what exactly should a court consider in order to determine the evident inadequacy of the penalty to the creditor's losses and to make a decision on reducing the penalty amount. For example, in Clause 42 of the joint Statement of 01 July 1996 No. 6/8, the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation marked that the amount of penalty can be reduced by a court only if the penalty due is evidently inadequate to the consequences of the liability violation. When estimating such consequences, the court may take into account, among others, the circumstances not directly related to the consequences of the liability violation (the price of goods, works and services; the value of the contract, etc.). In 2003, the Supreme Court of the Russian Federation (further – SC RF) in its "Overview of the judicial practice of the Supreme Court of the Russian Federation on civil cases" clarified that, when applying Article 333 of the RF Civil Code, a court should take into account the degree of execution of a liability by a debtor, the property status of the claimant, as well as not only property but also any other relevant interests of the respondent.

Since 2010, judicial practice of applying Article 333 of the RF Civil Code started changing significantly. With no common opinion on the issue of the independent reduction of the penalty amount by a court, the RF Supreme Arbitration Court had to articulate its own opinion in the Statement of the Presidium of the RF Supreme Arbitration Court No. 801/1 of 22 October 2013; thus, this Statement became the final word in the debate on who should initiate reducing the penalty amount.

As for the criterion to define the proportionality of the penalty to the consequences of the liability violation and to identify the amount which is enough to cover the creditor's losses, the Plenum of the RF Supreme Arbitration Court states in Clause 2 of Statement No. 81 the possibility for a court to consider a double discount rate of the Central Bank of the Russian Federation (further – CB RF) acting at the time of such violation.

Thus, we can say that, since 2010, a new approach in hearing suits on penalty recovery has been developed in the law enforcement practices in Russia. This approach takes into account a special character of penalty reduction mechanism applied by the courts and limits the discretionary powers of the courts. Also, the law enforcement bodies refuse to interpret the court's authority to reduce the penalty as its duty, which is well-grounded and complying to the literal meaning of Article 333 CC RF ("If the penalty due is evidently inadequate to the consequences of the liability violation, the court is entitled to reduce the penalty"). In our opinion, the approach applied since 2010 complies with the principles of reasonability and justice, takes into account the legal nature of penalty and facilitates making legal and well-grounded decisions.

The changes into the Civil Code of the Russian Federation in accordance with the Federal Law "On introducing the changes into Part 1 of the Civil Code of the Russian Federation" came into effect from 1 June 2015. Article 333 of the RF Civil Code stipulating the reduction of penalty amount was revised as "If the penalty due is evidently inadequate to the

consequences of liability violation, the court is entitled to reduce the penalty if the debtor appeals for such a reduction". In the revised version a legislator stipulated both alternatives of the existing law enforcement practice for cases on penalty reduction by a court and suggested a mixed alternative [11; pp. 190–206.]. Apparently, a legislator's alternative was based on the knowingly weaker position of physical persons within the legal procedure, compared to the professional subjects of civil law – organizations. The objective is to protect the weaker participant of a legal procedure, and it is an honorable objective, especially taking into account that physical persons quite often face penalty in legal procedures (for example, in cases on consumer rights protection). Now it is rather difficult to predict the results of this practice, we hope for a positive result.

The second group of novels which one should focus on is related to the grounds for the civil-legal liability. Traditionally, the ground for civil-legal liability is a civil offense characterized by the following conditions: losses, unlawful conduct, causal connection between the above, and the guilt of the offender.

Civil-legal liability occurs as a consequence of unlawful conduct, but the losses of the victim may also occur as a result of lawful actions, thus, one may speak of reinforcement of the compensatory impact of the civil in general, not only the civil-legal liability. Civil legislation assumes that the lawfully caused damage can be recovered only in cases and in accordance with the procedures directly specified by law. Therefore, the liabilities in recovering the lawfully caused damage arise only in cases introduced by law [12; pp. 46–58]. By their juridical nature, they cannot be viewed as a form the juridical liability implementation, but are rather protection measures, since there is no wrongfulness and no guilt of the person who caused such damage.

In the overwhelming majority of cases, the lawful damage is caused during execution of the functions of state bodies and local government authorities, for example, in case of withdrawing land for public needs, in case of killing animals to prevent epizooty, or in case of requisition. Therefore, the introduction of an article of CC RF is well justified, which stipulates the general norm on compensating the damage incurred to the personality or property of a citizen or the property of a legal entity through the legally valid actions of such bodies. On 30 December 2012, a new Article 16.1 was introduced, stating the compensating the damage incurred through legally valid actions of the public bodies and local government authorities [13; pp. 19–25]. The Statement of the Plenum of the RF Supreme Court notes that the possibility of this recovery is stipulated, for example, by Articles 279, 281, Clause 5 Article 790 of the RF Civil Code, Clause 2 Article 18 of the Federal Law No. 35-FZ of 6 March 2006 "On counteracting terrorism" (Clause 16).

Guilt is another subjective condition necessary for the attachment of civil-legal liability. Unlike in the criminal law, presumption of guilt of a wrong-doer is valid in the civil law. This is due to the fact that guilt is not a measure of liability; the subjective attitude of a person to one's illegal behavior is not significant for compensating the losses of the civil circulation participants. [14; pp. 67–74.] A wrong-doer is considered to be guilty if he/she does not prove the absence of guilt. Statement of the Plenum of the RF Supreme Court No. 25 notes that "a person having violated a liability proves the lack of guilt" (Clause 2 Article 401 of the RF Civil Code). According to the general rule, a wrong-doer is freed from damage recovery, if he/she proves that the damage is done through no fault of his/hers (Clause 2 Article 1064 of the RF Civil Code).

Presently, the number of cases has increased when liability arises regardless of guilt. For example, people engaged in entrepreneurial activity, owners of the sources of increased danger, professional keepers and other people become liable independent of guilt. If a person

is liable for the liability violation or for harm-doing independent of guilt, then the person has to prove the circumstances justifying their freeing from this liability (Clause 5, Statement of the Plenum of the RF Supreme Court No. 25); for instance, they may prove that harm is done due to the acts of God or the criminal intent of the affected party.

Losses are one more condition characterizing a wrong-doing. Losses in the civil law are both the main form of liability and the necessary element of an offense, provided doing the harm is its result. The notion of damage is a more general notion in relation to the losses; damage is interpreted as the negative property consequences of the offense. The property damage was considered above, when the forms of liability were characterized; now it is necessary to focus on the issue of moral damage compensation [15; pp. 4–8]. The notion of moral damage, which is generally interpreted as physical or moral sufferings, has not changed [16; pp. 4–8]. However, a legislator finally finished the lingering dispute on compensation of moral damage to juridical persons. This issue has for a long time been arising numerous questions. [17; pp. 147–154] The position of the RF Supreme court was articulated in the Statement of the Plenum of the RF Supreme Court No. 3 of 24 February 2005 "On court practices in the suits on protection of honor and dignity of the citizens", which stipulates that the rules regulating the moral damage compensation due to distribution of the information damaging the business reputation of a citizen are also applied in cases of distribution of this information regarding a legal entity (Clause 15). The position of the RF Supreme Arbitration Court regarding the possibility of moral damage compensation was not as straightforward. However, the Federal Law of 02 July 2013 introduced some changes to Article 152 of the RF Civil Code, which state the impossibility to apply the provisions of moral damage compensation to protect business reputation of legal entities. In our opinion, this legal regulation is correct since the negative consequences for a legal entity – an artificially created subject of law – due to damaging its business reputation cannot be equaled to the moral and physical sufferings of a citizen.

4. CONCLUSIONS

Thus, the paper views the main provisions of the reform of the RF civil law related to civil-legal liability. The reform results in this sphere are described in brief. The positive achievements in the law-enforcement practice and its role in establishing the unified application and interpretation of the civil law norms on liability are emphasized. Surely, these are not all changes concerning civil-legal liability, there are more than that, and they should be scientifically analyzed and tested.

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