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LOSS INDEMNITY AS A LEGAL IMPLICATION OF CONTRACTUAL DELINQUENCY

The legal category of loss indemnity as a legal implication of contractual delinquency was considered in the scientific article. The comparative legal analysis of the category «loss indemnity» in Ukraine and some countries of the European Union was made. Also there was given a definition of «loss indemnity» as a legal implication of contractual delinquency.

Key words: loss indemnity, legal implication, contractual delinquency.

Problem statement. The humanity has always faced the need to recover losses. Since the establishment of commodity-money relations in society the issue of protection of rights and legitimate interests of participants of these relations has become particularly relevant. One of the most ancient and fundamental institutions in the protection of violated rights is the institute of loss indemnity which safes its value to this day.

The analysis of recent studies and publications. The problem of loss indemnity was contemplated by scientists in the framework studies protecting civil rights and interests liable in civil law. Certain aspects of the concept of loss, the grounds and procedure for their compensation were considered in the works of scholars such as T. V. Bodnar, I. O. Dzera, I. S. Kanzafarova, V. M. Kossak, A. A. Kot, I. E. Kras'ko, D. V. Primak, S. M. Pristupa, etc. However, the question of components of the concept of loss indemnity is the least developed in civil law science.

Paper purpose. It is proposed to investigate certain aspects of loss indemnity as a legal implication of contractual delinquency in this article. The scientific investigation is based on comparative legal analysis of the category «loss indemnity» in Ukraine and some other countries of the European Union.

Paper main body. Article 611 of the Civil Code (hereinafter — CC) of Ukraine identifies the following implications of contractual delinquency: termination of obligations due to unilateral withdrawal; termination of obligations due to the termination of the contract; changing the terms of the obligation; payment of the penalty; loss indemnity and moral damages [1].

The CC of the Czech Republic does not contain a separate article on the legal implication of contractual delinquency. However, concerning to termination of certain types of contracts the following legal effects are provided: unilateral refusal of the agreement (Article 2125 of the CC of the Czech Republic — «the buyer has the right to require replacement things, or to cancel

the agreement»); the termination of the obligation due to termination of the contract (Article 2133 of the CC of the Czech Republic — «if the buyer does not pay more than one tenth of the purchase price, the seller has the right to break the contract»); changing the terms of the obligation (Article 2531 of the CC of the Czech Republic — «due to changes in the amount spent on the trip means, the organizer has the right to change the terms of the contract»); penalty; damages (Article 2048 — «failure to comply with the payment of a penalty in a certain size and in a certain order, the creditor is entitled to demand payment of damages at its discretion») [2].

The CC of Italy also contained no provision regarding the legal implication of contractual delinquency. However, there is a general rule that: «in case of damage to the property of others — one who has committed a wrongful act must pay loss indemnity (Article 2043). Also for each of the types of contracts the CC enshrines the right to demand loss indemnity, in particular: Article 1494 — «in the event of termination of the contract of sale and purchase as a consequence of its breach — the buyer is obliged to pay damages in case of defects caused», Article 2050 «if damage is caused in the way of operating means of increased danger — the tortfeasor would have to be obliged to repair damages…» [3].

Interesting is the fact that the CC of Spain considers the legal implication of contractual delinquency through the prism of the legal implication of agreement. Chapter 5 of the CC divides legal implications of contractual delinquency into lawful and unlawful: implication of wrongful termination (Article 1291): termination of the contract; changing the terms of the obligation; payment of the penalty; loss indemnity and moral damages [4].

Paragraph 280 of the German CC establishes the obligation of the liable party to recover loss indemnity in case of implication of contractual delinquency [5].

In France the implication of contractual delinquency arises out of Article 1382 of the French CC, according to which «any action harmful to another person requires from the responsible party to reimburse it» [6].

In English law there is no clear definition of implication of contractual delinquency. Individual peculiarity arises from judicial practice.

Since the studied countries belong to the European Union (hereinafter — EU), and the Ukrainian legislation should be adapted to the European, we cannot but mention the international Conventions and Principles.

In Articles 81–84 of the UN Convention about Contracts for the International Sale of Goods is regulated the implication of contractual delinquency. Thus, in particular, the parties are released from their obligations in respect of the fact that they haven't done, but what they ought to perform in case of preservation of the contract. Thus, the obligations of the parties cease to have effect for the future. The right of the parties to recover damages is guaranteed by Articles 74 to 79 of the Convention [7]. Under Clause 2, Article 81, a party who has performed the contract either wholly or in part has the right to demand from the contractor refund paid or delivered to him under the contract. If the contract is partially performed by each of the parties, the other party has the same right. But they must realize this right at the same time.

As for the definition of «loss indemnity», in the studied countries only the CC of Ukraine and France are directly define the specified category.

The CC of Ukraine in Paragraph 2 of Article 22 treats loss indemnity as losses, which a person has undergone as a result of destruction or damage things, as well as the costs that the person has made or should make for restoration of their violated rights (actual losses); the income that the person would actually get under normal circumstances, if his right had not been violated (lost profits). That is, loss indemnity in the civil law of Ukraine is, first, the protection of civil rights and interests, and secondly, one of the ways of compensation of property harm.

Differences in matters of loss indemnity in the CC of Ukraine and the CC of the Czech Republic can be noticed by examining the definition of loss. According to the legislation of Ukraine as losses are considered: 1) the loss, which the person has undergone as a result of destruction or damage things, as well as the costs that the person has made or should make for restoration of their violated rights (actual losses); 2) the income that the person would actually get under normal circumstances, if his right had not been violated (lost profits). As a general rule, this approach to the definition of losses can be considered inherent in the civil legislation of the Czech Republic. However, unlike the legislation of Ukraine, the CC of the Czech Republic stipulates that the lender, in its sole discretion, regardless of conditions, determines the amount of loss indemnity (Article 2048). In domestic law, the term «loss indemnity» is used in a broader sense. For example, in Ukraine the amount of loss indemnity is determined by proven losses that arise as a result of breach of contractual obligations.

Under French law loss indemnity in the field of contract law traditionally refers to the loss that their lender has incurred due to non-fulfillment of the contract by the debtor. The general concept of loss given in Article 1149 is: «loss indemnity that must be paid by the lender, are as a general rule, the loss incurred by the lender, or benefit that he lost».

In German law, the indemnification is not explicitly enshrined in law, however, from CC follows that the loss indemnity in German law is considered as compensation. Paragraph 249 of the German CC is the expression of thoughts about what should be protected, the integrity and interests of the victim. It may require primarily of harm compensation in its natural form. Only in cases where the performance of an obligation in kind did not happen on time, or it is impossible or possible, but very costly, there is a requirement of compensation in money (compensation). That is the aggrieved party must obtain such a financial compensation, which would allow her to be in a position in which it would be in the case of execution of the contract.

Also in theory and in practice, difficulties arise in deciding the ratio of losses with other related categories (interest, penalty).

Various scientists have a different approach to solving this issue. For example, V. V. Vitrianskiy, L. A. Lunts believe that the concept of «loss indemnity», «interest» and «penalty» are separate and distinct categories [8, p. 6–9]. But O. P. Podtserkovniy argues that the interest and penalties are a

form of damages [9, p. 271]. In our opinion, the most extensive is the concept of «loss», because the collection of interest and penalties involve property losses for the offender of the obligation, that is the penalty and interest are transformed into losses.

The principle of full reparation is established in the law of all studied countries, that means that and positive damage, both lost profits are recovered. In some cases the amount of compensation may exceed the amount of the damage: if the damage resulted from the personality, life and health (Germany); when the behavior of the person is particularly dangerous, of daring nature (England) [10, p. 53].

The amount of liability can be reduced if: there is a fault of the victim, the damage is done to insane citizen; heavy is the financial status delinquent (continental law); the amount of compensation is too large (the judge has the right to reduce it); the law provides for the reduction of compensation (reduced damages); if the solvency of the defendant is low (English law) [10, p. 55–56].

In the English-American legal system there is a concept of nominal harm that is being used by the court in cases where the plaintiff suffered no actual loss indemnity, but his rights have been violated and need to be protected. The court awards the recovery of conventional (nominal) amounts, which confirms the right of the victim (creditor), for example, 2 pounds in England. Illegal actions are manifested in the violation of the norms of objective law, which protects the interests of individuals, and an attack on someone else's subjective right or interests, the abuse of the law [10, p. 58].

The doctrine and jurisprudence of England classified illegal actions depending on the number of victims, against whom they were directed: mass tort (against a very large group of people, for example as a result of the crash, the accident at the nuclear power plant, chemical plant, etc.); group tort (compared to a group of people, for example, defamation of the collective of employees of the corporation); individual tort (against one individual) [11, p. 95–97].

On the French concept of civil liability, the wrongfulness of an act is an element of guilt of someone who has damage [11, p. 99].

Foreign civil law in sufficient detail considers diversified theories of causal relation as conditions of liability for causing damage (the theory of essential causation, the theory of equivalence, the theory of adequate communication, etc.). In the doctrine and jurisprudence has been established the rule that the unlawful act must be a necessary condition of the possibility of such damages. Only such a harm is subject to compensation.

Non-refundable: damages arising without adequate causation (Germany, Spain, the Czech Republic), indirect damages (France, Italy), too «remote» for the causal relationship (England) [11, p. 99–100].

The law of all studied countries establishes delinquent's guilt as mandatory condition of liability of causing damage. In order of contractual tort liabilities' relationships the defendant's fault is not allowed, it should be proved; the burden of fault's proof was assigned to the injured party.

In cases prescribed by law and judicial precedent, so-called absolute liability is possible offensive, i.e. liability regardless of fault, without fault of

someone who has harm. To the consequences which cause liability without fault in civil law countries are concerned: damage causing by the actions of employees during the performance of official duties, which are the responsibility of the employer (Para. 831 of the CC of Germany, Article 1384 of the CC of France, Article 1805 of the CC of Spain), causing damage to buildings (Par. 836–838 CC of Germany, Article 1386 of the CC of France, Article 2020 of the CC of the Czech Republic), to animals (Para. 833–834 of the CC of Germany, Article 1385 of the CC of France), poor-quality goods (Article 2055 of the CC of Italy), a source of danger, and causing moral harm to the dissemination of information discrediting the honor, dignity or business reputation.

In the countries of English-American law in such circumstances, as a rule, is causing harm to animals, including domesticated and wild; injury to a passenger at the time of embarkation or disembarkation, launch, flight, or landing; due to defects in goods and services, activities that pose an increased risk [10, p. 321].

So these are the general rules of tort liability, however, the right of each country has its own peculiarities of institute of non-contractual liability.

It seems to be the most transparent system of a general tort which is enshrined in French law. In the corresponding article of the CC of France (Article 1382) are established general rules of tort liability: any action causing harm to another person requires the responsible party to reimburse her. The provisions of this article shall apply to any civil offences in all cases of harm, so have the name «General offence».

By the form of guilt the judicial practice distinguishes the concept «quasi-delict» — unlawful damage causing that occurred as a result of negligent actions of the delinquent; tort is only intentional illegal acts. However, the legal consequences of torts and «quasi-delicts» are the same — the duty to compensate loss indemnity.

German law, unlike French, Spanish and Italian, establishes a system of so-called mixed tort that encompasses general and special torts. Thus, it is impossible to state confidently that there is a clear legislative definition of the general tort, but in some articles of the CC of Germany (Para. 823, 826) lays down the provisions that the obligation to make reparation occurs in the case of a violation of any law and tort for any unlawful actions.

In English law there is no general concept of tort, but the common law establishes a number of independent set of facts of civil torts that causes damage compensation, which is conventionally called the singular system of torts. The specific formulations of the offences are developed by court practice; the protection of law outside it is seen as problematic. By the objects of assault these offences are combined into certain groups: (a) encroachment on the individual — trespass (physical body — trespass to person): violence, threat of violence, imprisonment; negligence (neglect of duty, for example, not a warning about the harmful qualities of things sent to storage); oral or written defamation; (b) attacks on property — violation of property (trespass); crimes (harmful act, the creation of obstacles in the use of property); (c)

dispossession, content (illegal things deductions by a person who has no right to do it); embezzlement; defamation of title (dissemination of false information regarding the rights of the plaintiff on the item or its quality); violations of the exclusive rights; (d) the attack on the stability of the household and the denial relationship of service (employee's violation of the agreement on services provision); inducement to breach of contract; misrepresentation (deception) [12, p. 106–110].

Conditions of liability in certain types of offences may differ. In particular, in some cases, the presence of harm and the existence of guilt are not of crucial importance for the emergence of tort obligation. If there is no actual damage, recovery of nominal damages will be awarded [12, p. 110].

In the legislative practice of England the issue of a clear statement of the tort also remains unsolved: there is no general definition of the tort. In the doctrine there are also different points of view on this occasion; almost all scientists acknowledge that the delict (tort) is not a contract.

Generally, the law of England is developing a system of singular torts (separate factual elements of offences), which are reflected in the common law, establishes the general principles, clarifies and articulates the purpose and roles of tort liability. The most common types of torts is trespass, which has three varieties: (a) violation of the ownership of land or other real estate (entry to land or a building without sufficient cause, refusing to leave the land (building), placing, moving things on earth owner), except for cases when such actions are permitted by law; (b) violation of possession of movable property, unlawful use of things of the owner, depriving its owner of things, damage of things; (c) violation of personal integrity (physical violence or the threat to use, unlawful imprisonment; intentional interference with the person). Liability for trespass occurs regardless of the availability of damages for atrocities (nuisance), harmful acts — acts or omissions that cause interference, cause worry or trouble during the implementation of the person's rights as a member of society (public crimes) or property rights, land ownership, servitude and similar rights. Examples of such actions may be: placing on the neighboring plot of land harmful production, construction of the infectious disease hospitals, homes for the mentally ill, amusement park, smoke, shading the neighboring territories, creation of obstacles to traverse, to travel through your site by individuals who have servitude rights and any other actions that create the inability or inconvenience in the lawful use of property or enjoyment of other rights.

Jurisprudence develops also other types of torts, which include, for example, the liability of a seller of alcoholic beverages for injuries caused by a drunk driver; the responsibility of the administration for damage caused by guests to third parties; liability of public carriers and owners of social objects (shopping, sports, cultural centers, etc.) for damage caused by visitors with third parties; liability for acts aimed at destruction of evidence, which is necessary for victim in the process, deception, malicious conspiracy against the undertaker, spreading false information, interference with contractual relations, trade under an assumed name, and many others [13, p. 147–152].

Finally it should be noted that as a result of complications of social relations, sometimes, it is difficult to distinguish cases of contractual liability and liability for tort offences that's why a uniform basis for the obligation to compensate for harm must be established.

In some countries (Spain, Italy, and the Czech Republic) there is a tendency to the unification of contractual and tort liability, the possibility of application of the rules governing Delco liability, contractual relations, and in some of them formed the concept of the so-called competition claims. It means that the victim has the right to decide to submit the claim about compensation of harm caused by the contract or caused by the offence (tort) or not.

The consequences of filing a claim will be somewhat different, since there are major differences in the regulation of contractual and tort liability in terms of appearance, the burden of proof of fault as a prerequisite of liability, the possibility to claim compensation for moral damage and such as.

Competition of claims is allowed in the law of the Federal Republic of Germany, of England, but not French, Czech, Spanish and Italian law [14, p. 122–128].

In the jurisprudence of common law countries the most common claims, connected with breach of obligations, are the claims for damages payment. As it was noted by Zenin, law and jurisprudence of England does not recognize the impossibility of performance of obligations as any commitment can be turned into money, and money is always paid by the debtor [15, p. 92]. But in the countries of Romano-Germanic legal families the indemnification is not less common mean of protecting property rights in contractual relations.

Legal indemnity is the most common form of contractual liability. Because the losses are manifested in the reduction, loss or damage to property, the compensation is aimed at restoring the violated property rights of the lender's owner, and not directly to the protection of property rights, which cannot be recovered [16, p. 139].

The creditor is entitled to compensation for the damages caused in case of violation of obligations that is reinforced in the civil legislation of all countries.

So, although there is no definition of breach of commitments, the German CC in Chapter 325 establishes: if in a bilateral contract, the performance of an obligation has become impossible through the fault of one party, the other party shall have the right to claim damages [17, p. 140].

Article 1142 of the CC of France contains provisions that every obligation to do or not to do leads to damages in case of default by the debtor [17, p. 50].

It should be noted that a necessary condition for the application of responsibility measures as one of the contracting obligatory remedies in continental European countries is the fault of the debtor (Article 209 of the CC of Ukraine, Article 634 of the CC of the Czech Republic, Article 483 of the CC of Italy, Article 1147 of the CC of France, Article 282 of German CC, 656 of the CC of Spain). The presumption of guilt of the debtor's right enshrined in the CC, therefore, the creditor is required to prove only the fact of non-performance or improper performance of obligations.

The same refutation of the presumption rests with the debtor. The legislation does not define guilt; indicate only the forms of its manifestation: the intent and negligence. If the debtor wishes to exempt from liability for the breach of an obligation, he must prove that it was a case or force majeure.

The provisions of the English-American law concerning contractual liability differ markedly from the norms of civil law. The basic principle of common law is that agreements must be kept under all circumstances and regardless of fault of the debtor.

If the person has assumed the obligations under the contract, it may not refuse to perform the last of the motives it is impossible to do so. Such an absolute liability comes from understanding the nature and content of the contract at common law as promises, guarantees, which the debtor undertakes in respect of the creditor. In this case, the debtor does not guarantee the actual performance of the obligation, but only the receipt by the lender of a sum of money. With this approach, the question of impossibility of performance does not arise at all, because the money to pay it is always possible [15, p. 95].

Different laws of different countries addressed the issue of the possibility of a combination of several obligatory-legal means. Of course not always the party, whose rights under the treaty are violated, wants to use only one obligatory legal remedy. Sometimes the combination of these funds is more advantageous, for example, the injured party favorable is the insistence on the performance of the contract and damages in connection with the delay. If due to some circumstances the responsible party is unable or unwilling to perform the contract or the contract is lost to the injured party «economic benefit», the latter is interested in applying to the court with claims for damages and rescission of the contract for its failure. But not all countries legislation gives to the aggrieved party a right to combine the funds of property rights protection.

For example, Article 1184 of the CC of France provides the opportunity to align the requirement to terminate the contract and claim for loss indemnity. It provides for a provision according to which the creditor is entitled to require performance of the contract or its termination and damages in this regard.

The authors of the German CC, on the contrary, exclude the combination of termination and loss indemnity, because they believed that it is impossible to claim damages and to destroy the legal basis for this contract's claim through its termination. Thus, Section 326 of the German CC emphasizes that if in the presence of a bilateral treaty, one party has delayed the granting of performance, the other party may assign the corresponding period for the execution, warning that after the expiration of this period, she will not accept performance. After this deadline, she has the right either to claim damages from nonperformance of a contract, or to terminate the contract [18, p. 268]. That is, the German CC obliges the lender to make a choice between the two remedies.

The civil legislation of almost all countries studied provides for the debtor's obligation to reimburse the losses incurred by the creditor in full (except

Spain). The same rule is contained in the current legislation of Ukraine. This applies both to the costs made by the lender, loss or damage to its property, and to the income not received by the creditor which he would have received if the debtor had fulfilled the obligation (Article 203 of the CC).

Liability in these cases is considered full. But despite the consolidation of this rule, in Ukraine the most common at present is the limited liability. The use of limited liability for nonperformance or improper performance of the obligations is enshrined in Part 1 of Article 206 of the CC of Ukraine. This means that for breach of responsibility is paid only penalty, and losses are not reimbursed or are reimbursed but not in full amount.

According to Article 204 of the CC of Ukraine, if for non-performance or improper performance of the obligation set penalty, the losses shall be compensated in the part which is not covered by the forfeit. The law or the contract may stipulate the cases when are permitted only recovery of damages, but not losses, when losses may be recovered in full in excess of the penalty; when at the choice of the creditor damages or losses may be recovered, or liquidated.

Full loss indemnity, caused by contractual delinquency between organizations, is provided now in the areas of supply, purchase and sale, some contracting relationships and such as. In relation to the majority of other liabilities not complete, but limited liability for breach of contract is assumed (paid in the form of a penalty or in the form of actual damage compensation without the right to compensation of missed profit).

It does not meet modern requirements, since it would be more natural application of the principle of full compensation for damages for breach of obligations as widely as possible, in all phases of economic relations.

Differences in matters of damages by the laws of different countries can be noticed while researching the definition of losses. According to the legislation of Ukraine losses are: (a) the loss, which the person has undergone as a result of destruction or damage things, as well as the costs that the person has made or should make for restoration of their violated rights (actual losses); (b) the income that the person would actually get under normal circumstances, if his right had not been violated (lost profits).

This is an approach to the definition of losses inherent in the civil law countries of Europe. Unlike European law, in common law the term loss is used in a broader sense. As in European countries, in common law countries the amount of damages is determined by proven losses that arise as a result of breach of contractual obligations. But unlike the laws of Ukraine, they include not only the amount of damages and profits, which was expected, but might include moral damages. Despite the fact that loss is a monetary value of property damage [19, p. 538] according to the legislation of Ukraine non-property (moral) harm is not part of the damages. The right to compensation for moral harm caused by the breach of contractual obligations arises under the laws of Ukraine only in the cases provided for by law or contract, particularly in the case of moral damage from purchase of improper quality goods in the retail network (Article 24 of the Law of Ukraine «About Protection of Consumer Rights»). Under the laws of England, for example, losses can be charged for

a substantial physical inconvenience or discomfort, in certain circumstances, may be awarded damages for disappointment, frustration, hope, caused by a violation [20, p. 344–345]. So in English law, as in common law in general, this question is more developed.

The problem of compensation of moral harm most radically decided in the countries of Anglo-Saxon system of law. In the UK which law does not know the difference between pecuniary and non-pecuniary damage, the main condition for reimbursement is the reality of the harm and the seriousness of the offense. Compensation should be full and adequate. However, there is the rule that moral damages are limited to the scope of tort law. That is, non-pecuniary damage as a result of breach of contract, are non-refundable, unless the agreement provides otherwise. The last rule is not absolute, and in some states may vary.

When moral damages are in the field of tort law, the court may go beyond real damages, either pecuniary or moral, and to award in addition to compensatory damages (compensatory damages), the so-called punitive or exemplary damages (exemplary damages) depending on the moral assessment of the offence, manner of its causation, repeatability and, of course, value of the consequences. In this case, such payments become like a kind of punishment of the offender.

In Germany the issue of compensation of moral harm is viewed from another angle of view. On the one hand, the German legislation in the field of torts do not have a common principle of responsibility, which is characteristic for both proprietary and non-proprietary harm, as was done in the civil codes of other countries. Paragraph 253 of the German CC establishes that if the harm caused to the person and not to property, monetary compensation can be obtained only if specially prescribed by law. Violation of consumer rights in this list is missed. However it is permitted indemnification of moral harm on contractual obligations.

The CC of France does not distinguish material and moral harm. Article 1149 determines that the damage speaks for damages or loss in general and is not limited to monetary damages. For moral compensation and material prejudice the defendant must be guilty in causing damage. Unlike the German CC the French CC allows you to receive compensation for moral damage, no matter what was the cause of its appearance, breach of contract or tort. But traditionally in France the amount of compensation for non-pecuniary damage is lower than in countries of common law.

In determining the damages arising from contractual delinquency, the common law generally assumes that normal loss is the loss that may be incurred by any person, if it was caused by analogic damage. Specific damages are those damages that were actually suffered from causes inherent only in the circumstances of the case. Sometimes, the contract meets the warning, which establishes the payment of a certain sum of money as damages for violation of contract. Such conditions, which are named clause of liquidated damages, shall be deemed valid when: (a) difficult or impossible to prove the amount of actual damages in case of breach of contractual obligations; (b) liquidated

and stipulated damages reasonably related to the damages that could actually occur because of violations of contractual obligations [21, p. 111–112].

In addition to these types of damages in common law countries, if the party had not suffered damages for breach of contract, it is entitled to recover nominal damages. The court decision on recovery of nominal damages is awarded with a symbolic amount, for example, in England — two pounds sterling.

The courts of common law countries draw the border between the uncertainty of the availability of damages and the uncertainty of the extent of the damage. The plaintiff must prove that he has suffered damage and it is a direct result of the breach of contract, but there is no responsibility of proving the amount of damage. The question of the extent of the amount subject to the award may be submitted for consideration by the jury. If we can merely guess about whether in breach of contract was or not caused the harm, the plaintiff is not entitled to an award of compensatory damages [22, p. 24–25].

In Ukraine, according to the CC the amount of damages caused by the breach must be proved by the lender.

Thus damages are the one of obligatory remedies while admitting civil legislation of almost all countries but its application is specific.

The bottom line is that in Ukraine, Europe and the countries of common law damages from the breach of contract are awarded to compensate the caused damage, but not as punishment for the harm caused.

Besides the difference in the obligation of proving the amount of damages, the set of damages is also different (actual damages and lost profits, as losses that is provided by the legislation of Ukraine and countries of Europe, to the set of damages by the law of common law countries is also included moral damages, substantial damages for physical inconvenience, discomfort, and disappointment). The common law countries are aware of the concept of nominal damages. Civil law, like the laws of most developed countries, allows for the possibility of a combination of several obligatory remedies.

The principle of performance of the obligation in kind is found quite categorical in the consolidation of the norms of German CC in respect of contractual and tort liabilities, which consider the damages as an exceptional measure, mounted on case when performance would be impossible or inadequate to fully restore the interests of the lender.

In French law the so-called institute of the obligation enforcement in kind, which is applied by many countries of this civil-law system, is developed by court practice, and further enshrined in the procedural legislation: if the debtor refuses to perform the action to which it is obliged by the court decision, it is awarded to pay to the creditor a certain amount of money — fine per each day of delay of execution (asteriated). The amount of the fine is left to the discretion of the court and is not limited; it can grow arbitrarily and does not depend on the size of damages incurred by the lender, which can lead to substantial uncompensated losses of the debtor.

If the execution of the obligation in kind is physically possible and the creditor insists, on Romano-Germanic law, the court must make a decision about the enforcement of debtor's obligation in kind.

The awarding of monetary reimbursement, as already noted, the continental law is regarded as a minor sanction in liability for failure to perform the obligation which is established in case the performance in kind is impossible or creditor lost interest in this performance. Although in commercial transactions this form is most prevalent.

In Anglo-American law it was developed a principle opposite to continental law that the main civil liability for failure to perform obligations is the way of monetary compensation, which is provided by common law. Loss indemnity is viewed as the primary tool to protect the interests of lender which in the event of default by the debtor always has the right to claim monetary compensation.

Compulsory execution of obligations in kind as an additional measure of responsibility was developed in English-American legal system in the practice of the courts of justice. Latest judicial practice applies it more widely, especially in relation to trading (business) transactions. The execution has spread to the transaction in respect of which have not been used previously: construction contract, employment recruitment (evident in the re-employment), that deals not only with real estate, but also with other things that are classified as unique (antique, precious, other goods that cannot be purchased in the buyer's market) and so on [23, p. 2 81]. However, enforcement is still regarded as an exceptional measure, to be used by the court in the case where monetary compensation may not be an adequate remedy, and provided that there is no fault of the injured party and the contract concluded on the basis of adequate counter consideration (remuneration). The decision on compulsory enforcement of obligations in kind may be made depending on the content of debtor's duties violation and in the form of imposing the duty to perform certain actions in kind (specific performance), or in the form of a restraining court order (injunction) prohibiting the debtor to perform certain actions that violate its obligations under the contract.

You should also pay attention to the fact that Section 1 of Article 7.3.6 of the UNIDROIT principles provides that if the parties' return of all received under the contract in kind is not possible, appropriate compensation must be made in cash. In case of cancellation of contract the UN Convention about Contracts for the International Sale of Goods and the Principles contain two methods of calculation of losses subject to compensation. This specific method of calculation on the basis of substitution of the agreement (Article 75 of the Convention and Article 7.4.5). The principles and method of calculation are based on current rates — abstract method (Article 76 of the Convention and Article 7.4.6. of the Principles). It must be considered that in the determination of damages as a constraint is a rule about «predictability» of losses.

The use of a specific method of calculation of damages involves the presence of two necessary conditions. First, breach of contract should lead to its cessation. Secondly, the aggrieved party should carry out the substitution agreement.

In the presence of these conditions the lender, using a specific method of calculation may recover from the violator of the contract losses in the amount

of the difference between the contract price and the price realized in return transaction if the conclusion of the replaced agreement is held in a different location than the original deal, and is on other terms, the amount of damages should be determined taking into account may increase costs. When using this method, you must follow two conditions. Replace the deal should be done in a reasonable manner and within a reasonable time [24, p. 175]. Based on the principle of good faith of the parties to the contract and the interests of commerce, sensible way substitution agreement shall be such a method that will ensure its maximum efficiency taking into account the specific circumstances. A reasonable period of time within which must be enclosed model agreement, is determined by the characteristics, specific goods and trade in the good.

The use of abstract method of calculation of damages also requires certain conditions. First, it is necessary that the breach of contract led to his termination. Secondly, you must have the current price for this product at the time of termination. Thirdly, there must be a substitution agreement.

When these conditions exist the injured party has a right to claim as damages, the difference between the prices set in the contract and the current price at the time of termination. An abstract method can be used also in the case where it is not possible to determine exactly weather instead of contract's termination was made another deal.

Also in the Convention and in the normative Principles was defined the current price, with which to compare the contract price. So, the current is the price that would prevail in the place where should be delivered. The amount of damages may be reduced if the damage could be reduced by reasonable actions of the injured party.

Conclusions. Thus, compensation by the debtor, who did not fulfill or fulfilled obligations improperly, damages, that occurs from lender, in all the studied countries, is considered as a measure of civil liability, has exceptionally proprietary nature. The principles of indemnification are common to all countries: indemnification should be complete, i.e. compensated as a positive good (real costs and losses of the creditor), and missed profits (which he could receive if the obligation has been executed by the debtor properly); monetary compensation is purely compensatory in nature, that is, it should recover the creditor's position and put it in a position in which he would have been if the obligation had been performed, but it is limited to the amount of liability of the debtor. There are some exceptions to these general rules, which were considered in this research paper.

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ВІДШКОДУВАННЯ ЗБИТКІВ ЯК ПРАВОВИЙ НАСЛІДОК ПОРУШЕННЯ ДОГОВОРУ

Резюме

Відшкодування боржником, який не виконав або неналежно виконав зобов'язання, шкоди, що виникла у зв'язку з цим у кредитора, у всіх досліджуваних країнах розглядається як захід цивільно-правової відповідальності, що має суто майновий характер. Загальними для всіх країн є принципи відшкодування збитків: відшкодування має бути повним, тобто відшкодовується як позитивна шкода (реальні витрати й втрати кредитора), так і неодержані ним доходи (які він міг би отримати, якби зобов'язання було виконане боржником належно); грошове відшкодування має суто компенсаційний характер, тобто воно повинно відновити становище кредитора і поставити його у таке положення, в якому б він знаходився, якби зобов'язання було виконане, але цим і обмежується обсяг відповідальності боржника. Існують окремі винятки з цих загальних правил, що були розглянуті у даному науковому дослідженні.

Ключові слова: відшкодування збитків, правовий наслідок, порушення договору.

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ВОЗМЕЩЕНИЕ УБЫТКОВ КАК ПРАВОВОЕ ПОСЛЕДСТВИЕ НАРУШЕНИЯ ДОГОВОРА

Резюме

Возмещение должником, который не выполнил или выполнил обязательство ненадлежащим образом, ущерба, возникшего в связи с этим у кредитора, во всех исследуемых странах рассматривается как мера гражданско-правовой ответственности и носит чисто имущественный характер. Общими для всех стран являются принципы возмещения убытков: возмещение должно быть полным, т. е. возмещается как позитивный ущерб (реальные затраты и потери кредитора), так и неполученные им доходы (которые он мог бы получить, если бы обязательство было исполнено должником надлежащим образом); денежное возмещение имеет чисто компенсационный характер, то есть оно должно восстановить положение кредитора и поставить его в такое положение, в котором бы он находился, если бы обязательство было выполнено, но этим и ограничивается объем ответственности должника. Существуют отдельные исключения из этих общих правил, которые были рассмотрены в данном научном исследовании.

Ключевые слова: возмещение убытков, правовое последствие, нарушение договора.