# FEATURES OF FOREIGN LEGAL PROVISIONS RECEPTION IN THE RUSSIAN LAW OF OBLIGATIONS ON EXAMPLE OF INDEMNITY INSTITUTE

***Ainur G. Demieva,***
*Kazan Federal University (Russian Federation, Kazan), ademieva@bk.ru*
***Elena E. Bogdanova***,
*doctor of juridical sciences, acting head of the Chair of Civil Law of Moscow State Law University, bogdanova.ee@yandex.ru*

**Abstract.** The article is devoted to some problems of foreign legal norm reception in the Russian law of obligations. In this article, the authors note that the peculiarity of the Russian obligation law reform was the reception of individual institutions of other legal systems, including those based on other principles. Currently, there is the process of civil law socialization, accompanied by a curtailment of the positivist approach in law, the change of the legal paradigm per se, when the principles of conscientiousness, justice and reasonability, which are super-imperative in relation to the customary rule of law, take the first place in the legal understanding. A detailed study of the institute of indemnity adopted from the Anglo-American legal system made it possible to conclude that the introduction of a legal design with a rather contradictory application of borrowing in the country raises doubts about the effectiveness of its application in Russian Federation (for example, Article 406. 1 of RF Civil Code [1]). Summing up, the authors come to the conclusion that the provisions on indemnity, despite their abstract, non-process nature, were not blocked from the application of good faith rules to them.

**Key words**: reception; socialization of civil law; honesty; indemnity; guilt; principle of dispositivity.

**Introduction.** Reception is aimed at legal regulation effectiveness increase in various spheres of social relations, especially, the reception process is relevant for private law, based on the autonomy of participant will, the principles of disposability and equality of actors. The reasons for reception may be different. So one of the reasons is the existing bleakness in the regulation of this or that area of social relations and the impossibility of its elimination by available legal norms. Another reason is the need for a rapid reform of national legislation, the achievement of compatibility with other progressive legal systems, as well as with the basic principles and norms of international law.

**Materials and methods.** During the research, general scientific (logical and historical, system-structural approach, analysis and synthesis, etc.) and private-science methods (specifically sociological, formal-logical, comparative law) were used. Comparative method allowed to compare the norms of the current Russian civil legislation with the provisions of the Anglo-American legal system.

**Results and discussion.** During the reform of civil legislation (in particular, the introduction of amendments and additions to the section "Obligatory Law"), the legislator implemented the reception of individual legal entities and institutions inherent in foreign legislation. So the Russian law of obligations took from the Anglo-American legal system such a legal construction as the compensation for losses that arose in the event of the circumstances specified in a contract (indemnity) (Article 406.1 of RF Civil Code). According to this article, property losses that are subject to recovery, should not be the consequence of obligation violation. That is, we talk about the compensation for losses caused by lawful actions of the counterparty or the actions of third parties, state bodies, force majeure, etc.

The institution of indemnity is widely used in the Anglo-American legal system, but the attitude to this design is ambiguous in the doctrine and jurisprudence. So Wayne Courtney notes that "the compensation of losses is a common occurrence in modern commercial contracts, but it is surprising how uncertain their legal nature and consequences remain ... the term "loss compensation" is flexible. The condition on indemnity can be formulated in a contract in such a way, that the party will not incur any losses ..." [2, p. 1-18]. P. Parker and J. Slavich understand by indemnity "the agreement of two persons, under which one person agrees to cover any debts, losses or damages suffered by the other party as the result of a specified action occurrence (or by another reason) or the presentation of a third party claim." [3, p. 1351]. P. Booth notes that the conditions for indemnity in practice are usually applied in commercial contracts (except for an insurance contract), the content of which is often the transfer (the transition) of responsibility for an adverse event from one party to the other [4, p.2].

It is of interest to analyze foreign jurisprudence on the application of the condition for compensation of losses in a number of well-known precedents. So for one of the cases concerning the construction of the supermarket the visitor was injured who fell into the hole at the construction site. The supermarket, on the basis of an agreement with the general contractor, required the latter to reimburse him for all losses incurred as the result of the incidents, except for the cases when there was an exceptional negligence of the supermarket. In its turn, the general contractor concluded a subcontract agreement with the subcontractor, by which the contractor "transferred" his obligation to compensate damage to the supermarket by the inclusion of the relevant condition in the subcontract agreement.

The respondent supermarket, the general contractor and the subcontractor contributed one-third of the contributions to the joint settlement of the dispute with the plaintiff, but then a trial was conducted to determine the liabilities for the distribution of losses between the parties. The court of first instance ruled that, since there was no

exclusive negligence of the supermarket, the general contractor had to compensate the supermarket for the third part of the refund. The general contractor appealed and stated that the subcontractor must pay compensation because of the "pass through" condition for damages. The appellate instance agreed with this argument.

The Supreme Court of Pennsylvania revised the historically established strict interpretation of the conditions for compensation of losses, in particular those provisions that require compensation for their own negligence. The court stated that "the conditions containing the duty of one party to compensate the damage to the other party for the negligence of the latter must be narrowly interpreted, since the liability imposed by such a provision of the agreement is so dangerous, and the nature of the compensation is so unusual and exclusive that there can be no presumption that the person providing the reparation intends to take responsibility.

The Supreme Court stated that the transfer of the general contractor's duty requirement to compensate the supermarket for the losses to the subcontractor does not correspond to the nature of the indemnity condition. As the court explained, although the wording of this contract is clear and unambiguous, and allows such refunds to be transferred automatically under a subcontract contract through a standard clause to the subcontractor, the latter acquires more responsibility than it should have under a subcontract. The court concluded that the existing interpretation of the condition for indemnity will not be applied for the agreements providing the transfer of liability for damages from one party of the agreement to the other party (path through provisions), including the compensation for the negligence of another person [5]. It should be noted that the dispute under consideration raises a very important issue of the contractual condition application for the compensation of losses (Article 406.1 of RF Civil Code) to the transfer of responsibility by one contract party to the other party. Also, there may be a situation where a contract party, under the cover of the loss compensation norm, will try to shift its responsibility for the violation of the obligations to the counterparty. Thus, an amicable agreement was approved by a court ruling on one of the disputes. This agreement contained the following condition:

"If the Respondent transfers the Premise to the Claimant before the arbitration court approves this amicable agreement, the parties agreed to consider the transfer of the Premises as conditioned by the fulfillment of the obligations provided in Article 327.1. of RF Civil Code. This means that if the present settlement agreement is not approved by the Arbitration Court of the Urals District, the Respondent shall have the right to demand to return the Premise from the Claimant or demand compensation for losses (Article 406.1 of RF Civil Code), the amount of which will be equal to the amount of interest for the use of other people's money, which in the end will be awarded in favor of the Claimant within the framework of the abovementioned case consideration" [6]. In essence, such a wording of the condition on indemnity covers the reservation of the party release from liability for the violation of its obligation.

In this regard D.E. Bogdanov rightly believes that "despite all the controversial rules of the Art. 406.1 of RF Civil Code, the p. 1 of this article has the reservation that the compensation for losses is allowed if they are not related to a breach of the obligation by its party. Therefore, any violation of the obligation by the counterparty (the provision of poor-quality materials by the customer) excludes the very possibility of compensation for losses" [7, p.191]. The indication that the use of indemnity should not be associated with a breach of duty by a contract party is provided in the Art. 406.1 of RF Civil Code, but this rule does not refer to the prohibition of one party to a contract from assigning its obligations to a third party to a counterparty (the "path through provision" model we examined above). The specified article provides only the rule according to which the creditor's claim to this third party for the compensation of losses passes to this third person if losses have arisen in connection with the illegal actions of the third party.

It seems that the inclusion of rules on indemnity in the Civil Code pursued the goal of strengthening the principles of justice in the law of obligations, strengthening the principles of contract and disposition freedom inherent in private law.

It should be noted that, when the foreign practice of compensation for losses is considered, P. Booth reveals several types of such compensation:

(a) "bare" indemnity: i.e. the Party A reimburses to Party B all losses or other property losses that have arisen in connection with these events or circumstances, but without the setting of any special limits. In particular, within the condition of such payment, it will not be specified whether the losses related to own actions and/or omissions B are reimbursed (therefore they may also be a "reverse" or a "reflexive" refund).

(b) "reverse" or "reflexive" indemnity: that is, party A reimburses to Party B the losses incurred as the result of the Party B own actions and / or omissions (for example, negligence).

(c) "proportional" indemnity: they differ from "reverse" loss reimbursements by the fact that the party A reimburses to the Party B losses, other than those incurred as the result of the Party B own actions and/or omissions.

(d) "indemnity in favor of a third party": that is, Party A reimburses Party B for the requirements imposed on the latter by the Party C.

(e) "financial" indemnity: Party A indemnifies Party B for the losses incurred in case of unprofitable allocation of funds by Party C to Party B. These payments are usually associated with the "guarantee" mechanism in financing transactions.

(f) "partial" indemnity: that is, each party to the contract reimburses the other(s) the losses caused by a contract non-fulfillment (violation) [8, p.7-8].

The analysis of foreign experience will allow to recognize that the legal design of indemnity is closely connected with the institution of civil liability. In Russian civil law, despite the fact that the legislator tried to distinguish between the provisions for the compensation of losses and civil liability, the rules of the Art. 406.1 of RF Civil Code are placed in the Chapter 25 of RF Civil Code "Responsibility for the Violation of Obligations". This, in its turn, raises the question about the possibility of liability norms application to the relations for the reimbursement of losses. Especially, in the initial version of the art. 406.1 of RF Civil Code there was the reference to the art. Art. 15, 404 of RF Civil Code. Besides, civil-legal constructions, associated with the subjects and the objects of civil rights and civil transactions, also influence the classification of crimes [9].

It should also be noted that according to p. 2, 3, the art. 406.1 of RF Civil Code, a court can not reduce the amount of compensation for losses, unless it is proved that the party intentionally contributed to the increase of the amount of losses. Losses shall be reimbursed irrespective of a contract recognition as not concluded or invalid, unless otherwise provided by the agreement of the parties.

Thus, the obligation of indemnity has the signs of abstractness, since this condition acts independently from the recognition of the agreement itself as independent and not concluded. With this version of the art. 406.1 of RF Civil Code the question raises about the possibility to assess the fairness and the reasonableness of the conditions for indemnity, as well as to assess the integrity of its participant conduct.

The amount of reimbursable losses is determined by the agreement of the parties, which can not be reduced by the court, except for the deliberate assistance of the creditor to increase his losses. In this regard, there is a problem of accounting for other forms of guilt, in particular, gross negligence of the creditor, the problem of application the p. 2, Art. 333 of RF Civil Code concerning the reduction of the forfeited penalty sum, etc.

The wording on indemnity condition, presented in Art. 406. 1 of RF Civil Code, is capable of leading to a "supercompensation" of the reimbursement received by the creditor, to the obtaining of non-economic benefits at the expense of the other party, which does not correspond to the principles of fairness and proportionality. There is also the issue about the possibility of the court to change the conditions for indemnity if this agreement was concluded in the situation of "negotiating capability inequality" of the contracting parties.

An attempt to answer these questions was made by the Supreme Court of Russian Federation in its Decision No. 7 "On the application of certain provisions of RF Civil Code by courts concerning the liability for the breach of obligations" issued on March 24, 2017 [10]. The Supreme Court confirms that the relations for the compensation of losses (Article 406. 1 of the Civil Code) must be considered separately from the rules governing civil liability. Consequently, the Art. 15, 404 of RF Civil Code can not be used for recovering any amounts as indemnity.

Within the meaning of the Article 406.1 of RF Civil Code, the compensation for losses is allowed if it is proved that they have already been incurred or will inevitably be incurred in the future. At the same time, the party demanding the payment of the appropriate compensation must prove the existence of a causal relationship between the onset of the relevant circumstance and its losses.

Thus, the evaluation of the conscientious conduct of the participant demanding compensation for losses should also be carried out, if this participant acted in bad faith, facilitated the occurrence of the circumstance in the event of which compensation is established. The court, having considered this circumstance to be unenforceable, may refuse to pay compensation.

This paragraph draws attention to the way the Plenum characterized the participant's behavior - "unfairly promoted the occurrence of circumstances" by circumventing the wordings "knowingly", "guilty" or "intentionally", etc. often used in such cases, which characterize the guilty conduct of a contractual party. It seems that the indication of the unscrupulous nature of person's actions is not accidental in this provision.

Thus, the provisions on indemnity, despite their abstract, non-accessary nature, were not blocked, however, from the application of good faith rules to them. The provisions of the p. 17 of RF SC Plenum Resolution No. 7 that during the application of the provisions of Article 406.1 of RF Civil Code, the courts should take into account that the agreement on compensation for losses must be explicit and unambiguous. Within the meaning of the Article 431 of RF Civil Code, if it is not clear what the agreement of the parties establishes, the compensation for losses or the conditions of liability for the failure to fulfill an obligation, the provisions of the Article 406.1 of RF Civil Code are not applicable.

This approach of domestic practice repeats the rule of contract terms interpretation developed in the western legal order - contra proferentem, according to which the controversial provisions in the event of an unclear wording of the agreement will be interpreted against the party that put it forward as the reason to avoid its responsibility.

In this regard, it is of interest to analyze the so-called Canada SS rules [10] - the rules on the terms of the contract excluding the responsibility for party negligence (exclusion negligence clauses).

1. If the provision contains the formulation that directly exempts a person for whose benefit it is made from the consequences of his or her negligence, a legal effect should be provided for such a condition.

2. If there is no clear reference to negligence, the court must consider whether words are used in a broader or more general sense to include negligence in their content. If at that time there is a doubt, it must be allowed against the person in whose favor this condition is included (contra proferentem).

3. If the words are used in a sufficiently broad sense to cover negligence, the court must consider whether there is any other subject of responsibility. If not, the condition will be applied. If the condition is extremely burdensome for the party proposing to include it in the text of the contract, the responsibility will be assigned only to another subject of responsibility [12, p.14].

In this case, they also apply the principle of interpretation of a contentious condition with an unclear content against the party, in whose favor this condition was included in the text of the agreement.

**Conclusions.** It seems that the inclusion of provisions for the compensation of contractual losses in RF Civil Code was aimed to ensure the restorative function of civil law regulation, the strengthening of disposability origins to resolve the issue of contractual risk distribution. However, the provisions of the Art. 406.1 of RF Civil Code should not remove from the principles of good faith and contractual justice, the non-abuse the civil rights by participants according to the art. 1, 10 of RF Civil Code.

**Summary.** The rule borrowed in the foreign legal order will not act and be applied in other legislation as well as at home. It is necessary to take into account social, legal and other differences here.

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