CONTRACTUAL LIABILITY AND TORT LIABILITY

Todea Al., Oroian I., L. Holonec

University of Agricultural Sciences and Veterinary Medicine, 3-5 Mănăștur St., 400372, Cluj-Napoca, Romania, email: todea8@yahoo.com

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Abstract. In the research literature, the concept of civil liability is still under discussions and has many interpretations. Within the framework of liability for breaching the rights and obligations resulting from a contractual agreement, the illegal behavior is reduced to an encroachment of a right related to a deviation of a real behavior from a model enforced by the contractual agreement. This difference spotted in the research literature marks the limits between contractual and tort liability.

The differences between these two forms of liability allow us to establish them as separate forms. Taking into consideration the limits of each of these forms, the lawgiver is guided by how these forms of liability can influence the participants of civil relations, by stimulating them to take the best decisions.

INTRODUCTION

From the linguistic perspective the liability is the personality’s awareness of one’s duty to society, to a collectivity of people, the comprehension of the sense and meaning of one’s behaviour.

Within the jurisprudence the term acquired another meaning, different from the usual one; it outlines the negative consequences, occurring in the case of committing some illegal activities by a natural or legal person. Legal liability only includes those consequences resulting from the lawful violation, which are expressed by the appearing of new obligations or other modalities of the obligations resulting from the already existing lawful relation.

These modalities, as well as the newly appeared obligations are to be related to the negative consequences, unsatisfactory for the trespasser of the law.

The evidence of the liability as a special juridical system, beside the application of the constraining measures aiming at the execution of the existent obligation, it pertains to the contents of the relations which are brought about in that case. One can not deem as liability an obligation that is fulfilled by enforcement since the State restriction only aims at ensuring the obligation. Through constriction the participants in the relation are brought to the position in which even they should be in compliance with the legal requirements.

The civil juridical liability is that penalty which is applied to the delinquent under the form of the enforcement of a lawful juridical civil obligation or the withdrawal of a civil right that he (normally) has.

The civil liability is that form of juridical liability consisting in the obligation that each person has to make amends for the damage caused to another one. Being liable in a civil way means in a juridical sense, having liability from a civil standpoint.

Through its mending function, the civil liability aims at restoring to the former standing the patrimony of the person affected by the damage by the removal of all the injurious consequences of the illegal act. The rules, which both the judiciary practice and the specialty
literature consider fundamental but especially considered fundamental by the civil law, refer to the obligation of making amends.

In the specialty literature the notion of „civil judicial liability” remains questionable. Some authors advance the notion of positive liability, which is to be understood as the strict and firm fulfilment of all obligations. Within the scope of obligations, this liability actually coincides with the proper fulfilment of these obligations. But when being in the same context, the proper fulfilment of the obligations and the civil judicial liability are ruled by different regulations. As long as the obligations are properly fulfilled, one does not deal with liability, and, on the contrary, the application of liability excludes the proper fulfilment of obligations.

In some cases, the rightful (de jure) infringement serves as grounds for the birth and development of a new civil judicial relation. It is the case when there is damage caused, which will serve as grounds for the occurrence of the civil judicial relation of paying damages. Thus, the liability decreases to the appearance of a relation the aim of which is – the application of the proper influential measures towards the persons, which have infringed upon the proper lawful norm.

The situation is quite different regarding the improper fulfilment of an obligation or the failure to fulfil at all an obligation within an existent judicial relation. In this case the relation has already appeared and there is a connection between the participants in this relation. The liability measures are aimed at (in the case where it is impossible to recover the nature of the judicial relation breeched) changing the rights and obligations of parties so that the final result would attain the goal pursued all along and so that the loss and injury caused by the breech of obligation would be mended by the guilty person. The determining of the penal stipulation or the repairing of injury in the case of failure to fulfil the contractual obligation in the case where this fulfilment is real, are meant to obtain the concrete result (the realization of a work, the setting into circulation of some goods, some quality products, on the basis of a purchase and sales agreement).

Consequently, the liability for the breech of the obligations within a existent judicial relation has as its goal the compliance of the actual behaviour to the model behaviour within a judicial relation.

As a consequence, we delimitate liability in the basis of a judicial (illegal) act from the liability for the breech of a pre-established existent obligation. The difference within the contents of these relationships enables it to distinguish between different forms of liability. Thus, within the liability for an illegal act (delict), the subject, who has previously had an illegal behaviour, is in no previous judicial relation with the subject/subjects whose right he has violated. In this case, there is straight breach of a lawful norm, established in order to protect the absolute subjective rights and interests of those who would suffer injury.

In the case of liability for the breach of the rights and obligations within an existent judicial relation, the illegal behaviour is limited to the breach of a relative right, to a deviation of the actual behaviour from the model that is confirmed within a judicial relationship. This difference in the civil judicial literature takes the form of a delineation between the contractual civil liability and the...

Some authors consider that liability for injuries caused to the consumers would be a contractual one; moreover, if there is an agreement validly concluded, liability will be triggered off by contractual grounds. The grounds for liability for non-patrimonial injuries would be the improper fulfilment of the contract. However, most authors show that life, health, corporal integrity are not likely to make the object of any contractual negotiation, and when these are affected, we only may appeal to the judicial norms, that regulate the tort liability.
We suggest a few aspects regarding the delimitation of tort and contractual liability for products. Both of them are forms of civil liability, having the underlying idea of making amends for a patrimonial injury and in the same time the non-patrimonial injury caused by the illegal act out of guilt by a certain person (and sometimes even regardless of guiltiness, as we will show further).

There are no essential differences between these two forms. In order to entail any of these forms, the presence of a few elements is required.

1. The existence of an illegal act, through which some obligation is infringed, and thereby negatively affecting a subjective right of the consumer

2. The perpetration out of guilt of this act, as a subjective element of liability (is more characteristic to the contractual liability, whereas the draft of the new civil code proposes that, within the delictual area, the liability for products should apply regardless of the guilt of the producer (seller)

3. The existence of a damage;

4. A relation of causality between the illegal act and the damage

The civil contractual liability is the duty of the debtor of a obligation rising from a contractual agreement to make amends for the damage caused to the creditor; the civil liability may also be engaged by failing to fulfil in a large sense the activities due, more precisely the fulfilment thereof with delay, or the improper fulfilment or the partial/total failure to fulfil them.

Thus, considering the contents advanced for examination, the contractual liability will be triggered off by the following:

- Selling products (services, works) of an inadequate quality (incurring all the consequences provided for by the legislation in those situations)
- Selling products (services, works) without putting forth in the cases strictly mentioned by the law regarding validity dates, usage, warranty;
- Lack of information about the product (work, service) or improper information, etc

The tort liability is the obligation of a person to repair the injury caused in an illegal extra contractual act, or, according to the case, to repair the injury for which the law bids one to be answerable for. As concerns the area of liability for flawed products, since the product purchased jeopardized the life, or health or the patrimony of the consumer (and these, not only of the direct purchaser but also of the ones that would use this product, or those who were nearby in the moment when the damage was caused), tort liability will be applied whereas, in the case of a product which has inherent flaws, which, from some reasons may not be used as intended, by not incurring any of the dangers abovementioned, contractual liability is entailed.

Concerning the relation between the two forms of civil liability, we mention that tort liability is the common right of civil liability whereas contractual liability is a liability with a special derogatory character. Whenever one does not deal with contractual liability, the rules regarding tort liability shall be applied.

In the specialty literature theories came into being, pertaining to the judicial nature of the two forms of civil liability considering that these share common elements and, at the same time there are differences.

That is why there were controversial discussions in the attempt to settle this issue; the answers were different and two theories came into being: the theory of the civil liability duality versus the theory of the civil liability oneness. Considering that these theories are largely analysed in the specialty literature, we will not linger any further at their description in this context.
a) At the present time, the theory of the civil liability oneness seems to be endorsed more both by theoreticians and by practitioners, invoking the hypothesis that contractual guilt has the same nature as the delictual guilt and that it consists in the psychological attitude towards the illegal act. This theory was very much emphasized lately in the French specialty literature, upholding the abrogation of all differences between the standing of the contractual victim and the standing of a third party.

We know the fact that one of the principles characteristics of the contractual relationships is the relativity principle, that is to say, along this line, that contractual liability for products may only be invoked by the contracting parties. Third parties may not invoke contractual liability for the injury suffered resulting from the failure to fulfil or from the improper fulfilment of a contract. In order to retrieve the damage incurred, the third parties may appeal to the tort liability, to the extent to which the conditions required for this liability are met.

We admit the case in which a consumer has purchased a fridge, which has warranty valid for a year guaranteed by the producer. After a week’s time, the consumer at his turn sells this fridge to a third party as he needs it no more since he will be abroad for a long period of time.

During the period of its warranty, the fridge brakes down and can not be used any more (without any guilt from the new owner). The question arises: will the new owner engage the producer (or the trade unit) in contractual liability since there is no contractual relationship between them? Is reasonable to pursue the person who directly sold this apparatus, with the possibility that the first purchaser would further the legal action and sue the producer? (performer, trade company)

The long list of differences between the contractual and tort liabilities allows however to say that they exist within the area of unity of the civil liability. By establishing certain limits to the application of tort or contractual liabilities, the lawgiver orients by determining which one of the two forms allows for a more effective influence upon the participants in the civil relationships, prompting these to make optimal decisions in real situations? The lawgiver chooses the form of liability taking into account the functional specificity of contractual and tort liability; that is why this situation is to be taken in consideration regarding the improvement of the consumer’s protection.

While examining the civil judicial liability as a modality of protecting the rights of the consumers, one has to make an explanatory mention about its functions as this allows for determining the limits of effective application with the purpose of reaching the objectives assigned.

They are:
- the preventing function;
- the compensatory function

One of the functions can prevail upon the other, depending on the domains of the civil law. For instance, in the case of the conclusion of a services agreement, it is the preventing function which prevails, as this contract (agreement) is meant to ensure a full and thorough satisfaction of the material and cultural needs of the citizens. If one deals with the mending of damage, caused against life, health or the assets of the consumer by means of a hazardous or flawed product, then the compensatory function will prevail.

The specialty widely debates on the issue of the accumulation of contractual and tort liabilities. Of course, this issue may be discussed provided between the author of the injury and the plaintiff there is a valid agreement concluded, and its failure from being fulfilled was concretised in causing the damage.
Several questions arise from this situation:

1) May the creditor choose between the legal action based on contractual grounds and the legal action based upon delictual grounds, choosing the one he considers more advantageous?

2) After having taken legal action on contractual liability, may the consumer resort to the legal action on tort liability in order to obtain the completion of the damages obtained on contractual grounds?

First of all we should mention that the consumer may not obtain two reparations within the same illegal act, one based on contractual grounds and the other on delictual grounds since the cumulating of the two reparations would result in exceeding the integral value of the damage caused.

A principle that prevails within the judicial practice is that there can be no combination, within a combined action, of the rules that apply both in the case of tort liability and in the case of contractual liability and so it is also for the further appeal in completion to the contractual liability by virtue of which one has already obtained damages.

Taking into examination the case in which a consumer has purchased a certain product (fridge, television, etc) and which, being plugged to the electricity net, it exploded causing a fire. As a result, all the assets of this person were destroyed, his 5-year child suffered second-degree burns and other moral grievous consequences.

Of course, no guilt of the consumer is pursued in this situation, since everything was caused by the flawed quality of the product.

It is hardly imaginable that the consumer might bring an action on contractual grounds first (which would entail, in the present case either the replacement with another apparatus of good quality, or, the cancelling of the contract) and, subsequently going on bringing an action on delictual grounds, in order to obtain the recovery of the whole damage, both the material and the moral one.

Consequently, analysing the abovementioned, the consumer has all the grounds to bring direct legal action for tort liability; therefore we do not fully agree with the opinion that if there was an agreement between the parties, the non-fulfilment of which resulted in damage, it would not be possible to resort to tort liability, the only way to take being that of contractual liability.

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