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The History and Essence of the Formation of Contractual Relations in the Anglo-Saxon and Romano-German Legal Systems

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Abstract: It is aimed to study the conditions of its historical development in order to understand the relations of the Anglo-Saxon and Romano-German legal system states regarding contracts, the nature of the legal consequences arising from non-fulfillment of contracts.

Keywords: Contract , essential terms, obligations, legality , offer , acceptance.

In the countries of the Anglo-Saxon legal family, which is considered a common law system, the contract is one of the most important and ancient regulators of social relations, along with custom, precedent and other legal documents. Therefore, it is not without reason that great attention is paid to the history of contractual relations in this family of law when studying the modern contract rights of Great Britain, the United States, Canada, Australia and other Anglo-Saxon legal system states.

In this regard, A.K. Romanov[1] noted that it is impossible to understand the relations of English contract law without studying the historical requirements for the emergence and development of the contract in the common law system and, in particular, in English law. The predominance of case law, he continues, is one of the characteristics of English law, the lack of generally recognized codification, the lack of clear boundaries between the legal system and its various branches, external conservatism and even the desire to preserve the old form and a number of other means all emphasized that it is impossible to come to a clear opinion and conclusions about them without a thorough study of the history of the main institutions of the English law on the conclusion of contracts and the consequences of their non-performance.

In fact, summarizing the opinions of the scholars mentioned above, we can say that it is appropriate to study the historical development conditions of the Anglo-Saxon legal system in order to understand the nature of legal consequences arising from non-fulfillment of contracts.

Academician A. Saidov said that in the countries of Canada, Australia and New Zealand, which are considered to be countries of the Anglo-Saxon legal system, in the development of several areas of law, they followed the path of modernization of the old English laws, including the laws in the fields of traditional civil law. For example, in Canada, Australia and New Zealand, the sales contract is based on the English Sale of Goods Act 1893. The further development of these relations led to the adoption of separate documents regulating more specific issues. In Australia, the complication was that under the Constitution, the federal parliament had no power to regulate trading relationships, but could pass laws regulating the activities of corporations. It follows that the Australian Trade Practices Act 1974 applies to relationships where a corporation is a seller.

[1]Романов А. К. Правовая система Англии: Учебное пособие. М., 2000. С. 58.

The historical conditions of the emergence and development of the contract as an ordinary legal institution discussed not only in the Anglo-Saxon, but also in other countries and local literature, and the range of issues related to contract law arising from it is very wide and diverse. It is necessary to confess. The origin of the contract and its original legal essence are important in the legislation of the countries of the Anglo-Saxon (common law) system.

Among the scholars, did the contractual relations of the states of the Anglo-Saxon legal family appear as a legal institution directly under the influence of the Romano-Germanic legal system or did they adopt Roman law? There are different opinions. And as a logical continuation of this question, whether the characteristic features of the modern contract in the common law system should be considered as a direct consequence of the influence of the emergence of Roman law on the Anglo-Saxon legal system, or whether they are the common law itself ?

Answering these and similar questions, V. S. Belix points out that the researchers of the relations of the countries belonging to the Anglo-Saxon legal family have common and sometimes contradictory views in the field of legal science.[2]

In particular, a group of scientists, based on historical facts, put forward the opinion that before the conquest of Great Britain by Normandy, the institution of contract and contract law did not develop at all, contractual relations in the common law system appeared much later than the rule of the Romans [3].

Other authors, in particular R. Summers and R. Hillman, believe that contractual relations and contract law in the countries of the Anglo-Saxon legal family were created and improved under the direct influence of Roman law [4].

From our point of view, given that Roman law has survived to this day in certain forms in the contractual relations and law of contracts of many Romano-Germanic states, neither in the existing and developed early stages of this system nor in the later did not seriously affect the formation and development of the institution of the contract in the countries of the Anglo-Saxon legal system at all stages.

The conclusion of our opinion is that during the comparative-legal analysis of the contract law of a number of Anglo-Saxon countries, including Canada, Australia, the United Kingdom and the USA, and the study of scientific literature, the law of contract in the countries of this legal family, legal issues arising from the non-performance of the contract consequences are mostly decided by the courts, unlike in the countries of the Romano-Germanic legal system. Court decisions and court precedents play a decisive role in such relations.

There are other definitions of the concept of contract in the scientific literature that differ from each other to different degrees. However, from the point of view of a deeper and wider understanding of the contract in the common law system, it is not about their differences, but about the features that distinguish this institution from other similar systems in the Anglo-Saxon legal family and beyond, the legal consequences arising from the non-performance of contracts. It is considered appropriate to conduct. Because the basis of the topic we are studying is the legal consequences of non-fulfillment or improper fulfillment of the terms of the contract.

In the US Commercial Code, the section entitled «unfair contracts and transactions or parts thereof» (§ 2-302) states the following regarding contractual relations.

If, when considering a commercial dispute, the court considers that the contract or any part of it at the time of its conclusion contains signs of bad faith (for example, failure to fulfill certain clauses of the contract), the court:

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[2] Белых В.С. Договорное право Англии: сравнительно-правовое исследование: монография. М., 2018. С.57-59.

[3] Pollock F., Maitland E. The History of English Law. Cambridge, 1998. Vol . IP 134-147.

[4] Summers R., Hillman R. Contract and Related Obligations: Theory, Doctrine and Practice. St. _ Paul ., 1997

a) may legally refuse to recognize this contract;

b) finds only a part of the contract to be valid, except for the «unfairly concluded part»;

c) restricts the application of any unfairly constructed part of the contract [5].

In order to make a correct decision, the court requires the parties to the contract to present the relevant evidence to the court to prove that the contract was concluded in good faith or, on the contrary, that the contract was concluded unfairly or dishonestly.

At the same time, in the Anglo-Saxon legal system, unlike the Romano-Germanic family of law, the court mainly takes into account cases that are important and «possible» to be known to the «other party to the contract».

K. Schweigert and H. Koyets, the authenticity of the subject of the contract and its characteristics, cases of deception under the contract, as well as the personality of the partner under the contract are divided into separate categories in the Anglo-Saxon legal system.

If a party to a contract is acting with intent to deceive (with malicious intent), then intentional deception occurs. As a result, as a result of the legal consequences of non-fulfillment of such contracts, the deceived party has the right to cancel the contract and ask the other party to compensate for the damage. Of course, in such cases, the party accused of the contract will have to prove the absence of guilt in his actions, and if he can prove the absence of guilt, the claim for damages will not be satisfied by the court [6].

In scientific literature, according to the tradition formed in the traditions of the Anglo-Saxon legal system, it is emphasized that contract law applies only to mutual promises that are considered as obligations of a person or persons. One of the peculiarities of contract formation in the countries belonging to this legal family is that in cases where the promise of one party does not correspond to the counter-promise of the other party about the actions of the parties to the contract in the future, the contract does not have any it is expressed in the fact that it does not lead to legal consequences.

It is difficult to imagine the development of modern law without knowing the nature of the contract. Because the study of this legal category has recently become the focus of attention of theoretical scholars.

The main point in understanding the contract as a legal category is to study the essence of the phenomenon, because the essence determines the content of the subject being studied. «Essence and phenomenon are universal properties of the objective world, and in the process of cognition they act as stages of understanding the object.» The categories of essence and event are inextricably linked, therefore, the event is always a form of manifestation of the essence, and the latter is always revealed in the event, or vice versa, in the content of the event.

Thus, knowing the nature of the contract can be considered by analyzing its «constituent elements» as an object of research. Such elements may be contractual signs. In addition, the selection and analysis of general and special features of an object or event allows to identify this event or object in a number of similarities.

The issue of the characteristics of the contract is very multifaceted in modern legal literature due to the different understanding of the contract and its nature. In particular, the Romano-Germanic and Anglo-Saxon legal families have different ideas about the contract, its nature and characteristics, so the study of the characteristics of the contract should be carried out taking into account the characteristics of a particular legal family.

Thus, according to the ideas of the contract existing in the Romano-Germanic family of law, a contract is «an agreement between two or more persons for a certain amount of money or in an

[5]https://pravo.hse.ru/intprilaw/doc/0201

[6] Осакве К. Философские основы договора в англо-американском общем праве: договор как обещание // Правоведение. 2004. № 4.

arbitrary form to establish, modify or cancel civil rights and obligations agreement» is understood.

In terms of meaning, the definition proposed by the legislator differs from the doctrinal definition of the concept of contract, in particular, in terms of the set of main features. Among them: the freedom and equality of expressing the will of the parties, equivalence (reciprocity of the rights and obligations of the parties) are especially important aspects when entering into contractual relations. These features arise not only from the analysis of the definitions of the concept of contract, but also from the main principles of civil law, including freedom of contract, equality of participants in civil legal relations, etc.

It is worth considering each of these features in more detail.

1. Freedom of the parties to express their will .

This feature includes the main issues that must be determined by the future subjects of the contract (parties of the contract) before entering into contractual relations, namely:

- during the conclusion of the contract, proposing the issue of its extension to the other party under the contract;
- what contract model should be adopted;
- what conditions should be accepted when concluding a contract.

The parties are free to decide these issues, that is, no one can influence the will of the subjects who set the conditions. Also, it is the free expression rights of the parties to conclude or not to conclude a contract.

In general, freedom of contract is expressed in:

a) citizens and legal entities are free and independent in making decisions about entering into contractual relations. Compulsion to conclude a contract is not allowed, except in cases where the obligation to conclude a contract is provided for by law;

b) citizens and legal entities can choose a contract model based on the requirements stipulated by the current legislation. The parties should not act contrary to the current legislation when concluding contracts not provided for in the legislation;

c) citizens and legal entities must independently determine the terms of the contract they have concluded.

However, it should also be noted that freedom of contract is not absolute. That is, according to the contract, the freedom of one subject is limited by the freedom of another subject, it should not be affected.

2. Coordination of personal will of the parties .

This feature is perhaps the most important in contractual relations. The final goal will be preceded by a «consensus process involving three main steps.»

The first stage is the initiation of the process of consent formation, which is carried out by one of the parties to the contract, which seeks to achieve its goals with certain personal intentions. That is, preparation of an offer (offer), and at this stage, ways to reach an acceptable agreement for both parties are developed and implemented.

The second stage is to coordinate the development of a strategy of actions to achieve the agreed interests and goals. Such interests and objectives shall take priority in reaching an agreement. At this stage, the personal intentions of the parties change as a result of the negotiation process, which is the most important way to reach an agreement.

The third stage is the consolidation and implementation of the agreed actions in the contract act, which includes the pre-agreed and modified personal will of the parties, agreement on all important issues and serves as a guide for actions.

It should be noted that the agreeability of the contract is its inseparable feature, cited by almost all researchers of contract theory. It is appropriate to consider a number of definitions of the concept of contract proposed by different authors to show the agreement of the contract.

Y.Kananikina emphasizes the contract as «agreement of the will of at least two persons» aimed at a specific legal result, while V.Zalessky said «it is the most important means of coordination of desires and interests used in civil society. « E. Godeme gives such a definition as a contract - «agreement of two or more persons with the same general concept and aimed at a legal goal» [7]. According to M. Marchenko, consent is of primary importance for any contract, because without the mutual consent of the parties, there is no contract and it cannot be [8].

Summarizing the above, we can state our author's position and say that a contract is a contract formed on the basis of an agreement between two parties, where both parties are free to enter into a contract and are not forced to enter into this relationship. A contract is inconceivable without an agreement between the parties.

3. Equality of will of the parties .

When we talk about the equality of the parties as signs of the contract in general, it is necessary to remember only the formality in the contractual relationship, not the actual equality. The only factor on which the parties are truly equal is the question of changing the terms of the contract, the possibility of completing it, and the binding nature of such an agreement with the other party. If such equality is violated in the contract, this contract cannot be considered as a valid contract. Therefore, contractual equality is not the equality of the parties in formal laws, but the actual equality of the will of the subjects of the contract. Such rules on contracts exist mainly in European countries that belong to the Romano-Germanic legal system.

Modern researchers usually focus on the existence of a specific purpose in the contract. B. Puginsky, referring to the need to consider the contract as a type of legal integrity, «considers the contract defined by the common will of the parties, subject and other important conditions related to the achievement of the goal to be a valid contract» [9].

By summarizing some of the above results, the following small conclusions can be reached.

A contract is a document created for certain purposes by expressing the will of two parties entering into a contractual relationship. This document is drawn up based on the implementation of the principle of freedom of contract. Each of the subjects of private legal relations has the right to decide for himself whether to conclude a contract or not. The agreement provides for the interdependence of the rights and obligations of the participants with the corresponding requirements. Contracts have specific objectives.

Thus, from the point of view of the Romano-Germanic legal system, a contract is a document of a normative nature created by free agreement between two or more individuals and legal entities, drawn up for a specific purpose.

In the Anglo-Saxon family of law, the ideas about the contract and its characteristics differ from each other. In particular, the American researcher Christopher Oskave stated that «In the Anglo-American legal tradition, there is a bipolar concept of the contract, that is, the traditional (classical) concept of the contract in the common law and the modified (modern) concept of the

[7]Марченко М. Н. Общая теория договора: основные положения // Вестник Московского университета. Серия 11. Право. 2003. № 6. С. 10.

[8] Марченко М. Н. Общая теория договора: основные положения // Вестник Московского университета. Серия 11. Право. 2003. № 6. С. 11.

[9]Римское частное право: Учебник / Под ред. Б.Пугинский, И.Б.Новицкого и И.С.Перетерского. М.: “Юрайт”, 2018. С. 296.

contract in the law» [10]. At the same time, they emphasize that the primary understanding of the contract is a promise confirmed by the opposite rule, that is, a «prospective» transaction with money. In the second case, the contract is understood as a real contract. Both of these concepts of contract are based on common principles. That is, it consists of «the presence of counter supply as an integral part of any contract and the concept of contract as a market tool of gain, increase and distribution and its management».

Robert Hillman, an American researcher on the theory of contract, "there is a close connection between the promise and the creation of legal relations. In order to create a contractual obligation, it must be aimed at creating a legal relationship between the person who made the promise and the person who accepted the promise. If there is no such intention, it is considered that the contract was not concluded through a promise [11].

Thus, the basis for the formation of the contract is the will of the subjects based on trust.

It is not for nothing that in Anglo-American law, the contract is compared to «a locomotive that pulls the whole market with it.» An important task of the contract is to regulate public relations and, if necessary, to apply mandatory measures against persons who violate the requirements stipulated in the contract .

However, it is necessary to pay attention to a small aspect here. A contract can regulate legal relations only when it is a source of law. While the Anglo-Saxon legal system recognizes such a role for the contract, the tradition of the Romano-Germanic legal family strongly rejects it.

Here it is appropriate to consider why the Anglo-Saxon and Romano-Germanic traditions of legal systems have different views of the contract as a source of law. It is known that the contract regulates social relations, that is, relations between individuals in society. This right is not denied even in Anglo-Saxon or Romano-Germanic families. However, to answer this question, it is necessary to understand what the source of law means in the legal traditions under consideration.

In general, the ideas about the sources of law contained in the teachings of these legal traditions are not fundamentally different. Thus, in the Anglo-Saxon legal system, the source of law is understood as «an official document, an act containing legal norms» [12].

At the same time, the legal norm in the considered legal tradition is understood as «an accidental provision taken from the main part of the court decision and determining its legal position in the case» The norm of Anglo-Saxon law arises from the decision of a specific legal case and is much less abstract than the norm of continental law. Such a provision shows the random nature of Anglo-Saxon law, the participation of judges in the formation of legal norms.

In this regard, the source of Anglo-Saxon law means «the specific procedures, forms and processes by which the law acquires its reality - the legislative process, the process of forming customs, etc.» Such declarations allow for the formation of law by entities authorized to implement the law in the Anglo-Saxon system.

In scientific literature, in particular, the stability and ability of Anglo-Saxon legislation to make significant changes, adaptation to a changing environment, «pragmatism and quality» of the common law system, daily law enforcement and law enforcement activities of courts, ethics in the process of extensive reliance on moral norms It is distinguished by the presence of specific aspects such as the integral connection of the norms of common law [13].

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[10]Осакве К. Экономико-философская интерпретация договора в англо-американском общем праве: либеральная теория договора // Журнал российского права. 2004. № 9 (93). С. 92

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[13]Теория государства и права: Учебник / Под ред. В. К. Бабаева. М., 2007. С. 595.

It can be concluded from the above, the doctrine of the Anglo-Saxon legal system regarding contractual relations is based on moral imperatives such as «promise», «court protection of disputes», «voluntary compensation of unfulfilled requirements under the contract».

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