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COMMERCIAL LAW LIABILITY IN THE DOCTRINE OF COMMERCIAL LAW OF UKRAINE AND ITS LEGISLATIVE ASSIGNMENT

Abstract. *Legal liability is a cornerstone of any field of law. Commercial legal liability is not an exception as an institution of commercial law, which, despite its importance in the field of protection of the rights and interests of participants of commercial relations, has not received an adequate coverage in scientific researches.*

The purpose of the article is to reveal the features of commercial law responsibility and to apply commercial, operational-commercial and administrative-commercial sanctions to participants of commercial relations.

The peculiarities of commercial law responsibility are revealed, the main of which is the sphere of its usage, which determines both the basis of application of measures of the specified liability (commercial offense) and the range of subjects of commercial law responsibility, which are participants of relations in the sphere of commerce.

Distinctive features of commercial law responsibility are: the suffering of a participant of commercial relations of adverse commercial consequences not only of property, but also of organizational character; application to the offender, in addition to commercial, operational-commercial and administrative-commercial sanctions, as well as the possibility of determining the amount of penalties in domestic commercial relations; establishment of types and sizes (in case of their definition) of commercial, operational-commercial and administrative-commercial sanctions mainly (and for the latter – exclusively) by law; extrajudicial order (procedure) for the implementation of certain types of commercial law liability.

It is concluded that the norms of the Commercial Code of Ukraine generally reflect the peculiarities of commercial law liability as a type of legal liability and the peculiarities of applying such measures of commercial law liability, as operational, commercial and administrative-commercial sanctions, as well as the recognition of the debtor as a bankrupt.

At the same time, it is emphasized that the Commercial Code of Ukraine in terms of regulating the relations of commercial law responsibility requires certain changes and the main ones are proposed.

It is noted that the problems of commercial law responsibility require further scientific research in order to create a modern theory of commercial law responsibility on the basis of the best practices of domestic and foreign legal science and practice, which should be adequate to the existing conditions of a market economy.

Key words: *commercial law responsibility, commercial sanctions, operational-commercial sanctions, administrative-commercial sanctions.*

Legal liability issues have always been the subject of attention of both legal scholars and practitioners. There is no exception to the problem of commercial law liability, the expressions of increased attention to which are connected with the formation of commercial legislation of the market direction and, in particular, with the adoption of the Commercial Code of Ukraine[1], which not only enshrined, but also developed provisions on general principles of commercial law responsibility, regarding administrative-commercial and operational-commercial sanctions, regarding pre-trial order of realization of commercial law responsibility, regarding recognition the debtor as a bankrupt and others.

Despite the large number of scientific papers studying commercial law responsibility, only a few PhD theses were defended during the years of independence in Ukraine (Shumilo I.A. – 2001, Tatkova Z.F. – 2010, Zayarnyi O.A. – 2011, Novoshitska V.I. – 2017), dedicated to certain aspects of commercial law responsibility, which indicates the need for deeper theoretical studies of problems of commercial law responsibility, commercial and administrative-commercial sanctions, etc., and to determine the effectiveness of the application of these sanctions by courts, empowered state authorities and local governments, parties of commercial contracts.

Many issues related to the responsibility of participants in commercial relations have arisen due to certain differences between the rules of the Civil Code of Ukraine[2] and the Commercial Code of Ukraine, which is mainly due to the misunderstanding of the peculiarities of the application of commercial law liability measures to the participants of commercial relations and to their special kind as subjects of commerce. However, some discrepancies are the result of imperfect legal technique used in the drafting of the Commercial Code of Ukraine and inaccurate translation of the terms of the draft Ukrainian Commercial Code from Russian into Ukrainian.

The purpose of the research is to author's attempt to reveal the features of both commercial law responsibility and

[1] Господарський кодекс України: Закон України від 16 січня 2003 р. №436-IV. URL: https://zakon.rada.gov.ua/laws/show/436–15 (дата звернення: 30.05.2019)

[2] Цивільний кодекс України: Закон України від 16 січня 2003 р. №435-IV. URL: https://zakon.rada.gov.ua/laws/show/436–15 (дата звернення: 30.05.2019)

the application of its measures to subjects of commerce and other participants of commercial relations.

Commercial law responsibility is an instrument of coercion to comply with legal requirements (provisions of normative-legal and other legal acts, terms of commercial agreements and other rules of conduct), however, unlike the Soviet period, when many scientists considered state coercion as a feature of legal liability measures, today it is controversial to say so. For example, legal liability measures applied by a party to an commercial agreement in the form of operational and commercial sanctions, or voluntary payment of penalties or voluntary compensation of damages in some cases directly, in others – indirectly unrelated to state coercion. That is why V. V. Lutz when he disagrees that voluntary discharge of a legal responsibility cannot be[1].

Commercial law responsibility is in many respects similar to civil law liability, but it also has certain features that distinguish it not only from the latter but also from the commercial law responsibility of a planned economy period with certain features[2].

The main feature of commercial law responsibility is the sphere of its application – the sphere of commerce, which determines the basis of its application and determines the range of subjects of commercial law responsibility.

Taking that into account, it seems not entirely correct to refer to the grounds for the occurrence of commercial obligations on such grounds as damaging the subject or commerce, the acquisition or preservation of property of the subject or by a subject of commerce at the expense of another person without sufficient grounds (paragraph 5 of Part 1 of Article 174 of the Commercial Code of Ukraine). In essence, it is about nothing other than the grounds for the occurrence of non-contractual obligations and relations for compensation, which are regulated by the rules of the Civil Code of Ukraine, and therefore it is advisable to exclude paragraph 5 of part 1 of Article 174 from the regulatory act.

According to Part 1 of Art. 218 of the Commercial Code of Ukraine the basis of commercial law responsibility of the participant of commercial relations is an offense committed by one in the sphere of commerce. Thus, this provision clearly defines the sole basis for the appearance of a protective legal relationship committed by a participant of commercial relations offense in the field of commerce.

The content of a protective commercial relationship caused by commercial offense is the obligation of the obliged party (the offender) to restore the violated right and the right of the empowered party (the victim) to demand the restoration of the violated, unrecognized or contested right. To the parties of such legal relationship (however, as to the parties of the protective legal relation-

[1] Цивільне право України. Особлива частина: підручник / за ред О. В. Дзери, Н. С. Кузнєцової, Р. А. Майданика. – 3-тє вид., перероб. і допов. – К.: Юрінком Інтер, 2010. 194

[2] Хозяйственное право. Общие положения / Под ред. члена-корреспондента АН СССР В. В. Лаптева. – М.: Изд-во «Наука». 1983. 223.

ship caused by property commercial obligation violation), it is possible to use the terms (which were used above) "empowered party" and "obliged party" which are connected with organizational-commercial obligations in the Commercial Code of Ukraine. That, however, does not exclude the possibility of using the mentioned terms in relation to the protective relationship, in which the obliged party is the offender and empowered one – is the victim.

It should be mentioned that the existence in the Commercial Code of Ukraine rules on organizational-commercial obligations, concept and types of which are defined in Art. 176 of the Commercial Code of Ukraine, became one of the important reasons for the inclusion into the Commercial Code of Ukraine of a number of general rules on the liability of participants of commercial relations and caused the autonomous legal regulation of the measures of liability for violation of these obligations application. That is why such a circumstance does not give any reasons to conclude on the duplication of the provisions of the Civil Code of Ukraine in the articles of the Commercial Code of Ukraine and the proposals on removing certain rules regarding liability from the Commercial Code of Ukraine or on transferring them from the Commercial Code of Ukraine to the Civil Code of Ukraine.

However, it should be noted that commercial law liability is a concept narrower than the concept of liability offense in the sphere of commerce (if based on a broad understanding of commerce and the relevant range of subjects involved in it, then the liability in this area may also be civil, both administrative and criminal). Therefore, commercial law liability should be regarded as a separate, special type of liability applicable to commercial offenses as one of the types of offenses in the sphere of commerce.

However, the subjects of such responsibility may be exclusively participants of commercial relations, regardless of whether they are the a subjects of commerce, consumers, state authorities and local self-government bodies with commercial competence, or other participants of commercial relations defined in Art. 2 of the Commercial Code of Ukraine.

A significant distinguishing feature of commercial law responsibility is the fact that commercial law liability is the suffering by a participant of commercial relations (in particular by a subject of commerce) of unfavorable economical consequences not only of property, but also of organizational nature (the latter are, in particular, the consequences of operative-commercial sanctions usage and sanctions of administrative-commercial nature), which is confirmed by a wider range of sanctions (unlike the Civil Code of Ukraine) which can be used against the subjects of commerce and other participants of commercial relations for commercial offenses committed by them. These are commercial, operational-commercial and administrative-commercial sanctions, of which only commercial sanctions in the form of liquidated damages, fines, penalties and damage recovering more or less co-

incide with civil law sanctions. In regard with operative-commercial sanctions, such measures of liability are unknown in civil law. Similarly, the mentioned legislation does not provide for the possibility to determine the amount of penalties applicable in domestic commercial relations for violating of obligations, since the parties to domestic commercial obligations are recognized as subjects of law neither by civil law nor by the science of civil law, as well as the existence of domestic liabilities is not recognized.

The differences between commercial and civil sanctions are, in particular, that: a) Part 1 of Art. 549 of the Civil Code of Ukraine, using the term "liquidated damages (fine, penalty)", qualifies the fine and the penalty as varieties of liquidated damages, which in its "pure form" does not exist, while used in part 1 of Art. 230 of the Commercial Code of Ukraine the term "liquidated damages, fine, penalty" gives reasons to consider each of these types of sanctions, including liquidated damages, as an independent, although in further articles of the Commercial Code of Ukraine the term "liquidated damages" is not used. In our time, we noted that such technical, in our view, error could well be corrected by making editorial (technical) changes to Part 1 of Art. 230 Commercial Code of Ukraine; b) Part 1 of Art. 551 of the Commercial Code of Ukraine establishes that the matter of liquidated damages be a sum of money, movable and immovable property, whereas, according to Part 1 of Art. 230 of the Commercial Code of Ukraine as fine sanctions are recognized commercial sanctions in the form of monetary amount. In our opinion, such a restriction of the form of a liquidated damages in the Commercial Code of Ukraine can be explained by preventing the change of the owner of state or communal property bypassing the privatization legislation, however, we believe that the Commercial Code of Ukraine unreasonably restricts the right of subjects of commerce to set a liquidated damage in the form of property in the contract (for example, securities), because of the fears of possible violations while transferring such property equally apply to the payment of liquidated damage in cash. The establishment in the commercial agreements of the property form of liquidated damage will allow the offending subject of commerce to quickly maneuver its property and financial resources, and in some cases – to avoid possible bankruptcy proceedings. At the same time, the establishment of liquidated damages for commercial obligations violation will significantly reduce the time for restoration of the infringed property right of the victim; c) according to the Civil Code of Ukraine (Part 1, Art. 624), the main type of liquidated damage is fine one, whereas, according to Part 1, Art. 232 of the Comercial Code of Ukraine – offsetting one. The position we have expressed in this regard was to establish in the Commercial Code of Ukraine as a general rule of application of fine type of liquidated damages for commercial obligation violation, since these are participants of commercial relations, many of which are professionally engaged in independent, initiative, systematic,

at their own risk activity. Instead, the main type of liquidated damages for the members of civil relations could be the offsetting one.

It distinguishes commercial law liability from civil one and the fact that the types and sizes (if any) of commercial and operational-commercial sanctions are predominantly established by law. Only the law establishes the grounds and types of administrative-commercial sanctions, which is caused by a range of subjects of their application (state authorities and local self-government bodies) and meets the requirements of Part 2 of Art. 19 of the Constitution of Ukraine.

A distinctive feature of commercial law responsibility is also the order (procedure) of its application (judicial and extrajudicial), established by law. In this case, the court procedure for the application of commercial sanctions may be preceded by the so-called pre-trial procedure for the implementation of commercial law liability, which in accordance with Art. 222 of the Commercial Code of Ukraine consists in addressing by the victim to the offender with a written claim and in a written notice by the latter to victim about the results of consideration of the claim.

According to the general rule established by Part 2 of Art. 222 of the Civil Code of Ukraine, in the case of compensation for damages or application of other sanctions, a subject of commerce or other participant of commercial relations whose rights or legitimate interests were violated, in order to resolve a dispute directly with the offender of these rights or interests, has a right to make a written claim to one, unless otherwise provided by law.

Thus, provided for Art. 222 of the Civil Code of Ukraine the pre-trial procedure for the realization of commercial law liability, in essence, concerns only the application of such types of commercial sanctions as compensation for damages and fine sanctions. The right (but not the obligation) of the victim to make a claim is enshrined, in particular, in Chapter 2, "Claims", of Section XI, "Claims and lawsuits", of the Merchant Shipping Code of Ukraine, which set the possibility of claiming and, in particular, specifying the terms of the claim and consideration of the claim (art. 383–387 MSC of Ukraine). Similarly, paragraph 130 of the Charter of the Ukrainian Railways states that a lawsuit may be preceded by a claim to it, and paragraphs 131, 133, 134, and 135 identify the subjects of the claim and the consideration of the claim, cases of its claim and terms of application and consideration.

At the same time, the Charter of Road Transport of the Ukrainian SSR, which generally requires bringing its provisions in line with the modern needs of regulating road transport activity, including goods transportation, establishes a mandatory claim, regulating the related relations in art. art. 159–166.

Similarly, the mandatory filing of a claim is established in the case of violation of the terms of the contract of carriage of goods by air. Thus, paragraph 21.1.2. of The rules of air transportation of goods, approved by the order of the State Service of Ukraine for Supervision of Security of Aviation No. 186 of

March 14, 2006, stipulates that in case of damage, the person entitled to receive the cargo must send the carrier a claim immediately after finding the damage, but not later than 14 days from the date of receipt or from the date of signature by the consignee of the relevant delivery document. In case of delay, the claim must be sent no later than 21 days from the date when the cargo was given at the disposal of the person entitled to receive it. In case of loss, the claim must be submitted within 120 days from the date of issue of the air waybill.

It should be noted, however, that according to Part 1 of Art. 100 of the Air Code of Ukraine the procedure for filing claims and lawsuits is determined by the rules of the air carrier, not by state bodies. According to it, the Regulation on the Ministry of Infrastructure of Ukraine, adopted by the Cabinet of Ministers of Ukraine on June 30, 2015 No. 460, does not include among the powers of this Ministry, which provides for the formation and implementation of state policy in the field of aviation transport and use of Ukrainian airspace, approval of rules air freight.

The State Aviation Safety Supervision Service did not have such authority. Regulation on that Service was approved by the Decree of the Cabinet of Ministers of Ukraine No. 709 of May 23, 2006, lapsed under the resolution of the Cabinet of Ministers of Ukraine of November 2, 2006, No. 1526.

Therefore, the Rules for the carriage of goods by air which was mentioned here, must be abolished and the procedure for the filing of claims for the carriage of goods by air must be governed by the rules of the air carrier, as provided for in Part 1, Art. 100 of the Air Code of Ukraine.

Extra-judicial procedure also takes place in the case of operative-commercial sanctions by a party who has suffered an offense without first submitting a claim to the offender (part 1 of Article 237 of the Commercial Code of Ukraine). In this case, operative-commercial sanctions are applied irrespective of the fault of the subject that violated the commercial obligation (Part 3 of Article 235 of the Commercial Code of Ukraine).

Similarly, in extra-judicial order administrative-commercial sanctions are applied by empowered state authorities or by local self-government bodies to the subjects of commerce for violation of the commercial activity rules established by legislative acts. However, on administrative-commercial sanctions, according to the order of application and legal nature of the latter, the pre-trial procedure for the implementation of commercial law responsibility, established Art. 222 of the Commercial Code of Ukraine does not extend, in our opinion, it is expedient to provide it in the Commercial Code of Ukraine, supplementing it with Article 238 Part 3 of the relevant content.

Part 1 of Art. 223 of the Commercial Code of Ukraine requires an alignment with the provisions of the Civil Code of Ukraine, which refers to the "general and shortened limitation periods", which are used while the implementation in court of liability for offenses in the field of commerce. First, the Civil Code of Ukraine quite rightly abandoned the phrase "limi-

tation period", defining in Art. 256 statute of limitations as a period within which a person may apply to the court for the protection of his civil right or interest. Therefore, the use of the phrase "limitation period" is incorrect both in legal and grammatical sense. Secondly, Art. 223 of the Commercial Code of Ukraine unreasonably limits the possibility of application of statute of limitations with the duration specified by the Civil Code and Commercial Code of Ukraine, depriving the parties of the right to prolong the statute of limitations, established by law, by agreement (Part 1 of Article 259 of the Civil Code of Ukraine).

Based on the above, we propose to set out part 1 of Art. 223 of the Commercial Code of Ukraine in the following wording: "1. In case of judicial liability for commercial offenses in the form of compensation for damages and fine sanctions, the statute of limitations established by the Civil Code of Ukraine shall be applied, unless other terms are established by this Code."

Conclusions. Summarizing the above, it can be stated that commercial law liability, which, although it has certain similar features with civil law liability, is an independent type of legal liability and cannot be considered as a special type or component of civil liability. For example, the presence of similar elements, such as the fact of the offense, casual link, guilt are in no way a basis for the equation of criminal law and civil law liability. These elements are the features of legal liability in general and, as a general rule, extend to its specific sectoral types.

In general, the Commercial Code rules reflect the peculiarities of commercial law liability as a type of legal liability, and the peculiarities of applying such measures of commercial law liability, such as operative-commercial and administrative-commercial sanctions, as well as the recognition of the debtor as a bankrupt.

At the same time, the Commercial Code of Ukraine needs some changes regarding the regulation of commercial law liability relations. First of all, it concerns the structure of the Commercial Code of Ukraine, namely: a) Section V of the Commercial Code of Ukraine is appropriate to be called "Liability for Commercial Offenses" because its current name is too broad and creates the prerequisites for the inclusion into it the rules on administrative, criminal, civil and other liability for committing an offense in the field of commerce, which is certainly unacceptable; b) it is appropriate to exclude Chapter 23 from Section IV of the Commercial Code of Ukraine and to include (having previously brought its provisions into conformity with the Bankruptcy Code) as the last chapter in Section V, since the debtor's bankruptcy is, in our view, the most severe sanction; c) Chapter 28 of the Commercial Code of Ukraine, the rules of which are not in line with the provisions of the Law of Ukraine "On Protection of Economical Competitiveness", as it was indicated in scientific publications, it is advisable to exclude from the Code. However, the main reason for the exclusion of the said chapter from the Code is the uncertainty of the

criterion, according to which Chapter 28, the rules of which regulate the relations of responsibility in a particular sphere, (no matter how important for the economics it is), is included in Section V of the Commercial Code of Ukraine, the rules of which establish general provisions for commercial offenses and types of sanctions.

Rules that determine the basis for the application of administrative and commercial sanctions (such a basis can only be a violation of the rules of commercial activity) require more explicit wording in the legislation and the number of persons to whom such sanctions can be applied (subjects of commerce – legal entities and individual entrepreneurs) needs it too. However, the responsibility of commercial subjects, as persons who, on a professional basis and at their own risk, carry out commercial (entrepreneurial) activity, should come regardless of guilt, regardless of what types of sanctions – commercial or administrative-commercial – should be applied. In addition, the provisions of those laws that use the term "financial sanctions" in cases of administrative-commercial sanctions should be brought in line with the terminology of the Commercial Code of Ukraine.

In our view, the practice of applying the provisions of Art. 625 of the Civil Code of Ukraine on monetary obligations of participants of commercial relations requires to be significantly changed. The peculiarities of establishing fine sanctions for violation of monetary obligations by the participants of commercial relations are provided for in Part 6 of Art. 231 of the Commercial Code of Ukraine. With regard to the inflation index and percent annual, they cannot be considered as fine sanctions in the truest sense, they perform a compensation function (inflation index), which is mostly a feature of damages recovering, or is a charge for using someone else's money (percent annual). In any case, there are no reasons for qualifying them as measures of liability (along with payment of the amount of debt) that can be applied to participants of commercial relations in the form of sanctions, basing on the provisions of Art. 625 of the Civil Code of Ukraine.

As for other "differences" between the norms of the Civil Code of Ukraine and the Commercial Code of Ukraine on the responsibility of the subjects of civil and commercial relations, while the assessment and characterization of each of them should it should be taken into account the peculiarities of the legal regulation of civil and commercial relations, which should be purely objective and justified.

It is a question neither on "loosening" the positions of Ukrainian civilistics by representatives of the science of commercial law, nor on their "destruction", as it was mentioned by some representatives of civilistic science[1]. The realities of a market economy, while maintaining the unanswered need for regulatory in-

[1] І Спасибо-Фатєєва, Міркування про українську цивілістику в Спогади про Людину, Вченого, Науковця (до 60-річчя від Дня народження професора Ірини Володимирівни Жилінкової) / за заг. ред. Р.О. Стефанчука (Право 2019) 207

fluence of the state on the activities of commercial subjects in order to perform by it, in particular, social function, require the creation of new mechanisms of legal liability, including – the commercial law responsibility, which rules should find their place in The Commercial Code of Ukraine, which, despite trying to give him a label of "anti-market act"[1], to a greater extent than the Civil Code of Ukraine, regulates relations in the sphere of economics, taking into account their specificity.

It is time to realize that no field of legislation (law) can be a monopolist in regulating public relations in a particular sphere. An example of it is the land, water, environmental, family and other fields of law governing personal property and property relations, which have certain features that make them independent and different from civil relations.

In any case, the problems of commercial law responsibility require further scientific research on the basis of broad, truly scientific discussions between representatives of different law schools, with appropriate arguments (without distorting the scientific positions, views and conclusions of the representatives of commercial law, without attributing "merits" to them to which they have no regard, which unfortunately are made by certain civil scientists), so that, basing on the best practices of domestic and foreign legal science and practice to create the modern theory of commercial law liability that would meet current market economics conditions.

In particular, due to the updating of the legislation on joint stock companies, limited liability and additional liability companies require in-depth theoretical analysis of the problem of commercial law liability of participants of corporate and related relations. Despite the efforts of representatives of civil science to substantiate the relevance of corporate relations to the subject of legal regulation of civil law, we have not seen convincing arguments. Instead, the combination of corporate and organizational elements in corporate relations gives every reason to consider them as internal commercial relations, which are included in the sphere of commercial relations, and, therefore, is the subject of regulation of the Commercial Code of Ukraine, which, in fact, was reflected in the legal ensuring of corporate relations in Art. 167 of the Commercial Code of Ukraine and the absence of such norms in the Civil Code of Ukraine.

The existence of organizational-commercial (Article 176 of the Commercial Code of Ukraine), socio-communal (Article 177 of the Commercial Code of Ukraine) and public obligations (Article 178 of the Civil Code of Ukraine) objectively implies responsibility for their non-performance or improper performance, but the issue of such responsibility today is beyond the field of scientists' view

The results of scientific studies of the problems of commercial law responsibility should find appropriate setting in the normative-legal acts of commercial legislation.

[1] А Довгерт, Рекодифікація Цивільного кодексу України: основні чинники і передумови старту (2019) 1 Право України 38

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