Прегледни рад 347.447:34(37)
doi:10.5937/zrpfns59-55383

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FORESEEABILITY AND LIMITATION OF CONTRACTUAL DAMAGES IN ROMAN LAW

***Abstract**: This Article studies the limitation of liability for contractual damages in Roman law to examine whether foreseeability in contractual damages was formed in Roman law and its influence on the development of limitation of liability for contractual damages in modern law. It concludes that the limitation of contractual damages, without general rule, was discussed by some Roman jurists in given contexts and there was a vague implication of foreseeable damages to limit the compensation of damages. The Roman law laid the foundation for the fair limitation of contractual damages which became the inspiration to develop foreseeability and limitation of liability in the law of contract in modern times.*

***Keywords**: Foreseeability, Limitation of liability, Contractual damages, Roman law.*

I. INTRODUCTION

Foreseeability can be easily found in both national legal systems and international instruments as a method to limit damages award in contractual relationships. Did foreseeability already appear in Roman law – the most advanced known legal system in the ancient world? This article analyses the Roman law texts dealing with the limitation of contractual damages to examine whether foreseeability of damage was formed in Roman law and do Roman law texts contribute to the development of limitation of contractual damages and foreseeability in the modern law.

The Romans did not develop the theory of general law of contract, but only individual cases. The rules varied based on several factors, including the formulation

and the subject matter of contracts.[1] Although the general rule dealing with the limitation on contractual damages is absent in classical Roman law, it was addressed in particular circumstances by a number of jurists. In case of breaching the contract, parties have the right to claim compensation which would be objectively measured by the value of the object of sale or by referring to the facts of each individual case. The failure of the buyer to make timely payment, or to receive the delivered object of sale, is considered as default (*mora*, literally "delay"). Compensation, in this case, is calculated based on the value of the object of sale which may be only the price or interest when *mora* is determined by the judge, or also any costs relating to the object incurred by the seller prior to delivery. If the object of sale has a market value that can be easily measured, such as wheat or wine, the prevailing price at the time when suit is brought is used to measure the damages. The seller is liable for returning the paid price, or also the extent of the buyer's "interest" (*id quod interest*) because of his failure to timely deliver or selling the goods that have latent defects. It means the seller is liable not only for direct damages but also for some of the consequential losses incurred by the buyer due to the seller's default.[2]

While the term 'foreseeability' was not explicitly used in Roman legal texts, it was implicit in various aspects of Roman jurisprudence. Foreseeability can be found in imposition of civil liability as an important tool for limiting scope of liability and assessing the blameworthiness of conduct. Foreseeability, stated by Paulus, served as a standard for *culpa*, fault; that is, in general, it helped to abstractly represent the variety of concrete social practices that make human behavior predictable (see Paul Digest D. 9,2,31 and D. 9,2,28). It reshaped the boundaries of liability for unintentionally causing harm. Subjective foreseeability did not appear to be inherently significant; instead, it functioned to illustrate the avoidability of the harm, which is an objective, fundamentally causal examination. However, foreseeability of harm did not function as a generative concept nor as a standalone rationale for imposing liability.[3] Roman law recognized the principle of culpa, or fault, which required that an individual be held accountable for harm caused to another through their negligent or wrongful actions. Foreseeability was closely tied to the assessment of culpa, as it pertained to whether a reasonable person could have anticipated the consequences of their actions.

In the contractual relationship, foreseeable damages in Roman law seem to be a vague attempt to limit liability for damages.

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[1] Paul du Plessis, *Borkowski's Textbook On Roman Law,* Oxford 2020, para 9.2.

[2] Bruce Woodward Frier, (2021). *A Casebook on the Roman Law of Contracts, Chapter IV: Sale: A Contract Created Through Informal Agreement*, Oxford 2021, 59 and 67. Retrieved March 1, 2024, from http://www.law.harvard.edu/faculty/cdonahue/courses/rlaw/mats/Frier_007%20Chapter%204%20Casebook%20on%20the%20Roman%20Law%20of%20Contracts.pdf.

[3] Helen Scott, "The history of foreseeability". *Current Legal Problems*, 72(1), 2019, 287–314.

II. LIMITATION OF CONTRACTUAL DAMAGES AND FORESEEABILITY IN ROMAN LAW

1. Liability and Element of Knowledge

One of the attempts to limit liability for damages where the element of knowledge becomes a factor in evaluating liability can be found in D. 19,1,13pr – Ulpian wrote in the thirty-second book on the Edict:

> *Julian, in the fifteenth book of his [Digest,] distinguishes between the knowing and unknowing seller with regard to condemnation in an action on purchase. He says that if he acted unknowingly in selling a diseased herd or an unsound timber, then in an action on purchase he will be held responsible for the difference from the smaller amount I would have aid had I known of this. But if he knew but kept silent and so deceived the buyer, he will be held responsible to the buyer for all losses he sustained due to this sale. Therefore, if a building collapsed due to the timber's unsoundness, he must make good the building's calculated worth; if herds die through contagion from the diseased herd, he should be held responsible for the interest in this not having occurred.*[4]

Knowingly selling a piece of cattle that has contracted a contagious disease, the seller can be sued for all damages including consequential losses suffered by the buyer because of the defect from the sale, including the other animals owned by the buyer, which have died as a result of contracting the infection. If he conducts the sale without knowledge of the cow's disease, he only has to compensate part of the purchase price. Depending on knowledge, liability of the seller is treated differently. The conscious seller is liable not only for the defects but also for all consequential losses incurred by the buyer, while the unconscious one has liability only for the price reduction. The conscious seller had to bear the full liability for his failure to reveal the defects to the buyer and this action is treated as fraud (*dolus*) which becomes a factor triggering a liability for all damages resulting from it.

In a similar case the owner sold his slave who actually is a thief or a runaway – the D. 19,1,13,1. He is liable for the purchaser's interest not to be deceived if he was aware that the slave was a thief. But if the seller is unaware of the truth about the runaway, his liability is limited to the lesser amount than the one he would have paid for had he known the slave was a runaway. In contrast, the seller is not liable in case he had no knowledge that the slave is the thief. The rationale behind this distinction between a runaway and thief is that the buyer does not acquire the right to hold the runaway slave (*habere licere*), thus the seller is liable as if for eviction; but, with regard to a thief, we can retain possession.[5] Ulpian, however,

[4] Alan Watson, *The Digest of Justinian 2*, Philadelphia, 2001.
[5] B.W. Frier, 98.

continues in the D. 19,1,13,3 that the seller is liable: he ought not lightly to have affirmed what he did not know even if he is unaware of the truth, but assures that the slave is kind and truthful, and therefore charged for a high value. There is a distinction between a person who was aware but remained silent and one who affirms what he was unaware of. It is reasonable that the former should have revealed that the slave was a thief, while the latter should not make a hasty affirmation.

In contrast to the D. 19,1,13pr where full damage is only on the conscious sellers, the D. 19,1,6,4 (sale of a leaky barrel) and D. 19,2,19,1 (lease of a leaky barrel) hold the seller and lessor liable for all damages no matter whether he was aware of the defect in the thing sold or not. In the two Digests' texts, there is no distinction between the seller who owned knowledge of the defect and the one unaware, both are liable for the buyer's full interest.

D. 19,1,6,4 also mentioned the factor of affirmation that turn the seller to be liable for what the buyer lost because of that affirmation. Another case discussing on the issue of liability relating to warranties is D. 18,6,16. Gaius wrote in the second book of *Everyday Matters*:

> *If wine in vats is sold and (then), before it is removed by the buyer, it is corrupted because of its nature, he (the seller) will be liable to the buyer if he in fact affirmed its quality. But if he made no affirmation, the buyer bears the risk (periculum), since if he did not taste, or he did taste and wrongly approved (the wine), he has himself to blaim. Obviously, if the seller knew that its quality would not last until the day it was to be removed and did not warn the buyer, he will be liable for the extent of his (the buyer's) interest in having been warned.*[6]

In case wine became bad between the time of the sale transaction has been concluded and delivery, the risk normally is on the buyer (see Ulpian, D. 18,6,1 pr.). However, Gaius suggests two exceptions that the seller bears the risk: first, if the seller affirms product's quality; second, if the seller knew but chose not to disclose that it would go bad. The seller is liable to the extent of the buyer's interest in having received a proper warning if he knew latent defects and did not warn the buyer. The prevention criterion was added in the text and became a measurement of liability.

These Digests dealt with seller's liability for latent defects connecting to the knowledge factor. Some texts hold the seller who was unaware of the defects liable for damages. However, the extent of liability of the ignorant seller's was not treated equally. The unaware seller normally was liable for difference between the paid price and the amount the buyer would have paid if he had been awared of the defect, but some texts of the Digest (such as D. 19,1,6,4 or D. 19,2,19,1) hold them liable for full damages. In addition to the ones discussed above, there are

[6] Ibid, 91.

also other texts that hold the ignorant seller liable for defects - D. 18,1,45 (sale of used clothing as new), and C. 4,49,9 (sale of a piece of land that had a higher capitatio than the seller had claimed). The other texts exclude the unaware seller's liability for defects such as the D. 19,1,21,1 (sale of a piece of land for which a public land tax imposed).[7]

2. Loss and connection with the matter (*circa ipsam rem*)

The relationship between the loss and matter to determine damages is also discussed in the Roman Law. There are also issues where losses would not be recoverable in case of non-delivery causing a buyer to suffer loss that exceeds the value of the thing itself. Paul claimed that loss would be recoverable if it is "in close connection with this matter". Paul wrote in the thirty-third book on the Edict – para.19,1,21,3:

> *"When the seller is responsible for non-delivery of an object, every benefit to the buyer is taken into account provided that it stands in close connection with this matter [circa ipsam rem]. If he could have completed a deal and made profit from wine, this should not be reckoned in, no more than if he buys wheat and his household suffers from starvation because it was not delivered; he receives the price of the grain, not the price of the slaves killed by starvation. An obligation does not increase because it is carried out slowly, although it would grow greater if wine were worth more today, and rightly so, for if the wine had been delivered, as buyer would have it, and if not, that which should have been delivered previously is due now."*[8]

Under the text, Paul took the two examples (where a buyer who was unable to sell wine at a profit due to the non-delivery of wine, or failure to deliver grain resulting in the death of the buyer's slaves due to starvation) to suggest that loss would be recoverable if it is in close connection with the matter itself (*circa ipsam rem*). Potential profit from selling the wine, or losses suffered due to the slaves killed by starvation, are insufficiently closely connected with the matter (*res*). If delivery is conducted late and the value of wine increases because of the market price since that non-delivery date, damages is considered in sufficiently close connection with the matter or implying the close connection between loss and the object of obligation. However, there seems to be a conflict here because Paul clarifies that that loss of profit is not recoverable, while it can be argued that the buyer would have been able to profit from the increase in value by selling the wine

[7] Jan Hallebeek, "The ignorant seller's liability for latent defects: One regula or various sets of rules?" In J. W. Cairns, & P. J. du Plessis (Eds.), *The creation of the ius commune. From Casus to regula,* 2010, 175-217.

[8] A. Watson.

later. The rule and its function are not clear.[9] Besides, there is no clear explanation of which losses would be considered to be closely connected with the matter and what *res* mean; whether the matter refers to "thing" (i.e., the object of obligation) or "matter, affair" (i.e., the sale or the breach thereof). Paul seemed to expect to limit the scope of "proximate cause" as much as possible in order to prevent claims for consequential damages at least for the common items like wine and grain.[10]

From the above texts, whether there existed a foreseeability test even in that particular category of contract is still a question.

3. Foreseeability and Limitation of Contractual Damages

During Justinian period, by the sixth century, confusion arose when there were different rules for different types of contract.[11] Limitation of contractual damages was introduced by a ruling (C. 7,47,1 the so-called lex Sancimus) as a response to the desire for certainty and consistency in law. C. 7,47,1 provided:

> *"[W]henever the amount or the nature of the property is certain, as in the cases of sales, leases and all other contracts, the damages shall not exceed double the value of the property. In all other instances, however, where the value of the property seems to be uncertain, the judges... shall carefully ascertain the actual amount of the loss, and damages to that amount shall be granted..."*[12]

Accordingly, damages could not be awarded greater than double the property's value if the quantity or nature of the property was certain, as in sales, leases, and all other transactions. In contrast, if value of the property appears uncertain, the judges were permitted to determine carefully the actual amount of the loss and award damages corresponding to that precise loss. It is in accordance with nature to impose penalties with a proper degree of moderation, or are explicitly prescribed by the laws. However, there was no clear rationale provided for the rule and therefore it attracted various interpretations regarding limitation.[13] This rule was later developed to limitations upon damages in terms of a principle: foreseeability.

The Justinian C. 7,47,1 double damages rule was first explained to the statutory limitation in terms of foreseeability by Carolus Molinaeus (Charles Dumoulin) – a French jurist in the sixteenth century. He found that the rationale behind Justinian's constitution was based on the fact that, in most cases, the debtor could

[9] Alma Diamond, "Remoteness and the limitation of contractual damages", [LLM-thesis-Stellenbosch : Stellenbosch University], 2016, 12. Retrieved April 28, 2024, from https://core.ac.uk/download/pdf/188224834.pdf.

[10] B.W. Frier, 69.

[11] Reinhard Zimmerman, *The law of obligations : Roman foundations of the civilian tradition*, Cape Town 1990.

[12] Samuel Parsons Scott, *The Civil Law* – Translated from the Original Latin 5-6. Clark, 2001.

[13] K. Barnett, 5.

only foresee such damage i.e., the *duplum*. Based on this rationale, he developed the general principle that compensable damage resulting from a breach of contract must be limited to foreseeable harm.[14] From his idea, Pothier – a French jurist in the eighteenth century – developed the foreseeability rule. According to Pothier only damages or losses resulting from a defendant's failure to fulfill an obligation that could have been reasonably foreseen at the time the contract was formed may subject the defendant to liability. The distinction between intrinsic and extrinsic damages is categorized which relies on deemed contemplation and actual contemplation. Pothier also dealt with the question of what kind of losses are deemed to have been foreseen at the time of concluding contract. This work of Pothier became a significant influence on the modern French law of contract and the English approach in terms of foreseeability as a liability-limitation device.

III. Conclusion

Although there was no regulation on the issue of limitation of liability for contractual damages nor foreseeability in Roman law, varied rules were developed for certain circumstances. Liability of a defaulting party is limited in case of failure to timely deliver causing harm or selling or leasing defective products in the form of referring to the close connection between the breach committed and the losses suffered, or to the knowledge of the possible consequence caused by his breach of obligation. However, even in a similar situation relating to the element of knowledge, liability for damages is treated differently without a clear explanation (See section 1 discussed above). For the element of knowledge to be a factor to assess damages, Article 74 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) also develops knowledge factor in evaluating foreseeability of the party in breach.

The vague Roman law texts regarding the limitation of contractual damages were interpreted by many medieval glossators and commentators. From the texts 'close connection with the matter' – *circa ipsam rem* (see D 19,1,21,3 discussed above), the glossators set up two categories i) direct loss – *interesse circa rem* and ii) consequential loss – *interesse extra rem*.[15] These distinctions become widely accepted in modern legal systems with different interpretations. Ulpian's rule in D. 1,19,1,13 pr. was referred by Pothier to state that the debtor is also liable for damages which is unforeseen in cases of fraud. When committing fraud, liability includes consequential loss which is used in French law and also in the model instrument – the Principles of European Contract Law.

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[14] Franco Ferrari, "Comparative Ruminations on the Foreseeability of Damages in Contract Law", *Louisiana Law Review*, 53, 1993, 1257-1269.

[15] Zimmermann *(1990)*; Johannes Wilhelmus Wessels, *The law of contract in South Africa*, Johannesburg 1937, 923.

It is highlighted that although there are vague rules on limitation, the Roman law laid the foundation on the legal concept of fair limits on damages in case of breach of contract that the defendant is required to provide reparation for loss.[16] The Justinian C. 7,47,1 rules of double value became inspiration for the French jurists to develop the foreseeability principle which then has a significant influence on various national legal systems and model instruments.

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Предвидивост и ограничење уговорних штета у римском праву

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Кључне речи: *Предвидљивост, Ограничење одговорности, Уговорна штета, Римско право.*

Датум пријема рада: 12. 12. 2024.
Датум достављања коначне верзије рада: 4. 9. 2025.
Датум прихватања рада: 18. 9. 2025.