



LACK OF CIVIL LIABILITY IN LAW OF IRAN AND FRANCE

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ABSTRACT

Non-liability contract is an agreement based on which the parties annul the future possible civil liability. With such a condition the obligor (engagé) is exempted from the liability that would occur for him in future. Nowadays the application of non-liability is prevalent in internal and international contracts. Today the principle of validity of non-liability is accepted by most countries across the world though in some cases like intentional damage it is invalid because no one is allowed to set a condition that ensures his non-liability before his intentional actions. Generally speaking, in all cases where non-liability is against the social order it is annulled. Whenever non-liability is on the right track it annuls the liabilities of the obligor and leaves no room for the damaged person to ask compensation from the damage doer.

Keywords: Civil Liability, Trustee, Condition, Trust Contracts, Non-liability.

INTRODUCTION

Civil liability refers to one's being obliged to compensate the damages done to another the origin of which is the hesitation in implementation of a contract, damage arising from crime or semi-crime. If an obligation is breached by the obligor and the resulted damage could be substantiated he will be liable otherwise if the obligee is involved or guilty in the damage or he has been sufficiently warned of the possible damage or the obligor has had good will in doing the damage or non-liability has been set as a condition, the obligor will be exempted from the liability.

In Iranian law no codified and coherent acts and regulations are seen regarding trust contracts. One of the problems that is noted in the contracts that are concerned with trust is the possibility of private agreement of the parties regarding non-liability of the trustee. The most important difference of the legal system of trusts from other legal institutions is related to liability, its governing principles and the effects resulted from it. Earning the title of trustee upon the permission of religious authority or based on the consent of owner allows the trustee to take possession of another's property based on trust without any further liability. The trustee is not liable unless he goes to extremes and cross the lines. A significant issue here is that whether we can set the condition that even if the trustee crosses the lines and goes to extremes he is not to be held reliable before the damages incurred? Or we could mitigate the degree of liability for the trustee as compared to real liability? In this case we care faced with the condition of non-liability of the trustee. The rule of will principle, validity principle, domination rule, and the possibility of waiver are among proofs that substantiate the validity of this condition. Articles 230, 10 and 758 of Civil Code and Articles 381 and 386 of Commercial

Code all testify to the acceptance of this condition by the legislator. The main problem is setting the balance between freedom and order. Freedom is the basis of contract and order is basis of liability (responsibility). Non-liability is not basically in contradiction with law, public order and morals. However, it is of certain limitations in intentional and mortal crime cases due to the possible individual harms resulted from it and public order concerns. The annulment of the condition of non-liability in these cases does not lead to the annulment of the whole contract rather it remains intact in general. This condition can be applied to the third parties and does not have any conflict with the relative nature of the contract (Roshandel, 2010: 1).

Thus the scope of validity of non-liability condition in those contracts where trusteeship is of major or marginal significance, is the subject of various affirmative and negative views due to the special nature of trust and its relation with the essence of the contract at stake and public order. Then, the principle of free will requires the parties of the contract to be free to decide on the consequences of the violation of the terms in the same way that they are free to seal the contract.

Definition of Trustee

In trust based contracts the trustee has three major obligations that consist of: preservation of the proprietor's property, observation of the permission limits and returning the trusted property. The most important obligation that is undertaken by the trustee in trust contracts is the preservation of the proprietor's property. The trustee should take care of the entrusted property like a devoted proprietor. Moreover, since the trustee is the deputy and representative of the permission giver (proprietor) he needs to observe the limits of permission. The trustee is not allowed to breach the limits of permission and manipulate the entrusted property beyond the determined limits. The trustee does not have any right as regards the property entrusted to him and has to return it to the proprietor. The trustee's negligence as to the implementation of these obligations will be followed by consequences that include: liability, ineffectiveness of legal actions, and the annulment of trusteeship. If the trustee causes the entrusted property to be lost or defected due to his negligence he is obliged to compensate the damages for the proprietor. Moreover, if the trustee violates the terms of permission his action will be considered unauthorized and his action is legally effective if the proprietor has endowed him with the right to take that action. The actions outside of the permission limits leads to the annulment of the trustee's trusteeship and he turns to the occupier. In this case he will be responsible for all losses and defects that occur in the property even if they are not the result of his action (Rahmani, 2009: 1).

Place of Trust Contracts

From legal and jurisprudential point of view, no one is legally allowed to take possession of another's property. The one who takes possession of another's property is responsible to compensate the incurred damages. Transgressor of a contractual relationship can only evade the responsibilities via demonstration of the uncontrollable event. But since those people who take possession of another's property as the legal trustee are not liable for possessing the property. This is the greatest advantage that has been allocated for the trustee in tort law though possession is not always this way and if the trustee breaches the limits he will stand responsible for the damages. Nevertheless, the parties to the contract may include the condition of non-liability in the contract (Roshandel, 2010: 18).



Importance of Non-Liability of Trustee

The necessity of transaction of goods and services as well as economic and social ties cause the properties not to be always in possession of their proprietors. For example, one can name the initiation of various forms of contracts like rent, limited partnership, sharecropping, donation, borrowing, and endowment which both help the owners of properties to take advantage of their properties and also provide the required opportunity for the other people who need these properties but do not have the access to them. Following scientific and technological developments human life and relations took complicated forms and the necessity of this complicated relation led to the evolution of legal relations. Contracts are evolving from individual and bilateral form to collective and multilateral form. Trust based contracts have not been left behind these evolutions and the parties of such contracts are also encouraged by reducing the possible hazards through offering non-liability (Roshandel, 2010: 18).

Definition of Non-liability

In jurisprudence non-liability is discussed under such headings as “condition of exculpation from liability” or “condition of non-liability”; insofar as some great legal experts in our country are referring to non-liability through the aforementioned terms (Jafari Langeroodi, 1997: 383). Generally speaking, “non-liability contract is a contract that is sealed between the liable man and the one who would incur a loss in future and based on it the liable one is exempted from paying any compensation for damages as a whole. According to the general rules of liability, every individual who causes harm to another is obliged to compensate it but with non-liability condition the trustee is exempted from this obligation. When individuals are legally liable to compensate the incurred damages the non-liability condition does naturally thwarts all obligations before the emergence of any crime (Jalili, 2007: 90). We need to take into consideration that non-liability today is of a special place in contracts and relations between people in view of its function.

It needs to be mentioned that “non-liability” is conceivable and predictable in all types of civil liability, whether in contractual liabilities or in non-contractual liabilities, and its most striking example is “civil non-liability of the trustee in trust based contracts”. The implementation of this type of non-liability requires the consent of one of the parties to consider the other party not to be liable for the possible damages resulted from delay or misimplementation of the contract. Accordingly, the one who would be suffer a loss in future announces his consent of depriving himself of the right of compensation (Jalili, 2007: 90). For example, in a rental agreement it is stipulated that the renter not to be taken as liable for any of the damages done to the rented item even in those cases that the renter has been negligent and it is agreed that the compensation of all damages will be handled by the owner himself.

On the other hand, this condition might be concerned with the annulment of the non-contractual liabilities (civil liability). In this case the non-liability refers to the “agreement of the liable and the one who would suffer a loss in future according to which the former is exempted from all possible civil liabilities” (Jalili, 2007: 91). The other case that can be noted here is that the non-liability condition would be considered annulled due to its conflict with the requirements of the contract as a whole and in such a state the trustee might intend to exculpate himself from the liability resulted from the preliminary contract. For example, in the safe deposit box rental contract the bank cannot include the non-liability condition in the contract because the customer seals the contract to have the bank to keep his precious items



safe against robbery and other dangers. In such a case even if the bank includes non-liability condition in other contract (for example for opening a new account) because the preliminary contract contains liability condition due to its nature the new contract's condition is automatically annulled (Aqaei, 2016: 72). In Iranian Civil Code there is no clear definition of the non-liability condition though in the Article 436 the legislator has delicately touched upon this issue. According to this Article in Civil Code: "If the seller accepts no responsibility for the defect in such way that he can establish the fact that he was not responsible therefore, or if he sells the object with all its defects, the purchaser will have no right to recourse against the seller when a defect appears; and if the seller makes reservations against one particular defect, he will be relieved of liability only in respect of that particular defect" (Aqaei, 2016: 72).

A. Non-liability Status in Iran Law

Non-liability, as its name suggests, refers to the fact that one of the parties of contract is totally exempted from liability resulted from the non-implementation, misimplementation or delay in implementation of a certain task. In some contracts non-liability is included in a way that might restrict liability to intentional mortal faults. The most striking example of such case can be seen in the transportation contract where the transporter includes a condition of non-liability and exempts himself from all possible dangers.

B. Non-liability resulted from the force majeure

This type of non-liability is applied in two states:

1- Definition of Force Majeure (casus fortuitus):

In some cases liability mitigation would be conducted in a way that allow more extensive definition of "force majeure" to be offered (Jafari Langeroodi, 1997, p. 553). For example, the element of "unpredictability" would be deleted from among the conditions of "force majeure". Accordingly, the occurrence of an unpredictable and unmanageable external event can exempt the debtor from liability; in other words, the debtor suffices to prove the externality and unmanageability of the event in order to exempt himself from the liability. The unmanageability condition might be eliminated from among the conditions of force majeure. In such a case if the implementation of the contract proves hard because of the emergence of an external unpredictable external accident (without being impossible) the debtor will also be exempted from the liability of implementation and non-implementation (Izanlou, 2014: 55-56).

Some Implementation Means as Exceptions

In numerous contracts some means of the non-implementation of obligation are excluded from among liabilities stipulated in the contract; in other words, the parties agree mutually to consider certain accidents as examples of force majeure and accordingly they will not be liable for non-implementation of the contract. For example in transportation contract a condition might be included according to which the transporter is not liable to compensate the damages in the event of fire or robbery, or illness, the strike arranged by workers or some transportation vehicles, exempts the trustee from the liability. There are sheer differences on the description of these conditions particularly in the contracts of sea transportation insurance insofar as some consider it among the "defining conditions of obligation or conditions reducing the obligation" while some others regard them as "non-liability or liability mitigation conditions" (Izanlou, 2014: 56).



In Iranian law it seems that these conditions are classified as part of the non-liability, then the latter view is correct; because for example when the trustee is conditioned not to be liable in the event of robbery, his obligation as regards taking care of the trusted item does not disappear due to robbery rather he is obliged to adopt the necessary measures for preserving the trusted item in a place where the threat of robbery is low and if he makes any negligence in this regard he will be taken liable for the robbery while in the conditions of obligation reduction due to the lack of obligation negligence is meaningless (Izanlou, 2014: 57).

As to the latter thesis according to which some accidents are considered to be force majeure we need to take it into account that occurrence of accidents should not be resulted from intentional or mortal negligence on the debtor's behalf or harmful to physical totality or personality of individuals otherwise the aforementioned condition will be ineffective. Thus, it seems that taking advantage of these exceptions for the obligor (trustee) is more desirable than "definition of force majeure condition"; because the definition of force majeure in any case requires demonstration of one or two principles of conditions and features of force majeure and in fact makes the obligor (as claimant) responsible for demonstration of his own exoneration while on the contrary, in the exclusion of the means of non-implementation, the obligor is not obliged to demonstrate the exoneration and the occurrence of that accident as such exculpates him and thwarts the liability and the burden of demonstration of the opposite is on the obligee (as claimant) who requires to demonstrate the existence of intentional or mortal negligence (Aqaei, 2016: 78).

C. Shifting the Burden of Demonstration or Changing the liability Conditions in Favor of the Debtor (Trustee)

Such shifts that change the burden of demonstration in favor of the debtor or trustee are also considered to be among the "non-liability" cases. The best example that can be offered in this regard is the case where the parties consider a determinate accident like war or economic sanction to be "force majeure" but they give the truster the opportunity to receive all damages via demonstration of the fact that the accident did not have the features of a force majeure. In this example, if "war" is to pave the ground for the deliverance of the debtor or trustee from liability it needs to have all features of the force majeure. Therefore, no change has occurred in the conditions that ground the liability of the debtor and only it is supposed that such an accident holds the features of force majeure and the truster can demonstrate the opposite (Izanlou, 2014: 58-59).

Of course, one can say that in some cases, "condition of shift in demonstration burden" is confused with "condition that changes the conditions of liability". For example, in a legal system like Iran in which there is no need for the request of creditor to demonstrate the abjuration, the parties can set the condition that abjuration does not take place but through official request in which case we should accept that liability depends on an action that is done by the creditor (Izanlou, 2014: 59). For example, reimbursement of the debt that is "unspecified in terms of time period" is hinged upon the request of the lender or in the borrowing contract it is stipulated that the returning of the borrowed item is contingent upon the official request of the lender or in rental agreement the evacuation of the rented place requires the official declaration of the landlord. In this case, the aforementioned condition is in the favor of the debtor (trustee) and in some way it is considered to be an example of non-liability because if the obligee does not take any action the obligor will not be liable. Moreover,



it is not inconceivable that the parties to set another condition besides the necessity of official request of the creditor according to which a special time period (for example ten days after the deadline through official declaration). In such a case if the determinate time period passes and no official request is made by the creditor the debtor will not have any liability (Izanlou, 2014: 59). For example in a deposit contract it is specified that if any damage is done to the deposit the depositor has one month to ask the depository for compensation; otherwise the depository will not be liable to compensate the damages; or in debt contract it is specified that the creditor has ten days to ask the debtor to return the debt otherwise the debt is annulled. This is also the case with the condition based on which the creditor needs to demonstrate that the non-implementation of the obligation has not been resulted from the war or economic sanction regardless of the fact if the aforementioned event has the features of a force majeure or not. Thus, shift of demonstration burden on the behalf of the debtor is of demonstrative and essential aspects; then on the one hand, it changes the conditions of liability and frees one from liability and on the other hand, it transforms the burden of demonstration, as a result, it is up to the creditor to demonstrate that no war has occurred or it had not effect on the incurred damages (Izanlou, 2014: 214).

Civil Liability of Trustee in French Legal System

Liability resulted from negligence is of three types: negligence is followed by punishment. Contractual civil negligence requires contractual liability while non-contractual civil negligence leads to civil liability. It is needless to say that non-contractual civil negligence can have criminal aspect and French justice courts have accepted its occurrence in contracts. If the main goal of principles of trustee's civil liability is the compensation of material and spiritual damages of the one who has suffered losses, the government and its staff are not an exception to it. The endowment of immunity and non-liability right to government might cause some material and spiritual damages to certain real or legal persons.

The basis of civil liability in French law is the negligence of the one who has caused a loss or danger. The legislator seeks to use this notion to support the individual rights. Each one of these triple theories though contain part of reality has not succeeded to provide a basis alone for the liability (Hoshiari Ajirlou, Jedi, 2016: 2). For this reason, the current theories of civil liability consist of:

1. Welfare and evil theory
2. Negligence theory
3. Danger vs. profit theory

Non-liability in French Law

In French legal system when the parties of a contract are of the same economic condition the contract is an expression of the free will of the parties and according to the principle of equality in the event of equality of citizens there is no need for them to be supported in sealing the contract. As one of the outstanding members of the commission of codification of French civil law has pointed out, anyone who transacts with another should be alert and always take care of his own interests. He should earn the required information and never miss anything. Law is supposed to protect him against the possible cheatings but this does not mean that he is exempted from making use of his own sense and reason. (J.-E.M portalisi, □□□□, p□□□)



One of the effects of this idea was that the agreement sealed between the parties is taken to be effective in the regulations of the civil law. Then two articles in French Civil Codes deal with this issue. The first article, Article 1101 of French Civil Code according to which “contract is an agreement by which one or several persons bind themselves, towards one or several others, to do or not to do something”. The second article is Article 1134 of French Civil Code that reads: “agreement lawfully entered into take the place of the law for those who have made them”.

These two articles underline two significant and vital principles of freedom of contract and binding nature of contractual agreement according to which all contracts are based on agreement that is binding for the parties not for any other one and both principles are driven from Roman law (Bell, Boyron and Whittaker, 2004, p. 100)

Upon the industrialization and the expansion of trade in France, contract could no longer be an expression of the free will of parties. The contract was not sealed between the traders based on intelligible and logical conditions rather it was signed by professional and non-professional individuals, between the commercial firms and individuals and between important economic institutes that often had semi-monopolized power and the consumers. In these conditions, the economic power was more in favor of the seller and supplier of the services and the equality turned to an illusion according to French lawyers. It was in such conditions that in 1909 a French legal expert developed the adjoint contract theory that had four features:

1. There is an economic inequality between the parties.
2. Affirmation is in general form not for a special person.
3. The contract is provided by the party that owns economic power in a printed standard form without any further negotiation.
4. Contract has been designed in the high quality technical form and its understanding is hard for the non-professional ones and its conditions are in the way that are just in favor of the organization that has designed it.

For these reasons, adjoint contract is not a real contract, because a real and genuine contract is not an expression of the desires of both parties. Contract is just a manifestation of the party that has designed and prepared it and the other party joins it. Then, contract according to Article 1134 of Civil Code does not serve as a law for the parties and there is no occasion for joint intention of parties in order to be taken into account in interpretation time according to Article 1156 (Nekooei, 2011: 167). This issue caused certain discussions to be raised as regards the support of some individuals in a number of contracts and in some cases legislations were done. The policy of supporting the parties of a contract was endorsed by courts and non-liability was part of this support.

Judicial Procedure

French courts were against the effect of non-liability condition for a while and resorted to various methods in order to refute or mitigate the effect of non-liability condition. For the time being, as a general rule and principle, one can say that the validity of non-liability condition has been accepted in the domain of contractual liability and if the condition is clear and legal the Judge has to act according to it and the agreement of individuals in this regard is subject to the Article 1134 of Civil Code.



Of course, the rule contained in Article 1134 is applicable as regards complementary laws and it is not applicable regarding the imperative rules and individuals cannot evade them by non-liability condition.

Courts were first against the non-liability condition and argued that contractual liability is resulted from negligence and this is in conflict with public order to let a party to be free from liability before the other party. In 1874 the judicial procedure accepted the non-liability condition as valid in contractual fields though its effect was deemed to be reversing the burden of evidence. For this reason, in 1915 the Supreme Court accepted that the condition of non-liability of the trustee before the damages incurred to the entrusted item can at least shift the burden of demonstration of the evidence of negligence to the owner. Therefore, condition of non-liability was considered valid in contractual cases but this did not modify the non-contractual and force-majeure liabilities before the negligence mentioned in the Article 1382 of French Civil Code. Moreover, this change and modification of validity of non-liability was not effective as regards the responsibility of the non-implementation of obligations due to the means and it was said that liability of the defendant before his negligence is a force-majeure liability if the negligence is proven. But as far as it is concerned with the obligations regarding the result, this change and modification consisted of changing and reversing the burden of evidence if the liability is contractual. According to Article 1382, the burden of providing evidence of the involvement of an external cause is on the debtor and obligor. Nevertheless, non-liability condition obliges the obligee to demonstrate the non-involvement of an external agent and the negligence of the obligor while before the implementation of the non-liability condition all burden of demonstration was on the obligor.

This theory has been severely criticized due to various reasons including the restrictive effect of non-liability condition. However, this theory could not survive for more than 70 years. The judges who defended freedom reached an agreed solution according to which the severity of the negligence of obligor should be taken into account. Then French Supreme Court issued a verdict in 1959 according to which the non-liability condition was declared valid unless it is proven that a deception or a major negligence have occurred. The Supreme Court decided that if a company causes damages to the costumer due to failing to provide the intended quality it is obliged to compensate the damages and cannot evade its responsibilities by resorting to non-liability condition. Then no company is allowed to impose non-liability condition because of its economic supremacy. Even if the non-liability condition is included in the contract signed by parties deception and major fault can annul that condition.

Therefore, contractual non-liability condition is accepted as a maxim in French Law and it should be always regarded valid but in those cases where there is an intentional deception or a major negligence. Thus, minor negligence does not thwart the validity of non-liability condition. This suggests that courts are obliged to investigate about the existence of serious deception or major negligence in the cases where non-liability condition exists. Judicial procedure insists that the conditions related to non-liability are totally effective even if a minor negligence exists.

The validity of non-liability was endorsed in other cases after 1959. For example, in 1991 the Supreme Court announced that the contractor can cite the non-liability condition as a reason provided his negligence is not intentional or major. Or in 2005 it was said that the man in charge of land transportation can limit his own liability unless his fault is serious and major.



In French Law, contrary to the non-liability condition in contractual context, the validity of non-liability condition has not been recognized in force-majeure and extra-contractual liability and it has been argued that force-majeure and extra-contractual liability is concerned with public order and the non-liability condition cannot annul force-majeure and extra-contractual liability and due to its conflict with public order it is annulled.

The opponents of non-liability condition in force-majeure and extra-contractual liabilities base their arguments on the Article 1382 of Civil Code according to which “any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it”. This article is imperative and addresses an issue that is directly related to public order and no one is allowed to act against it. The French Supreme Court does not accept the non-liability condition due to its manifest conflict with the content of Article 1382 of Civil Code that is related to public order (Afshar, 1976: 220). Thus conceived, those contracts and agreements whose goal is annulling the previous effects resulted from extra-contractual liability should be considered ineffective on the basis of its being in conflict with public order (Ashtari, 1977: 98). Therefore, in France non-liability condition is valid in contracts while this condition is invalid in all extra-contractual and force-majeure liabilities.

Judicial procedure of France is still insisting on the invalidity of the conditions related to extra-contractual liabilities despite the critiques of part of the doctrine, and the reason for this insistence lies in the imperative nature of laws regarding force-majeure liability that is not arguable or matter of agreement.

Some have retorted to the latter critiques and argued that the relation of articles related to force-majeure liability and public order do not seem decisive because the one who suffers a loss can forgive the one who has caused him a damage. Why shouldn't we give him this right before the occurrence of damage?

Extra-contractual liabilities are also concerned with compensation of the personal damages of the one who has suffered a loss through giving an amount of money and one can hardly claim that this is always related to public order and does not lie in the domain of private contracts. One should pay an earnest attention to the nature of obligation that an official has failed to fulfil and never use the public order as an excuse in all contracts. Then, non-liability condition must be considered valid in both contractual and extra-contractual liabilities and instead of denying it in extra-contractual cases a note to be included to the effect that non-liability is valid as far as no major negligence or intentional fault have occurred. However, judicial procedure has not yet accepted the validity of non-liability condition in the domain of extra-contractual liability (Nekooei, 2011, 171-172).

Law

In French law there is no code similar to the act of unfair contract terms in British law. However, inequality of power of the trading parties caused the rights of the less powerful parties to be noticed. For this reason, the legislator has interfered in the courts affair as regards the non-liability condition and the condition of limited liability. For example, in 1905 a law was enacted according to which the contracts of land transportation cannot deny the liability before the incurred damages. (Contrary to delay in goods delivery) such legal interferences grew in those cases where the power of trading parties was unequal and finally in 1987 a general act was passed numbered as 23-78.



In this commissioned act it was insisted that the contractual conditions that are usually imposed by professionals to the unprofessional should be investigated and the unfair conditions to be identified, annulled or modified. Moreover, the aforementioned commission should inform the government of the conditions that need to be annulled.

The role of this commission has been enhanced based on the order no. (1993) 93-314. According to the Article 35 of this order if a case taken to the court that addresses an issue related to unfair terms and conditions the court can ask the commission to give consults on the nature of unfair terms. Of course, the court is not obliged to ask the consult.

The Article 2 of 1987 act has stipulated that no limiting condition or any condition that would deny the rights of nonprofessional individual or consumer for asking the professional party to compensate the possible damage caused due to the violation of obligations is allowed to be included in the contract. Because such conditions can be used as a means for abuse. Of course, this limitation of Article 4 of the aforementioned act is not negotiable.

In 1995 the Consumer Code was enacted in France. The second part of this code contains Articles, i.e. L131-1 to L132-5, that exclusively deal with unfair conditions. Article L 132-1 offers regulations regarding protection of consumer against the unfair terms. According to first paragraph of this article, in contracts concluded between a business and a non-business or consumers, clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair. When the contract is concluded, to all the circumstances surrounding its conclusion, as well as to all the other contractual clauses. It is also evaluated in respect of those contained in another contract where the conclusion or performance of these two contracts are legally dependent upon one another. Unfair terms are deemed to be null and void.

In French Consumer Code in the end of L 132-1 it is underlined that the regulations of this article are concerned with public order. Therefore, no one is allowed to make an agreement that is against it.

In the supplement of the French Consumer Code an allusion has been made to the unfair terms examples according to which the non-liability condition and limited liability condition can be considered annulled as unfair based on the paragraphs A and B.

Besides the aforementioned acts, there is another act that controls and evaluates the non-liability condition and in this way sets certain limitations for its validity and it is the act that was passed in 1998 that contains the European Society Regulation enacted in 1985 as well as the article 1386 bis of French Civil Code in 18 paragraphs.

This act discusses the liability resulted from defective product. According to paragraph 1 of Article 1386 bis, “a producer is liable for damages caused by a defect in his product, whether he was bound by a contract with the injured person or not”. The paragraph 15 of Article 1386 bis argues that “The clauses which tend to exempt from or to limit the liability for defective products are forbidden and shall be deemed not written.”

The result that is acquired based on the aforementioned acts is that non-liability condition is valid in the contracts that is concluded between professionals unless there is major negligence or deception.

Moreover, Article 1641 of French Civil Code binds the seller to warranty the latent defects of sold item though if the trade is done between professionals this can also be subject to non-



liability condition. The professionals (according to Article 1386 of French Civil Code) can deny the liability of the defects that exist in the products used for professional causes.

Non-liability of Trustee in French Law

Article 1134 of French Civil Code alludes to the domination of principle of free will in contracts and stipulates that “Agreements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law. They must be performed in good faith”. In French positive law, the trustee plays a major role in contract conclusion and has no right to make any unauthorized modification in the obligations undertaken by parties. (Elahi, 2015, p. 4)

In French law it is stipulated that trustee is obliged to compensate the damages that are done by him. Some French writers believe that non-liability degrades trustee. For example, the existence of “a latent defect in a product” disappoints the customer and degrades the production. If a product is innovative the seller as “trustee” is not supposed to be informed of possible defects even if he is a professional. However, he is obliged to accept all risks and is not allowed to limit his liability.

French courts insist on such criteria as “conspicuity of negligence”, “repetition of criminal action” and “importance and value of incurred damages” in determining the verdict of the trustee. In French law the mitigation of trustee’s liability is considered invalid where the sold product has latent defect because the producer is supposed to be informed of it and selling defected product in such case is a “major negligence”.

CONCLUSION

Principle of trusted possession in the contracts in which there is a kind of trusteeship relation causes the trustee to be in conditions based on which the trustee is not responsible for compensation of the damages that is entrusted to him. The same principle is reflected in Article 614 of Civil Code as follows: “A trustee is not a guarantor in respect of the destruction or the depreciation of the thing deposited with him, unless in case of negligence or excessive use.” Although this article addresses depositing contract it is also noted in other contracts like mortgage, trusteeship, proxy and so on and so forth. On the other hand, there is a rule in the Article 10 of the same Code that allows the contract concluders to conclude another private contract which can contain their common intentions. Now we should accept that every proprietor is inclined to have the one who takes possession of his property based on a contract stand liable for the possible damages according to a principle or a condition in order to be free from the burden of demonstration of the liability of trustee. This is so important that proprietors prefer not to enter any trust based contract in which this single condition is not included. Then it seems that principle of liability of trustee in trust based contracts is the solution for overcoming the existing conflict between the interests of parties to the contract. However, one needs to pay earnest attention to the fact that in the light of principle of contracts freedom (Article 10 of Civil Code) he cannot conclude all types of contracts because this principle is not working as regards the contracts that are in conflict with Sharia or public order or legal codes and more importantly the nature of contract at stake. Then we need first to know the limitations of the principle of freedom as regards the inclusion of condition of trustee’s liability and after that assay the nature of contract and know its requirements so if there is no obstacle in the way to make the trustee liable for the losses and damages.



According to the condition of non-liability, the liability resulted from the non-implementation of the contract or delay can be cancelled before the occurrence of any violation. To demonstrate the validity of non-liability condition one can refer to jurisprudential tradition and rules including the principle of conditions and domination. Moreover, no ban is seen in the legal texts on this condition and the Articles 10, 23, 436, 448, 752, 754 of Civil Code and Articles 381 and 386 of Commercial Code corroborate the legislator's acceptance of this condition. Such objections as unnecessary of this condition are not on target too; because they are not based on texts and even the jurists and legal experts who have refused it accept options annulment, not being liable for defected product and non-liability of the physician. Non-liability condition like any contract should be associated with intention without any reluctance or being contaminated with abuse, deception or damage; it also should not violate imperative rules otherwise it will not be effective. Ethics, public order and imperative rules are among the factors that control non-liability.

If the debtor has not committed any intentional or major fault the acceptance of force-majeure liability claim leads to disputes and wastes time and degrades the inclusion of non-liability condition, because one of the functions of non-liability condition is overcoming disputes and preventing opportunity and time from being wasted. When the debtor has not committed any intentional or semi-intentional action we should not take the claim of force-majeure liability heard. In response to the question if we can include the non-liability condition in the interest of a third party? We should state that since the third party is benefited from this condition and texts insist on the loyalty to contracts we can consider it correct; in jurisprudential texts the condition in the interest of the third party is declared valid.

The least effect of non-liability condition is that it takes the burden of demonstration from the shoulders of the debtor according to contractual obligation and it is the creditor who should prove his intentional fault. The effect of non-liability condition like other private contracts is not limited to the one who has suffered a loss and the inheritors should also benefited from the interests of this condition. Moreover, the non-liability condition is also valid among the traders before the third parties and does not have any conflict with the relativity of contracts. Of course, one needs to take it into consideration that when one who has suffered a loss bases his claim on the existence of a major fault or legal obligation the non-liability condition loses its effectivity. Thus the laws that have been codified in support of the consumer of transportation vehicles, home appliances, machineries, industrial equipment and consuming products that are directly related with people's lives have declared non-liability condition annulled (Article 5 of Proposed Bill of Support of Consumer Rights).

The invalidity of non-liability condition cannot invalidate the contract based on such reasons as being in conflict with public order and so on and so forth; Article 118 of Sea Law adopted in 1964 endorses the fact that the invalidity of non-liability condition does not invalidate the contract.

As to the non-liability of trustee in French Law one should say that the Article 134 of French Civil Code underlines the principle of freedom of will in contracts and states that those contracts that are concluded based on law are binding for both parties like a law. To put the matter otherwise, in the same way that law is binding, private contracts resulted from will are binding for both parties. In French positive law the trustee plays a major role in conclusion of the contract and does not have the right to make any modification in obligations of parties. In



French law if the non-liability of trustee results in harms requires compensation of damages and Some French writers believe that non-liability degrades trustee. For example, the existence of “a latent defect in a product” disappoints the costumer and degrades the production. If a product is innovative the seller as “trustee” is not supposed to be informed of possible defects even if he is a professional. However, he is obliged to accept all risks and is not allowed to limit his liability. French courts insist on such criteria as “conspicuity of negligence”, “repetition of criminal action” and “importance and value of incurred damages” in determining the verdict of the trustee. In French law the mitigation of trustee’s liability is considered invalid where the sold product has latent defect because the producer is supposed to be informed of it and selling defected product in such case is a “major negligence”.

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