Секция «44.5 Актуальные вопросы права Англии и США (на английском языке)»

Court adjustment in long-term contracts

Научный руководитель – Тарасова Татьяна Ильинична

Галиев Динислам Сагитович
Студент (магистр)
Московский государственный университет имени М.В.Ломоносова, Юридический факультет, Кафедра гражданского права, Москва, Россия
E-mail: dinislam017@icloud.com

Long-term supply contracts are meant to secure stable performance in an uncertain future. Yet precisely because full *ex ante* planning is costly (and often unrealistic), such contracts may become severely unbalanced after an unforeseen disruption: costs rise beyond the contract's escalation mechanism, the supplier faces ruinous losses, and the buyer – often after making relationship-specific investments – insists on specific performance. U.S. contract law appears to offer mainly "all-or-nothing" responses: hold the supplier to the bargain or excuse performance under impracticability doctrine. Judicial adjustment is rare and often regarded as a dangerous step toward "making a new contract." [1][2]

Robert A. Hillman reframes the debate: court adjustment should be treated as a remedy for an underlying duty to adjust that may arise in identifiable settings of long-term contracting. Hillman's central claim is deliberately moderate. He does not argue that courts should routinely rewrite bargains; rather, he argues that modern contract law already contains necessary mechanisms – good faith, interpretation, etc. [1]

Hillman distinguishes two models that explain when an adjustment duty should be recognized.

(1) **The agreement model**. In many long-term "relational" contracts, flexibility is not an afterthought but part of the deal's practical meaning. Even if the written terms do not expressly require renegotiation, the surrounding circumstances may show that the parties reasonably expected adjustment in serious disruption scenarios – through trade usage, course of dealing, course of performance, or broader norms of cooperation in ongoing commercial relationships. In such cases, a buyer's categorical refusal to negotiate may constitute breach of the contract as properly understood. The agreement model thus treats adjustment as an implication of the parties' own bargain-in-fact, reinforced by good-faith performance as "cooperation" necessary to preserve the other party's reasonable expectations. [1] Importantly, Hillman argues that an implied duty to adjust can, in appropriate circumstances, override even a fixed-price term or a price-adjustment formula, if the parties reasonably expected those terms to yield when they no longer served the contract's cooperative purpose. The coal-supply litigation around *Missouri Public Service v. Peabody Coal* illustrates how an escalation clause may fail to trigger demands for renegotiation even where the contract clause is detailed. [3]

(2) **The gap model**. Sometimes, however, there is no persuasive evidence that the parties expected adjustment as a contractual obligation. Yet long-term contracting can still leave a true gap: the parties simply did not allocate the risk of an extraordinary, calamitous event. In such a setting, it is argued that insisting on a blunt impracticability analysis is often conceptually misleading: courts "find" that the promisor assumed the risk, largely because remedial choices are rigid and judicial rhetoric discourages nuanced loss sharing. [1][6] The gap model justifies an adjustment duty on a fairness-based premise: where losses are unallocated, neither party should capture a windfall while the other suffers catastrophe – especially when the buyer has materially relied on continued supply. [5]

What should courts do after finding a duty to adjust and a failure to adjust? The adjustment must not be abandoned merely because courts are imperfect contract designers. First, courts can

attempt to induce settlement by ordering further bargaining or mediation. In case that fails, limited judicial adjustment remains conceptually available within modern doctrine. Second, remedies should be as simple and certain as possible, because uncertainty itself can distort long-term contracting incentives. [1]

The most essential issue concerns remedial design. In many cases the most defensible and administrable adjustment is duration-based: the supplier may be restrained from terminating for a period sufficient for the buyer to recoup reasonable reliance expenses. [4] A "buy-out" (a payment reflecting reliance) is regarded as an alternative but treats it as less attractive because it forces courts into a precise monetary figure.

On balance, this framework is particularly valuable because it integrates a relational account of long-term contracting with crucial legal mechanism, while keeping the intervention limited and justifiable. [1][5][6] For the Russian legal system, the issue of long-term contracts is of particular importance, as the problem of contract adjustment in continuing relationships has not yet been thoroughly examined. [7]

Источники и литература

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