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The Institute for Damage Prevention in the Civil Law of the Member States of the Commonwealth of Independent States

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ABSTRACT

The authors considered the development and the current state of the damage prevention institute in the civil legislation of the member states of the Commonwealth of Independent States. They singled out and substantiated the key features of damage prevention claim. They noted the shortcomings of legal regulation in this area and made some offers to improve the legislation.

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1. INTRODUCTION

Causing damage does not always happen suddenly. Sometimes it is foreseeable, being the result of a long-evolving situation. That is, causing damage is preceded by the emergence of the damage hazard. Even the Roman lawyers said: "Adversus periculum naturalis ratio permittit se defendere" (D. 9, 2, 4) [1, p. 278], which means: "It is allowed defending yourself from danger according to natural reason". There was a non-intentional tort obligation "actio de positis et suspensis" in the Roman law. The actio de positis et suspensis could be filed by any citizen, having noticed a thing that was dangerously placed on the wall or ledge of the building, the fall of which could cause damage to the passers-by. The claim subject was the fine recovery from the building's owner in the amount of 10 solids (D. 9. 3. 5). The Roman lawyers paid special attention to the task of damage prevention in the neighborhood relations. For example, the owner was given the right to prohibit his/her neighbor of carrying out the new construction works (operis novi nuntiatio), if these works created a threat of causing damage to the owner (D. 39. 1. 1. 17).

The modern European legislation pays also attention to the damage prevention in the neighboring relations. Thus, according to § 908 of the German Civil Code, if a land plot is threatened with damage due to the collapse danger of a building or other structure or part of a building or structure located on a neighboring plot, the land plot owner may require a person, being responsible for the damage caused, to take all necessary measures to prevent danger [2]. "In the French law, if a building or structure that is under construction creates a real threat to the neighbor's right to property (the so-called action de nouvel oeuvre), the neighbor has the right to bring a preventive claim, not waiting for the construction completion" [3, p. 308]. The English practice is based on the possibility

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of any damage prevention. "In the case of Redland Bricks Ltd. v. Morris (1970) in England, Lord Upjohn has found that the plaintiff has the right to a quia timet injunction, if the defendant threatens or intends to commit an action that can cause irreparable damage to the plaintiff (i.e., there is a threatening damage or an unfinished malicious act), or when the plaintiff has already received compensation for the damage caused to him, but claims that the defendant's early action can cause damage him in the future" [3, p. 308].

2. METHODOLOGY

We used the dialectical, historical, comparative legal and formal legal methods in this paper. We made an attempt to systematically examine the research subject. We made the conclusions on the basis of the comparative law method.

3. DISCUSSION AND RESULTS

The idea of damage prevention is not new for the legal systems of the member states of the Commonwealth of Independent States (CIS). Thus, there was a judicial dispute between the owners of two water mills in the Russian judicial practice in the 80s of the 19th century. One of them began digging a channel from the main riverbed, which threatened to the water level lowering in the mill of another one. The Governing Senate, in its consideration of the case, stated: "It is not right that the law violation could be the claim subject only if such violation caused damage in the present, but not if such damage was foreseen in the future. There is no legitimate reason to conclude that the expected damage from actions already taken by the respondent would not open to the opposing

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party the rights to file a claim to prevent such actions. The danger of damage or loss in the future can give a fair basis to the claim of prohibiting the defendant to make known actions aimed at the production of these consequences". The well-known Russian-Ukrainian civilist and processualist V.M. Gordon commented on this decision of the Governing Senate as follows: "The above decision shows that the prohibition claim has long been put forward by Russian judicial practice. Having appeared without the command of the legislator, it exists as a natural creation, generated by our judicial practice and perceived by the senate" [4, p. 6]. It is interesting to note that the draft Civil Code of the Russian Empire, published in 1905 and never became a law, included a number of preventive norms, including those designed to prevent damage in the neighborhood relations, for example, Articles 788, 2630 [5].

In the mid-1990s, the Interparliamentary Assembly of the CIS member states adopted the Model Civil Code for the CIS countries, which had a recommendatory nature. Part 2 of the Model Civil Code contains Article 991 "Damage Prevention", which stipulates the following:

"1. The future damage danger may be a claim basis to prohibit the actions creating such danger.

2. If the damage caused is a consequence of the enterprise operation, construction or other production activities that continue causing damage or threatening further damage, the court has the right to oblige the defendant, in addition to damage compensation, to terminate the relevant activities.

The court may deny the claim for terminating of the relevant activities, if its termination is contrary to the public interest. A refusal to terminate such activities does not deprive the victims of the right to damage compensation caused by these activities" [6].

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The above norms have been reproduced verbatim or with minor modifications in the civil codes of Azerbaijan (Article 1098), Armenia (Article 1059), Belarus (Article 934), Kazakhstan (Article 918), Kyrgyzstan (Article 994), Moldova (Article 1400), Russia 1065), Tajikistan (Article 1080), and Uzbekistan (Article 986). Commenting on the damage prevention norms in the civil legislation of the CIS member states, we can note the following:

1) the occurrence of the norms concerned is sometimes called "the result of a well-known "ecologization" of the sense of justice and a tribute to the wave of social environmental activity that have coincided with the time of preparation and adoption of the Civil Code" [7, p. 892]. However, the scope of these norms is not limited to preventing negative environmental consequences of economic activity. They are universal, designed to prevent any damage;

2) the basis of the damage prevention claim is the risk of damage in the future. What does produce it? The Model Civil Code, civil codes of Kazakhstan, Tajikistan refer to actions creating danger; the civil codes of Azerbaijan, Armenia, Belarus, Kyrgyzstan, Russia, Uzbekistan refer to activities creating danger; the Civil Code of Moldova refers to acts creating threat. Without going into the terminological dispute about the correlation of the above-mentioned concepts, we only note that the danger of causing damage can give rise to both actions and inaction of the defendant. The issues of the types of actions (inaction) that can create a danger are of fundamental importance. We counted four such types: a) continuing actions (for example, provision of catering services in violation of the sanitary requirements, use of children's rides with the expired technical operation); b) preparation for certain actions in the presence of objective evidence indicating such preparation (for example, approval of the incinerator construction project near a residential area); c)

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completed actions, having an objective result (for example, installation of metal grids on windows in violation of the fire safety rules, trench excavation by the defendant along the building foundation owned by the plaintiff); d) continuing inaction (for example, the defendant does not strengthen his/her dike, creating the property damage danger of third parties, does not replace the water supply pipes that have come into emergency condition). It is plain to see that the damage danger caused by completed actions, having an objective result, or continuing inaction can be eliminated only by obliging the defendant to take the necessary measures to eliminate the danger (install, replace, repair, dismantle, etc.). Unfortunately, such a type of the court decision under the damage prevention claim is not stipulated in the legislation of the CIS member states, which is a lack of legal regulation;

3) a condition for the damage prevention claim satisfaction is the wrongfulness of actions (inaction) of the defendant. Most often, unlawfulness is associated with the violation of a set of rules (construction or sanitary norms and rules, fire safety rules, operation rules, etc.). Legitimate actions, even if they imply some danger, cannot be prohibited based on the damage prevention rules (for example, the operation of increased danger sources, hazardous production facilities). The damage prevention is carried out outside the framework of civil liability (does not imply additional property encumbrances), so the defendant's fault is not a prerequisite for satisfying the damage prevention claim;

4) the defendant in a case is the subject whose actions (inaction) create the danger of causing damage. It is conceivable that the public legal entity or an authority acts as the defendant. An individual or legal entity, whose absolute civil rights are in danger of being violated, acts as the plaintiff. The damage prevention claim is also brought by the

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prosecution authorities and the state control bodies, which have the right to apply to the court in defense of an indefinite number of persons;

5) the danger of causing damage is eliminated by prohibiting the defendant's. The Model Civil Code, civil codes of Kazakhstan, Moldova, Tajikistan stipulate only one way of such prohibition - terminations of actions. This is a strict measure, meaning an irreversible ban on the appropriate actions. The civil codes of Azerbaijan, Armenia, Belarus, Kyrgyzstan, Russia, Uzbekistan introduce an alternative to termination - suspension of actions. This is a reversible measure, which is in effect until the defendant excludes the potential damage of his/her actions (for example, until he/she eliminates the violations of sanitary rules). At the same time, the court decision should specify what the defendant should do in order to get an opportunity to continue his/her activities. It is important to emphasize that the termination or suspension of the defendant's actions is carried out only to the extent necessary to eliminate the danger;

6) clause 2 of Article 991 of the Model Civil Code and the civil codes of the CIS member states include a special version of the court decision: on the defendant's obligation to compensate for the damage caused and to terminate (or suspend) the relevant activity. A court makes a similar decision in case that a tort obligation has already arisen, but the production activity continues causing damage or threatens with a new damage. The claim combines two requirements: on compensation for damage and on prohibiting the defendant's actions;

7) the Model Civil Code and, following it, the civil codes of Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Uzbekistan allow the court denying a claim for banning potentially harmful activities based on public interests. The civil codes of Azerbaijan and Armenia refer to the state interests and the civil code of Belarus - to the state and public

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interests. It should be noted that these are appraisal concepts, abstractions, and in the end, the court's opinion on what is important for the life and development of the society and the state (for example, ensuring the external security, improving the environmental situation, developing transport, social infrastructure, increasing the scientific knowledge and etc.). On the one hand, the rule on taking into account public interests leaves some space for judicial discretion, allows the court showing greater flexibility, choosing the most significant from the existing social interests. On the other hand, this opposition of private and public interests is clearly undesirable. In our opinion, the way out of this contradiction is to exclude the rule on taking into account public interests, affirming instead of it the possibility of the defendant's obligation to take necessary measures to eliminate the danger. Then the court, having come to the conclusion that the prohibition of the defendant's actions is contrary to the interests of the society or the state, would not deny the claim, but would oblige the respondent to take the necessary measures (for example, to install treatment facilities, modernize the equipment).

The procedural legislation of the majority of the CIS member states does not contain special rules on consideration of the damage prevention claims. That is, it is applied the general rules on jurisdiction, the period for the case examination, atc. One of the few procedural tools that allow the court promptly responding to a dangerous situation is the adoption of the claim security measures that prohibit the defendant from taking certain actions (for example, prohibiting from connection of the power lines to a support installed near a fuel and lubricant warehouse).

The legislative experience of Armenia is of great interest. The Civil Procedure Code of the Republic of Armenia contains Chapter 23 "Proceedings for the Claim Examination for Danger Causing Threat to the Life or Health of a Citizen" [8]. According to Article

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150 of this Code, a citizen has the right to file a claim for danger causing threat to his/her life or health with the court at his/her place of residence. The claim should contain information about the facts and circumstances that undoubtedly testify to the danger existence. The court immediately passes a decision on danger prevention, which is subject to immediate execution, and invites the applicant to submit a claim to the court within three days (clauses 2 and 3 of Article 151). If the claim is not submitted within this time, the court's ruling loses its validity (Article 152).

4. CONCLUSION

The damage prevention rules contained in the Model Civil Code and in the civil codes of the CIS member states are designed to prevent any kind of damage, to ensure the inviolability of various absolute civil rights. Our research has allowed us revealing the following features of the claim for damage prevention. The claim basis is the risk of causing damage by the defendant's actions or inaction. The condition for the claim satisfaction is the unlawfulness of the defendant's actions. The defendant's fault does not matter. The danger of causing harm is eliminated by prohibiting the defendant's activities. Along with the prohibition of the defendant's activities, it is necessary to consolidate the possibility of the defendant's obligation to take the necessary measures to eliminate the danger in the civil codes of the CIS member states. The procedural legislation of the majority of the CIS member states requires improvement in terms of fixing mechanisms that allow the court promptly responding to the situation causing the threat of damage.

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