

Секция «Английский язык и право (на английском языке)»

Contract law and human rights.

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One of the most significant events in recent English legal history is the enactment of the Human Rights Act 1998, which incorporates the European Convention on Human Rights into English law by creating 'Convention rights' which are enforceable in domestic law. The impact of these rights on the law of contract remains uncertain.

There are two issues, which are worth mentioning.

The first is that the Act makes it 'unlawful for a public authority including courts to act in a way which is incompatible with a 'Convention right'. It therefore clearly applies as between a public authority and a natural or a legal person. But does the Act also have 'horizontal effect', that is to ask, does it apply between two private citizens or between an individual and a business? The answer to this question is the subject of an extensive debate. The Act however has some horizontal effect, at least in the sense that Convention rights can be invoked in litigation between private parties when seeking to interpret domestic legislation.

The second question is how the 'Convention rights' may be violated by contracts or by the rules of contract law. Some examples are obvious. For instance, a contract of slavery would be a violation of Article 4 of the Convention, but this contract would be invalid under English contract law anyway. But there are those rules of contract law, which, in fact, can amount to a violation of a Convention right. The most obvious are perhaps Article 6 that provides the right to a fair and public trial, Article 14 that secures the enjoyment of the rights and freedoms without discrimination and Article 1 of the First Protocol that provides the right to the peaceful enjoyment of one's possessions. So, attempts to expropriate contract rights or to deny to claimants the right to have their disputes resolved by a court of law may involve a violation of a Convention right.

There are two examples of the potential impact of Convention rights on the law of contract.

The first is the decision of the House of Lords in *Wilson v First County Trust Ltd (No. 2)* [2003] in which their Lordships allowed an appeal from the decision of the Court of Appeal that found the rule of the Consumer Credit Act 1974 incompatible with the rights guaranteed by Article 6 and by Article 1 of the First Protocol. That rule renders an improperly-executed consumer credit agreement unenforceable by the creditor where the debtor did not sign a document which contains all the prescribed terms of the agreement.

The House of Lords reversed this decision. In so deciding, their Lordships emphasised that Article 6 cannot be used in order to create a substantive civil right which otherwise has no basis in national law. Whereas the target of Article 6 is procedural bars on bringing claims to court.

With respect to a violation of Article 1 of the First Protocol, their Lordships concluded that Article 1 was applicable on the facts of the case but that it had not been breached. The rule of Consumer Credit Act did deprive the creditor of its contractual right, but such a deprivation was proportionate, regarding that the consumer was a vulnerable party to a contract.

The second example of the potential role of human rights law in the law of contract is found in the regulation of illegal contracts, that currently refuses to enforce a contract which

is illegal or which is contrary to public policy, and refuses to allow a party who has conferred a benefit on another party to recover the value of the benefit so conferred. For example a contract under which one party promises in return for a fee to procure the marriage of another. Under *Hermann v Charlesworth* [1905] such a contract is unenforceable but could it be alleged that such decision would be a violation of Article 6 of the Convention? The answer is not entirely clear. At the time the Law Commission provisionally recommended that the courts should be given a discretion to decide whether or not to enforce an illegal contract or to reverse an unjust enrichment which has occurred under an illegal contract. The Court of Appeal in *Shanshal v Al-Kishtaini* [2001] held, that such an approach is compatible with the Convention and is justified by the public interest exception.

So, whereas the ultimate impact of human rights act remains uncertain, this regulation has influenced contract law dramatically so far.

Источники и литература

- 1) Ewan McKendrick. Contract law. 10th edition. – Palgrave Macmillan, 2013. – 432 p.