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The Abolition of the Concept of "Causa" in French Civil Law

Abstract: Causa is a subjective motive that determines the content of the obligation or material interest, which encourages the party to the trade to enter into an obligation taking on the associated burdens. In the countries of continental (mainland) Europe that belong to the Romano-Germanic law system, such as Germany, France, and Italy, the goal (objective) of the parties to the trade, causa, is legally significant. In the theory of the Civil law of the Romano-Germanic system, there is a general principle – any obligation arises for some purpose, which is called the basis of obligation. Causa is an individual interest that meets the requirements of the legal system. France was one of the last European countries that did not recognise the contingency theory as a basis for regulating the binding force of a contract. In practice, the courts have faced criticism of the concept of causation from both doctrine and law enforcement practice. In 2016, there was a significant reform of the French law of obligations. Legal science, undeservedly, did not attach due importance to one of the most noticeable innovations within the framework of the mentioned reform – the abolition of the concept of "causa" (reason, basis) of the contract, which until recently was one of the most original features of the French law and originated from Roman law, which was fixed in the Napoleonic Code. In this article, the theoretical provisions for the abolition of the concept of causa in French civil law, within the framework of the reform of the Civil Code, were investigated, and the corresponding conclusions were drawn.
Keywords: causa, contract, exception, obligation, stipulation, transaction

Introduction

The word "*causa*" is translated from Latin as "reason" or "ground". Causa is a subjective motive or ground that determines the content of the obligation, or a material interest that prompts us to enter into an obligation, taking on the associated

burdens. Since Roman law, the concept of "*causa*" has prompted a different response from the public.

In the theory of civil law of the German-Roman system, there is a general principle – any obligation arises for some purpose, which is called the basis for the occurrence of the obligation.

In the continental European jurisprudence of the 19th century, two main approaches to the causa, and its significance for the civil contract, were formed:

1) the causal theory of a contract, which originated in the French law,
2) the objective concept of the causa (purpose) of a contract in the German law.

1. The Occurrence of the Causa of a Contract

In Roman law, there is no holistic doctrine of the institution of the causa of a contract. In Roman law, only certain types of transactions were subject to claiming protection. In other words, a certain "reason" was required for the legal recognition of the transaction. These included stipulations, and furthermore, obligations in a special form: special ritual phrases were pronounced, all real contracts (a promise in return for a grant), as well as four types of consensual contracts (including sale and purchase).

Other agreements, called pacts, were initially not enforceable. Subsequently, some types of pacts (for example, the obligation to pay someone else's debt) received such protection and, in contrast to the so-called "naked pact" (*nudum pactum*), which had no protection, they began to be called "clothed pacts" (*pacta vestita*).

But, if there is no ground (*causa*), the obligation cannot arise by virtue of the agreement. Thus, solely from the pact, an obligation does not arise, but an exception arises – a reference to a circumstance that makes it wrong to satisfy the claim, even if the intention of the claim (*intentio* – the claim of the plaintiff) is justified.[1]

At the same time, for real contracts, causa meant the provision of the other party (transfer of money in the loan agreement, etc.), in the consensual agreement – the counter obligation of the other party, in the pact – the circumstances with which the law connected the possibility of legal protection of the current pact.

Stipulations (*stipulatio*), the features of which were subsequently inherited in a certain way by the bill, as obligations, in fact, had a one-sided character.[2] A stipulation is an oral agreement concluded through an oral question of the creditor and the answer of the debtor regarding what he was asked about.[3]

1 И.Б. Новицкий, В.С. Перетерский, Римское частное право, М., Волтерс Клувер, 2010, С. 68, 407 (I.B. Novicky, V.S. Peretersky, Roman private law, M., Wolters Kluwer, 2010, p. 68, 407).

2 *Ibidem.*

3 *В.А. Белов*, Сингулярное правопреемство в обязательстве, М.: ЮринфоР, 2007. С. 47 (V.A. Belov, Singular succession in an obligation, M., 2007, p. 47).

In this case, causa was considered to be compliance with the necessary formalities. The specific quality of the stipulation was the fact that it was an abstract contract, the validity of which depended not on the basis, but on the observance of the established form.

Consequently, the basis was not included in the composition of not only essential, but also accidental, elements of stipulation, which distinguished it from the overwhelming majority of other contracts of Roman law, which, in the absence of a basis, did not acquire legal force and therefore could be called causal contracts.[4]

However, in certain situations, the law recognized the admissibility of non-fulfilment of such obligations, for example, a solemn promise to return money to the creditor was made in connection with the assumed receipt of a loan from him, but the loan was never provided by the lender. In such cases, they also spoke about the absence of a causa.

This is how the Roman lawyer Ulpian (D. 2,14,7 pr. 2) described the problem of the causa of a contract: Agreements based on the law of peoples sometimes give rise to claims, sometimes – to an acceptance.

§ 1. Those agreements that give rise to claims do not remain with their (common) name (pacta), but are designated by the name assigned to this type – "contracts": these are the purchase and sale, hiring, partnership, loan, storage, and other similar contracts.

§ 2. But if the given matter is not included in any contract, but its essence remains, then, according to the correct answer of Arista Celsus, there is an obligation. For example, I gave you a thing to give me another thing, I gave you something to do; this is a synallagma, and hence the civil obligation is born.[5]

Thus, causa means an agreement reached about an interest in receiving something in return for something.

Since the 18th century, the understanding of the causa in European legal science has actually degraded. According to some jurists, causa is a rather complex legal institution and its function in the process of concluding a transaction is not, in all cases, sufficiently clear.[6]

The lack of understanding of the modern doctrine of the meaning of the general category of the contract and its application in classical Roman law largely depends on

4 О.С. Иоффе, В.А Мусин, Основы римского гражданского права, Л.: Изд-во ЛГУ, 1975. С.117–118 (O.S. Ioffe, V.A. Musin, Fundamentals of Roman Civil Law. L.: Publication LGU, 1975, pp. 117–118.)

5 Л.Л. Кованов (ред.), Дигесты Юстиниана. М., 2002, С. 261 (L.L. Kovanov (ed.), Digests of Justinian, M., 2002, p. 261.)

6 J.M. Smits, Contract Law: A comparative introduction. Cheltenham, UK; Northampton, MA, USA 2014, p. 78.

the often-manifested inability by novelists to understand what the operation of the contract is in general.[7]

Currently, there are opponents of the doctrine of *causa*, who argue that causa in the Roman law meant nothing more than any ground or reason for action. The word *causa,* in its application to the law of contracts, had a number of different meanings in Roman law itself: in the case of formal contracts, it was the observance of the prescribed legal formalities, in the case of consensual contracts – the consent of the parties, and in the case of real contracts – to promote or nominate.[8]

Thus, the causa is absent in the Roman law when it comes to absolutely heterogeneous cases of non-recognition of certain types of transactions by law. The expression "there is no causa", in Roman law, was synonymous with the expression "the law does not provide a transaction with legal protection". The rules for providing legal protection were different for different types of transactions and determined the meaning of the concept of "causa" in relation to this category of transactions.

2. Causa in the German Law

In the Germanic pandectics, which adheres to the volitional theory of the transaction, causa is reduced to general types of expression of will:

1) *causa dandi* – basis for transfer of ownership,
2) *causa credendi* – basis for entering into an obligation,
3) *causa solvendi* – basis for fulfilment of an obligation.

Back in the 19th century, one of the founders of the German Civil Code, B. Windscheid, discusses the authenticity of the expressed will as a requisite (necessary factor) of the legal force of the transaction (§§ 75–81). Thus, speaking about an error, he emphasizes that only a significant error serves as the basis for the nullity of an act. The first among the essential points in the expression of will, he calls "the nature of the established legal relationship".[9] It was exactly reflected in the age-old tradition of European legal *sciencen, which gave the world a developed doctrine of the causa of the transaction.*

In German civil law, developed on the basis of the key theories of B. Windstein and P. Ertmann, the doctrine of "falling away of the ground of the transaction"

7 C.A. Cannata, Contratto e causa nel diritto romano. Causa e contratto nella prospettiva storico-comparatistica: II Congresso internazionale ARISTEC, Palermo, 7–8 giugno 1995, p. 43.

8 E. Lorenzen, Causa and consideration in the Law of Contracts. Hain Online, 1919, p. 624. http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5569&context=fss_papers (10.05.2021).

9 Б. Виндшайд, Учебник пандектного права, Т. I. Общая часть. Пер.под ред. С.В. Пахмана, С. Петербург 1874, С. 173 (B. Vindshayd, A Textbook of Pandectic Law, (in:) V.S.S. Pahman, T. I. General part., S. Petersburg 1874, p. 173.)

(*Störung der Geschäftsgrundlage*) is essentially a development of the causa doctrine.[10] The theory of the development of the ideas of the causal transaction of B. Windstein was that during the conclusion of the contract, the parties have certain assumptions about the performance of the contract and the result of connections or ideas about certain circumstances that must necessarily take place and under the influence of which each of the parties concludes the transaction.[11]

In the development of B. Windstein's ideas, the scientist P. Ertmann stated that the basis of the transaction is the transactions that took place at the conclusion of the transaction, recognized by the counterparty in their significance and not contested representations of one of the parties or both parties about the presence or occurrence of certain circumstances underlying the transaction.[12]

All legal systems agree that for the emergence of a valid contractual relationship, capable parties are required, their mutual consent to conclude a contract that does not contradict the law, and a physically possible subject of the contract. In addition, a special form may be required for the validity of certain types of contracts. In Germany, these requirements are the only ones.

Article 134 of the German Civil Code states that a transaction that violates a statutory prohibition is void unless the law provides otherwise. With regard to the cases of violation of the prohibition, when the subjective goal is adequate, applying the provisions of the aforementioned article, the category of circumvention of the law is, in fact, unnecessary if the purpose and meaning of the prohibition established by law is taken into account when assessing the validity of the transaction. That is, the mentioned article already includes the cases of circumvention of the law.[13]

Thus, in the countries of the Romano-Germanic legal group, the subjective goal of the participants in the transaction is assessed. However, in the countries of the German legal group, causa is not a prerequisite for concluding an agreement.

3. Causa in the French Law

The development of the causa originates in the scientific research of J. Domar and R.-J. Pottier. Domar distinguished four types of contracts:

1) contracts in which the parties mutually exchange things;

2) in which each party does something for the other party;

10 К. Цвайгерт, Х. Кётц, Введение в сравнительное правоведение в сфере частного права, Т.2, М,: Международные отношения, 2000. С. 265–266 (K. Cvaygert, H. Ketc, Introduction to comparative law in private law, T.2, M., International relations, 2000, pp. 265–266.)

11 А.В. Кашанин, Кауза сделки в гражданском праве, 2003, С. 26 (A.V. Kashanin, Civil Law Transaction Causation, M., 2003, p. 26.)

12 *Ibidem*, p. 191.

13 W. Däubler, BGB kompakt. Allgemeiner Teil – Schuldrecht – Sachenrecht. 3. Auflage. München: Beck-Rechtsberater 2008, p. 460.

3) in which one party provides something in return for the services of another;
4) gratuitous provision and donation.[14]

Accordingly, in bilateral contracts, the causa for one party is expressed in the grant offered by the other party. In one-sided contracts, the causa is expressed in the obligation to return the previously provided property and pay interest. In gratuitous contracts, causa relies on a reasonable and fair desire to do something worthwhile. Such an idea of the causa, the types of which are limited to certain variants of the subject of the contract, and, accordingly, to certain types of contracts regulated by law, fits into the framework of the causal (objective) theory.[15]

Pottier also expressed his vision in a similar way, dividing all contracts into two groups:

1) non-gratuitous, in which causa is expressed as described by Domar;
2) gratuitous, in which causa was expressed in the generosity of one party in favour of the other.[16]

Pottier formulated the legal meaning of a causa according to the concept that if an obligation has no causa, or if the causa is feigned, the obligation is invalid, as well as the contract from which it arose.

Unlike Roman law, in the Code of Napoleon, all types of agreements received legal protection, with the exception of specially stipulated cases. This eliminated the notion of the "naked pact" with which the Roman concept of causa was associated. Nevertheless, the authors of the French Civil Code (FCC) considered it necessary to maintain the concept of causa (the basis of the contract), without which the contract is not considered valid.

The purpose of the causa (*cause finale*) is what the parties want to achieve through the transaction. This goal can be objective or subjective. An objective goal is usually understood and evaluated by its counter execution, which is received by the transaction party. For example, the objective goal of a seller under a purchase contract is to receive payment for the property, while the buyer's goal is to receive the property itself.

A subjective goal is usually understood as the personal motives of the participant(s) of the transaction. An objective target is usually used when evaluating a transaction for a renumeration, while an assessment of a subjective goal is most

14 И.А. Полуяхтов, К вопросу о делении сделок на абстрактные и каузальные. Цивилистическая практика, Вып. 4, Екатеринбург 2002, С.104–107 (I.A. Poluyahtov, To the question of dividing transactions into abstract and causal. Civilistic practice, vol. 4., Yekaterinburg 2002, pp. 104–107).

15 *Ibidem,* p. 106.

16 *Ibidem,* p. 107.

often needed when evaluating transactions without any renumeration, in which, in the absence of counter execution, it is impossible to assess an objective goal.[17]

There are also distinguished two main functions of the causa:

1) Inadmissibility of concluding a contract, the performance of which is objectively impossible;
2) It is forbidden to conclude a contract with an illegal or immoral purpose.[18]

Thus, the transaction is invalid if the counter execution contradicts the criteria established in Article 1133 of the FCC (for example, remuneration for the use of political pressure, trading of a human body or organs, etc.)

According to the existing doctrine of France, there is a basis of the law of obligations (*causa efficiens*), similar to a tort and the basis of the obligation itself is considered the contract itself and its purpose.

The practical consequences in France (where the causa was previously a requisite of the contract) and in Germany (where the causa was ignored) were so similar that attention to this category was significantly reduced.

4. Abolition of the Concept of Causa

The presence of a causa in FCC was one of the most original features of French law and was considered a necessary condition for the recognition of a contract as being valid. However, the French jurisprudence on the causa was ambiguous, and in many cases, the causa conditions could overlap with other legal conditions, for example, delusion and deception.[19]

Therefore, for many years in France, works have been underway to reform the Civil Code in the field of contract law, within the framework of which three relevant draft amendments were prepared. On February 12, 2015, the French Constitutional Council recognized that amendments to a number of laws, including the FCC, were not contradicted by the Constitution of the French Republic.[20] As a result, the government was instructed to take the legislative measures necessary to change the structure and content of the FCC – not only to modernize, simplify, and improve the text, but also to strengthen the availability of general provisions on contracts, rules on obligations, and provisions on evidence.

17 A. Schäfer, L'illicéité des prestations et ses consequences. Mémoire. CF.,Université d' Auvergne, 1995, p. 14.

18 J.M. Smits, Contract Law: A Comparative Introduction Cheltenham Northampton: Edward Elgar Publishing, 2014, pp. 87–89.

19 А.В. Кашанин, Кауза сделки в гражданском праве, М., 2003, С. 88 (A.V. Kashanin, Civil Law Transaction Causation, M., 2003, p. 88)

20 Décision n° 2015–710 DC du 12 février 2015. https://www.conseil constitutionnel.fr/decision/2015/2015710DC.htm.

On October 1, 2016, a new version of the FCC entered into force, including a comprehensive reform of the law of obligations.[21] It should be recognized that most of the changes are actually a codification of judicial practice that has developed over the past 200 years, combining in one complex all the functions that the causa has been endowed with by the judicial practice. One of the most notable innovations was the abolition of the concept of causa (reasons, grounds) of the contract. This innovation is a fundamental change in the foundations of the rule of law and civil law in general.

During the period of preparation of the reform, a significant sector of jurists was not ready for a radical departure from the two-century tradition. Thus, in one concept of the reform, the concept of the causa of a contract occupied its traditional place of honour, and the number of articles devoted to it increased. However, in the version adopted by the French government, there was no longer any causa in the conditions of the validity of the contract, thus inclining towards the international unification of law, and not towards the maintenance of traditions.

The reform is intended to achieve greater legal certainty by relieving the courts of the necessity to interpret the meaning of the term *causa*. At the same time, useful functions previously associated with the causal doctrine are performed in the new edition of the FCC with the help of other tools, for example, through the concept of a transaction that violates the requirements of the law, etc. However, if you study the changes in depth, you can ascertain that they are not as radical as may seem at first glance.

In the first edition of the corresponding norms of the FCC, which existed unchanged from 1804 until 2016, the validity of the agreement was formulated as follows. According to article 1108, the validity of the agreement is determined by four essential conditions:

- the consent of the party undertaking the obligation;
- the ability to conclude an agreement;
- the presence of a certain subject that constitutes the content of the obligation;
- existence of a legal basis in the obligation.[22]

Article 1131 determines that an obligation that has no basis or has an apparent or unlawful basis cannot be valid.[23] Subsequent application practice has clarified this rule as follows. There is no causa of a contract if the parties did not have a serious intention to create a contractual relationship (for example, the contract was concluded as a joke). There is also no causa if the execution of the contract is impossible (for example, the subject of the contract died before the conclusion of the contract).

21 French Civil Code 2016, https://www.trans-lex.org/601101/french-civil-code-2016/.

22 В. Захватаев (пер.), Гражданский кодекс Франции, *Киев,* Изд-во «Истина», "Истина", 2006, С. 374, 378. (V. Zahvataev (transl.), French Civil Code, Kiev, Publication "Truth" 2006, p. 374, 378).

23 *Ibidem*, p. 378.

The causa of a contract is considered "false" if the parties believed that the transaction had a certain legal basis, but in fact there was none (for example, an agreement to pay off a debt that did not actually exist). However, the expressions "has no basis" and "has false grounds" are often used synonymously.

In relation to an impermissible causation, according to the FCC, the ground is impermissible when it is prohibited by law, when it is contrary to good morals or public order.

The basis of the obligation, enshrined previously in the FCC, performed certain functions, which from then on were assumed by the new provisions included in the project. In the final version, the new rule on the terms of the validity of the contract is as follows. Article 1128 states that for the validity of the contract the following is required:

- consent of the parties;
- their ability to enter into a contract;
- permitted and defined content.[24]

Since the consent of the parties is one of the conditions for the validity of the contract its absence due to an error, deception, or violence, when they are such that if they were not admitted, the parties would not have concluded an agreement or would have concluded it on substantially different conditions, entails a relative invalidity of the contract (Articles 1130 and 1131 FCC).

The new provisions of the FCC on violence as a ground for the invalidity of the contract replace the rules of Articles 1111–1115. According to Article 1140 of the FCC, violence exists if one party accepts an obligation under pressure from the opposing party, which makes it fear that significant damage will be caused to the party itself, its condition, or the condition of its relatives. Violence is a ground for invalidity, regardless of whether it was used by a party or a third party (Article 1142). But the threat of the use of legal means is not violence, unless the legal means is used for a purpose other than it was intended, or when the legal means is invoked or used to obtain obviously significant benefits.

According to Article 1178 of the FCC, the invalidity of the contract is recognized by the court or can be established by the mutual agreement of the parties. This allows in the simplest cases not to apply to court.

The FCC also distinguishes between absolute and relative invalidity of an agreement; the new rules provide a systematic regulation of each of these two types of invalidity. However, in the provisions of the FCC itself, in some norms it is explicitly stated that with the existing defects, the contract is absolutely or relatively invalid. For example, Article 1147 establishes that failure to conclude a contract is a ground of

24 French Civil Code, 2016, https://www.trans-lex.org/601101/french-civil-code-2016/.

relative invalidity, while others simply refer to the invalidity of the contract (Article 1169).

Article 1179 states that invalidity is absolute if the violated norm is aimed at protecting common interests. Invalidity is relative if the sole purpose of the violated norm is a private interest.

Absolute invalidity can be declared by any interested person, as well as by a public ministry. It cannot be overcome by confirmation of the contract (Article 1180).

Relative invalidity can only be declared by the party to whose protection the law is directed. It can be overcome by confirmation. If several rightsholders are entitled to a claim of relative invalidity, the refusal of one of them does not impede the actions of the others (Article 1181).

Confirmation is an act by which the one who could invoke invalidity refuses to do this. Such an act should indicate the subject of the obligation and the defect of the contract. Confirmation can only follow after the conclusion of the contract. The voluntary performance of the contract by those who know about the grounds for invalidity is equated to confirmation. In the event of a violation, confirmation can follow only after the violation has ceased. Confirmation entails the rejection of those arguments and objections that could be relied on, without nevertheless affecting the rights of third parties (Article 1182).

The party also has the right to:

1) request in writing from the party that could take advantage of the invalidity,
2) confirm the contract,
3) declare a claim to be invalid within six months on pain of forfeiture to a subsequent appeal to the court.

The written document must explicitly state that without filing a claim for invalidity, after six months the contract will be considered confirmed (Article 1183).

Let us also consider some of the new edition rules, codifying the rules that were previously derived by courts from the concept of causa.

Article 1162 states that a contract cannot violate the foundations for the rule of law either by its terms or by its purpose, regardless of whether the latter was known to all parties.

Article 1169 states that a compensated contract is invalid if, at the time of its conclusion, the counter-provision, which the party to the contract agreed to accept, is illusory or insignificant.

Article 1170 states that any provision that makes the debtor's primary obligation meaningless is considered unwritten. This rule is also known as the "Chronopost

doctrine" in a case in which the principle of contracts without foundation was formulated, with reference to Article 1131 on contracts without foundation.[25]

Article 1194 of the FCC, as well as Article 1135, provides that contracts are binding not only in terms of what is reflected in them, but also in terms of the consequences that justice, custom, or law associate with them. However, the rule of Article 1195 of the FCC is fundamentally new, which states that if a change in circumstances that could not be foreseen at the time of the conclusion of the contract makes the performance much more difficult for a party that did not assume such a risk, it has the right to demand negotiations from its counterparty to revise the contract. This party continues to fulfil its obligations during the negotiations.

In case of refusal of negotiations or their failure, the parties have the right to agree to terminate the contract on the date and on the conditions that they define, or, by mutual agreement, apply to court to make the necessary changes to the contract. In the absence of such consent, the court, at the request of the party, changes or terminates the contract on the date and in accordance with the conditions at its discretion.

Thus, the causa of the transaction did not disappear from the FCC, in them the causa is present in the form of codification of the rules about the reason, the grounds for the contract.

Conclusions

1) Starting with Roman law, jurists have never come to a common understanding of whether the causa (ground) is the identical purpose of the contract.
2) The abolition of the causa concept in French law did not entail significant changes in the relations between the parties to contracts, the functions of the previously used causa doctrine were redistributed between other legal concepts.
3) The definition of a causal deal as a deal, the validity or invalidity of which is determined by the presence or absence of a causa, leads to a dispute about what a causa is in relation to a particular contract, and whether it is or it is not in this case. The authors of the reform described the invalidity of contracts of transactions in more understandable terms, harmonizing this with judicial practice.
4) It is quite possible that the concept of a certain and permissible content of a contract will be used in court practice as a causa.
5) The legal institution of causa did not disappear; rather, it was modified and received a unifying legal form about the purpose and content of the contract.

25 Case Société Banchereau v. Société Chronopost Subsequent developments, 1997, https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1134 (10.05.2021).

As a result of the reform, the objective and subjective causa of the previous doctrine is conveyed by the formalized law enforcement categories of "permissible content" and "legitimate purpose" of the contract.

6) Owing to the changes, the German legal institution Geschäftsgrundlage and the Romanesque causa have come closer together in the context of the development of a common terminological framework with the aim of harmonizing and unifying the civil law of the European Union.

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