UDC 347.440.64:340.15(37) **DOI https://doi.org/10.32782/2522-9656/2025-17-8**

Pavlova Viktoriia Georgiivna,
Candidate of Law, Associate Professor,
Associate Professor at the Department of Civil Law
National University “Odesa Law Academy”
ORCID ID: 0000-0001-8829-7045

RECEPTION OF CONTRACTUAL CONSTRUCTIONS: UNNAMED CONTRACTS

РЕЦЕПЦІЯ ДОГОВІРНИХ КОНСТРУКЦІЙ: НЕПОІМЕНОВАНІ КОНТРАКТИ

Abstract. The article is devoted to the study of contractual structures, which in Roman private law acquired their most extensive development, study and development. It is concluded that in Roman private law as a limitless source of civil norms and rules, the division of private law contracts, which were called contracts, into four exhaustive groups was initiated according to the criterion of the emergence of obligations: 1) by word (verbis); 2) by letter (litteris); 3) by thing (re contrahitur obligatio) or 4) by consent (consensu). Taking into account the diversity of Roman contracts, which were able to satisfy all the needs of economic Roman circulation, the Roman system of contract law was conditioned by strict typification. It is noted that with the rapid development of society, economic and business relations, new private law agreements appeared, which in their essence did not fall under any group of the above-mentioned formal contracts. Over time, when these agreements began to be protected at the praetorian level, they began to be called innominal contracts. The principle of freedom of contract and the place of the theory of autonomy of will are analyzed. Elements of freedom of contract are also highlighted. Special attention is paid to the systematization of innominal contracts in Justinian’s Digests, which were divided into four groups and the characteristics of the following types of innominal contracts: barter contract, valuation contract, conditional gift contract, peace agreement, precarium. It is concluded that due to the ability of jurisprudence, which through its efforts was able to clarify and disseminate new contractual structures, and the efforts of the praetors, who provided actiones infactum, and also allowed general means of protection - action civilis, innominal contracts gained their wide application and entered the legal tradition of Rome. It is noted that they received their general name – non-nominal contracts only in the Middle Ages, thanks to the careful study and reception by medieval lawyers of Roman private law. It is concluded that European legal science was based on a received theoretical basis, judicial practice, which developed due to the resolution of various cases, which passed through the prism of deep legal analysis by Roman lawyers and were reflected in modern legislation and legal theory of Ukraine.

Key words: unnamed contracts, contract law, reception of Roman private law, freedom of contract, innominal contracts, barter contract, valuation contract, conditional gift contract, peace agreement, precariat.

Анотація. Статтю присвячено дослідженню договірних конструкцій, які в римському приватному праві набули свого наймасштабнішого розроблення, вивчення та розвитку. Робиться висновок, що в римському приватному праві, як безмежному джерелі цивільних норм і правил, було започатковано розподіл приватноправових договорів, що отримали назву контрактів, на чотири вичерпні групи за критерієм виникнення зобов’язань: 1) словом (verbis);

2) буквою (litteris); 3) річчю (re contrahitur obligatio) або 4) згодою (consensu). З огляду на різноманітність римських договорів, які були здатні задовольнити всі потреби господарського римського обігу, римська система договірного права була обумовлена суворою типізацією. Зазначається, що з бурхливим розвитком суспільства, економічних і господарських зв'язків з'являлися нові приватноправові угоди, які за своєю суттю не підпадали під жодну групу наведених вище формальних контрактів. Із часом, коли ці угоди почали захищатися на преторському рівні, вони стали називатися безіменними контрактами. Проаналізовано принцип свободи договору та місце теорії автономії волі. Також виділено елементи свободи договору. Особливу увагу приділено систематизації непоіменованих договорів в Дигестах Юстиніана, які були розділені на чотири групи, та характеристиці таких видів інноміналь них контрактів, як-от договір міни, оціночний договір, договір дарування з умовою, мирова угода, прекарій. Робиться висновок, що завдяки спроможності юриспруденції, яка своїми зусиллями змогла роз'яснити та поширити нові договірні конструкції, і зусиллям преторів, які надавали actiones infactum, а також допускали і загальні засоби захисту – action civilis, інноміналь ні контракти дістали свого широкого застосування та ввійшли в правову традицію Риму. Зазначено, що свою загальну назву – непоіменовних договорів – вони отримали лише в середньовіччі завдяки ретельному дослідженню та рецепції середньовічними правниками римського приватного права. Робиться висновок, що європейська правова наука базувалася на реципованому теоретичному підґрунті, судовій практиці, що склалася завдяки вирішенню різноманітних казусів, які пройшли крізь призму глибокого правового аналізу з боку римських юристів та знайшли своє відображення в сучасному законодавстві та правовій теорії України.

Ключові слова: непоіменовані договори, договірне право, рецепція римського приватного права, свобода договору, інноміналь ні контракти, договір міни, оціночний договір, договір дарування з умовою, мирова угода, прекарій.

Introduction. The contract is one of the oldest ways of interaction between individuals. It was in Roman private law that the private law contract acquired its most extensive development, study and development. In Roman private law, as a limitless source of civil norms and rules, the division of private law contracts, which were called contracts, into four exhaustive groups was initiated according to the criterion of the emergence of obligations: 1) by word (verbis); 2) by letter (litteris); 3) by thing (re contrahitur obligatio) or 4) by consent (consensu). The development of Roman society in economic and business areas became a decisive element in the emergence of new contractual structures. Thus, violating the strict prescription of the law regarding the classification of contracts, civil legal relations went beyond the framework of such classification, which became the impetus for the emergence of new contractual structures, which were called in Roman private law - innominal contracts [1, p. 101].

Given the above, the choice of the topic of this study is explained by the fact that the reception of Roman private law according to the Eurasian concept, as noted by Kharitonov E.O., contradicts the logic of the natural development of Ukrainian law, since it is characterized by European values, and not Eurasian, that is, the Soviet and post-Soviet interpretation of the essence of civil law. Considering that it is contractual legal relations that have fallen under the sights of the "hybrid war" in order to prevent the European integration of Ukraine, the rights and interests of ordinary citizens are violated every day. This has become a challenge for the legal community, the goal of

which has become the fundamental need to find legal ways to overcome the “hybrid war” with all its unlawful factors and consequences.

Materials and method. The issue of unnamed contracts, as well as the reception of contractual structures, was the subject of scientific research by Bodnar T.V., Heinz R.M., Hrynko S.D., Dikovska I.A., Makarchuk V.S., Pidoprihory O.A., Sholudko M.V., Kharytonova E.O. and others. The methodological basis of this article is the general scientific dialectical method, as well as special scientific methods of historical, formal-legal, comparative-legal analysis.

Results. Freedom of contract in the civil law of states that have a democratic path of development is the cornerstone of civil legal relations of citizens. Therefore, all private law codes declare the autonomous will of participants in civil legal relations as freedom of the contractual process, development of trade, economy and welfare of the country as a whole. At the same time, taking into account that most civil agreements are bilateral agreements, unlike unilateral transactions, where freedom of decision-making depends on one person, the main requirement for bilateral and multilateral contracts is the voluntary, mutually agreed expression of the will of each party, which will ensure legitimacy and legality with its legal consequences. It is the theory of autonomy of will that laid the foundation for freedom of contract, the essence of which is that counterparties voluntarily assume obligations to fulfill the terms of the contract. The balance of civil rights and obligations in the content of the contract guarantees the consolidated will of its participants, expresses a stable agreement, trust, and impartiality.

The principle of freedom of contract – the freedom to choose the subject of the contract, its conditions, counterparties, rights and obligations of the parties is widely used in the civil codes of European and other countries of the world. At the same time, speaking of freedom of contract, it should be noted that such freedom cannot be absolute, its existence is impossible without logical limits, which is a direct factor of justice. As Voltaire noted: “The freedom of a person consists in his dependence exclusively on the law.” Studies of European civil codes give grounds to state that the freedom to choose counterparties and the terms of the contract are enshrined in the Napoleonic Code, the Civil Codes of Italy (Article 1322), Spain (Article 1255), Greece, Portugal, Belgium and Luxembourg, the Netherlands, the Austrian Civil Code, etc. [2]. At the same time, in European codes, unlike the US jurisdiction, which declares freedom of contract to be universally recognized and subject to precedential judicial protection, certain restrictions on freedom of contract are clearly visible, for example, compliance with public order, protection of a certain number of parties, etc.

As in most European civil codes, the principle of freedom of contract has found its declaration in the Civil Code of Ukraine. Article 3 of the Civil Code of Ukraine proclaims freedom of contract as one of the main principles of civil legislation. Part 1 of Article 6 of the Civil Code of Ukraine establishes the rule according to which

participants in civil legal relations are granted the right to conclude contracts at their own discretion in the absence of such contracts in civil legislation, provided that they are consistent with the law, reasonable, good faith, fair, taking into account the analogy of law and the analogy of law. In addition, elements of the principle of freedom of contract are reflected in Articles 627 and 628 of the Civil Code of Ukraine, according to which the parties are considered free in the procedure for concluding a civil law contract, free in choosing counterparties, rights and obligations of the parties to the contract, and also have the right to conclude contracts that bear the signs of different contractual structures, the so-called mixed contracts.

As mentioned above, in Roman private law a closed system of contract law was formed, which was impossible to change and supplement, and which was exhaustive in nature. In connection with the inability to regulate the newest civil legal relations that arose in multinational Rome, after a long time, judicial and theoretical analysis, Roman lawyers proposed a new, fifth element of the contractual family, which received its own name – Nova negotia (contractus innominati) – the sum of varieties of innominal contracts. Roman lawyers, taking into account the legal nature of innominal contracts, which were similar to real contracts, with the help of verbal plots distributed these agreements according to four features. Thus, the contractual system of Rome was represented by named contracts and unnamed contracts: 1) I give, so that you give (do ut des); 2) I give, so that you do (do ut facias); 3) I do so that you give (facio ut des); 4) I do so that you do (facio ut facias). As researchers note, such a four-member group was considered the system that Paul proposed.

It is worth noting that named contracts had a specific name, a special claim and theoretical developments, while unnamed ones did not require either a special name or a claim, and their legal characteristics were of a general nature. Thus, innominal contracts, going beyond the limits of legalized contractual structures, and also not falling under the protection of any of the existing claims, were understood by Roman lawyers as agreements outside the claim - nuda pacta. Innominal contracts were initially perceived as real contracts, since the emergence of the agreement coincided with the fulfillment of the obligation, while before such fulfillment they, as was noted, were considered nuda pacta. At the same time, in innominal contracts, unlike classical real contracts, both parties were endowed with rights and obligations, in other words, synalgam took place.

Innominal contracts gained their legal recognition due to the long-term use of specific legal relations that had no legal significance and formality. The first mentions of the use and recognition of new contractual structures occurred in the 1st century AD. Subsequently, on the basis of constant litigation that arose in the process of using new contractual structures, the praetorian community began to provide judicial protection for the injured party in such legal relations by compensating for damages. Due to the generally recognized principle according to which an obligation arises on

the basis of any agreement that has a legal basis, the final consolidation of innominal contracts occurred in the Justinian era by giving them legal force in the Digests. Thus, it should be emphasized that in the law of Justinian there were no longer any noticeable reservations for the prohibition of unnamed contracts, on the contrary, their general recognition took place on a par with other contractual structures that were part of the system of named contracts. The basis of such recognition was the sum of the following factors, firstly, this is the formula according to which the agreement arises on the basis of the performance of an obligation, if it does not contradict the law, secondly, the possibility of applying both praetorian and general means of protection – action civilis. Summarizing the above, it should be noted that the fact of recognition by Roman private law of the phenomenon of new contractual structures – unnamed contracts gave development and life to any extra-system private law agreements in which one party fulfilled its obligation.

Roman lawyers noted the possible presence of two types of private law relations in an innominal contractual structure, in which one element has legal precedence over the other. It was at the level of the praetorian edict that the issue of choosing a claim was resolved, which protected the interests of the injured party. In cases where a dispute was considered, the subject of which was an action, the dominant position of which had to be chosen, action prascriptis verbis was resorted to. Thus, innominal contracts received a claim protection, in which the guilty party was forced to fulfill the obligation arising on the basis of such a contract. For a party who duly fulfilled the terms of the contract in Roman private law, as noted above, a special claim with a proscription in the formula – action prascriptis verbis was granted by the praetorian edict. Thus, in the Justinian era, according to researchers, the party that fulfilled the obligation was given several types of claim protection to choose from: 1) a claim for providing a reason that remained without appropriate satisfaction; 2) action prascriptis verbis; 3) “right of repentance” – jus poenitendi, a claim for the refusal of the contract by the party that fulfilled its obligations, although the other party intended to fulfill the counter-obligation.

Innominal contracts were formed from an agreement between the parties, the obligations under which were of a property nature and did not fall under the scope of the contracts existing in Roman private law. It should be emphasized that the common feature of each innominal contract was that it had the features and conditions of a specific named contract. Such a contractual construction “I give, so that you give” (do ut des) had the features of a classical contract of sale, while the contractual construction “I give, so that you do” (do ut facias) was similar in content to two classical contracts at once – a contract of sale and a contract of work. Innominal contracts contained conditions in their content that were difficult to establish. At the same time, any atypical agreement subsequently acquired its place in the group of unnamed contracts. Researchers have attempted to provide relevant features to

unnamed contracts, among which the main features were the presence of voluntary consent of the parties to conclude a future contract, the presence of at least several identical conditions with any named contracts, the need for one of the counterparties to the contract to fulfill its obligations, as well as the possibility of applying general claim protection for similar unnamed contracts to this contract.

As noted above, taking into account the favorite systematization of Roman lawyers, various types of unnamed contracts in the Digests of Justinian were divided into four groups. The main attention of researchers from among unnamed contracts was paid to the characteristics of the following types of innominal contracts: a contract of exchange, a contract of valuation, a contract of gift with a condition, a peace agreement, a precarium (mainly a contract for receiving land for indefinite use) [3]. A precarium (precarium) is an agreement under which one party transferred a thing for free use to another party, without specifying the term for the return of the thing, which undertook to return this thing at the first demand of the owner. Wealthy Roman citizens provided a precarium to dependents who had small means and were poorly provided for financially. A precarium was a unilateral contract, since its conclusion depended solely on the will of the patron – the person who provided a certain thing for use. The precarist, in turn, had no obligations other than to return the thing upon first demand. According to the research of Onofreychuk V.D., the precarium entered the ranks of anonymous contracts thanks to the Justinian jurists. The conclusion of the precarium took place by agreement of the counterparties in writing or through the so-called messenger. An interesting fact, as Onofreychuk V.D. emphasizes, is that “a precarium could be a minor, which contradicted the classical principles of Roman private law. If the precarium refused to return the thing that was the subject of the contract voluntarily, the thing could be returned in two ways: by means of physical force and by collecting a fine in the amount of the value of the subject of the contract” [4].

Under the contract of barter, the first party transferred ownership of the thing to the second party, who, in turn, transferred ownership of another thing of the same value to the first party. The subject of this contract could be any things, except money. The barter agreement was considered a real contract, since the fact of concluding the contract was confirmed by the transfer of one of the goods to be exchanged. The party that fulfilled its obligation and transferred its thing for exchange had the right to protection, which gave the right to a counter-transfer of the thing by the other party or the right to return the thing transferred for exchange. In cases of unfair possession of a thing that was transferred to another party under the barter agreement, from which it was then seized by a court decision, the barter agreement was recognized as not concluded.

The next example of innominal contracts is the valuation contract (aestimatum), under which Roman private law understood an anonymous real contract, under which one party – the creditor – transferred to the other party – the debtor a thing determined

by individual characteristics for sale for a fee agreed between them, and the debtor had to return either this thing or its agreed fee. The debtor performed an intermediary service in finding a buyer for the thing that was the subject of the valuation contract, and instead of the remainder from the sale of the thing, he received a reward.

The subject of the valuation contract were things that were not removed from civil circulation. A type of unnamed contracts was also considered a peace agreement, which in classical times was not considered a separate contract, but served as the basis for the implementation of other contracts. Transactio – amicable agreement – the parties' refusal of mutual obligations in order to prevent the dispute from being considered in court or for the early termination of the dispute consideration by the praetor, as well as the termination of contractual relations by means of either concessions or a complete waiver of the initial claim for remuneration.

The last anonymous contract should be defined as a donation contract with a condition – donation sub modo – as a gratuitous transfer by the donor of his property to the donee with the condition that the latter perform certain actions stipulated by the contract. As a general rule, a donation contract with a condition was terminated in the event of failure to fulfill the condition to perform a certain action.

Conclusions. Thus, thanks to the ability of jurisprudence, which through its efforts was able to explain and disseminate new contractual structures, and the efforts of the praetors, who provided actiones infactum, and also allowed general means of protection – action civilis, innominal contracts gained their wide application and entered the legal tradition of Rome. At the same time, one should not forget that new contractual structures were consumed as abstract forms, since they did not have a clear individuality. Therefore, they received their general name - non-nominal contracts only in the Middle Ages, thanks to the careful study and reception by medieval lawyers of Roman private law.

The influence of Roman private law on the formation and development of legal culture, legislation, and jurisprudence cannot be estimated. It is a proven fact that European legal science was based on a received theoretical basis, judicial practice, which developed due to the resolution of various cases that passed through the prism of deep legal analysis by Roman lawyers and were reflected in legislation and legal theory. For many centuries, scientists from all over the world have been studying the phenomenon of reception of Roman law, and what is fascinating, scientific research continues even now.

Bibliography:

1. Павлова В. Г. Nova negotia (contractus innominati) – інномінальні контракти в римському приватному праві. Римське право і сучасність: реалізація і захист речових прав в умовах воєнного стану : матеріали Всеукр. наук. конф. (Одеса, 25 трав. 2024 р.) [Електронне видання]. За заг. ред.: Є. Харитонова, І. Давидової, В. Зубара. НУ «Одес. юрид. академія». Одеса : Фенікс, 2024. 254 с. С. 101.

2. Ole Lando, Hugh Beale. Principles of European Contract Law. Part I and II. London: Kluwer Law International, 2002. 201 p. URL: https://www.legiscompare.fr/web/IMG/pdf/19._Guiding_Principles.pdf.

3. Римське цивільне право : практикум / Уклад. Лубко І. М., Попова Н. О. Черкаси : Видавництво ЧНУ ім. Богдана Хмельницького, 2017. 492 с.

4. Онофрейчук В. Д. Прекарій у римському праві : автореферат дис. канд. юрид. наук. Київ, 1996. 25 с. URL: https://lawtheses.com/jreader/426664/a?#?page=20.

5. Харитонов Є. О. Рецепції римського права та інші феномени лабільності правових систем. Євген Олегович Харитонов, Олена Іванівна Харитонова. Римське приватне право: здобутки європейські та глобальні : матер. міжн. колокв. (м. Одеса, 27 жовтня 2018 р.). За заг. ред. д-ра юрид. наук, проф. Є. О. Харитонова. Одеса : Фенікс, 2018. С. 4–8, с. 7.

References:

1. Pavlova, V.G. (2024). Nova negotia (contractus innominati) – innominalny kontrakty v rymskomy pryvatnomy pravi [Nova negotia (contractus innominati) – innominal contracts in Roman private law]. Rymske pravo I sychasnist: realizaciy i zachyst rechovych prav v ymovach voennjgo stany: materialy Vseykr. nayk. konf. (Odesa, 25 trav. 2024 r.) [Elektronne vydannya]. Za zag. red.: E. Charitonova, I. Davidivoi, V. Zybara. NY “Odes. yurid. Akademiya”. Odesa: Fenix, 254 p. P. 101 [in Ukrainian].

2. Ole Lando, Hugh Beale. Principles of European Contract Law. Part I and II. London: Kluwer Law International, 2002. 201 p. Retrieved from: https://www.legiscompare.fr/web/IMG/pdf/19._Guiding_Principles.pdf.

3. Rymske zyvilne pravo: praktykum [Roman civil law: practical course] (2017). Uklad. Lubko I.M., Popova N.O. Vydavnytstvo ChNU im. Bohdana Chmelnytckogo. P. 492 [in Ukrainian].

4. Onofreychuk, V.D. (1996). Prekariy u rymskomu pravi. Avtoreferat dys. kand. yur. nauk. [Precarious in Roman law. Abstract of the dissertation of the candidate of legal sciences]. Kyiv, 25 p. Retrieved from: https://lawtheses.com/jreader/426664/a?#?page=20 [in Ukrainian].

5. Charitonov, E.O. (2018). Reztpzii rymskogo prava ta inshi fenomeny labilnosti pravjvych system [Receptions of Roman law and other phenomena of lability of legal systems]. Evgen Olegovych Charitonov, Olena Ivanivna Charitonova. Rymske pryvatne pravo: zdobutky evropeycki ta globalni: mater. mign. kojokv. (m. Odesa, 27 govtnya 2018 r.). Za zag. red. d-ra uryd. nauk, prof. E.O. Charitonova. Odesa: Fenix. P. 4–8, p. 7 [in Ukrainian].