

Exception of Non-Performance and Divided Obligations

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1. In modern Russian doctrine, there have been two approaches to determining the range of cases in which a debtor under a divided obligation is entitled to the defense of non-performance (*exceptio non adimpleti contractus*) in accordance with Art. 328(2) of the Civil Code of the Russian Federation.

1.1. Some legal scholars proceed from the fact that in such relationships synallagmatic connections arise between the individual duties of a debtor to a creditor and the same creditor to the same debtor. Therefore, if the obligation is violated by only one of the several debtors, the creditor is considered to be entitled to suspend his counter-performance only in relation to this debtor [5, c. 204–205; 6, c. 108–110].

1.2. Other jurists suggest that in divided obligations a synallagmatic connection arises between cumulative obligations (i.e. divided obligations as wholes). Based on this, they conclude that the debtor has the right to suspend his performance to any of the creditors if at least one of them does not fulfill his obligation to the debtor [4, c. 793–794; 3, c. 44].

2. Both approaches appear to be hasty and not fully justified.

2.1. First of all, each of them is based on a false assumption ignoring that a synallagma can exist both between divided obligations and between separate parts thereof.

Contrary to what is assumed by I.B. Novitsky, the nature of divided obligations as having relatively independent parts does not predetermine the need for the emergence of several synallagmata among the latter (cf. [5, c. 204]). Since it is considered acceptable to simultaneously exchange one thing for several ones (e.g., one 1000-ruble banknote for two 500-ruble banknotes), one shall not exclude the possibility of establishing a single synallagma between one and several obligations, regardless of their nature.

At the same time, there is no causal relation between the unity of cause and synallagmatic interdependence of two or more obligations (cf. [4, c. 794]). Obligations arisen from the same contract may not be synallagmatic, just as synallagmatic obligations may arise from different sources (e.g., linked contracts).

2.2. The consequences attributed to the second approach explicitly do not comply with the second paragraph of Art. 328(2) of the Civil Code of the Russian Federation and, apparently, are entirely borrowed from German law (cf. [2, p. 492; 3, c. 44]).

In Germany, a person who is a party to a synallagmatic contract may refuse his part of the performance until the other party renders consideration, unless he is obliged to perform in advance (§ 320(1) sent. 1 of the Civil Code of Germany). Furthermore, if performance is to be made to more than one creditor (i.e. in the case of the divided claim (*Teilgläubigerschaft*) [1, S. 1556]), each of them may be refused the part performance due to him until the complete consideration has been rendered (§ 320(1) sent. 2 of the Civil Code of Germany).

In Russia, on the other hand, a debtor is entitled to suspend his performance only to the extent of the non-performance of the reciprocal obligation (Art. 328(2) par. 2 of the Civil Code of the Russian Federation). Thus, the debtor's right to suspend the performance of the divided obligation does not depend in any way on whether one or more synallagmata exist between his debt and the reciprocal obligation of his creditors.

3. The German solution certainly has its advantages. However, in Russia, in order to establish similar consequences, parties to the divided obligations need to expressly stipulate it in the contract (Art. 328(4) of the Civil Code of the Russian Federation)—a simple agreement on the unity of the synallagma, for the reasons explained above, is not enough.

References

- 1) Erman Bürgerliches Gesetzbuch: Kommentar mit Nebengesetzen (AGG, BVerstG, EGBGB, ErbbauRG, ProdhaftG, VBVG, VersAusglG, WEG – teils in Auszügen) und Internationalem Privatrecht. Bd. I / hrsg. von H.P. Westermann, B. Grunewald, G. Maier-Reimer. 17. Aufl. Köln: O. Schmidt, 2023. LVIII, 7765 S.
- 2) *Larenz K.* Derecho de Obligaciones. T. I / trad. y not. por J. Santos Briz. Madrid: Editorial Revista de Derecho Privado, 1952. X, 542 p.
- 3) Гражданское право: учебник: в 4 т. Т. III: Общие положения об обязательствах и договорах. Договорные обязательства по передаче вещей в собственность или в пользование / под ред. Е.А. Суханова. 3-е изд. Москва: Статут, 2023. 523 с.
- 4) Исполнение и прекращение обязательства: комментарий к статьям 307–328 и 407–419 Гражданского кодекса Российской Федерации / под ред. А.Г. Карапетова. Москва: М-Логос, 2022. 1496 с.
- 5) *Новицкий И.Б., Луци Л.А.* Общее учение об обязательстве. Москва: Государственное издательство юридической литературы, 1950. 416, [1] с.
- 6) *Тололаева Н.В.* Пассивные солидарные обязательства: российский подход и континентально-европейская традиция: монография. Москва: Статут, 2020. 144 с.