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How to cite this article [Chicago]: Leheza, Yevhen, Bogdan Schcherbyna, Yluis Leheza, Olena Pushkina, and Olesia Marchenko. "Characteristics of Suspension or Full/Partial Refusal of Performance in Case of a Counterparty's Failure to Perform an Obligation under Ukraine's Civil Legislation". *Novum Jus* 18, no. 2 (2024):131-150. <https://doi.org/10.14718/NovumJus.2024.18.2.5>

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Characteristics of Suspension or Full/Partial Refusal of Performance in Case of a Counterparty's Failure to Perform an Obligation under Ukraine's Civil Legislation

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Received: March 10, 2023 | **Evaluated:** June 10, 2023 | **Accepted:** January 19, 2024

Abstract

The article explores the application of the right to suspend or fully or partially refuse to fulfill an obligation in the event of non-fulfillment of a counter-obligation by the other party. Scientific works of civilian classicists on obligation and research of Ukrainian civilian scientists served as material for study. The article distinguishes between conflicting and interdependent duties. It also highlights the issues of Part 3, Article 538 of the Civil Code of Ukraine, in case the buyer fails to fulfill the obligation to pre-pay for goods. The legal nature of the right to suspend or fully/partially refuse to fulfill a duty has been clarified: This is a way to protect civil rights and interests. Attention is drawn to the fact that the studied right can be exercised if the other party breaches a negative obligation. Ways to improve Ukraine's legislation on the specified topic are proposed.

Keywords: obligations, counter-duties, refusal to fulfill, suspension of performance, property rights

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Características de la suspensión o denegación total/parcial del cumplimiento de una obligación en caso de incumplimiento de la contraparte según la legislación civil de Ucrania

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Recibido: 10 de marzo de 2023 | **Evaluado:** 10 de junio de 2023 | **Aceptado:** 19 de enero de 2024

Resumen

El artículo está dedicado a la aplicación del derecho a suspender o negarse total o parcialmente al cumplimiento de una obligación en caso de incumplimiento de la otra parte. Como material de investigación, se emplearon los trabajos científicos de los clasicistas civiles en el campo de la obligación, así como las investigaciones de los científicos civiles ucranianos. A lo largo del artículo, se descubre qué deberes se deben considerar conflictivos mediante la distinción entre deberes conflictivos e interdependientes. Se destacan las cuestiones de aplicación de la parte 3 del art. 538 del Código Civil de Ucrania en caso de incumplimiento por parte del comprador de la obligación de pagar la mercancía por adelantado. Por otra parte, se aclara la naturaleza jurídica del derecho a suspender o negarse total o parcialmente al cumplimiento de un deber y se llega a la conclusión de que se trata de una forma de proteger los derechos e intereses civiles. Llama la atención el hecho de que el derecho estudiado se puede aplicar en caso de incumplimiento de una obligación negativa de la otra parte. Por último, se proponen formas de mejorar la legislación de Ucrania sobre el tema especificado.

Palabras clave: obligaciones, contraderechos, negativa a cumplir, suspensión del cumplimiento, derechos de propiedad

Introduction

According to Article 71 of the UN Convention on Contracts for the International Sale of Goods,¹ a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of a serious deficiency in his ability to perform, his creditworthiness, or his conduct in preparing to perform or in performing the contract.

A similar standard is also found in the Principles of European Contract Law:² A party obliged to perform his obligations simultaneously with or after the other party may suspend his obligation until the other party proposes to perform or performs his obligation. The first party may suspend performance fully or partially, depending on the conditions. A party may also suspend performance when it is evident that the other party will not perform his obligation within the given period.³

Part 3, Article 538 of the Civil Code of Ukraine (CCU)⁴ determines the right of a party to an agreement to suspend or to wholly/partially refuse to perform his duty if the other fails to perform his duty or if there are sufficient grounds to believe that he will not perform his duty within the determined period (term) or at all.

So, here, we have several regulatory acts (national and international) that determine the right to suspend or fully/partially refuse to perform a duty in case the counterparty fails to perform his duty (hereinafter referred to as “counter-duty”). There is also a relevant court practice of applying the mentioned regulations. However, in our opinion, the right to suspend or fully/partially refuse to perform a counter-duty has not been sufficiently researched in the scientific literature. Therefore, we consider this scientific research issue topical for civil law.⁵

¹ UN Convention on Contracts for the International Sale of Goods (April 11, 1980). https://zakon.rada.gov.ua/laws/show/995_003?lang=en#Text.

² Principles of European Contract Law, https://www.trans-lex.org/400200/_pecl/.

³ Oleksandr Vasylovych Dzera and Nataliia Semenivna Kuznietsova, *Civil law of Ukraine. A special part* (Kyiv: Yurinkom Inter, 2018).

⁴ Civil Code of Ukraine (January 16, 2003), <https://zakon.rada.gov.ua/laws/show/435-15?lang=en#Text>.

⁵ Viktor Petrovych Andrushchenko, *Social philosophy. History, theory, methodology: textbook. Kind. 3rd, ex. and additional* (Kyiv: Genesis, 2006).

Theoretical and Legal Grounds for Applying the Right of Suspension or Full/Partial Refusal of Performance in Case of the Other Party's Failure to Perform a Counter-duty under Ukraine's Civil Legislation

First, according to Part 1, Article 538 of the CCU, a duty performed by one of the parties conditioned by the performance of a duty by the other party should be considered a counter-duty.

The classic scientific literature on the law of obligations also includes information about counter-obligations in bilateral agreements. So, Novytskyi and Lunts understand “counter” as a synonym of mutuality (interconnectivity, interconditionality) and determine its meaning on the occurrence of an obligation and the stage of its fulfillment. According to these scientists, since each obligation is the ground for the other, invalidity of one of them shall lead to invalidity of the other. So, if the obligation of one of the parties is impossible or illegal, the other party's counter-obligation shall also be ineffective.⁶

Another manifestation of mutual relation is that although each interrelated obligation exists independently, it cannot be fulfilled separately from the respective counter-obligation. A buyer may not insist on providing the sold product if he fails to fulfill his duty to pay the purchase price. Such a counter-fulfillment of requirements separated from the mutual performance of obligations may come across the objection that the seller has not yet fulfilled his duty.⁷

In the CCU, Article 538 mentions the standards concerning the buyer's prepayment for the goods bought. So, according to Part 1 of Article 693, if the buyer fails to fulfill his duty concerning preliminary pay for goods, the provisions of Article 538 shall apply. This presupposes the seller's right to refuse to transfer goods if the buyer fails to fulfill his duty concerning prepayment for these goods.

In the mentioned case, the duties concerning prepayment and the transfer of the goods bought are counter-duties, but they are not interdependent. If the buyer fails to pay for goods preliminarily, the seller still has an opportunity to transfer these

⁶ Yvan Borysovych Novytskyi, *The general doctrine of obligations* (Moscow: Legal Literature, 1950).

⁷ Novytskyi, *The general doctrine*.

goods (excluding cases when they do not have these goods available and must buy them out). Therefore, the notion of “counter,” i.e., the conditionality of obligations determined in Article 538 of the CCU, does not imply interdependence.

In court practice, Part 3, Article 538 of the CCU applies to the failure to perform a duty to prepay for goods under sale-and-purchase agreements. So, for example, in Case No. 910/1102/20, the court of appeals concluded that since the plaintiff of the initial claim had failed to completely fulfill its obligation concerning pay for goods supplied by the initial defendant, Tec Engineering LLC had a right to suspend performance of its duty under Article 538 of the CCU. Messages from Tec Engineering LLC regarding the suspension of its duty to supply goods are provided in the case materials. The Supreme Court agreed with this conclusion and noted that when taking into account the conditions of the plaintiff's delayed payment, the court of appeals had correctly applied Article 538 of the CCU concerning the legal relations in dispute and accordingly determined available grounds to refuse the plaintiff's claims to collect the penalty from the defendant.⁸

It should be noted that Part 1, Article 693 of the CCU is the only special regulation on applying Article 538 of the CCU on mutual performance of contractual obligations. However, a similar condition concerning prepayment may be included in the respective contractor's agreement, service agreement, license agreement, etc.

In addition to duties not dependent on performance by the other party of the agreement, there may be interdependent duties. Interdependence is manifested in the fact that one of the parties cannot perform his duty before the contractor has fulfilled his. For example, in a construction agreement, the contractor cannot fulfill its duties before the customer provides a construction site. A contract for delivering educational services cannot be performed without the active actions of the person to whom educational services are provided (attending classes, completing tasks, etc.). Veterinary services cannot be provided if the customer does not bring an animal for treatment. Such duties are not only exclusive but also interdependent (mutually conditioned). In the scientific and practical commentary to the CCU edited by Spasibo-Fateyeva, interdependency in such cases shall be understood as an interrelationship of the respective duties which enables the subject of counter-performance to abandon it (or to suspend counter-performance) until

⁸ Cassation Commercial Court of the Supreme Court, Resolution dated April 1, 2020, in case No. 910/1102/20, <http://iplex.com.ua/doc.php?regnum=96172747&red=10000376b47e3bd887c3198bd21a19f26f1fa0&rd=>

this subject receives something that forms the essence of the corresponding duty of the other party.⁹

So, we have a whole range of contractual duties, which are not just counter ones but even interdependent ones, i.e., without fulfilling these duties, it is impossible to fulfill contractual obligations. In this regard, it should be noted that certain agreements must provide for the order of performance. So, Nadyon rightly notes that although Part 2, Article 538 of the CCU states that the parties must fulfill their duties simultaneously according to the general rule. However, the main emphasis is not on this but on the sequence of actions the parties performed. According to the author, a lack of advance performance affects the duties of the party obliged to further performance, i.e., these duties may not be fulfilled, or their fulfillment may be delayed.¹⁰

Authors of the *Scientific and Practical Commentary* to the CCU correlate the “counter” (mutuality) notion presented in Article 538 of the CCU with the order of obligation fulfillment. In particular, the scientists stated that “counter-fulfillment of obligations is one of the doctrinal-legislative structures which form a wider civil category belonging to the method of obligation fulfillment—and namely the order (including the procedure) of the debtor’s performance of actions that constitute the subject of fulfillment.”¹¹

The procedure (order) for performing a specific agreement can be established in the agreement itself and regulations. For example, the contractor has the right to refrain from starting the work or to stop the started work if the customer fails to provide the material, equipment, or element subject to processing, thereby making it impossible for the contractor to perform the agreement (Part 1, Article 851 of the CCU).

Duties that cannot be fulfilled before the performance of the contractual duties by the other party are mutually dependent or interdependent. In this sense, we are talking about primary duties, i.e., those subject to the agreement. Failure to fulfill secondary or auxiliary (supplementary) duties does not entitle the other party to

⁹ Liudmyla Mykolaivna Baranova, *The Civil Code of Ukraine. Scientific and practical commentary. Volume 7. General provisions on obligations and the contract* (Kharkiv: Stride, 2012).

¹⁰ Viktoriia Valentynivna Nadon, *Subjective duty as an element of the content of civil legal relations* (Kharkiv: Pravo, 2017).

¹¹ Baranova, *The Civil Code*.

refuse performance. So, the *Scientific and Practical Commentary* to the CCU indicates that the customer's duty to pay for the work performed by the contractor according to the record of completed work signed by the parties is not a counter-duty concerning the contractor's duty to issue an invoice for such payment. The duty to issue an invoice is an auxiliary one and does not release the customer from the duty to pay for accepted works.¹²

The order of fulfillment is also important when the debtor cannot fulfill their duty because if a loan is not granted on time, the debtor may have additional difficulties repaying part of the loan.. So, I. O. Yoffe pointed out that if the creditor evades accepting fulfillment, it happens because they are either interested in temporarily delaying fulfillment (for example, to find a warehouse where goods can be stored) or the creditor wishes to release himself from his duty in a mutual agreement (for example, a sale-and-purchase agreement). For this purpose, they oppose fulfillment of the debtor's counter-duty.¹³ In other words, preventing the creditor from accepting the ordered goods, providing services, or performing works is aimed at evading the duty to pay for the corresponding goods, services, or works. If the creditor's non-acceptance of fulfillment is temporary, then this only gives the debtor the right to delay fulfillment (under Part 2, Article 613 of the CCU). Nevertheless, if the creditor refuses to accept fulfillment, the issue of compensation arises due to the impossibility of the debtor to fulfill the counter-duty.

The mentioned issue is resolved differently depending on the type of agreement.¹⁴ So, for example, if the impossibility of performing the service agreement is due to a fault of the customer, they are obliged to pay the fee to the provider in full unless otherwise established by the agreement or the law (Part 2, Article 903 of the CCU). In the case of non-acceptance of the customer's performance under a consumer work agreement, the contractor has the right (after giving a written warning to the customer and within two months of the day of such warning) to sell the subject of the consumer work agreement for a reasonable price, and to deposit the proceeds, minus all payments owed to the contractor, in a notary's deposit, in the name of the customer (Article 874 of the CCU). Therefore, the CCU provides

¹² Baranova, *The Civil Code*.

¹³ Olympyad Solomonovych Yoffe, *Obligation law* (Moscow: Legal Literature, 1975).

¹⁴ Pavlo Liutikov Shevchenko, Mykhailo Shevchenko, and Dmytro Pryimachenko, "Judicial review of the exercise of discretionary powers: case-law of European Court of Human Rights and Experience from Ukraine," *Journal of Law and Political Sciences* 26, no. 1 (2021): 400–425.

protection mechanisms in payment-based agreements if the creditor fails to fulfill the counter-duty to accept performance.¹⁵

The counter-nature of duties in case of termination of the respective obligation due to the impossibility of its fulfillment (through no fault of any of the parties) is also of practical importance. If neither party has acted to fulfill the obligation, then the obligation is terminated. However, if in a mutual commitment, one of the parties has already fulfilled the contractual duty on its part, then in the event of impossible fulfillment, the other party, who will no longer receive a counter-fulfillment, has the right to return the property of funds subject to the contract. Yoffe provides the following example: If it is impossible to fulfill the obligation to transport the cargo by sea, then the transportation fee shall be returned to the customer in total, and if the cargo has already been moved part of the way, then the transportation fee shall be returned only in an amount proportional to the remaining length of the journey.¹⁶

It is possible to assert that Part 3, Article 538 of the CCU does not apply to unilateral agreements. However, that is only the first view. Concerning loan agreements, it may safely be said that such regulation cannot apply because the lender does not expect anything from the borrower to provide the loan. Before the loan is provided, the borrower is not subjected to any duty. The same is true about gift agreements (unless the matter is about gift agreements under certain conditions); for example, an assignment agreement (even if free of payment) may determine the principal's duty to provide funds or facilities for the assignment. For example, to purchase a plane ticket under a power of attorney, the attorney must receive funds for its purchase from the principal; to conclude a specific agreement in the principal's name and interests, the attorney must obtain a power of attorney to perform the transaction. Such a duty of the principal can be considered a counter one within Part 3 of Article 538 of the CCU since its fulfillment conditions the attorney's duty. In such cases, the attorney has the right to refrain from executing the assignment until the funds or power of attorney are provided. In this way, the attorney, based on Part 3, Article 538 of the CCU, can exercise its right to refuse to carry out an assignment. Then, the assignment agreement will not be implemented if the principal does not provide the funds or facilities to fulfill the power of attorney.

¹⁵ Jorge Villasmil Espinoza, Yevhen Leheza, and Liudmyla Holovii, "Reflexiones para el estudio interdisciplinario de la invasión de Ucrania por parte de la Federación Rusa en 2022," *Cuestiones Políticas* 40, no. 73 (2022): 16–24, <https://doi.org/10.46398/cuestpol.4073.00>.

¹⁶ Yoffe, *Obligation law*.

Is it possible to apply the specified regulation in unilateral agreements already at the implementation stage? The specific duties of a party to a contractual obligation can be performed after receiving a provision from the other party, for example, if the matter is about an agreement on establishing a free-of-charge land easement. Such an agreement is unilateral since only the easement receives the grant, and the owner of the property under the easement has only to “endure” the exercise of the easement on his property. If he does not receive a fee for an easement, they cannot refuse to grant the easement the right to use their land plot in a certain way after concluding an easement agreement. However, the easement still has specific duties: to exercise their right in the least burdensome way for the land plot owner. So, according to Part 4, Article 98 of the Land Code of Ukraine, land easement is carried out in the least burdensome way for the owner of the land plot for which it is established. Therefore, if the easement is abusive or creates obstacles for the owner to use the land plot or exercise his right in such a way that it may lead to the deterioration of the land plot, may the owner refuse to grant these based on Part 3, Article 538 of the CCU? It seems that they may. The duty of the easement to use the land plot in the least burdensome way for the owner can be considered a counter-obligation concerning the obligation to grant the right to use the land plot.

Thus, even unilateral contracts that do not mediate an exchange may provide certain rights for the party making the provision corresponding to the duties of the party receiving the provision. This ensures a balance of parties' interests. The absence of material benefit does not automatically mean the absence of any interests of the party making the provision. Thus, the attorney is interested in preserving his funds on the performance of the assignment, and the owner of the land plot, with an easement established, is interested in safeguarding himself from obstacles in using the land plot and in saving the land plot from deterioration of its condition. This means that even in unilateral agreements, there may be counter-duties, and Part 3, Article 538 of the CCU may also apply.

This also leads to another conclusion: bilateral (synallagmatic) agreements, which mediate exchange, provide for the presence of mutual duties of the parties. According to Article 538 of the CCU, such duties are counter ones. However, unilateral agreements that do not provide for mutuality, as an exception, may also provide for counter-duties that are not mutual. They are counter ones in that their fulfillment conditions the fulfillment of duties by the other party. In other words, the concept of “counter-duties” is broader than the concept of “mutual duties.” “Counter” in this sense means the interest of one party in the obligation to perform specific duties

by the other party. The availability of counter-duties in unilateral agreements is due to the counter-interests of the parties, which can be met by each of the parties fulfilling the terms of the contract.

Tsyban proposed the definition of counter-duties in his dissertation. The author proposes to consider duties as counter ones if their fulfillment conditions specific duties by the other party to the contractual obligation, i.e., they arise from the same basis, are interconnected, primary, and covered by the subject of the agreement.¹⁷ According to this position, the concept of counter-duties is equated with the interdependence of duties.

In the literature, there is a point of view that mutuality is not only a counter but also an organic interdependence of duties. It consists of the impossibility of fulfilling some duties until the creditor takes specific actions. Tolstoi gave the following example: The railway is not entitled to charge the client a fine for car detention if the delay in their return was caused by a malfunction of the railway's tracks.¹⁸

Is it possible to apply the concept of "counter" to free-of-charge agreements and, as a result, use Article 538 of the CCU? The peculiarity of free-of-charge contracts is that the party making the provision does not expect the counterparty to provide something in return. So, Havze argued that the criterion for the free-of-charge nature of an agreement is that the creditor does not have the right to demand a counter-provision.¹⁹ There may be exceptions to this rule, for example, in the case of concluding a gift contract with the obligation of the donee to perform a specific action of a property nature for the benefit of a third party or to refrain from doing a particular action (Article 725 of the CCU). The legal consequence of the donee's violation of such a duty will be the donor's right to demand termination of the agreement and return of the gift. If such a return is impossible, the donor will have the right to reimburse its amount (Article 726 of the CCU). Such a donation agreement contains counter-interests of the parties: the donee's interest in receiving the gift and the donor's interest in the donee performing specific actions of a property nature for the benefit of a third party (or in refraining from doing particular actions). The duty of the donee to perform a specific action of a property nature for the benefit of a third party or to refrain from doing particular actions is considered

¹⁷ Artem Andriiovych Tsyban, *Subjective civil duty as an element of a binding legal relationship: dissertation. to obtain a scientific degree of a candidate of legal faculties* (Kharkiv, 2018).

¹⁸ Volodymyr Tolstoi, *Execution of obligations* (Moscow: Legal Literature, 1973).

¹⁹ Faivel Ysaakovych Havze, *Obligation law (general provisions)* (Minsk: From BSU im. V.I. Lenin, Belarus, 1968).

a counter-duty. Still, its performance is implemented only after the donation is made. Therefore, Part 3, Article 538 of the CCU cannot apply to the agreement.

Another doctrinal question, which has practical significance, is: How should one qualify suspension of the fulfillment of the counter-duty or the refusal to perform it? Is this a form of liability, a way of protecting civil rights and interests, or a repudiation of the agreement? Ultimately, the answer to this question determines the regulations that should apply to the consequences of Part 3, Article 538 of the CCU.²⁰

It is considered that suspension of fulfilling the counter-duty or refusal to fulfill it is a separate case of the refusal of the obligation. Thus, according to the content of Article 525 of the CCU, unilateral refusal of an obligation or unilateral change of its conditions is not allowed unless otherwise established by the agreement or law. Article 538 of the Civil Code expressly provides for a complete or partial refusal of the obligation if the other party of the agreement fails to fulfill its counter-duty. If considered a refusal of the agreement, then Part 3, Article 651 of the CCU shall apply to such a refusal of a duty in the case of unilateral refusal of an agreement in full. If this agreement or law establishes the right to such a refusal, the agreement is terminated. This can be qualified as termination of the obligation at the will of one of the parties based on the law, i.e., based on Part 3, Article 538 of the CCU.

Nevertheless, this is only because the party to the agreement refuses to fulfill the counter-duty completely. Moreover, this duty must be subject to the contract (hand over goods, perform a particular work, provide a specific service). Otherwise, the obligation will be suspended only in part. If the matter is about a partial refusal or suspension of performance of the counter-duty for an indefinite period, then the agreement termination will not occur. Such a partial refusal of performance or suspension may be considered a way of protecting the creditor, which is applied to stimulate the debtor to fulfill their duty.

Should Part 3, Article 538 of the CCU apply to civil responsibility? This can be assumed based on the systematic interpretation of Article 611 of the CCU. The specified article provides legal consequences for breach of obligation; the first of

²⁰ Volodymyr Buha, Oleksii Iakubin, Tamara Mazur, Kristina Rezvorovich, and Nina Daraganova, "Legal regulation of the institute of control in the field of housing construction in the conditions of armed aggression of the Russian Federation," *Cuestiones Politicas* 40, no. 73 (Jul-Dec 2022): 151–171, <https://doi.org/10.46398/cuestpol.4073.07>.

such consequences consists of termination as a result of the unilateral refusal of the obligation, if it is established by the agreement or the law, or as a result of the termination of the contract (Clause 1, Part 1, Article 611 of the Civil Code). However, again, it should be a complete refusal to fulfill the obligation and not a partial refusal or suspension of fulfillment.²¹ There is another opinion on this issue in the scientific literature: Authors of the *Scientific and Practical Commentary* to the CCU indicate that the subject's performance of a counter-obligation under Part 3, Article 538 of the CCU cannot be qualified as bringing a civil responsibility. It follows from this that appropriate measures can be adopted by the subject of counter-fulfillment regardless of the fault of the violator. Still, actions of the latter must necessarily be determined as illegal.²²

Can the application of Part 3, Article 538 of the CCU, be considered a way of protecting civil rights and interests? Article 16 mentions the termination of legal relationships among the methods of civil rights protection (Clause 7, Part 1, Article 16 of the CCU). Therefore, if the matter concerns a complete refusal to fulfill a counter-duty according to Part 3, Article 538 of the CCU, which leads to termination of the obligation, it can also be considered a way to protect civil rights.²³

Practical Grounds for Applying the Right to Suspension or Full/Partial Refusal of Performance in Case of the Other Party's Failure to Perform a Counter-Duty under the Civil Legislation of Ukraine

Applying Part 3, Article 538 of the CCU in obligations with a plurality of subjects is also of practical importance. Regarding joint and several obligations, there is no doubt that the party's right to an agreement determined by Part 3, Article 538 of the CCU is exercised in the same way as in obligations with one subject on each of the parties.²⁴ If, for example, at least one of the joint debtors failed to fulfill his duty, the creditor may suspend fulfillment and refuse to meet his duty in whole or in part under Part 3, Article 538 of the CCU. Regarding several obligations

²¹ Villasmil Espinoza, Leheza, and Holovii, "Reflections for the interdisciplinary study."

²² Baranova, *The Civil Code*.

²³ Yevhen Leheza, Tatiana Filipenko, Olha Sokolenko, Valeri Darahan, and Oleksii Kucherenko, "Ensuring human rights in Ukraine: problematic issues and ways of their solution in the social and legal sphere," *Cuestiones politicas* 37, no. 64 (Jan-Jun 2020): 123–136, <https://doi.org/10.46398/cuestpol.3764.10>.

²⁴ Tshahik Kolinko, Krystyna Rezvorovych, and Maryna Yunina, "Legal characteristic of the franchise agreement in Germany," *Baltic Journal of Economic Studies* 5, no. 1 (2019): 96–100, <https://doi.org/10.30525/2256-0742/2019-5-1-96-100>.

with multiple parties, the issue is resolved differently. So, Tolstoi spoke about it as follows: If A and B jointly entered into a bilateral obligation without establishing solidarity, and one of them (A) files a claim against the debtor for his share, then the debtor can, as an objection to the claim, refer to the fact that A has not yet fulfilled his mutual duty. However, the debtor cannot cite the non-fulfillment of the obligation imposed on B as an objection, although this counter-obligation of B is based on the same agreement.²⁵ Such a decision is related to the fact that several obligations include several separate obligations. So, according to Tolstoi, in partial obligations, legal relationships, rights, and duties of each party that participated in the conclusion of the relevant agreement are connected only by an everyday basis of origin. After they arise, they exist independently. If several subjects are named in an agreement as creditors, then each requires fulfillment of only the part that belongs to him and gives counter-satisfaction only for what he received. If several debtors participate in a contract, they must perform only the action specified in the agreement to the joint creditor. They are responsible only for violating their duty.²⁶

The peculiarity of suspending the performance of or refusing to perform an obligation consists in the fact that this method of protection is manifested not in active actions but in the passive behavior of the authorized person. We believe that Sarbash's opinion is correct. According to him, refusal of an obligation is an expression of a person's will since it cannot be based on the will of a person who seeks to achieve specific goals in this way. A person's actions regarding refusal to fulfill an obligation occur in a particular manifestation of will (action), which can take a negative form, i.e., inaction for positive obligations, or positive form for negative obligations.²⁷

It should be noted that, as a rule, negative obligations are not counter-obligations since they are auxiliary to the primary obligation. Nevertheless, even if negative obligations are mutual (for example, the condition of an agreement on non-disclosure of trade secrets by the parties), then the violation of this obligation by one of the parties does not give the right to the other to refrain from fulfilling the obligations on its part (i.e., in the case of disclosure of trade secrets by the counterparty, it does not have the right to disclose trade secrets of the counterparty). Non-fulfillment of a negative obligation by one of the parties entails civil liability measures (compensation of damages, payment of fines, etc.).²⁸

²⁵ Tolstoi, *Execution of obligations*.

²⁶ Tolstoi, *Execution of obligations*.

²⁷ Serhei Vasylevych Sarbash, *Fulfillment of a contractual obligation* (Moscow: Statute, 2005).

²⁸ Anatolii Matviichuk, Viktor Shcherbak, Viktoria Sirko, Hanna Malieieva, and Yevhen Leheza, "Human principles of law as a universal normative framework," *Cuestiones Politicas* 40, no. 75 (2022): 221–231,

Regarding Part 3, Article 38 of the CCU, we can cite an example from the judicial practice. Thus, in case No. 757/12906/19-ts, the appellant indicated that, according to the agreement, the parties determined for themselves conditions for counter-fulfillment of the obligation. Payment of alimony for the maintenance of the plaintiff shall be carried out on the condition that the child lives with the defendant and the plaintiff complies with the obligation not to take the child outside the state of Israel without the defendant's permission, which is in the best interests of the child. Contrary to the terms of the agreement, the plaintiff failed to fulfill her obligations not to take the child out of the country of her residence without the defendant's permission and thereby changed the child's place of residence unilaterally, which became the basis for the legitimate suspension of payments for maintenance of the plaintiff. During the appellate review of the case, the appellant indicated that the court reached a premature conclusion about the sufficiency of the legal grounds to satisfy the claims without applying Article 538 of the CCU, which defines the right of the defendant to suspend counter-fulfillment of the obligation to pay alimony in connection with non-fulfillment by the plaintiff of the obligation regarding the child's place of residence.²⁹

The plaintiff objected that the defendant's obligation to maintain the plaintiff is conditioned by the requirement of Part 4, Article 76 of the CCU, which was established in the contract. The defendant's fulfillment of the obligation to maintain the plaintiff cannot be connected with the plaintiff's counter-fulfillment of any obligations under the agreement since the obligation to maintain the plaintiff is outlined in Article 76 of the CCU, which the defendant agreed to by establishing it in the agreement.³⁰

In its Resolution dated September 2, 2020, the Kyiv Court of Appeals took into account the appellant's arguments, indicating that since the plaintiff failed to fulfill her duties and unilaterally changed the child's place of residence contrary to the terms of the agreement, the condition of paying the alimony according to the agreement

<https://doi.org/10.46398/cuestpol.4075.14>.

²⁹ Olha Bezpalova, Maryna Yunina, Svitlana Korohod, Kristina Rezvovich, and Tsahik Ohanisian, "Legal regulation of entrepreneurial activity in the national security system," *Entrepreneurship and Sustainability Issues* 8, no. 3 (2021): 340–355, [https://doi.org/10.9770/jesi.2021.8.3\(22\)](https://doi.org/10.9770/jesi.2021.8.3(22)).

³⁰ Yevheniia, Kobrusieva, Yevhen Leheza, Kateryna Rudoi, Oleksandr Shamara, and Viktor Chalavan, "International standards of social protection of internally displaced persons: administrative and criminal aspects," *Jurnal Cita Hukum* 9, no. 3 (2021): 461–484, <https://doi.org/10.15408/jch.v9i3.23752>

was breached. The defendant had the right provided for in Part 3, Article 538 of the CCU to suspend his counter-duty of monthly payments for her maintenance.³¹

Therefore, in the specified court case, fulfillment of the duty to pay alimony was conditioned by the counter-duty not to take the child out of the country of his residence without the defendant's permission, which is a negative obligation. Therefore, non-fulfillment of a negative obligation may be the grounds for applying Part 3, Article 538 of the CCU.³²

Conclusions

This way, the correlation between counter and interdependent duties in contractual obligations has been defined. It has been proved that the concept of "counter-duties" is broader than the concept of "mutual duties." Obligations that cannot be fulfilled before the other party fulfills the contractual obligations are mutually dependent or interdependent.

It has been established that the legal nature of the right to suspension or refusal to fulfill a counter-duty protects civil rights and interests used by the creditor to stimulate the debtor to achieve his duty.

The right to suspend or completely/partially refuse counter-performance of the duty is primarily realized in bilateral (synallagmatic) contractual obligations, in which each party is both a creditor and a debtor at the same time.

Such shall apply to obligations when their performance is not simultaneous. Still, a particular procedure for performing parties' duties is provided.

The right to suspension or refusal to fulfill a counter-duty can apply if the other party's non-fulfillment of its primary duty under obligation; non-fulfillment of an auxiliary duty does not entitle the other party to suspend or refuse its duty. The right to suspend or refuse fulfillment cannot apply if the creditor refuses to accept the duty fulfilled by the debtor. The studied right shall also be used for obligations with a plurality of subjects, especially for joint and several obligations. The right to suspension or refusal to fulfill a duty shall not apply to negative obligations.

³¹ Kyiv Court of Appeal, Resolution dated September 2, 2020 in case No. 757/12906/19-ts, accessed January 22, 2023, <https://zakononline.com.ua/court-decisions/show/84536731>

³² Leheza, Filipenko, Sokolenko, Darahan, and Kucherenko, "Ensuring human rights."

So, we have a whole range of contractual duties, not just counter but even interdependent ones. It is impossible to fulfill these duties without fulfilling contractual obligations. In this regard, it should be noted that certain agreements must provide for the order of performance.

The CCU provides protection mechanisms in payment-based agreements if the creditor fails to fulfill the counter-duty to accept fulfillment.

The counter-nature of duties in case of termination of the respective obligation due to the impossibility of its fulfillment (through no fault of any of the parties) is also of practical importance. If neither party has acted to fulfill the obligation, then the obligation is terminated. However, if in a mutual obligation, one of the parties has already fulfilled the contractual duty on its part, then the other party, who will no longer receive a counter-fulfillment, has the right to return what was performed. For example, if it is impossible to fulfill the obligation to transport the cargo by sea, the transportation fee shall be returned to the client. In the event of such an impossibility after the cargo has already been moved part of the way, the transportation fee shall be returned only in proportion to the length of the remaining journey.

Thus, even unilateral contracts that do not mediate an exchange may provide certain rights for the party making the provision corresponding to the duties of the party receiving the provision. This ensures a balance of parties' interests. The absence of material benefit does not automatically mean the absence of any interests of the party making the provision. Thus, the attorney is interested in preserving his funds on the execution of the assignment, and the owner of the land plot, with an easement established, is interested in safeguarding himself from obstacles in using the land plot and in saving the land plot from deterioration of its condition, etc. This means that even in unilateral agreements, there may be counter-duties, and Part 3, Article 538 of the CCU may apply to them.

This also leads to another conclusion: Bilateral (synallagmatic) agreements, which mediate exchange, provide for the presence of mutual duties of the parties. Such duties are counter ones according to Article 538 of the CCU. However, unilateral agreements that do not provide for mutuality, as an exception, may also provide for counter-duties that are not mutual. They are counter ones in that their fulfillment conditions the fulfillment of duties by the other party. In other words, the concept of "counter-duties" is broader than the concept of "mutual duties." "Counter" in this

sense means the interest of one party in the obligation to perform specific duties by the other party. The availability of counter-duties in unilateral agreements is due to the counter-interests of the parties, which each can meet in fulfilling the terms of the contract.

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