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*Features of Applying the Right to Suspension or Complete/ Partial Refusal to
Fulfill a Duty in Case of Non-Fulfilment of the Counter Duty by the Other Party
According to the Civil Legislation of Ukraine*

DOI: [https://doi.org/10.34625/issn.2183-2705\(ne\)2023.ic-17](https://doi.org/10.34625/issn.2183-2705(ne)2023.ic-17)

Secção I

Investigação Científica*

* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review*.

Features of Applying the Right to Suspension or Complete/ Partial Refusal to Fulfill a Duty in Case of Non-Fulfilment of the Counter Duty by the Other Party According to the Civil Legislation of Ukraine

Características da Aplicação do Direito de Suspensão ou Recusa Total/ Parcial de Cumprir uma Obrigação em Caso de Não Cumprimento da Contra-Prestação pela Outra Parte, de Acordo com a Legislação Civil da Ucrânia

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ABSTRACT: The purpose of the research is to determine the scope and mechanism of applying the creditor's right to suspension or partial/complete refusal to perform a duty in case of non-fulfilment of the counter duty by the debtor (obligations the specified right is applied to and the mechanism of its implementation). Main content. The legal nature of the right to suspension or complete/partial refusal to fulfil a duty has been clarified: the author concluded that this is a way to protect civil rights and interests. Attention is drawn to the fact that the studied right can be applied in case of non-fulfilment of a negative obligation by the other party. Conclusions. The right to suspension or refusal to fulfil a duty shall be applied to obligations when their fulfilment is not simultaneous, but a certain procedure for performing parties' duties is provided for. This right can be applied in case of other party's non-fulfilment of its main duty within the obligation, non-fulfilment of an auxiliary duty does not entitle the other party to suspend or refuse its duty.

KEYWORDS: obligations; counter duties; refusal to fulfil; suspension of fulfilment; property rights.

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RESUMO: O objectivo da investigação é determinar o âmbito e o mecanismo de aplicação do direito do credor à suspensão ou recusa parcial/completa de cumprir um dever em caso de não cumprimento da contraprestação pelo devedor (obrigações a que se aplica o direito especificado e o mecanismo da sua execução). Conteúdo principal: A natureza jurídica do direito de suspensão ou recusa total/parcial de cumprir um dever foi clarificada: o autor chegou à conclusão de que esta é uma forma de proteger os direitos e interesses civis. Chama-se a atenção para o facto de que o direito estudado pode ser aplicado em caso de não cumprimento de uma obrigação negativa pela outra parte. Conclusões. O direito à suspensão ou recusa de cumprir um dever deve ser aplicado às obrigações quando o seu cumprimento não é simultâneo, mas está previsto um determinado procedimento para o cumprimento dos deveres das partes. Este direito pode ser aplicado em caso de incumprimento pela outra parte do seu dever principal dentro da obrigação, o não cumprimento de um dever auxiliar não dá direito à outra parte de suspender ou recusar o seu dever.

PALAVRAS-CHAVE: obrigações; deveres contrários; recusa de cumprimento; suspensão do cumprimento; direitos de propriedade.

1. Introduction

According to Article 71 of the UN Convention on Contracts for the International Sale of Goods a Party may suspend execution of its obligations if upon conclusion of an agreement it becomes evident that the other party fails to fulfil a significant part of its obligations in the result of: a serious fault in its ability to perform obligations or in its creditworthiness; or its behaviour during preparation or execution of the agreement.

A similar standard is also presented in Principles of European Law of Contracts: a party obliged to perform its obligations simultaneously with the other party or after the other party may suspend fulfilment of its obligation until the other party proposes to fulfil its own obligation or until the other party has fulfilled its own obligation. The first party may suspend fulfilment of its obligation completely or partially depending on conditions. A party may also suspend fulfilment execution of its obligation until it is evident that the other party will not fulfil its obligation within the period determined for fulfilment⁶.

Part 3 of Article 538 of the Civil Code of Ukraine determines the right of a party of an agreement to suspend fulfilment of its duty or to partially/completely refuse to fulfil its duty if one of the parties fails to fulfil its duty or if there are evident grounds to believe that it will not fulfil its duty within the determined period (term) or that it will not fulfil its duty in full amount.

⁶ DZERA, Oleksandr Vasylovych. KUZNIETSOVA, Nataliia Semenivna. Civil law of Ukraine. A special part. 2018. Kyiv: Yurinkom Inter, Ukraine.

So, here we have a number of regulatory acts (national and international ones) which determine the right to suspension or complete/partial refusal to fulfil a duty in case of non-fulfilment of the counter duty by the other party (hereinafter referred to as “counter duty”).

There is also a relevant court practice of applying the mentioned standards. But in our opinion, the right to suspension or complete/partial refusal to fulfil counter duty is not sufficiently researched in the scientific literature. Therefore, we consider this issue of scientific research to be topical for the civil law⁷.

2. Theoretical and legal grounds of applying the right to suspension or complete/ partial refusal to fulfil a duty in case of non-fulfilment of the counter duty by the other party according to the civil legislation of Ukraine

Let us first of all mention part 1 Article 538 of the Civil Code of Ukraine. According to it fulfilment of a duty performed by one of the parties conditioned by fulfilment of a duty by the other party should be considered a counter fulfilment of obligation.

The classic scientific literature on the law of obligations also includes information about counter obligations in bilateral agreements. So, I. B. Novytskyi and L. A. Lunts understand “counter” as a synonym of mutuality (interconnectivity, interconditionality) and determine its meaning on the stage of occurrence of an obligation and on the stage of its fulfilment. According to the scientists, since each of two obligations mutually is the ground for the other one, invalidity of one of them shall lead to invalidity of the other one. So, if obligation of one of the parties is impossible or illegal, the counter obligation of the other party shall be also out of force⁸.

Another manifestation of mutual relation consists in the fact that although each of interrelated obligations exists independently, it cannot be fulfilled in total separation from the respective counter obligation. A buyer may not insist on providing him/her with the sold product if he personally fails to fulfil his/her duty

⁷ ANDRUSHCHENKO, Viktor Petrovych. Social philosophy. History, theory, methodology: textbook. Kind. 3rd, ex. and additional. 2006. Genesis. **Kyiv, Ukraine.**

⁸ NOVYTSKYI, Yvan Borysovych. The general doctrine of obligations. 1950. Moscow. Legal Literature. USSR.

to pay the purchase price. Such a counter fulfilment of requirement separated from mutual fulfilment of obligations may lead to the fact that this requirement comes across an objection that the plaintiff has not yet fulfilled his/her own duty⁹.

In the Civil Code of Ukraine, the reference to applying Article 538 of the Civil Code of Ukraine is presented in standards concerning buyer's preliminary pay for the goods bought. So, according to part 1 of Article 693 in case of buyer's failure to fulfil his/her duty concerning preliminary pay for goods, provisions of article 538 of this Code shall apply. This presupposes seller's right to refuse to transfer goods if the buyer fails to fulfil his/her duty concerning preliminary pay for these goods.

In the mentioned case, duty concerning preliminary payment and duty concerning transfer of the bought goods are counter duties, but they are not interdependent. That is, if the buyer fails to preliminarily pay for goods the seller still has an opportunity to transfer these goods (excluding cases when he/she does not have these goods available and he/she must buy them out). Therefore, it can be concluded that the notion of "counter" i.e., conditionality of obligations determined in Article 538 of the Civil Code of Ukraine does not mean interdependence.

It is concerning non-fulfilment of a duty concerning preliminary pay for goods under sale-and-purchase agreements that the standard of part 3 of Article 538 of the Civil Code of Ukraine is applied in the court practice.

So, for example in case No 910/1102/20 the court of appeal concluded that since the plaintiff of the initial claim had failed to completely fulfil its obligation concerning pay for goods supplied by the initial defendant, "Tec Engineering" LLC had a right to suspend fulfilment of its duty in accordance with Article 538 of the Civil Code of Ukraine. Messages of "Tec Engineering" LLC on suspension of its duty concerning supply of goods are provided in sheets presented in the case materials. The Supreme Court agreed with this conclusion and noted that when taking into account conditions of plaintiff's delayed payment the court of appeal had correctly applied Article 538 of the Civil Code of Ukraine concerning the legal relations in dispute and accordingly

⁹ NOVYTSKYI, Yvan Borysovych. The general doctrine of obligations. 1950. Moscow. Legal Literature. USSR.

determined available grounds to refuse plaintiff's claims to collect penalty from the defendant¹⁰.

It should be noted that part 1 of Article 693 of the Civil Code of Ukraine is the only special standard concerning applying Article 538 of the Civil Code of Ukraine on mutual fulfilment in special standards of contractual obligations. Although a similar condition concerning preliminary payment may be included to the respective contractor's agreement, service provision agreement, license agreement etc.

In addition to duties not dependent on fulfilment of duties by the other party of the agreement there may be really interdependent duties. Interdependence is manifested in the fact that one of the parties of the agreement is unable to perform its duty before the contractor has fulfilled its own duty. For example, in a construction agreement the contractor cannot start to fulfil its duties before the client provides a construction site. An agreement for the provision of educational services cannot be fulfilled without active actions of the person educational services are provided to (attending classes, completing tasks, etc.). Veterinary services cannot be provided if the customer does not provide an animal for treatment, etc. Such duties are not only counter ones exclusive, but also interdependent (mutually conditioned) ones. In the Scientific and practical commentary to the Civil Code of Ukraine edited by I.V. Spasibo-Fateyeva interdependency in such cases shall be understood as an interrelationship of the respective duties which enables the subject of counter fulfilment to abandon it (or to suspend counter fulfilment) until this subject receives something that forms the essence of the corresponding duty of the other party¹¹.

So, we have a whole range of contractual duties, which are not just counter ones, but even interdependent ones, i.e., without the fulfilment of these duties it is impossible to fulfil contractual obligation. In this regard, it should be noted that certain agreements must provide for the order of execution. So,

¹⁰ Resolution dated April 1, 2020 in case No. 910/1102/20 (2020). Cassation Commercial Court of the Supreme Court. Available online. In <http://iplex.com.ua/doc.php?regnum=96172747&red=10000376b47e3bd887c3198bd21a19f26f1fa0&d=5> Consultation date: 20/01/2023

¹¹ BARANOVA, Liudmyla Mykolaivna. The Civil Code of Ukraine. Scientific and practical commentary. Volume 7. General provisions on obligations and the contract. 2012. Kharkiv. Stride. Ukraine.

V. V. Nadyon rightly notes that, although in Part 2 of Article 2 of Art. 538 of the Civil Code of Ukraine it is stated that according to the general rule the parties must fulfil their duties simultaneously, yet the main emphasis is not on this, but on the sequence that exists in actions performed by the parties. According to the author's opinion, lack of advance fulfilment affects duties of the party obliged to further fulfilment, i.e., these duties may not be fulfilled, or their fulfilment may be delayed¹².

Authors of the Scientific and practical commentary to the Civil Code of Ukraine edited by I. V. Spasibo-Fateyeva correlate the notion of "counter" (mutuality) presented in Article 538 of the Civil Code of Ukraine with the order of obligation fulfilment. In particular, the scientists stated that "counter fulfilment of obligations is one of the doctrinal-legislative structures which form a wider civil category belonging to the method of obligation fulfilment - and namely the order (including the procedure) of the debtor's performance of actions that constitute the subject of fulfilment"¹³.

The procedure (order) for the execution of a certain agreement can be established both in the agreement itself and in 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 thing subject to processing, and thereby makes it impossible for the contractor to fulfil the agreement (Part 1 of Article 851 of the Civil Code of Ukraine).

Duties that cannot be fulfilled before fulfilment of the contractual duties by the other party are mutually dependent or interdependent. And in this sense, we are talking about the main duties, that is, those duties that make up the subject of the agreement. Failure to fulfil secondary or auxiliary (supplementary) duties does not entitle the other party to refuse fulfilment. So, In the Scientific and practical commentary to the Civil Code of Ukraine edited by I. V. Spasio-Fateeva, it is indicated that the customer's duty to pay for the work performed by the contractor according to the act of completed work signed by the parties is not a counter one in relation to the contractor's duty to issue an invoice for such

¹² NADON, Viktoriia Valentynivna. Subjective duty as an element of the content of civil legal relations. 2017. Kharkiv: Pravo. Ukraine.

¹³ BARANOVA, Liudmyla Mykolaivna. The Civil Code of Ukraine. Scientific and practical commentary. Volume 7. General provisions on obligations and the contract. 2012. Kharkiv. Stride. Ukraine.

payment, since the duty to issue an invoice is an auxiliary one and it does not release the customer from the duty to pay for accepted works¹⁴.

The order of fulfilment is also important in those cases when the debtor cannot fulfil his/her duty, because the creditor himself/herself does not fulfil the duty to accept the fulfilment. So, Villasmil Espinoza Jorge pointed out that if the creditor evades to accept fulfilment, it happens because he/she is either interested in temporarily delaying fulfilment (for example, to find a warehouse where the property due to him under the obligation could be stored), or the creditor wishes to release himself/herself from his/her duty in a mutual agreement (for example, a sale-and-purchase agreement) and for this purpose he/she opposes fulfilment of debtor's counter duty¹⁵. 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, and works. If the creditor's non-acceptance of fulfilment is temporary, then this only gives the debtor the right to delay fulfilment (in accordance with Part 2 of Article 613 of the Civil Code of Ukraine). But if the creditor refuses to accept fulfilment at all, then the issue of compensation arises due to the impossibility of debtor's fulfilling the counter duty. The mentioned issue is resolved differently depending on the type of agreement¹⁶.

So, for example, if impossibility of fulfilling the agreement for provision of services occurred due to a fault of the customer, he/she is obliged to pay the fee to the executor in full, unless otherwise established by the agreement or the law (part 2 of article 903 of the Civil Code of Ukraine).

In the case of non-acceptance of customer's fulfilment under a consumer work agreement the contractor has the right, (after giving a written warning to the customer and upon expiration of two months from the day of such warning), to sell the subject of the consumer work agreement for a reasonable price, and

¹⁴ BARANOVA, Liudmyla Mykolaivna. *The Civil Code of Ukraine. Scientific and practical commentary. Volume 7. General provisions on obligations and the contract.* 2012. Kharkiv. Stride. Ukraine.

¹⁵ VILLASMIL ESPINOZA, Jorge; LEHEZA, Yevhen; HOLOVII, Liudmyla. Reflections for the interdisciplinary study of the Russian Federation's invasion of Ukraine in 2022: Reflexiones para el estudio interdisciplinario de la invasión de Ucrania por parte de la Federación Rusa en 2022. *Cuestiones Políticas*, 2022. 40(73), 16-24. <https://doi.org/10.46398/cuestpol.4073.00>.

¹⁶ LIUTIKOV, Pavlo. SHEVCHENKO, Mykhailo. PRYIMACHENKO, Dmytro. 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*. 2021. Vol. 26. Issue. 1. P. 400-425.

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 Civil Code of Ukraine)¹⁷.

It is possible to assert that Part 3 of Article 538 of the Civil Code of Ukraine is not applicable to unilateral agreements. But that is only the first view. Concerning loan agreements, it may safely be said that the standard of part 3 of Article 538 of the Civil Code of Ukraine cannot be applied because the loaner does not expect anything from the borrower in order to provide the loan. Before provision of the loan the borrower is not subjected to any duty¹⁸. The same is true about gift agreements (unless the matter is about gift agreements under certain conditions) But for example an assignment agreement (even it is free of payment) may determine the principal's duty to provide funds or facilities for execution of the assignment.

For example, in order to purchase a plane ticket under a power of attorney, the attorney must receive funds for its purchase from the principal; in order to conclude a certain agreement in the name and in the interests of the principal, 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 the meaning of Part 3 of Article 538 of the Civil Code of Ukraine, since its fulfilment conditions fulfilment of the duty by the attorney. In such cases, the attorney has the right to refrain from execution of the assignment until the funds and/or power of attorney are provided: in this way, the attorney based on Part 3 of Article 538 of the Civil Code of Ukraine can exercise its right to refusal to carry out an assignment. Then the assignment agreement will not be implemented at all, if the principal does not provide the funds or facilities to fulfil the power of attorney to the attorney.

Is it possible to apply the specified standard in unilateral agreements, but already at the stage of implementation? – We believe that it is, because certain duties of a party of a contractual obligation can be realized after receiving a

¹⁷ LEHEZA, Yevhen. DOROKHINA, Yuliia. SHAMARA, Oleksandr. MIROSHNYCHENKO, Serhii. MOROZ, Vita. Citizens 'participation in the fight against criminal offences: political and legal aspects. *Cuestiones Políticas*. 2021. Vol. 39, No. 69, pp. 212-224. DOI: <https://doi.org/10.46398/cuestpol.3969.12>

¹⁸ VILLASMIL ESPINOZA, Jorge; LEHEZA, Yevhen; HOLOVII, Liudmyla. Reflections for the interdisciplinary study of the Russian Federation's invasion of Ukraine in 2022: Reflexiones para el estudio interdisciplinario de la invasión de Ucrania por parte de la Federación Rusa en 2022. *Cuestiones Políticas*, 2022. 40(73), 16-24. <https://doi.org/10.46398/cuestpol.4073.00>.

provision from the other party. For example, it is so, if the matter is about an agreement on the establishment of a free-of-charge land easement. Such an agreement is unilateral since only the servituary receives the grant, and the owner of the easement object has only to “endure” the exercise of the easement in relation to his/her thing. If he does not receive a fee for granting an easement, then after concluding an easement agreement, he/she cannot refuse to grant the servituary the right to use his/her land plot in a certain way. But the servituary still has certain duties: to exercise his/her right in the least burdensome way for the owner of the land plot. So, according to part 4 of 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 it is established for. Therefore, if the servituary abuses, or by means of his/her use creates obstacles for the owner to use the land plot, or exercises his/her right in such a way that it may lead to the deterioration of the land plot, may the owner refuse to grant the use based on part 3 of Article 538 of the Civil Code of Ukraine? – It seems that he/she may. The duty of the servituary to use the land plot in the least burdensome way for the owner can be considered to be a counter obligation in relation to the obligation to grant the right to use the land plot.

Definition of counter duties was proposed by A.A. Tsyban in his dissertation. The author proposes to consider duties as counter ones if their fulfilment conditions fulfilment of certain duties by the other party to the contractual obligation, i.e., they arise from the same basis, are interconnected, main ones and covered by the subject of the agreement¹⁹. 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 being counter, but also an organic interdependence of duties. It consists in the impossibility to fulfil some duties until the creditor himself/herself takes certain actions. Leheza Yevhen, Pisotska Karina, Dubenko Oleksandr, Dakhno Oleksandr, Sotskyi Artur gave the following example: the railway is not entitled

¹⁹ TSYBAN, Artem Andriiovych. Subjective civil duty as an element of a binding legal relationship: dissertation. to obtain a scientific degree of a candidate of legal faculties. 2018. Kharkiv. Ukraine.

to charge the client a fine for car detention, if the delay in their return was caused by a malfunction of the tracks owned by the railway²⁰.

Is it possible to apply the concept of “counter” to free-of-charge agreements and, as a result, apply the norms of Article 538 of the Civil Code of Ukraine? – The peculiarity of free-of-charge agreements lies in the fact that the party making the provision does not expect the counterparty to provide something in return. So, F. I. 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 provision²¹. 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 certain action of a property nature for the benefit of a third party or to refrain from doing a certain action (Article 725 of the Civil Code). 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, and if such return is impossible the donor will have the right to reimbursement of its value (Article 726 of the Civil Code). That is, 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 certain actions of a property nature for the benefit of a third party (or in refraining from doing certain actions). It is considered that the duty of the donee to perform a certain action of a property nature for the benefit of a third party or to refrain from doing certain actions is a counter duty, but its performance is implemented only after the donation is made. Therefore, the standard of part 3 of Article 538 of the Civil Code of Ukraine cannot be applied to the mentioned agreement.

Another doctrinal question, which also has a practical significance, is: how should one qualify suspension of fulfilment of the counter duty or the refusal to perform it? Is this a form of liability, is it a way of protecting civil rights and interests, or is it a repudiation of the agreement? Ultimately, the answer to this question determines norms that should be applied to the consequences of applying part 3 of Article 538 of the Civil Code of Ukraine.

²⁰ LEHEZA, Yevhen. PISOTSKA, Karina. DUBENKO, Oleksandr. DAKHNO, Oleksandr. SOTSKYI, Artur. The Essence of the Principles of Ukrainian Law in Modern Jurisprudence. *Revista Jurídica Portucalense*, 2022. December, 342-363. DOI: [https://doi.org/10.34625/issn.2183-2705\(32\)2022.ic-15](https://doi.org/10.34625/issn.2183-2705(32)2022.ic-15)

²¹ HAVZE, Faivel Ysaakovych. Obligation law (general provisions). 1968. Minsk: From BSU im. V.I. Lenin, Belarus.

It is considered that suspension of fulfilling the counter duty or refusal to fulfil it is a separate case of the refusal of the obligation. Thus, according to the content of Article 525 of the Civil Code of Ukraine, unilateral refusal of an obligation or unilateral change of its conditions is not allowed, unless otherwise established by the agreement or law. The Standard of Article 538 of the Civil Code specifically provides for a complete or partial refusal of the obligation in the event that the other party of the agreement fails to fulfil its counter duty. If this is considered a refusal of the agreement, then in this case, the standard of Part 3 of Article 651 of the Civil Code of Ukraine shall be applied to such a refusal of a duty; according to the mentioned article in case of unilateral refusal of an agreement in full, if the right to such a refusal is established by this agreement or law, the agreement is terminated. This can be qualified as termination of the obligation at the will of one of the parties on the basis of the law, i.e., on the basis of Part 3 of Article 538 of the Civil Code of Ukraine. But this is only on the condition that the party to the agreement refuses to fulfil the counter duty completely. Moreover, this duty must be the subject of the contract (handover a thing, perform a certain work, provide a certain 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 of time, then termination of the agreement will not take place. Such a partial refusal of performance or suspension may be considered as a way of protecting the creditor which is applied for the purpose to stimulate the debtor to fulfil his/her duty.

Should Part 3 of Article 538 of the Civil Code of Ukraine be applied to civil responsibility? Based on the systematic interpretation of Article 611 of the Civil Code of Ukraine this can be assumed. The specified article provides legal consequences for breach of obligation; the first of such consequences consists in termination of the obligation as a result of unilateral refusal of the obligation, if it is established by the agreement or the law, or as a result of termination of the agreement (clause 1, Part 1 of Article 611 of the Civil Code). But again, it should be a complete refusal to fulfil the obligation, and not a partial one or

suspension of fulfilment²². However, there is another opinion on this issue in the scientific literature: Authors of the Scientific and practical commentary to the Civil Code of Ukraine edited by I. V. Spasibo-Fateyeva indicate that the subject's realization of a counter-obligation of the rights provided for in part 3 of Article 538 of the Civil Code of Ukraine cannot be qualified as bringing to a civil responsibility. It follows from this that appropriate measures can be applied by the subject of counter fulfilment regardless of the fault of the violator, but actions of the latter must necessarily be determined as illegal²³.

Can the application of Part 3 of Article 538 of the Civil Code of Ukraine be considered a way of protecting civil rights and interests? Article 16 mentions termination of legal relationship among the methods of protection of civil rights (clause 7, Part 1 of Article 16 of the Civil Code of Ukraine). Therefore, if the matter is about a complete refusal to fulfil a counter duty according to Part 3 of Article 538 of the Civil Code of Ukraine, which leads to termination of the obligation, it can also be considered a way to protect civil rights²⁴.

Kolinko Tsahik, Rezvorovych Krystyna, Yunina Maryna attributed refusal to fulfil an agreement before the receipt of counter-satisfaction to the measures of operational influence²⁵. Perhaps, under the influence of such a point of view, in the Economic Code of Ukraine, types of operational and economic sanctions include unilateral refusal of the managed party to fulfil its obligation, with the release of the respective liability - in case of violation of the obligation by the other party; refusal to pay for an obligation that was improperly performed or prematurely performed by the debtor without the respective consent of the other party; postponement of shipment of products or performance of work due to payer's delay in issuance of the letter of credit, termination of issuing bank

²² LEHEZA, Yevhen. SHAMARA, Oleksandr. CHALAVAN, Viktor. Principios del poder judicial administrativo en Ucrania. *DIXI*, 2022. 24(1), pp. 1-11. DOI: <https://doi.org/10.16925/2357-5891.2022.01.08>

²³ BARANOVA, Liudmyla Mykolaivna. The Civil Code of Ukraine. Scientific and practical commentary. Volume 7. General provisions on obligations and the contract. 2012. Kharkiv. Stride. Ukraine.

²⁴ LEHEZA, Yevhen. FILIPENKO, Tatiana. SOKOLENKO, Olha. DARAHAN, Valeri. KUCHERENKO, Oleksii. Ensuring human rights in Ukraine: problematic issues and ways of their solution in the social and legal sphere. *Cuestiones políticas*. 2020. Vol. 37 № 64 (enero-junio 2020). pp. 123-136. DOI: <https://doi.org/10.46398/cuestpol.3764.10>

²⁵ KOLINKO, Tsahik. REZVOROVYCH, Krystyna. YUNINA, Maryna. 2019. Legal characteristic of the franchise agreement in Germany. *Baltic Journal of Economic Studies*, 5(1), 96-100. DOI <https://doi.org/10.30525/2256-0742/2019-5-1-96-100>

loans, etc. (clause 1, Part 1 of Article 236 of the Economic Code of Ukraine). The specified operational and economic sanctions are correlated with the right to suspension of fulfilment or complete/partial refusal to fulfil the counter duty, which is provided for in Part 3 of Article 538 of the Civil Code of Ukraine²⁶.

3. Court decisions and practical grounds of applying the right to suspension or complete/ partial refusal to fulfil a duty in case of non-fulfilment of the counter duty by the other party according to the civil legislation of Ukraine

The matter of applying the norm of Part 3 of Article 538 of the Civil Code of Ukraine in obligations with a plurality of subjects is also of practical importance. Regarding joint and several obligations, there is no doubt that the right of the party of an agreement determined by Part 3 of Article 538 of the Civil Code of Ukraine is exercised in the same way as in obligations with one subject on each of the parties. That is, if, for example, at least one of the joint debtors failed to fulfil his/her duty, the creditor may suspend fulfilment, refuse to fulfil his/her duty in whole or in part with reference to part 3 of Article 538 of the Civil Code of Ukraine. Regarding a several obligations with multiple parties, the issue is resolved differently. So, Matviichuk Anatolii et al. spoke about it as follows: if A. and B. jointly entered into a bilateral several obligations 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, but the debtor cannot cite as an objection the fact of non-fulfilment of the obligation imposed on B., although this counter obligation of B. is based on the same agreement²⁷. Such a decision is related to the fact that a several obligations include several separate obligations. So, according to Halaburda Nadiia in partial obligations legal relationships rights and duties of each of the parties that participated in the conclusion of the relevant agreement are connected only by a common basis of origin. After they

²⁶ LEHEZA, Yevhen. YERKO, Iryna. KOLOMIICHUK, Viacheslav. LISNIAK, Mariia. International Legal And Administrative-Criminal Regulation Of Service Relations. *Jurnal cita hukum indonesian law journal*. 2022. Vol. 10 No. 1, pp. 49-60, DOI: <https://doi.org/10.15408/jch.v10i1.25808>

²⁷ MATVIICHUK, Anatolii. SHCHERBAK, Viktor. SIRKO, Viktoria. MALIEIEVA, Hanna. LEHEZA, Yevhen. Human principles of law as a universal normative framework: Principios humanos del derecho como marco normativo universal. *Cuestiones Políticas*, 2022. 40(75), 221-231. <https://doi.org/10.46398/cuestpol.4075.14>

arise, they exist independently²⁸. If several subjects are named in an agreement as creditors, then each of them requires fulfilment of only the part that belongs to him and gives counter satisfaction only for what he himself received. If several debtors participate in a contract, then each of them is obliged to perform to the common creditor only the action specified in the agreement and is responsible only for violation of only his own duty²⁹.

Peculiarity of suspension of fulfilment of an obligation or refusal to fulfil it consists in the fact that this method of protection is manifested not in active actions, but in passive behaviour of the authorized person. We believe that Buha Volodymyr opinion is correct. According to his opinion refusal of an obligation is manifested as an expression of a person's will, since it cannot but be based on the will of a person who seeks to achieve certain goals in this way. A person's actions regarding refusal to fulfil an obligation occur in a certain manifestation of will (action) which can take a negative form, that is, inaction for positive obligations, or positive form, respectively, for negative obligations³⁰.

However, regarding negative obligations, it should be noted that, as a rule, they are not counter obligations, since they are auxiliary to the main obligation. But even if negative obligations are mutual (for example, the condition of an agreement on non-disclosure of commercial secrets by the parties), then violation of this obligation by one of the parties does not give the right to the other party to refrain from fulfilment of the obligations on its part (that is, in the case of disclosure of commercial secrets by the counterparty it does not receive the right to disclose commercial secrets of the counterparty). Non-

²⁸ HALABURDA, Nadiia. LEHEZA, Yevhen, CHALAVAN, Viktor. YEFIMOV, Volodymyr. YEFIMOVA, Inna. Compliance with the principle of the rule of law in guarantees of ensuring the legality of providing public services in Ukraine. *Journal of law and political sciences*. 2021. Vol. 29, Issue 4, 100-121.

²⁹ HALABURDA, Nadiia. LEHEZA, Yevhen, CHALAVAN, Viktor. YEFIMOV, Volodymyr. YEFIMOVA, Inna. Compliance with the principle of the rule of law in guarantees of ensuring the legality of providing public services in Ukraine. *Journal of law and political sciences*. 2021. Vol. 29, Issue 4, 100-121.

³⁰ BUHA, Volodymyr. IAKUBIN, Oleksii. MAZUR, Tamara. REZVOROVICH Kristina, DARAGANOVA. Nina. Legal regulation of the institute of control in the field of housing construction in the conditions of armed aggression of the Russian Federation. *Cuestiones Políticas*. Jul-Dic2022. 2022. Vol. 40 Issue 73, 151-171. <https://doi.org/10.46398/cuestpol.4073.07>.

fulfilment of a negative obligation by one of the parties entails application of measures of civil liability (compensation of damages, payment of fines, etc.)³¹.

Regarding the application of the norm of Part 3 of Article 38 of the Civil Code of Ukraine, we can cite such 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-fulfilment 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 corresponds to the best interests of the child. Contrary to the terms of the agreement, the plaintiff failed to fulfil 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 by the plaintiff for maintenance of the plaintiff. During the appellate review of the case, the appellant indicated that the court reached a premature conclusion about sufficiency of the legal grounds to satisfy the claims, without applying Article 538 of the Civil Code of Ukraine, which defines the right of the defendant to suspend counter-fulfilment of the obligation to pay alimony in connection with non-fulfilment by the plaintiff of the obligation regarding the child's place of residence.

The plaintiff objected to this, that the defendant's obligation to maintain the plaintiff is conditioned by the requirement of Part 4 of Article 76 of the Civil Code of Ukraine, which was established in the contract. The defendant's fulfilment of the obligation to maintain the plaintiff cannot be connected with the counter-fulfilment by the plaintiff of any obligations under the agreement, since the obligation to maintain the plaintiff is established by Article 76 of the Civil Code of Ukraine, which the defendant agreed to by establishing it in the agreement³².

³¹ LEHEZA, Yevhen. DOROKHINA, Yuliia. SHAMARA, Oleksandr. MIROSHNYCHENKO, Serhii. MOROZ, Vita. Citizens' participation in the fight against criminal offences: political and legal aspects. *Cuestiones Políticas*. 2021. Vol. 39, No. 69, pp. 212-224. DOI: <https://doi.org/10.46398/cuestpol.3969.12>

³² LEHEZA, Yevhen. Illegal influence on the results of sports competitions: comparison with foreign legislation. *Ratio Juris UNAULA*, 2022. 17(34), pp. 53-70. Available online. In

The Kyiv Court of Appeals, in its Resolution dated 02 September 2020, took into account the arguments of the appellant, indicating that since the plaintiff failed to fulfil her duties and unilaterally changed the child's place of residence contrary to the terms of the agreement, the Court of Appeals concluded that the condition of paying the alimony according to the agreement was lost and the defendant had the right provided for in Part 3 of Article 538 of the Civil Code of Ukraine the right to suspend his counter duty of monthly payment of funds for her maintenance³³.

Therefore, in the specified court case, fulfilment 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 permission of the defendant, which is a negative obligation. Therefore, non-fulfilment of a negative obligation may be the ground for applying Part 3 of Article 538 of the Civil Code of Ukraine³⁴.

4. Conclusions

It has been established that the legal nature of the right to suspension or refusal to fulfil a counter duty is a way of protecting civil rights and interests used by the creditor to stimulate the debtor to fulfil his/her 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 of the parties is both a creditor and a debtor at the same time.

The right to suspension or refusal to fulfil a counter duty shall be applied to obligations when their performance is not simultaneous, but a certain procedure for performing parties' duties is provided for.

The right to suspension or refusal to fulfil a counter duty can be applied in case of other party's non-fulfilment of its main duty under obligation, non-fulfilment of an auxiliary duty does not entitle the other party to suspend or

<https://publicaciones.unaula.edu.co/index.php/ratiojuris/article/view/1338> Consultation date: 20/01/2023

³³ Resolution dated September 2, 2020 in case No. 757/12906/19-ts. Kyiv Court of Appeal. Available online. In <https://zakononline.com.ua/court-decisions/show/84536731> Consultation date: 22/01/2023

³⁴ LEHEZA, Yevhen. FILIPENKO, Tatiana. SOKOLENKO, Olha. DARAHAN, Valeri. KUCHERENKO, Oleksii. Ensuring human rights in Ukraine: problematic issues and ways of their solution in the social and legal sphere. *Cuestiones políticas*. 2020. Vol. 37 № 64 (enero-junio 2020). pp. 123-136. DOI: <https://doi.org/10.46398/cuestpol.3764.10>

refuse its duty. The right to suspend or refuse fulfilment cannot be applied if the creditor refuses to accept the duty fulfilled by the debtor. The studied right shall be also applied to obligations with a plurality of subjects, especially to joint and several obligations. The right to suspension or refusal to fulfil a duty shall not be applied to negative obligations.

So, we have a whole range of contractual duties, which are not just counter ones, but even interdependent ones, i.e., without the fulfilment of these duties it is impossible to fulfil contractual obligation. In this regard, it should be noted that certain agreements must provide for the order of execution.

The Civil Code of Ukraine provides protection mechanisms in payment-based agreements in case of creditor's non-fulfilment of the counter duty to accept fulfilment.

The issue of counter nature of duties in case of termination of the respective obligation due to the impossibility of its fulfilment (through no fault of any of the parties) is also of practical importance. If neither of the parties has taken actions to fulfil 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 in the event of impossible fulfilment, the other party, who will no longer receive a counter fulfilment, has the right to return the performed fulfilment. Example: if it is impossible to fulfil the obligation to transport the cargo by sea, then the transportation fee shall be returned to the client in full, and in the event of such an impossibility after the cargo has already been moved part of the way, then the transportation fee shall be returned only in an amount proportional to the length of the journey that remained.

Thus, even unilateral contracts that do not mediate an exchange may provide certain rights for the party making the provision that correspond to the corresponding duties of the party receiving the provision. This ensures a balance of parties' interests. Absence of material benefit does not automatically mean absence of any interests of the party making the provision. Thus, the attorney is interested in preserving his/her own funds on the execution of the assignment, the owner of the land plot with an easement established, is interested in preserving himself/herself 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 the standard of part 3 of Article 538 of the Civil Code of Ukraine may be applied to them as well.

This also leads to another conclusion: bilateral (synallagmatic) agreements, which mediate exchange, provide for presence of mutual duties of the parties. Such duties are counter ones according to Article 538 of the Civil Code of Ukraine. 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 the sense that their fulfilment conditions the fulfilment of duties by the other party. In other words, the concept of “counter duties” is broader than the concept “mutual duties”. “Counter” in this sense means the interest of one party of the obligation in the performance of certain duties by the other party. Availability of counter duties in unilateral agreements is due to the presence of counter interests of the parties, which can be met by each of the parties fulfilling the terms of the agreement.

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Data de submissão do artigo: 11/02/2023

Data de aprovação do artigo: 02/05/2023

Edição e propriedade:

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