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LEGAL PECULARITIES OF ADDITIONAL (ACCESSORY) OBLIGATIONS

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Summary

The article deals with separate aspects of the problem of definition of additional obligations and their legal features. The correlation of principal and additional (accessory) obligations is being analyzed. New theoretical propositions are developed, that may become the scientific basis for improvement of legal regulation of relative property relations.

Key words: obligations, liability legal relations, principal obligations, additional (accessory) obligations.

Аннотация

В статье исследуются отдельные аспекты проблемы понятия дополнительных (акцессорных) обязательств. Анализируется соотношение основных и дополнительных (акцессорных) обязательств. Разрабатываются новые теоретические положения, которые могут быть научной основой для совершенствования правового регулирования относительных имущественных отношений.

Ключевые слова: обязательства, обязательственные отношения, основные обязательства, дополнительные (акцессорные) обязательства.

Statement of the problem. The term „additional obligations" is commonly used in civilistic literature. The concepts of additional duties, additional rights, additional requirements are also used in the science of civil law. In the Art. 266 of the Civil Code of Ukraine the term „additional conditions" is mentioned. As the right of demand is an essential feature of obligations (this follows from the legal definition of regulatory obligations in part 1, Art. 509 of the Civil Code of Ukraine), we can conclude that the legislator indirectly recognizes the category of additional obligations.

At the same time we must admit, that a generally recognized understanding of this concept does not exist either in science, or in practice of law. There is no certainty as to what content should be added to the category of additional obligations to improve civil legislation. Under these conditions addressing the research of problems of additional (accessory) obligations should be claimed topical.

Additional (accessory) obligations have not been investigated in special monographic works. But they attracted attention of D.I. Meyer, M.M. Agarkov, R.I. Sayfulin, V.A. Belov. In addition, both in Soviet and post-Soviet times the studies of certain types of secured additional obligations were carried out.

The **purpose** of this article is the research of certain aspects of the problem of definition of additional obligations, their legal pecularities, making the attempt to solve the problem.

The main drawback of scientific papers, in which the authors refer to additional obligations, is the lack of a clear definition of the aspect of additional obligations, that is selected by the author as the subject of research.

It seems appropriate to distinguish three aspects of the problem of additional obligations – academic (educational), law enforcement and law-making aspects. Ideally, these aspects should not exist. In the optimal variant of legal regulation of civil relations the law enforcement and lawmaking aspects should coincide. Therefore academic (educational) aspect of additional obligations is designed to give an idea of lawmaking and law enforcement aspects of this problem, and the state of its scientific development may not coincide with the other aspects.

When M. Bartoshek in the publication, dedicated to the terms of Roman law, defines accessory obligation as an additional obligation of the warrantor (additional to the general or principal obligation) [1, p. 20 – 21], it is clear that this definition is not directed at the use of Roman private law and is not aimed at its improvement. The definition of an

accessory obligation by M. Bartoshek, based on Roman law, has exclusively academic (educational) value.

D.I. Meyer wrote a course of lectures on materials of civil legislation of Russia of the mid-nineteenth century, i.e. using the legislation that was in force at that time. But he limited himself with general formulations on collateral, accessory obligations and with an example about a civil legal institution that extends over principal obligation of a loan and over surety, which is used to secure such an obligation [2, p. 442 – 443].

M.M. Agarkov significantly aggravated the analysis of additional obligations. He examines the problem of complication of the structure of obligations with additional rights and duties, such as the duty of the debtor in monetary obligations to pay interest [3, p. 268], and then proceeds to additional requirements which may be real and binding [3, p. 268 – 269]. The duty of the creditor to accept performance M.M. Agarkov considers within additional "in relation to the principal relationship in an obligation that is inseparable from the principal" obligation[3, p. 277].

But at the time when M.M. Agarkov performed his research and prepared the results for publication (1940), were in force the Civil Code of the RSFSR of 1922 and the corresponding codes of other union republics. Article 46 of the Civil Code of RSFSR of 1922 provided extinguishment of law suits concerning additional claims by prescription in cases when the law suit concerning the principal claim is extinguished by prescription. So it was necessary to identify de lege lata those claims, which M.M. Agarkov called additional and over which the validity of Art. 46 of the Civil Code of RSFSR of 1922 is extened, but he did not make any attempt to interpret the definition of additional obligations in the law enforcement aspect. Certainly, it was hard to interpret the concept of additional obligations under the Art. 46 of the Civil Code of RSFSR of 1922, because from this article it could only be figured out that additional („supplementary") are those obligations, that are not principal obligations.

However, it should be considered that according to art. 141 of the Civil Code of RSFSR of 1922 an agreement concerning forfeit is not a principal agreement. This would have given a basis for a conclusion, that the agreement on forfeit is not a principal, but an additional agreement. This might have given grounds to consider the requirement for payment of penalty as an additional ("supplementary") claim. Then the question of additional character of other securing claims, and thus – obligations, could be considered. In the absence of sufficient legislative material for figuiring out the concept of additional claims, rights, duties, obligations we can turn to the court practice. M.M. Agarkov did nothing like that. He even ignored the fact that in the Art. 46 of the Civil Code of RSFSR the Russian term "придаточные требования" ("supplementary demands") was used and he started to use the term „additional" claims (obligations, rights, duties).

In order not to repeat the mistakes of other scientists, first of all we should single out the law enforcement aspects of the problem of additional obligations, i.e. carry out de lege lata approach. In the Art. 266 of the Civil Code of Ukraine the term „additional claim" is used and in parentheses are named the claims for penalty recovery and „imposition" (apparently „imposition" and „claim to property" are synonyms.

At least in Art. 589, 590 of the Civil Code of Ukraine, which establish special rules for pledge, the term „claim to property" is used). Claim to mortgaged property – is a claim that is presented to the court (we are not talking about other ways of recovery of the mortgaged property for the reason that Art. 266 of the Civil Code of Ukraine, concerning limitation, is being analyzed here) for the protection of property (mortgage) right. Therefore, we must admit that in Art. 266 of the Civil Code of Ukraine only one liability claim I is mentioned – concerning penalty recovery. However, this claim is connected with the claim to mortgaged property by the security nature of both these requirements.

Thus, the inclusion of the words "and so on" to the text of Art. 266 of the Civil Code of Ukraine after the direct indication of these two types of additional claims (penalty and claim to morgaged property) leads to the conclusion that the words "and so on" means other similar requirements, which are the security claims.

As for the guarantee, the legislator sought to separate it from the principal obligation and found that the guarantor's obligation to the creditor is not dependent on the principal obligation, in particular, when a in a guarantee there is a reference to the principal obligation (Art. 562 of the Civil Code of Ukraine). However, setting this rule, the legislator in brackets in this article explains that the independence of the guarantee from the principal obligation is in the independence of the guarantee from the principal obligation in the event of termination or invalidity of this obligation. In the rent the guarantee is connected with the principal obligation as an additional obligation.

On the supplementary nature of the gurantee indicates the fact, that the obligation, secured by the gurantee in Art. 562 of the Civil Code of Ukraine is called principal: and if it is a principal obligation, then warranty obligation is an additional obligation. In favor of the additional character of the warranty obligation indicates the fact that in Art. 560 of the Civil Code of Ukraine the guarantor is responsible to the creditor for the breach of obligation by the debtor, in part 1 of Art. 563 of the Civil Code of Ukraine that the guarantor is obliged to pay a sum of money to the creditor in case of violation by the debtor of the obligation, secured by the guarantee.

There are other arguments of connection of the warranty obligation as an additional obligation with the obligation, secured by it as the the principal obligation.

The stated understanding of additional obligations, based on the Art. 266 of the Civil Code of Ukraine, agrees with the provisions of Art. 548 of the Civil Code Ukraine, in which obligations, secured by penalty, surety, guarantee and deposit are claimed principal: if secured obligations are principal, then the obligations, that secure them (if they exist, because the claims, that constitute the content of the pledge and retention are not the claims, which have the nature of an obligation) can logically be recognized additional.

Some scientists are trying to expand the range of additional claims (rights, duties, obligations) on the basis of current legislation. Thus, commenting on the art. 266 of the Civil Code of Ukraine, V.I. Tsikalo calls an additional claim the claim „to parents (adoptive parents) or guardian for damage compensation caused by minors, etc". [7, p. 227]. The

claim to parents (adoptive parents) or a guardian is a typical subsidiary claim.

Therefore, the word „etc." in the above quotation gives reason to state, that V.I.Tsikalo refers to additional the claims to any subsidiarily obliged persons. If such a view was expressed de lege ferenda, it would have deserved attention and discussion. But de lege lata this opinion contradicts Art. 266 of the Civil Code of Ukraine.

As the content of the term "additional obligations" under the current civil legislation is quite clear, let us refer to this concept de lege ferenda: what legal phenomena should be embraced by the concept of additional obligations in the future, improved legislation. First of all, let us pay attention to the fact, that the line between principal and additional obligations is movable. Thus, the insurance obligation usually is considered and, indeed, is a principal obligation, and its performance may be secured by additional obligations.

But the insurance contract may be concluded for the purpose of insurance, for example, of the risk of loan default (sum of money, received by the borrower) under the credit contract on the terms of onerousness and return in a specified time period. In this case, civil legal and social-economic role of insurance obligation is the same, as the role of the instruments,, which are used to secure the fulfillment of obligations under the Art. 546 of the Civil Code of Ukraine.

This is taken into account in part 3 of art. 735 of the Civil Code Ukraine, which stipulates that the payment of rent may be secured by establishing the duty of the payer of rent to insure the risk of failure to perform his obligations under the contract of rent. If an insurance contract is concluded to secure the fulfillment of the principal obligation, the provisions of paragraphs 2, 3 of the art. 548 of the Civil Code of Ukraine, concerning the correlation of the principal obligation and the transaction, that is used to secure its fulfillment, may be applied concerning it.

On the other hand, the additional obligation, secured by the instruments, stipulated by the Art. 546 of the Civil Code of Ukraine, receives in relation to the obligation that is being secured the nature of the principal obligation. Thus, there are no legal obstacles to the establishment by the surety agreement of the penalty, which the surety will be liable to pay to the creditor in case of failure to perform the obligation, based on the contract of surety. In this case the surety obligation obtains the character of the principal obligation and to the relationships between the parties will apply Art. 548 of the Civil Code Ukraine. The usual practice is securing the fulfillment by the surety of the obligation to pay penalty. This practice is based on p.2, Art. 554 of the Civil Code of Ukraine. In such cases, the obligation to pay penalty receives the nature of the principal obligation.

The idea of impossibility of independent existence of additional obligations (in case of termination of the principal obligation) de lege ferenda is inadmissible only in respect of certain additional obligations. Thus, the existence of surety after the termination of the obligation secured by it loses all the sense. But concerning the obligation to pay the penalty, this idea is completely unacceptable.

So the feature of impossibility of independent existence (in the absence of the principal obligation) can not be recognized as mandatory for all additional obligations, even if as additional will be recognized only the security obligations. Therefore, additional obligations that are unable to exist without principal obligations – is only one type of additional obligations.

The supplementary nature of obligations on the example of monetary obligations on interest payment V.A. Belov explains stating that „the origin of the duty to pay interest linked by the law not as much with the will of the parties, but with the presence of the fact of the usage of money, received from the third party or those, which are not to be returned. In the absence of the fact of usage of the „foreign" (in the terminology of our legislation) money, i.e. in the absence of another (principal) monetary obligation the duty on interest payment can not appear..." [5, p. 278]. This is correct only to the extent to which the foregoing concerns monetary obligations to pay interest under Art. 395 of the Civil Code of Ukraine.

In the rest this statement can hardly be considered acceptable. The fact is that the obligation to pay interest in regulatory civil relations is not different from monetary obligations concerning payment for goods, works and services. Thus, the dispositive norm of paragraph 1, Art. 711 of the Civil Code of Russian Federation (its content literally coincides with part 1 of Art. 854 of the Civil Code of Ukraine) provides that payments, due to the contractor, is made out not only after the final delivery of the results of the work, but on condition that the work is performed by the contractor properly and within agreed term, and upon the consent of the customer – ahead of schedule. Therefore, in this case as well the payment for work is performed not upon the will of the parties, but upon the presence of the fact of performance of work.

Payment by the tenant (lessee) of the fees for the use of the thing is conditioned not only by the will of the parties, but by the fact of usage of the thing, and for all the time during which the property could be used by the tenant due to the circumstances for which he is not responsible, he is released from the obligation to pay fees for the use of the thing (part 6 of the Art. 762 of the Civil Code of Ukraine). Thus there are as many reasons to claim any monetary obligations on payment of goods, works and services additional, as there are to claim as additional the obligations to pay interest for the funds received under the loan agreements or credit contracts.

Contrary to the opinion, expressed in the science, additional obligations under the relevant exceptions are capable of independent existence (in the absence of the principal obligation). But additional rights and duties (claims, obligaions) may only exist in the presence of the principal obligation or in connection with its emergence or suspension.

So, the first feature of additional obligations lies in their origin. The second – in the moment of their emergence. Such a feature as the expiration of the period of limitation due to the expiry of the limitation period for the principal claim (the principal obligation) is characteristic only for certain additional obligations. Therefore, as additional should be recognized all the security obligations (for payment of penalties, obligation of surety, guarantee, obligation to return double the amount of the deposit), obligations where civil penalties for violations of obligations are realized (damage compensation, payment of interest on the basis of Art. 625 of the Civil Code of Ukraine). To

additional should also refer warranty obligations of the seller, contractor.

From additional obligations, within which the civil liability and other consequences of breach of obligations are realized (principal, supplementary, auxiliary) should be distinguished those obligations, that the legislator singled out from those that previously existed, and existing obligations, and claimed them independent principal obligations. Such principal obligations form a separate class of legal phenomena.

The most prominent representative of such phenomena is the obligation to damage compensation, caused by the shortcomings of goods, works (services). The very name of these obligations shows their connection with those obligations, within which specified goods, works (services) were received. But the lawmaker decided to divide the two mentioned types of obligations. He dedicated to the obligations on compensation of damages, caused as a result of defects of goods, works (services) a significant normative array, which includes art. 1209 – 1211 of the Civil Code of Ukraine and the Law of Ukraine "On liability for damage caused as a result of a defect in the product." Rupture of these two types of obligations is mainly caused by technical and legal considerations. Perhaps, the decision of the legislator was unfluenced by the dominance in the science of understanding of causation as direct or immediate.

Consequently, the legislator has formed the institute of compensation of damage, caused by the defects of goods, works (services), which applies to all types of obligations that may arise in this regard: 1) the obligation to compensate damages, caused by injury or other harm to health 2) obligation to compensate damages, caused by the death of the breadwinner; 3) the obligation of compensation of moral damage; 4) the obligation of compensation for material damage, caused by impairment to or destruction of property of the victim. These are different principal obligations that may arise and exist simultaneously. Only the obligation to compensate damages, caused by injury or other damage to health, liability and damages caused by the death of the breadwinner, can not occur in parallel because of their intrinsic incompatibility.

The institute of compensation of damages caused by severe injury, other health injury or death only partly coincides with the institute of damage compensation, caused by the defects in goods, works (services). Outside this coincidence it spreads over the obligation of damage compensation, caused by severe injury, other health damage or death of persons, performing contractual obligations. Therefore, in the relevant part the obligation of compensation of damage caused by injury, other health damage or death, could be replaced by additional obligations for compensation of damages, caused by violation of the pricipal obligation by the person, who alongside with the victim was a party to this basic obligation – these are the obligations of compensation of damages, caused by severe injury, other health damage or death of the passenger. According to Art. 928 of the Civil Code of Ukraine to such obligations apply the provisions of Chapter 82 of the Civil Code of Ukraine.

Technical and legal considerations, that were the basis for this legislative solution, can be easely noticed: the legislator rightly did not formulate numerous legal provisions concerning compensation of damage, caused as a result of the failure to protect life and health of passengers during transportation, and refers to the institute of damage compensation. However, together with such reference the legislator de facto qualified the obligation on compensation of damages caused by injury, other health damage or death of the passenger, not as additional obligations to the principal obligation of carriage, but as to main obligations. In order for this not to happen, the legislator had to note that to the obligations on compensation of damages, caused by injury, other health damage or death of the passenger, Chapter 82 of the Civil Code of Ukraine is applied subsidiarily, but he did not.

Conclusions. Additional (accessory) obligations have not been investigated in special monographic works, but we the legislator indirectly recognizes the category of additional obligations. At the same time we must admit that a generally recognized understanding of this concept does not exist either in science, or in practice of law. There is no certainty as to what content should be added to the category of additional obligations to improve civil legislation. Thus, addressing the research of problems of additional (accessory) obligations should be claimed topical.

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