
The Civil Code of the Russian Federation: General Provisions on Liability for the Violation of Obligations

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This article discusses the rules in the *Civil Code of the Russian Federation* ("C.C.R.F.") on the liability for the violation of contractual and extra-contractual obligations.

The author first describes the general regime of obligations in the C.C.R.F. and then goes on to discuss the remedy of monetary damages for the violation of an obligation. The interaction between contractual and statutory penalty clauses and damages is also raised. In particular, the author notes that special rules are applicable to the violation of a monetary obligation.

The remedy of specific performance and its limitations is then considered. The author follows this with a discussion about when a creditor may use self-help remedies to perform an obligation previously breached. The rules applicable to breaches of obligations to transfer objects with individual distinguishing characteristics are also canvassed by the author.

The article then focuses on the rules of subsidiary liability. The author notes, in particular, that the C.C.R.F. places limitations on liability to help better regulate business relations in Russia.

The author concludes by reviewing the various regimes of vicarious liability in the C.C.R.F., how a fault by a creditor will affect a debtor's liability, and the consequences of a delay in performance by a creditor or debtor.

Cet article porte sur les règles du *Code civil de la Fédération russe* concernant la responsabilité en cas de violation d'obligations contractuelles et extra-contractuelles.

L'auteur décrit premièrement le régime général des obligations dans le nouveau Code. Il discute ensuite du remède de dommages pécuniaires en cas de violation d'une obligation. L'interaction entre les dommages et les clauses pénales statutaires et contractuelles est aussi soulevée. L'auteur note en particulier que des règles spéciales sont applicables à la violation d'une obligation pécuniaire.

Le remède d'exécution en nature ainsi que ses limites sont décrits. L'auteur discute ensuite des instances où le créancier peut se servir de remèdes d'auto-assistance afin de remplir une obligation qui a été violée. Les règles applicables à la violation d'une obligation de transférer un objet ayant des caractéristiques individuelles particulières sont aussi soulevées par l'auteur.

L'auteur discute de la responsabilité subsidiaire qui est assumée par plusieurs créanciers en cas de violation d'une obligation. L'auteur note que le Code impose des limites à la responsabilité afin de mieux régir les relations commerciales.

L'auteur conclut en revoyant les divers régimes de responsabilité pour la faute d'autrui trouvés dans le Code, mais aussi comment une faute du créancier affectera la responsabilité du débiteur ainsi que les conséquences d'un retard dans l'exécution du débiteur ou du créancier.

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I. Grounds of Liability for the Violation of an Obligation

The new *Civil Code of the Russian Federation*¹ has not drastically changed the concept of grounds of liability which was represented in article 401 of the 1964 *Civil Code of the Russian Soviet Federated Socialist Republic*.² Specifically, liability for the violation of an obligation arises only where the debtor has committed a fault. The fault may be manifested both in the form of negligence and intent. In determining liability, the statute does not introduce any distinctions with respect to how the fault of the debtor arose.

The C.C.R.F. also provides for the possibility of establishing by statute or contract other grounds of liability for the violation of obligations. For instance, unlike the *culpa* principle, liability based on the principle of infliction of harm does not take the existence or absence of fault into account.

Grounds of liability established by a contract may extend or circumscribe liability. For example, the parties may agree that exemption from liability shall take place in instances directly specified in the contract, but these are unlikely to be comprehensive and may not result in the full and unconditional exclusion of the debtor's liability.

The most widespread method of changing the grounds of liability for incomplete or non-performed obligations is by agreement of the parties. In practice, the terms of a contract will specify particular circumstances where a party is exempted from liability. Such clauses consider not only the effect of a *force majeure* or superior force, but also situations resulting from the conscious acts of people. Inclusion of such a term in a contract means that in the event of the violation of a contractual obligation, the applicable provisions shall be those which were agreed upon by the parties rather than those contained in the C.C.R.F.

Article 401 of the 1964 Civil Code contained an important criterion for establishing liability: the parameters of conduct for determining whether the debtor has committed a fault. This provision applied to both intentional and non-intentional violations of obligations. It should be emphasized that the analysis of a debtor's conduct should be based on extrinsic characteristics. The analysis should specifically reflect the legal nature of the violated obligation and take into account the commercial reality.

A particular situation in which a person who violates an obligation happens to find himself should be compared to a standard of conduct which is determined by extrinsic characteristics. Only in the event where the conduct of the debtor meets the

¹ Part 1 was enacted in 1994: *Sobranie zakonodatelstva R.F.* (1994) No. 32, item 3301; and Part 2 was enacted in 1995: *Sobranie zakonodatelstva R.F.* (1996) No. 5, item 410 [hereinafter C.C.R.F.]. For the English-language translation, see P.B. Maggs & A.N. Zhiltsov, eds., *The Civil Code of the Russian Federation*, trans. P.B. Maggs & A.N. Zhiltsov (Armonk, N.Y.: M.E. Sharpe, 1997).

² *Vedomosti S"ezda Narodnykh Deputatov R.F. i Verkhovnogo Soveta R.F.* (1964) No. 24, item 406 [hereinafter 1964 Civil Code].

extrinsic requirements would the debtor be considered not culpable for the violation—despite the fact that the debtor may have failed to perform or improperly executed the obligation.

The C.C.R.F. establishes a presumption of fault, and places the burden on the debtor to prove that no violation of obligations occurred.³ The debtor can successfully rebut this presumption if it is proven that the violation of the obligation was caused by circumstances which exclude personal fault, such as the effect of *force majeure* or the conduct of third persons for which the debtor is not liable. Moreover, under the 1964 Civil Code, the debtor must prove that its conduct met the criteria established in article 401(1)(ii). It should be remembered, however, that the creditor must initially prove the very fact of the violation of an obligation.

For contractual relationships involving entrepreneurial activity, the C.C.R.F. expands the grounds of liability, establishing increased liability for the violation of obligations. Entrepreneurial activity is “independent activity done at one’s own risk directed at the systematic receipt of profit from the use of property, sale of goods, performance of work, or from the rendering of services by persons registered in this capacity by the procedure established by a statute.”⁴ Under contracts involving entrepreneurial activity, the debtor is exempted from liability only if it is proven that the violation of the obligation was the result of a *force majeure*. The C.C.R.F. characterizes this phenomenon as specific, extraordinary circumstances which are unavoidable in the given situation, adding that these circumstances should be analyzed with respect to specific facts related to the violation of the obligation.⁵ In order to avoid any debate about whether the most general cases of non-performance or improper performance of obligations in commerce constitute a *force majeure*, the C.C.R.F. lists instances of non-performance which are not considered as those relieving an entrepreneur of liability. These specifically include the violation of obligations on the part of contract partners of the debtor, the absence on the market of goods necessary for performance, and the lack of the debtor’s monetary funds.⁶

The characteristics of *force majeure* should be present in a given situation simultaneously, not alternatively. The question also arises as to whether the definition of “*force majeure*” given by the C.C.R.F. includes events which do not constitute natural disasters, but nevertheless appear to share the characteristics of a *force majeure*. Such events would include military actions, blockades, embargoes, acts of state agencies of any government level, and other events of public life. The answer to this question in each particular case will depend on the extent to which each event meets the established distinctive features of a *force majeure*. For instance, if the unavoidable nature of such events is obvious in practically all instances, their extraordinary nature (*i.e.*, the unpredictability of their emergence) may be subject to doubt.

³ Art. 401(2) C.C.R.F.

⁴ Art. 2(1)(iii) C.C.R.F.

⁵ Art. 401(3) C.C.R.F.

⁶ *Ibid.*

Such an approach means that for a party acting under circumstances which prevent the performance of obligations because of an unavoidable event, liability for non-performance may nevertheless be established if the event could have been foreseen at the moment the obligation arose. This means that in order to avoid being found liable for non-performance, a party entering into an obligatory relationship must directly exclude its liability. If there is an inability or unwillingness to do so, a party may take protective measures of an economic nature, such as insurance.

II. Compensation for Damages

The general norms that regulate issues of liability for the violation of obligations arising from contractual relations are contained in Chapter 25 of the C.C.R.F. At the beginning of this chapter, article 393 C.C.R.F. establishes a rule under which the debtor is obligated to compensate the creditor for damages resulting from the non-performance or the improper performance of an obligation. This fundamental rule implies that the unsatisfactory conduct of the debtor results in the emergence of an obligation to compensate for any damages caused by the debtor's actions or failure to act.

The key function of the debtor's obligation arising from the breach of contract is to compensate, in monetary form, those damages which the creditor incurred due to the non-performance or improper performance of an obligation placed upon the debtor. In this sense, article 393 C.C.R.F. reflects the legislator's belief in the important and socially meaningful goal of protecting the property interests of business participants.

The concept of compensation for damages in the law of obligations can serve various purposes, particularly in the area of regulation of entrepreneurial activity where it can assume both a preventive and punitive nature. This can be explained by the fact that the general rules of procedure for determining compensation in the event of a violation of obligations are first and foremost aimed at resolving issues arising in the relationship between a specific creditor and debtor. Such rules do not take into account the social and economic factors with respect to these actors. On the other hand, in the event of compensation by damages—when it is necessary to take into consideration these factors—the legislation may base itself on special principles and rules for the establishment and determination of the amount of compensation due to the creditor.

With respect to the amount of damages due for compensation, there is a general principle which implies that full compensation is necessary. Hence, all damages caused by the non-performance or improper performance of an obligation must be compensated, regardless of the nature of the fault or property status of the wrongdoer. At the same time, the scope of the debtor's obligations with respect to compensation for damages is influenced by a number of factors proceeding both from the law (*e.g.* article 404 C.C.R.F.) and the agreement of the parties (*e.g.* penalty clauses).

General rules relating to the scope of compensation for damages are established in article 15(1) C.C.R.F. This article states that “[a] person whose right has been vio-

lated may demand full compensation for the damages caused to it unless a statute or contract provides for compensation in a lesser amount." In principle, this provision also may be read as prohibiting compensation for damages which are beyond the scope of those caused by the violation (*i.e.*, penalty clauses).

It is significant that the C.C.R.F. makes a distinction between monetary compensation for material and property damage caused to the creditor on the one hand, and the compensation for moral harm on the other. It should be emphasized that in those instances where pecuniary compensation for moral harm is allowed by the C.C.R.F., special rules are applicable.⁷ A consequence of the violation of a contractual obligation is, normally, the emergence of damages in the form of harm caused to property. At the same time, if the violation of an obligation also results in moral harm, compensation for the latter will be regulated by provisions of the C.C.R.F. governing compensation for moral harm.⁸

Damages, in conformity with article 15 C.C.R.F., means the expenses incurred by the creditor whose right was violated (*i.e.*, those incurred in order to reinstate the right that was violated, or the loss of or harm to property). The amount also includes income not received that the creditor would have received in the usual course of business had the obligation not been violated.

Since compensation for damages aims to protect the business interests of the aggrieved party, the issue of what fundamental approaches must be taken to determine the magnitude of damage inflicted becomes particularly relevant. Given the fact that infliction of damage primarily affects the material status of the aggrieved party, the protection of this party's interest lies in the re-establishment—to the extent possible in pecuniary terms—of the creditor's property status that would have existed had the specific obligation not been violated by the debtor. In a market economy, the implementation of this goal normally will not be hindered in its search for criteria to establish the monetary equivalent for the performance of the violated obligation. Moreover, such an approach is desirable because it serves to create favourable conditions for the stability of business relations.

The C.C.R.F. stipulates that the existence of damage should be proven by the person filing a claim for compensation. The creditor should prove that between the violation of the obligation and the damage there is a causal connection such that the damage is a direct consequence of the violation of the obligation—and that this connection is not accidental in nature, but always exists in comparable circumstances. In practice, such damage is often referred to as "direct" damage and may be contrasted with "indirect damages" where the causal relationship is more remote. This criterion equally refers to both actual physical or material damage and lost profit.

A person who has the right to claim compensation for damages is someone who has suffered property damage as a result of the violation of an obligation. In principle,

⁷ Arts. 1099-1101 C.C.R.F.

⁸ *Ibid.*

the right to file a claim for compensation for damages belongs only to the party of an obligation. For instance, in the event of a violation of contractual obligations, a party to the contract has the legal right to compensation for damages. Thus, third parties whose business happens to be adversely affected by the debtor's violation of an obligation shall have no right to directly file a claim for compensation against the debtor. Moreover, third parties who also suffer damages as a result of the debtor's non-performance of the obligation owing to the creditor shall have no right, in principle, to file a claim against the debtor for the compensation for damages which did not emerge directly with that third party.

At the same time, a market economy presupposes complicated and multi-stage contractual interactions, including intermediary links characterized, at times, by disagreement over their economic content and legal form. In this context, it does not seem justifiable to absolutely deny the right of the creditor to claim compensation for damages which, in fact, emerged with the third person, but which only can be recovered from the debtor by the person who has relations *in personam* with the wrongdoer. Such damages, however, are not recoverable by the aggrieved party.

The recognition of damages following the claim of the creditor, not the aggrieved person, would be accepted by a court on the basis of the estimated "real nature" of damages to the creditor. The court must establish in these circumstances the degree of inevitability of such damages for the creditor as a debtor of the party who suffered real damages. This analysis should certainly include an examination of the legal relations between the creditor and the third person where the creditor is a debtor with respect to compensation for damages.

Establishing the obligation of a creditor to compensate damage caused to a third person in these situations is of the greatest significance, regardless of whether the monetary amounts have actually been paid by the creditor to the third person in compensation. It seems that such an interpretation logically follows from the definition of "damages" given by article 15(2) C.C.R.F. that mentions not only the expenses that the aggrieved party has incurred, but also the expenses that it must make to restore the right that was violated.

The rule in article 393(3) C.C.R.F. helps to overcome difficulties arising in practice with respect to the estimation of the amount of damage requiring compensation. According to this article, the determination of damages takes into account the prices that existed at the place where the obligation was to be performed on the day of voluntary satisfaction by the debtor of the creditor's claim, or if the claim was not satisfied voluntarily, on the day of filing the suit. Depending on the circumstances, a court may satisfy a claim of compensation for damages by taking into account prices existing on the decision date.

Such an approach to determining the amount of damages may of course be implemented only in a market economy—and this is new to Russian law. Article 393(3) C.C.R.F. also provides grounds for the conclusion that the legislator expected it would be possible to use a method other than the method of "concrete" calculation for determining the amount of damages. This involves determining damages as the difference between the price of the breached obligation and the price of the new obligation

into which the creditor had to enter to receive the required performance. The law also allows the possibility of using an abstract calculation of damages which equates the existing price of performance in a certain place and time with the cost of the performance which the creditor would have received had it really performed a substituting transaction. In other words, to prove that damages were really suffered, it is necessary to prove that at the time when the contract was breached there was a difference between the price as stipulated in the contract and the price effective for similar goods in the marketplace.

Given the fluctuation of prices in a market economy and the possibility that parties—when calculating the amount of damages—will use market fluctuations to their benefit, courts have been granted the right—upon the request of the party concerned—to calculate damages according to the prices on the day the decision is rendered.⁹ This right of the court should only be used when such a decision will contribute to the implementation of the principle of compensation for damages incurred.

In terms of awarding “future” damages, if the violated right may be restored in kind through the purchase of particular goods or through the performance of certain services—and in instances when at the moment that the claim is filed or the decision is being rendered actual expenses have not yet been determined by the creditor—the value of the goods and services should also be determined in conformity with article 393(3) C.C.R.F.

A general criterion that should be used by courts when determining lost profit is the general business practice, as defined in article 15(2) C.C.R.F. Article 393(4) C.C.R.F. also lists the circumstances related to the calculation of compensation that is subject to accounting. More specifically, measures taken by the creditor to receive future profit and the preparations made for this purpose may be considered as a minimum limit of lost profit requiring compensation. This may result in the inclusion of the amount of lost profit and other subjective criteria connected with a given situation. On the other hand, since the measures and preparations taken by the creditor are normally expressed in expenses incurred, they may be accounted for when the other constituent part of damages (*i.e.*, actual damage) is evaluated.

III. Damages and Penalties

For a long period during the economic development of Russia’s business relations, instead of claiming compensation for damages, sums on deposit were forfeited. The debtor was obligated to pay the deposit to the creditor to cover the possibility of non-performance or improper performance of an obligation. This is the reason why the drafters of the C.C.R.F. paid significant attention to the regulation of this form of liability. At the same time, one should not overlook the fact that the traditional attitude

⁹ Art. 393(3) C.C.R.F.

toward penalties as a means of securing obligations was reflected in certain statutory norms.¹⁰

The general provisions on penalties—primarily as means to secure obligations—are formulated in articles 330 to 333 C.C.R.F. In particular, these articles define the concept of a “penalty” and the form of agreement thereon. They also establish the right of a court, in certain instances, to reduce the amount of compensation.

Thus far, penalties have been used in the event of non-performance or improper performance by a debtor of an obligation. The imposition of these penalties is a rather widespread contractual practice in the area of business transactions. This practice demonstrates that the same penalty may be used for any violation of an obligation, or it may be applied only to specific kinds of non-performance or improper performance of obligations. In Chapter 25 of the C.C.R.F., the provisions on penalties are based on the understanding that they are a form of liability for the violation of obligations. The chapter regulates the correlation of penalties with the right to demand for damages.

The basic rule established by the C.C.R.F. limits the level of damages payable due to the non-performance or improper performance of an obligation to the amount of compensation not covered by the penalty. This rule, however, is only suppletive. A contract may also provide for a different proportion between a penalty and compensation for damages. For example, it may only allow recovery of a penalty amount (*i.e.*, exclusive penalty), damages to be recovered in full in excess of a penalty (*i.e.*, penalty forfeiture), or at the choice of the creditor, either damages or recovery of a penalty (*i.e.*, alternative penalty).

The C.C.R.F. provides that a penalty for non-performance or improper performance of an obligation may be established not only by contract, but by statute.¹¹ The practices of the application of statutory penalties as a method for regulating business relations between independent subjects of law under a decentralized economy, however, are unlikely to be of great importance.

For the provisions relating to compensation in the form of the proportion of damages and penalties to be implemented, the grounds for claiming both a penalty and damages should be the same, that is, they should be linked to the same violation of the contract. In cases where a penalty is established by statute, the question of a creditor’s right to receive both a penalty and compensation for damages is resolved in the statute itself. On the other hand, in cases where a penalty has been stipulated in the contract, the parties often specify the amount and grounds for the payment of the penalty, leaving the issue of the additional payment of damages open. It is in this particular case that a suppletive norm contained in article 394(1) C.C.R.F. will be applied.

For the creditor to receive compensation for damages not covered by the penalty, it will have to prove the full value of the damage caused, and that the amount of the

¹⁰ See *e.g.* art. 394 C.C.R.F.

¹¹ Art. 330(1) C.C.R.F.

penalty is less than this amount. Given the fact that the key goal of the penalty is to facilitate the recovery of damages caused by the violation of the obligation by excluding the necessity for the creditor to prove actual damages, a claim for compensation for damages not covered by the penalty will be limited to instances when the penalty merely compensates for insignificant damages suffered by the creditor.

The right to claim a penalty is not determined by the level of actual damage sustained by the creditor. However, if a penalty is clearly disproportionate to the consequences of a violation, a court has the right to reduce it.¹² In this case, the burden of proving the amount of the actual damage, or absence thereof, must be placed upon the debtor, on whose initiative the court normally initiates proceedings on the issue. If the court itself chooses to initiate proceedings, it may demand that the creditor provide proof of the amount of actual damage caused.

The amount of the penalty may be reduced by a court, but only if the penalty is clearly disproportionate to the consequences of the violation of the obligation. When such consequences are evaluated by the court, events may be taken into consideration that do not directly relate to the consequences of the violation of an obligation such as, *inter alia*, the price of goods, work, services, or the value of the contract.

A penalty forfeiture does not act as a means of facilitating the award of compensation for damages. Instead, it executes a punitive function. This type of penalty has been applied rather broadly in the past and was used mainly in instances where a penalty had been established by statute and where a rigid legal regulation of a certain kind of business relation was required. In civil and, particularly, business commerce penalties, forfeitures are unlikely to be considered as a natural element since the punitive nature of such penalties is not in line with the basic principles of private law.

At the same time, it should be taken into consideration that in contractual practices, penalty clauses are frequently the consequence of abusive behaviour by the dominant party of a contract. In such cases, a penalty forfeiture may be deemed unacceptable for its effect in preventing the exercise of civil rights¹³ and thereby deemed void of legal force.

In cases where a penalty has been awarded for the violation of an obligation and where there is, at the same time, a restriction on liability applicable to the same violation, limitation of liability takes priority over the penalty provisions by virtue of a balance established between the right to a penalty and the right to claim compensation for damages. Thus, in the case of the trumped penalty, the right of a creditor to compensation for damages whose coverage by the penalty has been displaced will be limited to an amount determined by the provisions on the limitation of liability.

¹² Art. 333 C.C.R.F.

¹³ Art. 10 C.C.R.F.

IV. Liability for Non-Performance of a Monetary Obligation

The C.C.R.F., following the tradition of the continental system, establishes special rules relating to the liability for non-performance of a monetary obligation. Although there is no general definition of such liability, both in theory and in practice a monetary obligation is unequivocally understood to be an obligation involving the payment of a money amount.

The necessity of special regulation of liability in the event of a violation of a monetary obligation is explained by the specific subject of such an obligation, which is of particular significance and has exclusive features. The key feature of this kind of obligation is the universal nature of money in civil and business transactions.

Violations of monetary obligations always result in a delay in payment. This distinguishes it from other obligations. It is this specific circumstance that is of a decisive nature for establishing liability, not the fact that the debtor unlawfully used these funds. Article 395(1) C.C.R.F. relating to the consequences of delay in performing monetary obligations is formulated in the following manner:

For the use of another's monetary assets as the result of their unlawful retention, refusal to return them, ... delay in their payment, or unjustified receipt or saving at the expense of another person, interest is subject to payment on the amount of these funds.

The provisions established by the C.C.R.F. with respect to the exercise of a creditor's right to receive interest in the event of non-performance of a monetary obligation do not require that the creditor prove actual damages (*i.e.*, the amount of interest actually paid for the receipt of borrowed funds) nor the fact of receiving a loan in connection with the delay in the performance of a monetary obligation by the debtor. The creditor need not prove the amount of income received by the debtor who unlawfully used the creditor's monetary funds. The right of the creditor to receive compensation for damages in the form of an interest charge on the amount of unpaid funds is dependent on how the funds were used by the debtor, more specifically, what income was received and whether loan funds were used. In order to satisfy a claim for payment of interest on the amount of monetary funds that are the subject of an unperformed obligation, it is enough for the creditor to prove the amount of interest according to the bank rate applicable in its place of residence, or alternatively, in the location of the relevant bank if the latter is the ultimate creditor of the monetary obligation.

Such a solution to the problem is justified since the creditor, in the event it does not receive monetary funds due from the debtor, may apply to the bank servicing it, which is normally located in the place specified. In addition, the interest rate used by this bank to finance its clients may be considered as proof of the existing bank rate in the bank's domicile.

In contrast to the old civil legislation,¹⁴ the amount of interest subject to payment in the event of a violation of a monetary obligation is not fixed in the C.C.R.F. This amount is determined by the rate of bank interest in accounting terms. Since the C.C.R.F. does not define the concept of the accounting rate of bank interest, senior Russian judicial bodies have provided the following explanation:

The amount of interest subject to payment for the use of another's money funds shall be determined by the accounting rate of the bank interest in the residence place of an individual creditor (location of a legal entity) as of the day of performance of a monetary obligation. Currently, the relations between organizations and citizens of the Russian Federation shall be subject to payment of interest in the amount of a single accounting rate of the Central Bank of the Russian Federation on loan resources provided to commercial banks (refinancing rate).¹⁵

The interest provided for by article 395(1) C.C.R.F. shall be subject to payment only with respect to a particular amount of monetary funds, and shall not be accrued on the interest for the use of another's money funds unless otherwise provided for by the law. The interest shall be paid for the whole period of use of another's monetary funds until the day of actual payment of these funds to the creditor, unless a statute, other legal acts, or a contractual clause establishes a shorter term.

If the monetary obligation has not been performed by the debtor at the moment when the decision was taken, the court decision on recovery of interest for the use of another's monetary funds shall contain information on the amount on which the interest has accrued. It shall also mention the starting date of the accrual, and the amount of interest on the basis of the bank rate. The bank rate is determined and applied on the date when the claim was filed, or the day when the decision was rendered. Interest on these sums shall accrue until the actual payment of the funds to the creditor. In establishing the accounting rate of bank interest, it is expedient to give preference to the rate which is the closest in value to the accounting rates applied during the period when the other party's funds were used.

In the event that the monetary obligation is performed by the debtor prior to the court's decision, the decision should specify the interest subject to recovery from the debtor for a fixed amount:

If in accordance with the legislation on currency regulation and currency control a monetary obligation is denominated in foreign currency [article 317 C.C.R.F.] and there is no official accounting rate of the bank interest with respect to currency loans as of the day of performance of the monetary obligation in the place of location of the creditor, the amount of interest shall be determined on the basis of information published in official sources of the average

¹⁴ The 1964 Civil Code and the 1961 *Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics*.

¹⁵ *Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics, Vedomosti S"ezda Narodnykh Deputatov S.S.S.R. i Verkhovnogo Soveta S.S.S.R.* (1991) No. 26, item 133, art. 51.

bank interest rates on short-term currency loans provided in the place of the creditor's location.¹⁶

If there are no such publications, the amount of interest to be recovered shall be established on the basis of a document submitted by the plaintiff from a major bank in the creditor's domicile, confirming the applicable rate on short-term currency credits.

At the same time, it seems that this explanation, with respect to monetary obligations existing between Russian enterprises, does not fully reflect the logic of traditional regulation concerning the interest rate that a creditor may rely upon in the event of a delay in the performance of a monetary obligation. Thus, proceeding from a generally accepted understanding of the functioning of the financial mechanism servicing commerce, it could be concluded that in such cases, current interest rates existing in the market should be applied; in other words, rates used by banks when providing loans to their clients, not the inter-bank crediting rates usually lower than the commercial interest rates. In this event, interest rates established by the Central Bank of the Russian Federation on its transactions should not be used, particularly since these rates are used mainly to influence interest rates in the market.

As a general rule, the C.C.R.F. establishes that the amount of interest shall be determined as of the day of performance of a monetary obligation. Given the fact that bank interest is subject to rather serious fluctuations, in the event of a lengthy delay these fluctuations may lead to a situation where, proceeding from the above rule, the creditor will not be able to receive the appropriate compensation for damages caused by the violation of the obligation by the debtor. To avoid such a situation, the C.C.R.F. provides an opportunity for the debtor to base its claim on the bank rate of interest prevailing on the day when the suit was filed or the day of the court's decision. The choice of either option rests with the creditor.

The appropriate interest rate to be paid for the violation of a monetary obligation may be established either by a statute or contract. Since the general development of Russian civil legislation reflects the continued liberalization of the regulation of business relations, the extent to which the amount of interest for non-performance of a monetary obligation will be established by statute is likely to be minimal. Conversely, the determination of the interest rate by contract under the conditions of a developing market is becoming a more widespread phenomenon because it allows parties to minimize the influence of fluctuations in interest rates. Although the C.C.R.F. does not directly establish any limitations with respect to the amount of interest that may be determined by a contract, this does not mean that the parties may voluntarily establish such amounts. For instance, certain rates that appear unjustifiably high may be deemed invalid if a court decides that they are a result of one party's dominant position in the market. This is stipulated in article 10 C.C.R.F., which establishes the general scope of the exercise of one's civil rights.

¹⁶ *Ibid.*, art. 52.

If a violation of a monetary obligation causes damages to a creditor that are not fully compensated by the payment of interest, the creditor has the right to claim compensation for such damages. This means that the creditor must prove that the amount of actual damages caused was the result of the unlawful withholding of the money amount by the debtor.

When a decision is rendered on the right of a creditor to receive compensation for such damages, all general norms relating to the regulation of liability for the violation of an obligation must be applied. In light of this, it is rare that damages caused by the violation of a monetary obligation will exceed the bank interest rate for the use of borrowed funds. This is primarily explained by the fact that fluctuations in the amount of bank interest reflect mainly economic factors (*e.g.* the devaluation of money due to inflation) which may later foster claims for compensation of additional damages.

The C.C.R.F. does not directly stipulate when the accrual of interest on a monetary obligation should begin. Most likely, this would be the moment when the right of a creditor to receive the amount due is violated. In situations where the period for the performance of a monetary obligation is established in advance (*e.g.* the time for paying the price under the purchase-sale contract), interest will start to accrue the day after the period for payment has expired. If a monetary obligation arises by virtue of a claim filed by the creditor (*e.g.* a claim for compensation for damages), the time for payment shall be determined based on the date of filing of the claim in addition to the time period deemed necessary for executing payment that is generally accepted under such circumstances.

V. Performance of Obligations in Kind

An important rule regarding the legal consequences of the violation of an obligation is fixed at article 396(1) C.C.R.F., which states that “[p]ayment of a penalty and compensation for damages in case of improper performance of an obligation shall not free the debtor from the performance of the obligation in kind unless otherwise provided by a statute or contract.” Thus, a principle of proportionality exists in relation to the specific means of legal protection that the creditor has when an obligation is violated.

At the same time, this is not meant to encompass all obligations. The above-mentioned principle only works when there is improper performance of an obligation (*i.e.*, when goods of improper quality are delivered) and the creditor uses its right to recover a penalty, or files a claim for compensation for damages. In such a situation, the creditor also has the right to claim the performance of the obligation in kind, *i.e.*, to demand the delivery of goods of proper quality. Such an approach is justified since the alternative measures of liability only compensate damages corresponding to the non-performed part of the obligation.

The C.C.R.F. provides that other regulations may follow from a statute or contract. If, in the above-mentioned instance, a creditor is deprived of the right to claim for performance of an obligation in kind, another form of protection that compensates for the deprivation should be given.

Where the violation of an obligation involves absolute non-performance (*i.e.*, where the creditor did not receive anything with respect to the obligation placed on the debtor) another rule will apply, namely, the rule articulated in article 396(2) C.C.R.F. In such a case, if damages resulting from non-performance are compensated, or the debtor paid the penalty stipulated for instances of absolute non-performance, the creditor shall be deprived of its right to claim for the performance of the obligation in kind since the latter will be deemed to have received compensation equivalent to the performance of the obligation.

Since these norms are of a suppletive nature, another method of regulating the legal rights of the creditor in such a situation may arise. Specifically, the creditor may have the right—despite having received the penalty amount or damages—to claim for the debtor's performance of the obligation in kind. This approach presumes that the payment by the debtor will serve as a penalty for non-performance of the obligation.

Article 396(3) C.C.R.F. provides a special rule that eliminates the debtor's obligation to perform an obligation in kind in two specific instances. First, the debtor is freed from performance of an obligation in kind if a creditor refuses to accept performance that—as a result of the delay—is no longer useful. The rights of a creditor in this situation are specified in article 405(2) C.C.R.F.

Second, the debtor is freed in situations in which the contract itself imposes penalties for the violation of an obligation, effectively compensating for termination of the contract (*i.e.*, cancellation compensation), and the creditor makes use of the penalties. In such an instance, the debtor is freed from the performance of the obligation in kind. The legal consequences of the agreement of the parties regarding cancellation compensation are established in article 409 C.C.R.F.

VI. Self-Assistance

Other legal consequences of non-performance of obligations of a different nature are established in article 397 C.C.R.F. If a debtor fails to perform its obligation to produce and transfer the object of the obligation to the creditor, or to perform defined work or render a service, the creditor shall have the right, within a reasonable time, to entrust the performance of the obligation to a third party for a reasonable price or to perform it by its own efforts. Such actions may be taken by the creditor unless otherwise prohibited by a statute or another legal act, by contract, or by the nature of the obligation itself. If the creditor suffers damages at the same time, it will have the right to claim compensation for the necessary expenses and any other damages suffered.

Article 397 C.C.R.F. applies only if an obligation violated by the debtor may be objectively performed, not only by the debtor, but by other persons including the creditor. The rule naturally expands the possibilities available to the creditor should the debtor fail to perform the obligation. Regulations providing for such actions, often described both in theory and practice as “self-assistance”, create conditions in which the creditor—having a real opportunity to exert influence for achieving a desirable result without resorting to any formal means of the protection of rights—may perform specific actions to bring about the necessary result.

The rule on "self-assistance", which did not exist in the 1964 Civil Code, encourages the active conduct of the creditor. This, of course, will reflect favourably on the justifiable active conduct of participants in entrepreneurial activity. Application of this rule does not in principle mean a change in the original legal basis of the relationships of the parties to the obligation. The fact that the creditor performed the obligation previously placed under the concluded contract upon the debtor does not have any influence upon their rights and obligations established in the context of mutual obligations.

The exercise of "self-assistance" is not an obligation of the creditor, but rather the creditor's right. The issue of whether the creditor should resort to this means of legal protection in a given case is resolved on the basis of its own interests. On the other hand, if the performance of certain actions by the creditor in such a situation may be considered as a reasonable necessity related to the mitigation of possible damages caused by the violation of the obligation, failure to take such action may influence the amount of damages for which compensation may be claimed by the creditor.¹⁷

The C.C.R.F. proceeds from the principle that it is possible to resort to legal rights provided to the creditor when the violation is an absolute non-performance of an obligation.¹⁸ In the event of improper performance of an obligation, however, the creditor does not have such a right. The legality of using the right to "self-assistance" is also determined by compliance with certain requirements. According to article 397 C.C.R.F., these requirements are as follows:

- (1) The creditor must, in choosing to make use of this right, exercise it within a reasonable time determined by the specific circumstances of performance of the obligation. It seems that in any case the creditor must inform the debtor of its actions.
- (2) The price of performance of the obligation by the creditor or third party, instead of by the debtor, must be reasonable.
- (3) If the creditor entrusts the performance of the obligation to a third party, it is presumed that this person will meet the same criteria as the debtor who failed to perform the obligation.
- (4) All expenses and other damages incurred by the creditor due to resorting to self-assistance will be subject to compensation in conformity with the general provisions on compensation for damages.

VII. Consequences of Non-Performance of an Obligation to Transfer an Object with Individual Distinguishing Characteristics

Article 398 C.C.R.F. stipulates an additional legal right of the creditor if an individually-defined thing (*i.e.*, a thing having certain individual distinguishing features

¹⁷ See art. 404 C.C.R.F.: "Fault of the Creditor."

¹⁸ Art. 397 C.C.R.F.

that make it different from other things) is the object of the violated obligation. This includes not only things existing as single items, but also things belonging to a certain group but for certain reasons have been singled out. If a thing is transferred into use, article 398 C.C.R.F. applies only in the case of use for compensation. The provision also establishes only the material right of the creditor to claim the transfer of the thing in question. If, despite the creditor's claim, the thing is not being transferred, the creditor may seek judicial protection of the violated right. In contrast to the provisions established in article 397 C.C.R.F., the creditor in this case cannot resort to "self-assistance" and withdraw the thing being claimed from the debtor.

Through this rule the C.C.R.F. confirms the principle of the priority of rights *in rem* over rights *in personam*. It specifies that if the thing has already been transferred to a third party having the right of ownership, the creditor claiming the thing loses the right to demand that it be transferred. On the other hand, if the thing has not yet been transferred to the person who has the right of ownership over it, and several creditors whose right is based on legal relations *in personam* claim it, the C.C.R.F. recognizes the priority of the creditor for whose benefit the obligation first arose. If this is impossible to establish, the thing will be subject to a transfer to the creditor who was the first to ensure the protection of its right, *i.e.*, the creditor who has filed a suit on the withdrawal of the thing to its benefit.

The creditor to whom the thing must be transferred may, instead of demanding that the thing be withdrawn from the debtor, file a claim for compensation for damages caused by the violation of the debtor's obligation to transfer the thing belonging to it. In this regard, general provisions on liability for the violation of obligations must be applied.

VIII. Subsidiary Liability

The C.C.R.F. contains special norms relating to general legal consequences where liability is borne by several debtors, some of whom are principal debtors while others bear supplementary (*i.e.*, subsidiary) liability.¹⁹ In other words, liability of the latter group arises not by virtue of a violation of certain obligations, but only where the debtor who bears the principal liability violates its obligation to the creditor.

The regulation of subsidiary liability is aimed at ensuring additional means of legal protection for creditors when they enter into legal relationships that imply the necessity of increased safeguards with respect to certain subjects of law. The rules on subsidiary liability established in the C.C.R.F. relate to the legal status of certain subjects of law. For example, there are provisions that regulate the relationships between the founder (*i.e.*, owner) of a legal entity and the appropriate corresponding legal entity under certain circumstances, such as in the event of insolvency and bankruptcy. A

¹⁹ Art. 399 C.C.R.F.

statute or contract may provide for subsidiary liability of the surety for the debtor's obligation secured by suretyship.²⁰

For a finding of subsidiary liability flowing from regulatory acts, expression of consent on the part of a subsidiary debtor is normally not required. However, for a finding of subsidiary liability caused by the violation of a contractual obligation, the consent of the person on whom such liability will be placed is necessary. For example, in an agreement between a creditor and a principal debtor where a third party is mentioned who will bear subsidiary liability in case of violation of the obligation by the principal debtor, such an obligation will not be valid unless the creditor and the subsidiary debtor formalize an appropriate obligation. As practice shows, the most widespread form of contractual subsidiary liability is suretyship.

The subsidiary nature of such liability is manifested primarily in the necessity of the creditor to file a claim on the performance of an obligation to the principal debtor, regardless of the existence of another debtor in addition to the principal one. Only when the principal debtor refuses to satisfy the lawful demand of the creditor for performance of the obligation—or if the debtor in no way reacts to such a demand within a reasonable time—shall subsidiary liability of the debtor arise. Moreover, a contract providing for subsidiary liability of the debtor may establish certain terms which should be fulfilled by the creditor prior to filing a claim against the subsidiary debtor. In such a case, it is the fulfilment of these terms that will satisfy the prerequisites for a finding of liability of the subsidiary debtor. The lawful refusal of the principal debtor to perform obligations, however, does not grant the creditor the right to turn to the subsidiary debtor.

There are also other limitations for the creditor with respect to subsidiary liability of the debtor. These specifically relate to instances in which the principal debtor has a counter-claim against the creditor. For example, the creditor must agree to accept the counter-claim of the principal debtor. If the creditor refuses to do so, in accordance with the nature of this rule, it may not address a claim to the subsidiary debtor. To some extent this provision restricts the freedom of the creditor's actions. However, it seems expedient from the perspective of rational business regulation since it orients the parties toward simpler and more economically efficient conduct. If the claim of the creditor is not redeemed in full by off-setting against the counter-claim of a principal debtor, its remaining part must be satisfied by the person bearing subsidiary liability. Furthermore, the creditor cannot present the person who bears subsidiary liability with a demand to perform the obligation if it has not used the right of uncontested recovery of funds from the principal debtor. In certain instances, a person who bears subsidiary liability takes the place of the principal debtor and has the right to use objections against the creditor which the principal debtor has and which may influence the satisfaction of the creditor's claim for the performance of the obligation.

²⁰ Art. 363 C.C.R.F.

To efficiently resolve the question of liability for the violation of an obligation, it is necessary to simultaneously consider all of the relevant issues. That is why the C.C.R.F. places upon the person bearing subsidiary liability the obligation to warn the principal debtor about it prior to satisfaction of the claim or—should a dispute be considered in court—to attract the latter to participate in the case. If this is not done, in the event of consideration of a recourse claim to the principal debtor, the latter may defend its position by objections which it had against the creditor and which it could report to the person with subsidiary liability when it considered the creditor's claim for performance of the obligation.

IX. Limitation of the Amount of Liability

The C.C.R.F. gives due attention to the issue of regulating the amount of liability in case of violation of obligations. This is so because establishing limited liability is a deviation from the fundamental provision on liability, namely, the principle of full compensation for damages suffered by the aggrieved party as the result of the violation of an obligation by the debtor.

Legislative limitation of the amount of liability for the violation of obligations is a form of state regulation of business relations. This method is frequently used for pursuing a certain economic policy aimed at the support of some branches of the national economy by creating favourable conditions for those engaged in the relevant industries, specifically by limiting their property liability for the violation of obligations.

The described method of regulating economic relations is undoubtedly a useful one among available measures aimed at implementation of social and economic policy in a State, particularly one under transition. Although provisions of the C.C.R.F. do not specify the conditions under which limitations of liability may be introduced, the establishment of limited liability should not run contrary to the fundamental principles of civil legislation established in article 1 C.C.R.F. In particular, civil rights may be limited only to the extent necessary for the purposes of defending the bases of the constitutional order, protecting morals, health, the legal interests of other persons, and ensuring the defence of the country and the security of the State.

This rule directly introduces an exemption from the principle of freedom of contract when the parties to the contract formulate provisions on liability for the violation of obligations. Where the amount of liability is determined by statute, agreements establishing the amount of liability are deemed null and void—unless such an agreement is concluded after the circumstances causing liability arise. Such limitations on freedom of contract are aimed at preventing an economically stronger party from using an advantage to create a situation that would harm the other party through contractual limitation of the stronger party's liability for the violation of obligations.

The established rules relate to two types of contractual relations: (i) relations under the contract of adhesion²¹ and (ii) relations under any other contract where an individual acting as a consumer is a creditor. Although the C.C.R.F. regulates the limitation of liability in such contracts, it may not be below the liability established by statute. Moreover, the established rule on the inadmissibility of provisions limiting liability will be applied on the condition that limited liability may be established in the future (*i.e.*, with respect to events that may ensue after the conclusion of the agreement). The consequence of failure to observe the established rules is that any agreement containing inadmissible limitations of liability will be declared null and void.

The fact that the above provisions on the limitation of liability are applied to the relations directly referred to does not mean that limited liability agreements that are not subject to the above rules—*i.e.*, in the sphere of entrepreneurial activity—may contain voluntary terms on agreed-upon limitations. Indeed, establishing limited liability on one's own obligations may become a source of abuse by the dominant party. Should this occur, a court may refuse to defend the right of the parties to freely determine the terms of the contract, which in effect could mean deeming the respective contractual provision on the limitation of liability as having no legal force. Also note that article 401(4) C.C.R.F. is a general rule stating that “[a]n agreement concluded in advance for eliminating or limiting liability for the intentional violation of an obligation is void.”

X. Liability of a Debtor for its Employees

The C.C.R.F. separately regulates this issue of vicarious liability. Article 402 C.C.R.F. provides that the actions of the debtor's employees in the performance of its obligation shall be considered actions of the debtor. Also, the debtor shall be liable for these actions if they have resulted in the non-performance or improper performance of the obligation. This rule is applied to the debtor regardless of whether it is an individual or a legal entity. For instance, an individual engaged in entrepreneurial activity without forming a legal entity shall bear liability in conformity with the relevant provisions of the C.C.R.F.

One should bear in mind that although it is not directly stated in this norm, this rule also applies in cases where the violation of an obligation is not only a consequence of the actions of the debtor's employees, but is an integral part of their failure to act. Such a situation arises if an employee does not fulfil his professional duties—the performance of which forms the content of the debtor's obligations.

The C.C.R.F. does not provide any general criteria or list of persons covered by the term “employees”. At the same time, it follows from the generally accepted meaning of the term that this category primarily describes the employed staff of the debtor—*i.e.*, persons who are in relationships with the debtor that are regulated by

²¹ Art. 428 C.C.R.F.

employment law. In this regard, it does not matter whether these employees are in the technical personnel category, whether they are vested with administrative or representative functions, or whether they are working on a part-time or a full-time basis with the debtor.

The above rule should be considered differently from the situation in which a person having legal power to do so by virtue of a statute acts in the name of a debtor (*e.g.* the actions of the manager of a joint stock company), or is designated as a representative under a contract (*e.g.* a person acting on the grounds of a power of attorney issued by the debtor).

Furthermore, the rules do not apply to persons who perform certain activities on the basis of a civil law contract (*e.g.* a contract of work). Since such persons cannot be regarded as the employees of the debtor because they have relations with the latter regulated not by employment law but by a civil law contract, the appropriate norms of civil law should be applied, for example, article 403 C.C.R.F. establishing the liability of the debtor for the actions of third parties.

The debtor's liability for the actions of its employees arises if these actions occur within the course of an employee's duty. The burden of proof concerning the absence of such a circumstance should be placed upon the debtor since the debtor is responsible for organizing the activity of its employees so that they properly perform their functions within the enterprise and that no factors causing doubt appear in the legal powers of the employees. On the other hand, the creditor, while presenting a claim to the debtor, should prove that a specific person whose actions form the violation of the obligation is an employee of the debtor.

In establishing the liability of the debtor in the case of non-performance or improper performance of an obligation, it is irrelevant whether an employee was culpable of performing actions that caused the violation of the obligation. For instance, an employee may perform his duties in good faith, but actions with respect to the creditor may still objectively constitute a violation of the employer's obligation. Similarly, in establishing the liability of the debtor, it is irrelevant whether the debtor intentionally or negligently violated its duty, and thereby caused the non-performance or improper performance of the obligation to the creditor.

XI. Liability of the Debtor for Actions of Third Parties

Article 403 C.C.R.F. states that "[t]he debtor shall be liable for non-performance or improper performance of an obligation by third [parties] to whom performance was entrusted, unless a statute establishes that liability is to be borne by the third [party] who is the direct performer." Since performance of an obligation may be transferred by the debtor to a third party²²—which is routinely done in civil and commercial practice—this creates a possibility for flexible conduct of the debtor and thus expands the

²² Art. 313 C.C.R.F.

possibility to enter into various contractual relations. The essence of this legal rule may be summarized as follows: placing performance of an obligation on a third party does not mean the transfer of the obligation itself, nor does it mean the debtor's liability for its violation.

As a rule, the choice of a third party employed for the performance of the obligation is made by the debtor itself. However, there are instances whereby the creditor prescribes the debtor to use the services of certain third parties for the performance of specific obligations either in full or in part. If in such a case the creditor and the debtor fail to reach an agreement on the consequences of a violation regarding the part of the obligation for which performance was assigned to the third party named by the creditor, the debtor will bear the risk of violation of the obligation by the third party.

The amount, terms, and grounds of liability of the third party to the debtor for performance of the obligation as determined in the agreement are irrelevant to determining the quantum of liability of the debtor who transferred the performance of the obligation to a third party—unless the creditor and debtor came to a separate agreement. For example, freeing the third party of liability for non-performance or improper performance of an obligation does not automatically lead to freeing the debtor of liability on this obligation to the creditor.

In case of a violation of a debtor's obligation, the consequences shall be determined on the basis of the general provisions on liability, specifically those establishing grounds of liability for the violation of obligations. The particular analysis of circumstances resulting in the violation of an obligation will also include an evaluation of whether the non-performance or improper performance of the obligation was influenced by the fact that it was performed not by the debtor, but by the third party. At the same time, note that the rule under consideration does not directly regulate the relations between the debtor and the creditor on the one hand, and the third party performing the obligation on the other.

XII. Fault of the Creditor

The C.C.R.F. also establishes a rule to be applied if an obligation is violated through the occurrence of a "mixed fault", *i.e.*, the fault of both the debtor and creditor.²³ In principle, liability should be grounded in the fault of the debtor. In this case, however, it obviously would be wrong to place liability for the consequences of a violation of the obligation exclusively on the debtor. To the extent that the violation of the obligation was determined by the culpable actions of the creditor, the amount of the debtor's liability will be reduced.

When establishing whether the act of the creditor in a specific situation was *actus reus* or not, the general criteria of liability contained in article 401(1)(i) C.C.R.F. should be applied by extension. Since the C.C.R.F. establishes a presumption of fault

²³ Art. 404 C.C.R.F.

on the debtor in the case of a violation of an obligation, the debtor must prove the existence of circumstances exonerating its liability for the violation of the obligation. The burden of proving the creditor's fault in non-performance or improper performance of the obligation must also be placed on the debtor.

The amount of liability of the debtor (*i.e.*, the sum total of damages subject to compensation) may be reduced if the creditor facilitated an increase in the amount of damages caused by the violation of the obligation. The liability of the debtor, however, only shall be decreased if such actions may be deemed as the chargeable fault of the creditor (*i.e.*, only if the latter performed them intentionally or by negligence).

The amount of liability also may be reduced if the creditor failed to take reasonable actions to decrease the amount of damages caused by the violation of the contract. The amount of liability may be decreased specifically by the amount of damages that the creditor could have avoided if it had acted reasonably under the circumstances. Determining what actions may be considered reasonable in such a case will depend on the specific circumstances and the customs that have taken shape in the sphere of civil or commercial practice.

Liability only may be reduced in this regard if the debtor proves that the creditor had a possibility to take reasonable measures to decrease damages, but did not do so. The debtor must also prove the amount of the damage which could have been prevented by such actions.

Where liability for the violation of an obligation by virtue of a statute or contract is established regardless of the fault—as in the case of obligations in the sphere of entrepreneurial activity or by virtue of agreement on the *force majeure* clause—the provisions on the reduction of liability stipulated in article 404(1) C.C.R.F. for instances of “mixed fault” shall nonetheless apply. At the same time, in situations where parties to the contract resolve these issues in a different way—namely by establishing the creditor's limitation of liability—such agreements will be deemed valid unless qualified as an abuse of right.²⁴

XIII. Delay by the Debtor

The C.C.R.F. separately considers the consequences of one of the most widespread violations of an obligation, namely, when the debtor breaches the period specified for performance regardless of whether this term of the obligation is established by statute or contract.²⁵

In the event of delay, all the general provisions on liability that provide for instances of improper performance of the obligation shall apply. Circumstances involving the impossibility to perform an obligation that arose during the delay are specifically regulated. In these cases, the risk of accidental events occurring that negatively

²⁴ Art. 10 C.C.R.F.

²⁵ Art. 405 C.C.R.F.

influence the performance of the obligation shall be placed upon the delaying debtor, who shall also be held liable for the consequences of such events. This rule applies only in situations where the liability of the debtor for the delay in performance is unambiguously established.

Delay in the performance of an obligation may also result in the refusal of the creditor to accept performance. This legal right of the creditor is limited only in an instance where—as the result of a lengthy delay—the creditor lost interest in the performance of the obligation. The length of delay granting the creditor such a right depends on specific circumstances, especially on what constitutes the subject of the obligation. In any case, the cause for the loss of the creditor's interest always should be the length of the delay, not other reasons unrelated to the delay.

Damages should compensate not for the delay in performance, but for the non-performance of the obligation as the whole. The loss of interest in the performance of the obligation must be proven by the creditor. It seems that in the evaluation of concrete circumstances, not only subjective aspects relating to the creditor should be taken into account, but also circumstances of an objective nature—specifically, the standards of conduct under similar situations which have become common in this particular sector of civil or commercial practice.

A situation in which performance of an obligation by the debtor depends on the performance of certain actions on the part of the creditor is also regulated by the C.C.R.F. If the debtor is unable to perform its obligation in due time because of the creditor, failure to comply with the stipulated period for performance will not be considered as a violation of the contract resulting in the application of measures of liability.

XIV. Delay by the Creditor

Article 406(1) C.C.R.F. states that “[a] creditor shall be considered to have delayed if it has refused to accept proper performance offered by the debtor or has not taken actions provided by a statute, other legal acts, or contract deriving from the customs of trade or from the nature of the obligation.” In this situation, non-performance of such actions deprives the debtor of the possibility to perform its obligation.

A creditor shall be considered to have delayed in cases where it refuses to confirm, in the appropriate form, the performance of the obligation by the debtor (e.g. by issuing a document of receipt of the debt).²⁶ Actions deemed a delay by the creditor should be in accordance with two general criteria: (i) they should represent a violation of an obligation of legal significance, which may vary in content and source, and (ii) the creditor's performance of these actions which constitute the obligation should be a mandatory prerequisite for the debtor's performance of its obligations.

²⁶ Art. 408(2) C.C.R.F.

The delay of the creditor gives the debtor a right to receive compensation for damages caused by the delay, unless the creditor proves that the delay occurred due to circumstances for which neither the creditor nor the persons upon whom the acceptance of the performance was placed—by virtue of statute, other legal acts, or the creditor's instruction—are responsible. At the same time, the C.C.R.F. does not identify any special grounds of creditor liability in the sphere of entrepreneurial activity that would parallel the provisions on the liability of the debtor for non-performance of obligations in this sphere.

Article 406(3) C.C.R.F. provides for the consequences of the creditor's delay with respect to the right to demand interest for this period. In this case, the creditor cannot claim interest on a monetary obligation.

Conclusion

The purpose of this article was to introduce the reader to some of the new provisions and concepts in the C.C.R.F. regarding liability for the violation of obligations. As demonstrated, many of these new developments stand in stark contrast to the previous legal regime. As with any new legal system, however, the key for the future rests in the effective implementation and enforcement of the new rules. Thus, only time will tell exactly how liability for breached obligations and the related C.C.R.F. provisions will be interpreted by the courts.

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