Facultative Obligation Construction

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Abstract: The article is devoted to the complex research of the civil and legal construction of the facultative obligation. Thanks to the facultative obligation construction the debtor receives a chance to escape from the obligation by providing the creditor with a substitution and this significantly reduces the risk of liability of the debtor for failure to perform the obligations or the improper obligation fulfillment. The facultative obligations are not defined in the current Russian Federation legislation. The mentioned circumstances prove the extreme significance of the facultative obligation research. The absence of the facultative obligation complex regulation in Russian legislation is largely caused by the poor research of these obligations. The author comes to the conclusion that a facultative obligation is an independent civil and legal category. In connection with that, it is necessary to fix the legal definition of the facultative obligation and its legal status in the civil legislation of the Russian Federation.

Key words: Facultative obligation • Obligation construction • Civil law • Legal category

INTRODUCTION

It is a known fact that there are no general rules of facultative obligations in the Civil Code of the Russian Federation. The analysis of the draft new edition of Part I of the Russian Federation Civil Code shows that the developers of the civil legislation reforms find it necessary to close the gap.

The justification of the necessity to research the facultative obligation institution was given by O. S Ioffe and V.I. Golevinsky, D.I. Azarevich who thought that “the absence of express indication to the facultative obligation in the law does not mean their absence in reality, because our law does not follow the rule to determine only those obligations that are directly mentioned in it” [9, p. 93]. Modern researches have the same attitude.

Facultative obligation concept development in the history of the civil theory. We shall first mention that the Russian legal science borrowed the facultative obligation category from the Roman law [16, 29].

One of the first to study the facultative obligation in the domestic science was V. I. Golevinsky, who opposed the “complicated dividing” (alternative) obligations to “complicated replacing” (facultative) obligations, where “from the two satisfactions…, only one is the chief subject of the obligation and the other one is chosen for the purpose of simplifying the payment-in facultate solutionis; consequently, the chief subject of the obligation can be replaced with another one and such an obligation is called the replacing one, obligatio facultative” [5, p. 210].

To develop the reasoning by V.I. Golevinsky, D.I. Azarevich noticed that the replacing obligations are “such obligations which have only one action in their subject, refer to one thing, but giving the debtor a right to compensate for this thing with another thing. The same right, i.e. the right referring to the claim, is given to the creditor. In such cases we see una res in obligatione, et altera in facultate solutionis, i.e. one certain thing is placed under obligation but it can be compensated for with another thing” [2, p. 63].

In V.V. Ephimov opinion, facultas alternativa «...takes place when the debtor is to perform one certain action, but with this he can replace one action or one thing with another action or thing» [8, p. 162].

From the point of view of L. N. Zagursky, it is obvious that “...not the obligation is facultative, but giving another thing as a payment instead of the one which is a chief subject of the obligation” [9, p. 38].

In the abstracts of the obligation law lectures by Professor P.P. Tcytovich it is mentioned that “We need to differentiate between the alternativeness (aut-aut) and
facultas solvendi: the subject of the obligation is the same and actio è exactio can be aimed at this subject only; but
the debtor can optionally replace the obligation subject with something else: “payment of the forfeit closes….”,
difference deals and so on. This facultas is not cancelled even after the court decision is made; it can be performed
also when enforcing the court decision” [14, p. 17].

G.F. Shershevevich gave the following example of the facultative obligation: the obligation from the
testamentary renunciation where the heritor is obliged to “transfer the “Peter I” steamship…on the condition that
the steamship transfer can be replaced with paying an equal sum of money” [15, p. 461]. Similar examples were
given by K.N. Annenkov, V.I. Sinaysky, V.A. Ryazanovsky. I.N. Trepitsin describes the following example of the facultative obligation: “I promise to grant an apartment, but retain the right to replace it with paying
such-and-such sum of money” [13, p. 52].

V.I. Sinaysky thought that both the facultative obligation and alternative obligation have several agreed
actions, but the impossibility to perform the main action releases from performing all the other actions agreed as
the main action replacements.

Some of the authors deny the existence of the facultative obligations. For example, S.I. Landkof rejected
the necessity to define the facultative obligation as a separate type of obligations, because the facultative
obligation, in his opinion, does not differ from the alternative one [11, p. 118].

Soviet legal theorists had two opposite positions about the understanding of the facultative obligations.
Some of them adhered to the classical understanding of this civil legal phenomenon, having added nothing new
into the research of it. Others preferred not to mention the facultative obligations at all, having replaced the
information about them with the characteristics of the replacement institution and (not always) the institution of
granting for the execution purposes.

V.A. Oygenzikh tried to prove that facultative obligation is an individual case of the alternative obligation [12, p. 5-13]. Although his position can hardly be recognized as a reasoned one.

In opinion of O.S. Ioffe, “in the facultative obligation, the debtor is given the right to replace the subject to be
performed with another subject agreed in advance” [10, p. 93].

Facultative obligation construction in the works of modern Russian legal theorists Modern legal theorists are
not sufficiently attentive to the facultative obligations [23, 25, 26]. The definitions of this civil legal phenomenon are
mostly met in the textbooks.

The facultative obligations are obligations that have a single execution subject, although the debtor has the
right to replace it with another subject agreed in advance. As the subject that can be used for the replacing the
principal obligation is agreed in advance, the creditor’s agreement to the replacement is not required. For example,
if the terms of agreement allow the debtor to transfer at his own will either 1 ton of granulated sugar or the raw sugar
in quantity enough to produce 1 ton of granulated sugar, the obligation can be deemed as optional.

- «In facultative obligation (lat. facultas-ability», «possibility», i.e. optionality) the debtor is to perform
a specific action for the benefit of the creditor, but he also has the right to replace the performing with other
subject agreed in advance. For example, the contractor who did the work with defects, is to repair
the defects, but has the right to do instead the whole work again free of charge, having compensated the
customer for the losses due to the downtime and the delay in execution (item 2 of Article 723 of the Civil
Code). Consequently, the subject of the execution is properly determined but the debtor at his choice (will)
can replace it with another subject» [6, p. 223].

The difference of the facultative obligation from the alternative obligation is “…in the fact that the debtor does
not have the right of choice-he is forced to replace the execution subject, although defined in advance. With this,
the replacement of the execution subject is allowed only if the impossibility to execute the originally stated subject
is proved…” [7, p. 602].

E. Bogdanova views the facultative obligation in the following way: «There is the only obligation subject in the
facultative obligations. But the debtor has the right to replace the execution subject with another subject
stipulated in the contract. Thus, the debtor can make the replacement of the execution subject with another subject
or to perform a defined action at his own will, not asking for the creditor’s permission for the replacement, however
he also has the right not to do it» [3, p. 56].

Explaining the general provisions of the Concept for the Civil Legislation reforming, V.V. Vitryansky
reasonably notices that “apart from the alternative obligation, where the debtor is to perform one of the two
equivalent obligations, the facultative obligation has a single obligation but the debtor has the right to replace it
with another obligation and if the debtor practices his right the creditor is to accept the execution of other
(replacing) obligation proposed by the debtor as a proper fulfillment of the facultative obligation” [4, p. 13].
Let us see the normative regulation of the facultative obligations in the legislations of the foreign countries [18, 19, 21, 22, 24, 27, 28]. Thus, Article 1552 of the Quebec Civil Code, directly defines that the facultative obligation is the obligation with a singular principal execution subject and the debtor can avoid performing it by providing with another subject of execution.

Correlation between the facultative obligation and neighboring civil legal constructions

The number of the civil and legal categories which are subject to comparing with the facultative obligations is rather limited: replacement of the execution, granting for execution purpose, compensation and innovation.

Facultative Obligation and Replacement of Execution. Professor M.M. Agarkov was the first to speak about the differences between the facultative obligation, replacement of execution and granting for execution purpose. He noted that “in case of the execution replacement, the debtor, commits another action instead of the action that he was supposed to perform. The replacement of the execution is the substitute for the execution… (and) makes the same action as the execution itself. The debtor having performed a replacing action with the creditor’s consent is considered to be the one having fulfilled the obligation” [1].

The classics of the Russian civil science thought that the main difference between the facultative obligations and the replacement of execution is in availability or in absence of the debtor’s right for such granting [17]. If the obligations allow the debtor to have such a right, then we speak about the facultative obligation. In case the debtor does not have the right, i.e. he is to ask the creditor to accept the subject proposed by him-then we speak about the replacement of the execution.

Facultative Obligation and Granting for Execution Purposes. Speaking about granting for the purpose of execution, M.M. Agarkov said: “… Suppose the debtor, instead of paying the debt, has granted the creditor with a thing approved by the creditor, so that is the creditor sells this thing and takes the debt sum from the revenue sum. Such granting of the thing to the creditor is not a replacement of the execution, it is aimed at the execution only. The debt will be paid not at the moment of the thing transfer, but at the moment when the creditor gets money for the thing” [1, p. 36].

The difference between the facultative obligation and granting for execution is obvious: in the facultative obligation, when the execution is replaced, the obligation finishes with the acceptance act (certificate) for the replacing subject and when it is granted for the execution—the creditor’s act is issued for accepting the revenue for the subject sale.

Facultative Obligation and Compensation. The most vivid opponent of the compensation agreement as the grounds for introducing the facultative element into the obligation was O.Y. Shilokhvoost, who in particular noted that the replacement subject in the facultative legislation should be defined in advance and the compensation agreements are often concluded “…when the deadline for the original obligation is missed and the debtor is experiencing a delay” [20].

Facultative Obligation and Innovation Agreement. The difference between the innovation agreement and the agreement on compensation is first of all in their direct purpose. The purpose of the agreement on compensation is to agree on such a termination of the known obligation as providing for the compensation-replacing its execution. The innovation agreement has the purpose of cancelling the known obligation by the very fact if its conclusion.

CONCLUSIONS

We need to note that the facultative obligation is an independent civil legal phenomenon.

The discovered characteristics of the facultative obligations allow to formulate the definition of the facultative obligation. The facultative obligation is an obligation having a defined subject of execution and characterized by the fact that its contents are complicated with the right of the debtor to make a replacement of the chief subject of the obligation.

We deem it necessary to provide for a legal definition of the facultative obligation in the civil legislation of the Russian Federation: the facultative obligation is an obligation that gives the right to the debtor to replace the mail execution with other (optional) execution agreed in the obligation terms.

REFERENCES