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Commodity Forfeit As A Way To Ensure The Compliance Of Obligations

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ABSTRACT

The article describes the norms that reflect the commodity forfeit in different legal systems, the thoughts by scholars, the practical significance of the application of the commodity forfeit, the theoretical and practical basis for its recognition as a way to ensure the fulfillment of obligations. There are also proposals to improve the Civil Code of the Republic of Uzbekistan on the use of commodity forfeit as a fulfilling method.

KEYWORDS

Security methods, forfeit, commodity forfeit, fine, penalty.

INTRODUCTION

The process of globalization is leading to the integration and unification of legal norms that effectively ensure the relationship, eliminating the boundaries that apply to different legal systems. In these processes, one of the urgent tasks today is to analyze the changes in the field of civil law to ensure the fulfillment of obligations in the legal system and to put forward appropriate proposals to improve national legislation.

On April 5, 2019, the President of the Republic of Uzbekistan issued Decree No. F-5464 "On measures to improve the civil legislation of the

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Republic of Uzbekistan", which approved a concept called "Concept of improving the civil legislation of the Republic of Uzbekistan" Clause 3 of Section II appoints that the challenge is to improve measures and tools to ensure the fair and proper exercise of civil rights and civic responsibilities [1].

It should be noted that Article 259 of the Civil Code of the Republic of Uzbekistan stipulates that the performance of obligations may be provided by forefeit, pledge, seizure of the debtor's property, guarantee, surety, pledge and other means secured by law or contract.

However, this does not mean that the enforcement of obligations is limited to the security methods specified in this norm.

As noted by H. Rakhmonkulov, the list of ways to ensure the fulfillment of obligations is not exhaustive. Obligations may also be secured by other means provided by law and the contract [2].

For example, it is recommended to supplement with a "security payment" the security methods listed in Article 291 of the new draft Civil Code of the Republic of Uzbekistan [3].

Scholars D.A. Torkin, a fiduciary pledge; commodity forfeit; returnable collateral; withholding money; irrevocable; transactions made under certain conditions (session, factoring, waiver) [4], EA Gabaraev waiver of monetary claims [5] and S.Bobokulov [6], Yu.S.Fyodorova [7], M.D.Akateva [8], A.Omonov [9] recognized commodity forfeit as a way to ensure fulfilment of obligations.

We support the views of D.A. Torkin, S. Bobokulov, Y.S. Fyodorova, M.D. Akateva and A. Omonov on the recognition of commodity forfeit as a method of civil law enforcement of obligations. However, the theory that forfeit or penalty may not be in the form of money [10] has caused controversy among legal scholars. In this regard, legal scholars can be divided into three groups based on their assertion that it means the transfer of property, a product, the performance of an action for a creditor, the performance of work, or the provision of services.

The participants of the first group try to express the forfeit, which is not in the form of money, only in connection with the delivery of the goods. In particular, A.A. Novikova argues that the imposition of goods (items) means the transfer of goods (items) by the debtor to the creditor under a specific contract in the event of non-performance or improper performance (including delays) [11], but A.I. Konovalov emphasizes an additional obligation of transferring the property (goods) to the creditor by the debtor under the obligation secured by this penalty [12].

It should be noted that the agreement on non-monetary forfeit allows the creditor to recover from the debtor a certain thing (work, service) specified in the contract through a one-time delivery (performance, rendering) in case of non-performance or improper performance of the main obligation. It is similar to the penalty model with its one-time transmission structure [13].

Participants in the second group describe a non-monetary forfeit in connection with the transfer of property or the performance of certain actions. In particular, according to D.I.Meyer, forfeit is formed by the debtor to transfer certain property to the creditor or to perform certain actions for the creditor [14].

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Representatives of the third group describe the forfeit, which is not in the form of money, in several cases. For example, according to F.Shodmonov, the forfeit can be set as a percentage of the work performed or the product grown, or in a certain amount of money [15].

In addition to the thoughts above, it should be noted that today it is not expedient to limit the definition of forfeit only as a sum of money.

Indeed, as acknowledged by A.M.Yakimova, non-cash forfeit is a conditional term, and the word "forfeit" does not change the nature of the traditional forfeit, expressed in money [16].

Inflation, which occurs in the process of development, makes the subjects of obligation more confident in property than in money. The reason is that while money may depreciate due to inflation, the value of property, on the contrary, increases. It is also preferable for a creditor to obtain a commodity penalty by agreement with the debtor, rather than spending extra time and overhead costs related to court costs, attorney's fees, and enforcement of a court order to recover a cash penalty.

In 2019, Uzbekistan ranks 41st in the world in the ranking of expenditures for the implementation of court decisions. Total costs accounted for 20.5 percent, of which 15 percent were fees for attorney services, 3.5 percent were court costs, and 2 percent were enforcement fees [17].

As a general rule, the creditor applies to the economic court to recover the forfeit in the amount of up to fifty percent of the unpaid part of the debt. However, only 5 or 10 percent of the forfeit recovered by the court. Naturally, the creditor loses 40 percent of the forfeit (50 percent of the requested - 10 percent of specified in the recovery = 40 percent lost) and its state duty falls on the creditor.

The overhead costs mentioned above have a negative impact on the economic interests of the creditor. In this case, is it preferable for the creditor to collect the cash penalty or is it better to receive the commodity forfeit?

In this case, it is appropriate to state that A.V.Bodilovsky thought that “it is much easier to give the "excess" goods than to pay the supplier in cash, and it is more profitable to get the goods he needs, even if it is a little later than when the buyer starts litigation to collect payment. In any case, it is reasonable to argue that in the absence of monetary reserves, the material forfeit provides an opportunity to obtain a more realistic coverage for the breach of obligation” [18].

Concepts of material forfeit have not emerged today. M.Y.Pergament, in his work “Treaty Forfeit and Interest in Roman and Modern Civil Law” [19], acknowledges that forfeit may be expressed in a special non-monetary form.

V.A.Vyatchin in his article "On the legal nature of commodity forfeit" noted that for the first time in the legislation Article 141 of the Civil Code of the RSFSR of 1922 stipulates that a contractor is obliged to deliver money or other property to another contractor in case of non-performance or improper performance of the contract. The essence of the concept of "other property value" is not described in any law, in any scientific literature [20].

Thus, although commodity forfeit was recognized in Roman law and legislation until the early XX century, it was forgotten in the creation of the norm in the next century, and to this day forfeit is recorded as the sum of

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money in most civil codes of the Commonwealth of Independent States.

In particular, Article 260, Part 1 of the Civil Code of the Republic of Uzbekistan, Article 330, Part 1 of the Civil Code of the Russian Federation [21], Article 311, Part 1 of the Civil Code of the Republic of Belarus [22], Article 293 of the Civil Code of the Republic of Kazakhstan [23], Article 427 of the Civil Code of Turkmenistan [24] and part 1 of Article 355 of the Civil Code of the Republic of Tajikistan [25], Article 417 of the Civil Code of Georgia [26], Article 462.1 of the Civil Code of the Republic of Azerbaijan [27] and Part 1 of Article 369 of the Civil Code of the Republic of Armenia [28] stipulate that the forfeit is the amount of money to be paid by the debtor to the creditor in case of non-performance or improper performance of the obligation.

It is no longer possible to fully secure the relationship that emerges as a result of development with norms of this content alone, and there is a need to reconsider them. As a result, there is a tendency today to re-establish pre-existing supply methods.

According to D.S. Kasimjanova, the Civil Codes of the Baltic States reinstated the rules on commodity forfeit, which were in force before the unification of Latvia, Lithuania and Estonia into the USSR [29].

In the Civil Codes of a number of foreign countries, forfeit is recognized as money and other valuables. In particular, according to Article 1717 of the Civil Code of the Republic of Latvia [30], forfeit can be included in any contract and it can be defined not only as money, but also as other value. Part 1 of Article 549 of the Civil Code of Ukraine [31], forfeit (fine, penalty) - is the amount of money or other property that must be given to the creditor in case of violation of the obligation by the debtor. According to Article 624 (1st part) of the Civil Code of the Republic of Moldova [32], a penalty is a contractual obligation under which the parties assess the damage in advance and the debtor is obliged to pay a certain amount of money or give a certain thing (penalty) in case of default.

Also, in part 1 of Article 320 of the Civil Code of the Kyrgyz Republic, in case of non-performance or improper performance of an obligation, the amount to be paid or transferred by the debtor to the creditor is recognized as forfeit [33].

In addition, paragraph 2048 of the Civil Code of the Czech Republic [34] also sets out the rules for forfeit in the form of money and non-cash.

At the same time, in the legislation and judicial practice of many developed countries of the world, forfeit is expressed in one form or another. For example, Article 1336 (1) of the Austrian Civil Code, Articles 339-345 of the German Civil Code, Articles 1229 and 1152 of the French Civil Code, Articles 1152 and 1226 of the Luxembourg Civil Code, Article 1152 of the Spanish Civil Code, Article 405 (2nd part) of the Greek Civil Code, Articles 1382-1384 of the Italian Civil Code, Articles 6:91-6:94 of the Civil Code of the Netherlands, as well as common law countries in judicial practice (e.g. Dunlop Pneumatic Tire Co. Ltd. v. New Garage and Motor Co. Ltd., 1915 in the United Kingdom, Clydebank Engineering & Shipbuilding Co. Ltd. v. Castaneda, 1904, Scotland, Banta v. Stamford Motor Co. 89 Conn., 1914 in the U.S. and etc.)) [35].

Today, in foreign jurisprudence, approaches to commodity forfeit are changing. For example,

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the Povolzhsky District Federal Arbitration Court imposed a "natural penalty" without any doubt as to its legitimacy [36]. The Federal Arbitration Court of the North Caucasus District ruled that "the material penalty is in itself based on Article 329 (1) of the Civil Code and does not contradict the law" [37].

It should be noted that the continental legal system defined forfeit differently in different countries.

According to Article 342 of the German Civil Code, forfeit can be not only in the form of a sum of money but also in the form of a different property provision [38].

Also, the legislation of other developed countries, in particular Article 1226 of the French Civil Code and Article 160 of the Swiss Liability Law, constitute the forfeit as amount of money or other property value to be paid by the debtor to the creditor in case of non-performance or improper performance of the obligation.

In addition, in the Dutch Civil Code, any condition can be the subject of forfeit, as not only money but also other payments or appoinments [39].

The term forfeit is not used because there is no forfeit institute in the USA and the UK, but there are similar institutes.

In contrast to continental law, the term "forfeit" can be applied to the general rules of Anglo-American law, which also describe the adverse consequences of the payment of a sum of money to an unfair party in relation to pre-arranged damages in breach of contract.

D.N.Karkhalev in his article "Methods of protection of civil rights under the legislation of Latin America" [40] cited a provision in Article 1578 of the Ecuadorian Civil Code that "under the Forfeit Agreement, a person may undertake to provide an object or perform an action in the event of non-performance or delay in performance of his main obligation to ensure the performance of his main obligation."

In this case, stating V.A. Khokhlov's thought that forfeit stable, widely popular and tried civil-law sanction; its legal and doctrinal concept is the amount of money that the debtor has to pay to the creditor in case of non-performance or improper performance of obligations, which does not change for hundreds of years [41] and it is also advisable to state opinions of E.G.Komisarov and DA Torkin that in the minds of business entities, the penalty is firmly rooted in the amount of money [42].

While acknowledging the views of V.A. Khokhlov, E.G.Komisarov and D.A. Torkin, it is time to abandon the expression of forfeit only as a sum of money. A forfeit can be recognized as a forfeit in the form of money (general rule) and in the form of a commodity (special rule).

The above-mentioned cases show that forfeit is used in the legislation of developed countries in the form of money and property value (commodity). This is the basis for recognizing the commodity forfeit as a way to ensure the fulfillment of obligations, along with the forfeit in the form of the amount of money.

Commodity forfeit differs from traditional penalty in that the goods are provided to the creditor instead of payment of the penalty in cash to the creditor in case of breach of the obligation by the debtor.

In our opinion, it is expedient to give an explanation of the commodity forfeit in such a

way that if the debtor does not fulfill its obligations or does not fulfill them properly, it is a commodity to be given to the creditor.

In order to ensure the practical application of the commodity forfeit, it is proposed to amend the first part of the Article 293 of the project of Civil Code of Uzbekistan and express it as follows: "It is a sum of money or a commodity forfeit, which is determined by the legislation or the contract, which the debtor is obliged to pay to the creditor in case of non-performance or improper performance or delay of the obligation". In the same way, supplement the article with the fifth part in the following expression: "In case of non-performance or improper performance or delay in performance of the obligation, by mutual agreement, the amount of money or the transfer of goods corresponding to the unfulfilled part of the obligation may be determined".

With the adoption of this proposal, the restrictions imposed on the parties to the contract (such as the fact that the penalty is only in the form of money) will be removed, and they will be able to freely exercise their rights.

In particular, if the application of a commodity forfeit to secure the performance of obligations under a mutual agreement encourages the debtor in financial distress to remedy the consequences of breach of obligation (in exchange for the goods created in the process of production) and enter into a new obligation, the creditor's right the possibility of recovery (compensation) is created.

In conclusion, it should be noted that the commodity forfeit has the characteristics of the methods of civil law enforcement. In particular, the fact that the consequences of a breach of the obligation can be remedied by the existing goods encourages the debtor to fulfill its obligations without hesitation (incentive function), and after the breach of the obligation provides protection of the creditor's rights by indemnifying (compensating function).

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