

Research on Defense Right Systems in Bilateral Contract

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Abstract—The "Contract Law of the People's Republic of China" promulgated in China in 1999 for the first time stipulated three types of defense right systems in bilateral contract: simultaneous execution of defense right, first execution of defense right, and unsafe defense right. They are of great value to the market economy and have played a significant role in maintaining the security of market transactions and protecting the interests of the parties. China has inherited and developed the traditional unsafe defense right under the civil law system, and creatively set up a system for first execution of defense right, while drawing on the anticipatory breach system under the common law system. There are natural conflicts between the legal systems of different law systems, leading to defects in the defense right under contract law of China. This paper is divided into three parts, studies the defense right system in China's bilateral contract, and discusses the value and defects of this system and issues about how to improve the system.

Keywords: *simultaneous execution of defense right, first execution of defense right, unsafe defense right, anticipatory breach*

I. INTRODUCTION

A. Concept of defense right in bilateral contract

Defense right refers to the right that a party can refuse to fulfill obligation to the other party when the conditions stipulated by the law are met, namely, this right can oppose the other party's claim. [1] The defense right in bilateral contract means that when one party makes a request to practice the contract right, the other party can reject the request under the conditions stipulated by the law to temporarily suspend the occurrence of the contract validity. [2]

B. Comparison between defense right in bilateral contract and other types of defense rights

1) The feature of dependence

Time-limited defense right and pre-litigation defense right are independent defense rights that do not depend on the main creditor's right but exist independently. As long as the other party requests to fulfill obligation, the party can exercise this right of defense. In bilateral contract, the three types of defense rights are subordinate to defense right. Its

existence must rely on the existence of the main creditor's right; one party must have the creditor's right to ask the other party to perform the payment, and play a guarantee role on its creditor's right. When this creditor's right is eliminated, the accompanying right of defense will also vanish at the same time.

2) The effectiveness to exercise

For example, time-limited defense right is a right to reject the plaintiff's action. It is also a permanent right of defense, and the exercise of this right of defense can always oppose the right of claim of the opposite party. The defense right in bilateral contract is only a momentary right of defense, which can only oppose the counterparty's right of claim in a limited time. The simultaneous execution of defense right means that the party can temporarily oppose the other party's right to claim when the other party fails to perform the contract or does not perform in line with the contract. However, if after the other party has performed the payment, and the party has lost the simultaneous execution of defense right, the party shall immediately perform its obligation and the validity of the contract shall continue. In pre-litigation defense right system, the general guarantor may refuse to pay the creditor until the main creditor conducts compulsory execution on the main debtor's property without effect. After the compulsory execution has taken effect, the general guarantor no longer has the pre-litigation defense right, and the creditor's right of claim becomes effective.

II. STATUS QUO AND DEFICIENCIES IN LEGISLATION OF CHINA'S EXECUTION OF DEFENSE RIGHT SYSTEM IN BILATERAL CONTRACT

A. Ambiguous legislative provisions for simultaneous execution of defense right

One of the applicable conditions for the simultaneous execution of defense right is that the two parties must bear each other's debt with consideration relationship. However, how to judge the consideration relationship of the debt needs to be discussed. In practice, there are various types of debt, and it is really ambiguous in the mere provisions for the consideration relationship. Some people hold that this type of consideration relationship requires having the same price; some scholars believe that this type of consideration

relationship is the same value agreed by both parties. Legislation needs to make a clear definition for this "consideration relationship" in order to benefit judicial practice.

B. Coincidence between first execution of defense right and simultaneous execution of defense right

From the content, simultaneous execution of defense right can also be applied to the contract with performance order. Therefore, first execution of defense right should be included in the definition of simultaneous execution of defense right. The two do not actually need to exist separately. First execution of defense right is derived from the concept of simultaneous execution of defense right. [3] The traditional civil law system also does not have first execution of defense right. First execution of defense right is a pioneering initiative in China, but this innovation is actually not conducive to reflecting the integrity, logic, and conciseness of the legal system. This innovation gets first execution of defense right separated from simultaneous execution of defense right, which splits the original theoretic framework of law and results in some adverse consequences and the diversified naming for Article 67 of the Contract Law in jurisprudential circle. This is not conducive to the legal research and judicial practice in China. There are many nomenclatures derived from the understanding of Article 67 of the Contract Law, such as first execution of defense right, later execution of defense right, and even many names such as remedy right for breach of contract, defense right for later execution for debt, first execution defense right, and so on.

C. Conflict between unsafe defense right system and anticipatory breach system

First, unsafe defense right and anticipatory breach system are sourced from different legal systems, having specific logic system and structure and large gap, and cannot be gradually fused with the development of internationalization and mutual learning. When providing unsafe defense right, China borrowed from the provisions of the two legal systems and super-impose them without considering the actual situation of China, which will inevitably lead to conflict. Furthermore, in view of its fundamental nature, unsafe defense right is a temporary right of defense and can only temporarily deny the other party's claim right; anticipatory breach system is the liability for breach of contract [4] and belongs to the content of contract liability.

Secondly, from the scope of application, there are overlapping and conflicting parts between unsafe defense right and anticipatory breach system. The overlapping means that unsafe defense right exists in bilateral contract with performance order, and anticipatory breach system has no such restriction and applies to all contracts no matter they are bilateral contract or unilateral contract and having performance order or not. [5] The conflict lies in that some legal situations meet the requirements of the two systems at the same time. For example, Article 68 of the Contract Law on "transfer of property" and "secretly withdrawing funds" as well as the transparency provisions " have stipulations for

"other cases that one loses or may lose the ability to perform the debt" and the Article 94 stipulates "the case that the parties have shown by their actions that they do not perform their principal debts". When it is specifically applied, it will bring confusion to the parties and judges. Which system should be specifically applied becomes a difficult problem that is easy to encounter in practice.

Thirdly, from the requirements for subjective fault of the party, the concern of unsafe defense right is only the objective fault of the other party, and the anticipatory breach system also pays attention to the subjective fault of the other party. Unsafe defense right is a defensive right, and a direct citation of it cannot make the party get immediate compensation. Therefore, it only needs to see that the other party has the possibility of not performing the contract or losing the ability of performing the contract, namely the objective status of the other party's performance ability and property capabilities. In anticipatory breach system, if the other party cannot perform the contract as agreed due to force majeure, it cannot constitute a breach of contract.

III. SUGGESTIONS FOR PERFECTING THE EXECUTION OF DEFENSE RIGHT IN BILATERAL CONTRACT

A. Adhering to the guidance of basic principles of civil law

1) Limitations of the principle of good faith

The principle of good faith is the guiding principle of the entire Contract Law, and also the foundation for the existence of the bilateral defense right system as stipulated in the contract law. All specific specifications must not violate the macro requirement of the principle of good faith. Under this requirement, the interests of the parties to the contract should be equal. If the interests of the two parties are imbalanced, the contract law should be adjusted and improved in a timely manner rather than letting it go. In bilateral contract, the purpose of formulating the right of defense should increase the moral requirements for both parties, not only requiring them to fulfill their obligations to realize their interests, but more encouraging to establish a trusted trading environment. [6]

2) Adhering to the principle of prohibiting abuse of rights

The right of defense is a means of defense and an effective mechanism for defending the interests of the contracting parties from being damaged. As a statutory right, it can directly fight against the breaching party's claim, and to some extent regulate the claim that is very easy to be abused. In contrast, the exercise of the right of defense also needs to be strictly restricted by law. The right of defense is a right of private relief. If one party arbitrarily exercises the right of defense, it will cause damage to the interests of others. The consequences caused by this right expansion may be more serious than the damage caused by non-performance of obligations. This is also clearly contrary to the legislative purpose of defense right. Therefore, the legal system also needs to limit the exercise of defense right in order to truly realize the value of law.

B. Suggestions for perfecting the system for simultaneous execution of defense right

1) Abolishing the system for first execution of defense right and establishing a perfect system for simultaneous execution of defense right

In order to save judicial resources, it is quite necessary to expand the interpretation of the definition of simultaneous execution of defense right. It is needed to add provisions in the Contract Law that the system for simultaneous execution of defense right can be applied to the case where both parties have provisions for the performance order of contractual debt and the later execution party advocate exercising defense right in case that the other party fails to fulfill the obligation or perform in serious discordance with the contract; in addition, it should also include the case which is considered as simultaneous execution but the performance order are not fulfilled or the agreement is not clear. [7] Provisions like this can to some extent solve the problem of the coincidence between first execution of defense right and simultaneous execution of defense right in China's contract law.

2) Clear definition of "simultaneous execution"

Regarding the timing of "simultaneous execution", we should discuss it in a variety of situations. If there is no agreement on the performance order or the agreement is not clear at the very beginning, the execution should be considered as "simultaneous execution" no matter what the specific situation is; if the performance times agreed by the two parties do not differ greatly, the performance times are also within the range of "simultaneous execution"; again, if the performance order is agreed, the later execution party also has the possibility to exercise simultaneous execution of defense right, namely in case that the first execution party fails to pay or cannot execute before expiry of the execution period.

C. Suggestions for improving the unsafe defense right system

1) Resolution of the conflict between unsafe defense right and anticipatory breach system

The resolution of this conflict requires the courts and judges to gradually summarize and conclude in trial practice. It also requires the Supreme People's Court to make a judicial interpretation as soon as possible. Article 66 of the Contract Law lacks detailed provisions on the further relief methods for the exercise of unsafe defense right; the party exercised unsafe defense right cannot get further legal guarantee, which may actually not reach the effect of self-help relief. This is not conducive to solving problems encountered in the performance of contract. In this regard, relevant judicial interpretations can be supplemented: first, the application requirements stipulated in Article 68 of the Contract Law should be limited to the first three conditions stipulated by the law, making the application of unsafe defense right clear and specific. The "One party clearly states or demonstrates in his behavior that he will not or does not perform the contractual obligation" as stipulated in Article 94 of the Contract Law should be divided into explicit anticipatory breach and implied anticipatory breach and its

detailed applicable conditions. Secondly, the remedy measure applicable after anticipatory breach can be understood in such way that the non-breaching party can propose the suspension of the contract, promptly inform the other party that it will suspend performance and notify the other party to provide guarantee as soon as possible. If the breaching party fails to provide guarantee within a reasonable period, the non-breaching party may terminate the contract. These approaches clarify the applicable requirements of unsafe defense right and anticipatory breach system, can effectively prevent conflicts in the application of the two, and can take corresponding legal remedy measures when corresponding legal facts occur.

2) Redefining vague legal terms

It is suggested to make further explicit provisions in legislation or judicial interpretation to reduce the waste of judicial resources. For example, regarding what is "timely/in time", we need to consider specific issues in practice, such as the distance between the parties, social transportation technology, communication technology development status, and social practice, to determine a clear time; this time should be as fast as possible to prevent the party exercising the right of defense and receiving accurate evidence from notifying the other party's suspension of performance of the debt too late, resulting in damage to the interests of the later execution party. At the same time, the effect of the suspension of the contract can only occur after the corresponding evidence is provided. The concept of "appropriate guarantee" is usually understood as "equivalent" and "sufficient" to the debt, but the two are not equal in actual operation and there are always some difference; for "reasonable period", I think the parties' meaning is that the parties are allowed to freely agree on a reasonable time limit, but legislation must pose a restriction on the time limit so that it cannot harm the interests of the parties. Secondly, there are related regulations in foreign countries. We can refer to the legislations of other countries and choose the most reasonable maximum period. [9]

3) Recommendations on the burden of proof

In order to reduce the burden of proof of the parties, the parties are encouraged to reasonably exercise their unsafe defense rights. Some adjustments can be made as appropriate: for example, some of the burden of proof can be transferred to the court, namely, when the first execution party has preliminary evidence to prove that the other party has a performance problem, the party can apply to the court for asking the court to investigate the evidence about economic situation of the relevant party; wherein, the channels for obtaining evidence need to be clear. In China, the way of obtaining evidence can be made clear by publishing authoritative judicial interpretations and restricting the specific criteria for evidence affirmation, rather than just using the judge's discretion to determine whether the evidence is accurate. [10]

IV. CONCLUSION

The establishment of defense right system in bilateral contract is an important milestone indicating that the field of

contract law in China is in line with the international advanced level. It is also a very meaningful safety plug for coping with legal issues in the current context of market economy. However, the system also has obvious defect of "inadaptability". While affirming the defense right system in the "Contract Law", it is also needed to see that the system has not yet been truly integrated into China's social environment. It is still not that operable in judicial practice. It is hoped that in the near future, China's "Contract Law" will be increasingly perfected and better serve the economic development.

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