Секция «Английский язык и право»

Legal Nature of Solidary Obligations

Научный руководитель – Буханцев Сергей Сергеевич

Борха Сергей Сергеевич
Студент (магистр)
Российская школа частного права (институт), Москва, Россия
E-mail: sergey@borha.ru

The question of the legal nature of solidary obligations was widely explored by foreign legal scientists. In the Russian doctrine, on the contrary, only a few works elucidate this subject [1, 2], and it is noteworthy that no known attempt has been made to admit that solidarity in the CCRF is not a homogeneous institution but several legal phenomena. In order to prove this thesis, it is indispensable to scrutinize theoretical views on the nature of solidarity in foreign doctrines. This will shed light on the legal nature and structure of solidarity in the law of obligations.

What is a solidary obligation: a complex obligation with a plurality of persons or a bundle of legal relationships between creditors and debtors? This is the main cornerstone of solidarity. Data from various sources demonstrate lack of consensus among scholars: whereas the former is more dominant in Germany, Austria, and Switzerland [2], the latter prevails *inter alia* in France, Spain (with certain diffusion), and Argentina [5].

Proponents of the first approach (Zacharie, Crome, Ascoli, Gangi, Savigny, Windscheid) indicate that a plurality of persons does not necessarily imply a plurality of obligations; the unity of the obligation is determined by the unity of its object [3]. This apprehension perfectly explicates the common effect of legal facts related only to one of the persons (e.g., why the performance made by one of the debtors discharges the others), but it fails to explain all cases of solidarity established by law [2, 4]. Furthermore, devotees of legal dogmatism often invoke the Roman texts where a singular form of a "solidary obligation" is utilized or quote similar excerpts from current civil codes [3], but it is certainly not the strongest argument, especially considering notorious quality of legal technique. Nonetheless, this concept is seemed to be the most adequate in regard to solidarity sensu stricto.

The antagonists in this dispute (Derburg, Sohm, Planiol, Enneccerus) take as a matter of course that a plurality of debtors or creditors predetermines the existence of separate obligations connected by virtue of the unity of the interest, objective, object or cause [6]. The main advantage of this theory is that it justifies why only some of the solidary obligations may have different conditions or terms, be secured, have different periods of limitation [1]. Pizarro and Vallespinos criticize this theory for not calibrating the nature of solidarity that always constitutes a single legal relationship with a plurality of persons and legal links but with the unity of the performance and cause [5]. In response to this remark, Pavlov argues that there is nothing absurd in recognizing the existence of four obligations when a creditor and two debtors participate in a "solidary obligation" [1]. However, this position is difficult to accept. For instance, if a simple partnership consisting of three members alienates property to spouses, twelve solidary obligations are arisen from the contract. This inference does not meet expectations of a reasonable man. Therefore, this concept of solidarity is inferior to the previous one.

Some scholars argue that there is no point accepting only one of the concepts of solidarity. Investigating the structure of solidary obligations in the civil law of Italy, Busnelli reached the conclusion that inasmuch as the institution of solidarity is not homogeneous and there are several types of solidary obligations that have different structure, this question appears to

be a pseudo-problem and should not be studies in a unitary way [4]. According to Busnelli, a solidary obligation is a single legal relationship if it is subjectively complex, or conversely, if solidarity is arisen from different sources and aimed at satisfaction the same interest of the creditor (e.g., the solidary liability of a guarantor and the principal debtor), there are a plurality of distinct obligations [4]. Fortuitously, this is also valid for the Russian legislation since the CCRF has established cases of solidarity without a plurality of persons as well. Nevertheless, there are grounds to doubt whether this approach is optimal. In 2015, the Argentinian legislator reconstructed the "genuine" model of a solidary obligation (as a single one) and introduced a new legal institution of concurrent obligations (*"las obligaciones concurrentes"*) for "ungenuine" solidarity. This solution implies differentiated and more equitable regulation of two distinct legal phenomena [7] that are still considered to be the same in the Russian legal doctrine.

Источники и литература

1) Павлов А.А.К вопросу о сущности солидарных обязательств // Очерки по торговому праву. 2010. Вып. 17. С. 65–75.
2) Тололаева Н.В.Пассивные солидарные обязательства: российский подход иконтинентально-европейская традиция. Дис. . . . канд. юрид. наук. М., 2017. 174 с.
3) Jordano Barea J. B. Las obligaciones solidarias // Anuario de derecho civil. 1992. № 45 (3). P. 847–874.
4) Franceschetti P., Marasca M. Le obbligazioni. Dogana, San Marino: Maggioli Editore. 2008.
5) Pizarro R.D., Vallespinos C.G. et al. Instituciones de derecho privado: Obligaciones. T. 1. Buenos Aires, Argentina: Hammurabi. 1999.
6) Ruiz Gallardón J.M., Ruiz Gallardón R. Derecho civil: obligaciones. Madrid, España: Estudios jurídicos "Gala". 1957.
7) Silvestre N.O. et al. Obligaciones. Buenos Aires, Argentina: La Ley. 2016.