Simultaneous performance of the parties' obligations under a Share Purchase Agreement (SPA)

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The debtor raising the defense of the simultaneous performance of the parties' obligations must raise it sufficently early in the court proceedings.

Judgment of the Federal Supreme Court of 30 September 2021

Case reference : 4A_262/2021

Facts

On March 21, 2018, two parties entered into a share purchase agreement concerning 3,500 shares of a Swiss company. The purchaser had to pay a total consideration of CHF 735,000 of which CHF 70,000 had already been paid. According to the contract, the remaining amount (i.e. CHF 665,000) was to be paid upon receiving the shares.

On December 21, 2018, the seller filed a lawsuit against the purchaser before the Court of First Instance, requesting that the latter be ordered to pay the outstanding consideration. During these proceedings, the purchaser announced that he intended to invoke his right to withhold performance: indeed – as the purchaser further provided for in his closing arguments – the seller had not fulfilled his obligation to transfer ownership of the shares, nor had he offered to do so (doctrine known as *exceptio non adimpleti contractus*). The Court of First Instance considered the purchaser's argument to be valid, however, the buyer's right to withhold performance did not justify dismissing the case. On the contrary, the Court of First Instance ordered the buyer to pay the outstanding consideration, but this judgment was conditioned by the simultaneous delivery of the shares by the seller.

Both parties challenged this ruling before the Appeal Court, which found that by asserting the *exceptio non adimpleti contractus* only in its closing arguments, the purchaser had not raised this argument in a valid manner in the proceedings (i.e. it was too late from a procedural standpoint). The purchaser was therefore ordered to pay the sale price, *without* the seller being obliged to simultaneously transfer ownership of the shares. This ruling was challenged by the purchaser before the Federal Supreme Court.

Issue

The Federal Supreme Court had to decide whether the purchaser had the right to withhold the performance of his obligation to pay the outstanding consideration on the ground that the seller had not performed his obligation to transfer the shares, even if the purchaser had raised this argument late in the proceedings.

Decision

According to Art. 82 of the Swiss Code of Obligations (SCO), "[a] party to a bilateral contract may not demand performance until he has discharged or offered to discharge his own obligation, unless the terms or nature of the contract allow him to do so at a later date". This provision establishes a dilatory defense, allowing a contracting party to withhold performance of an obligation until the other party performs (or offers to perform) the reciprocal obligation. Art. 82 CO is a provision applicable to all synallagmatic contracts, and in particular to sale contracts governed by Art. 184 et seq. SCO. It is up to the debtor to raise this defense: courts will not take it into account unless the debtor raises it. If the defense is justified, i.e. if the creditor has neither performed nor offered performance of his corresponding obligation, the court will order the debtor to perform simultaneously, i.e. under the condition of the performance of the reciprocal obligation of the creditor.

After having laid down these general principles, the Federal Supreme Court recalled a subtlety inherent to Art. 82 SCO: under the Swiss law of evidence, the party alleging a fact must generally prove it. However, this is not the case with the

exceptio non adimpleti contractus. In fact, the debtor wishing to raise this defense must only allege that the creditor has not performed and has not offered to perform his obligation (*Behauptungslast*), but he *does not have to prove* this (*Beweislast*). Once the debtor has raised this claim, it is up to the creditor to show, by any admissible means of proof, that he has in fact performed (or offered to perform) his own obligation.

From a chronological perspective, the debtor may not allege this claim (under Art. 82 SCO) at any time, but must comply with the applicable procedural requirements. According to the Swiss Civil Procedure Code (SCPC), the parties have two opportunities to bring forth facts and evidence to the proceedings: first, during the first exchange of briefs, and secondly, either during a second exchange of briefs or – if none is held – at an instruction hearing (Art. 226 para. 2 SCPC) or "at the beginning of the main hearing" (Art. 229 para. 2 SCPC). Thereafter, the parties only have the right to submit new facts and evidence under the limited conditions set forth under Art. 229 para. 1 SCO (i.e. new facts and evidence must be submitted immediately and fulfill one of the following conditions: i) they occurred after the exchange of written submissions or after the last instruction hearing, or ii) they existed before the close of the exchange of written submissions or before the last instruction hearing but could not have been submitted despite reasonable diligence).

In the case at hand, the Federal Supreme Court held – as did the Appeal Court – that the purchaser had clearly failed to submit the claim supporting his right to withhold performance of his obligation to pay the purchase price in accordance with the applicable procedural rules. In this respect, the Federal Supreme Court noted that the allegation of new facts by the purchaser during his closing arguments was procedurally overdue. That the proof of these facts must ultimately be provided by the seller does not change the outcome. Thus, the purchaser's appeal was rejected.

As a result, the purchaser was ordered to pay the outstanding consideration while the seller was not ordered to simultaneously perform his own contractual obligation (the transfer of shares) on the grounds that Art. 82 SCO was not applicable.

Key takeaway

This case highlights the risks associated with raising legal arguments at the "eleventh hour" in court proceedings. The purchaser could and should have raised the *exceptio* at an earlier stage of the proceedings. The case also provides an interesting reminder when it comes to allocating the burden of allegation and of proof under Swiss law in matters of *exceptio non adimpleti contractus*.

Comments

The *exceptio non adimpleti contractus* is a well-known defense mechanism in civil law systems. It has notably been implemented in Art. 7.1.3 of the UNIDROIT Principles of International Commercial Contracts. Although the underlying ratio for the *exceptio* may seem sensible (in a nutshell, to avoid that one party performs first and thus loses all means of pressure on his counterparty, while assuming the risk of non-performance and of insolvency of the counterparty), this case shows that the parties do not necessarily understand: *i)* what the obligation of simultaneous performance means, *ii)* what the violation of this obligation implies, and *iii)* how the *exceptio* must be invoked in legal proceedings. In order to reduce the risk of a litigation ending up before a judge with each party demanding that the other "perform first", it would be advisable for the parties to agree on the precise modalities regarding the simultaneous performance of their respective obligations in their contract. This could potentially be done by requesting that a formal closing session be held (with corresponding "closing actions" to be accomplished by the parties) in the course of which the respective obligations of each party must be simultaneously performed (see Tschäni Rudolf/Diem Hans-Jakob/Wolf Matthias, M&A-Transaktionen nach Schweizer Recht, 3rd ed., Zurich (Schulthess) 2021, § 378 ff., in particular 387).

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