

Defence of simultaneous performance

1. Simultaneous performance

- Unless the parties agree otherwise, obligations arising from a synallagmatic contract ought to be performed simultaneously
- Obligations to restore the thing sold and money received must also be performed simultaneously. Art. 549
- Where it is fair and equitable to require simultaneous performance:
 - 95Da1521 (construction of a three-storey house, top floor and 1/3 ownership of the land to be conveyed to the builder as a payment in kind for the construction work. Owner refused to convey arguing that the builder owes him money which was advanced by the owner to the builder)
 - 2001Da27784 (payment withheld until attachment is canceled)
 - 98Da13754: If the thing sold is attached (or an injunction banning its disposal is issued), the purchaser is entitled to refuse (=postpone) payment of the purchase price (until the attachment is cancelled or the injunction is discharged).
 - 2010Da11323: 買賣契約中 買主 交付 價金 前 賣主 已 將 該 物 質 押 與 債權人 賣主 應 於 價金 交付 前 將 該 物 質 押 解除 或 將 該 物 質 押 權 讓與 買主 否則 買主 得 拒絕 交付 價金 ([最高法院 1993. 8. 24. 台 92\(56490\) 台 上 意 決](#), [最高法院 1995. 3. 14. 台 94\(26646\) 台 上 意 決](#)), 買主 拒絕 交付 價金 後 賣主 將 該 物 質 押 解除 或 將 該 物 質 押 權 讓與 買主 買主 仍 得 拒絕 交付 價金 ([最高法院 2000. 2. 25. 台 97\(30066\) 台 上 意 決](#)).

2. “Defence”

- If the facts (that the counterpart has not tendered the performance) are presented, the court may not ignore them. The party shall not be held liable for late performance.
- 97Da54604 (Donga Construction): Donga (Construction company) appointed an agent (K) to negotiate land acquisition. K concluded the contract on behalf of Donga but the price was 1.5 times higher than authorised by Donga. Moreover, K received money from Donga and embezzled, rather than deliver it to the seller. Seller sues Donga and demand payment of purchase price plus delay interest on the partial payment. Donga denies liability and argues that the sale contract is not binding upon Donga. The court ruled that the sale contract is valid and binding. But Donga's liability for late payment damage in respect of the partial payment (which must be performed before the closing) shall only be payable until the closing date (when both parties' performances begin to be subject to the defence of simultaneous performance). From the closing date onward, no late payment damage is claimable. (This rule concerns the question of "substantive" entitlement of delay interest. "How much" the buyer is obligated to pay...)
- But where the defendant does not plead the defence of simultaneous performance, the court will order D's performance without mentioning the counter-performance.
90Daka25222

3. No right

- The defence, if successful, would allow the party to delay the performance without incurring liability for late performance.
- It does not create a right to enjoy the thing which is in possession of the party who has to return it.
89Daka4298
- Art 536, Para. 2 (Defence of feared risk of counter-

performance)

- 2011Da93025: The “manifest circumstances which make it difficult for the other party to perform” refer to a situation where there is a change of circumstances after the contract is concluded such as deterioration of the obligee’s creditworthiness, level of wealth or other circumstances which render the obligee’s counter-performance unlikely and, as a result, it is against fairness and against good faith to require the obligor to perform its obligation as originally agreed. Whether or not there are such circumstances must be assessed taking account of all attendant circumstances of the two parties in a comprehensive manner. The circumstances which give rise to the [obligor’s] defence of feared risk of counter-performance need not be limited to the occurrence of an event which has the objective or general nature such as deterioration of the obligee’s creditworthiness or level of wealth. The requisite circumstances need not be interpreted in a restrictive manner.

4. Comparative perspective

Concurrent condition: when the parties undertake to perform simultaneously, neither performance becomes due unless one is ready and willing to perform one’s own obligation.

Delivery and payment are concurrent conditions: Sale of Goods Act 1979, s 28

Mutuality of remedy: The court will not compel a defendant to perform his obligations specifically if it cannot at the same time ensure that any unperformed obligations of the plaintiff will be specifically performed. If, however, damages can be adequate remedy for plaintiff’s default, plaintiff may seek specific performance while he has not himself performed. Price v Strange [1978] Ch. 337 at 367-368.