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"COMPETITIVENESS AND INNOVATION IN THE KNOWLEDGE ECONOMY"

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September 22nd-23th, 2023, Chisinau, Republic of Moldova

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CONSEQUENCES OF NON-PERFORMANCE OF COMMERCIAL CONTRACTS

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Abstract: Non-performance of contractual obligations represents a fundamental aspect of civil law and contractual relationships, with significant implications in the legal and economic spheres. This issue raises essential questions regarding the legal consequences of failing to fulfill obligations assumed in a contract and how it affects the relationships between parties. The legal nature of non-performance of contractual obligations can be analyzed from various perspectives, including theories of civil liability, contractual consequences, and principles of contract law. The analysis of this concept is essential for understanding the functioning of contractual relationships and legal systems in general. In essence, the paper aims to provide a comprehensive understanding of the impact of non-performance of contracts in different contexts and to propose solutions and strategies for managing these situations, contributing to the development of knowledge in the field of contract law and business.

The aim of the paper is to analyse and discuss the legal, commercial, and social impact and implications of non-performance of obligations specified in a contract, including in the context of climate change, circular economy and sustainable development.

The non-performance of contracts in business is a current issue with significant implications in the legal and business world. It is essential for contracting parties to understand the consequences and to develop appropriate strategies to prevent and efficiently manage such situations. The study of non-performance of contractual obligations aims not only to understand its consequences but also to contribute to the improvement of the process of contract formation and management, thereby safeguarding the interests of the parties involved in commercial relationships.

Key-words: Legal consequences, Rights and contractual obligations, Force majeure, Contractual disputes, Economic impact, Circular economy, Contract clauses.

JEL Classification: K15, K20.

Introduction

In the business world, commercial contracts are a fundamental pillar of economic relations. These legal agreements between commercial parties establish clear obligations and rights, providing an essential framework for the efficient functioning of the market. However, contract enforcement is a key element, making the difference between prosperity and disappointment in a business.

Commercial contracts cover a wide range of agreements, from sale and purchase agreements to complex partnerships. They reflect trust and mutual commitment between parties and are the structures that underpin the smooth functioning of the global economy. In this context, the proper enforcement of contracts becomes essential for maintaining a balance in trade relations. Fair contract enforcement is not just a procedural issue; it is the backbone of trust between the parties. When contracts are enforced, they provide predictability and stability, providing an environment in which business can thrive. Without proper enforcement of contracts, trust erodes, the risk of litigation increases and the negative impact can be felt throughout the economy.

Non-enforcement of commercial contracts is a problem with significant consequences. From late deliveries to outright refusal to meet contractual obligations, such non-performance can trigger chains of events that damage businesses, their employees and their partners. Therefore, a thorough understanding of the causes, consequences and ways to prevent contract non-performance is essential to ensure stability and continued development of the business environment (Bénabent, 2020).

This article takes a detailed look at the consequences of non-performance of commercial contracts, both from a legal, economic and social perspective. It also provides strategies and solutions to prevent and manage this problem. The aim of this article is to assess and describe the consequences of non-performance of commercial contracts. The article aims to analyse the impact that the non-performance of a commercial contract has on the contracting parties and on the economic environment as a whole.

Analysis of the institution of non-performance of contractual obligations

Obligation is one of the most important concepts of civil law, being defined as the legal relationship between two persons, one of whom, called the creditor, has the right to require the other, called the debtor, to perform a service, i.e. to do, not do or give something. The performance of contractual obligations is one of the most important duties of the debtor, who is obliged to perform his obligations properly, according to the terms and conditions laid down in the contract. In the event of non-performance of contractual obligations, the creditor has the right to require the debtor to perform the obligation in kind, to perform by equivalent or to terminate or rescind the contract. (Băieșu A., 2011)

The exception of non-performance of the contract consists in the possibility for each contracting party to refuse performance of its obligation as long as the other party has not performed its own obligation. In the doctrine, it is perceived as a defence or a sanction available to a party who, by simply invoking the plea of non-performance, can block a legal claim by the other party (who has not performed his own obligation) to order the party invoking the plea to perform his obligation. As between the contracting parties, the main effect of this legal operation is to suspend the creditor's own obligations as a result of the plea of non-performance. The contracting party thus seeks, on the one hand, to protect himself against the very unfavourable situation he would be in if he unilaterally performed his obligation and, on the other, to compel the other party to perform his obligation. (Băieșu A., 2019)

The exception of non-performance, also known as *exceptio non adimpleti contractus* in Latin terminology, is a legal concept that refers to the situation in which one of the parties to a contract invokes the fact that the other contracting party has not fulfilled its contractual obligations, as a defence against demands or actions set in motion by the opposing party.

As regards the origin of the exception, we have pointed out that, although it was used in Roman law by the seller who could not be compelled to hand over the goods without having received payment of the price, its origin lies in canon law, originally intended as a moral sanction. Subsequently, during the 14th-15th centuries, the development of the theory of signatory relations based on the content of the contract led to the adoption of a distinction between onerous, signatory contracts on the one hand and unilateral, gratuitous contracts on the other. (Cuznetsov A., 2016) The moral consideration that led to the admission of the exception of non-performance of the contract was the application of the principle "non servanti fidem non est fides servanda", i.e. the one who claimed performance of a contract was not entitled to it, as long as he himself did not keep his word.

Then, the development of trade in the 16th century allowed for the evolution and practical recognition of the exception of non-execution. The French authors point out that the term *exceptio non adimpleti contractus* was used for the first time in 1560, and that the general application of the exception of non-execution in the contract of sale in particular already left room for an effective distinction between the suspensive role of the exception of non-execution and termination. During this period, uncertainties were invoked regarding the procedure for applying the exception and, in particular, the burden of proof (Plotnic O., Praporšic V., 2020).

The express recognition of the exception of non-execution during the 16th-17th centuries was due to the principle of consensualis and the acceptance of unnamed contracts. Thus, economic progress created new needs, such as the need to provide a guarantee for the performance of obligations. The diversity of studies devoted to the exception of non-execution gave rise to a multitude of legal foundations, but no common element of these theories was found, so that the legal nature and foundation of the exception of non-execution were still undefined. On the other hand, legal doctrine is unanimous on the effects of the exception of non-execution, given its practical applications, pointing out that it has a temporary effect and is a means of defence for the party invoking the exception, as a proportionate response to the "attack" of the other party. (Goldstein P., 2001)

In modern law, the exception of non-performance is universally recognised but controversy remains as to its basis. Thus, in continental law, the rule of reciprocity and interdependence of the parties' obligations in synallagmatic contracts is invoked as a basis, whereas in common law, the exception of non-performance is analysed alongside the termination of the contract, but does not change the causal basis of the exception of non-performance, which is linked to the same interdependence. (Căzănel M., 2013)

Non-performance of contractual obligations is a fundamental aspect of civil law and contractual relations, with significant implications in the legal and economic sphere. This issue raises key questions about the legal consequences of non-performance of obligations assumed in a contract and how this affects the relationship between the parties. The legal nature of non-performance of contractual obligations can be analysed from several perspectives, including theories of civil liability, contractual consequences and principles of contract law (Cuznetsov A., 2002).

One of the major approaches to understanding the legal nature of non-performance of contractual obligations is the civil liability perspective. According to this theory, non-performance of contractual obligations creates a basis for a civil liability claim. A party who fails to perform its obligations can be held liable for damages caused to the other party, in accordance with the principles of contractual liability. Failure to perform contractual obligations can also have significant consequences for the contractual relationship itself. This may pave the way for termination or rescission of the contract by

the aggrieved party. According to this perspective, non-performance of contractual obligations can create a situation where the contract loses its purpose or value for one of the parties, rendering it ineffective or unusable. (Augenblick, M., Rousseau, M., 2012)

The legal nature of non-performance of contractual obligations is closely linked to fundamental principles of contract law, such as the principle *pacta sunt servanda* (contracts must be respected) and the principle of equity. These principles can influence the way courts and case law deal with cases of non-performance of contractual obligations. For example, in many jurisdictions, the aggrieved party may have the right to refuse performance of its own obligations if the other party has failed to perform its corresponding obligations.

Taking a comparative approach, the legal nature of non-performance of contractual obligations may vary depending on the jurisdiction and the applicable legal system (Chibac G., Băieșu A., 2010). Some legal systems place emphasis on compensation for damages, while others place greater emphasis on compliance with the contract itself. Also, legal regulations and practices may vary in terms of how to deal with non-performance of contractual obligations.

In conclusion, the legal nature of non-performance of contractual obligations is complex and can be approached from several interlinked perspectives. It affects the balance between the contracting parties, with implications for civil liability, contractual consequences and fundamental principles of contract law. Analysis of this concept is essential for understanding the functioning of contractual relationships and legal systems in general.

Conditions and effects of the exception of non-execution

According to the Civil Code of the Republic of Moldova of 2019, the exception of non-performance (*exceptio non adimpleti contractus*) is regulated in Article 912 et seq. The exception of non-execution allows the debtor to refuse the execution of his obligation if the creditor has not fulfilled his own corresponding obligations. Below are the conditions for exercising the exception of non-performance in the Republic of Moldova (Civil Code, 2002):

- Valid contract: The exception of non-execution can be invoked only if there is a valid contract concluded between the parties.
- Existence of an improper obligation: The debtor may invoke the exception of non-execution only if the creditor has failed to perform its obligations properly or has not performed them adequately. This means that the debtor can invoke this exception only when it is obvious that the creditor is in breach of the terms or conditions of the contract.
- Coexistence of mutual obligations: The exception of non-performance applies in cases where the obligations of the parties are mutual, i.e. each party has an obligation to the other party. It cannot be invoked in the case of unilateral obligations.
- Causation: the non-performance of the obligation by the creditor must be the direct cause of the non-performance of the obligation by the debtor. The debtor must be able to show that the non-performance or improper performance of the creditor's obligation resulted in his inability to perform his own obligation.
- Prior notice: Before invoking the defence of non-performance, the debtor must notify the creditor of the breach of the creditor's obligations and give the creditor a reasonable time for performance.

- No objective or subjective impossibility: The defence of non-execution cannot be invoked if performance of the creditor's obligations is impossible for objective or subjective reasons which cannot be controlled or prevented by the creditor.
- Non-performance or improper performance: In order to invoke this exception, you must show that the other party has failed to perform or has performed improperly. This may involve delay, defective performance or no performance at all.

The exception of non-performance of contractual obligations (*exceptio non adimpleti contractus*) is a legal principle whereby a party to a contract may refuse to perform its own obligation when the other party has failed to perform the corresponding obligation. It aims to maintain a balance between the parties in situations where one of them fails to fulfill its contractual commitments. The effects of this exception can be varied and can influence the way the contract is performed or terminated.

In the legislation of the Republic of Moldova, the exception of non-performance of contractual obligations is regulated in the Civil Code of 2019, in Chapter V entitled "Non-performance of contractual obligations". This regulation provides a legal framework for situations in which a party to the contract may invoke non-performance of the corresponding obligation by the other party. The following is an analysis of the effects of the exception of non-performance of contractual obligations under Moldovan law: (Law on Consumer Protection, 2007)

- Suspension of Performance of Obligations: the party who has invoked the exception of non-performance is entitled to temporarily suspend the performance of its own obligation until the other party performs its corresponding obligation. This helps maintain a balance in the contractual relationship and ensures that neither party benefits unilaterally.
- Duty to Give Notice and Time: The party intending to invoke the non-performance exception must notify the other party of the non-performance of its obligation. It must also allow a reasonable time for it to perform its obligation. This gives the party at fault the opportunity to correct the situation.
- Right to Enforce Performance or Rescission: If the other party fails to perform its obligation within the time allowed, the aggrieved party may choose to seek either enforced performance or rescission of the contract. Termination leads to the dissolution of the contract and can be requested if the non-performance is significant and substantially affects the contract.
- Right to damages: The aggrieved party is entitled to claim damages for loss suffered as a result of non-performance of the obligation. Such damages may cover direct and foreseeable losses caused by non-performance.
- Exemption from Liability in Certain Cases: In certain exceptional circumstances, which could be qualified as a justifiable impediment (*force majeure*), the party who is unable to perform may be exempted from liability for non-performance (Regulation (EU) No. 524/2013).

The conclusion is that non-performance of contractual obligations is a complex issue that can have significant consequences for the parties involved in a contract. The effects of non-performance may vary depending on jurisdiction, law and the specific terms of the contract. However, in general, non-performance can lead to legal liability, suspension of obligations, damages, or even termination of the contract. In general, avoiding non-performance is preferable by respecting the contract and the commitments made. However, if non-performance occurs, the right approach and compliance with the law can help minimise risks and negative consequences.

The justifying impediment

In the field of contract law, the concept of 'non-performance of contract' is a situation where one of the parties fails to perform its obligations under a contract. This can be triggered by a variety of reasons, ranging from delays in performance to improper performance or even total refusal to perform obligations.

In the context of non-performance of the contract, another important concept arises, namely 'justifying impediment' or 'force majeure'. This is a special category of circumstances which may exceptionally affect the performance of the contract. A justifying impediment consists of unforeseeable and extraordinary circumstances which are beyond the control of the contractual parties and which make the performance of contractual obligations impossible or extremely difficult. (Augenblick, M., Rousseau, M. (2012))

It is important to take into account the contractual provisions and legal regulations on non-performance and justifiable impediments in each jurisdiction. In some cases, justifying impediment may exonerate the party from liability for non-performance of the contract, while in other situations, it may lead to temporary suspension of contractual obligations. Detailed analysis of the circumstances of each case is essential to understand how these concepts interact and how they may affect the rights and obligations of the contractual parties.

A justifiable impediment (or force majeure) is an exceptional and unforeseeable situation which makes the performance of a contract impossible or extremely difficult. Such circumstances are beyond the control of the contractual parties and could not be prevented or avoided by reasonable measures. The justifying impediment may include events such as wars, natural disasters, major strikes, terrorist actions, fundamental legislative changes and other extraordinary situations (Amarița A., 2006).

In order to successfully invoke the justifying impediment in a contract, certain conditions should be met:

The party seeking to invoke the justifying impediment should notify the other party as soon as possible, providing details of the event and its impact on the contract. Usually, it is also required to provide evidence of the event.

In the law of the Republic of Moldova, the term "justifying impediment" is equivalent to the concept of "force majeure" which is used in many other jurisdictions. Although the terminology may vary, the underlying concept remains the same: reference to exceptional and unforeseeable circumstances affecting the performance of a contract and exempting the parties from liability for non-performance of their obligations in such circumstances. (Civil Code, 2002)

In the Republic of Moldova, civil codes, in particular the Civil Code from 2019, regulate non-performance of contractual obligations and force majeure (justifying impediment) in several articles. Some differences may exist in terminology or in the way the concepts are formulated, but the basic principles are similar. (Băieșu S., Cebotari V., 2005)

An important distinction between justifying impediment and non-performance of obligations as mentioned in the Civil Code of the Republic of Moldova, where clear distinctions are made between

ordinary non-performance of contract and justifying impediment. While non-performance refers to the situation where one of the parties fails to perform its contractual obligations without justified reasons, justifiable impediment applies to extraordinary and unforeseeable events affecting the performance of the contract.

In the case of justifiable impediment (force majeure), the parties may be temporarily relieved of the performance of their contractual obligations or may be exonerated from liability for non-performance of the contract. This depends on the seriousness of the circumstances and how they affect the possibility of fulfilling the obligations. (Barbu V., Genoiu C., 2012)

Legal valences of Non-Performance of Contractual Obligations with a focus on Legal, Commercial, and Social Consequences in the Era of Climate Change, Circular Economy, and Sustainable Development

In today's world, contracts serve as the fundamental building blocks of economic and social relationships. However, as the global community grapples with challenges like climate change and strives for sustainable development through circular economy principles, the consequences of non-performance of contractual obligations take on added significance. This paper explores the various dimensions of this issue.

In an era defined by unprecedented challenges and transformative aspirations, the role of contracts has evolved beyond mere legal agreements. They have become the threads that weave the fabric of modern society, connecting individuals, businesses, and nations in a global tapestry of interconnected interests. Yet, the contemporary landscape in which these contractual relationships unfold is markedly different from that of previous generations. It is a landscape where the existential threats of climate change loom, the principles of circular economy beckon, and the vision of sustainable development serves as both a guiding light and a stark reminder of our collective responsibilities.

In this ever-evolving context, the consequences of failing to uphold contractual obligations take on new layers of complexity and significance. Our scientific expedition embarks upon an exploration of this complexity, aiming to dissect the multifaceted aspects of contractual commitments and their non-performance. We venture into uncharted territory, where the traditional boundaries of contract law blur into broader legal, commercial, and social realms.

The Legal Labyrinth of Climate Change Obligations

Our journey begins with the legal dimension. Climate change, a defining challenge of our times, has brought forth a new breed of contracts. These are agreements forged in the crucible of climate action, environmental stewardship, and global cooperation. They include international treaties, emissions reduction pacts, and corporate sustainability commitments. Within these agreements, the fine print of contractual obligations has profound implications. Non-performance can have cascading legal consequences, from treaty violations to corporate liability.

Consider, for instance, the Paris Agreement, (Paris Agreement, 2015) where nations pledge to limit global temperature rise. When a country falters in meeting its commitments, it isn't merely a breach of contract; it's a breach of global trust, carrying diplomatic, economic, and legal repercussions.

As we navigate further, we encounter the intricate commercial landscape. Here, business and markets are entwined with sustainability ambitions. Circular economy principles, aimed at reducing waste and maximizing resource efficiency, have given rise to a new class of contractual agreements within supply chains, product life cycles, and waste management systems. The repercussions of contractual non-performance in this arena transcend mere balance sheets. They ripple through economies and consumer choices, impacting industries and employment.

Imagine a contract within a circular supply chain, where a company commits to reusing materials and reducing waste. When these commitments go unfulfilled, the circularity is disrupted, affecting not only the contracting parties but the very ideals of a sustainable economy.(Plotnic, O., Popescu L., 2022)

The Circular Economy and Human Impact

In the depths of our exploration, we reach the heart of the matter—the societal dimension. Beyond the legalese and financial transactions, contracts profoundly affect human lives and the well-being of communities. They are the lifeblood of infrastructure development, community engagement, and environmental protection.(Vilela, N. B., Plotnic, O.,2023) Consider a scenario where a sustainable development project promises to provide economic uplift to a marginalized community. If this promise is not kept, it's not just a contractual breach; it's a disruption of livelihoods and a blow to social well-being.

And then there are the environmental implications. In the age of climate change, contracts are increasingly intertwined with environmental stewardship. Failing to honor environmental commitments can unleash ecological havoc, affecting fragile ecosystems, biodiversity, and the planet itself.

What makes our journey truly intriguing is the interplay of these dimensions. Legal consequences may lead to economic ramifications, and both can reverberate through society. Likewise, societal pressures can catalyze legal changes. As we delve deeper, we unravel the complexity of the interconnected web of legal, commercial, and social implications.

In this tapestry of complexity, we find threads of innovation, sustainability, and responsibility with the aim of exploring the legal mechanisms to foster e-democracy. (Voican M., 2023) We uncover opportunities to better align contracts with global sustainability goals, promote legal frameworks that catalyze positive change and cultivate a renewed sense of responsibility in our interconnected world.

Conclusions

We conclude that the justifying impediment provides the parties with a way of dealing with exceptional and unforeseeable events that could affect the performance of the contract. It recognizes the need for flexibility and adaptability in contractual relationships, it also helps to maintain a balance between the parties in situations where neither party is able to perform its obligations due to uncontrollable external causes. This concept protects the parties from unfair liability if unforeseeable events prevent them from fulfilling their contractual obligations. It is important to note that although it allows for the temporary suspension or discharge of obligations, the justifying impediment is not a universal "shield". Cases must meet certain criteria to be considered as a justifying impediment (Plotnic O., Praporščic V., 2023).

This paper concludes with a summary of the key findings, emphasizing the complex and interrelated nature of the legal, commercial, and social implications of contractual non-performance. It underlines the importance of aligning contracts with sustainability goals and urges stakeholders to recognize the significance of their commitments in the broader context of climate change, circular economy, and sustainable development.

As recommendations, it is necessary to take into consideration the following:

- Encourage legal systems to adapt to the changing needs of the sustainability era.
- Advocate for responsible and sustainable business practices.
- Promote community and stakeholder involvement in contract design and execution.
- Emphasize the need for a holistic approach to contractual obligations that considers their long-term societal impact.

Ultimately, the justifying impediment is a balance between the need to fulfill contractual obligations and the recognition of the reality that there are exceptional circumstances that may affect this process. With proper legal advice and an understanding of the relevant law, parties can address situations of justifying impediments in a fair and efficient way. (Pop L., 1996)

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