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Non-execution of obligations and its consequences in Albania

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NON-EXECUTION OF OBLIGATIONS AND ITS CONSEQUENCES IN ALBANIA

1) General meaning of non-execution of the obligation

The fulfillment of the obligation ⁽¹⁾ is the main function of civil legal ⁽²⁾ relationship of the obligation ⁽³⁾. If the obligations are not met, then nothing would be safe in everyday life. It is known the famous principle of Roman law, “*Pacta conventa quae neque contra leges neque dolo malo inita sunt, omni modo observanda sunt*”,⁴ which embodies the best means of fulfilling the obligations deriving from the contract.

Given that the object of the obligation is the behavior that should keep the debtor (to give something or to perform or not to perform a certain action), then if the latter does not maintain this behavior, we will have non-execution obligation ⁽⁵⁾. Of course, as the fulfillment of the obligation brings its factual and legal consequences, as well as its failure is accompanied by the relevant factual and legal consequences. While in the first case consequences are desired by the parties, in the second one can derive consequences that the parties normally do not like to happen. If the obligation is not executed, its goal is not reached, the creditor does not realize his subjective right. Non-execution of

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⁴ This principle states that: “Contracts entered into without violating the law and fraud, should be applied to every case”.

⁵ A. TRABUCCHI, *Istituzioni di Diritto Civile*. Padova, 1989.

obligations may be complete or partial ⁽⁶⁾. We will have full non-execution of the obligation, when the debtor does not fulfill at all what he owes and therefore the right of the creditor does not accomplished. While there will be partial non-execution, when the debtor fails to meet just one part of the obligation and the right of the creditor remains partially unfulfilled . Partial non-execution is the execution of the obligation out of term ⁽⁷⁾.

Referring to Article 690 of the Civil Code which provides that contracts regularly drafted is lawful forcible for the parties, we conclude that the failure of a contractual obligation, equates to the performance effects of a violation of law. What is mentioned to the contract also applies to the case of obligations arising under the contract, but not by law. Even in this case, the non-fulfillment of the obligation will be considered a violation of the law (with all following consequences). Non-enforcement of the obligation gives rise to the possibility of requesting immediate creditor addressed to the debtor to perform the obligation of that action that constitutes the object of the obligation that exists between them, in the execution of the obligation nature. Outdoor execution of the obligation is called the real execution.

If the execution (fulfillment) in the nature of the obligation is impossible, for any reason (eg: item purchased items to be delivered is destroyed), then the creditor has the right to require a cash equivalent execution corresponding compensation for the damage. As a rule, a creditor, whether in contractual obligations as well as extra ones, has the right to seek compensation of all damages suffered by the non-execution or non-execution the obligation properly (partial non-execution). This right of the creditor is only if the damage was due to non-execution and if the execution or non-execution in the proper manner has resulted due to the fault of the debtor. Exceptionally, in some cases, the debtor is liable without fault for causing the damage ⁽⁸⁾.

2) Requiring outdoor performance obligation.

In Article 476 of the Civil Code stipulates that:

“Any deficiency in the performance of duties requires the debtor to compensate the damage suffered by the creditor, unless he proves that the failure is not his fault.

In this case, the creditor has the right:

a) require outdoor execution of the obligation, particularly the delivery of the item or the execution of works, as well as compensation for damage caused by delay in execution; or

b) compensation for damages caused by the failure to enforce the obligatio”.

The reason why the parties establish among themselves a voluntary relationship obligation relates to the fulfillment of their mutual interests, of economic nature. Fulfillment of the object of the obligation according to the content of the obligation is

⁶ *Ibidem*.

⁷ Above was treated the meaning of the term of the contract and it also fits understanding what is explained here.

⁸ . A. TORRENTE – P. SHLESINGER, *Manuale di Diritto Privato*. Milano. 1994.

presumed that the primary interest of the creditor and debtor (⁹). Thus, for example: in the case of a contract for the sale of an item of movable, in principle, the buyer is interested to take the thing and to do so must pay the price, while the seller is interested to receive the award (for realize the interests of its economic profit) and therefore must deliver the item. This example maps the essential meaning outdoor performance of the obligation, where this element is seen more closely connected with the object and the content of the obligation. In the case of causing harm, outdoor fulfillment of the obligation consists in the reinstatement of what good that vulnerability (¹⁰). However, in most cases it is done by means of the payment of money. Outdoor fulfillment of the obligation related to the three components of activities that may constitute the object of obligation are:

- Giving a certain thing,
- The performance of an action by the debtor,
- Failure to perform any action by the debtor.

When it comes to the provision of an object and the debtor does not give it, then we are in front of the default and the debtor may be forced by the court (*which is set in motion by the claim of the creditor*) to deliver the item that is the subject of the relationship liability that exists between the parties. Once the creditor wins stating trial court for the debtor's obligation to deliver a certain item, if the latter again fails to fulfill his obligation, then should be applied a compulsory execution in accordance with the provisions of the Civil Procedure Code, namely Articles 601-604 of this Code.

Even when it comes to performing a particular action by the debtor in favor of the creditor and the debtor does not act, then we are faced with the default. The debtor may be forced judicially fulfill his obligation, even by means of compulsory execution. In Article 478 of the Civil Code stipulates that the obligation relates to actions that can be performed by other persons and the debtor does not execute the obligation, the creditor has the right to request to conduct himself on behalf of the debtor. For example: when the debtor is required to make a wall and does not, then the creditor can seek to make the wall by other persons on behalf of the debtor.

Also, when the debtor has committed an act that had the obligation not to commit the creditor has the right to ask to be allowed, for the account of the debtor, to eliminate what is done contrary to the object and the content of the the obligation. In this case we have failure of the obligation by performing actions unlike the case of the above coupled with the failure of certain actions (¹¹).

Outdoor performance principle of the obligation must be understood in the direction that the creditor is bound to accept execution in nature when it is provided by the debtor. Thus, the right to be recognized creditor under Article 476 of the Civil Code to require outdoor execution debtor liability and compensation for damage resulting from delay or damage claim arising from the failure to enforce the obligation, does not mean that he has the right to refuse the execution of the obligation nature, when provided by the debtor. Even if the execution of the obligation becomes delinquent, the creditor is

⁹ *Ibidem*.

¹⁰ G.H.L. FRIDMAN, *The Law of Contract. The Carswell Company Limited* Toronto, Canada, 1976.

¹¹ F. GALGANO, *Private Law*. Tirane, 2006.

bound to accept, unless such execution delay is no longer of interest to the creditor, and in this case it has the right to refuse the execution of the obligation outdoor and in its place, to seek compensation for damage arising from failure to enforce the obligation ⁽¹²⁾.

Article 476 of the Civil Code, not binding the creditor, in the event of failure to comply with the obligation by the debtor necessarily require outdoor performance of the obligation. The wording of the article implies that it is the choice of the creditor, acting in function of his interests, which are presumed to know.

3) Causal connection as a necessary condition and extra-contractual liability.

One of the necessary conditions that a person be charged for damage compensation liability as a result of the default, is the causal connection between the conduct of the person and the effect that has come from this behavior. So repercussions must be the result of the behavior of the person and the latter must have been the cause of the effect. It should be understood that the very person responsible behavior brought about the consequence and not the action of someone else.

However, be added that in some cases it is very clear causal link (*ie: when someone deliberately set fire to the car of an opponent*), in others it is not easy to determine that element. This issue is resolved by the courts on a case by case ⁽¹³⁾.

Causal Connection is an element that is essential not only for civil rights, but also for criminal or administrative. By defining the mechanism of occurrence of certain consequences, it is possible to detect the causes and further build causal relationship, which is of interest for the application of different norms that regulate and determine the type of responsibility of persons. However it should be noted that in civil law, as distinct from criminal, civil liability cases arises when there is a causal link only, without competing with the fault element, such as that provided for in Article 623 of the Civil Code, where the owner of a building or a building is liable for damages caused by the shortcomings of every other vice related to the construction or maintenance ⁽¹⁴⁾.

Causal Connection is depending on the objective elements and whenever you need to discover it, the analysis carried out, it should be objective and abstract subjective elements of the event. Another issue is then the fault of the person who, in cases where required with causal connection, viewed in unity, in order to determine the civil-legal responsibility of the person responsible.

In other words, the causal connection is seen and required in any event to cause damage, contractual or extra-contractual and affects the emergence of civil liability depending on whether it can stand alone, with no fault element or the latter is required, in order to arise the civil-legal responsibility.

4) The fault as a condition of liability for failure of duty and causing damage. Liability without fault.

¹² *Ibidem*.

¹³ See for more treatment causal connection element to cause damage institute.

¹⁴ However, the owner of the building or the construction has the right to request to persons who are liable for it, to compensate damages.

As we mentioned in other parts of this paper the fault is one of the key elements of the birth of liability, whether contractual or tort. In general we can say that the birth of responsibility by causing damage that comes from the non-fulfillment of the obligations required to subject the right to have acted with guilt. So, as a rule, the debtor is responsible only when his illegal behavior that has led to harmful consequences, is performed with guilt ⁽¹⁵⁾. If we consider the provisions of causing harm or those dealing with the consequences of non-execution of obligations, we note that the fault element is omnipresent. Thus, Article 476/1 of the Civil Code expressly stated that any deficiency in the performance of duties requires the debtor to compensate the damage suffered by the creditor, unless he proves that the failure is not his fault. As noted, in this case, unlike criminal law, civil law presumed the existence of guilt, it is sufficient to prove causal link between the default and the damage caused.

Also, Article 608 of the Civil Code provides that a person who unlawfully and with fault causes another person or damage to his property, is obliged to compensate the damage caused. *The person who caused the damage is not liable if he proves to be not guilty*. The damage is considered illegal when it is a result of the violation or infringement of interest and other rights that are protected by legal order or good morals.

Here we note that the responsibility and the burden of proof to prove guilty of no fault damage, falls on the latter and not the one who raises the claim. So in the right of the obligations, the fault of the debtor defaults or the cause of the damage is presumed until the contrary is proved.

In the second paragraph of Article 480 of the Civil Code stipulates that the debtor is guilty when, intentionally or negligently, has created circumstances that have made it impossible for the execution or when it does not take measures to stop it.

From the above it can be concluded that the debtor is at fault when the execution of the the obligation is possible and he does not carry it. Also he is to blame when the execution becomes impossible due to the fault of the debtor.

As we mentioned above, the fault is a subjective element which is determined by the man's attitude towards his behavior contrary to the law and to the impact of income, in the form of prediction or forecasting the possibility of this result and its avoidance. About fault element, it applies that we handle to causing damage, so here will turn briefly to the treatment of the aspects of liability without fault. Exceptionally fault liability, the debtor is responsible in some cases even when the execution becomes impossible through no fault of his or damage was caused through no fault of his.

These cases are :

- i. Responsibility for the liabilities for items listed in gender.
- ii. Responsibility for the fault of another person.

On responsibility for liabilities that are subject to gender-defined items, it should be noted that even if these items disappear through no fault of the debtor, because of their quality, they can be replaced with other items and the debtor has the opportunity to fulfill his obligation. For example: if the debtor is obliged to pay the creditor twenty ordinary A4 paper packs and not his fault this paper breaks from the rain, it being specified item gender, can be replaced by the debtor who can buy twenty other packages on the market

¹⁵ A. SALLABANDA. *The Law on Obligations (the general part)*, Tirane, 1962.

and fulfill the obligation to the creditor (¹⁶). Also, the lack of the debtor of money needed for the execution of the obligation can not be considered a circumstance which discharges it from liability because there is always money in circulation.

On responsibility for the fault of another person, in Article 477 of the Civil Code provides that the debtor in the execution of the obligation uses the work of third parties responsible for their actions, committed with guilt, as if they were their own. So the responsibility for another fault is responsible for the behavior of another person, which place in case the other person's guilt and no fault of the person who is considered not fulfilling the obligation. Debtor who is responsible for the fault of another person can be sued for return (regression) against the other person, if it does not come out the opposite by their agreement.

5) Losses that are awarded as a result of non-execution of the obligation

In Article 480 of the Civil Code stipulates that when the execution of the obligation becomes impossible to fault of the debtor, the creditor has the right to ask him compensation of the damage caused.

During the treatment part of the execution of obligations, we have emphasized that the primary obligation of the debtor is outdoor fulfillment of the obligation. If he does so, then the creditor has the right to require the debtor's obligation to execute in nature and the obligation to compensate the damage caused by delay or request compensation that comes from the failure to enforce no obligation.

Compensation of damage from outdoor non-execution of the obligation is intended to replace the latter, therefore it should be complete. This means that the amount of money to be paid by the debtor, must position the creditor to the property position he would be if the obligation was duly executed or unless the damage was not caused.

In Article 486 of the Civil Code stipulates that damages that should be paid by the debtor for failure of duty consists of all losses incurred by loss of property, as well as the profit that can be drawn in normal market conditions (missed profit). In reward for repairing the damage, they are part of the costs reasonably necessary to prevent or lessen the damage related to the circumstances upon which the liability of the party reasonable expenses necessary to determine the damage and responsibility as well as those that are required to find a solution outside the court to fulfill the obligation.

When the damage came from the non-execution of the obligation is triggered or supplemented by acts or omissions by the fault of the creditor, or when it has not shown due diligence to reduce this damage, the court case can reduce the amount of compensation or completely discharge the debtor from his obligation to pay (*Article 493 of the Civil Code*).

¹⁶ See as well M. J. HETEMI, *Obligations and Contracts*. Tirana, 1998; J.G. RIDDALL, *Jurisprudence*, Butterworths, 1999. A. NATHALINI, *Introduction to Civil Law of Popular Republic of Albania*, 1970; A. GAMS, *Introduction to Civil Law*, Prishtinë, 1986.

When it was decided that the creditor is paid to the non-enforcement of the obligation or to execute his delay, the court taking into account the property of the debtor, may set a different period for payment of this reward, or allow to be paid installments.

6) Delay of the debtor.

Debtor fails to fulfill an obligation searchable in due time, be deemed to be in arrears (more), unless the non-execution is the result of circumstances not related to the debtor's fault.

Debtor made by a delay notification.

It is not necessary putting in delay when:

- a) the debtor has stated in writing that he does not want to execute the obligation;
- b) has expired the period within which it will be executed obligation.

When the debtor dies and the deadline set for the execution of the obligation ends after his death, his heirs are called that are past due at the end of 15 days of written notice from the creditor.

- c) when the obligation is arising from an illegal act.

Debtor is in delay is not released from sudden failure of performance of the obligation, even if it is caused through no fault of his creditor, unless he proves that the scope of liability would be destroyed or damaged even if it was under the auspices of creditor ⁽¹⁷⁾. Loss or damage of an item got illegally, not relieve the person who received it from the obligation to restore its value.

It should be noted that the provisions of the delay provided for in the Civil Code shall only apply to those obligations that have positive character, or words that are executed to perform certain actions. In Article 483 of the Civil Code stipulates that the provisions on the delay does not apply to obligations contained omissions. Any adverse action is failure of the obligation.

The creditor may not accept the offer of the debtor who has any delays for the execution of the obligation, if it does not include the expenses of incurred damage and expenditures made during the delay, or when the creditor because of the debtor's delay has no interest for the execution liability ⁽¹⁸⁾.

However, in Article 485 of the Civil Code provides that the debtor who has a searchable credit to his creditor, may suspend the enforcement of the obligation to pay the credit, provided that between the credit and the obligation to have sufficient connection, as can be among other things, the availability of a single legal report or relationships that the parties have had regularly.

The suspension of the obligation execution can not be required when:

- a) the execution of the obligation by the other party becomes impossible due to the delay of the creditor, or if is impossible permanently;

¹⁷ On this point see A. NATHANAILI, Civil Law e Popular Republic of Albania (general part). Tirana, 1974.

¹⁸ C. GUARNIERI – P. PEDERZOLI, *Magistracy in contemporary democracies*, Tirana. 2004.

b) counterparty credit is not sequestered.

As stated above, it is concluded that the debtor is also responsible for the partial non-execution of the obligation. Partial non-execution of the obligation we have in those cases where, although the debtor has executed the obligation, this execution was flawed from the standpoint of quality, type or quantity, and when implementation is done after the deadline specified in the contract or by law.

As above it concludes that the debtor's delay causes these consequences:

- Debtor is obliged to compensate the creditor for damages caused by delayed execution of the obligation.
- Debtor has liability even when the execution of the obligations becomes impossible after delay unless exemption provided by Article 482 of the Civil Code.
- If due to delay execution of the obligation is no longer of interest to the creditor, he may refuse to accept the execution and to seek compensation of damages in the case of full non-execution of obligation.
- When the object of the obligation is the payment of a sum of money, the debtor is obliged to pay interest for the time of the delay, without the need for the creditor to prove any caused damage.

7) Delay of creditor.

Creditor is on delay when without any legitimate reason refuse the execution of the obligation by the debtor, or because of circumstances created by his fault, does not fulfill the obligation to the debtor, without which he can not execute his obligation (Article 491 of the Civil Code).

When a creditor is in delay, the debtor has the right to seek compensation for caused damage and he is released from liability if later the execution of his obligation becomes impossible, unless the impossibility of execution occurs by his fault. Cash obligations, when the creditor is in delay, the debtor does not pay interest.

During his delay creditor has no right to seek measures for compulsory execution.

In addition to Article 495 of the Civil Code stipulates that when the creditor is delayed or can not be found, the debtor has the right to execute the obligation by depositing the object to a person who carries out depositing activity or in a place that it is determined by the Court of the place of obligation execution. When the subject of the obligation are money, papers or documents with a value or valuables, they must be deposited in the bank.

With deposition the interest is interrupted.

In cases where the deposition requires large expenses, it becomes difficult or item put in deposit quickly breaks or for its nature, can not be left on deposit, the debtor, after notify the creditor, asks the court to be allowed to sell preceding item and the value derived from the sale to deposit in the bank of the state on behalf of the creditor.

When the debtor withdraws deposited item before it is accepted by the creditor, deposition is considered that is not done.

Depositor delivers creditor item only after he has paid all the expenses for the execution of the obligation.

Delay of creditor causes a series of consequences, as follows:

- The creditor is obliged to compensate the debtor for damages caused by the delay in receipt of execution.
- When a creditor is delayed, the debtor is discharged from liability if the item disappear later no by his fault.

8) The interdependence of execution of obligations in contracts with reciprocal obligations.

As we said during the treatment of the classification of contracts, bilateral contract is a contract under which the two parties have mutual obligations towards each other. Each of the parties is appeared with the quality of the creditor and the debtor against another. The two obligations arising from bilateral contract are related and dependent on each other. Execution of one obligation depends on the execution of another obligation.

In Article 487 of the Civil Code expressly provides that in the contracts with bilateral obligations, the parties must execute their obligation at the same time, unless from the contract or from the nature of the obligation it appears that one of the parties must execute its obligation before other. For example: when buying something at the store, passing the item of possession and payment of its price at the cashbox, must be at the same time.

Further to Article 488 of that Code provides that when in a contract with mutual obligations, the execution of the obligation of a party has become impossible without the fault of either party, each of them has the right to require from another execution of the obligation or damages compensation, except when by law or the contract provides otherwise. Each party has the right to require the other party to return what was given for the execution of the obligation.

Also, if in a contract with mutual obligations, the execution of the obligation of one party has become impossible, because the other party has fallen into insolvency or bankruptcy or any other circumstance happened for her fault, the other party has the right not to implement its obligations, while to be guaranteed the execution of the obligation in its favor, or require compensation for damages caused by the non-execution of the contract⁽¹⁹⁾.

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