

ORDER OF PERFORMANCE OF OBLIGATIONS

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Abstract: *The proposed article examines the treatment of the order of enforcement of obligations by parties in Romanian law. The order of performance is a key issue in contracts and can influence the rights and responsibilities of the parties involved. According to the Romanian Civil Code, the order of performance of obligations can be determined by agreement of the parties or by applicable legal provisions. Thus, the parties may expressly stipulate in the contract the order in which they are to perform their obligations. If the contract does not provide for such an order, the Civil Code provides general principles and rules for determining the priority of performance of obligations. In practice, compliance with the order of performance of obligations may be essential if one of the parties does not fulfil its contractual responsibilities. If one party fails to perform its obligation in accordance with the established order, the other party may claim non-performance of the contract and seek termination, damages or other remedies available under the law. It is therefore crucial that parties pay particular attention to establishing and respecting the order of performance of obligations in contracts. This will help to avoid disputes and provide a clear and predictable framework for contractual relations. In conclusion, the order of performance of obligations in Romanian law is an important issue in contracts. Both by agreement of the parties and by application of the general rules, the aim is to establish a clear hierarchy of contractual obligations. Compliance with this order can protect the interests of the parties and facilitate the efficient resolution of disputes in the event of non-compliance with the contract.*

Keywords: obligations, contract, disputes, agreement, good faith

1. Introduction

In the case of complex contracts, the order in which the parties perform their obligations is extremely important. In the remainder of this paper we will try to clarify some issues in relation to that order of performance.

2. The Rules

The provisions of Article 1.555 of the Civil Code “(1) Unless the parties' agreement or the circumstances indicate otherwise, to the extent that the obligations can be performed simultaneously, the parties are bound to perform them in this way (2). To the extent

that the performance of a party's obligation requires a period of time, that party is bound to perform the contract first, unless the agreement of the parties or the circumstances indicate otherwise” [1] shed the necessary light on the interpretation of contractual clauses in this respect. The placement of this law within the section regarding the justified grounds for non-performance of an obligation indicates that the purpose of this rule is to prevent non-performance of contracts by the parties. In other words, since the purpose of any contract is to 'bind' at least two parties to perform something specific, i.e. the contract

must be performed and not left unperformed, the order of performance concerns directly the legal security of the social relations embodied in the contractual instrument and the good faith of the contracting parties.

A simple grammatical interpretation of the word 'order' shows that this concept implies that contractual obligations in a particular relationship must be performed by the parties in accordance with a timetable characterized by temporality, that is the particular moments of obligation performance, but also by the various modes of performance.

The practical implications of these theoretical elements are numerous. The sequence of contractual obligations performance determines both the parties' future conduct in the performance of their agreements and their planning of their legal relations with third parties. As we shall see below, a practical implication also stems from the way in which this phasing is understood by third parties, including the courts or arbitral tribunals, since it is these institutions which will be called upon by the parties in the event of a conflict to consider and decide on the liability caused by non-performance or late performance and on the sanctions or remedies to be taken.

Firstly - the legal security referred to above remains a form without content in the absence of clear, predictable and stable rules to determine in one form or another the legal relations between persons. When the contract parties, in their capacity as subjects of rights and obligations coming to a common agreement through the conclusion of a contract, lay down in the terms of the contract certain obligations to be performed in a certain series and in a certain way, they merely contribute to that legal security. By their own common action, the parties shape their framework of obligations, the order of performance of the framework elements being the network

which 'links' the obligations. By putting in order the obligatory content of the contract, a certainty of future benefits is created for each party to the contract, a certainty which is reinforced by the means of protection which the courts, whatever their nature may be, may order in favor of the party affected by non-compliance with this order.

Secondly - good faith, this principle of civil law which ensures that the legitimate interests of one party are respected by the other party, is guaranteed both by compliance with the undertaken obligations and by respect for the order in which they are performed. In other words - the contract contains not only the totality of obligations, but also the order in which they are performed. The performance of contractual obligations in another order than the one laid down constitutes an abuse of law in the same way as in the case of a separate obligation, either explicitly stated in an individual clause or explicitly stated in a number of clauses. The order of obligation performance stated in a contract has the practical effect of proving fairness in the cooperation between the parties. Neglect or willful disregard of the order of performance proves - on the contrary - the manifestation by one party of an anticompetitive interest, even the alteration or extinction of the common interest which led to the creation of the contract.

Given that the first source of the order of obligation performance of a contract that the Article 1.555 of the Civil Code provides us with is the contract itself, before analysing this direction, we will briefly review the concept of obligation, the characteristics of this legal institution - source, object, content and term. We will also classify contractual obligations according to criteria such as nature, creditors and debtors, performance, etc. Contractual obligations are legal relationships resulting from negotiation (reaching a common agreement on a common object to be fulfilled) and

conclusion of the contract by the parties (fulfilment of the agreement of will). This manifestation of the willingness, freely expressed as a result of common consent, is to produce legal effects. Each of the contractual obligations, expressed in the terms of the contract, can be determined by the parties, as well as the assembly - the contract. As the contract must not lead to a breach of the law or public policy, its elements - the contractual obligations - must not exceed these limits. The subject matter of contractual obligations is represented by a more or less concrete, i.e. determined or determinable performance (to give, to do or not to do, each being possible, lawful and moral). The content of the obligation consists of what the parties have undertaken to perform in relation to the expectations of the other party. This content is made explicit by the wording of the contractual terms, but also by the applicable rules of law, that is the elements of law which form the limits of performance of the contractual obligations, but also of the contract as a whole, as we have already seen. Of course, certain contractual obligations, and therefore also the corresponding clauses, are more important for the contract than others, the most important being those which are essential to the parties' understanding. Another characteristic of contractual obligations is their term, meaning the time moment when they become due or cease to have effect. Periods may be express or tacit, fixed or variable. At the end of the list of characteristics of contractual obligations, it should be noted that they must not only be within the limits of the law but must also comply with principles of contract law such as the binding force of the contract, the relativity of the effects of the contract, contractual good faith, etc. A second classification of contractual obligations can be made according to the following elements - the nature of the performance which is the subject of the obligation

(transfer of a right in rem, performance of a certain activity or, on the contrary, refraining from a certain action), the number of creditors and debtors, which makes the obligations simple, alternative, cumulative optional, divisible or indivisible, joint and several, etc., the manner of performance - according to this criterion the obligations are pure and simple, subject to a time limit or condition, with obligations, etc. All these types of contractual obligations not only demonstrate the diversity of this legal institution, but also show the difficulties involved in performing them in a particular order.

Returning to the provisions of Article 1.555 of the Civil Code, we must establish what the general rule is and what are the exceptions to it. "As is clear from the first paragraph of this civil rule, the rule refers to the simultaneous" [2] performance of obligations. This rule is often found in practice but almost only in relatively simple contracts, such as sale-purchase at a market or fair (*do ut des*), so it is unlikely to be encountered in the case of complex agreements. As can be seen from the wording of Article 1.555 of the Civil Code, this rule is permissive, but it is also conditional. It cannot be regarded as absolute, as the will of the parties can be derogated from in the form of contractual clauses or on the basis of "circumstances", a concept to which we shall return below. In the absence of exceptions, the persons interpreting or applying the contract, whether the parties to it or the judge in a contractual liability dispute, for example, are bound by the premise of simultaneity in the performance of obligations. A hypothetical situation to see how these provisions are applied in practice might be the following - a debtor has several more or less similar obligations to his creditor, but his resources at the time do not allow him to perform them all simultaneously. In such cases, the debtor will perform the

obligations in the succession given by the contract. We do not rule out the possibility of another agreement between the parties precisely in order to establish a different order of performance. The judge may also establish by judgment another legal criterion for determining the order, unless the parties' agreement binds him irrevocably by a mandatory clause. In this respect, the judge could choose the legal institution of imputation of payment unless the contract has its own clauses for this operation. Thus, "Civil Code art. 1.506. - (1) Payment made by the debtor of several debts to the same creditor which have the same subject-matter shall be set off against them in accordance with the agreement of the parties. (2) In the absence of agreement of the parties, the provisions of this Section shall apply. (1) A debtor who owes more than one debt in respect of the same kind of property has the right to indicate, when making payment, the debt which he intends to enforce. Payment shall be charged first against expenses, then against interest and finally against the principal. (2) The debtor may not, without the consent of the creditor, charge payment against a debt which is not yet due in preference to a debt which is due, unless it has been provided that the debtor may pay in advance. (3) In the case of payment by bank transfer, the debtor shall make the charge by making the appropriate entries on the payment order. Art. 1.508. - (1) In the absence of an indication by the debtor, the creditor may, within a reasonable time after having received the payment, indicate to the debtor the debt against which it is to be set off. The creditor may not set off payment against a debt which is not due or which is in dispute. (2) When the creditor gives the debtor a discharge receipt, he is under a duty to set off against that receipt. Art. 1.509. - (1) If neither party submits the imputation of payment, the following rules apply in order: a) payment shall be imputed first to debts which have fallen due; b)

unsecured debts or those for which the creditor has the least security shall be considered discharged first; c) imputation shall be made first to debts which are more onerous for the debtor; d) if all the debts are equally due and equally secured and onerous, the older debts shall be discharged; e) in the absence of all the criteria referred to in lit. (2) In all cases, payment shall first be charged against legal and enforcement costs, then against instalments, interest and penalties in the chronological order in which they fall due, and finally against the principal, unless the parties agree otherwise" [3]. All this points to one idea - the legislator has regulated in favour of the creditor, who is the protected party; the interpretation of the rule according to its purpose is in favour of the creditor of the obligation. The creditor should not be exposed to the arbitrary will of his debtor, nor should the debtor be confused as to what obligations he has to perform and when, and thus, the contractual balance is ensured.

3. Exceptions

Hereinafter, we will discuss exceptions to the simultaneous enforcement rule.

The first exception arises from the wording "Unless the parties' agreement (...) indicates otherwise". Such an exception arises where the diligent creditor has negotiated an express contractual clause in an agreement providing for a certain order of performance. A good example of such provisions are contractual clauses of the "solve et repete" [4] type. A solve et repete agreement is one in which the debtor undertakes to satisfy a monetary debt before suing the creditor. The use of this type of contract or clause is intended to ensure that contractual obligations are enforced as quickly and firmly as possible, but also to avoid lengthy disputes involving substantial costs. The most appropriate model for a "solve et repete" agreement is that between a landlord and his tenant. If the tenant

decides that the landlord has not provided the expected living conditions or has caused damage, he cannot refuse to pay the rent until the disagreement has been resolved by a court. Thus, when there is such a clause in the lease contract, the tenant must first pay the rent and then claim damages in court. Another example is a supply contract, an agreement between a supplier and a recipient of services or products. The beneficiary who is unsatisfied with the quality of the services or products supplied can withhold the payment until the dispute has been clarified by a magistrate. The recipient must first pay the invoice issued by the supplier and then seek possible compensation. Solve et repete arrangements have the benefit of anticipating breaches of obligations by parties who might take legal action on flimsy pretexts to delay or to evade payment. Moreover, these agreements attract and educate amicable behavior and mutual understanding between the parties, who become more involved in resolving potential problems by reconciliation. Solve-and-repeat agreements also have drawbacks, such as the possibility of determining financial hardship for the debtor of an advance payment, even though he considers it to be undue or arbitrarily calculated. Equally, such agreements can give rise to perfidious habits on the part of the party accepting the advance payment, a party that could gain from the situation created by not performing its obligations adequately.

The second exception arises from the wording “Unless (...) the circumstances indicate otherwise”. The term “circumstances” has a general meaning in this rule, it refers both to the factual situation and to the relations between the parties, and no legal meaning is to be sought for this word, the interpretation is for the judge in case of dispute. If the state of facts, the “circumstances” in the broadest and most general sense, are proved by the means legally accepted by the procedural

provisions, the relations between the parties, which may be pre-contractual but also develop during the contract, are proved by certain customs. “Civil Code, Art. 1. - (1) The sources of civil law are the law, customs and general principles of law. (2) In cases not provided for by law, customary law shall apply, and in their absence, legal provisions relating to similar situations, and where there are no such provisions, general principles of law. (3) In matters governed by law, customary law shall apply only in so far as the law expressly refers to it. (4) Only customs in accordance with public policy and morality shall be recognised as sources of law” [5]. Such customs may require one of the parties to perform its obligations first. The party who is bound first will not be able to plead non-performance in his favour. The examples are prosaic - payment of the restaurant consumption is made only after consumption [6].

4. Special situations

In the following we will deal with the consequences of failure to comply with the order of obligation performance. Regardless of whether this order is given by a legal provision or by the parties' agreement, its importance is essential to the legal relationship between the parties, especially in the case of those of a signallagmatic nature. While in the case of a contract with simultaneous performance, such as the sale and purchase of goods of small value, the consequences are obvious - the seller does not receive the money if he does not give the goods to the buyer - in the case of contracts with successive performance, such as leasing, or alternative performance, such as an option contract, the consequences of failure to comply with the order of performance are serious. In general, if the order is not respected, the creditor may lose various rights due to forfeiture or limitation periods, but may also suffer moral or material damage, resulting from delays in expected

performance. The debtor, the other party to the legal obligation, may suffer from the payment of either moratory or compensatory damages. The most serious liability of the debtor would be termination of the contract by the dissatisfied creditor, followed by a claim for damages based on culpable non-performance or late performance.

Another contractual element affected by the non-performance of obligation in the order agreed by the parties is the precise determination of the decisive moment for any delay in the performance of a particular obligation in their succession. Depending on this moment, the party, other than the one who must perform his obligation at that moment, is entitled to raise the exception of non-performance provided for in Article 1.556 of the Civil Code –“(1) Where obligations arising under a contract of a signatory are due and payable and one of the parties fails to perform or offer to perform the obligation, the other party may, to an appropriate extent, refuse to perform its own obligation, unless it is clear from the law, the will of the parties or custom that the other party is obliged to perform first. (2) Performance may not be refused if, according to the circumstances and having regard to the minor importance of the non-performance, such refusal would be contrary to good faith” [7]. Thus, in a lease contract, if the lessor does not hand over the property to the lessee, the latter is entitled not to pay the rent. Another example from a contract of a more complex type is the following - in some cases it is common for the work provided in work contracts not to start until the beneficiary of the work has made an advance payment to the general contractor. The obligation to make the advance payment may be written into the contract or may be inferred from pre-contractual negotiations between the parties, from their previous conduct, such as the existence of customs between them or from adherence to some standard form of contract, such as one of the contracts issued

by FIDIC [8]. Therefore, in order to avoid such consequences, it is in the interest of both parties not only to perform the obligations undertaken, but to perform them in the order undertaken.

Even the nature of the contract may be decisive for the order of obligation performance contained therein. In such a situation, not only what is explicitly stated in the wording of the contract's content is decisive for interpretation, but also what reveals the purpose of the contract and the common interests of the signatory parties.

A special situation is that of contracts containing suspensive or resolutive clauses. These are essential for the performance of the obligations of one or other of the parties. In these special situations, the order of performance is determined by conditions of the upcoming realization and of the uncertainty of an event. It is this event on which the generation or maintenance of the benefits of the obligation in question depends. A special exception is in cases where the resolutive condition has retroactive consequences if fulfilled, so that the debtor is subject to enforcement. As in the previous cases, the order of enforcement depends on the nature and content of the contracts with a resolutive condition. From the time of the conclusion of the contract until the fulfilment of the resolutive condition, the signatory parties are bound to perform the obligations assumed by the agreement. The consequences are as follows: first, if one of the parties fails to perform its obligations or performs them poorly, the other party may request either compulsory enforcement of the agreement or its termination for non-performance; second, if the resolutive condition is activated, the contract no longer has the intended effects and the parties must pay everything they have agreed to under it.

Another special case is that of contracts containing penalty clauses for late performance of one party's obligations. The penalty clause is a procedure to safeguard

the creditor's interest. In such special situations the penalty agreed between the parties to the contract for failure to perform on time is determined by the order of performance.

There is a possibility that in certain situations the parties may derogate from the general principles of ordinary contract law by the order of obligation performance of a particular contract. Such derogations are found in administrative contracts, such as those for the public procurement of goods, services and works, concessions and public-private partnerships. Contracts of an international nature are another exception to the above.

5. Conclusions

The order of performance is an important aspect of contracts, which can influence the rights and the obligations of the parties, as

well as the arrangements for foreclosure or dispute resolution. According to Article 1555 of the New Civil Code, the general rule is that obligations are to be performed simultaneously if this is possible and not contrary to the parties' agreement or the circumstances. Otherwise, the parties may establish by contract a different order of performance, depending on the nature of the performance or other criteria. If one party fails to perform its obligation within the time limit, the other party may invoke the non-performance exception or request termination or rescission of the contract, as the case may be. The order of performance of obligations must therefore be clear and respected by the parties in order to avoid conflicts and to ensure the proper functioning of the contractual relationship.

References List

- [1] Romanian Civil Code–Law no.287/2009, Monitorul Oficial no.505/15.07.2011, art.1555
- [2] Pop L., Popa I.F., Vidu S.I. - Elementary Treatise on Civil Law - Obligations ed. Universul juridic Bucharest, 2012, page 272
- [3] Romanian Civil Code–Law no.287/2009, Monitorul Oficial no.505/15.07.2011, art.1506,1508,1509
- [4] Mirror B., Business Law. General Theory. Contract, Universul Juridic Publishing House, Bucharest 2012, page 412
- [5] Romanian Civil Code–Law no.287/2009, Monitorul Oficial no.505/15.07.2011, art.1
- [6] Pop L., Popa I.F., Vidu S.I. - Elementary Treatise on Civil Law - Obligations ed. Universul juridic Bucharest, 2012, page 27
- [7] Romanian Civil Code–Law no.287/2009, Monitorul Oficial no.505/15.07.2011, art.1556
- [8] <https://www.fidic.org/>, Fédération Internationale des Ingénieurs Conseils, International Federation of Consulting Engineers.