CONTRACTUAL LIABILITY

Mariana RUDĂREANU, Lecturer Ph.D.
Faculty of Law and Public Administration, Bucharest
Spiru Haret University

Abstract

Any obligation entitles the creditor to claim the debtor to fulfil accordingly the performance he is bound to. An improper or delayed performance or the failure to perform by one party causes the other a prejudice, therefore entitling the latter to claim the former damages equivalent to the prejudice suffered.

Key-words: *contractual liability, damages, prejudice, wrongful act, default, assessment*

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1. Concept and regulation

Contractual liability involves the debtor's obligation to compensate the creditor for the damage caused following the failure to perform or the improper or delayed performance of his contractual obligations.

In the Civil Code, tort liability is addressed separately, while contractual liability is stipulated in the obligation effects section along with the damages. Therefore, according to doctrine, damages are a possible aspect of the performance of the obligation, by equivalent, when the performance in kind is not possible.

There are two types of damages:

1) *compensatory damages* – the equivalent of the prejudice suffered by the creditor following the debtor failing to perform or partially performing his obligations;

2) *moratory damages* – the equivalent of the prejudice suffered by the creditor following the debtor performing his obligations with delay. This type of compensation can be cumulated with the performance in kind, while the compensatory damages are meant to replace the performance in kind.

According to the provisions of the Civil Code, the following conditions must be met in order to have contractual liability:

- the wrongful act resulting in the debtor failing to perform his contractual obligations;
- the prejudice;
- the causal relation between the wrongful act and the prejudice;
- the debtor's default.

At European level, the contractual obligations are governed by the provisions of the Convention of Rome of 1980 on the enforceable act for contractual obligations as well as of Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the enforceable act for contractual obligations (Rome I).

2. **Conditions for awarding damages**

The prejudice means the harmful patrimonial or non-patrimonial consequences deriving from the infringement by the debtor of the creditor's right to claim damages, through the failure to perform his obligation / obligations.

This condition is stipulated in article 1082 of the Civil Code, according to which the debtor shall be bound to pay damages "if appropriate".

In the absence of the prejudice, the creditor's action for damages shall be dismissed.

The prejudice is the result of the debtor's wrongful act consisting in the failure to perform or the improper performance of his obligation.

The burden of proof in terms of the prejudice lies with the creditor, except for the cases in which the extent of the prejudice is established by law (for example, in case of pecuniary obligations when the law sets the legal interest as compensation).

The wrongful act, a consequence of the violation of the obligation, is specific to the contractual liability.

Unlike tort liability, which operates as a result of the failure to perform an obligation not deriving from a valid contract, the contractual liability operates in case of the failure to perform a contract-based obligation.

The wrongful act may take various shapes, such as:

- the improper performance of the obligation;
- delay in the performance of the obligation;
- the partial performance of the obligation;
- the failure to perform the obligation.

The causal relation between the wrongful act and the prejudice

Pursuant to article 1086 of the Civil Code, the damages shall only cover the direct and necessary consequence of the failure to perform.

The debtor's default is an element of the subjective side of the offence, translating in the fact that the debtor is responsible for the failure to perform his obligations or for the improper or delayed performance.

As a rule, until proven otherwise, the debtor is presumed to have failed to perform his obligations.

In this respect, we have three situations, as follows:

- in case of negative obligations ("to omit"), the creditor shall be bound to prove the act committed by the debtor;
- in case of positive obligations ("to do" and "to give"), the creditor must prove the existence of the claim; if he succeeds in doing that, the debtor is presumably responsible for the failure to perform his obligation, until he proves the contrary.

The debtor shall be cleared only if he proves that the failure to perform is a result of a fortuitous event, force majeure or the creditor's default.

The extension of the term by which the debtor can perform his obligations

The creditor claims the debtor to perform his obligations.

According to article 1079, paragraph 1 of the Civil Code, in case of positive obligations („to do" or „to give"), the debtor shall be notified by the Court of Law located in the territorial area in which he resides that the term by which he can perform his obligations has been extended. This must take one of the following shapes:

- *notification by an enforcer*;
- *writ of summons*.

The term by which the debtor can perform his obligations is extended de jure in the following cases:

– when the law expressly stipulates that (article 1079 (1) of the Civil Code); in case of pecuniary obligations, the law sets the legal interest as compensation;

– when the parties have expressly agreed that the debtor cannot perform his obligations upon maturity (article 1079 (2) of the Civil Code), the term is extended by will of the parties;

– when the obligation, by its nature, could only be performed within a determined interval and the debtor has failed to perform it within the respective period of time (article 1079 (3) and article 1081 of the Civil Code);

– in case of continuing obligations, such as the obligation to provide power or water;

– in case of failure to perform the negative obligations (article 1072 of the Civil Code).

The extension of the term by which the debtor can perform his obligations has the following legal effects:

- from the date he is notified on the extension of the term, the debtor is bound to moratory damages;
- from that date, the creditor is entitled to compensatory damages;
- when the obligation consists in giving an individually-determined asset, the risk is incurred by the debtor, as a result of the extension of the term.

3. **The conventions amending the contractual liability**

The parties may include in the contract derogatory rules in terms of liability or may sign an additional deed in this respect.

The clauses may cover:

- exemption from liability;
- restriction of liability;
- aggravation of liability.

4. **Damage assessment**

Judicial assessment

The assessment of damages by the Court is stipulated in articles 1084-1086 of the Civil Code, as follows:

- upon setting the damages, the Court will consider both the actual prejudice suffered by the creditor and the profit he could not achieve;
- as a rule, the debtor shall be bound to recover only the foreseeable damages upon concluding the contract;
- the debtor shall be bound to recover only the direct damages resulting from the failure to perform.

Legal assessment

The legal assessment operates in case of the prejudice resulted from the failure to perform a pecuniary obligation.

In compliance with article 1088 of the Civil Code *in case of obligations covering a certain amount of money, the damages for failure to perform can only result in the legal interest, except for the special rules enforceable in trade relations and fidejussion. The creditor shall be entitled to these damages without being held to prove the existence of the prejudice; the damages shall be established the day of summons, except for the cases in which the interest is set by law.*

The legal interests for pecuniary obligations shall be established by Government Ordinance no. 9/2000, as amended and added by Act no. 356/2002.

Conventional assessment

The damages can also be assessed by will of the parties. They include a clause in the contract, called ***penalty clause***.

The penalty clause is *the ancillary agreement by which the parties predetermine the equivalent of the prejudice suffered by the creditor following the debtor failing to perform, improperly performing or performing with delay his obligations.*

The penalty clause has the following legal features:

- it is an ancillary agreement;
- it has a practical value, for it predetermines the value of the damages;
- it is legally binding;
- it operates solely when all the terms for damages award are met.

Due to its conventional nature, the penalty clause is meant to predetermine the amount of the damages to be suffered by the creditor, therefore the Court shall only ascertain whether or not the performance has been fulfilled under the terms of the contract. This means that the Court cannot claim the creditor referring to the penalty clause to prove the prejudice suffered.

In practice, the Courts have in view that "the penalties stipulated by the parties in the loan agreement operate as a penalty clause set for the delayed reimbursement of the amount borrowed.

REFERENCES

Chivu, Gheorghe. "Discussions about the Legal Interest, in light of New Regulations." *Law Journal* no.5 (1999): 44-49; Țuca, A. Iuliana. "Legal Regime of Interest in the Loan Agreement, in light of the New Regulations contained in Ordinance of the Government no. 9/ 2000. *Juridica Journal* no.6 (2000): 28-31; Popescu, C. Liviu. "Establishment of Legal Interest Level. in light of the Regulations of Ordinance of the Government no. 9/ 2000, approved with amendments by Law no.365/ 2002 and Law no. 422/ 2002." *Law Journal* no.10 (2002): 3-16.

Ciutacu, Florin, and Cristian Jora, *Civil Law. The General Theory of Obligations*. Bucharest:Themis Cart, 2003. p. 385-386.

Corhan, Adriana. *Compensation by Cash Equivalent.* Bucharest: Lumina Lex,1999. p. 73-80.

Eliescu, Mihail. *Tort Liability.* Bucharest: The Romanian Academy, 1972. p. 7.; Albu, Ioan. *Civil Law. The Contract and Civil Liability.* Cluj-Napoca: Dacia, 1994, p. 235.;

Law no. 356/ 2002 for the approval of Ordinance of the Government no. 9/ 2000 on the Legal Interest for Financial Obligations, published in The Official Journal of Romania no. 425 of 18 June 2002.

Liviu. *Treaty of Civil Law. The Obligations*, 1st. vol., "The General Legal Regime". Bucharest: CH Beck, 2006, p. 339.

Ordinance of the Government no. 9 / 2000 on the Legal Interest for Financial Obligations, published in The Official Journal of Romania no. 26 of 25 January 2000.

Pop, Liviu. w*ork cited*. p.348; Toma, Mircea. *Civil Law. The General Theory of Obligations.* Bucharest: Argument, 2000. p.347. Filipescu, P. Ion, and Andrei I. Filipescu. *Work Cited.* p.206; Stătescu, Constantin, and Corneliu Bîrsan. *Work Cited*. p.357; Dogaru, Ion, and Pompil Drăghici. *Civil Law. The General Theory of Obligations.* Bucharest: All Beck, 2002. p. 455; Ciutacu, Florin, and Cristian Jora, w*ork cited.* p.388.

Stătescu, Constantin, and Cornelius Bîrsan, *Civil Law. The General Theory of Obligations.* Bucharest: All Beck, 2002. p. 349.

"The Supreme Court, Civil Section, Decision no. 625/ 14.03.1984", in Ioan Mihuț. *Repertory of Practice in Civil Matters of the Supreme Court and other Courts for the Years 1980-1985.* Bucharest: Scientific and Encyclopedic Publ.,1986. p.82.

"The Court of Appeal of Bucharest, the 4th.Civil Section, Civil Decision no. 3154/ 1999." Collection of Legal Practice (1999): 43.