

## Exercising the Exception of Contract Non-Performance in the Extrajudicial Area

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### Abstract

*The exception of contract non-performance implies that the person exercising it is the debtor of a due obligation and that s/he has no other reason to refuse to perform his/her contractual obligation than the other party's refusal to perform its correlated obligation. Therefore, exceptio non adimpleti contractus is a preventive remedy, i.e. it prevents the situation where one of the contracting parties performs its own obligation and can no longer obtain anything from the other party.*

**Key words:** contract, non-performance, exception, co-contractant, excipiens.

**J.E.L. Classification:** K

### 1. Introduction

By directly invoking the exception of non-performance between the contracting parties, without court intervention, there is achieved the protection of the party that has performed its contractual obligations in good faith or that is willing to perform them. Having the right to refuse to perform its obligations, the debtor, who is at the same time a creditor, may avoid the eventual concurrence of the other creditors of the co-contractor.

### 2. The Exception of Contract Non-Performance

In the extrajudicial area, based on the reciprocity and interdependence of obligations in synallagmatic contracts (which makes each reciprocal obligation to be the legal cause of the other), it has been established that a specific effect of these contracts is the exception of contract non-performance. This is a defense means available to the party that is required to fulfill its obligations, when the other party that requests this performance did not fulfill its own obligations.

This "exception" has a content and meaning that does not bring it closer to the similar notion of civil procedural law or that of material civil law. It is a specific sanction of the fact that the party claiming the performance of the obligation by the co-contractor has failed to perform its own obligations. In this case, the exception is invoked directly between the parties, without court intervention, so that it can also exist outside a trial.

In recent legal literature, it has been argued that the exception of non-performance, together with the resolution and the forced execution in nature, are remedies for contract non-performance, consisting of the means available to the creditor in the event of the debtor's default (the creditor's rights in case of non-performance). The idea of "sanction" should be abandoned because it is not found in the new Romanian Civil Code regulation (Popet *al*, 2012, pp.254-255, Căzănel, 2013, p.18). Thus, the use of the term "remedies" is consistent with both the European and international coding trend and the current doctrine (The term is found in all European and international regulatory proposals, as well as in all international instruments on contractual private law: UNIDROIT Principles; Project of the European Parliament and Council on the European regulation on uniform sales law; Pop *et al*, 2012, p.256 show that in the previous Romanian Civil Code, the regulation of remedies was brief and insufficient: the regulation of the resolution was too broad

(art. 1020-1021 of the Civil Code, 1865), the unsystematic regulation of damages, separated from the criminal clause and in conjunction with the forced execution in nature, as well as the complete lack of the principal rule of the exception of non-performance).

It can be concluded that the notion of "exception" is not only specific to procedural law, but it can also be found in substantive law, as it is used with multiple meanings, in the various branches of law. At the same time, the court may fail to rule on the exception of non-performance when the party to a synallagmatic contract invokes it, but the other party does not refer the court, claiming that its invocation has been abusive. For these reasons, it is clear from the case-law and the doctrine that the exception of non-performance as a defensive and provisional measure must meet two conditions: the existence of reciprocal and exigible obligations and the good faith of the party that invokes it, as already mentioned above.

By definition, the exception of non-performance implies that the person exercising it is the debtor of a due obligation and that it has no other reason to refuse to perform its own obligation than the refusal of the other party to perform its correlative obligation (Deleanu, 2002,p.342) . Therefore, the exception of non-performance is a preventive remedy in the sense that it prevents the situation where one of the contracting parties performs its own obligation and can no longer obtain anything from the other party. The preventive nature is even more evident in the case of the anticipated exception of non-performance (Pop *et al*, 2012, p.277have shown that anticipating the risk of performance by the co-contractor entitles the party to suspend the performance of its own obligations).

Also, as a form of private justice and as a means of constraint of the other party, the exception of non-performance implies the good faith of the one that invokes it and, in the alternative, a certain degree of gravity of the non-performance and the need for a balance between the non-performance of contractual obligations (Terré *et al*, 2005, p.617; Larroumet, 2007, p.808; Malecki,1999, p.217; Bénabent, 2003, p.256; Cabrillac,2002, p.123; Căzănel, 2016, p.7)Vasilescu, 2007, p.517 shows that "the excipiens must be honest and that s/he must calculate not only the weight of his/her refusal to pay his/her own debt, but also the importance of the obligation s/he has not performed").

In this respect, in judicial practice (C.S.J., s.com., dec. nr. 1353 of 5 March 2003 in Cucuet *al*,2006, p.74-77) it was stated that "the invocation of the exception of non-performance of the commission contract by the principal, after the partial payment of the commission and the receipt of the price of the contract that was the commission object, does not produce legal effects as long as the commissioner has fulfilled its mandate and the legal acts concluded by the commissioner with third parties produce their effects on the principal. Therefore, the principal cannot refuse to pay the due commission".

Thus, the exception of non-performance can be invoked between the contracting parties by the entitled party in its own power without the judge's intervention and without delaying the debtor, because in this case contract cancellation is not required; only its effects are suspended. Therefore, it produces its effects directly between the parties without the need for a court decision, since it is sufficient to oppose it to the party claiming the contract performance (Pop, 2009, p.720).

It is also noteworthy that its exercise is not subject to any formality. The Romanian legal literature is unanimous in considering that the invocation of the exception of contract non-performance cannot be conditioned by the debtor's delay because the exception is the simplest and most effective means of defending the party invoking it, being also a means of pressure on the other party.

In accordance with the doctrine, we consider that the delay of the co-contractor is not decisive for invoking the exception of contract non-performance, even if the effect obtained by using this defense means consists in suspending the binding force of the contract. Moreover, the party using the exception of contract non-performance may not be required to pay moratory damages for the delay in the performance of the obligations owed to the other party. Between the contracting parties, the main effect of the exception of non-performance is the suspension of the performance of the obligations by the excipiens until the date when the other contracting party performs its own obligations, which in no case constitutes a delayed performance of those obligations.

Thus, it is not obligatory for the debtor to be delayed, except for a contrary clause. In the French literature, it was considered that this entails secondary issues (Maurie *et al*, 2010, p.475). In this respect, it has been argued that, however, the debtor's delay is useful in establishing the non-performance justifying the exception and the good faith of the party invoking it, but it is not a precondition for the exercise of the exception of contract non-performance (In case-law, Cass.com., 10 décembre 1979, Bull.civ.IV, nr.327 cited in Malaurie *et al*, 2010, p.475 ruled: "noting that Somechapp is debtor with significant sums which should have been paid to Elf Distribution for a long time in the performance of the contract connecting them, the court of appeal, in order to release the latter, which opposed the former the exception of the non-performance of its correlative obligations should not have required a prior delay". In the present case, Elf Distribution had promised Somechapp the annual supply of domestic fuel; then, since it has not been paid for a long time, Elf Distribution has notified the contractor by registered letter that it decided not to supply it again from the next day; it was pertinently and fairly determined that it had the right to suspend the supply contract).

This aspect reveals that the exception of contract non-performance, as already mentioned, is a simple refusal to perform, which is a tool of private justice, since the debtor refuses to perform an obligation incumbent upon it, without prior judicial authorization (Vasilescu, 2007, p.517). The decision to suspend the performance of its own obligation belongs to the debtor as its creditor fails to fulfill its own obligations. Therefore, the debtor assumes a risk that the judge will control a posteriori.

As mentioned above, the other party that is opposed the exception of contract non-performance can appeal to the court, claiming that the excipiens was not entitled to refuse the performance. In this case, the court will control the exercise of this exception. In order to avoid any confusion, we point out that this makes the difference between the exception of non-performance and contract rescission, which is usually decided by the court and operates under a final and irrevocable court decision. The explanation is that the exception of non-performance is a preventive means, and the resolution is a remedy (Pop, 2009, p.720).

The advantages of invoking the exception of non-performance are as follows: it avoids the risk of insolvency of the other party and, therefore, the non-performance of its obligation; it is a means of putting pressure on the other party, in order to make it, in its turn, to perform its obligation. Thus, it is an indirect means of obtaining the contract performance in kind.

As mentioned above, the reciprocity and interdependence of obligations, the fact that each of the obligations is the legal cause of the other implies the simultaneous execution of those obligations, i.e. the possibility of invoking the exception of non-performance, if simultaneity is not respected. In judicial practice (Court of International Commercial Arbitration - CCIR, decision no. 117 of 2 July 1999, published in Revista de drept comercial nr.6/2000, p.163), it has been established that "in synallagmatic contracts, a party cannot demand anything without providing itself with the performance of its obligation; otherwise, its claim would be rejected by the exception of non adimpleti contractus. The exception implies the simultaneity of reciprocal obligations, the good faith of the petitioner, and the proportionality to the gravity of the non-performance" (Court of International Commercial Arbitration - CCIR, decision no. 117 of 2 July 1999, published in Revista de drept comercial nr.6/2000, p.163). Thus, the exception of non-performance is a defense means against the party claiming the performance of the obligation, although it does not intend to fulfill its own assumed contractual obligations.

### 3. Conclusions

Based on the principle of reciprocity and interdependence of obligations in synallagmatic contracts, it has been established that a specific effect of these contracts is the exception of contract non-performance as a defense means available to the party claiming to perform its own obligation.

At the same time, it is a sanction specific to the situation when the party claiming the performance of the obligation by the co-contractor has failed to perform its own obligations. In this case, the exception is invoked directly between the parties, without the court's intervention.

On the other hand, in recent legal literature, it has been rightly argued that the exception of non-performance is a true remedy for contract non-performance, which is in line with both the European and international codification tendency and with the current doctrine. As already argued, the exception of non-performance implies that the party exercising it is the debtor of a due obligation and that it has no other reason to refuse to perform its obligation than the other party's refusal to perform its correlative obligation. Therefore, the exception of non-performance is a preventive remedy in the sense that it prevents the situation in which one of the contracting parties performs its own obligation and can no longer obtain anything from the other party.

At the same time, *exceptio non adimpleti contractus* constitutes a form of private justice and a means of coercion of the other party, which presupposes the bona fide of the claimant and, in the alternative, a certain degree of gravity of the non-performance and the need for a balance between the non-performance of contractual obligations.

The invocation of the exception of non-performance is not subject to any formalities and the debtor's delay is not required, since in that case only a suspension of contract effects takes place. Therefore, it produces direct effects between the parties without the need for a court intervention, since it is sufficient to oppose it to the party claiming the performance of the contract.

In addition, the party using the exception of contract non-performance may not be required to pay moratorium damages for the delay in the performance of the obligations owed to the other party because it is not a delayed performance of contractual obligations but a suspension of their performance in a legitimate way.

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