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CIVIL LIABILITY FOR DAMAGES CAUSED BY BREACH OF CONTRACT

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Abstract

It is no easy task to determine the liability for damages caused by failure to complete or by improperly completing a contract because the judge or arbitrator must carefully evaluate all facts and proof that are relevant for the determination of the amount of damages to compensate.

Before addressing the evaluation of the damages from the failure to fulfill a contract, first one must determine whether the executed contract is lawful or not, and then whether the obeying party has suffered any damages from the failure to implement the contract, and finally whether all legal presumptions for the award of damages have been fulfilled. Upon completion of the aforementioned analysis, the court or arbitration panel may evaluate the amount of damages.

Failure to fulfill contractual obligations can cause serious consequences for the obeying party to the contract, which party as a result of such breach could suffer material damages in the form of real damages and loss of profit.

The main precondition that must be fulfilled before the imposition of contractual liability for damages is the existence of damages. Should there be no damages from the failure to implement a contract, then the obeying party of the contract cannot seek compensation of damages. The other preconditions that must be met before imposition of liability are addressed in detail in this written work.

Keywords*: contract, compensation, damages, liability.*

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1. *General theoretical views regarding Contracts.*

Pursuant to Article 15 of the Law on Obligational Relationships of Kosovo,[1] a contract is considered established at the moment when the contracting parties agree with regard to the essential elements of the contract. There are a few important issues that stem from this legal provision regarding its implementation. Firstly, from the agreement of the party to enter into a contract, one must deduce the contracting party's willingness to create certain legal effects. Whereas, by the will element we understand awareness, purpose and the interest of the party to engage in a contractual relationship. The will of the contracting parties must exist with the both parties that enter into contractual relationships with the purpose of realizing their interest that must be in harmony with the law and moral principles.

The aforementioned legal provision specifies that the will to enter into a contract must exist among the contracting parties, which means that this will must exist even in multi-party contracts. The way will is expressed is regulated by Law on Obligational Relationships (hereinafter "LOR"). According to this law, most contracts are not formal, which means that for a contract to be established, there is no need for the will to be expressed in a certain way. As an exception, LOR provides that for certain contracts to be valid, the will of the parties must be specified in writing (ex. construction contracts, license contracts, franchise contracts, etc. – to produce legal effects, they must be in a written form).

Even though the principle of the autonomous will and freedom to contract are basic principles of the contracts law, in some circumstances a party may not always be free to decide whether it wishes to contract with another subject of the law. This would occur when a party has a monopolistic position as pursuant to law, as is the case with Publicly Owned Enterprises that offer utilities services such as water, electric energy, central heating, etc.

Thus, we can conclude that the free will of the parties is limited not only by imperative norms and moral principles, but also by the legal position of certain subjects such as Publicly Owned Enterprises, which as stated above, must enter into contracts regardless of their will.

LOR does not provide a definition of what are the essential elements of a Contract. What contractual elements are essential or not is dependent on the specific contract and the circumstances of that particular case.

Pursuant to Article 31 of LOR, a contract is considered created at the moment when the offeror receives the declaration of the offeree that she accepts the offer. This legal provision also

[1] Article 15 of LOR. A contract is established when the contracting parties agree on the essential elements of the contract.

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provides that the place where the contract was created is considered the offeror's domicile, residence, or his headquarters, at the moment of the making of the offer.[2]

From the moment when a contract is made, the contracting parties cannot unilaterally terminate the contract without suffering legal consequences. The moment a contract is made is important for several other reasons, because from that moment the deadlines for the implementation of the contract begin to run, the statute of limitation, the deadlines for obtaining certain licenses from state regulators, etc.

A contract is considered established between two persons physically present in cases where the offeror and the offeree are located in a common area and when communicating by telephone, radio, etc. It becomes more problematic determining the moment when the contract is established when the parties to the contract are not physically present at the moment of the making of the offer and its acceptance. Legal precedent in Kosovo has accepted the theory that the contract is considered made at the moment when the offeror receives the response of the offeree regarding the acceptance of the offer even when we speak of the making of a contract between parties that are not present, ex. in cases where the offeror receives the response by a letter that was mailed, emailed, etc.

With regard to the place of contract, we consider that paragraph 2 of Article 31 envisions the place of contract, in cases where the contract is made between persons that are not present, because when said contract is made between parties that are present then the place where the contract was entered into is the place where the parties agree on the essential elements of the contract.[3]

The place where a contract is entered into is of great importance when determining the competence for dispute settlement. In contracts with a foreign element, other than the determination of the competent court, the place of contract may also impact the applicable material law for the contract. Thus, if the contracting parties have not selected the applicable law in the event of a dispute regarding the implementation of the contract, the place where the contract is made in most cases shall be determinant of the applicable material law.

The offer is the first step in making a contract, which is a one-sided legal act by which the offeror informs a specific person, or persons, that she wishes to enter into a contract, in which case the offer must contain the essential elements of the contract, so that the contract would be considered as formed as envisioned by Article 26 of LOR.[4]

Paragraph 2 of Article 32 of LOR allows for the possibility that the parties agree on accessary matters after the contract has been executed, meaning after the agreement on the essential

2. Article 22 of the Law on Obligational Relationships of Kosovo.
4. Gorenc, Komentar Zakona o Obveznim Odnosima. RRIF plus, Zagreb, 2005, fq. 351.
5. Dragoslav Veljkovic, Ugovori u Privredi, Poslovni Biro, Beograd 2008, fq. 62.

elements of the contracts has been reached. Should the parties not agree on the essential elements of the contract, then the Court, as pursuant to a proposal by one of the parties, shall determine the accessory matters of the contract, taking into account the negotiations, business practices between the contracting parties, as well as trade practices.

In some cases, the offer is obligatory as pursuant to law. The legal principle of the right of first refusal as envisioned by the Law on Sale of Real Property, states that the seller must first offer to sell the real property to the other coowners, and only if said coowners are unwilling to purchase the real property then the real property can be sold to third parties as pursuant to the same conditions as stated in the offer, or pursuant to conditions more favorable to the offeror.[5]

2. *Generally, on contractual damages.*

Legal theory, law and judicial precedent divide liability for any damage caused into contractual liability and noncontractual. This division is based on eh fact that the noncontractual liability is created when a legal provision is violated, ex. Article 9 of LOR, whereas contractual liability is created by breaching a contractual provision.

When dealing with noncontractual damages, before the causation of the damage there exists no legal relationship between the damaged party and the party that caused the damage. The legal relationship is created by way of violating the legal provision as a result of which the damage is caused.

In the case of contractual damages, the legal relationship between the person that has caused the damage and the person that was damaged, the legal relationship exists before the causation of the damage, whereas damage is a result of the violation of the contractual obligations.

There are conflicting views in the legal theory with regard to the relationship between the contractual and noncontractual damages. According to the monist theory, liability for damages is joint. According to this theory, liability for damages caused is always based on the violation of a provision, be it legal or contractual. Whereas, according to the dualist theory, there is a difference between these two types of liabilities. The difference between the contractual damages and noncontractual damages exists in the source of the obligation to compensate said damages (with noncontractual liability the source of obligation is the offense itself, whereas with

6. Dragoslav Veljkovic, Ugovori u Privredi, Poslovni Biro, Beograd 2008, fq. 63.

the contractual liability the source of the obligation is the contract), the causation, form and level of compensation for damages, ability to limit liability, different prescription periods, etc.[6]

According to the author Cigoj "there are not credible arguments, by which one could provide that the contractual liability for damages caused and noncontractual liability are different legal principles." [7]

From the aforementioned, it is understood that the Kosovar legal system has accepted the dualist theory.

3. Notion and composition of contractual liability for damages.

If a party in a contractual relationship does not fulfill its obligations, or is late in fulfilling same, then we immediately have to deal with the issue of liability with regard to the fulfillment of the obligation and the causation of damages, namely compensation of damages. These issues are addressed in Articles 106 to 115 of LOR. Pursuant to Article 106 of LOR, the creditor in an obligational relationship has the right to demand from the debtor for the debtor to fulfill its obligation in a responsible way exactly as the obligation stands.

If the debtor does not fulfill its obligation, or is late in doing so, the creditor has the right to demand compensation of damages sustained as a result of the debtor's breach of its contractual obligations.

The obligation of the debtor to compensate damages stems from contractual liability. Author Jankovec defines contractual liability as "a type of proprietary liability, that occurs in certain circumstances, if a party does not act in accordance with the undertaken obligation, which obligation stems from some obligational relationship, or from a contractual relationship."[8]

Taking into account the fact that liability for causing damages to another does not stem solely from the failure to abide by contractual obligations or their proper execution, but also from other sources of obligations such as: unilateral expression of will, unjust enrichment, completion of works without order, etc., a dilemma has appeared in theory and practice on whether the term

11. Dr. stojan Cigoj , Obligacije, Sistem splosnega obligasiskega prava v teoriji, sodstvu in primerjalnem pravu, Lubljana, 1976, fq. 406-413 ; dr. Sllobodan Perovic, Naknada stete u svetlu ugovorne i deliktne odgovornosti "Pravni Zivot" nr. 4-5 fq.5, dr. Ivica Jankovec, Ugovorna Odgovornost, Beograd, 1993, fq. 383-397.
12. Dr. Stojan Cigoj, vepër e cituar, fq. 412
13. Dr. Ivica Jankovec, vepër e cituar, fq. 8-9.

"contractual liability" is adequate, or maybe another term should be used that encompasses liability for damages caused that stem from other legal-obligational principles mentioned above.[9]

For contractual liability for damages to be proven, one must fulfill all legal presumptions, such as: illegal action of one of the parties (in cases of contractual liability, the act that is in violation of the contract, because the contract is considered law of the parties), the existence of damages, and a causal relationship between the action/inaction of the party and the damage, as well as liability for the damage. Another two presumption are added to the existing presumptions, such as: the existence of a contract and its breach by one of the contracting parties.[10]

I believe that contractual liability could be divided into the general and specific parts. In the general part of contractual liability fall: expansion or limitation of contractual liability by way of the contract, ascertainment of liability in specific cases such as cases with authorization and obtaining of approval for the execution of a contract, and then the execution of relatively or absolutely invalid contracts.

In the specific part of the contractual liability one finds the cases of liability for damages caused that are a consequence of the failure to fulfill, irregular fulfillment or inability to fulfill, and then contractual liability in cases where the contracting parties are replaced (cessation, taking over of debt, etc.), application of contractual penalties, etc.

If we are dealing with failure to fulfill obligations in money that stem from a contractual relationship, such as for example the Contract to Borrow, in the event of a delay in the paying back of the borrowed funds, the lender need not prove the existence of damages because according to Article 382 of LOR, the debtor that is late with its monetary obligations, is liable not only for the principal amount but also for legal interest. Therefore, the right to the legal interest, in this specific case belongs to the lender regardless of whether the lender has suffered any damages as a result of the delay in payments made by the borrower. However, according to paragraph 2 of Article 384 of LOR, if the amount of damages caused is greater than the legal interest then the creditor has the right to seek the entire amount of damages. For instance, if the amount of damages caused is 5,000.00 Euro, whereas the legal interest for delays in payments of monetary obligations is only 500.00 Euro, then the creditor has the right to seek damages in the amount of 4,500.00 Euro, which represents the difference between the legal interest and the sustained damages.

14. Dr. Zhivomir Djordjevic, Komentar Zakona o Obligacionim Odnosima, Kragujevc, 1980, fq. 757.
15. Ivica Crnic, Naknada stete-Odgovornost za stetu i popravljanje stete, Pregled aktualne sudske prakse, Organizator, Zagreb, 1995, fq. 5-6.

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4. ***Presumptions of contractual liability***

The action or inaction by which contractual damages are caused is also a violation of Article 8 of LOR because according to this article parties that take part in obligational relationships are obligated to fulfill their obligations and are responsible for their fulfillment.[11]

From one can deduce that an action or inaction by which damage is caused is every failure to act as pursuant to the contractual provisions.

A contract is the main source of obligational relationship and represents the main instrument by which contracting parties realize their aims, which are mainly of business nature and for this reason it is considered the law of the parties. Contracting parties are obligated to implement the contract, same as any other citizen that respects the law. Upon entering into a contractual relationship, parties are unable to unilaterally change the obligations envisioned by the contract, or to unilaterally decide to not implement the contract.[12]

The preconditions that must be fulfilled for contractual liability for damages to exits are:

a) For the debtor to fail to implement the contract, or to implement it irregularly;
b) For the creditor to have suffered damages;
c) To exist a causal connection between the damages and the failure to implement the contract;
d) For there not to exist a legal provision that releases the debtor from liability for causing damages.[13]

Considering the fact that in legal theory and practice, whenever we speak of compensating damages we always look for debtor's illegal action, we must state that the debtor with regard to contractual liability is the person that fails to fulfill his/her end of the bargain. A judgment of the Supreme Court of the Republic of Croatia states: Whenever we speak of damages that stem from a contractual relationship, then the illegality and fault are express in the breach of obligations determined in the contract and for this reason the damaged person is not obligated to specifically proof the existence of illegality and the existence of fault. It is sufficient to prove the existence of the contract and the fact that the contract has not been fulfills as the contracting parties have agreed."[14]

16. Gorenc, Komentar Zakona o Obveznim Odnosima. RRIF plus, Zagreb, 2005, fq. 19.

17. Po aty, fq. 19.
18. J. Barbic, I.Crnic, M.Curkovic, Odgovornost za stetu,Inzenjerski biro, Zagreb, 2006.
19. Aktgjykimi i Gjykatës supreme të Kroacisë , Gz br. 3440/75 dt. 23.4.1976, Bilten Sudske Prakse Vrhovnog Suda Hrvatske, nr.10, fq.12.

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The notion of damages is defined in Article 137 of LOR, according to which damage is the reduction in the wealth of a person (real damage), prevention of wealth to grow (loss of profit), causation of psychological or physical pain, fear (non-material damage). When addressing contractual liability, the provisions that deal with compensation of non-material damages do not have practical importance, because this type of liability deals only with the compensation of material damages.

The extent of contractual liability for caused damages is determined in Article 249 of LOR. Creditor is entitled to compensation of damages, which the debtor at the moment of entering into the contract could have foreseen, taking into account facts that he/she knew or should have known at that moment. Limitation of damages in this way is applicable only if the damages were caused by mild carelessness. If damages are caused intentionally, or from intentional disregard, the creditor has the right to compensation for all damages caused due to the debtor's breach of the contractual obligations, regardless of whether the consequences were known to the debtor. Therefore, we can conclude that if the damages were a result of debtor's mild carelessness, the debtor shall be liable for damages up to the level that the debtor could have foreseen, taking into account the facts that were known to him, or the facts that based on the circumstances of the specific case the debtor should have known at the moment the contract was entered into, but not also the value of all the damages. But if the damages were caused intentionally or by reckless disregard, the entire amount of damages are to be compensated.

Following the compensation of damages by the debtor, the creditor must be put in the same position as the creditor was before sustaining the damages due to the failure to realize the contractual benefits. This means that the creditor cannot in any way benefit from the damage that was caused to him/her. The Court is obligated when ordering compensation of damages to take into account all potential benefits that the creditor could have from the damages caused and to take them into account when determining the amount of damages.

Court precedent has taken the position that loss of profit is the profit that would have been made by the creditor for sure, but for the debtor's failure to fulfil its obligation under the contract.[15]

If the creditor does not undertake all necessary actions to reduce or eliminate the damages, the debtor has the right to ask for the reduction of damages for the amount that the creditor could have reduced the damages by undertaking said actions. This obligation is envisioned by Article 249 of LOR. The actions that should have taken by the creditor, to reduce the damages suffered, are evaluated depending on the specific circumstances of the case.

There must be a causal connection between the damages suffered and the contractual obligation. LOR does not specifically address what causal connection means, however, causal connection means the action or inaction in correlation with the damages that were caused.

20. Dragoslav Veljkovic, Ugovori u Privredi, Poslovni Biro, Beograd 2008, fq. 442.

According to Article 256 of LOR, the debtor may be released from the obligation to compensate damages if the debtor proves that he/she was unable to fulfill the obligation, namely that the debtor was late in fulfilling such obligations due to circumstances created after the contract was entered into, which were outside of the debtor's control and could not have been prevented by the debtor.

From the legal text of Article 256 of LOR one can see that a debtor may be released from liability for compensation of damages only when the following conditions are fulfilled cumulatively:

a) For the debtor to have failed to fulfill the obligation, or to have been late in doing so;
b) that the failure to fulfill the obligation or lateness in doing so occurred after the contract was entered into; c) that the debtor was unable to prevent the occurrence of the circumstances that have impacted the debtor's failure to fulfill his/her obligation; and d) that the debtor prove that he/she was unable to fulfill the debtor's obligations as envisioned by contract.[16]
If failure to fulfill the contract was a result of force majeure then the debtor is released from liability for any damages that were caused.

Force majeure principally means natural disasters such as: earthquake, floods, fires, etc., however, force majeure could also mean war, strikes, different types of hostilities that prevent the free movement of goods. Therefore, an event like that could become force majeure if it is unpredictable, unavoidable, and unsurpassable.[17]

If the circumstances that prevent the enforcement of the contract existed prior to the execution of the contract by the parties, and we are dealing with an obligation that can be realized (possible obligation), then the debtor shall not be released from liability for compensation of damages because the debtor should have taken into account these circumstances that appeared before the contract was made. If the circumstances that make the implementation of the contract impossible existed before the contract was made, then the debtor shall not be liable for the damages that are caused due to the failure to fulfill the contract, as pursuant to the principle of "impossibilium nula obligation".

Circumstances that occur after the contract enters into effect, which unable the debtor to fulfill contractual obligations must be objective in nature, meaning that they must be circumstances that did not occur as a result of debtor's actions. Whereas, the proving of facts that are considered a hurdle to the fulfillment of the contract, must be evaluated based on objective criteria, and not on subjective evaluation by the debtor.[18]

21. Dragoslav Veljkovic, Ugovori u Privredi, Poslovni Biro, Beograd 2008, fq. 439.
22. Dragoslav Veljkovic, Ugovori u Privredi, Poslovni Biro, Beograd 2008, fq. 439.
23. Gorenc, Komentar Zakona o Obveznim Odnosima. RRIF plus, Zagreb, 2005, fq. 507.

5. Court Precedent

"A dentist that has a private practice and who during a tooth removal injured the patient (broken jaw) is liable for damage caused as pursuant to contract, and not as liability for an offense. This has to do with a contractual relationship that stems from a task-based contract. Plaintiff seeks compensation of damages because during the intervention by the dentist, the person's jaw was broken because the dentist in this specific case failed to act as pursuant to contract and professional standards, which he was obligated to do pursuant to Article 607, paragraph 1 of LOR. Defendant, in his capacity as a debtor in this case, could be released from liability for this damage if the presumptions under Article 263 of LOR have been fulfilled, specifically if he can prove that during his intervention there was no way to prevent or stop the breaking of the Plaintiff's jaw."[19]

Pursuant to Article 18 of LOR, all parties in obligational relationships, when fulfilling their obligations, must act based on the principles of a good host or good economist. If the debtor performs a contractual obligation, based on his professional activities, then the debtor is obligated to act with added care, as pursuant to professional standards, meaning with the care of a good expert. Violating this principle means causing damages with reckless disregard.[20]

The liability for contractual damages is principally of the subjective nature, except for the cases where by law it was envisioned that this liability to be of the objective nature. It is understandable that even in the cases of contractual liability there could be a split liability for the damages that were caused, even though in the first look it appears that the split liability is something that belongs more with liability for offenses. This is proven by a statement from a Croatian court precedent:
"Provisions of LOR regarding split liability on compensation of non-contractual damages, in a similar way are applied to the compensation of contractual damages."[21]

6. Summary and Conclusions.

Contractual liability for compensation of damages is a special kind of liability because the basis of liability rests with the failure to fulfill the contractual obligations. As a result of failing to fulfill the contractual obligations, the party that has complied with the contractual obligations must have suffered real damages or loss of profit.

24. Vs, Rev-2156/91 od 8 sjecnja 1992. Vs, Rev-1483/91 od 24 listopada 1991, Izbor 93/74.
25. Dr. Boris Strohsack, element deliktne odgovornosti za stetu iz poslovanja "Informator" nr. 2721, dt. 4.4.1980, Zagreb, fq. 20.
26. Aktgjykim i Gjykatës Supreme të Kroacisë, Rev.br. 6415/94, dt. 11.1.1995.

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The debtor can be released from liability for compensating damages if he shows that the damages were the result of causes for which he cannot be responsible, for ex., inability to implement the contract due to force majeure.

Even with contractual damages one could encounter split liability, in cases where both parties are responsible for the damages that the creditor has suffered.

If the creditor cannot be put in the position that he was in before the damage was caused, then the damages must be compensated in monetary value of the damages sustained.

Liability for contractual damages may be limited by agreement between the contracting parties, however, such an agreement cannot be contrary to the honesty principle.

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