DEFINITION OF CONTRACT FOR COMMERCIAL SALE OF GOODS. FULFILLING THE OBLIGATIONS OF THE SELLER AND BUYER IN CONTRACT FOR COMMERCIAL SALE OF GOODS

Defining the element of “fulfillment” in comparative law

There is great interest of law and are given number of definitions for the term fulfillment of the obligations in the contract of sale.


1. To deliver the goods
2. To pass the documents
3. To transfer ownership

When it comes to obligations of the buyer, according to Mladen Drashkic (1987, p.114) main obligations of the buyer are:

4. To pay the price
5. To take the delivery

Furthermore, because it is a double (synallagmatic) contract, the main obligations of the contracting parties meet their basic rights. Thus, the obligation of the seller to deliver the goods match the right of the buyer to demand delivery of the goods, while the obligation of the buyer to pay the price, gives the right to the seller to require the price to be paid.

From synallagmatic character of the contract is derived the principle for simultaneous execution of mutual obligations.

According to Article 30 of the United Nations Convention on Contracts for the International Sale of Goods, the seller shall, in the manner provided in the contract and this Convention, deliver the goods, hand over documents relating to the goods and to transfer ownership of the goods.

Article 30 defines three essential obligations of the seller. In addition, the seller is obliged to meet other obligations specified in the contract as the ob-
ligation the goods to be delivered to exceptional customer (See, e.g., Oberlandesgericht Frankfurt, Germany, 17 September 1991, Neue Juristische).

In contrast, in the UNIDROIT Principles of International Commercial Contracts (2010) is not identified the fulfillment, but the failure to fulfill. According to Article 7.1.1 “Failure is the failure of a party to fulfill any of the obligations under the contract, including improper performance and delayed performance.”

The Principles of European Contract Law (PECL), (2002) in Article 8: 103 defines what is significant breach of the contract by the seller.

Non-compliance with the obligation of the contract is important if:

a) strict compliance of the obligations is essential

b) failure substantially deprives the aggrieved party of what it expected from the contract, unless the other party did not predict, nor could predict the effect

c) failure is intentional and gives the aggrieved party reason to believe that cannot expect in the future fulfillment of the other contracting party.

According to Professor Ole Lando, when a party fails fulfill the obligations of the contract, whether it is a partial fulfillment or delayed fulfillment or completely failed to fulfill, or could not fulfill in any other way, the question of legal remedies arises (Lando & Beale, 2000).

**IMPROPER FULFILLMENT OF OBLIGATIONS AND SIGNIFICANT BREACH OF CONTRACT**

Disorderly fulfilling the obligations of the seller and buyer

Determining and defining the fulfillment and improper fulfillment of obligations of any seller or buyer under the commercial sale is a complex problem that requires a great effort to overcome the difficulties that arise when studying it as well as to achieve greater safety in trade.

Improper fulfillment of the obligations of the seller under the contract for commercial sale label these more cases: non-delivery of goods, delivery of goods to another place instead the agreed, late delivery of the goods, the partial fulfillment of the obligation and others.

In international acts (uniform laws, conventions, principles) for commercial sale of goods and Macedonian Law on Obligations, closer determination of improper fulfillment of the obligations of the seller is one of the key issues because on one side it has in common with the fulfillment of the obligations of a seller, and on the other one it is closely related to the legal remedies available to the buyer.

The question is what constitutes improper fulfillment of the obligations of the seller under the contract for commercial sale? The answer to this question we will give to provide assistance with the provisions of international laws and Macedonian Law on Obligations.
According to the Convention relating to a Uniform Law on the International Sale of Goods (furthermore in the text ULIS) improper fulfillment means when the seller does not properly performed its obligations in terms of time or place of delivery, and when there is a lack of conformity of the goods with the contract. Because of the improper fulfillment of the obligations of the seller, the buyer can use legal remedies as may the shortcomings of fulfillment be avoided.

To the goal of ULIS is related and the United Nations Convention on Contracts for the International Sale of Goods (Furthermore in the text CISG). “Seller shall in the manner prescribed in the contract and this Convention, deliver the goods, hand over documents relating to the goods and transfer the ownership of the goods” (Article 30, CISG), otherwise its fulfillment will be improper.

Under the UNIDROIT Principles of International Commercial Contracts 2010 (Furthermore in the text UNIDROIT Principles), Improper fulfilling is failure of one party to fulfill any of the obligations of the contract, including inconsistent performance and delayed performance (Article 7.1.1, UNIDROIT).

Furthermore, the criterion that should guide the contracting parties to fulfill their obligations on compatible way is given in Article 7:109 of the Principles of European Contract Law (2002) (Furthermore in the text PECL). More about them we will focus when talking for improper fulfillment and legal remedies under PECL.

Finally, according to the Macedonian Law on Obligations improper fulfillment of obligations is when the seller does not fulfill on the agreed place and time and if the delivered goods have material and legal defects (Article 442-542, LO).

When the breach of the contract is important?

Main and decisive factor in determining whether the breach of the contract is significant is the meaning of the interest which the contract and other circumstances (the practice, negotiation between the contracting parties, the customs and the behavior of the contracting parties) as well as specific contractual obligation have for the damaged party.

Meaning of the interest is shown in the fact that the damaged party loses its interest for fulfillment of the contract, and can not remove the consequences of the breach of the contract with compensation, price reduction or repairing.

A second factor that influences whether a breach is significant is the seriousness (importance, severity) effects of the injury. This criteria can be analyzed and explained from three aspects: 1. Material loss suffered by the damaged party 2. Deceiving the purpose of the contract 3. Availability of the funds (Aneta Spaic, 2009, p.91).
Who can do significant breach of the contract?

Depending on the entity of the contract which with its disorderly fulfillment committed a breach of commercial sales contract, damages differ:

1. By seller
2. By buyer
3. By the seller and the buyer

In this work the subject of interest is the disorderly fulfillment of obligations by the seller and the buyer, and the system of sanctions for disorderly fulfillment.

Factors determining the significant breach of contract

To determine whether the breach of the commercial sales contract is significant, we are considering the following seven factors (Aneta Spaic, 2009, p.89-105):

1. Nature of the contractual obligations
   When there is no express provision in the contract that gives to one contracting party the right to terminate the contract when it comes to significant breach of the contract by the other party, then the fulfillment of the obligations in existing conditions is essential and any deviation from the same would be considered a significant breach of the contract.

2. Seriousness of the consequences of the damage
   Three aspects are important for determining whether the consequences of the damage to the damaged party substantially deprive the party of the expectations from the contract:
   a) material loss to the damaged party
      Traders conclude the contract from purely material reasons, so the damage caused from the breach of the contract as a whole can be compensated by paying damages;
   b) manipulating the purpose of the contract
      The buyer buys goods with a specific intent, so the damage that causes intentional use of goods to be disabled is a significant breach of the contract.
   c) the availability of funds
      Is guided by the principle pacta sunt servanda and favors the maintenance of the contract in force as long as possible.

3. Inability to fulfill the obligations
   Failure will be considered a significant breach of the contract whenever the performance is objectively impossible, or when the subject of the legal matter is unique and destroyed (ex. is contracted selling an image that will be destroyed in the meantime, and the author is deceased).
4. Anticipating of the damage

Is not allowed in situations where it is clear that one contracting party will breach contract obligations, the other to be obliged to fulfill its obligations.

5. Breach of the contract in respect of future deliveries

Three situations are distinguished:

a) when will be determined the existence of a significant breach of the contract in respect of one delivery in which occurs termination

b) due to defaults on one contracting party in a delivery the other contracting party may reasonably conclude that there will be significant breach of the contract in respect of future deliveries, and the other contracting party terminates the contract pro futuro.

c) when a contracting party wants to terminate the contract in respect of one delivery, it can state that it terminates the contract and for past and future deliveries if, their interdependently performed deliveries could not be used for the purpose that the parties had consideration at the conclusion of the contract.

6. An offer to remove failure

It requires two conditions to be fulfilled: a) removal of the failure is possible within a reasonable time b) removal of non-fulfillment is possible if not causing the buyer unreasonable disadvantage or uncertainty that the seller will reimburse the costs incurred in connection with it.

7. Chance to eliminate the failure

There is not significant breach of the contract if there is possibility the obligation further to be performed.

**System of sanctions**

Determining the system of sanctions depends on whether the breach of the contract will be qualified as a significant or not.

In terms of sanctions, the most general division of the assets available to the damaged party is on **tougher sanctions** which group includes the right to cancel the contract and the right to request replacement of goods and **minor sanctions** such as compensation and cost reduction, rights that the damaged party can choose when there is a significant breach of the contract.

Ascertaining the breach of contract for the commercial sale of goods as significant, gives to the damaged party the right to terminate the contract whenever:

1. Failure of fulfilling obligations by the other party is a significant breach of the contract

2. Partial failure or lack of compliance is a significant breach of the contract
3. Before the deadline for the fulfillment of the obligations of the other contracting party is clear that it would come to significant breach of contract.

4. Non-fulfillment of any obligation on one contracting party, which refers to contract with mutual obligations, is a breach of contract.

5. On the basis of the non-fulfillment of any obligation of one contracting party in respect of any other mutual delivery, the other party may reasonably conclude that there will be significant breach of the contract in respect of future deliveries.

Legal remedies available to the buyer

In case of improper fulfillment of the obligations of the seller, the buyer has available legal means through which may require achievement of the contracted:

1. Right to demand fulfillment
2. Right to claim partial fulfillment
3. Reducing the price
4. Replacement of the goods or to want deficiency to be repaired
5. Compensation of damage
6. Termination

Legal remedies in the event of improper fulfillment of the obligations of the buyer and seller are subject to interest of this paper in the sections below.

Elements of the significant breach of contract for commercial sale

According to Aneta Spaic (2009, p.63) the concept of significant breach of the contract consists of two constituent elements:

1. Detriment and substantial deprivation
2. Predictability

What is a “detriment” and “substantial deprivation”?

Basic and most important elements for significant breach of contract are detriment and substantial deprivation.

Detriment means all (existing and future) negative consequences of the damage. Detriment includes actual injury, loss (injury, loss, result) material damage (monetary harm) and damage caused by disabling or reducing the activities of the damaged party (interference with other activities) (Aneta Spaic, 2009, p.63).

Substantial deprivation involves the loss of interest to the damaged party for fulfillment of the contract, ie the damaged party can not be compensated.
with compensation, price reduction or correction (Aneta Spaic, 2009, p.64). Accordingly, terminating the contract is ultima ratio (last legal remedy) which may be available to the damaged party.

According to the above, the breach of contract is significant when the contracting party which has not achieved its right from the contract for commercial sale of goods because the other contracting party failed to fulfill its obligation, will lose the interest to demand fulfillment of the contract because is essentially deprived of what it reasonably expected from the contract.

**What is “predictability”?**

To determine the importance of the breach of the contract are relevant the detriment and the substantial deprivation, while predictability as an element is used exclusively as opportunity for the party in breach to relief of liability for breach of contract (Aneta Spaic, 2009, p.65).

Predictability as a criterion for determining whether the breach of the contract is significant has Article 25 of CISG regarding “unless such consequence is not foreseen by the contracting party in breach of the contract neither would would be predicted by reasonable person with the same qualifications in the same circumstances.” From the text of the provision can be concluded that the predictability is defined as an exception that exempts from liability a certain circle of people.

**SYSTEM OF SANCTIONS IN TRADE AND INTERNATIONAL TREATY LAW**

**Why unification of international trade of goods selling?**

The goal of the unification of law is to facilitate the international trade of goods and resolve the problems arising from the conflict of laws through the establishment of equal, uniform rules for participants from different countries (Aneta Spaic, 2009, p.6).

The need for unification of the law of international sale of goods results from the contemporary process of globalization, which is characterized by an increased volume of trade between entities that are registered and operate under many national state laws. Because the contracting parties in the contractual relations come from different backgrounds and the rules they apply vary from one state to another, hence arise many problems that legal science, and especially one that examines international trade contracts should give answers.

Therefore, the attention and interest of legal science in 20-ies of the 20th century is aimed at creating an international act whose rules will be valid and will be applied by entities belonging to different economic systems, political systems and legal cultures. As a result of years of work of the committees and working groups for the preparation of an international
act for the sale of goods are created international acts that follow and are analyzed in this work.


What is a significant breach of the contract?

Breach of the contract made from one contracting party is significant if it causes such damage to the other contracting party which essentially deprives it of what it reasonably expected from the contract, unless such consequence is not foreseen by the party which makes the damage, nor would have been predicted by a reasonable person with the same properties in the same circumstances.

In the context of the concept of significant breach of contract we can determine two constitutive elements of significant breach: detriment and substantial deprivation and predictability. Commonly significant breach of contract leads to termination of the contract.


UNIDROIT Principles introduced novelties previously not covered in the earlier adopted international acts. Thus, subject to the contractual relationships are the creditor and the debtor, rather than the seller and the buyer. Furthermore, the positioning of such entities in contractual relations has resulted in the determination of the place of delivery as a criterion to set the type of the obligation, ie the delivery depends on whether the obligation is a monetary or non-monetary obligation. When it comes to the time of the fulfillment, more detailed approach covers several possible prescribed situations, for example fulfillment once or repeatedly, order of fulfillment, previously fulfillment.

In addition, the UNIDROIT Principles is international act for the contract for sale where for the first time are prescribed provisions for the currency of payment, the method of payment, and cases where the validity of a contract depends on getting a permission from the state authority.

Principles of European Contract Law

Disorderly fulfillment of the obligations of the contract is a significant breach of the contract if:

a) strict compliance of the obligations is essential to the contract
b) disorderly fulfillment substantially deprives the aggrieved party of what it expected from the contract, unless the other party failed to predict, nor was able to predict the effect.
c) disorderly fulfillment is intentional and gives the aggrieved contracting party reason to believe that it can not expect the other contracting party to fulfill its obligations in the future (PECL, Article 8:103).

**Common European Sales Law and Draft common frame of reference**

In the framework of the so called soft law, relating to the private law in the European Union, a special place take up and Draft common frame of reference (Горан Коевски и Дарко Спасевски, 2012, р.2-5).

The purpose of the Draft common frame of reference is to serve as a tool in the interpretation of the private law and huge progress has been made in the areas of consumer contracts and can be a nucleus for unification of the entire contract law in the European Union. Also, their purpose is to serve as an optional instrument, which by accepting of the contracting parties of various countries of the EU will be a harmonized set of rules that will be applied on a certain contract (Горан Коевски и Дарко Спасевски, 2012, p.2-5). Because of these reasons, and due to the needs of such a tool, in October 2011. The European Commission published the Draft-regulation on the Common European Sales Law (CESL) as optional law (instrument) for sale which will exist in parallel with the national laws governing the matter in the member states (Горан Коевски и Дарко Спасевски, 2012, p.2-5).

**INCOTERMS 2010**

**Definition of transport clauses. Application**

Incoterms is shortcut to the International Trade Terms (International Commercial TERMS) and the chosen Incoterm is actually an element of the contract for sale and not an element of the contract of carriage.

Through these contracting parties are told what they need to take about:

- International distance sale of goods
- Do not refer to the contract of carriage
- It regulates only relations between the seller and the buyer even though colloquially referred to as “transport clauses” (Горан Коевски, 2008, p.1).

INCOTERMS rules explain the groups of three-letter trade terms that reflect business practice in contracts for the sale of goods and describe primarily liabilities, costs and risks associated with the delivery of the goods from the seller to the buyer (Карло Змајшек, 2010, p.11).
**Essential characteristics**

It is a common shortcut for commercial terms, where through the use of a small number of words and abbreviations shall be regulated the number of rights and obligations between the seller and the buyer (Горан Коевски, 2008, p.1) in the sales contract:

- Passage of risk
- Passage of costs
- Time, place and method of delivery of the goods
- Providing transport vehicle
- Providing transport insurance
- Provision of transport documents
- Notification to the other contracting party

**CONCLUSION - SAFETY IN TRADE AND THE ASPIRATIONS FOR UNIFICATION**

From the above it can be concluded that the importance of studying the fulfillment of the obligations of the seller and buyer and their compliance with the commercial sales contract is significant, firstly because of the presence in trade of the commercial sales contract, but also due to the volume and complexity of the matter which governs the execution of obligations of the seller and buyer and sanctions for them in case of improper fulfillment.

The demonstrated activity for unification of a commercial sale contract increases reliability in trade, contributes to the development of trade and simplifies commercial sales contract, the tendency in the future to establish and adopt an international act that covers most of the problems in trade and a unified solution for commercial sales contract and safety in domestic and international trade.

Commercial sales contract is a topic that has been studied, but because of the importance it has and the complex relations arising from the relationship between the seller and buyer, today it is relevant and is the subject of interest and research of the lawyers.
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