2528-9705

Örgütsel Davranış Araştırmaları Dergisi
Journal Of Organizational Behavior Research
Cilt / Vol.: 7, Sayı / Is.: S, Yıl/Year: 2022, Kod/ID: 22S0-912

Investigating the crime and liabilities of continuous and service contracts

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ABSTRACT

The goal of this research is to investigate the crime and liabilities of continuous and service contracts. Methodology is analytical-descriptive using the library resources. It was addressed to claims for late payment damages in this research which is related to the time elapsed from due date to its payment date, namely it should be happened the fault until it can claim the damages. Until the performance bond is as the threatening condition whereby the person in whose favor a condition is made must pay the amounts in case of the fault. If the performance bond is for the fault, it only can ask the performance bond and not the original obligation too, namely if it wants to, it can waiver the performance bond and only ask the original obligation and or can ask the performance bond. In this case, it is optimal the unity state. It should be added that to determine the performance bond is not meant to authorize the implementation of the original obligation or giving of the performance bond. there is not any authorization to him/her absolutely.

Keywords: *liabilities of service contracts, crimes of service contracts, late payment damages, performance bond.*

INTRODUCTION

The contractual liability is to commit to compensate because of the fault. Therefore when there is the contract between the parties and it is refused to implement by one of the parties and whereby it is happened the damages by other party, the person whose has violated for the fault will have the contractual liability. Other condition to realize the contractual liability is to damage in which, the contractual liability is excluded if there had been no damage, therefore some lawyers has included the damage one of the main pillars of the contractual liability. One the other hand, it is said about the contractual liability that those damages are compensable which they got predictable. So to be predictable for the damage has been accepted as one of its conditions to compensate and the unexpected languages are not included in the territory of the contractual liability.

The fault (breach of covenant) arising from the contract is another one of the conditions to realize the contractual liability which can be appeared as the failure to performance, incomplete performance, or delay in performance of commitment. Whether the fault is the type of oblige wrong or it should be the one of the necessary conditions to realize the contractual liability, there is not any solidarity between lawyers. One opinion is that there is not any oblige wrong in the civil law for the contractual liability, so in Iran law, the fault is not effective to create the contractual liability, while other opinion is that oblige wrong is as the one of the conditions to realize the contractual liability. Of course, this oblige wrong is meant to violate the contract or

the fault. Whether what is the failure to performance of commitment and how it should be proved depends on this topic that we can recognize the commitment as a tool or a result.

It is necessary to realize the contractual liability a causal relationship between the fault and happening damage. The person whose claims to damage can prove this relationship, namely it is the duty of claimer who prove that there is a civil causal relationship between oblige wrong and happening the damage. Of course, one of the conditions to this relationship is to be immediacy.

While realizing each type of liability is different, so the method of proving oblige wrong in them is different too. To prove oblige wrong is possible more easily in the contractual liability, because the fault is assumed oblige wrong unless it can be proved to the outer cause by the violator. The easiness to prove oblige wrong has be caused the courts try to achieve a contractual liability between damager and damagee as far as even the liability of the dangerous goods sellers and manufacturers and public victual suppliers is attributed to the contract and the consumer is exempted to prove oblige wrong based on the contractual liability. It is harder to prove oblige wrong in the out-contractual liabilities, because the damagee must prove thah the damage has been created by oblige wrong of the damager in addition to prove the damage. What it is hard is to prove the oblige wrong of the damager, because the oblige wrong is contrary to the principle and it is sometimes hard to prove as it is caused to reject the plaintiffs claim. As for the cited topics, the goal is to investigate the crime and the liabilities of continuous and service contracts.

Research theoretical principals:

Late payment damages

Lawyers believe that “late payment damages are about those claims in which their topics are cash, but the damage created by the failure to performance is not cash and it is stated as the fair equivalent remuneration and damage created by the failure of submission and or late payment in the complaints”. And other lawyers has written that “late payment damage is the amount in which it is taken from the borrower and or credit because of the late payment in the interest and principal installment of the loan and or the credit, from the due date or the maturing debt date to maximum of legal description for the delay time”.

The concept of late payment damage is generally to decrease the money value. It means that the base of late payment damage can be resulted with any reason other than decrease the money value which the debtor has created the late payment for the creditor.

The question which it is important about the late payment damage is that what time is the origin of late payment damage and what time the debtor must pay it to the creditor in the case of conviction and when the damage is computed and it should be paid to the creditor?

To response to this question, we should separate these two modes :

First- the cases in which the parties has agreed about the late payment damage as contractually or orally.

Second- the cases in which the parties has not agreed about the rate and the value of the late payment damage.

While the payment condition of the late payment damage is included in the contract by considering to compensate the damage created to the late payment damage, can not be considered as “condition in favor the creditor” and or “condition of the excess reception” until it is questioned to be usury, because the damage created to the creditor is compensated by

performing this condition and it do not recieve any benefit. Also, the condition of the late payment damage to defend the legitimacy can be documented to those same criterions cited in the juridical resources to lockout the usury.

In justification to recieve the late payment damage as the condition during the contract and the performance bond in the bank contracts, it can be said that in according to the rule of " المؤمنون عند شروطهم the believers must implement on their conditions" which it is constant between jurisconsults, if a condition is written during the true and necessary contract, as it can not be against to the condition, secondly it can not be against to law and thirdly it can be agreed between the parties, this condition such as the bond is true and has the ability of implementation.

In Iran legal system, even if the performance bond had be determined as fixed, it should be considered to some topics because they are caused to adjust the sentence as following.

1-It is assumed that the performance bond cited in the contract is not proportional to the real damage as it is meaningless, this condition is discredited for the lack of real intention and the obligee can ask to compensate the based on public rule.

2- In the cases that the sections of the contract are done and those sections are independent for the creditor, the magistrate can justify the performance bond proportionally. For example, It is assumed that it has be promised to sell 10 automobile which it has be owned 5 automobile on timely, the court can decrease the performance bond %50 proportionally and can deduct it from total amount.

3- It is assumed that the contract was canceled for each legal reason, also the performance bond related to the late payment damage created by the failure to performance or to performance will be canceled. Article 246 of civil law which states that "if the deal was broken for cancellation, also the condition cited during it will be canceled " confirms this same topic. Therefore the performance bond is discarded by cancellation too. Of course, it is considered that, if it is assumed that if the damage had be anticipated because of the price which is belonging other person, the cancellation of the contract is not lead to the cancellation of the condition, owing to the parties already have paid the damage and regarded the liability by assuming the cancellation.

Agreement with the degree of liability

From the last part of Article 522 of civil law can be deducted the possibility and impossibility of agreement with the liability of the late payment damage. After approval of the late payment damage based on Central Bank Price Change Index, this Article has allowed that the parties compromise against it. It has not been anticipated in this article that the parties can make a condition in their own contract against these provisions. It has come at the following of Article that if the parties compromise in another way, their compromise is effective.

If the condition of the late payment damage had not been interfered with the provisions of usury (namely the borrow usury and the extend usury) and was valid in according to the conditions, it can't be imaged any limitation for the accuracy of condition. Some say that its result is undesirable clearly, because it creates the possibility of abuse the creditors specially the financial firms. These persons put the ruling laws aside easily according to the additional contract provisions which the creditor has to sign it and take the performance bond into its own hands completely.

Commercial commitments are resulted with civil commitments and juridical acts mostly and the conditions in civil commitments have an irrefutable role to the commitments resulted with commercial documents. Whether it is reflected on the commercial documents or not.

One of public conditions for the reasons of bonds accuracy is which the deal can't make any damage and some believe that the insurance bond is necessary, so it is not considered valid for the legislator. The reason of the believers of this theory is that the most insurers do not receive anything in exchange for the payment of installments (because any event not happened) and it is certain the payment without repayment in exchange for that damage. Therefore the insurance is a necessary bond and it is not implementable consequently. In respond, they have said that firstly the insurer earns the mental relaxation in exchange for the payment of premium and in exchange for it can be property or service or spiritual affairs. Secondly, that damage in which "the rule of prohibition of detriment" has be forbidden is that somebody don't implement it rationally, while the possible damage of the insurer will not prohibit to contract the insurance bond and also will not prohibit it's accuracy and implementable. It can be acknowledged that the insurer has received its own premium exchange by earning mental relaxation basically and there is not any damage until it is made a cancellation of the premium documented with "the rule of prohibition of detriment".

Private International Law

Since the governments enjoy freedom to make a law of nationalization such as other laws, when the properties belonged to foreigners are included in this type of law too, the necessity of international relationships specially the rules reflected to the rights international resources limit their freedom about this topic.

Ownership of the properties belonged to foreigners by the government is caused to litigate against them if they can claim the compensation. The competent court in these cases is the arbitration contract if there had been the arbitration contract between them and the government, and the competent court is Internal Public Judicial Authority if there had not been the arbitration contract. On other hand, their followed government can litigate against that government as the political support according to the public international law. Anyway the competence of pending court is limited to handle the damage and no the principle of nationalization, which it is an act resulting with the right of ownership and it is inviolable. However, it is considerable to the civil liability law provisions too. The government in Article 11 civil law about applying governance states that "about applying governance the government didn't have to pay any damage even if it is done to supply the social benefits necessarily according to law and is harmed to other"

The competence of pending court is a part of governance of each government, so the court conflict has a political face and it is far from the complexities created by the laws conflict because of having legal face, therefore the court conflict is easier than the law conflict due to the rules considered with domestic rights. The law conflict is based to equity domestic nationals with foreign nationals, while there are usually the points for the domestic nationals in the court conflict.

Although the competence of pending court is not meant the governance of law in that country, nevertheless the conflict in the competence of pending court is effective to solve the law conflict, because it is possible to effect the competence of pending court on handling the complaint, thus the judge always should approve the qualified law due to its own rule of solving conflict, which

this law at other countries and consequently the competence of pending court may be different by referring to the court at each of the two countries. On other hand, if the foreign law is opposite to public order of law located in the pending court where the court can recognize it as pending court in according to the law of solving the conflict, it is not possible to perform the foreign law and consequently the judge may perform the law located in the court, or may refuse to perform the foreign law. Because generally judicial competence, identifiable and applicable law and holding the votes of the foreign law are subject to the rules of private international rights at the countries.

Arbitration Reference

Nowadays in international arbitration the parties allow to refuse selecting the national law as the ruling law and to oblige the arbitrator which solves the plaintiffs according to private international rights, traders customs. The parties can select the law of two or more countries as the ruling law among the countries where they have a close relationship with them, for example they can agree to govern the law created in the bond location on creating the contract, the law created in location of implementing the bond on how to perform the contract and the related difference. The parties can back their own previous selection out and can replace other law to previous law and even can assign it to the court and or arbitration reference by cancelling the ruling law.

For selecting the court which it is competence locally, plaintiff must determine the defendant location and also must sue its complaint in that country, this public law has been anticipated in Article 3 Hague convention draft. In 2 Brussels convention that it is the last and most important document about competence of pending court at the level of Europe Unity, which it has be approved as "Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the recognition and Enforcement of Judgments in civil and commerical Matters." by the countries membered in Europe Council and it is performable since 2002 March, the competence of pending court located at the defendant location is principle.

Ruling Law

It is only Article 968 in Iran civil law that is including the mutual rule of solving conflicts in the case of the contracts and in fact, it is not found any the provision in Iran private international rights that it had be considered specially to determine the law governed on the contracts about the intellectual property rights. Therefore Article 968 civil law and its analyze are necessary to earn the law governed on the contracts about the intellectual property rights. The certification given to inventor and or innovator by the related administrations is not considered a contract, consequently they are not included in this Article, but the contracts related to it are included in the territory of Article 968 civil law, and it can be found the law governed on the contracts about the intellectual property rights by analyzing this Article. The ruling law may limit actability of law of the supporter country or the law governed on the contracts that we will pay attention to this topic in the part of analyzing Article 968 civil law.

What it should be done if the ruling law had not be identified explicitly and implicitly? Article 4 Rome convention has considered to this topic and has been specialized by assuming the lack of identifying the ruling law by the parties. The criterion of identifying the ruling law in this Article is the criterion of "closest connection" with the contract. Rome convention 1 starts the process of identifying the identity of "closest connection" in Article 4(2)by applying a reputable Article. This Article exactly states that the contract has the most connection with the country in

which there is the party who is effective on the index obligation permanently. If the party of contract is a judicial person, its administrative center is replaced to the permanent location and it applies as the basic location of the commerce while the person who is effective on the index obligation had been contracted along with its commercial affairs.

It has been considered a condition in the international convention of selling goods in which the contract should be valid. In other words applying the basics of convention is necessary as the contract accuracy and validity should be confirmed according to the nation law and In other words the convention has accepted the principles cited in domestic country laws. But by considering to Article 14 convention to identifying the price, if it had not be cited in the contract but the contract be about the price explicitly and implicitly, the contract will be correct.

Therefore, 3 principles is earnable from the convention cited about the price:

Firstly the principle 55 of the convention will not be done if the national law of the country followed by the parties of contract cancelled the contract in despite to no mention to the price.

Secondly it should be confirmed that there is not other background to the lack of accuracy and validity in the law governed on the contract if the contract is correct according to the nation law.

Thirdly there had not be any the identifiable or determined and fixed price until it can reach to the explicit price and finally Article 55 of convention is applicable, it will determine the price subsequently.

Performing Foreign Votes

Whatever it can be said about the countries of German-Roman judicial family generally that the difference of performance ritual and promote each two different and basic methods is related to perform the foreign arbitration votes in the countries of this family. Some countries such as Poland, Italy and Spain where have used the comparison method of the foreign arbitration votes with the foreign court rules and the performance ritual of last group to first group, and some countries such as Germany, Austria, French and Belgium have gained the comparison method of the foreign arbitration votes with national arbitration votes and the invariable system of performing the forign and national arbitration votes. It is inevitable to adjustments that create the possibility of desirable conformity of implementing by law in relation to the foreign arbitration votes : It has not been considered to submit or to valedict the foreign votes to the court in Germany against to the domestic arbitration votes. It has been only allowed to sue together in Belgium by considering to the impossibility of transferring the judicial monitoring into handling the cancellation about foreign arbitration votes as beginning the first phase of performance handlings, by expanding to the judicial monitoring.

The rules published by the foreign court are applicable only in the territory of governance that same issued country, although are certain and final and have all conditions. Because the rules published by the courts of a country are issued with the name of governance of that country and the right of governance of each government is not limited to its political territory according to the principles of public international rights, and any government can't govern the out of its territory. Also, if a country accepted to implement the rules of foreign countries courts according to the domestic rules, in fact it has harmed to its own governance and independence, and its own territory has be opened to implement the judicial rules the out of border that this is the opposite of interests of country.

It is considerable that the phase of implementing a foreign rule is done after identifying that rule and the court of a country should identify at first the each implemented rule. Nevertheless, identification don't inhere to its implementation.

Also, about implementing the foreign rule, it is the most important to contradict or non-contradict the foreign rule with the public order and the good morals. Article 975 civil law about this topic states that "the court can't implement timely the foreign rule and or the special contracts which are opposite to the good morals, and or they are considered the opposite to the public order because of injuring to the emotions of society or other reason, even if it be allowable to implement the cited rules basically". In addition to Article 170 the law of implementing the civil rule about the conditions of implementing the foreign rules states the conditions as following that:

About the conditions of implementing the foreign rules, Article 177 the civil law states that": the applicable documents adjusted by the foreign countries are applicable similar to the conditions determined to implement the rules of the foreign court at Iran, and additionally, at the country in where has been adjusted the document, the Iran council or political representation should agree to adjust the document with the local law".

Conclusion:

It was considered to the late payment damages in this research which is related to the time elapsed from due date to its payment date, namely it should be happened the fault until it can claim the damages. Until the performance bond is as the threatening condition whereby the person in whose favor a condition is made must pay the amounts in case of the fault. If the performance bond is for the late payment, it can ask both of the performance bond and the original obligation too. In this case, it is desirable the multiplicity mode but if the performance bond is for the fault, it only can ask the performance bond and not the original obligation too, namely if it wants to, it can waiver the performance bond and only ask the original obligation and or can ask the performance bond. In this case, it is desirable the unity mode and it is the same ai French. It should be added that to determine the performance bond is not meant to authorize the implementation of the original obligation or giving of the performance bond. There is not any authorization to him/her absolutely. Also it was considered to the courts and arbitration.

Reference

- Ebrahimy, Mohammad-Hosein, Usury and Debt in Islam, Qom, 1372, page 2.
- Akhgary Bonab, Nader, Execution of Foreign Judgment, Baqer Al-Olum Research Center, page1.
- Taqizade, Ebrahim, Maritime Transport Rights, Tehran, Majd, p. 81.
- Hoseiny, Mohammad Baqer, The Role of Oblige Wrong In The Contractual Liability, Journal of Justice, N. 72, Twelfth Year, Bahman and Esfand 1387, P.3.
- Saljuqy, Mahmood, Private International Rights, Volume 2, Mizan Publications, Sixth Printing, 1389, Page 349
- Adl, Mostafa, Civil Rights, Prepared By Bandarchy Mohammad Reza, First Printing (Edition), Qazvin, Bahr Al-Olum Publication , 1373, p.134
- Katuzian , Naser, 1370, Civil Rights, Tortious Liability, Civil Liability, Second Printing, Tehran, Tehran University Publications.

- Almasi ,Nejadali, Identifying and Executing Foreign Civil Rules, Journal of Tehran University Politic Sciences and School of Law. N. 25, Jnuary 1369, p.80
- Matin Daftary, Ahmad, Commercial and Civil Procedure Rules, Second Volume, Majd Publications, Second Printing (Edition), Tehran, 1381, p. 53
- Maqsury, Reza, Davoody Hosein, Agreement With Late Payment Damage Emphasizing On The Judicial Procedure, Vote Quarterly: Judicial Votes Studys, N. 13, Winter 1394
- Mohajery, Ali, Comprehensive Description About Law Of Executing Civil Rules, Tehran, Fekrsazan, 1384, First Printing, Volume 2, page 277