

THE LEGAL EFFECT OF ASSERTING NON-FULFILLMENT OF THE CONTRACT. "A COMPARATIVE ANALYTICAL STUDY"

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Abstract

This study addressed the principle of payment by non-execution of a contract, which is considered one of the established principles in civil law. This principle grants the right to one of the contracting parties to refrain from executing their obligation until the other party fulfills their own obligation during the contract execution stage. This results in a temporary suspension of the contract execution without terminating the contractual relationship. During this stage, the contract does not become divisible when the payment by non-execution is claimed, and the contractual obligations do not expire completely, but are limited to the suspension of their execution. Therefore, the legal effect of payment by non-execution of a contract is of great importance as it contributes to achieving equality and justice between the contracting parties, where one party does not find themselves forced or obligated to execute the contract while the other party fails to do so. This creates a balance between the obligations of the parties to the contract. Moreover, the importance of this principle lies in its role in reducing cases of termination, as it ensures the continuity of the contract execution, which is the goal of the contract. Furthermore, the payment by non-execution of a contract provides an opportunity for both parties to resume the execution of the contract after its suspension. Therefore, based on all that this principle embodies, it can have legal effects.

INTRODUCTION

Firstly: Abstract

The principle of non-performance payment is well-established in civil law, where it grants one of the contracting parties the right to suspend the execution of their obligation during the execution phase of the contract until the other contracting party fulfills their commitment. This leads to a temporary suspension of the execution of the contract without terminating it. At this stage, the contract is not divided when adhering to the principle of non-performance payment. The contractual obligations do not cease, but rather are limited to stopping their execution.

The origin of this principle can be traced back to the jurists of canon law. Churchmen addressed this issue because it was deemed essential from both a moral standpoint and in terms of upholding justice. A person's conscience can be bound by an oath they have sworn or a promise they have made. Several moral principles were agreed upon by the churchmen to serve as a foundation for this issue. For instance, if someone fails to honor their covenant, it is considered a sin in their heart. Therefore, they believed that there is no sin for those who break their covenant in response to someone else breaking theirs. As the saying goes, "the covenant of one who has no covenant is not respected, nor is their covenant respected if they themselves are not respected. According to the romans, the means to compensate for the non-execution of the party demanding performance was the fraud payment, which had no substantive basis, but was rather a general rule used in all contracts based on good faith and did not carry a private label¹.

Thus arose the principle of payment by non-execution of contract, taken from them by later commentators of roman law in the Middle Ages. Then they formulated a general theory from it and linked it to roman law. The jurists of ancient French law did not accept the idea of the principle as a general theory. That explains the absence in the old French civil law of a general text establishing this theory, and they limit their application to cases where there is a text².

Secondly: The importance of the topic and the reasons for choosing it:

The significance of exploring the legal impact of Payment for non-execution of the contract lies in its ability to establish fairness and balance between the contracting parties. This principle ensures that one party is not forced to execute the contract while the other party is not fulfilling its obligations, resulting in a situation of equilibrium between the obligations of both parties. It is important to adhere to this principle as it reduces the cases of termination and ensures the continuous execution of the contract, which is the primary purpose of the contract. The Payment of non-execution of the contract provides the opportunity for the two parties to continue the execution of the contract after it has been suspended. Furthermore, this principle can lead to legal effects and implications, indicating its importance in the field of civil law.

Thirdly: Research Problems

The main issue that arises is when one party to a contract fails to fulfill its obligation in a timely manner, leading the other party to refuse to fulfill its obligation. This refusal results in legal consequences due to the temporary suspension of the execution of the contract. Therefore, our objective is to find legal solutions that balance the obligations of the parties involved in the contract to maintain stable transactions and prevent the adoption of methods that could lead to the termination or cancellation of the contract.

Fourthly: The Scope of the Research

This research topic focuses on the principle of Payment for Non-Execution of Contract in Iraqi and Egyptian civil law. It explores the nature and scope of this principle, including the circumstances in which it can be applied, the conditions that must be met to implement it, and limitations on its application. The article also aims to explain the legal effects that result from adhering to the Payment for Non-Execution of Contract principle.

Fifthly: Research Methodology

In this research, we will adopt the following approaches:

1. Analytical approach: This approach involves examining legal provisions and their treatment of cases involving non-fulfillment of contracts, as well as the solutions provided to ensure their execution.
2. Comparative approach: This method involves comparing the legal provisions related to the subject of non-fulfillment of contracts in both Iraqi and Egyptian civil law.

Sixthly: Research Structure

First Chapter: The Concept of Asserting Non-Fulfillment of a Contract

Section One: Definition of Asserting Non-Fulfillment of a Contract

Section Two: Scope of Asserting Non-Fulfillment of a Contract

Second Chapter: Adherence to the Assertion of Non-Fulfillment of a Contract

Section One: Conditions for Adhering to the Assertion of Non-Fulfillment of a Contract

Section Two: Limitations of Adhering to the Assertion of Non-Fulfillment of a Contract

Third Chapter: Consequences of Asserting Non-Fulfillment of a Contract

Section One: The Effect of Asserting Non-Fulfillment of a Contract between the Contracting Parties

Section Two: The Effect of Asserting Non-Fulfillment of a Contract Concerning Third Parties

First Chapter

The Concept of Asserting Non-Fulfillment of a Contract

Asserting non-fulfillment of a contract is a response made by one party to the other party's demand for the fulfillment of their commitment. This concept is considered a well-established rule and principle in civil law. It allows one party to refrain from fulfilling their obligation until the other party has fulfilled their own. Considering this topic, we will discuss the definition of asserting non-fulfillment of a contract and then clarify its scope through the following two sections:

Section one

Definition of Asserting Non-Fulfillment of a Contract

The principle of asserting non-fulfillment has been defined from a terminological perspective in Iraqi Civil Law No. 40 of 1951, in the first paragraph of Article 282, which states: "Each party that has committed to performing something has the right to refrain from fulfilling it as long as the creditor has not fulfilled their own obligation, which arose due to the debtor's commitment and is linked to it.

Through the text, the Iraqi civil legislator considered the assertion of non-fulfillment of a contract as an application of the right to withhold performance. This right allows the creditor to abstain from fulfilling their debt until they receive a debt owed to them by the debtor, provided that the creditor and debtor roles are present in both parties and there is a connection between the two debts. On one hand, this concept is seen as a passive means consisting of responding to non-fulfillment with an equivalent non-fulfillment³. On the other hand, it is also considered a negative tool that forms a response to non-fulfillment with similar non-fulfillment⁴.

This principle is also highlighted in Egyptian Civil Law No. 131 of 1948, in Article 161, which states: "In contracts binding both parties, if the reciprocal obligations are due for fulfillment, each contracting party may refrain from executing their obligation if the other party has not fulfilled their commitment." Here, the Egyptian legislator also considered this principle as an

application of the right to withhold performance within the scope of contracts binding both parties. Each party may abstain from fulfilling the obligations imposed by the contract, even if they are due for performance, until the other party fulfills their obligations or at least offers to perform them, provided that these latter obligations are also due for performance.⁵

The scholars have disagreed on defining this principle, as each of them has defined it according to their understanding. Some defined it as, "In a reciprocal contract, each party can refrain from fulfilling their obligation until the other party fulfills their obligation."⁶

On the other hand, some others defined it as, "A legal system which stipulates that in reciprocal contracts, each party is allowed to refrain from executing the obligations imposed by the contract, even if they are due for performance, until the other party fulfills their corresponding obligations or at least offers to perform them, as long as these latter obligations are also due for performance."⁷

It has also been defined as, "The suspension of contract execution by one party until the other party fulfills their obligation, which is a means used by a contracting party to put pressure on the other party to perform their obligation."⁸

Through these definitions, it becomes clear to us that this principle or rule is the basis on which the interdependence of obligations is established, making the execution from one side reciprocal to the execution from another side. This is also in line with the traditional theory of causation, which states that the reason for each obligation is the execution of the other obligation.

Section Two

Scope of Asserting Non-Fulfillment of a Contract

From a legal perspective, payment is typically divided into three categories. Either the payment is a formality related to jurisdiction and court procedures, or the payment is objective and related to the case itself in terms of its origin, existence, and resolution, or the payment is not accepted as a means of protecting the rights of the person bringing the case.

To narrow down the scope of Payment for non-execution of the contract through the above-mentioned tripartite division, legal experts have chosen three directions. The first direction considers Payment as an objective payment, where the defendant is claiming an objectively motivated Payment in the hope of avoiding a conviction based on the legitimacy of their refusal to execute the obligation at hand. The second direction sees Payment as a push towards non-acceptance, where the defendant upholding the Payment by the non-execution claim argues that the claimant's demand is illegitimate. The third direction considers Payment of non-execution as a deferred payment, where the defendant upholding the payment asks for permission to be compelled to fulfill their obligation to deliver before their opponent fulfills their obligation. Therefore, they request that the judgment be postponed until the other party executes it.

The directions discussed above suggest that the principle of Payment for non-execution of the contract is a defensive rather than offensive means decided by the law for a contracting party

who is both a debtor and a creditor to the other contracting party. This principle grants the right to the party who upholds Payment to pay off the debt that the opponent owes them, for the opponent to fulfill their own obligation. It is a protective measure aimed at ensuring the fulfillment of mutual obligations and achieving justice, considering that it is unfair to require the creditor to give first and then demand their rights, which may lead to procrastination, delay, and loss of rights. Therefore, it is established that if one of the contracting parties fails to fulfill their obligation, the other party is not obliged to fulfill their obligation without the need for an official notice or a judgment to cancel the contract⁹.

The scope of the Payment for non-execution of the contract is limited to contracts that bind both parties, which fall under the applications of the right of retention. This is what is explained by Article 282 of the Iraqi Civil Law and Articles 161 and 264, paragraph one, under the subject of the right of retention in the Egyptian Civil Law. According to the Iraqi and Egyptian laws, the Payment for non-execution of the contract, like termination, is limited to reciprocal contracts, meaning contracts that bind both parties. This means that its application is limited to the obligations that correspond to the contractual obligations of the parties. In reciprocal contracts, if each party is both a debtor and a creditor, the non-execution by one party of their obligation is a reason for the other party to withhold their own performance of the obligations that they owe until the other party executes what they have undertaken to perform.¹⁰

There has been a question regarding the possibility of using payment for non-execution of the contract in incomplete reciprocal contracts, which are contracts that are originally binding to one party, but during their execution, there arises an obligation on the creditor's side. An example of this is a gratuitous deposit, where the depositor is allowed to claim what he spent on the deposited thing as necessary expenses for its preservation. However, the reality is that the contract that is binding on one party remains in its original nature and is not subject to the payment for non-execution of the contract rule. Rather, it has another right, which is the right to retain what is in its possession until it fulfills what it spent, and this applies to deposit, bare ownership, and mortgage contracts. All these contracts only allow for the right of retention and not the payment for non-execution of the contract¹¹.

Payment for non-execution of the contract, set-off, termination, and the right to detain. These systems all stem from the same idea, which is to correspond to obligations. However, payment for non-execution of the contract differs from the others in that it is limited to contracts that are binding on both parties. On the other hand, set-off, termination, and the right to detain have a wider scope than payment for non-execution of the contract.¹²

Both the right to payment in lieu of contract performance and the right to detention are independent legal concepts. Detention refers to holding someone's property or money owned by someone else, while payment in lieu of contract performance can be sought even if what the defaulting party is withholding is their own property, a sum of money, or an act or omission. Additionally, the underlying principles for each right are different, as payment in lieu of contract performance is based on the rules of intention and purpose, while the right to detention is based on balancing conflicting interests.

The right to demand the return of a thing belongs to the owner of that thing, while the right of the holder is based on a right towards the owner in relation to that thing. Both rights are based on considerations of justice.¹³

Second Chapter

Adherence to the Assertion of Non-Fulfillment of a Contract

The principle of payment by non-performance of the contract, as a negative action by one of the parties seeking to compel the other party to perform its obligation by paying what it owes, does not imply termination or invalidation of the contract, but rather suspends it temporarily. Therefore, it does not require prior notice, as notice is required before terminating a contract. The consequences resulting from these issues vary in their seriousness and importance, as insisting on payment by non-performance is a payment and not a legal claim.¹⁴

The right to payment by non-execution of the contract is considered a right if certain conditions are met. Moreover, there are limitations on the use of this payment. To clarify these conditions and limitations, we will divide this topic into two demands. In the first demand, we will outline the necessary conditions to adhere to this principle, and in the second demand, we will explain the limitations as follows:

Section One

Conditions for Adhering to the Assertion of Non-Fulfillment of a Contract

To adhere to the payment by non-execution of the contract as a right, several conditions must be met, as follows:

1. The contract must be a binding contract for both parties.

The rule of payment by non-execution of the contract, like termination, applies to contracts that are binding on both parties, such as sales and leases, where there are obligations on the part of the contracting party who has not committed a breach and can suspend their implementation. However, in contracts that are binding on one party, such as gifts, there is no room for payment by non-execution of the contract¹⁵. This is confirmed not only by legal texts but also by the opinions of scholars who considered that the legitimate refusal to fulfill the contract is based on the idea of causality, which establishes a relationship between mutual obligations. Payment by non-execution of the contract is related to the theory of causation, as the cause of the obligation of each of the contracting parties is for the purpose of fulfilling the other reciprocal obligation. If the latter fails to fulfill it, the cause of the other's obligation disappears, and thus the disappearance of the cause in this way is a legitimate argument to suspend the implementation of the contract by the non-breaching party¹⁶.

Therefore, given that contracts binding both parties have important characteristics that distinguish them from other contracts, and given the importance of these contracts, it becomes evident that they establish mutual obligations that lead to consequences that are not seen in contracts that bind only one party, due to the absence of mutuality. One of these consequences is that if either party to the contract binding both parties fail to fulfill its obligation, the other

contracting party can terminate the contract. Additionally, each contracting party has the right to demand the other party's performance of its obligation unless there is a deadline, and each party can demand payment from the other party that has not fulfilled its obligation. Here, the party demanding payment does not withhold its own obligation but rather expresses its desire to fulfill its obligation first so that the other party can also fulfill its obligation contemporaneously. In contrast, a contract that binds only one party does not have these consequences because there is only one obligation, and therefore there is no room for payment by non-execution of the contract or termination in case of non-performance.¹⁷

2. The existence of mutual obligations under the contract:

For the payment by non-execution of the contract to be valid, there must be a link between the reciprocal obligations. Without a link between the obligations, it is not possible to use this payment method, even if both parties agree to it. The link between the obligations is based on what the jurists have reasoned, as evidenced by their texts, such as the seller's right to detain the sold item until he receives full payment, or the buyer's right to detain the payment until he receives the item. However, it is worth noting that any refusal to fulfill an obligation can only be invoked if there is a corresponding and related obligation. This is evident from their expression of the validity of detaining the sold item to receive its price or detaining the price to receive the sold item.¹⁸

3. That the mutual obligations are due for performance:

In addition to the contract being binding on both parties, it is necessary that the mutual obligations are due for performance. It follows that the seller, for example, cannot legitimately refuse to fulfill the contract by not delivering the sold item to the buyer if the price is not yet due, but rather postponed. Similarly, it is not permissible to rely on payment by non-execution of the contract if the obligation is natural and not civil¹⁹. If the obligation is civil and due for performance, and one of the contracting parties fails to fulfill it but still demands the other party to perform their obligation, then it is permissible for the latter to resort to payment by non-execution of the contract.²⁰

It is also not permissible for a contracting party to insist on the payment of non-performance of the contract if it can be inferred from the nature of the contract or from custom, as his obligation to perform is due before the reciprocal obligation, as is the case with the worker or the hotel owner. The worker's obligation is due for performance before the employer's obligation, so he is not allowed to insist on payment for non-performance of the contract, and the same applies to the hotel owner's obligation due for performance before the guest's obligation, so he also cannot insist on payment for non-performance of the contract. In other words, if the time for performing the reciprocal obligations differs, the party on whom the obligation to perform first falls is prevented from insisting on payment for non-performance of the contract. In contracts with a period, especially in contracts that include periodic performances, the party responsible for the performance must be proactive in fulfilling their obligation, and thus cannot claim payment for non-performance of the contract unless the reciprocal obligation has not been fulfilled despite the deadline, in which case they may refuse

to perform the next obligation. If the performance of the reciprocal obligations is contemporary, each of the contracting parties has the right to insist on payment for non-performance of the contract against the other, and there is no way out of this negative situation except for one of the contracting parties to resort to the judiciary. In this case, the judge rules on each of them to deposit what they have committed to in the court's treasury or with a third party, unless the plaintiff has resorted to the real presentation procedures, or it becomes apparent to the judge that the defendant is obstinate in his conduct. In this case, the judge orders the defendant to perform his obligation without conditioning the plaintiff's obligation to be performed, as this is the default²¹.

4. One of the contracting parties violates the contract

One of the contracting parties must breach the contract for the breach to occur. This breach only occurs if the obligations are due and require performance. If the obligations are deferred, then the failure to perform does not constitute a breach. For example, if a sales contract is concluded and the payment is deferred, the seller cannot withhold the transfer of ownership and delivery of the sold item to the buyer for non-payment. The reason for this is that the seller has granted the buyer a deferment, which amounts to a waiver of his right to withhold the delivery for non-payment. However, if the contract specifies a judicial grace period for performance²², the seller can still withhold delivery for non-performance²³, but only if the non-performance is total. If the non-performance is partial or defective, the Iraqi law and the Egyptian law do not differentiate between withholding payment for non-performance partially and completely.²⁴

5. The obligation that one party refuses to perform must be a genuine and serious obligation.

It is not permissible for the buyer, for example, to refuse to fulfill his obligation of paying the price due to the delusion or claim of the existence of a risk of the sold item becoming due if this risk is not serious.²⁵

If the above conditions are met, the party who has not fulfilled their contractual obligation may be entitled to refrain from fulfilling their obligation until the other party fulfills their obligation. There is no need for prior notice to use the legitimate abstention from fulfilling the contract, nor is there a need for a court judgment to annul the contract. Likewise, there is no need to resort to the court to request permission to withhold payment until the contract is fulfilled. However, in some cases, it may be necessary to resort to the court, such as when one party denies the other's position in withholding payment until the contract is fulfilled, or when both parties withhold payment and refuse to fulfill their obligations. In such cases, the only way out is to resort to the court.²⁶

Section Two

Limitations of Adhering to the Assertion of Non-Fulfillment of a Contract

Although the conditions for insisting on payment without implementing the contract are met, there are some restrictions that must be considered by the person insisting on payment without implementation, otherwise he will not benefit from his insistence. These restrictions include:

1. It is essential to consider good faith when adhering to the legitimate refusal to fulfill the contract: If the matter relates to a contract binding on both parties, and the reciprocal obligations are due for performance, the contracting party has the right to refrain from fulfilling his obligation if the other party has not fulfilled his obligation. However, there should be no abuse in exercising this right. The rule is that good faith must be considered when implementing contracts. If the one who adheres to the payment after the non-fulfillment of the contract is the one who caused the delay in the other party's fulfillment of his obligation, or if the remaining commitment of this other party is relatively small compared to the overall commitment, then he is not entitled to adhere to the payment after the non-fulfillment of the contract, otherwise he would be acting arbitrarily in using his right.²⁷

It is not permissible for a contracting party to refuse to fulfill a primary obligation in the contract until the other contracting party fulfills a secondary obligation that is of lesser importance compared to the first obligation. For example, a tenant cannot refuse to pay rent until the landlord performs major repairs and renovations to the rented property. Furthermore, a seller is not obligated to deliver a non-divisible item if the buyer is satisfied with paying only a portion of the price. Additionally, a buyer may suspend payment if they face a threat from a third party, have strong reasons to fear imminent harm, or if defects in the item become apparent.

Sometimes, the right to refrain from fulfilling a contractual obligation may be limited to a secondary aspect of the obligations imposed on one of the parties. In this case, the intention accompanying the conclusion of the contract is taken into consideration to determine whether this aspect has a decisive impact on the contract. If it becomes clear that one of the contracting parties has refused to fulfill his obligation under the contract, it is not acceptable for him to insist on the right to refrain from fulfilling his obligation to the other party who, in turn, has refused to fulfill his corresponding obligation. This is because this right should not be misused, according to the general principle of good faith in the implementation of contracts as stipulated in the first paragraph of Article 150 of the Iraqi Civil Law. Therefore, if the part that has not been fulfilled is of little importance, the creditor of this obligation cannot refrain from fulfilling his obligation, and it is up to the judge to assess the importance of the part or the obligation and its impact on the nature of the contract, and to determine the penalty for the breach and whether it justifies the right to refrain from fulfilling the obligation. The judiciary usually tends to be lenient in allowing payment instead of contract fulfillment more than it does in canceling the contract.²⁸

2. The defendant should not be bound to fulfill their obligations according to the contract first: Sometimes the contract may regulate the issue of execution between the parties sequentially, rather than concurrently, so if the contract regulates execution in this way, the taking should be in accordance with what is stipulated, and therefore there is no room for payment for non-execution of the contract. However, the legislator may sometimes intervene and allow payment despite the contract's provisions. For example, the seller may refrain from fulfilling their obligation to deliver despite deferring payment, in the event of the buyer's bankruptcy, as bankruptcy cancels the term. Also, custom may be established for a specific arrangement of reciprocal obligations, such as in construction contracts where it may be customary for the contractor to execute the work first and then receive their dues according to the progress of the work, thus leaving no room for payment for non-execution of the contract.²⁹

3. One of the parties to the contract cannot demand the other party to fulfill their obligation while they themselves are not ready to fulfill their own obligation. This is the situation that is addressed by the payment for non-performance of the contract. However, difficulties may arise when one of the contracting parties has partially fulfilled their obligation. In this case, can they demand the fulfillment of a part of the obligation without being objected to by the payment of non-performance of the contract? The principle is that full compliance is required, so anyone who has not fulfilled their entire obligation cannot demand the other party to fulfill their obligation, even if they have partially fulfilled it. However, the judge, considering the circumstances of the case before him, may assess the importance of partial implementation, and then issue his judgment regarding the legality of the payment of non-performance of the contract considering that.³⁰

4. The contracting party who insists on payment without fulfilling the contract obligations must be willing to fulfill their own obligations. If one of the contracting parties denies their commitment and clearly expresses their intention not to fulfill their obligations, they cannot claim payment without fulfilling the contract. This is evidence of their bad faith, which they have declared.³¹

5. The impact of the delivery and receipt process on the payment for non-performance of the contract: If one of the contractors has begun to fulfill the preliminary delivery and receipt procedures, the other is not entitled to adhere to the payment for non-performance of the contract. Because fulfillment and delivery mean starting the delivery process, with the nature of each commitment being real estate or movable property. The contractor starting registration procedures in the real estate is considered a delivery, so the buyer is not entitled to refuse because the seller did not deliver the purchased item. The same applies to movable property, by transferring it between the parties, which is considered delivery. The delivery differs according to the general rules of the law depending on the nature of the subject, as well as the method agreed upon by the parties, or what the customary law provides. If the contract is concluded, then fulfillment should be immediate, and both sides must fulfill their obligations at the same time. If a sale takes place and the parties agree that the seller will deliver the item immediately to the buyer in exchange for the buyer's immediate payment of the price, the buyer

must fulfill the payment obligation to demand delivery from the seller. Similarly, the seller is not entitled to demand payment from the buyer unless the item is ready for delivery.³²

Third Chapter

Consequences of Asserting Non-Fulfillment of a Contract

The use of the mechanism of payment for non-performance in a contract is subject to the advantages it entails. Payment for non-performance is a means of achieving justice and equality between the parties to the contract, as it is not fair for one party to be forced to fulfill their obligation while the other party fails to do so. It is also a means of pressuring the other contracting party, as insisting on payment for non-performance gives them the impression that they will not receive the corresponding performance of their obligation unless they fulfill their own obligation. This encourages them to hasten the fulfillment of their obligation. Additionally, payment for non-performance is a guarantee for the party insisting on it against the other party's insolvency, ensuring that they do not lose all or a significant portion of what they have fulfilled. Moreover, it is also a simple, quick, and cost-effective means.

Furthermore, resorting to this mechanism is subject to the effects it may produce. By this, we mean the consequences of the party insisting on payment for non-performance of the contract. If the conditions for payment for non-performance of the contract are met, it will have an impact on the contracting parties as well as on third parties³³. To clarify this, we will divide the third section into two parts. In the first part, we will explain its effects between the contracting parties, and in the second part, we will explain its effects on third parties.

Section One

The Effect of Asserting Non-Fulfillment of a Contract between the Contracting Parties

The effects of payment in lieu of performance of the contract between the parties are as follows:

1. Suspension of performance in non-delivery of a sample: If the conditions for payment of non-performance of the contract are met, the party who withholds payment is not obliged to perform their obligation, but rather this obligation is suspended without being terminated, as in cancellation. If the suspended obligation is a commitment to transfer a property right, such as the seller's commitment to transfer ownership, the seller may refrain from assisting the buyer in registering the contract so that ownership does not transfer to the buyer. If the obligation is to perform an action, such as the contractor's obligation to build a building, the contractor may stop construction work. If the obligation is to refrain from doing an action, such as a merchant's undertaking to refrain from conducting business in a certain neighborhood to avoid overcrowding, the merchant may continue to conduct business in this neighborhood.

It should be noted that there are circumstances in which the suspension of the obligation is not conceivable, as in the case where a representative or singer undertakes to refrain from performing a certain concert in exchange for a certain amount of money. If the debtor delays in paying this money, the creditor has no choice but to breach this obligation and hold the concert if possible. This would be a termination of the contract, not a suspension of it, because the nature of the obligation does not allow for suspension. This rule also applies to obligations

to perform an act, if the performance of this act is mandatory at a certain time, otherwise the intended purpose will be missed. For example, if a maker undertakes to complete products for display in a public exhibition to be held at a specific time, and the maker suspends the obligation to fulfill his commitment until the exhibition deadline passes because he did not receive his fee, this would be equivalent to termination of the contract.³⁴

2. Suspension of performance in the obligation to deliver a sample: If the suspended obligation is the obligation to deliver an object, the holder of the payment right may suspend performance by withholding the object until they receive their right from the other contracting party. This is like when a seller refuses to deliver the sold object until they receive payment. In this case, the suspension of performance mixes with the right of withholding the object. It is established by precedent that a third party, who is not the seller, cannot file a lawsuit for the validity of the contract if the buyer fails to fulfill their obligation of paying the remaining price, because this payment is considered the same as the payment of non-performance of the contract. Therefore, the challenger (non-party) who is a second buyer of the sold property cannot appeal the ruling regarding the validity and deposit obtained by the first challenged party, and the consequences of considering it as exonerating the liability of the buyer from the judgment.

If the payment of non-performance does not grant the creditor any right of privilege over the subject matter of their commitment, it is still considered a guarantee that secures the creditor against the risk of the debtor's insolvency. However, during the payment period, the creditor is not allowed to take possession of the subject matter of the commitment. Instead, they must provide an account of it. Additionally, the creditor must take care of the detained thing, and if they spend any necessary or beneficial expenses on it, they must be reimbursed. If the detained thing is lost or destroyed during the detention period for a foreign reason, the owner of the thing bears the consequences.

The payment by way of non-performance and the right of retention cannot be accepted in the case where the subject matter of the obligation is the transfer of ownership of a thing, meaning that the creditor may withhold the performance of his obligation if the debtor has not fulfilled his entire obligation. However, the creditor is not allowed to abuse his right if the remaining part of the debtor's obligation is a small amount.³⁵

3. Suspension of performance in successive contracts: There is nothing that prevents the creditor from insisting on payment by non-performance of the contract in successive contracts. The lessee may refrain from paying rent for the period in which he was deprived of the benefit of the rented property. Similarly, the employer may refrain from paying the employee's wages for the period in which he refused to perform his work. It should be noted that in these contracts, where time is considered an element of the contract, suspending the obligation results in a decrease in the amount of performance due for the time during which the suspension occurred. What has elapsed cannot be compensated, just as if the tenant was late in paying rent and the lessor refused to perform his obligation by allowing the tenant to benefit from the property for a period of time, the lessor during this period would be considered as having not performed his

obligation at all, not temporarily, and thus the lessor's obligation would be reduced by this amount.³⁶

4. Suspension of performance in instantaneous contracts: It is permissible to withhold payment for non-performance in instantaneous contracts, which are contracts that are executed once and do not involve stages of performance over agreed-upon periods of time. In these contracts, non-performance does not affect the amount or quantity of the obligation and may even increase it. For example, if the sold item generates fruits or crops during the period of non-delivery, the party withholding payment for non-performance may claim those upon the end of the suspension. In this case, payment for non-performance is always a mere deferred effect, and the position of the contracting parties does not differ from before the withholding. Thus, if the seller refrains from delivering the sold item for a period, this does not entail any modification to the quantity of the obligation, as it remains the same after two months of justified withholding as it was before.³⁷

Section Two

The Effect of Asserting Non-Fulfillment of a Contract Concerning Third Parties

The payment of non-performance of the contract also applies to third parties. Here, by "third parties" it meant those who are not the debtor, but rather those who inherit his ordinary and special debts in the future. We will explain this in the following manner:

First: Applicability of the payment of non-execution of the contract against general successors and creditors

The payment for non-execution of the contract applies to the debtor's general successor³⁸ and creditors. For instance, if the seller has not received the price, they may attach the sample against the buyer, the heirs of the buyer, or the buyer's personal creditors. This right to refuse legitimate payment can be exercised whether the debt was established before or after the establishment of the right to payment by non-execution, and in case of the creditor's bankruptcy, whether alone or against all creditors. The legitimate right to refuse payment passes from the seller to their heirs, and creditors are also entitled to use it on their behalf according to general provisions³⁹. The debtor's general successor and creditors are not entitled to anything other than the debtor's rights or advances. If one of the ordinary creditors executes the sale, the seller may refrain from delivering it to the creditor until they have received their full entitlement. To say otherwise would strip the non-execution payment of all practical effects as a means of guarantee. It follows that every creditor of the contracting party for whom the payment of the non-execution contract is upheld must sell the sample by force. Otherwise, the upholder would lose the right of confinement that remains attached to the payment of non-execution.⁴⁰

Second: The validity of a legitimate refusal to perform the execution of the contract against the general successor

To establish the validity of the right to Payment by non-execution of the contract against the debtor's general successor⁴¹, it must be determined whether the successor acquired the right

before or after the establishment of the right to Payment by non-execution of the contract. If the successor acquired the right after the establishment of the right to Payment by non-execution, then the defense of non-payment of the contract can be raised against them. However, if the successor acquired the right before the establishment of the right to Payment by non-execution, then the defense of non-payment of the contract cannot be raised against them in court.⁴²

The first case: Payment by non-execution of the contract applies to the special successor if this successor acquired the right after the establishment of the right to payment by non-execution of the contract. For example, if the buyer is late in paying the price, the seller may uphold the payment by non-execution of the contract and retain the sole asset. Anyone who acquires a right from the buyer on the asset after the seller upholds the payment by non-execution of the contract is entitled to payment by non-execution of the contract. If the buyer sells the asset to another buyer or pledges it to a secured creditor, the seller may keep the asset against the second buyer or secured creditor. This is because the buyer did not transfer to his successor more rights than he had, and his rights were subject to the seller's right to retain the asset. Therefore, these rights are transferred to the successor subject to this right, and the buyer cannot transfer a right he does not possess, and the one who is deprived of something cannot give it.⁴³

Case Two: Payment by non-execution of the contract does not apply against the special successor if the latter acquired the right before the establishment of the right to payment by non-execution. For example, if a person mortgaged his house and then leased it to a tenant, and later sold it to a buyer who wanted to take possession of the house before the end of the lease contract, the right to payment by non-execution does not apply to the buyer if the lease contract is not fixed date. In this case, the tenant has the right to compensation that he can claim from the lessor, and he can attach the property against the buyer, but he has no right to withhold the property against the mortgage creditor, since the mortgage right precedes the establishment of the right to attachment.⁴⁴

Payment for non-execution of a contract is a temporary measure, as it cannot be continued indefinitely. Either the contracting party who was in default will perform their obligations, or the party who used payment for non-execution of the contract will realize that the other party will not fulfill their obligations and will seek to exit this negative situation to be able to act in accordance with the performance that they were supposed to receive from the other party. To do this, they can request cancellation, thus moving from a negative to a positive situation. It may happen that one of the contracting parties has fulfilled their obligations while the other party has not. In this case, the party who has fulfilled their obligations is unlikely to use payment for non-execution of the contract, and they will need to take a positive stance by demanding cancellation.⁴⁵

CONCLUSION

First: Conclusion

1. Payment for non-execution of the contract is a defensive means of the right of detention, which allows a contracting party to withhold payment of their debt until their own debt to the other party is paid. This means that payment for non-execution is applicable to the other contracting party who has failed to fulfill their obligations under the same contract. It is a legitimate and temporary means of defense.
2. Payment for non-execution of the contract is a protective measure aimed at ensuring the mutual fulfillment of contractual obligations and achieving justice and equality between the parties to the contract.
3. The Iraqi legislator has limited the scope of payment for non-execution of the contract to contracts that are binding on both parties, such as sale, lease, loan, and other contracts that are binding on both parties.
4. To invoke the right to payment by non-execution of the contract, it is required that there be a reciprocal obligation between the parties, the obligation to be due for performance, one of the contracting parties fails to perform its obligation, and the obligation that the party refrains from performing is genuine and serious.
5. The party withholding payment for non-execution of the contract must consider the restrictions that apply when using this defense, otherwise they may be considered abusive in the exercise of their rights.
6. Payment for non-execution of the contract does not require a lawsuit to be filed. It is sufficient for the party withholding payment to do so when the opposing party breaches their obligation.
7. The party withholding payment for non-execution of the contract must provide notice to the other contracting party, unlike when seeking to cancel the contract.
8. The effect of payment for non-execution of the contract is the suspension of the obligation. The obligation is not terminated, and payment for non-execution of the contract can be used against the general successor, creditors, and private successor.

Second: Recommendations

1. We recommend that the Iraqi legislator should not limit the principle of payment by non-execution only within the right of retention rule, following the example of the Egyptian legislator. Additionally, the scope of the principle of the right of retention is broader, as it includes contracts that are binding on both parties and one party because of their legal or material bond, such as possession. In contrast, the non-execution payment principle applies only to mutual contracts that bind both parties.
2. In cases where serious reasons are feared for non-compliance with obligations, we recommend that the Iraqi legislator allow the contracting party to suspend the

implementation of its obligations if it fears that the other contracting party will not fulfill its obligations.

3. We recommend that the legislator creates specific legal provisions regarding payment by non-execution of the contract regarding restrictions on adherence and the consequences that result from it. While the idea of interdependence between mutual obligations in contracts that bind both parties is the essence of payment by non-execution, the legislator has not provided a text in the Civil Code that clarifies this idea. The text is limited only to the consequences that result from it.
4. We suggest that the Iraqi Civil legislator include a legal provision that differentiates between the case of complete payment by non-execution of the contract and partial payment by non-execution of the contract, as it is illogical, for example, for a seller to conclude a sales contract with deferred payment and then hold onto the payment by non-execution of the contract and refuse to transfer ownership of the sold item because the buyer did not fulfill their obligation, which is to pay the price.

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 17. Dr. Mohammed Najib Awadin al-Maghribi, previous source, p. 153-154.
 18. Mansour Abdullah Al-Tawalbeh, The Payment for Non-execution of the Commitment: A Comparative Study, Doctoral thesis submitted to the College of Higher Studies, University of Jordan, 2005, p. 93-94.
 19. A civil obligation consists of elements of indebtedness and responsibility; the debtor may be compelled to fulfill his obligation... A natural obligation, on the other hand, is limited only to the element of indebtedness without responsibility, and here the debtor cannot be forced to fulfill a natural obligation that lacks the element of coercion or compulsion, but by choosing it fairly his choice will be right.
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 22. A grace period is the period granted by the judge to the debtor to pay his debt if an emergency that is beyond his control prevents him from fulfilling his obligation.
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33. Zainab Salim, previous reference, p. 93.
34. Dr. Abdulrazzaq Ahmad al-Sanhouri, The Mediator in Explaining the New Civil Law, previous source, p. 835-836.
35. Dr. Elias Nassif, previous reference, p. 348.
36. Dr. Elias Nassif, previous reference, p. 349.
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38. A general successor is one who succeeds to the financial responsibility of a person in terms of rights and obligations, or part of it, in a group of money without specifying anything specific, for example, without specifying the heir of the estate or the beneficiary of part of the estate, the heir is considered the successor of his own inheritance, as well as the one who bequeathed to him the advances are part of the estate, such as a quarter or a third.
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41. A general successor is a person who takes a person's place in a particular situation. Real estate or a car, or just like that, the specific successor is the buyer who takes ownership of what is sold from the seller according to the contract of sale. Just as the gifted person has a specific thing, so likewise if his predecessor bequeathed a specific sample, such as land or a car, to a person. This spring, he made him a specific successor. The designated successor replaces his predecessor with a specific eye for many reasons, not including inheritance. Not because the inheritance is in kind but because it transfers a sum of money to the heir.
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43. Dr. Abdulrazzaq Ahmed Al-Sanhouri, The Mediator in Explaining of Civil Law, previous source, p. 838.
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