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THE APPLICATION OF SPECIFIC PERFORMACE IN CONTRACTUAL RELATIONSHIPS

Asta Jakutytė-Sungailienė

Mykolas Romeris University, Faculty of Law,
Department of Civil and Commercial Law
Ateities 20, LT-08303 Vilnius, Lithuania
Phone (+370 5) 2714 587
Email ckk@mruni.eu

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Abstract. *The civil law tradition considers specific performance the primary remedy for non-performance of obligations, as opposed to awarding damages and termination of contract. In recent years, creditors have rarely sought specific performance due to its costly and complex enforcement. This article focuses on whether specific performance is still efficient in legal practice. Since the fulfillment of monetary obligations is always possible in specie, the article deals with the fulfillment of non-monetary obligations and the enforcement of the court order of specific performance. Moreover, this article focuses on the general rules of specific performance in contract law and also analyses the possibility of demanding the fulfillment of obligations arising from a lease agreement—as lease agreements are distinguished by their continuing performance of obligations being a crucial part of successful commercial practice.*

Keywords: *specific performance, non-performance of obligation, non-monetary obligation, lease agreement*

Introduction

The national legal system of Lithuania, being a part of the civil law tradition, considers specific performance the primary remedy for the non-performance of obligations, as opposed to awarding damages and termination of contract. Such an approach derives from the Roman legal principle *pacta sunt servanda,* constituting the very core of law dealing with obligations. For a national lawyer, it is obvious that contractual obligations must be duly fulfilled and that the aggrieved party may seek the reimbursement of incurred damages only if performance *in specie* is impossible. As the enforcement of the order of specific performance is cumbersome due to its dependence exclusively on the debtor's will, the aggrieved party usually favors the reimbursement of incurred damages. Due to its costly and complex enforcement, creditors rarely seek specific performance. Accordingly, some legal researchers of the civil law tradition boldly state: specific performance has been abolished in legal practice.[1] Consequently, it raises the question—what enforcement mechanism is the most efficient when applying specific performance?

Some legal scholars present the use of specific performance as a remedy for non-performance as one of the divergences between the law of obligations in the civil and Anglo-American law traditions—the civil law tradition ranks specific performance as the primary remedy whereas the Anglo-American law tradition considers it as an extraordinary remedy for non-performance. According to the Anglo-American law tradition, specific performance can be decided at a judge's discretion only in such cases when it is more efficient than the reimbursement of damages. For instance, when the aggrieved party's interest in the fulfillment of an obligation is justifiable and adequate as compared to the restraints inflicted upon the debtor. Such differences are usually explained by pointing out the wide breadth of Roman law in the civil law tradition. However, modern research of Roman law confirms that specific performance was not an absolutely general rule because courts were sometimes entitled to adjudge reimbursement of damages.[2]

It should be noted that the majority of legal scientists focus on the analysis of specific performance in situations arising from sale-purchase agreements where the seller's obligation to transfer ownership (*dare*) and the purchaser's obligation to pay the agreed price are rather easily enforceable *in specie*. However, the specific performance of lease agreements creates practical difficulties beause such agreements establish parties' obligations to act (*facere*) or to refrain from acting (*non facere*). Lease agreements comprise a large section of commercial practice. Furthermore, lease agreements are distinguished by continuing performance where the due fulfillment of obligations is crucial to successful commercial practice. Therefore, this article focuses on general rules of specific

1 Faust, F.; Wiese, V. Specific Performance: a German Perspective. In *Specific Performance in Contract Law: National and Other Perspectives*. Antwerpen, Oxford, Portland: Intersentia, 2008, p. 47.

2 For more extensive analysis see Dondrop, H. Specific Performance: a Historical Perspective. In *Specific Performance in Contract Law: National and Other Perspectives*. Antwerpen, Oxford, Portland: Intersentia, 2008, p. 265−282.

performance in contract law and also analyses the possibility of performance *in specie* of obligations arising from lease agreements.

Unfortunately, Lithuanian national legal doctrine lacks any publications on the subject matter. Therefore, this analysis has been done using references to the research of foreign authors and foreign case law.

1. General Provisions of the Application of Specific Performance

In the case of non-performance of contractual obligation, the aggrieved party is entitled to seek (i) specific performance, (ii) price reduction, (iii) termination of contract, (iv) reimbursement of incurred damages, or (v) withhold performance. The latter two remedies can be applied concurrently with the other three. Article 6.216[3] of the Civil Code of the Republic of Lithuania (LCC) establishes specific performance as the primary remedy for the non-performance of obligations. Firstly, it should be noted that there is a distinction between monetary and non-monetary obligations in respect to performance *in specie*. Section 1 of Article 6.213[4] of the LCC unambiguously states that every monetary obligation is always enforceable *in specie*. This legal provision corresponds with Article 7.2.1[5] of the UNIDROIT Principles of International Commercial Contracts, which reflects the generally accepted principle that monetary obligations are always feasible *in specie*[6]. Thus, demanding specific performance and demanding enforcement of the order of specific performance of monetary obligation is not a problem because money is fungible.

Non-monetary obligations are not all homogenous—they can be divided into three categories: (i) the obligation to transfer ownership (*dare*), (ii) the obligation to perform an action (*facere*), and (iii) the obligation to refrain from acting (*non facere*)[7]. Regarding the obligation to transfer ownership or the right to use or possess a non-generic object (*dare*), Section 1 of Article 6.60[8] of LCC specifies a creditor's right to demand

3 Article 6.216 states "In the event where a debtor fails to perform in kind a non-monetary obligation within a fixed time-limit, or where the creditor does not have the right to demand for the performance in kind, the creditor may require other remedies to be invoked." – Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262.

4 Section 1 of Article 6.213 states "In the event where a party fails to perform his monetary obligation, the other party shall have the right to demand performance in kind." - Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262.

5 Article 7.2.1 states "Where a party who is obliged to pay money does not do so, the other party may require payment".

6 Commentary of UNIDROIT Principles of International Commercial Contracts [interactive]. [accessed 15-02-2010]. <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637>.

7 Mikelėnas, V. *Prievolių teisė* [Law of Obligations]. Vilnius: Justitia, 2002, p. 67−68.

8 Section 1 of Article 6.60 states "Where a debtor fails to perform the obligation to deliver an individually determined thing to the creditor's ownership or possession thereof by the right of trust or use, the creditor shall have the right to demand that thing to be delivered. This right shall become extinct upon the thing concerned being handed over to another creditor with the same kind of right. While the thing is not handed

specific performance of such an obligation. If this object has been already transferred to the entitled third party, the aggrieved party can seek the reimbursement of incurred damages but cannot seek specific performance. Obligations to perform an action (*facere*) or refrain from acting (*non facere*) constitute actions (inaction) for the benefit of the creditor except for the transfer of ownership (right to use). The general rule for specific performance of an obligation to perform a task is stipulated in Article 6.61[9] of LCC—the aggrieved party is entitled to choose either to perform the task at the expense of the debtor or to terminate the agreement and reimburse damages. The court can order specific performance in the case that the performance of the agreed task can be fulfilled only by the debtor and only if the creditor is not at fault for non-performance. The debtor cannot be exempt from liability on *force majeure* (forces beyond their control) or when none of the exceptions of specific performance applies. One might come to the conclusion that the specific performance of obligations to act (or refrain from acting) can be applied very rarely because, in such cases, other remedies are usually applied—damages, termination of contract, or performing the task at the expense of the debtor.

Although Article 6.216 of the LCC ranks specific performance as the primary remedy for non-performance of non-monetary obligations, Section 2 of Article 6.213[10] of the LCC establishes limitations to its application. This legal provision corresponds with Article 7.2.2[11] of the UNIDROIT Principles of International Commercial Contracts. Ex-

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over, the priority to receive it shall belong to the creditor in whose favour the obligation arose first of all, and in the event where it is impossible to be ascertained, to the creditor who was the first to bring the action. The creditor who cannot avail himself of the right to force the performance of the obligation in kind, shall be entitled only to compensation of damages." - Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262.

9 Article 6.61 states "1. In the event where a debtor fails to perform an obligation that entails doing a certain work, the creditor shall have the right to perform that work himself at the debtor's expense within a reasonable time and for a reasonable price unless otherwise established by laws or a contract, or he may claim damages. In these instances, the creditor shall have the right to file a suit and demand the creditor to pay in advance the amount necessary for performing the work. 2. In the event where a debtor fails to perform an obligation that entails performing a certain work or actions which can be performed exclusively by the debtor personally, the court may ,upon the demand of the creditor, exact a fine from the debtor in favour of the creditor. The amount of the fine shall be determined by the court. The fine may be exacted in a lump sum, or payable for every delayed day until the full performance of the obligation by the debtor. 3. Paragraph 2 of this Article shall not apply in the instances where the violated rights of the creditor can be defended by other forms of protection of rights, likewise where the performance of the obligation was rendered impossible not through the fault of the debtor." - Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262.

10 Section 2 of Article 6.213 states "If a party fails to perform his non-monetary obligation, the other party may demand performance in kind, except in cases where: 1) performance of a contractual obligation in kind is impossible in fact; 2) performance of a contractual obligation in kind would be greatly burdensome or expensive for the debtor; 3) the party entitled to performance may reasonably obtain performance from another source; 4) the party entitled to performance does not demand that performance within a reasonable time after he became or should have become aware of the non-performance of the contract; 5) the non-performed obligation is of an exclusively personal character." - Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262.

11 Article 7.2.2 states "Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless (a) performance is impossible in law or in fact; (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive; (c) the party entitled to performance may reasonably obtain performance from another source; (d) performance is of an exclusively

ceptions to claiming specific performance are (i) impossibility, (ii) unreasonable burden, (iii) replacement transaction, (iv) performance of an obligation of an exclusively personal character, and (iv) request made within reasonable time. In order to know if the court is entitled to order specific performance of a non-monetary obligation, it must be ascertained that none of the aforementioned exceptions exist. In other words, if a non-monetary obligation is not of exclusively personal character, and is still possible to perform within reasonable costs, the aggrieved party must request performance within a reasonable amount of time. Only then, if the party in breach still does not perform its obligation, may the aggrieved party seek a court order of specific performance.

1.1. Exceptions of Specific Performance

Unfortunately, national case law on the exceptions of specific performance is very scarce and one can only reason theoretically when referring to foreign case law.[12]

The concept of impossibility to fulfil an obligation should be explained according to the Roman principle *impossibilium nulla obligatio est*—no one is obliged to perform an obligation which is impossible in law or in fact.[13] For instance, legal impossibility occurs if a permit or licence to import or export goods is cancelled. The obligation is impossible to fulfil in fact if the object has physically perished.[14] Although impossibility as an exception of specific performance seems to be easily applicable, foreign case law shows that, at times, it is highly controversial. Impossibility to perform an obligation occurs when the parties have agreed that the time of performance is crucial and when performance upon the expiry of the time limit is deemed impossible (although it is still physically possible). For instance, an invitation card needs to be delivered on the day of an event but an employee fails to deliver it. In other words, the performance of the obligation is not absolutely impossible, but rather, relatively impossible—this concept of relative impossibility extends to the classical concept of absolute impossibility.[15]

The controversial cases of impossibility are linked with the loss of a party's interest to perform. The question is not only whether the promisor has to fulfil the obligation but whether this performance is useful to the promisee. The most typical example illustrating loss of interest is that of the lease of a balcony to watch a coronation parade when

personal character; or (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance."

12 For German case law summary see Faust, F.; Wiese, V., *supra* note 1, p. 51−60; For Dutch case law summary see Haas, D.; Jansen, C. Specific Performance in Dutch Law. In *Specific Performance in Contract Law: National and Other Perspectives*. Antwerpen, Oxford, Portland: Intersentia, 2008, p. 17−20; For Scots case law summary see Macgregor, L. Specific Implement in Scots Law. In *Specific Performance in Contract Law: National and Other Perspectives*. Antwerpen, Oxford, Portland: Intersentia, 2008, p. 76−81.

13 For influence of principle *impossibilium nulla obligatio est* to validity of transactions see Dambrauskaitė, A. Neįmanomumo įvykdyti prievolę įtaka sandorių galiojimui: principo "*impossibilium nulla obligatio est*" taikymas šiuolaikinėje teisėje [Influence of Impossibility of Performance on the Validity of Legal Transactions – Application of Rule "*Impossibilium Nulla Obligatio Est"* in Modern Law]. *Jurisprudencija*. 2009, 3.

14 *Lietuvos Respublikos Civilinio kodekso komentaras. Šeštoji knyga: Prievolių teisė* [Commentary of the Civil Code of Lithuania. Sixth book: Law of Obligations]. T. 1. Vilnius: Justitia, 2003, p. 287.

15 Haas, D.; Jansen, C., *supra* note 12, p. 17−19.

the parade has been cancelled. Should the promisor be entitled to the lease price even though the promisee lost his interest in using the balcony? Previous foreign case law suggests that in such a case it becomes impossibile to perform the obligation and the promisee is exempt from the obligation to pay for the lease. However, the modern approach to the impossibility doctrine heavily criticizes such reasoning, pointing out that the usefulness of the performance is a risk to be borne by the promisee but not the promisor. Hence, if the parties cannot prove that this risk was shifted (or intended to be shifted) to the promisor by the contract, the impossibility doctrine would not be applicable. Interestingly, economic crises don't always make it impossible to perform an obligation. For instance, German case law indicates that economic destabilization, in itself, cannot justify the unilateral termination of a contract, even if specific performance causes a huge pecuniary loss for the obliged party. Only if specific performance, or it along with other reasons, leads to the full or near economic ruin of the obliged party, can the aggrieved party be denied the order of specific performance. Even then, the court should seek to keep the contract by amending its provisions—applying the *rebus sic stantibus* rule.[16] It should be noted that Article 6.204 of the LCC also established the meaning of the *rebus sic stantibus* rule—that obligations must be performed with consideration of the dramatically changed circumstances, which can constitute grounds for amendment of the contract and, in extreme cases, termination of the contract. Hence, future national case law should consider the aforementioned rule before denying specific performance on the grounds of impossibility.

The unreasonable burden of performing an obligation is closely linked with the relative impossibility of performance. This exception of specific performance is defined as the disproportionate cost of performance. For example, the promisor has to deliver a piece of jewellery which falls into the sea. To search for it would be economic nonsense, thus, the promisor can invoke unreasonable burden in order to refuse performance. The difference between this and relative impossibility is that the party obliged to perform the obligation has to prove the disproportion between the costs of performance and the interest in performance. The problem lies in determining the threshold of sufficient disproportion of costs constituting the unreasonable economic burden. Estimating the costs of performance and interest in performance is rather easy if the promisor's expenditure and promisee's interest is purely pecuniary. Whereas, if the expenditure and interest bear immaterial character, the estimation of costs is rather complex. In order to be able to take into account immaterial interests, a sufficient disproportion of costs should be interpreted as an obvious inefficiency of performance. In other words, if the disproportion of costs is not obviously inadequate, the promisor could be exempt from the performance by agreeing to pay a sum to reimburse the promisee's immaterial interest.[17]

The Supreme Court of Lithuania has interpreted the exception of unreasonable burden in one case.[18] The court ordered specific performance of an obligation to accept

16 Faust, F.; Wiese, V., *supra* note, p. 51−60.

17 *Ibid.*, p. 54−59.

18 The Supreme Court of Lithuania, 2009-03-24 Ruling *UAB "Mineraliniai vandenys" v. "UAB REAM"* No. 3K-3-148/2009.

unsold goods arising from a distribution agreement even though the goods were beyond their expiry date, denying the defendant's defence of unreasonable financial burden on the grounds of non-cooperation with the aggrieved party. The court did not evaluate the balance between the costs of performance and the costs of non-performance, although such a cost balance test is prerequisite in the application of the unreasonable burden exception.

Replacement transaction, as an exception of specific performance, motivates the aggrieved party to seek alternative performance for similar costs. Many goods and services are of a standard kind and are offered by many suppliers in the market. Such being the case, it would be unreasonable for the aggrieved party to waste time and effort demanding specific performance from the debtor. Instead, the aggrieved party is entitled to terminate the contract, obtain substitute goods or services from an alternative source and claim damages for non-performance.[19]

Performance of an obligation of an exclusively personal character depends entirely on the will of the party in breach—the obligation to paint a painting, to write a book, etc. Therefore, ordering specific performance in such cases is practically unenforceable because no one is entitled to restrain the debtor's personal freedom. On the other hand, even if the debtor is ordered to perform an obligation of an exclusively personal character *in specie*, the quality of performance can be insufficient. This exception does not apply to obligations undertaken by a legal person, or to the ordinary activities of a lawyer, a doctor or an engineer, for they can be performed by other persons with the same training and experience. The performance is of an exclusively personal character if it is not delegable and requires the individual skills of an artistic or scientific nature, or if it involves a confidential and personal relationship. Due to the impossibility of enforcing such obligations, they cannot be ordered to perform *in specie.*[20]

The last exception relevant to specific performance is the rule of request of specific performance within reasonable time. Currently, the performance of contracts must be prompt. The aggrieved party has to choose a remedy for the breach of contract (non-performance) promptly. If the time for performance has passed but the aggrieved party has failed to demand performance within a reasonable time, the party in breach may assume that the aggrieved party will not insist upon specific performance. Otherwise, the aggrieved party could take unfair advantage of developments in the market.[21]

1.2. Enforcement of the Order of Specific Performance

If the aggrieved party has obtained a court order of specific performance, it does not guarantee that such a ruling will be enforced. Upon the refusal of the debtor to voluntarily carry out the court order, the creditor must seek compulsory enforcement. Article 273 of the Civil Procedure Code of the Republic of Lithuania[22] (LCPC) entitles the court

19 *Commentary of the Civil Code of Lithuania. Sixth book: Law of Obligations*, *supra* note 14, p. 287.

20 *Ibid.*

21 *Ibid.*

22 Civil Procedure Code of the Republic of Lithuania. *Official Gazette*. 2002, No. 36-1340.

to allow the plaintiff himself to perform the actions which the defendant should have performed, or to terminate the defendant's actions at the expense of the latter. Of course, in cases when only the defendant can personally execute the court's order, this provision is not applicable. Such being the case, the court sets a time limit for the defendant to carry out the order. Upon the expiry of the aforementioned time limit, the defendant is made to pay a fine fixed by the court. Article 771 of LCPC elaborates on the execution of court orders which oblige parties to act or to refrain from acting. The bailiff executing such a court order is entitled to sue the unwilling defendant claiming a fine up to 1000 Lt and fixing a new time limit for the defendant. This procedure can be repeated a limitless number of times until the court order is executed properly.

Although it seems that the law provides efficient remedies for the aggrieved party to execute a court order of specific performance, the actual situation usually leads to a deadlock. The procedure of fining the defendant according to the abovementioned rules of court order execution is time-consuming. Thus, it turn out to be of little practical use for the plaintiff. Moreover, a maximum fine of 1000 Lt is not painful enough for the defendant taking into account the present economic situation. It is more likely that the plaintiff will lose interest in forcing the defendant to comply with the court order of specific performance and simply seek reimbursement of incurred damages. However, the situation does not have to be so grim.

Article 6.215 of LCC provides that the court is entitled to fix a fine for the benefit of the plaintiff, taking into consideration the circumstances of a particular case. The fine can be fixed by an exact sum of money or a percentage for every day of delay of execution of the court order. Thereby, the plaintiff is able to use this remedy in the original legal proceedings in order to forestall the probable obstacles of execution. Unfortunately, this remedy is not popular in national legal practice—at least yet. The reasons for this might be that legal practitioners shortsightedly "forget" this remedy and end up applying the rules of court order execution which are less favorable to the plaintiff.

It should be noted that Article 6.215 of the LCC corresponds with Article 7.2.4 of the UNIDROIT Principles of International Commercial Contracts. According to the Commentary of UNIDROIT, the threat of a judicially imposed penalty for disobedience is the most effective means of ensuring compliance with judgments ordering the specific performance of contractual obligations. As some legal systems do not provide for such sanctions, because they are considered to constitute an inadmissible infringement of personal freedom, the aforementioned article establishes a compromise—a monetary fine but not for other forms of penalties, e.g. civil imprisonment. In addition, legal systems differ regarding the beneficiary of the imposed monetary fine. Should it be the aggrieved party, the State, or both? Some systems regard payment to the aggrieved party as constituting an unjustified benefit which is contrary to public policy.[23] Lithuania has chosen to impose monetary fines on defendants for the benefit of the aggrieved party.

23 *Commentary of UNIDROIT Principles of International Commercial Contracts* [interactive]. [accessed 15-02-2010]. <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637>.

A monetary fine, for the benefit of the aggrieved party, meant to induce the defendant to execute the court order of specific performance derives from French case law and is known as *astreinte*. Although such court practice was criticized in legal doctrine for violating the debtor's rights and free will, in 1972 *astreinte* was established in substantial law.[24] Consequently, other legal systems also established similar remedies.[25] It should be emphasized that a monetary fine for non-execution of the court order of specific performance must be distinguished from incurred damages because the purpose of such a fine is to induce the debtor to execute the court order. Thus, the court must take into account (i) the interest of the aggrieved party in specific performance—ascertain that it is impossible to obtain alternative performance; (ii) the financial status of the debtor—fix such a fine which would be painful for the debtor; (iii) the nature of the obligation—if it is an obligation to transfer ownership (*dare*), then it is easily executed by the bailiff.[26] However, in imposing such a fine, the court always faces a dilemma—if the fine is too small, the debtor will have no interest in executing the order, but the fine cannot justify unjust enrichment of the aggrieved party. Therefore, the monetary fine is applicable in enforcing a court order to perform an obligation which must be performed personally by the debtor if the immaterial interest of the aggrieved party prevails—obligations to refrain from obstructing the proper usage of a thing. Moreover, the aggrieved party for whose benefit the fine is imposed should not be held liable for the incurred losses of the debtor even if it exceeds actual damages—the greater good is ensured by the enforcement of the court order of specific performance.

2. Specific Performance in a Contractual Lease Relationship

According to the provisions of Article 6.477 of the LCC, under a contract of lease, the lessor is obliged to transfer to the lessee a thing for payment in temporary possession and use, and the lessee is obliged to pay a lease payment. The lease agreement establishes the principal obligations of the lessor: (i) to transfer the right to temporarily possess and use a thing, (ii) to guarantee the quality and compliance with the provisions of the contract of a thing, (iii) to repair the leased thing at his own expense unless otherwise provided for by laws or the contract, (iv) to renew the contract with the lessee who has duly performed his duties upon the expiry of the period.

Regarding a lessor's obligation to transfer the right to temporarily possess and use a thing, the obligation can be easily enforced in compliance with the provisions of Article 6.60 and 6.484 of the LCC—the lessee is entitled to choose either to claim the transfer of the leased object (unless the object has already been transferred to a third person), or to dissolve the contract and seek reimbursement of incurred damages. The Supreme Court of Lithuania has interpreted the lessor's duty to transfer the leased thing in such a way

24 Dondrop, H. Specific Performance: a Historical Perspective. In *Specific Performance in Contract Law: National and Other Perspectives*. Antwerpen, Oxford, Portland: Intersentia, 2008, p. 279−281.

25 For instance, in Dutch law—*dwangsom*.

26 Haas, D.; Jansen, C., *supra* note 12, p. 23.

that physical transfer of the object, allowing the lessee to use the object, or signing the transfer-acceptance deed constitute due performance.[27]

If the lessor is in breach of his obligation to guarantee the quality and compliance with the provisions of the contract, the lessee is entitled to choose either to demand the elimination of those defects (at the expense of the lessor), to make a reduction of the lease payment, or to compensate the expenses that the lessee incurred in the elimination of the defects.[28] National case law is rather explicit regarding the lessor's duty to guarantee the quality of the leased object.[29] Moreover, it should be emphasized that if the lessor obstructs the proper usage of the leased object, the lessee is entitled to terminate the contract or demand that the lessor refrain from such conduct by submitting preventive action (Article 6.255 of LCC). Since preventive action establishes the defendant's obligation to refrain from acting (*non facere*), such an obligation can be enforced by applying a monetary fine according to Article 6.215 of the LCC.

In the case that the lessor is in breach of his obligation to make a capital repair of the leased thing at his own expense, the lessee must address the court in order to make the capital repair himself and demand the incurred expenses from the lessor. However, according to the provisions of Article 6.492 of the LCC, the lessee is also entitled to terminate the contract and reimburse damages. The freedom to choose a remedy again falls to the aggrieved party. Furthermore, the lessee is entitled to start a capital repair without court consent if the repair is urgent and necessary (Article 6.493 of the LCC). Regarding the lessor's obligation, national case law has established a rule that if the lessor is unable to indicate the statutory provision by which he is exempt from the duty to make a capital repair, and the lease contract does not shift this obligation to the lessee, the lessor is obliged to carry out the capital repair.[30]

If the contract is not renewed with the lessee who has duly performed his duties upon the expiry of the period and the lessor has concluded a lease contract with a third person within one year, the former lessee is entitled, to claim either the transfer of the rights and duties of the lessee under the contract of lease concluded or compensation of damages incurred as a result of the refusal to conclude a contract of lease for a new period.[31]

The lease agreement establishes the following principal obligations of the lessee: (i) to pay the lease payment on time; (ii) to use the leased thing in accordance with the contract and designation of the thing; (iii) to maintain the leased thing in a proper state, to bear expenses for the maintenance of the thing and to undertake its repair at his own

27 The Supreme Court of Lithuania, 2009-03-17 Ruling *UAB Vakario transportas v. UAB SEB VB Lizingas* No. 3K-3-125/2009.

28 Paragraph 1 of Section 2 of Article 6.485 of the Civil Code of Lithuania.

29 For instance see The Supreme Court of Lithuania, 2008-01-28 Ruling *UAB Talša v. UAB Metaloidas,* No. 3K-3-9/2008; The Supreme Court of Lithuania, 2007-03-06 Ruling *B. K. v. UAB Frima,* No. 3K-3-88/2007; The Supreme Court of Lithuania, 2006-09-11 Ruling *UAB Artapolas v. UAB Medonos mėsa,* No. 3K-3-464/2006; etc.

30 The Supreme Court of Lithuania, 2007-06-19 Ruling *Kauno m. savivaldybė v. UAB „Kvarclita",* No. 3K-3-253/2007.

31 Section 4 of Article 6.482 of the Civil Code of Lithuania.

expense, unless otherwise provided for by laws or the contract; (iv) to return the thing to the lessor in the state he received it, taking into account normal wear and tear.

As stated earlier, monetary obligations are always possible to perform *in specie*. Therefore, the lessee can always be forced to pay lease payments on time. In order to ascertain that this obligation has been fulfilled on time, the lessor is entitled to demand a lease payment for two periods of payment in advance if the lessee has not duly performed his obligation to pay on time before.

According to Article 6.497 of the LCC, non-performance of the lessee's obligations to use the leased thing in accordance with the contract, to maintain the leased thing in a proper state, and to make its current repair at his own expense constitutes a grounds for termination of the contract. However, the lessor is entitled to exercise this right only if the lessor demanded the lessee to perform his obligation *in specie* prior to termination of contract. Furthermore, the lessor might be unwilling to terminate the contract. He is, therefore, entitled to issue a preventive action (Article 6.255 of the LCC) demanding the lessee to refrain from acting or to act in accordance with the contract (Article 6.61 of the LCC). Again, since the preventive action establishes the defendant's obligation to refrain from acting (*non facere*) and also establishes a claim to act in accordance with the contract (Article 6.61 of the LCC)—obligation to act (*facere*)—the obligations can be enforced by applying a monetary fine according to Article 6.215 of LCC.

If upon the termination of the contract of lease the lessee fails to return the leased thing, the lessor is entitled to demand the return of the object according to the provisions of Article 6.60 of the LCC. In the case that the leased object has perished, the lessee is obliged to reimburse all damages incurred by the lessor. Regarding due performance of lessee's obligation to return the leased object, national case law indicates that the return of the object allows the lessor the possibility to use and dispose of the thing according to his discretion. Thus, if the lessor refuses to accept, for instance, the vacated premises returned by the lessee, the latter cannot be held liable for non-performance of his obligation.[32]

In summary, it is obvious that the aggrieved party in a contractual lease relationship is always entitled to choose either to seek specific performance or to apply alternative remedies—termination of contract, reimbursement of incurred damages or performance at the expense of the debtor. Hence, ranking specific performance the primary remedy for non-performance should be regarded as rather relative.

Conclusions

1. The specific performance of obligations to act (*facere*) (refrain from acting (*non facere*) can seldom be applied in such cases where the judge favors other remedies—damages, termination of contract, or performing the task at the expense of the debtor.

32 The Supreme Court of Lithuania, 2008-11-25 Ruling *A. R. įmonė (duomenys neskelbtini) v. UAB Sonex group,* No. 3K-3-487/2008.

2. In order to answer the question of whether the court is entitled to order specific performance of a non-monetary obligation, it must be ascertained that none of the exceptions to specific performance provided in Section 2 of Article 6.213 of the LCC exist. Hence, the aggrieved party may seek a court order of specific performance if the non-monetary obligation is not of an exclusively personal character; it is still possible to perform in law and in fact within reasonable costs; or the party in breach did not perform its obligation after the aggrieved party had requested performance within reasonable time.

3. According to foreign case law and the provisions of Article 6.204 of the LCC, future national case law should consider applying the *rebus sic stantibus* rule before denying specific performance on the grounds of impossibility.

4. The difference between the relative impossibility exception and unreasonable burden is that the party obliged to perform the obligation has to prove the disproportion between the costs of performance and the interest in performance. Therefore, the cost balance test is a prerequisite in application of the unreasonable burden exception, although recent national case law has misapplied this test.

5. Although it seems that the concept of substantial law provides efficient remedies for the aggrieved party to execute a court order of specific performance, the actual situation usually leads to a deadlock because the procedure for fining the defendant, according to the rules of court order execution provided in Article 771 of the LCPC is time-consuming. This process turns out to be of little practical use for the plaintiff.

6. Article 6.215 of the LCC entitles the court to fix a fine for the benefit of the plaintiff in the original legal proceedings, taking into consideration the circumstances of a particular case. Thereby, the plaintiff is able to demand a fine for non-compliance with the future court order of specific performance in order to forestall the probable obstacles of execution. It should be emphasized that a monetary fine for non-execution of a court order of specific performance must be distinguished from a fine for possibly incurred damages because the purpose of the former is to induce the debtor to execute the court order. This monetary fine is mostly applicable in enforcing a court order to perform an obligation which must be performed personally by the debtor if the immaterial interest of the aggrieved party prevails—the obligation to refrain from obstructing the proper usage of a thing. Moreover, the aggrieved party, for whose benefit the fine is imposed, should not be held liable for the incurred losses of the debtor, even if it exceeds actual damages, because the greater good is to ensure the enforcement of the court order of specific performance.

7. The aggrieved party in the lease contractual relationship is always entitled to choose to seek specific performance or to apply alternative remedies—termination of contract, reimbursement of incurred damages or performance at the expense of the debtor. Hence, ranking specific performance, the primary remedy for non-performance should be regarded as rather relative.

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PRIEVOLĖS ĮVYKDYMO NATŪRA TAIKYMAS ESANT NUOMOS TEISINIAMS SANTYKIAMS

Asta Jakutytė-Sungailienė

Mykolo Romerio universitetas, Lietuva

Santrauka. *Lietuvos teisės sistemoje, kuri priklauso civilinės teisės tradicijai, prievolės įvykdymas natūra priskiriamas prie pirminių civilinių teisių gynimo būdų. Toks požiūris yra grindžiamas romėniškuoju principu pacta sunt servanda, sudarančiu prievolių teisės*

pagrindą. Tačiau teismo sprendimo, įpareigojančio skolininką įvykdyti prievolę natūra, įgyvendinimas yra sudėtingas, nes dažniausiai priklauso išimtinai nuo skolininko valios. Dėl to teisės doktrinos atstovai kelia klausimą, ar apskritai prievolės įvykdymas natūra, kaip pirminis pažeistos teisės gynimo būdas, yra efektyviai pritaikomas praktikoje.

Pažymėtina, kad dauguma teisės doktrinos atstovų nagrinėja prievolių, kylančių iš pirkimo-pardavimo sutarties, įvykdymą natūra, kai pardavėjo pareiga, perduoti nuosavybės teisę į objektą (lot. – dare) ir pirkėjo pareiga sumokėti sutartą kainą, yra lengvai įgyvendinamos. Tuo tarpu prievoles, kylančias iš nuomos sutarties, vykdyti natūra yra daug sudėtingiau, nes šiuo atveju kyla sutarties šalies pareiga atlikti tam tikrą veiksmą (facere) arba susilaikyti nuo veikimo (non facere). Nuomos sutartys sudaro didelę dalį komercinės praktikos, o iš šių sutarčių kylančios prievolės yra tęstinio vykdymo, todėl šiuos įsipareigojimus tinkamai vykdyti natūra yra itin aktualu praktikoje. Dėl to šiame straipsnyje, be bendrųjų prievolių vykdymo natūra nuostatų analizės, taip pat nagrinėjama galimybė priversti nuomos sutarties šalis vykdyti savo prievoles natūra.

Atsižvelgiant į tai, kad Lietuvos teismų praktikos nagrinėjamuoju klausimu beveik nėra, o teisės doktrinoje prievolių vykdymo natūra problema plačiau nenagrinėjama, analizė atliekama pasitelkiant užsienio autorių šaltinius bei teismų praktiką.

Straipsnio pabaigoje pateikiamos šios išvados: 1) prievolių, kurių dalykas yra atlikti tam tikrus veiksmus (facere) arba susilaikymo nuo šių veiksmų atlikimo (non facere), įvykdymas natūra gali būti taikomas retai, nes įstatymų leidėjas teikia pirmenybę kitiems gynimo būdams – nuostolių atlyginimui, sutarties nutraukimui arba veiksmų atlikimui skolininko sąskaita; 2) siekiant atsakyti į klausimą, ar teismas turi teisę priteisti vykdyti nepiniginę prievolę natūra, būtina įsitikinti, kad netaikomos Lietuvos Respublikos civilinio kodekso (toliau – LR CK) 6.213 straipsnio 2 dalyje įtvirtintos išimtys; 3) remiantis užsienio šalių teismų praktika bei atsižvelgiant į LR CK 6.204 straipsnio nuostatas, Lietuvos teismai taip pat turėtų pirmiausia svarstyti galimybę taikyti rebus sic stantibus taisyklę prieš atmesdami reikalavimą priteisti prievolę vykdyti natūra grindžiant neįmanomumu; 4) santykinį neįmanomumą įvykdyti prievolę reikia skirti nuo nepagrįstai didelės vykdymo naštos, kai egzistuoja neproporcingai didelis skolininko sąnaudų ir kreditoriaus intereso skirtumas. Dėl to taikant nepagrįstai didelės vykdymo naštos pagrindą būtina atlikti šių sąnaudų balanso testą, deja, Lietuvos teismų praktika jo nepagrįstai netaiko; 5) nors teisės normos nustato teismo sprendimų, įpareigojančių skolininką atlikti tam tikrus veiksmus, vykdymo tvarką, tačiau praktiškai taikant šią procedūrą dažniausiai nepasiekiamas norimas rezultatas, nes skolininką baudžiant finansiškai pagal Lietuvos Respublikos civilinio proceso kodekso 771 straipsnį būtinos didelės laiko sąnaudos; 6) LR CK 6.215 straipsnis suteikia teisę teismui nustatyti baudą kreditoriaus naudai, jei skolininkas nevykdo teismo sprendimo, įpareigojančio įvykdyti prievolę natūra, todėl kreditorius turi galimybę iš karto užkirsti kelią neefektyviam vykdymo procesui. Pažymėtina, kad ši piniginė bauda nėra skirta galimiems nuostoliams padengti, bet turi skatinti skolininką vykdyti prievolę, kurią įvykdyti gali tik pats skolininkas natūra (pvz., nutraukti žalą darančius veiksmus), todėl bauda gali viršyti atsiradusius nuostolius; 7) nuomos sutartiniuose santykiuose nukentėjusioji šalis visuomet turi galimybę pasirinkti, ar reikalauti prievolę įvykdyti natūra, ar pasitelkti alternatyvius pažeistų teisių gynimo būdus, t. y. nutraukti sutartį, reikalauti nuostolių atlyginimo arba

atlikti veiksmus skolininko sąskaita. Dėl to prievolės įvykdymas natūra tik sąlygiškai gali būti traktuojamas kaip pirminis gynybos būdas.

Reikšminiai žodžiai: *prievolės įvykdymas natūra, prievolių neįvykdymas, nepiniginės prievolės, nuomos sutartis.*

Asta Jakutytė-Sungailienė, Mykolo Romerio universiteto Teisės fakulteto Civilinės ir komercinės teisės katedros doktorantė, lektorė. Mokslinių tyrimų kryptys: civilinė teisė, daiktinė teisė, intelektinės nuosavybės teisė, prievolių teisė.

Asta Jakutytė-Sungailienė, Mykolas Romeris University, Faculty of Law, Department of Civil and Commercial Law, doctoral student, lecturer. Research interests: civil law, property law, intellectual property law, law of obligations.