Remedies for breach of contract: In Azerbaijan and different legal systems

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In the modern free market economic conditions, property and property-related obligations are of great economic and social importance. The fulfillment of the obligations in good faith arising from contracts , first of all, serve to the mutual lawful interests of parties and the stability of the civil process. In today's world, contracts are common in everyday business practice, they are at the heart of any modern society. A contract is a legally binding and enforceable contract between two or more parties. Each party to the contract makes a promise to do something or refrain from doing something in exchange for the other party's promise. Contracts take many different forms and are used for many different reasons. Through history, the use of contracts has developed and now we find ourselves forming contracts on a daily basis.

Frequently, a contracting party fails to fulfill or completely perform, the contract. Without remedies, contracts would no backbone and therefore historically some form of remedy would have always been available since the creation of contracts.Every legal system has developed its own unique contract law and all legal systems have a means to resolve breach of contract through a remedy. Therefore, remedies have are needed as they ensure a contract is fulfilled to what was agreed.

In general "breach" in relation to a contract means a failure, without legal justification, to perform an obligation under the contract as required by the contract.[1] Failure of one party to perform its duties in a lawful contract renders the party liable for breach of contract. Breach of contract means a violation of law or non-adherence to the terms of the contract. Breaches of a contract are single, occurring at a single point in time, or continuing breaches. The contract may be either written or oral.The party which suffers loss or damage as a result of this breach may take action against the party which is responsible for such loss.

The main types of breach of contract will be minor, material, fundamental, and anticipatory. [2] When one party has breached the contract, the party who has performed is entitled to various remedies for the breach.

Azerbaijani contract law has developed a range of remedial responses where a breach of contract occurs. According to Article 448 of the Civil code of Azerbaijan Republic the debtor shall be liable for all the events of non -performance of the obligations, entering the extent of his risks, if nothing otherwise is envisaged by this Code. The debtor shall be liable for every violation of the obligation (action or failure to act). Any advance indemnification for a fault, willful misconduct or gross carelessness, is prohibited.

According to Azerbaijani legislation non -performance of the contractual obligation is one of types of breach of contract which has legal consequences. The Civil Code does not contain a comprehensive concept of breach of contract such as is recognized in Anglo-American Law. Nevertheless, it gives definition of non-performance of contractual obligation in Article 442 of Civil Code as non-performance of obligation shall mean its violation or improper performance (untimely performance, performance with the breach of other terms and conditions, certain defects in goods, works and services, or performance with the violation

of the other terms of the obligation defined by the subject matter of the obligation.

The innocent party may maintain a right of action by claiming one or more of the remedies. We will not associate any of the remedies with any particular form of contract. Various remedies exist in contract law. These include:

1) Damages
2) Restitutionary awards
3) Suspension of performance
4) Rescission
5) Specific performance
6) Injunctions

Specific performance is an equitable remedy available at the discretion of the judge. It is an order by the court requiring one party to perform their contractual obligation. Whilst it is often said that contracts are made to be performed and parties should be held to their contractual obligations, the courts are often reluctant to order a party to unwillingly perform the contract and specific performance is only available in limited circumstances. [3]

Specific performance grants the plaintiff what he actually bargained for in the contract rather than damages (pecuniary compensation for loss or injury incurred through the unlawful conduct of another) for not receiving it; thus specific performance is an equitable rather than legal remedy. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved than by awarding damages for a breach of contract.[4] In Common Law, expectation damages are the default remedy. specific performance is only awarded in cases in which damages are deemed inadequate.[5]

The Azerbaijani language equivalent of the term 'specific performance' is "naturada icra"and literally means 'performance in kind'. According to 450.2 of Civil code in the event of non-performance of the obligation, compensation of the forfeit and losses for the obligation thereof shall release the debtor from performing the obligation in kind if nothing otherwise is set forth in this Code or the agreement.

Suspension of performance is one of the remedies available. If one party has not performed an obligation at the due time the other party can withhold any performance, due at the same time or later, which is the counterpart of the performance which has not been received. The contract is not brought to an end. The situation where the remedy of suspension of performance is useful is where the contract contains obligations which are the counterpart of each other but does not make either obligation conditional on the performance of the other.

Suspension of performance as a non-judicial remedy is specified in the Civil Code of Azerbaijan Republic. According to Article 441.2 in the event of failure of a party to perform obligation envisaged by the contract, or in the event of circumstances resulting in impracticability of such performance within the set term, the party being subject to mutual obligations performance, may withhold performance of its obligation or refusing a performance may claim losses.

Rescission is a remedy whereby the aggrieved party brings the contract substantially to an end. It is available in response to a repudiation or material breach but not in response to a non-material breach. As far as possible, each party must place the other party into the position he was in before the contract was entered into. In addition to being reserved in the contract, the right to rescind can (and often does) arise by operation of law as one of the remedies the innocent party can elect when the other party is in default of his contractual obligations. The contracting parties are obligated to return the benefits received from the other party without delay. Special problems occur when the benefit to be returned consists of an object which was damaged, destroyed, or lost in some other way due to the fault of the contracting party obligated to return it. If the right of rescission was exercised on the basis of a clause in the contract, then the party obligated return the object is required to compensate the rescinding party for all destruction, damage, or losses which occurred since he received the object; but, the former is entitled to reimbursement for expenses he incurred in maintaining it.

The most common ground is restitution for unjust enrichment. There are two elements: some form of payment or transfer by the claimant to the defendant coupled with some unjust factor that vitiates the claimant's intention. The difference between restitution and compensa-

tion lies in the manner in which the monetary award is calculated. With restitution, the award is calculated based on how much the defendant gained from the violation. With compensation, the amount is calculated based on how much the plaintiff lost .

One of the more common remedies for a breach of contract is a damages award. This is monetary compensation that must be made by the breaching party to compensate the other party for losses and other expenses connected with the breach.

Compensatory damages are those that are meant to compensate the non-breaching party for the breach. These include expectation damages and consequential damages. Expectation damages are those that give the non-breaching party the monetary funds that he or she would have received had the contract been performed. These damages are usually based on the contract itself or the fair market value of the subject matter of the contract. For example, compensatory damages may be the amount necessary for the non-breaching party to purchase a substitute product that is equivalent to the one contracted for. If the contract was for a sale of goods, compensatory damages are usually the difference between the contract price and the market value of the goods.

These damages also consist of the expenses necessary to make the non-breaching party whole after the breach, such as advertising expenses to advertise the products that the breaching party failed to pay for. However, the non-breaching party generally has a duty to mitigate his or her losses

Some civil law countries also allow non-pecuniary damage to be claimed, which is known as moral damage.Moral damages are damages occurring from intangible injury to feelings, honor, or moral principles, causing pain or suffering.

Consequential damages are those damages that reimburse the innocent party for indirect costs that resulted from the breach. They often result from special circumstances that are involved in the contract that may not be ordinarily predictable. For example, an innocent party may ask to be reimbursed for the loss of business profits that derived from not having access to the necessary materials to produce a product for a third party. In order for the innocent party to receive these damages, he or she must show that this loss was reasonably foreseeable to both parties when they wrote the contract and the loss was a direct result of the breach.This requires the breaching party to pay the non-breaching party an amount that puts the non-breaching party in the same position they would have been in if the contract was performed.

Courts can force the breaching party to make a payment as a punishment for the breach of contract so called punitive damages. Punitive damages are meant to punish a guilty party in order to prevent that party or others from engaging in similar conduct in the future. However, punitive damages usually require a stronger intent than is necessary in standard breach of contract claims. For example, to be awarded punitive damages, a plaintiff may have to show that the breaching party acted in a malicious or fraudulent matter. Some states specifically prohibit plaintiffs from recovering punitive damages on the breach of contract claims.

The main distinction between the award of punitive damages under the Civil Law and the Common Law is that under Civil Law punitive damages may only be considered when specifically set out in applicable legislation. Under the Common Law, the court has a discretion to award punitive damages where it finds that the award of compensatory damages will not serve as a sufficient deterrence and that the defendant's actions must be further punished. Punitive damages and disgorgement stand in contrast to damages that are compensatory.

Compensatory damages measure what the plaintiff has lost through the defendant's breach of contract. Punishment and disgorgement, in contrast, focus on the defendant: punishment on the outrageousness of the defendant's act, and disgorgement on what the defendant has gained through the wrong. This contrast between compensation on the one hand and punishment and disgorgement on the other means that the latter two cannot be considered in isolation from the function and possible inadequacies of the former.[6]

In some contracts, specific damages are predetermined. These damages are called liquidated damages. They are typically part of contracts where it would be difficult to determine the actual amount that a party was damaged due to a breach, such as a breach of a contract not to compete. The parties agree, at the time they

make the contract, that if one party breaches the contract, the breaching party should pay a specified sum. Thus, this is an amount written in the contract. Such a clause will be enforceable by the courts only in so far as it is a genuine pre-estimate of loss. If it is a genuine pre-estimate it is known as a liquidated damages clause. If however, the amount specified in the contract is not a genuine pre-estimate but is aimed at deterring a breach of contract or punishing the party in breach, this is known as a penalty clause which is not enforceable. Nominal damage is a minimal amount provided to the non-breaching party if that party won the case but did not financially lose much.

Damages for breach of contract are available under Azerbaijan Law in accordance with several Articles. The debtor, which does not perform its obligation, shall be subject to compensate damages caused to the creditor . Damages shall be determined in accordance with the rules, envisaged by Article 21 hereof. According to the Article damages are the expenses, incurred or to be incurred by which a person, whose right has been violated, incurred or will incur to restore the violated right or damage to his property (tangible loss) as well as profits, which the person would have earned under ordinary conditions of civil relationships, if his rights have not been breached (lost profits). Damages have two classes. The first refers to damages actually suffered from reliance and the second refers to one of the parties 'expectation' loss according to Article 21

The right to damages is always available when a contract has been breached. The aim of damages is to compensate a party for the loss which he has suffered as a result of a breach. As stipulated in Article 454.1 it is allowed to limit the right for a claim for complete compensation of losses under certain obligations and under obligations relating to certain types of activity (limited liability).

In the event of determination of a forfeit for non-performance or improper performance of the obligation, a forfeit of the deficient part of the damage shall be compensated.

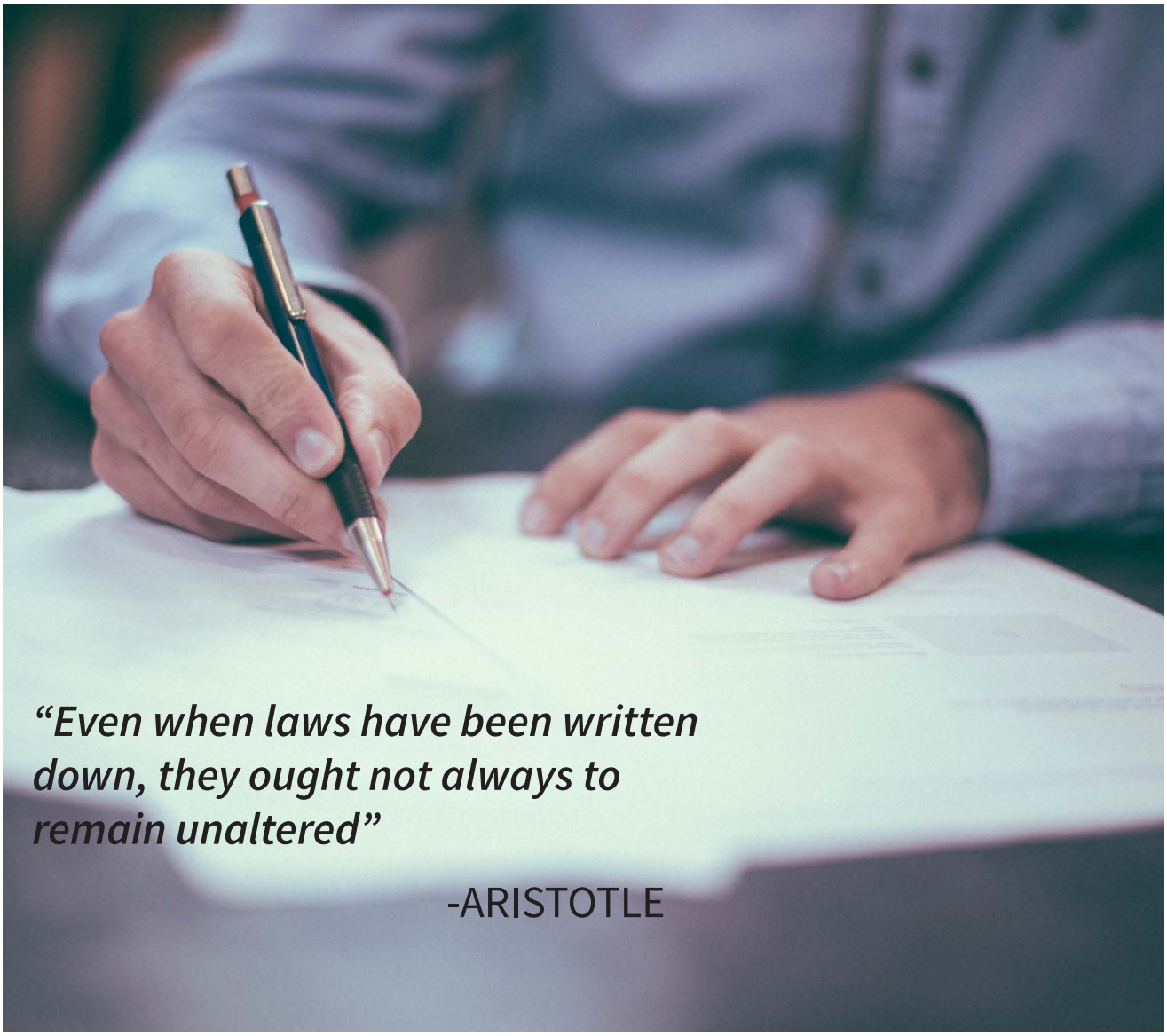
According to Article 450.2 in the event of non-performance of the obligation, compensation of the forfeit and losses for the obligation thereof shall release the debtor from performing the obligation in kind, if nothing otherwise is set forth in this Code or the agreement.

Importantly, according to Article 458, damages will be reduced if one of the parties is to blame for the defendant's breach of contract. Nevertheless in the event of determination of a limited liability for the non-performance or improper performance of the obligation, the damage not reaching the amount of the forfeit, or exceeding the forfeit, or being subject to payment instead of the forfeit, can be withheld to the extent determined by the limitation.As stated in Article 458 "if the creditor's negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence" This therefore, means a party cannot claim damages for breaches of contract brought about by their own fault, or for losses which they could and should have avoided.

According to Article 451 creditor may perform the contract obligation at the expense of the debtor by may assigning the obligation performance to third parties, for a reasonable payment and within a reasonable time, or perform it on his own, and demand from the debtor all the compensation of the necessary expenses and other losses incurred. For example, if an individual is building a house and the brick layer does not complete the building of a wall, the innocent party through performance can request someone else to complete the work according to Article 451 and then claim for damages.

Remedies for breach of monetary obligations are specially stipulated in Civil law. According to Article 449 under the name of liability for non-performance of the monetary obligations In the event someone's monetary funds are utilized and are illegally not returned, or in the event of any evasion from return thereof, or other delays of repayment thereof, or groundless acquisition or accumulation of funds, interest is due payable on the amounts of such funds. The amount of interest shall be determined by the Central Bank of Azerbaijan Republic.

Summary-Due to the aggressive growth in the field of technology, the parties entering into commercial transactions are more cautious than ever, thus making the parties deliberate even on the minute details or specifications so as they can best secure their interest. Therefore, contents of a contract have become highly detailed and elaborate. Particularly, as



a measure of safeguarding, securing and protecting their respective interests in an event of the breach of the terms of the contract, parties generally negotiate and agree upon the various remedies that the injured party can invoke to mitigate and compensate for the losses it may suffer on account of such breach. Therefore, with regard to liquidated damages and penalties, the primary conclusions of the court appear to be that liquidated damages should be regarded as reasonable compensation, while penalties should not. Further, it also appears to have concluded that in case of a penalty, damages will have to be proved.

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