

# THE EXCEPTION OF NON-ENFORCEMENT, AS A REMEDY FOR NON-ENFORCEMENT IN BUSINESS LAW RELATIONSHIPS AND IN DISPUTES BETWEEN PROFESSIONALS

George-Bogdan IONIȚĂ\*

## Abstract

*This study aims to analyze the institution of the exception of non-execution from the perspective of the effects it produces in business law relations and especially in the case of disputes between professionals. First, the study will analyze the relationship between the subjects of the business law relationship, natural or legal persons as professional traders. Then, we will analyze the mechanism of operation of the exception of non-execution, referring to the legal provisions provided for in the Civil Code and the relevant judicial practice in the matter. In the proposed analysis, we will use the incident and updated legislation in force, specialized works on the subject and jurisprudential elements relevant to the proposed analysis.*

**Keywords:** *exception of non-execution, business law relations, professionals, traders, disputes between professionals.*

## 1. Introduction

The effervescence of legal relations in the business world represents a current reality that is forced to constantly respond to all the challenges that arise in the legislative sphere but also in the tangential environments in which they are found. Thus, according to a definition formulated in the specialized doctrine, business law represents a multidisciplinary science that has as its object of study the legal norms that regulate the social relations of the enterprise from the moment of its establishment until the moment of its dissolution, respectively the relations that are established between the state, on the one hand, and the trader, on the other hand (administrative, fiscal, criminal law) but also the relations of private law, which means the application of provisions of civil law (legal regime of goods, consumer protection), of labor law (labor contract, labor jurisdiction) and, last but not least, of commercial law (professionals, goodwill, commercial contracts, etc.<sup>1</sup>).

## 2. Determining the scope of the subjects of business law relationship

Noting the proposed definition, we will specify that the legal relationship represents a social relationship established between two or more persons, natural or legal, regulated by a specific legal norm<sup>2</sup>. To be specific, the legal relationship of business law represents the social relationship through which the satisfaction of material or other interests is sought, regulated by the legal norm, in which the parties appear as holders of rights, and correlatively, of mutual obligations, carried out, if necessary, with the support of public force and the quality of „professionals” confers particularity to the relationship. Thus, the legal relationship of business law is characterized by the fact that the parties may have a position of legal equality, when we refer to relationships governed by the norms of private law<sup>3</sup>. At the same time, in a legal relationship of business law we can talk about a position of legal subordination of the parties, when we refer to relationships governed by public law, respectively within the framework of legal relationships in which one of the parties is the state or its representative bodies (the National Trade Register Office, the National Tax Administration Agency, the National Agency for Cadastre and Real Estate Advertising, etc.)<sup>4</sup>.

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\* PhD, Lawyer in Bucharest Bar (e-mail: ionita.bogdan.george@gmail.com).

<sup>1</sup> M. Dumitru, C. Ignătescu, *Dreptul afacerilor. Raportul juridic de drept al afacerilor. Contractul*, Hamangiu Publishing House, Bucharest, 2012, p. 6.

<sup>2</sup> G. Boroi, C. Angheliescu, *Curs de drept civil. Parte generală*, 3<sup>rd</sup> ed., revised and added, Hamangiu Publishing House, Bucharest, 2021, p. 58; C.T. Ungureanu, I-A. Toader, *Drept civil. Parte generală. Persoanele*, 5<sup>th</sup> ed., revised and added, Hamangiu Publishing House, Bucharest, 2022, p. 63.

<sup>3</sup> R.Ș. Pătru, *Dreptul afacerilor. Curs universitar. Teoria generală. Societățile. Relațiile de muncă în mediul de afaceri*, Universul Juridic Publishing House, Bucharest, 2023, pp. 49-51.

<sup>4</sup> L.B. Lunțaru, *Dreptul afacerilor. Note de curs*, Universul Juridic Publishing House, Bucharest, 2022, pp. 13-14.

Regarding the composition of the legal relationship of business law, it includes several elements. The first element refers to the subjects of the relationship, which are represented by the persons holding rights and obligations between whom these business relationships are established, whether they are natural persons (man, as a natural person) or legal persons (collectives of individuals, who have an independent organization, their own patrimony and a purpose in accordance with the general interests of society). The next element is given by the content of the legal relationship, which consists of the set of subjective rights and obligations that the subjects of the respective legal relationship have in business law. And finally, we will also consider the object of the legal relationship, which consists of the conduct of the parties, that is, the actions or inactions to which the parties are entitled or obliged<sup>5</sup>.

Returning to the specific subjects of business law, in the case of the natural person<sup>6</sup>, things are quite clear, but in the case of the legal person, we believe that we should make a few clarifications. First of all, in order to be able to discuss a legal person, it must cumulatively meet the following three conditions: to have an independent organization, that is, to specify its internal structure, the way in which the management, administration and control bodies are composed, as well as their attributions, the way in which it comes into being and in which it can be dissolved as a legal subject; to have its own patrimony, distinct from that of the natural persons that make up the legal person; to have a determined, lawful and moral purpose, in accordance with the general interest, which corresponds to the object of activity of the legal person<sup>7</sup>.

At the same time, until October 1, 2011, the date of entry into force of the current Civil Code, the main subjects of business law were traders, as defined by art. 7 of the Commercial Code. With the entry into force of the current Civil Code, the legislator expands the scope of business law subjects, the main category of participants in business life currently being „professionals”<sup>8</sup>.

According to art. 3 para. (2) CC, „all those who operate an enterprise” are considered professionals, and according to para. (3), „the operation of an enterprise constitutes the systematic exercise, by one or more persons of an organized activity consisting of the production, administration or alienation of goods or the provision of services, regardless of whether it has a profit-making purpose or not”<sup>9</sup>. Given the importance of the exact identification of „professionals”<sup>10</sup>, art. 8 para. (1) of Law no. 71/2011 implementing the Civil Code lists by way of example the categories subsumed under the notion of „professional” provided for in art. 3 CC: traders<sup>11</sup>; entrepreneurs<sup>12</sup>; economic operators; as well as any other persons authorized to carry out economic or professional activities, as these notions are provided for by law.

The most important category of professionals is that of traders, whose typology is indicated by art. 6 of Law no. 71/2011. In addition, traders are those who are required to register in the trade register, namely: natural

<sup>5</sup> C.S. Săraru, *Dreptul afacerilor. Curs pentru învățământul economic*, ASE Publishing House, Bucharest, 2015, pp. 124-134.

<sup>6</sup> According to art. 25 para. (2) CC, it establishes that „a natural person is a human being, viewed individually, as the holder of civil rights and obligations”. See also, E. Chelaru, *Drept civil. Persoanele*, 5<sup>th</sup> ed., C.H. Beck Publishing House, Bucharest, 2020, p. 3.

<sup>7</sup> According to art. 187 CC; See also M. Nicolae (coord.), *Drept civil. Persoanele*, Universul Juridic Publishing House, Bucharest, 2016, pp. 271-281.

<sup>8</sup> C.F. Stoica, S.L. Cristea, *Dreptul afacerilor. Subiecte și contracte*, ASE Publishing House, Bucharest, 2011, pp. 15-17.

<sup>9</sup> Regarding the notion of „business”, we can consider it as any organized or casual economic activity, carried out for the purpose of obtaining profit. At the same time, in a broad sense, the notion of „business” designates both organized businesses proper („business enterprises”), including certain enterprises of non-commercial professionals (freelancers), but also occasional businesses that are not carried out in an organized form and with a continuity character. In a narrow sense, by „business” we can refer only to those economic enterprises carried out for the purpose of obtaining profit.

<sup>10</sup> I. Turcu, M. Botină, *Dreptul afacerilor întreprenderii*, vol. I, C.H. Beck Publishing House, Bucharest, 2013, p. 4; I. Schiau, *Întreprinderea – un concept distonant*, in *Revista Română de Drept al Afacerilor* no. 4/2017 (<https://sintact.ro/#/publication/151011966?keyword=%C3%AEntreprinzatorii&cm=SREST>).

<sup>11</sup> S. Angheni, *Drept comercial. Tratat*, C.H. Beck Publishing House, Bucharest, 2019, pp. 46-49.

<sup>12</sup> According to art. 3 para. (1) of Law no. 346/2004 on the stimulation of the establishment and development of small and medium-sized enterprises, with subsequent amendments and updates, it establishes that small and medium-sized enterprises are defined as those enterprises that cumulatively meet the following conditions: • have an average annual number of employees of less than 250; • have an annual net turnover of up to 50 million euros, equivalent in lei, or have total assets that do not exceed the equivalent in lei of 43 million euros, according to the last approved financial statement. Total assets are understood as fixed assets plus current assets plus prepaid expenses.

And art. 4 establishes that small and medium-sized enterprises are classified, depending on the average annual number of employees and the net annual turnover or total assets they hold, in the following categories: • microenterprises – have up to 9 employees and achieve an annual net turnover or have total assets of up to 2 million euros, equivalent in lei; • small enterprises – have between 10 and 49 employees and achieve an annual net turnover or have total assets of up to 10 million euros, equivalent in lei; • medium-sized enterprises – have between 50 and 249 employees and achieve an annual net turnover of up to 50 million euros, equivalent in lei, or have total assets that do not exceed the lei equivalent of 43 million euros.

persons who exercise trade as a profession, individually or within an individual or family business<sup>13</sup>, companies (formerly commercial)<sup>14</sup>, autonomous governments<sup>15</sup>, cooperative societies<sup>16</sup>, economic interest groups<sup>17</sup>, etc. But „professionals” are not limited to the category of „traders”. An example is given by the liberal professions (lawyers, notaries, insolvency practitioners, mediators, doctors, tax consultants, accounting experts, architects, etc.)<sup>18</sup>. These professions and occupations are enterprises, and their holders are professionals, within the meaning of the Civil Code.

Systematizing the above, professionals, business owners, can be: natural persons who carry out economic activities independently, namely traders – authorized natural persons, entrepreneurs within the individual enterprise and entrepreneurs within the family enterprise, as well as persons exercising liberal or regulated professions; legal persons under private law: companies (formerly commercial), cooperatives, autonomous regies, civil societies with legal personality; entities without legal personality: civil societies without legal personality (pension funds, investment funds, law firms, notaries, bailiffs), groups of companies.

### 3. The mechanism of operation of the exception of non-execution by reporting to relevant jurisprudential aspects

The exception of non-execution is the defense that consists in the refusal to perform the obligation, expressed by one of the parties to the synallagmatic contract when the other party demands this performance without performing or offering to perform its own obligation<sup>19</sup>.

The institution of the exception of non-execution is based on the obligations arising from a synallagmatic<sup>20</sup> contract that are due, and one of the parties does not perform or does not offer to perform the obligation, the

<sup>13</sup> The headquarters of the matter can be found in GEO no. 44/2008 on the conduct of economic activities by authorized individuals, individual enterprises and family businesses, with subsequent amendments and updates.

<sup>14</sup> V. Nemeș, *Drept comercial*. 5<sup>th</sup> ed., Hamangiu Publishing House, Bucharest, 2023, pp. 37-38.

<sup>15</sup> According to art. 3 of Law no. 15/1990 on the reorganization of state economic units as autonomous regies and commercial companies, with subsequent amendments and updates, it establishes that autonomous regies are legal entities and operate based on economic management and financial autonomy. Autonomous regies may be established by decision of the government, for those of national interest, or by decision of the county and municipal bodies of the state administration, for those of local interest, in the branches and fields established according to the law.

<sup>16</sup> Art. 4 of Law no. 1/2005 on the organization and functioning of cooperation, republished, establishes that cooperative societies can be established in several forms: craft cooperative societies, consumer cooperative societies, recovery cooperative societies, agricultural cooperative societies, housing cooperative societies, fishing cooperative societies, transport cooperative societies or forestry cooperative societies.

<sup>17</sup> The provisions of art. 118 of Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignities, public functions and in the business environment, the prevention and sanctioning of corruption, with subsequent amendments and updates, establish that the economic interest group (G.I.E.) represents an association between two or more natural or legal persons, established for a determined period, in order to facilitate or develop the economic activity of its members, as well as to improve the results of that activity. The economic interest group is a legal entity with patrimonial purposes, which may have the status of trader or non-trader. The number of members of an economic interest group cannot exceed 20. The activity of the group must be related to the economic activity of its members and be only of an accessory nature to it.

<sup>18</sup> For example, in the case of lawyers, the Framework Law no. 51/1995 on the organization and exercise of the legal profession establishes that lawyers carry out a professional and liberal and autonomous activity. They are not traders, but being professionals, they have specific obligations such as tax registration and compliance with certain ethical rules.

<sup>19</sup> L. Pop, *Curs de drept civil. Obligațiile*, Universul Juridic Publishing House, Bucharest, 2015, p. 202; N. Daghe, *Considerații teoretice și practice referitoare la excepția de neexecutare a contractului*, in *Dreptul* no. 1/2013 (<https://sintact.ro/#/publication/151023938?pit=2025-04-02&keyword=excep%C8%9Bia%20de%20neexecutare&cm=SREST>).

In judicial practice, it has been noted that the exception of non-performance is conceived as a justifiable cause for non-performance of contractual obligations, which allows the parties to remain as contractual partners, capable and willing to honor their assumed obligations, outside the formal and enforceable framework of the court. The conclusion of a synallagmatic contract obliges each of the contracting parties to voluntarily accept the authority of the other, the content of the contract being consciously delimited from the beginning. What completes the perimeter of the individual's freedom by assuming the rights and obligations of the contract in which he has engaged is characterized by a mandatory, constraining character. Therefore, the failure to fulfill obligations by one of the parties triggers in favor of the other the power to choose between the possibility of remaining in the rudimentary space of private justice or of resorting to the coercive means imposed by the formal framework of justice. See, Trib. Bucharest, dec. of 22.05.2024 (<https://sintact.ro/#/jurisprudence/553951284/1/incheiere-nr-rj-23-g-339323-2024-din-22-mai-2024-tribunalul-bucuresti-litigiu-privind-achizitiile...?pit=2025-04-02&cm=URELATIONS>).

<sup>20</sup> According to art. 1171 CC, a contract is synallagmatic when the obligations arising from it are reciprocal and interdependent. In a case, it was held that the exception of non-performance of the contract is a substantive defense regulated by art. 1556 para. (1) CC, which provides that when the obligations arising from a synallagmatic contract are due and payable, and one of the parties does not perform or does not offer to perform the obligation, the other party may, to an appropriate extent, refuse to perform its own obligation, unless the law, the will of the parties or customs result in the other party being obliged to perform first. Thus, from the above-mentioned legal text, several conditions that must be met for the exception of non-performance to be applicable, of which, a first condition that must be met is that the obligations must be born from a synallagmatic contract. The contract is defined as synallagmatic, according to art. 1171 CC, when

other party may, to an appropriate extent, refuse to perform its own obligation, unless the law, the will of the parties or customs result in the other party being obliged to perform first<sup>21</sup>. At the same time, performance cannot be refused if, according to the circumstances and considering the small importance of the unperformed performance, this refusal would be contrary to good faith<sup>22</sup>.

In recent judicial practice, it has been held that „according to art. 1556 CC, in order to operate this justified cause of non-performance, it is necessary to cumulatively fulfill the following conditions: (i) the obligations of the parties must arise from a synallagmatic contract; (ii) the existence of non-performance of the obligation of the party against whom the exception is invoked; (iii) the obligations must be due; (iv) the existence of the proportional nature of the invocation of the exception, compared to para. (2) of the said article, and (v) the absence of an order for the performance of the obligations arising from the law, the will of the parties or from customs”<sup>23</sup>.

Regarding the conditions for invoking the exception of non-execution, the first condition refers to the fact that the mutual obligations of the parties must be based on the same synallagmatic contract and not have different sources. In one case, it was held that the investments necessary to carry out the commercial activity in the space in question were deducted from the judgments that far exceed the plaintiff's claims. These investments are also briefly mentioned in the Minutes Annex 1 concluded between the parties on 20.12.2022. In this regard, as a substantive defense, under art. 1556 CC, it intends to invoke the exception of the lack of execution of the contract by the plaintiff. in the sense that it made available to the undersigned a space unsuitable for carrying out the commercial activities for which it was rented and did not comply with the contractual obligations assumed. The damage suffered by the defendant because of the plaintiff's culpable attitude are indisputable, and her present legal action takes the form of an amount not owed, to enrich herself without just cause, within the meaning of art. 1345 CC<sup>24</sup>.

The second condition refers to the existence of a non-performance, even partial, but sufficiently significant, on the part of the party claiming performance. In judicial practice, it has been held that given that the plaintiff did not fulfill its own contractual obligations, not completing the works within the contractual term, as well as performing works that do not correspond to both the technical specifications requested by the defendant and the general ones in the field, pursuant to art. 1556 CC, the defendant intends to invoke the exception of non-performance of the contract<sup>25</sup>.

At the same time, the non-performance must be attributable to the party who, in turn, claims the performance of the other party's obligation, and not due to an act committed by the party invoking the exception or to a circumstance that excludes guilt.

A third condition refers to both obligations being due on the date of invoking the exception (of course, the obligation of the party against whom the exception is opposed is of interest). In one case, it was held that the present claim is not certain, liquid and due, the creditor did not prepare and submit all the documentation regarding the contracted services in accordance with the contractual obligations, a failure to comply which necessitated the need for additional checks by the departments that order the payment. These documents lead

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the obligations arising from it are reciprocal and interdependent. Otherwise, the contract is unilateral even if its execution implies obligations on both parties. The case refers to the conclusion between the parties of a loan contract, which has the following characteristics according to the provisions of art. 2158 and 2159 CC: unilateral, real, property transfer. Therefore, about the loan contract concluded on 14.09.2022, the court finds that the conditions provided by law for the exception of non-execution to be raised are not met, since the loan contract concluded between the parties is not a synallagmatic contract. See, Bucharest District 4 Court, sent. of 03.10.2024 (<https://sintact.ro/#/jurisprudence/553963044/1/sentinta-nr-rj-ee-6-e-96756-2024-din-03-oct-2024-judecatoria-bucuresti-sectorul-4-ordonanta-de...?pit=2025-04-02&cm=URELATIONS>).

<sup>21</sup> See art. 1556 para. (1) CC. See also L. Pop, *Excepția de neexecutare – remediu natural al neexecutării contractului în reglementarea Noului Cod civil*, in *Dreptul* no. 3/2015 (<https://sintact.ro/#/publication/151021967?pit=2025-04-02&keyword=excep%C8%9Bia%20de%20neexecutare&cm=SREST>).

<sup>22</sup> Art. 1556 para. (2) CC.

<sup>23</sup> Bucharest District Court 5, dec. of 26.02.2025 (<https://sintact.ro/#/jurisprudence/553973292/1/sentinta-nr-rj-86-g-37-e-8-d-6-2025-din-26-feb-2025-judecatoria-bucuresti-sectorul-5-ordonanta-de...?pit=2025-04-02&cm=URELATIONS>).

<sup>24</sup> Călărași Court, sent. of 18.12.2024 (<https://sintact.ro/#/jurisprudence/553966368/1/sentinta-nr-rj-628-d-8-d-989-2024-din-18-dec-2024-judecatoria-calarasi-pretentii-civil?pit=2025-04-02&cm=URELATIONS>).

<sup>25</sup> Trib. Constanța, sent. of 08.01.2025 (<https://sintact.ro/#/jurisprudence/553967453/1/sentinta-nr-rj-393-e-525-g-9-2025-din-08-ian-2025-tribunalul-constanta-actiune-in-daune...?pit=2025-04-02&cm=URELATIONS>).

to the conclusion that the asserted claim rights did not arise, given that the fate of the correlative obligations is determined by the provisions of art. 1556 CC<sup>26</sup>.

Another condition refers to the fact that there is no specific order in the execution of the obligations, in the sense that the obligation of the party invoking the exception should not be executed before the obligation of the other party. For example, in the case of sale, if the parties have not stipulated otherwise, the good is delivered as soon as the price is paid (art. 1693 CC), so the buyer could not refuse to fulfill the obligation to pay the price on the grounds that the good was not delivered; however, if the parties have agreed on a term only for the obligation to pay the price, and the buyer requests the delivery of the good, the seller cannot raise the exception of non-performance of the contract.

Moreover, and finally, the refusal must not be contrary to good faith. With regard to this negative condition, in one case it was held that, „in accordance with the provisions of art. 1270 para. (1) CC, a validly concluded contract has the force of law between the contracting parties, and according to art. 1170 CC, the parties must act in good faith both when negotiating and concluding the contract and throughout its execution, and they cannot remove or limit this obligation. Also, in accordance with the provisions of art. 1516 para. (2) point 2 CC, in conjunction with those of art. 1549 *et seq.* CC, the creditor has the right to obtain, in the case of contractual obligations, the termination of the contract, but by reference to the provisions of art. 1556 para. (2) CC, execution cannot be refused if, according to the circumstances and taking into account the small importance of the unperformed service, this refusal would be contrary to good faith”<sup>27</sup>.

If any of the conditions necessary for invoking the exception are not met, the refusal to enforce will entitle the other party to claim damages based on contractual civil liability. In one case, it was held that „the non-performance of the obligation to pay rent starting with July 2020 by the appellant-defendant is unjustified, as the legal conditions provided for in art. 1556 CC were not met for it to be able to invoke the exception of non-performance of the contract. Consequently, the provisions of art. 26 of the contract (termination of the rental contract before the established term may be made in accordance with the CC provisions at the request of the owner when the tenant does not pay the rent within 30 days from the due date) and art. 1549 para. (1) CC becoming applicable, the trial court rightly ordered the termination of the contract with the consequence of the eviction of the appellant-defendant from the rented space. At the same time, the exception of non-execution cannot be opposed to third parties who invoke a right of their own, distinct from the contract”<sup>28</sup>.

Regarding the effects produced by the exception of non-execution, these occur immediately and consist in the suspension of the execution of the obligation assumed by the party that resorts to this means of defense, until the date on which the other party will execute its obligation assumed by the same contract. At the same time, the party entitled to refuse to execute its obligation cannot be obliged to pay liquidated damages on grounds of delay in the execution of its obligation. It should be noted that the contract and its binding force do not cease, its execution being only suspended, therefore the contracting parties are not released from their obligations<sup>29</sup>.

#### 4. Conclusions

As we have seen, in terms of specific business law subjects, in the case of natural persons, things are quite clear, but in the case of legal persons, we believe that we should make a few clarifications. First of all, in order to be able to discuss a legal person, it must cumulatively meet the following three conditions: to have an independent organization, that is, to specify its internal structure, the way in which the management, administration and control bodies are composed, as well as their attributions, the way in which it comes into being and in which it can be dissolved as a legal subject; to have its own patrimony, distinct from that of the natural persons that make up the legal person; to have a specific, lawful and moral purpose, in accordance with

<sup>26</sup> Galați Court, sent. of 09.12.2024 (<https://sintact.ro/#/jurisprudence/553966520/1/sentinta-nr-rj-6286-d-3-dgg-2024-din-09-dec-2024-judecatoria-galati-ordonanta-de-plata-oug-119...?pit=2025-04-02&cm=URELATIONS>).

<sup>27</sup> Gura Humorului Court, sent. of 08.08.2024 (<https://sintact.ro/#/jurisprudence/553956398/1/sentinta-nr-rj-23-g-9-e-9794-2024-din-08-aug-2024-judecatoria-gura-humorului-reziliere-contract...?pit=2025-04-02&cm=URELATIONS>).

<sup>28</sup> Brașov CA, dec. of 17.06.2024 (<https://sintact.ro/#/jurisprudence/553953601/1/decizie-nr-rj-6243-e-9445-2024-din-17-iun-2024-curtea-de-apel-brasov-reziliere-contract-litigii...?pit=2025-04-02&cm=URELATIONS>).

<sup>29</sup> I. Dogaru, P. Drăghici, *Drept civil. Teoria generală a obligațiilor*, 3<sup>rd</sup> ed., C.H. Beck Publishing House, Bucharest, 2019, p. 201; P. Vasilescu, *Drept civil. Obligații*, Hamangiu Publishing House, Bucharest, 2012, p. 516; C. Zamșa, *Drept civil. Teoria generală a obligațiilor*, 2<sup>nd</sup> ed., revised and added, Hamangiu Publishing House, Bucharest, 2024, p. 128.

the general interest, which corresponds to the object of activity of the legal person. With the entry into force of the current Civil Code, the legislator expands the scope of business law subjects, the main category of participants in business life currently being „professionals”. The most important category of professionals is that of traders, whose typology is indicated by art. 6 of Law no. 71/2011.

Regarding the institution of the exception of non-performance, we have observed that it is based on obligations arising from a synallagmatic contract that are due and payable, and one of the parties does not perform or does not offer to perform the obligation, the other party may, to an appropriate extent, refuse to perform its own obligation, unless the law, the will of the parties or customs result in the other party being obliged to perform first. At the same time, performance cannot be refused if, according to the circumstances and considering the small importance of the non-performed service, this refusal would be contrary to good faith.

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