

Business law

Prepared by Dr. Galal Elmasry

MGM412

Lecture 3





مجموعة جامعة
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The most important main themes of the lecture:

- 1- Obligations.
- 2- Types of Obligations.
- 3-Subject of Obligations.
- 4- Sources of Obligations.
- 5- Cessation of Obligations.

1- Obligations:

1- Definition and characteristics of obligations:

- Law of obligations is a set of all legal norms that regulate obligations. Obligations (obligation relations) represent legal relations between certain persons/entities in which one entity is obliged to perform an obligation to the other entity, and the other entity has the right/authorisation to request the first entity to do it. There are two parties in obligations; however, one or more persons/entities can be in each party. The first party is a person who is authorised, has the right to demand and request, and that party is called a creditor (active side of an obligation).

1- Obligations:

- The creditor's authorisation to request something from the other party is called a claim. The other party is a person who is obliged to do something for the creditor, so this party is called a debtor (passive side of an obligation). Subjects of obligations can be legal or natural persons.
- A debtor is obliged to meet his obligations towards a creditor, to do what the creditor is authorised to request from him. This is how the term law of obligations was coined (Lat. obligatio= obligation). An obligation also denotes the entire specific contractual legal relation between a creditor and a debtor.

Considering that obligations represent legal relations, a creditor can force a debtor via the intervention of a state authority to do what he is obliged to do in this relation. Like other legal relations, obligations are protected and can be implemented by filing a lawsuit in court. The court includes arbitral tribunal as well.

1- Obligations:

- Obligations are civil legal relations, and their characteristic is that they are legal relations between precisely determined persons and due to a precisely determined action. Law of obligations is a relative right, which means that it is not addressed towards everyone, and that its holder is not protected against everyone's actions, which is the case with absolute rights (e.g. ownership, pledge). A creditor may only exercise his right from an obligation of his (specific) debtor (e.g. a seller and a buyer). The creditor has no rights whatsoever over third parties, that are not in that obligation. The debtor, as the other party in the obligation should take certain action by which he will bring the creditor into a relation with a certain object and enable him to use it. In order to become an owner, a buyer cannot take the item he has bought; the seller has to give it to him.

1- Obligations:

-In Bosnian law, like in contemporary law in general, a typical lawsuit for the protection of an obligation is a civil legal lawsuit. The means of coercion against the debtor who does not perform the obligation towards the creditor are not aimed against his person, but rather against his property. A typical sanction against a violator of an obligation is damage compensation (reimbursement). It is implemented in various ways.

1- Obligations:

2-Performance of an obligation:

-Obligations are determined by legal norms. The disposition of a legal norm determines the conduct of a subject in the obligation. This conduct, what they should do in the obligation, is called performance of an obligation, or simply performance, prestation. The performance is an object of obligation, unlike the content of obligation. The content includes rights and obligations of subjects in an obligation: the authorisation of a creditor to request a debtor to act in a certain way (e.g. to pay the rent) and the obligation of a debtor to meet the request of a creditor, to act as obliged (to pay the rent).

1- Obligations:

- Performance (by its nature) can be giving (dare) an item, acting (facere), non acting (non facere), i.e. refraining from doing something, failing to do something, and enduring (pati)—allowing the creditor to do something which he would not be allowed to do otherwise.
- Law of obligations as part of civil law or property law regulates property relations between persons. Therefore, a performance of an obligation must primarily be of a proprietary character, must directly or indirectly concern the property of persons who establish obligations. This means that it must be expressible in money terms.

1-Obligations according to types of performance:

- Performance of obligation can imply, as already mentioned, giving, acting or non-acting, as well as enduring and failing to perform. This means that the debtor's role in an obligation can be active, when the debtor gives or does something, or passive, when the debtor is obliged to not do something, to miss doing what he would, if there was no obligation, have the right to do, or to endure something which he would normally not be obliged to endure. According to this criterion, i.e. whether a performance implies giving and acting, or non-acting and enduring, obligations are classified into active or positive, and passive or negative. The significance of differentiation between the two is in the burden of proof: in positive obligations the burden of proof is on the creditor, in passive obligations it is on the debtor.

1-Obligations according to types of performance:

- Obligations are strictly personal if only the debtor is obliged to perform the obligation and no one else. It does not make a difference what reasons led to the acceptance of an obligation for the obligation to be considered performed only if it is performed by the debtor personally. It does not have to be the case of the debtor's particular ability, or of the creditor's trust; however, more often than not, that is the case. Other obligations are impersonal. Some authors call them personal obligations though. In impersonal obligations, someone else can perform the obligation instead of the debtor. Impersonal obligations are usually positive. The significance of differentiation: in impersonal obligations it is possible to change the subject, while in strictly personal obligations this is not possible; the death of a subject in an obligation leads to the termination of a strictly personal obligation, which is not the case with impersonal obligations.

1-Obligations according to types of performance:

- According to whether the obligation can be performed in a specific, short period of time, or the performance takes a longer period of time, obligations are either current or permanent. A current obligation, for example, would be delivering goods or their transfer in one or several rounds, one following the other.
- A permanent obligation, for example, is a rent, obligation of a transport organisation to transport all goods for someone to the railway station during a certain period of time. The duration of an obligation can be a fixed term (e.g. six months, a year), or an indefinite period of time (e.g. until someone is dismissed).

1-Obligations according to types of performance:

- Regarding whether the performance of obligation is divisible, it can be performed in parts (instalments) which have the same characteristics, or it is indivisible, cannot be divided, cannot be performed part by part without destroying its essence and decreasing its value, obligations are either divisible or indivisible.

2-Obligations according to method of determination of a performance:

-Regarding the criterion of the method of determination of a performance, obligations are classified into: individual, generic (determined by the type), as well as alternative and facultative.

-A special or individual obligation is an obligation in which it is known which specific performance a debtor is obliged. The performance is specially determined (in species) and the obligation can only be performed by performing that specific action (e.g. the same machinery that was rented out must be returned). It is characteristic for special obligations that a debtor is not held responsible if the obligation cannot be performed due to a subsequent objective impossibility, with the condition of a lack of his fault (e.g. when the affair fails due to force majeure).

2-Obligations according to method of determination of a performance:

- An object of obligation can be determined by genus i.e. kind only. These are generic obligations. Unlike individual, in which the object of obligation is precisely determined, in generic obligations the object is not sufficiently determined (e.g. 100 litres of white wine). Only the kind (genus) of the item or the performance is determined, and which exact item or performance is going to be used at the moment of fulfilling the obligation is less relevant for the parties in the obligation. This usually concerns fungible things whose kind can be of a narrower or wider scope.
- An obligation can be such that it concerns one action, its object is one specific action, but the debtor is authorised to perform the obligation by performing another obligation which is also determined. This is a facultative obligation.

1- Definition of subjects of business law:

- A subject of law is any person who has the capacity to be a carrier of rights and obligations. Generally, natural and legal persons occur as subjects of law. For that reason, the subjects of business law need to be searched for within the framework of natural and legal persons that have certain characteristics when compared to other persons. Classic theory generally determines the subjects of business law via the term of trade business and the characteristics of persons who conduct business activities. Such approach implies the existence of three basic criteria for the determination of business law subjects: objective, subjective and mixed.

- An obligation can be one with several subjects in one or both parties. Clearly, an obligation cannot be with one subject, as one cannot be in a legal relation with oneself. Namely, no one cannot owe or demand something from themselves.

1- Multitude of subjects in an obligation:

- Several persons can be found in an obligation, on each side, i.e. several persons or entities as creditors or several persons or entities as debtors, or several persons on both sides. Various reasons can lead to such arrangements. Likewise, a mutual relation of several persons who represent the same side of the obligation can be different. A performance can be divisible, so that several persons are obliged, or that they appear as creditors whether jointly or individually. A performance can be the one which can be performed once only, that it cannot be divided, so that each person on the creditor's side can request the fulfilment of the entire obligation, i.e. each person on the debtor's side can only fulfil the obligation in its entirety.

1- Multitude of subjects in an obligation:

- When a performance is divisible, and the relation between the multitude of subjects is such that each creditor is authorised to demand only his own portion of the claim, such an obligation is a divided obligation (simple joint obligation).
- If there are several subjects on one side of an obligation, and the performance is divisible, the obligation is divided, unless determined by the law or by a contract that such an obligation is a joint one. In this situation, if it concerns a business law contract, and there are several subjects on the side of the debtor, there is a legal assumption of a joint obligation which can be explicitly excluded by a contract.

1- Multitude of subjects in an obligation:

-In the case of multitude of subjects in an obligation, their mutual relation can be arranged so that all co-debtors (e.g. three of them) are obliged to perform the entire obligation, and that all co-creditors (e.g. two of them) are authorised to demand the entire obligation to be performed, regardless of the performance being divisible. Those are solidary (joint) obligations (solidum – solid figure, a whole). The principle is: one for all, all for one.

-The relation of solidarity can exist on the side of the creditor (active solidarity), or on the debtor's side (passive solidarity), or simultaneously on both sides. In a solidary obligation there is an external relation (creditors – debtors) and an internal relation (relation between creditors or between debtors).

2-Change of subjects in an obligation:

-In a legal relation in general, except in the case of a strictly personal obligation, subjects who participate can be changed.

This is true for obligations as well, in which the object of obligation has property value, because, generally, property can be utilised. Rights and obligations from an obligation can be transferred to other persons/entities. Clearly, the object of obligation remains the same. The content (identity) of obligation does not change either. Only the subjects who participate in the obligation change. Instead of a creditor, another one can enter the obligation and have the same authorisation like the previous one. Likewise, instead of a debtor, a new one can take the same obligation that the previous one had.

2-Change of subjects in an obligation:

-If the creditor in an obligation changes, it is called a cession, or transfer of a claim. A cession of a claim i.e. a change of a creditor most frequently occurs based on a contract. Exceptionally, it can occur based on a unilateral legal affair (e.g. a testator transfers his claim to someone, in case of his death). By the contract, the old creditor (cedent) transfers his claim onto his contractor –the new creditor (cessionary). The debtor (cessus) remains the same, and the performance remains the same as well. A cession can be performed several times: each creditor can transfer a claim to a new cessionary.

2-Change of subjects in an obligation:

-A cession of a claim has its economic reason and its legal basis. The legal basis is a legal affair in whose performance a cession occurs. There are different basic legal affairs. One can gift his claim to someone, or return a debt by transferring his claim, or an item one is buying can be paid by transferring a claim. A claim can be sold as well, whereby the creditor transfers his claim to a new creditor. The cause can be: causa solvendi – performing another, existing claim, causa credendi in which the transferred claim is a loan, or causa donandi in which the transferred claim is a gift. A cession can occur based on a court decision, or based on the law, which is rarer.

2-Change of subjects in an obligation:

- The change of a subject of obligation on the debtor's side is possible in several ways. The most common change of debtors is conducted by the transfer of debt (intercession). Furthermore, the change of a debtor is possible through accession to debt or transfer of fulfilment. A change of a debtor can occur based on a contract but also based on the law, which is less common.
- By a change of a debtor, the obligation (content of obligation) remains the same, and only the debtor (person) changes.

4-Sources of obligations:

- Legal facts and states on the basis of which obligations occur are the sources of obligations, the basics of the occurrence of obligations. They are the reasons due to which the obligations occur. The first, the richest and the most frequent source of obligations are legal affairs in general and contracts in particular.
- Agreements/contracts are consented declarations of will of two or more persons with which these persons agree that a particular obligation occurs between them, and that they perform an agreed obligation. The second source of obligations is unilateral civil-law affairs. Their specificity is in the fact that an obligation, as a bilateral legal relation, occurs with a declaration of will of only one party.

4-Sources of obligations:

- The third source is inflicting damage .A civil offence is a source of obligations in the sense that a person who illegally inflicts damage to another person/entity assumes the obligation to compensate such damage (to the damaged party), unless it can be proven that the damage occurred without his fault. Therefore, in theory, in order for an obligation to occur, the damage should have been caused by the person (a person that caused the damage) due to whose actions that damage had been caused. It is a system (theory) of subjective responsibility for which the following requirements ought to be met: unlawfulness of an action made by a person who caused the damage.

4-Sources of obligations:

- Damage can be caused by a harmful action to a person with whom a person who caused damage has not been in a legal relation up to that time. In such a case we are dealing with a Delict civil liability (non-contractual liability). Damage could be caused to a contractual partner by non-fulfilment of illegitimate fulfilment of contractual obligations. It is a contractual civil liability.

4-Sources of obligations:

-Acquiring without ground represents the fourth source of obligations . It is also known as an unlawful or unjust enrichment. When someone has obtained something or received something and hence enriched his property without legal foundations, i.e. unjustly, then it is said that he has enriched without any grounds for it. In fact, one part of someone's property becomes a part of someone else's property, and that transfer has no legal or lawful grounds in legal affairs⁸⁶ (e.g. a person A had paid twice to a person B for the same debt). If that had happened in a lawful manner and not by theft, deceit, or any other illicit action and if no offence was made, then it is referred to as acquiring without ground.

4-Sources of obligations:

-The fifth source doing business without order or authority. If someone, with a good intention, undertakes an action for the interest of another person, and without that person's consent, then it is referred to as doing business without order or authority, an unbidden performance of someone else's activities or effectiveness without a proxy. If the undertaken action is accepted by and approved by another person, then a relation occurs in the same manner as in the case of representation. If the undertaken action is not approved by another person, then this obligation occurs, similar to a case when a representative oversteps the scope of authorisation. If a business manager acted dully and did what was required by the circumstances and took over the liabilities for the main manager of business, then the main manager of business is obliged to compensate him for all necessary expenses including the effort for his job.

5-Cessation of Obligations:

-There are numerous ways of cessation of an obligation:

1- Fulfilment, payment is a usual way of cessation of an obligation. A debtor performs an action which he was obliged to perform for a creditor. A creditor cannot request of a debtor to do something else, nor can a debtor entail a creditor to fulfil an obligation apart from the one to which he had committed.

2- In principle, the death of a subject of obligation (debtor's or creditor's), does not imply the cessation of an obligation, but rather the rights and liabilities are transferred onto a successor. However, in a case when a liability or right is strictly linked to an individual that is a subject of obligation, the cessation of obligation occurs in a case of a subject's death.

5-Cessation of Obligations:

-There are numerous ways of cessation of an obligation:

3- Compensation, offsetting, set-off is a setoff of a debt for debt by settling mutual obligations.

4- A novation, substitution is a substitution of an existing obligation for another one, a new one. Hence the name substitution. The existing (old) obligation ceases to exist with the agreement of subjects, and instead of it, a new obligation is founded.

5- Obligation can cease to exist by a discharge of debt. It is a waiver of the right to claim, which in fact is a gift of what a debtor owed.

6- Obligation ceases to exist when a claim and a debt affiliate at the same person, when the attributes of a creditor and of a debtor are found in the same person.

5-Cessation of Obligations:

-There are numerous ways of cessation of an obligation:

7- **Furthermore**, an obligation can cease to exist by a settlement or arrangement. A settlement is an agreement between subjects of one existing obligation, whereby their unclear and disputed claims and debts from that obligation are eliminated and whereby what is left to do, is determined in regards to what is owed and what is claimed.

8- A law could be enacted for many reasons whereby obligations are either annulled or repealed or in general they cease to exist.

9- Obsolescence as a way of cessation of obligations was discussed in a section on the effect of time on legal relations. It is a loss of the right to a coercive realisation of a claim by the expiration of a specified period of time.



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