

# Legal Responsibility to Maintain the Performance of Commercial Contracts in Case of Breach: A Reflective View from Vietnamese Law

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## **Abstract**

*Legal responsibility for breach of commercial contracts is an important aspect recognized in the commercial laws of countries around the world, including Vietnam. Various types of legal responsibilities for breach of commercial contracts are enacted to ensure the validity of contracts and protect the primary interests of the aggrieved party. Within the scope of this article, the author examines and analyzes the types of legal responsibilities aimed at maintaining the performance of commercial contracts upon breach according to the provisions of Vietnamese law, including the obligation to perform contractual duties, temporary suspension of contractual duties, and the legal responsibilities to maintain contract performance as agreed upon by the parties.*

**Keywords:** *Legal Responsibility, Obligation To Perform Contractual Duties, Temporary Suspension Of Contractual Duties, Maintaining Contract Performance, Parties' Agreement.*

## **INTRODUCTION**

The conclusion of commercial contracts plays a crucial role in ensuring that commercial activities are conducted within the framework of the law and serves as the basis for entities to exercise their rights and obligations. Alongside the increasing prevalence of commercial contracts in the economy, breaches of commercial contracts are also becoming more diverse in nature. Legal responsibility for breach of commercial contracts or sanctions in commerce is an effective measure aimed at imposing liability on the party committing the breach. Legal systems in each country worldwide stipulate various types of responsibilities arising from contract breaches and regulate each type of legal responsibility to suit the circumstances, history, and development conditions of the respective countries. Similarly, Vietnam regulates various types of legal responsibilities for breach of commercial contracts in the 2005 Commercial Law, based on alignment with the general trend of commercial law worldwide and tailored to the specific conditions and development requirements of Vietnam. These legal responsibilities aim to terminate contract performance, compensate for damages resulting from the breach, or determine the continuation of contract performance. Among these, the legal measures aimed at maintaining the performance of commercial contracts recognized by Vietnamese law include the obligation to perform contractual duties, temporary suspension of contractual duties, and the legal responsibilities to maintain contract performance as agreed upon by the parties.

### **Obligation To Perform Contractual Duties**

#### **Provisions In The 2005 Commercial Law**

The 2005 Commercial Law stipulates that “The obligation to perform the contract means that the aggrieved party requests the breaching party to perform the contract correctly or use other measures to ensure contract performance, and the breaching party must bear the associated costs”. The use of the term "performing correctly" is not suitable for the actual situation because once the deadline has passed, it is impossible to perform correctly, and delivering missing goods to make up for the shortfall may also never be correct as originally promised. Everyone knows that "performing correctly" means fulfilling the commitments made in the contract, but if the contractual commitments have expired, continuing enforcement may never be exactly as initially promised. According to the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principles of International Commercial Contracts (PICC), and the laws of other countries that do not use this term, they instead use terms such as actual performance or continuation of contractual obligation

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The basis for applying this liability is the occurrence of violations such as partial delivery of goods or services, delivery of low-quality goods or services, exclusion of violations due to non-performance. However, it cannot be asserted that this liability only applies when there is a non-fundamental breach, but even fundamental breaches such as severe non-conforming replacement of goods or services. The violating party utilizes this measure in any violation caused by the violating entity, the Commercial Law prioritizes the application of this measure for violations stipulated in the Commercial Law. When the violating entity continues to fulfill its obligations due to the breach of contract, it is simultaneously subjected to penalties for the violation if agreed upon and compensates for damages if any occur, with no other measures applied. If the violation is severe, the violating party may choose to enforce the contract correctly or apply other measures, but simultaneous enforcement of the contract with cancellation, suspension, or termination of the contract is not permitted. And if the violating party is the buyer, they may purchase goods or receive service from another party to replace according to the type of goods or services specified in the contract and related expenses. However, if the violating party is the buyer, only the obligation to pay or receive the goods is stipulated, with no additional provisions by the Commercial Law. Thus, the seller may sell the goods or services to collect payment, and if the goods or services are used solely by the buyer without selling to others, what should be done? Can the seller borrow money from a bank and then the buyer has to repay both the loan and the interest? The Commercial Law does not foresee whether this scenario is unfair in applying this measure to the violating party as the buyer or the seller.

Regarding violations before and after the contract execution deadline, this measure only applies to violations occurring after the contract execution deadline, as violations before the deadline cannot be applied because the violating party has been declared by the other party to repudiate the contract, or the violating party is certain that the other party cannot perform by the deadline in practice. Additionally, the violating party must have evidence to prove that the other party will not be able to perform.

Unilateral violation means one party violates, and bilateral violation (also known as coincidental violation), in both types of violations, a party may apply this except in specific cases, if both parties violate, then the practical enforcement of continuing performance seems unfeasible, both parties do not want to achieve what is committed in the contract through their violations, binding this relationship through enforcing the contract seems unreasonable.

Violations arising from the performance of contractual parties may prioritize the application of this measure if the contract delegates obligations to a third party for execution, but such delegation leads to a breach, typically in such contracts, assigning obligations to another entity may not ensure the same level of responsibility as the parties to the contract; it cannot be said they lack responsibility, but it can be argued they may not exert themselves fully, thus applying the measure of enforcing continued contract performance may not be appropriate.

Contractual breaches agreed upon to enforce strict compliance must be seriously respected by all parties, even the provisions of the Commercial Law, court judgments must be respected, but such agreements must be reasonable, meaning they must exclude cases impractical to enforce in reality. Violations where this measure is applied by the court will also be respected; however, its application must be appropriate in each case. In addition to breaches of accompanying duties based on the principle of mutual trust, if there is a breach, it may be difficult to apply this measure since requesting performance based on lost trust may not yield desired results.

### **Conditions Apply To Continue Performing The Contract**

To apply this type of responsibility, the contract must meet the following requirements: the contract must be valid, signed by competent parties, and the nature, circumstances, and subject matter of the contract must be realistically performable without falling into impracticality. If these conditions are not met, the contract cannot be enforced, and other measures such as contract termination, or compensation for contractual damages should be pursued.

Types of contracts listed in the Commercial Law such as purchase and service contracts. And contracts such as sale and purchase of real estate, land use rights transfer, securities, insurance, credit, construction, business cooperation, enterprise establishment, sale and purchase of enterprises... not regulated in the Commercial Law. According to the provisions of specialized laws directly governing these types of contracts, it is stated "if this

law does not regulate, the Civil Code shall apply”. However, considering the nature and subject matter of the contract, these are specific types of commercial contracts that must be regulated by the Commercial Law; if the Commercial Law does not regulate, then the Civil Code can be applied. Therefore, prioritizing the application of the Commercial Law first and then the Civil Code is natural. We do not delve into this issue much but consider the prioritized application of responsibility in each type, each group of contracts when violations occur.

Prioritizing which responsibility to apply is not as important as applying the appropriate type of responsibility to the actual situation. If it is argued that strict enforcement of contractual obligations must be applied as a principle like the principle of strict compliance “*Pacta Sunt Servanda*”, it is not accurate; it must depend on the agreement in the contract, the request of the violating party, the actual circumstances of each case, the jurisdiction of the court in each case. Of course, the essence of contracting is to fulfill the contract and achieve the agreed-upon purpose, but the situation has now changed with a breach, meaning the relationship between the parties is no longer the same as when the contract was signed. Therefore, applying the appropriate type of responsibility to the actual situation when a breach has occurred does not always require choosing this measure. And whether the violating party can apply it unconditionally or whether the violating party must be compelled to apply this measure to the violating party when they no longer wish to apply it due to the changed relationship between the two parties.

### **Cases Prioritizing The Application Of The Measure To Enforce Contractual Obligations**

First, there is an agreement. If the parties have agreed, absolute respect for the agreement is required, and the breaching party must fulfill the commitment in the contract.

Second, inability to accurately determine actual damages, such as in the case of buying and selling ancient paintings or stocks where the stocks of company A are not readily available on the market.

Third, compensating with physical benefits incompatible with the actual situation, for example, in contracts for the sale of houses or land use rights transfer, where the value of the land and construction costs increase in the market and the specified location of this type of contract, compensation to purchase another location would not be suitable for the buyer. However, the seller can still sell to others at market price and demand compensation from the buyer if the buyer does not continue the purchase, meaning if the buyer breaches, the seller may not be obliged to apply this measure. For contracts that can be divided, meaning separable without affecting the remaining part, the obligated party must still fulfill this part, while compensation for damages applies to the remaining part. For contracts where the subject cannot be divided, compliance with the contract is compulsory.

Fourth, contract termination will affect the reputation of the damaged party.

Fifth, contract termination will cause the breaching party to breach a contract with a third party.

In cases where contract performance is demanded, compensation for damages, if any remains applicable. This provision is not only stipulated by the Commercial Law but also by CISG and PICC, contract laws of countries following the Continental European legal system or uniform laws, all address this issue. The question arises: when applying the measure to enforce the contract, does the breaching party have the right to change the measure of liability for the breaching party? Accordingly, the breaching party will be allowed to apply the measure of contract termination and compensation for damages. However, after the court has ruled to continue the contract performance, but the breaching party still fails to comply within the deadline, the damaged party can compel the breaching party by requesting the enforcement authority to compel the breaching party to perform. So, can the breaching party change the measure applied to the breaching party unlike the verdict? If so, does the enforcement authority have the right to enforce something different from the verdict? According to the Commercial Law, the breaching party can change the measure applied to the breaching party, but this change without enforcement is not reasonable. If so, invisibly, the breaching party probably has to file a lawsuit again.

Contracts in which the breaching party cannot request compulsory performance of the contract include: there is an agreement in the contract. When the contracting parties are no longer in a business cooperation contract where no legal entity is formed; contracts for the sale of businesses; contracts for capital contribution to

establish a business; contracts where the subject matter is no longer available, for example, goods for transportation are lost due to the decision of a state agency; applying contract termination and compensation would be more compatible instead of incurring unreasonable costs to perform the contract, for example, a construction contract with design errors that require significant demolition to rectify; contracts of a personal nature, depending on the capabilities of the breaching party, for example, service contracts, construction contracts, contracts requiring high technical supervision. Contracts with provisions that are not clearly defined, such as vague pricing in lease contracts, unclear buyer, pricing, and essential terms in sales contracts. Contracts signed under authorization for another party, contracts that should not apply compulsory performance when trust is lost between the parties. Contracts that prolong the continuation of contract performance for an excessively long time.

Furthermore, when applying compulsory performance or not applying this measure, changes in the circumstances during the performance of the contract by the breaching party, considering the impact on third parties, unreasonable actions of both parties, faults, costs incurred to perform. Compulsory performance of the contract is considered based on three grounds: agreement of the parties when signing the contract but not contrary to legal provisions, provisions in the current Commercial Law, decisions of the reviewing authority in each specific case based on legal provisions and compliance with legal principles. The third issue is decided by the court, and countries worldwide apply case law extensively to the competent court, a jurisdiction defined in legal documents.

From the above analysis, we note that Articles 297, 298, 299 of the Commercial Law still do not fully resolve all the factors mentioned. First, the principle of compulsory performance of the contract as stated is not accurate because it must respect the agreement of the parties, determine the type of violation to apply or not, it seems that the Commercial Law stipulates as a principle so that any violation naturally applies this measure. There is a need to specify which cases prioritize the application of compulsory contract performance and which cases are excluded, how the court, the enforcement authority should choose the applicable measure.

### **Suspension Of Contractual Obligations For The Breaching Party**

#### **Terminology And Provisions Of Current Law Regarding The Suspension Of Contract Performance**

The Commercial Law stipulates that “suspension of a contract is when one party temporarily does not fulfill obligations in the contract due to an agreement of the parties when there is a breach of conditions; when one party fundamentally breaches the contractual obligations”. During the suspension of the contract, the contract remains valid, and the breaching party must compensate for the damages caused to the other party. In the case of force majeure breaches the breaching party is exempt from liability, meaning that the suspension of obligations does not apply to the breaching party.

The provisions in the Commercial Law regarding the suspension of contracts are understood only when there is a fundamental breach by the breaching party for the other party to apply this responsibility. The right to suspend is granted to the party with impending obligations when it is determined that the other party has fundamentally breached. Suspension does not apply in cases of force majeure events. The term used is suspension of payment for goods, but the content within the clauses of this law specifies suspension; furthermore, it does not affirm that only fundamental breaches warrant this measure. Rather, any breach is sufficient, such as when the buyer has evidence that the seller has deceived, disputed goods, or delivered inadequately.

This terminology, as regulated by the Civil Code, is the postponement of contract performance, divided into two cases: the party with obligations first will postpone performance upon finding that the performing party will breach the contract when the deadline arrives. This is a form of anticipation of breach before the deadline. The second case is when the party with obligations to perform later will postpone performance when the other party has not fulfilled its obligations by the deadline. The Civil Code does not stipulate the necessity of a fundamental breach; it only requires a breach before the deadline, and in such cases, the breaching party will be subject to this measure.

In our opinion, the term "suspension" should be used for accuracy and consistency in both legal texts because using the term "postponement" implies that either party is permitted to use it, suggesting equal footing without distinguishing between a breaching party and an aggrieved party. Moreover, in practice, this postponement can be used as a temporary cessation due to objective reasons rather than the fault of any party. Suspension should not be regulated only when there is a fundamental breach, as in the Commercial Law, but even non-fundamental breaches should warrant its application. The term "postponement of contract" should not be used when there is a breach of contract because in such cases, the breaching party can also send a postponement request to the aggrieved party. In cases of force majeure, parties also have the right to extend the implementation period. When a party has breached the contract, the aggrieved party has the right to extend the deadline for the breaching party to continue performing the contract; the contract becomes void, and postponement can also apply to unilateral contracts, not just bilateral contracts. However, we only consider postponing performance when one party breaches the contract.

Almost all legal documents worldwide have provisions on the suspension of contract performance, although each document has different provisions. CISG regulates two grounds, one party sees the other as seriously deficient in its ability to perform or in its preparations for performance, then one party can suspend contract performance. If one party has partially performed, it can suspend obligations if it detects the aforementioned deficiencies in the other party. Article 71(3) of CISG does not cover all of (1), only mentioning (2) about the obligation for the suspending party to notify the other party. It does not explicitly mention the obligation to prove the actions of the breaching party. There is a provision that if, afterwards, the breaching party is subject to suspension of the contract, the contract will be terminated if allowing that breach to become a fundamental breach of the contract. According to the Uniform Commercial Code (UCC) of the United States, a party can only show that the other party is at risk of being unable to reasonably perform the contract due to lack of good faith or capability, then the suspension of contractual obligations will be granted. The party suspending the contract also has the right to request in writing that the breaching party provide reasonable assurances within a reasonable time to ensure that the contract will be performed, and if the assurances are not provided within a reasonable time, the contract will be terminated.

### **Basis for Applying the Suspension of Contractual Obligations**

Comparison reveals that each legal document has provisions regarding the suspension of contractual obligations due to breaches, albeit not entirely similar. In our view, the issue of suspending contracts cannot be stipulated solely for cases of fundamental breaches. The purpose of suspension is to either continue contract performance or to allow the breaching party, which may be preparing to fulfill its contractual obligations, to rectify its mistakes. This is both an enforcement measure and a concession from the aggrieved party to provide the breaching party an opportunity to rectify its errors. Additionally, suspending the contract prevents the breaching party from falling into a situation where the contract is terminated due to breaches before the deadline, which could pose significant risks if the breaching party might be able to perform the contract by the deadline. The right to suspend the contract belongs to the aggrieved party, not the breaching party. If the breaching party grants an extension to the other party to prepare for contract performance, it cannot be included in this case. The suspension of the contract is a measure applied by the aggrieved party against the breaching party, as stipulated by the 2005 Commercial Law. However, this measure is applied when there is a breach before the deadline by one party, when one party fulfills part of the contractual obligation while the other party does not. In cases where one party has completed its obligation but the other party has not, this measure cannot be applied. In such cases, only the measures of enforcing contract performance or contract termination in case of serious breaches can be applied because adhering to the principle of fulfilling commitments does not allow for the application of suspension in such circumstances. In cases of concurrent breaches, determining who is at fault can also warrant the application of this measure to consider whether the contract should continue to be performed. It needs to be clarified that the party applying this measure against the breaching party must provide evidence for its application. The provision granting the aggrieved party the right to request the other party to provide reasonable assurances within a reasonable time to suspend the contract to ensure that the contract will continue to be performed should be included. If there are no assurances provided within a reasonable time, the contract will be terminated without the need to wait for contract performance. Naturally, during the suspension

period, the contract remains in effect if the breaching party has received assurances from the other party. Article 51 of the Commercial Law needs to be repealed, and this provision should be included in the Commercial Law in a more general sense to encompass all parties in various types of contracts. The application of contract suspension can still be combined with compensation for damages and penalties for breaches. Subsequently, if the breaching party continues to breach the contract without fulfilling the requirements, meaning it continues to perform the contract, the breaching party may suspend or terminate the contract if there are serious breaches or breaches before the deadline. Thus, the essence of suspension is to assess the breaching party's ability to perform, provide an opportunity to continue contract performance, and avoid hastily applying measures that could eliminate the contract. Moreover, it requires convincing evidence of whether the breaching party can continue to perform the contract or chooses not to perform it or lacks the intention to perform it. This is the measure of good faith and honesty in the relationship between the parties. After temporarily suspending the contract, the aggrieved party may request the breaching party to provide security, such as holding relevant assets or documents, to ensure that the contract will continue when the suspension period ends. This asset retention can be applied at the commencement of contract signing or, in this case, is reasonable.

### **Legal Responsibilities Maintaining Contract Performance by Agreement**

In addition to the types of responsibilities mentioned above, the parties may also agree to apply certain types of responsibilities beyond those provided for in current legal documents. According to the provisions of the 2005 Commercial Law, “parties may agree on other types of legal responsibilities that are not contrary to the basic principles of Vietnamese law, international treaties to which Vietnam is a member, and international practices”. Adhering to the principle of freedom of contract between the parties in contractual relations, parties may agree on measures such as asset retention to ensure contract performance. This measure is regulated by the laws of various countries in cases of breaches to enforce continued contract performance. In this case, the breaching party must provide security, such as asset retention. Additionally, asset retention is a common measure applied among parties in contractual relationships.

Another provision considered as an effective responsibility measure is applying a price reduction in case of breaches. This measure is naturally agreed upon by the parties as an implicit provision. If the breaching party delivers goods or services of lower quality than initially agreed upon, or if there are delays in delivery leading to price changes, the parties have the right to apply a price reduction as agreed upon in the contract. In cases where the contract does not contain prior agreements regarding these measures, but breaches occur during contract performance and the parties wish to maintain their relationship, they may agree on these measures after the breach. Such agreements are binding, and parties must comply with them. Therefore, whether there are provisions specifying the value of the retained assets compared to the contract value is not prohibited by law. For example, if Party A lends \$100 million to Party B, they may agree to retain property documents worth several billion dong. Similarly, the application of a price reduction in case of breaches is not binding if the parties have agreed upon it.

### **CONCLUSION**

Commercial contracts play a crucial role in the economy and are a common form of contract used by entities to conduct commercial activities. The development of commercial contracts leads to breaches between contracting parties, which in turn necessitates the establishment of legal responsibilities or sanctions for breach of contract. Based on the types of legal responsibilities for breaches of commercial contracts as stipulated by international law, this article has examined, from the perspective of Vietnamese commercial law, various measures to maintain contract performance, including enforcing contractual obligations, suspending contractual obligations, and legal responsibilities for maintaining contract performance by agreement. Specifically, the author has analyzed and clarified the legal provisions and basis for applying measures to enforce contractual obligations and suspend contractual obligations, thereby highlighting certain inconsistencies in Vietnamese law and providing suggestions for improvement. Additionally, the author has elucidated the legal responsibilities agreed upon by the parties to maintain contract performance through the application of asset retention measures. It can be argued that measures aimed at maintaining the performance of commercial

contracts are effective measures to address breaches of commercial contracts, ensuring the continued performance of contracts and protecting the legitimate rights and interests of parties to commercial contracts.

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