

**The role of the judge in determining the fate  
of the unexecuted contract for a legitimate reason**

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**Abstract:**

Whenever a contract is established gathering the elements and the conditions for its validity, all its effects will result. The parties are obligated to execute it, even if by compulsion, whenever possible, and since the execution of contracts is the principle, the failure to execute it cannot be legitimate. However, in the case in which the other contracting party does not perform its obligations arising from the same contract, the non-performance becomes lawful.

It may happen that the obligations of the contractors are due at the same time, and both of them adhere to the paying after execution and remain in this state, and although the Algerian legislator stipulated in Article 123 of the Civil Code their right to adhere to this paying, it did not give a solution to this problem. It's unreasonable for the contract to remain in place that brings the parties together forever, as this is illegal, and this study came to shed light on the positive role of the judge in determining the fate of the contract in such cases.

**Keywords:** Judge; Execution; Contract.

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## 1. INTRODUCTION

If the corresponding obligations in the contracts that obligate the two sides are due to be fulfilled, and one of the parties has not executed its commitment, then the other party can refrain from executing its commitment, and its refusal to do so is legal because it aims to ensure the continuation of the time balance between the corresponding due obligations, which is termed by the plea for non-implementation.

The plea for non-implementation is a defensive and not offensive means, set by the legislator to protect the contractor who is ready to execute his obligations, and who is a creditor or debtor to another contractor who has not fulfilled his obligations. The contractor who adheres to this plea for non-implementation is in the middle of execution or unexecuted, as this plea for non-implementation is a means of pressure on the other contractor to get him to execute his commitment. It does not lead to the cancellation of the contract as happens in the case of dissolution, but rather leads to its weakening only temporarily, because it stops the execution of the obligations arising from the contract and does not remove them.

And the contracting party can adhere to the plea for non-implementation by non-execution when its conditions are met on its own without the need for an admonition or a court ruling, and this is different from the annulment that requires all of that, It's just a negative behavior of the debtor, so he does not need to resort to the judiciary to issue a ruling because adhering to this exception aims to Putting pressure on the contractor to fulfill his obligations.

If this contracting party fulfills his obligation, the right of the other party to execution shall be forfeited, but this does not mean that the judiciary is not approached in any case. The creditor may sue the debtor who adheres to the presentation for non-performance regarding his right to this position, as if the debtor who adheres to the presentation is obligated to perform first by virtue of the agreement, custom, the nature of the contract or a legal text, in these cases he does not have the right to this exception.

One of the most important problems that arise from a practical point of view regarding the plea for non-implementation, is the insistence of each of the contracting parties to pay if the corresponding obligations are simultaneous, as each of them refrains from implementing his commitment as long as the other has not executed his commitment. If the two are right in their position, what is the fate of the contract that binds them? Do they remain preoccupied with commitment as long as the plea for the plea for non-implementation does not dissolve the contractual bond, especially since the Algerian legislator did not put a solution to this issue and only referred to the right of the parties to uphold this right in binding contracts for both sides?

There is no doubt that the fate of the contract in this case depends on the role played by the judge. What role for the latter here? What solutions does it have to resolve this type of conflict?

In order to answer this problem, we divided the research into two axes: first, we dealt with the judge's control over the legality of the plea for non-implementation, and in the second, we discussed the judge's progress in the dispute towards maintaining and implementing the contract.

### **2. The judge's control over the legality of the plea for non-implementation**

For abstaining from executing the contract to be legitimate, it must meet certain conditions in addition to the absence of impediments to adhering to the plea for non-implementation, and the judge who decides in the dispute must verify these issues and this is what we will address in two points as follows:

#### **2.1 Oversight of gathering conditions for adherence to the plea for non-implementation**

The contracting party may not invoke the plea for non-implementation against the other party to the contract unless the conditions required by law to adhere to this exception are fulfilled.

##### **2.1.1 The contract is binding on both sides**

The plea for plea for non-implementation represents a direct effect of the contracts binding on both sides, through which the contracting party is able, within a legal framework, to temporarily refrain from executing its obligation until the other party performs its corresponding obligation. Therefore, It's a temporary exception to the binding force of the contract. In contracts binding on both sides, both contracting parties are both creditors and debtors at the same time, and the legislator has approved the defense of non-performance as a legal means by which the creditor can obtain what he has from his debtor, especially if this creditor is ready to implement his obligation towards the other contracting party<sup>1</sup>.

The judge is obligated to verify that the contract that binds the parties to the dispute in his hands is a binding contract for both sides and not a contract binding on one side, because even though these contracts are concluded between two parties such as a gift, guarantee and deposit without return, in terms of their effects they result in obligations owed by one party only.

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<sup>1</sup> Abd Elyai Hedjazi, *The General Theory of Obligation According to Kuwaiti Law, A Comparative Study, Part 01 Sources of Obligation, Voluntary and Involuntary Sources, Volume 01 The Theory of Commitment, Contract Analysis, Kuwait University Publications, 1982, pp 478-479.*

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One of the contracting parties is a creditor and not a debtor, while the other contracting party is a debtor and not a creditor, and therefore the debtor cannot demand the creditor to perform his obligations, because the creditor in this relationship is not owed to the debtor any related and simultaneous obligations, to be a basis for using that the plea for non-implementation. This payment requires, in the first place, a binding contract for both sides, because these contracts not only create mutual obligations, but also create an interrelationship between those obligations and require simultaneous implementation, which allows the use of that payment.

The plea for non-implementation is based on the contrast between the obligations of the parties, if one of them does not execute his commitment, he cannot demand the other party to implement his commitment, because the latter will simply except that demand for unexecuted, this exception aims to achieve justice and equality when implementing the obligations between the parties, through the abstention of one the contracting parties from carrying out his obligation as long as the other contracting party did not perform his obligations<sup>1</sup>.

Justice is an indirect basis for the plea for non-implementation; It's subject to the discretion of the contracting party adhering to the exception, and this is a matter of some danger, because whoever adheres to the plea for non-implementation takes a negative position, making it an opponent and a judgment, which leads to the abuse of this the exception or its deviation from the purpose for which It's intended<sup>2</sup>.

The plea for non-implementation aims to postpone the implementation of the obligations of the contractor adhering to this exception until the time of execution of the corresponding obligations<sup>3</sup>.

Some lawmakers say that "if a creditor in a contract binding on both sides has the right to request the termination of the contract if the debtor does not perform his obligation, so the creditor is freed from carrying out the obligation that he owed, then he has the first place, instead of being relieved from the implementation of his obligation to limit its implementation to stopping its implementation until the debtor fulfills his obligation<sup>4</sup>.

According to the Algerian legislator, the scope of the plea for non-implementation

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<sup>1</sup> Mustapha El-Aouadji, **Civil Law, Part One: The Contract with an Introduction to Civil Obligations, Publications: Al-Halabi publications**, Beirut, Lebanon, undated, p 608.

<sup>2</sup> Houssein Belaid AbdEssalam El-Harbi, **The plea for non-implementation in civil law**, Master's thesis, Faculty of Law, Alexandria University, 2021, p 22.

<sup>3</sup> Ali Filali, Obligations, **The General Theory of the Contract**, Algeria, Moufem Publishing, 2012, p 443.

<sup>4</sup> Abd Erazzak Ahmad Essanhouri, **The Mediator in Explanation of the New Civil Law, Theory of General Obligation, Sources of Obligation**, Part 01, Volume 02, Nahdet Misr, 2011, p 733.

is limited to contracts binding on both sides and not others<sup>1</sup>, contrary to what some comparative legislators see, that the scope of this exception is wide; since the plea for non-implementation is based on the interrelationship between the obligations, some jurists went to say that the scope of application of this exception is not limited to contracts binding on both sides, but applies whenever there are two related obligations, and considering interdependence is the criterion by which this issue is taken, It's not required that interconnected obligations arise from a contract. Rather, this plea for non-implementation can be used for related obligations, even if each of them arises from an independent cause<sup>2</sup>. The plea for non-implementation can extend to incomplete exchange contracts, such as the deposit contract and the loan contract, if the borrower or the depositor spends on the thing loaned or deposited for its preservation or maintenance. Likewise, in the case of rescission, the order is for each party to return what it has received to the other party, and for this It's the right of each of them to adhere to the plea for non-implementation, and refrain from handing over what he owes until the other delivers what is owed to the first. It's even possible to adhere to this exception towards the employer, and he refrains from handing over what resulted from works until the employer fulfills his obligation towards the worker by refunding the amounts he spent, even though the obligations of the worker and the employer are not arising from a contract. It is clear that this trend finds that sticking to the plea for non-implementation is possible whenever there are interrelated and mutual obligations so that the execution of one requires the execution of the other.

It means that this interdependence requires simultaneous implementation by the parties to the relationship, so that if one of them refrains from implementing his commitment, the implementation may be abstained until the first implements what he must implement<sup>3</sup>.

In fact, in other relations outside of contracts binding on both sides, It's a matter of the right to imprisonment and not of the plea for non-implementation. Despite the closeness between the two systems, there are differences between them in terms of the field of each of them and their legal effects<sup>4</sup>.

In French law, prior to the issuance of Decree 131/2016 related to the reform of contract law, public order and the proof of obligations, the French legislator was limited to referring to separate applications of the plea for non-implementation, which led to a

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<sup>1</sup> Mohammed Sabri Essaadi: **The Manifest in Explanation of Civil Law, General Theory of Obligations, Sources of Obligation, Contract and Single Will**, A Comparative Study in Arab Laws, El-Houda Editions, Ain Melilla, Algeria, 2012, p 363.

<sup>2</sup> Abd Erazzak Ahmad Essanhour, **Theory of the Contract, Part 2, Al-Halabi publications**, Beirut, Lebanon, 2<sup>nd</sup> Edition, 1998, pp 712-713.

<sup>3</sup> Aziz Kadhem DJabr, Legal Refusal to Execute the Contract, the Rule of the plea for non-implementation, A Comparative Study of Islamic Jurisprudence, **Errafidayn Journal of Rights**, Issue 16, Volume 01, 2003, p 61.

<sup>4</sup> Ali Filali, Op.Cit, p 444.

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difference of legislation on the issue of the scope of application of the plea for non-implementation.

Some of the jurists considered that the scope of the plea for non-implementation was limited to contracts binding on both sides, and proponents of this trend justify their opinion that the plea for non-implementation is based on the idea of reason in general, whether its role is limited to the stage of concluding the contract, or extends to the stage of implementation.

And that the plea for the plea for non-implementation is only the assumed will of the contracting parties, on this basis, its scope is limited to contracts binding on both sides. As for incomplete reciprocal contracts such as deposit and agency, they fall within the scope of the right to imprisonment, as well as non-contractual relationships, such as the relationship of the worker with the employer, and the emerging relationship For the dissolution of the contract by annulment or nullity<sup>1</sup>.

While another side saw the extension of the scope of the plea for non-implementation outside the circle of contracts binding on both sides, supporters of this trend said that the push for the unexecuted is not limited to the circle of contracts binding on both sides, or binding on one side, its circle is wider than the circle of contracts, as it can be adhered to the exception whenever there is a connection between two commitments, whatever the source of the commitment. Correlation is the criterion that must be relied upon in determining the scope of the plea for non-implementation<sup>2</sup>.

However, after the issuance of Decree No: 131/2016 dated: February 10, 2016 related to contract law, public order and the proof of obligations, the French law explicitly stipulated the principle of the plea for non-implementation in Articles 12019 and 1220 in the fifth section under the title: "Execution of the contract". And on this basis, the majority of jurists went to say that the plea for unexecuted extends to all interests and mutual relations, for example in the case of virtue, and after the contract binding on both sides is terminated or invalidated<sup>3</sup>.

### 2.1.2 The judge's control of the other contracting party's breach of contract

The plea for the plea for non-implementation has purely defensive effects, as it only results in suspending the obligation until the counterparty fulfills its obligation, and the obligation does not cease unless the contract is terminated<sup>4</sup>. Accordingly, each contracting party in contracts binding on both sides has the right not to perform his obligation in the face of the other contracting party who has not fulfilled his

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<sup>1</sup> Houssein Belaid AbdEssalam El-Harbi, Op.Cit, p 26.

<sup>2</sup> Marty and Raynaud, **Droit civil**, , part II, V I. Obligations, 2<sup>nd</sup> edition, Paris, 1988, p 260.

<sup>3</sup> Houssein Belaid AbdEssalam El-Harbi, Op.Cit, p 27.

<sup>4</sup> Mohamed Ezzein, **The General Theory of Obligations, The Contract**, El-Atrach Complex, Tunis 1993, p 317.

corresponding obligation arising from the same contract<sup>1</sup>.

The push for the plea for non-implementation is a means of pressure to ensure the simultaneous fulfillment of the corresponding obligations. In order to be able to adhere to this exception, the obligation that is excepted by unexecuted it must be due to be fulfilled, or in other words, it must be executed immediately<sup>2</sup>.

The purpose of this essential condition is to retard the idea on which the plea for non-implementation plea is based, which is that a person is not entitled to claim his right as long as he is in breach of his obligation<sup>3</sup>. The creditor who demands from his debtor for execution, must demand it on the specified time for execution, but if it's deferred, he may not demand it, and as a result there is no room for holding on to exception. It's sufficient for the debtor to insist that he has no right to demand execution, because there is no breach of contract. That is, given that the plea for non-implementation is an indirect means to compel the debtor to carry out his obligation, it's not possible to use that method before its time, which is the date set for implementation<sup>4</sup>. For example, in the sale contract, which is a binding contract for both sides, the seller cannot insist on the plea for non-implementation if he agrees with the buyer to postpone the price. The obligation to unexecute here is not due. It should be noted here that the deadlines must arise from the agreement of the parties or extracted from custom, or that the nature of the contract requires postponing the obligations of one of the parties<sup>5</sup>.

In a different case, the judge must search for the time of delivery in each contract in which the plea for non-implementation is insisted, and study all possibilities related to this issue. For example, in the sales contract, it looks for the time in which each party must hand over what is owed to the other party, in order to determine which party is entitled to adhere to that the exception<sup>6</sup>.

If the obligation of one of the parties is expedited according to the nature of the contract or the law stipulates that it performs the execution first, then it cannot adhere to the plea for non-implementation, as well as from the stipulation of the contract that his obligation must be executed before the other party, the plea for non-implementation requires that the obligation that is paid for the unexecuted is an obligation worthy of fulfillment, that means, it must be implemented immediately. If the contract requires one of the contracting parties to begin executing his obligation before the other

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<sup>1</sup> Abd Elhamid E-chawarbi, **Practical Problems in the Execution of Contracts**, University Volunteers House, Alexandria, Egypt, undated, p 152.

<sup>2</sup> Fawaz Salih, **The plea for non-implementation**, Research on the Arab Legal Encyclopedia website, (consulted on: 15/08/2020), <http://arab-ency.com.sy/law/detail/163644>

<sup>3</sup> Jacques Ghestin, **Traité de droit civil, les obligations, les effets du contrat**, L.G.D.J 1992, p 317.

<sup>4</sup> Houssein Belaid AbdEssalam El-Harbi, Op.Cit, p 66.

<sup>5</sup> Ali Filali, Op.Cit, p 445.

<sup>6</sup> Aziz Kadhém DJabr, Op.Cit, p 67.

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contracting party, the contracting party charged with execution is not entitled first to benefit from this the exception<sup>1</sup>. However, the terms that the debtor enjoys, if granted by the judiciary based on the view of the facilitator, the creditor can insist on the plea for non-implementation if that debtor asks him to implement his obligation<sup>2</sup>.

### **1.1.3- The judge's control of the presence of good faith in the adherent to the exception and the absence of his arbitrariness:**

The plea for non-implementation must be used if its conditions are fulfilled in good faith, like all rights. Neither party may insist on the exception if he is the initiator of unexecuted, or he is the cause of the other contracting party's the unexecuted of its obligations.

The plea for non-implementation is intended to protect the contractor who wishes to implement his commitment in good faith, as It's his means of expressing his protest to obtain his rights from the party refraining from executing his obligations arising from the same contract. Therefore, he must not be abusive in the use of this right so as not to lose the legal protection assigned to him, and the meaning of non-abusive use of this right is that it does not cause the other contracting party to fail to implement its obligations, such as the case in which it has been proven that it intends not to execut, or deliberate breach of its obligations<sup>3</sup>. And the contracting party who meets the demands of the other contracting party for this exception is not considered abusive in his use of his right as long as those demands are not related to the implementation of the obligations dictated by the contract.

For example, the tenant who insists on staying in the rented property in implementation of the lease contract, refusing to respond to the landlord's desire to terminate the lease contract by his own will, is considered a user of a legitimate right of his and is not considered abusive. In parallel, the tenant who refuses to pay the rent is considered abusive if his payment is related to the landlord's failure to carry out the necessary repairs on the rented property. The rent is offset by a basic obligation to hand over the leased property, unless the tenant's benefit, which is the use of the leased property, will be left behind if these repairs are not made<sup>4</sup>.

Although the text of Article 123 of the Civil Code was general and did not specify

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<sup>1</sup> Abd Erazzak Ahmad Essanhouri, *The Mediator in Explanation of the New Civil Law*, Part 01, p 733.

<sup>2</sup> Nabil Ibrahim Saad, **The General Theory of Commitment, Part 01 Sources of Commitment**, New University Edition, Alexandria, Egypt, 2004, p 323.

<sup>3</sup> Mansour Abd Allah Ettewalba, **The exception of unexecuted of the commitment, a comparative study**, PhD thesis, College of Graduate Studies, University of Jordan, 2005, p 123.

<sup>4</sup> Article 476 of the Civil Code stipulates that the leased property must be delivered while It's in a usable condition for which it was prepared according to the agreement of the parties.



the extent of the significant breach<sup>1</sup>, a non-debtor is considered abusive if he adheres to this exception at the time when the contracting party has fulfilled most of his obligation and only a little thing remains that does not justify the failure of the first contracting party to fulfill his obligation. All that the first contracting party has the right to do in this case is to keep part of his commitment without implementation, corresponding to the unexecuted part of the other contracting party's obligation, if we assume that the first commitment is indivisible<sup>2</sup>.

The gravity of unexecuted is subject to the discretionary power of the judge, and in order to determine the criterion of the gravity of unexecuted, some jurists suggested a differentiation between primary obligations and secondary obligations, while others suggested the standard of good faith in the objective sense, which is the preponderant criterion in legislation<sup>3</sup>.

The plea for non-implementation cannot -therefore- depart from this theory by exceeding the goal for which it was found. This principle cannot turn into a means of procrastination that is used only for the purpose of delaying the fulfillment of the obligation, or to turn into a means by which the holder of this right evades from performing what He is owed. Abuse occurs when the creditor uses the exception of execution with the aim of prejudice in the debtor, but the realistic circumstances surrounding each case would enable the judge to search for the intent to prejudice<sup>4</sup>.

### **2.2 The judge's control over the absence of the impediments to adhering to the plea for non-implementation**

Sometimes all the necessary conditions for the use of the plea for non-implementation may be met, yet there is something that prevents the one who adheres to it from using it, in the following cases:

#### **2.2.1 Excluding the plea for non-implementation for violating public order and morals**

The use of the plea for non-implementation, even if It's a right of the contracting party, uses it in the face of the other contracting party who breached the implementation of his current obligation, but this is restricted not to be in its use in violation of public order and morals, as is the case with the abstention of the one who adheres to the plea for non-implementation in the field of obligations related to the human body. For example, It's not permissible for the funeral director to refuse to deliver the dead body;

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<sup>1</sup> Larbi Belhadj, **The General Theory of Obligation in the Algerian Civil Law, Part One, Legal Disposition of Contract and Single Will**, office of University Publications, Ben Aknoun, Algeria, 2006, p 424.

<sup>2</sup> Abd Elfettah Abd Elbaki, **Encyclopedia of Civil Law, Theory of Contract and Single Will**, Volume 2, without publisher, 1984, p 671.

<sup>3</sup> Fawaz Salih, Op.Cit.

<sup>4</sup> Jean François Pillebout, **recherches sur l'exception d'inexécution**, Paris, L.G.D.J 1971, p 29.

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For not paying the funeral expenses<sup>1</sup>.

### 2.2.2 Excluding the plea for non-implementation according to a legal text

A legal text may provide for excluding adherence to the plea for non-implementation, taking into account certain interests that the legislator deems to be more important than the interest of the contracting party who adheres to this exception. This is what the French legislator adopted when promulgating Law No 58-98 of January 25, 1985, regarding the evaluation and judicial liquidation of projects, which introduced an amendment to the bankruptcy system in force in France.

According to what was stated in this law in (Article 37/2.1) of it, the contracting party may not refrain from executing his due obligations despite the unexecuted of the other contracting obligations of his corresponding obligations prior to the declaration of his bankruptcy. In other words, a creditor who owes a bankrupt may not insist on the plea for non-implementation to refrain from fulfilling his obligations, alleging that his opponent did not perform his obligations prior to his bankruptcy. However, if the financial liquidator decides to execute the obligations of the bankrupt, if he sees that the creditors' interest is in the execution of the contract and he actually implements it, then the contracting with the bankrupt debtor shall refrain from refusing to execute his obligations<sup>2</sup>.

The public interest requires the prohibition of the contracting party with the administration to the plea for non-implementation, although this is permissible for the administration itself. The necessity of running public bodies requires not allowing the contractor with the administration to refrain from fulfilling his commitments in confronting them under the pretext of the administration's failure to perform its obligations towards him within the specified time, especially since the administration is characterized by financial solvency, and that the administrative contract is based on looking at the contractor with the administration, not on He is just an ordinary contractor, but rather as he performs the duty to cooperate with the administration in the management of public bodies<sup>3</sup>.

### 2.2.3 Excluding the plea for non-implementation on a condition in the contract

The plea for non-implementation is not related to public order, as there is nothing to prevent a requirement to prevent one or both of the contracting parties from adhering to it, and there is nothing to prevent the contracting party from waiving his right to use it, whether the waiver is explicit or implicit, noting that acceptance of partial fulfillment

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<sup>1</sup> Houssein Belaid AbdEssalam El-Harbi, Op.Cit, p 87.

<sup>2</sup> Houssein Belaid AbdEssalam El-Harbi, Op.Cit, p 88.

<sup>3</sup> Rezzak Bara Karima, The exception of unexecuted in the field of administrative contracts, **Journal of Law and Human Sciences**, Djelfa Université, Volume 10, Issue 02, 2017, p 409.

Commitment does not mean a waiver of adherence to the right<sup>1</sup>.

The inadmissibility of using the plea for non-implementation is included by the two contracting parties in the contract, or by a subsequent agreement stipulating that, and this prohibition concerns one of the contracting parties or both according to the agreement, so It's forbidden for him to use this exception whatever the reason for unexecuted, or the prohibition is limited to some reasons for unexecuted without some the other<sup>2</sup>. For example, to include in the sales contract that It's not permissible to withhold the amount of the price unless one of the cases stipulated in Paragraph 02 of Article 388 of the Civil Code is fulfilled, which is the non-delivery of the thing sold, or infringing upon the buyer based on a previous or subsequent right of the seller, or the state of fear of removing the thing sold from the buyer's hand<sup>3</sup>. The meaning of this condition is that the buyer may not use the plea for non-implementation in the event that the seller breaches any other obligation arising from the sales contract that does not fall under one of the cases provided for in Article 388.

This condition means that it may be agree to exclude adherence to the plea for non-implementation (i.e. waive it in advance) since It's not related to public order, This is derived from the aforementioned text 388, which stipulates the right of the buyer to refrain from paying the price in the event of legal exposure from other parties, or if It's feared for reasonable reasons that the delivery of the thing sold will take away the seller's guarantee, until the exposure ceases or the danger ceases, unless a condition in the contract prevents it. There is no dispute as to the validity of this condition, until the limits within which the contracting party can adhere to this payment are known. However, it must be explicit and specific, precise and sufficient, It's not permissible for the condition to be general and unspecified so that the contractor is deprived of the legally prescribed means for his protection<sup>4</sup>.

### 2.2.4 Excluding the plea for non-implementation due due to lack of feasibility

If the main purpose of permissibility to adhere to the plea for non-implementation is to push the contracting party refraining from carrying out his current commitment to execution, through pressure that is exercised in a legal manner, and therefore if it turns out that resorting to t the plea for non-implementation will not achieve that goal, there is no point in holding on with it.

For example, if the contracting party's obligation is to refrain from performing a certain act, but he breached this obligation and did the act, such as an artist's pledge not

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<sup>1</sup> Marty et Raynaud, **Droit civil, les obligations**, Tome 1, 2<sup>ème</sup> éd, Paris, 1988, pp 334-336.

<sup>2</sup> Houssein Belaid AbdEssalam El-Harbi, Op.Cit, p 89.

<sup>3</sup> Mohamed Sabri ESSaadi: **The Manifest in Explanation of Civil Law, Sale and Barter Contract, A Comparative Study in Arab Laws**, El-Houda Editions, Ain Melilla, Algeria, 2012, pp 435-436.

<sup>4</sup> Abd Erazzak Ahmad Essanhouri, **The Mediator in Explaining of the New Civil Law, Part 4, Contracts on Ownership, Sale and Barter**, Nahdet Misr, 2011, p 791.

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to participate in the revival of a particular party, if he breached this pledge, and participated in the revival of this party, or in the case of the debtor's commitment to perform a certain act, he must complete it within a specified period, as if an artist pledged to hold a party on a specific and specific date but did not attend this concert, and he missed the time allotted to revive this concert, in both cases there is no point in resorting to the other contracting party to adhere to the plea for non-implementation, but It's in his interest to claim Rescinding the contract and compensation if justified<sup>1</sup>.

### 3. moving the conflict towards preserving and implementing the contract

After the judge has made sure that all the conditions for sticking to the plea for non-implementation are met and that the dispute before him does not fall within one of the cases in which the contractor is prevented from this exception by law, he moves to the most important issue in the entire dispute, which is the issue of applying the possible legal mechanisms that fall within the limits of his discretionary authority to reach To implement the contract as a first priority, or to force the contracting parties to maintain the contract even after a while.

#### 3.1 moving the contract towards implementation

The judge seeks to know the intransigent party, and here there may be intransigence from the parties or only one of them, and both may be intransigent, but the problem is due to the lack of trust between them.

##### 3.1.1 A case of a lack of intransigence and a lack of trust between the parties

If one of the contracting parties sues the other, demanding that he implement his obligations arising from the contract, and it turns out to the judge that neither of the parties is intransigent, but both of them adhere to the plea for non-implementation, and consequently both of them refrain from executing his obligation until the other party performs the implementation, the judge judges the plaintiff he must carry out his obligation on the condition that the plaintiff on his part implement his obligation<sup>2</sup>. If It's proven that none of the parties trusts the other, then the judge can resort to the procedures of real presentation and deposit, and in this way the two obligations are implemented simultaneously<sup>3</sup>.

Although the offer of fulfillment and carrying out the procedures of presentation on the truth and deposit are not required to adhere to the plea for non-implementation, this indicates good faith. If the plaintiff offers to pay his opponent, in this way he puts his opponent in the position of the one who defaulted on the implementation, and the

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<sup>1</sup> Mohamed Ali Elbadawi El-Azhari, **The General Theory of Commitment, Part One Sources of Commitment**, second edition, El-Wihda Edition, Benghazi, Libya, 2018, p 207.

<sup>2</sup> Abd Elfettah Abd Elbaki, Op.Cit, p 674.

<sup>3</sup> Said Saad Abd Essalam, **Sources of Civil Commitment, first edition**, Ennahdha El-Arabiya Edition, Cairo, Egyp, undated, p 304.

judge has no choice but to order him to execute<sup>1</sup>. The offer is submitted by means of a judicial report in the real or chosen domicile of the creditor, and is officially notified in accordance with the provisions of this Code of Civil and Administrative Procedures. In the same minutes, the creditor is alerted that if he rejects the submitted offer, the deposit will be made at the place, day and time specified in the offer request, and that he will forfeit his right to claim it, after the lapse of one year, effective from the date of filing<sup>2</sup>, In the event of the creditor's refusal to offer the permissibility of depositing the cash amount or the thing presented in the judicial record office, and when necessary, the court's seizure fiduciary<sup>3</sup>.

### 3.1.2 A case of intransigence of one or both parties

If It's proven to the judge that one of the contracting parties is intransigent, he shall rule in the dispute before him according to the side whose intransigence was proven. If he is the plaintiff, the case shall be dismissed, but if the defendant is intransigent, he shall be sentenced to execution without condition<sup>4</sup>. If both parties are intransigent, he obliges them to deposit with the court treasury or under the hands of a third person they trust, and thus the dispute has been resolved by ending the issue of execution<sup>5</sup>.

### 3.2 Preserving the contract for future implementation

Preserving and implementing the contract always remains the primary goal of the judge, and for this purpose, he uses the means authorized by the law.

#### Provide a sufficient guarantee

The principle is the execution of contracts, but rescission always remains a precautionary measure and an exceptional penalty<sup>6</sup>, but if the contractor continues to refuse execution, It's fair to exempt the other contractor from continuing the contractual process, as a solution to difficult cases<sup>7</sup>.

However, if the judge finds that It's possible to resort to other means that would maintain the contract and implement it at a later time, and that the debtor, by sticking to the payment by not performing his obligation, disrupts the interests of the creditor, and

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<sup>1</sup> Houssein Belaid AbdEssalam El-Harbi, Op.Cit, p 87.

<sup>2</sup> Article 584 of Civil and Administrative Procedures Law.

<sup>3</sup> Article 585 of Civil and Administrative Procedures Law.

<sup>4</sup> Mohamed Houssein Abd Errahman, Provisions of the exception of unexecuted in the Light of the Court of Cassation, **Journal of the Faculty of Religion and Law in Assiut**, El-Azhar University, Issue 09, 1997, p 89.

<sup>5</sup> Houssein Belaid AbdEssalam El-Harbi, Op.Cit, p 86.

<sup>6</sup> Al-Sharif Bahmawi, The judge's authority to amend abusive conditions, **EL BAHITH for Academic Studies**, Volume 01, Issue 02, 2014, p 110.

<sup>7</sup> Abd Elhakam Fouda, **Ending the binding force of the contract**, University Volunteers House, Alexandria, Egypt, 1993, p 02.

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causes him a prejudice that far exceeds the prejudice that the debtor may suffer if his right to pay is forfeited by the plea for non-implementation. The judge orders the provision of a sufficient guarantee to guarantee his right, and this is nothing but a branch of the non-abusive use of the right and adherence to the defense of the plea for non-implementation in a manner consistent with the principle of good faith<sup>1</sup>.

In this way, the contracting parties wishing to obtain the desired benefit from concluding the contract avoid the negative effects of termination, which often lead to a waste of effort, time and money.

### 4- Conclusion

After completing the examination of the issues related to the legal refusal to execute the contract, and examining the role of the judge regarding this issue, we found that:

- The plea for non-implementation plays an important role in ensuring the implementation of contracts, and It's known that the implementation of contracts has an economic role, as the contract is no longer just a means of dealing between individuals, but rather extends to all industrial and commercial fields, and has become the ideal tool for exchanging wealth, experiences and benefits. Given the economic importance of contracts, an effective means must be found to ensure full execution, and the means to achieve this must be taken into account, which is the plea for non-implementation.

- Adhering to the plea for non-implementation may prove to each of the contracting parties, each of them can use it or not, and the judge is not authorized to take it on his own, the latter, after making sure that all the conditions required by law and the absence of impediments to the plea for non-implementation, provides an answer to the contractor who adheres to the exception of suspend the execution of his commitment, until his opponent fulfills what he must, but he never judges that voluntarily on his own.

- Estimating the rule of "execution in reciprocity" requires a kind of flexibility in deduction, and here in particular the creative role of the judge emerges, so he has to match this rule with the requirements of the dispute before him, which in many cases enables him to maintain and implement the contract.

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<sup>1</sup> Abd Erazzak Ahmad Essanhouri, **Theory of the Contract**, p 716.

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