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**| RESEARCH ARTICLE**

**Cases of Delay in the Performance of Contractual Obligations under the Jordanian Civil Code and the Moroccan Code of Obligations and Contracts**

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**| ABSTRACT**

Delay in the performance of contractual obligations is a fundamental issue in contract law due to its implications for contractual liability, legal certainty, and the principle of good faith. Despite its importance, comparative studies examining both debtor delay and creditor delay within Arab civil law systems remain limited. This study comparatively analyzes the legal framework governing delay under the Jordanian Civil Code and the Moroccan Code of Obligations and Contracts, focusing on the circumstances giving rise to delay, the role of notice, and the legal consequences of delayed performance. The study adopts a doctrinal comparative methodology based on descriptive, analytical, critical, and comparative approaches, drawing upon legislative provisions, judicial decisions, and legal scholarship. The findings reveal that both legal systems treat delay as a form of unjustified non-performance aimed at protecting contractual stability and legitimate expectations. However, they differ in the procedural requirements for establishing delay, particularly regarding the role of notice. The analysis further demonstrates that both systems recognize creditor delay as an independent legal institution arising from unjustified refusal, silence, absence, or failure to cooperate in performance. The study contributes to comparative contract law by providing an integrated analysis of debtor and creditor delay within two influential Arab civil law systems. It highlights the central role of good faith in regulating delayed performance and offers insights for enhancing legal certainty, judicial consistency, and legislative reform in the law of contractual obligations.

**| KEYWORDS**

Delay, Contractual Obligation, Non-Performance of Obligations, Jordanian Civil Code, Moroccan Code of Obligations and Contracts

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**1. Introduction**

The performance of contractual commitments is considered a basic tenet of contract law. The performance of contractual commitments is considered a basic tenet of contract law. Contractual parties typically have the duty to fulfill their respective duties as established according to the provisions contained in their agreement. A fundamental premise underlying this obligation is that contracts serve as the law of the parties. Therefore, in fulfilling their obligations to one another under a contract, each party must satisfy the requirements of the obligation within the time constraints specified in the contract and act in good faith. This requirement will be waived when a party either does not fulfill its obligation at the due date or delays or unjustifiably defers fulfillment of its obligation.

One of the primary forms of failure to meet obligations that can be evidenced in civil law is a delay in meeting obligations. There are several different ways a delay can be evidenced. First, there is a debtor's delay; a delay occurs when a debtor fails to meet

his/her obligation(s) at the time they mature. Additionally, a debtor's delay can occur if the creditor requests performance (formally) and a specific deadline was not stated in the original contract. Second, there is a creditor's delay; creditors may cause a delay if they refuse to accept satisfactory performance offered by the debtor, or fail to provide cooperation that is necessary for the debtor to fulfill its obligations. As a result, a delay is not limited solely to the actions taken by the debtor, but can also be caused by actions taken by the creditor that prevent completion of a contractual obligation.

Although both the Jordanian Civil Code and the Moroccan Code of Obligations and Contracts provide regulation as regards the legal consequences of late fulfillment of obligations, neither of these two codes provides a comprehensive statutory definition of late fulfillment. In contrast with the Moroccan legislator, who explicitly uses the term "delay" (matl) when defining the legal consequences of late fulfillment, the Jordanian legislator has defined the problem of late fulfillment by regulating the different legal consequences that derive from it, including non-fulfillment of contractual obligations, contractual remedies, notice to creditors, and compensation to debtors. Although the Jordanian legislator does not use the term "late fulfillment," whereas the Moroccan legislator uses it expressly, both legislatures are pursuing the same objectives in their respective regulations regarding contract stability, protection of contracting parties' interests, and provision of effective remedy to damage caused by late fulfillment.

Beyond the simple fact that a party failed to fulfill an obligation, late fulfillment generates many other problems for parties, such as financial losses, disturbances in expectations based on contracts, increase of litigation costs, and uncertainty about what will happen in all commercial and civil activities. For that reason, civil laws have established rules regarding notice, compensation, specific performance, rescission, and creditor's assistance in fulfilling his obligation so that they can find a fair equilibrium among the rights and obligations of each party. Therefore, this matter is very close to the principles of contractual fairness, legal certainty, and good faith in contract performance.

Although the topic is significant, most current legal literature has examined the issue of delay through a narrow lens. For example, there are several studies on debtor delay, creditor delay, non-fulfillment of obligations, and/or contractual obligation (liability) within each country's legal system; however, few have compared and contrasted delays under both Jordanian and Moroccan laws. Furthermore, few scholarly works have addressed debtor delay and creditor delay using an integrated comparative approach, which examines legislative frameworks, judicial opinions, and judicial applications together. Therefore, it becomes clear that there exists a need for a comprehensive comparative study that will identify the similarities and differences in the two legal systems and evaluate how effective these systems' approaches are in handling dispute issues resulting from delayed contract fulfillment.

This study holds significance in theory because it investigates delay as a legal issue as well as an ethical concern related to adherence to contractual good-faith principles and performance of obligations. In addition, this study adds to comparative law research by comparing and contrasting the laws regarding delays in two prominent Arab countries. Additionally, it possesses relevance to practice due to the increase in disputes based upon late contract performance and the necessity for clarity in the court's and contracting parties' use of legal tools to resolve these types of disputes.

In addition, the purpose of this study is to explore the legal context for the delay of contractual obligation performance under the Jordanian Civil Code as well as under the Moroccan Code of Obligations and Contracts. The study will also seek to investigate the conditions that allow debtors and creditors to be considered delayed with respect to one another; it will evaluate the function of notification or notice in establishing delay; and it will determine the main similarities and differences between these two legal contexts.

To achieve these objectives, the study addresses the following research questions:

1. What is meant by delay in the performance of a contractual obligation?
2. Under what circumstances is a debtor considered to be in delay?
3. Do the cases of debtor delay differ depending on whether the obligation is subject to a specified term?
4. Under what circumstances may a creditor be considered to be in delay?
5. Can creditor delay arise implicitly through silence, absence, or failure to cooperate in the performance of the obligation?

## 2. Literature Review

Azoukar's (2011) research on the defense of non-performance in both Moroccan and French law is an additional significant scholarly contribution related to this subject matter. In addition to arguing that a debtor can be legally justified for their failure to fulfill the terms of a contract in specific situations, thus not providing grounds for contractual liability, Azoukar also made the point that non-performance under the auspices of a legitimate defense should be distinguished from unjustified delay and that it is through the exercise of judicial discretion that it will be determined whether or not a debtor acted appropriately. A major limitation of this research is that it does not consider how delay is treated comparatively by Jordanian legislation. Therefore, while this research is very informative relative to the interrelationship between non-performance and contractual liability, its scope is limited to Morocco and France. As such, there are many areas of law that would benefit from further examination based upon the comparative analysis of all three jurisdictions. One area is when a creditor seeks redress against a debtor who failed to complete their obligation(s) in accordance with the agreed-upon time frame.

Similarly, Asghou et al. (2022), compared both debtor delay and creditor delay within the context of Moroccan law. The focus of their research was centered around the specific legal elements required to prove delay, as well as the resultant consequences of a contracting party failing to fulfill its obligations. The researchers found that delay is heavily influenced by the contractually defined concepts of contractual fault and contractual liability; they also illustrated that the legal consequences of delay are based on whether an unjustifiable failure to fulfill obligations occurred.

Although the researchers' findings were primarily based upon Moroccan legislation, no comparative analysis was conducted with respect to other Arab legal systems.

Delay in fulfilling obligation performance was studied from both a legislative perspective and a judicial perspective by Labzour (2013). A key finding of this research study was that judicial interpretation plays a very important role in identifying whether a delay has occurred. Furthermore, the study indicated that courts often play a significant role in how applicable statute provisions related to delays are applied to particular circumstances, including those regarding notice requirements and contractual remedies.

Classical legal research has likewise been concerned with the broader theoretical bases of delayed performance. Al-Sanhouri (n.d.) has researched the general theory of obligations and produced an extensive review of performance, proof of fulfillment, and the effects of obligations. His work has provided the jurisprudential basis for understanding delay as a type of contractual non-performance and has clearly defined the relationship between performance, notice, and contractual liability. Shahboun (1999) has similarly reviewed the Moroccan Code of Obligations and Contracts and developed an extended treatment of creditor delay. He noted that when a creditor refuses to receive valid performance, it can itself be considered an infringement on the principle of good faith and will lead to similar legal results as would occur in debtor delay.

Al-Halalshah (2010), Al-Kasawneh (2008), and Al-Far (n.d.), within Jordanian legal literature, have studied the effects of obligations in civil law and discussed the relevant laws governing performance, contract conditions, notice requirements, and remedies available to parties involved in disputes related to delayed performance. Their work was significant in developing the knowledge base relative to the Jordanian legal structure that governs contractual obligations and emphasized the significance of notice as a procedural protection mechanism for parties involved in disputes due to contractual non-performance.

Despite the many contributions made by prior studies, there appear to be some significant omissions in the current body of research. Firstly, with the exception of a few comparative analyses, prior studies typically concentrated their focus upon a singular legal system. Secondly, although studies concerning debtor delay have received an abundance of scholarly attention, creditor delay has been examined relatively infrequently within the same body of research, even though it is significantly important. Thirdly, although many prior studies provide an overview of legislative provisions or judicial practice independently, none of them have provided a systematic comparison of the interplay between statutory rules and doctrine as well as how they have been interpreted by judges. Fourthly, and finally, it does not appear that any prior study has conducted a thorough comparative analysis of both debtor and creditor delays, in accordance with the Jordanian Civil Code and the Moroccan Code of Obligations and Contracts. Accordingly, the goal of the present study was to close this gap through providing a comparative examination of the legal framework pertaining to delays in each legal system.

### **3. Research Methodology**

To clarify all aspects of this subject area and in compliance with the normative practices of legal research, the researcher has chosen to use a number of methodologies for addressing the primary research issue and secondary issues that have been previously identified.

This study will be based upon the descriptive, analytical, critical, and comparative methodologies. This study employs the descriptive methodology in order to analyze the legal rules that govern this subject area. The analytical methodology was employed in order to obtain, analyze, and support the analysis of the relevant legal texts and doctrine as well as to support those analyses by means of judicial decisions. This study uses the critical methodology in order to critique the substantive and procedural legal rules that regulate delay within both the Moroccan Code of Obligations and Contracts and the Jordanian Civil Code, determine how effective these are, point out where there may be deficiencies, and provide recommendations for the reform of such laws. The comparative methodology was also employed in order to compare the legal rules regulating delay within both of these legal systems as well as the relevant jurisprudence opinions and judicial decisions in order to arrive at some meaningful conclusions regarding those comparisons.

### **4. Results / Findings**

#### **4.1 Cases of Debtor Delay**

As a general principle, contractual obligations arise for the purpose of being performed, and each party is therefore required to fulfil the obligations incumbent upon it. However, one of the parties to a contractual obligation may fail to perform what it has undertaken to do upon the expiry of the term specified in the contract or, where no specific term exists, following formal notice, thereby delaying the performance of its obligation. A debtor is considered to be in delay when it fails to fulfil its contractual obligations. The situations giving rise to delay vary according to the nature of the obligation, particularly depending on whether the obligation is subject to a specified term or is not subject to any term (Asghou, Hami, & Al-Ismaïli, 2022, p. 7).

Accordingly, it is necessary to examine debtor delay in cases where the debtor fails to perform, or delays the performance of, an obligation that is subject to a specified term and then to examine debtor delay in cases where the debtor fails to perform, or delays the performance of, an obligation that is not subject to a specified term. This discussion will be addressed in the following two subsections.

##### **4.1.1 Debtor Delay in the Performance of an Obligation Subject to a Specified Term**

The performance of contractual obligations constitutes the general rule, whereas the exception arises when one of the parties fails to perform such obligations upon the expiry of the term stipulated in the contract. Where a party delays the performance of its obligations, it is deemed to be in a state of delay (*matl*), or what may be described as voluntary delay, insofar as it arises within the framework of a contractual relationship established by the will of the parties. Delay occurs when the debtor fails to perform its obligations within the period specified for performance (Asghou, Hami, & Al-Ismaïli, 2022, p. 7; Sabbar, 2023, p. 28).

Where the performance of an obligation is subject to a specified term, delay arises upon the expiry of that term without the debtor having fulfilled the obligations incumbent upon it, or where performance is postponed without an acceptable justification or excuse. Such delay may be either total or partial. It is total when it affects the obligation in its entirety, whereas it is partial when it relates only to a portion of the obligation.

Neither the Jordanian nor the Moroccan legislator has expressly defined the concept of a term. Rather, both have limited themselves to recognizing the possibility of attaching an obligation to a term. Article 402 of the Jordanian Civil Code provides that: "A legal act may be made subject to a term upon the expiry of which its effectiveness or termination shall take effect" (Jordanian Civil Code, 1976, Art. 402). Legal scholarship has examined the concept of a term and its legal consequences within the framework of the effects of obligations in civil law (Al-Kasawneh, 2008, p. 206). Likewise, Article 127 of the Moroccan Code of Obligations and Contracts provides that: "If no specific term has been fixed for the performance of an obligation, performance shall be due immediately unless the term results from the nature of the obligation, the manner of its performance, or the place designated for such performance..."

Accordingly, a term constitutes a future event whose occurrence is certain and upon whose arrival the obligation either becomes enforceable or comes to an end without retroactive effect. It is a characteristic attached to the contractual relationship that

transforms it from an immediately enforceable obligation into one whose performance is deferred, such that its enforceability or termination depends upon the occurrence of the specified event (Al-Halalsheh, 2010, p. 164).

A term is therefore a future event certain to occur. In most cases, it is determined by a specific date for the performance or termination of an obligation, such as the borrower's obligation to repay a loan on a specified date. It may also be linked to an uncertain date while remaining certain in occurrence, such as death.

Terms may be classified according to their source into contractual terms, statutory terms, and judicial terms. They may also be classified according to their legal effect into suspensive terms and resolutive terms.

Article 254 of the Moroccan Code of Obligations and Contracts provides that: "The debtor shall be in delay if he fails to perform his obligations, wholly or partially, without reasonable cause." Under this provision, debtor delay is legally established whenever the debtor wholly or partially fails to perform an obligation without an acceptable justification. Thus, the decisive criterion for establishing delay is the debtor's failure to comply with the term fixed for performance.

For example, where a person leases a house for residential purposes and agrees to pay the rent at the end of each month, failure by the tenant to pay the rent within the period specified in the instrument creating the obligation, namely the lease agreement, and in the absence of a valid justification, renders the tenant in delay pursuant to the first paragraph of Article 255 of the same Code, which states that: "The debtor shall be in delay upon the mere expiry of the term fixed in the instrument creating the obligation..."

Article 249 of the Moroccan Code of Obligations and Contracts further provides that: "The rules relating to the time at which performance must take place are set out in Article 127 and the provisions following it." Article 127 states that: "If no specific term has been fixed for the performance of an obligation, performance shall be due immediately unless the term results from the nature of the obligation, the manner of its performance, or the place designated for such performance. In such cases, the term shall be fixed by the court." Article 129 further provides that: "The term shall commence from the date of the contract unless the parties or the law determine another date..."

Similarly, Article 315 of the Jordanian Civil Code states: "An obligation will be enforced after fulfillment of the requirements of enforcement under the law; if the debtor does not comply with his obligations, he may be forced to do so..." Furthermore, Article 334(1) also provides: "...performance must be immediate upon the final establishment of the obligation in the debtor's estate (patrimony), unless the parties agree or there is a legal basis that specifies otherwise."

Together, these articles state that when contracting or as per an agreement or the terms provided by the law, the debtor has a duty to perform their obligations right away and, should they fail to do so, the debtor will be in default unless they can provide a valid defense (i.e., justification) approved of by the law.

In this respect, the principles stated above are supplemental in nature and thus optional, allowing the contracting parties to determine otherwise. In this regard, the parties to a contract may agree to a particular date for performance of their respective duties, regardless of whether it was established at the time of contracting or thereafter by way of subsequent agreement.

The Jordanian Court of Cassation addressed a situation involving delay in the performance of an obligation subject to a term, stating:

"The defendants failed to comply with their obligation to transfer and deliver the parcel of land and the building agreed to be constructed thereon as stipulated in Clause 3 of the statement of claim. Following this failure, the first defendant signed a supplementary delivery agreement on 11 July 2018, whereby she undertook to transfer ownership of the land and deliver the building referred to in Clause 3 by 30 December 2018. She further undertook, in the event of failure to meet the delivery date of 30 December 2018, to pay an amount of 250 Jordanian Dinars as a delay penalty for each month beyond the agreed period. The notified parties delayed delivery for twenty-two months, resulting in total penalties amounting to JOD 5,500" (Jordanian Court of Cassation, 2023a, Judgment No. 9000 of 2022; Jordanian Court of Cassation, 2023b, Judgment No. 8959 of 2022).

In another decision, the Court held:

"The claimant seeks all rights arising from the execution of these two tenders, including compensation for kilometre allowances resulting from delays in handing over the work sites, changes in work locations, delays in approving the commencement order, and suspension of work caused by the defendant" (Jordanian Court of Cassation, 2023c, Judgment No. 6230 of 2023).

Delay in the performance of a contractual obligation may be regarded, on the one hand, as defective or non-conforming performance and, on the other hand, as a form of partial non-performance when account is taken of the temporal element within which performance should occur. Although delayed performance may remain physically possible, performance at the agreed time becomes impossible because time itself cannot be restored. Consequently, even where specific performance remains possible after the agreed date, delayed performance constitutes a form of partial non-performance.

However, where performance has become impossible or has lost all utility for the creditor, the situation is equivalent to total non-performance. This may occur, for example, where a purchaser is contractually obliged to pay instalments at the end of each month but fails to pay one of the instalments when due.

The Court of First Instance in Guelmim held:

"The defendant had undertaken to pay the debt owed to the claimant within the specified period ending on 18 March 2005, but failed to do so... Consequently, the defendant failed to perform the obligation within the prescribed period and is therefore considered to be in a state of delay..." (Court of First Instance in Guelmim, 2007, as cited by Ben Al-Madani).

Delay in performance may be considered to affect an entire obligation and thus cause total delay in performance of an obligation, or it can be limited to just a specific area of performance on an obligation with a divisible subject matter. Nonetheless, when the obligation is indivisible based upon the nature of the obligation itself, by agreement of the parties to the contract, or pursuant to applicable law, then the partial failure to perform will result in treating such failure to perform as if the total obligation had been breached. Therefore, the failure to partially perform an obligation, whether it relates to an obligation that is divisible by nature, by law, or by agreement of the parties, results in the same legal consequences as the breach of an obligation for total non-performance. Therefore, performing only part of an obligation within the time limits established will not eliminate the circumstances resulting from delay. The principles discussed above were reaffirmed by Morocco's Supreme Court, Court of Cassation, in their ruling:

"The tenant's tendering payment of only part of the rent due prior to the expiration date provided for in the notice would place him in delay of his rental payments, even though he made timely payment of the remainder of the rent." (Moroccan Court of Cassation, 2012, Decision No. 867)

Since most legal rules governing performance, including its time and place, are not matters of public policy but rather supplementary rules, they apply only in the absence of an agreement or legal provision to the contrary. Accordingly, a term is presumed to be established for the benefit of the debtor, who may therefore perform the obligation before the expiry of the term (Moroccan Code of Obligations and Contracts, Art. 137).

Moroccan legislation nevertheless draws a distinction in this regard. It permits the debtor to perform the obligation before the expiry of the term where the obligation consists of a sum of money and such early performance causes no prejudice to the creditor. Where the obligation concerns something other than money, however, the creditor cannot be compelled to accept performance before the expiry of the term unless he consents thereto.

The Jordanian legislator does not make such a distinction. Whether the obligation concerns a sum of money or another subject matter, Article 335(1) of the Jordanian Civil Code permits the debtor to perform before the expiry of the term, provided that the term was established exclusively for the debtor's benefit. In such circumstances, the creditor may be compelled to accept performance.

If payments are made prior to expiration of the contractual term and then either canceled or deemed invalid (and repayment of the sums paid is required), the contractual obligations will revive and remain subject to the remaining portion of the original contract term (Article 335(2) Jordanian Civil Code; Article 136 Moroccan Code of Obligations and Contracts). In short, when a debtor pays a debt early and the payment is later repaid, the debt will resume with deferred status. Furthermore, a debtor cannot recover monies that were paid on time but prior to expiration of the contractual term even if the debtor did not know of the existence of the contractual term (as per Moroccan Code of Obligations and Contracts Article 136), since the legislator has created a legal presumption of waiver of the benefits of the term in this case.

In cases where the debtor's nonperformance of his obligation is either complete or incomplete, the debtor shall be considered late in performing his obligation simply upon expiration of the established deadline without the necessity of providing formal notice to the debtor as provided within the Moroccan Code of Obligations and Contracts. Although the rule allowing the creditor

exemption from providing notice to the debtor when the obligation is subject to a term is not unconditional, there are instances where exemptions may occur through either operation of law, by nature of the obligation, or by agreement between the parties.

Parties may also enter into agreements requiring creditors to provide formal notice to debtors before the legal consequences of nonperformance will take effect. The purpose of such an agreement is to assist in protecting the rights of debtors. As long as such an agreement does not contradict public policy or public morals, it is valid and enforceable.

Likewise, the law can also provide for exceptions to the application of delay provisions when the debtor has certain special rights that need to be protected. Articles 257 and 254 of the Moroccan Code of Obligations and Contracts provide as follows:

Article 257 of the Moroccan Code of Obligations and Contracts states:

"Upon death of the debtor, it will not be presumed that the heirs are in default with respect to their obligations until they receive from the creditor or his representative an express demand for payment of the obligations of the deceased.

In cases where an heir is a minor, or does not possess full legal capacity, service on such person must be made through a representative having authority over said minor."

Additionally, Article 254 of the Moroccan Code of Obligations and Contracts also requires that in order to constitute a breach of contract there be both total or partial failure to perform, and that this failure to perform occurred "without reasonable cause."

The term "reasonable cause," however, means that if a reason for the delay exists (i.e., merely delaying), then the court cannot find that the debtor breached his contract based solely on the fact that he delayed. However, the legislature did not define what constitutes a "reasonable cause," but rather used a very broad and subjective standard that leaves much room for interpretation by the courts. Therefore, under these circumstances, a party's reasonable cause for failing to perform will excuse such party from performing its contractual obligations and will prevent such party from suffering all of the normal consequences resulting from its failure to perform.

Although the legislator did not define "reasonable cause" for the purposes of Article 267 or enumerate the voluntary factors that could constitute reasonable cause (given the presence of mandatory factors that can also serve as a reasonable cause, including force majeure and fortuity), there is an interpretation of this term that relates it to the external factor described in Article 268 of the Moroccan Code of Obligations and Contracts; according to Article 268:

"No compensation shall be due if the debtor proves that non-performance or delay in performance resulted from a cause that cannot be attributed to him, such as force majeure, a fortuitous event, or creditor delay."

In contrast, it can be reasonably assumed that reasonable cause is not limited solely to exogenous reasons, but rather all situations where the lack of fulfillment or late fulfillment are lawful (justified), as well. Therefore, this perspective would include defenses of non-fulfillment too because the inability to force the creditor to fulfill their obligations or pay damages when the conditions for an obligation do not exist demonstrate that there is justification for the failure to fulfill an obligation by the creditor and thus it does not represent a delay on behalf of the creditor. The broadened discretion granted to judges will allow them to assess the surrounding conditions to determine if the reason for delay or refusal to fulfill an obligation was sufficient enough to prevent delay and consequently remove the legal effects associated with a delay (Asghou, Hami, & Al-Ismaïli, 2022, p. 8; Azoukar, 2011, p. 10).

The researcher considers the first view unduly restrictive. Whenever the Moroccan legislator intends to refer to force majeure or a fortuitous event, it does so expressly. Even if such circumstances fall within the scope of "reasonable cause," this would merely confirm what is already expressly provided for in Article 268 as a ground excluding liability and compensation. The researcher therefore agrees with the second view and concludes that the expression "reasonable cause" in Article 254 of the Moroccan Code of Obligations and Contracts is a broad concept encompassing every situation in which non-performance or delayed performance is justified by a legitimate and acceptable reason.

It follows from this provision that mere non-performance or delay in performance constitutes a contractual fault capable of giving rise to contractual liability and thus satisfies the first condition for compensation. Such liability may only be avoided where it is established that the non-performance or delay resulted from a reasonable cause, such as an external event beyond the

debtor's control. In such cases, the causal link between fault and damage is severed, and contractual liability does not arise. Where such an external cause prevents performance absolutely, it becomes the true and direct cause of the non-performance or delayed performance. Consequently, the legal effect of the delay disappears because the debtor's failure to perform or delay in performance occurred through compulsion rather than through choice, as previously explained.

#### **4.1.2 Debtor Delay in the Performance of an Obligation Not Subject to a Specified Term**

A debtor is deemed to be in delay with respect to contractual obligations that are subject to a specified term upon the mere expiry of the term stipulated in the contract creating the obligation. By contrast, where the obligation is not subject to a specified term, the debtor is not considered to be in delay unless an express notice demanding performance of the debt has first been served in accordance with the formal requirements prescribed by law.

In short, there cannot be a delay on the part of the State unless a formal notice has been sent to the debtor (or his legal agent) according to what is provided by law when there is not a deadline attached to the obligation. The requirement of sending a formal notice appears in Article 255 of the Moroccan Code of Obligations and Contracts (Art. 255 Moroccan Code of Obligations and Contracts); it also appears in Article 254 of the same Code ("the Debtor will be late if he does not complete all or part of his obligations without a justified reason"), and in Article 127 which says:

"If there is no specific time limit for completing an obligation, then the obligation must be completed immediately, unless a time limit can be derived from the nature of the obligation, the way the obligation should be performed, or the location at which it should be performed. If this is the case, then a time limit will have to be established by the Court" (Article 127 Moroccan Code of Obligations and Contracts).

Accordingly, where there is no time frame for the obligation to be performed by the debtor, the debtor will not be considered to have breached until the creditor has served a formal notice on the debtor or their representative, requesting that the debtor complete the obligation. Article 255 of the Moroccan Code of Obligations and Contracts states:

"If no term has been fixed for the obligation, the debtor shall not be deemed to be in delay unless an express notice demanding payment of the debt has been addressed to him or to his legal representative. Such notice must contain:

- (1) A request to the debtor to fulfill his obligations during a reasonable amount of time; and
- (2) An indication that if the debtor does not comply with this request, the creditor will at his discretion act on it as he sees fit."

Similarly, Article 334(1) of the Jordanian Civil Code provides:

"Performance must take place immediately once the obligation becomes finally established in the debtor's patrimony unless an agreement or legal provision stipulates otherwise" (Jordanian Civil Code, 1976, Art. 334(1)).

Accordingly, a debtor bound by a contractual obligation that is not subject to a term is not considered to be in delay until formally notified to perform.

This principle has been consistently affirmed by the Moroccan Court of Cassation. In one decision, the Court held:

"Where the debt has become due, there is no need for the creditor to serve a notice demanding performance upon the debtor" (Moroccan Court of Cassation, 2000, Decision No. 903).

In another decision, the Court stated:

"Debtor delay is not established unless the debtor has been notified to perform the obligation within a specified period where no term for performance has been fixed in the obligation" (Moroccan Court of Cassation, 1996, Decision No. 2051, as cited in Mriziq, 2002, p. 33).

The Court further held:

"A tenant shall not be considered in default of the obligation to pay rent so as to be deemed in delay unless the landlord proves that a notice demanding payment of the overdue rent was legally served upon the tenant and that the tenant failed to make the requested payment" (Moroccan Court of Cassation, 1995, Decision No. 2234).

Likewise, the Marrakesh Court of Appeal held:

"The appellant based his appeal on the claim that he had paid part of the debt amounting to ten thousand dirhams out of a total debt of sixteen thousand dirhams... The remaining amount was paid during the hearing, leaving the appellant indebted for the full amount stipulated in the loan agreement whose signature was authenticated on 31 May 2006 and which he had undertaken to repay on 30 December 2006. Delay in performance is therefore established against him even without any notice being served, pursuant to Article 255 of the Code of Obligations and Contracts. Accordingly, the appealed judgment ordering payment of the debt and compensation for delay was properly founded and must be upheld" (Marrakesh Court of Appeal, 2012, Decision No. 805).

The Jordanian Court of Cassation has also stressed the importance of notice. As the court noted in one of its decisions:

"Our Court found that the Court of Appeals approached this decision differently than we had when they used Article 246 of the Civil Code and ruled that notice was needed and that the claimant's submission of notice as part of his supporting documents did not fulfill its function... Our Court believes that there are two questions that need to be addressed: First, does notice constitute an element of public policy that can be raised by the court independently (and therefore does not depend upon action by a party) or does it simply provide the parties with a right? Based on Article 245 of the Civil Code, where it states that the parties may specifically agree to forgo giving notice in contractual rescission situations; and Article 361, where it allows parties to waive their rights regarding notice related to claims for compensation, our Court concludes that notice is not an element of public policy. If it were an element of public policy, then the legislature would not allow parties to contractually opt out of providing such notice. Therefore, the Court cannot raise notice as an independent issue because it is a right belonging solely to the parties, most notably the debtor, and he has the ability to both assert such a right and forego it. Accordingly, the Court of Appeal erred in treating notice as a matter of public policy, and its decision must therefore be quashed" (Jordanian Court of Cassation, 2023d, Judgment No. 2174 of 2023).

These judicial decisions confirm that, where the debtor delays performance of an obligation not subject to a specified term, the debtor is not considered to be in delay unless a formal notice has first been served. Thus, a debtor who fails to perform without reasonable cause is considered to be in delay either upon the expiry of the specified term where the obligation is term-based or upon receipt of a legally valid notice where no term has been specified.

As previously noted, however, the requirement of notice is not a rule of public policy and may therefore be waived by agreement of the parties, excluded by law, or rendered unnecessary by the nature of the contract. Moreover, legislation may exclude the application of delay provisions in circumstances where the debtor's interests merit special protection, as is the case with the heirs of a deceased debtor. Such exceptions are provided for in Articles 256 and 257 of the Moroccan Code of Obligations and Contracts and Article 363 of the Jordanian Civil Code (Moroccan Code of Obligations and Contracts, Arts. 256–257; Jordanian Civil Code, 1976, Art. 363).

Generally speaking, delay in obligations not subject to a specified term arises where the debtor fails to perform within a reasonable period following notice or after the expiration of the period specified in the notice, subject to the statutory exceptions established by law, including those contained in Article 256 of the Moroccan Code of Obligations and Contracts.

In addition to limiting the need for notification to those obligations without terms, Morocco's judiciary has generally applied the same principle to all obligations with and without terms. The Taza Court of Appeals ruled:

"The Appellant's objections to the decision of the trial court were irrelevant because paying rent is an obligation on the part of the Tenant. Because it was proven that the Appellant had been served notice to pay rent and did not dispute such service, proof of the Appellant being late also existed; therefore, termination of the lease contract remained justifiable" (Taza Court of Appeals, 2011, Decision #277, as cited in Labzour, 2013, p. 25).

Thus, the Court based its determination that there had been a failure to make timely payments (i.e., a delay) on receipt of the notice demanding payment rather than merely the expiration date set forth in the contractual term.

As previously mentioned, this illustrates how Moroccan legislation has somewhat paralleled the judiciary and requires notification as a condition precedent to establish a delay in several other special statutory regimes. As one example, Article 23 of Lease Premises Intended for Residential and Commercial Use Law No. 67.12 states:

"Should rents and related charges be unpaid, the landlord shall have the right to ask the President of the Court of First Instance for permission to notify the tenant to pay such amount(s)" (Lease Premises Intended for Residential and Commercial Use Law No. 67.12, Article 23).

The same can be said regarding Article 33 of Law No. 49.16 dealing with commercial, industrial and artisanal use leases as follows:

"If the lessee does not pay the rent for three consecutive months the lessor, provided there is a rescissory clause in the contract and if he gives the lessee formal notice to pay the arrears and this notice proves ineffective and if fifteen days have elapsed since it was given, may bring an action before the urgent court requesting that it declare the rescissory clause effective and requesting recovery of the rented premises or the leased goods" (Law No. 49.16, Art. 33).

In other words, due to its new status as a prerequisite to establish a breach of obligation (even in term-based obligations), a great departure from the literal interpretation of Article 255 of the Moroccan Code of Obligations and Contracts can be observed. The significant impact of judicial decisions on statutory provisions explains why in all types of contractual obligations based on time terms (obligations subject to a term), a delay will be found at the moment when the lessor sends a formal demand to the tenant requiring him to pay his rent.

Notice is required as well for finding oneself in a delay situation under Jordanian law irrespective of whether the obligation is subject to a deadline, except where the contracting parties decide otherwise or a legislative provision provides an exemption. Article 355(1) of the Jordanian Civil Code states:

"The creditor shall be entitled to request the debtor to comply with his obligation in-kind, if such compliance is still possible, following formal notice."

The same point is made by Article 361 of the Civil Procedure Law which states:

"No compensation can be demanded from a person who does not know that he owes something unless such person has been formally informed of his obligation; except when the law or an agreement provide otherwise."

These two articles indicate that formal notice is usually required to claim compensation for breach of contract based on performance failures under either a specific time limit or no time limit unless formal notice has been waived or there is a statutory exception.

The position is also supported by the Jordanian Court of Cassation's recent decision:

"The Appellant submitted to the Supreme Court that the Court of Appeal committed an error when it did not dismiss the Plaintiff's lawsuit as premature since the Plaintiff did not serve a legal notice to the Appellant before commencing the legal proceedings pursuant to Article 361 of the Civil Procedure Law since the relations of both parties were contractual. This defense was raised by the Appellant's attorney before the first instance court and again at closing arguments. Neither of these courts dealt with the defense although it is a significant one. Therefore, the Court of Appeal should have filled the gap left by the lower court and evaluated the defense according to law. As it did not, its decision was premature and against the law and accordingly must be quashed.

The Jordanian Court of Cassation made another determination regarding the legal notice as follows:

"Legal notice is required when a party seeks rescission or performance of a contract based on article 246 of the civil code, specifically in cases involving bilateral contracts. As the Claimant here is seeking a monetary recovery based on an award of the tender to it and not either performance or rescission of the contract, there are insufficient grounds for requiring the legal notice described in article 246. In addition, since the Claimant is not making a claim for compensation under article 361, article 361 will likewise have no application. Finally, although the Claimant served a legal notice with regard to the subject matter of this

dispute, the Court of First Instance must dismiss this ground of appeal." (Jordanian Court of Cassation, 2023e, Judgment No. 3936/2023)

In addition, the Jordanian Court of Cassation determined:

"In accordance with article 246 of the civil code, if one contracting party fails to fulfill their obligation(s) under the contract, the other party can seek fulfillment or cancellation of the contract after giving the debt-creating party adequate notice. Similarly articles 360 and 361 indicate that in cases where a contracting party makes a claim for damage resulting from breach of a contractual relationship, such claims fall within the purview of the principle of contractual liability; however, compensation may only be recovered against a contracting party who has received notice thereof, except to the extent provided for by law or contract. Therefore, since the Court of Appeal failed to establish whether or not the Claimant gave the Defendant notice prior to bringing suit, the decision of the Court of Appeal which ordered compensation was premature and improperly reasoned and should accordingly be annulled." (Jordanian Court of Cassation, 2023f, Judgment No. 862/2023).

The Courts' decision-making process reflects an ongoing view held by the Jordanian Judiciary, which holds that when obligations are not tied to a particular time period they will be fulfilled upon request from the obligee (the creditor) and that the obligation to perform can only begin after failure to do so. The Courts' position as to the interpretation of this aspect of the Jordanian Civil Code clearly shows how the Courts operate within the contract between parties and how they identify breaches of that contract. This also illustrates that a breach can occur without an express clause being written into a contract and subsequently give rise to financial compensation or other legal ramifications depending on the conditions surrounding each case.

In addition to providing a framework for determining whether or not a delay constitutes a breach of contractual obligation, the Courts have also considered Article 32 and Article 141 of the Civil Procedure Law in relation to Precautionary Attachment in their examination of cases in which there was a delay in fulfilling obligations contained in a Contract but which were not specifically stated in terms of time. Therefore, the Courts have established that Precautionary Attachment must be shown to be urgent and that it does not cause prejudice to the determination of the substantive issues of the matter. The Courts have defined urgency as requiring a true threat of immediate danger to the rights that the claimant is seeking protection of. Based on these criteria, timely performance of Obligations continues to represent one of the most critical requirements for preventing harm to the opposing party or jeopardizing those party's rights.

This provision provides several examples where notification by the creditor is not required to terminate a contract due to the inability of the obligor to meet his obligations. The grounds for termination are:

where performance of the obligation has been made impossible due to the action of the obligor;

where compensation is due for an unlawful act committed by the obligor;

where there is a request for restitution of property which the obligor knows is stolen or was obtained without legal right and with such knowledge; and/or when the obligor has made written declaration to the other party stating that he will not fulfill the obligation. These provisions have also been applied in practice by the Jordanian Court of Cassation. For example, it was stated by the Court of Cassation:

"Pursuant to Article 362 of the Civil Code, when claiming cessation of interference and compensation for use and occupation, service of a notice on the obligor is not obligatory, since the first defendant's retention of the property after the agreed-upon delivery time became illegal. Therefore, this reason for appeal shall be dismissed" (Jordanian Court of Cassation, 2023g, Judgment No. 5195/2023).

The Court concluded in another ruling that:

"Counterclaiming Claimants chose to end their Construction Contract with Respondents and are seeking to recover the cost of damages caused by Appellants' inability to fulfill their contractual duties, and to allow Counterclaiming Claimants to take possession of the site and begin executing the project. The aforementioned damages have already been incurred and were incapable of being rectified via a Notice to Perform. Moreover, after termination of the contract, it will serve no useful purpose to require Counterclaiming Claimants to provide Appellant's with further opportunity to comply with contractual duties which no longer exist. Thus, this Grounds of Appeal shall be rejected." (Jordanian Court of Cassation, 2023h, Judgment No. 1642 of 2023).

Additionally, the Jordanian Court of Cassation ruled that:

"Pursuant to Article 362(1) of the Civil Code, a contracting party may not be required to give Notice to a contracting party who has committed a breach of contractual obligation(s), if such performance has become impossible or futile due to the breaching contracting party's actions. Herein, Appellant is claiming to be entitled to Compensation for Damages allegedly sustained when Respondent evicted Appellant from leased property by terminating Appellant's access to Water and Electricity Supplies, Harassing Appellant and conducting Demolition/Maintenance Works on said premises. Since Appellant is not seeking Performance or Rescission of the Lease Agreements in question but rather Compensation for Damages which have already accrued and cannot be restored, Appellant was under no obligation to serve Notice prior to filing suit. Therefore, the conclusions reached by the Court of Appeal regarding Appellant's entitlement to serve Notice prior to filing suit were incorrect and unlawful and accordingly should be reversed." (Jordanian Court of Cassation, 2023i, Judgment No. 8237 of 2022).

The examples above show that notice is typically required as a condition precedent for establishing debtor delays with regard to obligations governed by terms not specifically provided under both Jordanian and Moroccan law. However, there are numerous statutory and contractual exceptions which permit the waiver of the need for notice when such would be ineffective to provide an objective basis for performance having become either impossible, futile, or legally unnecessary. This is indicative of a legislative and judicial balancing of creditor/debtor rights as well as an interest in promoting fairness and efficiency through the enforcement of contractual rights.

#### **4.2 Cases of Creditor Delay**

Both the Moroccan and Jordanian legislators regulate cases of creditor delay in a relatively limited number of provisions compared to those governing debtor delay. A debtor may have a legitimate interest in performing an obligation and discharging the debt as quickly as possible, particularly where the debt bears interest or where the debtor seeks to relieve himself of the burden of preserving the subject matter of the obligation and bearing the risk of its loss or destruction. Accordingly, the debtor may seek to perform the obligation through unilateral action in accordance with the procedures and conditions prescribed by law. However, the creditor may refuse to accept such performance.

In these circumstances, the creditor himself may be considered to be in a state of delay. Creditor delay arises where the debtor seeks to perform the obligation owed while the creditor, without reasonable justification, refuses to accept that performance. In other words, where the debtor is willing to fulfil the obligation and the creditor unjustifiably refuses to accept performance, the creditor is deemed to be in delay. Consequently, the legal consequences of delay shift from the creditor to the debtor, and the first form of creditor delay arises when the creditor, without a legally recognized justification, refuses to accept performance duly tendered by the debtor or by another person acting on the debtor's behalf.

A creditor may also be in delay where he retracts his willingness to proceed with the contractual relationship for some reason. For example, a creditor may refuse to receive the price in order to avoid being bound by the corresponding obligation. In such a case, the creditor enters into a state of delay because of the refusal to receive the price, which itself constitutes one of the obligations arising from the contract of sale. Similarly, within the context of mutual obligations, a creditor will be treated as being in default when they refuse to fulfill the obligation corresponding with the obligation created by an agreement between the parties. This is due to their negative behavior regarding the agreement, giving them the status of creditor delay. A creditor's delay can also occur under one other circumstance. That is, the creditor's involvement is required for fulfillment of the obligation. Therefore, the creditor remains passive toward the debtor (whether this is through silence or absence), thus preventing the debtor from fulfilling their duties and ultimately placing themselves in creditor delay.

Article 270 of the Moroccan Code of Obligations and Contracts outlines the conditions that would result in a creditor being placed in delay. These are stated as follows:

"The creditor shall be considered to be in delay, if, without a valid legal reason, he refuses acceptance of performance offered by the debtor or by someone who has acted in good faith and at the request of the debtor for performance in accordance with terms established by the agreement establishing the obligation, or according to the nature of the obligation. Where a creditor's active participation is needed for the performance of an obligation and there is no response from the creditor either by virtue of his silence or his absence, such shall be construed as a refusal on his part."

The conditions under which the creditor may refuse performance are specified in Articles 271 and 272 of the Moroccan Code of Obligations and Contracts, and the rules regulating formal tenders and deposits pursuant to Article 275 and those articles that follow.

Article 322 of the Jordanian Civil Code also states:

“Where the creditor, without justification, refuses to accept due performance when such acceptance is required, fails to undertake those acts without which the performance cannot be completed, or declares that he does not intend to accept performance, the debtor must formally advise the creditor and give him a reasonable time within which to take whatever steps are necessary to enable him to claim his right.”

In addition to this, the Jordanian legislator has made sure that a debtor will not have their obligations obstructed by the creditor by giving them the opportunity to fulfill an obligation on their own initiative via the formal tender and judicial deposit methods that are established in Articles 322–328 of the Jordanian Civil Code.

Such obstinacy on the part of the creditor may take the form of an express refusal to accept payment of the debt or a refusal to perform acts without which performance cannot be completed. For example, where the debt is payable at the debtor’s domicile and the creditor refuses to attend that location to receive payment, the creditor may be deemed to be in delay.

The creditor’s refusal may also take a more anticipatory form, such as where the creditor expressly declares in advance that he will not accept payment from the debtor if tendered. Similarly, situations may arise in which the debtor genuinely wishes to perform but is unaware of the creditor’s place of residence.

A debtor who is prepared to perform may encounter additional difficulties. For example, the debtor may be unaware of the creditor’s identity or domicile, as where the original creditor has died and the debt has passed to heirs whose identities or places of residence are unknown to the debtor. Similar problems can also arise when the creditor is legally incompetent and has no legal representative who could formally accept the performance on his behalf, or if there are multiple claimants of the same debt that dispute it, or if there are some practical impediments to perform. As mentioned before, Jordanian law allows a debtor in these situations to make a direct judicial deposit, regardless of whether he provides any prior notice or makes any formal offer.

Therefore, it is necessary to establish how the situation should be treated, whether the creditor explicitly rejects an offered performance or whether the creditor implicitly rejects an offered performance.

#### **4.2.1 The Creditor’s Express Refusal of the Tendered Performance**

The creditor’s refusal to accept a debtor’s offer to pay on time is referred to as the creditor’s “refusal to perform”. There are many possible causes of this type of refusal including disputes about the subject of the performance, how the performance should take place, or some other matter connected thereto. When there is no legally acceptable cause for refusing a timely payment offered by the debtor, the creditor may be said to have delayed in accepting the payment offered by the debtor. Once the creditor delays in accepting the payment tendered by the debtor, then the laws allowing for compulsory performance of the obligations may be invoked. It is possible that a debtor could make a good-faith offer to pay and that a creditor, being recalcitrant, would unreasonably refuse to accept the good-faith payment made by the debtor.

A creditor may unreasonably refuse to accept a payment tendered by the debtor when the creditor states in advance that they will not accept payment if paid. This could include a situation wherein a debt is due and payable at the debtor’s residence in Amman but the creditor refuses to go to the debtor’s home to collect payment and therefore is delaying. To resolve issues such as these, the Jordanian legislature has granted the debtor authority to overcome creditor opposition and/or obstruction by providing the debtor with ways to act independently to discharge their obligations through the formal tender procedure and judicial deposit procedure found in Articles 322-328 of the Jordanian Civil Code (Al-Far, n.d., pp. 39-40).

The creditor will be considered delayed when it refuses to accept the proposed performance that is not supported by an appropriate legal basis for its rejection. This is as stated clearly in both Article 270 of the Moroccan Code of Obligations and Contracts and Article 322 of the Jordanian Civil Code (Moroccan Code of Obligations and Contracts, Art. 270; Jordanian Civil Code, 1976, Art. 322). The creditor will not be considered in delay if the refusal was justified by a lawfully valid reason (Shahboun, 1999, pp. 347-348).

As such, there are circumstances wherein a creditor can reject a proposal and still not be in delay:

### **First: Refusal Due to a Defect in the Subject Matter of the Obligation**

The basic rule governing performance is that performance must occur when the debtor delivers or performs the very item or acts that were the subject of the agreement. Essentially, performance can never vary from what the parties have agreed shall constitute performance. Pursuant to Article 242 of the Moroccan Code of Obligations and Contracts, a debtor discharges his obligation solely by delivering "that which he owes in accordance with the amount and nature described in the obligation." Similarly, pursuant to Article 329(1) of the Jordanian Civil Code:

"When a debt has been specifically defined, the debtor cannot replace the thing due with some other thing without the creditor's approval; nor is the replacement valid even though the substitute is equal to or greater in value than the thing due."

Therefore, since performance is a legal transaction, whose object corresponds to that of the debt itself and no party can unilaterally modify that object (Al-Sanhouri, n.d., p. 567), the debtor cannot require the creditor to accept anything but that which was agreed. Therefore, if the creditor rejects accepting anything except for that which was due, this rejection will be deemed lawful and the creditor will not be considered to be in default. In fact, the creditor may assert the illegality of both the formal offer and the judicial deposit based on the non-correspondence of the offered performance with the obligation owed (Al-Dinassouri & Akkaz, 1990, p. 1106).

### **Second: Refusal Due to Delay in Performance**

If a debtor delays entirely or partially in fulfilling their obligation under a contract, then this by itself can lead to the creditor refusing to receive that debtor's performance, thereby preventing the creditor from being seen as in delay. It should also be obvious that if the debtor has begun to delay in their obligations, the creditor could never at the same time be said to be in delay since the creditor's decision to refuse that debtor's performance is based on an accepted legal premise. This conclusion is clearly derived from Articles 254 of the Moroccan Code of Obligations and Contracts and Article 334 of the Jordanian Civil Code.

### **Third: Refusal of a Tender Subject to an Improper Condition**

As a general rule, a contractual obligation's performance should always be free from any terms or restrictions that a contracting party (debtor) cannot lawfully place on another contracting party (creditor). In addition to not having the right to limit its performance (e.g., payment), a debtor also cannot make an unconditional obligation (i.e., one that is "unlimited") dependent on a condition that limits that obligation. The above proposition presents the standard rules for contractual obligations' performance (Al-Meligi, 2000, art. 8; Al-Dinassouri & Akkaz, 2000, art. 1109).

In the event that the law permits a debtor to conditionally make a performance of obligation contingent on lawful requirements, the creditor can refuse to accept performance under those legal conditions. However, such refusal would not constitute a legally justified basis for refusing the performance.

Article 251 of Morocco's Civil Law Code of Obligations and Contracts states:

"The debtor who has fulfilled their obligations has the right to obtain back the evidence of the debt as long as there are no indications that he has been discharged from his obligations" (Civil Law Code of Obligations and Contracts Article 251).

The equivalent clause in Jordanian law is Article 339 of the Jordanian Civil Code, as follows:

"Where a person has discharged a debt either fully or partly, he shall be entitled to obtain a receipt for the amount he has paid. In default of such a receipt being obtained by him, he may lodge the amount due at Court" (Jordanian Civil Code, 1976, Article 339).

This clause and others like it are based on the underlying principle that an individual who has satisfied their obligation to pay all or part of a debt should have proof that they have done so. Proof of this satisfaction usually comes in the form of a receipt, or the creditor's return of the instrument or evidence of the debt. Therefore, when a creditor willfully fails to issue such proof, this creates a situation where the creditor is guilty of delay since there is no reasonable basis in law for his failure (Al-Sanhouri, n.d., p. 565).

#### 4.2.2 The Creditor's Implied Refusal of the Tendered Performance

Where a creditor does not overtly reject the creditor's performance offered by the obligor (debtor), establishing whether a creditor has refused acceptance of an obligor's performance can be somewhat ambiguous. However, in cases of implicit refusal, the creditor chooses to act passively toward the obligor with regard to the obligation; this includes, but is not limited to, the creditor failing to respond to the obligor or choosing not to be present when their presence is required for fulfillment of the obligation.

Where there exist reciprocal obligations created under a contract, a creditor may also be considered late in fulfilling their obligation if they adopt a passive demeanor with respect to their obligation; i.e., if their failure to perform their obligation causes them to be found to have been delayed in fulfilling their obligation with respect to said obligation.

The Moroccan legislature sought to remove ambiguity and disparate interpretations of such actions with the enactment of Article 270(2) of Morocco's Code of Obligations and Contracts, which states: "Silence or absence of the creditor, where his participation is needed for the execution of the obligation, will be construed as a rejection by him."

Furthermore, Article 322 of the Jordanian Civil Code stipulates:

"When the creditor unreasonably rejects a proper tender of performance; when the creditor fails to perform those acts (if any) which are indispensable for completing performance; or when the creditor states in writing that he does not intend to accept the due performance; then, after having notified the creditor officially thereof and allowing said creditor a reasonable time to act upon this notification, the debtor can request creditor consent for his own performance."

This demonstrates that each of Morocco's and Jordan's legislative bodies consider the creditor's rejection of actions that need to be performed prior to completion of performance, as well as their written statement rejecting acceptance of performance, to be examples of implied creditor delay. While the Jordanian legislature has not explicitly stated that a creditor's silent conduct constitutes a form of creditor delay so as to allow the use of formal tender and judicial deposit, it would appear that there would be no reason why such an interpretation could not be made by analogy because it would follow the same logic as that behind legislation regarding creditor delays and failure to perform contractual duties.

The principal manifestations of implied creditor delay may be examined as follows:

##### **First: The Creditor's Silence**

The contract is a legally binding agreement that exists based on the principle of good faith. Therefore, it was appropriate for the legislature to attach serious legal consequences to a creditor's passive behavior when the creditor's active participation is required. In fact, Morocco has explicitly stated in Article 270(2) of its Code of Obligations and Contracts that a creditor's failure to respond to a debtor's offer to perform an obligation shall be considered a rejection if the creditor is required to act in order to fulfill his obligation (Moroccan Code of Obligations and Contracts, Art. 270).

The Moroccan Court of Cassation also supported this principle by stating that:

"A creditor will be found in breach of his duty where he remains inactive towards a debtor, either through a refusal to cooperate, by being silent, or by leaving" (Moroccan Court of Cassation, 1995, Decision Number 5444).

While a creditor's express rejection of a debtor's obligation to perform is clear, a creditor's silence in responding to a debtor's request to perform can create ambiguity and give rise to doubt about the creditor's intentions. Because of these concerns regarding clarity, Article 270 of the Moroccan Code of Obligations and Contracts provides for a legal presumption such that a creditor's silence is interpreted as an implied rejection of the performance requested.

The adoption of this method of establishing silence as an act of creditor delay is not unique to the laws of Morocco. A similar approach has been adopted by the legislator in various legal contexts in Morocco. Silence will be considered as tantamount to consent, although the general rule applicable in many countries states that silence cannot be construed as a manifestation of the declaratory intent of a party (Articles 25, 340 & 406 – Moroccan Code of Obligations and Contracts). However, the legislator's position in those cases did not relate to silence per se. It relates to qualified or contextual silence from which one could reasonably infer that the creditor had decided not to participate in fulfilling his obligations when he knew that his cooperation was necessary for the fulfillment of such obligation (Al-Safi supra at p. 271).

With regard to Jordanian law, there are no specific provisions of legislation that explicitly equate creditor delay with silence. Therefore, based on this analysis, it is believed that it would be reasonable to adopt analogous legislation as found in Morocco.

## **Second: The Creditor's Absence**

The parties to an agreement have an obligation to fulfill all agreements as stated within the agreement. In addition, they have an obligation to act in good faith toward each other during the fulfillment of those obligations. These two obligations combine so that both the debtor and creditor cannot engage in any conduct which will place an undue burden on either party's performance. Furthermore, the creditor has a responsibility to assist the debtor in fulfilling his/her obligations by taking reasonable steps to help the debtor perform. If the creditor fails to do so, he/she can be liable under contract law (Khalifa, 2007–2008, p. 40).

As such, although the debtor has the obligation to fulfill his/her part of the agreement, the creditor also has the same obligation to take reasonable action in helping the debtor achieve performance. Articles 270(2) of the Moroccan Code of Obligations and Contracts and Article 322 of the Jordanian Civil Code provide that if the creditor is absent when his/her presence is needed for the performance of the obligation, it shall be treated as though he/she had refused to perform (Jordanian Civil Code, 1976, Art. 322; Moroccan Code of Obligations and Contracts, Art. 270).

The creditor's absence will produce this legal effect only where his/her participation is actually required for the performance of the obligation. When his/her participation is not necessary for performance, the creditor's absence or lack of assistance will not result in automatic implied refusal. Therefore, no creditor delay exists.

In other words, when the debtor's obligation involves the creditor traveling to the debtor's residence to receive the debtor's performance and the creditor does not agree to do so, therefore blocking the debtor from performing their obligations, then the creditor's failure to perform is enough reason to allow the debtor to use formal tender and judicial deposit processes. A similar type of creditor delay can occur when the creditor fails to take some action that prevents completion of performance by the debtor, e.g., when the creditor refuses to provide documentation showing his readiness to accept performance or he will not sign until after he has met with a registrar who is required to record the sale contract (Al-Meligi, 2000, pp. 39-40).

This is what was stated by the Morocco Court of Cassation regarding this principle. The court decided that:

"The debtor must file formal tender and judicial deposit proceedings even if the creditor does not appear, since the creditor's appearance is not necessary in this case. The fact that the creditor is absent is not sufficient cause to exempt the debtor from filing the mentioned proceeding. To show that the creditor is delaying, it is necessary to demonstrate an express refusal on the part of the creditor" (Moroccan Court of Cassation, 1981, Decision No. 500).

The Jordanian Judiciary has taken an identical stance. In its appellate role, the Amman Court of First Instance ruled:

"Concerning the refusal on the part of the Respondents to receive cheques submitted by the First Appellant according to the provisions of Article 322 of the Civil Code relating to the payment of rent, it is provided in Article 322 of the Civil Code that: "If the Creditor, without good cause, refuses to accept a performance when this can reasonably be expected; if he refuses to perform acts that are indispensable to the completion of said performance; or if he states that he does not intend to accept a performance, the Debtor shall formally advise the Creditor and afford him a reasonable time frame within which to perform those things necessary to enable the Creditor to exercise his rights."

It follows from Article 326 of the Civil Code that judicial deposit may be ordered (a) when the Debtor is ignorant of the Creditor's name or place of residence; (b) when the Creditor has no representative who is empowered to act on behalf of the Creditor in receiving performance; (c) when there are disputes amongst multiple persons regarding liability to pay the debt owed by the Debtor; or (d) when there exist some serious circumstances rendering it justifiable to resort to judicial deposit. Likewise, Article 15 of the Landlords and Tenants Law provides that receipt of Rent at the Registry of the Court shall constitute valid payment. Therefore, both formal tender under Article 322 of the Civil Code and judicial deposit under Article 15 of the Landlords and Tenants Law functionally serve as alternatives to actual performance. Since the Appellants relied upon the landlord's failure to receive rent as grounds for failing to make timely payments, Appellants could have availed themselves of the legal procedures established by statute for achieving this result—namely through either judicial deposit or formal tender—and instead chose to effectuate payments directly. Because Appellants did not pursue these remedies, Appellants' arguments cannot affect the validity of Respondents' claims" (Judgment No. 5309 of 2023 by the Amman Court of First Instance in its Appellate Capacity).

The Jordanian Court of Cassation similarly stated: "Based on the information provided in the legal notice sent by the defendant in reply to the claimant's notice, there was a request to the claimant to accept the goods agreed to be delivered. Therefore, the claim against the defendant is subject to the articles 322-328 of the Civil Code, which relate to non-performance. From the evidence before the court, it cannot be deduced from the actions taken by the defendant as a plaintiff in respect to making a constructive judicial delivery of the goods according to the agreement. Therefore, since this argument has no factual support, it undermines the appealed judgment." (Jordanian Court of Cassation, 2017, Judgment No. 2135 of 2017).

See also: Judgment No. 2037 of 2014 of the Jordanian Court of Cassation. Similarly, the Court ruled:

"That the claimant had discharged his duty to prepare the books requested by the defendant and send them to the defendant. Despite service of process on the defendant, he failed to receive them. Having determined that performance could no longer occur, the Court of Appeals properly followed the applicable law concerning contractual liability, as it rescinded the contract and restored the parties to their pre-contractual position in accordance with article 246(2) of the Civil Code. For this reason, there was no foundation for the application of articles 322-327 of the Civil Code regarding formal tender and judicial deposit, cited by the Appellant, because both parties were bound reciprocally to each other pursuant to article 246 of the Civil Code." (Jordanian Court of Cassation, 2015, Judgment No. 1556 of 2015).

### **Third: Refusal by the Creditor to Accept the Tendered Object Temporarily After Being Notified**

The debtor is likewise considered as being in default when he notifies the creditor that he intends to carry out his obligations under their contract within a reasonable time frame, and the creditor temporarily declines acceptance of the debtor's offer of performance.

This concept is explicitly stated in the last paragraph of Article 272 of the Moroccan Code of Obligations and Contracts, which states:

"If the debtor has informed the creditor, within a reasonable time frame, of his desire to fulfill an obligation, the creditor will be in default even if he only refuses to accept the object offered to him temporarily."

Therefore, a creditor will be determined to be in default for refusing to accept a debtor's performance (or performance from other parties acting on behalf of the debtor) with no legal justification or legitimate excuse. In addition, a creditor's failure to respond or be absent (where such is required for fulfillment of an obligation) constitutes a creditor's refusal, resulting in creditor default.

## **5. Conclusion**

This research examined the legal structure governing delays in the fulfillment of contractual obligations in the Jordanian Civil Code and the Moroccan Code of Obligations and Contracts, especially concerning debtors' delays, creditors' delays, and the use of notice in determining whether a delay has occurred. As shown by this research, both codes define a delay as an unjustified non-performance of an obligation that causes a disruption to the balance of the contract, leading to potential legal ramifications intended to protect the contractual expectations of the parties involved and ensure timely completion of all obligations. Although the two jurisdictions vary considerably in terms of procedure (e.g., Morocco generally differentiates between obligations that have a time limit and those that do not, whereas Jordan uses notice as a standard method to determine when a delay occurs), they share common objectives to promote contractual certainty, legality, and equity among parties in a contract.

Additionally, the research demonstrates that a delay is not solely based on the actions of the debtor; both jurisdictions identify creditor delay as its own independent legal entity resulting from the creditor's unjustified refusal to perform, silence, absence, or failure to cooperate if cooperation is required to fulfill the obligations of a contract. This represents a contemporary view of contracts as being based on mutually beneficial cooperative agreements built upon good faith rather than simply enforcing each party's individual duty to fulfill their obligations.

The study demonstrates the importance of good faith in law, specifically the role of good faith in establishing the normative basis for regulating delayed performance. The research makes a contribution to comparative legal studies with regard to the development of a comprehensive analytic model which compares both debtor and creditor delays based on legislation, case law, and doctrinal analysis. In particular, the research provides new insights into how delay is used as a way of maintaining contract balance, protecting legitimate expectations, and providing procedural fairness between contracting parties.

### **5.1 Recommendations**

The results show why it is necessary to implement new laws and court decisions regarding the clarification of legal certainty with respect to the delayed execution of contracts.

In this regard, the author recommends that the Moroccan legislator clarify the vague and ambiguous terms used by the law (such as "cause raisonnable", "silence", or "absence") so that judges can give more consistent judgments and therefore be able to better forecast what will happen.

Also, as shown by the comparative analysis, if Morocco were to require the parties to send prior notice before the deadline is established and clearly define the exceptions, it could offer greater guarantees for the contracting parties (debtors) and lead to an equilibrium of contractual relations.

Finally, it is essential that the judiciary continues to encourage and favor the interpretation of cases based on good faith and contractual collaboration. This way, the theory of delay will remain flexible enough to take into account the reality of today's commercial relations.

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