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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

SUGGESTED APPROACH TO THE FUTURE WORK ON THE CHAPTER ON NON-PERFORMANCE IN THE PROPOSED CODE OF INTERNATIONAL TRADE LAW

(Secretariat memorandum)

Rome, February 1980

1.- According to the decisions taken by the Steering Committee, set up by the President of UNIDROIT with the task of orienting work on the preparation of a Uniform Code of international trade law the following subjects and problems should be dealt with, within the framework of the general part of the proposed code: (a) formation of contracts; (b) interpretation of contracts; (c) conditions of validity including the validity of contractual provisions contained in general conditions and standard forms of contract; (d) performance of contracts; (e) non-performance of contracts; (f) damages awarded for non-performance; (g) injust enrichment and restitution; (h) proof.

So far draft uniform rules concerning the first two chapters of the future code have been prepared and subsequently submitted for consideration by an enlarged Study Group which met at the headquarters of UNIDROIT in September 1979. As far as the rules on the validity of contracts are concerned it was decided to try and see to what extent the UNIDROIT draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods could be adapted in order to be applicable to international commercial contracts in general: in this respect the Max-Plank-Institut für ausländisches und internationales Privatrecht, on the excellent comparative study of which the above-mentioned draft is based, kindly announced its willingness to prepare a supplementary report and to submit, if necessary, suggestions for additional rules.

As to the remaining chapters the problem of non-performance is well known to be among the most difficult ones in the law of contracts in general and therefore will require particulary careful preparatory study. On the assumption that the first task will be that of exactly determining the sequence of the future work to be carried out in this field, the Secretariat intends with the present report to provide a first aperçu of the various aspects which ought to be dealt with specifically in the general framework of the problem of non-performance.

2.- One of the first problems which should be considered concerns the determination of the objective characteristics of the various cases of non-performance dealt with in the different legal systems. As a matter of fact, not only do some systems lack a general concept of non-performance, but even when it does exist, it does not always refer to the same situations.

There is no unitarian concept of non-performance in German law for example. The BGB provides for two typical cases of non-performance i.e. "impossibility" (Unmöglichkeit) (BGB par. 275 and following) and "delay" (Verzug) (BGB par. 284 and following). As regards the first case, the BGB differentiates between "objective impossibility" (par. 275 I) and "subjective impossibility" (Unvermögen) (par. 275 II). The former applies when it would be objectively impossible for anyone to perform the contract or when performance would be impossible only by infringing a law, while the latter is based on the personal situation of the debtor.

In practice, this distinction is only of importance for things in genere ("Gattungsschuld"). A subjective impossibility preventing the debtor from performing his contract, on the contrary to an objective impossibility, is not sufficient to discharge him (BGB par. 279). It should also be pointed out that doctrine and case law make a distinction between total or partial impossibility and temporary or definitive impossibility. However, in certain cases, which depend entirely upon the type of performance required by the contract, and the intention of the parties as interpreted by the principle of Treu und Glauben, temporary or partial impossibilities can be considered total or definitive. As for the other case of non-performance expressly provided for by the BGB i.e. delay, it should be recalled that "delay" differs from "impossibility" in that performance in the case of the former is still possible. Moreover, a case of delay requires an injuction (Mahung) on the part of the creditor except when the contract actually establishes or gives the possibility to establish the date of performance. Doctrine also provides for another exception which arises when the debtor notifies by another means that he will not perform the contract in the given time.

However, the gaps in the BGB as regards non-performance have been bridged by jurisprudence and doctrine which provide for a third typical case of non-performance, the "positive Vertragsverletzung". This concept is supposed to cover all cases of non-performance which

do not fall under "impossibility" or "delay". These include defective performance (Leistungsstörung), the non-performance of secondary obligations attached to the contract as established by Treu und Glauben and "Verkehrssitte" (Verletzung secundäre Leistungspflichten). This principle, which is a result of the continual development in jurisprudence, is varied and complex and it is therefore impossible to summarise it here.

The French Civil Code and anglo-saxon legislations have, on the contrary, a unitarian concept for non-performance. The former refers to non-performance in Article 1147 (1), and the latter use the general term of "breach of contract". Neither legal system gives an exact definition of this concept but there is no doubt that it covers all the cases of violation of the obligations deriving from the contract (2). It should therefore not be difficult to reconstruct the objective characteristics required by these legal systems in given circumstances in order to consider the principles on non-performance applicable. The only point upon which the two systems diverge and which will have to be considered, is the fact that the French Civil Code deals expressly with the concept of delay ("retard dans l'exécution") (Art. 1146, 1147, 1153) and requires an injuction from the creditor, whereas there is no specific term for "retard" in anglo-saxon legal terminology although the concepts of "delay" and "frustration" may assume the same significance particularly in the case of certain types of contracts for example, the contract for sale of goods with delivery by instalments, charterparties, and employment contracts.

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(1) See Article 1218 of the Italian Civil Code for a similar provision.

(2) See par. 312 of the "Restatement": "A breach of contract is a non-performance of any contractual duty of immediate performance. A breach may be total or partial, and may take place by failure to perform acts promised, by prevention or hindrance or by repudation".

3.- Once the necessary objective characteristics which qualify a given situation as being a case of non-performance have been established, the next problem to be faced is that concerning the basic principles by which the debtor will be held liable for non-performance. Here one can approximately distinguish between two groups of systems: the first, applied by nearly all the civil law systems, is based on the principle of fault by the debtor; the second, applied by the common law systems, is grounded on the contrary, on the principle of the objective liability of the debtor for all cases of breach of contract.

We have used the word "approximately" as, on this subject as well, a more detailed analysis which would penetrate beyond the study of the theoretical and general principles and include an examination of the functioning and practical application of these systems, would reveal both affinities and differences which overstep the bounds of the two traditionally opposed systems.

As already noted, German and French legislation, for example, is usually founded on the principle of "culpabilité". This fact is established by par. 276 of the BGB and by Article 1147 and 1137 of the French Civil Code. However, French doctrine and jurisprudence, following the example given by Demogue, has introduced a distinction between "obligations of result" ("obligations de résultat") and "obligations of means" ("obligations de moyens") - the former being dealt with in Article 1147 and for which the debtor is liable within the limits of "force majeure" (circumstances within his control) and the latter in Article 1137 to which the traditional principle of fault is applicable. The problem also arises in other legal systems similar to the French system (3) and indicates that the legal systems based on civil law also provide, in some cases at least, for something similar to the objective liability for breach of contract existing in anglo-saxon legal systems. Even the BGB which, as we have seen, is clearly in favour of the principle of "Schuldhaftung" (par. 276), accepts important exceptions such as, for example, those dealt with in par. 279 (liability for obligations in genere) and par. 278 (liability for faulty behaviour of employees). To these exceptions one must add the many cases of nearly objective liability provided for in special provisions such as those on road, railway and air trafic, or on the care of animals, or, more recently,

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(3) See Article 1218 and 1176 of the Italian Civil Code.

on electricity companies or on atomic reactors. All these cases of liability, even those of a contractual nature, are based on Gefährdungshaftung by which the debtor is bound by a higher degree of diligence than normally expected of him.

Furthermore, in anglo-saxon legal systems, the fundamental principle doubtlessly establishes that the debtor is liable for all cases of brach of contract whether due to his fault or not. This general principle of the absolute liability of the debtor is nevertheless attentualted by the theory of "frustration". Although it is not possible here to examine its various practical applications /"Illegality", "Impossibility", "Frustration of adventure"/ and the different ways in which it is justified /"Implied terms", "Just solution", "Foundation of the contract"/, all the same, it is interesting to note that, as a result of the important evolution of the contract in anglo-saxon legal systems, there are a large number of cases in which the debtor is no longer liable for his non-performance if he can prove, if not certain cases of impossibility, at least the alteration or failing of the implied or express conditions of contract.

Another problem which will have to be faced in cases of liability for non-performance based on the debtor's fault, is that of the definition of this fault, the distinction between the varying degrees of fault and finally, the burden of proof. It is a known fact that the notions of "dol" and "faute lourde" in French law for example, do not always wholly correspond to those of "Vorsatz" and "grobe Fahrlässigkeit" in German law and that it is sometimes sufficient for the creditor to prove the objective circumstances of non-performance, whereas the proof that there is no fault falls to the debtor. In other cases it is up to the creditor to prove that the debtor did not take the necessary care. In this context, the problem of the admissibility of clauses excluding or limiting liability will also have to be considered. This problem is not always solved in the same way by the various systems (see for example, Article 1150 of the French Civil Code, Article 1229 of the Italian Civil Code and par. 276 II of the BGB) and it varies also for the different types of contracts.

4.- Once the liability of the debtor has been established, there remains the determination of the nature and sum of the damage to be compensated for and the person entitles to claim it.

This person should normally be the creditor who directly suffered damage through non-performance. This is undoubtedly the general principle followed by the various legal systems. However, it should not be forgotten that in certain types of contracts other persons which are third parties to the contract, also suffer damage if the contract is not performed (defective performance or violation of the decondary obligations). In order to protect these persons, German doctrine and jurisprudence have elaborated the theory of contracts which take the position of third parties into consideration ("Vertrage mit Schutzwirkung für Dritte") according to which they may claim compensation for damages from the debtor on the basis of his contractual liability.

As regards the nature of the damage and the amount of the sum to be paid in compensation, some of the main questions which arise are the following. Is the debtor compelled to compensate only the loss suffered (damnun emergens) or also the loss of expected profits (lucrum cessans) ? Is he liable within the limits of the consequence forseeable at the time of conclusion of the contract or also beyond these limits ? In which cases can one ask for specific performance ? In a case of money obligations, can one recover a compensation for other damages suffered apart from the interest on overdue payments ? Does one apply the nominalistic or realistic principle ? If a damage is to be paid for in a currency which is not that of the contract, which is the rate of exchange to be applied ? Which principles should govern the penal clauses included in the contract by the parties with a view to simplifying the payment of damage ? There are therefore a great number of problems over which the various legal systems do not always coincide and which complicate the drawing up of uniform provisions for contracts in general.

5.- Finally, there remains to be considered the problem of the influence of non-performance (whether imputable to the debtor or not) on the position of the other party to the contract.

The various problems examined up to now (objective character of the various cases of non-performance; the criteria rendering the debtor liable for an objective non-performance; the duty of the debtor to compensate damages resulting from non-performance) are all problems concerning obligations in general, that is to say, they concern the debtor's position as regards his creditor in given circumstances. This situation only arises in the case of contracts which establish obligations for only one side.

On the contrary, when a given contract establishes the rights and obligations of both parties in such a way that they are both creditor and debtor at the same time and there is a correlation between the two so that the performance of one party is conditioned by the performance of the other and that both are carried out at the same time - as in the case of synallagmatic contracts (do ut des) (Zug-um Zug Leistung) - the the problem arises concerning the effects which non-performance by one of the parties has on the obligations of the other: thus, can, and if so, and on what conditions does non-performance by one of the parties justify repudation of the contract or even free the other party from his obligations ? Can and if so on what conditions may the innocent party claim the restitution in respect of obligations which he has already performed? What is the exact relationship between his claim for a continuation of the contract and the claim for the resolution of the contract? Can, and if so on what conditions, may non-performance by one of the parties cause the total resolution of the contract ?

6.- In conclusion, the comparative studies and, subsequently, the work for uniform rules on the non-performance of contracts, could be organized by using the following plan:

a) The objective characteristics of the different cases of non-performance (delay, defective performance, non-performance in the narrow sense);

b) The conditions under which the debtor is held liable for the above-mentioned circumstances: the problem of "contractual liability";

c) The consequences of the liability of the debtor: the problem of the "compensation of damages";

d) The influence of the various cases of non-performance in the objective sense (ascriable to the debtor or not) on the position of the innocent party to the contract as regards the performance of his obligations.