



UNIDROIT 1984
Study I - Doc. 33
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

UNIFORM RULES ON INTERNATIONAL CONTRACTS IN GENERAL

Chapter 5 : PERFORMANCE

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Rome, December 1984

Performance of Obligations

- Art. 1 § 1 - The debtor must fulfil the obligation in accordance with its content and in a manner corresponding to its nature and economic purpose.
- § 2 - The creditor must cooperate in the same manner in the fulfilment of the obligation.
- Art. 2 - The debtor is obliged to observe the reasonable diligence required in relations of a given type (due diligence).
- Art. 3 - The creditor may refuse a partial performance, unless otherwise results from the nature of the obligation.
- Art. 4 - The creditor may demand a debtor's personal performance if this appears from the nature of the obligation.
- Art. 5 - If a pecuniary claim is enforceable the creditor cannot refuse to accept payment from a third person, even if that person is acting without the debtor's knowledge.
- Art. 6 - If the debtor is obliged to give things defined only generically and the quality of the things is not defined by the contract or does not result from the international customs established in the given branch of international trade, the debtor should give things of average quality as established in the state of his place of business (1).

(1) A provision similar to Art. 10 of the Vienna Convention is to be included somewhere (place of business).

If, however, the destination of the things was known to the debtor, he is obliged to give things of an appropriate quality.

[Monetary obligations]

Art. 7 - Fulfilment of an obligation to pay of a sum of money takes place by the payment of the nominal amount due in the agreed currency.

Art. 8 -

Art. 9 -

Art. 10 - If the interest rate due is not otherwise determined it is due in the amount of the discount rate as established in the state where the debtor has his place of business at the moment of the enforceability of the obligation. If this discount rate cannot be established an interest rate of ... % is due.

[Time of Performance]

- Art. 11 - If the time of performance is not stipulated by the parties or determinable from the purpose of the contract and the nature of the obligation, the obligation must be performed within reasonable time fixed by the creditor. The debtor is entitled to perform his obligation before the creditor has fixed that time, after delivering him a notice to that effect in due time. However, if the performance in time indicated by the debtor would violate the creditor's justified interest, the latter may by immediate notice demand the debtor to perform at a reasonably later time.
- Art. 12 - Time limit for performance specified by the contract is considered to be stipulated for the benefit of the debtor, unless otherwise results from the nature of the obligation. The creditor may refuse to accept an earlier performance if such performance would violate his justified interest.
- Art. 13 - The party which accepted the earlier performance is bound to the earlier mutual performance.
- Art. 14 - If the parties stipulated in the contract that performance of an obligation is to take place in parts over a certain period, but did not specify the size of particular performances, those performances are

to be made in equal parts in time as established by splitting the period of performance into the fixed number of parts unless otherwise results from the nature of the obligation. If the number of parts has not been established, the performance is to be made in equal parts : monthly, if the time of performance is shorter than one year and quarterly if it is one year or longer unless otherwise results from the nature of the obligation.

[Art. 15

- If the debtor is in a situation endangering his solvency or if the security of the claim has been considerably reduced the creditor may demand an appropriate security. If the debtor does not give this security, the creditor may demand performance, regardless of the stipulated time limit. If the creditor is obliged to perform a mutual obligation he may withhold its fulfilment until the debtor offers his performance or gives security.]

[Place of Performance]

Art. 16

- If the place of performance is not stipulated by the parties or determinable from the purpose of the contract and the nature of the obligation, the obligation is to be performed at the place, where at the moment when the obligation arose the debtor had his place of business.

Art. 17 - A payment of money is to be made at the place of business of the creditor at the moment of such payment ; if the creditor has changed his place of business after the obligation was contracted, he bears the surplus cost of remittance caused by that change.

Art. 18 - A payment by the way of a transfert is to be made through to the bank in which the creditor has his account.

[Costs of Payments]

Art. 19 - The debtor is charged with the costs incurred in executing performance which were not caused by the creditor.

Art. 20 - Each party has to pay the taxes and public duties connected with the contract due in the state of his place of business. The taxes and public duties due in other states lie on the party, whose obligations they are connected with.

[Accipiens]

Art. 21 - Performance made to a person not authorized to receive it for the creditor is valid if the creditor ratifies the acceptance ; if he does not ratify it, the performance is only valid insofar as the creditor has benefited from it.

- Art. 22 - Performance to a person, who shows a receipt made out by the creditor releases the debtor, unless it was stipulated that the performance was to be made to the creditor in person, or unless the debtor acted in bad faith.

[Appropriation of Payments]

- Art. 23 - The debtor owing several separate debts of the same type to the same creditor may specify, at the time of payment, which debt he intends the payment to be applied to.
- Art. 24 - However, when the term operates in favour of the creditor, the debtor may not, without the consent of the creditor, impute payment to a debt not due.
- Art. 25 - The debtor who owes a debt bearing interest may not, without the consent of the creditor, impute the payment which he makes to the principal in preference to the interest. Payment made is to discharge any interest due before the principal.
- Art. 26 - When the debtor who owes several debts has accepted a discharge note whereby the creditor has imputed what he has received to one of those debts, the debtor may no longer require imputation to a different debt.

Art. 27 - In the absence of imputation by the parties, payment is first imputed to whichever debt is due. If several debts are due, payment is imputed to that which the debtor has the greatest interest in paying. When the interest is equally divided, payment is imputed to the debt which became due first. All things being equal, imputation is effected proportionally.

NOTES ON THE DRAFT ARTICLES

Art. 1 and 2

Those general principles have been tentatively included in the draft on performance, but they have been put between brackets as the final decision on their location and contents depends on the coordination to be established between the respective chapters on performance and non-performance. Article X of the draft Code also has to be considered.

The references to the purpose of the contract (art. 1 § 1) and the necessary cooperation of the creditor (art. 1 § 2) are mainly inspired by the GIW (art. 259) (Doc. 28, p. 8). Article 2 is similar to a provision contained in the C.C. Pol. (art. 355 § 1) and in the new C.O.Y. (art. 129).

The first part of art. 1 § 1 corresponds to a general solution about the object of performance (Doc. 28, p. 10 ; add art. 307 C.O.Y., art. 277 C.C.H. and art. 354 C.C.Pol.).

Art. 3

A choice has been made here between the two opposite solutions described in Doc. 28, pp. 10-11, in favor of the more common one (art. 310 C.O.Y.) also adheres to that solution, whereas art. 285 C.C.H. and art. 356 § 2 and 450 C.C.Pol. are similar to the solution of the L. Tch. ; comp. Chitty on Contracts, 23rd ed, n° 1164, about payments of sums of money).

Art. 4 and 5

The traditional rule according to which the creditor cannot in principle refuse payment from a third person (Doc. 28, p. 20) is implicitly recognized by articles 4 and 5, which respectively provide for a generally-admitted exception (art. 4) and stress a frequent case of application (art. 5). Comp. however Chitty on Contracts, 23 rd ed, n° 1157.

Art. 6

The "average quality" rule is very commonly adopted (Doc. 28, p. 11 ; add art. 357 C.C.Pol.). The proposed texts add a reference to the debtor's place of business, in order to eliminate a possible source of controversy in international contracts. Cfr. also the reference to international customs.

Art. 6 § 2 is an addition inspired by art. 311 C.O.Y.

Art. 7 - 10

Art. 7 expresses the nominalistic principle. It is taken for granted that this is not going to be a mandatory rule ; it should not create obstacles to the frequent practice of adaptation clauses.

Art. 8 and 9 have yet to be drafted. They will concern payments through financial institutions (cfr. Doc. 28, p. 13 and the possible Benelux source of inspiration ; see also art. 318 C.O.Y.) and perhaps also electronic funds transfers (cfr. UNCITRAL Document A/CN.9/221, 17 May 1982).

Art. 10 is to be compared to similar provisions in C.O. and C.C.Eth. (Doc. 28, p. 12). Also see art. 359 § 3 C.C. Pol.

Art. 11 - 15

Art. 11 is inspired by art. 44 G.I.W. (Doc. 28, p. 14). The criterium of "reasonableness" also corresponds to common law solutions (comp. Restatement of Contracts 2nd, § 204, and Comment d ; UCC s. 2-309 (1)).

Art. 12 expresses a traditional solution (Doc. 28, p. 15 ; add. art. 457 C.C.Pol.), corrected by the restriction contained in the second sentence (compare art. 44 G.I.W.), and complemented by the rule expressed in art. 13.

Art. 14 is to be compared to art. 456 C.C. Pol.

Art. 15 has been put between brackets as it may be preferable to consider the problems involved in the chapter on non-performance (also see Doc. 28, p. 15).

Art. 16 - 18

Art. 16 expresses a traditional solution (Doc. 28, p. 17). Comp. U.C.C. s. 2-308 and 2-310, and Chitty on Contracts, 23rd ed, n° 1134.

Art. 17 establishes the opposite solution for payments of money, in line with part of the legal systems (Doc. 28, p. 17, last paragraph ; add for that solution art. 454 C.C. Pol., art. 291 C.C.H., art. 320 C.O.Y. ; cfr. also Chitty on Contracts, 23rd ed, n° 1167). Compare art. 18 with art. 43 al. 4 G.I.W.

Articles 17 and 18 will have to be coordinated with the future articles 8 and 9.

Art. 19 - 20

Art. 19 also expresses a traditional solution (Doc. 28, p. 19 ; add art. 298 C.O.Y.).

Art. 20 provides for a rule which can prove to be useful in international trade.

Art. 21 - 22

Art. 21 provides for a solution accepted by most codifications (Doc. 28, p. 22). Comp. Chitty on Contracts, 23rd ed, n° 1158-1159.

Art. 22 is more restrictive than the frequent rule on payments to apparent creditors (Doc. 28, p. 22), as it seems that in that respect , more prudence should be expected from international operators.

Art. 23 - 27

Even though the Study Group has expressed the view that drafting provisions on appropriation of payments were not among priorities in preparing the proposed codification, articles 23 - 27 are submitted for possible discussion. Compare with Doc. 28, p. 23.

But then art. 2, 2bis and 3 would be very similar and somewhat repetitive. Another solution could be to delete those three provisions, and to redraft art. 1 § 1 in a way like this :

" § 1. The parties must perform their obligations in the manner required by the contract (in accordance with their nature (and economic purpose)); where the contract is silent, the parties must perform their obligations in the manner usually required in activities of the type involved in the particular trade concerned".

Article 4 (Art. 3 of the 1984 Draft)

A party may refuse a partial performance, unless otherwise results from the nature of the obligation.

Article 5 (Art. 7 of the 1984 Draft)

Performance of an obligation to pay a sum of money takes place by the payment of the nominal amount due /.

Article 6 (new)

1. A monetary obligation due in a currency other than that of the place of payment may be paid in the currency of the place of payment according to the rate of exchange prevailing there at the date of maturity.

2. If the debtor has not paid at the time of maturity, the creditor may demand payment in the currency of the place of payment according to the rate of exchange prevailing there at the date of maturity or at the date of actual payment.

Note : The article is inspired by § 1.106 of the texts drafted by the Commission on European Contract Law.

Article 7 (new)

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods delivered or such services performed under comparable circumstances in the trade concerned.

When no such price is available, and in the absence of any indication to the contrary, the price is determined by the party who delivers the goods or performs the service, provided it is reasonable./

Article 8 (Art. 11 of the 1984 Draft)

If the time of performance is neither stipulated by the parties nor determinable from the contract or the nature of the obligation, the obligation must be performed within a reasonable time after the conclusion of the contract.

Article 9 (Art. 12 of the 1984 Draft)

If the time of performance is fixed by or determinable from the contract, the parties are not entitled to make an earlier performance.

Article 10 (Art. 13 of the 1984 Draft)

A party who accepts an earlier performance is not thereby bound to effect a reciprocal earlier performance.

Article 11 (Art. 16 of the 1984 Draft)

If the place of performance is neither stipulated by the parties nor determinable from the contract or the nature of the obligation, the obligation is to be performed at the place where at the moment when the contract was concluded the obliged party has its place of business.

Article 12 (Art. 17 of the 1984 Draft)

If the place of performance of a monetary obligation is neither stipulated by the parties nor determinable from the contract, such obligation is to be performed at the place of business of the creditor at the moment when the contract was concluded.

Note : This new solution was decided upon in Milan, but it should perhaps be given more attention. It could be a source of trouble if the creditor has moved, whereas it would not put too much of a burden on the debtor's shoulders to change the place of payment of a monetary obligation, as long as he does not have bear extra-costs.

We should also be cautious about possible conflicts between art. 12 and 13.

Article 13 (Art. 18 of the 1984 Draft)

1. Payment of a monetary obligation can be made by a transfer to any of the financial institutions in which the creditor has an account, unless either the creditor has expressly indicated to which account he wants the sum credited or he has excluded payment by the way of a transfer.

2. Payment by the way of a transfer becomes effective upon notice of the transfer to the transferee financial institution.

Note : Article 13 (2) provides for a tentative solution, which is probably the most logical from a legal point of view (the transferee bank is the creditor's agent).

Article 14 (new)

1. Payment of a monetary obligation can be made by a cheque, a bill of exchange or another instrument instructing the debtor's financial institution to pay, if it has been stipulated by the parties or if it is accepted by the creditor at the time of payment.

2. Payment by the way of such an instrument is presumed to be accepted on condition that the instruction will be honored by the debtor's financial institution.

Note : Article 14 (2" is inspired by § 1.115 of the texts drafted by the Commission on European Contract Law; also conform to the generally accepted solution.

Article 15 (Art. 20 of the 1984 Draft)

Each party has to bear the cost of taxes and duties connected with performance of its part of the contract. /

Article 16 (Arts. 23, 25 and 26 of the 1984 Draft)

1. A debtor owing several monetary obligations which are due to the same creditor may specify, at the time of payment, which debt he intends the payment to be applied to.

2. However, payment made is to discharge any interest due before the principal.

3. When the debtor has accepted a receipt whereby the creditor has imputed what he has received to one of the debts, the debtor may no longer require imputation to a different debt.

Article 17 (Art. 27 of the 1984 Draft)

In the absence of imputation by the parties, payment is imputed to that debt which the creditor has the greatest interest in receiving.

When the interest is equally divided, payment is imputed to the debt which became due first.

All things being equal, imputation is effected proportionally.

Article 18 (new)

Articles 16 and 17 apply accordingly to the appropriation of payment of non-monetary obligations.

enough, that the non-performance will be a fundamental one, and that the party who is to receive performance gives notice of termination within reasonable time from the moment he became aware or ought to have become aware of the fact that due performance would not be made.

(A rule, as the one provided in UCC art. 2.609 has been considered, but not yet drafted. Under this rule the receiving party has a right to ask for adequate assurance of due performance in case he has reasonable grounds to suspect a future non-performance by the other party).

Art. 5

a. Termination Excluded when Restitution is Impossible

Art. 5 embodies the principle that a contract for delivery of tangible property may only be terminated if the property received under the contract can be returned in substantially the same condition. This restriction does not lead to any injustice to the aggrieved party. Even if he cannot terminate the contract he may recover damages resulting from the other party's non-performance or obtain a reduction of the price relating to contracts.

b. Rule Applicable to Tangible Property

Art. 5 applies only when the performance received is tangible property which can be restored. It covers immovable and movable property including bearer share certificates.

It applies to contracts for the transfer of property and use, such as sale, barter, bailment and lease.

c. Restitution when the Party Who has Received Performance is not Responsible for the Loss

Under art. 5 (2) the buyer does not lose his right to terminate the contract even if restitution has become impossible when this is due to certain contingencies for which the buyer cannot be held responsible, see para 2 a) - c). If in the case mentioned under c) the transformation of the goods or their consumption gave the receiving party a benefit he must account for it to the supplying party.

Art. 5 does not entitle the receiving party to terminate if he has resold the property and is unable to return it to the seller for other

reasons than those laid down in para 2, cfr. CISG art. 82 (2) (c).

Art. 6

a. The General Approach

Termination releases both parties from their duty to effect and to receive performance. The contract, however, is not cancelled in the sense that it is treated as if it never has been made. Other rights and duties still persist, see para 2 on damages and para 3 on dispute settlement and on other rights and duties provided in the agreement such as a covenant not to use or divulge confidential information.

Art. 6 states the general rule that termination of a contract has no retroactive effect. A party who has performed cannot get restitution of what he has supplied. In many contracts a literal restoration is not possible. This applies to work and labour, services, the hiring out of goods and the letting of premises, and the carriage and custody of goods. A party who has received a performance of this kind cannot give it back. In contracts for sale or barter restitution may become impossible when the goods have perished or have been consumed or transformed.

In all these situations the party who has received a performance which he cannot return might retribute the value of it and various legal systems provide for such a restitution. However, art. 7 and 8 only give a retroactive effect to termination in those cases where the aggrieved party can get back what he has performed under the contract, i.e. money paid (art. 7) or property which in casu can be returned (art. 8). If in these cases the aggrieved party is able to return what he has received he must also do so. Art. 5 deals with the situation where the aggrieved party cannot return tangible property which he has received.

b. Operation of the Rules Illustrated by an Example

The operation of art. 5 - 8 may be illustrated by an example:
A sells to B a specified production machinery and discloses to B confidential information which is necessary for the production. B agrees not to divulge the confidential information as long as it has not become publicly known. The contract further contains a

clause referring disputes to the courts of A's country. After B has placed the machinery into operation serious defects in the machinery lead to a shutdown of B's assembly plant. B declares the contract terminated and claims damages.

The termination has the effect that each party must return to the other what he has received, A the payment and B the machinery, see art. 7, that B has a duty not to divulge the confidential information as long as it remains secret, see art. 6 (3), that B may claim damages for breach of contract, see art. 6 (2), and that any dispute relating to the contract and its effects are to be settled by the courts of A's country, see art. 6 (3).

c. Reason for the "Prospective" Approach

This "prospective" approach to restitution has been chosen for its simplicity. Rules on the aggrieved party's claim for restitution are not necessary in cases where he cannot get back the performance. The rules on damages will generally put him as nearly as possible in the position in which he would have been if the contract had been duly performed, see art. (Y). Cases may arise in which a defaulting party who is unable to return a performance received is also excused from making the counter performance and therefore not liable in damages. These cases are rare and may, if they ever occur, be regulated by the national rules on unjust enrichment.

Art. 7

a. Restitution of Money Paid

Under art. 7 a party may claim back money which he has paid for a performance which he did not receive. This rule has general application where a party who has prepaid money rightfully rejects performance by the other party or where the latter fails to effect performance.

b. Application of Art. 7 to Various Specific Contracts

1^o. Sale of Tangibles and Intangibles

The rule in art. 7 applies to sale of goods or other property where the party who was to furnish the property either did not make any tender or the tender made was properly rejected by the party who had paid for it and thereby returned to the first party. In these cases the party who

paid money may claim it back.

If the party who paid did not return the tangible property which he has rejected he must do so concurrently with the repayment, see para 2. The rule on each party's right to withhold performance in art. X applies mutatis mutandis to these situations. If the aggrieved party is unable to return the property received the rules in art. 5 apply.

There is also a duty to return money paid where a party was to assign intangibles such as patents, know how, trademarks and copyrights which the other party properly rejected or did not receive.

c. Other Contracts

Money paid for services or work which were not performed or properly rejected should be repaid to the party who paid for it. The same principle apply to custody of goods and rent and lease of property. In these contracts a pro-rata rule will apply when the amount to be paid depends upon the period of time during which performance is made. The party who has paid may claim restitution of a payment covering a period of time during which he did not receive performance, either because he properly rejected it, or because the other party failed to provide it.

To take an example:

A has hired B's premises which B has assured can be adequately heated and A has prepaid 6 months' rent. When he moves in on August 1, he does not discover that the premises cannot be heated. When the cold weather comes on November 1, A immediately moves out. A can claim back rent for 3 months.

Art. 8

a. Art. 8 Applies to Tangible Property other than Money

Art. 8 provides for a retroactive effect of termination where a party has supplied a performance other than money which can be restored. If the contract is terminated he may claim back what he has supplied under the contract.

b. Third-Party Rights Are not Affected

Like other articles of this (book) art. 7 deals exclusively with the relationship between the parties and not with the effect which the contract may have on the property in question. Whether, for instance, a creditor of the buyer, the buyer's receivers in bankruptcy, or a bona fide purchaser may oppose the restitution of goods sold is to be determined by the applicable national law.

c. Money Must be Repaid

Often a party will terminate the contract because he has not received payments for the goods. If, however, he has received payment he will have to repay it concurrently with the restoration of the tangibles when he terminates the contract, see comment a. to art.7. A party who terminates a contract for delivery of goods by instalments because of failing payment for one instalment must repay the money he has received for earlier instalments concurrently with the restitution of these instalments.

The rules in art. (Y) on a party's right to withhold performance apply mutatis mutandis to the restitution.

d. Negotiable Instruments, Securities and Shares

A contract for the sale or assignment of stocks, shares, investment securities, negotiable instruments and debts is often performed by delivering the warrant certificate or other instrument which gives evidence of the right. If the contract is terminated the seller or assignor should be entitled to recover the paper irrespective of whether this paper is a negotiable instrument or not.

e. Industrial and Intellectual Property

If a contract for the assignment of a product of the mind is terminated literal restitution of the intangible is sometimes not possible.

However, restitution may be possible of industrial property rights such as patents and trade marks which may be transferred back to the assignor. Furthermore, it may be possible to give back things which attach to the intangible. Know-how and literary works are written on

paper, paintings are made on canvas, sculptures cast in bronze. Tangible things which in this way materialize the product of the mind must be returned when the contract is terminated.

f. Art. 8 also Applies to Bad Bargains

Art. 8 applies also when the party who supplied the property made a bad bargain. Let us take an example:

A has sold a Renoir painting to B for 200.000 US\$; the true value of the painting is over 250.000 US\$. When the picture is delivered to B, he does not pay for it. A is entitled to claim back the painting.

g. Restoration is Impossible or too Onerous

The rules in (2) on performance in natura applies mutatis mutandis to the claim for restitution. The aggrieved party cannot claim back the goods or other tangibles when it has become impossible or would involve the defaulting party in an unreasonable effort or expense.