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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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PERFORMANCE OF CONTRACT

Article 1 (Art. 1 of the 1984 Draft)

1. The parties shall perform their obligations in accordance with their content and in a manner corresponding to their nature and economic purpose.

2. Each party shall cooperate with the other party, when such cooperation is necessary for the performance of that party's obligations.

Note : The explanatory note will refer to Article X (intended to state in general terms the duty to observe the principle of good faith).

Article 2 (Art. 2 of the 1984 Draft)

If an obligation of a party involves a duty of care in the performance of an activity, the party is obliged to observe the reasonable diligence required in activities of the type involved in the particular trade concerned.

Article 3 (Art. 6 of the 1984 Draft)

1. When a party is obliged to deliver goods, they must be of the quantity, quality and description required by the contract and be contained or packaged in the manner required by the contract.

2. The goods do not conform with the contract unless they:

- (a) are fit for the purposes for which goods of the same description would ordinarily be used;
- (b) are fit for any particular purpose expressly or impliedly made known to the obliged party at the time of the conclusion of the contract, except where the circumstances show that the other party did not rely, or that it was unreasonable for it to rely, on the obliged party's skill and judgement;

- (c) possess the qualities of goods which the obliged party has held out to the other party as a sample or model;
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

3. The obliged party is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the other party knew or could not have been unaware of such lack of conformity.

Note : The drafters have reservations about article 3, directly inspired from CISG, for two main reasons :

- 1) it is much too detailed for a codification of a general scope such as ours;
- 2) it puts the emphasis on the express or implied contractual agreements, obviously avoiding to refer to trade usages. It was probably deliberate in CISG, but do we have to adopt the same attitude ?

One should at least be coherent, and we feel is not the case with our articles 2 and 3: the former refers to usages, the latter to a much stricter contractual interpretation.

The problem was recognized when trying to draft article 2 bis, dealing with obligations to achieve specific results.

On the line with art. 2, it could read as follows :

"When a party is obliged to achieve a specific result, that result must be of the quality usually required in the particular trade concerned".

But on the line with art. 3, it could look like this :

- " § 1. When a party is obliged to achieve a specific result, that result must be of the quality and description required by the contract.
- § 2. The result does not conform with the contract unless it :
  - a) is fit for the ordinary purposes of the performed service;
  - b) is fit for any particular purpose ... (continue as art. 3 § 2 b)
- § 3. (adapted version of art. 3 § 3)".

If we want to follow the CISG model, we should redraft art. 2. But our preference would go to less strict provisions, admitting references to usages where parties have not provided for everything.

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.