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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

Chapter 6 : NON PERFORMANCE

Section (a) : Performance in natura

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Section (b) : Termination for non-performance

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Section (a)

PERFORMANCE IN NATURA

Art. 1 Performance of Monetary Obligation

If the debtor of an obligation to pay money does not make payment, the creditor may demand payment.

Art. 2 Performance of Non-monetary Obligation

- 1) If the obligor of an obligation other than to pay money does not perform, the obligee may demand performance.
- 2) However, performance cannot be demanded where
 - a) performance is impossible in law or in fact; or
 - b) performance would involve the obligor in unreasonable effort or expense; or
 - c) the obligee may reasonably obtain performance from another source; or
 - d) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship; or

e) the obligee does not demand performance within a reasonable time after he has, or ought to have, become aware of the non-performance.

Art. 3 Reparation of Defective Performance

The obligee may demand from the obligor to repair or replace a defective performance. The provisions of artt. 1 and 2 apply accordingly.

Art. 4 Judicial Penalty

1) Where the court orders the obligor to perform, it may also direct that the obligor pay a penalty if he does not comply with the order.

2) The penalty shall be paid to the obligee unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the obligee does not affect any claim for damages.

Art. 5 Unenforceable Claim for Performance in Natura

If a claim, a judicial decision or an arbitral award for performance in natura cannot be enforced, the obligee is not precluded from invoking any other remedy for non-performance.

TERMINATION FOR NON-PERFORMANCE

Art. 1. The Right to Terminate the Contract

(1) A party may declare the contract terminated if the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) A non-performance of an obligation is fundamental if

- a. strict compliance with the obligation which has not been performed is of essence to the contract; or
- b. the non-performance substantially deprives the aggrieved party of what he was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result; or
- c. the non-performance is intentional and gives the aggrieved party reason to believe that he cannot rely on the other party's future performance.

Art. 2. Termination after Notice Fixing Additional Period for Performance

(1) In case of delay in performance the aggrieved party may in a notice to the defaulting party fix an additional period of time for performance. When the delay does not amount to a fundamental non-performance under art. 1 the additional period, if not of reasonable length, shall be extended to a reasonable length.

(2) If a defaulting party fails to perform before the time allowed him under para (1) has expired the aggrieved party may declare the contract terminated if he has not already provided for its termination in his notice to the defaulting party.

Art. 3. Notice of Termination

(1) A party will lose his right to declare the contract terminated for non-performance unless he gives notice of termination to the other party within a reasonable time after he has or ought to have become aware of the non-performance.

(2) A party to whom performance has been tendered late will lose any right he may have to declare the contract terminated unless he gives

notice of termination to the other party within a reasonable time after he has or ought to have become aware of the tender.

(3) Where no performance has been tendered notice in accordance with para (1) is required only when the aggrieved party has reason to believe that the defaulting party intends to tender performance.

Art. 4. Anticipatory Non-Performance

Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by him, the other party may declare the contract terminated provided he gives notice of termination within reasonable time after he became aware or ought to have become aware that due performance would not be made.

Art. 5. Termination Excluded

(1) A party who has received tangible property loses the right to terminate the contract for non-performance if he is unable to make restitution of the property substantially in the same condition in which he received it.

(2) Para (1) does not apply

- a. if the impossibility of making restitution of the property or part thereof substantially in the condition in which the party received it is not due to his act or omission; or
- b. if the property or part of it has perished or deteriorated as a result of a normal examination; or
- c. if the property has been consumed or transformed in course of normal use by the party who received it before that party became aware or ought to have become aware that he was entitled to terminate the contract.

Art. 6. Effects of Termination in General

(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance, but, subject to art. 7 and 8, does not affect the rights and liabilities that have accrued at the time of termination.

(2) Termination does not preclude a claim for damages for non-performance.

(3) The termination does not affect any provision in the contract for the

settlement of disputes or any other provision of the contract capable of surviving its termination.

Art. 7. Restitution of Money Received

(1) On termination of the contract a party may claim restitution of money paid for a performance which he did not receive or which he properly rejected.

(2) Concurrently with the repayment a party will have to return property which he has received from the other party.

Art. 8. Restitution of Property

On termination of the contract a party who against payment of money has supplied property may claim restitution of whatever he has supplied provided that he makes a concurrent restitution to the other party of the money received.

Comment

A. In General

a) Non-performance must be serious

Termination of the contract is often a grave detriment for the defaulting party, and the aggrieved party should therefore not be permitted to terminate the contract in case of any failure in performance. Art. 1, 2 and 4 express the principle that termination may be declared only if the non-performance has assumed or will assume a certain high degree of seriousness.

b) Termination also if non-performance is excused

The rules in this part are intended to apply both in cases where the non-performance is attributable to the defaulting party, and where it is excused so that the aggrieved party can claim neither specific performance nor damages for non-performance, see the comment b. on art. 3 below.

c) Termination operates "de plein droit"

In all cases the termination of the contract is effected by the act of the aggrieved party alone, mostly by giving notice of termination, see art. 3. If the requirements of art. 1, 2 and 4 are satisfied no period of grace may be granted to the defaulting party in case of delay.

B. The Articles

Art. 1

The Fundamental non-performance

Art. 1 lists three situations where the non-performance is fundamental and therefore gives the aggrieved party the right to terminate the contract.

Art. 1 (1) looks not at the actual gravity of the non-performance but at the assumption in the contract that strict performance by one party is a correlative of the other party's duty to perform. Such obligations of strict performance are common in commercial contracts. For example, it is a rule in many systems of law that in a commercial sale time of delivery is of the essence; that in a documentary credit transaction the documents tendered must conform strictly to the terms of the credit; that a tender of goods under a contract of sale which does not conform to the contract description may be rejected by the buyer even if what is tendered is no less in value than the goods contracted for.

Art. 1 (2) and (3) require that the breach is serious in itself or brings evidence of an intention not longer to be bound by the contract.

Art. 2

The "Nachfrist"

Art. 2 introduces the Nachfrist-procedure of German law. It may be applied where the non-performance is not fundamental. In that case the additional time for performance must be of a reasonable length. The determination of which period of time is reasonable must ultimately be left to the court. Several factors should be regarded such as the period of time set for performance in the contract, the need of the aggrieved party - apparent to the defaulting party - for prompt performance, the nature of the performance - complicated or simple - and the event which causes the delay - excusable or not.

The "Nachfrist" may also be given when the non-performance is fundamental. In that case the aggrieved party may not terminate the contract if the defaulting party performs his obligations within the time set for performance.

In order for the notice to be effective it must be for a fixed period of time. It will not suffice to ask for performance "as soon as possible" or "within reasonable time".

Art. 3a. The Requirement of Notice

Art. 3 rests on the assumption that an aggrieved party who wishes to terminate the contract must give notice thereof to the other party. Uncertainty as to whether the aggrieved party will accept the performance or not may cause a loss to the defaulting party which is disproportionate to the inconvenience which the aggrieved party will suffer from giving notice. A requirement of notice will also prevent the aggrieved party from speculating for a rise or a fall to the detriment of the defaulting party.

b. The Status Quo

Art. 3 also adheres to the principle that an aggrieved party who wishes to maintain status quo needs not give notice when performance has been tendered, see para 2, and when no performance has been tendered, see para 3. The rule in para 3 is compatible with the conception prevailing in those legal systems under which a total and lasting force majeure destroys the contract ipso facto, and termination needs not be declared. If, however, the frustrating event is temporary or causes a partial or defectful performance only, and the defaulting party expressly or by implication makes known to the aggrieved party that he intends to perform when possible or to make a partial or defectful performance the other party must give notice if he wishes to terminate.

c. The Reasonable Time

The aggrieved party must give notice within a reasonable time. What is reasonable time depends upon the circumstances and must ultimately be decided by the court. Where the aggrieved party may easily get substitute goods or sell the goods and may thus speculate for a fall or rise in the price of the goods notice must be given without delay. Where he has to investigate whether he can get substitute performance from other sources the reasonable period of time will be longer.

Art. 4Anticipatory Non-Performance

The effect of art. 4 is that a non-performance which is to be expected is equated with a non-performance which has occurred at the time when performance fell due. The requirements are that it is clear that there will be non-performance, a suspicion, even a well founded one, is not