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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

Chapter 5 : PERFORMANCE

Section 1 : Performance in General

(Text and Comments prepared by Professors M. Fontaine, D. Maskow and J. Rajski following the discussions at the meeting of the Working Group held in Potsdam-Babelsberg from 28 to 30 November 1985)

Rome, April 1987

Article 1 (ex - 1§1)
(Express and implied obligations)

The parties shall perform their obligations as expressly or impliedly required by the contract.

Article 2 (ex - 2)
(Duty of care)

To the extent that an obligation of a party involves a duty of care in the performance of an activity, that party is obliged to observe the diligence observed by reasonable persons of the same kind in activities of the same type.

Article 3 (new)
(Duty to achieve a specific result)

To the extent that an obligation of a party involves a duty to achieve a specific result, that party is obliged to achieve a result of the quality usually achieved under obligations of the same type.

Article 4 (new)

In determining whether an obligation of a party involves a duty of care in the performance of an activity or an obligation to achieve a specific result, the following circumstances may be significant:

- (a) the wording of the contract;
- (b) the contractual price (in particular the way it is calculated);
- (c) the degree of uncertainty normally involved in trying to achieve the promised result;
- [(d) the other party's ability to influence the performance of the obligation.]

Article 5 (ex - 1§1)
(Cooperation between parties)

Each party shall cooperate with the other party, when such cooperation may reasonably be expected for the performance of that party's obligations.

Article 6 (ex - 4)
(Partial performance)

(1) If the whole of one party's performance can be rendered at one time, it is due at one time.

(2) Variant 1: A party may not, however, refuse a partial performance if, given the circumstances, it would be contrary to good faith to do so.]

Variant 2: A party may not refuse partial payment of a sum of money.]

(3) Additional expenses caused to the other party by partial performance are to be borne by the performing party.

Article 7 (ex - 8)
(Time of performance)

A party must perform its obligations:

(a) if a time is fixed by or determinable from the contract, at that time;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 8 (ex - 9 and 10)
(Earlier performance)

(1) If the time of performance is fixed or determinable from the contract, a party is not entitled to make an earlier performance.

(2) The other party may not, however, refuse an earlier performance if given the circumstances it would be contrary to good faith to do so.

(3) A party who accepts an earlier performance is not thereby obliged to render an earlier performance in exchange.

(4) Additional expenses caused to the other party by earlier performance are to be borne by the performing party.

Article 9 (new)
(Simultaneity of performance)

(1) If the parties' performances can be rendered simultaneously, they are due simultaneously, unless the circumstances indicate otherwise.

[2) If the performance of only one party requires a period of time, its performance is due at an earlier time than that of the other party, unless the circumstances indicate otherwise.]

Article 10 (ex - 7)
(Price determination)

(1) If a contract 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 performances under comparable circumstances in the trade concerned.

(2) When no such price is available, and in the absence of any indication to the contrary, a reasonable price is to be determined by the performing party.

Article 11 (ex - 11 and 12)
(Place of performance)

(1) If the place of performance is not fixed by nor determinable from the contract, a party is to perform:

(a) a monetary obligation, at the creditor's place of business at the time of conclusion of the contract;

(b) any other obligation, at its place of business at the time of conclusion of the contract.

(2) Unless the circumstances indicate otherwise, the entitled party may move the place of performance to its new place of business, if this does not cause an unreasonable inconvenience for the other party notified thereupon in due time.

(3) Additional expenses caused to the other party by such change of the place of performance are to be borne by the party that effected the change.

Article 12 (ex - 13)
(Payment by funds transfer)

- (1) Unless the creditor has indicated a particular account, payment can be made by a transfer to any of the financial institutions in which the creditor has an account.
- (2) Payment by a transfer is completed when the transfer to the creditor's financial institution becomes effective.

Article 13 (ex - 14)
(Payment by cheque)

- (1) Payment can be made by a cheque or a similar instrument by which the debtor instructs a financial institution to pay, unless the creditor refuses to accept it.
- (2) Such payment is made subject to the condition that the instrument will be honoured by the financial institution, unless the circumstances indicate otherwise.

Article 14 (ex - 6)
(Currency of payment)

- (1) Unless the circumstances, including exchange regulations, indicate otherwise, 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.]

Article 15 (new)
(Currency not specified)

If the contract does not indicate in which currency a monetary obligation is due, payment is to be made in the currency usually agreed between parties to contracts of the type involved in the trade concerned.]

Article 16 (ex - 15)
(Taxes and duties)

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

Article 17 (ex - 16)
(Appropriation of payments)

- (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 18 (ex - 17)

- (1) In the absence of imputation by the parties, payment is imputed to that debt which the creditor has the greatest interest in receiving.
- (2) When the interest is equally divided, payment is imputed to the debt which became due first.
- (3) All things being equal, imputation is effected proportionally.

Article 19 (ex - 18)

Articles 17 and 18 apply accordingly to the appropriation of payment of non-monetary obligations.

Article 20 (ex - Chap. 4)
(Application for public permission)

- (1) Where the law of a State requires a permission the absence of which would wholly or in part affect the validity of the contract or render its performance impossible, the party who has its place of business in that State shall take the measures necessary to obtain the permission.

(2) Where none of the parties has a place of business in that State, the party whose performance requires permission shall take the necessary measures.

Article 21 (ex - Chap. 4)

(Procedure in applying for permission)

(1) The party required to take the measures necessary to obtain the permission (the applicant party) shall do so without undue delay and with due diligence. He shall bear any expenses so entailed.

(2) The applicant party shall inform the other party of the grant or refusal of such permission without undue delay. He shall not be entitled to rely in relation to the other party on the full effectiveness of the contract, if he has not informed the other party of the grant of permission.

Article 22 (ex - Chap. 4)

(Failure to obtain permission)

Both parties are entitled to terminate the contract if, notwithstanding the fact that the applicant party took all measures required, he failed to obtain a grant of permission within an agreed period or, where no period has been agreed, within a reasonable period from the conclusion of the contract.

COMMENTS

Article 1 - Express and implied obligations

This provision states the very general principle according to which parties have to perform their obligations "as expressly or impliedly required by the contract". Earlier versions of this provision referred to the "nature" and "economic purpose" of the contract; these standards were rejected as being too vague and ambiguous. The new rule adopted at Potsdam stresses that the parties' obligations are not limited to what the contract provisions expressly stipulate; other obligations can be implicit. For instance, the seller of a sophisticated machine has the obligation to give the buyer the necessary technical information, even though it was not expressly stipulated. The principle of Art. 1 is closely connected to the requirement of good faith expressed in several civil law codifications (e.g. French C.Civ., Art. 1134 al. 3 and 1135; §242 B.G.B.; Netherlands B.W., Art. 1374 al. 3; Netherlands N.B.W., Art. 6.1.1.2., Port. Civil Code, Art. 762, 2°).

Articles 2 - 4 - Duty of care, duty to achieve a specific result

These three provisions retain the distinction between "obligations de moyens" and "obligations de résultats", familiar to some legal systems, and felt to correspond to two typical degrees of intensity of a party's obligations. In the first case, a party bound by a duty of care has to exercise its best efforts to perform, but does not guarantee the achievement of any specific result. A distributor, for instance, will promise to expand the sales of a product on a particular market without necessarily promising to reach a certain quota. In the second case, on the contrary, the obligation is more intense, as a specific result is promised. A carrier, for instance, does not merely promise to do his best to transport the goods, he promises to bring them to destination, undamaged, at the agreed moment.

Articles 2 and 3, adopted in Potsdam, attempt to define more precisely what is meant by "duty of care" and "duty to achieve a specific result". In both cases reference is made to what is usually expected in activities or obligations of the same kind. Can it be hoped that these broad criteria will be of some utility? It is difficult to be more precise in provisions of such a general scope of application.

Article 4, drafted by the Rapporteurs according to the wish expressed in Potsdam, tries to enumerate some of the criteria which may help to distinguish a mere duty of care from an obligation to reach a specific

result. The wording of the contract may be sufficiently clear. Otherwise, the contractual price can give a clue: a higher price can indicate a reinforcement of the obligation towards the promise to achieve a specific result. The basic criterion is however expressed at littera (c): it can be presumed that a specific result has not been promised when its achievement is normally subject to a high degree of uncertainty. Littera (d) had been put between brackets: the Rapporteurs feel this fourth criterion is already implied by the preceding one.

The Rapporteurs have some doubts about the usefulness of Articles 2-4. Articles 2 and 3 have really little meaning.

Article 5 - Cooperation between parties

In the traditional view, each party can claim performance of the other party's obligations, without any duty to provide any assistance unless specifically agreed. The development of the requirement of good faith in the law of contract has somewhat modified the perspective. A contract is no longer considered as a mere combination of conflicting interests, but as a common project to which each party must cooperate.

This "moralization" of contract law corresponds to a trend which should be especially encouraged in international contracts. Article 5, adopted at Potsdam, is inspired by Art. 259 of the G.I.W. of the German Democratic Republic. The duty to cooperate must of course be contained within certain limits, so as not to upset the allocation of duties in the performance of the contract. Article 5 thus refers to the cooperation which may "reasonably be expected".

Article 6 - Partial performance

1. Art. 6 §1 states the established rule that a party which can give its whole performance at one time is expected to do so. It is therefore not entitled to perform in instalments, nor is it entitled to perform only a part of its obligation at the date of maturity.

2. The above rule may appear, however, to be too rigid in view of special circumstances which have to be taken into account in international economic relations. This is why the Rapporteurs propose a flexible solution in this respect which does not leave it to the discretion of a party to refuse or to accept a partial performance by the other party, as this would introduce a great amount of uncertainty and would be inconsistent with the general principles laid down in §1. Thus, in exceptional cases, justified by special circumstances and good faith considerations, a party may not refuse a partial performance (variant A). Another possibility would be to limit the

right to partial performance to the case of monetary obligations (variant B). Either of the above proposed solution presupposes that the additional expenses caused to the other party by partial performance are to be borne by the performing party.

Article 7 - Time of performance

This provision, which the group decided to reformulate along the lines of Art. 33 of CISG, distinguishes the following three situations: first, there is an agreement on a fixed or determinable time of performance; second, there is an agreement on a period of time during which the performance may be made and third, there is no agreement to that effect. In the second case the rule is that a party may perform its obligation at any time within the agreed period. An exception from that rule is introduced in order to take into account specific circumstances which indicate that the other party is to choose a time. When no time of performance has been agreed, a party must perform his obligation within a reasonable time after the conclusion of the contract. This flexible solution, being based upon an objective criterion (lapse of a reasonable time), does not privilege any party (fixing the time of performance has not been left to a discretionary decision of any of them). What is reasonable time depends on the nature of the performance involved and on the circumstances (good faith).

Article 8 - Earlier performance

A compromise formula tending to reconcile the possible extreme solutions, which either fully authorize an earlier performance or totally prohibit it, has been adopted.

Thus Art. 8 states that as a general rule an early performance is not permitted and therefore may not be imposed upon the other party. This solution is in conformity with Art. 52 (1) of CISG. It is justified by the fact that the performance is usually scheduled in accordance with the creditor's activities and availabilities and an earlier performance may cause him some inconvenience and additional expenses. However, if this is not the case, i.e. in the given circumstances it would be contrary to good faith to allow the creditor to refuse an earlier performance, the other party is entitled to render it. Additional expenses to the creditor caused by an earlier performance are to be borne by the performing party.

Finally, the acceptance of an earlier performance does not oblige the accepting party to render an earlier performance in exchange.

Article 9 - Simultaneity of performance

This provision adopted at Potsdam and inspired by §234 of the Restatement on Contracts, 2nd, states that for bilateral contracts simultaneity of performance is the rule. Stipulations to the contrary are of course frequent, and circumstances can also indicate otherwise.

In many contracts, such as contracts for services, it happens that the performance of only one party requires a period of time. Art. 9 §2 provides that in such a case that performance is due at an earlier time than that of the other party, unless the circumstances indicate otherwise. This principle has been put between brackets, as decided at Potsdam, because it does not correspond to actual usages in many sectors (cf. insurance, transportation, leases, etc ...). The Rapporteurs would suggest to delete this §2.

Article 10 - Price determination

This provision, adopted at Potsdam, is inspired by Art. 55 of CISG. Even though some legal systems (e.g. France) have much stricter requirements as to price determination, it is felt that such a flexible rule fits the needs of international trade.

The new wording of paragraph 2 intends to leave open the problem of the burden of proof as to the reasonableness of the price determined by the performing party. This problem should be solved according to the applicable rules on the burden of proof in general.

As the Rapporteurs do not favour the extension of this article to the lack of determination of other terms of the contract (comp. Restatement on Contracts, 2nd, §204), they do not submit any provision of such a general character.

Article 11 - Place of performance

1. If the place of performance is neither fixed nor determinable from the contract, different rules apply according to the nature of the obligation.
2. The place of a monetary obligation is the creditor's place of business, unless the circumstances indicate otherwise.

This solution, which was decided by the Group, seems in the opinion of the Rapporteurs to be incomplete as it fails to indicate the time which is relevant for the determination of the creditor's place of business. As a matter of fact both possible solutions (the time of the conclusion of the

contract or the time of payment) were rejected by the Group, as giving rise to difficulties. It was pointed out that the first one might be a source of trouble if the creditor changed his place of business after the conclusion of the contract, while the second may give rise to difficulties when the creditor failed duly to inform the debtor of his move, also as regards currency restrictions that may be involved in such a move. Finally the Group recommended that express reference be made in the explanatory notes to the case of a supervening change in the creditor's place of business indicating that an appropriate solution "must be found in each single case in the light of the general principle of good faith and the duty of cooperation between the parties in the performance of their respective obligations". Thus no indication would be given to the parties in this respect, which would create a high degree of uncertainty as to the final place of performance. This is why the Rapporteurs are of the opinion that it would be advisable to indicate the time of the conclusion of the contract as relevant, thus drawing the parties' attention to the necessity of including, whenever appropriate, special stipulations in their contract.

3. As far as obligations other than monetary obligations are concerned, the place of performance is the debtor's place of business. This is in conformity with the general principle that in cases of doubt it is implied that the debtor has undertaken the least burdensome obligation.

Here again it seems advisable to indicate the time of the conclusion of the contract as relevant for the determination of the debtor's place of business both in order to safeguard a desirable degree of certainty, and in order to protect the interests of the creditor.

4. The entitled party may as a rule move the place of performance to its new place of business on condition first, that this does not unreasonably inconvenience the other party and second, that it notifies the other party in due time.

If, as a result of a change of the place of performance, there is any increase in the expense of performance, this increase must be borne by the party who has changed the place of performance.

Article 12 - Payment by funds transfer

1. The debtor is entitled to make payment by a transfer to any of the financial institutions in which the creditor has an account, unless the latter has indicated a particular account for that purpose. As used in this article, "transfer to /a/ financial institution" means a system of debiting and crediting accounts with banks or similar financial institutions including electronic funds transfer.

"Financial institution" means any institution which as an ordinary part of its business engages in transfers of money for itself and for other parties irrespective of its status under the relevant banking law. This broad concept of transfers has been adopted in order to prevent delineation problems when applying the rule embodied in Art. 12 in the world's various legal systems.

2. The concept of performance of a monetary obligation has been associated in Art. 12 §2 with the effectiveness, i.e. finality, of the funds transfer to the creditor's financial institution. The moment at which the transfer is to be considered final is to be settled according to proper financial (banking) practices and law. As a matter of fact, different legal systems have fixed different points of time for funds transfer to be considered final (debit to the account of the transferor; credit to the account of the transferee bank; notice of credit to the account of the transferee bank; decision of the transferee bank to accept credit transfer; entry of credit to transferee's account; decision not to reverse credit which was entered subject to reversal; notice of credit to the transferee's account). The matter is further complicated by the changes in procedures for the transfer of funds brought about by the different types of electronic funds transfer in use. It has, for example, become apparent that the timing for the entry of debits and credits to a customer's account is in large measure an arbitrary matter.

It is worthy of note that an attempt to establish a new understanding regarding the time when a funds transfer is final has been undertaken in UNCITRAL in the form the preparation of model rules on the subject of electronic funds.

Article 13 - Payment by cheque

1. This paragraph states a rule according to which the debtor may make payment by a cheque or by a similar instrument by which he instructs a financial institution to pay, however, on condition that the creditor does not refuse to accept it. The creditor has therefore a discretionary power as to the acceptance of a cheque or of a similar instrument, even where neither the contractual provisions nor he himself ever excluded such a way of payment. This is why some members of the Group suggested the adoption of a provision similar to that contained in §249 of the American Restatement (Second) on Contracts, according to which a creditor who refuses to accept such an instrument must give the debtor any extension of time reasonably necessary to procure legal tender. The majority of the Group decided, however, not to state expressly such an additional condition (it was argued that it follows from the general principle of good faith that a creditor who refuses a cheque without any valid reason should at

least offer the debtor the possibility of curing his defective performance by making the necessary arrangements for another mode of payment within a reasonable time).

2. It is commonly accepted that a cheque or other similar instrument is "conditional payment". Para. 2 of Art. 13 states this result in terms of honouring of the instrument by the financial institution. The circumstances may, however, indicate another result, e.g. in cases of payment made by means of a so-called guaranteed cheque or of a similar unconditionally guaranteed instrument. In such cases a resolutive condition that the cheque is to be honoured is not included.

3. Art. 13 does not deal with the question of the date from which payment by cheque or by a similar instrument shall be deemed to be effective. It was understood that it should be the date from which the sum indicated by the cheque is credited to the creditor's account. Since, however, this date may vary in different countries, it was decided not to deal with it in the draft, on the understanding that should the creditor dispose of the sum at a later date than that of the maturity of the obligation, the debtor should be liable for breach.

Article 14 - Currency of payment

1. The rule stated in Art. 14 §1 according to which the debtor has a choice between making the payment either in the agreed currency or in the currency of the place of payment, unless the circumstances indicate otherwise, was decided by the Group as a compromise solution.

The Rapporteurs have doubts about its appropriateness as it seems to be inconsistent with both basic contractual assumptions and widely accepted practice.

First of all it is contrary to the basic assumption that the creditor may demand and the debtor must make payment in the agreed currency, i.e. to the right to demand performance in accordance with the content of the contractual obligation.

Secondly, it appears to be contrary to widely accepted practice. As a matter of fact, it is common in international commercial practice to stipulate payment in defined currency (e.g. US dollars) to be made at named banks in countries with other currency, and this does not at all mean that the debtor in reality has the right to pay in the currency of the place of payment. Thus the opposite rule to that embodied in Art. 14 would be more consistent with international contractual practice.

A mitigation of the rule adopted in Art. 14 by referring to circumstances indicating otherwise does not seem to be very useful. What circumstances (apart from exchange controls which do not necessarily constitute a factor relevant to the debtor's right as to the medium of payment) would make it clear that, for example, US dollars as a numeraire are really also required as medium of payment?

2. As to the provision contained in Art. 14 §2, we are of the opinion that the proper place to deal with the question would be the chapter on non-performance.

Article 15 - Currency not specified

Art. 15 deals with the case when the parties neither expressly nor impliedly determined the currency in which the payment is to be made.

This may happen, for example, where the parties have not expressly or impliedly determined the price, or when the contract provides for certain expenses to be borne by a party without specifying the currency of payment.

The solution adopted in Art. 15, as proposed by the Group, has been modelled upon §49(2) of the GDR International Economic Contracts Act.

The reference to the currency usually agreed between parties to contracts of the same type is further specified by the indication of the trade concerned, which permits the taking into account of the requirements specific to the given field of international economic relations (e.g. the requirements of agreements related to international payments concluded between the States concerned, or the currency law of these States).

Article 16 - Taxes and duties

The allocation of cost provided by this article was the subject of much discussion in Milan, and it was decided to put the provision between square brackets. Another solution, expressed in an earlier version, of the draft, obliged each party to pay the taxes and duties connected with the contract in the State of its place of business; taxes and duties in other States connected with the obligation of a party fell to the lot of that party.

The Group did not have time to reconsider this provision at Potsdam.

Articles 17-19 - Appropriation of payments

Appropriation of payments can be made by the debtor at the time of payment, with the reservation that payment made is to discharge any interest due before the principal. But a debtor who has accepted a receipt whereby the creditor has himself made an appropriation may no longer require a different one.

In the absence of appropriation by the parties, Art. 18 provides for different criteria.

These rules have been redrafted after the Milan meeting. There was no time to reconsider them at Potsdam.

Articles 20-22 - Public permission requirements

At its meeting held in Rome from 7 to 9 November 1983, the Working Group elaborated a text concerning public policy legislation. It was composed of two parts, Article X determining the relevance of such legislation to contracts, and Chapter 4 determining the rights and obligations of the parties in relation to relevant public policy requirements.

This text was later commented and submitted to the Governing Council as Study L - Doc. 32. At the 64th session of the Governing Council, held in Rome from 13 to 17 May 1985, the idea of Art. X found no support. But on the other hand a substantial majority of members of the Governing Council was of the opinion that an attempt should be made to see whether some of the provisions contained in Chapter 4 could not find a more appropriate place in Chapter 5 which deals with performance. The Secretariat subsequently submitted some proposals in that direction (P.C. - Misc. 7).

The submitted text of Articles 20-22 is based on these proposals, and carries modifications of the Doc. 32 version only in so far as this became necessary as a result of the omission of some parts of the original proposal. The commentary of Doc. 32 has not been reproduced here, and will be updated when a final decision has been taken on whether such provisions should be concluded, and if so on how this should be done.

