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)

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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.7

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