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WORKING GROUP FOR THE PREPARATION OF  
PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

Chapter 6

NON-PERFORMANCE

Section 1: General Provisions

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CHAPTER 6

SECTION 1: General provisions

Article 6.1.1  
(Definition)

(....)

Comment

I have not attempted a definition as I do not at the moment understand the thinking which provides for a definition of non-performance at this point in the scheme. To an English draughtsman the purpose of defining non-performance here would be to ensure that the concept of non-performance was consistently used throughout the chapter and to avoid excessive verbiage by permitting the repeated use of the words non-performance without the need to set-out *in extenso* any qualifications or refinements which would be contained in the definition. I do not at the moment read the rest of chapter 6 as raising difficulties in understanding what is meant by non-performance which requires such a definition.

Article 6.1.2  
(Cumulation of remedies)

(1) Remedies which are not incompatible may be cumulated.

(2) In particular, a party is not deprived at any claim for damages or exercising his right to another remedy.

Comment

This is of course taken from the Commission on European Contract Law s. 2.101*Abis*. A similar rule is stated in the Vienna Convention articles 45 and 61. In *Bianca and Bonell*, p. 331 Will says "Some national laws such as the English, German and Hungarian ones, do not allow combining the remedy of avoidance of a contract with an action for damages." This statement is certainly wrong for English law which undoubtedly permits a plaintiff both to terminate a contract for a serious breach and to recover damages for that breach. This is because termination for breach operates prospectively and not retrospectively. The position may well be different where the plaintiff is seeking to argue that the contract should be treated as never having existed on grounds of initial invalidity. However the text as formulated would not bar this latter argument since it would certainly be possible to argue that the claims (a) the contract never existed and (b) I am entitled to damages for breach of it, are incompatible.

Presumably a plaintiff who chooses specific performance as his primary remedy and who receives an award of specific performance which is carried out by the defendant cannot later obtain damages (except perhaps for the delay in receiving performance). On the other hand a plaintiff who elects for specific performance as his primary remedy and either does not obtain an award from the court or, although he obtains an award from the court, does not in fact receive specific performance is not barred from suing for damages.

A question, which is not addressed in the text but which has bothered some systems, is whether there are any limits to the right of the plaintiff to change his mind about which remedy he regards as his primary remedy.

Article 6.1.3  
(Exemptions)

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or part of the contract, that party is exempt from liability only if:

- (a) he is exempt under the preceding paragraph; and
- (b) the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this convention.

Comment

This is of course article 79 of the Vienna Convention. A modified version of article 79 is to be found in section 2.101B of the Commission on European Contract Law. This provides in (1) that "A party is excused from non-performance if he proves that the failure to perform his obligation is due to an impediment beyond his control" ... and adds the words "its occurrence" after the word "avoided". European Contract Law does not contain an equivalent of 79(2). The European equivalent of (3) provides "When the impediment is only temporary the exemption provided by this

article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance according to s 2.102 the obligee may treat it as such".

The European equivalent of (4) is slightly differently worded and there is no equivalent of (5).

For one who did not participate in the debates leading up to these formulations, they give rise to a large variety of questions. These are of widely varying degrees of importance. For instance, I find the word "impediment" unattractive as a matter of English style, though it is now perhaps hallowed by usage.

There are significant problems about the relationship between an article in words such as this and other parts of the Principles

(i) The placing of the article suggests that it is aimed at post-contract impediments but the wording appears wide enough to cover pre-contract impediments. Is this so? If so what is its relation to articles 3.2 and 3.3?

(ii) What is the relationship between this article and article 5.2 Hardship.

(iii) I assume that it is taken for granted that it is open to the parties to make a wider provision. Many force majeure clauses in International Commercial Contracts are significantly wider than the article, for example, because they extend to impediments which could have been foreseen by the parties.

(iv) The provision for temporary impediments both in the Vienna Convention and in the European Contract Commission appears inappropriate at least for contracts other than sale. For instance, in a construction contract the length of the interruption may have no

precise causal relationship to the extent to which performance of the contract is dislocated. Suppose, for instance, we have a contract to dig and lay pipes across Siberia which is delayed for a month due to an unforeseen impediment out of the party's control and the effect of which is that work will now have to be carried out in the Siberian winter and not in the Siberian summer.

(v) The (rather narrow) English doctrines of impossibility and frustration operate, when they do operate, not by way of excuse for non-performance but automatically to bring the contract to an end. So the fact that one party cannot perform may be relied on by the other as a ground for termination. This was the situation in a number of leading English cases arising out of requisitions of chartered ships in the 1914-1918 war when charterers were willing to go on paying hire even though the ship was not available to them because they would then be able to collect the larger amount of compensation paid by the government. It is presumed that this possibility does not arise under the structure of provisions such as article 79 of the Vienna Convention.

The Vienna Convention provides in article 80 that "A party may not rely on the failure of the other party to perform to the extent that such failure was caused by the first party's act or omission." The Commission on European Contract Law in its draft section 2.101A(3) provides that "A party may not exercise any of the remedies set out in chapter 4 to the extent that the other parties failure to perform was caused by his own act or omission." Should a provision of this kind be inserted? I find the scope of article 80 not wholly clear. Insofar as the first party's act or omission constitutes a breach of contract a provision like article 80 appears unnecessary. In this context one must bear in mind furthermore that article 5.1.4 of the present text imposes a duty of cooperation on the parties.

I must also confess that it was not until I read Professor Tallon's commentary on article 80 in *Bianca and Bonelli* that I realised that article 80 covers the situation in which one party's failure to perform was due *in part* to the other party's act or omission. If it is desired to deal with that situation it might perhaps be done more clearly. It is perhaps closely allied to the question, recently much discussed in English law, as to whether and to what extent Contributory Negligence is a defence for actions for breach of contract.

Article 6.1.4

(Right to withhold performance)

The obligee is entitled to withhold performance of any of his obligations which are conditional on prior performance of some of his obligations by the obligor.

**COMMENT**

The right to withhold performance is closely related to the right to terminate since in practice the same events may first of all entitle a party to withhold performance and subsequently to terminate. Nevertheless, the right to withhold performance is analytically distinct.

It is easy to see examples of cases where one party's obligation is dependent on performance by the other party of some prior obligation. So in an International Sale Contract it may be that the seller does not have to ship the goods unless the buyer has previously opened a letter of credit in conformity with his undertaking. The text is an attempt to state this notion. It is obviously closely connected with article 5.1.8 (Order of performance):