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FOR INTERNATIONAL COMMERCIAL CONTRACTS

Chapter 6

NON-PERFORMANCE

Section 2: Specific Performance

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CHAPTER 6

NON - PERFORMANCE

SECTION 2: Specific Performance [Right to Performance]

Article 6.2.1

(Performance of Monetary Obligation)

If a party who owes an obligation to pay money does not pay, the other party may require payment.

[Reporter's alternative:

(1) If a party who is obliged to pay money does not do so, the other party may require payment.

(2) Payment may be required either in the currency of the proper place of payment or in the currency agreed upon in the contract, unless mandatory provisions of the proper place of payment require payment to be made in local currency.

(3) Effect must be given to exchange control provisions of the law of the forum or, by virtue of an international obligation or comity of the forum, of the law of another state.

(4) Where payment in conformity with the contract is prohibited by exchange control provisions of the law of the state where the debtor's assets are located the remedy provided for in par. 1 is suspended for so long as the relevant exchange control provision is in force. Where such payment is prohibited by an exchange control provision of the law of the proper place of payment, payment at another suitable place may be required.]

Comments

A. The Principle

Art. 6.2.1 (1) expresses the generally accepted principle that performance of a monetary obligation may always be required. The term "required" indicates that the party entitled to receive payment may make both a demand to the other party as well as address a court in order to enforce payment.

B. Exceptions

An action for the price of goods or services may, however, be excluded in certain circumstances. A prominent example are usages which require a seller to resell goods which are not accepted and paid for by the buyer; such usages prevail (art. 1.6).

C. Currency of Payment

Par. 2 indicates in which currency payment may be required. The person entitled to payment has two options: he may demand payment either in the local currency of the agreed place of payment or in the currency agreed upon in the contract (cf. art. 5.1.15 - 5.1.16).

To require payment in the local currency of the place of payment is a matter of convenience for both parties. The right to require such a payment corresponds to the right of the other party to make payment in that currency (cf. art. 5.1.15). The rate of exchange to be applied in this case is indicated by art. 5.1.15.

The right to require payment in the currency agreed upon follows from the principle which underlies art. 6.2.1 (1). Nevertheless, this right must be made subject to mandatory provisions which in some countries

require that local payments must be effected in local currency.

D. Exchange controls

More important in practice are exchange controls which exist in many countries. Their impact upon monetary obligations are regulated by par. 3 and 4.

Par. 3 envisages three cases in which exchange controls must be respected: First, those of the forum state itself; this rule does not require justification. In two instances, the exchange control provisions of other states must be respected: one is where the forum state is by international treaty obliged to do so; the most prominent example is the famous provision in the Bretton Woods Agreement art. VIII (2) (b) which is in force in all member countries of the International Monetary Fund. The second case is where according to the conflict of law rules of the forum foreign exchange controls are taken into account voluntarily, in the interest of either the foreign state or the contracting parties.

Par. 4 envisages cases which are not covered by par. 3. Here a distinction is made: Where exchange controls do in fact prevent the debtor from making payment because all his assets are located in the restricting country, the duty of payment is suspended (par. 4 sent. 1). By contrast, if exchange controls exist only at the agreed place of payment while the debtor has assets in other countries, it is equitable to allow a request for payment to be made at another suitable place where payment is possible (par. 4 sent. 2).

Article 6.2.2

(Performance of Non-Monetary Obligation)

If a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

- a) performance is impossible in law or in fact;
- b) performance is unreasonably burdensome or expensive;
- c) the party entitled to performance may reasonably obtain performance from another source;
- d) performance consists in an activity [is] of a personal character; or
- e) the party entitled to performance does not require performance within a reasonable time after he has, or ought to have, become aware of the non-performance.

Comments:

A. The Principle

A consequence of the principle of "pacta sunt servanda" is that the aggrieved party may require the performance of the contractual obligations assumed by the other party. The principle is the same as in the case of monetary obligations (cf. art. 6.2.1, Comment A); however, in the case of non-monetary obligations it is controversial between the Civil Law countries on the one hand which affirm it, and the Common Law countries on the other hand which admit it only in special circumstances. Following the international sales

conventions of 1964 and 1980, the principle of specific performance is adopted, yet in an attenuated form.

The principle is even more important outside the field of sales. Contractual obligations to do something or to abstain from doing something or to deliver an asset can often only be performed by the other contracting party. In these cases, the only way to obtain such performances at all is by a request to the other contracting party which, if need be, must be enforced against that party.

Contrary to the equitable discretion of a Common Law court, under the present provision the court must order performance, unless one of the exceptions is relevant.

B. The Five Exceptions

It follows from the structure of the rule in art. 6.2.2, that the person invoking one of the exceptions must prove its conditions.

(1) Impossibility (litt. a)

Obviously, a performance which is impossible in law or in fact, cannot be required.

The refusal of a public law permission may render a contract void (cf. art. 5.1.23 (1)); in this case, no issue of non-performance arises. In other cases, such a refusal may not affect the validity of the contract but may make its performance impossible (art. 5.1.23 (2)). One of the consequences is that in this case performance may not be required under litt. (a).

(2) Unreasonable burden (litt. b)

In exceptionable circumstances, performance, although still possible, may become so demanding as to effort or

expense that it would run counter good faith and fair dealing to require it. This may occur, in particular, where after conclusion of the contract circumstances have changed thoroughly.

Illustration 1:

A tanker with oil has sunk in a heavy storm in coastal waters. Although it would be possible to lift the ship from the bottom of the sea, the owner of the cargo may not require performance of the contract of transportation, if this would involve the shipowner into expenses vastly exceeding the value of the cargo.

Other consequences of such unforeseen change of circumstances for the parties' rights and duties may have to be considered under the rules on hardship (cf. art. 5.2 ff.).

(3) Cover Transaction (litt. c)

Many goods and services are of a generic nature; they are offered by many suppliers and have usually a standard quality. If a contract for such staple goods or standard services is not performed, most contractors will not waste their time and effort to obtain the contractual performance from the other party. They will go into the market, provide themselves with a substitute performance and demand damages for non-performance (especially a higher price and additional expenses) from the non-performing party.

This course of action is economically sound and legally simple. Letter c), therefore, raises this commercially expedient course of action to a legal duty by excluding a claim for performance in such circumstances.

In determining the reasonableness of a cover transaction, all the circumstances of the aggrieved party must be taken into account.

Illustration 2:

Firm B, residing in a developing country with a scarcity of foreign exchange, has bought a machine of a standard type from S in Birmingham. According to the contract, B has paid the price of 100 000 US\$ before delivery. S does not deliver. Although B could obtain the machine from another source in England, due to the scarcity and high price of foreign exchange in its home country, it would be unreasonable to require B to take this course. B may therefore require delivery of the machine from S.

If a reasonable cover transaction has been made, art. 6.4.6 simplifies the computation of the damages to which the aggrieved party may be entitled.

(4) Performance of a Personal Character (litt. d)

Where a performance has a personal character, enforcing such a performance would encroach upon the personal freedom of the person obliged to perform. Moreover, the quality of a performance enforced in this way will often be impaired. In some countries where courts are obliged to supervise the appropriateness of a performance, the supervision of a very personal performance may also give rise to insuperable practical difficulties. For all these reasons, enforcement of performances of a personal character cannot be required.

Of course, the true import of this exception depends essentially upon the interpretation of the term "personal character". The modern tendency is to narrow this term to performances of a unique character. Ordinary activities of a lawyer, surgeon or engineer are not covered by the clause since they can be performed by other persons with the some training and experience. A performance is of a personal character if

it is not delegable and requires individual skills of an artistic or scientific nature or if it involves a confidential and personal relationship.

Illustration 3:

If a firm of architects has agreed to design a row of 10 private homes, they can be forced to perform this obligation since they can assign the one or the other of their partners or employed architects to do this job.

By contrast, take a contract which provides that Le Corbusier is to make the design of a new city hall embodying the idea of a city of the 21st century. Such an obligation cannot be enforced because it is obviously highly unique and directed to a particular person's very special skills.

The performance of obligations to abstain from doing something will not fall under litt. c). [In view of such obligations, the formulation "activity of a personal character" is too narrow.] The same is true if the party who is to perform is an enterprise or a company, unless the contract demands execution by a specific person in view of its special expertise.

(5) Request Within Reasonable Time (litt. e)

Performance of a contract often requires special preparations and efforts by the party who is obliged to perform. If the time for performance has passed but the party entitled to performance fails to demand it within a reasonable time, the other party may be entitled to assume that the first party will no longer insist on performance. If the party entitled to performance were allowed to leave the other party in uncertainty whether performance will be required, that may give rise to the risk that the first party may unduly speculate, to the other party's disadvantage, upon a favourable development of the market.

For these reasons, litt. e) excludes the right to performance if the latter is not required within a reasonable time after the party entitled to performance has become, or ought to have become, aware of the non-performance.

This rule is in conformity with the rule of art. 6.3.3 (1) regarding the loss of the right to terminate a contract; here also an action by the party entitled to termination is required. The idea underlying the exception to this rule, as laid down in par. 3 of that provision, can also be extended to art. 6.2.2 litt. e): If the defaulting party has indicated its willingness to tender performance, a request for performance by the aggrieved party is not necessary; this need not be spelt out.

[However, if it is thought necessary to spell out this idea, the following words should be inserted at the beginning of lett. e):

"e) the aggrieved party has reason to assume that the defaulting party does not intend to perform and the aggrieved party does not require ..."]

Article 6.2.3

(Cure of defective performance)

A [The] right to require performance includes in appropriate cases the right to require repair or [,] replacement [or other cure] of a defective performance. The provisions of articles 6.2.1 and 6.2.2 apply accordingly.

Comments:

A. The Basic Rule

This provision applies the general principles of art. 6.2.1 and 6.2.2 to a special, yet very frequent case of non-performance, i.e. a defective performance. In the interest of clarity it is desirable and useful to specify that the right to require performance comprises the right of the party who has received a defective performance to require cure of the defect.

B. The Meaning of Cure

In order to clarify the meaning of the provision, two specific examples of cure are mentioned expressly. Repair of a defective good or service is the most obvious illustration; replacement of a defective performance is another instance. A right to require replacement may also exist with respect to payments of money, e.g. in case of payment in a wrong currency or to an account different from that agreed upon by the parties.

The relationship between the remedies of repair and replacement cannot be regulated in a general way, but must be determined separately for the various types of contracts.

[Apart from repair and replacement, there are other forms of cure, such as removal of the legal rights of third persons with respect to the subject-matter of the performance or obtaining a necessary governmental approval.]

C. Restrictions

The right to require cure of a defective performance is subject to the same limitations as the general right to

performance. The limitations with respect to payments of money are those set out in art. 6.2.1 and with respect to other performances those set out in art. 6.2.2. The second sentence of the present provision therefore refers to those two rules.

Most of the exceptions to a right to require performance that are set out in art. 6.2.1 and art. 6.2.2 are easily applied to the various forms of cure of a defective performance. The application of art. 2 litt. b) calls for specific comment. In many cases of a small, insignificant defect, both replacement and even repair may involve "an unreasonable effort or expense" and may therefore be excluded.

Illustration 4:

A small new car is sold by a dealer; there is a tiny painting defect which decreases the value of the car by 0,01 % of the purchase price. Repainting would cost 0,5% of the purchase price. A claim for repair is excluded but the buyer can reduce the purchase price according to a general principle of law [that has not yet been recognized by the present Principles].

The adaptation of the exceptions laid down in art. 6.2.1 (2) - (4) and in art. 6.2.2 litt. a) - e) to cases of cure cannot be generalised but must be determined in a flexible manner. For this reason, the rules of artt. 6.2.1 and 6.2.2 can be applied only "accordingly" to those cases.

Article 6.2.4

(Judicial penalty)

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

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

Comments:

A. Judicial Penalty: the Principle

Experience in some Central European countries has proved that a judicial warning of a penalty in case of disobedience by a party who is ordered to perform a contractual duty, is a highly effective means to assure compliance with the order. Most legal systems dispose of such penalties, although mostly for specified cases of non-performance only, especially obligations to do or not do something which cannot easily be performed by another person. Some times the remedy available in case of disobedience is even imprisonment.

The present provision takes a middle course by providing for a monetary penalty only, but making this applicable to all kinds of orders for performance, including those for payment of money. However, in this latter case a penalty should be threatened or imposed only in exceptional situations, especially where speedy payment is essential for the aggrieved party. The same is true for obligations to deliver an asset. The reason for reluctance is that obligations to pay and to deliver can normally be enforced with ease by the ordinary means of execution. By contrast, obligations to do or to abstain from doing something which cannot easily be performed by a third person are the most appropriate objects of a judicial penalty.

The wording of par. 1 ("may") makes it clear that threatening or imposing a judicial penalty is a matter

of discretion. Important criteria for the exercise of this discretion have just been mentioned; cf. also infra C in fine.

B. Beneficiary

Legal systems are strongly divided on the question to whom a judicial penalty should be paid, whether to the aggrieved party, to the state, or to both. Some countries regard payment to the aggrieved party as an unwarranted windfall profit contravening public policy.

These Principles regard this critique as too narrow because the aggrieved party deserves compensation for the non-performance of a contractual obligation by the defaulting party.

In order to take into account strong national policies to the contrary, par. 2 sentence 1 makes a reservation in favour of a state with mandatory provisions. Courts in such a country are therefore free to apply such mandatory local rules in determining the beneficiary of a judicial penalty.

C. Damages and Contractual Penalty

Par. 2 sentence 2 makes clear that a judicial penalty paid to the aggrieved party does not affect the latter's claim for damages. This rule is based upon the consideration that payment of the penalty compensates the aggrieved party for those disadvantages deriving from non-performance of the contractual obligation which cannot be compensated under the ordinary rules for the recovery of damages. Moreover, since damages will usually be recovered only quite some time after payment of a judicial penalty, judges may to some

degree be able in fact, in measuring the damages, to take into account the payment of the penalty.

Contractual penalties, which are allowed within certain limits (art. 6.4.17), perform a similar function as judicial penalties. If the court considers the contractual penalty as a sufficient incentive for performance, it may refuse to threaten or to inflict a judicial penalty.

D. Procedure

The procedural details for threatening and imposing a judicial penalty are governed by the lex fori.

[E. Penalty by Arbitrators

According to the proposed art. 1.7, the term "court" includes an arbitral tribunal. Therefore the question must be raised whether arbitrators also ought to be allowed to threaten and impose a penalty.

The relatively few legal systems which consider this issue are divided. Only the Netherlands have now clear statutory authority in favour of an arbitral penalty. In France, opinion is sharply divided; while an old decision of the Cour de cassation allowed an arbitral penalty clause, there is at present little authority and apparently no arbitral practice. In the United States, the increasingly liberal attitude towards arbitration has induced several courts to allow the imposition of punitive damages by arbitrators, which is akin to an arbitral penalty. Contractual penalties as such are, however, deemed contrary to public policy; this will probably exclude an arbitral penalty as well.

The modern trend thus is in favour of allowing an arbitral penalty, in keeping with the increasing rôle of arbitration as a means of alternative dispute settlement. Abuses of such a power are prevented by the fact that the execution of an arbitral penalty can only be effected by, or with the assistance of, a state court which will exercise appropriate control.

In order not to prejudice developments in any direction it seems preferable to leave the issue open. This can be achieved either by passing over it in silence or by expressly saying that no stand is taken upon the issue. The reporter prefers the latter alternative.]

Art. 6.2.5

(Unenforceable Decision)

[(Change of remedy)]

[(1) An aggrieved party who had required performance of an obligation according to article 6.2.2 may in a notice to the defaulting party fix an additional period of time of reasonable length for performance. If the defaulting party fails to perform within that period of time, the aggrieved party may invoke any other remedy for non-performance.]

(2) If a judicial decision or an arbitral award for performance [of an obligation under article 6.2.2] cannot be enforced, the aggrieved party is not precluded from invoking any other remedy for non-performance.

Comments:

A. The Principle

This provision addresses a problem which is peculiar to the right of performance. While art. 6.1.2 allows the cumulation of several remedies, insofar as they are compatible, the present provision grants the right to change from the remedy of requiring performance to another remedy (or other remedies). This change of remedy is, however, limited to the right of requiring performance of obligations other than to pay money.

The reason for allowing such change is the difficulty of enforcing the performance of obligations other than for the payment of money. Even if the aggrieved party had at first decided to invoke his right of requiring such performance, it would be inequitable if he would be stuck with this option. It may only later turn out that the defaulting party is unable to perform; or such inability may be caused by subsequent events. The permission of changing to another remedy (or other remedies) demonstrates a certain weakness of, and reservations against, the right to require performance of obligations other than to pay money.

Two different situations must be addressed.

[B. Voluntary Change of Remedy]

In the first case, the aggrieved party had first required performance but then, before execution of a decision for performance, changes his mind or discovers the defaulting party's inability to perform; or that inability is caused by subsequent events. The aggrieved party therefore now wishes to invoke one or

more other remedies. Such a voluntary change of remedy can only be admitted if the interests of the defaulting party are duly protected. He may have prepared for performance and have incurred efforts and expenses. A voluntary change from the remedy of performance can therefore only be accepted under the same conditions as have been established for the right of termination in case of delay in performance (cf. art. 6.3.2). These conditions, properly adapted to the present situation, are laid down in par. 1.

The adequacy of the additional time for performance depends upon the nature and difficulty of the outstanding performance. Before expiry of the additional period, the defaulting party has the right to make the performance owed by it under the contract.]

C. Unenforceable Decision

Par. 2 addresses the less difficult case where the aggrieved party had attempted without success to enforce a judicial decision or arbitral award directing performance against the defaulting party. In this situation it is even more obvious that the aggrieved party must not be precluded from invoking any other remedy for non-performance.

D. Time Limits

Since this provision allows a (subsequent) change of remedy, the time limit set for a notice of termination by art. 6.3.2 must, of course, be extended accordingly. The reasonable time for giving notice begins to run

- in the case of par. 1, after the aggrieved party has or ought to have become aware of non-performance at the expiry of the additional period of time;

- and in the case of par. 2, after the aggrieved party has or ought to have become aware of the unenforceability of the decision or award requiring performance.