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**Draft Rules
on
Restitution**

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ARTICLE 3.2.15

(Restitution)

(1) On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that such party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.

COMMENT

1. Right of parties to restitution on avoidance

According to paragraph (1) of the present article either party may claim restitution of what it has supplied under the contract or the part of it avoided. The only condition for such restitution is that each party makes restitution of whatever it has received under the contract or the part of it avoided.

Illustration

1. In the process of a takeover of a company, controlling shareholder A agrees to sell and transfer to B shares for £ 100,000. After discovering that A had fraudulently misstated the profits the company was earning, B avoids the contract. B can claim back the purchase price of £ 100,000. At the same time, B has to return the shares received from A.

Concerning the costs involved in making restitution Article 6.1.11 applies.

2. Restitution in kind not possible or appropriate

Restitution must normally be in kind. There are, however, instances where instead of restitution in kind, an allowance in money has to be made. This is the case first of all where restitution in kind is not possible. The allowance will normally amount to the value of the performance received.

Illustration

2. A commissions B to paint his factory. B had fraudulently induced A to conclude the contract at a price that is much higher than the market price. After having discovered the fraud, A avoids the contract. A can reclaim the purchase price from B while A himself is under a duty to pay for the value of having had his factory painted.

An allowance is further envisaged by paragraph (2) of this article whenever restitution in kind would not be appropriate. This is so in particular when returning the performance in kind would cause unreasonable effort or expense. The standard, in that respect, is the same as under Article 7.2.2(b).

Illustration

3. A fraudulently induces B to buy a collection of gold coins. The gold coins are reloaded onto one of B's ships. In a heavy storm that ship sinks. B subsequently discovers the fraud and avoids the contract. B can recover the price that it has paid, while itself having to make an allowance representing the value of the gold coins. This is in view of the fact that recovery of the gold coins from the sunken ship would involve expenses vastly exceeding their value.

The purpose of specifying that an allowance has to be made in money "whenever reasonable" is to make it clear that an allowance only has to be made if, and to the extent that, the performance received constitutes a benefit for the recipient.

Illustration

4. A has undertaken to decorate the entrance hall of B's business centre. After A has completed about half of the decorations B discovers that A is not the well-known decorator who A has pretended to be. B avoids the contract. Since the decorations so

far made cannot be returned, and have no value for B, A is not entitled to any allowance for the work done.

3. The allocation of risk

The rule contained in paragraph (2) implies an allocation of risk: it imposes a liability on the recipient of the performance to make good the value of that performance if it is unable to make restitution in kind. The rule in paragraph (2) applies no matter whether the recipient has been responsible for the deterioration or destruction of what it had received. Such allocation of the risk of deterioration or destruction is justified, in particular, because there should be correspondence between risk and control. Of course, there is no liability to make good the value where the deterioration or destruction is attributable to the other party: either because it has been due to the other party's fault, or due to a defect inherent in the performance. Hence the rule in paragraph (3).

Illustration

5. A buys from B a painting which both of them believe to be a genuine Constable. Subsequently doubts arise about the authenticity of the painting. B undertakes to obtain an expert opinion by the well-known expert C. C confirms that the painting actually is from a much less well-known painter living at the time of Constable. Due to B's negligence, the painting is destroyed on the way back from C to A. A avoids the contract on the ground of a relevant mistake under Article 3.2.2. A can claim back the purchase price but does not have to make an allowance for the value of the painting.

The recipient's liability to pay the value of the performance received is not excluded in cases where the deterioration or destruction would also have occurred had the performance not been rendered.

Illustration

6. Company A sells and transfers earth-moving equipment to company B. The equipment is subsequently destroyed by a hurricane flooding the properties of both the A and B. B avoids the contract because of a relevant mistake under Article 3.2.2. B can reclaim the purchase price but, at the same time, has to make an allowance for the value of the earth-moving equipment.

Nor is the recipient's liability to make good the value of the performance excluded in cases where it has been led to conclude the contract by the other party's fraudulent representation.

Illustration

7. The antique dealer A has fraudulently induced the garage owner B to swap A's ramshackle car against a valuable ancient Greek vase belonging to B. The car is accidentally destroyed while standing in B's garage. If B avoids the contract under Article 3.2.5, B can claim the vase back but has to make good the value of the car.

Article 3.8 of the Principles merely wants to make sure that B is not bound by the contract that he has entered into: that is why a right of avoidance is given to him; and to make sure that B is not saddled with the consequences of a bad bargain that A has induced him to make: that is why there has to be restitution. But the rule on fraud does not intend to protect B against accidents.

The question of risk allocation only arises in cases where the deterioration or destruction occurs before termination of the contract. If what has been performed deteriorates or is destroyed after termination of the contract, the recipient of the performance is under a duty to return what he had received. Any non-performance of that duty gives the other party a right to claim damages according to Article 7.4.1, unless the non-performance is excused under Article 7.1.7.

Illustration

8. A buys from B a painting which both of them believe to be a genuine Constable. After it has turned out that the painting actually is from a much less well-known painter living at the time of Constable, A avoids the contract on the ground of a relevant mistake under Article 3.2.2. As a result, A can reclaim the purchase price but is under a duty to return the painting. Before A can return the painting it is stolen by burglars. Whether B can claim damages depends on whether the burglary can be regarded as *force majeure* (see Article 7.1.7).

4. Compensation for expenses

The recipient of a performance may have incurred expenses for the preservation or maintenance of the object of the performance. It appears to be reasonable to allow the recipient to claim compensation

for such expenses in cases where the contract has been avoided and where, therefore, the parties have to return what they have received.

Illustration

9. A has sold and delivered a race horse to B. After some time B realizes that A has fraudulently concealed from him the true parentage of that horse. B avoids the contract. B can claim compensation for the costs incurred in feeding and caring for the horse.

This rule applies only to reasonable expenses. What is reasonable depends on the circumstances of the case. In Illustration 9 it would matter whether the horse had been sold as a race horse or as an ordinary farm horse.

Compensation cannot be claimed for other expenses linked to the performance received, even if they are reasonable.

Illustration

10. A has sold and delivered a software package to B which both parties believed to possess a certain functionality. When B discovers that this is not the case, he asks C to check whether that functionality can still be implemented. Since that turns out not to be possible, B avoids the contract because of a relevant mistake under Article 3.2.2. B cannot recover the fee paid to C as expenses under paragraph (4) from A.

5. Benefits

The Principles do not take a position concerning benefits that have been derived from the performance, or interest that has been earned. In commercial practice it will often be difficult to establish the value of the benefits received by the parties as a result of the performance. Also, often both parties will have received such benefits.

ARTICLE 7.3.6

(Restitution with respect to contracts to be performed at one time)

(1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party

concurrently makes restitution of whatever it has received under the contract.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.

COMMENT

1. Contracts to be performed at one time

The present article only refers to contracts to be performed at one time. A different regime applies to contracts under which the characteristic performance is to be made over a period of time (see Article 7.3.7). The most common example of a contract to be performed at one time is an ordinary contract of sale where the entire object of the sale has to be transferred at one particular moment. But the present article also, e.g., refers to construction contracts, where the contractor is under an obligation to produce the entire work to be accepted by his customer at one particular time. A turnkey contract provides an important example.

One party under a commercial contract will usually have to pay money for the performance received. That obligation is not the one that is characteristic of the contract. Thus, a contract of sale, where the purchase price has to be paid in instalments, will fall under the present article, provided the seller's performance is to be made at one time.

2. Right of parties to restitution on termination

Paragraph (1) of this article provides for a right for each party to claim the return of whatever it has supplied under the contract provided that it concurrently makes restitution of whatever it has received.

Illustration

1. In the process of a takeover of a company, controlling shareholder A agrees to sell and transfer to B shares for £ 100,000. B only pays £ 60,000 after the shares have been

transferred, and A therefore terminates the contract. A can claim back the shares. At the same time, A has to return the £ 60,000 received from B.

The rule also applies when the aggrieved party has made a bad bargain. If, in the case mentioned in illustration 1, the real market value of the shares is £ 150,000, A may still require the return of the shares.

The present article also applies to the situation where the aggrieved party has supplied money in exchange for property, services, or other performances which it has not received or which are defective.

Illustration

2. A sells a Constable painting to B for 600,000 Euro. B only pays 200,000 Euro for the painting when it is delivered, and A therefore terminates the contract. Subsequently it turns out that the painting is not a Constable but a copy. On termination of the contract, B can claim back the money and must return the copy to A.

Concerning the costs involved in making restitution Article 6.1.11 applies.

3. Restitution in kind not possible or appropriate

Restitution must normally be in kind. There are, however, instances where instead of restitution in kind, an allowance in money has to be made. This is the case first of all where restitution in kind is not possible. The allowance will normally amount to the value of the performance received.

Illustrations

3. A who has contracted to excavate B's site, leaves it after only part of the work has been done. B, who then terminates the contract, will have to pay A a reasonable sum for the work done, measured by the value that work has for B. At the same time B will have a claim against A for whatever damages B may have suffered as a result of A's breach of contract (see Article 7.3.5 (2)).

4. Company A chartered a ship for a company cruise for its employees which is to take them up the Norwegian coast. In Trondheim the cruise ship breaks down and cannot continue the cruise. A terminates the contract with B, the owner of the

business organizing the cruise, and decides to fly its employees home. If A had already paid the price A can now claim it back. At the same time, A owes B an allowance amounting to the value of the cruise so far. In addition, A can claim damages for the loss suffered as a result of B's non-performance (see Article 7.3.5 (2)).

An allowance is further envisaged by paragraph (2) of this article whenever restitution in kind would not be appropriate. This is so in particular when returning the performance in kind would cause unreasonable effort or expense. The standard, in that respect, is the same as under Article 7.2.2(b).

Illustration

5. A, an artist, sells 200 silver-plated rings to B. B fails to pay for the rings and A thereupon terminates the contract. It turns out that B had, in the meantime, attempted to ship the rings to his business premises. However, the boat on which they had been stored, has sunk. Although it would be possible, at great expense, to rescue the rings from the wrecked ship, this cannot be expected of B. B has to pay a reasonable sum to A, measured by the value of the rings.

The purpose of specifying that an allowance has to be made in money "whenever reasonable" is to make it clear that an allowance only has to be made if, and to the extent that, the performance has conferred a benefit on its recipient. That is not the case, for example, where the defect which gives the recipient of the performance a right to terminate has only become apparent in the course of processing the object of that performance.

Illustration

6. A sells to B, who wants to paint his house, ten litres of paint. While B is using the paint it becomes apparent that it does not stick to the wall of the house. B can terminate and reclaim the purchase price but it would not be reasonable to expect B to make good the value of the paint.

4. The allocation of risk

The rule contained in paragraph (2) implies an allocation of risk: it imposes a liability on the recipient of the performance to make good the value of that performance if it is unable to make restitution in kind. The

rule in paragraph (2) applies no matter whether the recipient has been responsible for the deterioration or destruction of what it had received. Such allocation of the risk of deterioration or destruction is justified, in particular, because there should be correspondence between risk and control. Of course, there is no liability to make good the value where the deterioration or destruction is attributable to the other party: either because it has been due to the other party's fault, or due to a defect inherent in the performance. Hence the rule in paragraph (3).

Illustration

7. Manufacturer A sells and delivers to company B a luxury car. The car has defective brakes. Due to this defect it crashes into another car and is totally destroyed as a result of this accident. Since the car was unfit to be used for its intended purpose, B can terminate the contract and reclaim the purchase price. B does not have to make an allowance for not being able to return the car.

The recipient's liability to make good the value of the performance received is not excluded in cases where the deterioration or destruction would also have occurred had the performance not been rendered.

Illustration

8. Manufacturer A sells and delivers a car to company B. After delivery has taken place, the car is totally destroyed by a hurricane flooding the properties of both A and B. B terminates the contract because of a defect attaching to the car. B can reclaim the purchase price but, at the same time, has to make an allowance for the value of the car prior to its destruction.

The question of risk allocation only arises in cases where the deterioration or destruction occurs before termination of the contract. If what has been performed deteriorates or is destroyed after termination of the contract, the normal rules on non-performance apply. For after termination, the recipient of the performance is under a duty to return what he had received. Any non-performance of that duty gives the other party a right to claim damages according to Article 7.4.1, unless the non-performance is excused under Article 7.1.7.

Illustration

9. A sells and delivers to B a limousine with a leaking roof. Since the limousine is unfit to be used for its intended purpose, B can terminate the contract. As a result, B can reclaim the purchase

price but is under a duty to return the limousine. Before B can return the car it is totally destroyed by a thunderstorm. A cannot claim damages because B is excused under Article 7.1.7.

5. Compensation for expenses

The recipient of a performance may have incurred expenses for the preservation or maintenance of the object of the performance. It is reasonable to allow him to claim compensation for such expenses in cases where the contract has been terminated and where, therefore, the parties have to return what they have received.

Illustration

10. A has sold and delivered a race horse to B. Some time later it becomes apparent that the horse is not, as A had promised, a descendant of a particular stallion. B terminates the contract. B can claim compensation for the costs incurred in feeding and caring for the horse.

The rule applies only to reasonable expenses. What is reasonable depends on the circumstances of the case. In Illustration 10 it would matter whether the horse that has been sold is a race horse or an ordinary farm horse.

Compensation cannot be claimed for other expenses linked to the performance received, even if they are reasonable.

Illustration

11. A has sold and delivered a software package to B. B then discovers that the software is lacking a certain functionality it was supposed to have. B therefore asks C to check whether that functionality can still be implemented. Since that turns out not to be possible, B terminates the contract. B cannot recover the fee paid to C as expenses under paragraph (4) from A.

6. Benefits

The Principles do not take a position concerning benefits that have been derived from the performance, or interest that has been earned. In commercial practice it will often be difficult to establish the value of the benefits received by the parties as a result of the performance. Also, often both parties will have received such benefits.

7. Rights of third persons not affected

In common with other articles of the Principles, the present article deals with the relationship between the parties and not with any rights which third persons may have acquired on the goods concerned. Whether, for instance, an obligee of the buyer, the buyer's receivers in bankruptcy, or a purchaser in good faith may oppose the restitution of goods sold is to be determined by the applicable national law.

ARTICLE 7.3.7

(Restitution with respect to contracts to be performed over a period of time)

(1) On termination of a contract to be performed over a period of time restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible.

(2) As far as restitution has to be made, the rules of Article 7.3.6 apply.

COMMENT

1. Contracts to be performed over a period of time

Contracts to be performed over a period of time are at least as important, commercially, as contracts to be performed at one point, such as contracts of sale where the object of the sale has to be transferred at one particular moment. They include leases (e.g. equipment leases), contracts involving distributorship, out-sourcing, franchising, licensing and commercial agency, as well as service contracts in general. The present rule also covers contracts of sale where the goods have to be delivered in instalments. Performances under such contracts can have been made over a long period of time before the contract is terminated, and it may thus be inconvenient to unravel these performances. Also, termination is a remedy with merely prospective effect. Restitution can, therefore, only be claimed in respect of the period after termination.

Illustration

1. A contracts to service B's computer hardware and software for a period of five years. After three years of regular service A is obliged by illness to discontinue the services and the contract is terminated. B, who has paid A for the fourth year, can claim return of the advance payment for that year but not for the money paid for the three years of regular service.

Since the contract is terminated only for the future, any outstanding payments for past performances can still be claimed. The present article also, of course, does not prevent a claim for damages being brought.

Illustrations

2. A leases equipment to B for three years at a rental of 10,000 Euro a month. B pays punctually for the first two months but then fails to make any further payments despite repeated requests by A. After the lapse of five months A terminates the lease. A is entitled to retain the 20,000 Euro already received (Article 7.3.7 (1)) and to recover the 30,000 Euro accrued due (on the basis of the contract of lease which is terminated only for the future), together with whatever damages for breach he has sustained (see Article 7.3.5 (2)).

3. H, a hospital, engages C to carry out cleaning services for the hospital, the contract to run for three years. After a year C informs H that it cannot continue with the cleaning services unless the price is doubled. H refuses to agree and C ceases to provide the service. On terminating the contract H can recover damages for any additional expense it incurs in hiring another cleaning firm (Article 7.4.1 in conjunction with Article 7.3.5 (2)), while C is entitled to retain the payments it has received for services already provided (see Article 7.3.7 (1)).

The rule that restitution can only be claimed for the period after termination has taken effect does not apply if the contract is indivisible.

Illustration

4. A undertakes to paint ten pictures depicting one and the same historical event for B's festival hall. After delivering and having been paid for five paintings, A abandons the work. In view of the fact that the decoration of the hall is supposed to consist of ten paintings to be painted by the same painter and showing

different aspects of one historical event, B can claim return of the advances paid to A and must return the five paintings to A.

2. Restitution

The present article is a special rule excluding restitution, with regard to contracts to be performed over a period of time, for performances made in the past. As far as there is restitution under the present article, it follows the rules under Article 7.3.6.