

UNIVERSITE CATHOLIQUE DE LOUVAIN

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C E N T R E D E D R O I T D E S O B L I G A T I O N S

PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

CHAPTER 5 : PERFORMANCE

Section 1 : Performance in General

Marcel FONTAINE
et Geneviève SCHAMPS

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UNIDROIT
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PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

Chapter 5 : PERFORMANCE¹

Section 1 : Performance in General

Article 1 (Express and implied obligations)

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

COMMENTS

This provision states the widely accepted principle according to which the parties' obligations are not necessarily limited to what has been expressly stipulated in the contract. Some other obligations may be implicit. Different reasons can account for the fact that they have not been expressed, e.g. that they were so obvious that "they went without saying", or that they were already prescribed by the usages of the trade, or simply that the parties did not think of them when drafting the contract, but would have certainly stipulated them if they had been a little more attentive. In some jurisdictions, for certain types of contracts, implied terms have been codified by statute.

¹ Revised version, for discussion at Bristol (July 1989).

Close links exist this rule and some other provisions of these Principles. This Article 1 is a direct corollary of the rule according to which "The ... performance ... of a contract shall be in accordance with the principles of good faith and fair dealing in international trade" (Chapter I, art. 3). Insofar as the rules on interpretation (Chapter III) provide for criteria for filling lacunæ (besides criteria for solving ambiguities), those rules can contribute to determine the precise content of the contract and therefore to establish which terms have to be considered as implied.

Illustration 1

Firm A rents a full computer network to Firm B., and installs it. The contract fails to provide anything about A's possible obligation to give the lessee at least some basic information concerning the way to operate the system. But it can be considered to be an implied obligation. It is obvious, and necessary for the accomplishment of the purpose of such a contract, that the provider of sophisticated goods has to supply the other party with a minimum of information.

Illustration 2

A broker has negotiated a charter-party and he now claims for his commission. The brokerage contract is silent about the moment when that commission is due. The usages of the sector can provide an implied term according to which the commission is due e.g. only when the hire is earned, or, on the contrary, on signing the charter-party, regardless whether the hire will effectively be paid or not.

CROSS REFERENCES

Chapter I, art. 3

Chapter III

NOTES

The notion that parties can also be bound by implied obligations is a corollary of the principle of good faith (for references to relevant provisions in national legislations, see the notes under chapter I, art. 3); it is specifically stated in some codifications (French C.C., art. 1135; Neth. B.W., art. 1375 ; Neth. N.B.W., art. 6.5.3.1. ; Quebec draft, art. 71). In common law countries, implied terms are sometimes codified by statute (e.g. English Sales of Goods Act 1979, sect. 12-15). See also C.I.S.G., art 9.

LITERATURE

WEILL and TERRE, *Les obligations*, 4th ed., n° 368-369.

SACCO, *Il contratto*, pp. 786-801.

LARENZ, *Allg. Teil des BGB*, 7th ed., pp. 44, 538-546.

ENGEL, *Traité des obligations en droit suisse*, pp. 166-167, 170-171.

HARTKAMP, *Algemene leer der overeenkomsten*, 1989, n° 281-282, 289-311.

FARNSWORTH, *Contracts*, pp. 75-76.

FURMSTON, 9th ed. of CHESHIRE and FIFOOT's *Law of Contract*, pp. 112-135.

BONELL in BIANCA and BONELL, *Commentary on the International Sales Law, the 1980 Vienna Sales convention*, pp. 103-115.

Article 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 expected to observe the diligence observed by reasonable persons of the same kind under similar circumstances.

COMMENTS

The degree of diligence required from a party in the performance of an obligation may vary considerably according to the kind of obligation incurred. Sometimes a party is only bound by a duty of care; he then has to exercise his best efforts to perform, but does not guarantee the achievement of a specific result. In other cases, on the contrary, the obligation is more intense, and such a result is promised.

The distinction between "duty of care" (art. 2) and "duty to achieve a specific result" (art. 3) corresponds to the respective concepts of "obligations de moyens" and "obligations de résultat" in French law and similar legal systems. It does not encompass all possible situations, but it describes two frequent and typical degrees of intensity in assuming a contractual obligation.

Obligations of both types can coexist in the same contract. For instance, the firm that repairs a defective machine may be

considered to be under a duty of care concerning the quality of the repair work in general, and under a duty to achieve a specific result relatively to the replacement of certain spare parts.

Articles 2 and 3 give parties, judges and arbitrators general criteria by which the respective meanings of duties of care and duties to achieve specific results can be appreciated. Article 2 refers to what is expected in similar situations, but also to a test of reasonableness. It means that a party may not raise the defense that his performance was no worse than that of others. This provision should allow judges or arbitrators to raise the standards of performance when they are too low.

Illustration 1

A distributor promises "to use his best efforts to expand the sales of the product" in the contract zone, without any stipulation to reach minimum quantities. This provision can be considered as creating a duty of care; it obliges the distributor to take all the steps that a reasonable person, placed under similar circumstances (nature of the product, characteristics of the market, importance and experience of his firm, presence of competitors, etc...) would take to promote the sales (advertising, visits to customers, good service, etc...). He does not promise a specific result, like a certain amount of sales per year, but he undertakes to do all that can be expected from him when acting as a reasonable person.

CROSS REFERENCES

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NOTES

In French Law, the concept of "obligations de moyens" is derived from art. 1137 C.C. About the standard of care required from a professional party, see Ital. C.C., art. 1176.

LITERATURE

WEILL and TERRE, *Les obligations*, 4th.ed., n° 398.
 L. MENGONI, *Obbligazioni "di risultati" e obbligazioni "di mezzi"*, Riv. Dir. Comm., 1954, pp. 185-209, 280-320, 365-396.
 HARTKAMP, *De verbintenits in het algemeen*, n° 314 and 346.
 FARNSWORTH, *On Trying to Keep One's Promises : the Duty of Best Efforts in Contract Law*, 46 Univ. of Pittsburgh L.R. (1984), pp. 1-20.

Article 3 (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 expected to achieve a result of the quality usually achieved under obligations of the same type.

COMMENTS

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CROSS REFERENCES

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NOTES

In French Law, the concept of "obligation de résultat" is derived from art. 1147 C.C.

LITERATURE

WEILL and TERRE, 4th ed., n° 397.

HARTKAMP, De verbintenissen in het algemeen, n° 314 and 346.

Reporter's observations

1. It was remarked in Rome (Report p. 4) that "usually achieved " means "which should usually be achieved". This affirmation is questionable, and there is a risk that one will find here a significant difference with the standard applied in article 2 ("observed by reasonable persons").

2. The reference to the "quality" of the result is also debatable, unless one gives the word a very broad meaning. Often the result consists in a deadline to meet, a quantity to reach, a price to pay; in such matters one can hardly talk of the "quality" of the result.

3. The main feature of an obligation to achieve a specific result is that the result must be reached. We should not induce any discussion about its "quality", whether we decide it should be "usual" or, alternatively, "reasonable". The text should perhaps simply state : "... that party is obliged to achieve the result required under obligations of the same type".

4. There is a problem about the quality of performance, but it is wider than the scope of article 3. It is often decided that when the parties have not provided otherwise, performance must be of average quality (see Principles of Eur. Contract Law, art. 1.105 bis; French C. Civ., art. 1246). Should we devote a general provision to the problem ? We have just applied a stricter standard in article 2.

5. Much of our difficulties with articles 2 and 3 derive from the fact that the distinction between those two kinds of obligations is mainly relevant when it comes to problems of non-performance (causes of exemption, burden of proof). What we state about them in this chapter does not address the essence. Yet we have to say something about them to introduce article 4, which is the really useful provision of the three. Or do we ? Article 4 could perhaps stand by itself, with appropriate accompanying comments, if the problems linked with quality of performance are dealt with in a specific, more general provision.

Article 4

In determining the extent to which an obligation of a party involves a duty of care in the performance of an activity or a duty to achieve a specific result, regard shall be had, among others, to the following circumstances :

- a) the way in which the obligation is expressed in the contract ;
- b) the contractual price and other terms of the contract ;
- c) the degree of certainty normally involved in achieving the expected result ;

d) the other party's ability to influence the performance of the obligation.

COMMENTS

It is important to determine whether an obligation involves a mere duty of care or a duty to achieve a specific result, as the obligation is more intense in the latter case. Sometimes that determination can be difficult. This provision offers criteria that can guide parties, judges and arbitrators, though the list given is not limitative. The problems involved are often matters of interpretation, but it is felt this provision is more conveniently located in this Chapter, immediately after the articles dealing with those two types of contractual duties.

a) The way in which the obligation is expressed in the contract can often contribute to determine whether the parties have meant to stipulate a duty of care or a duty to achieve a specific result.

Illustrations 1 and 2

Contractor A will build a storage facility for his client B, who badly wants the work to be finished in an unusually short time. If Contractor A accepts to promise that "the work will be completed before December 31", he assumes the obligation to achieve the specific result of meeting that deadline. If he merely undertakes "to try to complete the work before December 31", his obligation involves a duty of care to attempt to meet the deadline, but no guarantee it will certainly be met.

b) The contractual price or other terms of the contract can also offer clues for the qualification of an obligation. An unusually high price, or another particular non-monetary reciprocal obligation, can be indicative of a duty to achieve a specific result where one normally assumes a mere duty of care. Clauses linking payment of the price to the successful outcome of the operation, penalty clauses applicable if the result is not achieved, hardship clauses enabling a party to adapt the contract if circumstances make it too hard to perform as initially agreed, are other examples of contractual terms which can - in either way - help in the qualification of the concerned obligation.

c) When performance of an obligation normally involves a great degree of risk, one can generally expect that the obliged party will not want to guarantee a result, and the other party will not expect so much either. The opposite conclusion will be drawn when the desired result is normally reachable without any special difficulty.

Illustration 3

A space agency promises to put a telecommunication satellite into orbit. The rate of failure of the past launchings has been 22 %. One cannot expect the space agency to guarantee that the orbiting will be successful. The obligation is merely to observe the degree of diligence required for such launchings, considering the present state of technology.

Illustration 4.

Firm A promises to deliver 20 tons of steel to Firm B, on June 30. Such a relatively simple operation is subject to no special risk. Firm A is committed to the specific result of delivering the required quantity of steel on the required date, not merely to try to do it.

d) Sometimes the other party has some influence on the performance of the obligation. That circumstance can transform into duties of care obligations which otherwise could involve duties to achieve specific results.

Illustration 5.

Company A will give Company B the technical assistance necessary to apply a newly discovered chemical process, and it is agreed that B will send some of its engineers to attend training sessions organized by A. Company A cannot promise the new process will be mastered by the other party, since that result partly depends on B's effectively sending its engineers to the sessions, on those engineers's competence and on their assiduity to the sessions.

Reporter's observations

Criterion d) and Illustration 5 are perhaps debatable. Is not the other party's influence on the performance of the obligation a possible cause of exemption of liability, even in obligations to achieve a specific result, rather than a criterium that can transform the latter type of obligation into a duty of care ? I would favor deleting d).

CROSS REFERENCES

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NOTES

This seems to be the first attempt to codify the criteria permitting to decide whether an obligation involves a mere duty of care or an obligation to achieve a specific result.

LITERATURE

WEILL and TERRE, Les obligations, 4th ed, n°396, 399-402.
HARTKAMP, De verbintenissen in het algemeen, n° 346.

Article 5 (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.

COMMENTS

A contract is not the mere meeting point of conflicting interests; it must also, to some extent, be considered as a common project to which each party has to cooperate. This view has definite links with the principle of good faith that dominates the law of contract, as well as with the obligation to mitigate damages in case of breach..

This duty to cooperate must of course be contained within certain limits (the provision refers to reasonable expectations), so as not to upset the allocation of duties in the performance of the contract. The duty not to hinder the other party's performance is the main concern of the provision. But there may also be instances requiring a more active cooperation.

Illustration 1

Party A, after contracting with B for the immediate delivery of a certain quantity of oil, buys from another source all the available oil on the spot market. This behavior, which will hinder B from performing, is contrary to the obligation of cooperation.

Illustration 2

An art gallery of country B has bought an ancient painting from a private collector of country A. The work of art may not be exported without a special authorization, and the contract obliges the seller to apply for that permission. The seller, who has no experience with such formalities, encounters serious difficulties with his application. The art gallery, on the other hand, is familiar with such procedures. Under those circumstances, and in spite of the contractual provision, the buyer can be expected to give at least some help to the seller.

CROSS REFERENCES

Chapter I, art. 3

Chapter VI, art. 24

NOTES

The obligation for the parties to cooperate is another corollary of the principle of good faith (see the notes under Chapter I, art. 3). It is explicitly stated in the German Democratic Republic's G.I.W., art. 259.

LITERATURE

WEILL and TERRE, *Les obligations*, 4th. ed., n° 357.

((Article 6 (Performance at one time or in installments))

If the whole of one party's performance can be rendered at one time, it is due at one time, unless the circumstances indicate otherwise.))

COMMENTS

A party's performance is sometimes necessarily rendered at one time (e.g. delivery of a single object), or, on the contrary, necessarily takes places over a period of time (e.g. construction). But there are also cases when it can be rendered either at one time or in installments (e.g. delivery of quantities of goods). Article 6 addresses this last situation, in the absence of any contractual provision as to how such performance should then be rendered. The principle stated is that performance is due at one time, unless the circumstances indicate otherwise.

Illustration 1

Firm A has promised to deliver 100 tons of coal to firm B "in March". It would materially be possible for A, and perhaps convenient for that party, to deliver those 100 tons in installments; for instance, 25 tons every week of the month. But in principle, according to the rule of article 6, A has to deliver the 100 tons at one time.

Illustration 2

The case is the same as in Illustration 1, but Firm B needs the coal gradually, to meet the needs of its operations; it also has limited storage facilities and could not adequately cope with a delivery of 100 tons at one time. Here are circumstances that indicate that Firm A should instead deliver in installments, during the month of March.

CROSS REFERENCES

Articles 7, 8.

NOTES

U.C.C. § 2-307 ; see also Rest. 2nd Contr. § 233

LITERATURE

FURMSTON, 9th ed. of CHESHIRE and FIFOOT's Law of Contract, pp. 525-526.

FARNSWORTH, Contracts, pp. 589-590.

Reporter's observations

It was decided in Rome to leave this provision between brackets, pending a final decision concerning its utility; perhaps the exceptions to the rule occur more frequently than the rule itself.

Article 7 (Partial performance)

(1) The obligee may refuse a partial performance unless he has no legitimate interest in doing so.

(2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor.

COMMENTS

(1) When performance is due at maturity (whether it is the whole performance or an installment), what is due has to be performed completely. In principle, the obligee may refuse partial performance. He is entitled to receive the whole of what was stipulated. Partial performance would constitute a breach of contract. The obligee who does not get a full performance at maturity can make use of the available remedies. This is a common rule, which already appears in most legal systems. Normally the obligee has a legitimate interest in demanding full performance of what was promised.

There may however be situations when such legitimate interest is not apparent, when temporarily accepting partial performance will not cause any significant harm to the obligee. If the party tendering partial performance proves that it is the case, the obligee cannot

then refuse such partial performance (subject to the following paragraph (2)).

Illustration 1

Firm A wants to open a subsidiary in Brussels and it rents the necessary office space in a building under construction, due to be finished by the time of the move, on September 1. On that date, only 4 of the 10 offices are ready. Firm A may refuse to accept moving into those 4 offices only.

Illustration 2

An airline has promised to transport 25 automobiles from Italy to Brasil, in one single delivery due to be made on a definite date. When performance is due, some circumstances make it difficult for the airline, though not impossible, to find sufficient place in a single aircraft. The airline suggests to make two successive deliveries within a week. It is established that this will not cause any inconvenience to the purchaser of the cars, which will actually not be used before the following month. Here the obligee has no legitimate interest in refusing partial performance.

(2) If according to the preceding provision, the obligee may not refuse partial performance, it is on the condition that possible additional costs would not be borne by him, but by the party tendering partial performance.

Illustration 3

If in the case of Illustration 2 above, the purchaser has to meet additional expenses because of having to make double arrangements for picking up the cars at the airport, these extra costs will be borne by the airline.

Reporter's observations

A discussion took place in Rome concerning the possibility for the obligee having to accept partial performance to claim not only for reimbursement of additional expenses, but also for damages. It is submitted that no damages are due when this provision applies. If it is demonstrated, according to our rule, that the obligee has no legitimate interest in refusing partial performance, then such partial performance is no longer a breach of contract, and the same can be said of the performance of the rest of the obligation which necessarily has to follow some time after maturity. In such circumstances, the obligee can only claim to be exempt from additional expenses. Damages and other remedies could

of course become available if performance of the rest does not occur later. (If this interpretation is accepted, it should be included in the comments above).

CROSS REFERENCES

Chapter I, art. 3

Chapter VI, art. 24

NOTES

Many codifications state the principle that an obligee may refuse partial performance (French and Belgian C.C., art. 1244; Ital. C.C., art. 1181; Swiss C.O., art. 69; Neth. B.W., art. 1426; Neth. N.B.W., art. 6.1.6.3.; B.G.B., § 266; Youg. C.C., art. 310; Benelux draft on performance, art. 3; Quebec draft, art. 211). Exceptions are sometimes provided, e.g. when partial performance is permitted by usages (Ital. C.C., art. 1181), or when the obligation is pecuniary (Youg. C.C., art. 310). The opposite rule is the principle in a few other systems : the obligee must accept partial performance, unless it is against the nature of the obligation (Czech. Code of Int. Comm., art. 218) or against the obligee's legitimate interest (Polish C.C., art. 450). Comp. C.I.S.G., art 51.

LITERATURE

WEILL and TERRE, *Les obligations*, 4th ed., n° 996.

ESSER/SCHMIDT, *Schuldrecht*, I, 6th ed., pp. 226-228.

ENGEL, *Traité des obligations en droit suisse*, pp.420-421.

HARTKAMP, *De verbinten is in het algemeen*, n° 226.

Article 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.**

COMMENTS

When is a contractual obligation to be performed ? This article distinguishes between three situations. First, the answer will be found in the contract if it stipulates the precise time for performance or makes it determinable. If the contract does not provide a precise moment, but a period of time for performing, any time during that period chosen by the performing party will be adequate, unless circumstances indicate the other party is to choose the time. Finally, in any other case, performance is due within a reasonable time.

This article, inspired by article 33 of C.I.S.G., embodies well established and widely recognized principles.

Illustration 1

Firm A offers to counsel firm B in the latter's plans to buy computer equipment and software, and it is agreed A's experts will visit B "in May". It is in principle up to A to announce when precisely in May that visit will take place. But the opposite solution could derive from the circumstances, clearly if the contract explicitly gives B the choice of the precise dates, but also, for example, if it is understood that some of B's staff members, who are often away on business trips, have to be present when A's experts come.

Illustration 2

Building Contractor A encounters unusual difficulties when excavating a site, and needs special equipment he does not have to continue the work. Contractor A immediately telephones to Contractor B, who has the equipment and agrees to lend it to A. But nothing is said about the moment those tools should be delivered to A. Performance is then to take place "within a reasonable time", under the circumstances. Since the work

has been interrupted because of the difficulties mentioned above, A needs to receive the borrowed tools urgently. In this case, "within a reasonable time" probably means that performance is due almost immediately.

CROSS REFERENCES

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NOTES

Many codifications devote a suppletive provision to the time of performance, often stating it must in principle be immediate (see and compare B.G.B., § 271; Ital. C.C., art. 1183; Swiss C.O., art. 75; Neth. N.B.W., art. 6.1.6.9.; Polish C.C., art. 455; Czech. Code of Int. Comm., art. 225; Benelux draft on performance, art. 12; Quebec draft, art. 134), or take place in a reasonable time (G.D.R. G.I.W., art. 44; U.C.C. §§ 1-204, 2-309). This provision is inspired by C.I.S.G., art. 33.

LITERATURE

WEILL and TERRE, *Les obligations*, 4th ed., n° 1008.
 ESSER/SCHMIDT, *Schuldrecht*, I, 6th ed.; pp. 222-226.
 ENGEL, *Traité des obligations en droit suisse*, pp. 422-425.
 HARTKAMP, *De verbintenissen in het algemeen*, n° 231-244.
 FURMSTON, 9th ed. of CHESHIRE and FIFOOT's *Law of Contract*, pp. 530-532.
 FARNSWORTH, *Contracts*, pp. 585- 590.
 LANDO, in BIANCA and BONELL, *Commentary on Int. Sales Law, the 1980 Vienna Sales Convention*, pp. 261-264.

Article 9 (Earlier performance)

(1) A party may refuse an earlier performance unless he has no legitimate interest in doing so.

(2) A party's acceptance of an earlier performance does not affect the time for the performance of his own obligation if it has been fixed irrespective of the performance of the other party's obligations.

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

COMMENTS

(1) When performance is due at a certain moment (determined according to article 8), it has to take place at that moment. In principle, the obligee may refuse earlier performance. Usually the time for performance has been set to suit the obligee's activities, and earlier performance may cause him some inconvenience; he has a legitimate interest to refuse it.

There may however be situations when such legitimate interest is not apparent, when accepting earlier performance will not cause significant harm to the obligee. If the party tendering earlier performance proves that this is the case, the other party cannot then refuse earlier performance (subject to the following paragraph (3)).

Illustration 1

Firm B is to do the yearly maintenance of all elevators in Firm A's office building on October 15. B's employees appear on October 14, a day when important meetings, with many visitors, are taking place in the building. Firm A is entitled to refuse such earlier performance that would cause obvious trouble.

Illustration 2

Same example as the preceding illustration, but October 14 is an ordinary day just as October 15. Firm B can probably prove A has no legitimate interest in refusing that earlier performance.

(2) If a party accepts earlier performance by the other party, does it affect the time for performing his own obligations ? This provision draws a distinction. If those obligations were due at a certain time, not linked the performance of the other party's obligations, that time for performance remains unchanged. But if the two parties' respective obligations were linked with each other, accepting earlier performance will mean having to perform oneself earlier. This can of course represent a "legitimate interest" to refuse earlier performance by the other party.

Illustration 3

Firm B has to deliver goods to Firm A on May 15, and A has to pay the price on June 30. Firm B wants to deliver the goods on May 10, and A has no legitimate interest in refusing such earlier performance. But this will have no effect on the time agreed upon for payment of the price, which was determined irrespective of the date of delivery.

Illustration 4

Firm B has to deliver goods to Firm A on May 15, and A has to pay the price "on delivery". If A accepts to receive the goods on May 10, it will have to pay the price then too.

(3) If, according to paragraph (1), the obligee may not refuse earlier performance, it is on the condition that possible additional costs would not be borne by him, but by the party tendering earlier performance.

Illustration 5

Firm A has no legitimate interest to refuse delivery of the goods on May 10 instead of May 15, but there are some additional storage fees to pay for those five extra days. Those costs will be borne by Firm B.

Reporter's observations

As in article 7 concerning partial performance, the comments should clarify the relationship between earlier performance in conformity with article 9 and breach of contract. Our opinion is similarly that earlier performance permitted by article 9 constitutes no breach. Thus only additional costs are involved, not damages.

CROSS REFERENCES

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NOTES

Many codifications provide that the time for performance stipulated in the contract is presumed to be in favor of the performing party, who can thus in principle waive it and perform earlier (see French and Belgian C.C., art. 1187 and 1188; Ital. C.C.,

art. 1185; Neth. B.W., art. 1306 and 1307; Neth. N.B.W., art. 6.1.6.9.; B.G.B., § 271; Swiss C.O., art. 81; Benelux draft on performance, art. 13; Quebec draft, art. 134; Polish C.C., art. 457; Czech. Code on Int. Contr., art. 228). Sometimes the obligee's approval is however required (G.D.R. G.I.W., art. 44; C.I.S.G., art. 52, 1°). See also Rest. 2nd Contr. § 234.

LITERATURE

WEILL and TERRE, *Les obligations*, 4th ed., n° 914.

ENGEL, *Traité des obligations en droit suisse*, p. 425.

HARTKAMP, *De verbintenissen in het algemeen*, n° 238.

WILL, in BIANCA and BONELL, *Commentary on Int. Sales Law, the 1980 Vienna Sales Convention*, pp. 379-382.

Article 10 (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, or if no such price is available, to a reasonable price.

(2) Where the price is to be determined by one party ((or by a third party)) whose determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price shall be substituted.

(3) Where the price is to be fixed by a third party, and he cannot or will not do so, the parties are deemed to have empowered the court to appoint another person to fix the price.

(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

COMMENTS

(1) A contract usually fixes the price to be paid, or makes provision for its determination. If however this is not the case, this article presumes that the parties have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such performances under comparable conditions in the trade concerned. All these qualifications are of course significant. The provision also permits to reverse the presumption if there is any indication to the contrary.

This article is inspired by article 55 of C.I.S.G. The rule has the necessary flexibility to fit the needs of international trade.

It is true that in some cases, the price generally charged on the market may not satisfy the reasonableness test present elsewhere in this article. One would then have to appeal to the general

provision on good faith and fair dealing (Chapter I, article 3), or possibly to some of the provisions on mistake, fraud and gross disparity (Chapter IV).

Some international contracts concern operations which are unique or at least very specific, for which one cannot refer to the price charged for similar performances under comparable circumstances. The parties are then deemed to have impliedly made reference to a reasonable price. The concerned party will fix his price at a reasonable level, under the control of judges or arbitrators.

Illustration 1

Firm A, specialized in express mailing all over the world, receives from Firm B a parcel to be delivered as soon as possible from France to the United States. Nothing is said about the price. Firm A is supposed to bill B with the price that is usually charged in the sector for such a service.

Illustration 2

The next order that same Firm A gets from Firm B is now to deliver another parcel as soon as possible to ... Antarctica, where an exploratory mission needs some urgent supplies. Again, nothing is said about the price, but there is really no possible comparison on the market. Firm A will have to be reasonable when fixing the price.

(2) In some cases the contract expressly provides that the price will be determined by one of the parties. This is a frequent occurrence in several sectors, e.g. for services. The price cannot easily be determined in advance, and the performing party is in the best position to evaluate what it has done. ((In other cases, price determination is left to a third party, for instance an expert in the field.))

In those instances where the parties have made such provisions for determining the price, it will be enforced. But, against possible abuses, paragraph (2) enables judges or arbitrators to replace a grossly unreasonable price by a reasonable one. This provision is mandatory.

(3) The provision that the price will be determined by a third party can lead to a serious difficulty if that third party is not able to accomplish his mission (he is not the expert one thought he was), or refuses to do it. Section (3) provides that the court is then deemed to have been empowered by the parties to appoint another third person to determine the price.

(4) In other cases, the price is to be fixed by reference to some outside factors, typically a published index, or quotations at a commodities exchange. What shall be done if the reference factor ceases to exist or to be accessible ? This paragraph provides that the nearest equivalent factor shall be treated as a substitute.

Illustration 3

The price of a construction contract is linked to several indexes, including the "official index of salaries in the construction sector", regularly published by the local government. Several installments of the price still have to be calculated when that index ceases to be published. But the Federation of Construction, a private trade association, decides to start publishing a similar index to replace the former one. This new index will serve as a substitute.

CROSS REFERENCES

Chapter I, art. 3 and 13

Chapter IV

NOTES

See C.I.S.G., art. 55. In civil law codifications the problem of price determination is often ruled by general provisions of determination of the "object" of the contract (see French and Belgian C.C., art. 1129; Neth. B.W., art. 1356, 3° and 1359; Neth. N.B.W., art. 6.5.2.10; Ital. C.C., art. 1346 and 1349 ; comp. B.G.B. §§ 315-319; see also B.G.B. § 154 and Swiss C.O., art. 19) and/or by special provisions on sales contracts (see French and Belgian C.C., art. 1592; Neth. B.W., art. 1501 ; Neth. N.B.W., art. 7.1.1.2; Ital. C.C., art. 1473; Swiss C.O., art. 212; Quebec draft, art. 386). In the common law, see U.C.C. § 2-305; see also Rest. 2nd Contr. §§ 33-34 and 204.

LITERATURE

WEILL and TERRE, *Les Obligations*, 4th ed., n° 232.

HARTKAMP, *Algemene leer der overeenkomsten*, 1989, n° 78, 224-225.

ESSER/SCHMIDT, *Schuldrecht*, I, pp. 209-210, 214-217.

LARENZ, *Allgemeiner Teil*, p. 528.

ENGEL, *Traité des obligations en droit suisse*, p. 186.

FARNSWORTH, *Contracts*, p. 197.

EORSI, in BIANCA and BONELL, *Commentary on Int. Sales Law, the 1980 Vienna Sales Convention*, pp. 401-409.

PLACE OF PERFORMANCE

Reporter's observations

Four possible versions of article 11 are submitted after the discussion in Rome, where no decision could be reached on the subject of place of performance. All four versions state that in principle, in the absence of a contractual provision, a monetary obligation has to be performed at the creditor's place of business, and any other obligation, at the performing party's place of business. This seems to have been agreed upon. It was pointed out that the contract will often fix or imply another place of performance (cfr. a construction on a certain site, carriage of goods from one place to another, renting of a building, etc...).

Difficulties arose when considering supervening changes in the place of performance, due either to a party's changing his place of business, or to a party's willing to indicate another place of performance for any other reason. The two situations are very different. One cannot prevent a party from moving, but then, if performance was linked to his place of business, it is necessary to have a provision stating the effects of the move on performance. On the contrary, a party may not normally, by unilateral decision, change the place of performance agreed upon; we can choose to allow it and organize the consequences, but we can also choose not to give that possibility.

Versions A 1 and A 2 only deal with the change of the place of business; versions B 1 and B 2 with both situations.

VERSION A 1

Article 11 (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 ;

b) any other obligation, at his own place of business at the time of conclusion of the contract.

(2) The creditor must bear any increase in the expenses incidental to performance which is caused by a change in his place of business subsequent to the conclusion of the contract.

Reporter's observations

This Version A 1 provides that performance supposed to take place at the creditor's place of business will have to be carried out at his new place if he has moved, but he will bear the additional costs. The provision mainly concerns monetary obligations, but not necessarily : paragraph (2) could also apply to other obligations, when the contract provides performance at the creditor's place of business (except that the word "creditor" seems to refer mainly to monetary obligations ?).

Version A 1 does not give similar consequences to the move of the obliged party, when performance is to take place at his place of business : paragraph (1)(b) refers to his place of business at the time of conclusion of the contract, and paragraph (2) only refers to the creditor's changing his place of business. So, after moving, the obliged party still has to perform at his former place of business. Whether this is justified is debatable. That is why we also submit the Version A 2 below, which does not make any distinction between the parties if they move their place of business :

VERSION A 2

Article 11 (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 ;

b) any other obligation, at his own place of business ;

(2) A party must bear any increase in the expenses incidental to performance which is caused by a change in his place of business subsequent to the conclusion of the contract.

Reporter's observations

The two following B Versions consider changes in the place of performance due not only to the move of one of the parties, but also to unilateral decisions to indicate another place for performance. Examples were given when such situations could occur : counter-trade, where a third party is designated who will buy the compensation goods, factoring, where payment will have to be made to the factor. As was said before, we could very well decide such a change in the place of performance is not possible, unless the party wishing to change can get the other party to agree; for this we would not need any provision. We must also bear in mind that in such cases, the change of place of performance is only an incidental problem to the much wider question of assignment of contracts, which should some day be considered elsewhere in our Principles.

In Version B 1 only the obligee can change the place of performance; in Version B 2 both parties have that possibility. In both versions, the wording is meant to cover changes due to moving as well as to a unilateral decision.

VERSION B 1

Article 11 (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 ;

b) any other obligation, at his own place of business at the time of conclusion of the contract;

(2) Subsequently to the conclusion of the contract, the obligee may however designate another place for performance, provided that he bears any additional expenses.

VERSION B 2

Article 11 (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 ;

b) any other obligation, at his own place of business;

(2) Subsequently to the conclusion of the contract, a party may however designate another place for performance, provided that he bears any additional expenses.

COMMENTS

(to be drafted after choice of provision)

CROSS REFERENCES

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NOTES

Most codifications offer suppletive provisions concerning the place of performance. It is often stated it must take place at the obliged party's place of business (French and Belgian C.C., art. 1247; Ital. C.C., art. 1182; B.G.B., § 269; Swiss C.O., art. 74; Neth. B.W., art. 1429; Neth. N.B.W., art. 6.1.6.11; Czech. Code on Int. Contracts, art. 223; Polish C.C., art. 454; Quebec draft, art. 218). But many of the above provisions have a different rule about obligations to deliver a specific item, the performance of which is to take place where the item was when the contract was concluded. Comp. C.I.S.G., art. 31 and U.C.C. § 2-308. Opposite solutions appear about monetary

obligations : they are often due at the creditor's place of business (B.G.B., § 270; Ital. C.C., art. 1182; Swiss C.O., art. 74; Neth. B.W., art. 1429; Neth. N.B.W., art. 6.1.9A.5.; Polish C.C., art. 454; comp. C.I.S.G., art. 57; G.D.R. G.I.W., art. 43), but sometimes at the debtor's place of business (French and Belgian C.C., art. 1247; Quebec draft, art. 218). Provisions concerning the effect of a change in the place of business are found in some codifications (Neth. N.B.W., art. 6.1.9A.6.)

LITERATURE

WEILL and TERRE, *Les obligations*, 4th ed., n° 1009.

ESSER/SCHMIDT, *Schuldrecht*, I, pp. 218-221.

ENGEL, *Traité des obligations en droit suisse*, pp. 426-428.

HARTKAMP, *De verbintenissen in het algemeen*, n° 245-249, 520-521.

LANDO, in BIANCA and BONELL, *Commentary on International Sales Law, the 1980 Vienna Convention*, pp. 249-256; MASKOW, *ibid.*, pp. 412-419.

Article 12 (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 made it known he has an account.

(2) Payment by a transfer is completed when the transfer to the creditor's financial institution becomes effective.

COMMENTS

Payment of monetary obligations are very frequently made by transfers between financial institutions, or by cheques or similar instruments. Yet the problems involved have very seldom been the object of codifications. Notable exceptions are all draft texts : the Benelux draft on performance, the Dutch N.B.W. and the UNCITRAL draft Model Rules on International Credit Transfers. Without attempting to provide a detailed regulation, which would not be compatible with the very rapid evolution of techniques in this field, articles 12 and 13 state a few basic principles which should be useful in international payments.

Article 12 deals with payments by funds transfers between financial institutions.

Paragraph (1) concerns the admissibility of payments by funds transfers. Though the principle still stands, according to article 11, that payment of a monetary obligation should be made at the creditor's place of business, it can also be made to one of the financial institutions in which the creditor has made it known he has an account. If however the creditor has indicated a particular account, payment should then be made to that account. Naturally, the creditor can also make it known that he does not want his payment to be made by transfer.

Paragraph (2) deals with the difficult question of determining when a payment by funds transfer can be considered as completed. This matter is of importance, e.g. to decide whether the payment was made in time, or in the case one of the banks does not forward the funds it has received. But the choice of an adequate solution has been the center of much controversy in many countries and

international forums. Different moments have been considered : debit to the account of the transferor, credit to the account of the transferee bank, notice of credit to that account, decision of the transferee bank to accept credit transfer, entry of credit to transferee's account, notice of credit to transferee, etc... The matter is further complicated by the changes of procedures for the transfer of funds brought about by new electronic transfer mechanisms, and bank practices can also differ from one case to another.

All of this makes it extremely hazardous to establish a very accurate rule providing when payment by a transfer is completed. Article 12 (1) still serves a useful purpose as it states the basic principle which will permit to find the more precise rule in each case. Such a payment will be effective when the transfer to the creditor's financial institution will become effective. The solution rests on the ground that that institution acts as the creditor's agent. It means no effective payment exists before that moment, even though the order has been given to the transferor's financial institution, and the transferor's account has been debited. And payment is effective before the transferee is notified or credited of it by his financial institution. But the precise moment when payment to the creditor's financial institution can be considered as effective will depend on banking practices in the case concerned.

Illustration 1

Shipyard Y, a firm established in Helsinki, has repaired a ship belonging to a Swedish firm, and the bill is sent on a letter-head that mentions a bank account in Finland and another one in Sweden. Unless Y states that payment has to be made to the Finnish account, or by another means than a bank transfer, the Swedish firm is entitled to pay to the Swedish account.

Illustration 2

Licensee A gives his Bank Z a transfer order of \$ 5,000, royalties due to Licensor B, who has an account with Bank W. Bank Z debits A's account, but fails to forward the funds to Bank W, and goes bankrupt. Licensee A has not effectively paid Licensor B.

CROSS REFERENCES

Chapter V, article 11

NOTES

Few codifications deal with the problems involved in this article. See Benelux draft on performance, art. 19-20; Neth. N.B.W., art. 6.1.9A.3; UNCITRAL draft, art. 11.

LITERATURE

HARTKAMP, De verbinten is in het algemeen, n° 516-517.

Article 13. (Payment by cheque or other instruments)

(1) Payment of money due may be made in any form used in the ordinary course of business at the place of payment.

(2) However, a creditor who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, an order to pay or another instrument, or in place of the debtor's original obligation to pay, some other obligation to pay, is presumed to do so only on condition that it will be honored.

COMMENTS

The provision or paragraph (1) allows for a payment of money to be made in any form that is usual at the place of payment. With the reservation expressed in paragraph (2), the debtor may for instance pay with a cheque, a banker's draft, a bill of exchange, or with any other technique, like the newly developing electronic means of payment, provided he chooses a mode that is usual at the place of payment, i.e. normally at the creditor's place of business. In principle, the creditor should be satisfied to receive his payment in a form that is customary at his place.

Paragraph (2) states the generally recognized principle according to which the creditor's acceptance of an instrument of payment that has to be honored by a financial institution or another third party can only be given on the condition that the instrument will effectively be honored.

Illustration 1

Luxembourg Importer A receives a bill for the goods he has bought from a firm in Central America, and he sends an eurocheque in payment. The exporter may reject this mode of payment if the banks in his country are not familiar with eurocheques.

Illustration 2

Contractor Y has to pay Sub-contractor Z for the works he has completed on the building site, but Y is going through a liquidity crisis as Client X is late in paying him the first installment due. Client X, however, has given Y a set of promissory notes up to the amount of his debt. Contractor Y offers to pay Z by assigning the adequate number of promissory notes to the sub-contractor. If Z accepts them (in this case he probably does not have to, as it is not a usual form of payment), the effectiveness of the payment by Y to Z is conditional to X's honoring the promissory notes at maturity.

CROSS REFERENCES

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NOTES

Few codifications contain provisions concerning the problems involved. See Benelux draft on performance, art.20; U.C.C., § 2-511. See also Rest. 2nd Contr., § 249.

LITERATURE

HARTKAMP, De verbintenis in het algemeen, n° 225, 518-519.
FURMSTON, 9th ed. of CHESHIRE and FIFOOT's Law of Contract, p. 88.

Article 14 (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 for such performances under comparable circumstances in the trade concerned.

COMMENTS

It may not be frequent that parties fail to express the currency in which a monetary obligation is due, but instances can be found : a contract can state that the price will be the "current price", or that it will be determined by a third party, or that some expenses or costs will be reimbursed by one party to the other, without specifying in which currency these payments should occur. The rule in article 14, which is basically a rule of interpretation, states that in such cases, the adequate currency of payment will be determined in conformity with usages for similar situations. It will be noticed that analogous standards are logically used in article 10, which deals with the determination of the amount due, and in this provision, which concerns the currency in which payment should be made.

Article 14 does not concern the currency in which damages are to be paid. This problem is covered by article 29 of the chapter on non-performance.

Reporter's observation

The phrasing of article 14 has been modified to align it with the phrasing of article 10.

Illustration 1

Dutch Client A instructs his broker to buy shares on the Frankfurt stock exchange. The broker pays them in German marks; should he bill his client in marks, or in Dutch guilders ? It will all depend of what is customary in the Netherlands for such purchases of foreign shares through local brokers.

CROSS REFERENCES

Chapter III,
Chapter V, article 10
Chapter VI, article 29

NOTES

This provision is inspired by art. 48 (2) of the German Democratic Republic G.D.R.

LITERATURE

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Article 15 (Taxes and duties)

Each party has to bear the cost of taxes and duties connected with performance of his obligations.

COMMENTS

Performing a contract often implies the payment of taxes and duties. Article 15 allocates the cost of those expenditures to the party whose performance made them due: it is a generally recognized principle that each party should normally bear the costs involved in performing properly. The purpose of the provision is to determine which party has ultimately to bear those taxes and duties, irrespective of who, according to the relevant fiscal regulation, has actually to pay them to the relevant authorities.

Illustration 1

According to the contract, some goods sold from Algeria to Spain have to be delivered to the buyer's premises in Toledo. Spanish import duties will be borne by the seller.

Reporter's observations

1. A more general draft provision, according to which a party had to bear the costs incurred in performing his obligations, was rejected earlier, on the basis that rules about place of performance already implied that solution. Cannot the same criticism be made about this article 15 ?

2. The provision only considers taxes and duties connected with performing the contract. It was said in Milano that taxes connected with the conclusion of the contract were dealt with in the chapter on public permissions. Is it really the case ? Are not some taxes of that kind (stamp duties, "registration" of contracts) due independently of any permission requirement ?

3. Is the link with one party's obligations (an earlier text referred to "his part of the contract") always workable as a criterium ? If it can be said that customs duties are linked to delivery of the goods, what about a general "sales tax" ? Is it clearly connected with the obligations of either the seller or the buyer ? What about the value added tax ?

CROSS REFERENCES

Chapter V, art. 11

NOTES

Some civil law codifications provide for the more general principle according to which the costs of performance are to be borne by the performing party (French and Belgian C.C., art. 1248; Ital. C.C., art. 1196; Neth. B.W., art. 1431; Neth. N.B.W., art.6.1.6.16; Benelux draft on performance, art. 21; Quebec draft, art. 219; comp. B.G.B., § 270).

LITERATURE

WEILL and TERRE, *Les obligations*, 4th ed., n° 1010
ESSER/SCHMIDT, *Schuldrecht*, I, 6th ed., p. 220.
HARTKAMP, *De verbintenis in het algemeen*, n° 255.

Article 16 (Imputation 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; however, payment made is to discharge first the expenses, then the interests due before the principal.

(2) If the debtor does not make such specification, the other party may, immediately or within a reasonable time after payment, declare to the performing party to which obligation he imputes the payment, provided it applies to an undisputed obligation.

(3) In the absence of imputation according to paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria and in the sequence indicated :

a) the obligation which is due or which is the first to fall due;

b) the obligation for which the creditor has least security;

c) the obligation which is the most burdensome for the debtor;

d) the obligation which has arisen first.

If none of the preceding criteria applies, payment is imputed proportionally to the amount of the obligations.

COMMENTS

Articles 16 and 17 deal with the classical problem of imputation of payments. If a debtor owes at the same time, to the same creditor, several monetary obligations which are due (i.e. mature, exigible) , and he makes a payment the amount of which is not sufficient to extinguish all those debts, to which debts does that payment apply ?

Article 16, inspired by principles recognized by many codifications, gives the debtor a first possibility to impute his payment, provided expenses and interests due are discharged before the principal. In the absence of any imputation by the debtor, the provision enables the creditor to impute the payment received, though not to a disputed debt. Paragraph (3) gives criteria which will govern the imputation in the absence of any initiative by either party.

Illustration 1

Firm A has received three loans, each of \$ 100,000, from Bank B, by separate contracts. All three loans are due on December 31. Bank B receives \$ 100,000 from A on January 2, with the imprecise message : "Reimbursement of the loan". The bank pays little attention to the matter and does not react at first. Three months later, the bank sues Firm A for payment of the remaining \$ 200,000, and the parties disagree as to which of the loans has been reimbursed by the January payment. The Bank had similar security in each case, but the interest rates were not the same : 8 % on Loan n° 1, 8,50 % on Loan n° 2 and 9 % on Loan n° 3. Article 16 (3)(c) applies : the January payment will be imputed on Loan n° 3.

CROSS REFERENCES :

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NOTES :

Most civil or socialist law codifications provide for rules concerning imputation of payments, rather similar in spite of occasional variations : French and Belgian C.C., art. 1253-1256; Italian C.C., art. 1193-1195, Swiss C.O., art. 85-87; B.G.B., §§. 366-367; Neth. B.W., art. 1432-1435; Neth. N.B.W., art. 6.1.6.13-14; Benelux draft on performance, art. 16-17; Quebec draft, art. 249-253; G.D.R. G.I.W., § 265; Czech. Code of Int. Comm., art. 219. See also Rest. 2nd Contr., §§ 258-260.

LITERATURE :

WEILL and TERRE, Les obligations, 4th ed., n° 1029-1030.

ESSER/SCHMIDT, Schuldrecht, I, pp. 257, 273.

ENGEL, Traité des obligations en droit suisse, p. 438.

HARTKAMP, De verbintenissen in het algemeen, n° 250-254, 554, 561.

Article 17

Article 16 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

COMMENTS :

The problem of imputation of payments normally concerns monetary obligations, but similar difficulties can sometimes occur about obligations of a different nature. Article 17 provides that the preceding rules will then apply, with appropriate adaptations.

Illustration 1

Company Z is performing construction work on several sites in an African country, and through five separate and successive contracts with Supplier W, purchases different quantities of cement, all to be delivered in Antwerp on the same date, to be loaded on the same ship. The contracts are similar, except that contracts n° 3 and 5 stipulate very high liquidated damages for late delivery. Due to some difficulties, W can only deliver part of what he was supposed to. Upon delivery, in accordance with article 16 (1), the Supplier is entitled to specify that the quantities delivered are to be imputed to contracts n° 3 and 5.

CROSS REFERENCES :

Chapter V, article 16

NOTES :

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LITERATURE :

HARTKAMP, De verbintenis in het algemeen, n° 250.