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**Performance of Contract in the Unidroit Draft Principles
for International Commercial Contracts.**

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PERFORMANCE OF CONTRACT

in the

UNIDROIT DRAFT PRINCIPLES for

INTERNATIONAL COMMERCIAL CONTRACTS

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When our Unidroit working group was constituted and responsibilities distributed between participants, I thought Professor J. Rajski, from Warsaw University, and myself had been entrusted with a relatively easy task. We were supposed to draft the chapter on "performance". For a civil lawyer, and also for someone who was then a "Socialist lawyer", it was a clear and well-defined job. Performance of contracts, for us, includes a series of practical problems, the list of which immediately comes to the mind. The solutions can differ between countries, but those are technical variations, about which a task of harmonization should not be too difficult. In comparison to our colleagues who had to prepare the chapters on for instance questions of validity, or non performance and remedies, we thought we would not have much trouble "performing" our job.

We were wrong. The chapter on performance proved to be one of the most difficult ones to prepare. Our initial draft had to go through three successive readings, which always entailed substantial changes. More recently, the text finally approved to the working party drew another long set of questions and criticism from the Governing Council of Unidroit, and our group had to spend some more time revising it yesterday morning.

It seems that these unexpected difficulties are interesting to consider in themselves, as they provide with a typical example of the misunderstandings a comparative lawyer must constantly elucidate and try to overcome. It soon became clear that the contents of a chapter on "performance of contracts" were perceived in quite different ways by

common lawyers on one hand, civil and Socialist lawyers on the other hand. The main difficulties were not so much about agreeing on technical solutions, but essentially about understanding the other side's list of preoccupations. Common lawyers often had trouble grasping the meaning and the importance of some problems which have always been on our list, and vice-versa. Many efforts were devoted by the group to overcome this difficulty, and to integrate the two sets of problems to be covered - in a way acceptable to both sides.

Precise examples will be given below, e.g. about the civil law approaches to "partial" and "earlier performance", and the common law rules concerning "performance in installments" and "order of performances". More generally, a civil lawyer is often surprised at what he finds when looking under the "performance" title of an English or American treatise or codification (such as § 2-501 to 2-515 of the U.C.C.), and the reverse is certainly true. When an earlier version of the Unidroit draft chapter on performance was submitted for comments to a prominent, but unprepared, American specialist of contract law, he wrote he was *"puzzled by its choices of topics to include and to omit. Certainly the points that are dealt with are not a catalogue of issues that I am aware frequently arise and trouble arbitrators ... they seem to be more the kind of favorite issues of European civil law conceptualists ..."*. The same specialist could not recognize the object of the provisions on "imputation of payments" (*"What sort of problem is this intended to solve ?"*), even though the same question is covered, under the name "application of performance", in the Uniform Consumer Credit Code (§§ 3-3304) and in the Restatement Second on Contracts (§§ 258-260).

This shows that harmonization attempts must begin with serious efforts to meet each other at the starting point, and to keep in touch along the way. It is not easy, and the history of our chapter on performance has often demonstrated it.

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Chapter 5 of the Unidroit Principles is devoted to "Performance". It is divided into two sections, "performance in general" and "hardship". This paper will not cover the latter section, nor some provisions of the former devoted to public permission requirements. Those provisions were prepared by our colleague D. Maskow, who will be in a better position to comment on them.

We shall deal with a choice of problems in the first 20 articles of the first section (art. 5.1.1. to 5.1.20.). It is of course impossible, in such a short report, to present and analyze those 20 provisions, many of which are very technical. In spite of their undeniable interest, we shall not cover a few aspects which have been the occasion of relatively little discussion, such as the provisions on express and implied obligations (art. 5.1.1. and 5.1.2.), cooperation between parties (art. 5.1.5.), place of performance (art. 5.1.12), costs of performance (art. 5.1.18) and imputation of payments (art. 5.1.19. and 5.1.20.).

I shall concentrate on four problems or groups of problems that can illustrate four different approaches we followed in our task of harmonization. At times we have tried to take advantage of previous achievements, and we took our inspiration from already existing uniform law such as the Vienna Convention on International Sales (I). In other instances we have decided to adopt concepts known in certain legal systems only, which we thought could be of a universal interest for international contracts (II). There are also cases when we tried to combine civil law and common law approaches, in order to make our rules more generally acceptable(III). Finally I shall also mention some provisions where we had very few models in previously existing provisions, and tried to innovate and create original rules (IV).

I. Price determination

My first illustration is that of a case where we have tried to take advantage of previous achievements : the question of price determination. From a practical point of view, the provision of article 5.1.12 is a most important one. It is not unusual in international contracts that the price is not

expressly or implicitly fixed, and that the contract does not even make provision for the way of determining the price. The Principles have taken their inspiration on this point from the Vienna Convention on the International Sale of Goods (art. 55) ¹. In such circumstances, our draft provides that

"... the parties are considered, in the absence of any indication to the contrary, to have 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..."

Further paragraphs of the same article meet the circumstances where a party allowed to determine the price sets it at a manifestly unreasonable level, where a third party who was to fix the price cannot or will not do it, and where the factors by reference to which the price had to be fixed do not exist or cease to exist or to be accessible.

All of this seems to be useful, and brought remarkably little controversy within the group or before the Governing Council. Some countries adhere to stricter standards as to price determination (e.g. France) ², but the needs of international trade seem to have prevailed here over national particularities.

II. Duty of best efforts vs. duty to achieve a specific result

In this other matter, we have decided to import concepts known in certain legal systems only.

Article 5.1.3. distinguishes between two kinds of duties, the "duty of best efforts" and the "duty to achieve a specific result". It goes on by saying that

(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.

¹ Cf. G. EÖRSI, Open-price contracts, in C.M. BIANCA and J.M. BONELL, Commentary on the International Sales Law, 1987, pp. 4°1-409.

² Cf. J. GHESTIN et B. DESCHE, *Traité des contrats, La vente*, 1990, n° 381-400 ; I. CORBISIER, La détermination du prix dans les contrats commerciaux portant vente de marchandises, réflexions comparatives, *Rev. Int. Dr. Comp.*, 1987, pp. 767 et seq.

(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to observe the diligence observed by reasonable persons of the same kind under similar circumstances.

Article 5.1.4 then attempts to set criteria for determining the extent to which an obligation of a party involves a "duty of best efforts" or a "duty to achieve a specific result":

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

- 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 risk normally involved in trying to achieve the expected result ;*
- d) the other party's ability to influence the performance of the obligation.*

Those provisions introduce into the Principles the distinction originated in French law between so called "*obligations de moyens*" and "*obligations de résultat*". Originally suggested by Demogue³, this distinction has become a basic tool of analysis for contract lawyers not only in France⁴ but also in many civil law countries, such as Belgium⁵, the Netherlands⁶, Italy⁷ and Quebec⁸. It stresses the fact that a contractual obligation can be assumed with different degrees of intensity. Sometimes the obliged party promises to achieve a specific result. A carrier, for instance, promises he will deliver the goods in perfect condition, at the agreed time and place. In other cases, one merely promises to exert due diligence, in other words one's best efforts, to perform the obligation, but with no firm undertaking as to the achievement of any specific result. A physician, for instance, promises to take care of the

³ *Traité des Obligations*, V, n° 237.

⁴ Cf. J. FROSSARD, *La distinction des obligations de moyens et des obligations de résultat*, 1965 ; G. VINEY, *Traité de droit civil*, vol. IV, *Les Obligations, La responsabilité, conditions*, 1980, pp. 626-665.

⁵ Cf. H. DE PAGE, *Traité élémentaire de droit civil belge*, II, 3e éd., 1964, n° 596 ; P. VAN OMMESLAGHE, *Les obligations. Examen de jurisprudence 1974-1982*, *Rev. Crit. Jur. B.*, 1986, pp. 215-217.

⁶ J.D.A. DEN TONKELAAR, *Resultaatsverbintenissen en inspanningsverbintenissen*, Zwolle, 1982 ; A.S. HARTKAMP, *Verbintenissenrecht*, I, 8e éd., 1988, n° 184.

⁷ L. MENGONI, *Obbligazioni « di risultato » e obbligazioni « di mezzi »*, *Rev. Dir. Comm.*, 1954, pp. 185-209, 280-320, 365-396.

⁸ P.A. CREPEAU, *L'intensité de l'obligation juridique, ou des obligations de diligence, de résultat et de garantie*, 1989.

patient with all his attention and technical competence, but does not promise he will heal him.

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This distinction has important legal consequences. Where there is an obligation to achieve a specific result, failure to obtain that result presumes fault and per se constitutes a breach of contract, leaving the defaulting party with the burden of trying to establish an exculpatory cause, such as force majeure. Where there is only an obligation of best efforts, on the contrary, dissatisfaction as to the performance received puts the burden on the aggrieved party to prove that the obliged party did not act with the required diligence ("*en bon père de famille*"). It is apparent that the type of obligation assumed does not only determine the intensity of the efforts required in performing, but also the more or less comfortable situation of the aggrieved party in case performance is not satisfactory.

How to distinguish those two kinds of obligations is a classical problem in the legal systems that have adopted the concepts. Case law is abundant on the subject. The nature of the obligation can often be determined from the wording of the statutory or contractual text that enunciates it. Otherwise, courts will determine the likely intention of the parties through an analysis of the concerned obligation, using the sort of criteria that have been formulated in littera (b) through (d) of article 5.1.4. of the Unidroit draft, e.g. the degree of risk normally involved in trying to achieve the expected result.

It should be stressed that to lawyers familiar with the distinction, the two concepts of "*obligations de moyens*" and "*obligations de résultat*" are not meant to be all-inclusive. Some obligations can be stricter than obligations to achieve a specific result (such as the so-called "*obligations de garantie*")⁹, and all sorts of variations are possible between the two basic models. Elaborate examples of intermediate formulas are to be found in some international conventions, such as those concerning international transport¹⁰. Obligations of best efforts and obligations to achieve a specific result are simply reference models, which correspond to two very common types of contractual obligations.

⁹ Cf. B. GROSS, *La notion d'obligation de garantie dans le droit des contrats*, 1964 ; J.L. FAGNART, *Les obligations de garantie*, *Mélanges Bagniet*, 1976, pp. 233-262.

¹⁰ See for instance art. 17 and 18 of the CMR Convention of May 19, 1956 on road transport.

It must also be pointed out that this is a distinction which deals with single obligations. Contracts quite frequently combine obligations of both types. If a physician normally owes an obligation of diligence in taking care of his patient, the latter is bound by an obligation to achieve a specific result when it comes to paying the doctor's fees.

However familiar the distinction may be with many civil lawyers, it has not been received in all civil law jurisdictions (e.g. not in Germany), and it is foreign to common lawyers. Professor Farnsworth, however, has contributed to its introduction into the American scene¹¹.

In articles 5.1.3. and 5.1.4. of the Unidroit draft chapter on performance, we have thus decided to make use of that distinction, even though at the present stage it is known only in certain jurisdictions. It is felt to be a useful move in order to draw the attention of the parties to the existence of different degrees of intensity in contractual engagements, and thus to the necessity of formulating their obligations with the corresponding precision. The criteria set forth in article 5.1.4. should also prove useful for judges and arbitrators who, in the absence of clear language in the contract, are called upon to define the exact nature of the parties' duties.

As was already said, article 5.1.3. attempts to define the two different types of obligations involved. The duty of best efforts is described through the criterium of what "*reasonable persons of the same kind*" would do "*under similar circumstances*". It is a contemporary rendition of the *bonus paterfamilias*' behavior, and it is not unrelated to the common "*best efforts*" clause in modern-day contracts¹². As to the party who has the duty to achieve a specific result, "*that party is bound to achieve that result*". That formula is far from being the tautology it may seem to be at first sight. It is meant to precisely express the strict contents of such an obligation. To promise to achieve a specific result simply obliges one to achieve it, literally. The formula has to be read in its context, i.e. in contrast to the mere duty of best efforts described in the following paragraph.

¹¹ E.A. FARNSWORTH, On Trying to Keep One's Promises : the Duty of Best Efforts in Contract Law, 46 *University of Pittsburgh Law Review* (1980), 1-20 (especially at 4).

¹² Cf. our study on Best Efforts, Reasonable Care, Due Diligence et Règles de l'Art, in *Droit des Contrats Internationaux*, 1984, pp. 91-125.

III. Partial performance, performance at one time or in installments, time of performance, order of performance, earlier performance.

Articles 5.1.6. to 5.1.10 of the current draft contain certain provisions dealing respectively with partial performance, time of performance, performance at one time or in installments, order of performance and earlier performance.

Article 5.1.6. (Partial performance)

(1) The obligee may refuse an offer to perform in part at the time performance is due 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 without prejudice to any other remedy.

Article 5.1.7. (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.*

Art. 5.1.8. (Performance at one time or in installments)

In cases under Articles 5.1.7. (b) or (c), a party must perform its obligations at one time, if that performance can be rendered at one time and the circumstances do not indicate otherwise.

Art. 5.1.9. (Order of performance)

(1) To the extent that the parties' performances can be rendered simultaneously, the parties are bound to render them simultaneously, unless the circumstances indicate otherwise.

(2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

Article 5.1.10. (Earlier performance)

(1) The obligee may reject 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 performance 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 without prejudice to any other remedy.

Those provisions form a group that has provoked the greatest difficulties - and perhaps still does. They have been redrafted several times, and their respective order often rearranged. Much of this is the result of the attempt to combine some rules familiar to civil lawyers with rules more familiar to common lawyers. It gives the opportunity to illustrate the problems mentioned at the beginning of this report.

At the start, the draft included one provision preventing "partial performance", and several articles dealing with "time of performance", including the consequences of "earlier performance" by the other party. The rules proposed were inspired by similar provisions in most civil law codifications, and no major difficulty was expected. Such problems deserve little more than passing mentions in civil law treatises and law courses, at least in countries like France and Belgium, and case-law is virtually non-existent.

1. So-called "partial performance", for instance, is routinely covered by Civil codes ¹³, generally to be excluded, sometimes to be accepted in certain cases, e.g. when it is justified by usages. It means that in principle, the obligee is entitled to receive the whole of the performance at one time, and he may thus refuse to accept only part of it.

Common lawyers in the group were however not familiar with such a rule, and puzzled by its apparent simplicity. They wondered what relationship it had to the possibility of rendering the performance in installments; reference was made to § 233 (1) of the American Restatement Second on Contracts (*"Where performances are to be exchanged under an exchange of promises, and the whole of one party's performance can be rendered at one time, it is due at one time, unless the language or the circumstances indicate to the contrary"*).

It was agreed that the two rules had different scopes. The "partial performance" provision does not of course prevent any agreement on

¹³ France and Belgium, art. 1244; Italy, art. 1181 ; Swiss Code of Obligations, art. 69 ; the Netherlands (N.B.W.), art. 6.1.6.3.; Germany, § 266 ; Yugoslavia, art. 310; Quebec draft, art. 211. Cf. for instance A. WEILL and F. TERRE, *Droit civil. Les Obligations*, 4th ed., 1986, n° 996 (French law).

payment by installments; on the other hand, it concerns the situation at maturity (of the whole performance or of an agreed installment): then the obliged party must in principle perform all that is due at that moment. The "installment" provision covers a different question, i.e., the possibility which a party may have, when there is no fixed time for performance (e.g. when performance has to take place within a period of time, or within a reasonable time), to decide to perform at one time or in successive parts. 10

The group then decided to use both rules, and they now stand respectively as articles 5.1.5. and 5.1.7. Since the proposed distinction confines the "installment" provision to cases when performance must not be made at a fixed time, a link had to be expressed between art. 5.1.8. and some of the specific hypotheses covered by art. 5.1.7., the provision that governs "time of performance" in general.

The solution adopted is not entirely satisfactory. The combination of the two provisions on "partial performance" and on "installments" has generated lengthy discussions among the group, as well as within the Governing Council. In spite of the conceptual difference between the situations respectively covered, the rules may overlap and thus create difficulties of interpretation.

An example was given. If a party were required to deliver goods during August and during that month he made a tender of any part of that quantity, art. 5.1.8. decides that is not correct performance as he must perform his obligations at one time *"If ... the circumstances do not indicate otherwise"*. But would not art. 5.1.6 also apply to prevent the other party to reject the tender *"unless he has no legitimate interest in doing so"* ? In that case, problems would immediately arise from the cumulative application of those two rules, each admitting exceptions based on different criteria.

One could still attempt to show the two provisions have their respective scopes and utilities. Yet the suggestion has been made to find a way to merge articles 5.1.6. and 5.1.8. into a more simple and general rule stating that in principle, an obliged party is not allowed to perform in part - which would be the return to the starting point, when the draft had a provision on partial performance only !

2. Another case of attempting to combine civil and common law rules followed the initial proposal of an article about "earlier performance". Many Civil codes provide that the time for performance stipulated in the contract is "*presumed to be in favor*" of the performing party, who can waive it and perform earlier¹⁴. For international contracts, however, it was felt that the principle should be different, and the current art. 5.1.10 gives the obligee the right to reject an earlier performance "*unless he has no legitimate interest in doing so*". The text goes on with provisions on the obligee's own obligations and additional expenses in case of earlier performance by the other party.

At first, common lawyers were again unfamiliar with this approach, and wondered about its relationship with a rule such as § 234 of the American Restatement Second on Contracts concerning the order of performances. Reciprocally, civil lawyers are not used to rules along the lines of that § 234 ; for those civil lawyers, questions involved in § 234 do not seem to create any problems : they are apparently solved by provisions in the contract, or by usages (one always pays a theater ticket before the show and a haircut after getting it, without giving it much of a thought).

Much discussion ensued. A provision inspired by the § 234 rule was adopted at a meeting, deleted at the next one, then reinstated to become the current art. 5.1.9.

"Order of performance" and "earlier performance" may be related, but they are clearly different problems. The "order of performance" rule comes first, to determine when each performance is due. Only then may the "earlier performance" question arise. On the other hand, "order of performance" only concerns bilateral contracts, while "earlier performance" also matters in unilateral obligations.

The new rule on "order of performances", however, once again raised much discussion in the Governing Council, where its utility was not always well understood. Situations where the order of performances can be a question vary so much from a contract to the other, depending on the

¹⁴ France and Belgium, art. 1187 and 1188; Italy, art. 1185; the Netherlands (N.B.W.), art. 6.1.6.9; Germany, § 271; Swiss Code of Obligations, art. 81, Poland, art. 457; Quebec draft, art. 134. Cf. for instance A. WEILL and F. TERRE, *op. cit.*, n° 914.

obligations involved, usages and contractual stipulations, that it is very ¹² difficult to draft a general rule. It may seem that the escape clause "*unless the situation indicates otherwise*" will apply most of the time. The group, however, has decided to keep the provision as it is.

IV. Payments by cheques, funds transfers, etc...

I shall finally come to a group of provisions where we have tried to innovate due to the extreme scarcity of existing models.

Payments by cheques, transfers and similar instruments are certainly nothing new, but very few codifications have so far attempted to set out the main principles governing such payments. There were path-breaking provisions in a Benelux draft on Performance of Contracts, but it was never adopted. There is a provision on funds transfers in the new Dutch civil code, which has just entered into force (art. 6-114) ¹⁵. On the international scene, very important progress has been made with the UNCITRAL Draft Model Law on International Credit Transfers ¹⁶. But in general, the problems involved have not been regulated so far.

Thus the provisions of articles 5.1.14 and 5.1.15 of the Unidroit draft have the merit of relative originality. The purpose of these rules is to set out simple but fundamental principles which can be of use in international transactions. The provisions also attempt to be broad enough in their language to permit the adaptation to the rapid technological evolution that is taking place, e.g. in the form of electronic means of payment.

Article 5.1.14 (1) allows for a payment of money to be made in any form that is usual at the place of payment. The debtor may for instance pay with a cheque, a banker's draft, a bill of exchange, or with any other technique, including the new electronic ones, provided he chooses a mode that is usual at the place of payment, i.e. normally at the creditor's place of business (according to another provision of the draft, art. 5.1.11). In principle, the creditor should be satisfied to receive his payment in a form that is customary at his place.

¹⁵ Cf. A.S. HARTKAMP, *Verbintenissenrecht, Deel I, De verbintenis in het algemeen*, 1992, n° 516.

¹⁶ A/CN.9/318.

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.

Article 5.1.15 (1) concerns the admissibility of payments by funds transfers. Though the principle stands in the Unidroit draft that payment of a monetary obligation should be made at the creditor's place of business (art. 5.1.11), it can also be made to one of the financial institutions in which the creditor has made it known that he has an account. If however the creditor has indicated a particular account, then payment should be made to that account. Naturally, the creditor can also make it known that he does not want to receive a payment by transfer.

The provision goes on with a rule - art. 5.1.15(2) - about 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 can be 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 along 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 5.1.15. (2) merely states that

payment by a transfer is completed when the transfer to the creditor's financial institution becomes effective.

This broad provision still serves a useful purpose as it states the basic principle which will permit to find the more precise rule in each case. The solution rests on the ground that the creditor's financial institution acts as

the creditor's agent. It means that no effective payment exists before that institution receives the transfer, even though the order has been given to the transferor's own financial institution, and the transferor's account has been debited. On the other hand, payment can be 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. 14

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Such are some of the problems met and difficulties encountered when drafting the Unidroit chapter on performance, which has certainly proved to be one of the most controversial of the project. This short paper has attempted to show that the problems are not so much with the choice of the best technical solutions, but often mainly with the need to overcome barriers of understanding between the different legal systems. I have also tried, with the four examples chosen, to show the flexibility of our approaches in our attempts to harmonize, and the different methods we have been using in our search for the most adequate solutions. It has been difficult, and the outcome may not be completely satisfactory. In any case, our efforts have been the occasion of a fascinating exercise in comparative law.