

Comparative Private Law II

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Overview Remedies

- General Approach to Remedies – Civil Law / Common Law
- Specific Performance
- Avoidance
- Damages
- Exemption
- Interest

General Approach

- Cause oriented approach – specific breaches trigger specific remedies
- Breach of contract approach – all breaches trigger same set of remedies
- Modern approach – CISG / PICC

Cause Oriented Approach

- Civil Law legal systems
- Roman Law as starting point
- Impossibility
- Delay of debtor / delay of creditor
- Improper performance

Non-conformity

Breach of other duties

Breach of Contract Approach

- Common Law legal systems
- Equal treatment of breaches
- Consequences of breach

Damages

Specific performance

Avoidance

Modern Approach

- General
- Breach of contract approach as starting point
- Influences of cause-oriented approach

Specific performance

Reduction of price

Nachfrist principle

Specific Performance

- General
- Interests involved
 - Party interests
 - Market interests – efficient breach?
- Terminology
 - Right v. remedy
 - Specific performance v. cure

Civil Law Approach

- General
- Non-conformity: *alius v. peius*
- Cure
- Exceptions
- Enforcement proceedings

Common Law Approach

- General – Common law v. equity
- Specific performance granted
 - Action for the price, unique goods, requirement and output contracts, cure
- Restrictions
 - clean-hands doctrine, conduct of both parties, need for supervision, potential hardship for obligor

International approach

- CISG
- PICC
- PECL
- CESL

Art. 46 CISG

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Art. 62 CISG

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Art. 28 CISG

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Art. 7.2.1 PICC

Where a party who is obliged to pay money does not do so, the other party may require payment.

Art. 7.2.2 PICC

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

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

Art. 7.2.3 PICC

The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.

Art. 7.2.4 PICC

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

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

Art. 9:101 PECL

(1) The creditor is entitled to recover money which is due.

(2) Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless:

(a) it could have made a reasonable substitute transaction without significant effort or expense; or

(b) performance would be unreasonable in the circumstances.

Art. 9:102 PECL

- (1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.
- (2) Specific performance cannot, however, be obtained where:
 - (a) performance would be unlawful or impossible; or
 - (b) performance would cause the debtor unreasonable effort or expense; or
 - (c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or
 - (d) the aggrieved party may reasonably obtain performance from another source.
- (3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.

Art. 110 CESL

1. The buyer is entitled to require performance of the seller's obligations.
2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.
3. Performance cannot be required where:
 - (a) performance would be impossible or has become unlawful; or
 - (b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.

Avoidance - Overview

- General
- Grounds for Avoidance
- Loss of Right to Avoid
- Mechanisms for Avoidance

Avoidance - General

- Avoidance and *pacta sunt servanda*
- Unwinding of the contract
- Concept
- Distinguish withdrawal, revocation, rescission
- Avoidance and validity issues
- Impossibility, frustration, impracticability
- Terminology: avoidance v. termination
- Avoidance by agreement

Grounds for Avoidance

- Contractual agreement
 - avoidance clauses – clauses résolutoires
 - conditions v. warranties
- Cause-oriented v. unitarian approach

Cause-Oriented Approach

- General

Civil Law – Common Law

Conditions, warranties, intermediate terms

- Impossibility, frustration, impracticability

Development and functions

Scope

Requirements

Cause-Oriented Approach

- Delay

Notion of delay

Nachfrist, exceptions, calculation of period

Period of grace

Time of the essence, express contract terms, interpretation

Non-Conformity of the Goods

- Civil Law legal systems
 - Roman law; *actio redhibitoria*
 - Restrictions
- Common Law legal systems
 - Perfect tender rule
 - Acceptance
 - Revocation of acceptance

Unitarian Approach

- General; starting point CISG
- Fundamental breach approach
 - Notion of fundamental breach
 - Non-performance in general - Time of the essence
 - Non-conformity, relevance of cure
- *Nachfrist* approach

Art. 49 CISG

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2)

Art. 7.3.1 PICC

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) ...

Art. 25 CISG

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Art. 7.3.1 PICC

- (2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether
- (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
 - (b) strict compliance with the obligation which has not been performed is of essence under the contract;
 - (c) the non-performance is intentional or reckless;
 - (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
 - (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.
- (3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired.

Loss of and Mechanism for Avoidance

- Loss of right to avoid – *mortuus redhibetur*
- Mechanisms for Avoidance

Ipso facto / ipso iure (impossibility/
frustration, avoidance clauses, expiration
of *Nachfrist*)

Court order

Declaration by aggrieved party (time for
declaration, dispatch v. receipt)

Damages - Overview

- General
- Causation
- Fault and foreseeability
- Categorisation of losses
- Extent of damages
- Methods of calculation
- Contractual stipulations

Damages - General

- Purposes of damages
- Compensation
- Prevention (deterrence v. punishment, punitive damages, disgorgement of profits)
- Full compensation v. overcompensation
- Economic benefits v. performance principle
- Pecuniary v. non-pecuniary loss

Art. 74 CISG

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Art. 7.4.2 PICC

(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

(2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

Causation

- Causation doctrine
- Natural causality (*conditio sine qua non*)
- Restrictions (adequacy/common sense, scope of duty breached)
- Intervening facts (third party intervention, act or omission by aggrieved party)

Fault and Foreseeability

- General

- Fault

 - Notion of fault

 - Attribution of fault

 - Non-conformity

- Foreseeability

 - Hadley v. Baxendale* rule

 - Relationship to fault

Categorisation of Losses

- *Damnum emergens* and *lucrum cessans*
- Expectation and reliance loss

Election between losses

- Direct and indirect loss (causality approach, foreseeability, degree of fault, statutory definitions)
- Incidental and consequential loss

Extent of Damages

- Non-performance loss
- Incidental loss
 - Legal costs
- Consequential loss
 - Damage to property / Personal injury
 - Loss of goodwill and reputation
 - Recourse for liability to third parties
 - Lost profit / loss of a chance

Methods of Calculation

- General
- Concrete and abstract calculation – relationship
- Concrete calculation (substitute transaction, repair)
- Abstract calculation (market price-rule)
- Profit from breach of contract

Contractual Stipulations

- Penalty / Liquidated damages clauses
 - Limits (unenforceability of penalty clauses, reduction of excessive sums)
 - Relationship to other remedies
- Limitation clauses (exclusion clauses, certain losses excluded, caps)
- Restrictions (express warranties/guarantees, minimum adequate remedy, gravity of fault)

Exemption

- Liability systems
- Impediment and hardship
- Unitary approach
- Impact of non-breaching party

Art. 79 CISG

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

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Art. 7.1.7 PICC

(1) Non-performance by a party is excused if that party proves that the nonperformance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

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Impediment

- Contractual allocation (*force majeure* clause)
- Impossibility, frustration
- *Force majeure*
- Relevant threshold (examples)
- Non-conformity
- Consequences – Impact on remedies
- Temporary / partial impediment
- Duty to give notice

ICC Force Majeure Clause 2003

(3) In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1 [a] and [b] of this Clause in case of the occurrence of one or more of the following impediments:

[a] war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade; military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation;

[b] civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;

[c] act of terrorism, sabotage or piracy;

[d] act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;

[e] act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;

[f] explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;

[g] general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises.

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Hardship

- Contractual allocation (hardship clause)
- Different concepts
- Initial v. subsequent imbalance
- Threshold (examples)
- Consequences

Duty to renegotiate

Adaptation of the contract

Avoidance

ICC Hardship Clause 2003

(1) A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

(2) Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

[a] the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that

[b] it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

(3) Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.

Art. 6.2.2 PICC

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.

Art. 6.2.3 PICC

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
 - (a) terminate the contract at a date and on terms to be fixed, or
 - (b) adapt the contract with a view to restoring its equilibrium.

Interest

- General questions
- Procedural v. substantive approach
- Starting points
- Contractual stipulations

Limits; rate, compound interest

Interest – Default Rules

- Starting time; payment due (examples), delay, fault
- Ending time; payment / judgement
- Interest rate
 - Fixed rate (single/different rates)
 - Variable rate
- CISG – possible solutions
- Compound interest

Art. 78 CISG

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Art. 7.4.9 PICC

- (1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.
- (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.
- (3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.