

Ramifications of the Right to Performance under the CISG

Hiroo Sono
Hokkaido University, Japan

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Introduction

- Little Practical Significance?
 - Right to performance rarely exercised in international sale of goods (except for seller's right to payment of price).
 - More cost-effective measures available.
- Indirect Practical Ramification
 - Efficient Breach
- Direct Practical Ramification
 - Impossibility

Introduction

- Right to Performance under the CISG
 - Buyer’s Right: Arts 45 & 46 CISG
 - **Article 46 (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.”
 - **Article 46 (2):** Right to substitute goods (but more akin to avoidance of contract)
 - **Article 46 (3):** Right to repair
 - Seller’s Right: Arts 61 & 62 CISG
 - **Article 62** “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.”

Introduction

- Civil Law v. Common Law: Compromises
 - Article 28
 - **Article 28** “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.”
 - Right to Performance as a “remedy” in case of breach (Arts 45(1)(a), 61(1)(a)), rather than consequence of “*pacta sunt servanda*”
 - Enforcement measures left to domestic law

Theoretical Ramifications

- Right to performance as the “primary” remedy
 - Primacy over “damages” and “avoidance of contract”.
 - Right to performance may be exercised unless the aggrieved party has resorted to an “inconsistent remedy” (Arts 46(1), 62)
 - Most typically, right to performance can be exercised unless the contract is avoided.
 - Rejection of “*ipso facto* avoidance” (cf. Art 26)
 - *Synallagmatic* relationship (*quid pro quo*) preserved until (i) all obligations are performed or (ii) the contract is avoided (cf. Art 81).
 - Article 28 does not change this basic structure

Practical Ramification: Efficient Breach

- **Illustration:** S enters into contract with B1, for sale of last available set of chairs in stock. Price \$10K. B1 intends to resell the chairs in the retail market for the price of \$12K. B2 offers S to purchase the chairs for the price of \$15K.
- **Theory of efficient breach:** efficient or socially beneficial to breach contract: Even if S pays damages of \$2K ($12K - 10K$) to B1, S still receives \$3K ($15K - 12K$) more from B2, and therefore is better off by \$1K.

Practical Ramification: Efficient Breach

- Right of Performance is “primary” remedy.
 - B1 can require S to deliver (including injunction)
 - Disgorgement of Profits?
 - If S delivers to B2, can B1 claim damages for \$5,000?
 - Opposing view (majority opinion):
 - “windfall” to B1
 - Supporting View:
 - “Breach of contract should not pay”
 - B2’s offer of 15K is presumption of market condition.
 - Disgorgement is functionally equivalent to Injunction. Had B1 negotiated with B2, B1 would have made profit of \$5000 (15K-10K).

Practical Ramification: Impossibility and Right to Performance

- “Impossibility” constitutes breach of contract under the CISG. Can right to performance be exercised? Answer should be NO, but on what grounds?
 - Art 28. But reliance on domestic law, and also discretionary.
- Practical question when one takes a lenient view of “impossibility”
- There must be internal control within the CISG (cf. UNIDROIT Principles Art 7.2.2)

UNIDROIT Principles of International Contracts 2010

ARTICLE 7.2.2 (PERFORMANCE OF NON-MONETARY OBLIGATION)

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.

Practical Ramification: Impossibility and Right to Performance

- Candidates for Internal Control
 - Balance with Art 79 (Exemption of damages in case of impediment beyond ones control).
 - Article 46(3)?
 - **Article 46(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. [...]”

Conclusion

- The right to performance may not be exercised frequently in international sale of goods. In practice, direct applications of Art 46 and 62 may have limited practical value.
- However, theoretically, the existence of the right to performance forms the pillar of the system of contract law under the CISG, and as such, it has ramifications beyond its direct application.

Muchas gracias por su atención!