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Additional Period (*Nachfrist*) for Late Performance: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law

Chengwei Liu¹

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¹ LL.M. of Renmin University of China; e-mail: lexway@mail.com.

Key provisions at issue

- CISG Arts. 47/49(1)(b), 63/64(1)(b)
- UNIDROIT Principles Art. 7.1.5
- PECL Art. 8:106

The purpose behind the flexible remedy of *Nachfrist* is that the CISG, as one of its principles, attempts to keep the contract afoot as long as there is a possibility to perform contractual obligations. This is in line with the attempt to overcome some of the problems of distance, expense and time in having an international contract terminated where, operating under another general principle of the CISG, namely good faith, remedial action could have been possible, resulting in a win-win situation.²

I. Introduction

“Various multilateral/international organizations have developed legal standards applicable to international sales contracts which have incorporated (or purported to incorporate) the concept of *Nachfrist*.”³ Among such standards are the United Nations Convention on Contracts for the International Sale of Goods (1980)⁴ (“CISG” or “Convention”), UNIDROIT Principles of International Commercial Contracts (1994)⁵ (“UNIDROIT Principles”) and Principles of European Contract Law (1998)⁶ (“PECL”).

² Bruno Zeller, *Editorial Remarks on the Comparison of CISG Articles 47 and 49(1)(b) with Principles of European Contract Law Article 8:106*, at <http://www.cisg.law.pace.edu/cisg/text/peclcomp47.html> last visited April 28, 2005) [hereinafter Zeller, Comparison of CISG Articles 47 and 49(1)(b)]; Bruno Zeller, *Editorial Remarks on the Comparison of CISG Articles 63 and 64(1)(b) with Principles of European Contract Law Article 8:106*, at <http://www.cisg.law.pace.edu/cisg/text/peclcomp63.html> (last visited April 28, 2005).

³ Maryellen DiPalma, *Nachfrist under National Law, the CISG, and the UNIDROIT and European Principles: A Comparison*, 5 INT’L CONT. ADVISER 28-38 (1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/DiPalma.html> (last visited April 25, 2005).

⁴ United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, art. 47, S.Treaty Doc. No. 98-9 (1984), 1489 U.N.T.S. 3, reprinted in United Nations Conference for the International Sale of Goods, 19 I.L.M. 671 (1980) [hereinafter CISG].

Briefly speaking, the *Nachfrist* procedure allows an additional period for performance by the party who did not perform at the date due under the contract. It is a *companion* of the remedy of specific performance, which is the right to require performance of the contract by the non-performing party, which anticipates the aid of a court or arbitral tribunal in enforcing that right. If one party delays performing the contract, however, the “judicial procedure for enforcement may [not seem feasible or may] require more time than the other party can afford to wait.”⁷ It may consequently be to the aggrieved party’s advantage to avoid the contract and make a cover transaction with a third party. “However, at that time it may not be certain that the ... delay [in performance] constitutes a fundamental breach of contract justifying the avoidance of the contract.”⁸ Thus, the *Nachfrist* procedure is established in favor of the aggrieved party to relieve concerns arising in waiting for performance or to eliminate uncertainties concerning avoidance.

Among the three standards mentioned above, reference of *Nachfrist* can be, above all, made to CISG Arts. 47 and 63, which generally defines the *Nachfrist* concept under the Convention. More importantly, CISG Arts. 49(1)(b) and 64(1)(b) authorize the aggrieved buyer/seller to avoid the contract by the expiration of a *Nachfrist*, regardless whether or not a fundamental breach has occurred (in this context, it is usually discussed under the term “notice-avoidance”). These relevant rules state, respectively:

⁵ United Nations International Institute Of The Unifications Of Private Law Principles of International Commercial Contract, Rome, 1994, available at <http://www.unilex.info> [hereinafter UNIDROIT].

⁶ Principles of European Contract Law, the Commission on European Contract Law (Kluwer Law International 1999) [hereinafter PECL].

⁷ The Secretariat Commentary is on the 1978 Draft of the CISG, not the Official Text, which re-numbered most of the articles of the 1978 Draft. To the extent it is relevant to the Official Text, the Secretariat Commentary on the 1978 Draft is perhaps the most authoritative source one can cite. It is the closest counterpart to an Official Commentary on the CISG. The Secretariat Commentary on the 1978 Draft of the CISG, art. 43 is on the draft counterpart of CISG, art. 43. The Secretariat Commentary on the 1978 Draft of the CISG, art. 59 is on the draft counterpart of CISG, art. 63. See Secretariat Commentary on the 1978 Draft of the CISG, art. 43, cmt. 2, at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-47.html> (last visited April 28, 2005) [hereinafter Secretariat Commentary on art. 43]; Secretariat Commentary on the 1978 Draft of the CISG, art. 59, cmt. 2, at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-63.html> [hereinafter Secretariat Commentary on art. 59].

⁸ See Secretariat Commentary on art. 43, *supra* note 7, at cmt. 2; Secretariat Commentary on art. 59, *supra* note 7.

CISG Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.⁹

CISG Article 49(1)(b)

The buyer may declare the contract avoided [...] in the 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.¹⁰

CISG Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.¹¹

CISG Article 64(1)(b)

The seller may declare the contract avoided [...] if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.¹²

CISG Arts. 47 and 49(1)(b), or Arts. 63 and 64(1)(b), are provisions which span both remedies through the principle of “*Nachfrist*,” a principle that has been mainly borrowed from the German concept of *Nachfrist*,¹³ as well as from the French procedure of *mise en demeure*.¹⁴

⁹ CISG, *supra* note 4, art. 47.

¹⁰ CISG, *supra* note 4, art. 49(1)(b).

¹¹ CISG, *supra* note 4, art. 63.

¹² CISG, *supra* note 4, arts. 64(1)(b).

¹³ § 326 BGB (F.R.G.).

The two remedies spanned under CISG Arts. 47 and 49(1)(b), or Arts. 63 and 64(1)(b), are combined in UNIDROIT Principles Art. 7.1.5, which, “inspired by the German concept of *Nachfrist* although similar results are obtained by different conceptual means in other legal systems,” deals with the situation “where one party performs late and the other party is willing to give extra time for performance.”¹⁵ It reads:

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that maybe available under this Chapter.

(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.

(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.¹⁶

PECL has also adopted a *Nachfrist* procedure in basically the same form as under the CISG. Of particular relevance, PECL Art. 8:106, almost identical to UNIDROIT Principles Art. 7.1.5, prescribes that:

(1) In any case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

¹⁴ See Zeller, Comparison of CISG Articles 47 and 49(1)(b), *supra* note 2.

¹⁵ Comment on UNIDROIT Principles, art. 7.1.5, available at <http://www.cisg.law.pace.edu/cisg/principles/uni47,49.html> (last visited April 25, 2005).

¹⁶ UNIDROIT, *supra* note 5, art. 7.1.5.