NATIONAL AND INTERNATIONAL REMEDIES FOR BREACH OF CONTRACT

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SUMMARY

This article deals with the remedies which French, English legal systems and the UNIDROIT Principles offer in the case of non-performance of contract obligation. The comparative analysis of French and English models of remedies shows the effectiveness of each of them, their advantages and weak points. Then article describes how the UNIDROIT Principles harmonize inconsistent approaches of French and English Law. Also it reveals the main idea of the UNIDROIT Principles to keep the contract 'alive' after the non-performance – *favor contractus* principle.

Key words: Non-performance, damages, termination, foreseeability of harm, mitigation of harm, contributory negligence.

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В данной статье раскрыты средства правовой защиты, предлагаемые французской и английской правовыми системами, а также Принципами УНИДРУА в случае невыполнения договорного обязательства. Благодаря сравнительному анализу французской и английской моделей удалось показать эффективность каждой из них, их преимущества и недостатки. В статье описано, каким образом в Принципах УНИДРУА удалось гармонизировать не всегда совместимые подходы французского и английского права. Также в статье раскрыта базовая идея Принципов УНИДРУА – *favor contractus*, заключающаяся в том, чтобы сохранить договор после невыполнения.

Ключевые слова: невыполнение, убытки, расторжение, предсказуемость ущерба, уменьшение ущерба, вклад пострадавшей стороны в нанесение ущерба.

Introduction. Without doubts the main purpose of the Contract Law is to work out effective remedies for a breach of contract. Usually the party, who hasn't received what she expected from the contract, may withhold her own performance, enforce owed performance, terminate the contract, claim damages or restitution etc. On the basis of these and some other remedies each national system proposes its own methods for solving the situation of non-performance.

For the long time no uniform mechanism of remedies existed, until in 1994 International Institute for the Unification of Private Law (UNIDROIT) adopted the Principles of the International Commercial Contracts (the UNIDROIT Principles). This document actually embodies a common core of the Law of obligations 'ex contractu' and in this article we are going to compare English, French and the UNIDROIT Principles' systems of remedies for the breach of contract. The purpose of such comparative analysis is to estimate effectiveness of each legal system and to answer the question: do the UNIDROIT Principles deserve to be a model example for national legal systems? For the purpose of our research we use comparative analysis, gnosiological and axiological methods.

It is also important to admit the names of legal scholars whose works on Comparative Contract Law constitute the preliminary foundation to this article: A. Rosett, F. Terré, R. Stone, G. Treitel, A. Karapetov, K. Zweigert and H. Kötz.

As A. Rosett once said provisions concerning non-performance are 'the substantive heart' of the whole Contract Law [1, p.441]. Actually he said this in the context of the UNIDROIT Principles but this is also true for the whole Contract Law, because parties refer to the law only in the case of dispute and a breach of contract is the reason for the dispute. That's why provisions concerning breach of contract are the main in Contract Law and comparative analysis of these provisions is very ***important today*** for the development of national Contract Law. It's important because the development of national Contract Law is no longer a separate process; nowadays it involves the unification of Contract Law rules all over the world.

Main part. One may see that terms 'breach of contract' and 'non-performance' are used in this article interchangeably. It's because all these cases of the failure of performance *(défaillance d'execution)* French law determines as non-performance *(inexécution)* while English law operates with the concept of breach.

Whereas Art. 7.1.1 UPICC uses the term 'non-performance' and defines it as the 'failure by a party to perform any of its obligations under the contract, including defective performance or late performance' [2, p.223].

Despite of using different terms the wrong way of the contract relations is actually described similarly in all systems. But it doesn't mean that all systems lead to similar solutions.

French system of remedies for non-performance encourages the preservation of the contract and enforcement its performance [3, p.191]. This approach is coming from the idea that obligee always wants to receive the performance *'en nature'* [4, p.271] and the purpose of law is to give him what he wants.

Otherwise, English law acknowledges that breach 'might bring a contract to an end automatically, irrespective of the wishes of the parties' [5, p.572]. So the main purpose of law, as it was stated in *Robinson v Harman* (1848), is to provide a compensation

in order to put the aggrieved party *'so far as money can do it... in the same situation... as if the contract had been performed'* [6, p.937].

This leads to the conclusion that French law insist on specific performance while English law prefers monetary compensation above all remedies. Taking into account such crucial difference it is not an easy task to create an international uniform model of Contract Law remedies for breach of contract. But the UNIDROIT Principles actually managed to do this. Of course Working Group of the UNIDROIT Principles was referring to many national legal systems during its work, not only French and English. But let's analyze precisely French law as the representative of civil law systems and English law as the representative of classic common law.

The main idiosyncrasy of French law is that all questions arising from non-performance have to be decided by court. Thus according to the art. 1184 Cc *'le contrat n'est point résolu de plein droit'* [7] contract can't be terminated only because a party has a right for this. *'La résolution doit être demandée en justice'* – the termination must be claimed by the way of legal proceedings in court. This approach came from the principal of Roman Law: *«Nul ne peut se faire justice à soi-même»* [8, p.43].

According to the literal interpretation of the art. 1184 Cc in the case of the obligor's non-performance the obligee has a right to choose between the enforced performance (where it is possible) and termination of the contract *(resolution)* together with damages. But actually French law doesn't give these two options at once. First the obligee should demand a performance, because if he decides to terminate the contract immediately, such termination could be objected in the court [4, p.270]. Therefore obligee first of all has to put the debtor on default by sending him a notice with demand to fulfill his undertaking within a reasonable time *(mise en demeure)* (art. 1139 Cc). Obligee may not give this notice and, according to the art. 1184 Cc, initiate the judicial proceedings. This means that judge would enforce the performance and only if this is not possible he would resolve the contract.

Obviously it is not so easy to enforce someone to do something, that's why French jurisprudence in the XIX century worked out the certain instrument astreinte, in order to make obligor to fulfill his undertaking. *Astreinte* is a special type of penalty, and it is the discretion of judge to impose it [9, p.458]. The legal character of *astreinte* is not definite: from one side this is the administrative punishment for non-performing obligor, from other side it doesn't go to the government treasury, but it is transferred to the obligee's account, so *astreinte* must be some kind of the penalty damages [10, p.209].

Judges don't only use penalties; they can also give an additional grace period *(délai de grâce)* for the obligor to perform his obligation finally [3, p.193]. It is also important to mention that the judge can impose the grace period even when the obligee didn't ask for the specific performance, but his demand was to terminate the contract. In the case where the grace period was given the contract could be terminated only if the obligation hadn't been performed after the expiration of this period. Then termination comes automatically without the necessity to resort to the judicial proceedings again [8, p.53].

Despite of all means it is not always possible to receive the performance from default obligor, that's why French law invented another way how to get the specific performance *(exécution en nature)*. Thus, art. 1144 Cc gives an opportunity to the obligee to perform the obligor's obligation while the obligor should cover the cost of that performance. Actually art. 1144 Cc means that obligee would ask the third person to perform the obligation. For instance if it is impossible to receive a certain thing from obligor, then obligee can buy the same thing from the third person by costs of obligor [9, p.457]. In 1991 the art. 1144 Cc was amended so that obligor has to give money to obligee in advance.

If any of remedies which help to receive specific performance doesn't work then the contract is to be terminated by the court. It is necessary to mention that there are no criteria for estimation of the non-performance seriousness in French civil code [8, p.49]. Therefore courts in France have a broad discretionary power to decide if the non-performance is serious enough to terminate the contract.

Judicial proceedings is not a convenient way to terminate the contract. As far as it is impossible to foresee if the judge will assume particular non-performance to be serious enough to terminate the contract, this brings parties to that situation that they stay in unawareness of the future of their contract for months, they can't do replacement transactions and should be prepared to continue to perform this contract [10, pp.234-235].

According to French law 'termination' has retrospective effect. This effect is typically described by French jurists and courts as *l'anéantissement du contrat*, ie the complete destruction of the contract [3, p.190], another words – restitution.

But it's not always possible or reasonable to give back what was received for instance where a landlord seeks to end a tenancy for failure to pay rent … the landlord does not have to return rent previously paid nor does the tenant have to pay any sum representing his enjoyment of the property [3, p.195]. Even in those cases where restitution is possible, it may have unfair consequences as far as it allows the obligee to bring back what he had given plus compensate the damages which may lead to the unjustified enrichment [3, p.195]. But restitution is the rule in French Law.

After termination obligee may claim damages *(dommages-intérêts)*. Several requirements should met in order to receive right to damages: 1) actual suffering of loss *(dommage)*; 2) the fault of the obligor in that loss *(faute)* 3) causal link between loss and fault *(lien de causalité)*.

According to art. 1149 Cc damages should cover the loss obligee has suffered and the gain of which he was deprived. Additionally to this general

rule on damages French law also contains the special rule in art. 1150 Cc which states that damages should be foreseeable to the obligor at the moment of the contract conclusion [11, p.568].

To sum up, French system of remedies in case of non-performance is quite clear, but it needs modernization. Thus each principal rule needs revision:

1) Priority of the enforcement of specific performance – too much press on the obligor, disrespect to his dignity and freedom of will;

2) Resorting to court for termination – procedure inconvenient for the parties of commercial contract;

3) Necessity to prove the existence of fault for receiving the damages – quite doubtful issue whether the institute of fault is appropriate for Contract Law;

4) Retrospective restitution – the rule without logic.

The main feature of English law is that it imposes strict liability for breach of contract which means that breach leads to liability without necessity to prove obligor's faute.

The liable party should fully compensate aggrieved all its losses by paying damages. Damages is the main remedy for breach of contract in English law, while enforcement of the performance in kind (specific enforcement) can be used only in the case where damages would be an inadequate remedy [5, p.640].

Moreover there are a lot of restrictions for specific enforcement, for instance, judge would ever make decision in favor of specific performance if it needs constant supervision or the involvement of the personal skills and talents of the obligor or in case it would be unreasonably burdensome for obligor, or behavior of the obligee was inappropriate and it would be unfair to render him performance in kind.

Taking into account all this restrictions we might say that damages is almost universal remedy. In everything concerning damages English law is more developed than any other system of law. It's important to stress that damages according to common law has only compensatory function and do not have punitive effect.

There are several methods of calculating damages in order to measure equal compensation for losses and to avoid extra payment as punishment to obligor. The first method is based on expectation interest. It allows to recover the lost profit which aggrieved party expected to receive. The second method is based on reliance interest of the aggrieved party. According to this method party may compensate her expenses incurred in relation with contract [5, p.592].

English law doctrine also worked out the list of factors which may influence the reduction of the sum of damages. They are: remoteness (very remote distance between breach of contract and harm sustained), non-mitigation of the harm (when an aggrieved party did nothing to decrease the level of harm), contributory negligence (when the harm is partly caused by aggrieved party).

In the case of fundamental (other variants: total, material, repudiatory) breach the aggrieved party receive the right to rescind (terminate) the contract [6, p.770].

For the rescission aggrieved party doesn't need any judicial procedure. She only has to inform obligor about her decision to rescind the contract. Rescission always has perspective effect [8, p.94].

The overall observation of the English doctrine shows that this law is focused on paying damages in case of any contract breach and allowing termination in case of fundamental breach.

The UNIDROIT Principles in their Chapter 7 'Non-performance' establish its own system of remedies for non-performance. A. Rosett described the idea of this system in such words: *'the rules [regulating situation of non-performance] are structured to encourage parties to cure their defects, to extend the time for performance, to allow it to be completed'* [1, p.447].

In order to complete the contract after non-performance the Principles work out rules which help parties to start communication and to renew their cooperation. Thus, according to art. 7.1.4 UPICC obligor has the right to cure non-performance or defective performance. And according to art. 7.1.5 UPICC obligee has the right to give obligor an additional period of time for fixing non-performance. So each party can give another a notice for continuation of their relation till the successful fulfillment of their relations. Rules about cure and additional time temporary forbid to terminate the contract. These rules express the core idea of the UNIDROIT Principles which can be briefly formulated as *'favor contractus'*.

If time for cure or additional time doesn't give any result, obligee has two options: either to resort to court for enforcement of the performance or to terminate the contract.

At first sight it seems that the UNIDROIT Principles similarly to French law give preference to the specific performance over paying damages. But actually art. 7.2.2 UPICC states the list of exceptions when requiring performance in kind is forbidden. They are: impossibility of performance; unreasonably burdensome or expensive character of performance; opportunity to obtain performance from another source; exclusively personal character of performance; too late demand for performance [2, pp.239-240]. It's obvious that these exceptions correlate with existing in English law. This is the example of a very elegant harmonization of two different approaches of French and English law.

The other example of perfect harmonization we discover in art. 7.2.4(1) UPICC 'Judicial penalty'. This article states that *'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, p.245]. It seems that this article is the reflection of *astrainte*. From the other side it correlates with English statute law rule, according to which judges has discretion to impose interests on agreed sum of compensation for non-performance (liquidated damages) from the moment of the commencement of judicial proceedings till actual payment [12, p.151]. So art. 7.2.4 UPICC drafted in such way that it can be perfectly used

both in cases concerning performance in kind and execution of monetary obligation.

As for termination of the contract the UNIDROIT Principles follow the approach of English Law and state that party may terminate the contract by giving termination notice to the other party in case of fundamental non-performance.

Contrary to English law the UNIDROIT Principles give parties a right to restitution. But unlike French law the UNIDROIT Principles don't establish that restitution is the direct effect of termination, it is just a right of either party to claim back what she has supplied.

According to art. 7.4.1 UPICC aggrieved party may claim damages for any non-performance except if it had happened because of force majeure or one of situations described in the exemption clause.

Damages as remedy should provide full, adequate and fair compensation for the loss party sustained. Art. 7.4.4 UPICC says that the non-performing party is liable only for harm which was possible to foresee at the beginning of contract relations as a logical result of non-performance. The principle of foreseeability of harm was derived from French law. According to the UNIDROIT Principles damages may be reduced if aggrieved party herself contributed to the harm she sustained (art. 7.4.7 UPICC) or if she did nothing to mitigate the harm arising from non-performance (art. 7.4.8 UPICC). These both restrictions are derived from English Law.

Conclusions. In comparison with French and English systems of remedies, the UNIDROIT Principles' system has its own basic idea. Whereas French system appreciates the enforcement of obligor's performance and English systems gives the instruction how to calculate damages, the UNIDROIT Principles try to bring parties to the successful fulfillment of their contract even after non-performance. The UNIDROIT Principles system is neither combination of French and English rules nor the other national rules – this document offers its own system of remedies. We came to the conclusion that the UNIDROIT Principles system is much more efficient than French and English national systems. At the same time it is very well harmonized and doesn't contradict to the rules of both national systems, so they can be reformed in the way of the UNIDROIT Principles suggest.

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