Nachfrist under National Law, the CISG, and the UNIDROIT and European Principles - A Comparison

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“Nachfrist”

Providing an automatic extension of time for the parties to a commercial contract to fulfill their obligations is mandated under German law. Such automatic extension, and its mechanics, is known in German as Nachfrist. Its principal purpose is to provide additional latitude and protection to the debtor contracting party.

Similar legal concepts exist in other national commercial laws of civil law countries.

Various multilateral/international organizations have developed legal standards applicable to international sales contracts which have incorporated (or purported to incorporate) the concept of Nachfrist. These include the United Nations Convention on Contracts for the International Sale of Goods, (“CISG”)\(^1\) the UNIDROIT Principles of International Commercial Contracts (“UNIDROIT Principles”),\(^2\) prepared by the International Institute for the Unification of Private Law (“UNIDROIT”), and the European Principles of Contract Law (“European Principles”),\(^3\) prepared by the Commission on European Contract Law/Lando Commission under the aegis of the European Union.

Confusion arises because the same term, Nachfrist, is used both under German law and under descriptions of the various international principles but the actual legal import of such term differs greatly between German law and the international principles and – to a lesser degree – among the international principles themselves.

This article will comparatively examine the application of Nachfrist concepts in national laws and under the principles of international contract law referred to above as well as reviewing the specifics of notice, reasonable amount of time, and the effects of Nachfrist on avoidance of a contract.

Nachfrist under General Law

Generally, per Larry A. Dimatteo,\(^4\) German contract law is


\(^{2}\) Available from UNIDROIT, Rome, Italy, or Transnational Juris Publications, Irvington-on-Hudson, NY – for further information see the relevant article in ICA Volume II, No. 2.

\(^{3}\) Still being formulated, but completed portions have been published and are available from Kluwer Law International – for further information see the relevant article in ICA Volume IV, No. 1.
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grounded in an environment of flexibility and legal informalism which differs greatly from Anglo-American jurisprudence. Contracting parties are given free reign under the Bürgerliches Gesetzbuch (“BGB”) or Civil Code in structuring their contractual relationships. This permits parties greater latitude in structuring transactions using more numerous legal instruments to effectuate their intent. The German approach to contractual liability is also more consequence-based than that of the common law system. German law places less emphasis on types of legal instruments used and the labels applied to them as well as on the legal meaning of the words used within the instruments. German commercial law attempts, instead, to give greater effect to the implicit purpose of the instruments.

The Nachfrist obligation is articulated in Section 326 of the German Civil Code. Loosely translated, the Section reads in English as, “The Creditor must, as a general rule, reasonably extend the original term for performance unless such contractual performance is of no further interest to the Creditor due to delay or unless the final deadline is apparently, for some other reason, superfluous. When the grace period has elapsed without completion of the contractual obligation, the Creditor may choose between damages for non-performance and avoidance of the contract. A claim for performance is, however, excluded.”

German law does not require any Nachfrist notice to be given in writing. On the contrary, it provides that “a merchant's guarantee is valid even if given only verbally.” German civil law mirrors the French Civil Code in this respect. Unlike the common law statute of frauds requirement that guaranty instruments be in writing, the French Civil Code states that “with respect to merchants, acts of commerce may be proved by all means.”

In German case-law, a noticed period of additional time that is too short will be enlarged de jure to a reasonable period of time unless the buyer, by the shortness of the stipulated period, demonstrates an intention to effectively provide no additional period. That extension of time is automatic, unlike similar notices under common law where a fresh notice may have to be served since a judicially-invalidated notice will be treated as having no effect. Under German law, if the buyer requests a Nachfrist, the seller is obligated to respond to the request. Failure to do so results in an automatic grant of additional time.

Under the German Civil Code, the failure of the breaching party to perform during an extension or Nachfrist permits the other party to declare an immediate avoidance of the contract. Of similar intent and consequence to the German concept of Nachfrist are the French Civil Code’s mise en demeure and kindred provisions to those of Germany and France in other national civil and commercial codes.

Nachfrist under CISG

The CISG incorporated, among other elements, the notion of Nachfrist from German law. However, the CISG, unlike German law, does not require a party to offer an additional period of time under which a prospectively defaulting party may perform under the contract. It merely permits a party to offer such an additional period of time. The substantive difference between

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5Dimatteo supra note 4 at 123.
6Id. at 124.
the two approaches is both obvious and important. Seemingly, a number of the drafters and proponents of the CISG were smitten with the concept of, and lobbied to retain the use of the term *Nachfrist* even when they could not convince their colleagues to retain the full implications of its underlying significance.

The CISG deals separately (a) with the *Nachfrist* obligations of the seller and buyer’s remedies for breach of contract by the seller and (b) with the *Nachfrist* obligations of the buyer and seller’s remedies for breach of contract by the buyer. In the first instance, this is accomplished under Section III, Remedies for Breach of Contract by the Seller, under Chapter III, Obligations of the Seller, of Part II, Sale of Goods, while in the latter case it is done by Section III, Remedies for Breach of Contract by the Buyer, under Chapter III, Obligations of the Buyer, of Part II, Sale of Goods. Neither Article 47, Buyer’s Notice Fixing Additional Final Period for Performance, nor Article 63, Seller’s Notice Fixing Additional Final Period for Performance – the principal relevant articles – have mandatory application. Both provide identical obligations for the buyer and the seller with regards adherence, notice, and reasonable length of time.

Article 47 deals specifically with the buyer’s options and states:

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.“

Although, as Fritz Enderlein and Dietrich Maskow state, “the procedure envisaged by Article 47(1) has a certain parentage in the German procedure of *Nachfrist* and the French procedure of a *mise en demeure*, in its current form it does not partake of either one. In particular, the procedure envisaged by Article 47(1) is not mandatory.”

Article 63 is concerned with the options of the seller and provides:

“(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 the performance.”

In discussing Article 63, [Victor Knapp] note[s], “Fixing an additional period of time under Article 63(1) is the seller’s right, but not his obligation . . . the seller may sue for enforcement of his right without granting the buyer any additional term for performance. Similarly, if the failure by the buyer to perform his obligation amounts to a fundamental breach of contract, the seller is authorized to declare the contract avoided under Article 64(1)(a) without having any obligation to fix first an additional term of performance for the buyer. In this respect the procedure envisaged by Article 63(1) differs from the Nachfrist of the law of the Federal Republic of Germany and the *mise en demeure* under French law.”

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In other words, Articles 47 and 63 each create the possibility that a buyer or seller may – but need not – set a Nachfrist with the main consequence being that the buyer or seller, during that period, must generally adhere to its contractual obligations while retaining its rights to subsequently claim damages.

The explanation of a CISG notice designed to offer a specific and clear basis for the fixing of an additional period for performance is succinctly described by Professor John O. Honnold in the following example: “A contract called for Seller to manufacture and deliver a complex stamping machine to Buyer by June 1. Seller was late in making delivery and on June 2 Buyer wired Seller: ‘We are anxious to receive the machine. Hope very much that it can arrive by July 1.’ Seller delivered the machine on July 3, but Buyer refused the machine and declared that the contract was avoided for failure to comply with the July 1 delivery date set forth in its wire of June 2.” According to Professor Honnold, “Such a notice gives no warning that a deadline has been ‘fixed’. Indeed, a communication that invites performance without making clear that a final deadline has been set could mislead the seller into an attempt at substantial performance.”

Professor Honnold suggests, “An effective notice under Article 47(1) should make clear that the additional period sets a fixed and final limit on the date for delivery; e.g., ‘The last date when we can accept delivery will be July 1.’”

Professor Honnold’s contention is supported by the [Secretariat] commentary to the [1978 draft of the] CISG which specifies, “the period may be fixed either by specifying the date by which performance must be made (e.g. 30 September) or by specifying a time period (e.g. ‘within one month from today’). A general demand by the buyer that the seller perform or that he perform ‘promptly’ or the like is not a ‘fixing’ of a period of time under [this provision].”

The CISG is silent on whether the notice must be in writing or can be presented orally. According to [Knapp], a broad interpretation of Article 11 will lead to the conclusion that the notice under Article 63(2) need not be made in writing and that it may be transmitted by any means.

The setting of a reasonable time under the CISG presents a more ambiguous dilemma than under German law. For instance, according to some scholars, the question of what exactly should be considered a reasonable length of time, “depends on the particular circumstances for each case. Among the elements to be taken into account are the nature, extent and consequences of the delay, the seller’s possibilities of and time needed for delivery, and the buyer’s special interest in speedy performance.” Others, however, such as Professor Honnold above at p. 371, contend: “The Convention uses flexible language; different periods of time could be reasonable.” Within this leeway the choice is given to the buyer – the innocent party who faces breach by the seller. Indeed, respect must be given to the buyer’s discretion in setting the ‘reasonable’ period if the notice-avoidance procedure is to serve its purpose – reducing uncertainty concerning the right to avoid the contract. In determining whether the period the buyer fixes is ‘reasonable’ the dominant consideration is the buyer’s need for delivery of goods without further delay . . . on the other hand, since the seller’s failure to comply with the period fixed by the buyer empowers the buyer to avoid the contract (Art. 49(l)(a) . . .), the reasonableness of this period should be considered in the light of the basic policy decision, embodied in Articles 25, 49 and 64, that contracts should not be avoided on insubstantial

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11 Knapp supra note 9 at 463.

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Professor Honnold’s concern for the buyer’s precarious position is elaborated when he notes “that a short increase in the value of the goods might tempt a seller to try to escape from the contract by sending the buyer a Nachfrist notice fixing a short, final period for taking delivery . . . [T]he reasonableness of the period set in the notice should be decided in conformity with the Convention’s general policy against the avoidance of the contract on insubstantial grounds.”

Messrs Enderlein and Maskow state, “The vague term of reasonableness leaves some room to act at one’s own discretion which can be used by the party who is entitled to set the Nachfrist, . . . If he fixes too short a period, the competent deciding body could determine the minimum Nachfrist.”

Since the use of a Nachfrist is discretionary under the CISG, the rules of avoidance under Articles 49(1)(b) which asserts,

“The buyer may declare the contract avoided . . . 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.”

permit avoidance of the contract without a demonstration that a fundamental breach has occurred only in the case of non-delivery following issuance of a Nachfrist and the lapsing of the stated extended time for delivery but not if there is non-delivery (or any other non-performance) under the contract without use of a Nachfrist unless such fundamental breach may be proven.

Section 64(1)(b) of CISG, which addresses the seller’s ability to avoid a contract, states,

“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.”

Subsequently, per [Knapp], “if . . . the failure by the buyer to perform his obligation amounts to a fundamental breach of contract, the seller is authorized to declare the contract avoided . . . without having any obligation to fix first an additional term of performance for the buyer.”

Nachfrist under the UNIDROIT Principles

The UNIDROIT Principles (regarding which all information herein is taken from UNIDROIT Principles of International [Commercial] Contracts issued by UNIDROIT in 1994) do not apply to domestic contracts and are intended to operate globally. While the UNIDROIT Principles are designed only for commercial contracts, they are – per p. 2 – “in no way intended to take over the distinction traditionally made in some legal systems between ‘civil’ and ‘commercial’ parties and/or transactions, i.e., to make the application of the Principles dependent on whether the parties have the formal status of ‘merchants’ and/or the transaction is commercial in nature.”

Although Article 7.1 of the UNIDROIT Principles deals with the issue of Nachfrist, the UNIDROIT Principles – like the CISG – do not require an automatic extension of time for performance

13Honnold supra note 10 at 371.
14Id. at 444.
15Enderlein and Maskow supra note 8 at 238
16Knapp supra note 9 at 460.
and delegate such option to the discretion of the parties involved per p. 165.

The specifics of a Nachfrist under the UNIDROIT Principles are set forth in Article 7.1, which says that:

“1. In a case of a 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 may be 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.”

(. . .)

Article 7.14(3) provides for the allowance of a reasonable amount of time in which to complete performance of the contract. If the additional amount of time is not of a reasonable length, the UNIDROIT Principles provide for an additional extension in order to comply with the mandate in the Article. The UNIDROIT Principles do not specifically address the method to be incorporated in determining what is a reasonable amount of time and who decides when and if an additional extension of time is warranted. However, since the commentary to the UNIDROIT Principles advises the inclusion of an arbitration clause, one can assume that the appropriate length of time can be determined by an arbitrator.

Under the UNIDROIT Principles, all from p. 65, the "party who grants the extension of time cannot terminate or seek specific performance during the extension time. The right to recover damages arising from late performance is not affected." However, "if the contract is not completely performed during the extension, the right to terminate for fundamental non-performance simply springs into life again as soon as the extension period expires. On the other hand, if the late performance was not yet fundamental, termination would only be possible at the end of the period of extension if the extension was reasonable in length."

Nachfrist under the European Principles

Unlike the CISG and the UNIDROIT Principles which apply exclusively to international contracts, the “European Principles are to be applicable (1) to domestic European contracts as well as to trans-European Union international contracts and (2) to virtually all European contracts, including merchant consumer contracts as well as contracts between commercial parties”.

While the drafters of the European Principles reviewed the provisions of the CISG, they knowingly created differences be-

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tween the two documents.

Similar to the CISG, the application of the European Principles is not mandatory. However, per p. 16, "it should be noted that if parties voluntarily make the European Principles applicable to their contract, the drafters of the European Principles have declared certain provisions to be mandatory; such as Articles 1.106, 21.102, 3.109 and 4.508(2)." Interestingly, unlike German Civil Law, the fixing of a mandatory extension of time for performance was not included in the European Principles.

Under the European Principles, Article 3.106, prescribes:

“(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.

“(2) During the additional period the aggrieved party may withhold performance of his own reciprocal obligations and may claim damages, but he may not resort to any other remedy. If he 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 may be available under Chapter 4.

“(3) If in a case of delay in performance which is not fundamental the aggrieved party has given a notice fixing an additional period of time of reasonable length, he may terminate the contract at the end of the period of notice. The aggrieved party may in his notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically. If the period stated is too short, the aggrieved party may terminate, or, as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice.”

There is no lengthy discussion as to the type of notice that must be furnished by the aggrieved party. Rather, the European Principles speak to the details of notice in Article 1.110 which states:

“(1) Notice given pursuant to these Principles has effect if given by any means, whether in writing or otherwise, appropriate to the circumstances.

“(2) If pursuant to these Principles one party gives notice to the other because of the other’s non-performance or because such non-performance is reasonably anticipated by the first party and the notice is properly dispatched or given, a delay or error in the transmission of the notice or its failure to arrive does not prevent it from having effect. The notice shall have effect from the time at which it would have arrived under normal circumstances.

“(3) In any other case, notice does not have effect unless and until it reaches the person to whom it is given.

“(4) For the purpose of this Article, ‘notice’ includes a declaration, demand, request or any other form of communication.”

The comments to Article 1.110 indicate that notice may be conveyed by any form of communication including orally, in writing, by telex or by fax, “provided that the form of notice used is appropriate to the circumstances . . . for notices of major importance a written form of notice may be appropriate.” Under the European Principles, a party does not have to be in receipt of the notice in order for it to take effect. The commentary to Article 1.110 at p. 67 indicates that “A notice subject to the dispatch principle may be effective even though it never arrives or is delayed, but it is not effective the moment it is dispatched . . . Accordingly the notice takes effect only from the time at which it would normally have been received.” . . .
Further comments issued by the Commission on European Contract Law have focused more on eliminating ambiguous time frames provided in the notice and not on the specifics of an oral versus a written notice. According to the Commission at p. 44, “It will not suffice to ask for performance ‘as soon as possible’, it must be a request for performance ‘within a week’; or ‘not later than July 1’. The request must not be couched in ambiguous terms; it is not sufficient to say that ‘we hope very much that performance can be made by July 1.’”

Under the European Principles the issue of what is a reasonable time is handled much as it is under German law by designating the courts as the final word on a reasonable time. However, the drafters of the European Principles have provided the courts with guidelines in arriving at a fair determination. Factors, per p. 138, to be considered include:

- “The period of time originally set for performance. If the period is short, the additional period of time may also be short;
- “The need of the aggrieved party for quick performance, provided that this is apparent to the defaulting party;
- “The nature of the goods, services or rights to be performed or conveyed;
- “The event which caused the delay. A party who has been prevented from performance by bad weather should be granted a longer respite than a party who merely forgot his duties.”

If the parties agree to an additional period of time for performance, the aggrieved party may, per p. 135, withhold his own performance and may also claim damages for any expenses or losses incurred due the delay in performance. However, the aggrieved party may not terminate or avoid the contract during the extended period of time.

Summary and Conclusions

Nachfrist as a matter of commercial contract law in Germany and – under similar doctrines – in other civil law jurisdictions is a substantive legal right, principally available to buyers who fail to timely perform their contractual obligations, for a limited but reasonable extension of time in which to perform those obligations. A failure of the party granted such extended period results in the right of the other party to seek various redress, including avoidance of the contract. Under the various schemes of multilateral/international commercial contract rules examined in this article, the same term is used but it has lost virtually all its prescriptive character. There is no obligation to issue an extension of time and rights of the party issuing any extension following non-performance at the end of its period are often lesser than under German law and are generally no greater than had the initial non-performance been the party’s cause of action. Consequently, although the details of the different uses of Nachfrist examined here are important, what the reader should principally gain from this article is the understanding that only under national laws does the term have real compelling legal power. Under the various international regimes dealt with here, it is a weaker concept – sometimes little more than an admonition by the drafters to the parties to consider voluntarily issuance of such an extension of time.