V.1.4 - Principle of simultaneous performance; right to withhold performance

(a) The parties to a bilateral contract are required to render their respective performances simultaneously, unless they have agreed on or circumstances indicate a different order of performance.

(b) If performance of an obligation by one party is dependent upon performance of another obligation arising out of the same contract by the other party, each party may withhold performance until tender of performance by the other party. Where one party has performed in part, the other party cannot refuse to perform if to do so would be contrary to good faith, having regard in particular to the relatively slight or trivial nature of the default ("exceptio non adimpleti contractus", "inadimplenti non est adimplendum").

Commentary:

1 A scenario in which the parties are not under a duty to perform simultaneously as provided for in Subsection (a) would be a contract which provides for delivery and deferred payment or delivery on credit or, vice-versa, for payment in advance of delivery.

2 The question as to whether the performance of an obligation is dependent upon performance of another obligation by the other party as provided for in Subsection (b) is a matter of contract interpretation. This always applies to those core obligations of a contract which constitute a direct exchange of promises and which are characterized in some jurisdictions as "synallagmatic" or "reciprocal" ("do ut des"), i.e. the duty of the seller to deliver the goods sold and the duty of the buyer to pay the sales price. There may be contracts in which two obligations are so closely connected by the will of the parties as expressed in the contract that they may be qualified as "dependent" even though they would not be characterized as "synallagmatic" or "reciprocal" in those jurisdictions.

3 Subsection (b) makes it clear that the exercise of the right to withhold performance is always subject to the Principle of good faith (Trans-Lex Principle I.1.1). The principle of proportionality mentioned in Subsection (b) is derived from the Principle of good faith. It would be contrary to good faith (and amount to an abuse of right) to rely on the non-performance of a relatively minor obligation by the other side in an attempt to avoid performance of an essential obligation of the party invoking the right to withhold performance, see Fouchard Gaillard Goldman On International Commercial Arbitration, 1999, No. 1486.

4 The relative triviality of non-performance by one party, however, is but one illustration of a more general restriction of the scope of subsection (b) by the requirement of good faith. The overriding Principle of good faith may restrict a party’s right to invoke a right to withhold performance also in other scenarios outside the ambit of Subsection (b).