Requiring and withholding performance, termination and price reduction: The CESL in comparison with the Vienna Sales Convention

Joint CCBE and CNF Conference on the proposed Common European Sales Law

Rome, April 11, 2012
GENERAL PROVISIONS (1/2)

CISG Part III – art. 25
- “breach of contract”
- No definition of what is considered as a breach of contract;

Jurisprudence:
- Lack of conformity of goods;
- Late delivery;
- Partial delivery;
- Non-delivery;
- Non payment of price;
- Other cases – E.g.:
  - Failure to give buyer correct instructions as to packaging;
  - Buyer’s failure to take delivery (under certain circumstances).

CESL Part IV – art. 87
- “non-performance of an obligation”;
- Non-performance of an obligation is ANY failure to perform that obligation and INCLUDES:
  - Non-delivery or delayed delivery of the goods / non-supply or delayed supply of digital content;
  - Delivery of goods which are not in conformity with the contract;
  - Non-payment or late payment of the price;
  - Any other purported performance which is not in conformity with the contract.
GENERAL PROVISIONS (2/2)

CISG Part III – Chapter I

- art. 25 - “fundamental breach (of contract)”;
- Art. 26 – Avoidance of the contract;
- Art. 27 – right to rely on the communication;
- Art. 28 – Requiring performance / specific performance;
- Art. 29 – Termination of contract by mutual agreement.

CESL Part IV – Chapter 9

- art. 87 § 2 - “fundamental non-performance (of an obligation)”;
- Art. 88 – Excused non-performance;
- Art. 89 – Change of circumstances.
REMEDIES TO THE BUYER
- REQUIRING PERFORMANCE -

**CISG – Art. 46 - 47**

- Unless the buyer has resorted to a remedy which is inconsistent with this requirement;
  
  1) delivery of substitute goods
  
  2) repair

**Choice of the buyer**

**CESL – Art. 110 - 113**

- Remedying free of charge of a performance which is not in conformity with the contract.
- No performance can be required where:
  - It would be impossible or has become unlawful,
  - The burden/expense would be disproportionate to the benefit the buyer would obtain.

**If the buyer is a consumer:**

- 1) repair
- 2) replacement
REMEDIES TO THE BUYER
- WITHHOLDING PERFORMANCE -

(exceptio inadimpleti contractus / conditional promises)

CISG

- CISG fails to articulate a general right of suspension for breach (see Art. 45) (ICC case No. 9448);
- Art. 58?
- Art. 71?
- **Jurisprudence:**
  - Zurich Chamber of Commerce award (case No. 273/95): exceptio inadimpleti contractus is a general principle;

CESL

- Art. 106(b);
- Art. 113:
  - Buyer who is to perform at the same time as, or after, the seller performs;
  - Buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when it becomes due.
REMEDIES TO THE BUYER
- TERMINATION / AVOIDANCE -

CISG – “AVOIDANCE”
- Art. 49 – When?:
  - (i) if the failure by the seller to perform amounts to a **fundamental breach** of contract;
  - (ii) **in case of non-delivery**, if the seller does not deliver the goods within the additional period fixed by the buyer in accordance with Art. 47;
  - Art. 72: if prior to the date of performance of the contract it is clear that the other party will commit a fundamental breach of contract;
- Instalment sales: Art. 73;
- Separate parts: Art. 51
- Exercise by notice (Art. 26);
  - **Time limit:** “within a reasonable time” (Art. 49 (2))
- Loss of right to avoid

CESL – “TERMINATION”
- When?:
  - Art. 114: (i) if the seller’s non-performance under the contract is **fundamental**;
  - (ii) In consumer sales contract/supply of digital content: in case of non-performance because the goods do not conform to the contract;
  - Art. 115: (iii) **in case of delay in delivery** which is not in itself fundamental, if the seller does not perform within the additional period fixed by the buyer;
  - Art. 116: before performance is due, if the seller has declared that there will be a non-performance such as to justify termination.
- Separate parts: Art. 117;
- Exercise by notice (Art. 118);
  - **Time limit:** “within a reasonable time” (Art. 119)
  - Unless: (i) the buyer is a consumer, (ii) no performance at all has been tendered.
- Loss of right to terminate
REMEDIES TO THE BUYER
- PRICE REDUCTION -

**CISG – Art. 50**

**WHEN:**
if goods do not conform with the contract and whether or not the price has been paid

**IN WHAT MEASURE:**
In the same proportion as the value that the goods actually delivered had at the time of delivery

**NOT POSSIBLE:**
If the seller remedies any failure to perform as per art. 37 or 48, or if the buyer refuses to accept performance by the seller in accordance with those articles.

**CESL – Art. 120**

**WHEN:**
The buyer accepts a performance non conforming to the contract

**IN WHAT MEASURE:**
Proportionate to the decrease in the value of what was received in performance at the time performance was made compared to the value of what would have been received by a conforming performance.
REMEDIES TO THE SELLER
- REQUIRING PERFORMANCE -

**CISG – Art. 62**

The seller may require:

- Payment of price;
- Take delivery;
- Performance of other obligations.

The seller may fix:

- An additional reasonable period of time to the buyer for performance.

**CESL – Art. 132**

The seller may require:

- Payment of price;
- Take delivery;
- Performance of other obligations.
REMEDIES TO THE SELLER
- WITHHOLDING PERFORMANCE -
(exceptio inadimpleti contractus / conditional promises)

CISG
- CISG fails to articulate a general right of suspension for breach (ICC case No. 9448);
- Art. 71?;
- **Jurisprudence:**
  - Zurich Chamber of Commerce award (case No. 273/95): *exceptio inadimpleti contractus* is a general principle;
  - Belarusian Int. Court of Arbitration (case No. 24/13-95): the seller can suspend performance according to art. 71 if the buyer fails to pay.

CESL
- Art. 131(b);
- Art. 133:
  - Seller who is to perform at the same time as, or after, the buyer performs;
  - Seller who is to perform before the buyer performs and who reasonably believes that there will be non-performance by the buyer when it becomes due.
REMEDIES TO THE SELLER
- TERMINATION / AVOIDANCE -

CISG – “AVOIDANCE”

- Art. 64 – When?:
  - (i) if the failure by the buyer to perform amounts to a fundamental breach of contract;
  - (ii) if the buyer does not perform his obligation within the additional period fixed by the seller in accordance with Art. 63 (1);
  - Art. 72: if prior to the date of performance of the contract it is clear that the other party will commit a fundamental breach of contract;
- Exercise by notice (Art. 26);

  Art. 64(2): If the buyer has paid the price:
  Loss of right to avoid
  (exceptions are under Art. 64 (2))

CESL – “TERMINATION”

- When?:
  - Art. 134: if the buyer’s non-performance under the contract is fundamental;
  - Art. 135: in case of delay in performance which is not in itself fundamental, if the buyer does not perform within the additional period fixed by the seller;
  - Art. 136: before performance is due, if the buyer has declared or made clear that there will be a fundamental non-performance.
- Separate parts: Art. 137;
- Exercise by notice (Art. 138);

  Time limit:
  “within a reasonable time” (Art. 139)
  Loss of right to terminate
Thank you very much for your attention