

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

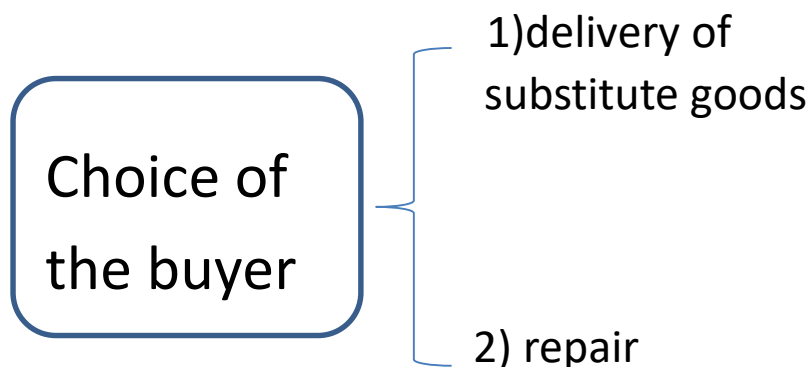
- art. 87 § 2 - “fundamental non-performance (of an obligation)”;
- Art. 88 – Excused non-performance;
- Art. 89 – Change of circumstances.

REMEDIES TO THE BUYER

- REQUIRING PERFORMANCE -

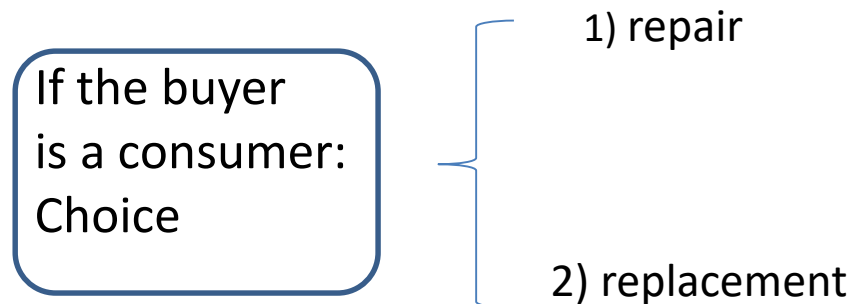
CISG – Art. 46 - 47

- Unless the buyer has resorted to a remedy which is inconsistent with this requirement;



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.



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;
 - ICC award (case No. 8547) (rendered under the 1969 Uniform Law on International Sale of Goods): suspending payment is justified by Article 7.1.3 of the UNIDROIT Principles.

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