

CESL; Performance and Non-performance of obligations

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Performance and Non-performance

- General concept of non-performance – Article 87 I CESL
- Fundamental non-performance – Article 87 II CESL – relevant generally only for termination of contract – but in consumer contracts in case of the lack of conformity the „fundamentality“ is not required for termination, the lack of conformity cannot be however insignificant.
- Relevant also for the right to cure, if delay would amount to the fundamental non-performance

Performance and Non-performance

- Excused non-performance – Art. 88 – relevant only for damages, interests in consumer cases and requiring performance for monetary obligations

Remedies: Requiring performance

- 1. Specific performance
- 2. Remedying the non performance
- - in B2B transactions the seller may determine the way of remedying the non-performance
- In B2C transactions the consumer has choice between repair or replacement, unless the chosen way of remedy would generate the costs which are disproportionate in relation to other remedy

Other remedies

- Withholding performance
- Price reduction
- Termination
- Damages
- Interests

Differences between B2B and B2C contracts

- More objective concept of the lack of conformity in consumer contracts
- Presumption that the lack of conformity discovered within 6 months after passing of the risk existed already at the time of the passing of the risk
- Right to cure – there is no right to cure of the seller in consumer contracts (with exception of services)

Differences

- There is no a duty to examine the goods and notify the seller within the reasonable time in consumer contracts
- A consumer may terminate the contract even if the non-performance is not fundamental
- The seller may claim interests from the consumer after 30 days of delay if the delay is not excused

Hypothetical

- A buyer from Poland buys for private purposes a car from a professional seller with the place of business in Germany. The parties have agreed to the terms of the contract and separately that the contract will be governed by the CESL.
- A bought a VW car with a diesel-powered engine. It has an environmentally friendly engine with a special filter collecting the dust particles. The seller has not informed the buyer that for every 100 km of driving the car must have one drive of at least 50 km, rather than only drives for short distances. The longer drive is required to purify the filter. The buyer uses the car only in the city and has not done the longer drives of this type. The filter becomes clogged with dust and must be replaced. The buyer does not want a car that requires this kind of periodic long drive and wants to terminate the contract.