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Breach of contract: theoretical explanations in according to CESL and CISG

I. Introduction

After the Second World War, jurists had a common purpose to create an international commercial codex which was applicable for lots of commercial case, especially in international sale of goods. The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) is the solution in this situation. ‘The purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs’.¹ In July 2010, Viviane Reding² put forward a series of alternatives in a Green Paper on a new pan-European contract law.³ The European Commission made proposal for a Regulation of The European Parliament and of The Council on a Common European Sales Law (hereinafter: CESL) what it explained that ‘the overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business’.⁴

So our first question is, in connection with this topic, the first question is what could we definite as a breach of contract? General definition according to business dictionary is: contracting party's actual failure or refusal to perform (or a clear indication of its intentions to not perform) its obligations under the contract.⁵ Of course, it is absolutely right, but how it is evolving in CISG and it worked in CESL.

II. General rules

’According to Art. 25 CISG a breach is fundamental “if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract”. The first prerequisite is the breach of a contractual obligation⁶. The obligation may be expressly

¹ http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (2018. 09. 25.)

² She was the European Commissioner for Information Society and Media from 2004 to 2010.

³ Allen and Overy: A Common European Sales Law (CESL)? – An update on the European Commission's ambitious plans www.allenoverly.com/SiteCollectionDocuments/CESL.pdf; (2018. 09. 25.)

⁴ Proposal for a European Commission made proposal for a Regulation of The European Parliament and of The Council on a Common European Sales Law COM(2011) 635 final, (2018. 09. 25.)

⁵ <http://www.businessdictionary.com/definition/breach-of-contract.html> (2018. 09. 22.)

⁶ We could find a similar opinion, like that of Franco Ferrari: „a breach of contract – whatever its nature – is fundamental when it substantially deprives the other party of what it is entitled to expect under the contract,

provided for in the CISG, such as delivery of conforming goods and documents at the right time, at the right place etc., but it may also be a sui generis obligation agreed upon by the parties, such as information, training of employees, refraining from reimport, non-competition etc.⁷ As Schwenger says ‘Art. 25 CISG provides for an element of foreseeability. A breach cannot be deemed fundamental if the breaching party “did not foresee and a reasonable person of the same kind and in the same circumstances would not have foreseen such a result”. Some authors opine that lack of foreseeability and knowledge is a kind of subjective ground for excusing the party in breach. However, knowledge and foreseeability are instead relevant only when interpreting the contract and ascertaining the importance of an obligation.’⁸

‘Special problems arise when the goods are defective but repairable. Some courts have held that easy repairability precludes finding a fundamental breach. Courts are reluctant to consider a breach fundamental when the seller offers and effects speedy repair without any inconvenience to the buyer. Also if the buyer itself repairs the goods and uses them this is evidence that he has not lost the interest in the contract and a fundamental breach must be denied.’⁹ ‘The violation of other contractual obligations can also amount to a fundamental breach. It is, however, necessary that the breach deprive the aggrieved party of the main benefit of the contract and that this result could have been foreseen by the other party. Thus, a court stated that there is no fundamental breach in case of delivery of incorrect certificates pertaining to the goods if either the goods were nevertheless merchantable or if the buyer itself could—at the seller’s expense—easily acquire the correct certificates.’¹⁰

However several courts have found that, if the defects are easily repaired, the lack of conformity¹¹ is not a fundamental breach. At least where the seller offers and effects speedy

provided that the party in breach did not foresee and a reasonable person of the same kind in the same circumstances could not have foreseen such a result.”, In. Franco Ferrari: Fundamental Breach of Contract Under the UN Sales Convention - 25 Years of Article 25 CISG, 25 Journal of Law and Commerce, Spring 2006. 492. o.
⁷ Ingeborg Schwenger: The right to avoid the contract <http://anali.ius.bg.ac.rs/Annals%202012/Annals%202012%20p%20207-215.pdf> (2018. 09. 22.) 208. o.

⁸ Schwenger i. m. 209. o.

⁹ UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf 115. o., point 9.

¹⁰ UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf 115. o., point 10.

¹¹ See also: CISG Advisory Council Opinion No. 2: Examination of the Goods and Notice of Non-Conformity Articles 38 and 39, 4.1. point: „The obligation to examine the goods in article 38 is designed to set a time when, if no examination was conducted, the buyer "ought to have discovered" a lack of conformity of the goods as provided in article 39. There is no other consequence arising out of a failure to examine the goods. There are other occasions when the buyer ought to discover a lack of conformity even though there was no examination of the goods. For example, a buyer ought to discover a lack of conformity that was evident upon delivery of the goods. Similarly, even if article 38 did not exist, a reasonable interpretation of article 39 would be that a buyer "ought to have discovered" any lack of conformity that a reasonable examination of the goods would have shown.” <http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html> (2018. 09. 23.)

repair without any inconvenience to the buyer, courts will not find that the non-conformity is a fundamental breach.¹²

We can also find the general breach of contract in CESL. Non-performance an obligation is any failure to perform that obligation, whether or not the failure is excused, and includes:

- (a) non-delivery or delayed delivery of the goods;
- (b) non-supply or delayed supply of the digital content;
- (c) delivery of goods which are not in conformity with the contract;
- (d) supply of digital content which is not in conformity with the contract;
- (e) non-payment or late payment of the price; and
- (f) any other purported performance which is not in conformity with the contract.¹³

Non-performance of an obligation by one party is fundamental if it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the nonperforming party did not foresee and could not be expected to have foreseen that result; or it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.¹⁴

According to Art 88 CESL, a party's non-performance of an obligation is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.

III. Practicable laws in case of breach of contract

III. 1. The first steps: replacement, revision, price reduction

Article 46¹⁵ gives the buyer a general right to require the seller to perform its contractual obligations in kind. The right to require performance is subject to the restriction regarding

¹² Digest 222. o.

¹³ Art. 87 (1) CESL

¹⁴ Art. 87 (2) CESL

¹⁵ Article 46 CISG, (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

specific performance set forth in article. If the seized court would not, on the facts of the case before, grant such remedy under its own national law, it will not be bound to do so under the CISG. Therefore the courts of those jurisdictions that restrict the availability of specific performance may refuse to grant specific performance of the obligation in dispute, except in circumstances where the court would grant the remedy under its own domestic law, and may award only damages.’¹⁶ The first requirement for a performance claim under Art. 46 CISG is that the seller has breached an obligation under the CISG or under the contract. For Art. 46 (2) and (3) CISG to be applicable, this must be the obligation to deliver conforming goods.¹⁷ The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations. 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.¹⁸ ‘Though the objective essential nature of the defect is always a necessary condition to establish a fundamental breach of contract, it will not always be sufficient. In cases where the non-conformity of the goods can be remedied by the seller - e.g., by repairing the goods or delivering substitute or missing goods - without causing unreasonable delay or inconvenience to the buyer, there is not yet a fundamental breach. Here, due regard is to be given to the purposes for which the buyer needs the goods. If timely delivery of conforming goods is of the essence of the contract, repair or replacement usually will lead to unreasonable delay. In finding such unreasonableness the same criteria have to be applied as in case of late delivery; namely whether exceeding a time limit - either a date or the end of a period of time - amounts to a fundamental breach. Furthermore, the buyer should not be expected to accept cure by the seller if the basis of trust for the contract has been destroyed, e.g., due to the seller's deceitful behaviour. When the seller either refuses to remedy the defect, simply fails to react, or if the defect cannot be remedied by a reasonable number of attempts within a reasonable time, then a fundamental breach will also be deemed to have occurred’. If in a given case the buyer is in a better position than the seller to have the goods repaired himself or by a

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

¹⁶ Digest 221. o.

¹⁷ *Peter Huber – Alastair Mullis: The CISG: A new textbook for students and practitioners*, Sellier European Law Publisher 2007. 185. o.

¹⁸ Art 47 CISG

third party, to buy missing parts or - in case of a defect in quantity - to buy the missing amount of goods, he is obliged to do so and may not declare the contract avoided for fundamental breach.¹⁹

According to CESL the buyer is entitled to require performance of the seller's obligations. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract. Performance cannot be required where performance would be impossible or has become unlawful; or the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.²⁰ Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article 110 (2) CESL the consumer may choose between repair and replacement unless the option chosen would be unlawful or impossible or, compared to the other option available, would impose costs on the seller that would be disproportionate taking into account:

- (a) the value the goods would have if there were no lack of conformity;
- (b) the significance of the lack of conformity; and
- (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.

If the consumer has required the remedying of the lack of conformity by repair or replacement the consumer may resort to other remedies only if the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days. However, the consumer may withhold performance during that time.²¹ Where the seller has remedied the lack of conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller's expense. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.²²

III. 2. Right of withdraw

The buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or CISG amounts to a fundamental breach of contract; or 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 CISG or declares that he will not deliver within the period so fixed.²³ 'Avoidance of the contract is a remedy of last resort

¹⁹ CISG Advisory Council Opinion No. 5, Comments 4.4. and 4.5. points

²⁰ Art. 110 CESL

²¹ Art. 111 CESL

²² Art. 112 CESL

²³ Art. 49 CISG

(ultima ratio) that is available when the buyer can no longer be expected to continue the contract. A contract is avoided only when the buyer provides notice of avoidance (Art. 26 CISG). In cases of non-delivery, the buyer is entitled to avoid the contract at any time after all prerequisites for avoidance have been met. If the seller has delivered the goods, however, the buyer loses the right to avoid the contract if the buyer does not exercise it within the reasonable time periods specified in Art. 49 (2) CISG. The buyer may also lose its right of avoidance if a return of the goods in their original condition is no longer possible'.²⁴ A mere announcement of future termination, a statement urging delivery, or merely returning the goods without comment does not suffice. A communication that asks the seller to cease deliveries until certain price issues were solved was also held insufficient. Commencing a law suit claiming avoidance of contract has been treated as notice of avoidance. The same has been found if the buyer refuses the goods or requests the repayment of the price or cancels the order.²⁵

The seller may declare the contract avoided:

(a) If the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) If the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63 CISG, 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.²⁶

During the withdrawal period the consumer has a right to withdraw from the contract without giving any reason from a distance contract, an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.²⁷

However it does not apply in the following nine cases:

1. a contract concluded by means of an automatic vending machine or automated commercial premises;

2. a contract for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household and which are physically supplied by the trader on frequent and regular rounds to the consumer's home, residence or workplace;

²⁴ Digest 230. o.

²⁵ *Huber- Mullis* i. m. 209. o.

²⁶ Art. 64 (1) CISG

²⁷ Art. 40 (1) CESL

3. a contract for the supply of goods or related services for which the price depends on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;

4. a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalised;

5. a contract for the supply of goods which are liable to deteriorate or expire rapidly;

6. a contract for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 days from the time of conclusion of the contract and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;

7. a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;

8. a contract concluded at a public auction; and

9. a contract for catering or services related to leisure activities which provides for a specific date or period of performance.²⁸

IV. Conclusion

Even though CESL was intended to stimulate trade by encouraging cross-border sales and to enhance consumer trust in the purchasing of goods abroad, the Juncker-Commission has listed in its 2015 Annual Work Programme a series of legislative proposals that it intends to withdraw or modify, amongst which the draft Regulation on a Common European Sales Law (CESL) submitted in October 2011. As announced in the 2015 Work Programme, the Commission presented new contractual rules for online sales aimed at easing e-commerce on 9 December 2015, which included two pieces of draft legislation. First of these concerne contracts for the supply of digital content while the second dealt with contracts for the on-line and other distant sales of goods.²⁹

The success of CESL has been broken and has not been used. CESL failed before it came into force. One of the possible reasons is that consumers have more confidence in the law of their state and in the relevant consumer protection regulations of the European Union.

It is against the CISG, whose success is unbroken. 'The CISG applies only to international transactions and avoids the recourse to rules of private international law for those contracts

²⁸ Art. 40 (2) CESL

²⁹<http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law/10-2016> (2018. 09. 23.)

falling under its scope of application'.³⁰ It is characterized by clear rules and consistency. In addition, many countries participated in the drafting process, which included a small part of their own right in the text. It is characterized by wrapped wording and rules. Simple text can be understood and applied by anyone at any time in a sales contract. As we see in preamble of CISG the purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs.³¹

³⁰ http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (2018. 09. 23.)

³¹ http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (2018. 11. 12.)

