

# § 10 Performance and irregularities in the performance

## I. The duty to perform (sect. 241 et seq. BGB)

### 1) General aspects

- by virtue of an obligation [Schuldverhältnis], a creditor (obligee) is entitled to claim performance from the debtor (obligor) (sect. 241(1))
- the substance of both parties' performances is usually specified precisely in the contract
  - within the limits drawn by mandatory provisions in the Civil Code
  - where necessary complemented by dispositive provisions in the Civil Code
  - the parties can leave the specification of the remuneration, as consideration (performance in return) for one party's performance, to this party
    - in case of service contracts (e.g. for medical treatment or transport) or contracts to produce a work (e.g. to repair a car) the remuneration must then follow existing tariffs or the usual remuneration (sect. 612(2), 632(2) BGB)
    - where such standards do not exist, it must be determined in reasonable exercise of discretion (sect. 315 BGB)

### 2) Specific obligation and obligation in kind [Stückschuld & Gattungsschuld]

- in case of a *specific obligation (determinate obligation)*<sup>1</sup>, the debtor owes a specific thing
  - e.g. his own, five years old Porsche car, or a famous painting
- in case of an *obligation in kind (indeterminate obligation)*<sup>2</sup>, the debtor owes a thing or a quantity of things of a certain category/class
  - e.g. a new Porsche 718 Cayman, model 2024, or 10 kg apples
  - in this case, the creditor is not interested in a specific thing but in any thing of this category
  - the debtor must supply a thing of the relevant category/class of average kind and quality (sect. 243(1) BGB)
- in case of a *limited obligation in kind*, the debtor owes a thing or a quantity of things of a certain category/class, but only out of a certain stock
  - e.g. "... as long as stock lasts"
- consequences of the distinction: in both cases, the debtor does not need to perform if the performance is impossible (sect. 275 BGB), but...
  - in case of a specific obligation this is the case if the specific thing has gone
    - the seller's own, five years old Porsche car has been stolen, lost, confiscated or destroyed in an accident
  - in case of an obligation in kind this is not the case, as long as things of its category/class are still available on the market
    - the seller whose new Porsche 718 Cayman has been stolen from his business premises needs to buy another one to supply it to the buyer
    - the debtor can, however, transform his obligation in kind into a specific obligation by the way of *specification* (sect. 243(2) BGB)
      - "doing what is necessary on his part to supply such a thing"
      - apart from choosing an object from his stock, the requirements depend on the agreed modalities of delivery:

### 3) Place of performance

- an important issue in the performance of purchase agreements
- three different constellations:

#### a) Debt to be collected [Holschuld]

- the standard constellation, relevant unless otherwise specified (sect. 269 BGB)
- debtor performs and fulfills his obligation at his place
  - by separating the owed good and keeping it ready for collection
- creditor must pick up the goods at the debtor's place

<sup>1</sup> In English, also the term "obligation to supply ascertained goods" is common.

<sup>2</sup> In English, also the terms "generic obligation" or "obligation to supply unascertained goods" are common.

**b) Debt to be delivered** [Bringschuld]

- debtor performs and fulfills his obligation at the creditor's place
  - by bringing the good to the creditor's place
- applies also to payment obligations: debtor bears risk and costs of the money transfer to the creditor's place (sect. 270 BGB)

**c) Debt to be sent** [Schickschuld]

- debtor performs his obligation at his place
  - by separating the owed good at his place and sending it via a transport company to the creditor's place
- however, the obligation is fulfilled at the creditor's place
  - since the creditor will only become owner of the product when it is handed out to him (cf. sect. 929 BGB)
- the risk (of loss or damage) devolves to the creditor once the debtor has delivered the good to the transport company (sect. 447)
  - exception: purchase of consumer goods (sect. 475(2) BGB)

**4) Time of performance**

- if not specified or evident from the circumstances, debtor may perform and creditor demand performance immediately (sect. 271 BGB)
- special regulations for a number of particular types of contracts
- non-performance of a due obligation despite a reminder constitutes default (sect. 286 BGB)
- the exact time of performance can be absolute, so that any later performance will not fulfill anymore the obligation
  - example: booking of a place at the apartment window for the time of a carnival parade in the street

**5) Order of performance**

- the principle: *debtor must perform when performance is due*
  - non-performance after a reminder of the creditor will put him in default (sect. 286 BGB)
- exception: *right of retention* [Zurückbehaltungsrecht] (sect. 273 BGB), if
  - debtor and creditor have claims against each other (reciprocity)
  - debtor's own claim is due, at least in case of own performance (maturity)
  - both claims result from the same legal relationship (connectivity)  
(interpreted generously: any internal, natural resp. economical connection)
  - retention not excluded by agreement or the kind of obligation
- exception: *objection (defence) of unperformed reciprocal contract* (sect. 320 BGB), if
  - there is a reciprocal contract (performance promised for the sake of consideration)
  - there is a synallagmatic relationship between the refused and requested performance
  - requested performance is due (maturity)
  - debtor not obliged to perform in advance
- exception: *objection of uncertainty* (sect. 321 BGB), if claim to consideration will apparently be jeopardised by the other party's inability to perform
- in case of these exceptions, in court proceedings the court will not order performance per se but *concurrent (step by step) performance* (sect. 274, 322 BGB)

## II. In particular: the duty to perform in good faith (*bona fides*) [Treu und Glauben]

**Sect. 242 BGB:** "The debtor is obliged to perform the obligation in accordance with the requirements of good faith, with due regard to common usage."

- one of the most important provisions in the German Civil Code, preventing unfair solutions under private law, correcting distorted results of a schematic application of the Civil Code and serving as important gateway for the practical effect of the fundamental rights in private law
- based on an indefinite legal concept that needs to be concretised permanently, also with regard to new developments in business life and society, in an abundance of jurisprudence
- excludes any interpretation of contracts in such a way that obligations under the contract would be incompatible with fundamental rights or human dignity as objective values
- complements, *together with sect. 241(2) BGB*, the primary duties under the contract by *secondary (collateral) duties under the contract* to ensure a fair and equitable overall performance
  - duties of loyalty and consideration
    - parties must do everything that favours the contract purpose and refrain from anything that would impair or frustrate it
    - in particular: no *venire contra factum proprium* (inconsistent, contradictory conduct)
  - duties of due diligence and protection
    - parties must avoid to cause any harm or danger to anyone in all their activities linked to the contract (e.g. keep the premises in safe conditions, use only safe devices)
  - duties of collaboration
    - parties must take any action necessary to ensure that the contract purpose is achieved (e.g. cooperate with authorities, apply for licenses)
  - duties to inform
    - parties must inform each other about the scope, risks and negative effects of performances and decisions or dangers they notice during their performance

## III. The debtor's (obligor's) liability for breach of duty

### 1) The creditor's claim to compensation for damages

- an important general clause on compensation for damages in *sect. 280 BGB*
- if debtor breaches any duty under the obligation, creditor can demand compensation for the caused damages *in addition to performance* if debtor is responsible for the breach of duty (→ see *infra*, III.2)
- creditor can even claim compensation of *damages in lieu of performance* if
  - debtor does not render/not render correctly performance after creditor has set a reasonable time limit (*sect. 281 BGB*)
  - debtor has violated a duty of loyalty and consideration and creditor cannot reasonably be required anymore to accept debtor's performance (*sect. 282, 241(2) BGB*)
  - debtor does not need to perform because it is impossible (*sect. 283, 275 BGB*)
- damage: any involuntary loss of assets
- causality: if, according to general life experience, breach of duty is likely to bring about an outcome of this kind (theory of adequacy [Adäquanztheorie])

### 2) The debtor's responsibility for intent and negligence (*sect. 276.-278 BGB*)

- if not agreed or resulting from the obligation otherwise, debtor is only liable in case of *fault* (intent and negligence)
  - strict liability (liability without fault) only in exceptional areas, under special legislation
- negligence: the failure to exercise the care required in business dealings (*sect. 276(2)*)
  - in some rare cases, special provisions require gross negligence for liability
- debtor also liable for fault of his legal representative or *vicarious agent* [Erfüllungsgehilfe], i.e. a person whose services he uses to perform the obligation (*sect. 278*)
  - in particular liability for fault of sub-contractors and employees

## IV. The creditor's (obligee's) right of rescission in the case of irregularities in performance (sect. 323-326 BGB)

- a special option, limited to reciprocal contracts
- does not presuppose fault of the debtor
- the rescission [Rücktritt] invalids the contract *ex nunc* and transforms the original obligation into an obligation to reverse the contract (details regulated in sect. 346 BGB)
  - it does not exclude a possible claim for compensation of damages (sect. 325 BGB)

### 1) Rescission for non-performance or incorrect performance (sect. 323 BGB)

- if performance is due and debtor does not perform or not perform correctly, creditor may, after setting a reasonable additional period of time, rescind the contract
  - except if creditor is responsible for the circumstances that would entitle him to do so (sect. 323(6))
  - under certain circumstances, setting an additional period of time may be dispensed (sect. 323(2))
- debtor may already rescind before performance is due if it is obvious that the prerequisites for rescission will be met (sect. 323(4))

### 2) Rescission for violation of a duty of loyalty and consideration (sect. 324, 241(2) BGB)

- if, after a violation of such a duty, creditor can no longer be reasonably expected to uphold the contract, he may rescind it

### 3) Rescission in case of debtor's impossibility of performance

(sect. 326(5), 275(1-3) BGB)

- if debtor does not need to perform because performance is impossible, creditor does not need to perform consideration (cf. sect. 326(1)) but also has the option to rescind the contract

## V. Impossibility of performance [Unmöglichkeit] (sect. 275, 283 - 285, 311a, 326 BGB)

- note: besides the following general rules there are special rules for the most important kinds of contracts

### 1) Objective and subjective, initial and subsequent impossibility of performance

- performance is impossible if it cannot be rendered for factual or legal reasons
- it may be impossible for the debtor (*subjective impossibility*) or for everyone (*objective impossibility*)
- performance may have been impossible from the beginning (*initial impossibility*) or become impossible after the contract was concluded (*subsequent impossibility*)

### 2) Release of the debtor from the duty to perform (sect. 275(1) BGB)

- no duty of performance where performance is impossible! (→ *impossibilium nulla est obligatio*)
- besides, *debtor may refuse an unreasonable performance* in case of
  - *de facto impossibility*: performance would require grossly disproportionate expenditure
    - sect. 275(2) BGB; example: the owed but lost ring lies on the ground of a lake
  - *impossibility for personal reasons*: a significant impediment turns the performance of a debtor who needs to perform in person unreasonable (requires balancing with creditor's interests)
    - sect. 275(3) BGB; example: serious illness of a close family member

### 3) Release of the creditor from consideration (sect. 326(1-4) BGB)

- except if creditor is responsible for the impossibility of performance, or in default, or demands the surrender of a substitute benefit

### 4) Right of the creditor to rescind the contract (sect. 326(5) BGB)

## 5) Secondary claims of the creditor

- a) **Claim for surrender of a substitute benefit** (sect. 285 BGB)
  - e.g. of insurance benefits for the stolen car
- b) **In case of original impossibility: claim for compensation for damages in lieu of performance or reimbursement of futile expenses** (sect. 311a, 284 BGB)
  - contract is valid but limited to secondary claims
  - creditor can choose between the two options
  - claim does not require debtor's responsibility for the impossibility of his performance
  - but no claim if debtor can prove that he was not aware of the impediment preventing performance when he concluded the contract, and not responsible for his lack of awareness (sect. 311a(2))
- c) **In case of subsequent impossibility**
  - aa) **Claim for compensation of damages in lieu of performance** (sect. 280(1, 3), 283 BGB)
    - only if debtor is responsible for the impossibility, i.e. he or his vicarious agents have caused it intentionally or negligently (cf. sect. 280(1) phrase 2, 276, 278 BGB)
  - bb) **Claim for reimbursement of futile expenses** (sect. 284 BGB)
    - creditor can choose this option as alternative to the claim for damages
      - consequently, it also requires responsibility of the debtor for the impossibility
    - reimbursement of expenses made in reliance on receiving performance

## VI. Failure to perform in time (default) [Verzug] (sect. 286 BGB)

### 1) Requirements for debtor's default

- a) **Non-performance** of the debtor
- b) **Maturity**
- c) **Reminder** (sect. 286(1))
  - in certain cases not necessary (cf. sect. 286(2))
  - in business life often replaced by a formal reminder notice served by the court for easier enforcement [Mahnbescheid] (sect. 286(1) phrase 2)
  - alternatively in case of *claims for payment*: **expiry of 30-days period** after receipt of invoice or statement of payment (sect. 286(3))
    - in case of a consumer only if consequences specifically noted in the document
- d) **Responsibility** of the debtor for the delay (sect. 286(4))

### 2) Legal consequences of debtor's default

- a) **Claim for compensation for damage caused by the delay** (sect. 280(2), 286 BGB)
  - in addition to the claim for performance
  - includes the costs for the reminder or for a debt collection agency
- b) **Claim for compensation for damages in lieu of performance** (sect. 280(1, 3), 281 BGB)
  - only after creditor has set a reasonable time limit (sect. 281(1) phrase 1)
- c) **Claim for default interest** (sect. 288, 286 BGB)
  - with increased interest rate (sect. 288(1) phrase 2)
  - even claim for a lump sum of 40 € (sect. 288(5))
- d) **Right to rescission for non-performance** (sect. 323 BGB)
  - possible in addition to claiming compensation of damages (sect. 325 BGB)

## VII. Defective performance (cf. sect. 280(1, 3), 281(1), 282, 241(2) BGB)

- the practically important liability for "positive breach of contract" [positive Vertragsverletzung], developed by judicial further development of law but after 100 years finally incorporated into the German Civil Code
- performance is rendered, even in time, but "not rendered as owed"

### 1) Case groups

- a) Liability for violation of a secondary (collateral) duty** [Nebenpflicht] (see sect. 241(2) BGB)
  - of a duty of loyalty and consideration, due diligence and protection, collaboration or information
- b) Liability for malperformance** [Schlechtleistung]
  - performance has been rendered, but not correctly
    - e.g. some of the delivered goods are damaged or there are bugs in the delivered food

### 2) Legal consequences

- note: concerning malperformance, there are also special rules for particular kinds of contracts

  - a) Claim for compensation for damages** (sect. 280(1) BGB)
  - b) Claim for compensation for damages in lieu of performance** (sect. 280(1, 3), 281 BGB)
    - creditor must first set a reasonable time limit for supplementary performance (sect. 281 BGB)
  - c) Right to rescission for defective performance** (sect. 323 BGB)
    - creditor must generally first set a reasonable time limit for supplementary performance (sect. 323(1) BGB)
    - possible in addition to claiming compensation of damages (sect. 325 BGB)

### 3) Special case: pre-contractual liability (culpa in contrahendo)

(sect. 280(1) read together with sect. 241(2) and 311(2, 3) BGB)

- another legal institution developed by judicial further development of law and after 100 years finally incorporated into the Civil Code
- already before a contract is concluded, contract negotiations, a certain initiation of a contract or similar business contacts create a *pre-contractual obligation* (sect. 311(2)) with collateral duties (cf. sect. 241(2)) - even with third persons (sect. 311(3))
- violation of these duties leads to a *claim for compensation for damages*, even if later a contract is not concluded

## VIII. Creditor's default (sect. 293 et seq. BGB)

- the non-acceptance of the debtor's factually and correctly offered performance by the creditor
  - in particular failure to collect the goods provided by the debtor (cf. sect. 295 BGB)
  - also if creditor does not offer the consideration in a case of concurrent (step by step) performance (sect. 298 BGB)
  - no creditor default: if debtor was actually incapable of effecting performance (sect. 297)
- dogmatically not a breach of a contractual obligation but neglect of a responsibility that is in the creditor's own interest [Obliegenheitsverletzung]
- legal consequences:
  - debtor may still demand consideration (sect. 326(2) BGB)
  - debtor henceforth only responsible for intention and gross negligence (sect. 300(1))
  - in case of an obligation in kind, risk of loss or destruction moves to creditor (sect. 300(2))
  - debtor entitled to abandon possession of land or a ship (sect. 303)
  - debtor may deposit valuables, securities and other documents at the depository (sect. 372 BGB)
  - debtor may claim compensation for extra expenses (sect. 304)