
Title:

VI.1 - Termination of contract in case of fundamental non-performance

**Content:****No. VI.1 - Termination of contract in case of fundamental non-performance**

- (a) If a party's failure to perform its obligation amounts to a fundamental non-performance, the other party may terminate the contract.
- (b) The right of a party to terminate the contract is exercised by notice to the other party.
- (c) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance.
- (d) Termination of the contract releases both parties from their obligation to effect and to receive future performance.
- (e) Upon termination of the contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable. However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.
- (f) Termination does not preclude a claim for damages for non-performance.
- (g) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

Commentary:

1 The right to terminate the contract requires that the other party's non-performance is fundamental. The type of non-performance is irrelevant, it relates to any failure by a party to perform any of its obligations under the contract. This wide scope includes defective and late performance.

2 A party's non-performance is fundamental if the requirements of Art. 25 CISG are met, *i.e.* if the non-performance substantially deprives the other party of what it was entitled to expect under the contract unless the non-performing party did not foresee and could not reasonably have foreseen such result. The nature of the obligation which one party is not performing may also be relevant in determining whether that party's non-performance is fundamental, *e.g.* when strict performance in compliance with the letters of the contract is of the essence. The time factor may also be relevant in that a non-performance that, in and of itself, is not fundamental, may be qualified as fundamental because the non-performance is of such a nature that the other party has reasonable grounds to believe that the non-performing party will not or cannot perform in the future.