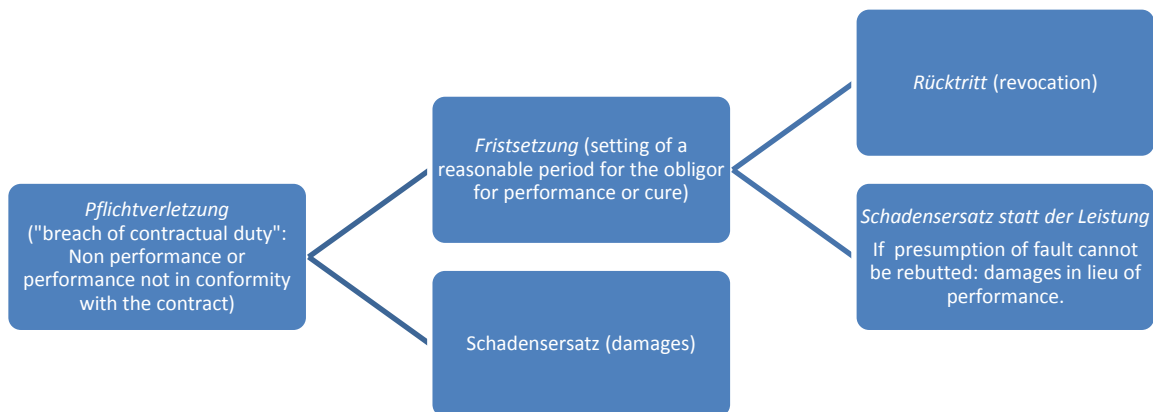


Introduction to German Law

Contract (2)

Remedies in German contract law



The delivery of a defective thing under a contract of sale is treated as a special case of breach of duty under German law. The buyer's remedies are mostly identical to those which every creditor has in the case of non-performance (performance not in conformity with the contract): if the defect is not cured within a reasonable period (§ 437 Nr. 1, 439 BGB), the buyer may revoke the contract or claim damages in lieu of performance (§ 437 Nr. 2 BGB). In addition to these rights, the buyer may also reduce the price (§ 441 BGB). The buyer's remedies are subject to shorter limitation periods than creditor's rights in general (§ 438 BGB).

Case 1: S sells his car to B. B pays the price of € 10,000. S refuses to hand over the car because his new car unexpectedly has not been delivered. B buys a car of the same type from X for € 12,000.

B has a claim for the delivery of the car under § 433 (1) BGB.

If B prefers to pursue a claim for damages in lieu of performance in the amount of € 12,000, she first has to give S notice and set a reasonable period (say, two weeks) during which S may cure his breach by delivering the car. If B buys a car from X without giving S a chance to cure the breach, she will not be entitled to damages in lieu of performance under § 281, § 280 (1) and (3) BGB.

Case 2: U agrees to paint the walls of B's flat for € 1,000. U's employee E accidentally kicks a valuable vase from a cupboard while working in B's flat.

B has a claim for damages against U under § 280 (1) BGB. The destruction of the vase was a breach of a collateral duty (Nebenpflichtverletzung) arising under the contract for work. U was not at fault himself, but he is liable for E's negligence under § 278 BGB. Since the damages for the vase are not damages in lieu of performance, no additional requirements (like the setting of a grace period) must be met.

The claim under § 280 (1) BGB will often be important to the injured party: B has a claim in delict (§ 823 (1) BGB) against E, but he will often prefer to sue U, because U is more likely to have enough money to satisfy B's claim. In delict, B can claim from U under § 831 BGB, but this claim fails if U can prove that he was not negligent in selecting E for the task and in supervising E's work. This defence is not available against the claim under § 280 (1) BGB.

Case 3: B buys a car from S. Shortly after delivery of the car, B is severely injured in a road accident. The accident occurs because the brakes of B's new car are not working. S had noticed this but had not told B because he felt the sale would not go forward if B knew there was a problem with the brakes.

B has a claim for damages resulting from the accident against S under § 437 Nr. 3, 280 (1) BGB. The defectiveness of the brakes constitutes a defect of the thing sold in the sense of § 434 (1) sentence 2 Nr. 1 BGB. The remedies available to the buyer are listed in § 437 BGB.

Since the delivery of the defective car constitutes a breach of a contractual duty, B has a claim for damages under § 280 (1) BGB, unless S can prove that he was not at fault (§§ 280 (1) sentence 2, 276 BGB). The damages claimed are not damages in lieu of performance (they are supposed to cover the cost of the accident, not to replace the car), B does not have to comply with the additional requirements of § 280 (3) BGB. Specifically, he does not have to set a grace period.

B will also have a claim in delict against S. However, under § 823 (1) BGB, B will have to prove S' fault, whereas under § 280 (1) BGB, S has to prove that he was not at fault.

