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Contracts III
Prof. Dr. M. Müller-Chen, February 12, 2024

"From insight to impact"

A. Performance of Contract

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Performance of the Contract (Overview)

…the right **parties** (art. 68 CO)

…the contractually agreed upon **obligations**

…at the right **place** (art. 74 CO)

…and at the right **time** (art. 75 CO)

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Time and Place of Performance

- **Time** of performance: Contract – nature of legal relationship – art. 75 CO (immediately)
- **Place** of performance determined
  - by the contract (art. 74 para. 1 CO)
  - by specific provisions of the CO or CC (e.g. art. 477 CO)
  - by the following rules in art. 74 para. 2 CO
    - Pecuniary debts: at the place where the creditor is domiciled
    - Specific object: at the place where it was located at time of formation of contract
    - All other debts: at the place where the debtor is domiciled

Change of Circumstances

Can a contract be adapted (or even terminated) when circumstances change for the worse?

- No: Pacta sunt servanda
- Exception to that rule:
  - If parties contractually dealt with such a situation (e.g. index clause, hardship clause, force majeure clause)
  - Otherwise only if:
    - The debtor is not at fault for the changed circumstances
    - The events were unforeseeable
    - The hindrance to perform is insurmountable and unavoidable
    - The contractual equilibrium is severly disturbed.

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Example of a force majeure clause (ICC 2020):

«Neither party shall be liable for any failure or delay in performing its obligations under this Agreement to the extent that such failure or delay is caused by a Force Majeure Event. A Force Majeure Event means an event beyond the reasonable control of a party, which by its nature could not have been foreseen or, if it could have been foreseen, was unavoidable, and includes, without limitation, acts of God, storms, floods, earthquakes, fires, explosions, pandemics, wars, acts of terrorism, riots, civil commotion, strikes, lockouts, and other industrial disputes, and acts of government or public authorities, provided that such acts or omissions are beyond the reasonable control of the affected party and materially impair the affected party's ability to perform its obligations under this Agreement.*»*

See more in detail: icc-forcemajeure-hardship-clauses-march2020.pdf (iccwbo.org)

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B. Breach of Contract

Specific Performance – Non-performance - Default

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Introduction

- The Code of Obligations has general rules on the breach of contract and its remedies in art. 97-109 CO.
- Additionally, you will find particular rules in the sections dealing with individual contracts (sales, rent, work contract etc.). They supplement, extend, and sometimes subsitute the general rules.
- To find out the remedies for a breach of contract, you will need to know the *cause* of the breach is.
- Take, e.g., a look at art. 97 and 102 seq. CO: You will see that the law differentiates between impossible, defective and late performances.
- The remedies are not the same
  - Impossibility of performance can fall under art. 20, 97 or 119 CO
  - Deficient performance is governed by art. 97, 197 seq. (sales), 258 seq. CO (rent) etc.
  - Late performance falls under art. 102 seq., 190 seq. CO (sales) etc.

Specific Performance

Specific Performance

- Primary remedy: Creditor should exactly get what he was promised
- Available as soon as
  - there is a valid contract;
  - Performance is possible, and
  - obligation is due.
- Independent of fault
- Practical significance: if promised object is unique or of specific value to the creditor (e.g., long-term supply contracts)
- Limits
  - Personal services (since they can’t be directly enforced)
  - Impossible obligations
  - Unreasonable obligations

Non-performance

Neither party is at fault for the non-performance (art. 119 CO)

- In a synallagmatic contract, the debtor does not perform its obligation and the creditor demands performance.
- Assumption: The obligation in kind or for a service cannot be peformed due to impossibility. Neither party is at fault.
- What happens to the mutual obligations?
  - Art. 119 para. 1 CO: The obligation of the debtor in kind or service is extinguished: The obligation expires.
  - Art. 119 para. 2 CO: Due to the synallagma, the creditor's obligation to perform (usually the obligation to pay) also expires.
  - However, according to Art. 119 para. 3 CO, this only applies in cases "where the risk passes to the creditor before performance according to the law or the content of the contract".

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Debtor is at fault for the non-performance (art. 97 CO)

A undertakes to transport B's breeding stallion. The horse is injured during transportation because it was inadequately secured. It later dies due to a rare form of tetanus. Can B claim damages?

Requirements:

- Non-performance or defective performance («breach of contract»)
- Fault (Note: reversal of the burden of proof): deliberate wrongdoing or negligence
- Damage: involuntary reduction of assets
- Causality (conditio sine qua non, adequacy)

Consequence:

Damages for non or defective performance of the contract

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Vicarious Liability (art. 101 i.c.w. art. 97 CO)

Bob promised to paint the inside of Jane's house. He sends his employee Jack to do the job. Jack accidentally spills paint over the expensive sofa in the living room.

Does Bob have to pay damages?

Yes, if the requirements of art. 101 CO are fulfilled, liability is attributed to the debtor (Bob) arising from actions of the auxiliary person (Jack):

- Contract between the principal debtor and the injured person
- The debtor was authorized to delegate the performance to an auxiliary person.
- The obligation was performed insufficiently by the auxiliary person.
- Functional connection («acting in the scope of the contract»)
- Hypothetical liability

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Quiz – Question 7

Carla sends her apprentice Paul to repair the dishwasher at the Cramer residence. During a break, Paul lights a cigarette and carelessly throws away the cigarette butt, which leads to a fire causing substantial damage to the house.

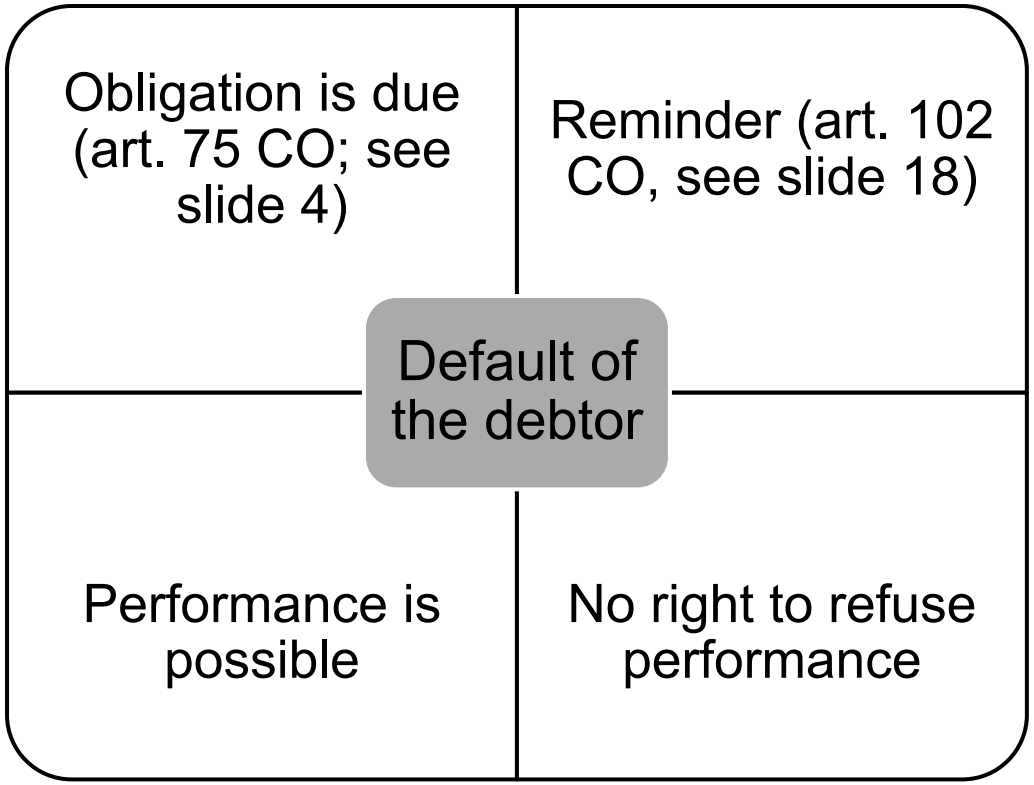
What are the Cramers' rights?

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Debtor’s Default

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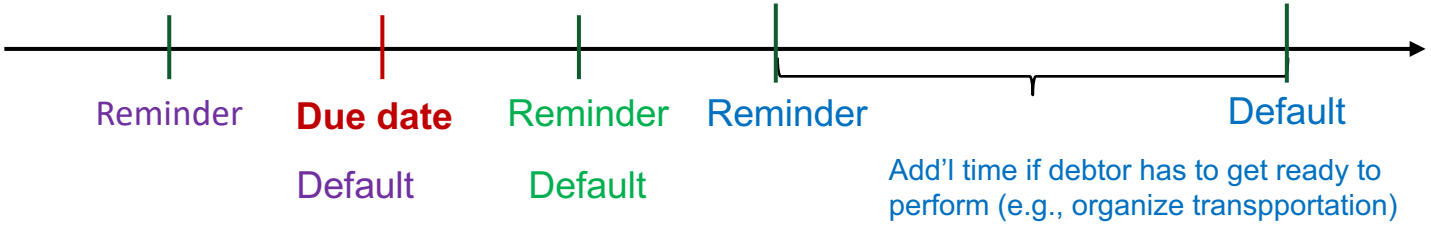
Debtor's Default: Requirements



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Reminder

Reminder:

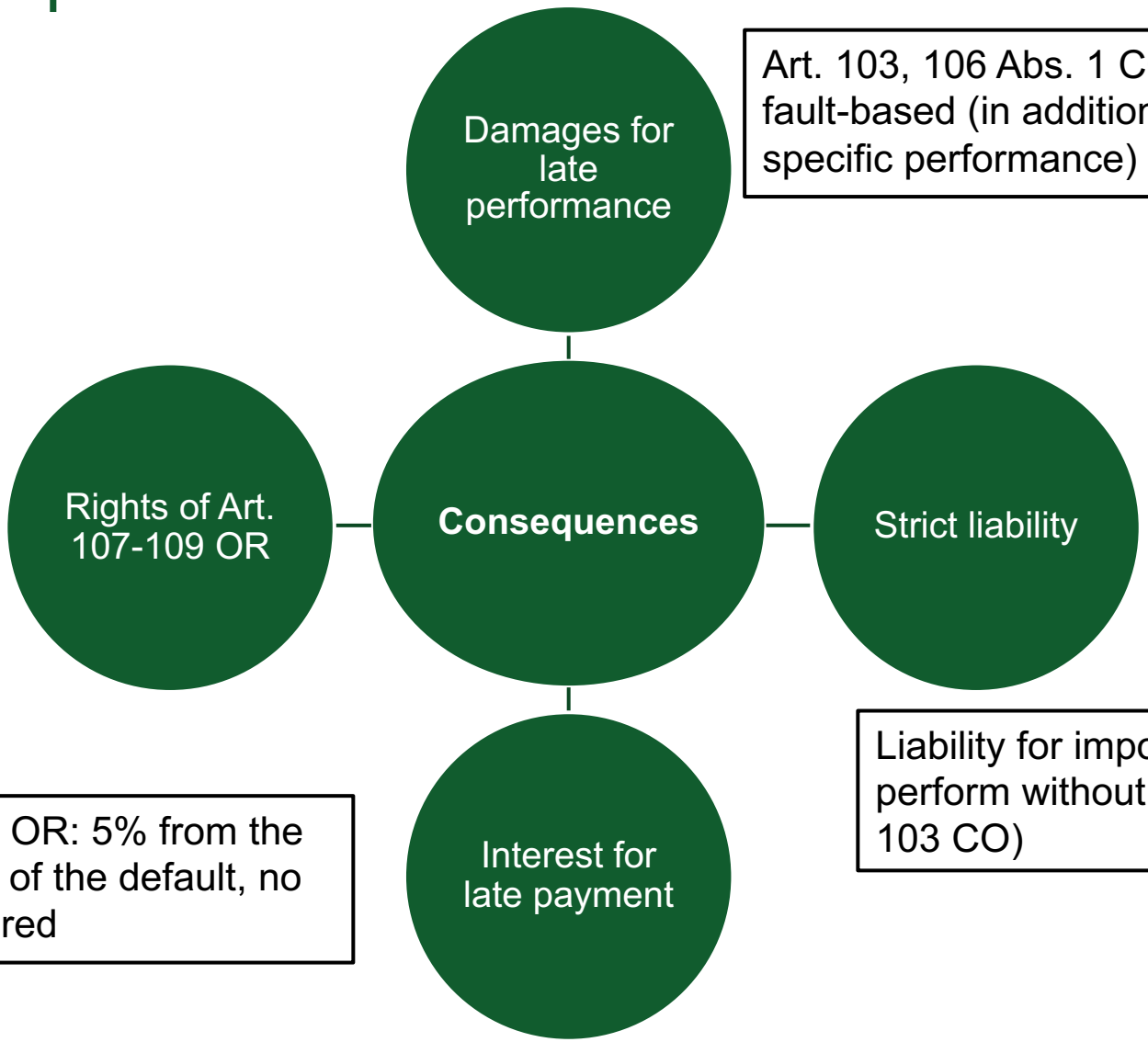


Default without reminder:

- Deadline has been set by agreement (art. 102 para. 2 CO)
- Deadline as a result of a duly exercised right of termination reserved by one party (art. 102 para. 2 CO)
- Reminder pointless (debtor manifestly refuses performance)
- Reminder unreasonable (debtor obstructs receipt)

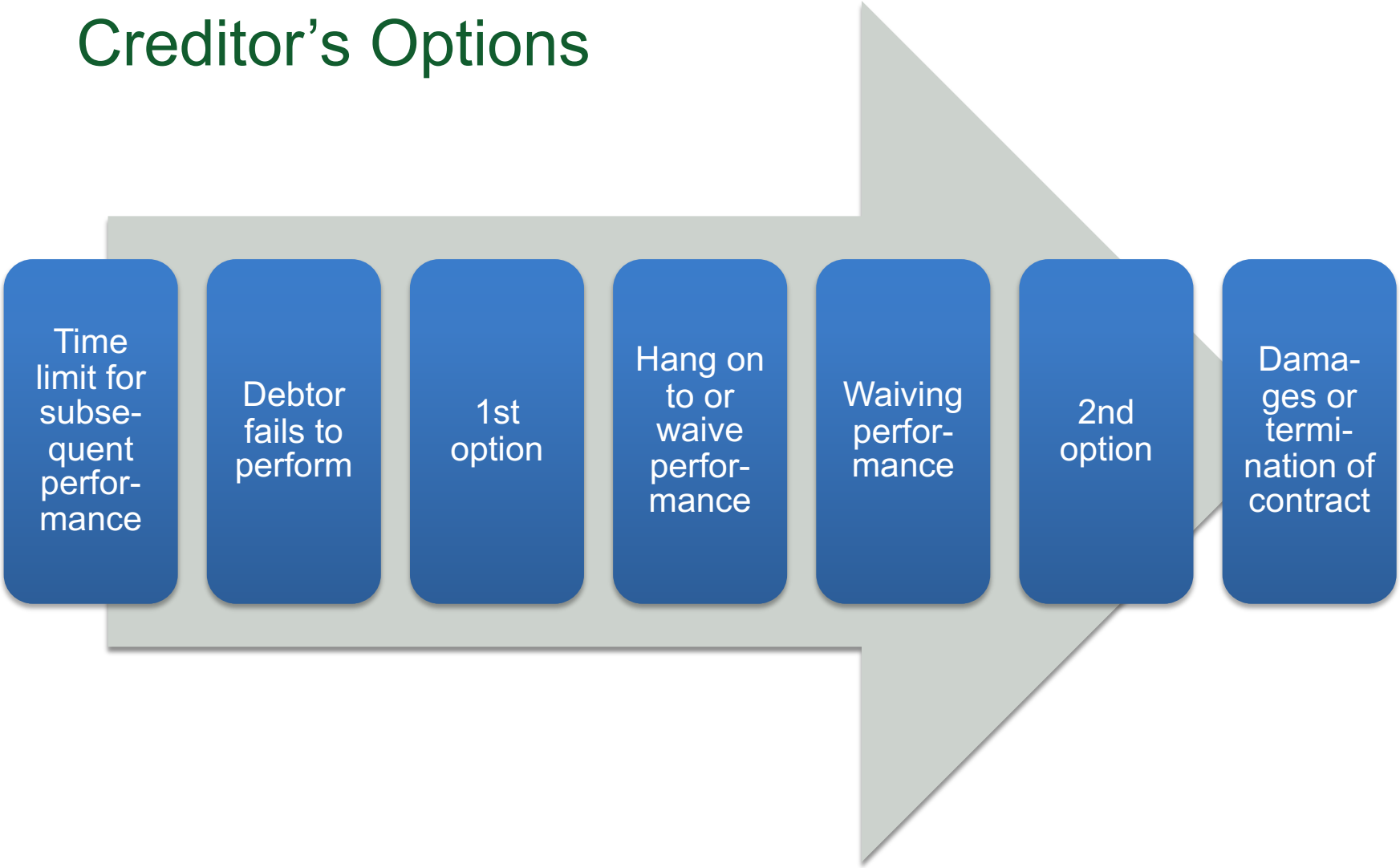
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Consequences of Debtor‘s Default



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Creditor's Options



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Quiz – Question 8

Tammy has still not received the TV she ordered two weeks ago. She calls the store to inform them she no longer wants it.

Has Tammy acted correctly?

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Contractual Amendment of the Liability Rules for Breach of Contract

Exclusion or Modification of Contractual Liability

Types of exclusion / modification:

- Exclusion of simple negligence
- Limitation of damages (floor / cap / combination)
- Intensifying the prerequisites for liability

Limits to exclusion:

- Art. 100 CO (for actions of the debtor itself)
- Art. 101 para. 2 and 3 CO (for actions of auxiliary persons)

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Quiz – Question 9

Annie sell her house to Maggie for CHF 1.5 Mio. In the notarized contract it is stipulated that «the seller excludes all liability to the farthest extent possible by law».

- What does that mean?
- What is the legal situation if the cellar is flooded after a heavy storm because the basement of the house has cracks invisible to the naked eye?

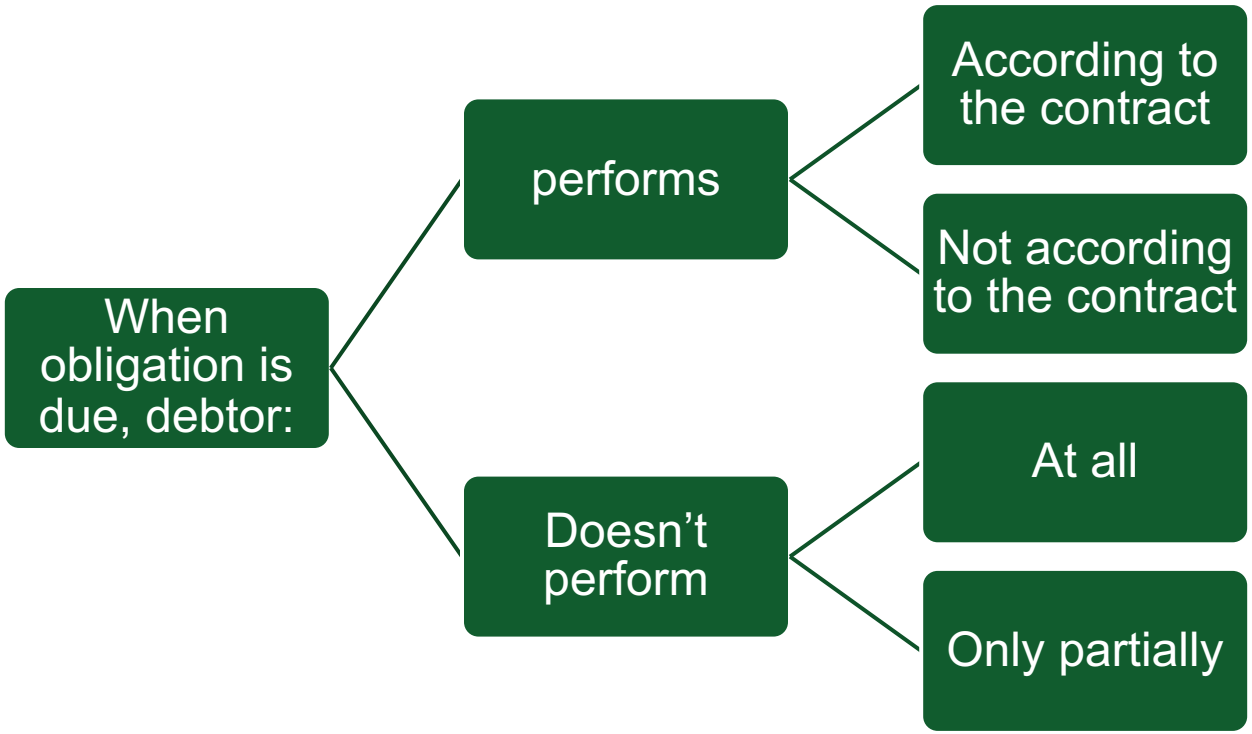
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Summary

Remedies for Breach of Contract

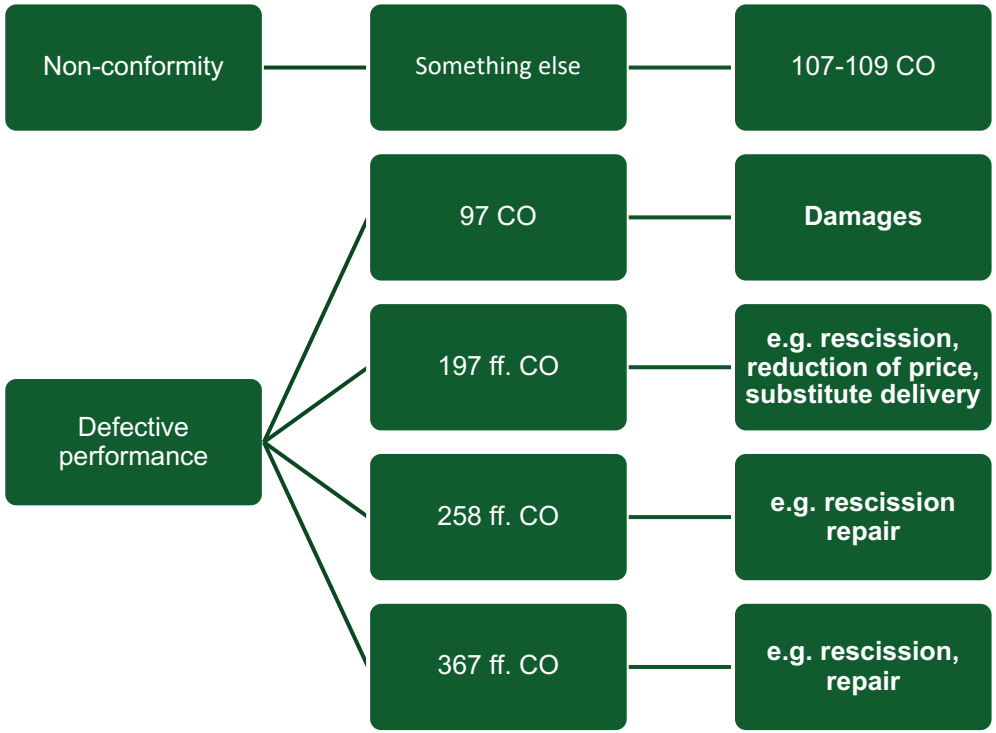
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Starting Point



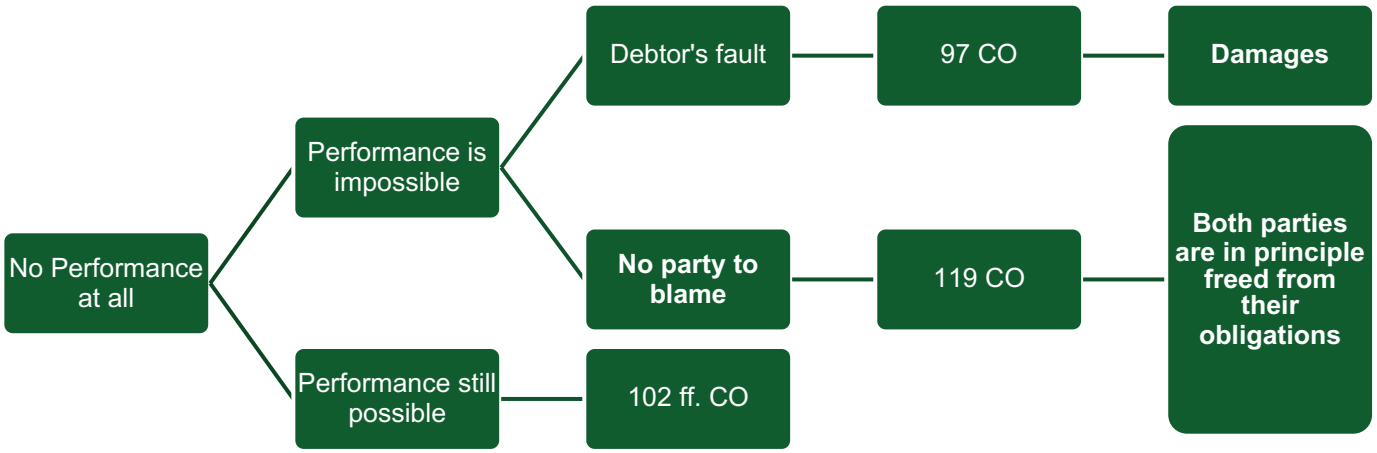
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Performance wasn't in conformity with the contract



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No Performance at all

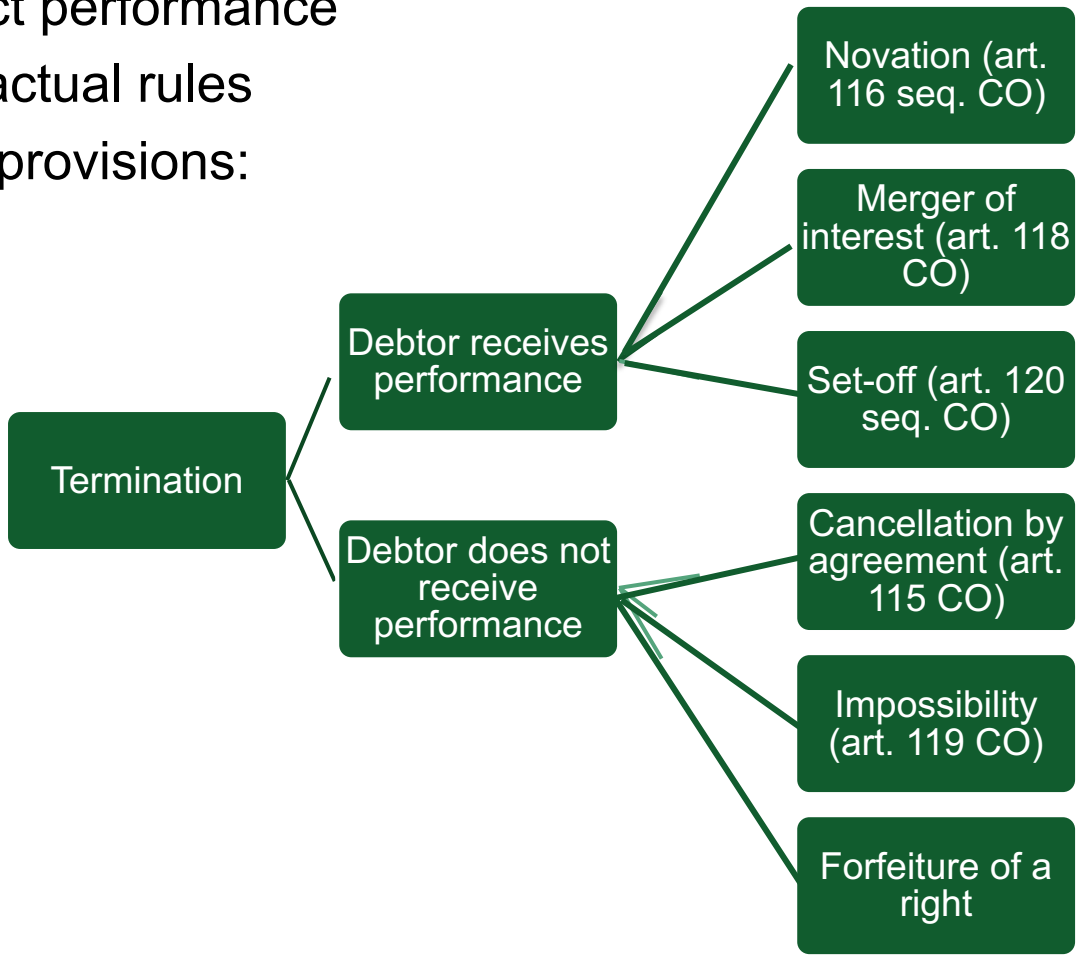


C. Termination of Contracts

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Overview for the Reasons for Termination

- Correct performance
- Contractual rules
- Legal provisions:



D. Prescription

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Prescription (I/II)

Prescription (a/k/a *time limits* or *statute of limitations*) prevents actionability. This means that the obligation still exists, but the debtor can permanently block its enforcement.

Important: A court may not consider the expiration of a period of limitation *ex officio* (art. 142 CO), the debtor must assert that the claim is time-barred.



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Prescription (II/II)

Requirements:

- Obligation must be prescribable (this is in general the case)
- The applicable prescription period must have passed
- The debtor must not have waived prescription (art. 141 CO)

Time limits:

- Art. 127 CO: ordinary period of limitations: ten years
- Art. 128 CO: five years for some obligations
- Other special time limits: art. 60, 67, 128a, 210, 371 CO etc.

Calculation of time periods:

- Begin: art. 130 para. 1 CO: When obligation becomes due
- Calculation: art. 132 CO
- Impediment, suspension: art. 134 CO (esp. para. 1 nr. 8!)
- Interruption: art. 135 CO

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