

CISG Advisory Council* Opinion No. 21

Delivery of Substitute Goods and Repair under the CISG

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* The CISG-AC started as a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law, Prof. Michael Joachim Bonell, University of Rome La Sapienza, Prof. E. Allan Farnsworth, Columbia University School of Law, Prof. Alejandro M. Garro, Columbia University School of Law, Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation, Prof. Jan Ramberg, University of Stockholm, Faculty of Law, Prof. Peter Schlechtriem, Freiburg University, Prof. Hiroo Sono, Faculty of Law, Hokkaido University, Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council.

At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Prof. Ingeborg Schwenzer, University of Basel; Prof. John Y. Gotanda, Villanova University; Prof. Michael G. Bridge, London School of Economics; Prof. Han Shiyuan, Tsinghua University and Prof. Yeşim Atamer, Istanbul Bilgi University, Turkey, Prof. Ulrich G. Schroeter, University of Mannheim, Germany, Prof. Lauro Gama Jnr, Pontifical Catholic University, Justice Johnny Herre, Justice of the Supreme Court of Sweden, Prof. Harry M. Flechtner, University of Pittsburgh, Prof. Sieg Eiselen, Department of Private Law of the University of South Africa, and Prof. Edgardo Muñoz López, Universidad Panamericana, Guadalajara, Mexico.

Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenzer of the University of Basel was elected Chair and at its 24th meeting in Antigua, Guatemala, Prof. Michael G. Bridge of the London School of Economics was elected Chair of the CISG-AC. At its 26th meeting in Asunción, Paraguay, Ass. Prof. Milena Djordjević, University of Belgrade, Serbia, was elected Secretary.

OPINION [BLACK LETTER TEXT]

Article 46

(1) [...]

(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.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) 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.

Article 48 CISG

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49 CISG

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; [...].

[...]

I. Application

- 1. Delivery of substitute goods (Article 46(2) CISG) and repair (Article 46(3) CISG) are remedies not subject to Article 28 CISG.**
- 2. These remedies apply not only to non-conformity of the goods (Article 35 CISG) but also in cases of third party rights or claims (Article 41 CISG), as well as third party rights or claims based on industrial or intellectual property (Article 42 CISG).**

II. Delivery of substitute goods (Article 46(2) CISG)

- 3. Under Article 46(2) CISG, a fundamental breach of contract can only be found if the non-conforming goods cannot be used as intended and if it is reasonable for the buyer to refuse repair.**
- 4. A buyer requiring delivery of substitute goods is subject to Article 82 CISG.**
- 5. The buyer's right to require delivery of substitute goods is excluded if it is disproportionate having regard to all the circumstances.**

III. Repair (Article 46(3) CISG)

- 6. The buyer may require the seller to remedy the non-conformity by repair unless this is unreasonable. In determining whether repair by the seller is unreasonable regard is to be had to:**
 - a. whether the buyer is better placed to arrange for repair of the goods;**
 - b. whether the seller offers to advance the costs for repair by the buyer or a third party;**
 - c. whether repair imposes costs on the seller that are disproportional to the actual or prospective loss of or benefit to the buyer.**

IV. Consequences

- 7. If the goods have been combined with other goods or installed, the costs of retrofitting may be recovered as damages but in general are not borne by the seller as part of the remedy of delivery of substitute goods or repair. However, if in a mixed contract the seller has also assumed the obligation of combining or installing the goods the costs of retrofitting are borne by the seller as part of the remedy of delivery of substitute goods or repair.**
- 8. In cases of delivery of substitute goods, or repair of the goods by delivery of substitute parts,**
 - a. the buyer must make restitution to the seller of the goods or parts first delivered;**
 - b. the seller must take back the goods or parts first delivered;**
 - c. the costs of restitution must be borne by the seller.**
- 9. The buyer is not bound to**
 - a. make restitution of benefits derived from the substituted non-conforming goods or parts first delivered;**
 - b. account for any betterment caused by the delivery of substitute goods, or repair of the goods by delivery of substitute parts.**
- 10. After substitution or repair, the buyer has to comply with the examination and notice requirements of Articles 38, 39 and 43 CISG. In case of non-conformity of the goods the two year cut off period (Article 39(2) CISG) starts to run with the actual handing over of the substituted goods or repair.**

V. Seller's right to cure under Article 48 CISG

- 11. Under Article 48 CISG the seller has a right to cure "subject to article 49". The seller's right to cure is excluded in case of a fundamental breach of contract, i.e., the goods are not usable and the non-conformity is not curable in time.**
- 12. If both delivery of substitute goods and repair are adequate to remedy the non-conformity of the goods the seller may choose between the two forms of cure.**
- 13. The buyer may fix an additional period of time of reasonable length for delivery of substitute goods or repair (Article 47(1) CISG). However, it is not obliged to do so. Subject to Article 77 CISG and the seller's right to cure under Article 48 CISG, the buyer may instead immediately have recourse to other remedies available, such as damages or reduction of the purchase price.**

14. During a reasonable length of time fixed by the buyer under Article 47 CISG or by the seller under Article 48(2) CISG and expressly or implicitly accepted by the buyer, the buyer may not resort to any remedy inconsistent with cure.

OPINION [BLACK LETTER TEXT]	1
COMMENTS	6
1. Introduction	6
2. Drafting History	7
a) <i>Article 46 CISG</i>	7
b) <i>Article 48 CISG</i>	8
3. Interpretation	9
a) <i>Application</i>	9
aa) Specific performance and Article 28 CISG	9
bb) Non-conformity of the goods	10
cc) Defects in quantity	12
dd) Defects in packaging	13
ee) Timely request	13
b) <i>Delivery of substitute goods (Article 46(2) CISG)</i>	15
aa) Fundamental breach	15
bb) No differentiation between generic and identified goods	16
cc) Exclusion of Article 46(2) CISG	17
c) <i>Repair (Article 46(3) CISG)</i>	20
d) <i>Consequences</i>	22
aa) Costs of substitute delivery and repair	22
bb) Costs of retrofitting	23
cc) Restitution of non-conforming goods or non-conforming parts of the goods to the seller	25
dd) Application of Articles 38, 39 and 43 CISG	28
ee) Place of substitute delivery and repair	29
ff) Right to withhold performance	30
e) <i>Seller's right to cure under Article 48 CISG</i>	30
aa) Relation of Article 48 and 49 CISG	30
bb) Seller's right to choose	32
cc) Limitation of the seller's right to cure	33
dd) Application of Article 47(1) CISG	35
ee) Exclusion of other remedies	38
ADDENDUM: CASES CITED	40

COMMENTS¹

1. Introduction

1.1 The most prevalent case of seller's breach of contract is non-conformity of the goods.² There are different possibilities to remedy this non-conformity. First and foremost, the parties may contractually agree on remedies in case of non-conformity of the goods.³ The CISG provisions concerning remedies are non-mandatory.⁴ The parties may derogate from these default provisions according to Article 6 CISG.⁵ If the parties do not derogate, the default remedies of the CISG apply. The provisions regarding these remedies, i.e., Articles 46–49 CISG, are subject to constant confusion and debate.⁶ This does not only apply to the academic level, but also in practice.⁷ The remedies for non-conformity differ from those for other breaches due to several specificities.

1.2 The specificities of Articles 46–49 CISG regarding the buyer's and seller's rights and duties will be elaborated on in this opinion. Delivery of substitute goods and repair “*are opportunities sought by sellers – to preserve good will, reduce damage liability and avoid the drastic remedy of avoidance.*”⁸ The contractual bond between the parties should be preserved as far as possible and avoidance regarded as an *ultima ratio* under the CISG.⁹ Thereby, additional transportation

¹ These comments rely on the views expressed in Ingeborg Schwenzler/Ilka Beimel, *Replacement and Repair of Non-Conforming Goods under the CISG*, Internationales Handelsrecht 2017, 187.

All websites last visited on 1 November 2020.

² The notion of non-conformity under Art. 35 CISG is much broader than in most domestic legal systems. It does not only relate to defects in quality (*peius*) but rather it also encompasses defects in quantity, the delivery of goods of a different kind (description, *aliud*), as well as defects in packaging. Also, non-conforming documents (accompanying documents or documentary sales) are encompassed by Art. 35 CISG, CISG-AC Opinion No. 5, *The buyer's right to avoid the contract in case of non-conforming goods or documents*, 7 May 2005, Badenweiler (Germany). Rapporteur: Professor Dr. Ingeborg Schwenzler, LL.M., Professor (em.) of Private Law, in Schwenzler (ed.) *The CISG Advisory Council Opinions* (Den Haag 2017), 101, 110-111 para. 4.7 et seq., also available at <http://www.cisgac.com/cisgac-opinion-no5/>.

³ To apply the contractual remedies, the parties' contract must be interpreted according to Arts. 8, 9 CISG whereby trade usages play an important role.

⁴ Cf., Ingeborg Schwenzler/Pascal Hachem, in Schwenzler (ed.), *Schlechtriem & Schwenzler Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed., Oxford 2016), Art. 6 para. 28 for examples; see also Sieg Eiselen, *Adopting the Vienna Sales Convention: Reflections Eight Years down the Line*, 19 South African Mercantile Law Journal (2007) 14, 17 et seq.

⁵ Such a derogation of the CISG may be made explicitly or implicitly. Schwenzler/Hachem, in *Schlechtriem & Schwenzler* (n. 4) Art. 6 para. 3; Peter Huber, in Stefan Kröll/Loukas Mistelis/Pilar Perales Viscasillas (eds.), *UN-Convention on the International Sales of Goods (CISG)* (2nd ed., München 2018), Art. 6 para. 14.

⁶ See in general, Christiana Fountoulakis, *Remedies for breach of contract under the United Nations Convention on the International Sale of Goods*, ERA Forum (2011) 12: 7–23; Lachmi Singh/Benjamin Leisinger, *A Law for International Sale of Goods: A Reply to Michael Bridge*, 20 Pace International Law Review (2008) 161, 163 et seq.; Peter Schlechtriem, *Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-conformity of the Goods*, 18 Pace International Law Review (2006) 83; Ericson Kimbel, *Nachfrist Notice and Avoidance Under the CISG*, 18 Journal of Law and Commerce (1998-1999) 301, 301 et seq.

⁷ See for example Landgericht (District Court) Zweibrücken, 19 March 2010, 6 HK. O 13/03, CISG-online 2794 on the issue of a claim for damages in case of repair by the buyer (followed by Oberlandesgericht (Court of Appeal) Zweibrücken, 29 October 2012, 8 U 22/10, CISG-online 2696 and Bundesgerichtshof (German Supreme Court), 24 September 2014, VIII ZR 394/12, CISG-online 2545).

⁸ John O. Honnold/Harry Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th ed., Alphen aan den Rijn 2009), Art. 46 para. 286.

⁹ UNCITRAL, *Digest of Case Law on the CISG* (2016), available at https://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf, Art. 46 para. 3.

efforts and costs can be saved. The discussions on interpreting and applying Articles 46–49 CISG require balancing the buyer’s and the seller’s interests. The typical civil law understanding is that *pacta sunt servanda* requires the seller to potentially perform more than once, while under the typical common law approach specific performance is not easily granted at all. Analyzing this potential legal dichotomy and the parties’ interests, the international character of the CISG and the need to interpret the CISG autonomously must be borne in mind.

2. Drafting History

2.1 In drafting Articles 46 and 48 CISG, the role of specific performance, the relation of the seller’s right to cure in Article 48 CISG and the buyer’s right to avoid the contract in Article 49 CISG, as well as the notion of fundamental breach in Articles 46 and 49 CISG were discussed in great detail. Regarding both parties’ interests, the drafters focused on the seller’s interest in remedying any defect and the buyer’s interest in the contract’s execution.¹⁰

a) Article 46 CISG

2.2 Initially, Article 46 CISG had two paragraphs: the general remedy to request performance, Article 46(1), and the remedy to request delivery of substitute goods, Article 46(2) CISG. Repair was not included directly.¹¹ In contrast, the preceding Article 42 of the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) spoke of repair, additional delivery, and substitute delivery. With this background, it was not surprising that the delegates in Vienna in 1980 discussed whether to include repair directly in the CISG. In the end, the Federal Republic of Germany, Finland, Norway, and Sweden proposed to include Article 46(3) CISG to limit the remedy of repair. The delegates argued that “*in some cases the buyer’s right to a reduction in price and damages constituted an adequate remedy, particularly when the goods concerned could easily be repaired by him or when the cost of repair to the seller would be unreasonably high*”.¹² France proposed to name the perspective of the “*legitimate interests of the buyer*” when evaluating the availability of repair.¹³ In the end, the delegates agreed on the current wording “*having regard to all the circumstances*” not limiting the perspective on the buyer’s interests.¹⁴

2.3 Regarding the right to request specific performance in Article 46(1) CISG, the delegates discussed the need to balance the buyer’s and the seller’s interests, different approaches in

¹⁰ *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, Vienna, 10 March–11 April 1980 (United Nations publication, Sales No. E.81.IV.3), 351 para. 6.

¹¹ Cf., *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat (Secretariat’s Commentary) / UN DOC. A/CONF. 97/5*, Art. 42. However, it is possible that some delegates understood the previous Art. 46 CISG to indirectly include repair, cf. *Official Records* (n. 10), 78, Art. 42.

¹² *Official Records* (n. 10), 335 para. 11.

¹³ *Official Records* (n. 10), 335 para. 15.

¹⁴ *Official Records* (n. 10), 335 para. 15 et seq.

favoring the buyer's or the seller's "*freedom to limit the legal consequences of defects*",¹⁵ and restricting the time within which such request can be made.¹⁶ The U.S.-American delegation proposed to amend specific performance "*to rule out the remedy of specific performance in cases where the buyer could 'purchase substitute goods without unreasonable additional expense or inconvenience'.*"¹⁷ In rejecting the amendment, the opponents relied on *pacta sunt servanda*, one of the basic principles of the CISG,¹⁸ the effect of the amendment to "*reduce the buyer's freedom to limit the legal consequences of defects*"¹⁹ or to "*encourage the seller to dishonour his obligations if the product he was selling was available on the market.*"²⁰

b) Article 48

2.4 Article 48 and, in particular, its relation to Article 49 CISG caused much debate in Vienna in 1980.²¹ Regarding the relation of Articles 48 and 49 CISG, the delegates tried "*to establish a balance between the seller's right to remedy and the buyer's right to avoid.*"²² Also, the delegates understood that "[t]he essential thing was to define precisely what constituted a fundamental breach."²³ An indicative vote on the question of whether the seller's right to remedy in Article 48 CISG should prevail over the buyer's right of avoidance guided the discussion. The question was denied.²⁴ The delegates changed the introduction of Article 48(1) CISG from "*Unless the buyer has declared the contract avoided in accordance with article 45,*"²⁵ to the current version. Additionally, a Singaporean amendment led to the change of the previous wording referring to "*such delay as will amount to a fundamental breach of contract*" to a mere "*unreasonable delay*" was adopted.²⁶

2.5 On the interaction of Articles 48 and 46 CISG, notably two proposals to clarify their relation were rejected. First, one of the German delegates proposed that generally, the seller's right to remedy its failure to perform should prevail over the buyer's rights, especially its right to avoid the contract.²⁷ Second, one of the U.S.-American delegates proposed to amend Article 48 CISG

¹⁵ The term freedom was used in this discussion by one of the delegates of the German Democratic Republic (GDR), *Official Records* (n. 10), 331 para. 58.

¹⁶ One of the U.S.-American delegates proposed such restriction, *Official Records* (n. 10), 334 para. 5. He argued that it would be important to clarify that the buyer may not change its mind while requesting the remedy. The proposal was supported by the U.K. but rejected in the end.

¹⁷ *Official Records* (n. 10), 330 para. 47. This proposal was supported by Australia, Italy, Norway, and the U.K. The latter commented that it is "*difficult to see what interest a buyer could have in forcing a seller to perform when it was possible for he himself to purchase substitute goods, without substantial additional expense or inconvenience, and obtain compensation for any additional costs incurred*", 331 para. 57.

¹⁸ Raised by the delegation of the Union of Soviet Socialist Republics (USSR), *Official Records* (n. 10), 332 para. 67.

¹⁹ Raised by the delegation of the GDR, *Official Records* (n. 10), 331 para. 58. The delegation added that this freedom "*was widespread in commercial life and which should be extended rather than restricted.*"

²⁰ *Official Records* (n. 10), 332 para. 64.

²¹ *Official Records* (n. 10), 341 et seq.

²² U.S.-American delegation, *Official Records* (n. 10), 342 para. 47.

²³ Swedish delegation, *Official Record* (n. 10), 342 para. 48.

²⁴ *Official Records* (n. 10), 342 para. 64.

²⁵ Art. 44(1) 1978 Draft Convention, published in *Official Records* (n. 10), 10.

²⁶ *Official Records* (n. 10), 114 para. 3(ii), 351 paras. 5 et seq.

²⁷ *Official Records* (n. 10), 341 para. 38.

to implement the seller's right to choose the manner of cure if a conflict between Articles 46 and 48 CISG arises.²⁸ The latter was rejected by 10 votes in favor and 10 votes against. However, lacking any discussion, it is not clear whether the votes against understood the clarification to be superfluous or opposed in substance.

3. Interpretation

a) Application

aa) Specific performance and Article 28 CISG

1. Delivery of substitute goods (Article 46(2) CISG) and repair (Article 46(3) CISG) are remedies not subject to Article 28 CISG.

3.1 The general remedy to require specific performance in Article 46(1) CISG is subject to Article 28 CISG. Concerning the remedies in Articles 46(2) and (3) CISG it is, however, questionable whether Article 28 CISG applies. The drafting history is ambiguous. On the one hand, the Secretariat's Commentary discussed Article 28 CISG only with regard to Article 46(1) but not Article 46(2) CISG.²⁹ On the other hand, one Member State commented on the 1978 Draft Convention in a manner applying Article 28 CISG to the remedy of repair.³⁰ However, repair was not yet mentioned in the 1978 Draft Convention.

3.2 Primarily, German and Swiss authors favor the application of Article 28 CISG in cases of Articles 46(2) and (3) CISG.³¹ One argument is that Articles 46(2) and (3) CISG are part of a general right to request specific performance and Article 28 CISG applies to this general right.³² It is not surprising that primarily German authors rely on this argument since, under German, i.e., civil, law the remedies of repair and delivery of substitute goods are considered to be remedies of specific performance. However, in other legal systems, especially common law systems, these remedies would not be regarded as remedies of specific performance.³³

3.3 The arguments in favor of applying Article 28 CISG to cases of Articles 46(2) and (3) CISG do not convince. First, Articles 46(2) and (3) CISG name different prerequisites than the general right to request specific performance under Article 46(1) CISG. Articles 46(2) and (3) CISG require fundamentality of the breach and reasonableness of the claim for repair. Hence,

²⁸ *Official Records* (n. 10), 352 para. 32.

²⁹ *Secretariat's Commentary* (n. 11), Art. 42 para. 10.

³⁰ Norway gave an example in respect to limiting the right to require repair of the goods, *Official Records* (n. 10), 78, Art. 42 para. 1.

³¹ Peter Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 46 paras. 31, 45; Peter Huber, in *Münchener Kommentar zum BGB, Band 4* (8th ed., München 2019), Art. 46 para. 37; Hanns-Christian Salger, in Wolfgang Witz/Hanns-Christian Salger/Manuel Lorenz, *International Einheitliches Kaufrecht* (2nd ed., Frankfurt 2016), Art. 46 para. 1; Müller-Chen, Markus, in *Schlechtriem & Schwenzler* (n. 4), Art. 28 para. 6; Christoph Brunner/Diana Akikol/Lucien Bürki, in Christoph Brunner/Benjamin Gottlieb (ed.), *Commentary on the UN Sales Law (CISG)* (Alphen aan den Rijn 2019), Art. 46 para. 9.

³² Ulrich Magnus, in Dagmar Kaiser (ed.), *Staudinger BGB* (Berlin 2018), Art. 46 paras. 31, 64.

³³ In fact, under the U.K. Sale of Goods Act 1979, there is no formal right to cure. But see Michael Bridge, *The Sale of Goods*, (4th ed., Oxford 2019), para. 10.135.

Articles 46(2) and (3) CISG are *leges speciales* “qualifying the general provision of Article 28 CISG”.³⁴ As Honnold and Flechtner correctly argue, it would contradict the “spirit of fairness” to restrict “the grounds for relief in some jurisdictions without requiring liberalization of the grounds in others”.³⁵ Second, applying Article 28 CISG to Articles 46(2) and (3) CISG ignores the interplay of Articles 46(2) and (3) CISG, and the seller’s right to cure under Article 48 CISG which is not restricted by Article 28 CISG. Some sellers would be privileged with a buyer who has no rights under Articles 46(2) and (3) CISG. The harmony of Articles 46(2) and (3) and Article 48 CISG, balancing buyer’s and seller’s interests, would be disturbed.³⁶ Third, the approach suggested in Rule No. 1 is in line with the wording and purpose of Article 28 CISG. The wording of Article 28 CISG states to “require performance” and is congruent with the wording in Article 46(1) CISG, also stating to “require performance”. It differs, however, from the wording in Articles 46(2) and (3) CISG, referring to the “delivery of substitute goods” and “repair”. The purpose of Article 28 CISG is to bridge the “differences between the continental European legal system and the English and American legal system on the issue of the right to require specific performance”.³⁷ This purpose does not apply to Articles 46(2) and (3) CISG. Specific performance is available in limited circumstances in the English and American legal systems.³⁸ Although their limitations differ from Articles 46(2) and (3) CISG,³⁹ their mere existence provides a bridge to the English and American legal system, rendering Article 28 CISG superfluous.

3.4 Therefore, delivery of substitute goods and repair have a broader scope of application than the general right to request specific performance. Whereas the general right to require specific performance is subject to Article 28 CISG, the remedies in Article 46(2) and (3) CISG are not.

bb) Non-conformity of the goods

2. These remedies apply not only to non-conformity of the goods (Article 35 CISG) but also in cases of third party rights or claims (Article 41 CISG), as well as third party rights or claims based on industrial or intellectual property (Article 42 CISG).

3.5 The heading of Section II CISG, including Articles 35, 41, and 42 CISG, differentiates between “conformity of the goods and third party claims”. The wording of Articles 46(2) and (3) CISG only addresses non-conformity. Hence, at first glance Articles 46(2) and (3) CISG do not apply in case of third party rights or claims, Article 41 CISG, or third party industrial or

³⁴ Honnold/Flechtner (n. 8), Art. 46 para. 285.1.

³⁵ Honnold/Flechtner (n. 8), Art. 46 para. 285.1.

³⁶ Where the seller may use Art. 48 CISG without being faced by a buyer enjoying Art. 46(2), (3) CISG, an imbalance may result. During the negotiations in Vienna in 1980, one of the U.S.-American delegates generally described that both Articles are closely linked with each other, *Official Records* (n. 10), 344 para. 79.

³⁷ Markus Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 28 para. 1. However, the author favors the approach opposing Rule No. 1.

³⁸ C.f., Sect. 2-716(1) UCC for the U.S.-American understanding, and Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed., Oxford 2019), 402 et seq.

³⁹ These are, generally, uniqueness – physical or commercial –, the difficulty to assess damages, or the inadequacy to pay damages.

intellectual property rights or claims, Article 42 CISG.⁴⁰ This argument could be supported by the Secretariat's Commentary on the 1978 Draft Convention, which explicitly states that Article 46(2) CISG does not apply in cases of Articles 41 and 42 CISG.⁴¹ Additionally, one may note that Articles 46(2) and (3) CISG only refer to Article 39 CISG, not Article 43 CISG.

3.6 However, a practical interpretation and understanding of Articles 46(2) and (3) CISG favor their application in cases of Articles 41 and 42 CISG, where appropriate.⁴² Articles 46(2) and (3) CISG express a general principle in the CISG of balancing both parties' interests in case of a breach of contract by the seller. In cases of Articles 41 and 42 CISG both parties are often faced with similar issues as in the case of non-conformity.⁴³ Alternatively, some scholars differentiate between Article 41 and 42 CISG and argue that Articles 46(2) and (3) CISG apply only to Article 42 CISG.⁴⁴ According to these authors, liability for defects under Article 42 CISG is closer to non-conformity than to Article 41 CISG.⁴⁵ Comparing Articles 35, 41, and 42 CISG, it is evident that only Articles 35(3) and 42(2)(a) CISG apply the same standard of the buyer's knowledge.⁴⁶ Article 41 CISG would deviate from this standard since it does not even require positive knowledge of the buyer.⁴⁷

3.7 The better view is to apply Articles 46(2) and (3) CISG not only to Article 42 CISG but even to Article 41 CISG. Whenever it is practically feasible to apply Article 46(2) and (3) CISG to either Article 41 or 42 CISG, there is no reason to deny the applicability in general. Under Article 41 CISG the seller must deliver goods which are free from any right or claim of a third party, excluding industrial property or other intellectual property rights. These may be property rights or other defects in title.⁴⁸ Delivery of substitute goods not subject to such third party rights may cure the defective performance (Article 46(2) CISG). Where the defects can be

⁴⁰ Relying on a systematic reading Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 46 para. 7. See also Axel Metzger, *Seller's Liability for Defects in Title According to Articles 41 and 42 of the CISG*, in Ingeborg Schwenzler/Yeşim Atamer/Petra Butler (eds.), *Current Issues in the CISG and Arbitration* (Den Haag 2014), 195, 199.

⁴¹ *Secretariat's Commentary* (n. 11), Art. 39 para. 8, Art. 40 para. 12.

⁴² The same applies to Art. 46(1) CISG, David Tebel, *Liability for Infringing Goods*, Ph.D. Thesis 2019 (in publication), Part 6, A. III. 1.

⁴³ Cf., Tebel, *Liability for Infringing Goods* (n. 42), Part 6, A. III. 1.; Pascal Hachem, in *Beck'scher Online Großkommentar BGB* (Ed. 01.08.2020, Munich), Art. 42 para. 28.

⁴⁴ Kröll, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 42 para. 51; Florian Mohs, *Die Vertragswidrigkeit im Rahmen des Art. 82 Abs. 2 lit. c CISG*, in *Internationales Handelsrecht* 2002, 59, 63.

⁴⁵ Mohs, *Die Vertragswidrigkeit im Rahmen des Art. 82 Abs. 2 lit. c CISG* (n. 44), 63; see also Hachem, in *Beck'scher Online Großkommentar BGB* (n. 43), Art. 42 para. 28.

⁴⁶ Mohs, *Die Vertragswidrigkeit im Rahmen des Art. 82 Abs. 2 lit. c CISG* (n. 44), n. 34, citing Yingxia Su, *Die Rechtsmängelhaftung des Verkäufers nach UN-Kaufrecht und im chinesischen Recht*, *Praxis des Internationalen Privat- und Verfahrensrechts*, 1997, 284, 287.

⁴⁷ Mohs, *Die Vertragswidrigkeit im Rahmen des Art. 82 Abs. 2 lit. c CISG* (n. 44), n. 35, citing Peter Schlechtriem, *Conformity of the Goods, Seller's Obligations under the United Nations Convention on Contracts for the International Sale of Goods*, in Nina Galston/Hans Smit (ed.), *International Sales*, 1984, § 6.03, 6–31.

⁴⁸ E.g., Bundesgerichtshof (German Supreme Court), 11 January 2006, VIII ZR 268/04, CISG-online 1200.

‘repaired’ by fulfillment or termination of the third party right or claim through the seller,⁴⁹ it is appropriate to apply Article 46(3) CISG.

3.8 Article 42 CISG requires delivery of goods free from any right or claim of a third party based on industrial property or other intellectual property rights. Article 46(2) CISG may apply if the goods are only protected by intellectual property rights in one state of use. Where the buyer intends to use the goods in several states and actually uses them, it has no interest in substituting all goods.⁵⁰ Similarly, if delivered goods may be used in different, non-infringing ways,⁵¹ this may guide the application of Article 46(2) CISG. Under Article 46(3) CISG it may be possible that the third party is willing to grant the missing license.⁵² If, however, the costs for the license are prohibitively high these costs may render the repair unreasonable when, for example, conforming goods can be delivered in a non-infringing way.⁵³

3.9 Therefore, under a practical interpretation and understanding, both the buyer’s rights and seller’s protection under Articles 46(2) and (3) CISG should apply in scenarios of Articles 41 and 42 CISG.⁵⁴ Buyers confronted with goods not free from third party rights are treated equally to buyers faced with non-conforming goods. Articles 46(2) and (3) CISG apply either directly or by analogy to third party rights or claims and third party industrial or intellectual property rights or claims.⁵⁵

cc) Defects in quantity

3.10 According to Article 35(1) CISG, the seller must deliver goods which are of the quantity, quality, and description required by the contract. Although defects in quantity and quality are both referred to as non-conformity,⁵⁶ one may distinguish between non-conformity and partial non-delivery.⁵⁷ This mutual reference may cause difficulties in applying either Article 46(1) or (2) CISG.

⁴⁹ E.g., in Obergericht (Court of Appeal) des Kantons Aargau, 3 March 2009, ZOR.2008.16/eb, CISG-online 2013, a Swiss claimant ordered a prefabricated house from an Austrian respondent, who relied on sub-contractors. Since the respondent failed to pay the sub-contractors, the prefabricated house was not free from third party rights, here security rights. The claimant requested damages, Art. 74 CISG, but could have equally requested repair in form of payment to the sub-contractors.

⁵⁰ Cf., Tebel, *Liability for Infringing Goods* (n. 42), Part 6, A. III. 1.; Hachem, in *Beck’scher Online Großkommentar BGB* (n. 43), Art. 42 para. 28.

⁵¹ Tebel, *Liability for Infringing Goods* (n. 42), Part 6, A. III. 1., providing the example of using textiles with a protected check pattern purchased with the intent to manufacture clothing to manufacture curtains which are also part of the buyer’s usual portfolio of goods.

⁵² Cf., for example, Oberster Gerichtshof (Austrian Supreme Court), 12 September 2006, 10 Ob 122/05x, CISG-online 1364 para. 32.

⁵³ Tebel, *Liability for Infringing Goods* (n. 42), Part 6, A. III. 1.

⁵⁴ Another approach is to generally dismiss the differentiation in terminology between Arts. 35, 41, and 42 CISG in regard to remedies, Rolf Herber/Beate Czerwenka, *Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf*, (München 1991), Art. 45 para. 2., see also Art. 41, para. 10. For the opposing view see Tebel, in Brunner/Gottlieb, (n. 31), Art. 41 para. 26 and Art. 42 para. 26.

⁵⁵ For the analogy, see Tebel, *Liability for Infringing Goods*, (n. 42), Part 6, A. II.

⁵⁶ Schwenzler, in *Schlechtriem & Schwenzler* (n. 4), Art. 35 paras. 4, 8.

⁵⁷ E.g., Kröll, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 35 para. 23 with further references; Salger, in Witz/Salger/Lorenz (n. 31), Art. 35 para. 6.

3.11 As far as the defect in quantity is a partial non-delivery, for example instead of 100 timber planks only 90 planks are delivered, Article 46(2) CISG does not apply; rather Article 51 CISG applies.⁵⁸ Consequently, under Article 51(1) CISG, the buyer can exercise its remedies only for the missing part. In such a case “*delivery of substitute goods*” is not conceivable. Rather, the buyer may rely on the unrestricted right of specific performance under Article 46(1) CISG to request delivery.⁵⁹

3.12 If the delivered goods do not conform with the contract as regards their size or weight, e.g., the weight of a square meter of the goods is less than agreed upon, or timber planks are shorter than required under the contract, this amounts to a defect in quality or simply a non-conformity. Article 46(2) CISG applies if the prerequisites are met.

3.13 Finally, another scenario is where all goods are delivered but parts of them are non-conforming for other reasons than size or weight.⁶⁰ The CISG refers to these scenarios as partial non-conformity. In order for cure being possible, the goods must be divisible.⁶¹

dd) Defects in packaging

3.14 Generally, a defect in packaging in itself will not give rise to a right to request delivery of substitute goods. However, the following scenarios have to be distinguished: If the packaging is part of the goods themselves, for example, the original packaging of branded goods, any deficiency constitutes a defect in quality. It is a matter of quality since the physical condition of the goods is not as agreed upon.⁶² If the packaging simply serves to protect the goods during the transport from the seller to the buyer, the applicability of Articles 46(2) and (3) CISG depends on whether the goods have been affected by the defect in packaging.⁶³ If the answer is no, there are no remedies whatsoever.⁶⁴ If, however, the goods have been damaged or destroyed

⁵⁸ Honnold/Flechtner (n. 8), Art. 46 para. 283; Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 46 para. 8; Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 51 para. 2. See on avoidance and Art. 51(1) CISG 서울고등법원 (Court of Appeal Seoul), 17 January 2013, 2012Na27850, CISG-online 2832.

⁵⁹ Peter Huber, in Peter Huber/Alastir Mullis, *The CISG* (2nd ed., Berlin 2014), 198 et seq. The buyer may also rely on Art. 51(2) CISG in case the partial non-delivery constitutes a fundamental breach, see for example China International Economic & Trade Arbitration Commission, 18 September 2006, CISG/2006/24, CISG-online 2053.

⁶⁰ E.g., within a delivery of 40.000 books 35% of the books had no cover, Cour d’appel (Court of Appeal) d’Orléans, 28 February 2008, 07/01189, CISG-online 5028.

⁶¹ Bundesgericht (Swiss Supreme Court), 16 July 2012, 4A_753/2011, CISG-online 2371.

⁶² See seller’s argumentation in Cour de cassation (French Supreme Court), 23 January 1996, 93-16.542, CISG-online 159. In general, Schwenzler, in *Schlechtriem & Schwenzler* (n. 4), Art. 35 para. 9, for the definition of “*quality*”.

⁶³ Schwenzler, in *Schlechtriem & Schwenzler* (n. 4), Art. 35 para. 33; see for example 湖北省武汉经济技术开发区人民法院 (Wuhan Economic and Technology Development Zone People’s Court), 30 June 2000, CISG-online 2028.

⁶⁴ Kröll, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 35 para. 35. The seller did not breach its obligations under Art. 35 CISG, cf. *idem.*, para. 144.

due to the defect in packaging, this again amounts to a defect in quality which may entail the right to request delivery of substitute goods.⁶⁵

dd) Timely request

3.15 Under Articles 46(2) and (3) sentence 2 CISG, the buyer must request delivery of substitute goods or repair in conjunction with giving notice of non-conformity under Article 39 CISG or within a reasonable time thereafter. If the seller knows about the non-conformity or could not have been unaware and, therefore, may not rely on the buyer not having given notice (Article 40 CISG), the period of a reasonable time under Articles 46(2) and (3) sentence 2 CISG commences when notice of non-conformity should have been given.⁶⁶

3.16 In determining the length of such a reasonable time, the interests of both the seller and the buyer must be taken into account and balanced. On the one hand, the buyer must be given enough time to decide which remedy to pursue and to act accordingly.⁶⁷ On the other hand, the seller's interest in legal certainty must be taken into account.⁶⁸ The time limit for requiring delivery of substitute goods and repair must be coordinated with the one laid down in Article 49(2)(b) CISG for a declaration of avoidance.⁶⁹ Just like in determining the reasonable time under Article 39 CISG, much will depend on the circumstances of the individual case,⁷⁰ such as the nature of the goods, the market in question, etc.

3.17 If the buyer fails to comply with the time limit for requiring delivery of substitute goods or repair, it is restricted to the otherwise available remedies, i.e., a claim for damages, price reduction, and avoidance for fundamental breach.⁷¹

3.18 In the end, in case of non-conformity of the goods, the following usual sequence of periods results:⁷² after delivery, the buyer must examine the goods (Article 38 CISG), followed by a reasonable time to give notice (Article 39 CISG), whereupon the buyer may require delivery of

⁶⁵ Kröll, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 35 para. 144.

⁶⁶ Pascal Hachem, *Verjährungs- und Verwirkungsfragen bei CISG-Verträgen*, Internationales Handelsrecht 2017, 1, 3 et seq.

⁶⁷ In this regard, the parties may need some time to negotiate the possibilities. See for example Cour d'appel (Court of Appeal) Colmar, 24 October 2000, 200002525, CISG-online 578.

⁶⁸ Cf., Schlechtriem, *Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-conformity of the Goods* (n. 3), 93, on the purpose of time limits in Arts. 46(2), (3) and Art. 49(2)(b) CISG.

⁶⁹ This applies to both Arts. 46(2) and (3) sentence 2 CISG since the wording of both provisions is identical and both serve the purpose of legal certainty. See also Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 46 paras. 36, 50; Müller-Chen, in *Slechtriem & Schwenzler* (n. 4), Art. 46 paras. 33, 43; Salger, in *Witz/Salger/Lorenz* (n. 31), Art. 46 para. 7.

⁷⁰ Hachem, *Verjährungs- und Verwirkungsfragen bei CISG-Verträgen* (n. 66), 4. See in general, CISG-AC Opinion No. 2, *Examination of the Goods and Notice of Non-Conformity Articles 38 and 39*, 7 June 2004, London (England). Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York, in Schwenzler (ed.) *The CISG Advisory Council Opinions* (Den Haag 2017), 39, also available at <http://www.cisgac.com/cisgac-opinion-no2/>.

⁷¹ The buyer loses the right to claim substitute delivery or repair. See, in general, Handelsgericht (Commercial Court) Zürich, 17 September 2014, HG130167-O/U, CISG-online 2656.

⁷² One has to bear in mind that this is merely a possible sequence with many variations in line with Art. 49(2)(b)(i), (iii) CISG.

substitute goods or repair within a reasonable time (Articles 46(2) and (3) sentence 2 CISG; if the buyer did not already do so in its notice under Article 39 CISG), followed again by a reasonable time granted to the seller for cure (Article 47(1) CISG), and only thereafter, the time for declaring avoidance begins to run (Article 49(2)(b)(ii) CISG).⁷³ However, the buyer is not obliged to fix any period under Article 47 CISG. It may, instead, immediately have recourse to other remedies available (Rule No. 13). In practice, the seller is well advised to react immediately to the buyer's notice under Article 39 CISG and, if it is willing to cure, offer cure per Articles 48(2) and (3) CISG.

b) Delivery of substitute goods (Article 46(2) CISG)

aa) Fundamental breach

3. Under Article 46(2) CISG, a fundamental breach of contract can only be found if the non-conforming goods cannot be used as intended and if it is reasonable for the buyer to refuse repair.

3.19 The right to deliver substitute goods under Article 46(2) CISG requires a fundamental breach. This prerequisite is in line with the purpose of the CISG to avoid unnecessary costly returns of goods, also underlying the restriction of the buyer's right to avoid the contract.⁷⁴

3.20 Generally, a breach is fundamental under Article 25 CISG if it results in such detriment as substantially to deprive the buyer of what it is entitled to expect under the contract. Primarily, the parties may agree on what they expect to be of the essence of the contract.⁷⁵ Whether or not a contractual agreement is of the essence is a matter of interpretation under Article 8 CISG.⁷⁶ If the interpretation of the contract does not clarify what amounts to a fundamental breach, the purpose of the sale becomes relevant. Usually, a buyer who wants to use the goods itself is not

⁷³ Hachem, *Verjährungs- und Verwirkungsfragen bei CISG-Verträgen* (n. 66), 6. See for example *Sąd Apelacyjny w Białymstoku* (Court of Appeal Białystok), 18 March 2016, I ACa 177/15, CISG-online 4419. It is, however, possible to make an anticipatory declaration of avoidance together with the request to repair, see for example *Kantonsgericht* (Court of First Instance) Schaffhausen, 24 January 2004, 11/1999/99, CISG-online 960. Generally, the declaration of avoidance can be combined with a notice of lack of conformity or with an additional period for performance, Christiana Fountoulakis, in *Schlechtriem & Schwenzler* (n. 4), Art. 26 para. 8, with further case references.

⁷⁴ Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 46 para. 33; UNCITRAL, *Digest* (n. 9), Art. 46 para. 3, "avoidance of the contract should be available only as a last resort". Although this reasoning might not be compelling in the case of an EXW contract, i.e., where there has been no transport of the goods, a fundamental breach is also required in these cases, CISG-AC Opinion No. 5 (n. 2), para. 4.6.

⁷⁵ E.g., the concrete age of an antique marble sculpture, *Handelsgericht* (Commercial Court) Zürich, 18 June 2012, HG060451, CISG-online 2660; a minimum shelf life of fresh pasta, *Oberlandesgericht* (Court of Appeal) Stuttgart, 27 November 2019, 3 U 239/18, CISG-online 5410, where the delay in delivery of only 3 days, thus, resulted in a fundamental breach.

⁷⁶ According to Schroeter, it is common in contracting practice to explicitly define certain obligations as 'fundamental' or 'essential', see Ulrich Schroeter, in *Schlechtriem & Schwenzler* (n. 4), Art. 25 para. 21 n. 91. Often the parties allocate specific central features to the goods, as apple juice concentrate to be unsweetened, rolls of aluminum to be of a certain thickness, and soy protein to not be genetically modified, see CISG-AC Opinion No. 5 (n. 2), para. 4.2 with further reference. See also, *Urica, Inc. v. Pharmaplast S.A.E.*, U.S. District Court for the Central District of California, 8 August 2014, CISG-online 2952, paras. 85-87.

interested in reselling. Hence, in the usual case, it cannot be decisive whether the non-confirming goods could be resold.⁷⁷ Instead, the decisive factor is whether the goods are improper for the use intended by the buyer.⁷⁸ However, a buyer who is in the resale business is interested in reselling the goods. Thus, resaleability becomes relevant.⁷⁹ To what extent resaleability or non-resaleability causes a fundamental breach is a case-by-case decision and due regard should be given to balancing the possibilities and interests of the buyer and seller.⁸⁰

3.21 In cases where the seller, the buyer, or a third person can remedy the non-conforming goods by repair, there is usually not yet a fundamental breach.⁸¹ The buyer is restricted to require repair under Article 46(3) CISG or claiming damages and a reduction of the purchase price. However, in exceptional circumstances, the mere possibility of repair does not hinder the fundamentality of the breach. In such exceptional circumstances, the breach becomes fundamental if it is reasonable for the buyer to refuse repair. An example of a reasonable refusal of repair is where timely delivery of conforming goods is of the essence of the contract. The practical importance of this example is questionable concerning Article 46(2) CISG: If time is of the essence the buyer will usually not request delivery of substitute goods but revert to another remedy.⁸²

3.22 In general, if the goods are usable by the buyer, there is no fundamental breach.⁸³ The buyer is restricted to the remedies of repair (Article 46(3) CISG),⁸⁴ claim for damages (Article 74 CISG), or reduction of the purchase price (Article 50 CISG).⁸⁵ Even if repair is not possible but the goods are still usable, there is not necessarily a fundamental breach.⁸⁶

bb) No differentiation between generic and identified goods

3.23 The application of Article 46(2) CISG in case of identified goods is disputed. The traditional view in Germanic legal systems is that delivery of substitute goods may only be

⁷⁷ CISG-AC Opinion No. 5 (n. 2), para. 4.3.

⁷⁸ It may, however, be important whether the buyer can use the goods differently without unreasonable expenditures, see CISG-AC Opinion No. 5 (n. 2), para. 4.3 n. 34; UNCITRAL, *Digest* (n. 9), Art. 25 para. 8.

⁷⁹ For example, Kantonsgericht (Court of First Instance) Schaffhausen, 27 January 2004, 11/1999/99, CISG-online 960.

⁸⁰ If the goods are not resaleable at all, the breach is generally fundamental. If the defect does not hinder the resaleability, the decisive question is whether “*resale can reasonably be expected from the individual buyer in [its] normal course of business*”. CISG-AC Opinion No. 5 (n. 2), para. 4.3.

⁸¹ CISG-AC Opinion No. 5 (n. 2), para. 4.4 n. 41; Schroeter, in *Schlechtriem & Schwenzler* (n. 4), Art. 25 para. 50. In light of Art. 48 CISG the Oberlandesgericht (Court of Appeal) Koblenz decided that the seller’s willingness to cure the defect is also decisive when determining whether a breach is fundamental or not, Oberlandesgericht (Court of Appeal) Koblenz, 31 January 1997, 2 U 31/96, CISG-online 256. See also UNCITRAL, *Digest* (n. 9), Art. 46 para. 14.

⁸² See below comments on Rule No. 11 on the importance of time being of the essence for a fundamental breach.

⁸³ UNCITRAL, *Digest* (n. 9), Art. 46 para. 13. The line should be drawn where the use would be an unreasonable burden, see Schroeter, in *Schlechtriem & Schwenzler* (n. 4), Art. 25 para. 54.

⁸⁴ See for example, Landgericht (District Court) Stade, 16 April 2015, 5 O 122/14, CISG-online 2668.

⁸⁵ For example, Federal Arbitration Court of North Caucasus Area, Krasnodor, 3 October 2011, A63-4588/2010, CISG-online 2518, where the court did not discuss the fundamentality of the breach but relied on the seller’s failure to start repair within a reasonable period of time when granting Art. 50 CISG.

⁸⁶ Bundesgerichtshof (German Supreme Court), 3 April 1996, VIII ZR 51/95, CISG-online 135; Kantonsgericht (Court of First Instance) Zug, 30 August 2007, A3 2006 79, CISG-online 1722.

considered in cases of defects in quality⁸⁷ and where goods of a different kind have been delivered,⁸⁸ therefore, almost exclusively in case of generic goods. If the contract relates to an identified object, delivery of a substitute object usually should not be expected from the seller.⁸⁹ The argument is that in the case of identified objects the remedy in Article 46(2) CISG cannot be used to expand the seller's obligations which are limited to the identified objects.⁹⁰ However, it is more convincing not to differentiate categorically between generic and identified goods. Rather, the substitutability of the goods and the parties' interests in substitution should guide the application of Article 46(2) CISG.⁹¹ First, the distinction between generic and identified goods is unknown to the CISG; the wording of Article 46(2) CISG does not differentiate between generic and identified goods either. However, Article 42 ULIS explicitly differentiated between generic and identified goods.⁹² With this background, the omission in Article 46(2) CISG must have been intentional. Second, and on the one hand, the differentiation between generic and identified goods may cause difficulties, e.g., where the identified category of goods is not produced anymore.⁹³ On the other hand, the differentiation between substitute delivery and repair may be difficult, e.g., repairing the significant parts of a good by delivering substitutions of these parts.⁹⁴ Categorically favoring repair over substitute delivery here is, thus, not useful. Finally, the differentiation between generic and identified goods and the exclusion of substitute delivery in the case of identified goods is a traditional German civil law approach.⁹⁵ However, even the German Supreme Court does not categorically apply this approach but differentiates in practice and pays much attention to the parties' interests.⁹⁶

3.24 Therefore, a more practical approach is to rely on an interpretation of the contract and to determine the substitutability of the goods. The evaluation of whether Article 46(2) CISG is useful and appropriate should be guided by the parties' intentions and interests.⁹⁷ Such an approach is in line with the drafting history of the CISG: Not only the nature of the goods but

⁸⁷ Peter Schlechtriem/Ulrich Schroeter, *Internationales UN-Kaufrecht* (6th ed., Tübingen 2016), para. 455.

⁸⁸ Anton K. Schnyder/ Ralf M. Straub, in Heinrich Honsell (ed.), *Kommentar zum UN-Kaufrecht* (2nd ed., Wien 2010), Art. 46 para. 18.

⁸⁹ In exceptional circumstances Art. 46(2) CISG may apply to identified objects. This is, for example, the case for an *aliud* delivery, i.e., the wrong object was delivered, Magnus, in *Staudinger BGB* (n. 32), Art. 46 para. 34, and where the parties concluded a new contract, Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 46 para. 37.

⁹⁰ Felix Hartmann, *Beck'scher Online Großkommentar BGB* (n. 43) Art. 46 para. 31.1.

⁹¹ In this direction already Claus-Wilhelm Canaris, *Die Nacherfüllung durch Lieferung einer mangelfreien Sache beim Stückkauf*, *JuristenZeitung*, 2003, 831, 834.

⁹² Already the 1976 Draft Convention abolished this reference in its wording of Art. 27(2), now Art. 46(2) CISG.

⁹³ This is the case in some of the cases against Volkswagen, where the seller argues that the identified category of cars is not produced anymore and thus it is impossible to substitute the goods. In Bundesgerichtshof (German Supreme Court), indicative order 8 January 2019, VIII ZR 225/17, the Court dismissed this argument.

⁹⁴ Georg Bitter, *Der Nachlieferungsanspruch beim Stück-, Vorrats- und Gattungskauf in Sachmängelfällen sowie beim Untergang der Sache*, *Zeitschrift für Wirtschaftsrecht* 2007, 1881, 1885, on German law.

⁹⁵ Scholars argue that it would be impossible under Sect. 275(1) German BGB to deliver a substitute good in case of identified goods since the seller is only obliged to deliver the identified object, see e.g., Thomas Ackermann, *Die Nacherfüllungspflicht des Stückverkäufers*, *JuristenZeitung* 2002, 378.

⁹⁶ Bundesgerichtshof (German Supreme Court), indicative order 8 January 2019, VIII ZR 225/17.

⁹⁷ Similar to Bundesgerichtshof (German Supreme Court), indicative order 8 January 2019, VIII ZR 225/17, courts applying Art. 46(2) CISG should interpret the parties' intents to clarify whether Art. 46(2) CISG is the appropriate remedy. See also in detail Yeşim Atamer, *Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?*, *Uniform Law Review* 2020, 20 et seq.

especially their substitutability guided the drafters to differentiate between repair and the delivery of substitute goods.⁹⁸

cc) Exclusion of Article 46(2) CISG

3.25 The buyer's right to request delivery of substitute goods is in the ordinary case excluded when the buyer is unable to make restitution of the goods first received (Rule No. 4) and if delivery of substitute goods is disproportionate, regarding all the circumstances (Rule No. 5).

4. A buyer requiring delivery of substitute goods is subject to Article 82 CISG.

3.26 Although the heading of Section V, including Article 82 CISG, is "*Effects of avoidance*", this provision applies also to the delivery of substitute goods. The clear wording of Article 82 CISG requires its application and establishes an exclusion of Article 46(2) CISG in some cases. According to Article 82(1) CISG "[t]he buyer loses the right to [...] require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".⁹⁹ Article 82 CISG is based on the idea that restitution is the "*natural consequence*"¹⁰⁰ of the delivery of substitute goods. The wording does not require restitution of the goods in the exact same condition.¹⁰¹ Only if the change in the condition of the goods is of such importance that it would no longer be proper to require the seller to retake the goods as the equivalent of what it had delivered to the buyer, the buyer fails to fulfill its obligation.¹⁰² When goods perish in between the buyer's request for substitution and the delivery of substitute goods, the buyer's claim for substitute goods is not excluded but the buyer may be liable in damages.¹⁰³

5. The buyer's right to require delivery of substitute goods is excluded if it is disproportionate having regard to all the circumstances.

3.27 Whereas Article 46(3) CISG refers to reasonableness for balancing both parties' interests, there is no such requirement in Article 46(2) CISG. The drafting history of Article 46(2) CISG does not address disproportionality. The drafters discussed whether to lower the threshold for substitute delivery by replacing fundamentality with mere reasonableness of substitution.¹⁰⁴

⁹⁸ *Official Records* (n. 10), 337 paras. 52 et seq.

⁹⁹ But see the exceptions in Art. 82(2) CISG.

¹⁰⁰ *Secretariats Commentary* (n. 11), Art. 67 para. 2.

¹⁰¹ Especially, the mere usage by the buyer does not fulfill Art. 82(1) CISG, e.g., Sąd Najwyższy (Supreme Court of Poland), 13 September 2017, IV CSK 662/16, CISG-online 4269. However, if the goods are processed, Art. 82(1) CISG, e.g., Tribunale di (District Court) Modena, 19 February 2014, 2340/2006, CISG-online 2751, if not Art. 82(2)(c) CISG applies.

¹⁰² *Secretariats Commentary* (n. 11), Art. 67 para. 3.

¹⁰³ But also here, the expectations of Art. 82(2) CISG applies. See in general on the allocation of risk the period between avoidance and redelivery CISG-AC Opinion No. 9, *Consequences of Avoidance of the Contract*, 15 November 2008, Tokyo (Japan). Rapporteur: Professor Michael Bridge, London School of Economics, London, U.K., in Schwenzler (ed.) *The CISG Advisory Council Opinions* (Den Haag 2017), 101, 110-111 para. 3.18, also available at <http://www.cisgac.com/cisgac-opinion-no9/>.

¹⁰⁴ A joint proposal by Finland, the Federal Republic of Germany, Norway, and Sweden provided that: "*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 not reasonably practicable for the seller. A request for repair must be made either in conjunction with notice given under article 37 or within a reasonable time thereafter.*" *Official Records* (n. 10),

However, they did not discuss whether, in addition to the prerequisite of a fundamental breach, general disproportionality may hinder the claim under Article 46(2) CISG. Such an approach appears useful and in line with the Convention's primary purpose in Article 46(2) CISG to save the seller's transportation costs where they outweigh the buyer's interest in receiving conforming goods.¹⁰⁵ More generally, this purpose requires defining both parties' interests and weighing them against each other.¹⁰⁶

3.28 Cases where the delivery of substitute goods is unreasonable may include a substitute not being available, being only available at very high costs, or constituting an upgrade.¹⁰⁷ Rule No. 5 satisfies this general requirement regarding substitute delivery. The approach of balancing both parties' interests is similar to that in Article 46(3) and 48 CISG, both requiring the remedy to be reasonable under the circumstances of the case.¹⁰⁸ Also, the question may arise whether a clause introducing a cap on damages to a sales contract applies to substitute delivery, hence, potentially barring Article 46(2) CISG if the costs for substitution exceed the cap.¹⁰⁹

3.29 When examining proportionality in Article 46(2) CISG the decisive criteria may be the seller's position and ability to substitute the goods,¹¹⁰ the costs of substitution, the nature of the goods and their general substitutability,¹¹¹ and the parties' interests in the remedy.¹¹² The examination needs to be objective. Regarding the costs of substitution, a cap on damages may in some cases guide the examination. If the parties' contract provides for a cap on damages, the parties may have arguably intended to limit costs for remedies, including substitute delivery, to that amount. For example, if the delivery of substitute goods would require the seller to produce goods in the amount of 28 million, but the contract limits damages to 20 million, it is questionable whether this cap renders the delivery of substitute goods disproportional.¹¹³ The

112 B No. 3(viii). The proposal was dismissed with the arguments that substitute delivery generates economic consequences similar to avoidance, i.e., costs for transportation of restitution, and should thus be treated similarly. Repair, however, is different in this regard, *Official Records* (n. 10), 337.

¹⁰⁵ Cf., *Secretariat's Commentary* (n. 11), Art. 42 para. 12.

¹⁰⁶ Relying on a general principle that "*the law should not encourage economically irrational behaviour*", Atamer comes to a similar conclusion, Atamer, *Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?* (n. 97), 9.

¹⁰⁷ Alternatively, other scholars suggest an interpretation of Art. 46(2) CISG in parallel to Art. 79 CISG arguing that this provision gives the buyer the right to insist on performance as long as a commercially viable substitute exists and this substitute does not differ substantially from the original obligation, Atamer, *Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?* (n. 97), 22.

¹⁰⁸ One may wish to apply Art. 46(3) CISG by analogy, bearing in mind that the drafting history of Art. 46(2) CISG reveals an unconscious gap. The argument raised in the drafting history that substitute delivery and repair differ in their approach to costs of transportation are not material in this regard. However, a broad interpretation of the purpose of Art. 46(2) CISG leads to the same conclusion.

¹⁰⁹ The Problem of the 27th / 17th Willem C. Vis (East) International Commercial Arbitration Moot addressed this issue.

¹¹⁰ There will usually be no lenience if the seller manufactures the goods.

¹¹¹ Cf., above at paras. 3.20 et seq.

¹¹² The seller may, however, not be heard with the mere argument that it must deliver new products in order to fulfill its obligation under Art. 46(2) CISG.

¹¹³ Again, see, e.g., the Problem of the 27th / 17th Willem C. Vis (East) International Commercial Arbitration Moot.

outcome will depend on the wording of the contract and the parties' intention for agreeing on the cap. It, therefore, remains a question of contract interpretation.

c) Repair (Article 46(3) CISG)

- 6. The buyer may require the seller to remedy the non-conformity by repair unless this is unreasonable. In determining whether repair by the seller is unreasonable regard is to be had to:**
- a. whether the buyer is better placed to arrange for repair of the goods;**
 - b. whether the seller offers to advance the costs for repair by the buyer or a third party;**
 - c. whether repair imposes costs on the seller that are disproportional to the actual or prospective loss of or benefit to the buyer.**

3.30 Under Article 46(3) CISG the buyer may require the seller to remedy the lack of conformity by repair. This right to repair exists “*unless this is unreasonable having regard to all circumstances*”.¹¹⁴ In determining whether repair by the seller is unreasonable, the rules in litera a-c are intended to assist in balancing both parties' interests.¹¹⁵

3.31 According to Rule 6 litera a, repair may be unreasonable if the buyer is better placed to arrange for repair. The buyer may be better placed if the non-conformity can be easily removed by the buyer itself or a third party and, for example, if the seller is unable to repair the goods because it is not the manufacturer but only a retailer of the goods,¹¹⁶ or repair is technically too complex for the seller,¹¹⁷ the seller does not maintain repair services itself, or does not have access to third parties being able to repair the goods.¹¹⁸ Also, if repair by the buyer itself or a third party is less expensive than repair by the seller,¹¹⁹ the buyer may be better placed to repair the goods.

¹¹⁴ Art. 46(3) CISG. For an overview of the decisive factors for reasonableness, cf., Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 46 para. 40.

¹¹⁵ Cf., Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 46 para. 40, for the requirement to balance the buyer's interests against those of the seller.

¹¹⁶ Salger, in *Witz/Salger/Lorenz* (n. 31), Art. 46 para. 8; See also Michael Will, in Cesare M. Bianca/Michael J. Bonell, (eds.), *Commentary on the International Sales Law* (Milan 1987), Art. 46 para. 2.2.2.2; Magnus, in *Staudinger BGB* (n. 32), Art. 46 para. 62.

¹¹⁷ Cf., Schelchtriem/Schroeter (n. 87), para. 461, on technical difficulties.

¹¹⁸ See for example, the seller's allegations in China International Economic & Trade Arbitration Commission, 21 October 2002, CISG/2002/16, CISG-online 1557, although the seller could not succeed with its submission. Cf., additionally Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 46 para. 48. In general, the *travaux préparatoires* refer to the nature of the goods guiding the question of reasonability, *Official Records* (n. 10), 335 para. 20.

¹¹⁹ However, the mere fact that repair by the seller is costly does not render repair unreasonable, see Kantonsgericht (Court of First Instance) Schaffhausen, 27 January 2004, 11/1999/99, CISG-online 960. The correlation of the costs of repair with the purchase price is disputed, see Müller-Chen, in *Schlechtriem &*

3.32 Under Rule 6 litera b, the seller's offer to advance the costs for repair by the buyer or a third person may render repair by the seller unreasonable. This consideration is closely connected to Rule 6 litera a since the buyer will often be better placed to arrange for repair if it has all necessary monetary resources to repair.

3.33 Rule 6 litera c weighs the costs of repair imposed on the seller with the actual or prospective loss of or benefit to the buyer.¹²⁰ In determining the buyer's loss, the general principles of calculation of damages have to be considered.¹²¹ The famous English *Ruxley* case¹²² may serve as an example. The debtor was meant to build a seven-foot six-inch deep pool, but it was built to only six feet. The pool was safe for diving and the obligee never intended to put in a diving board. Hence, curing the defect would not have been reasonable.¹²³ There, the claim for damages for the costs of curing the defect was rejected; instead, a claim for damages for loss of "amenity" was granted. The same considerations may be introduced under the CISG's general principle of mitigation of damages, as it is laid down in Article 77 CISG. As a consequence, Article 77 CISG should be applied by analogy when defining reasonableness in the sense of Article 46(3) CISG.¹²⁴ If the buyer were to engage a third party in repairing the goods and were to reclaim the costs incurred as damages, one would have to ask whether the buyer had properly mitigated its loss.¹²⁵ To illustrate this issue, regard must be given to possible alternatives the buyer is faced with within the scenario of Article 46(3) CISG. If a cover purchase is less expensive than repairing the non-conforming goods, the seller may refuse repair. In any case the buyer would not be entitled to claim the full cost of repairing the goods. Instead, the buyer would only be entitled to compensation for the costs of the cover purchase. If the goods are usable as initially intended, but still may fail at some point in the future,¹²⁶ the

Schwenzler (n. 4), Art. 46 para. 40 n. 109 for both views. Also, the *travaux préparatoires* provide that the seller could not refuse repair simply with the argument that it is costly, *Official Records* (n. 10), 335 para. 19.

¹²⁰ Cf., Schlechtriem/Schroeter (n. 87), para. 461, generally on unreasonability due to costs and Hartmann, *Beck'scher Online Großkommentar BGB* (n. 43), Art. 46 para. 63, for an overview of different views on how to balance the seller's costs and the buyer's (potential) loss.

¹²¹ For the general principles on calculating damages under the CISG see CISG-AC Opinion No. 6, *Calculation of Damages under CISG Article 74*, 2006, Stockholm (Sweden), Rapporteur: Professor John Y. Gotanda, President of Hawai'i Pacific University, Hawai'i, USA, in Schwenzler (ed.), *The CISG Advisory Council Opinions* (Den Haag 2017), 125 et seq., also available at <http://www.cisgac.com/cisgac-opinion-no6/>.

¹²² *Ruxley Electronics and Construction Limited (Appellants) v Forsyth (Respondent)*, 29 June 1995, [1995] 3 All ER 268, [1996] AC 344, [1995] 3 WLR 118, [1995] CLC 905, [1995] UKHL 8.

¹²³ Curing the defect would have meant to build a new pool. Here again, one could argue that the reparation of the pool by the buyer and the following claim for damages is unreasonable under Art. 77 CISG. See in this regard Ingeborg Schwenzler/Pascal Hachem, *The Scope of the CISG Provisions on Damages*, in Djokhongir Saidov/Ralph Cunnington (eds.), *Contract Damages: Domestic and International Perspectives* (London 2008), 91, 96.

¹²⁴ Whether Art. 77 CISG can be applied to the remedy of specific performance in general or whether it should be limited to reduce a claim for damages need not to be discussed here. In general, for the application of Art. 77 CISG to other remedies than damages see Schwenzler, in *Slechtriem & Schwenzler* (n. 4), Art. 77 paras. 4–5.

¹²⁵ The same applies to where the buyer repaired the goods itself and claims damages for compensating the costs of repair. Cf., Bundesgerichtshof (German Supreme Court), 24 September 2014, VIII ZR 394/12, CISG-online 2545 (not granting the claim for damages); OLG Graz, 22 November 2012, CISG-online 2459; Ad hoc Arbitration, 10 November 2010, CISG-online 2154; Michael Bridge, *Curing a Seller's Defective Tender or Delivery of Goods in Commercial Sales*, in Andrea Büchler/Markus Müller-Chen (eds.), *Festschrift für Ingeborg Schwenzler* (Bern 2011), 221, 232; Honnold/Flechtner (n. 8), para. 296.1.

¹²⁶ For example, where the seller is obliged to produce and deliver 1.000 fire detectors to be sold to private consumers, 50 detectors failed to work, and it is uncertain whether more detectors will fail to work.

principle of mitigation may require the buyer to postpone any action until the actual failure of the goods occurs.¹²⁷ Whether the buyer has to postpone any action or not will depend on the probability of the failure to occur as well as on the consequences of a failure of the goods. Will a failure cause personal injury to consumers, property damages, purely economic loss, no loss or other negative consequences at all? At least in the latter case it does not seem reasonable to require the seller to repair the goods before they fail.

3.34 In the end, reasonableness remains an issue to be decided on a case-by-case basis.¹²⁸ Only if repair is impossible, it is clearly unreasonable.¹²⁹

d) Consequences

3.35 As a consequence of the buyer's right to request either substitute delivery or repair, additional questions of costs, retrofitting, detailed issues of restitution – including benefits and betterment –, the application of Articles 38, 39, and 43 CISG, the place of substitute delivery and repair, and the right to withhold performance arise.

aa) Costs of substitute delivery and repair

3.36 In general, costs of repair and substitute delivery are borne by the seller.¹³⁰ These costs are, *inter alia*, costs for material and personnel,¹³¹ costs for arranging repair or substitute delivery,¹³² or freight costs.¹³³ Although the wording of Articles 46(2) and (3) CISG does not include these costs, both case law and scholars agree on that these costs should be borne, in principle, by the seller. Case law and scholars differ, however, in their reasoning. Some refer to the wording and purpose of Article 48(1) CISG,¹³⁴ others to the availability of a claim for

¹²⁷ However, this is subject to the possible threat that the buyer's claim is time barred by the applicable statute of limitations.

¹²⁸ Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 46 para. 46.

¹²⁹ Cf., Landgericht (District Court) Landsberg am Lech, 21 June 2006, 1 C 1025/06, CISG-online 1460. The buyer, i.e., the claimant, proved that repair was impossible. However, since the seller previously failed twice to repair the court ruled that these failures suffice to render any further repair unreasonable. Hence, it did not rule on the alleged impossibility.

¹³⁰ Oberlandesgericht (Court of Appeal) Graz, 22 November 2012, 3 R 192/12y, CISG-online 2459 on costs for repair, followed and partially upheld by Oberlandesgericht (Court of Appeal) Graz, 13 June 2013, 3 R 100/13w, CISG-online 2458; Oberlandesgericht (Court of Appeal) Hamm, 9 June 1995, 11 U 191/94, CISG-online 146, on delivery of substitute goods; Atamer, *Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?* (n. 97), 1; Hartmann, *Beck'scher Online Großkommentar BGB* (n. 43), Art. 46 paras. 49, 65.

¹³¹ E.g., in China International Economic & Trade Arbitration Commission (CIETAC), 31 May 2006, CISG/2006/01, CISG-online 1454, the tribunal ruled that costs for "Total parts" and "Labor fee" would be included. Cf., also Polimeles Protodikio Athinon (Multi-member Court of First Instance Athens), 2009, 4505/2009, CISG-online 2228.

¹³² Landgericht (District Court) Stade, 15 May 2014, 8 O 70/13, CISG-online 2988.

¹³³ Cf., Landgericht (District Court) Oldenburg, 9 November 1994, 12 O 674/93, CISG-online 114.

¹³⁴ Oberlandesgericht (Court of Appeal) Hamm, 9 June 1995, 11 U 191/94, CISG-online 146; see also Atamer, *Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?* (n. 97), 7 on the discussion of the legal nature of the claim. Some scholars refer additionally to a general principle underlying Art. 48(1), according to Art. 7(2) CISG, Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 46 para. 42; Huber, in Huber/Mullis (n. 59), 203.

damages under Article 45(1)(b) and (2) CISG.¹³⁵ Concerning Article 48(1) CISG the seller bears the costs in case of its own offered repair or substitute delivery.¹³⁶ This must be the case *a fortiori* under Article 46 CISG. The claim for damages is based on Articles 74 et seq.,¹³⁷ including Article 77 CISG.¹³⁸

bb) Costs of retrofitting

7. If the goods have been combined with other goods or installed, the costs of retrofitting may be recovered as damages but in general are not borne by the seller as part of the remedy of delivery of substitute goods or repair. However, if in a mixed contract the seller has also assumed the obligation of combining or installing the goods the costs of retrofitting are borne by the seller as part of the remedy of delivery of substitute goods or repair.

3.37 In case of repair or substitute delivery of incorporated goods, additional costs occur due to retrofitting. Removal of the incorporated non-conforming goods and reinstallation of conforming goods generate additional costs.¹³⁹ Retrofitting and installation refer to all sorts of actions putting the goods in place so that they are ready for use. The definition of retrofitting and installation under this Opinion is broad.

3.38 Though not dealing with the CISG, the European Court of Justice (ECJ) under the Consumer Sales Directive¹⁴⁰ ruled that the seller who is liable for the non-conformity of the goods must also bear the costs of retrofitting.¹⁴¹ The case before the ECJ dealt with a B2C

¹³⁵ Landgericht (District Court) Stade, 15 May 2014, 8 O 70/13, CISG-online 2988; Landgericht (District Court) Zweibrücken, 19 March 2010, 6 HK. O 13/03, CISG-online 2794; Oberlandesgericht (Court of Appeal) Graz, 22 November 2012, 3 R 192/12y, CISG-online 2459 on costs for repair; China International Economic & Trade Arbitration Commission (CIETAC), 31 May 2006, CISG/2006/01, CISG-online 1454; Hartmann, *Beck'scher Online Großkommentar BGB* (n. 43), Art. 46 paras. 49, 65.

¹³⁶ Hartmann, *Beck'scher Online Großkommentar BGB* (n. 43), Art. 48 para. 25.

¹³⁷ E.g., in China International Economic & Trade Arbitration Commission (CIETAC), 31 May 2006, CISG/2006/01, CISG-online 1454. Cf., Cour d'appel (Court of Appeal) Reims, 30 June 2015, 13/02339, CISG-online 2703, where it appears as if the court based the claim for reimbursement of transportation costs, which initially had to be borne by the buyer, on Arts. 74, 46(2) CISG, although no substitute delivery was requested but price reduction under Art. 50 CISG.

¹³⁸ Cf., Polimeles Protodikio Athinon (Multi-member Court of First Instance Athens), 2009, 4505/2009, CISG-online 2228.

¹³⁹ E.g., in Bundesgerichtshof (German Supreme Court), 21 December 2011, VIII ZR 70/08, the initial price of the goods, floor tiles, was EUR 1.190. They were not in conformity with the contract and needed to be removed. The buyer claimed damages in the amount of EUR 5.830 for new tiles and retrofitting. Prior to the Bundesgerichtshof, the European Court of Justice dealt with this case in *Gebr. Weber GmbH v Jürgen Wittmer* (C-65/09) and *Ingrid Putz v Medianess Electronics GmbH* (C-87/09), European Court of Justice, 16 June 2011.

¹⁴⁰ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, succeeded by Directive 2019/771 of the European Parliament and of the Council of 20 May 2019.

¹⁴¹ *Gebr. Weber GmbH v Jürgen Wittmer* (C-65/09) and *Ingrid Putz v Medianess Electronics GmbH* (C-87/09), European Court of Justice, 16 June 2011. The argument was primarily based on the wording of Art. 3(3) Directive 1999/44/EC, granting the consumer the right to require the seller to repair the goods or to replace them free of charge, unless that is impossible or disproportionate, para. 45. The same conclusion was reached as regards Swedish law in a recent Swedish Supreme Court case, *Högsta domstolen* (Swedish Supreme Court), 17 July 2018, NJA 2018 s. 653. The case dealt with a service contract where one contractor made a wrongful installation of pipes in a floor later filled with concrete by another contractor engaged by the

relationship, but it prompted the German legislator to revise the provisions in the German BGB in 2016, applicable to B2C and B2B contracts.¹⁴² The amendment was arguably based on the fact that limiting the application of the ECJ's judgment to B2C contracts may eventually preclude service providers facing consumer claims to recover damages from the retailer, in light of the fault principle applicable in German law.¹⁴³

3.39 These considerations do not have any bearing under the CISG. Under the CISG's principle of strict liability, the seller of the goods is responsible for any non-conformity. It is not exempted under Article 79 CISG if the non-conformity must be attributed to its supplier or the manufacturer of the goods.¹⁴⁴ The full compensation principle of Articles 74 CISG et seq. may encompass the claim for damages covering costs of retrofitting and installation.¹⁴⁵ This claim for damages requires, first, foreseeability of the resulting damages as a possible consequence of the breach.¹⁴⁶ The decisive question is what a reasonable person in the shoes of the promisor and aware of the circumstances at the time of the conclusion of the contract ought to have foreseen.¹⁴⁷ Hence, the seller must have foreseen the retrofitting and installation. For example, in a sale of pipes, usable in many different ways, it is highly questionable whether the seller foresaw or ought to have foreseen that the pipes in one case were to be used on a construction site underwater. Without having provided additional information, the seller in such a case is unlikely to be held liable for the costs required to reach the pipes underwater.

buyer. The contractor had to pay the costs for breaking up the floor, reinstalling the pipes and then cast the new concrete floor. In a sale of goods under Swedish law, as well as Danish and Norwegian law, this would be regarded as costs of repair.

¹⁴² Deutscher Bundestag, Drucksache 18/8486. The revised provision in Sect. 439(3) BGB is in force since 1 January 2018. The German legislator chose to apply the revision also to business contracts to secure the right to redress, Deutscher Bundestag, Drucksache 18/8486, 39.

¹⁴³ Under the fault principle in German law, the seller, as a retailer, usually cannot be found to be at fault for a breach caused by the manufacturer. The legislative action is perceived differently: Some authors welcome the step, especially with regard to an economic analysis of the decision to make the manufacturer of the goods liable, Florian Bien, *Haftung für reine Vermögensschäden in der Absatzkette*, *Zeitschrift für Europäisches Privatrecht* 2012, 644, 649 et seq.; Gerhard Wagner, *Der Verbrauchsgüterkauf in den Händen des EuGH: Überzogener Verbraucherschutz oder ökonomische Rationalität?*, *Zeitschrift für Europäisches Privatrecht* 2016, 87, 102 et seq.; others criticize the approach Stephan Lorenz, *Ein- und Ausbaupflichtung des Verkäufers bei der kaufrechtlichen Nacherfüllung – Ein Paukenschlag aus Luxemburg und seine Folgen*, *Neue Juristische Wochenschrift* 2011, 2241; Dagmar Kaiser, *EuGH zum Austausch mangelhafter eingebauter Verbrauchsgüter*, *JuristenZeitung* 2011, 978.

¹⁴⁴ This is fundamentally different from German law: Liability of the seller does not include the supplier or manufacturer of the goods, Bundesgerichtshof (German Supreme Court), 21 June 1967, VIII ZR 7, *Neue Juristische Wochenschrift* 1967, 1903 et seq.; Bundesgerichtshof (German Supreme Court), 15 July 2008, VIII ZR 211/07, *Neue Juristische Wochenschrift* 2008, 2837 et seq.

¹⁴⁵ E.g., Oberster Gerichtshof (Austrian Supreme Court), 15 January 2013, 4 Ob 208/12k, CISG-online 2398; Oberlandesgericht (Court of Appeal) Hamm, 9 June 1995, 11 U 191/94, CISG-online 146; Brunner/Akikol/Bürki, in Brunner/Gottlieb, (n. 31), Art. 46 para. 24; Atamer, *Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?* (n. 97), 8. See more general, Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 46 para. 36; Magnus, in *Staudinger BGB* (n. 32), Art. 46 para. 50; Schlechtriem/Schroeter (n. 87), para. 459. Alternatively to Art. 74 CISG et seq., one may argue that costs of retrofitting are covered by a claim for reimbursement directly based on Art. 46 CISG, cf. for this discussion Atamer, *Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?* (n. 97), 7.

¹⁴⁶ Schwenzler, in *Schlechtriem & Schwenzler* (n. 4), Art. 74 para. 50.

¹⁴⁷ Schwenzler, in *Schlechtriem & Schwenzler* (n. 4), Art. 74 para. 51.

3.40 Furthermore, as regards damages the buyer needs to adhere to Article 77 CISG. It must take reasonable measures to mitigate the loss. Regarding retrofitting, the issue may arise whether the seller or the buyer is liable for defective retrofitting by a service provider.

3.41 Treating costs for retrofitting as damages is especially important where the parties agreed on a cap on damages below the costs of retrofitting. In such a case the seller is not obliged to pay above the cap if the interpretation of the clause providing for the cap on damages affirms the application of the cap in this scenario (cf., above at para. 3.29).

3.42 The general rule that retrofitting costs may be recovered by the buyer in a claim for damages does not apply where in a mixed contract the seller has undertaken the obligation to install the goods. In this scenario the seller was initially obliged to bear the costs for installation. The same rule must apply when it comes to cure.¹⁴⁸

cc) Restitution of non-conforming goods or non-conforming parts of the goods to the seller

(1) General Rules

- 8. In cases of delivery of substitute goods, or repair of the goods by delivery of substitute parts,**
- a. the buyer must make restitution to the seller of the goods or parts first delivered;**
 - b. the seller must take back the goods or parts first delivered;**
 - c. the costs of restitution must be borne by the seller.**

3.43 In case of delivery of substitute goods or repair of the goods by delivery of substitute parts, the initial delivery is wound up. Article 46 CISG does not address this winding up, but Section V does so. Their principles must be applied to the delivery of substitute goods or repair of the goods by delivery of substitute parts even though the heading of their Section V refers to avoidance only.¹⁴⁹ However, its underlying purpose, dealing with the winding up, applies to those goods and parts substituted in the case of Article 46 CISG.

3.44 Rule No. 8 litera a requires restitution to the seller. Although not expressly requiring the return, Article 46 CISG is predicated on the assumption of restitution.¹⁵⁰ The application of Article 82 CISG in the case of Article 46(2) CISG is made clear by the wording of Article 82 CISG and was already favoured in the Secretariat's Commentary.¹⁵¹ The same must apply where the goods are repaired by delivery of substitute parts. In both cases restitution will usually be in the interest of the parties. The buyer may not be interested in keeping the goods, since additional costs for storage or destruction may occur, and the seller instead may be able

¹⁴⁸ Hence, the above comments on costs of repair and delivery of substitute goods can be applied.

¹⁴⁹ See above Rule No. 4 and its comments.

¹⁵⁰ Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 46 para. 34.

¹⁵¹ *Secretariat's Commentary* (n. 11), Art. 42 para. 13, referring to Art. 67 (now Art. 82 CISG). See also CISG-AC Opinion No. 9 (n. 103), para. 3.19 et seq.

to make use of the goods returned.¹⁵² If it is impossible for the buyer to make restitution of the goods substantially in the condition in which it received them, it loses the right to require the seller to deliver substitute goods, according to Article 82 CISG.¹⁵³

3.45 Correspondingly, under Rule No. 8 litera b, the seller bears a duty to take back the goods. Restitution reverses the initial sale, at least for the non-conforming parts of the goods.¹⁵⁴ If the seller does not take back the goods the buyer may be obliged under Articles 86–88 CISG to dispose of or preserve the goods.¹⁵⁵ Hence, if the seller is unreasonably delayed taking back the goods, the buyer may sell them by any appropriate means, in accordance with Article 88(1) CISG. In case of disposal, the costs of disposal are borne by the non-performing party, i.e., the seller, in accordance with general principles.¹⁵⁶

3.46 Rule No. 8 litera c clarifies that the costs of the restitution must be borne by the seller, i.e., the party in breach. In the case of avoidance, it is questionable who should bear the costs of restitution. Some scholars argue that generally, the party in breach should bear the costs.¹⁵⁷ Others argue that it is the party declaring avoidance that bears the costs – under the assumption that this party has a damages claim.¹⁵⁸ However, the delivery of substitute goods or repair of the goods by delivery of substitute parts differs from avoidance: First, the buyer upholds the initial contract, and second, the seller always breached the contract. Especially the latter aspect justifies the general rule that the costs of the restitution in case of delivery of substitute goods or repair of the goods by delivery of substitute parts must be borne by the seller.¹⁵⁹ The claim for recovery of these costs is not a claim for damages.

3.47 Finally, the place of performance for restitution needs to be determined. Most scholars and case law agree that this is a question governed by the CISG¹⁶⁰ but differ in determining the place of performance for restitution. Similar to the dispute on costs of the restitution, some

¹⁵² Generally, the buyer has no right to insist that the goods in restitution be returned concurrently against the delivery of substitute goods. The Norwegian proposal under Art. 81(2) CISG in regard to the delivery of substitute goods was rejected, *Official Records* (n. 10), 136, 387. However, if the non-conforming delivery occurred by concurrent exchange for payment of the purchase price, an exception appears justified in regard to the initial agreement of the parties, Brunner/Akikol/Bürki, in Brunner/Gottlieb (n. 31), Art. 46 para. 25.

¹⁵³ See above Rule 4.

¹⁵⁴ CISG-AC Opinion No. 9 (n. 103), para. 3.7 et seq. The requirement of taking back the initial goods can also result from prior usage between the parties, Handelsgericht (Commercial Court) des Kantons Zürich, HG010395/U/zs, 24 October 2003, CISG-online 857.

¹⁵⁵ Art. 86 CISG applies in case of Art. 46 CISG, Klaus Bacher, in *Schlechtriem & Schwenzler* (n. 4), Art. 86 para. 5.

¹⁵⁶ CISG-AC Opinion No. 9 (n. 103), para. 3.16 et seq.

¹⁵⁷ Cf., CISG-AC Opinion No. 9 (n. 103), para. 3.16 et seq.

¹⁵⁸ Fountoulakis, in *Schlechtriem & Schwenzler* (n. 4), Art. 81 para. 33.

¹⁵⁹ In practice, there may be difficulties in differentiating between costs of retrofitting and restitution costs. The circumstances of the case will guide this determination – led by the questions where the focus of the individual circumstances is.

¹⁶⁰ Oberster Gerichtshof (Austrian Supreme Court), 29 June 1999, 1 Ob 74/99k, CISG-online 483, relying on Art. 7(2) CISG; Brunner/Santschi, in Brunner/Gottlieb (n. 31), Art. 81 para. 8; Rolf H. Weber, in Honsell (n. 88), Art. 81 para. 21; Huber, in Huber/Mullis (n. 59), 244; Bridge, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 81 para. 23; Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 81 para. 15; Schlechtriem/Schroeter (n. 87), para. 777 et seq; Fountoulakis, in *Schlechtriem & Schwenzler* (n. 4), Art. 81 para. 26; cf., also CISG-AC Opinion No. 9 (n. 103), para. 3.12. But see Cour d'appel (Court of Appeal) de Grenoble, 94/3859, 23 October 1996, CISG-online 305, applying the UNIDROIT Principles.

scholars favor determining the place in reversal to the initial contract, arguing that restitution is the reversal of the initial contract.¹⁶¹ Others argue that the determination depends on the evaluation of the party in breach.¹⁶² The place of performance should be at the place of the party not in breach. This approach values the adherence to the contract by the party not in breach.¹⁶³ This latter approach is more convincing regarding the delivery of substitute goods or repair of the goods by delivery of substitute parts. Again, the differences between avoidance and delivery of substitute goods, i.e., the contract is upheld, and the seller is in breach, speak against the mere reversal of the initial contract.

(2) Benefits and betterment

9. The buyer is not bound to

- a. make restitution of benefits derived from the substituted non-conforming goods or parts first delivered;**
- b. account for any betterment caused by the delivery of substitute goods, or repair of the goods by delivery of substitute parts.**

3.48 Rule Nos. 4 and 8 clarify that Article 82 CISG applies to both the delivery of substitute goods and repair of the goods by delivery of substitute parts. Therefore, the question may arise whether in these cases the buyer is bound to account for benefits it has derived from the goods originally delivered according to Article 84(2) CISG. Likewise, it may be questionable whether the buyer must account for any betterment in such cases.

3.49 Rule No. 9 litera a discharges the buyer of making restitution of benefits derived from the substituted non-conforming goods or parts first delivered. Benefits are all sorts of advantages derived from the substituted non-conforming goods or parts first delivered, including external advantages. Benefits must be excluded from restitution since they are covered by the initial contract. The buyer was entitled to receive the benefits under the contract. Since the contract is upheld, unlike in the case of avoidance, there is no ground for restitution of these benefits. The buyer's right to benefit from the goods does not become unjustified by requesting delivery of substitute goods. Also, the seller would be rewarded for not performing as required if it were to enjoy the benefits.¹⁶⁴ Therefore, the seller's claims for restitution of benefits must be rejected

¹⁶¹ Weber, in Honsell (n. 88), Art. 81 para. 21; Huber, in Huber/Mullis (n. 59), 244; Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 81 para. 15; Mankowski, in *Münchener Kommentar zum HGB, Band 5* (4th ed., München 2018), Art. 81 para. 8; Schlechtriem/Schroeter (n. 87), para. 778; Fountoulakis, in *Slechtriem & Schwenger* (n. 4), Art. 81 para. 26; Magnus, in *Staudinger BGB* (n. 32), Art. 81 para. 19.

¹⁶² Brunner/Santschi, in Brunner/Gottlieb (n. 31), Art. 81 para. 8; Christian Thiele, *Erfüllungsort bei der Rückabwicklung von Vertragspflichten nach Art 81 UN-Kaufrecht*, *Recht der internationalen Wirtschaft* 2000, 892, 895.

¹⁶³ Thiele, *Erfüllungsort bei der Rückabwicklung von Vertragspflichten nach Art 81 UN-Kaufrecht*, (n. 163), 895.

¹⁶⁴ In parallel, the seller is not bound to refund the price and pay interest under Art. 84(1) CISG in case of delivery of substitute goods or parts, Bridge, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 84 para. 17. Bridge, however, also provides a theoretical example to the contrary.

in cases of delivery of substitute goods or parts. Article 84(2)(a) CISG does not apply in these cases.¹⁶⁵

3.50 Under Rule No. 9 litera b the buyer is not bound to account for any betterment caused by the delivery of substitute goods or repair of the goods by delivery of substitute parts. Betterment covers all sorts of improvements made to the delivered goods and other goods or values. The substituted goods have a longer lifetime than the original ones and, thus, cause betterment. Another example is a substitution with a newer and better model of the goods.¹⁶⁶ Some scholars favor the buyer's payment for betterment in any case.¹⁶⁷ One may rely on the difference to Rule No. 9 litera a, i.e., that the betterment derives from the new, not the originally delivered goods. The buyer was, thus, not directly entitled to receive the betterment under the contract. Other scholars deny the payment for betterment¹⁶⁸ because the betterment is forced upon the buyer.¹⁶⁹ A third approach is to differentiate according to whether "*the buyer enjoys an actual financial benefit from the substitute goods*".¹⁷⁰ Under this approach, only if the buyer enjoys, for example, a higher production outcome due to higher capacity of the replacement goods, or a higher profit margin due to the better model, the seller should have the right to claim for the price difference between the new and the old model. In light of the performance principle and the seller's general warranty for the conformity of the goods under the CISG, however, it is most convincing to discharge the buyer from any accounting of betterments. The seller, i.e., the party in breach, fulfills its obligation under Article 46(2) CISG. Betterment is indeed a by-product of the fact that the seller is unable to make a different substitution. The buyer does not intend to buy better and new goods. One would have to assume such unfounded intention in order to make the buyer accountable for the betterment.

dd) Application of Articles 38, 39 and 43 CISG

10. After substitution or repair, the buyer has to comply with the examination and notice requirements of Articles 38, 39 and 43 CISG. In case of non-conformity of the goods

¹⁶⁵ Bridge, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 84 para. 17; Brunner/Santschi, in Brunner/Gottlieb (n. 31), Art. 84 para. 7; Huber, *Münchener Kommentar zum BGB* (n. 31), Art. 84 para. 11; Magnus, in *Staudinger BGB* (n. 32), Art. 46, para 48, Art. 84 para. 20; Weber, in Honsell (n. 88), Art. 84 para 12; Schlechtriem/Schroeter (n. 87), para. 781; Mankowski, in *Münchener Kommentar zum HGB* (n. 162), Art. 84 para. 12. However, Mankowski suggests deducing any benefits from a claim for damages the buyer may additionally raise.

¹⁶⁶ See Atamer, *Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?* (n. 97), 12 et seq., for this example based on the Volkswagen scandal in Germany.

¹⁶⁷ Fountoulakis, in *Slechtriem & Schwenger* (n. 4), Art. 84 para 5.

¹⁶⁸ Schlechtriem/Schroeter (n. 87), para 781; Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 84, para. 11. See also Schwenger, in *Slechtriem & Schwenger* (n. 4), Art. 74 para 44.

¹⁶⁹ Schwenger, in *Slechtriem & Schwenger* (n. 4), Art. 74 para 44.

¹⁷⁰ Atamer, *Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?* (n. 97), 24, referring to a parallel approach under English law, n. 86.

the two year cut off period (Article 39(2) CISG) starts to run with the actual handing over of the substituted goods or repair.

3.51 Articles 38, 39, and 43 CISG apply to goods that are delivered in substitution of the original goods as well as to the goods repaired.¹⁷¹ If the goods are still non-conforming the buyer may again make use of Articles 45 CISG et seq.¹⁷² The costs of such an additional examination can be claimed as damages.

3.52 Additionally, the two year cut off period under Article 39(2) CISG applies anew.¹⁷³ It generally starts to run with the actual handing over of the goods, i.e., the physical handing over.¹⁷⁴ The purpose of Article 39(2) CISG is to strike a fair balance and to protect buyers in cases where the defects are latent as well as to protect sellers against claims which arise long after the goods have been delivered.¹⁷⁵ In cases of Articles 46(2) and (3) CISG, these interests need to be protected regarding substituted or repaired goods. The physical handing over occurs anew in these cases.

3.53 If the substituted goods come from the same source as the goods first delivered it is questionable whether the seller is aware of any new lack of conformity or could not have been unaware of it, according to Article 40 CISG. For example, in the case of non-conforming stones due to cracks in the stones that hinder processing the stones, this question arises if the delivery of substituted stones comes from the same rock as the stones first delivered.¹⁷⁶ However, as

¹⁷¹ Cf., Oberlandesgericht (Court of Appeal) Nürnberg, 20 September 1995, 12 U 2919/94, CISG-online 267; Landgericht Oldenburg (District Court Oldenburg), 9 November 1994, 12 O 674/93, CISG-online 114; Landgericht Oldenburg (District Court Oldenburg), 6 July 1994, 12 O 3010/93, CISG-online 274; Schlechtriem/Schroeter (n. 87), para. 463. See also Landgericht (District Court) Stendal, 12 October 2000, 22 S 234/99, CISG-online 592.

¹⁷² Landgericht (District Court) Stendal, 12 October 2000, 22 S 234/99, CISG-online 592; Müller-Chen, in *Slechtriem & Schwenger* (n. 4), Art. 46 paras. 37, 47; Brunner/Akikol/Bürki, in Brunner/Gottlieb (n. 31), Art. 46 para. 39; Huber, in Huber/Mullis (n. 59), 203.

¹⁷³ Since this period should not be confused with the limitation periods, the seller's interests and protection under any applicable limitation periods are not touched upon.

¹⁷⁴ Schwenger, in *Slechtriem & Schwenger* (n. 4), Art. 39 para. 25.

¹⁷⁵ Schwenger, in *Slechtriem & Schwenger* (n. 4), Art. 39 para. 23.

¹⁷⁶ Cf., Landgericht (District Court) Stendal, 12 October 2000, 22 S 234/99, CISG-online 592.

Article 40 CISG should be restricted to “*special circumstances*”,¹⁷⁷ it will usually require more than the mere fact of the goods originating from the same source.¹⁷⁸

ee) Place of repair and delivery of substitute goods

3.54 It is commonly held that the place of repair is the buyer’s place of business, or where the goods are located.¹⁷⁹ The place of delivery of substitute goods, however, is disputed. Some scholars argue that the place of delivery of substituted goods should be the same as the place defined in the contract.¹⁸⁰ Thus, when the parties agree on EXW, i.e., delivery at the seller’s premises, this determines the place of substitute delivery as well.¹⁸¹ However, under this approach the buyer is burdened with arrangements and risks – and at least in first place with costs. Thus, the better view is to define the place of performance for the substitute delivery or repair as the place where the goods are located in accordance with the contract.¹⁸² This may save additional costs when disposing the goods in the local market¹⁸³ and may even be more sustainable. The place where the goods are currently located can, however, be decisive only if the seller knew or could not have been unaware of the prospective location of the goods at the time of the conclusion of the contract. If this is not the case, it should be the buyer’s place of business.

ff) Right to withhold performance

3.55 If the buyer has not fulfilled its obligation under the contract, i.e., usually payment, it may withhold performance until the seller performed under Articles 46(2) and (3) CISG.¹⁸⁴ The prevailing view derives this right to withhold performance from numerous provisions in the CISG, which may be called a general principle under Article 7(2) CISG.¹⁸⁵ The right to withhold performance “*enables the buyer to raise the objection that the contract has not been*

¹⁷⁷ *Beijing Light Automobile Co., Ltd v. Connell Limited Partnership*, Arbitral Award, Stockholm Chamber of Commerce, 5 June 1998, CISG-Online 379.

¹⁷⁸ See Landgericht (District Court) Stendal, 12 October 2000, 22 S 234/99, CISG-online 592, Art. 40 CISG holding that the requirements of Art. 40 CISG were not fulfilled. According to the court, the mere fact that the stones came from the same rock was not sufficient to demonstrate that the seller knew or could not have been unaware of the lack of conformity. In case of repair, however, Art. 40 CISG may apply where the buyer previously gave numerous notices and the seller tried to repair the same non-conformity without success, Oberlandesgericht (Court of Appeal) Zweibrücken, 29 October 2012, 8 U 22/10, CISG-online 2696.

¹⁷⁹ Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 46 para. 61; Magnus, in *Staudinger BGB* (n. 32), Art. 46 para. 66; Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 46 para. 45; Schnyder/Straub, in Honsell (n. 88), Art. 46 para. 104b et seq.

¹⁸⁰ Huber, in Huber/Mullis (n. 59), 203.

¹⁸¹ Cf., Cour d’appel (Court of Appeal) de Paris, 4 March 1998, 97/24418, CISG-online 535.

¹⁸² Brunner/Akikol/Bürki, in Brunner/Gottlieb (n. 31), Art. 46 para. 38, with further references.

¹⁸³ CISG-AC Opinion No. 9 (n. 103), para. 3.12.

¹⁸⁴ In general, on the buyer’s right to withhold performance CISG-AC Opinion No. 5 (n. 2), para. 4.18 et seq.

¹⁸⁵ CISG-AC Opinion No. 5 (n. 2), para. 4.19.

(properly) performed and to withhold his own performance until such time as the other party is prepared to render (simultaneous) performance”.¹⁸⁶

e) Seller’s right to cure under Article 48 CISG

3.56 Article 48 CISG lays down the seller’s right to cure. It is a manifestation of the principle of *favor contractus* and of restricting avoidance of the contract wherever possible. This requires co-ordination of the buyer’s right to avoid the contract under Article 49 CISG, the buyer’s right to request delivery of substitute goods or repair under Articles 46(2) and (3) CISG, and its right to claim damages under Articles 74 et seq. CISG. Additionally, Article 48 CISG, together with Article 47 CISG, is a “*tool for cooperation*”.¹⁸⁷ Articles 48(2) and (3) CISG shed some light on the regulation of the seller’s and buyer’s cooperation.

aa) Relation of Articles 48 and 49 CISG

11. Under Article 48 CISG the seller has a right to cure “subject to article 49”. The seller’s right to cure is excluded in case of a fundamental breach of contract, i.e., the goods are not usable and the non-conformity is not curable in time.

3.57 According to Article 48(1) CISG the seller’s right to cure is “[s]ubject to Article 49”, i.e., the buyer’s right to avoid the contract is not excluded by the seller’s right to cure.¹⁸⁸ This provision has proven to be highly controversial in scholarly writing.¹⁸⁹ The controversy focuses on the differentiation between Article 48(1) and 49 CISG, concretely whether the seller may cure under Article 48 CISG in case of a fundamental breach.

3.58 Some scholars argue that the seller’s right to cure in Article 48(1) CISG is excluded by the mere existence of a fundamental breach without having regard to the curability of the breach.¹⁹⁰ Other approaches are, first, that the fundamentality of the breach depends on the seller’s failure to cure – and, therefore, the curability of the breach –,¹⁹¹ second, that the exclusion of

¹⁸⁶ Oberster Gerichtshof (Austrian Supreme Court), 8 November 2005, 4 Ob 179/05k, CISG-online 1156. But see *Zodiac Seats US LLC v. Synergy Aerospace Corp.*, U.S. District Court for the Southern District of Texas, 8 April 2020, CISG-online 5172, differentiating that “*there is no CISG provision entitling a buyer to withhold the full contract price due to receipt of partially nonconforming goods*”.

¹⁸⁷ Only on Art. 48 CISG, Honnold/Flechtner (n. 8), Art. 48 para. 292.

¹⁸⁸ This wording was implemented during the final negotiations in Vienna in 1980, *Official Records* (n. 10), 115, 351 et seq. and chosen “*since the buyer must retain the right to declare the contract avoided*”, 351, para. 9.

¹⁸⁹ Michael Bridge, *The International Sale of Goods* (4th ed. Oxford 2018), para. 12.28; Michael Bridge, *Avoidance for Fundamental Breach*, 59 *International and Comparative Law Quarterly* (2010) 911, 928 et seq.; Ulrich Magnus, *Aufhebungsrecht des Käufers und Nacherfüllungsrecht des Verkäufers im UN-Kaufrecht*, in Ingeborg Schwenzler/Günter Hager (eds.), *Festschrift für Peter Schlechtriem* (Tübingen 2003), 599, 602 et seq.; Florian Faust, *Specific Performance*, in Schwenzler/Atamer/Butler (n. 40), 235, 242 et seq.; Magnus, in *Staudinger BGB* (n. 32), Art. 48 para. 18 et seq.; Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 48 para. 14 et seq.

¹⁹⁰ Cf., Faust (n. 190), 242; Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 48 para. 17. Both emphasize the buyer does not need to declare avoidance.

¹⁹¹ Martin Karollus, *UN-Kaufrecht: Vertragsaufhebung und Nacherfüllungsrecht bei Lieferung mangelhafter Ware*, *Zeitschrift für Wirtschaftsrecht*, 1993, 490, 495 et seq. In this direction also Honnold/Flechtner (n. 8), Art. 48 para. 296; Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 48 para. 11.

Article 48(1) CISG in case of a fundamental breach depends on the sequence of declarations (of Articles 48 and 49 CISG),¹⁹² and third, to weigh the relevance of non-conformity against the modalities of cure.¹⁹³ All these approaches should be rejected with regard to a ‘simple’ fundamental breach, i.e., a breach only relating to the non-conformity while cure of the breach is possible. In addition to such breach, time must be of the essence.¹⁹⁴ Without this requirement, the seller’s right to cure could be “nullified” by an “unqualified application of Art[icle] 49(1) [CISG]”.¹⁹⁵ Where time is of the essence, e.g., in case of an annual fair, the buyer may only declare avoidance if the non-conforming goods, i.e., goods for the fair, are not usable and not curable on time for the fair.¹⁹⁶ If the goods are usable, the buyer is limited to claim damages or reduction of the purchase price. Fundamentality here is, hence, composed of non-usability and non-curability (in time). The requirement of time being of the essence safeguards an equal treatment of the seller and the buyer and balances their interests and upholds the principle of *favor contractus*. Both parties’ interests are to fulfill the contract. Unless time is of the essence, there is no reason to limit the seller’s right to cure in Article 48 CISG.

3.59 Therefore, the friction between the seller’s right to cure and the buyer’s right to avoid the contract under Article 49(1)(a) CISG mainly depends on the definition of a fundamental breach.¹⁹⁷ If a fundamental breach is denied in cases where cure is possible, and the seller is willing to perform cure within the limits of Article 48(1) CISG, at least in practice, the controversy of the relation of Articles 48 and 49 CISG proves to be fruitless. In the end, the

¹⁹² Cf., Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 49 para. 33, for an overview. The author concludes, however, that the sequence of declarations should not be decisive. The above approach would lead to an unpractical race between seller and buyer without balancing their interests. (In addition, the drafting history demonstrates that the declaration of avoidance is not decisive for this differentiation as the delegates favored to delete the requirement of a declaration in the previous Art. 44(1) sentence 1 1978 Draft Convention; see in detail also Hartmann, *Beck online Großkommentar* (n. 43), Art. 48 para. 17; Brunner/Akikol/Bürki, in Brunner/Gottlieb (n. 31), Art. 48 para. 11.)

¹⁹³ Landgericht (District Court) Linz, 30 June 2010, 5 Cg 176/06m-62, CISG-online 3008: Where the relevance of non-conformity prevails the buyer may avoid, and where the modalities of cure, i.e., the possibility to cure, prevail, Art. 48(1) CISG should apply, Schnyder/Straub in Honsell (n. 88), Art. 48 para. 17 et seq., Art. 49 para. 23. In this direction also Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 49 para. 28 et seq.

¹⁹⁴ Alternatively, if the seller does not cure within the time limit set by the buyer under Art. 47(1) CISG or within its own time limit under Art. 48(2) CISG.

¹⁹⁵ Honnold/Flechtner (n. 8), Art. 48 para. 296 n. 5.

¹⁹⁶ Usable is not to be confused with repairable, since repair will usually not be in the interest of the buyer due to the amount of time this would require. Usability refers to the purpose of the contract, see above at 3.20 et seq.

¹⁹⁷ Schroeter, in *Schlechtriem & Schwenzler* (n. 4), Art. 25 para. 47 et seq.; Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 48 para. 18. The predominant case law arguing that the right to avoid the contract trumps the seller’s right to cure must be analyzed under this clarification. See in particular International Chamber of Commerce (ICC) International Court of Arbitration, 1994, CISG-online 565, and also Oberster Gerichtshof (Austrian Supreme Court), 22 November 2011, CISG-online 2239; Bundesgericht (Swiss Supreme Court), 18 May 2009, CISG-online 1900; Gerechthof (Court of Appeal) Arnhem, 7 October 2008, CISG-online 1749; Cámara Nacional de Apelaciones en lo Comercial (National Court of Appeal), 31 May 2007, CISG-online 1517; Handelsgericht (Commercial Court) des Kantons Aargau, 5 November 2002, CISG-online 715; Oberlandesgericht (Court of Appeal) Köln, 4 October 2002, CISG-online 709; Oberlandesgericht (Court of Appeal) Koblenz, 31 January 1997, CISG-online 256. This case law shifts the relevant question to Art. 25 CISG and whether there can be a fundamental breach if non-conformity can be cured in a reasonable manner. Most cases deny this, unless time is of the essence.

buyer may only avoid the contract if the non-conformity amounts to a fundamental breach, i.e., goods being not usable and the non-conformity not being curable in time.¹⁹⁸

bb) Seller's right to choose

12. If both delivery of substitute goods and repair are adequate to remedy the non-conformity of the goods the seller may choose between the two remedies.

3.60 In the case of non-conforming goods, cure may either take the form of delivery of substitute goods or repair. As described above, the buyer may only require delivery of substitute goods where the non-conformity amounts to a fundamental breach of contract, especially where repair of the goods is not possible,¹⁹⁹ and delivery of substitute goods is not disproportionate.²⁰⁰ The buyer may also require repair, subject to reasonableness.²⁰¹ If both delivery of substitute goods and repair are available, the seller generally has the choice between the two forms of remedying the non-conformity.²⁰²

3.61 The seller's choice depends on the potential quality of cure.²⁰³ Both delivery of substitute goods and repair must be "*adequate to remedy the non-conformity*". It is in the buyer's interest that only where both manners of cure would be in line with Article 35 CISG, the seller may choose. Another criterion for the quality of cure could be the sustainability of either method of cure. At least where sustainability is a principle underlying the contractual relationship in question – for example where the contract explicitly refers to sustainability goals –, the method that is more sustainable may be the only adequate one.

3.62 In practice, the seller may use its right to choose only if it prefers the delivery of substitute goods to repair. If the buyer requires the delivery of substitute goods, implying that repair is not adequate, the seller must act in accordance with the buyer's request. However, if the buyer requires repair, the seller may generally respond by offering delivery of substitute goods

¹⁹⁸ Cf., CISG-AC Opinion No. 5 (n. 2), para. 4.4. In this direction also Oberlandesgericht (Court of Appeal) Linz, 18 May 2011, 1 R 181/10h, CISG-online 2443, denying a fundamental breach since the goods were usable and defects curable; Handelsgericht (Commercial Court) des Kantons, 5 November 2002, OR.2001.00029, CISG-online 715, also denying a fundamental breach due to the fact that the goods were repairable and usable; Peter Huber, *Typically German? – Two Contentious German Contributions to the CISG*, 59 *Annals of the Faculty of Law in Belgrade - International Edition* (2011), 150, 154 et seq. on "*reasonable use*". But see *Pattison Outdoor Advertising LP v. Zon LED LCC*, Supreme Court of British Columbia, 6 April 2018, CISG-online 3224, where a 'simple' fundamental breach justified avoidance, although the seller was in the process of curing. It should be noted that the court relied on other decisions not applying the CISG.

¹⁹⁹ See above Rule No. 3 and comments thereon.

²⁰⁰ See above Rule No. 5 and comments thereon.

²⁰¹ See above Rule No. 6 and comments thereon.

²⁰² Cf., Cour d'appel (Court of Appeal) de Grenoble, 26 April 1995, 93/4879, CISG-online 154. The buyer requested substitute delivery (restoring a warehouse to a new state) but the court ruled that repair of some parts of the warehouse was sufficient under Art. 46(3) CISG – otherwise the buyer would have been placed 40 times better. Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 48 para. 6, emphasizing that the manner of cure must remedy the defect completely; Faust (n. 190), 241. In general, Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 46 para. 42, Art. 48 para. 25 et seq.

²⁰³ Cf., Bridge, *Curing a Seller's Defective Tender or Delivery of Goods in Commercial Sales* (n. 125), 234, using the criterion of quality for differentiation between Art. 48 and 49 CISG. Rule No. 11 deals with this differentiation. According to Bridge, poor cure is not effective. For the opposing view see *Secretariat's Commentary* (n. 11), Art. 44 para. 4.

instead. The aim of limiting the buyer's right to require delivery of substitute goods protects the seller.²⁰⁴ If the seller itself prefers delivery of substitute goods to repair and delivery of substitute goods is adequate within the limits of Article 48(1) CISG, it is usually not to the detriment of the buyer.²⁰⁵ Rather, the buyer benefits from this manner of cure.

cc) Limitation of the seller's right to cure

3.63 Article 48(1) CISG limits the seller's right to cure to cases where it "*can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer*". The following explanations are mere examples of interpreting the wording. It is not an exclusive interpretation limited to these scenarios.

3.64 First, cure must be effected "*without unreasonable delay*", Article 48(1) CISG. It has been argued in scholarly writing that the reasonable time in Article 48(1) CISG has to be determined "*according to the standard that is also used for the additional period of time in Article 47(1)*".²⁰⁶ However, this approach disregards the different functions of these two periods. Article 47(1) CISG binds the buyer and seeks to protect the seller in being granted enough time to perform its obligations.²⁰⁷ On the contrary, Article 48(1) CISG protects the buyer; how long can the buyer reasonably be expected to accept cure by the seller? These different purposes do not require the two periods in Articles 48(1) and 47(1) CISG to be of the same length.²⁰⁸ Rather, unreasonable delay in Article 48(1) CISG should be found where after a certain date the buyer can no longer be expected to accept performance by the seller.²⁰⁹ Thus, the question is whether, at the time of cure effected by the seller, the buyer would be substantially deprived of what it can expect under the contract.²¹⁰ Thereby, the individual circumstances of the case must be taken into account;²¹¹ there is no definite point in time from which the delay should be calculated. In other words, an unreasonable delay can only be assumed where time is of the

²⁰⁴ The requirement of a fundamental breach in Art. 46(2) CISG and the high threshold to approve a fundamental breach serve this protection.

²⁰⁵ If the manner of cure leads to a detriment for the buyer, it might be considered an unreasonable inconvenience under Art. 48(1) CISG.

²⁰⁶ Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 48 para. 10. See also Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 48 para. 9; Christoph Benicke, in *Münchener Kommentar zum HGB* (n. 162), Art. 48 para. 8.

²⁰⁷ Brunner/Akikol/Bürki, in Brunner/Gottlieb (n. 31), Art. 47 para. 1. Cf., *Official Records* (n. 10), 339 para. 4 et seq.

²⁰⁸ This is compatible with the drafting history requiring a flexible approach in Art. 48(1) CISG, *Official Records* (n. 10), 351 para. 9.

²⁰⁹ Cf. Amtsgericht (Local Court) München, 23 June 1994, 271 C 18968/94, CISG-online 368. The mere fact that cure by the buyer or by a third person can be effected faster does not render the delay in itself unreasonable. But see Salger, in Witz/Salger/Lorenz (n. 31), Art. 48 para. 3.

²¹⁰ The delay is usually unreasonable if it amounts to a fundamental breach, Handelsgericht (Commercial Court) des Kantons Zürich, 10 February 1999, HG 970238.1 CISG-online 488; Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 48 para. 9. The fact that the draft wording of Art. 48 CISG (i.e., Art. 44 1978 Draft Convention) foresaw the delay amounting to a fundamental breach but had been changed does not exclude either statements. The draft wording of Art. 48 CISG was: "*without such delay as will amount to a fundamental breach of contract*". It had been changed because the double reference to Art. 49 CISG and a fundamental breach in Art. 48(1) CISG appeared inappropriate, see *Official Records* (n. 10), 351 para. 9.

²¹¹ The circumstances of each individual case are relevant for all three alternatives of reasonableness in Art. 48 CISG, Will, in Bianca/Bonell (n. 116), Art. 48 para. 2.1.1.1.2.

essence at the point in time when cure would be effected. To give an example: The buyer has ordered goods to be delivered on 1 April, goods which the buyer must deliver to a sub-buyer on 1 May, without having any other reasonable use for them. Albeit the original delivery date not being of the essence, cure of non-conformity would be unreasonably delayed if it could not be effected before delivery to the sub-buyer is due.

3.65 Further, the seller is not allowed to cure if this implies any other unreasonable inconvenience to the buyer. In general, the term “*unreasonable inconvenience*” is to be understood in the same manner as in Article 37 CISG.²¹² Cases of “*unreasonable inconvenience*” occur where repair causes suspension or disruption of buyer’s production,²¹³ buyer’s customers are threatening with actions for damages,²¹⁴ or obviously unprofessional actions by the seller lead to several attempts of subsequent performance.²¹⁵ Most importantly, unreasonable inconvenience can be found where the buyer has lost trust in the seller’s ability or willingness to cure.²¹⁶ However, the loss of trust must be reasonable in itself.²¹⁷ Otherwise it would be possible to circumvent the requirement of reasonableness in Article 48 CISG. Thereby, it is not the buyer’s point of view whether it lost trust in the seller, but rather the point of view of a reasonable third person in the shoes of the buyer is decisive.²¹⁸ Altogether, it is to be considered that it is the seller’s right to cure. An “*unreasonable inconvenience*” may not only be inferred from the mere fact that cure by the buyer or a third person would be less burdensome for the buyer.²¹⁹ Likewise, the unsuccessful attempt of the first action by the seller itself does not lead to unreasonableness.²²⁰

3.66 Finally, the seller may not cure the non-conformity if it causes uncertainty of reimbursement of expenses advanced by the buyer. It must be emphasized in the first place that the seller itself must bear all costs of remedying the failure to perform.²²¹ Thus, cases will be rare where the buyer has to advance expenses. Possible situations are the buyer must dismantle the defective product, bear possible transportation costs to have the product repaired by the

²¹² Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 48 para. 7.

²¹³ Honnold, John O., *Uniform Law for International Sales* (2nd ed., Alphen aan den Rijn 1991), Art. 37 para. 245.

²¹⁴ Amtsgericht (Local Court) München, 23 June 1995, 271 C 18968/94, CISG-online 368.

²¹⁵ Bundesgerichtshof (German Supreme Court), 24 September 2014, VIII ZR 394/12, CISG-online 2545; Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 48 para. 11, with further references; Benicke, in *Münchener Kommentar zum HGB* (n. 162), Art. 48 para. 7. Further, “*unreasonable inconvenience*” can be found where the seller made an inadequate offer to cure, see Tribunale (District Court) di Forlì, 11 December 2008, 2280/2007, CISG-online 1729.

²¹⁶ Landgericht (District Court) Stade, 15 May 2014, CISG-online 2988; Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 48 para. 10. Already, the delegates in Vienna accepted that the seller should not be able to remedy where the buyer lost confidence in the seller’s ability to cure, *Official Record* (n. 10), 342 para. 52.

²¹⁷ A merely subjective loss of trust should not be sufficient, Schnyder/Straub, in Honsell (n. 88), Art. 48 para. 25.

²¹⁸ This objective perspective is generally decisive for determining reasonableness, Landgericht (District Court) Stade, 15 May 2014, 8 O 70/13, CISG-online 2988; Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 48 para. 9; Magnus, in *Staudinger BGB* (n. 32), Art. 48 para. 14; Schlechtriem/Schroeter (n. 87), para. 449 n. 260.

²¹⁹ For the opposing view see Salger, in Witz/Salger/Lorenz (n. 31), Art. 48 para. 3.

²²⁰ Cf. Honnold/Flechtner (n. 8), Art. 37 para. 247; Urs Gruber, in *Münchener Kommentar zum BGB* (n. 31), Art. 37 para. 14.

²²¹ See above paras. 3.36 et seq. and Oberlandesgericht (Court of Appeal) Hamm, 9 June 1995, 11 U 191/94, CISG-online 146; Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 48 para. 20.

seller,²²² disruption of production,²²³ or additional manpower is required on the side of the buyer. If the buyer raises the issue of insecurity of reimbursement of expenses, the seller may dismiss the buyer's argument by giving adequate assurance of reimbursement of the buyer's costs.²²⁴

dd) Application of Article 47(1) CISG

13. The buyer may fix an additional period of time of reasonable length for delivery of substitute goods or repair (Article 47(1) CISG). However, it is not obliged to do so. Subject to Article 77 CISG and the seller's right to cure under Article 48 CISG, the buyer may instead immediately have recourse to other remedies available, such as damages or reduction of the purchase price.

3.67 In line with the clear wording of Article 47(1) CISG,²²⁵ and the purpose of Article 47 CISG, to offer another possibility for the buyer to initiate cure, fixing a period of time and using Article 47(1) CISG cannot be mandatory.²²⁶ Under Article 47(1) CISG the buyer is “*acting for the [seller's] benefit, although not obliged to.*”²²⁷

3.68 Instead of fixing an additional period of time for the seller to perform, the buyer may immediately have recourse to other remedies. The circumstances may demand immediate repair or resale of the goods. Such circumstances may be a factor in determining whether it would be unreasonably inconvenient to the buyer for the seller to remedy its failure to perform.²²⁸ However, even if the seller's cure is not unreasonably inconvenient to the buyer, the question arises whether the buyer may resort to other remedies. The answer must be yes considering the wording and the drafting history of Article 48(1) CISG, the general system of Article 45(1) CISG and the fact that Article 77 CISG offers a fruitful alternative to completely barring other remedies.

3.69 Some scholars and case law²²⁹ deny the buyer's right to opt for other remedies, arguing that the buyer's remedies under Article 45 CISG do not arise as long as the seller “*has a right to cure*”,²³⁰ that the seller's right to cure is only limited by the buyer's right to avoid the

²²² Brunner/Akikol/Bürki, in Brunner/Gottlieb (n. 31), Art. 48 para. 7.

²²³ Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 48 para. 12.

²²⁴ Bridge, *Curing a Seller's Defective Tender or Delivery of Goods in Commercial Sales* (n. 125), 230. The adequate assurance would be the same as in Arts. 71(3), 72(2) CISG.

²²⁵ “*The buyer may fix an additional period of time*” emph. add. Thus, the *Secretariats Commentary*, Art. 43 para. 8 stresses that “[i]n particular, the procedure envisaged by article 43 (I) is not mandatory”.

²²⁶ Oberlandesgericht (Court of Appeal) Graz, 22 November 2012, 3 R 192/12y, CISG-online 2459;

Secretariat's Commentary (n. 11), Art. 43 para. 8.

²²⁷ *Official Records* (n. 10), 339 para. 4.

²²⁸ See above para. 3.64 and also *Secretariat's Commentary* (n. 11), Art. 44 para. 9.

²²⁹ E.g., Oberster Gerichtshof (Austrian Supreme Court), 14 January 2002, 7 Ob 301/01t, CISG-online 643.

²³⁰ Peter Huber/Markus Altenkirch, *Buyer's right to cure?*, 4 *European Review of Contract Law* (2008), 540, 544 et seq., see also Miquel Mirambell Fargas, *The Seller's Right to Cure under Article 48 CISG* (Den Haag 2018), 218.

contract,²³¹ or that Article 80 CISG bars such a claim.²³² However, neither the wording of Article 48(1) CISG nor its drafting history reflect such a limited understanding.

3.70 First, the wording of Article 48(1) CISG clarifies that cure is generally available even after the date of delivery. To this extent the provision accomplishes what Article 37 CISG lays down for the time before the delivery date.²³³ Additionally, the seller cannot cure when Article 49 CISG applies.²³⁴ The wording of Article 48(1) CISG is silent on any right of the buyer to cure²³⁵ and to make use of other remedies. Yet, under Article 48(1) sentence 2 CISG, the buyer retains any right to claim damages as provided for in the CISG. This right to request damages is not limited under Article 48(1) CISG.²³⁶ Especially, the limitations of Article 47(2) sentence 2 or Article 48(2) sentence 2 CISG do not apply, as the seller has no reason to rely on its second chance to perform in the situation of Article 48(1) CISG.²³⁷

3.71 Second, the drafting history demonstrates that Article 48(1) CISG relates to the differentiation with Article 49 CISG. In this regard, the delegates in Vienna denied that the seller's right to cure should prevail over the buyer's right to avoid the contract.²³⁸ One may conclude that the CISG is, thus, "*opposed to avoidance*"²³⁹ but this does not lead to the conclusion that the buyer may not resort to other remedies. Article 45(1) CISG offers the buyer the option to exercise the rights provided in Articles 46 to 52 CISG or to claim damages as provided in Articles 74 to 77 CISG, without any limitation of the buyer's right to request damages only after having requested cure from the seller.²⁴⁰ Delivery of non-conforming goods by the seller entitles the buyer to claim a sum equal to the loss suffered as a consequence of the breach. Neither does the CISG distinguish between damages in lieu of performance and simple damages nor does it require the buyer to set a *Nachfrist* before claiming damages in lieu of

²³¹ Marc-Philippe Weller/Charlotte S. Harms, *Der Primat der Nacherfüllung im Gemeinsamen Europäischen Kaufrecht*, Zeitschrift für das Privatrecht der Europäischen Union, 2012, 298, 300, relying on the wording of Art. 48(1) CISG.

²³² See in detail for an overview on this position and the first one Till Maier-Lohmann, *Buyer's self-repair of non-conforming goods versus seller's right to cure under Article 48 of the CISG*, 24 Uniform Law Review (2019), 59 et seq., who opposes both views.

²³³ Art. 37 sentence 1 CISG reads: „If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.“

²³⁴ Hereby, Art. 48(1) CISG clarifies that “[i]f the [goods] could be repaired within a few days, there was no fundamental breach”, as expressed by the delegation of the U.K. in the 1980 discussions in Vienna, *Official Records* (n. 10), 342 para. 44.

²³⁵ Honnold/Flechtner (n. 8), Art. 48 para. 296.1; to this extent in line with Magnus, in *Staudinger BGB* (n. 32), Art. 48 para. 35.

²³⁶ Till Maier-Lohmann, *Neuausrichtung der Selbstvornahme und des Art. 48 Abs. 1 CISG*, Internationales Handelsrecht 2018, 225, 228–229.

²³⁷ Maier-Lohmann, *Neuausrichtung der Selbstvornahme und des Art. 48 Abs. 1 CISG* (n. 237), 228–229.

²³⁸ *Official Records* (n. 10), 342 para. 64.

²³⁹ Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 The American Journal of Comparative Law (1983), 333, 334.

²⁴⁰ Till Maier-Lohmann, *Neuausrichtung der Selbstvornahme und des Art. 48 Abs. 1 CISG* (n. 237), 228. In this regard also Honnold/Flechtner (n. 8), Art. 48 para. 296.1, arguing that “punishing buyers by denying damages [...] would violate the mandate of Article 7(1) to interpret the Convention in a fashion that promotes good faith in international trade.”

performance.²⁴¹ Therefore, there is no reason to exclude the buyer from invoking other remedies although the seller has a right to cure under Article 48(1) CISG.

3.72 If the buyer unreasonably objects to the seller's offer to cure under Article 48(1) CISG, its claim for damages will be restricted by Article 77 CISG.²⁴² Applying Article 77 CISG²⁴³ in these circumstances balances the economic interests of both parties: If the seller is able to repair the goods at a lower price than the buyer or a third party, the buyer may not be compensated for incurred higher costs.²⁴⁴ In fact, the application of Article 77 CISG in the context of the delivery of substitute goods and repair was already proposed by the Secretariat's Commentary on the 1978 Draft Convention. The commentary suggested that alternatively to the remedies in Article 46 CISG, "*the buyer may find it more advantageous to remedy the defective performance himself or to have it remedied by a third party. Article [77], which requires the party who relies on a breach of contract to mitigate the loss, authorizes such measures to the extent that they are reasonable in the circumstances.*"²⁴⁵ If the seller was able to cure but the buyer immediately had recourse to other remedies, this possibility has to be assessed under Article 77 CISG.²⁴⁶ Cure remains a concession to the seller, whereas requiring performance a right to the buyer.²⁴⁷ Therefore, Article 77 limits the buyer's claim for damages in cases where the buyer's direct recourse to other remedies, e.g., self-repair,²⁴⁸ is unreasonable.

ee) Exclusion of other remedies

14. During a reasonable length of time fixed by the buyer under Article 47 CISG or by the seller under Article 48(2) CISG and expressly or implicitly accepted by the buyer, the buyer may not resort to any remedy inconsistent with cure.

3.73 Article 47(1) as well as Articles 48(2) and (3) CISG provide both parties with the opportunity to clarify any uncertainties regarding the performance of cure by setting a certain

²⁴¹ Peter Huber/Markus Altenkirch, *Buyer's right to cure?* (n. 231), 544. The authors conclude, however, the opposite, that the buyer's rights are limited by the seller's right to cure.

²⁴² Maier-Lohmann, *Buyer's self-repair of non-conforming goods versus seller's right to cure under Article 48 of the CISG* (n. 233), 66; Honnold/Flehtner (n. 8), Art. 48 para. 296.1.

²⁴³ It is questionable whether Art. 77 CISG is restricted to Art. 74 CISG or whether it may also apply to Art. 50 CISG to harmonize both solutions. The wording, the systematic position, and the drafting history of Art. 77 CISG hinder the direct application to Article 50 CISG, cf. *Secretariat's Commentary* (n. 11), Art. 73 para. 3; Witz, in Witz/Salger/Lorenz (n. 31), Art. 77 para. 3; Honnold/Flehtner (n. 8), Art. 77 para. 419.3. However, one may argue that the principle to mitigate damages laid down in Art. 77 CISG is a general principle of the CISG (Art. 7(2) CISG) and thus applies in comparable scenarios, cf. Huber, in *Münchener Kommentar zum BGB* (n. 31), Art. 77 para. 3; Schwenger, in *Schlechtriem & Schwenger* (n. 4), Art. 77 para. 4.

²⁴⁴ Maier-Lohmann, *Buyer's self-repair of non-conforming goods versus seller's right to cure under Article 48 of the CISG* (n. 233), 66. The buyer's claim for damages will be reduced in line with Art. 77 sentence 2.

²⁴⁵ *Secretariat's Commentary* (n. 11), Art. 42 para. 14.

²⁴⁶ Rechtbank (District Court) Gelderland, 7296250, 25 January 2019, CISG-online 4400; Rechtbank (District Court) Gelderland, 30 July 2014, C/05/250706 / HA ZA 13-630, CISG-online 2541; Maier-Lohmann *Buyer's self-repair of non-conforming goods versus seller's right to cure under Article 48 of the CISG* (n. 233), 70.

²⁴⁷ Cf., Bridge, *Curing a Seller's Defective Tender or Delivery of Goods in Commercial Sales* (n. 125), 231.

²⁴⁸ See in general on the issue of damages in case of self-repair Maier-Lohmann, *Buyer's self-repair of non-conforming goods versus seller's right to cure under Article 48 of the CISG* (n. 233), for a similar approach and Katarzyna Kryla-Cudna, *Damages for the Cost of Repair and the Seller's Right to Cure in International Sales Contracts*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521209 for the opposing approach.

period of time. These provisions govern the situation in which the seller, after being notified according to Article 39 CISG, offers cure (Articles 48(2) and (3) CISG) or does not react (Article 47(1) CISG). Under Article 47(1) CISG the buyer may fix an additional period of time of reasonable length for performance by the seller. Under Article 48(2) CISG the seller may request the buyer to make known whether it will accept cure within a specified period of time. According to Article 48(3) CISG, the seller's notice informing the buyer that it will perform within a specified period of time is assumed to include such a request. These provisions give legal effect to the communication between the parties in situations of cure.²⁴⁹ They seek to guarantee that during the respective periods of time the seller may cure without the buyer being able to resort to other remedies that would thwart the seller's right to cure. During these periods, the seller reasonably relies on its second chance to perform and, thus, needs some form of protection.

3.74 In practice, conflicts may arise between the two parties setting different periods of time: The buyer may first set a period under Article 47(1) CISG. As already mentioned, this period must be reasonable. What is reasonable must be determined on a case-by-case basis. Relevant criteria are *inter alia* the nature of the goods, the initial length of the period to deliver, and the location of both parties and the goods (especially whether shipment is necessary or not).²⁵⁰ With regard to non-conformity, the additional period of time must give the seller a realistic opportunity to deliver substitute goods or repair the defective goods.²⁵¹ If according to all these circumstances, the period is too short, it causes a reasonable period of time to commence.²⁵² Even if the seller does not react to the buyer setting this *Nachfrist* period, the buyer is bound to its declaration during this period or – if it is too short – during a period of reasonable length. However, if the seller simply rejects the buyer's request for performance of cure (under Article 47(1) CISG) without offering cure during an alternative period of time (under Article 48(2) CISG), the buyer is no longer bound and may immediately resort to the remedies being otherwise available.²⁵³ First, in case of fundamentality of the non-conformity, these remedies could be avoidance or claim for damages calculated on the basis of a cover purchase. Second, and in all other cases, the buyer may request a reduction of the purchase price or damages for the reduced value of the goods – the latter may be calculated on the basis of repair by a third party. However, if the seller, in turn, offers cure suggesting a longer period of time than the buyer's period under Article 47(1) CISG (constituting a request under Article 48(2) CISG), it is now again the buyer's turn to react within a reasonable time²⁵⁴ to this counter-proposal. If the buyer rejects the seller's offer to cure within the specified period, the seller must perform cure within the reasonable time originally set by the buyer (under

²⁴⁹ Honnold/Flehtner (n. 8), Art. 48 para. 297. An example where insufficient communication hindered seller's right to cure is Landgericht (District Court) Regensburg, 17 December 1998, 6 O 107/98, CISG-online 514.

²⁵⁰ Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 47 para. 10.

²⁵¹ Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 47 para. 6.

²⁵² Kantonsgericht (Court of First Instance) Zug, 14 December 2009, A2 2001 105, CISG-online 2026; Oberlandesgericht (Court of Appeal) Naumburg, 27 April 1999, 9 U 146/98, CISG-online 512; Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 47 para. 8.

²⁵³ The seller does not rely on its second chance to perform anymore and, thus, does not need any protection.

²⁵⁴ This period must be shorter than the period to cure itself, cf. Huber, in Kröll/Mistelis/Perales Viscasillas (n. 5), Art. 48 para. 32.

Article 47(1) CISG).²⁵⁵ However, if the buyer does not react to the seller's request under Article 48(2) CISG, it may not, during that period, "*resort to any remedy which is inconsistent with performance by the seller*".²⁵⁶

3.75 Article 48(2) CISG also governs cases where the buyer did not set any additional period of time under Article 47(1) CISG.²⁵⁷ If the buyer, in that situation, does not comply with the seller's request within a reasonable time, the seller may perform within the time indicated in its request.²⁵⁸ If the buyer, however, objects, the seller may still perform within the time that is deemed to be reasonable under Article 48(1) CISG. A conflict between Articles 47(1) and 48(1) CISG does not arise since the buyer itself did not set a *Nachfrist*. The buyer, in turn, may shorten this period by fixing itself an additional period of time of reasonable length under Article 47(1) CISG.

²⁵⁵ Otherwise, the seller could circumvent the buyer's proposed reasonable period of time in Art. 47(1) CISG.

²⁵⁶ Art. 48(2) sentence 2 CISG.

²⁵⁷ For example, Handelsgericht (Commercial Court) Aargau, 5 November 2002, OR.2001.00029, CISG-online 715.

²⁵⁸ The purpose of Art. 48(2) CISG is to protect the seller, Müller-Chen, in *Schlechtriem & Schwenzler* (n. 4), Art. 48 para. 24.

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