

# Aufsätze

## Replacement and Repair of Non-Conforming Goods under the CISG

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### I. Introduction

In practice, non-conformity of goods is the most prevalent case of seller's breach of contract. This is especially true as under Article 35 CISG the notion of non-conformity 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 Article 35 CISG.<sup>1</sup>

There are different possibilities to remedy the non-conformity.

First and foremost, the parties may contractually provide remedies in case of non-conformity of the goods. In order to apply the contractual remedies the parties' contract must be interpreted according to Articles 8 and 9 CISG whereby trade usages play an important role. The CISG provisions with regard to remedies are non-mandatory.<sup>2</sup> The parties may derogate from these default provisions according to Article 6 CISG. Such derogation of the CISG may be made explicitly or implicitly.<sup>3</sup> The CISG Advisory Council (CISG-AC) Opinion No. 16 recommends "express" form only for the "Exclusion of the CISG under Art. 6" but not for mere derogation from certain provisions of the CISG as the title itself emphasizes. Originally, the CISG-AC intended to address both exclusion and derogation, but then decided to only deal with "exclusion" since the prerequisites for derogation differ considerably in being much lower than those necessary for an entire exclusion of the CISG. Thus, merely providing for different remedies or for different prerequisites may constitute a derogation and can trump the CISG provisions.

If the parties have not provided for otherwise, the default remedies of the CISG apply. These provisions are subject to constant confusion and debate.<sup>4</sup> This does not only apply to the academic level, but also in practice.<sup>5</sup> The remedies for non-conformity differ from those for other breaches due to several specificities.

The first distinction must be made with regard to the remedy of avoidance. Under Article 49(1)(a) CISG the buyer may declare the contract avoided if the seller's breach amounts to a fundamental breach of the contract. Under Article 49(1)(b) CISG avoidance is possible in case of non-delivery if the seller did not deliver the goods within an additional period of time fixed by the buyer (principle of *Nachfrist*).<sup>6</sup> This possibility to convert an originally non-fundamental breach into a fundamental one by fixing a *Nachfrist* in case of non-delivery is not given in case of

<sup>1</sup> CISG-AC Opinion No. 5, *The buyer's right to avoid the contract in case of non-conforming goods or documents*, 7.5.2005, Badenweiler (Germany). Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M., Professor (em.) of Private Law, IHR 2006, 35 *et seq.*, also in Schwenzer, Ingeborg (ed.) *The CISG Advisory Council Opinions* (Den Haag 2017), 101, 110–112 para. 4.7 *et seq.*, and available at <http://www.cisgac.com/cisgac-opinion-no5>.

<sup>2</sup> Cf. Schwenzer, Ingeborg/Hachem, Pascal, in Schlechtriem, Peter/Schwenzer, Ingeborg (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed., Oxford 2016), Art. 6 para. 28; see also S. Eiselen, *Adopting the Vienna Sales Convention: Reflections Eight Years down the Line*, 19 South African Mercantile Law Journal (2007) 14, 17 *et seq.*

<sup>3</sup> Schwenzer/Hachem, in Schlechtriem/Schwenzer (n. 2) Art. 6 para. 3; Mistelis, Loukas, in Kröll, Stefan/Mistelis, Loukas/Perales Viscasillas, Pilar (eds.), *UN-Convention on the International Sales of Goods (CISG)* (München 2011), Art. 6 para. 14.

<sup>4</sup> See in general, Fountoulakis, Christiana, *Remedies for breach of contract under the United Nations Convention on the International Sale of Goods*, ERA Forum (2011) 12: 7–23; Singh, Lachmi/Leisinger, Benjamin, *A Law for International Sale of Goods: A Reply to Michael Bridge*, 20 Pace International Law Review (2008) 161, 163 *et seq.*; Schlechtriem, Peter, *Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-conformity of the Goods*, 18 Pace International Law Review (2006) 83; Kimbel, Ericson, *Nachfrist Notice and Avoidance Under the CISG*, 18 Journal of Law and Commerce (1998–1999) 301.

<sup>5</sup> For example Landgericht (LG) Zweibrücken, 19.3.2010, CISG-online 2794 on the question of damages for repair by the buyer itself (followed by Oberlandesgericht (OLG) Zweibrücken 29.10.2012, CISG-online 2696 and Bundesgerichtshof (BGH) 24.9.2014, IHR 2015, 8 = CISG-online 2545).

<sup>6</sup> According to the principle of *Nachfrist*, the additional final period of reasonable length "makes this period of time of the essence", Honnold, John O./Flechtnner, Harry, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th ed., Alphen aan den Rijn 2009), Art. 49 para. 305.

non-conformity of the goods.<sup>7</sup> In case of Article 49(1)(a) CISG it is not enough that the non-conformity in itself amounts to a fundamental breach. In addition, time must be of the essence. If time is not of the essence, even a fundamental non-conformity can be cured either by replacement or repair. Hence, fundamentality related to non-conformity of the goods in the sense of Article 49(1)(a) CISG generally is twofold: on the one hand, the non-conformity itself must amount to a fundamental breach of contract, and on the other hand, time must be of the essence.<sup>8</sup> Only in case of specific goods it might be conceivable that a fundamental breach exists already before time is of the essence, namely where the defect cannot be remedied.<sup>9</sup>

In addition to the remedies available for any breach of contract, *i.e.* damages, and avoidance in case of fundamental breach, there are some specific remedies in case of non-conforming goods: namely reduction of the purchase price (Article 50 CISG), and the remedy of specific performance in form of replacement and repair (Articles 46(2), (3) CISG).<sup>10</sup> There are considerable differences between the general right to require specific performance under Article 46(1) CISG, and the right to require replacement and repair under Articles 46(2), (3) CISG. On the one hand, the right to require replacement and repair is limited by setting up special prerequisites (fundamentality for the first, and reasonableness for the latter). On the other hand, replacement and repair have a broader scope of application than the general right of specific performance. The general right to require specific performance is subject to Article 28 CISG, *i.e.* a court is not bound to enter such a judgement unless it would do so under its own law in respect of similar contracts of sale not governed by the CISG. Although the wording of Article 28 CISG might suggest otherwise, Articles 46(2), (3) CISG must be regarded as *leges speciales* “qualifying the general provision of Article 28 CISG”.<sup>11</sup> 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”.<sup>12</sup>

In the following, further specificities of the buyer’s right to cure under Articles 46(2), (3) CISG and the seller’s right to cure under Article 48 CISG will be discussed.

## II. Right to replacement, Article 46(2) CISG

According to Article 46(2) CISG, the buyer may require the delivery of substitute goods if the lack of conformity constitutes a fundamental breach of contract.

### 1. Scope of application

Article 46(2) CISG refers to the notion of non-conformity, specified in Article 35(1) CISG. This means that cases of third party rights (Article 41 CISG) as well as of third party industrial or intellectual property rights (Article 42 CISG) are not subject to Article 46(2) CISG. Rather, the buyer may rely on Article 46(1) CISG, the general right to specific performance, in case of such a breach of contract.<sup>13</sup>

The delivery of substitute goods may only be considered in cases of defects in quality<sup>14</sup> and where goods of a different kind have been delivered.<sup>15</sup> This is of practical importance almost exclusively with regard to generic goods. If the sales contract relates to an identified object, delivery of a substitute object usually cannot be expected from the seller.<sup>16</sup>

With regard to defects in quantity one must distinguish: as far as the defect in quantity is a partial non-delivery, for example instead of 100 units only 90 units are delivered Article 51 CISG applies,<sup>17</sup> not Article 46(2) CISG. Under Article 51(1) CISG, the buyer can exercise its remedies only in respect to the missing part. In such a case “replacement” is not conceivable. Rather, the buyer may rely on the unrestricted right of specific performance under Article 46(1) CISG.<sup>18</sup> If the delivered goods do not conform with the contract as regards their size or weight, for example the weight of a square metre of the goods is less than agreed upon,<sup>19</sup>

<sup>7</sup> Otherwise, the principles of *favor contractus* and avoidance being a remedy of last resort would not be adhered to. For more details on the limitation of Art. 49(1)(b) CISG to late delivery see 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), 354–356.

<sup>8</sup> This twofold character is not equivalent to Art. 43 ULIS (requiring that “the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract”). See *infra* at V.1.

<sup>9</sup> Müller-Chen, Markus, in Schlechtriem/Schwenzer (n. 2), Art. 49 para. 5.

<sup>10</sup> Also Art. 37 CISG foresees the possibility to remedy non-conforming goods. However, this provision only applies before the date of delivery.

<sup>11</sup> Honnold/Flechtner (n. 6) Art. 46 para. 285.1. For the opposing view that is found primarily among German authors see Huber, Peter, in Säcker, Franz J./Rixecker, Roland/Oetker, Hartmut/Limperg, Bettina (eds.), *Münchener Kommentar zum BGB, Band 3* (7th ed., München 2016), Art. 46 para. 37; Salger, Hanns-Christian, in Witz, Wolfgang/Salger, Hanns-Christian/Lorenz, Manuel, *International Einheitliches Kaufrecht* (2nd ed., Frankfurt 2016), Art. 46 para. 1; Magnus, Ulrich, in Staudinger, Julius von, *Staudinger BGB* (Berlin 2013), Art. 46 paras. 31, 64, with the possible justification that all paragraphs of Art. 46 CISG are part of the general right to request specific performance. See also *idem* Art. 46 para. 2. However, Arts. 46(2),(3) CISG foresee additional prerequisites and are hence not identical to the general right to request specific performance. Further, Magnus’ argument ignores the interplay of Arts. 46(2), (3) CISG and the seller’s right to cure under Art. 48 CISG which is not restricted by Art. 28 CISG. Some sellers would be privileged to not be faced with a buyer who has rights under Arts. 46(2), (3) CISG. The harmony of Arts. 46(2), (3) and Art. 48 CISG, balancing buyer’s and seller’s interests, would be disturbed.

<sup>12</sup> Honnold/Flechtner (n. 6) Art. 46 para. 285.1.

<sup>13</sup> Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 46 para. 22; Huber, Peter in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 46 para. 7.

<sup>14</sup> Schlechtriem, Peter/Schroeter, Ulrich, *Internationales UN-Kaufrecht* (6th ed., Tübingen 2016), para. 455.

<sup>15</sup> Schnyder, Anton K./Straub, Ralf M., in Honsell, Heinrich (ed.), *Kommentar zum UN-Kaufrecht* (2nd ed., Berlin 2010), Art. 46 para. 18.

<sup>16</sup> 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 (n. 11) Art. 46 para. 34, and where the parties concluded a new contract, Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 46 para. 37.

<sup>17</sup> Honnold/Flechtner (n. 6) Art. 46 para. 283; Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 46 para. 8; Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 51 para. 2.

<sup>18</sup> Huber, Peter, in Huber, Peter/Mullis, Alastair, *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 CIETAC Arbitration, 18.9.2006, CISG-online 2053.

or timber is shorter than required under the contract, this amounts to a defect in quality, rather than a defect in quantity.<sup>20</sup>

Likewise, a defect in packaging in itself will not give rise to a right to replacement. 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.<sup>21</sup> If the packaging simply serves to protect the goods during the transport from the seller to the buyer, it depends whether the goods have been affected by the defect in packaging.<sup>22</sup> If the answer is no, there are no remedies whatsoever.<sup>23</sup> If, however, the goods have been damaged or destroyed due to the defect in packaging, this again amounts to a defect in quality which may entail the right to delivery of substitute goods.<sup>24</sup>

## 2. Fundamental breach

Unlike Article 46(1) CISG, the right to replacement 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 buyer's right to avoid the contract.<sup>25</sup> Although this reasoning might not be compelling in the case of an "EXW" contract,<sup>26</sup> a fundamental breach is also required in these cases.<sup>27</sup>

Generally, a breach is fundamental under Article 25 CISG if the breach results in such detriment to the buyer as substantially to deprive it 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. Whether or not a contractual agreement is of the essence is a matter of interpretation under Article 8 CISG.<sup>28</sup> If the interpretation does not clarify what amounts to a fundamental breach according to the contract, the purpose of the sale becomes relevant. A buyer who wants to use the goods itself is not interested in reselling. Hence, in the usual case, it cannot be decisive whether the goods could be resold.<sup>29</sup> Instead, the decisive factor entails whether the goods are improper for the use intended by the buyer.<sup>30</sup> A buyer who is in the resale business is interested in reselling the goods. Thus, resaleability becomes relevant.<sup>31</sup> To what extent the resaleability or non-resaleability causes a fundamental breach is a case by case decision. 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".<sup>32</sup>

In general, if the goods are usable, there is no fundamental breach.<sup>33</sup> The buyer is restricted to the remedies of repair (Article 46(3) CISG),<sup>34</sup> damages (Article 74 CISG) or reduction of the purchase price (Article 50 CISG).<sup>35</sup> Even if repair is not possible but the goods are still usable, there is not necessarily a fundamental breach.<sup>36</sup>

In cases where the non-conforming goods can be remedied by repair, be it by the seller, the buyer or a third person, there is not yet a fundamental breach.<sup>37</sup> Again, the buyer is restricted to damages and reduction of the purchase price. Nevertheless, where timely delivery of conforming goods is of the essence of the contract the mere possibility of repair does not hinder the fundamentality of the breach. With regard to Article 46(2) CISG

this scenario is of less importance as if time is of the essence the buyer will usually not request replacement of the goods.<sup>38</sup>

## III. Right to Repair, Article 46(3) CISG

Alternatively to the right to require replacement or where the latter's pre-condition of a fundamental breach is not present, 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".<sup>39</sup>

The question of reasonableness has to be decided on a case by case basis.<sup>40</sup> The interests of the buyer have to be balanced against the interests of the seller.<sup>41</sup> Cases of unreasonableness occur first,

<sup>19</sup> Magnus, in Staudinger (n. 11) Art. 46 para. 35 *et seq.* However, Magnus qualifies this example as a defect in quantity.

<sup>20</sup> See for example ICC Arbitration, June 1999, CISG-online 705.

<sup>21</sup> It is a matter of quality since the physical condition of the goods is not as agreed upon. See Cour de cassation civ 1ère, 23.1.1996, CISG-online 159; LG Aachen, 3.4.1990, CISG-online 12. In general, Schwenzer, in Schlechtriem/Schwenzer (n. 2) Art. 35 para. 9 for the definition of "quality".

<sup>22</sup> Schwenzer, in Schlechtriem/Schwenzer (n. 2) Art. 35 para. 33; see for example Wuhan Economic and Technology Development Zone People's Court, 30.6.2000, CISG-online 2028.

<sup>23</sup> Kröll, Stefan in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 35 para. 35.

<sup>24</sup> Cf. Kröll, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 35 para. 144.

<sup>25</sup> Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 46 para. 33; UNCITRAL, *Digest of Case Law on the CISG* (2016), Art. 46 para. 3, "avoidance of the contract should be available only as a last resort".

<sup>26</sup> *I.e.* where there has been no transport of the goods.

<sup>27</sup> Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 46 para. 34; CISG-AC No. 5 (I. Schwenzer) (n. 1) para. 4.6.

<sup>28</sup> According to Schroeter, it is common to explicitly define certain obligations as 'fundamental' or 'essential' in contracting practice, see Schroeter, Ulrich, in Schlechtriem/Schwenzer (n. 2) 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 aluminium to be of a certain thickness and soy protein to not be genetically modified, see CISG-AC Opinion No. 5 (I. Schwenzer) (n. 1) para. 4.2 with further reference.

<sup>29</sup> CISG-AC Opinion No. 5 (I. Schwenzer) (n. 1) para. 4.3.

<sup>30</sup> It may, however, be important whether the buyer is able to use the goods differently without unreasonable expenditures, see CISG-AC Opinion No. 5 (I. Schwenzer) (n. 1) para. 4.3 n. 34; UNCITRAL (n. 25) Art. 25 para. 8.

<sup>31</sup> For example, Kantonsgericht (KGer) Schaffhausen, 27.1.2004, CISG-online 960.

<sup>32</sup> CISG-AC Opinion No. 5 (I. Schwenzer) (n. 1) para. 4.3.

<sup>33</sup> UNCITRAL (n. 25) Art. 46 para. 13. The line should be drawn where the use would be an unreasonable burden, see Schroeter, in Schlechtriem/Schwenzer (n. 2) Art. 25 para. 54.

<sup>34</sup> See for example, LG Stade, 16.4.2015, IHR 2017, 20 = CISG-online 2668.

<sup>35</sup> For example, Amtsgericht (AGer) Luzern-Land, 21.9.2004, CISG-online 963; Federal Arbitration Court of North Caucasus Area, Krasnodor, 3.10.2011, CISG-online 2518, where the court did not discuss the fundamentality of the breach.

<sup>36</sup> BGH, 3.4.1996, CISG-online 135; KGer Zug, 30.8.2007, CISG-online 1722.

<sup>37</sup> CISG-AC Opinion No. 5 (I. Schwenzer) (n. 1) para. 4.4 n. 41; Schroeter, in Schlechtriem/Schwenzer (n. 2) Art. 25 para. 50. In light of Art. 48 CISG the OLG Koblenz decided that the seller's willingness to cure the defect is also decisive when determining whether a breach is fundamental or not, OLG Koblenz, 31.1.1997, IHR 2003, 172 = CISG-online 256. See also UNCITRAL (n. 25) Art. 46 para. 14.

<sup>38</sup> See *infra* at V.1. on Art. 48(1) CISG.

<sup>39</sup> Art. 46(3). For an overview of the decisive factors for reasonableness cf. Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 46 para. 40.

<sup>40</sup> Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 46 para. 46.

<sup>41</sup> Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 46 para. 40.

if repair is impossible,<sup>42</sup> second, if the seller is not in a position to repair the goods because it is not the manufacturer of the goods, does not maintain repair services itself, or does not have access to third parties being able to repair the goods<sup>43</sup> and third, if repair by the buyer itself or a third party is less expensive than repair by the seller.<sup>44</sup>

In addition, the principle of mitigation, as it is laid down in Article 77 CISG, must be relied upon to define reasonableness in the sense of Article 46(3) CISG.<sup>45</sup> 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.<sup>46</sup> In order to illustrate this issue, regard must be given to possible alternatives the buyer is faced within the scenario of Article 46(3) CISG. If a cover purchase is less expensive than repairing the non-conforming goods, the buyer may be obliged to perform such a cover purchase. It may then claim the costs of the cover purchase as damages due to mitigation measures, regardless of whether the non-conformity amounts to a fundamental breach or not. If the goods are usable as initially intended, but still may fail at some point in the future,<sup>47</sup> the principle of mitigation may require the buyer to postpone any action until the actual failure of the goods occurs. 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, or no loss at all? At least in the latter case repair before failure of the goods appears to be unreasonable.

At last, the general principles of calculation of damages have to be considered in determining reasonableness under Article 46(3) CISG.<sup>48</sup> The famous English Ruxley case<sup>49</sup> may serve as an example. There, damages were denied for the costs of curing a defect in a building contract; instead damages for loss of “amenity” were granted. The debtor was meant to build a seven-foot six-inch deep pool but it was built to only six feet. It was found that the pool was safe for diving and anyway the obligee never intended to put in a diving board. Hence, curing the defect would not have been reasonable.<sup>50</sup> The influence of the principles of calculation of damages for determining reasonableness under Article 46(3) CISG certainly varies from case to case. However, it is important to recognize that these principles generally serve as an additional argument besides others.

#### IV. Timely Request for Replacement or Repair

Under Articles 46(2), (3) sent. 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. In cases where 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), (3) sent. 2 CISG commences when notice of non-conformity should have been given.<sup>51</sup>

In determining the length of such a reasonable time the interests of both the seller and the buyer, must be taken into account. On the one hand, the buyer must be given enough time to decide

which remedy to pursue and to act accordingly.<sup>52</sup> On the other hand, the seller's interest in legal certainty must be taken into account.<sup>53</sup> 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.<sup>54</sup> Just like in determining the reasonable time under Article 39 CISG, much will depend on the circumstances of the individual case,<sup>55</sup> such as the nature of the goods, the market in question etc.

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.* damages, price reduction and avoidance for fundamental breach.<sup>56</sup>

<sup>42</sup> Cf. AG Landsberg am Lech, 21.6.2006, IHR 2008, 27 = 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.

<sup>43</sup> See for example, the seller's allegations in CIETAC Arbitration, 21.10.2002, CISG-online 1557, although the seller could not succeed with its submission. Cf. also Huber, in Kröll/Mistel/Perales Viscasillas (n. 3) Art. 46 para. 48.

<sup>44</sup> However, the mere fact that repair by the seller is costly does not render repair unreasonable, see KGer Schaffhausen, 27.1.2004, CISG-online 960. The correlation of the costs of repair with the purchase price is disputed, see Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 46 para. 40 n. 109 for both views.

<sup>45</sup> The question whether Art. 77 CISG can be applied to the remedy of specific performance in general, or whether due to systematic considerations it must be confined to damages must not be decided here.

<sup>46</sup> The same applies where the buyer repaired the goods itself and claims damages for compensating the costs of repair. See BGH, 24.9.2014, IHR 2015, 8 = CISG-online 2545; OLG Graz, 22.11.2012, CISG-online 2459; Ad hoc Arbitration, 10.11.2010, CISG-online 2154; Honnold/Flechtner (n. 6) para. 296.1.

<sup>47</sup> 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.

<sup>48</sup> 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, IHR 2007, 250 et seq., also in Schwenzer (ed.), *The CISG Advisory Council Opinions* (Den Haag 2017), 125 et seq., also available at <http://www.cisgac.com/cisgac-opinion-no6/>.

<sup>49</sup> *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.

<sup>50</sup> Cure 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 Schwenzer, Ingeborg/Hachem, Pascal, *The Scope of the CISG Provisions on Damages*, in Saidov, Djokhongir/Cunnington, Ralph (eds.), *Contract Damages: Domestic and International Perspectives* (London 2008), 91, 96.

<sup>51</sup> Hachem, Pascal, *Verjährungs- und Verwirkungsfragen bei CISG-Verträgen*, Internationales Handelsrecht (IHR) 2017, 1, 3 et seq.

<sup>52</sup> In this regard the parties may need some time to negotiate the possibilities. See for example Cour d'appel Colmar, 24.10.2000, CISG-online 578.

<sup>53</sup> Cf. Schlechtriem (n. 4) 18 Pace International Law Review (2006) 83, 93 on the purpose of time limits in Arts. 46(2), (3) and Art. 49(2)(b) CISG.

<sup>54</sup> This applies to both Arts. 46(2) and (3) s. 2 CISG since the wording of both provisions is identical and both serve the purpose of legal certainty. See also Huber, in Kröll/Mistel/Perales Viscasillas (n. 3) Art. 46 paras. 36, 50; Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 46 paras. 33, 43; Salger, in Witz/Salger/Lorenz (n. 11) Art. 46 para. 7.

<sup>55</sup> Hachem (n. 51) IHR 2017, 1, 4.

<sup>56</sup> The buyer loses the right to claim substitute delivery or repair, Handelsgericht (HGer) Zürich, 17.9.2014, CISG-online 2656.

Therefore, in case of non-conformity of the goods the following usual sequence of time periods results:<sup>57</sup> 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 substitute goods or repair within a reasonable time (Articles 46(2), (3) sent. 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).<sup>58</sup>

## V. Seller's Right to Cure, Article 48 CISG

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 raises serious co-ordination issues regarding the buyer's right to avoid the contract under Article 49 CISG and the buyer's right to request delivery of substitute goods or repair under Articles 46(2), (3) CISG.

### 1. Reservation

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. This provision has proven to be highly controversial in scholarly writing.<sup>59</sup> However, the friction between the seller's right to cure and the buyer's right to avoid the contract mainly depends on the definition of a fundamental breach.<sup>60</sup> 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 proves to be fruitless. In the end, the buyer may only avoid the contract if: first, the non-conformity in itself amounts to a fundamental breach, and, second, time is of the essence,<sup>61</sup> or the seller does not cure within the time limit set by the buyer according to Article 47(1) CISG,<sup>62</sup> or its own time limit indicated according to Article 48(2) CISG.<sup>63</sup> This leads to the conclusion that, where time is not of the essence, seller's right to cure, if properly performed, trumps buyer's right to avoid the contract for non-conformity of the goods.<sup>64</sup>

Further, these two requirements for avoidance, *i.e.* a fundamental breach and time being of the essence, provide an answer to the linked question whether Article 48(1) CISG is excluded by the mere existence of a fundamental breach.<sup>65</sup> The answer must be no with regard to a "simple" fundamental breach, *i.e.* a breach simply relating to the non-conformity. Only if additionally, time is of the essence,<sup>66</sup> the buyer may declare avoidance.<sup>67</sup> First, this second requirement guarantees the application of Article 48(1) CISG. Without this requirement, seller's right to cure could be "nullified" by an "unqualified application of Art[icle] 49(1) [CISG]".<sup>68</sup> Second, this requirement safeguards an equal treatment of seller and buyer and balances their interests. Both parties' interest is to fulfil the contract. Unless time is not of the essence, there is no reason to shorten the seller's right to cure in Article 48 CISG.<sup>69</sup>

## 2. Manner of Cure

In 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 replacement where the non-conformity amounts to a fundamental breach of contract, especially where repair of the goods is not possible.<sup>70</sup> The latter may be required by

<sup>57</sup> 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.

<sup>58</sup> Hachem (n. 51) IHR 2017, 1, 6. It is, however, possible to make an anticipatory declaration of avoidance together with the request to repair, see for example KGer Schaffhausen, 24.1.2004, CISG-online 960. Generally, the declaration of avoidance can be combined with a notice of lack of conformity or with an additional period of time for performance, Fountoulakis, Christiana, in Schlechtriem/Schwenzer (n. 2) Art. 26 para. 8, with further case references.

<sup>59</sup> Bridge, Michael, *International Sale of Goods*, (3rd ed., Oxford 2013) para. 12.28; Bridge, Michael, *Avoidance for Fundamental Breach*, 59 *International and Comparative Law Quarterly* (2010) 911, 928 *et seq*; Magnus, Ulrich, *Aufhebungsrecht des Käufers und Nacherfüllungsrecht des Verkäufers im UN-Kaufrecht*, in Schwenzer, Ingeborg/Hager, Günter (eds.), *Festschrift für Peter Schlechtriem* (Tübingen 2003), 599, 602 *et seq*; Magnus, in Staudinger (n. 11) Art. 48 para. 18 *et seq*; Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 48 para. 14 *et seq*; Faust, Florian, *Specific Performance*, in Schwenzer, Ingeborg/Atamer, Yeşim/Butler, Petra (eds.), *Current Issues in the CISG and Arbitration* (Den Haag 2014), 235, 242 *et seq*.

<sup>60</sup> Schroeter, in Schlechtriem/Schwenzer (n. 2) Art. 25 para. 47 *et seq*; Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 48 para. 18; Mirambell Fargas, Miquel dels Sants, *The Seller's Right to Cure Under Article 48 United Nations Convention on Contracts for the International Sale of Goods* (Barcelona 2017), 14, 154.

<sup>61</sup> In this direction also KGer Aargau, 5.11.2002, CISG-online 715; Huber, Peter, *Typically German? – Two Contentious German Contributions to the CISG*, *Annals of the Faculty of Law in Belgrade – International Edition* (2011) 150, 154 *et seq*.

<sup>62</sup> This, however, only in case of non-delivery, see Art. 49(1)(b) CISG.

<sup>63</sup> The latter time limit must be in accordance with the reasonable time under Art. 49(2)(b)(i) CISG. In practice, Art. 49(2)(b)(i) CISG might primarily apply to cases where time is of the essence. For the failure to comply with an additional time limit, see AG München, 23.6.1994, CISG-online 386. Additionally, in this case time was of the essence.

<sup>64</sup> For a different conclusion see Bridge, *International Sale of Goods*, (n. 59) para. 12.24, although Bridge does not differentiate between non-conformity and time of the essence regarding fundamental breach. Bridge argues that seller's cure does not need to be a perfect one and should, hence, be trumped by buyer's right to demand cure.

<sup>65</sup> On this question cf. Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 48 para. 17; Faust (n. 59) 235, 242. Another way to draft this question is whether fundamentality of the breach depends on the seller's failure to perform under Art. 48 CISG, cf. Karollus, Martin, *UN-Kaufrecht: Vertragsaufhebung und Nacherfüllungsrecht bei Lieferung mangelhafter Ware*, *Zeitschrift für Wirtschaftsrecht* (ZIP) 1993, 490, 491.

<sup>66</sup> 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.

<sup>67</sup> An alternative solution to the question whether to exclude Art. 48(1) CISG in case of a fundamental breach is the dependence on the sequence of declarations (of Arts. 48 and 49 CISG), cf. Huber, in Säcker/Rixecker/Oetker/Limberg (n. 11) Art. 48 para. 10. This, however, would lead to an unpractical race between seller and buyer without balancing their interests.

<sup>68</sup> Honnold/Flechtner (n. 6) Art. 48 para. 296 n. 5.

<sup>69</sup> This leads to a general equal treatment of non-conformity and non-delivery (where the seller has the possibility to deliver within the time set in accordance of Art. 47 CISG). This equal treatment is in conformity with the system of remedies under the CISG, although they have their specificities, Karollus (n. 65) ZIP 1993, 490, 492 *et seq*.

<sup>70</sup> See *supra* at II.2.

the buyer, subject to reasonableness. However, the seller generally has the choice between offering delivery of substitute goods and repair if both are possible.<sup>71</sup>

In practice, this means that if the buyer requires the delivery of substitute goods, implying that repair is not possible, the seller must act in accordance with the buyer's request. However, if the buyer requires repair, the seller may respond by offering delivery of substitute goods instead. The aim of limiting the buyer's right to require replacement protects the seller.<sup>72</sup> If the seller itself prefers replacement to repair and replacement is possible within the limits of Article 48(1) CISG, it is usually not to the detriment of the buyer.<sup>73</sup> Rather, the buyer benefits from this manner of cure.

### 3. Reasonableness of Cure

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".

#### a) Unreasonable Delay

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)".<sup>74</sup> However, this approach disregards the different functions of these two periods. Article 47(1) CISG seeks to protect the seller in being granted enough time to perform its obligations.<sup>75</sup> To the contrary, Article 48(1) CISG protects the buyer; how long can the buyer reasonably be expected to accept cure through 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. 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.<sup>76</sup> 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.<sup>77</sup> Thereby, the individual circumstances of the case must be taken into account;<sup>78</sup> 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 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 which it must deliver itself 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.

#### b) Unreasonable Inconvenience

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.<sup>79</sup> Cases of "unreasonable inconvenience" refer especially to where repair causes suspension or disruption of buyer's production,<sup>80</sup> buyer's customers are threat-

ening with actions for damages,<sup>81</sup> or obviously unprofessional actions by the seller lead to several attempts of subsequent performance.<sup>82</sup> Most importantly, unreasonable inconvenience can be found where the buyer has lost trust in the seller's ability or willingness to cure.<sup>83</sup> However, the loss of trust must be reasonable in itself.<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup> Likewise, the unsuccessful attempt of the first action by the seller itself does not lead to unreasonableness.<sup>87</sup>

<sup>71</sup> Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 48 para. 6; Faust (n. 59) 235, 241. See in general Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 46 para. 42, Art. 48 para. 25 *et seq.*

<sup>72</sup> The requirement of a fundamental breach in Art. 46(2) CISG and the high threshold to approve a fundamental breach enable the protection.

<sup>73</sup> If the manner of cure leads to a detriment for the buyer, it might be considered as an unreasonable inconvenience under Art. 48(1) CISG.

<sup>74</sup> Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 48 para. 10. See also Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 48 para. 9; Benicke, Christoph, in Schmidt, Karsten (ed.), *Münchener Kommentar zum HGB, Band 5* (3rd ed., München 2013), Art. 48 para. 7.

<sup>75</sup> Akikol, Diana/Bürki, Lucien, in Brunner, Christoph (ed.), *UN-Kaufrecht – CISG* (2nd ed., Bern 2014), Art. 47 para. 1.

<sup>76</sup> Cf. AG München, 23.6.1995, 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. See also Mirambell Fargas (n. 60) 157 *et seq.*

<sup>77</sup> The delay is usually unreasonable if it amounts to a fundamental breach, HGer Zürich, 10.2.1999, CISG-online 488; Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 48 para. 9. The fact that the draft wording of Art. 48 (*i.e.* Art. 44) foresaw the delay amounting to a fundamental breach had been changed does not exclude either statements. The draft wording of Art. 48 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 of the United Nations Conference on Contracts for the International Sale of Goods (n. 7) 351 para. 9.

<sup>78</sup> The circumstances of each individual case are relevant for all three alternatives of reasonableness in Art. 48, Will, Michael, in Bianca, Cesare M./Bonell, Michael J. (eds.), *Commentary on the International Sales Law* (Milan 1987), Art. 48 para. 2. I. 1.1.2.

<sup>79</sup> Huber, in Säcker/Rixecker/Oetker/Limberg (n. 11) Art. 48 para. 7.

<sup>80</sup> Honnold, John O., *Uniform Law for International Sales* (2nd ed., Alphen aan den Rijn 1991), Art. 37 para. 245.

<sup>81</sup> AG München, 23.6.1995, CISG-online 368.

<sup>82</sup> BGH, 24.9.2014, IHR 2015, 8 = CISG-online 2545; Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 48 para. 11, with further references; Benicke, in Schmidt (n. 74) Art. 48 para. 6. Further, "unreasonable inconvenience" can be found where the seller made an inadequate offer to cure, see Tribunale di Forlì, 11.12.2008, CISG-online 1788=1729.

<sup>83</sup> Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 48 para. 10.

<sup>84</sup> A merely subjective loss of trust should not be sufficient, Schnyder/Straub, in Honsell (n. 15) Art. 48 para. 25.

<sup>85</sup> In general, the buyer's objective perspective is decisive for determining reasonableness, Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 48 para. 9; Magnus, in Staudinger (n. 11) Art. 48 para. 14; Schlechtriem/Schroeter (n. 14) para. 449 n. 260.

<sup>86</sup> For the opposing view see Salger, in Witz/Salger/Lorenz (n. 11) Art. 48 para. 3.

<sup>87</sup> Cf. Honnold/Flechtner (n. 6) Art. 37 para. 247; Gruber, Urs, in Säcker/Rixecker/Oetker/Limberg (n. 11) Art. 37 para. 14; Saenger, Ingo, in Bam-

### c) Reimbursement of costs

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.<sup>88</sup> 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 seller,<sup>89</sup> disruption of production,<sup>90</sup> or additional manpower is required on the side of the buyer.

In any case of the buyer raising 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.<sup>91</sup>

## 4. Notice Mechanism

Article 47(1) as well as Article 48(2) CISG provide the parties, both the buyer and the seller, with the opportunity to clarify any uncertainties regarding the performance of cure by setting a certain period of time. 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.<sup>92</sup> The provisions give legal effect to the communication between the parties in situations of cure.<sup>93</sup>

In general, both provisions 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 destroy the seller's right to cure. Such other possible remedies might be avoidance of the contract or exercising a cover purchase if the breach amounts to a fundamental one, in other cases reduction of the purchase price or damages based on repair costs.

In practice, conflicts may arise between the two parties setting different periods of time. Thus, the buyer might 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).<sup>94</sup> 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.<sup>95</sup> If, according to all these circumstances, the period is too short, it causes a reasonable period of time to commence.<sup>96</sup> 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.<sup>97</sup> First, in case of fundamentality of the non-conformity, these remedies could be avoidance or damages calculated on the basis of a cover purchase. Second, and in all other cases, the buyer may invoke 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 time<sup>98</sup> 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 Article 47(1) CISG).<sup>99</sup> 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".<sup>100</sup>

Article 48(2) CISG also governs cases where the buyer did not set any additional period of time under Article 47(1) CISG for performance of cure by the seller.<sup>101</sup> 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.<sup>102</sup> 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 Article 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.

## VI. Groups of cases

Following the above discussions concerning repair and replacement of non-conforming goods, for practical purposes several groups of cases can be discerned.

The first question is whether the original delivery date is of the essence, that means that neither delivery of substitute goods nor repair is possible with regard to the buyer's interest. If this is the case, remedies of the buyer depend upon the non-conformity being fundamental or not. If the non-conformity is funda-

berger, Heinz G./Roth, Herbert (eds.), *Beck'scher Online Kommentar BGB* (42nd ed., München 2017), Art. 37 para. 4.

<sup>88</sup> OLG Hamm, 9.6.1995, CISG-online 146; Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 48 para. 20.

<sup>89</sup> Akikol/Bürki, in Brunner (n. 75) Art. 48 para. 7.

<sup>90</sup> Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 48 para. 12.

<sup>91</sup> Bridge, Michael, in Büchler, Andrea/Müller-Chen, Markus (eds.), *Festschrift für Ingeborg Schwenzer* (Bern 2011), 221, 230. The adequate assurance would be the same as in Arts. 71(3), 72(2) CISG.

<sup>92</sup> According to Art. 48(3) CISG, notice by the seller that it will perform within a specified period of time is assumed to include such a request.

<sup>93</sup> Honnold/Flechtner (n. 6) Art. 48 para. 297. An example where insufficient communication hindered seller's right to cure is LG Regensburg, 17.12.1998, CISG-online 514.

<sup>94</sup> Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 47 para. 10.

<sup>95</sup> Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 47 para. 6.

<sup>96</sup> KGer Zug, 14.12.2009, CISG-online 2026; OLG Naumburg, 27.4.1999, IHR 2000, 22 = CISG-online 512; Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 47 para. 8.

<sup>97</sup> It is not necessary to protect the seller in this situation.

<sup>98</sup> This period must be shorter than the period to cure itself, cf. Huber, in Kröll/Mistelis/Perales Viscasillas (n. 3) Art. 48 para. 32.

<sup>99</sup> Otherwise the seller could circumvent the buyer's proposed reasonable period of time in Art. 47(1) CISG.

<sup>100</sup> Art. 48(2) s. 2 CISG.

<sup>101</sup> For example, HGer Aargau, 5.11.2002, CISG-online 715.

<sup>102</sup> The purpose of Art. 48(2) CISG is to protect the seller, Müller-Chen, in Schlechtriem/Schwenzer (n. 2) Art. 48 para. 24.

mental, the buyer may avoid the contract, according to Article 49(1)(a) CISG. If the non-conformity is not fundamental, *i.e.* the goods are usable despite their non-conformity, the buyer may request a reduction of the purchase price (Article 50 CISG) or damages in the amount of the lesser value of the goods (Article 74 CISG).<sup>103</sup>

Second, if timely delivery of conforming goods is not of the essence, the buyer's remedies again depend on the fundamentality of the non-conformity. Where repair is not possible and goods are not usable this constitutes a fundamental breach and the buyer has the right to request the delivery of substitute goods under Article 46(2) CISG and the seller may offer such delivery under, and within the limits of, Article 48(1) CISG. Where the non-conformity is not fundamental because repair is possible, the buyer may request repair under Article 46(3) CISG if this is reasonable. If repair is not reasonable, the buyer is restricted to the remedy of reduction of the purchase price and damages for the reduced value of the goods.<sup>104</sup> The same applies where repair is not possible but the goods are still usable despite their non-

conformity. However, in all cases the seller is free to offer replacement under Article 48(1) CISG or repair if it is possible.

## VII. Conclusion

Although the mechanism for replacement and repair of non-conforming goods under the CISG may, at first sight, seem to be complicated, especially with regard to the interplay between Articles 46, 47, 48 and 49 CISG, we hope that the foregoing discussions have evidenced that these provisions correctly applied constitute an adequate tool to fairly balance the interests of buyer and seller. The provisions are suitable to cover a great variety of, in practice, relevant cases. It is important to bear in mind the parties' needs and the outcome of the transaction. Any pure theoretical or dogmatic approach must yield to the practical exigencies.

<sup>103</sup> Alongside with damages for any other losses it may have sustained.

<sup>104</sup> Again, alongside with damages for any other losses.