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TYPICALLY GERMAN? TWO CONTENTIOUS GERMAN CONTRIBUTIONS TO THE CISG

The paper discusses two contentious German contributions to the CISG. The first issue is the so called reasonable use test which is applied as part of the funda mental breach doctrine. The second issue is an intricate doctrinal debate about the relationship between the right to avoid the contract and the right to claim damages for the performance interest.

Key words: *CISG. – Fundamental breach. – Reasonable use. – Performance interest. – Avoidance. – Damages.*

1. Introduction

It is common knowledge that the UN Convention on the International Sale of Goods (CISG)[1] has been a success story. An impressive number of states have acceded to the Convention, there is a considerable body of case law (which is made accessible by fabulous websites such as Al Kritzer's Pace Database[2] or CISG Online,[3] and, last but not least, the amount of academic writing on the Convention is overwhelming. From the very beginning, German courts and academics have whole-heartedly embraced the new instrument, be it by applying it, be it by writing on it.

[1] The official English text of the UN Convention on the International Sale of Goods (1980) (CISG) can be found under *http://www.cisg.law.pace.edu/cisg/text/treaty. html*, 23 February 2011.

[2] Electronic Library on International Commercial Law and the CISG, *http://www. cisg.law.pace.edu*, 23 February 2011.

[3] CISG Online, *http://www.cisg online.ch*, 23 February 2011.

In doing so, they have brought a number of contentious doctrines to the Convention, for example the (former) strict interpretation of the inspection and notice periods in Art. 38, 39 CISG[4] or the restrictive approach towards the incorporation of standard terms.[5] The present paper aims at discussing two other German "contributions" to the CISG which both have to do with the structure of remedies under the Convention.

2. THE REASONABLE USE DOCTRINE

2.1. Short outline of the buyer's standard remedies

The buyer's standard[6] remedies under the CISG are set out in Art. 45 CISG: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in Art. 46 to 52 CISG; (b) claim damages as provided in Art. 74 to 77 CISG." This means that the buyer can resort to the following remedies, provided that their respective requirements are met: (1) performance, including substitute delivery and repair; (2) avoidance of the contract; (3) reduction of the purchase price; (4) damages. The most defining features of these provisions shall be shortly outlined in the following paragraphs.

2.1.1. Performance

Art. 46 CISG governs the buyer's right to claim performance from the seller. Art. 46(1) CISG deals with the general claim for performance. Art. 46(2) and (3) CISG provide specific rules for substitute delivery or repair in cases where the seller has delivered goods that do not conform with the contract. Repair is rather easy to get under the CISG: according to Art. 46(3) the buyer has the right to require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to the circumstances. In contrast, the provision on substitute delivery (Art.

[4] ...about which a veritable song has been written..., see "The CISG Song by Professor Harry Flechtner" at *http://www.cisg.law.pace.edu*. For more detail on this issue, and in particular on the "noble month" rule suggested by Ingeborg Schwenzer, see I. Schwenzer, "National Preconceptions That Endanger Uniformity", *Pace International Law Review* 19/2007, 103 and I. Schwenzer, in: P. Schlechtriem, I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, Oxford University Press, Oxford, 2010³, Art. 39 para. 17.

[5] See (German) Bundesgerichtshof, 31 October 2001, *CISG Online* No. 617 and the critical discussion by M. Schmidt Kessel, in: P. Schlechtriem, I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, Oxford University Press, Oxford, 2010³, Art. 8 paras. 57 etc.

[6] In specific types of scenarios, e.g. partial delivery, excess delivery, anticipatory breach, instalment contracts, the CISG modifies or supplements these standard remedies in specific provisions, e.g. Art. 50, 51, 71 etc.

46(2) CISG is more restrictive: The buyer can only claim delivery of substitute goods if the lack of conformity constitutes a fundamental breach of contract (Art. 25 CISG), i.e. if the breach is particularly serious.

2.1.2. Avoidance

In principle Art. 49(1) CISG limits avoidance to cases of fundamental breach (lit. (a)). The only exception to that rule is Art. 49(1) lit. (b) CISG which allows the buyer to "upgrade" a non-fundamental breach to one which justifies avoidance by fixing an additional period of time for performance under Art. 47 CISG. This possibility is, however, limited to cases of non-delivery.[7] In other cases than non-delivery the Convention does not give the buyer the chance to upgrade a non-fundamental breach by using that mechanism, which is, based on its German roots, often called the "*Nachfrist*-procedure".

2.1.3. Price reduction

Art. 50 CISG gives the buyer the right to reduce the contract price if the goods do not conform to the contract. The provision explicitly provides that the seller's right to cure (Art. 48 CISG) takes priority over the buyer's right to reduce the price.

2.1.4. Damages

Any breach of contract by the seller will give the buyer a right to claim damages according to Art. 45(1) lit. (b) CISG. Further details of the damages claim are governed by the general rules in Art. 74 to 77 CISG.

Damages are not fault-based in the CISG. In principle, liability is strict, but there are certain grounds of exemption in Art. 79, 80 CISG (impediments beyond the seller's control, failure caused by the buyer himself). Art. 74 CISG contains a further limitation on claims for damages: Damages may not exceed the loss which the party in breach could have foreseen as a possible consequence of the breach (foreseeability rule or contemplation rule).

2.2. "Avoiding avoidance" and the fundamental breach doctrine

The most defining feature of the system of remedies in the CISG is that it aims at keeping the contract alive as long as possible in order to avoid the necessity to unwind the contract. The prime consequence of this

[7] Cf. (German) Oberlandesgericht Frankfurt, 18 January 1994, *CISG Online* No. 123; M. Müller Chen, "Art. 49", *Commentary on the UN Convention on the International Sale of Goods* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford, 2010[3], para. 15.

is that avoidance of the contract will only be available as a remedy of last resort.[8]

In taking that approach the CISG is in line with (and actually a very important cause for) an international trend to deviate from the old traditions of the Aedilition remedies in Roman law which – as a general rule[9] – regarded termination for non-conformity as a rather easily available remedy. This modern trend has arisen during the 20th century.[10] Several modern sales laws (such as the new German law[11] or Scandinavian laws[12]) and international instruments (such as the Unidroit Principles[13] or the Principles of European Contract Law[14]) also regard the termination of the contract as a remedy of last resort.[15]

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[8] See for example (German) Bundesgerichtshof, 3 April 1996, *CISG Online* No. 135 ("...last possibility for the creditor..."); (Swiss) Bundesgericht, 28 October 1998, *CISG Online* No. 413; I. Schwenzer, "Art. 25", *Commentary on the UN Convention on the International Sale of Goods* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford, 2010³, para. 21a; P. Huber, A. Mullis, *The CISG*, Sellier European Law Publishers, Munich 2007, 181 etc. See in more detail P. Huber, "CISG The structure of remedies", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ) 71/2007 13, 18 etc. It should be noted that the objective to save the contract and to avoid restitution may also have effects on other remedies such as claims for performance, claims for damages and the right to reduce the contract price. These issues will, however, not be discussed here.

[9] Under the ius commune, this was disputed; see R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford 1996, 325 326, 329.

[10] For a comparative overview see: H. Sivesand, *The Buyer's Remedies for non conforming Goods*, Sellier European Law Publishers, Munich 2005, 68 etc.; M. Torsello, *Common Features of Commercial Uniform Commercial Law Conventions*, Sellier European Law Publishers, Munich 2004, 187 etc.; P. Huber, "Comparative Sales Law", *The Oxford Handbook of Comparative Law* (eds. M. Reimann, R. Zimmermann), Oxford University Press, Oxford 2006, 938, 960 etc.

[11] § 323 Bürgerliches Gesetzbuch (BGB) [cf. Gesetz zur Modernisierung des Schuldrechts vom 26.11.2001, Federal Law Gazette I No. 61/2001]. For more detail on these rules see R. Zimmermann, *The New German Law of Obligations*, Oxford University Press, Oxford 2005, 66 etc.

[12] Cf. J. Lookofsky, "The Scandinavian Experience", *The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences* (ed. F. Ferrari), Sellier European Law Publishers, Munich 2003, 95, 113.

[13] Art. 7.3.1. UNIDROIT Principles.

For the English text of the Principles see UNIDROIT Principles of International Commercial Contracts 2004, *http://www.unidroit.org/english/principles/contracts/main.htm*, 23 February 2011.

[14] Art. 9:310 Principles of European Contract Law (PECL).

For the text of the PECL see Commission on European Contract Law: Principles of European Contract Law, *http://frontpage.cbs.dk/law/commission on european contract law/*, 23 February 2011.

[15] P. Huber, A. Mullis, 181 182.

In order to achieve that objective the CISG primarily relies on the fundamental breach doctrine. This is evidenced not only by the fact that avoidance generally (i.e. except in cases of non-delivery where the buyer has chosen the *Nachfrist* – mechanism) requires a fundamental breach, but also by the rule in Art. 46(2) CISG which states that the buyer can claim delivery of substitute goods only if the non-conformity of the originally delivered goods amounts to a fundamental breach.

This leads to the question when a breach is fundamental. At first glance, Art. 25 CISG seems to provide the answer by stating that a breach is fundamental "if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result". On closer analysis, however, it becomes clear that the formula in Art. 25 CISG needs to be concretized. And, indeed, there is an impressive body of case law on when a seller's breach is or is not fundamental.[16]

2.3. Three fundamental breach criteria

Based on the case law, it is submitted that there are at least three criteria which can (not necessarily must) be taken into account when deciding on whether or not the seller's breach is fundamental.

The first criterion is self-evident and generally accepted: The parties may in their contract define which of the requirements shall be fundamental in the sense that their breach will lead to a right of avoidance.[17]

The second criterion is the seriousness of the breach.[18] The fact that this factor should be taken into account, is probably beyond dispute. It is another question, however, how much weight one should attach to it. To put it differently: Does a serious breach as such justify avoidance? The answer probably is: No. There is – at least – one further factor which may come into the equation and prevent the breach from being fundamental, namely the seller's right to cure.

After a history of intense debate[19], the predominant opinion today effectively gives the seller a right to cure the non-conformity unless the buyer has a legitimate interest in immediate avoidance of the contract (for

[16] *Ibid.*, 216 etc.

[17] (German) Bundesgerichtshof, 3 April 1996, *CISG Online* No. 135; I. Schwenzer, para. 21a.

[18] See (German) Oberlandesgericht München, 2 March 1994, *CISG Online* No. 108; U.S. Court of Appeals, 2nd Circuit, 6 December 1995, *CISG Online* No. 140 ("Delchi vs. Rotorex").

[19] P. Huber, A. Mullis, 218 etc.

example because he had good reasons to lose his trust in the seller's ability to perform or because time was of the essence). As a consequence, even a serious breach will as a rule not be fundamental if the seller effectively (offers to and does) cure it under Art. 48 CISG.[20]

2.4. The reasonable use doctrine – a fourth criterion?

If one takes the example of non-conformity, on the basis of the three criteria outlined above, the seller's breach would be fundamental if the non-conformity is serious and cannot be cured (assuming that there is no contractual agreement on when a breach is fundamental).

In the famous cobalt sulphate case, however, the German Supreme Court in civil matters (*Bundesgerichtshof*) has applied a fourth factor which is often referred to as the reasonable-use-test.[21] A shortened and somewhat simplified version of the facts runs as follows: The seller had sold different quantities of cobalt sulphate to the buyer, a German company. It was agreed that the goods should be of British origin.[22] The buyer tried to avoid the contract on several grounds. One of the buyer's arguments was that the cobalt sulphate originated from South Africa and that this caused him serious difficulties, as he "primarily" exported to India and South East Asia where there was an embargo on South African products.

The court did not follow that line of argument because the buyer had neither been able to name potential buyers in those countries or to adduce evidence of earlier sales in these countries, nor had he even alleged that it would have been impossible or unreasonable to make another use of the goods in Germany or to export them into another country. The actual decision of the case thus is based on procedural reasons, namely on the lack of proof by the buyer.[23]

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[20] See for example (German) Oberlandesgericht Köln, 14 October 2002, *CISG Online* No. 709; (German) Oberlandesgericht Koblenz, 31 January 1997, *CISG Online* No. 256; (Swiss) Handelsgericht des Kantons Aargau, 5 November 2002, *CISG Online* No. 715; M. Müller Chen, para. 15; P. Huber, A. Mullis, 218 etc.

[21] (German) Bundesgerichtshof, 3 April 1996, *CISG Online* No. 135 ("cobalt sul phate"); cf. also (German) Oberlandesgericht Köln, 14 October 2002, *Internationales Handelsrecht* (IHR) 2003, 115, 116 CISG Online No. 709; (German) Oberlandesgericht Frankfurt, 18 January 1994, *Neue Juristische Wochenschrift* (NJW) 1994, 1013, 1014 *CISG Online* No. 123.

[22] The seller was also obliged to supply certificates of origin and of quality. The consequences of the breach of his documentary obligations will not be discussed here, however.

[23] The situation was the same in the case of (German) Oberlandesgericht Frank furt 18 January 1994, *NJW* 1994, 1013, 1014 CISG Online No. 123: A stock of shoes had been sold from Italy to Germany. The buyer refused to pay on the ground that he had avoided the contract because the goods did not conform to the contract. The court found against the buyer on the ground that he had not alleged and proven to a sufficiently de

It is, however, an interesting question what the court would have decided if the buyer actually had proven that he could not resell the goods in a considerable part of the world. In light of the reasoning adopted, it seems likely that the court would have told the buyer to look for a country where there was no embargo, sell the goods there (albeit for a lower price) and claim damages for the losses incurred by doing so (for instance for the price difference).

The facts of a case decided by the Swiss Bundesgericht in 1998 were more straightforward.[24] The contract was for the sale of frozen meat. The meat which was delivered did not live up to the agreed standards. As a consequence the value of the delivered goods was about 25 percent less than agreed. The Swiss Bundesgericht explicitly referred to the cobalt sulphate judgment of the German Bundesgerichtshof and held that there was no fundamental breach as the delivered meat could have been reasonably sold on by the buyer for a lower price (which might then have been compensated by a claim for damages).

Both the highest German[25] and Swiss[26] courts therefore attach attached considerable weight to the question whether the buyer can make some other reasonable use of the non-conforming goods. They have for example, refused the right to terminate the contract if it is possible and reasonable for the buyer to resell the goods in the ordinary course of business, albeit for a lower price.

It is, however, by no means certain that it will find world-wide support. There are judgments which regard the breach as fundamental without using the reasonable-use-criterion, the most well-known of which[27] is the American case of Delchi vs. Rotorex.[28] The parties had contracted for

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tailed extent that the goods were defective and that it would have been unreasonable to make some other use of them.

[24] (Swiss) Bundesgericht, 28 October 1998, *CISG Online* No. 413.

[25] (German) Bundesgerichtshof, 3 April 1996, *CISG Online* No. 135 ("cobalt sul phate"); cf. also (German) Oberlandesgericht Köln, 14 October 2002, *IHR* 2003, 115, 116 *CISG Online* No. 709; (German) Oberlandesgericht Frankfurt, 18 January 1994, *NJW* 1994, 1013, 1014 *CISG Online* No. 123.

[26] (Swiss) Bundesgericht 28 October 1998, CISG Online No.413.

[27] Another case is: (German) Oberlandesgericht Hamburg, 26 November 1999, *IHR* 2001, 19, 21 *CISG Online* No. 515. The position of the French courts is not clear yet: cf. (French) Cour de Cassation, 23 January 1996, *CISG Online* No. 159, where arti ficially sugared wine was regarded as a fundamental breach without examining the ques tion of whether it could have been resold (for instance for industrial purposes), but on the other hand stating that the wine was not suited for consumption thus virtually excluding the very use wine is made for; (French) Cour de Cassation, 26 Mai 1999, *CISG Online* No. 487, where the Court may have been indirectly influenced by the fact that the goods were not usable.

[28] U.S. Court of Appeals, 2nd Circuit, 6 December 1995, *CISG Online* No. 140 *UNILEX* E.1995 31 ("Rotorex Corp. v Delchi Carrier S.p.A".).

the sale of air conditioner compressors. The compressors delivered by the seller were less efficient than the sample model and had lower cooling capacity and consumed more energy than the specifications indicated. The Court of Appeals for the Second Circuit held that there was a fundamental breach by the seller because "the cooling power and energy consumption of an air conditioner compressor are important determinants of the product's value".[29] The court did not take into account whether the buyer could have reasonably expected to resell the defective goods or make any other use of them and claim damages or price reduction.

Delchi and cases like it do not necessarily mean that the reasonable use criterion should not be applied at all. It is possible to explain them on the basis that there was no other reasonable use to which the goods could have been put and that thus the court did not have to address directly the reasonable use issue. To date, therefore, no definite answer exists in the case law as to whether the reasonable-use-criterion will find general acceptance.[30]

It is submitted, however, that the reasonable use criterion is in accordance with the CISG objective of restricting the availability of avoidance as a remedy.[31] If the right to terminate the contract requires proof that the buyer has essentially lost what he was entitled to expect under the contract, then it does make sense not to allow him to avoid the contract where he still can make some reasonable use of the goods. In such a situation, the award of damages is an adequate remedy.[32]

It is further submitted, however, that the concept of reasonable use should be given a restrictive interpretation. Particular importance should be attached to the commercial background of the transaction which may lead to the result that there was no reasonable use for the buyer (or even to the conclusion that there should be no "reasonable use" analysis at all).[33]

Thus, where it appears from the commercial background of the contract that time and/or quality were of the essence of the contract, the delivery of non-conforming goods will amount to a fundamental breach from the outset and there will therefore be neither room nor justification for embarking on a "reasonable use" analysis.

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[29] U.S. Court of Appeals, 2nd Circuit, 6 December 1995, *CISG Online* No. 140 *UNILEX* E.1995 31 ("Rotorex Corp. v Delchi Carrier S.p.A.").

[30] P. Huber, A. Mullis, 230.

[31] See for further considerations for instance I. Schwenzer "CISG AC Opinion No. 5: The buyer's right to avoid the contract in case of non conforming goods or docu ments", *IHR* 1/2005, 35.

[32] P. Huber, A. Mullis, 230 etc.

[33] *Ibid.*

So too, where the buyer needs the goods for use in his production process it will often appear from the commercial background that he cannot reasonably use materials of a lower quality. The position may, however, be different if the buyer also produces goods of a lower quality so that he can simply use the delivered goods for that part of his business (provided of course that he has a need for the delivered materials there and that he will not create an overload of material on stock there). Where the buyer buys goods for resale similar criteria should apply. Here, much will turn on the question whether the buyer only sells high-quality goods or whether he also deals in goods of a lower quality and could use the goods delivered by the seller for that line of his business. Thus, the mere fact that the goods are resaleable by the buyer does not mean that there will be no fundamental breach. If for instance the buyer runs an exclusive boutique, it would not be reasonable to expect him to use part of his upmarket showroom for the sale of low-quality goods at discount prices. In this respect, considerable importance should be given to the issues of reputation, brand image and related matters. The reasonable use test should not lead to the result that the buyer is left with goods that he cannot sell on without risking damage to his reputation.[34]

3. THE LOVE OF INTRICATE DOCTRINAL EXERCISE

Another aspect which German scholars to a certain extent may have brought to the CISG is the love of intricate doctrinal exercise. German legal education and academia has always indulged in thorough systematic and doctrinal exercises. Sometimes this has led to remarkably elaborate codes, sometimes it has simply complicated matters where it was not necessary. Be that as it may, the fact that many German academics have whole-heartedly embraced the CISG from its very beginning and started to spend their (and their assistants') ample research time writing on it, has undoubtedly influenced the character of legal debate on the CISG. This can be exemplified by a discussion on a very specific issue which has its roots in certain particularities of the (former) German law of obligations and which has found its way into the CISG. This issue actually is a follow-up problem resulting from the *ultima-ratio* doctrine: if the CISG does not allow the buyer to avoid the contract (for example because the breach is not fundamental), may he nevertheless conduct a cover purchase and claim the price as damages under Art. 45(1)(b)?

Allowing the buyer to conduct a cover purchase seems to conflict with the specific policy considerations of the law of termination – in particular the fundamental breach requirement, but also the time limits provided for in Art. 49(2) CISG. If the buyer could conduct a cover purchase and claim the price as damages from the seller, so the argument goes, he

[34] *Ibid.*, 231 etc.

would be placed in the same position as if he had avoided the contract – although the buyer does not have a right to avoid the contract.[35] A strict approach therefore would be, not to allow a buyer to make use of Art. 75's formula, i.e., not to allow him to calculate his damages based on the costs of a cover purchase.

A closer look reveals that the answer needs to be more complex. Doubts are raised by the fact that under Art. 77 CISG the buyer is obliged to mitigate his damages. Imagine that the buyer would lose a 1 million € profit if his resale of the bought goods were cancelled as a result of the non-conformity of the goods his seller had delivered. Imagine further that it would cost him a mere 500,000 € to buy new goods in the market – i.e. that the costs of the cover purchase are lower than the amount of the expected loss. In such a scenario it seems to be reasonable – and to accord with the seller's interest – that the buyer conducts a cover purchase to mitigate his damages by € 500,000. In fact, the CISG even obliges the buyer to do so: According to Art. 77, the buyer "must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach".

Against this background *Peter Schlechtriem* has advocated a more subtle approach to the issue.[36] In *Schlechtriem's* view the buyer should be able to conduct the cover purchase and to claim the costs of this cover purchase as damages. In order not to undermine the CISG's strict avoidance requirements *Schlechtriem* suggests that the buyer, as a general rule, should not be allowed to reject (or revoke his acceptance of) the non-conforming goods and to refuse to pay the purchase price, simply because

[35] See for concerns in this regard (Austrian) Oberster Gerichtshof, 6 February 1996, *CISG Online* No. 224; (Austrian) Oberster Gerichtshof, 14 January 2002, *CISG Online* No. 643; (German) OLG Bamberg, 13 January 1999, *CISG Online* No. 516; (German) AG Nordhorn, 14 June 1994, *CISG Online* 259; P. Mankowski, in: *Münchener Kommentar HGB*, C. H. Beck, Munich 2007², Art. 75 para. 3; M. Müller Chen, "Art. 45", *Commentary on the UN Convention on the International Sale of Goods* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford, 2010³, para. 27; U. Magnus, in: *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch*, Sellier & de Gruyter, Berlin 2005, Art. 45 para. 22; P. Huber, A. Mullis, 282; N. Schmidt Ahrendts, *Das Verhältnis von Erfüllung, Schadensersatz und Vertragsaufhebung im CISG*, Mohr Siebeck, Tübingen 2007, 152 etc.

[36] P. Schlechtriem, Damages, avoidance of the contract and performance interest under the CISG (available at the Pace Database: *http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem21.html*, last visited 23 February 2011); similarly I. Schwenzer, "Art. 74", *Commentary on the UN Convention on the International Sale of Goods* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford, 2010³, para. 22; (Austrian) Oberlandesgericht Graz, 29 July 2004, *CISG Online* No. 1627; Karollus, *UN Kaufrecht*, Springer, Wien 1991, 155; J. Honnold, H.M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer International Law, Alphen an den Rijn 2009⁴, para. 410.2. differentiating N. Schmidt Ahrendts, 152 etc.

he does not have a right to avoid the contract under Art. 49 CISG.[37] This approach leaves a buyer who has conducted a cover purchase with both the seller's non-conforming goods and the cover goods. Obviously, when claiming the costs of the cover purchase as damages from the seller, the buyer must subtract the value of the non-conforming goods which will remain with him or at his disposition. [38] Otherwise he would be unjustly enriched: he would have bought two deliveries at the price of one.

Thus, at a first glance, *Schlechtriem* seems to take a position which is fundamentally different from the strict approach. While the latter would not allow the buyer (who is not entitled to avoid the contract) to claim the costs of the cover purchase as (direct) damages under Art. 74 CISG, *Schlechtriem* would do so.

On a closer analysis, however, the difference between the two positions seems to dwindle. In fact, in many cases both lines of thought will lead to identical results in practice, or rather: they should lead to identical results if properly applied. *Schlechtriem* in essence allows the buyer to liquidate the cover costs (minus the value of the non-conforming goods) as a direct damage under Art. 74 CISG. The strict approach, if correctly applied, would have to reach the same result by another route. In fact, it appears to be widely accepted in case law and legal writing that the buyer can claim reimbursement of the costs which he incurs in taking reasonable mitigation measures as required by Art. 77 CISG.[39] Thus, while the strict approach would not allow recovery of the cover costs under Art. 74 CISG as such, it would have to accept the cover costs in their "disguise" as mitigations costs, provided of course that cover was reasonable and

[37] P. Schlechtriem, *ibid.* at I. e) does, however, suggest modifications to this gen eral rule. Thus, in his view, the seller may be under an obligation to take the goods back and sell them otherwise, if this is economically reasonable, for example where the costs of restitution are lower than the costs that would accrue if the buyer had to dispose of the goods. A further modification of the general rule applies in cases of non delivery. Here, Schlechtriem suggests that a buyer who has already made a cover purchase should no longer be entitled to claim performance under Art. 46 CISG, although the contract has not (and cannot) be avoided under Art. 49 CISG. M. Karollus, *UN Kaufrecht*, Springer, Wien 1991, 155 even allows the buyer to reject delivery.

[38] P. Schlechtriem, *ibid*. at I. e); apparently contra: J. Gotanda "AC Opinion No 6: Calculation of damages under CISG Art. 74" *IHR* 6/2007, para. 8; cf. *infra* IV.

[39] (German) Bundesgerichtshof, 25 June 1997, *CISG Online* No. 277; P. Huber, "Art. 77", *Münchener Kommentar zum Bürgerliches Gesetzbuch* (W. Krüger et al.), C.H. Beck, Munich 2008[5], para. 12; U. Magnus, in: *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch*, Sellier & de Gruyter, Berlin 2005, Art. 77 para. 20; V. Knapp, "Art. 77", *Commentary on the International Sales Law* (eds. C. M. Bianca, M. J. Bonell), Giuffrè, Milan 1987, note 2.6; F. Enderlein, D. Maskow, *International Sales Law*, Oceana Publica tions, New York 1992, Art. 77 note 2; I. Schwenzer, Art. 77 para. 11. Opinions seem to differ only in regard to the question whether the claim for reimbursement should be based on Art. 74 or Art. 77.

required under Art. 77 CISG and that the value of the non-conforming goods which remain with the buyer has to be subtracted. In the pumps-case this would mean that the buyer is required under Art. 77 CISG to acquire additional pumps as cover for USD 500.000 and that he could get them reimbursed as mitigation costs (minus the value of the non-conforming goods).

On that basis, one might be inclined to regard the above-mentioned controversy as a typical academic exercise with little practical relevance.[40] One might further inclined to call it a "typically" German debate, for two reasons: First, most of the actors in the debate are German academics or courts. Secondly, the debate probably has its roots in certain particularities of the former German law of obligations (i.e. the law before the fundamental reform of the law of obligations in 2002). Former German law contained the general rule that termination of the contract could not be combined with a claim for damages. As, obviously, the concrete results of such a rule could be harsh and inadequate, German law developed a technique to circumvent these adverse consequences. Without going into detail, and very broadly speaking, this technique consisted in trying to avoid to actually "terminate" the contract. Rather than formally declaring termination, the creditor simply claimed damages and calculated the damages on the assumption that the contract would no longer be performed. These so-called "damages for non-performance" or "damages in lieu of performance" more or less produced results which were similar to those that would have arisen if the creditor had first terminated the contract and then claimed damages (which, as said, he was not allowed to do). In the present author's opinion, this wide-spread technique has made German lawyers rather sensitive towards the fact that one can reach the results of a termination of the contract by simply "calling it damages" and calculating the damages on the assumption that the contract is no longer performed. This could explain why German authors have discussed the above-mentioned issue of the cover purchase under Art. 74 CISG in such detail.

[40] In fact, the issue of "cover under Art. 74 CISG" has certain facets which would seem to make it relevant in practice. These facets, however, will have to be discussed in another paper.