Pace International Law Review

Volume 18
Issue 1 *Spring 2006*

Article 3

April 2006

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Peter Schlechtriem, *Subsequent Performance and Delivery Deadlines - Avoidance of CISG Sales Contracts due to Non-Conformity of the Goods*, 18 Pace Int'l L. Rev. 83 (2006)
Available at: http://digitalcommons.pace.edu/pilr/vol18/iss1/3

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SUBSEQUENT PERFORMANCE AND DELIVERY DEADLINES - AVOIDANCE OF CISG SALES CONTRACTS DUE TO NON-CONFORMITY OF THE GOODS

Peter Schlechtriem†

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I. Avoiding A Contract on Account of Non-Conformity with Tendered Goods

The rules regarding the prerequisites for avoidance of sales contracts due to non-conformity of the goods—referred to in the *Bürgerliches Gesetzbuch* (German Civil Code) [hereinafter BGB] as rescission (*Rücktritt*), previously cancellation (*Wandelung*)—are difficult and have been the object of international controversy in uniform sales law.[1]

There are, in particular, three interests to be considered and weighed against each other in the avoidance of a sales contract due to non-conformity of the goods, especially due to defects in the quality of goods. The buyer has an interest that the threshold for avoidance be as low as possible, so that in the event of non-conformity of the goods he can readily get out of

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[1] The following tentative considerations are part of a collection of essays to be published in 2006 in honor of an eminent German scholar.

the contract. The old BGB, with its remedy of cancellation that could always be claimed as long as the "reduction in value or fitness" of the goods caused by the defect was not "immaterial" (§ 459 (1) BGB old version), acknowledged this interest. The new version of the BGB, through the reform of the Law of Obligations, retained the materiality threshold (§ 23 (5) BGB), but with the precedence of claims for cure and the corresponding possibility of a second tender, it strengthened the position of the seller. Such a tender would under the new BGB, however, generally only occur in the form demanded by the buyer. (§ 439 (1), (3) BGB). The possibility of salvaging the contract through a "second tender" conforming to the contract (this being the second interest to consider) is granted to the seller, who is thereby provided a "second chance."[2] The third interest to be considered and weighed is costs of unwinding the contract, and it is especially important with sales requiring shipment to the buyer. This interest is not clearly ascribed to buyer or seller as such, but rather depends upon the system for restitution: avoidance of a contract that the seller has already partially or fully performed, a situation that makes return shipment of the goods necessary and often requires temporary storage as well.

This creates costs and can increase the risks of loss and damages. Who finally bears these costs and risks depends on the various circumstances of the individual case and the differing rules (responsibility for breach of contract and the corresponding liability to pay damages; responsibility for restitution and the risk of loss). Undoing the deal in such cases (where shipment is involved) can make the whole transaction more expensive and is often cited as the explanation for why the CISG, with its requirement of "fundamental breach," sets the threshold for avoidance of the contract due to non-conforming goods much higher than the BGB.[3] Another reason the CISG's

[2] Still the seminal work, *see* HANS GROßMANN-DOERTH, DIE RECHTSFOLGEN VERTRAGSWIDRIGER ANDIENUNG, (1934) [his explanations, particularly pages 191-193, likely influenced Ernst Rabel in the drafts and texts of the Uniform Sales Laws]. *See also* Ulrich Huber, *in* KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT art. 48 para. 5 n.6 (Ernst von Caemmerer & Peter Schlechtriem eds., 1990).

[3] Bundesgerichtshof [BGH] [German Supreme Court] Hamburg No. VIII ZR 51/95, 3 Apr. 1996 (F.R.G.) *at* http://www.cisg.law.pace.edu/cases/960403g1.html (stating that contract avoidance and restoration are to be restrained); *see also* Peter Schlechtriem *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), art. 25, para. 21a (Peter Schlechtriem & Ingeborg

threshold is so high—and according to the decisions of the Bundesgerichtshof (German Supreme Court) almost insurmountable—is because the CISG provision concerning a seller's breach of contract by delivery of non-conforming goods does not provide for a compromise between the avoidance interest of the buyer and the interest of the seller in a second chance by way of an extension of time, which (as in the case of a total failure to deliver) would put the buyer in a position to set an additional period of time for the cure of the non-conformity, and after its expiration to avoid the contract. That means that the buyer must also accept and retain defective goods that have not yet been delivered, even when the defects become known before delivery (but after formation of the contract) and the costs and the risks from the return shipping could not be triggered at all.

In the Anglo-American realm, the rule that the buyer must accept non-conforming goods meets with particular resistance and incomprehension, since the so-called "perfect tender rule," which is considered a commercial axiom and allows the buyer to reject the goods due to a (but not every) lack of conformity to the contract,[4] does not apply within the sphere of application of the CISG. In England, this is viewed as one of the reasons for not ratifying the CISG[5] and in American writing as a motive to contractually exclude application of the CISG.[6]

Schwenzer eds., 2d ed. 2005) [hereinafter Schlechtriem COMMENTARY]; CISG-AC (Advisory Council on the CISG) Opinion No. 5 (May 7, 2005) (Rapporteur Schwenzer). It appears that the cost argument against easy avoidance of the contract due to non-conformity was first brought into the discussion by Honnold: *see* John Honnold, *Buyer's Right of Rejection – A Study in the Impact of Codification on a Commercial Problem*, 97 U. PA. L. REV. 457 (1949).

[4] *See* MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS para. 3.24 (1999); Alistair Mullis, *Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases*, *in* ANGLO-SWEDISH STUDIES IN LAW 326-55 (Mads Andenas & Nils Jarborg eds., 1998) *available at* http://www.cisg.law.pace.edu/cisg/biblio/mullis1.html. Regarding the "perfect tender rule," *see also* CISG-AC Opinion No. 5, para. 2.2 (May 7 2005) (Rapporteur Schwenzer) *available at* http://www.CISG-online.ch/cisg/cisgac/html.

[5] *See* Mullis, *supra* note 4.

[6] *See* Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, 32 COLO. LAW. 11-12, 17, 19-20 (2003), *available at* http://cisgw3.law.pace.edu.

Compared to the CISG, its precursor, the Uniform Law for the International Sale of Goods (ULIS),[7] allowed avoidance of the contract or rejection of defective goods under relaxed conditions, though not always to the extent of the perfect tender rule or § 459 (2) of the old BGB. In particular, Art. 44(2) ULIS provided that the buyer could fix an additional period of time for the remedying of defects as well; and (hardly practicable) Art. 43 ULIS permitted avoidance when non-conformity and delay represented fundamental breaches and were cumulated.[8] Thus, avoidance was allowed when a defect was fundamental but capable of subsequent cure, but that could no longer be remedied within the agreed-upon time for delivery.[9] Such could be the case for transactions calling for performance at a fixed time, for transactions with seasonal goods, or particularly in the international commodity trade with prices listed on the commodity exchange:[10] it is in those cases where the deviation of the CISG from internal sales law has been especially criticized in Anglo-American writing.

The drafters of the CISG expressly rejected the eased restrictions on avoidance found in the ULIS: in 1973 the UNCITRAL Working Group proposed the elimination of Art. 44(2) and Art. 43 ULIS,[11] and in the Geneva Draft of 1976 the current

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[7] In German, the *Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen*, [Uniform Law for the International Sale of Goods], 1973 BGB1. II at 892 (F.R.G.), commonly known as the Hague Uniform Sales Law.

[8] "The buyer may declare the contract avoided if [both] 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." Art. 43 ULIS.

[9] *See* Herbert Stumpf *in* KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT art. 43, para. 1 (Hans Dölle ed., 1976) with reference to examples that were used as a basis in the working group. It is questionable, and with regards to the ULIS in this context was never clear, whether a fundamental breach can even occur with a curable defect (*see* section II, *infra*), so that the actual gravamen that permitted contract avoidance in these cases was the failure to observe the fixed delivery times. Exceeding fixed delivery dates by reason of an additional period to perform would then have been the natural counterpart to failing to observe an additional period of time for cure in Art. 44(2) ULIS.

[10] *See* Huber, *supra* note 2, at art. 48, para. 5.

[11] *See* Report of the United Nations Commission on International Trade Law on the Work of its Fourth Session, U.N. Doc. A/CN.9/75 (1973) regarding Article 44(2) ULIS (*Nachfristmodell*); *see* Progress Report of the Working Group on the International Sale of Goods on the Work of its Third Session, U.N. Doc. A/CN.9/62 & Adds. 1-2 (1972) regarding Article 43 ULIS. *See also* United Nations Commission on International Trade Law 4 Y.B. 54, No.130-145 (1973) [hereinafter UNCITRAL]. *See* Huber, *supra* note 2, at art. 48, para. 6 (regarding the reasons for the

solution was already set out. Attempts remained unsuccessful during the Vienna Conference to again introduce the model of setting an additional period of time for performance (*Nachfrist*) as to defective goods, and where there is a seller's offer to cure, to *presume* a fundamental breach only when the cure would require going "materially" beyond the deadline (in other words, practically the solution of Arts. 43 and 44(2) ULIS).[12]

Despite the clear (though debatable) decision of the CISG drafters, some legal writers maintained their reservations regarding the solution of the CISG and occasionally sought a way out of the rigid union of avoidance with the threshold for fundamental breach in the CISG by reasoning that if the seller fails to satisfactorily cure[13] when demanded by the buyer, then after the expiration of a reasonable period of time, the breach should be allowed to become a fundamental breach of contract.[14]

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elimination, in particular as to the "paradox" of the ULIS provisions (consequently abandoned by UNCITRAL) in setting further requirements such as lapsed delivery times or an elapsed *Nachfrist*, even where there is a fundamental breach due to lack of conformity).

[12] See the proposals of the Netherlands and Canada, which were supported by Germany:United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March–11 April 1980, Official Records, A/CONF. 97/19, Art. 45, Para. 3, No. 1-2, *available at* http://cisgw3.law.pace.edu/cisg/1stcommittee/summaries49.html; Art. 45, Para. 67, 68, 71, *available at* http://cisgw3.law.pace.edu/cisg/firstcommittee/Meeting22.html. *See also* Huber,*supra* note 2, at art. 48, para. 9; art. 49, para. 4; JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION para. 296 (1982) (interpreting the negotiations in Vienna and their outcome such that the seller's offer to cure a lack of conformity always has priority).

[13] Under Article 46(2) of the CISG, the buyer can only demand delivery of substitute goods if the non-conformity itself constitutes a fundamental breach. In such a case, the buyer could also avoid the contract without demanding delivery of substitute goods anyway. *See* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* Pace Law School Institute of International Commercial Law, http://cisgw3.law.pace.edu. [hereinafter CISG].

[14] *See, e.g.,* Huber, *supra* note 2, at art. 45, para. 29 (Under Article 46(3), the buyer can claim remedy by repair as well as compensation for all losses caused by delay, and consequential and incidental losses: "If an attempt to cure fails or is not carried out within a reasonable time, then that constitutes a renewed breach of contract, which will be viewed as a fundamental breach even if the original breach lacked sufficient substantiality to qualify as such.") *See also* Huber, *supra* note 2, at art. 46, para. 60: "The second breach of contract, since it occurs after an existing breach, is to be viewed as 'fundamental'. . .[t]he buyer is now entitled to declare the contract avoided pursuant to Article 49(1)(a)."

Both the rejection of the CISG's solution in Anglo-American legal literature, and the apprehension of German jurists regarding adherence to the contract despite the non-conformity of the tendered goods, should serve as an opportunity to once again take up the question of rejection of non-conforming goods and to reconsider the issues.

II. Non-Conformity of the Goods to the Contract as Fundamental

A. *Breach and the Right of the Seller to Offer a Second Tender*

As briefly described in section I, the issue of prerequisites for avoidance in the case of non-conforming goods is particularly a problem of weighing the buyer's interest to get out of the contract as easily as possible against the seller's interest to be able to salvage the contract through a second tender. This is reflected in the struggle over a model for a delivery period and/or an additional period of time (*Nachfrist*), as is evident in Articles 43 and 44(2) ULIS, in the working groups of UNCITRAL, and at the Vienna Conference. In the preparation of the CISG, this issue was repeatedly disputed and discussed with regard to the right of a second tender, now set in Article 48 CISG. After the CISG solution was finally established and the Convention entered into effect, the discussion on this issue continued through the interpretation of the words "subject to [A]rticle 49" in Article 48(1) CISG. This formulation suggested the interpretation that the seller's right to offer a second tender provided in Article 48 CISG could be cut off by the buyer through a declaration of avoidance if the lack of conformity itself represents a fundamental breach. The view already unsuccessfully presented at the Vienna Conference, that there cannot be a fundamental breach if the seller makes a sincere offer to cure which is possible within the agreed-upon delivery period (so that therefore the antinomy between Article 48(1) and Article 49 CISG is only apparent and not real), has prevailed today,[15] but was long dis-

[15] *See* Urs Peter Gruber *in* Münchner Kommentar art. 25, para. 25 (4th ed. 2004); Ulrich Magnus, *Aufhebungsrecht des Käufers und Nacherfüllungsrecht des Verkäufers im UN-Kaufrecht*, *in* Festschrift für Peter Schlechtriem 599-612 (2003). Magnus may be summarized on this point as follows: "With severe defects in performance that the seller can easily remedy, dissolution of the contract may

puted[16] and does not quite correspond to the course of discussions at UNCITRAL. A proposal there by the American delegate John Honnold to bestow significance for purposes of a fundamental breach (and thereby the right of the buyer to avoid the contract) on the seller's offer to cure, remained unsuccessful.[17] Such proposals also remained fruitless in the discussions at the UN Conference in Vienna in 1980. Practically speaking, in many cases this solution may be attained through the seller's unequivocal and lasting offer to cure pursuant to the second sentence of Article 48(2) CISG, which vitiates the need to settle the dogmatic question of whether the seller's offer to cure prevents the "fundamentality" of the breach or only blocks avoidance (as with the subsequent performance of incompatible remedies). However, the question remains if the buyer objects to the seller's offer to cure.

The prevailing view today in the German legal literature[18] that a realistic offer of the seller to cure "prevents" immediate avoidance is correct; but a constant reservation, though often only casually mentioned, should be pointed out here: the offer to cure must be performed within the fixed delivery time, or in any case within a reasonable time, since otherwise the delay in performance that conforms to the contract can itself turn into a fundamental breach. A further requirement seems to be that the lack of conformity itself (i.e., without a timely feasible cure)

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only occur when the seller fails to use his chance to subsequently perform within a reasonable time." *Id.* at 612. This corresponds to the solution advanced by Huber. *See supra* note 14 and accompanying text.

[16] *See* Huber, *supra* note 2, at art. 48, paras. 7, 8. *Compare id.* at art. 46, para. 65; art. 48, para 9 (stating that the suggestion that an offer to cure should be considered in the interpretation of Article 25 CISG is "not to be followed") *with id.* at art. 49, para. 27 (stating non-conformities capable of being remedied by reasonable means "as a rule" do not yet constitute a fundamental breach).

[17] *See* UNCITRAL 8 Y.B. 31, Nos. 93-96 (1977); UNCITRAL 8 Y.B. 45, Nos. 275-276. Honnold had suggested that a seller's reasonable offer to cure be included in the definition of a fundamental breach (now Article 25 CISG) as an additional factor to be considered for determining materiality of the breach. Honnold retained this view in the interpretation of the adopted version of the Convention. *See* HONNOLD, *supra* note 12, paras. 184, 296.

[18] *See* Schlechtriem COMMENTARY, *supra* note 3, at art. 25, para. 20; Christiana Fountoulakis, *Das Verhältnis von Nacherfüllungsrecht des Verkäufers und Vertragsaufhebungsrecht des Käufers im UN-Kaufrecht* INTERNATIONALES HANDELSRECHT 160-169 (2003); Ulrich Magnus, *Aufhebungsrecht des Käufers und Nacherfüllungsrecht des Verkäufers im UN-Kaufrecht, in* FESTSCHRIFT SCHLECHTRIEM 599-612 (2003) (with further citations at 601-02).

would be so serious that it would constitute a fundamental breach. In practice this amounts to the basic idea of Article 43 ULIS, but naturally without its "paradoxical"[19] cumulation of requirements for avoidance.

The development of the solutions outlined here regarding the issue of conditions under which a contract can be avoided due to non-conformity of the goods from the ULIS to the CISG, in addition to the possibilities and alternatives vigorously discussed by the members of the working groups, by UNCITRAL, and finally by the delegates of the Vienna UN Conference, as well as various commentators and the interpretation uncertainties regarding the relationship between Article 48(1) and Article 49 CISG, all show that apart from the weight of the respective defect, a time factor has significant importance for the avoidability of the contract. As long as the seller can cure a lack of conformity by subsequent performance without exceeding fixed delivery dates or deadlines, the seller's interest in a second tender (within the qualifications of Article 48(1) CISG) ought to be given priority. The occasionally advocated "reasonable time" or the *Nachfrist* model for remedying a defect such as in Article 44(2) ULIS or § 437(2) and § 323(1) BGB are mostly important where the fixed character of the delivery time is uncertain or, as with sales contracts between private individuals, is infrequent and uncommon. For the time being, the "third interest" of avoiding the cost and risks of undoing the transaction, is disregarded here (see *infra*, section IV).

In practice, however, not much is gained with this concretization of the time factor as a relevant element for avoidance. Especially for commerce in markets with fluctuating prices, where the buyer requires prompt certainty regarding further action and the fate of the sales contract (and thereby the offered goods), this merely offers the buyer stones rather than bread. Moreover, an extension of time or *Nachfristmodell*, which, against the clear intention of the CISG drafters (and thereby the national legislative bodies that ratified the Convention), could not be implanted as interpretation or gap-filler, would by itself not always be helpful in the above-referenced segment of commerce. However, one should consider whether there is not a

[19] Huber, *supra* note 2, at art. 48, para. 6.

useful solution to be found which would correspond to the directives of interpretation in Article 7(1) CISG or by means of a gap-filler through recourse to principles of the Convention provided in Article 7(2) CISG, that is practicable.

III. The Refusal to Accept Goods as the Exercise of a General Right to withhold Performance

1. As mentioned above, the CISG does not recognize the right of the buyer to reject non-conforming goods in a manner directly corresponding to the Anglo-American rules. Rejection rights, which are presupposed in Article 86(1) CISG, are provided for only in the instances set forth in Article 52 CISG (delivery before the date fixed, or delivery of a quantity greater than that provided for in the contract). Otherwise, the position taken in the legal literature is that the buyer can reject the goods only when exercising the right to avoid the contract.[20] The buyer must therefore take delivery of defective goods as well, unless he can avoid. Of course, in comparing the perfect tender rule, whereby the buyer loses the right to avoid the contract and treat it as discharged[21] if he does not reject non-conforming goods, one must consider that according to the understanding of Anglo-American jurists, acceptance of non-conforming goods is more than the mere physical taking delivery of the goods; rather, it is to be understood as "acceptance as performance." Since the buyer "accepted as performance," he can no longer reject on the basis of non-performance. However, taking delivery under the CISG does not have this far-reaching effect. The CISG does not require the severity of the perfect tender rule and the possibility of rejecting non-conforming goods in order to preserve the buyer's rights. Nevertheless, concerns over such a solution, which forces the buyer to always

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[20] *See* Wolfgang Witz, *Zurückbehaltungsrechte im internationalen Kauf – Eine praxisorienterte Analyse zur Durchsetzung des Kaufpreisanspruchs im CISG*, *in* Festschrift Für Peter Schlechtriem 291, 291 - 304 (Ingeborg Schwenzer & Gunter Hagar eds, 2003); Wolfgang Witz et al., International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG, art. 60, para. 10 (2000) (unlimited recognition of a right of rejection would contradict the general principle that avoidance of the contract require a fundamental breach; if necessary, the buyer must avoid the contract or demand delivery of substitute goods).

[21] *See* Mullis, *supra* note 4, at 332.

take delivery of non-conforming goods unless the high and possibly uncertain threshold of a fundamental breach is reached and the buyer timely declares avoidance before the acceptance" (the effectiveness of which might only be resolved much later in a lawsuit over the fundamental nature" of the non-conformity of the goods), are understandable.[22] Such a solution has properly been criticized as insufficient for commerce with goods of fluctuating prices, in particular for the international commodities trade (raw materials, but also finished goods such as memory chips, etc.).

2. It is questionable, however, whether the buyer really is required to take delivery of non-conforming goods, and whether he always breaches a duty by refusing to do so. Although the CISG contains no general rule regarding the right of withholding or retaining one's performance, it may be presumed today as the prevailing view that, pursuant to Article 7(2) CISG, such a right can be developed as a gap-filler from a general principle upon which a series of provisions of the CISG are based.[23] Such a right can also counter the seller's demand that the buyer take delivery of the goods, to which the buyer is obligated under Articles 53 and 60.[24] A justified refusal to take delivery based on such a right to withhold performance means first of all only that the buyer has not thereby breached the contract. Thus, if the buyer had the obligation to pick up the goods, the buyer is not required to fetch them, and if the seller had the obligation to deliver the goods, upon their arrival the buyer must only take steps to preserve them (and perhaps take them into possession

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[22] In light of the numerous cases in which the "materiality" of a breach was not "clarified" until having reached a court of last instance, the demand that the fundamental nature of the breach be "immediately determinable and then remain so fixed" (Huber, *supra* note 2, at art. 46, para. 65), is hardly realistic.

[23] *See* Witz *in* FESTSCHRIFT SCHLECHTRIEM, *supra* note 20; Peter Schlechtriem, CISG – Auslegung, Lückenfüllung und Weiterentwicklung, Address at a Symposium in Honor of Frank Vischer (May 11, 2004), English version in 16 PACE INT'L L. REV. 279, 279-306 (2004), *available at* http://cisg-online.ch/cisg/Schlechtriem_Symposium_Vischer.pdf; *see also* Kantonsgericht Appenzell Ausserrhoden [KG] [Court of the Canton of Appenzell] Mar. 10, 2003, Proz, Nr. 433/02 (Switz), *available at* http://www.CISG-online.ch No. 852 = IHR 2004, 254-256 (English version available at http://cisgw3.law.pace.edu/cases/030310s1.html) (withholding the payment of the price as long as the seller is in default as to his obligation to set a date for the buyer to collect the goods).

[24] *See* CISG-AC Opinion No. 5, *supra* note 4, at 4.18-4.21; Schlechtriem, *supra* note 23, at sub. II, para. 5.

for preservation) pursuant to Article 86 CISG, as in the case of rejection due to delivery of a quantity greater than that provided for in the contract, delivery before the date fixed, or avoidance of the contract. This course of action also regularly prevents liability after the risk of loss has passed, since pursuant to Article 66 CISG the buyer's non-acceptance is due to conduct of the seller (tender of non-conforming goods).[25]

Of course, the right to withhold (or to retain) one's performance can also counter the seller's claim for payment of the sales price.[26] The state of uncertainty regarding the contract's implementation, which is produced by the assertion of the right of retention, can only last until the buyer has decided what remedy he both desires and can claim: thus, pursuant to Article 49(2)(b) CISG for a reasonable time or, if the buyer can demand a cure pursuant to Article 46(2) or (3) CISG, for the additional period fixed in accordance with Article 47(1) CISG. Upon the expiration of such time limits, the right to withhold performance lapses and the refusal to take delivery or pay the price becomes a breach of contract. The state of uncertainty existing until the expiration of a reasonable time can also be terminated by a second tender that conforms to the contract, as long as fixed delivery dates have not already passed. Article 48(2) and (3) CISG provide the seller in this situation the additional possibility to give notice of a second tender and thereby block the buyer from declaring the contract avoided for the duration of a reasonable time, which however, cannot exceed fixed delivery dates. Independent from Article 46 CISG and the limitations regarding the buyer's demands for cure set in paragraphs (2) and (3) of that article, the seller is free in the form of his cure.

3. The justified (and time limited) refusal to accept goods as the exercise of a general right to withhold performance can lead to fixed times for delivery being exceeded and *thereby* causing a fundamental breach that would permit avoidance of the contract. Thus, if the seller has not timely cured in a manner that conforms to the contract, the buyer can now declare the contract avoided for failure to meet a fixed deadline, without determining whether the non-conformity itself represents a fun-

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[25] *See* Günter Hager *in* COMMENTARY ON THE CISG, *supra* note 3, at art. 66, para. 5.

[26] Schlechtriem, *supra* note 23, at sub. II, para. 5(c).

damental breach (which might otherwise necessitate a long litigation or arbitration of uncertain outcome). In commerce with goods where fixed deadlines are common, this practically leads to a result corresponding to the perfect tender rule.

IV. Costs and Risks of Undoing the Transaction

The solution suggested in section III, which is a continuation of earlier deliberations,[27] must face the argument that its result leads to a further development of the CISG, which partly corrects the views of its drafters and which neglects the third interest viewpoint introduced at the beginning of this article, which was influential in the decision of the CISG drafters that, due to the costs and risks associated with undoing a transaction, contract avoidance should be prevented as best as possible. Thus, we must examine the importance of this argument, and if need be, scrutinize earlier views taken on the subject.[28]

First we must recall that in a comparative analysis of cases from the courts of the Contracting States and from arbitration tribunals, the severity of the German Supreme Court in judging when a lack of conformity is to be viewed as a fundamental breach can certainly not be considered an international standard.[29] This alone should caution against overvaluing the prerequisites for avoidance with references to the costs and risks of returning the goods. However, for other reasons as well it is not always valid in every case:

1. The argument that additional costs and risks associated with the necessary return shipment of the goods and their possible interim storage must be avoided, can only have significance if the goods have already been delivered to the buyer (or at least brought to the carrier) or have been placed in storage. If, however, the buyer goes to collect the goods himself, discovers a lack of conformity and therefore refuses acceptance, such costs and risks do not arise, or at least not always to such a degree that requires hindrance of unwinding the contract

[27] *See* Schlechtriem, *supra* note 23; Peter Schlechtriem, Internationales UN-Kaufrecht para. 188, n.132 (2d ed. 2003).

[28] Schlechtriem Commentary, *supra* note 3, at art. 25, para. 21a.

[29] *See* CISG-AC Opinion No. 5, *supra* note 4, at 4.1-4.21, and citations in Annex 1.

through imposition of a high threshold for avoidance.[30] The situation is similar with anticipatory repudiation and the decision of whether the seller will commit a fundamental breach under Article 72(1) CISG. If before the time for delivery it is clear that the seller will not be able to deliver goods that conform to the contract, then the reason for an elevated threshold for avoidance cannot be because costs and risks of a return shipment of the goods must be prevented, since such costs and risks do not even arise. The same applies in the case of installment deliveries still due and a corresponding avoidance of the contract pursuant to Article 73(2) CISG: if the first deliveries are defective, one cannot use the cost and risk element of undoing the transaction to argue for a high materiality threshold for the anticipated breaches (i.e., the installment deliveries still due). If the sold goods are warehoused, or to be delivered by ship or motor vehicle, then new arrangements can be made before delivery to the buyer so that these additional costs will not necessarily arise or will not increase to such an extent to be much higher than those when return shipping is required. A significant risk increase would be an exception rather than the rule.

2. If the buyer takes possession of the goods elsewhere than at the seller's place of business, then avoidance need not necessarily involve return shipping, since for avoidance the same must apply as for the exercise of the right of rejection before acceptance: the buyer is under a duty to preserve the goods under Article 86 CISG. However, the buyer can often resort to a self-help sale of the goods at their location pursuant to Article 88 CISG, so that at least return shipping costs are spared and corresponding risks are avoided. Also, if the buyer seeks to recover damages, a cover sale at the location of the goods can be desirable to mitigate losses.[31]

3. (a) Indeed, costs and risks associated with the return transport of non-conforming goods that have already been

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[30] For reasoning against a special evaluation of these cases, *see* CISG-AC Opinion No. 5, *supra* note 4, at 4.6.

[31] In numerous references by the courts regarding the justification of preserving the sales contract, it is stated that the buyer can and must use or liquidate the non-conforming goods, if need be at throw-away prices. Apart from avoiding the contract, the buyer must be allowed to do that if the proceeds from the liquidation of the non-conforming goods at their location are higher than the costs to return them.

shipped to the buyer can be considerable. However, there are instances where return shipment to the seller and disposition of the goods in an exporting country can even work to reduce losses in comparison with an "emergency sale" in an importing country. If the goods are non-conforming (only) because they do not meet public law safety standards of the importing country and are consequently unusable and unmarketable there,[32] but in the exporting country of the seller the goods are acceptable, then avoidance of the contract and shipment of the goods back to the seller can possibly reduce the net loss from the transaction and thus be advisable. Nevertheless, often the situation will be different: such as when the goods in question are machines or high quality electronic wares vulnerable to theft and delivered to a country with an insufficient shipping and warehouse infrastructure. The organization of cargo space for the return shipment to the seller, rail or road transport to the port of discharge, interim storage, etc., can all be expensive and hazardous, such that, in fact, it seems economically advisable to preserve the contract and to satisfy the buyer's interest with damages and/or a reduction in the price. However, in such cases there may be no possibility for use of the non-conforming goods in the buyer's country at all, so that also under the strict criteria of the German Supreme Court a fundamental breach would exist and avoidance would be consequently permissible. Therefore, the transaction might still come undone.

(b) The costs of return shipping, etc., are generally ascribed to the seller as foreseeable consequential damages from his breach of contract.[33] Exemption under Article 79(1) or (2) CISG would hardly ever be applicable. However, *after* avoidance the buyer is responsible for the preservation of the goods, and any deterioration or loss of the goods should be judged pursuant to

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[32] On the disputed question of whether public law regulations in the importing land or exporting land control, *see* Ingeborg Schwenzer *in* COMMENTARY, ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 3, at art. 35, paras. 17-18.

[33] *See* Rainer Hornung *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 3, at art. 81, para. 19 [hereinafter Hornung COMMENTARY]. See also the clear reasoning regarding foreseeability of transport costs (chartering and re-chartering a ship) that arose as a consequence of a party avoiding a contract due to the other party's refusal to perform in *Downs Investments Pty. Ltd. v. Perwaja Steel* (2001) 2 Q.R. 462 (Austl.), *at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011012a2.html.

Articles 74 and 79 CISG.[34] Passage of the risk of loss (if, despite the seller's breach, the risk even should have passed[35] and the purchase price has already been paid), is determined in accordance with Articles 66- 70 CISG. For such purposes one must first resolve where and how the buyer is to perform his obligation of restitution.[36] For example, if the buyer (who is under a duty to restore the goods) delivers the goods to be returned to a carrier, and if the goods are then damaged or destroyed in transit, the buyer can still reclaim the purchase price through corresponding application of Articles 66 and 67(1) CISG.

(c) Regardless of who must bear the costs and risks, the total expenses of the transaction increase in such situations, which can be viewed as economically wasteful. In such cases, it seems sensible and even advisable to make avoidance of the contract more difficult. But the question must be permitted, whether the buyer's interest in being able to return non-conforming goods should be placed behind the economic interest in minimizing the costs of failed transactions. Generally, the breaching seller bears these costs as a consequence of his delivery of non-conforming goods.[37] To the extent the buyer is responsible for risks and costs, such as the risk of liability for return of the goods, and possibly the risk for the return of the purchase price, the buyer assumed such costs and risks with his choice of "avoidance" as a remedy and considered (or at least should have considered) this choice against other remedies. In the allocation of such burdens, their prevention should not be forced upon the buyer through the denial of avoidance of the contract with the argument of a (perhaps) economically sensible reduction in costs.

All things considered, the argument that avoidance of the contract carries costs and risks due to the necessity of returning the goods, and that therefore in the case of non-conforming

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[34] *See* Hornung COMMENTARY, *supra* note 33, at art. 82, para. 13.

[35] *See* text above at section III.2.; Exceptions considered are those in which the seller neither caused the lack of conformity of the goods nor is responsible for it.

[36] Details regarding these questions that are not settled in the CISG will not be dealt with here; *see* Hornung COMMENTARY, *supra* note 33, at art. 81, paras. 17-18b.

[37] *See* Hornung COMMENTARY, *supra* note 33.

goods, avoidance should be restricted as much as possible, seems incorrect in many situations. Moreover, such an argument seems rather unconvincing, and fails to persuade that the right of avoidance based on lapsed delivery deadlines, exercised through a justified refusal of acceptance as described herein, should be rejected too.