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Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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A comparison of the Remedies under the CISG and German law and the effect of the Directive 1999/44/EC on German sales law

A. Introduction

Today's economic developments which lead to more and more international trade relations and globalisation underline the importance and need of regulations in this field. The belief that there should be a consistent and universal form of international mercantile law which is based upon common sense and common legal principles led to the development of the United Nations Convention on Contracts for the International Sale of Goods (CISG).¹ The CISG was adopted by a diplomatic conference on 11 April 1980², entered into force on 1 January 1988³ and has been accepted by 74 different states till today.⁴ It provides essential rules for the sale of goods and a regulation of issues of contract law.⁵ It has to be mentioned that, in contrast to the BGB, the CISG does not apply to items, bought for personal household use, properties and ships as well as to stocks, shares, money, liquids, gas, rights and other items, for example, electricity and intellectual property rights (Article 2 CISG).

'With regard to the substantive issues, the CISG basically governs three areas: the conclusion of the contract, the obligations of the seller including the corresponding remedies of the buyer and the obligations of the buyer

¹ Piliounis *The Remedies of Specific Performance, Price Reduction and Additional Time (Nochfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?* Available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1146&context=intlaw> [Accessed 05.06.2010].

² United Nations Commission on International Trade Law http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html [Accessed 05.06.2010].

³ Sim *'The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods'* in Pace International Law Review 'Review of the Convention on Contracts for the International Sale of Goods (CISG)' 24.

⁴ United Nations Commission on International Trade Law http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html [Accessed 05.06.2010].

⁵ Huber *'Some introductory remarks on the CISG'* (2006) *Internationales Handelsrecht* 228 Available at <http://www.cisg.law.pace.edu/cisg/biblio/huber.html> [Accessed 05.06.2010].

including the corresponding remedies of the seller.⁶ For Germany as one of the biggest export countries in the world the CISG is a very relevant legal instrument. Nearly all sales disputes involve claims by one party that the contracting party failed to perform an obligation incurred.⁷ Especially with regard to liability and remedies they, no matter if buyer or seller, have to find out which law provides the most attractive provisions for them. This dissertation will compare the remedies and requirements of the CISG with the remedies and requirements in German sales law which was subject to a major reform caused by the implementation of Directive 1999/44/EC⁸. Its aim was to harmonise the national regulations of the European Union member states. The changes in German sales law were strongly influenced by the rules of the CISG. However, there are still differences.

B. The idea of remedies

Remedies are legal tools that are available to a party to react to breaches by the other party in a contractual relationship.⁹ Under the CISG and German law there are four basic categories of remedies. Firstly, a party can claim specific performance which compels the breaching party to perform his part of the bargain.¹⁰ Secondly, a party can declare the contract avoided. Thirdly, the seller may reduce the purchase price and finally, a party can claim damages. Under both the CISG and the German Civil Code (BGB), specific performance is the 'primary' remedy as the main aim must always be to keep the contract alive.¹¹ A contract can only be avoided, if a party is not able to perform.

Below, I will explain these remedies and the requirements to claim the remedies in detail. I will show the possibilities which a buyer or a seller has if there is a breach of contract at either side.

⁶ Ibid.

⁷ Lookofsky 'Understanding the CISG' 67.

⁸ Rott 'German Sales Law Two Years After the Implementation of Directive 1999/44/EC' (2004) 5 German Law Journal 237.

⁹ Torsello 'Remedies for breach of contract under the 1980 Convention on Contracts for the International Sale of Goods (CISG)' in: Ferrari 'Quo Vadis CISG' 43.

¹⁰ Lookofsky 'Understanding the CISG' 108.

¹¹ Ibid.

C. Remedies for breach of contract by the seller

I. Requirements to claim defects

The modernisation of the German Law of obligations on 1 January 2002 changed the German Civil Code more radically than any previous reform¹² and brought the German purchase law closer to the regulations contained in the CISG. However, there are still some differences, for example, the equal applicability of the BGB-rules to consumer and non-consumer sales.¹³

The UN sales law does not differentiate between the several types of impairment of performance of an obligation. Relevant is only that there is a breach of contract. All remedies named in Article 45 CISG require that the seller is in such a breach and it makes no difference if the contract has not been fulfilled at all or has only not been fulfilled exactly as it was required. It is sufficient that the seller fails to perform one of his obligations, regardless whether this is a main or a secondary obligation.

1. Obligations of the seller

The obligations of the seller under UN purchase law are listed in Chapter II of the CISG. Article 30 CISG states that '[t]he seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.'

These obligations are the main duties of the seller and he is equally bound to perform any other obligation provided for in the contract or by any usage or practice between the parties.¹⁴

Under German law, § 433(1) BGB contains rules concerning the obligations of the seller. Like under the CISG, the seller has the duty to hand over the sold goods to the buyer and to transfer the property of the goods. He is obliged to transfer the goods free from material and legal defects (§ 433(2) BGB). Under the BGB, one must distinguish between main and secondary

¹² Heldrich/Rehm 'Modernisation of the German Law of Obligations: Harmonisation of Civil Law and Common Law in the Recent Reform of the German Civil Code' in Cohen/McKendrick 'Comparative Remedies for Breach of Contract' 123.

¹³ Sivesand 'The Buyer's Remedies for Non-Conforming Goods' 24.

¹⁴ Ferrari/Flechtner/Brand 'The Draft UNCITRAL Digest and Beyond' 613 f.

obligations while the CISG grants a right to remedies in any case of breach of contract depending on the importance of the respective breach of duties.¹⁵ Main obligations are the ones named in § 433 BGB. Secondary obligations could arise out of contractual agreements or out of law. An example for a secondary obligation is the duty to disclosure or the duty to proper storage and dispatching of the goods.¹⁶

a) Delivery

aa) CISG

The Articles 31-33 CISG explain the obligations of the seller to deliver the goods. However, in practice, the parties will agree that these matters are to be governed by Incoterms such as CIF or FOB which describe particular delivery obligations.¹⁷ Therefore, there will be little use for these corresponding provisions of the CISG.¹⁸ The rules do not, however, deal with the transfer of property.¹⁹ The question what the seller must do to transfer the title is left to the applicable national law.²⁰

(1) Place of delivery

Article 31 CISG specifies the place of delivery for the seller. The Convention distinguishes between several possibilities. If the parties do not agree otherwise the seller has either to hand the goods over to the carrier in the case that the sale involves a carriage contract (Article 31(a) CISG), or place the goods at the buyer's disposal at a certain place where they were stored, manufactured or produced (Article 31(b) CISG). In other cases the seller has to place the goods at the buyer's disposal at the seller's place of business at the time of the conclusion of the contract (Article 31(c) CISG).

¹⁵ Tvalavadze 'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht' 150.

¹⁶ Jauernig 'Bürgerliches Gesetzbuch – Kommentar' 511.

¹⁷ Huber/Mullis 'The CISG' 106.

¹⁸ Lookofsky 'Understanding the CISG' 70.

¹⁹ Lando 'Article 30' p. 247 Available at <http://www.cisg.law.pace.edu/cisg/biblio/lando-bb30.html> [Accessed 07.06.2010].

²⁰ Ibid.

At the buyer's disposal means that the seller has to do everything which is necessary that the buyer is able to take possession.²¹ This includes for example the identification of the goods and the completion of any pre-delivery preparation.²²

When the seller has delivered the goods he has performed his obligations and regularly the risk of subsequent damage or loss passes onto the buyer.²³ Even if the goods do not correspond with those ones required by the contract the seller delivered in accordance with the Articles 31 and following.²⁴ However, there will be a breach of contract that gives the buyer the right to make use of his remedies laid down in Articles 45 following.²⁵

Article 32 CISG supplements Article 31 CISG when the sale includes the carriage of the goods.²⁶ The seller has the duty to enable the buyer to identify the goods if this leads to problems while they are in the hands of the carrier (Article 32(1) CISG). The seller then has to send, for example, a transport document to the buyer which names the buyer as consignee.²⁷ A failure of this duty will prevent the passing of the risk under Article 67(2) CISG.²⁸ Furthermore, the buyer may be entitled to the remedies under Articles 45 following CISG as this is a breach of contract.²⁹

The seller must also act with reasonable care if he is bound to arrange for the carriage (Article 32(2) CISG).³⁰ He must make sure that the type of transportation is appropriate for the carriage of the contracting goods.³¹

The seller is obliged to provide the buyer with all information necessary in order to insure the goods (Article 32(3) CISG). This could include details of

²¹ Secretariat Commentary 'Guide to CISG Article 31' Available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-31.html> [Accessed 07.06.2010].

²² Ibid.

²³ Ferrari/Flechtner/Brand 'The Draft UNCITRAL Digest and Beyond' 619.

²⁴ Schlechtriem 'The Sellers Obligations Under the United Nations Convention on Contracts for the International Sale of Goods' p. 6-12 Available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem10.html> [Accessed 07.06.2010].

²⁵ Ibid.

²⁶ Butler 'A practical guide to the CISG: Negotiations through litigation' §4.03 [A][1] Available at <http://cisgw3.law.pace.edu/cisg/biblio/butler6-ch4.pdf> [Accessed 07.06.2010].

²⁷ Huber/Mullis 'The CISG' 119.

²⁸ Ibid at 120.

²⁹ Ibid.

³⁰ Ferrari/Flechtner/Brand 'The Draft UNCITRAL Digest and Beyond' 620.

³¹ Huber/Mullis 'The CISG' 120.

the goods shipped, the date of shipment and the name of the vessel and the carrier.³²

(2) Time of delivery

Article 33 CISG specifies when the seller has to deliver the goods. If a date or a period of time is fixed in the contract the seller has to deliver on that date or during that period (Article 33(a) and (b) CISG). In any other case he has to deliver within a reasonable time after conclusion of the contract (Article 33(c) CISG). The time must be adequate in the circumstances.³³ That can be determined by comparing what is normal and acceptable in the relevant trade.³⁴ This will vary from case to case and one must have a look at factors, such as the nature of the goods and the distance covered.³⁵

bb) BGB

(1) Place of delivery

The place of performance is determined in the general part of the German Civil Code. § 269 BGB states that where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made at the place where the seller had his residence at the time when the obligation arose. If the obligation arose in the commercial undertaking of the seller, the place of the commercial undertaking takes the place of the residence if the seller maintained his commercial undertaking at another place. This is the corresponding rule to Article 31(c) CISG.

The German Civil Code provides additional regulations which are very important for the international trade. In the case of sales shipment the seller ships the goods sold to another place than the place of performance and the

³² Ibid at 121.

³³ Ferrari/Flechtner/Brand 'The Draft UNCITRAL Digest and Beyond' 623.

³⁴ Honnold 'Unifarm law for international sales under the 1980 United Nations Convention' 101.

³⁵ Ying 'Comparison between provisions of the CISG (Articles 33 and 52(1)) and the counterpart provisions of the PECL (Articles 7:102 and 7:103)' Available at <http://www.cisg.law.pace.edu/cisg/biblio/ying.html> [Accessed 0706.2010].

risk passes to the buyer as soon as the seller has handed the goods over to the forwarder, carrier or other person or body specified to carry out the shipment. However, this does not mean that the seller has performed his obligations at this time.³⁶ This is only the case, contrary to Article 31(a) CISG, if the goods were actually handed over at the buyer's place of residence.

(2) Time of delivery

It is usual that the parties fix a time of delivery in the contract. Then they have to respect these times. Otherwise, § 271(1) BGB contains rules that allow the buyer to demand performance immediately and the seller to effect it immediately. This differs from the provisions in the CISG where the seller has to deliver within a reasonable time after conclusion of the contract.

Where a time has been specified, it must be assumed that the buyer may not demand performance before that time, but the seller may effect it prior to that time (§ 271(2) BGB).

b) Handing over of documents

aa) CISG

The seller has to hand over documents relating to the goods (Article 34 CISG). These could be documents of title for example a bill of lading, warehouse receipt, insurance policy and certificate of origin.³⁷ If the seller hands over non-conforming documents the buyer is entitled to make use of the normal remedies as this is a breach of contract.³⁸

³⁶ Tvalavadze 'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht' 11.

³⁷ Enderlein 'Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods' p. 153 f. Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html> [Accessed 07.06.2010].

³⁸ Ferrari/Flechtner/Brand 'The Draft UNCITRAL Digest and Beyond' 626.

bb) BGB

The BGB does not contain a rule similar to Article 34 CISG. The reason for that is the national character of the BGB. Therefore, it is not necessary to hand over a bill of lading or a certificate of origin.

c) Transfer of property**aa) CISG**

The seller has to transfer the property to the buyer according to Article 30 CISG. However, the CISG does not govern issues concerned with the transfer of property which is rather subject to the law applicable pursuant to the private international law of the forum.³⁹

bb) BGB

§ 929 BGB determines the transfer of ownership for moveable goods. The owner has to deliver the goods to the acquirer and both have to agree that ownership is to pass. If the acquirer is in possession of the goods, agreement on the transfer of the ownership suffices. In the case of immovable property, §§ 873 and 925 BGB apply. Thus, the change of rights must be written down in the Land Register and the agreement must be declared in the presence of both parties before a competent agency. There are no similar rules in the CISG. The reason for that is the national nature of the German rules as opposed to the international nature of the CISG. Furthermore, the CISG only applies for sales of movable goods and not for the sales of immovable property.

³⁹ Huber/Mullis *The CISG* 129.

d) Conformity of goods / material defect

aa) CISG

Articles 35 – 37 CISG deal with the seller's obligation to deliver goods of the quantity, quality and description as it is required by the contract. If the seller fails his obligation to deliver conforming goods, the buyer will be entitled to resort to the remedies in Articles 45 and following CISG.⁴⁰

(1) Contractual conformity

According to Article 35 CISG the buyer must deliver the exact quantity of the goods as it is named in the sales contract. With formulations in the contract, such as 'more or less' or 'about' the parties agree that the seller can deviate a little bit from the amount stipulated in the contract.⁴¹ Differences in quantity and contractual requirements can only be regarded as non-conformance if they are of certain seriousness.⁴²

The term 'quality' in this Article is not restricted to the physical characteristics of the goods since it was decided that the fact that the delivered goods did not come from the agreed country constitute a defect in the quality of the goods.⁴³ Furthermore, there can also be a breach of contract if the goods are of a similar or even higher quality.⁴⁴

The delivered goods must also be of the description required by the contract. The question arose on how to treat the delivery of completely different goods from those of the contractual description, so-called 'aliud'.⁴⁵ Some argued that these cases should not be treated as a delivery of non-conforming goods and should rather be regarded as a breach by the seller to deliver under Article 30 CISG with the consequence that the notice requirement in Article

⁴⁰ Ibid at 130.

⁴¹ Ibid.

⁴² *Thread case* Appellate Court Düsseldorf, Germany, 21 April 2004 Available at <http://cisgw3.law.pace.edu/cases/040421g2.htm> [Accessed 07.06.2010].

⁴³ *Cobalt sulphate case* Federal Supreme Court, Germany, 3 April 1996 Available at <http://cisgw3.law.pace.edu/cases/960403g1.html> [Accessed 07.06.2010].

⁴⁴ Huber/Mullis 'The CISG' 132.

⁴⁵ Ibid.

38 CISG would not apply.⁴⁶ The preferable opinion, however, regards these 'aliud' – cases as cases of non-conformity.⁴⁷ According to these voices the word 'description' in Article 35 CISG also covers the delivery of an 'aliud' and has the advantage that a distinction between defective and totally different goods is unnecessary.⁴⁸ Thus, if the buyer gives notice to the seller of the non-conformity of the goods, he has almost the same remedies as those available where the seller fails or refuses to deliver, as the 'aliud' delivery will often amount to a fundamental breach.⁴⁹

(2) Conformity with the standards set out in Article 35(2) CISG

Article 35(2) CISG defines when the goods do conform with the contract if there is no agreement. It requires first that the goods are fit for the purpose for which they are ordinarily used (Art. 35(2)(a) CISG). The goods do not have to be perfect, unless this is required to fulfil their ordinary purposes.⁵⁰ The question arose whether conformity is determined in regard to standards in the seller's country or the country of the buyer. In the New Zealand mussels case 'the Supreme Court held that article 35(2)(a) and (b) CISG does not place an obligation on the seller to supply goods, which conform to all statutory or other public provisions in force in the import State, unless the same provisions exist in the export State as well, or the buyer informed the seller about such provisions relying on the seller's expert knowledge, or the seller had knowledge of the provisions due to special circumstances.'⁵¹ Many authors agree with this position.⁵² However, in the case *Medical Marketing International, Inc. v. Internazionale Medico Scientifica*⁵³ an exception was made from the mussels case. It was stated that the public law standards of

⁴⁶ Ibid at 133.

⁴⁷ *Cabalt sulphate case* Federal Supreme Court, Germany, 3 April 1996 Available at <http://cisgw3.law.pace.edu/cases/960403g1.html> [Accessed 07.06.2010].

⁴⁸ Huber/Mullis 'The CISG' 133.

⁴⁹ Ibid.

⁵⁰ Ferrari/Flechtner/Brand 'The Draft UNCITRAL Digest and Beyond' 630.

⁵¹ *New Zealand mussels case* Federal Supreme Court, Germany, 8 March 1995 Available at <http://cisgw3.law.pace.edu/cases/950308g3.html> [Accessed 08.06.2010].

⁵² Huber/Mullis 'The CISG' 137.

⁵³ *Medical Marketing v. Internazionale Medico Scientifica* Federal District Court Louisiana, United States, 17 May 1999 Available at <http://cisgw3.law.pace.edu/cases/990517u1.html> [Accessed 08.06.2010].

the buyer's country are relevant.⁵⁴ The seller should have been aware of and was bound by the provisions of the buyer's country because of 'special circumstances'.⁵⁵

I prefer the first view. If a person concludes a purchase contract with an international seller, he should be aware that there might be other standards in this country. A seller can assume that a foreign buyer is informed about these standards in the seller's country. It is easy for the buyer to give the seller information about characteristics that are important for him. Thus, the decision in the New Zealand mussels case was right.

Under Article 35(2)(b) CISG the goods must be 'fit for any particular purpose expressly or impliedly made known to the seller'. This gives the buyer additional protection over that provided by Article 35(2)(a) CISG.⁵⁶ The more specifically the buyer states the purpose the more the seller has to ensure that the goods are fit for it.⁵⁷ However, there is no breach of this Article if the buyer did not rely on the seller's skills and judgement to deliver goods fit for that purpose.

Furthermore, the goods must be of the quality of goods which the seller has held out to the buyer as a sample or model (Article 35(2)(c) CISG) and must be packaged in the manner usual for such goods or adequate to protect the goods (Article 35(2)(d) CISG).

(3) Exclusion of liability

The seller is not liable for non-conformity if the buyer knew or could not have been unaware of the non-conformity at the time when the contract was concluded (Article 35(3) CISG). The buyer does not have to undertake a pre-contractual inspection but if he actually finds out that the goods are not fit (i.e.) for ordinary purposes, he cannot hold the seller liable after he bought the goods with this knowledge.⁵⁸ However, if the seller is liable for the lack of conformity and acts fraudulently, this rule will not apply even if the buyer has

⁵⁴ Ibid.

⁵⁵ Digest of Article 35 case law, par 9 Available at <http://www.cisg.law.pace.edu/cisg/text/digest-art-35.html#ii> [Accessed 15.05.2010].

⁵⁶ Huber/Mullis 'The CISG' 138.

⁵⁷ Ibid.

⁵⁸ Lookofsky 'Understanding the CISG' 83.

been aware of the non-conformity because a very negligent buyer deserves more protection than a seller acting fraudulently.⁵⁹ The seller will have to prove that the buyer was aware or could not have been unaware of the defects.⁶⁰

(4) Relevant time

The lack of conformity must, according to Article 36(1) CISG, exist at the time when the risk passes to the buyer. Only then the seller is liable. If the parties had not agreed the moment when the risk will pass, it passes at the time set down in Articles 66 and following CISG.

Article 36(2) CISG provides that the seller is liable for a lack of conformity which occurs after the passing of the risk and which is due to a breach of any of his obligations. If the seller, for example, has the duty to conclude a contract of carriage and he chooses an obviously incompetent carrier, then it would be his responsibility if the goods are damaged during the carriage, no matter if the risk passed or not.⁶¹

(5) Burden of proof

A critical question is who bears the burden of proof concerning lack of conformity.⁶² Some voices defer to the applicable domestic law.⁶³ It is also argued by certain authors that the party asserting the non-conformity has to prove it, which is a general principle under the CISG.⁶⁴ A German court, applying the CISG, stated that the buyer has the burden if he has accepted the goods without objecting to its quality⁶⁵ while another court held that where a refrigeration unit broke down shortly after it was delivered, the seller

⁵⁹ *Used car case* Appellate Court Köln, Germany, 21 May 1996 Available at <http://cisgw3.law.pace.edu/cases/960521g1.html> [Accessed 08.06.2010].

⁶⁰ Huber/Mullis *The CISG* 143.

⁶¹ *Ibid* at 145.

⁶² Ferrari/Flechtner/Brand *The Draft UNCITRAL Digest and Beyond* 640.

⁶³ *Maaden v. Thyssen* Court of Arbitration of the International Chamber of Commerce, France, 26 March 1993 Available at <http://cisgw3.law.pace.edu/cases/936653i1.html> [Accessed 08.06.2010].

⁶⁴ Ferrari/Flechtner/Brand *The Draft UNCITRAL Digest and Beyond* 641.

⁶⁵ *Meat case* District Court Flensburg, Germany, 24 March 1999 Available at <http://cisgw3.law.pace.edu/cases/990324g2.html> [Accessed 08.06.2010].

has to prove that the defect did not exist when the goods were shipped⁶⁶. I prefer the second decision. Some defects are not visible even if a buyer examines the goods. If a defect occurs within a short time after delivery, it is often the case that the goods did not have the contractual quality at the time of delivery. Consequently, it is fair to impose the burden of proof on the seller.

(6) Right to cure before delivery date

Under Article 37 CISG the seller has the possibility to cure any non-conformity if he has delivered before the date for delivery, provided that he does not cause the buyer unreasonable inconvenience or expense.

bb) BGB

The seller must deliver the goods for the buyer free from material defect (§ 433(1) second sentence BGB). § 434 BGB contains rules which describe whether there is a defect or not. The regulations are similar to those in Article 35 CISG. Both instruments define the defectiveness of the goods and base it on subjective arrangements made in the contract.

Contrary to the CISG, it does not matter whether the defect is serious or not.⁶⁷ A defect exists in any case but it will be of relevance for the remedies applicable.⁶⁸ § 323(5) second sentence BGB contains a rule that the buyer may not withdraw from the contract if the breach of duty is trivial. Furthermore, the right to specific performance may be limited according to § 439(3) BGB.

The goods are free of material defects if, upon the passing of the risk, they have the agreed quality (§ 434(1) first sentence BGB). The quality must be content of the contract.⁶⁹ Beneficial deviations for the buyer will not constitute a material defect.⁷⁰

⁶⁶ *Thermo King v. Cigno Insurance Company of Europe SA-NV* Appeal Court Grenoble, France, 15 May 1996 Available at <http://cisgw3.law.pace.edu/cases/960515f1.html> [Accessed 08.06.2010].

⁶⁷ Tvalavdze 'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht' 20.

⁶⁸ Ibid.

⁶⁹ Jauernig 'Bürgerliches Gesetzbuch – Kommentar' 516.

⁷⁰ Ibid.

In addition to the subjective regulations the paragraph contains, like the CISG, objective rules for the existence of a material defect if the parties have not agreed every detail in the contract. Thus, the goods are free of material defects if they are suitable for the use intended under the contract (§ 434(1) Nr 1 BGB) or if they are suitable for the customary use and its quality is usual for goods of the same kind and the buyer may expect this quality in view of the nature of the goods (434(1) Nr 2 BGB). Whether there is a defect or not has to be decided on a case to case basis.

A material defect also exists, according to § 434(2) BGB, if the agreed assembly by the seller or persons whom he used to perform his obligation has been carried out improperly. In addition, there is a material defect in the goods intended for assembly if the assembly instructions are defective, unless the goods have been assembled without any error. It is required that the assembly is a secondary obligation of the seller. Otherwise, there will be a service contract rather than a purchase contract.⁷¹

Eventually, § 434(3) BGB equalises the delivery of different goods ('aliud') or of a lesser amount of the goods with a material defect. In contrast to the BGB, the CISG does not contain such a provision but it has been decided by case law that 'aliud' – deliveries are cases of non-performance⁷².

The paragraph does not apply if the delivery is obviously unrelated to the claim of the buyer.⁷³

e) Third party claims / defect in title

aa) CISG

The CISG distinguishes between regularly third party claims (Article 41 CISG) and third party claims based on industrial property or other intellectual property (Article 42 CISG).

⁷¹ *ibid* at 518.

⁷² *Cobalt sulphate case* Federal Supreme Court, Germany, 3 April 1996 Available at <http://cisgw3.law.pace.edu/cases/960403g1.html> [Accessed 07.06.2010].

⁷³ Jauernig 'Bürgerliches Gesetzbuch – Kommentar' 519.

(1) Regularly third party claims

Article 41 CISG determines that '[t]he seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim'. A third party claim is given, if the third party can prevent the buyer from being able to use, resell or otherwise dispose of the goods.⁷⁴ This is for example the case, if the seller cannot transfer property because he is not the owner of the goods.⁷⁵

Third party claims may include rights of property, rights of ownership, security interests and rights of use.⁷⁶

'[T]he provision probably does not include claims by public authorities that the goods violate health or safety regulations and that they may not, therefore, be used or distributed.'⁷⁷ These claims fall under Article 35 CISG.⁷⁸

The intention of this rule is to prevent the buyer from conflicts with third parties. Therefore, even unfounded claims lead to a breach of Article 41 CISG and the solution of such problems falls in the seller's sphere of risk.⁷⁹

Thus, he has to demonstrate to the satisfaction of the buyer that the claim is unfounded.⁸⁰ If he fails and he cannot free the goods from the claim, the buyer can exercise the rights provided in Article 45 CISG.⁸¹

The seller is also liable even if the buyer knew or could not have been unaware of the third party right⁸² unless the buyer agreed to take the goods subject to that right or claim (Article 41 first sentence CISG).

(2) Industrial or intellectual property rights

Article 42 CISG states the duty of the seller to deliver goods which are free from industrial or other intellectual property rights of third parties, of which the

⁷⁴ Huber/Mullis *'The CISG'* 170.

⁷⁵ Ibid.

⁷⁶ Tvalavadze *'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht'* 169.

⁷⁷ Huber/Mullis *'The CISG'* 171.

⁷⁸ Ibid.

⁷⁹ Tvalavadze *'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht'* 170.

⁸⁰ Secretariat Commentary *'Guide to CISG Article 41'* Available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-41.html> [Accessed 01.09.2010].

⁸¹ Ibid.

⁸² Ibid.

seller knew or could not have been unaware at the time of the conclusion of the contract. This paragraph does not apply where the buyer knew or could not have been unaware of the right or claim at the time of the conclusion of the contract (Article 42(2)(a) CISG) or the right results from the seller's compliance with technical drawings, designs, formulae or other specifications furnished by the buyer (Article 42(2)(b) CISG).

This claim is also limited to cases where the third party's claim is based on the law of the state named by Article 42(1)(a) or (b) CISG, whichever alternative is applicable.⁸³ This leads to a milder liability than Article 41 CISG determines as these rights are limited to a territorial area.⁸⁴ The reason is that the seller cannot be expected to have knowledge of industrial and intellectual property rights worldwide.⁸⁵

(3) Notice requirement

To rely on Article 41 or 42 CISG, the buyer must give notice to the seller within a reasonable time after he has become aware or ought to have become aware of the right specifying the nature of the right or claim of the third party (Article 43(1) CISG). There is no duty of the buyer to examine the goods and the buyer ought to have become aware only if there were concrete indications that such a right existed.⁸⁶

According to Article 43(2) CISG, this rule does not apply if the seller knew of the right of the third party and the nature of it. If this is not the case, the buyer cannot use the remedies under Articles 45 following CISG. However, he will still be able to reduce the price in accordance with Article 50 CISG or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice (Article 44 CISG). This rule applies for material defects as well and will be discussed below.

⁸³ Huber/Mullis *The CISG* 173.

⁸⁴ Tvalavadze *'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht'* 175.

⁸⁵ Secretariat Commentary *'Guide to CISG Article 42'* Available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-42.html> [Accessed 01.09.2010].

⁸⁶ Huber/Mullis *The CISG* 177.

bb) BGB

According to § 433(1) BGB, the seller must deliver the goods to the buyer free of legal defects.

§ 435 first sentence BGB contains a rule describing that the goods are free of legal defects if third parties, in relation to the goods, can assert either no rights, or only the rights taken over in the purchase agreement, against the buyer. In contrast to the CISG, which does not apply for the purchase of land, the BGB contains the rule, that it is equivalent to a legal defect if a right that does not exist is registered in the Land Register (§ 435 second sentence BGB).

Another difference to the CISG is that the third party right must really exist.⁸⁷ An unfounded claim does not lead to a violation of § 435 BGB.

Some voices in literature take the view that it does not constitute a legal defect if the seller is not able to transfer property to the buyer⁸⁸ while other author's think that the opposite is the case⁸⁹. I prefer the first opinion as § 433(1) BGB already provides that the seller has the duty to transfer the property. If he does not, this leads to a violation of the sellers duty according to § 433(1) first sentence BGB.⁹⁰

The German Civil Code does not contain a rule similar to Article 42 CISG. The violation of such rights falls under the general claims for defects of title.⁹¹ Furthermore, there is no notice requirement under German purchase law for third party rights.

The claims for defects in title and for material defects do not differ and are outlined in § 437 BGB.⁹²

⁸⁷ Jauernig *'Bürgerliches Gesetzbuch – Kommentar'* 521.

⁸⁸ Tvalavadze *'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht'* 32.

⁸⁹ Jauernig *'Bürgerliches Gesetzbuch – Kommentar'* 521.

⁹⁰ Tvalavadze *'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht'* 32.

⁹¹ Nau *'Das Gewährleistungsrecht in BGB, UN-Kaufrecht und den Reformvorschlägen der Schuldrechtskommission'* 193.

⁹² Jauernig *'Bürgerliches Gesetzbuch – Kommentar'* 522.

2. Breach of contract

a) CISG

If the seller fails to perform how it is expected of him according to the contract or to the CISG Articles 30 and following there will always be a breach of contract. Consequently, the buyer can use his remedies. However, Articles 46(2) and 49(1)(a) CISG require that the breach must be fundamental because avoidance if the buyer seeks to avoid the contract because avoidance is a remedy of last resort and the court is supposed to try to keep the contract alive⁹³. The term of fundamental breach is defined in Article 25 CISG. It is a breach that results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. This is not the case if 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. Article 25 CISG does not specify of what type the breach might be. Therefore, defective goods and late delivery alone will not constitute a fundamental breach.⁹⁴ The surrounding circumstances must always be taken in consideration and in the case of defective goods there will not be a fundamental breach as long as the buyer can use or resell them.⁹⁵ However, the final non-delivery by the seller constitutes a fundamental breach unless he has a justifying reason.⁹⁶

There is no breach when the other party could not foresee it. The CISG does not say which moment in time is relevant for the determination of the foreseeability but the majority opinion holds that the time of the conclusion of the contract is decisive.⁹⁷

⁹³ Pauly 'The concept of fundamental breach as an international principle to create uniformity of commercial law' (1999-2000) 19 Journal of Law and Commerce 225.

⁹⁴ *Cabalt sulphate case* Federal Supreme Court, Germany, 3 April 1996 Available at <http://cisgw3.law.pace.edu/cases/960403g1.html> [Accessed 08.06.2010].

⁹⁵ Ibid.

⁹⁶ *Foliapack v. Daniplast* Court of First Instance Parma, Italy, 24 November 1989 Available at <http://cisgw3.law.pace.edu/cases/891124i3.html> [Accessed 13.08.2010].

⁹⁷ Ferrari 'Fundamental breach of contract under the UN Sales Convention' (2005) 2005 International Business Law Journal 392.

b) BGB

The BGB does not speak of breach of contract. It only provides that the seller has to deliver goods without a material defect. Concerning damages, the BGB requires a breach of duty not a breach of contract. Consequently, 'the rules cover impediments not only to contractual but also to statutory obligations. Thus, these provisions apply in all cases in which there is a legal relationship between two or more persons obliging at least one party to perform a certain obligation towards the other party, giving (at least) one party the entitlement to certain benefits or the right to recovery.'⁹⁸ The reason for that is the national character of the BGB. In an international trade, different countries are involved and they will regularly have different opinions on which statutes should be applied.

3. Duties of the buyer

a) Examination and notice

aa) CISG

To rely on the remedies given for a breach of contract the buyer also has to carry out his duties. He has to examine the goods and give notice of the lack of conformity according to Article 38 and 39 CISG. The buyer does not have to examine the goods himself. He can also engage third persons that examine them with due care⁹⁹ or leave this to the customer to whom he has sold the goods¹⁰⁰.

⁹⁸ Coester-Waltjen 'The New Approach to Breach of Contract in German Law' in Cohen/McKendrick 'Comparative Remedies for Breach of Contract' 136.

⁹⁹ Enderlein 'Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods' p. 167 Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html> [Accessed 09.06.2010].

¹⁰⁰ Rore hard wood case Appellate Court Köln, Germany, 22 February 1996 Available at <http://cisgw3.law.pace.edu/cases/940222g1.html> [Accessed 09.06.2010].

The time given for the examination depends on the circumstances and the period begins with the receipt of the goods¹⁰¹. However, there may be other cases where the buyer can wait till the end of the period or the original date for delivery.¹⁰² Article 38(2) and (3) CISG contains provisions for the starting of the examination period in cases of contracts including carriage and cases where the goods are redirected or redispached by the buyer.

If large quantities of goods are delivered, the buyer only has to examine a representative sample which could include test runs in the case that the goods will be used in production processes.¹⁰³ Only if there was a defect in an earlier delivery it is not sufficient to only examine a sample.¹⁰⁴

If the buyer finds a lack of conformity, he has to give notice to the seller within a reasonable time after discovering it or after he ought to have discovered it according to Article 39(1) CISG. Otherwise he will lose his rights to claim these defects. Reasonable is a short period and means in many cases that he has to give notice immediately after he discovered the lack of conformity.¹⁰⁵ However, the buyer will not lose this right until both periods, the one in Article 38 and the period in Article 39 CISG, have expired.¹⁰⁶

The buyer must describe the nature of the non-conformity to give the seller the opportunity to understand the kind of breach and to cure it.¹⁰⁷

When latent defects become visible someday it is hard to determine if they were caused by a breach of contract by the seller or by other influences after passing of the risk.¹⁰⁸ Therefore, Article 39(2) CISG gives a maximum period of two years within which notice must be given to the seller. This period starts from the time on which the goods were actually handed over to the buyer.

¹⁰¹ Enderlein *'Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods'* p. 167 Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html> [Accessed 10.06.2010].

¹⁰² *Ibid.*

¹⁰³ *Chemical substance case* Appellate Court Koblenz, Germany, 11 September 1998 Available at <http://cisgw3.law.pace.edu/cases/980911g1.html> [Accessed 12.06.2010].

¹⁰⁴ *Shoes case* District Court Stuttgart, Germany, 31 August 1989 Available at <http://cisgw3.law.pace.edu/cases/890831g1.html> [Accessed 12.06.2010].

¹⁰⁵ Enderlein *'Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods'* p. 167 Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html> [Accessed 12.06.2010].

¹⁰⁶ Huber/Mullis *'The CISG'* 160.

¹⁰⁷ Ferrari/Flechtner/Brand *'The Draft UNCITRAL Digest and Beyond'* 667.

¹⁰⁸ Enderlein *'Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods'* p. 167 Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html> [Accessed 12.06.2010].

bb) BGB

The BGB does not contain a duty of the buyer to examine the goods and to give notice if there is a material defect. Such a regulation only exists for merchants in a commercial transaction and is therefore part of the German commercial code (Handelsgesetzbuch – HGB). If the buyer does not give notice of the defect, the goods are considered to be accepted by him and he cannot make use of his remedies.

The CISG (Articles 38, 39) and the HGB agree that the buyer has to examine the goods and give notice as soon as possible. Only the wording differs slightly.¹⁰⁹ The time for examination starts with the receipt of the goods¹¹⁰ and the period depends on the type of business and the nature of the goods.¹¹¹

b) Exceptions to the notice requirement

aa) CISG

Article 40 CISG states that ‘the seller is not entitled to rely on the provisions of Articles 38 and 39 CISG if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.’ It is very difficult for the buyer to prove an actual knowledge of lack of conformity. Article 40 CISG applies in cases of fraud or bad faith.¹¹² The question is whether it applies if the seller acts negligently. ‘[S]ome authors are of the opinion that also what can be described as gross negligence or even ordinary negligence suffices, while others indicate that slightly more than gross negligence (approaching deliberate negligence) is required.’¹¹³ In this case a majority of the tribunal concluded that the level of seller awareness of non-conformities that is required to apply Article 40 CISG

¹⁰⁹ Nau ‘Das Gewährleistungsrecht in BGB, UN-Kaufrecht und den Reformvorschlägen der Schuldrechtskommission’ 190.

¹¹⁰ Rosenhäger ‘Vertragsklauseln zur Rügeobliegenheit nach deutschem und UN-Kaufrecht’ 17.

¹¹¹ Ibid.

¹¹² Huber/Mullis ‘The CISG’ 164.

¹¹³ *Bijing Light Automobile Co. v Connel* Arbitration Award, Chamber of Commerce Stockholm, 5 June 1998 Available at <http://cisgw3.law.pace.edu/cases/980605s5.html> [Accessed 13.06.2010].

is 'a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity'.¹¹⁴

According to Article 44 CISG the buyer may still reduce the price or claim damages if he has a reasonable excuse for his failure to give the required notice. This excuse is limited to Article 39(1) CISG and does not effect the two-year-cut-off period of Article 39(2) CISG. It furthermore, does not give an exempt from Article 38 CISG regarding the timely inspection.¹¹⁵ To determine whether there is a reasonable excuse, regard must be had to the circumstances like the type and size of business, the nature of the goods and the seriousness of the breach.¹¹⁶ If Article 44 CISG applies the buyer cannot claim specific performance or avoid the contract as the buyer's possibilities (reducing the price and claim damages) are expressly named in the Article.

bb) BGB

The BGB does not contain a rule.

However, according to § 377(5) HGB, the seller is not entitled to rely on this provision if he conceals the material defect fraudulently. This rule is similar to the CISG with only a difference in the wording.

There is no exclusion similar to Article 44 CISG. The buyer cannot rely on a reasonable excuse for his failure to give the required notice.

4. Exclusion of liability

a) CISG

The liability of the parties can be excluded. Such exclusion is contained in Article 35(3) CISG as described before.

Another case of exclusion is mentioned in Article 79 CISG. If a party can prove that a failure to perform was due to an impediment beyond his control and that he could not be expected to have taken it into account at the time of the conclusion of the contract, then he is not liable. It has been decided by a

¹¹⁴ Ibid.

¹¹⁵ Honnold 'Uniform Law for International Sales under the 1980 United Nations Convention' 283 f.

¹¹⁶ Huber/Mullis 'The CISG' 166 f.

court that this impediment must be 'an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness'.¹¹⁷ However, courts have to decide on a case by case basis if there is an impediment beyond the party's control. The parties cannot claim that a change in the financial aspects of the sales contract excludes liability for damages as the parties must assume the risk of market fluctuations and should take it into account when they conclude the contract.¹¹⁸

In cases of objective impossibility a claim for specific performance should not be granted if the seller can exempt himself under Article 79 CISG.¹¹⁹ This applies to permanent (e.g. the sold good has been destroyed) as well as to temporary impossibility during the period of impediment (the sold good has been stolen).¹²⁰ Concerning relative impossibility which means that only the seller cannot perform, he is exempted only in exceptional cases.¹²¹

If the seller is responsible for an impediment then the buyer's material and intangible interest in specific performance is to be weighed against the seller's unforeseeable cost of performance.¹²²

A party can claim exemption if his own failure was 'due to the failure by a third person whom he has engaged to perform the whole or part of the contract (Article 79(2) CISG). It only applies if the party is exempt under Article 79(1) CISG and if the third person would be exempt if the provisions of that Article were applied to him.

A further exclusion of liability is contained in Article 80 CISG. If a party causes a failure of performance of the other party then he may not rely on it. Acts that cause the failure could, for example, be the buyer's failure to pay the purchase price for the delivered goods¹²³ or the seller's failure to perform

¹¹⁷ *Chinese goods case* Arbitral Tribunal Hamburg, Germany, 21 March 1996 Available at <http://cisgw3.law.pace.edu/cases/960321g1.html> [Accessed 14.06.2010].

¹¹⁸ Ferrari/Flehtner/Brand *The Draft UNCITRAL Digest and Beyond* 825 f.

¹¹⁹ Schlechtriem/Schwenzer *Commentary on the UN Convention on the International Sale of Goods* 538.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.* at 539.

¹²³ *Leather goods case* Appellate Court München, Germany, 9 July 1997 Available at <http://cisgw3.law.pace.edu/cases/970709g1.html> [Accessed 14.06.2010].

his obligation to name the loading port from which the goods were shipped.¹²⁴

In cases of third party rights, the exclusions in Articles 35(3), 41 first sentence, second clause and 42(2) CISG apply.

b) BGB

The BGB, as well, contains rules that exclude the liability of the seller. According to § 442(1) BGB the rights of the buyer due to a defect are excluded if he had knowledge of the defect at the time when the contract was entered into. This is the same as to Article 35(3) CISG.

If the buyer has no knowledge of a defect due to gross negligence, the buyer may assert rights in relation to this defect only if the seller fraudulently concealed the defect or gave a guarantee of the quality of the goods.

Furthermore, according to § 275(1) BGB, the seller is exempted from performance to the extent that performance is impossible for the seller (objective impossibility) or for any other person (subjective impossibility). However, the contract as such is not terminated.¹²⁵ The rights remaining to the seller are governed by §§ 280, 283 to 285, 311a and 326 BGB. As long as performance is possible the buyer may ask for it.¹²⁶

Only if there are extraordinary circumstances where it is outrageous to ask for performance, the seller may refuse it (§ 275 (2) BGB).¹²⁷

The present rule is independent of responsibility of the seller for the impossibility.¹²⁸ However, if the seller is responsible this can be included under § 275(2) BGB which states that the seller may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the buyer.

In contrast to the CISG, the German Civil Code differs between impossibility before the conclusion of the contract (§ 311a BGB) and after the conclusion

¹²⁴ *Prapane case* Supreme Court, Austria, 6 February 1996 Available at <http://cisgw3.law.pace.edu/cases/960206a3.html> [Accessed 14.06.2010].

¹²⁵ Coester-Waltjen 'The New Approach to Breach of Contract in German Law' in Cohen/McKendrick 'Comparative Remedies for Breach of Contract' 139.

¹²⁶ *Ibid.*

¹²⁷ *Ibid* at 139 f.

¹²⁸ Jauernig 'Bürgerliches Gesetzbuch – Kommentar' 241.

of contract (§ 275 BGB). However, the legal consequences do not differ. A contract is not prevented from being effective by the fact that under § 275 (1) to (3) BGB the obligor does not need to perform and the obstacle to performance already exists when the contract is entered into (§ 311a(1) BGB).

A similar rule to Article 80 CISG is contained in § 326(2) BGB. Thus, the seller retains the entitlement to consideration if the buyer is solely or very predominantly responsible for the circumstance due to which the obligor does not, under section 275 (1) to (3), have to cure his lack of insufficient performance. Furthermore, he retains the entitlement to consideration if this circumstance for which the seller is not responsible occurs at a time when the buyer is in default of acceptance.

Contrary to the CISG, the exclusions for defects in title are the same exclusions which apply for material defects and which are set down in § 442 BGB.¹²⁹

5. Risk

a) CISG

The time of the passing of risk is very important to determine if the seller is liable for any damages of the goods. Article 66 provides that the buyer has to pay the purchase price when the loss or damage occurs after the risk has passed to him, unless the loss or damage is due to an act or omission of the seller. The buyer also bears the risk of subsequent delay by the carrier after the seller handed over the goods to that carrier.¹³⁰

The time when the risk passed could be determined in the contract, for example, by using the Incoterms. If this is not the case Articles 66-70 CISG will apply.

If the contract involves the carriage of the goods, the risk passes to the buyer when the seller hands over the goods to the first carrier (Article 67(1) CISG). The 'risk passes without taking into account who owns the goods' and

¹²⁹ Tvalavadze 'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht' 173.

¹³⁰ Ferrari/Flechtner/Brand 'The Draft UNCITRAL Digest and Beyond' 750.

therefore, 'the passage of risk and transfer of title need not occur at the same time'.¹³¹

In the case of transit the risk passes to the buyer when the contract is concluded (Article 68 CISG). However, it is sometimes hard to determine when the damage of the goods occurred, whether that was before or after concluding the contract and parties are better advised to use common trade terms such as the Incoterms. There is an exception of this rule in Article 68 CISG that determines that the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents if the circumstances indicate so.

b) BGB

The risk of accidental destruction and accidental deterioration passes to the buyer upon delivery of the goods sold. From the time of delivery the emoluments of the goods accrue to the buyer and he bears the charges on it. The goods will be considered as delivered if the buyer is in default of acceptance of delivery (§ 446 BGB). Consequently, the buyer has to pay the purchase price even if the transfer of property has become impossible due to an accident after the seller has handed over the goods.¹³² The third sentence of this regulation is the same as Article 69 I CISG.

Contrary to international sales which the CISG covers, it is not usual to use standard terms like the Incoterms for national purchases to determine when the risk passes.

§ 269(1) BGB determines that where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the seller had his residence at the time when the obligation arose. If the obligation arose in the commercial undertaking of the seller, the place of the commercial undertaking takes the place of the residence if the seller maintained his commercial undertaking at another place (§ 269(2) BGB). In these cases, the

¹³¹ *St. Paul Guardian Insurance Company et al. v. Neuramed Medical Systems & Support Federal District Court New York, United States, 26 March 2006 Available at <http://cisgw3.law.pace.edu/cases/020326u1.html> Accessed 15.06.2010].*

¹³² Jauernig 'Bürgerliches Gesetzbuch – Kommentar' 544.

risk passes at the time when the seller hands over the goods at the place of performance.

If the parties agree that the seller has to deliver the goods to the buyer the risk passes at the place where the buyer has his residence.¹³³

§ 447 BGB contains rules, like Article 67 CISG, concerning the passing of risk if the parties arrange a sales shipment. If the seller, at the request of the buyer, ships the goods sold to another place than the place of performance, the risk passes to the buyer as soon as the seller has handed the goods over to the forwarder, carrier or other person or body specified to carry out the shipment. Many authors argue that the risk also passes when the seller transports the goods by himself or through his employees if the parties have arranged a sales shipment.¹³⁴ However, § 447(1) BGB only names persons independent from the seller and the seller is still in charge of the goods.¹³⁵ Furthermore, it would be hard to differentiate between cases falling under § 446 BGB, where the seller can deliver by himself as well, and cases falling under § 447 BGB.

II. Remedies of the buyer to claim defects

In UN purchase law, Article 45 CISG gives an overview over the remedies the buyer has if the seller fails to perform any of his obligations. The remedies referred to in Article 45(1)(a) CISG may be claimed concurrently with the right to damages under Article 45(1)(b) CISG.¹³⁶

The remedies available to the buyer under the BGB are listed in § 437 BGB. Thus, the buyer may, provided the requirements of the following provisions are met and unless otherwise specified, demand cure, withdraw from the agreement or reduce the purchase price and demand damages or reimbursement of futile expenditure. The rules under the German law have a broad field of application and have therefore, a relatively high level of

¹³³ Ibid at 228.

¹³⁴ Oetker/Maultzsch 'Vertragliche Schuldverhältnisse' 165 f.

¹³⁵ Tvalavadze 'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht' 17.

¹³⁶ Schlechtriem/Schwenzer 'Commentary on the UN Convention on the International Sale of Goods' 520.

abstraction.¹³⁷ In this aspect they differ from the CISG – rules which are less abstract and easier to understand.¹³⁸

'[I]t has to be stressed that independent of these remedies the creditor retains the right to performance as long as such is possible, be it a monetary or a non-monetary obligation.'¹³⁹

The hierarchy of remedies has been maintained by the German legislator as it was provided for by Directive 1999/44/EC.¹⁴⁰

1. Specific performance

a) CISG

aa) General right to require performance (Article 46(1) CISG)

(1) Provisions

'In interaction with Articles 48 and 49, this rule expresses the principle of priority of the right to require performance.'¹⁴¹

The buyer must give a clear demand that the seller should fulfil the disputed obligation.¹⁴² He cannot require specific performance if he has already resorted to a remedy which is inconsistent with this remedy. Such inconsistency could exist if the buyer declares the contract avoided, chooses the remedy of price reduction or claims damages due to the failure to perform.¹⁴³

¹³⁷ Coester-Waltjen 'The New Approach to Breach of Contract in German Law' in Cohen/McKendrick 'Comparative Remedies for Breach of Contract' 136.

¹³⁸ Ibid.

¹³⁹ Ibid at 138.

¹⁴⁰ Rott 'German Sales Law Two Years After the Implementation of Directive 1999/44/EC' (2004) 5 German Law Journal 248.

¹⁴¹ Schlechtriem/Schwenzer 'Commentary on the UN Convention on the International Sale of Goods' 536.

¹⁴² Ferrari/Flechtner/Brand 'The Draft UNCITRAL Digest and Beyond' 701.

¹⁴³ Schlechtriem/Schwenzer 'Commentary on the UN Convention on the International Sale of Goods' 537.

(2) Exemptions under Article 79

In accordance to Article 79(1) CISG a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an 'unforeseeable and unavoidable impediment beyond his control'¹⁴⁴. This Article does cover claims for performance although Article 79(5) CISG seems to indicate the opposite.¹⁴⁵ Details have been discussed above under exclusion of liability.

bb) Right to require delivery of substitute goods (Article 46(2) CISG)

If the lack of conformity of the goods, determined according to Article 35 CISG, constitutes a fundamental breach of contract and the buyer has made a request either in conjunction with notice given under Article 39 CISG or within a reasonable time, the seller has to deliver substitute goods.

According to Article 82(1) CISG the buyer loses this right if he is not able to make restitution of the goods substantially in the condition in which he received them. This does not apply if the impossibility of making restitution is not due to his act or omission or if the goods have been sold in the normal course of business (Article 81(2) CISG).

Article 46(2) CISG is designed for the sale of generic goods.¹⁴⁶ However, the seller is not obliged to deliver goods of a different genus if the entire genus is unavailable.¹⁴⁷ If the purchase items are specific goods (e.g. a used car), the delivery obligation is limited to the specific item.¹⁴⁸ However, the buyer can claim delivery of substitute goods if the specific item was defective and economically equivalent to a replacement item which satisfies the buyer's interest in performance.¹⁴⁹

Cases in which the seller delivers another good than the sold good are described as 'aliud'. These situations are regarded as cases of non-

¹⁴⁴ Huber/Mullis *'The CISG'* 192.

¹⁴⁵ *Ibid.*

¹⁴⁶ Schlechtriem/Schwenzer *'Commentary on the UN Convention on the International Sale of Goods'* 539.

¹⁴⁷ *Ibid* at 540.

¹⁴⁸ *Ibid.*

¹⁴⁹ District Court Ellwangen, 13 December 2002 (2003) *Neue Juristische Wochenschrift* 517.

conformity and therefore fall under the claim in Article 46(2) CISG and not under the general performance claim in Article 46(1) CISG.¹⁵⁰

If the seller delivers fewer items than required under the contract, Article 51(1) CISG applies. It is not crucial that there is non-conformity in the quantity of the goods.¹⁵¹ In fact one has only to focus on the part which is missing and the seller will be liable only for non-delivery according to Article 46(1) CISG but not for non-conformity (Article 46(2) CISG).¹⁵²

cc) Right to require repair (Article 46(3) CISG)

In the case of non-conformity of the goods, the buyer can require the seller in conjunction with notice given under Article 39 CISG or within reasonable time to remedy the lack of conformity by repair.

The required repair could be unreasonable if, for example, the costs of repair are considerably higher than the costs of substitute delivery.¹⁵³ 'However, the relationship between repair costs and purchase price is irrelevant.'¹⁵⁴

b) BGB

As already mentioned, the right to specific performance is the primary remedy of the buyer. This is the same system as under the CISG.

The seller has a right to a second chance to perform his obligation and consequently, most of the other remedies are only available to the buyer after he has given notice of an additional period for performance.¹⁵⁵

This system is in favour of the seller. In my opinion, it would be unreasonable if the buyer had the chance to declare the contract avoided after the first breach of contract by the seller. Avoidance of the contract or any other remedy than performance would constitute a serious impact which would be disproportional as a breach of contract can often be cured with only little

¹⁵⁰ Huber/Mullis *The CISG* 197.

¹⁵¹ Ibid at 198.

¹⁵² Ibid at 199.

¹⁵³ Ibid at 205.

¹⁵⁴ Schlechtriem/Schwenzer *Commentary on the UN Convention on the International Sale of Goods* 549.

¹⁵⁵ Coester-Waltjen *The New Approach to Breach of Contract in German Law* in Cohen/McKendrick *Comparative Remedies for Breach of Contract* 138.

effort. It must be the aim to keep the contract alive and to find a solution which is in the interest of both parties.

The cure is provided in §§ 437 Nr 1 in connection with 439 BGB. As cure the buyer may, at his choice, demand that the defect is remedied or goods free of defects are supplied (§ 439(1) BGB). This claim is independent of negligence.¹⁵⁶

The seller is liable for all expenses required for the purpose of cure, in particular transport, labour and material costs (§ 439(2) BGB).

The buyer can choose between the two remedies.¹⁵⁷ If he is in default with the choice, the seller may, according to § 264(2) BGB, demand that he exercises that right, specifying a reasonable period of time. At the end of the period of time the right of choice passes to the seller if the buyer does not make the choice in good time.

The cure is excluded if the remedy of defect and delivery of substitute goods has become impossible.¹⁵⁸ Then the buyer can terminate the contract or reduce the price without setting an additional period of time.¹⁵⁹ Concerning generic goods the cure is only impossible if the entire genus is unavailable.¹⁶⁰ In the case of purchase of specific goods the delivery of substitute goods is not impossible as long as an economically equivalent item can be delivered.¹⁶¹ These rules conform to those of the CISG.

If repair and/or delivery of substitute goods are still possible but merely at disproportionate expense, the seller can reject either according to § 439(3) BGB. 'What exactly is disproportionate is an important point of discussion in German literature.'¹⁶² It was proposed by some authors to allow rejection completely once the costs make up for 150% of the total value of the goods.¹⁶³ This seems to be reasonable. However, whether rejection is allowed or not must be decided for every single case. It has been clarified by the appellate court Braunschweig that the costs for replacement and repair

¹⁵⁶ Tvalavadze 'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht' 57.

¹⁵⁷ Jauernig 'Bürgerliches Gesetzbuch – Kommentar' 532.

¹⁵⁸ Ibid at 533.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Rott 'German Sales Law Two Years After the Implementation of Directive 1999/44/EC' (2004) 5 German Law Journal 248.

¹⁶³ Ibid

must be compared to the objective value of the goods and not to the purchase price.¹⁶⁴ Consequently, the fact that the goods have been sold at a reduced price does not impact on the assessment of whether replacement or repair are disproportionate.¹⁶⁵

According to § 438(4) BGB the seller may demand the return of the defective goods in accordance with sections 346 to 348 BGB if he supplies goods free of defects for the purpose of cure. The reason for that provision is that the buyer should not have any advantages.¹⁶⁶

For defects in title the right to claim specific performance is the same as for material defects with the exception that the seller has to correct the defect in title in relation to § 439(3) BGB.¹⁶⁷

2. Seller's right to cure (Article 48 CISG)

Article 48 CISG allows the seller to cure any failure to perform his obligation even after the date for delivery. This is not a remedy of the buyer but it helps him to receive delivery of conforming goods. Such a provision is not contained in the German Civil Code.

According to some court decisions avoidance of the contract excludes the seller's right to cure and therefore, the buyer can decide whether or not he wants to avoid a contract without being restricted by the seller's right to cure.¹⁶⁸ However, other courts have adopted a different view with the result that the seller must first be allowed to cure any failure before there can be a fundamental breach.¹⁶⁹

The right to cure can only be granted if the seller can perform without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement. The buyer retains the right to claim damages.

¹⁶⁴ OLG Braunschweig, 04 February 2003 (2003) *Neue Juristische Wochenschrift* 1053, 1054.

¹⁶⁵ *Ibid.*

¹⁶⁶ Jauernig *'Bürgerliches Gesetzbuch – Kommentar'* 534.

¹⁶⁷ *Ibid* at 522.

¹⁶⁸ *Foliopack v. Daniplast* Court of First Instance Parma, Italy, 24 November 1989 Available at <http://cisgw3.law.pace.edu/cases/891124i3.html> [Accessed 12.08.2010].

¹⁶⁹ *Cloth case* District Court Regensburg, Germany, 24 September 1998 Available at <http://cisgw3.law.pace.edu/cases/980924g1.html> [Accessed 12.08.2010].

If the seller gives notice of his willingness to perform, the buyer must react within a reasonable time (Article 48(2), (3) CISG). Otherwise, he is forced to accept the latter performance of the seller and may not resort to any other remedy during that period of time which is inconsistent with performance by the seller.

3. Avoidance / Termination of contract

a) CISG

The buyer has the right to declare the contract avoided if the non-performance of the seller amounts to a fundamental breach of contract (Article 49(1)(a) CISG). Consequently, both parties are released from their obligations according to Article 81 CISG. This right is excluded unless full restitution of the goods is possible.¹⁷⁰ Avoidance of the contract should be a remedy of last resort and the parties should always try to keep the contract alive.¹⁷¹

Whether a fundamental breach is given is based on Article 25 CISG and has been discussed under C.I.2. According to Article 26 CISG the declaration of avoidance is effective only if made by notice to the other party.

Another reason for the avoidance of a contract is stated in Article 49(1)(b) CISG which only applies in cases of non-delivery. The buyer can fix an additional time in accordance with Article 47 CISG. If the seller does not deliver the goods within this time, the buyer can avoid the contract.

Article 47 CISG is often referred to as *Nachfrist* after the German law remedy which has a similar effect and it gives the seller a right to cure a non-conforming delivery by repairing or replacing the goods within a reasonable time.¹⁷² If the seller does not perform within the given time period, the buyer can consider a fundamental breach to have occurred and avoid the

¹⁷⁰ Magnus 'The Remedy of Avoidance of Contract Under CISG – General Remarks and Special Cases' (2005-2006) 25 Journal of Law and Commerce 430, also available at <http://www.cisg.law.pace.edu/cisg/biblio/magnus2.html> [Accessed 16.08.2010].

¹⁷¹ Huber/Mullis 'The CISG' 209.

¹⁷² Piliounis 'The Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?' (2000) 12 Pace International Law Review 21.

contract.¹⁷³ Until the expiry of the *Nachfrist* the buyer is prohibited from resorting to any other remedy except of damages according to Article 47(2) CISG.

The additional period of time must be reasonable. If the buyer fixes an unreasonable period a reasonable period starts to run instead.¹⁷⁴

If the seller already has delivered the goods, the buyer has to declare the contract avoided within a reasonable time (Article 49(2) CISG).

In the case that the seller delivers only a part of the goods or if only a part is in conformity with the contract the buyer can declare the contract avoided in respect of the part which is missing or does not conform (Article 51). However, he can only declare the whole contract avoided if this failure amounts to a fundamental breach.

b) BGB

The buyer may declare termination of the contract according to §§ 437 Nr 2 clause 1 in connection with 440, 323 and 326(5) BGB if the seller fails to perform in conformity with the contract. German law differs from the CISG in so far as it does not require a fundamental breach to terminate the contract and thus, avoids the problematic definition for fundamental breach.¹⁷⁵ However, there are also restrictions under German law which provide safeguards for the seller.¹⁷⁶ For example, § 323(5) first sentence BGB provides that if the seller has performed in part, the buyer may withdraw from the whole contract only if he has no interest in partial performance. Furthermore, the buyer may not withdraw from the contract if the breach of duty is trivial (§ 323(5) second sentence BGB).

Under the BGB, the buyer has generally to specify an additional period of time (*Nachfrist*). This is determined in § 323(1) BGB and implicitly contains the hierarchy of remedies, namely, that a right to cure the default must be

¹⁷³ Ibid.

¹⁷⁴ *Spanish paprika case* District Court Ellwangen, Germany, 21 August 1995 Available at <http://cisgw3.law.pace.edu/cases/950821g2.html> [Accessed 12.08.2010].

¹⁷⁵ Coester-Waltjen *The New Approach to Breach of Contract in German Law* in Cohen/McKendrick *Comparative Remedies for Breach of Contract* 141.

¹⁷⁶ Ibid.

given to the seller.¹⁷⁷ Under the CISG however, an additional period of time is only required in the case of non-delivery, according to Article 49(1)(b) CISG.

The period must give the seller a fair chance to perform and depends on the circumstances.¹⁷⁸ If the seller fails to perform, the buyer may terminate the contract.

There are cases in which the additional period of time is dispensable. That is if the seller seriously and definitively refuses performance, if the seller does not render performance by a date specified in the contract or within a specific period and the buyer, in the contract, has made the continuation of his interest in performance subject to performance being rendered in good time, or if there are special circumstances which, when the interests of both parties are weighed, justify immediate withdrawal (§ 323(2) BGB).

Moreover, according to § 440 BGB, it is not necessary to specify a period of time if the seller has refused to carry out both kinds of cure under § 439(3) BGB or if the kind of cure that the buyer is entitled to receive has failed or cannot reasonably be expected of him. A repair is deemed to have failed after the second unsuccessful attempt, unless in particular the nature of the goods or of the defect or the other circumstances lead to a different conclusion.

The buyer may, like under the CISG, also terminate the contract if the seller is not responsible for the failure of performance.¹⁷⁹ According to § 323 (6) BGB, termination is excluded if the buyer is solely or very predominantly responsible for the circumstance that would entitle him to withdraw from the contract or if the circumstance for which the seller is not responsible occurs at a time when the buyer is in default of acceptance.

In the case of termination, both parties are released from their obligations and performance received and emoluments taken are to be returned (§ 346(1) BGB). If they cannot be returned, the buyer is in most cases obliged to compensate the seller (§ 346(2) BGB). In contrast, the CISG contains a

¹⁷⁷ Rott 'German Sales Law Two Years After the Implementation of Directive 1999/44/EC' (2004) 5 German Law Journal 249.

¹⁷⁸ Coester-Waltjen 'The New Approach to Breach of Contract in German Law' in Cohen/McKendrick 'Comparative Remedies for Breach of Contract' 142.

¹⁷⁹ Ibid.

provision in Article 82 that regularly denies the buyer the right to declare the contract avoided.

Consequently, it is much more difficult under the CISG to declare the contract avoided than it is under the BGB.

4. Price reduction

a) CISG

Article 50 CISG gives the buyer the right to reduce the price if the seller delivers non-conforming goods. This right is not available if the seller has cured any failure to perform in accordance with Article 37 CISG or Article 48 CISG. Furthermore, the buyer may only reduce the price in the case of non-conformity in the sense of Article 35 CISG (defects in quantity, quality, description and package) and not in the case of late delivery or violation of another obligation.¹⁸⁰

Article 50 CISG applies irrespective whether the breach of contract is fundamental or simple or whether or not the seller acted negligently.¹⁸¹

The buyer must give timely notice of the defect according to Article 39 CISG. The declaration of price reduction must make it clear that the buyer wants to reduce the price but does not need to state a specific amount.¹⁸²

The reduction will be in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

If the buyer has already paid the full price, this cannot be considered a waiver of the right of price reduction according to Article 50 first sentence.

According to Article 50 second sentence CISG, the buyer may not reduce the price if the seller remedies any failure to perform his obligation or if the buyer refuses to accept performance.

¹⁸⁰ Ferrari/Flehtner/Brand *'The Draft UNCITRAL Digest and Beyond'* 719.

¹⁸¹ Ibid.

¹⁸² Schlechtriem/Schwenzer *'Commentary on the UN Convention on the International Sale of Goods'* 598.

b) BGB

Under German law, the buyer may reduce the price according to § 441 BGB instead of terminate the contract. Thus, the same requirements have to be fulfilled as for termination of the contract, namely that the buyer has to fix an additional period of time to give the seller the chance to cure the lack of conformity.¹⁸³ However, price reduction is not excluded if the breach of duty is trivial (§ 441(1) second sentence). Price reduction does not lead to termination of the purchase contract and does not require a damage of the buyer.¹⁸⁴

The calculation of price reduction under the BGB differs from the one under the CISG. Here, the purchase price is to be reduced in the proportion in which the value of the goods free of defects would, at the time when the contract was entered into, have had to the actual value. To the extent necessary, the price reduction is to be established by appraisal (§ 441(3) BGB). Under the CISG, the time of delivery is decisive and not the time of conclusion of the contract. Thus, the buyer can lose the advantages of a beneficial purchase if, in the period between conclusion of contract and date of delivery, the prices for the goods of the delivered, but not conforming quality, increase more than the price for goods with the quality agreed in the contract.¹⁸⁵ Subsequent price fluctuations will not matter.¹⁸⁶

5. Damages

a) CISG

Pursuant to Article 45(1)(b) CISG the buyer can claim damages as provided in Articles 74 – 77 CISG for all losses arising from breach of contract,

¹⁸³ Sivesand *'The Buyer's Remedies for Non-Conforming Goods'* 63.

¹⁸⁴ Jauernig *'Bürgerliches Gesetzbuch – Kommentar'* 536.

¹⁸⁵ Schlechtriem *'Internationales UN-Kaufrecht'* 147.

¹⁸⁶ Sivesand *'The Buyer's Remedies for Non-Conforming Goods'* 63.

irrespective of fault, unless the seller is exempted in accordance with Articles 79, 80 CISG.¹⁸⁷

The amount of the damages is determined by Articles 74 following CISG. In contrast to German law (§§ 249 following BGB) the seller does not have to reconstitute the original conditions. He rather has to pay a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach (Article 74 CISG).¹⁸⁸

A claim for damages may be declared concurrently with other remedies or instead of them.¹⁸⁹ The amount of the damages then depends on the respective choice.¹⁹⁰ The seller has to provide full compensation of the disadvantages the buyer suffered.¹⁹¹ This includes material damages and loss of profit. However, immaterial damages will not be compensated.¹⁹²

Only the person who suffered a loss is entitled to claim damages. The CISG, in contrast to German law, does not recognize a legal institute which allows the extension of contractual rights to third parties even without a specific agreement.¹⁹³

Important is also the provision in Article 74 second sentence which states that damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract. Such a rule does not exist under German law.

The CISG differs between damages without termination (Article 74 CISG) and damages with termination of contract (Article 75 CISG). If the contract has been declared avoided damages amount to the difference between the contract price and the costs of a cover transaction together with any further damages. The buyer can also choose to claim damages under Article 46 CISG and recover the difference between the price fixed by the contract and the current price at the time of avoidance. This is possible if there is a current

¹⁸⁷ Schlechtriem/Schwenzer *'Commentary on the UN Convention on the International Sale of Goods'* 746.

¹⁸⁸ Nau *'Das Gewährleistungsrecht in BGB, UN-Kaufrecht und den Reformvorschlägen der Schuldrechtskommission'* 176.

¹⁸⁹ *Ibid* at 177.

¹⁹⁰ *Ibid*.

¹⁹¹ Schlechtriem/Schwenzer *'Commentary on the UN Convention on the International Sale of Goods'* 752.

¹⁹² Schlechtriem *'Internationales UN-Kaufrecht'* 210.

¹⁹³ Schlechtriem/Schwenzer *'Commentary on the UN Convention on the International Sale of Goods'* 760.

price for the goods and the buyer has not made a purchase under Article 75 CISG.

b) BGB

The new German purchase law does not contain own rules concerning damages. One has to look at the general part of the German Civil Code as damages are regulated in §§ 280 following BGB. In contrast to the CISG, the German sales law has kept a fault-based system for damages.¹⁹⁴ According to § 278 BGB, the seller is also responsible for fault of persons whom he uses to perform his obligation, to the same extent as to the fault of his own part. However, if the seller can prove that he is not responsible for the breach of duty, he is not liable anymore (§ 280(1) second sentence BGB). Furthermore, the seller's liability will be reduced if the damage was mainly caused to a certain extent by the other party (§ 254(1) BGB). Thus, contributory negligence causes a reduction in the damages payable.¹⁹⁵

The 'legal rules on damages differ slightly depending on the kind of non-performance and the kind of damage that has been suffered.'¹⁹⁶ The CISG, in contrast, does not distinguish between the several kinds of damages.

The buyer may claim simple damages if the seller breaches a duty arising from the obligation. These are determined in § 280 BGB. This claim exists beside the original claim for performance and does not substitute it.¹⁹⁷

The buyer can also claim damages in cases of default of the obligor according to §§ 280(2), 286 BGB if he has set a warning notice without success if there is need for such a notice (§ 286(2) BGB).

Furthermore, § 280(3) in connection with § 281 BGB regulate the damages instead of performance. They are linked with the buyer's right to terminate the contract and therefore, also require, contrary to the CISG, that the buyer has fixed an additional period of time if this is not dispensable (§ 281(2)

¹⁹⁴ Rott 'German Sales Law Two Years After the Implementation of Directive 1999/44/EC' (2004) 5 German Law Journal 250.

¹⁹⁵ Coester-Waltjen 'The New Approach to Breach of Contract in German Law' in Cohen/McKendrick 'Comparative Remedies for Breach of Contract' 148.

¹⁹⁶ Ibid at 144.

¹⁹⁷ Ibid at 146 f.

BGB).¹⁹⁸ These damages substitute or supplement the performance and the party receiving the damages 'should be in the same financial position as he would have been had the contract been performed exactly in the way promised'.¹⁹⁹ Consequently, profits, the value of the price or counter-performance already paid are included.²⁰⁰ The party who suffered the loss can decide whether he wants damages for complete non-performance or only the balance between good and defective performance.²⁰¹

Moreover, the aggrieved party may claim damages according to §§ 280(3), 282 BGB, if the obligor breaches a duty under § 241(2) BGB, namely taking account of the rights, legal interests and other interests of the other party, and he can no longer reasonably be expected to accept performance by the obligor.

According to §§ 280(3), 283 BGB damages can further be claimed if the seller is not obliged to perform because of impossibility.

Instead of performance, the buyer may demand reimbursement of the expenses which he has made (§ 284 BGB).

As mentioned, the BGB, in contrast to the CISG, does recognize a legal institute which allows the extension of contractual rights to third parties. To realize that, some requirements have to be given. The third party who suffered the damage must not have a direct contractual obligation to the seller. There must be a contractual obligation between the seller and the buyer and the third person has to encounter the performance which means that he must bear the same risk as the buyer to suffer a breach of contract.²⁰²

Furthermore, the buyer must have an interest in the protection of the third person and this has to be recognisable for the seller. There can only be an extension of contractual rights to a third party if this party does not have any claim against the seller by himself.

The scope of damages is provided in §§ 249 following BGB. § 249 BGB determines that a person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not

¹⁹⁸ Sivesand *The Buyer's Remedies for Non-Conforming Goods* 94.

¹⁹⁹ Coester-Waltjen *The New Approach to Breach of Contract in German Law* in Cohen/McKendrick *Comparative Remedies for Breach of Contract* 145 f.

²⁰⁰ *Ibid* at 146.

²⁰¹ *Ibid*.

²⁰² Federal Supreme Court, Germany, 7 November 1984 (1985) *Neue Juristische Wochenschrift* 489.

occurred. The second paragraph states that, in the case of damages payable for injury to a person or damage to the goods, the aggrieved party may demand the required monetary amount instead of restoration.

§§ 250 and 251 BGB contain provisions for damages in money if the seller fails to undertake restoration after the specification of a reasonable period of time or if restoration is impossible, not sufficient or only possible with disproportionate expenses.

The buyer may also claim damages for loss of profit (§ 252 BGB).

Immaterial damages will be compensated only in the cases stipulated by law (§ 253(1) BGB).

6. Limitation

a) CISG

The CISG does not contain rules for the limitation of claims. This gap has to be filled by the applicable national law. This law is found with reference to the private international law of the country where the dispute is heard.²⁰³ Before the application of national rules, it has to be proved whether the requirements for the application of the UNCITRAL limitation convention are given.²⁰⁴ However, only few countries are members of the convention.²⁰⁵ Thus, it does not gain great recognition and courts usually apply national rules concerning limitation.²⁰⁶

A similar effect to limitation has the provision in Article 39(2) CISG which determines that the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice thereof to the seller at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.

b) BGB

²⁰³ Tvalavadze 'Gewährleistung nach deutschem, georgischem und UN-Kaufrecht' 275.

²⁰⁴ Ibid.

²⁰⁵ Ibid at 276.

²⁰⁶ Ibid.

The regular period for limitation for claims in purchase law is two years according to § 438(1) Nr 3 BGB. After § 214(1) BGB limitation does not terminate the duty of the seller to deliver, it rather gives him the right to refuse performance.²⁰⁷ However, the seller is not entitled to claim back performance that was rendered after the beginning of limitation (§ 214(2) BGB).

If the defect consists in a real right of a third party on the basis of which return of the purchased goods may be demanded or some other rights registered in the Land Register, the limitation period is thirty years (§ 438(1) Nr 1 BGB).

D) Remedies for breach of contract by the buyer

I. Obligations of the buyer

The buyer's obligations are set down in Articles 53 following CISG and § 433(2) BGB. Thus, he has to pay the agreed price and take delivery of the goods. The CISG contains more rules than the BGB specifying these duties. Under German law, the appropriate rules are contained in the general part of the BGB and there is no extra chapter. The rules are, however, not exhaustive as other obligations may arise out of the contract, usages or practices.²⁰⁸

1. Payment of the purchase price

a) CISG

The payment of the purchase price is determined in Articles 54 – 59 CISG. According to Article 55 CISG, the parties are considered to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in trade concerned, if they did not expressly or implicitly determine the price in the contract. This Article is contradictory to Article 14 CISG which states that an

²⁰⁷ Ibid at 129.

²⁰⁸ Huber/Mullis *The CISG* 303.

offer is only given if it is sufficiently definite and expressly or implicitly fixes or makes provisions for determining the price.

On the one side, it has been argued that Article 55 CISG should take priority over Article 14 CISG because the parties agreed that they wanted to conclude the contract without fixing a certain price and derogated from Article 14(1) CISG.²⁰⁹

The other, prevailing opinion, states that Article 14 CISG should be given precedence and that Article 55 CISG 'has effect only if one of the parties has his place of business in a Contracting State which has ratified or accepted this Convention as to Part III (Sales of goods) but not as to Part II (Formation of the contract) and if the law of the State provides that a contract can be validly concluded even though it does not expressly or impliedly fix or make provisions for determining the price.'²¹⁰

In my opinion, the second view is preferable as it gives a reasonable explanation for the contradiction within the CISG and avoids conflicts of these rules.

In most cases the parties will, however, have fixed a price, or an implicit agreement results, for instance, from previous dealings or from trade usages.²¹¹

The place of payment is determined in Article 57 CISG. If the parties did not arrange a place in the contract, the buyer has to pay the seller at the seller's place of business (Article 57(1)(a) CISG) or, if the payment is to be made against the handing over of the goods or documents, at the place where the handing over takes place (Article 57(1)(b) CISG).

If the buyer fails to make payment because the seller moved to a new address, the seller cannot complain about that if he failed to inform the buyer about the move (Article 80 CISG).²¹² In fact, he rather has to bear any increase in the expenses incidental to payment which is caused by this change in his place of business (Article 57(2) CISG).

²⁰⁹ Ibid at 76.

²¹⁰ Secretariat Commentary 'Guide to CISG Article 55' Available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-55.html> [Accessed 03.09.2010].

²¹¹ Huber/Mullis 'The CISG' 305.

²¹² Murray 'Buyer obligations under the CISG' in Ferrari/Flechtner/Brand 'The Draft UNCITRAL Digest and Beyond' 449.

Articles 58 and 59 CISG contain rules concerning the time of payment. The buyer has to pay the price when the seller places the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract, unless another time has been agreed by the parties (Article 58(1) CISG). In practice, seller and buyer will regularly perform concurrently.²¹³ Moreover, Articles 58(1) second sentence and 58(2) CISG give the seller the right to make payment a condition for the handing over of the goods or documents.

Article 58(3) CISG gives the buyer the right to examine the goods before paying the purchase price. This is not identical to the obligation of examination under Article 38 CISG and he still has the possibility to examine the goods more carefully in accordance with Article 38 CISG.²¹⁴

The buyer has to effect payment when it becomes due without any request by the seller (Article 59 CISG). Otherwise, the buyer is in breach of contract and the seller is entitled to remedies.²¹⁵

b) BGB

The main duty of the buyer is to pay the agreed purchase price according to § 433(2) BGB. Here it is sufficient if the price is determinable and must not have been agreed by the parties when the contract was concluded.²¹⁶ It has been suggested that in such cases the parties regularly had the intention to agree the market price as purchase price.²¹⁷

§ 270 BGB contains rules concerning the place where payment must be made. Consequently, in cases of doubt, the buyer has to transfer the money at his own risk and his own expense to the seller at the residence of the latter. If the obligation came about in the commercial undertaking of the seller, then, if he has his business establishment in another place, the place of the commercial undertaking takes the place of the residence. Like under

²¹³ Huber/Mullis *The CISG* 307.

²¹⁴ Enderlein/Maskow *International Sales Law* p. 226 Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html> [Accessed 03.09.2010].

²¹⁵ Huber/Mullis *The CISG* 308.

²¹⁶ Appellate Court Hamm, Germany, 24 October 1975 (1976) *Neue Juristische Wochenschrift* 1212.

²¹⁷ *ibid.*

the CISG, the seller has to bear increases in the expenses incidental to payment which is caused by a change in his place of business.²¹⁸

The time of payment is provided in § 271 BGB. It states that if no time for performance has been specified, the obligee may demand performance immediately, and the obligor may effect it instantly. However, if there are no other contractual agreements, the buyer only has to pay the purchase price concurrently with the transfer of property of the goods.²¹⁹

2. Taking delivery

a) CISG

Article 60 CISG states that the buyer has to do everything which could reasonably be expected of him in order to enable the seller to make delivery and he must take over the goods. He has to do all the acts which are in accordance with normal commercial conduct and which are customary.²²⁰

Preparatory acts, such as the giving of instructions for dispatch or calls for delivery, have to be done before taking delivery so that the seller is able to deliver within the period for delivery.²²¹

The arrangement for taking over the goods depends on whether the parties agreed that the seller only has to put the goods in his place of business at the buyer's disposal or if the seller delivers the goods to the buyer.²²² In the first case, the buyer has to pick up the goods while in the second case he only has to take delivery of them.

The seller may reject delivery of the goods in some cases. Firstly, if the seller delivers before the date fixed (Article 52(1) CISG), secondly, if the seller delivers a quantity of goods greater than that provided for in the contract (Article 52(2) CISG) and lastly, if there is a fundamental breach of contract which gives the buyer the right to declare the contract avoided or to demand

²¹⁸ Jauernig *'Bürgerliches Gesetzbuch – Kommentar'* 231.

²¹⁹ *Ibid* at 513.

²²⁰ Enderlein/Maskow *'International Sales Law'* p. 231 Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html> [Accessed 06.09.2010].

²²¹ *Ibid* at 232.

²²² Ferrari/Flechtner/Brand *'The Draft UNCITRAL Digest and Beyond'* 740.

delivery of substitute goods.²²³ However, the buyer has the duty to take such steps to preserve the goods as are reasonable in the circumstances (Article 86 CISG).

'In case of the usual sales contract concerning non-perishable goods and without peculiarities of storage or transport, neither a breach of the obligation to accept the goods nor a breach of the obligation to make payment of the purchase price automatically constitutes a fundamental breach of contract.'²²⁴

Only if the refusal to take delivery is definite, this will regularly amount to a fundamental breach.²²⁵ Even if the buyer fails to accept more than a half of the goods purchased, a fundamental breach of contract might be given as it was stated by the German Appellate Court Hamm.²²⁶

b) BGB

Under German law, the duty to take delivery of the goods counts regularly to the secondary obligation of the buyer.²²⁷ More secondary obligations can arise out of law and contract.²²⁸ Taking delivery does not mean that the buyer accepts the goods.²²⁹ He may still exercise the rights given to him for breach of contract by the seller. This is the same under the CISG.

The buyer is allowed to refuse taking delivery without getting into default in acceptance if the other party does not render consideration, for instance, if the seller delivers defect goods (§ 320(1) BGB).²³⁰ Thus, the seller has still the duty to deliver conforming goods.

II. Remedies of the seller

²²³ *Ibid.*

²²⁴ *Shoes case* Appellate Court Düsseldorf, Germany, 22 July 2004 Available at <http://cisgw3.law.pace.edu/cases/040722g1.html> [Accessed 06.10.2010].

²²⁵ Huber/Mullis *The CISG* 328.

²²⁶ *Frozen bacon case* Appellate Court Hamm, Germany, 22 September 1992 Available at <http://cisgw3.law.pace.edu/cases/920922g1.html> [Accessed 06.10.2010].

²²⁷ Jauernig *'Bürgerliches Gesetzbuch – Kommentar'* S13.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ Emmerich *'BGB-Schuldrecht Besonderer Teil'* 7.

Articles 61 following CISG contain rules concerning the remedies of the seller in case of breach of contract by the buyer. Article 61 CISG gives, like Article 45 CISG, an overview of these rights and serves as a source for the seller's right to claim damages.²³¹ These remedies are available to the seller no matter if the buyer acted negligently or wilfully as they are not fault-based.²³² The BGB, in contrast to the CISG, does not contain a specific chapter with the remedies of the seller. In case of breach of contract by the buyer, the seller has to revert to the provisions in the general part of the German Civil Code. Thus, the German law system is structured much more difficult than the CISG with his own rules concerning the remedies of the seller. The legislator should consider to implement such a chapter as well and to give clear requirements for the seller's remedies. This would make German law more attractive to national as well as to international lawyers.

1. Performance

a) CISG

The seller may require performance. Thus, the buyer has to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

The seller can require the buyer to pay the price without making reasonable efforts to resell the goods to a third party.²³³ This is the case in some countries where he can then recover as damages the difference between the contract price and the price he received from the third party if the resale is reasonably possible.²³⁴

The right to obtain performance becomes irrelevant if the seller already declared the contract avoided as this is an inconsistent remedy.²³⁵ Inconsistent is, as well, the determining of an additional period of time for

²³¹ Secretariat Commentary 'Guide to CISG Article 61' Available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-61.html> [Accessed 07.09.2010].

²³² Huber/Mullis *The CISG* 321.

²³³ Secretariat Commentary 'Guide to CISG Article 62' Available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-62.html> [Accessed 08.09.2010].

²³⁴ Ibid.

²³⁵ Enderlein/Maskow *International Sales Law* p. 236 Available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html> [Accessed 08.09.2010].

performance according to Article 63(2) CISG if this time is still running and the claiming of damages instead of performance according to Articles 61(1)(b), 74 following CISG.²³⁶

The buyer can, like the seller, also be exempted from liability according to Articles 79 and 80 CISG.

b) BGB

The seller has the right to require performance of the buyer's obligations, namely to pay the purchase price or to take delivery. Regularly, he has to fix an additional period of time before he refers to the other remedies available for him.

2. Avoidance

a) CISG

The seller can declare the contract avoided in two cases. Firstly, if the buyer's failure to perform amounts to a fundamental breach and secondly, if the buyer does not perform his obligation to pay the price or take delivery of the goods within the fixed additional period of time (Article 64(1) CISG).

The declaration of avoidance does not have to be made in a certain form.²³⁷ It only must show clearly that the seller does not longer want to be bound by the contract.²³⁸

A seller may declare the contract avoided, according to Article 64(1)(a) CISG, without fixing an additional period of time if there is a fundamental breach by the buyer. Whether a breach is fundamental or not is determined according to Article 25 CISG. However, the buyer's failure to pay the price or take delivery will in practice often amount to a fundamental breach only after the passage of some period of time.²³⁹

²³⁶ Huber/Mullis *'The CISG'* 322.

²³⁷ *Jewelry case* Supreme Court, Austria, 28 April 2000 Available at <http://cisgw3.law.pace.edu/cases/000428a3.html> [Accessed 08.09.2010].

²³⁸ *ibid.*

²³⁹ Secretariat Commentary *'Guide to CISG Article 64'* Available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-64.html> [Accessed 08.09.2010].

In the second case which gives the right to avoidance, the seller fixes an additional period of time in accordance with Article 63 CISG. This should give the buyer a second chance to perform and preserves some advantages for the seller in providing certainty that he is allowed to avoid the contract as it is hard to judge if a breach is fundamental if an extra period of time has not been given before.²⁴⁰ If the buyer does not perform within this time or declares that he will not do so within this time, avoidance is possible.

The buyer has to take all the steps which are necessary to enable payment, such as registering the contract with a government office or a bank or procuring the necessary foreign exchange.²⁴¹

In cases where the buyer has already paid the price, the seller loses the right to declare the contract avoided unless the alleged breach of the buyer consists in late performance (Article 64(2)(a) CISG) or in another type of breach (Article 64(2)(b) CISG). In the first case the seller loses this right unless he declares the contract avoided before he has become aware that performance has been rendered. In the second case he only loses that right if he does not declare avoidance within a reasonable time after he knew or ought to have known of the breach (Article 64(2)(b)(i) CISG), after the expiration of an additional period of time according to Article 63(1) CISG or after the buyer has declared that he will not perform his obligation within such a period (Article 64(2)(b)(ii) CISG).

If the seller declares the contract avoided, the parties are released from their obligations according to Article 81 CISG and restitutions may be claimed if one party has already performed his obligations.

b) BGB

The seller may avoid the contract if the buyer does not pay the purchase price. He can also declare avoidance if the duty to take delivery is a main duty. The right to avoidance is determined in § 323 BGB. The provisions of this rule have already been discussed above. They do not differ from the cases where the seller declares avoidance.

²⁴⁰ Huber/Mullis *The CISG* 329.

²⁴¹ Secretariat Commentary *Guide to CISG Article 64* Available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-64.html> [Accessed 08.09.2010].

3. Damages

a) CISG

The right of the seller to claim damages is determined in Article 61(1)(b) CISG. The amount and the type of damages are provided in Articles 74 to 77 CISG and are almost the same as for the buyer in the case of breach of contract by the seller. These have been explained in detail above.

However, it should be mentioned that a loss resulting from the depreciation of the contract currency between the agreed and a late payment is regularly recoverable under Article 74 CISG.²⁴² However, it depends on whether the buyer could have foreseen that the seller was going to convert the owed debt from the contract currency to another currency which will often be the case if the contract currency is not the seller's home currency.²⁴³

The buyer cannot be exempt from liability according to Article 79 CISG because of his low financial capacity.²⁴⁴ He, furthermore, has to bear the risk that the bought goods become useless for him.²⁴⁵

b) BGB

If the buyer fails to perform his obligation to pay the price or take delivery of the goods, the seller can claim damages. He may claim damages for default of the buyer according to §§ 280(2), 286 BGB which exist as soon as the buyer is in delay and beside the claim to require performance. Or the seller can claim damages instead of performance after he fixed an additional period of time and this period ran down according to § 280(3), 281 BGB.

²⁴² Huber/Mullis *The CISG* 335.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

E. How did the Consumer Sales Directive effect German sales law?

This chapter shall give a short overview of the changes in German sales law after the transposition of the European Directive 1999/44/EC. As described in the first part of my work, German purchase law has many features in common with the CISG today. This was different before the reformation of the German law of obligations which was caused by the Directive in 2002. To explain its impact on German law, it is necessary to give a brief description of the content of the Directive firstly.

I. Content and significance of the European Directive 1999/44/EC

The Directive was adopted in May 1999.²⁴⁶ The EU member states were obliged to transpose the Directive into national law not later than on 1 January 2002.²⁴⁷

The Directive only contains 14 Articles and is applicable to the sale of consumer goods and associated guarantees.²⁴⁸ A consumer good is given if there is a sales contract between a consumer and a professional seller.²⁴⁹ The consumer and seller are defined in Article 2 of the Directive. The Directive deals with the concept of legal guarantees, relating to the legal protection of the buyer in respect of defects in the goods acquired which is rendered compulsory by the law, and commercial guarantees, relating to the willingness of the guarantor who assumes personal liability for certain defects.²⁵⁰ Subsequent to the introductory and for European Directives typical

²⁴⁶ Directive 1999/44/EC.

²⁴⁷ *Ibid* at Article 11(1).

²⁴⁸ *Ibid* at Article 1.

²⁴⁹ Sivesand *The Buyer's Remedies for Non-Conforming Goods*' 15.

²⁵⁰ 'Sale of consumer goods and associated guarantees' Available at http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32022_en.htm [Accessed 16.09.2010].

definitions, rules concerning contractual conformity of the goods and consumer rights follow.²⁵¹

It was the purpose of the Directive that consumers always have the same rights, regardless in which member country they buy a product.²⁵² This should be achieved through the harmonisation of consumer law concerning defective goods and guarantees.²⁵³ Furthermore, the approximation of the rules of the member states to the Directive was supposed to contribute to the simplification of the national regulations.²⁵⁴

The Consumer Sales Directive can be regarded as one of the most important guideline of the European legislator as it intervenes in a central and traditional part of contract law.²⁵⁵

II. The CISG and the Consumer Sales Directive

It is important to mention the CISG in connection with the European Directive as the substance of the Consumer Sales Directive and therefore, indirectly, the consumer sales law of the EU member states, was strongly influenced by the CISG.²⁵⁶ The basic structure of the CISG served as a model for the Directive. Even if the CISG does not apply to consumer sales, similar rules were partly adopted by the Directive and adapted to consumer sales, for instance the liability regardless of negligence or fault for every breach of contract and the system of remedies with specific performance as the primary remedy.²⁵⁷ However, they also differ in some points. While the CISG wants to provide that trade transactions are performed quickly, the main goal of the European Directive is to protect the consumer through special rules.²⁵⁸

III. Impact of the Consumer Sales Directive

²⁵¹ Saenger 'Die Umsetzung der Richtlinie über Verbraucherkäufe in Deutschland' in Schermaier 'Verbraucherkauf in Europa' 191.

²⁵² Sivesand 'The Buyer's Remedies for Non-Conforming Goods' 14.

²⁵³ Ibid.

²⁵⁴ Zerres 'Die Bedeutung der Verbrauchsgüterkaufrichtlinie für die Europäisierung des Vertragsrechts: eine rechtsvergleichende Untersuchung am Beispiel des deutschen und englischen Kaufrechts' 2.

²⁵⁵ Ibid.

²⁵⁶ Sivesand 'The Buyer's Remedies for Non-Conforming Goods' 12.

²⁵⁷ Magnus 'Europäisches Vertragsrecht und materielles Einheitsrecht' in Mansel/Pfeiffer 'Festschrift für Erik Joyme' 1317.

²⁵⁸ Morgenroth 'Umsetzung der Verbrauchsgüterkaufrichtlinie in Spanien und Deutschland' 52.

The impact of the European Directive 1999/44/EC varied in the different member states of the European Union. While the Nordic Countries only made the changes that were absolutely necessary, Germany took this as a possibility to reform its entire law of obligations.²⁵⁹ The act to modernise the German law of obligations in 2002, which was a result of the Consumer Sales Directive, led to more changes in German sales law than in any other part of the law of obligations. The provisions for consumer sales within the Directive were adopted by the German legislator and apply now to all kinds of sale contracts and not only to consumer sales. Consequently, the influence by the CISG on the consumer sales law of the UN member states effected the general German sales law in the way that more or less identical rules now apply to all purchases.²⁶⁰

The former German purchase law was completely modernised. Only § 433 BGB as the central rule for a purchase contract has remained unaffected.²⁶¹

Below, I will summarize the most important changes the transposition of the Directive brought and compare these with the old sales law in Germany.

1. Changes of the obligations of the seller

According to Article 2(1) of the Directive 1999/44/EC, the seller has the duty to deliver goods which are in conformity with the contract of sale. This obligation was adopted by § 433(1) second sentence BGB. The former German sales law only imposed the obligation on the seller to deliver the goods and to transfer the property.²⁶² A duty to deliver without any material defect or defect in title was not part of the main obligation.²⁶³

2. Changes in the definition of material defect

²⁵⁹ Sivesand *The Buyer's Remedies for Non-Conforming Goods* 15.

²⁶⁰ *Ibid* at 12.

²⁶¹ Saenger *Die Umsetzung der Richtlinie über Verbraucherkäufe in Deutschland* in Schermaier *Verbraucherkauf in Europa* 196.

²⁶² Schreier *Vergleich der Umsetzung ausgewählter Verbraucherschutzrichtlinien in Deutschland und Norwegen* 168.

²⁶³ *Ibid*.

One central rule within the European Directive is the term of contractual conformity of the goods whereby the seller has to deliver goods which are in conformity with the contract of sale. Decisive for the question, whether the buyer has the right to make use of his remedies, is primarily the agreement between the parties and, as well, objective circumstances as described in Article 2(2)(c) and (d) of the Directive.²⁶⁴

According to Article 2(2) of the Directive consumer goods are presumed to be in conformity with the contract if they:

- comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model (Article 2(2)(a)),
- are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted (Article 2(2)(b)),
- are fit for the purposes for which goods of the same type are normally used (Article 2(2)(c)) or
- show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling (Article 2(2)(d)).

§ 434 BGB is very similar to this Article as most of the rules were transposed into national law. However, under German law, the conformity of the goods is not only presumed, it is rather taken for granted if one of the listed cases occurs.²⁶⁵

The question was, whether the definition of material defect changed a lot under new German purchase law compared to the old German sales law. § 459 first sentence BGB, old version determined that the seller is liable for defects of the goods which annul or reduce the value or fitness for the ordinary or contractual use of the goods and which exist at the time when the risk passes.

²⁶⁴ Ibid at 165.

²⁶⁵ Morgenroth 'Umsetzung der Verbrauchsgüterkaufrichtlinie in Spanien und Deutschland' 308.

The objective theory assumed a defect only, if the goods were not fit for the purposes for which goods of the same type were normally used.²⁶⁶ According to the prevailing, subjective – objective theory, the content of the contract was decisive in determining whether there was a defect or not.²⁶⁷ Only if there was no contractual agreement, objective circumstances were implied.²⁶⁸

Thus, the European Directive 1999/44/EC brought no big changes in the definition of the material defect in German sales law concerning this point. New was, however, the rule that it is also a material defect if the agreed assembly by the seller or persons whom he used to perform his obligation has been carried out improperly and if the assembly instructions are defective, unless the goods have been assembled without any error (§ 434(2) BGB). Consequently, Article 2(5) of the Directive, which contains this regulation, was transposed into national law.

Furthermore, the new German sales law determines that the supply by the seller of different goods or of a lesser amount of the goods is equivalent to a material defect (§ 434(3) BGB).

These provisions show how the CISG influenced the Directive and the German sales law. Article 35 CISG contains very similar rules to Articles 2(2) and 2(5) of the Directive. The Directive adopted these regulations and applies them to consumer sales.

3. Changes in the provisions concerning defect in title

The old German sales law differentiated between material defects and defects in title not only in the wording, but also in the legal consequences.²⁶⁹ The act to modernise the German law of obligations led to the abandonment of this distinction. Although the BGB still defines a defect in title, the legal consequences comply with the consequences for material defects. Thus, the importance to distinguish between the two defects is not as important as it

²⁶⁶ Ibid at 301.

²⁶⁷ Federal Supreme Court, Germany, 18 December 1954, BGHZ 16, 54 (55).

²⁶⁸ Schreier 'Vergleich der Umsetzung ausgewählter Verbraucherschutzrichtlinien in Deutschland und Norwegen' 167.

²⁶⁹ Morgenroth 'Umsetzung der Verbrauchsgüterkaufrichtlinie in Spanien und Deutschland' 164.

was before the modernisation.²⁷⁰ This change in law was not regulated by the European Directive and was therefore a voluntary step of the German legislator to harmonize the system of remedies.²⁷¹

4. Changes within the remedies available to the buyer

The act to modernise the German law of obligations altered the remedy system almost completely. It is now similar to the UN purchase law.

a) Specific Performance

Article 3(3) of the European Directive states that, in the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate. Thus, specific performance is the primary remedy and there is regularly no right for the buyer to choose another one without setting an additional period of time. The new German sales law contains the same principle.

Under the old law, the buyer had a right to require delivery of conforming goods instead of termination of the contract or reduction of the price (§ 480(1) first sentence BGB, old version). He regularly did not have the right to require repair of the goods. This was only the case if the parties of the purchase contract agreed to this. With the transposition of Article 3(3) of the Directive 1999/44/EC, the remedy of specific performance under German law today also includes the duty to repair the goods if this is required by the buyer.

A hierarchy of the different remedies, with specific performance as the primary remedy, was not given.

Furthermore, the old version of the BGB did not grant the right to require specific performance or to reduce the price if the defect was trivial.²⁷² This is possible under the new sales law.

²⁷⁰ Ibid at 322.

²⁷¹ Ibid.

²⁷² Schreier *Vergleich der Umsetzung ausgewählter Verbraucherschutzrichtlinien in Deutschland und Norwegen* 172.

b) Termination of contract

The Directive determines in Article 3(2) and (5) that a buyer has the right to rescind the contract and provides some conditions for that. These provisions correspond to the requirements to terminate a contract under the new German sales law. Contrary to the old sales law, termination of the contract does not require delay or default of the seller anymore.²⁷³ The buyer is still entitled to terminate the contract even if the seller is not responsible for the breach of duty.²⁷⁴

Another big difference between the old sales law and the modernised purchase law is the possibility of the buyer to claim damages beside the declaration of termination under new law.²⁷⁵ The buyer can, for instance require damages for non-delivery even though he declared termination of the contract.²⁷⁶ Consequently, in the case that specific performance failed, the buyer can terminate the contract and require damages for the extra costs he had if it was necessary for him to buy the same goods somewhere else to a higher price.²⁷⁷ This was not possible under the old German sales law as termination of the contract and damages were mutually exclusive.²⁷⁸

c) Price reduction

The new German sales law determines in § 441(1) first sentence BGB, that the buyer may reduce the purchase price instead of withdrawing from the agreement. However, according to sentence two, it does not matter if the breach of duty is trivial or not. The new sales law adopted the provision in Article 3(6) of the Directive 1999/44/EC which states that termination of contract is not possible if the lack of conformity is minor. Consequently, it does not matter for the remedy of price reduction whether the lack of conformity is trivial or not.

²⁷³ Morgenroth 'Umsetzung der Verbrauchsgüterkaufrichtlinie in Spanien und Deutschland' 351.

²⁷⁴ Heinrichs in Palandt 'Bürgerliches Gesetzbuch – Kommentar' 527.

²⁷⁵ Saenger 'Die Umsetzung der Richtlinie über Verbraucherkäufe in Deutschland' in Schermaier 'Verbraucherkauf in Europa' 201.

²⁷⁶ Willert 'Neues Kaufrecht – Auswirkungen der Schuldrechtsmodernisierung' (2002) BC – Zeitschrift für Bilanzierung, Rechnungswesen und Controlling 164.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

The former German sales law did not grant the seller a right to make use of this remedy if the reduction of value or suitability of the goods was minor (§ 459(1) second sentence BGB, old version).

Thus, the German purchase law converged to the rule of the UN sales law in Article 50 CISG which does not require a fundamental breach.²⁷⁹

The right to declare price reduction, even if the defect is minor, complies with the purpose of this remedy as the relation between the agreed purchase price and the value of the goods is disturbed in these cases.²⁸⁰

d) Damages

The new version of the German Civil Code grants the buyer a right to claim damages in any case of breach of duty by the seller for which he is responsible.²⁸¹ According to the old sales law, such a right only existed if a warranted property was not given or if the seller fraudulently concealed a defect (§ 463 BGB, old version).

Another difference is that there does not have to be a threat of refusal when the obligee sets an additional period of time.²⁸² Under § 326(1) BGB, old version, the buyer was able to claim damages or to terminate the contract if he determined an additional period of time with the declaration that he will refuse to take delivery after the period of time ran out. The courts made high demands on this threat of refusal. It must clearly show that the buyer will refuse delivery after the period has passed off.²⁸³ In practice, this very often caused the exclusion of the right to claim damages in the past.²⁸⁴ Consequently, under the new version of the German Civil Code, it is sufficient if the buyer determines only a period of time without any statement that he will seriously claim damages after the passing of this period.²⁸⁵

A further consequence of the act to modernise the German law of obligations is that a contract which cannot be fulfilled is still valid even if the impossibility

²⁷⁹ Morgenroth 'Umsetzung der Verbrauchsgüterkaufrichtlinie in Spanien und Deutschland' 355.

²⁸⁰ Ibid at 356.

²⁸¹ Saenger 'Die Umsetzung der Richtlinie über Verbraucherkäufe in Deutschland' in Schermaier 'Verbraucherkauf in Europa' 201.

²⁸² Morgenroth 'Umsetzung der Verbrauchsgüterkaufrichtlinie in Spanien und Deutschland' 372.

²⁸³ Federal Supreme Court, Germany, 20 September 1996 (1997) Neue Juristische Wochenschrift 51.

²⁸⁴ Morgenroth 'Umsetzung der Verbrauchsgüterkaufrichtlinie in Spanien und Deutschland' 372.

²⁸⁵ Ibid.

existed before the conclusion of the contract (§ 311a(1) BGB). The buyer may claim damages in lieu of performance or reimbursement of his expenses in the extent specified in section 284 (§ 311a(2) BGB). The old version determined that such contracts are invalid (§ 306 BGB, old version).

5. Changes in limitation periods

Through the transformation of the Directive 1999/44/EC, the German legislator had to change the period of limitation for new manufactured goods from six months to two years according to Article 5(1) of the Directive.²⁸⁶ Agreements concerning a shortening of the prescription period are only allowed in regard to second-hand goods and may not be less than one year (Article 7(1) of the Directive). However, the BGB does grant such agreements for new goods as well, according to § 309 No 8(b)(ff) BGB. In the case of consumer sales, the agreement must not lead to a limitation period of less than two years or, in the case of second-hand things, of less than one year (§ 475(2) BGB).

These changes of limitation periods constitute a clear improvement of the consumer's legal position and led to the harmonisation of the limitation periods of the European Union member states.²⁸⁷

In regard to defects in title, the limitation period has been shortened from 30 years to two years according to § 438(1) No 3 BGB. However, this rule does not apply if the defect consists in a real right of a third party on the basis of which return of the purchased thing may be demanded or some other right registered in the Land Register. Then, the claim becomes statute-barred in thirty years (§ 438(1) No 1 BGB).

6. Implementation of rules concerning consumer sales

The German legislator adopted the provisions of the Consumer Sales Directive and applied them to all purchase contracts. Thus, there are only few Articles which apply exclusively to consumer sales in Germany. These rules

²⁸⁶ Schreier 'Vergleich der Umsetzung ausgewählter Verbraucherschutzrichtlinien in Deutschland und Norwegen' 173.

²⁸⁷ *ibid.*

are an innovation in the German Civil Code. The old Civil Code did not contain such rules and they improve the rights of consumers considerably. Although the CISG influenced a very big part of the Directive 1999/44/EC and the German Civil Code, these special rules cannot be found within the CISG. The reason for that is that the UN purchase law is not applicable to consumer sales. Consequently, there is no necessity to include rules for the protection of consumers.

Article 4 first sentence of the Directive determines that the final seller must have the opportunity to pursue remedies against the person or persons liable in the contractual chain if he is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary. However, the person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law (Article 4 second sentence). It was the decision of the national legislator whether there are effective rights of redress for the seller.²⁸⁸ Thus, the member states had the possibility to exclude the right of redress completely or in part.²⁸⁹ This exclusion could have led to inequitable results for the final seller because of the different periods of limitation between the consumer and the seller and between the several businessmen.²⁹⁰ The limitation period of two years in Article 5(1) of the Directive does not apply for sales between businessmen. This could cause the limitation of the seller's claims against the producer or previous seller in the same chain, for example if the consumer wants to make use of his rights one year after delivery of the goods, as the own redress would have been time – barred according to § 477(1) BGB, old version.²⁹¹ Consequently, the German legislator implemented several rules concerning consumer sales to protect the final seller sufficiently.

²⁸⁸ Schreier *Vergleich der Umsetzung ausgewählter Verbraucherschutzrichtlinien in Deutschland und Norwegen* 176.

²⁸⁹ Ehmann/Rust *Die Verbrauchsgüterkaufrichtlinie-Umsetzungsverschlage unter Berucksichtigung des Refarmentwurfs der deutschen Schuldrechtsreform* (1999) *Juristen Zeitung* 862.

²⁹⁰ *Ibid.*

²⁹¹ Schreier *Vergleich der Umsetzung ausgewahlter Verbraucherschutzrichtlinien in Deutschland und Norwegen* 177.

a) Recourse of the entrepreneur

Firstly, the entrepreneur may, where newly manufactured goods are sold, demand of his supplier reimbursement of the expenses which the entrepreneur had to bear in relation to the consumer under § 439(2) BGB, if the defect asserted by the consumer already existed upon the passing of the risk to the entrepreneur (§ 478(2) BGB). If a material defect manifests itself within six months after the date of the passing of the risk, it is presumed that the goods were already defective when the risk passed, unless this presumption is incompatible with the nature of the goods or of the defect (§ 476 BGB). Hence, Article 5(3) of the Directive was implemented.

b) Limitation of recourse claims

A second regulation provides that the claims specified in §§ 437 and 478(2) BGB of the entrepreneur against his supplier for a defect in newly manufactured goods sold to a consumer, become statute-barred at the earliest two months after the date on which the entrepreneur satisfies the claims of the consumer. This suspension of expiry of limitation ends at the latest five years after the time when the supplier delivers the thing to the entrepreneur (§ 479(2) BGB). Consequently, the final seller still has the opportunity to pursue remedies against the producer within two months even if he sold the goods only after 3 years to the consumer. Without this rule, the claim would be time – barred.

F. Conclusion

The last chapter of this work clarified that the Consumer Sales Directive caused many changes in German sales law. The German legislator regarded the duty to transpose the Consumer Sales Directive into national law as a chance and reformed the whole purchase law. The first part of this dissertation shows that this reformation created a German Civil Code that

contains similar rules to those of the CISG. However, the German Civil Code is still very abstract because there are many unclear wordings and a complicated system of references.²⁹² It should be the goal of the German legislator to improve some chapters of the Code. It would, for instance be advisable to define the remedies of the seller within the code explicitly and to use the UN purchase law as a model for that. This would make it easier for national and especially international lawyers, who are not well schooled in German law, to find and apply these rules.

Nevertheless, the German modernisation of the law of obligations and the extensive adoption of international guidelines should give an impulse for the European harmonisation of the legal rules of the member states.²⁹³ Unfortunately, even if the internationalisation of the purchase law progresses, Europe is far away from a uniform civil code.²⁹⁴

²⁹² Saenger *'Die Umsetzung der Richtlinie über Verbraucherkäufe in Deutschland'* in Schermaier *'Verbraucherkauf in Europa'* 208.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*