

INTRODUCTION TO LEGAL CASE-SOLVING AND MOOTING

concerning § 2 V Bases of claims, pleas and defenses under the CISG

Diagram 2

Remedies of the buyer under the CISG¹

- for breach of contract by the seller -

A. Right to performance (art. 46(1))

- = right to delivery of the promised goods, handing over of documents and transfer of property (art. 30)
- note, however, that due to art. 28 in some (Common Law) states the court may not enter a judgement for specific performance but for monetary compensation

I. *Applicability of the CISG*^{2 3}

- see *diagram 1*⁴

II. *Effective formation of the contract (art. 14 et seq.)*⁵

- effective *acceptance* of an *offer* under art. 14 et seq.

III. *Maturity (art. 33, 58(1))*

- the delivery of goods must be due under art. 33
- the seller may make payment a condition for handing over the goods or documents (art. 58(1) phrase 2)

IV. *No resorting to remedies inconsistent with performance (art. 46(1))*

- 1) No avoidance of the contract (cf. art. 81(1))
- 2) No acceptance of a price reduction (cf. art. 50)
- 3) No fixing of an additional period of time for performance that has not yet expired (cf. art. 47(2))

V. *No expiration of the limitation period*

- according to the law applicable according to international private law

B. Right to delivery of substitute goods (art. 46(2))

I. *Applicability of the CISG*

II. *Effective formation of the contract (art. 14 et seq.)*

III. *Contract on the sale of generic (not individual) goods*

¹ This diagram can be used as an examination scheme (like a check list) for the systematic solving of a given case; see my Introduction to legal case-solving (from this course), p. 4 f.

² Note: If the CISG is not applicable, it is evident that there cannot be any remedies under the CISG in the given case. In this situation it would be logically wrong to examine the other preconditions of any remedy because it is irrelevant if they are fulfilled or not. Your proper case solution must finish with the result that there is no remedy under the CISG because the CISG is inapplicable. However, there may be controversial issues concerning the applicability and you must prepare for the case that not everybody follows your opinion. Therefore you must proceed to a so-called auxiliary expertise ["Hilfsgutachten"], which must be attached to the proper case solution; see my Introduction to legal case-solving, p. 5. In the auxiliary expertise, you will examine separately if the other preconditions of a remedy under the CISG are fulfilled. Like that your case solution in the broader sense deals with all aspects and you are well-prepared for any questions.

³ Note: If the parties make use of their right to derogate from or to vary the effect of individual CISG provisions under art. 6, this does not affect the applicability of the CISG in general. Therefore it must not be discussed at this place but in the context with the relevant norm.

⁴ Note: At this place you have to check thoroughly if all the preconditions listed in diagram 1 are fulfilled. In many cases there will be little doubts that the CISG is applicable. Then it is adequate to check all details in your mind but to confine your written case solution to the discussion of the essential requirements and the more important aspects.

⁵ All remedies under art. 45 et seq. CISG require that the CISG is not only applicable but that the concerned contract of international sale of goods has been concluded *effectively* according to the rules in art. 14 et seq. CISG.

IV. Lack of conformity of the goods with the contract (cf. art. 35 et seq.)

- in principle at the time of the passing of the risk to the buyer (cf. art. 36, art. 66 et seq.)
- 1) Lack of conformity of the goods with requirements under art. 35
 - a) Lack of conformity with the requirements specified in the contract (art. 35(1))
 - concerning quantity, quality, description, containment and packing
 - b) Lack of conformity with generally applicable requirements (art. 35(2))
 - concerning function for the *purpose*, qualities, containment and packaging
 - only applies as far as parties have not agreed otherwise
 - the lack of conformity is irrelevant if buyer knew or could not have been unaware of it (art. 35(3))
- 2) No loss of the right to rely on the lack of conformity under art. 39
 - buyer must have *examined the goods* (art. 38) and have *notified* the seller within a reasonable time
 - note the exception under art. 40

V. No causation of the lack of conformity by the buyer's act or omission (cf. art. 80)

VI. Fundamental breach of contract

- 1) Breach of a contractual obligation of the seller (→ (+))
 - here: of the obligation to deliver goods that are conform with the contract
- 2) Fundamentality of the breach (art. 25)
 - a) Detriment to the buyer
 - b) Substantial deprivation of the buyer of what he is entitled to expect
 - c) Foreseeability of this result by the seller

VII. Request for substitute goods within a reasonable time after notifying the seller

VIII. No impossibility to restitute the received goods in unimpaired conditions (art. 82)

IX. No expiration of the limitation period

C. Right to repair (art. 46(3))

I. Applicability of the CISG

II. Effective formation of the contract (art. 14 et seq.)

III. Lack of conformity of the goods with the contract (cf. art. 35 et seq.)

- see above (B.IV.)

IV. No causation of the lack of conformity by the buyer's act or omission (cf. art. 80)

V. Reasonableness of the request to repair

- in particular: *reparability*⁶

VI. Request for repair within a reasonable time after notifying the seller

VII. No expiration of the limitation period

D. Right to price reduction (art. 50)

I. Applicability of the CISG

II. Effective formation of the contract (art. 14 et seq.)

III. Lack of conformity of the goods with the contract (cf. art. 35 et seq.)

- see above (B.IV.); however, the buyer may reduce the price even in case of failure to notify the seller (cf. art. 39) if he has a reasonable excuse

IV. No causation of the lack of conformity by the buyer's act or omission (cf. art. 80)

V. No exclusion of the right to price reduction under art. 50 phrase 2

- no price reduction if seller remedies under art. 37 or 48 (or if buyer refuses to accept)

V. No expiration of the limitation period

⁶ Logically, a right to repair makes only sense if the lack of conformity is reparable. This issue can be discussed either as an independent precondition of the right to repair, either as a sub-aspect of the reasonableness of the request to repair. Since it is not addressed explicitly in art. 46(3), the second option is preferable.

E. Right of retention (art. 58, 71)

I. Right to retain the price under art. 58

- 1) Applicability of the CISG
- 2) Effective formation of the contract (art. 14 et seq.)
- 3) No contractual agreement obliging the buyer to pay the price in advance
- 4) No placing of the goods or documents at the buyer's disposal
 - or no opportunity for the buyer to examine the goods (art. 58(3))
- 5) No passing of the risk under art. 67 et seq. (cf. art. 66)

II. Right to retain performances under art. 71

- 1) Applicability of the CISG
- 2) Effective formation of the contract (art. 14 et seq.)
- 3) (Future) non-performance of a substantial part of the seller's obligation as a result of
 - a) a serious deficiency in his ability to perform (art. 71(1) lit. a)
 - b) a serious deficiency in his credit-worthiness (art. 71(1) lit. a)
 - c) his conduct in performing or preparing to perform (art. 71(1) lit. b)
- 4) (Future) non-performance becomes apparent after the conclusion of the contract

F. Right to avoidance of the contract (art. 49, 72)

- must be declared by *notice of avoidance* (art. 26)

I. Applicability of the CISG

II. Effective formation of the contract (art. 14 et seq.)

III. Ground of avoidance

- 1) Fundamental breach of contract (art. 49(1) lit. a)
 - a) Breach of a contractual obligation of the seller (→ art. 30 et seq.)
 - non-delivery, belated delivery, lack of conformity of the goods with the contract (see above), lack of freedom of the goods from rights or claims of third parties (art. 41) or industrial and property rights of third parties (art. 42), violation of accessory obligations etc.
 - the breach is irrelevant if buyer ignored his obligations to examine the goods and to notify the seller (cf. art. 38, 39, 43)
 - b) Fundamentality of the breach (art. 25)
 - aa) Detriment to the buyer
 - bb) Substantial deprivation of the buyer of what he is entitled to expect
 - cc) Foreseeability of this result by the seller
- 2) Anticipatory fundamental breach of contract (art. 72)
 - prior to the date of performance
 - a) Impending fundamental breach (art. 72(1))
 - b) Reasonable notice of the intention of avoidance (art. 72(2))
- 3) Non-delivery within an additional period of time (art. 49(1) lit. b)
 - a) Non-delivery of the goods in violation of the contract
 - b) Fixing of a reasonable additional period of time for delivery (cf. art. 47(1))
 - c) No delivery of the goods within the additional period of time

IV. No causation of the seller's failure to perform by the buyer's act or omission (art. 80)

V. No impossibility to restate any received goods in unimpaired conditions (art. 82)

VI. Declaration of avoidance within a reasonable time (art. 49(2))

- only in cases where the seller has eventually delivered the goods

VII. No expiration of the limitation period

G. Remedies after avoidance

I. Right to restitution of payment (art. 81(2))

- Problems: Where and when? Who bears the costs and risks?

- 1) Applicability of the CISG
- 2) Effective formation of the contract (art. 14 et seq.)

- 3) Payment (or partial payment) of the price by the buyer
- 4) Avoidance of the contract
 - a) Right to avoidance of the contract (art. 49, 72)
 - b) Declaration of avoidance (art. 26)
- 5) No expiration of the limitation period

II. Right to interest on the payment (art. 84(1))

- in all cases where seller must refund the price under art. 81(2)
- problem: interest rate not determined in the CISG

H. Right to damages (art. 45(1) lit. b, 74 et seq.)

- can be coupled with other remedies (art. 45(2))

I. Applicability of the CISG

II. Effective formation of the contract (art. 14 et seq.)

III. Breach of a contractual obligation of the seller (→ art. 30 et seq.)

- can be any breach of contract; does not presuppose fault (intent or negligence)
- the breach is irrelevant if buyer ignored his obligations to examine the goods and to notify the seller (cf. art. 38, 39, 43)
 - unless he has a reasonable excuse (cf. art. 44)

IV. No causation of the seller's failure to perform by the buyer's act or omission (art. 80)

V. Damage suffered by the buyer as a consequence of the breach⁷

VI. No exemption of the seller from liability under art. 79

- no unforeseeable impediment beyond the control of the seller that he could not avoid or overcome (force majeure)
 - see special preconditions for the exemption if seller has engaged a third person to perform the contract (art. 79(2))

VII. No expiration of the limitation period

VIII. Calculation of damages (→ see art. 74 - 77)

- principle of full compensation (art. 74 phrase 1)
 - including *loss of profit* (see, however, restriction under art. 44)
- damage must be *foreseeable* (art. 74 phrase 2)
- reduction in the damages if buyer fails to take reasonable measures to *mitigate the loss* (art. 77)

(Date: Diagram 2 (Case-solving))

⁷ Note that at this point you must only examine if there is a damage at all. The question what damages are to be compensated is not a question of the existence of the right to damages (i.e. its preconditions, see art. 45(1) lit. b) but of the calculation of the damages (i.e. its consequences, see art. 74 et seq.).