

INTRODUCTION TO LEGAL CASE-SOLVING AND MOOTING

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

Diagram 3

Remedies of the seller under the CISG¹

- for breach of contract by the buyer -

A. Right to performance (art. 62)

- = right to payment of the price, acceptance of delivery and performance of other obligations (cf. art. 53, 54 et seq., 60)
- 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

- see *diagram 1*

II. *Effective formation of the contract (art. 14 et seq.)*²

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

III. *Maturity (art. 58)*

- buyer not bound to pay before agreed time or when seller has placed goods or documents at his disposal (art. 58(1))
- buyer not bound to pay until he has had an opportunity to examine the goods (art. 58(3))

IV. *No resorting to remedies inconsistent with performance (art. 62)*

- 1) No avoidance of the contract (cf. art. 81(1))
- 2) No fixing of an additional period of time for performance that has not yet expired (cf. art. 63(2))

V. *No expiration of the limitation period*

- according to the law applicable according to international private law

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

I. *Right to retain the goods and documents under art. 58(1) phrase 2, 58(2)*

- 1) Applicability of the CISG
- 2) Effective formation of the contract (art. 14 et seq.)
- 3) No contractual agreement obliging the seller to deliver the goods and hand over the documents in advance
- 4) No payment of the price

II. *Right to retain performances under art. 71*

- includes the *right of stoppage in transit* (art. 71(2))

 - 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 buyer'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

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 Concerning this issue see the corresponding footnotes in diagram 2.

C. Right to avoidance of the contract (art. 64, 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. 64(1) lit. a)
 - a) Breach of a contractual obligation of the buyer (→ art. 53 et seq.)
 - non-payment or belated payment of the price
 - non-taking or belated taking delivery of goods
 - violation of accessory obligations
 - b) Fundamentality of the breach (art. 25)
 - aa) Detriment to the seller
 - bb) Substantial deprivation of the seller of what he is entitled to expect
 - cc) Foreseeability of this result by the buyer
- 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-payment or non-taking delivery within an additional period of time (art. 64(1) lit. b)
 - a) Non-payment or non-taking delivery of goods in violation of the contract
 - b) Fixing of a reasonable additional period of time for the payment or taking delivery (cf. art. 63(1))
 - c) No payment or no taking delivery of the goods within the additional period of time

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

V. Declaration of avoidance in due time (art. 64(2))

- only in cases where the buyer has eventually paid the price

 - 1) In case of late performance: declaration of avoidance before becoming aware of the eventual performance (art. 64(2) lit. a)
 - 2) In other cases: declaration of avoidance within a reasonable time (art. 64(2) lit. b)

VI. No expiration of the limitation period

D. Remedies after avoidance

I. Right to restitution of delivered goods (art. 81(2))

- 1) Applicability of the CISG
- 2) Effective formation of the contract (art. 14 et seq.)
- 3) Delivery of goods by the seller
- 4) Avoidance of the contract
 - a) Right to avoidance of the contract (art. 64, 72)
 - b) Declaration of avoidance (art. 26)
- 5) No expiration of the limitation period

II. Right to benefits derived from delivered goods (art. 84(2) lit. a)

III. Right to surrogates for delivered goods (art. 84(2) lit. b)

- if goods cannot be restituted or cannot be restituted in unimpaired conditions

E. Right to damages (art. 61(1) lit. b, 74 et seq.)

- can be coupled with other remedies (art. 61(2))

I. Applicability of the CISG

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

III. Breach of a contractual obligation of the buyer (→ art. 53 et seq.)

- can be any breach of contract; does not presuppose fault (intent or negligence)

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

V. *Damage suffered by the seller as a consequence of the breach²*

VI. *No exemption of the buyer from liability under art. 79*

- no unforeseeable impediment beyond the control of the buyer that he could not avoid or overcome (force majeure)
- see special preconditions for the exemption if buyer 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)
- damage must be *foreseeable* (art. 74 phrase 2)
- reduction in the damages if seller fails to take reasonable measures to *mitigate the loss* (art. 77)