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# Cover purchase without avoidance – Welcome when worthwhile

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## 1. Introduction

Let us assume that a retailer from the famous state of Danubia purchases from a large sports manufacturing company with its seat in Equatioriana sports equipment in order to re-sell it in his home country. After delivery a third party claims that the sale of the equipment would violate this party's intellectual property rights. On the facts, as clarified in numerous e-mail exchanges, it seems unlikely that this third-party claim might eventually be upheld in court proceedings, still litigation would not be easy. Is the Danubian retailer allowed to avoid the contract?

Or let us assume that an engineering company from Mediterraneo purchases water pumps from an Equatorianian supplier in order to complete an irrigation project for a client in an obscure state called Oceania. Because the delivered pumps contain beryllium, the client in Oceania cancels the installation contract. Is the engineering company entitled to avoid the purchase contract with the supplier if it can use the pumps for several other projects or simply resell them?

These and many other of Eric Bergsten's 18 moot problems touch on one of the CISG's main characteristics, namely the fact that the CISG aims at keeping the

↑ Wolters Kluwer 2011, 585 ↑ ↓ Wolters Kluwer 2011, 586 ↓

contract alive as long as possible in order to avoid the necessity to unwind the contract. The prime consequence of this is that termination of the contract will only be available as a remedy of last resort.[1] In order to achieve this goal, the CISG primarily relies on the fundamental breach doctrine. Thus, for example, a buyer will generally only be allowed to terminate the contract if the seller's breach was fundamental (Art. 49(1)(a) CISG); (only) in cases of non-delivery, the buyer can alternatively resort to the famous "Nachfrist"-doctrine (Art. 49(1)(b) CISG) by giving the seller a second chance to deliver within an additional period of time, at the fruitless expiry of which the buyer will be entitled to terminate. Unfortunately the CISG does not give a really precise definition of the concept of fundamental breach in Art. 25 CISG. As a consequence, (probably too) much ink has been spilt in academic writing and case law in trying to define the concept of fundamental breach.[2] And, of course,

↑ Wolters Kluwer 2011, 586 ↑ ↓ Wolters Kluwer 2011, 587 ↓

thousands of Mooties have struggled with and argued about the concept of fundamental breach.

The present authors do not intend to add another piece to this impressive list. Rather attention shall be drawn to a follow-up problem resulting from the ultimaratio-doctrine: if the CISG does not allow the buyer to avoid the contract (for example because the breach is not fundamental), may he nevertheless conduct a cover purchase and claim the price as damages under Art. 45(1)(b) CISG? May the retailer purchase similar sports equipment and sell it in his home country? May the construction company purchase different pumps from another producer and install these substitute goods? And if so: what happens to the original non-conforming equipment or pumps?

## 2. Two possible approaches

Allowing the buyer to conduct a cover purchase seems to conflict with the specific policy considerations of the law of termination – in particular the fundamental breach requirement, but also the time limits provided for in Art. 49(2) CISG. If the buyer could conduct a cover purchase and claim the price as damages from the seller, so the argument goes, he would be placed in the same position as if he had avoided the contract – although the buyer does not have a right to avoid the contract.[3] A strict approach therefore would be not to allow a buyer to make use of Art. 75's formula, i.e., not to allow him to calculate his damages based on the costs of a cover purchase.

↑ Wolters Kluwer 2011, 587 ↑ ↓ Wolters Kluwer 2011, 588 ↓

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

Against this background *Peter Schlechtriem* has advocated a more subtle approach to the issue.[4] In *Schlechtriem's* view the buyer should be able to conduct the cover purchase and to claim the costs of this cover purchase as damages under Art. 74 CISG. In order not to undermine the CISG's strict avoidance requirements *Schlechtriem* suggests that the buyer, as a general rule, should not be allowed to reject (or revoke his acceptance of) the non-conforming goods and to refuse to pay the purchase price, simply because he does not have a right to avoid the contract

under Art. 49 CISG.[5] This approach leaves a buyer who has conducted a cover purchase with both the seller's non-conforming goods

↑ Wolters Kluwer 2011, 588 ↑ ↓ Wolters Kluwer 2011, 589 ↓

and the cover goods. Obviously, when claiming the costs of the cover purchase as damages from the seller, the buyer must subtract the value of the non-conforming goods which will remain with him or at his disposition. [6] Otherwise he would be unjustly enriched: he would have bought two deliveries at the price of one.

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

On a closer analysis, however, the difference between the two positions seems to dwindle. In fact, in many cases both lines of thought will lead to identical results in practice, or rather: they should lead to identical results if properly applied. *Schlechtriem* in essence allows the buyer to liquidate the cover costs (minus the value of the non-conforming goods) as a direct damage under Art. 74 CISG. The strict approach, if correctly applied, would have to reach the same result by another route. In fact, it appears to be widely accepted in case law and legal writing that the buyer can claim reimbursement of the costs which he incurs in taking reasonable mitigation measures as required by Art. 77 CISG.[7] Thus, while the strict approach would not allow recovery of the cover costs under Art. 74 CISG as such, it would have to accept the cover costs in their "disguise" as mitigations costs, provided of course that cover was reasonable and required under Art. 77 CISG and that the value of the non-conforming goods which remain with the buyer has to be subtracted. In the pumps-case this would mean that the buyer is required under Art. 77 CISG to acquire additional pumps as cover for USD 500.000 and that he could get them reimbursed as mitigation costs (minus the value of the non-conforming goods).

↑ Wolters Kluwer 2011, 589 ↑ ↓ Wolters Kluwer 2011, 590 ↓

On that basis, one might be inclined to regard the above-mentioned controversy as a typical academic exercise with little practical relevance. This would, however, be a premature conclusion. In fact, both lines of thought differ in some details which may very well play an important role in practice. These details will be analysed in the next part before the paper will turn to specific issues of the calculation of damages.

## 3. The two crucial differences between both approaches

It is suggested that the two lines of thought which have been outlined above differ with regard to issues of proof and with regard to the foreseeability rule. The results of these differences are not only conceptual in nature, but will also have practical effects. In the present authors' opinion, an analysis of these differences and their effects leads to the conclusion that the strict approach should be preferred over *Schlechtriem's* approach.

## 3.1. The issue of proof

The strict approach admits the cover costs only through the back door which is labelled "Art. 77 CISG", i.e. as the costs for reasonable mitigation measures under Art. 77 CISG. As a consequence, it is submitted, the buyer needs the key to the back door. This key lies in the proof that the cover transaction was a required and reasonable mitigation measure under Art. 77 CISG.[8] In order to do so, the buyer would usually have to prove the damage he would have suffered if he had not taken the mitigation measure, i.e. if he had not made the cover transaction (the "no-cover-damage"). Even if one does not require the buyer to give the exact amount, but lets it suffice that the buyer shows that the no-cover-damage was at any rate larger than the cover costs, this might mean that the buyer has to reveal his own contracts with his sub-buyers (to show his profit margin or his liability risk etc.) or that he faces serious difficulties in proving a potential loss in reputation.

↑ Wolters Kluwer 2011, 590 ↑ ↓ Wolters Kluwer 2011, 591 ↓

The approach advocated by *Schlechtriem* arguably would relieve the buyer from that type of proof.[9] As *Schlechtriem* would regard the cover costs as a head of damages which is directly recoverable under Art. 74 CISG, the buyer would not have to make any proof with regard to the back door of Art. 77 CISG, but would simply have to prove that he made the cover transaction in order to fill the gap that the seller's breach (non-conformity) left open.

If the two approaches differ in that point, the question will arise which approach should be followed. In our opinion, the preferable view is the one taken by the strict approach. The reason for this submission is the very existence of Art. 75 CISG. That provision – just like *Schlechtriem* under Art. 74 CISG – classifies the cover costs directly and without much ado as recoverable damages, albeit only on the condition that the buyer rightfully avoids the contract. This leads to a coherent picture: As the buyer has avoided the contract, he will not be able to keep the non-conforming goods. His primary loss therefore lies in the fact that he is left without the goods he was promised by the seller in the contract. On that basis the compensation he can claim logically should consist in the costs that he has to incur in getting these goods elsewhere, i.e. in the cover costs. This scenario is, however, not given in the situation envisaged here, i.e. in the situation where the buyer is not entitled to avoid the contract; rather, the buyer still has the delivered goods in his possession. In that situation, the crucial policy rationale behind letting the buyer make the cover transaction rather appears to be the mitigation aspect. If that is correct, one should also allocate the issues and burdens of proof according to mitigation principles which is what the strict approach does.

## 3.2. The foreseeability requirement

Under the famous foreseeability rule in Art. 74 CISG, damages may not exceed the loss which the seller foresaw or ought to have foreseen as a possible consequence of his breach. In other words, the seller is only liable for those heads of damages which

were foreseeable to him at the time of the conclusion of the contract.[10] In contrast, Art. 75 CISG does not set out such a foreseeability

↑ Wolters Kluwer 2011, 591 ↑ ↓ Wolters Kluwer 2011, 592 ↓

requirement in those cases where the buyer rightfully avoids the contract and claims the costs of a cover purchase as damages.[11]

In cases where the buyer is not entitled to avoid the contract, the foreseeability rule in Art. 74 CISG will apply without any doubts. Again, however, it is submitted that the two approaches set out above will differ with regard to certain details.

Under the prevailing view, the cover costs would only be relevant through the back door, i.e. as reasonable mitigation costs within the meaning of Art. 77 CISG. The foreseeability test would therefore relate to the question whether it would be reasonable for the buyer to make the cover purchase. This, in turn, depends on whether the buyer would have suffered a higher loss if he had not made the cover purchase. Thus, as a result, the foreseeability test would ask whether the seller ought to have foreseen that his breach would have caused damages to the buyer and that these no-cover-damages would have been higher than the cover costs.

Under *Schlechtriem's* view, the answer is not definitely settled yet. However, as the cover cost is regarded as a direct head of damage under Art. 74 CISG, it is arguable that the foreseeability test would simply relate to the question whether it was foreseeable that the buyer would conduct a cover purchase. In the case of a commercial buyer (as usually is the case under the CISG), it is arguable that this usually was foreseeable.[12] Of course, one could argue that a reasonable buyer likely would only make the cover transaction if his risk of liability was higher than the cover costs, and that, as a consequence, the foreseeability test under the prevailing view was more or less identical to the foreseeability test under *Schlechtriem's* view. It is submitted, however, that such a line of thought would

↑ Wolters Kluwer 2011, 592 ↑ ↓ Wolters Kluwer 2011, 593 ↓

not be entirely convincing: the buyer may make a cover transaction although he does not know his exact liability risk yet, simply because he planned his production or his business on receiving the promised goods in a conforming quality and because he does not want to alter his business plans simply as a result of the seller's breach.

As with regard to the issue of proof, the answer to the question which of the two views is preferable should take into account the parallel provision in Art. 75 CISG. This provision does not require foreseeability. It is submitted that the reason for not doing so lies in the simple fact that the provision only applies where the buyer has rightfully avoided the contract. In such a case, the buyer has not received the goods and it is obvious that he will (usually) have a need to get them elsewhere. In other words, the occurrence of a cover purchase is more or less "automatically" foreseeable.[13] The situation is different, however, where the buyer has to keep the (non-conforming) goods, as in the situations discussed in this paper. In these cases the only "automatically" foreseeable head of damages is the reduction in value that results from the non-conformity. Everything else, for example a loss of profit, a loss

of reputation or the costs of a cover purchase, may but need not arise. Therefore it makes sense to subject the claim for damages to a concrete foreseeability analysis. Such a concrete foreseeability analysis is exactly what the prevailing view requires, whereas *Schlechtriem's* view would – at least arguably – grant damages for the cover costs "automatically", as outlined above.

### 3.3. The conclusion so far

The analysis so far has shown that the preferable solution to the problem is to allow the buyer to claim damages under Art. 74 for his mitigation costs (minus the value of the non-conforming goods which he still has). The mitigation costs can be calculated on the basis of the costs of the buyer's cover purchase if the buyer can show that the cover purchase was a reasonable mitigation measure as required by Art. 77 CISG. Furthermore, this fact must have been foreseeable for the seller under Art. 74, 2nd sentence CISG; according to the prevailing (albeit disputed) opinion, the burden of proof in that respect lies with the buyer.[14] As,

↑ Wolters Kluwer 2011, 593 ↑ ↓ Wolters Kluwer 2011, 594 ↓

however, the buyer does not have a right to avoid the contract under Art. 49 CISG (no fundamental breach), he would have to keep the delivered (non-conforming) goods. Therefore, so it has been stated so far, the "value" of these goods would have to be subtracted from the cover costs. This raises the question how the "value" of the delivered goods should be determined. This issue will be dealt with in the next section, together with several follow-up issues that are related to it.

## 4. The "value" of the delivered (non-conforming) goods

The defining feature of the buyer's situation is that he will be left with two sets of goods, namely the delivered (non-conforming) goods from his seller, and the goods he got through his cover purchase.

Let us take an example: the sales contract provides for goods of grade A (price: USD 10,000), but the seller delivers goods of (the lower quality) grade B. The buyer who is a retailer trades in both grade A and grade B goods. Therefore, it is not unreasonable to expect him to sell the delivered B-goods in his ordinary course of business. On that assumption, the breach would not be fundamental if one follows the strict approach in German and Swiss case law which regards even a severe and not curable breach as not being fundamental, if the buyer could reasonably be expected to make another use of the goods (the so-called reasonable use doctrine).[15] The buyer now conducts a cover purchase by buying A-goods from supplier X for USD 12,000 because he needs the A-goods to perform other contracts which he has already concluded and which would create a substantial liability risk in case of non-delivery.

The buyer thus has two sets of goods: the B-goods from the seller and the A-goods from the cover purchase. He owes the contract price to the seller (USD 10,000) because he does not have a right to avoid the contract. He also paid USD 12,000 to the supplier X for the cover purchase. Let us assume that – on the basis of the approach taken by the present authors – the buyer would be entitled to

↑ Wolters Kluwer 2011, 594 ↑ ↓ Wolters Kluwer 2011, 595 ↓

claim reimbursement of the cover-purchase price because the cover purchase was a reasonable mitigation measure under Art. 77 CISG and prevented higher losses. The actual loss thus consists in the price for the cover purchase (12,000 €) minus the "value" of the B-goods delivered by the seller.

Theoretically, the value of the B-goods could be determined either by reference to the price that the buyer could earn by selling them in his ordinary course of business (the "sales value") or by reference to the price that the buyer would have to pay if he bought B-goods in the market (the "purchase-value"). Presumably, the purchase value would be lower than the sales value.

It is submitted that regard should be had to the purchase value, but not to the sales value for the B-goods. If one took the opposite view and referred to the sales value, one would transfer the profit of the "reasonable use" transaction (i.e. the sale of the delivered B-goods) from the buyer to the seller and this would not seem appropriate in light of the fact that it was the seller who breached the contract.

It is further suggested as a general rule that the relevant time for determining the purchase value is the time when the B-goods were delivered to the buyer. It may, however, be necessary to make exceptions from this rule in certain cases. One of these cases would seem to be given if the buyer can show that under ordinary circumstances he would not have ordered B-goods at the time when the seller made his delivery and that the market price for ordering B-goods would have been lower at the time when the buyer would have ordered them. Otherwise the reasonable use doctrine which requires the buyer to keep the B-goods would have the effect of forcing upon him a (B-goods) purchase in a high-price period which he would not have made if the seller had performed his obligations under the contract (for A-goods) correctly.

In fact, the latter scenario has – in slightly different circumstances, i.e. in a case of late-delivery – been the subject of the 12th Vis Moot problem. A candy producer from Mediterraneo ordered 400 metric tons of cocoa beans from an Equatorianian Commodity exporter. The parties agreed on a delivery between March and May. When the seller because of an embargo had not undertaken delivery until October the candy producer ran out of stock. Although he could not avoid the contract for certain reasons he conducted a cover purchase – unfortunately market prices had exploded in the meantime. One month after this cover purchase, the embargo was abolished and the seller delivered his cocoa

↑ Wolters Kluwer 2011, 595 ↑ ↓ Wolters Kluwer 2011, 596 ↓

beans – at a time when their market price was at essentially the same level as in October.

If one subtracted the value of the delivered goods from the cover-purchase price, the buyer's loss would be reduced to zero. Yet, the buyer would never have bought the seller's 400 tons of cocoa beans in November. After the cover purchase, his stocks would not have run out until, say, January. Given that by then the price level of cocoa

would have dropped down to normal again, it becomes clear that relying on the November price would unreasonably disadvantage the buyer. He would be put in a position as if he had ordered cocoa when prices were at a peak level – which he but for the seller's breach would not have done. The value of the (tardy) delivered cocoa beans therefore should be determined on the basis of the market prices in January as the time when the buyer would have ordered them.

## 5. Instead of a conclusion

Rather than presenting a conclusion on the foregoing comments, we would like to take the opportunity to address one of Eric Bergsten's greatest achievements, the Willem C. Vis International Commercial Arbitration Moot. "The Moot" as he uses to call it, has not only created enthusiasm, friendship and knowledge amongst thousands of law students, but also immensely enriched the work of law professors all over the world. For us, the Vis Moot is the best part of our academic activity and the highlight of the year. If it did not exist, university life would be much less fun. Thank you!

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[1] (German) Bundesgerichtshof, 3 April 1996, CISG-Online No. 135 ('… last possibility for the creditor …'); (German) Bundesgerichtshof, 28 October 1998, CISG-Online No. 413; (Austrian) Oberster Gerichtshof, 7 September 2000, CISG-Online No. 642; Markus Müller-Chen, Art. 49 para. 2, in *Commentary on the UN Convention on the International Sale of Goods (CISG)*, eds. P. Schlechtriem & I. Schwenzer (Oxford University Press, 2010); Ulrich G. Schroeter, Art. 25 para. 1 et seq., in *Commentary on the UN Convention on the International Sale of Goods (CISG)*, eds. P. Schlechtriem & I. Schwenzer (Oxford University Press, 2010); Peter Huber & Stefan Kröll, 'Deutsche Rechtsprechung zum UN-Kaufrecht in den Jahren 2001/2002', *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* (2003), 309, 313; Christiana Fountoulakis, 'Das Verhältnis von Nacherfüllungsrecht des Verkäufers und Vertragsaufhebungsrecht des Käufers im UN-Kaufrecht', *Zeitschrift für Internationales Handelsrecht (IHR)* (2003), 160, 161; Peter Huber, in The CISG, eds. P. Huber & A. Mullis (Munich, Sellier elp 2007), 209.

[2] Amongst many others Babiak, 'Defining „Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods', 6 *Temp. Int'l & Comp. L. J.* (1992), 113; Frank Diedrich, 'Voraussetzungen einer Vertragsaufhebung wegen Sachmängeln nach dem Wiener Kaufrecht', *RIW* (1995), 11; Franco Ferrari, 'Wesentliche Vertragsverletzung nach UN-Kaufrecht', *Zeitschrift für internationalen Handelsrecht (IHR)* 2005, 1; Nicole Freiburg*, Das Recht auf Vertragsaufhebung im UN-Kaufrecht* (Berlin: Duncker & Humblot, 2001); Graffi, 'Divergences in the interpretation of the CISG: The concept of "Fundamental Breach"', in *The 1980 Uniform Sales Law*, ed. Franco Ferrari (2003), 313 et. seq.; Peter Huber, 'CISG – The structure of remedies', 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* (2007), 13; Gerhard Lubbe, 'Fundamental breach under the CISG: A source of fundamentally divergent results', 68 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* (2004), 444; Ulrich Magnus, 'Aufhebungsrecht des Käufers und Nacherfüllungsrecht des Verkäufers im UN-Kaufrecht', in *Festschrift für Peter Schlechtriem zum 70. Geburtstag,* ed. Ingeborg Schwenzer & Günther Hager (Tübingen: Mohr Siebeck, 2003), 599; Brigitta Lurger, 'Die wesentliche Vertragsverletzung nach Art. 25 CISG', *Zeitschrift für Internationales Handelsrecht (IHR)* (2001), 91; Alastair Mullis, 'Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases', in *Anglo-Swedish Studies in Law,* eds. Mats Andenas & Nils Jarborg (Uppsala: Iustus Förlag, 1998), 326; Mullis, 'Termination for breach of contract in C.I.F. contracts under the Vienna Convention and English law: Is there a substantial difference?', in *Contemporary Issues in Commercial Law: Essays in honour of Prof. A.G. Guest,* ed. Eva Lomnicka & C.G.J. Morse (London: Sweet & Maxwell, 1997), 137.

[3] See for concerns in this regard (Austrian) Oberster Gerichtshof, 6 February 1996, CISG-Online No. 224; (Austrian) Oberster Gerichtshof, 14 January 2002, CISG-Online No. 643; OLG Bamberg, 13 January 1999, CISG-online No. 516; AG Nordhorn, 14 June 1994, CISG-online 259; Peter Mankowski, Art. 75 para. 3, in *Münchener Kommentar* HGB, ed. K. Schmidt, 2nd ed. (Munich: Beck, 2007); Müller-Chen, Art. 45 para. 27, in *Commentary on the UN Convention on the International Sale of Goods (CISG),* eds. P. Schlechtriem & I. Schwenzer (Oxford University Press, 2010); Ulrich Magnus, Art. 45, para. 22, in *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch* (Berlin: Sellier & de Gruyter, 2005); Huber, in *The CISG*, eds. Huber & Mullis, 282; Hans Stoll, 'Zur Haftung bei Erfüllungsverweigerung im Einheitlichen Kaufrecht', 52 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* (1988), 617; Schmidt-Ahrendts, *Das Verhältnis von Erfüllung, Schadensersatz und Vertragsaufhebung im CISG* (Tübingen: Mohr Siebeck 2007), 152 et seq.

[4] Schlechtriem, *Damages, avoidance of the contract and performance interest under the CISG,* <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem21.html>, 8 January 2011; similarly Ingeborg Schwenzer, Art. 74 para. 22, in *Commentary on the UN Convention on the International Sale of Goods (CISG)*, eds. P. Schlechtriem & I. Schwenzer (Oxford University Press, 2010); Herbert Schönle & Thomas Koller, Art. 74 para. 15, in *Kommentar zum UN-Kaufrecht*, ed. H. Honsell, 2nd ed. (Berlin, Springer, 2010); (Austrian) Oberlandesgericht Graz, 29 July 2004, CISG-online No. 1627; Karollus, *UN-Kaufrecht* (Wien: Springer, 1991), 155; Honnold/Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention,* 4th ed. (Alphen an den Rijn, Kluwer International Law 2009), para. 410.2. – differentiating Nils Schmidt-Ahrendts, *Das Verhältnis von Erfüllung, Schadensersatz und Vertragsaufhebung im CISG* (Tübingen: Mohr Siebeck 2007), 152 et seq.

[5] Schlechtriem, *Damages, avoidance and performance interest, supra* note 4 at I. e), does, however, suggest modifications to this general rule. Thus, in his view, the seller may be under an obligation to take the goods back and sell them otherwise, if this is economically reasonable, for example where the costs of restitution are lower than the costs that would accrue if the buyer had to dispose of the goods. A further modification of the general rule applies in cases of non-delivery. Here, Schlechtriem suggests that a buyer who has already made a cover purchase should no longer be entitled to claim performance under Art. 46 CISG, although the contract has not (and cannot) been avoided under Art. 49 CISG. Karollus, *UN-Kaufrecht, supra* note 4 at 155 even allows the buyer to reject delivery.

[6] Schlechtriem, *Damages, avoidance and performance interest, supra* note 4 at I. e); apparently contra: AC Opinion No 6 (Gotanda) para. 8; cf. *infra* IV.

[7] (German) Bundesgerichtshof, 25 June 1997, CISG-online No. 277; Peter Huber, Art. 77, para. 12 in *Münchener Kommentar* Bürgerliches Gesetzbuch, 5th ed. (Munich: Beck, 2008); Ulrich Magnus in *Staudinger, supra* note 3 at Art. 77 para. 20; Victor Knapp, Art. 77 note 2.6, in *Commentary on the International Sales Law*, eds. Bianca & Bonell (Milan, Giuffrè 1987); Fritz Enderlein & Dietrich Maskow, *International Sales Law* (New York: Oceana Publications, 1992), Art. 77 note 2; Ingeborg Schwenzer, Art. 77 para. 11, in *Commentary on the UN Convention on the International Sale of Goods* (CISG), eds. P. Schlechtriem & I. Schwenzer (Oxford University Press, 2010). Opinions seem to differ only in regard to the question whether the claim for reimbursement should be based on Art. 74 or Art. 77.

[8] The buyer cannot claim reimbursement of costs for unreasonable measures: (German) Bundesgerichtshof, 25 June 1997, CISG-online No. 277; Peter Huber, Art. 77 para. 12, in *Münchener Kommentar Bürgerliches Gesetzbuch*, eds. F. J. Säcker & R. Rixecker, 5th ed. (Munich, Beck 2008); Ulrich Magnus in *Staudinger*, Art. 77 para. 20; Ingeborg Schwenzer, Art. 77 para. 11, in *Commentary on the UN Convention on the International Sale of Goods (CISG)*, eds. P. Schlechtriem & I. Schwenzer (Oxford University Press, 2010).

[9] *Cf.* in particular Schlechtriem/Butler, *UN Law on International Sales* (Berlin & Heidelberg: Springer, 2009), para. 309.

[10] For a detailed analysis of the foreseeability requirement see Faust, *Die Vorhersehbarkeit des Schadens gemäß Art. 74 Satz 2 UN-Kaufrecht (CISG)* (Tübingen: Mohr Siebeck, 1996).

[11] Predominant opinion: Ingeborg Schwenzer, Art. 75 para. 8, in *Commentary on the UN Convention on the International Sale of Goods (CISG)*, eds. P. Schlechtriem & I. Schwenzer (Oxford University Press, 2010); Peter Huber, in *The CISG, supra* note 3 at 283; Nils Schmidt-Ahrendts, *Das Verhältnis von Erfüllung, Schadensersatz und Vertragsaufhebung im CISG* (Tübingen: Mohr Siebeck, 2007), 91; Faust, *Die Vorhersehbarkeit des Schadens gemäß Art. 74 Satz 2 UN-Kaufrecht (CISG)* (Tübingen: Mohr Siebeck, 1996), 134 et seq.; – concurring Herbert Schönle & Thomas Koller, Art. 75 para. 26, in *Kommentar zum UN-Kaufrecht*, ed. H. Honsell, 2nd ed. (Berlin, Springer, 2010).

[12] See Schlechtriem, *Damages, avoidance and performance interest, supra* note 4 at I a), on the foreseeability requirement: 'This should normally be the case if goods do not conform with the contract or if the seller is in default in delivering commodities or other goods in a volatile market.'

[13] *Cf.* Herbert Schönle & Thomas Koller, Art. 75 para. 26, *Kommentar zum UN-Kaufrecht, supra,* note 11.

[14] Ingeborg Schwenzer, Art. 74 para. 64, in *Commentary on the UN Convention on the International Sale of Goods (CISG),* eds. P. Schlechtriem & I. Schwenzer (Oxford University Press, 2010) (with references to the contrary opinion); Huber, in *The CISG, supra* note 3 at 281 et seq.

[15] (German) Bundesgerichtshof, 3 April 1996, CISG-Online No. 135; (German) Oberlandesgericht Köln, 14 October 2002, CISG-Online No. 709; (German) Oberlandesgericht Frankfurt, 18 January 1994, CISG-Online No. 123; (Swiss) Bundesgericht, 28 October 1998, CISG-Online No. 413; cf. Huber, in *The CISG, supra* note 3 at 228 et seq. This position, however, does not seem to find world-wide support; see e.g. U.S. Court of Appeals, 2nd Circuit, 6 December 1995 (*Delchi Carrier S.p.A. v. Rotorex Corp*), CISG-Online No. 140; unclear: (French) Cour de Cassation, 23 January 1996, CISG-Online No. 159, (French) Cour de Cassation, 26 May 1999, CISG-Online No. 487; cf. CISG-AC Opinion No 5 (Schwenzer) para. 4.3.