

PRICE REDUCTION UNDER THE CISG:  
A 21ST CENTURY PERSPECTIVE

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I. INTRODUCTION

It is very likely that at least once in your (business) life, you will encounter a situation wherein price reduction can be applied. Indeed, although it is often overlooked, price reduction can be a useful remedy for various occasions. Imagine for example that you were an indoor golf course operator and that you bought artificial turf from a seller who delivers non-conforming artificial turf: the turf is marked with white lines which have to be cut out. Well, in exactly this situation a German court considered: “According to common usage, a golf course does not have white lines. Thus, the turf has not been in conformity with the contract, wherefore the buyer is entitled to reduce the price.”<sup>1</sup>

This decision illustrates that price reduction can be an interesting remedy for breach of contract by the seller. It is therefore not surprising that the Vienna Convention on Contracts for International Sale of Goods (CISG) provides this remedy.<sup>2</sup> The CISG of course provides different remedies for breach of contract by the seller. The buyer can require performance, claim for the delivery of substitute goods or repair; he can claim for damages or even terminate the contract under certain circumstances.<sup>3</sup> But the

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<sup>1</sup> Landgericht Stuttgart [LG] [District Court] Oct. 29, 2009, 25 O 99/09 (Ger.) (Artificial Turf Case), *translation available at* <http://cisgw3.law.pace.edu/cases/091029g1.html>.

<sup>2</sup> United Nations Vienna Convention on Contracts for the International Sale of Goods, Oct. 4, 1980 [hereinafter CISG or Vienna Sales Convention].

<sup>3</sup> Art. 49 CISG uses the following formulation: “may declare the contract avoided.” We will use the term “termination” instead of “avoidance.”

unsatisfied buyer can also apply, as we have seen in the *artificial turf* case, a price reduction remedy. Indeed, Article 50 CISG states:

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price 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. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

As a result, price reduction under the CISG can be defined as a proportional reduction of the price, in the occurrence of the delivery of non-conforming goods within an international sales contract. Various aspects of this price reduction have already been described in the literature,<sup>4</sup> but a thorough and comprehensive examination of this remedy is lacking.<sup>4</sup> There are three more reasons why research about this remedy is of the utmost importance.

First, the historical roots of Article 50 CISG have to be taken into account. This remedy is founded on the so-called Roman *actio quanti minoris*, which was developed in *civil law* countries (and to a lesser extent or not at all in *common law* countries).<sup>5</sup> The study of Article 50 CISG

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<sup>4</sup> See, e.g., Ivo Bach, *Art. 50, in UN CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (CISG)* 748, 748–67 (Stefan Kröll et al. eds., 2011); Eric E. Bergsten & Anthony J. Miller, *The Remedy of Reduction of Price*, *AM. J. COMP. L.* 255, 255–77 (1979); John O. Honnold, *Article 50 Reduction of the Price*, in *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 335, 335–42 (10th ed. 1999); Chengwei Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law* (2d ed. 2005), available at [www.cisg.law.pace.edu/cisg/biblio/chengwei2.html](http://www.cisg.law.pace.edu/cisg/biblio/chengwei2.html); Markus Müller-Chen, *Art. 50 CISG, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 770, 770–80 (Ingeborg Schwenzer ed., 2010); Peter A. 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?*, 12 *PACE INT'L L. REV.* 1, 1–46 (2000); Anton K. Schnyder & Ralf M. Straub, *Art. 50, in KOMMENTAR ZUM UN-KAUFRECHT* 641, 641–61 (Heinrich Honsell ed., 2010); Michael R. Will, *Art. 50, in BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW* 368, 368–76 (M.C. Bianca & M.J. Bonell eds., 1987).

<sup>5</sup> Bach, *supra* note 4, at 749; Bergsten & Miller, *supra* note 4, at 256–57; MICHAEL G. BRIDGE, *THE INTERNATIONAL SALE OF GOODS* 588 (2007) [hereinafter BRIDGE 2007]; MICHAEL G. BRIDGE, *THE INTERNATIONAL SALE OF GOODS* 603 (2013) [hereinafter BRIDGE 2013]; Anette Gärtner, *Britain and the CISG: The Case for Ratification—A Comparative Analysis with Special Reference to German Law*, *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)*, at IIA.1 (10th ed. 2000–2001); Olga Gonzalez, *Remedies under the U.N. Convention for the International Sale of Goods*, 2 *INT'L TAX & BUS. LAW.* 79, 91 (1984); PETER HUBER & ALASTAIR MULLIS, *THE CISG*

clarifies many aspects of the price reduction remedy based on the *actio quanti minoris*. At the same time, a comprehensive overview of this remedy is, of course, also interesting for countries that were not familiar with the price reduction remedy before becoming a Contracting State to the CISG.

A study of this kind is also essential from a European perspective. Article 50 CISG inspired many European *soft law* initiatives, such as the DCFR and the PECL, to include the price reduction remedy.<sup>6</sup> The Consumer Sales Directive and the recent proposed Regulation on a Common European Sales Law also introduce the price reduction remedy,<sup>7</sup> and even the commentaries from some of these instruments refer to Article 50 CISG.<sup>8</sup>

Finally, the most important reason to study Article 50 CISG is its frequent application in case law and the encountered difficulties in applying it.<sup>9</sup> The frequent application in case law makes it clear that this remedy is very relevant and useful for the international sales practice. However, case law also shows that there are a lot of uncertainties and ambiguities, for example the calculation method and the role of the judges and parties, which still need to be resolved. In this paper, I will address these difficulties and I will formulate adequate and comprehensive answers.

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247 (2007); Liu, *supra* note 4, at n.1; Ulrich Magnus, *Art. 50 CISG*, in VON STAUDINGERS KOMMENTAR ZUM BGB, WIENER UN-KAUFRECHT 530 n.5 (Martinek ed., 2004); Piliounis, *supra* note 4, at 30; Erika Sondahl, *Understanding the Remedy of Price Reduction—A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods*, 7 VINDOBONA J. INT'L COMM. L. & ARBITRATION 255, Introduction (2003); FRANS J.A. VAN DER VELDEN, HET WEENSE KOOPVERDRAG 1980 EN ZIJN RECHTSMIDDELEN 343–44 (1988); Will, *supra* note 4, at 368.

<sup>6</sup> See Art. 9:401 PECL (Principles of European Contract Law) and Art. III.-3:601 DCFR (Draft Common Frame of Reference: C. von Bar & E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (DCFR) (2009)).

<sup>7</sup> See Art. 3(2) of the Directive 1999/44/EC of May 25, 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 1999, 171/12 [hereinafter Consumer Sales Directive]. See also the Proposal of the European Commission of 11 October 2011 for a regulation of the European parliament and of the council on a Common European Sales Law, COM (2011) 635 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>. For price reduction as a buyer's remedy, see Art. 106.1(d) CESL, this remedy is elaborated in Art. 120 CESL. For price reduction as a customer's remedy in related service contracts, see Art. 155.1(d) CESL.

<sup>8</sup> See, e.g., von Bar & Clive, *supra* note 6, at 913, § I (mentioning Art. 50 CISG with regard to the calculation method of the price reduction under the DCFR).

<sup>9</sup> See the following databases for classification per Article: <http://www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html>; <http://www.uncitral.org/clout/showSearchDocument.do>.

This paper will discuss the price reduction remedy under the Vienna Sales Convention in five different parts. I will first define its conditions of application (II), and I will examine the role of the parties and the judge (III). Another very important aspect is the calculation method of the price reduction (IV). Finally, some other characteristics of the price reduction will be examined (V), and a comparison with other remedies—*i.e.* damages and partial termination—will be made (VI).

## II. CONDITIONS OF APPLICATION

For the buyer to invoke the price reduction remedy under the CISG, six conditions must be fulfilled. Firstly, the situation has to fall within the scope of application of the CISG—*i.e.* an international sale of moveable goods (§ 1). Further, there must be a breach of contract because of non-conformity of the goods with the contract (§ 2). The buyer must respect certain time limits (§ 3), while also understanding that a price reduction can only be invoked as a remedy by the buyer, not by the seller (§ 4). Further the price reduction remedy is subject to the seller's right to cure, under the Articles 37 or 48 CISG (price reduction is only a *subsidiary* remedy) (§ 5). Finally, the application of price reduction does not require a fundamental non-performance—which can be required in case of termination<sup>10</sup>—or a minor non-performance (§ 6). In what follows, I will deal with these criteria separately.

### § 1. *International Sales Law*

The application of the price reduction remedy is, of course, subject to the scope of application of the CISG. For the sake of completeness, I shall describe some of the main features. It applies to the *sale of moveable goods* between parties whose place of business are in *different* Contracting States<sup>11</sup> or “when the rules of private international law lead to the application of the law of a Contracting State.”<sup>12</sup> The Convention does not

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<sup>10</sup> Art. 49(1)(a) CISG.

<sup>11</sup> Art. 1(1)(a) CISG.

<sup>12</sup> Art. 1(1)(b) CISG. About this requirement, *see detailed* BRIDGE 2013, *supra* note 5, at 474–77; JOHN O. HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE

apply “to sales of goods bought for personal, family or household use” (unless the seller, at any time before or at the conclusion of the contract neither knew nor ought to have known that the goods were bought for any such use).<sup>13</sup> This means that *consumer sales contracts are excluded*.<sup>14</sup> Summarized, the Convention is applicable to international commercial sales of moveable goods. The following paragraph will elaborate some elements of its scope of application.

The Convention is, in principle, only applicable to *sales contracts*.<sup>15</sup> Articles 2(b) and (c) CISG exclude the sale by auction or on execution or otherwise by authority of law.<sup>16</sup> Article 3(1) CISG states that “contracts for the supply of goods whether to be manufactured or produced, are to be considered sales unless the party who orders the goods intends to supply a substantial part of the materials necessary for such manufacture or production.”<sup>17</sup> The Convention is also not applicable “to contracts in which the preponderant part of the obligations to the party who furnishes the goods consists of the supply of labor or other services.”<sup>18</sup> From this, it can be deduced that the *proportion* between the sale of goods and the supply of

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1980 UNITED NATIONS CONVENTION 29–39 (2009); L. Mistelis, *Art. 1, in UN CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (CISG)* 21, 23–24 (S. Kröll et al. eds., 2011); I. Schwenzer & P. Hachem, *Art. 1, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 28, 30, 39–43 (I. Schwenzer ed., 2010).

<sup>13</sup> Art. 2(a) CISG.

<sup>14</sup> BRIDGE (2013), *supra* note 5, at 481; Gonzalez, *supra* note 5, at 82; F. Spohnheimer, *Art. 2, in UN CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (CISG)* 39, 40–46 (S. Kröll et al. eds., 2011). *See similarly* I. Schwenzer & P. Hachem, *Art. 2, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 49–51 (I. Schwenzer ed., 2010).

<sup>15</sup> About the lack of definition of this notion, see BRIDGE (2013), *supra* note 5, at 481; J. Erauw, *Wanneer is het Weens Koopverdrag van toepassing, HET WEENS KOOPVERDRAG* 21, 37–38 (H. Van Houtte et al. eds., 1997); Mistelis, *supra* note 12, at 22, 28; Schwenzer & Hachem, *supra* note 12, at 31. For a creative definition following from the obligations of the seller and of the buyer (Art. 30, 53 CISG) see FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* 27–28 (1992); Mistelis, *supra* note 12, at 22, 28; Schwenzer & Hachem, *supra* note 12, at 31.

<sup>16</sup> Erauw, *supra* note 15, at 41; HONNOLD & FLECHTNER, *supra* note 12, at 51–52; Spohnheimer, *supra* note 14, at 46–49; Schwenzer & Hachem, *Art. 2, supra* note 14, at 55–56.

<sup>17</sup> *See, e.g.*, Hof van beroep Antwerpen [Court of Appeal Antwerp] Oct. 1, 2012, 2010/AR/3455 (Belg.) (Dashboard Mould Case) (unpublished). *See also* BRIDGE (2013), *supra* note 5, at 482–83; ENDERLEIN & MASKOW, *supra* note 15, at 36–38; HONNOLD & FLECHTNER, *supra* note 12, at 63–66; Mistelis & Raymond, *Art. 3, in UN CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (CISG)* 53, 54–57 (S. Kröll et al. eds., 2011); I. Schwenzer & P. Hachem, *Art. 3, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 62–67 (I. Schwenzer ed., 2010).

<sup>18</sup> Art. 3(2) CISG.

labor is crucial to determine whether or not the contract is subject to the Convention.<sup>19</sup>

Article 1 CISG indicates that it is only applicable to *moveable* goods.<sup>20</sup> Article 2 CISG excludes some goods explicitly from the scope of application of the Convention: sales of stocks, shares, investment securities, negotiable instruments or money; sales of ships, vessels, hovercraft or aircraft, and finally also the sale of electricity.<sup>21</sup>

Finally, it should be pointed out that the Convention is only applicable to *international commercial* sales contracts (and not to consumer sales contracts).<sup>22</sup> Indeed, the *international* character of the agreement is clear. Article 1 CISG states that the parties must have their place of business in *different* (Contract) States.<sup>23</sup> With regard to the *commercial* character, Article 2(a) CISG makes clear that the sale of goods meant for private use falls outside the scope of application of the Convention.

## § 2. *Non-conformity of the goods*

The following paragraph will elucidate what is meant by “non-conformity of the goods” under Article 50 CISG (a). I will also examine whether or not this concept includes a delay in delivery or a delivery at the wrong place (b), non-(conform) delivery of accessories or fruits (c) and third party claims (d). Finally, we will conclude that Article 50 CISG can be applied in case of an excused and an unexcused non-performance (e).

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<sup>19</sup> Erauw, *supra* note 15, at 42–43; Sondahl, *supra* note 5, at 266 n.A.3.ii. *See also* BRIDGE (2013), *supra* note 5, at 483–85; ENDERLEIN & MASKOW, *supra* note 15, at 36–38; HONNOLD & FLECHTNER, *supra* note 12, at 66–69; Mistelis & Raymond, *Art. 3 CISG, supra* note 17, at 57–61; I. Schwenger & P. Hachem, *Art. 3 CISG, supra* note 17.

<sup>20</sup> ENDERLEIN & MASKOW, *supra* note 15, at 29; Erauw, *supra* note 15, at 38–39; Mistelis, *Art. 1 CISG, supra* note 12, at 31; Schwenger & Hachem, *Art. 1 CISG, supra* note 12, at 35 *et seq.*

<sup>21</sup> BRIDGE (2013), *supra* note 5, at 485–87; Erauw, *supra* note 15, at 41; HONNOLD & FLECHTNER, *supra* note 12, at 52–55; Spohnheimer, *supra* note 14, at 49–52; Schwenger & Hachem, *Art. 2 CISG, supra* note 12, at 57–60.

<sup>22</sup> *See* Article 2(a) CISG. *See also* Mistelis, *Art. 1 CISG, supra* note 12, at 33; Schwenger & Hachem, *Art. 1 CISG, supra* note 12, at 38–39.

<sup>23</sup> HONNOLD & FLECHTNER, *supra* note 22, at 29–30.

*a) Non-conformity*

The price reduction remedy requires a breach of contract because of the non-conformity of the goods with the contract.<sup>24</sup> According to Article 35(1) CISG, the conformity of a good relates to the quantity (or weight),<sup>25</sup> the quality, the description, and the packaging of the goods.<sup>26</sup> Article 35 also relates to the delivery of *different* goods than was agreed upon (an “*aliud*”).<sup>27</sup> A price reduction cannot be applied if there is no non-conformity and the buyer merely regrets his purchase or if it turns out that he has paid too much for it in comparison to the market price.<sup>28</sup> Finally, it must be noted that a price reduction cannot be applied in case of a *non-delivery* because Article 50 CISG requires that “the goods do not conform with the contract.”

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<sup>24</sup> Art. 35(1) CISG. Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat (“Secretariat Commentary”) 1978 U.N. DOC. A/CONF. 97/5, 42 (referring to Article 33(1) [at present Article 35(1)] CISG). Landgericht Stuttgart [LG] [District Court] June 4, 2002, 15 O 179/01 (Ger.) (Porphyr Stoves Case), *translation available at* <http://cisgw3.law.pace.edu/cases/020604g1.html>; Dashboard Mould Case, *supra* note 17. *See also* Christoph Benicke, *Art. 50 CISG*, MÜNCHENER KOMMENTAR HANDELSGESETZBUCH 573 n.2 (K. Schmidt ed., 2004) (referring to Arts. 35–36 CISG); HUBER & MULLIS, *supra* note 5, at 247 (referring to Arts. 35 and 36 CISG); Magnus, *supra* note 5, at n.8 (referring to Art. 35 CISG and defective documents); Sophie Stijns & Raf Van Ransbeeck, *De rechtsmiddelen (algemeen)*, HET WEENS KOOPVERDRAG 191, 204 (Hans Van Houtte et al. eds., 1997) (referring to Article 35 CISG); Will, *supra* note 4, at 370 n.2.1 (referring to Art. 35 *et seq.* CISG).

<sup>25</sup> Sondahl is not sure whether the price reduction under Art. 50 CISG is applicable to a non-conformity with regard to the *quantity*: Sondahl, *supra* note 5, at 266 n.A.3.ii. Some authors claim that the price reduction remedy is not applicable to a non-conformity with regard to the *quantity*. *See* Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, “Validity” and Reduction of Price Under Article 50*, 14 J.L. & COM. 153, 169–71 (1994–95) (referring to the *Braun-case*, understanding this case to mean that a price reduction would not be allowed in case of a divergence in *quantity*: *S.V. Braun, Inc. v. Alitalia-Linee Aeree Italiane, S.P.A.*, No. 91 Civ. 8484 (LBS) (S.D.N.Y. Apr. 6, 1994), *available at* [cisgw3.law.pace.edu/cases/940406u1.html](http://cisgw3.law.pace.edu/cases/940406u1.html)). Furthermore, some authors think that the rules of Art. 51 CISG precede those of Art. 50 CISG in case of a non-conformity with regard to a shortcoming in the *quantity*: Bach, *supra* note 4, at 754–55 (with examples); Müller-Chen, *supra* note 4, at n.2; Schnyder & Straub, *supra* note 4, at n.10. *See* the authors who correctly point out that a price reduction can be applied in the case of a shortcoming of both *quality* and *quantity*: VINCENT HEUZÉ, *LA VENTE INTERNATIONALE DE MARCHANDISES* n.457 (2000); ALBERT H. KRITZER, *GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 374 (1989); Piliounis, *supra* note 4, at 31; Anton K. Schnyder & Ralf M. Straub, *Art. 50*, in *KOMMENTAR ZUM UN-KAUFRECHT* 581 n.10 (Heinrich Honsell ed., 1997); VAN DER VELDEN, *supra* note 5, at 344–45. For a confirmation of the last opinion, see also Foreign Trade Court of Arbitration attached to the Chamber of Commerce Jan. 5, 2007, T-13/05 (Serbia) (Frozen



Article 36 CISG states that the seller is liable for any lack of conformity which exists at the time when *the risk passes to the buyer*, even though the lack of conformity becomes apparent only afterwards.<sup>29</sup> This last phrase indicates that the price reduction remedy (and all the other remedies) can be applied in the case of non-conformity which already existed at the moment of the transfer of risk but only became apparent later on—*i.e.* a *hidden defect*.<sup>30</sup>

*b) Delay or delivery at the wrong place*

According to Liu, price reduction is restricted to the delivery of non-conforming goods and cannot be applied to any other obligation of the

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Plums and Raspberries Case), *translation available at* <http://cisgw3.law.pace.edu/cases/070105sb.html> (applying the price reduction remedy in the case of a shortcoming in quantity).

<sup>26</sup> Art. 35(1)-(2) CISG states:

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) Are fit for the purposes for which goods of the same description would ordinarily be used; (b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

For a discussion of whether Art. 35 CISG can determine the notion of non-conformity, see INGEBORG SCHWENZER ET AL., *INTERNATIONAL SALES LAW. A GUIDE TO THE CISG* 235–87, 407 (2012); S.A. KRUISINGA, (NON)-CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A UNIFORM CONCEPT? 25–62 (2004).

<sup>27</sup> KRUISINGA, *supra* note 26, at 27–28, 38–42.

<sup>28</sup> *See, e.g.*, CIETAC Aug. 8, 1996, CISG/1996/36 (China) (Diaper Machine Case), *translation available at* <http://cisgw3.law.pace.edu/cases/960808c1.html> (“However, the purchase price was determined by both seller and buyer after negotiation. Buyer could not request a one-third discount simply because buyer considers the price is much higher than the price for one of a similar type in the international market.”).

<sup>29</sup> *See also infra* about the transfer of risk.

<sup>30</sup> Bundesgerichtshof [BGH] [Federal Supreme Court] Mar. 2, 2005, VIII ZR 67/04 (Ger.) (Frozen Pork Case 2), *translation available at* <http://cisgw3.law.pace.edu/cases/050302g1.html> (stating that at the moment of the transfer of risk there was no suspicion of contamination with dioxins, but, nevertheless, the goods were not in conformity with the contract because the possible contamination with dioxins is to be considered a hidden defect).



seller.<sup>31</sup> Therefore, this remedy *cannot be applied* in case of *delay or delivery at the wrong place*.<sup>32</sup> Indeed, from the structure of the CISG we can deduce that Article 50 CISG only refers to non-conformity of the goods<sup>33</sup> and not to the time or place of delivery.<sup>34</sup>

*c) Non-(conform) delivery of accessories or fruits*

It is unclear whether Article 35(1) CISG also includes the non-(conform) delivery of the accessories or the fruits of a good. Doctrine and case law do not treat this matter. Perhaps it is part of the duty of the seller to deliver goods which are of the required “description,” as indicated by Article 35(1) CISG. The latter reasoning would result in the applicability of remedies of the CISG, such as price reduction. Actually, there is a debate about the question whether or not Article 50 CISG can be applied in case of non-performance of the duty *to hand over the documents* relating to the goods. Some authors are convinced that the omission to hand over the documents can be remedied by a price reduction.<sup>35</sup> Another part of the doctrine strictly sticks to Article 35 CISG to define the concept of non-conformity, which does not mention the delivery of the documents.<sup>36</sup> The duty to hand over the documents is also, in my opinion, meant by the “description of the good,” as mentioned by Article 35(1) CISG. As a result, the application of price reduction is not necessarily ruled out.

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<sup>31</sup> Liu, *supra* note 4, at n.4.1.

<sup>32</sup> See also Landgericht Düsseldorf [LG] [District Court] Mar. 5, 1996, 36 O 178/95 (Ger.) (Shoes Case 3), translation available at <http://cisgw3.law.pace.edu/cases/960305g1.html> (no application of Art. 50 CISG in case of late delivery). See also Schnyder & Straub, *supra* note 25, at n.12 (1997) (Art. 50 CISG cannot be applied in case of late delivery, delivery at the wrong place, non-delivery of necessary documents, or lack of providing property); Schnyder & Straub, *supra* note 4, at n.12 (2010) (*idem*). Some commentators believe that Art. 50 CISG cannot be applied in case of a *late* delivery. See, e.g., Bach, *supra* note 4, at 752 (this author adds that Art. 50 CISG is not applicable in case of non-delivery); HUBER & MULLIS, *supra* note 5, at 247; Magnus, *supra* note 5, at n.8; VAN DER VELDEN, *supra* note 5, at 345.

<sup>33</sup> Art. 35 *et seq.* CISG.

<sup>34</sup> Honnold, *supra* note 4, at n.313.1 (this author seems to add that Art. 50 CISG is not applicable in case of non-delivery of the necessary documents (Arts. 31–34 CISG) or the existence of third party claims (Art. 41 CISG, see also *infra*, II.d) and other requirements by the contract (Art. 30 CISG)); HONNOLD & FLECHTNER, *supra* note 12, at n.313.1.

<sup>35</sup> Magnus, *supra* note 5, at n.8.

<sup>36</sup> Cf. Art. 34 CISG; Honnold, *supra* note 4, at n.313.1; Schnyder & Straub, *supra* note 4, at n.12.

*d) Third party claims*

There are still many discussions in the doctrine around the question of whether or not price reduction can be applied if the value of the good reduces because of third party claims.<sup>37</sup>

To this point, some legal scholars think that price reduction cannot be applied in the case of third party claims. There are some good reasons to accept this point of view. At the Vienna diplomatic conference, the Norwegian delegation submitted an amendment which made the application of Article 50 CISG possible in the case of third party claims.<sup>38</sup> This amendment has never been accepted due to the pressures of time.<sup>39</sup> Another argument is that the term “non-conformity,” being a technical term, has to be interpreted consistently for the whole Convention.<sup>40</sup> Moreover, some of the authors who think that price reduction cannot be applied, in the case of third party claims, claim that the wording of Article 50 CISG refers only to the non-conformity of the goods and not to third party claims.<sup>41</sup> A further argument is that the calculation method of price reduction under Article 50

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<sup>37</sup> For an overview of the different points of view, see Will, *supra* note 4, at 375–76, 3.4 (more research has to be done before he can take up a position). See also HUBER & MULLIS, *supra* note 5, at 247–48; Liu, *supra* note 4, at n.4.1; CHENGWEI LIU, REMEDIES IN INTERNATIONAL SALES 121–24 (2007); PETER SCHLECHTRIEM, UNIFORM SALES LAW. THE UN-CONVENTION ON CONTRACTS AND INTERNATIONAL SALE OF GOODS 79 (1986) (in principle, price reduction should be applicable in case of third party claims, however, in such a case it is difficult to work out a formula to calculate the reduction in value); Sondahl, *supra* note 5, at 265 n.A.3.ii. Both the terms “third party claim” and “legal defect” will be used.

<sup>38</sup> For the amendment proposal of Norway, see U.N. DOC. A/CONF.97/C.1/L.167. For the discussions in the first committee, see also Official Records, Summary records of meetings of the First Committee, 23rd meeting, 360, <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting23.html>. See also Report of the First Committee, UN. Doc. A/CONF.97/11, <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries50.html>.

<sup>39</sup> For this argument, see Müller-Chen, *supra* note 4, at n.2 (damages would be more appropriate); Arnau Muriá Tuñón, *The Actio Quanti Minoris and Sales of Goods Between Mexico and the U.S.: An Analysis of the Remedy of Reduction of the Price in the UN Sales Convention, CISG Art. 50 and Its Civil Law Antecedents* n.4.2.3 (1998), available at [www.cisg.law.pace.edu/cisg/biblio/muria.html](http://www.cisg.law.pace.edu/cisg/biblio/muria.html) (damages would be more appropriate). Seems to accept this point of view: Honnold, *supra* note 4, at n.313.1; HONNOLD & FLECHTNER, *supra* note 12, at n.313.1. For an overview of this first position (without taking stance), see also Will, *supra* note 4, at 375–76 n.3.4.

<sup>40</sup> Referring to Art. 35–36 CISG. HUBER & MULLIS, *supra* note 5, at 248. The following authors also believe that the wording and the structure of the Convention rule out the application of Art. 50 CISG to third party claims: Schnyder & Straub, *supra* note 25, at n.11; Schnyder & Straub, *supra* note 4, at n.11.

<sup>41</sup> For the same point of view, see Piliounis, *supra* note 4, at 36.

CISG would be inappropriate in cases of third party claims.<sup>42</sup> It is argued that it is very difficult to assess the “(reduction in) value” if a good is affected by third party claims. This means that only the assessment of the losses is possible. When following this argument, the buyer can only be compensated by receiving damages. Bach adheres to this point of view by invoking reasons of legal certainty and stressing the need to apply the concept of “non-conformity” in a coherent way throughout the Convention.<sup>43</sup> Nevertheless, *de lege ferenda*, he is in favor of an extension of Article 50 CISG to third party claims because there are no reasons to treat the two situations (non-conformity of the goods and third party claims) differently.<sup>44</sup>

On the other hand, some legal scholars believe that Article 50 CISG can be applied in cases of third party claims. One argument is based on the fact that Article 44 CISG refers to Article 50 CISG. This is important, because Article 44 is also applicable, next to (material) non-conformity, to third party rights.<sup>45</sup> Article 44 CISG assumes the application of price reduction in the specific situation where the buyer has not notified the seller about non-conformity, but has a reasonable excuse for his failure to give the required notice:

Notwithstanding the provisions of paragraph (1) of Article 39 [to give notice of the non-conformity], and paragraph (1) of Article 43 [to give notice of third party claims], the buyer may reduce the price in accordance with Article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

It is argued that if price reduction can be applied in this particular situation, one must extend the scope of the application of price reduction in cases of third party claims to other situations. A further argument is the coherence of and the equality of material and legal defects.<sup>46</sup> When following this argument, we can avoid the difficult delineation between material defect

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<sup>42</sup> HEUZÉ, *supra* note 25, at 412; Honnold, *supra* note 4, at n.313.1; HONNOLD & FLECHTNER, *supra* note 12, at n.313.1; Tuñón, *supra* note 39, at n.4.2.3.

<sup>43</sup> Bach, *supra* note 4, at 753.

<sup>44</sup> *Id.* at 754.

<sup>45</sup> KARL H. NEUMAYER & CATHERINE MING, CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES 357–58 (1993). For the same reasoning (without taking a stance), see Will, *supra* note 4, at 376 n.3.4; *contra* Bach, *supra* note 4, at 753.

<sup>46</sup> NEUMAYER & MING, *supra* note 45, at 108.

(with regard to the quality) and legal defects (such as third party claims).<sup>47</sup> Because of the lack of a clear solution in the text of the CISG, courts will have to decipher this difficult problem.<sup>48</sup>

I believe that many elements indicate that the second point of view (price reduction can be applied in case of third party claims) should be subscribed to. Indeed, it is often difficult to differentiate between “material” and “legal” defects of a good. Secondly, the argument that the *calculation* of the price reduction in case of a legal defect would be more difficult if it is of no value. Also, in case of *qualitative* shortcomings of the good, it is difficult to assess the reduction of value. Nevertheless, it cannot be denied that the preparatory documents of the CISG speak against the application of the price reduction in cases of a legal defect. On the one hand it would be extremely desirable that any revision of the CISG would clarify this issue. On the other hand, I would, with no revision of the CISG ahead, welcome any development in the case law that would accept the price reduction in cases of third party claims.

*e) Excused and unexcused non-performance*

Article 36(1) CISG states that the seller is *liable* for every lack of conformity of the goods which exists at *the time when the risk passes* to the buyer (even though the lack of conformity becomes apparent only after that time).<sup>49</sup> Articles 66-70 CISG regulate the *moment of the transfer of risk*.<sup>50</sup> In some cases, the risk only passes when the goods are handed over to the first carrier for transmission to the buyer,<sup>51</sup> in other cases the risk passes

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<sup>47</sup> PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES 152 (2009). *See also* Magnus, *supra* note 5, at n.10 (there is no objective difference between material and legal defects that would justify a different treatment).

<sup>48</sup> Sondahl, *supra* note 5, at 62–63 n.A.3.iii.

<sup>49</sup> No liability for the seller (and no price reduction for the buyer) if the non-conformity *arises* after the transfer of risk: Landgericht Flensburg [LG] [District Court] Mar. 24, 1999, 2 O 291/98 (Ger.) (Meat Case), *translation available at* <http://cisgw3.law.pace.edu/cases/990324g2.html>.

<sup>50</sup> *See* Manuel Gustin, *Passing of Risk and Impossibility of Performance Under the CISG*, 3 INT'L BUS. L.J. 379, 379–400 (2001).

<sup>51</sup> Art. 67(1) CISG.

from the time of conclusion of the contract<sup>52</sup> or when the buyer takes over the goods.<sup>53</sup>

It is important to first point to the fact that the CISG, in principle, does *not require a fault* of the seller to enable the buyer to claim *damages* for non-conformity.<sup>54</sup> Further, Article 79(5) of the CISG states that each remedy, except for damages, can be applied to the case of an “*impediment beyond his [the seller’s] control.*”<sup>55</sup> Therefore, an objective non-conformity is enough to apply a price reduction, independent from the fact of whether or not the seller is responsible for the non-conformity,<sup>56</sup> and whether or not he can invoke the liberating circumstances of Article 79 CISG.<sup>57</sup> This means that the price reduction remedy does not depend on the contractual liability of the seller. Nevertheless, after the transfer of risk it is not possible anymore to invoke a remedy, because the buyer bears the risk. According to Article 69 of the CISG, the risk often passes only to the buyer when he takes over the goods or as soon as the goods are placed at his disposal. This means that the price reduction remedy can still be applied after the *consensus* until the transfer of risk, when the goods would have partially

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<sup>52</sup> Art. 68 CISG.

<sup>53</sup> Art. 69 CISG.

<sup>54</sup> See Bach, *supra* note 4, at 749; Benicke, *supra* note 24 n.1; Bergsten & Miller, *supra* note 4, at 258–59; Gärtner, *supra* note 5, at 63–64 n.II.A.2.a.; HONNOLD & FLECHTNER, *supra* note 12, at n.313; KRITZER, *supra* note 25, at 375; KRUISINGA, *supra* note 26, at 123; CHENGWEI LIU & MARIE S. NEWMAN, REMEDIES IN INTERNATIONAL SALES: PERSPECTIVES FROM CISG, UNIDROIT PRINCIPLES AND PECL 101–02 (Marie Stefanini Newman ed., 2007); Piliounis, *supra* note 4, at 30; Will, *supra* note 4, at 368–69 n.1.2.

<sup>55</sup> For the scope of application of Art. 79(5) CISG, see also CISG, *supra* note 46, Art. 79(1) (A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.).

<sup>56</sup> About the discussion whether non-conformity suffices to apply Art. 79 CISG or whether non-delivery or late delivery is required to apply Art. 79 CISG, see KRUISINGA, *supra* note 26, at 127–32 (is correctly of the opinion that a non-conformity suffices).

<sup>57</sup> Also seen in relation to damages *infra*, VI. § 2. Müller-Chen, *supra* note 4, at 772 n.2. See also HUBER & MULLIS, *supra* note 5, at 250; S. Jansen, *Price Reduction as a Remedy in European Contract Law and the Consumer Acquis*, ALTERNATIVE WAYS TO IUS COMMUNE. THE EUROPEANISATION OF PRIVATE LAW 169, 180 (A. Keirse & M. Loos eds., 2012); Schnyder & Straub, *supra* note 25, at n.17; Schnyder & Straub, *supra* note 4, at n.17; SCHWENZER ET AL., *supra* note 26, at 407 (“liability under Article 79 is irrelevant”). *But see* VAN DER VELDEN, *supra* note 5, at 348–49 (this author believes that the application of Art. 50 CISG can only be precluded in the circumstances of Art. 79 CISG if the price reduction remedy is considered a species of damages. Afterwards, on page 350, he concludes that price reduction cannot be compared with damages).

perished due to an “impediment beyond the seller’s control.” In some countries, such as France and Belgium, the transfer of risk in sales contracts of “*species* goods” takes place at the moment of the consensus. Consequently, these countries apply the classical *res perit domino*-rule. This means that the buyer bears the risk after the consensus for any loss of the good and will have to pay the price even when the goods cannot be delivered due to *force majeure*. Nevertheless, in the very common case of the sale of *genus* goods other rules apply; the risk will only pass at the specification of these goods. Specification will often coincide with the *delivery* of the *genus* goods. This shows that often, even in countries with a consensus based system, similar rules to the CISG with regard to the passing of the risk will apply.

### § 3. Time limits

Hereafter we will find that the CISG states time limits for the notification of a *non-conformity* of the good.<sup>58</sup> While termination has to be done within certain time limits according to Article 49(2) of the CISG, the Convention does not state any time limit for the buyer to exercise the *price reduction remedy*.<sup>59</sup>

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<sup>58</sup> See *infra*, III. § 1.c.

<sup>59</sup> Bach, *supra* note 4, at 758 (refers to the national time limits and the UN-Convention of 1974 on the Limitation Period in the International Sale of Goods); HUBER & MULLIS, *supra* note 5, at 250; LIU, *supra* note 37, at 131–32; KRITZER, *supra* note 25, at 377; KRUISINGA, *supra* note 26, at 99–104; Magnus, *supra* note 5, at n.17 (refers to the national time limits); Müller-Chen, *supra* note 4, at 773 n.4 (refers to the national time limits); NEUMAYER & MING, *supra* note 45, at 355; Schnyder & Straub, *supra* note 25, at n.28; Schnyder & Straub, *supra* note 4, at n.28 (referring to the national time limits); Sondahl, *supra* note 5, at 36–40 n.A.2 (no requirement to exercise it within a “reasonable time limit”); VAN DER VELDEN, *supra* note 5, at 347; Will, *supra* note 4, at 372 n.2.1.3 (refers to the national time limits). For a case in which the difference between a price reduction (no time limit) and termination (time limit) is stressed, see Oberster Gerichtshof [OGH] [Supreme Court] May 25, 2005, 3 Ob 193/04k (Austria) (Coffee Machines Case), *translation available at* <http://cisgw3.law.pace.edu/cases/050523a3.html>. For other cases in which a price reduction is not precluded when the time limit for termination has elapsed, see Randers Byret [County Court] Nov. 4, 1998, BS 9700016-4 (Denmark) (Christmas Trees Case), *translation available at* <http://cisgw3.law.pace.edu/cases/981104d1.html>; Cour de Justice Genève [CJ] [Appellate Court] Nov. 15, 2002, C/12709/2001 (Switz.) (Window Frames Case), *translation available at* <http://cisgw3.law.pace.edu/cases/021115s1.html>; Landgericht Bamberg [LG] [District Court] Oct. 23, 2006, 2 O 51/02 (Ger.) (Plants Case), *translation available at* <http://cisgw3.law.pace.edu/cases/061023g1.html> (implicitly); Oberlandesgericht Koblenze [OLG] [Provincial Appellate Court] Dec. 14, 2006, 2 U 923/06 (Ger.) (Bottles Case), *translation available at* <http://cisgw3.law.pace.edu/cases/061214g1.html>.

§ 4. *A buyer's remedy*

The price reduction remedy under the CISG is only a buyer's remedy and cannot be used as a seller's remedy.<sup>60</sup> Indeed, it is logical that only the buyer can "reduce a *price*" in case of non-performance of the seller. However, a "reduction of performances" would be an alternative that would allow the seller to remedy a partial payment by the buyer; the drafters of the CISG, however, have not provided this.<sup>61</sup>

§ 5. *Price reduction is subsidiary to the seller's right to cure*

The CISG provides different remedies for a breach of contract by the seller. The buyer can require performance, claim for the delivery of substitute goods or repair, he can claim for damages, apply a price reduction, or terminate the contract.<sup>62</sup> The CISG favors the remedies that intend to "maintain" the contract: such as performance, repair and replacement. Termination can only be applied after a reasonable period of time (in case of non-delivery) or in case of a fundamental non-performance.<sup>63</sup> Price reduction is subject to the *seller's right to cure*, by virtue of Articles 37 or 48 of the CISG.<sup>64</sup> If the buyer refuses to accept a

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<sup>60</sup> LIU, *supra* note 37, at 107.

<sup>61</sup> See Acquis Principles, Art. 8:301 (provides a "reduction of performances" instead of a "price reduction."). See also J. PISULINSKI ET AL., TERMINATION AND REDUCTION OF PERFORMANCE, CONTRACT II: GENERAL PROVISIONS, DELIVERY OF GOODS, PACKAGE TRAVEL AND PAYMENT SERVICES IN PRINCIPLES OF THE EXISTING EC CONTRACT LAW (ACQUIS PRINCIPLES) 411, 414 (Acquis Grp. ed., 2009).

<sup>62</sup> Art. 46(1) CISG (performance); Art. 46(3) CISG (repair); Art. 46(2) CISG (delivery of substitute goods); Art. 50 CISG (price reduction); Art. 49 (termination, but only in case of a fundamental breach of contract or in case of non-delivery if the seller does not deliver the goods within the additional period of time fixed by the buyer according to Article 47(1) or if he declares that he will not deliver within the period so fixed).

<sup>63</sup> Art. 49(1) CISG in fine.

<sup>64</sup> Compare Art. 50 CISG, with Art. 37, 48 CISG; Secretariat Commentary, *supra* note 24. About the fact that the price reduction is subordinate to the seller's right to cure, see Pretore della giurisdizione di Locarno Campagna Apr. 27, 1992, 6252 (Switz.) (Furniture Case), *translation available at* <http://cisgw3.law.pace.edu/cases/920427s1.html> (price reduction was still possible for the second part of the goods); Oberlandesgericht Koblenz [OLG] [Provincial Court of Appeal] Jan. 31, 1997, 2 U 31/96 (Ger.) (Acrylic Blankets Case), *translation available at* <http://cisgw3.law.pace.edu/cases/970131g1.html> (with regard to termination and price reduction; price reduction was not applied); Turun Hoveikeus [TH] [Court of Appeal] Nov. 12, 1997, S 97/324 (Finland) (Canned Food Case 2), *translation available at* <http://cisgw3.law.pace.edu/cases/971112f5.html> (price reduction was still possible); Tribunal of



performance according to Articles 37 or 48 CISG, he loses his right to reduce the price.<sup>65</sup>

Article 37 CISG introduces the seller's right to cure if he has delivered the goods *before* the date for delivery. The seller's right to cure will only be restricted if it causes the buyer unreasonable inconvenience or unreasonable expenses.

Article 48 of the CISG introduces the seller's right to cure *after* the date for delivery. The seller's right to cure will be restricted if it causes the buyer unreasonable delay and unreasonable inconvenience, or if it causes uncertainty of reimbursement by the seller of expenses advanced by the buyer.<sup>66</sup> Moreover, Article 48(2) of the CISG states that the seller can request the buyer to make known whether he will accept performance. If the buyer does not comply with this request within a reasonable time, the seller may perform within the time indicated by his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller (such as the price reduction remedy).

We can conclude that the CISG introduces a clear hierarchy between the remedies which aim the performance of the contract (primary remedies) and price reduction (secondary remedies).<sup>67</sup> The reason for the precedence of the primary remedies presumably lies in the buyer's duty to mitigate damages, and the intention to balance the interests of the buyer and the seller.<sup>68</sup> Furthermore, the seller's right to cure is consistent with the

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International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Mar. 23, 2005, 126/2004 (Russia Arbitration Proceeding), *translation available at* <http://cisgw3.law.pace.edu/cases/050323r1.html> (a price reduction was not allowed because the seller replaced the defect goods); Müller-Chen, *supra* note 4, at 773–74 n.7; Will, *supra* note 4, at 368, 372 nn.1.1, 1.3.1, 2.3.

<sup>65</sup> Art. 50 CISG.

<sup>66</sup> Landgericht Köln [LG] [District Court of Köln] Mar. 25, 2003, 3 O 196/01 (Ger.) (Racing carts case), *translation available at* <http://cisgw3.law.pace.edu/cases/030325g1.html> (taking into account the intention to use the “carts” in a 24-hour race, it would have been unreasonable to give the seller the possibility to repair the defects or to deliver substitute-carts. Consequently, a price reduction can only be applied for all defects repaired by the buyer *before* the race).

<sup>67</sup> About the hierarchy of remedies in the CISG, see Benicke, *supra* note 24, at nn.4-7; Stefan Grundmann, *Consumer Law, Commercial Law, Private Law: How Can the Sales Directive and the Sales Convention Be So Similar?*, 14 EUR. BUS. L. REP. 237, 240–43 (2003); Jansen, *supra* note 57, at 177. See also HUBER & MULLIS, *supra* note 5, at 249 (“the seller's right to cure takes precedence over the buyer's right to reduce the price”); Magnus, *supra* note 5, at n.27 (“Despite the wordings [. . .] the seller's right to cure takes precedence over the buyer's wish to reduce the price.” (English translation)).

<sup>68</sup> Liu, *supra* note 4, at n.4.3 (and the intention “to preserve the parties' bargain wherever possible”); LIU, *supra* note 37, at 129–30. See also Bergsten & Miller, *supra* note 4, at 265 (although the

intention of the drafters of the CISG to safeguard the performance of the contract.<sup>69</sup>

Apart from that, Article 47 of the CISG makes it possible for the buyer to fix *himself* a reasonable period for performance by the seller, if he does not want to wait for the reasonable period of Article 48 CISG. The use of Article 47 is *not required* by Article 50 CISG. If the buyer uses Article 47 CISG, he may not, during that period, resort to any remedy for breach of contract (such as a price reduction). If this period has elapsed, it is clear that the seller cannot perform within a reasonable period, as required by Article 48(1) CISG. As a consequence, the buyer can immediately apply the price reduction remedy.<sup>70</sup>

§ 6. *The non-conformity does not need to be fundamental or minor*

The price reduction remedy of Article 50 of the CISG can be applied independent of the fact to whether the non-conformity is fundamental or not.<sup>71</sup> It suffices that the value of the goods is reduced because of the non-

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duty to mitigate damages of Article 73 draft-CISG is not applicable, the same result is reached by Article 46 draft-CISG. This Article enables the seller to cure the non-conformity); Honnold, *supra* note 4, at n.313 (about the duty to mitigate damages); HONNOLD & FLECHTNER, *supra* note 12, at n.313 (about the duty to mitigate damages); Piliounis, *supra* note 4, at 35 (about the balancing of interests of both buyer and seller). See also Reza Beheshti, *A Comparative Analysis of Damages Along with Self-Off Under the SGA Versus Price Reduction Under the CISG and the CESL*, UNIVERSITY OF LEICESTER SCHOOL OF LAW AND LEGAL STUDIES RESEARCH PAPER SERIES 1, 2 (2014) (Article 50 CISG is according to this author nonetheless not subject to a duty to mitigate damages).

<sup>69</sup> Bach, *supra* note 4, at 755.

<sup>70</sup> HUBER & MULLIS, *supra* note 5, at 249–50. The following author believes that it is advisable for the buyer to fix the seller a period for performance. As a consequence, the buyer can apply a price reduction if the fixed period elapses without any performance by the seller: Magnus, *supra* note 5, at n.29. Accord Benicke, *supra* note 24, at n.6.

<sup>71</sup> Netherlands Court of First Instance Rotterdam 1 June 2011, n.284566 / HA ZA 07-1344, available at [www.rechtspraak.nl](http://www.rechtspraak.nl) (the application of a price reduction does not require a fundamental defect). Accord Benicke, *supra* note 24, at n.3; Leonardo Graffi, *Case Law on the Concept of “Fundamental Breach” in the Vienna Sales Convention*, 3 INT’L BUS. L.J. 338, 338 (2003); HEUZÉ, *supra* note 25, at n.459; HUBER & MULLIS, *supra* note 5, at 250; Magnus, *supra* note 5, at n.13; Schnyder & Straub, *supra* note 25, at nn.13–14 (1997); SCHWENZER ET AL., *supra* note 26, at 407. About the concept “fundamental breach,” see Franco Ferrari, *Fundamental Breach of Contract Under the UN Sales Convention—25 Years Article 25 CISG*, 3 INT’L BUS. L.J. 389, 389–400 (2005); Graffi, *supra* note 71, at 338–49; Stijns & Van Ransbeeck, *supra* note 24, at 192–201.

conformity of the goods.<sup>72</sup> We can deduce from this that there is no requirement of a “minimum” degree of seriousness of the non-conformity.<sup>73</sup>

Furthermore, the CISG does not impose a “maximum” degree of seriousness of the non-conformity. This means that the CISG does not require that the non-conformity has to be minor or very small to apply the price reduction remedy. As a result, the non-conformity may be very modest.<sup>74</sup> In this case it might be, however, more difficult for the buyer to prove the reduction in value of the good.<sup>75</sup>

### III. THE ROLE OF THE PARTIES AND THE JUDGE

#### § 1. *The role of the parties*

##### *a) The buyer’s right to choose and the hierarchy of remedies*

The wording of Article 50 CISG shows that the price reduction must be considered a buyer’s choice. Indeed, this Article states that “*the buyer may reduce the price.*” Nevertheless, the buyer’s right to choose is not free. We have already seen that the price reduction remedy of Article 50 is conceived as a secondary remedy.<sup>76</sup> The buyer can only apply this remedy if the seller does not succeed in his right to cure or does not use his right to cure. The precedence of the seller’s right to cure introduces a hierarchy between the different remedies. The buyer can only apply a price reduction if the seller does not wish to exercise his right to cure or does not cure within a certain period.

Apart from this, it is logical that the buyer cannot combine the price reduction remedy with a claim for (full) performance, repair and

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<sup>72</sup> Benicke, *supra* note 24, at n.3.

<sup>73</sup> Schnyder & Straub, *supra* note 25, at n.15; Schnyder & Straub, *supra* note 4, at n.15.

<sup>74</sup> About the possibility to apply remedies in case of minor discrepancies, see also KRUISINGA, *supra* note 26, at 36–37.

<sup>75</sup> Schnyder & Straub, *supra* note 25, at n.15; Schnyder & Straub, *supra* note 4, at n.15.

<sup>76</sup> See *supra* II. § 5.

replacement or with the complete termination of the contract.<sup>77</sup> However, a combination with a claim for damages can be allowed to a certain extent.<sup>78</sup>

*b) In principle an extrajudicial price reduction*

The price reduction remedy of Article 50 CISG can be applied *unilaterally* by the buyer.<sup>79</sup> This means that the buyer, without the prior intervention of the judge, may adjust the contract. Consequently, the buyer can invoke the price reduction by a unilateral declaration.<sup>80</sup> This does not alter the fact that the judge can carry out an examination *a posteriori*, if the seller does not agree with the unilateral price reduction declaration or with its calculation.

It has to be noted that the unilateral character of price reduction will often be an illusion.<sup>81</sup> First of all, the seller can disagree with the proportion of the price reduction or with the finding of non-conformity. These conflicts will have to be decided by a judge. Nevertheless, these conflicts will not always rule out a unilateral price reduction. The role of the judge will often be reduced to an examination *a posteriori*. However, there will be a prior intervention of the judge if the buyer has already paid the purchase price, and the seller refuses to pay back (part) of this price.<sup>82</sup> A prior intervention of the judge is also needed in the case that the seller claims the full price in court, and the buyer argues that he is entitled to a price reduction.

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<sup>77</sup> Müller-Chen, *supra* note 4, at 779 n.17; VAN DER VELDEN, *supra* note 5, at 345–46. See also SCHWENZER ET AL., *supra* note 266, at 405 (“it prevents the buyer from ‘double-dipping’”).

<sup>78</sup> See also *infra*, V. § 5; VI. § 2.

<sup>79</sup> Window Frames Case, *supra* note 59; Bach, *supra* note 4, at 751, 756; Bergsten & Miller, *supra* note 4, at 263; BRIDGE (2013), *supra* note 5, at 603; Fritz Enderlein, *Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods*, INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 133, 197 (P. Sarcevic & P. Volken eds., 1996); Gonzalez, *supra* note 5, at 92; KRITZER, *supra* note 25, at 375–76; Liu, *supra* note 4, at n.2; LIU, *supra* note 37, at 104–05; NEUMAYER & MING, *supra* note 45, at 355; Magnus, *supra* note 5, at n.1; Piliounis, *supra* note 4, at 31; Schnyder & Straub, *supra* note 4, at 29; Stijns & Van Ransbeeck, *supra* note 24, at 204; VAN DER VELDEN, *supra* note 5, at 347; Will, *supra* note 4, at 372 n.2.1.3.

<sup>80</sup> See *infra* III. § 1.d. See also Liu, *supra* note 4, at n.4.4.

<sup>81</sup> For an overview of all the elements that hinder an extrajudicial price reduction, see Liu, *supra* note 4, at n.2; LIU, *supra* note 37, at 105–06; Piliounis, *supra* note 4, at 31–32.

<sup>82</sup> See Alison E. Williams, *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales in the United Kingdom*, PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 11, IV.C.5 (X ed. 2000–01). See also *infra* III. § 2.1.

*c) Examination and notification in case of non-conformity*

Before exercising his choice for a price reduction, the buyer has to *examine* the goods or cause them to be examined.<sup>83</sup> Secondly, the buyer has to give *notice* to the seller specifying the nature of the lack of conformity. This notification has to be distinguished from the notification to invoke a remedy (such as price reduction) as such.<sup>84</sup> The buyer has to notify the seller, in accordance with Article 39 CISG of the lack of conformity by means of a notification.<sup>85</sup> This Article states that the buyer has to notify the seller specifying the nature of the lack of conformity<sup>86</sup> within a reasonable time,<sup>87</sup> after he has discovered it or ought to have discovered it.<sup>88</sup> The fact

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<sup>83</sup> See Art. 38 CISG: (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination. See also Oberlandesgericht Munich [OLG] [Provincial Court of Appeal] Mar. 11, 1998, 7 U 4427/97 (Ger.) (Cashmere Sweaters Case), translation available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/310.htm> (the buyer loses, amongst others, his right to apply a price reduction if he does not examine the goods timely). See KRUISINGA, *supra* note 26, at 65–76 (about the buyer’s duty to examine the goods).

<sup>84</sup> See *infra* III. § 1.d.

<sup>85</sup> Bach, *supra* note 4, at 758; Benicke, *supra* note 24, at n.3; Liu, *supra* note 4, at n.4.2; HEUZÉ, *supra* note 25, at n.457; KRUISINGA, *supra* note 26, at 63; LIU, *supra* note 37, at 125–27; Müller-Chen, *supra* note 4, at 772 n.3; Schnyder & Straub, *supra* note 25, at n.18 (1997); Schnyder & Straub, *supra* note 4, at n.18.

<sup>86</sup> See KRUISINGA, *supra* note 26, at 89–95.

<sup>87</sup> See *id.* at 76–89 (about “reasonable time”).

<sup>88</sup> The price reduction remedy can be applied if the condition of Art. 39 CISG is fulfilled: Tampere Court of First Instance Jan. 17, 1997, 95/11193 (Finland) (Canned Food Case 1), translation available at <http://cisgw3.law.pace.edu/cases/970117f5.html>, Hof van beroep Antwerpen [Court of Appeal] Nov. 4, 1998, 1995/AR/1 (Belg.) (I.S. Trading v. Vadotex), translation available at <http://cisgw3.law.pace.edu/cases/981104b1.html> (the condition of Article 39 CISG is fulfilled, but strangely the notification period of the standard terms was already expired); Rechtbank van Koophandel Mechelen [District Court for Commercial Matters] Jan. 18, 2002 (Belg.) (Tomatoes Case), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=941&step=FullText>; Oberlandesgericht Köln [OLG] [Provincial Appellate Court] Aug 17, 2005, 16 U 57/05 (Ger.) (Potatoes Case 1), translation available at <http://cisgw3.law.pace.edu/cases/060814g1.htm>; Plants Case, *supra* note 59 (If a multitude of the same goods (plants) are sold a notification for all the goods suffices; a notification per plant is not necessary); Bottles Case, *supra* note 59 (A price reduction can be applied when the seller has been notified timely and correctly by the buyer; it is sufficient that the seller is notified of the non-conformity and is able to remedy it; it suffices that the buyer describes the symptoms of the defect, and it is not necessary that he establishes the cause of the defect.); Handelsgericht Wien [HG] [Commercial Court

that the buyer has to notify the seller after he *ought to have discovered* the non-conformity makes the link with the buyer's duty to examine the goods.<sup>89</sup> The buyer will lose his right to rely on a lack of conformity (and thus the right to invoke a remedy such as price reduction) if he does not give the seller notice thereof within a reasonable time<sup>90</sup> or if he does not specify the non-conformity sufficiently.<sup>91</sup> Moreover, Article 39 CISG states that the buyer loses the right to rely on a lack of conformity in any event, if he does not notify the seller within a period of *two years* from the date on which the goods were actually handed over to the buyer. This notification does not necessarily require a specific form, and can be done over the

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Vienna] May 3, 2007, 43 Cg 34/05f (Austria) (Poppy Seed Case), *translation available at* <http://cisgw3.law.pace.edu/cases/070503a3.html>; District Court in Kamarno Feb. 24, 2009, 5 Cb/114/2006 (Slovakia) (Potatoes Case 2), *translation available at* <http://cisgw3.law.pace.edu/cases/090224k1.html>. Audiencia Provincial de Asturias sección 7ª Sept. 29, 2010 (Spain) (Anchovies Case), *abstract available at* <http://cisgw3.law.pace.edu/cases/100929s4.html>; Rechtbank Rotterdam [Rb] [District Court] June 1, 2011, 284566/HA ZA 07-1344 (Neth.) (Indice SL v. Defendant), *available at* <http://www.rechtspraak.nl>.

<sup>89</sup> KRUISINGA, *supra* note 26, at 65.

<sup>90</sup> If this condition of Article 39 CISG is not fulfilled, the price reduction remedy cannot be applied Oberlandesgericht Düsseldorf [OLG] [Provincial Court of Appeal] Jan. 8, 1993, 17 U 82/92 (Ger.) (Tinned Cucumbers Case), *translation available at* <http://cisgw3.law.pace.edu/cases/930108g1.html>; Arbitration Court of the Chamber of Commerce and Industry of Budapest Dec. 5, 1995, Vb 94131 (Hung.) (Waste Container Case), *translation available at* <http://cisgw3.law.pace.edu/cases/951205h1.html>; Landgericht Stendal [LG] [District Court] Oct. 12, 2000, No. 22 S 234/94 (Ger.) (Granite Rock Case), *translation available at* <http://cisgw3.law.pace.edu/cases/001012g1.html>; Oberlandesgericht Schleswig [OLG] [Appellate Court] Aug. 22, 2002, 11 U 40/01 (Ger.) (Live Sheep Case), *translation available at* <http://cisgw3.law.pace.edu/cases/020822g2.html>; Landgericht München [LG] [District Court Munich] May 18, 2009, 28 O 20906/06 (Ger.) (Flowers Case), *translation available at* <http://cisgw3.law.pace.edu/cases/090518g1.html>, *available at* <http://globalsaleslaw.com/content/api/cisg/urteile/1998.pdf>; Hof Arnhem [Appellate Court] Jan. 28, 2010, 87379 (HAZA 07-716 (Neth.) (Groente-en Fruithandel Heemskerk B.V. v. Frutas Caminito Sociedad Cooperativa Valenciana), *translation available at* <http://cisgw3.law.pace.edu/cases/100128n1.html>.

<sup>91</sup> About the specification of the non-conformity: Oberlandesgericht München [OLG] [Provincial Court of Appeal Munich] July 9, 1997, 7 U 2070/97 (Ger.) (Leather Goods Case), *translation available at* <http://cisgw3.law.pace.edu/cases/970709g1.html> (the buyer has not sufficiently specified the nature of the non-conformity in the notification of Art. 39 CISG and therefore he has no right to apply a price reduction under Art. 50); Oberlandesgericht Karlsruhe [OLG] [Provincial Appellate Court] Feb. 8, 2006, 7 U 10/04 (Ger.) (Hungarian Wheat Case), *translation available at* <http://cisgw3.law.pace.edu/cases/060208g1.html> (the notification of Art. 39 CISG has to indicate the non-conformity and the nature of it). See also in general Regional Court Trnava, Jan. 12, 2006, 36 Cbm/6/2003 (Slovakia) (Pumpkin Case), *translation available at* <http://cisgw3.law.pace.edu/cases/060112k1.html> (insufficient notification because it was sent to the wrong company). See also Federal Arbitration Court for the Far East Area, Jan. 24, 2006, F03-A73/05-1/4096 (Russ.) (Maize Case), *translation available at* <http://cisgw3.law.pace.edu/cases/060124r1.html> (cassation of a court decision because of the fact that it was not proved that the condition of Art. 39 CISG was respected by the buyer).

phone.<sup>92</sup> The requirement to notify the seller has exceptions, which we will not touch upon in this contribution.<sup>93</sup>

*d) The notification of the price reduction or the price reduction declaration*

The fact that the price reduction can be applied unilaterally, without prior intervention of a judge, has a direct influence on the application of the remedy. A *notification of the non-conformity* of the goods is necessary, in case of a *judicial* price reduction under Article 50 CISG.<sup>94</sup> Afterwards, it is sufficient to ask price reduction in a statement of claim or defense or in the writ of summons.<sup>95</sup>

If the price reduction is applied *extra-judicially*, the buyer also has to *notify* the seller in exercising unilaterally the price reduction remedy. Indeed, he has to inform the seller of his choice to apply price reduction. The mere payment of a reduced price will not suffice because it is unclear whether the buyer wants to apply a price reduction or a temporary partial suspension.<sup>96</sup> Consequently, a notification of the price reduction remedy by means of a declaration is obligatory, in the case of an extrajudicial price reduction.

A second question is whether the buyer has to do the declaration of the price reduction *before* he actually exercises the price reduction, or is it sufficient to notify the seller *at the moment* he actually exercises the price reduction? This question is of importance especially if the buyer has not yet paid. If the buyer has already paid the price, he must, in any case, ask the seller to apply the price reduction remedy *beforehand*.

Shin raises an interesting question; is the buyer *obliged* to do a separate declaration of price reduction *before* he actually reduces the

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<sup>92</sup> Potatoes Case 1, *supra* note 88.

<sup>93</sup> Art. 40 CISG: “The seller is not entitled to rely on the provisions of articles 38 and 39 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.” *See also* Arts. 43(2) and 44 CISG (regarding third party claims). *See also* KRUISINGA, *supra* note 26, at 64, 104–21.

<sup>94</sup> *See supra* III. § 1.c.

<sup>95</sup> *See also* Window Frames Case, *supra* note 59 (a prior declaration/notice is necessary: “must be communicated to the seller before it takes effect,” but the price reduction can also be asked judicially).

<sup>96</sup> Bach, *supra* note 4, at 756–57; Müller-Chen, *supra* note 4, at n.4. *Accord* Schnyder & Straub, *supra* note 4, at n.27.



price?<sup>97</sup> A first position, supported by the *Oberlandesgericht* of Munich, Germany in a judgment of March 2, 1994, and part of the legal doctrine, answers this question positively.<sup>98</sup> The buyer that has not yet paid must, according to this position, make a *separate declaration* to the seller, *before* actually applying the price reduction by refusing to pay a part of the price. The opposite position, supported by Shin, claims that such an interpretation must be rejected.<sup>99</sup> The historical development of the price reduction remedy under Article 50 CISG would—according to its supporters—justify this position.<sup>100</sup> Earlier versions of Article 50 CISG expressly stated that the buyer has to make a “declaration” of price reduction. To avoid this interpretation, the Diplomatic Conference would have deleted these words. Another argument is that the wording of Article 50 CISG does not require a separate “declaration.”

Even if we adhered to the second position (which does not require a *separate* price reduction declaration), the buyer would still have to notify the seller about the price reduction remedy by means of a declaration *on the moment he exercises his right to reduce the price*. It is not a declaration that has to be done *before* the buyer exercises his right to reduce the price. It has to be understood as an “accompanying” declaration, which explains that the

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<sup>97</sup> Chang-Sop Shin, *Declaration of Price Reduction Under the CISG Article 50 Price Reduction Remedy*, 25 J.L. & COM. 349, 349–52 (2005–06). See also Bergsten & Miller, *supra* note 4, at 263 (mention a: “declaration of avoidance of contract by notice”).

<sup>98</sup> See *Oberlandesgericht München [OLG] [Provincial Court of Appeal] Mar. 2, 1994, 7 U 4419/93 (Ger.) (Coke Case), translation available at <http://cisgw3.law.pace.edu/cases/940302g1.html>; Handelsgericht Aargau [HG] [Commercial Court] June 11, 1999, OR.98.00010 (Switz.) (Granular Plastic Case), translation available at <http://cisgw3.law.pace.edu/cases/990611s1.html>; Window Frames Case, *supra* note 59 (a prior declaration is necessary: “must be communicated to the seller before it takes effect,” but the price reduction can also be applied if the buyer claims it before a court). See also Liu, *supra* note 4, at n.4.4; LIU, *supra* note 37, at 130–31. Cf. Müller-Chen, *supra* note 4, at 772–73 n.4 (seeming to have the same opinion).*

<sup>99</sup> Shin, *supra* note 97, at 349–52. See also Gonzalez, *supra* note 5, at 92 (footnote 82); Honnold, *supra* note 4, at n.313.2; HONNOLD & FLECHTNER, *supra* note 12, at n.313.2; Tuñón, *supra* note 39, at n.4.2.1.

<sup>100</sup> For the adopted proposal for amendment of the UK (which replaces the wording “*the buyer may declare the price to be reduced*” by “*is entitled to reduce the price*”), see U.N. DOC. A/CONF.97/C.1/L.169. See also the discussion in the first committee: Official Records, Summary records of meetings of the First Committee, 23rd meeting, 359–60, available at <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting23.html> (last visited Mar. 21, 2014); Legislative History 1980 Vienna Diplomatic Conference Report of the First Committee, U.N. Doc. A/CONF.97/11, available at <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries50.html> (last visited Mar. 21, 2014).

seller exercises the price reduction remedy by paying a reduced price.<sup>101</sup> It is clear that such a declaration is desirable and will enhance legal certainty.

What can we conclude from that? If the buyer has not yet paid the price and wishes to apply a price reduction, he must notify the seller at least *at the moment he exercises the price reduction* by means of a declaration. If the buyer has already paid the price, he must make a declaration *before* he can exercise his right to reduce the price. Indeed, he must make clear he wishes to apply a price reduction.

What about the *content* and *form* of the price reduction declaration? First and foremost, this declaration must make clear that the buyer wishes to exercise a price reduction.<sup>102</sup> It is not necessary to mention the specific term “price reduction.”<sup>103</sup> Further, it is not necessary to state the exact amount of the price reduction in the declaration.<sup>104</sup> As stated before, the mere payment of a reduced amount or price will not suffice because it is not clear whether the buyer wants to apply the price reduction remedy or a temporary (partial) suspension.<sup>105</sup> Furthermore, there are no specific requirements with regard to the price reduction declaration.<sup>106</sup>

Even if it is not formally required to use the term “price reduction,” the buyer has to be cautious. It is advisable that the buyer makes it clear to the

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<sup>101</sup> See also Bergsten & Miller, *supra* note 4, at 263 (mentioning a “*declaration by notice*” that can take place (immediately) by means of a claim or a defense before a court); VAN DER VELDEN, *supra* note 5, at 347 (“*It is sufficient that the notification on the moment of payment of the price which mentions that a price reduction has been applied or has been chosen.*” (English translation)).

<sup>102</sup> Bach, *supra* note 4, at 756; HUBER & MULLIS, *supra* note 5, at 250; Magnus, *supra* note 5, at n.16; Müller-Chen, *supra* note 4, at 772 n.4; Schnyder & Straub, *supra* note 25, at n.26; Schnyder & Straub, *supra* note 4, at n.26.

<sup>103</sup> Bach, *supra* note 4, at 756.

<sup>104</sup> Magnus, *supra* note 5, at n.16; Müller-Chen, *supra* note 4, at 772 n.4. *But see* Bach, *supra* note 4, at 757 (the claim has to be sufficiently specific—according to the majority of legal systems—if the price has already been paid); Schnyder & Straub, *supra* note 25, at n.26 (the buyer may express first his wish to reduce the price without calculating the exact amount of the reduction, but afterwards the amount of the price reduction has to be notified by the buyer); Schnyder & Straub, *supra* note 4, at n.26 (*idem*). *Contra* Window Frames Case, *supra* note 59 (the judge is of the opinion that the buyer has to specify the amount of the price reduction during the judicial proceedings); Kantonsgericht Zug [District Court] Aug. 30, 2007, A3 2006 79 (Switz.) (GSM Modules Case), *translation available at* <http://cisgw3.law.pace.edu/cases/070830s1.html> (the buyer cannot apply his right to reduce the price because he did not specify the amount of the price reduction).

<sup>105</sup> Bach, *supra* note 4, at 756–57; Müller-Chen, *supra* note 4, at n.4. *Accord* Schnyder & Straub, *supra* note 4, at n.27.

<sup>106</sup> HUBER & MULLIS, *supra* note 5, at 250; Magnus, *supra* note 5, at n.15; Schnyder & Straub, *supra* note 25, at n.27 (orally or written); Schnyder & Straub, *supra* note 4, at n.27 (*idem*).

seller in the declaration that he “*definitively refuses to pay part of the price.*” The price reduction declaration may not raise any doubt about the fact that the buyer wishes to apply the price reduction as a *definite* remedy. It is also acceptable that the buyer has to describe his motivation in the declaration of why he wishes to apply the price reduction unilaterally.<sup>107</sup> For that reason, the buyer has to specify precisely the shortcomings in the obligations of the seller, which would justify a price reduction. Summarized, the *intention* to apply the price reduction remedy and the *motivation* thereof, are two essential elements of the price reduction declaration. These two substantive requirements will enable the judge to examine this declaration *a posteriori*.<sup>108</sup>

Another question, with regard to the price reduction declaration, is *how this declaration actually works*. The (extrajudicial) price reduction declaration has effect as from the moment the buyer has sent it to the seller and alters, according to the majority of doctrine, immediately the contract.<sup>109</sup>

The *transmission* of the unilateral declaration is at the risk of the seller: even if the declaration does not arrive, this does not deprive the buyer of the right to rely on the declaration.<sup>110</sup>

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<sup>107</sup> See S. STIJNS, DE GERECHTELIJKE EN DE BUITENGERECHTELIJKE ONTBINDING VAN OVEREENKOMSTEN n.487 (1994) (for the same reasoning in the case of a unilateral termination of a contract in exceptional circumstances in Belgium).

<sup>108</sup> *Id.* See also *infra*, III. § 2.c.

<sup>109</sup> Will, *supra* note 4, at 372 n.2.1.3. Accord Bach, *supra* note 4, at 757; HUBER & MULLIS, *supra* note 5, at 250. Contra Benicke, *supra* note 24, at n.14.

<sup>110</sup> Art. 27 CISG; accord Will, *supra* note 4, at n.2.1.3; see also Bach, *supra* note 4, at 757; HUBER & MULLIS, *supra* note 5, at 250; NEUMAYER & MING, *supra* note 45, at 355; Magnus, *supra* note 5, at 530 n.15; Schnyder & Straub, *supra* note 25, at 581 n.29.

*e) Extra period of time for performance after notification*

The question arises whether the buyer must give the seller an extra period of time to perform, *after the notification of non-conformity* or *after the price reduction declaration*. I must stress in this regard the *subsidiary* character of the price reduction remedy. Articles 37 and 48 of the CISG prescribe the seller's right to cure.<sup>111</sup>

Does the seller's right to cure require that the buyer must give the seller an extra period of time to perform after the notification of non-conformity or after the price reduction declaration? This is not how the commentators of the CISG see it.<sup>112</sup> They believe that the seller's right to cure *takes precedence* apart from who has acted first.<sup>113</sup> If the seller first offers performance, within the framework of his right to cure, the buyer is not allowed to make a price reduction declaration.<sup>114</sup> But if the buyer first makes a price reduction declaration to the seller and the latter offers performance, then within the framework of his right to cure, the declaration of the buyer will have no effect.<sup>115</sup> This doctrine is explained by means of the figure of the "*resolatory condition*." The declaration of the buyer shall have temporary effect, but the effectiveness will cease if the seller offers to perform and is successful.<sup>116</sup> This means that the seller's right to cure does *not* require that the buyer must give the seller an extra period of time to perform neither after the notification of the non-conformity nor after the declaration of price reduction.<sup>117</sup> However, Article 47 of the CISG provides

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<sup>111</sup> See *supra* II, § 5.

<sup>112</sup> Bach, *supra* note 4, at 756; HUBER & MULLIS, *supra* note 5, at 249; Müller-Chen, *supra* note 4, at n.7.

<sup>113</sup> HUBER & MULLIS, *supra* note 5, at 249.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* See also NEUMAYER & MING, *supra* note 45, at 358.

<sup>116</sup> HUBER & MULLIS, *supra* note 5, at 249; see also Bach, *supra* note 4, at n.28; Müller-Chen, *supra* note 4, at n.7; NEUMAYER & MING, *supra* note 45, at 358 ("The declared price reduction loses its validity *ex tunc* in case that the seller effectuated a new delivery or a repair of the non-conformities within the time limit pursuant to the articles 37 or 48 CISG." (English translation)); Schnyder & Straub, *supra* note 25, at 581 n.22; Schnyder & Straub, *supra* note 4, at 642 n.22; see also Secretariat Commentary, *supra* note 24 ("If the seller subsequently remedies his failure to perform or is not allowed by the buyer to remedy that failure, the 'declaration of reduction of the price is of no effect.'").

<sup>117</sup> *Contra* Racing Carts Case, *supra* note 66 ("Insofar, [Buyer] was obliged to set an additional period of time for removal of defects to be allowed to exercise its rights [such as a price reduction] due to a breach of contract on [Seller]'s part (Art. 47(1), (2) CISG).").

the possibility for the buyer to *voluntarily* grant the seller an extra period of time, to ensure afterwards the application of remedies, such as a price reduction.<sup>118</sup>

*f) Anticipatory price reduction*

Some authors hold the opinion that the buyer can apply the price reduction *before* the goods are delivered in non-conformity.<sup>119</sup> The buyer would not have to wait until the effective delivery of the goods takes place if in advance it is clear that the seller will deliver defective goods and will not be able to repair them. According to this doctrine, this can be inferred from the general principle of anticipatory breach under Article 72(1) of the CISG.

*g) Alternation of the buyer's choice*

Does the buyer have the possibility, after he has chosen the price reduction remedy, of altering his choice and to choose another remedy?

As indicated, the extra-judicial price reduction *declaration* has an effect from the moment the buyer has *sent* it to the seller and immediately alters the contract.<sup>120</sup> The transmission of the unilateral declaration is at the risk of the seller, even if it does not arrive with the seller. It will have effect.<sup>121</sup> This price reduction declaration is binding upon the buyer.<sup>122</sup> Consequently, the buyer loses—according to some authors—the right to choose another remedy.<sup>123</sup> This means that an alteration of the buyer's choice, for example to termination or performance of the contract, is not possible anymore. Other authors support the opinion that a change of choice

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<sup>118</sup> Magnus, *supra* note 5, at 538 n.29 (Magnus believes that it is appropriate for the buyer to grant the seller an extra period of time for performance. As a result the buyer can apply a price reduction after the expiration of the period of time); *accord* Benicke, *supra* note 24, at n.6.

<sup>119</sup> Bach, *supra* note 4, at 751–52; Müller-Chen, *supra* note 4, at 772. *See also* Benicke, *supra* note 24, at n.3; Magnus, *supra* note 5, at n.12.

<sup>120</sup> *See also supra* III. § 1.d.

<sup>121</sup> *Id.*; Art. 27 CISG.

<sup>122</sup> Müller-Chen, *supra* note 4, at n.4.

<sup>123</sup> Will, *supra* note 4, at n.2.1.3; Schnyder & Straub, *supra* note 25, at n.31 (independent from the fact of whether or not it is a “Gestaltungsrecht”); Schnyder & Straub, *supra* note 4, at n.31; VAN DER VELDEN, *supra* note 5, at 346 (seems to support the same opinion).

would be possible in certain circumstances.<sup>124</sup> Müller-Chen grants the buyer the possibility to change its prior choice for a price reduction in the following situations. A change of choice is possible if the seller is not aware of the price reduction declaration because he has not received it, or if the seller does not alter his position after receipt of the declaration and does not agree with a price reduction.<sup>125</sup> Benicke states more generally that if the seller does not agree with the price reduction or with the amount of the price reduction, the buyer can still change its choice and choose another remedy.<sup>126</sup> Benicke also states that if the buyer desires a price reduction and the seller does not agree with it, the buyer will benefit from a change of choice. As a result, the seller will not be kept in a state of uncertainty with regard to the proposed remedy by the buyer.

Stijns' theory, which has been developed in the context of European consumer sales remedies, can now be applied.<sup>127</sup> She differentiates between remedies that are on the one hand applied *judicially* and on the other hand those which are applied *extra-judicially*. If the buyer invokes the price reduction remedy *extra-judicially*, by means of a declaration, it does not allow any change of choice by the buyer. In case of a *judicial* procedure, the buyer may, according to this theory, choose another remedy because the fact that there is a judicial procedure means that there is a conflict about the applicable remedies between the parties, and that the final remedy will be imposed by the judgment. In case of a judicial procedure, the buyer can always change his choice for a remedy, and this can be, as stated by Benicke, beneficial for both parties and for the course of the proceedings. In case of an *extrajudicial* price reduction, the declaration is constitutive. This is not the case for a *judicial* claim or defense invoking a price reduction.

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<sup>124</sup> Bach, *supra* note 4, at 757 (is very critical about the view that excludes the alternation of the buyer's choice as a matter of principle, but does not clearly state his own opinion).

<sup>125</sup> See Müller-Chen, *supra* note 4, at 773 n.4; Magnus, *supra* note 5, at n.15 (is also of the opinion that the buyer can change his choice for a price reduction if the seller is not aware of the price reduction declaration because he has not received it).

<sup>126</sup> Benicke, *supra* note 24, at n.14 (according to Benicke, the price reduction is no "Gestaltungsrecht").

<sup>127</sup> Sophie Stijns, *De Consumentenkoop: Actuele Knelpunten*, in *KNELPUNTEN VERKOOP ROERENDE GOEDEREN* 21 n.60 (A. Verbeke & B. Tilleman eds., 2009).

## § 2. *The role of the judge*

### *a) In principle an extrajudicial price reduction*

We have already discovered that a price reduction will be, in principle, applied unilaterally by the buyer without prior intervention of a judge.<sup>128</sup> This means that the role of the judge will often be restricted to so-called “conflict situations.” However, the role of the judge may not be minimized because the unilateral character of the price reduction is often an “illusion.”<sup>129</sup> The seller will often disagree with the amount of price reduction or with the finding of non-conformity. Those conflicts will often cause the intervention of a judge. Nevertheless, these conflicts do not always rule out a unilateral or an extra-judicial price reduction. The role of the judge is often reduced to an intervention *a posteriori*.<sup>130</sup> In many situations however, a *prior* intervention of the judge is needed. This is the case if the buyer has already paid the price and the seller refuses to cooperate with a price reduction and refuses to pay back a part of the price,<sup>131</sup> or if the seller claims the whole price before court and the buyer defends himself by stating for the first time that he is entitled to a price reduction.

I have tried, by means of an extensive study of case law, to single out the cases where the judge operates an *a posteriori* examination because the buyer applied an *extrajudicial, unilateral* price reduction. I tried to separate these from the cases where the judge operates an *a priori* examination when then buyer applies a *judicial* price reduction. Unfortunately, the facts of many judgments did not allow me to determine whether it was a “judicial” or an “extrajudicial” price reduction. Only in some exceptional cases did the facts or the decision of the judge allow for this assessment. The facts of a judgment of the Amtsgericht in Cloppenburg, Germany, on April 14, 1993 were sufficiently clear to determine that the buyer had carried out an extrajudicial price reduction.<sup>132</sup> This case was about the delivery of a

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<sup>128</sup> See *supra* III. § 1.b.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See Williams, *supra* note 82, at IV.C.5.

<sup>132</sup> Amtsgericht Cloppenburg [AG] [Petty District Court] Apr. 14, 1993, 2 C 425/92 (Ger.) (Used Agricultural Machine (Mower) Case), translation available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930414g1.html>.



defective used agricultural mower. The buyer only paid a part of the price because of this defect. The partial payment was accompanied with a letter that explained why the buyer reduced the price. Therefore, we can clearly establish that this is an application of an extrajudicial price reduction. In many cases, it is unclear whether the buyer has unilaterally reduced the price. A buyer often declares that he does not accept the invoice because of non-conformity,<sup>133</sup> that he refuses to pay a part of the price,<sup>134</sup> or that he wishes a *credit note* because of non-conformity.<sup>135</sup> However, I have indicated before<sup>136</sup> that it must be clear that the buyer “definitively refuses to pay a part of the price.” I believe that this is only the case if the buyer claims a credit note because of non-conformity.

*b) Prior examination by the judge*

In case of an *a priori* intervention, the judge must—in every case—examine the conditions of Article 50 of the CISG. The judge must examine, for example, whether or not the buyer has respected the hierarchy of remedies<sup>137</sup> and the time limits for the notification of non-conformity of the good.

The aspect of whether the buyer has to exercise his rights regarding the principle of “*prohibition of abuse of rights*” or the principle “*good faith*” is not explicitly treated under the CISG. Consequently, a possible “*prohibition of abuse of rights*”—examination or a “*good faith*”—examination of the judge in this regard has not yet been fleshed out. Nevertheless, Article 7 of the CISG states that in the interpretation of the Convention, the observance of “*good faith*” in international trade has to be, amongst others, taken into account. However, the opinions about the interpretation and the scope of

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<sup>133</sup> *E.g.*, Coffee Machines Case, *supra* note 59.

<sup>134</sup> *E.g.*, Diaper Machine Case, *supra* note 28.

<sup>135</sup> *E.g.*, Tomatoes Case, *supra* note 88.

<sup>136</sup> *See supra* III. § 1.d.

<sup>137</sup> See about the fact that the price reduction is subordinate to the seller’s right to cure: Furniture Case, *supra* note 64 (But a price reduction for the second part of the goods is nevertheless possible.); Acrylic Blankets Case, *supra* note 64 (with regard to termination and price reduction; price reduction cannot be applied); Canned Food Case 2, *supra* note 64 (but in this case a price reduction was nevertheless possible); Russian Arbitration Proceeding, *supra* note 64 (the price reduction remedy was not allowed because the seller replaced the defect goods).

“good faith” in the CISG are divergent.<sup>138</sup> Therefore it is uncertain whether the judge may examine the buyer’s demand for a price reduction regarding the principle of prohibition of abuse of rights or the principle of good faith.

*c) A posteriori examination by the judge*

If the buyer reduces the price *extra-judicially*, an *a posteriori* examination of the judge can take place if the seller so requests. The judge must, similarly to the *a priori* examination, examine the conditions of Article 50 of the CISG. The judge can also examine the amount of the applied price reduction if this is disputed among the parties. It is also uncertain in case of an *a posteriori* examination by the judge whether the judge may examine the buyer’s price reduction declaration regarding the principle of prohibition of abuse of right or the principle of good faith, based on Article 7 of the CISG.

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<sup>138</sup> For an overview of the scope of good faith under the CISG, see Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 3 VINDOBONA J. INT’L COM. L. & ARB. 15, 15–40 (1999) (is in favour of a broad scope of application); see also Franco Ferrari, *Art. 7*, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 157 nn.25–27 (P. Schlechtriem & I. Schwenzer eds., 2008) (good faith is not merely a means to interpret the Convention but also plays a role in the interaction between the parties if an element is not expressly regulated by the CISG); HONNOLD & FLECHTNER, *supra* note 12, at 133–36 (good faith has only an interpretative function); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR INTERNATIONAL SALE OF GOODS 37–39 (3d ed. 2008) (is in favor of a broad principle of good faith that not only governs the interpretation of the CISG, but also obliges the parties to act in good faith); Ulrich Magnus, *Art. 7 CISG*, in VON STAUDINGERS KOMMENTAR ZUM BGB, WIENER UN-KAUFRECHT 165 n.10, 24 (Martinek ed., 2004) (is in favour of a broad principle of good faith both for the interpretation of the Convention as for the interaction between parties); NEUMAYER & MING, *supra* note 45, at 102 (the principle of good faith is applicable to the interpretation of the Convention and to the behaviour of the parties); Peter Schlechtriem & Claude Witz, *Convention de Vienne sur les Contrats de Vente Internationale de Marchandises* n.78, 83 (Dalloz 2008) (the principle of good faith governs the interpretation of the CISG and can be used in case of lacunas); Pilar Perales Viscasillas, *Art. 7*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 111 nn.21–30 (Stefan Kröll et al. eds., 2011) (is in favour of a broad interpretation of the principle of good faith).

## IV. CALCULATION OF THE PRICE REDUCTION

## § 1. Proportional calculation method

Article 50 of the CISG prescribes a calculation method which has also been adopted by many European (soft law) instruments (such as the PECL,<sup>139</sup> the DCFR, and the CESL).<sup>140</sup>

It is a “proportional calculation method.” The price reduction is proportional to the reduction in value of the goods not in conformity compared to the value of goods in conformity.<sup>141</sup> This proportional calculation method will not necessarily come down to the costs of the reparation of the good.<sup>142</sup> This doctrine often makes reference to the formula of Will to calculate the price reduction under Article 50 of the CISG.<sup>143</sup>

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<sup>139</sup> See also Liu, *supra* note 4, at n.5.1.

<sup>140</sup> See *supra* notes 6–7 and accompanying text.

<sup>141</sup> About the proportional character of price reduction: see Furniture Case, *supra* note 64 (with a reproduction of the formula of Will); Oberlandesgericht Koblenz [OLG] [Provincial Court of Appeal] Nov. 9, 1995, 6 R 194/95 (Ger.) (Marble Slabs Case), *translation available at* <http://cisgw3.law.pace.edu/cases/951109a3.html>; Handelsgericht Zürich [HG] [Commercial Court] Feb. 10, 1999, HG 970238.1 (Switz.) (Art Books Case), *translation available at* <http://cisgw3.law.pace.edu/cases/990210s1.html> (the proportional calculation of the price reduction requires that the buyer shows that the goods have been reduced in value); Window Frames Case, *supra* note 59 (“The price can be reduced only on a pro rata basis, using the appropriate method, without taking into consideration the repair costs.”); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Dec. 23, 2004, 97/2004 (Russia Arbitration Proceeding), *translation available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/041223r1.html> (the proportional character of the price reduction remedy is mentioned but curiously the percentage of the reduction has to be, according to the arbitrators, determined by the *lex mercatoria*); Poppy Seed Case, *supra* note 88 (stressing the relative character of the price reduction); Dashboard Mould Case, *supra* note 17.

<sup>142</sup> Liu, *supra* note 4, at n.5.1; LIU, *supra* note 37, at 133; Window Frames Case, *supra* note 59 (“The price can be reduced only on a pro rata basis, using the appropriate method, without taking into consideration the repair costs.”).

<sup>143</sup> Will, *supra* note 4, at 372; see also Bach, *supra* note 4, at 758–59; HEUZÉ, *supra* note 25, at n.458; HUBER & MULLIS, *supra* note 5, at 252; Jansen, *supra* note 57, at 205; Liu, *supra* note 4, at n.5.1; LIU, *supra* note 37, at 132; Müller-Chen, *supra* note 4, at 774 n.8; Magnus, *supra* note 5, at n.19; Schnyder & Straub, *supra* note 25, at n.33; Schnyder & Straub, *supra* note 4, at n.33; Stijns & Van Ransbeeck, *supra* note 24, at 204; KRITZER, *supra* note 25, at 377 (Kritzer seems to use the same calculation method but uses instead of the term “reduced price,” the misleading term “amount of recovery.” This is only correct if he means the “reduced price” and not the price reduction itself).

$$\frac{\textit{Stipulated price}}{\textit{Reduced price}} = \frac{\textit{Value of conforming goods}}{\textit{Value of non – conforming goods}}$$

$$\textit{Reduced price} = \frac{(\textit{Value of non – conforming goods} \times \textit{stipulated price})}{\textit{value of conforming goods}}$$

Case law also refers to this formula. The Swiss District court of Locarno Campagna mentions explicitly this formula in a judgment of April 27, 1992: “Pursuant to well-settled case law, reduction of the price is performed in accordance with the following formula: reduced price: convened price = objective value of the non-conforming goods: value of conforming goods.”<sup>144</sup> A very recent judgment of the Belgian Court of Appeals of Antwerp mentions explicitly this formula too. “After the finding of non-conformity and the timely notification under the Articles 38 and 39 CISG, the buyer can reduce the price according to the following formula (value of the delivered goods x contract price)/(value of the goods that should have been delivered, if they were delivered in conformity).” Moreover, the judge reopened the proceedings to allow the buyer to state the amount of the claimed price reduction by means of a “detailed calculation” based on the “aforementioned formula.”<sup>145</sup>

## § 2. Time of calculation

It is clear that the price reduction under the CISG is calculated *at the time of delivery*.<sup>146</sup> In principle, Article 31 of the CISG specifies the concept of “time of delivery.”<sup>147</sup> Also for the PECL, the DCFR, and the

<sup>144</sup> Furniture Case, *supra* note 64.

<sup>145</sup> Dashboard Mould Case, *supra* note 17.

<sup>146</sup> See Will, *supra* note 4, at 370 (about the importance of the time of the calculation); see also Marble Slabs Case, *supra* note 141; Dashboard Mould Case, *supra* note 17.

<sup>147</sup> Schnyder & Straub, *supra* note 25, at n.39; Schnyder & Straub, *supra* note 4, at nn.39, 39a, 39c; Williams, *supra* note 82, at IV.C.5. See also Müller-Chen, *supra* note 4, at 775 nn.9–11 (nuanced; it is not always desirable to refer to the point of time in Article 31 CISG for the calculation of the price reduction because of the fact that delivery and transfer of risk do not always take place at the same moment. This author suggests considering the moment on which the buyer disposes of the goods); accord Bottles Case, *supra* note 59 (in case of distance sales, the “time of delivery” is supposed to be the moment on which the goods arrive at the destination). Contra Bach, *supra* note 4, at 760–61; Benicke, *supra* note 24, at n.11. See generally HUBER & MULLIS, *supra* note 5, at 253.

CESL the time of delivery has to be taken into consideration for the calculation of the price reduction. This is different from the calculation method in Article 46 of the ULIS,<sup>148</sup> which mentions the *moment of the conclusion of the contract*. Article 46 of the draft-CISG, about the price reduction, adopted the time of calculation of the ULIS.<sup>149</sup> The Norwegian Delegation, however, suggested changing the time of calculation of the price reduction.<sup>150</sup> As a consequence, the final version of Article 50 CISG, takes *the time of delivery* into consideration. Two reasons are put forward to do away with the time of the conclusion of the contract.<sup>151</sup> A first argument is that the goods do not exist at the moment of conclusion of the contract, which makes it difficult to assess the value of the (non-) conforming goods. Another argument is that if the price reduction is calculated at the moment of delivery, the same figures can be used for the calculation of damages.<sup>152</sup>

Because the calculation takes place at the moment of delivery, we must assess the influence of an increase in market price (value) or a decrease in market price between the conclusion of the contract and the time of delivery. We can come to the conclusion that the price reduction will not vary if the market price of both conforming and non-conforming goods rise, fall or remains the same (see example 1). But if both market prices rise or fall differently, the result will vary (see example 2). I refer to Will's examples.<sup>153</sup>

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<sup>148</sup> Convention Relating to a Uniform Law on the International Sale of Goods (ULIS), at Art. 46, 1964, available at <http://www.cisg.law.pace.edu/cisg/text/ulis.html> ("Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.") (emphasis added).

<sup>149</sup> See Bergsten & Miller, *supra* note 4, at 259.

<sup>150</sup> For the proposal of the amendment by Norway, see U.N. DOC. A/CONF.97/C.1/L.167. See also the discussion in the first commission: Official Records, Summary records of meetings of the First Committee, 23rd meeting, at 357–58, <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting23.html>. See also Report of the First Committee, U.N. Doc. A/CONF.97/11, available at <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries50.html>.

<sup>151</sup> About the two reasons see Gonzalez, *supra* note 5, at 93–94; Will, *supra* note 4, at 369–70. About the first reason see Honnold, *supra* note 4, at n.313; VAN DER VELDEN, *supra* note 5, at 348. See also Martin L. Zientz, *A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?*, 2 NW. INT'L L. & BUS. 129, 171 (1980) (mentions that the Draft Convention of 1978 takes into account the moment of the conclusion of the contract for the calculation of the price reduction, whilst damages are calculated at the moment of delivery).

<sup>152</sup> However, in Belgium, damages are calculated at the moment of the judgement.

<sup>153</sup> Will, *supra* note 4, at 370. For another example see Gonzalez, *supra* note 5, at 94.

Example 1: The price reduction will correspond to 50 if the seller agrees to deliver n° 1 corn and delivers n° 3 corn of a lower quality and the market prices are 200 and 150. The price reduction will also correspond to 50 if both market prices have risen (e.g. with 20%) or fallen (e.g. with 60%) or have remained the same.<sup>154</sup>

Example 2: The price reduction will correspond to zero if the market price of n° 1 corn has risen at the moment of delivery with 20% and of n° 3 corn with 60%.<sup>155</sup> The price reduction will correspond to 125 if, on the contrary, the market price of n° 1 corn has fallen with 20% and n° 3 corn with 60%.<sup>156</sup>

The last example shows that a difference in the decrease or increase in market price of the two types of corn influences the price reduction.

If I put the data of both examples in the formula and add a possible variation of the market price between the conclusion of the contract and the moment of delivery (in %), the following formula appears. We have to take into consideration the following variable amounts: x = reduced price; y = absolute percentage of the rise (+) or fall (-) of the market price (market value) of non-conforming goods (n° 3 corn) and z = the absolute percentage of the rise (+) or the fall (-) of the market price (market value) of conforming goods (n° 1 corn).

$$(x) = \frac{\left( \left( \left( \frac{y}{100} \times 150 \right) + 150 \right) \times 200 \right)}{\left( \left( \frac{z}{100} \times 200 \right) + 200 \right)}$$

<sup>154</sup> Calculation: if both market prices remain the same: reduced price = (value non-conforming good (150) X agreed price (200))/(value conforming good (200)) = 150 (price reduction = 50); if the market price rises with 20%: reduced price = (value non-conforming good (180) X agreed price (200))/(value conforming good (240)) = 150 (price reduction = 50); if the market price falls with 60%: reduced price = (value non-conforming good (60) X agreed price (200))/(value conforming good (80)) = 150 (price reduction = 50).

<sup>155</sup> Calculation: reduced price = (value non-conforming good (240) X agreed price (200))/(value conforming good (240)) = 200 (price reduction = 0).

<sup>156</sup> Calculation: reduced price = (value non-conforming good (60) X agreed price (200))/(value conforming good (160)) = 75 (price reduction = 125).

We can deduce from this that the moment of calculation of the price reduction effectively plays a role. The final result will be different when we compare a calculation at the moment of the conclusion of a contract and at the moment of delivery. In this last case the outcome will differ if the market prices (market value) of conforming and non-conforming goods rise or fall differently. This (unequal) decrease or increase in market price will not play a role in a calculation at the moment of the conclusion of the contract.

Will believes that this calculation method entails a fair distribution of risks and chances.<sup>157</sup> If the market price of non-conforming goods rises disproportionately in comparison to conforming goods, the buyer will hold, at the time of delivery, goods with a higher market value but with an inferior quality. If the buyer chooses to benefit of the higher market value, the price reduction will be lesser or can even be zero.<sup>158</sup> If the market value of non-conforming goods falls disproportionately in comparison to conforming goods, the buyer does not hold only goods of an inferior quality but also goods with a lower market value. If the buyer accepts the non-conforming goods, it is only fair that the amount of the price reduction will be more considerable.

### § 3. *Place of calculation*

The CISG does not clarify the question *where* the values of the (non-) conforming goods have to be calculated.<sup>159</sup> Indeed, the value of goods in Bangkok can differ dramatically from the value of the same goods in Paris.

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<sup>157</sup> Will, *supra* note 4, at 371.

<sup>158</sup> Schlechtriem suggests that the buyer loses the advantages of a profitable purchase, which is not the case under German sales law, Schlechtriem, *supra* note 138, at 79.

<sup>159</sup> Mentions the problems, but does not treat the problems in detail: Tuñón, *supra* note 39, at n.4.2.2; Sondahl, *supra* note 5, at n.A.3. Very detailed, but do not take a stance: Bach, *supra* note 4, at 761; LIU, *supra* note 37, at 140–41. For a proposal about the place of calculation of price reduction by Argentina, Spain and Portugal, which was not adopted, see U.N. DOC. A/CONF.97/C.1/L.168. For the discussions in the first committee see Official Records, Summary records of meetings of the First Committee, 23rd meeting, 358–59, available at <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting23.html>. See also Report of the First Committee, UN. Doc. A/CONF.97/11, available at <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries50.html>.



Different solutions have been put forward by legal doctrine.<sup>160</sup> Some authors propose a three-step solution.<sup>161</sup> Initially, the value of the goods of the first *destination* of the goods should be considered. If this solution does not work, the place of *delivery* of the non-conforming goods should be considered. As a final solution, this authors suggest a *catchall* place which implies that the buyer can choose between the place of business of the buyer or the place of business of the seller. Another part of doctrine thinks that only the place of *destination* of the goods has to be taken into account.<sup>162</sup> Some other authors defend in principle the place of *delivery* of the non-conforming goods.<sup>163</sup> Unfortunately, case law is equally non conclusive.<sup>164</sup>

#### § 4. Price reduction until zero

Part of doctrine and case law defends that if the delivered goods are worthless, the seller should, within the framework of price reduction, reimburse the entire price.<sup>165</sup> Price reduction until zero is not subject to the

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<sup>160</sup> For a detailed overview of all the points of view see Schnyder & Straub, *supra* note 25, at nn.40–43

<sup>161</sup> Piliounis, *supra* note 4, at 34; Will, *supra* note 4, at 374–75 n.3.3.

<sup>162</sup> Benicke, *supra* note 24, at n.12; Schnyder & Straub, *supra* note 25, at n.41; Schnyder & Straub, *supra* note 4, at n.41.

<sup>163</sup> Enderlein, *supra* note 79, at 197 (but this author does not rule out that the buyer would prefer to take the place of destination into account). See for the same opinion LIU, *supra* note 37, at 141; VAN DER VELDEN, *supra* note 5, at 348. See also HUBER & MULLIS, *supra* note 5, at 253 (these authors prefer the place of delivery, but for goods that need transportation, the place of destination will be taken into account); Magnus, *supra* note 5, at n.22 (takes, in principle, the place of delivery into account, but for goods that need transportation, the place of destination will be taken into account); Müller-Chen, *supra* note 4, at 776–77 n.12 (this author takes the place of destination into account for goods that need transportation and for every other case the place of delivery as defined by Article 31(b) and (c) CISG. This means that in the case of a sale where the buyer must pick up the good, the place where to goods are at the buyer's disposal will be relevant and in the case the seller must deliver the goods, the place of destination will be relevant.).

<sup>164</sup> See Marble Slabs Case, *supra* note 141; Waste Container Case, *supra* note 90 (“at the place where the goods are being directed that the seller knows of; or in accordance to the price level at the place where the buyer is situated”).

<sup>165</sup> For this opinion, see Bach, *supra* note 4, at 761; LIU, *supra* note 37, at 135–38; Magnus, *supra* note 5, at n.23; Müller-Chen, *supra* note 4, at 777, at n.13; SCHLECHTRIEM & BUTLER, *supra* note 47, at n.202; Schnyder & Straub, *supra* note 4, at nn.45–46 (these authors defend another opinion in the edition of 1997). See also Coffee Machines Case, *supra* note 59 (very detailed). For a translation of this case in English, see SCHWENZER ET AL., *supra* note 26, at 407–09. See also Amtsgericht Nordhorn [AG] [Petty District Court] June 14, 1994, 3 C75/94 (Ger.) (Shoes Case 2), translation available at

conditions of application of termination.<sup>166</sup> This means that the buyer can keep the useless good, while this is not possible in case of termination because of the restitution duties.<sup>167</sup> However, some authors defend, albeit incorrectly, that the application of price reduction until zero also requires the fulfillment of the conditions of application of termination.<sup>168</sup> Price reduction until zero will be very useful to the buyer precisely when termination of the contract is no longer possible (e.g. in the case of exceeding the time limits under Article 49(2) CISG).<sup>169</sup>

### § 5. Interest and price reduction

Must the seller, who has already received full payment, pay interests for the part he should reimburse, if a price reduction is applied afterwards? Most authors believe the seller must pay interest. However, there is a doctrinal dispute whether Article 78 CISG or Article 84(1) CISG has to be

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<http://cisgw3.law.pace.edu/cases/940614g1.html>; *Ginza Pte Ltd. v. Vista Corporation Pty Ltd.*, [2003] WASC 11, CIV 1647 of 1998 consolidated by order 12/5/2000, 197–200 (WASC Jan. 17, 2003), available at <http://cisgw3.law.pace.edu/cases/030117a2.html> (“This outcome reflects the proportion the value the goods actually delivered had at time of the delivery (effectively no value) to the value that conforming goods would have had at that time.”); Oberlandesgericht Frankfurt [OLG] [Appellate Court] Jan. 29, 2004, 7 U 40/02 (Ger.) (Frozen Pork Case 1), translation available at <http://cisgw3.law.pace.edu/cases/040129g1.html> (price reduction until zero because the goods are worthless (frozen pork meet that is suspected to be contaminated with dioxins)); *In re Siskiyou Evergreen, Inc.*, No. 02-66975-fra11 (Bankr. D. Ore. Mar. 29, 2004) (US), available at [cisgw3.law.pace.edu/cases/040329u2.html](http://cisgw3.law.pace.edu/cases/040329u2.html) (the buyer can get the price back of each non-conforming lot); Frozen Pork Case 2, *supra* note 30 (the price of meet that was possibly contaminated with dioxins can be reduced until zero because there was no possibility to use the meet); Potatoes Case 1, *supra* note 88 (some lots of non-conforming potatoes cannot be sold anymore); Bottles Case, *supra* note 59; GSM Modules Case, *supra* note 104 (no application of the price reduction remedy; but the judge considers that a price reduction until zero would be possible if the goods would have been completely worthless).

<sup>166</sup> For an overview of the different points of view but do not defend one particular view see HUBER & MULLIS, *supra* note 5, at 254.

<sup>167</sup> Bach, *supra* note 4, at nn.48–50. See also Magnus, *supra* note 5, at n.23 (implicitly). The buyer is obliged to return the useless good to the seller in case of price reduction until zero under German law (§ 346(1) BGB): Christian Berger, § 441 *Minderung*, in *BÜRGERLICHES GESETZBUCH* n.6 (O. Jauernig ed., 2011); Anne Marie Matusche-Beckmann, § 441, in *VON STAUDINGERS KOMMENTAR ZUM BGB* 308 n.25 (M. Martinek ed., 2004).

<sup>168</sup> Schnyder & Straub, *supra* note 25, at n.15, 45–46 (1997) (these authors change their opinion in the edition of 2010).

<sup>169</sup> Müller-Chen, *supra* note 4, at 777, at n.13. See also *supra* II. § 3.

applied.<sup>170</sup> Some legal scholars prefer applying Article 78 CISG.<sup>171</sup> This Article states that if a party fails to pay a price, the other party is entitled to interests on it. Other legal scholars prefer applying Article 84(1) CISG.<sup>172</sup> This Article states that if the seller must reimburse the price, he must also pay interest on it, from the date on which the price is paid. This would mean—according to this point of view—that the interest in case of termination and in the case of price reduction would be calculated in the same way. Apart from this, some authors argue that a delay in payment is a breach of contract and should be indemnified by damages under Article 45(1)(b) CISG.<sup>173</sup>

There is also discussion about *when* the interest starts accruing. Some authors suggest that the seller must pay interests *from the moment he received the unjustified payment* (the payment of the price).<sup>174</sup> Bach, who defends this point of view, argues that *only* Article 84(1) CISG provides that the interest will accrue as from the payment of the price. The application of Article 78 CISG presupposes interests as from the moment the seller is in “delay,” which only commences at the moment of the buyer’s price reduction declaration.<sup>175</sup> This would be—according to Bach—another argument to prefer applying Article 84(1) CISG with regard to the interest. Other legal scholars defend rightly that interests only should accrue as from the moment the seller is in delay, *i.e.* from the moment of the buyer’s price reduction declaration of the buyer<sup>176</sup> or the (judicial) demand for price reduction. As a result, Article 78 CISG seems more appropriate to

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<sup>170</sup> For the discussion see HUBER & MULLIS, *supra* note 5, at 251 (the authors do not defend a particular view).

<sup>171</sup> Müller-Chen, *supra* note 4, at 778–79 n.16. *Accord* HEUZÉ, *supra* note 25, at n.462; Schnyder & Straub, *supra* note 25, at n.52; Schnyder & Straub, *supra* note 4, at n.52; Williams, *supra* note 82, at IV. C.5. *Accord* Frozen Plums and Raspberries Case, *supra* note 25 (but the interest only runs as from the moment the buyer brings the action against the seller, because the buyer has granted the seller an extra period of time for reimbursement).

<sup>172</sup> Bach, *supra* note 4, at 764. Apply also Article 84(1) CISG: Magnus, *supra* note 5, at n.26; SCHLECHTRIEM & BUTLER, *supra* note 47, at 154.

<sup>173</sup> Bach, *supra* note 4, at 764; Müller-Chen, *supra* note 4, at 779 n.16.

<sup>174</sup> Müller-Chen, *supra* note 4, at 778–79 n.16. *Accord* HEUZÉ, *supra* note 25, at n.463.

<sup>175</sup> Bach, *supra* note 4, at 764.

<sup>176</sup> Specify moreover that the price reduction declaration must specify the amount of price reduction before the interest starts to run; Schnyder & Straub, *supra* note 25, at n.52; Schnyder & Straub, *supra* note 4, at n.52.

explain the interest which the seller has to pay because the price reduction is applied after he had already received full payment.

§ 6. *Place of reimbursement of price reduction*

If the buyer has already paid the full price and decides to apply later on for a price reduction, we must establish *where* the seller has to reimburse part of the price. At first sight, the CISG does not give an answer to this question. Doctrine provides that Article 57(1)(a) CISG, which states that the place where the price has to be paid corresponds to the place of business of the seller, contains a general principle of the CISG: payment has to be done at the place of business of the *creditor*.<sup>177</sup> This means that the seller has to reimburse part of the price at the place of business of the buyer.<sup>178</sup>

§ 7. *Currency of reimbursement*

In general, the reimbursement has to be done using the same currency as the original payment of the buyer, even if this currency was not what the parties had agreed on.<sup>179</sup>

§ 8. *Comparison between damages and price reduction with regard to the calculation of the reduction in value*

Legal doctrine considers rightly that the reduction in value is calculated differently in case of price reduction compared to damages. The calculation of price reduction would be *proportional* or *relative*, while the calculation of damages would be *absolute* or *linear*.<sup>180</sup> Damages depend on the abstract or absolute difference between the value of conforming and non-conforming goods.<sup>181</sup>

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<sup>177</sup> Bach, *supra* note 4, at 763; HUBER & MULLIS, *supra* note 5, at 314; Magnus, *supra* note 5, at n.25.

<sup>178</sup> Bach, *supra* note 4, at 763; Magnus, *supra* note 5, at n.25; Schnyder & Straub, *supra* note 4, at n.52a.

<sup>179</sup> Bach, *supra* note 4, at 763.

<sup>180</sup> *Id.* at 758; Piliounis, *supra* note 4, at 34; SCHLECHTRIEM & BUTLER, *supra* note 47, at 152–53. For the relative calculation method under Art. 50 CISG see also Marble Slabs Case, *supra* note 141.

<sup>181</sup> Bach, *supra* note 4, at 758; HUBER & MULLIS, *supra* note 5, at 254; Liu, *supra* note 4, at n.3.1; Müller-Chen, *supra* note 4, at 774 n.8.

Piliounis<sup>182</sup> and Honnold<sup>183</sup> give an example.<sup>184</sup> In this example, we suppose that the value of the goods is equal to the price of the goods. The seller contracts for \$100,000 worth of cheese (the price equals \$100,000), and receives at the time of delivery moldy cheese worth 1/5 of the value (= \$20,000). If the price of cheese remains the same, there would be no difference between the amount claimed as damages or price reduction, namely \$80,000 (except for the fact that if there are other losses than the reduction in value, this can also be compensated by means of damages).<sup>185</sup> If the price increases (of cheese *and* moldy cheese), we have seen in the preceding paragraph that the price reduction would remain \$80,000. But the amount of damages would be more because there is a larger difference between what is contracted for and what has been delivered. That is, if the price of cheese has doubled, the value of the conforming cheese would be \$200,000 and the delivered value is \$40,000. Here, the amount of damages would be \$160,000. The other way around, if the price of cheese halves, the value of the delivered cheese would be \$10,000 compared to the conforming goods worth \$50,000, which are damages of only \$40,000.

We can deduce from this example, that a price reduction can be more profitable than damages in falling market conditions (if the value of the conforming and non-conforming fall similarly).<sup>186</sup> Furthermore, a price reduction will be possible and damages will be excluded if the buyer resells the goods with profit.<sup>187</sup> In this case, the buyer has not suffered any “losses”

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<sup>182</sup> Piliounis, *supra* note 4, at 34–36.

<sup>183</sup> Honnold, *supra* note 4, at n.312; HONNOLD & FLECHTNER, *supra* note 12, at n.312.

<sup>184</sup> For other examples see Bach, *supra* note 4, at 759; Bergsten & Miller, *supra* note 4, at 260–63; BRIDGE (2007), *supra* note 5, at 589; BRIDGE (2013), *supra* note 5, at 604–05.

<sup>185</sup> For a similar reasoning see Bach, *supra* note 4, at 759.

<sup>186</sup> See also Benicke, *supra* note 24, at n.15; BRIDGE (2007), *supra* note 5, at 589–90; BRIDGE (2013), *supra* note 5, at 605; Gärtner, *supra* note 5, at II.A.2.b.(2); Honnold, *supra* note 4, at n.312; HUBER & MULLIS, *supra* note 5, at 254–55; Liu, *supra* note 4, at n.3.2; LIU, *supra* note 37, at 103; Müller-Chen, *supra* note 4, at 779–80 n.18; NEUMAYER & MING, *supra* note 45, at 356; Schnyder & Straub, *supra* note 25, at n.5; Schnyder & Straub, *supra* note 4, at n.5; Shin, *supra* note 97, at n.1; Williams, *supra* note 82, at IV. C.5; Ziontz, *supra* note 151, at 172.

<sup>187</sup> For the same opinion see Schnyder & Straub, *supra* note 4, at n.5. For a case in which price reduction and damages are confused, see Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry July 8, 1999, 318/1997 (Russia Arbitration Proceeding), translation available at <http://cisgw3.law.pace.edu/cases/990708r1.html> (the arbitrators do not allow a price reduction because the buyer has sold the non-conforming goods at a higher price than the conforming goods; consequently, the buyer has not suffered any damages).

and cannot claim damages. However, a price reduction can still be applied if the buyer shows that the value of goods has been reduced because of the non-conformity.

§ 9. *Goal of the proportional calculation method*

The price reduction has to be proportional with the reduction in value of the goods. The goal of the calculation method is that the buyer can *keep the bargain* and thus allow the parties to preserve a good or a bad bargain.<sup>188</sup>

For example, if you bought a designer lamp at the favorable price of \$200 (and this lamp is actually worth \$400) and due to a non-conforming delivery the lamp is only worth \$300. In this case damages will correspond to \$100 and a price reduction will be \$50.<sup>189</sup> In the opposite situation, you can buy a design lamp at the price of \$400 (and this lamp is actually worth \$200). Due to a non-conforming delivery the lamp is only worth \$100. This means that damages will correspond to \$100 and a price reduction will be \$200.

However, the Dutch author Van Der Velden correctly points out that two conditions have to be fulfilled to maintain the “*the balance of the bargain*”: it must be possible to determine the proportion between the value of the conforming and the non-conforming goods, *and* this proportion must remain the same until the moment of delivery.<sup>190</sup> If the value of the conforming and non-conforming varies to a greater or lesser degree between the conclusion of the contract and the delivery,<sup>191</sup> the proportion between the value of conforming and non-conforming goods will change. This means that the calculation of price reduction, which takes place at the *moment of delivery*, will take this into account and increasingly obtains characteristics of the calculation of damages.<sup>192</sup>

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<sup>188</sup> Liu, *supra* note 4, at nn.3.1, 5.1. See also HUBER & MULLIS, *supra* note 5, at 252; KRITZER, *supra* note 25, at 377; Sondahl, *supra* note 5, at n.A.2 (“the same relative bargain or the proportion of the bargain”); VAN DER VELDEN, *supra* note 5, at 351.

<sup>189</sup> Calculation: reduced price = (value non-conforming good (300) X agreed price (200))/(value conforming good (400)) = 150 (price reduction = 50).

<sup>190</sup> VAN DER VELDEN, *supra* note 5, at 351.

<sup>191</sup> See, e.g., *supra*, IV, § 2.

<sup>192</sup> VAN DER VELDEN, *supra* note 5, at 351.

## V. OTHER CHARACTERISTICS OF PRICE REDUCTION

## § 1. Price reduction as a claim and as a defense of the buyer

Surprisingly, Shondahl tries to classify this price reduction under one category: either as a “claim,” or as a “defense,” and suggests that it cannot be both.<sup>193</sup> Nevertheless, the price reduction remedy under Article 50 CISG can in principle be invoked as a claim *as well as* a defense by the *buyer*.<sup>194</sup> If the buyer has already paid the price of a defect good and he claims part of the price back, the buyer will use the price reduction as a claim. The buyer certainly also “claims” a price reduction in case that the buyer unilaterally invokes the price reduction as a constitutive remedy. If the buyer has not yet paid the (entire) price, and the seller claims the payment of the full price, the buyer can use price reduction as a defense.<sup>195</sup> Furthermore, many CISG commentators put forward that Article 50 CISG is mostly used by the buyer as a “defense,” and not as an initial claim.<sup>196</sup>

I tried to answer the question of whether a price reduction is usually invoked by the buyer as a *claim* or as a *defense*, by means of a case law investigation, taking into account the relevant cases about article 50 CISG.<sup>197</sup> The result was conclusive. It is true that in a judicial procedure, a price reduction is, most of the time, used as a defense against the seller’s claim for payment of the entire purchase price. Of 46 cases in which the buyer has explicitly used “price reduction” as a defense or a claim, the buyer, uses in 41 cases, the price reduction as a defense. Of these 41 cases, the buyer was successful in 21 cases (and was allowed to apply a price reduction) and lost in 20 cases.<sup>198</sup> The five cases, in which the buyer used a

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<sup>193</sup> Sondahl, *supra* note 5, at n.A.3.i. See for a similar reasoning: Beheshti, *supra* note 68, at 4–5.

<sup>194</sup> Bach, *supra* note 4, at 758; Müller-Chen, *supra* note 4, at 778 n.16.

<sup>195</sup> Bottles Case, *supra* note 59 (“The right may also be used as an objection to the seller’s claim for payment of the purchase price.”); Liu, *supra* note 4, at n.2 (A price reduction is most of the time used as a defense of the buyer.); LIU, *supra* note 37, at 107; Tuñón, *supra* note 39, at n.4.1.

<sup>196</sup> Piliounis, *supra* note 4, at 32.

<sup>197</sup> We took the published cases about article 50 CISG of the following databases into account (which were translated into English, French, German or Dutch, at <http://www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html>; <http://www.uncitral.org/clout/showSearchDocument.do>).

<sup>198</sup> For the 21 cases in which the buyer was successful in invoking a price reduction as a defense in cases where the seller claims (the remaining part of) the purchase price, see Landgericht Aachen [LG] [District Court] Apr. 3, 1989, 41 O 198/89 (Ger.) (Shoes Case 1), *translation available at* <http://cisgw3>



price reduction as a claim, were decided in favor of the buyer.<sup>199</sup> We can conclude that a price reduction is usually invoked as a defense, and that it can be used by the buyer as a claim *and* as a defense.

§ 2. *Price reduction before and after the payment of the price*

Article 50 CISG allows the buyer to apply a price reduction both *before* and *after* the payment of the price.<sup>200</sup> Indeed, Article 50 CISG

.law.pace.edu/cases/900403g1.html; Interag Ltd. v. Stafford Phase, No. 89 Civ. 4950 (CSH), 1990 Westlaw 71478 (S.D.N.Y. May 22, 1990) (US), *available at* <http://cisgw3.law.pace.edu/cases/900522u1.html>; Waste Container Case, *supra* note 90; Diaper Machine Case, *supra* note 28; Canned Food Case 1, *supra* note 88; I.S. Trading v. Vadotex, *supra* note 88; Christmas Trees Case, *supra* note 59; CIETAC May 21, 1999, CISG/1999/26 (China) (Excavator Case), *translation available at* <http://cisgw3.law.pace.edu/cases/990521c1.html>; Tomatoes Case, *supra* note 88; Porphyry Stones Case, *supra* note 24; Ginza Pte Ltd. v. Vista Corporation Pty Ltd., *supra* note 165; Racing Carts Case, *supra* note 66; Frozen Pork Case 1, *supra* note 165; Russia Arbitration Proceeding, *supra* note 64; Coffee Machines Case, *supra* note 59; Plants Case, *supra* note 59; Poppy Seed Case, *supra* note 88; Hof Amsterdam [Appellate Court] Nov. 10, 2007, 1259/05 (Neth.) (B.V. v. Produce Agencies Limited, Nieuw Zeeland), *translation available at* <http://cisgw3.law.pace.edu/cases/071110n1.html>; Potatoes Case 2, *supra* note 88; Artificial Turf Case, *supra* note 1; Indice SL v. Defendant, *supra* note 88. For the 20 cases in which the buyer was not successful in invoking a price reduction as a defense in case the seller claims (the remaining part of) the purchase price see Tinned Cucumbers Case, *supra* note 90; Used Agriculture Machine (Mower) Case, *supra* note 132; Coke Case, *supra* note 98; Marble Slabs Case, *supra* note 141; Waste Container Case, *supra* note 90; Shoes Case 3, *supra* note 32; Acrylic Blankets Case, *supra* note 64; Cashmere Sweaters Case, *supra* note 83; Art Books Case, *supra* note 141; Granular Plastic Case, *supra* note 98; Russia Arbitration Proceeding, *supra* note 187; Landgericht Darmstadt [LG] [District Court] May 9, 2000, 100 72/0 (Video Recorders Case), *translation available at* <http://cisgw3.law.pace.edu/cases/000509g1.html>; Granite Rock Case, *supra* note 90; Live Sheep Case, *supra* note 90; Window Frames Case, *supra* note 59; Obergericht Luzern [OG] [Appellate Court] May 12, 2003, 11 01 73 (Switz.) (Used Textile Washing Machine Case), *translation available at* <http://cisgw3.law.pace.edu/cases/030512s1.html>; Audiencia Provincial de Vizcaya, sección 5ª Nov. 5, 2003, 648/2000 (Spain) (Scrap Metal Case), *translation available at* <http://cisgw3.law.pace.edu/cases/031105s4.html>; Hungarian Wheat Case, *supra* note 91; Cour d'Appel Aix-en-Provence [CA] [Appellate Court] May 7, 2009, 06/16296 (Fr.) (Production Line Case), *translation available at* <http://cisgw3.law.pace.edu/cases/090507f1.html>.

<sup>199</sup> CIETAC Nov. 11, 2002, CISG/2002/26 (China) (Platform Case), *translation available at* <http://cisgw3.law.pace.edu/cases/021111c1.html>; CIETAC Jan. 19, 2003, CISG/2003/07 (China) (Ferrochrome Case), *translation available at* <http://cisgw3.law.pace.edu/cases/030119c1.html>; Russia Arbitration Proceeding, *supra* note 141; CIETAC Apr. 2006 CISG/2006/20 (China) (Water Heater Production Line Case), *translation available at* <http://cisgw3.law.pace.edu/cases/060400c1.html>; Chamber of National and International Arbitration Milan July 30, 2007 (Italy) (Machinery Case), *translation available at* <http://cisgw3.law.pace.edu/cases/070730i3.html>.

<sup>200</sup> Secretariat Commentary, *supra* note 24 (“Article 46 [at present Article 50] does not depend on the buyer’s ability to withhold future sums due.”). For cases where the judge expressly invokes this principle *see, e.g.*, Art Books Case, *supra* note 141 (the buyer has already paid part of the price); Frozen

clearly states that the buyer may reduce the price “*whether or not the price has already been paid.*” Will considers the price reduction remedy as an exceptionally powerful weapon if the buyer has not yet paid the price.<sup>201</sup> This is true because the buyer can—under these circumstances—easily invoke an extrajudicial price reduction.<sup>202</sup>

### § 3. *No restitution*

I have already indicated, with regard to the price reduction until zero, that the buyer does not have to return the non-conforming goods.<sup>203</sup> The application of the price reduction typically implies that the buyer keeps the non-conforming good.<sup>204</sup> This is also the case for the price reduction under Article 50 CISG. The buyer accepts, in principle the non-conforming goods (with a reservation about the price) and keeps them in order to apply a price reduction.<sup>205</sup>

### § 4. *Resale*

A resale does not exclude the application of Article 50 CISG.<sup>206</sup> This means that buyer can apply the price reduction remedy even if he sells the goods (immediately) afterwards. However, Liu does not exclude that a resale might have an influence on the amount of the price reduction.<sup>207</sup> Indeed, a resale will often give an indication of the value of the non-

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Pork Case 2, *supra* note 30 (the price reduction can be applied after the payment of (a part of) the price); Plants Case, *supra* note 59 (the price had in this case not yet been paid); Potatoes Case 2, *supra* note 88 (part of the price has already been paid and the seller claims the remaining part of the price while the buyer wants to apply a price reduction).

<sup>201</sup> Will, *supra* note 4, at 373 n.2.2.

<sup>202</sup> See also *supra* III. § 1.b; III. § 2.a.

<sup>203</sup> See *supra* IV. § 4.

<sup>204</sup> Müller-Chen, *supra* note 4, at n.1.

<sup>205</sup> LIU, *supra* note 37, at 104.

<sup>206</sup> Canned Food Case 1, *supra* note 88; Canned Food Case 2, *supra* note 64 (price reduction can be applied irrespective of the fact that the non-conforming goods have been resold); Excavator Case, *supra* note 198 (the arbitrators apply a price reduction after the machines had been resold); B.V. v. Produce Agencies Limited, Nieuw Zeeland, *supra* note 198. *Accord* Bach, *supra* note 4, at 750; Liu, *supra* note 4, at n.2; LIU, *supra* note 37, at 105.

<sup>207</sup> Canned Food Case 1, *supra* note 88. *Accord* Liu, *supra* note 4, at n.2; LIU, *supra* note 37, at 105.

conforming goods.<sup>208</sup> Nevertheless, in contrast to damages, a price reduction will not be excluded if the buyer resells the non-conforming goods *with profit*.<sup>209</sup> The buyer can still apply a price reduction if he establishes that the goods have been reduced in value due to the non-conformity.<sup>210</sup>

### § 5. Combination of price reduction and damages

The remedies of damages and price reduction can be combined.<sup>211</sup> Article 45(1)(a)(b) and (2) CISG state that the buyer is not deprived of any right he may have to claim *damages* by exercising his right to other remedies (in the Articles 46–52 CISG). Of course, the two remedies cannot be applied at the same time for the same “loss.”<sup>212</sup> In case of a combination

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<sup>208</sup> Cf. *Interag Ltd. v. Stafford Phase*, *supra* note 198 (“it is well settled that the price obtained for defective goods on resale is probative of the value of the goods as actually received”). See also *infra* § 6 for the burden of proof of the buyer.

<sup>209</sup> *Accord Schnyder & Straub*, *supra* note 4, at n.5. *Contra* Russia Arbitration Proceeding, *supra* note 187 (the arbitrators do not allow a price reduction because the non-conforming goods were sold at a higher price than the conforming goods; the buyer has, consequently, not suffered any “damage”). See also *supra*, IV. § 8.

<sup>210</sup> If the resale of the goods excludes the fact that the buyer can prove that there is a non-conformity or if he thereby breaches the conditions of the Articles 38 (duty to examine) and 39 (duty to notify) CISG, a price reduction cannot be applied. See also *Furniture Case*, *supra* note 64.

<sup>211</sup> Secretariat Commentary, *supra* note 24, at 43. *Accord* Bundesgericht [BGer] [Supreme Court] Oct. 28, 1998, 4C.179/1998/odi (Switz.) (Meat Case), translation available at <http://cisgw3.law.pace.edu/cases/981028s1.html>; *Porphyry Stones Case*, *supra* note 24; *Window Frames Case*, *supra* note 59 (“A claim for damages and interest exists parallel with a claim for replacement or repair of goods, and a claim for price reduction.”); *Ginza Pte Ltd. v. Vista Corporation Pty Ltd.*, *supra* note 165 (next to the price reduction the buyer can ask for “damages for negligence” (emphasis added)); *In re Siskiyou Evergreen, Inc.*, *supra* note 165; *Amtsgericht Luzern-Land [AG] [District Court]* Sept. 21, 2004, 11 4/ZU 016 (Switz.) (Watches Case), translation available at <http://cisgw3.law.pace.edu/cases/040921s1.html> (but ultimately both remedies were not allowed); *Russia Arbitration Proceedings*, *supra* note 141; *Potatoes Case 1*, *supra* note 88; *Artificial Turf Case*, *supra* note 1. *Accord* Bach, *supra* note 4, at 765–66; Benicke, *supra* note 24, at n.15; BRIDGE (2013), *supra* note 5, at 603–04; Gonzalez, *supra* note 5, at 92; HONNOLD & FLECHTNER, *supra* note 12, at 448 n.312; HUBER & MULLIS, *supra* note 5, at 255; KRITZER, *supra* note 21, at 377; Liu, *supra* note 4, at n.3.3; Magnus, *supra* note 5, at n.30; Müller-Chen, *supra* note 4, at 779 n.18; Piliounis, *supra* note 4, at 33; Schnyder & Straub, *supra* note 25, at n.57; Schnyder & Straub, *supra* note 4, at n.57; SCHWENZER ET AL., *supra* note 26, at 407; VAN DER VELDEN, *supra* note 5, at 350–51; Will, *supra* note 4, at 372–73 n.2.2.

<sup>212</sup> *Meat Case*, *supra* note 208; *Live Sheep Case*, *supra* note 90 (a price reduction for the reduction in value (because the sheep were too lean), makes goods for the same item of loss as damages for fattening the same sheep). *Accord* Bach, *supra* note 4, at 765; Benicke, *supra* note 24, at n.15; HONNOLD & FLECHTNER, *supra* note 12, at 448 n.312; Liu, *supra* note 4, at n.3.3; LIU, *supra* note 37, at

of both remedies, a price reduction will remedy the reduction in value of the goods due to the non-conform delivery, while the damages will compensate any additional losses. The damages can only compensate other items of loss and cannot compensate for the reduced value due to the non-conformity of the goods, which has already been made good by the price reduction.

### § 6. Burden of Proof

In order to obtain a price reduction the buyer has to prove the original price, the value of a conforming good, and the value of a non-conforming good.<sup>213</sup> This means implicitly that the buyer has to prove the non-conformity of the good.<sup>214</sup> Even for goods for which a market price

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115–17, 119; Müller-Chen, *supra* note 4, at 780 n.18; Schnyder & Straub, *supra* note 25, at n.57; Schnyder & Straub, *supra* note 4, at n.57; SCHWENZER ET AL., *supra* note 26, at 407.

<sup>213</sup> See Used Textile Washing Machine Case, *supra* note 198 (no price reduction because the buyer does not prove that the defect causes a reduction in value); Dashboard Mould Case, *supra* note 17 (the buyer has to prove that the amount of the demanded price reduction corresponds to the proportional price reduction formula). *But see* CIETAC Mar. 22, 1995, CISG/1995/05 (China) (Down Jacket and Winer Coat Case), translation available at <http://cisgw3.law.pace.edu/cases/950322c1.html> (e.g., “With respect to the winter coats, [Buyer] failed to prove that the defect in color resulted in any loss to it,” it is unclear whether “loss” refers to “damages” or to a reduction in value.); Russia Arbitration Proceeding, *supra* note 187 (this judgement does not allow a price reduction because the non-conforming goods were resold at a higher price as the conforming goods; as a consequence, the buyer would not have suffered any losses). For an alleviation of the buyer’s burden of proof because the parties agreed that the price reduction would be calculated proportionately, taking into account the best possible price that the buyer could get when reselling the non-conforming goods, see Potatoes Case 1, *supra* note 88. See also Bach, *supra* note 4, at 764-65; Benicke, *supra* note 24, at n.10 (without any reference to the original price); BRIDGE (2013), *supra* note 5, at 604 (only refers to the fact that the buyer must prove that the goods have reduced in value); HEUZÉ, *supra* note 25, at n.458; Magnus, *supra* note 5, at n.34 (without any reference to the original price); Müller-Chen, *supra* note 4, at 778 n.15 (without any reference to the original price); Schnyder & Straub, *supra* note 25, at n.58 (without any reference to the original price); Schnyder & Straub, *supra* note 4, at n.58 (without any reference to the original price). The following authors seem to confirm this: HUBER & MULLIS, *supra* note 5, at 251.

<sup>214</sup> Flowers Case, *supra* note 90. See also Video Recorders Case, *supra* note 198 (a price reduction is rejected because the buyer does not prove the defect of the goods); Scrap Metal Case, *supra* note 198 (a price reduction is rejected because the buyer cannot prove that the goods did not conform the contract); Audiencia Provincial de Barcelona, sección 13a Mar. 24, 2009, 403/2008 (Spain) (Cuttlefish Case), translation available at <http://cisgw3.law.pace.edu/cases/090324s4.html> (no proof of a non-conformity; as a consequence Art. 50 CISG cannot be applied); Hof van beroep Gent [Court of Appeal Ghent] Oct. 7, 2009, 2007/AR/2569 (Belg.) (Jar Lid Case), available at <http://www.cass.be>. See also KRUISINGA, *supra* note 26, at 171 (see also very detailed about different opinions pp. 168–77). *But see* Plants Case, *supra* note 59 (if the buyer notifies the seller within a reasonable time of the defect, the burden of proof lies with the seller and the latter has to prove that the goods are in conformity with the

exists<sup>215</sup>—both for conforming and non-conforming goods—an expert is sometimes called upon to determine this “market price.”<sup>216</sup> If it concerns goods for which *no* market price exists, it is assumed that the agreed price corresponds with the value of the conforming goods at the moment of delivery.<sup>217</sup> It is also sometimes argued that in this last case, the reduction of value corresponds with the cost for the buyer to repair the good.<sup>218</sup> The UNCITRAL “Secretariat Commentary” of the CISG states that if the goods have no market price and if the reduction in value is difficult to establish, the judge or the arbiter finally has to decide.<sup>219</sup>

### § 7. *Derogating contracts*

According to Article 6 CISG the parties can conclude derogating contracts and change the rules of Article 50 CISG or exclude them.<sup>220</sup> Consequently, parties can agree upon the precise role of the judge and the parties, a different price reduction mechanism and prescribe the exact calculation method.<sup>221</sup>

## VI. COMPARISON WITH OTHER REMEDIES UNDER THE CISG

Confusion exists between price reduction and other remedies under the CISG. Admittedly, sometimes price reduction and other remedies seem to

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contract at the moment of the transfer of risk). *See also* Schnyder & Straub, *supra* note 4, at n.58. *See* for the condition of application of non-conformity *supra*, II, § 2.

<sup>215</sup> *Cf.* Interag Ltd. v. Stafford Phase, *supra* note 198 (“it is well settled that the price obtained for defective goods on resale is probative of the value of the goods as actually received”).

<sup>216</sup> B.V. v. Produce Agencies Limited, Nieuw Zeeland, *supra* note 198.

<sup>217</sup> Bach, *supra* note 4, at 765; Müller-Chen, *supra* note 4, at 778 n.15. Without reference to the fact that no market price exists: Schnyder & Straub, *supra* note 4, at n.58. *See also* Furniture Case, *supra* note 64 (“The objective value of the conforming goods is presumed to correspond to the agreed upon price.”).

<sup>218</sup> Bach, *supra* note 4, at 765. *See also* Furniture Case, *supra* note 64 (“The difference between the value of the conforming goods and the value of the non-conforming goods does not necessarily coincide with the cost to repair, but most of the time it does”).

<sup>219</sup> Secretariat Commentary, *supra* note 24, at 43.

<sup>220</sup> Schnyder & Straub, *supra* note 25, at nn.60–61; Schnyder & Straub, *supra* note 4, at nn.60–61.

<sup>221</sup> For an alleviation of the buyer’s burden of proof because the parties agreed that the price reduction would be calculated proportionately, taking into account the best possible price that the buyer could get when reselling the non-conforming goods see Potatoes Case 1, *supra* note 88.

have the same outcome. Commentators of Article 50 CISG have already pointed to overlaps between price reduction and other remedies. Indeed, Article 51(1) CISG provides that if there is only a partial delivery or only part of the goods have been delivered in conformity with the contract, the buyer's remedies may be applied contained in Articles 46 to 50 CISG. These remedies may be partial avoidance (termination), price reduction and damages as compensation for the reduction in value. All those remedies might practically lead to the same result.

### § 1. Price reduction and partial termination

The remedies of price reduction and partial termination can lead to the same result.<sup>222</sup> As I have indicated, Article 51 CISG provides a possibility to *partially terminate* the contract if the seller only delivers part of the goods or if only part of the goods conform the contract.<sup>223</sup> Article 51(2) CISG states that if a partial delivery or a non-conforming delivery amounts to a fundamental breach, the buyer can terminate the whole contract.<sup>224</sup> The application of Article 51 CISG supposes that the sold goods can be separated or are *divisible*.<sup>225</sup> It really concerns separate, physical and economical autonomous goods, which are only partially delivered.<sup>226</sup> The

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<sup>222</sup> Secretariat Commentary, *supra* note 24, at 42.

<sup>223</sup> *Id.* at 44 (“In effect, this paragraph provides that the buyer can avoid a part of the contract.”); Art. 51(1) CISG. For a reference to “partial termination” see Ivo Bach, *Art. 51 CISG*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) n.35 *et seq.* (Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas eds., 2011); Markus Müller-Chen, *Art. 51 CISG*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 781 n.1 (Ingeborg Schwenzer ed., 2010); SCHWENZER ET AL., *supra* note 26, at 412.

<sup>224</sup> See HONNOLD & FLECHTNER, *supra* note 12, at n.317; Müller-Chen, *Art. 51 CISG*, *supra* note 223, at 785 nn.9–10.

<sup>225</sup> Bach, *Art. 51 (CISG)*, *supra* note 223, at 771–73; Christoph Benicke, *Art. 51 CISG*, in MÜNCHENER KOMMENTAR HANDELSGESETZBUCH nn.2–3 (K. Schmidt ed., 2004); Ulrich Magnus, *Art. 51 CISG*, in VON STAUDINGERS KOMMENTAR ZUM BGB, WIENER UN-KAUFRECHT 530 n.4 (Martinek ed., 2004); Müller-Chen, *supra* note 223, at 782 n.2; Schnyder & Straub, *Art. 51 CISG*, *supra* note 25, at n.8 *et seq.* (very detailed); Schnyder & Straub, *Art. 51 CISG*, *supra* note 4, at n.8 *et seq.*

<sup>226</sup> HONNOLD & FLECHTNER, *supra* note 12, at n.316; Magnus, *supra* note 225, at n.4; Müller-Chen, *supra* note 223, at 782 n.2; SCHWENZER ET AL., *supra* note 26, at 412; Lisa Spagnolo, *The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers*, 10 MELB. J. INT'L L. 141, 186 (2009) (this author discusses critically a decision of the Supreme Court of Western Australia (*Ginza Pte Ltd. v. Vista Corporation Pty Ltd.*, *supra* note 165), because the Court rejected the application of Article 51(1) CISG without ruling about the divisibility of the goods). Suggests another criterion: Bach, *Art. 51 (CISG)*, *supra* note 223, at

application Article 51(1) CISG means that the buyer may not refuse partial delivery, except if this partial delivery amounts to a fundamental breach of the sales contract.<sup>227</sup> When applying Article 51 CISG, the seller's right to cure will have priority (except in case of application of Article 49(1) CISG).<sup>228</sup> For instalment contracts, Article 73 CISG is applicable.<sup>229</sup>

In the case of instalment contracts Article 73(1) CISG states that if the failure of one party to perform any of this obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract terminated with regard to that instalment. This Article seems only to allow a *termination* as a remedy with regard to one instalment. Nevertheless, some authors are of the opinion that also other remedies (such as a price reduction) can be applied with regard to one instalment.<sup>230</sup>

In case of a *partial delivery* (a shortcoming in the *quantity*) price reduction under Article 50 and partial termination under Article 51 CISG can turn out to the same pecuniary compensation.<sup>231</sup> However, a partial termination under Article 51 CISG will require a fundamental shortcoming (with regard to that part of the contract)<sup>232</sup> or will require that the buyer grants the seller an extra period of time to perform in accordance with

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771–73 (the price of the part has to be identifiable and it must be possible to separate the part or to add the separated part again).

<sup>227</sup> Art. 51(2) CISG; Bach, *Art. 51 (CISG)*, *supra* note 223, at 781; Müller-Chen, *Art. 51 (CISG)*, *supra* note 223, at 783 n.4; Spagnolo, *supra* note 226, at 186 (this author critically discusses a judgment of the Supreme Court of Western Australia (*Ginza Pte Ltd. v. Vista Corporation Pty Ltd.*, No. [2003] WASC 11, CIV 1647 of 1998 consolidated by order 12/5/2000) because the Court rejected the application of Article 51(1) CISG without verifying whether the shortcoming of the seller was fundamental under Article 51(2) CISG).

<sup>228</sup> See Müller-Chen, *Art. 51 (CISG)*, *supra* note 223, at 784 n.6.

<sup>229</sup> Bach, *Art. 51 (CISG)*, *supra* note 223, at 769–70 (but Art. 51 CISG can also be applied in case of a non-conformity of only one instalment); Müller-Chen, *Art. 51 CISG*, *supra* note 223, at 782–83 n.3.

<sup>230</sup> SCHLECHTRIEM & BUTLER, *supra* note 47, at 147.

<sup>231</sup> Bergsten & Miller, *supra* note 4, at 259–60. See also Müller-Chen, *Art. 51 CISG*, *supra* note 223, at 784 n.6. But see Bach, *Art. 51 (CISG)*, *supra* note 223, at 780 (seems not to accept this: a price reduction would not be applicable under these circumstances).

<sup>232</sup> This fundamental shortcoming may be considered taking into account the relevant part of the contract and not taking into account the whole contract: Bach, *Art. 51 (CISG)*, *supra* note 223, at 778. See also Secretariat Commentary, *supra* note 24, at 44 (“However, under article 47 (1) [at present Article 51(1)] it is clear that under this Convention the buyer is able to avoid a part of the contract if the criteria for avoidance are *met as to that part*”) (emphasis added).



Article 49 CISG.<sup>233</sup> Indeed, Article 49(1)(b) CISG requires that in case of a non-delivery (which is the case for the concerning part) the buyer fixes an additional period of time.

In case of a *non-conforming partial* delivery (due to a lack of quality of a part of the delivery) some clarifications must be made. Suppose that 100 units have been delivered in conformity and 20 units have a defect in quality which is a fundamental shortcoming *with respect to that part of the contract*.<sup>234</sup> In this case, Article 51 CISG will allow that the buyer terminates the contract with regard to the 20 units and to reduce the price with 1/5th.<sup>235</sup> The buyer may also keep the entire delivery and apply a price reduction for the reduction in value with regard to the 20 units under Article 50 CISG or under Article 51 CISG (but by means of the theory of price reduction and not by applying partial termination).<sup>236</sup> Suppose that a very small non-conformity would affect all the goods, which is *not fundamental* to the contract. In this case partial termination cannot be applied because all the goods are affected with non-conformity, and there is no fundamental shortcoming. A price reduction can offer relieve and enable the parties to maintain the contract if the conditions of application of Article 50 CISG are fulfilled.<sup>237</sup>

I also have to point at another important difference between (partial) termination and price reduction.<sup>238</sup> Termination of the contract requires that restitution has to be made of the non-conforming goods to the seller.<sup>239</sup> The price reduction remedy precisely requires the buyer to keep the non-

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<sup>233</sup> Bach, *Art. 51 (CISG)*, *supra* note 223, at 778; Müller-Chen, *Art. 51 (CISG)*, *supra* note 223, at 784 n.6; Schnyder & Straub, *Art. 51 (CISG)*, *supra* note 25, at n.41; Schnyder & Straub, *Art. 51 (CISG)*, *supra* note 4, at n.40.

<sup>234</sup> This fundamental shortcoming may be considered taking into account the relevant part of the contract and not taking into account the whole contract: Bach, *Art. 51 (CISG)*, *supra* note 223, at 777. Only termination because of a “fundamental” shortcoming can be applied with regard to this non-conforming part (and not a termination because the seller did not respect the extra period of time under Article 49(1)(b) CISG, because the application of this Article supposes a “non-delivery”): Schnyder & Straub, *Art. 51 (CISG)*, *supra* note 25, at n.41; Schnyder & Straub, *Art. 51 (CISG)*, *supra* note 4, at n.47.

<sup>235</sup> Müller-Chen, *Art. 51 CISG*, *supra* note 223, at 784 n.7.

<sup>236</sup> Bach, *Art. 51 (CISG)*, *supra* note 223, at 780. *See also* Müller-Chen *Art. 51 CISG*, *supra* note 223, at 784 n.7.

<sup>237</sup> *See* HEUZÉ, *supra* note 25, at n.459.

<sup>238</sup> *But see id.*

<sup>239</sup> Art. 81 CISG.

conforming goods.<sup>240</sup> The price reduction remedy under Article 50 CISG can still be applied if the buyer cannot give back the goods to the seller, even by his own fault.<sup>241</sup>

### § 2. Price reduction and damages

At first sight, the remedies of price reduction and damages appear to be very similar. Some authors are particularly critical about the remedy of price reduction, and think that this remedy does not really differ from a damages claim:

Whether there is anything to be gained from not simply regarding such a remedy as a damages claim, other than a continuation of the Civilian tradition, is an open question; perhaps its advantage would be the “self-help” element in deducting sums from payments due, a remedy often explicitly provided for in commercial contracts.<sup>242</sup>

Nevertheless, price reduction and damages are two *different* remedies that can be invoked by the buyer.<sup>243</sup> I have already pointed to the different *calculation method* of both remedies<sup>244</sup> and to the fact that price reduction and damages can be *combined* in so far they do not compensate the same losses.<sup>245</sup> Also other elements can differentiate the price reduction remedy from damages. First of all, a price reduction can be invoked *extra-judicially*, which is in principle, impossible in case of damages.<sup>246</sup> Secondly, damages require that the party in breach *foresaw* or ought to have foreseen the loss (Article 74 CISG), which is not required for the calculation of a price reduction.<sup>247</sup> Price reduction is also not subject to the

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<sup>240</sup> See *supra* V. § 3.

<sup>241</sup> See HEUZÉ, *supra* note 25, at n.459.

<sup>242</sup> H.L. Macqueen, *Remedies for Breach of Contract: The Future Development of Scots Law in its European and International Context*, 1 EDINBURGH L. REV. 200, 225 (1996–97).

<sup>243</sup> Secretariat Commentary, *supra* note 24, at 42.

<sup>244</sup> See *supra* IV. § 8.

<sup>245</sup> See *supra* V. § 5.

<sup>246</sup> Most of the time damages will be negotiated or be estimated through legal proceedings: Liu, *supra* note 4, at n.3.1; LIU, *supra* note 37, at 103. See also HEUZÉ, *supra* note 25, at n.460; Sondahl, *supra* note 5, at n.A.1.

<sup>247</sup> Secretariat Commentary, *supra* note 24, at 42. Bach, *supra* note 4, at 750; Sondahl, *supra* note 5, at n.A.2.

duty to mitigate damages (Article 77 CISG).<sup>248</sup> Further, in order to get damages, the buyer has to *prove* its actual loss,<sup>249</sup> where it suffices to prove the original price and the value of a conforming and non-conforming goods for the application of price reduction.<sup>250</sup> Price reduction can also play an important role if the *liberating circumstances* under Article 79(1) CISG occur.<sup>251</sup> Article 79(5) CISG does not allow damages, but all the other remedies under the CISG, such as price reduction, can still be applied. Finally, the *goals* of damages and price reduction fundamentally differ. On the one hand, damages compensate the actual loss of the buyer. The allocation of damages will put the buyer in the position he would have been in when no breach of contract has occurred and the seller has honored the contract.<sup>252</sup> A price reduction will, on the other hand, preserve the bargain.<sup>253</sup> The buyer will be treated as if he had bought the non-conforming goods.<sup>254</sup> Some authors point to a different contextual approach.<sup>255</sup> The allocation of damages stems from an economic logic and efficiency. However, a price reduction would be based on a moral

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<sup>248</sup> Beheshti, *supra* note 68, at 2–3.

<sup>249</sup> Liu, *supra* note 4, at n.3.2; Piliounis, *supra* note 4, at 33–34 (if the buyer buys something for charity purposes, a non-conforming delivery will not necessarily cause him damages because of the reduction in value of the goods. This means that it is difficult to obtain damages, but does not affect the possibility to apply a price reduction.)

<sup>250</sup> See *supra* V. § 6. See I.S. Trading v. Vadotex, *supra* note 88 (the judge rejects a claim for damages because the buyer could not prove his loss, but a price reduction is allowed under Art. 50 CISG). For an incorrect decision in which price reduction is not allowed because the non-conforming goods were resold at a higher price than the conforming goods (this meant—according to the arbitrators—that the buyer did not suffer any damages), see Russia Arbitration Proceeding, *supra* note 187.

<sup>251</sup> Secretariat Commentary, *supra* note 24, at 42; Bach, *supra* note 4, at 750 (does not merely mention *force majeure*, but also mentions “*imprévision*”); Benicke, *supra* note 24, at n.3; Bergsten & Miller, *supra* note 4, at 265, 273; Gärtner, *supra* note 5, at II. A.2.b.(1); Gonzalez, *supra* note 5, at 92; Gustin, *supra* note 50, at 398; HEUZÉ, *supra* note 25, at nn.460, 476; HONNOLD & FLECHTNER, *supra* note 12, at n.311; KRITZER, *supra* note 25, at 376; KRUISINGA, *supra* note 26, at 125; Liu, *supra* note 4, at n.3.2; LIU, *supra* note 37, at 103, 109–10; Magnus, *supra* note 5, at n.4; Müller-Chen, *supra* note 4, at 779 n.18; Tuñón, *supra* note 39, at n.4.3.4; NEUMAYER & MING, *supra* note 45, at 356–57; Piliounis, *supra* note 4, at 34; SCHLECHTRIEM & BUTLER, *supra* note 47, at 153; Sondahl, *supra* note 5, at n.A.2; Schnyder & Straub, *supra* note 25, at nn.5, 17; Schnyder & Straub, *supra* note 4, at nn.5, 17; Shin, *supra* note 97, at n.I; Williams, *supra* note 82, at IV.C.5; Ziontz, *supra* note 151, at 172. For an example see also Honnold, *supra* note 4, §§ 309–11.

<sup>252</sup> E.g., LIU, *supra* note 37, at 108.

<sup>253</sup> See also *supra* IV. § 9.

<sup>254</sup> E.g., Flechtner, *supra* note 25, at 174; LIU, *supra* note 37, at 109.

<sup>255</sup> E.g., Tuñón, *supra* note 39, at n.4.3.5. See also LIU, *supra* note 37, at 109.

background and points to the right of the buyer to maintain the promise of the seller.

## VII. CONCLUSION

Price reduction under Article 50 CISG is a fascinating remedy. It has major advantages for the buyer in comparison with the other remedies of the CISG. Compared to damages, applying a price reduction has the advantages that, it can be invoked *extra-judicially*, while the *burden of proof* is limited to the establishment of a reduction in value of the good due to a non-conforming delivery. Further, price reduction can be invoked when the *liberating circumstances* under Article 79 CISG occur, which is not the case for damages.

Compared to termination, price reduction has the advantage that there are no restitution duties for the buyer and that he does not have to respect a time limit to invoke the price reduction remedy. This is not the case for termination. Indeed, Articles 81 and 82 CISG oblige the buyer to make *restitution*, while Article 49(2) CISG obliges the buyer to respect a *reasonable time* to invoke the declaration of *termination*.<sup>256</sup> Price reduction will not necessarily be ruled out if this “reasonable period of time” to invoke termination has elapsed.<sup>257</sup>

Nonetheless, the most important pitfall is that, like the other remedies, price reduction requires that the buyer *notifies the seller of the nature of the*

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<sup>256</sup> See Art. 49(2) CISG:

However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of Article 48, or after the buyer has declared that he will not accept performance.

<sup>257</sup> For a case in which the difference between a price reduction (no time limit) and termination (time limit) is stressed see *Coffee Machines Case*, *supra* note 59. For other cases in which a price reduction is not precluded when the time limit for termination has elapsed see *Christmas Trees Case*, *supra* note 59; *Window Frames Case*, *supra* note 59; *Plants Case*, *supra* note 59 (implicitly); *Bottles Case*, *supra* note 59.

*non-conformity* within a reasonable time. In many cases the buyer loses its right to reduce the price because he forgets to respect this obligation. Furthermore, if the buyer wants to invoke the price reduction extrajudicially, he must do this by means of a price reduction declaration, in which he must express his *intention* to apply the price reduction remedy unilaterally and give the *motivation* thereof.

The advantages of the price reduction remedy under the CISG result in a frequent application in case law. This case law, in mutual co-operation with legal doctrine, fleshed out many uncertainties about the price reduction remedy. I was, for example, able to discern a rather clear overview of the conditions of application of price reduction and the role of the parties and the judge. Moreover, the typical proportional calculation method described in detail by legal doctrine and applied in case law has divulged almost all its secrets. It is true that some elements remain unclear. For example, it is disputable whether parties can invoke a price reduction *before* the effective delivery of the goods (anticipatory price reduction) or *where* the value of the (non-) conforming goods has to be calculated.

Furthermore, the development of the price reduction remedy under CISG has been and will continue to be a source of inspiration for the emerging European contract law. The fact that the PECL and the DCFR include price reduction as a remedy and that the Consumer Sales Directive and the recent CESL in the CESL-proposal also provide for it, is proof that this remedy is still relevant and developing.

Finally, it has to be stressed that price reduction is indeed a remedy with a different rationale when compared to damages. It starts from the *do ut des*-idea: the buyer keeps the non-conforming goods, thereby maintaining the contract, and only has to pay a proportionally adapted price.