Replacement of non-conforming goods 'free of charge': is there a need to differentiate between B2B and B2C sales contracts?

Yeşim M. Atamer*

Abstract

The buyer's right to request replacement of any non-conforming goods is today a standard remedy in many jurisdictions. This development was also influenced by the widespread effect of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Council Directive (EC) 1999/44 on consumer sales, which both grant the buyer a right to replacement. However, some questions related to the requirement that replacement has to be 'free of charge' continue to be disputed under both legal systems, as well as under the newly introduced Council Directive (EC) 2019/22 on consumer sales. This article intends to discuss how the term 'free of charge' is being interpreted in business-to-business as well as in business-to-consumer sales contracts and whether there is any need to differentiate between the two types of sales contracts.

I. Introduction

The objective of this article is to delve into two legal questions that were raised in the European Union (EU) in relation to the replacement remedy in business-to-consumer (B2C) sales contracts. Both issues had to be resolved by the Court of Justice of the European Union (CJEU). The cases were referred to the CJEU from several German courts, which stayed proceedings in order to get an authoritative interpretation of Council Directive (EC) 1999/44 on Consumer Sales.[1] Both issues

* Yeşim M. Atamer, Faculty of Law, Chair for Private Law, Commercial Law, European and Comparative Law, University of Zurich. Email: yesim.atamer@rwi.uzh.ch. The websites were last visited on 5 April 2020.

[1] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

Unif. L. Rev., 2020, 1–25
doi:10.1093/ulr/unaa005

triggered changes in German law as well as in the new Council Directive (EC) 2019/22 on Consumer Sales.[2]

The first question regarding substitute deliveries is the allocation of costs occurring in case non-conforming goods are already installed by the buyer, so that replacement can only be affected by first removing the old goods. The second question is whether the buyer has to account for any benefits received from the non-conforming goods. These benefits can occur in two ways: the buyer might have already used the defective goods, for example, for 20 months until the defect became apparent. If the goods are replaced after 20 months with new ones, this might result in a benefit to the buyer as he can now use the same goods for a longer period. The buyer might also further benefit from a replacement if the seller can only offer a newer/better model of the non-conforming goods as a substitute.

Below, each scenario will be elaborated on by discussing the details of the B2C case, the relating CJEU decision, and the effects of this decision, especially on German law, as the country referring the questions to the CJEU. Following these explanations, the hypothetical outcome of the same cases under the CISG will be discussed. The conclusions of this analysis can be briefly included here: there are only very few areas where business-to-business (B2B) and B2C sales need to be regulated differently.[3]

II. Allocation of costs related to uninstalling non-conforming goods and reinstalling replacement goods

1. *Non-conforming tiles, malfunctioning washing machines, and the cost of replacement under EU consumer law*

In the two cases decided jointly by the CJEU in 2011,[4] the issue was very similar (*Weber/Putz* decision). Wittmer had bought polished tiles at a price of €1,382.27. After having had approximately two-thirds of the tiles laid in his house, he noticed shading on the tiles that was visible to the naked eye. The appointed expert concluded that the shadings were fine micro brush marks that

[2] As of 1 January 2022, Directive 1999/44 will be replaced by Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

[3] Cf. on this discussion: Yeşim M. Atamer, 'Do We Really Need Special Provisions for Business-to-Consumer Sales?' in Ingeborg Schwenzer (ed), *35 Years CISG and Beyond* (Eleven International Publishing, The Hague 2015), 185 et seq.; Gerhard Wagner, 'Der Verbrauchsgüterkauf in den Händen des EuGH: Überzogener Verbraucherschutz oder ökonomische Rationalität?' (2016) 24 *Zeitschrift für Europäisches Privatrecht* 87, 87 et seq.

[4] Case 65/09 *Gebr. Weber GmbH v Jürgen Wittmer* and Case 87/09 *Ingrid Putz v Medianess Electronics GmbH* [2011] ECLI:EU:C:2011:396. Cf. on this case e.g. Hans-W. Micklitz and Betül Kas, 'Overview of cases before the CJEU on European Consumer Contract Law (2008–2013)—Part I' (2014) 10 *European Review on Contract Law* 1, 58 et seq.; Joasia Luzak, 'A Storm in a Teacup? On Consumers' Remedies for Non-conforming Goods after Weber and Putz' (2015) 23 *European Review of Private Law* 689, 689 et seq.

could not be removed. Therefore, the only remedy possible was a complete replacement of the tiles. The expert estimated the cost of this at €5,830.57.

Putz, in turn, had concluded a sales contract over the Internet for a new dishwasher for the price of €376.52. The parties agreed on delivery to the door of Putz's house. After Putz had the dishwasher installed in her house, a defect—which was not attributable to the installation of the machine and was irreparable—became apparent. The parties agreed on the replacement of the dishwasher. In this context, Putz demanded not only delivery of a new dishwasher but also removal of the defective machine and installation of the replacement one or, as an alternative, payment of the costs of removal and new installation.

Article 3 of the Council Directive 1999/44 provides the rule that 'in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement'. In both cases, the CJEU was confronted with the question of how broadly the term 'replacement free of charge' should be interpreted. If it were decided that the act of replacement involves only delivering substitute goods at the place of performance,[5] then any expenses related to removal of the non-conforming goods and re-installation of the new ones would have to be borne by the buyer and could only be claimed from the seller if the prerequisites of a damages claim were given. The other option would be a broader interpretation of the term 'replacement free of charge' so that the seller's duty to remedy is understood to cover all costs involved with putting the buyer in the position as if the first delivery were in conformity with the contract.

This categorization is especially important for civil law jurisdictions that base contractual liability for damages on fault—as is the case in Germany (section 276 of the German Civil Code (BGB)).[6] In such countries, the specific performance remedy is available independent of any faulty behaviour on the side of the seller. However, in order to succeed with a damages claim, the seller has to be at fault in delivering non-conforming goods. Therefore, the qualification as 'costs' to be carried by the seller or 'expenses' to be reimbursed as incidental losses of the buyer is of the utmost importance. Given that nowadays sellers are mostly just re-sellers in a long supply chain and not producers, they are often not blameable for the non-conformity. The result is that buyers' claims for damages

[5] Directive 1999/44 included no provision defining the place of performance for replacement or repair. The new sales law Directive 2019/771 now expressly states in Recital No 56 that this issue is left to the Member States to decide. Cf. on this discussion Susanne Augenhofer, 'Der Nacherfüllungsort beim Verbrauchsgüterkauf, Bei dir oder bei mir?—Das sagt uns dann das Gericht' (2019) 72 *Neue Juristische Wochenschrift* 1988, 1988–90.

[6] For a comparison of different jurisdictions on this issue see Ingeborg Schwenzer and others, *Global Sales and Contract Law* (OUP, London 2012) 591 et seq.; Reinhard Zimmermann, 'Article 9:501', in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (OUP, Corby Northants 2018), paras 2–9; Stefan Grundmann, 'The Fault Principle as the Chameleon of Contract Law: A Market Function Approach', in Omri Ben-Shahar/Ariel Porat (eds), *Fault in American Contract Law* (CUP, New York, NY 2010), 35 et seq.

prove futile.[7] However, even in jurisdictions where contractual liability for damages is based on the strict liability principle, as in most common law jurisdictions[8] as well as under the CISG,[9] this discussion can still be of value, as a damages claim has certain prerequisites and, besides, the seller has the right to exempt himself.

The CJEU came to a decision on the issue by also taking into account these different approaches in EU countries. It ruled that remedying defective performance by replacement burdens the seller also with the costs of removing the old goods and installing the new ones, and this is regardless of whether the seller was obliged to install the consumer goods in the first place. According to the CJEU, such interpretation does not lead to an inequitable outcome:

> Even assuming that the non-conformity of goods does not result from the fault of the seller, the fact remains that by delivering goods not in conformity the seller fails correctly to perform the obligation which he accepted in the contract of sale, and must therefore bear the consequences of that faulty performance. On the other hand, the consumer, for his part, paid the selling price and therefore correctly performed his contractual obligations. . . .In addition, the fact that the consumer, confident in the conformity of the goods delivered, installed the defective goods, in good faith, in a manner consistent with their nature and purpose, before the defect became apparent, cannot be held against him as a fault.

The Court further argues that:

> in a situation where neither party to the contract is at fault, it is justified to make the seller bear the cost of removing the goods not in conformity and installing the replacement goods, since those additional costs, first, would have been avoided if the seller had at the outset correctly performed his contractual obligations and, second, are now necessary to bring the goods into conformity.[10]

The arguments of the CJEU were heard by the drafters of the new Council Directive (EC) 2019/771 on Sales Law. Article 14(3) now expressly states what the CJEU has decided:

> Where a repair requires the removal of goods that had been installed in a manner consistent with their nature and purpose before the lack of conformity became

[7] Cf. on this problem Yeşim M. Atamer, 'Haftung des gewerblichen Verkäufers für Schäden durch mangelhafte Ware: Ist das Verschuldenserfordernis sachgerecht?' (2011) 130 *Zeitschrift für Schweizerisches Recht* 449, 449 et seq.

[8] Günther Treitel, 'Fault in the Common Law of Contract', in Maarten Bos and Ian Brownlie (eds), *Liber Amicorum Lord Wilberforce* (Clarendon Press, Oxford 1987), 185, 93; Martin Schmidt-Kessel, *Standards vertraglicher Haftung nach englischem Recht: Limits of Frustration* (Nomos, Baden-Baden 2003) 235 et seq.; Stefan Kirsten, *Verschuldensunabhängige Schadensersatzhaftung für Sachmängel beim Warenkauf?* (Mohr Siebeck, Tübingen 2009) 145 et seq. Cf. also Omri Ben-Shahar and Ariel Porat, *Fault in American Contract Law* (CUP, New York, N.Y. 2010) passim.

[9] Ulrich Magnus, 'Article 79', in Ulrich Magnus (ed), *Wiener UN-Kaufrecht (CISG), Staudingers Kommentar zum BGB* (Neubearbeitung, Sellier-de Gruyer, Berlin 2018) para 1; Yeşim M. Atamer, 'Article 79', in Stephan Kröll and others (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, C.H. Beck, München 2018) para 1.

[10] Case 65/09 and 87/09, paras 56–57.

apparent, or where such goods are to be replaced, the obligation to repair or replace the goods shall include the removal of the non-conforming goods, and the installation of replacement goods or repaired goods, or bearing the costs of that removal and installation.

Given that both old and new Sales Law Directives do not govern the liability of the seller for damages and leave this issue to the Member States,[11] it is certain that Article 14(3) of the new Directive provides for compensation of the costs incurred during the process of replacement not as damages and, therefore, is independent of the prerequisites of a damages claim under national laws.

However, both old and new Consumer Sales Directives give the seller at least the chance to refuse repair or replacement if, compared to the other remedy, it would impose costs on him that would be disproportionate. The disproportionality is ascertained by taking into account all circumstances of the case. Council Directive 2019/771 especially mentions in Article 13(2) the value the goods would have if there were no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy (in our case, repair) could be provided without significant inconvenience to the consumer. According to a newly added paragraph (3), the seller may even refuse cure in its entirety if repair and replacement are impossible or would impose costs on the seller that would be disproportionate in light of all circumstances.[12] Under such circumstances, the consumer will have to make use of his right to reduce the price or terminate the contract. The right of the consumer to claim damages according to the prerequisites of its national law remains.

2. *The effect of the Weber/Putz decision in Germany*

In Germany, as the country referring the interpretative questions to the CJEU for preliminary ruling, the initial effects of the CJEU decision were that the German High Court (BGH) changed its understanding regarding the relevant provision in the BGB—that is, section 439—in order to abide by EU law. It decided that the replacement remedy would cover the costs of uninstalling and reinstalling in B2C sales contracts.[13] However, the BGH did not extend this interpretation to B2B contracts and stated expressly that these costs would be

[11] This is now mentioned expressly in 2019/771 Sales Law Directive, Recital No 61.

[12] This is a policy decision taken by the European Legislator after the CJEU had underlined in *Weber/Putz* that the seller remains obliged to remedy the defect even if both ways of curing (replacement/repair) are disproportionate under the given circumstances of the case. The Court had argued that the consumer always needs to have a remedy assuring performance, even if it should become most onerous for the seller. However, the ECJ had also introduced a compromise by stating that the 1999/44 Directive does not "preclude the consumer's right to reimbursement of the cost of removing the defective goods and of installing the replacement goods from being limited, in such a case, to the payment by the seller of a proportionate amount." The EU Legislator did not share this approach and granted the seller the right to block the performance claim in total (2019/771 Sales Law Directive, Recital no 48–49). Cf. especially on the problems caused by the approach taken in the *Weber/Putz* decision Joasia Luzak, 'A Storm in a Teacup? On Consumers' Remedies for Non-conforming Goods after Weber and Putz' (2015) 23 *European Review of Private Law* 698, 698 et seq.

[13] BGH, 21. 12. 2011—VIII ZR 70/08, (2012) 65 *Neue Juristische Wochenschrift* 1073, 1073–80.

claimed by a commercial buyer only as damages if the seller was at fault in delivering non-conforming goods.[14] The BGH underlined that it was up to the legislator to decide whether also for B2B contracts the same interpretation should apply. It is exciting to see that the German Parliament reacted to this appeal and introduced, as of 1 January 2018, a third paragraph to section 439 of the BGB that now has a neutral wording and burdens the seller, in a B2B as well as a B2C contract, with the costs of uninstalling defective goods and reinstalling replacement ones.[15] This means that any costs the buyer had to bear during replacement have to be compensated by the seller irrespective of his fault. However, the seller is granted the disproportionality defence.[16]

3. *Allocation of costs of replacement under the CISG*

Assuming that the seller has delivered non-conforming goods, Article 46(2) of the CISG grants the buyer the right to request substitute delivery whenever the lack of conformity constitutes a fundamental breach and the request is made within a reasonable time of giving notice of non-conformity. [17] However, the provision does not expressly allocate the costs of replacement to the seller. The same is true for the right to require repair, which is granted in Article 46(3). But in CISG literature, it is beyond discussion that Article 46(1)–(2) has to be read in light of Article 48(1),[18] the mirror image rule to Article 46 of the CISG. This

[14] BGH, 17. 10. 2012—VIII ZR 226/11, (2013) 66 *Neue Juristische Wochenschrift* 220, 220–3; BGH, 2.4.2014—VIII ZR 46/13, (2014) 67 *Neue Juristische Wochenschrift* 2183, 2183–6. Critical about this differentiation in B2B and B2C sales Wagner, 'Der Verbrauchsgüterkauf in den Händen des EuGH: Überzogener Verbraucherschutz oder ökonomische Rationalität?' 106 et seq.

[15] '[. . .] (3) If the buyer has installed the defective item into another item or attached it to another item in accordance with its type and intended use, the seller is obliged within the framework of a substitute delivery to reimburse the buyer for the necessary expenses for the removal of the defective item and the installation or attachment of the repaired or delivered defect-free item.' BGBl. 2017 I 969 (Translations from German into English are based on suggestions made by <http://www.DeepL.com/Translator>). Cf. on this revision Dirk Looschelders, 'Neuregelungen im Kaufrecht durch das Gesetz zur Reform des Bauvertragsrechts und zur Änderung der kaufrechtlichen Mängelhaftung' (2018) 50 Juristische Arbeitsblätter 81 et seq.

[16] For the time being a slight difference between B2B and B2C contracts remains under German law as § 475(4) BGB, parallel to the *Weber/Putz* decision (see above fn. 12), grants the seller a disproportionality defence only for one of the remedies not for both. However, given that the new Consumer Sales Directive has not followed the approach of the ECJ on this issue the German law maker will have to make an adjustment in §475(4) allowing the seller to block both remedies, repair as well as replacement, in case both are disproportionate under the given circumstances.

[17] The question of when exactly a lack of conformity qualifies as fundamental and the *ratio legis* behind the fundamental breach criteria are not going to be discussed here as these issues have already been subject to extensive research. Compare on this issue e.g. Markus Müller-Chen, 'Article 46', in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed, OUP, London 2016) paras 23 et seq.; Peter Huber, 'Article 46', in Stephan Kröll and others (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, C.H. Beck, München 2018) paras 31 et seq.

[18] Oberlandesgericht Graz, 22.11.2012, CISG-online 2459; Oberlandesgericht Hamm, 9.6.1995, CISG-online 146; Christoph Brunner and others, 'Article 46', in Christoph Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Wolters Kluwer, Alphen aan den Rijn 2019) para 37; Huber, 'Article 46', para 40; Müller-Chen, 'Article 46', para 36; Magnus, 'Article 46', para 65; Hwa Kim, *Die Nacherfüllung als Rechtsbehelf des Käufers nach CISG, deutschem und koreanischem Recht* (Mohr Siebeck, Tübingen 2014) 62.

provision grants the seller the right to cure, even after the date for delivery but 'at his own expense'. Besides, the seller has to fulfil the cure without causing the buyer unreasonable uncertainty in regard to reimbursement of any expenses advanced. This means that independent of the fact that the seller has offered cure under Article 48 of the CISG and the buyer has accepted this or that the buyer asked for cure under Article 46 of the CISG and the seller has accepted this, the seller has to bear the costs of replacement or repair.[19] The seller cannot make the cure dependent on any advance payment by the buyer or invoice any parts of the remedying process to the buyer. Any costs related to replacement that were carried by the buyer need to be reimbursed.

Having said this, the question remains: on which grounds do the costs incurred by the buyer during the replacement process have to be reimbursed? Is this a 'simple' damages claim governed by Articles 74 and 79 of the CISG, or is it a special reimbursement claim directly based on Article 46/48 of the CISG and, therefore, not subject to the restrictions of Articles 74 and 79 of the CISG? There seem to be several views in doctrine favouring a special reimbursement claim where the foreseeability requirement and the *force majeure* defence would not kick in.[20] The wording of Article 48 is put forward to support this view given that it mentions the right of the buyer 'to claim damages as provided for in this Convention' alongside the right of the buyer to be reimbursed for advanced expenses. It seems as if the drafters wanted to differentiate between these two claims.

However, the majority view does not distinguish between a claim for reimbursement and one for damages.[21] The courts follow this approach.[22] In a case decided by the Austrian High Court (OGH), where the facts were almost identical to the *Weber/Putz* decision, an Italian seller had delivered glass mosaic tiles

[19] The predominant view under the CISG seems to be that the seller can choose the type of remedy if both are equally suitable to remedy the non-conformity: Huber, 'Article 46', para 42; Müller-Chen, 'Article 46', para 3; Andreas Leukart, *The Seller's Right to Cure* (Helbing Lichtenhahn, Basel 2013) para 243; Miquel Dels Sants Mirambell Fargas, *The Seller's Right to Cure under Article 48 CISG* (Eleven International Publishing, The Hague 2018) 221 et seq.

[20] Cf. e.g. Leukart, *The Seller's Right to Cure*, paras 271 et seq.; Mirambell Fargas, *The Seller's Right to Cure under Article 48 CISG*, 193; Huber, 'Article 48', para 20; Markus Müller-Chen, 'Article 48', in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed, OUP, London 2016) para 8; Anton K. Schnyder and Ralf Michael Straub, 'Article 48', in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (2nd edn, Springer, Berlin Heidelberg 2010) para 18.

[21] Ingeborg Schwenzer, 'Article 74', in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed, OUP, London 2016) para 25; Magnus, 'Article 46', para 50 and 'Article 74', para 41; Peter Schlechtriem and Ulrich Schroeter, *Internationales UN-Kaufrecht*, (6th edn, Mohr Siebeck, Tübingen 2016) para 459; Matthias Weller, 'Die "Abhilfen" des Käufers im Kommissionsvorschlag für ein Gemeinsames Europäisches Kaufrecht: Neujustierung des Nacherfüllungsanspruchs im Rechtsvergleich' (2012) 9 *Zeitschrift für das Privatrecht der Europäischen Union* 173, 176; Brunner and others, 'Article 46', para 24; Jens Kleinschmidt, 'Appendix to Article 9:102(1)', in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (OUP, Corby Northants 2018) para 4; Bruno Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods* (3rd edn, OUP, Oxford 2018) para 5.29; Djakhongir Saidov, *The Law of Damages in International Sales* (Hart, Oxford/Portland 2008) 218–19; Ingeborg Schwenzer and Ilka Beimel, 'Replacement and Repair of Non-Conforming Goods under the CISG' (2017) 17 *Internationales Handelsrecht* 185, 187.

[22] Oberlandesgericht Hamm, 9.6.1995, CISG-online 146.

produced in India to an Austrian buyer. After the tiles were laid, the buyer found out that they were partly defective. The buyer made a cover purchase, removed all tiles (defective as well as contract-conforming ones as they were incompatible with the new ones) and laid out the new tiles. The OGH granted further to the difference of the cover purchase also the costs of removal and reinstallation.[23]

This approach seems to be convincing, as there is no compelling reason to introduce a discussion typical to Germanic legal systems into the CISG. From an economic perspective, the aim of the liability rules should certainly be to burden the producer as the one liable for the defect with the final cost of curing defective performance as well as all other losses incurring due to non-conformity. This way the producer will be forced to internalize the costs of producing defective goods and, thereby, incentivized to practise more care during the production process.[24] Given that the seller is mostly not the producer and a direct claim against the producer is not given under most jurisdictions,[25] the correct way to reach this goal would be by holding the seller liable for damages.

The CISG regime is perfectly suitable to serve this goal without introducing a separate claim for costs under Article 48.[26] Even though Article 74 of the CISG is limiting damages to losses, which were foreseeable at the time of conclusion of the contract, it is obvious that removal and reinstallation costs will be conceivable for any seller trading with goods that need to be installed in other goods or immovables. Also, the exemption clause of Article 79 of the CISG should not be seen as a risk, given that cases where the seller can exempt himself from delivering non-conforming goods are extremely rare.[27] This means that under the CISG system the buyer will almost always be able to receive compensation for the incurred costs as damages.

A remaining question is how a situation has to be judged where the costs of replacement are unreasonably burdensome. Here, again, the CISG system does not need a special provision. The first limit to the remedy of replacement is always the 'fundamental breach' requirement stated in Article 46(2) of the CISG. If non-conformity can be cured easily and without unreasonable inconvenience to the buyer by repairing the goods, the breach itself will not be qualified as fundamental, and the buyer will have no right to ask for replacement.[28] However, if the defective goods are irreparable and the costs of replacement are

[23] OGH, 15.1.2013, CISG-online 2398.

[24] Wagner, 'Der Verbrauchsgüterkauf in den Händen des EuGH: Überzogener Verbraucherschutz oder ökonomische Rationalität?', at 106–7.

[25] Compare on such direct claim Martin Ebers and others, European Perspectives on Producers' Liability, Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress (Sellier, München 2009) passim.

[26] Introducing a separate claim under Article 48 would only trigger long discussions on what exactly counts as removal or re-installation costs in comparison to losses encountered due to defective delivery, Kleinschmidt, 'Appendix to Article 9:102(1)', para 4.

[27] See Atamer, 'Article 79', para 74 et seq.

[28] Magnus, 'Article 46', para 40; Huber, 'Article 46', para 33; Müller-Chen, 'Article 46', para 26.

disproportionate to the benefits to be gained by the buyer from the replacement, the seller needs to be granted a defence against this claim, just as it is under Article 13(3) of Council Directive 2019/771.[29] The reason for excluding a specific performance claim under such circumstances is the idea that the law should not encourage economically irrational behaviour. Whenever a cost-benefit analysis shows a blatant disproportion between the costs of a substitute delivery and the interest of the buyer in receiving performance, the seller ought to have the right to refuse a performance claim.[30]

The justification for the obligor's defence in cases of such disproportionality can be found in a general principle underlying the CISG.[31] In fact, Article 46(3) of the CISG states that a claim for repair can be blocked whenever such request is 'unreasonable'.[32] Article 79(1) of the CISG supplies a parallel argument exempting the obligor from liability in damages if he cannot 'reasonably' be expected to have overcome the consequences of an unforeseen impediment. This idea of 'reasonableness' deserves to be generalized under Article 7(2) of the CISG as a general principle and to be applied also whenever a claim for replacement becomes unreasonably costly.[33] Under such circumstances, the buyer would have the right to terminate the contract and claim damages or to reduce the contract price.

III. Restitution of benefits received from defective goods prior to replacement or from replacement with a newer model

1. Benefits received from replacement under EU consumer law

A. Benefits received from using a defective stove-set under EU consumer law (Quelle decision)

In August 2002, Quelle (the seller) delivered to Brüning a 'stove-set' for private use. In early 2004, Brüning detected a non-conformity and returned the stove to the seller as repair was not possible. The seller replaced it with a new appliance; however, he required Brüning to pay €69.97 as compensation for the benefit, which she had obtained from use of the stove initially delivered. The seller argued that the applicable German law at that time granted the seller such

[29] See above fn. 12 and related text.

[30] Atamer, 'Article 79', para 36.

[31] Atamer, 'Article 79', para 39.

[32] Cf. Müller-Chen, 'Article 46', para 40 on how the costs of repair can play a role when deciding on the reasonableness requirement.

[33] Cf. on the qualification of the reasonability criteria as a general principle on which the CISG is based in Perales Viscasillas, 'Article 7', in Stephan Kröll and others (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, C.H. Beck, München 2018) para 64; Franco Ferrari, 'Article 7' in Peter Schlechtriem and others (eds), *Kommentar zum UN-Kaufrecht (CISG)* (7th edn, Helbing Lichtenhahn, Basel 2019) para 53.

compensation (section 439(4)[34] and section 346 of the BGB) and, besides, that the stove had functioned perfectly until the defect became apparent. If no such compensation would be allowed for, the buyer could use the same goods for a longer period of time for the same amount of money. This would lead to an unjust enrichment.[35] The question referred to the CJEU was whether the German law provisions were compatible with the Council Directive 1999/44.

The CJEU rejected the arguments of the seller and declared that section 439(4) in relation with section 346 of the BGB were violating EU law and needed to be interpreted in line with Council Directive 1999/44:[36]

> If a seller delivers goods which are not in conformity, it fails correctly to perform the obligation which it accepted in the contract of sale and must therefore bear the consequences of that faulty performance. By receiving new goods to replace the goods not in conformity, the consumer—who, for his part, paid the selling price and therefore correctly performed his contractual obligation—is not unjustly enriched. He merely receives, belatedly, goods in conformity with the specifications of the contract, which he should have received at the outset.

The Court also emphasized that the EU legislator wanted to protect consumers from the risk of financial burdens, which might dissuade them from asserting their rights if bringing of goods into conformity would not be 'free of charge'. Having to compensate any usage of the defective goods would result exactly in such a financial burden.

Just like the *Weber/Putz* decision, the *Quelle* decision was also incorporated by the EU legislator into the 2019 Sales Directive by stating in Article 14(4) that '[t]he consumer shall not be liable to pay for normal use made of the replaced goods during the period prior to their replacement'. The only addition made by the drafters is that the consumer shall be liable if the usage was not 'normal'. The Recitals state that '[t]he use of the goods should be considered normal if it is in accordance with the nature and purpose of the goods'.[37] In the limited literature that has been published until now on this Directive, excessive usage and destruction of the goods by the buyer are given as examples for such abnormality where the buyer would need to pay compensation.[38] However, this view does not seem convincing in regard to cases where the goods cannot be returned as they have perished. First of all, the Directive does not provide for any rules

[34] Today it is § 439(5) BGB.

[35] This was also the argument brought forward in the explanatory memorandum of the law introducing § 439(4): BT-Drucks. 14/6040, p. 232–33.

[36] Case 404/06, *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECLI:EU:C:2008:231, para 41. Cf. on this case Peter Rott, 'The Quelle Case and the Potential of and Limitations to Interpretation in the Light of the Relevant Directive' (2008) 16 *European Review of Private Law* 1119, 1119 et seq.

[37] Article 112 of the Common European Sales Law (CESL) had also followed the *Quelle* decision in its Article 112(2). For more details, see Freyderyk Zoll, 'Article 112' in Reiner Schulze (ed), *Common European Sales Law (CESL)—Commentary* (C.H. Beck/Hart Publishing/Nomos, München/Oxford/Baden-Baden 2012) para 7, 13–14.

[38] Brigitta Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel' (2019) 16 *Zeitschrift für das Privatrecht der Europäischen Union* 115, 130.

applicable in case of an impossibility to return the goods. The issue of whether the consumer has the right to avoid the contract or ask for replacement if the goods cannot be returned is left to national laws to decide (Article 16(3), lit. 2).[39] There are different approaches in national laws, especially regarding the distribution of risk when goods perish accidentally.

Assuming that the national law gives the buyer/consumer the right to ask for replacement even if he cannot return the goods, it would still be questionable whether the consumer would need to pay compensation for using the defective goods before they perished. Under national laws, the seller might have a right to ask for any surrogate the consumer has received—for example, damages paid by a third party who is responsible for the loss of the goods or payment by an insurance company. However, any compensation claim for usage should be dependent on whether the goods were used excessively before they perished. Obviously, this excessive usage might be the very reason why the goods perished. In such case, the consumer would have to compensate for this usage under Article 14(4) of the 2019 Sales Directive, and might also be liable to compensate the value of the defective goods under national laws. But the second claim is not governed by the Directive.[40]

How exactly the amount to be paid by the consumer is to be calculated in case of such an excessive usage remains open to discussion. If, for example, an oven bought by a consumer was employed later in a bakery and was used several times a day, which is unusual for home use, the seller should have the right to ask for the benefit of this excessive usage before the oven became defective. It would make sense to calculate the benefit by way of putting the price paid and the average life span of an oven into relation. If, for example, an oven can be used for eight years and the price was €1,000, the yearly benefit of usage is €125. If the oven was used excessively for 12 months before the defect forced the consumer to ask for replacement, the benefit for that whole year (€125) could be claimed by the seller.[41]

[39] 2019/771 Sales Law Directive, Recital No 18 and 60. Cf. on the different approaches in national laws and in uniform law projects Phillip Hellwege, 'Article 9:306' in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (OUP, Corby Northants 2018) para 18 et seq.; Ingeborg Schwenzer and others, *Global Sales and Contract Law*, paras 47.171–77; Christina Fountoulakis, 'Article 82' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP, London 2016) paras 3–4.

[40] Given that the Directive 2011/83/EU on Consumer Rights expressly provides in Article 14(2) for a compensation of any 'diminished value' of the goods in case of withdrawal it has to be reasoned that this issue was known to the EU legislator and intentionally not introduced into the 2019 Sales Directive. According to the Consumer Rights Directive, a consumer making use of his or her right of withdrawal is only obliged to pay for the diminished value of the goods 'resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods'. It has to be submitted that it would have been more reasonable to burden the consumer with payment of the lesser value of the goods returned instead of holding him liable for the 'abnormal' usage made of the defective goods since the second value is new to EU consumer law and its calculation yet unclear.

[41] This method of estimation is employed by the German High Court to calculate the benefits of usage whenever a sales contract is avoided and the goods have to be returned together with the benefits derived from the goods (§ 346(1) BGB). Cf. on this approach Hubert Schmidt, '§ 346

B. Benefits received from replacement with a newer version of the goods under EU Consumer Law

The *Quelle* decision and the 2019 Sales Directive leave the question open in regard to whether the consumer has to pay the difference if the substitute goods are of a better quality or a newer model. If, for example, the sold car is defective and the seller can only solve the issue by delivering a newer model of the car (since the old model is not produced anymore), the question arises: whether the buyer, first, has a right to ask for replacement with the new model and second, whether the seller can make this replacement conditional on payment for the difference in improvement. As will be discussed below, this question became especially acute in Germany in the context of the Volkswagen (VW) emission scandal.

Given that newly produced cars have to be qualified as unascertained (generic) goods, replacement with a comparable car is, in principle, possible. However, if the specific series is sold out and not produced anymore, national courts might tend to qualify this as an 'impossibility' that, according to Article 3(3) of the 1999 Directive and Article 13(3) of the 2019 Directive, is listed as grounds for denying a replacement claim by the buyer. There is no decision of the CJEU that clarifies what exactly this 'impossibility' means. The 1999 Directive only states in its Recital no. 16 that replacement of second-hand goods is impossible. This seems to favour an interpretation that for any new goods impossibility cannot be the case.[42] The 2019 Sales Directive, in turn, defines in its Recital no. 48 that '[t]he consumer's choice between repair and replacement should only be limited where the option chosen would be legally or factually impossible'. The term 'factual impossibility', again, leaves room for interpretation. However, as the Directive aims to contribute to the attainment of a high level of consumer protection, the better view seems to be to reject impossibility in such cases and to give the consumer the right to claim also a newer model of the defective goods. This solution also seems favourable in light of the pace of change in electronic products. Some goods, like cell phones, can even have more than one newer version in a year. If these versions cannot qualify as substitutes the remedy of substitution would often be eliminated, especially where the defect is a systemic one concerning all products of a certain model and thereby disqualifying these in total for any replacement.

If both Consumer Sales Directives were interpreted to allow for a replacement with a newer model, the second question would be whether the seller could make this replacement subject to an additional payment for this 'upgrade'. In principle, this has to be denied given that the costs of replacement have to be carried by the seller, as underlined by the CJEU in the *Quelle* decision. However, in this decision, the CJEU also shows a way out for the seller:

BGB', in Bamberger and others (eds), *Beck'scher Online Kommentar zu BGB* (51th ed, as of 01.08.2019) para 47; Jürgen Oechsler, *Vertragliche Schuldverhältnisse* (2nd edn, Mohr Siebeck, Tübingen 2017) para 294.

[42] Parallel Ivo Bach, *Leistungshindernisse* (Mohr Siebeck, Tübingen 2017) 619.

> The fact remains that the seller's financial interests are protected, on the one hand, by the two-year time-limit laid down in Article 5(1) of the Directive and, on the other, by the fact that, under the second subparagraph of Article 3(3) of the Directive, it may refuse to replace the goods where that remedy would be disproportionate in that it would impose unreasonable costs on the seller.[43]

If the seller is able to prove that replacement with a newer model would 'impose unreasonable costs' on him (especially also in comparison to repair), he can reject this type of cure and offer repair as an alternative. If repair is not possible, the consumer would have to make use of his right either to avoid the contract and ask for damages under national law or to reduce the sales price.

2. *Benefits received from replacement under German law*

A. *Benefits received from using non-conforming goods under German law*

After the *Quelle* decision, the German High Court was confronted with the difficult task of interpreting the BGB against its express wording so that it would comply with the requirements of the CJEU.[44] But the German parliament reacted quickly and introduced a provision stating that the buyer in a consumer sales contract is not required to compensate for any benefits derived from defective goods where they were replaced (section 474(2), today section 475(3) of the BGB).[45] However, the lawmaker chose to introduce this rule only for B2C sales. In B2B sales, the buyer remains obligated to reimburse any benefits gained up to the point of returning the defective goods.

In literature, this choice was partly criticized as there are no compelling reasons for a differentiation between B2C and B2B.[46] There are, indeed, several arguments against such restitution of benefits that are valid for B2B as well B2C contracts. First of all, other than in cases of avoidance, the seller is not returning the benefits—that is, the interest he gained from the sales price that was paid at due date. This is causing an imbalance in favour of the seller, who is the one breaching the contract and triggering the replacement remedy.[47] Another argument brought forward is that the buyer is almost forced to make a second

[43] Case 404/06 Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände [2008] ECLI:EU:C:2008:231, para 42.

[44] BGH, 26. 11. 2008 – VIII ZR 200/05, (2009) 62 *Neue Juristische Wochenschrift*427, 427. Cf. on this discussion Thomas Pfeiffer, 'Richtlinienkonforme Auslegung gegen den Wortlaut des nationalen Gesetzes—Die Quelle-Folgeentscheidung des BGH' (2009) 62 *Neue Juristische Wochenschrift* 412, 412–13; Beate Gsell, 'Anmerkung zu BGH, Urteil vom 26. 11. 2008 – VIII ZR 200/05' (2009) 64 *JuristenZeitung* 522, 522–6.

[45] BGBl. 2008 I 2399 (at p. 2400).

[46] Cf. in detail about the different arguments in German literature Stephan Tillkorn, *Der Nutzungsersatz im Kaufrecht* (Nomos, Baden-Baden 2013) 56 et seq. In favour of the decision of the lawmaker Wagner, 'Der Verbrauchsgüterkauf in den Händen des EuGH: Überzogener Verbraucherschutz oder ökonomische Rationalität?', 114.

[47] Gsell, 'Anmerkung zu BGH, Urteil vom 26. 11. 2008 – VIII ZR 200/05' 525; Tillkorn, *Der Nutzungsersatz im Kaufrecht* 62 et seq.; Christopher Woitkewitsch, 'Nutzungsersatzanspruch bei Ersatzlieferung?' (2005) 20 *Verbraucher und Recht* 1, 2.

payment for goods that he might have intended to use only for two years. [48] Indeed, if, for example, a cell phone breaks down after 18 months of usage and the commercial buyer asks for replacement, he will probably have to pay more than one-third of the sales price, given that the average lifespan for cell phones is roughly four years. However, this calculation obviously presupposes that the buyer will also want to use the new phone for another two years, which might not be correct.[49] As with many other electronic goods, new versions with new specifications are introduced in much shorter periods.[50]

The distinction between B2B and B2C contracts is even more disturbing as it is also much debated under German law whether the buyer will have an additional two-year limitation period for any defects the replaced goods might show later.[51] The High Court has not ruled on the issue until today. If the replaced goods were subject to the remaining limitation period as the initially delivered defective ones (in the cell phone example of six months), the buyer would be forced to pay for the same goods a second time without even having a remedy for the additional period of usage. Finally, the seller might also have the chance to resell the replaced goods at a lower price if repair is possible. This means the seller would gain the normal sales price plus the benefits the buyer has derived in the 18 months, and, in addition, the second-hand sales price, if he can resell the repaired goods. However, despite all this criticism, the German legislator did not change their approach during the 2018 revision of the BGB. In B2B contracts, the seller still has a right to ask for restitution of benefits if the defective goods are replaced (section 439(5) of the BGB).

B. Benefits received from replacement with a newer version of the goods under German law

The second question—of whether the seller is obliged to deliver a newer model of the defective goods if the old model cannot be procured anymore or whether he can argue that replacement has become impossible—has been decided very recently by the German High Court.[52] The issue became a hot topic in relation

[48] Tillkorn, Der Nutzungsersatz im Kaufrecht 96 et seq.

[49] Compare for a study made in the USA where the replacement cycle length of smartphones in 2019 is indicated as 2.83 years for consumers and 2.51 years for enterprises. This figure is estimated to go down for consumers to 2.74 and for enterprises to 2.43 years in 2023: <https://www.statista.com/statistics/619788/average-smartphone-life/>.

[50] Beate Gsell, 'Nutzungsentschädigung bei kaufrechtlicher Nacherfüllung?' (2003) 56 *Neue Juristische Wochenschrift* 1969, at 1972.

[51] For this discussion see Tillkorn, *Der Nutzungsersatz im Kaufrecht* 88 et seq.; Harm Peter Westermann, '§ 438 BGB' in Harm Peter Westermann (ed), *Münchener Kommentar zum BGB* (8th ed, C.H. Beck, München 2019) para 4 ("Kettengewährleistung"); Oechsler, *Vertragliche Schuldverhältnisse* para 461.

[52] The BGH issued an indicative order („Hinweisbeschluss") as many lower courts confronted with the same questions were deciding differently, however a final decision by the BGH could not be taken as the matter was settled by the sellers each time a revision was sought by the buyers. BGH, Hinweisbeschluss vom 8.1.2019 – VIII ZR 225/17, (2019) 72 *Neue Juristische Wochenschrift* 1133, 1133–7. Cf. on this decision Stefan Arnold, 'Schuldrecht BT: Sachmangel und Ersatzlieferung im Diesel-Abgasskandal' (2019) 59 *Juristische Schulung* 489, 489 et seq. See

to the VW emission scandal.[53] The buyer of a VW Tiguan 2.0 TDI, which was equipped with a manipulated software program, demanded replacement of the car. However, the available comparable version was the follow-up model, the so-called 'VW Tiguan second generation', with slightly bigger dimensions and a higher maximum speed. The seller argued that this was a new car and could not serve as a replacement. The BGH did not follow this line of argument. According to the Court:

> [i]t should be noted. . .that when purchasing a new vehicle, the production and market entry of a successor model is typically to be expected. The parties, namely the car dealer, are usually aware at the time of the conclusion of the sales contract that the car manufacturer can change models after a certain period, and will no longer produce the previous model. On the market, the successor model replaces the outdated predecessor model. As a rule, successor models are further developed in many respects, whether through classification according to new European emission standards and changes in engine technology, through advances in safety and assistance systems and the corresponding more extensive use of control software, through changes in dimensions, weight, fuel consumption and design language, or through increased comfort. This way, the successor model on the market supersedes and replaces its predecessor.

The BGH especially underlines that qualification of the goods as specific or unascertained (generic) goods has to be made by taking into account the purpose of the contract and the perceivable will of the parties, given that section 439 of the BGB does not require delivery of an identical item as replacement.[54] This provision only requires delivery of a contract-conforming, but otherwise similar and—functionally as well as contractually—equivalent item. Replacement, therefore, is not limited to supplying a contract-conforming item that is identical to the object of purchase. Rather, it must be determined whether the contracting parties regarded the goods as exchangeable. The content and scope of the procurement risk assumed by the seller is to be determined by the interpretation of the sales contract in accordance with the interests involved. It has to be underlined that the BGH does not limit its decision to B2C sales but, rather, speaks of 'a sales contract' without specifying the parties.

The only open door that the German Court leaves for sellers, parallel to the CJEU decision, is the argument that the remedy would be disproportionate if it would impose unreasonable costs on the seller. The decision states that the first sales agreement was concluded for €31,350 and that the second-generation car would cost the seller €28,000 minus the proceeds of the returned first car, which

also Kolja van Lück, 'Kaufrechtliche Ansprüche des Käufers im Diesel-Abgasskandal' (2019) 34 *Verbraucher und Recht* 8, 8–14 for an overview of the several lower court decisions.

[53] <https://en.wikipedia.org/wiki/Volkswagen_emissions_scandal>.

[54] This line of thought is parallel to the previous decisions of the BGH underlining that even for specific goods like used cars a replacement can be existent as long as the interpretation of the contract, taking account of all circumstances, reveals such intention of the parties. Cf. BGH, 7.6.2006 – VIII ZR 209/05, (2006) 59 *Neue Juristische Wochenschrift* 2839, 2839 and Bach, *Leistungshindernisse* 616 et seq.

is assessed at €19,330. However, the BGH leaves the final assessment of disproportionality to the lower courts.

The indicative order of the BGH was applauded by some[55] and harshly criticized by others.[56] Those authors in favour underlined that any other approach would make the remedy of replacement dependent on a contingency that the buyer cannot know in advance. At a random moment in time when the producer decides to stop the production of exactly the same model of goods, the buyer would lose his replacement remedy. Besides, it would often be a matter of difficult interpretation whether the new model involved only a simple 'facelift' or a real technical upgrade.[57] It is argued that the seller is sufficiently protected by his defence that replacement would be a disproportionate remedy. The opponents, on the other hand, underlined—among others—that contract interpretation would lead to no reliable result in the majority of sales agreements, and it would be left to the courts to decide whether the newer model could really qualify as a substitute or not.[58] Besides, they argue that this approach can easily backfire on the buyer as the seller is now given the right to fulfil the contract with something other than exactly what was contracted for and the buyer cannot object to this performance.[59] It remains to be seen how the lower courts will react to the indicative order of the BGH.[60]

The indicative order of the BGH deals not expressly with the question of whether the buyer will have to pay an additional fee for the second-generation car should the lower courts order the seller to replace. Regarding B2C sales, German authors agree that the wording of the *Quelle* decision stating that free of charge 'means that the seller cannot make any financial claim in connection with the performance of its obligation to bring into conformity the goods to which the contract relates' is too broad to allow for such a 'new for old' payment.[61] However, regarding B2B sales contracts, the issue remains unclear.

[55] Ansgar Staudinger/Rudi Ruks, 'Hinweise aus Karlsruhe zu § 439 BGB im "Dieselskandal"' (2019) 72 *Neue Juristische Wochenschrift* 1179, 1179 et seq.; Michael Heese, 'Was der Dieselskandal über die Rechtsdurchsetzung, deren Protagonisten und die Funktion des Privatrechts verrät' (2019) 32 *Neue Zeitschrift für Verkehrsrecht* 273, 273 et seq. In the same vein already before the indicative order of the BGH: Bach, *Leistungshindernisse* 630–1.

[56] Thomas Riehm, 'Der Anspruch auf Nachlieferung, Insbesondere in den "Diesel-Abgas-Fällen"' (2019) *Zeitschrift für Wirtschaftsrecht* 589, 589 et seq.; Beate Gsell, 'Entscheidungsrezension' (2019) *Entscheidungen zum Wirtschaftsrecht, Kurzkommentare*, 429, 429–30.

[57] Staudinger/Ruks, 'Hinweise aus Karlsruhe zu § 439 BGB im "Dieselskandal"' 1179–80.

[58] Riehm, 'Der Anspruch auf Nachlieferung, Insbesondere in den "Diesel-Abgas-Fällen"' 591.

[59] Gsell, 'Entscheidungsrezension' 430.

[60] Several of the regional appeal courts have meanwhile followed the approach of the Bundesgericht and decided that VW has to replace with a newer model and that this is not a disproportionate remedy in the given circumstances. See OLG Stuttgart (5. Zivilsenat), Urteil vom 29 Juli 2019 – 5 U 45/18, (2019) 73 *Wertpapiermitteilungen Zeitschrift für Wirtschafts- und Bankrecht*2085, 2085; OLG Hamburg (4. Zivilsenat), Urteil vom 15 Juli 2019 – 4 U 97/17, (2019) *BeckRechtsprechung* 16548, 16548.

[61] Gsell, 'Anmerkung zu BGH, Urteil vom 26. 11. 2008 – VIII ZR 200/05' 525; Carsten Herresthal, 'Die Richtlinienwidrigkeit des Nutzungsersatzes bei Nachlieferung im Verbrauchsgüterkauf' (2008) 61 *Neue Juristische Wochenschrift* 2475, 2475–6.

Given that the VW emission scandal will trigger several more judgments, the question will stay on the agenda of German lawyers for some years to come.

3. *Benefits received from replacement under the CISG*

A. *Benefits received from using non-conforming goods under the CISG*

Article 84 of the CISG provides for the restitution of benefits where the buyer makes use of his remedy of replacement or avoidance. The parallel provision under the Convention Relating to a Uniform Law on the International Sale of Goods (Article 81) only governs restitution in relation to avoidance. However, the Working Group drafting the CISG decided to add an explicit reference also to the remedy of replacement as the interests of the parties involved are partly parallel to avoidance.[62] Articles 82–4 were adapted accordingly, but the section heading remained as 'Effects of Avoidance'.

Article 82(1) of the CISG limits the right to avoid as well as the right to require substitute delivery if the goods cannot be returned substantially in the condition in which the buyer had received them.[63] Paragraph 2 of Article 82 lists exceptions to this rule that are circumstances where the goods cannot be returned, but the buyer is still entitled to ask for replacement or to avoid the contract. Article 84, in turn, deals with the details of restitution where the buyer has a right to avoid or to ask for replacement within the limits of Article 82. But given that the replacement remedy is only mentioned once under Article 84(2)(b), the question of to what extent the remaining sections of Article 84 are suitable to be applied to a claim for replacement is still being debated today.

The structure of Article 84 is as follows: the first paragraph provides for the obligation of the seller to refund the price plus interest. It is obvious that this paragraph cannot be applied if the goods are only replaced. In this variant, the contract remains intact, and the seller keeps the payment as well as the interest. The second paragraph relates to the buyer's obligations: 'The buyer must account to the seller for all benefits which he has derived from the goods' if subparagraph (a) or (b) finds application. Subparagraph (a) covers cases where the goods are actually returned, while subparagraph (b) applies where the goods cannot be returned but the buyer still has a right to request replacement or to avoid the contract, since one of the exceptions listed in Article 82(2) applies.

It is interesting to see that the CISG commentators—other than, for example, in Germany for B2B sales—almost unanimously rejected a claim by the seller for benefits under subsection (a)—that is, when the non-conforming goods are actually returned to the seller and conforming ones are delivered to the buyer.[64]

[62] Cf. John O. Honnold, *Documentary History of the Uniform Law for International Sales* (Kluwer Law and Taxation Publishers, The Netherlands and Boston 1989) 188–90.

[63] For the ease of reading, this part of Article 82 is not going be repeated in the text. When speaking of "returning the goods" it should be understood to refer to returning the goods "substantially in the condition in which the buyer received them".

[64] Cf. e.g. Michael Bridge, 'Article 84' in Stephan Kröll and others (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, C.H. Beck, München 2018), para

The buyer's duty to account for the benefits is qualified as the counterpart of the seller's duty to pay interest on the price received.[65] Given that price plus interest is not refunded in case of replacement, the buyer should also not be liable for any benefit from using the goods until they became defective. Other than in cases of avoidance, the replacement remedy keeps the contract intact, and, therefore, the right of the buyer to benefit from the goods does not become unjustified.[66] As the drafters knowingly abstained from introducing a reference to the remedy of replacement of goods in subsection (2)(a), it is certainly the preferable view to exclude any claim for restitution of benefits where the non-conforming goods are actually returned and conforming ones delivered instead.[67] The arguments listed above in relation to the discussion of B2B sales in Germany are all also valid under the CISG.[68]

Article 84(2)(b), however, expressly refers to the replacement remedy and burdens the buyer to account for all the 'benefits derived from the goods' if it is impossible for him to return the goods, but he has nevertheless the right to ask for replacement under Article 82(2). How shall this provision be interpreted in light of the above?

The drafting history and the way the replacement remedy was appended to the already existent provisions on restitution in case of avoidance seem to indicate that the drafters were especially concerned with cases where the non-conforming goods could no longer be returned.[69] Therefore, the first issue resolved in Article 82(1) was to limit the replacement remedy, just like avoidance, only to cases where the goods could actually be returned. However, the

17; Magnus, 'Article 46', para 48 and 'Article 84' para 20; Christoph Brunner and Jurij Santschi, 'Article 84', in Christoph Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Wolters Kluwer, Alphen aan den Rijn 2019), para 7; Rolf H. Weber, 'Article 84' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (2nd ed, Springer, Berlin Heidelberg 2010), para 12; Peter Schlechtriem and Ulrich Schroeter, *Internationales UN-Kaufrecht* (6th edn, Mohr Siebeck, Tübingen 2016) para 781; Franco Ferrari, 'Article 84', in Franco Ferrari and others (eds), *Internationales Vertragsrecht, Rom I-VO, CISG, CMR, FactÜ, Kommentar* (3rd edn, C.H. Beck, München 2018), para 12; Peter Mankowski, 'Article 84' in Peter Mankowski (ed), *Commercial Law* (C.H. Beck/Hart Publishing/Nomos, München/Oxford/Baden-Baden 2019) para 12; Peter Huber, 'Article 84 CISG' in Harm Peter Westermann (ed), *Münchener Kommentar zum BGB* (8th edn, C.H. Beck, München 2019), para 11.

65 Bridge, 'Article 84', para 17.

66 Huber, 'Article 84 CISG', para 11.

67 The view expressed in doctrine that in cases governed by Article 84(2)(a) there will only rarely be benefits of the defective goods for which the buyer will have to account for does not seem to reflect reality (cf. e.g. Christina Fountoulakis, 'Article 84', in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, (4th ed, OUP, London 2016) para 5). As already seen from the real-life examples above, a defective machine e.g. can work perfectly well for 23.5 months before the defects become apparent. In case the buyer has the right to ask for replacement, as the machine cannot be repaired, the issue of whether benefits from using this machine for 23.5 months can be claimed by the seller has to be raised also under the CISG. Under such circumstances, the question that needs to be answered is, if the buyer has to account for e.g. the lease price of the same machine for 23.5 months.

68 Cf. above the text relating to fn. 46–51.

69 Cf. from literature Hermann Weitnauer, 'Article 79 ULIS' in Hans Dölle (ed), *Kommentar zum Einheitlichen Kaufrecht* (C.H. Beck, München 1976) para 5 who was suggesting that Article 79 ULIS should be applied per analogy also to claims for replacement.

exceptions to this limitation listed in paragraph (2) of Article 82 were to apply also in case of replacement. Therefore, in Article 84(2), it had to be underlined that the buyer has to at least account for any benefits gained as a substitute for the goods (which he could no longer return). But benefits gained from using the goods are not covered under subparagraph (2)(b) as these do not have to be accounted for even if the buyer could actually return the defective goods.[70] It would not make any sense to hold him liable for such benefits just because the defective goods can no longer be returned.

What exactly are these benefits that the buyer would need to account for under subparagraph Article 84(2)(b)? The exceptions mentioned in Article 82(2) already lead the way: the first exception relates to cases where returning the defective goods becomes impossible for the buyer without his act or omission being the reason for this impossibility. However, if the buyer should get payment from an insurance company and/or damages from a third party liable for the loss, this benefit has to be passed on to the seller. This is a surrogate for the lost goods, and the seller has the right to demand payment of this amount. Leaving this amount to the buyer and giving him, in addition, the claim for new goods would lead to enrichment.

If the goods cannot be returned by the buyer as he has already resold them (Article 82(2)(c)), the question will arise whether the proceeds of the resale will now qualify as benefits gained in return for the defective goods. This cannot be convincing. The buyer/sub-seller will normally ask for replacement only if his sub-buyer has asked for replacement too. This means he will have to pass on the conforming goods to the sub-buyer and the non-conforming goods, returned by the sub-buyer, he will pass on to the seller. However, in cases where the defective goods were lost while with the sub-buyer without any surrogate payment made by third parties, and the sub-buyer is given a replacement claim against his sub-seller as that the loss was not due to his act or omission (Article 82(2)(a)), the sub-seller will claim from his seller delivery of conforming goods as replacement. Should the seller have a right to ask for the sales proceeds under such circumstances? The answer is certainly no as there is no obvious reason why the seller should have a right to claim the higher sales value in the second sales contract as both sales contracts are still intact.[71] The buyer/sub-seller has a

[70] Parallel Huber, 'Article 84 CISG', para 15.

[71] Statements made in literature that the buyer has to account for the proceeds of his sub-sale (*commodum ex negotione*) in case he has a right to replacement despite the sub-sale seem to be too sweeping (cf. e.g. Magnus, 'Article 84', para 24). As long as the buyer in the sub-sale also uses his remedy of replacement, the sub-seller does not have to account for any proceeds. If the sub-buyer avoids the contract and the goods are returned to the sub-seller it will be a case falling under Article 84(2)(a). If the sub-buyer asks for repair plus damages, the sub-seller will have no chance to ask for replacement in his contract, as the fundamental breach requirement for replacement will not be fulfilled. That means only in an admittedly rare case where the sub-buyer asks for price reduction plus damages and, the sub-seller can still ask for replacement as the breach is a fundamental one, one could think of the option that the proceeds of the second sales agreement have to be transferred to the first seller. Given that the sub-seller will have a damages claim against the seller, the profit from the second sale contract will most probably be set off.

right to retain his profit in the sub-sale. He will, again, simply pass on the conforming goods to his sub-buyer.

The last variation that needs to be checked is the case where goods are consumed or transformed by the buyer in the normal course of business, but, later, the goods turn out to be defective. Should the buyer be paying for the benefits he gained? If, for example, capacitors—which were bought and then integrated by a computer manufacturer into his products—later caused a defect in these computers, the manufacturer might ask for replacement so that he, in turn, can replace the capacitors in the computers he has already sold. If the old capacitors inevitably get damaged during replacement so that they are of no use to the seller anymore, can he ask his buyer (the manufacturer) to transfer any benefits to him? Again, the answer should be no, as there are no such benefits that could be seen as a surrogate to the lost capacitors.

In brief, in relation to the remedy of replacement, Article 84 of the CISG only provides for the restitution of surrogates that the buyer might receive in cases of loss of the non-conforming goods. However, the benefit of using the goods until the non-conformity becomes apparent is not an issue that Article 84 aims to address. The better view seems to be, just as it is accepted almost unanimously in doctrine, that in cases of replacement the buyer keeps these benefits as the seller is also keeping the benefit of using the money.[72]

B. Benefits received from replacement with a newer model of the goods under the CISG

The last issue that should be addressed here is the case where replacement involves the delivery of a better or newer model. First, does the buyer have a right under the CISG to claim this newer model as replacement? Second, if he has such a right does the buyer need to compensate the seller for this upgrade in the model?

(i) Can the buyer claim a newer model as replacement?

Whether or not the buyer has a right to claim delivery of a newer model of unascertained goods in cases where the old model has sold out or shows a systemic defect that cannot be cured by repair has not caught much attention in CISG case law and literature. However, a related question regarding the right to ask for replacement if specific goods are defective has been discussed. The view in literature is split: some commentators choose to interpret the term 'specific goods' more strictly. According to these authors, if the sale and delivery of a specific machine delivered duty paid (DDP) at the buyer's place is stipulated and the machine gets damaged during transit, the buyer would have no right to ask for a substitute delivery.[73] This result is based on the will of the parties,

[72] Cf. for a parallel approach PICC Article 7.3.6 Comment 6; DCFR III.-3:205(2). See also Kleinschmidt 'Appendix to Article 9:102(1)', para 9.

[73] Huber, 'Article 46', para 37.

especially the seller's intention to limit his liability to delivery of a specific product, thereby excluding the possibility that the buyer can ask for any substitutes. Such an interpretation overweighs also in cases where the seller has limited his delivery duty to a certain stock or to goods from a certain production facility.[74] Others in literature choose a more lenient approach where an item that is economically equivalent to the specific item contracted for and equally satisfying to the buyer's interest is available on the market.[75] Under such circumstances, the buyer should have the right to claim replacement.

In fact, these views can be reconciled easily as they both do not object to the fact that the parties' intention precedes. Given that the qualification of the goods as 'ascertained' or 'unascertained' is not legally predetermined but mainly a contractual issue, it seems to be the better view to start with the parties' will. If, for example, 'VW Tiguan 2.0 TDI cars on a certain truck' are sold by a German seller to a Turkish buyer DDP Istanbul, and the goods are damaged due to unexpected flooding on the road, it needs to be decided according to the contract if the seller is still under the obligation to provide new cars. The very logic of concluding a contract for a limited number of goods is to restrict the liability of the seller. Even if cars of the same series were available on the market the seller would not be liable to deliver new ones as the parties decided that the seller should not carry the procurement risk.[76] That means the buyer cannot ask for the delivery of new cars. If the buyer were to complete a cover purchase on the market he would also not be able to claim the price difference as damages since the impediment qualifies for an Article 79 exemption.[77]

However, if the contract terms define the delivery duty as '20 VW Tiguan 2.0 TDI cars DDP Istanbul', and the seller encounters the same flood with the same truck and the goods get lost, this time the seller would be under an obligation to deliver new cars as the contract burdens him with the risk. It is true that the buyer cannot claim compensation for any delay damages as the late delivery of the new cars is caused by an impediment beyond control (flood) that was unforeseeable at the conclusion of the contract. However, the seller can still claim delivery of other unascertained cars according to Article 79(5). If the seller should reject such delivery request and the buyer would instead avoid the contract and buy substitute goods on the market, he could claim the loss he encountered as damages, as these losses are not related to the impediment beyond control. The seller is only exempt from paying the delay damages.

[74] Peter Huber, 'Article 46' in Harm Peter Westermann (ed), *Münchener Kommentar zum BGB* (8th edn, C.H. Beck, München 2019) para 40; Brunner and others, 'Article 46', para 20.

[75] Müller-Chen, 'Article 46', para 18; Kim, Die Nacherfüllung als Rechtsbehelf des Käufers nach CISG, deutschem und koreanischem Recht 28–9; cf. for a parallel approach under CESL Bach, Leistungshindernisse 635 et seq.

[76] Ingeborg Schwenzer, 'Article 79' in Ingeborg Schwenzer (ed), Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG) (4th edn, OUP, London 2016) para 28.

[77] Cf. on the prerequisites of exemption Atamer, 'Article 79' paras 43 et seq.

Therefore, the relevant question—in cases where the delivery of '20 VW Tiguan 2.0 TDI' cars has been stipulated and the whole series is defective—is whether the parties really wanted to limit the risk of the seller. It has to be submitted that this stipulation is not comparable to the cases where delivery of a certain machine or cars on a certain truck have been contracted for. The seller has not limited his risk at all. In addition, it would be too far-fetched to read into the contract such a will of the parties. As long as 'VW Tiguan second generation' can serve as a commercially reasonable substitute of 'VW Tiguan 2.0 TDI', the buyer should have the right to insist on substitute delivery.

This approach facilitates also an interpretation of Article 46(2) parallel to Article 79 of the CISG. Although it is not expressly stated in the convention, Article 79 is generally understood in literature and jurisprudence to give the buyer the right to insist on performance as long as a commercially viable substitute exists and this substitute does not differ substantially from the original obligation.[78] According to the Secretariat Commentary, 'a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was required under the contract'.[79] Whether or not delivering 'VW Tiguan second generation' cars would burden the seller with disproportionate costs and he might have a right to reject delivery of substitutes for this very reason is another issue.[80]

Another argument that would lead to a parallel outcome is the prevalent interpretation of a 'reasonable' cover transaction concluded under Article 75. Here, too, CISG literature, as well as case law, seems to accept superior or lower quality goods as reasonable substitutes as long as identical goods are not readily available on the market.[81] However, there needs to be a strong congruence

[78] Secretariat Commentary to the 1978 Draft, Article 65 (now Article 79) paras 7–8, in John O. Honnold (ed), *Documentary History of the Uniform Law for International Sales* (Kluwer Law and Taxation Publishers, The Netherlands and Boston 1989), 445; Christoph Brunner, *Force Majeure and Hardship under General Contract Principle* (Kluwer Law International, Austin/TX 2008) 323 et seq.; Schwenzer, 'Article 79', para 15; Magnus, 'Article 79', para 34; Atamer, 'Article 79', para 57; Bach, *Leistungshindernisse* 634–5; Pascal Pichonnaz, *Impossibilité et exorbitance*, Thesis, Université de Fribourg, 1997, paras 1757 et seq.; OLG Hamburg, 28.02.1997, CISG-online 261: "... an impediment can be overcome by the Seller as long as there are replacement goods available on the market. Even if the exact quality required by the contract of 12 October 1994 could not be acquired on the Chinese market, an argument the Seller has not even raised, replacement material slightly deviating with respect its composition but reasonable according to commercial perception could have been acquired. The Buyer would have accepted the delivery of such slightly worse material, as the fax of 31 October 1994 shows. The acquisition risk is therefore only exceeded and the Seller is only exempted, if the goods were not available in comparable quality and if the Seller did not need to take this into account at contract conclusion." Cf. also Arbitral Award, American Arbitration Association, 23.10.2007, CISG-Online 1645.

[79] Secretariat Commentary on 1978 Draft, Article 65 (now Article 79) para. 7, in John O. Honnold (ed), *Documentary History of the Uniform Law for International Sales* (Kluwer Law and Taxation Publishers, The Netherlands and Boston 1989), 445.

[80] Cf. in detail Atamer, 'Article 79', para 57.

[81] Saidov, *The Law of Damages in International Sales* 181; Schwenzer, 'Article 79', para 6; Milena Djordjevic, 'Article 75' in Stephan Kröll and others (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, C.H. Beck, München 2018), para 22; Clayton P. Gillette and Steven D. Walt, *The UN Convention on Contracts for the International Sale of Goods* (2nd edn, CUP, Cambridge, 2016) 380; Christoph Brunner and others, 'Article 75' in Christoph

between the goods sold and those bought as cover.[82] The difference in the specifications should be slight, minor, or unimportant.[83] When deciding on such congruency, it needs to be kept in mind that the buyer is under the duty to mitigate his losses (Article 77 of the CISG). Therefore, it may often even be the buyer's duty to purchase the nearest equivalent if the goods are intended to be used in the production process of the buyer and any delay would increase his loss. A newer or more developed model of machine could perfectly serve as a substitute under such circumstances.

For the reasons stated above the better view seems to be that the buyer has a claim to substitute goods even if the seller can only fulfil this obligation by delivering a better or newer version of the stipulated goods.

(ii) Can the seller ask for the price difference if he has to deliver a newer model of the goods?

A final thought should be given to the question of whether the buyer has to pay for the upgrade if the seller can only replace with a newer model. Here, too, the CISG commentators seem to disagree. Some reject such payments for betterment;[84] others accept it in every case.[85] The better view seems to be to distinguish between the different case scenarios as it is not the newer model *per se*, which triggers a benefit for the buyer.

If the buyer is the end-user of the sold car and the car is just employed as a company car, the buyer will enjoy no pecuniary benefit from this newer model.[86] This is not different to any other B2C sales contract. The fact that the newer model is costlier does not mean that the commercial buyer has to pay the price difference.[87] However, if the new version of the goods involves an actual gain for the buyer then—only then—could one argue that he should also pay the price difference between the new and the old model of the goods.

Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Wolters Kluwer, Alphen aan den Rijn 2019), para 4; District Court Hamburg, 26.11.2003 (Phtalic anhydride of Italian origin instead of Mexican origin, which was lower in quality and cheaper), CISG-online 875; ICC Arbitration Case No. 8128, CISG-online 526 ("The buyer may claim the costs following from purchase of goods in replacement as damages if the transaction is reasonable in conformity with Article 75 of the Convention. The buyer concludes such a contract if he behaves as a careful and prudent businessman undertaking in this purchase of surface dressing. The first condition for this is that the goods in replacement are of the same type and quality. . . .The specifications of the chemical fertilizers in the purchase in replacement are slightly different from the contractual specifications. They concern purity and water content. But the differences are minor and are not important...").

82 See Schwenzer and others, *Global Sales and Contract Law* para 44.235.

83 See Saidov, The Law of Damages in International Sales 180.

84 Schlechtriem and Schroeter, *Internationales UN-Kaufrecht* para 781; Schwenzer, 'Article 74', para 44.

85 Fountoulakis, 'Article 84', para 5.

86 Cf. for a parallel approach under English law Francis Dawson, 'Remedies of the Buyer', in Michael Bridge (ed), *Benjamin's Sale of Goods* (10th edn, Sweet & Maxwell/Thomson Reuters, London 2017) para 17-024/17-066; Hugh Beale, 'Damages', in Hugh Beale (ed), *Chitty on Contracts*, vol. 1 (23rd edn, W. Green Publ., Edinburgh 2018) para 26–105.

87 Schlechtriem and Schroeter, *Internationales UN-Kaufrecht* para 781.

The facts of the famous *British Westinghouse* case decided by the House of Lords in 1912 can serve as a good example.[88] The Metropolitan District Electric Traction Company had contracted with British Westinghouse to provide eight steam turbines at a power of 5,500 kilowatts with a steam consumption of no more than 17.7 pounds per kilowatt hour. However, the turbines were less efficient than promised. After several repair attempts by the seller, the buyer concluded a cover transaction with another company. Given the pace at which steam turbine efficiency was advancing at the beginning of the 20th century, the substitute turbines were much more powerful, operating at a power of 6,000 kilowatts with a steam consumption of 5.8 pounds per kilowatt hour.[89] The House of Lords concluded that the value of the increased efficiency had to be taken into account when calculating the actual loss incurred by the buyer.

As this case shows, whenever the buyer enjoys an actual financial benefit from the substitute goods it seems fair to have the buyer pay for the difference in value of the replacement goods. If, in this particular case, British Westinghouse would have delivered the new and more powerful turbines as a substitute, it should have had the right to demand the price difference between the new and the old turbines as a counterclaim. Such a benefit might also occur in cases where the buyer is a reseller. He might have a higher profit margin with the higher quality model. If the seller can prove this, he should, again, have the right to ask for the price difference of the substitute goods when replacing them.[90]

Such a claim can be based on a general principle to be derived from Article 84(2) of the CISG. Even though Article 84(2) does not directly settle the issue, the principle inherent in this provision is the idea that the buyer shall not be enriched by the remedy he chose. It has to be submitted that this is a principle worth being generalized under Article 7(2) of the CISG. The higher value of the replacement goods can be calculated parallel to the formula used for price reduction under Article 50 of the CISG.[91] The ratio of the contractual sales price to the market price at the time of contract conclusion should be applied to the market price of the newer version of the goods. The difference between the contractual price and the price calculated by applying the ratio will be the

[88] British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd, [1912] AC 673. Cf. in detail Andrew Dyson, 'British Westinghouse revisited' (2012) Lloyd's Maritime and Commercial Law Quarterly 412, 412 et seq.

[89] Cf. for the facts of the case and the historical background Andrew Dyson, 'British Westinghouse revisited' 413–15.

[90] Where the buyer avoids the contract and makes a cover purchase involving higher quality or newer model goods, the same arguments have to be taken into account when calculating the actual loss of the buyer. Should the buyer be the final user of the goods, like in the company car example, he should have the right to claim for the price difference of the newer/better model as damages under Article 75 CISG. However, if the buyer is using the newer/better model for production purposes, like in the case of the turbines, and the new turbines are of greater efficiency, his claim for the price difference between the contract price and the price for the substitute goods might be rejected due to the betterment enjoyed by the buyer's choice. However, the issue of whether the losses encountered by the buyer during e.g. the stand-still of the non-conforming machines have to be offset against the gain of the buyer due to the new and more effective machines is not covered in this article and certainly deserves special attention.

[91] Cf. for this formula e.g. Müller-Chen, 'Article 50' para 8 et seq.

additional payment the buyer would have to make. It has to be kept in mind that the price in the resale contract (buyer to sub-buyer) is not of importance. It is the fictional sales contract between the seller and the buyer for the improved model of the goods that matters.

IV. Conclusion

As already expressed at the beginning of this article, B2B and B2C sales contracts only rarely involve different interests and therefore, in principle, should not require different statutory provisions. The issues discussed in this article seem to confirm this assessment at least for a comparison of the EU Consumer Sales Directives (1999/44 and 2019/771), the CISG, and partly German law. The conclusions can be briefly restated as follows:

- Costs related to uninstalling non-conforming goods and reinstalling replacement ones have to be borne by the seller. This is the same under B2B as well as B2C contracts according to the EU Sales Law Directives, the CISG, and German law. If the prerequisites of a replacement claim are existent, the seller can only block such a claim based on the argument that the costs involved would be unreasonably high.
- Neither under the CISG nor under the EU Consumer Sales Directives does the seller have a right to ask for the benefits received from using the non-conforming goods until they were replaced. The differentiation in this regard between B2B and B2C sales contracts under German law is not convincing.
- Even though it is debated under the EU Sales Law Directives, the CISG, and German law, the better view is to grant the buyer in a B2B as well as a B2C contract a right to ask for replacement of the non-conforming goods with a newer or better model if the contractually stipulated model is no longer available.
- Whether the seller can claim the price difference of the newer model has only rarely received attention under these jurisdictions. In B2C contracts, such a claim by the seller has to be rejected given that the buyer does not enjoy any pecuniary benefit from the newer model. In B2B contracts, it is the same as long as the commercial buyer does not gain any benefit from using the new model, such as using the replacement car as a company car. However, if the buyer has a readily realizable benefit like higher production outcome due to higher capacity of the replacement goods, or a higher profit margin due to the better model, the seller should have the right to claim for the price difference between the new and the old model. Given that in B2C contracts the goods are generally not deployed to generate profit, this is the only case where B2B contracts need to be treated differently.