



The 'Right to Repair' under the CISG: The Many Shades of Green

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Panel on "Greening the Supply Chain: A
Perspective from the CISG"
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1. The “Right to Repair”: Background

- A concept encompassing the buyer’s right to require remedy of lack of conformity by repair (e.g., Art 46(3) CISG), but much broader.
- Includes right to repair goods that were conforming, but e.g., ceases to function.
- Began as a **consumer rights** movement (against corporate greed) in the 2000s, and then later added the layer of **environmental protection**.
- **Planned Obsolescence:** Deliberate shortening of the useful life of a product (e.g., reduction of functionality, cease functioning, newer model) so that consumers will purchase more replacements. Seen as encroachment of consumer rights.
- **Circular Economy:** Reduce, Reuse, Recycle (3Rs) + Refuse, Repair (5Rs); minimize generation of waste.



2. Domestic “Right to Repair” (1)

(1) Selected Positive Jurisdictions

A. EU

- **Right to Repair Directive (R2RD)**, Directive (EU) 2024/1799 as of 13 June 2024
- **Contract for the Sale of Goods Directive**, Directive (EU) 2019/77 (amended by R2RD)

The two Directives provide for consumers’ rights to repair:

- in case of non-conformity (Art 10 of Directive (EU) 2019/77); and
- where “**repairability requirements**” are provided for certain goods (*), the manufacturer has an **obligation to repair** (Art 5 of Directive (EU) 2024/1799).

The repairability requirement is to “enable a good to be repaired, including requirements to improve ease of disassembly and requirements concerning access to spare parts, repair-related information and tools applicable to goods or specific components of goods” (Art 2(11) of Directive (EU) 2024/1799).

(*) household washing machines, dishwashers, refrigerating appliances, electronic displays, vacuum cleaners, servers and data storage products, mobile phones, tumble dryers, LMT batteries

2. Domestic “Right to Repair” (2)

B. US

- **Federal:** Fair Trade Commission (FTA) “Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers” (2021)
FTC to “prioritize investigations into **unlawful repair restrictions** under relevant statutes such as the Magnuson-Moss Warranty Act and Section 5 of the Federal Trade Commission Act.”
- **States:** mostly covering consumer electronic/digital devices
 - New York: Fair Repair Act (2022);
 - Colorado: Consumer Right to Repair Wheelchairs Act (2022), Consumer Right to Repair Agricultural Equipment Act (2023), Consumer Repair Bill of Rights Act [covering digital devices](2024);
 - California: Right to Repair Act (2023);
 - Minnesota: Digital Fair Repair Act (2023) ;
 - Oregon: Right to Repair Consumer Electronic Equipment Act (2024)

Cf. Repair Association website, <https://www.repair.org/know-your-rights> (last accessed 21 October 2024)

2. Domestic “Right to Repair” (3)

(2) Selected Hesitant Jurisdiction?: Japan

- One environmental law expert laments that Japan’s policy-maker “overemphasizes ‘autonomy’ and takes a cautious attitude toward regulation” (Otsuka 2022).

- Japan Ministry of External Trade and Industry (METI), in response to a suggestion made in a public consultation to adopt a “right of repair”:

“Repair and reuse are only one direction of the elements of the Circular Economy (CE), and they may not be the only direction to aim for in CE. For example, extending product life and continuing to use older, inefficient models may not always be the better option from an environmental impact perspective, while technological **innovation** is producing new products with lower environmental impact.”

<https://www.meti.go.jp/press/2022/06/20220623002/20220623002.html>

3. Right to Repair in Non-conformity Cases under the CISG (1)

(1) Buyer's right to require repair (Art 46(3) CISG)

- Generally allowed if delivered goods are non-conforming (subject to notice of non-conformity (Art 39 CISG))
- Exception: repair is **“unreasonable having regard to all circumstances.”** (Art 46(3) CISG)
 - Cost of repair is more expensive than the benefit of repair (e.g., non-conformity is minor)
 - Cost of repair is more expensive than cost of acquiring substitute goods
 - Seller (e.g., wholesaler or retailer) does not have the technique to repair and a third party must be engaged for repair (cost of repair to be claimed as damages (Art 45(1)(b) CISG))
 - Easier for the buyer to repair

3. Right to Repair in Non-conformity Cases under the CISG (2)

(2) Who should repair?

- Under the CISG: the “seller” (Art 46(3) CISG)
 - The buyer may engage a third party to do the repair and claim the expenses as damages against the seller (Art 45(1)(b) CISG), subject to the duty to mitigate (Art 77 CISG).
- “Manufacturers” or other suppliers in the upstream of supply chain?
 - Not under the CISG (Art 4 CISG; basic principle of relativity/privity of contract)
 - However, the otherwise applicable law may allow “direct actions”

(3) Seller’s Right to Remedy Non-conformity (Arts 37 & 48 CISG)

- Seller can offer the buyer to remedy non-conformity (by repair).

4. Primacy of Repair over Replacement? (1)

Right to Replacement (substitute goods) (Art 46(2) CISG)

A. Right to Replacement is already Green: Fundamental Breach

- Right to Replacement under CISG is limited: the non-conformity must amount to a **“fundamental breach”** (cf. Art 25 CISG)
- Justification: high cost of delivery of substitute goods and return of non-conforming goods (esp. in international sales). If the buyer can still achieve the purpose of the contract even with the non-conformity, the buyer should resort to less radical remedies such as repair, price reduction, or damages.
- Right to replacement under CISG is already “green” in this aspect (as it somewhat takes into the waste that replacement will generate).

4. Primacy of Repair over Replacement? (2)

B. Right to Replacement v Repair

- If there is FB and buyer exercises its right to replacement (Art 46(2) CISG), can seller offer to repair instead?
 - Yes, “if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.” (Art 48(1) CISG).
 - It is true that Art 48(2)-(4) indicate that the buyer can refuse to accept repair by the seller. **BUT**, if seller offers repair, the non-conformity will no longer be a fundamental breach, and thus no replacement. (No repair, No replacement)
- In this sense, **repair has primacy over replacements. CISG is Green.**

4. Primacy of Repair over Replacement? (3)

C. Is Right to Repair always Greener than Replacement?

- However, is repair always greener than replacement in international sales?
 - (i) Depending on the goods, repair may emit more CO₂ than replacement.
E.g., repair can entail travelling by engineers, and cost of sending the goods back and forth for repair.
 - (ii) If replacement by “refurbished” goods is allowed, the emission of CO₂ may be reduced. [However, if refurbished goods are marketed at a lower price than completely new products, the buyer will not be getting what it bargained for.]

5. Primacy of Repair over Price Reduction? (1)

Right to Price Reduction (Art 50 CISG)

A. Right to Price Reduction is Green.

- If the goods are non-conforming, the buyer may reduce
- Price reduction is a green remedy because it does not generate emissions of CO₂.

B. Is Price Reduction always Green?

- Consider products harmful to the environment being used without repair.
Example: automobiles with unlawful software that hides emissions (cf. the Volkswagen emissions scandal (Dieselgate or Emissionsgate))

5. Primacy of Repair over Price Reduction? (2)

C. Right to Price Reduction v Repair

- Buyer can choose between Price Reduction and Repair (no need to require repair before resorting to price reduction)
- **However**, no price reduction if (second sentence of Art 50):
 - (i) the seller remedies the non-conformity; or
 - (ii) if the buyer refuses to accept cure by the seller under Arts 37 or 48.
- If seller chooses to repair, and the buyer refuses, no price reduction (no repair, no price reduction). **Repair has primacy over price reduction.**

6. Primacy of Repair over Avoidance? (1)

Right to Avoid the Contract (Art 49(1)(a) CISG)

A. Right to avoidance is already (reasonably) Green

- Right to avoidance due to non-conformity under CISG is limited: the non-conformity must amount to a **“fundamental breach”** (cf. Art 25 CISG). Thus, avoidance is a reasonably green remedy.

6. Primacy of Repair over Avoidance? (2)

B. Right of Avoidance v. Repair

- If there is FB and buyer exercises its right to avoidance (Art 49(1)(a) CISG), can seller offer to repair (Art 48 CISG) instead?
 - Same as discussion on “replacements”.
- In this sense, **repair has primacy over avoidance. CISG is Green.**

7. CISG and the Right to Repair in cases other than non-conformity

- **One view:** the issue does not arise under the CISG because there is no non-conformity (or breach by the seller).
- **Another view:** can the “**lack of repairability**” amount to non-conformity of the goods?
 - The same issue as other “sustainability” issues. To be decided by:
 - (i) Parties’ agreement (express or implied) (Arts 8, 9, 35(1) CISG)
 - (ii) Fitness for ordinary purposes (Art 35(2)(a)) or particular purpose (Art 35(2)(b))
 - However, no universal acceptance that “repairability” is required for the ordinary use of the product. There is only regional (e.g., EU) and partial (e.g., consumer sales, limited products).
- For the sake of clarity, parties are recommended to use express terms.



Conclusion

- **Non-conformity cases:** Primacy of Repair over other remedies (but other remedies are also reasonably green). CISG is Green. But also query if repair is always green.
- **Other cases:** Questionable whether “lack of repairability” universally amounts to non-conformity. Hasty further “greening” should be cautioned.



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Thank you for your attention!