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Consequences of Premature Self-Cure: The Lawless Buyer? – A Critical Review of *Bundesgerichtshof*'s Decision of 23 February 2005

By Tobias Caspary[*]

A. Introduction

More than three and a half years ago, the German law of obligations, codified in the second of the five books of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB),[1] underwent its greatest reform since the *BGB* was enacted on 1 January 1900. The Act to Modernize the Law of Obligations, the *Schuldrechtsmodernisierungsgesetz*,[2] which came into force on 1 January 2002, dramatically altered the law of obligations.[3] Whereas legal practitioners had almost no time to adapt to the new provisions,[4] at least the German courts were granted a grace period.[5] Nevertheless,

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[1] Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002 Bundesgesetzblat [BGBl] BGBl. I at 42, as amended [hereinafter BGB].

[2] Schuldrechtsmodernisierungsgesetz [The Act to Modernize the Law of Obligations], Nov. 26, 2001, BGBl. I at 3138 [hereinafter the Reform Act], *available at* http://www.iuscomp.org/gla/statutes/BGB.htm.

[3] BGB §§ 241 et seq.

[4] Contrary to the 1900 version of the BGB, which was announced four years before it came into force, the new version of the BGB containing the Reform Act was announced on 2 January 2002 in the *Bundesgesetzblatt* one day after the Reform Act entered into force. *See* Peter Schlechtriem, The *German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*, *in* OXFORD UNIVERSITY COMPARATIVE LAW FORUM, at article 2 (2002), *available at* http://ouclf.iuscomp.org/articles/schlechtriem2.shtml.

[5] Particularly for that reason, the legislative procedure of the Reform Act was accompanied by an unprecedented severe backlash from law professors. Some 250 of them took part in a petition opposing the Reform Act. Despite that fact, and due to political ambitions, the then German Minister of Justice, Herta Däubler-Gmelin, pushed the legislative procedure with incredible speed. The Minister of Justice

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by now the first cases involving the modernized law have reached the benches of the *Bundesgerichtshof* (BGH – Federal Court of Justice).[6]

This article deals with "one of the currently most controversially discussed questions"[7] of the law of obligations: Whether a buyer, who cures a product's defect[8] can claim reimbursement for the associated expenses (*Aufwendungen*)[9] from the seller, without giving the seller an additional period of time for supplementary performance (*Nacherfüllung*).[10] This manner of bringing the product into conformity with the contract can be described as a premature self-cure (*verfrühte Selbstvornahme*).[11]

Part B of this paper will summarize the different opinions on premature self-cure under sales law and will put emphasis on the *Bundesgerichtshof's* decision of 23 February 2005, which, from a practical point of view, has determined the *status quo*

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was driven by the desire to combine a complete revision of the law of obligations with the domestication of several EC Directives. Among these directives was the directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, which had to be domesticated by 1 January 2002. *See* Council Directive 99/44, art. 11, 1999 O.J. (L 171) 12 (EC) [hereinafter the Consumer Sales Directive]. Other EU Member States still have not implemented the Consumer Sales Directive into their national laws. An overview on the current status is *available at* http://www.ipr.uni-koeln.de/eurprivr/umsetzung1999_44.htm.

[6] *See* Keil, *Kurzkommentar - BGH 23.02.2005 – VIII ZR 100/04*, 1 ENTSCHEIDUNGEN ZUM WIRTSCHAFTSRECHT (EWiR) 497 (2005) (determining June 2004 as the starting volley).

[7] Martin Tonner & Volker Wiese, *Selbstvornahme der Mängelbeseitigung durch den Käufer*, BETRIEBSBERATER 903 (2005). *See* Keil, *supra* note 6; Mankowski, *Kurzkommentar*, AG Kempen 18.08.2003 – 11 C 225/02, 7 ENTSCHEIDUNGEN ZUM WIRTSCHAFTSRECHT (EWiR) 325, 326 (2004) ("one of the most thrilling disputes of the Reform Act").

[8] Strictly speaking, German sales law refers to a *Sache* – a "thing" – which encompasses any tangible items. BGB §90. Even though this term differs from the term (consumer) good, which is defined by art, 1 (2) lit b Consumer Sales Directive, as any tangible movable items (with exceptions), the term thing – *Sache* – and good – *Gut* – are used interchangeably within this paper; *See* Jürgen Kohler, *Property Law (Sachenrecht)*, *in* INTRODUCTION TO GERMAN LAW 227 (Reimann & Zekoll eds., 2d ed. 2005).

[9] For the purpose of this paper, the terms "expenditures," "expenses" and "costs" are used interchangeably.

[10] *See* Peer Zumbansen, *Contract Law*, *in* INTRODUCTION TO GERMAN LAW, *supra* note 8, at 198 ("additional performance").

[11] *See* Stephan Lorenz, *Selbstvornahme der Mängelbeseitigung im Kaufrecht*, 56 NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW) 1417, 1418 (2003); *see also* Ulrich Schroeter, *Kostenerstattungsanspruch des Käufers nach eigenmächtiger Selbstvornahme der Mängelbeseitigung?*, 58 JURISTISCHE RUNDSCHAU (JR) 441 (2004) ("arbitrary" (*eigenmächtig*)); Peter Bydlinski, Die Konsequenzen voreiliger Selbstverbesserung, entwickelt aus den zentralen gesetzlichen Wertungen, 3 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS) 129 (2005) ("overhasty self-improvement" (*voreilige Selbstverbesserung*)).

on that issue by denying any rights to the buyer. By giving a brief survey of the remedies available under the new BGB, Part B of this paper will explain why the majority of scholars finds the present legal situation to be unsatisfactory for the buyer. In analyzing the diverging approaches, Part C will show, in an argument-by-argument evaluation, that neither side of the debate is completely convincing. The paper will conclude that the *Bundesgerichtshof* neither examined whether the seller must be deemed notified about the non-conformity by the buyer, nor addressed the sales law provision's lack of conformity with the relevant Consumer Sales directive. With regard to the disputed legal question, the decision can be criticized for its reasoning, but not for its result.

B. Status Quo

I. Sales Contracts: The Most Thrilling Area of the Modernized BGB

The law on sales contracts was fundamentally affected by the Reform Act.[12] Under the new regime, which is applicable to all kinds of sales,[13] the buyer has the primary remedy to demand supplementary performance pursuant to § 439, if the seller made a non-conforming tender. A non-conforming tender, according to the language of §§ 434 et seq., is a defect at the time of the risk's passing.[14] Even though the terminology might be misleading, the "primary relief" provided by supplementary performance, namely the power to require cure by the seller, was not introduced to strengthen buyers' rights. Rather, § 439 is a seller-friendly rule, because the primary relief initially blocks all other secondary relief otherwise available to the buyer;[15] the right to reduce the purchase price, to rescind the contract and to claim damages.[16]

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[12] For an overview, *see* Zumbansen, *supra* note 8, at 197.

[13] Including B2B, C2C, and B2C sales.

[14] Which usually takes place when the thing is handed over to the buyer. BGB § 446.

[15] *See* Lorenz, *supra* note 11, at 1417. *See also* United Nations Convention on Contracts for the International Sale of Goods, art. 47 (1), April 11, 1980, 658 UNTS 163 [hereinafter CISG] ("[t]he buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.")

[16] Particularly, the buyer can not claim damages in the event of the delivery of a defective good if the seller is neither liable for the defect – which will often be the case when he is not the manufacturer of the good – nor in default of his primary obligation according to BGB §433. *See* Ina Ebert, *Das Recht des Verkäufers zur zweiten Andienung und seine Risiken für den Käufer*, 57 NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW) 1761 (2004). Contrary to art. 39 (1) of the CISG, under the BGB the buyer does not lose his rights if he does not give the seller prompt notice about non-conformity. A provision comparable to art. 39 of the CISG is the German *Handelsgesetzbuch* [HGB] [Commercial Code] § 377,

The following example demonstrates the simplified facts of the *Bundesgerichtshof*'s decision:[17] F bought a new Seat Arosa in March 2002 from G. The sales contract was negotiated for the seller through the medium of a car dealer. Simultaneously, F and the car dealer concluded a guarantee agreement for specific parts of the car. After F recognized an engine failure, he informed the car dealer, who refused any repairs because the defect was allegedly not covered by the guarantee agreement. Subsequently, F authorized a repair shop to replace the motor without contacting G directly in advance. He now declares reduction of the purchase price and demands reimbursements of the expenses amounting to those expenditures G "saved".

In this case, the seller (G) would still be obliged to cure the defect. However, the car has already been repaired, *i.e.* the sold object now conforms to the sales contract. Thus, without having G fulfill its obligation to cure the defect, the purpose of the supplementary performance has been achieved.[18] Thus, the right to claim supplementary performance became null and void due to impossibility.[19] Moreover, all secondary relief usually available to the buyer does not apply:[20] First, F is barred from rescinding the contract.[21] On the one hand, the prerequisite to fix a grace period became legally superfluous at the time of the removal of the defect because supplementary performance became "qualitatively" impossible.[22] On the other hand, § 323 (6) provides that "[t]ermination is excluded if the creditor is solely

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available at http://dejure.org/gesetze/HGB. This provision, however, is only applicable in business to business sales.

[17] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php.

[18] So called *Zweckerreichung*.

[19] BGB § 275 (1). The predominate view generally regards *Zweckerreichung* as a sub-category of impossibility. *See* Beate Gsell, *Rechtsgrundlosigkeit des Käufers bei voreiliger Selbstvornahme der Mängelbeseitigung*, 26 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT UND INSOLVENZPRAXIS (ZIP) 922, 923 (2005). For more on the dispute over the legal consequence of the buyer's cure of the defect is discussed, *see infra* Part D. *II*.

[20] *See* Lorenz, *supra* note 11, at 1418; Ernst, § 281 BGB, *in* MÜNCHENER KOMMENTAR margin note 60 (KURT REBMANN, FRANZ JÜRGEN SÄCKER, ROLAND RIXECKER eds., 4TH ed. 2003/2004).

[21] BGB §§ 437 n 2, 323, 326 (5).

[22] BGB § 326 (5). The term "qualitative impossibility" ("*qualitative Unmöglichkeit*") was introduced by the Reform Act because the new BGB § 433 (1) 2 lifted the obligation to procure the thing in a state free from defects to the rank of a primary obligation of the seller. *See* Lorenz, *supra* note 11, at 1417; *see also* Lorenz, *Rücktritt, Minderung und Schadensersatz wegen Sachmängeln im neuen Kaufrecht: Was hat der Verkäufer zu vertreten?*, 55 NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW) 2497 (2002). For the legal fate of the supplementary performance, *see infra*, Part C. III.

or overwhelmingly responsible for the circumstance which would entitle him to rescind the contract [....]" *In casu*, F made it impossible for G to cure the defect and is therefore responsible within the meaning of § 323 (6). Second, F can not reduce the price because § 441, providing the prerequisite "[i]nstead of termination of the contract," is also excluded by § 323 (6). Third, the right to claim compensation in *lieu* of performance is also not available to F: § 281 is not applicable since it is superseded by § 283 whenever the obligor does not have to perform because of subsequent impossibility.[23] Finally, the buyer also is barred from claiming compensation pursuant to § 283 because such a claim requires that the debtor, here the seller, be liable for the event which led to the impossibility. Consequently, F has no claim against G even though, from an economic perspective, he suffered a loss, at least,[24] in the amount of the cost of repairs.

To add insult to the buyer's injury, the seller is still entitled to claim the full sale price. It is usually the case that, if the debtor is released from his obligation to perform due to impossibility, the claim for counter-performance also lapses.[25] But, if the impossibility refers to the obligation of supplementary performance, the duty to pay the purchase price does not lapse *ipso iure*.[26] Rather, the buyer maintains a *ius variandi* between the rescission of the contract and the price reduction.[27] In short, the seller seems to get "everything" whereas the buyer seems to go away empty-handed.

II. Diverging Opinions

This apparent injustice led to one of the greatest disputes to arise from the modernized law of obligations. Two main diverging opinions emerged, advocating and opposing a buyer's recourse claim.[28]

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[23] This obvious result was astonishingly overlooked by the *Bundesgerichtshof*, *see infra*, B. II. 1. *See also* Amtsgericht Daun, 21 NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNG REPORT (NJW-RR), 1465 (2003), *available at* http://www.lrz-muenchen.de/~Lorenz/urteile/agdaun3c664_02.htm; and Amtsgericht Kempen, 10 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS), 397 (2003), *available at* http://www.lrz-muenchen.de/~Lorenz/urteile/agkempen11c225.htm; Lorenz, *supra* note 11, at 1417; Tonner & Wiese, *supra* note 7, at 906.

[24] Moreover, since F bought a new car, the defect would also result in a reduced market value (*merkantiler Minderwert*).

[25] BGB § 326 (1) 1, 1st main-clause.

[26] BGB § 326 (1) 2.

[27] *See* Lorenz, *supra* note 11, at 1418.

[28] For the former Professor Lorenz can be regarded as the founder, for the latter Professor Dauner-Lieb and the members of her chair. *See* Barbara Dauner-Lieb & Wolfgang Dötsch, *§ 326 II 2 (analog) bei der*

1. Prevailing Case Law and Minority Opinion in the Literature: Rejecting Any Buyer's Rights

The German ordinary courts were faced with this problem particularly in cases involving the sale of allegedly defective cars. In four out of five cases, the courts denied a buyer's right for reimbursement if he did not allow the seller a grace period to repair the alleged defect by himself.[29] It was, therefore, not surprising[30] that the *Bundesgerichtshof* on 23 February 2005 rejected any claims raised by the buyer, mainly for three reasons.[31]

First, in the Court's view, the sales law provisions exclusively govern the buyer's rights arising from the delivery of non-conforming goods, thereby prohibiting resort to other provisions.[32] Comparing the situation of the buyer with that of a tenant and a customer (of a work contract), the *Bundesgerichtshof* recognized that the latter two are both granted a right of reimbursement for necessary expenditures by

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Selbstvornahme, 5 NEUE ZEITSCHRIFT FÜR BAURECHT (NZBau) 233 (2004); Dauner-Lieb & Wolfgang Dötsch, *Selbstvornahme im Kaufrecht?*, ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS) 250 (2003); Dauner-Lieb & Wolfgang Dötsch, *Nochmals: Selbstvornahme im Kaufrecht?, ZGS* 455 (2003); Dauner-Lieb & Arnd Arnold, *Dauerthema Selbstvornahme*, ZGS 10 (2005); Wolfgang Dötsch, *Rechte des Käufers nach eigenmächtiger Mangelbeseitigung*, 17 MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 975 (2004).

[29] Amtsgericht Daun, NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNG REPORT (NJW-RR), 21 (2003), 1465, *available at* http://www.lrz-muenchen.de/~Lorenz/urteile/agdaun3c664_02.htm (sale of a used Volkswagen Golf); Amtsgericht Kempen, 10 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS), 397 (2003), *available at* http://www.lrz-muenchen.de/~Lorenz/urteile/agkempen11c225.htm (sale of a used GPS-navigation system); *Landgericht* Aachen, verdict of 23 October 2003 (6 S 99/03), *available at* http://www.lrz-muenchen.de/~Lorenz/urteile/lgaachen6s99_03.htm (sale of a used Peugeot 106); Landgericht Gießen, 6 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS) (2004), 238, *available at* http://www.lrz-muenchen.de/~Lorenz/urteile/zgs04_238.htm (sale of a used Sear Arosa). For the only contrary decision, *see* Landgericht Bielefeld, 2 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS), (2005), 79 (sale of a puppy).

[30] The Court's future decision was indicated by an article, published almost a year earlier by Judge Wolfgang Ball of the *Bundesgerichtshof's* 8th civil senate - the senate generally competent for sales law. *See* Wolfgang Ball, *Die Nacherfüllung beim Autokauf*, 14 NEUE ZEITSCHRIFT FÜR VERKEHRSRECHT (NZV) 217 (2004).

[31] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php. *See* Tonner & Wiese, *supra* note 7, at 903 (Tonner agreeing with and Wiese rejecting the decision).

[32] BGH, *id.*

the law.[33] However, the Court reasoned that the legislature explicitly refrained from granting such a right to the buyer.[34]

Second, the priority of the remedy for supplementary performance would be undermined. The reason why the buyer does not have a claim for recourse simply stems, in the Court's view, from the fact that he did not comply with the legal prerequisites for the remedies of defective goods.[35] Accordingly, the reimbursement of the costs for the remedy of defects saved by the seller would be contrary to the priority for the remedy of supplementary performance.[36] The seller who is willing to perform, loses the possibility to finally earn the sale price through a second delivery, if the buyer repairs the good himself, without allowing a grace period.[37]

Finally, the *Bundesgerichtshof* rejected the buyer's claim for evidentiary problems. Since the product sold was brought into conformity, it would be difficult to ascertain whether, and to what extent, an alleged defect existed at the passing of the risk.[38]

2. The Prevailing Opinion in Literature: Buyer's Right to Claim Seller's Saved Costs

Conversely, according to the supposedly prevailing opinion in the literature, the seller's right to claim and to retain the sale price respectively, is reduced by the saved expenditures he would otherwise have incurred if he would have cured the defect.[39] This approach is legally justified by either the direct or analogous

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[33] BGB § 536a (2) (tenants); BGB §§ 634 n2 & 637 (work contracts).

[34] Therefore, an unintended gap in the law, a prerequisite for the analogous application of BGB § 326 (2) 2, does not exist.

[35] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, 1350, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] Lorenz, *supra* note 11, at 1417; Lorenz, *supra* note 20, at 398; Lorenz, *Voreilige Selbstvornahme der Nacherfüllung im Kaufrecht: Der BGH hat gesprochen und nichts ist geklärt*, 19 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1321 (2005); Lorenz, *Schuldrechtsreform 2002: Problemschwerpunkte drei Jahre danach*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1889, 1895 (2005); Mathias Katzenstein, *Kostenersatz bei eigenmächtiger Selbstvornahme der Mängelbeseitigung nach § 326 Abs. 2 Satz 2 BGB*, 4 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS) 144 (2004); Katzenstein, *Nochmals: Ersatz ersparter Aufwendungen bei eigenmächtiger Selbstvornahme der Mängelbeseitigung*, 9 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS) 349 (2004); Bydlinski, *supra* note 11, at 129 (also summarizing the Austrian law on this issue); Gsell, *supra*

application of § 326 (2) 2 or by having recourse to the rules on unjust enrichment, §§ 812 *et seq*., either directly or by reference to the rules on illegitimate agency-without-mandate.[40]

On the merits, these commentators agree that a recourse claim is not excluded by sales law provisions, because the latter do not govern the question of reimbursement of expenditures.[41] Otherwise, the seller would receive a gift he does not deserve[42] and the buyer would be punished, since the former has to bear all expenditures for the supplementary performance pursuant to § 439 (2). The seller's right for a second delivery,[43] however, is not undermined if one allows the buyer to reclaim his expenses amounting to the seller's saved costs. Rather, there is no reason why the seller should be completely released from his obligations.[44] In contrast, the prerequisite to give the seller a grace period only intends to protect the seller from additional costs, which might arise due to improper repairs.[45] Since only the saved costs are taken into consideration, such expenses would not harm the seller. If a third person, without being commissioned by the buyer, would

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note 19, at 922; Ebert, *supra* note 16, at 1761; Jürgen Oechsler, *Kein Ersatz ersparter Verkäuferaufwendungen im Falle der eigenmächtigen Mangelbeseitigung durch den Käufer*, 6 KOMMENTIERTE BGH-RECHTSPRECHUNG LINDENMAIER-MÖHRING (LMK) 81 (2005); Carsten Herresthal & Thomas Rhiem, *Die eigenmächtige Selbstvornahme im allgemeinen und besonderen Leistungsstörungsrecht*, 21 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1457 (2005); Florian Faust, *§ 437*, *in* BÜRGERLICHES GESETZBUCH (KOMMENTAR) margin note 33 (Bamberger/Roth eds., 2005); Florian Faust, *§ 439*, *in* BÜRGERLICHES GESETZBUCH (KOMMENTAR) margin note 56 (Bamberger/Roth eds., 2005); Wolfgang Voit, § 637, *in* BÜRGERLICHES GESETZBUCH (KOMMENTAR) margin note 17 (Bamberger/Roth eds., 2005) (for work contracts); Palandt/Heinrichs, *§ 326*, *in* BÜRGERLICHES GESETZBUCH (KOMMENTAR) margin note 13 (Palandt ed., 64th ed. 2005); Palandt/Putzo, *§ 437*, *in* BÜRGERLICHES GESETZBUCH (KOMMENTAR) margin note 4a (Palandt ed., 64th ed. 2005); Ernst, *in* MÜNCHENER KOMMENTAR, *supra* note 20, at § 281 marginal note 60.

[40] *Nichtberechtigte Geschäftsführung ohne Auftrag*. *See* Peter Hay, *From Rule-Orientation to "Approach" in German Conflicts Law – the Effect of the 1986 and 1999 Codifications*, 47 AM. J. COMP. L. 633, 644 (1999)("The concept of 'agency without mandate' has no exact counterpart in American law. *Negotiorum gestio*, of Roman law origin, covers a number of instances in which one person […] performs the obligation of another or performs a task for the other without having received a mandate or request to do so.").

[41] Katzenstein, *supra* note 39, at 351.

[42] Oechsler, *supra* note 39, at 81 ("an undeserved stroke of luck"). *See* Herresthal & Rhiem, *supra* note 39, at 1457 ("a gift for the debtor").

[43] *Recht der zweiten Andienung*. Compare with CISG art. 37 and 48 (providing for a similar seller's "right to cure").

[44] Bydlinski, *supra* note 11, at 130.

[45] Oechsler, *supra* note 39, at 81. Distinguishing between internal and external costs, *see* Herresthal & Rhiem, *supra* note 39, at 1458.

perform the seller's duty of supplementary performance[46] and remove the defect, he could demand the saved costs from the seller.[47] According to that approach, there is no reason why the buyer should not have the same rights as a third person.[48] Moreover, the fact that the seller can not inspect the defects (anymore), does not weaken his procedural position in trial, because the buyer has the burden of showing a defect.[49]

C. Analysis

The following analysis will first examine issues the *Bundesgerichtshof* arguably overlooked.[50] It will then address the arguments brought forward from both sides, each of them in turn.[51] As demonstrated below, the question of which side ultimately prevails depends on the burden of argumentation for the derivation of a claim or its denial.[52]

I. Overlooked Issues

The *Bundesgerichtshof* crucially based its decision on the fact that the buyer did not allow the seller a grace period to remove the defect. Due to this failure, the Court also refused to enforce all of the buyer's rights. Yet, if the facts were ascertained in a slightly different way, the buyer would have been entitled to secondary relief. In particular, the buyer would have been entitled to the right of a price reduction, a right the he demanded in the *Bundesgerichthof's* decision. To grant him this right, two conditions must be satisfied: the first was denied by the *Bundesgerichtshof*,[53] and the second was not discussed.[54]

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[46] BGB § 267 (1) provides that a third person can also perform without the creditor's consent, unless the debtor has to provide in persona.

[47] Oechsler, *supra* note 39, at 81. *See* Herresthal & Rhiem, *supra* note 39, at 1458.

[48] Oechsler, *id.*

[49] *Id*. Herresthal & Rhiem, *supra* note 39, at 1458; Katzenstein, *supra* note 39, at 354.

[50] *See infra* Part C. I.

[51] *See infra* Part C. II- IV.

[52] *See infra* Part C. V.

[53] *See infra* Part C. I 1.

[54] *See infra* Part C. I 2.

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1. Did the Buyer Really Fail to Notify the Seller?

First, the *Bundesgerichtshof* held that the car dealer's denial, when the buyer informed him about the defect, could not be attributed to the seller because the refusal was limited to a denial to perform repairs under the guarantee agreement, and was, therefore, not relevant for the remedy of supplementary performance under the sales contract. This is a legal relationship distinct from the guarantee agreement.[55] This reasoning, however, is not persuasive under the following assumptions.

Obviously, the car dealer was the seller's contact person for both the sales contract, as well as, the guarantee agreement. With respect to the sales contract, the car dealer acted as the seller's agent, arguably[56] as his commercial agent (*Handelsvertreter*) pursuant to §§ 84 HGB[57] *et seq*. Even if the car dealer had no authority to conclude a contract in the seller's name he would be deemed as authorized to receive, *inter alia*, notice of a defect and declarations pursuant to which the buyer asserts his rights arising from the delivery of a defective product under § 91 (2) 1 HGB. Here, the buyer did both: he notified the car dealer about a defect and claimed the defect's cure. The *Bundesgerichtshof* construed the notification as a limited claim for rights arising from the guarantee agreement.[58] This view is not compelling because, from the buyer's perspective, the buyer was clearly interested in the repair of the engine failure, irrespective of whether he could achieve a repair through invoking rights from the sales contract or the guarantee agreement. The buyer was probably not aware of the fact that he had concluded two different legal relationships because, from an economics perspective, both agreements belonged to each other. But, even if one would require a layperson to recognize the difference, it is surely too much to demand the buyer to understand that the car dealer's denial to perform repairs was a refusal limited to the guarantee agreement. This would ultimately require the buyer to ask the same person a second time for a repair. In any case, the subtle distinction

[55] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, 1349, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php.

[56] A commercial agent is defined as an independent tradesman who is permanently commissioned to broker deals for another businessman or to conclude deals in his name, HGB § 84 (1) 1. Although not evidenced by the facts told by the *Bundesgerichtshof*, it is probable that the car dealer did not only independently act as the seller's agent with respect to the buyer's sales contract, but also with regard to other sales contracts. The following comments are based on these assumptions.

[57] HGB.

[58] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, 1349, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php.

between notifications with regard to the sales contract, on the one hand, and with regard to the guarantee agreement, on the other hand, would only be permissive if the buyer himself, while notifying the car dealer about the defect, limited his claims respectively. Yet, there is no finding in the case that the buyer acted in that way. To the contrary, the *Bundesgerichtshof* incorrectly derived such a limitation from the car dealer's response to the buyer's notification.[59] Otherwise, it would be in the hands of the commercial agent to limit the buyer's rights, and thereby circumvent the purpose of § 91 (2) 1 HGB, which is to protect the contracting party.[60] In other words, it is erroneous to focus on whether the car dealer's behavior could be attributed to the seller. Rather, it is crucial whether the buyer's notification of a defect was deemed to be received by the seller *vis-à-vis* the car dealer pursuant to § 91 (2) 2 HGB. Under the assumptions made,[61] this question is to be answered in the affirmative.

2. The Blatant Violation of the Consumer Sales Directive

Second, the *Bundesgerichtshof* did not address the question whether the requirement of fixing a period of time conforms to the Consumer Sales Directive. This is highly regrettable because the Directive does not provide for such a requirement. Unlike the modernized German-based buyer's rights, the Consumer Sales Directive only requires "any repair or replacement [to] be completed within a reasonable time and without any significant inconvenience to the consumer" (Art. 3 (3)). Therefore, the consumer is only obligated to ask for the repair or replacement of the good under the Directive.[62] If the seller then does not comply with this request, the consumer may ask for "an appropriate reduction of the price or have the contract rescinded" (Art. 3 (5) Consumer Sales Directive). Due to this divergence, scholars assume that the implemented domestic rules do not conform to EC law.[63] Astoundingly, German courts have ignored this blatant violation of the Directive so far.

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[59] *Id.*

[60] Moreover, it is also illegitimate to draw conclusions from the buyer's preceding behavior for the question of whether he himself limited his claims to those arising from the guarantee agreement because this behavior resulted from H's refusal, as the Court apparently did, too.

[61] *See supra* note 56.

[62] Wolfgang Ernst & Beate Gsell, *Kaufrechtsrichtlinie und BGB*, 21 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT UND INSOLVENZPRAXIS (ZIP) 1410, 1418 (2000). In contrast to CISG art. 38-39, the Directive regrettably does not obligate the consumer to inspect the good and to notify the seller within a reasonable time.

[63] Faust, *§ 437*, *supra* note 39, at margin note 17; Lorenz, *§ 474*, *in* MÜNCHENER KOMMENTAR margin note 20 (KURT REBMANN, FRANZ JÜRGEN SÄCKER, ROLAND RIXECKER eds., 4TH ed. 2003/2004); Lorenz, *supra* note 39, at 1894; Ernst & Gsell, *supra* note 62, at 1418; Dauner-Lieb, *§ 323*, *in* ANWALTKOMMENTAR, margin note 20 (Dauner-Lieb & Heidel eds., 2001).

To overcome this inconsistency, the legislature itself, while assuring that the fixing of a period of time conforms to EC law, offers a backdoor.[64] According to the *travaux preparatoires*, the failure of supplementary performance within the meaning of § 440,[65] and thereby the dispensability of the prerequisite to fix a grace period, should always be assumed whenever the supplementary performance is not performed within reasonable time, even if the buyer did not combine his request for repair or replacement with the fixing of a period of time.[66] Scholars agrees with the result, but favor the application of § 323 (2) no. 3.[67]

Even though the outcome of both approaches is correct, there are two objections to make against the view held by most scholars. First, the consumer sale now forms the basic model for a contract for sale in the modernized BGB.[68] Thus, by assumption of law, a consumer sale is not a "special circumstance" within the meaning of § 323 (2) no. 3, but the generally assumed sales situation. Second, it is wiser to position the solution of an inconsistency of German provisions with the Consumer *Sales* Directive into the part of the BGB, which specifically deals with *sales* law, *i.e.* §§ 433 *et seq*. It is conceivable that the reading of § 323 (2) no. 3 proposed by the scholarship, located in the general part of the law of obligations, leads to friction with other areas of the law of obligations, where the prerequisite to fix a time period does not violate EC law.[69]

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[64] BTDrucks 14/6040, 221 et seq. ("Even if [§ 323 (1) BGB] might not be regarded as sufficient for the implementation of the Consumer Sales Directive, § 440 is to be taken into consideration, which provides for exceptions for the prerequisite to fix a period of time"). *See* Faust, *§ 437*, *supra* note 39, at margin note 17.

[65] BGB § 440 provides: "[I]t is not necessary to fix a period of time if […] the form of supplementary performance to which the buyer is entitled has failed or would be unreasonable for him […]"

[66] BTDrucks 14/6040, 222.

[67] Faust, *§ 437*, *supra* note 39, at margin note 18; Lorenz, *supra* note 63; Lorenz, *supra* note 39, at 1894.

[68] Germany used the implementation of the Consumer Sales Directive to fundamentally change the whole system of the law of obligations. As a result, the sale of a good from a seller to a consumer forms now the basic model for a BGB sales contract. Whether this new standard model is favorable is questionable since it does now presuppose an inequality of the parties' powers whereas the traditional understanding of the BGB assumed that the bargaining parties of a contract are equal in power.

[69] Still, it may not be concealed in this context that the other approach also bears a systematical advantage. Unlike BGB § 323 (2) no. 3, BGB § 440 also waives the time fixing prerequisite for a compensation claim, even though such a betterment of the buyer is not indicated by the Consumer Sales directive since the Directive does not grant the buyer a right of compensation. Yet, facing these two systematical problems, the lesser evil seems the positioning of a solution in § 440.

To sum up, under the assumptions that the car dealer acted as the seller's commercial agent and that the buyer and seller concluded a consumer sales contract, the buyer would have been entitled to the claimed price reduction. Yet, for cases in which these assumptions are not met, the question of whether a buyer has a right to claim compensation remains. Thus, it is imperative to analyze the different arguments brought forward.

II. How to Cope with Evidence Problems

Potential evidence problems for the seller, caused by the buyer's remedy of the defect, should not influence the discussion of whether a buyer has a right to claim the saved costs. Obviously, these problems hardly exist in the legal sense, because the burden of proof to show the requirements for a claim based on a defective product generally rests with the buyer.[70] It would be up to the buyer to show that the product was non-conforming and that the other requirements for compensation, rescission or price reduction exist. However, it must be conceded that evidence problems exist as a practical matter. Usually, the buyer does not repair the defect by himself but mandates a repair shop to do so. Since the buyer believes the seller will reimburse him for all repair costs,[71] he has no incentive to avoid superfluous expenditures. In fact, he is interested in the best possible solution, which, especially in the case of the sale of a used car, can arguably lead to an even higher car's value than the one at the time of the contract formation. Likewise, the repair shop might not want to perform only necessary repairs because it would reduce its profit.[72] Only at first glance does the seller seem to be protected from excessive costs, if he would only have to reimburse his saved costs. Yet, this protection falls short in cases in which a defect did not exist at all or at the risk's passing. Here, the buyer would not actually have any rights against the buyer. Since the alleged defect is removed, the buyer would have to prove that a defect once existed, for example, by introducing a document, like the bill from the repair shop, or witness testimony, like the statement of a worker at the repair shop, into the trial. For the lack of incentive explained above, it is foreseeable that in some of these cases the introduced evidence might not be correct.[73] Yet, the seller would particularly find it difficult to challenge the credibility of the evidence or to plead

[70] *See* Palandt/Putzo, *supra* note 39, at margin note 59.

[71] Due to the "high-speed" legislative process of the Reform Act, *see supra* note 4, a consumer had and still has very little knowledge about his rights according to the modernized sales law. Moreover, the priority of the right to claim supplementary performance is "well hidden in the law." *See* Bydlinski, *supra* note 11, at 130.

[72] It must be stressed that this argument is far from pretending that repair shops are not reliable.

[73] *Contra* Bydlinski, *supra* note 11, at 131.

ignorance.[74] In both cases, it is more likely that a court will find that the buyer has established all prerequisites for his claim *vis-à-vis* cases in which the seller could present his counter-evidence showing the requirements are not met.

These remarks imply a very skeptical view about a particular branch of business. It is also doubtful if they could be generalized in order to apply them in other situations.[75] But even under these pessimistic assumptions, which arguably have induced the *Bundesgerichtshof* to its reasoning, it seems obvious that potentially existing evidentiary problems are to be solved in that area of law where they arise, *i.e.* in the field of evidence.[76] From a practical point of view, the outright refusal of a right to claim saved costs seems favorable because it avoids many disputes,[77] but legal certainty may not be achieved at the cost of a *per se* denial of disputed claims.[78] The *Bundesgerichtshof's* reasoning is, therefore, unconvincing.

III. Supplementary Performance's Unknown Fate

Regrettably, the Court did not answer whether the buyer's self-cure led to the impossibility of supplementary performance. Still, the criticism by Tonner and Wiese is unfounded. They argue that the *Bundesgerichtshof* could not leave this question open because, if supplementary performance would be possible, the buyer could still demand this right.[79] This argument overlooks the fact that the alternative to the impossibility of supplementary performance is not, as it might seem at first glance, the possibility of supplementary performance, but the performance of the primary buyer's claim itself.[80] In other words, either the cure of a defect extinguishes a buyer's claim arising from that defect at the moment of the cure, *ex nunc*, or the claim from a legal perspective never existed, *ex tunc*. Both options exist only alternatively and exclusively.[81] The *Bundesgerichtshof's* shared

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[74] Gsell is, thus, correct in advocating a cautious use of the seller's secondary burden of proof. Gsell, *supra* note 19, at 927.

[75] Imagine, for example, the *Landgericht* Bielefeld's case, *supra* note 29, where it would be the veterinarian to give oral testimony.

[76] Gsell, *supra* note 19, at 926.

[77] This argument was conceded by Oechsler, *supra* note 39, at 82.

[78] Bydlinski, *supra* note 11, at 131.

[79] Tonner & Wiese, *supra* note 7, at 906.

[80] BGB § 362 (1). See Keil, *supra* note 6, at 497. Tonner and Wiese, however, admit that their result is "strange". Tonner & Wiese, *supra* note 7, at 906.

[81] Katzenstein errs in his assumption that the cure of a defect by the buyer leads to a "qualitative partial impossibility." Katzenstein, *supra* note 39, at 355. A partial impossibility would require by definition

understanding of this is evidenced by the Court's mentioning of those scholars in this context who oppose the idea of impossibility of supplementary performance by describing the latter alternative.[82]

However, contrary to the view of these scholars,[83] it is better to assume that the right of supplementary performance lapses due to impossibility for three reasons. First, this view seems more appropriate with regard to the clear wording of § 434, whereby the law defines as the point of time the risk's passing, which is crucial for the assessment whether rights arising from defective products emerge. To apply a different point of time for that assessment contradicts § 434.[84]

Second, due to the fact that the dominating view generally classifies the occurrence of the obligation's performance (*Zweckerreichung*), to which the premature buyer's self-cure belongs, as a sub-category of impossibility,[85] the assumption that the premature self-cure does not lead to impossibility would unjustifiably create confusion.[86]

Third, the impossibility of the supplementary performance is a more comprehensible legal solution provided that supplementary and original performances are not identical. Indeed, the question of the legal quality of these

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that performance is also partially possible which is obviously incorrect because performance and supplementary performance are insofar intrinsically tied to each other. Gsell is unclear in advocating an "analogous application of the principles of impossibility." Gsell, *supra* note 19, at 923.

[82] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, 1349, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php (*citing* Jürgen Oechsler, *Praktische Anwendungsprobleme des Nacherfüllungsanspruchs*, 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1825, 1826 (2004); Grunewald, § 437, in BGB KOMMENTAR at margin number 3 (WALTER ERMAN, HARM P. WESTERMANN, eds., 11 ed., 2004) and Ulrich Schroeter, *Kostenerstattungsanspruch des Käufers nach eigenmächtiger Selbstvornahme der Mängelbeseitigung?*, 58 JURISTISCHE RUNDSCHAU (JR) 441, 442 (2004)). *Compare*, *supra*, C. I. 2.

[83] *But see* Keil, *supra* note 6, at 497.

[84] A different evaluation does also not result with view to BGB § 323 (4), which provides that a creditor may rescind from the contract before performance becomes due if it is obvious that the preconditions for rescission will be satisfied, since this rule only reschedules the relevant point of time for invoking the secondary right of rescission to an earlier but not to a later date. *Contra Landgericht* Bielefeld, *supra* note 29, at 80.

[85] Gsell admits as much. Gsell, *supra* note 19, at 923.

[86] Gsell's proposal that the principles of impossibility should be applied on the premature self-cure only by way of analogy, since it would not constitute a case of "real" impossibility is unclear. *Id.*

two rights goes far beyond the scope of this paper;[87] nevertheless, it may be recognized that the arguably dominating opinion, for example, assumes a buyer's right to claim replacement of a non-conforming specific good (*Stückschuld*) and thereby implicitly accepts a different scope.[88]

IV. How "Much" is the Right of a Second Delivery Violated?

It is true that the seller's right of a second delivery is undermined if the buyer could incur the saved expenditures. At first glance, the seller does not suffer a disadvantage through the recognition of the deduction in the amount of the seller's saved expenditures. Yet, the *Bundesgerichtshof* correctly finds a clear disadvantage for the seller because he would be presented with a *fait accompli*.[89] For example, he would be deprived of the possibility to inspect whether the alleged defect exists and whether it was already present at the time of the risk's passing, the fact on which it was based, whether and how it could be removed, and secure evidence of this, if necessary. It is therefore, incorrect to completely negate the undermining effect on the seller's right of a second delivery. Rather, it is more appropriate to analyze whether this restriction is acceptable, evaluating the conflicting parties' interests. In this context, it is important that the seller would also be deprived of his right to refuse supplementary performance by invoking the defense according to § 439 (3) that supplementary performance is unreasonably high.[90] Since the seller, for lack of notification, could not invoke the defense and thereby prevent the enforceability of a claim for supplementary performance, the buyer's right to demand repair was not suspended at the time of the self-cure. However, in particular, the application of § 326 (2) 2 would then lead to a buyer's reimbursement claim amounting to the seller's saved costs, which the seller would not have been obligated to cover if he had had the chance to invoke the defense. Although it is obvious that the buyer may not receive reimbursement in this situation, it is troublesome, for dogmatic as well as systematic reasons, to argue

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[87] *See* FLORIAN SCHULZ, DER ERSATZLIEFERUNGS- UND NACHBESSERUNGSANSPRUCH DES KÄUFERS IM INTERNEN DEUTSCHEN RECHT, IM UCC UND IM CISG (2002).

[88] *See* Oberlandesgericht Braunschweig [BraOLGZ] [Court of Appeals for Braunschweig], NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 56 (2003), 1053 (with further references).

[89] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, 1360, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php (the Court argues, the seller's possibilities of defense would be unjustifiably weakened).

[90] The seller is protected by this defense since the buyer has the right to choose between the two kinds of supplementary performance – repair or replacement. If, for example, the object sold is a brand-new mass product and generally both potential kinds of supplementary performance would be available, the replacement of the good will be often less expensive.

how the defense of § 439 (3) could be read into § 326 (2) 2, provided one generally accepts the norm's application.

V. The All-Deciding Issue: Finding the BGB Claim

Consequently, and despite such considerations which focus on the merits of the dispute, a *de lege lata* solution necessarily depends upon the legal derivation of a claim under the BGB. First, a remedy granted by the rules on agency without mandate will rarely be available.[91] Also, such a buyer's right can be derived from neither an analogous[92] nor a direct[93] application of § 326 (2) 2 under the current regime of the civil code. Finally, the general principles of unjust enrichment are excluded by §§ 434 et seq. and thus can not grant the buyer a right to demand reimbursement amounting to the seller's saved cost.[94]

1. Equity Above All or an Abuse of the Rules on Agency-Without-Mandate?

Remarkably, the *Bundesgerichtshof* did not explicitly address the recourse claims pursuant to §§ 683, 670,[95] §§ 684, 818,[96] and §§ 812 *et seq*., but only justified its decision by negating a remedy based on § 326 (2) 2 by analogy, thereby unconvincingly easing its burden of argumentation.[97] Obviously, by rejecting any buyer's rights, the Court implicitly rebuffed all other views proposing a reimbursement through other norms. This is already true for most cases regarding a recourse claim pursuant to a legitimate agency-without-mandate,[98] because the taking over of the agency by the buyer does not comply with the interest or will of the principal.[99] Moreover, legitimate, as well as illegitimate, agencies-without-mandate require the agent to act with intent to perform an obligation of another

[91] *See infra*, Part C. IV. 1.

[92] *See infra*, Part C. IV. 2.

[93] *See infra*, Part C. IV. 3.

[94] *See infra*, Part C. IV. 4.

[95] Legitimate agency-without-mandate.

[96] Illegitimate agency-without-mandate.

[97] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, 1349, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php.

[98] BGB §§ 683, 670.

[99] BGB § 683.

(*Fremdgeschäftsführungswille*), which is questionable in many cases.[100] Furthermore, §§ 677 *et seq*. require an agency-without-mandate, which is not the case if the parties' relationship is already regulated, in particular, by a contractual agreement. Since the buyer and the seller concluded a sales contract, their duties and rights arise solely from that sales contract and the respective sales law provisions.[101] In fact, the existing contract between the buyer and the seller distinguishes their relationship from a situation where a third person performs the seller's obligations pursuant to § 267.[102]

Moreover, German courts frequently invoke the rules on agency-without-mandate in order to achieve practically oriented equitable results and thereby circumvent the less favorably deemed provisions on delict[103] and unjust enrichment.[104] For example, it seems questionable whether the *Landgericht* Bielefeld, the only court granting a reimbursement, would have come to the same result if the object sold was not a puppy vended by an elderly couple, but a used car sold by a car dealer.[105] Such a case-by-case analysis is undesirable from a dogmatic point of view.[106]

2. The Necessity of an Unintentional Gap in the Law

There is no unintended gap in the law. On the one hand, the legislature modified the right of self-cure for the customer of a contract for work (§ 637) and gave the

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[100] Bydlinski, *supra* note 11, at 131; *contra* Oechsler, *supra* note 82, at 1826 (stating that such an intent would normally exist).

[101] *See* Palandt/Putzo, *§ 677*, *supra* note 39, at margin note 11.

[102] Oechsler overlooks this. Oechsler, *supra* note 39, at 81; see, *supra*, Part B. II. 2.

[103] BGB §§ 823-853. The rules on delict in combination with §§ 249-304 are comparable with torts.

[104] For example, courts applied BGB §§ 677-687, in which a void contract "existed" to circumvent BGB §§ 812—22; *See* Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 50 (1997), 47, 48. However, it must be conceded that in the *Landgericht* Bielefeld's case the court, by way of reference to BGB § 684, applied the rules on unjust enrichment.

[105] Landgericht Bielefeld, 2 ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT (ZGS), 79 (2005).

[106] Furthermore, the *Landgericht* Bielefeld's reasoning that the veterinarian's commission by the buyer to heal the puppy was "without mandate" of the seller - notwithstanding the existing sales contract - since § 684 would not open a law on breach of contracts alternative to BGB § 437, is unconvincing as it comes close to a *petitio principii*: the application of BGB § 684 requires a "true" agency-without-mandate pursuant to BGB § 677, which in turn necessitates a person to perform intentionally an obligation of another without having received a mandate. Provided that an illegitimate agency without mandate exists, BGB §§ 684, 818-22 govern the agent's right to claim reimbursement of his expenses. Yet, the *Landgericht* Bielefeld assumed the application of BGB § 684 to reason why the requirements of BGB § 677 are met.

tenant of a lease contract a similar right (§ 536a (2) no. 2). But, on the other hand, the legislature clearly showed its intention by not implementing a comparable rule in the sales law provisions.[107] Besides this *argumentum e contrario*, the lawmaker's will can also be derived from the protocols where they expressly stated: "Particularly, only the customer of a contract for work has a right of self-cure, whereas the buyer is not entitled to such a right."[108] Still, a claim to demand the necessary expenditures after self-cure and the remedy to claim reimbursement for saved costs are not identical. This difference, however, does not in itself justify a reimbursement claim. Thus, the correct observation that the non-applicability of § 326 (2) 2 is the consequence of the modernized BGB falls short of a legal justification of an analogy.[109] Likewise, an analogy can not be justified by a teleological observation of the prerequisite to fix a grace period,[110] since it could only lead to a teleological reduction of §§ 281 (2), 323 (2) or 637 *de lege lata* or to a *de lege ferenda* proposal. Rather, it would be necessary to show that the legislator, by remodeling the structure of the law of obligations, unintentionally did not govern the buyer's right to demand the saved costs, which is, obviously, not possible.

3. Revolting against the Legislator: A Direct Application of § 326 (2) 2

Besides an *argumentum a maiore ad minus* resulting from the remarks on an analogous application, there are two further objections against a direct application of § 326 (2) 2. First, this approach contradicts the mechanism of § 326 BGB. Those who favor a direct application of § 326 (2) 2, correctly[111] assume that the cure of the defect by the buyer leads to impossibility of supplementary performance.[112] Nevertheless, the assumption that all prerequisites of § 326 (2) 2 are, therefore fulfilled,[113] comes close to an allegation without substance. Indeed, the argument would have to be that § 326 (2) 2, due to its wording and position in the law, is applicable on the qualitative impossibility, even though the norm only refers to

[107] *Contra* Katzenstein, *supra* note 39, at 351.

[108] BTDrucks 14/6040, 229.

[109] It is not surprising that now advocates the direct applicability of BGB § 326 II 2 and thereby avoids the necessity to show the requirements of an analogy. Lorenz, *supra* note 20, at 398. See Herresthal & Rhiem, *supra* note 39, at 1460 at footnote 55.

[110] *Contra* Herresthal & Rhiem, *supra* note 39, at 1458.

[111] *See*, *supra*, Part C. III.

[112] Lorenz, *supra* note 11, at 1419; Ebert, *supra* note 16, at 1763; *see* Gsell, *supra* note 19, at 925.

[113] Ebert, *supra* note 16, at 1763.

§ 326 (1) 1 and not to §§ 326 (1) 2, (5).[114] This sounds like an outright disobedience of the legislature.[115]

Second, there is no necessity for a direct application of § 326 (2) 2 because a similar result, not shared by the author, could be achieved with less friction through the rules on unjust enrichment. In fact, the purpose of § 326 (2) 2 aims at the compensation of unjust enrichment, and thereby, is comparable with the rationale underlying §§ 812 *et seq*. While it is troublesome to reason for an application of § 326 (2) 2, it is relatively easier to justify a reimbursement of the seller's saved expenses by virtue of § 812. Here, the burden of argumentation regarding the rules on unjust enrichment should not be applied, shifting instead to those negating such a right.

4. § 812 – No Commandment of Justice to Penetrate the Sales Law's Barring Effect

It is regretful that the *Bundesgerichtshof* did not also address the recourse claims pursuant to unjust enrichment. Likewise, those who advocate the applicability of the rules on unjust enrichment hardly render a justification,[116] which, therefore, is necessary because §§ 812 *et seq*. generally are not pertinent within the scope of §§ 434 *et seq*.[117] It must be conceded that the sales law's barring effect reaches only

[114] Gsell, *supra* note 19, at 925.

[115] Dauner-Lieb & Dötsch, *supra* note 28, at 458. In this context, the relative weakness of any wording argument must be born in mind, because the terminology of BGB § 326 can only be described as a legislator's failure, in particular if one compares the miscarried language of BGB § 326 (1) 1 and (5). Seemingly, both have the same prerequisites – the debtor is released from his obligation perform because of impossibility - but lead to different legal consequences – an *ipso iure* lapse of the counter-performance vis-à-vis a *ius variandi* to rescind from the contract or to demand price reduction. Only a closer look at BGB § 326 (1) 2 and a view at the legislative history reveals, that BGB § 326 (1) 1 governs "real", whereas BGB § 326 (5) governs the "qualitative" impossibility. While BGB § 326 (1) 1 of the draft version of the Reform Act was already identical with the later enacted BGB § 326 (1) 1 1st main clause, BGB § 326 (1) 3 draft version granted a creditor's right to rescind in the event of qualitative impossibility. After several proposals to change BGB § 326, this right to rescind was finally moved into BGB § 326 (5). According to the legal committee (*Rechtsausschuss*) of the Federal Parliament (*Bundestag*), this spin-off aimed to clarify that BGB §§ 326 (2-4) exclusively deal with the lapse of the obligation to perform consideration, but not with the right of rescission due to qualitative impossibility, BTDrucks 14/7052, 193. Therefore, it is clear that according to the legislator BGB § 326 (2) 2 is not applicable in the event of qualitative impossibility.

[116] Katzenstein, *supra* note 39, at 148 discusses only the prerequisites of a claim pursuant to BGB § 812 but not its applicability. Compare also Gsell, *supra* note 19, at 926.

[117] Palandt/Putzo, *supra* note 39, at margin note 58; Westermann, § 437, *in* MÜNCHENER KOMMENTAR margin note 64 (KURT REBMANN, FRANZ JÜRGEN SÄCKER, ROLAND RIXECKER eds ., 4TH ed. 2003/2004).

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as far as it regulates a situation.[118] Thus, it is arguably possible to apply § 812 if the difference between saved expenditures, which are calculated by the repair costs caused by the buyer's side, and necessary expenditures, which are assessed by the costs the seller saved, justify a different legal treatment. Yet, the *Bundesgerichtshof* was correct in its assumption that this difference was not sufficient, since both cases deal with the costs of supplementary performance.[119] Even though it is possible, from a legal point of view, to evaluate the same economic displacement from two different angels,[120] the legal consequences of one evaluation may not contradict the other regime's purpose. In fact, because the doctrines of tort and unjust enrichment serve different purposes, both can co-exist.[121] On the contrary, the laws on non-conforming goods and unjust enrichment generally cannot co-exist since they serve comparable purposes.[122] Thus, a penetration of the barring effect of the sales law provisions, *vis-à-vis* the rules on unjust enrichment has only been assumed in exceptional circumstances, for example, where one of the contracting parties defrauded the other.[123] The self-cure of a defect, obviously, does not constitute a comparable situation, since the buyer suffered a loss because of his non-compliance with the sales law provisions, and not because of any illegitimate actions. Therefore, this can not justify a breach with the BGB's system.

Finally, the result of an "empty-handed" buyer is shared by the Vienna Convention on Contracts for the International Sale of Goods (CISG),[124] the role model for the Consumer Sales Directive. Regrettably, the *Bundesgerichtshof* found it sufficient to point out that its decision complied with its pre-2002 case law on work contracts.[125]

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[118] This analysis may not be confused with the search of an unintended gap, since the denial of a gap does not automatically result in a blocking effect of other provisions outside the sales law, *see supra* Part C. *V*. 2.

[119] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, 1349, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php.

[120] For example, from the view of either the person who suffered the loss, or the one who received a gain.

[121] By examining the suffered loss, tort protects the victim's rights (*Integritätsinteresse,* literally "interest of integrity"). *See* BGB §§ 823-53 & §§ 249-92. The principles of unjust enrichment adjust unjust economic displacements by looking at the debtor's gained loss. *See* BGB §§ 812-22.

[122] For example, if the buyer uses his right of rescission, the contract is unwounded pursuant to the rules of rescission, but not through the principles of unjust enrichment. *See* BGB §§ 346-61.

[123] Palandt/Putzo, *supra* note 39, at marginal notes 54 & 58; Westermann, *supra* note 117, at marginal notes 55 and 64.

[124] 1989 BGBl. II at 588.

[125] Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1348, 1350, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php (citing Bundesgerichtshof (BGH), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 19 (1966), 39, 40).

Thereby, the Court overlooked the fact that the new sales law, through the implementation of the Consumer Sales Directive in the BGB, received a different branch of roots, *inter alia*, the CISG. Like §§ 434 *et seq*., the CISG also recognizes a seller's right to cure a defect.[126] However, as long as this right exists, it simultaneously negates a buyer's right to cure the defect and demand reimbursement of the expenditures from the seller.[127]

D. Conclusion

From a practical point of view, the decision of the *Bundesgerichtshof* she light on one of the most disputed areas of the reformed sales law, thereby achieving legal certainty. The clear message from the Court is this: If the buyer does not allow the seller a grace period for cure, he generally can not recover his repair costs, unless the seller was at fault. From the buyer's perspective, the *Bundesgerichtshof*'s decision is not satisfying, especially in the mentioned car sales where the repair costs were considerably high. Yet, under the assumption that the case in dispute was a consumer goods sale and the car dealer a sales agent of the buyer, the outcome of this case would have been different. The seller would be deemed notified (§ 91 (2) 2 HGB) about the defect, which would be sufficient since § 440 must be interpreted accordingly to achieve consistency with the Consumer Sales Directive. Even though the decision meets approval in the outcome, its reasoning, with regard to the question of whether a buyer has the right to compensation for the saved costs, is less convincing. The Court's denial of an analogous application of § 326 (2) 2 is correct by showing that no unintentional gap exists. Therefore, the *Bundesgerichtshof* also implicitly rejects a direct application of § 326 (2) 2, which is true because of an *argumentum a maiore ad minus*, the legislative history of the norm and a comparison of § 326 (1) with § 326 (6).

On the other hand, the Court did not explicitly explain why neither the rules on agency-without-mandate nor the principles of unjust enrichment are applicable, as some scholars have advocated. In fact, the buyer cannot claim his expenditures through these rules because of the necessary requirements are not fulfilled, namely: intent to perform an obligation of another "without mandate," and/or the principal approving the agent's assumption of the agency. Nevertheless, courts will continue

[126] CISG art. 48.

[127] Ulrich Huber, *Art. 48*, *in* PETER SCHLECHTRIEM, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT margin note 28 (CISG 3d ed. 2000); WILHELM-ALBRECHT ACHILLES, KOMMENTAR ZUM UN-KAUFRECHTSÜBEREINKOMMEN art. 48 margin note 6 (CISG 2000); Schulz, *supra* note 87, at 311; Peter Huber, *Art. 48*, *in* MÜNCHENER KOMMENTAR margin note 22 (CISG 4TH ed. 2004); Müller-Chen, *Art. 48*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS margin note 21 (Peter Schlechtriem & Ingeborg Schwenzer eds., CISG 2d ed. 2005).

applying §§ 677 *et seq*. as an equity instrument. Moreover, a recourse claim, according to the rules on unjust enrichment, is blocked by the sales law provisions and a penetration of the blocking effect of §§ 434 *et seq*. is not indicated as a matter of overriding justice or by a comparison with the CISG.

Problems with evidence resulting from the buyer's cure, existing *de facto,* but not *de jure,* may not be solved at the cost of a *per se* denial of disputed claims, but must be determined by the rules on evidence. Furthermore, the question of the supplementary performance's legal fate after the buyer's cure, left open by the *Bundesgerichtshof,* must be answered with the doctrine of impossibility because of the wording of § 434 (1), the classification of the *Zweckerreichung* as an sub-category of the doctrine of impossibility, and the arguably different scopes of original and supplementary performance. Moreover, the seller's right of second delivery, in particular with regard to the seller's possibility to invoke the defense of § 439 (3), would be, for lack of potential consideration, undermined by § 326 (2) 2.