THE SELLER'S RIGHT TO CURE UNDER ARTICLE 48 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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Abstract

In principle, contracts are enforceable mutually beneficial agreements. In the event of a breach of contract, many national, supranational, and international legal systems—as well as recent European harmonization projects on private law—turn to cure regimes for the furtherance of such (assumed) contractually generated welfare. Namely, a mandatory *Nachfrist*-mechanism, a hierarchy of remedies, and debtor's (in sales law: seller's) rights to cure—before and after performance date—are normative devices intended to perform and preserve contracts, employing purportedly better, more cost-effective remedies for breach. Discussion of the utility of these legal institutions undisputedly belongs to the debate on modern contract law.

In this thesis, one of these cure-oriented devices is exhaustively analyzed: the seller's right to cure after performance date under Article 48 CISG[1]. Whereas according to paragraph (1) the seller—provided that certain preconditions are met—can impose subsequent performance on the aggrieved buyer, under paragraphs (2-4) they can merely offer cure within a period of time, irrespective of any preconditions.

[1] Official text available at:
http://www.cisg-online.ch/__temp/CISG_english.pdf and
https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf
(1) Subject to Article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, 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. However, the buyer retains any right to claim damages as provided for in this Convention.
(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.
(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.
(4) A request or notice by the seller under paragraph (2) or (3) of this Article is not effective unless received by the buyer.

Article 48 CISG's systematic setting, comparative law framework, origin, forerunners, preconditions for existence—general and specific—performance in practice, legal consequences—with regards to both the breach-of-contract regime and the availability of other remedies under the CISG—, and economic-behavioural implications are exegetically analysed. A particular focus is given to the allocation of contractual risk (see epigraph 3.2.9). Finally, conclusions are drawn at two levels: one concerning the CISG's regime and another related to general Contract law.

Resumen

En principio, los contratos son acuerdos ejecutables mutuamente beneficiosos. En caso de incumplimiento del contrato, muchos sistemas jurídicos nacionales, supranacionales e internacionales—así como los recientes proyectos europeos de armonización en derecho privado—recurren a regímenes de subsanación para promover el bienestar que presumiblemente se ha generado con el contrato. A saber, un mecanismo de un *Nachfrist* obligatorio, una jerarquía de remedios y derechos del deudor (en compraventa: del vendedor) de subsanar—antes y después de la fecha de cumplimiento—son instrumentos normativos destinados a dar cumplimiento a los contratos y a preservarlos por medio de remedios, a priori, económicamente más eficientes. La discusión sobre la bondad y utilidad de estas instituciones indudablemente pertenece al planteamiento de un derecho de contratos moderno.

En esta tesis se analiza exhaustivamente uno de estos instrumentos de subsanación: el derecho del vendedor a subsanar después de la fecha de entrega en virtud del artículo 48 CISG[2]. Mientras que de

[2] Texto oficial disponible en:
http://www.cisg-online.ch/__temp/CISG_spanish.pdf y
https://www.uncitral.org/pdf/spanish/texts/sales/cisg/V1057000-CISG-s.pdf
1) Sin perjuicio de lo dispuesto en el artículo 49, el vendedor podrá, incluso después de la fecha de entrega, subsanar a su propia costa todo incumplimiento de sus obligaciones, si puede hacerlo sin una demora excesiva y sin causar al comprador inconvenientes excesivos o incertidumbre en cuanto al reembolso por el vendedor de los gastos anticipados por el comprador. No obstante, el comprador conservará el derecho a exigir la indemnización de los daños y perjuicios conforme a la presente Convención.

acuerdo con su párrafo (1) el vendedor –reuniendo ciertas condiciones previas– puede imponer una ulterior ejecución al comprador perjudicado; en virtud de los párrafos (2-4), éste solamente puede ofrecer una subsanación dentro de un plazo, pero independientemente de cualquier condición previa.

Del citado artículo 48 se analizan exegéticamente el entorno sistemático, el marco en derecho comparado, el origen, los precursores, las condiciones previas para la existencia—generales y específicas—, su ejecución en la práctica, las consecuencias jurídicas—en el régimen del incumplimiento del contrato y en la disponibilidad de otros remedios bajo la Convención—así como las implicaciones económicas y conductuales. Se hace una contribución en relación con la asignación del riesgo contractual (véase infra 3.2.9). Finalmente, se extraen conclusiones a dos niveles: uno enfocado al régimen de la Convención y otro relativo al Derecho de contratos en general.

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2) Si el vendedor pide al comprador que le haga saber si acepta el cumplimiento y el comprador no atiende la petición en un plazo razonable, el vendedor podrá cumplir sus obligaciones en el plazo indicado en su petición. El comprador no podrá, antes del vencimiento de ese plazo, ejercitar ningún derecho o acción incompatible con el cumplimiento por el vendedor de las obligaciones que le incumban.
3) Cuando el vendedor comunique que cumplirá sus obligaciones en un plazo determinado, se presumirá que pide al comprador que le haga saber su decisión conforme al párrafo precedente.
4) La petición o comunicación hecha por el vendedor conforme al párrafo 2) o al párrafo 3) de este artículo no surtirá efecto a menos que sea recibida por el comprador.

Summary of Contents

Tables of Cases

i. Case Law Applying the CISG

*Sorted by date in ascending order

Court (Country)	*Date**	*Reference*	*Goods involved*
Pretura di Parma (Italy)	24 November 1989	CISG-online 316	Bags, Knapsacks and plastic-wallets
Oberlandesgericht Frankfurt (Germany)	17 November 1991	CISG-online 28	Shoes
Landgericht Heidelberg (Germany)	3 July 1992	CISG-online 38	Computer components
Arb. Ct. International Chamber of Commerce (ICC), Final Award No. 7531	1 January 1994	CISG-online 565	Scaffold fittings
Oberlandesgericht Frankfurt (Germany)	18 January 1994	CISG-online 123	Shoes
Amtsgericht Nordhorn (Germany)	14 June 1994	CISG-online 259	Shoes
Landgericht Berlin (Germany)	15 September 1994	CISG-online 399	Shoes
Landgericht Oldenburg (Germany)	9 November 1994	CISG-online 114	Lorry platforms and belts
Arb. Ct. International Chamber of Commerce (ICC)	1 January 1995	CISG-online 526	Chemical fertilizers
Oberlandesgericht Oldenburg (Germany)	1 February 1995	CISG-online 253	Furniture
Oberlandesgericht München (Germany)	8 February 1995	CISG-online 143	Automobiles
Cour d'appel de Grenoble (France)	22 February 1995	CISG-online 151	Jeans
Arb. Ct. International	1 March 1995	CISG-online	Crude metal

Chamber of Commerce (ICC), case no. 7645		844	
Trib. Int. Com. Arb. at the Russian Federation Chamber of Commerce and Industry	25 April 1995	CISG-online 206	Chocolate confectionery products
Cour d'Appel de Grenoble (France)	26 April 1995	CISG-online 154	Portable warehouse shed
Oberlandesgericht Celle (Germany)	24 May 1995	CISG-online 152	Printing machines
Oberlandesgericht Hamm (Germany)	9 June 1995	CISG-online 146	Windows
Amtsgericht München (Germany)	23 June 1995	CISG-online 368	Tetracycline HCL
Delchi Carrier, S.p.A v. Rotorex Corp. US Ct. of App., Northern District of New York (2nd Cir.) (USA)	6 December 1995	CISG-online 140	Compressors
Bundesgerichthof (Germany)	3 April 1996	CISG-online 135	Cobalt sulphate
Oberlandesgericht Koblenz (Germany)	31 January 1997	CISG-online 256	Acrylic blankets
Oberlandesgericht Hamburg (Germany)	28 February 1997	CISG-online 261	Iron-molybdenum
Oberlandesgericht Düsseldorf (Germany)	24 April 1997	CISG-online 385	Shoes
Landgericht Heilbronn (Germany),	15 September 1997	CISG-online 562	Film coating machine
Turku Court of Appeals (Finland)	12 November 1997	CISG-online 2636	Canned food
Appellate Court Versailles (France)	29 January 1998	CISG-online 337	Double-edged roll grinder machines
Landgericht Halle	27 March 1998	CISG-online	Car Ford Escort

(Germany)		521	
Corte di Appello di Milano (Italy)	28 March 1998	CISG-online 348	Knitted fabrics
Landesgericht Regensburg (Germany)	24 September 1998	CISG-online 1307	Knitted fabrics
Bundesgerichtshof (Switzerland)	28 October 1998	CISG-online 413	Frozen meat
Landgericht Regensburg (Germany)	17 December 1998	CISG-online 514	Skirts and dresses
Bundesgerichtshof (Germany)	25 November 1998	CISG-online 353	Removable self-adhesive foil
Arbitral Award, Hamburg Friendly Arbitrage (Germany)	29 December 1998	CISG-online 638	Cheese
Arb. Ct. International Chamber of Commerce (ICC), no. 9083	July 1999	CISG-online 707	Roller bearings
Arb. Ct. International Chamber of Commerce (ICC), no. 9083	August 1999	CISG-online 706	Books
Arbitration proceeding Shenzhen No. 1138-1 CIETAC (China)	29 December 1999	CISG-online 1255	Indonesian Merbau round logs
Handelsgericht des Kantons Zürich (Switzerland)	10 February 1999	CISG-online 488	Art books
Arb. Ct. International Chamber of Commerce (ICC) Award no. 9083	August 1999	CISG-online 706	Books
Magellan International Corporation v. Salzgitter Handel GmbH, Federal District Court (USA)	7 December 1999	CISG-online 439	Steel bars

Oberster Gerichtshof (Austria)	7 September 2000	CISG-online 642	Gravestones
Bundesgericht (Switzerland)	15 September 2000	CISG-online 770	Egyptian cotton
Oberlandesgericht Düsseldorf (Germany)	15 February 2001	CISG-online 658	CNC milling machine
Oberlandesgericht Stuttgart (Germany)	12 March 2001	CISG-online 841	Polish apple juice
Landgericht Darmstadt (Germany)	29 May 2001	CISG-online 686	Furniture
Oberster Gerichtshof (Austria)	5 July 2001	CISG-online 652	Computer microprocessors
Bundesgerichtshof (Germany)	31 October 2001	CISG-online 617	Computer-controlled CNC rolling-milling machine
Oberster Gerichtshof (Austria)	14 January 2002	CISG-online 643	Two-cycle table cooler
Oberlandesgericht Köln (Germany)	14 October 2002	CISG-online 709	Fashion clothing products
Handelsgericht Aargau (Switzerland)	5 November 2002	CISG-online 715	Inflatable triumphal arches
Oberlandesgericht München (Germany)	13 November 2002	CISG-online 786	Organic barley
Landesgericht Köln (Germany)	25 March 2003	CISG-online 1090	"Dino leisure" racing carts
Appellationsgericht Basel-Stadt (Switzerland)	22 August 2003	CISG-online 943	Soy beans
Superior Court of Justice of Ontario (Canada)	6 October 2003	CISG-online 1436	Vacuum panel insulation
Audiencia Provincial de Barcelona (Spain)	28 April 2004	CISG-online 931	Metal covers for sewage drains
Rechtbank van Koophandel in Kortrijk (Belgium)	4 June 2004	CISG-online 945	Caterpillar V8OE truck
Oberlandesgericht	20 July 2004	CISG-online	Shoes

Karlsruhe (Germany)		858	
US Federal District Court New Jersey (USA)	4 April 2006	CISG-online 1216	Stock of naphtha
Bundesgerichtshof (Germany)	2 March 2005	CISG-online 999	Foodstuff (Pork)
Turku Court of Appeals (Finland)	24 May 2005	CISG-online 2369	Paprika powder
Trib. Int. Com. Arb. at the Russian Federation Chamber of Commerce and Industry	18 October 2005	CISG-online 1481	Equipment
Oberster Gerichtshof (Austria)	8 November 2005	CISG-online 1156	Crushing and sieving machine
Bundesgerichtshof (Switzerland)	20 December 2006	CISG-online 1426	Sanding machines and accessories
Oberlandesgericht Dresden (Germany)	21 March 2007	CISG-online 1626	Used Car
National Commercial Court of Appeals, Div. A, Buenos Aires, (Argentina)	31 May 2007	CISG-online 1517	Pealed full-sized almonds
Audiencia Provincial Madrid (Spain)	18 October 2007	CISG-online 2082	Seasonal fabrics
Oberlandesgericht Oldenburg (Germany)	20 December 2007	CISG-online 1644	Tools for the production of door frames and car wings
Tribunale di Forli (Italy)	11 December 2008	CISG-online 1788	Shoes
Tribunal Cantonal du Valais (Switzerland)	28 January 2009	CISG-online 2025	Composite materials (Fiberglass)
Audiencia Provinciale de Zaragoza (Spain)	31 March 2009	CISG-online 2085	Fresh and frozen shoulders of pork
Bundesgerichtshof (Switzerland)	18 May 2009	CISG-online 1900	Packaging Machine

Olivaylle Pty. Ltd. v. Flottweg GmbH & Co KGAA Federal Court of Australia (Australia)	20 May 2009	CISG-online 1902	Olive oil production line (disputed application of the CISG)
Hof van Cassatie (Belgium)	19 June 2009	CISG-online 1963	Steel tubes
Oberlandesgericht Linz (Austria)	18 May 2011	CISG-online 2443	Video surveillance systems
Federal Arbitration Court of North Caucasus Area, Krasnodor (Russian Federation)	3 October 2011	CISG-online 2518	Second-hand automated line for pasta production
Bundesgerichtshof (Germany)	26 September 2012	CISG-online 2348	Clay (kaolinite)
Oberster Gerichtshof (Austria)	15 November 2012	CISG-online 2399	Fashion clothing
U.S. District Court, M.D. of Florida, Fort Myers Division (USA)	23 January 2013	CISG-online 2395	Mobile phones
Bundesgerichtshof (Germany)	28 May 2014	CISG-online 2513	Bowling alleys
Bundesgerichtshof (Germany)	24 September 2014	CISG-online 2545	Plastic tools for automobile industry
Bundesgericht (Switzerland)	2 April 2015	CISG-online 2592	Wire rod
Cour d'appel de Bordeaux (France)	25 February 2016	CISG-online 2699	Wine

ii. Case Law Interpreting European Law

Court of Justice of the European Union

*Sorted by date in ascending order

Date; Case reference*	*Case name*	*Goods involved*

17 April 2008; c-404/06	*Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*	Stove set
16 June 2011; c-65/09 and c-87/09	*Gebr. Weber GmbH v. Jürgen Wittmer* and *Ingrid Putz v. Medianess Electronics GmbH*	Tiles and dishwasher
3 October 2013; c-32/12	*Soledad Duarte Hueros v. Autociba SA and Automóviles Citroën España SA*	New Vehicle
4 June 2015; c-497/13	*Froukje Faber v. Autobedrijf Hazet Ochten BV*	Secondhand vehicle

iii. Case Law Applying National Laws

Germany

*Sorted by date in ascending order

Court	*Date*; Reference*	*Goods involved*
Bundesgerichtshof	10 February 1982; NJW 1982, 1279	Industrial equipment
Bundesgerichtshof	8 December 2006; NJW 2007, 835	Real estate
Bundesgerichtshof	5 November 2008; NJW 2009, 508	Used car
Oberlandesgericht Düsseldorf	18 December 2015; NJW-RR 2016, 533	Drywall construction

Spain

*Sorted by date in ascending order

Court	*Date*; number*	*Reference*	*Goods involved*
Audiencia provincial Ciudad Real	19 September 2003	CISG-online 1050	Livestock

Tribunal Supremo, 1st chamber	21 October 2005; num. 781	RJ 2006\1689	Olive oil
Tribunal Supremo, 1st chamber	20 July 2006	CISG-online 1801	Real estate
Tribunal Supremo, 1st chamber	26 May 2016; num. 348	JUR 2016\121855	Locomotives of freight trains

United Kingdom

*Sorted by date in ascending order

Parties	*Date*; Reference*	*Goods involved*
Borrowman Phillips & Co. v. Free & Hollis	25th November 1878; 4 QBD 500	Corn cargo
E.E. & Brian Smith (1928) Ltd v. Wheatsheaf Mills Ltd	28th March 1939; 2 KB 302	Chinese white peas

United States of America

*Sorted by date in ascending order

Parties	*Cout*	*Date*; Reference*	*Goods involved*
Filley v. Pope	Supreme Court of the United States	1885; 6 S.Ct. 19	No. 1 Shotts (Scotch) pig iron
Wilson v. Scampoli	District of Columbia Ct. of App.	1967; 228 A.2d 848	Colour television
Appleton State Bank v. Lee,	Supreme Court of Wisconsin	1967; 33 Wis.2d 690	Sewing machine and vacuum sweeper
Zabriskie Chevrolet, Inc. v. Smith	Superior Court of New Jersey, Law Division	1968; 99 N.J. Super. 441, 240 A.2d 195	1966 Chevrolet automobile
T. W. Oil, Inc. v. Consolidated Edison Co.	Ct. of App. Of New York	1982; 57 N.Y.2d 574	Oil cargo
Ramírez v. Autosport	Superior Court of New Jersey	1982; 88 N.J. 277, 440 A.2d 1345	Camper van
National Fleet Supply, Inc. v. Fairchild	Ct. of App of Indiana, 3rd District	1983; 450 N.E.2d 1015	Diesel engine

Gappelberg v. Landrum	Supreme Court of Texas.	1984; 666 S.W.2d 88	Television set
Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith	Supreme Court of Mississippi	1988; 523 So.2d 324	Used car
D.P. Technology Corp. v. Sherwood Tool, Inc.	District Court, D. Connecticut	1990; 751 F. Supp. 1038	Manufactured Computer System
Superior Derrick Services, Inc. v. Anderson	Ct. of App. Of Texas, Houston (14th Dist.)	1992; 831 S.W..2d 868	Mast for oil and gas industries

List of Main Abbreviations

ALI	American Law Institute
BGB	Bürgerliches Gesetzbuch (German Civil code)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BW	Burgerlijk Wetboek (Dutch Civil code)
CESL	Common European Sales Law
CIETAC	China International Economic and Trade Arbitration Comission
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
CISG-AC	Advisory Council of the Vienna Convention on Contracts for the International Sale of Goods
CISG-online	Internet database on CISG decision and materials, University of Basel
CJEU	Court of Justice of the European Union
CLOUT	Case Law on UNCITRAL Texts
COM	Document of the European Commission intended for communication to the public
DCFR	Draft Common Frame of Reference
HGB	Handelsgesetzbuch (German Commercial Code)
ICC	International Chamber of Commerce (Paris)
KL	Finnish Köplagen (Sales law act)
Kjl	Norwegian Kjopsloven (Sales law act)

KöpL	Swedish Köplagen (Sales law act)
NCC	National Conference of Commissioners on Uniform State Laws
NJW	Neue Juristische Wochenschrift (Germany)
NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungsreport Zivilrecht (Germany)
O R	Official Records (CISG drafting process)
OHADA	L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts
SGA	Sale of Goods Act (United Kingdom)
UCC	Uniform Commercial Code (United States)
ULFC	Convention on Uniform Law on the Formation of Contracts for the International Sale of Goods (Hague, 1964)
ULIS	Convention on Uniform Law on the International Sale of Goods (Hague, 1964)
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institut International pour l'Unification du Droit Privé (Roma)
UNILEX	International Case Law, UNIDROIT

INTRODUCTION. BRIEF EMPIRICAL APPROACH, THESIS' STRUCTURE AND METHODOLOGY

The harbor of Hamburg on the river Elbe

In April 2017, the CISG counts 85 Contracting States[3], and it is submitted that it may potentially cover more than 80 per cent of world's trade in goods[4]. Nevertheless, "potentially" is the key adverb as the CISG is more mentioned than applied—courts use the CISG as mere interpretation tool—and it is also extensively excluded by contracting parties from their contracts[5].

The reality described above, along with the fact that many arbitral decisions are not reported, principally justifies the followings figures regarding enforceability of the CISG. Since 1st January 1988—the date on which the Convention entered into force—to April 2017, over 2,700 decisions from all over the world have been reported as relevant case law[6].

Data contained in the following page seeks to further depict the CISG. This data does not focus on enforcement but rather provides the reader with additional variables that might be relevant in order to obtain a better understanding about the CISG's status worldwide.

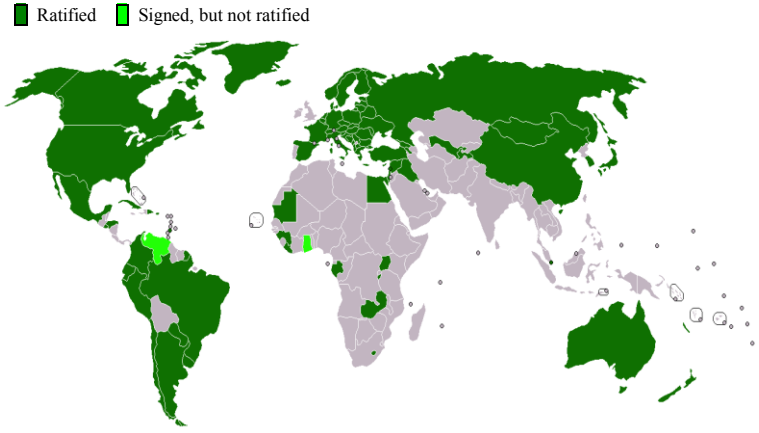
[3] *See* an up-to-date list at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

[4] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Introduction, p. 1.

[5] *See* for example in Spanish jurisdiction the following decisions mentioning the CISG but not applying: Supreme Court 20 July 2006, CISG-online 1801 (involved goods were real estate); Audiencia Provincial Ciudad Real 19 September 2003, CISG-online 1050 (parties' exclusion under Article 6 CISG).

[6] Data from Global Sales Law: www.cisg-online.ch/index.cfm?pageID=29; *Cf.* www.cisg.law.pace.edu/cisg/text/casecit.html also including references to ULIS.

Fig. 1. CISG's Contracting States*



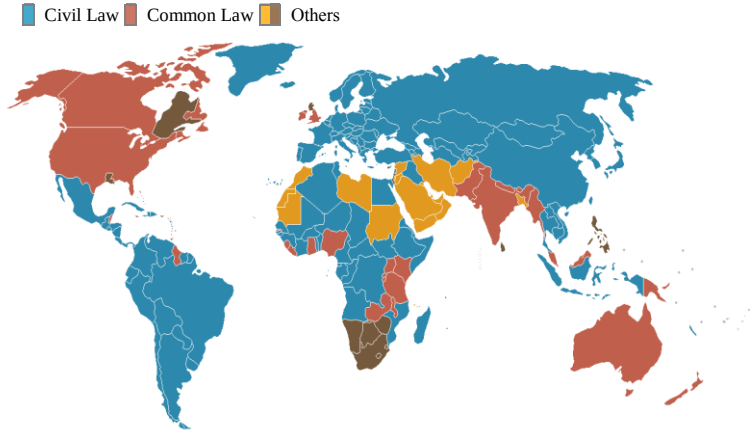
*http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status_map.html;https://en.wikipedia.org/wiki/United_Nations_Convention_on_Contracts_for_the_International_Sale_of_Goods

Fig. 3. Top Six Jurisdictions on CISG's Case Law***

Jurisdiction	*Num. Cases*	*Jurisdiction*	*Num. Cases*
Germany	534	Netherlands	268
China	432	Switzerland	212
Russia	305	United States	183

***http://www.cisg.law.pace.edu/cisg/text/casecit.html

Fig. 2. World's Distribution of Legal Systems**



**http://static.diffen.com/uploadz/thumb/c/c3/legal-systems.jpg/610px-legal-systems.jpg

Fig. 4. Leading Exporters in World Merchandise Trade, 2015 (Billion Dollars; Percentage)****

Country	*Figures*	*Country*	*Figures*
China	2275; 13.8%	Japan	625; 3.8%
USA	1505; 9.1%	Netherlands	567; 3.4%
Germany	1329; 8.1%	Rep. of Korea	527; 3.2%

****https://www.wto.org/english/res_e/statis_e/wts2016_e/wts2016_e.pdf

Among the above-indicated figures on case law concerning CISG's application, 708 decisions—representing 26.22% of the total reported case law—will be highlighted. These are cases involving the event of a breach of contract by the seller, identified during the course research by either the general provision on seller's liability for breach of contract (Article 45) or by the specific provisions on buyer's remedies (Articles 45 to 52).

> *Article 45*
>
> (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
>
> (a) exercise the rights provided in articles 46 to 52;
>
> (b) claim damages as provided in articles 74 to 77.

To address many of these scenarios of breach of contract by the seller, the Convention includes a *Cure Regime*[7]. Thereby, under the CISG one comes across many provisions which set forth normative devices, intended on the one hand to pursue performance of breached contractual obligations for as long as reasonable; yet on the other hand, designed to eschew non-performance-oriented remedies—basically, to relegate avoidance of contract as an *ultima ratio* default remedy.

> Suppose a seller is to deliver 10.000 units of certain goods by July 1. Upon date, the seller only delivers 9.000 units, and 3.000 are defective. After buyer gives notice of the lack of conformity—affecting quality and quantity according to Article 35 CISG—the Convention tends to uphold that the breaching seller has an opportunity to subsequently deliver 4.000 conforming units if it can do so within a reasonable time[8].

Article 34 (seller's right to cure non-conforming documents prior to delivery date), Article 37 (seller's right to cure defects in goods prematurely delivered), Article 47 (additional period of time for

[7] *See below* Ch. I, 1.1.1,c) & 1.1.2. This term is coined to comprise alternative normative techniques for sequencing the remedies for breach. For instance, mandatory additional periods of time for performance—under Article 47(1)(b) CISG or §323 BGB—normative hierarchy of remedies—pursuant to Article 3 Directive 1999/44/EC of the European Parliament and of the Council of May 25th 1999 on certain aspects of the sale of consumer goods and associated guarantees. Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 764, Para 1; Vogenauer/ HUBER (2015), pp. 918-919, Paras 1-6; and SIVESAND (2006), *Buyer's Remedies*, p. 115.

[8] Adapted from a longer example set forth in DAVIES/ SNYDER (2014), p. 361.

performance fixed by buyer, also known as *Nachfrist*) and Article 48 (seller's right to cure after delivery date) are the CISG's provisions dealing with the seller's cure regime.

> Furthermore, on the one hand, Articles 71(3) and 72(2) establish that a potentially breaching seller can adequately assure its future performance when circumstances might indicate that it will not perform. On the other hand, Article 62 also lays down an additional period of time, as fixed by an aggrieved seller, to allow a breaching buyer to subsequently meet its obligations.

The common functioning of all these normative devices is to provide—perhaps only potentially, according to Articles 71 and 72—the breaching seller with an extra opportunity to subsequently fix its failure to perform. This is tantamount to giving performance to the contract before the buyer asserts its remedies for breach. It must be stressed, however, that in some events damages are to be cumulatively claimed under Articles 74-77.

As a result, the common outcome achieved by all of these rules is that the seller complies with its obligations and gets entitlement to the purchase price. At the same time, the buyer gets satisfactory fulfillment of its contractual interests under the terms that it contracted for, without having to end up involved in expensive and time-consuming international litigation[9].

In numbers, in 181 cases—representing 6.7% of the total reported case law—the CISG's provisions on seller's cure regime indicated above—namely, Articles 34, 37, 47, and 48—are at issue[10]. It is eye-catching that almost fifty percent (49.16%) of this case law stems from just three jurisdictions: Germany (37 cases; 20.44%), China (30 cases; 16.57%) and Switzerland (22 cases; 12.15%).

Furthermore, it is remarkable that in the vast majority of the cases in which these provisions are triggered, the items involved are industrial machinery and technical equipment. This aside, one

[9] As specifically discussed *below* Ch. IV, 4.2. these seller's opportunities to carry out a subsequent performance might have a crucial impact on the notion of breach of contract and on the availability of remedies for breach to an aggrieved buyer.
[10] According to data from http://www.cisg-online.ch/; *Cf.* 233 cases reported by http://www.cisg.law.pace.edu/cgi-bin/isearch?DATABASE=cases.

should not disregard those other cases where raw materials for production—e.g. steel or chemicals—as well as particular products for resale—mainly food and clothing—are also regularly at stake.

Focusing on the topic of the present dissertation, the seller's right to cure after delivery date under Article 48 might constitute a clear-cut example of the CISG's stance on a cure regime. This assumption is principally derived from the far-reaching legal consequences—as explained below—that its application entails. This provision gives the seller a right to impose on the buyer a subsequent cure of any kind for failure to perform—within some restrictions and as long as some preconditions are met—even in cases where the delivery date has already expired.

Article 48(1) reads as follows:

> (1) Subject to Article 49, the seller may, even after the time for delivery, remedy at his own expense any failure to perform his obligations, 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. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 48(2-4) provides the breaching seller with an opportunity to cure its failure to perform irrespective of the circumstances and preconditions given above, which curtail Article 48(1). However, in these other scenarios the breaching seller cannot impose cure on the buyer but merely offer it—therefore cure depends upon buyer's acceptance—or wait until the buyer fails to give a response to the seller's communications regarding cure within a reasonable time. This is phrased in the following terms:

> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.
>
> (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.
>
> (4) A request or notice by the seller under paragraph (2) or (3) of this Article is not effective unless received by the buyer.

Even though the provision on seller's cure is systematically placed among buyer's remedies for breach of contract (Articles 45-52), such a subsequent opportunity to fix the breach pursuant to Article 48 is vested as a seller's right[11]. As a result, this rule is assumed to strike a balance between parties' interests by tempering the range of remedies for breach available to an aggrieved buyer.

Wherever the cure after delivery date is successfully conducted by the seller, the aggrieved buyer receives performance in the terms that it contracted for—as long as, assumedly, it is still in its interest—plus compensation of non-curable damages if needed. The seller can avoid the economic waste—and probably also the overall waste in terms of welfare—that would have been caused had the buyer resorted to a different remedy—e.g. declaration of avoidance.

In numbers, since 1st January 1988, the seller's right to cure under Article 48 is the provision at issue in 56 decisions. It amounts to 2.07% of the total reported relevant case law on CISG as well as to 30.94% of that regarding the specific case law on the seller's cure regime. Germany is the country with the most litigation on this topic (10 cases; 17.86%), followed by China (9 cases; 16.07%), Switzerland (6 cases; 10.71%) Austria (4 cases; 7.14%), and the Netherlands (4 cases; 7.14%).

As to the type of goods at stake under Article 48 CISG, the most frequent items are machines, technical equipment, and tools—which total up to 25 cases amounting to almost fifty percent of the case law on Article 48 (44.64%)[12]. Mirroring the above-presented data, fabrics, and foods—counting, respectively, 8 cases (14.29%) and 7 cases (12.5%)—are also to be taken into consideration.

- Dissertation Structure, Contents, and Methodology

[11] MAK (2009), pp. 56-57, preliminary stating that: "[o]ther two [buyer's right to ask seller for specific performance and seller's right to cure] have an overlap with the rights category"; SCHMIDT-KESSEL (2009), p. 84 also referring to the idea of *einheitliches Forderungsrecht*.

[12] Arguably, these are the types of goods more closely related with Article 3's scope of application: "[c]ontracts for the supply of goods to be manufactured or produced are to be considered sales […]".

After providing the reader with data about the CISG, briefly outline the seller's right to cure under Article 48 and empirically pinpoint its global application so far; a comparative legal study is thus undertaken in the first part of chapter one.

This analysis, however, starts with a short systematic approach to Article 48 aimed at locating this provision within the Convention itself. It mainly comprises the breach-of-contract regime, remedial system—focusing on the CISG's cure regime—and the correlated underlying principles.

This preliminary outline is then used as a blueprint to furnish a comparative legal framework, which will bring together and analyse different approaches to the cure regime for breach of contract—including seller's rights to cure, additional periods of time for performance and hierarchy of remedies—found in disparate legal systems. This analysis is mainly aimed at depicting their basic features as well as highlighting their differences with respect to Article 48 CISG and the Convention's regime. Likewise, in some instances, the analysis will present interpretations of certain notions and chart the interplay of these provisions with the notion of fundamental—i.e. material—breach.

In so doing, the comparative analysis takes into account a triad of normative sources: Common law, Civil law and Consumer law. Accordingly, it deals with either domestic laws—principally, the seller's right to cure under §2-508 US Uniform Commercial Code and its comparison with the English SGA, the German *Nachfristsetzung* under §§323, and 437(2) BGB—and the hierarchy of performance-oriented remedies built by Article 3 Directive 1999/44/EC of the European Parliament and of the Council of 25th May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

Finally, some developments are presented on the CISG's impact on the furtherance of cure regimes worldwide, in particular, of the seller's right to cure after time for performance. First of all, special attention is brought to Article 7.1.4 UNIDROIT Principles of International Commercial Contracts (PICC) which, although comprising a genuine seller's right to cure after delivery date,

adopts an approach to its consequences on breach-of-contract and on the remedial system that strongly deviates from the CISG.

The impact of the Convention's cure regime built upon the seller's right to cure after the date for delivery is further exemplified by analyzing some provisions laid down in scholarly European projects for harmonization of private law, namely, the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR). Last but not least, an impact can also be noticed on modernized national contract laws.

After the comparative legal analysis, the first chapter of this thesis concludes by taking a historical approach to Article 48 CISG. It is not only focused on locating and putting its origin into context, but also on its legislative forerunners. In this regard, reference to the US Uniform Commercial Code is unavoidable. Accurately tracking the tortuous drafting process of the seller's right to cure finally enshrined in Article 48 CISG will give a better understanding of the controversial aspects that this provision entails.

After the first chapter, this doctoral work will move on to an exegetical analysis of Article 48 split into three chapters.

In the second chapter the necessary requirements for the existence of the seller's right to cure are presented and classified into two categories: *General* and *Specific Preconditions*. The former gathers those circumstances that are to be met for the feasibility of seller's cure; that is, the existence of a remediable failure to perform after the date for delivery. The parties' agreements on the seller's right to cure as well as the main obligations to which the seller can be held under a contract governed by the CISG are of particular importance.

The latter category of preconditions—namely specific ones—refers to Article 48(1)'s clauses on reasonableness of delay in performance, inconveniences caused to the buyer and uncertainty of reimbursement. Consistently with the standard of reasonableness, which imposes the need to conduct assessment on a case-by-case basis, the specific preconditions for the existence of the seller's right to cure under Article 48(1) are principally analyzed by means of case law. Particularly conspicuous is the discussion and interpretation of the notion of *unreasonable delay*, which here is

brought in line with the concept of fundamental breach under Article 25 CISG.

The third chapter is concerned with the practical performance of the seller's right to cure. Firstly, on the one hand, the communication regime laid down in Article 48 is discussed by pointing out its fundamental relevance and goals. In doing so, one must be aware that Article 48(2-4) CISG opens the door for the application of the seller's right to cure to cases of fundamental breach where, under Article 48(1), it would have been impossible.

On the other hand, the first part of this third chapter also bears the purpose of identifying problematic scenarios of miscommunication between the parties that might not be straightforwardly addressed by the default regime for notices articulated under the Convention.

The second part of the third chapter focuses on the practical performance of Article 48. The first step is to identify the extent, content and means that seller's cure might adopt. The second step is to determine further relevant strands for seller's cure: how many attempts to cure should the seller be able to conduct before this amounts to *unreasonable inconveniences*; which is the party that must/can carry the subsequent cure out; which party chooses the means of cure, and which party has to pay for it.

Likewise, it is imperative to determine where the cure must/can be performed and to analyse the buyer's cooperation in the cure's performance. In addition, a particular focus is given to the allocation of risk of loss and of damage to the goods while cure is being performed by the seller or a third party on its behalf.

The fourth chapter broadly deals with the impact of the seller's right to cure under Article 48 on other areas of the CISG, principally the breach-of-contract regime and remedial system. The discussion—bearing a striking difference to the UNIDROIT Principles—is basically triggered by the opening wording of Article 48(1) CISG: "[s]ubject to".

On the one hand, the significance the seller's right to cure under Article 48 should have as a yardstick to determine the curability—on which the notion of fundamental breach under the Convention is

based—of an established failure to perform is considered thoroughly.
Conspicuously, intensity of breach is examined in accordance with the notion of Article 25 (fundamental breach), upon which application of Article 49(1) (avoidance of contract) ultimately hinges.

On the other hand, the seller's right to cure under Article 48 is rigorously contrasted with every single remedy—arising out of a breach of contract—to which buyer might be entitled under the CISG's remedial system.

The seller's right to cure is therefore squared off with: fixed sums agreed by parties; the buyer's right to ask for specific performance (Article 46); an additional period of time fixed by buyer—i.e. Nachfrist—(Article 47); the buyer's right to declare the contract avoided (Article 49); a reduction of the purchase price (Article 50); the construed buyer's right to withhold its own performance; and other buyer's specific rights to reject tenders of non-conforming performance (Article 52).

Last but not least, in the last part of the fourth chapter, several topics in the economics of the seller's right to cure after the date for performance are discussed, and some of its behavioural consequences as well. Also, a criticism is pointed out with reference to the circularity that the seller's right to cure under Article 48(1) CISG and the notion of fundamental breach might create.

All in all, this dissertation closes with some final remarks, which are presented at a two-tier fork. This is a result of the exegetical analysis of the Convention's provision combined with the experience of the comparative legal study.

CHAPTER 1. COMPARATIVE LEGAL STUDY AND HISTORICAL APPROACH TO THE SELLER'S RIGHT TO CURE UNDER ARTICLE 48 CISG

1.1 Comparative Legal Study

An up-to-date an accurate study of the seller's right to cure under Article 48 CISG must take into consideration the comparative legal context. For the sake of a more understandable analysis, before moving on to the examination of specific rules worth comparing with the provision at issue—as well as with the CISG's cure regime—some foundations of the Convention are presented.

These basic hallmarks of the CISG set a background against which to conduct a comparative legal analysis that will encompass, among others: domestic laws—both from the Civil and Common law traditions; European law on sales of consumer goods; international sets of Uniform rules for commercial contracts; and two projects for the harmonization of contract law in Europe. This overview of comparative law closes by highlighting some further global influences and imprints of the CISG on the modernization of national or supranational legislations.

1.1.1 Blueprint: Preliminary Systematic Remarks on the Seller's Right to Cure under Article 48 within the CISG's Breach-of-Contract and Remedial Systems

a) CISG's Unitarian approach to Breach-of-Contract

The drafters of the CISG adopted a Unitarian regime that approaches to the concept of breach of contract by means of a basic all-embracing notion: *Failure to Perform*[13].

Hence, it is worth noting that this concept of failure to perform found under the CISG drastically differs from many of those set forth in domestic laws. For instance, it neither depends upon an *ex ante* classification of contractual terms into *conditions* and

[13] *See below* Ch. II, 2.1.2.

warranties, as would be the case under English law—in particular, under the SGA—nor upon the civil law triad of: *Nichtleistung* (total failure to perform), *Spätleistung* (delay) and *Schlechtleistung* (wrong performance, i.e. non-conforming tender of performance)[14].

Furthermore, the second main characteristic of the CISG's approach to breach-of-contract is that it sticks with a *Non-Fault Principle*. As a result, legal consequences arising out of the promisor's failure to perform—namely liability for breach of contract—are triggered irrespective of any subjective criterion of imputation[15].

This simplified scheme of breach-of-contract is thus broad and homogeneous enough to cover all kinds of possible deviations from the agreed contractual plan—basically, non-performances and non-conforming tenders of performance[16]. It results, in words of Prof. Fountoulakis, in a system that is no longer focused on the particular origin of the breach occurring but rather on its consequences[17].

Despite the above-stated simplicity of an approach to breach-of-contract based largely on homogeneity, its legal consequences are not uniformly triggered for all events of breach. In particular, the availability of certain remedies for breach to the aggrieved party crucially depends upon the intensity[18] of the failure to perform occurring.

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[14] SCHWENZER (2016) *OR AT*, p. 446, Para 60.02.

[15] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 723, Para 8. This approach to breach of contract has been openly welcomed by the followers of the CISG. *Cf.*, however, with national laws that openly advocate for fault-principle applying to non-performance of obligations. As a salient example, in Spanish law, *see* BADOSA (1987), p. 247, footnote 18 who phrases as follows: "[i]ncumplimiento como infracción obligacional causa material de los daños y *culpa o dolo como fundamento de responsabilidad*" (emphasis added).

[16] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 722, Para 5; *see also e.g.* Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 79, pp. 1130, 1148-1149, Paras 5, 50; SCHWENZER/ HACHEM/ KEE (2012), p. 714, Para 47.24; and LUBBE (2004), pp. 446, 449-450. In the case law see *Tribunale di Forli* 11 December 2008, CISG-online 1788 which states: "[d]oes not differentiate among several types of breach, e.g. non-delivery, non-payment, impossibility to perform, delay, or others, *but encapsulates a unique concept of breach*" (emphasis added).

[17] FOUNTOULAKIS (2011), p. 8.

[18] For all, clearly, SCHWENZER (2016) *OR AT*, p. 450, Para 60.04: "[m]oderne Kodifikationen –wie insbesondere das CISG– bauen demgegenüber auf einem grundsätzlich einheitlichen leistungsstörungstatbestand auf. Die Art der

Under the CISG, this intensity is referred as *Fundamentality*. The CISG then turns to one key and structural concept as yardstick for the determination of such intensity: the notion of fundamental breach within the meaning of Article 25[19]:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

As indicated, the *Fundamental Breach Doctrine*[20] constitutes the central test to gauge the intensity of a failure to perform and, as a result, to structure the entire CISG's remedial system for breach of contract. Particularly, it curtails the availability of certain remedies; namely avoidance of the contract—under Articles 49(1)(a), 64(1)(a)—and replacement of non-conforming goods—under Article 46(2). As its systematic position under the heading of general provisions already hints, it must be a notion steadily interpreted throughout the entire application of the CISG.

Namely, besides above-mentioned Articles 46, 49 and 64 "fundamental breach" further appears under Articles 51(2) (partial performance), 70 (relationship between passing of risk and buyer's remedies on account of a seller's fundamental breach), 72(1) (anticipatory breach) and 73(1)(2) (instalment contracts).

Fundamental breach is a notion defined in open terms, resulting in its dynamism and complexity, and which has to be determined on a case-by-case basis. It means that when deciding whether a breach occurring falls into the category of fundamental breach, judges and adjudicators have to principally take into account those particular circumstances of the given case[21].

Gläubigerin zur Verfügung stehenden Rechtsbehelfe hängt nicht von der Ursache der Leistungsstörung, sondern von deren Intensität ab".

[19] SCHWENZER/ HACHEM/ KEE (2012), p. 737, Para 47.111; Ferrari *et al*/ GARRO (2004), *Draft Digest*, pp. 362-363 and YOVEL (2007), pp. 398-399.

[20] Coining this term, *see* for example, Vogenauer/ HUBER (2015), p. 918, Para 3.

[21] LOOKOFSKY (2012), *Understanding the CISG*, p. 112-114. *See also* ZIEGEL (1984), *Remedial Provisions*, p. 12; and LUBBE (2004), pp. 451, 471 who uses the expression of "[s]lippery nature of CISG's doctrine of Unitarian Breach".

> Firstly, the contractual stipulations that may expressly characterize the importance that performance of a particular obligation is to have for the promisee—for instance because time has been determined as of essence of the contract[22]. Secondly, judges and adjudicators face important challenges as to the interpretation of the CISG's default rule[23]. Among others: it has to be assessed what constitutes a "substantial deprivation of the expectations" that the aggrieved party was entitled to have according to the contract or whether the breaching party should or could have "foreseen that result".

What is more, regarding the topic of the present dissertation, it has to be evaluated what the role of the seller's right to cure—pursuant to Article 48(1)—is in the determination of a fundamental breach within the meaning of Article 25 CISG. Only in this way can the discussion about the interplay between the seller's right to cure and the buyer's right to avoid the contract under Article 49(1)(a) (which the opening wording of Article 48(1), "subject to", gave rise to) be clarified[24].

However, as indicated, the *Fundamental Breach Doctrine* does not suffice to give an adequate response to all scenarios of breach of contract. Consequently, the Convention also recognizes, in the limited instances of non-deliveries, a *Nachfrist-mechanism* to allow the buyer to declare the contract avoided under Articles 47(1), 49(1)(b):

> *Article 47*
>
> (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.
>
> *Article 49*
>
> (1) The buyer may declare the contract avoided:
> […]
> (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with

[22] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 418, Para 2.

[23] LUBBE (2004), p. 446 and LURGER (2001), p. 102 who empathize that Article 25's vague definition of the concept of fundamental breach generates a lack of legal certainty to the parties.

[24] In this regard, *see below* Ch. I, 1.1.3.a) for some differences with the regime laid down under Article 7.1.4 and 7.3.1(1) UNIDROIT Principles.

> paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed.

As we have seen, according to these rules, if a non-delivery has occurred[25]—provided that it does not immediately amount to a fundamental breach because, for example, the time for performance was stipulated of the essence—the aggrieved buyer might nevertheless be entitled to declare the contract avoided. The requirement is that the seller does not subsequently perform within a reasonable period of time previously fixed by the buyer. This alternative technique for avoidance finds comparable rules in the *Nachfristsetzung* under §§323 and 437(2) BGB[26].

> Criticism of the *Nachfrist*-mechanism may derive from the fact that it imposes the need to classify at least one kind of breach of contract: remediable non-deliveries of goods—in other words, non-fundamental delays in delivery. Thus, the *Nachfrist*-mechanism might challenge the previous statement about the simplicity—based on homogeneity—of the CISG's Unitarian approach to breach-of-contract[27].

b) Buyer's Set of Remedies for Breach of Contract under the CISG

Remedies for breach of contract constitute one of the core issues of the contract law. Their relevance must be taken into account from

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[25] In case of any failure to perform other than non-delivery, the expiration of an additional period of time fixed by the aggrieved buyer under Article 47(1) does not automatically upgrade the established breach up to the category of fundamental within the meaning of Article 25. HONNOLD/ FLECHTNER (2009), p. 423, Para 291; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 422, Para 10. It constitutes a conspicuous difference between ULIS' and CISG's regimes as noted in CISG-AC Opinion no 5, p. 3 Para 3.2. *See also* SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 143, Para 188 in the following words: "[u]nlike Article 44(2) ULIS, the CISG does not allow avoidance if the buyer unsuccessfully grants an additional time period to remedy any defects of the goods".

[26] *See below* Ch. I, 1.1.2.b).

[27] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 722, Para 5 who phrases this assumed criticism as follows: "[n]otwithstanding the fact that any breach […] in principle triggers the remedies enumerated in Articles 45(1) and/or 61(1) regardless of the type of breach of contract, the various types of performance failures cannot be ignored entirely in the remedy system".

both: *ex ante* and *ex post* viewpoints[28]. In this regard, CISG's regime for international sales of goods is not an exception[29].

According to *Part III* of the Convention (*Sale of Goods*) and in particular *Chapter II: Obligations of the Seller* and *Section III: Remedies for Breach of Contract by the Seller*, if the seller fails to perform one of its contractual obligations and as a consequence commits a breach of contract, the buyer is entitled to resort to a range of rights pursuant to Article 45[30]:

> (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
> (a) exercise the rights provided in Articles 46 to 52;
> (b) claim damages as provided in Articles 74 to 77.

Through the all-embracing term "remedies for breach of contract by the seller" adopted by the CISG, it is implied that the Convention only expressly provides an aggrieved buyer with four remedies: right to require performance (Article 46), to avoid the contract (Article 49), to claim a reduction in price (Article 50), and to claim for damages (Articles 74-77)[31].

Other default rules under Articles 47 (fixing supplementary time for performance), 51 (remedies in events of partial performance) and 52 (buyer's rights to reject premature delivery or delivery of more than the contractually agreed quantity) are merely complementary in nature[32]. This latter category is where the seller's right to cure after performance date (Article 48) is comprised.

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[28] *See* an appealing chapter in FARNSWORTH (2007), *The Legal Analyst*, pp. 3-12; HERMALIN/ KATZ/ CRASWELL (2007), p. 99.

[29] Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 4, p. 106, Para 10; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 92, Para 102 who refers to remedies in the following terms: "[…] which are, so to speak, the backbone of the CISG and define the legal status of the parties".

[30] It has been submitted that CISG's default remedies available to an aggrieved buyer depict the achievement of a compromise solution between the drafters of the Convention, which came from countries of either common law and civil law traditions, ZIEGEL (1984), *Remedial Provisions*, p. 3; KATZ (2006), p. 378; and LOOKOFSKY (2012), *Understanding the CISG*, p. 103.

[31] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1060, Para 10.

[32] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 725, Para 11.

Focusing on the Convention's remedial system for breach of contract available to a buyer, it must be noted that the list proffered by Article 45 CISG is not self-sustaining. The first feature is that all of the buyer's remedies are dipositive; thus, all of them can either be varied or excluded by virtue of a parties' agreement as expressly stated in Article 6[33]:

> The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.

Likewise, new remedies can also be introduced into the contract by parties' agreement. In this regard, clear-cut examples are: fixed sums stipulated by the parties to either *ex ante* liquidate damages or to supplementarily penalize the breach of contract[34], as well as additional contract-based buyer's rights to reject non-conforming tenders of performance.

As a result, for the sake of providing the reader with a more complete framework to analyze the seller's right to cure after performance date under Article 48 within the Convention default remedial system, the following buyer's rights—gathered under the notion of *Remedies* according to the CISG's nomenclature—will be considered in the present dissertation:

- Damages, which includes the buyer's cure by itself and fixed sums payable upon breach of contract.
- Buyer's right to ask for cure, in particular, replacement and repair of non-conforming goods.
- Buyer's right to fix an additional period of time for performance (Nachfrist).
- Buyer's right to declare the contract avoided due to a fundamental breach or after a futile expiration of a Nachfrist.
- Reduction of the purchase price.
- Buyer's rights to withhold own performance.
- Specific buyer's rights to reject non-conforming tenders of performance.

[33] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 734, Para 36; LOOKOFSKY (2012), *Understanding the CISG*, p. 101 who stresses the fact that the validity of such agreements is subject to the applicable domestic law. *Extensively, see below* Ch. II, 2.1.1.

[34] *Audiencia Provincial Madrid* 18 October 2007, CISG-online 2082.

To further illustrate the buyer's remedies for breach of contract, a second feature of the CISG's remedial system is to be highlighted. It must be noticed that the Convention places all remedies for breach of contract on an *Equal Footing Basis*, which means that, a priori, there is no remedy taking preference over others[35]. On one hand, consistent with the above-explained Unitarian approach to breach-of-contract, the precise type of breach occurring does not matter. Generally speaking, total non-performance, delay or delivery of non-conforming goods—as deviations from the plan agreed under the contract—might trigger the exact same remedies in favor of an aggrieved buyer[36].

On the other hand, as indicated above, the rightful exercise of some of these remedies—namely, replacement of goods (Article 46(2)) and avoidance of the contract (Article 49(1)(a))—is only possible upon qualified—i.e. fundamental—failures to perform. Accordingly, despite the equal footing basis on which the buyer's remedies are assumed to be displayed, it is also true that the CISG's remedial system splits availability of remedies into two spheres: an unrestricted one—aimed at all breaches including non-fundamental and fundamental ones—and a restricted one, in which certain remedies only become available after the fundamentality of the breach in question is established.

The third feature to be outlined concerning the CISG's set of remedies for an aggrieved buyer is that the promisor can—as long as preconditions for each of them are met—freely choose among the available remedies. However, the buyer cannot cumulatively assert some of these remedies whose consequences are incompatible. Only damages can be rightfully combined with other remedies, provided

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[35] SCHWENZER/ HACHEM/ KEE (2012), p. 533, Para 41.03. *Cf.*—as will be presented in epigraph 1.1.2.c)—this clearly differs from the hierarchy of remedies coined by Article 3(3) Directive 1999/44/EC of the European Parliament and of the Council of May 25th 1999 on certain aspects of the sale of consumer goods and associated guarantees, which reads:

> (3) *In the first place*, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate (emphasis added).

[36] However, it is true that some remedies are only triggered by certain non-performances, for example, price reduction—under Article 50—is only applicable to non-conformities in the purchased goods, SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 209, Para 446.

that their scope is accordingly adjusted. Reductions in the amount of damages are justified because a damages award can never lead to overcompensation of the aggrieved buyer[37].

Furthermore, all the above consideration of the CISG's remedial systems must be related to another consideration stemming from the very practical exercise of remedies. The CISG provides neither remedies with *ipso facto* effects nor requires a judicial declaration for the effective exercise of a remedy. The CISG only requires that the aggrieved promisee (here the buyer) gives notice to its counter-party for the lawfully exercise of its rights arising out of the breach. For instance, it is submitted that the CISG requires a buyer's declaration of set-off[38].

Finally, it is significant to stress the general principle of *Preemption* as regards the CISG's remedies for breach of contract, derived from Article 4, sentence 1 and Article 7. Concerning the breach-of-contract regime and its resultant remedial system, the Convention has sufficient exclusivity[39], as well as general principles specific enough, as to build rules that allow an adjudicator to fill possible gaps[40].

> Gap-filling could be relevant, for example, should the existing remedies for breach of contract not expressly address the circumstances of a given case, or wherever the Convention's rules on breach of contract do not fully address the specific features of a peculiar breached obligation, for instance, those of supply of services.

Wherever the issues arising from a dispute fall within the scope of the Convention's remedial system, an aggrieved buyer cannot

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[37] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1060, Para 10; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, pp. 725, 730 Paras 12, 25; HONNOLD/ FLECHTNER (2009), pp. 405-406, Para 277; FOUNTOULAKIS (2011), p. 11; and LOOKOFSKY (2012), *Understanding the CISG*, p. 102.

[38] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, pp. 133-134, 135, Paras 30, 33: "[…] rights of one party only take effect if that party gives notice to the other party of making use of its right".

[39] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, pp. 732-733 Paras 30-32 stating in the latter: "[t]he general principle is that exclusivity of uniform law is to be assumed".

[40] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, pp. 133-134, Para 30.

assert, in addition or instead of its rights under Article 45(1) CISG, further rights that it may derive from the domestic contract law. Specifically, as a matter of principle, and to the extent that a controversy is ruled or falls within the CISG's scope of application, the buyer cannot turn to rules governing the breach of contract or the remedies based on domestic law[41].

c) The Seller's Right to Cure After the Date for Delivery as Regards the CISG's Cure Regime and Underlying Principles

The CISG comprises some default rules that *sequence the remedies for breach of contract*[42], which, arguably, lead to a *Cure Regime*. This regime pursues two main goals:

On the one hand, to foster performance of contract under its agreed terms in order to uphold what parties contracted for—insofar as it is in tune with the remaining interests of the aggrieved promisor (here the buyer) into the contract[43]. On the other hand, to divest assumedly less cost-effective remedies for breach of contract (in

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[41] SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 448 stresses this solution for non-conformity of the goods: "[a]ndererseits müssen auch dem Käufer günstige nationale Regeln, etwa Vorschriften über zusätzliche Rechtsbehelfe, ausgeschlossen sein". Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 4, p. 81, Para 19; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 733, Para 32; SCHWENZER (2007), p. 421, HONNOLD/ FLECHTNER (2009), p. 406, Para 278 and SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 138; *but Cf.* LOOKOFSKY (2012), *Understanding the CISG*, p. 115.
Not dealt with in this thesis is the controversy about to what extent the CISG's remedial system is compatible with further remedies stemming from other areas of domestic contract and tort laws. For instance, claims arising out of validity issues, which are left out by Article 4(a) CISG, claims for *culpa in contrahendo*, and contractual claims for personal death and injuries assumedly excluded under Article 5. *See* SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, pp. 84, 210, Paras 169, 448; Schlechtriem/ Schwenzer/ SCHROETER (2016), Intro to Arts. 14-24, pp. 256-260, Paras 66-74; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 733, Para 32; and Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 4, pp. 80-81, Para 18, Art. 5, p. 733, Para 4. *For all* Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 4, p. 112, Para 22 who coins a test based upon: "[f]unktional äquivalente Lösung".

[42] *See for the concept* FRIEHE/ TRÖGER (2010), pp. 161, 182.

[43] Staudinger/ U. MAGNUS (2013), Art. 48, Para 3.

economic terms and as regards the contractually generated welfare)—mainly, avoidance of contract[44].

First of all, the Convention sets forth, under its Articles 34, 37 and 48, three genuine seller's rights to cure. Differences between these provisions depend upon the nature of the failure to perform as well as whether the date for delivery has expired or not[45].

> *Article 34*
>
> […] If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity […].

> *Article 37*
>
> If the seller has delivered goods before the date for delivery, he may, up to that time, deliver any missing part or make up any deficiency […].

Furthermore, as indicated above, pursuant to Article 47(1), an aggrieved buyer may fix an additional period of time of reasonable length—the *Nachfrist* or *délai supplémentaire*—which allows the breaching seller to subsequently perform its obligations[46]. In practice, this extra time grants the seller an opportunity to cure[47].

> *Article 47*
>
> (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

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[44] Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 587 Para 10; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, pp. 629, 630 Paras 2, 5: "[t]he CISG adopts the principle that the contract should continue in existence wherever possible; the right to avoid the contract is accordingly restricted to cases of fundamental breach of contract"; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 764, Para 1: "[a]rticle 48 CISG, in conjunction with Articles 34 and 37, constitute a cure regime that puts the seller in a strong position […]".

[45] *See below*, 2.1.2.b).

[46] P. HUBER (2006), *Comparative Sales Law*, pp. 962-963 stresses that the seller's right to cure and the *Nachfrist* are closely related, but they start from a different angle; MAK (2009), p. 175 refers to: "[t]he crucial distinction is that *Nachfrist* will only apply at the discretion of the buyer –he is not obliged to set an extra period of performance for the seller".

[47] P. HUBER (2007), pp. 20-21 and YOVEL (2005), p. 7 who plastically states: "[t]he curative nature of the Nachfrist mechanism".

Thirdly, an aggrieved buyer, pursuant to Article 46(1), is generally entitled to require performance—i.e. it has a right to *ask for cure*[48]. Therefore, it is submitted that in accordance with this unrestricted entitlement to claim for specific performance, the Convention has approximated the scope of application of Articles 46(1) and 48[49].

> *Article 46*
>
> (1)The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

Fourthly, in certain scenarios of breach of contract, the buyer might be expected to *Cure by Itself* and then charge the seller with the incurred expenses as well as a claim for non-curable damages—particularly those arising from the delay in performance[50]. In practical terms, curing activities conducted by the buyer itself may be the same that the breaching seller would have undertaken under Article 48, had it been feasible[51].

Fifthly, according to Article 79(1), in cases where an impediment in performance—temporal or definitive—has been proven, the seller can proffer performance under different terms than those initially stipulated—i.e. the seller may seek to reach an agreement with the buyer to amend the contract.

> *Article 79*
>
> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the

[48] *See* BRIDGE (2014), pp. 575, 580, Paras 10.129, 10.138.

[49] SCHWENZER/ HACHEM/ KEE (2012), p. 562, Para 43.09; and ADAME-MARTÍNEZ (2013), p. 547.

[50] In the literature, some authors have empathized the incurability of delay: HONNOLD/ FLECHTNER (2009), p. 425, Para 295; and Díez-Picazo/ LÓPEZ (1998), Art. 48, p. 431-432.

[51] CISG-AC Opinion no 5, p. 5 Para 4.5: "[i]f in a given case the buyer is in a better position than the seller to have the goods repaired himself or by a third party, to buy missing parts or –in case of a defect in quantity– to buy the missing amount of goods, he is obliged to do so and may not declare the contract avoided for fundamental breach". In the case law, *Landgericht* Heidelberg 3 July 1992, CISG-online 38 and German *Bundesgerichtshof* 3 April 1996, CISG-online 135.

> impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

Currently, this solution is also assumed to be restrictively applicable to unforeseeable change of economic circumstances; that is, wherever an unforeseen change renders the promisor's performance under the original terms extremely onerous (i.e. hardship)[52]. Although this amendment could pursue similar goals to the cure regime—that is, perform the contract and eschew its avoidance—this technique inexorably entails deviation of the contractual program, and, consequently, it should not be included within the cure regime[53].

Sixthly, wherever prior to the scheduled date for performance, the success of the seller's forthcoming performance is threatened—under Article 73—or when a foreseeable failure to perform by the seller would be tantamount to a fundamental breach—under Article 72—the potentially aggrieved can temporarily suspend its own performance and, in the latter situations, declare the contract avoided upon the basis of an *Anticipatory Breach*. In doing so, however, the buyer must give notice to the potentially breaching seller, in order to allow the latter to provide adequate assurance of its future performance and counter any threat[54]:

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[52] Schlechtriem/ Schwenzer/ SCHWENER (2016), Art. 79, p. 1142, Para 31; decision of Belgium *Hof van Cassatie* 19 June 2009, CISG-online 1963 which reads: "[c]hanged circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision [art. 79(1)] of the Convention". *Cf.* for an early opposite opinion Díez-Picazo/ SALVADOR (1998), Art. 79, pp. 644, 652 nevertheless ultimately agreeing upon the same outcome: *Sozialexistenz* or *Limit of Sacrifice*.

[53] *See below*, Ch. III, 3.2.2. This distinction holds true irrespective of the fact that a denial by promisee of a reasonable offer of amendment by promisor may have the effect of excluding promisee's remedy to avoid the contract, which, as it will be discussed, seems a very similar effect to those of the seller's right to cure pursuant to Article 48(1). For all *see* Schlechtreim/Schwenzer/ SCHWENZER (2016), Art. 79, pp. 1150-1151 Para 55.

[54] FOUNTOULAKIS (2011), p. 11; *see* for different roles of these communications Schlechtreim/Schwenzer/ FOUNTOULAKIS (2016), Art. 72, p. 1031 Para 18: "[u]nlike the notice requirement in Article 71(3), the notice mentioned in Article 72(2) is a precondition for an effective avoidance […]".

Article 71(3)

A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72(2)

If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

If the seller furnishes adequate assurance of its due performance, the achieved result might seem familiar to what is accomplished by the Convention's cure regime—here, in particular, by the seller's right to cure after delivery date under Article 48. Assumedly, a potentially breaching seller is *curing* a threat on its failure to perform and, therefore, ultimately performing the contract by lifting the temporal suspension or excluding definitive avoidance of contract[55].

All in all, the two goals above depicted concerning the *Cure Regime* flow together into the principle *Favor Contractus*, which is one of the most acknowledged priciples under the Convention and, disputedly, in continental Civil law[56]. Among others, Articles 25, 34, 37, 47, 46(2), 48, 49, 63, 64 and 72 are provisions from which such a general principle can be derived[57]. It is submitted in the literature that such principle is in tune with the CISG's basic goal of

[55] SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 191, Paras 272-273; SCHWENZER/ HACHEM/ KEE (2012), p. 558, Para 42.46; LOOKOFSKY (2012), *Understanding the CISG*, p. 118-119; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 3; MAK (2009), p. 149; and FOUNTOULAKIS (2011), p. 12 who expressly states "[i]f the seller's performance has not yet become due but the buyer wishes to exercise a preliminary remedy, the principle of the seller's right to cure taking priority over the buyer's exercise of remedies is modified accordingly: the seller's issuance of adequate assurance that it will perform the contract properly cuts off the buyer's right for avoidance or suspension of performance".

[56] DAVIES/ SNYDER (2014), p. 398.

[57] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, p. 136, Para 35; Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 7, p. 184, Para 54; HEUZÉ (2000), *Vente internationale*, Art. 48, pp. 372, 376, Paras 420, 425; P. HUBER /MULLIS (2007), p. 181; P. HUBER (2007), p. 18; JANSSEN/ KIENE (2009), *General Principles*, p. 274.

promoting international commerce[58], as it is neatly stated at the preamble of the Convention that:

> "[A]doption of uniform rules which govern contracts for the international sale of goods […] would contribute to the removal of legal barriers in international trade and promote the development of international trade
> […]"

In this sense, the decision of the *Handelsgericht Aargau* 5 November 2002, CISG-online 715 is also relevant:

> In April 2000, a German buyer—a company that held the rights of commercialization of the German Touring Car Masters (DTM)—acquired from a Swiss seller three inflatable triumphal arches. These arches were installed in the race circuit of *Hockenheimring* to be used as an advertising medium near to and above the motor racing tracks, during several races of the 2000 season.
>
> On the morning of the first day of races, one of the inflatable triumphal arches (D2-arch) collapsed and, due to safety concerns, the directorship of the race ordered the removal of all arches installed lengthwise along the circuit. As a consequence, the buyer notified the seller of the lack of conformity of the goods and some days after declared the contract avoided pursuant to Article 49(1)(a) CISG. The seller disputed such avoidance as it had—in good time—offered to remedy the defects in the arches because they were curable and, therefore, the failure to perform could not amount to a fundamental breach upon which the buyer could effectively avoid the contract.
>
> As preliminary remarks—regarding the general principle at stake—the *Handelsgericht* considers: "[t]he UN sales law proceeds from the fundamental precedence of preservation of the contract". Afterwards, furtherance of this principle led the Swiss court to conclude: "[w]hen, in doubt, the contract is to be maintained even in case of fundamental defects, and immediate contract avoidance should stay exceptional".

As a result, *Favor Contractus* is the CISG's underlying principle most closely linked with the seller's right to cure after delivery date under Article 48[59]. In particular, regarding the interplay between

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[58] MAGNUS (2012), *CISG vs CESL*, p. 98.

[59] *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 1; P. HUBER (2006), *Comparative Sales Law*, p. 964; MAK (2009), p. 150; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 1; BRIDGE (2013), *Int' l Sale of Goods*, p. 583, Para 12.22; and DiMatteo/ Janssen/ MAGNUS/ Schulze (2016), p. 497, Para 101: "[t]he idea

this right of the seller and the *Fundamental Breach Doctrine*. As Prof. Huber deftly outlines, Article 48's relevance to this principle can be split into two different strands[60]:

> "Das Recht zur zweiten Andienung dient der Verwirklichung der generellen Zielsetzung des Übereinkommens:
>
> [1] Die Durchführung des Vertrages so weit wie möglich zu gewährleisten;
>
> [2] Und die Vertragsaufhebung zurückzudrängen"

As stated, on one hand, the seller's right to cure after delivery date—either on account of an imposition according to Article 48(1) or after a request/notice to the aggrieved buyer under 48(2-4) —is a basic performance-oriented right intended to furnish alternative performance of contract, as long as it is still possible and adequate, taking into account the buyer's interests in the contract[61].

On the other hand, the seller's right to cure also plays a crucial role in affecting other non-performance-oriented remedies' application—e.g. price reduction or damages[62]. What is more, the existence of the seller's right to cure under Article 48(1) is one of the principal factors to be taken into account when determining the curability of an established breach of contract.

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that deficiencies of the performance should be healed if possible and not too burdensome for both parties underlines the maxima of *pacta sunt servanda* and also corresponds with the concept of fundamental breach. This concept, too, aims at the maintenance and execution of the contract instead of its rush termination which it allows in severe cases only".

[60] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 1; *see also* in similar terms Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 764 Para 1: "[t]he CISG adheres to the principle *Favor Contractus*, which also means that the buyer's right to avoid the contract is the *ultima ratio*"; and AHDAR (1990), abstract: "[e]ncouraging the parties to resolve their differences while keeping the deal together and minimizing economic waste are two of the most common justifications".

[61] MAK (2009), p. 150 who stresses: "[t]wo main policy reasons plead in favour of the recognition of a right to cure for the seller. First, it promotes the objectives of contract law, for example to ensure performance of the contract"; and LIU (2005), p. 3. As to Article 7.1.4 of the PICC *see* UNIDROIT (2010), *Off. Comm.* Art. 7.1.4., p. 227. As to the CESL *see* Schulze/ ZOLL (2012), *Commentary*, p. 496, Para 1. For implications on efficiency of remedy to require promisor to specifically perform the contract *see* HERMALIN/ KATZ/ CRASWELL (2007), pp. 117-118.

[62] *See below* Ch. IV 4.2.

Therefore, Article 48(1) indirectly affects the finding of the fundamentality of a breach, upon which the Convention's breach-of-contract regime is built and upon which buyer's right to declare the contract avoided ultimately hinges[63]. Consequently, the seller's right to cure, in conjunction with the notion of fundamental breach within Article 25 CISG, basically achieves the goal of preserving the contract by relegating avoidance of contract to the category of *ultima ratio* default remedy.

From a legal theory viewpoint, is noticeable that the principle *Favor Contractus* is in tune with the classic principle of Contract Law: *Pacta Sunt Servanda*[64]. It advocates for performance of what parties contracted for in strict compliance with agreed terms—despite the delay that subsequent perform inevitably entails, which is to be compensated by damages—and ultimately for fulfilment of the purpose of the contract. In so doing, this principle seeks legal protection of all parties' legitimate interests placed into the contract and, as a matter of principle, it ultimately results in upholding private autonomy[65].

In economic and behavioural terms, also discussed later as to the narrower perspective of the seller's right to cure[66], the CISG's key

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[63] *See below* Ch. IV 4.1; CISG-AC Opinion no 5, p. 3 Para 3.1; SCHWENZER (2005), p. 442; SCHWENZER/ HACHEM/ KEE (2012), p. 709, Para 47.03; and SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 148, Para 194 stating: "[c]ore deals underlying the CISG are to keep the contract "alive" as long as possible, the threshold for a breach to be fundamental is relatively high".

[64] ZIMMERMANN (2002), *Remedies*, p. 36; P. HUBER (2006), *Comparative Sales Law*, p. 961; MAK (2009), p. 48 stating: "[…] *Pacta sunt servanda*: Parties are bound by their contractual obligations, and therefore bound to give the other party the performance that he contracted for, or at least the value of it"; and MAK (2009), p. 150 who stresses: "[t]wo main policy reasons plead in favour of the recognition of a right to cure for the seller. […] Secondly, it is in line with the policy to avoid economic waste. Termination of a contract upon breach may cause losses for both parties".

[65] MAK (2009), pp. 65-66 considers that a breach of contract entails two headings: losses caused and protection of the performance interest. Therefore, the author purports superiority of a performance-oriented remedy over damages because only the former is able to redress both: "[d]amages are unable to protect the performance interest, and that therefore performance-oriented remedies are the better remedies"; for development on these categories and ideas *see* WEBB (2006) pp. 46-47, 71.

[66] *See* Ch. IV, 4.3.

principle *Favor Contractus* induces parties to rely on performance—as long as adequate—of what they had contracted for. It results in better incentives to enter into and specifically invest into the contract. In addition, *Favor Contractus* avoids notorious uneconomic risks and costs that the winding-up process after declaration of avoidance—also delivery of substitute goods—would have given rise to[67]. Finally, the principle minimizes a negative allocation of costs and risks that would result from the avoidance of the contract.

Last but not least, other general principles are also related to the seller's right to cure. Here, it must be highlighted that the CISG's cure regime—which comprises Article 48—is based on a general principle of *Parties' Cooperation* in performance of the contract[68].

Such cooperation has been deemed as exceptionally important in the context of international sales of goods because it allows the parties to cheaply, quickly and privately solve their commercial disputes. Hence, cooperation reinforces the performance of the contractual obligations and ultimately upholds the purpose for which the parties entered into the contract, without having to resort to expensive and time-consuming dispute resolution mechanisms—usually international commercial arbitration—or to national courts[69].

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[67] FOUNTOULAKIS (2011), p. 17 stressing: "[a]voidance of the contract is a remedy of last resort, because avoidance raises additional costs for return transport and insurance which are useless […] costs"; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 448, Para 51.

[68] JANSSEN/ KIENE (2009), *General Principles*, p. 272, who also consider that this parties' duty to cooperate is independent from the principle of observance of good faith. As to the existence of a general duty to cooperate which underlies the CISG's provisions *see also* Schlechtreim/Schwenzer/SCHWENZER (2016), Art. 79, p. 1147 Para 44; Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 7, p. 185, Para 54: „[…] jede Partei mit der anderen zusammenarbeiten muss, um ihr die Erfüllung zu ermöglichen und um das Vertragsziel nicht zu gefährden".

[69] KATZ (2006), p. 390, who refers to them as: "[h]igh transaction cost of pursuing ex post legal relief"; HERMALIN/ KATZ/ CRASWELL (2007), pp. 11, 120-121; and MAK (2009), p. 151 stating: "[a] widely available remedy of cure […] enables the parties to resolve their dispute with the smallest possible economic losses".

1.1.2 Main Approaches to Cure Regime in Comparative Law: Seller's Rights to Cure, Nachfrist and Hierarchy of Remedies for Breach

a) *From the Common Law*: The Seller's Right to Cure under §2-508 Uniform Commercial Code

The salient example as regards the so-called first approach to the cure regime is proffered by the law for transactions involving the sale of goods in the United States of America. Its primary source is the Uniform Commercial Code (UCC)—as adopted by each state—whose Article 2 governs sales between merchants (business-to-business or B2B) as well as between merchants and consumers (business-to-consumer or B2C)[70]. Its §2-508 reads as follows:

> *§2-508. Cure by Seller of Improper Tender or Delivery; replacement*
>
> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
>
> (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

Notably, §2-508(1) establishes the seller's right to cure before performance date. This provision basically corresponds with Articles 34 and 37 CISG[71], which articulate the seller's rights to cure—provided that cure is conducted in the period right up to the last contractual time for performance—those prematurely tendered non-conforming documents or goods.

> Notably, an obvious difference in the wording is that CISG's provisions curtail the seller's right to cure whenever it might cause the aggrieved buyer unreasonable inconveniences or unreasonable expense, whereas UCC's provision is silent as to this concern[72].

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[70] FARNSWORTH/ *et al.* (2013), *Contracts*, p. 7; and PALUMBO (2015), p. 5.
[71] KRITZER (1989), *Guide to Practical Applications*, pp. 246, 297.
[72] FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 822, Paras 10-11; and GILLETTE/ WALT (2016), p. 243.

Conversely, §2-508(2) governs the seller's cure after delivery date, which is virtually tantamount to Article 48 CISG. In the analysis of this provision, besides some indispensable focus on the interplay between the seller's right to cure under §2-508(2) and the Perfect Tender Rule under §2-601—addressed below—three preliminary remarks are worth pointing out.

First of all, it must be stressed that this rule is dispositive (and also non-mandatory), therefore, it can be either expanded or displaced by parties' agreement[73].

Secondly, due to the fact that the seller's right to cure under §2-508(2) is extended after performance time, it is correspondingly subject to the following three specific preconditions: (1) The seller had reasonable grounds to believe that the rejected tender would be acceptable with or without money allowance[74]; (2) The seller reasonably notifies the buyer of its intention to cure[75]; and (3) The seller cures within a reasonable time by substituting the previous tender of performance for a conforming one[76].

To determine the notion of a reasonable time for cure, attention must be brought to the proffered interpretation of this notion under

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[73] FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 827, Para 18; DAVIES/ SNYDER (2014), p. 366 referring to exclusions by "no replacements" clause.

[74] GILLETTE/ WALT (2016), p. 244; SCHNEIDER (1989), p. 93; and *Wilson v. Scampoli* D.C. Ct. of App. (1967) 228 A.2d 848 stating: "[a] retail dealer would certainly expect and have reasonable grounds to believe that merchandise like color television sets, new and delivered as crated at the factory, would be acceptable as delivered". *See also* PALUMBO (2015), pp. 128-129 affirming that the focus of the test is not what the seller knew but rather "what a reasonable prudent seller should have known"; and DiMatteo/ Janssen/ Magnus/ Schulze/ BRIDGE (2016), p. 487, Para 61.

[75] SCHNEIDER (1989), p. 95; FRISCH (2014), *Lawrence's Anderson on the UCC*, pp. 824-825, Para 14; PALUMBO (2015), p. 129; and *National Fleet Supply, Inc. v. Fairchild* Ind. Ct. App. 3rd Dis. (1983) 450 N.E.2d 1015: "[s]eller did not clearly indicate desire to cure until more than *two months after sale* […], trial court did not err in entering judgment in favor of buyer on purchase price" (emphasis added).

[76] Extensively WHITE/ SUMMERS (2010), pp. 438, 439-444; SCHNEIDER (1989), p. 95; FRISCH (2014), *Lawrence's Anderson on the UCC*, pp. 826-827, Para 16; and *Ramírez v. Autosport*, 88 N.J. Sp. Ct. (1982) 277, 440 A.2d 1345: "[s]eller failed to cure defect within reasonable time […] August 1978 when buyers rejected […] seller did not demonstrate that van conformed to contract on September 1".

Article 48(1) CISG[77], Article 8:104 PECL or §§323 and 437(2) BGB. Under the Convention, it is assumed that the period is reasonable insofar as the time lag would not amount to a fundamental—i.e. *material* under US law—breach. This also appears expressly stated under article 8:104 PECL: "[…] or the delay would not be such as to constitute a fundamental non-performance". Under the UCC, as discussed below, the notion of fundamental breach is not recognized, but for particular provisions like §§2-608(1) or 2-612.

The first precondition seems—a priori—to constitute the harshest hurdle on the application of the seller's cure and a severe impediment to the interpretation of §2-508(2) alike. Two of the key difficulties are: whether the breaching seller had to be unaware of the non-conformity or whether this party could be aware of it but believe to be of minor importance[78]; and determining what circumstances may give the seller "good grounds to believe" in the buyer's acceptance of the goods as to trigger the seller's opportunity to cure[79].

> In consequence, this quick glance to the wording of §2-508(2)'s preconditions might lead to the conclusion that its application is more restricted than under Article 48 CISG[80].

Thirdly, for the correct application of §2-508(2) it is important to determine if the reference to only "substitute" a conforming tender precludes other methods of cure; in particular, whether subsequent adjustments and repair of defective goods are effective methods of cure under the UCC's provision. Scholars and courts have interpreted affirmatively. Therefore, it is submitted that a breaching seller is allowed to repair non-conforming tendered goods, which is in tune with the means that a breaching seller can resort to under Article 48 CISG in order to cure non-conforming goods[81].

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[77] *See below* Ch. II, 2.2.a).
[78] GILLETTE/ WALT (2016), p. 244; and FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 825, Para 14.
[79] LAWRENCE (1994), p. 1672.
[80] Upholding such assumption KRITZER (1989), *Guide to Practical Applications*, p. 363; and SINGH (2006), p. 26.
[81] SCHNEIDER (1989), p. 97; WHITE/ SUMMERS (2010), p. 442; GILLETTE/ WALT (2016), pp. 248-250; LAWRENCE (1994), pp. 1674-1678; PALUMBO (2015), p.

Nevertheless, three limits are to be traced. First, the subjective impairment to the buyer, coined under the so-called *Shaken Faith Doctrine*[82]. Secondly, it is submitted that such subsequent repair cannot be a half-way measure of cure, but that finally tendered goods must perfectly conform the contract. In other words, sellers have to completely furnish what the aggrieved buyer contracted for and the value of goods to the buyer cannot end up impaired[83]. Thirdly, it is disputed whether a money allowance by the breaching seller may constitute a proper method to conduct subsequent cure under §2-508 UCC[84].

i. Seller's Right to Cure v. Perfect Tender Rule

Generally speaking, US contract law takes into account the intensity—i.e. the seriousness—of an occurred breach in allowing an aggrieved promisee to terminate the contract. A serious breach is qualified as *Material Breach* in accordance with the guidelines set forth in §241 Restatement 2nd of Contracts (1981)[85, 86]:

> *§ 241. Circumstances Significant in Determining Whether a Failure Is Material*

130; and FRISCH (2014), *Lawrence's Anderson on the UCC*, pp. 833-836, Paras 32-36.

In *Wilson v. Scampoli* D.C. Ct. of App. (1967) 228 A.2d 848; EPSTEIN/ MARTINS (1977), pp. 376-378 was so affirmed: "While […] no mandate to require the buyer to accept patchwork goods or substantially repaired Articles in lieu of flawless merchandise, they do indicate that minor repairs or reasonable adjustments are frequently the means by which an imperfect tender may be cured".

[82] *See also below* Ch. 2.2.c) for the seller's right to cure under Article 48 CISG.

[83] FOSS (1991), p. 6; FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 835, Para 34 affirms: "[o]rdinarily, repairs will be held to be adequate when they render the goods conforming to the contract".

[84] Supporting an affirmative view *see* WHITE/ SUMMERS (2010), p. 443 citing *Superior Derrick Services, Inc. v. Anderson*, Houston (Tex.) Ct. of App. (1992) 831 S.W.2d 868 for Texas; *but Cf.* in a negative opinion *see* SCHNEIDER (1989), p. 97 affirming: "[M]oney allowance or price adjustment is not considered a cure under §2-508(2)"; *also* FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 818, Para 4; and LAWRENCE (1994), pp. 1678-1680.

[85] AMERICAN LAW INSTITUTE (1981), *Restatement 2nd of Contracts*, p. 237.

[86] DAVIES/ SNYDER (2014), pp. 364-365.

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> > (a) The extent to which the injured party will be deprived of the benefit which he reasonably expected;
> >
> > (b) The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> >
> > (c) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> >
> > (d) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstance including any reasonable assurances;
> >
> > (e) The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

However, a salient part of US contract law, namely, law of sales of goods—which is mainly governed by the UCC—does not follow this categorization but is built around a different basis: the so-called *Perfect Tender Rule*[87]. Accordingly, the US law of sales of goods is crafted on the core rationale that an aggrieved buyer should be entitled to immediately reject tender or delivery that do not *perfectly* conform to the contract, as §2-601 professes:

> *§ 2-601. Buyer's Rights on Improper Delivery.*
>
> Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:
> (a) reject the whole; or
> (b) accept the whole; or

[87] DAVIES/ SNYDER (2014), pp. 365, 391: "[t]he law of sales of goods in common systems, however, was different […] The goods should conform exactly to the contract, and if they not, you could reject them and cancel the contract, refusing to pay and suing for any damages you had suffered".
In contrast, must be stressed that the *Perfect Tender Rule* does not apply to service and construction contracts, *see* GILLETTE/ WALT (2016), p. 230; and FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 817, Para 3. As to services CHIRELSTEIN (2006, 5th ed.), p. 125 phrases such idea as follows: "[t]he Article [good] is either T or it is not-T; logically, no other category exist. The nature of the service, by contrast, is less susceptible of categorical definition".

(c) accept any commercial unit or units and reject the rest.

The preliminary remark to be borne in mind is that US sales law strongly deviates from the CISG's foundations stressed above. The UCC works functionally differently, as it is structured upon a strict performance rule—*Perfect Tender Rule*—that allows the aggrieved buyer to immediately reject a non-conforming tender of performance as well as to call off the contract[88].

In contrast, the CISG embodies a substantial performance rule, articulated upon the notion of *Fundamental Breach* under Articles 25, 49(1)(a), only upon which a contract can be avoided[89].

Article 49

(1)The buyer may declare the contract avoided:
(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract […]

However, the Perfect Tender Rule under §2-601 UCC was thought to be excessively harsh on sellers that committed minor breaches of contract. Foremost, an unbridled application of the Perfect Tender Rule would give room to buyer's *surprise rejections*. A surprise rejection occurs when the buyer pursues opportunistic interests at the expense of the seller[90], by rejecting slightly non-conforming deliveries or goods—that the seller had reasonable grounds to expect to be accepted by buyer with or without money allowance—for the mere purpose of stepping out of a bad deal.

It was what occurred in the well-known case *Filley v. Pope*[91], where the buyer's real interest in rejecting the shipment of 500 tons of pig iron

[88] GILLETTE/ WALT (2016), p. 230; CHIRELSTEIN (2006, 5th ed.), p. 126; DAVIES/ SNYDER (2014), p. 392: "[b]uyer's rejection of the goods, which of course require timely notice, sets up the buyer's right to cancel the contract. In UCC terminology, goods are rejected, and the contract is cancelled".

[89] KRITZER (1989), *Guide to Practical Applications*, p. 363 phrasing: "[…] system where substantial rather than strict performance is the rule"; SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 384; and SCHWENZER/ HACHEM/ KEE (2012), p. 729, Para 47.88.

[90] GILLETTE/ WALT (2016), pp. 229-230; PRIEST (1978), p. 972; and SCHNEIDER (1989), p. 97.

[91] S. Ct. (1885) 6 S.Ct. 19; *see also T. W. Oil, Inc. v. Consolidated Edison Co.* Ct. of App. NY (1982) 57 N.Y.2d 574; and DAVIES/ SNYDER (2014), p. 365. In

> from Leith harbor—instead of Glasgow harbor—was due to a plunge in the market price after the conclusion of the contract.

As a result, it is generally upheld that in some instances, the application of the Perfect Tender Rule should be accordingly adjusted. Hereunder are presented the principal avenues that US law and courts have turned to for curtailing the aggrieved buyer's powerful right to reject delivery and subsequently terminate the contract under the Perfect Tender Rule. Particularly noticeable is the role of the seller's right to cure under §2-508(2).

First, in particular scenarios the Perfect Tender Rule is abolished by cross-application of other UCC's sections. This fact easily leads to the conclusion that *materiality* (equivalently *fundamentality*) of breach is not entirely neglected by US law of sales of goods[92]. Whereas under §2-601, the buyer is entitled to reject a delivery that "fails in any respect to conform to the contract", the buyer can only revoke an acceptance due to non-conformities if it "substantially impairs its value to him", pursuant to Article §2-608(1)[93]:

> *§ 2-608. Revocation of Acceptance in Whole or in Part.*
>
> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it,
>
> (a) On the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) Without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> […]
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Second, the Perfect Tender Rule only applies to ordinary single-delivery contracts[94], whereas instalment contracts are not subject to

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English law see MCKENDRICK (2013), *English Private Law*, p. 688, Para 10.47 for the arguably equivalent notion of *Technical Breach of Condition*.

[92] CISG-AC Opinion no 5, footnote 19; SCHNEIDER (1989), p. 92; and DAVIES/ SNYDER (2014), p. 392.

[93] FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 816, Para 3.

[94] DAVIES/ SNYDER (2014), p. 365; GILLETTE/ WALT (2016), p. 234; PRIEST (1978), p. 972 affirms: "[t]he Code provides a stricter standard for rejection in

such a strict standard of performance. Pursuant to §2-612 the buyer can only reject a tender of performance in instalment contracts if "the non-conformity substantially impairs the value of that instalment":

> *§ 2-612. "Installment contract"; Breach.*
>
> (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
>
> (2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
>
> (3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

Third, in order to restrict strategic rejections courts also resorted to the good faith principle under §1-304 UCC[95], which provides:

> *§1-304 UCC Obligation of Good Faith.*
>
> Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.

In the case law, *D.P. Technology Corp. v. Sherwood Tool, Inc.*[96] neatly exemplifies the good-faith-restriction on the buyer's rights to reject and to terminate the contract based upon a strict observance of the Perfect Tender Rule.

> D.P. Technology Corp., sited in California, belatedly delivered specially manufactured computer systems to Sherwood Tool, Inc., sited in Connecticut. The latter refused to pay the price on the basis that the seller failed to deliver in a timely fashion. The court affirms the

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installment contracts, where the time between formation and performance typically is greater than in a single delivery contract".

[95] SCHWENZER/ HACHEM/ KEE (2012), p. 729, Para 47.88.

[96] D. Ct. D. Conn. (1990) 751 F. Supp. 1038; and GILLETTE/ WALT (2016), p. 232

> restriction on the buyer's rejection imposed by good faith in the following manner: "[a] rejection of goods that have been specially manufactured for an insubstantial delay where no damage is caused is arguably not in good faith". Accordingly, it is finally decided that: "[t]his court finds that in cases where the nonconformity involves a delay in the delivery of specially manufactured goods, the law in Connecticut requires substantial nonconformity for a buyer's rejection under 2–601".

Finally, in fourth place, UCC gives the breaching seller a generous right to cure under §2-508(2)[97]. In accordance with the wording of the provision, the seller can cure—if it can do so within a reasonable time and after giving notice—those non-conforming tenders of performance that the buyer has rejected but that the seller had reasonable grounds to believe would have been accepted with or without money allowance. If the new tender of performance conforms to the contract, the buyer must accept it and pay for it[98].

The case law backs up such a generous application of a seller's right to cure after performance date as a restriction of the aggrieved-buyer's right to reject and cancel the contract. This buyer's right comes into existence after tender or delivery of non-conforming goods, and ends with acceptance—sometimes only deemed—under §2-601[99]. Arguably, so long as the preconditions under §2-508 are

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[97] CISG-AC Opinion no 5, p. 3 Para 2.2; FARNSWORTH/ *et al.* (2013), *Contracts*, p. 762; BRIDGE (2011), *FS Schwenzer*, p. 224; DAVIES/ SNYDER (2014), p. 392; HAMMOND (1990), pp. 562, 571; and WHITE/ SUMMERS (2010), p. 415-416, 436 considering the extent to which the courts have been tempering the Perfect Tender Rule, nowadays the provision on rejection (§2-601 and *ff.*) should be interpreted as only giving the aggrieved buyer a right to reject upon "substantial non-conformities". *See also* SCHNEIDER (1989), p. 92, 102 stressing: "[t]he most relevant limitation on the buyer's right to reject goods is the seller's right to cure a defective performance"; BRIDGE (2013), *Int' l Sale of Goods*, p. 585, Para 12.23: "[c]ure, therefore, takes place within the shadow of the perfect tender rule"; FOSS (1991), p. 11; PICHÉ (2003), p. 532 affirming: "[p]erfect tender rules comes with an unconditional right to cure a defective tender"; FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 817, Para 4: "[t]he seller's right to cure tempers the severity of the perfect tender rule"; and GILLETTE/ WALT (2016), pp. 231, 242 who phrases: "[s]ome courts have been sympathetic to the claims of sellers and have essentially eviscerated the perfect tender rule" as well as "[t]he seller's ability to cure an initial defective performance substantially diminishes the effect of the perfect tender rule".

[98] Neatly stated in DAVIES/ SNYDER (2014), pp. 365-366; PALUMBO (2015), p. 37.

[99] SCHNEIDER (1989), pp. 89-90.

met, the seller can cure non-conforming tenders of performance or deliveries after the performance date has expired[100].

In the event that the buyer unlawfully refuses to permit the seller to attempt to cure, it is submitted that the buyer loses its right to reject on the basis of a non-conforming tender. That was so decided in *Wilson v. Scampoli*[101], where the buyer had refused to allow the seller to remove the chassis of the purchased television asserting that it did not want a repaired item but another new set. The above solution resembles the sanction laid down in Article 80 CISG:

> *Article 80*
> A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

As a consequence, on one hand, the seller's right to cure completely serves the purpose of curtailing *surprise rejections* only motivated by buyer's opportunistic interests[102]. On the other hand, a general seller's right to cure after performance date allows the alignment of parties' conflicting interests. In accordance with the remaining

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[100] Among others *see Wilson v. Scampoli* D.C. Ct. of App. (1967) 228 A.2d 848: "[TV set] delivered and uncrated (sic.)"; *National Fleet Supply, Inc. v. Fairchild* Ind. Ct. App. 3rd Dis. (1983) 450 N.E.2d 1015: "[w]here diesel engine delivered by seller did not conform to terms of sales contract"; *Ramírez v. Autosport*, 88 N.J. Sp. Ct. (1982) 277, 440 A.2d 1345: "[a] buyer may reject goods with insubstantial defects and also cancel contract if those defects remain uncured"; *Appleton State Bank v. Lee*, S. Ct. of Win. (1967) 33 Wis.2d 690: "[s]ewing machine delivered was not of brand specified in contract […] and seller immediately attempted to rectify error by delivering specified brand but buyers refused to accept tender, in absence of any showing that time was of the essence of contract the failure to originally deliver specified sewing machine did not justify rescission of contract by buyers" and *Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith* S. Ct. Miss. (1988) 523 So.2d 324: "[t]he law's policy of minimization of economic waste strongly supports recognition of a reasonable opportunity for cure". *See also* PALUMBO (2015), p. 117.

[101] D.C. Ct. of App. (1967) 228 A.2d 848; EPSTEIN/ MARTINS (1977), pp. 376-378; FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 830, Para 24; and PALUMBO (2015), p. 130. *Cf. T. W. Oil, Inc. v. Consolidated Edison Co.* Ct. of App. NY (1982) 57 N.Y.2d 574 where the seller sued the buyer for damages.

[102] HAMMOND (1990), p. 560; FRISCH (2014), *Lawrence's Anderson on the UCC*, p. 815, Para 1; *Cf.* PRIEST (1978), p. 999 who critiques cure of defective tenders as follows: "[w]here the price of the goods or the buyer's information has changed, courts must either permit overinvestment in cure or grant a windfall to the buyer".

scope of the application of the Perfect Tender Rule under §2-601, the buyer is, to a large extent, protected from being left with defective merchandise with no remedy other than a claim for damages. At the same time, the seller can duly perform the contract by meeting its obligations.

Furthermore, disputed interpretation of §2-508(2) has also admitted its application to cases of revocation of acceptance, so-called post-revocation cure. The leading case at stake is *Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith*[103]. Hence, even in cases where the buyer had already accepted the goods and then revokes acceptance, the seller has an opportunity to cure its non-conforming tender[104].

> Previously, authors affirmed the exclusion of the seller's right to cure when the buyer had accepted the goods and later revoked acceptance. This was the decision in *Grappelberg v. Landrum*[105]. They justified this position on the grounds that the very wording of §2-508(2) only refers to rejection (it only reads "rejects" without reference to "revocation of acceptance") and on the assumption that the requirement of substantial impairment for revocation already suffices to protect the breaching seller.

All in all, the seller's right to cure after the date for performance under §2-508(2) has indisputably become a significant provision within the UCC remedial structure. The seller's cure constitutes a general restriction on the application of the buyer's rights to reject and terminate the contract by merit of the Perfect Tender Rule under §2-601. Hence, UCC's remedial regime, traditionally structured upon the rigid §2-601, is nowadays strongly tempered by §2-508(2) leading to the assumption that it has slightly drifted towards a

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[103] S. Ct. of Miss (1988) 523 So.2d 324 which footnote 1 reads: "[f]urtherance of the policy justification [minimization of economic waste] undergirding that statute and our Common law doctrine of cure in contracts generally, we recognize that, before *Smith* was entitled to get his money back, *Fitzner* had a right to a reasonable opportunity to cure the vehicle's deficiencies"; *see also* PALUMBO (2015), pp. 127-128.

[104] *See* SCHNEIDER (1989), p. 95; and BRIDGE (2011), *FS Schwenzer*, p. 222; *Cf.* GILLETTE/ WALT (2016), pp. 259-260; and FOSS (1991), p. 24, ff. who holds an eclectic view by suggesting a balancing approach so as to decide, upon the circumstances of every case, whether the seller has a right to cure when the buyer revokes acceptance.

[105] S. Ct. Tex. (1984) 666 S.W.2d 88.

system of substantive performance, rather than a strict performance rule.

In so doing, seller's cure under §2-508(2) brings the UCC closer to the above-excerpted §241(d) of Restatement 2nd. Furthermore, it might also mirror the mediate impact that the seller's right to cure under Article 48 CISG has on the buyer's right to avoid the contract under Article 49, which is reliant on the finding of a fundamental breach—within the meaning of Article 25[106].

As a conclusion, is worth mentioning the 2003 draft for amendment of the UCC. Even though this draft will not see the light of the day, it is interesting to notice how the newly drafted version of §2-508(2) of the UCC addressed many of the doubtful issues seen above[107]. It reads as follows:

> (2) Where the buyer rejects goods or a tender of delivery under Section 2-601 or 2-612 or except in a consumer contract justifiably revokes acceptance under Section 2-608(1)(b) and the agreed time for performance has expired, a seller that has performed in good faith, upon seasonable notice to the buyer and at the seller's own expense, may cure the breach of contract, if the cure is appropriate and timely under the circumstances, by making a tender of conforming goods. The seller shall compensate the buyer for all of the buyer's reasonable expenses caused by the seller's breach of contract and subsequent cure.

Namely, the proposed version clearly states the relationship between the seller's right to cure under §2-508(2) and the buyer's right to revoke acceptance. It also clarifies its application to either non-conforming tender or delivery, and laid down, as a precondition for the existence of the seller's right to cure, that the seller had performed in good faith. Therefore, this drafted section left out the former precondition regarding whether seller could reasonably have expected that its non-conforming tender was acceptable.

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[106] *See below* Ch. IV, 4.1. and 4.2.; PICHÉ (2003), p. 532 stating: "[t]he perfect tender rule under the UCC, doubled with its comprehensive cure provisions, amounts to a –substantial performance– requirement equivalent to the CISG –fundamental breach– rule"; and SCHNEIDER (1989), p. 102-103 who clearly reinforces this conclusions in the following terms: "[u]nder both the CISG and the UCC, when the goods are not delivered on time or are non-conforming, *the buyer's rights are determined by the scope of the seller's right to cure*" (emphasis added).

[107] P. HUBER (2007), p. 22.

Finally, this alternative version would have brought §2-508(2) closer to Article 48 CISG's wording. It not only makes reference to cure and remaining expenses to be borne by breaching seller—which clearly resembles the buyer's claim for damages under Article 48(1) *in fine*—but also imposes that seller's cure be appropriate and timely, under the circumstances. Arguably, this latter assumption is virtually modelled on the reasonableness criteria found in Article 48(1).

ii. The Seller's Right to Cure under English Law of Sale of Goods (SGA 1979)

In contrast to §2-508 UCC, under the English 1979 SGA, one cannot find an express provision on the seller's right to cure. Nevertheless, scholars[108] and judges[109] have been concluding that a seller should be entitled to cure—even against an unwilling buyer—by re-tendering, when initial non-conforming tender was refused. It is submitted that, otherwise, defective tenders *per se* would be tantamount to repudiatory breaches[110], according to §11(3) SGA:

> "(3) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated […]"

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[108] BRIDGE (2014), pp. 575, 577 Paras 10.130, 10.132 stressing: "[t]he Sale of Goods Act does not formally recognize a seller's right to cure. It does not necessarily follow, however, that no room for cure can be found in the Act"; *see also* BRIDGE (2013), *Int'l Sale of Goods*, p. 583, Para 12.122; and MCKENDRICK (2016), *Goode on Commercial Law*, pp. 368-369, Paras 12.19-12.21; YOVEL (2005), p. 2; and MAK (2009), p. 170.

[109] *See* English leading decision *Borrowman Phillips & Co. v. Free & Hollis* (1878) 4 QBD 500. *See* for further imprints: *E.E. & Brian Smith (1928) Ltd v. Wheatsheaf Mills Ltd* (1939) 2 KB 302 in which it is stated: "[buyer's rejection of a tender] [d]oes not prevent the seller, if he has time within which to do so, from tendering another parcel of goods, which may be goods which accord with the contract, and which the buyer must, therefore, accept and pay for".

[110] BRIDGE (2014), p. 577, Para 10.132 and *E.E. & Brian Smith (1928) Ltd v. Wheatsheaf Mills Ltd* (1939) 2 KB 302 in which Judge Branson J. concludes: "[i]t cannot be said that the seller becomes in breach the moment he tenders goods which, for some reason or other (it may be some purely formal reason with regard to the documents), the buyer can say are not in fulfilment of the contract […]".

This conclusion is developed to the extent that the seller's opportunity to re-tender should not only be possible within the contractual delivery timeframe, but also after the fixed delivery date has expired, if the seller's late subsequent tender does not frustrate the promisee's—i.e. buyer's—expectations or the contract's purposes[111].

However, outcomes are very different when the seller effectively makes delivery and then the goods turn out to be non-conforming. It no longer constitutes a mere non-delivery (refused defective tender)[112], but this delivery of non-conforming goods amounts to a seller's breach of a condition under §11(3)[113], upon which the aggrieved buyer may seek to reject the goods and, as an inseparable consequence of rejection, to treat the contract as repudiated[114]. In these scenarios, therefore, the buyer is already entitled to cancel the contract so that there is little or no room for a seller's right to cure.

In addition, even if an attempt to cure the non-conforming delivery has been asked for or agreed to with the breaching seller, §35(6)(a) makes clear that the aggrieved buyer does not lose its right to reject delivery and to treat the contract as repudiated based on the breach of a condition about quality of the delivered goods. Consequently, in these cases, the seller can never be entitled to impose cure of a defective delivery on an unwilling buyer.

> (6) The buyer is not by virtue of this section deemed to have accepted the goods merely because–

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[111] *See* BRIDGE (2014), p. 577, Para 10.132 who phrases: "[w]here time is not of the essence, there seems no reason to prevent a late cure if it occurs before the delay assumes frustrating proportions"; MCKENDRICK (2016), *Goode on Commercial Law*, pp. 367, 370, Paras 12.17, 12.24.

[112] MCKENDRICK (2016), *Goode on Commercial Law*, p. 367, Para 12.17: "[t]he seller is treated as if he had not tendered delivery at all".

[113] SCHWENZER/ HACHEM/ KEE (2012), p. 729, Paras 47.89, 47.90.

[114] BRIDGE (2014), p. 577, Para 10.133 stating: "[s]ection 11(3) appears to link the buyer's rejection of the goods seamlessly to treating the contract as repudiated, thus leaving no for the application of some step, control, or constraint between these two actions of the buyer".
Complementarily, *see* MCKENDRICK (2013), *English Private Law*, p. 688, Para 10.47 who identifies the risk derived from a harsh rule on rejection of goods linked to termination of contract: "[t]echnical breach of a condition in order to escape from what has turned out to be a bad bargain".

> (a) He asks for, or agrees to, their repair by or under an arrangement with the seller, or
> […]

To sum up, under English sales law it is submitted that the seller is only entitled to cure—before or after delivery time—a defective tender, not a defective delivery, as the latter directly amounts to a breach of a condition under the sales contract, which is tantamount to a fundamental breach under the CISG regime's Article 25[115].

b) *A Particular Example in the Civil Law*: An Additional Period of Time for Performance (Nachfrist) under §§323, 437(2) Bürgerliches Gesetzbuch (BGB)

The modernized German BGB[116] perfectly illustrates the tendency to adopt a Unitarian approach to breach of contract, which, a priori—despite §280(1) for damages for breach of duty—is freed from the *Fault Principle*[117]. Upon this notion of breach, the BGB intends to construct a simpler remedial system[118].

Specifically, the BGB includes a second technique to sequence the remedies for breach of contract, which is tantamount to an alternative approach to build a cure regime. As seen, this regime pursues the double goal under the umbrella of the principle *Favor Contractus*: to foster subsequent performance as stipulated under the contract and to disown its uneconomic termination—i.e. avoidance under the CISG—[119, 120].

In so doing, however, the BGB deviates from other approaches. On the one hand, either from the CISG or law of sales in Common Law systems—which lay down several seller's rights to cure non-

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[115] BRIDGE (2014), p. 579, Para 10.137 stating: "[E]nglish law therefore cannot be seen as permitting the cure of a non-conforming delivery by the seller against an unwilling buyer […]".
[116] *Gesetz zur Modernisierung des Schuldrechts* of November 2001, entering into force on 1st January 2002.
[117] KÖTZ (2012), *Vertragsrecht*, p. 381, Para 911; and P. HUBER (2006), *Comparative Sales Law*, p. 960.
[118] ZIMMERMANN (2005), p. 68.
[119] *MünchKomm*/ ERNST (2016), §323, Para 1; DAVIES/ SNYDER (2014), p. 398.
[120] As to the terminology "avoidance", "termination", "cancellation" *see* Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 362.

conforming tenders of performance before and after the date for delivery (here mainly Article 48 CISG and §2-508(2) UCC)—.

On the other hand, from the Convention and other national laws of civilian tradition[121], which rely on the notion of fundamental breach. As well, the modernized Contract law under the BGB deviates from the finding of a breach of a condition, which—under the English SGA—is an inexorable requirement for termination.

Namely, the BGB relies on the fixing, by the aggrieved promisor, of an additional period of time of reasonable length for performance—known as *Nachfristsetzung* under §§323 BGB—which constitutes, under the current German law of obligations, a generally expected mandatory step for the rightful assertion of the remedy to declare reciprocal contracts terminated (*Rücktrittsrecht*)[122, 123].

> *§323 Rücktritt wegen nicht oder nicht vertragsgemäß erbrachter Leistung*
>
> (1) Erbringt bei einem gegenseitigen Vertrag der Schuldner eine fällige Leistung nicht oder nicht vertragsgemäß, so kann der Gläubiger, wenn er dem Schuldner erfolglos eine angemessene Frist zur Leistung oder Nacherfüllung bestimmt hat, vom Vertrag zurücktreten.

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[121] Spanish Contract law is a good example. For all, *see* CLEMENTE MEORO (1998), pp. 27, 237-241; DÍEZ-PICAZO (2008), *Fundamentos*, pp. 763-765; and CARRASCO (2010), pp. 864-865, 1121-1123: "[p]uede afirmarse que nuestro incumplimiento esencial o fundamental o sustancial, de eficacia resolutoria, coincide con el concepto de incumplimiento fundamental […] del Convenio de Viena y demás textos internacionales que se apoyan en esta norma".

[122] *MünchKomm*/ ERNST (2016), §323, Para 2; *Palandt*/ GRÜNEBERG (2017), §323, p. 553, Para 14; KÖTZ (2012), *Vertragsrecht*, p. 386, Paras 920-921; KÖTZ (2015), *Europäisches Vertragsrecht*, p. 327: "[N]achfristmodell"; and SCHWENZER/ HACHEM/ KEE (2012), p. 737, Para 47.112.
Exceptional cases in which avoidance of contract is immediately available are, again, where performance has turned out to be impossible, under §§275 and 326. Likewise, according to §324, for cases of infringement of ancillary duties—§241(2)—it is established that the buyer can avoid the contract if: "[h]e can no longer reasonably be expected to uphold the contract".

[123] KÖTZ (2012), *Vertragsrecht*, pp. 383, 386 Paras 916, 920; ZIMMERMANN (2005), p. 56. Whereas the notice of a Nachfrist under §323 grants the breaching promisor an additional period for cure, in cases of belated performance (*Verzug*), a warning notice (*Mahnung*) is required—under §286—for the assertion of a damages claim pursuant to § 280.

What is more, in instances of tenders of performance of non-conforming goods under sales contracts, §437 BGB lays down a cross-reference including a specific rule as to price reduction[124]. The aggrieved buyer may terminate the contract according to §437(2) in conjunction with §323:

> *§ 437 Rechte des Käufers bei Mängeln*
>
> Ist die Sache mangelhaft, kann der Käufer, wenn die Voraussetzungen der folgenden Vorschriften vorliegen und soweit nicht ein anderes bestimmt ist,
> […]
> (2) nach den §§ 440, 323 und 326 Abs. 5 von dem Vertrag zurücktreten oder nach § 441 den Kaufpreis mindern und

Conclusively, this extra period of time grants, in practice, the breaching promisor an opportunity to subsequently cure any kind of failure to perform insofar as possible and appropriate—curtailed by §323(2) as explained below—and, as a matter of principle, prevents the assumedly undesirable avoidance of contract[125].

It is beyond doubt, therefore, that these outcomes closely resemble those achieved by the cure regime and, in particular, by the seller's rights to cure after delivery date under Article 48 CISG and §2-508 UCC[126]. Nevertheless, §323 BGB does not directly correspond to a

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[124] *Bundesgerichtshof* 5 November 2008, NJW 2009, 508. MEDICUS/ PETERSEN (2015), pp. 139, 151, Paras 280-281, 292; *MünchKomm*/ ERNST (2016), §323, Para 17 all note other important provisions under the HGB §375 (*Bestimmungskauf*) and §376 (*Fixhandelskauf*), and the different rules governing sales of consumer goods and the applicability of the CISG on the international ones; KÖTZ (2012), *Vertragsrecht*, p. 396, Para 954; and OETKER/ MAULTZSCH (2013), pp. 123, 124, Paras 234, 236.

[125] DiMatteo/ Janssen/ MAGNUS/ Schulze (2016), p. 484, Para 54: "[n]o special provision on cure. However, the general Nachfrist procedure serves the same aim"; P. HUBER (2007), p. 21; and VON BAR / CLIVE (2009), pp. 815, footnote 5. The other side of the coin is that a futile expiration of a Nachfrist upgrades the breach as to render avoidance applicable *see* SCHWENZER/ HACHEM/ KEE (2012), p. 738, Para 47.114; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 418, Para 2.

[126] Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 729, Para 18: "[d]as Recht der zweiten Andienung des Verkäufers ist im BGB wegen der für die Geltendmachung weitergehender Rechtsbehelfe grundsätzlich erforderlichen Fristsetzung gewahrt"; Dannemann / Vogenauer / MACQUEEN / DAUNER-LIEB / TETTINGER (2013), pp. 637, 638.

seller's right to cure, such as under Article 48 CISG[127], but is straightforwardly comparable to Article 47 CISG, which lays down the additional period for performance—i.e. Nachfrist—under the Convention in the following ways:

> (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.
>
> (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Even though the BGB does not refer to the concept of fundamental or material breach explicitly[128], it can arguably be found under §323(2). This paragraph summarizes the situations in which an aggrieved promisor is exempted of fixing a Nachfrist before availing itself of the remedy of avoidance of the contract[129].

All these circumstances are, in particular, directly comparable to those where a fundamental breach is established under Article 25 CISG. For instance, wherever the seller repudiates performance or the time for performance was stipulated as the essence[130]. They amount to the buyer's immediate entitlement to avoid the contract pursuant to Article 49(1)(a) CISG and, therefore, rendering the Nachfrist under Article 47 unnecessary and excluding the seller's right to cure under Article 48(1).

> §323(2) Die Fristsetzung ist entbehrlich, wenn

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[127] For the discussion of the existence of a seller's right to cure under the BGB *see* OETKER/ MAULTZSCH (2013), p. 124, Paras 235: "Dem Verkäufer steht kein subjektives Recht auf eine Erfüllung zu und den Käufer trifft keine Pflicht i. S. des § 280 BGB, eine solche zu dulden. Vielmehr ist lediglich das Recht des Käufers zum Rücktritt (in der Regel) gegenüber der Nacherfüllung nachrangig, so dass von einer *zweiten Erfüllungschance* des Verkäufers gesprochen werden sollte".

[128] *MünchKomm*/ ERNST (2016), §323, Para 49.

[129] In the case law: *Oberlandesgericht Düsseldorf* 18 December 2015, NJW-RR 2016, 533. In the literature; KÖTZ (2012), *Vertragsrecht*, pp. 390-391, Para 936-940; and P. HUBER (2006), *Comparative Sales Law*, p. 962.

[130] *Bundesgerichtshof* 8 December 2006, NJW 2007, 835; OETKER/ MAULTZSCH (2013), pp. 126-127, Paras 241, 241a.

> (1) der Schuldner die Leistung ernsthaft und endgültig verweigert,
>
> (2) der Schuldner die Leistung bis zu einem im Vertrag bestimmten Termin oder innerhalb einer im Vertrag bestimmten Frist nicht bewirkt, obwohl die termin- oder fristgerechte Leistung nach einer Mitteilung des Gläubigers an den Schuldner vor Vertragsschluss oder auf Grund anderer den Vertragsabschluss begleitenden Umstände für den Gläubiger wesentlich ist, oder
>
> (3) im Falle einer nicht vertragsgemäß erbrachten Leistung besondere Umstände vorliegen, die unter Abwägung der beiderseitigen Interessen den sofortigen Rücktritt rechtfertigen.

Though there are clear similarities to be found between all provisions mentioned, some striking differences must also be highlighted.

Firstly, §323 BGB sets the general rule that before avoidance of the contract can be lawfully declared, the aggrieved promisor must fix an additional period of time. Likewise, §437(2) BGB narrows down the Nachfrist as a requirement to be met before the assertion of other remedies for breach, namely, reduction of the purchase price.

On the flip side, Article 47(2) CISG brings about the same effects but it is merely voluntarily on the part of the aggrieved buyer. Only in cases of non-delivery does a Nachfrist becomes mandatory under the CISG regime, and only if the aggrieved buyer seeks entitlement, in conjunction with 49(1)(b) CISG, to declare the avoidance of the contract[131].

Secondly, it is necessary to make reference to the reasonableness—i.e. *Angemessenheit*—of the length of the fixed Nachfrist for cure, either under §323(1) BGB[132] or Article 47(1)[133] & 48(1) CISG. With reference to the German provision, it is submitted that, first and foremost, attention must be given to the parties' intention as vested in the contract. Should it not provide an answer, an

[131] P. HUBER (2007), p. 21 notes that Article 49(1)(b) CISG is confined to non-deliveries, whereas §323's Nachfrist is applicable to all kind of breaches of contract.
[132] *See* the old decision *Bundesgerichtshof* 10 February 1982; NJW 1982, 1279.
[133] *See below* Ch. IV, 4.2.5.

adjudicator must take into account the circumstances of the given case and assess them against an objective criterion[134].

Nevertheless, the key question is whether the length of a Nachfrist is unreasonable only if, and insofar as, the consequences of the time lag after the time for subsequent performance would amount to a *fundamental* (under the CISG) or *material* (under US Contract law) breach, had the fixed additional period of time under §323 BGB expired without proper performance by the promisor.

In other words, the doubt is whether—despite the *Nachfristmodell*—the BGB preserves a bias for the fundamental character of a breach. This question is particularly conspicuous because, a priori, an aggrieved promisee is not expected to fix another period of time but can immediately resort to remedies for breach, including, as a matter of principle, termination of the contract[135].

The following interpretation is upheld:

i. The reasonableness of the length of the Nachfrist fixed by the aggrieved promisor under §323 BGB—i.e. the buyer under §437(2) BGB—must, on the one hand, give a realistic opportunity to the breaching seller to cure according to the circumstances of the case.

ii. On the other hand, reasonableness of the Nachfrist does not find its limits wherever the time lag would amount to a fundamental breach, which would be in tune with the interpretation, discussed below[136], proffered for Article 48(1)'s specific precondition that the seller's right to cure must not cause the buyer an "unreasonable delay".

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[134] *MünchKomm*/ ERNST (2016), §323, Paras 71-72 (*zu lange Nachfrist*) and Paras 79-80 (*zu kurze Nachfrist*); KÖTZ (2012), *Vertragsrecht*, pp. 392-393, Para 944-945. *Cf.* SCHULZE (2017), *HK-BGB*, Para 5.
In the comparison with the CISG, *see* Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 47, pp. 758-759, Paras 6-10.

[135] MEDICUS/ PETERSEN (2015), p. 140, Paras 282 phrasing: "[n]ach dem vorzugswürdigen Einheitkonzept bedarf es keiner neuerlichen Fristsetzung […]".

[136] Ch. II, 2.2.a).

Under the BGB's system, all breaches—except if they are minor—may lead to termination of the contract, if the Nachfrist fixed by the creditor was reasonably long enough according to circumstances[137] and has expired without due performance by the promisor. Conclusively, there is no fundamental breach bias under the BGB.

This conclusion clashes with the Convention, where, in cases other than non-deliveries, the fruitless expiration of a Nachfrist does never upgrade the established breach to the category of a fundamental one, only which would allow avoidance of the contract[138]. Interestingly enough, it might be the case that after the expiration of an additional period of time under Article 47(1), the seller can still impose its right to cure pursuant to Article 48(1) and the buyer cannot resort to replacement or avoidance of the contract, because the failure to perform does not amount to a fundamental breach yet.

All in all, on the one hand, the mechanism laid down by §323 BGB provides a rather strong guarantee to the breaching promisor that the contract will not be opportunistically avoided by the aggrieved promisee. On the other hand, it is submitted in the literature that the Nachfrist device reinforces legal certainty, as it articulates a mechanism that neatly rules the remedies for breach of contract in favor of both parties[139].

The latter is assumed to be the most significant advantage of the German cure regime over the not always straightforwardly applicable seller's rights to cure—particularly due to their several preconditions under Article 48(1) CISG and §2-508(2) UCC—as well as over the necessity to determine as complex a notion as the

[137] KÖTZ (2012), p. 393, Para 944 *in fine*: "[d]as bedeutet, dass der Rücktritt nur dann berechtigt ist, wenn er bis zum Ablauf einer vom Gericht festzusetzenden ‚angemessenen' Frist erfolgt ist".

[138] As indicated above, that constitutes a crucial difference between the CISG and ULIS regimes, CISG-AC Opinion no 5, p. 3 Para 3.2. *See also* SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 143, Para 188.

[139] OETKER/ MAULTZSCH (2013), p. 125, Para 238.

one of fundamental—or material—breach within the context of Article 25 CISG or under the SGA[140].

c) *In European Consumer Law*: Hierarchy of Remedies under Article 3 European Directive 1999/44/EC on Certain Aspects of Sale of Consumer Goods

Careful attention must be brought to the Directive 1999/44/EC of the European Parliament and of the Council of 25th May 1999 on certain aspects of the sale of consumer goods and associated guarantees[141].

A priori, one of the core purposes of the Directive is to articulate the consumer's remedies for breach of contract due to a lack of conformity of goods. This principle of conformity is defined in Article 2 in rather similar terms to Article 35 CISG[142]:

> *Article 2.- Conformity with the contract*
>
> (1) The seller must deliver goods to the consumer which are in conformity with the contract of sale.
>
> (2) Consumer goods are presumed to be in conformity with the contract if they:
>
> (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
>
> (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
>
> (c) are fit for the purposes for which goods of the same type are normally used;

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[140] *See* P. HUBER (2007), p. 34; and MAK (2009), p. 171. For a harsh criticism on the uncertainty created by the seller's right to cure, *see* BRIDGE (2011), *FS Schwenzer*, p. 235.

[141] Official Journal of the European Union L 171/12; Modified by Directive 2011/83/EU of the European Parliament and of the Council of 25th October 2011 *on consumer rights*, Official Journal of the European Union L 304/64. *See also* Giovanni DE CRISTOFARO/ Alberto DE FRANCESCHI (eds.) (2016), pp. 1, 5.

[142] In the case law, *see CJEU* 4 June 2015; c-497/13 *Froukje Faber v. Autobedrijf Hazet Ochten BV* for the application of the directive even if the consumer has not declared its condition as such, as well as for the presumption of non-conformity in the purchased goods in accordance with Article 5(3). In the literature: Bianca/ GRUNDMANN (2002), *Commentary*, pp. 119, 122, Paras 1, 6.

> (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

However, according to the commentary[143], it was noticed early on that not only non-conformities in the goods themselves but also all kind of non-conformities in the tender of performance—as deviations from the agreed contractual plan—should amount to breaches of contract and trigger the corresponding remedies. With the modification introduced by the directive 2011/83/EU of the European Parliament and of the Council of 25th October 2011 *on consumer rights*, the question was clearly settled[144].

Particularly, in Article 18(2), the directive introduced a mechanism for avoidance based upon the fixing by the consumer of an additional time for performance by the seller (*Nachfrist*), which allows the consumer to terminate the contract if the seller does not deliver within the extra period of time granted to it. This remedial system, confined to non-deliveries, is clearly modelled on the avoidance of contract pursuant to the Nachfrist mechanism under Article 47(1) in conjunction with 49(1)(b) CISG[145].

> *Article 18 Delivery*
>
> (1) […]
>
> (2) Where the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1, the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails to deliver the goods within that additional period of time, the consumer shall be entitled to terminate the contract.

Exceptions to that Nachfrist-mechanism are gathered under Article 18(2) *in fine* Directive, which, for instance, governs immediate

[143] Bianca/ GRUNDMANN (2002), *Commentary*, p. 122, Para 5.
[144] Article 18 Directive 2011/83/EU introduced the buyer's remedies for delay in the delivery of the purchased goods to the consumer.
[145] Also 7.1.5 UNIDROIT PICC, *see* Díaz Alabart/ Álvarez/ FUENTESECA (2014), pp. 432, 442-443, 446; and CARRASCO (2016), pp. 103-104, 107.

termination in cases where timely delivery was of the essence—tantamount to avoidance under Article 49(1)(a) CISG. All these exceptions are clearly similar to those cases where a fundamental breach, within the definitions of Article 25 CISG, is already applicable after the non-delivery by the seller.

> *Article 18*
>
> (2) [*in fine*] The first subparagraph shall not be applicable to sales contracts where the trader has refused to deliver the goods or where delivery within the agreed delivery period is essential taking into account all the circumstances attending the conclusion of the contract or where the consumer informs the trader, prior to the conclusion of the contract, that delivery by or on a specified date is essential. In those cases, if the trader fails to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1, the consumer shall be entitled to terminate the contract immediately.

Furthermore, Article 18(4) Directive states the compatibility of the Nachfrist-mechanism with other remedies for breach of contract, even those stemming from national law. This provision, however, mainly refers to the cumulative feature of damages.

> *Article 18*
>
> (4) In addition to the termination of the contract in accordance with paragraph 2, the consumer may have recourse to other remedies provided for by national law.

For cases of non-conforming tenders of performance by the seller other than non-delivery, however, the Directive deviates from the CISG by not comprising a seller's right to impose cure after performance date on the consumer before the latter can assert its remedies for breach of contract under Article 48 CISG, or, conspicuously, under §2-508(2) UCC, which also applies to consumer transactions. Likewise, in these instances, the Directive does not opt for a *Nachfristsetzung*, under §§323, 437(2) BGB, but sets forth a remedial system, structured hierarchically[146].

As a result, Article 3(1)(2)(5) Directive sets forth the liability of the seller and the range of remedies for breach potentially available to the consumer. Following the hierarchy above mentioned, in the case

[146] CARRASCO (2016), pp. 107-108; and CÁMARA (2003), pp. 548-549.

of non-conformity, the aggrieved consumer has to primarily exercise its right to ask for seller's cure—i.e. specific performance—by means of repair or replacement.

> *Article 3 Rights of the consumer*
>
> (1) The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.
>
> (2) 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 accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.

This hierarchy is laid down in paragraph (3)—"in the first place"—which further specifies and restricts these rights. On the one hand, the seller cannot charge the consumer for the replacement or repair, nor for use, until the replacement is conducted. On the other hand, the consumer cannot claim for repair or replacement when it is impossible or disproportionate. For interpretation of these headings, the judgements of the Court of Justice of the European Union are of the utmost relevance[147].

Furthermore, the cure must be carried out within a reasonable timeframe and without causing any significant inconvenience to the consumer. The assessment, following the standard of reasonableness, must be conducted upon a case-by-case basis. According to the Directive's wording, particular focus must be given to the nature of the goods and purpose for which they were bought.

Arguably, as regards the timeframe, the replacement or repair by the seller should be deemed to be within a reasonable period wherever the resulting time lag after the subsequent performance would not

[147] *CJEU* 16 June 2011, c-65/09 *Weber v. Wittmer* and c-87/09 *Putz v. Medianess*, where the Court imposes the obligation on the seller to remove the defective goods and install conforming goods in replacement. The CJEU further interprets Article 3(2)(3) Directive as regards the disproportion that costs arising out of such replacement may cause to the seller. *Also, CJEU* 17 April 2008, c-404/06 *Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*, where the Court finds for the consumer on the grounds that the seller is not entitled to economic compensation for the use of the defective goods by the consumer from the delivery until the replacement is effectively carried out.

be tantamount to a scenario of fundamental breach under Article 25 CISG or exemption of the *Nachfristsetzung* under Article 18(2) *in fine*. For example, the time taken for performance would be particularly unreasonable if the consumer has specified that it needs the goods by a certain date and the seller does not meet such a requirement.

> *Article 3*
>
> (3) In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account:
>
> - 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 could be completed without significant inconvenience to the consumer.
>
> Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

Only after this preliminary attempt to exercise the cure-oriented remedies—replacement and repair—may the consumer resort to the two secondary ones: reduction of the purchase price and avoidance—or, in the words of the Directive, rescission of the contract[148]. The latter, however, is only permissible provided that the lack of conformity is not minor[149].

> *Article 3*
>
> (5) The consumer may require an appropriate reduction of the price or have the contract rescinded:
>
> - if the consumer is entitled to neither repair nor replacement, or
>
> - if the seller has not completed the remedy within a reasonable time, or

[148] BIANCA/ Grundmann (2002), *Commentary*, p. 159, Para 22.

[149] For the restriction of the remedy to avoid the sales contract wherever the lack of conformity is minor and the following possibility to assert the remedy to reduce the price, *see CJEU* 3 October 2013, c-32/12 *Soledad Duarte Hueros v. Autociba SA and Automóviles Citroën España SA*.

> - if the seller has not completed the remedy without significant inconvenience to the consumer.
>
> (6) The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

First and foremost, under the Directive—as well as under §§323, 437(2) BGB—the aggrieved consumer is entitled to avoid the contract without recourse to the notion of fundamental breach. This, of course, seems to constitute a crucial deviation from the CISG model, which hinges upon Article 25[150].

Therefore, this remedial system articulated upon a hierarchical basis builds a cure regime that enshrines common goals under the general principle *Favor Contractus*. Namely, it aims to grant performance of the contract as long as appropriate according to the circumstances and parties' interests at stake, as well as to eschew avoidance of the sales contract. Notwithstanding the similarities, the Directive adopts a strikingly different approach to meeting these goals compared to the alternative mechanisms presented above [151].

One main explanation can be proffered on account of the nature of the parties involved in the sales governed by the Directives. It might be argued that a seller's right to cure better fits a sale between professional parties than a business-to-consumer (B2C) contract. In the latter, the unbalanced positions of the parties is the basic characteristic; therefore, it is submitted that the consumer must be legally protected.

Here, however, the UCC turns out to be the conspicuous exception. The UCC comprises a consumer-friendly immediate right to reject non-conforming tenders and call off the contract, on the basis of the *Perfect Tender Rule* under §2-601 UCC, tempered by two generous seller's rights to cure—before and after delivery date—under §2-508(1)(2) UCC, respectively.

Therefore, the hierarchy in the remedies for breach can be seen as a matter of market policy[152]: as seen, following the primary remedies

[150] CARRASCO (2016), p.109.
[151] BIANCA/ Grundmann (2002), *Commentary*, p. 169, Para 57.
[152] MAK (2009), p. 208.

focused on replacement and repair of the defective goods, the Directive pursues the goal of preservation of the contract and full performance under agreed terms but without yielding the control of the post-breach scenario to the trader over the consumer[153].

As a consequence, both parties have their positions legally guaranteed while their contractual interests are properly satisfied. The consumer receives the goods purchased in conformity with the contract and the seller gets the price agreed in exchange for them. As an ultimate outcome, this mechanism serves to promote trade—as well as economic growth—within a European market that counts over 500 Million consumers[154].

1.1.3 Opting for the Seller's Rights to Cure: Imprints and Developments

a) Uniform Rules for International Commercial Contracts

The 2004 and 2010 versions of the UNIDROIT Principles of International Commercial Contracts (PICC) lay down under Article 7.1.4, a non-conforming party's right to cure that shares rationales with Article 48 CISG and §2-508 UCC. Consequently, it is assumed that the PICC supports a cure regime that, in line with the principle of *favour contractus*, seeks to ensure performance of the contract as long as possible and to disown avoidance on account of economic reasons[155].

> Article 7.1.4 *Cure by non-performing party*
>
> (1) The non-performing party may, at its own expense, cure any non-performance, provided that
>
> (a) Without undue delay, it gives notice indicating the proposed manner and timing of the cure;
>
> (b) Cure is appropriate in the circumstances;

[153] BIANCA/ Grundmann (2002), *Commentary*, p. 160, Para 23.
[154] EUROSTAT, *Key figures on Europe, 2016 ed.*, Statistical Books, available at: http://ec.europa.eu/eurostat/documents/3217494/7827738/KS-EI-16-001-EN-N.pdf/69cc9e0d-9eb3-40e5-b424-29d00686b957.
[155] Vogenauer/ HUBER (2015), pp. 921-922, Para 6.

(c) The aggrieved party has no legitimate interest in refusing cure; and
(d) Cure is effected promptly.

Nevertheless, it must be noted that Article 7.1.5, acting in conjunction with Article 7.3.1(3) UNIDROIT, lays down a particular *Nachfrist* mechanism for avoidance of the contract in instances of a delay in performance. This specific mechanism to avoid the contract is clearly modelled on Articles 47(1) and 49(1)(b) CISG, although the latter is limited to non-deliveries, whereas under UNIDROIT this technique is greatly widened to cover delay in performance of all obligations under the contract. Therefore, it closely resembles to the Nachfrist-mechanisms set forth under §§323 and 437(2) BGB[156] as well as under Article 18(2) Directive 2011/83/EU.

Article 7.1.4 UNIDROIT governs an all-embracing right to cure by the non-performing party. This assumption can be supported by three principal remarks. Firstly, the provision in question widens the scope of application by expressly coining the notion of a *non-performing party*. Therefore, this provision deviates from the confinement to which the right to cure is put under Article 48 CISG or §2-508 UCC, according to which only the *seller* is entitled to perform a subsequent cure[157].

Secondly, pursuant to the UNIDROIT Principles, there is only one general right to cure. Whereas the CISG or the UCC separate the application of the seller's rights to cure before and after the due date for delivery—i.e. performance—resulting in several seller's rights to cure under Articles 34, 37, and 48 CISG or §2-508(1)(2) UCC respectively, the UNIDROIT principles do not differentiate between these[158].

Thirdly, the principles of Article 7.1.4 UNIDROIT expressly refer to the cure of "any non-performance", which mirrors Article 48's broad notion of "any failure to perform". The UNIDROIT principles

[156] Vogenauer/ SCHELHAAS (2015), pp. 851-852, Paras 1-2 coining the expression of "proactive approach to non-performance"; Vogenauer/ HUBER (2015), p. 921, Para 3.
[157] SINGH (2006), p. 27.
[158] LIU (2005), p. 3; Vogenauer/ SCHELHAAS (2015), p. 846, Para 5; and SINGH (2006), p. 28.

also conclusively stick to the Unitarian approach to breach-of-contract[159], early enshrined under the CISG, which considers all types of failure to perform potentially subject to the seller's right to cure.

Comparing the specific wording of Article 7.1.4 UNIDROIT and Article 48 CISG, some similarities and some differences are both noticeable. In the former category, Article 7.1.4 UNIDROIT principles make expressly clear that cure must be conducted at the non-performing party's expense. In the latter, Article 7.1.4 expressly lays down that the cure has to be effected *promptly* after the notice of cure is given by the breaching party. This requirement is absent from Article 48(1) which only curtails cure where it may create unreasonable delay:

> *Article 48*
>
> (1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, 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. However, the buyer retains any right to claim damages as provided for in this Convention.

It is submitted in the literature that "promptly"[160], taking into account the circumstances of the case, must be a rather short interval. However, it must at the same time give a realistic opportunity to the breaching party to subsequently cure its failure to perform[161]. Arguably, the boundaries of the length of the time for conducting the subsequent cure must be delineated by the notion of fundamental breach in keeping with their interpretation under Article 48(1) and §323(2) BGB. Under the UNIDROIT principles, as discussed below, this notion is not only found under Article 7.3.1(2) but also under Article 7.1.4(1)(b-c).

Furthermore, provided that the non-performing party has given effective notice of its intent to cure, the other party may not resort to

[159] Vogenauer/ SCHELHAAS (2015), p. 846, Para 5; and KRUISINGA (2011), p. 913.
[160] MAGNUS (2012), *CISG vs CESL*, p. 118; and Schulze/ ZOLL (2012), *Commentary*, p. 501, Para 19, upholding a homogeneous interpretation of the notion "promptly" and "reasonable period of time" under Article 109 CESL.
[161] Vogenauer/ SCHELHAAS (2015), pp. 848-849, Para 20.

other remedies. However, unlike Article 48 CISG, Article 7.1.4(4)(5) not only expressly states the compatibility of the right to cure with a claim for non-curable damages—such as those derived from the delay in performance—but also with entitlement to withhold performance on the part of the aggrieved party[162].

> Article 7.1.4 *Cure by non-performing party*
>
> […]
> (4) The aggrieved party may withhold performance pending cure.
> (5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

Regarding the preconditions for the existence of the right to cure, it is worth noting that, under Article 48(1) CISG, the seller's right to cure exists as a right in itself. Under UNIDROIT principles, however, the non-performing party's right to cure is only existent once the party has given an effective notice offering cure. This notice must be given without undue delay and it is reputed to be an essential requirement for the existence of the right to cure itself[163].

Therefore, in accordance with Article 48(2-4) CISG but heavily deviating from Article 48(1) CISG, a notice of cure given by the breaching party to the aggrieved one is not a mere requisite for the *performance* but for the very *existence* of the right to cure. Assumedly, failing this notice, nothing should impede the aggrieved party from lawfully resorting to its remedies for breach.

From this perspective, the breaching party's right to cure under the UNIDROIT Principles, unlike Article 48(1) CISG, seems to pay less attention to the preconditions for the existence of the right in itself, instead shifting the focus to other aspects of the right. The Article 7.1.4 UNIDROIT upholds the balance between the parties' positions—as well as guaranteeing their legitimate interests after the breach is established—by giving to the aggrieved party grounds for refusal. Among these, however, it may be submitted that a rather

[162] *See below* Ch. IV, 4.2.8.
[163] Vogenauer/ SCHELHAAS (2015), p. 847, Para 9; SINGH (2006), p. 29; KEE (2007), p. 191; and KRUISINGA (2011), p. 913.

subjective criterion is set forth by means of the notion "legitimate interest of the aggrieved party"[164].

> Article 7.1.4 *Cure by non-performing party*
>
> (1) The non-performing party may, at its own expense, cure any non-performance, provided that
> (a) Without undue delay, it gives notice indicating the proposed manner and timing of the cure;
> (b) Cure is appropriate in the circumstances;
> (c) The aggrieved party has no legitimate interest in refusing cure; and
> (d) Cure is effected promptly.

Insofar as the aggrieved party does not agree to an opportunity to subsequently cure, all headings under Article 7.1.4(1)(a) to (d) must be positively and cumulatively met to allow the non-performing party to cure[165]; in any other event, the aggrieved party can exclude the right to cure. The burden of proof initially lies with the non-performing party, whereas the aggrieved one only has to prove its legitimate interest in refusing cure[166] after preconditions (a) and (b) are met.

All this results in the need to shed light on the most complex issue, found under Article 7.1.4(2). This provision states[167]:

> Article 7.1.4 *Cure by non-performing party*
>
> […]
> (2) The right to cure is not precluded by notice of termination.
> (3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.
> […]

Under the UNIDROIT principles scheme, a crucial deviation from Article 48(1) CISG—which reads "subject to"—but not from

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[164] It might resemble the exceptions to a *Nachfristsetzung* under §323(2)(3) BGB, Vogenauer/ SCHELHAAS (2015), p. 848, Para 16 and SINGH (2006), p. 28. In comparison, *see* the seller's right to cure under Article 109 CESL, Dannemann/ Vogenauer/ MACQUEEN/ DAUNER-LIEB/ TETTINGER (2013), p. 636.
[165] KRUISINGA (2011), p. 913.
[166] Vogenauer/ SCHELHAAS (2015), p. 846, Paras 6, 8.
[167] SINGH (2006), p. 28; Vogenauer/ HUBER (2015), p. 928, Para 33; and KEE (2007), p. 191.

Article 48(2-4) CISG or Article III.– 3:201 to 3:204 DCFR[168] (discussed subsequently), is that the existence of a concept of fundamental non-performance within the structure of Article 7.3.1(2) UNIDROIT (upon which the aggrieved party is entitled to rightfully terminate—i.e. avoid—the contract pursuant to Article 7.3.1(1) UNIDROIT) does not, a priori, preclude the chance to cure by the non-performing party[169].

> Article 7.3.1 *Right to terminate the contract*
>
> (1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.
>
> (2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether
>
> (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
>
> (b) strict compliance with the obligation which has not been performed is of essence under the contract;
>
> (c) the non-performance is intentional or reckless;
>
> (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
>
> (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

Ultimately, under the UNIDROIT's regime for cure, the notion of fundamental breach according to Article 7.3.1(2) is constructed without having to take into account whether it is still possible to cure the non-performance[170]. It results in the assumption that the

[168] Vogenauer/ SCHELHAAS (2015), p. 849, Paras 22

[169] DiMatteo/ Janssen/ Magnus/ Schulze/ BRIDGE (2016), p. 476, Para 26: "[c]ontrary to the CISG the *rightful* termination does not preclude the right to cure".

[170] Vogenauer/ HUBER (2015), p. 928, Paras 33: "[i]t is submitted that (unlike the CISG) the right to cure should not be taken into account under Art 7.3.1(2)(a) […] Art 7.1.4(2) and (3) make clear that the right to cure takes precedence over the right to terminate the contract. As a result, under the fundamental breach analysis there is no need to consider whether it is possible to cure a non-performance".

non-performing party's right to cure, wherever the requirements of Article 7.1.4(1)(a-d) are met, is not only independent from the notion of fundamental non-performance but it also prevails over the aggrieved party's right to terminate the contract, as Article 7.1.4(2)(3) clearly sets forth.

Therefore, since that the breaching party's right to cure prevails over the aggrieved party's right to terminate the contract[171], the exercise of the right to cure is correspondingly vested with the most far-reaching consequences. As stated in the official commentary[172], the effects of a termination are suspended by an effective notice of cure under Article 7.1.4. What is more, a rightful offer of cure may also alter the position of the aggrieved party by *reviving* a contract that had been terminated[173]. Hence, obligations of restitution arising out of the winding-up process are likewise cancelled.

> Important criticism has been raised against this scheme of termination. Primarily, it is assumed that it undermines parties' certainty because the aggrieved party cannot fully rely on the effectiveness of its notice of termination as this can be challenged by a subsequent notice of cure by the non-performing party[174].

All in all, the key question regarding the regime of the non-performing party's right to cure under Article 7.1.4 UNIDROIT Principles arises from cases where cure of a fundamental breach is in fact possible, and the aggrieved party has already terminated the contract.

With regards this point, it is beyond doubt that whenever a non-performance amounts to a fundamental one as far as Article 7.3.1(2) is concerned[175], though the breach may be factually curable, the grounds for refusal by the aggrieved party of the offer to cure enumerated by Article 7.1.4(1)(a-d) are easily met[176].

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[171] YOVEL (2005), p. 9.
[172] UNIDROIT (2010), *Off. Comm.* Art. 7.1.4., p. 229.
[173] Vogenauer/ SCHELHAAS (2015), p. 849, Paras 22.
[174] Vogenauer/ SCHELHAAS (2015), p. 849, Para 22, YOVEL (2005), p. 9 and LIU (2005), p. 5.
[175] Vogenauer/ HUBER (2015), p. 918, Para 3.
[176] WAGNER (2012), p. 5 reaches to the same conclusion when interpreting Article 87(2) CESL (fundamental non-performance) and the grounds for refusal of the seller's right to cure after performance date under Article 109(2) and *ff.* CESL.

> Namely, these grounds are: (a) Without undue delay, it gives notice indicating the proposed manner and timing of the cure; (b) Cure is appropriate in the circumstances; (c) The aggrieved party has no legitimate interest in refusing cure; and (d) Cure is effected promptly.

For instance, wherever the time for performance was of the essence under the contract (*Fixgeschäft*), the aggrieved party can freely resort to 7.1.4(1)(b)(c) to lawfully refuse an offer of cure. Therefore, if the aggrieved party has already declared the contract avoided—i.e. terminated—this avoidance of contract can hardly be challenged by the breaching party by means of a notice of cure. This understanding is both more in tune with the regime of the seller's right to cure as governed by Article 48(1) CISG and allows tempering of the sharp criticisms of Article 7.1.4.

b) Scholarly Works for the Harmonization of the European Contract Law: PECL and DCFR

The Commission on European Contract Law, led by Prof. Ole Lando—also known as Lando Commission—set a Working Party to draw up the Principles of European Contract Law (PECL). Strongly influenced by the CISG[177], these Principles comprise a cure regime for addressing breach of contract basically structured on the grounds of a non-performing party's right to cure[178]. Article 8:104 PECL reads as follows:

> *Article 8:104: Cure by non-performing party*
>
> A party whose tender of performance is not accepted by the other party because it does not conform to the contract may make a new and conforming tender where the time for performance has not yet arrived or the delay would not be such as to constitute a fundamental non-performance.

Even though this non-performing party's right to cure applies to all non-conforming tenders of performance[179]—comprising any

[177] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Introduction, p. 10.

[178] DiMatteo/ Janssen/ Magnus/ Schulze/ FLEISCHMANN/ SCHMIDT-KESSEL (2016), pp. 478-479, Para 36.

[179] YOVEL (2005), p. 8, pp. 386-387; LANDO/ BEALE, *Parts I and II*, p. 359 referring to equivalence with the notion of "any failure to perform" under the Convention. *But Cf.* KRUISINGA (2011), p. 914.

deviation from the contractual plan—it is further complemented with a specific Nachfrist-mechanism. The latter, however, is mainly relevant for scenarios of delay in performance, where it articulates an alternative mechanism for avoidance. This is laid down under Articles 8:106 in conjunction with 9:301(b) PECL, which are clearly modelled on Article 7.1.5 and 7.3.1(3) UNIDROIT principles, and in turn, on Articles 47(1) and 49(1)(b) CISG[180].

> *Article 8:106: Notice Fixing Additional Period for Performance*
>
> […]
> (3) If in a case of delay in performance which is not fundamental the aggrieved party has given a notice fixing an additional period of time of reasonable length, it may terminate the contract at the end of the period of notice. The aggrieved party may in its notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically. If the period stated is too short, the aggrieved party may terminate, or, as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice.

As regards the norm dealing with the right to cure, this provision is arguably not only derived from Article 48 CISG but also modelled on Article 7.1.4 UNIDROIT principles. Thereby, in first place, the right to cure under Article 8:104 PECL is given to the broad notion of the *non-conforming party*. From this wording, it can be clearly derived that it is a general right, not only available to both parties of the contract but also not merely confined to contracts for the sale of goods[181].

Second, Article 8:104 PECL comprises in a sole provision two different rights to cure. Deviating from the provision under the UNIDROIT principles but closer to that of the Convention, the PECL's provision positively distinguishes between them. According to the first right, a subsequent cure must be conducted before the performance date—when the "time for performance has not yet arrived"—which corresponds with Articles 34 and 37 CISG. The second right is only to be carried out after the contractual date for performance—inevitably incurring a delay—and is tantamount to Article 48 CISG[182].

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[180] LANDO/ BEALE, *Parts I and II*, p. 359, 373-374.
[181] SIVESAND (2006), *Buyer's Remedies*, p. 16.
[182] YOVEL (2005), p. 3.

Focusing on the latter right, it is noticeable that Article 8:104 PECL is far more limited in guiding its own application than Article 48 CISG.

Firstly, under Article 8:104 PECL, no particular preconditions for its existence are provided; nor is a regime of communications between the parties detailed; there is no express exclusion or suspension of incompatible remedies; and no general compatibility of damages. Despite this lack of specifications, it is submitted that the general obligation to act according to good faith and fair dealing—under Article 1:201(a)—can address most of the doubts that Article 8:104 might generate[183].

> *Article 1:201: Good Faith and Fair Dealing*
>
> (1) Each party must act in accordance with good faith and fair dealing.

The only requirement expressly set is a time cap, per which the non-performing party has no right to cure when the delay would amount to a fundamental non-performance[184]. Notably, this formulation clearly defines the boundaries of the notion of *reasonable delay* to the conduction of a subsequent cure by the breaching party. As upheld elsewhere—e.g. under Article 48(1) CISG, §2-508(2) UCC or §323(1) BGB—reasonable time for subsequent cure should, as a rule of thumb, be interpreted as finding its ultimate limit wherever the resulting time lag would amount to a fundamental breach of contract.

Secondly, Article 8:104 PECL limits the availability of the non-performing party's right to cure to cases of non-acceptance[185]. Thus, it is disputed whether if the aggrieved party accepts a non-conforming tender and then the goods turn to be non-conforming, there would be room for a non-performing party's right to cure, or if

[183] LANDO/ BEALE, *Parts I and II*, p. 113; and YOVEL (2005), p. 16.
[184] *See* YOVEL (2005), p. 5. *Cf.* MAK (2009), p. 168.
[185] YOVEL (2005), p. 8 and (2007), pp. 386-387. Even though the provision refers to the non-acceptance of the non-conforming tender of performance, the promisor is not generally entitled to reject a non-conforming tender. The PECL does not recognize a Perfect Tender Rule equivalent to that governed under §2-601 UCC.

the aggrieved party would be entitled to directly resort to remedies for breach of contract[186].

Finally, Article 8:104—differing from Article 48(1) CISG—does not expressly subject the non-performing party's right to cure to the aggrieved party's right to terminate the contract pursuant to Article 9:301(1) PECL. It is not normatively settled, therefore, what the exact interplay between the non-performing party's right to cure and the aggrieved party's right to terminate the contract is; nor is it clear what the impact of the non-performing party's right on the notion of fundamental non-performance under Article 8:103 PECL is; or indeed whether curability is a yardstick to be taken into account:

> *Article 8:103: Fundamental Non-Performance*
>
> A non-performance of an obligation is fundamental to the contract if:
>
> (a) strict compliance with the obligation is of the essence of the contract; or
>
> (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or
>
> (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.
>
> *Article 9:301: Right to Terminate the Contract*
>
> (1) A party may terminate the contract if the other party's non-performance is fundamental.

Arguably, like UNIDROIT Principles but deviating from Article 48(1) CISG, nothing in the PECL's rules curtails the application of the breaching party's right to cure after delivery date to cases of factually curable fundamental non-performance. Thus, curability of the breach cannot be considered one of the factors in the assessment of the seriousness of the breach under the PECL, upon which the remedy of termination as per Article 9:301(1) is articulated.

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[186] VON BAR/ CLIVE (2009), p. 812, following the example presented there: to reduce the purchase price. By comparison, *see* the similar discussion about whether §2-508(2) UCC also applies to cases of revocation of acceptance by the buyer under §2-608 UCC.

There are only two requirements. On the one hand, that the cure must not cause a delay that makes the resulting time lag amount to a fundamental non-performance, as expressly outlined by Article 8:104[187]. On the other hand, unlike Article 7.1.4(3) UNIDROIT Principles, a rightful termination of the contract by the aggrieved party would also preclude the non-performing party's cure[188].

This is so stated under Article 9:303(b) PECL, which lays down a crucial rule basically rooted in the far-reaching principle of good faith under the PECL[189]:

> *Article 9:303: Notice of Termination*
>
> (3) […]
>
> (b) If, however, the aggrieved party knows or has reason to know that the other party still intends to tender within a reasonable time, and the aggrieved party unreasonably fails to notify the other party that it will not accept performance, it loses its right to terminate if the other party in fact tenders within a reasonable time.

Accordingly, even if the established non-performance amounts to a fundamental breach within the meaning of Article 8:103 PECL and, correspondingly, the aggrieved party rightfully seeks to terminate the contract pursuant to Article 9:301(a) PECL, the breaching party may be granted with an unusual opportunity to subsequently cure this fundamental non-performance, if the aggrieved party has failed in giving the notice that it will not accept the subsequent tender of performance. In so doing, the PECL clearly pursues the goal of avoiding economic waste arising from impaired attempts to cure.

Subsequently, the Study Group on a European Civil Code and the Acquis group drew up the Draft Common Frame of Reference (DCFR)[190], whose Articles III.– 3:202-204 structure a cure regime based upon a non-performing party's right to subsequently cure. The four DCFR model rules on the right to cure by debtor, which

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[187] MAK (2009), p. 168.

[188] YOVEL (2005), p. 15, in his words, under Article 8:104 the right to cure is *unqualified* for either non-fundamental or fundamental non-performances.

[189] *Article 1:201: Good Faith and Fair Dealing*

(1) Each party must act in accordance with good faith and fair dealing.

[190] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Introduction, p. 10.

read as follows, probably constitute the most accurate normative attempt to regulate this legal institution.

> *III.—3:201: Scope*
>
> This Section applies where a debtor's performance does not conform to the terms regulating the obligation.
>
> *III.—3:202: Cure by debtor: general rules*
>
> (1) The debtor may make a new and conforming tender if that can be done within the time allowed for performance.
> (2) If the debtor cannot make a new and conforming tender within the time allowed for performance but, promptly after being notified of the lack of conformity, offers to cure it with a reasonable time and at the debtor's own expense, the creditor may not pursue any remedy for non-performance, other that withholding performance, before allowing the debtor a reasonable period in which to attempt to cure the non-conformity.
> (3) Paragraph (2) is subject to the provisions of the following Article.
>
> *III.—3:203: When creditor need not allow debtor an opportunity to cure*
>
> The creditor need not, under paragraph (2) of the preceding Article, allow the debtor a period in which to attempt cure if:
> (a) failure to perform a contractual obligation within the time allowed for performance amounts to a fundamental non-performance;
> (b) the creditor has reason to believe that the debtor's performance was made with knowledge of the non-conformity and was not in accordance with good faith and fair dealing;
> (c) the creditor has reason to believe that the debtor will be unable to effect the cure within a reasonable time and without significant inconvenience to the creditor or other prejudice to the creditor's legitimate interests; or
> (d) cure would be inappropriate in the circumstances
>
> *III.—3:204: Consequences of allowing debtor opportunity to cure*
>
> (1) During the period allowed for cure the creditor may withhold performance of the creditor's reciprocal obligations, but may not resort to any other remedy.
> (2) If the debtor fails to effect cure within the time allowed, the creditor may resort to any available remedy.
> (3) Notwithstanding cure, the creditor retains the right to damages for any loss caused by the debtor's initial or subsequent non-performance or by the process of effecting cure.

These DCFR provisions concerning the debtor's right to cure are gathered in Section 2, under the heading: "cure by debtor of non-

conforming performance". This section is located in the third Book, dealing with obligations and corresponding rights, and elaborated in Chapter 3, which regards remedies for non-performance. These systematic remarks clearly evidence that, in contrast with the prior PECL, Article 48 CISG, and §2-508 UCC, this right is given to a *debtor*. Therefore, the debtor of any kind of obligation—not confined to contractual ones—has an opportunity to cure[191].

> Nevertheless, the DCFR also lays down default rules for specific types of contracts. Conspicuously, Articles IV. A.—4:201 and 4:202, concerning the contract of sales of consumer goods, include modifications of the generally available remedies for non-conformities to adjust particular aspects to the nature of the parties involved[192].
>
> Furthermore, as to lease of goods contracts, Articles IV. B.—4:101 to 4:104 vary the general remedies in some ways. For instance, and particularly regarding the debtor's right to cure, Article IV. B.—4:102(2) states that the lessee has a remedy to reduce the rent for a period of time, even within which the lessor is able to cure according to art. III.—3:201 to 3:204. Therefore, an additional remedy for the creditor is expressly made compatible with the debtor's right to cure[193].
>
> *IV. B.—4:102: Rent reduction*
>
> […]
> (2) The rent may be reduced even for periods in which the lessor retains the right to perform or cure according to III.—3:103 (Notice fixing additional time for performance), III.—3:202 (Cure by debtor: general rules) paragraph (2) and III.—3:204 (Consequences of allowing debtor opportunity to cure)).
> […]

Although more detailed, Art. III.– 3:102 and *ff*. DCFR are clearly modelled on the UNIDROIT Principles and the former PECL. First, a non-performance of an obligation is stated to amount to any failure to perform the obligation, which entails that the DCFR embraces

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[191] Dannemann/ Vogenauer/ MACQUEEN/ DAUNER-LIEB/ TETTINGER (2013), p. 634; and TOMÁS MARTÍNEZ (2012), p. 593.
As was already discussed under Article 8:104 PECL, no substantial differentiation should be perceived regarding the notion of "non-performance" under PECL and DCFR with regards to the equally broad notion of "any failure to perform" outlined by Articles 45 and 48(1) CISG.

[192] Vaquer/ Bosch/ SÁNCHEZ (2012), *Tomo II*, p. 902; and TOMÁS MARTÍNEZ (2012), p. 592.

[193] Vaquer/ Bosch/ SÁNCHEZ (2012), *Tomo II*, p. 1051.

the unitary concept of breach-of-contract early coined by the CISG[194]. Particularly, as to the debtor's right to cure, Article III.—3:201 turns to the concept of non-conforming tender of performance[195] which includes any kind of deviation from the contractual plan[196].

Notwithstanding the homogeneous treatment of breach of contract, it is remarkable that the DCFR turns, under its Article III.– 3:503, to a Nachfrist-mechanism for avoidance of contract in particular cases. Namely, these cases are those where delay in performance is not initially fundamental[197]. This alternative mechanism is, of course, modelled upon Articles 47(1) and 49(1)(b) CISG, §§323 BGB, Article 7.1.5 UNIDROIT Principles, and Article 8:106 PECL.

> *III.—3:503: Termination after notice fixing additional time for performance*
>
> (1) A creditor may terminate in a case of delay in performance of a contractual obligation which is not in itself fundamental if the creditor gives a notice fixing an additional period of time of reasonable length for performance and the debtor does not perform within that period.
>
> (2) If the period fixed is unreasonably short, the creditor may terminate only after a reasonable period from the time of the notice.

Article III.– 3:202 DCFR expressly differentiates, in its paragraphs (1) and (2), between two different rights to cure, also separated under Articles 34, 37 and 48 CISG, §2-508(1)(2) UCC and Article 8:104 PECL, though not Article 7.1.4 UNIDROIT principles. Namely, these are those cases where cure is carried out before the performance date, and those where cure is done afterwards.

For the latter group of cases, Article III.– 3:202 DCFR imposes a duty to the debtor to promptly offer cure to the creditor. This provision also establishes the effects of cure on the availability of remedies to the creditor other than withholding performance[198],

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[194] VON BAR/ CLIVE (2009), p. 672.
[195] *See also* Article III.—3:202(2) *in fine*.
[196] VON BAR/ CLIVE (2009), p. 813 stresses the importance of practices, usages and default rules in shaping the content of the contractual obligations.
[197] VON BAR/ CLIVE (2009), pp. 812-813.
[198] TOMÁS MARTÍNEZ (2012), p. 594 according to whom it amounts to an extrajudicial exercise of the *exception non rite adimpleti contractus*.

which are afterwards reinforced by Article III.– 3:204 DCFR—particularly as to the compatibility of a claim for non-curable damages. This is clearly in line with Article 48(1) *in fine* CISG.

Modelled on Article 7.1.4 UNIDROIT Principles, Article III.–3:202(3) announces that Article III.– 3:203 seeks to strike a balance between the apparently generous debtor's right to subsequently cure laid down under Article III.– 3:202(2), which is independent of the notion of fundamental non-performance, and a proper guarantee of the creditor's legitimate interests after the breach of contract[199]. In so doing, Article III.– 3:203 encapsulates some grounds for refusal of the debtor's offer of cure[200].

However, also following the UNIDROIT Principles and PECL none of the provisions—with the exception of those grounds for creditor's refusal under Article 3:203(a-d)—governing the debtor's right to cure under the DCFR normatively subject it to any of the creditor's remedies, and particularly not to termination of contract (Article III.—3:502), unlike the CISG, which does so in the opening sentence of its Article 48(1)—"subject to"[201].

> *III.—3:502: Termination for fundamental non-performance*
>
> (1) A creditor may terminate if the debtor's non-performance of a contractual obligation is fundamental.
> (2) A non-performance of a contractual obligation is fundamental if:
> (a) It substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or
> (b) It is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on.

Hence, it is once again important to consider the interplay between the notion of fundamental non-performance, the right to cure by the debtor, and the available remedies to the aggrieved creditor[202].

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[199] VON BAR/ CLIVE (2009), p. 817; and KRUISINGA (2011), p. 919.
[200] VON BAR/ CLIVE (2009), p. 820, footnote 7.
[201] TOMÁS MARTÍNEZ (2012), p. 602.
[202] VON BAR/ CLIVE/ SCHULTE-NÖLKE (2009), *outline edition*, p. 78, principle 27.

A priori, under the DCFR, the debtor is not only entitled to subsequently cure non-fundamental breaches, but also fundamental ones that are still factually curable, provided that it promptly notifies the creditor and the resulting time lag in curing would not end up amounting to a fundamental non-performance[203]. The notion of fundamental non-performance is, thus, constructed without taking into account the curability of the breach by the debtor.

On the flip side, wherever a certain non-performance meets the definition of a fundamental one—despite the fact that this breach may be, in fact, still curable—the creditor may easily and rightfully raise a refusal of the offered cure according to Article III.– 3:203(a-d). Consequently, the creditor can eschew the debtor's cure. If, however, the creditor does not refuse cure, then the debtor will be entitled to cure a fundamental non-performance as is the case under Article 48(2-4) CISG.

c) Global influence over the Modernization of Sales Laws

The above depicted cure regime for breach of contract, by sequencing the remedies and aimed at upholding the principle *Favour Contractus* by adopting a debtor's—i.e. seller's—right to cure non-conforming tenders of performance, was early followed by national laws.

The salient examples in this regard are the Scandinavian sale of goods acts (Sweden: KöpL, Finland: KL and Norway: Kjl). Although the old Scandinavian law of sales already acknowledged the seller's right to cure, the new acts were modelled on the CISG[204, 205]. Consequently, §36 reads:

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[203] The creditor is not obliged to accept an offer of cure by the debtor, according to Article III.—3:202(2), and thus it is allowed to resort to other remedies, when the delay in curing would amount to a fundamental non-performance. This further reinforces the proffered interpretation that a reasonable delay for subsequent cure finishes when the time lag would amount to a fundamental breach.

[204] Gerhard RING/ Line OLSEN-RING (2001), *Kaufrechte in Skandinavien*, p. 88, Para 246 and p. 179 (synoptic presentation).

[205] Between 1987 and 1990, Sweden, Finland, and Norway enacted new sales legislations in order to adapt their national sales laws to the uniform international law recently reached in Vienna. In contrast, Denmark refrained from modifying Danish law and retained its old sales act from 1906, which did not establish a general seller's right to cure after delivery date but whose §49 provided a

§36 Swedish Köplagen (KöpL)[206]

(1) Notwithstanding that the buyer has not demanded rectification, the seller shall be entitled, at his own expense, to rectify the defect or deliver substitute goods, provided this can be done without causing material inconvenience to the buyer and without causing material inconvenience to the buyer and without jeopardizing the recovery by the buyer from the seller of the buyer's costs.

§36 Finnish Köplagen (KL)[207]

(1) Even if the buyer does not require the seller to remedy the defect or to deliver substitute goods, the seller may, at his own expense, remedy the defect or deliver substitute goods if this can be done without substantial inconvenience to the buyer or uncertainty of reimbursement by the seller of any expenses advanced by the buyer.

§36 Norwegian Kjopsloven (Kjl)[208]

(1) Whether or not required by the buyer, the seller may at his own expense rectify the lack of conformity or deliver substitute goods, when he can do so without major inconvenience to the buyer and without prejudice to the buyer's ability to recover his expenses from the seller.

However, striking differences in comparison with the Convention's provisions must be stressed; in particular, regarding the seller's right to cure after the date for delivery. Firstly, whereas Article 48(1) applies to any failure to perform, the seller's rights to cure under the §§36(1) excerpted above are apparently confined to only one type of breach of contract. Namely, under §§36(1) the breaching seller can cure, by repair or replacement, only tenders of goods not conforming to the contract.

Secondly, §§36(2) KöpL and KL and §36(3) Kjl restrict application of the seller's rights to cure. The breaching seller loses its opportunity to subsequently cure by repair or by delivery of

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breaching seller with a right to cure up until that date, *see* Gerhard RING/ Line OLSEN-RING (2001), *Kaufrechte in Skandinavien*, p. 191; SIVESAND (2006), *Buyer's Remedies*, p. 107; and LANDO/ BEALE, *Parts I and II*, p. 369.

[206] English translation available in *Swedish Commercial Legislation*, published by Norstedts Juridik, 2011.

[207] English translation available at: http://www.finlex.fi/en/laki/kaannokset/1987/en19870355.pdf.

[208] English translation available at: http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19880513-027-eng.pdf.

substitute goods wherever the aggrieved buyer has non-conforming goods remedied by its own efforts when the circumstances dictate that it would have been unreasonable to require it to wait for a seller's cure.

> *§36 Swedish Köplagen (KöpL)*
>
> (2) The seller may not allege that he has not been afforded the opportunity to rectify the defect or deliver substitute goods if the buyer has rectified the defect and, taking into account all of the circumstances, the buyer could not reasonably be required to await rectification or substitution by the seller.
>
> *§36(1) Finnish Köplagen (KL)*
>
> (2) The seller may not rely on the buyer's failure to give the seller an opportunity to remedy the defect or to deliver substitute goods in accordance with paragraph (1) if the buyer has had the defect remedied under circumstances in which it would not have been reasonable to require that he had waited for remedy by the seller.
>
> *§36 Norwegian Kjopsloven (Kjl)*[209]
>
> (3) The seller may not claim that he did not have an opportunity to rectify or deliver substitute goods, if the buyer has arranged to have the lack of conformity rectified and it would under the circumstances be unreasonable to require him to wait for the seller's rectification or delivery of substitute goods.

The influence of the CISG's cure regime over national sales of goods acts stretches from this very first acknowledgement to the most recent one: the sixth book of the Catalan Civil code[210]. This

[209] English translation available at: http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19880513-027-eng.pdf.

[210] In between, there are other remarkable instances. Following the German *Schuldrechtsreform* above discussed, the Nachfrist-mechanism set in Article 383 Greek Civil Code is noticeable, *see* VON BAR/ CLIVE (2009), p. 815, footnote 8; and AGALLOPOULOU (2005), pp. 284-285. In the Netherlands, a modernization of the *Burgerlijk Wetboek* was adopted—within which the debtor's offer of subsequent performance under its Article 6:86 is particularly relevant. In Eastern Europe, some successor States of the former Soviet Union partially adopted the CISG as domestic commercial law. Similarly, §107 Estonian law of obligations act incorporated a right to cure. In Asia, the new Chinese, Japanese and South Korean contract laws are modelled after the CISG. For further references *see* Vogenauer/ HUBER (2015), pp. 918-919, Paras 1, 5-6 referring to "[a]n international trend […]"; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Introduction, p. 10; Vogenauer/ SCHELHAAS (2015), p. 845, Para 2, footnote 82;

new law, without altering the general part of contract law regulated under the Spanish Civil code, intends to draw up a modernized law of sales[211].

> It must be mentioned, however, that Spanish contract law—civil and commercial—is also profoundly and thoroughly reviewed. As a result, different drafting commissions and working groups have drawn up several projects of modernization over the last ten years, heavily influenced by the CISG and following European texts.
>
> Among them, the *Proposal for the modernization of the Civil code as to obligations and contracts*[212] in 2009, included a Nachfrist-mechanism under Article 1200(1). Also, the *proposal for a Commercial code* in 2013[213] laid down, under Article 417-2(1), a promisor's right to cure after the date for performance; and, under Article 417(2) a Nachfrist-technique applicable to all kind of failures to perform. It is also remarkable that, in May 2016, the *proposal for a new fifth and sixth books of the Civil Code*[214] included a Nachfrist-mechanism clearly modeled on the former Art. 1200 of the *Proposal for the modernization of the Civil code*.
>
> In addition, Spanish case law turns to this international trend to build up a cure regime on the basis of certain mechanisms—namely, debtor's or seller's rights to cure or *Nachfristsetzungen*—for the interpretation of the old Article 1124 Spanish Civil Code. This provision lays down the right to terminate the contract and whose paragraph (3) allows the court to set an additional period of time for performance before the termination of the contract is granted[215]. Furthermore, it must be stressed that the

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and DiMatteo/ Janssen/ MAGNUS/ Schulze (2016), p. 495, Para 93 for Chinese contract law.

[211] Special attention is brought to the Catalan and Spanish contract laws on account of the author's background.

[212] Available at: www.mjusticia.gob.es/cs/Satellite/1292338914438.

[213] Available at: http://nuevocodigomercantil.es/pdf/Propuesta_codigo_mercantil.pdf.

[214] Available at: http://www.derechocivil.net/esp/pdf/Propuesta%20Libros%20may%202016.pdf

[215] In this regard *see* the salient decision of Spanish Supreme Court, 1st Chamber, 26 May 2016; no. 348/2016 JUR 2016\121855 that resorts to the good faith principle in order to interpret the notion of essential breach—triggered by non-delivery at the contractual date—where parties had not agreed upon the essence of timely performance. The decision mentions—but does not apply—Articles 25, 47(1) and 49(1)(b) CISG. *See also* CARRASCO (2016), pp. 111-112; DiMatteo/ Janssen/ MAGNUS/ Schulze (2016), pp. 491, 493, Paras 77, 85: "[d]oes not contain a provision on cure. But since the court has discretion to grant a further period for performance during which the debtor can perform this offers a possibility of cure".

existing Article 1504 Spanish Civil Code allows a buyer of real estate to belatedly pay in order to eschew avoidance of the contract[216].

In so doing, Article 621-39(1)(2) of the Sixth Book lays down two seller's rights to cure—before and after performance date, respectively—whose core rationale looks very much like those under Articles 37 and 48(1) CISG, but whose wording and dynamics more closely resemble to Article 7.1.4 UNIDROIT Principles, Articles 8:104 PECL, as well as III.– 3:201 to III.–3:204 DCFR.

Basically, the notion of fundamental breach is independent of curability, and the application of the seller's right to cure finds its limit wherever the buyer rightfully raises grounds for refusal, or the contract has been lawfully terminated.

Nevertheless, a critical difference from Article 48 CISG, Article 7.1.4 UNIDROIT Prinicples and the rules under both scholarly works on the harmonization of the contract law in Europe (PECL and DCFR), is that under Article 621-39 Sixth Book, the seller's right to cure is confined to deliveries of non-conforming goods. Therefore, this seller's right does not apply to any kind of failure to perform—i.e. non-performance or non-conforming tender of performance[217]:

> *Article 621-39. Cure by the seller*
>
> 1. The seller may cure the lack of conformity in the goods if he can do so before the performance date.
>
> 2. After the performance date, and after having received the notification of non-conformity, the seller may cure it within a reasonable time if it immediately offers to do so. The buyer may reject such offer if:
>
> a) The correction cannot be carried out without delay or inconvenience to the buyer.
> b) The buyer has reasonable grounds to believe that the seller will not perform or will not properly perform. Or,

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In the literature, *see also* NAVAS (2004), pp. 270-271 noting that Spanish courts generally grant an additional period of time for performance before declaring a contract terminated, where breached obligations were ancillary—i.e. derived from principal reciprocal ones—or in cases of partial or defective performance.

[216] CARRASCO (2010), pp. 1125, 1134-1136 and (2016), p. 110.

[217] Act 3/2017, 15th February 2017, *Diari Oficial de la Generalitat de Catalunya*, num. 7314, 22nd February 2017. English translation done by myself from the text available at: http://portaldogc.gencat.cat/utilsEADOP/PDF/7314/1591282.pdf.

c) Delay amount to an essential breach.

3. Pending cure, the buyer may suspend performance of its obligations but may not resort to any right which is inconsistent with the cure by the seller which is feasible within a reasonable time.

4. The seller must pay for the expenses of cure and eventually must compensate those damages caused by delay and any others that cure might have caused or could not have avoided, including costs of materials, labor and transportation.

Also, it must be remarked that Article 621-41(3) Sixth Book turns—cross-referencing Article 621-13(3)—to a *Nachfrist*-technique for termination of the contract on account of non-delivery. Therefore, it can be conclusively said that Article 621-41 is strictly modelled on the mechanism laid down between Articles 47(1) and 49(1)(a)(b) CISG.

Art. 621-13(3). Time for delivery

If the seller does not deliver the goods in due time, the buyer shall require it to deliver within an additional period of time adequate to circumstances, unless the seller has declared that it will not deliver the goods or, the time for delivery is of the essence.

Article 621-41. Contract termination

3. Non-essential delay in performance allows to terminate the contract if the buyer or the seller do not perform within the fixed additional time for performance that has been notified and that is adequate to circumstances.

Notably, the international trend of setting a cure regime to reinforce the principle *Favor Contractus*, early enshrined by the CISG on the basis of the seller's rights to cure and following the Nachfrist-mechanism and the fundamental breach doctrine, has not only been followed by national laws but also by other pieces of legislation at supranational levels:

i. In Africa, the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) has based its steady work harmonizing private law on the path of the CISG.

   For instance, the eighth book, which is on commercial sales, incorporated at the *Acte uniforme révisé portant sur le droit commercial general*, and enacted on 15th December 2010, is basically derived from the rules of the Convention on sales

of goods[218]. In this regard, Article 283, first paragraph, reads:

> *Article 283*
>
> Si l'acheteur invoque dans les délais fixés aux articles 258 et 259 du présent Acte uniforme un défaut de conformité des marchandises livrées, le vendeur a la faculté d'imposer, à ses frais exclusifs et sans délai, à l'acheteur le remplacement des marchandises défectueuses par des marchandises conformes.
> […]

ii. In Europe, the proposal for a Common European Sales Law (CESL)[219] and the proposals for two Directives on the European Digital Single Market[220] are the most conspicuous examples[221]. Whereas the former builds, under Article 109 CESL, a cure regime for breach of contract on the basis of a seller's right to cure modelled on Article 7.1.4 UNIDROIT Principles; the latter closely follows Article 3 Directive 1999/44/EC[222]. In so doing, the proposals for directives articulate, in case of non-conformity of the supplied digital

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[218] Available at: http://www.ohada.com/actes-uniformes/940/1054/livre-8-vente-commerciale.html.

[219] The CESL was prepared by the EU Commission and published early on 11th October 2011 COM(2011) 635 Final. This first version was later modified, on 26th February 2014, by the legislative resolution of the European Parliament on *the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law*, *see* MAGNUS (2012), *CISG vs CESL*, p. 97; and classification of remedies DiMatteo/ Janssen/ MAGNUS/ Schulze (2016), pp. 481-482, Para 46.

[220] Directive *on certain aspects concerning contracts for the supply of digital content* COM(2015) 634, 9 December 2015; and Directive *on certain aspects concerning the contract for the online and other distance sales of goods* COM(2015) 635, 9 December 2015. They are comprised under the so-called *European Digital Single Market Strategy*: www.ec.europa.eu/priorities/digital-single-market_en. It is submitted that both directives were drafted taking into account the experience acquired from the EU directives on consumer contracts and from the failed CESL, *see Explanatory Memmorandum*, Para 1; and CÁMARA (2016), p. 8.

[221] However, since they will never see the light of the day, these proposals are only briefly commented on in this dissertation. Notably, the CESL was cancelled in February 2015.

[222] CÁMARA (2016), p. 41.

content or goods, a hierarchical remedial system that gives preference to specific-performance oriented remedies[223].

A final comment is required concerning the seller's right under the CESL, whose availability, as a matter of principle, depends upon whether the transaction at issue is business-to-business (B2B) or business-to- consumer (B2C), which are both governed by this so-called "optional instrument".

Besides specific cure of related services—under Article 155(2) CESL—and cure of customized goods or digital content—under Article106(3)(a)—Article 106 CESL adjusts the remedial system for breach of contract to the kind of parties involved, assumedly on grounds of the unbalanced position of the parties. Accordingly, as a general rule, the seller's right to cure has preference over other remedies for breach only in B2B sales, whereas an aggrieved consumer is not normatively held to a specific trader on account of post-breach seller's rights to cure[224].

1.2 Historical Approach: Origin and Forerunners of Article 48 CISG

1.2.1 Origin of the Seller's Right to Cure and First Appearance in Early UNIDROIT Drafts on International Sales Law

It is submitted that the concept of seller's cure was not, prior to formalisation, neglected by business. Sales contracts ordinarily provided the seller with a subsequent opportunity to perform and to ultimately fix the breach. Thus, cure constitutes a mechanism arising out of contract practice private parties engaged in

[223] *See* Article 9 Directive on online sales and Article 12 Directive digital content. In particular, the latter directive, under Article 5, provides the consumer with an immediate right to terminate the contract wherever the seller does not supply, *see* CÁMARA (2016), pp. 40, 65.

[224] Vaquer/ Bosch/ SÁNCHEZ (2012), p. 497; WAGNER (2012), p. 4, 13; Schulze/ ZOLL (2012), *Commentary*, p. 497, Paras 3-4; and Claeys/ FELTKAMP/ VANBOSSELE (2013), p. 224.

commercial transactions commonly resorted to in order to pre-emptively resolve potential disputes[225].

> One can easily come up with an intuitive economic—or rather behavioural—explanation for the birth of that mechanism in commercial contracting and practice. In a commercial trade setting parties are, more often than not, players in repeated games. In this context, parties are moved to act by the incentive of future potential deals with their counter-parties. Therefore, the seller's right to cure mechanism, which allows the seller to perform under agreed terms—preserving the contract alike—as well as to give satisfaction to buyer's contractual interests, perfectly fits the setting. It allows parties to secure further rounds of mutually beneficial agreements[226].

Although market agents were widely familiar with seller's cure, and some isolated judicial decisions also ruled in this direction—mainly by deriving such a mechanism from general principles of law such as good faith[227]—this entitlement was continuously disregarded by sales law. Nevertheless, this tendency began to change in Scandinavian countries, whose law of sales of goods early regulated the seller's right to cure[228].

Additionally, in the United States over the 1940s, the first architect of the US Uniform Commercial Code—Karl Llewellyn—turned to commercial practice for drafting uniform rules on sales of goods. It is submitted that Llewellyn's initial preparatory works on drafts and reports for the Uniform Sales Act—finished in September 1941—had the purpose of renewing the old customary commercial order and bringing back the *Law of the Merchant*[229].

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[225] SCHWENZER (2005), p. 442; WAGNER (2012), p. 2; DAVIES/ SNYDER (2014), p. 363; PALUMBO (2015), p. 127; and SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 387. *Cf.* BRIDGE (2011), *FS Schwenzer*, p. 235.

[226] *See* an excellent explanation in COOTER/ ULEN (2016) pp. 299-301; and MICELI (2009), pp. 154-158.

[227] RABEL (1958), *Das Recht des Warenkaufs*, vol. II, p. 252.

[228] *See* in RABEL (1958), *Das Recht des Warenkaufs*, vol. II, pp. 252-254 the seller's rights to *Nachbesserung* and *Nachlieferung*.

[229] However, *see* WHITMAN (1987), pp. 156-158 who depicts how much Llewellyn was influenced by the German romantic and post-romantic legal thought, particularly embodied in the work of the commercial lawyer Levin Goldschmidt (drafter of an early *Handelsgesetzbuch* dated in 1857).

As a result, Llewellyn incorporated a seller's right to cure in the UCC draft[230]. After an intense drafting process lasting ten years[231,232], the following provision was coined in §2-508 of 1957 UCC Official Draft[233], which corresponds with the current wording:

> *§ 2-508. Cure by Seller of Improper Tender or Delivery; replacement*
>
> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
>
> (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

In Europe, the inflection point was in 1926, when the UNIDROIT Institute in Rome—an auxiliary organ of the League of Nations—was established for the unification of private law[234]. On 29th April 1930, the Institute appointed a Committee to draft a project on uniform international law of sales of goods. The Committee intensively worked on its task over four years, with the efforts of Prof. Ernst Rabel, whose extensive work on comparative law was taken as the cornerstone to develop a uniform international sales law, being particularly outstanding[235].

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[230] WHITE/ SUMMERS (2010), p. 436, according to whom the resulting draft on sales law amounted to the "first legal recognition to a general pattern of business behavior"; KAMP (1998), p. 281: "Llewellyn's program to have commercial law based on trade norms […]"; FRISCH (2014), p. 815; and WAGNER (2012), p. 280.

[231] *See* for an intermediate version of §2-508 the 1949 Draft in ALI & NCC (1949), *May 1949 Draft*, pp. 157-158.

[232] Drafting process began after the agreement—in 1944—between the National Conference of Commissioners on Uniform State Laws (NCC) and the American Law Institute (ALI). In May 1949, the first complete draft on UCC was published. In 1953, it was adopted by Pennsylvania but not by New York, and the New York Law Revision Commission challenged the text with many amendments. These remarks were further discussed by UCC's drafters resulting in the 1957 Official Draft which was later on enacted by US jurisdictions; *see* KAMP (1998), pp. 277, 313, 336 and 346.

[233] ALI & NCC (1957), *Official Edition*, pp. 42-43.

[234] For further information, *see*: http://www.unidroit.org/.

[235] *See* RABEL (1935), pp. 1-79, 339-363 for the preparatory draft and comments published in Rabel's law journal *Zeitschrift für Ausländisches und Internationales Privatrecht*—established in 1927 under the title *Der Entwurf eines einheitlichen Kaufgesetzes*. Furthermore, it is also remarkable that Prof. Rabel ran the Kaiser-

The drafting committee preliminarily concluded its task in 1934 by submitting—to the UNIDROIT council—the first draft, titled *Projet d'une loi internationale sur la vente* (*Entwurf eines einheitlichen Kaufgesetzes*), finally approved by the council in 1935[236]. However, the drafting process was interrupted by the Second World War (1939-1945) and only resumed in 1951[237]. After this span of time, the initial project was reviewed, resulting in UNIDROIT's 1939-1951 draft, 1956 draft, and 1963 texts. The latter served as a working basis for the final adoption of 1964 Hague Conventions ULIS and ULFC[238].

Regarding the seller's right to cure after performance date, this provision was early incorporated in Article 56 of UNIDROIT'S 1935 project on uniform international sales law, in the following terms[239]:

> *Article 56*
>
> If the seller must produce or construct the thing according to special specifications of the buyer, seller has the obligation to repair, within a reasonable time, the defect that has been noticed to him. It also has the right to repair this defect within a reasonable time, provided that this does not result in appreciable inconvenience or expense.
>
> The buyer, in such cases, cannot exercise the rights that to which he is entitled regarding defects of the thing, pursuant to Article 51, but only once the reasonable period indicated in the first paragraph has expired. Eventually, buyer may claim compensation for damages caused by the first defective delivery.

Wilhelm-Institut für ausländisches und internationales Privatrechts in Berlin, predecessor of the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg.

[236] RABEL (1935), pp. 1-79; and RABEL (1958), *Das Recht des Warenkaufs*, vol. II, p. 373; Schlechtriem/Schwenzer/U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 518, Para 1; *see* P. HUBER (2006), *Comparative Sales Law*, pp. 938, 940, 941-942 and 967 stressing the importance of Ernst Rabel's work *Das Recht des Warenkaufs* (vol. I, 1936; vol. II 1958).

[237] *See* Projet d'une loi internationale sur la vente (Entwurf eines einheitlichen Kaufgesetzes) 1939— Rome, 1951 in RABEL (1958), *Das Recht des Warenkaufs*, vol. II, pp. 395-415.

[238] *See* RABEL (1958), *Das Recht des Warenkaufs*, vol. II, pp. 375, 395, 416; and http://www.unidroit.org/ulfc-overview.

[239] Translated from RABEL (1935), pp. 24-25 (French and German versions). *See* an early Spanish translation conducted by GONZÁLEZ MARTÍNEZ (1935-1936), núm. 134, p. 174. and republished GONZÁLEZ MARTÍNEZ (1948), pp. 42-43.

As noticeable, the provision confines the seller's right to cure to those scenarios where the seller has produced or constructed the purchased goods according to buyer's specific instructions. In the early commentary, Prof. Ernst Rabel stressed that whereas a right to cure for the breaching *constructor* was acknowledged in some domestic laws—thereby concerning the *Werkvertrag* (contract for work)—it was not contemplated for dealers[240].

> Consequently—differing from the approach taken for drafting §2-508 UCC assumedly influenced by Scandinavian Sales of laws—the inclusion of the seller's right to cure in the project of international law of sales of goods could be justified on the grounds of a parallelism between a constructor and the position of the seller of specifically manufactured goods or customised items[241].

Later on, UNIDROIT'S 1939 (1951) project on uniform international sales law incorporated, in its Article 45, a seller's right to cure that was drafted as follows[242]. The remarkable feature of this provision is its widened scope of application, which now also refers to sales of generic goods, provided that seller can cure within performance date.

> *Article 45*
>
> In a sale of generic goods, the seller is entitled to deliver new goods, in replacement of those defective, within the time for delivery stipulated in the contract.
>
> In a sale of goods to be manufactured or produced by the seller in accordance with the buyer's special specifications, the seller is entitled to repair the defects within a reasonable time even after the time fixed for delivery, provided that this does not result in appreciable inconvenience or expense.

Finally, Articles 46 and 53 of UNIDROIT'S 1956 draft on uniform international sales law laid down—respectively—the seller's right

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[240] RABEL (1935), p. 334 "[i]n Fällen des Werkvertrages, vor allem aus dem Grunde, dass der Werkunternehmer die Ausrüstung zur Nachbesserung hat, ein Händler nicht".

[241] RABEL (1958), *Das Recht des Warenkaufs*, vol. II, p. 252.

[242] Translated into English from the French version RABEL (1958), *Das Recht des Warenkaufs*, vol. II, p. 403.

to cure before and after performance date. Focusing on the latter, it read as follows[243]:

> *Article 53*
>
> If the failure to deliver upon the date fixed does not constitute an essential contravention of the contract, the seller retains, after the date fixed for delivery, the right to deliver either the missing part or quantity or new things in conformity with the contract. Where in a sale of specific goods or of goods to be manufactured, or produced, the seller may repair the defects provided that such repair does not cause the buyer inconvenience or appreciable expense.
>
> However, if the seller avails himself of the rights conferred upon him by the preceding paragraph, the buyer, having regularly denounced the lack of conformity, may fix, for the second delivery or the completion of the repair, an additional period of time of reasonable length, the expiry of which, if he has not obtained satisfaction, he may resort to the rights under Article 50.

Several novelties can be highlighted. First, the provision expressly states the subjection of the seller's cure to the fact that the occurred failure to perform had not yet amounted to an essential breach. Secondly, the seller's right to cure is strengthened, by expressly stating that it covers either shortage in quantity—to be cured by subsequent deliveries of missing goods (*Nachlieferung*)—or defects in quality—which can be fixed by replacement or repair (*Nachbesserung*). The latter, however, still follows its forerunners in limiting its application to cases in which—as long as the repair can be conducted without causing the buyer inconvenience or appreciable expense—the seller followed buyer's instructions to produce the goods.

1.2.2 Articles 27(1), 31(1) 44(1) of the UNIDROIT 1964 Hague Convention on Uniform Law on the International Sale of Goods (ULIS)

As a significant difference, under ULIS, the seller's right to cure after delivery date was split into several provisions categorised by the kind of failure to perform. They read as follows[244]:

[243] Translated into English from the French version available in RABEL (1958), *Das Recht des Warenkaufs*, vol. II, p. 427.

Article 27

(1) Where failure to deliver the goods at the date fixed does not amount to a fundamental breach of contract, the seller shall retain the right to effect delivery […]

Article 31

(1) In cases not provided for in Article 30 [failure to deliver the goods at the place fixed amounts to a fundamental breach], the seller shall retain the right to effect delivery at the place fixed […]

Article 44

(1) In cases not provided for in Article 43, the seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

Also, it must be noticed that whereas the respective first paragraphs of Articles 27, 31, and 44 govern the seller's right to cure after delivery date, the second ones lay down rules for the buyer fixing an additional period of time for performance—i.e. a Nachfristsetzung. Hence, Articles 27(2), 31(2), and 44(2) are directly equivalent to Article 47 CISG[245].

Article 27

(2) The buyer may however grant the seller an additional period of time of reasonable length […]

Article 31

(2) The buyer may however grant the seller an additional period of time of reasonable length […]

Article 44

(2) The buyer may however fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. […]

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[244] *See* for the texts ZWEIGERT/ KROPHOLLER (1971), pp. 41-65 (English version), pp. 387-410 (French version), pp. 735-754 (German version). Furthermore, Article 37 lays down the seller's right to cure before the date fixed for delivery. *See also* Dölle/STUMPF (1976), Art. 10, p. 52, Para 14.

[245] Dölle/STUMPF (1976), Art. 44, p. 306, Para 4.

Accordingly, ULIS' drafters opted to establish a range of specific rules governing breaches of contract as well as to construct particular performance-oriented remedies in parallel, thus allowing the breaching seller to subsequently perform. Namely, the different seller's rights to cure after delivery date—also additional periods of time fixed by buyer—depend upon whether the failure to perform affects the date of delivery, the place of delivery or the conformity in the goods.

Although multiple amendments altered these provisions on the seller's right to cure—the obvious example being that it finally ends up consolidated into one provision, as Article 48 CISG covers all kinds of failures to perform any of seller's obligations—an important rationale underlying Articles 27(1), 31(1) and 44(1) has been preserved in the current CISG version of the seller's right to cure[246].

> Hence, the provision dealing with the seller's right to cure after the delivery date might serve as a neat representation of the fact that, besides a few significant differences, current CISG rules are mainly rooted in the precursor 1964 Hague Conventions (ULIS and ULFC). In turn, these were essentially modelled on the pioneering UNIDROIT drafts[247].

The seller's rights to cure are subject to fundamental breach and ultimately to a dominant buyer's right to declare the contract avoided[248]. Under Articles 27(1), 31(1) and 44(1), the several seller's rights to cure unanimously find their limit whenever the initial failure to perform amounted to a fundamental breach due to the seller's lack of performance by the time fixed[249].

Likewise, though slightly different from the CISG system, Article 44(1) turns to the wording: "[cure] does not cause the buyer unreasonable inconvenience or unreasonable expense" for curtailing the seller's right to cure non-conformities. It was affirmed that, under the ULIS, whenever this restriction to the seller's cure by

[246] Staudinger/ U. MAGNUS (2013), Art. 48, Para 4.
[247] HONNOLD (1989), *Documentary History*, p. 1; SCHNEIDER (1989), p. 72; *See* http://www.unidroit.org/ulfc-overview.
[248] Bianca/ Bonell/ WILL (1987), Art. 48, p. 348.
[249] Dölle/ STUMPF (1976), Art. 44, p. 305, Para 1.

subsequent delivery, by replacement or by repair, comes into play, the failure to perform is tantamount to a fundamental breach[250].

The latter is in tune with the striking difference between ULIS and CISG, also discussed elsewhere in this thesis, referring to the concept of *Secondary Fundamental Breach*[251]. Arguably, an unsuccessful attempt to cure a failure to perform under Articles 27(1), 31(1), and 44(1)—as well as the fruitless elapse of a Nachfrist under Articles 27(2), 31(2), and 44(2)—always allows the buyer to avoid the contract, regardless of the very fundamentality of the original defect in performance[252].

1.2.3 The Working Group Drafting Process on Article 43*bis* and Resulting Article 29 of the 1976 UNCITRAL Working Group on the *Sales* Draft (also Known as Geneva Draft)

The 1964 Hague Conventions—ULFC and ULIS—failed in their goal of developing a uniform law for the international sale of goods adopted worldwide. Consequently, in 1968, the United Nations Commission on International Trade Law (established in 1966) set up a Working Group with the mandate to produce a more successful text. In so doing, ULFC's and ULIS's texts were taken as a working basis.

With particular reference to the seller's right to cure after performance date, the Working Group redrafted ULIS' Articles 27, 31, 43 and 44 at its third session, held in Geneva from 17th to 28th January 1972. Afterwards, in the Working Group's fourth session—held in New York from 22nd January to 2nd February 1973—the Working Group ended up with the following version[253]:

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[250] Dölle/ STUMPF (1976), Art. 10, p. 52, Para 15 phrases it thusly: "[W]esentlichkeit der Vertragsverletzung bedeutet hier also nichts anderes als Unzumutbarkeit der Nachfristsetzung"; *also* Art. 44, p. 305, Para 2.

[251] *See below* Ch. III, 3.2.4.

[252] CISG-AC Opinion no 5, p. 3 Para 3.2.

[253] HONNOLD (1989), *Documentary History*, pp. 94: *Doc. A(5); III Yearbook 77-95; (A/CN.9/62)*, and pp. 138-139, 155: *Doc. A(7); VI Yearbook 61-79; (A/CN.9/75)*.

Article 43bis

1. The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with Article 44 or the price reduced in accordance with Article 45 [or has notified the seller that he will himself cure the lack of conformity].

2. If the seller requests the buyer to make known his decision under the preceding paragraph, and the buyer does not comply within a reasonable time, the seller may perform provided that he does so before the expiration of any time indicated in the request, or if no time is indicated, within a reasonable time. Notice by the seller that he will perform within a specified period of time shall be presumed to include a request under the present paragraph that the buyer makes known his decision.

As to the scope of application, the first remark to be made is that Article 43*bis* noticeably laid down a unique and all-comprehensive rule on seller's right to cure after delivery date. From its wording "cure any failure to perform his obligations" it is clear that the new draft put aside the ULIS' divided rules on seller's cure—under Articles 27(1), 31(1) and 44(1)—which sorted the cure's application according to the nature of the failure to perform.

Drawing attention to three other aspects is also important:

i. The provisions concerning a Nachfrist fixed by the buyer and the seller's right to cure were finally split. Article 43 referred to the additional period of time allowing the seller to subsequently perform, whereas Article 43*bis* (above excerpted) exclusively dealt with the seller's right to cure after performance date.

ii. In this version of the seller's right to cure it is clearly stated that Article 43*bis* is subject to other buyer's remedies for breach of contract. The seller's right to cure does not only depend upon the buyer's right to declare the contract avoided, but also—a salient difference from the current Article 50 CISG—upon the buyer not having reduced the price or notified the seller that it will conduct cure by itself. Therefore, the seller's right to cure seems to be confined to

marginal cases where the buyer has not yet exercised any of its prevailing remedies for breach of contract.

iii. Article 43*bis* (2) introduces a communication regime between parties for the exercise of the seller's right to cure. Accordingly, the seller may request that the buyer—and mere notice by the seller is assumed to include a request—makes known its decision regarding the seller's tender of remedy of its failure to perform within a fixed time. If there is no timeframe indicated, it is presumed that the seller will cure within a reasonable span of time.

This version of the seller's right to cure laid down in Article 43*bis* was preserved in the same terms at the fifth session of the Working Group—held again in Geneva from 21st January to 1st February[254] 1974. However, at the sixth session—back in New York from 27th January to 7th February 1975—the Working Group decided to delete the words in parentheses found in the last sentence of the provision. Hence, drafters eliminated the reference to the priority of the buyer's notice that it will conduct cure by itself over the seller's right to cure[255].

The above described drafting process resulted in two drafts, which then had to be submitted to the review of the full Commission. One draft was on the formation of contracts for the international sale of goods and the other was the so-called 1977 "Sales" Draft. The latter established the rights and obligations of the seller and the buyer under the international sales of goods, whose Article 29 read as follows[256]:

> (1) The seller may cure, even after the date for delivery, any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the

[254] HONNOLD (1989), *Documentary History*, pp. 174-175, 200-201: *Doc. A(9); V Yearbook 29-60; (A/CN.9/87)*.
[255] HONNOLD (1989), *Documentary History*, pp. 240 and 247: *Doc. A(11); VI Yearbook 49-62; (A/CN.9/100)*.
[256] HONNOLD (1989), *Documentary History*, pp. 3 and 337: *Doc. B(1); VIII Yearbook 25-64; (A/32/17, Annex I)*.

> buyer has declared the contract avoided in accordance with Article 30 or has declared the price to be reduced in accordance with Article 31.
>
> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply within a reasonable time, the seller may perform within the time indicated in his request or, if no time is indicated, within a reasonable time. The buyer cannot, during either period of time, resort to any remedy which is inconsistent with performance by the seller.
>
> (3) A notice by the seller that he will perform within a specified period of time or within a reasonable period of time is assumed to include a request, under paragraph (2) of this Article, that the buyer make known his decision.

The most evident consideration regards the two separate paragraphs into which the recently introduced communication regime—between parties for the exercise of the seller's right to cure after delivery date—was separated. From then until the current version under Article 48(2)(3) CISG, the seller's request and notice to the buyer were differently governed[257].

In a closer look, it is important to highlight a variation in wording that leads to the conclusion that Article 29(2-3)'s communication regime disregards all of the preconditions to which Article 29(1) ties the application of the seller's right to cure. Article 43*bis*(2) used to read: "[I]f the seller requests the buyer to make known his decision under the preceding paragraph […]". Article 29(2) does not contain the explicit cross-reference, reading: "[I]f the seller requests the buyer to make known whether he will accept performance […]".

Arguably, this sets the two strands of the seller's right to cure still standing under Article 48 CISG. Whereas, according to 48(1), the seller—provided that certain preconditions are met—can impose subsequent performance on an aggrieved buyer, under 48(2-4) the seller can only offer cure within a set period of time. In the latter event, the seller's opportunity to cure does not depend upon preconditions anymore, but only upon the buyer's acceptance of or failure to timeously respond to the seller's enquiry.

[257] Staudinger/U. MAGNUS (2013), Art. 48, Para 5.

1.2.4 Article 30 of the 1977 UNCITRAL Sales Draft (also Known as Vienna Draft)

In a second stage of the drafting process, the UNCITRAL Committee of the Whole (also known as Full Commission) reviewed—at its tenth annual session—the above-mentioned 1977 "Sales" Draft (or Geneva Draft) prepared by the Working Group. The meeting was held in Vienna and lasted from 23rd May to 17th June 1977[258]; the outcome was an unanimously-approved revisited draft, in which the renumbered Article 30 read as follows[259]:

> (1) Unless the buyer has declared the contract avoided in accordance with Article 31, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.
>
> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply within a reasonable time, the seller may perform within the time indicated in his request. The buyer cannot, during either period of time, resort to any remedy which is inconsistent with performance by the seller.
>
> (3) A notice by the seller that he will perform within a specified period of time or within a reasonable period of time is assumed to include a request, under paragraph (2) of this Article, that the buyer make known his decision.
>
> (4) A request or notice by the seller under paragraphs (2) and (3) of this Article is not effective unless received by the buyer.

Two headings were noticeably introduced. First, at the end of the first paragraph reading "the buyer retains any right to claim damages […]", the possibility of accumulating claims for non-curable damages is made expressly clear. Second, an independent fourth paragraph added to Article 30 referred to the requirement that any communication made by a breaching seller in relation with its right to cure is only effective upon reception by aggrieved buyer.

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[258] HONNOLD (1989), *Documentary History*, p. 318, explanation of *Doc. B(1) VIII Yearbook 25-64, A/32/17, Annex I*.

[259] HONNOLD (1989), *Documentary History*, p. 338, Para 289: *Doc. B(1) VIII Yearbook 25-64, A/32/17, Annex I*.

Furthermore, paragraphs (2) and (3) were also modified by eliminating the possibility the seller had previously been provided with to conduct cure within a reasonable time even if its initial communication—request or notice—did not include an indication of the time required for cure. Drafters made clear that in absence of an indication of the fixed time for curing, the seller could never derive any right from the failure of the buyer to reply to the request or notice within a reasonable time[260].

Finally, the members of the UNCITRAL Committee also discussed the core issue of the interplay between the seller's right to cure and other buyer's remedies for breach (namely avoidance and price reduction). The basis for this debate was provided by its forerunner:

> *Article 29(1) in fine*
>
> […] [U]nless the buyer has declared the contract avoided in accordance with Article 30 or has declared the price to be reduced in accordance with Article 31.

The first sentence of Article 30 was modified and the wording "Unless the buyer has declared the contract avoided"—modelled on the last sentence of Article 29(1)—was introduced. Therefore, the provision explicitly preserved subjection of seller's right to cure to buyer's right to avoid—which constituted the most controversial point during the debates in the Vienna Conference[261].

Regarding the right to reduce the price, the sense of the provision was diametrically changed, as it was generally upheld that the seller's right to cure should have primacy. Therefore, any reference to subjection of the seller's cure to the buyer's declaration of reduction of the price was completely eliminated from Article

[260] HONNOLD (1989), *Documentary History*, p. 338, Para 287: *Doc. B(1) VIII Yearbook 25-64, A/32/17, Annex I*.

[261] CISG-AC Opinion no 5, p. 3 Para 3.2: "[…] the preconditions for the breach being fundamental and the necessity to declare the contract avoided remained in dispute until the Vienna Conference […]"; and Bianca/Bonell/WILL (1987), Art. 48, p. 348.

30(1)[262]. This assumption still holds true under Article 50 CISG (remedy to price reduction).

1.2.5 Article 44 of the 1978 Draft Convention (also Known as New York Draft)

Before the Diplomatic Conference in 1980, the last step in the drafting process was the decision of the Uncitral Committee of the Whole (also Full Commission) to combine Uncitral's 1977 drafts on formation and sales into one single text. The result of this enterprise was the 1978 UNCITRAL Draft (generally called the New York Draft), which besides merging contents included a few linguistic modifications[263].

UNCITRAL unanimously approved the New York Draft. Afterwards, this draft was circulated to governments and interested international organizations for comments and further review. Finally, it served the UN General Assembly as a working document with which to convene a diplomatic conference in which the Convention on international sales law would be concluded[264].

The provision dealing with the seller's right to cure—previously Article 30—was renumbered as Article 44 and read as follows[265]:

> (1) Unless the buyer has declared the contract avoided in accordance with Article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

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[262] HONNOLD (1989), *Documentary History*, p. 338, Paras 276, 277: *Doc. B(1) VIII Yearbook 25-64, A/32/17, Annex I*; Staudinger/U. MAGNUS (2013), Art. 48, Para 6.
[263] Staudinger/U. MAGNUS (2013), Art. 48, Para 6.
[264] HONNOLD (1989), *Documentary History*, p. 364, explanation of *Doc. B(3) IX Yearbook 31-45, A/33/17, Annex I*.
[265] Materials published in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1979), vol. 43, p. 544 (English version), p. 545 (French version).

> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply within a reasonable time, the seller may perform within the time indicated in his request. The buyer cannot, during either period of time, resort to any remedy which is inconsistent with performance by the seller.
>
> (3) A notice by the seller that he will perform within a specified period of time or within a reasonable period of time is assumed to include a request, under paragraph (2) of this Article, that the buyer make known his decision.
>
> (4) A request or notice by the seller under paragraphs (2) and (3) of this Article is not effective unless received by the buyer.

1.2.6 1980 Diplomatic Conference Held in Vienna, from 10th March to 11th April

During the five weeks within which the above reviewed UNCITRAL'S New York Draft was revisited at the diplomatic conference convened by the UN General Assembly[266]—mainly by the First Committee[267]–, the provision on the seller's right to cure was fervently discussed[268]. In particular, national delegates at the conference strongly argued about the opening sentence of Article 44(1):

> (1) Unless the buyer has declared the contract avoided in accordance with Article 45, the seller may […]

The debate focused on the complex interplay between the seller's right to cure, the notion of fundamental breach and the buyer's remedy to declare the contract avoided. Opinions critical of the wording of Article 44(1) argued that the provision at issue did not achieve a balance between sellers' and buyers' interests[269].

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[266] 62 States attended the Vienna conference, HONNOLD (1989), *Documentary History*, p. 3, Para (3).

[267] The First Committee had the mandate to prepare Parts I-III (Articles 1-88) of the Convention, which deal with uniform law for international sales, HONNOLD (1989), *Documentary History*, p. 3, Para (3).

[268] SCHLECHTRIEM (1981), *Einheitliches UN- Kaufrecht*, p. 69; and SINGH (2006), p. 25 who phrases the idea as follows: "[a]rticle 48 contains a legislative history that is fraught with tensions […]".

[269] As expressed by the Bulgarian representative Mr. Stalev when proposing his amendment to Article 44 (A/CONF.97/C.1/L.160): "[t]he existing text did not

As a consequence, at the 20th meeting (Monday, 24th March 1980), Mr. Klingsporn (representative of the Federal Republic of Germany), as well as Mr. Rognlien (Norway) and Mr. Low (Canada), supported the Bulgarian amendment—presented by Mr. Stalev and numbered as A/CONF.97/C.1/L.160—which proposed:

> [Bulgaria] (A/CONF.97/C.1/L.160): Delete in paragraph (1) of Article 44 the words: *Unless the buyer has declared the contract avoided in accordance with Article 45*[270].

In so doing, the seller's right to remedy its failure to perform would indisputably gain prevalence over buyer's remedies for breach in cases where the seller is ready to remedy a failure to perform within a reasonable time. However, this view encountered the strong opposition of Mr. Bennett (representative of Australia), Mr. Sami (Iraq) and Mr. Feltham (United Kingdom), who advocated for a more dominant right to avoid the contract for the aggrieved buyer[271].

Therefore, in order to reach an agreement during the diplomatic conference and thus to finally conclude the Convention, it was necessary to bridge differences among national representatives by providing the draft with an alternative wording for Article 44(1). At the 22nd meeting (Tuesday, 25 March 1980), representatives of Bulgaria, Canada, the Democratic Republic of Germany, the Federal Republic of Germany, the Netherlands, Norway, and the United States of America forwarded a joint proposal of amendment. It was numbered as A/CONF.97/C.1/L.213 and included three proposals for a new wording of Article 44(1)[272]:

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achieve a proper balance between the seller's interests and those of the buyer, since Article 44(1) permitted the buyer to declare the contract avoided immediately […] without giving the seller an opportunity to remedy his failure to perform", *Official Records*, First Committee deliberations, p. 341 *see* in HONNOLD (1989), *Documentary History*, p. 562: *Doc. C(4); O.R. 236-433*; *see* also SINGH (2006), p. 26.

[270] Available at: http://cisgw3.law.pace.edu/cisg/text/link48.html

[271] *Official Records*, First Committee deliberations, pp. 341-342 *see* in HONNOLD (1989), *Documentary History*, pp. 562-563, Paras 42-44: *Doc. C(4); O.R. 236-433*; and KRITZER (1989), *Guide to Practical Applications*, p. 359-360.

[272] Available at: http://cisgw3.law.pace.edu/cisg/text/link48.html; and HONNOLD (1989), *Documentary History*, p. 687: *Doc. C(5); O.R. 83-141*.

Alternative I:
Paragraph (1).
Revise paragraph (1) of Article 44 to read as follows:

(1) The seller may remedy at his own expense the failure to perform his obligations only if this is consistent with the reasonable interests of the buyer, does not cause him unreasonable inconvenience and the resulting delay does not amount to a fundamental breach of contract. The buyer retains any right to claim damages as provided for in this Convention."

Alternative II:
Paragraph (1).
Revise paragraphs (1) and (2) of Article 44 to read as follows:

(1) Subject to Article 45 the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, 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. The buyer retains any right to claim damages as provided for in this Convention.

(2) The seller may request the buyer to make known whether he will accept a remedy of his failure to perform, unless the buyer has fixed an additional period of time in accordance with Article 43 or declared the contract avoided in accordance with Article 45. If the buyer does not reply within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

Alternative III:
At the end of Article 45(1)(a), add the following words:

[…] and the seller does not remedy the failure in accordance with Article 44.

In the debate, Mr. Schlechtriem (representative of Federal Republic of Germany) clarified that *Alternative III* was not an amendment on its own but only a clarification of *Alternative I*[273]. Then chairman of the meeting (Mr. Loewe) put amendment A/CONF.97/C.1/L.213 to the vote. The result was that *Alternative II* was adopted[274]—

[273] *Official Records*, First Committee deliberations, p. 351 *see* in HONNOLD (1989), *Documentary History*, p. 572, Para 8: *Doc. C(4); O.R. 236-433*; p. 687, Para 7: *Doc. C(5); O.R. 83-141*.
[274] *Official Records*, First Committee deliberations, p. 352 *see* in HONNOLD (1989), *Documentary History*, p. 573, Paras 19-23: *Doc. C(4); O.R. 236-433*. The

although only its *Paragraph 1*—which corresponds with the current wording of Article 48(1) CISG[275].

The contentious opening sentence of Article 44(1) was shifted from "Unless the buyer has declared the contract avoided in accordance with Article 45" to the quite controversial cross-reference[276] "Subject to Article 49" enshrined in the current version of Article 48(1) CISG. In the opinion of the representatives at the meeting, only this new wording could align parties' divergent interests: the seller's opportunity to cure, preservation and performance of the contract as far as possible, or—otherwise—buyer's avoidance[277].

> Later on, Mr. Krispis (representative of Greece)—with the support of Mr. Cuker (Czechoslovakia)—proposed a further amendment. They intended to modify the recently adopted paragraph 1 of Article 44 by introducing the following content: "Subject to the contract not having been declared avoided in accordance with Article 45".
>
> However, Mr. Bonell (Italy) immediately fought this amendment on the basis that it would considerably alter the content of Article 44[278]. Accordingly, Mr. Loewe (Chairman)—taking into account that the Greek proposal of revision received little support—concluded that the First Committee wished to reject it[279].

It must be noticed that, despite the above-traced drafting process and strong debate during the diplomatic conference, the central question of whether the seller's right to cure should prevail over the buyer's right to avoid the contract—or vice versa—was not

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amendment was adopted by 19 votes in favor and 7 against, HONNOLD (1989), *Documentary History*, p. 687, Para 9: *Doc. C(5); O.R. 83-141*.

[275] KRITZER (1989), *Guide to Practical Applications*, p. 359 and Staudinger/U. MAGNUS (2013), Art. 48, Para 7.

[276] Bianca/Bonell/WILL (1987), Art. 48, p. 348 phrases: "[b]ut replaced it by the *enigmatic* cross-reference […]" (emphasis added).

[277] In words of Mr. Stalev: "[t]he amendment intended to guarantee the right of the seller to remedy a failure to perform while at the same time safeguarding the lawful interests of the buyer, who must be assured that the contract would be executed", *Official Records*, First Committee deliberations, p. 351 *see* in HONNOLD (1989), *Documentary History*, pp. 572: *Doc. C(4); O.R. 236-433*.

[278] *Official Records*, First Committee deliberations, p. 352 *see* in HONNOLD (1989), *Documentary History*, p. 573, Para 28: *Doc. C(4); O.R. 236-433*.

[279] *Official Records*, First Committee deliberations, p. 352 *see* in HONNOLD (1989), *Documentary History*, p. 573, Paras 29-30: *Doc. C(4); O.R. 236-433*.

successfully settled[280]. So far, the topic has been profusely debated. Whereas the concept of fundamental breach itself is not so controversial, scholars' works and adjudicators' decisions have not always taken consistent approaches to the intertwined interpretation and application of these provisions—Articles 25, 48, and 49(1)(a).

Another salient modification of Article 44 of UNCITRAL's 1978 New York Draft also resulted from the adoption of *Paragraph 1 of Alternative II* of the joint amendment A/CONF.97/C.1/L.213[281]. It affected the time precondition for the rightful existence of the seller's right to cure under the first paragraph. Thus, previous reference to "such delay as will amount to a fundamental breach of contract" laid down in Article 44(1) was shifted to an apparently simpler "without unreasonable delay", which, as discussed later[282], kept the same meaning.

All in all, the First Committee's workings resulted in, on 4th April 1980, a final document—including draft Articles—which was finally submitted to the Plenary of the Conference. Article 44 of this document read as follows[283]:

> (1) Subject to Article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.
>
> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

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[280] CISG-AC Opinion no 5, p. 3 Para 3.2; *see below* Ch. IV, 4.1 & 4.2.6.

[281] This joint proposal integrated a previous amendment formulated by Singapore and numbered as A/CONF.97/C.1/L.148 which proposed to replace the words "without such delay as will amount to a fundamental breach of contract" in the first sentence of paragraph (1) by the words "without unreasonable delay", *Official Records*, Proposals; Action by First Committee, p. 114 *see* in HONNOLD (1989), *Documentary History*, p. 686: *Doc. C(5); O.R. 83-141*.

[282] *See below* Ch. II, 2.2.a) and Ch. IV, 4.2.5.

[283] *Official Records*, Draft Proposals, pp. 159-160 *see* in HONNOLD (1989), *Documentary History*, p. 719: *Doc. C(6); O.R. 155-167, 169-175*.

> (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.
>
> (4) A request or notice by the seller under paragraph (2) or (3) of this Article is not effective unless received by the buyer.

Two additional changes from the draft Article's wording are remarkable. Firstly, "however" was introduced at the beginning of the last sentence of the first paragraph. Hence, the buyer's entitlement to accumulate a claim for non-curable damages was neatly upheld even if the seller had successfully cured its failure to perform. Second, an express reference to the "preceding paragraph" was introduced in Article 44(3), equalizing the effects of both paragraphs.

This version of Article 44—prepared by the First Committee at its 22nd meeting—was finally adopted by the Plenary Conference on 9th April 1980, at its 8th meeting[284]. The proposed Article 44 was adopted by 38 votes to none, with 2 abstentions. This provision was then renumbered as Article 48 in the final text of the Convention and published in six official versions: Arabic, Chinese, English, French, Russian and Spanish[285].

[284] *Official Records*, Decisions by Plenary Conference, p. 211 *see* in HONNOLD (1989), *Documentary History*, p. 746: *Doc. C(7); O.R. 199-228*.
[285] All available at: http://www.cisg-online.ch/index.cfm?pageID=643; *see also*, HONNOLD (1989), *Documentary History*, pp. 766-867: *Doc. C(9); O.R. 178-190*.

CHAPTER 2. EXISTENCE OF THE SELLER'S RIGHT TO CURE UNDER ARTICLE 48 CISG

Arguably, the CISG's default remedial system provides parties with a fair solution in the average case[286]. Once a breach of contract has been established, the Convention's default remedies seek to strike a balance between sellers' and buyers' interests. In particular, regarding the seller's right to cure after performance date under Article 48(1), the following has to be considered.

If in all cases of failure to perform, the legal system gave the seller as powerful a performance-oriented remedy as the seller's right to cure, it would result in a dramatic impairment of the aggrieved buyer's position. After a breach, the buyer would be left with no means to pursue its legitimate interests, finding itself subject to the will of the breaching seller. Ultimately, the seller would opt to cure in the most convenient way given its needs, neglecting those of the buyer. Obviously, this result would clearly sit at odds with the rationales that the CISG's default remedies assumedly uphold[287].

As a consequence, the seller's right to cure after performance time is legally limited by several normative requirements, which intend to address scenarios in which providing the breaching seller with this right seems inappropriate. They constitute an evident manifestation of the CISG's drafters' attempt to strike a balance between seller's and buyer's interests in the post-breach setting. In the present dissertation, these requirements are classified as *General* or *Specific Preconditions*[288].

> The CISG is not the only body of law that encompasses preconditions—namely those laid down for the most part in Article 48(1)—to temper the application of such a seller's performance-oriented right. The UCC § 2-508(2) also provides the seller with an additional opportunity to perform as long as: 1) the subsequent performance is conducted within a further reasonable time; 2) the seller had grounds to believe that the initial

[286] LOOKOFSKY (2012), *Understanding the CISG*, p. 163; and ENDERLEIN (1986), *Rights and Obligations of the Seller*, p. 134. For an insight into the interplay between contract and default system *see* SCHWENZER/ HACHEM/ KEE (2012), p. 66, Para 4.58-4.59.

[287] Same idea but from the opposite perspective *see* MAK (2009), p. 164.

[288] *See below* Ch. II, 2.1. and 2.2. respectively.

> tender would be acceptable; 3) and—according to the provision's wording– the seller substitutes a conforming tender[289].

Furthermore, under the CISG, the seller's right to cure is not only normatively curtailed after the performance date. The seller can only cure non-conformities in prematurely delivered documents or goods—according to Articles 34 and 37, respectively—provided that such subsequent performance is carried out within the time stipulated in the contract. What is more, these seller's rights to cure have to comply with two other specific preconditions. The seller's cure cannot cause to the buyer either "unreasonable inconvenience" nor "unreasonable expense". They read as follows:

> *Article 34*
>
> […] cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.
>
> *Article 37*
>
> […], provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.

This differs from §2-508(1) UCC, according to which the seller's right to cure premature non-conforming tenders or deliveries within the fixed time for performance is not restricted by any additional legal requirement.

> *§2-508. Cure by Seller of Improper Tender or Delivery; replacement*
>
> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

This is also the case under other provisions establishing the seller's right to cure within performance time. For instance, Article III. – 3:202(1) DCFR[290]:

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[289] GILLETTE/ WALT (2016), p. 244.

[290] KRUISINGA (2011), p. 918; *see also* MAK (2009), p. 169.
Another example is Article 109(1) CESL:
"1. A seller who has tendered performance early and who has been notified that the performance is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance".

III. – 3:202: Cure by debtor: general rules

(1) The debtor may make a new and conforming tender if that can be done within the time allowed for performance.

2.1 General Preconditions

2.1.1 Parties' Agreements on the Seller's Right to Cure

First and foremost, the existence of the seller's right to cure depends upon the terms of the contract. Freedom of contract is, channeling private autonomy and self-regulation, one of the foundations of private law[291]. The CISG is no exception in this regard and gives a dominant role to the principle of parties' autonomy. Article 6 CISG clearly professes that[292]:

> The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Therefore, this principle should also govern the default provision that provides the breaching seller with a right to cure after the time for performance. As a result, attention must be primarily attached to the question—and consequences—of whether parties to a contract under the CISG can effectively alter the availability of this seller's right.

The answer is undisputedly affirmative[293]. Contractual variations on the default seller's right to cure rule may result in either: *incorporation*, in scenarios where otherwise it would not exist; *variations of its extent*—mainly specifying means of cure, a period

[291] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 6, pp. 105, 113, Paras 8, 23; and SCHWENZER/ HACHEM/ KEE (2012), p. 66, Para 4.58.
[292] Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 6, p. 137, Paras 5-6; JANSSEN/KIENE, *General Principles*, pp. 271-272; SCHWENZER/ HACHEM/ KEE (2012), p. 67, Para 4.62; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 31.
[293] Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 6, pp. 137-138, Paras 5-7; Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 6, p. 115, Para 28 state: "[e]xclude the seller's right to cure (Article 48) entirely or limit it […]".

of time for conducting subsequent performance, etc.[294]; and *exclusion* (also known as derogatory agreements)[295].

On the one hand, as to the contractual *incorporation* or *expansive variations* of the default seller's right to cure under article 48, a well-positioned seller with strong bargaining power could easily include such a clause in the contract. Principally, this term would have a double effect for its interests.

Firstly, it would permit the seller a second opportunity to perform in more scenarios of breach of contract than those envisaged by the default rule. Strikingly, for instance, the parties might agree on the seller's entitlement to preliminarily attempt to cure any kind of failure to perform, regardless of its intensity—i.e. the fundamentality within the meaning of Article 25—. Likewise, the seller's right to cure could also be reinforced by virtue of a stipulation that makes it applicable irrespective of all—or at least some of—the preconditions outlined in Article 48(1).

Secondly, an incorporated or expanded seller's right to cure has the effect of wholly restricting those remedies for breach to which the aggrieved buyer would otherwise be entitled to resort according to the CISG's default rules. This impact is clear, for example, on contracts in which the seller introduces a "repair or replace" clause for the non-conformity of the delivered goods[296].

> Prof. Lookofsky[297] depicts the controversy that a "repair or replace" clause might create. On one side, the seller may introduce the clause in order to exclusively restrict the buyer's remedies for breach to those

[294] Ensthaler/ Bandasch/ ACHILLES (2015), Art. 48, p. 1838, Para 4; GABRIEL (2008), *Drafting Contracts*, p. 534; DAVIES/ SNYDER (2014), p. 362 referring to the so-called "notice and cure" clauses.

[295] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 31; GABRIEL (2008), *Drafting Contracts*, p. 534; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 585, Para 66; DAVIES/ SNYDER (2014), p. 364; Witz/ SALGER/ Lorenz (2016), Art. 48, pp. 407-408, Para 8 giving an example of an exclusion of the seller's right to cure to be found in general conditions for the purchase; and LOOKOFSKY (2012), *Understanding the CISG*, pp. 153, 154, who stresses the common parties' tendency to vary the CISG default remedial system in order to tailor the remedies to their contractual interests.

[296] LOOKOFSKY (2012), *Understanding the CISG*, p. 160.

[297] LOOKOFSKY (2012), *Understanding the CISG*, p. 157.

> which are cure-oriented, under Articles 46 and 48 of the CISG. On the other side, the buyer may seek to interpret such a clause as merely establishing a hierarchy of remedies but not as an exclusion of other remedies for breach, such as price reduction or avoidance of the contract.

These two consequences aside, parties' agreement on the seller's right to cure may also aim to specify the methods by which cure is to be accomplished. Examples are: how a defective title in the goods should be cured by the seller[298]; or, concerning cure by repair or replacement, when, where, and by whom the subsequent performance has to be conducted, within what timeframe, etc.

On the other hand, *exclusion* of the seller's right to cure or *reductive variation* of its scope of application result in curtailing the availability of the seller's right to cure in scenarios where, failing such stipulation, the seller would have been entitled to cure under the default CISG's provision.

Parties may directly leave out the seller's right to cure from the contract by agreeing on such an exclusion. In addition, parties may also indirectly derogate the seller's right to cure by stipulating the essential character of certain obligations under the contract. In so doing, the parties are indirectly denying the existence—or restricting reasonableness under Article 48(1)—of the seller's right to cure after performance date. The parties are *ex ante* qualifying the failures to perform as fundamental breaches and allowing the buyer to immediately declare the contract avoided or ask for replacement of non-conforming goods[299].

In practice, parties usually contract upon the essentiality of a timely performance—commonly known as "time is of the essence". In so

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[298] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 31; *See below* Ch. III 3.2.1.

[299] The interpretation of these contractual terms is governed by Article 8 CISG, *see* CISG-AC Opinion no 5, p. 4 Para 4.2; and LOOKOFSKY (2012), *Understanding the CISG*, p. 153.
In the same terms, DAVIES/ SNYDER (2014), p. 362: "[i]n their contract, then, the parties can do one of two things. First, […] state expressly that the contract can be called off for any breach at all. Such clause would be the contractual equivalent of the perfect tender rule. Alternatively, they may try to define what will count as a serious breach rather than leave a tribunal to figure it out based on the general definitions in the law".

doing, as affirmed above, parties not only *ex ante* qualify the breach and foresee its consequences but they also exclude any seller's right to cure after that time. In case of breach, cure according to Article 48(1 is no longer reasonable)[300].

> An example may be the decision of the *Corte di Appello di Milano*, 28 March 1998, CISG-online 348. An Italian buyer bought knitted goods (knitwear) from a Hong Kong seller. In the contract, the parties agreed that goods were to be delivered by a fixed time: 3 December 1990. The buyer paid 6.000 USD. The Hong Kong seller missed this deadline for delivery and the buyer immediately cancelled the purchase order, which amounted to a declaration of avoidance. In mid-December, the seller announced the imminent delivery of the goods. However, the buyer sued the seller claiming for payment of the total amount which has already been paid, with interest thereon, by effect of the avoided contract.
>
> The Court of Appeals of Milan reversed the first instance decision, which held that the buyer had not proved that the term of delivery was essential. By contrast, the Court of Appeals of Milan declared the contract rightfully avoided and confirmed the buyer's entitlement to restitution for the partial payment of US $ 6.000 on the following grounds: "[t]here is no doubt that the agreed time of delivery was a fundamental term and that the contract hinged on the availability of the goods just before the buyer's end of the year sales".

Furthermore, parties may also expressly stipulate the essentiality of the proper tender of some obligations under the contract—here, irrespective of the timeframe—for which failure to perform amounts to a fundamental breach of contract.

> In the case law, *Appellationsgericht* Basel-Stadt, 22 August 2003, CISG-online 943[301]. In December 1996, a Swiss company bought soy beans from a Belgian seller. In the contract was stipulated that those edible goods could not be Genetically Modified Organisms (GMOs). In addition, clause 5.5 of the supply agreement used to read:
>
> > "In the event [Seller]'s liability is finally established, [Seller] will replace the defective goods or if such replacement has become impossible, [Seller] will give an equivalent financial compensation, such compensation cannot exceed the invoiced value of the original transaction".
>
> After delivery of goods, it was established that the soy beans contained GMOs. The Swiss buyer immediately declared the contract avoided,

[300] GABRIEL (2008), *Drafting Contracts*, p. 534, footnote 20; and MAK (2009), p. 165.
[301] P. Huber /Mullis / P. HUBER (2007), p. 224; *see* Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 442-442, Para 44 for further references.

> suing the seller for additional damages, on the basis of the existence of a fundamental breach, thus, no seller's right to cure was to be considered. Besides the fundamental character attached to GMO-free warranty, it was also debatable whether such limitation of liability was to be observed even if the seller had expressly warranted a certain feature of the goods.
>
> The *Appellationsgericht* found for the buyer considering, on the one hand: "[t]hat fundamental significance was attached to a GMO-free product […]". On the other hand: "[d]espite the warranty of freedom from GMO, it was still permissible in the present case to limit the liability for delivery of defective goods in such a way that, although the buyer can avoid the contract, it does not have any further rights to additional damages".

- Limits to Parties' Agreements on the Seller's Right to Cure

The question here is whether—or to what extent—a direct or indirect agreement between the parties upon the existence of a seller's right to cure under Article 48 would be valid—or effective—if its content undermines or is inconsistent with CISG's basic principles.

i. *Derogation of the Seller's Right to Cure*

This question ultimately concerns derogation (i.e. exclusion) of the seller's right to cure under Article 48. Such exclusion might entail contractually setting an immediate right to declare the contract avoided—articulating fundamentality regardless of the notion of fundamental breach under Article 25 which comprises curability of the failure to perform by the seller. This would be tantamount to the perfect tender rule under §2-601 UCC[302]:

> *Buyer's Rights on Improper Delivery.*
>
> Subject to the provisions […], if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
>
> (a) reject the whole; or
> (b) accept the whole; or
> (c) accept any commercial unit or units and reject the rest.

[302] *See above* DAVIES/ SNYDER (2014), p. 362.

On the one hand, this stipulation might arguably disrupt the functioning of the CISG's default remedial system, which, assumedly, provides parties with a balanced solution. On top of that, this clause might also neglect some of the basic principles—i.e. foundations—of the CISG. The Convention approaches the remedy of avoidance of contract restrictively, on the basis that contracts are to be preserved as far as appropriate. On the flip side, on the basis that economic—and perhaps also welfare—waste resulting from costly restitutions must be minimized.

On the other hand, a contractually-based immediate right to avoid the contract—precipitated by exclusion of the seller's right to cure under Article 48(1)—could be strategically used by the aggrieved buyer. As examined under the UCC[303], this mechanism would allow the buyer to circumvent the CISG's restrictions on the remedy of avoidance, as well as paving the path for opportunistic avoidances of contract—i.e. those only aimed at stepping out of a bad deal, for example, due to a plunge in the market price after the conclusion of the contract.

ii. *Expansion of the Seller's Right to Cure*

All these concerns are also existent in the opposite direction, where the seller might seek to expand its right to cure to strategically restrict the counter-party's remedies for breach. Conspicuously, wherever market prices dramatically fall after the conclusion of the contract, the breaching seller could opportunistically use a contractually-based right to cure after performance date to hold the buyer to the contract beyond what would be economically desirable.

In an extreme case, a limitless contractual expansion of the seller's right to cure might lead to an override of the buyer's remedies for breach and to bind the performance of the contract to the seller's will.

iii. *Developments*

[303] *See above* Ch. I, 1.1.2.a).

The solution is not straightforwardly provided by the CISG. Article 4, sent. 2, (a) clearly states that the Convention does not govern validity of the contract or of any of its provisions or of any usage[304]:

> *Article 4*
>
> […] In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage;

Therefore, an adjudicator must resort to the applicable domestic law to decide on matters outside of the Convention; here, norms on the validity of the contract[305]. On this matter, attention must be drawn not only to general contract law rules, but also to specific legal regimes on substantive control (i.e. control of content) of the standard terms of business, in particular, to those applicable to non-consumer transactions (i.e. business to business, or B2B).

> In case law, the decision of the *Oberster Gerichtshof* (Austria) 7 September 2000 CISG-online 642 is prominent. In this particular case, a German seller sold an Austrian buyer several gravestones in early 1992. After a few months, some of the products turned out to be defective, and the buyer withheld payment. The German seller sued the buyer, claiming for payment because, according to its standard terms of business—to which the buyer agreed—that right was excluded from the contract of sale.
>
> In its ruling, the Austrian Supreme Court first and foremost expressly held that questions relating to the validity of clauses in standard terms which modify the rights of a party are not governed by CISG. In this case, the conflict of laws led to the application of the German domestic law so as to ascertain the validity of the clauses. Nevertheless, the Austrian Supreme court rules that those national norms on validity of contracts—or clauses—that are inconsistent with the CISG's fundamental principles are not applicable. In the words of the court: "[n]ational provisions contradicting these core values [of the CISG] can be considered as inadmissible".

[304] LOOKOFSKY (2012), *Understanding the CISG*, p. 161.

[305] Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 4, p. 108, Para 15: "[d]ie anderen die Gültigkeit des Vertrages berührenden Fragen sind in der Regel nach dem anwendbaren nationalen Recht zu beantworten"; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 430, Para 25; and HUBER /MULLIS (2007), p. 33.

With this framework in mind, it must be affirmed that, under the CISG, parties that bargain on an arm's length basis are free to contract as granted by the law of the State whose law is applicable to those matters outside the Convention[306]. Consequently, *sans* any defect in the formation of the contract relevant enough as to constitute grounds for invalidity under the applicable domestic law[307], it must be assumed that any variation on the seller's right to cure should be deemed valid—and, thus, effective.

For instance, parties may consider it better for their interests to bring their contractual relationship closer to the UCC Perfect Tender Rule, by upgrading obligations to the category of essential ones. Failure to perform these obligations would then amount to a fundamental breach, and exclude cure by the seller under Article 48. The validity of this clause should be undisputed—even if, with it, the parties have altered the CISG's breach-of-contract regime and the availability of remedies in contravention of the CISG's basic principles.

> The parties might be interested in contractually allowing the aggrieved buyer to immediately declare the contract avoided. On the one hand, perhaps the potential breaching seller is more strongly induced to properly perform its contractual obligations if it is harshly threatened by the most radical remedy for breach. On the other hand, perhaps the buyer has had to pay a higher price for the corresponding level of accurateness in performance that such a rule assumedly imposes on the seller.

In other words, contravention of the CISG's foundations does not suffice—in terms of validity—as justification to curtail the parties' freedom of contract. Parties dealing on an arm's length basis can freely shape their rights and obligations in accordance with their interests. Only in this way can they self-regulate their private relationships and pursue the goals that brought them to enter into an international sales contract.

Different, however, are cases where parties have not agreed on those modifications of the default rules, but one or both parties have

[306] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 6, p. 113, Para 23.
[307] SCHLECHTRIEM (1984), *Seller's Obligations*, p. 2.

incorporated[308] them into the contract by using a non-negotiated clause—most commonly known as standard terms of business. The most clear-cut example of this would be a buyer's fine-print formulary containing detailed purchase conditions, among which the exclusion of the seller's right to cure is established[309].

Case law[310]—backed up by scholarly opinions[311]—lead to the conclusion that if the content of a clause of the incorporated standard terms is inconsistent with the CISG's foundations, it should be considered invalid—and thus, ineffective. This assumption holds true, even if the same clause would be considered valid under the applicable domestic law.

> In the decision of *Oberster Gerichtshof* of 7 September 2000, CISG-online 642 the court held that a standard term—in this case a limitation of the buyer's right to withhold payment—which contradicts the CISG's fundamental principles (or 'values' in accordance with the German

[308] Discussion about incorporation of non-negotiated terms—business standard forms—to contracts governed by the CISG falls beyond the topic of the present dissertation. However, in the case law, *see Bundesgerichtshof* 9 January 2002, CISG-online 651, where a "Sales and Delivery Terms" incorporated into the contract established an exemption clause which excluded the seller's liability for defects of the machinery sold; and *Bundesgerichtshof* 28 May 2014, CISG-online 2513. *See also* CISG-AC Opinion no 13 on Inclusion of Standard Terms under the CISG. Comparatively to the CISG, *see* Article 2.1.22 (1) UNIDROIT principles which lays down rules on incorporation.
In the literature, *see* Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, pp. 1081-1082, Para 60; Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 4, p. 110, Para 20; LOOKOFSKY (2012), *Understanding the CISG*, p. 157; SCHMIDT-KESSEL (2002) p. 10, Para II.2; and SCHWENZER/ HACHEM/ KEE (2012), pp. 165-166, Para 12.05.

[309] Ensthaler/ Bandasch/ ACHILLES (2015), Art. 48, p. 1838, Para 4.

[310] *E.g.* the *Oberlandesgericht Oldenburg*, 20 December 2007, CISG-online 1644 explains: "[m]oreover, the choice of law contained in para. 292 of [Buyer]'s standard terms may exclude an application of the CISG only if these standard terms have become part of the contract […], recourse must be taken to the CISG in order to assess whether the requirements for a valid introduction of standard terms are fulfilled".

[311] Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 4, p. 111, Para 21; Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 4, p. 89, Para 38; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1082, Para 60: "[t]he standards of the Convention must be observed"; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 31: "[…] in so far as they [standard terms of business] are not in conflict with the fundamental values of the CISG"; and LOOKOFSKY (2012), *Understanding the CISG*, p. 154.

> expression *Grundwertungen*), can be denied contractual effect for that reason alone, even if the term in question would be considered valid under the otherwise applicable domestic contract law.
>
> In this case, the applicable domestic law was German law, according to which the exclusion of the right to withhold payment was valid. The *Oberster Gerichtshof* further considered that such exclusion did not violate the basic principles of the CISG. In contrast, the court insisted that, had parties excluded the right to avoid the contract without even granting the right to damages, it would have undermined the CISG's basic principles and thus would have amounted to an invalid term.

In short, if variations of the seller's right to cure after performance date (i.e. exclusion, reduction, expansion, inclusion) are effected by incorporation of a standard terms of business into the contract, their validity will be assessed against a substantive control according to the applicable domestic contract law, by virtue of Article 4, sent. 2, (a). Notwithstanding, an adjudicator—when considering the validity of the clause under the applicable domestic law—must also take into consideration the CISG, in and of itself[312].

As a result, in accordance with the circumstances of the case, a clause on the seller's right to cure might be deemed invalid. There are less strong reasons to replace the assumedly fair, reasonable and economically efficient CISG's foundations, for instance, the restrictive approach to the remedy of avoidance—which is upheld by default rules such as the seller's right to cure under Article 48—with buyer's or seller's fine-print rules that lead to biased outcomes.

> This solution holds perfectly consistent for all those jurisdictions whose contract law rules on standard terms of business permit the assessment of validity of content when the transaction is business to business (B2B)[313]. In other jurisdictions, for example Spain, a substantive control of standard terms' content in B2B transactions is rather disputed[314].

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[312] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 4, p. 89, Para 38; SCHLECHTRIEM (1984), *Seller's Obligations*, p. 3: "[t]he Convention is not just a gap-filler. It may under certain circumstances also be a yardstick for the validity of clauses that the parties *have not really agreed upon but that on has imposed upon the other through the use of standard terms or other means*" (emphasis added); and LOOKOFSKY (2012), *Understanding the CISG*, p. 163.

[313] Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 4, p. 110, Para 20 referring to §§ 308 and 309 BGB.

[314] CARRASCO (2010), pp. 777-778.

Different answers are justified because incorporated standard terms are non-negotiated clauses. It is unlikely, then, that parties have consciously agreed upon better shaping the default remedial regime to pursue their contractual interests. As a consequence, there is no leading principle of freedom of contract—in turn, channeling the principle of parties' self-regulation—prevailing over the inconsistency of contract terms with the CISG's basic principles.

2.1.2 Seller's Breach

The existence of the seller's right to cure depends upon another obvious general precondition: a seller's breach of contract[315].

a) Any Failure to Perform

Under the CISG, wherever the seller—no matter how, when, or why—fails to perform as due at least one of its contractual obligations—be it concretely agreed or derived from usages, practices or the Convention's default rules—it breaches the contract[316]. This is clearly set forth in Article 45(1), which enumerates the buyer's set of remedies for breach of contract:

> (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: […]

Such all-embracing notion of breach perfectly meets the objective of the Convention's drafters to articulate a Unitarian approach to breach of contract[317]. Systematically, it is remarkable that a seller's

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[315] SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 561, Para 6; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 721, Para 2.

[316] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 424, Para 13. As to the notions of "failure to perform" or "breach" *see* Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 722, Para 5 stating: "[w]hat constitutes 'failure to perform' or the synonymous term 'breach of contract' […]". It has been submitted that this unitary concept better corresponds with the English notion of breach of contract. *See also* P. HUBER (2006), *Comparative Sales Law*, p. 959.

[317] *See above* Ch. I, 1.1.1. Witz/ SALGER/ Lorenz (2016), Art. 48, p. 404, Para 1; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 1; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 4; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 2; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 79, p. 1131, Para 6.

breach also exists even when they would be exempted from liability pursuant to Article 79, which paragraph one establishes[318]:

> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

The seller's right to cure under Article 48(1), by expressly stating its applicability to "any failure to perform", perfectly aligns with this absolute approach to breach of contract. On the one hand, the seller's right to cure is not confined to any particular type of breach, but covers both: delay in performance (*Spätleistung*)—as long as the contractually-fixed timeframe was not of the essence, as that would be tantamount to definitive non-performance (*Nichtleistung*) and thus to a fundamental breach of contract[319]; and wrongly-executed tender of performance (*Schlechtleistung*)—i.e. non-conforming performance—still curable by the seller or a third party on his behalf[320].

On the other hand, the seller's right to cure after performance date is triggered concerning "any [failure to perform] his obligations" [321]. As indicated, as a matter of principle, the parties are free to determine the content of their contractual relationship. However, henceforth, it is relevant to keep in mind that the seller's obligations

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[318] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 79, pp. 1131, Para 6: "[t]he comprehensive concept of non-performance in the CISG therefore corresponds to the uniform principle of exemption under Article 79".

[319] Among others, *see* the decisions *Oberlandesgericht Düsseldorf* 24 April 1997, CISG-online 385 and *Oberlandesgericht Hamburg* 28 February 1997, CISG-online 261: "[a]lthough delay in time is not generally considered as a fundamental breach of contract, it can constitute a fundamental breach if delivery within a specific time is of special interest to the buyer […]". In the literature, clearly, SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 211, Para 450: "[b]ei einem Fixgeschäft käme dann auch die nachträgliche Behebung […] zu spät".

[320] Staudinger/ MAGNUS (2013), Art. 48, Para 9 who stresses in the idea in the following words: "[a]rt 48 gilt ferner unabhängig davon, ob die Pflicht schlecht oder überhaupt nicht erfüllt wurde"; SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449; and Ensthaler/ Bandasch/ ACHILLES (2015), Art. 48, p. 1838, Para 2.

[321] Schlechtriem/ Schwenzer/ WIDEMR LÜCHNGER (2016), Art. 30, p. 514, Para 1; and *see below* 2.1.3.

may not only be specified by the parties—expressly or implicitly—. Subsidiarily to the contract, this content can also derive from established party practices, applicable trade usages, and the Convention itself.

> *Article 30*
>
> The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

All in all, the seller's right to cure under Article 48(1) potentially—so long as its specific preconditions are met—exists in all events where the seller misses non-essential timeframes for performance or tenders remediable non-conforming performance. Both cathegories of breach as regards: additional obligations (such as services, duties to provide information, montage, advertising campaigns, etc.); defects in title; handing over of conforming documents or delivery of conforming goods. Furthermore, Article 48 is also applicable to partial deliveries of goods or delivery of partially conforming goods, as provided by Article 51(1)[322]:

> (1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

In detail, failure to perform by the seller must include three other features. As mentioned and explained further on, the seller cannot impose subsequent cure on the buyer under Article 48(1) if its breach already constitutes a fundamental breach within the meaning of Article 25.

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[322] SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449: "[k]ann der Verkäufer […] liefern, Beschaffenheitsmängel ausbessern, Rechte Dritter beseitigen […] Ersatzteile oder –ware stellen"; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 4; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 437, Para 2; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 561, Para 6; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 437, Para 2; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 139, Para 179; Staudinger/ MAGNUS (2013), Art. 48, Para 8; Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 709, who starkly phrases: "whatever contractual obligation"; and Soergel/ LÜDERITZ / SCHÜSSLER-LANGEHEINE (2000), Art. 48, p. 96, Para 2.

The second characteristic regards attainable curability of the failure to perform. A breach of contract committed by the seller must certainly meet this feature in order to be covered by Article 48(1). The provision, by expressly reading "if he can do so", indicates that it only deals with those failures to perform which are in fact possible to cure—i.e. remediable[323].

Hence, established breaches that transpire to be physically or legally incurable—thus amounting to definitive non-performances (*Nichtleistungen*)—remain excluded. An example of the former would be a unique and original piece of art that turns to be fake, and can be neither repaired nor replaced; an example of the latter, wherever delivered goods are burdened by third party industrial or intellectual property rights that can be neither cleaned nor replaced with free goods[324].

A non-remediable failure to perform could also be the case in which the seller was under an additional obligation to refrain from conducting certain acts[325]; for instance, an obligation of non-competition[326] or a contractually-based confidentiality duty. If the seller breaches such a kind of obligation, it can never be subsequently cured. The yardstick in all these events, thus, is that cure is neither possible by the seller, nor by the buyer, nor third parties on their behalf[327].

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[323] SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 211, Para 450; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 5; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 7; Bamberger/Roth/SAENGER (2016), Art. 48, Para 3; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 438, Para 6; *see for all* SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 562, Para 8. However, it must be stressed that even if a breach is not subsequently curable neither by the seller, nor by the buyer, nor by third engaged parties, it does not necessarily entail the fundamentality of the breach, under Article 25, as it may be of minor importance.

[324] METZGER (2014), p. 201.

[325] *See* the decision of the *Cour d'appel de Grenoble* 22 February 1995, CISG-online 151, where the failure to perform an obligation, although imposed on the buyer, to refrain from introducing goods into certain countries, constituted a fundamental breach within the meaning of article 25 CISG.

[326] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 425, Para 15; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 561, Para 6.

[327] *See* U. HUBER (2000), *3. Aufl.*, Art. 48, pp. 520-521, Para 8.

b) Cure Before and After the Date for *Delivery*: Seller's Rights to Cure under Articles 34, 37, and 48

As a third feature of the required breach, the seller's right to cure under Article 48 exclusively applies to those scenarios where the subsequent performance is carried out by the seller *after* the date for delivery has expired[328].

If, however, the seller has prematurely handed over non-conforming documents or delivered non-conforming goods—provided that it can remedy the defects before the latest contractual date by which performance is due—Articles 34 and 37 provide the seller with two others rights to cure[329]:

> *Article 34*
>
> If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.
>
> *Article 37*
>
> If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.

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[328] Schlechtriem/ Schwenzer/ WIDEMR LÜCHNGER (2016), Art. 33, p. 573, Para 6. This rule equals to §2-508(2) UCC.

[329] In other words, seller's rights to cure under Articles 34 and 37 require not only an early non-conforming tender, but also cure made only within the contractually fixed timeframe. Article 48, thus, applies to all other cases. BRIDGE (2013), *Int' l Sale of Goods*, p. 584, Para 12.23; Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, pp. 587, 588 Paras 10, 14; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 630 Para 4; Staudinger/ U. MAGNUS (2013), Art. 48, Para 12; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 112; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 1; DAVIES/ SNYDER (2014), p. 363; and *MünchKomm*/ P. HUBER (2016), Art. 48, Para 3, stressing that the difference between provisions 34, 37 and 48; it is not based on the moment in which performance had to be done, but rather when the cure by the seller is carried out. By contrast, these rules mirror §2-508(1) UCC.

> However, the buyer retains any right to claim damages as provided for in this Convention.

It is affirmed that, under the CISG, a failure to perform exists under all these provisions dealing with the seller's rights to cure. In words of Prof. Müller-Chen: "early delivery is a breach of contract just as much as late delivery"[330]. This all-embracing notion of breach would be structurally and systematically in tune with the Unitarian approach to breach-of-contract to which the CISG firmly sticks.

However, technically, this is disputable, as no remedies for breach under Article 45 *et seq.* are available to the buyer until the time for performance has not elapsed. All in all, the key issue concerning the seller's right to cure is that, in all these instances, a fundamental breach of contract can only exist in the form of an anticipatory breach within the meaning of Article 72(1)[331].

> *Article 72*
>
> (1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

As indicated, the relevant feature of all scenarios governed by Articles 34 and 47 is that a seller's deviation from the contract may be remedied right up to the latest permissible date—for delivery or for handing-over—within the contract's timeframe[332]—i.e. without expiration. Hence, in these circumstances, it seems sensible to give the breaching seller a general (also named *unrestricted*) opportunity to subsequently remedy its early non-conforming tender[333].

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[330] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 52, pp. 815, 816 Paras 1, 4 points out that: "[t]he reason is that the buyer is not prepared for the premature delivery and should not be burdened with the costs and difficulties involved (e.g. storing the goods)". Furthermore, Articles 34 *in fine* and 37 *in fine* set forth that claims for non-curable damages caused by premature delivery or handing over are directly governed by Articles 74-77. *Cf.* TOMÁS MARTÍNEZ (2012), p. 593.

[331] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 630, Para 3.

[332] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 5; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 630 Para 5.

[333] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 5; Staudinger/ U. MAGNUS (2013), Art. 48, Para 1, 12, BRIDGE, *Sale of Goods* (1997), p. 97; MAK (2009), pp. 152, 163 mentions the generally available right to cure before the due performance

Besides the unavoidable constraint on the seller's cure resultant from the time within which cure must be effected, the seller's rights to subsequently perform before the date for delivery under Articles 34 and 37 find other limits. The seller's attempt to cure cannot cause the buyer "unreasonable inconvenience or expense". Clearly, under the provisions at issue[334], cure of premature non-conforming tenders can only be imposed:

> *Article 34*
>
> […] if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.
>
> *Article 37*
>
> […] provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.

When the seller's intended cure falls outside these boundaries, its rights to cure premature non-conforming tenders of performance cease to exist. The buyer, once the delivery date becomes due, is entitled to resort to its remedies for breach—provided that their preconditions are met—in accordance with Article 45(1)(a)(b)[335].

> In practice, it is submitted that these preconditions are not often relevant for the application of seller's right to cure under Article 34. It seems difficult to determine how subsequent tender of conforming documents might cause unreasonable inconvenience or expense to the buyer[336]. However, this conclusion may strongly differ with regards to Article 37. Of particular relevance are: the purpose for which the goods were bought, the number of attempts to cure that the breaching seller has already conducted, and the financial capacity of the buyer[337].

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date laid down by Article 8:104 PECL; and ZIEGEL (1984), *Remedial Provisions*, p. 21 does the same for § 2-508(1) UCC.

[334] The seller's right to cure under Article 34 was modelled on Article 37 and introduced into the Convention following a proposal by Canada; Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 587 Para 10; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 633, Para 12. *See below* for further discussion, Ch. II 2.2.b).

[335] SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 124; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 634, Para 15.

[336] Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 588 Para 15.

[337] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 633, Paras 13, 14.

Additionally, two further clarifications are required regarding the buyer's remedies under Article 45(1)(a)(b). First, as seen above, if the early tender of non-conforming performance already amounted to a fundamental breach—which would only exist in the form of an anticipatory breach of contract—the buyer may proceed to avoid the contract according to Article 72(1)[338]:

> In the case law see the decision of *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, 25 April 1995, CISG-online 206. In mid-November 1993, a Swiss seller and a Russian buyer entered into a contract for the purchase of chocolate confectionery products. The parties stipulated a timeframe for delivery of one week after receipt of the banker's guarantee. Shortly after, but before the fixed time for delivery, the seller delivered the first of the two installments. The buyer took delivery of the goods but did not pay for them, on the basis that it was discharged from its obligation to pay, as the seller had fundamentally breached the contract by dispatching the goods before the buyer had transmitted the banker's guarantee. The seller sued the buyer for the payment.
>
> In settling this dispute, the tribunal decides that the buyer is not entitled to avoid the contract, but only to recover for non-remediable damages under Article 37, because: "[v]iolation by the seller of the terms specified for dispatch of the goods (delivery in the absence of a banker's guarantee) could not be deemed a fundamental breach of contract […]".

Second, in scenarios where premature performance has occurred, the buyer retains one key remedy: a right to reject. It is remarkable that this seems closer to a strict performance system—such as the Perfect Tender Rule under §2-601 UCC—than to a system structured around the notion of fundamental breach. Accordingly, the seller's right to cure under Article 37 is squared off with the buyer's right to reject—that is, refuse to take delivery of—a premature delivery of goods[339].

Article 52(1)

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[338] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 634, Para 15.

[339] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 52, p. 815, Paras 1-2; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 630 Para 4. As to the buyer's rejection of non-conforming documents, *see* Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 588, Para 13; and ZIEGEL (1984), *Remedial Provisions*, p. 7, stating that Article 52(1) also applies to the early tender of non-conforming documents.

> (1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

All this allows the identification of two striking differences between Articles 34 & 37, and 48(1), in addition to the already indicated divergence around cure *before* or *after* the performance date.

Firstly, whereas Article 48(1) applies to any failure to perform by the seller of its obligations under the contract, Articles 34 and 37 are confined to *non-conformities* in handed over documents or delivered goods[340].

> It is also submitted in the relevant literature that, under the CISG, the seller should be provided with a right to cure premature tenders of performance, in the case where items are defective due to third party rights or claims—i.e. defects in title or third party industrial or intellectual property rights (Articles 41 and 42)[341].

Secondly, whereas the existence of the seller's right to cure under Article 48(1)'s is stringently curtailed—i.e. *restricted*—by Article 49 wherever the buyer can avoid the contract on the basis that a fundamental breach has been established (though cure may still happen under Article 48(2-4)[342]); it is irrelevant, with respect to the seller's rights to cure under Articles 34 and 37, whether the lack of conformity represents a fundamental breach of contract[343]. As stated, avoidance of contract can only rightfully occur on the merits of an anticipatory breach under Article 72(1). By contrast, then, they are considered conclusively *unrestricted*.

Having considered these substantial differences between the default rules on seller's rights to cure, it may seem important—provided

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[340] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 631 Para 6. The systematic position of Articles 34 and 37 is also remarkable. The provision is embedded among the CISG's default provisions ruling delivery of goods, handing over of documents, and the notion of conformity. Article 48 is otherwise found among the provisions on buyer's remedies for breach.

[341] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 631 Para 6: "[t]he general principles underlying the CISG […] require that Article 37 be applied accordingly to Articles 41 and 42"; and Ferrari *et al*/ FERRARI (2011), *Int VertragsR*, Art. 37, Para 7.

[342] LAUROBA (2015), p. 1440 distinguishes a "general" and a "qualified" right to cure.

[343] Schlechtreim/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 631 Para 6.

that no specific clause on the seller's right to cure is directly given by the contract itself—to determine when a tender of non-conforming documents or goods has taken place before the due date. Only then could it be clarified whether the seller is able to assert its right to cure according to the unrestricted Articles 34 & 37, or under the restricted Article 48[344].

- **Determination of the Time for Delivery in Regard to the Seller's Rights to Cure**

To draw the line between provisions governing the seller's rights to cure in accordance with the wording "[remedy] even after the date for delivery" found in Article 48(1), and those governing cure before this point, one has to consider the fixed timeframe for delivery—be it due on a certain date or within a period of time. To do so, one must primarily turn to the contract, then move on to established practices or applicable usages, and finally to the CISG's default rules[345], as enumerated in Article 33:

> The seller must deliver the goods:
>
> (a) if a date is fixed by or determinable from the contract, on that date;
>
> (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
>
> (c) in any other case, within a reasonable time after the conclusion of the contract.

However, with respect to the words "date for delivery"—enshrined in Article 48(1)—the following question must be answered: Is it the fixed time for delivery of goods the only relevant moment upon which the seller's right to cure under Article 48 depends?

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[344] Schlechtreim/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 630 Paras 4-5 stating: "[i]f, instead of Article 37, Article 48 is applied to the delivery of non-conforming goods during a delivery period, the seller then runs the risk of not being granted a right to cure a fundamental breach of contract". The opposite scenario is rather impossible, as the buyer would be entitled to avoid the contract on the basis of an anticipatory breach under Article 72(1).

[345] On determination of the delivery date, *see* Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 33, pp. 571-581 Paras 1, 6-20.

There is general consensus on the fact that the notion of "date for delivery" under Article 48(1) should be interpreted as "date for performance". As explained, the seller's right to cure governed by this provision not only covers the seller's obligation to deliver conforming goods but also the supply of other things, such as services. Therefore, the concept of delivery must be consistently aligned with Article 48's scope of application: the normative relevant point of time, upon which the seller's right to cure after performance date hinges, is moved from the "date for delivery" to the date on which a certain obligation is to be performed[346].

If the solution was different, it could result in incoherent outcomes. Imagine, for example, that a seller is obliged to provide the buyer with some documents by a certain date before that for delivery of the goods. If the seller fails to hand over the conforming documents at this particular fixed moment, its right to cure would be governed by Article 34—instead of Article 48(1)—until the fixed time for the delivery of goods expires.

All in all, it is submitted that the discussion regarding the division of cases between Articles 34, 37, and 48 is rather theoretical. In practice, provided that the normative subjection of Article 48(1) to Article 49 is correctly understood—namely, a fundamental breach within the meaning of Article 25 can never be assumed as long as the breach is curable within a reasonable period of time[347]—the seller ends up equally entitled to remedy tenders of non-conforming items either under the *unrestricted* Articles 34 and 37 or the *restricted* 48(1)[348].

2.1.3 Seller's Obligations

[346] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 4; *see also* Kröll *et al*/ P. HUBER (2011), Art. 48, Para 6. For instance, Article 34 reads: "[…] [the seller] must hand them [documents relating to the goods] over *at the time* and place and in the form required by the contract" (emphasis added).

[347] *See* below Ch. IV, 4.1; Schlechtreim/ Schwenzer/ SCHROETER (2016), Art. 25, p. 447 Para 48; and decisions, among others: *Oberlandesgericht Koblenz*, 31 January 1997, CISG-online 256; *Handelsgericht Aargau*, 5 November 2002, CISG-online 715; and *National Commercial Court of Appeals*, Division A, Buenos Aires, 31 May 2007, CISG-online 1517.

[348] Schlechtreim/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 631 Para 5.

The nature of seller's obligations is the second key component of the heading "any failure to perform his obligations". This is the notion to which the Convention turns in order to construct a scope of application of the seller's right to cure after performance.

> Article 48
>
> (1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so […].

For the sake of a complete exegetical analysis of Article 48, the seller's obligations are briefly and preliminarily depicted in the following sections. Though a deep analysis of these obligations falls beyond the scope of the present dissertation, a basic outline not only offers a complete insight into the application of the seller's right to cure under Article 48. Likewise, it sheds light on the general framework within which the performance of the seller's right to cure can afterwards be judged[349].

The first question to be considered is what the seller can be held to. In other words, the scope—and substance—of the seller's obligations must be determined. On this count, the seller is primarily bound by all obligations either expressly stated or implied construed under the contract[350]. Even so, it must be stressed that additional obligations can also stem from existing parties' practices and trade usages (given Article 9) or—failing other specifications—can be derived from the Convention itself[351]. The CISG lists and gives content to the main obligations of the seller as follows:

> *Article 30*
>
> The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

From a Civil law viewpoint, it is interesting to notice that, under the CISG, a party might be obliged to abide by certain mere duties. Compliance with these duties is in the interest of the respective

[349] *See* below Ch. III, 3.2., in particular, 3.2.3.
[350] Staudinger/ U. MAGNUS (2013), Art. 30, Para 1.
[351] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 425-426, Para 15.

party—e.g. examination for any lack of conformity under Articles 38 & 39 on the part of the buyer—for whom breach would impede the exercise of rights that otherwise could be derived from them. However, breach of mere non-actionable duties would not impede its entitlement to exercise its remedies in accordance with Article 45(1)(a)(b).

Another salient example is Article 77 CISG: if the aggrieved party does not take reasonable measures to mitigate losses arising out of an established breach, this party will suffer a reduction in the damages award that it otherwise would have had the right to claim for. Since this is not a contractual obligation but a non-actionable duty, the breaching party cannot effectively enforce such mitigation of damages by exercising its contractual remedies for breach[352].

a) Obligation to Deliver the Goods

It is submitted that delivery of contracted items is the archetypal obligation under a contract of sale of goods[353]. Legal systems attach important normative consequences to both the notion of delivery and to the full performance of this obligation by the seller. For instance, under the CISG, the notion of delivery is used in a rather descriptive[354] fashion, but also entails several legal consequences.

> In general terms, the consequences dependent upon performance of delivery obligation can be categorized as *internal* and *external*[355].
>
> Regarding the former category, a fixed time for delivery establishes the moment in which risk is deemed to pass to the buyer—see for example Articles 33(a) and 67(1) CISG. Furthermore, time for delivery can also be the moment in which conformity of the goods must be assessed or in which the market price is to be considered to calculate damages. By contrast, external effects stemming from performance by the seller of the obligation to deliver the contracted goods include—to name a few—

[352] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, pp. 1061-1062, Para 13, distinguishes between "non-actionable duties" and "genuine—and thus actionable—contractual obligations"; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, pp. 721-722, Paras 3, 4.
[353] SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 150, Para 120.
[354] SCHLECHTRIEM (1984), *Seller's Obligations*, p. 4.
[355] SCHWENZER/ HACHEM/ KEE (2012), p. 337, Para 29.11.

> determination of the competent jurisdiction and of the law applicable to the contract[356].

A clear-cut example of the central role attributed to the obligation to deliver can be found regarding the seller's right to cure. As was analyzed above[357], the wording of Article 48(1) uses the notion of "date for delivery"—instead of "date of performance"—to determine whether the seller is entitled to remedy a non-conformity pursuant to Articles 34 & 37, or rather a failure to perform pursuant to Article 48.

As a result, it should not be surprising that legal systems—the CISG is no exception in this regard—besides upholding the prevailing determination of the content of obligation—by parties' agreement (Article 6), existing parties' practices, or by trade usages[358]—also accurately articulate default rules to provide a framework to assist the performance of such a crucial obligation.

Under the Convention, Articles 31, 32, and 33 are—respectively—designed to fill the gaps in the contract concerning the place of delivery, the manner in which the seller has to deliver, and the time of delivery[359].

> In case law, see the decision of the *Tribunal Cantonal du Valais*, 28 January 2009, CISG-online 2025. A German seller and a Swiss buyer entered into a contract for the supply of composite material for the manufacture of windsurf boards. On 8 May 2001, the seller made a first delivery of fiberglass and sent an invoice indicating the 'Incoterms DDU Z'. Later, upon the seller's request, the buyer communicated that it had not paid the total price because it had deducted a part of it as compensation for certain custom duties that it had incurred, which it was

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[356] SCHWENZER/ HACHEM/ KEE (2012), pp. 337, 338 Paras 29.17, 29.20.

[357] *See above* Ch. II, 2.1.2.b).

[358] In this regard the International Commercial Terms drafted by the International Chamber of Commerce in Paris (ICC Incoterms) are of the utmost relevance. The current version, ICC Incoterms 2010, came into force on 1 January 2011. *See* Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 30, pp. 515-517, Paras 5-7 who states that: "[…] ICC Incoterms will often amount to a usage of which the parties knew or ought to have known and which in international trade is widely known … and regularly observed".

[359] *See* ENDERLEIN (1986), *Rights and Obligations of the Seller*, pp. 144-153; Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 30, p. 514, Para 4; and SCHLECHTRIEM (1984), *Seller's Obligations*, pp. 3-8.

not obliged to pay. The seller lodged a claim for payment of the total price plus damages and due interest.

Hence, one of the main questions for the court was to decide who should have paid the customs duties by taking into consideration the reference to "Incoterm DDU *Z*", as included in the invoice of 8 May 2001. The *Tribunal Cantonal du Valais* concluded that: "[the] [s]eller's obligation was to deliver the goods not cleared of customs duties. Therefore, [Buyer] was not entitled to deduct the amount of […]".

In the ruling, the court states: "The obligations of the seller are set forth in Art. 30 CISG and the following articles. These articles are dispositive provisions, they apply only if the parties did not specify the details of the delivery, expressly or implicitly, in accordance with the practices which the parties have established between themselves (Art. 8 CISG), or with reference to commercial terms such as Incoterms […] In lack of an express agreement between the parties, [Incoterms] may also be applicable under Art. 9(2) CISG, as their role as usages is widely recognized and regularly observed in international trade, provided, however, that the applicable Incoterm clause is relevant to the contract".

b) Conformity Principle and Duties to Examine and Notify

Although it is not expressly listed as one of the seller's obligations under Article 30 CISG, this separate epigraph covering the *Conformity Principle* is justified by the central role that the notion of conformity plays across the CISG regime, and also due to its far-reaching consequences for and impact on the seller's right to cure after the delivery date[360, 361]. Regarding the latter, some authors

[360] The seller is obliged to deliver goods that conform with the contract. First and foremost, it is up to the parties to expressly or implicitly (e.g. by reference to industry standards) determine the notion of conformity. Practices established between the parties and applicable trade usages—under Article 9—are also to be considered. This is known as the concept of a *subjective defect*—expressly upheld by Article 35(1):

> (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

In contrast, Article 35(2)(a-d) lay down a set of default rules that articulate an *objective criteria* aimed to assist in determining the conformity of the goods:

> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> (a) are fit for the purposes for which goods of the same description would ordinarily be used;

have affirmed[362] that, in practice, the obligation to deliver goods conforming to the contract is the scenario where this seller's right to cure is most appropriate.

Although this assumption is indisputable for the seller's right to cure under Article 37, it is rather questionable with respect to the seller's right to cure after the performance date. Under Article 48, this right to cure is triggered by the broader notion of "any failure to perform". Hence, many other common breaches in practice are included. For instance, non-essential delays in performance, and incorrect performances of other obligations—which are not subject

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(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

However, this topic is beyond the subject matter of the present dissertation. Some basic comments are presented in this epigraph wherever relevant for the seller's right to cure under Article 48, but *see* the following further contributions on the Conformity Principle:
In case law, among others: *Bundesgerichtshof* 3 April 1996, CISG-online 135; *ICC Ct. Arb*. no. 9083, August 1999, CISG-online 706; *Bundesgerichtshof* (Germany) 2 March 2005, CISG-online 999; *Audiencia Provincial de Barcelona*, 28 April 2004, CISG-online 931; *Oberlandesgericht* Stuttgart (Germany) 12 March 2001 CISG-online 841.
In the literature: SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, pp. 172-189, Paras 360-400; MAGNUS/ Honsell (2010), Art. 35, pp. 385-395, Paras 1-33; Schlechtriem/ Schwenzer/ SCHWENZER (2013), *6. Aufl.*, Art. 35, pp. 578-602, Paras 4-55; SCHLECHTRIEM (1984), *Seller's Obligations*, p. 20; SCHWENZER/ HACHEM/ KEE (2012), pp. 362, 379, 383, 385, 562 Paras 31.01, 31.42, 31.76, 31.96, 31.106, 43.08; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, pp. 113-114, Para 133; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, pp. 593-622, Paras 4-58.

[361] It is also remarkable that, over the last few years, the Conformity Principle has gained great relevance as an inspiration for national and supranational projects on legislations for the modernization of sales law of goods. For the former, *see* Article 621-20 of the recently approved Book sixth of the Catalan Civil Code (BOPC n. 332, 15 February 2016). For the latter, among others pieces of legislation, *see* Article 2 Directive 1999/44/EC of the European Parliament and of the Council of May 25th 1999 on certain aspects of the sale of consumer goods and associated guarantees—amended by Directive 2011/83/EU on consumer rights.

[362] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 764, Para 1.

to the Conformity Principle of Article 35— such as handing over of documents relating to the goods, defects in title or goods burdened by industrial or intellectual property rights under Articles 41 and 42, or *sui generis* obligations contractually created.

To focus on issues concerning the lack of conformity in the goods to be cured by the seller in accordance with Article 48—in some instances overlapping with Article 37—attention must first of all be shifted from Article 35 to Articles 38 & 39. These establish, respectively, default rules on buyer's duties to examine, and to notify the seller of any lack of conformity in, the delivered goods[363]:

> *Article 38*
>
> (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
>
> (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
>
> (3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.
>
> *Article 39*
>
> (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
>
> (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

The vital importance of these provisions, regarding the seller's rights to cure, stems from the fact that a buyer's prompt notification is crucial to place the seller in a position in which—if possible—it

[363] Conspicuously, Article 43(1) does the same in regard to defects in title:
> (1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

may attempt to cure the non-conformity in the goods[364]. Generally speaking, the seller is worse positioned to become aware of the lack of conformity after delivery of the goods or to know the particular nature of the defects. Only after the notification of the buyer can the seller take the necessary steps to prepare its cure within a reasonable time—or up to the last possible date for delivery—by delivering missing goods, substituting them, providing repair, etc.[365]

Conclusively, the buyer's duty to examine the goods and to notify the seller of any lack of conformity are systematically in tune with the regime for curing set by the CISG's default rules. In particular, in cases of a lack of conformity in the goods, they constitute the starting point for the subsequent cure by the seller of such defects.

Notwithstanding this crucial role of the buyer's duties under Articles 38 and 39, none of them, surprisingly or not, is tantamount to an actionable contractual obligation, but instead a mere non-actionable duty. Therefore, it may be doubtful whether the seller's position—mainly concerning its subsequent opportunity to cure defects in the goods—is sufficiently secured, since the seller cannot rightfully enforce such duties on the buyer by resorting to its remedies for breach.

Article 39(1) strikes the necessary balance between parties' interests. If the aggrieved buyer does not notify the seller—specifying the nature of the defects—within a reasonable time after it discovered or should have discovered the non-conformity of the goods, it can no longer rely on the applicability of the breach committed by the seller[366]. Therefore, it is in the utmost interest of

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[364] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 38, p. 638, Para 4; and SCHWENZER/ HACHEM/ KEE (2012), p. 434, Para 34.52. In the case law, *Appellate Court Versailles* 29 January 1998, CISG-online 337.

[365] For instance, *ICC Ct. Arb*. no. 9083, August 1999, CISG-online 706 states: "[t]he notification must substantiate and describe the deficiency. If it is a lack in the quantity, the missing amount must be stated".

[366] However, Articles 40 and 44 come to temper these negative consequences to the buyer. According to the former, which is similar to Article 43(2)—but, in a stark difference, also includes a reference to positive and constructive knowledge of the seller—it is the case that:

> (2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

the buyer to promptly examine the goods and notify the seller, specifying the defects. The rule, thus, generates dynamics that result in guaranteeing the feasibility of the seller's rights to cure the lack of conformity in the goods[367].

> In summing up all these considerations, the decision of the *Oberlandesgericht* Koblenz 31 January 1997, CISG-online 256 is relevant. In November 1993, a German buyer—a company trading in beddings and blankets—acquired acrylic blankets from a Dutch seller. These were to be *Telan* model blankets, and produced in Spain. After delivery, the buyer noticed the lack of conformity of goods and further claimed that five reels of blankets were missing. The seller acknowledged that two reels were missing, but disputed the buyer's exercise of its remedies for breach, in particular, avoidance of the contract. Finally, the seller sued for payment of the purchase price. In its claim, the seller stated that there was no fundamental breach to support such avoidance, given the fact that the buyer had unrightfully rejected its intended offer to cure pursuant to Article 48 CISG.
>
> The *Oberlandesgericht* Koblenz decided that the buyer had lost its remedies. Interestingly, among other considerations, the German court affirmed that the buyer could not rely on the lack of conformity in the goods because it missed giving timely and concrete notice to the seller per the requirements of Article 39(1) CISG: "[Buyer's] complaint notice of 8 December 1993 merely mentioned that five rolls were missing. Such notice does not suffice to enable [Seller] to *provide for remedy of its failure to perform*" (emphasis added).

With regards to this epigraph, it will be useful to briefly depict several basic notions about the principle of conformity under Article 35—and its consequences—in order to better frame the application of the seller's right to cure after the date of performance in cases where the goods do not conform to the contract. The cornerstone of the discussion is that the concept of lack of conformity in the goods adopted by the CISG considers deficiencies in quality, quantity, nature, and packaging to be equally included[368].

The latter is aimed to preserve certain—rather limited—remedies for the buyer in the following terms:

> Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

[367] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 38, p. 638, Para 5.

[368] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, p. 593, Para 4. In so doing the CISG deviates from many domestic laws belonging to both Civil law

As a first consequence, under the CISG, the nature of defects in the goods is no longer relevant in determining the consequences of the seller's failure to perform. In other words, the CISG abolishes the Civil law distinction between *aliud* and *peius*.

Under the CISG regime, if the seller delivers goods that present a serious non-conformity, or even if the seller delivers different goods that those contracted for—e.g. the seller delivers oil instead of wine—the case is treated as non-conformity under Article 35, not as a non-performance of the obligation to deliver (i.e. non-delivery)[369].

This consideration is of the utmost importance with respect to the general remedial system, and, in particular, the seller's right to cure under Article 48. On the one hand, had the breach been treated as a non-delivery, the buyer would have been entitled to seek avoidance on account of the *Nachfrist*-mechanism—under Article 47(1) in conjunction with 49(1)(b)[370]:

Article 49

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and Common law traditions. As an example of the former, in Spain, in case of *peius* in a contract of sale of goods, the buyer is entitled to return the goods against the price (*action redhibitoria*) or reduce the purchase price (*actio quanti minoris*), *see e.g*. art. 1486(1) Spanish Civil Code. Furthermore, the buyer is only entitled to claim for damages if the seller had given express guarantee or acted in bad faith, *see e.g.* Art. 1486(2) and 1488(2) Spanish Civil Code. For commercial sales of goods, *see* Arts. 329, 342 Spanish Commercial Code. However—strongly backed up by decisions of the Supreme Court, e.g. STS, 1st, 781/2005, 21 October 2005—if the case is deemed to constitute an *aliud*, the remedies for non-conforming goods are neither restricted nor heavily curtailed by limitation periods, but those corresponding to the general remedial system for breach of contract are applicable; *see e.g*. arts. 1096, 1101 and 1124 Spanish Civil Code. *See* GÓMEZ POMAR (2007), pp. 13-14; and MARTÍNEZ MARTÍNEZ (2006), pp. 1101-1122.

[369] SCHWENZER/ HACHEM/ KEE (2012), pp. 336, 369, Paras 29.10, 31.08, 31.09; P. HUBER /MULLIS (2007), p. 235; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 143, Para 189; SCHLECHTRIEM (1984), *Seller's Obligations*, pp. 6, 7; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, pp. 592, 597-598, Paras 2, 11: "[u]nder the CISG, non-conformity of the goods has no effect on delivery, but gives rise to the buyer's remedies under Article 45 *et seq.*".

[370] Early stated by SCHLECHTRIEM (1981), *Einheitliches UN-Kaufrecht*, p. 69; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, pp. 722-723, Para 7. In the case law: German *Bundesgerichtshof* 3 April 1996, CISG-online 135.

(1) The buyer may declare the contract avoided:

[…]

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

In case law, see *Oberlandesgericht* Stuttgart (Germany) 12 March 2001 CISG-online 841. In January 1997, a German buyer purchased 100,000kg of Polish apple juice concentrate from an Austrian seller. On 28th January 1997, the goods turned out to be non-conforming as it was discovered that glucose syrup had been added to the apple juice concentrate. The buyer fixed a *Nachfrist* for the seller to make a conforming delivery and afterwards, on 26th March 1997, declared the contract avoided pursuant to Article 49(1)(b) because the additional time had expired without effectuation of a delivery from the seller.

The *Oberlandesgericht* concluded that the buyer was not entitled to declare the contract avoided because "[d]elivery of an *aliud* does not in any case constitute a non-delivery in the meaning of Art. 49(1)(b) […]" and "[t]herefore, avoidance of contract can only be based on Art. 49(1)(a)", which takes into account the fundamentality of the non-conformity.

On the other hand, since it is not, the seller could cure the non-conformity by substituting or remedying—if possible—the delivered goods. This stands in contrast to the situation had the case amounted to a non-delivery, where the buyer could have resorted to the unrestricted right to ask for performance under Article 46(1), instead of the curtailed rights to require replacement or repair of the non-conforming goods laid down in paragraphs (2)(3):

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

As a second consequence, under the CISG, any delivery that falls short in quantity compared to the number of goods required by the contract constitutes an instance of non-conformity under Article 35—and thus a breach of contract[371]—but not a partial delivery[372]. Buyer's remedies for breach under Art. 45 *et seq.* are accordingly triggered, then, including the seller's right to cure after delivery date. Thus, the seller is entitled to cure its breach of contract by delivering the missing parts, as expressly stated for attempts to cure before the delivery date, under Article 37:

> […] deliver any missing part or make up any deficiency in the quantity of the goods delivered […]

Nevertheless, a further clarification is needed. If a non-conformity has been established regarding either a shortage in quantity or defects in some of the goods, but the contracted items can be delivered in parts—i.e. the sale involves a number of physically and economically discrete goods[373]—the buyer's remedies—as well as the seller's right to cure under Article 48—are confined to the missing or non-conforming part, according to Article 51(1)[374]:

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[371] Provided that there are no particular agreements (e.g. *circa* clause), relevant practices or applicable trade usages that allow a certain margin of deviation in performance. *See* Staudinger/ U. MAGNUS (2013), Art. 35, Para 11; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, p. 595, Para 8; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 51, p. 812, Para 5; and, for example, the decision of *ICC Ct. Arb*. no. 9083, August 1999, CISG-online 706.

[372] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, pp. 595-596, Para 8; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 51, p. 813, Para 6: "[a] deviation in quantity is non-conformity according to Article 35 […] the partial delivery is a non-conforming delivery according to Article 35"; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 146, Para 192a; SCHWENZER/ HACHEM/ KEE (2012), p. 375, Paras 31.64, 31-65. This solution also applies wherever the seller delivers a greater quantity of conforming goods, which triggers the specific right to reject under Article 52(2).

[373] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 51, p. 811, Para 2.

[374] The buyer can, in cases of partial delivery, fix an additional period of time for delivery of the missing part of goods—under Article 47—upon which expiration it will be able to declare the contract avoided with regard to this missing part, pursuant to Article 49(1)(b) in conjunction with Article 51(1), Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 51, p. 813, Para 6. The buyer can only avoid the contract in its entirely according to Article 51(2):

> If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, Articles 46 to 50 apply in respect of the part which is missing or which does not conform.

However, these cases must be discerned from those where parties concluded an instalment contract, which is then governed by Article 73. Whereas Article 51 concerns *partial* deliveries, which are to be made at the same time but the items are separable, Article 73 governs contracts that include at least two *successive* single deliveries severable from each other[375].

As a result, a double confinement of the seller's right to cure after performance date can be derived from the cumulative application of both provisions. First, Article 73(1) restricts the seller's cure—and, generally, all other buyer's remedies for breach—to one particular instalment. Second, Article 51(1) further restricts the cure—and other remedies—to the missing or non-conforming part of the goods that were the content of that instalment.

c) Obligation to Hand Over any Documents Relating to the Goods

In a contract for an international sale of goods, the handing over of conforming documents relating to the purchased items constitutes a crucial aspect to be taken into account[376]. It is disputed, however, whether the Convention directly imposes such a contractual obligation on the seller[377].

Any obligation must derive, first and foremost, from the clauses of the contract that the parties—on the merits of private autonomy

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(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

[375] SCHLECHTRIEM/ Cl. WITZ, *Convention de Vienne*, p. 123, Para 174; Schlechtriem/ Schwenzer/ FOUNTOULAKIS (2016), Art. 73, p. 1044, Para 8; and SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 146, Para 192.

[376] SCHLECHTRIEM (1984), *Seller's Obligations*, p. 16; and *Oberlandesgericht München*, 13 November 2002, CISG-online 786.

[377] Negative opinion: Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 30, p. 517, Para 8; Art. 34, p. 582, Para 1. However, *Cf.* Affirmative view: Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 4, p. 79, Para 14.

under Article 6—have agreed upon. Ordinarily, parties do not only specify which documents are relevant under their contract[378] but they also shape the nature of the obligation to hand over those documents relating to the purchased goods. In addition, practices established between the parties and applicable trade usages—under Article 9—may also become relevant[379].

Nevertheless, once this obligation is established under the contract, CISG's default legal rules no longer neglect the issue. Articles 30 & 34 assist the parties in defining the obligation to hand over documents, its performance, and its cure alike. For the sake of clarity, the following section will preliminarily sort the relevant documents (relating to goods internationally purchased) into two different categories[380]. Additionally, a third category is mentioned, covering documents for payment.

Documents that fall in the first category are those intended to pass title and those others that merely entitle the holder to control of the goods, including the right to claim physical possession. Examples of this type may be documents of title and transport documents[381], such as bills of lading or warehouse warrants—which both could be negotiable—and duplicates of the consignment note—which are non-negotiable.

> For example, see the decision of *ICC Ct. Arb.*, Case No. 7645 1 March 1995, CISG-online 844. A Czech buyer purchased crude metal from a Korean seller. The payment was to be made by a letter of credit which specified 30 September 1991 as the limit date for shipment. In spite of amendment of the expiration deadline, the seller shipped five days after the expiration date. Some weeks after the vessel left port, it collided with another vessel and the salvaged cargo had to be liquidated in a forced sale.
>
> Regardless of the loss of the goods, the arbitral court decided in favor of the buyer's right to avoid the contract and particularly stressed that this party was entitled to receive and the seller obliged to provide it: "[w]ith

[378] Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 583, Para 2; and SCHWENZER/ HACHEM/ KEE (2012), p. 352, Para 30.04.
[379] CISG-AC Opinion no 5, p. 6, Paras 4.11, referring to Incoterms of the ICC.
[380] SCHWENZER (2005), *J L&Com*, p. 440; SCHWENZER/ HACHEM/ KEE (2012), p. 352, Para 30.06.
[381] SCHWENZER/ HACHEM/ KEE (2012), p. 352, Para 30.07.

> a dated bill of lading, or more specifically, with a bill of lading evidencing the date of issue".

The former sub-category—referring to documents of title effecting the disposition of goods, also known as representing documents—is of the utmost importance for documentary sales. In particular, these documents constitute the central element for the string transactions held in futures markets—i.e. for commodity trading[382]. Hence, in documentary sales, intermediate parties do not bargain upon the sale for the physical delivery of goods but only upon the delivery of clean representing documents[383]. Accordingly, the seller performs its common obligations under the sales contract—to deliver the contracted goods and transfer the property to the buyer—by merely handing over the documents as due[384].

> Article 58(1) CISG expressly refers to this first category of documents, reading as follows: "[…] seller places the goods or documents controlling their disposition at the buyer's disposal […]"

Second, besides those documents of title and possession, one must consider other documents, aimed to permit the buyer to use the purchased goods as intended. Therefore, some documents may have an effect on the determination of the standard of conformity of the goods that the contract requires or that, in default, Article 35 establishes[385].

In contrast to the first category of document, this second sort of document does not intend to pass title of the goods and does not affect possession or control, but merely sets the features of the goods. For instance, an accompanying document may serve the purpose of confirming that purchased goods have a certain quality.

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[382] For a brief characterization of the Commodity Trade and its suitability under the CISG *see* ZELLER (2016), pp. 94-99.

[383] SCHLECHTRIEM (1984), *Seller's Obligations*, p. 16; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 453, Para 63; and CISG-AC Opinion no 5, p. 6, Paras 4.13 states that the aggrieved buyer can reject the tender of performance irrespectively of the actual conformity of the goods.

[384] SCHWENZER/ HACHEM/ KEE (2012), pp. 329, 352, Paras 28.21, 30.08; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 452, Para 61; *see* GILLETTE/ WALT (2016), pp. 225-226 for an explanation about the advantages of documentary sales. *Cf.* DAVIES/ SNYDER (2014), pp. 22-26.

[385] *Oberlandesgericht München*, 13 November 2002, CISG-online 786.

Therefore, wherever these documents are missing, it constitutes a discrepancy—i.e. non-conformity—within the definitions of Article 35. Prominent examples might be: transport insurance policies, invoices, export licenses, certificates of origin or of quality, etc.[386]

> In the case law, see the salient decision of the German *Bundesgerichtshof* 3 April 1996, CISG-online 135. In 1992, a German buyer concluded four contracts of sale with a Dutch seller for the total supply of 15,000kg of British cobalt sulphate 21%. The parties agreed that the seller had to hand over certificates of origin and of quality. After receipt of documents, the buyer declared the contracted avoided because the sulphate turned to be made in South Africa, so the submitted certificates from the *Antwerp Chamber of Commerce* were wrong and the quality of goods was inferior to what was agreed upon. The Dutch seller disputed such avoidance and sued the buyer, claiming payment of the purchase price.
>
> The German Supreme Court finds for the Dutch seller on the account that no fundamental breach is at stake. In particular, as to the documents the court holds: "[i]f the [buyer] itself was able to obtain a correct Certificate of Origin, as the [seller] submitted without the [buyer's] objection, then the [buyer's] substantial contractual interest was preserved as far as such a certificate was needed for the resale of the goods"; furthermore, "[t]he [buyer] did not plead that it could not utilize the cobalt sulfate with a correct Certificate of Origin—South Africa".

The third category is related to certain documents commonly used as commercial devices for payment in international transactions—so attention must be brought to trade usages under Article 9[387]. These documents are mainly known as documentary credits or letters of credit[388]. On this issue, the Commission on Banking Technique and Practice of the International Chamber of Commerce (ICC) published the *Uniform Custom and Practice for Documentary Credits*[389]. This constitutes a set of rules on documentary credits, which are frequently used for transactions involving letters of credit worldwide[390].

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[386] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, pp. 596-596, Paras 9-10; Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 583, Para 3; and SCHWENZER/ HACHEM/ KEE (2012), p. 354, Para 30.14.

[387] Schlechtriem/ Schwenzer/ SCHMIDT-KESSEL (2016), Art. 9, p. 196, Para 28.

[388] BACKER/ DOLAN (2008), p. 7.

[389] Two versions: 1993 UCP 500 and 2007 UCP 600.

[390] *See ICC Ct. Arb. Case No. 7645*, 1 March 1995, CISG-online 844. *See also* BACKER/ DOLAN (2008), p. 7; DAVIES/ SNYDER (2014), pp. 273, 281-283; and

Under the CISG, once the parties have established the obligation to hand over documents, the seller is consequently liable for breach of contract wherever it does not timely hand over the required documents, or where they are non-conforming as required by the contract and the Convention[391]. As a result, buyer's remedies for breach are triggered *mutatis mutandis* under Article 45 *et seq.*[392], including the seller's right to cure after performance date under Article 48.

On the one hand, this assumption is, conspicuously, perfectly in tune with the all-embracing notion of "any failure to perform", laid down in Article 48(1). Firstly, if the seller has not handed over the required documents to the buyer in a timely manner—provided that the time was not fixed as essential—the seller may attempt to cure by subsequently submitting the documents within a reasonable period of time. Secondly, in the case that the seller delivers non-conforming documents, it is entitled to remove the non-conformity in the documents before the date by which the documents are due, or after it—within a reasonable period of time—albeit subject to the requirements of Articles 34 and 48 CISG[393].

On the other hand, for a proper application of the seller's rights to cure to breaches of the obligation to hand over required documents, it becomes indispensable to determine whether the buyer is subject to the duties to examine and notify under Article 38 & 39. Although the CISG's default rules are silent on this count, the relevant

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SCHWENZER/ HACHEM/ KEE (2012), p. 352, Para 30.05; Schlechtriem/ Schwenzer/ MOHS (2016), Art. 53, pp. 829-830, Paras 17-18.

[391] CISG-AC Opinion no 5, pp. 5, 6, Paras 4.7, 4.14; SCHLECHTRIEM (1984), *Seller's Obligations*, p. 18 and ENDERLEIN (1986), *Rights and Obligations of the Seller*, pp. 153-154; *See also* the wording of Article 34 CISG: "[a]ny lack of conformity in the documents […]".

[392] ZELLER (2016), pp. 96-98; and Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 586, Para 9.

[393] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 49, p. 781, Para 11; and CISG-AC Opinion no 5, p. 5, Para 4.9. The analogous applicability of Articles 38 and 39 is, thus, of vital importance as to provide the seller with an opportunity to cure non-conformities in the submitted documents; *see* Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 38, p. 639, Para 7.

literature proffers an affirmative answer[394]. Therefore, the buyer has to give notice to the seller specifying the non-conformity in the tender of documents, which results in placing the seller in a good position to attempt a subsequent cure within a reasonable time.

What is more, if the seller hands incorrect documents over to the buyer—which would be tantamount to an *aliud* regarding the goods—the failure to perform cannot be treated as a non-delivery, but must still be considered as a breach of contract. Consequently, the buyer is not entitled to resort to avoidance of the contract by having fixed a *Nachfrist*, as per Articles 47(1) in conjunction with 49(1)(b)[395].

Last but not least, attention must be brought to the particular sector of documentary sales in the commodity trade. As indicated above, due to the fact that this market is characteristically dominated by string transactions, the seller is, as a rule of thumb, obliged to timeously hand over clean documents of title—i.e. representative documents—given that such an obligation is of the essence of the contract[396].

As a consequence, there is little or no room for the seller's right to cure after due date. Any late submission of documents or any delivery of "unclean" documents of title is not subsequently remediable within a reasonable time and, thus, it immediately entitles the buyer to reject the tender of performance and to avoid the contract. This solution seems to bring the CISG closer to the *Perfect Tender Rule* under § 2-601 UCC[397].

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[394] Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, pp. 583, 586, Paras 3, 9; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 38, p. 639, Para 7 submits the idea that: "[…] Articles 38 and 39 must be applied by analogy because otherwise, in practice, the seller's right to remedy would be undermined". *See also Oberlandesgericht München*, 13 November 2002, CISG-online 786.

[395] German *Bundesgerichtshof* 3 April 1996, CISG-online 135; and CISG-AC Opinion no 5, p. 5, Para 4.10.

[396] CISG-AC Opinion no 5, p. 6, Paras 4.13, 4.14.

[397] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 455-456, Paras 65, 66; SCHWENZER (2005), *J L&Com*, pp. 441-442; and CISG-AC Opinion no 5, p. 7, Para 4.17: "[a]s a result, in practice, the seller's possibility to remedy a defect in the documents normally does not exist in the commodity trade […] [t]hus, in

d) Transfer the Property in the Goods

According to the default rules of the Convention—in particular, Article 30—the seller is expressly obliged to transfer the property in the goods to the buyer:

> The seller must deliver the goods, […] transfer the property in the goods, as required by the contract and this Convention.

Even thought the CISG expressly establishes such an obligation, Article 4(b) excludes from its scope of application the consequences that an international sales contract might have on the ownership. In other words, the CISG does not govern *how* the property in the goods is to be transferred to the buyer[398] but imposes an obligation on the seller to do so.

As a result, if the seller is unable to transfer the ownership in the goods to the buyer as required under the contract—in accordance with the applicable domestic law—due to the existence of rights or claims of third parties (i.e. legal defects), it is to be held liable to the buyer for breach of contract under Article 41[399]. The grounds for such *unrestricted* seller's liability is the existence of a third party right or claim that may totally hinder the legal position of the buyer as owner of the goods after the sales contract is performed:

> *Article 41*
>
> The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim […].

> In the case law, see the decision of *Oberlandesgericht Dresden*, 21 March 2007, CISG-online 1626. On 28 May 2001, a Belorussian buyer purchased from a German seller a used car—an Audi. The parties agreed upon an exclusion of liability for defects. The buyer paid for the car but, upon delivery, it turned out to be stolen and was seized by the

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this specific trade branch the solution under the CISG is quite similar to that under the perfect tender rule".

[398] SCHWENZER/ HACHEM/ KEE (2012), pp. 327, 502, Paras 28.09, 39.26; Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 30, p. 518, Para 9.

[399] Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 30, p. 518, Para 10; and METZGER (2014), p. 197.

> Belorussian police. The Belorussian seller gave notice of this fact to the buyer one week after the seizure occurred. Later on, the buyer sued the seller for damages, but the latter objected that the buyer failed to give notice of the defect within a reasonable time under Article 43, that the liability for defects had been contractually excluded, and that it could not be aware or be supposed to become aware of the defects.
>
> The *Oberlandesgericht*, reversing the first instance decision, concluded that: "[t]he seller had breached its obligation under article 30 CISG as well as its obligation under article 41 CISG to deliver the good free from any right or claim of a third party". The German Court of Appeals affirms that, according to the German law (§ 935 BGB)—which is the applicable domestic law to property-related effects of the conclusion of the contract left out by Article 4 sent. 2 (b) CISG—the seller had failed to transfer the property in the car to the buyer.
> However, the court distinguishes between two independent breaches of the obligation to transfer the property: one under Article 41, and another under Article 30. This distinction (disputably) allowed the court to decide that the contractually-based exclusion of liability for defects deprives the buyer of its rights under article 41 CISG, but it does not affect the seller's main obligation to transfer the property under article 30 CISG. Furthermore, the court concluded that the duty to notify under article 43 CISG does not apply to article 30 CISG.

Likewise, Article 42(1) lays down a *restricted* sphere of liability for certain kinds of defects in title. Namely, this provision governs the seller's liability for selling goods that are not free from industrial or intellectual property rights or claims—e.g. if seller delivers goods that infringe trademarks[400]:

> *Article 42*
>
> (1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property: […]

For the sake of a better analysis, these two sub-categories of defects in title must be sorted out. The first, set forth by Article 41, refers to general defects in title, known as third parties' rights. It mainly covers cases where a third party has full or partial ownership or when it has a right to encumber the goods. According to the literature, even frivolous claims against the buyer's legal position

[400] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 41, p. 680, Para 1.

relating to the purchased goods suffices to amount to a legal defect[401].

The second sub-category, found under Article 42, is based on industrial and intellectual property rights or claims. In particular, it includes the infringement of copyrights, utility models, registered designs, trade names, and trademarks, as well as patents[402]. Salient examples are rights resulting from scientific, literary and artistic fields, or even geographical indications[403].

All in all, it is clear that the CISG constructs a particular regime for the non-conforming tender of performance (*Schlechtleistung*) due to legal defects, which deviates from the conformity principle applicable to goods themselves[404] pursuant to Article 35 *et seq.* Despite the differences between these two regimes in determining the seller's liability, their consequences are rather similar.

In alignment with the Unitarian approach to breach of contract that characterizes the Convention, wherever the seller is unable to transfer the property or deliver goods free from defects in title—under the general Article 41 or the narrower Article 42—it commits a breach of contract. Accordingly, the buyer's remedies under Article 45 *et seq.* are *mutatis mutandis* triggered[405].

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[401] SCHLECHTRIEM (1984), *Seller's Obligations*, pp. 31-32; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 41, p. 685, Para 11; SCHWENZER/ HACHEM/ KEE (2012), p. 409, Para 32.31; and METZGER (2014), pp. 196-199.

[402] METZGER (2014), p. 214.

[403] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 42, pp. 694-695, Para 4; and METZGER (2014), pp. 201-203. For a discussion of whether goods that may generate unfair competition and affect personality rights—such as visual image or name—are covered by Article 42 *see* Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 42, p. 696, Para 5; METZGER (2014), pp. 214-215; and SCHWENZER/ HACHEM/ KEE (2012), p. 416, Paras 33.09, 33.11.

[404] *See*, for detailed consideration of the differences: *Secretariat's Commentary*, O R Art. 39, p. 37, Paras 7, 8; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 133, Para 166; SCHWENZER/ HACHEM/ KEE (2012), p. 412, Paras 32.40, 32.41; *see also* ENDERLEIN (1986), *Rights and Obligations of the Seller*, p. 178.

[405] METZGER (2014), p. 199; Andersen/ Schroeter/ JANAL (2008), p. 224; SCHWENZER/ HACHEM/ KEE (2012), p. 403, Para 31.07; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 41, pp. 689-690, Paras 23-24, Art. 41, p. 705, Paras 27-28, who discuss whether the provisions expressly linked to the conformity of the goods with the contract (Articles 46(2)(3), 50) are to be applied to liability under Article 42(1).

The seller's right to cure after performance date counts among these remedies. For proper application, then, the duty Article 43(1) poses on the buyer to give notice to the seller specifying the nature of the non-conformity—i.e. defect in title—becomes critical. Otherwise, the seller would not promptly know the lack of conformity, resulting in an undermined opportunity to cure[406].

e) Additional Obligations

Regarding the merits of the principle of freedom of contract under Article 6, the parties involved may expressly or implicitly shape the content of their contract of sale of goods. Particularly, in order to better meet their interests, the parties can establish further obligations to be fulfilled by the seller in addition to those expressly enumerated in Article 30.

Likewise, additional contractual obligations can derive from other sources: practices established between the parties, applicable trade usages—according to Article 9—and, arguably, the Convention itself[407]. These additional obligations fall within the Convention's scope of application only if and insofar as the contract for the sale of goods itself is governed by the CISG—according to Articles 2 and 3[408]—and they are deemed to be part of it. This assumption clearly follows from the wording of Article 4 sent. 1[409]:

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[406] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 42, p. 704, Para 25; Art. 43, p. 708, Para 2.

[407] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 4, p. 79, Para 15. It is rather disputed whether the principle of good faith under Article 7 can also be a source of contractual obligations, *see* Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 30, p. 519, Para 12; and SCHWENZER/ HACHEM/ KEE (2012), p. 331, Para 28.32. Furthermore is the question of whether obligations stemming from other areas of the applicable law—i.e. duties of care in tort law—might be incorporated into contract as a contractual obligation, *MünchKomm*/ P. HUBER (2016), Art. 48, Para 3; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 426, Para 16.

[408] For the (in)applicability of the Convention to contracts for work and materials, and to service contracts *see* Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 3, pp. 61-72, Paras 2-23. Groups of cases may be: turnkey-contracts, operating and financial leasing-contracts, or hire-purchase-agreements.

[409] In case law, *see below*, *Oberlandesgericht Frankfurt* 17 November 1991, CISG-online 28.

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer *arising from such a contract*. […] (emphasis added).

At an international level, these contractual obligations are submitted to be included under the notion of additional duties[410]. Among them, for example, are[411]: the rendering of services related to goods—e.g. montage or training to buyer's employees[412]; to keep the buyer's business secrets confidential; to respect an industrial or intellectual property right (trademark)[413]; to provide the buyer with some information—e.g. a duty to inform and advise; to avoid competition—e.g. exclusive distributorship agreements[414]; to cooperate and assist in advertisement and marketing campaigns[415]; to protect the buyer's property[416]; etc.

As to the seller's liability for breach of additional obligations, it must first of all be stressed that the CISG neither sorts out parties' obligations between the traditional civil law categories of principal—i.e. main—or ancillary—i.e. auxiliary—obligations[417]; nor does split them according to common law rooted distinctions—for instance, the English law classification between conditions and warranties[418]. Hence, contrary to the majority of domestic laws, the

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[410] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 4; and SCHWENZER/ HACHEM/ KEE (2012), p. 330, Para 28.27.

[411] *See* Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 425-426, Paras 15-17 provides a list of examples of additional obligations, but refers to them as "[*s*]*ui generis* obligation[s] contractually created and defined by parties".

[412] SCHWENZER/ HACHEM/ KEE (2012), p. 332, Para 28.37 listing services: "[i]nstallation, training, test runs, ongoing maintenance, supervision, service, and support"; *see also* p. 120, Para 8.47 considering the applicability of the CISG to turnkey contracts according to Article 3(2).

[413] *Oberlandesgericht Frankfurt* 17 November 1991, CISG-online 28.

[414] *Oberlandesgericht* Koblenz 31 January 1997, CISG-online 256.

[415] Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 437, Para 2.

[416] *See* SCHWENZER/ HACHEM/ KEE (2012), p. 775, Para 49.48. The proposed interpretation in this work is based on the close relationship between the harm incurred and the purpose for which the goods were purchased by the buyer.

[417] However, *cf. Bundesgericht* (Switzerland), 15 September 2000, CISG-online 770: "[t]he breach of an *ancillary obligation* can only constitute a fundamental breach if it has some repercussions on the performance of the *principal obligations* in a such way that the interest of the creditor in the performance of the contract is lost" (emphasis added).

[418] SCHLECHTRIEM/ Cl. WITZ, *Convention de Vienne*, p. 124, Para 175.

CISG refrains from qualifying the intensity of the breach, and consequently from establishing the available remedies, on the basis of a hierarchy of the obligations under the contract[419].

> Moreover, it must be stressed that parties might attach particular weight—i.e. essential character—to the performance of one or more of these additional obligations under the contract[420].

All in all, if the seller fails to perform one of these additional obligations under the contract, it commits a breach according to the Convention. As a consequence, the buyer's set of remedies for breach under Article 45 *et seq.*—which includes the seller's right to cure after performance date—is *mutatis mutandis* triggered[421]. It remains problematic, however, that the CISG is silent as to the remedial system applicable to additional obligations. Hence, the content of the buyer's remedies must be derived from the underlying principles, per Article 7(2)[422].

> In the case law, see the leading decision of *Oberlandesgericht Frankfurt* 17 November 1991, CISG-online 28. A German buyer entered into a contract for the manufacture of shoes with an Italian seller. In the contract, the parties stipulated that the seller had to follow the instructions from the buyer as well as had to respect the buyer's exclusive right to market and sell the shoes subject to "M" designation. However, at a trade fair held in Bologna (Italy) from 3 to 6 March 1989, the seller exhibited shoes marked with an "M". After the buyer unsuccessfully requested the removal of the shoes from the exhibition, it declared the contract avoided. The seller contested the avoidance, arguing that the clause on exclusive rights under the contract was invalid, and sued the buyer for non-payment.
>
> The *Oberlandesgericht* found for the buyer and holds that the contract was governed by the CISG and, accordingly, it was properly avoided pursuant to Article 49(1)(a) on the basis that the seller's exhibition of the shoes with "M" designation constituted a fundamental breach. Nevertheless, the court misleadingly refers to primary and secondary obligations: "[t]he exhibition of the shoes at the fair represents a fundamental breach of contract pursuant to Article 25 CISG […] the

[419] SCHWENZER/ HACHEM/ KEE (2012), p. 330, Para 28.27; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 459-460, Paras 71, 72.
[420] Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 366.
[421] Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 30, p. 519 Para 12.
[422] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, p. 138 Para 37.

> breach of an obligation which is not a *primary* obligation of the contract, but, rather, a *secondary* obligation can be, without anything further, fundamental" (emphasis added).

2.2 Specific Preconditions

Article 48(1) CISG's *Blanket Clauses*: Reasonableness of the Seller's Right to Cure under the Circumstances

Besides the above-mentioned *General Preconditions* for the existence of the seller's right to cure, the wording of Article 48(1) lays down further *Specific preconditions*. In accordance with this provision, an opportunity to cure by the breaching seller can only exist[423] if it can be carried out by this party abiding by the following three requirements. Subsequent cure must: (1) not provoke an unreasonable delay in performance; (2) not cause the buyer unreasonable inconvenience; and (3) feature no uncertainty of reimbursement by the seller of expenses advanced by the buyer.

> In the relevant literature[424], these kinds of vague requirements—closer to standards than to rules[425]—have been labelled as *Blanket Clauses*. Throughout the CISG text one easily finds provisions that meet the definition: for example, the standard of reasonableness under Article 77, or the concept of fundamental breach itself, under Article 25[426].

These standards, embedded in CISG's provisions, are designed to give discretion to the adjudicator, so as to allow it to closely take into account the particular circumstances of a given case. In other words, the standards pursue the ultimate goal of providing a

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[423] In different words but expressing the same idea: Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, pp. 766-767, Para 9: "[t]he seller's right to cure after the delivery date *only exists* if […]" (emphasis added); Staudinger/ U. MAGNUS (2013), Art. 48, Para 13: "*Nur dann* ist der Verkäufer zu ihr berechtigt" (emphasis added); Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 375: "[b]ecause the right to cure *lies only if* not unreasonable under the circumstances" (emphasis added); *see also* SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 565, Para 19. Comparatively, *see* the specific preconditions set forth by §2-508(2) UCC.

[424] LEISINGER (2007), *Fundamental Breach*, pp. 2-3.

[425] FARNSWORTH (2007), *The Legal Analyst*, pp. 163-171.

[426] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 421, Para 7.

maximum degree of flexibility, to reach to the best solution for the individual case.

A priori, these Specific Preconditions for the seller's right to cure may seem divergent, as they refer to several categories: Time, inconvenience to the buyer, or reimbursement of expenses advanced. Arguably, however, all of them lead to the common notion of appropriateness—or more accurately, *reasonableness*—of the seller's right to cure. Systematically, reasonableness is the yardstick to which the CISG commonly resorts to assess existence and applicability of its provisions. In this regard, the seller's right to cure after performance date under Article 48(1) is no exception.

Noticeable is that Article 48(1)'s specific preconditions are not to be cumulatively met but that the occurrence of any one of them suffices to exclude the seller's right to cure. In other words, an unreasonable delay is tantamount to a non-curable breach by the seller—under Article 48(1)—irrespective of whether the inconveniences or uncertainty to the buyer were high or low[427]. It is almost trite to add that the more blanket clauses are met, the more clear the exclusion of the seller's right to cure under Article 48(1) CISG will be.

Whereas in a scenario already categorized as a fundamental breach the seller's right to cure is always deemed unreasonable (i.e. inappropriate), the result is entirely different in scenarios where the fundamental character of the breach is still in doubt. In the latter cases, the analysis of the reasonableness of the seller's right to cure gains the most significance. Curability of a failure to perform constitutes one of the central factors upon which the fundamentality (i.e. intensity) of the breach by the seller will then be determined[428].

[427] Soergel/ LÜDERITZ/ SCHÜSSLER-LANGEHEINE (2000), Art. 48, p. 97, Para 7; Staudinger/ U. MAGNUS (2013), Art. 48, Para 14; Witz/ SALGER/ Lorenz (2016), Art. 48, p. 406, Para 4; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 566, Para 22.

[428] *See* for further discussion Ch. IV, 4.1.1. On the flip side, however, this does not mean that in all cases where the seller's right to cure from Article 48 is unreasonable the seller's failure to perform immediately amounts to a fundamental breach. Even if the breach is not curable by the seller, the buyer may still be expected to cure by itself, or the defect may be of minor importance, or

In the following sections, the blanket clauses from Article 48(1) CISG—i.e. specific preconditions—are split into three individual categories, and analyzed. In addition, allocation of the burden of proof between parties is presented. However, before jumping into further concrete categories, it is interesting to briefly present some general guidelines regarding the broad notion of reasonableness.

- **General Remarks on the Standard of Reasonableness, Interpretation, Gap-Filling, and Observance of Good Faith in International Trade Regarding the Seller's Right to Cure After Delivery Date**

An attempt to theoretically define the notion of reasonableness applicable to the seller's right to cure under Article 48 is rather a useless endeavour. As stated above, reasonableness is a standard, which is principally designed to tailor analysis regarding the application of a provision to the characteristics of an individual case[429]. Even so, from a theoretical point of view, providing adjudicators with some transverse guidelines with which to conduct this case-by-case analysis can be worthwhile.

With this purpose in mind, three remarks on the '*Reasonableness Test'* under Article 48(1) are to be presented: (1) scholars have generally agreed that reasonableness of the seller's right to cure has to be mainly evaluated with respect to the buyer's legitimate interests in the contract[430]; (2) furthermore, these interests are to be taken into account from an objective perspective[431]; and finally, (3)

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the goods may still be reasonably usable in the normal course of business for the aggrieved buyer. *See also MünchKomm*/ P. HUBER (2016), Art. 48, Para 10.

[429] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 735-736, Para 9: "[o]b die Zumutbarkeitsschwelle überschritten ist, kann nicht allgemein, sondern nur auf Grund der Umstände des Einzelfalls entschieden werden"; Bianca/ Bonell/ WILL (1987), Art. 48, p. 352, note 2.1.1.12.

[430] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 5; Soergel/ LÜDERITZ/ SCHÜSSLER-LANGEHEINE (2000), Art. 48, p. 97, Para 7; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 565, Para 20.

[431] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 766, Para 9; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 736, Para 9: "[M]aßgeblich ist die objektive Käufersperspekitve und nicht die Einschätzungen des Verkäufers"; Staudinger/ U. MAGNUS (2013), Art. 48, Para 14: "[e]rster Linie

it is submitted that the seller's mere opinions, statements or promises to the buyer about reasonable curability are irrelevant in determining the reasonableness[432].

> All of them, as indicated elsewhere[433], find foundations in the fact that the legitimate interests of the buyer are mainly drawn from the express terms of the contract and by interpretation and integration, under Articles 8 and 9[434]. In the contract formation phase, the buyer had probably paid a higher price and had had to disclose sensitive information to incorporate certain terms into the contract. Reliance on the enforceability of agreements would then dramatically plunge—alongside losses in terms of welfare for the loss of mutually beneficial agreements—if at the performance stage the promisor was not held to the exact terms as contracted[435].

The second focus for guidelines is: to what extent the formulation of the principle of good faith—under Article 7(1)(2)[436]— should be relevant in determining the concept of reasonableness under Article

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die objektivierbaren Interessen des Käufers"; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 565, Para 20: "[d]ie Interessenlage des Käufers aufgrund objektiver Gesichtspunkte"; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 5: "[a]bzustellen ist dabei auf eine objektive Betrachtung insbesondere der Interessen des Käufers"; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 9: "[a]s a rule, these reasonableness requirements should be assessed on an objective basis from the buyer's perspective rather than from the seller's perspective"; and Soergel/ LÜDERITZ/ SCHÜSSLER-LANGEHEINE (2000), Art. 48, p. 97, Para 7: "[j]edenfalls kommt es maßgeblich auf die objektiven Interessen des Käufers an".

[432] See in the case law the decision of the *Rechtbank van Koophandel in Kortrijk*, 4 June 2004, CISG-online 945. Although the seller had promised delivery, it did not take place within the two months after the delivery of the wrong caterpillar truck, and the court rules for the buyer: "[s]ince […] in the two following months the truck was still not sent, it must be admitted that the [Seller] had committed a fundamental breach of contract". Agreeing on the lack of relevance of "[s]ubjektiven Einschätzungen oder Versprechungen des Verkäufers" Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 736, Para 9; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 5; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 565, Para 20.

[433] *See*, for instance, Ch. II, 2.1.1; Ch. III, 3.1.1; and Ch. IV, 4.2.1.

[434] SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 390 gives the following example: "[i]t is up to the parties to stipulate what they consider to be the essence of the contract. If the seller then fails to deliver in accordance with the express stipulations given, it cannot be argued that it did not foresee any detriment that occurs to the buyer".

[435] KAPLOW/ SHAVELL (2004), pp. 1-12. *See* for models on reliance of parties in performance COOTER/ ULEN (2016), pp. 276-306.

[436] EGEA (2011), pp. 16, 18.

48(1). In particular, the question is whether the observance of good faith in international trade is also a yardstick to be taken into account when considering the existence of the seller's right to cure after delivery date.

In other words, whether observing good faith in international trade should be added as a fourth criteria to the existing blanket clauses of the *Reasonableness Test* under Article 48(1). Namely, unreasonable delay, inconvenience and uncertainty of reimbursement of expenses[437].

On the one hand, Article 7(1) deals with the interpretation of the Convention but does not directly affect the individual contract[438]:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Therefore, the observance of good faith in international trade could only become relevant in interpreting Article 48(1), but not in directly establishing the rights and obligations of the parties. That is, an adjudicator cannot determine the existence of a seller's right to cure in a certain case on the mere merits of Article 7(1).

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[437] The topic of good faith in international trade falls, of course, beyond the subject of this thesis. For a general presentation under the CISG *see* Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, pp. 121-142, Paras 5-44; and Schlechtriem/ Schwenzer/ FERRARI (2013), *6. Aufl.*, Art. 7, pp. 157-193, Paras 4-69. For a broader overview on the principles of good faith and fair dealing *see* EGEA (2011), pp. 15, 19, 21, 27-28, 47. The author explains the distinction between the subjective and objective strands of good faith. He further states that only the latter constitutes a standard and, in addition, exposes that the accompanying concept of *fair dealing* is a specification of objective good faith from a passive viewpoint. This concept of fair dealing is currently embedded in national laws, such as Article 111-7 CCCat, mirroring—at an international level—Article 1.7(1) Unidroit Principles, 2010: "[e]ach party must act in accordance with good faith and *fair dealing* in international trade" (emphasis added); and, regarding European scholarly projects for harmonization, for instance, III.-1:103(1) DCFR: "[A] person has a duty to act in accordance with good faith and *fair dealing* in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship" (emphasis added).

[438] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, pp. 127, 128, Paras 17, 19.

Hence, the answer should be that good faith cannot directly complement the criteria of reasonableness under Article 48(1) in determining the existence of the seller's right to cure, but can only indirectly be used to concretize—i.e. to interpret—such rights as are laid down by this provision[439].

> Otherwise, if an adjudicator was able to directly resort to the general principle of good faith in international trade under Article 7(1) to set a seller's right to cure in a particular scenario of breach, the application of such a seller's right would be uncontrollably boosted. It might result, in some instances, in a dramatic impairment of the buyer's interests under the contract, less certainty as to available remedies for breach, and perhaps also to a major dysfunction of the CISG's remedial system and a lack of uniformity in its application across jurisdictions.

Finally, on the other hand, Article 7(2) is focused on filling gaps in the CISG's rules in order to give appropriate meaning and content to them.

> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Therefore, under the second paragraph, an adjudicator could effectively create and shape rights and obligations based on the general principle of observing good faith; in particular, here, for the purpose of ascertaining the existence of the seller's right to cure after performance date. This notwithstanding, taking into account the wording of Article 48 and systematically related provisions, there is only room in limited instances for gap-filling[440].

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[439] However, *cf. Oberlandesgericht Celle*, 24 May 1995, CISG-online 152, which wrongly considers that: "[t]he [seller's] obligation of good faith (Art. 7(1)) required him to await the [buyer's] answer to his offer before shipping". Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, p. 127, Para 17.

[440] *See* Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, pp. 127, 128, Paras 17, 19 stating that: "[t]he borderline between extensive interpretation [–under Article 7(1)–] and gap-filling [–under Article 7(2)–] is uncertain […] but is a merely theoretical problem. *Cf.* Bianca/ Bonell/ WILL (1987), Art. 48, p. 350 and LEUKART (2013), p. 137, Para 173.

Nevertheless, it can be argued that the observance of good faith in international trade—as well as the CISG's general principles—in gap-filling pursuant to Article 7(2) might become relevant, for example, wherever the seller has an opportunity to subsequently cure failures to perform of its additional obligations also governed by the CISG.

In the case law, for instance[441], the decision of *Audiencia Provincial de Zaragoza*, 31 March 2009, CISG on-line 2085 is relevant. In May 2005, a Spanish buyer and a Belgian seller entered into a contract for the purchase of fresh and frozen shoulders of pork. After delivery, the seller sued for payment but the buyer alleged that the seller had breached concerning the quality of the goods supplied, upon the basis that goods should meet certain conditions of weight and fat content so that they could be marketed as serrano ham. However, after the buyer had received the goods, they had gone through the drying and curing process for several months so that the seller asserted articles 38 and 39 of CISG, arguing that the buyer had examined the merchandise and had not given notice of the lack of conformity specifying the nature of the defect.

The court finds for the seller on the basis of the buyer's non-compliance with articles 38 and 39 of CISG. What is more, the court decides, on the basis of an obligation to observe good faith: "[D]e todo el comportamiento de la parte compradora resulta que la mercancía fue aceptada, interpretación que se deriva de su actuación según el principio de la buena fe que establece el Art. 7 CISG, que en definitiva exige una rapidez en la denuncia para que el vendedor pueda actuar en consecuencia, con posibilidad de reparar (sic.) la mercancía o de sustituirla (Arts. 46 y 48)".

a) Unreasonable Delay

As indicated, the seller's right to cure per Article 48(1) only exists once the delivery date—i.e. the performance date, as explained above—has expired. Hence, there is always a situation of delay in performance[442]. Accordingly, the seller's opportunity to subsequently remedy the breach is curtailed by requiring that its

[441] *Cf.* SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449 referring to the decision of the *Bundesgerichtshof* (Germany) 24 September 2014, CISG-online 2545: "[d]ie Rechtsprechung entnimmt dem Grundsatz von Treu und Glauben (Art. 7 I CISG) eine Obliegenheit des Verkäufers, den Käufer über seine Absicht und Bereitschaft zu informieren […]".

[442] SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 566, Para 23. This is also the underlying rationale for why the buyer is boldly entitled to sue the seller seeking for damages pursuant to Article 48(1) *in fine*; Staudinger/ U. MAGNUS (2013), Art. 48, Para 14.

cure must not cause an unreasonable delay to the buyer[443]. The question, thus, is to determine what amounts to a *(un)reasonable* delay.

As a matter of principle, the answer can only be provided on a case-by-case basis. Nevertheless, it is submitted that, in some instances, comparison with the requirement of an "additional period of time of reasonable length" under Article 47(1) may also be relevant[444].

> For the sake of a complete analysis, however, it must be remembered that only a delay in performance by the seller of its obligation to deliver the goods to the buyer opens the door to avoidance pursuant to the *Nachfrist*-mechanism under Article 47 in conjunction with 49(1)(b) CISG. It is submitted, thus, that in these events, avoidance of the contract occurs regardless of the notion of fundamental breach under Article 25.

All in all, the criterion upheld here is as follows: the boundaries of reasonableness of a delay in curing by the seller under Article 48(1) are delimitated by the notion of fundamental breach. Other than these scenarios, the delay must be deemed reasonable[445]. This clearly deviates from the notion of an "additional period of time of reasonable length", which is laid under Article 47(1). Likewise, it also deviates from the notion of Nachfrist required in German law of sales for the termination of the contract, under §437(2) in conjunction with §323 BGB.

On the one hand if a time lag has already amounted to a fundamental breach within the meaning of Article 25, the delay is indisputably and immediately deemed unreasonable and there is no room for cure by the seller under Article 48(1)[446]. Conspicuously,

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[443] Comparatively, *see* § 2-508(2) UCC, which requires a "further reasonable time", GILLETTE/ WALT (2016), p. 244.

[444] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 47, p. 758, Para 6, Art. 48, p. 767, Para 10.

[445] However, *cf.*, for another opinion, Bianca/ Bonell/ WILL (1987), Art. 48, p. 352: "[t]here are three kinds of delay caused by curing: 1. A delay which constitutes a fundamental breach of contract and is dealt with by Article 49(1)(a); 2. *A delay which does not amount to a fundamental breach but still appears unreasonable*; 3. And finally a delay which is not unreasonable. Only the last opens the way for the right to cure" (emphasis added).

[446] *See* the amended wording of Article 44(1) of the 1978 Draft Convention which clearly expressed this consequence. *See also* Staudinger/ U. MAGNUS (2013), Art. 48, Para 14; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 6; Kröll *et al*/ P.

this is the case where performance by a certain date is expressly or implicitly fixed as of the essence in the contract—e.g. contracting upon a specific schedule of delivery[447]—or wherever the parties have concluded a 'just-in-time' contract[448]. At an international level, particular attention must also be brought to the incorporation of ICC Incoterms into the contract[449].

> As an example, see the decision of the *Oberlandesgericht Hamburg* 28 February 1997, CISG-online 261. An English company purchased 18,000kg of Chinese iron-molybdenum from a German seller. The parties agreed upon CIF Rotterdam as the destination and upon 12 October 1994 as the date for delivery. The German seller never delivered the goods as its own Chinese supplier failed to deliver. In January 1995, the English buyer performed a cover purchase and sued the seller for damages in the amount to the difference between the price agreed and the price it had to pay in the cover transaction.
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> The OLG Hamburg concludes that the buyer is entitled to avoid the contract under Articles 25, 49,1 (a)(b) CISG because: "[t]he use of the Incoterm CIF which makes clear that the contract was a contract for

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HUBER (2011), Art. 48, Para 9; SCHWENZER/ HACHEM/ KEE (2012), p. 725, Para 47.69; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 438-439, Para 39.

[447] In the case law, for instance, *Superior Court of Justice of Ontario*, 6 October 2003, CISG-online 1436; and *Landgericht Halle*, 27 March 1998, CISG-online 521.

In the literature, *see* Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 438-439, Para 39; *see also* SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 566, Para 23; SCHWENZER/ HACHEM/ KEE (2012), p. 724, Para 47.63; SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 398; SCHWENZER (2005), *J L&Com*, p. 439; Witz/ SALGER/ Lorenz (2016), Art. 48, p. 406, Para 4; and CISG-AC Opinion no 5, p. 4 Para 4.4, footnote 42. *Cf.* HEUZÉ (2000), *Vente internationale*, Art. 48, p. 373, Para 422 in a confusing wording.

Cf. MAK (2009), p. 167 who states that missing an essential time for performance should not in every case amount to a fundamental breach but only when the buyer suffered detriment arising out of such failure to perform. She justifies as follows: "[f]or example, it may prevent buyers from getting out of a bad bargain *merely* on the ground that time was of the essence and the seller did not perform on time even if they suffered no detriment as a result of the seller's breach" (emphasis added).

[448] SCHWENZER/ HACHEM/ KEE (2012), p. 725, Para 47.69.

[449] *See*, for example, Incoterms C.I.F. and F.O.B. By contrast, the C.F.R. term does not upgrade the time of performance to an essential feature of the contract, *see* SCHWENZER (2005), *J L&Com*, p. 439; *cf.* Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 440-441, Para 41.

delivery by a fixed date under which timely delivery is a fundamental obligation".

On the other hand, a period of time for cure by the seller under Article 48(1) must also be considered unreasonable wherever, had the seller attempted to cure within a certain time—according to the circumstances of the case and particular interests of the buyer[450]—the incurred delay would have led to a fundamental breach[451].

> On this count see also the decision from the *Landesgericht Köln* 25 March 2003, CISG-online 1090. In 1999, a German company that ran a racetrack for carts in Köln purchased thirteen new carts of the model "DINO Leisure" from a Danish producer and seller. In the contract, the parties agreed that the sold carts had to be delivered fully assembled—i.e. "ready-to-operate". Furthermore, at the conclusion of the contract the buyer made it known that the carts were intended to be used in a 24-hour race held at its racetrack on the next 30 and 31 October 1999.
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> On 26 October 1999, four days before that race, the delivery took place. Nevertheless, the delivered carts were non-conforming as they were not "ready-to-operate"—some components were missing, incorrect pinions were assembled—sized 21cm instead of ordered 19cm—and the color was also defective (the carts were supposed to be red but the delivered ones had a black chassis). Although four days were still ahead, the seller's right to cure under Article 48(1) was rejected: "[b]earing in mind the upcoming 24-hour race, it would have been unreasonable to grant [seller] the possibility to repair the deficiencies with its own personnel or to deliver carts in replacement".

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[450] Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 438, Para 5; Staudinger/ U. MAGNUS (2013), Art. 48, Para 14; and *MünchKomm*/ P. HUBER (2016), Art. 48, Para 5.

[451] In the literature, SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 566, Para 23 stating: "[w]enn bei einer einfachen Erfüllungsverzögerung der Zeitverzug zu einer wesentlichen Vertragsverletzung führen würde"; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 446, Para 47: "[c]ure is possible […] the time needed to make substitute deliver or to repair will not in itself lead to a fundamental breach".
In the case law, *see* the decisions of the *Handelsgericht des Kantons Zürich*, 10 February 1999, CISG-online 488. The court concludes: "[h]owever, the seller is only entitled to remedy the lack of conformity if the buyer can reasonably be expected to accept the belated remedy. The remedy may not cause unreasonable delay […]. An unreasonable delay will generally be caused if a failure to keep to the delivery date already constituted a fundamental breach of contract or if the further delay led to a fundamental breach".

In conclusion, the seller's right to cure under Article 48(1) does not create an unreasonable delay insofar as cure is carried out right up until the date that the incurred time lag would have amounted to a fundamental breach. This reinforces the idea that reasonableness of the time for the seller's right to cure under Article 48(1) must not be determined in abstract, and that close attention to all of the idiosyncratic circumstances of a given case becomes extremely important.

i. *Circumstances*

First and foremost, regard must be given to the following: the terms of the contract (interpreted under Article 8); practices established between the parties; applicable trade usages (under Article 9); and surrounding matters of fact[452]. For instance, if prices are subject to strong fluctuations in the market[453], the buyer announced the final closure of its business[454], the goods are used for the production of other goods subject to a volatile market price, or the goods are rapidly perishable or seasonal[455]:

> See the decision of the *Oberlandesgericht Köln*, 14 October 2002, CISG-online 709. An Italian seller sold high value fashion clothing products for women to a German buyer. The seller partially delivered non-conforming goods on 16 March 1999 and the buyer declared the contract avoided on the day after.
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> The Court found for the buyer, affirming that avoidance was rightful as it considered the existence of a fundamental breach proven. The OLG Köln stated that: "[n]ot only the weight of the defect, but also the preparedness of the seller to cure the defect without unacceptable delay and burden to the buyer is of importance". Narrowing this consideration down to the seller's right to cure, it added that: "[i]n light of the multitude of defects, the [buyer] did not have to accept the [seller's] willingness to remedy the

[452] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 438-439, Para 39.
[453] P. HUBER/ MULLIS (2007), p. 242; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 439, Para 39; *Bundesgericht* (Switzerland), 15 September 2000, CISG-online 770 which states: "[a] delay in the delivery of goods constitutes a fundamental breach of contract if the parties decided that the delivery must be made at a specific date, and that date was determinative from the point of view of the interest of the buyer in the performance of the contract and that the seller knew it, especially in cases concerning seasonal goods".
[454] *Oberlandesgericht Karlsruhe*, 20 July 2004, CISG-online 858.
[455] Staudinger/ U. MAGNUS (2013), Art. 48, Para 14; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 439, Para 39.

> defects" and "[i]t was thus uncertain whether it would be possible to receive merchantable goods as soon as possible. In that regard, further consideration is to be had to the fact that all this is about fashion products for the summer season in the high price segment and, that, in this market segment, the sale already starts at the beginning of May, when even faultless goods are only saleable with a discount".

Furthermore, other factors relating to the parties' position are also relevant in determining the reasonableness of the delay in the seller's attempt to cure under Article 48(1). In particular, whether the goods are traded in string transactions—e.g. the sale of commodities—or if the delay in curing the breach by the seller makes the buyer liable in front of its own sub-buyers and customers[456].

> In the case law, see the decision of the *Amtsgericht München* 23 June 1995, CISG-online 368. On 15 March 1993, a German buyer purchased 200kg of the product Tetracycline HCL from an Italian seller with the specification of "a micronization below 25 microns". The shipment was effected on 5 May 1993, the buyer took delivery in Germany on 10 May and on 11 May the buyer forwarded the goods to its customers. Some days after these customers made known to the German buyer—who made known to the seller—the non-conformity of those delivered goods, which did not meet the contractual requirements.
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> The seller, under Article 48(1), instructed the buyer to jointly undertake the subsequent remedy of the goods by replacement. However, this cure took more time than expected as the goods accidentally ended up stored in München due to troubles with the freight contract. On 8 June 1993, a customer informed the buyer that it needed immediate disposal of the goods, that a further delay would be unacceptable, and that if the buyer failed again in delivering of conforming goods it would face an important claim for damages. The buyer reacted, entering into a cover purchase with a company based in Bremen and successfully delivered the goods to their clients.
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> Nevertheless, the Italian seller sued, seeking payment of the purchase price, and the buyer lodged a claim for set-off with the seller's claim on the merits of its own claim for damages pursuant to Article 45(1)(b) in conjunction with 74-77 CISG. The seller argued that the buyer's

[456] *See also* in the case law: *Oberlandesgericht Karlsruhe*, 20 July 2004, CISG-online 858; and *Handelsgericht des Kantons Zürich* 10 February 1999, CISG-online 488. In the literature: *MünchKomm*/ P. HUBER (2016), Art. 48, Para 6; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 9; Staudinger/ U. MAGNUS (2013), Art. 48, Para 14; P. Huber /Mullis / P. HUBER (2007), pp. 219, 226; and LEUKART (2013), p. 115, Para 144.

behavior "[t]hwarted the [seller's] right to remedy the non-conformity, even though a remedy by the [seller] would have been reasonable in the circumstances".

The Court found for the buyer's set-off and decided against the seller's claim for payment of the purchase price on the basis of reasonable delay: "[t]he [seller] knew that a quicker delivery of the goods was necessary. After it then turned out that the goods delivered did not conform to the contract, the [seller] could have realized that any further delay might possibly not be acceptable to the [buyer]".

ii. *Uncertainty*

In practice, however, the buyer may be in doubt as to whether the seller's cure amounts to an unreasonable delay. As will be discussed below[457], and bearing in mind the negative legal consequences of an unlawful rejection of the seller's offer to cure, a buyer is well-advised to make sure of the exclusion of the seller's right to cure before resorting to remedies incompatible with subsequent performance by the seller. It is generally submitted in the literature[458] that a proper mechanism by which the buyer can dissipate doubts is by fixing a *Nachfrist* under Article 47 CISG.

Although fixing a Nachfrist might not yield an immediately clear-cut resolution for the buyer[459], it could provide it with evidence for the unreasonableness of the seller's right to cure due to the fact that the incurred time lag would have led to a fundamental breach. As will be seen, however, so long as the buyer has not rightfully avoided the contract pursuant to Article 49(1)(b), the seller's cure is not excluded immediately after the expiration of a Nachfrist.

The seller can still impose cure under Article 48(1) provided that all of its blanket clauses are met. In other words, delay for the seller's right to cure might still be reasonable after the Nachfrist if the time

[457] *See* Ch. III, 3.1.2.

[458] Staudinger/ U. MAGNUS (2013), Art. 48, Para 14; Karollus (1991), *UN-Kaufrecht*, p. 143; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 6; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 566, Para 24; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 10; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 9; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 736, Para 10.

[459] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 47, p. 759, Para 9; and SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 400.

lag does not yet amount to a fundamental breach. It is so because, as stated above, the notion of "unreasonable delay" is not tantamount to an "additional period of time of reasonable length"[460].

> In the case law see the decision of the *Oberlandesgericht Celle* 24 May 1995, CISG-online 152. In 1992, a German seller sold nine used printing machines to an Egyptian buyer, which were to be delivered in Egypt in two instalments. The first delivery was incorrect as it was contracted to include six presses but only three were delivered. The second instalment was delayed. Given these circumstances, on 4 December 1992, the buyer sent a notice giving the seller until next 16 December 1992 to perform, otherwise it would declare the contract avoided for the missing part pursuant to Article 49(1)(b).
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> Even then, it was disputable whether the additional period of time of two weeks was too short—and thus not reasonable under Article 47(1). The contract, however, was deemed rightfully avoided because the buyer had sent the declaration of avoidance to the seller only after seven weeks (on 26 January 1993). The tribunal states: "[w]ith hindsight, this period was possibly too short […] In any case, when the [buyer] gave notice that the contract was avoided on 26 January 1993, a sufficiently long time had elapsed". Furthermore: "[t]he [seller's] subsequent announcement on 3 February 1993, that he would be able to deliver the original press, came too late".

b) Unreasonable Inconvenience, with Particular Consideration of the Shaken Faith Doctrine

Two questions are to be addressed within the *Reasonableness Test* when considering inconveniences that an attempt to cure by the seller—pursuant to Article 48(1)—may cause to the buyer. On the one hand, what kind of inconveniences may be at stake? On the other hand, what is the threshold of relevance that such inconveniences should meet in order to finally deem the seller's right to cure unreasonable?

The notion of inconveniences under Article 48(1) includes several groupings of cases. The clearest example is negative alterations—either suspension or disruption—to the buyer's business[461]; Prof. Peter Huber lists some common instances of these disturbances as:

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[460] Ch. IV, 4.2.5; and *Olivaylle Pty. Ltd. v. Flottweg GmbH & Co KGAA* Federal Court of Australia 20 May 2009, CISG-online 1902.

[461] Staudinger/ U. MAGNUS (2013), Art. 48, Para 15; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 11.

necessary works for rearrangement; noise; and dirt[462]. Arguably, the notion of (un)reasonable inconveniences with regards to the seller's right to cure must also be interpreted—according to Article 7(2)—as including further damages to the buyer's property, market reputation[463], or employees.

> Arguably, by contrast, in cases where a seller's breach is due to deficiencies in quantity, the seller's right to cure under Article 48 might be easily deemed reasonable with regards to inconveniences generated to the buyer. A priori, complementary delivery of missing goods should not cause unreasonable inconveniences to the buyer, as this party was—or it should have been according to Articles 53 and 60—already prepared for receiving them at the initial time of delivery[464]. However, this assumption cannot be generalized. It might also be the case that the buyer has to incur inconvenience to rearrange everything necessary to take the goods belatedly delivered—e.g. freights, personnel, etc.

Furthermore, as will be discussed[465], multiple attempts—presumably tolerated by the buyer—to perform on the part of the seller may constitute a significant inconvenience. In this regard, the situation is even clearer when the buyer has invested some of its own time, resources and efforts to assist the seller in its unsuccessful attempts to cure[466].

Sometimes, the boundaries between the several blanket clauses laid down in Article 48(1) are not entirely clear. There are examples of inconveniences to the buyer that may overlap with the notion of unreasonable delay. An example could be the liability of the buyer to its sub-buyers and customers, which cannot be categorized as a

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[462] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 7 (nötige Umräumarbeiten), (Lärm) and (Schmutz). For all *see* and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 567, Para 25: "[B]eispiele für unzumutbar Unannehmlichkeiten sind gravierende Unterbrechungen oder Behinderungen im Betriebsablauf des Käufers, Mitarbeiterfreistellungen, umfangreiche Umbau- oder Aufräumarbeiten […]".

[463] *Oberster Gerichtshof*, 5 July 2001, CISG-online 652.

[464] Staudinger/ U. MAGNUS (2013), Art. 48, Para 15.

[465] *See* Ch. III, 3.2.4. In the case law, *see Landgericht Heilbronn*, 15 September 1997 CISG-online 562: on several occasions and over a period of nine months, the seller unsuccessfully attempted to cure its failure to perform.

[466] *Amtsgericht München* 23 June 1995, CISG-online 368. In this case, the buyer commissioned the freight to transport back the defective goods to the seller.

mere result of the actual delay in performance but also as a further inconvenience[467].

> In the case law, see the decision excerpted above[468] of the *Amtsgericht München* 23 June 1995, CISG-online 368. Once it was established that the Italian seller had not delivered the product Tetracycline HCL as was required under the contract, the seller sought to remedy the non-conformity under Art. 48(1) CISG. Accordingly, on 25 May 1995, the seller asked the buyer to return the goods to Italy. The buyer commissioned the freight of the defective goods, strictly following the seller's instructions. However, this attempt to remedy the lack of conformity failed after the goods were not transported to Italy, but were stored in Munich.
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> The lower court found for the buyer's counter-claim of set-off damages with the seller's claim for the purchase price affirming: "[c]onsequently, the [seller] did not perform the remedy within a time period that would not have caused the [buyer] unreasonable inconvenience, that is, until 8 June 1993. A longer delay—after 8 June 1993—would cause the [buyer] unreasonable inconvenience as it is undisputed that such a delay would have led to considerable claims for damages by the [buyer]'s customer".

This unclear classification has led some authors to consider the heading of unreasonable inconveniences to the buyer a global blanket clause under Article 48(1), including the others. In their view, therefore, delay and uncertainty of reimbursement are mere sub-categories of inconveniences to the buyer caused by the seller's attempt to cure[469].

As regards the second question formulated above—the determination of the threshold for the inconveniences to lead to an exclusion of the seller's right to cure under Article 48(1)—the literature has generally tried to define it in rather abstract terms. In these theoretical attempts, the notion of reasonable inconvenience ranges from the low requirement of not constituting merely minor

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[467] *See also Bundesgerichtshof* (Germany) 24 September 2014, CISG-online 2545. In the literature, SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 567, Para 25: "[B]eispiele für unzumutbar Unannehmlichkeiten […] Auswirkungen auf Verpflichtungen gegenüber den Abnehmern des Käufers als Folge der nachträglichen Erfüllung".

[468] *See* Ch. II, 2.2.a).

[469] BRIDGE (2011), *FS Schwenzer*, p. 231; Bianca/ Bonell/ WILL (1987), Art. 48, p. 352; and *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 6.

hurdles, to the upper limit that they must not amount to almost unbearable burdens for the aggrieved buyer[470].

In detail, and arguably in contrast with the notion of unreasonable delay under Article 48(1), boundaries of (un)reasonableness for inconveniences are not only delimited by the notion of fundamental breach.

On the one hand, if a fundamental breach is already established, the seller's right to cure under Article 48(1) is indisputably excluded from the outset. On the other hand, however, even if the resulting scenario after the seller's cure would not have been tantamount to a fundamental breach, an attempt to cure that causes sufficient inconvenience to the buyer may exclude the seller's right to cure un Article 48(1). In other words, there are inconveniences that do not lead to a fundamental breach but still appear unreasonable.

> This is the case, for example, where the seller's subsequent cure under Article 48(1) is deemed to cause unreasonable inconvenience to the buyer because repair of the goods by the seller could conceivably require a significant disruption of the buyer's business. However, these inconveniences might not meet the threshold of a fundamental breach because the failure to perform may still be curable by the buyer itself[471] —provided that the buyer can cure in a reasonable fashion taking into account the circumstances.

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[470] Setting both boundaries *see* Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, pp. 766-767, Para 9; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 736, Para 9; *MünchKomm*/ P. HUBER (2016), Art. 48, Paras 5, 7; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 565, Para 21; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 437, Para 4; and Staudinger/ U. MAGNUS (2013), Art. 48, Para 15. *Cf.* MAK (2009), pp. 72-74, who coins an interpretation of the right to cure based on moral rights theory: "[s]ince the seller, unlike an innocent party seeking specific performance, is the wrongdoing party, it may be thought that the scope of his remedy should be more limited than the buyer's entitlement to a performance-oriented remedy. This may be reflected in the limits to cure, e.g. unreasonable inconvenience or unreasonable expense to the buyer may be assumed more quickly than disproportionality to the seller would be assumed in relation to specific performance"; in particular, focusing on the interpretation of Article 48(1)'s blanket clause on inconveniences *see* pp. 197-198: "[s]ince the seller was the wrongdoing party, it is submitted that the—unreasonable inconvenience—exception should be interpreted in a way that favors the buyer rather than the seller".

[471] *See*, for instance, German *Bundesgerichtshof* 3 April 1996, CISG-online 135.

All in all, an abstract determination of (un)reasonableness is rather complex and it can only provide the adjudicator with limited guidelines. In accordance with the assumption that reasonableness is a standard, adjudicators have to rigorously consider, analyze and take into account not only all idiosyncratic circumstances of the case but also the parties' interests—here, mainly the buyer's[472].

> For all the above, see the prominent decision of the *Bundesgerichtshof* (Germany) 24 September 2014, CISG-online 2545. A German buyer entered into an agreement with a Hungarian seller for the supply of plastic tools for the automobile industry. Sometime after, the buyer noticed the non-conformity of the goods delivered—upon the existence of defects—by the Hungarian seller during years 2000 and 2001 and declared the sales contract avoided pursuant to Article 49(1)(a) CISG. The seller disputed such avoidance on the basis of the inexistence of a fundamental breach according to Article 25.
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> In the decision, the *Bundesgerichtshof* takes into account the existence of a seller's right to cure under Article 48(1). As to the reasonableness-test in the given case, the tribunal first stresses the incompatibility of the notion of reasonableness with the ascertainment of a fundamental breach: "[U]nzumutbarkeit tritt nicht erst dann ein, wenn die mit der Nachbesserung verbundenen Nachteile zu einer wesentlichen Vertragsverletzung im Sinne von Art. 25 CISG führen würden".
>
> Furthermore, the *Bundesgerichtshof* also considers other relevant factors that may entail the exclusion of the seller's right to cure under Article 48(1), even if the unreasonableness of the inconveniences themselves would not have led to the establishment of a fundamental breach in the given case: "[v]ielmehr können unzumutbare Unannehmlichkeiten insbesondere darin liegen, dass dem Käufer Schadensersatzklagen seiner Abnehmer drohen oder dass der Verkäufer, der mehrfach vergeblich nachgebessert hat, offensichtlich unfachmännisch vorgeht".

For the sake of a more complete analysis of the blanket clauses under Article 48(1)—and particularly of the reasonableness of the inconveniences caused to the buyer by the seller's attempt to cure after the date for performance—some attention must be brought to

[472] *Bundesgerichtshof* (Germany) 24 September 2014, CISG-online 2545: "[o]b die von Art. 48 Abs. 1 CISG aufgestellte Zumutbarkeitsschwelle überschritten ist, lässt sich nur anhand der jeweiligen Umstände des Einzelfalls beurteilen und ist in erster Linie Sache des Tatrichters". In the literature, *see* Bianca/ Bonell/ WILL (1987), Art. 48, p. 352.

the equivalent preconditions laid down under Articles 34 and 37[473]. Conspicuously, these provisions also require that the seller's right to cure prior to delivery date "does not cause the buyer unreasonable inconvenience or unreasonable expense".

Finally, it must be discussed whether a buyer's doubts or lack of confidence in the seller's capability or willingness to accomplish the subsequent performance as required under the contract might constitute unreasonable inconveniences under Article 48(1) and thus amount to a fundamental breach of contract, leading to the exclusion of the seller's right to cure.

Specifically, this lack of confidence may arise not only from an objective incapability of the seller to subsequently remedy numerous and complex defects[474], but also of unprofessional and even deceitful or unlawful acts by the seller during its attempts to cure[475].

To deal with the topic, comparison must be made with the '*Shaken Faith Doctrine*'[476], particularly derived from §§ 2-601 and 2-508 UCC. According to this doctrine, the aggrieved buyer can lawfully reject any tender of performance—initial or subsequent—provided that, even if goods were subsequently repaired by the seller, the buyer would still have reasonable doubts whether the purchased items meet the standard of conformity as contracted, or on whether

[473] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 7; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 633, Para 13; Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 588, Para 15; and Staudinger/ U. MAGNUS (2013), Art. 48, Para 15.

[474] *Oberlandesgericht Köln*, 14 October 2002, CISG-online 709.

[475] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 11.

[476] In the case law, the salient decision in *Zabriskie Chevrolet, Inc. v. Smith* 99 N.J. Super (Law Div.) (1968) 441, 240 A.2d 195—as excerpted by EPSTEIN/ MARTINS (1977), pp. 379-381—was concluded: "[f]or a majority of people the purchase of a new car is a major investment, rationalized by the peace of mind that flows from its dependability and safety. Once their *faith is shaken*, the vehicle loses no only its real value in their eyes, but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension. *The attempted cure in the present case was ineffective*" (emphasis added). In the literature, *see* FRISCH (2014), *Lawrence's Anderson on the UCC*, pp. 835-836, Para 35.

they would always present problems no matter how many times the seller attempts to cure.

Under the CISG, this apparently affirmative answer for the exclusion of the seller's right to cure must be firmly tempered. As well expressed by Profs. Diana Akikol and Lucien Bürki[477], a buyer's doubts and lack of confidence in the seller's capability and/or willingness to furnish subsequent performance as required by the contract must only be assessed against objective criteria and on the basis of ascertainable facts. Buyers' unsubstantiated doubts, internal concerns, mere uncertainty or reluctance with regards to the seller's willingness and/or capability to cure are not sufficient to exclude the seller's cure under Article 48(1).

c) Uncertainty of Reimbursement by the Seller of Expenses Advanced by the Buyer

> In case law, see again the decision (excerpted above[478]) of the *Amtsgericht München* 23 June 1995, CISG-online 368. The seller sought to remedy, under Art. 48(1) CISG, the non-conformity in the sold products—Tetracycline HCL—as was required under the contract. Accordingly, on 25 May 1995, the seller asked the buyer to return the goods to Italy. The buyer commissioned the freight order based solely on the instructions that the seller had given to it. However, this attempt to remedy the lack of conformity failed after the goods were not transported to Italy, but were stored in Munich.
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> In the trial, the *Amtsgericht* finds for the buyer on the grounds that: "[seller] did not perform the remedy within a time period that would not have caused the [buyer] unreasonable inconvenience, that is, until 8 June 1993". Furthermore, the court holds that: "[s]econdly, the [buyer] cannot be held responsible for the fact that it did not dispatch the goods to the [seller] via air freight. Such action would have required specific instructions by the [seller], as the right to remedy was the [seller]'s own responsibility and had to be effected at the [seller]'s expense under Art. 48(1) CISG".

[477] Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, pp. 438-439, Para 6 and footnote 1960; *see MünchKomm*/ P. HUBER (2016), Art. 48, Para 7 who phrases it as follows: "[v]erliert der Käufer *mit gutem Grund* das Vertrauen in die Fähigkeit des Verkäufers zur Behebung des Erfüllungsmangels [...]" (emphasis added).
[478] *See* Ch. II, 2.2.a).

As seen in the case law, and as will be explained elsewhere[479], also when the seller's right to cure under Article 48 is at stake, the buyer is expected to cooperate. This duty includes, at the least, assistance of the seller and a lack of impediment or disruption of the seller's subsequent performance. The main way by which the buyer can cooperate with the seller to accomplish cure is by advancing the payment of certain costs or by assuming expenses prior to reimbursement by the seller[480].

These sums that the buyer is under a duty to anticipate may range from the common example of expenses in returning non-conforming goods[481] to expenses derived from rearrangement works in the buyer's plant. Furthermore, it is submitted by some authors that expenses derived from necessary interruptions of the buyer's business—i.e. inconveniences—are also to be considered under the third blanket clause of Article 48(1)[482].

Conspicuously, costs or expenses advanced by the buyer are to be reimbursed by the seller. This means that the buyer may be under a duty to merely advance expenses, as a manifestation of its duty to cooperate with the performance of the cure; but the aggrieved party is never under a duty to absorb those costs or expenses.

Likewise, the buyer must never pay for the seller's right to cure[483].The clear-cut justification for such a remark is the wording

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[479] *See* Ch. III, 3.1.2.b) and 3.2.10.

[480] BRIDGE (2013), *Int' l Sale of Goods*, p. 588, Para 12.26; Staudinger/ U. MAGNUS (2013), Art. 48, Para 16; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 11; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, pp. 567-568, Para 27 affirming: "[d]ieses Erstatungsrisiko ist aber unabhängig davon gegeben, ob der Käufer einzelne Beträge in Gel vorstreckt oder Sachaufwand in Kauf nehmen muss […]".

[481] It is clear, in the above excerpted decision *Amtsgericht München* 23 June 1995, CISG-online 368 that the buyer had to commission the freight to transport the defective goods back to Italy for the purpose of the seller's right to cure.

[482] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 8; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 12; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, pp. 567-568, Para 27.

[483] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 12: "[s]ince the seller must bear the costs […]"; Staudinger/ U. MAGNUS (2013), Art. 48, Para 16; for cases in which the seller ask an additional payment in exchange for cure *see below* Ch. III, 3.2.7.

of Article 48(1), which reads: "the seller may […] remedy at his own expense".

Therefore, if the buyer faces uncertainty in the reimbursement of those advanced costs and assumed expenses, it becomes relevant grounds to deem the seller's attempt to cure unreasonable. This follows from the third blanket clause set in Article 48(1), whose aim is to protect the buyer on this count. According to this legal prerequisite, there must be no *uncertainty of reimbursement* of those expenses that the buyer might have advanced in complying with the seller's right to cure.

In spite of the apparent simplicity of this legal formulation, four considerations are to be analyzed under what can be known as the '*Uncertainty of Reimbursement Test'*:

Firstly, it must be decided whether the seller's reimbursement of advanced expenses by the buyer must only be *uncertain* or also *unreasonably uncertain.* The question turns up from the ambiguous wording of Article 48(1), which seems to link unreasonableness and uncertainty of reimbursement by reading: "without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer". The Secretariat's Commentary[484]—as well as some opinions in the relevant literature—have supported this interpretation[485]. Adopting the contrary opinion, however, this interpretation should not be derived from the wording of Article 48(1)[486].

Be that as it may—i.e. irrespective of the standard of reasonableness in determining the notion of uncertainty—it can be argued that the

[484] *Secretariat's Commentary*, O R Art. 44, p. 41, Para 11 which reads: "[i]f there was an *unreasonable uncertainty* that the buyer would be reimbursed for those expenses" (emphasis added).

[485] Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 523, Para 15 (Unzumutbare Ungewissheit); *see also* SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 567, Para 26.

[486] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 12 resorts to the French version of the Convention, which reads: "[e]t ne cause à l'acheteur ni inconvénients déraisonnables *ni incertitude* quant au remboursement par le vendeur des frais faits par l'acheteur" (emphasis added); and Bianca/ Bonell/ WILL (1987), Art. 48, p. 353.

result in practice is virtually the same. The rationale for this conclusion is explained in the remaining sections.

Secondly, the level of uncertainty of reimbursement of advanced expenses is not only related to the seller's *willingness* to pay, but also to its *capability* to reimburse the expenses already advanced by the buyer. A clear-cut example is the seller's likelihood to fall into bankruptcy or to become insolvent[487].

Thirdly, whatever the cause, it must be stressed—in line with the question indicated above under the first remark—that not all degrees of uncertainty are sufficient to exclude the seller's right to cure. For instance, unsubstantiated doubts on the part of the buyer as to the willingness or capability of reimbursement by the seller are deemed to be irrelevant in excluding the application of Article 48. As was already discussed under inconveniences, buyer's doubts are to be well-founded or at least meet an ascertainable threshold of seriousness[488].

Moreover, the seller is entitled to provide the buyer with securities, substantiating that it is willing as well as well as economically able to undertake the owed reimbursement. On the flip side, these securities proffered by the seller allow it to secure its own right to cure under Article 48(19) by eliminating any relevant degree of uncertainty[489].

> These securities, provided by the seller on the reimbursement, may be compared with those set forth in Articles 71(3) and 72(2). These latter provisions lay down assurances of performance to be given, by the potential breaching party, in order to avoid—respectively—suspension of performance or an anticipatory breach by the potential aggrieved party.

For example, the seller may provide the buyer with an adequate bank guarantee or with security of a quick payment, regarding which it is submitted that it must amount to a security on a first-demand-basis[490]. Conspicuously, security of reimbursement can

[487] Bianca/ Bonell/ WILL (1987), Art. 48, p. 353.
[488] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 12.
[489] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 8.
[490] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 11.

also be achieved by offsetting the sums that the buyer has to pay under the contract—principally, the purchase price. Hence, either the seller can offer the buyer offset against the price[491] or the buyer can merely offset by itself[492].

> Some authors point out that reimbursement of expenses, remarkably, must—according to the general principles of the CISG Article 7(2)— be done at the creditor's—here, buyer's—place of business[493].

Fourthly, it must be considered, on the merits of Article 7(1), whether the amount of advanced expenses can alter the assessment of exclusion of the seller's right to cure under Article 48(1). Whereas prominent voices have affirmed that the amount of expenses is not relevant, as it is not even mentioned in the wording of the provision at issue[494], nowadays one can also find opinions arguing the opposite answer[495].

According to the latter opinion, only a relevant amount of expenses advanced by the buyer entails the exclusion of the seller's right to cure after performance date. This interpretation aims to avoid an excessively strict interpretation of Article 48(1), which would lead to the exclusion of the seller's right to cure for even insignificant advanced expenses, in cases where cure would be an appropriate solution.

> A final remark is appropriate, in line with the problem—discussed above between delay and inconveniences—that some of the blanket clauses under Article 48(1) overlap in practice. It is submitted that a high amount of expenses to be advanced by the buyer due to its cooperation with the seller's attempt to cure may be directly categorized as causing

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[491] Witz/ SALGER/ Lorenz (2016), Art. 48, p. 406, Para 3 who reads: "[e]ntsprechenden Bankbürgschaft oder rasche Bezahlung, häufig auch der Käufer im Wege der Aufrechnung mit dem Kaufpreis".

[492] For instance, *see Amtsgericht München* 23 June 1995, CISG-online 368. In this case, the buyer—as a precaution—declared a set-off against the seller's claim for payment of the purchase price with its counterclaim for damages.

[493] JANSSEN/ KIENE (2009), *General Principles*, p. 280.

[494] BRIDGE (2013), *Int' l Sale of Goods*, p. 588, Para 12.26; Bianca/ Bonell/ WILL (1987), Art. 48, p. 353 who states: "[t]he amount of the expense is not considered. However small the amount, what counts is the uncertainty of its recovery".

[495] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 12; Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 523, Para 15; and *MünchKomm*/ P. HUBER (2016), Art. 48, Para 8.

unreasonable inconvenience to the buyer. Therefore, unreasonable inconveniences—rather than uncertainty of reimbursement—is what would exclude the seller's right to cure after delivery date[496].

2.3 Burden of Proof in Regard to the Preconditions for the Existence of the Seller's Right to Cure

In the case of dispute, whereas the seller bears the burden of proving the *suitability* of its subsequent attempt to cure with respect to the particulars of the given scenario of breach of contract, the buyer has to prove its *unreasonableness*[497]. This follows first and foremost from the general principle that every party has to prove the facts on which a lodged claim—be it right or a defense[498]—is based.

As to the former, on the one hand, the seller has to prove whether the general preconditions for the existence of its right to cure after delivery date are met. For example, the seller must prove a contractually-based attribution of such a right, and that it is still feasible to cure an established breach. On the other hand, the allocation of proof borne by the seller further includes the burden to produce evidence that the chosen method of cure is adequate, taking into account the circumstances. The seller has to prove that a chosen method of cure is suitable in achieving full performance of the contract and meeting the buyer's legitimate interests[499].

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[496] BRIDGE (2013), *Int' l Sale of Goods*, p. 588, Para 12.26; *see* SIVESAND (2006), *Buyer's Remedies*, p. 108 who refers to the preparatory works for the Swedish Sales Act; and Bianca/ Bonell/ WILL (1987), Art. 48, p. 353.

[497] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, pp. 767-768, Para 13; and Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 729, Para 17: "[d]er Käufer, welcher der Nacherfüllung widerspricht, hat deren Unzumutbarkeit (Abs. 1) zu beweisen; Die Tauglichkeit der beabsichtigten Nacherfüllung ist dagegen vom Verkäufer zu beweisen".

[498] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, p. 137, Para 35 states that the principle arises from Articles 2(a) and 79; and Ferrari *et al*/ FERRARI (2011), *Int VertragsR*, Art. 25 p. 553, Para 15.

[499] *See also* German *Bundesgerichtshof* 3 April 1996, CISG-online 135. *Furthermore*, *MünchKomm*/ P. HUBER (2016), Art. 48, Para 34; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 585, Para 64; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 737, Para 13 who stresses "Der Verkäufer ist beweispflichtig für die *Tauglichkeit* der beabsichtigten Nacherfüllung" (emphasis added).

As regards the buyer's proof, if this party disputes the seller's right to cure after delivery date, it has to prove its unreasonableness by evidencing the concurrence of one or more Article 48(1)'s specific preconditions—i.e. blanket clauses. Namely, the buyer bears the burden of ascertaining and proving that a certain seller's attempt to cure would cause unreasonable delay, unreasonable inconveniences, or uncertainty in reimbursement of expenses that the buyer advanced[500].

> For example, in case law, the decision of the *Handelsgericht* Aargau 5 November 2002, CISG-online 715. The Swiss court took into account the burden of proof as regards the—reputedly exceptional—(un)reasonableness of the seller's subsequent performance and concluded: "[a]s [seller] has […] declared his readiness to remedy, the [buyer] has to bear the onus of assertion and proof concerning the existence of an exceptional fact of the case".

The above distribution of the burden of proof between the buyer and the seller is upheld by three main justifications:

i. *Wording*

The allocation results from the very wording of Article 48(1)[501]. The provision refers to the blanket clauses in a negative phrasing; as a consequence, the order in which the factors are displayed in the provision arguably upholds the interpretation that the seller's right to cure is the general rule whereas its denial by the buyer the exception[502].

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[500] Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 441, Para 11; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, pp. 580, 585, Paras 47a, 64; Staudinger/ U. MAGNUS (2013), Art. 48, Para 46; and Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 524, Para 16.
However cf. MünchKommHGB/ BENICKE (2013), Art. 48, Paras 23, 24 who considers that the seller has to evidence not only the objective possibility of undertaking the cure but also its reasonableness, whereas the buyer only bears the burden of proving the exceptional circumstances stemming from its own sphere.

[501] Art. 48(1) reads: "[t]he seller may […] remedy at his own expense […] *if he can do so without* […]" (emphasis added). *See MünchKomm*/ P. HUBER (2016), Art. 48, Para 34 ("wenn dies keine"); and Baumgärtel/ Laumen/ Prütting/ HEPTING/ MÜLLER (2009), *Handbuch der Beweislast*, Art. 48 CISG, p. 678, Paras 7, 8 ("wenn nicht").

[502] Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 524, Para 16; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, pp. 767-

> Furthermore, such interpretation neatly complies with the CISG general principle per which the party that wants to rely on an exception has to prove the factual prerequisites for that exception[503].

ii. *Proof Proximity*

The second justification takes into account the proximity and ease of acquiring evidences to substantiate each of the positions concerning the seller's right to cure under Article 48(1). On the one hand, the seller is better placed to have information about the suitability of its cure. For instance, this party assumedly better knows whether the chosen method of cure will abide by the contract terms, will accomplish full performance, and will meet the buyer's legitimate contractual interests. By contrast, a priori, the buyer might have no or very little information on this count.

On the other hand, it is submitted to be within the buyer's sphere of control—and thus, easier for it to acquire knowledge and collect proofs regarding—whether the relevant circumstances related to reasonableness under Article 48(1)'s blanket clauses are fulfilled. In addition, the buyer is also the party who, a priori, occupies the best position to ascertain how a subsequent performance by the seller is going to affect its legitimate interests[504].

iii. *Fundamental Breach*

The final justification is linked with the existence of a fundamental breach within the meaning of Article 25. It is affirmed that, in cases of breach of contract by the seller, the buyer is the party who bears the burden of proving the fundamentality of the breach[505].

768, Para 13; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, pp. 736-737, Para 13.

[503] JANSSEN/ KIENE (2009), *General Principles*, p. 278 who states: "[…] following from Art. 2(a), 35(2)(b) and 79 CISG a party bears the burden of proof for those prerequisites of a provision that are profitable to him. If a party wants to rely on an exception, he has to prove the factual prerequisites of that exception".

[504] Baumgärtel/ Laumen/ Prütting/ HEPTING/ MÜLLER (2009), *Handbuch der Beweislast*, Art. 48 CISG, p. 679, Para 9; and Staudinger/ U. MAGNUS (2013), Art. 48, Para 46.

[505] Ferrari *et al*/ FERRARI (2011), *Int VertragsR*, Art. 25 p. 553, Para 15; *MünchKommHGB*/ BENICKE (2013), Art. 48, Paras 23, 24 Baumgärtel/ Laumen/ Prütting/ HEPTING/ MÜLLER (2009), *Handbuch der Beweislast*, Art. 48 CISG, p.

> As discussed elsewhere[506], the curability of the breach is a factor to mainly take into consideration when assessing the intensity—i.e. fundamental character—of an established breach of contract. The seller's right to cure per Article 48(1), thus, represents one of the key mechanisms for pursuing and accomplishing such a cure. On the flipside, the seller's right to cure is immediately deemed unreasonable and thus excluded from the outset wherever the intensity of the breach already amounts to a fundamental failure to perform.

Therefore, it seems consistent that the party who bears the burden of proving the broader notion of fundamentality of the breach under Article 25, also bears the burden of evidencing the exclusion of one of its indirect factors, i.e. the seller's right to cure under Article 48(1)[507].

> It must be noted that this constitutes one of the most common scenarios in case law; where the buyer had declared the contracted avoided on the basis of an apparent fundamental breach and the seller disputed such avoidance along with suing its counter-party for payment of the purchase price. Before the court, the seller has to prove that its cure would have fitted into the circumstances and there was a suitable mechanism to achieve successful cure. On the other side, the buyer has to prove the unreasonableness of the cure under Article 48(1), for example because the failure to perform by the seller already amounted to a fundamental breach.

679, Para 10; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 435, Para 34.

[506] *See below* Ch. IV, 4.1.

[507] Baumgärtel/ Laumen/ Prütting/ HEPTING/ MÜLLER (2009), *Handbuch der Beweislast*, Art. 48 CISG, p. 679, Para 10, who reads: "[e]s ist sinnvoll, wenn die Beweislast für diejenigen Umstände, von denen die Zulässigkeit der Nacherfüllung abhängt, bei derselben Partei liegt".

CHAPTER 3. PERFORMANCE OF THE SELLER'S RIGHT TO CURE UNDER ARTICLE 48 CISG

3.1 Communications between the Parties: Setting an Opportunity to Remedy Under Article 48(2)(3)(4)

3.1.1 Parties' Agreement on Communication Regime

First and foremost, following on from Article 6 CISG, the parties may expressly or implicitly agree to alter the default communication regime set by Article 48(2-4), as well as to shape a specific rule that might deviate from the general *Dispatch Rule* set forth in Article 27 CISG. This could lead to the result, for instance, that a buyer who is seeking to answer the seller's offer of cure after delivery date might no longer deem the mere dispatch of its communication[508] effective, but might require the seller's reception.

> *Article 27*
>
> Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by any means appropriate in the circumstances, a delay or error in transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Furthermore, parties can seek to ossify the notion of "appropriate means in the circumstances" set forth in Article 27 upon which the effectiveness of the dispatch rule hinges. In particular, parties may consent to the appropriateness and value (for their agreement) of electronic communications—e.g. email, recorded voice messages, or the mobile commerce—by customizing in their contract the notion of "writing" under Article 13 CISG[509]:

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[508] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 35; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 586, Para 67. *Cf.* LOOKOFSKY (2016), pp. 153, Para 224, who considers that: "paragraphs (2)-(4), contains a series of logical rules".

[509] In the case law, *Olivaylle Pty. Ltd. v. Flottweg GmbH & Co KGAA* Federal Court of Australia 20 May 2009, CISG-online 1902. *See also* Ferrari *et al*/ GARRO (2004), *Draft Digest*, pp. 370-371; BUTLER (2014), pp. 127, 144; the 1996 *Model Law on Electronic Commerce*; and the 2001 *Model Law on Electronic Signatures* drawn up by UNCITRAL as well as the 2005 *UN Convention on the Use of Electronic Communications in International Contracts* (ECC).

> *Article 13*
>
> For the purposes of this Convention "writing" includes telegram and telex.

As pointed out in the literature[510], the parties may be well-advised to include these stipulations in order to tailor the communication regime to their particular contractual interests. As a result, a neat system for communications agreed in advance will provide the parties with valuable certainty as to their positions in the post-breach scenario.

This greater certainty is strikingly important when it comes to the seller's right to cure after the date for performance. A clearer contractually-based communication regime—adjusting the default rules under Article 48(2-4) CISG—may be extremely beneficial, for example, when the particular circumstances give rise to doubts about the reasonable curability by the seller of its failure to perform.

3.1.2 Purposes of the Communication Regime

Under the Convention, the seller's right to cure after performance date governed by Article 48(1) CISG exists *per se*—i.e. insofar as its general and specific preconditions are met—entitling the seller to impose its subsequent performance on the buyer. In other words, the existence of such a seller's right does not depend on any previous notice to the buyer about its offer or intention to cure[511].

> As analyzed previously, this feature is a crucial difference with Article 7.1.4 UNIDROIT Principles, under which the existence of the seller's right to cure is subject to the effective notice to the buyer by the seller[512].

By contrast, what actually depends on the notice given by the seller to the buyer is the rightful performance and following-up effects of the seller's right to cure, either under Article 48(1) or Article 48(2-

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Finally, particular attention must be brought to the CISG-AC Opinion no 1 on *Electronic Communications under CISG*.

[510] SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 586, Para 67.

[511] KEE (2007), p. 190; and Staudinger/ U. MAGNUS (2013), Art. 48, Para 36.

[512] *See above* Ch. I, 1.1.3.a).

4). As to the latter, however, it must be preliminarily noted that an opportunity to cure under Article 48(2-4) may apply to all factually remediable failures to perform, irrespective of the reasonableness or the seriousness of the breach. Hence, it not only applies wherever the initial breach would be deemed unreasonably curable under the yardstick of Article 48(1)'s specific preconditions, but also to scenarios that amount to a fundamental breach within the meaning of Article 25 CISG.

As a result, following the straightforward explanation presented by Prof. Peter Huber[513], it can be stated that the communication regime under Article 48(2-4) pursues two main goals: (1) to allow both parties to dissipate uncertainties regarding the subsequent performance; and (2) to allow the seller to secure its right to cure irrespective of Article 48(1)'s specific preconditions. All in all, a proper notice of cure to the buyer determines the availability and effectiveness of the buyer's remedies for breach, as Article 48(2) *in fine* lays down:

> *Article 48(2)*
>
> "[…] The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller".

a) To Eliminate Uncertainty

As to the first goal, the seller is well-advised to notify the buyer of its offer to cure prior to undertaking any steps towards subsequently performing. This applies to both scenarios; either if the breaching seller intends to impose cure under Article 48(1) or seeks to ask for an opportunity to subsequently perform pursuant to Article 48(2-4).

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[513] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 2; *see also* FOUNTOULAKIS (2003), p. 167; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 436, Para 1; ad GILLETTE/ WALT (2016), p. 270.
However, for additional goals:
Cf. Bianca/ Bonell/ WILL (1987), Art. 48, p. 354 who added a third purpose, linked with the idea of cooperation between parties in regard to cure after performance date: "[t]he buyer deserves protection only when he is cooperative and gives the seller a fair chance";
Cf. HEUZÉ (2000), *Vente internationale*, Art. 48, p. 374, Para 423 who seems to stress the mere purpose of informing the buyer: "[c]ar ce dernier [créancier], s'il n'en était pas informé, pourrait prendre ses dispositions pour remédier à la carence de son cocontractant, notamment en s'adressant à un tiers".

As pointed out, all these communications consistently aim to strike a balance with the situation of uncertainty in which the parties are left when breach-of-contract has been established.

What is more, this uncertainty can give rise to a situation of jeopardy under some circumstances. Namely, if the seller is convinced of the reasonableness of its subsequent performance under Article 48(1) but the buyer is seeking avoidance of contract because it has already lost all interest in performance, this constitutes a fundamental breach per Article 25 in conjunction with Article 49(1)(a)[514]. In these scenarios, if the seller did not communicate before attempting to subsequently perform and, in the meanwhile, the buyer rightfully declares the contract avoided, the practical result would be a dramatic loss of resources due to the seller's futile effort to cure[515].

Such uncertainty is nurtured by, on the one hand, the fact that the breaching seller is unlikely to be aware of the post-breach interests, strategies and intentions of the aggrieved buyer. Furthermore, the seller is also likely worse positioned to assess idiosyncratic circumstances in the buyer's sphere of business that may lead to the seller's right to cure under Article 48(1) being unreasonable, e.g. resultant significant interruptions in the buyer's production, compromises with the buyer's customers, etc.

On the other hand, the aggrieved buyer may also face important uncertainties as to assess: whether a cure by the seller under Article 48(1) is feasible, whether it is reasonable under the triple yardsticks of Article 48(1), and whether the seller is willing to and capable of imposing it. Here, in contrast to the source of uncertainty described above, the relevant information is likely to be closer to the breaching seller. For instance, the reasonableness of the seller's cure may be specifically related to technical characteristics of the goods, regarding which only the seller has the relevant information.

[514] Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 529 Para 30; and *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 1.

[515] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 772, Para 24: "[…] give the seller a means of clarifying the situation, in order to protect him from futile attempts at subsequent performance".

- A gap in Article 48(1)? Whether There Exists a Seller's Duty to Communicate the Curability of the Breach in a Reasonable Time

The latter consideration about uncertainty—that relevant information about whether a failure to perform is curable according to Article 48(1) might only be available to the breaching seller—has given rise to the following question. Some authors have asked whether the effective and fair exercise of Article 48(1) requires the seller to be held to a duty to disclose the remediability of its failure to perform in a reasonable period of time after the breach has been established[516].

> As seen previously, this concern is straightforwardly addressed by Article 7.1.4.(1)(a) of the UNIDROIT Principles. This provision conditions the existence of the debtor's right to cure after the date for performance to a seller's timely notice to the buyer about its intended cure[517]:
>
> Article 7.1.4 *Cure by non-performing party*
>
> (1) The non-performing party may, at its own expense, cure any non-performance, provided that
>
> (a) Without undue delay, it gives notice indicating the proposed manner and timing of the cure;
>
> […]

The discussion about the existence of such a duty on the part of the breaching seller becomes more relevant taking into account that, under the Convention's scheme, the curability of a failure to perform is an important factor to be considered when determining the fundamentality of a breach of contract under Article 25.

Likewise, fundamentality of the breach aside, the seller's right to cure under Article 48(1) has, on its own, a shocking impact on the availability of the buyer's remedies for breach of contract. The

[516] FOUNTOULAKIS (2003), p. 167; Kröll *et al*/ P. HUBER (2011), Art. 48, Paras 14, 15. The categorization as a duty seems more appropriate as its failure would only bring about the loss of the party's own rights, and cannot be enforced by the counter-party's remedies. For the distinction between so-called non-actionable duties and contractual obligations under the Convention *see* Schlechtriem/ Schwenzer/ SCHWENZER (2016), *Commentary 4th ed.*, Art. 74, pp. 1061-1062, Para 13; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), *Commentary 4th ed.*, Art. 45, pp. 721-722, Paras 3, 4.

[517] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 15; and *see above* Ch. I, 1.1.3.a).

aggrieved buyer can only rightfully—and thus, effectively—exercise those remedies for breach inconsistent with the seller's subsequent performance once the seller's failure to perform is deemed unreasonably curable[518]. The clearest example in this regard is the remedy of reduction of the price under Article 50:

> *Article 50*
>
> […] However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Therefore, if the determination of the curability was entirely left to the seller, the buyer might find itself in an awkward situation. It would have scarce remedies to defend its interests— perhaps only the right to withhold own performance. Furthermore, if the seller was not forced to disclose the remediability of an established breach of contract in a timely manner, the result would directly undermine the haste that should govern international trade[519].

A first doctrinal opinion admits that Article 48 CISG does not entirely address these potential questions and proposes two main ways to resolve any doubts. On the one hand, the duty to observe good faith in international trade, by virtue of an extensive interpretation under Article 7(1), may account for the imposition on the seller of a duty to promptly disclose the curability of the breach. Likewise, this duty could be directly derived from the general principles of the Convention, by the technique of gap-filling under Article 7(2)[520]. On the other hand, a duty to disclose can also be imposed on the breaching seller by analogically adopting the rule of Article 7.1.4.(1)(a) of the UNIDROIT Principles[521].

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[518] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 764, Para 1, Footnote 2, comparatively referring to Nachfrist under German sales law, §§323 and 437(2) BGB.

[519] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 14. Furthermore, the author stresses that the buyer cannot dissipate the uncertainty by fixing a Nachfrist, as—under the CISG—the expiration of such additional time does not generally upgrade failures to perform to fundamental breaches. This only occurs in particular cases, namely, non-deliveries under Articles 47(1) and 49(1)(b) CISG.

[520] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), *Commentary 4th ed.*, Art. 7, pp. 127, 128, Paras 17, 19.

[521] For both see Kröll *et al*/ P. HUBER (2011), Art. 48, Paras 14, 15.

By contrast, other authors argue that no gap is to be filled under Article 48(1)[522]. For the proper exercise of the seller's right to cure under Article 48(1), there is arguably no need to impose an express duty to timeously give notice regarding the curability of the breach, the failure of which would lose the seller its right to cure. Dynamics of the cure regime under Article 48(1) create adequate incentives to force the seller to timeously make known the curability of the breach and their willingness to cure. The rationale can be summarized as follows:

Strategically—by successfully curing under Article 48(1)—the seller can eliminate (or at least minimize) the buyer's losses resulting from the breach of contract. Therefore, the more time the seller delays its notice regarding the curability of the established breach of contract, the larger the damages amount that the seller will have to pay to the buyer pursuant to Article 48(1) *in fine* in conjunction with Articles 74-77 CISG. It is obvious that the seller will try its best to quickly and properly exercise its right to cure after the date for delivery, by giving the buyer a timely notice about the curability and its willingness to remedy. It stands only to benefit from doing so.

In addition, the more the time the seller delays its offer of or notice regarding its intended cure, the more the cure can itself be deemed to cause unreasonable delay or inconveniences to the buyer per the specific preconditions of Article 48(1)[523]. Furthermore, the lack of a prompt reaction—by notice—to the curability of a given breach might constitute solid evidence of the seller's lack of willingness—or even capability—to cure.

> From a behavioral enforcement viewpoint, two motivations are clear. Firstly, the threat of reputational damage—provided that breaches are easily observable in the market—is an important incentive for subsequent performance. The seller may be eager to meticulously and faultlessly effect cure after delivery date—requiring, obviously, prompt notice to the buyer—in order to maintain the commercial relationships

[522] HONNOLD/ FLECHTNER (2009), p. 428, Para 296.
[523] SIVESAND (2005) p. 117: "[a]fter the buyer has notified the seller, the latter must become active in order not to lose his right to cure, and as a result, the conflict will be resolved speedily".

> and its reputation in a highly-specialized market. Secondly, long-term relationships between the same parties, which are a form of repetitive game often known as *relational contracts*, create powerful scenarios of self-enforcement where parties are wont to amicably solve their disputes[524].

Finally, the buyer can either inquire about the curability of the breach, by simply sending it a request regarding cure, or provoke the seller's reaction by lawfully resorting to one of its remedies compatible with the seller's cure after the date for performance. These buyer's remedies not only do not bar the seller from offering its cure, but are specific-performance orientated.

Therefore, the buyer should not be prevented from exercising its remedy to ask for performance under Article 46(1)—in case of non-conformity 46(3)—or to fix a Nachfrist under Article 47(1)[525].

If the seller then fails to respond to the buyer's simple inquiry or if it does not react to the exercised remedy, the seller might assumedly be found in a situation of repudiation of performance. This is a *Nichtleistung*—i.e. a definitive failure to perform—that would open the door to the buyer's set of remedies for breach and could, a priori, also amount to a fundamental breach per the definition in Article 25[526].

However, under the CISG, the curability of the breach is a crucial factor in the so-called *Fundamentality-Test*. Hence, insofar as the buyer may be expected to cure the breach by itself, the buyer cannot, even if the seller refused to perform, avoid the contract on account of a fundamental breach pursuant to Article 25 in conjunction with Article 49(1)(a).

b) To Set an Opportunity to Remedy Regardless the Unreasonableness of the Cure (or the Fundamentality of the Failure to Perform)

[524] Polinsky/ Shavell/ HERMALIN/ KATZ/ CRASWELL (2007), pp. 122-123.
[525] *See below* Ch. IV, 4.2.4 and 4.2.5 for the interplay between these remedies and the seller's right to cure.
[526] This was the case decided by *Arbitral Award, Hamburg Friendly Arbitrage* 29 December 1998, CISG-online 638, where the seller refused to deliver some of the installments in which the contract was construed.

> *Arbitration Court of the International Chamber of Commerce*, Final Award No. 7531, 1 January 1994, CISG-online 565. An Austrian buyer and a Chinese seller entered into a contract for the purchase of scaffold fittings. The goods finally delivered turned out to be seriously defective under the standards of Article 35 CISG. On this basis, the buyer declared the contract avoided and lodged a claim for compensation of the damages that the resale of a part of the goods at a lower price had given rise to.
>
> The sole adjudicator found for the buyer, verifying the fundamentality of the occurred breach upon which the buyer had declared the contract avoided pursuant to Article 49(1)(a). In particular, the adjudicator affirms that the breaching seller was not entitled to remedy by supplying substitute goods in accordance with Art. 48(1) CISG, since in the opinion of the sole arbitrator, this seller's right is dependent on the consent of the buyer.

This case serves to depict a rather controversial feature of the seller's right to cure under Article 48 CISG. As explained above, once a failure to perform has been established, the seller is well advised to quickly give notice, offering performance to the aggrieved buyer, in accordance with the communication regime under Article 48(2-4) CISG. Should specific preconditions for the existence of the seller's right to cure under Article 48(1) be met, this breaching party can then impose its cure on the buyer, even if the latter seeks a different solution.

However, Article 48(2-4) CISG notably creates another group of cases. Under this default provision, the breaching seller can also give notice to the buyer regarding its intent to cure in scenarios where the seller's subsequent performance would be deemed unreasonable under the specific preconditions of Article 48(1). Ultimately,' this assumption holds true even if the failure to perform amounts to a fundamental breach of contract, per the definition in Article 25[527]. In a striking difference from the previous group of

[527] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 772, Para 24: "[t]he right to remedy by subsequent performance pursuant to Article 48(2) exists even if the seller is not entitled to it pursuant to Article 48(1)". Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 740, Para 24; HONNOLD/ FLECHTNER (2009), p. 430, Para 298; *MünchKommHGB*/BENICKE (2013), Art. 48, Para 14; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 11; MAK (2009), p. 168; Ferrari *et al*/SAENGER (2011), *Int VertragsR*, Art. 48, p. 727, Para 7; and TREITEL (1989), *Remedies for Breach*, p. 373, Para 276.

scenarios, here, the seller cannot impose cure on an aggrieved buyer but may merely offer it. In this group of cases only, then, must the buyer consent to the seller's right to cure.

Reinforcing this argument, some authors[528] posit that the fact that the buyer has already gained remedies inconsistent with the seller's performance, e.g. price reduction or avoidance of contract, does not necessarily mean the exclusion of the seller's right to cure after performance date. In other words, when the circumstances of the failure to perform reach the threshold of fundamental breach, or when cure is merely no longer feasible per Article 48(1)'s blanket clauses, these circumstances do not exclude *per se* a seller's right to cure under Article 48(2-4) CISG.

> Clearly, with this broader scope of application that encompasses fundamental breaches, the seller's right to cure under Article 48(2-4) CISG moves closer to the seller's rights to cure under Articles 7.1.4 UNIDROIT Principles, 8:104 PECL, and III.– 3:201 to III.– 3:204 DCFR. As seen, these rights to cure are, a priori, triggered by any non-performance, irrespective of its seriousness.

Only the rightful—i.e. effective—assertion of those buyer's remedies for breach inconsistent with a subsequent performance of the contract—in particular, avoidance of the contract under Article 49 CISG[529]—leads to the outright exclusion of the seller's cure after delivery date. A lawful assertion of this group of remedies for breach also lends weight to the fact that the buyer is neither obliged to accept any other offer of subsequent performance from the seller[530], nor it is expected to comply with a duty to respond to further communications about cure—even under Article 48(2-4).

> Comparatively, this is an important difference from the seller's right to cure set forth under Article 7.1.4 of the UNIDROIT Principles. According

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However, *Cf.* SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 576, Para 39.

[528] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 36; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 28; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 19.

[529] SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449: "[s]olange der Käufer den Vertrag nicht *wirksam* aufgelöst hat, […]" (emphasis added); and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 30: "[i]f the buyer is justified in declaring the contract avoided (Article 49(1)) before the seller's offer reaches him, then the right to remedy by subsequent performance has lapsed and the contract is avoided".

[530] UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 233, Para 2.

> to the second paragraph of this provision, even if the aggrieved buyer considered the contract avoided, the seller can subsequently cure:
>
> Article 7.1.4 *Cure by non-performing party*
>
> (2) The right to cure is not precluded by notice of termination.

Despite the apparently extensive application of the seller's right to cure after the date for delivery under to Article 48(2-4) CISG, a fair balance of interests between the parties is always guaranteed by the CISG default set of rules. Hence, taking into account the communication regime under Article 48(2-4), in conjunction with this allocation of the burden of proof between parties with regards to the seller's right cure, Prof. Vincent Heuzé[531] categorised the resulting scenarios thusly:

(i) the buyer accepts cure;
(ii) the buyer rightfully or unrightfully rejects cure;
(iii) the buyer remains silent by failing to give a timely response.

> As a reminder, once an aggrieved buyer receives an offer of cure, it is up to this party to furnish evidence of the fundamentality of the failure to perform and to exercise remedies upon this qualification. Likewise, this party must substantiate all circumstances or idiosyncratic legitimate interests that could lead to the exclusion of the seller's cure on the basis of unreasonableness per Article 48(1)'s specific standards.

(i) Consent to the Offer of Cure

First of all, the aggrieved buyer may accept to the proffered attempt at cure even if such cure would be deemed unreasonable under the circumstances and per Article 48(1). Furthermore, the buyer may also accept such cure even if the failure to perform by the seller amounts to a fundamental breach of contract per the definition in Article 25. This buyer's acceptance can occur in those cases in which, in spite of the fundamental failure to perform by the seller,

[531] HEUZE (2000), *Vente internationale*, Art. 48, pp. 374-375, Para 424: "Aussi bien trois situations sont alors envisageables :
– Soit le créancier accepte formellement l'offre d'exécution […] ;
– Soit le créancier ne répond pas expressément ou, du moins, ne répond pas dans un délai raisonnable […] ;
– Soit, enfin, le créancier […] refuse l'offre qui lui est faite […]".

the buyer's preferences change[532], and it considers that it is still in its interest to obtain performance of the contract on the agreed terms.

> In the case law, see *Landgericht Oldenburg* 9 November 1994, CISG-online 114. An Italian seller and a German buyer entered into a sales contract for the purchase of six lorry platforms and two belts. Upon delivery, the buyer gave notice to the seller of the lack of conformity in the goods and the seller took back five of the six platforms for repair. With regards to this opportunity to cure by the seller, the German court affirmed: "[t]he Court assumes that the repair of the defects had been a consensual cure in accordance with Arts. 46(3), 48 CISG".

It is important to stress that this scenario of subsequent cure—resulting from the buyer's acceptance of an a priori unreasonable performance—does not amount to a waiver, a modification, or an amendment of the contract[533]. The contract is to be executed by the same contracting parties in its original stipulated terms, except for the delay in performance. This inevitably entails a subsequent tender of performance, which is to be compensated by damages. Therefore, the parties abide by the same duties and obligations that they originally contracted for.

In conclusion, it would be trite to note that there must be no legal restriction of the seller's cure in such scenarios. Subsequent performance of the contract in its original terms is the product of bilateral consent that is not only in the interests of both parties—as expressed by the seller's offer to cure and the buyer's assent, both under Article 48(2-4)—but also, as presented above, neatly in tune with one of the basic principles of the Convention: *Favor Contractus*.

The remaining crucial point to be discussed here is whether and to what extent the buyer's acceptance can be established. Of course, there is consent whenever the buyer directly and expressly replies affirmatively to the seller. However, a trickier question is whether

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[532] An explanation for the buyer's decision from a behavioral perspective could be, for example, that an aggrieved buyer cares more about future transactions to be concluded with the breaching seller than about exercising remedies arising from a fundamental breach in a discrete contract.

[533] SCHWENZER/ HACHEM/ KEE (2012), pp. 190-191, Paras 14.01, 14.03.

the buyer may tacitly accept the seller's offer of cure under Article 48(2-4)[534].

On this count, Article 18(3) CISG sets forth the possibility, under the Convention, that a party gives assent to an offer for the formation of a sales contract by merely performing acts.

> *Article 18(3) CISG*
>
> (3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

However, when it comes to setting an opportunity to cure under Article 48(2-4) CISG, the tacit consent of the buyer to the seller's offer to cure the breach—rather than a thinner scenario of assent implicitly indicated by mere acts—is better addressed under the rules of a waiver of rights. In this regard, then, the hallmark decision is that of the *Bundesgerichtshof* 25 November 1998, CISG-online 353[535].

> A German seller entered into a sales contract with an Austrian buyer. The goods involved were a removable surface-protective film, to be used in the production process of metal by a third company. Upon the first use of the purchased goods, they turned out to be defective. After being notified, the buyer forwarded the notice of the lack of conformity in the goods to the seller. Both entered into negotiations, over a period of 15 months, as to the amount of damages and how they should be paid. In so doing, the seller did not reserve its right to rely on Articles 38 and 39 CISG (duties to examine and give notice of the lack of conformity in the goods). Finally, the buyer lodged a claim for reimbursement of the expenses that he suffered due to the non-conformity of the delivered goods.
>
> The German Supreme Court found for the buyer and in so doing reversed the appellate court's decision, which dismissed the buyer's

[534] HEUZE (2000), *Vente internationale*, Art. 48, p. 375, Para 424: "Soit le créancier ne répond pas expressément […]".
[535] Schlechtriem/ Schwenzer/ SCHMIDT-KESSEL (2016), Art. 8, p. 162, Para 38. See also the decision discussed below *Arbitration proceeding Shenzhen No. 1138-1 CIETAC* 29 December 1999, CISG-online 1255.

> claim for damages. In particular, as to the waiver of rights, the BGH affirmed that the seller can waive its rights in an implicit manner. However, the circumstances of the case must always uphold this waiver: "[s]ince a general waiver of rights is not to be presumed, clear supporting facts must be presented which the buyer could understand as a waiver of rights". As exception, however, the BGH points out: "[a]ccordingly, the acceptance of an implied waiver is ruled out when dealing with rights of which the other party is unaware and with which it has not reckoned".

Narrowing down this discussion to the seller's offer of cure under Article 48(2-4), the answer should be as follows. It is clear that the buyer cannot be unaware—or, at the least, it is very unlikely it would be, since this stems from a basic principle of commerce—that it is entitled to resort to certain remedies for breach by way of reaction to an event of failure to perform by the seller. Therefore, if the buyer performs such acts as clearly cooperate with the seller's proposed method of cure, this may be deemed tacit consent to the seller's offer of cure under Article 48(2-4)—i.e. an implied waiver of its rights.

However, an adjudicator must be aware that it should not be overly fond of construing the buyer's assent to the seller's offer of subsequent cure from the acts performed by the former party. This is particularly so because, in some of the cases governed by Article 48(2-4), the seller's cure would otherwise have been deemed unreasonable, or is being exceptionally applied to a fundamental breach.

Otherwise, the result would dramatically be at the expense of the aggrieved buyer, who would see its legal position irremediably subject to the seller's offer of cure. This would inexorably lead to disruption of the balance of parties' contractual interests in the post breach scenario. In any case, careful attention must, as taught by the *Bundesgerichtshof* 25 November 1998, CISG-online 353, be paid to any applicable usages, those practices established between the parties, and the particular circumstances of the given case.

> For instance, a scenario in which the buyer's tacit consent to seller's cure may be safely deemed to exist is where the seller offered repair of the non-conforming goods at a third parties' facilities and then it receives notice that buyer dispatched the goods to that particular place. It is clear

that there is no other reason for such dispatch but the buyer's acceptance of the seller's offer to subsequently cure under Article 48(2-4) CISG.

(ii) (Un)Rightful Refusing of the Seller's Subsequent Cure

Fair balance between the buyer's and seller's interests, once the breach of contract has been established, is not only guaranteed by the effective exercise of buyer's remedies incompatible with the seller's performance, but also by the opportunity for the buyer to refuse any offer to cure wherever the preconditions of Article 48(1) are not met. In other words, to refuse the seller's subsequent performance, the buyer is not required to have already resorted to a remedy for breach incompatible with the seller's performance, but can issue a response refusing the offered cure.

The first consequence is that the Convention's communication regime for the seller's right to cure after the date for delivery avoids a "notice race" between parties. On one hand, as indicted, if the initial breach is reasonably curable according to Article 48(1), the buyer cannot effectively assert its remedies for breach incompatible with the seller's attempt at subsequent performance. Under Article 48(1), the seller is entitled *per se* to cure; therefore, the buyer cannot challenge or impede this remedy wherever it is feasible and reasonable.

On the other hand, if the breach scenario is not reasonably curable—generally due to the existence of a fundamental breach—the buyer's remedies for breach are effective and neither excluded, nor limited by a seller's offer of cure under Article 48(2-4) CISG. In addition, even if the buyer has not yet effectively exercised any remedy incompatible with the seller's performance, the aggrieved buyer can merely notify the seller of its rejection of cure. In so doing, the buyer is not—a priori—expected to provide the seller with an explanation or justification of its refusal of cure in its response[536].

However, the aggrieved buyer can only rightfully reject a seller's offer to subsequently fix its failure to perform if the intensity of this breach is

[536] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 34; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 579, Para 46.

fundamental or where cure would be unreasonable according to Article 48(1)'s blanket clauses[537]. As seen, it would then be up to this party to substantiate the grounds that lead to the exclusion of the seller's cure[538].

The other side of the coin is that the buyer may unlawfully refuse the seller's cure. Although an aggrieved buyer has no effective remedies with which to challenge the seller's cure when it is deemed feasible and reasonable under Article 48(1), the buyer could impede the seller's subsequent attempt to cure by, for instance, not taking delivery of the substitute delivery (if goods were not delivered or they have been replaced), seeking to reject delivered non-conforming goods, or not conducting acts necessary to cooperate with the seller's performance.

Furthermore, a buyer could also behave deceitfully in order to bar the seller's cure. For example, this party could unlawfully fabricate a fictional 'essential deadline for performance' which has already elapsed, or exaggerate the potential inconveniences or expenses of the cure by inventing idiosyncratic interests in the post-breach scenario.

All in all, if the seller disputes such a denial of cure and intends to impose on the unwilling buyer its subsequent performance under Article 48(1), an unrightfully obstructed opportunity of cure may give rise to severe consequences for the buyer's legal position.

First, as some authors early noted[539], an aggrieved buyer that has unrightfully refused a seller's offer to cure must face the adverse application of Article 77 CISG. Pursuant to this provision, the party that relies on a breach of contract is under a duty to take reasonable measures, in accordance with the circumstances, in order to mitigate

[537] GILLETTE/ WALT (2016), pp. 269-270; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 580, Para 47a stresses that an aggrieved buyer has no general right to refuse a seller's offer to attempt at subsequent cure: "[d]em Käufer steht insoweit kein allgemeines Verweigerungsrecht gegenüber der Durchführung einer Nacherfüllung zu".

[538] SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 580, Para 47a.

[539] Hoyer/ Posch/ NIGGEMANN (1992), p. 102; and NEUMAYER/ MING (1993), p. 346, Para 9: "[i]l résulte du devoir de diminuer le dommage (art. 77) que l'acheteur n'est pas en droit de refuser la réparation par le vendeur pour la simple raison qu'il préfère le paiement des dommages et intérêts".

the loss resulting from such a breach. Should they fail, the other party may claim that the amount of damages ought to be reduced.

> *Article 77*
>
> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

In the opinion of these authors, accepting a reasonable offer to cure by the seller in accordance with Article 48 is itself a reasonable measure to be adopted by an aggrieved buyer to mitigate the loss resulting from the breach. Hence, if the buyer unrightfully refuses cure, the seller may request a reduction, by the amount that the offered cure would have mitigated, in the total award of damages claimed by the buyer.

Second, according to other commentators[540], the starting point is set forth by Article 80 CISG. This provision lays down the rule that a creditor may not rely on a failure to perform by its counter-party to the extent that the creditor caused it.

> *Article 80*
>
> A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Tailoring this rule to the buyer's unlawful refusal of a seller's offer to subsequently cure, if the buyer unrightfully refuses seller's cure, it must face a complete discharge of the seller's duties to perform[541].

The buyer not only fails to abide by its duties of cooperation towards the seller's cure[542], but conducts an act that directly

[540] Witz/ SALGER/ Lorenz (2016), Art. 48, p. 408, Para 9; Staudinger/ U. MAGNUS (2013), Art. 48, Para 45; Kröll *et al*/P. HUBER (2011), Art. 48, Para 28; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 580, Para 47a; and Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, pp. 529-530, Para 32.
[541] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 80, p. 1158, Para 6; and SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, pp. 199-200, Para 287.
[542] See Chapter III, 3.2.10.

impedes the seller's performance of the contract. Therefore, no remedy is left to the aggrieved buyer with which to enforce the performance of the obligations under the contract and, as a result, to pursue its interests. In so doing, the Convention considers that this creditor—here the buyer—no longer deserves legal protection.

Third, in tune with some other authors'[543] observations, there is still room for a more radical sanction. The buyer's non-legitimate refusal of seller's offer of subsequently cure must, they argue, be treated as tantamount to a separate breach of contract. The buyer would not only impede performance of the seller's subsequent cure, but also would repudiate performance of its binding contractual obligations under Article 53.

> *Article 53*
>
> The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Accordingly, the buyer may fail to take delivery or, if the goods have already been delivered, it may seek to unlawfully reject them. Likewise, the buyer may breach the contract by not paying the due purchase price—if it has not yet been paid—or lodging a claim against the seller seeking refund. Therefore, this constitutes a breach of contract upon which the seller acquires remedies pursuant to Article 61 CISG:

> *Article 61*
>
> (1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:
>
> (a) exercise the rights provided in articles 62 to 65;
>
> (b) claim damages as provided in articles 74 to 77.
>
> […]

(iii) Silence of the Buyer

[543] Staudinger/ U. MAGNUS (2013), Art. 48, Para 45; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 580, Para 47a: "[h]ierbei ist zu berücksichtigen, dass der Käufer bei einer unberechtigten Ablehnung ggf. eine Vertragsverletzung begeht und gemäß Art. 80 eine nachträgliche Erfüllung nicht mehr verlangen könnte".

The third scenario under Article 48(2-4), whose consequences are equivalent to an express or implicit acceptance by the buyer of the offered cure, is where the buyer fails to give a response within a reasonable time. The following case may serve as an example:

> *Arbitration proceeding Shenzhen No. 1138-1 CIETAC* 29 December 1999, CISG-online 1255. In November 1998, a Chinese buyer and a seller based in Singapore entered into a contract for the purchase of 7,000m^3 of Indonesian Merbau round logs. Shortly after delivery, the buyer inspected the goods, which turned out to be non-conforming with the contract. The buyer gave notice to the seller, and the latter issued a fax accepting the rejection of the goods and offering a refund of the price. The buyer, however, not only did not promptly reply to this notice but also resold a large quantity of the defective items. Nevertheless, later on, the aggrieved buyer filed for arbitration, claiming for damages.
>
> The arbitral tribunal, referring to Article 48(2), found for the seller on the grounds that the lack of a speedy notice by the buyer amounts to an implicit waiver of its right to claim damages. Furthermore, mistakenly considering rejection and refund as a method of cure ("i.e. the remedy was to accept the return of the goods"), the court referred to cure under Article 48(2): "[this provision] indicates what would be the result if the seller explicitly puts forward some way of remedy but meet with no response from the buyer. […] If the [Buyer] did not make response within a reasonable time, the seller might perform the obligations as it requested previously. When the [Seller] put forward different remedy, the [Buyer] should have made prompt replay, expressing to accept it or not".

As indicated, on the one hand, an aggrieved buyer has to endure the subsequent performance of contract by the seller. Conspicuously, the former cannot rightfully resort to any remedies for breach incompatible with the seller's performance during the time in which the seller offered to carry out its cure. This is stated under Article 48(2) *in fine*[544]:

> *Article 48*
>
> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

[544] Staudinger/ U. MAGNUS (2013), Art. 48, Para 2; Kröll *et al*/ P. HUBER (2011), Art. 48, Paras 37-38.

On the other hand, a breaching seller ends up entitled to cure not only a failure to perform that, a priori, would have been deemed not reasonably remediable under the standards provided by Article 48(1) but also, in extreme cases, a fundamental breach (per the definition in Article 25 CISG)[545]. Consequently, in terms of results, a buyer's failure to give response is equal to its consent to a subsequent offer of cure by the seller.

Although this curing structure may seem a detrimental solution for the buyer's interests, it can be affirmed that it is not. This relevant effect of the buyer's silence under Article 48(2-4) CISG neither downgrades the neat and fair balance between parties' interests that the Convention's default rules are supposed to proffer. Namely, an aggrieved buyer is not prevented from protecting its legitimate interests by, say, exercising remedies incompatible with the seller's performance or by rightfully refusing cure. The effectiveness attached to the buyer's silence under Article 48(2-4) only compels this party to react promptly[546].

> At the same time, if the buyer reacts quickly, it helps the seller to keep losses down, provided that it would neither need to prepare nor conduct a futile attempt to cure. Likewise, this would minimize the amount of damages resultant from the delay. As an aggregate result, the contractual surplus assumedly generated by the mutually beneficial agreement is jeopardized to a smaller extent.

By contrast, if the buyer reacts too slowly, cure is not an unfair penalty from a normative viewpoint. Firstly, cure allows the seller to subsequently perform the contract in its original terms, upon which the parties contracted for. In so doing, cure upholds the basic CISG principle *Favor Contractus*[547], and boosts the haste necessary in international trade. Secondly, regarding claims for non-curable damages to be paid alongside the cure, the seller may be entitled to object on grounds of the duty to mitigate under Article 77.

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[545] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, pp. 772-773, Para 26; Witz/ SALGER/ Lorenz (2016), Art. 48, pp. 406-407, Para 5; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 2; and Staudinger/ U. MAGNUS (2013), Art. 48, Para 41.

[546] *See above* Ch. III, 3.1.2.a).(ii).

[547] On this count see Bianca/ Bonell/ WILL (1987), Art. 48, p. 355; and LAUROBA (2015), p. 1444.

> In the case law[548], see *Amtsgericht Nordhorn* 14 June 1994, CISG-online 259. On 21st March 1993, an Italian Seller (a shoe-maker) sold 280 pairs of various shoes to a German buyer (a shoe retailer). In the contract the parties clearly stated that delivery had to be done before the holidays, which in the Italian market meant before August. Nevertheless, the seller delivered in two instalments on 5 August 1993 and 24 September 1993. Whereas the buyer disputed conformity of the goods and declared the contracted avoided, the seller claimed for payment of the purchase price.
>
> The court concluded that the buyer was not entitled to declare the contract avoided and, therefore, the seller was entitled to receive payment of the full price. Firstly, the time was not indicated to be of the essence. Secondly, the buyer failed to give timely response to the seller's communication, made on 5 August 1993 (with delivery of the first instalment), in which the seller offered the delivery of the second instalment by 10 September 1993. As a consequence, it was taken that the buyer did not timeously assert any objection to this delayed performance. Therefore, the buyer could not rely on this delay as grounds for an effective exercise of its right to declare the contract avoided.
>
> The courts thus decided that: "[buyer]'s conduct after the expiry of that date shows that a fixed delivery date was not intended. The [buyer], on the one hand, still accepted a delivery made on 5 August 1993 and, on the other hand, failed to refuse an additional period of time for performance by the [seller] of its obligations until 10 September 1993, as required by Art. 48(2) and (3) CISG".

Taking into consideration such significant consequences, it is crucial to ascertain what is meant by the buyer complying with the seller's offer "within a reasonable time"; the vague notion coined in Article 48(2). Even though a prominent opinion early outlined this reasonable time as a very short time[549], the proper interpretation of such a standard must be made, as always, on a case-by-case basis. Circumstances such as the nature and scope of the breach, the preparations to be made by the buyer, the length of the period fixed by the seller in its offer, the offered method of cure[550], and the kind of communications employed all strongly influence the determination of reasonableness.

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[548] *See* UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 234, Para 8.
[549] HEUZÉ (2000), *Vente internationale*, Art. 48, p. 375, Para 424, footnote 205 affirming: "Pour être raisonnable, ce délai doit certainement être très bref".
[550] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 773, Para 26.

The key question, however, is whether the particular circumstances of a case may ever lead to "reasonable" being considered to amount to "immediate". It is submitted that the answer should be affirmative as, in some instances, an immediate reaction could be the only reasonable way to act[551]. Furthermore, as a matter of principle, the concept of "reasonable" is not *per se* inconsistent with the notion "immediate". Arguably, given certain facts, it could be in tune with the observance of good faith in international trade that Article 7(1) requires when interpreting the Convention.

Secondly, requiring an immediate response from the buyer brings about coherent consequences. It has to be remembered that whenever the seller offers the buyer cure of the breach beyond the blanket clauses of Article 48(1), it finds itself in a stifling situation in which it depends entirely on the buyer's response. As discussed below, the seller has to indicate a period of time within which it will conduct cure. Therefore, the more the buyer delays its response, the shorter the time left to the seller to subsequently perform. In some instances, an immediate response must be required in order to avoid opportunistic behavior from an aggrieved buyer, who may seek to squeeze out the seller's subsequent performance by unlawfully delaying its response[552].

3.1.3 Two Types of Communication under Article 48(2)(3): Request v. Notice

[551] *See*, for example, as to suspension of performance Schlechtriem/ Schwenzer/ FOUNTOULAKIS (2016), Art. 71, p. 1014, Para 34: "'[i]mmediat[e] notice' means that the creditor must inform the debtor […] without any avoidable delay". For the examination of goods, Article 38 CISG imposes that it must be conducted "within as short a period as is practicable in the circumstances". It is so decided in the *Landgericht Darmstadt* 29 May 2001, CISG-online 686: "[w]hen determining this period [under Article 38], special circumstances of the case at hand and reasonable possibilities of the parties have to be taken into account".
However, *Cf.* Staudinger/ U. MAGNUS (2013), Art. 48, Para 42.

[552] Schlechtriem/Schwenzer/MÜLLER-CHEN (2016), Art. 48, p. 773, Para 26: "[s]ince the matter is urgent for the seller, who for his part must comply with the time period he has fixed, it will be 'reasonable' for the buyer to respond without delay, taking into account the circumstances of the individual case".

A common aspect to be preliminarily considered, regarding the seller's notices under Article 48(2-4), is their form. Both types of seller's communications operate under the CISG's general principle of freedom of form[553]. It results that the seller can either orally or by writing request or notify the buyer about its offer to subsequently perform.

However, bearing in mind the consequences stated above to result from Articles 48(2-3), a seller's offer cannot be tacitly made. If the seller only acts, for instance, by directly sending conforming substitute goods to the buyer without expressly requesting or giving notice of such, it does so with the complete risk of the buyer rightfully rejecting such subsequent performance[554].

This conclusion stems from the fact that Article 48(2-4) is applicable to both sellers' failures to perform that are reasonably curable under Article 48(1) and to others that are deemed to not be reasonably curable or which directly amount to a fundamental breach per Article 25. Otherwise, if the seller was granted the possibility of offering subsequent cure by merely performing acts, the legal position of the buyer would be jeopardized.

The second common aspect to be analyzed is the content of the seller's communications. Following the explanation proffered by Prof. Peter Huber[555], such content can be split into three elements:

(i) the seller's willingness to perform;
(ii) a request to the buyer to make known its decision;
(iii) a certain period within which the seller intends to remedy.

The first heading (i) does not require further attention as the mere notice already proves the seller's will to subsequently cure. As regards the second aspect (ii), this constitutes the crucial difference

[553] JANSSEN/KIENE (2009), *General Principles*, p. 276 who stress that this general principle of freedom of form can be mainly derived from Articles 11 and 29(1) CISG. *See also* Schlechtriem/Schwenzer/SCHWENZER/HACHEM (2016), Art. 7, p. 135, Para 32; Staudinger/U. MAGNUS (2013), Art. 48, Para 38; and *MünchKommHGB*/BENICKE (2013), Art. 48, Para 15.
[554] Staudinger/U. MAGNUS (2013), Art. 48, Para 38.
[555] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 30.

between a request and a notice under Article 48(2)(3): in the latter type of communication, an express request is missing.

In spite of this apparent divergence between types of communications, in practice the difference turns out to be minor[556]. According to the wording of Article 48(3), any notice by the seller is "assumed to include a request" per Article 48(2). Accordingly, the mainstream position in the case law[557] as well as relevant literature holds that this assumption is irrefutable[558].

The most important and problematic element is the third (iii). With reference to the wording of Article 48(2-3), the breaching seller has to indicate—i.e specify—a time within which it will conduct the offered subsequent cure. This time must not necessarily be determined by a certain date but may also be a period[559]. Consequently, this gives rise to two following crucial questions: what happens if the seller does not indicate the time within which it will intend to cure? And must the time indicated be reasonable?

- Communication Without Indication of a (reasonable) Time for Cure

[556] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 773, Para 28.

[557] Cour d'appel de Bordeaux 25 February 2016, CISG-online 2699: "[a]lors que les alinéas 3 et 4 de l'article 48 […] il est *présumé* demander à l'acheteur de lui faire connaître sa décision" (emphasis added).

[558] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 773, Para 28: "[p]ursuant to Article 48(3), it is irrefutably assumed (*vermutet, présumé*) that the notice of willingness to perform within a specific period of time includes this request". Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, pp. 741-742, Para 28; Bianca/ Bonell/ WILL (1987), Art. 48, p. 354; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 443, Para 15.
For a slightly different opinion on concepts *Cf.* Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 530, Para 34 who state: "[s]o handelt es sich nicht um eine Vermutung im technischen Sinn (also um eine Beweisregel), auch nicht um eine Auslegungsregel, sondern um eine Fiktion".
For the totally opposite opinion regarding the refutability of the presumption under Article 48(3) *Cf.* Witz/ SALGER/ Lorenz (2016), Art. 48, p. 407, Para 6 who stresses: "[z]war sieht Abs. 3 insoweit lediglich eine Vermutung vor, die grundsätzlich widerlegbar ist. Eine Widerlegung wird aber kaum je gelingen können".

[559] Staudinger/ U. MAGNUS (2013), Art. 48, Para 39.

Indisputably, any effects resulting from the seller's request or notice—under Article 48(2) & (3) respectively—are reliant on the seller's indication of a timespan within which cure is to be carried out[560]. In other words, the fixing of a timeframe is an indispensable legal requirement for bringing about Article 48(2)'s legal consequences. Namely, if there is no time indication in the request/notice sent by the seller, this party will not be enabled to cure and the buyer may resort to those remedies available incompatible with cure[561].

As Prof. Ulrich Magnus[562] stresses, the rationale behind the denial of effect to Article 48(2) & (3) when a seller's request/notice does not indicate a time frame is that the aggrieved buyer has no grounds upon which to decide whether to allow the seller to subsequently perform the breached obligation. The buyer is left in a scenario of being unable to assess whether the delay in performing cure would fit its post-breach contractual interests and, conspicuously, whether the time lag in performance would finally lead to a fundamental breach.

With reference to the second question—that is, reasonableness of the time indicated in the seller's offer—it must, first and foremost, be noticed that neither Article 48 paragraph (2) nor (3) contain a

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[560] Staudinger/ U. MAGNUS (2013), Art. 48, Para 39; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 772, Para 25; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 2; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 441, Para 15 who considers the indication of the time for cure *unentbehrlich*; and Witz/ SALGER/ Lorenz (2016), Art. 48, p. 406, Para 5 who refers to the specification of time as a *Voraussetzung*.

[561] *See Secretariat's Commentary*, O R Art. 44, p. 42, Para 14 which reads as follows: "[i]f there is no indication of this period but merely an offer to cure, *the seller can draw no conclusions nor derive any rights from a failure by the buyer to respond*" (emphasis added); *see also* UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 234, Para 9 in the following words: "[a] request for the buyer's response to a proposed cure by the seller under Article 48(2) or (3) must specify the time within which the seller will perform. Without such a time frame for the proposed cure, the request *does not have the effect* specified in Article 48(2)". (emphasis added); Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 711; and Staudinger/ U. MAGNUS (2013), Art. 48, Para 39.

[562] Staudinger/ U. MAGNUS (2013), Art. 48, Para 39. In this regard *see also* Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 772, Para 25: "[a] period of time must be specified so that the buyer may decide whether to accept or decline the offer".

blanket clause on this count. Therefore, a priori, it submitted that the seller is free to specify in its offer any period of time within which it will carry out cure[563].

> For the sake of clarification, Article 48(2), as seen, lays down a blanket clause for the reasonableness of the time within which the buyer has to respond to the seller's request/notice. This requirement of reasonableness must not be analogously applied to the discussion held here.

However, despite the fact that, at first glance, the seller may seem relatively free to indicate any span of time for its cure, in practice, the time within which it will enabled to cure is limited by the dynamics of the parties and the interplay of other provisions. Therefore, when Article 48(2)(3) was drafted, it did not seem necessary to include any specification regarding the reasonableness of the time indicated by the seller for its subsequent performance[564].

On one hand, if the time indicated by the seller is *too long*, it will give solid grounds for the buyer to rightfully refuse the seller's offer of cure[565]. In particular, if the seller indicates that subsequent performance will be accomplished by a date by which the time lag would amount to a fundamental breach given the contractual interests of the buyer, this latter party can easily substantiate the exclusion of the seller's right to cure and safely resort to other remedies for breach.

On the other hand, if the time indicated is *too short* as to even allow the buyer to respond, it is submitted that the seller cannot derive any of the binding effects expressly set forth in Article 48(2). As seen, this solution is tantamount to the one proffered for cases where the seller does not indicate a period of time for its subsequent cure in its

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[563] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 772, Para 25: "[w]hether or not the period is 'reasonable' is irrelevant".

[564] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 11; and Staudinger/ U. MAGNUS (2013), Art. 48, Para 39.

[565] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 772, Para 25: "[i]f the buyer considers the period too long, he can reject the offer"; and Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 529, Para 31.

communication. Consequently, the buyer is not barred from resorting to incompatible remedies for breach[566].

3.1.4 Risk of Delay and Loss in Transmission

As to risk in transmission, Article 48(4) CSIG sets an exception to the general rule of Article 27[567]. According to the latter, it is submitted that the CISG upholds the so-called *Dispatch Rule*[568], whereas the exception in Article 48(4) entails the *Reception Rule*[569]:

> *Article 27*
>
> Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.
>
> *Article 48*
>
> (4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Therefore, in accordance with this exception, the communication of the seller under Article 48(2) or (3)—be it a request or a notice—is only effective upon reception by the aggrieved buyer. Only then does the reasonable period of time within which it must respond to

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[566] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 772, Para 25: "[t]he period may not be so short that it is impossible for the buyer to reply before the date referred to by the seller; in such a case the buyer cannot be bound under Article 48(2)"; and Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 529, Para 31.

[567] Here, again, the discussion about the use of electronic communications must kept in mind. *See* Ferrari *et al*/ GARRO (2004), *Draft Digest*, pp. 370-371.

[568] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, pp. 135-136, Para 23: "[a]rticle 27 is read to embody the dispatch rule (unless otherwise stated in the Convention)".

[569] Witz/ SALGER/ Lorenz (2016), Art. 48, p. 407, Para 7; Ferrari *et al*/ GARRO (2004), *Draft Digest*, pp. 370, 711; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 29; Bianca/ Bonell/ WILL (1987), Art. 48, p. 354; UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 234, Para 10; HONNOLD/ FLECHTNER (2009), p. 432, Para 300; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 34; *Secretariat's Commentary*, O R Art. 44, p. 42, Para 15.

the offer of the seller begin to run[570]. Firstly, concerning the notion of what constitutes being "received", one has to resort to the interpretative benchmarks of Article 7(1) and to the Convention's general principles under Article 7(2). In this regard, attention must also be brought to the concept of "reaching" the addressee, coined in Article 24[571]:

> *Article 24*
>
> For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

In contrast, a communication by the buyer, for example a rightful refusal of the subsequent cure offered by the seller, is deemed to follow the general rule under Article 27. As a result, this notice is effective from the moment it has been dispatched by the aggrieved buyer. Article 27 renders effectiveness of the communication reliant only on the addressor using appropriate means given the circumstances.

Furthermore, it is submitted that the exception to the general rule under Article 27 also affects the content of the communication. Thus, if the meaning of the notice of cure sent by the seller reaches the buyer distorted or incomplete, the buyer is bound only by the exact text received[572]. This rule, thus, seeks to guarantee that the buyer is able to give a fully informed response and that it will not be bound to any extent that it could not have been aware of.

> In the case law, this is so decided in *Turku Court of Appeals* 12 November 1997, CISG-online 2636. A Spanish seller and Finnish buyer entered into a contract for the purchase of purportedly top-quality canned food (such as mushrooms, pears and mandarin oranges). Upon delivery, per Articles 38 and 39, the buyer gave notice of important defects: "[t]he cans contained many foreign objects including stones, cigarettes, snails, etc. Some of the cans have had deformities, rust and other faults". On

[570] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 29.
[571] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 29: "[t]he request or the offer are effective (ie the buyer's silence is deemed to be acceptance) only if they *reach* the buyer" (emphasis added).
[572] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 29.

> these grounds, the buyer lodged a claim for the reduction of the purchase price already paid. Against this, the seller alleged that the goods were not defective, and that the buyer was not entitled to reduce the price because, in accordance with Article 50, a price reduction is subject to seller's right to cure. In its view, the buyer had not given any opportunity for remedy of the non-conformity in the goods.
>
> The Finnish court found for the buyer, given that, in the case, the seller did not substantiate that an offer of subsequent cure reached the buyer: "[a]ccording to article 48(4), a request or notice concerning seller's cure of a non-conformity is not effective unless received by the buyer. [Seller] has not even alleged that it would have afforded [buyer] an opportunity to have the non-conformities remedied […] [Seller] is still standing by its statement that the goods conformed to the contract".

As a result of this shift in the general regime of risks of delay and loss in transmission propitiated by Article 48(4), the seller bears a larger amount of risk: its requests/notices are not only dependent on the buyer's reception, but the buyer's response also travels at the seller's risk. In detail, the risk borne by the seller is enlarged because the seller assumes all risk of loss or delay until the moment its request/notice reaches the buyer, as set in Article 48(4).

The seller also bears a major burden because the risk of delay or loss in transmission is borne by this party from the moment the buyer dispatches, according Article 27, by means appropriate in the circumstances[573]. In conclusion, whereas the buyer can rely on the effectiveness of its communication regardless of whether it reaches its counter-party, the seller cannot.

The first rationale for the mentioned exception to the regime of risks in communications laid down by Article 48(4) stems from the fact that the seller is the breaching party. Therefore, it is submitted that the communication regime has to be on the side of the aggrieved party—here the buyer—or, at the least, not stand to actively benefit the seller in these instances[574]. A second justification for the shift in risks points to the effects entailed by the buyer's silence or failure to

[573] Staudinger/ U. MAGNUS (2013), Art. 48, Para 43; Bianca/ Bonell/ WILL (1987), Art. 48, pp. 334-355.
[574] GABRIEL (2008), *Drafting Contracts*, p. 174; and ENDERLEIN/ Maskow/ Strohbach, Art. 48, p. 156, Para 16.

respond within a reasonable time pursuant to Article 48(2) *in fine*[575].

> It must be remembered that irrespective of any specific precondition for the existence of the seller's right to cure according to Article 48(1), the seller is entitled to cure within the indicated time, and the buyer prevented from resorting to incompatible remedies for breach during that period, if the buyer "does not comply with the request within a reasonable time".

As a consequence, arguably, such a buyer-friendly allocation of risk of delay and loss in transmission pursues the ultimate objective of striking a balance between parties' legal positions in the post-breach scenario. It seeks to facilitate and encourage the aggrieved buyer's response to the seller's offer of cure, thus avoiding the binding effect to the seller's subsequent cure that would otherwise result from its failure to give response within a reasonable period of time, under Article 48(2).

- Burden of Proof in Regard to Communications of Cure

As seen, the aggrieved buyer has to prove the existence of any specific precondition, of those enumerated under Article 48(1), to bar the seller's right to cure on grounds of its unreasonableness. Only by such substantiation is the buyer is entitled to rightfully reject the seller's offer of cure. However, the buyer's burden of proof does not finish here. This party is held to the duty to prove the timely dispatch of its response by appropriate means in circumstances, as required by Article 27[576].

On the flip side, due to the shift in the risk of delay and loss in transmission borne by the breaching seller enacted by Article 48(4), the burden of proof that this party assumes is accordingly enlarged. Therefore, it does not suffice for the seller to prove that it timeously dispatched its request/notice regarding an opportunity to

[575] *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 15.

[576] Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 729, Para 17; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 34; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 585, Para 65; Baumgärtel/ Laumen/ Prütting/ HEPTING/ MÜLLER (2009), *Handbuch der Beweislast*, Art. 48 CISG, p. 682, Para 25; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 24; and Kröll *et al*/ P. HUBER (2011), Art. 48, Para 34.

subsequently cure but, under Article 48(4), it is submitted that it has to prove that such communication timeously *reached* the addressee (buyer)[577].

Furthermore, the seller not only has to prove the effectiveness of the communication in itself—i.e. that it "reached" the buyer—but also of its content. As indicated above, the buyer is only bound by the content finally received and to which it is able to respond. Thus, the seller bears the burden of proving whether the full text—or, in case of disruption in transmission the extent to which the text—reached the buyer.

Last but not least, conspicuously, in cases where the buyer remains silent or "does not comply with the request within a reasonable time" as required by Article 48(2), the seller must, if the aggrieved buyer then disputes the binding consequences of Article 48(2) *in fine*, prove such failure to respond[578].

3.2 Remedying a Failure to Perform

3.2.1 Parties' Agreement on the Execution of the Seller's Cure

An important group of cases of parties' agreements regarding the seller's right to cure after delivery date concerns modifications of the performance of the subsequent cure; for instance, limitation of the number of unsuccessful attempts to cure, or even restrictions to one unique attempt. Likewise, the parties may contract that only the contracting seller is entitled to remedy after breach, thereby excluding any remedy carried out by third parties on its behalf.

[577] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 774, Para 29: "[t]he seller bears the burden of proof that notice was given and that it reached the buyer"; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 34; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 585, Para 64; Baumgärtel/ Laumen/ Prütting/ HEPTING/ MÜLLER (2009), *Handbuch der Beweislast*, Art. 48 CISG, p. 681, Para 23; and Kröll *et al*/P. HUBER (2011), Art. 48, Para 31.

[578] In the case law: *Turku Court of Appeals* 12 November 1997, CISG-online 2636. In the literature: Baumgärtel/ Laumen/ Prütting/ HEPTING/ MÜLLER (2009), *Handbuch der Beweislast*, Art. 48 CISG, p. 682, Para 26.

Finally, the seller might also agree to yield the buyer the right to choose the particular method of cure.

A second category of cases covers those agreements intended to specify a particular method of cure[579], which then becomes the only effective way to cure under the parties' contract. The parties may also seek to tailor the range of possible methods of cure to the ones that best fit their interests. The clearest example would e a contract stipulation on "new" goods. If the goods delivered by the seller are non-conforming with the contract, such parties' agreement has the effect of excluding repair, making replacement the only curing method left to the seller[580].

Finally, when an express agreement on a particular method of cure is found in the contract, it is not settled whether the seller is still subject to the blanket clauses of Article 48(1) CISG, or can subsequently perform irrespective of the standard of reasonableness. For example, if the parties stipulated that only replacement is possible as a method of cure, but at the moment of performing this would create unreasonable inconveniences to the buyer and thus fall outside the standard of Article 48(1), it is doubtful whether the seller can still conduct its cure.

Barring any particularities arising from the contract or its setting—including circumstances, practices established between the parties or applicable usages, under Articles 8 and 9 CISG—the answer should be that the seller's cure is always subject to the reasonableness criterion of Article 48(1)[581].

3.2.2 Content, Nature and Extent of the Performance Resulting from the Seller's Right to Cure. Modifications of the Contract.

The seller's right to cure after delivery date can be doctrinally categorized as a *specific-performance oriented remedy*, a *remedy of*

[579] For examples of methods of cure *see below* Ch. III, 3.2.3; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5.
[580] BRIDGE, *Sale of Goods* (1997), p. 198; and LEUKART (2013), p. 111, Para 140.
[581] LEUKART (2013), p. 42, Para 55.

conduct or a *preventive remedy*[582]. This classification mainly follows from the fact that its goal is to permit the breaching promisor to subsequently abide by what was it had promised under the contract that it entered into. In other words, the right to cure is a remedy that stands by the principle *Favor Contractus* by giving performance to the contract without deviating from its designed plan—in spite of the important pitfall of the requisite delay.

Accordingly, it is submitted that subsequent cure by the seller must follow the nature of the contractual obligation that lead to the breach of contract[583]. Therefore, assumedly, the seller's right to cure under Article 48 mirrors the buyer's general entitlement to ask for specific performance pursuant to Article 46(1) CISG:

> *Article 46*
>
> (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

The buyer, insofar as it has not lawfully made known to the seller that is no longer interested in performance of the contract, will receive what it contracted for in compliance with the specific terms under which it entered into the contract. The buyer may rightfully eschew such subsequent cure by effectively exercising a remedy for breach incompatible with the subsequent specific performance—e.g. price reduction or avoidance—or by rightfully rejecting to a seller's offer/notice of cure under Article 48(2-4).

Two follow-up consequences from these remarks must be considered. First, as indicated elsewhere[584], if the parties modify the terms of performance—other than the time for performance which obviously cannot be cured but only offset with an award of damages under Article 48(1) *in fine*—this is no longer cure. In this scenario, instead of subsequent cure of a breach by furnishing specific performance on the agreed terms, there would be a modification of

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[582] LAYCOCK (2010), pp. 3-5.

[583] SCHWENZER/ HACHEM/ KEE (2012), p. 562, Para 43.09; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5: "[h]ow the seller is to remedy his failure follows the nature of the obligation breached"; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 562, Para 9; PETRIKIC (1999), p. 77.

[584] Concerning impediments to perform under Article 79(1), *see* Ch. I, 1.1.1.c).

the content of the contractual obligations by an amendment, whose crucial element is then, the consent of the promisee—i.e. the buyer.

Under the Convention, unlike the former ULIS, Article 29(1)(2) expressly refers to modifications of contract[585]:

> *Article 29*
>
> (1) A contract may be modified or terminated by the mere agreement of the parties.

Concerning the seller's right to cure after the date for delivery under Article 48, the given example is cases where the seller "apparently" subsequently cures its failure to perform by offering a discount or reduction in the purchase price. In exchange, the buyer must keep the non-conforming goods and it cannot further assert any of its remedies against the seller. Obviously, in these scenarios there is a modification of contract—e.g. a waiver[586]—both parties agreed to deviate from what they originally contracted for and the seller's performance no longer specifically abides by the initial content of the breached obligation[587].

> As a clear example in the case-law, see the decision of the *Tribunale di Forli* 11 December 2008, CISG-online 1788. A Slovenian buyer bought various models of shoes from an Italian buyer. Right after delivery, the buyer notified the seller of non-conformities in the goods and asked for replacement. The seller admitted the non-conformity and offered replacement of defective goods by shoes belonging to next season's collection, which were less valuable. The buyer conditioned its acceptance on monetary compensation for the lesser value of the

[585] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 29, pp. 494-495, 497, 499 Paras 1, 7 and 10. In the case law, although discussing whether setting a Nachfrist under Article 47(1) for the delivery of mobile phones one month after the stipulated date for delivery –19 July 2011– amounts to an offer to modify the contract under Article 29(1), *see U.S. District Court, M.D. of Florida, Fort Myers Division*, 23 January 2013, CISG-online 2395.

[586] SCHWENZER/ HACHEM/ KEE (2012), p. 191, Para 14.03: "[a] waiver may occur when a party does not insist on performance in accordance with the strict letter of the contract, but instead is willing to accept performance on different terms".

[587] LEUKART (2013), p. 128, Para 161 who states: "[t]hus, from a legal point of view, cure and money allowance pursue diametrically opposed aims. Furthermore, it is held that money allowance functionally is partial avoidance, which compensates the aggrieved party for the lesser value in the goods, whereas cure is a specific form of performance of the contract". Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 29, p. 497, Para 6 refers to proposals to adjust the price.

> substitute goods. The seller refused such off-setting, which led the buyer to seek avoidance of the contract.
>
> The court found in favor of the buyer's claim for avoidance of the contract on the basis that the method of cure by the seller was unsuitable: "[Seller's] offer made clear that the shoes would have been replaced with different items that the buyer declared not fit for its retail market".

Consequently, as a secondary remark, it is almost trite to note that performance of the seller's right to cure must not only follow the content and nature of the breached obligation, but that this subsequent performance also has to be in full[588]. In other words, a partial or sub-standard performance is contrary to the very purpose of Article 48[589], because it entails a deviation of the contractual plan and, as a result, deprives the buyer of what it specifically contracted for.

All in all, the result to be achieved by the seller's right to cure must be that a previously established failure to perform no longer exists[590]. The seller's subsequent tender of performance must be satisfactory with regards to the content—i.e. the nature—of the breached obligation as well as to its extent—i.e. full. On top of that, non-curable damages must be compensated, as provided by Article 48 (1) *in fine*. Other than this, the seller remains in breach of contract and the corresponding buyer's remedies for breach are triggered.

In particular, it must be avoided that a breaching seller, pursuant to Article 48(1), is able to impose on the buyer an incomplete cure merely intended to alleviate or temper the seriousness—and in particular the fundamentality under Article 25 CISG—of a failure to

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[588] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5: "[t]he decisive factor is that the defect is *completely* remedied" (emphasis added).

[589] Kröll *et al*/ P. HUBER (2011), Art. 48, Paras 17, 22; LEUKART (2013), p. 143, Para 186; *MünchKomm*/P. HUBER (2016), Art. 48, Para 12; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 4; Staudinger/ U. MAGNUS (2013), Art. 48, Para 11; and SCHNYDER/STRAUB/Honsell (2010), Art. 48, p. 562, Para 9. *Cf.* BRIDGE (2013), *Int' l Sale of Goods*, pp. 589-590, Para 12.29 who takes into account that the CISG does not lay down a *Perfect Tender Rule* and that this results in the lack of need for a full seller's cure, a merely satisfactory one sufficing.

[590] Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 725, Para 3; and DiMatteo/ Janssen/ MAGNUS/ Schulze (2016), p. 497, Para 101 who refers to the concept of "healing" a failure to perform.

perform. In so doing, the seller would likely seek to restrict the most severe buyer's remedies for breach—namely, replacement of goods under Article 46(2) and avoidance of contract under Article 49(1)(a). By avoiding such a scenario, the buyer's rights are not curtailed and this offer of cure can be rightfully rejected under Article 48(2-4).

In practice, such scenarios could appear as follows. For non-conformities in quantity: if the seller owed 100 units but only delivered 50, the seller cannot partially cure by sending 30 to the buyer. In cases of defects in the delivered goods, a superficial repair that does not fully bring the products into conformity with the contract—or with the default standards under Article 35—is not tantamount to subsequent cure under Article 48.

> In the case law see the decision of the *Oberlandesgericht Oldenburg* 1 February 1995, CISG-online 253 (first instance: *Landesgericht Oldenburg* 6 July 1994, CISG-online 274). In the first half of 1992, an Austrian seller sold a German buyer furniture; in particular, a leather seating arrangement. After delivery, a sub-buyer gave notice to the buyer of the non-conformity of the goods with the contract, and the latter forwarded the complaint to the seller. The seller tried to repair by taking the goods from the buyer and redelivering once repaired. Nevertheless, the goods still presented defects after subsequent delivery. On this basis, the buyer declared the contract avoided.
>
> In both instances, the German courts only found for a partial avoidance of the contract under Article 51 and, therefore, the seller remains entitled to receive part of the purchase price. This notwithstanding, the *Landesgericht* states, as regards the seller's right to cure after the date for delivery: "Die Nachbesserung der Klägerin ist fehlgeschlagen, da sie nicht *alle* Mängel der Polstergarnitur beseitigt hat" (emphasis added).

However, as indicated, it might also be the case that, though the seller made its best efforts to entirely remedy its failure to perform, the result is nonetheless an unsuccessful or incomplete cure. This could be because the attempted cure is only partly effective in fixing the seller's breach. In this scenario, as also explained extensively later in this work, the seller remains in breach but, if cure by the seller is still reasonable, this party may undertake further attempts at cure until it achieves the cure's ultimate goal of the complete performance of the contract; or, otherwise, fails in its purpose by

falling beyond the standard of reasonableness under Article 48(1) CISG[591].

These considerations concerning the nature, content and extent of the performance of the seller's cure after the date for delivery lead to the reinforcement of the ideas stated previously[592] regarding the crucial role of the buyer's duties of notification and notice in cases of non-conformity in the goods. Namely, only a timely notice given in accordance with Articles 38 & 39 CISG allow the seller to acquire the necessary information regarding the success of its attempts at subsequent performance.

> In the case law see the decision of the *Oberlandesgericht Frankfurt* 18 January 1994, CISG-online 123. In January 1991, an Italian seller entered into a contract with a German buyer for the sale of women's shoes. After delivery, the buyer did not pay, claiming avoidance of the contract on the grounds that the goods had not been delivered within the proper time frame and that the items did not conform to the contract specifications.
>
> The OLG Frankfurt decided in favor of the seller and obliged the buyer to pay the purchase price plus interest rate: "because of the insufficiency of its allegations, the [buyer] failed to meet the statutory requirement for avoidance of the contract". In particular, as regards the buyer's examination and notification duties, the court considered that the buyer did not properly specify the defects found in the goods because it only gave vague submissions: "[i]t is not possible to draw from these submissions the precise defects alleged".

- Buyer's Obligation to Take Subsequent Delivery

All above remarks about specific relief and full performance after cure under Article 48 CISG find their counterpart in the contractual obligation that the Convention imposes on a buyer to take delivery, laid down in Articles 53 and 60. In particular, the crucial question is what happens if a buyer refuses to take subsequent delivery once the seller has carried out an attempt to remedy.

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[591] It must be preliminarily indicated that "each new attempt will increase the likelihood of unreasonableness or the buyer", Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, pp. 632-633, Para 11. *See below* Ch. III, 3.2.4; and Kröll *et al*/ P. HUBER (2011), Art. 48, Para 17.

[592] *See above* Ch. II, 2.1.3.b); SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 127, Para 153.

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

The general rule under the CISG is that the buyer is only entitled to immediately reject non-conforming tenders of performance by the seller upon the basis of a fundamental breach—Article 25—or under certain restricted circumstances—Article 52[593]. This rule, of course, also covers performances resulting from a seller's attempt to cure conducted after the date for performance[594].

As seen, according to Articles 53 and 60 the buyer is under an "obligation" to take the "goods". The latter further breaks down the content of this obligation into two headings: (1) the buyer has to do all acts reasonably expected of it to enable delivery by the seller[595]; and (2) the buyer has to take over the goods.

Article 60

The buyer's obligation to take delivery consists:
(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
(b) in taking over the goods.

A first remark refers to the scope of application of the buyer's obligation to take delivery. In accordance with the mainstream in the relevant literature—despite the wording of Article 60 which only refers to *goods*—the buyer is under the same obligation with respect to any documents or any other tender of performance by the seller[596]. Therefore, it can be generalized as follows: the buyer is under the obligation to take the seller's *tender of performance*. As seen, this notion also includes the one arising out of a seller's attempt at subsequent cure under Article 48.

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[593] *See below* Ch. IV, 4.2.9; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 442, Para 44.

[594] In this regard, the sanction imposed on the buyer under Article 80 is also relevant, Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 80, p. 1157, Para 3: "[t]he unjustified refusal to accept a substitute delivery of goods".

[595] This refers, for instance, to when, under a sales contract, the buyer is to make specification of features of the goods. It explains, as a consequence, the seller's remedy of self-specification under Article 65 CISG.

[596] Schlechtriem/ Schwenzer/ MOHS (2016), Art. 60, p. 893, Para 6.

The second important remark to be made on the buyer's obligation to take performance precisely stresses the technical categorization of the obligation as a buyer's contractual obligation. Any failure to perform such an obligation by the buyer amounts to a breach of contract. Consequently, such failure to perform is actionable[597] by the seller's set of remedies for breach under the Convention. Hence, the seller can enforce this obligation by, among other remedies, asserting specific performance or damages pursuant to Articles 61 and 62 to 65 in conjunction with Articles 74 to 77 CISG.

> In the case law, see *Oberlandesgericht München* 8 February 1995, CISG-online 143. In March 1992, an Italian buyer and a German seller concluded a sales contract concerning eleven cars. Five cars were ready for delivery in August; the remainder in the following October. Due to extreme currency fluctuations, however, the buyer communicated that acceptance of delivery of the cars was impossible. The seller cancelled all orders it had made with its suppliers and demanded payment of the bank guarantee that was provided under the contract. The buyer counter-claimed asking for refund of the bank guarantee.
>
> Regarding the fact that the buyer did not take delivery, the court stated: "[t]he non-acceptance of the automobiles by the [buyer] within a reasonable period of time after the [seller] had made available the sold automobiles in compliance with its contractual obligations was a breach of the [buyer]'s own obligations. Such a breach of obligations would generally entitle the [seller] to a claim of damages, i.e., any loss suffered, pursuant to Art. 61(1)(b) CISG [*] in connection with Art. 74 CISG".

As a consequence, it is obvious that the buyer's obligation to take tenders of performance and, in particular, its enforceability by the seller's remedies for breach, are, as a matter of principle, key to assuring an effective seller's right to cure after performance date[598], which is imposed on the buyer pursuant to Article 48(1) CISG.

On one hand, this obligation on the part of the buyer gives certainty to the seller—interested in the specific performance of the

[597] *See above* Ch. 2, 2.1.3 for the distinction between "non-actionable duties" and "genuine—and thus actionable—contractual obligations"; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, pp. 1061-1062, Para 13; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, pp. 721-722, Paras 3, 4; Schlechtriem/ Schwenzer/ MOHS (2016), Art. 53, pp. 821-822, Para 1; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 80, p. 1162, Para 11.
[598] MAK (2009), p. 188.

contract—because it *ex ante* knows that its attempts to cure will not be in vain[599].

On the other, the availability of remedies in case of breach optimally encourages the seller to take all necessary steps in order to effectively cure. Principally, in cases under Article 48(1), the seller can anticipate that it will able to enforce this obligation in case the buyer disputes reception of the seller's late tender of performance resulting from the cure by, for example, claiming compensation for damages[600].

This gives rise to a last controversial question concerning Article 28 CISG, which lays down the following rule: a court applying the CISG is not expected to enter a judgement for specific performance if the court would not have done so under its own law.

> *Article 28*
>
> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

It is doubtful, then, whether an initially breaching seller can ask for specific performance in a scenario where this promisor has subsequently conformingly performed—by virtue of its right to cure under Article 48(1) or (2-4)—and the aggrieved buyer refuses to take its tender of performance. Having in mind such a general limitation to specific performance under Article 28 CISG, Article 62 is, arguably, excluded for the seller[601]:

> *Article 62*
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> The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

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[599] MAK (2009), p. 202.

[600] Schlechtriem/ Schwenzer/ MOHS (2016), Art. 53, pp. 837-838, Para 41.

[601] Schlechtriem/ Schwenzer/ MOHS (2016), Art. 28, p. 911, Para 15; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 28, pp. 485-486, Para 6: "[o]n the other hand, Article 28 is also applicable to the seller's rights to require performance by the buyer".

3.2.3 Suitable Means to Perform Seller's Cure

Two factors are to be considered when choosing how to remedy a breach under Article 48: the nature of the obligation breached under the contract and the precise type of failure to perform in question[602]. Therefore, categorising the types of breach creates a crucial benchmark with which to assess the seller's means of cure under Article 48[603].

(a) Remedying Non-performances. Consideration of Delay

Even in cases of non-performance—meaning that the seller entirely fails to perform one or more of its obligations under the contract by the moment that it is due—the seller can nonetheless impose its cure, under Article 48(1), or ask for an opportunity to cure, under Article 48(2-4). In so doing, the seller must cure by performing those breached obligations as bargained for. In a common example, as discussed below, if the seller did not at all deliver as contracted, it cures by delivering those owed items.

As seen, the seller' cure after the date for delivery is only feasible provided that seller's subsequent performance is still possible; in other words, the breach must still be physically remediable[604]. Furthermore, and in particular regarding cure under Article 48(1) CISG, the non-performance must, besides the precondition of being

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[602] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, pp. 765-766, Paras 5-6; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 12 who puts it in the following words: "[w]elche Maßnahmen dazu im Einzelnen erforderlich sind, richtet sich nach der Art der Vertragsverletzung". *Cf.* Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 725, Para 3.

[603] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 722, Para 5 who states as follows: "[n]otwithstanding the fact that any breach of duty represents a failure to perform and in principle triggers the remedies […], the various types of performances failures cannot be ignored entirely in the remedy system".

[604] SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 211, Para 450; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 98, Para 113; and SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, pp. 382, 401.

materially feasible, not be definitive—in the sense of amounting to a fundamental breach per Article 25[605].

> In the case law, a clear-cut example is the *Landgericht Berlin* 15 September 1994, CISG-online 399. In September 1992, a German buyer entered into a contract with an Italian seller for the purchase of 143 pairs of various types of shoes. After delivery, the buyer gave notice to the seller that some of the shoes presented serious defects—affecting, mostly, the jewelry ornamentation elements, straps and soles—which made the products non-resalable. Accordingly, the buyer declared the contract partially avoided under Article 25 in conjunction with 49(1)(a) and 51, and deducted a certain amount from the agreed purchase price. On this basis, the seller lodged a claim against the buyer for the total price plus interest, alleging that the shoes perfectly conformed to the contract.
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> The district court of Berlin affirmed that: "[a] right to remedy the defects or to substitute delivery does not exist. The buyer can demand avoidance of the contract as there is no right to repeated performance in case of a fundamental breach of contract. The fundamental breach of contract can—as is the case—also be seen in the fact that the existence of a lack of conformity is completely denied".

As a matter of principle, under the CISG, a total failure to perform a contractual obligation does not amount to a fundamental breach of contract under Article 25. Therefore, this breach amounts to a mere delay in performance—i.e. *Spätleistung*[606]—which generally admits a subsequent tender of performance. This belated performance, however, must be accompanied with a monetary compensation of non-curable damages by the breaching party as *fugit irreparabile tempus*[607], as it is expressly laid down in Article 48(1) *in fine*.

As indicated, the first and most clear-cut scenario of a total failure to perform one of the contractual obligations by the seller is the case in which this promisor completely fails to perform its obligation to

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[605] *LG Berlin* 15 September 1994, CISG-online 399 which found for the buyer provided that the non-conformity in the goods amounted to a fundamental breach of contract.

[606] SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 562, Para 7; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 4; and Staudinger/ U. MAGNUS (2013), Art. 48, Para 10; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 438, Para 38.

[607] Theoretically, if the seller can remedy its total non-performance but not its delay, it could be disputable whether the seller's cure can ever furnish performance in full. The complementary award of damages allows it to do so.

deliver goods in accordance with the contracted date for delivery[608]. If subsequent delivery is still possible, the seller may cure such non-performance by belatedly delivering those contracted goods[609]. Again, this is only insofar as no idiosyncratic circumstances—such as a repudiation of performance[610] or the time being agreed or construed to be of the essence per Articles 8 and 9 CISG[611]—are given.

> In the case law, see *US Federal District Court New Jersey* 4 April 2006, CISG-online 1216. In August 2001, a US (Delaware) Buyer entered into a contract with Finish seller for the purchase of a stock of naphtha. The seller failed to deliver within the contractual window, 10th-20th September, but delivered on the morning of 22nd September. However, the buyer refused to take delivery and claimed to have discharged the contract. Upon these facts, the buyer claimed against the seller for the damages that the delay had caused to it. On the flip side, the seller lodged a counter-claim alleging that the buyer had unlawfully rejected belated delivery and claimed for the corresponding claims.
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> The court found for the seller, deciding on the apportionment of damages: "[seller] breached the contract by failing to effect delivery within the September 10-20 window. The breach, however, was not fundamental and did not enable [buyer] to avoid the contract. [Buyer] is entitled to recover any damages it would have suffered from a two-day delivery delay, and [seller] is entitled to recover damages it incurred as a result of [buyer]'s failure to accept and pay for the naphtha in accordance with the contract and any other damages it suffered".

It must be remembered that this type of breach—non-delivery—is particularly addressed by the Convention under its Articles 47(1) in

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[608] In the case law, *I.C.C. International Court of Arbitration* 1 January 1995, CISG-online 526: "[a] simple delay does not however constitute a fundamental breach under Article 25 of the Convention because the buyer is usually obliged to fix an additional period of time of reasonable length for performance by the seller of his obligations in conformity with Article 47".

[609] ENDERLEIN/ Maskow/ Strohbach, Art. 48, p. 154, Para 2; Bianca/ Bonell/ WILL (1987), Art. 48, p. 353 who stresses: "[b]elated delivery effectively and wholly remedies the grievance"; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 740, Para 25; and SCHLECHTRIEM/ Cl. WITZ, *Convention de Vienne*, p. 122, Para 173.

[610] CISG-AC Opinion no 5, p. 4, Para 4.4; SCHWENZER (2005), *J L&Com*, p. 439; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 573, Para 32e.

[611] SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 98, Para 113; and *I.C.C. International Court of Arbitration* 1 January 1995, CISG-online 526.

conjunction with 49(1)(b), permitting the buyer to immediately avoid the contract if the seller does not deliver within the additional period of time of reasonable length fixed by the buyer. As stressed, the particularity of these cases is, thus, that avoidance is rightful irrespective of whether the breach amounts to a fundamental breach.

Furthermore, two considerations are to be stressed as to total failures to perform in particular scenarios: concerning partial performances under Article 51(1) or instalment contracts according to Article 73(1), and concerning other obligations to which the seller can be held under the contract.

Firstly, if the seller fails to deliver part of the goods, the buyer's remedies, among which is the seller's right to cure, are limited to the missing part. Differing from many national contract laws, under the CISG the buyer is not, a priori, entitled to reject partial deliveries. Therefore, the buyer keeps part of the goods and the seller may subsequently cure by belatedly delivering the missing part[612]. This regime is exactly replicated wherever the seller fails to meet an instalment. In this latter scenario, on a general basis, the remedies for breach are confined to the failed instalment.

Secondly, all above remarks on the curability of non-deliveries by the seller under Article 48 CISG are to be considered with reference to all other obligations of the seller under the contract. Accordingly, insofar as subsequent cure of a total failure to perform is still physically and contractually possible, the seller can seek to cure its obligation to hand over documents relating to the goods[613] or to comply with additional contractually-based obligations[614]. In these scenarios, the seller must cure by handing over the contractually required documents or by providing the buyer with what the parties bargained for.

> As to the seller's obligation to transfer the property in the goods, the seller has to conduct all necessary acts as to achieve this goal according

[612] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 632, Para 8: "[t]he CISG does not contain the rule existing in many domestic legal systems, under which the buyer is not obliged to accept partial delivery".
[613] Witz/ SALGER/ Lorenz (2016), Art. 48, p. 404, Para 1; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5.
[614] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 4.

to the applicable domestic law. However, conspicuously, Article 4, sentence 2, (b) expressly excludes from the CISG's scope of application from the "effects of the contract on the property in the goods sold".

(b) Remedying Non-Conformities in the Goods

As stated, under the Convention, the notion of conformity of the goods with the contract—as laid down in Article 35 CISG—comprises deviations from the contractual plan concerning: quality, quantity, nature, and packaging[615]. In practice, assumedly, non-conformities in the goods delivered constitute one of the scenarios which commonly gives rise to the application of the seller's right to cure after the date for delivery[616].

Firstly, regarding the quantity of the goods, if the seller delivers less goods than the amount owed under the contract, this party can subsequently remedy by delivering those missing goods or making up any deficiency in quantity[617].

As seen above, under the CISG, this shortage in quantity amounts to a lack of conformity and, thus, to a breach of contract, triggering the remedies under Article 45 *et seq.*[618]. Exceptionally, however, where the goods are economically and physically divisible, attention must be brought to the provision governing partial deliveries[619]—under Article 51. Also, special consideration must be given wherever the failure to perform affects contracts structured in instalments—Article 73.

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[615] *See above* Ch. II, 2.1.3.b); and Schlechtriem/ Schwenzer/ SCHWENZER (2016), *Commentary 4th ed.*, Art. 35, p. 593, Para 4.

[616] Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 518, Para 1; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 442, Para 43; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 764, Para 1: "[i]n practice, the provision is of most significance in regard to delivery of goods not conforming to the contract".

[617] SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449; SCHWENZER (2005), *J L&Com*, p. 439; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, pp. 631-632, Paras 7-8; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5: "[m]issing components or quantities can be delivered".

[618] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, pp. 595-596, Para 8; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 51, p. 813, Para 6.

[619] Soergel/ LÜDERITZ/ SCHÜSSLER-LANGEHEINE (2000), Art. 48, p. 96, Para 2.

The other side of the coin regarding breaches due to defects in quantity are deliveries of a greater quantity of goods than owed by the seller. Assumedly, these constitute a non-conformity in the goods that amounts to a breach of contract in the same terms that a short delivery does[620]. In this scenario, a seller could also conduct cure by reducing or extracting—insofar as it is possible—the excess in quantity.

However, it must be stressed that this latter type of breach not only triggers the general buyer's remedies as any other seller's failure to perform pursuant to Article 45 *et seq.*, but also entitles the buyer to immediately reject delivery of the excess quantity per Article 52(2)[621].

Secondly, the subsequent remedy of defects in quality in the already delivered goods—insofar as possible—is mainly accomplished by two methods of cure: *replacement* and *repair*[622]. In practice, for the performance of these methods of cure, it is again important to keep in mind those particularities imposed by Articles 51 and 73 in cases of partial deliveries and instalment contracts[623].

On the one hand, *replacement* of the goods permits the seller to deliver to the buyer items to substitute for those initially delivered that afterwards turned out to be non-conforming. Therefore, the

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[620] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, pp. 595-596, Para 8; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 52, p. 817, Para 6 who stresses in the following words: "[i]f the seller delivers a larger quantity than agreed in the contract, he commits a breach of contract (Article 35(1))"; *see also* LEUKART (2013), p. 123, Para 157.

[621] *See below* Ch. IV, 4.2.9. That could be a common scenario under the CISG, taking into account that the Convention usually governs sales of generic goods; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 52, p. 817, Para 6.

[622] HEUZÉ (2000), *Vente internationale*, Art. 48, p. 373, Para 422; Witz/ SALGER/ Lorenz (2016), Art. 48, p. 404, Para 1; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 631, Para 7; SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449 referring to: "Beschaffenheitsmängel ausbessern"; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5.

[623] *See* for an example as to repair, Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 752, Para 44 stressing: "[i]f one part of a divisible delivery is defective, the buyer's right depends upon Article 46(1) in conjunction with Article 51(1)".

defective items are exchanged for conforming ones, which involves concurrent return of the goods already delivered[624].

> In the case law, see for instance *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, 18 October 2005, CISG-online 1481. On 21 November 2000, a German seller contracted for the sale of equipment to a Russian Buyer. After delivery, the equipment presented defects that the seller cured by replacement. The buyer withheld payment of part of the purchase price which, therefore, brought the seller to sue the buyer seeking for payment of the full purchase price.
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> The court found in favor of the seller's claim and stated: "[t]he case papers show that the [Seller] has replaced the defective equipment with new equipment. This fact is not contested by [Buyer]. Under such conditions, [Buyer] may not reduce the price for delivered goods, while [Seller] has the right to claim the unpaid part of the price for the goods".

The most controversial scenario of cure of non-conforming quality by subsequent replacement is where the contract involves specific goods. A prominent line of opinion holds that wherever the seller delivered a defective specific item which is economically equivalent to another good with which the seller could conduct cure and which would satisfy the buyer's interests in performance as bargained for, the seller must be enabled to cure such non-conformity by replacement[625].

Finally, replacement is a particularly suitable method of cure by the seller for non-conformities in the nature of the goods. This means delivery of goods different than those owed, classically known as a case of *aliud*—delivery of generic goods belonging to a different *genus* or delivery of the wrong specific good[626]. As explained, under the CISG's notion of conformity, delivery of wrong goods is no longer considered a non-delivery but a regular breach of contract

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[624] HERBER/ CZERWENKA (1991), Art. 37, p. 171, Para 7: "[e]ine Ersatzlieferung wird grundsätzlich Zug um Zug zu erfolgen haben"; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 632, Para 9.

[625] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 742, Para 18, Art. 48, p. 765, Para 5; and *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 3. Other than these cases, the parties should enter into renegotiation for the modification of the contract.

[626] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 742, Para 18.

under the umbrella of a lack of conformity in the goods[627]. Accordingly, this breach triggers the buyer's remedies under Article 45 *et seq*. and, therefore, the seller may have a right to cure by subsequently delivering the correct goods.

In practice, the replacement of non-conforming goods is particularly suitable when the goods present grave defects which are physically impossible or unreasonable—under the reasonableness criterion of Article 48(1)—to repair.

Lastly, replacement is also a relevant method for cure wherever the seller performs by delivering goods of a better quality which are unsuitable for the intended purpose or which the buyer rejected under Article 52(2)[628]. Under the CISG, modelled on the uniform concept of a lack of conformity, a better quality in the goods delivered also amounts to a breach of contract[629] by the seller that accordingly triggers the buyer's remedies under Article 45 *et seq*.

On the other hand, *repair* of defective delivered goods involves such acts to be performed by the breaching seller as to completely eliminate the flaws in those goods—i.e. to bring the goods into conformity with the contract[630]. For example, the seller repairs by fixing the malfunctioning part of an item or reassembling it with substitute components[631]. Arguably, in contrast to a cure by delivery of substitute goods, seller's cure by repair is (normally) a more suitable, and probably more cost-effective, remedy for non-conformities in specific goods (rather than generic ones)[632].

A prominent opinion[633] has raised the key question of whether the seller's subsequent cure by repair—even within the parameters of reasonableness from Article 48(1)—should find an additional limit

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[627] *See above* Ch. II, 2.1.3.b).
[628] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 742, Para 18; and PETRIKIC (1999), p. 77.
[629] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, p. 596, Para 9; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 52, p. 820, Para 11.
[630] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 632, Para 9; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5.
[631] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 752, Para 44.
[632] LEUKART (2013), p. 110, Para 139.
[633] BRIDGE (2011), *FS Schwenzer*, p. 224.

in the quality of the goods finally delivered to the buyer. In other words, should repair only be deemed reasonable if it entails minor repairs, excluding it as a suitable method of subsequent performance wherever it might lead to delivery of substantially repaired items?

Under the CISG's provisions there is, a priori, no grounds to justify such a limitation on the method of repair. If no particulars—such as specific parties' agreements—are given and as long Article 48(1)'s blanket clauses are respected, even a complex repair has to be deemed to successfully cure the breach, provided that the seller's final tender meets the buyer's contractual interests in performance.

> In the case law, *Cour d'Appel de Grenoble* 26 April 1995, CISG-online 154. In 1990, a French seller and a Portuguese buyer entered into a contract for the sale of a used portable warehouse shed, including the cost of dismantling and shipping its metal parts. The buyer did not pay the last part of the purchase price alleging that, at the moment of removal of the ordered metal framework, a third of the parts were unusable. Upon notice by the buyer, the parties agreed to repair the goods. After repair, however, the buyer alleged that the parties had contracted that the seller was obliged to render the metal framework like new, which would increase the value of the goods by forty times—the cost of newly worked steel. Hence, the buyer lodged a claim against the seller demanding avoidance of the contract and damages and interest. The seller counter-claimed for the payment of the purchase price.
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> The French court, after considering the CISG applicable, found for the seller on the grounds that avoidance by the buyer was not rightful: "[d]efect relates only to a part of the warehouse shed and concerns some metal parts which it was possible to repair; it did not constitute an essential breach […] it does not justify an avoidance of the contract (Article 49)". Furthermore, the court considered that the seller had never accepted the obligation to render the metal framework like new worked steel. On top of that, the court affirmed that: "[Buyer] has not established that, after being remedied, the goods are still unfit to be used".

(c) Remedying Non-Conformities in Documents Relating to the Goods

Here, the very form of the seller's subsequent cure of defective documents will depend on the cause of the non-conformity; for example, whether the documents are missing, wrong, or defective. Furthermore, it is relevant to keep in mind the two different main

categories of documents to be tendered by the seller: documents of title or accompanying documents[634].

The first kind of non-conformity concerns cases where owed documents are missing. The breaching seller can cure this failure to perform, in accordance with Article 48 CISG, by subsequently sending the buyer the documents required under the contract[635]. However, it is important to consider that, as a matter of principle in a documentary sales, missing documents of title—in particular, representative documents—may not be a case of non-conformity but directly amount to a non-delivery.

Second, the seller can cure defects in the documents by replacement or repair[636]. On the one hand, for example, if the seller hands over a bill of lading that indicates a late date of loading, the seller can turn to the market for the purchase of other goods that were loaded on time, and tender the second bill of lading to the buyer—referring to these secondly purchased goods—in replacement of the non-conforming one. On the other hand, the breaching seller can 'repair' non-conforming documents by amending them—i.e. introducing or making changes to the documents themselves.

It can be proven, however, that this latter method of cure is rather rare in practice[637]. In particular concerning documentary sales, mostly involving representative documents, and insofar as cure is still possible according to the contract[638], the more cost-effective

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[634] *See above* Ch. II, 2.1.3.c). In the case law, German *Bundesgerichtshof* 3 April 1996, CISG-online 135. *See also*, Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 587, Para 12, listing non-conformities in the documents.

[635] Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 588, Para 14.

[636] Notably, wherever the seller hands over representative documents that refer to a larger amount of goods, it also amounts to a non-conformity, thus, to a breach of contract, Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 35, p. 596, Para 8.

[637] Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 588, Para 14: "[t]hat the seller might also cure the non-conformity by amending […] is difficult to conceive in practice, for if the non-conforming document was issued by the seller, then he can easily replace it, and if it was issued by a third party, then the seller will not be in a position to amend it".

[638] CISG-AC Opinion no 5, p. 2 opinions 2, 6 "[i]n the case of documentary sales, there is no fundamental breach if the seller can remedy the non-conformity of the

method of subsequently furnishing remedy of these non-conforming documents is by replacement. For instance, the seller tenders a *clean* bill of lading that substitutes the initial one, which was deemed to be *unclean*[639].

A second type of documents are those that accompany the goods, whose main effect concerns the usability of the goods. Therefore, the performance of the obligation to hand over accompanying documents closely follows the nature, terms and regime of the obligation to deliver conforming goods under Article 35[640]. As a result, for the determination of the fundamentality of the breach, it is specifically relevant whether the non-conformity of this kind of document restricts the buyer's intended use of the goods[641].

In practice, for instance, the seller's right to cure non-conforming accompanying documents results in delivery of a second transport insurance policy, wherever the initial insurance did not conform to the contract[642]. Likewise, it may mean making amendments to an insurance contract to meet the requirements under the sales

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documents consistently with the weight accorded to the time of performance"; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5. Nevertheless, according to Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 454-455, Paras 64 in this sort of transaction, not only the subjection of seller's performance to a strict performance rule—known as *Clean Handing over Rule*—but also to the essentiality of the time for performance is likely to immediately upgrade any failure to perform to a fundamental breach which, of course, then renders inapplicable the seller's right to cure from Article 48(1).

[639] Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 588, Para 14; PETRIKIC (1999), p. 77; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 49, p. 781, Para 11; and CISG-AC Opinion no 5, p. 6, Para 4.14. SCHWENZER (2005), *J L&Com*, p. 441 stresses that it is also the case wherever the contract includes a "cash against documents" clause or for documentary credits.

[640] CISG-AC Opinion no 5, p. 1, opinion 5: "[t]he issue of avoidance in case of non-conforming accompanying documents such as insurance policies, certificates, etc. must be decided by resorting to the criteria set forth in 1. to 4. [regime of avoidance for non-conforming goods]".

[641] In the case law, German *Bundesgerichtshof* 3 April 1996, CISG-online 135. *See also* CISG-AC Opinion no 5, p. 5, Paras 4.9, 4.10; and SCHLECHTRIEM/P. BUTLER (2009), *UN Law*, p. 144, Para 189.

[642] Schlechtriem/Schwenzer/ WIDMER LÜCHINGER (2016), Art. 34, p. 588, Para 14.

agreement[643], or replacing non-conforming certificates of quality, origin[644], etc.

> As to the latter, in the case law, a good example is prominent decision of the German *Bundesgerichtshof* 3 April 1996, CISG-online 135. In the case, as resumed previously[645], the parties agreed that the seller had to hand over certificates of origin and of quality of the purchased British cobalt sulphate. In particular, regarding the documents, after the receipt of them, the buyer avoided the contract since the certificate of origin was wrong (the cobalt sulphate was made in South Africa).
>
> The BGH, however, found for the seller and denied the existence of a fundamental breach. Thus, avoidance of the contract was unrightfully declared as the buyer could have cured the non-conformity in the documents by acquiring substitute ones: "[buyer] itself would have been able to obtain the correct Certificate of Origin at the latest after the issue of the origin of the goods was".

(d) Remedying Non-Conformities in Title. Encumbrances by Third Parties' Rights or Claims Under Articles 41 and 42

As to the *unrestricted* liability of the seller for the sale of goods hindered by third parties' property rights under Article 41 CISG, the seller's cure entails clearance of the buyer from all defects in title, including conflicting rights or claims of third parties[646]. In so doing, the most common method of cure—mainly concerning sales of generic goods—is by trying to replace them by others free of such third parties' rights[647], or to obtain permission from the rights

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[643] DiMatteo/ Janssen/ Magnus/ Schulze/FLEISCHMANN/ SCHMIDT-KESSEL (2016), pp. 356-357, Para 44.

[644] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 4; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 437, Para 2; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5 and Art. 49, p. 781, Para 11.

[645] *See above* Ch. II, 2.1.3.c).

[646] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 42, p. 690, Para 24 affirms: "[d]ischarging the encumbrance"; and SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449: "[R]echte Dritter beseitigen bzw. Ansprüche Dritte abwehren".

[647] SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 632, Para 9; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 42, p. 690, Para 24.

holder[648]. In the literature, acquiring from a third party the property rights and then transferring them to the buyer is also widely proposed as a method of cure for the seller [649].

As to the *restricted* liability for non-conformities stemming from rights or claims of third parties based on industrial or intellectual property, in accordance with Article 42 CISG, the methods of cure are rather similar. Therefore, the clearest method to subsequently attempt cure would be replacement of those hindered goods by others free of threatening industrial or intellectual property rights.

However, for this second group of cases, other mechanisms of cure by the seller are imaginable. On the one hand, assumedly, repair is also possible if the seller can replace the given parts of the delivered goods by alternate components free from industrial or intellectual property rights[650]. On the other hand, the breaching seller can also cure by acquiring the proper license from the third party to allow the buyer to use the protected items[651].

(e) Remedying Non-Conformities in Performing Additional Contractual Obligations. Consideration to Services.

As indicated, a priori the seller's right to cure after delivery date applies *mutatis mutandis* to the subsequent performance of additional obligations under the sales contract governed by the CISG[652].

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[648] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 4; METZGER (2014), p. 199; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 42, p. 690, Para 24: "[a] third party's express declaration that he will not claim against the buyer will also be sufficient".

[649] LEUKART (2013), p. 133, Para 170; HEUZÉ (2000), *Vente internationale*, Art. 48, p. 372, Para 421; and PETRIKIC (1999), p. 77.

[650] SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 752, Para 44.

[651] Witz/ SALGER/ Lorenz (2016), Art. 48, p. 404, Para 1; and METZGER (2014), p. 199: "[a]cquire the right that are necessary for the distribution of goods that are free from defects in title (*e.g.* by entering into a licensing agreement)".

[652] *See above* Ch. II, 2.1.3.e). In the case law, *Cour d'Appel de Grenoble* 26 April 1995, CISG-online 154, considering the applicability of the Convention to the service obligations of dismantling and shipping the parts of the sold metals framework.

However, little is said under the Convention to instruct the seller's cure in these scenarios. As a result, the gap-filling technique under Article 7(2) CISG becomes relevant. This is particularly so regarding the extent to which the Convention entails general principles specific enough to adequately rule the seller's cure of services and other additional obligations. Otherwise, room should be given to the applicable domestic law according to Article 7(2) *in fine*.

Arguably, the general principles and standards of the Convention concerning conformity, breach and available remedies suffice to give response to the doubts that seller's cure according to Article 48 might give rise to as regards cure of service obligations[653] and other additional obligations[654].

Firstly, such a subsequent remedy by the seller must stringently follow the nature and content of the breached additional obligation—excepting the inevitable delay. This assumption derives from the maxim that the seller's right to cure is a right to perform the contractual duties as bargained for[655].

For example, on the one hand, it is clear that wherever the seller was obliged to provide the buyer with services of training, montage and assistance, the seller must cure by subsequently rendering these services to the aggrieved buyer as contracted. On the other hand, for instance, the seller may be contractually obliged to have spare parts for the sold goods available for a certain period of time. If the seller then runs out of these items, it can remedy this failure to perform by acquiring from a third party those spare parts owed and subsequently making them available to the buyer.

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[653] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, p. 138, Para 37: "[w]hether the services rendered are in conformity with the contract is subject to the rules of the CISG […] Similarly, the question of the remedies available to the buyer in case a service obligation is breached can be resolved".

[654] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, p. 139, Para 38: "[t]hese cases should follow a similar pattern as cases of breach of service obligations".

[655] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, p. 138, Para 37: "[p]erformance by cure of non-conforming services is governed by Article 46(3)".

It must be noted, however, that the content of certain *sui generis* obligations created contractually oblige the seller to refrain from conducting certain acts. Some examples are obligations to respect industrial property (trademarks) or comply with geographically-structured distributorship agreements[656]. In case of breach of these kind of obligations, it is plausible that there would be no room for subsequent cure by the seller as the breach would be incurable.

3.2.4 Several Attempts to Cure or Secondary Fundamental Breach?

Assuming the parties have not agreed otherwise, it is undisputed that the seller is not restricted—insofar the breach is still physically curable and as long as cure is reasonable under the particular circumstances—to a unique attempt to cure[657]. On top of that, the seller is able to vary the method of cure chosen over its different attempts at cure. For instance, if the seller first tried unsuccessfully to repair defects in the non-conforming delivered goods, the seller can, if cure is still reasonable, then attempt to deliver substitute items[658].

> For instance, in *Delchi Carrier, S.p.A v. Rotorex Corp.* US Court of Appeals, Northern District of New York (2nd Cir.) 6 December 1995, CISG-online 140. In 1988, a US seller agreed to sell 10,800 compressors to an Italian buyer for the assembling of air conditioners. After the two first deliveries, the buyer noticed that goods were non-conforming with the sample model and the accompanying specifications upon which they concluded the contract. The compressors had lower cooling capacity and consumed more power than contracted. The seller undertook several

[656] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 425-426, Para 15.

[657] In the case law, Swiss *Bundesgerichtshof* 18 May 2009, CISG-online 1900: "[t]wenty letters which contain detailed accounts of the still existing defects subsequent to the respective attempts to remedy. After the [seller] had undertaken these unsuccessful attempts for more than one year". In the literature, SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 402; HERBER/ CZERWENKA (1991), Art. 48, p. 221, Para 2; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 563, Para 12; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 633, Para 11.

[658] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, pp. 765-766, Para 6: "[a]gain subject to reasonableness; these attempts may also be of different types (eg first repair, then delivery of substitute goods)".

attempts to cure by repairing the compressors, but all of them turned out to be unsuccessful. As a consequence, the buyer firstly asked for substitute goods, which the seller refused to deliver, and then the buyer declared the contract avoided.

The possibility of several attempts to cure is justified by the fact that the Convention does not acknowledge the so-called *Secondary Fundamental Breach*, either after expiration of a Nachfrist fixed in accordance with Article 47(1)[659], or after a seller's futile attempt to cure under Article 48. Conclusively, as seen, the *Nachfristsetzung* under §323 BGB strongly deviates from the CISG's approach.

Furthermore, whereas the expiration of a Nachfrist under Article 47(1) opens the door—in cases of non-delivery only—to the buyer to lawfully assert its right to avoid pursuant to Article 49(1)(b), the fruitless expiry of the time for cure under Article 48 does not. It neither automatically upgrades the breach in question to the category of a fundamental breach—making avoidance available under Article 49(1)(a)—nor opens a right to avoid under Article 49(1)(b).

Article 49

(1) The buyer may declare the contract avoided:
(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

In particular, concerning a subsequent cure imposed by the seller on the buyer after the date for delivery pursuant to Article 48(1), the unreasonableness test—in accordance with the provision's specific preconditions—has to be run again after an attempt to cure has failed to successfully remedy the breach. This leads to the conclusion not only that, a priori, there is room for further attempts by the seller, but also that these attempts are only excluded upon one of two following conditions:

[659] *See above* Ch. I, 1.1.2.b) and *below* Ch. IV, 4.2.5; P. Huber/ MULLIS (2007), p. 236; and SCHWENZER/ HACHEM/ KEE (2012), p. 743, Para 47.135.

Firstly, to exclude further attempts at cure, the occurred—and still not properly cured—failure to perform must already amount to a fundamental breach of contract per Article 25. This categorization will usually be due to a delay in performance[660].

Secondly, further attempts by the seller can be excluded because cure causes unreasonable inconveniences to the buyer or uncertainty in reimbursement[661] in accordance with the admissible reasonableness standard under Article 48(1). For instance, it is proven that a seller's unprofessional attempt to remedy—which results in the need for further attempts to achieve successful cure—can amount to grounds for barring the seller's right to cure[662].

> In the case law, see *Landgericht Heilbronn* 15 September 1997, CISG-online 562. A German seller entered into a contract with an Italian buyer for the purchase—for subsequent leasing—of a film coating machine for kitchen furnishings. After delivery, the machine presented problems in functioning that led the lessee to commission an expert report which concluded that the machine was defective. The seller undertook several unsuccessful repairs over a period of nine months. Finally, the buyer assigned its rights to the lessee, who declared the contract avoided and sued the seller for the reimbursement of the purchase price and damages.
>
> The German court found for the lessee concluding, as regards the seller's attempts at cure: "[t]he decision of the [Plaintiff], to refuse further subsequent improvement efforts and to introduce a preservation of evidence procedure, is justified by the doubt […] whether the subsequent improvement effort […] would be sufficient, and additionally by the [seller]'s unsuccessful subsequent improvement efforts of nine months, since the assembly of the machine in February 1992".

[660] CISG-AC Opinion no 5, p. 4 Para 4.4.

[661] SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 563, Para 12; PETRIKIC (1999), p. 77; CISG-AC Opinion no 5, p. 4 Para 4.4; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 633, Para 11: "[h]owever, each new attempt will increase the likelihood of unreasonableness for the buyer".

[662] In the case law, see *Bundesgerichtshof* 24 September 2014, CISG-online 2545: "[v]ielmehr können unzumutbare Unannehmlichkeiten insbesondere darin liegen, [...] der mehrfach vergeblich nachgebessert hat, offensichtlich *unfachmännisch* vorgeht" (emphasis added). In the literature, *MünchKomm*/ P. HUBER (2016), Art. 48, Para 7.

All in all, it must be remembered that, even if the seller's subsequent performance is deemed unreasonable or the initial failure to perform now amounts to a fundamental one, the seller cannot impose its cure under Article 48(1). However, the breaching seller can still offer its cure under Article 48(2-4), and the buyer may accept it or fail to give response within a reasonable period of time[663].

3.2.5 Seller's Right to Choose the Method for Remedy

It is generally agreed that, wherever a failure to perform by the seller can admit different mechanisms of cure, the seller is the party entitled to choose how to remedy the established breach. In other words, a priori, the seller is not restricted to any particular technique of cure[664]. Furthermore, as mentioned before, the seller can even combine different techniques over several attempts at subsequent cure. This notwithstanding, it must be stressed that parties may deviate from this default rule. The parties may contract on this issue and contractually attribute the right to choose the method of cure to the aggrieved buyer.

> In this regard, in the Vienna Conference, the delegation of United States proposed an amendment to the wording of Article 48(1). It sought to include an additional heading clearly stating the seller's right to choose the method of cure. This amendment, however, was dismissed on the basis that the right to choose is self-evident under the wording of Article 48(1)[665].

[663] Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 727, Para 10.

[664] Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 725, Para 3: "[w]obei dem Verkäufer ein Wahlrecht zwischen mehreren Möglichkeiten der Mangelbeseitigung zusteht"; Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 631, Para 7; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 6; Staudinger/ U. MAGNUS (2013), Art. 48, Para 11; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 4; Kröll *et al*/P. HUBER (2011), Art. 48, Para 18; SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 214, Para 457; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 562, Para 10.

[665] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 6, Footnote 10; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 735, Footnote 9 *in fine*; and SCHNEIDER (1989), pp. 81-82.

The seller, however, is far from an entitlement to freely choose how to remedy. Its right to choose (*Wahlrecht*) has two principal limits. On the one hand, the seller can choose among the methods of cure as long as they are materially feasible[666]. On the other hand, the methods of cure must be reasonable under the standards of Article 48(1)[667].

Regarding the former, it must be remembered that the methods of cure must, a priori, guarantee full performance in compliance with the contracted-for terms. Here, attention has to be brought to whether the parties agreed upon certain contract terms that tailored down the seller's methods of cure to a concrete list. Arguably, under a "new products" clause, the seller cannot undertake cure by repair but only by delivery of new substitute conforming goods.

As to the latter restriction, the method finally chosen by the seller must take into account the buyer's idiosyncratic interests as written into the contract and its needs according to the circumstances. That is why the seller's right to choose how to remedy finds its limits within the standard of reasonableness determined by Article 48(1)'s blanket clauses. The seller cannot choose a method that, even if it seems suitable and potentially successful under the contracted-for terms, might give rise to unreasonable delay, inconveniences or uncertainties of reimbursement to the buyer[668].

The former scenario brings about a third limitation. If the seller indicates in its offer of cure the method of cure that it will follow, and the buyer accepts, the seller cannot later on change methods to accomplish subsequent performance. This equally applies to cases where the aggrieved buyer does not respond to the seller's offer of cure within a reasonable time and consequently finds itself bound to cure under Article 48(2)[669].

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[666] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 5.
[667] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 6.
[668] Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 437, Para 3; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 6. *See* Ch. IV. 4.2.4 for particularities in the interplay between the seller's right to cure and the buyer's remedy of asking for specific performance.
[669] Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 442, Para 12 who states: "[e]ine Beschränkung des Wahlrechts des Verkäufers ergibt sich aus Abs. 2. Und 3.: Hat der Verkäufer in seiner Erfüllungsanzeige eine bestimmte Art der Nacherfüllung

This interpretation aims to avoid opportunistic behaviors on the side of the seller. Under the default regime, an aggrieved buyer is granted a chance to rightfully reject the seller's offer to cure, if the offered cure does not comply with the standard of reasonableness under the blanket clauses of Article 48(1), because, for example, the failure to perform amounts to a fundamental breach. On this basis, if the buyer accepts—or fails to give timely response to—a proposed method of cure, it may be assumed that this aggrieved party deems the offered method of cure appropriate and reasonable. If the seller was afterwards entitled to change the offered method of cure, this would result in depriving the buyer its opportunity to rightfully reject cure.

Finally, a missing aspect must be addressed regarding the limitations to the seller's right to choose the technique of cure. The question is, given a breaching seller may opt for one of several suitable and reasonable means of remedy, whether this seller is obliged to adopt the method that creates the least inconveniences to the buyer, provided that all techniques are adequate and reasonable under Article 48(1).

The answer should be negative. As long as all of these alternative methods are appropriate to accomplish full cure and within Article 48(1)'s yardstick of reasonableness, the seller is free to choose the particular method that best fits its interests[670]. This conclusion is supported because, firstly, an average rational seller will normally choose the cheapest method of cure. This will directly result in a more cost-effective subsequent performance. In second place, if the method of cure finally chosen creates larger—but still reasonable—damages to the buyer, this does not matter as the buyer will receive compensation by way of a damages award under Articles 48(1) *in fine* and 74-77 CISG[671].

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angeboten [...] muss sich der Verkäufer an die angebotene Maßnahme halten und kann nicht eine andere Art der Nacherfüllung durchführen".

[670] SIVESAND (2006), *Buyer's Remedies*, p. 107; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 562, Para 10. *Cf.* Kröll *et al*/ P. HUBER (2011), Art. 48, Para 17 who upholds a slightly different opinion: "[h]e should, however, try to choose the one that causes the least inconvenience for the buyer, without being strictly obliged to do so".

[671] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 633, Para 14.

3.2.6 Party Who Must Remedy the Seller's Failure to Perform

According to the assumed general rule, which follows from the very wording of Article 48(1) "if he can do so", the breaching seller is the party which conducts the subsequent cure. Nevertheless, as long as it has not been excluded by parties' explicit agreement in the contract, an exception can be posed. Under Article 48, it is also conceivable that a third party might be engaged for the subsequent remedy of a failure to perform. This party will do so on behalf of the seller[672].

> For example, this would be sensible for cases in which the seller has to conduct a repair of machinery installed in the plants of the buyer and the parties' places of business are very distant. Provided that it is reasonable under Article 48(1), the breaching seller might contract a third party in the buyer's country to carry out such repair in the facilities of the buyer on behalf of the former.

Two additional remarks are important. First of all, as indicated, the breaching seller can only engage a third party in its attempt to subsequently cure as long as it is reasonable under the standard of reasonableness laid down in Article 48(1). Secondly, this cure by the seller conducted by a third party must not be confused with cases where it is the buyer who contracts a third party to remedy the defects at the expense of the seller. Subsequent performance in these latter cases does not result from a seller's right to cure under Article 48 but because the buyer undertook cure by itself[673].

3.2.7 Seller's Assumption of All Costs Resulting from Cure

[672] HERBER/ CZERWENKA (1991), Art. 48, p. 222, Para 2; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 632, Para 10: "[t]he seller is free—provided it is not unreasonable for the buyer—to decide whether he should carry out the repairs himself at his own cost, or have them carried out by a third party".
[673] Staudinger/ U. MAGNUS (2013), Art. 48, Para 35; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 771, Para 21.

It is undisputed that the breaching seller has to assume all costs[674] arising from its subsequent attempt at cure. This obligation on the part of the seller is neatly stated in Article 48(1), under the wording "remedy at his own expense". Furthermore, it is covered by the third blanket clause, which refers to uncertainty of reimbursement of expenses advanced by the buyer, reinforcing the seller's obligation to pay for the costs of cure[675].

> In the case law, see *Oberlandesgericht Hamm* 9 June 1995, CISG-online 146. In 1991, a German buyer acquired 19 windows from an Italian seller. After delivery by the seller, the buyer proceeded to install the purchased items. The goods, however, turned out to be non-conforming because part of the ISO window-panes were defective. The seller replaced the defective windows with new ones but the buyer had to bear the costs of instalment. As a consequence, the buyer withheld payment to the seller of part of the price as a set-off for the costs of the installation of the substitute window-panes. The seller then disputed such a set-off.
>
> The Court of appeals of Hamm ruled in favor of the buyer's claim and stated: "[o]ne can conclude from CISG 48(1) that the seller bears the costs for the delivery of substitute goods for the repair […] Moreover, according to subparagraphs 1(b) and 2 of CISG Art. 45, the seller must reimburse the buyer for all other damages caused by nonconformity of the first delivery in so far as they cannot be remedied by a delivery of substituted goods or a repair. Those damages include the costs for the exchange of […] window-panes by [buyer]".

Such an obligation on the part of the seller to bear all costs arising out of its cure can be broken down into different aspects[676]. On the one hand, the seller cannot invoice the buyer for costs that the

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[674] HERBER/ CZERWENKA (1991), Art. 48, p. 222, Para 2: "[d]ie Kosten der Nacherfüllung hat der Verkäufer *in vollem Umfang* zu tragen" (emphasis added).

[675] Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 728, Para 15; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 8; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 765, Para 6.
Cf. MAK (2009), pp. 197, 200 who provides an extra justification for the seller's total assumption of costs arising from its cure. She bases this consideration on the aspect that the seller is the wrongdoer: "[i]t was the seller who performed unsatisfactorily, and thus causes both the need for cure and the expenses related to it […] it is thought that the seller's right to cure should be denied where it imposes any costs at all on the buyer".

[676] SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 564, Para 16.

former incurred in remedying its failure to perform after the date for performance[677].

Accordingly, the seller can not make its subsequent attempt at cure, under Article 48, dependent upon the buyer's agreement to assume the costs that this cure may give rise to[678]. It is submitted that this would be tantamount to a seller's refusal to perform[679]. Likewise, the seller cannot condition its cure on the buyer's giving performance to any new (counter-) obligation to which the seller was not entitled under the original terms of the contract.

> In the case law, it is so decided in the Swiss *Bundesgerichtshof* 20 December 2006, CISG-online 1426. In 1994 and 1995, a German seller entered into two contracts with a Swiss buyer for the purchase of sanding machines and other accessories. The first contract was executed, but the seller failed to timeously deliver part of the machinery under the second contract. On this basis, in accordance with Article 47(1), the aggrieved buyer requested the delivery of the missing machine (OKK-Zenter PCH 600, 60 EZ). However, the seller conditioned its subsequent delivery upon payment in advance of another sum of money. These facts led the buyer, pursuant to Article 49(1)(b), to finally declare the second contract avoided with regard to the non-executed part. The seller, nevertheless, disputed such avoidance and sued the buyer for payment of the full price.
>
> The federal court found for the buyer. In particular, as to the subsequent delivery by the seller, the high court held: "[t]he seller does not satisfy his duty to deliver within the additional period of time, if he offers the delivery within that time, but only in return for consideration he cannot rightfully claim under the contract or the applicable law".

On the other hand, as indicated, the breaching seller must assume and reimburse the buyer all expenses incurred as a result of the

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[677] Witz/ SALGER/ Lorenz (2016), Art. 48, p. 404, Para 4; UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 233, Para 4; Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 710; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 5; *MünchKomm*/P. HUBER (2016), Art. 48, Para 8; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 766, Para 8: "[t]he seller may not charge to the buyer any additional expenditure incurred as a result of his performance after the date for delivery".

[678] SCHNYDER/STRAUB/Honsell (2010), Art. 48, p. 564, Para 17; MÜLLER-CHEN/ PAIR (2011), p. 672; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 766, Paras 8: "[n]ot make remedying of defects dependent upon the agreement of the buyer to bear such expenses".

[679] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 47, p. 762, Para 27, Footnote 46; Art. 48, p. 767, Para 12, Footnote 29.

subsequent remedy. Strikingly important are those expenses that the buyer has advanced to allow to or to cooperate with the seller's subsequent cure[680].

These expenses include, for instance, the costs of sending back defective goods for replacement, the costs of taking delivery of the new substitute goods, or the costs of preparation of the buyer's own facilities and personnel[681]. As seen, if the circumstances give rise to uncertainty as to whether the seller will be able to reimburse them, the seller's right to cure would be deemed unreasonable and thus excluded under Article 48(1)[682].

Finally, even though these costs may be brought by the aggrieved buyer as a claim for damages[683], it must be stressed that they are not damages but expenses derived from cure. Accordingly, they are directly acknowledged by Article 48(1)[684]. As highlighted in the literature[685], this categorization beyond the notion of damages is of the utmost importance, bearing in mind the exemption under Article 79(1)(5) CISG.

> *Article 79*
>
> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

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[680] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 766, Para 8.
[681] In the case law, *Oberlandesgericht Hamm* 9 June 1995, CISG-online 146. In the literature, SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 565, Para 18.
[682] The seller, however, can still provide security for those costs or assurance that it will be able to assume them. *See above* Ch. II, 2.2.c); and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 12.
[683] *Oberlandesgericht Hamm* 9 June 1995, CISG-online 146: "[a]ccording to subparagraphs 1(b) and 2 of CISG Art. 45, the seller must reimburse the buyer for all other damages caused by nonconformity of the first delivery in so far as they cannot be remedied by a delivery of substituted goods or a repair. Those damages include the costs for the exchange of […] windowpanes".
[684] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 20.
[685] SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 565, Para 18.

3.2.8 Place of Cure

Under Article 48, as a matter of principle, the place where the seller should conduct its cure is the original place where the breached obligation was to be performed[686]. For instance, handing over of substitute items must be conducted at the initially contracted place. This consideration derives from the fact that subsequent cure by the seller must strictly follow the nature, content, and bargained-for terms of the contractual obligations[687].

However, as an exception, mostly given in scenarios where cure is conducted by repair, it is admitted that the seller can change the place of cure. Firstly, cure can be carried out at the place where the goods physically are[688]—for example, in the carrier's warehouse—at the moment that the non-conformity is discovered. Furthermore, as a second exception, the seller is also entitled to send the goods elsewhere. In other words, the breaching seller is entitled to pick up the defective goods from the buyer's premises and to send them to its own facilities or to third parties' places of business[689].

> The seller would be interested in doing so, for example, wherever non-conforming delivered items are easily reparable but the seller needs its machinery, installed in its own premises. In these scenarios, it is likely to be cost effective to transport the goods back from the buyer to the seller, instead of dismantling and moving the seller's machinery.

On the one hand, three limits on changing the place of cure are to be outlined. Firstly, the seller must assume all expenses that this change may give rise to. For instance, the seller has to pay or reimburse to the buyer any shipment costs—e.g. if the buyer commissioned the freight. Furthermore, cure by the seller in a location other than the initially contracted place for performance is possible only if, in accordance with the circumstances, it seems an appropriate method for successfully accomplishing subsequent cure.

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[686] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 19; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 563, Para 11.
[687] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 766, Para 7.
[688] PETRIKIC (1999), p. 77.
[689] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 632, Para 10: "[w]hether to do so [remedy defects in the goods] at the buyer's premises, in his own factory, or at third party's site (eg of the manufacturer)"; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 766, Para 7.

Finally, change of place is possible only insofar as the standards of reasonableness under Article 48(1) are met. However, noticeably, it could also occur that the buyer was bound, under Article 48(2), to an attempt at cure in a different place, regardless of the reasonableness under Article 48(1). This will be the case if the buyer accepted or failed to give response, in a reasonable time, to the seller's offer of cure indicating a different place.

On the other hand, conspicuously, the fact that the breaching seller is entitled to conduct cure in a different place may have a great impact on the existence of the seller's right to cure under Article 48(1) itself. Namely, a seller's attempt at cure to be carried out in the buyer's factory could bring about serious disruptions in the latter's production line, amounting to unreasonable inconveniences. A priori, this would lead to the exclusion of the seller's right to cure under Article 48(1). However, by taking the goods somewhere else, the seller may avoid these inconveniences. Therefore, the breaching seller not only pursues a more cost-effective remedy of its failure to perform but this party also guarantees the reasonableness of its cure[690].

3.2.9 Risk of Loss of or Damage to the Goods During the Seller's Performance of Cure

The CISG defines, under Article 66, the notion and principal consequences of the passing of risk[691]. The determination of the time of passing of risk is regulated under the following Articles 67, 68 and 69[692]. Whereas the latter lays down, under its first paragraph, the general default rule, the other two provisions govern the passing of risk in particular circumstances.

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[690] SIVESAND (2006), *Buyer's Remedies*, p. 107; and HERBER/ CZERWENKA (1991), Art. 48, p. 222, Para 2.

[691] WITZ/ Salger/ Lorenz (2016), Art. 66, pp. 514-515, 516 Paras 2, 6. Risks of loss or damage to the purchased goods is particularly relevant in the context of international trade. In cross-border sales, the goods are exposed to greater jeopardies and significant transport perils. For example, extreme changes in temperatures, accidents in harbors, etc.

[692] WITZ/ Salger/ Lorenz (2016), Art. 66, pp. 516-517, Para 6; Schlechtriem/ Schwenzer/ HACHEM (2016), Art. 66, p. 958, Paras 2, 3.

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.
[…]

According to the relevant literature[693], it is submitted that the CISG follows the so-called *Handing-Over Approach*. Therefore, the passing of risk is not linked to the delivery of goods but to the moment in which the seller gives up control over them. What is more, in practice, these default rules are of limited importance. Usually, the parties to a contract for the international sale of goods specifically bargain on the allocation of risks. The incorporation of ICC Incoterms to shape the content of the contract in this regard is remarkable here[694].

However, when it comes to risks in relation to the seller's right to cure after the date for performance, the issue is not generally settled. Specifically, the following important question is left wide open: does the risk fall back on the seller during the time within which this party conducts its attempt at cure according to Article 48(1) or (2-4)?

On the one hand, the Convention's default regime does not regulate this issue. On the other hand, the parties rarely specify the allocation

[693] In practice, delivery and handing over the goods will typically coincide. Nonetheless, an analysis of the regime of risks under the CISG falls beyond the scope of the present dissertation. *See* for all, Schlechtriem/ Schwenzer/ HACHEM (2016), Intro to Arts. 66-70, pp. 953-955, Paras 11, 13, 18, 20; and SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 165, Para 223.

[694] In the case law, *Oberlandesgericht Hamburg* 28 February 1997, CISG-online 261. In the literature, Schlechtriem/ Schwenzer/ HACHEM (2016), Intro to Arts. 66-70, pp. 956-957, Paras 23, 24; WITZ/ Salger/ Lorenz (2016), Art. 66, p. 521, Para 14; and Schlechtriem/ Schwenzer/ WIDMER LÜCHINGER (2016), Art. 30, pp. 515-517, Paras 5-7.

of risks during the period in which subsequent cure is carried out by the breaching seller.

In seeking an answer the impact of an aggrieved party's right to withhold its own performance must firstly be considered. As a matter of principle, under certain exceptional circumstances, the buyer is entitled to withhold taking delivery of items for a reasonable period of time[695].

Therefore, in those cases in which the seller tenders non-conforming performance and the risk has not already passed to the buyer, the seller bears the risk of loss of or damage to the goods during its attempt at cure under Article 48. In these scenarios, the risk has not already passed because the buyer has temporarily withheld taking legal delivery, even if it took physical possession in accordance with Article 86(2)'s first sentence.

> *Article 86*
>
> (2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. […]

Secondly, in regard to the CISG's default regime, the key provision to determine which party bears the risk during performance of cure by the seller under Article 48 is Article 70 CISG.

> *Article 70*
>
> If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

According to this provision, if the seller commits a fundamental breach—per the definition in Article 25—the aggrieved buyer can exercise its remedies irrespective of the passing of risk regime. In other words, on the basis of the fundamental breach, the buyer may avail itself of the remedies of replacement and avoidance—under Articles 46(2) and 49(1)(a). Both remedies entail causing the risk of

[695] *See below* Ch. IV, 4.2.8 & 4.2.9; and CISG-AC Opinion no 5, p. 7, Paras 4.20-4.21.

loss or damage to the goods to fall back on the seller. The buyer is entitled to new conforming goods or to keep or be refunded the price[696].

Regarding the seller's right to cure after the date for performance, if the seller remedies under Article 48(2-4), the risk of loss or damages to the goods should be included in this scenario. Under Article 48(2), a buyer that has accepted or has failed to give answer to the seller's offer—notice or request—of cure within a reasonable time is bound by it. This result is achieved irrespective of whether the failure to perform amounted to a fundamental breach of contract or was reasonably curable per Article 48(1).

Therefore, in these particular scenarios of cure by the seller of a fundamental breach provided the assumed acquiescence of the buyer, the risk of loss of or damage to the goods falls back on the seller during the time in which it performs its cure. This results from Articles 48(2)(3) in conjunction with 70 CISG. Therefore, the seller bears the risk of loss of or damage to the goods although the goods are within the control of the buyer[697].

For example, if, during the seller's attempt to cure by repairing defective components of the goods, these items end up lost by chance, the seller bears such loss. Accordingly, the seller is obliged to provide new conforming goods. The rationale behind this is that the buyer was already entitled to resort to replacement or avoidance of contract on the basis of the initial fundamental breach. Consequently, according to the mechanics of these remedies, the buyer was also already able to shift the risk of loss or damage to the goods onto the seller by asking for substitute goods or by ending the contractual relationship.

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[696] In the case law, *Tribunale di Forli* 11 December 2008, CISG-online 1788, which states: "[t]he Convention links specific consequences to the concept of fundamental breach […] in addition to causing the party in breach to bear the risk of peril of goods". In the literature, SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 166, Para 224; Schlechtriem/ Schwenzer/ HACHEM (2016), Art. 70, p. 999, Paras 10, 11; Schlechtriem/ Schwenzer/ HAGER (2005), *2nd ed.*, Art. 70, p. 698, Para 7; and Ferrari *et al*/ MANKOWSKI (2011), *Int VertragsR*, Art. 70, Para 5.

[697] Schlechtriem/ Schwenzer/ HACHEM (2016), Art. 70, p. 997, Para 5; and Schlechtriem/ Schwenzer/ HAGER (2005), *2nd ed.*, Art. 70, p. 696, Para 2.

The opposite scenario is more controversial. It requires determining whether the risk also falls back onto the seller in cases in which the failure to perform does not amount to a fundamental breach. It has been affirmed that Article 70 CISG, even though it only expressly refers to fundamental breach, should also include other buyer's remedies for non-fundamental breaches[698]. Therefore, a priori, even if the risk of loss or damage to the goods has already passed to the buyer, this party can anyway resort to its remedies for breach of contract under Article 45 *et seq.* However, the aggrieved buyer can only claim for the breach itself, not for the accidentally lost goods, because it bears the risk.

In other words, if the breach is not fundamental—it does not fall under the definition in Article 25—the buyer cannot avail itself of the two remedies that would enable it to recover the accidental loss of or damage to the goods; i.e. replacement—Article 46(2)—or avoidance—Article 49(1)(a). Even though Article 70 does not exclude the other buyer's remedies for breach, the buyer cannot recover the value of the lost goods. Price reduction or a claim for damages only refer to compensation for the seller's breach itself. Again, the buyer still bears the risk in the goods[699].

As a consequence, if the failure to perform does not amount to a fundamental breach and, during the time for cure by the seller, the goods end up lost by chance or accident, the buyer is still obliged to pay the purchase price. Claimable compensation is for the breach, not for the goods themselves. Remarkably, here, the cure by the seller may not only be possible under Article 48(2)(3) but also imposed by the seller in accordance with the standards under Article 48(1). Applying the same rationale seen above, in this second group of cases, the buyer is not able to shift the risk of loss or damage to the goods onto the seller because the buyer is neither entitled to resort to replacement of the goods nor to avoidance of the contract.

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[698] Staudinger/ U. MAGNUS (2013), Art. 70, Paras 6-7 who stresses: "[n]ach aA gilt Art 70 bei nicht wesentlichen Vertragsverletzungen jedenfalls entsprechend"; and Schlechtriem/ Schwenzer/ HACHEM (2016), Art. 70, p. 998, Paras 8.

[699] WITZ/ Salger/ Lorenz (2016), Art. 66, pp. 407-408, Para 8; Schlechtriem/ Schwenzer/ HACHEM (2016), Art. 70, p. 998, Paras 8; and Schlechtriem/ Schwenzer/ HAGER (2005), *2nd ed.*, Art. 70, p. 698, Para 5a.

- Exceptions to Risk of Loss of or Damage to the Goods during the Performance of the Seller's Right to Cure

Two group of cases may pose important pitfalls for the default regime of risk of loss or damage to the goods during the time within which the breaching seller attempts to cure pursuant to Article 48. Both of them concern to failures to perform that do not fall within Article 25. The first concerns cases of non-fundamental breaches cured by replacement. The second concerns cases where the breaching seller conducts cure of non-fundamental breaches by repair at its own facilities or at third party facilities[700].

In both group of cases, the cure by the seller is carried out away from the party who bears the risk. On top of that, the party that has direct possession and control of the goods—i.e. the breaching seller while attempts cure—does not bear the risk of loss or damage to them. It must be remembered that, according to Article 70, the buyer cannot make the risk fall back onto the seller if the failure to perform did not amount to a fundamental breach. This is so because, other than in these specific scenarios, the buyer cannot avail itself of a claim for substitute goods or declare the contract avoided.

The proffered solution reads as follows. Its starting point is Article 66 *in fine*, which refers to a seller's "act or omission"[701]–.

> *Article 66*
>
> […], unless the loss or damage is due to an act or omission of the seller.

The two controversial groups of cases regarding cure, replacement of goods in non-fundamental breaches or repair of goods away from the buyer's facilities, can be easily deemed as "act or omission" of

[700] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 632, Paras 10 who refers to an economic risk borne by the buyer if it has paid the price and the seller sends the goods somewhere else to carry out its subsequent cure.

[701] Schlechtriem/ Schwenzer/ HACHEM (2016), Art. 66, p. 963, Para 18; WITZ/ Salger/ Lorenz (2016), Art. 66, p. 517, Para 8; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 165, Para 223; and Staudinger/ U. MAGNUS (2013), Art. 66, Para 15.

the seller[702]. Such categorization, then, allows some malleability in the rules on risk of loss of or damage to the goods for non-fundamental breaches, under Articles 25, 46(2), 49(1)(a), and 70, according to which, a priori, the buyer cannot shift the allocation of risk.

As a consequence, Article 66 *in fine* renders the passing of risk irrelevant even if the failure did not amount to a fundamental breach per the definition in Article 25[703]. The categorization of seller's cure under Article 66 *in fine*, thus, reintroduces grounds to allow the buyer to make the risk fall back on the breaching seller in these two groups of cases also. This is achieved regardless of whether the buyer is entitled to demand replacement—Article 46(2)—or declare the contract avoided—Article 49(1)(a)–.

Therefore, if the goods are lost or damaged by accident while the seller was conducting a replacement or a repair pursuant to Article 48—either in his own facilities or in any place other than the buyer's plant—it is obliged to provide new goods. As an ultimate result, the categorization of the seller's subsequent cure under Article 66 *in fine* allows redress of the situation in which the goods are taken far from the control of the party who bears the risk by making this risk fall back on the party who has effective possession and control[704].

Finally, it must be noticed that these two exceptions on the rules on passing of risk during performance of seller's cure, in scenarios of non-fundamental breach, redound in widening the application of such a seller's right to cure from Article 48 CISG. If the buyer had anticipated that risk of loss of or damage to the goods had not fallen back on the seller during cure by replacement or repair away from

[702] This concept is definitely a broader notion than that set forth in Article 36(2), Schlechtriem/ Schwenzer/ HACHEM (2016), Art. 66, p. 965, Para 22.
[703] WITZ/ Salger/ Lorenz (2016), Art. 66, p. 517, Para 7.
[704] It is also totally coherent from a Law & Economics viewpoint. *See* SALVADOR (2009), pp. 41-42 who neatly explains the doctrine of *Superior Risk Bearer* and *Superior Insurer*. This doctrine was early drawn up by POSNER & ROSEFIELD (1977), p. 90: "A party can be a superior risk bearer […], he may be in a better position to prevent the risk from materializing […] Prevention is only one way of dealing with risk; the other is insurance. The promisor may be the superior insurer".

its control, this party would have had better grounds to refuse the seller's offer of cure. It is conceivable that the buyer could easily deem as an unreasonable inconvenience—per the second blanket clause of Article 48(1)—having to bear the risk on the purchased goods when they are cured away from its sphere of control.

3.2.10 Buyer's Cooperation in Performance of the Seller's cure. Joint Responsibility for Failures in Curing

> In the case law, *Landesgericht Regensburg* 24 September 1998, CISG-online 1307. At a textiles fair, a German buyer entered into a contract with an Italian seller for the purchase of fabrics to produce skirts and dresses. After delivery, the buyer objected to the quality and to the size of the textiles. The seller sent samples of another fabric and asked for further information as it did not know the problems faced by the buyer with the first kind of goods delivered. However, the buyer refused acceptance, which brought the seller to lodge a claim for the payment of the price.
>
> The Court allowed the claim and declared that the buyer had no right to refuse to pay the purchase price. Also, the Court affirmed that the buyer barred the seller's right to remedy under article 48 CISG, by demanding re-delivery without specifying the non-conformity: "[buyer] would only have been entitled to declare the contract avoided if it had provided the [seller] with an opportunity to remedy the alleged breach of contract […] [Buyer] therefore thwarted [seller]'s right to remedy a non-conformity under Art. 48 CISG. Since the [seller] could not know which type of fabric the [buyer] would accept, it was not obliged to send more than a sample of the replacement cloth. The delivery of the sample was also timely because the parties had not agreed on a specific period of delivery. The [buyer] was therefore held to agree to the solution suggested by the [seller]".

It is submitted that, under Articles 77 and 80 CISG, the parties are obliged to ensure full performance of their main obligations[705]. As seen in the case law, when it comes to the seller's right to cure after delivery date under Article 48, this general obligation is translated into the buyer's duty to cooperate. On the one hand, as seen, the buyer must not unrightfully refuse the seller's offer to cure by declaring the contract avoided. On the other hand, the buyer can be

[705] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, pp. 136-137, Para 35.

expected to collaborate with the seller to accomplish subsequent performance.

Accordingly, the buyer has to collaborate with and assist the seller—insofar as reasonable—in successfully performing its attempt at cure. This holds true whether cure by the seller is carried out according to Article 48(1) or the buyer is bound to the seller's cure under Article 48(2). The latter is the case wherever the buyer agreed or failed to refuse the offer of cure in a reasonable time[706].

In other words, under the Convention, the buyer can neither disrupt nor bar the seller's performance of the contract, even if it is accomplished by way of its right to cure under Article 48. In this regard, the clearest example is posed by the third blanket clause of Article 48(1). It refers to uncertainty of reimbursement of expenses advanced by the buyer. This provision clearly lays down that, under certain circumstances and as far as reasonable, the buyer might be expected to have paid in advance some expenses so as to secure a cure after delivery date from the breaching seller[707].

If the buyer, wherever it is reasonable, does not cooperate with seller's subsequent performance under Article 48, this buyer faces some sanctions. These negative consequences are modelled on what would happen if the buyer unrightfully refused the seller's offer to cure under Article 48(2)(3)[708]. In this scenario, the aggrieved buyer mostly faces the sanctions provided in Articles 77 and 80 CISG.

> *Article 77*
>
> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the

[706] In comparison *see* Article III.-1:104 DCFR which reads as follows: "[t]he debtor and creditor are *obliged to co-operate* with each other when and to the extent that this can reasonably be expected for the performance of the debtor's obligation" (emphasis added).

[707] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 80, p. 1157, Para 3; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 767, Para 12: "[i]n some act of cooperation necessary in connection with remedying a defect". The buyer's duty to cooperate may also encompass other acts. For instance, the buyer should also permit the seller to access to its facilities in order to repair non-conforming goods, SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 568, Para 28.

[708] *See above* Ch. III, 3.1.2.b).(ii).

party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

According to the former rule, if the buyer did not cooperate with the seller's cure after the date for delivery as expected, the amount of damages claimable by the aggrieved buyer on account of the seller's breach would be reduced. The reduction of damages accounts for the loss that should have been mitigated had the buyer cooperated with the seller and, thus, accomplished a successful cure after delivery date[709].

In contrast, according to the latter provision excerpted above, the buyer will not be entitled to rely on any seller's failure to perform followed by an unsuccessful attempt at cure under Article 48, to the extent that this was caused by the buyer. Here, the buyer may have caused the non-performance of the seller through a lack of cooperation with the subsequent attempt at cure[710].

It must be noticed, however, that the buyer's causation of the seller's breach does not necessarily amount to its own breach of contract under Article 53 CISG. Given this, the amount of payable damages will not only be reduced—under Article 77—but the seller will also be freed from any consequences arising out of the breach—according to Article 80. However, were this not the case, if the buyer breached one of its obligations, the seller could also assert its remedies for breach against the buyer pursuant to Article 61[711].

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[709] SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, pp. 220-221, Paras 315, 316.

[710] In the case law, *Oberlandesgericht Linz* 18 May 2011, CISG-online 2443: "[n]ach Art 80 könne sich die Klägerin auf die Nichterfüllung durch die Beklagte nicht berufen, weil sie diese Nichterfüllung selbst dadurch verursacht habe, dass sie eine Mängelbehebung nicht zugelassen habe". In the literature, Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 80, p. 1156, Para 3: "[t]o allow the seller to cure the non-conformity".

[711] It will usually be the case wherever the buyer fails to take subsequent delivery. In the case law, *Oberlandesgericht München* 8 February 1995, CISG-online 143, and in the literature, Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 80, p. 1162, Para 11; and HUBER/ Mullis (2007), p. 267.

The buyer's failure to cooperate with the seller's opportunity to subsequently perform under Article 48 is not always an all-or-nothing scenario. It is possible that a seller's attempt to cure under Article 48 fails due to cumulative wrongs or omissions from both sides: the breaching seller and the aggrieved buyer. In other words, responsibility for the cure's failure may be contributory.

Articles 77 and 80 CISG also address these cases in which both parties caused the breach[712], including by lack of cooperation with the seller's attempt to subsequently cure under Article 48. Nevertheless, in these cases that fall under Article 80, the legal consequences must be restrained[713]. Whereas, on one hand, the buyer should not entirely lose its remedies for breach, on the other hand, a compromise solution must be proffered in order to strike a balance between parties' interests.

> In the case law, see *Bundesgerichtshof* 26 September 2012, CISG-online 2348. A German seller entered into a contract with a Dutch buyer for the delivery of clay named "Aardappelbescheidingsklei A 01" (Potato Separation Clay A 01) for the grading of potatoes. In 1999, this clay was prohibited from the market by administrative order, as it contained high levels of natural dioxin. Since then, the clay has had to be processed separately. Nevertheless, in autumn 2004, elevated dioxin levels were detected in milk and other diaries produced in the Netherlands. Upon these facts, the aggrieved buyer lodged a claim against the seller, seeking compensation of existing and future damages resulting from the delivery of clay containing dioxin.
>
> As to the contributory breach, the BGH finally determined that the buyer has to bear half of the damage due to the misuse of the non-conforming clay. In so doing, the Federal Supreme Court stressed: "[a]rt. 77 CISG is based on the general underlying principle, that a damage, which could have reasonably been avoided, is not to be compensated", whereas "[a]rt. 80 CISG is an expression of the bar on contradictory behavior, formulating the general thought, that an obligee shall not benefit from its own damage causing behavior". Conclusively: "[b]oth provisions show […] that the consequence of the contribution to the damage by the obligee should not be the loss of the claim, but that in case of mutual

[712] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 7, p. 137, Para 35: "[a]rticles 77 and 80 […] Both provisions have also been taken to express a general principle that where both parties have contributed to a breach, their respective shares must be reflected in the assessment of damages".
[713] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 80, pp. 1158-1159, Para 7. *Cf.* HUBER/ Mullis (2007), p. 267.

> causing of the damage and dividable remedies like damages the respective contributions to the damage have to be reasonably taken into account in the assessment, weighing and balancing of interests".

Therefore, in cases of joint responsibility for the failure of the cure after delivery date under Article 48, both provisions—Articles 77 and 80—acknowledge that the buyer can still rely on the seller's breach of contract. However, the buyer must pay—or is not entitled to claim from—a monetary amount reflecting its part in the responsibility for the breach[714].

Conclusively, if the buyer claims, after the failed cure under Article 48, for monetary remedies—i.e. damages or price reduction—the case should be solved by a mere apportionment. Likewise, wherever the buyer seeks for non-monetary remedies after a failed cure, the solution should mirror that proffered for original failures to perform contributorily caused by both parties. On these grounds, it is submitted that the aggrieved buyer will only be able to assert its non-monetary remedies for breach of contract—for example, avoidance under Article 49(1)(a)—if it pays an amount equal to its contribution to the breach[715].

[714] SCHWENZER/ HACHEM/ KEE (2012), pp. 676-677, Para 45.128.
[715] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 80, p. 1161, Para 10.

CHAPTER 4. LEGAL CONSEQUENCES AND ECONOMIC-BEHAVIOURAL IMPLICATIONS OF THE SELLER'S RIGHT TO CURE UNDER ARTICLE 48 CISG

4.1 The Seller's Right to Cure Under Article 48 and the Notion of Fundamental Breach Under Article 25

4.1.1 General Remarks

The question to be addressed in the present section, neatly phrased by Prof. Huber[716], can be broken down into parts. Firstly, from a general viewpoint, it asks whether the curability of an established failure to perform should be taken into account when assessing whether this breach constitutes a fundamental breach. Secondly, if so, it must be considered to what extent the seller's right to cure after performance date per Article 48 is relevant for the curability of a breach.

Despite the complexity of the subject matter, the answer to the first part is nowadays rather clear. Under the Convention's scheme of breach-of-contract, the (un)reasonable curability of a failure to perform is one of the elements of the assessment of what constitutes a fundamental breach per the definition in Article 25:

> *Article 25*
>
> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Conclusively, as a matter of principle, provided that a failure to perform may still be expected to be reasonably cured—either by the

[716] P. HUBER (2007), p. 23: "[t]he crucial question is then: does the fact that the breach could be cured by the seller make that breach non-fundamental? In other words, should the curability of the breach be taken into account when deciding whether or not it is—fundamental–?"; *also*, Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 445, Para 47; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 768, Para 14.

promisor or by the promisee itself—this breach cannot be categorized as fundamental under Article 25. However, this must not be misunderstood: even if a failure to perform is non-curable, it may not directly amount to a fundamental breach, e.g. if the importance of the failure to perform was minor[717].

Accordingly, the second part of the question and the topic of this dissertation can be answered as follows. Wherever the seller committed a breach that this party is still able to subsequently remedy by furnishing due performance in a reasonable fashion, the failure to perform does not amount to a fundamental breach under Article 25.

To determine the reasonableness of the seller's subsequent performance, attention must be brought to whether the seller's attempt complies with the three standards of reasonableness under Article 48(1). More clearly, if, according to the circumstances, the seller has a right to cure under Article 48(1), a fundamental breach according to Article 25 cannot be established.

Taking diverse approaches and in a variety of scenarios, both answers have been extensively supported by case law[718] and literature[719].

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[717] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 447, 448, Para 48, 50; and Staudinger/ U. MAGNUS (2013), Art. 49, Para 14.

[718] Among others: *Cour d'Appel de Grenoble* 26 April 1995, CISG-online 154; *Bundesgerichtshof* 3 April 1996, CISG-online 135; *Oberlandesgericht* Koblenz 31 January 1997, CISG-online 256; *Landgericht Regensburg* 17 December 1998, CISG-online 514; *Oberlandesgericht Köln* 14 October 2002, CISG-online 709; *Handelsgericht Aargau* 5 November 2002, CISG-online 715; *National Commercial Court of Appeals, Div. A, Buenos Aires* 31 May 2007, CISG-online 1517; *Bundesgerichtshof* (Switzerland) 18 May 2009, CISG-online 1900; *Oberster Gerichtshof* 15 November 2012, CISG-online 2399; *Bundesgerichtshof* (Germany) 24 September 2014, CISG-online 2545. In addition, NIEMANN (2006), p. 201 for German and Italian decisions.

[719] TREITEL (1989), *Remedies for Breach*, p. 373, Para 276; SCHLECHTRIEM (1981), *Einheitliches UN- Kaufrecht*, p. 69; HONNOLD/ FLECHTNER (2009), p. 280, Para 184; Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 726, Para 5; SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 211, Para 450; SCHWENZER (2005), *J L&Com*, p. 439; SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 377; SCHWENZER/ HACHEM/ KEE (2012), p. 745, Para 47.143; Kröll *et al*/ P. HUBER (2011), Art. 48, Para 16; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 10; Schlechtriem/ Schwenzer/

However, as stressed, this subsequent performance by the breaching seller is only relevant if it is conducted in a reasonable manner—i.e. in accordance with Article 48(1). Whereas this kind of cure affects the *Fundamentality Test*[720], a cure by the seller according to Article 48(2-4) CISG does not.

In other words, only a cure that—as long as the standards of reasonableness under Article 48(1) are met—the seller is entitled to impose on an aggrieved buyer may determine the curability of a failure to perform. Namely, the seller will be able to do so only insofar as its cure does not cause the buyer unreasonable delay, unreasonable inconveniences, or uncertainty of reimbursement of expenses advanced.

As seen, a cure under Article 48(2-4) can be offered regardless of the blanket clauses of Article 48(1). As a result, it can be applied to scenarios of fundamental breach, if the aggrieved buyer accepts or fails to respond within a reasonable period of time to the seller's offer of subsequent cure. During the time indicated in the offer of cure, then, the buyer cannot resort to incompatible remedies for breach, as laid down by Article 48(2).

SCHROETER (2016), Art. 25, pp. 447, 448 Paras 48, 50; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 769, Para 15; Staudinger/ U. MAGNUS (2013), Art. 48, Para 30; JANSSEN/ KIENE (2009), *General Principles*, p. 283; SCHLECHTRIEM/ Cl. WITZ, *Convention de Vienne*, p. 126, Para 177; VERWEYEN/ FÖRSTER/ TOUFAR (2008), *Handbuch*, p. 126, Para 4.2.4.3; MAK (2009), pp. 153, 171; SIVESAND (2006), *Buyer's Remedies*, pp. 151, 153; Witz/ SALGER/ Lorenz (2016), Art. 48, p. 405, Para 2; Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 710; FOUNTOULAKIS (2011), p. 16; UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 233, Para 2; *Secretariat's Commentary*, O R Art. 44, p. 41, Para 5; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 571, Para 32a; Bamberger/Roth/SAENGER (2016), Art. 48, Para 5; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 440, Para 9, Footnote 1964; GILLETTE/ WALT (2016), pp. 268-269; LOOKOFSKY (2016), pp. 152-153, Para 223; and HEUZÉ (2000), *Vente internationale*, Art. 48, p. 373, Para 422. However, for a contrary view, mainly referring to the buyer's right to ask for replacement under Article 46(2) *see* Bianca/ Bonell/ WILL (1987), Art. 48, p. 357; and KAROLLUS (1991), *UN-Kaufrecht*, pp. 142-143.

[720] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 769, Para 15: "[o]r cannot be remedied under the preconditions of Article 48(1)"; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 10. On the flip side, Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 710 states: "[…] but this rule should not be misunderstood to mean that in each case the seller must first be offered an opportunity to cure".

However, in this second group of cases, a cure by the seller does not alter the designation of fundamental breach, cannot be imposed on the aggrieved buyer, and does not, a priori, thwart the buyer's remedies for breach[721].

Some additional remarks are needed in order to clarify the intended analysis and proffered considerations. This discussion is neither focused on the concept of fundamental breach under Article 25[722], nor on the curability itself. As mentioned, this study only seeks to depict the role that, under the Convention, a seller's right to cure after the date for performance may play as a reasonable technique for achieving cure of a breach of contract. This, in turn, is proven to constitute one of the elements to be taken into account for the assessment of fundamentality.

As a consequence, the present analysis disregards other factors that should also be considered when determining the fundamentality of a breach. It will not be discussed here what amounts to a reasonably foreseeable substantial deprivation of what the promisee was entitled to expect under the contract[723]; or, as mentioned, whether the failure to perform is reasonably curable by the buyer itself[724]; or the threshold for the objective seriousness of the failure to perform[725]; or the reasonable use of the goods in the buyer's ordinary course of business[726].

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[721] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 770, Para 17.

[722] For all, *see* Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 424-436, Paras 13-36.

[723] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 428-450, Paras 21-53.

[724] CISG-AC Opinion no 5, pp. 1, 4 Paras 3, 4.5. In regard to non-conforming accompanying documents *see* SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 396 and *Bundesgerichtshof* 3 April 1996, CISG-online 135.

[725] SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 376; CISG-AC Opinion no 5, p. 4 Paras 4.4; and *Handelsgericht Aargau* (Switzerland) 5 November 2002, CISG-online 715.

[726] In the case law, *Bundesgerichtshof* (Switzerland) 28 October 1998, CISG-online 413. In the literature, *see* SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 100, Para 115 who states: "[t]herefore, before the contract can be avoided, the defect has to be so severe that it cannot be rectified within a reasonable time nor can the goods be useable (or saleable) even if at a loss"; CISG-AC Opinion no 5, p. 4 Paras 4.3; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 448-

Returning to this work's focus, this means, for example, that if the seller has committed a failure to perform that turns out to be non-curable—or not curable in a reasonable fashion—but also of minor weight, the fact that this breach is not reasonably remediable does not suffice to make the breach fall under the auspices of Article 25[727]. All in all, even if the seller does not have a right to cure under Article 48(1), this does not suffice to directly upgrade a failure to perform to a fundamental breach, insofar as all other factors within the meaning of Article 25 are not met.

Also, it must be taken into account that the buyer's legitimate interests—either expressly agreed or construed from the contract, for which this partly assumedly has paid—might directly upgrade any breach to a of fundamental breach. This would happen, for example, wherever the date for delivery is of the essence of the contract. This results in the immediate exclusion of any seller's attempt to subsequently cure under Article 48(1), because any delay in performance will amount to a fundamental breach[728].

This notwithstanding, the buyer's legitimate interests might lead to a seller's cure pursuant to Article 48(1) being deemed unreasonable, even if they do not immediately establish the failure to perform as fundamental. This second group of cases could include, for instance, where a subsequent performance by the seller would cause unreasonable inconveniences to the buyer. Here, however, the failure to perform might not directly be fundamental; e.g. if it is reasonably expected that the buyer will cure the breach itself.

450, Paras 50-53; P. HUBER (2007), pp. 26-27; and HUBER /Mullis (2007), pp. 231-232. *Cf.* SCHLECHTRIEM/ Cl. WITZ, *Convention de Vienne*, p. 126, Para 177 who points out that this reasonable-use-test has not been unanimously applied in the case law.

[727] Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 366; and SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, pp. 571-572, Paras 32b, 32c: "[d]ie Behebbarkeit ist allerdings nicht das absolute Kriterium für die Feststellung der Wesentlichkeit eines Erfüllungsmangels. [...] Das Nacherfüllungsrecht des Verkäufers und die Wesentlichkeit der Vertragsverletzung sind demnach nicht zwei Seiten einer Medaille, sondern zwei grundsätzlich voneinander zu unterscheidende Sachpunkte".

[728] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 428, Para 21; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 769, Para 15.

The seller's right to cure under Article 48(1) not only has an impact on the determination of the fundamentality of a breach but also dramatically affects the availability of the buyer's remedies[729]. The reasonable curability of a failure to perform—in many instances per the seller's right to cure under Article 48(1)—is frequently the basis for the rightful assertion of the buyer's remedies for breach pursuant to Article 45 *et seq*; in particular, for the buyer's entitlement to avoid the contract—Article 49(1)(a)—or to demand delivery of substitute goods—Article 46(2).

These conclusions, however, are not above criticism, and they can give rise to some doubts. Firstly, as to the former, it is affirmed that the CISG's notion of fundamental breach, by taking into account the reasonableness of curability and, thus, the seller's right to cure under Article 48(1), entails the generation of a significant pitfall. This, in combination with the unclear opening cross-reference in Article 48(1)—"subject to Article 49"—results in a *Circularity* of concepts[730], which creates significant uncertainty at expense of the aggrieved buyer's legal position[731].

> *Article 48*
>
> (1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations […]

In many instances, after a breach has occurred, the buyer may not be sure whether the failure to perform falls within the category of fundamental breach per Article 25 CISG. As a consequence, the buyer might not have any guarantee—or at least it not the certainty necessary for the kind of swift reaction assumedly needed in international trade—that it can resort to more powerful remedies for breach against the seller; e.g. to demand replacement or to declare the contract avoided.

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[729] For exhaustive discussion in this topic *see below* Ch. IV, 4.2, KAROLLUS (1991), *UN-Kaufrecht*, p. 142; and Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 420-421, Para 6 reading: "[t]he main significance of the notion of a 'fundamental breach of contract', which has aptly been characterized as the 'linchpin' of the Convention's system of remedies, is that it constitutes a precondition for avoiding the contract".

[730] *See below* Ch IV, 4.3.6; GILLETTE/ WALT (2016), p. 269.

[731] BRIDGE (2011), *FS Schwenzer*, p. 235; and LOOKOFSKY (2016), p. 153, Para 223.

By way of comparative analysis, UNIDROIT Principles and DCFR, surely conscious of this legal uncertainty, do not link fundamentality of a breach—and corresponding remedies for breach—with its reasonable curability. In particular, fundamentality is established irrespective of a seller's right to cure after the date for performance.

> Under both sets of rules, a breaching debtor—i.e. seller—may always offer a subsequent cure, regardless of the reasonableness of the performance or the actual fundamentality of the breach. It is then up to the aggrieved creditor—i.e. the buyer—to assert one of the listed grounds of refusal to eschew the debtor's—i.e. seller's—right to cure[732].

A second concern was raised by Prof. Graffi[733]. There can be debate as to whether the mere existence and reasonableness of a seller's right to cure—per the restrictions under Article 48(1)—excludes fundamentality of breach. Or, from the opposite perspective, whether it is necessary that the seller has effectively offered the buyer its reasonable attempt at cure to deem the failure to perform curable and, thus, non-fundamental.

It is submitted that the mere fact that a breach is reasonably curable, under Article 48(1)'s specific preconditions, suffices to confirm that the original failure to perform cannot amount to a fundamental breach per the definition in Article 25. If a subsequent attempt at cure by the seller will not, a priori, cause unreasonable delay, unreasonable inconveniences, or uncertainty in reimbursement to the buyer, this promisee cannot rightfully avail itself of the remedies based upon a fundamental breach. This holds true, even if the aggrieved buyer is uncertain whether the seller's attempt at cure will be successful[734].

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[732] FRIEHE/ TRÖGER (2010), pp. 162-163 note that, in both sets of rules, the seller's right to cure is 'overriding'. *See above* Ch. I, 1.1.3.a) and b).

[733] GRAFFI (2003), p. 345: "[s]everal commentators suggest that in case of delivery of defective goods there is no fundamental breach if the seller has made a serious offer to cure the defect […] Another commentator even suggests that there is no fundamental breach also in the absence of an offer to cure, as long as the breach remains curable". *Also* Kröll *et al*/ P. HUBER (2011), Art. 48, Para 23.

[734] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 18; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 446-447, Para 48 who phrases it thusly: "[a]s long as no reasonable period of time has passed and no unreasonable

4.1.2 Particular Considerations

It is generally agreed that the notion of fundamental breach must be uniformly interpreted the applied throughout the CISG's text. This is totally in tune with the Unitarian approach to breach-of-contract that, as a matter of principle, the Convention upholds. Furthermore, it also follows from the systematic position of Article 25—defining fundamental breach—which is located in the opening of part III: *sale of goods*, Chapter I: *general provisions*[735].

Consequently, as seen above, if it is decided that the seller's right to cure after the date for delivery—in accordance with Article 48(1)—is one of the crucial factors to be taken into account when assessing the fundamentality of a failure to perform, this assumption must hold true for all specific scenarios of breach by the seller. This means, with regards to partial performances (Article 51)[736], anticipatory breaches (Article 72(1))[737], and instalment contracts

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inconvenience has been caused, the seller has not committed a fundamental breach in the sense of Article 25"; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 770, Para 17.

[735] Staudinger/ U. MAGNUS (2013), Art. 48, Para 29; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 421, Para 7; UNCITRAL (2012), *Digest of Case-Law*, Art. 46, Para 13; and GRAFFI (2003), p. 345. *Cf.* SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 190, Para 271 who considers the Nachfrist-mechanism as an exception.

[736] In the case law, *Pretura di Parma* 24 November 1989, CISG-online 316: "[t]he [seller's] non-performance is a fundamental breach of contract according to article 49(1)(a) because two months after the conclusion of the contract, the [seller] was not yet able to deliver one-third of the goods"; *Landgericht Heidelberg* 3 July 1992, CISG-online 38. In the literature, SCHWENZER/ HACHEM/ KEE (2012), p. 749, Para 47.161; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 51, pp. 813, 814, Paras 6 and 10.

[737] SCHWENZER/ HACHEM/ KEE (2012), p. 745, Para 47.143: "[f]or example, whether it is—clear—that the other party will commit an important and serious breach of contract but the other party (here seller) *will easily be able to cure that, there is no fundamental breach and there is no place for an actual anticipatory breach* application" (emphasis added); Schlechtriem/ Schwenzer/ FOUNTOULAKIS (2016), Art. 72, p. 1028, Para 10: "[f]or assessing whether the breach is fundamental, the standard of Article 25 applies"; and, in the case law, *Magellan International Corporation v. Salzgitter Handel GmbH, Federal District Court (Illinois)* 7 December 1999, CISG-online 439: "[u]nder the Convention an anticipatory repudiation pleader need simply allege (1) that the defendant

(Article 73)[738], the existence of a seller's right to cure does indeed under Article 48(1) excludes the fundamental character of the breach.

> As to partial deliveries, see *Landgericht Heidelberg* 3 July 1992, CISG-online 38. A US Seller entered into a contract with a German buyer for the sale of computer components in 11 parts. After the seller only delivered 5 parts, the buyer refused payment and declared the contract avoided under Article 52(1).
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> The court found for the seller on grounds that no fundamental breach was established: "The term fundamental breach is defined in CISG Art. 25. Specifically, the purpose for the purchase of the goods by the [Buyer] which also has to at least indirectly become clear out of the contract, must then be unobtainable because of the breach of contract by the [Seller]. To guarantee the achievement of the purpose of the contract in cases of a breach of contract by the seller, the buyer may be expected to make a substitute transaction".

As an ultimate result, then, the seller's right to cure under Article 48(1) plays a crucial role in enabling the most drastic remedies for breach to the buyer in these instances also [739].

> *Article 51*
>
> (1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.
> (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.
>
> *Article 72*
>
> (1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
>
> *Article 73*
>
> (1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any

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intended to breach the contract before the contract's performance date and (2) that such breach was fundamental".

[738] HUBER /Mullis (2007), pp. 295-296.

[739] Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 421, Para 7: "[a] 'remedy specific' interpretation of Article 25, […], should therefore be rejected".

> instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.
>
> (2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
>
> (3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Furthermore, those cases in which fundamental breach might be caused by an accumulation of multiple breaches under the same contract are also of interest[740]. Here, again, there is no fundamental breach, provided that the breaching seller can cure these multiple breaches—or the resulting aggregate breach—in a reasonable way, which is again to be determined by the blanket clauses under Article 48(1).

The CISG's concept of fundamental breach under Article 25, rightfully interpreted in conjunction with the seller's right to cure according to Article 48(1), should uniformly apply to all types of failures to perform by the seller.

Firstly, a common notion of fundamentality has to be found for both non-performances[741] or non-conforming tenders of performance. Secondly, it must concern a seller's breach of any obligation arising from of the contract. As proven in the case law, these obligations are to deliver conforming goods[742], to hand over conforming

[740] In the case law, *Bundesgericht* 2 April 2015 CISG-online 2592: "[m]ehrere Vertragsverletzungen begründen indes nicht automatisch eine wesentliche Vertragsverletzung, machen diese aber wahrscheinlicher". *Also*, Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 427-428, Para 20.

[741] *Landesgericht Regensburg* 24 September 1998, CISG-online 1307. However, the particular Nachfrist-technique must be remembered, which—under Articles 47(1) and 49(1)(b)— allows the buyer to avoid the contract in case of non-delivery irrespective of the finding of a fundamental breach.

[742] *Handelsgericht Aargau* 5 November 2002, CISG-online 715.

documents relating to them[743], to transfer the property in them, and any other obligations additionally agreed[744].

4.2 Interplay between the Seller's Right to Cure after Performance Date and the Buyer's Remedies for Breach

4.2.1 Parties' Agreement on the availability of Remedies

It is submitted that the parties to a contract governed by the CISG may limit the liability to be imposed on the breaching promisor in the case of failure to perform[745]. In addition, they may agree on the availability of certain remedies for breach. Hence, they may contract deviations from those remedies that the Conventions' default rules otherwise provide[746], among which, as already discussed above, is the seller's right to cure after performance date, which may, thus, be expressly or implicitly altered or even excluded[747].

However, what becomes relevant in the present discussion it is not an all-or-nothing exclusion of the default remedies or an alteration of their availability in and of itself; rather, what is discussed here is contractual modification of interactions between them, which the default rules would otherwise structure. Of particular interest, of course, is the interplay between the seller's right to cure under Article 48 and the rest of the buyer's remedies for breach under Articles 45 *et seq*.

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[743] *Bundesgerichtshof* 3 April 1996, CISG-online 135.
[744] *Oberlandesgericht Frankfurt* 17 November 1991, CISG-online 28.
[745] *Bundesgerichtshof* 31 October 2001 CISG-online 617; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1081, Para 60.
[746] Schlechtriem/ Schwenzer/ SCHWENZER/ HACHEM (2016), Art. 6, p. 115, Para 28; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, pp. 734-735, Para 36; GILLETTE/ WALT (2016), pp. 475-477; and P. Huber /Mullis / P. HUBER (2007), p. 258 denoting the relevance in practice of the *Force Majeure Clauses*.
[747] The latter is usually deemed to occur wherever the parties had given essential significance to the performance of the breached obligation. *See above* Ch. II, 2.1.1. This is particularly so for the incorporation and effectiveness of variations imposed on standard terms of business and sale conditions.

Therefore, the question is whether the parties may contract around the non-mandatory sequence of remedies given by the CISG's default rules. Imaginably, for instance, the parties could condition the effectiveness of a right to declare the contract avoided on the buyer having allowed the seller to attempt cure. This could conceivably occur irrespective of whether the scenario already amounted to a fundamental breach[748]. It is also conceivable that, for instance, the parties could have agreed to make a seller's right to cure compatible with a reduction of the purchase price.

> *Olivaylle Pty. Ltd. v. Flottweg GmbH & Co KGAA Federal Court of Australia* 20 May 2009, CISG-online 1902. In 2005, a German seller and an Australian buyer entered into a contract for the sale of an equipment for the production of olive oil. In the contract, besides a disputable choice-of-law provision, it was stipulated that buyer had a right to claim a reduction in the purchase price or withdraw from the contract. However, these remedies are only available after the expiration of a "reasonable period of grace", indicated by the promisor.

Having considered these initial remarks, the frame for discussion is narrowed down as follows. The next sections are focused on the interplay of a seller's right to cure—under Article 48—with each of the buyer's remedies for breach of contract[749]. In so doing, these remedies are analyzed according to the ordinary conditions for their application, as given by the non-mandatory provisions of the CISG. Hence, it is assumed that the parties have not agreed otherwise.

4.2.2 Starting Point

The impact of the seller's right to cure after performance date on the availability of the buyer's remedies for breach must be summarized by taking into account the following groups of cases.

First of all, the opportunity of a reasonable cure under Article 48(1) excludes those buyer's remedies for breach that are inconsistent with the seller's subsequent performance. In other words, insofar as

[748] UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 233, Para 2.

[749] Reference to Article 45 *et seq*. does not suffice to comprise all remedies for breach to which an aggrieved buyer may turn to for relief, as pointed out by Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 45, p. 721, Para 1.

the circumstances within which a seller's cure is deemed reasonable—as dictated by the Article 48(1)'s blanket clauses—have not elapsed, the buyer is not legally provided with effective remedies.

As seen, according to Article 48(1), the seller can avail itself of its right to subsequently cure and impose performance on an aggrieved buyer. The former can do so, even if the latter would have sought another solution. Therefore, after a breach has been established and cure found to be still feasible and reasonable—that is, it will not cause the buyer unreasonable delay, unreasonable inconveniences, or uncertainty in reimbursement—the seller can impose its specific performance as a remedy.

The buyer can only resort to a right to withhold own performance, for instance, withholding payment of the purchase price. Exceptionally, provided that the buyer already paid the purchase price without being obliged to do so and cure is carried out by replacement, it is argued that the buyer should also have a right to withhold the handing over of the delivered non-conforming goods. Otherwise, the buyer will run a significant economic risk while the seller is curing. However, it should also be possible for a seller to avert this right of retention by furnishing adequate securities[750].

Secondly, if, for instance, the seller has offered cure in terms that do not comply with the blanket clauses of Article 48(1), or the original failure to perform already amounts to a fundamental breach under Article 25, the buyer does not have to endure the seller's attempt at cure. The buyer can rightfully reject such an attempt to cure per the notification regime of Article 48(2-4). Additionally, the buyer can legitimately turn to its remedies for breach inconsistent with a seller's subsequent cure—for the most part listed under Article 45 *et seq*.

Here, however, two resulting sub-scenarios are to be distinguished:

[750] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 632, Paras 9-10 who affirms that a right of retention should also be granted to an aggrieved buyer, if the seller cures by repairing the goods away from the buyer's sphere of control. *See also* Ch. IV, 4.2.8.

i. *Unreasonableness Without a Fundamental Breach*

If the seller's failure to perform does not constitute a fundamental breach but cure by the seller is merely unreasonable—for instance, because it will cause unreasonable inconveniences per the yardstick of Article 48(1)—the buyer may avail itself of remedies consistent with performance of the contract. Namely, the buyer may fix a Nachfrist under Article 47(1) as well as require performance under Article 46(1)(3).

The buyer may also resort to those other remedies that are inconsistent with subsequent performance by the seller; i.e. damages, under Articles 45(1)(b) in conjunction with 74-77, or price reduction, under Article 50. In contrast to the former group of cases, the goal of these remedies is not the performance of the contract in its terms but to provide the aggrieved buyer with a monetary compensation for the suffered breach. However, the buyer does not yet have access to the full range of remedies.

ii. *Scenario of Fundamental Breach*

If the breach is unreasonably curable because it directly amounts to a fundamental breach of contract under Article 25, the buyer is provided with the whole set of remedies. Therefore, in this second scenario the list of remedies available to an aggrieved buyer is longer. Besides all remedies mentioned above, the buyer is, a priori, also entitled to seek replacement, under Article 46(2), and avoidance, under Article 49(1)(a)[751].

Last but not least, it has to be remembered that, in any of these groups of cases, the buyer may see how its effective remedies are suspended by effect of the communication regime under Article 48(2-4).

> *Article 48*
>
> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

[751] Bianca/ Bonell/ WILL (1987), Art. 48, p. 356; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 737, Para 1; Art. 49, p. 776, Para 2.

> (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.
>
> (4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

If the buyer accepts or fails to respond in a reasonable time to the seller's offer of subsequent cure, the buyer, according to the wording of Article 48(2) *in fine* may not "resort to any remedy which is inconsistent with performance by the seller". As explained elsewhere, these legal consequences take place regardless of the reasonability of the seller's cure according to Article 48(1), and may occur even in the event of fundamentality of the failure to perform.

4.2.3 Seller's Right to Cure v. Damages. Remarks on Cure by the Buyer Itself and Fixed Sums

As to the interplay between the seller's right to cure and the buyer's entitlement to damages, two sub-items are to be distinguished.

Firstly, the buyer's entitlement to damages, which is primarily intended to compensate and amount equivalent to expectation damages[752], is directly inconsistent with a reasonable seller's right to cure under Article 48(1)[753].

Therefore, only once the seller has attempted to cure without any success and extra attempts at cure are not reasonable anymore; or if the initial breach is deemed unreasonably curable; or, finally, if the failure to perform reaches the category of fundamental breach per

[752] *See below*, *Turku Court of Appeals* 24 May 2005, CISG-online 2369. *Also*, Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1063, Para 18; and COOTER/ ULEN (2016), p. 314, Figure 9.1 for an intuitive graphic on expectation, opportunity cost, and reliance measures of damages.

[753] Kröll *et al*/ P. HUBER (2011), Art. 48, Para 38 phrases as follows: "[c]laiming damages for those losses which cannot be avoided by the seller's performance would be consistent with the seller's request, whereas claiming damages for other losses would be inconsistent with it"; *Secretariat's Commentary*, O R Art. 44, p. 40, Para 9; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1065, Para 25.

the definition in Article 25, may the buyer may rightfully claim for expectation damages[754].

Accordingly, it must also be noticed that, so long as the buyer does not rightfully reject an offer of cure under Article 48(2-4), it cannot claim for full compensation in damages under Articles 74 *et seq*. This is the case even if the original failure to perform is not reasonably curable under Article 48(1) or directly amounts to a fundamental breach under Article 25. As seen above, expectation damages fall into the category of remedies inconsistent with performance by the seller.

> *Article 74*
>
> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Nonetheless, it is beyond doubt that a seller's attempt to cure under Article 48, even if not completely successful, might reduce or mitigate the gravity of the breach and the losses arising out of it. In these cases, cure by the seller should have a relevant impact on the calculation of damages to be paid. Even if the buyer is entitled to claim for expectation damages, a seller's attempt to subsequently cure its failure to perform may ultimately reduce its liability for damages[755].

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[754] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 771, Para 21; SCHWENZER/ HACHEM/ KEE (2012), p. 743, Para 47.135; *Secretariat's Commentary*, O R Art. 44, p. 40, Para 9; LAUROBA (2015), p. 1445; *Cf.* Díez-Picazo/ LÓPEZ (1998), Art. 48, p. 432 alleging the so-called Principle of Full Compensation. *See also* BRIDGE (2013), *Int' l Sale of Goods*, p. 585, Para 12.23 affirming that the seller's right to cure is: "[a] type of enforced mitigation of loss that the buyer must allow the seller to implement".

[755] TREITEL (1989), *Remedies for Breach*, p. 371, Para 276, footnote 89; ENDERLEIN/ Maskow/ Strohbach, Art. 48, p. 154, Para 9; BRIDGE (2013), *Int' l Sale of Goods*, p. 585, Para 12.23; and *Secretariat's Commentary*, O R Art. 44, p. 40, Para 9: "[t]he original damage claim will, of course, be modified by the cure".

As indicated while referring to the notion of *Curability* of a breach, the so-called 'cure' by the buyer is interesting. In some instances of breach, the buyer is expected, insofar as reasonable according to the circumstances, to obtain performance elsewhere in the market before being able to assert other remedies; particularly avoidance of the contract pursuant to Article 49(1)(a)[756]. If the buyer does so, it is entitled to charge the costs of the substitute bargain to the initial breaching seller as damages pursuant to Article 45(1)(b)[757].

> *Article 45*
>
> (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
>
> (a) exercise the rights provided in articles 46 to 52;
>
> (b) claim damages as provided in articles 74 to 77.

However, insofar as the seller's right to cure under Article 48(1) exists, the buyer is not expected to do so, as it is prevented from entering into cure by itself. This is so as long as the seller is entitled to cure by virtue of Article 48(2-4)[758]; otherwise, the buyer would have means by which to bar the seller's subsequent performance. In short, cure by the buyer is inconsistent with the seller's right to cure after the date for performance[759].

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[756] For instance, the leading *Bundesgerichtshof* 3 April 1996, CISG-online 135.

[757] *Oberster Gerichtshof* 14 January 2002, CISG-online 643; and *Landgericht Heidelberg* 3 July 1992, CISG-online 38: "[t]he buyer may claim possible additional costs due to a substitute transaction as damages […] in accordance with CISG Art. 74".

[758] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1065, Para 25; CISG-AC Opinion no 5, p. 4 Para 4.5; Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 528, Para 28; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 442, Para 12; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 21; Kröll *et al*/ P. HUBER (2011), Art. 48, Paras 17, 38; P. Huber /Mullis / P. HUBER (2007), p. 275. The latter stresses the fact that third parties' high costs of repair might not be foreseeable by the seller under Article 74 and thus be non-recoverable for the buyer.

Cf. HONNOLD/ FLECHTNER (2009), p. 429, Para 296.1 who have a more lenient view of cure by the buyer itself despite the seller's right to cure.

[759] *Oberlandesgericht Düsseldorf* 15 February 2001, CISG-online 658: "[d]er Mängelbeseitigungsaufwand kann zwar nicht als Schadensersatz geltend gemacht werden, solange dem Verkäufer das Nacherfüllungsrecht (Nachbesserungsrecht) nach Art. 48 CISG zusteht". Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 771, Para 21: "[a]s long as a right to remedy defects exists, the buyer is not entitled to remedy the defect himself and to charge the costs to the seller as

The second sub-item to be addressed is the compatibility—openly professed by Article 48(1) *in fine*—of the buyer's remedy to claim for damages with the seller's cure under Article 48. It is not relevant here whether this subsequent performance has been imposed on the buyer under Article 48(1), or is made with the buyer's permission per Article 48(2-4).

As a matter of principle, these damages only cover the extent of those buyer's losses that cannot be subsequently cured by its counter-party[760]. Conspicuously, the scope of the damages is not directly designed to compensate the buyer for its expectative measure, but to merely complement the seller's cure. What is more, the buyer cannot claim for a reduction of value in the goods, if, for instance, the seller successfully repaired them[761].

As a result, the seller's subsequent cure in conjunction with a damages award guarantee that the buyer will finally receive the full expected measure of what it contracted for[762]. Technically speaking, a buyer is entitled to seek damages because the seller's right to cure does not amount to an amendment of contract but a remedy for an established breach[763]. However, even though a seller's successful attempt at cure entirely redresses the failure to perform, and ultimately excludes all the buyer's rights, these effects are not

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damages […] that is because he would thereby prevent the seller from performing the contract after the date for delivery".

[760] In the case law, *see Oberlandesgericht Hamm* 9 June 1995, CISG-online 146: "[a]ccording to subparagraphs 1(b) and 2 of Art. 45, the seller must reimburse the buyer for all other damages caused by nonconformity of the first delivery in so far as they cannot be remedied by a delivery of substituted goods or a repair". *Also* Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 771, Para 21.

[761] HEUZÉ (2000), *Vente internationale*, Art. 48, p. 372, Para 421; FOUNTOULAKIS (2011), p. 12; Staudinger/ U. MAGNUS (2013), Art. 48, Para 31; and Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 528, Para 25.

[762] SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 210, Para 300; P. Huber /Mullis / P. HUBER (2007), p. 271. Furthermore, it is submitted that under the CISG, interest is payable on damages, *see* SCHWENZER/ HACHEM/ KEE (2012), p. 694, Para 46.65.

[763] For the same rationale in the case of fixing of a Nachfrist, Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 47, p. 759, Para 9.

retroactive. As a result, the seller is still liable for any remaining consequences of its breach that cure cannot properly fix.

Particularly, the compatible categories of damages to be recovered despite a successful seller's cure are non-curable damages directly resulting from the non-performance, such as delay[764], and other non-curable ancillary loss[765], mainly comprising the recoverability of incidental damages[766].

> In the case law, *Landgericht Oldenburg* 9 November 1994, CISG-online 114. As outlined, an Italian seller and a German buyer entered into a contract for the purchase of six lorry platforms and two belts. Upon delivery, the seller repaired five of the six platforms, which had turned out to be non-conforming. As to the subsequent cure conducted by the seller, the court stated: "[a]long with the right to demand cure, however, the [buyer's] rights under Art. 45(1)(b) to other remedies for breach of contract by the seller remain unaffected. According to this provision, besides demanding subsequent delivery or cure, the buyer can request damages for incidental and consequential losses suffered".

In practice, the latter notion of damages principally includes the buyer's costs of taking delivery, of examination of non-conforming goods, or of dismantling installed goods[767]. Likewise, it also includes costs incurred by the buyer in cooperating with the seller's attempt to cure; e.g. the costs of sending back the non-conforming

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[764] *Cour d'Appel de Grenoble* 26 April 1995, CISG-online 154: "[a]ttendu cependant que, conformément à l'article 48(1) de la Convention, l'acheteur conserve un droit à dommages- intérêts malgré la réparation en nature faite à ses frais par le venduer; Que la Cour, tenant compte du retard souffert […], lui [buyer] alloue, à titre de dommages et intérêts, […], représentant au surplus dix pour cent de la valeur globale de la vente". *Also*, Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 710; UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 234, Para 7; TREITEL (1989), *Remedies for Breach*, p. 373, Para 276; and *Secretariat's Commentary*, O R Art. 44, pp. 40-41, Para 12.

[765] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 771, Para 21; Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 528, Para 25; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 585, Para 63; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 13; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 442, Para 13; and *MünchKomm*/ P. HUBER (2016), Art. 48, Paras 20-21, all referring to the notions of: "Verzögerungs—und Begleitschäden".

[766] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1065, Para 25, Footnote 61: "[t]he recoverability of damages for delay and incidental damages remains unaffected".

[767] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 771, Para 21.

goods, costs of storage of non-conforming goods, or costs of sorting out the defective items[768].

> *Turku Court of Appeals* 24 May 2005, CISG-online 2369. In November 2000, a Spanish seller entered into a contract with a Finnish buyer for the purchase of 40 tons of paprika powder. This good was to be used in various spice mixes that afterwards were forwarded to several sub-buyers. To reduce microbe levels in the powder, the contract specified that the goods needed to be steam-treated. However, later laboratory sample tests established that the powder had been treated with radiation. The Finnish buyer alleged that the powder was useless for the intended purpose because the customers in the Finnish market did not want to acquire irradiated products. The Buyer lodged a claim for damages with interest against the seller.
>
> In the decision, the Court of Appeals concluded: "[t]he amount of damages the Buyer claimed consisted of compensation paid by the Buyer to its customers because the goods were withdrawn from the market, compensation paid for redeemed goods, cost for destroying the powdered paprika in the warehouse, cost for booking the powdered paprika as deficit, labour—travelling—and cargo costs incurred in investigating the matter, cost for analyzing and destroying the goods. All the damages claimed by the Buyer […] could be compensated under CISG Article 74".

In addition, the buyer could also jointly claim for losses of profit during the time within which cure by the seller is performed[769]. To some extent, consequential damages could conceivably also cover losses whose recovery as damages is compatible with the seller's attempt at cure. These could include damages to the buyer's

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[768] In the case law, *Landgericht Oldenburg* 9 November 1994, CISG-online 114: "[o]f the damages claimed by [buyer], travel expenses [...] as well as the tolls [...] and the freight costs, which were incurred for the subsequently delivered platforms, are recoverable". Also, Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1068, Para 28.

[769] In the case law, *Delchi Carrier, S.p.A v. Rotorex Corp.* US Court of Appeals, Northern District of New York (2nd Cir.) 6 December 1995, CISG-online 140; and *Oberster Gerichtshof* 14 January 2002, CISG-online 643.
In the literature, Kröll *et al*/ P. HUBER (2011), Art. 48, Para 26; P. Huber /Mullis / P. HUBER (2007), p. 220 stresses: "[w]here the seller delivers a machine which was not in conformity with the contract under Art. 35 and where its repair takes three weeks, damages will be recoverable for any lost profit incurred while the machine was being repaired, but not for the difference in value between the (unrepaired) machine and the value that a conforming machine would have had at the time of delivery". Comparatively, for the same solution under the DCFR, *see* Wagner/ FAUST (2009), p. 30.

property, reputational damages, or losses resulting from the buyer's liability to its sub-buyers[770].

As a final remark, focus must be given to the relation between the seller's right to cure and fixed sums agreed by the parties to be payable upon breach of contract.

A priori, fixed sums—comprising either liquidated damages or penalty clauses—follow the same patterns applicable to the ordinary buyer's claim for damages. The seller can be held to them, as long as they fall within the restrictions of Article 74, if the initial breach was fundamental or merely unreasonably curable under Article 48(1).

Also, in case the failure to perform is reasonably curable under Article 48(1) or the seller becomes entitled to cure according to Article 48(2-4), they are only payable to the extent that they are not covered by a seller's attempt to subsequently perform[771].

In particular, enforcement of fixed sums in a scenario of reasonably remediable breach depends upon what it was the fixed sums were designed to sanction[772]. If, for example—as is often the case[773]—fixed sums are triggered by a delay in performance, the seller may not be exempted from paying the agreed sum by alleging that it subsequently cured its failure to perform[774]. As discussed, even if subsequent cure is successfully accomplished, it has no retroactive effects, and certainly cannot cure time.

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[770] For categories of losses recoverable under Article 74 CISG *see* Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, pp. 1064, 1067, 1070, 1072, Paras 22, 28, 33, 38.

[771] For the recoverability of contractual penalties as consequential losses *see* Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 74, p. 1070, Para 33. For the interaction between fixed sums and Nachfrist under Article 47 Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 47, p. 762, Para 20.

[772] GÓMEZ (2007), p. 28.

[773] *Audiencia Provincial Madrid* 18 October 2007, CISG-online 2082 where the court finally moderates the penalty clause according to the domestic law.

[774] UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 234, Para 6.

4.2.4 Seller's Right to Cure v. Buyer's Right to Require Seller to Perform. In particular, Replacement and Repair.

The general assumption is that, if a seller can reasonably cure its failure to perform in compliance with the standards laid down in Article 48(1), this party should prevail with its subsequent performance over any buyer's remedies for breach. The latter's remedies, as long as a seller's subsequent cure is reasonable under Article 48(1)—or not timeously rejected under Article 48(2-4)—are ineffective. As seen above, only the remedy for damages is compatible with cure by the seller under Article 48(1).

> *Article 48*
>
> (1) Subject to Article 49, […]. However, the buyer retains any right to claim damages as provided for in this Convention.

In particular, the issue to be addressed in the present section is the relationship between the seller's subsequent cure and the buyer's right to demand specific performance[775]; that is, where the seller fails to perform one of its obligations under the contract and the buyer reacts to this breach by asking for performance under Article 46. At the same time, we assume that the breaching seller is still able to cure under the restrictions of Article 48(1) or has offered an attempt to cure under Article 48(2-4). Conclusively, then, both parties have evidenced a common purpose: specific performance of the contract. Even so, they seek this goal via divergent paths.

> *Article 46*
>
> (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

In further detail, attention should be brought to two sub-scenarios. These comprise those cases where the seller and buyer seek subsequent performance, given that the seller delivered non-

[775] SCHWENZER/ HACHEM/ KEE (2012), p. 562, Para 43.09: "[w]ith the emergence of a the obligation to deliver goods in conformity with the contract as a general obligation under a sales contract, specific performance and cure have approximated"; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 737, Para 1.

conforming goods. In short, the interplay between the buyer's rights to demand replacement or repair—under Article 46(2)(3), respectively—and the assumed priority of the seller's right to cure under Article 48 must be resolved[776].

> (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.
>
> (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

For all three instances, the general assumption stated above holds true. Insofar as the seller undertakes cure in accordance with Article 48(1), or its offer of cure has not been lawfully rejected under Article 48(2-4), it has primacy in determining how to cure[777]. As to the former, provided that the boundaries of reasonableness under Article 48(1) are respected and the method of cure is, a priori, suitable for fixing the breach, the seller is the party who, for example, should decide whether to eliminate the defects in the items or deliver conforming substitute ones.

i. *Buyer Demands Replacement and Seller Offers Repair*

The first sub-scenario to be individually discussed refers to the interaction between the requested replacement and the offered cure. Specifically, where the buyer asks for replacement of non-conforming goods under Article 46(2), but the seller offers cure by repair under Article 48(1). As affirmed, the seller's right to cure has priority[778].

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[776] *See*, for a preliminary discussion about the applicability of Articles 46(2)(3) to defects arising out of third parties' rights on the goods sold P. HUBER /MULLIS (2007), p. 198; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 141, Para 184; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, pp. 743, 750 Paras 22, 39.

[777] *See above* Ch. III, 3.2.5 for the choice by the seller of the method of cure; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 749, Para 35.

[778] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, pp. 748, 749 Paras 32, 35; Art. 48, pp. 770-771, Para 20; *MünchKomm*/ P. HUBER (2016), Art. 48,

First of all, as seen, it must be noticed that demand of replacement is only possible on the basis of a fundamental breach.

> *Article 46*
>
> (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract […].

Thus, it is conceivable, if the buyer asked for replacement but repair is still feasible and reasonable under Article 48(1), that the buyer unrightfully resorted to Article 46(2)[779]. As stated above, if a failure to perform is still reasonably curable—either by the seller or the buyer itself—this failure to perform is deemed not to have reached the threshold of fundamental breach per the definition in Article 25[780]. As a conclusion, the buyer claimed for replacement without being entitled to such, and the seller can impose its subsequent cure.

Further justifications for such a solution come from normative and economic viewpoints.

Para 13 who stresses: "[w]enn diese für den Käufer nicht unzumutbar iSd Art. 48 Abs. 1 ist [...] hat der Verkäufer das Recht, die Vertragswidrigkeit mit der Nachbesserung zu beheben und dem Ersatzlieferungsverlangen des Käufers damit den Boden zu entziehen"; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, pp. 562-563, 584, Paras 10a, 59; HEUZÉ (2000), *Vente internationale*, Art. 48, p. 372, Para 421; PETRIKIC (1999), p. 77; and Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 441, Para 12.
However, *Cf.* BRIDGE (2013), *Int' l Sale of Goods*, p. 586, Para 12.24; and SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 141, Para 186.

[779] DiMatteo/ Janssen/ Magnus/ Schulze/ BRIDGE (2016), p. 582, Para 103: "[t]he weight of authority behind the effect of even a partial cure preventing the occurrence of a fundamental breach means that the buyer's right to require substitute goods does not arise"; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, pp. 744, 748 Paras 23, 32; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, pp. 445-446, Para 47.

[780] *See MünchKommHGB*/ BENICKE (2013), Art. 48, Para 12, who qualifies the requirement of a fundamental breach as a paradox: "Allerdings ist es paradox, wenn Art. 46 Abs. 2 eine wesentliche Vertragsverletzung als Voraussetzung für den Anspruch auf Ersatzlieferung statuiert, eine wesentliche Vertragsverletzung aber immer dann nicht vorliegt, wenn die Vertragsverletzung durch Ersatzlieferung beseitigt werden kann".

As to the normative, there is no reservation in Article 48 subjecting the seller's cure to the buyer's right to seek replacement, in contrast of what is laid down in regard to the buyer's right to declare the contract avoided under Article 49. In addition, it is submitted that subjection of the seller's cure cannot be analogously applied to replacement cases because, under the CISG, only avoidance of the contract would exclude the seller's right to cure[781].

As to the economic justifications, on the one hand, the remedy of replacement brings about the same negative consequences as declaration of avoidance. The parties have to return the goods, incurring great costs and risks. In addition, this is an operation conspicuously more expensive at an international level[782]. The legal attempt to avoid such a waste of resources, then, is fully coherent. In this particular scenario, this goal is met not only by establishing the fundamental breach as a precondition for Article 46(2) but also by giving priority to the seller's choice of repair despite the buyer's request for replacement.

On the other hand, in many cases, the breaching seller is the party best placed to carry out performance in a more cost-effective fashion. Therefore, economically, it should be left to this party to decide the technique with which to proffer accomplishment of such cure. For instance, the seller like has the *know-how*, trained personnel, and/or necessary machinery for conducting cure by repair in the most straightforward way, whereas replacement could be dramatically costly.

ii. *Buyer Demands Repair and Seller Offers Replacement*

The second interaction to be analyzed here is the reverse scenario, which is assumed to be rather rare in practice[783]. This is the hypothesis in which the buyer seeks repair pursuant to Article 46(3)

[781] SCHLECHTRIEM/ SCHROETER (2016), *Int. UN-Kaufrecht*, p. 210, Para 449: "[s]olange der Käufer den Vertrag nicht wirksam aufgelöst hat, […]". NEUMAYER/ MING (1993), p. 343, Para 5; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 13; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 442, Para 12; Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 709.
[782] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 744, Para 23.
[783] DiMatteo/ Janssen/ Magnus/ Schulze/ BRIDGE (2016), p. 582, Para 103.

and the seller offers cure by delivery of substitute conforming goods under Article 48.

Here, again, so long as the seller's method of cure is suitable to the buyer's interests and needs and complies with the standards under Article 48(1), the seller's right to cure must have priority[784]. Given the fact that in this second sub-scenario there are no major complications regarding the fundamentality of the breach—in contrast to Article 46(2)—the main justification here also stems from the fact that the seller' is the party better-placed to evaluate the efficiency of its cure.

Normatively, this rationale is neatly taken into consideration by Article 46(3) itself. This provision makes repair dependent upon a standard of reasonableness. As Prof. Fountoulakis masterfully points out, this reasonableness test under Article 46(3) is typically linked to the seller's costs in curing by repair. If such a method is disproportionally more expensive than replacement, or the seller's expenditure is massive in comparison with buyer's advantages derived from the removal of the non-conformity, it is legally sensible to give priority to the seller's choice of the method of cure[785].

iii. *Developments*

The remaining question, then, concerns cases where subsequent cure by the seller falls outside the standards of reasonableness of Article 48(1). It might be doubtful whether, in cases where the seller does not have priority in determining the technique of cure according to the standards of reasonableness, the seller can still choose how to remedy, provided that the buyer asks for subsequent performance pursuant to Article 46.

In first place, it must be noticed that the breaching seller may have offered subsequent performance of the contract under Article 48(2-

[784] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, pp. 770-771, Para 20; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 441, Para 12; and Bianca/ Bonell/ WILL (1987), Art. 48, p. 35.

[785] FOUNTOULAKIS (2011), p. 14; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 46, p. 751, Para 40. Comparatively, see the reasonable-test in *CJEU* 16 June 2011, c-65/09 *Weber v. Wittmer* and c-87/09 *Putz v. Medianess*.

4). The seller should have indicated a certain amount of time as well as a technique for carrying out such cure. Accordingly, it can offer cure, even if the reasonableness standards under Article 48(1) are not met, or the failure to perform already amounts to a fundamental breach under Article 25. If then the buyer accepts or fails to give a timely response as laid down in Article 48(2), this party will be bound by the technique of cure chosen by the seller.

> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

Other than these cases, however, the soundest perspective seems to indicate otherwise. If the breaching seller's cure is beyond the standard of reasonableness laid down by Article 48(1) or, more clearly, if the failure to perform amounts to a fundamental breach under Article 25, the seller should not be able to determine how to remedy.

When the buyer has requested a specific method of performance under Article 46, the seller should abide by it. Even if, in some instances, economic arguments might support the seller's choice of the method of cure—like the argument regarding the most cost-effective method for subsequent performance—the buyer should be entitled to demand performance in the way it prefers. Fortunately, in practice, the parties will surely enter into renegotiation in these cases in order to avoid an economically excessive performance.

4.2.5 Seller's Right to Cure v. Nachfrist

The key question to be resolved in this section is whether, after the buyer has set a Nachfrist under Article 47, subsequent cure by the breaching seller may still be considered to be within a reasonable period of time pursuant to Article 48(1). Answers are especially interesting if, other than in cases of non-delivery, the buyer has

conditioned the expiration of the Nachfrist without due performance to an automatic declaration of avoidance of the contract[786].

> In the case law, see *Olivaylle Pty. Ltd. v. Flottweg GmbH & Co KGAA Federal Court of Australia* 20 May 2009, CISG-online 1902. As outlined previously, a German seller delivered a piece equipment for the production of olive oil to an Australian buyer. In February 2006, during the first harvesting season, the machine turned to be non-conforming to the contract. On this basis, the buyer notified the seller that it would withdraw from the contract unless the seller repaired the good in the following four months—by June 2006. The seller accepted that the gearbox needed to be replaced but refused to carry out a subsequent cure of any other part because it attributed the defects to a misuse of the machine by the buyer. The buyer refused to allow the seller to carry out any repair and lodged a claim for the declaration of avoidance.
>
> The Federal Court found for the seller, arguing that the buyer's refusal to allow the seller to repair the gearboxes was unreasonable. As to the interplay between the seller's right to cure and the buyer's Nachfrist: "[r]elying on Article 48 (1) CISG, […] in February 2006 the buyer was not entitled to specify a grace period ending in June of that year, because the reasonable time period for seller's repairs had not expired at that time. […], the reasonable time period for repairing defects that had materialized during the harvesting season expired at the end of June 2006; only at that point would the buyer have had the right to specify a grace period and threaten withdrawal".

As seen, to proffer an answer, a central idea upheld in this dissertation is that the notion of "an additional period of time of reasonable length"[787]—per Article 47(1)—is not equal to the concept of "unreasonable delay"—laid down in Article 48(1). Under the Convention, an *unreasonable delay* exists only if and insofar as the resulting time lag in performance leads to the establishment of a fundamental breach per the definition in Article 25[788].

Therefore, if, after a Nachfrist fixed by the buyer pursuant to Article 47(1), the seller can cure while abiding by the standards of

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[786] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 29.

[787] For references *see* Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 47, pp. 758-759, Paras 6, 7. Comparatively, for the German §323 BGB, KÖTZ (2012), p. 393, Para 944; KÖTZ (2015), p. 327.

[788] *See above* Ch. II, 2.2.a); SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 585, Para 61; SCHLECHTRIEM/ SCHROETER (2016), pp. 211-212, Para 452.

reasonableness under Article 48(1), it may avail itself of its right to cure. In other words, as proven in the case law, even in cases other than non-delivery[789], the expiration of a Nachfrist does neither *per se* amount to an unreasonable delay, nor does it upgrade a failure to perform to a fundamental breach, nor does it open the door to declaring the contract avoided. As a matter of principle, after a Nachfrist, cure by the seller should still be reasonable.

This conclusion is in tune with the one proffered for cases where the seller has carried out several unsuccessful attempts at cure after the date for delivery[790]. In contrast to what the ULIS laid down, the CISG does not embrace the concept of a secondary fundamental breach[791]. A priori, provided that reasonableness limits under Article 48(1) are met, the seller should be able to impose cure on the buyer over multiple attempts.

Therefore, in these scenarios, if the buyer conditioned the expiration of the fixed additional period of time to an automatic avoidance of the contract, this avoidance is unrightfully declared. As extensively proven, under Article 49(1)(a), an aggrieved buyer can only declare the contract avoided upon a fundamental breach per the definition in Article 25.

This avoidance would only be effective if the buyer neatly linked particular interests with the expiration of the Nachfrist—e.g. a deadline to forward the purchased goods to its customers—or other circumstances lead to the time lag after the Nachfrist being deemed equivalent to a fundamental breach under Article 25[792].

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[789] *Oberlandesgericht Celle*, 24 May 1995, CISG-online 152.

[790] *See above* Ch. III, 3.2.4; SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 403; and *Bundesgerichtshof* (Switzerland) 18 May 2009, CISG-online 1900.

[791] TREITEL (1989), *Remedies for Breach*, p. 373, Para 276; CISG-AC Opinion no 5, p. 3 Para 3.2; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, p. 102, Para 115; and Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 366.

[792] Exceptionally, as mentioned, if the case was of non-delivery, the buyer can declare the contract avoided pursuant to the Nachfrist-technique. Therefore, this would be irrespective of the existence of a fundamental breach pursuant to Article 47(1) in conjunction with 49(1)(b). Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 47, p. 758, Para 6.

In practice, however, after the expiration of a Nachfrist fixed by the buyer, the reasonableness of the seller's right under Article 48(1) may be doubtful. Hence, the communication regime under Article 48(2-4) becomes of the utmost importance. It allows an opportunity to cure, to clarify the resulting situation, and to better rule its consequences.

This regime of communications thus opens the way to several scenarios, which must be distinguished.

i. *First Hypothesis*

The buyer may fix a Nachfrist from Article 47(1) and, subsequently, the seller may object to it by indicating a different period of time. It is beyond any doubt that, if the time for performance indicated by the seller in its response is shorter than the time fixed by the buyer, the former's right to cure does not cause unreasonable delay to the latter. Consequently, the seller can impose subsequent performance according to Article 48(1)[793].

ii. *Second Hypothesis*

More controversially, the buyer may fix a Nachfrist under Article 47(1) and, then, the seller may give notice of cure indicating the need for a longer period of time. It is extensively submitted that, if the seller notifies that its attempt to cure will take a longer period of time than that specified by the buyer, the buyer is again subject to Article 48(2-4). In other words, the buyer is expected to timeously give response to the seller's divergent notice of cure, otherwise, it will be bound to it by virtue of Article 48(2)[794].

> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

[793] *MünchKomm*/ P. HUBER (2016), Art. 48, Para 29.

[794] *See* Kröll *et al*/ P. HUBER (2011), Art. 48, Para 33; Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, pp. 530-531, Para 36; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 29; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 20; considering that this conclusion also holds true when the buyer conditions its Nachfrist to an immediate declaration of avoidance.

The particular dynamics between these notices force the aggrieved buyer to react wherever the time indicated by the seller in its offer seems unreasonable to it under Article 48(1). As seen before, this unreasonableness here means only wherever the time lag leads to a fundamental breach per the definition in Article 25. Therefore, on the flip side, if the delay in curing is not tantamount to a fundamental breach, the buyer will unrightfully refuse seller's cure and prevent it from duly perform the contract.

Consequently, on the one hand, the seller can object to this refusal by the buyer. It will still have a chance to impose cure on the buyer pursuant to Article 48(1).

On the other hand, even if the longer time indicated by the seller would cause an unreasonable delay, the seller may be able to cure, provided that the buyer has accepted or failed to timeously refuse the longer period of time. As seen elsewhere, cure under Article 48(2-4) is applicable regardless of the standards of reasonableness under Article 48(1) or a fundamental breach under Article 25.

iii. *Third Hypothesis*

The seller may offer cure within a certain period of time, under Article 48(2-4), and the buyer may reply by fixing a shorter Nachfrist pursuant to Article 47(1). This scenario must be resolved by considering the buyer's alternate timing as a refusal of the seller's request/ notice of subsequent cure.

Assumedly, with the indication of a shorter period of time, the aggrieved buyer indicates the amount of time within which delay would not be unreasonable. Provided that the buyer does so rightfully, the seller can only tender subsequent performance within the span of time fixed by buyer.

All in all, with the fixing of a Nachfrist after breach has occurred, the buyer gains clear grounds to refuse seller's cure. In event of dispute, they are therefore more likely to successfully prove the unreasonableness of the cure under the blanket clauses of Article 48(1). In particular, the buyer could allege that, when setting the Nachfrist under Article 47(1), it intended to indicate the point of time in which the delay becomes unreasonable, and thus a

fundamental breach under Article 25. Hence, the court could more easily find for the buyer, affirming that it rightfully rejected the cure and asserted other remedies[795].

4.2.6 Seller's Right to Cure v. Avoidance of contract

The interplay between the buyer's right to avoid the contract and the seller's right to cure under Article 48 is one of the most controversial issues under the CISG[796]. This controversy was evident early in the drafting discussions of CISG's provisions.

In particular, at the 1980 Diplomatic Conference, the heading of Article 48(1) suffered a crucial amendment. The well-known cross-reference: "Subject to Article 49" was introduced[797]. The former version of Article 48, Article 44 New York Draft, used to read as follows:

> "Unless the buyer has declared the contract avoided in accordance with Article 45, […]"

It was agreed, that this former wording had to be changed as it immediately nullified the seller's right to cure. If, in all events of breach of contract, the buyer prevailed with its right to declare avoidance over the seller's subsequent cure, the seller's right to cure would be left with no practical effects[798]. After the amendment, the resulting interplay between Articles 48 and 49, by virtue of the new wording "subject to", can be interpreted and summarized as follows.

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[795] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, pp. 767, 768, Paras 10, 14; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 742, Para 30; Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, pp. 530-531, Para 36; *MünchKommHGB*/ BENICKE (2013), Art. 48, Para 20; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 29. *See* SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, p. 584, Para 61.

[796] As to the terminology "avoidance", "termination", "cancellation" *see* Ferrari *et al*/ GARRO (2004), *Draft Digest*, p. 362.

[797] *See above* Ch. I, 1.2.6. For further references: Bianca/ Bonell/ WILL (1987), Art. 48, p. 348; HONNOLD (1989), *Documentary History*, p. 562: *Doc. C(4); O.R. 236-433* p. 687: *Doc. C(5); O.R. 83-141*; Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 524, Para 18; SCHNYDER/ STRAUB/ Honsell (2010), Art. 48, pp. 568-569, Para 30.

[798] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 768, Para 14.

Article 49

(1) The buyer may declare the contract avoided:
(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

On one hand, when the right to avoid the contract already exists on the side of the buyer, the seller's right to cure under Article 48(1) is immediately excluded[799]. The seller cannot impose cure of failure to perform on the buyer if it is not reasonably curable or the failure amounts to a fundamental breach per the definition in Article 25. In this group of cases, the seller could only cure if the buyer accepted or failed to respond to an offer of cure under Article 48(2-4). Should this be the case, the already existent buyer's right to avoid would be temporarily suspended during the indicated period of time within which the seller intends to conduct cure.

On the other hand, as seen, the buyer's remedy of contractual avoidance in accordance with Article 49(1)(a) only comes into play once the existence of a fundamental breach has been established—or, as an exception for non-deliveries only, after the fruitless expiration of a fixed Nachfrist according to Article 47(1) in conjunction with 49(1)(b). As a consequence, the cross-reference between the seller's right to cure under Article 48(1) and the buyer's right to avoid under Article 49(1)(a) can only be correctly interpreted by taking into account the fundamentality of the breach.

> By way of comparative analysis, the Uniform Commercial Code is particularly remarkable, specifically the interplay between the seller's right to cure under §2-508(2) and the *Perfect Tender Rule* under §2-601. In addition, it is worth considering the Nachfrist-mechanism for termination of contract under the German law of sales, according to §§323 and 437(2)[800].

[799] MAK (2009), p. 169; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 768, Para 14.
[800] *See above* Ch. I, 1.1.2.a). and b).

Modelled on the conclusions drawn up previously[801] and supported by the case law, a failure to perform does not amount to a fundamental breach under Article 25 as long as it is reasonably remediable. Hence, the buyer cannot be entitled to avoid the contract.

In other words, the seller's right to cure according to Article 48(1) plays a crucial role in the determination of the curability of an established failure to perform. This ultimately determines the availability of the remedy of contract avoidance to the buyer[802].

> *Bundesgerichtshof* (Switzerland) 18 May 2009, CISG-online 1900. On 12 December 2000, a Swiss seller and a Spanish buyer entered into a contract for the purchase and installation of a specially-designed packaging machine. The product was formed by ten individual devices as well as transportation and interconnection systems. After several months of use, the buyer disputed whether the machine lived up to the promised performance. According to the buyer, the seller had promised an output of 180 vials per minute. However, the machine achieved an actual performance of 52 vials per minute (a loss of productivity of 71%). The seller undertook several attempts at cure which were unsuccessful. On these grounds, the buyer declared the contract avoided. The seller counter-claimed.
>
> The Supreme Court stated: "[i]n general, only considerably severe lacks of conformity will meet the requirements imposed by Art. 25 CISG […] This applies in particular to those lacks of conformity which cannot be remedied within reasonable time and by reasonable efforts". In the particular case: "[t]he packaging machine delivered by [Seller] only

[801] *See* Ch. IV, 4.1. for a general analysis of the curability as a precondition for a fundamental breach under the Convention. Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 770, Para 18 masterfully explain as follows: "[T]he right to avoid the contract is not excluded by the seller's right remedy by subsequent performance. Such an exclusion results—indirectly—only from the fact that the preconditions for a fundamental breach of contract (Article 25 and 49(1)(a)) generally do not exist as long as the preconditions of Article 48(1) exist"; HERBER/ CZERWENKA (1991), Art. 48, pp. 224-225, Para 9; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 441, Para 12; P. HUBER (2007), p. 23 who considers: "[T]he reservation therefore merely shifts the problem onto the concept of fundamental breach", and also *MünchKomm*/ P. HUBER (2016), Art. 48, Para 31. However, *Cf.* UNCITRAL (2012), *Digest of Case-Law*, Art. 48, p. 233, Para 2.

[802] SCHLECHTRIEM/ SCHROETER (2016), p. 211, Para 450: "[i]mmer dann, wenn Nacherfüllung innerhalb angemessener Frist möglich und vom Verkäufer zu erwarten ist, ein wesentlicher Vertragsbruch (Art. 25 CISG) noch nicht anzunehmen und deshalb ein Aufhebungsrecht (noch) nicht gegeben ist".

> achieved 29% of the agreed performance. […] This amounts to a fundamental breach. The numerous attempts by [Seller] to cure the lack of conformity also demonstrate that the non-conformity could not be remedied within a reasonable time. Moreover, the particular packaging machine was specifically designed for [Buyer]'s individual needs. Therefore, any resale of the machine has been impossible or at least inappropriate for [Buyer]".

What is more, the seller's notice or request regarding cure is not the relevant fact in excluding a right to declare the contract avoided on the part of the buyer. The mere existence of the seller's ability to reasonably cure, complying with the reasonableness standards under Article 48(1), is sufficient to exclude the fundamentality of a breach, and, as an ultimate consequence, to exclude the right to avoid under Article 49(1)(a).

Therefore, the interplay between the seller's right to cure and the right to declare avoidance does not depend upon a *First Notice Rule*. It makes no difference which party acted first—whether the seller gave notice first or the buyer firstly declared the contract avoided—as it is a matter of effectiveness of the remedy[803]. There is no right to avoid the contract pursuant to Article 49(1)(a) as long as the seller can cure the breach in accordance with the blanket clauses of Article 48(1).

As a result, then, the seller's right to cure after delivery date is not an immediate precondition for the buyer's right to avoid the contract but, in some instances, might be a mediate one. Avoidance by the buyer, pursuant to Article 49(1)(a), can only be effectively declared if such remedy exists according to the yardstick of Article 25. This requires consideration of the curability of the breach. On the flip side, insofar as the failure to perform amounts to a fundamental breach, the aggrieved buyer does not have to allow the seller to cure before resorting to its right to avoid[804]. In these cases,

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[803] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 770, Para 17; *MünchKomm*/ P. HUBER (2016), Art. 48, Para 18: "[i]n diesem Fällen genügt bereits das bloße Bestehen des Behebungsrechts, um die Vertragsaufhebung auszuschließen"; Staudinger/ U. MAGNUS (2013), Art. 48, Para 13 who affirms that, otherwise, the communication regime under Article 48(2-4) would be void of purpose; and HONNOLD (1989), *Documentary History*, p. 686: *Doc. C(5); O.R. 83-141*; resorting to the history of Articles 48(1) and 49 for the same conclusion.
[804] *Cf.* Ferrari *et al*/ GARRO (2004), *Draft Digest*, pp. 709-710.

avoidance overrides the seller's opportunity to cure, as laid down in the wording of Article 48(1): "Subject to Article 49".

4.2.7 Seller's Right to Cure v. Price reduction

> *Article 50*
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> If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

In accordance with the Article 50, sentence 1, the buyer's right to reduce price is confined to failures to perform due to deliveries of non-conforming goods—per Article 35 CISG. Therefore, it must be noticed that its scope of application is narrower than that of the seller's right to cure under Article 48 as the latter applies to "any failure to perform".

Furthermore, reduction of the purchase price does not depend upon the finding of a fundamental breach per the definition in Article 25. This remedy is, a priori, triggered irrespective of the intensity of the failure to perform in question. It is only disputable, then, whether the buyer is entitled to reduce the price to zero. According to the relevant literature and case law, it is submitted that the CISG admits reduction to zero[805]. However, this applies only in cases where goods are totally worthless. Therefore, it only applies in cases where the non-conformity would usually amount to a fundamental breach under Article 25 anyway.

> *Bundesgerichtshof* (Germany) 2 March 2005, CISG-online 999. In April 1999, a German buyer entered into contract with a Belgian seller for the purchase of pork. An ultimate buyer was sited in Bosnia-Herzegovina. The goods were delivered in three instalments. By the time that the third

[805] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 50, p. 806, Para 13: "[i]f it is clear that the goods delivered are literally without any value"; SCHWENZER/ HACHEM/ KEE (2012), p. 764, Para 48.18; and CISG-AC Opinion no 5, p. 4, Para 4.3, Footnote 35.

> instalment reached the ultimate buyer (June 1999), a suspicion of Belgian pork being contaminated with dioxin brought Germany, Bosnia-Herzegovina, and Belgium to declare Belgian pork as not marketable. On this count, the EU also issued an ordinance for certificates on dioxin-free goods. Once Bosnia-Herzegovina prohibited the sale of the purchased pork, the buyer, in several instances, requested a health clearance certificate. However, the seller did not hand over such a certificate. Finally, the goods were destroyed. The buyer did not declare the contract avoided but lodged a claim for the reduction of the purchase price against the seller.
>
> The Federal Court, despite avoidance not being declared, granted a price reduction to zero. The Court stated: "[Buyer] was, therefore, allowed to reduce the purchase price to zero for the non-conforming partial shipments because there was also no other possibility for utilizing the meat—e.g., for processing into feeding stuffs".

As clearly laid down in the discussed provision, the effectiveness of the remedy to reduce the purchase price hinges upon the seller's rights to cure. Article 50, sentence 2, clearly states the preference of the seller's rights to cure over the buyer's right to reduce the price. This preference concerns cures both before or after the date for performance, under Articles 37 or 48 respectively.

> *Article 37*
>
> If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, […]

In particular, the cross-reference set forth by this rule neatly depicts the interaction of the seller's right to cure under Article 48(1) with this remedy for breach. If the seller's right to cure under Article 48(1) exists—or in other words, if the seller is entitled to cure in accordance with the reasonableness standards—the buyer's right to reduce price is ineffective[806].

[806] Also, *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, 18 October 2005, CISG-online 1481. In the literature, SIVESAND (2006), *Buyer's Remedies*, p. 107 "[a]rt. 48(1) gives the seller the right to cure a lack of conformity in the goods through repair and replacement, even if the buyer has asked for another remedy. This is confirmed by a cross reference in Art. 50 […]". *See also* Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 48, p. 770, Para 19; *MünchKomm*/ P.

> In the case law, see *Federal Arbitration Court of North Caucasus Area, Krasnodor Russian Federation*, 3 October 2011, CISG-online 2518. A Russian buyer and a Czech seller entered into a contract for the purchase of a second-hand automated line for the production of pasta. The parties agreed that, if the rate of productivity decreased by 10% or more, the total value of the contract would be reduced proportionately. The machine turned out to be defective. On these grounds, the buyer claimed against the seller to reduce the price.
>
> The arbitration court found for the buyer. In its reasoning, the court took into consideration that the seller had not started to correct the defects within a reasonable period of time. Therefore, it concluded that, despite the reservation contained in Article 50 as to the seller's rights to cure, the buyer had rightly asserted this remedy for breach.

Likewise, if seller gives notices of its cure under Article 48(2-4), and the buyer accepts such an offer of subsequent performance—or fails to timeously give a response to it—the buyer's right to reduce the price is suspended. This suspension lasts the duration of the period fixed by seller within which it intends to carry out its cure. This second scenario occurs irrespective of the actual intensity of the failure to perform and the reasonableness of the cure according to Article 25.

4.2.8 Seller's Right to Cure v. Right to withhold own performance

Some introductory words are needed to better frame the following discussion. The CISG does not expressly provide an aggrieved party with a right to withhold own performance[807]. The Convention only recognizes a right to suspend performance under Article 71[808].

HUBER (2016), Art. 48, Para 19; FOUNTOULAKIS (2011), p. 16; HEUZÉ (2000), *Vente internationale*, Art. 48, p. 372, Para 421; P. HUBER (2007), p. 28; Brunner/ AKIKOL/ BÜRKI (2014), Art. 48, p. 441, Para 12 who stresses: "[d]as Nacherfüllungsrecht des Verkäufers hat Vorrang (vgl. Art. 50 S 2). Die Minderung kann also nur wirksam verlangt werden, wenn der Verkäufer nicht oder nicht mehr zur Nacherfüllung berechtigt ist (Art. 50 N 5)"; and HERBER/ CZERWENKA (1991), Art. 48, p. 225, Para 10.

[807] *International Chamber of Commerce (ICC)* Arbitration case no. 9083 July 1999, CISG-online 707.

[808] *Oberlandesgericht Karlsruhe*, 20 July 2004, CISG-online 858.

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

A right to suspend performance has its scope of application based in a prognosis. That is, it exists wherever the promisor has not yet committed a breach but there are reasonable fears that it will occur; for instance, wherever circumstances pose credible threats to the promisor's ability to perform as due.

The former, a right to withhold own performance, applies as a reaction to an established failure to perform, provided that the withholding parties' obligations are already mature[809]. The resulting question is whether, under the Convention, an aggrieved buyer can react to a seller's breach by withholding its own performance.

An affirmative answer is generally upheld. An aggrieved party can withhold its own performance wherever the parties expressly agreed upon such a remedy for breach. In addition, this remedy can be drawn up from Convention's default rules. In particular, under the auspices of Article 7(2), a general principle of simultaneous performance has been construed from Articles 58, 71, 80, 81(2), 85(2) and 86(1)[810].

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[809] Schlechtriem/ Schwenzer/ MOHS (2016), Art. 58, p. 882, Para 28; SCHWENZER/ HACHEM/ KEE (2012), p. 555, Para 42.37: "[w]here the right to withhold performance exists because it is a fact that the co-contractant does not perform at the due time. In the present context, the oblige—merely—fears that the obligor will not be able to perform at the due time. Yet, that eventuality has not materialized at this point in time, as the due date for performance has not yet arrived".

[810] CISG-AC Opinion no 5, p. 7 Para 4.19; SCHWENZER/ HACHEM/ KEE (2012), p. 550, Para 42.07; Schlechtriem/ Schwenzer/ MOHS (2016), Art. 58, p. 882, Para 28; and JANSSEN/ KIENE (2009), *General Principles*, p. 277 who reads: "[f]rom Art. 58 CISG as well as Art. 81(2) and 85 CISG the general principle of simultaneous exchange of performance can be derived".
Another argument stems from the CISG's goal of promoting uniformity. If the Convention includes a right to withhold performance, parties and adjudicators are not tempted to resort to domestic laws.

As a consequence, aggrieved parties—here particularly the buyer—can withhold performance when facing counter-parties' failures to perform. This right comes into play together with other remedies for breach[811]. Thus, the remaining question is how a right to withhold interacts with the seller's right to cure after delivery date under Article 48.

First of all, it is remarkable that two requirements are to be met in order to effectively assert this right to withhold performance. On the one hand, the aggrieved party withholding its own performance has to be in a position to perform[812]. On the other hand, the withholding party has to give notice to its counter-party[813].

Secondly, as proven in the case law[814], an aggrieved buyer can effectively withhold purchase price during the period in which the seller is performing cure under Article 48. However, it has been agreed in the relevant literature that this right has to be exercised by the buyer on a proportional basis and during a reasonable period of time[815]. For instance, only a serious lack of conformity that entirely impairs the buyer's intended use of goods would allow the buyer to temporarily withhold payment of the total price[816].

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[811] CISG-AC Opinion no 5, p. 7 Paras 4.18, 4.19; SCHLECHTRIEM/ P. BUTLER (2009), *UN Law*, pp. 155, 186 Paras 207, 264. In Civil law systems, this remedy amounts to the *exception non (rite) adimpleti contractus* (also *Einrede des nicht erfüllten Vertrages*) admitted for reciprocal obligations. In the case law, *Oberster Gerichtshof* 8 November 2005, CISG-online 1156: "[Buyer]—who here demands substitute delivery and repairs in accordance with Art. 46 CISG—thus also has the right according to the Convention to withhold the remaining remuneration until such time as the [Seller] has performed its obligations in conformity with the contract".

[812] SCHWENZER/ HACHEM/ KEE (2012), p. 553, Para 42.26.

[813] Schlechtriem/ Schwenzer/ MOHS (2016), Art. 58, p. 884, Para 33.

[814] *Landesgericht Regensburg* 24 September 1998, CISG-online 1307.

[815] As to proportionality *see* CISG-AC Opinion no 5, p. 7 Para 4.20 stating: "[t]he buyer may withhold the payment of the purchase price; however, this right must be limited to the extent of the non-conformity and the expected detriment".

[816] SCHWENZER/ HACHEM/ KEE (2012), pp. 552, 553, Paras 42.18, 42.23; Schlechtriem/ Schwenzer/ MOHS (2016), Art. 58, p. 883, Para 29. For a compromise solution *see* CISG-AC Opinion no 5, p. 7 Para 4.20: "[i]f the extent of the non-conformity cannot be easily ascertained, the buyer should be given the right to withhold the whole purchase price for a reasonable time that is necessary to inspect the goods and to estimate the extent of the expected detriment".

It must be stressed that the buyer can only totally reject performance of its due obligations if the failure to perform amounts to a fundamental breach; the same condition as would allow the buyer to declare the contract avoided under Article 49(1)(a).

> In the case law, see *Oberster Gerichtshof* 8 November 2005, CISG-online 1156. In October 2002, an Italian seller entered into a contract with an Austrian buyer for the design, production, delivery and installation of a crushing and sieving machine. It was agreed that the remuneration would be 20% paid up front, 60% paid upon delivery or notice of delivery, and the remaining 20% paid upon the activation of the machine, at the latest sixty days after notice of delivery. In addition, the seller gave a twelve-month warranty. In December 2002, the machine was finally installed at the buyer's facilities in Italy. Some months later, the buyer gave notice that the machine turned to be non-conforming. It presented several defects and was not able to process all the different types of materials required by the contract. The seller undertook nine measures to cure the defects, which were all unsuccessful. On these grounds, the buyer withheld payment of the purchased price. The seller contested this, alleging that Article 48 CISG allows the seller to remedy and only reserves the buyer the rights to claim avoidance and damages.
>
> The Supreme Court stated: "[t]he principle of simultaneous exchange of performances also acknowledged in the CISG enables the buyer to raise the objection that the contract has not been (properly) performed and to withhold his own performance until such time as the other party is prepared to render (simultaneous) performance".
>
> Therefore, the court found for the buyer: "[i]t does not follow from Art. 48 CISG that the buyer lacks the right to refuse payment of the price. The possibility provided to the seller in Art. 48 CISG to rectify his performance, and to the buyer to refuse such rectification and/or to claim damages, does not […] tell us whether it is permissible under the principle of simultaneous exchange of performances for the buyer to refuse to perform on the basis of a non-conforming performance of the contract".

Thirdly, the fact that the seller can withhold payment during the period within which the seller attempts cure aside, the interplay of a general right to withhold performance with a seller's right to cure under Article 48 raises further questions.

On the one hand, as seen before, it may be asked whether a buyer, who has already paid the purchase price without being obliged to do

so, can withhold performance of its obligation to give the goods back to the seller in case of cure by replacement[817].

On the other hand, provided that the buyer has not taken delivery of the goods, it can be questioned whether it is possible for the buyer to withhold performance of its obligation to take delivery according to the definition in Articles 53 & 60 CISG, during the reasonable period of time within which the seller intends to cure[818]. This is discussed in the following section.

This latter scenario is relevant due to its consequences for the allocation of risks of loss or damage to the goods during the seller's period for cure. If the buyer had withheld taking performance—and the goods were lost by chance during the time of cure—then the seller bears such loss, as the passing of risk—under Articles 66-69—would not have occurred[819]. In cases of non-fundamental breaches, this would lead to the circumvention of the limitation laid down in Article 70.

> *Article 70*
>
> If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

In other words, if the goods are lost, the buyer having withheld taking delivery, the buyer can assert its remedies for breach, as well as claiming against the seller for the accidental loss in itself. This is so even if the failure to perform did not amount to a fundamental breach as required by Article 70[820].

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[817] *See above* Ch. IV, 4.2.2; and Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 37, p. 632, Paras 9-10.

[818] CISG-AC Opinion no 5, p. 7 Paras 4.20-4.21; Schlechtriem/ Schwenzer/ MOHS (2016), Art. 60, p. 896, Para 16

[819] CISG-AC Opinion no 5, p. 7 Paras 4.20-4.21: "[t]he practical consequence of the buyer's right to refuse to take delivery is only important where the risk of loss has not yet passed pursuant to Arts 67 and 68 CISG. The risk then passes according to Art 69(1) CISG when the buyer takes over the goods, which implies an acceptance—within the meaning of taking delivery—by the buyer".

[820] *See above* Ch. III, 3.2.8.

4.2.9 Seller's Right to Cure v. Right to reject performance

Under the Convention, a buyer is generally under the obligation to take delivery, even if performance deviates from what the parties contracted[821], whether it results from the seller's initial failure to perform or its subsequent attempt to cure[822]. This rule of thumb is easily justified by the fact that the CISG is structured around a rule of fundamental performance and does not follow a strict performance rule such as the *Perfect Tender Rule*[823].

A priori, the buyer is only entitled to reject a tender of performance—i.e. withhold performance of its obligation to take delivery—provided that the non-conformity amounts to a fundamental breach per the definition in Article 25. Only this qualified failure to perform would entitle the aggrieved buyer to rightfully avoid the contract pursuant to Article 49(1)(a)[824], and thus to reject the tendered performance.

This is also applicable to partial deliveries. According to Article 51(2), rejection may be extended to the entire contract, allowing the buyer to completely declare the contract avoided.

Article 51

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[821] Schlechtriem/ Schwenzer/ MOHS (2016), Art. 60, pp. 895-897, Paras 14, 15, 18.

[822] *See above* 3.2.2.

[823] *See* §2-601 UCC. *Also*, Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 442, Para 44. The most controversial cases are documentary sales, for instance in commodity trade. In this kind of string transaction in markets whose prices are subject to fluctuations, the buyer is entitled to immediately reject tenders of non-conforming documents. Here, the seller is under the essential obligation to submit "clean documents". This results in dynamics that closely mirror the application of a *Perfect Tender Rule*. CISG-AC Opinion no 5, p. 7, Para 4.17; and Schlechtriem/ Schwenzer/ MOHS (2016), Art. 60, pp. 896-897, Para 18.

[824] SCHWENZER/ FOUNTOULAKIS/ DIMSEY (2012), *International Sales Law*, Art. 48, p. 376; CISG-AC Opinion no 5, pp. 6-7 Para 4.18; Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2013), *6. Aufl.*, Art. 48, p. 523, Para 16; ENDERLEIN/ Maskow/ Strohbach, Art. 48, pp. 154-155, Para 10; Schlechtriem/ Schwenzer/ U. HUBER (2000), *Kommentar 3. Aufl.*, Art. 48, p. 518, Para 1; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 438, Para 38; and Schlechtriem/ Schwenzer/ MOHS (2016), Art. 60, pp. 895896 Paras 14, 15.

> (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Therefore, as a matter of principle, if the failure to perform is reasonably remediable—because, for example, the seller can cure in compliance with Article 48(1)'s standards—no fundamental breach under Article 25 can be established. This results in the assumption that an aggrieved buyer can neither withhold taking performance nor declare avoidance under Article 49(1)(a).

All in all, in practice, the concurrence of a seller's right to cure and a buyer's right to reject delivery would not be usual. The buyer is only entitled to exercise this right if, at the time of taking delivery, it can clearly assess the fundamental character of the non-conformity in the tendered performance[825]. Arguably, this is rather rare in the type of transactions governed by the CISG[826].

Therefore, the practice and the default rules both force the buyer to accept delivery and, afterwards, to notify the seller of the lack of conformity, and, ultimately, to resort to the remedies for breach under Article 45 *et seq*.

Nevertheless, the CISG allows an aggrieved buyer to immediately reject non-conforming tenders of performance in exceptional scenarios. Before analyzing them, however, the following must be stressed. If a buyer lawfully rejects delivery, this party may be obliged—in accordance with Article 86—to temporarily take possession of the goods on behalf of the seller[827].

> *Article 86*
>
> (1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is

[825] Schlechtriem/ Schwenzer/ MOHS (2016), Art. 58, p. 883, Para 29: "[o]nly in case of apparent non-conformities, ie non-conformities that the buyer detects while taking delivery and briefly examining the goods under Article 58(3)".
[826] It submitted that, in practice, it is normally far easier to ascertain non-conformity in documents at the very time of delivery than those in goods. *See* Schlechtriem/ Schwenzer/ MOHS (2016), Art. 60, p. 896, Paras 15.
[827] Schlechtriem/ Schwenzer/ MOHS (2016), Art. 60, p. 896, Para 17.

> entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

Article 52(1) CISG lays down a right to reject premature deliveries. Likewise, Article 52(2) provides a buyer with a right to reject excesses in delivery, if the seller delivered a greater quantity of goods than that agreed under the contract.

> *Article 52*
>
> (1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.
>
> (2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Focusing on the latter group of cases, the interplay of such a right to reject under Article 52(2) and the seller's right to cure pursuant to Article 48(1) must be discussed. As an exception to the general rule, the breaching seller cannot immediately assert its right to cure, even if Article 48(1)'s specific preconditions are met. In these scenarios, the buyer is entitled to act first. The buyer can decide whether to accept the excess quantity and pay the corresponding price or to refuse to take delivery of the excess quantity[828].

Secondly, if the buyer delivers goods of better quality than that provided for in the contract, Article 52(2) should be analogously applied.

However, this is so only if and insofar as the higher quality of the delivered goods makes them suitable and does not alter the buyer's intended use or purpose. If the better quality of the goods makes them unsuitable for the purposes for which they were contracted, this breach follows the general rules of any failure to perform and triggers the buyer's remedies from Article 45 *et seq*. In this circumstance, the seller did not deliver better quality—but rather

[828] It has to be pointed out that this scenario might occur after a seller's attempt to cure under Article 48. It could be the case, for example, where the seller cured its initial breach by replacing defective items, but the seller subsequently delivers a greater amount of substitute goods than owed. Likewise, the buyer firstly decides under Article 52(2).

non-conforming—goods[829]. As a result, the seller's right to cure under Article 48 applies ordinarily.

In these cases the seller cannot impose its right to cure, either—even if Article 48(1)'s specific preconditions are met. Instead the aggrieved buyer must decide whether to accept the goods. If its accepts, or fails to object to the lack of conformity due to the better quality of the goods, the buyer has to pay the increase in the sales price at the contract rate[830]. If not, the buyer has an immediate right to reject the better quality of the goods—e.g. of components.

This solution, however, invites some criticism, particularly where the better quality of goods cannot be distinguished from others that, quality aside, would conform with the contract. Under these circumstances, Article 52(2) would provide the aggrieved buyer with a right to immediately reject the entire delivery of goods irrespective of the occurrence of a fundamental breach. If so, this would result in circumvention of the CISG's Unitarian approach to breach-of-contract structured around Article 25.

On this basis, some opinions, such as Prof. Lekmkuhl[831], state that Article 52(2) should never analogously applied to cases of delivery of more valuable or better quality goods. This would give a privileged right to reject performance, which is not given to a buyer in cases of delivery of a lower quality of goods. For instance, if the goods tendered were more valuable, the buyer could reject the entire delivery, whereas if the items were of lower quality, the buyer could only reject them on the basis of a fundamental breach under Article 25. Therefore, insofar as the non-conforming quality was

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[829] Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 39, p. 670, Para 32, referring to: "better quality, higher value *aliud*".

[830] Staudinger/ U. MAGNUS (2013), Art. 48, Para 9: "[A]rt 48 greift jedoch nicht ein, wenn der Verkäufer taugliche, aber höherwertigere Ware als vereinbart geliefert hat (zB erste statt zweiter Qualität). Hier kann er nicht selbst etwa die erste durch zweite Qualität austauschen". *See also* Schlechtriem/ Schwenzer/ SCHWENZER (2016), Art. 39, p. 670, Para 32; and Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 52, p. 820, Para 11.

[831] LEHMKUHL (2003), pp. 116-117 "[n]ach der hier vertretenen Auffassung verbietet sich eine analoge Anwendung von Art. 52 Abs. 2 CISG [...] Der Empfänger eine qualitativ bessere Ware wäre dann privilegiert [...] Insoweit ist der typische Anwendungsbereich von Art. 48 Abs. 1 CISG eröffnet".

reasonably remediable—for example, by the seller under Article 48(1)—the buyer should be forced to accept the goods.

Thirdly, the seller can also hand documents over to the buyer that indicate a larger quantity of or a better quality in the items than those contracted. It is submitted that these scenarios should also be analogously governed by Article 52(2). Accordingly, the seller does not have an immediate right to cure its breach under Article 48(1) by means of correcting the content or handing over new conforming documents; the buyer can firstly decide whether to take or refuse delivery of the extra or better part.

However, as Prof. Müller-Chen points out, the problematic case is that in which the seller tenders a bill of lading indicating the delivery of 120 sacks and only 100 were contracted[832]. As the excess is not separable from the conforming document, the buyer cannot partially refuse to take delivery of the excess quantity but has to entirely reject this bill of lading. As a consequence, the buyer is again entitled—as in the case of better quality—to immediately refuse to take delivery of those documents irrespective of the fundamentality of the seller's failure to perform. This would result in a regime closer to a strict performance than to a substantial performance rule[833].

4.3 Economics in The Seller's Right to Cure Under Article 48 and Behavioural Implications

This fourth chapter concludes by summarizing economic and behavioral consequences to the rule of the seller's right to cure after the date for performance. This exercise is conducted by taking a basic "economics of law"[834] approach, which places the focus to: economic outcomes, incentives, and social costs.

[832] Schlechtriem/ Schwenzer/ MÜLLER-CHEN (2016), Art. 52, pp. 818-819, Para 8.
[833] Schlechtriem/ Schwenzer/ MOHS (2016), Art. 60, pp. 896-897, Para 18.
[834] POSNER (1987), pp. 4-7. *Cf.* Eric POSNER (2003), pp. 879-880.

4.3.1 Cost-Effective Performance versus Opportunistic Behaviours

First of all, the seller's right to cure after delivery date, in particular concerning non-conformities in the tendered items, achieves the goal of being a desirable cost-effective performance-oriented remedy. Furthermore, this conclusion holds true not only for transactions involving specific items, but also for generic ones.

As to the sale of specific goods, the contracted seller is generally better placed to carry out subsequent cure. Insofar as cure is still possible, this seller is better able to furnish a more cost-effective performance of unique or customized items—comprising goods, documents or services—than any other party. For instance, in cases of cure by repair of defective high-tech machinery, the seller is the party which, a priori, has the *know-how*, tools, and trained personnel to achieve a proper performance of this contract within a reasonable period of time at the lowest cost[835].

Furthermore, the parties can anticipate that the enforcement of this performance-oriented outcome, due to the acknowledgment of a seller's opportunity to subsequently cure under Article 48 CISG, can be accomplished without adding on large *ex post* costs. These costs would otherwise arise out of expensive and time-consuming judicial or arbitral dispute resolution. Remarkably, costs are comparatively large for litigation at an international level[836].

As to the sale of generic items, the seller's right to cure comes to strike a crucial balance between the parties' positions in the post-breach scenario. The seller's right to cure after the date for delivery avoids opportunistic behaviors on the part of an aggrieved buyer. These behaviors, which are close to scenarios of moral hazard[837], may occur wherever the aggrieved buyer experiences a change in its preferences after the conclusion of the contract.

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[835] At the end of the day, specialization of businesses is the fundamental basis for productivity, as convincingly explained in ARRUÑADA (1998), pp. 25-26, 45, 90-106, 153-156.
[836] Wagner/ FAUST (2009), p. 30.
[837] GÓMEZ/ GILI (2014), *ADC*, p. 1235.

This is so because, if the remedy to call off the contract were immediately or easily available to an aggrieved buyer, this party could be tempted to avail itself of such avoidance in cases where the tender of performance is merely slightly non-conforming—for instance, due to insignificant delay or minor defects in the goods—but the buyer has found cheaper substitute items elsewhere in the market. This could also occur in cases where the buyer is solely interested in stepping out of a bad deal due to plunges in the market prices after the conclusion of the sale.

As proven in the comparison, even though both seller's rights to cure under §2-508 UCC and Article 48 CISG are adequate to avoid buyers' opportunistic terminations of contract in cross-border sales of goods, this is exceptionally important under the US Common law system. Such a situation stems from the fact that the dominant strict performance rule—namely the *Perfect Tender Rule* under §2-601 UCC—entitles aggrieved buyers to immediately reject non-conforming tenders of performance and then freely walk away from the contract. Conclusively, then, a reinforcement of the seller's position, by granting a bold right to cure after delivery date pursuant to §2-508(2) UCC, seems coherent[838].

> However, under the CISG, this problem of opportunistic termination occurs with far less frequency. Even if the seller is not entitled to subsequently perform in a given case because its offered cure does not meet the standards of Article 48(1) CISG, avoidance of the contract can also be barred to the aggrieved buyer; this will occur wherever a fundamental breach, as per Article 25 CISG, cannot been established—for example because defects in the goods are expected to be cured by the buyer itself.

4.3.2 Permeability to Efficient Breaches

Secondly, to return to the Convention's key principle *Favor Contractus*—here, in particular, strongly backed up by the seller's

[838] *See above* Ch I., 1.1.2.a); PRIEST (1978), p. 1000; WAGNER (2012), p. 12; Polinsky/ Shavell/ HERMALIN/ KATZ/ CRASWELL (2007), p. 125; and P. HUBER (2006), *Comparative Sales Law*, p. 962 who considers that it is difficult to justify a *legitimate* interest in immediately terminating the contract wherever the seller can easily cure at its own expense and the buyer retains a further claim for remaining damages or for additional losses.

right to cure after the date for delivery under Article 48 CISG—it is of the utmost importance to stress the assumption that a seller's right to cure after the date for delivery furnishes subsequent performance only as long as adequate.

Notably, the dynamics of the seller's right to cure itself, mainly by virtue of the specific preconditions under Article 48(1)—i.e. not causing an unreasonable delay, unreasonable inconveniences, or uncertainty of reimbursement of expenses advanced by the buyer—make the seller's right to cure permeable to idiosyncratic legitimate interests of the aggrieved party. Likewise, to the hallmark law & economics standard of Efficient Breach[839].

As to the former, the seller's right to cure is excluded wherever the standards of Article 48(1) are not met, which may include many varieties of legitimate buyers' interests in the post-breach scenario. At the margin, the seller's right to cure is also outright excluded wherever the breach already amounts to a fundamental failure to perform under Article 25 CISG.

Therefore, in cases where the threat of immediate termination by the buyer better incentivizes performance by the seller[840], the parties are enabled and well advised to tailor the avoidance of the contract to this particular interest by "opting-out" of the default seller's right to cure[841]. This objective is usually met by expressly defining timely performance of certain obligations as of the essence of the contract.

Concerning the standard of *Efficient Breach*, it can be assumed that the seller's right to cure after the date for performance operates in stark contrast to the remedy of asking for specific performance, which might lead to scenarios of inefficient performance—i.e. where costs must be incurred in compelling the seller to yield such performance and it monitoring that performance, and where the cost

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[839] In particular, regarding sales contracts *see* KÖTZ (2015), pp. 312-313; and PRIEST (1978), pp. 999-1000.

[840] BROOKS/ STREMITZER (2011), p. 699: "[t]he mere presence of a threat to rescind, even if not carried out, exerts an effect on the behaviour of parties".

[841] *See above* Ch. II, 2.1.1; Schlechtriem/ Schwenzer/ SCHROETER (2016), Art. 25, p. 428, Para 21; and Polinsky/ Shavell/ HERMALIN/ KATZ/ CRASWELL (2007), p. 126. This result would not be possible, for example, if mandatory rules structure a cure regime around a hierarchy of remedies.

incurred outweigh the value of the performance[842]—wherever renegotiation after breach is not possible.

On the one hand, the communication regime under Article 48(2-4) might open a fertile space for quick renegotiation after the breach.

On the other hand, the breaching seller may decide not to offer subsequent performance, and the dynamics of the default rule—by virtue of the blanket clauses under Article 48(1)—may lead to the exact same result[843], if the breach of the contract compensated by a remedy of expectation damages is cheaper than its specific performance. Arguably, the seller's right to cure will be excluded wherever subsequent specific performance of the contract is better not occur, which, on aggregate, it is deemed to be a more efficient outcome for both parties[844].

4.3.3 Providing *Ex Ante* Reliance for Specific Investments

It is submitted that a seller's right to cure after the date for delivery generates important *ex ante* incentives. This rule secures performance of the contract under the bargained-for terms, which create scenarios conducive to cooperative games where otherwise they would have not existed. Consequently, it allows parties to achieve greater mutually beneficial outcomes that, assumedly, are tantamount to *Pareto-efficiency* and, thus, socially desirable[845]. This assumption is resultant from three considerations.

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[842] SHAVELL (2004), pp. 312-313; and GILLETTE (2016), *Advanced Intro*, p. 115: "[r]equiring a party specifically to perform a contract not only imposes an obligation to act in a manner inconsistent with the breaching party's revealed desire not to perform certain acts, it also discourages some breaches that we might actually want to occur".

[843] *For all* Ferrari *et al*/ SAENGER (2011), *Int VertragsR*, Art. 48, p. 726, Para 5: "[d]as bedeutet aber nicht, dass dem Verkäufer in jedem Fall die Möglichkeit der Nacherfüllung angeboten werden muss".

[844] Polinsky/ Shavell/ HERMALIN/ KATZ/ CRASWELL (2007), pp. 117; KÖTZ (2015), p. 312; and GILLETTE (2016), *Advanced Intro*, p. 115.

[845] PICHÉ (2003), p. 548 affirms: "Both [§2-508(2) UCC] and the Nachfrist provision are remedies that secure the future bargained-for commitment and allow parties to a contract to rely upon the assurance of performance. *Overall, greater efficiency is thus obtained*" (emphasis added); and SHAVELL (2004), pp. 312-313.

Firstly, *ex ante* assured performance, strictly per the contracted terms, boosts the parties' willingness to incur a larger bundle of transaction costs. In particular, parties can anticipate that the investment of resources in not only the establishment of a sales agreement but also in producing an accurate and detailed contract will pay off in the event of a breach. This incentive is of the utmost importance if one takes into account that these costs are comparatively higher when drafting and concluding contracts for cross-border sales of goods between international sophisticated parties.

Secondly, this greater *ex ante* assurance of receiving the bargained-for commitment fosters willingness in the potential parties to make specific investments—such as the training of personnel, establishment of channels of distribution, customization of machinery for the processing of the relevant goods, etc.—when entering into contracts with foreign strangers[846]. Although these investments are expensive and regularly threatened by holding-up, they are economically desirable so as to maximize the contractually-generated surplus.

Thirdly, subsequent cure allows the breaching seller to keep mutually beneficial *relational contracts* with aggrieved buyers—i.e. contracts involving repetitive interactions like, for instance, distributorship agreements over a period of time. Likewise, subsequent cure may allow for the mitigation of any reputation costs arising out of breach, which is especially important wherever the parties contract on easily substitutable goods.

Conclusively, strengthened *ex ante* reliance on the furtherance of the parties' interests, here conspicuously upheld by the seller's right to cure under Article 48 CISG, might allow for more profitable cooperative games which otherwise might have not existed due to

[846] Eric POSNER (2003), p. 835; BROOKS/ STREMITZER (2011), pp. 709-710; GÓMEZ/ GILI (2014), *ADC*, pp. 1221; COOTER/ ULEN (2016), pp. 284-285; Polinsky/ Shavell/ HERMALIN/ KATZ/ CRASWELL (2007), pp. 11, 99 stating that: "[a]bsent binding purchase commitments prior to investment, suppliers' incentives to invest will be suboptimal, possibly to the point that no investment and, so, no trade occur". *Cf.* FARNSWORTH/ *et al.* (2013), *Contracts*, p. 628 for considerations on overinvestment.

high transaction costs. Furthermore, this reinforced *ex ante* reliance on the bargained-for commitment also allows the parties to make the most of these profitable scenarios by investing in the contract, and thus to be better-off[847].

4.3.4 Avoiding Uneconomic Unravelling

Allowing subsequent performance by the seller after the date for delivery has expired—and thereby preserving the contract—avoids, particularly in the context of cross-border sales of goods, various notoriously uneconomic risks and costs. Without this opportunity, these costs would derive from the winding-up process after declaration of avoidance of a contract[848]. For example, the parties do not have to commission and insure a freight for the return of defective goods overseas.

Under the Convention, restitution obligations are laid down in Articles 81 and *ff*.—among which, for instance, Article 81(2) reads:

> (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

It must be noticed that these uneconomic costs and risks are not only generated by a declaration of avoidance, but can also derive from other remedies for breach. In particular, the replacement of non-conforming goods under Article 46(2) brings about the same costs and risks as it also imposes return overseas[849]. These risks and

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[847] COOTER/ ULEN (2016), pp. 284-285; Polinsky/ Shavell/ HERMALIN/ KATZ/ CRASWELL (2007), pp. 11, 9, 120-121 states that: "[a]bsent binding purchase commitments prior to investment, suppliers' incentives to invest will be suboptimal, possibly to the point that no investment and, so, no trade occur".
Cf. FARNSWORTH *et al.* (2013), *Contracts*, p. 628 for considerations on overinvestment.

[848] FOUNTOULAKIS (2011), p. 17 stresses: "[a]voidance of the contract is a remedy of last resort, because avoidance raises additional costs for return transport and insurance which are useless […] costs".

[849] It has to be taken into account that these risks and costs may be particularly significant in situations where international commercial transactions are governed by the CISG. For instance, sellers and buyers are likely to be placed far from each

costs serve as justification for the restriction on the application of this provision by requiring the concurrence of a fundamental breach.

4.3.5 Minimization of Allocative Costs and Risks Resulting from Avoidance

Avoidance of the contract entails an important drawback regarding the allocation of risks and losses[850] that slightly defective items or small non-conformities can give rise to. Small imperfections can result in further uneconomic implications that the seller's right to cure after delivery date attempts to directly address.

Whereas other remedies for breach—such as price reduction or damages—only seek to offset the consequences of occurred failure to perform in monetary terms, meaning that an aggrieved buyer keeps the non-conforming goods as their minor defects do not prevent them from economic usage, processing, or sale, avoidance works otherwise.

Avoidance has the effect of leaving a breaching seller with these slightly defective or moderately non-conforming goods, which the seller can—if at all—only use, process, or sell through great effort[851]. The worst scenario would be the case, for example, where the goods have lost value on account the first delivery and, thus, are not easily resaleable only at a lower price. The same applies to customized goods, such as those that include the buyer's trademark.

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other, and contracted goods might be of rapidly perishable nature. HEUZÉ (2000), Art. 48, *Vente internationale*, p. 425; and P. HUBER (2006), *Comparative Sales Law*, pp. 961-962 considers that: "[f]rom an economic perspective, therefore, termination may prove to be an expensive remedy"; as to Article 7.1.4 PICC *see* UNIDROIT (2010), *Off. Comm.* Art. 7.1.4., p. 227; and WAGNER (2012), p. 9.

[850] As to "allocative costs of the remedy" *see* PRIEST (1978), p. 965.

[851] SIVESAND (2006), *Buyer's Remedies*, p. 150, who concludes: "[f]rom an economic point of view, this is not desirable [termination for small defects], since the seller will get stuck with slightly defective goods, which he cannot, or only with difficulty, expose of"; and ZIMMERMANN (2002), *Remedies*, p. 37, who refers to the allocation of risk.

> The difference in market positions between the seller and buyer account for the greatest difficulties the former in reselling or processing non-conforming goods. For example, the breaching seller may have no distribution or selling channels in the country/place where the goods are located after the first failed tender of performance. Likewise, the seller may not have the machinery to produce the final goods for which the purchased goods are generally used to construct.

Therefore, the remedy of avoidance—and also the right to immediately reject non-conforming tenders of performance—leads to a sub-optimal minimization of *allocative costs* wherever defective goods are more valuable in the hands of the aggrieved buyer than in those of the breaching seller[852].

Hence, as seen, the remedy of avoidance of the contract has the effect of throwing losses resulting from depreciation, non-resaleability, or non-usability of non-conforming goods back on the breaching seller[853], in circumstances where the buyer might generally be better positioned to efficiently use, process, or otherwise employ such goods.

What is more, the lack of precise information regarding the actual *status* and physical condition of the goods in the possession of the buyer may give rise to an important problem of asymmetric information, if the goods are to be send back into the market[854]. Third parties are unaware as well as it is rather costly for them to verify the actual *status* of the goods. This might result in the fact that the goods are not marketable anymore or only at an extremely low price.

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[852] GÓMEZ/ GILI (2014), *ADC*, pp. 1234. *Cf.* PRIEST (1978), pp. 964, 967, 972, 999, who depicts the dilemma of "overinvestment in cure or grant[ing] a windfall to the buyer". Additionally, BROOKS/ STREMITZER (2011), p. 716 affirm that when the goods are defective "often it will be the case that they are still more valuable to the buyer than to the seller"; and SIVESAND (2006), *Buyer's Remedies*, p. 150, who concludes: "[f]rom an economic point of view, this is not desirable [termination for small defects], since the seller will get stuck with slightly defective goods, which he cannot, or only with difficulty, expose of".

[853] WHITE/ SUMMERS (2010), p. 406; and WAGNER (2012), pp. 8-9.

[854] Polinsky/ Shavell/ HERMALIN/ KATZ/ CRASWELL (2007), p. 125: "[m]any litigated cases involve the sale of cars or houses that seem to be 'lemons', […]".

4.3.6 Criticisms

Despite the range of advantages of the seller's right to cure after delivery date under Article 48 CISG so far depicted, two important deficiencies must be considered.

First of all, it is submitted that, if the seller can anticipate that it will be granted with a second opportunity to perform the contract, it is under-incentivized to properly *invest in quality*[855] in a first round of action. This criticism, however, can be tempered as follows.

Firstly, a non-conforming performance is always risky for the seller, due to the fact that this party cannot securely anticipate whether it will be able to impose cure later on, due to the (un)reasonableness criterion of Article 48(1). Secondly, the compatibility of the seller's right to cure with a claim for non-curable damages—such as delay or inconveniences caused to the buyer—caused by an initially failed tender of performance, as expressly laid down under Article 48(1) *in fine*, may also effectively redress this behavioural pitfall.

The strongest criticism of the seller's right to cure after delivery date under Article 48 concerns the existence legal uncertainty, as well as the pro-seller bias that some have suggested the CISG's regime entails[856]. It is submitted that, in the event of a failure to perform, the *Circularity* between the concept of fundamental breach under Article 25 and curability —in particular, by the seller under Article 48(1) CISG—, imposes great uncertainty on the buyer[857] with regards the availability of remedies and, in particular, the right to avoid the contract according to Article 49(1)(a)[858].

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[855] BROOKS/ STREMITZER (2011), pp. 726-727.
[856] Díez-Picazo/ LÓPEZ (1998), Art. 48, p. 431-432.
[857] GILLETTE/ WALT (2016), p. 269; BRIDGE (2011), *FS Schwenzer*, p. 235; and LOOKOFSKY (2016), p. 153, Para 223 refers to "[t]he existence of a 'dynamic' relationship among Articles 25, 48(1) and 49". This uncertainty under the Convention's seller's right to cure has led some authors to affirm the superiority of a *Nachfristsetzung* mechanism. *See* MAK (2009), p. 201: "[i]n order to minimize uncertainty that may arise […], it will be argued that such a regime is most effective where the buyer is under an obligation to fix an additional period of time for performance before he becomes entitled to other remedies".
[858] *See above* Ch. IV, 4.1.1.

Even though it is conceivable that, in some instances, uncertainty might lead to the optimal result of eschewing avoidance of the contract wherever it is not economically desirable[859], uncertainty should never be employed as a technique for rule-drafting.

As a matter of principle, default contract law rules seek to avoid transaction costs by being modelled on what reasonable parties would have contracted for, had it been possible to create a *complete contract*[860]. If a certain rule is unclear and thus creates uncertainty, parties who do not wish to bear such uncertainty are inexorably forced to (re)negotiate, incurring transaction costs[861]. If these are high enough, which may often be the case at an international level, they may impede the existence of a mutually beneficial contract. Thus, the Contract law default rule dramatically misses its purpose[862].

[859] BRIDGE (2011), *FS Schwenzer*, p. 235 phrases it: "[…] less legal certainty in order to extra-neglect remedy of avoidance" and P. HUBER (2007), p. 34: "[t]he more restricted and uncertain the right to terminate, the rarer actual cases of termination will come".

[860] Wagner/ FAUST (2009), p. 34. But *cf.* AYRES/ GERTNER (1989), p. 93 affirms the incompleteness of the so-called "would have wanted" approach to default selection. For the notion of complete contracts, *see* the work of John Hart, recently awarded the Nobel Prize in economics. For all, *see* HART/ MOORE (1988), pp. 755-756; HART/ MOORE (1999), pp. 115-117,134-135 and the persuasive contribution by GÓMEZ/ GANUZA (2016), pp. 3-5. *See also* SHAVELL (2004), pp. 299-301.

[861] LOOKOFSKY (2016), p. 153, Para 223 affirms: "[c]ontracting parties are well-advised to include an express term which specifies the relationship between cure and avoidance".

[862] Wagner/ FAUST (2009), p. 34.

CONCLUSIONS (in English)

The conclusions of this Ph.D. are two-tiered:

First: The Seller's Right to Cure under the CISG

In this dissertation, an analysis of the seller's right to cure after the date for performance pursuant to Article 48 CISG has been conducted. This first approach—under the headings of existence, performance, and consequences—aimed to describe the mechanics and functioning of this remedy and to provide practitioners and adjudicators with most of the responses necessary for their daily operation under the Convention. The following research results can be highlighted:

1. Indisputably, parties can negotiate on and contractually vary the scope of application of the seller's right to cure under Article 48. In particular, parties may effectively exclude such a right on the side of the seller in a direct or indirect manner.

2. However, when a variation of the seller's opportunity to subsequently perform is effected by incorporation of standard terms of business, an adjudicator should be able to control its content—not only under the applicable national law but also upon the foundations of the CISG—and to strike down invalid non-negotiated clauses.

3. The application of the seller's right to cure covers all seller's obligations under the contract. According to Article 48(1), the seller's right to subsequently perform strictly follows the standards of reasonableness—which are to be determined on a case-by-case basis—concerning delay, inconveniences to the buyer, and reimbursement of expenses.

4. Inconveniences and reimbursement of expenses may be unreasonable without entailing a fundamental breach. In contrast, an unreasonable delay will only exist provided that the time lag after cure would have amounted to a fundamental breach under Article 25 CISG. Systematically, therefore, the notion of "unreasonable delay" is neither equivalent to an "additional

period of time of reasonable length" for performance fixed by the buyer according to Article 47(1) CISG—which does not necessarily lead to a fundamental breach—nor, comparatively, to the *Nachfrist*-mechanism under §323 BGB—which is freed from a fundamental breach bias.

5. Under Article 48(2-4), if the aggrieved buyer accepts or fails to respond within a reasonable period of time to a seller's offer of cure—which must specify a period of time for conducting such subsequent performance—, a breaching seller can subsequently cure. This holds true regardless of the preconditions of Article 48(1) or the actual fundamentality of the breach.

6. Buyer's cooperation is paramount not only in the setting of an opportunity to cure but also in its following performance. Therefore, where cooperation is unrightfully absent, the buyer faces relevant negative consequences.

7. Provided that the Convention does not recognise the notion of *Secondary Fundamental Breach*, a breaching seller may impose cure by any conceivable means over several attempts, insofar as seller's subsequent performance still meets the standards of reasonableness under Article 48(1).

8. The seller must cure at its own expense and the chosen methods must assure exact and full performance of the breached obligation. Examples of breached obligations and methods of cure include: belated delivery of missing goods, repair of non-conformities in goods, replacement of non-conforming documents, acquisition of licenses necessary to redress infringements of intellectual property rights, and retendering of services to the buyer.

9. During a seller's attempt at cure under Article 48(1), the risk of loss or damage to the goods must fall back onto the seller only in two particular scenarios: whenever the seller subsequently cures by repairing the defective goods away of the buyer's facilities, or by replacing non-conforming items. By operation of Article 66 *in fine*, even when occurred failures to perform are not tantamount to fundamental breaches—and thus beyond Article

70—the risk can be reallocated onto the seller. Only in this way the general rule that risk of loss or damage to the goods should be borne by the party that has physical possession or effective control over them can be upheld.

10. A reasonable opportunity to cure under Article 48(1) may have a crucial impact on the notion of fundamental breach. Under the Convention, curability of a failure to perform is one of the factors to be taken into consideration for the *Fundamentality Test* of Article 25. As a consequence, it is criticised that these provisions are circular in application, resulting in little legal certainty.

11. Whereas an opportunity to cure by the seller under Article 48(2-4) suspends the remedies already available to the buyer, the reasonable seller's right to cure under Article 48(1) is only compatible with a remedy of damages for the amount of non-curable losses.

12. In certain instances, however, the seller's right to cure under Article 48(1) may also be compatible with the buyer's right to withhold its own performance—particularly interesting are cases of delivery of an excessive quantity of goods or better quality ones—, the fixing of an additional period of time for performance, or the buyer's right to ask for cure.

13. All other remedies for breach of contract are thus not effective while the seller can still reasonably cure after the date for delivery in accordance with Article 48(1). These include: a remedy of damages for the expectation measure, the buyer's imposition of a specific method of performance, the right to reduce the purchase price, and the right to declare the contract avoided—in spite of the opening wording of Article 48(1): "subject to Article 49".

Second: Right to Cure and Contract Law

At a theoretical level, this dissertation aims to shed light onto a rule that indisputably belongs to a modern understanding of Contract law. The seller's right to cure after the date for performance is a bottom-up rule—born in commercial practice—that was early

adopted by some legal systems and, over the years, has proven to be one of the most widely acknowledged mechanisms upholding the principle *Favor Contractus*.

This unequivocal relevance applies to both strands comprising the principle: the pursuit of contract performance insofar as appropriate and the disowning of avoidance as *ultima ratio* remedy. Therefore, the main economic and behavioural implications of the seller's right to cure had to be described. Likewise, this remedy had to be put into the comparative legal context alongside alternative normative techniques designed to accomplish similar results by *sequencing the remedies for breach* [concept used by FRIEHE/ TRÖGER (2010), pp. 161, 182]. Accordingly, it can be affirmed:

14. The seller's right to cure after the date for delivery principally disincentivises opportunistic terminations of contract whenever generic goods are involved. At the same time, it proffers a better cost-effective mechanism for subsequent performance when goods are unique, specific or customized, while it keeps being permeable to the notion of *Efficient Breach*. Furthermore, this rule minimizes the allocative cost that would otherwise result from the remedy of termination as well as its uneconomic consequences.

15. The doctrine of fundamental breach, the *Nachfristsetzung*, the normative hierarchy of remedies, and finely-tuned debtor's rights to cure are all good solutions to sequence the remedies for breach and to build a cure regime for the sake of *Favor Contractus*. When it comes to choosing a default normative technique, or a combination like under the CISG, the goal must be to strike a neat balance between parties' interests modelled on the ideal of *Complete Contract*, having regard to the very kind of transactions involved and the contractual setting, grounded on legal certainty.

CONCLUSIONS (en català)

Les conclusions d'aquesta tesi doctoral es formulen des d'un doble punt de vista:

Primer: el dret de correcció del venedor a la CISG

En el treball de tesi s'ha dut a terme una anàlisi del dret de correcció del venedor després de la data de compliment, d'acord amb l'Article 48 CISG. Aquest estudi—dividit en les parts relatives a existència, execució i conseqüències—està encaminat a descriure el funcionament i l'estructura del remei en qüestió a fi de donar respostes a la majoria de preguntes en relació amb a la seva aplicació pràctica. Es poden destacar els següents resultats:

1. Les parts poden negociar sens dubte sobre el dret de correcció de l'Article 48 CISG i modificar-ne contractualment l'aplicació. En concret, les parts poden directament o indirecta excloure de forma eficaç aquest dret del venedor.

2. Ara bé, en cas que la modificació del dret de correcció del venedor s'hagi dut a terme per mitjà de la incorporació de condicions generals de la contractació, un jutge o àrbitre ha de ser capaç de controlar-ne el contingut—no només conforme al dret nacional aplicable, sinó també d'acord amb els principis bàsics de la CISG—i, si escau, declarar la invalidesa de la clàusula no-negociada.

3. El dret de correcció del venedor cobreix totes les obligacions del venedor derivades del contracte. A més, d'acord amb l'Article 48(1), aquesta aplicació està estrictament regida pels estàndards de raonabilitat que es prediquen del retard, de les inconveniències causades al comprador i del reemborsament de despeses.

4. Les inconveniències i el reemborsament de despeses poden ser considerats no raonables sense arribar a constituir un incompliment essencial. Per contra, un retard no raonable només existirà si la demora en el compliment després de l'oportunitat de correcció hagués estat equivalent a un incompliment essencial de l'Article 25 CISG. Per això, sistemàticament, es pot afirmar que el concepte de "retard no raonable" no és equivalent ni al d'un "termini de durada raonable" per al compliment fixat pel comprador d'acord amb l'Article 47(1) CISG—el qual no implica un incompliment essencial—ni, comparativament, al

mecanisme del *Nachfrist* de §323 BGB—que no contempla la noció d'incompliment essencial.

5. De conformitat amb l'Article 48(2-4), si el comprador perjudicat ha acceptat o no ha respost dins d'un termini raonable a l'oferta de correcció del venedor—la qual havia d'especificar un termini concret per dur a terme aquest compliment posterior—, el venedor pot corregir. Això té lloc independentment dels criteris de raonabilitat de l'Article 48(1) o del caràcter essencial de l'incompliment ocorregut.

6. La cooperació del comprador és un element clau tant en l'exercici com en l'execució del dret de correcció. Per això, quan no hi ha cooperació de forma injustificada, el comprador ha de fer front a conseqüències negatives rellevants.

7. Com que la Convenció no reconeix el concepte de *Secondary Fundamental Breach*, el venedor pot corregir el seu incompliment per mitjà de qualsevol tècnica imaginable i executar diversos intents, sempre i quan continuï complint amb els estàndards de raonabilitat.

8. El venedor ha de corregir al seu propi càrrec i els mètodes de correcció escollits han d'assegurar un compliment íntegre i exacte de l'obligació incomplerta. En són exemples transversals: l'entrega retardada de béns, la reparació de béns no conformes amb el contracte, la substitució de documents no conformes, l'adquisició de les llicències necessàries per evitar la infracció de drets de propietat intel·lectual i la prestació de serveis tal com exigeix el contracte.

9. Mentre el venedor executa un intent de correcció d'acord amb l'Article 48(1), només ha de córrer amb el risc de pèrdua o de deteriorament en els béns en dos escenaris particulars: sempre que el venedor repari els béns no conformes lluny de les instal·lacions dels comprador o quan entregui ítems en substitució d'aquells no conformes. En virtut de l'Article 66 *in fine*, fins i tot si l'incompliment ocorregut no equival a un incompliment essencial—per tant fora de l'àmbit d'aplicació de l'Article 70—el risc és reassignable al venedor. D'aquesta manera es pot garantir la regla general que el risc de pèrdua o de

deteriorament en els béns l'ha de suportar la part contractual que en té la possessió o un control efectiu.

10. La possibilitat d'un compliment posterior raonable d'acord amb l'Article 48(1) pot tenir un efecte dràstic sobre la noció d'incompliment essencial. Això és perquè, en el règim de la Convenció, la curabilitat de la manca de compliment és un dels criteris a tenir en compte quan s'analitza l'essencialitat de l'incompliment segons l'Article 25. No obstant, una crítica apunta que ambdues normes són circulars en la seva aplicació, de manera que comporta menys seguretat jurídica per a les parts.

11. Mentre que una oportunitat de correcció ulterior del venedor d'acord amb l'Article 48(2-4) comporta la suspensió del remeis del comprador que ja existien, el dret de correcció del venedor conforme a l'Article 48(1) només és compatible amb una indemnització per aquells danys que no es poden corregir.

12. En algunes ocasions, el dret de correcció del venedor, segons l'Article 48(1), també serà compatible amb el dret del comprador per suspendre el compliment de les seves pròpies obligacions—aquí són particularment rellevants els casos d'entrega d'una quantitat excessiva de béns o d'entrega d'ítems d'una millor qualitat que la contractada—, amb l'establiment d'un termini addicional per al compliment o amb el dret del comprador d'exigir el compliment en forma específica.

13. Tota la resta de remeis del comprador no són eficaços mentre el venedor pugui corregir després de la data de compliment d'una forma raonable d'acord amb l'Article 48(1). Aquí trobem inclosos: una indemnització per danys i perjudicis que cobreixi l'interès a l'expectativa, la imposició per part del comprador del mètode de compliment específic, el dret a la reducció del preu de compra i el remei de resolució del contracte—malgrat que el text de l'Article 48(1) comenci amb l'expressió: "subjecte a l'Article 49".

Segon: el dret de correcció i el Dret de contractes

Des d'un punt de vista teòric, aquesta tesi doctoral intenta donar raó d'una norma que sens dubte pertany a una nova concepció del Dret

de contractes. El dret de correcció del venedor després de la data de compliment és una norma *bottom-up*—nascuda de la pràctica comercial—que en un primer moment ja va ser recollida per alguns ordenaments jurídics i que, al llarg dels anys, ha demostrat ser àmpliament reconeguda com a un mecanisme per garantir el principi *Favor Contractus*.

Aquesta innegable importància es predica respecte dels dos elements que integren el principi: l'afany de complir el contracte en la mesura que sigui apropiat i de considerar el remei resolutori com a *ultima ratio*. És per aquest motiu que s'havien de tenir en compte les seves principals implicacions econòmiques i conductuals. Igualment, aquest remei del venedor s'havia de comparar amb altres tècniques normatives destinades a complir els mateixos objectius, per mitjà de *seqüenciar els remeis per a l'incompliment* [terme utilitzat per FRIEHE/ TRÖGER (2010), pp. 161, 182]. En conjunt, es poden fer les següents afirmacions:

14. El dret de correcció del venedor després de la data de compliment evita resolucions oportunistes de contractes de compravenda sobre béns genèrics. Al mateix temps, ofereix un mecanisme econòmicament rentable per al compliment ulterior, quan els béns són únics, específics o personalitzats, que es manté permeable a la noció de *Efficient Breach*. A més a més, aquesta norma minimitza els costs distributius que d'altra forma resultarien del remei resolutori i les seves conseqüències poc econòmiques.

15. La doctrina de l'incompliment essencial, el *Nachfristsetzung*, la jerarquia normativa de remeis i els drets de correcció del deutor ben definits són solucions totes bones per seqüenciar els remeis per a l'incompliment i construir un règim de correcció amb la finalitat de garantir el principi *Favor Contractus*. Quan toqui triar una tècnica normativa de defecte, o combinar-les com fa la CISG, l'objectiu ha de ser aconseguir un nítid equilibri entre els interessos de les parts prenent com a referència la utopia del *Complete Contract*, tenint present el tipus de transaccions involucrades i l'entorn contractual, sobre la base de la seguretat jurídica.

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