
EXTENSION AND LIMITATION OF THE BUYER'S RIGHT TO AVOID THE CONTRACT UNDER THE CISG

WITH FOCUS ON THE SITUATION WHERE THE SELLER IS IN CURRENT BREACH OF THE CONTRACT AFTER THE TIME FOR PERFORMANCE HAS PASSED.

UDVIDELSE OG INDSKRÆNKNING AF KØBERS RET TIL AT OPHÆVE KONTRAKTEN EFTER CISG

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TABLE OF CONTENTS

1. Introduction and statement of intent	1
2. The main rule: The buyer's right to avoid the contract due to a fundamental breach	2
2.1. Introduction	2
2.2. Detriment leading to a substantial deprivation of the buyer's expectations under the contract.....	3
2.2.1. Detriment.....	3
2.2.2. Substantial deprivation of the buyer's expectations under the contract	3
2.3. Foreseeability	4
2.4. The evaluation under the article.....	6
2.5. The legal consequences	7
2.6. The CISG policy to keep contracts functioning.....	7
3. Extension of the buyer's right to avoid the contract – the buyer's right to fix a nachfrist for the purposes of avoidance	8
3.1. Introduction	8
3.2. Applicable time frame.....	9
3.3. The Nachfrist procedure under Art. 47(1) CISG	10
3.3.1. Fixing the period and demanding performance	10
3.3.2. Reasonable period of time	11
3.3.3. No form requirement	13
3.4. Is the buyer entitled to fix several periods?.....	13
3.5. The legal consequences	13
4. Limits on time for avoidance.....	14
4.1. Introduction	14
4.2. Cases of late delivery.....	15
4.3. Other fundamental breaches	15
4.4. The reasonable time limit.....	15
5. Limitation of the buyer's right to avoid the contract – the seller's right to cure the breach	16
5.1. Introduction	16
5.2. The seller's right to remedy a failure to perform without a request	17
5.2.1. Remedying the failure.....	17
5.2.2. Costs	18
5.2.3. Failure to perform.....	18
5.2.4. The requirements for the seller's right to cure	19

5.2.5.	The legal consequences	20
5.3.	The seller's right to remedy a failure to perform following from his request to the buyer	21
5.3.1.	Request to the buyer whether he will accept performance.....	21
5.3.1.1.	Subsequent performance	22
5.3.1.2.	The buyer's compliance within a reasonable time	22
5.3.1.3.	Specified time period.....	22
5.3.2.	Notice to the buyer without a request	23
5.3.3.	The notice must reach the buyer	23
5.3.4.	The legal consequences	24
6.	Interaction between the articles and the influence this has on the buyer's right to avoid the contract	24
6.1.	Introduction	24
6.2.	Interaction between Art. 49(1)(a) CISG and Art. 47(1) CISG, cf. Art. 49(1)(b) CISG	25
6.2.1.	Introduction to the conflict.....	25
6.2.2.	The time for avoidance when the buyer has fixed a Nachfrist	26
6.2.3.	Does the buyer have to fix a Nachfrist to be able to avoid the contract even though there is a fundamental breach?	27
6.2.4.	Conclusion and evaluation.....	29
6.3.	Interaction between Art. 49(1)(a) CISG and Art. 48(1) CISG	30
6.3.1.	Introduction to the conflict.....	30
6.3.2.	Interpretation of "[s]ubject to article 49"	31
6.3.2.1.	The legislative history of the provision	31
6.3.2.2.	The literal approach.....	32
6.3.2.3.	At what point in time is the seller's right to cure the breach excluded? 34	
6.3.2.4.	The fair reading.....	36
6.3.2.5.	Sub-conclusion and evaluation	38
6.3.3.	Cure in relation to fundamental breach?	39
6.3.3.1.	Introduction to the hypothesis	39
6.3.3.2.	The legal theories.....	40
6.3.3.3.	Does cure always prevent a breach from being fundamental?	42
6.3.3.4.	The legislative history.....	42
6.3.3.5.	Case law.....	43
6.3.3.6.	The underlying principles of the CISG	45
6.3.3.7.	Sub-conclusion and evaluation	46
6.3.4.	Conclusion	48

6.3.5.	Is a change of Art. 48(1) CISG necessary?.....	48
6.4.	Interaction between 49(1)(a) CISG and Art. 48(2) and (3) CISG.....	49
6.4.1.	Introduction to the conflict.....	49
6.4.2.	The solution.....	50
6.4.3.	Conclusion and evaluation.....	51
6.5.	Interaction between Art. 49(1)(b) CISG and Art. 48(1) CISG.....	51
6.5.1.	Introduction to the conflict.....	51
6.5.2.	Art. 48(1) CISG is not applicable to cases of late delivery	51
6.5.3.	The Nachfrist has a curative nature	52
6.5.4.	Conclusion and evaluation.....	52
6.6.	Interaction between Art. 49(1)(b) CISG and Art. 48(2) and (3) CISG	53
6.6.1.	Introduction to the conflict.....	53
6.6.2.	The solution.....	53
6.6.3.	Conclusion and evaluation.....	54
7.	Conclusion	54
8.	Bibliography	58
8.1.	Scholarly works and articles.....	58
8.2.	Preparatory work	61
8.3.	Cases.....	62

1. INTRODUCTION AND STATEMENT OF INTENT

Under the United Nations Convention on Contracts for the International Sale of Goods (the CISG), a buyer is granted certain remedies when a seller fails to perform one or more of his obligations under an international sales contract.¹ Art. 45 (1) CISG summarizes these remedies. This thesis addresses the buyer's right to avoid the contract when the seller is in breach of contract.²

It will be examined in what situations the buyer has the right to avoid the contract under the CISG and when this right can be extended or limited. In that regard it should be noted that the focus of this thesis will be the main situation where the seller is in current breach of his obligations after the time for the projected performance has passed. This delimitation will therefore exclude situations where the seller has delivered non-conforming goods (or documents) before the date of delivery and the buyer's right to avoid the contract is limited by the seller's right to cure this breach, cf. Arts. 34 and 37 CISG, and also situations where the buyer is entitled to avoid the contract due to the seller's anticipated breach, cf. Arts. 72 and 73 CISG. These scenarios will not be addressed further.

The main rule under the CISG is outlined in Art. 49(1)(a) CISG which states that the buyer is only entitled to avoid the contract when there is a fundamental breach, cf. Art. 25 CISG. This right can be extended to some types of non-fundamental breaches where the buyer fixes what is usually referred to as a *Nachfrist*, cf. Art. 49(1)(b) CISG, cf. Art. 47(1) CISG. Nevertheless, this right may also be limited by the seller's right to cure the breach, cf. Art. 48 CISG. Which rule applies when will be shortly analysed in sections 2-5.

As slightly insinuated, the articles overlap since they interfere in the same legal sphere. Therefore, there will be situations where more than one of them is applicable at the same time. The question is: How do these rules interact and does one of them take priority? The different types of interaction situations will be analysed and the main theme for this thesis will be the discussion of these conflicts, cf. section 6. The legal dogmatic method will be used in the analysis, and in line with Art. 7(1) CISG, to promote uniformity in the CISG's

¹ If the CISG is applicable, cf. Arts. 1-6 CISG, it applies by default in the international sales context.

² Sometimes the contract defines the remedies available for the buyer. However, this thesis will be concentrating on the situation where the default remedies under the CISG are applicable.

application and interpretation, both common law and civil law legal writers will be examined along with case law.

2. THE MAIN RULE: THE BUYER'S RIGHT TO AVOID THE CONTRACT DUE TO A FUNDAMENTAL BREACH

2.1. Introduction

The buyer has a limited right to avoid the contract under the CISG. The main rule is stated in Art. 49(1)(a) CISG: “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”. Thus, the buyer is entitled to avoid the contract if (1) the seller fails to perform one of his obligations under the contract and (2) this failure results in a fundamental breach of the contract.

Art. 25 CISG states that a breach 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”. This definition may be categorized as vague, but as Art. 25 CISG has to cover a variety of different situations a general workable definition of fundamental breach must remain vague.³ Due to the variety of different situations, it is not possible to construct and apply one universal formula under which all facts of each case can be submitted which will lead to correct results in practice. The assessment then has to be made in the light of all the circumstances and facts of the specific case.⁴

It follows from Art. 25 CISG that two requirements must be fulfilled before the buyer is entitled to avoid the contract, cf. Art. 49(1)(a) CISG: (1) there must be a detriment that leads to the substantial deprivation of the buyer's expectations under the contract and (2)

³ Cf. Honnold par. 181.2 and Magnus p. 322. This may be why there were proposals at the drafting stage that there should not even be a definition of threshold at which a contract might be avoided, cf. Schroeter p. 403, par. 8.

⁴ Cf. Huber p. 213, Schroeter pp. 403-404, par. 9, Honnold par. 296 and Gabriel pp. 337-338. Cf. section 2.4 for the evaluation under Art. 25 CISG.

this result has to be foreseeable for the seller or a reasonable person of the same kind in the same circumstances. In the following sections these two requirements will be analysed.

2.2. Detriment leading to a substantial deprivation of the buyer's expectations under the contract

As already noted, it is not possible to construct a universal formula for the application of Art. 25 CISG. However, a few general principles can be found:

2.2.1. Detriment

The scholars appear to agree that this element is not the decisive one since the term “detriment” should be construed very widely and does not mean that the buyer must have suffered a damage or loss because of the breach.⁵ The important element is whether the buyer suffered a substantial deprivation: “If it turns out that the promisee was deprived of what he was entitled to expect under the contract, there will automatically be a “detriment”, too”⁶.

2.2.2. Substantial deprivation of the buyer's expectations under the contract

Whether the buyer is substantially deprived of what he was entitled to expect under the contract depends on how important a proper performance would have been for the individual buyer.⁷ What the parties have agreed on in the contract is of great importance when determining the buyer's interest in a proper performance.⁸ The contract is therefore a significant tool that can be used to create an interest of importance for the buyer by attaching particular weight to certain obligations. Pre-contractual negotiations and the purpose of the contract can also play an important role in that regard.⁹ Consequently, the contract has two functions: (1) it creates obligations for the parties and (2) it determines how important the obligations are to the buyer. Usages and additional provisions of the Convention can also,

⁵ Cf. Liu pp. 199-201, Schroeter p. 409, par. 22 and Will pp. 210-211.

⁶ Cf. Huber p. 214. See also BGER 28 Oct. 1998: “The central element of Art. 25 CISG is the issue whether the party which obeyed the contractual obligations is essentially deprived of what it could have expected under the contract”.

⁷ Cf. Huber p. 215 and Schlechtriem/Butler par. 111. It is not of importance how ‘badly’ the seller behaved or to what extent the breach caused damages for the buyer.

⁸ See also OLG Frankfurt 17 Sep. 1991 where the court stated: “A breach of contract is fundamental when the purpose of the contract is endangered so seriously that, for the concerned party to the contract, interest in the fulfillment of the contract ceases to exist as a consequence of the breach of the contract”.

⁹ Cf. Schroeter p. 409, par. 21, Gomard/Rechnagel p. 90, Huber p. 214 and Schlechtriem/Butler par. 116.

besides the contract, give the buyer expectations that can lead to an interest of importance.¹⁰

The buyer's expectations from the contract are objectively decided. The standard is what expectations a reasonable person in the same circumstances would get when looking at the contract. What the buyer personally, subjectively expected is subordinate.¹¹

2.3. Foreseeability

The substantial deprivation must be foreseeable for the seller. It is irrelevant whether the seller has foreseen the breach itself or the reasons for the breach. The test is both subjective and objective: Firstly, it must be considered, from the seller's actual knowledge of relevant circumstances, whether he foresaw the result. Secondly, since it can be difficult to prove the seller's actual knowledge, it must be considered whether a reasonable person of the same kind in the same circumstances would have foreseen it.¹²

If the seller neither objectively nor subjectively foresaw the consequence of the breach then it must follow from Art. 25 CISG that the breach is not fundamental, cf. the "unless..." in the provision. However, some scholars discuss whether the seller can rely on the foreseeability requirement as an independent ground that can excuse the seller.¹³

The predominant opinion amongst legal writers is that the foreseeability requirement is a subjective ground that can excuse the party in breach and preclude avoidance of the contract.¹⁴ Other legal writers do not see the requirement as an independent ground to excuse the seller, but instead as an interpretation tool to assess the importance of the obligations that are breached.¹⁵ However, the result seems to be the same since for example Schroeter concludes that a party can only rely on something as a 'substantial' expectation 'under the contract' if the other party, by entering into the contract, knew about (foresaw) creating such an expectation.

¹⁰ Cf. The Draft Digest p. 601, par. 3.

¹¹ Cf. BGer 28 Oct. 1998, Huber p. 215, Will p. 215 and Liu p. 206.

¹² Cf. Will p. 217 and Huber p. 215.

¹³ Cf. especially Schroeter pp. 411-412, par. 26-27 in that regard.

¹⁴ Cf. for example Huber p. 215, Gomard/Rechnagel p. 90, Liu p. 208 and Will p. 215.

¹⁵ Cf. Schroeter pp. 401-402, par. 5 and 412, par. 27 and Schlechtriem/Butler par. 112.

The foreseeability requirement can be limited by the objective substantial deprivation criterion. If the seller is substantially deprived of his expectations under the contract it can be very difficult for the seller to prove that this could not have been foreseen at least by a reasonable person in the same circumstances. This is especially the case if the parties have stated an obligation's importance during the pre-contractual negotiations or in the contract as not much room can be left for excluding the fundamental nature of the breach by using the foreseeability rule.¹⁶

Art. 25 CISG does not state at what point in time the foreseeability must occur. The UNCITRAL Drafting Committee was aware of the problem, but did not consider it necessary to solve.¹⁷ This probably resulted in the Secretariat Commentary that states that the decision must be made by the tribunal in the case of dispute.¹⁸ The delegates at the Vienna Sales Conference also decided to leave this question open to the adjudicating body;¹⁹ it is therefore not surprising that the legal writers do not agree on the matter.

The predominant view amongst legal writers is that the assessment should be made at the time of conclusion of the contract since the seller should be able to foresee his liability risks at that point in time.²⁰ Further to this, both Art. 73(3) CISG and Art. 74 CISG include a related foreseeability rule in accordance to which the foreseeability is assessed at the time of conclusion of the contract.

On the other hand, some scholars are of the opinion that information received after contracting can also be taken into account. Avoidance should not be precluded in a situation where the contractual relationship would still be damaged simply because the seller was not aware of the importance of the obligation at time of contracting. Some legal writers are of the opinion that the information can be taken into account if it is soon enough to affect the seller's performance (before shipment for instance)²¹ while others are of the opinion that it is only up until that point in time when the seller's preparations start.²²

¹⁶ Cf. Huber p. 216, Schroeter p. 412, par. 28 and Liu p. 211.

¹⁷ Cf. the Committee Report par. 90.

¹⁸ Cf. The Secretariat Commentary to Art. 25 CISG, par. 5.

¹⁹ Cf. the 13th meeting, par. 1-3, cf. Documentary p. 523.

²⁰ Cf. for example Huber p. 216, Schroeter p. 415, par. 33, Schlechtriem/Butler par. 112 and Gormard/Rechnagel p. 90.

²¹ Cf. Honnold par. 183.

²² Cf. Will p. 221 and Enderlein/Maskow pp. 116 and 215 that are both emphasizing that this should only be the exception.

To conclude, the question remains unsettled. One can therefore wonder why the delegates left the issue open to the tribunals to decide, especially when they decided that the damage provision in Art. 74 CISG should state a point in time for the foreseeability assessment.²³

2.4. The evaluation under the article

Whether a breach is fundamental is, as stated in section 2.1, a concrete evaluation based on all the circumstances of the specific case: “Whether a breach of contract in the given situation is fundamental, according to the explained standard and if the most severe remedy of avoidance of the contract is justified, depends on the particular circumstances of the individual case”²⁴. This issue can be discussed for a long time by reasonable minds, and the courts seem to have developed certain rules for specific types of cases.

Some breaches are clearly fundamental. In cases of non-delivery the breach will usually amount to a fundamental breach. A delay in performance can also amount to a fundamental breach if time is ‘of the essence’²⁵: “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”²⁶. In cases of defective goods/non-conforming goods many scholars deduce from several cases that there is not a fundamental breach as long as the buyer can use or resell the goods.²⁷

In other cases it is clear that the breach is not fundamental. For example, if the seller is only delayed a few days, this will not in itself be considered a fundamental breach.²⁸

The problem is ‘borderline’ cases in which the courts cannot decide whether there is a fundamental breach. In such cases the courts have been reluctant to give the buyer the benefit

²³ Cf. also Ziegel pp. 9-19 to 9-20 in that regard.

²⁴ Cf. BGer 28 Oct. 1998.

²⁵ Cf. Schroeter pp. 417-418, par. 37-38 and Liu pp. 230-235.

²⁶ Cf. BGer 15 Sep. 2000 [4C.105/2000].

²⁷ Cf. for example Gabriel p. 338 and Lookofsky p. 116. For cases see for example LG München 27 Feb. 2002 and OLG Stuttgart 12 Mar. 2001.

²⁸ See also OLG München 1 Jul. 2002 where the court stated that a delay in delivery was not enough to amount to a fundamental breach in itself or else the provision in Art. 49(1)(b) CISG would not have been necessary. See section 3 for a review of this article.

of the doubt²⁹: “The concept of fundamental breach as defined in article 25 CISG must be interpreted in a restrictive way and, in case of doubt, it must be considered that conditions of such breach are not fulfilled”³⁰. If a CISG buyer therefore wants to be sure that he will, should a certain breach of the contract occur, have the opportunity to avoid the contract, the buyer has to include a contractual term that gives the seller (and the courts) no doubt about the importance of the buyer’s interest.

2.5. The legal consequences

When the requirements under Art. 25 CISG are fulfilled, the buyer has the right to avoid the contract immediately, cf. Art. 49(1)(a) CISG.³¹ He is not obligated to grant the seller an additional period of time within which the seller has a second chance to perform.³²

2.6. The CISG policy to keep contracts functioning

From the previous sections it can be concluded that the CISG strictly limits the situations where the buyer has a right to avoid the contract due to a fundamental breach, since the requirements under Art. 25 CISG are not easily fulfilled.

The drafters of the Convention chose to limit the situations where the buyer could avoid the contract due to the preference for an economically efficient system of remedies. Termination of contracts often leads to additional costs and risks since the contract goods have to be stored and transported back to the seller.³³ International contracts are usually complex and of great importance to the parties involved and therefore, avoidance should not be possible in trivial situations.³⁴ The contracts should be kept and performance allowed even in adverse circumstances with the goal to promote loyalty and good faith in international sales.³⁵ Therefore, if the buyer’s interest can be satisfied by other possible remedies, termination of the contract should be avoided: “The buyer shall primarily make use of the other remedies, namely price reduction and compensation, with the reversed transac-

²⁹ Cf. Lookofsky p. 117.

³⁰ Cf. BGer 15 Sep. 2000 [4C.105/2000].

³¹ Cf. Gomard/Rechnagel p. 151, Liu p. 70 and Enderlein/Maskow pp. 112 and 192.

³² However, when Art. 47 CISG, cf. Art. 49(1)(b) CISG, or Art. 48 CISG are applicable at the same time this immediate right can be frustrated. See sections 6.2-6.4 where the interaction between the articles is discussed.

³³ Cf. Schroeter pp. 403-404, par. 9 and p. 427, par. 51.

³⁴ Cf. Honnold par. 304 and the Secretariat Commentary to Art. 49 CISG, par. 4.

³⁵ Cf. Liu p. 257.

tion constituting the last recourse in reacting to the other party's breach of contract which is that essential that it deprives that party of its interest in the fulfilment of the contract"³⁶. Many scholars and case law therefore state that avoidance should only be granted the buyer as a last resort, *ultima ratio*, which would be in situations where the breach of contract is so grave that no other remedy would be satisfactory for the buyer.³⁷ The fact that courts are not giving the buyer the benefit of the doubt in 'borderline' cases, cf. section 2.4, also reflects the CISG policy to keep contracts functioning.³⁸

The problem with the strict limitation of the buyer's right to avoid the contract is that the buyer can be afraid of taking a stand, since a non-justified avoidance of the contract could lead to consequences for the buyer. The most favourable situation for the buyer would be that he would know for sure, no matter what kind of breach it was, whether he was entitled to avoid the contract. In cases of late delivery/non-delivery the CISG creates a solution for the buyer, cf. the next section.

3. EXTENSION OF THE BUYER'S RIGHT TO AVOID THE CONTRACT – THE BUYER'S RIGHT TO FIX A NACHFRIST FOR THE PURPOSES OF AVOIDANCE

3.1. Introduction

Since the default rule under the CISG tries to limit the buyer's right to avoid the contract, the buyer can be left in an uncertain situation, cf. the above section. In cases of late delivery/non-delivery, the CISG does not automatically state time to be 'of the essence'. However, in such situations the CISG eliminates the buyer's uncertainty by giving the buyer an alternative ground for avoidance "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", cf. Art.

³⁶ Cf. BGer 28 Oct. 1998.

³⁷ Cf. Huber p. 209, Müller-Chen p. 747, par. 2, Schroeter p. 427, par. 51 and Honnold par. 181.2. For case law see for example Bundesgerichtshof 3 Apr. 1996.

³⁸ This fundamental purpose and underlying principle of the CISG plays an important role in the interpretation and discussion of the buyer's remedies. See the following review of the other articles and especially the interaction discussion in section 6.

49(1)(b) CISG.³⁹ The buyer's right to avoid the contract is thereby extended since he is entitled to avoid the contract irrespectively of whether the breach at that point in time has reached fundamental proportions. The breach, when the buyer uses the procedure under Art. 47(1) CISG, is 'upgraded' to one that justifies avoidance.⁴⁰ This notice-avoidance approach is inspired by German law (and French law) and is called a 'Nachfrist', which is a term that is part of the CISG terminology.⁴¹

It is noteworthy that even though Art. 47(1) CISG gives the buyer the right to fix an additional period of time for the seller to perform *any* of his obligations, the buyer can only fix a Nachfrist for the purposes under Art. 49(1)(b) CISG in cases of *non-delivery* (or cases of late delivery where the seller delivers after expiration of the Nachfrist period).⁴²

It could be questioned whether this extension of the buyer's right to avoid the contract is in line with the CISG policy to keep contracts functioning, cf. section 2.6? The answer must be "yes" since the buyer by using another remedy than avoidance, the Nachfrist, gives the seller a second chance to perform.⁴³ The underlying principles of the CISG were also the reason why the delegates at the Vienna Sales Conference chose to limit avoidance based on a Nachfrist notice to the basic obligation to deliver the goods (non-delivery).⁴⁴

3.2. Applicable time frame⁴⁵

Some legal writers state that a buyer is only entitled to fix a Nachfrist for the purpose of Art. 49(1)(b) CISG after the date for delivery has passed. One of these legal writers is Müller-Chen. He is of the opinion that this follows from the fact that the remedy under Art. 49(1)(b) CISG may first be used when the seller has failed to perform his obligations

³⁹ Fixing an additional period of time also removes the uncertainty for the buyer about whether and when the seller will deliver.

⁴⁰ Cf. Lookofsky p. 122 and Huber p. 209.

⁴¹ However, not all aspects from the German Nachfrist were taken since it is not mandatory for the buyer under the CISG to fix a Nachfrist before he is entitled to avoid the contract. See also section 6.2.3.

⁴² See section 6.2.3 for a further description of the history behind the provision. Some scholars, however, advise the buyer to fix a Nachfrist in the non-conformity situations as well since it can have an influence when assessing whether the breach is of fundamental nature, cf. Will p. 346 and Liu pp. 68-69.

⁴³ Cf. Huber p. 234. This is also shown by the fact that the buyer's remedies, including avoidance of the contract, is suspended in the Nachfrist period, cf. Art. 47(2) CISG. See also section 6.2.2.

⁴⁴ Cf. Honnold par. 354. See also section 6.2.3.

⁴⁵ The author is aware that this section is in the borderland of what is the main situation discussed in this thesis, namely when the seller is in breach of contract after the time for performance has passed. However it has been chosen to leave it in for the sake of the overview.

which is when delivery is due, cf. Art. 45(1)(a) CISG, and also from the nature of the Nachfrist as being a supplementary period.⁴⁶

Enderlein and Maskow seem to be of a different opinion. They state that the Nachfrist remedy can be used even before there is a delay in situations where it can be anticipated. The seller will still be entitled to deliver at the date fixed in the contract, and the Nachfrist does not start to run until the end of the time for performance.⁴⁷

In the light of the CISG policy of keeping contracts functioning, Enderlein and Maskow's theory would probably be the best solution to the problem. If the buyer could only use the remedies for anticipated breach in Arts. 71-73 CISG, this would maybe result in an avoidance of the contract. By allowing the buyer to fix a Nachfrist in such a situation, an immediate termination of the contract could be prevented.

3.3. The Nachfrist procedure under Art. 47(1) CISG

Art. 47(1) CISG states: "The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations". In the following sections the elements of Art. 47(1) CISG will be analysed to find out what amounts to a fulfilment of this article.

3.3.1. Fixing the period and demanding performance

The Nachfrist notice must, to be effective, (1) stipulate performance by a particular date and (2) include a specific demand for performance. In other words, the notice must make it clear that the additional period sets a fixed and final limit on the date for delivery.⁴⁸

Regarding (1): If the demand for performance lacks a specific date or deadline for performance, it is not effective. A reminder that demands prompt delivery is therefore not satisfactory as a Nachfrist, since it does not include an additional period of time.⁴⁹

⁴⁶ Cf. Müller-Chen p. 729, par. 11. Cf. also Liu pp. 97-98 and Knapp p. 459 for the same view.

⁴⁷ Cf. Enderlein/Maskow pp. 237-238.

⁴⁸ Cf. Müller-Chen p. 726, par. 4-5, Koch 2 p. 183, Will pp. 344-345 and Honnold par. 305.

⁴⁹ Cf. OLG Düsseldorf 24 Apr. 1997, the Secretariat Commentary to Art. 49, par. 7, Müller-Chen p. 726, par. 4, Will p. 345 and Gomard/Rechnagel p. 146. This reasoning can also be shown by the fact that the UNCTRAL Drafting Committee did not retain a proposal to insert a provision into Art. 47 CISG that would also enable the article to be used in situations where the buyer requested performance by the seller but did not fix an additional period of time, cf. the Committee Report, par. 262-265.

Regarding (2): Many legal writers are of the opinion that the Nachfrist notice, besides fixing a time limit, also has to include a demand for specific performance.⁵⁰ This demand does not need to state that the buyer will avoid the contract if the seller does not deliver. However, the warning has to set an unequivocal deadline, namely it must be so clear as to leave the seller in no doubt that this is his last chance to perform. This can be done by directly stating that the buyer has fixed an “additional period of time” within which the seller has to deliver, but other formulations are acceptable, as long as they include a specific demand for performance. Excessively polite wordings are, however, insufficient.

Some scholars disagree that a Nachfrist can only be fixed if it is followed by a specific demand for performance. The buyer only has to fix a specific deadline.⁵¹ This view is also supported by some cases that state that when the buyer tolerates or accepts a later performance by the seller, without doing anything further, this is enough to fix an additional period of time under Art. 47(1) CISG.⁵²

To conclude, it cannot be said for sure whether this second requirement has to be fulfilled by the buyer when fixing the additional period of time. However, the buyer must be advised to include a specific demand for performance in his notice since some courts do not share the view that it is enough that the notice fulfils requirement (1).⁵³

3.3.2. Reasonable period of time

The buyer has to choose a reasonable period of time for the seller to deliver within.⁵⁴ There have been many cases regarding this question but it is not a settled area. Whether a period is reasonable depends on the individual circumstances of the case.⁵⁵

When looking at the reasonableness of the period fixed by the buyer, some scholars find that the key consideration should be the buyer’s need for delivery of the goods without further delay since respect must be given to the buyer’s discretion in setting a reasonable pe-

⁵⁰ Cf. Müller-Chen p. 726, par. 5, Honnold par. 289 and Will p. 345.

⁵¹ Cf. Albert H. Kritzer’s editorial remarks to ICC Arbitration Case No. 7585 of 1992, Enderlein/Maskow p. 238 and Knapp p. 461.

⁵² Cf. CA Versailles 29 Jan. 1998 and Audiencia Provincial de Barcelona 3 Nov. 1997.

⁵³ Cf. Liu p. 76.

⁵⁴ Note, however, that this is only an issue in cases of non-fundamental delay. In cases of fundamental delay the period does not have to be of reasonable length since the buyer has the right to terminate the contract immediately, cf. Liu p. 80.

⁵⁵ Cf. Huber p. 237, Gabriel pp. 354-355 and Liu p. 81.

riod if the procedure should serve its purpose.⁵⁶ Other legal writers only see this as one matter that should be taken into consideration amongst others which could be: the length of the contractual delivery period, the scope and nature of the seller's obligation, the event that caused the delay, the transmission period for the declaration fixing an additional period of time or the delivery circumstances themselves.⁵⁷ However, the reasonableness of the period must always be seen "in the light of the basic policy decision, embodied in Articles 25, 49 and 64, that contracts should not be avoided on insubstantial grounds"⁵⁸.

The buyer can set a time limit that is reasonably too short. The prevailing opinion amongst legal writers, based on several cases, is that this does not make the Nachfrist entirely ineffective. Instead it initiates a period of reasonable length meaning that the buyer cannot avoid the contract under Art. 49(1)(b) CISG immediately after the expiry of the insufficient period. If the buyer waits to declare the contract avoided until after the expiration of the reasonable period of time, this notice will be valid under Art. 49(1)(b) CISG.⁵⁹

Gabriel does not find this view to be consistent with the spirit of Art. 47 CISG on the ground that this would take away the seller's right under Art. 49(1)(b) CISG to have a reasonable period fixed by the buyer before avoidance of the contract.⁶⁰ Other commentators are arguing that if the buyer fixes a Nachfrist that is either too short or too long, this makes the notice ineffective.⁶¹ However, in Koch's opinion this view is not persuasive. Neither the language nor the legislative history suggests that Art. 47(1) CISG and Art. 49(1)(b) CISG precludes the extension of an unreasonable Nachfrist. An ineffective notice would give the buyer an extra burden to fix a new Nachfrist, but it would also allow the buyer to use other remedies, cf. Art. 47(2) CISG conversely. Consequently, the seller would be frustrated in his efforts to effective delivery and his expenses in attempting to perform would be wasted.⁶²

To conclude, based on Koch's arguments, the predominant view amongst scholars supported by case law seems to be the right solution. It would not be in the light of the CISG

⁵⁶ Cf. Honnold par. 289 and Lookofsky pp. 122-123.

⁵⁷ Cf. Müller-Chen p. 727-728, par. 6, Koch 2 pp. 183-184, Will p. 345 and Liu p. 82.

⁵⁸ Cf. Honnold par. 289.

⁵⁹ Cf. for example Müller-Chen p. 728, par. 7-9, Huber p. 238 and Koch 2 p. 184 and also OLG Naumburg 27 Apr. 1999: "The Court does not need to decide whether the additional period of time set by the [buyer] until 24 March 1997 was too short, as in that instance a reasonable period of time would have started to run".

⁶⁰ Cf. Gabriel p. 355.

⁶¹ Cf. Koch's references to scholars in Koch 2 p. 184, n. 27.

⁶² Cf. Koch 2 pp. 184-185 for a further elaboration.

policy to keep contracts functioning to declare a too short (or too long) notice ineffective since this would not promote good faith in international sales and could result in additional costs for the seller.⁶³

The reasonable period starts to run when the notice is dispatched, leaving the risk of transmission on the seller, cf. Art. 27 CISG.⁶⁴

3.3.3. No form requirement

When the buyer is informing the seller that he has fixed a Nachfrist there is generally no form prescribed for that.⁶⁵

3.4. Is the buyer entitled to fix several periods?

The buyer has no obligation to avoid the contract when the additional period runs out. Even though the seller must take the period as a final one, “additional” does not mean final for the buyer. He is entitled to express his continuing interest in contract performance, and the buyer is always free to fix a second, third and further additional periods.⁶⁶ However, there is one exception to the buyer’s freedom to fix a new Nachfrist. This is the situation where the buyer has combined the Nachfrist-notice with a declaration of avoidance. Here the contract is avoided when the additional period expires.⁶⁷

3.5. The legal consequences

If the requirements under Art. 47(1) CISG are fulfilled, the buyer is entitled to avoid the contract when the Nachfrist expires, cf. Art. 49(1)(b) CISG. Further to this, Art. 47(2) CISG states: “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

⁶³ If the buyer fixes a Nachfrist that is too long (longer than necessary), avoidance is only possible after the period has expired, cf. Art. 47(2) CISG and Müller-Chen p. 729, par. 10. See also section 6.2.2.

⁶⁴ Cf. Müller-Chen p. 729, par. 12, Enderlein/Maskow p. 183 and Liu pp. 84-85.

⁶⁵ Cf. Müller-Chen p. 729, par. 12 and Enderlein/Maskow p. 183.

⁶⁶ Cf. Will p. 344, Liu pp. 78-79, Müller-Chen p. 756, par. 22 and Enderlein/Maskow p. 182. The buyer is therefore also entitled to accept the seller’s request for additional time, cf. Art. 48(2) CISG. See also section 5.3.

⁶⁷ Cf. Müller-Chen p. 756, par. 22 and Liu pp. 95-96. This is thereby the only exception to the main rule that the buyer has to send an avoidance declaration if he wants to avoid the contract.

breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance”.

From the first sentence follows that the buyer, in the Nachfrist period, is not entitled to use any remedies for breach of contract, cf. Art. 45(1) CISG.⁶⁸ However, from the second sentence follows that the buyer still has the right to claim damages for the delay, cf. also the general rule in Art. 45(2) CISG. The basis for claiming damages is found in Art. 45(1)(b) CISG.⁶⁹

4. LIMITS ON TIME FOR AVOIDANCE

4.1. Introduction

In the above sections it has been analysed when the buyer has the right to avoid the contract. However, the seller needs to know whether he can rely on a concluded contract, and the CISG therefore sets some time limits for the buyer’s right to avoid the contract.

In general, the buyer is not bound to avoid the contract at a specific time. If the delivery date has passed, but delivery is still outstanding, the buyer can wait as long as he wants before he avoids the contract.⁷⁰ However, as soon as delivery has been made, the buyer’s avoidance declaration has to comply with Art. 49(2) CISG. In accordance with this provision the buyer must avoid the contract within a reasonable period of time. This provision has been named the most complicated in the entire Convention and is criticised for being unnecessarily refined and detailed.⁷¹

According to Will, Art. 49(2) CISG only covers situations under Art. 49(1)(a) CISG since it is only concerned with situations where the goods have been delivered.⁷² At first sight Will’s view can seem right, since Art. 49(1)(b) CISG is only applicable to situations of non-delivery. However, a scenario where both Art. 49(1)(b) CISG and Art. 49(2) CISG can be

⁶⁸ See section 6.2.2 for the influence this provision has on the buyer’s right to avoid the contract immediately, cf. Art. 49(1)(a) CISG.

⁶⁹ Cf. the Secretariat Commentary to Art. 49, par. 10 and Enderlein/Maskow p. 184.

⁷⁰ Cf. Enderlein/Maskow p. 193, Honnold p. 330, Will p. 364, Liu p. 365, Schlechtriem/Butler par. 200 and Gomard/Rechnagel p. 151.

⁷¹ Cf. Magnus’ critique pp. 333-334.

⁷² Cf. Will p. 364.

met is when the seller has delivered the goods, but after the expiry of the Nachfrist. In such a situation Art. 49(2) CISG is applicable.⁷³

4.2. Cases of late delivery

In cases of late delivery, the reasonable period starts to run when the buyer has become aware of the delivery, cf. Art. 49(2)(a) CISG. Some legal writers point out that this provision includes, besides the situation where there is a fundamental breach due to late delivery, the situation where the buyer has the right to avoid the contract due to the expiry of a Nachfrist, cf. Art. 49(1)(b) CISG.⁷⁴

4.3. Other fundamental breaches

In case of other fundamental breaches Art. 49(2)(b) CISG outlines some particular circumstances set out in (i) to (iii) from which the reasonable period starts to run:

- i. In cases of other fundamental breaches than late delivery, for example non-conformity, it starts to run when the buyer knew or ought to have known of the breach.⁷⁵
- ii. After a period fixed in accordance with Art. 47(1) CISG has expired or after the seller has declared that he will not perform within this period.⁷⁶
- iii. After a period set in accordance with Art. 48(2) CISG has expired or after the buyer has declared that he will not accept performance, cf. Art. 49(2)(b) CISG.⁷⁷

4.4. The reasonable time limit

The reasonable time limit is meant to be flexible and depends on the circumstances in the specific case.⁷⁸ Gabriel concludes from case law that there is no uniformity or trend as to what constitutes a reasonable time. The only pattern is that avoidance after a longer period

⁷³ Cf. Huber pp. 239-240.

⁷⁴ Cf. Enderlein/Moskaw p. 194, Müller-Chen p. 760, par. 28 and Honnold par. 307.

⁷⁵ From this provision follows an obligation for the buyer to examine the goods that seems close to Art. 38 CISG, cf. Will p. 365, Enderlein/Moskaw p. 194 and Honnold par. 308.

⁷⁶ Cf. Müller-Chen's elaboration on this provision in Müller-Chen pp. 764-766, par. 36-40. Honnold disagrees with this, cf. Honnold par. 308.

⁷⁷ For the relationship between Art. 49(2)(b)(ii) and Art. 49(2)(b)(iii) see Müller-Chen p. 766, par. 41-42. For the situations where Art. 48(2) CISG is applicable see section 5.3.

⁷⁸ Cf. Huber p. 242, Liu p. 368 and Müller-Chen pp. 760-761, par. 29.

is more unreasonable than avoidance after a shorter period.⁷⁹ However, some legal writers are stating a few general remarks:

A reasonable period of time under Art. 49(2)(a) CISG is generally regarded as being very short and should rather be measured in days than in weeks. The buyer does not need much time to find out whether he will use the delivered goods whereas the seller needs to know as quickly as possible so he can dispose the goods elsewhere.⁸⁰

A reasonable period of time under Art. 49(2)(b) CISG is measured in a much more generous way since there are more factors that must be taken into account here. These factors could be the notice period under Art. 39(1) CISG, the provisions of the contract, the type of goods and defect, or the seller's behaviour after the notice of defect has been given.⁸¹

If the buyer does not avoid the contract within the reasonable period of time, he loses his right to avoid the contract. The buyer complies with the time limit in Art. 49(2) CISG by dispatching an avoidance declaration within the reasonable period, cf. Arts. 26-27 CISG.⁸²

5. LIMITATION OF THE BUYER'S RIGHT TO AVOID THE CONTRACT – THE SELLER'S RIGHT TO CURE THE BREACH

5.1. Introduction

In the previous sections it has been analysed when the buyer is entitled to avoid the contract due to the seller's failure to perform his obligations under the contract. However, the seller also has some rights in such a situation. Under Art. 48(1) CISG, the seller is entitled to perform the contract, to remedy his breach, even after the delivery date has passed.⁸³

Art. 48(1) CISG leaves the seller in an uncertain situation since he does not know whether the buyer is willing to accept subsequent performance or whether he will reject the seller's offer and avoid the contract. For this purpose, Art. 48(2)-(4) CISG gives the seller a chance to clarify the situation by contacting the buyer. The seller can offer the buyer to remedy the breach within a specific period of time, and the buyer must, if he wishes to reject this offer,

⁷⁹ Cf. Gabriel pp. 357-358.

⁸⁰ Cf. Huber pp. 240-241, Müller-Chen pp. 760-761, par. 29 and Honnold par. 307, n. 9.

⁸¹ Cf. Huber p. 241, Müller-Chen pp. 762-763, par. 34 and Honnold par. 308.

⁸² Cf. Huber p. 240 and Müller-Chen p. 760, par. 28.

⁸³ Note that Art. 48 CISG is only applicable when the time for performance has passed. Arts. 34 and 37 CISG are on the other hand the applicable ones if the time for performance has not passed yet. However, as already noted in section 1, these articles are not subject for this thesis.

object without unreasonable delay.⁸⁴ The idea is that the buyer only deserves protection if he cooperates and gives the seller a fair chance.⁸⁵

The seller's right to cure the breach has been categorized as a strong right since it goes against the terms of the contract and the strict doctrines of liability of breach and limits the buyer's right to draw all the consequences from a breach of the contract.⁸⁶ However, the philosophy fits well with the CISG policy to keep contracts functioning and what especially underlies the cure provisions in the CISG is the endeavour to avoid economic waste.⁸⁷

5.2. The seller's right to remedy a failure to perform without a request

Art. 48(1) CISG states that the seller may “[s]ubject to article 49⁸⁸ [...] 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”. In the following sections these requirements will be analysed.

5.2.1. Remedying the failure

It follows from the nature of the breach how the seller should remedy his failure. The seller is free to decide how he wants to do that. The only requirements are that it must actually be possible to cure the breach and that the defect must be completely remedied.⁸⁹ However, the seller should try to choose the remedy that causes the least inconvenience to the buyer. If two options are equally suited and acceptable to the buyer, then it is the seller's choice.⁹⁰

⁸⁴ Cf. Huber pp. 220-221, Müller-Chen p. 734, par. 2 and Honnold par. 298-299.

⁸⁵ Cf. Will pp. 349 and 354.

⁸⁶ Cf. the Secretariat Commentary to Art. 48(1) CISG par. 12. It has an important relation to the buyer's right to avoid the contract immediately, cf. section 6.3.

⁸⁷ Cf. Liu pp. 147-148.

⁸⁸ This phrase will not be further analysed in this section, but see instead the discussion in section 6.3.2. Dependent on how this phrase is interpreted, it can be seen as the first condition the seller's right to cure depends on, namely that the buyer has not rightfully avoided the contract.

⁸⁹ Cf. Müller-Chen pp. 735-736, par. 5 and Huber pp. 218-219. See also Will p. 353 who adds that slight variations must be tolerated.

⁹⁰ Cf. Huber p. 219.

The place of performance for the cure is the place where the seller originally should have performed after the contract. However, special considerations can be taken into account when cure is made by substitute delivery or by repair.⁹¹

5.2.2. Costs

The seller may cure the breach “at his own expense”. The seller is not allowed to charge the buyer any additional costs in his attempt to remedy the breach, and the seller has to reimburse the buyer the costs that has incurred to the buyer as a result of the remedy. The costs and internalised risks are in other words allocated to the seller.⁹²

5.2.3. Failure to perform

The seller is allowed to cure “any failure to perform his obligations”. But what kind of failures does this phrase cover? Literally taken, it must mean all kinds of failures to perform and therefore all kinds of breaches, cf. Yovel, who is of the opinion that Art. 48(1) CISG is a general provision, which covers both fundamental and non-fundamental breaches.⁹³

Other legal writers also take the literal approach and are of the opinion that Art. 48(1) CISG covers *any* failure to perform including both non-conforming delivery and delayed delivery.⁹⁴ On the other hand Honnold states that the formulation is broad enough to include a defect in documents, but time that has passed cannot be recalled and is intrinsically impossible to remedy. The formulation therefore does not include late delivery.⁹⁵ However, this is not a significant problem, since Honnold notes that if none of the requirements under Art. 49(1) CISG are fulfilled,⁹⁶ there is no need for a ‘cure’ to obligate the buyer to take delivery. Will agrees with Honnold that time that has passed cannot be recalled. However, it is the non-performance of the obligation to deliver that should be cured. In such situations, where there is no fundamental breach, the delivery remedies the grievance.⁹⁷ Never-

⁹¹ Cf. Huber p. 220 and Müller-Chen p. 736, par. 7. Note however that Müller-Chen is of the opinion that it is the repair situation that is the only modification.

⁹² Cf. Müller-Chen p. 736, par. 8, Huber p. 220 and Yovel section 5. This applies no matter if the buyer is entitled to claim damages.

⁹³ Cf. Yovel sections 3 and 4.1. See however section 6.3.2.4 for Honnold’s theory that it is not a general provision.

⁹⁴ Cf. Müller-Chen pp. 734-735, par. 3 and Huber p. 218.

⁹⁵ Cf. Honnold par. 295. See also Gomard/Rechnagel p. 147.

⁹⁶ See sections 6.3 and 6.5 for the interaction between Art. 49(1) CISG and Art. 48(1) CISG.

⁹⁷ Cf. Will p. 353. See also Enderlein/Maskow p. 186, Liu p. 145 and the Secretariat Commentary to Art. 48 CISG, par. 12.

theless, there is not much difference between the approaches since they all seem to recognize the seller's right to deliver later, one of them is just not calling it 'cure'.

5.2.4. The requirements for the seller's right to cure

The seller has the right to cure the breach 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".⁹⁸ Whether these conditions are fulfilled depends on the circumstances of each individual case.⁹⁹ The inconveniences do not have to result in a fundamental breach for the buyer, but on the other hand merely minor inconveniences should not be counted as unreasonable.¹⁰⁰ It is the buyer's objective perspective that is the governing factor and not the opinions of the seller.¹⁰¹

Whether there is an "unreasonable delay" depends on the circumstances of each case.¹⁰²

There can be three different types of delay¹⁰³:

- 1) A delay that amounts to a fundamental breach. In these cases a cure will usually be unreasonable (and the situation is dealt with by Art. 49(1)(a) CISG).¹⁰⁴
- 2) A delay that is below the fundamental breach standard but still appears to be unreasonable. This could be the case if the delay makes the buyer liable towards his sub-buyers¹⁰⁵ or if the buyer has fixed a Nachfrist within which the seller has to make repairs¹⁰⁶.
- 3) A delay that is not unreasonable. Only this scenario opens up for the seller's right to cure. However, whether this scenario is fulfilled still depends on the individual

⁹⁸ Some scholars argue that the real test is whether the cure causes the buyer unreasonable inconvenience since this term includes the two other conditions, cf. Will p. 352, Enderlein/Maskow p. 186 and Liu p. 164. Other legal writers are referring to the three conditions as reasonable requirements, cf. Müller-Chen pp. 736-737, par. 9 and Huber p. 218. Nevertheless, these flexible three conditions are the ones that could limit the seller's right to cure under Art. 48(1) CISG.

⁹⁹ Cf. Müller-Chen pp. 736-737, par. 9, Ziegel p. 9-24 and Will p. 352.

¹⁰⁰ Cf. Will p. 352, Honnold par. 293 and Müller-Chen pp. 736-737, par. 9.

¹⁰¹ Cf. Müller-Chen pp. 736-737, par. 9.

¹⁰² Cf. for example Will p. 352. See also Yovel section 6 and Müller-Chen p. 737, par. 10 who both compare to other reasonable delay standards. However, since these standards are also based on the circumstances of each case, they cannot be used as much guidance.

¹⁰³ Cf. Will p. 352.

¹⁰⁴ Cf. Huber p. 219, Will p. 352 and Enderlein/Maskow p. 186. The latter add that the seller will only be entitled to cure the breach in such a situation if he has gotten the buyer's agreement.

¹⁰⁵ Cf. Huber p. 219.

¹⁰⁶ Cf. Müller-Chen p. 737, par. 10. See also section 6.5 where the similarity in the nature of the cure provision and the Nachfrist provision is looked at.

circumstances of the case and looking at these three types of delay will therefore not get one much closer to a result.

“Unreasonable inconvenience” is also decided on a case-by-case basis.¹⁰⁷ It could be the disturbance the cure would bring to the buyer’s business¹⁰⁸ or obviously unprofessional actions by the seller that lead to several remedy attempts¹⁰⁹.

The reference to “uncertainty of reimbursement by the seller” can seem a bit surprising since the seller is already obligated to cure the breach at his own expense. But in some cases the buyer can incur expenses, for example if effective subsequent performance requires the buyer’s cooperation (for example by arranging the return of the goods). If there is any doubt about whether the seller has the willingness or ability to reimburse the buyer’s costs, then the seller has to create certainty for the buyer, for instance by providing the buyer with a security for the expenses. If the seller does not manage to remove the uncertainty then the buyer may refuse to allow the seller to cure the breach.¹¹⁰

Müller-Chen seems to put a triviality limit into this requirement since he states that the costs have to be “reasonably significant”.¹¹¹ Other legal writers are of the opinion that it does not matter how small the amount is since the only thing that counts is the uncertainty of the recovery.¹¹² It could seem fair that there is a triviality limit. However, Art. 48(1) CISG does not reveal anything about that, and the provision could therefore tend to agree with the latter’s opinion.

5.2.5. The legal consequences

If the requirements under Art. 48(1) CISG are fulfilled, the seller is entitled to remedy the breach. When the seller is trying to cure the breach the buyer’s remedies under Art. 45(1) CISG are suspended except (maybe) for the buyer’s right to avoid the contract^{113,114}.

¹⁰⁷ Cf. Enderlein/Maskow p. 187, Liu p. 163 and Will p. 352.

¹⁰⁸ Cf. the Secretariat Commentary to Art. 48(1) par. 10 and Gomard/Rechnagel p. 148, n. 10.

¹⁰⁹ Cf. Huber p. 219 and Müller-Chen p. 737, par. 11.

¹¹⁰ Cf. Müller-Chen pp. 737-738, par. 12, Huber p. 219, Will p. 353, Enderlein/Maskow p. 187 and the Secretariat Commentary to Art. 48(1) CISG, par. 11.

¹¹¹ Cf. Müller-Chen pp. 737-738, par. 12.

¹¹² Cf. Will p. 353, Enderlein/Maskow p. 187, Huber p. 219, n. 800 and Liu p. 164.

¹¹³ This depends on the interpretation of the phrase “[s]ubject to article 49”. See section 6.3.2 for this discussion.

¹¹⁴ Cf. Müller-Chen p. 742, par. 22-23.

However, even though the seller manages to cure the breach, and the buyer therefore has lost his right to remedy the breach, it will not have any effect on the buyer's right to claim damages, cf. the second sentence of Art. 48(1) CISG. There has to be a basis for claiming damages under Art. 45(1)(b) CISG, though, and Art. 48(1) CISG only refers to those damages resulting from the original breach which cannot be removed by the cure. This could be situations where the buyer had projected with certain expectations from the contractual relationship that are not fully compensated for by the seller's cure.¹¹⁵

If the seller, on the other hand, does not manage to cure the breach, or if it is connected with unreasonable delay or unreasonable inconvenience, the buyer regains all of the remedies under Article 45(1) CISG.¹¹⁶

5.3. The seller's right to remedy a failure to perform following from his request to the buyer

5.3.1. Request to the buyer whether he will accept performance

The first sentence of Art. 48(2) CISG states: "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 seller is thereby given the opportunity to remove the uncertainty about whether he can cure the breach (without being afraid of the buyer's sudden avoidance) by asking the buyer.

Art. 48(2) CISG has an independent life meaning that the requirements under Art. 48(1) CISG do not need to be fulfilled. In the light of good faith, Art. 48(2) CISG instead gives effect to the buyer's duty to communicate with the seller since it is in the seller's interest to know whether the contract can be retained to prevent an avoidable expense.¹¹⁷ In the following sections the requirements will be analysed.

¹¹⁵ Cf. Huber p. 220, Enderlein/Maskow p. 187 and Yovel section 7.

¹¹⁶ Cf. Müller-Chen p. 742, par. 22.

¹¹⁷ Cf. Honnold par. 298, Will p. 354, Enderlein Maskow pp. 188-189 and Liu p. 171.

5.3.1.1. Subsequent performance

The scholars seem to agree on what kind of performance Art. 48(2) CISG refers to. It covers all kinds of breaches including late delivery, repair and substitute goods.¹¹⁸ Honnold also supports this opinion by stating that the difficulties regarding late delivery do not extend to the provisions in Art. 48(2)-(4) CISG due to the open lines of communication they call for.¹¹⁹

5.3.1.2. The buyer's compliance within a reasonable time

It depends on the circumstances of the individual case whether the buyer's compliance with the request is within reasonable time.¹²⁰ However, the ultimate limit is clear: The seller has to be given enough time to perform and therefore this reasonable period has to be shorter than the time period offered by the seller.¹²¹ Where the seller has set a short period of time the buyer therefore has to comply quickly. The buyer complies with the request if he dispatches a corresponding declaration within reasonable time since the risk for delay and loss in transmission is placed on the seller, cf. Art. 27 CISG.

5.3.1.3. Specified time period

Most legal writers are of the opinion that the request must indicate a time frame within which the seller will perform; otherwise the request cannot have any effect. This is clear from the wording of Art. 48(2) CISG that states "within time indicated in his request"¹²². However, Yovel is of the opinion that this interpretation seems too harsh. If the seller does not indicate a time then the default time under Art. 48(1) CISG, "without unreasonable delay", will apply due to the fact that Art. 48(2) CISG is an article allowing the seller to divert from this default time but not obligating him to do so.¹²³ No one else has been found supporting this statement. Therefore, based on the predominant view amongst scholars and since Art. 48(2) CISG has an independent life, it does not seem right to use the default time

¹¹⁸ Cf. for example Müller-Chen p. 743, par. 25.

¹¹⁹ Cf. Honnold par. 299 and 297.

¹²⁰ Cf. Will p. 355 and Müller-Chen p. 743, par. 26.

¹²¹ Cf. Will pp. 354-355, Enderlein/Maskow p. 188 and Gomard/Rechnagel p. 149, n. 13.

¹²² Cf. Liu pp. 165-166. This is also relevant for Art. 48(3) CISG that states "within a specified period". See also Enderlein/Maskow p. 188, the Secretariat Commentary to Art. 48 CISG, par. 14 and Turun hoveikeus 12 Nov. 1997 where the court stated: "The seller must indicate the time period within which the proposed cure will be effected. Without specific indication as to the time frame, a mere offer to cure does not oblige the buyer to respond to the offer".

¹²³ Cf. Yovel section 6.

in Art. 48(1) CISG as a supplement. Instead Art. 48(1) CISG will be the possible applicable provision in such a situation.

It is irrelevant whether or not the period is reasonable (conversely the “without unreasonable delay” requirement under Art. 48(1) CISG). However, the period cannot be so short that it will be impossible for the buyer to reply before it runs out. When the period is too short, the buyer cannot be bound under Art. 48(2) CISG.¹²⁴ On the other hand, the seller is entitled to reduce the buyer’s reaction to a minimum so the buyer has to respond promptly.¹²⁵

5.3.2. Notice to the buyer without a request

Art. 48(3) CISG states: “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”. Hence, the seller does not need to expressly request the buyer to make known whether he will accept performance. The mere notice of intention is sufficient and the legal consequences are the same as if the buyer had included a request in his notice.¹²⁶

5.3.3. The notice must reach the buyer

Art. 48(4) CISG states: “A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer”. Hence, the seller in breach bears the risk of loss or error in transmission. This rule thereby expresses a modification to the general “dispatch” rule in Art. 27 CISG which states that the risk for getting such a notice falls on the addressee.¹²⁷ On the other hand, when the buyer dispatches an objection to the request for cure, Art. 27 CISG applies, also placing the risk for this notice on the seller.¹²⁸ Art. 48(4) CISG thereby only applies to the seller.

¹²⁴ Cf. Yovel section 6 and Müller-Chen p. 743, par. 25.

¹²⁵ Cf. Enderlein/Maskow p. 188 and Will p. 355 who observes that this reasoning seems to be in the spirit of the CISG to maintain the contract and to keep the seller’s losses down. Therefore, if the buyer reacts too slowly cure does not seem to be an unfair punishment.

¹²⁶ Cf. Müller-Chen p. 744, par. 28, Honnold par. 298 and Liu p. 167.

¹²⁷ Cf. the Secretariat Commentary to Art. 48 CISG, par. 15, Müller-Chen p. 744, par. 29, Will p. 354, Gormard/Rechnagel p. 149 and Liu p. 168.

¹²⁸ Cf. the Committee Report par. 286, Honnold par. 300 and Enderlein/Maskow p. 189.

5.3.4. The legal consequences

If the buyer does not reject the seller's request, cf. Art. 48(2) CISG, or notice that he will perform, cf. Art. 48(3) CISG, within a reasonable period of time, the buyer is bound by the time period indicated in the seller's request, cf. the first sentence of Art. 48(2) CISG,¹²⁹ and the seller is entitled to cure the breach. It follows from the second sentence of Art. 48(2) CISG that "[t]he buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller". Hence, the buyer is in the requested period not entitled to use any remedies that are inconsistent with the seller's performance.¹³⁰

If the seller does not cure the breach within this time frame, or if it becomes clear that the seller will not perform the cure, the buyer regains the freedom to use the remedies under Art. 45(1) CISG. If the buyer rejects the offer within a reasonable period of time he is also allowed to use his remedies under Article 45(1) CISG. However, it is important to remember that Art. 48(1) can still be applicable in such a situation.¹³¹

6. INTERACTION BETWEEN THE ARTICLES AND THE INFLUENCE THIS HAS ON THE BUYER'S RIGHT TO AVOID THE CONTRACT

6.1. Introduction

In the previous sections, it has been examined in which situations the buyer is entitled to avoid the contract after the time for the seller's performance has passed, cf. Art. 49(1)(a) and (b) CISG, and also when the seller in such situations is entitled to cure his own breach, cf. Art. 48 CISG. Nevertheless, with these application issues aside, some new complications arise since the articles compete to take priority in the same sphere. The main rule is that the buyer is only entitled to avoid the contract due to a fundamental breach, cf. Art. 49(1)(a) CISG, cf. Art. 25 CISG. However, in cases of late delivery the buyer can by fixing a Nachfrist, cf. Art. 47(1) CISG, extend this right to some situations of non-fundamental breach, cf. Art. 49(1)(b) CISG, and in other situations the right can maybe be limited by the

¹²⁹ That the buyer is bound by his acceptance of the seller's request to cure already follows from general legal principles.

¹³⁰ See sections 6.4 and 6.6 for the influence this provision has on the buyer's right to avoid the contract. Note, that the buyer is still entitled to claim those damages which can no longer be cured, cf. Müller-Chen pp. 743-744, par. 27.

¹³¹ Cf. the Secretariat Commentary to Art. 48 CISG, par. 16, Will p. 355, Müller-Chen pp. 743-744, par. 27 and Liu p. 172.

seller's right to cure the breach, cf. Art. 48 CISG. There will be situations where more than one of the articles is applicable at the same time, thus creating problems. The question is therefore: How do the rights interact? The following scenarios can be lined up:

- (1) The interaction between the buyer's right to avoid the contract due to a fundamental breach, cf. Art. 49(1)(a) CISG, and the buyer's right to fix a Nachfrist, cf. Art. 47(1) CISG, for the purpose of avoidance, cf. Art. 49(1)(b) CISG, cf. section 6.2.
- (2) The interaction between the buyer's right to avoid the contract due to a fundamental breach, cf. Art. 49(1)(a) CISG, and the seller's right to cure the breach without a request, cf. Art. 48(1) CISG, cf. section 6.3.
- (3) The interaction between the buyer's right to avoid the contract due to a fundamental breach, cf. Art. 49(1)(a) CISG, and the seller's right to cure the breach due to his request, cf. Art. 48(2) and (3) CISG, cf. section 6.4.
- (4) The interaction between the buyer's right to avoid the contract when the Nachfrist has expired, cf. Art. 49(1)(b), and the seller's right to cure the breach without a request, cf. Art. 48(1) CISG, cf. section 6.5.
- (5) The interaction between the buyer's right to avoid the contract when the Nachfrist has expired, cf. Art. 49(1)(b) CISG, and the seller's right to cure the breach due to his request, cf. Art. 48(2) and (3) CISG, cf. section 6.6.

Scenario (2) is the most complicated scenario, and this issue has for a long time been one of the most debated ones in international sales law. Therefore, the emphasis in this section will be put on that issue. However, the other scenarios will be discussed as well.

6.2. Interaction between Art. 49(1)(a) CISG and Art. 47(1) CISG, cf. Art. 49(1)(b) CISG

6.2.1. Introduction to the conflict

In some situations the buyer chooses to fix a Nachfrist, cf. Art. 47(1) CISG, for the purpose of Art. 49(1)(b) CISG, even though he is already entitled to avoid the contract due to a fundamental breach, cf. Art. 49(1)(a) CISG. The question is whether this has an influence on the buyer's right to avoid the contract immediately under Art. 49(1)(a) CISG. In other words, does the buyer have to wait with avoiding the contract until the additional period of time runs out? Another question in that regard is whether the buyer is obligated to fix a Nachfrist before he is entitled to avoid the contract.

6.2.2. The time for avoidance when the buyer has fixed a Nachfrist

By fixing an additional period of time, cf. Art. 47(1) CISG, the buyer is certain about his right to avoid the contract, cf. Art. 49(1)(b) CISG.¹³² The seller also gains some certainty in this situation since the first sentence of Art. 47(2) CISG states: “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”. Consequently, the buyer’s remedies under Art. 45(1) CISG are suspended during the additional period.

Nearly all the legal writers agree that Art. 47(2) CISG, when the additional period of time runs, excludes the buyer’s right to avoid the contract immediately due to a fundamental breach, cf. Art. 49(1)(a) CISG.¹³³ The purpose of Art. 47(2) CISG is to protect the seller who relies on the Nachfrist notice, and this reflects the principle of good faith that a party cannot refuse a performance he has invited.¹³⁴ In other words, the Nachfrist fixed under Art. 47(1) CISG takes priority since the buyer has to wait with avoiding the contract until it runs out, at which point in time Art. 49(1)(b) CISG will also be applicable.

However, one scholar, Schroeter, seems to disagree with this understanding. He points out that the Nachfrist procedure is an independent and additional avenue to contract avoidance and it does not affect the party’s right to rely on a fundamental breach in accordance with Art. 49(1)(a) CISG. Consequently, “[t]his right is neither excluded in cases in which a party could have or *has fixed* an additional period of time (Articles 49(1)(b), 64(1)(b) are supplementary and not exclusive in nature)[...]”¹³⁵ (emphasis added). Schroeter seems to be of the opinion that, even though the buyer has fixed a Nachfrist, he is still entitled to avoid the contract due to a fundamental breach. This statement is highly surprising since Art. 47(2) CISG itself states the direct opposite as do all the other legal writers.

Is there anything that can explain Schroeter’s statement? Maybe one of the following reasons: Firstly, Schroeter could simply have made a mistake by writing his statement wrong. If “or has fixed” is taken out of the sentence everything else he states in that section re-

¹³² See also section 3.1.

¹³³ Cf. for example Koch 2 p. 186, Müller-Chen p. 730, par. 14, Honnold par. 291, Huber pp. 238-239, Enderlein/Maskow pp. 183-184, Schneider p. 86, Will pp. 345-346, Gomard/Rechnagel p. 146 and Liu pp. 87-89. See also the Secretariat Commentary to Art. 49 CISG, par. 9.

¹³⁴ That all the buyer’s remedies should be excluded in the Nachfrist period was already the purpose with Art. 47 (2) CISG at the UNCITRAL drafting stage, cf. the Committee Report par. 261. The UNCITRAL text was adopted at the Vienna Sales Conference and the purpose was upheld, cf. Documentary pp. 685-686, par. 6.

¹³⁵ Cf. Schroeter p. 404, par. 10.

garding the relationship between Art. 49(1)(a) and (b) CISG is correct. Secondly, he does not refer to Art. 47 CISG at all in this section – could he have overlooked it? However, that seems unlikely when taking into account that Schroeter is an acknowledged scholar within the CISG area. Thirdly, Schroeter could be referring to the situation where the seller, during the additional period of time, commits another breach which is fundamental (cf. the following modification (c)). In this situation, it is obvious that the buyer does not have to wait until the period expires before he declares the contract avoided due to the second breach.

To conclude, if none of these options can explain Schroeter’s statement and its plain meaning, it must simply be wrong.

There are some modifications to the main rule in Art. 47(2) CISG:

- (a) If the seller has declared seriously and finally¹³⁶ that he will not perform within the additional period of time the buyer may avoid the contract right away, cf. Art. 47(2) CISG, first half of the sentence. This is both due to the purpose of Art. 49(1)(b) CISG and the “unless” in Art. 47(2) CISG.¹³⁷
- (b) It also follows from Art. 47(2) CISG that, if the seller delivers the goods later than within the additional period of time, the buyer regains his freedom of action and is entitled to avoid the contract. However, it must be emphasised that this is only the case if the additional period was of a reasonable length or if the breach was already fundamental at the point in time when the *Nachfrist* was fixed.¹³⁸
- (c) If the seller, during the *Nachfrist* period, commits a further fundamental breach, this would also justify immediate avoidance of the contract.¹³⁹

6.2.3. Does the buyer have to fix a *Nachfrist* to be able to avoid the contract even though there is a fundamental breach?

The previous section addresses the situation in which a *Nachfrist* *has* been fixed. But what about the situation where the buyer has the possibility to fix a *Nachfrist* but would rather avoid the contract due to a fundamental breach? Does he have a choice?

¹³⁶ Cf. Liu p. 94.

¹³⁷ Cf. Huber p. 239.

¹³⁸ Cf. Liu p. 95 and n. 54 in section 3.3.2 above.

¹³⁹ Cf. Müller-Chen pp. 730-731, par. 15, Gomard/Rechnagel p. 146, n. 9 and Liu p. 89.

Under the CISG the Nachfrist procedure is not mandatory for avoidance. This follows directly from the wording of Art. 49(1) CISG where an “or” is stated in between (a) and (b).¹⁴⁰ The legal writers agree that the buyer can choose to proceed under Art. 49(1)(a) CISG and avoid the contract immediately without fixing a Nachfrist period first.¹⁴¹ This is also supported by case law, cf. for example BGer 15 Sep. 2000 [4C.105/2000] where the court stated that since the failure of the seller amounted to a fundamental breach “[it] was not necessary that [buyer] [...] before declaring avoidance of the contract [...] [gave] an additional period to [seller] for delivery of the ordered goods, under article 49(1)(b) CISG”.¹⁴²

A number of German cases do not agree with this understanding. According to these cases, a Nachfrist has to be fixed before a contract can be avoided, no matter how serious the breach is. This is both stated in cases regarding late delivery/non-delivery¹⁴³ and also in cases regarding non-conformity¹⁴⁴. However, there are other German cases stating that it is not mandatory for the buyer to fix a Nachfrist.¹⁴⁵ Do these German cases have an influence on the understanding of the interaction between Art. 49(1)(a) CISG and Art. 49(1)(b) CISG? The answer must be “no”, cf. the following.

Art. 49(1)(b) CISG directly states that it can only be used “in cases of non-delivery”. The legal writers agree that a Nachfrist can only be fixed for the purposes of Art. 49(1)(b) CISG in cases of late delivery/non-delivery.¹⁴⁶ This is also supported by case law.¹⁴⁷ At the Vienna Sales Conference there were proposals that the Nachfrist notice should be extended to cover non-conformity as well.¹⁴⁸ But these proposals were rejected¹⁴⁹ since the delegates did

¹⁴⁰ See also OLG Koblenz 21 Nov. 2007 that concluded the same from the wording.

¹⁴¹ Cf. for example Huber pp. 234-235, Honnold par. 290 and 305, Schroeter p. 404, par. 10 and pp. 426-427, par. 49, Schlechtriem/Butler par. 182 and Liu pp. 59-62.

¹⁴² See also CA Grenoble 4 Feb. 1999.

¹⁴³ See AG Oldenburg in Holstein 24 Apr. 1990, OLG Köln 22 Feb. 1994, OLG Frankfurt 18 Jan. 1994, OLG München 1 Jul. 2002 and OLG Naumburg 27 Apr. 1999.

¹⁴⁴ See OLG Düsseldorf 10 Feb. 1994 and LG Stendal 12 Oct. 2000.

¹⁴⁵ See for example OLG Koblenz 21 Nov. 2007.

¹⁴⁶ Cf. for example Honnold par. 288 and 305, Schroeter p. 404, par. 11 and p. 427, Müller-Chen p.754, par. 16 and Enderlein/Maskow p. 183.

¹⁴⁷ See for example OLG Koblenz 21 Nov. 2007.

¹⁴⁸ Cf. for example Canada’s proposal at the 22nd meeting in par. 67, cf. Documentary p. 575.

¹⁴⁹ A joint proposal by Canada and Netherlands was rejected at the 22nd meeting by 31 votes to 9, cf. par. 96, cf. Documentary p. 577. This issue was already discussed at the UNCITRAL Drafting Committee where the wording of Art. 49(1)(b) CISG was a bit different. But already then the Committee saw the problem in giving unwanted power to a buyer to avoid the contract due to a minimal lack of conformity in the goods, cf. the Committee Report par. 291-293.

not want the notice to be abused to convert a trivial breach/minor defect in the goods into a ground for avoidance by a buyer who wanted to escape from his contractual obligations.¹⁵⁰ To conclude, Art. 49(1)(b) CISG cannot be used in cases on non-conformity, and the German cases are therefore wrong.

As already stated, the wording of Art. 49(1) CISG, the opinions of the legal writers and the case law agree that the buyer can choose between Art. 49(1)(a) CISG and Art. 49(1)(b) CISG. The fact that German courts have made many rulings on the opposite understanding does not make this understanding the right one.¹⁵¹ As Gabriel indicates, court decisions should be weighed according to the persuasiveness of their reasoning rather than counted.¹⁵² The cases must simply be evidence of a wrong national interpretation on the matter. This can probably be explained by the fact that the *Nachfrist* in German law is used slightly different than the *Nachfrist* in the CISG. Under German law a buyer *has* to fix a *Nachfrist* before he is entitled to avoid the contract.¹⁵³ The CISG only took the idea, the inspiration, of a *Nachfrist* from German law but not all of its aspects.

The fact that some German courts have been wrong in their understanding is, however, something that has to be taken into consideration in the real business life when choosing venue. If a conflict arises between a buyer in Germany and a seller in another CISG state, it could be preferable to choose to proceed with the case in the other CISG state to avoid an incorrect interpretation of Art. 49(1) CISG by the German courts.

6.2.4. Conclusion and evaluation

When the buyer has already fixed a *Nachfrist*, cf. Art. 47(1) CISG, the buyer is not entitled to avoid the contract immediately, cf. Art. 49(1)(a) CISG. The *Nachfrist* takes priority since the buyer has to wait until it expires, cf. Art. 47(2) CISG, at which point in time Art. 49(1)(b) CISG will also be applicable. This legal consequence also fits neatly with the CISG policy to keep contracts functioning, cf. section 2.6. The seller is preparing to perform the contract within this granted extra time, but maybe at further expense, and he therefore

¹⁵⁰ Cf. Honnold par. 288. Cf. the 22nd meeting and United Kingdom's worry in par. 84, cf. Documentary pp. 576-577, Sweden's remarks in par. 69, cf. Documentary p. 575, and Finland's remarks in par. 79, cf. Documentary p. 576.

¹⁵¹ Schroeter, Gabriel and Liu are directly stating that some of these cases are wrong, cf. Schroeter p. 404, par. 10, n. 34-35, Gabriel pp. 375-376 and Liu pp. 74-75.

¹⁵² Cf. Gabriel pp. 375-376.

¹⁵³ Cf. Honnold par. 290.

needs to know that he can rely on this period. The rule thereby helps promoting good faith in the international business world while avoiding additional costs and risks.

In the situation where the buyer has not yet chosen whether he wants to fix a *Nachfrist* instead of avoiding the contract immediately, it must be concluded from Art. 49(1) CISG itself, the work of legal writers and some case law that the choice is the buyer's. But is this second conclusion in line with the CISG policy to keep contracts functioning? One could argue that it would fit better with the policy if effect is actually given to the German cases referred to above. However, one must remember, when dealing with the exceptional situation where Art. 49(1)(a) CISG is applicable, that the breach in such a situation is already so fatal for the buyer that the only satisfactory remedy would be avoidance. The fact that he can actually choose to fix a *Nachfrist* in such a situation, instead of avoiding the contract immediately, can therefore possibly be seen as being in line with the policy to keep contracts functioning.

6.3. Interaction between Art. 49(1)(a) CISG and Art. 48(1) CISG

6.3.1. Introduction to the conflict

Art. 48 (1) CISG states that the seller has the right to cure any failure to perform “[s]ubject to article 49”. Under the 1980 Vienna Sales Conference this wording replaced the preceding provision in the Draft Convention that began with an “unless” clause: “Unless the buyer has declared the contract avoided in accordance with article 45” (now Art. 49 CISG). How to interpret the cross reference in Art. 48(1) CISG and how to determine the relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG is an issue that for a long time has been one of the most debated ones in international sales law. A contract cannot both be avoided and cured at the same time, and it can seem impossible to find a proper balance since the interest of the buyer and the interest of the seller clash so strongly.¹⁵⁴

Two main conditions must be met before the interaction problematic occurs: (1) Cure must be possible and offered without unreasonable delay and inconvenience, cf. Art. 48(1) CISG, cf. section 5.2, and (2) there must be a failure to perform that amounts to a fundamental breach, cf. Art. 49(1)(a) CISG, cf. section 2. From Art. 48(1) CISG it must therefore

¹⁵⁴ Cf. Yovel section 4 and Will p. 349.

follow that the right to cure is unqualified for any non-fundamental breach since Art. 49(1)(a) CISG is not applicable in these cases.¹⁵⁵

Different facts amount to different types of cases and discussions. The main discussion amongst the legal writers is concentrating on one type of case, namely cases of reparable non-conforming goods. Should the seller have the possibility to repair the non-conformity before the buyer is entitled to avoid the contract? And should this reparable non-conformity even be regarded as a fundamental breach? The following sections will be concentrating on this discussion leaving out other types of cases such as fundamental breach due to late delivery¹⁵⁶, cases where the seller has refused to deliver¹⁵⁷, fundamental breach of duties other than the duty to deliver in time or to deliver conforming goods¹⁵⁸, defective but non-remediable goods¹⁵⁹ and cases of partial non-conforming delivery¹⁶⁰.

6.3.2. Interpretation of “[s]ubject to article 49”

First of all, it must be examined whether the relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG can be resolved from looking at the wording “[s]ubject to article 49”.¹⁶¹ In the following sections, the legislative history of the provision will be examined, and some of the different interpretations and theories amongst legal writers will be described.

6.3.2.1. The legislative history of the provision

The relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG was already a highly debated issue in the UNCITRAL Drafting Committee’s sessions and again at the Vienna Sales Conference. Some delegates wanted the buyer’s right to avoid the contract to prevail, and some wanted to give the seller the right to cure before the buyer could avoid the con-

¹⁵⁵ Cf. Yovel section 4.1 and the Secretariat Commentary to Art. 48 CISG, par. 8. However, there can maybe be a problem with this statement when taking Art. 49(1)(b) CISG into consideration since a non-fundamental late delivery can be upgraded to an avoidable breach by fixing a Nachfrist. If one is taking the literal approach, cf. section 6.3.2.2, that avoidance takes priority over cure, this will therefore be a modification to the statement. Nevertheless, as will be shown in section 6.5 regarding the interaction between Art. 48(1) CISG and Art. 49(1)(b) CISG, since a Nachfrist has a curative nature this must not be seen as a large problem in practice.

¹⁵⁶ Cf. Liu p. 159-161, Magnus p. 332 and Schlechtriem/Butler par. 180 on this issue.

¹⁵⁷ Cf. Schlechtriem/Butler par. 180 and Magnus p. 332 on this issue.

¹⁵⁸ Cf. Magnus p. 333 on this issue.

¹⁵⁹ Cf. Schlechtriem/Butler par. 180 and Magnus p. 332-333 on this issue.

¹⁶⁰ Cf. Jafarzadeh part II, section 2.3 on this issue.

¹⁶¹ The interpretation of this phrase would also be relevant for the relationship between Art. 49(1)(b) CISG and Art. 48(1) CISG. See section 6.5.

tract. Other delegates thought that the possibility of cure instead should have an influence on whether a breach was fundamental. Germany, Japan and Bulgaria all proposed at the Conference that the “unless” clause in the draft article should be deleted. The principle behind these proposals, that Art. 49 CISG should not have an influence on the seller’s right to cure the breach, was supported by 14 delegations and opposed by 18 delegations.¹⁶² Since there was no consensus about rejecting these proposals one should be careful to use the legislative history of Art. 48(1) CISG to reach concrete conclusions.

That no certain conclusion can be drawn from the legislative history can be illustrated by two legal writers’ different views: According to Honnold, there was at the conference “widespread agreement that whether a breach is fundamental should be decided in the light of the seller’s offer to cure [...] and that the buyer’s right to avoid the contract (Art. 49(1)) should not nullify the seller’s right to cure (Art. 48(1))”¹⁶³. On the other hand, Jafarzadeh is of the opinion that “the legislative history of the provision clearly shows that the majority of delegations at the Conference were opposed to the approach which sought to give absolute priority to the seller’s right to cure over the buyer’s right to avoid the contract under Art. 49(1)(a). The opening words of Art. 48 were adopted upon this general understanding”¹⁶⁴. The legal writers thereby seem to take from the legislative history whatever supports their arguments.

6.3.2.2. The literal approach

Literally taken “[s]ubject to article 49” means that the seller’s right to cure the breach is conditional upon the buyer’s right to avoid the contract. In other words, the buyer’s right to avoid the contract takes priority over the seller’s right to cure the breach. Consequently, if the buyer wants to rely on his right to avoid the contract due to a fundamental breach, cf. Art. 49(1)(a) CISG, the seller’s right to rely on Art. 48(1) CISG is excluded. The predominant tendency amongst legal writers appears to be to interpret “[s]ubject to article 49” in

¹⁶² Cf. the 20th meeting, par. 66, cf. Documentary p. 564. This vote resulted in a working group: Bulgaria, Canada, German Democratic Republic, Germany, Federal Republic of Netherlands, Norway and the United States of America that agreed on a joint proposal, which in alternative II proposed the first phrase of Art. 48(1) CISG as it is today, cf. Documentary p. 687, par. 6. 19 votes were in favor and 7 against. Again there was not a clear consensus, and the problem was that this alternative II was accepted with minimal discussion. It was not discussed exactly how “[s]ubject to article 49” should be understood, and it can therefore not be said for sure what the difference between the “unless” clause and this new phrase is – if there even is a difference.

¹⁶³ Cf. Honnold par. 296.

¹⁶⁴ Cf. Jafarzadeh part II, section 2.3.

the literal way.¹⁶⁵ It has generally been held that it is the buyer's choice whether he wants to avoid the contract in such a situation.¹⁶⁶

Some legal writers mention that this conclusion is strengthened by Art. 48(2) CISG. Art. 48(2) CISG is the only provision in the CISG that deprives the buyer of his right to avoid the contract, and that is solely the case if the buyer accepts the seller's request to cure.¹⁶⁷ Art. 48(2) CISG would not have been necessary if it already followed from Art. 48(1) CISG that the seller's right to cure was pre-emptive. Hence, the buyer is in all other cases than the ones who fall under Art. 48(2) CISG entitled to avoid the contract immediately.¹⁶⁸

One of the legal writers in favour of the literal approach is Ziegel.¹⁶⁹ In his opinion "[s]ubject to article 49" means that no right to cure would survive avoidance of the contract by the buyer.¹⁷⁰ If the wording of Art. 48(1) CISG is given an ordinary and plain meaning there is "no material difference [...] between the opening words of old article 44(1) and their successors"¹⁷¹. Most lawyers would read the "unless" clause in Art. 44(1) in this way, and many delegates at the diplomatic conference in Vienna must also have read it that way since there were several amendments that the "unless" clause should be deleted from Art. 44(1).

The literal approach is supported by case law. One of the cases interpreting directly on "[s]ubject to article 49" is OLG Koblenz 31 Jan. 1997 where the court stated: "By its reference to Art. 49 CISG, Art. 48 CISG gives priority to the buyer's right to avoid the contract over the seller's right to remedy for his failure to perform as stated in Art. 48(1) CISG".¹⁷²

Another case supporting the literal approach, by pointing out that it is the buyer's choice whether he wants to avoid the contract, is ICC Arbitration Case No. 7531 of 1994, which

¹⁶⁵ Cf. for example Müller-Chen pp. 738-739, par. 14, Huber p. 224, Gabriel p. 356, Liu p. 153, Yovel section 4.3, Jafarzadeh part II, section 2.3, Ziegel p. 9-22, Kee p. 190, Koch 2 p. 131, Enderlein p. 194, Magnus p. 323, Koch p. 323, Gomard/Rechnagel p. 148, Martinussen p. 76, Graffi p. 344 and Enderlein/Maskow p. 185.

¹⁶⁶ Cf. The Draft Digest pp. 709-710, par. 2.

¹⁶⁷ See also sections 6.4 and 6.5 regarding the interaction between Art. 49(1) CISG and Art. 48(2) CISG.

¹⁶⁸ Cf. Jafarzadeh part II, section 2.3, Ziegel p. 9-23, Yovel section 4.3 and The Draft Digest pp. 709-710, par. 2.

¹⁶⁹ Cf. Ziegel p. 9-22.

¹⁷⁰ Both Yovel section 4.3 and Liu p. 153 are making references to Ziegel and agree with his interpretation.

¹⁷¹ Cf. Ziegel p. 9-22. See also Schneider p. 84 who states that "it is, on its face, no different than the Draft Convention".

¹⁷² See also the mentioning of the case in section 6.3.3.5 since it also states that cure has an influence on whether a breach is fundamental.

several legal writers refer to.¹⁷³ In this case a Chinese seller and an Austrian buyer agreed on a contract for the sale of scaffold fittings. After delivery the buyer found some serious defects in the goods, and he therefore declared the contract avoided. The court stated that the buyer was entitled to avoid the contract since the lack of conformity amounted to a fundamental breach and continued: “Defendant is not entitled to supply substitute items after the delivery date specified in the contract *without the consent of Claimant*” (emphasis added). Since the buyer had declared the contract avoided pursuant to Art. 49(1)(a) CISG, the seller was not entitled to cure the breach without getting the buyer’s acceptance.¹⁷⁴ The court thereby indicated that the buyer was entitled to avoid the contract without being restricted by the seller’s right to cure the breach, and that it was the buyer’s choice whether the seller should have the right to subsequent performance.¹⁷⁵

Presupposing that the literal approach is the right understanding; will it then solve the problem? Not according to Huber¹⁷⁶: “This, however, only allows the conclusion that, in principle, the right of avoidance, *if it exists*, shall not be impaired by the cure provision. It does not necessarily mean that the curability of the defect must not be regarded when it comes to examine the *preconditions* of the right to avoid, i.e. the concept of fundamental breach”¹⁷⁷. In other words, the problem just shifts to the interpretation of Art. 49(1)(a) CISG, cf. Art. 25 CISG, and a new question arises: When a breach can be finally cured in accordance with Art. 48(1) CISG, can it then be fundamental?¹⁷⁸

6.3.2.3. At what point in time is the seller’s right to cure the breach excluded?

When taking the literal approach the question is at what point in time the seller’s right to cure the breach is excluded.¹⁷⁹ Is it already excluded by the very existence of a fundamental

¹⁷³ Cf. though Gabriel p. 356, n. 93 who thinks that the result of the case is a misreading of Art. 48(2) CISG. However, Art. 48(2) CISG is not mentioned anywhere in the judgment, and it must be doubted whether the court in its ruling was making a reference to Art. 48(2) CISG and was not just interpreting on Art. 48(1) CISG. See also Albert H. Kritzer’s Editorial remarks to the case.

¹⁷⁴ See Albert H. Kritzer’s Editorial remarks to the case.

¹⁷⁵ In accordance with both Gabriel p. 356, n. 93 and Yovel section 4.3, n. 26 further cases supporting the literal approach are Pretura circondariale di Parma 24 Nov. 1989, OLG Frankfurt 17 Sep. 1991, OLG Oldenburg 1 Feb. 1995 and Bundesgerichtshof 25 Jun. 1997.

¹⁷⁶ Cf. Huber pp. 221-222.

¹⁷⁷ Cf. Huber p. 222.

¹⁷⁸ See the discussion of this question in section 6.3.3.

¹⁷⁹ In Müller-Chen’s opinion this is the point where there is lack of consensus amongst legal writers and not whether the literal approach is the right one (he is of the opinion that there is “largely international consensus on this point”). Cf. Müller-Chen pp. 738-739, par. 14 and p. 740, par. 17.

breach, or is it first excluded when the buyer has declared the contract avoided? Another question arises in that regard: Does it matter whether the avoidance declaration or the offer to cure the breach comes first? These considerations have led to some variants of the literal approach.

Liu is one of the legal writers supporting that the decisive point in time is when the buyer actually exercises his right to avoid the contract.¹⁸⁰ He takes his theory a bit further than the other legal writers, however, by claiming that it is a “race” of what comes first¹⁸¹: “The buyer’s *exercise* of a justified right to avoidance would make any cure unavailable to the non-performing seller because no right to cure can survive a rightfully declared avoidance; whereas *the right* to avoidance may be suspended by the offer to cure, provided such a cure is offered before the exercise, by declaration, of the right to avoidance”¹⁸². Consequently, a seller can remedy his failure to perform in cases of fundamental breach if the buyer has not yet exercised his right by a valid declaration. The seller is in the curative period immune to the buyer’s power to avoid the contract.

Huber is one of the legal writers in favour of the bare existence of a right to avoid the contract as the decisive point in time.¹⁸³ At the same time he rejects the “race” model since it does not make any difference whether the avoidance declaration or the seller’s offer to cure comes first. In both cases it will depend on whether the requirements for avoidance under Art. 49(1)(a) CISG are fulfilled.¹⁸⁴ Huber stresses however, that in situations where Art. 49(1)(a) CISG has been fulfilled and the seller’s offer to cure comes first “[a]ccording to the reservation in Art. 48(1) CISG, this will take precedence over the seller’s right to cure. Neither the wording nor the history of that reservation supports the conclusion that it de-

¹⁸⁰ Cf. Liu pp. 157-159. Other legal writers of this opinion are for example Enderlein/Maskow p. 185 and Gomard/Rechnagel p. 148.

¹⁸¹ He is thereby supporting what Yovel calls the “race” model, cf. Yovel section 4.

¹⁸² Cf. Liu p. 155.

¹⁸³ Cf. Huber pp. 224-225. See for example also Müller-Chen p. 740, par. 17 and Jafarzadeh part II, section 2.3.

¹⁸⁴ Because the potential cure has an influence on whether the breach is fundamental, see in that regard section 6.3.3, this will only be the case if the buyer had a legitimate interest in avoiding the contract immediately or if the seller’s cure failed. In other cases the seller will get his chance to cure, no matter what notice comes first.

depends on the buyer actually having declared his right to avoid before the seller offered cure¹⁸⁵.

6.3.2.4. The fair reading

A few scholars are basing their interpretation on a fairer reading of “[s]ubject to article 49”. The seller must, based on good faith and fair dealing, be given the chance to remedy the non-conformity.¹⁸⁶

One of the legal writers reading the cross reference in Art. 48(1) CISG in a different way is Honnold.¹⁸⁷ In his opinion the amendment, “[s]ubject to article 49”, to the draft Art. 44(1) leaves little room for doubt since at the Vienna Sales Conference there was widespread agreement that the seller’s right to cure the breach should not be nullified by the buyer’s right to avoid the contract.¹⁸⁸ Therefore, not even the former “unless” clause frustrated the seller’s right to cure.¹⁸⁹ In his opinion Art. 49(1) CISG, the general provision applicable to other circumstances than cure, yields to the specific narrow provision in Art. 48(1) CISG.¹⁹⁰ An unqualified application of Art. 49(1) CISG can therefore not be allowed to frustrate the seller’s right to cure under the provision in Art. 48(1) CISG. The buyer is under this interpretation precluded from hastily declaring the contract avoided where cure is feasible and can be expected.¹⁹¹ The main question in this connection is: Will the seller cure? Any doubt about the answer to this question can be solved by the parties’ communication and Honnold is thereby strongly relying on the parties’ duty of cooperation.

¹⁸⁵ Cf. Huber pp. 224-225. See also Müller-Chen p. 740, par. 17 who problematizes that Art. 48(2) CISG would be meaningless if the decision would depend on the timing of the buyer’s avoidance declaration.

¹⁸⁶ Cf. Magnus p. 331.

¹⁸⁷ Cf. Honnold par. 296. In Müller-Chen’s opinion Honnold is spokesman for the literal approach, cf. Müller-Chen pp. 738-739, par. 14, n. 33. However, this is hard to read from Honnold’s statements and other legal writers are also referring to him as interpreting the phrase differently than the literal approach, cf. Koch 2 p. 131, n. 32, Schneider p. 84, Ziegel p. 9-23, Yovel section 4.3 and Enderlein/Maskow p. 185.

¹⁸⁸ See however section 6.3.2.1 above where the fact that the legal writers deduce something from the legal history of Art. 48(1) CISG is problematized.

¹⁸⁹ See Ziegel in section 6.3.2.2 above for the opposite view.

¹⁹⁰ See, however, Yovel sections 3 and 4.1, also referred to in section 5.2.3, who is of the opinion that Art. 48(1) CISG is the general provision and Art. 49(1)(a) CISG is the specific provision. In his opinion such an interpretation would not make Art. 48(1) CISG futile since it would still be applicable to situations where a breach is not fundamental.

¹⁹¹ This is due to the fact that where cure is feasible this will not amount to a fundamental breach, cf. also section 6.3.3.2 below. Honnold’s theory on “[s]ubject to article 49” therefore has a close connection to the theory that cure has an influence on whether a breach is fundamental.

Will takes Honnold's theory further.¹⁹² He is also of the opinion that asking the question whether the seller will cure is the fairest solution to the problem, holding the buyer's and the seller's interest at a fair balance. However, Will's theory differs from Honnold's as Will is of the opinion that the buyer should ask himself that question whenever he considers avoiding the contract¹⁹³: "When at the moment a positive answer can be given on the basis of actual knowledge (good experience with the seller, an *ad hoc* commitment, the underlying general conditions of sale) and only then may the buyer be expected to refrain from avoiding for a while"¹⁹⁴. Will has the fairness in international trade in his view since it is a solution that serves both parties: The buyer is freed in situations where cure is not reasonably expected and the seller is protected against avoidance if serious efforts to cure are in sight.

A fairer reading of "[s]ubject to article 49" is supported by case law, cf. for example Pretura di Locarno Campagna 27 Apr. 1992. In this case a Swiss buyer bought some furniture from an Italian seller. The cushions on one of the sofas were defective, and the buyer avoided the contract refusing the seller's offer to repair the goods. The court held that the buyer had not examined the goods, cf. Art. 38 CISG, and given a non-conformity notice in accordance with Art. 39 CISG, and therefore the buyer was not entitled to avoid the contract. But what is important is that the court added: "In addition, it must be noted that [seller] offered to repair the defect: [buyer] should have accepted this proposal, instead of seeking avoidance of its contract with the [seller] (Art. 48 of the CISG)". The court indicated with this statement that Art. 48(1) CISG takes priority over the buyer's right to avoid the contract. On the other hand, however, one could also argue that the court with its ruling is supporting the "race" model, cf. section 6.3.2.3, since the seller's offer to cure came before the buyer's avoidance declaration. Nevertheless, the court's statement is just a casual comment that has nothing to do with the main issue of the case, and the court did not in any way follow up on this remark. Consequently, it must be doubtful if something for sure can

¹⁹² Cf. Will pp. 351-352.

¹⁹³ Will is criticizing Honnold's 'can be expected' test where the buyer is doomed to wait as long as the expectations remains since it fails to reveal how active the buyer must be to find out whether cure can be expected. On the other hand, Honnold is critical to Will's test where the buyer should ask himself this question since there can be doubt about the buyer's actual knowledge and this is why he is relying on the parties' communication.

¹⁹⁴ Cf. Will p. 351. See however Enderlein/Maskow p. 185 who criticize Will's reference to general conditions of the contract since the contractual agreement prevails over the provisions in the CISG.

be concluded from this statement.¹⁹⁵ Further to this it must be noted that this ruling comes from a district court, and its value of precedence can therefore seem questionable.¹⁹⁶

The fundamental principle behind the remedies in the CISG to keep contracts functioning to avoid economic waste and risks and to promote loyalty and good faith in international sales, cf. section 2.6, also points in the direction of a more fair reading of the cross reference in Art. 48(1) CISG.¹⁹⁷ Avoidance of the contract is the exceptional remedy and if the seller can save the contract by curing the breach this must be the preferred remedy. However, exactly in what way cure should have an influence on the right to avoidance is difficult to say, and in the author's opinion it fits better to bring this underlying principle into the discussion when looking at whether cure has an influence on a breach's fundamentality, cf. section 6.3.3.

6.3.2.5. Sub-conclusion and evaluation

It is not possible to find any help in the legislative history as to how "[s]ubject to article 49" should be interpreted. The legal writers seem to deduce from the legislative history whatever can support their theoretical arguments.

There appears to be a wide international consensus amongst legal writers supporting the literal approach that "[s]ubject to article 49" means that the buyer's right to avoid the contract takes priority over the seller's right to cure the breach. This interpretation is also supported by case law. However, the legal writers do not agree about at what point in time the seller's right to cure the breach is excluded and whether it makes any difference if the avoidance declaration or the offer to cure comes first.

A few legal writers support a fairer reading of the cross reference in Art. 48(1) CISG. Art. 48(1) CISG takes priority if the question of whether the seller will cure the breach is answered with a "yes". A fairer reading is also supported by case law, but the critique of the two rulings found supporting this view must be taken into consideration, and it must also

¹⁹⁵ See also Yovel's critique of this case in Yovel section 4.3, n. 28 where he states that this casual argument "seem to reflect preferred rather than the applicable law".

¹⁹⁶ LG Regensburg 24 Sep. 1998 can maybe also be seen as a case in favour of a more fair reading. The problem with this case is that the court seems to use the right to avoid the contract due to a Nachfrist on a case on non-conformity, which is not correct, and therefore it must be doubtful how much value such a case can be credited for. It must furthermore pointed out that this case also comes from a district court. See also Yovel's critique of this case in Yovel section 4.3, n. 24.

¹⁹⁷ The CISG policy is what underlies the CISG's cure provisions, cf. also Ziegel p. 9-21.

be pointed out that the rulings come from district courts. The principle behind the CISG to keep contracts functioning would also support a fairer reading, even though it is difficult to say in what way.

Consequently, it cannot be said with certainty what “[s]ubject to article 49” means, and what the exact relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG is remains unclear.

The question is whether it is of utmost importance to determine exactly what the phrase “[s]ubject to article 49” means. Already at the Vienna Sales Conference there were proposals that the problem instead should be solved under Art. 25 CISG and that the possibility of cure should have an influence on whether a breach is fundamental¹⁹⁸, cf. the following section.

6.3.3. Cure in relation to fundamental breach?

6.3.3.1. Introduction to the hypothesis

Yovel states that “under terms of CISG Art. 48(1), the buyer’s right to avoid under Art. 49 is an independent right unaffected by the seller’s intentions to cure”¹⁹⁹. However, if this approach is taken as the right one, it does not necessarily mean that cure cannot have an influence on whether a breach is fundamental.²⁰⁰ In some situations the non-conformity in the goods would be reparable, and the question is therefore whether this can have an influence on the evaluation under Art. 25 CISG.

If it is supported in the practical use of Art. 25 CISG that the possibility of curing the non-conformity can prevent a breach from being fundamental, the conflict between Art. 49(1)(a) CISG and Art. 48(1) CISG and how to interpret “[s]ubject to article 49” would not be of particular practical importance.²⁰¹ Hence, if a breach is not fundamental, which is a precondition for the use of Art. 49(1)(a) CISG, then there will be no conflict between Art.

¹⁹⁸ Cf. the 20th meeting and Federal Republic of Germany in par. 38, cf. Documentary p. 562, United Kingdom in par. 44, cf. Documentary p. 562, Sweden in par. 48, cf. Documentary p. 563, and Argentina in par. 55, cf. Documentary p. 563-564.

¹⁹⁹ Cf. Yovel section 4.3.

²⁰⁰ As Huber puts it, cf. section 6.3.2.2, the discussion will instead be on the interpretation of Art. 49(1)(a) CISG and whether cure has an influence on a breach’s fundamentality.

²⁰¹ See Schlechtriem/Butler par. 180 who are of the opinion that the relationship between Art. 49(1)(a) CISG and 48(1) CISG is not a big issue in practice since the requirements of a fundamental breach are generally not met in cases where substitute performance without unreasonable delay is possible.

49(1)(a) CISG and Art. 48(1) CISG, and the seller will have the right to cure the breach if the requirements under Art. 48(1) CISG are fulfilled. In the following sections it will be examined whether there is a tendency in practice to take cure into account when evaluating a breach's fundamentality.

6.3.3.2. The legal theories

The predominant view amongst legal writers is that cure has an influence on whether a breach is fundamental. If the defect in the goods can be cured easily and quickly the breach is not fundamental.²⁰² This is due to the fact of the existence of a 'dynamic' relationship between Arts. 25, 48(1) and 49 CISG.²⁰³ In these situations the seller should be granted a second chance to perform. As long as the reasonable period has not passed and no unreasonable inconvenience has been caused the buyer, cf. Art. 48(1) CISG, the breach is not a fundamental breach under Art. 25 CISG. It is only at the end of the reasonable period of time, or when it becomes clear that the seller will not cure the breach or that no successful cure can be expected, that the non-conformity becomes a fundamental breach.²⁰⁴

Honnold is one of the authors sharing the predominant opinion. When determining whether a breach is fundamental under Art. 25 CISG you have to look at *all* the circumstances, including the possibility of cure. When cure can easily be made, the breach cannot be concluded to be fundamental before it is known whether the seller will cure.²⁰⁵ A rapid replacement of the defective part, even after the agreed delivery date, would prevent that a substantial detriment is caused, and thereby that the breach is fundamental. The seller's exercise of his right to cure would be futile if the question of whether a breach is fundamental for the purpose of avoidance is not answered in the light of the effect of a rightful offer to cure from the seller. Arts. 25, 48 and 49 CISG should therefore be construed together.²⁰⁶

²⁰² Cf. for example Gabriel pp. 356-357, Lookofsky p. 121, Schlechtriem/Butler par. 180, Müller-Chen p. 739, par. 15, Liu p. 152, Magnus p. 323, Schroeter pp. 425-426, par. 48, Gomard/Rechnagel p. 148, n. 6, Huber pp. 222-223, Ziegel p. 9-23 and Honnold par. 184 and 296.

²⁰³ Cf. Lookofsky 2, p. 122.

²⁰⁴ Cf. Schroeter in Schwenzler pp. 425-426, par. 48, Huber p. 223, Schlechtriem/Butler par. 180 and Müller-Chen p. 739 par. 15. For case law see for example OLG Oldenburg 1 Feb. 1995 and Tribunale di Forlì 11 Dec. 2008.

²⁰⁵ Cf. Honnold par. 296. See section 6.3.2.4 above for the whole "will the seller cure?" theory.

²⁰⁶ Cf. Honnold par. 184.

Will is one of the few legal writers of the opposite opinion.²⁰⁷ Whether cure has an influence on a breach's fundamentality is only a theoretical question of little practical consequence.²⁰⁸ According to Will, the approach Honnold is supporting is an unconvincing construction that would lead to the weakening of the notion of fundamental breach. The cure element is not very precise, and the buyer would be burdened even more since he already bears the risk of evaluating the degree of non-conformity. In his opinion "[t]he same goal is just as well achieved when the fundamental breach is determined by lack of conformity only (without having regard to cure), and the existing right to avoid is merely suspended when a rightful offer to cure arrives"²⁰⁹.

Jafarzadeh comments on Honnold's and Will's opposite theories and agrees with Honnold based on the legislative history.²¹⁰ He suggests, though, that the mere possibility of cure must not in itself change the character of an actual fundamental breach. This would limit Art. 49(1)(a) CISG to very exceptional cases, which would increase the uncertainty. "A commercial seller is expected to act in a reasonable manner. It would not be fair to keep the buyer waiting for the seller to be able and willing to cure"²¹¹. Hence, the seller has to show his ability and willingness to cure the breach.²¹² Honnold is, however, aware of this problem in his theory since he stresses how important the parties' communication is.²¹³ This is probably also why some legal writers, including Honnold, indicate that it is the seller's actual offer to cure the breach that has an influence on the evaluation under Art. 25 CISG.²¹⁴

²⁰⁷ Cf. Will pp. 356-358. See also Koch pp. 323-325 who shares this view.

²⁰⁸ Cf. Will p. 352. See Schlechtriem and Butler referred to above in section 6.3.3.1, n. 201, who are of the opposite opinion (that it is cure's influence on the fundamental breach that is of practical importance).

²⁰⁹ Cf. Will pp. 357-358.

²¹⁰ Cf. Jafarzadeh part II, section 2.3. See also section 6.3.3.4 regarding the legislative history.

²¹¹ Cf. Jafarzadeh part II, section 2.3. The buyer does not under the CISG have any duty to discover the possibility of cure by the seller, cf. Liu p. 251.

²¹² See also Liu p. 251 who deduces the same from Jafarzadeh's theory.

²¹³ Cf. Honnold par. 296.

²¹⁴ Cf. especially Liu p. 250 who observes that "[t]he prevailing view today (especially in the German legal literature) that a realistic offer of the seller to cure "prevents" immediate avoidance is correct". See for example also Magnus p. 323, Ziegel p. 9-23, Schroeter pp. 425-426, par. 48, and Honnold par. 184. Other scholars, on the other hand, are just stating that if cure can be easily made, it has an influence on whether a breach is fundamental, but do not say anything about whether the seller must actually have offered cure, cf. for example Lookofsky p. 121 and Huber pp. 222-223.

6.3.3.3. Does cure always prevent a breach from being fundamental?

The question is whether the seller must always be given a second chance to perform his obligations under the contract when there is a fundamental breach.

The scholars in favour of cure having an influence on a breach's fundamentality agree that in certain exceptional cases, the breach would still be a fundamental breach under Art. 25 CISG.²¹⁵ Where the buyer has a legitimate or particular interest in immediate avoidance of the contract, the curability should not be taken into account. These cases are: (1) where the basis of trust between the parties has been destroyed as a result of the breach,²¹⁶ and (2) where the buyer's legitimate interest in immediate avoidance results directly from the contractual agreement interpreted in its widest sense (for example a fixed delivery date).²¹⁷

6.3.3.4. The legislative history

The UNCITRAL Drafting Committee discussed whether it should be put into Art. 25 CISG that "all the circumstances, including a reasonable offer to cure" should be taken into account when determining whether a breach of contract is fundamental.²¹⁸ However, the members did not vote in favour of this amendment because they were of the opinion that the problem was already governed by Art. 48 CISG,²¹⁹ and that the proposal was therefore unnecessary and superfluous.²²⁰

Both Honnold and Jafarzadeh deduce from the UNCITRAL Drafting Committee's work that a breach's curability should be taken into account when determining the fundamentality. They base this conclusion on the reason for rejection since it shows that the members did not doubt the fact that when determining whether a breach is fundamental, the seller's rightful offer to cure should be regarded as a decisive factor.²²¹

Koch, on the other hand, does not think that what took place at the UNCITRAL Drafting Committee has any influence on the question whether cure can affect a breach's fundamen-

²¹⁵ Cf. Schroeter pp. 425-426, par. 48, Lookofsky 2 p. 122, Müller-Chen p. 739, par. 15, Liu pp. 152 and 246-247, Huber pp. 222-224 and Magnus pp. 323-324.

²¹⁶ Cf. Huber p. 223 and for example OLG Köln 14 Oct. 2002 where the court stated that the buyer's "trust in the efficiency of the [Seller] could seriously be shaken".

²¹⁷ Cf. Huber p. 223 and for example HG des Kantons Zürich 25 Jun. 2007.

²¹⁸ It was actually a proposal made by Honnold.

²¹⁹ See Michida who argues that the rejection on this proposal was based on misunderstandings.

²²⁰ Cf. par. 93-94 of the Committee Report.

²²¹ Cf. Jafarzadeh part II, section 2.3 and Honnold par. 184, n. 12.

tality.²²² There were rejections of various proposals regarding the effect of cure at the Vienna sales conference and further to this there was the preliminary vote that the “unless” clause should not be deleted.²²³ This vote becomes conclusive when looking at the fact that the Vienna Sales conference failed to put into the cure provision that the seller’s right to cure should have priority.

When evaluating these different views, the author tends to agree with Jafarzadeh and Honold that it can probably be deduced from the UNCITRAL Drafting Committee’s rejection of the amendment that the seller’s reasonable offer to cure should be taken into account when determining whether a breach is fundamental. Why else would they find the proposal superfluous and unnecessary? The problem is that nothing further was discussed on this issue under the Vienna Sales Conference when the delegates dealt with the formulation of Art. 25 CISG. Nevertheless, there were several delegations that indicated, when discussing the cure provision in Art. 48(1) CISG, that cure should have an influence on whether a breach is fundamental.²²⁴ No delegation disagreed with these statements which can maybe be taken as an indication that all the delegations agreed that cure should be taken into account when making the Art. 25 CISG evaluation. At the same time it must be emphasized that the preliminary vote, which Koch is referring to, cannot be used to say anything certain regarding this issue, since there was no consensus amongst the delegations.²²⁵

To conclude, the legislative history seems to indicate that the seller’s reasonable offer to cure the breach, cf. the amendment proposed to the UNCITRAL Drafting Committee, should have an influence on a breach’s fundamentality.

6.3.3.5. Case law

There is a growing case law that suggests that cure has an influence on a breach’s fundamentality. If the non-conformity can be easily and quickly repaired this can prevent the breach from being fundamental, cf. for example Hof Arnhem 7 Oct. 2008: “[w]hen determining whether the breach of contract was fundamental in the sense of Art. 25 CISG in connection with (the reason for avoidance) Art. 49(1)(a) CISG or not, it is also relevant, if the non-performance could have been remedied within a reasonable period of time. Fol-

²²² Cf. Koch p. 295.

²²³ See also section 6.3.2.1 in that regard.

²²⁴ Cf. n. 198 in section 6.3.2.5.

²²⁵ See also the problematization of this in section 6.3.2.1.

lowing Art. 48(1) CISG, the seller is entitled to remedy at his own expense any failure to perform his obligations even after the date for delivery”.²²⁶

The seller’s willingness or offer to cure the breach is something that the courts have often taken into account when evaluating whether a breach is fundamental:

In OLG Köln 14 Oct. 2002 the court stated that “[e]ven a serious defect is not a fundamental breach of contract *if the seller is prepared to replace the goods* without unacceptable burden to the buyer” (emphasis added). In the actual case, where the seller had only made a partial delivery of the clothes, the buyer did not have to accept the seller’s willingness to cure the breach, which the seller had announced by letter, since it was seasonal goods and it was uncertain when the seller would perform.

Another case supporting this view is OLG Koblenz 31 Jan. 1997 where the seller offered to remedy the defects in some acrylic blankets, which the buyer rejected. The court stated that the fundamental nature of a breach “depends not only on the gravity of the defect, but also on *the seller’s willingness to remedy the defect* without causing unreasonable delay or inconvenience to the buyer. Even a severe defect may not constitute a fundamental breach of contract in the sense of Art. 49 CISG, if the seller is able and willing to remedy without causing unreasonable inconvenience to the buyer” (emphasis added). There was no fundamental breach since the buyer had not reacted when the seller offered to cure.²²⁷

To conclude, case law appears to agree with the predominant theory that if the non-conformity is easily and quickly curable, it has an influence on whether a breach is fundamental. Some cases are just focusing on the bare possibility of an easy and quickly cure while others have especially taken the seller’s willingness or offer to cure the breach into account. The latter can thereby probably be seen as in line with Jafarzadeh’s reasoning, cf. section 6.3.3.2, that the mere possibility of cure is not enough to impact the fundamental breach evaluation. Consequently, if it is not an exceptional case, cf. section 6.3.3.3, and if the non-conformity in the goods, even if it is a serious breach, can be cured without unreasonable inconvenience, cf. the limitation requirements under Art. 48(1) CISG, this can prevent the breach from being fundamental. However, the scope of influence cure has on the fundamental breach evaluation under Art. 25 CISG cannot be determined for sure. The

²²⁶ See also HG Zürich 26 Apr. 1995, CA Grenoble 26 Apr. 1995 and ICC Arbitration Case No. 7754 of Jan. 1995.

²²⁷ See also Tribunale di Forlì 11 Dec. 2008 and HG Aargau 5 Nov. 2002.

cases do not agree whether the seller's willingness to cure is of special importance, and the cases also show that the evaluation is always made on a case-by-case basis, cf. also section 2.4. Hence, a general formula solving the problem cannot be found from the cases.

Only one case has been found disagreeing with the above cases. That is BGer 15 Sep. 2000 [4C.105/2000], which states regarding the Art. 25 CISG evaluation: "Moreover, it does not matter whether or not the default is objectively reparable". Thus, the availability of cure does not have an influence on whether a breach is fundamental. On the other hand, the court only seems to refer to the situation where the breach is possible curable, cf. the term "objectively reparable", and maybe this can be taken as an indication that something more is needed.²²⁸ However, the court does not make any further comments to this statement and it is therefore hard to say what exactly is meant with it.

6.3.3.6. The underlying principles of the CISG

As already indicated in section 6.3.2.4, the underlying principles behind the remedies in the CISG, cf. section 2.6, seem to support that the seller should have a right to cure the breach before the buyer avoids the contract. The predominant opinion amongst the legal writers and case law that cure can prevent the breach from being fundamental, which could lead to the seller's actual right to cure the breach under Art. 48(1) CISG, is thereby in line with the CISG policy to keep contracts functioning. As a matter of fact, the underlying rationale of the cases, referred to in the above section 6.3.3.5, is this policy:

In HG Aargau 5 Nov. 2002 the court stated that: "*The UN Sales Law proceeds from the fundamental precedence of preservation of the contract, even in case of an objective fundamental defect [...] [A]s long as and so far as (even) a fundamental defect can still be removed by remedy or replacement, the fulfillment of the contract by the seller is still possible and the buyer's essential interest in the performance is not yet definitively at risk*" (emphasis added).

Cf. also OLG Köln 14 Oct. 2002: "At the examination, under what circumstances [...] a breach of contract by the seller essentially deprives the buyer of its positive interest, *due consideration is also foremost to be had to the tendency of the CISG to restrain the remedy of avoidance of contract in favor of other possible legal remedies [...]* Therefore, not only the weight of the defect, but

²²⁸ Maybe this case can thereby be seen as in line with the above cases indicating that it is especially the seller's willingness/offer to cure the breach that has an influence on the evaluation under Art. 25 CISG.

also the preparedness of the seller to cure the defect without unacceptable delay and burden to the buyer is of importance” (emphasis added).

Consequently, the fact that the cases are basing their arguments on the CISG policy to keep contracts functioning indicates how important this underlying principle behind the remedies in the CISG is. It must therefore be attached a significant importance when discussing whether cure should play a role in the fundamental breach evaluation under Art. 25 CISG.

6.3.3.7. Sub-conclusion and evaluation

The predominant view amongst legal writers is that when cure can be easily and quickly made it can prevent the breach from being fundamental. The only modification to this main rule is exceptional cases where the buyer has an interest in avoiding the contract. The fact that the mere possibility of cure has an influence on a breach’s fundamentality can be problematized. This is probably why some scholars indicate that it is the seller’s actual offer to cure the breach that has an influence on the evaluation under Art. 25 CISG. The legislative history of the CISG also seems in favour of a reasonable offer from the seller to cure the breach having an influence on whether the breach is fundamental.

There is a growing case law supporting the predominant view. Some cases have especially taken the seller’s willingness/offer to cure the breach into account, and they can thereby seem to support that something more is needed than just the possibility of cure. However, the scope within which cure is taken into account when making the Art. 25 CISG evaluation cannot be determined for sure from the cases.

Case law and the predominant view amongst the scholars are in line with the CISG policy to keep contracts functioning, since a seller can get the right to cure the breach after Art. 48(1) CISG, before the buyer is entitled to avoid the contract, if the curability of the breach can prevent it from being fundamental. This policy also seems to be the underlying rationale of the cases.

On the other hand, a few legal writers support the view that cure does not have an influence on whether a breach is fundamental. In their opinion, the cure element is not very precise and it would increase the uncertainty about when a breach is fundamental. This is maybe also supported by case law, cf. BGer 15 Sep. 2000 [4C.105/2000]. However, it cannot be said for sure from the case what the court exactly meant with its statement.

To conclude, a strong trend has developed amongst legal writers and in case law that if the non-conformity in the goods can be cured, it has an influence on whether a breach is fundamental. Even though there is not complete consensus amongst legal writers and in case law (as a few legal writers and cases do not agree), the legislative history and especially the principles behind the CISG that contracts should be kept functioning as far as possible strengthen this conclusion. Hence, the hypothesis introduced in section 6.3.3.1, that the interaction between Art. 49(1)(a) CISG and Art. 48(1) CISG is not of significant importance in practice, appears to be confirmed. The focus in practice has been moved from the discussion of the relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG to the discussion of whether cure should be taken into consideration when evaluating on a breach's fundamentality under Art. 25 CISG. Since the trend in practice is that cure has an influence on a breach's fundamentality, the problem with the interaction between Art. 49(1)(a) CISG and Art. 48(1) CISG seems to have been "caught" under Art. 25 CISG. Thus, if the non-conformity in the goods will not amount to a fundamental breach, Art. 49(1)(a) CISG is not applicable and there will be no conflict with Art. 48(1) CISG. In other words, the seller will have the right to cure the breach if the requirements under Art. 48(1) CISG are fulfilled. Consequently, the problems with the relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG are not that significant in practice. As Garro puts it: "The cases are more likely to turn on the seriousness of the breach and the ease with which repairs can be effected rather than on the wording of either Article 48(1) or 49(1)(a)"²²⁹.

One could be tempted to deduce from the above conclusion that a seller in breach of contract due to non-conformity should not worry about the evaluation under Art. 25 CISG and whether the buyer will avoid the contract. He should instead try to cure the breach (and show the buyer his willingness to cure) if he can do so without causing the buyer unreasonable inconvenience. Thus, even though it is a serious breach it would not be regarded fundamental. The problem with this reasoning is, as already indicated in section 6.3.3.5, that the evaluation under Art. 25 CISG still remains uncertain. The exact scope of how cure is taken into account is non-determinable. This is shown by the fact that some legal writers and some case law are indicating that it is the seller's actual offer/willingness to cure the breach that is the predominant factor while others are indicating that a breach can

²²⁹ Cf. Garro p. 366.

be prevented from being fundamental in every single case where cure can be done easy and quickly. Further to this, the evaluation under Art. 25 CISG is made on a case-by-case basis, taking the individual circumstances in each case into account. One can therefore not be absolutely sure how the courts would take the cure factor into consideration. Thus, is impossible to apply a general formula to all the individual cases.

6.3.4. Conclusion

It cannot be concluded with certainty what “[s]ubject to article 49” means and the exact relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG remains unclear, cf. section 6.3.2.5. However, the issue regarding the interaction between Art. 49(1)(a) CISG and Art. 48(1) CISG does maybe not cause problems in practice. The focus has been moved to the discussion of whether the curability of the non-conforming goods has an influence on a breach’s fundamentality. There is a growing commentary and case law, strongly supported by the legislative history and the CISG policy to keep contracts functioning, stating that cure has an influence on whether a breach is fundamental and thereby on the buyer’s right to avoid the contract. If a potentially curable breach is not evaluated as being fundamental under Art. 25 CISG, the problem with the relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG will not occur, since the buyer will not be entitled to avoid the contract, and the seller will have the right to cure the breach given that the requirements under Art. 48(1) CISG are fulfilled. What remains uncertain is the scope within which the cure is taken into account when making the Art. 25 CISG evaluation, since it depends on the actual facts of the individual case.

6.3.5. Is a change of Art. 48(1) CISG necessary?

Putting the problems with the cross reference in Art. 48(1) CISG into perspective it can be questioned whether there is a need to amend the provision? The answer to this question, in the author’s opinion, would be “no” due to the following reasons:

Firstly, if the parties communicate and cooperate with each other there will not be a problem. Usually, the parties will be interested in keeping the good business relationship, which

will typically end out in an agreement or compromise between the parties, solving the issue.²³⁰

Secondly, Art. 48(1) CISG is a compromise between the CISG states. As shown in section 6.3.2.1, the delegates at the Vienna Sales Conference could not agree on how the seller's right to cure the breach should interact with the buyer's right to avoid the contract due to a fundamental breach. It is a very complex topic, and the members differ broadly in their backgrounds and legal opinions. Based on these facts, it seems hard to believe that if it was attempted to amend the provision in Art. 48(1) CISG, a better solution would be achieved. Thirdly, as shown in section 6.3.3, the trend in practice seems to have resolved the problem by taking cure into account when determining whether a breach is fundamental, cf. Art. 49(1)(a) CISG, cf. Art. 25 CISG. This tendency will minimize the cases where both Art. 49(1)(a) CISG and Art. 48(1) CISG are fulfilled at the same time, and the relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG does therefore not seem to be a major problem in practice. The cases left, where both articles would be fulfilled, would be the extreme cases where there would not be any other satisfactory remedy for the buyer than avoidance of the contract. In those cases it seems fair, in the light of the principles behind the remedies in the CISG, to use the literal interpretation of "[s]ubject to article 49" and give the buyer the right to avoid the contract.

Finally, one question is left: Is this trend in practice one that is likely to continue? There is a great possibility of that since it is in line with the CISG policy to keep contracts functioning. Consequently, there is no need for an amendment of Art. 48(1) CISG in the nearest future.

6.4. Interaction between 49(1)(a) CISG and Art. 48(2) and (3) CISG

6.4.1. Introduction to the conflict

The buyer has acquired the right to avoid the contract due to the seller's fundamental breach, cf. Art. 49(1)(a) CISG. However, at the same point in time, the seller sends the buyer a request for cure in accordance with Art. 48(2) CISG or a notice that he will perform, cf. Art. 48(3) CISG, which the buyer goes along with or fails to reject within a reasonable period of time. Which right takes priority?

²³⁰ The seller can also try to avoid the problem with the cross reference in Art. 48(1) CISG by communicating a request to the buyer under Art. 48(2) or (3) CISG, cf. the next section.

6.4.2. The solution

The legal writers appear to agree that there is no conflict between the buyer's right to avoid the contract due to a fundamental breach under Art. 49(1)(a) CISG and the seller's request for cure under Art. 48(2) or (3) CISG.²³¹ The uncertainty regarding the seller's right to cure the breach (that exists under Art. 48(1) CISG) is removed by the seller's request to the buyer. When the buyer goes along with the seller's request for cure or does not reply within a reasonable period of time, cf. the first sentence of Art. 48(2) CISG, the buyer expressly or by silence has 'accepted' the seller's offer to cure. Consequently, this 'agreement', that the seller in the requested period has the right to cure the breach takes precedence over the buyer's right to avoid the contract.²³² Hence, the buyer's right to avoid the contract is suspended in the period requested by the seller.²³³ This reasoning can also be concluded directly from the second sentence of Art. 48(2) CISG: "The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller".

That the seller's right to cure the breach in these situations takes priority and limits the buyer's right to avoid the contract is also supported by case law. Cf. for example AG Nordhorn 14 Jun. 1994 where the court indicated, based on Art. 48(2) and (3) CISG, that the buyer was not entitled to avoid the contract in the additional period of time for performance the seller had requested, since the buyer failed to reply to this request.²³⁴

Note that the decision, whether the power to avoid the contract should be suspended, remains with the buyer. If the buyer does not go along with the seller's request he is free to avoid the contract. However, Art. 48(1) CISG can still be applicable in such a situation, and in that case the seller's right to cure will depend on the outcome of the above discussion in section 6.3.

²³¹ Cf. Magnus p. 333, Honnold par. 296 and 298, Müller-Chen pp. 739-740, par. 16, Huber p. 221, Yovel section 4.5, Will p. 354, Liu p. 172 and Jafarzadeh part II, section 2.3. The requirements under Art. 48(1) do not need to be fulfilled since it must be assumed that Art. 48(2) CISG has an independent life.

²³² Cf. Huber p. 221.

²³³ If the seller does not cure the breach within the requested period of time, or if it becomes clear that the seller will not cure, the buyer regains his freedom to avoid the contract, cf. section 5.3.4.

²³⁴ In the concrete case the court used the fact that the buyer had not replied to the seller's request, cf. Art. 48(2) and (3) CISG, to state that the buyer had not warned the seller about his avoidance in accordance with a standard term in the contract. See also the editorial remarks made by Sanna Kuoppala to *Turun hovioikeus* 12 Nov. 1997.

6.4.3. Conclusion and evaluation

When the buyer goes along with or fails to reply to the seller's request within a reasonable period of time, cf. Art. 48(2) or (3) CISG, he is bound by this "agreement" to let the seller cure the breach in the requested period and is not entitled to avoid the contract immediately in accordance with Art. 49(1)(a) CISG. That Art. 48(2) and (3) CISG takes priority follows directly from the wording of the second sentence of Art. 48(2) CISG and is also supported by the scholars and case law.

This solution is clearly in line with and supports the CISG policy to keep contracts functioning, cf. section 2.6. The fact that the seller is entitled to rely on the communication with the buyer promotes good faith in international sales and avoids additional costs and risks that a termination of the contract would lead to.

6.5. Interaction between Art. 49(1)(b) CISG and Art. 48(1) CISG

6.5.1. Introduction to the conflict

The cross reference in Art. 48(1) CISG states "[s]ubject to article 49" which must also include the buyer's right to avoid the contract due to a *Nachfrist*, cf. Art. 49(1)(b) CISG. Consequently, the conflict between Art. 49(1)(b) CISG and Art. 48(1) CISG results in the same discussion as was taken in section 6.3.2, namely how to interpret "[s]ubject to article 49" which, as already shown, cannot be determined with certainty. However, the scholars appear to concentrate the discussion on the relationship between Art. 49(1)(a) CISG and Art. 48(1) CISG and do not seem to be concerned about the situation where Art. 49(1)(b) CISG is applicable.²³⁵ In the author's opinion there are two possible reasons for this:

6.5.2. Art. 48(1) CISG is not applicable to cases of late delivery

Art. 49(1)(b) CISG is only applicable in cases of non-delivery/late delivery.²³⁶ Some scholars are of the opinion that Art. 48(1) CISG does not apply to breaches regarding late delivery.²³⁷ Thus, if Art. 48(1) CISG is not applicable in such cases, no problem will arise.

²³⁵ Yovel section 4.1 is the only legal writer found commenting a bit directly on this conflict.

²³⁶ Cf. section 3.1 and 6.2.3.

²³⁷ Cf. section 5.2.3

6.5.3. The Nachfrist has a curative nature

Fixing an additional period of time within which the seller has to deliver, cf. Art. 47(1) CISG, is basically the same as permitting the seller to cure the breach under Art. 48(1) CISG. By fixing a Nachfrist the buyer allows the seller to cure the breach, since the buyer is not entitled to avoid the contract in this period, cf. Art. 47(2) CISG, and the Nachfrist thereby has a curative nature.²³⁸ Nachfrist sits very well together with cure since both doctrines have requirements of reasonableness²³⁹: The additional period of time under Art. 47(1) CISG has to be of a reasonable length, and the cure under Art. 48(1) CISG has to be done without unreasonable delay and inconvenience.²⁴⁰

Consequently, the interaction between Art. 48(1) CISG and Art. 49(1)(b) CISG is a problem of little practical importance. When it comes to the point in time where the buyer is actually entitled to avoid the contract, cf. Art. 49(1)(b) CISG, the seller has already had a second chance to perform his obligations under the contract. It seems to be the right solution that the buyer, when the additional period of time runs out, is entitled to avoid the contract, since this will only be the case if the seller has failed to cure the breach. The legal writers would probably agree that there would be no problem in interpreting “[s]ubject to article 49” literally in such a situation.²⁴¹

6.5.4. Conclusion and evaluation

According to some scholars Art. 48(1) CISG is not applicable to cases of late delivery. This can be the reason why the legal writers are not concerned with the relationship between Art. 49(1)(b) CISG and Art. 48(1) CISG when discussing the cross reference in Art. 48(1) CISG.

Another reason could be that a Nachfrist has a curative nature, and when it comes to the point in time when Art. 49(1)(b) CISG is applicable, the seller has already had a second chance to perform. This solution supports the principle behind the remedies in the CISG to try to keep contracts functioning due to loyalty and additional costs between the parties involved in avoidance, cf. section 2.6. The buyer is using a remedy other than avoidance,

²³⁸ Koch 2 p. 186 also seems to indicate that the Nachfrist has a curative nature.

²³⁹ Cf. Yovel section 4.1.

²⁴⁰ Cf. however Kee p. 191, who problematizes the fact that both provisions refer to reasonableness.

²⁴¹ See section 6.3.2.2 for the literal approach. See also Yovel section 4.6, n. 35 who is of the opinion that if the seller fails to perform within the Nachfrist, the buyer is entitled to avoid the contract.

the Nachfrist, which gives the seller the opportunity to cure the breach and save the contract. If the seller does not manage to cure the breach within the Nachfrist it seems in line with this underlying principle of the CISG that the buyer can avoid the contract since he has made an honest attempt to keep the deal together and the contract alive.

6.6. Interaction between Art. 49(1)(b) CISG and Art. 48(2) and (3) CISG

6.6.1. Introduction to the conflict

When there is a breach of contract due to late delivery, the buyer has the right to fix an additional period of time of *reasonable length* for performance by the seller for the purpose of avoidance, cf. Art. 47 CISG, cf. Art. 49(1)(b) CISG. But at the same point in time the seller has the right under Art. 48(2) (and (3)) CISG to request the buyer whether he will accept performance within the *time indicated* in his request. How will Art. 49(1)(b) CISG and Art. 48(2) (and (3)) CISG interact in the situation where the buyer has fixed a Nachfrist, but the seller counters this reasonable period of time with a request for cure for a longer period of time?

6.6.2. The solution

The legal writers seem to agree on what the result would be in such a situation.²⁴² If the buyer has fixed an additional period of time under Art. 47 CISG, cf. Art. 49(1)(b) CISG, the seller is entitled to counter this time limit by offering cure under Art. 48(2) and (3) CISG and thereby fix a period of time that is longer than the one fixed by the buyer. If the buyer does not react to the request, or reacts too late, the seller's time period takes precedence over the one fixed by the buyer.²⁴³ This is a principle that applies under good faith. Therefore, in situations where the buyer has stated that he will not accept performance after the expiration of the Nachfrist period the seller's request under Art. 48(2) and (3) CISG will also take priority since it must be assumed that the buyer will object if he does not agree with a reasonable counterproposal by the seller.

²⁴² Cf. to the whole section Müller-Chen p. 744, par. 30 and p. 756, par. 21 and Huber p. 238. See also Schlechtriem/Butler par. 181, and also Magnus p. 333 who seems to indicate the same result.

²⁴³ Note, as indicated in section 6.4.2, the decision as to whether the power to avoid the contract should be suspended remains with the buyer, and if the buyer rejects the offer within the reasonable period of time it will instead amount to a conflict with Art. 48(1) CISG (and result in the discussion in section 6.5 above).

This reasoning also follows directly from the second sentence of Art. 48(2) CISG: “The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller”. Hence, the Nachfrist period will be extended until the date fixed by the seller expires, and the buyer is first entitled to avoid the contract after that point in time.²⁴⁴

6.6.3. Conclusion and evaluation

The relationship between Art. 49(1)(b) CISG and Art. 48(2)(3) CISG appears to be similar to the one between Art. 49(1)(a) CISG and Art. 48(2) and (3) CISG. If the buyer fails to react to the seller’s request within a reasonable period of time, the buyer’s right to avoid the contract after the Nachfrist expires is suspended in the time period indicated in the seller’s request. Thus, the seller’s right to cure the breach takes priority. This follows from the second sentence of Art. 48(2) CISG and is supported by the legal writers.

This result is also in line with the underlying principles of the CISG to keep contracts functioning, cf. section 2.6. Due to good faith in the parties’ business relationship the buyer is obligated to communicate and reply to the seller’s request. If the buyer does not reply within the reasonable period of time it seems to be a fair consequence that the seller can count on the period indicated in his request, so the contract can be kept and additional risks and costs avoided.

7. CONCLUSION

In the previous sections it has been examined in which situations the buyer is entitled to avoid the contract under the CISG after the time for the seller’s performance has passed and in which situations this right can be extended and limited. The main rule under the CISG is that the buyer is only entitled to avoid the contract when the seller’s failure to perform his contractual obligations amounts to a fundamental breach, cf. Art. 49(1)(a) CISG. The fundamental breach evaluation is made under Art. 25 CISG on a case-by-case basis. If the seller is in breach of the contract due to late delivery Art. 49(1)(b) CISG gives the buyer the opportunity to extend his right to avoid the contract. By fixing an additional period of time, a Nachfrist, under Art. 47(1) CISG the buyer can ‘upgrade’ the breach to one that jus-

²⁴⁴ However, if it becomes clear that the seller will not cure the breach, the buyer regains his freedom to avoid the contract, cf. section 5.3.4.

tifies avoidance when the Nachfrist has expired. On the other hand, the seller also has some rights when he fails to perform his obligations under the contract, which can maybe limit the buyer's right to avoid the contract. Art. 48(1) CISG gives the seller the right to perform his obligations under the contract after the date for delivery has passed if he can do so without causing the buyer unreasonable delay, unreasonable inconvenience or uncertainty about reimbursement of the buyer's expenses. Art. 48(2) and (3) CISG gives the seller a right, independent of Art. 48(1) CISG, to request the buyer to indicate whether he will accept delivery within the period indicated in the seller's request.

The problems arise when more than one of these articles is applicable at the same time since they interfere in the same legal sphere. Therefore, it has been the main theme for this thesis to examine how the articles interact.

When the buyer has fixed a Nachfrist for the purposes of avoidance, cf. Art. 47(1) CISG, cf. Art. 49(1)(b) CISG, the buyer's right to avoid the contract immediately due to a fundamental breach, cf. Art. 49(1)(a), is suspended in the Nachfrist period which takes priority, cf. Art. 47(2) CISG. In the situation where the buyer has not yet fixed a Nachfrist it is his choice whether he wants to avoid the contract immediately, cf. Art. 49(1)(a) CISG, or whether he wants to fix a Nachfrist, cf. Art. 49(1)(b) CISG.

The interaction between Art. 48(1) CISG and Art. 49(1)(a) CISG is not easily decided and has been one of the most debated issues in international sales law. The discussion in this thesis has been concentrated on reparable non-conforming goods since this is the most debated type of case amongst legal writers. How to interpret the cross reference in Art. 48(1) CISG, "[s]ubject to article 49", cannot be said with certainty since the legal writers and case law do not agree. However, this does not seem to be a major problem in practice, since the focus has been moved to whether the remedy of cure for breach should have an influence on the fundamental breach evaluation under Art. 25 CISG. The trend amongst legal writers and case law, strongly supported by the legislative history and the CISG policy to keep contracts functioning, is that the availability of curing a breach does have an influence on whether the breach is fundamental. Hence, if a curable breach is not fundamental, the buyer is not entitled to avoid the contract under Art. 49(1)(a) CISG, and there will therefore not be a conflict with Art. 48(1) CISG. Thus, the seller will be entitled to cure the

breach, cf. Art. 48(1) CISG. It is uncertain, though, to what extent cure has an influence on the evaluation under Art. 25 CISG, as it is made on a case-by-case basis.

How to solve the relationship between Art. 49(1)(a) CISG and Art. 48(2) and (3) CISG follows from the second sentence of Art. 48(2) CISG. If the buyer does not reply to the seller's request within a reasonable period of time, he has 'agreed' that the seller can cure the breach within the period indicated in his request. The buyer's right to avoid the contract is suspended during this time period. Thus, the seller's right to cure the breach takes priority.

The discussion of the interaction between Art. 49(1)(b) CISG and Art. 48(1) CISG also seems to be about how to interpret "[s]ubject to article 49". However, not many legal writers concentrate on Art. 49(1)(b) CISG when discussing this issue. The reason for this could be that some of the scholars are not of the opinion that Art. 48(1) CISG is applicable to late delivery. It could also be due to the fact that a Nachfrist has a curative nature. When the buyer fixes a Nachfrist, he gives the seller an opportunity to cure the breach, since the buyer may not avoid the contract in the Nachfrist period, cf. Art. 47(2) CISG. The seller is thereby entitled to cure the breach before the buyer has the right to avoid the contract under Art. 49(1)(b) CISG, and the interaction between the articles is therefore not a major problem in practice.

The relationship between Art. 49(1)(b) CISG and Art. 48(2) and (3) CISG also follows from the second sentence of Art. 48(2) CISG. If the buyer fixes a Nachfrist the seller is entitled to counter this time period with a longer period of time indicated in his request to the buyer. If the buyer does not reply to the seller's request within a reasonable period of time the buyer is not entitled to avoid the contract in the longer period of time requested for by the seller. Hence, the seller's right to cure the breach takes priority.

One of the main principles behind the CISG is that contracts should be kept alive to avoid additional costs and risks, which come with avoidance of contracts, and in light of maintaining good faith and loyalty in the international business life. Avoidance of the contract should be the absolute last remedy the buyer resorts to. The articles and their interaction

must be seen in the light of this policy, and all the above conclusions must be evaluated to fit neatly with this worthy underlying principle of the CISG.

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- The Secretariat Commentary The Secretariat Commentary on the 1978 CISG Draft. The commentary was written under the direction of Eric E. Bergsten and it is trying to illustrate the thinking that went into the draft. One should be a bit careful with using the commentary regarding some of the articles since there have been some changes from the 1978 draft to the final result in the CISG. The commentary is available online at <http://www.cisg.law.pace.edu/cisg/text/cisg-toc.html>.

All the links are last accessed and found functioning 1 August 2010.

7.2. Preparatory work

Abbreviation Full Citation

- The Committee Report ANNEX I: “Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods”. The Commission established a drafting committee, the UNCITRAL Drafting Committee, that was requested to consider the draft Convention on the International Sale of Goods as adopted by the Commission’s Working Group on the International Sale of Goods. Available online at <http://www.cisg.law.pace.edu/cisg/legislative/doc-B01.html>.
- Documentary “Documentary History of the Uniform Law for International Sales. The studies, deliberations and decisions that led to the 1980 United Nations Convention with introductions and explanations”. Edited by John Honnold. Kluwer Law And Taxation Publishers, 1989.

7.3. Cases

Abbreviation	Full citation
AG Nordhorn 14 Jun. 1994	Amtsgericht Nordhorn, 14 June 1994, Germany (Shoes case).
AG Oldenburg in Holstein 24 Apr. 1990	Amtsgericht Oldenburg in Holstein, 24 April 1990, Germany (Fashion textiles case).
Audiencia Provincial de Barcelona 3 Nov. 1997	Audiencia Provincial de Barcelona, 3 November 1997, Spain (Rolled steel case).
Bundesgerichtshof 3 Apr. 1996	Bundesgerichtshof, 3 April 1996, Germany (Cobalt sulphate case).
Bundesgerichtshof 25 Jun. 1997	Bundesgerichtshof, 25 June 1997, Germany (Stainless steel wire case).
BGer 15 Sep. 2000 [4C.105/2000]	Bundesgericht, 15 September 2000, Switzerland [4C.105/2000] (FCF S.A. v. Adriafile Commerciale S.r.l.).
BGer 28 Oct. 1998	Bundesgericht, 28 October 1998, Switzerland (Meat case).
CA Grenoble 26 Apr. 1995	Cour d'appel Grenoble, 26 April 1995, France (Marques Roque Joachim v. Manin Rivière).
CA Grenoble 4 Feb. 1999	Cour d'appel Grenoble, 4 February 1999, France (Ego Fruits v. La Verja Begastri).
CA Versailles 29 Jan. 1998	Cour d'appel Versailles, 29 January 1998, France (Giustina International v. Perfect Circle Europe).
HG Aargau 5 Nov. 2002	Handelsgericht Aargau, 5 November 2002, Switzerland (Inflatable triumphal arch case).
HG des Kantons Zürich 25 Jun. 2007	Handelsgericht des Kantons Zürich, 25 June 2007, Switzerland (Printed materials case).
HG Zürich 26 Apr. 1995	Handelsgericht Zürich, 26 April 1995, Switzerland (Saltwater isolation tank case).

Hof Arnhem 7 Oct. 2008	Gerechtshof Arnhem, 7 October 2008, Netherlands (Arens Sondermaschinen GmbH v. Smit Draad / Draad Nijmegen B.V.).
ICC Arbitration Case No. 7585 of 1992	ICC Arbitration Case No. 7585 of 1992 (Foamed board machinery).
ICC Arbitration Case No. 7531 of 1994	ICC Arbitration Case No. 7531 of 1994 (Scaffold fittings case).
ICC Arbitration Case No. 7754 of Jan. 1995	ICC Arbitration Case No. 7754 of January 1995 (Computer hardware case).
LG München 27 Feb. 2002	Landgericht München, 27 February 2002, Germany (Globes case).
LG Regensburg 24 Sep. 1998	Landgericht Regensburg, 24 September 1998, Germany (Cloth case).
LG Stendal 12 Oct. 2000	Landgericht Stendal, 12 October 2000, Germany (Granite rock case).
OLG Düsseldorf 10 Feb. 1994	Oberlandesgericht Düsseldorf, 10 February 1994, Germany [6 U 119/93] (Fabrics case).
OLG Düsseldorf 24 Apr. 1997	Oberlandesgericht Düsseldorf, 24 April 1997, Germany (Shoes case).
OLG Frankfurt 17 Sep. 1991	Oberlandesgericht Frankfurt, 17 September 1991, Germany (Shoes case).
OLG Frankfurt 18 Jan. 1994	Oberlandesgericht Frankfurt, 18 January 1994, Germany (Shoes case).
OLG Koblenz 31 Jan. 1997	Oberlandesgericht Koblenz, 31 January 1997, Germany (Acrylic blankets case).
OLG Koblenz 21 Nov. 2007	Oberlandesgericht Koblenz, 21 November 2007, Germany (Shoes case).
OLG Köln 22 Feb. 1994	Oberlandesgericht Köln, 22 February 1994, Germany (Rare

	hard wood case).
OLG Köln 14 Oct. 2002	Oberlandesgericht Köln, 14 October 2002, Germany (Designer clothes case).
OLG München 1 Jul. 2002	Oberlandesgericht München, 1 July 2002, Germany (Shoes case).
OLG Naumburg 27 Apr. 1999	Oberlandesgericht Naumburg, 27 April 1999, Germany (Automobile case).
OLG Oldenburg 1 Feb. 1995	Oberlandesgericht Oldenburg, 1 February 1995, Germany (Furniture case).
OLG Stuttgart 12 Mar. 2001	Oberlandesgericht Stuttgart, 12 March 2001, Germany (Apple juice concentrate case).
Pretura circondariale di Parma 24 Nov. 1989	Pretura circondariale di Parma, 24 November 1989, Italy (Foliopack v. Daniplast).
Pretura di Locarno Campagna 27 Apr. 1992	Pretura di Locarno Campagna, 27 April 1992, Switzerland (Furniture case).
Tribunale di Forli 11 Dec. 2008	Tribunale di Forli, 11 December 2008, Italy (Mitias v. Solidea S.r.l.).
Turun hoveikeus 12 Nov. 1997	Turun hoveikeus, 12 November 1997, Finland (Canned food case).