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Seller's right to cure under the
United Nations Convention for
the International Sale of Goods
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Summary

The United Nations Convention on Contracts for The International Sale of Goods is one of the most successful instruments of uniform commercial law worldwide. With 62 countries from a variety of legal backgrounds involved in the preparation process of such an instrument compromises are inevitable regarding the substance of the provisions involving controversial issues. As a result, compromises might subsequently create ambiguities and controversy concerning the interpretation of such provisions. This thesis is intended to elaborate on such a controversial subject that was intensely debated during the preparation of the Convention, namely the two conflicting interests of a seller's right to cure a defect in performance according to article 48 CISG on the one hand and a buyer's right to avoid a contract in the event of a seller's fundamental breach according to article 49 on the other.

In this regard questions arise as to whether a buyer's right to avoid a contract according to article 49 in the event of a seller's fundamental breach takes precedence over article 48 in any event? Or, whether the fundamentality of the breach should be considered in the light of an offer by the seller to cure the defect?

These questions are of importance to sellers as an avoidance of a contract by a buyer will cause a seller to not only lose the profit in the price contracted for but also incur expenses for transportation and storage in returning the dispatched goods. The right to avoid a contract by a buyer is equally of importance as this might be preferable to a cure in situations where a buyer has lost faith in a seller's ability to perform or in a situation where avoidance would cause less damage to his business compared to keeping the contract afoot with cure in combination with a remedy in damages e.g. loss of contracts with other parties. The question can also be of importance to buyers in a fluctuating market where a buyer would seek grounds for escaping the contract for more profitable deals.

In order to answer the above questions the interpretative methods of the Convention are analyzed. Reference to article 7 of the Convention is made as it provides the set of rules to be followed when interpreting the Convention. It is concluded that article 7 provides that the Convention needs to be interpreted in an

autonomous way, free from concepts and principles established in domestic law and that the provision imposes a duty to act in good faith between parties to contracts governed by the CISG. Additionally, it is established that it is consistent with the principles set out in article 7 to have regard to case law from different jurisdictions as well as scholarly writings, the legislative history of the Convention and other international instruments on commercial law such as the UNIDROIT Principles of International Commercial Contracts when interpreting the Convention.

Although scholars remain divided on the subject as to whether the right to avoid a contract always takes precedence over a seller's right to cure, a majority of scholars favors the approach in which article 49 as a rule does not take precedence to article 48 and that fundamental breach should be viewed in the light of an offer to cure. Others consider that a seller is not allowed to cure in the event of fundamental breach and a buyer has avoided the contract. Examples in case law confirm the support of the prevailing opinion among scholars in that the courts look to whether the seller is willing to cure and such a cure would be possible and reasonable under the circumstances.

Regarding the legislative history of the Convention it has been found that there is no conclusive evidence to support any of the approaches taken in scholarly opinion. However, it is concluded that due to the discussions among delegates of the Vienna convention a strong case can be made for the approach that considers that article 49 does not generally take precedence over article 48 and that fundamental breach should be considered in the light of an offer to cure.

Concerning the principle of good faith in the Convention it was found that the principle is not suited for obligating a buyer to allow a seller to cure as it works in conjunction with the intention of the parties. Hence, the use of the principle would only be appropriate in this setting when a party acts in contravention to his promise.

As a final point the conclusion is reached that the use of The UNIDROIT Principles in interpreting the Convention show that a buyer's right to avoid a contract for fundamental breach does not preclude a seller from curing a defect in performance.

As a result of the above, it is concluded that the question as to whether article 49 takes precedence over article 48 should be answered in the negative, with the exception for situations where a cure would be unreasonably burdensome to a buyer. Such situations would be present where a buyer loses faith in a seller's ability to perform, cure have been allowed but failed or where a cure would be considered as unreasonably inconvenient to the buyer under the circumstances. Consequently, the question whether fundamental breach should be viewed in light of a seller's willingness to cure should be answered in the positive.

Sammanfattning

Förenta nationernas konvention angående avtal om internationella köp av varor är till antalet länder som ratificerat densamma en av de mest lyckade internationella regelverk mellan stater hittills. 62 deltagande länder i den förberedande processen, varav många från olika juridiska system, medförde att kompromisser angående innehållet i regelverket var oundvikliga. Som ett resultat av detta kan tvetydigheter och kontroverser uppstå kring tolkningen av bestämmelser i regelverket. Avsikten med detta examensarbete är att belysa ett av de kontroversiella ämnen som debatterades under förberedelsen av konventionen, nämligen avvägningen mellan å ena sidan säljarens rätt att avhjälpa fel i vara enligt artikel 48 och å andra sidan köparens rätt att häva köp enligt artikel 49.

Den huvudsakliga fråga som behandlas i uppsatsen är huruvida en säljare är berättigad till att avhjälpa fel i en vara då densamma har begått ett väsentligt avtalsbrott, när köparen avser att häva avtalet dem emellan. Således är de frågor som avses att bli besvarade i examensarbetet huruvida köparens rätt att häva avtal på grund av säljares väsentliga avtalsbrott enligt artikel 49 har prioritet över säljares rätt att avhjälpa fel i vara enligt artikel 48 oavkortat eller om väsentligheten i säljarens avtalsbrott ska avgöras med hänsyn till säljarens villighet att avhjälpa fel i varan.

Dessa frågor kan få betydelse för säljaren då hävning av ett avtal av köparen kan innebära inte bara en förlust av köpeskillingen utan även föra med sig stora lagrings- och transportkostnader för att returnera godset. Rätten att häva ett avtal är också av stor betydelse för en köpare då detta kan vara att föredra framför en avhjälpling av felet i ett förhållande där köparen tappat förtroendet för säljaren eller i en situation där hävning av avtalet skulle innebära en mindre förlust än att avhjälpa felet i kombination med ett skadeståndsanspråk, t.ex. förlust av kontrakt med andra parter. Frågan kan även vara aktuell för köpare vid fluktuerande marknadspriser, vilket kan utgöra skäl för att undersöka möjligheter att dra sig ur avtal för mer lönsamma sådana.

För att besvara de ovanstående frågorna har olika metoder för att tolka konventionen granskats. Således har artikel 7 CISG analyserats då bestämmelsen

föreskriver de principer enligt, vilka konventionen ska tolkas. I denna mening har det konstaterats att artikel 7 föreskriver att konventionen ska tolkas autonomt, fritt från principer och koncept utvecklade i nationell rätt, samt att bestämmelsen innehåller en ”godtrosprincip” som gäller mellan parter vars avtal regleras av konventionen. Därtill, har det konstaterats att det är förenligt med de principer som är utsatta i artikel 7 att ta hänsyn till rättspraxis och doktrin från olika konventionsstater, förarbeten till konventionen och andra internationella regelverk för internationell handel vid tolkning av konventionen, så som The UNIDROIT Principles of International Commercial Contracts.

Även om doktrinen kring ämnet står delad kan en majoritet urskiljas till fördel för ståndpunkten som förespråkar att artikel 49 inte har företräde framför artikel 48, samt att väsentligheten i ett avtalsbrott ska bedömas med hänsyn till säljarens vilja att avhjälpa fel i varan. En minoritet menar dock att säljaren inte besitter en rätt att avhjälpa fel i vara i det fall köparen har hävt avtalet. Rättspraxis bekräftar den mening som förespråkas av majoriteten i doktrinen i det avseendet att domstolar ser till omständigheten huruvida säljaren är beredd att avhjälpa felet och huruvida ett avhjälpande kan anses som rimligt och möjligt under omständigheterna.

Beträffande förarbetena till konventionen har det konstaterats att inget definitivt svar kan ges på frågan om företrädesrätten till artikel 49 i konventionen. Inte desto mindre, har det konstaterats att döma efter de diskussioner som fördes delegationerna emellan vid mötet i Wien så finns tydliga indikationer på att artikel 49 inte skall ges prioritet över artikel 48. Likaså, indikerar diskussionerna att väsentligheten i ett avtalsbrott skall bedömas med hänsyn till säljares vilja att avhjälpa fel i vara.

Beträffande ”godtrosprincipen” i anknytning till säljarens rätt att avhjälpa fel i vara har det konstaterats att principen inte är lämpad för att tvinga köparen att tillmötesgå säljarens vilja att avhjälpa fel då principen fungerar i samband parternas intentioner. Således, är principen endast lämplig i situationer då köparen avtalat med säljaren om att avhjälpa fel men sedermera agerar mot sitt löfte.

Beträffande användningen av UNIDROIT Principles för att tolka konventionen har det konstaterats att dessa principer talar för att köparens hävning av avtalet inte hindrar säljaren från att avhjälpa fel i varan.

Avslutningsvis konstateras att frågan huruvida artikel 49 har prioritet över artikel 48 är avhängig av huruvida ett avhjälpande skulle anses som betungande för köparen. Sådana situationer kan således uppstå då köparen tappat förtroende för säljaren, då säljaren har beretts möjlighet att avhjälpa fel utan positivt resultat eller då ett avhjälpande är att anses som extra betungande under omständigheterna i det enskilda fallet. Således nås slutsatsen att väsentligheten i säljarens avtalsbrott skall bedömas med hänsyn till säljarens villighet att avhjälpa fel i varan.

Preface

I would like to extend my gratitude to my supervisor Professor Proshanto Mukherjee for his efforts in reviewing and commenting on this thesis. I would also like to take the opportunity to thank Joachim Bernström for his assistance in commenting on parts of this thesis and all the good discussions surrounding the subject of this thesis during the work.

Abbreviations

CISG	United Nations Convention on contracts for the International Sale of Goods
CLOUT	Case Law on UNCITRAL Texts
ICC	International Chamber of Commerce
ULIS	Convention Relating to a Uniform Law on the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UN	United Nations
UNIDROIT	International Institute for the Unification of Private Law

1 Introduction

The United Nations Convention on Contracts for The International Sale of Goods (hereinafter referred to as the CISG) is a sales code that governs contracts for sale of goods between parties whose businesses are based in different countries and provides the parties with a common sales law.¹ It was unanimously approved by a diplomatic conference of 62 countries in Vienna on April 11 1980.² In January 1 1988 ten countries had deposited their instruments of acceptance and the convention came into force, as provided by article 99 of the convention.³ As of today the convention has gained wide spread acceptance from countries all over the world. The United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) reports that 77 countries have adopted the convention as of August 1 2011,⁴ which shows that it has become one of the most successful instruments of uniform commercial law worldwide.⁵

With the number of countries involved in preparing the convention it is difficult to reconcile the different interests regarding the meaning and content of the provisions, especially considering the variety of different legal systems involved in the process. Compromises are inevitable, which can result in ambiguities as to the content in certain provisions. As we shall see one of these ambiguities that was intensely debated during the preparation of the convention was whether a buyer's right to avoid a contract according to article 49 in the event of fundamental a breach should take precedence in any event or if the right of a seller to remedy a failure to perform any of his obligations according to article 48 should be allowed even if a breach could be considered as fundamental.⁶

Article 48 (1) states:

¹ See article 1 CISG

² See A/CONF.97/19, Official Records

³ Honnold, *The Sales Convention: Background, Status, Application*, page 4, available at <http://www.cisg.law.pace.edu/cisg/biblio/honnond-background.html>

⁴ <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>

⁵ Fundamental Breach of Contract Under the CISG: A Controversial Rule, Proceedings of the Annual Meeting (American Society of International Law) Vol: 101, Page: 407

⁶ Huber, *The CISG A new text book for students and practitioners*, Sellier European Law Publishers 2007, page 222

“Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention”.

The meaning of the opening words “subject to” of article 48 has created controversy among scholars and the debate over a seller’s right to cure did not end at the Vienna conference.⁷ These rights are important to both buyers and sellers. Avoidance of the contract will force a seller to take back goods delivered. In this sense a seller’s right to remedy a late performance or delivery of non-conforming goods is important since he might incur expenses for storage and transportation of the goods in doing so. A buyer’s right to avoid a contract is equally important in situations where a defect in goods or late performance would cause the buyer to lose faith in a seller’s ability to perform or suffer substantial loss e.g. loss of contracts with other parties. In such cases avoidance of the contract might be preferable to the buyer instead of a cure by the seller.

The parties to a contract governed by the CISG have the opportunity to provide for whether the seller will have a right to cure a defect in performance and under which circumstances he may do so.⁸ It is also common in industry practices and the various manufacturing, export and import, retailing trades in cases involving manufactured goods of substantial value, that the seller reserves the right in the contract to cure defective goods.⁹ But anticipating every possible situation might be difficult and even though it is common to include a clause concerning the right of a seller to cure in contracts in some areas, not all provide the contract with a clause to that effect. Thus, even though that right can provide some certainty for

⁷ Huber, *The CISG A new text book for students and practitioners*, page 219, who notes that the wording of article 48 has created considerable controversy. See also Will, in Bianca-Bonell *Commentary on the International Sales Law*, page 348, who is of the opinion that the relationship between article 48 and 49 remains unsettled. Schneider, *The Seller’s Right to Cure under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods*, page 83, notes that opinion as to a seller’s right to cure is divergent.

⁸ See article 6 which provides; “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

⁹ Koch, in Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 131

sellers of goods, it does not provide a solution to the controversy surrounding a seller's right to cure in article 48. In this sense the relationship between the corresponding rights in article 48 and 49 warrants clarity.

1.1 Purpose and method

The purpose of this thesis is to provide a comprehensive account for the scope of a seller's right to remedy a failure to perform his obligations provided in article 48 of the CISG in relation to a buyer's right to avoid a contract for fundamental breach according to article 49. The relationship between a seller's right to cure a defect and a buyer's right to avoid a contract involves two questions that are intended to be answered; does a buyer's right to avoid a contract according to article 49 and 25 of the CISG take precedence over a seller's right to cure a failure to perform any of his obligations according to article 48? Would it make any difference as to the buyer's right to avoid a contract if the fundamentality of the breach by the seller could be removed without causing the buyer unreasonable inconvenience i.e. should the presence of a fundamental breach be construed in the light of an offer by a seller to cure the defect?

To answer these questions and elucidate the relationship between the rights of the parties we shall as a starting point, examine how the CISG is to be interpreted. The CISG contains its own set of principles for that purpose in article 7. Thus, an account for these principles and other interpretative methods in line with these principles will be given. These principles will then be applied to the issue at hand. Consequently, as we shall see, article 7 provides that the convention should be interpreted in a globally uniform way and for that reason an extract of case law from different jurisdictions to serve the reader with practical examples and reflections of how the principle of a seller's right to cure a failure in performance has been applied under certain circumstances. Scholarly opinion also plays an important role in interpreting the convention and accordingly different standpoints on the subject will be examined. The legislative history of the CISG will also be consulted as it will shed light on the discussions held amongst the delegates in preparing the convention, which in turn will provide guidance as to how the relationship between buyer's rights of avoidance and seller's rights of cure should be construed. The impact of the principle of good faith inherent in the CISG will also be examined in relation to the party's rights. Finally the concept of a seller's

right to cure in the UNIDROIT Principles will be examined as this perhaps, from a comparative perspective, will provide clarity as to how the relationship between buyers' and sellers' related rights should be interpreted.

The thesis is written from an international perspective and is intended to focus on how a seller's right to cure after the date of delivery in article 48 in the CISG in relation to article 49 has been commonly interpreted and applied. A general understanding of the CISG and its remedial system is presumed. Even though a buyer's right to avoid a contract in article 49 is dependent on the presence of a fundamental breach according to article 25 the thesis will not account for the elements contained therein. Accordingly, the thesis will only deal with the presence of fundamental breach where it is relevant for a seller's right to cure a failure to perform his obligations.

2 Article 7 and the rules for interpretation of the CISG

2.1 Introduction

Under a uniform sales law such as the CISG with 77 adopting countries¹⁰, it is natural for disputes to arise regarding the meanings of various words or phrases in its provisions. Thus, the question arises as to how the CISG's concepts and terms should be interpreted, especially considering the fact that the convention comes in six official languages that are equally authentic.¹¹ Article 7 lays down the general principles on how the convention should be interpreted.¹² As a result we shall examine these principles to establish the most suitable way to interpret the provisions of the CISG.

2.2 Article 7 CISG

The first paragraph in article 7 provides that in interpreting the provisions contained in the CISG regard is to be had to its "international character", the "need to promote uniformity in its application" and the "observance of good faith". The first two requisites indicate that the provision prescribes an autonomous approach to be adopted.¹³

Consequently, the provisions and terms contained in the CISG must be interpreted without recourse to the meanings of terms and concepts developed under domestic

¹⁰ See database provided by the Institute of International Commercial Law at PACE University, available at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>, see also UNCITRAL web page, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

¹¹ See signature clause of the CISG

¹² (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

¹³ Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 7, Schlechtriem and Butler, *UN Law on International sales The UN Convention on the International Sale of Goods*, page 48

law. The result would otherwise not only be contradictory to the principle of an autonomous approach vested in article 7 (1), but would also promote forum shopping.¹⁴ For example it would be inconsistent with the convention to interpret the concept of fundamental breach in article 25 in accordance with the English law of contract, since the doctrine provides a non-breaching party with the remedy of escaping exemption clauses in contracts.¹⁵ However, it might be the case that a term in the CISG has been given the same meaning as under domestic law. In such a case it has been suggested that recourse to the domestic interpretation of the term is not excluded by the aim for promoting international uniformity, save for unclear conclusions.¹⁶

In contrast to the English jurisprudence on contract law, where statutes such as the U.K. Sale of Goods Act could be viewed as a small component of a larger structure of un-codified common law, where statute is given a narrow view, the CISG is better off given a broader meaning, and an international interpretation.¹⁷ The reason for this would be that in viewing the CISG in the narrow sense would not leave much for a person searching for a solution to a problem that was not confined within the convention; since compared with the English system there are no

¹⁴ Concerning application of domestic law: Lookofsky, *Understanding the CISG*, page 30, and concerning forum shopping: Honnold, *Uniform Law for International Sales under the United Nations Convention*, 4th edition, 2009, page 92, and Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 11 note 40; Honnold, *Uniform Law for International Sales under the United Nations Convention*, second edition 1991, page 142, stating: "The settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persisted in divergent interpretations of the Convention." on a different holding see: Enderlein, "Uniform Law and its Application by Judges and Arbitrators," (Rome, September 7-10, 1987), at 340-341, who is of the opinion that the lack of uniformity in the interpretation of uniform laws has no influence on the choice of forum, so the danger of forum shopping is not real in these circumstances.

¹⁵ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999), page 204

¹⁶ Huber, *Some introductory remarks on the CISG*, page 228, available at <http://www.cisg.law.pace.edu/cisg/biblio/huber.html#5>. And Koch, *The concept of fundamental breach under the United Nations Convention on Contracts for the International Sale of Goods*, page 8, available at http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=20987&local_base=GEN01-MCG02

¹⁷ Expressing support for this view seems well established, e.g. see: Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 11, Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 62

established principles in case law to rely on; instead one merely resorts to private international law and differing national solutions.¹⁸

If the meaning of a particular word in the CISG is evident and clear to the interpreter there is no need to consult other methods. However, in situations where a term is ambiguous difficulties are presented by the fact that only the official texts of the convention are of decisive character and even more so considering the fact that all six languages are equally authentic. A translation into non-official languages would only serve as prima facie presumption as to the meaning of the words therein.¹⁹

Situations might arise where there are discrepancies between the official language versions. In such a case a comparison between the different versions have to be made to ascertain the correct meaning.²⁰ If the discrepancy would persist, the English and French versions seems to be the most authoritative ones considering the fact that the negotiations of the conference were carried out in those languages and English was the language used by the drafting committee²¹

2.3 Observance of good faith in international trade

The third prerequisite in article 7 (1) requires that in interpreting the convention regard is to be had to the need to promote “the observance of good faith in international trade”. Any guidance to how the element of the provision should be interpreted is not provided in the CISG. Looking at the legislative history²² of the

¹⁸ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 1982, section 21

¹⁹ Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, page 316

²⁰ Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, page 316, Koch, *The concept of fundamental breach under the United Nations Convention on Contracts for the International Sale of Goods*, page 11

²¹ Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 64 and Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, page 316
Diedrich reaches the conclusion that English and French takes precedence but takes the route through article 33 of the 1969 Vienna convention, which focuses on the intention of the conference, to reach his decision.

²² See Summary Records of the 3rd, 5th and 11th Meetings of the first Committee in A/CONF.97/19, Official Records

convention shows that the provision was a result of a compromise between delegates at the Vienna conference.²³ On the one side there were delegates who supported an inclusion of a general provision that imposed a duty by the parties to contracts to observe principles of fair dealing and act in good faith, while on the other there were delegates who opposed such an inclusion due to its vagueness and imprecision.²⁴ The compromise concerning article 7 (1) by the conference resulted in a general acceptance to a duty to observe good faith when interpreting the convention.²⁵ However, the 1978 draft of article 6 did not differ to any large extent compared to the final version that became article 7 (1).²⁶ So, it appears that the compromise did not end the controversy between the divergent views as scholars remain divided on the scope of the duty of good faith within article 7.²⁷ Some commentators would say that there is no duty of good faith among the parties in each contract for the sale of goods and that the observance of good faith is merely a tool for interpreting the convention.²⁸ Others consider there to be an existing duty of good faith under the first paragraph of article 7 as a general principle due to the

²³ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 1982, section 94

²⁴ *Ibid*

²⁵ *Ibid*. For a differing view on the legislative history see: Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 63 where he states: “Despite its narrow wording, Article 7 (1) cannot be confined to the interpretation of the CISG’s express rules. Not only the impossibility of differentiating clearly between interpreting and supplementing a provision militates against such an assumption, but also the history of Article 7. The deletion of the word “application”, which appeared alongside the reference to “interpretation”, was considered to be a purely editorial matter.”

²⁶ The difference between the 1978 draft and final version of article 7(1) was the word “application” next to the word “interpretation” and the change of “the need to promote uniformity” to “the need to promote uniformity in its application”. See match-up of the article at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-07.html>

²⁷ Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 13, Koch, *The concept of fundamental breach under the United Nations Convention on Contracts for the International Sale of Goods*, page 20, note 85

²⁸ Huber, *Some introductory remarks on the CISG*, page 228, available at <http://www.cisg.law.pace.edu/cisg/biblio/huber.html#5> and Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws*, page 56, who is of the opinion that “Taken literally, this provision does no more than instruct a court interpreting the Convention’s provision to *consider* the importance of the listed factors.” And considers that “[a]s one of the delegates who opposed any reference to good faith, it strikes me as a perversion of the compromise to let a general principle of good faith in by the back door.” Available at <http://www.trans-lex.org/122100> see also Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 14, who recognizes the compromise in the legislative history and states “[the convention] cannot now be given the meaning originally suggested by those advocating the imposition of a positive duty of good faith on the parties, as doing so would reverse the intent of the compromise.”

hardship in practice of differentiating between interpreting the provisions without applying it to the conduct between the parties; giving the legislative history a lesser meaning.²⁹ Thus, they also recognize the concept as one of the general principles in the second paragraph of article 7 that can be used in gap-filling concerning questions that are governed by the convention but not expressly settled by it.³⁰ Some authors have taken the route through the second paragraph directly to deduce a concept of good faith by inferring such a principle on the grounds that many provisions in the convention are based on a standard of reasonableness.³¹ However, there seems to be a consensus among scholars that reference to principles of good faith established in domestic law is excluded by the general principles vested in article 7.³² It would also be inconsistent with the wording of article 7 for a court in a dispute to replace a provision in the convention with an application of a general principle of good faith because it considers it fairer.³³

Looking at the Secretariat Commentary on article 7, the closest thing to an official commentary, shows that the provisions that include the concept of reasonableness

²⁹ See note 41, and Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, page 391, available at <http://www.cisg.law.pace.edu/cisg/biblio/lando5.html#41> who states: "it is not possible in practice to distinguish a problem of interpretation from one of supplementation. It is not reasonable that a question of interpretation of a rule in the Convention is, and the interpretation of a term in the sales contract is not to be governed by the principle of good faith". See also, Zeller, *Four-Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, who says in chapter 4.1.h.: "The *travaux préparatoires* reveal that article 7 is a compromise and that, in order to reach a compromise, concessions had to be made. The "safe" conclusion is that only the final product, namely the CISG itself is the prime document to be taken into consideration. Article 7(1) is clear in its mandate to promote uniformity by applying good faith. It is logically impossible to apply good faith to the Convention as a whole without influencing or affecting the behavior of the parties. The discussion confirms the view this thesis has taken that *travaux préparatoires* arguably are predominantly of historical interest." Available at: <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html#chp4>
Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws*, page 56

³⁰ Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 65

³¹ See for example note 46, and Bell, *How the Fact of Accepting Good Faith as a General Principle of the CISG Will Bring More Uniformity, Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005-2006*, page 20

³² Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, page 391, available at <http://www.cisg.law.pace.edu/cisg/biblio/lando5.html#41> and Felemegas *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 14, Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 63

³³ Huber, *Some introductory remarks on the CISG*, page 228, available at <http://www.cisg.law.pace.edu/cisg/biblio/huber.html#5>

are manifestations of the requirement of the observance of good faith.³⁴ In addition to this, article 9³⁵ provides that the parties are bound by any usage or practices established between the parties, and article 8³⁶ provides that statements or conduct of a party are to be interpreted according to what the other party knew, ought to have known or as a reasonable person under the same circumstance would understand it. The conventions provisions should be interpreted in good faith. Together the articles results in the obligation for the parties to negotiate in good faith. The intent of the parties in article 8 is thus linked with articles 9 and 7, which

³⁴ For a list of manifestations of the good faith principle in the convention see: GUIDE TO CISG ARTICLE 7, Secretariat Commentary (closest counterpart to an Official Commentary), available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html> which says: There are numerous applications of this principle in particular provisions of the Convention. Among the manifestations of the requirement of the observance of good faith are the rules contained in the following articles:

- article 14(2)(b) [*draft counterpart of CISG article 16(2)(b)*] on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer;
- article 19(2) [*draft counterpart of CISG article 21(2)*] on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;
- article 27(2) [*draft counterpart of CISG 29(2)*] in relation to the preclusion of a party from relying on a provision in a contract that modification or abrogation [*termination*] of the contract must be in writing;
- articles 35 and 44 [*draft counterpart of CISG articles 37 and 38*] on the rights of a seller to remedy non-conformities in the goods;
- article 38 [*draft counterpart of CISG article 40*] which precludes the seller from relying on the fact that notice of non-conformity has not been given by the buyer in accordance with articles 36 and 37 [*draft counterpart of CISG articles 38 and 39*] if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer;
- articles 45(2), 60(2) and 67 [*draft counterpart of CISG articles 49(2), 64(2) and 82*] on the loss of the right to declare the contract avoided;
- articles 74 and 77 [*draft counterpart of CISG articles 85 to 88*] which impose on the parties obligations to take steps to preserve the goods.

³⁵ (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

³⁶ Article 8 provides: (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

results in the fact that good faith governs the conduct between the contractual parties on the basis of article 7 (1).³⁷

The principle of good faith has been applied in the broader sense as an obligation between the parties by courts from different jurisdictions.³⁸ In the majority of the reported cases concerning the good faith principle, the courts have considered the principle to be an obligation among the parties.³⁹ Thus, it appears as the debate over how the concept of good faith is to be interpreted is of a purely academic character.

With the above having been said it is in the present writer's view that distinguishing between interpreting the convention in good faith and not applying the principle between the parties to international sales contracts, seems an impossible task. One should keep in mind that the CISG is the result of negotiations between states which will naturally lead to textual compromises, which sometimes remain unresolved and pose substantial difficulties.⁴⁰ Despite the compromise of the Vienna conference it is the final text of the convention that needs to be considered when it is applied and article 7 clearly prescribes the application of good faith to promote uniformity. Therefore it appears that the view

³⁷ For a similar affirmation see: Zeller, *Damages under the convention on contracts for the international sale of goods*, page 24

³⁸ See for example: : United States, *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., et al.*, U.S District Court, S.D., New York, 98 Civ. 861, 99 Civ. 3607, available at <http://www.unilex.info/case.cfm?id=739>, United States, *BP Oil Int'l v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003), available at <http://cisgw3.law.pace.edu/cases/030611u1.html> Netherlands, 23 April 2003 Appellate Court 's-Gravenhage (*Rynpoort Trading v. Meneba Meel*), available at: <http://cisgw3.law.pace.edu/cases/030423n1.html>, where the court moved away from the caveat emptor principle, Spain, 7 June 2003, Audiencia Provincial Appellate Court Valencia No.142/2003, available at <http://cisgw3.law.pace.edu/cases/030607s4.html>, Belgium, 15 May 2002, Hof van Beroep Appellate Court, Gent No. 2001/AR/0180, available at <http://cisg3.law.pace.edu/cases/020515b1.html>, Italy, 25 Feb. 2004, Tribunale District Court Padova No. 40552, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

³⁹ The statement is based on case law reported at PACE web-site. In September 2011 there were 96 cases reported on PACE Law School, Institute of International Commercial Law, involving the good faith principle. Available at http://www.cisg.law.pace.edu/cgi-bin/isearch?DATABASE=cases2&SEARCH_TYPE=ADVANCED&ISEARCH_TERM=Good+faith&ELEMENT_SET=TITLE&MAXHITS=500. Case law on UNCITRAL texts (CLOUT) only had 20 reported cases involving article 7, available at <http://www.uncitral.org/clout/searchDocument.do?jsessionid=8CFDFEB3921C9E3B8CBA D25BBF7BDF68.cl013>

⁴⁰ Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 19

supporting a duty of good faith among the parties through article 7 (1) is the most plausible one. This view also seems to be in line with the majority of scholars.⁴¹

As there is a duty among the parties to negotiate in good faith the result is that it might invalidate the invocation of certain rights under the convention if one of the parties negotiates in bad faith. Whether a contractual term can invalidate a party's statutory right to avoid the contract, will be discussed later in this thesis.

2.4 Gap-filling in the convention

Article 7 (2)⁴² serves the purpose of gap-filling in situations where the text of the provisions does not clearly settle a certain issue. However, since the concept of fundamental breach (article 25) and a possible right to cure (article 48 (1)) are expressly settled by the convention one should not have to resort to the general principles or the rules under private international law. Thus, the question whether fundamental breach should be determined in the light of a seller's right to cure, should be governed by the rules of interpretation under article 7 (1).

2.5 Other methods to interpret the convention

Even though the CISG demands an autonomous interpretation, without recourse to legal principles established under domestic law, the convention may still be interpreted in different ways by courts in different countries. Article 7 does not, for example, provide any guidance to the proper steps to be taken when a provision is ambiguous. The question is what methods are to be used when interpreting the CISG?

⁴¹ For a similar conclusion see Sheehy, *Good Faith in the CISG: The Interpretation Problems of Article 7, Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005-2006* page 162. Also: Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 14. For support of such interpretation see: Bonell, in Bianca-Bonell *Commentary on the International Sales Law*, page 83, available at <http://www.cisg.law.pace.edu/cisg/biblio/bonell-bb7.html> Lookofsky, excerpt from *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, Article 7 *Convention Interpretation*, page 49, available at <http://www.cisg.law.pace.edu/cisg/biblio/loo7.html>. Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 63. Zeller, *Four-Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*

⁴² See article 7

The CISG is an agreement between states and therefore one might think of the 1969 Vienna Convention as a tool for interpretation. However, the 1969 Vienna Convention on the Law of treaties is not directly applicable to the interpretation of the CISG for the simple reason that it is solely concerned with the obligations between states and not the obligations of parties to a sales contract.⁴³ As for the latter the CISG contains its own rules for interpretation in article 7. Even so, the CISG is partially concerned with the obligations between states but only as far as part IV is concerned, e.g. rules concerning reservations by states to limit its obligations under the convention. These obligations should be construed in light of the 1969 Vienna Convention.⁴⁴

There are provisions in the 1969 Vienna Convention that are similar to methods of interpretation in civil law and might seem useful in the interpretation of a uniform law such as the CISG. Article 31 to 33 covers the provisions for interpretation of treaties. Article 31 prescribes that a treaty is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” While article 32 prescribes that recourse may be had to supplementary means of interpretation such as preparatory work to confirm the grammatical meaning according to article 31 or to determine the meaning when the grammatical interpretation of a provision in a treaty “leads to a result which is manifestly absurd or unreasonable”. Finally article 33 regulates the situation when a treaty is drawn up in several languages.

⁴³ E.g. see article 2.1.a. 1969 Convention stating that a treaty needs to be in written form in contrast to article 11 CISG which states that a contract can be concluded orally. See Honnold, *Uniform Law for International Sales under the United Nations Convention*, 4th edition, Kluwer Law International 2009, § 103

⁴⁴ For a similar affirmation see Honnold, *Uniform Law for International Sales under the United Nations Convention*, 4th edition, Kluwer Law International 2009, § 103: “not surprisingly, these rules call for a more flexible approach than would be acceptable for rules defining the obligations of states. This flexibility is epitomized by the fact that virtually all the provisions of parts I-III (Arts. 1-88) yield to the contract made by the seller and buyer; in short, the heart of the Sales Convention is the contract of sale.” See also Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, page 313, available at <http://cisgw3.law.pace.edu/cisg/biblio/Diedrich.html> “the Vienna Convention states that interpretation principles are rigid and therefore only applicable to state obligations. In contrast, article 6 gives the parties the freedom to derogate from any of the CISG's provisions and article 11 allows parties to contract orally. This flexibility calls for an equally flexible method for interpreting the obligations of parties, as already stated in article 7, to give full effect to the convention's general rules and purposes.” See Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 62 note 20

It has been said that since the CISG is focused on the contract between buyers and sellers its interpretation calls for a more detailed or flexible approach than that for interpreting obligations according to a treaty between states.⁴⁵ To this end, where the rules of the 1969 Vienna convention are similar to the ones that are used for interpretation in civil law they are redundant and where they are not they simply do not apply.⁴⁶

There are however other interpretative aids at the disposal of interpreters of the CISG. To this effect, there seems to be a consensus among scholars that the most obvious way to promote uniformity in the application of the convention as prescribed by article 7 (1), is the use of scholarly writings and consultation of foreign case law to avoid diverse and conflicting interpretations when facing an ambiguous legal issue.⁴⁷ The weight given to academic writing by judges differs from civil law to common law countries.⁴⁸ Even though the use of academic writing has traditionally played a smaller role in common law jurisdictions such as England and a more prominent role in civil law jurisdictions and the U.S., the need to create uniformity in international law has led to an increase in the use of reference to scholarly works even in England.⁴⁹

⁴⁵ Ibid

⁴⁶ For a similar affirmation see Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 62. He notes that there are situations where those rules might be useful but (note 22): “apart from article 33 there will seldom be a need to do so.” Because “the rules of international law are either superfluous for the CISG, because they are identical with general rules of interpretation of civil law, or they are unsuitable.” See also similar conclusion in Enderlein, *Uniform Law and its Application by Judges and Arbitrators*, (Rome, 7-10 September 1987) page 336

⁴⁷ See for example: Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: article 7 and Uniform Interpretation*, *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2000-2001*, page 250, Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 62, see also; Honnold, *Uniform Law for International Sales under the United Nations Convention*, 4th edition, 2009, section 92

⁴⁸ Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 18 and Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 1982, section 92

⁴⁹ Ibid. Following the case *Fothergill v. Monarch Airlines* [1980] 2 All E.R. 696 (H.L.) English law took a decisive step in approving the use of scholarly writing and foreign case law when interpreting conventions. The case involved interpretation of the Warsaw Convention on the liability of air carriers due to the loss of baggage by a passenger. Four of five opinions concluded that consideration should be given to scholarly writing, foreign case law and the legislative history, however with differing opinions about the weight to be given to the different sources.

Scholars commenting on the CISG often refer to the legislative history of the CISG.⁵⁰ To establish the aim and purpose of a provision the legislative history or *travaux préparatoires* must be consulted. The legislative history would also be binding on the contracting states' courts since the intentions of the conference resulted in law that was ratified by the states.⁵¹ The legislative history of the convention is rich and one referring to it should take into account the documents and reports from the constituent bodies of the UNCITRAL, the secretariat and its commentaries on the 1978 draft and the summary records of the first committee and plenary meetings of the diplomatic conference. All these documents can be accessed through the UNCITRAL website.⁵² Moreover, since the preparation of the CISG is based on The Hague conventions and provisions in them were retained in the CISG they might have to be considered when referring to the legislative history.⁵³

The secretariat commentaries were submitted to the 1980 conference to be used as a guide to better understand the meaning of the relevant provisions. To the extent that the provisions in the 1978 draft match up to the final text in the CISG the secretariat commentary is the most authoritative source to which reference can be made.⁵⁴

Reference to legislative history of an international conference is not always conclusive evidence of a certain meaning of a provision. With respect to the difficulty in determining the opinion of a conference that is based on political

⁵⁰ Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: article 7 and Uniform Interpretation*, *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2000-2001*, page 250, Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 62, see also; Honnold, *Uniform Law for International Sales under the United Nations Convention*, 4th edition 2009, section 92

⁵¹ Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, 8 *Pace International L. Rev.* (1996) 303-338, page 320

⁵² <http://www.uncitral.org/uncitral/en/commission/sessions.html>

⁵³ Honnold, *Uniform Law for International Sales under the United Nations Convention*, 4th edition 2009, § 88 where Honnold considers that in the instances where the Hague solution was retained “the discussions shed light on the common understanding of the Hague solution and the reasons for its retention.”

⁵⁴ E.g. see Secretariat Commentary to article 7 (1) available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html> which states: “To the extent it is relevant to the Official Text, the Secretariat Commentary on the 1978 Draft is perhaps the most authoritative source one can cite. It is the closest counterpart to an Official Commentary on the CISG. A match-up of this article of the 1978 Draft with the version adopted for the Official Text is necessary to document the relevancy of the Secretariat Commentary on this article.”

negotiations between states, legislative history should be approached with caution.⁵⁵ It has been said that “a statement by one delegate does not establish a prevailing viewpoint, and silence following a statement does not establish assent.”⁵⁶ Koch points to one of the difficulties inherent in negotiations of a conference saying that delegates might not reveal their true intentions in negotiations at a conference, because in the end it is the final text that needs to be agreed upon, not the differing views or opinions.⁵⁷ Thus, difference in intention might well underlie a certain provision.

One must also keep in mind that an instrument such as the CISG that is not prone to amendments must be susceptible to flexible interpretations.⁵⁸ The original intention of drafters is only one of the meanings taken into account of its current meanings.⁵⁹ The meanings given to a certain text can change over time as it needs to be adapted to the needs of the business community it is supposed to serve.⁶⁰

Many scholars also refer to other international law or soft law when interpreting the CISG.⁶¹ Concerning this latter aspect there is one international instrument that specifically comes to mind in this sense; the International Institute for the Unification of Private Law Principles of International Commercial Contracts (hereinafter referred to as UNIDROIT Principles)⁶². Since article 7 (1) provides

⁵⁵ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 1982, section 91

⁵⁶ *Ibid*

⁵⁷ Koch, *The concept of fundamental breach under the United Nations Convention on Contracts for the International Sale of Goods*, page 13

⁵⁸ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 1982, section 20

⁵⁹ Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 18

⁶⁰ Compare Schlechtriem and Butler, *UN Law on International Sales - The UN Convention on the International Sale of Goods*, page 49, Who emphasizes the importance of flexibility in application of the convention as developments occur in the international market.

⁶¹ Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2000-2001*, at chapter 4, 6 (b), available at <http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html#ch46>. Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?* at chapter III (b), available at <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html#iii>

⁶² The preamble of the UNIDROIT Principles also prescribes: “They may be used to interpret or supplement international uniform law instruments.” One of the reasons for the creation of the Principles was to resolve unsettled controversial issues created by the CISG. See Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments*, at section I (b)

that international character and the need to promote uniformity are to be considered in the interpretation of the convention the principles should be allowed to be used to be compared with provisions in the CISG to clarify its meaning.⁶³ However, they should only be used to the extent that the relevant provisions being compared correspond to the underlying purposes of each other.⁶⁴

⁶³ Ibid

⁶⁴ Ibid. Koch, in Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law* page 129

3 Seller's right to cure in case law and scholarly opinion

3.1 Introduction

The purpose of this part is to establish the relationship between a buyer's right to avoid the contract, in accordance with article 49 (1) and a seller's right to cure, in article 48 (1). In the previous part we established that reference to scholarly opinion and reference to foreign case law is one of the ways to promote uniformity in the application of the convention as prescribed by article 7 (1) to avoid diverse and conflicting interpretations. For that reason we shall in this part examine the different views taken by scholars and courts from different jurisdictions on whether fundamental breach should be viewed in the light of an offer by a seller to cure. In addition, to provide the reader with the setting within the CISG in which a seller's right to cure exists, an overview of the relevant provisions is in order.

3.2 Overview of the relevant provisions

According to the CISG article 35, a seller of goods has an obligation to "deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract." If the seller does not comply with article 35 he is in breach of contract according to article 36.⁶⁵ The goods must also be free from any right or claim of a third party according to article 41 – 42. However, if a seller fails to perform any of his obligations, either in conjunction with goods delivered before or after the date of delivery or when delay in delivery occurs, the CISG contains rights for a seller to remedy such failures.⁶⁶ The right to cure a defect after the date of delivery is found in article 48 (1) which provides as follows:

Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without

⁶⁵ To be able to rely on article 35, notice must be given within a reasonable time after the discovery of the defect or at the latest two years after delivery according to article 39. Except for the two year limit the same applies to reliance on articles 41 – 42.

⁶⁶ For the right to cure prior to date of delivery see articles 34 and 37 CISG.

“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.”

The right to cure concerns *any* failure to perform by a seller.⁶⁷ However, the provision is primarily concerned with delivery of non-conforming goods.⁶⁸ The reason for this is that Article 49 (1) (b) provides that in situations of non-delivery the contract would automatically be avoidable if additional time has been given to the seller to deliver.⁶⁹ The buyer may then avoid the contract without the criteria of article 25 being fulfilled. If the buyer wanted to avoid the contract before that period the breach by the buyer would have to be of fundamental character according to article 49 (1) (a).⁷⁰

A right to cure is subject to a reasonableness test as to delay, inconvenience and reimbursement by the seller of expenses advanced by the buyer. If one of these elements fails to be reasonable in the circumstances and amounts to a fundamental breach it goes without saying that a buyer could rely on article 49 to avoid the contract within a reasonable time.⁷¹ On the other hand it has also been held by a German court that a delay in cure may also be unreasonable even where the breach

⁶⁷ Which would also include defects in documents, See Honnold, *Uniform Law for International Sales under the United Nations Convention*, 4th edition 2009, § 295

⁶⁸ Schlechtriem and Butler, *UN Law on International sales The UN Convention on the International Sale of Goods*, page 145, Huber in Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 402

⁶⁹ Ibid. Article 49 provides: (1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed. (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

⁷⁰ Ibid. Unless the breach is fundamental the buyer would be under an obligation to take delivery of the goods according to article 53

⁷¹ See article 49 CISG

does not become fundamental if a buyer becomes liable towards his subcontractors.⁷²

Unless a buyer has given notice about a defect in goods and claimed repair, a buyer might be uncertain as to whether he would be allowed to cure in the case that it would be unreasonable according to the first paragraph of article 48. The second and third paragraph of article 48 works to eliminate such uncertainty. If the seller requests cure and the buyer does not respond within a reasonable time the provision allows the seller to commence cure within the time indicated in his request. Irrespective of whether the agreement is implied in this way or expressly agreed to, the buyer is not allowed to avoid the contract during this period. This would follow from the agreement and the second paragraph of the provision.⁷³

For an avoidance of contract by a buyer to be effective, notice must be given to the other party according to article 26.⁷⁴ The elements of article 25⁷⁵ must also be fulfilled before a breach reaches a level that can be considered as fundamental. However, we will not concern ourselves with them but rather whether fundamental breach should be viewed in the light of the possibility of a cure. As we shall see, it is the opening words of article 48 that has created controversy among scholars.

3.3 Scholarly opinion

Even though one might argue that the opening words of article 48 (1) “subject to article 49” is clear in its mandate to give precedence to the right to avoid the

⁷² Germany 23 June 1995 Lower Court München (*Tetracycline case*), available at: <http://cisgw3.law.pace.edu/cases/950623g1.html>

⁷³ Article 48 (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller. (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

⁷⁴ Article 26 A declaration of avoidance of the contract is effective only if made by notice to the other party.

⁷⁵ Article 25 A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

contract, scholarly opinion is divergent on this topic.⁷⁶ Some scholars are of the opinion that fundamental breach as defined in article 25 should be construed in the light of a rightful and possible offer to cure.⁷⁷ It should be noted that the right to cure is always invariably reserved by sellers in industry practices and the various manufacturing, export and importing, retailing trades when it comes to contracts for manufactured goods of substantial value.⁷⁸

One of the most cited scholars on the subject, Honnold, is of the opinion that the opening words of article 48 (1) leaves little room for doubt as to its meaning.⁷⁹ He suggests that the question of whether the buyer have a right to avoid should be construed in the light of the seller's willingness or offer to cure; if the non-conformity can easily be remedied the buyer is not substantially deprived of what he was expecting under the contract according to article 25.⁸⁰

Will is also supportive of the theory that a fundamental breach should be curable by the seller if possible.⁸¹ He notes as a problem with this theory is that the buyer might be put in an uncertain situation as to the seller's willingness to cure.⁸² Consequently, the contract could go from avoided to curable from one day to the next. He suggests as a solution to this problem that a buyer faced with this

⁷⁶Huber, *The CISG A new text book for students and practitioners*, Sellier 2007, page 219. Mullis, *Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases*, page 341

⁷⁷ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. 1999, § 184. Huber, *The CISG A new text book for students and practitioners*, page 224. Will, in Bianca-Bonell *Commentary on the International Sales Law*, page 350. Fountoulakis, *Remedies for breach of contract under the United Nations Conventions on the International Sale of Goods*, page 12, Lookofsky, *Understanding the CISG*, page 121, Schlechtriem and Butler, *UN Law on International sales The UN Convention on the International Sale of Goods*, page 100

⁷⁸ Koch, *Commentary on Whether The UNIDROIT Principles of International Commercial Contracts may be used to Interpret or Supplement Article 25 CISG*, in Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 131

⁷⁹ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. 1999, at § 296

⁸⁰ Ibid, page 320. He bases his standpoint on the legislative history of the CISG and states at § 296: "There was 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)). However, it was difficult to find language that would clearly express the proper relationship between avoidance and cure."

⁸¹ Will, in Bianca-Bonell *Commentary on the International Sales Law*, page 350. Will is of the opinion that the legislative history of the relationship between cure and avoidance shows that opinions remained divided after the Vienna Conference and was thus open for interpretation. See page 347.

⁸² Ibid, page 349

uncertainty should take into account a seller's prospects of curing the breach before avoiding the contract.⁸³ This way the uncertainty of whether the cure will be allowed will be shifted to the party obliged to cure instead of burdening the buyer with the uncertainty of a seller's ability and willingness to cure. If a buyer already has declared a contract avoided, he suggests that a buyer's avoidance should become suspended if a breach subsequently proves to be curable and if the seller would fail to cure the breach, the contract would automatically become avoided again.⁸⁴

In respect of Honnold's approach, he does not take into account situations where it would lie in the buyer's rightful interest to avoid the contract e.g. in situations in which the buyer might have lost confidence in the buyer as a result of the breach or the situation when the outlook of a willing seller to cure looks slim. Huber provides a more flexible approach in respect of this issue. Although he supports the theory that a possibility of cure should be considered when determining fundamental breach and avoidance in article 48, he is of the opinion that there are exceptional situations in which the buyer has particular and legitimate interests that allow avoidance of the contract without the curability of the breach taken into account, which would arise either from the gravity of the breach in itself or from the contractual agreement.⁸⁵ Consequently, such a situation would be present when the trust has been lost between the parties due to the seller's breach; in particular where the seller has acted deceitfully or where it is obvious that the seller is incapable of performing.⁸⁶ Another such situation would be when the contract can be interpreted to stipulate that time is of the essence because delivery is stipulated to occur on a certain date or where late performance would not be of interest to the buyer.⁸⁷ In this sense he mentions documentary sales contracts where in particular the subject matter of the sale is subject to market fluctuations.⁸⁸ As a last example of a situation where immediate avoidance of the contract can be allowed without giving the seller the opportunity to cure, Huber refers to situations in which the contract stipulates that there cannot be any deviation from the agreed quality as for instance

⁸³ Ibid, page 350

⁸⁴ Ibid, page 357

⁸⁵ Huber, *The CISG A new text book for students and practitioners*, page 222. He considers that no definite conclusions can be made from the legislative history on this issue. Although he is of the opinion that no support can be found to the fact that a curability of a breach cannot be considered when determining the fundamentality of a breach, see page 222.

⁸⁶ Ibid, page 223

⁸⁷ Ibid

⁸⁸ Ibid, page 224

“when a work of art or an antique piece of furniture are sold on the condition that they are 100 percent original and there have not been any measures of restoration”.⁸⁹ As to the question of whether it makes any difference if the buyer has avoided the contract or not before a seller offers to cure Huber is of the opinion that it all boils down to whether avoidance of the contract is justified or not and the above question should therefore be answered in the negative.⁹⁰

Huber’s theory has not been left without criticism. A problem that has been noted in construing fundamental breach in the light of a possible cure is in connection with article 46 (2) that gives the buyer the right to demand substitute goods if the breach by the seller amounts to a fundamental breach. If the seller would have the opportunity to cure a breach under article 48 even though it could be considered as fundamental, the seller would also have the opportunity to cure a breach when the buyer demands substitute goods under 46 (2).⁹¹ The buyer would therefore not only be barred from avoiding the contract but also from demanding substitute delivery.⁹² The possibility of substitute delivery would thus be reduced to situations where the buyer considers that the breach is not curable.⁹³ Huber is however of the opinion that this particular effect is acceptable.⁹⁴

Scholars who do not support the view that fundamental breach should be viewed in the light of an offer to cure, recognize that the right to avoid the contract in article 49 takes precedence.⁹⁵ Koch is of the opinion that if the opening words “Subject to Article 49” of article 48, is given their ordinary and plain meaning the buyer’s right

⁸⁹ Ibid, page 225

⁹⁰ Ibid

⁹¹ Will, in Bianca-Bonell, *Commentary on the International Sales Law*, page 355

⁹² Ibid, page 356

⁹³ Ibid, He notes to this fact: “Such a reduction was certainly not in mind of the drafters, who had originally dedicated all of Article 46 to the right to require substitute goods” and refers to the Secretariat Commentary Official Records, I, 38-39; and Official Records, II, 332-333. Will is however of the opinion that the right to avoid should not be construed in the light of an offer to cure (however the buyer need to ask himself that question – see page 350) but the right should be suspended if a rightful offer to cure comes along. He also considers that the same suspending effect should be placed on the remedy of substitute delivery in Article 46(2). See page 357

⁹⁴ Huber in Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 410

⁹⁵ Koch, *The concept of fundamental breach under the United Nations Convention on Contracts for the International Sale of Goods*, page 128, Chenwei, *Cure by Non-Conforming Party: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, available at <http://www.cisg.law.pace.edu/cisg/biblio/chengwei1.html#iii>, Enderlein and Maskow, *INTERNATIONAL SALES LAW*, page 1, available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html#is>

to avoid prevails over the seller's right to cure provided the breach is fundamental.⁹⁶ He considers that the right to cure by the seller is restricted to situations where the breach has not become fundamental or in situations where it has, the buyer has not declared the contract avoided.⁹⁷ In support for this view he argues that the clear wording of article 50, which expressly states that the seller's right to cure prevails over the right to reduce the price, indicates that if the delegates of the Diplomatic Conference had wanted a prevailing right to cure over the right to avoid they would have provided for it accordingly.⁹⁸ Moreover, he considers that employing an offer to cure as a relevant factor in determining fundamental breach also causes theoretical and practical problems in that an offer to cure retrospectively frustrating an existing avoidance is difficult to justify in theory.⁹⁹ As a practical problem such an approach would provoke competition between parties to a contract which in turn would create arbitrary results and leave the seller in limbo as long as he is unaware of a defect in goods.¹⁰⁰ The only solution to this he states: "would be either to impose on the buyer the duty to notify the seller of the breach and to give the seller the opportunity to invalidate the declaration of avoidance retroactively through an offer to cure, or to not treat his right to cure as precluded by the notice of avoidance."

Chenwei, although not of the opinion that the opening words of article 48 are clear, is, however, also supportive of the view that it is the declaration of avoidance that is of importance for the seller's right to cure.¹⁰¹ He argues that the convention does not expressly impose a duty on the buyer to discover the possibility of the seller to cure a defect.¹⁰² Accordingly, the seller has a right to cure as long as the buyer has not declared the contract avoided.¹⁰³ This approach might seem burdensome to the seller due to the uncertainty it would cause him because his right to cure in article

⁹⁶ Koch, *The concept of fundamental breach under the United Nations Convention on Contracts for the International Sale of Goods*, page 127 and 146, he is of the opinion that the wording of article 25 can support the approach which determines fundamental breach in the light of an offer to cure. Although he is also of the opinion that the legislative history on the relationship between cure and avoidance show that the right of a buyer to avoid should always precedence over a seller's right to cure.

⁹⁷ Ibid, page 128

⁹⁸ Ibid, page 132

⁹⁹ Ibid, page 126

¹⁰⁰ Ibid

¹⁰¹ Chengwei, *Cure by Non-Conforming Party: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, section 3.3, available at <http://www.cisg.law.pace.edu/cisg/biblio/chengwei1.html>

¹⁰² Ibid, section 3.2

¹⁰³ Ibid

48 might be overridden by the buyer's avoidance if he is unaware of the non-conformity. Chenwei addresses this problem by comparing article 48 with the equivalent article in The UNIDROIT Principles.¹⁰⁴ He concludes that as long as a breach under that article can be cured it cannot be considered as "fundamental non-performance" (the equivalence of fundamental breach in CISG) and that this approach results in an uncertainty for the buyer of whether the seller will cure or not. Consequently he considers that it is more justifiable to place this burden on the party in breach than on the aggrieved party.

In the present writer's view it appears that Chenwei is right to conclude that the CISG does not expressly impose a duty on the buyer to discover the possibilities of the seller to cure. But the fairness of his approach to burden sellers with the uncertainty of their possibilities of cure may be questioned. As both Will and Chenwei notes this uncertainty must be weighed against the uncertainty for the buyer of whether a seller will cure in a situation where he fails to perform. Honnold addresses the issue of a buyer's uncertainty as to the willingness of a seller to cure. He rightfully argues that buyers are under a duty to notify a seller of the non-conformity in the goods according to article 39, in the absence of which the buyer will lose the possibility of relying on the non-conformity when avoiding the contract.¹⁰⁵ Moreover, if a seller would be willing and able to cure a failure to perform, he would reasonably make the buyer aware of this fact at the moment he receives the notice by the buyer. In this respect he rightfully concludes that the alleged uncertainty of a buyer as to a seller's ability to cure is of little significance.¹⁰⁶ In comparison with the uncertainty for a seller of whether he may be allowed to cure at all because this right lies in the hands of the buyer seems in the present writer's view to be more unjustifiable.

It is submitted that commercial legislation has to be adapted and applied in a fair manner to the realities of the business world it is supposed to serve. In this sense, as noted by Professor Huber, there are situations in which a failure to deliver conforming goods by a seller could be removed by a simple cure without causing the buyer inconvenience, where it would be unjust to allow a buyer to avoid the

¹⁰⁴ Chengwei, *Cure by Non-Conforming Party: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, section 3.3

¹⁰⁵ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. 1999, at § 296

¹⁰⁶ *Ibid*

contract. There are also situations where a buyer would have a special interest in avoiding a contract where either the gravity of the breach or the terms of the contract would demand it. Moreover, the right to cure is often reserved by sellers in industry practices. In this manner it appears as Huber provides the most realistic approach as to how far a seller's right to cure should stretch.

3.4 Case law

There is substantial case law addressing the question of whether a seller should be given an opportunity to cure a defect before the breach is considered fundamental in accordance with article 25. The purpose of this section is not to account for every case involving the above principle but rather to provide the reader with a general overview of how the principle has been applied by the courts. The examples of cases reviewed are ones reported in CLOUT database provided by UNCITRAL or the PACE database provided by Pace Law School at Pace University.¹⁰⁷ It is notable that these cases are predominantly of European origin.

One of the earliest cases that involved avoidance according to the CISG was an Italian case from 1989.¹⁰⁸ The court had to consider whether the buyer had a right to avoid for fundamental breach when the seller failed to deliver on time. The case involved a contract for 500 pieces of a new line of products called "Air Bubble" (bags, knapsacks and plastic-wallets) between Italian and Swiss parties. The court deduced from the correspondence between the parties and the contract that the time limit set between the parties to deliver the goods was of fundamental importance, *inter alia*, because the buyer had expressly requested that the goods be delivered within 10-15 days. The goods were delivered after more than two months during which the seller had come up with different reasons for not delivering including lying about having shipped the products. Because of this fact, the court considered the time limit the seller was given to deliver the goods of fundamental importance. Thus the buyer was allowed to avoid the contract according to article 49 (1) (a).

¹⁰⁷ See websites of UNCITRAL, available at: http://www.uncitral.org/uncitral/en/case_law.html and Pace University, available at: <http://www.cisg.law.pace.edu/>

¹⁰⁸ Italy 24 November 1989 Court of First Instance Parma (*Foliopack v. Daniplast*), available at: <http://cisgw3.law.pace.edu/cases/891124i3.html>

In a German case the Appellate Court of Düsseldorf had to establish whether a breach for late delivery constituted fundamental breach.¹⁰⁹ A German buyer had contracted for the purchase of mobile phones with an Israeli seller. The terms of the contract stipulated that delivery was to take place “as soon as possible” and directly after 20 percent of the price for the goods were paid. The seller delivered the mobile phones four days after 20 percent of the purchase price was paid by the buyer. By then the buyer had already re-sold the phones to one of its customers. Two days after delivery the buyer declared the contract avoided. The court held that the fact as to whether the seller knew that the buyer had resold the phones was of no relevance. Instead, the court held that the delivery date was of fundamental importance as this was apparent from the circumstance that delivery was supposed to take place upon payment of 20 percent of the purchase price, which had not occurred. In addition to this the court held that not only the non delivery on the delivery date constituted fundamental breach, the fact that delivery took place four days after the delivery date was also sufficient grounds to grounds for concluding that there was a fundamental breach.

A case adjudicated in an ICC arbitration the same year involved the purchase by an Austrian buyer of 80, 000 scaffolding fittings from a Chinese seller.¹¹⁰ Parts of the fittings were lacking in conformity and the buyer subsequently wanted to avoid the contract while the seller offered substitute delivery. It was established that the estimated costs for sorting out the bad fittings from the good ones would have been more costly than one third of the purchase price. Determinative of the issue of avoidance was that an important part of the goods was lacking in conformity. On this circumstance the arbitrator held:

“The lack of conformity of an important part of the goods supplied amounts to a breach of the contract which, under Article 25, is fundamental since the buyer is deprived of substantially what he was entitled to expect under the contract.

¹⁰⁹ Germany 21 April 2004 Appellate Court Düsseldorf [15 U 88/03] (*Mobile car phones case*), available at: <http://cisgw3.law.pace.edu/cases/040421g3.html>, see also Germany 24 April 1997 Appellate Court Düsseldorf (*Shoes case*), available at: <http://cisgw3.law.pace.edu/cases/970424g1.html> where the court held that goods of seasonal character can also provide sufficient ground to establish that time is of the essence and justify avoidance. However, the court concluded that the circumstances in the case did not indicate that the goods were of seasonal character.

¹¹⁰ CLOUT case; CLOUT case No. 304 Arbitration—International Chamber of Commerce No. 7531, 1994. available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=139&step=FullText>

Defendant is not entitled to supply substitute items after the delivery date specified in the contract without the consent of Claimant.”

Consequently the buyer was entitled to rely on articles 49 (1) (a) and 52 (2) to avoid the contract. The arbitrator did not consider the fundamental breach by the seller in the light of the offer by the seller to cure, but instead gave precedence to the buyer’s right to avoid the contract for fundamental breach. No mention was made in the case as to whether there are situations in which a seller could be allowed to cure if this would remove the fundamentality of the breach. In light of the above it is fair to say that the case confirms the approach taken by some scholars who consider that the right to avoid the contract by the buyer is absolute and that any right to cure is limited to situations where the breach has not become fundamental.

In a French case the Court of Appeal in Grenoble had to decide whether a Portuguese buyer of a used portable warehouse from a company with its place of business in France had a right to avoid the contract because of the lack of conformity to the contract (article 35 CISG).¹¹¹ The price for the warehouse included the costs for the dismantling and transportation of the house. When the house was to be reassembled it became apparent that one third of the parts of the house were unfit for an identical reassembly. The buyer alleged that the parties had agreed to a remedy of the defects to a degree equal to the quality of new parts. Since the buyer disputed the degree of the cure the buyer wanted to avoid the contract. The court held that the defective parts only related to a part of the warehouse and concerned metal parts that were possible to be repaired. Thus the breach did not constitute a fundamental breach that deprived the buyer of what he was entitled to expect under the contract (article 25 CISG) and did not justify avoidance of the contract according to article 49.

A case adjudicated in the Koblenz Commercial court, Germany in 1997, involved the sale of acrylic blankets between a Dutch seller and a German buyer.¹¹² Upon delivery of the goods the buyer claimed there were 5 reels of blankets missing and

¹¹¹ France 26 April 1995 Appellate Court Grenoble (Marques Roque Joachim v. Manin Rivière)

<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950426f2.html>

¹¹² Germany 31 January 1997 Appellate Court Koblenz (*Acrylic blankets case*), available at: <http://cisgw3.law.pace.edu/cases/970131g1.html>

the goods delivered were lacking in quality. The buyer also claimed that the seller had violated an exclusive distribution agreement and claimed the contract to be declared avoided. It was established that the seller had offered to cure the defects. The Court of Appeals held that the buyer had failed to prove the existence of such an exclusive distribution agreement. Regarding the alleged non-conformity of the goods the court held that the buyer's notice of breach of the quality and quantity had not been specific enough according to article 39 (1). In addition to this, the buyer's avoidance of the contract had not been done unambiguously and within a reasonable time according to article 49 (2) (b) (i). However, the court noted that even if defects in the goods had been established a fundamental breach could not be ascertained without taking into account the seller's willingness to cure. It held that article 49 generally takes precedence over article 48 but only if the delivery of the defective goods amounts to a fundamental breach according to article 25, which is dependent not only on the gravity of the breach but also on the seller's willingness to cure.

In a Swiss case between a German buyer and a Swiss seller the commercial court of Aargau ruled against the buyer for having wrongfully declared the contract avoided.¹¹³ The contract concerned three inflatable triumphal arches that were to be used at a race for an entire season by the buyer who held the marketing rights to the race. One of the arches collapsed during the first day of the race as it was subject to a quality problem and contained a manufacturing defect. The buyer notified the seller of the defect and the seller responded two days later offering to remedy the defect. In response to this the buyer declared the contract avoided two weeks later.

The court held that the non-conformity of the goods could have been remedied by the seller without causing the buyer unreasonable inconvenience. The buyer had also reacted immediately to remedy the defect and so decided that the buyer had wrongfully avoided the contract. On this point the court held as follows:

“The UN Sales Law proceeds from the fundamental precedence of preservation of the contract, even in case of an objective fundamental defect. When in doubt, the contract is to be maintained even in case of fundamental defects, and an immediate contract avoidance should stay exceptional. Because, as long as and so far as

¹¹³ Switzerland 5 November 2002 Commercial Court of the Canton of Aargau (*Inflatable triumphal arch case*), available at: <http://cisgw3.law.pace.edu/cases/021105s1.html>

(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. According to doctrine as well as jurisdiction of the UN Sales Law, an objective fundamental defect does not mean a fundamental breach of contract when the defect is removable and the seller agrees to remedy this defect without creating unreasonable delay or burden on the buyer.”

The court based its reasoning on both Swiss and German case law.¹¹⁴ Moreover, the court, by referring to Huber, recognized that there are situations in which a buyer may be allowed to avoid the contract directly as outlined above.¹¹⁵

In a case involving the sale of designer clothes between an Italian seller and a German buyer the latter was allowed to avoid the contract without giving the seller the opportunity to cure defects in the goods delivered.¹¹⁶ The clothes delivered were considered too small, badly cut and of poor quality. The contract between the parties did not contain any specification as to when a party could avoid the contract. The court noted that when determining fundamental breach regard is to be had to the possibility of the buyer of making other use of the defective goods delivered. In addition to this, regard was 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, especially reduction of price or compensation for damages.” In this sense the court argued that the remedy of avoidance should only be available as a last resort to react to a fundamental breach by a seller. In determining fundamental breach the court considered that not only the weight of a defect should be taken into account but also the preparedness of the seller to cure the defect without unacceptable delay and burden to the buyer. The court held that the delivered goods were unmerchantable in the condition they were in. Moreover, since the clothes delivered concerned only a partial delivery, the court concluded that the buyer had justifiably lost trust in the seller’s ability to perform. As a result, it was

¹¹⁴ See judgment of the Switzerland, 28 October 1998, Bundesgericht [Swiss Supreme Court] of 4C.197/1998 Erw. 2b [available at <<http://cisgw3.law.pace.edu/cases/9810218s1.html>>]; Germany, 31 January 1997, Oberlandesgericht [Appellate Court] Koblenz , 2 U 31/96 = CISG Online 256 [available at <<http://cisgw3.law.pace.edu/cases/970131g1.html>>];

¹¹⁵ See part 3.3 Scholarly opinion

¹¹⁶ Germany, 14 October 2002, Appellate Court (Oberlandesgericht) Köln, [16 U 77/01], available at <http://cisgw3.law.pace.edu/cases/021014g1.html>

concluded that the buyer did not have to accept the seller's willingness to remedy the defects as offered. The seller had thus rightfully avoided the sales contract.

Interestingly, as in the previous Swiss case, Huber was cited in the case. The holding of the court confirms the view as expressed by him and as outlined above¹¹⁷ that there are situations where the buyer has a legitimate interest in avoiding the contract for lack of trust between the parties and the severity of the breach.

A more recent case that was adjudicated by arbitration in Russia in 2005 involved a purchase contract for a machine between a Cypriot buyer and a German seller.¹¹⁸ The buyer experienced several breakdowns of the machine. Upon numerous failed attempts of the seller to repair the defects, the buyer claimed that the defects in the machine were design defects of irremovable character and thus avoided the contract. The seller offered to replace the malfunctioning unit with a new one but the offer was however declined by the buyer. In determining whether the breach by the seller was of fundamental character the tribunal was of the opinion that article 25 of the CISG was a general rule that did not specify particular cases of fundamental breach. Instead of referring to article 48 concerning the seller's right to cure the tribunal on the grounds of article 7 (2) of the CISG referred to Russian law, which specified cases of fundamental breach as to the quality of the goods. Both parties had supplied expert examinations of the machine. On consideration of these examinations the tribunal concluded that both these experts' opinions reached the same result; that the non-conformity was a design defect of constant and irremovable character. Hence, in light of the seller's attempts to remedy the defects in the goods and the opinions of the experts, the tribunal held that the seller's breach was considered to be fundamental according to art. 475(2) of the Russian Civil Code, where a fundamental breach implies "irremovable defects, defects which cannot be removed without disproportionate costs or costs of time, recurrent defects or newly emerged defects after their removal, and of other similar shortcomings." The buyer had rightfully avoided the contract according to article 49.

¹¹⁷ See part 3.3 Scholarly opinion

¹¹⁸ Russia, 18 October 2005, Arbitration proceeding 21/2005 (*Varnish and paint machine case*) available at: <http://cisgw3.law.pace.edu/cases/051018r1.html>

The conclusions of the tribunal of what the Russian civil code implied about fundamental breach as cited appears to have the same effect as the wording of article 48 (1) that a cure must be reasonable. Moreover, it is clear in the case that the buyer gave the seller a chance to remedy the defects. Only after the seller failed to do so he resorted to avoiding the contract. Even if one is not supportive of the approach that a seller's right to remedy should be considered before a fundamental breach can be established it is clear that once a chance to cure is given the cure must also be possible under the circumstances. Even if this does not follow from article 25 it goes without saying that this follows from article 48 (1). In the opinion of the present writer it appears that the application of Russian law by the tribunal in the case was both unnecessary and not in conformity with the principles of article 7 (1) of the CISG that prescribes an autonomous application of the concepts contained in the convention.¹¹⁹

In a case from the Netherlands 2008 the Court of Appeal had to decide on whether non-conforming goods constituted a fundamental breach of contract.¹²⁰ The facts of the case were as follows. The seller in the case operated a machine factory, whilst the buyer produced copper wires for electronic purposes. The seller built a machine for the buyer that had the purpose of producing rectangular copper wire. The buyer in this instance would provide the know-how as to the plaiting of the copper wire. And for every machine sold by the seller the buyer would receive commission. There were delays as to the procurement of the machine by the seller and when finally a test run could be arranged the buyer concluded that the machine did not conform to the specifications of the contract. To determine whether the buyer had rightfully avoided the contract the court had to put the proceedings on hold for the determination of the conformity of the machine at the test date according to article 35 CISG and whether these non-conformities could be remedied. Nonetheless, the court held that in determining whether a breach of contract is fundamental within the meaning of article 25, it is also relevant if performance could have been remedied within a reasonable period of time. The court noted that the reason for this was that a seller is entitled to remedy a failure in performance at his own expense even after the date of delivery according to article 48 (1).

¹¹⁹ See part 2 on article 7 and the rules on interpretation above

¹²⁰ Netherlands, 7 October 2008, *Gerechtshof* [Appellate Court] Arnhem (*Arens Sondermaschinen GmbH v. Smit Draad / Draad Nijmegen B.V.*), available at: <http://cisgw3.law.pace.edu/cases/081007n1.html>

It is fair to say that the majority of the reported cases involving seller's rights to cure after date of delivery are predominantly European and thus provides a restricted view of the application of the principle in practice. In this regard one has to take into account the possibility that, even though this might be the aim of the organizations, there are cases around the world not reported in the PACE and the CLOUT databases. Nonetheless, in the cases reviewed, it appears that the principle of a seller's right to cure has been applied generously in that buyers have not been allowed to avoid the contract unless a seller was given a chance to remedy and failed, the gravity of the breach demanded it, the terms of the contract or the commercial background would demand it e.g. when time was considered to be of the essence. With this being said it also seems fair to say that the question of whether it makes any difference if a buyer has avoided the contract before a seller has offered to cure have been answered in the negative. In the present writer's view case law supports the approach that the right to avoid a contract in accordance with article 49 and 25, fundamental breach should be considered in the light of the possibility of cure by a seller. Even though the subject has been one of a controversial character in literature this does not seem to be true when it comes to the application in practice. Accordingly, the application of the principle seems to be in line with the approach advocated by Huber as outlined above.¹²¹ This appears to be particularly true when it comes to how the principle has been applied by Swiss and German courts.

¹²¹ See part 3.3 above

4 The Legislative History of article 48

4.1 Introduction

The purpose of reviewing the legislative history of the convention is to resolve any ambiguities concerning the intention of the delegates of the Vienna convention as to whether fundamental breach should be interpreted with an offer by a seller to cure in mind.¹²² Therefore it is necessary to start by looking at the relevant provisions in the predecessor to the Convention, Convention Relating to a Uniform Law on the International Sale of Goods (hereinafter referred to as ULIS), since this convention served as the starting point for the preparations of the CISG.¹²³ Following this we shall take a look at the proposals that were made during the discussions within UNCITRAL and at the Vienna conference. Since the issue of a possible cure in determining fundamental breach involves opinions on the notion of a seller's right to cure being based on article 48, 49 or 25, we shall examine the legislative history of these articles where it is appropriate.

4.2 Convention relating to a Uniform Law on the International Sale of Goods

ULIS contains a provision giving the seller the right to cure under article 44. Article 49 of the CISG also has its corresponding provision in ULIS; article 43. That provision gives the buyer the right to avoid the contract when the seller commits a fundamental breach.¹²⁴ However, the equivalent cure provision appears to be narrow in its mandate to allow the seller to cure, hence giving the buyer a

¹²² As established in part 2.5 above, reference to the legislative history of the CISG facilitates a uniform and autonomous interpretation of its provisions.

¹²³ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 1982, § 9

¹²⁴ Article 43 provides: The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or, in the case to which paragraph 2 of Article 42 applies, after the expiration of the period referred to in that paragraph.

broad right to avoid the contract in cases where the breach could be considered as fundamental.¹²⁵ Article 44 ULIS provides:

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

2. The buyer may however fix an additional period of time of reasonable length for the further delivery or the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract and reducing the price in accordance with Article 46 or, provided that he does so promptly, declare the contract avoided.

As we have seen, some authors prefer to interpret article 25 of the CISG in the light of a possible cure by the seller. But as it appears there is no express requirement to that effect in article 10 of ULIS (the counterpart of article 25 CISG) that a cure by a seller should be allowed if it could remove the fundamentality of the breach.¹²⁶

4.3 UNCITRAL

During the preparatory work carried out by the UNCITRAL working group and the Committee for the cure provision (now article 48) different proposals to clarify the relationship between the seller's right to cure and the buyer's right to avoid or reduce the price had to be considered.¹²⁷ Of certain importance in considering these proposals was the issue of whether the buyer would be able to preclude the seller from curing a defect in non-conforming goods without causing delay that would

¹²⁵Schneider, *The Seller's Right to Cure under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods*, page 83

¹²⁶ Article 10 ULIS provides: For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects

¹²⁷ UNCITRAL Yearbook VIII (1977), A/32/17 (Report of the United Nations Commission on International Trade Law on the work of its tenth session), page 44, available at <http://www.uncitral.org/uncitral/en/commission/sessions/10th.html>

amount to fundamental breach or causing the buyer unreasonable expense and inconvenience.¹²⁸ One view expressed was that the seller's right to cure should take precedence over the buyer's right to avoid the contract or to reduce the price to facilitate the upholding of contracts and to avoid expenses which a seller would incur as a result of the avoidance, when the seller could easily cure a defect without any inconvenience or expense to the buyer.¹²⁹ Another suggestion was that a fundamental breach should never be considered as such if a cure was possible because a fundamental breach must be viewed in light of the defect itself and in light of the possibility of cure. It was argued that such a meaning would not be apparent in many common law jurisdictions if the words "unless the buyer has declared the contract avoided in accordance with article 30" were retained.¹³⁰

However, there was considerable opposition to these proposals¹³¹. "The seller was in breach and any possibility to cure was a privilege which depended upon the consent of the buyer who had the right to declare the contract avoided".¹³² Thus, the text of the first paragraph of article 29¹³³ that was adopted read: "The seller may, at his own expense, cure, even after the date for delivery, any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience including any uncertainty in reimbursement by the seller of expenses advanced by the buyer, unless the buyer has declared the contract avoided in accordance with article 30".¹³⁴

Because of the above discussions the committee reconsidered the meaning of article 9 (article 25 in the CISG) and proposals were made to change the provision to include words to the effect that the fundamentality of a breach should be

¹²⁸ Ibid, page 45, see also proposals made during the fourth session of the UNCITRAL working group: A/CN.9/75, Yearbook IV 1973 page 70, see also proposals in, Yearbook VI 1975, page 56, "An observer proposed adding the words "on account of delay" following the words "unless the buyer". The effect would have been that the buyer could have avoided the contract 'and thereby cut off the seller's right to cure a defect in the goods only if there was late delivery. The Working Group rejected the proposal." Both of which are available at <http://www.uncitral.org/uncitral/publications/yearbook.html>

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ Ibid, There was however substantive support for the view that the buyers' right to price reduction should be subject to the seller's right to cure on condition that the seller bore all expenses for the cure. See paragraph 277

¹³² Ibid

¹³³ Renumbered as article 30 when adopted

¹³⁴ UNCITRAL Yearbook VIII (1977), A/32/17 (Report of the United Nations Commission on International Trade Law on the work of its tenth session), page 45

considered in the light of a “reasonable offer to cure” to prevent technical avoidance of the contract when there had been an offer to cure under article 29.¹³⁵ This change was considered unnecessary because the right to cure was already laid down in article 29 and if there was no offer to cure the situation would be governed by article 9 and thus the proposal was considered superfluous.¹³⁶ Although discussions to widen the scope of seller’s rights to cure were held, no changes were made to that effect. On this ground it appears that a buyer’s right to avoid contracts took precedence in any event if a seller was in fundamental breach of contract.

4.4 The secretariat commentary

The result of the work of UNCITRAL was the 1978 draft. This text was also accompanied by the Secretariat Commentary. The text of draft article 44 (1)¹³⁷ draft provided:

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

The Secretariat Commentary serves as a guide to the meaning of provisions within the CISG. The commentary is also authoritative to the meaning of provisions in the CISG but only to the extent it is relevant to the official text, i.e. if there is a match-up. Looking at the commentary two points seem to be of importance. First, it is clear that the provision gave the seller the right to cure even if the breach was fundamental, on condition that the buyer had not declared the contract avoided.¹³⁸

¹³⁵ Ibid, page 31

¹³⁶ Ibid

¹³⁷ Paragraphs (2) and (4) of CISG article 48 and 1978 Draft article 44 are identical; paragraph (3) is substantively identical (the only difference being a substitution of "under the preceding paragraph" for "under paragraph (2) of this article").

¹³⁸ See Secretariat Commentary, at paragraph 3: “The seller may remedy his failure to perform under this article even though the failure to perform amounts to a fundamental breach, so long as that fundamental breach was not a delay in performance. Thus, even if the failure of the goods to operate at the time of delivery constituted a fundamental breach

In this sense the difference between the official article 48 and article 44 is obvious, due to the opening words of the provision.

Moreover, the commentary provides that there are two situations where the seller may remedy his failure to perform if he can do so without such delay as would amount to fundamental breach: “where there is a complete or substantial failure to deliver the goods and where the goods as delivered, have such a non-conformity that either at the moment of delivery, or at some later time, the condition of those goods, if not remedied, would constitute a fundamental breach of contract.” The phrase without “such delay as would amount to fundamental breach” was changed to “without unreasonable delay”. Since these two phrases were changed, the meaning of the issues they concern must be viewed in the context of the revised version for them to be valid as guides to its meaning.

4.5 The Vienna conference

The draft convention was subsequently sent to participating countries and organizations that could make comments and suggestions for amendments. Relating to article 44 a proposal from Germany was that the words “Unless the buyer has declared the contract avoided in accordance with article 45” be deleted.¹³⁹ At the conference in Vienna the main discussion concerning article 48 revolved around the proposals of the German and Bulgarian delegates who shared the same values.¹⁴⁰ They were of the opinion that “the existing text did not achieve a proper balance between the seller’s interests and those of the buyer, since article 44(1) [became CISG article 48(1)] permitted the buyer to declare the contract avoided immediately in the event of non-conformity which amounted to a fundamental breach of contract without giving the seller an opportunity to remedy his failure to perform.”¹⁴¹ To support the argument the German delegate posed an

of contract, the seller would have the right to remedy the non-conformity in the goods by repairing or replacing them, unless the buyer terminated the seller’s right by declaring the contract avoided.” available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-48.html>

¹³⁹ Document A/CONF.97/9 in A/CONF.97/19, Official Records, available at <http://www.cisg.law.pace.edu/cisg/Fdraft.html>

¹⁴⁰ See propositions: A/CONF.97/C.1/L.140 and A/CONF.97/C.1/L.160 in A/CONF.97/19, Official Records page 114, which both suggested that “Unless the buyer has declared the contract avoided in accordance with article 45” be removed.

¹⁴¹ A/CONF.97/19, Official Records, page 341, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf>

example of the purchase of a machine, delivered on time but once installed proved to be defective.¹⁴² If the seller was able to remedy the fault within a reasonable time the breach could not be considered as fundamental. Therefore it was argued that a seller's rights to remedy a fault should prevail over a buyer's rights. These proposals won support by a great number of delegates, although some with minor modifications.¹⁴³ One of the delegates that were of the opposite view elaborated on the example given by the German delegate and posed an alternative possible situation; "If the machine could be repaired within a few days, there was no fundamental breach, which was what article 44 [became CISG article 48] was concerned with. Conversely, the case should be considered where the seller had delivered a machine which in no way fulfilled the buyer's expectations, whereupon the latter lost confidence and did not even wish the seller to attempt to repair it."¹⁴⁴ Since the opinions seemed divided in the committee as to whether the general principle of a seller's right to cure taking precedence over a buyer's remedies was supported by the committee it was suggested that an indicative vote was taken.¹⁴⁵ The purpose of it was to see whether it was necessary to put together a working group to draft a proposal in line with that general principle.¹⁴⁶ The vote was opposed by 18 to 14.

As the deliberations progressed a working group was nevertheless established¹⁴⁷, consisting of delegates from 7 countries, including the German and Bulgarian delegates. The group put together a joint proposal to amend the cure provisions.¹⁴⁸ The proposal consisted of three alternatives:

¹⁴² Ibid

¹⁴³ See A/CONF.97/19, Official Records page 342, Mr. SZÁSZ (Hungary) said that he supported the Bulgarian amendment and agreed with the idea of deleting the first phrase of article 44(1) [became CISG article 48(1)]. The connection between the seller's right to remedy, dealt with in article 44 [became CISG article 48], and the buyer's right to avoid, covered by article 45 [became CISG article 49], should, however, also be mentioned in article 45 [became CISG article 49].

¹⁴⁴ Ibid, page 341

¹⁴⁵ Ibid, page 343

¹⁴⁶ Ibid

¹⁴⁷ The CHAIRMAN explained that article 44 remained unchanged, that the proposals had not been rejected as such and that a new proposal couched in the same or different terms could be submitted. Delegations were quite free to set up a working group on the question if they wished.

¹⁴⁸ A/CONF.97/19, Official Records, page 351, Bulgaria, Canada, the German Democratic Republic, the Federal Republic of Germany, the Netherlands, Norway and the United States of America, had submitted an amendment to article 44 [became CISG article 48] (A/CONF.97/C.1/L.213).

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

Alternative II: 44 (1) "Subject to article 45 [became CISG article 49] the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so *without unreasonable delay* and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention"

(2) "The seller may request the buyer to make known whether he will accept a remedy of his failure to perform, unless the buyer has fixed an additional period of time in accordance with article 43 [became CISG article 47] or declared the contract avoided in accordance with article 45 [became CISG article 49]. If the buyer does not reply within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller."

Alternative III: At the end of article 45(1) (a) [became CISG article 49(1) (a)], add the following words:

". . . and the seller does not remedy the failure in accordance with article 44 [became CISG article 48]."

A Bulgarian delegate explained that "the amendment was intended to guarantee the right of the seller to remedy a failure to perform while at the same time safeguarding the lawful interests of the buyer, who must be assured that the contract would be executed. That was the basic difference between it and the former text."¹⁴⁹ In addition, the Norwegian delegate gave the following explanation to the amendment "*without unreasonable delay*": "the idea of unreasonable delay had been introduced instead of delay "not amounting to a fundamental breach". The proposed formula "unreasonable delay" was more flexible and offered a remedy, suspending the buyer's actual avoidance of the contract under article 45."¹⁵⁰

¹⁴⁹ Ibid

¹⁵⁰ Ibid

The three alternatives in the joint proposal were voted on by the committee.¹⁵¹ It was decided that the first paragraph should be adopted by 19 votes in favor and 7 against.¹⁵² The second paragraph of alternative II that left a seller without remedy in the event a buyer avoided the contract was not adopted.¹⁵³

Interestingly enough, the opinions about the meaning of the opening words of article 44 (1) were divided.¹⁵⁴ One delegate suggested that the words be amended to suit his interpretation of the words, which were in favor of the avoidance remedy to take precedence.¹⁵⁵ Another delegate noted that the words were open to a number of interpretations and were supportive of this proposition.¹⁵⁶ However, no changes were made to the provision since the support for such an amendment was very limited.¹⁵⁷

In the present writers' view the discussions at the beginning of the conference in Vienna shows that proposals from the Bulgarian and German delegates to widen the seller's right to remedy won support by a great number of delegates, although not by the majority. However, the general principle of the seller's right to remedy subsequently gained support since a joint proposal to the same effect was accepted by a clear majority. Even though that proposal safeguarded the buyer's right to avoid, it clearly did not give the buyer's right to avoid in all situations, given the explanation as to its meaning by the Bulgarian and Norwegian delegates and considering the fact that the second paragraph of alternative II of the joint proposal was not approved. Although it was noted by a delegate that the opening words "subject to" of the provision adopted by the committee could be interpreted in different ways the proposition by one delegate to give the opening words the meaning that a buyer's right to avoid should always take precedence over a seller's right to remedy was not accepted. This fact indicates that the majority of the committee did not support such an interpretation at the end of the conference.

¹⁵¹ Ibid, 352

¹⁵² For number of votes see Document A/CONF.97/11, in A/CONF.97/19, Official Records

¹⁵³ Ibid, 7 votes in favor and 17 against.

¹⁵⁴ A/CONF.97/19, Official Records 352 "The CHAIRMAN noted that opinion in the Committee seemed to be divided, some delegations having spoken in favor of the new article 44 in its present wording while other delegations seemed to want a change."

¹⁵⁵ The Greek delegate suggested that the words should be amended to say "Subject to the contract not having been declared avoided in accordance with article 45" and wanted it placed on record that that was the meaning he prescribed the words. A/CONF.97/19, Official Records 352.

¹⁵⁶ Ibid

¹⁵⁷ Ibid, article 44 was later voted on in plenary and was adopted with 38 in favor, non against and 2 abstentions; see A/CONF.97/19, Official Records page 211.

As mentioned, the Secretariat Commentary on the 1978 draft convention may be used to interpret the provisions in the CISG when they are equivalent to each other. However, considering the discussions at the conference it can be said that concerning the issue at hand they do not match up. Thus, they cannot be used to interpret article 48 in this sense.

5 Seller's right to cure and the principle of good faith

As concluded above the principle of good faith is part of the interpretative tools when interpreting the convention under article 7. The principle is also one that governs the conduct between the parties. Therefore the purpose of this part is to establish whether the principle of good faith can be applied to prevent a party from avoiding the contract without giving the seller the opportunity to cure a failure in performance of his obligations.

Although the question has been addressed by scholars it is apparent that the existing scholarly opinion on the subject is scarce. Some authors are of the opinion that the parties are bound by the duty of good faith in that they are obligated to communicate with each other and cooperate to remedy non-conformity.¹⁵⁸ The buyer is under an obligation to notify the seller of the lack of conformity (article 39 CISG) while at the same time under the general principle of good faith the seller would be under an obligation to respond. In this sense, the buyer would be bound not to avoid the contract in the event of defective goods before giving the buyer a chance to remedy if that could cure the defect.¹⁵⁹

¹⁵⁸ Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, at § 95; "Delay in compelling specific performance or avoiding a contract after a market change or construing ambiguous acts as acceptance—situations that could permit a party to speculate at the other's expense—may well be inconsistent with the Convention's provisions governing these remedies when they are construed in the light of the principle of good faith." See also section 296. See also Neumayer/Ming in section 20 in Schlechtriem, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, page 409, For a contrary view see Will, in Bianca-Bonell *Commentary on the International Sales Law*, page 349, who states that requiring the buyer to go out of his way to find out whether the seller is willing to cure cannot be in line with the principle of good faith. See also Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, *Cornell Review of the Convention on Contracts for the International Sale of Goods* (1995), available at <http://cisgw3.law.pace.edu/cisg/biblio/hillman1.html#103> at C stating: "Generally, an aggrieved party must act reasonably to mitigate damages. The injured party's duty to minimize loss may require it to accept new offers from the breaching party, possibly even after a "fundamental" breach."

¹⁵⁹ Koch, *The concept of fundamental breach under the United Nations Convention on Contracts for the International Sale of Goods*, page 140

Koch opposes this view.¹⁶⁰ In response to whether the principle of good faith can be used to prevent the buyer from avoiding a contract he argues that the principle cannot be used in a way that is contrary to the text in a CISG provision, in this case article 48, in order to justify a result that is considered fairer.¹⁶¹ Accordingly, he is of the opinion that the principle should not be used to require that an offer to cure must be taken into account in determining fundamental breach, since the drafting history in combination with the opening words of article 48 in his opinion are absolute in its meaning and gives priority to article 49.¹⁶² It is submitted that Koch is correct in his conclusion that the principle of good faith cannot remove the statutory effect of a provision in the CISG. This is true even if one argues that fundamental breach should be considered in the light of cure since articles 48 and 49 provides buyers with the right to avoid the contract upon fundamental breach. Therefore the principle of good faith does not seem to be suitable for determining whether a seller should be entitled to cure.

In the present writer's view it is reasonable to say that the parties are under a duty to communicate with each other. But the principle of good faith works in conjunction with the parties' intentions.¹⁶³ Consequently, if a buyer gives a seller who delivered non-conforming goods a chance to remedy, then subsequently avoids the contract e.g. for market fluctuations, such behavior would be inconsistent with the principle of good faith, since the buyer makes a promises and does not act accordingly. To apply the principle generally to the right for the seller to cure seems contrary to how the principle needs to be applied.

There is no case law scrutinizing the issue of whether the principle of good faith would prevent a buyer from avoiding a contract before allowing a seller to cure. However, there are examples in case law where the principle of good faith has been considered in conjunction with the reasonable criteria of avoidance in article 49 (2). In an Italian case an Ecuadorian company had bought a machine used for recycling plastic bags from an Italian seller.¹⁶⁴ The machine proved to be defective

¹⁶⁰ Koch, *The concept of fundamental breach under the United Nations Convention on Contracts for the International Sale of Goods*, page 141

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ See the part 2.3 Observance of good faith in international trade

¹⁶⁴ Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13353&x=1> see also CLOUT

and after several attempts by the seller to repair it without success the buyer declared the contract avoided. In determining whether the buyer had done so within reasonable time, the court noted that the principle of good faith was one existing under international law and that it would be contrary to that principle if a party declared the contract avoided without waiting the outcome of the attempts by the seller to cure the defects. In the case the buyer was considered to have declared the contract within a reasonable time. The case confirms the view of the present writer described above, since the issue under scrutiny was whether the buyer had not held up his end of the agreement in allowing the seller to cure.

case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] where the court considered that avoidance after 2 ½ years following the non-delivery of the goods was not in accordance with the principle of good faith.

6 UNIDROIT Principles as an aid to interpretation of fundamental breach

As mentioned above some authors prefer to use the UNIDROIT principles to clarify a provision in the CISG.¹⁶⁵ To function as an aid to interpret international uniform law instruments is also one of the purposes of the UNIDROIT Principles according to its preamble.¹⁶⁶ In addition, it should also be noted that one of the purposes of The UNIDROIT Principles was to resolve unsettled controversial issues that was apparent under the CISG.¹⁶⁷ The Principles have a provision corresponding to article 48 in the CISG. The relevant provision is as follows:

Article 7.1.4 – Cure by Non-Performing Party

- (1) The non-performing party may, at its own expense, cure any non-performance, provided that
 - (a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;
 - (b) cure is appropriate in the circumstances;
 - (c) the aggrieved party has no legitimate interest in refusing cure; and
 - (d) cure is effected promptly.
- (2) The right to cure is not precluded by notice of termination.
- (3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.
- (4) The aggrieved party may withhold performance pending cure.
- (5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

¹⁶⁵ See the part 2.5. above.

¹⁶⁶ See “purpose of the Principles” in the preamble of the UNIDROIT Principles: “They may be used to interpret or supplement international uniform law instruments.”

¹⁶⁷ Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments*, at section I (b)

As noted above these principles may only be used to the extent the underlying purposes correspond to each other. A difference between the CISG is that the Principles prescribes that the seller must give the buyer notice before his right to cure arises.¹⁶⁸ Article 48 gives the seller the right to cure even without such notice.¹⁶⁹ Another difference is that the Principles prescribe under article 7.1.4. paragraph (c) that a refusal by a buyer to cure must be legitimate. In addition, the second paragraph under the provision expressly states that the right to cure is not precluded by notice of termination. This is a major difference in wording compared to article 48 which prescribes that the right to cure is subject to the buyer's right to avoid in article 49.

The second paragraph of article 48 CISG and the third paragraph of article 7.1.4. UNIDROIT share the principle that an aggrieved party may not resort to any remedy which is inconsistent with the sellers' performance. However, in this instance there is a difference between the provisions, in the sense that such a right by a seller is subject to whether the buyer has responded to the seller's request to cure within a "reasonable time", when on the other hand the UNIDROIT Principles provides the same right on "effective notice" of cure. These points aside, the provisions share the same purpose as to the reasonableness criteria in the seller's cure, although expressed differently.¹⁷⁰

The UNIDROIT principles also have their counterpart in article 7.3.1 to fundamental breach in article 25 in the CISG. The underlying policy to only allow avoidance of the contract where the breach is of fundamental character shows that both sets of rules follow the same policy; to preserve enforceability of the contract whenever feasible.¹⁷¹

¹⁶⁸ See article 7.1.4., 1 (a) Under section II

¹⁶⁹ See Kee, *Commentary on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 48 of the CISG*, section III, available at <http://www.cisg.law.pace.edu/cisg/principles/uni48.html>

¹⁷⁰ Ibid

¹⁷¹ Koch, in Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 133

In the present writer's view, the cure provision in the UNIDROIT Principles is, undoubtedly clearer than the CISG in its mandate to prescribe a right for the seller to cure. However, considering the controversy surrounding article 48 and as one of the purposes of the UNIDROIT Principles was to clarify some of the unsettled issues pertaining to the CISG it is reasonable not to give absolute precedence to article 49 when interpreting article 48 of the CISG and the relationship between the right to avoid and cure.¹⁷² In addition, the wording of article 25 of the CISG does not exclude account being given to whether cure is feasible under the circumstances.¹⁷³

In consideration of these circumstances it is the present writer's view that the only feasible approach when using the UNIDROIT Principles to interpret a seller's right to cure in the CISG is that fundamental breach should be determined in light of a possible cure by a seller.

¹⁷² Concerning the purpose of the UNIDROIT Principles see Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments*, at section I (b), concerning a similar conclusion about article 48 CISG and article 7.1.4. UNIDROIT Principles see section III (b) "Equally, Art.7.1.4, which as mentioned above expressly states that the right of the non-performing party to cure its own failure may be exercised notwithstanding the fact that the aggrieved party has given notice of termination of the contract, may be invoked in order to resolve the doubts which in this respect exist under the corresponding Art.48 CISG."

¹⁷³ For a similar affirmation see Koch, in Felemegas, *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of goods (1980) as Uniform Sales Law*, page 133.

Although he notes: "The concerns, expressed in my earlier writings against giving the teleological interpretation overriding effect where other interpretive techniques lead to different results, still apply." However, to avoid the problems that these conclusions incur on the seller he concludes that the UNIDROIT Principles can be used to preclude a fundamental breach in the CISG.

7 Summary and Conclusion

Buyer's right to avoid a contract governed by the CISG and seller's right to cure was a controversial subject during the preparation of the convention. The compromise that followed from the Vienna conference in 1980 did not settle the issue and scholars have prescribed various meanings to the first paragraph of article 48 CISG.

The scope of a seller's right to cure a defect in performance of any of its obligations is important as it may have effects on costs for storage and transportation of goods in the event of avoidance of the contract by the buyer. The right might also serve as protection against avoidance by buyers for questionable reasons such as fluctuations in market prices etc. Accordingly, the buyer might have an opposing interest in his rights to avoid a contract when a situation calls for it. Deceitful or careless behavior by a seller might cause a buyer to want to be freed from his obligations to perform. Even fluctuations in market prices might cause a buyer to reconsider a contract and evaluate the possibilities of avoidance.

The purpose of this essay has been to elucidate the relationship between these two rights. For this purpose the following questions were intended to be addressed; does a buyer's right to avoid a contract according to article 49 and 25 of the CISG take precedence over a seller's right to cure a failure to perform any of his obligations according to article 48? Would it make any difference to the buyer's right to avoid a contract if the fundamentality of the breach by the seller could be removed without causing the buyer unreasonable inconvenience i.e. should the presence of a fundamental breach be construed in the light of a possible cure?

To answer these questions we have referred to article 7 CISG as it provides a set of principles to be followed when interpreting the provisions contained in the convention. We concluded that article 7 needs to be interpreted in an autonomous way, free from notions or concepts established in a contracting state's domestic legal system. We considered the good faith principle in article 7 and how it should be construed. The legislative history indicated that the topic was of a controversial nature during the deliberations of the conference and was not really settled by a compromise and the final text. Support for a duty on the parties to act in good faith

could be found in other provisions that regulated the conduct of parties to a contract. Case law and a prevailing view amongst scholarly opinion proved that the convention contains a duty to act in good faith among the parties to an international sale of goods contract. It was concluded that the principle of good faith cannot invalidate a provision in the convention because it is fairer in the circumstances.

Methods for interpreting the provisions in the CISG not expressly provided for in article 7 were considered. It was submitted that reference to scholarly opinion, case law, legislative history and the UNIDROIT principles is consistent with the principles set out in article 7 and are suitable for this purpose.

Considering scholarly opinion on whether fundamental breach should be viewed in the light of an offer to cure we concluded that although it can be said that there are divergent views on the topic among scholars it is clear that the prevailing opinion favors a consideration of a possible cure when determining fundamental breach. We have seen that there are authors of this prevailing view who consider that avoidance of the contract by the buyer according to article 49 should always be considered in the light of a possible cure by the seller. Others who share this approach suggest that there are exceptional situations where the buyer would be entitled to avoid the contract immediately. In contrast to this, there is scholarly opinion which considers that avoidance by the buyer in article 49 should always take precedence in relation to article 48, if the buyer has declared the contract avoided because the criteria in article 25 are fulfilled.

We have seen that case law considering a seller's right to cure is predominantly of European origin. Even though a seller's right to cure is a controversial matter academically, this does not appear to be true in practice. Examples in case law confirm support for the prevailing opinion among scholars in that the courts look to whether the seller is willing to cure, and whether such a cure would be possible and reasonable under the circumstances. In the majority of cases buyers have been denied avoiding the contract because the seller was not given a chance to cure the defect. Even though there are cases where aggrieved buyers have been allowed to avoid the contract for the seller's breach, it has either been in situations where:

- the gravity of the breach by the seller was considered severe enough or where trust had been lost between the parties;

- in situations where sellers were given a chance to remedy the defect and failed;
- where time was considered to be of the essence or in the case where a cure was considered to be unreasonably burdensome to the buyer.

It was concluded that the approach applied by the courts is in line with Huber's approach in the way he advocates exceptions to cure by sellers when the gravity of the breach or where the terms of the contract demands it.

The legislative history of the CISG shows that the subject was one of controversial character during the preparations for the convention. Looking at the period prior to the deliberations in Vienna it appears that the rights for buyers to avoid a contract upon fundamental breach were broad considering the text of ULIS and the preparatory works for the 1978 draft convention that only allowed a seller to cure a failure to perform its obligations if the buyer had not declared the contract avoided. Although there were suggestions to widen the scope of the seller's right to remedy failure to perform during the deliberations in UNCITRAL no changes were made to that effect due to the lack of support for such proposals.

We established that due to the diversity of opinions amongst delegates regarding the meaning of the opening words of article 48 during the deliberations of the Vienna convention no conclusive evidence can be found in support of the fact that fundamental breach should be viewed in the light of an offer to cure. However, the discussions amongst the delegates of the Vienna conference indicate that such a meaning subsequently received great support. This is supported by the fact that a majority of the delegates at the end of the deliberations were not in favor of a proposal to amend the provision to give absolute precedence to article 49.

It is true that reference to legislative history of a convention calls for discretion and that it is the final text that needs to be agreed upon, not the opinion as to its meaning. However, there is a strong case for the view that the intentions of the conference was that even though a buyer still has the right to avoid, a breach by a seller will generally not constitute a fundamental breach if the seller could cure without inconvenience to the buyer.

It was concluded that the Secretariat Commentary on the 1978 draft convention can assist in elucidating the meaning of provisions in the CISG. In this respect the difference as to the meaning given to the opening words of the provision in the 1978 draft convention and the discussions concerning the provision in Vienna it was concluded that the Secretariat Commentary on the 1978 draft convention does not provide any assistance regarding the substance of article 48.

Although scholarly opinion on the subject is scarce there are scholars considering whether a buyer's right to avoid the contract in article 49 can be determined in the light of the principle of good faith in article 7. There are scholars of the opinion that the principle can be applied to obligate the buyer to allow the seller to cure if he is willing, while at the same time one scholar is of the opinion that the principle cannot be used to consider fundamental breach in the light of an offer to cure. It was concluded that the principle of good faith is not suited for determining fundamental breach in the light of an offer to cure, since the principle works in conjunction with the intention of the parties and article 48 clearly prescribes a right to avoid a contract. Consequently, the principle of good faith is only suited to prohibit avoidance in situations where a buyer has promised not to avoid the contract prior to cure but does not act accordingly.

Concerning the UNIDROIT principles as an aid to interpreting the CISG we concluded that the Principles may only be used in the sense that the relevant provisions correspond to each other. In this respect we concluded that this is the case regarding the relevant provisions on cure and fundamental breach in the UNIDROIT Principles and CISG. Thus, a consideration of a possible cure must be taken into account when determining fundamental breach in the CISG in light of the UNIDROIT Principles.

In consideration of the above, it appears the only feasible interpretation of a seller's right to cure under the CISG is that article 49 and the right to avoid contracts for seller's fundamental breach does not take precedence over a seller's right to cure a defect in performance in any of its obligations save for situations where it would be unreasonably burdensome to a buyer. Such situations would be present where a buyer loses faith in a seller's ability to perform, cure has been allowed but failed or where a cure would be considered as unreasonably inconvenient to the buyer.

Consequently fundamental breach must be construed in the light of a seller's possibility to cure.

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