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Damages for the Cost of Repair and the Seller's Right to Cure under the UN Convention on Contracts for the International Sale of Goods

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Abstract: The article focuses on whether, in the case of a breach of a sales contract, the buyer can remedy the non-conformity of the goods independently and claim damages for the cost of repair without giving the seller an opportunity to cure his failure to perform. The analysis is based on the solutions adopted in the United Nations Convention on Contracts for the International Sale of Goods. The issue has recently given rise to divergent approaches in the literature. The article seeks to shed new light on the problem and offers a way of resolving the question of the interplay between the seller's right to cure and the buyer's right to claim damages for the cost of repair. The principal conclusion is that the buyer's right to claim damages for the cost of repair and the seller's right to cure do not stand on an equal footing. Rather, the seller's right to cure has priority over the buyer's damages claim. As long as the seller is entitled to remedy his failure to perform under the Convention, the buyer cannot cure the non-conformity independently. If he does so, he cannot claim compensation for the costs incurred as a result of the repair.

Keywords: the right to cure; United Nations Convention on Contracts for the International Sale of Goods; CISG; damages; breach of contract; remedies; sales contract; repair; avoidance; favour contractus

I. Introduction

The right to cure gives the promisor the privilege to make good his initial failure to perform. In the case of a sales contract this means that the seller may be entitled to deliver the goods which, contrary to the contract, were not delivered or cure a non-conformity of the delivered goods before the buyer resorts to remedies for a breach of contract. There is no inconsistency between the fact that the seller committed a breach of contract and that he nonetheless is willing to perform. He may wish to remedy his failure to perform for a number of reasons.[1] For instance, he will normally only be entitled to receive the agreed upon price if he delivers the goods which conform to the contract. It is also likely that he incurred some expenses in order to facilitate the delivery which would be wasted if the goods are not accepted by the buyer. Furthermore, he may care about his reputation as a person who honours his commitments; an established breach of contract may damage this reputation and influence his future

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[1] See also Solène Rowan, *Resisting termination: some comparative observations*, in Andrew Dyson, James Goudkamp, Frederick Wilmot-Smith (eds), *Defences in Contract. Hart studies in private law: essays on defences*, 164 (Oxford and Portland: Hart Publishing, 2017).

transactions with third parties. It is clear therefore that the seller may want to insist on performance of a contract even in the case of a breach.

One of the characteristic features of the United Nations Convention on Contracts for the International Sale of Goods (CISG)[2] is its strong commitment to the principle of *favour contractus*, a direct result of which is the recognition of the seller's right to cure his initial failure to perform. The significance of the right to cure under the Convention has recently been challenged in the literature. It has been claimed that the seller's right to remedy his failure to perform does not need to be respected by the buyer if he prefers to cure the non-conformity of the goods independently.[3] According to this view, the buyer is entitled to repair the defects in goods himself or have it repaired by a third party and claim damages for the cost of repair. He has a right to do so without giving the seller an opportunity to make good his failure to perform. The only restriction is that the amount of damages awarded to the buyer may be reduced based on Art. 77 CISG if by curing the non-conformity independently he does not satisfy the duty to mitigate. It will be argued in this paper that this approach is unfounded. The buyer's right to claim damages for the cost of repair and the seller's right to cure do not stand on an equal footing. Rather, the seller's right to cure has priority over the buyer's damages claim. As long as the seller is entitled to remedy his failure to perform under the Convention, the buyer cannot cure the non-conformity independently. If he does so, he cannot claim compensation for the costs incurred as a result of the repair.

My argument will proceed as follows. In the first part of the paper, I will briefly present the rules governing the interpretation of the provisions of the CISG on which I will base the subsequent analysis. In the second part, I will concentrate on the model of the seller's right to cure as adopted in the CISG and the policy considerations on which this model was based. In the third part of the paper, I will investigate how the policy choices made by the drafters of the CISG have been reflected in the solutions concerning the interplay between the seller's right to cure and the buyer's right to avoid the contract and to reduce the price. In the fourth part of the paper, I will use the outcomes of the preceding analysis to determine the relation between the seller's right to cure and the buyer's right to claim damages for the cost of repair. Finally, I will critically address the arguments which were offered in the literature to support the view that the buyer can elect to resort to a damages claim to cover the cost of repair rather than giving the seller an opportunity to cure. The analysis of the right to cure presented in this paper does not claim to be comprehensive or exhaustive. A thorough examination of all issues linked to the right to cure would require a monographical survey. Rather, the discussion is limited to those aspects of the seller's entitlement to remedy his failure to perform which are necessary to answer the posed research question, i.e. to identify the relation between the seller's right to cure and the buyer's right to claim damages for the cost of repair.

II. The interpretative rules

[2] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18.

[3] Till Maier-Lohmann, *Buyer's self-repair of non-conforming goods versus seller's right to cure under Article 48 of the CISG*, 24 Uniform Law Review 58 (2019); Till Maier-Lohmann, *Neuausrichtung der Selbstvornahme und des Art. 48 Abs. 1 CISG*, 18 Internationales Handelsrecht. Zeitschrift für das Recht des internationalen Warenkaufs und Warenvertriebs 225 (2018).

Article 7(1) of the CISG states that '[i]n the interpretation of the 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.' The reference to the need to promote uniformity in the application of the Convention signifies that the Convention should be interpreted in the same way in each jurisdiction. Thus, the Convention requires an autonomous interpretation.[4] As explained by Martin Gebauer, an autonomous interpretation means that '*the Convention's terms and concepts are to be interpreted in the context of the Convention itself (...) by reference to the Convention's own system and objectives. Autonomous interpretation, in this sense, may be said to rest on systematic and teleological arguments. This does not mean that in interpreting a uniform law other elements, such as literal or historical considerations, are less important, only that they do not constitute the autonomy of interpretation.*'[5] This means that literal or historical considerations can be used as an argument in favour of a given choice of interpretation but not as an independent solution.[6] An autonomous interpretation, therefore, is not a method of interpretation in addition to other methods but is rather seen as a principle of interpretation which prioritises certain type of teleological and systematic argument in interpreting the Convention.[7]

The reference to the observance of good faith in Art. 7(1) has given rise to an extensive debate.[8] For the purposes of this paper, it will be assumed that Art. 7(1) does not impose a positive duty of good faith on the parties to an international sales contract. The provision merely indicates that good faith is

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[4] Franco Ferrari, *Have the Dragons of Uniform Sales Law Been Tamed?: Ruminations on the CISG's Autonomous Interpretation by Courts'*, in Camilla B Andersen, Ulrich G Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday,* 134 (London; Wildy, Simmons and Hill Publishing, 2008); Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, 5 Uniform Law Review 683 (2000); Harry M Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 Journal of Law and Commerce 187 (1997–8); Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters*, 17 Journal of Law and Commerce 245 (1997–8); Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 Minnesota Journal of Global Trade 105 (1997); Robert A 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 21 (1995).

[5] Gebauer, *supra* note 4, at 686–7.

[6] *Ibid.*

[7] *Ibid.*

[8] Eventually, three views have emerged. According to the first view, the CISG does not impose a positive duty of good faith on the parties to the contract but only requires its provisions to be interpreted in a way which produces equitable and fair results (see e.g.: E Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws*, 3 Tulane Journal of International and Comparative Law 47, 56 (1995); John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, paras 94–5 (Deventer: Kluwer, 2009), edited and updated by Harry M Fletchner). According to the second view, art 7(1) imposes a positive duty of good faith on the parties to the contract (see e.g.: Michael J Bonell, *Interpretation of Convention*, in Cesare M Bianca and Michael J Bonell (eds), *Commentary on the International Sales Law*, 84–5 (Milan: Giuffrè, 1987); Gyula Eörsi, *General Provisions*, in Nina M Galston, Hans Smit (eds), *International Sales: The UN Convention on Contracts for the International Sale of Goods*, para. 2.03 (New York: Mathew Bender, 1984)). According to the third view, good faith constitutes one of the general principles on which the Convention is based (see e.g.: Peter Schlechtriem, *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods*, 39 (Vienna: Manz, 1986); Amy H Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 Northwestern Journal of International Law and Business 574, 596–7 (1987–8).

seen as a criterion taken into account in the interpretation of the Convention in order to avoid such outcomes of interpretation that could be seen as inequitable or unfair.[9]

III. The general model of the right to cure under the CISG

1. The seller's right to cure prior to the date set for performance

The CISG distinguishes between the seller's right to cure before and after the due delivery date.[10] The exercise of the right to cure by the seller before the date set for performance has been regulated in Art. 37. This provision states that if the goods were delivered by the seller prior to the agreed upon date, he may up to that date cure any non-conformity of the goods with the contract as long as it does not cause an unreasonable inconvenience or expense to the buyer. In particular, the seller may deliver any missing part or make up any deficiency in the quantity of the goods as well as repair defective goods, or deliver substitute goods to replace the non-conforming ones. As long as performance is still possible, the only limitation on the seller's right to cure at this stage is the case of an anticipatory breach in the sense of art 72 CISG. Article 34 extends the seller's right to cure to the obligation to hand over documents relating to the goods. If the seller has handed over such documents before the time indicated in the contract, he may cure any lack of conformity in the documents up to that time.

The entitlement of the seller to cure his defective performance before the due delivery date is largely undisputed. Prior to the contractually agreed upon date for performance the seller's obligation is not yet exigible. If the seller decides to deliver the goods early, he does so voluntarily, of his free will.[11] Hence, at that point in time the seller is not yet in breach of contract. Consequently, apart from

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[9] As emphasized by Allan Farnsworth, a different interpretation would be 'a perversion of the compromise' achieved by the delegates in Vienna. See, Farnsworth, *supra* note 8.

[10] For a comparative analysis of the right to cure under the CISG see Miquel dels Sants Mirambell Fargas, *The Seller's Right to Cure under Article 48 CISG*, 9–64 (The Hague: Eleven International Publishing, 2018); Uta Gutknecht, *Das Nacherfüllungsrecht des Verkäufers bei Kauf- und Werklieferungsverträgen: Rechtsvergleichende Untersuchung zum CISG, zum US-amerikanischen Uniform Commercial Code, zum deutschen Recht und zu dem Vorschlag der Kommission zur Überarbeitung des deutschen Schuldrechts* (Frankfurt am Main: Peter Lang, 1996); Till Maier-Lohmann, *supra* note 3, 2019, at 60–63; Till Maier-Lohmann, *supra* note 3, 2018, at 226–227; Peter Huber, *CISG – The Structure of Remedies*, 71 Rabels Zeitschrift für ausländisches und internationales Privatrecht 13, 22 (2007); Arsi Pavelts, Karin Sein, *The Buyer's Right to Require Reimbursement for Repair Costs of Defective Goods under the CISG, the CESL, and Estonian Law*, 21 Juridica International Law Review: University of Tartu 147 (2014); Eric C 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*, 7 Arizona Journal of International and Comparative Law 69 (1989–1990); Sonja Kruisinga, *The Seller's Right to Cure in the CISG and the Common European Sales Law*, 19 European Review of Private Law 907 (2011); Jonathan Yovel, *Cure after date for delivery: Comparison between provisions of the CISG (Seller's Right to Remedy Failure to Perform: Article 48) and the counterpart provisions of the PECL (Articles 8:104 and 9:303)*, in John Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, 381 (Cambridge: Cambridge University Press, 2007); Vanessa Mak, *Performance-Oriented Remedies in European Sale of Goods Law*, 149–204 (Oxford and Portland: Hart Publishing, 2009).

[11] Mak, *supra* note 10, at 163. It might be claimed that if the seller decides to deliver goods before the contractually agreed upon date he waives his right to perform until the due date and accepts an obligation to deliver goods that are in conformity with the contract at an earlier stage. Thus, the seller accepts that if the goods

the cases of an anticipatory breach, the buyer's only remedy at this stage is to withhold performance of his own obligations until the seller delivers goods of satisfactory quality.[12]

2. The seller's right to cure after the due delivery date

A much more controversial issue is the seller's right to cure after the due delivery date. After the due date, the seller is in breach of contract. He failed to deliver goods that are in conformity with the contract or he failed to perform by an agreed upon date. Nevertheless, a number of jurisdictions leave a room for cure even where the due delivery date has passed, especially where the buyer has not suffered any negative consequences of the seller's breach.[13] Cure may still be more efficient for both parties than invoking remedies for breach of contract.

Such an approach has been adopted in the CISG. Article 48(1) gives the seller a right to remedy any failure to perform his obligations, even after the contractually agreed upon date for delivery, as long as he can do so without unreasonable delay and without causing unreasonable inconvenience to the buyer or making reimbursement of expenses advanced by the buyer uncertain. The seller's right to cure is available as long as the buyer is not entitled to avoid the contract under art 49.[14]

IV. Clarifying the rationales of the right to cure

delivered early are not in accordance with the contract the buyer will have a right to resort to remedies for a breach of contract rather than giving the seller an opportunity to cure the non-conformity (for an analysis of this view see Mak, *supra* note 10, at 156). This approach, however, is arguably not reflected in the CISG. The mere fact that the seller delivers non-conforming goods before the due date does not mean that he is unwilling to perform what was agreed upon in the contract. Hence, he still should be allowed to cure his failure to perform.

[12] The CISG does not expressly regulate the right to withhold performance. Article 71 CISG introduces the right to suspend performance which applies where the promisor is not yet in breach of contract but it is reasonable to expect that the breach will occur. The right to withhold performance, on the other hand, applies in a situation in which the failure to perform has already been established. It is accepted that the buyer can withhold purchase price during the time in which the seller exercises his right to cure. As stated in the CISG-AC Opinion no. 5 (para 4.20, available at <https://www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> (accessed 20 Sept. 2019)): *'[t]he buyer may withhold the payment of the purchase price; however, this right must be limited to the extent of the non-conformity and the expected detriment.'* Consequently, the buyer can temporarily withhold the payment of the full price only in cases in which the lack of conformity is so serious that it deprives the buyer of the possibility to use the goods as intended – see Mirambell Fargas, *supra* note 10, at 236.

[13] For a comparative analysis of solutions adopted in this respect in German, English and Dutch law see Mak, *supra* note 10, at 164ff.

[14] An additional requirement has been indicated by the German Federal Supreme Court which held that where the seller wishes to exercise his right to cure, he must notify the buyer of this intention (Germany 24 September 2014 Bundesgerichtshof (*Tools case*) <http://cisgw3.law.pace.edu/cases/140924g1.html> (accessed 20 Sept. 2019)). Otherwise, the seller loses his entitlement to remedy his failure to perform. This decision has been explained by reference to the principle of good faith under Art. 7(1) CISG. Arguably, this approach is not correct. Article 48(1) does not mention a duty to inform the buyer of the intention to cure. Such a condition is only mentioned in art 48(2)–(4) which, however, have a different scope of application than art 48(1). Hence, it seems that there is no reason to limit the entitlement to cure by imposing on the seller an additional requirement to notify the buyer of his intentions. For a detailed account of notification duties in sales law see Christoph Jeloschek, *Examination and Notification Duties in Consumer Sales Law: How Far Should We Go in Protecting the Consumer?* (München: Sellier, 2006).

The availability of the seller's right to cure both before and after the due delivery date reveals several policy choices that have been made by the drafters of the CISG. For instance, giving the seller a right to remedy his failure to perform owes much to a desire to uphold a contractual relation between the parties and protect performance of a contract. The principle of *favour contractus* has been identified as one of the general principles on which the CISG is based [15] and 'the most characteristic feature of the system of remedies under the CISG'.[16] The principle expresses priority for keeping the contract alive. [17] In the case of a breach of contract, the parties are encouraged to maintain their relationship and find a solution. [18] It is preferable to save the contract wherever feasible. The contractual relationship should be rescued rather than avoided. Avoidance should be seen as the final resort. [19] The right to cure constitutes an important tool to ensure that the parties persist in their relationship. In particular, it prevents the buyer from escaping from the contract where a defect is minor and could be easily cured at the seller's expense. If the seller had no right to cure, the buyer could use a minor non-conformity of the goods as an excuse to cancel the contract for an external reason, such as a fall in market prices for the goods or changed preferences. [20]

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[15] Bertram Keller, *Favor Contractus. Reading the CISG in Favour of the Contract*, in Camilla B Andersen, Ulrich G Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday*, 247 (London: Wildy, Simmons & Hill Publishing, 2008); Ulrich Magnus, *Allgemeine Grundsätze im UN-Kaufrecht*, 59 Rabels Zeitschrift für ausländisches und internationales Privatrecht 469, 483 (1995) (an English translation of this paper is available at <https://cisgw3.law.pace.edu/cisg/biblio/magnus.html> (accessed 20 September 2019)); the rules can be seen in a number of provisions of the CISG – *see* arts 19(2); 25–26; 34; 37; 48; 49; 51(1); 64; 71–72.

[16] Huber, *supra* note 10, at 18.

[17] Keller, *supra* note 15, at 248–249.

[18] *Ibid.*

[19]Italy 11 December 2008 Tribunale di Forli <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=1729> (accessed 20 Sept. 2019); Germany 25 January 2008 OLG Hamburg <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=1681> (accessed 20 Sept. 2019); Germany 3 April 1996 Bundesgerichtshof (*Cobalt sulphate case*) <https://cisgw3.law.pace.edu/cases/960403g1.html> (accessed 20 Sept. 2019); Switzerland 28 October 1998 Bundesgericht <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=413> (accessed 20 Sept. 2019); Austria 7 September 2000 Oberster Gerichtshof <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=642> (accessed 20 Sept. 2019); Magnus, *supra* note 15, at 483; Ulrich Magnus, *The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases*, 25 Journal of Law and Commerce 423, 424 (2005); Huber, *supra* note 10, at 17; Markus Müller-Chen, *Art 49 CISG*, in Peter Schlechtriem, Ingeborg Schwenzer, Ulrich G. Schroeter (eds), *Kommentar zum UN-Kaufrecht (CISG)*, para. 2 (München: C.H. Beck, 2019); Peter Huber, *Deutsche Rechtsprechung zum UN-Kaufrecht in den Jahren 2001/2002*, IPRax 309, 313 (2003); Christiana Fountoulakis, *Das Verhältnis von Nacherfüllungsrecht des Verkäufers und Vertragsaufhebungsrecht des Käufers im UN-Kaufrecht*, 3 Internationales Handelsrecht. Zeitschrift für das Recht des internationalen Warenkaufs und Warenvertriebs 160, 161 (2003); Rona Sezoran, *Restrictions to Buyer's Right to Avoidance According to the CISG and Turkish Code of Obligations*, in Ingeborg Schwenzer, Yesim Atamer, Petra Butler (eds), *Current Issues in the CISG and arbitration*, 247, 249 (The Hague: Eleven International Publishing, 2014); Markus Müller-Chen, Lara M Pair, *Avoidance for non-conformity of goods under Art 49(1)(A) CISG*, in Stefan Kröll, Loukas A Mistelis, Pilar Perales Viscasillas, Vikki M Rogers (eds), *Liber Amicorum Eric Bergsten, International Arbitration and International Commercial Law: Synergy Convergence and Evolution*, 655 (Alphen aan den Rijn: Kluwer Law International, 2011); Anna Kazimierska, *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods*, Pace Review of the Convention on Contracts for the International Sale of Goods 79 (1999–2000). This approach can be clearly seen in the CISG: see arts 25, 34, 37, 47, 48, 49, 63, and 64 – for a detailed analysis see Keller, *supra* note 15, *passim.*

[20] Huber, *supra* note 10, at 20; Gerhard Wagner, *Termination and Cure Under the Common European Sales Law: Avoiding Pitfalls in Contract Remedies*, 14, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083049> (accessed 20 Sept. 2019).

The seller's right to cure constitutes 'the mirror image'[21] of the buyer's right to specific performance. The right to specific performance allows the buyer to enforce what was promised to him in the contract even if the seller would prefer to avoid that and pay damages instead. The right to cure, on the other hand, enables the seller to persist in performing the contract even if the buyer would prefer to obtain a different remedy, such as avoidance, damages or a price reduction.[22] The seller is entitled to deliver goods that were not delivered or to repair or replace goods that are defective. Only after the seller is given a chance to make good his failure to perform, the buyer can claim other remedies. If the buyer were given a right to avoid the contract right after receiving defective goods, the performance of the parties' original bargain would be far less likely.[23]

As such, the right to cure promotes performance of a contract in accordance with its content and is linked to a belief, clearly demonstrated in the provisions of the CISG[24], that it is not only the promisee but also the promisor who has an interest in performance worthy of protection. This interest continues to exist where the promisor has failed to perform his own obligations under the contract and does not depend on the seriousness of the breach. Giving the promisor a right to remedy his failure to perform ensures that his performance interest is protected and cannot be easily frustrated. Common law jurisdictions typically concentrate on the *promisee's* performance interest. In English law, for example, there is hardly any mention of the *promisor* having an interest in performance.[25] Both the case law and the literature usually focus on the need to protect the 'expectation interest' or 'performance interest' of the promisee. By emphasizing the promisor's interest in performance the CISG comes close to solutions adopted in civil law jurisdictions where importance is given to both the interests of the promisee and promisor alike.[26]

Apart from being justified by the values rooted in the CISG itself (i.e. the principle of *favour contractus* and the recognition of the promisor's interest in performance) giving the seller a right to cure is also supported by efficiency concerns.[27] Preventing the seller from curing a non-conformity may prove to be very expensive, especially where a defect is minor and can be easily remedied by the seller.[28] Where the buyer avoids a contract, he normally has to search for a cover purchase which involves additional efforts and costs. Avoidance may also be inefficient from the seller's perspective: his efforts and costs incurred to effect performance may become frustrated and he may lose the benefit

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[21] Mak, *supra* note 10, at 149.
[22] *Ibid*.
[23] Antonia Apps, *The right to cure defective performance*, Lloyd's Maritime & Commercial Law Quarterly 525, 554 (1994).
[24] Articles 34, 37 and 48 are the prime examples.
[25] Rowan, *supra* note 1, at 183–184; Guenter Treitel, *Remedies for a Breach of Contract: A Comparative Account*, 259 (Oxford: Clarendon Press, 1988). Treitel explains that: 'Anglo-American courts are, in the matter of termination, less concerned with the protection of the debtor than either German or French law. Their emphasis tends…to be on speedy and convenient remedies for the creditor.'
[26] Rowan, *supra* note 1, at 183–184.
[27] For the economic analysis of the remedies for breach of contract under the CISG, including the right to cure, see Avery W Katz, *Remedies for Breach of Contract under the CISG*, 25 International Review of Law and Economics 378 (2005). Specifically on the economic analysis of the right to cure see Mirambell Fargas, *supra* note 10, at 242–250.
[28] Huber, *supra* note 10, at 20; Michael R Will, *Art 49*, in Cesare M Bianca, Michael J Bonell (eds) *Commentary on the International Sales Law – The 1980 Vienna Sales Convention*, para. 2.1.2 (Milan: Guiffrè, 1987); Ulrich Magnus, *Art 49*, in Michael Martinek (ed.), *J von Staudingers Kommentar zum Bürgerlichen Geseztbuch mit Einführungsgesetz und Nebensgesetzen: Wiener UN-Kaufrecht*, para. 4 (Berlin: Sellier & Co. Walter de Gruyter, 2012).

that he expected to gain from performance. In case of most commercial contracts the seller's right to cure is therefore justified by the principle of *ex post* mitigation.[29] The seller will normally exercise his right to cure only where it will cost him less than an alternative remedy that might be elected by the buyer. Thus, the seller will offer cure as long as it is 'the cheapest response' to the breach of contract.[30] As a result, the right to cure contributes to the policy of avoidance of economic waste.[31]

One argument against the efficiency of a right to cure is that it may create a disincentive for the seller to perform the contract in accordance with its content. Knowing that he will always have an opportunity to cure a defective performance, the seller may refrain from taking cost-effective precautionary measures needed to make sure that the goods delivered are of sufficient quality and in conformity with the contract.[32] It seems unlikely, however, that the seller could be better off by delivering defective goods and then curing the defect rather than by delivering conforming goods right from the beginning.[33] The costs of delivering defective goods and curing the defect at a later stage will normally be much higher, especially in the case of international sales.[34]

One final rationale for the seller's right to cure concerns specifically the area of commercial sales. An entitlement of the seller to cure a defective performance is anchored in the commercial practice. Among merchants, the cure by the seller is seen as a standard remedy for delivery of non-conforming goods.[35] It has been claimed that commercial law should reflect trade practices and usages accepted in the world of commerce. Hence, the law should ensure that the seller has an opportunity to make good his failure to perform before the buyer resorts to remedies for breach of contract.[36]

The remaining part of the paper will investigate how the policy choices made by the drafters of the CISG are reflected in the significance given to the seller's right to cure as compared to the remedies of the buyer. It will be shown that only under specific circumstances will the remedies for non-conformity prevail over the seller's entitlement to make good his failure to perform. The main subject matter of this paper is the interplay between the seller's right to cure and the buyer's right to claim damages for the cost of repair. Nonetheless, given the need for systematic interpretation of the Convention, as specified in Art. 7(1), the analysis will first cover the relation between the right to cure and other remedies of the buyer which are inconsistent with this right, i.e. the right to avoid the contract and the right to reduce the price. The outcomes of this examination will be used to determine whether the buyer can resort to damages for the cost of repair without giving the seller an opportunity to cure.

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[29] Wagner, *supra* note 20, at 14.
[30] *Ibid.*
[31] Mak, *supra* note 10, at 150; Michael Bridge, *A Law of International Sales*, 37 Hong Kong Law Journal 17, 22 (2007); Michael Bridge, *Avoidance for Fundamental Breach under the CISG*, 59 International and Comparative Law Quarterly 911, 915 (2010); Joseph Lookofsky, *Understanding the CISG. A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, at para. 6.8 (Alphen aan den Rijn: Kluwer Law International, 2017); Ulrich G Schroeter, *Art 25 CISG*, in Peter Schlechtriem, Ingeborg Schwenzer, Ulrich G Schroeter (eds), *Kommentar zum UN-Kaufrecht (CISG)*, para. 21 (München: C.H. Beck, 2019).
[32] Wagner, *supra* note 20, at 14.
[33] *Ibid.*
[34] *Ibid.*
[35] Wagner, *supra* note 20, at 2; Bridge, *supra* note 31, at 29.
[36] Bridge, *supra* note 31, at 29; Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in T E Carbonneau (ed.), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, 173, 176 (New York: Transnational Juris Publications Inc., 1990), available at: <https://www.cisg.law.pace.edu/cisg/biblio/audit.html> (accessed 20 Sept. 2019).

V. The right to cure, the right of avoidance, and the right to reduce the price

1. The right to cure and the right of avoidance

The buyer's right to avoid the contract is considered to be the primary limitation on the seller's right to cure.[37] Article 48(1) CISG explicitly states that the seller can remedy his failure to perform 'subject to article 49'. The latter provision regulates the right of avoidance. In situations in which the buyer is entitled to avoid the contract, the seller's right to cure ceases to be available. This is understandable given that both rights lead to contradictory results. While the latter aims to keep the contract alive, the former leads to its end.

1.1. The circumstances giving rise to the right of avoidance under the CISG and the seller's right to cure

Under the CISG a contract can be avoided only in limited circumstances.[38] The threshold for the buyer to acquire a right to put an end to a contract and prevent the cure by the seller is very high. The buyer is entitled to do so only in the case of a fundamental breach.[39] Alternatively, if the goods were not delivered at all before the due date, the buyer can fix an additional period of time for the seller to perform (*Nachfrist*) and avoid the contract after this period has expired.[40]

As explained in Art. 25, a fundamental breach occurs where the failure to perform results in such a detriment to the buyer as substantially to deprive him of what he is entitled to expect under the contract. The result of the breach must have been foreseeable to the party in breach or to a reasonable person in that party's position. It has been clarified in the literature that in order to constitute a fundamental breach the failure to perform has to be so intense that 'the purpose of the contract could not be fulfilled anymore.'[41] In other words, it must 'destroy the core of the reciprocal exchange'.[42] Understood this way, the test is very difficult to satisfy and the instances in which a breach is likely to qualify as 'fundamental' are few. Thus, avoidance is seen as the *ultima ratio* of a breach of contract.[43]

The meaning of 'fundamental' breach has given rise to a large volume of case law.[44] Even though there are some discrepancies in court decisions, several points clearly emerge which play a

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[37] Keller, *supra* note 15, at 260; Schneider, *supra* note 10, at 82.
[38] For a more general analysis see Huber, *supra* note 10, at 18; Bridge, *supra* note 31, at 22–25; Lachmi Signh, Benjamin Leisinger, *A Law for International Sale of Goods: A Reply to Michael Bridge*, 20 Pace International Law Review 161, 163–167 (2008).
[39] For a more general analysis see Huber, *supra* note 10, at 24.
[40] Articles 47 and 49(1)(b) CISG.
[41] Keller, *supra* note 15, at 258. See also Robert Koch, *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, Pace Review of the Convention on Contracts for the International Sale of Goods, 348 (1999).
[42] Keller, *supra* note 15, at 258.
[43] Germany 3 April 1996 Bundesgerichtshof (*Cobalt sulphate case*) <https://cisgw3.law.pace.edu/cases/960403g1.html> (accessed 20 Sept. 2019); Signh, Leisinger, *supra* note 38, at 185.
[44] See Alastair Mullis, *Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases*, in Mads Andenæs, Nils Jareborg (eds), *Anglo-Swedish Studies in Law*, 326 (Uppsala: Iustug Förlag,

major role in setting the boundaries between the buyer's right to avoid the contract and the seller's right to cure. In particular, a delay in delivery does not in itself constitute a fundamental breach unless the parties agreed otherwise[45] or the late performance would be of no interest to the buyer.[46] In other cases, it is necessary to examine whether the consequences resulting from the delay are sufficiently serious to justify avoidance under Art. 49.[47] It is for the buyer to prove that he has suffered a detriment as described in Art. 25 CISG due to untimely performance. If the buyer is unable to prove that, he cannot avoid the contract. From this perspective, the solution adopted in the CISG may lead to an uncertainty which is generally considered to be undesirable in commercial sales contracts. Even where the parties have made it clear that the goods should be delivered by a given date, the seller remains entitled to deliver the goods later than agreed as long as the buyer does not suffer a substantial detriment as a result of the late delivery. A stricter solution, however, might have curtailed the seller's right to cure to too large an extent. Giving the buyer the right to avoid the contract and preventing cure after the contractually agreed upon date for performance could limit the possibility to reach a cost-effective result for both parties. This is particularly important in the case of international sales contracts which often involve expensive shipment. Allowing the buyer to avoid a contract even where the delay has not caused any significant consequences would be wasteful of resources.[48] Furthermore, making the buyer's right to avoid dependent on a technical aspect, such as a delivery of goods by an agreed upon date, may open the opportunity to escape from a bad bargain.[49] This way the buyer could avoid the contract not because he really suffered negative consequences of the late performance but because of changes on the market or because his preferences have changed. In this respect, the approach adopted in the CISG ensures that not only the interests of the buyer but also the interests of the seller are upheld.[50]

It is well-established in the case law that a reasonable offer to remedy the failure to perform is likely to make good an otherwise fundamental breach.[51] Thus, curability is generally seen as an

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1998); Leonardo Graffi, *Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention*, Revue de droit des affaires internationales 338 (2003).

[45] See e.g. Germany 3 April 1996 Bundesgerichtshof (*Cobalt sulphate case*) <https://cisgw3.law.pace.edu/cases/960403g1.html> (accessed 20 Sept. 2019); Magnus, *supra* note 28, at para. 30; Signh, Leisinger, *supra* note 38, at 164–165.

[46] Magnus, *supra* note 28, at para. 30; Georg Gruber, *Art 25*, in Harm Peter Westermann (ed), *Münchener Kommentar zum BGB. Band 4*, para. 21 (München: C.H. Beck, 2019); Switzerland 5 November 2002 HG Kanton Aargau (*Inflatable triumphal arch case*) <http://cisgw3.law.pace.edu/cases/021105s1.html> (accessed 20 Sept. 2019).

[47] See John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, para. 184 (The Hague: Kluwer Law International, 1999).

[48] Mullis, *supra* note 44, at 344–345.

[49] Mak, *supra* note 10, at 166.

[50] Alastair Mullis similarly claims that even though the approach adopted in the CISG may engender uncertainty, it may still be 'a price worth paying as a way of promoting justice' – see Mullis, *supra* note 44, at 344. One may also point out that the uncertainty resulting from this approach can be mitigated by the buyer. The buyer may give the seller a *Nachfrist* notice in accordance with art 47(1) CISG. If the seller does not perform within the *Nachfrist* period, the buyer can avoid the contract (art 49(1) (b) CISG).

[51] See e.g. Switzerland 27 April 1992 Pretura di Locarno-Campagna (*Furniture case*) <https://cisgw3.law.pace.edu/cases/920427s1.html> (accessed 20 Sept. 2019) – a case in which the buyer re-sold living-room furniture to a customer who claimed that they were defective; the buyer was not entitled to avoid the contract because he refused the seller's offer to cure; similarly: France 26 April 1995 Cour d'appel de Grenoble (*Alain Veyron v Ambrosio*) <http://cisgw3.law.pace.edu/cases/950426f1.html> (accessed 20 Sept. 2019); Austria 22 November 2011 Oberster Gerichtshof (*Video surveillance system case*)

indication that a breach cannot be deemed sufficiently serious to justify avoidance of a contract.[52] Therefore, in principle, the seller should be given a chance to effect cure whenever it is still possible. The CISG has not adopted a first notice rule. Hence, it is irrelevant whether the buyer declared his willingness to avoid the contract before the seller expressed his intention to cure. What matters is the effectiveness of the remedy.[53] The buyer does not have a right to avoid the contract under Art. 49 as long as the breach is not fundamental. In most cases this means that the buyer cannot avoid the contract as long as the non-performance is curable.[54] Exceptions established in the case law concern in particular situations in which the breach was so serious that it destroyed the trust between the parties.[55] The German Federal Supreme Court went further and stated that even where cure is not possible, the buyer does not automatically have a right to avoid the contract.[56] He may rather be required to look for

<http://cisgw3.law.pace.edu/cases/111122a3.html> (accessed 20 Sept. 2019). It has been pointed out in the Digest of CISG case law that 'a breach is rarely fundamental when the failure of performance could easily be remedied' – *UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods*, 2016, 228, available at <https://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf> (accessed 20 Sept. 2019).

[52] Mak, *supra* note 10, at 171; Kruisinga, *supra* note 10, at 916; Peter Huber, *Art 49*, in Harm Peter Westermann (ed.), *Münchener Kommentar zum BGB. Band 4*, para. 28 (München: C.H. Beck, 2019); Gruber, *supra* note 46, at para. 24; Honnold, *supra* note 47, at para. 296; Müller-Chen, *supra* note 19, para. 15; Ulrich Magnus, *Beyond the Digest: Part III (Articles 25–34,45–52)*, in Franco Ferrari, Harry Flechtner, Ronald A. Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, 319, 323 (München: Sellier; London: Sweet & Maxwell, 2004); Alejandro M Garro, *Cases, analyses and unresolved issues in Articles 25–34, 45–52*, in Franco Ferrari, Harry Flechtner, Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, 362, 366 (München: Sellier; London: Sweet & Maxwell, 2004); Tobias Plate, *The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?*, 6 Vindobona Journal of International Commercial Law and Arbitration 57, 80 (2002). See also case law, e.g.: Germany 24 September 2014 Bundesgerichtshof (*Tools case*) <http://cisgw3.law.pace.edu/cases/140924g1.html> (accessed 20 Sept. 2019); Switzerland 18 May 2009 Bundesgericht <http://www.cisg-online.ch/content/api/cisg/display.cfm?test=1900> (accessed 20 Sept. 2019); Germany 14 October 2002 OLG Köln (*Designer clothes case*) <http://cisgw3.law.pace.edu/cases/021014g1.html> (accessed 20 Sept. 2019); Germany 31 January 1997 OLG Koblenz (*Acrylic blankets case*) <https://cisgw3.law.pace.edu/cases/970131g1.html> (accessed 20 Sept. 2019); Switzerland 5 November 2002 Handelsgericht Kanton Aargau (*Inflatable triumphal arch case*) <http://cisgw3.law.pace.edu/cases/021105s1.html> (accessed 20 Sept. 2019); Lookofsky, *supra* note 31, at para. 6.9; Keller, *supra* note 15, at 258.

[53] Huber, *supra* note 52, at para. 33.

[54] Signh, Leisinger, *supra* note 38, at 185–186 and the case law and literature cited there.

[55] See e.g. the Netherlands 23 April 2003 Hof 's-Gravenhage (*Rynpoort Trading v. Meneba Meel*) <http://cisgw3.law.pace.edu/cases/030423n1.html> (accessed 20 Sept. 2019); Magnus, *supra* note 28, at para. 30; Kruisinga, *supra* note 10, at 916.

[56] Germany 3 April 1996 Bundesgerichtshof (*Cobalt sulphate case*) <https://cisgw3.law.pace.edu/cases/960403g1.html> (accessed 20 Sept. 2019); see also Germany 14 October 2002 OLG Köln (*Designer clothes case*) <http://cisgw3.law.pace.edu/cases/021014g1.html> (accessed 20 Sept. 2019); Germany 18 January 1994 OLG Frankfurt am Main (*Shoes case*) <https://cisgw3.law.pace.edu/cases/940118g1.html> (accessed 20 Sept. 2019); Switzerland 28 October 1998 Bundesgericht (*Meat case*) <http://cisgw3.law.pace.edu/cases/981028s1.html> (accessed 20 Sept. 2019). See, however: United States 6 December 1995 Federal Appellate (2nd Circuit) *(Delchi Carrier v. Rotorex)* <https://cisgw3.law.pace.edu/cases/951206u1.html> (accessed 20 Sept. 2019), where the court did not examine whether the buyer could have made another use of the defective goods. The position of the French courts on this matter is unclear: see France 23 January 1996 Cour de Cassation (*Sacovini/M Marrazza v. Les fils de Henri Ramel*) <http://cisgw3.law.pace.edu/cases/960123f1.html> (accessed 20 Sept. 2019), where the court held that a delivery of artificially sugared, and not suited for consumption, wine constitutes a fundamental breach but did not investigate whether the wine could have been resold for other purposes; and France 26 May 1999 Cour de Cassation (*Schreiber v. Thermo Dynamique*) <http://cisgw3.law.pace.edu/cases/990526f1.html> (accessed 20

alternative uses for the goods. The court indicated that 'avoidance of a contract is only supposed to be the [buyer's] last resort to react to a breach of contract by the other party which is so grave that the [buyer's] interest in the performance of the contract essentially ceases to exist'.

As can be seen from the above analysis, the high threshold for avoidance of the contract adopted in the CISG protects the seller from being deprived of the benefit arising from the contract too easily. Avoidance is allowed only in the case of the most severe breaches. When the seller has not performed the contract, he can still argue that the consequences of the breach suffered by the buyer are not sufficiently serious to justify avoidance and insist on exercising cure. Only in those rare cases in which the breach qualifies as fundamental, the buyer's right to avoid the contract takes priority over the seller's right to cure. This solution signifies a strong emphasis on the principle of *favour contractus* and on the need to protect the interests of both the aggrieved party and the party in breach.

1.2. The seller's right to cure in cases in which the requirements stated in article 48(1) are not satisfied

Once the right to avoid the contract has been established, its exercise by the buyer is in principle unrestricted. Thus, *if it exists* it prevails over the seller's right to cure.[57] Nevertheless, in specific circumstances the seller can still insist on performance of the contract. He can do so by relying on the buyer's willingness to accept cure under Art. 48(2) CISG. Furthermore, the seller can offer a new tender which the buyer may have to accept in order to mitigate the damage suffered.

a) The seller's right to cure under article 48(2)

Even where the requirements of Art. 48(1) CISG are not met, the seller can request the buyer to allow him to cure his failure to perform based on Art. 48(2) CISG. The latter provision states that: '[i]f 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.' According to the prevailing opinion, the seller can remedy his failure to perform under Art. 48(2) irrespective of whether cure is reasonable or whether the buyer has a right to avoid the contract under Art. 49 (thus, regardless of whether the breach qualifies as fundamental).[58] The seller is required to request the buyer's approval and indicate the period of time within which he

Sept. 2019), where the Court's reasoning seemed to be influenced by the fact that the goods were not usable. For a broader analysis see Signh, Leisinger, *supra* note 38, at 170–173.

[57] A proposal not to favour the buyer's right to avoid the contract over the seller's right to cure even where the conditions stated in art 49 are satisfied was rejected at the Vienna Conference – see United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, *Official Records*, 115, 343, available at <https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> (accessed 20 Sept. 2019).

[58] Markus Müller-Chen, *Art 48*, in Peter Schlechtriem, Ingeborg Schwenzer, Ulrich G. Schroeter (eds), *Kommentar zum UN-Kaufrecht (CISG)*, para. 24 (München: C.H. Beck, 2019).

wishes to perform cure.[59] The buyer is expected to cooperate with the seller and to be willing to communicate.[60] Since the buyer has a right to object to the seller's wish to cure, the solution introduced in Art. 48(2) does not harm his interests.[61] It is the choice of the buyer whether to affirm cure or not.[62] Nevertheless, a lack of response from the buyer within a reasonable time is understood as an acceptance of the seller's wish to cure.[63] The mere fact that the buyer is entitled to avoid the contract under Art. 49 does not exempt him from making an objection to the seller's request. Only if the buyer has already effectively avoided the contract before the request was made by the seller, he can ignore this request.[64]

Hence, the solution adopted in Art. 48(2) further strengthens the protection of the seller's interest in performance already ensured in Art. 48(1). Even where a breach is fundamental, the seller can resist avoidance and make good his failure to perform as long as the buyer does not object to this attempt. At the same time, this solution contributes to the general principle of *favour contractus*. It increases the likelihood that the parties will persist in their contractual relationship rather than putting an end to it regardless of the serious character of the seller's breach.

b) The seller's interest in performance and the mitigation principle

Another solution potentially available to the defaulting seller as a means to insist on performance arises through the doctrine of mitigation. Article 77 CISG clearly states that if the aggrieved party fails to take reasonable measures needed to mitigate the loss resulting from the breach, the defaulting party may claim a reduction of damages. In some cases, even though a breach of contract is fundamental, it may be reasonable for the buyer to accept the seller's new offer of a substitute performance in order to mitigate losses resulting from the breach. The buyer is not obliged to accept the seller's new offer; however, a rejection may lead to a reduction of his damages award. An example may be seen in a decision of the Spanish Supreme Court from 28 January 2000[65] although in this case it was the buyer who was in breach of contract. After the conclusion of the contract, the buyer refused to take delivery of the goods and offered to purchase them at a lower price than originally agreed. The seller did not accept the buyer's new offer. Instead, the seller entered into a substitute transaction with a third party. The price at which the goods were resold to the third party was lower than both the original contract price and the price subsequently offered by the buyer. The seller claimed damages

[59] As such, art 48(2) gives the seller an opportunity to clarify whether the buyer will accept cure. Hence, the provision shields the seller from futile attempts to make good his failure to perform.
[60] Müller-Chen, *supra* note 58, para. 24.
[61] Peter Huber, *Art 48*, in Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sales of Goods (CISG): A Commentary*, para. 35 (München: C. H. Beck/Hart/Nomos, 2018).
[62] *UNCITRAL Digest of case law*, *supra* note 51, at 228.
[63] Article 48(2) CISG.
[64] This is because the seller's request cannot reanimate the contract which had already been rightfully avoided (Huber, *supra* note 61, at para. 36). If the buyer approves the seller's wish to cure he cannot claim any remedy inconsistent with performance by the seller within the period of time indicated in the seller's request (art 48(2) CISG). This solution reflects the principle of *venire contra factum proprium* according to which one should not act in contradiction to his own previous conduct. The seller should be able to rely on having the time frame agreed upon with the buyer for exercising his right to cure.
[65] Spain 28 January 2000 Tribunal Supremo (*Internationale Jute Maatschappij v. Marín Palomares*) <http://cisgw3.law.pace.edu/cases/000128s4.html> (accessed 20 Sept. 2019). See also Helmut Koziol, *Reduction in Damages According to Article 77 CISG*, 25 Journal of Law and Commerce 385 (2005–2006).

based on the difference between the contract price and the resale price. However, the court dismissed the claim on the ground that the seller failed to mitigate the loss by rejecting the buyer's new offer to purchase the goods at a modified price. In consequence, the measure of damages awarded to the seller was limited to the loss that he would have suffered had he accepted the buyer's new offer. [66]

What both the mitigation doctrine and the right to cure have in common is that they aim to reduce the financial impact that a breach of contract may have on the promisor. Thus, they both protect the promisor's interests. The doctrine of mitigation requires the promisee to accept a reasonable new offer made by the promisor if in this way he can avoid a part of loss resulting from the breach. The promisee remains entitled to damages for losses that cannot be compensated by the promisor's new tender. As a result, the doctrine of mitigation offers another way to ensure that the promisor receives at least a part of the benefit that he expected to gain from the contract even in the case of a fundamental breach.

2. The right to cure and right to reduce the price

The remedy of price reduction has a similar practical effect as a partial avoidance of the contract.[67] Article 50 CISG explicitly gives the buyer a right to reduce the price if the goods delivered by the seller do not conform to the contract. At the same time, the provision clearly regulates the relation between the buyer's right to reduce the price and the seller's right to cure by giving priority to the latter.[68] This priority concerns the right to cure both before and after the contractually agreed upon date for performance. As long as the seller is entitled to cure under Art. 37 or 48 CISG, the buyer cannot reduce the price.

Given the practical resemblance between the right to reduce the price and the right to avoid the contract, a similar rationale applies to justify the relation of both rights to the seller's right to cure. The CISG is based on the assumption that the parties' bargain should be preserved wherever possible as expressed in the principle of *favour contractus*. Therefore, as long as it is in the seller's interest to insist on cure, the buyer should not be allowed to prevent that by accepting non-conforming goods and reducing the price. In cases in which the seller cures the non-conformity or the buyer unjustifiably declines to accept cure, the buyer loses his right to reduce the price. The buyer's refusal to accept cure does not have to be explicit but can also be implied.[69] It is accepted, for instance, that where the buyer cures the non-conformity himself, rendering cure by the seller impossible, his behaviour should be

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[66] Compare also Ingeborg Schwenzer, *Art 77*, in Peter Schlechtriem, Ingeborg Schwenzer, Ulrich G. Schroeter (eds.), *Kommentar zum UN-Kaufrecht (CISG)*, para. 8 (München: C.H. Beck, 2019).

[67] *Official Records*, *supra* note 57, at 43, para. 11. For a more general account of the right to price reduction under the CISG see Matthias Hirner, *Der Rechtsbehelf der Minderung nach dem UN-Kaufrecht* (Frankfurt am Main: Peter Lang, 2000); Huber, *supra* note 10, at 16; Peter A Piliounis, *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?*, 12 Pace International Law Review 1, 29–43 (2000).

[68] *Official Records*, *supra* note 57, at 43, para. 14; Ivo Bach, *Art 50*, in Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sales of Goods (CISG): A Commentary*, para. 28 (München: C. H. Beck/Hart/Nomos, 2018); Markus Müller-Chen, *Art 50 CISG*, in Peter Schlechtriem, Ingeborg Schwenzer, Ulrich G. Schroeter (eds), *Kommentar zum UN-Kaufrecht (CISG)*, para. 7 (München: C.H. Beck, 2019).

[69] Bach, *supra* note 68, at para. 26; Hirner, *supra* note 67, at 249.

seen as a refusal to accept the seller's attempt to cure which deprives the buyer of his right to reduce the price.[70]

3. Concluding remarks on the interplay between the right to cure, the right of avoidance, and the right to reduce the price

The solutions introduced in the CISG in regard to the buyer's right to avoid the contract and to reduce the price show a solid commitment to the principle of *favour contractus* and a clear recognition of the seller's interest in performance. The right to avoid the contract will only prevail over the right to cure in the rare cases in which the breach qualifies as fundamental. At the same time, however, a fundamental character of the breach will normally be excluded where the seller makes a reasonable offer to cure. Furthermore, even where a breach of contract is serious enough to qualify as fundamental, the seller may request the buyer to accept cure based on Art. 48(2) or make a new tender which the buyer may need to accept in order to avoid a reduction of damages award based on Art. 77. A mere delivery of non-conforming goods will also not entitle the buyer to reduce the price. He will only be allowed to do so after giving the seller a chance to make good the non-conformity. Clearly therefore there is a strong emphasis in the Convention to respect the parties' original bargain and to keep the contract alive for as long as possible. The next part of the paper will examine how these values influence the interplay between the seller's right to cure and the buyer's right to claim damages, in particular damages for the cost of repair.

VI. The right to cure and the right to claim damages for the cost of repair

1. Introductory remarks

Article 74 of the CISG establishes the standard for calculation of damages for a breach of contract. According to this provision, damages 'consist of a sum equal to the loss, including loss of profit, suffered … as a consequence of the breach.' It is unanimously accepted that the aim of damages as laid down in this article is to put the aggrieved party in the position which he would have been in had the contract been performed.[71] Where the seller delivers non-conforming goods and the buyer retains them, the loss suffered by the buyer can be measured in a number of ways.[72] In instances in which the buyer can cure the non-conformity himself or have it cured by a third party, the damage he has suffered will often amount to the cost of repair.[73] Similarly as the right to avoid the contract and to reduce the price, the buyer's right to claim damages for the cost of repair is inconsistent with the seller's right to cure. Differently than in the case of the other two remedies, however, the CISG does not

[70] Bach, *supra* note 68, at para. 26.
[71] *Official Records*, *supra* note 57, at 59, para. 3.
[72] For an overview of the methods of calculation of damages applicable under the CISG see Djakhongir Saidov, *The Law of Damages in the International Sale of Goods. The CISG and other International Instruments*, 171–266 (Oxford and Portland: Hart Publishing, 2008).
[73] *Official Records*, *supra* note 57, at 59, para. 6.

explicitly indicate whether and, if so, when the seller's right to cure has priority over the buyer's right to claim damages for the cost of repair. Articles 34, 37 and 48(1) merely state that where the seller has a right to remedy his failure to perform 'the buyer retains any right to claim damages as provided for in this Convention.' The absence of an unambiguous mention on the relation of the right to cure to the right to claim damages for the cost of repair has led to controversies. It is submitted in this paper that despite the lack of a clear indication in the Convention, the seller's right to cure prevails over the buyer's right to claim damages for the cost of repair. This interpretation is supported by the wording of Arts 34, 37 and 48(1) as well as by the policy choices made by the drafters of the CISG. As I have argued above, these policy choices are clearly reflected in the solutions adopted in the CISG in regard to the other remedies of the buyer which are inconsistent with the seller's right to cure, i.e. the right to avoid the contract and to reduce the price. They should also guide the interpretation of the provisions referring to damages.

2. The relation between the seller's right to cure and the buyer's right to claim damages for the cost of repair – the proposed interpretation

The priority of the seller's right to cure over the buyer's right to claim damages for the cost of repair can be implied from the content of Arts 34, 37 and 48(1) CISG. The primary purpose of these provisions is to declare that the seller has a *legal right* to remedy his failure to perform and to specify in which circumstances this right is not available. Only *after* stating that the seller has such a right and indicating the conditions under which this right does not arise, the provisions refer to a claim for damages by indicating that the buyer retains his right to compensation. The provisions do not mention specific types of damage for which compensation can be claimed. However, it seems clear that they do not aim to entitle the buyer to claim damages in lieu of performance where it would be incompatible with the seller's right to cure. Otherwise, the right to cure granted to the seller in the initial parts of these provisions would be meaningless. The buyer could readily defeat this right by claiming damages instead. It should rather be accepted that Arts 34, 37 and 48(1) refer to such damage resulting from the breach of contract which cannot be removed by the cure.[74]

The seller's right to cure constitutes a remedy for an established breach of contract.[75] The exercise of cure by the seller does not have a retroactive effect. There may still be consequences of a breach which cannot be remedied by cure. The claim for damages referred to in Arts 34, 37 and 48(1) aims to complement the seller's cure in order to ensure that the buyer is put in as good a position as he would have been in had the contract been performed. Apart from losses resulting from a delay in receiving conforming goods, the buyer may suffer a number of consequential losses even where the seller's attempt to cure is successful. These losses may include the costs of examining the non-conforming goods or costs of taking delivery. Furthermore, the buyer may incur costs resulting from

[74] Huber, *supra* note 61, at para. 26; Peter Huber, *Art 48*, in Harm Peter Westermann (ed.), *Münchener Kommentar zum BGB. Band 4*, para. 22 (München: C.H. Beck, 2019); Müller-Chen, *supra* note 58, para. 21.
[75] One should note that technically the right to cure is not a remedy. The aim of the right to cure is to protect the seller against the losses or expenses that he could suffer as a result of providing a remedy that could be claimed by the buyer. For a broader analysis see Mak, *supra* note 10, at 57.

the cooperation with the seller's attempt to cure, such as the costs of sending back the non-conforming goods, costs of deinstalling the goods or costs of storage of non-conforming goods.[76] Articles 34, 37 and 48(1) make clear that the buyer is entitled to compensation for such losses. Respectively, damage which can be remedied by the exercise of the right to cure is not recoverable. [77] Thus, if the buyer has the cure performed by a third party depriving the seller of his *right* to cure, he cannot claim damages for the cost of repair because this cost could have been avoided had the buyer allowed the seller to remedy the non-performance.[78] Any other interpretation of Arts 34, 37 and 48(1) would undermine the significance given to the seller's right to cure in the initial parts of these provisions.

3. The interplay between the right to avoid the contract and the right to claim damages

The problem of the interplay between the seller's right to cure and the buyer's right to claim damages corresponds to the discussion whether the buyer can claim damages under Art. 74 CISG without first avoiding the contract under Art. 49. It has been claimed, both in the case law and in the literature, that allowing the buyer's claim for damages in lieu of (the entire) performance where a contract had not been avoided would challenge the policy considerations on which the right of avoidance is based.[79] The buyer could effectively achieve the same result as in the case of avoidance of a contract but without going through the difficult process of establishing a fundamental breach.[80] Furthermore, it would put into question the significance of Art. 49(2) which specifies that the buyer loses his right to avoid the contract if he does not exercise this right within a reasonable time.[81] Finally, it would cast doubt on the meaning of Arts 75 and 76 which regulate specific ways of measuring damages. Both provisions require the contract to be avoided. [82] For these reasons it has been accepted that the CISG does not allow a claim for damages in lieu of (the entire) performance as long as the contract has not been avoided. The Austrian Supreme Court[83] confirmed that in cases in which the

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[76] Mirambell Fargas, *supra* note 10, at 220.

[77] See also Heinrich Honsell, *Die Vertragsverletzung des Verkäufers nach dem Wiener Kaufrecht*, SJZ – Schweizerische Juristen-Zeitung 345, 354 (1992); Martin Karollus, *UN-Kaufrecht: Vertragsaufhebung und Nacherfüllung*, ZIP – Zeitschrift für Wirtschaftsrecht 490, 491 (1993); Nils Schmidt-Ahrendts, *Das Verhältnis von Erfüllung, Schadenersatz und Vertragsaufhebung im CISG*, 14 (Tübingen: Mohr Siebeck, 2007); Marc-Philippe Weller, Charlotte Sophie Harms, *Der Primat der Nacherfüllung im Gemeinsamen Europäischen Kaufrecht*, GPR – Zeitschrift für das Privatrecht der Europäischen Union 298, 300 (2012); Huber, *supra* note 61, at para. 26; Christoph Benicke, *Article 48*, in Barbara Grunewald (ed), *Münchener Kommentar zum Handelsgesetzbuch: HGB Band 5*, para. 25 (München: CH Beck, 2018; Mirambell Fargas, *supra* note 10, at 218; Keller, *supra* note 15, at 260; Kruisinga, *supra* note 10, at 916–7.

[78] Huber, *supra* note 61, at para. 26; Huber, *supra* note 74, at para. 22; Müller-Chen, *supra* note 58, para. 21.

[79] Austria 6 February 1996 Oberster Gerichtshof (*Propane case*) <http://cisgw3.law.pace.edu/cases/960206a3.html> (accessed 20 Sept. 2019); Austria 14 January 2002 Oberster Gerichtshof (*Cooling system case*) <http://cisgw3.law.pace.edu/cases/020114a3.html> (accessed 20 Sept. 2019); Huber, *supra* note 10, at 29; Peter Huber, *Art 74*, in Harm Peter Westermann (ed.), *Münchener Kommentar zum BGB. Band 4* paras 9–10 (München: C.H. Beck, 2019); Markus Müller-Chen, *Art 45*, in Peter Schlechtriem, Ingeborg Schwenzer, Ulrich G Schroeter (eds), *Kommentar zum UN-Kaufrecht (CISG)*, para. 27 (München: C.H. Beck, 2019).

[80] Huber, *supra* note 79, at para. 9; Müller-Chen, *supra* note 79, para. 27.

[81] Huber, *supra* note 10, at 29.

[82] *Ibid.*

[83] Austria 6 February 1996 Oberster Gerichtshof (*Propane case*) <http://cisgw3.law.pace.edu/cases/960206a3.html> (accessed 20 Sept. 2019); Austria 14 January 2002 Oberster Gerichtshof (*Cooling system case*) <http://cisgw3.law.pace.edu/cases/020114a3.html> (accessed 20 Sept. 2019).

buyer rejects the non-conforming goods, an avoidance is necessary for an action for damages to be successful. However, according to the court, if the buyer decides to keep the non-conforming goods and claim damages for the non-conformity, an avoidance is not needed.[84] Following this reasoning, the buyer can only claim damages in lieu of (the entire) performance where the breach of contract is fundamental. Otherwise, he cannot avoid the contract under Art. 49(1) and the action for damages in lieu of (the entire) performance is barred. Since curability normally excludes a fundamental character of a breach, the buyer can only claim damages in lieu of (the entire) performance where cure by the seller is no longer reasonable. Given that the buyer must give the seller a chance to cure even where the breach is so serious that he wishes to reject the goods, *a maiore ad minus*, he should also be expected to respect the seller's entitlement to cure when he decides to keep the non-conforming goods, thus, where the breach is less serious.

4. The interplay between the seller's right to cure and the buyer's right to claim damages for the cost of repair in the light of the policy considerations

The view supported in this paper is justified in the light of the policy choices which have been made by the drafters of the CISG. Allowing the buyer to perform cure independently, without giving the seller a chance to make good the non-conformity, would contradict the principle of *favour contractus* and the recognition by the drafters of the CISG of the seller's interest in performance. As explained above, *favour contractus* is considered to be one of the general principles underlying the Convention and, at the same time, it is claimed to be the most characteristic feature of the system of remedies adopted in it.[85] The analysis conducted above has shown that this principle is clearly reflected in solutions concerning the interplay between the seller's right to cure and the buyer's right to avoid the contract and to reduce the price. As far as the right to avoid the contract is concerned, the buyer is only allowed to exercise this right where the breach of contract is fundamental. In most cases, a reasonable offer to cure from the seller will exclude the fundamental character of a breach. Thus, a disappointed buyer will have to give the seller an opportunity to cure even where he would prefer to avoid the contract and enter into a substitute transaction with a third party instead. Similarly, as illustrated in Art. 50, the principle of *favour contracts* prevents the buyer from reducing the price without giving the seller a chance to remedy the non-conformity. As long as the seller's right to cure is not respected, the buyer must stick to the original bargain and pay the price which was agreed upon in the contract regardless of the non-conformity of the delivered goods.

As explained in the first part of this paper, Art. 7(1) requires an autonomous interpretation of the Convention which rests on systematic and teleological arguments and takes the Convention's own system and objectives as the primary point of reference. Furthermore, Art. 7(1) requires to take account of the need to observe good faith as a means to avoid inequitable or unfair outcomes of interpretation. The solutions adopted in regard to the buyer's right to avoid the contract and to reduce the price give a clear indication that, from the systematic point of view, the buyer's right to claim damages cannot

[84] See also an approach suggested by Peter Schlechtriem which leads to similar outcomes: Peter Schlechtriem, *Schadensersatz und Erfüllungsinteresse*, in Michael Stathopoulos, Kostas Beys, Philippos Doris, Ioannis Karakostas (eds), *Festschrift Apostolos Georgiades*, 383ff (München: C.H. Beck, 2006).
[85] Huber, *supra* note 10, at 18.

stand on an equal footing with the seller's right to cure. Rather, similarly as the other remedies, the buyer's right to claim damages must correspond to Convention's objectives of keeping the contract alive for as long as possible and respecting the interests which both the buyer and the seller have in the performance of the contract.

It could be argued that preventing the buyer from entering into a cover transaction even where the goods do not conform to the contract may lead to inadequate results. The interests of the buyer may not be sufficiently protected. In particular, this could be the case where the time of performance and the quality of goods are of the essence. It is submitted, however, that such arguments are unfounded. If the background of a given transaction clearly indicates that time or the quality of goods are of the essence and a breach of these requirements means that the purpose of the contract cannot be fulfilled anymore[86], such a breach will qualify as fundamental.[87] In such instances, the buyer will have a right to immediately avoid the contract based on Art. 49 and enter into a cover transaction right away without giving the seller an opportunity to cure. It should also be noted that both Art. 37 and 48(1) exclude the seller's right to cure where its exercise would cause an unreasonable inconvenience or delay to the buyer. On this ground, for example, the District Court in Köln rejected the seller's right to cure in a judgment from 25 March 2003.[88] In this case, the buyer ran a racetrack for carts. He purchased new carts from the seller which were supposed to be delivered fully assembled and 'ready-to-operate.' It was known to the seller that the buyer intended to use the carts in a 24-hour race held on 30 and 31 October 1999. The seller delivered the carts on 26 October 1999. The carts did not conform to the contract – they were not 'ready-to-operate', some components were missing and they showed a number of other defects. According to the court '[b]earing in mind the upcoming 24-hour race, it would have been unreasonable to grant [the seller] the possibility to repair the deficiencies with its own personnel or to deliver carts in replacement'. It is clear therefore that the Convention can cater for those occasions where the exercise of the right to cure would endanger the buyer's interest. If the circumstances of the case or an explicit agreement between the parties show that the time and the quality of the goods are of the essence to the buyer, he can enter into a cover transaction with a third party and claim damages for the cost of repair. In other cases, however, the buyer is required to respect the seller's right to remedy his failure to perform.

5. The arguments in favour of an alternative interpretation

An alternative interpretation of the relation between the buyer's claim for damages for the cost of repair and the seller's right to cure has been offered in the literature.[89] It has been argued that Arts 34, 37 and 48(1) do not introduce a superiority of the seller's right to cure over the buyer's right to claim damages. Rather, the wording of these provisions which state that 'the buyer retains any right to

[86] Keller, *supra* note 15, at 258; Koch, *supra* note 41, at 348.
[87] See e.g. Canada 6 October 2003 Superior Court of Justice, Ontario (*Diversitel v. Glacier*) <http://cisgw3.law.pace.edu/cases/031006c4.html> (accessed 20 Sept. 2019); Germany 27 April 1999 OLG Naumburg (*Automobile case*) <http://cisgw3.law.pace.edu/cases/990427g1.html> (accessed 20 Sept. 2019); Germany 28 February 1997 OLG Hamburg (*Iron molybdenum case*) <http://cisgw3.law.pace.edu/cases/970228g1.html> (accessed 20 Sept. 2019).
[88] Germany 25 March 2003 LG Köln (*Racing carts case*) <http://cisgw3.law.pace.edu/cases/030325g1.html> (accessed 20 Sept. 2019).
[89] Maier-Lohmann, *supra* note 3, 2019, at 58; Maier-Lohmann, *supra* note 3, 2018, at 225.

claim damages' suggests that both the seller's right to cure and the buyer's right to claim damages are seen as equal and none of these rights has any advantage over the other. Four arguments have been indicated to support this conclusion: (i) the fact that the liability for a breach of contract under the CISG is strict; (ii) the difference in wording between the provisions regulating the right to cure and Art. 47(2) CISG in the part in which each of these provisions refers to the claim for damages; (iii) the fact that a strict priority of the right to cure could amount to an unjustified windfall for the seller; (iv) the preparatory works on the CISG. It is submitted that none of these arguments is convincing.

5.1. The strict character of liability for breach

The first argument is based on the ground that the seller's liability under the CISG is strict. Any breach of contract will suffice for a claim for damages to arise.[90] Consequently, the buyer's right to damages emerges, in a sense, automatically in the case of a breach. Therefore, there are no reasons to limit this right by requiring the buyer to accept the seller's cure.[91]

One major argument against this interpretation is that the buyer's right to reduce the price is also independent of the seller's fault. Any non-conformity of the goods entitles the buyer to reduce the price regardless of whether the non-conformity is attributable to the seller.[92] Yet, the CISG in its Art. 50 explicitly gives priority to the seller's right to cure over the buyer's right to declare a price reduction. It is clear therefore that the strict character of the seller's liability does not necessarily need to confine his right to cure.

5.2. The difference in wording between provisions concerning the right to cure and article 47(2)

The second argument concerns the difference in wording between the provisions regulating the right to cure (i.e. Arts 34, 37 and 48) and Art. 47(2) CISG. Article 47 concerns the so-called *Nachfrist* mechanism which, in general, gives the buyer a right to fix an additional period of time for performance.[93] The provision expressly indicates that during the period so fixed, the buyer cannot resort to any remedy for a breach of contract. The provision further clarifies, however, that 'the buyer is not deprived thereby of any right he may have to claim damages *for delay* in performance' (emphasis added) (art 47(2) *in fine*). Thus, unlike the provisions concerning the right to cure, art 47(2) explicitly refers to damage resulting from *a delay* in performance as the type of damage for which compensation can be claimed. The provisions regulating the right to cure do not entail a limitation to any specific

[90] For a broader analysis see Jürgen Basedow, *Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG*, 25 International Review of Law and Economics 487, 496–498 (2005). See also, e.g. Müller-Chen, *supra* note 79, para. 23; Honnold, *supra* note 47, at para. 276; Huber, *supra* note 10, at 17; Saidov, *supra* note 72, at 21–23.
[91] Maier-Lohmann, *supra* note 3, 2019, at 63–64.
[92] As explained in the UNCITRAL Digest 'Price reduction applies whether the non-conformity constitutes a fundamental or a simple breach of contract, whether or not the seller acted negligently, and whether or not the seller was exempted from liability under article 79. Thus even where damages are excluded because of article 79, price reduction may be available.' – see *UNCITRAL Digest of case law*, *supra* note 51, at 237. See also Reza Beheshti, *Price Reduction versus Damages: A Battle without a Winner*, 21 Uniform Law Review 216 (2016).
[93] For a more general analysis see Huber, *supra* note 10, at 20–21.

type of damage. On the contrary, they state that 'the buyer retains *any* right to claim damages' (arts 34, 37 and 48(1)). Therefore, it has been argued that based on these provisions the buyer does not have to wait for the seller to exercise his right to cure but he can rather choose to claim compensation for *any* damage incurred as a result of the breach.[94] It has been claimed that even though such an interpretation may undermine the significance of the seller's right to cure, it does justice to the exact wording of Arts 34, 37 and 48(1) as compared to Art. 47(2).[95]

It is submitted that this interpretation is unfounded. One major distinction between *Nachfrist*, as regulated in Art. 47 CISG, and the right to cure, as regulated in Arts 34, 37 and 48(1) CISG, is that the former only applies at the discretion of the buyer. The buyer is not *obliged* to set an extra period for the seller to perform. In certain circumstances, there are incentives which may motivate the buyer to do so. This is the case where the goods were not delivered by the agreed upon date but the delay does not give rise to consequences serious enough to constitute a fundamental breach. In such a case, the buyer does not have a right to avoid the contract. Nevertheless, if he gives a *Nachfrist* notice to the seller in accordance with Art. 47, he becomes entitled to avoidance upon the expiration of the period indicated in the notice. Hence, the buyer may have an interest in fixing an extra period for the seller to perform under Art. 47 but he never has an *obligation* to do so. It always remains at his discretion. The seller cannot require the buyer to fix this extra period. Articles 34, 37 and 48(1), on the other hand, give the seller a *legal right* to cure his failure to perform which is not dependent on the discretion of the buyer.

Article 47 CISG does not exclude the buyer's remedies other than damages for delay but merely suspends them for a certain period of time. The rationale behind this rule is to protect the seller's reliance. Where the buyer accorded to the seller an additional period to perform, he should not be allowed to avoid the contract, reduce the price, or claim damages in lieu of performance until this time has expired (*venire contra factum proprium*).[96] The provision does not create a claim for damages for delay but merely makes clear that they are not barred or suspended by a *Nachfrist* notice.[97] After the expiration of the period fixed under Art. 47, the buyer can claim damages for both the consequences of delay and *any other losses* resulting from the breach.

One major issue that needs to be considered in interpretation of Art. 47 is its actual scope of application. Although fixing an extra period of time for performance may be useful in any type of breach of contract[98], the scope of application of this provision is in practice limited to cases of non-delivery.[99] The provision aims to protect the buyer who is waiting for a delayed delivery and therefore has an interest in establishing at what point the breach is sufficiently serious for the right to avoid the contract to arise.[100] This is reflected in the content of Art. 49(1)(b) CISG. As mentioned above, this

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[94] Maier-Lohmann, *supra* note 3, 2019, at 64.
[95] Maier-Lohmann, *supra* note 3, 2019, 64–65.
[96] Peter Huber, *Art 47*, in: Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sales of Goods (CISG): A Commentary*, para. 2 (München: C. H. Beck/Hart/Nomos, 2018).
[97] Huber, *supra* note 96, at para. 16.
[98] Huber, *supra* note 10, at 21.
[99] Huber, *supra* note 96, at para. 11; Lookofsky, *supra* note 31, at para. 6.10; Honnold, *supra* note 47, at para. 288; Huber, *supra* note 10, at 16; Germany 18 January 1994 OLG Frankfurt am Main (*Shoes case*) <https://cisgw3.law.pace.edu/cases/940118g1.html> (accessed 20 Sept. 2019); Müller-Chen, *supra* note 19, at para. 15.
[100] Piliounis, *supra* note 67, at 21–22.

provision gives the buyer a right to avoid the contract, irrespective of whether the breach was fundamental, after giving the seller a *Nachfrist* notice in accordance with Art. 47. However, Art. 49(1)(b) explicitly refers only to cases of non-delivery. Hence, in the case of delivery of non-conforming goods, giving the seller a *Nachfrist* notice does not entitle the buyer to avoid the contract after the expiration of the fixed period. The buyer must still prove that the breach was fundamental.[101] This means that a *Nachfrist* notice given in cases of delivery of non-conforming goods would actually be detrimental to the buyer. The only result of giving a *Nachfrist* notice would be precluding the buyer from taking any remedial action during the period of such notice. The buyer would not acquire any benefit from setting the extra period. It is unclear therefore what would be the purpose for the buyer to give the seller a *Nachfrist* notice in such circumstances.[102] Thus, practically, the scope of application of Art. 47 is restricted to cases of late performance rather than non-conformity of the goods with the contract. From this perspective it is understandable that Art. 47(2) refers explicitly to damages for delay. It clarifies that the mere fact that the buyer gave the seller an extra period to perform does not excuse the seller from liability for his failure to respect the contractually agreed upon date for performance. In any case, the buyer remains entitled to claim damages for any other losses after the expiration of the extra period.

The scope of application of Arts 34, 37 and 48(1) on the other hand is not limited to cases of a delay but covers all instances of a breach of contract. This can be clearly seen if one takes into account that Art. 37 CISG concerns a situation in which non-conforming goods are delivered *before* the due delivery date and the seller remedies the failure to perform *prior* to that date. Thus, in these instances the buyer does not suffer any damage resulting from a delayed performance. The seller performs his obligations before the contractually agreed upon date. It is obvious therefore that damages for delay are not mentioned in the content of Art. 37. Such damages are simply not relevant in cases in which this provision applies. Under this provision, the buyer is entitled to compensation for *any* type of damage which cannot be remedied by cure. The content of Art. 34 can be explained in the same way. Article 48(1) *in fine* simply repeats the wording used in Arts 37 and 34 *in fine*. Since art 48(1) applies in cases in which the time for performance has passed, it covers both losses resulting from delay and any other type of damage which cannot be removed by cure.

To conclude, the difference in wording between Art. 47(2) and Arts 34, 37 and 48(1) does not suggest that the latter provisions put the buyer's right to claim damages on an equal footing with the seller's right to cure. Rather, it is a result of a different scope of application of those provisions and a different character of *Nachfrist* as compared to the right to cure.

5.3. A windfall for the seller

It has been argued that giving priority to the seller's right to cure over the buyer's right to claim damages could lead to an unjustified windfall for the seller.[103] This could be the case in situations

[101] For the justification of this solution see Honnold, *supra* note 47, at para. 288.
[102] Piliounis, *supra* note 67, at 22; Albert H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, 356 (Deventer: Kluwer, 1989).
[103] Maier-Lohmann, *supra* note 3, 2019, at 65–66.

where the buyer has cured the defect himself or had it repaired by a third party instead of giving the seller a chance to cure. If the interpretation supported in this paper is accepted, in such a case the buyer would not be allowed to claim damages for the expenditures incurred because they could have been removed by an exercise of the right to cure by the seller. As a result, the seller would no longer have to perform his obligations under the contract (because the breach has already been cured by the buyer himself) and, at the same time, he would be exempted from liability for losses suffered by the buyer (because these losses would not have occurred had the seller been given a chance to cure[104]). It has been claimed that such an outcome would have a punitive effect on the buyer. Furthermore, such an interpretation would protect the breaching party at the expense of the aggrieved party.[105]

One should point out however that if the buyer stops the seller from exercising his right to cure, it is the buyer who is the '*breaching*' party. As expressly indicated in Arts 34, 37 and 48(1) the seller has a *legal right* to cure. This right is violated by the buyer if he does not give the seller an opportunity to remedy the non-performance. The negative consequences which arise from the infringement of the seller's right (such as the absence of a damages claim), are a direct result of the buyer's conduct. Preventing the seller from exercising his right to cure can be seen as causing his failure to perform. According to Art. 80 CISG, a party cannot rely on another party's failure to perform if the failure was induced by the first party's own conduct. Hence, where the buyer deprives the seller of the opportunity to cure, he cannot claim compensation for damage resulting from the fact that proper performance was not provided.[106] This interpretation has been confirmed in the case law. In a case of the Appellate Court in Koblenz[107], the seller, who delivered non-conforming goods to the buyer, subsequently offered to deliver new goods in accordance with Art. 48(1) CISG. The buyer rejected the seller's offer. The court held that by doing so the buyer 'had hindered the seller's right to cure the non-conformity' and therefore he could not rely on the seller's breach. In another case, the Lower Court in Munich confirmed that it is possible for the seller to rely on Art. 80 where the buyer prevented the seller from curing his failure to perform.[108] Such a broad interpretation of Art. 80 is justified even though the very fact that the right to cure emerges indicates that a contract has already been breached.[109] Article 80 is said to be rooted in the idea of good faith and fair dealing.[110] The observance of good faith is also specifically indicated in Art. 7(1) as a factor taken into account in the interpretation of the provisions of the CISG. Under the Convention, the seller has a *legal right* to cure. If successfully exercised, this right could eventually lead to performance of the contract. [111] Preventing the seller from

[104] An exception would be losses resulting from the delay and losses which could not have been avoided by the exercise of the right to cure by the seller.
[105] Maier-Lohmann, *supra* note 3, 2019, at 65–66.
[106] Müller-Chen, *supra* note 58, at para. 21. See also, similarly: Kathrin Pier-Eiling, *Das Nacherfüllungsrecht des Verkäufers aus Art 48 CISG: unter besonderer Berücksichtigung seines Verhältnisses zu den Rechtsbehelfen des Käufers*, 176 (Berlin: Tenea 2003); Andreas Leukart, *The Seller's Right to Cure: with special reference to Standard Terms and The United Nations Convention on Contracts for the International Sale of Goods (CISG)*, paras 233–6 (Basel: Helbing Lichtenhahn, 2013). See, however, Gutknecht, *supra* note 10, at 73.
[107] Germany 31 January 1997 OLG Koblenz (*Acrylic blankets case*) <https://cisgw3.law.pace.edu/cases/970131g1.html> (accessed 20 Sept. 2019).
[108] Germany 23 June 1995 AG München (*Tetracycline case*) <http://cisgw3.law.pace.edu/cases/950623g1.html> (accessed 20 Sept. 2019).
[109] It has been claimed that, in general, the interpretation of Art. 80 should be broad – see Thomas Neumann, *The Duty to Cooperate in International Sales. The Scope and Role of Article 80 CISG*, 69 (Munich: Sellier, 2012).
[110] Neumann, *supra* note 109, at 109, 116ff.
[111] Saidov, *supra* note 72, at 99–100.

exercising his right to cure, explicitly guaranteed to the seller in the provisions of the Convention, by allowing the buyer to enter into a cover transaction would be difficult to justify in the light of good faith. If the buyer does not give the seller an opportunity to cure, he deprives the seller of a chance to ensure performance of the contract after an unsuccessful initial attempt even though the seller has a legal right to do so.[112] It is submitted that the need to observe good faith in international trade justifies a broader interpretation of Art. 80 in order to accommodate for those cases. Therefore, if the buyer did not respect the seller's offer to cure, Art. 80 should prevent the buyer from claiming compensation for the damage resulting thereof.

5.4. Preparatory works

Finally, it has been argued that allowing the buyer to claim damages regardless of the seller's right to cure is justified in the light of the *travaux préparatoires*.[113] This argument is based on the ground that the materials relating to the predecessor of Art. 46 CISG (thus, a provision giving the buyer a right to claim performance-oriented remedies) indicate that: 'In place of requesting the seller to perform pursuant to this article, the buyer may find it more advantageous to cure the defective performance himself or to have it cured by a third party. Article 59 of the draft [currently art 77 of the CISG], which requires the party who relies on a breach of contract to mitigate the losses, authorizes such measures to the extent that they are reasonable in the circumstances.'[114] This explanation has been copied to the Secretariat Commentary, although the term 'cure' was replaced by the term 'to remedy'.[115]

One should point out that the cited section refers to the predecessor of Art. 46 rather than Art. 48 CISG. Hence, it does not refer to the seller's right to cure but rather to the buyer's right to claim performance-oriented remedies, i.e. repair or replacement. The section suggests that the right to claim such remedies does not have priority over the right to claim damages. Thus, the CISG does not introduce a hierarchy of remedies but rather gives the buyer a right to resort to a remedy of his choice. Instead of requesting the seller to provide proper performance by repairing or replacing the non-conforming goods, the buyer is therefore allowed to cure the defect by himself or have it cured by a third party and claim damages from the seller.

Article 48(1) CISG, on the other hand, refers to an earlier stage in the life of a contract than Art. 46. It gives the seller a right to make good his failure to perform *before* the buyer invokes remedies for breach. The buyer's remedies are ineffective as long as the seller has a right to cure.[116] This concerns also the buyer's right to claim performance-oriented remedies.[117] Even though both the buyer's right to claim repair or replacement and the seller's right to cure share a similar purpose, i.e.

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[112] Saidov, *supra* note 72, at 99–100.
[113] Maier-Lohmann, *supra* note 3, 2019, at 67–68.
[114] United Nations Commission on International Trade Law, *Yearbook: Volume VII* 113 (1976), at para. 12, available at <https://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/yb_1976_e.pdf> (accessed 20 Sept. 2019).
[115] *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary")*, UN DOC. A/CONF. 97/5, Article 42, para 14, available at <http://www.cisg-online.ch/index.cfm?pageID=644#Article%2042> (accessed 20 Sept. 2019).
[116] Mirambell Fargas, *supra* note 10, at 221.
[117] *Ibid.* See also Müller-Chen, *supra* note 58, at paras 18–21.

specific performance of the contract, they are in fact distinct. This can be particularly seen where following a breach of contract the seller offers cure by replacing defective goods under Art. 48(1) while the buyer demands a repair under Art. 46(3).[118] It has been accepted that in such a case the seller's right to cure has priority and therefore the choice between repair and replacement belongs to the seller.[119] Only where the right to cure ceases to exist, the buyer is entitled to claim a remedy of his choice. In conclusion, the seller's right to cure regulated in Art. 48 and the buyer's right to demand cure under Art. 46 should be kept distinct. Therefore, the solutions suggested in *travaux préparatoires* concerning the latter should not automatically apply to the former.

VII. Conclusion

The conclusions I have arrived at in this paper can be summarised as follows. First, the solutions adopted in the CISG show a strong commitment to the principle of *favour contractus*, commonly seen as one of the general principles underlying the Convention. Furthermore, following the approach typical for civil law jurisdictions, the CISG recognizes that not only the interest of the promisee but also the interest of the promisor in the performance of the contract should be offered protection. For these reasons, the Convention generally allows the seller to make good his initial failure to perform. Only under specific circumstances, the Convention places limitations on the seller's right to cure and allows the buyer to pursue remedies which are inconsistent with this right. This is particularly the case if a breach of contract is fundamental which usually implies that cure by the seller would not be reasonable anymore. In other instances, the buyer is expected to respect the seller's right to remedy his failure to perform before resorting to remedies for breach. This approach can be clearly seen in solutions concerning the exercise of the right to avoid the contract and to reduce the price. It has been argued in this paper that similar rules should govern the exercise of the right to claim damages, in particular damages for the cost of repair. As long as the seller is entitled to remedy his failure to perform, the buyer is not allowed to cure the non-conformity independently and claim damages for the cost of repair. He is rather required to first give the seller an opportunity to cure unless this would cause unreasonable delay or inconvenience. Since the seller has a legal right to cure, an infringement of this right by the buyer prevents the latter from claiming damages for the losses suffered as a result of the breach.

[118] It should be noted that according to Art. 46 the buyer can only require delivery of substitute goods where breach of contract is fundamental. The right to claim repair of defective goods is not limited in this way.
[119] Müller-Chen, *supra* note 79, para. 35; Müller-Chen, *supra* note 58, at para. 20; Huber, *supra* note 74, at para. 14; Mirambell Fargas, *supra* note 10, at 223.