

CHAPTER SIX

The Seller's Right to Cure Defects in Performance

6.0 Introduction

In the previous chapter, this thesis examined the provisions in the United Nations Convention on Contracts for the International Sale of Goods 1980 dealing with the buyer's right to avoid the contract.¹ This chapter examines what is considered to be one of the most controversial issues affecting the buyer's right to avoid the contract.² Specifically, the chapter examines the provisions dealing with the seller's right to cure any lack of conformity or any failure to perform its obligations under the contract.³ This examination is necessary in order to determine how the seller's right to cure defective performance will impact on the buyer's right to avoid the contract. The chapter commences by examining art 34 CISG, the seller's right to cure defects in the documents relating to the goods before the time of delivery. Next, the chapter examines art 37 CISG, which addresses the seller's right to cure defects in the goods if they are delivered before the contractual date. The chapter then critically considers art 48 CISG, which deals with the seller's right to cure defective performance *after* the date of delivery. Article 48 is one of the most contentious provisions determining whether or not a fundamental breach of contract has occurred as the buyer may be precluded from avoiding the contract if the breach

¹ See discussion at chapter 5; CISG, arts 25, 49, 47(1); Hereinafter referred to as the 'CISG'; United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG); UNCITRAL, 'United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)'

<www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> accessed 29 September 2013.

² Jacob Ziegel, 'The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives' in Nina Galston & Hans Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Juris 1984) 9; Michael Will, 'Article 48' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 348; John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer 1999) 209; Bertram Keller, 'Early Delivery and Seller's Right to Cure Lack of Conformity: Article 37 CISG and UNIDROIT Principles Comparative' (*IICL*, 11 June 2004) <www.cisg.law.pace.edu/cisg/biblio/keller.html> accessed 09 May 2013.

³ CISG, arts 34, 37 and 48.

can be cured.⁴ The chapter also examines whether the UNIDROIT Principles⁵ can be used to fill in the gaps and ambiguities inherent in the seller's right to cure defects in the documents and goods.⁶ Additionally, comparisons will be made with the English common law,⁷ in conjunction with the Sale of Goods Act 1979,⁸ dealing with the seller's right to cure non-conforming performance. The chapter will determine whether English law could provide a more certain and swift remedy for the buyer to use to terminate the contract.⁹

6.1 The Seller's Right to Cure Defects in the Documents before Date of Performance

Article 34 sets out the seller's obligation to hand over documents relating to the goods at the time, place and in the form stipulated in the contract.¹⁰ If the seller tenders non-conforming documents earlier than the contractual date, he is permitted the right to cure the defects. This right however is subject to the condition that it 'does not cause the buyer unreasonable inconvenience or unreasonable expense'.

The following sections examine the legislative history, meaning and purpose of art 34 to explain why the provision was thought to be necessary and what problems are inherent in its interpretation.

⁴ CISG, arts 25 and 49(1); Ziegel (n 2) 9; Honnold (n 2) 209.

⁵ Hereinafter referred to as 'UNIDROIT Principles' or 'Principles'; International Institute for the Unification of Private Law, 'UNIDROIT Principles 2010' <www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010> accessed 18 July 2014.

⁶ See discussion at chapter 3.6; International Institute for the Unification of Private Law, 'UNIDROIT Principles of International Commercial Contracts' <www.unidroit.org/english/principles/contracts/main.htm> accessed 13 October 2013; Katharina Boele-Woelki, 'Terms of Co-Existence the CISG and the UNIDROIT Principles' in Petar Sarcevic and Paul Volken (eds), *The International Sale of Goods Revisited* (Kluwer 2001) 203.

⁷ Hereinafter referred to as 'English law'.

⁸ Hereinafter referred to as SGA; Sale of Goods Act 1979, SR & O 1983/1572.

⁹ See discussion at chapter 1.2, chapter 2.4.1 and chapter 3.7.1.

¹⁰ CISG, art 34 states: 'If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention'.

6.1.1 Legislative History of Article 34 CISG

The antecedent to art 34 CISG can be found in art 50 of the Uniform Law for the International Sale of Goods.¹¹ Article 50 ULIS is similar to art 34 CISG in that the seller is bound to hand over documents pertaining to the goods as set out in the contract. However, art 50 stipulated that the time and place for performance can also be determined by relevant usages. Although art 34 makes no reference to usages, the thesis argues that art 9 CISG will expressly or impliedly incorporate usages into its application.¹² Article 34 goes further than its ULIS counterpart by including the seller's right to cure non-conformities in the documents, subject to the criterion that the buyer is not unreasonably inconvenienced or expensed. These additions were to provide the seller with the same opportunities to cure defects in the documents as he would have with the goods under art 37 CISG.¹³

6.1.2 Meaning and Purpose of Article 34 CISG

Article 34 will apply to all documents that relate to the goods. These documents include: negotiable and non-negotiable bills of lading, invoices, insurance documents as well as certificates of origin and quality.¹⁴ It is the terms of the contract,¹⁵ practices established between the parties,¹⁶ as well the use of delivery terms that will determine the required documents.¹⁷ In one case a Mexican tribunal

¹¹ Hereinafter referred to as ULIS; ULIS, art 50 states: 'Where the seller is bound to hand over to the buyer any documents relating to the goods, he shall do so at the time and place fixed by the contract or by usage'.

¹² See discussion at chapter 4.3.

¹³ See discussion below at chapter 6.2.2; Ole Lando, 'Article 34' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 265; UNCITRAL, 'Official Records I' (1991) A/CONF.97/19 <www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> accessed 31 October 2013.

¹⁴ Corinne Widmer, 'Obligations of the Seller: Article 34' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 561; Ukraine 5 July 2005 Arbitration proceeding (*Medical equipment case*) (IICL, 19 October 2006) <<http://cisgw3.law.pace.edu/cases/050705u5.html>> accessed 14 October 2014.

¹⁵ CISG, art 6 (principle of party autonomy).

¹⁶ CISG, art 8.

¹⁷ See discussion at chapter 4.1-4.3; CISG, art 9; See for example 'CIF' (Cost, Insurance, Freight); INCOTERMS 2010, rr A1-10.

found that the seller had failed to tender conforming documents, specifically, the commercial invoice did not state the quantity or the value of goods.¹⁸ The tribunal determined that the seller's obligation to provide this information was discernible from the terms of the contract as well as the use of the delivery term 'FOB'.¹⁹ It is suggested that in the absence of express stipulations or usages as to the time and place for delivery, art 7 CISG and the general principle of the observance of good faith require that documents be handed over in a manner that allows the buyer to take delivery of the goods.²⁰ However, a Swiss court held that this duty did not extend to the seller procuring export documents for the goods unless the parties had expressly agreed on this requirement.²¹

It should be noted that art 34 may only be exercised by the seller if there is still time left to perform in the contract. Once the period for delivery of the documents has passed, the seller can no longer rely on art 34 and must instead look to art 48.²² Under art 34 the seller has discretion regarding the method of cure employed. For example, he can exchange, correct or amend the documents.²³ However, this discretion is subject to the criterion that the cure cannot cause the buyer unreasonable inconvenience or expense. The former refers to situations where the buyer is no longer in possession of the documents and it would be difficult for him to recall them, whereas the latter pertains to the costs that the buyer may incur waiting for the cure to be effected.²⁴

¹⁸ Mexico 29 April 1996 Compromex Arbitration proceeding (*Conservas La Costeña v Lanín*) (IICL, 26 November 2012) <<http://cisgw3.law.pace.edu/cases/960429m1.html>> accessed 14 October 2014.

¹⁹ See discussion at chapter 4.3.4; Free on Board.

²⁰ See discussion at chapter 3.4.3; Lando (n 13) 266.

²¹ Switzerland 12 August 1997 District Court St Gallen (*Clothes case*) (IICL, 12 October 2004) <<http://cisgw3.law.pace.edu/cases/970812s1.html>> accessed 14 October 2014.

²² See discussion below at chapter 6.3; Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods* (Oceana 1992) 138.

²³ Enderlein and Maskow (n 22) 138.

²⁴ *ibid.*

It can be argued that the seller's right to cure under art 34 will affect the buyer's right to avoid the contract as it is unlikely that tendering non-conforming documents before the date of performance will amount to a fundamental breach.²⁵ It is recalled that a fundamental breach must substantially deprive the buyer of its contractual expectations.²⁶ The only way in which this could occur is if the contract excluded early tender of documents as well as the seller's right to cure. This is supported by the fact that the provision has been relatively uncontroversial and has generated very little case law.²⁷ There are no reported cases of the application of art 34 causing unreasonable inconvenience or expense to the buyer.²⁸ Furthermore, art 34 permits the buyer the right to claim damages for any costs incurred in accepting the new tender, for instance the costs of having them re-examined by the issuing bank before a letter of credit can be opened.²⁹ Therefore, the criteria of fundamental breach as set out in art 25 will be difficult to establish if there is still time for the seller to perform his obligations.³⁰

The next section proceeds to examine the position in English law on curing defects in the documents before the date of performance.

6.1.3 English Law on Curing Defective Documents before the Date of Performance

Bridge argues that generally the seller's right to cure defects has no place in English law.³¹ He points out that the right to cure defects in the documents may result in uncertainty for the well-established principle in English 'CIF' contracts;

²⁵ See discussion at chapter 5.1; CISG, art 49(1)(a).

²⁶ See discussion at chapter 5.1.2.

²⁷ Pace Law School Institute of International Commercial Law, 'UNCITRAL Digest Cases for Article 34' (*IICL*, 03 October 2012) <www.cisg.law.pace.edu/cisg/text/digest-cases-34.html> accessed 21 October 2013.

²⁸ *ibid.*

²⁹ Martin Karollus, 'Article 34' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (Springer 2009) 114.

³⁰ See discussion at chapter 5.1.2.

³¹ Michael Bridge, *The International Sale of Goods: Law and Practice* (2nd edn, OUP 2007) 576.

namely, the buyer's right to reject any early non-conforming tender.³² This approach was confirmed by the Law Commission who determined that the seller's right to cure was unsuitable for commercial contracts as the parties to these transactions required swift termination rights.³³ However, English law *does* recognise a limited scope for the seller's right to cure defects.³⁴ This can be seen in cases where the contractual period for performance has either not passed or alternatively time is not of the essence.³⁵ For example, in *Borrowman Phillips & Co v Free & Hollis* the seller was allowed the right to retender as the contractual period had not expired.³⁶ The approach adopted in art 34 CISG does not affect international sales contracts, even those of a documentary nature, as it is only the intermediate buyers in the string sale that will require conforming documents, thus an early tender and cure is unlikely to cause inconvenience to these parties.³⁷ Furthermore, the English courts have been reluctant to find that *all* breaches of time stipulations will result in the buyer being allowed to reject the tender and terminate the contract, particularly if there has been no loss as a result of the tender.³⁸ These breaches have been treated as intermediate or innominate terms rather than conditions.³⁹

This thesis argues that the approach of the CISG in allowing the seller the right to cure defects in the documents before the date of delivery is appropriate in international sales of goods contracts. For instance, most goods will already be enroute to their destination when the documents are handed over to the buyer. A second opportunity to tender conforming documents will help to prevent wasted

³² *ibid* 577.

³³ Law Commission, *Sale and Supply of Goods* (Law Com No 58 1983).

³⁴ Vanessa Mak, 'The Seller's Right to Cure Defective Performance – A Reappraisal' (2007) LMCLQ 409.

³⁵ *ibid*.

³⁶ (1878) 4 QBD 500.

³⁷ See discussion at chapter 2.4.1; Bridge (n 31) 577.

³⁸ *Torvald Klaveness A/S v Arni Maritime Corp (The Gregos)* [1994] 1 WLR 1465.

³⁹ See discussion at chapter 3.7.2.

expenditure of having to transport and resell the goods elsewhere. Article 34 is similar to the approach taken in English law whereby the seller is given the opportunity to retender if there is still time left to perform the contract.⁴⁰ However, by stipulating that the retender cannot cause the buyer unreasonable inconvenience or expense, art 34 offers a clear and balanced approach to the needs of both the buyer and seller.

6.1.4 Conclusion to Article 34 CISG

It has been established that art 34 has posed little problem in practice. In fact, art 34 can prove to be useful in cases where the buyer requires conforming contractual documents in order to take possession or resell the goods. Furthermore, the approach in art 34 will be beneficial to the buyer with a vested interest in delivery or if there is a rising market for the goods and the buyer requires the documents relating to the goods without further delays.⁴¹

The chapter proceeds to examine art 37 CISG, curing defects in the goods before the date of performance.

6.2 The Seller's Right to Cure Defects in the Goods before Date of Performance

Article 37 CISG allows the seller the right to cure any non-conformity in the goods before the date of performance.⁴² These non-conformities can include defects in quantity as well as quality of the goods as set out in art 35.⁴³ The seller has until the last date in the contractual period to effect the cure. Similar to the wording of art

⁴⁰ *Borrowman Phillips & Co v Free & Hollis* (1878) 4 QBD 500.

⁴¹ See discussion at chapter 2.4.1.

⁴² CISG, art 37 states: 'If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention'.

⁴³ See discussion at chapter 5.2.7.1 and chapter 5.2.7.3.

34,⁴⁴ the seller's right under art 37 should not cause the buyer unreasonable inconvenience or expense. In the case of the latter the buyer may recover damages for any losses caused by the cure.

The following sections discuss the legislative history, meaning and purpose of art 37 to determine why the provision was necessary and what problems are inherent in its interpretation.

6.2.1 Legislative History of Article 37 CISG

The antecedent to art 37 CISG can be found in art 37 ULIS.⁴⁵ These provisions are very similar with the exception of the addition of the buyer's right to claim damages in art 37 CISG.⁴⁶ The legislative history of art 37 was fairly straightforward as the drafting delegates were in agreement on the seller's right to cure before the date of performance had passed.⁴⁷ The wording of art 37 was adopted by 47 votes to none.⁴⁸

6.2.2 Meaning and Purpose of Article 37 CISG

Article 37 stipulates that the seller may cure any non-conformity in the goods before the date of delivery has expired. However, art 37 must be read subject to art 52(1) which states that, 'if the seller delivers the goods before the date fixed, the

⁴⁴ See discussion above at chapter 6.1.

⁴⁵ ULIS, art 37 states: 'If the seller has handed over goods before the date fixed for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defects in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense'.

⁴⁶ This addition was to bring the wording of CISG, arts 34, 37 and 48 in line with each other.

⁴⁷ This right is also see in the United States Uniform Commercial Code (UCC) s 2-508 states: '(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery. (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender'; See also Eric 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' (1989) 7 *Ariz J Int'l & Comp L* 69.

⁴⁸ UNCITRAL, 'Legislative History 1980 Vienna Diplomatic Conference' (*UNCITRAL*, 29 January 1999) <www.cisg.law.pace.edu/cisg/firstcommittee/Meeting37.html> accessed 17 October 2014.

buyer may take delivery or refuse to take delivery'.⁴⁹ Therefore, for art 37 to take effect, the buyer must have taken delivery of the goods on an earlier date than contractually agreed. This would allow the seller a second opportunity to retender the goods.⁵⁰ Article 37 applies where delivery is made before the date fixed by the contract⁵¹ or alternatively before the first day of the period of time fixed by the contract.⁵² Any attempts to cure after the aforementioned times will fall under art 48.⁵³

In the case of non-conforming goods the buyer must examine the goods⁵⁴ and notify the seller of the defects in accordance with art 39.⁵⁵ Article 37 envisions three types of cure. First, where there are missing parts or a shortfall in quantity, the seller may deliver the missing parts or make up the deficit. Secondly, in the case of defects in quality, the seller may tender replacement goods. Thirdly, the seller could decide to cure the defect by repairing the goods, this cure would be appropriate in the case of bespoke or complex machinery.⁵⁶ Although it will be for the seller to decide the nature of the cure, the cure should cause the buyer unreasonable inconvenience or expense. Bianca argues that:

[U]nreasonable is an inconvenience exceeding in an intolerable way the normal prejudice brought about to the buyer by the replacement or repair of the goods. An example of such inconvenience would be if the goods had to be delivered to the seller's place of business and the buyer could not arrange to take away the missing quantity at a convenient time.⁵⁷

⁴⁹ See discussion at chapter 2.4.4.

⁵⁰ Keller (n 2).

⁵¹ CISG, art 33(a).

⁵² CISG, art 33(b).

⁵³ See discussion below at chapter 6.3.

⁵⁴ CISG, art 38.

⁵⁵ See discussion at chapter 5.2.7.

⁵⁶ Ingeborg Schwenzer, 'Article 37' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP 2010) 603.

⁵⁷ Cesare Massimo Bianca, 'Article 37' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 292.

The thesis suggests that situations that would cause unreasonable inconvenience to the buyer *before* the contractual delivery date are rare, thus it would be unreasonable on the part of the buyer to refuse performance under art 37.⁵⁸ Furthermore, precluding the seller's right to cure based on unreasonable expense is unrealistic as expenses can be reclaimed from the seller.⁵⁹ Thus, if the buyer can reclaim expenses under the damages provision then arguably the cure cannot be unreasonable.⁶⁰ However, the seller cannot insist that the buyer advance any money towards curing the breach and later recover that amount in damages.⁶¹

After examination of the meaning and purpose of art 37, the thesis argues that this provision will have an impact on the buyer's right to avoid the contract for fundamental breach under art 49(1)(a). The reason for this is that the buyer would find it difficult to argue that curing the defects in the goods before the date of performance has resulted in substantial deprivation of its contractual interests.⁶² To date there are very few reported cases dealing with art 37 and there are no reported cases on the seller's right to cure under art 37 causing the buyer unreasonable inconvenience or expense.⁶³ Thus, if the buyer wanted to preclude the application of art 37, the prudent approach would be to refuse early delivery under art 52(1). However, early delivery under art 52(1) is not a ground for avoidance of the contract

⁵⁸ Honnold (n 2) 347.

⁵⁹ Enderlein and Maskow (n 22) 153.

⁶⁰ CISG, art 74 states: 'Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract'.

⁶¹ Bianca (57) 293.

⁶² See discussion at chapter 5.1.2; The buyer may have a claim for fundamental breach for anticipatory breach under CISG, art 72(1). However this falls outside the scope of the thesis.

⁶³ Pace Law School Institute of International Commercial Law, 'UNCITRAL Digest Cases for Article 37' (*IICL*, 11 September 2014) <www.cisg.law.pace.edu/cisg/text/digest-cases-37.html> accessed 18 October 2014.

under the CISG.⁶⁴ Thus, under art 52(1) the buyer can refuse early delivery of the goods but the seller can still retender the goods when the date of performance arrives.

The next section examines the corresponding position in English law on curing defects in the goods before the date of performance.

6.2.3 English Law on Curing Defective Goods before the Date of Performance

In commercial contracts, time of delivery is considered of essence to the contract.⁶⁵ The common law stipulates that the buyer is entitled to reject the goods if they are delivered earlier than the contractual date.⁶⁶ For example, in *Bowes v Shand*, the buyer was entitled to treat the contract at an end for breach of condition even though he had suffered no loss as a result of the early delivery.⁶⁷ Conversely, in *Borrowman Phillips & Co v Free & Hollis* the court determined that the seller could make a second tender if the contractual period for delivery had not expired.⁶⁸ The latter approach is consistent with the fact that the seller may carry out performance in the manner he sees fit to fulfil the terms of the contract.⁶⁹ In the case of early defective delivery, the buyer should only be allowed to treat the contract as repudiated if the seller is unable or unwilling to retender conforming goods by the contract date.⁷⁰ This is supported by the wording of s 11(3) SGA which recognises the possibility of the right to cure defects, as it states that the buyer

⁶⁴ China 25 May 2005 CIETAC Arbitration proceeding (*Iron ore case*) (*IICL*, 21 July 2008) <<http://cisgw3.law.pace.edu/cases/050525c1.html>> accessed 19 October 2014.

⁶⁵ John Adams and Hector MacQueen, *Atiyah's Sale of Goods* (12th edn, Pearson 2010) 126.

⁶⁶ See discussion at chapter 5.2.6; *Bowes v Shand* (1877) 2 App Cas 455; cf SGA, s 10.

⁶⁷ (1877) 2 App Cas 455.

⁶⁸ See discussion above at chapter 6.1.3; (1878) 4 QBD 500; See also *EE & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 KB 302.

⁶⁹ Mak (n 35) 412.

⁷⁰ The buyer may have a claim for fundamental breach for anticipatory breach under CISG, art 72(1). However this falls outside the scope of the thesis; Mak (n 35) 414.

'may' treat the contract at an end for a breach of condition.⁷¹ Therefore, rejection of non-conforming goods does not always result in termination of the contract; the two remedies are separate. In the case where there is still time left to perform the contract, the buyer may withhold his own performance, mainly payment, until the seller provides conforming goods.⁷² However, the buyer may only terminate the contract once the delivery date has passed.⁷³

Therefore, English law provides the seller with the opportunity to cure defective performance before the contractual period has expired. However, art 37 is more straightforward and provides more certainty to the buyer. Ziegel supports this contention stating that, 'the conceptual basis of the common law right was never properly articulated nor was it subject to the same restrictions as those appearing in the Convention'.⁷⁴ Thus, although it is unlikely that the criterion of unreasonable inconvenience and expense will be borne out by the facts to preclude the seller's right to cure under art 37, the buyer is aware that the right exists and may prevent avoidance for fundamental breach.

6.2.4 Conclusion to Article 37 CISG

In this part of the chapter it was established that art 37 can be used by the buyer to minimise the disruption and costs associated with delivery of non-conforming goods. The seller's right to cure defects in the goods before the date of contractual delivery means that the buyer does not have to procure those goods from an alternate source. Furthermore, if there is a rising market for those goods or the buyer has

⁷¹ A G Guest and Guenter Treitel, *Benjamin's Sale of Goods*, (5th edn, Sweet & Maxwell 1997) 12-028.

⁷² Hugh Beale, *Remedies for Breach of Contract* (Sweet & Maxwell 1980) 20.

⁷³ Unless there are grounds to argue anticipatory breach, but this discussion is outside the scope of the thesis.

⁷⁴ Ziegel (n 2) fn 59.

entered into subsequent contracts with third parties his interest in the offer to cure will be increased.

The next section examines art 48 CISG, curing defects in performance after the date of performance. This provision is considered problematic as it is directly linked to the wording and application of art 49.

6.3 The Seller's Right to Cure after the Date of Delivery

Article 48 CISG deals with the seller's right to cure defective performance relating to the documents or the goods after the date of delivery.⁷⁵ Article 48(1) states that: 'subject to art 49, the seller may cure defective performance at his own expense after the contractual date of delivery if it does not result in 'unreasonable delay...inconvenience or uncertainty of reimbursement' to the buyer'.⁷⁶ Article 48(2) stipulates that the seller may request that the buyer confirm whether he is willing to accept the offer to cure the defect. If the buyer fails to respond within a reasonable time the seller may commence with performance. The buyer will be

⁷⁵ CISG, art 48 states: '(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention. (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller. (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision. (4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer'.

⁷⁶ See discussion at chapter 5.2.2; CISG, art 49 states: '(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed. (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance'.

precluded from pursuing any other remedy until the expiry of the time indicated in the seller's request. Furthermore, the seller's notification of the intention to cure impliedly includes a request that the buyer makes known his decision to accept the cure.⁷⁷ The seller's request or notice to cure must be received by the buyer.⁷⁸ The next sections examine the legislative history, meaning and purpose of art 48.

6.3.1 Legislative History of Article 48 CISG

The antecedent counterpart to art 48 CISG can be found in art 44 ULIS.⁷⁹ The legislative history of art 48 was contentious.⁸⁰ Many amendments were made to the original draft text, as delegates could not agree on the correct balance between the buyer's right to avoid the contract and the seller's right to cure.⁸¹ The wording of art 44 ULIS indicated that the seller would have the right to cure defects only in cases not covered by the buyer's right to avoid the contract for fundamental breach.⁸² Therefore, it was clear that the buyer's right to avoid the contract would prevail over the seller's right to cure. Will argues that some drafting delegates were concerned that this approach would frustrate the seller's chance to cure the breach.⁸³ Honnold suggests that if the seller was willing to cure the defect within a reasonable time,

⁷⁷ CISG, art 48(3).

⁷⁸ CISG, art 48(4).

⁷⁹ ULIS, art 44 states: '(1) In cases not provided for in Article 43, the seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. (2) The buyer may however fix an additional period of time of reasonable length for the further delivery or the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with Article 46 or, provided that he does so promptly, declare the contract avoided'.

⁸⁰ Will (n 2) 347.

⁸¹ *ibid.*

⁸² ULIS, art 43 states: 'The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or, in the case to which paragraph 2 of Article 42 applies, after the expiration of the period referred to in that paragraph'.

⁸³ Will (n 2) 347; See also ; UNCITRAL, 'Official Records II' (1991) A/CONF.97/19 <www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> accessed 31 October 2013.

then allowing the buyer the right to avoid the contract would result in economic waste.⁸⁴ The Bulgarian and German delegations advocated excluding the reference to the buyer's right to avoid the contract altogether from art 48, thus the seller would *always* have the right to cure defective performance.⁸⁵ However, this proposal was rejected by a majority vote as the buyer needed to be able to lawfully exercise the right to avoid the contract in the event of a fundamental breach.⁸⁶ After much debate an alternative wording of the text was presented to the delegation and it was agreed that art 48 should read 'subject to article 49'. However, this did not end the debate about whether the buyer's right to avoid the contract should prevail over the seller's right to cure. The wording of art 48(1) has left the nexus between cure and avoidance uncertain.⁸⁷

Article 48 paras (2)-(4) CISG were introduced during the drafting deliberations.⁸⁸ There are no corresponding provisions in ULIS. The new paragraphs were introduced to place an obligation on the buyer to co-operate and respond to the seller's request to cure.⁸⁹ This approach is supported by the general principles of the observance of good faith and preservation of contract in the CISG.⁹⁰ The Turkish and Pakistani delegations proposed to delete the new paragraphs as it was argued they were superfluous and the wording could be ascertained from general

⁸⁴ Honnold (n 2) 320.

⁸⁵ UNCITRAL, 'Official Records II' (1991) A/CONF.97/19
<www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> accessed 31 October 2013, 351-352.

⁸⁶ *ibid.*

⁸⁷ Will (n 2) 347.

⁸⁸ UNCITRAL, 'Yearbook: Volume IV (1973)' A/CN.9/SER.A/1973
<www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973_e.pdf> accessed 26 October 2013.

⁸⁹ Will (n 2) 347.

⁹⁰ See discussion at chapter 3.5; Robert Hillman, 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 21; Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn, Clarendon 1998) 176; Paul Powers, 'Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods' (1999) 18 J L & Com 333, 345.

contractual principles.⁹¹ This suggestion was rejected as the majority of delegates thought that the wording of paras 2-4 set out precise guidelines for the parties to follow to minimise uncertainty.⁹²

6.3.2 Meaning and Purpose of Article 48 CISG

When the seller does not deliver contractual documents or goods in a timely manner or presents non-conforming tender, art 48(1) permits the seller the right to cure the defective performance even after the contractual date has passed. Under art 48 the seller is allowed to decide whether to repair or replace non-conforming goods.⁹³ Additionally, in the case of non-delivery, he can cure the failure to perform by supplying the missing goods.⁹⁴ This right to cure is 'subject to article 49'. Will argues that 'the relationship between Articles 48 and 49 remains unsettled...the interests of buyers and sellers clash so strongly that it seems...impossible to find a proper balance'.⁹⁵ The thesis disagrees with this contention and argues that the wording of art 48(1) does not present the legal conundrum as suggested by academic commentary.⁹⁶ Instead the words 'subject to' should be read to mean the seller may cure the breach only in circumstances where the buyer has *not* already exercised the right to avoid the contract.⁹⁷ For instance, if the breach was fundamental, the buyer may have already exercised the right of avoidance as set out in art 49(1)(a).⁹⁸ This approach is correct as an avoided contract no longer exists, hence the seller's right to cure is precluded on the basis that the contract cannot be revived by an offer to cure.

⁹¹ UNCITRAL, 'Official Records II' (1991) A/CONF.97/19
<www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> accessed 31 October 2013, 352-353.

⁹² *ibid.*

⁹³ See discussion at chapter 5.2.7.1 and chapter 5.2.7.1; CISG, art 35.

⁹⁴ Will (n 2) 347; Schneider (n 47) 69.

⁹⁵ Will (n 2) 348.

⁹⁶ See discussion at chapter 2.4.4; Ziegel (n 2) 9; Will (n 2) 348; Schneider (n 47) 89; Honnold (n 2) 209.

⁹⁷ Enderlein and Maskow (n 22) 184.

⁹⁸ See discussion at chapter 5.2.2.

This approach is supported by academic commentary⁹⁹ and case law.¹⁰⁰ In one case it was decided that the seller's failure to deliver goods two months after the contractual date was a fundamental breach entitling the buyer the right to avoid the contract.¹⁰¹ In this case the seller's attempt to ship the goods after the notice of avoidance was given was invalid.¹⁰² Therefore, once avoidance has been declared by the buyer, the seller cannot be permitted the right to cure the breach.

Where the buyer has the right to avoid the contract and has *not yet* exercised the right, then the seller may be permitted the right to cure.¹⁰³ In these circumstances the question arises whether the buyer must wait for the seller's offer to cure before proceeding to the remedy of avoidance?¹⁰⁴ If the buyer could immediately avoid the contract, this would render art 48 futile. However, if the buyer is forced to wait for an offer to cure, this leaves him in a position of uncertainty.¹⁰⁵ In the case of the latter this would add further burden to the already aggrieved buyer. Such an approach would be contrary to the needs of international trade as well as the general principle of the observance of good faith found in art 7.¹⁰⁶ The case law on this issue largely supports the position that in the case of fundamental breach, the buyer need not wait for the seller's offer to cure, he can avoid the contract forthwith.¹⁰⁷

⁹⁹ Ziegel (n 2) 9-20; Enderlein and Maskow (n 22) 184; Markus Müller-Chen, 'Article 49' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 738.

¹⁰⁰ Italy 24 November 1989 Court of First Instance Parma (*Foliopack v Daniplast*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/891124i3.html>> accessed 29 October 2014; See also Germany 17 September 1991 Appellate Court Frankfurt (*Shoes case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/910917g1.html>> accessed 29 October 2014.

¹⁰¹ Italy 24 November 1989 Court of First Instance Parma (*Foliopack v Daniplast*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/891124i3.html>> accessed 29 October 2014.

¹⁰² *ibid.*

¹⁰³ Enderlein and Maskow (n 22) 184.

¹⁰⁴ Will (n 2) 348.

¹⁰⁵ *ibid* 349.

¹⁰⁶ See discussion at chapter 3.4.3; Hillman (n 90) 21.

¹⁰⁷ Italy 24 November 1989 Court of First Instance Parma (*Foliopack v Daniplast*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/891124i3.html>> accessed 29 October 2014; Germany 17 September 1991 Appellate Court Frankfurt (*Shoes case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/910917g1.html>> accessed 29 October 2014; Germany 1 February

However, there are cases where a contrary position was taken.¹⁰⁸ For instance in one case the seller delivered fabric for the production of dresses, but the buyer claimed that the fabric was non-conforming as it could not be cut economically to produce the required number of dresses.¹⁰⁹ The seller sent a replacement delivery and asked the buyer to inform him of further problems. However, the buyer refused the delivery. The court found that the buyer had lost the right to avoid the contract as he had not allowed the seller the right to cure the defects.¹¹⁰ Although at first glance this decision appears to be contrary to the wording of art 48, the point was correctly decided. In this case the buyer had never stipulated the particular use of the goods in accordance with art 35(2)(b), thus the goods were fit for their ordinary purpose.¹¹¹ As such, this was not a fundamental breach for the purposes of art 49(1)(a). In any case the buyer would have lost the right to avoid the contract as he did not exercise the provisions in art 49(2)(b)(iii), that is, avoidance after he had given the seller an opportunity to cure the defect.¹¹²

To minimise uncertainty as to whether the breach is fundamental, the buyer must ask himself, 'will the seller cure'?¹¹³ The answer may be evident if the buyer and seller had previously contracted with each other or the terms of the contract reflect the seller's position on cure. It is recommended that if the parties wanted to

1995 Appellate Court Oldenburg (*Furniture case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/950201g1.html>> accessed 30 October 2014; Germany 25 June 1997 Supreme Court (*Stainless steel wire case*) (*IICL*, 21 February 2007); See also UNCITRAL, 'Yearbook: Volume IV (1973)' A/CN.9/SER.A/1973 <www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973_e.pdf> accessed 26 October 2013.

¹⁰⁸ Germany 24 September 1998 District Court Regensburg (*Cloth case*) (*IICL*, 15 September 2006) <<http://cisgw3.law.pace.edu/cases/980924g1.html>> accessed 30 October 2014; Switzerland 5 November 2002 Commercial Court of the Canton of Aargau (*Inflatable triumphal arch case*) (*IICL*, 9 December 2009) <<http://cisgw3.law.pace.edu/cases/021105s1.html>> accessed 10 July 2014 (this case was discussed in chapter five).

¹⁰⁹ Germany 24 September 1998 District Court Regensburg (*Cloth case*) (*IICL*, 15 September 2006) <<http://cisgw3.law.pace.edu/cases/980924g1.html>> accessed 30 October 2014

¹¹⁰ *ibid.*

¹¹¹ See discussion at chapter 5.2.7.3; CISG, art 35(2)(a).

¹¹² See discussion at chapter 5.2.9.

¹¹³ Will (n 2) 350.

minimise uncertainty regarding the seller's right to cure, they could exclude art 48 altogether. Alternatively they could vary the wording to set a specified period for cure.¹¹⁴ This position is supported by art 6 and the general principle of party autonomy.¹¹⁵ The parties' intent on the issue of cure can either be express or implied and is discernible from all surrounding circumstances.¹¹⁶ The CISG Advisory Council recommends that it is for the parties to decide what terms are considered of essence to the contract.¹¹⁷ Hence, if delivery of conforming goods is of essence then cure will cause the buyer unreasonable delay or inconvenience. The criterion of unreasonable inconvenience has already been dealt with previously in the chapter.¹¹⁸ 'Unreasonable' means a standard that is less detrimental than fundamental breach.¹¹⁹ This is supported by the fact that the initial delay or delivery of non-conforming goods may not amount to a fundamental breach.¹²⁰ However the cure itself may present *further* delays and inconvenience which may further impede the buyer's position. In such cases, the buyer may want to resort to one of his other remedies under the CISG.¹²¹ Some commentators argue that the words 'unreasonable delay'

¹¹⁴ For instance cure must be effected in five working days.

¹¹⁵ See discussion at chapter 4.1.

¹¹⁶ See discussion at chapter 4.2; CISG, art 8.

¹¹⁷ Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IICL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014.

¹¹⁸ See discussion above at chapter 6.2.2.

¹¹⁹ Will (n 2) 351.

¹²⁰ See discussion at chapter 5.1; CISG, art 25.

¹²¹ CISG, art 46 states: '(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement. (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter. (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter'; CISG, art 74 states: 'Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract'.

and 'uncertainty of reimbursement' to art 48(1) are superfluous as they both amount to inconvenience.¹²² While this is true for delay, as it is a type of inconvenience, it may not necessarily apply to the uncertainty of reimbursement. Circumstances of the latter may arise if the buyer is concerned about the solvency of the seller and thus may not want to incur expenses in order for the seller to effect a cure. An example of this could be where the buyer has to pay to ship goods back to the seller to have them repaired. In this case, it is not the issue of the amount that the buyer could claim in damages but rather whether he will be able to do so if the seller is insolvent. Such circumstances could hardly fall under the heading of 'inconvenience'.¹²³ Thus the thesis argues that the term 'uncertainty' used in art 48(1) is correct.

This thesis suggests that where the buyer and seller have not contracted on previous occasions or the contract is silent on the issue of cure, then arts 48(2) and (3) provide both parties with certainty. Article 48(2) stipulates that the seller can request that the buyer makes known whether he will accept a cure within a specified period of time. Similarly art 48(3) stipulates that the seller may notify the buyer that he will cure within a specified time. This notice carries with it an implied request that the buyer must respond.¹²⁴ The buyer must respond to the request or notice within a reasonable time.¹²⁵ A failure on the part of the buyer to communicate his decision means that the seller can commence cure and the buyer will be unable to exercise any other remedy during that period of time.¹²⁶ These provisions help to balance the interests of the buyer and seller. Specifically, it informs the buyer that the seller is willing to cure the breach and prevents the seller from tendering an unwanted cure which could result in wasted expenditure. Additionally, it provides a

¹²² Will (n 2) 352.

¹²³ *ibid*; Enderlein and Maskow (n 22) 186.

¹²⁴ CISG, art 48(3).

¹²⁵ CISG, art 48(2).

¹²⁶ This includes the remedy of avoidance under CISG, art 49.

more efficient solution than excluding the right to cure altogether, as circumstances could arise that would increase the buyer's interest in performance. These can include a rising market for the goods or the buyer's commitments to third party sales contracts. The period for performance stated in the request or notice to cure must be clearly defined; that is, it must have a definitive date that the seller will commence the cure.¹²⁷ Article 48(2) states that the buyer must respond within a reasonable time. What constitutes a reasonable time will be determined on a case by case basis. For instance, it may depend on the nature of the breach and the time fixed to effect the cure. The request or notice to cure is not effective until it is 'received' by the buyer.¹²⁸ This rule is found in art 24 and is interpreted to mean that the request or notice must be made 'orally to him or delivered by any other means to him personally'.¹²⁹ However, the buyer's response is not subject to art 24 but rather art 27, meaning that it will be subject to the 'dispatch' rule.¹³⁰ This rule stipulates that errors or delays in communication will not deprive the buyer of the right to rely on the response.

If the buyer is non-responsive to the seller's request to cure, then the seller's right to cure takes precedence and the buyer cannot resort to any other remedies under the CISG for that period of time. In one case the China International Economic and Trade Arbitration Commission¹³¹ found that when the seller proposed a remedy in response to the buyer's claim of non-conformity, the buyer should have

¹²⁷ Müller-Chen (n 99) 743.

¹²⁸ CISG, art 48(4).

¹²⁹ CISG, art 24 states: 'For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence'.

¹³⁰ CISG, art 27 states: 'Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication'.

¹³¹ Hereinafter referred to as 'CIETAC'.

indicated his acceptance or rejection of the offer to cure.¹³² As a result the buyer was denied the right to claim damages.

Although art 48 makes no mention of the number of attempts the seller is permitted to achieve the cure, the CISG Advisory Council¹³³ and case law¹³⁴ indicate that it must be reasonable within the time stipulated. If the breach cannot be remedied within this time, then this will be a fundamental breach.¹³⁵

In light of the examination of the meaning and purpose of art 48, the thesis argues that the buyer's right to avoid the contract will prevail over the offer to cure in three circumstances. The first is where the buyer has already declared the contract avoided for fundamental breach.¹³⁶ In this case the offer to cure is fruitless as the contract is no longer in existence.¹³⁷ The second is where the breach is fundamental and the buyer has not declared the contract avoided. In these cases the CISG allows the buyer the right to avoid the contract without waiting for the seller's offer to cure.¹³⁸ Thirdly, cure is precluded if it will cause the buyer unreasonable delay, inconvenience or uncertainty of reimbursement.¹³⁹ In these cases the buyer may

¹³² China 29 December 1999 CIETAC Arbitration proceeding Shenzhen No 1138-1 (*Indonesian round logs case*) (*IICL*, 27 October 2008) <<http://cisgw3.law.pace.edu/cases/991229c1.html>> accessed 30 October 2014.

¹³³ Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IICL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014.

¹³⁴ Germany 6 July 1994 District Court Oldenburg (*Furniture case*) (*IICL*, 12 August 2005) <<http://cisgw3.law.pace.edu/cases/940706g2.html>> accessed 30 October 2014; United States 6 December 1995 Federal Appellate Court [2nd Circuit] (*Delchi Carrier v Rotorex*) (*IICL*, 09 January 2008) <<http://cisgw3.law.pace.edu/cases/951206u1.html>> accessed 30 October 2014.

¹³⁵ CISG, art 49(2)(b)(iii).

¹³⁶ CISG, arts 49(1)(a), 25 and 26.

¹³⁷ Italy 24 November 1989 Court of First Instance Parma (*Foliopack v Daniplast*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/891124i3.html>> accessed 29 October 2014.

¹³⁸ *ibid*; Germany 17 September 1991 Appellate Court Frankfurt (*Shoes case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/910917g1.html>> accessed 29 October 2014; Germany 1 February 1995 Appellate Court Oldenburg (*Furniture case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/950201g1.html>> accessed 30 October 2014; Germany 25 June 1997 Supreme Court (*Stainless steel wire case*) (*IICL*, 21 February 2007); See also UNCITRAL, 'Yearbook: Volume IV (1973)' A/CN.9/SER.A/1973 <www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973_e.pdf> accessed 26 October 2013.

¹³⁹ CISG, art 48(1).

refuse the offer to cure in accordance with arts 48(2) and 49(2)(b)(iii). In contrast, the seller's right to cure will prevail over the buyer's right to avoid the contract in two circumstances. The first is where the cure does not cause the buyer unreasonable delay, inconvenience or uncertainty of reimbursement.¹⁴⁰ Academic commentary¹⁴¹ and the CISG Advisory Council support the position that if the non-conformity can be remedied by the seller without unreasonable delay, inconvenience or uncertainty of reimbursement to the buyer, the breach is not yet fundamental.¹⁴² This thesis is in agreement with this approach as the threshold for fundamental breach requires substantial detriment; arguably this cannot be met if the breach can be cured.¹⁴³ The one exception to this is where the term is of essence to the contract. In these cases the contractual terms should take precedence to allow the buyer the right to avoid the contract. The second circumstance where the seller's right to cure will prevail over the buyer's right to avoid the contract is when the buyer fails to respond to the seller's request or notice.¹⁴⁴ This approach is justified as the CISG rests on the general principles of co-operation and preservation of the contract. Therefore, the buyer is under an obligation to communicate his intention to the seller.¹⁴⁵ This requirement will help to minimise uncertainty for the parties as well as avoid wasted expenditure.

The next section examines the English law on curing defects after the date of performance.

¹⁴⁰ CISG, art 48(1).

¹⁴¹ Honnold (n 2) 320; Müller-Chen (n 99) 740.

¹⁴² Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IICL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014.

¹⁴³ See discussion at chapter 5.1.2.

¹⁴⁴ CISG, arts 48(2) and (3).

¹⁴⁵ Hillman (n 90) 21.

6.3.3 English Law on Curing Defective Performance after the Contractual Date

It has already been established that English law recognises a limited right to cure if the contractual time for performance has not yet passed.¹⁴⁶ The position on cure after the date of performance is uncertain. The reason for this uncertainty stems from s 35 SGA where the buyer will lose the right to reject the goods if he is deemed to have accepted them. The buyer will lose the right to reject the goods in three circumstances. The first is where: 'he intimates to the seller that he has accepted them'.¹⁴⁷ The second is where 'he does any act in relation to them which is inconsistent with the ownership of the seller'.¹⁴⁸ The third is, if 'after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them'.¹⁴⁹ However, in *Bernstein v Pamson Motors (Golders Green) Ltd*¹⁵⁰ the court recognised that certain complex goods required a longer time for examination, thus what is regarded as a 'reasonable time' should be decided on a case by case basis.¹⁵¹ Although the SGA provides no formal mechanism for the seller to cure defective performance, s 35(6)(a) states that the buyer is not deemed to have accepted the goods simply because he has asked for or agreed to the seller's offer of repair. Thus the buyer may still reject the non-conforming goods and terminate the contract if the repair proves ineffective.¹⁵² However, neither the common law nor the SGA provides any further clarity on whether the time taken to carry out the repair will be counted as a reasonable time for the buyer to reject the goods.¹⁵³ This lack of clarity leaves the seller in an uncertain position as the buyer

¹⁴⁶ See discussion above at chapters 6.1.3 and 6.2.3; *Borrowman Phillips & Co v Free & Hollis* (1878) 4 QBD 500.

¹⁴⁷ SGA, s 35(1)(a).

¹⁴⁸ SGA, s 35(1)(b).

¹⁴⁹ See discussion at chapter 5.2.9; SGA, s 35(4).

¹⁵⁰ [1987] 2 All ER 220; See also SGA s 35(5).

¹⁵¹ Rex Ahdar, 'Seller Cure in the Sale of Goods' (1990) LMCLQ 364, 365.

¹⁵² Mak (n 35) 416.

¹⁵³ *ibid.*

may still decide to reject the goods even after repair.¹⁵⁴ This raises the troublesome question: at what point in time is the buyer deemed to have accepted the repaired goods? In the case of *J & H Ritchie Ltd v Lloyd Ltd*¹⁵⁵ the seller's delivered a defective harrow to the buyer and after some use the harrow malfunctioned. The seller offered to repair the machine and in addition provided the buyer with a replacement machine to use in the interim. When the seller attempted to redeliver the repaired machine the buyer refused delivery as the seller had not provided any information as to the nature of the problem. The House of Lords decided in the buyer's favour, determining on the basis of implied terms of fact and business efficacy¹⁵⁶ that the seller should have supplied the engineer's report detailing the nature of the problem.¹⁵⁷ The judges implied the term, not into the contract of sale, but rather into the repair agreement. In this case the failure to provide details of the nature of the repairs, was a material breach and the buyer was entitled to rescind the contract of repair. The judges reasoned that the contract of sale made no mention of repairs, thus one could not imply the term into the contract. The rationale of the judges in this case was flawed, as the contract of sale was still in existence, the reason being that the buyer had never rejected the goods or terminated the contract.¹⁵⁸ The approach in this case further obscures the issue of cure in English law.¹⁵⁹ Instead of implying a term of fact into the repair agreement, English law needs to have a defined position on the seller's right to cure in the contract of sale.¹⁶⁰ If the contract was still in existence, that is, it was never terminated, the buyer should

¹⁵⁴ *ibid* 417.

¹⁵⁵ [2007] UKHL 9, this is a Scottish case but the position in the SGA on this issue is the same for Scots law as it is for English law.

¹⁵⁶ The courts consider the term to be obvious and necessary. Therefore the question to be asked is, 'would the parties have made a provision in the contract if they had thought of it?'

¹⁵⁷ See discussion at chapter 4.3.5.

¹⁵⁸ Kelvin Low, 'Repair, Rejection & Rescission: An Uneasy Resolution' (2007) LQR 536, 539.

¹⁵⁹ *ibid* 541; Mak (n 35) 420.

¹⁶⁰ Low (n 158) 420.

be bound to accept the retendered goods if they were conforming to the contract. This is supported by s 27 SGA where the seller is under a duty to deliver the goods and the buyer must accept and pay for them.¹⁶¹ There is some case law supporting this position, that is, where the time for performance has passed but the buyer has not terminated the contract, a retender should be permitted.¹⁶² In *Stocznia Gdanska SA v Latvian Shipping Company (No 2)*, Rix LJ points out that the time between the right to reject the goods and the right to terminate the contract remains a grey area.¹⁶³ Thus, a prolonged delay could mean that the seller can render conforming performance which would then exclude the right to terminate.¹⁶⁴ An example of this can be found in *Ampurius Nu Homes Ltd v Telford Homes (Creekside) Ltd*, where the defendants were contracted to build several blocks of flats.¹⁶⁵ Due to cash flow difficulties the defendants failed to meet the deadline, however the appellants did not repudiate the contract. Instead the parties entered into prolonged negotiations and the appellants sought to terminate the contract almost eight months later. They were prevented from doing so as without their knowledge, the defendants had recommenced work on the flats one month earlier. The Court of Appeal found that the initial breach, although repudiatory, had been cured by the subsequent performance.

It is clear that there is some leeway for cure after the date of performance in English law,¹⁶⁶ specifically in cases where the breach is serious but the buyer has not yet exercised the right to reject the goods and terminate the contract. If the buyer

¹⁶¹ SGA, s 27 states: 'It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale'.

¹⁶² *Stocznia Gdanska SA v Latvian Shipping Company (No 2)* [2002] 2 All ER (Comm) Rix LJ; Low (n 158) 538.

¹⁶³ *Stocznia Gdanska SA v Latvian Shipping Company (No 2)* [2002] 2 All ER (Comm).

¹⁶⁴ Low (n 158) 538.

¹⁶⁵ [2013] EWCA Civ 577.

¹⁶⁶ Bridge (n 31) 576.

decides to take some time to weigh his options, he leaves open the possibility of a cure by the seller and thus his right to terminate the contract is extinguished. The position in art 48 CISG is significantly clearer and offers the buyer more certainty on the position of the seller's right to cure after the date of performance, specifically, the seller is required to state the time period to effect the cure.¹⁶⁷ Therefore, if the cure would cause the buyer unreasonable delay or inconvenience, the buyer may reject the offer to cure.

Although English law recognises that the buyer can ask for or agree to repair of the goods¹⁶⁸ and in some cases the seller can commence with retendering performance if the buyer has not terminated the contract¹⁶⁹ having a formal mechanism for the seller to cure would provide more certainty to both parties.

The next part of the chapter examines whether the Principles can be used to clarify some of the ambiguities contained in the seller's right to cure.

6.4 Can the UNIDROIT Principles be used to Interpret the Seller's Right to Cure?

Article 7.1.4 UNIDROIT is the general provision dealing with the non-performing party's right to cure the breach.¹⁷⁰ Unlike arts 34, 37 and 48 CISG, the Principles do not contain special provisions for curing documents or goods. Furthermore, it does not distinguish between cure before and after the date of performance. Article 7.1.4 (1) is broadly similar to arts 34, 37, 48 CISG with a few

¹⁶⁷ CISG, arts 48 (1) and (2).

¹⁶⁸ SGA, s 35(6)(a).

¹⁶⁹ *Ampurius Nu Homes Ltd v Telford Homes (Creeside) Ltd* [2013] EWCA Civ 577.

¹⁷⁰ UNIDROIT, art 7.1.4 states: '(1) The non-performing party may, at its own expense, cure any non-performance, provided that (a) without undue delay, it gives notice indicating the proposed manner and timing of the cure; (b) cure is appropriate in the circumstances; (c) the aggrieved party has no legitimate interest in refusing cure; and (d) cure is effected promptly. (2) The right to cure is not precluded by notice of termination. (3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired. (4) The aggrieved party may withhold performance pending cure. (5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure'.

exceptions. Article 7.1.4 (1) is comparable to its CISG counterparts in that it is for the seller to bear the expense of achieving the cure, thus the buyer is not expected to incur any expenses in this regard. However, Article 7.1.4 (1)(a) requires that the seller must give notice to the buyer before he can carry out the cure. As such, the Principles do not contain the automatic right to cure found in arts 34, 37 and 48(1) CISG. The notice requirement in art 7.1.4 (1)(a) helps to reduce the uncertainty of the seller's intention to cure.¹⁷¹ Although arts 34 and 37 do not expressly mention the requirement of notice, this must be implied otherwise the cure could result in unreasonable inconvenience to the buyer.¹⁷² For instance, the seller under art 37, cures a non-conforming tender by delivering replacement goods, however the buyer was unaware of the seller's intention to cure and is not prepared to accommodate the cure. In this circumstance, the buyer may not be in a position to take delivery of the goods as it is still earlier than the date of performance. The notice requirement in art 7.1.4(1)(a) cannot be extended to art 48(1) CISG as the latter is only 'subject to article 49' and furthermore the notice requirement is confined to arts 48(2) and (3). Thus the drafters of the CISG must have intended art 48(1) to remain unfettered by the requirement of notice.¹⁷³ Articles 7.1.4(1)(b) and (d) stipulate that the cure must be appropriate and effected promptly. These requirements are compatible with the approach taken in arts 34, 37 and 48 CISG as these provisions all state that the buyer must not be unreasonably inconvenienced by the seller's right to cure. Article 7.1.4(1)(c) states that the seller may be denied the right to cure if the buyer has a legitimate interest in refusing performance. Although this provision goes beyond the

¹⁷¹ Christopher Kee, 'Commentary on the Manner in which the UNIDROIT Principles may be used to Interpret or Supplement Article 48 of the CISG' (*IJCL*, 05 January 2007) <<http://www.cisg.law.pace.edu/cisg/principles/uni48.html>> accessed 31 October 2014.

¹⁷² Keller (n 2).

¹⁷³ UNCITRAL, 'Yearbook: Volume IV (1973)' A/CN.9/SER.A/1973 <www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973_e.pdf> accessed 26 October 2013.

criterion of unreasonable inconvenience found in the CISG, nevertheless it is still compatible. This is supported by the CISG Advisory Council which recommended that cure should be precluded in cases of intentional breaches or where the seller's behaviour has resulted in a loss of trust.¹⁷⁴ In these cases the buyer has no further interest in performance as the breach would be difficult to remedy.¹⁷⁵ Article 7.1.4(2) states that the seller's right to cure is not precluded by a notice of termination. Thus, even where the buyer has lawfully terminated the contract, the effects of termination will be suspended when the seller tenders the notice to cure.¹⁷⁶ If the seller is able to effect the cure in the stipulated period, the termination is set aside; if however the attempt at cure is ineffective then the termination will take effect upon expiry of the time to perform.¹⁷⁷ This part of the provision cannot be used to interpret the seller's right to cure under art 48 CISG. Article 48 CISG very clearly states that it is 'subject to article 49', thus cure is precluded where avoidance has already taken place.

Article 7.1.4(3) stipulates that the buyer may not resort to any other remedies during the period set aside for cure. This position is the same under arts 34, 37 and 48 CISG. Additionally art 7.1.4(4) states that the buyer may withhold its own performance until the cure is effected. The CISG does not address this issue and the thesis argues that in certain circumstances the buyer withholding performance may frustrate the seller's attempt to cure. For instance, if the seller requires access to the buyer's place of business to carry out repair to the goods, then the buyer must co-

¹⁷⁴ Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IICL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014; Germany 17 September 1991 Appellate Court Frankfurt (*Shoes case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/910917g1.html>> accessed 29 May 2014.

¹⁷⁵ See discussion at chapter 5.2.2.

¹⁷⁶ UNIDROIT, art 7.1.4 official commentary para 8.

¹⁷⁷ UNIDROIT, art 7.1.4 official commentary para 8.

operate to facilitate the cure. It is also worth noting that art 71 CISG only allows suspension of performance in very limited circumstances, which do not include the period stipulated for cure.¹⁷⁸ Therefore, it is unlikely that art 7.1.4(4) can be used to interpret the seller's right to cure under the CISG. Article 7.1.4(5) is similar to arts 34, 37 and 48 in that the buyer is allowed to claim damages for any losses or expenses incurred as a result of the cure.

In light of the examination above, it is clear that both the UNIDROIT Principles and the CISG share the same general principles of preservation of the contract and reducing wasted expenditure when interpreting the seller's right to cure.¹⁷⁹ However, this thesis recommends that the provisions of art 7.1.4 only be used to interpret and supplement arts 34, 37 and 48 where they are compatible.¹⁸⁰ This means that arts 7.1.4(1)(c), 7.1.4(2) and 7.1.4(4) all fall outside the scope of the CISG and would render the seller's right to cure inconsistent with the drafters' intent. Article 7.1.4(2) in particular warrants concern as it would displace the buyer's lawful avoidance of the contract in favour of the seller's right to cure. This thesis argues that the buyer should not be placed in a position of uncertainty where a fundamental breach exists. If the terms breached are of essence to the contract, such as timely delivery or conforming goods, then the seller should not be allowed the right to cure.

¹⁷⁸ CISG, art 71 states: '(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract. (2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller. (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance'.

¹⁷⁹ Hillman (n 90) 21.

¹⁸⁰ UNIDROIT, art 7.1.4(1)(a) can be used to interpret CISG, arts 34 and 37 but not art 48; UNIDROIT, art 7.1.4(1)(b) and (d); UNIDROIT, arts 7.1.4(3) and (5).

6.5 Conclusion

This chapter has established that the seller's right to cure defective performance of the contract under the CISG is a suitable remedy for international sale of goods contracts.¹⁸¹ Contrary to the opinion of some commentators, the seller's right to cure does not impede the buyer's right to avoid the contract.¹⁸² This is demonstrated by the application of arts 34 and 37, cure of the documents and goods before the date of performance. These provisions have been relatively uncontroversial as the seller's right to cure before the contractual date would very rarely cause the buyer unreasonable inconvenience. Furthermore, breaches before the date of performance would not meet the threshold of fundamental breach as set out in art 25 CISG.¹⁸³ The chapter has demonstrated that in most cases the buyer would prefer a cure before the date of performance so that he can avoid costly delays. In the case of art 48, cure after the date of performance, the chapter has shown that the buyer's right to avoid the contract¹⁸⁴ will still take precedence over this provision. Thus, if the breach is fundamental the buyer does not have to wait for the seller's offer to cure, he can declare the contract avoided immediately. However, if the buyer has a vested interest in performance or there is a rising market for those goods, he may prefer to wait for the cure rather than hastily avoiding the contract. The Principles offer very little help to interpret or supplement the seller's right to cure under the CISG as some of the guidelines would fall outside its scope. The chapter was also able to establish that the CISG's provisions on cure offers the buyer more certainty and clearer

¹⁸¹ For the purposes of the thesis 'suitable' means that the remedy must be capable of being applied to contracts for different kinds of goods and contracts commonly sold in international trade. Additionally the remedy must one that the parties can lawfully establish and exercise swiftly and with certainty.

¹⁸² Bridge (n 31) 567; See also Jan Hellner, 'The Vienna Convention and Standard Form Contracts' in Paul Volken and Petar Sarcevic (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana 1986) 335, 338.

¹⁸³ See discussion at chapter 5.1.

¹⁸⁴ CISG, art 49.

guidelines than English law. In the case of the latter the buyer may be caught off-guard by the seller's cure if he does not swiftly exercise the right to terminate the contract.

The next chapter examines the exercise of the right to avoid the contract, namely art 26 CISG where the rules of notice and time are examined. This chapter also examines the consequences of avoidance, namely arts 81-84 CISG which deal with damage for avoidance and restitution.