THE BUYER'S RIGHT TO AVOID THE CONTRACT IN INTERNATIONAL SALES

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1. General

Avoidance of the contract ("termination" in some jurisdictions and contexts such as the CESL and PECL), is normally the most extreme measure a party may take in response to a breach of contract ("non-performance," in the context of the CESL and PECL).[1] Avoidance puts a stop to any future performance, except for contractual performances designated to take effect upon avoidance, such as dispute resolution clauses or liquidated damages.[2] (Any restitution following avoidance is not, properly speaking, a contractual performance, but a statutory or common-law requirement, as the case may be).[3] Both the CISG and the PECL offer aggrieved parties less extreme measures to deal with breach or with anticipatory breach, such as suspension of performance and requirement of assurances,[4] requirement of performance,[5] or unilateral price reduction.[6] They likewise contain various cure measures that – when applied or applicable – allow for delayed or remedial performance and thus either delay recourse to avoidance or render it unnecessary. In this, both the CISG and PECL manifest a "relational" bias,[7] namely attempting to salvage fractured contractual relations by providing an escalation of remedial measures, whose eventual failure ultimately leads to breaking up of the contractual framework through avoidance. In this, the CISG and PECL differ from several national systems that either allow for avoidance in cases of lesser breaches or simply fail to offer such sliding scales.[8]

2. Fundamental Breach

Due to its extreme nature, both the CISG and the PECL reserve avoidance to special cases, namely to fundamental breaches (non-performances) of the contract.[9] This restriction, however, can be bypassed (or extended) in the case of non-delivery of the goods even without establishing that the failure constitutes a fundamental breach by use of a special mechanism. In the case of the CISG, while fundamental breaches make avoidance available immediately, non-fundamental non-delivery allows for avoidance if the aggrieved party has fixed a curative period for performance – a so-called "*Nachfrist* period" – and the breach has continued throughout that period.[10] In the case of the PECL, "delay in performance" followed by further failure to perform throughout a *Nachfrist* period may allow for avoidance. Thus the CISG allows for an "upgrade" of post-*Nachfrist* non-fundamental non-delivery to allow for avoidance, while PECL makes avoidance under similar circumstances for "delay" in performance,

whether that of delivery or another.[11] These types of cases are discussed in detail below.

In making avoidance of the contract available only in cases of fundamental breach, both CISG and PECL seem to deviate from commercial practices that allow parties to reject goods – and more importantly, documents – that fail to strictly conform with the contractual specifications, even if that discrepancy is of little practical significance.[12] Such practices are prevalent in documentary transactions[13] such as CIF,[14] and in particular such that involve documentary credit such as an L/C or "unclean" documents such as bills of lading.[15] Under the fundamental breach rule it would seem that such rejection would not amount in itself to avoidance but instead to a demand for cure (*see* CISG Arts. 30, 34, 47) which, if unmet, may then constitute a breach allowing avoidance, as discussed below.[16] However, two considerations mitigate the apparent difference between the fundamental breach and strict compliance approaches to avoidance of contract. The first is contractual, namely the parties' general freedom to stipulate what breaches would count as fundamental; in documentary transactions, strict documentary compliance may simply be agreed upon. The second has to do with the function of custom, usage, and commercial practices. Under CISG Art. 9(2), parties are generally bound by prevalent usages; this general principle would certainly apply to the construction of fundamental breach under CISG Arts. 25 and 49. Perhaps even more significantly, PECL 1:105 makes a similar provision for contracts in general, beyond *lex mercatoria*. Strict compliance with documentary requirements may fall under both categories: contractual stipulation as well as prevalent usage.[17]

3. No Fault, No Grace, No Regard for Title, No "Perfect Tender"

Both the PECL and CISG share a no-fault approach to breach of contract that allows for avoidance. In this, the general common law rather than general civil law approach is followed (*see*, however, PECL Art. 8:103(c)).

Neither CISG nor the PECL sets a default "grace period" for performance, during which the aggrieved party is enjoined from avoiding the contract. However, both treat the matter of a cure or remedial period set or allowed by the aggrieved party as a special case during which the power to avoid the contract is suspended, as discussed below. Similarly, curative performance intended and indicated by the

party in breach may limit the aggrieved seller's power to avoid the contract for a certain duration. Under PECL 9:303(3)(b) when the aggrieved party knows of the intention of the non-performing party to tender curative performance and fails to notify it that it will not accept cure, it forfeits the power to terminate the contract if the non-performing party in fact performs. Likewise, according to CISG Art. 48(2) an aggrieved buyer who failed to object to the breaching seller's indication that it intends to cure, is estopped from avoiding the contract for an indicated period.[18]

Additionally, the fundamental breach requirement itself may sometimes operate as setting a grace period in relation to avoidance, in the sense that the buyer's failure to pay – or to carry out any other of her allocated or derivative[19] performances – may become fundamental only some time after the breach itself has come to pass. E.g., a very short delay – in respect to the contractual stipulation – in opening a letter of credit will normally not constitute a fundamental breach, but a longer delay may.[20]

As the CISG deals exclusively with obligatory questions,[21] the aggrieved buyer's power to declare the contract avoided is wholly independent from questions of title to the goods. If questions of title need to be resolved, domestic law would apply and determine entitlements.[22] The PECL, wider in scope and application than the CISG, is also limited to contractual (and related obligation) context too.[23] Discharging rights granted by the CISG and PECL – such as the right to restitution following avoidance of the contract – may be found subject to third party interests and property rights, regulated by domestic law.

Both the CISG and the PECL do not contain a so-called "perfect tender" rule that allows for rejecting[24] non-conforming goods after tender was performed (such as the UCC §2-601).[25] Buyer must accept non-conforming goods, returning them to the seller only upon avoidance.[26] Such taking of the goods does not constitute "acceptance" in the common law sense of the contract having been discharged and the power to avoid the contract lost.[27]

4. Self-Help

Contract avoidance is sometimes referred to as a "self-help" remedy although, properly speaking, it is not a remedy in the strict contractual sense: rather than remedial, its effects are to excuse parties from further performances, and to restore pre-performance conditions by either requiring reciprocal restitution of

all exchanges or making such restitution or its substitute available to parties.[28] The basic feature of avoidance in the CISG is its autonomous, unilateral character: it requires no court action and may be executed entirely through appropriate declarations. The PECL shares the CISG's approach to contract avoidance as a unilateral act requiring merely a declaration (notice) to the other party.[29] In this, it is "markedly different" from several continental systems, where the general principle is that avoidance requires court proceedings.[30] Note, that this is consistent with the rule, shared by CISG and PECL, under which the aggrieved party need not serve the non-performing party with notice to put the latter into breach (such as a *mise en demeure* or *Mahnung*).[31] Parties must, of course, be cognizant of the fact that in subsequent litigation courts may disagree with a claim that avoidance was either available or executed properly. Such risk is associated with all self-help measures. In the case of CISG or PECL avoidance, however, it is especially pronounced by the insistence that only fundamental and tantamount breaches may allow the aggrieved party to declare the contract avoided. A prudent buyer unsure of the fundamentality of the seller's breach may then attempt to "upgrade" the severity of the breach through the usage of a *Nachfrist* mechanism (discussed below), available under both the CISG and PECL. While suspending her power to avoid the contract for the length of the curative period (unless an anticipatory breach becomes apparent during that period), the two-tier mechanism significantly reduces her exposure to counterclaims regarding the unlawfulness of declaring the contract avoided.

5. Avoidance (*termination*) in Reasonable Time

The CISG distinguishes between two categories of cases for the purpose of contract avoidance: whether the goods were in fact delivered, or were not delivered. In each case, the CISG fixes a different point of balancing between the seller's risk and the buyer's risk. Quite obviously, avoidance – as it results in mutual restitution – typically creates hardship for the seller in the former case, when goods may be stranded.[32] Sellers must internalize such risks into the contractual price, and the drafters of the CISG sought to reduce such risks (such *ex-post* expenditures may also provide buyers with over-strong bargaining positions in case of negotiation for mutual contract adjustment). The seller may incur substantial loss from retrieving the goods, finding substitute transaction under unfavorable conditions, and even – in extreme cases where the latter is not forthcoming and the cost of the former onerous – be compelled to relinquish the

goods altogether. Furthermore, a breaching party has a distinct interest in knowing as soon as possible whether the aggrieved party intends to avoid the contract, or not. While the aggrieved party has an interest in extending a period of time for deliberation and calculation, both the CISG and the PECL contain some time limitations on exercising the power of avoidance (termination).

Herein, however, lays a distinct difference of approaches. PECL Art. 9:303(2) restricts the power to terminate to a "reasonable time" after the party has become aware of non-performance, or after it ought to have been aware. This applies to all cases of non-performance and is a general limitation on the power to terminate.[33] The CISG contains no such general limitation; instead, CISG Art. 49(2) enumerates cases in which the power to avoid is limited to a reasonable time after a certain occurrence has come to pass.[34] Such limitations apply only in cases in which the seller has delivered the goods, and are divided to breaches of late delivery and other breaches. The following section examines these limitations in the CISG, followed by their PECL counterparts.

6. Buyer's Right to Avoid Contract after the Goods have been Delivered

In case the goods have been delivered, CISG Art. 49(2) restricts the buyer's right to avoid even under the relatively tight conditions – *i.e.*, fundamental breach – of CISG Art. 49(1). The restriction is one of a time limit on the exercise of the power to avoid. In respect of late delivery, CISG Art. 49(2)(a) restricts the power to avoid to a "reasonable time" after the buyer became aware that delivery has been made. Circumstances obviously play an important role in how long "reasonable" is.[35] In respect of any breach other than late delivery – a such as non-conformity – the power to avoid will expire within a reasonable time after she knew or ought to have known of the breach (CISG Art. 49(2)(b)(i)).[36] Likewise, a *Nachfrist* period fixed in accordance with CISG Art. 47(1) (see below) limits the power of avoidance to a reasonable time, unless the seller has declared continuing default (see CISG Art. 49(2)(b)(ii), governing a case tantamount to anticipatory breach, where additional delay would serve no purpose.) This is also the case if the curative period was initiated by the defaulting seller according to Art. 48(2) (see Art. 49(2)(b)(iii)).[37]

7. Reasonable Time

As noted, the PECL requires notice in reasonable time for all terminations. In this, the PECL expresses its comprehensive commitment to the good faith principle (PECL Art. 1:201). The provision corresponds with those of several European and other legal systems,[38] although some require briefer delays such as "*unverzüglich*," "without undue delay"[39]

7.1 In fact, the PECL shows special concern for cases of late tender, *e.g.*, when goods were delivered by the seller. Art. 9:303 makes further provisions in this vain dealing with late tender. Art. 9:303 (3)(a) mitigates the effects of Art. 9:303 to the effect that, in cases of late tender, a notice of termination need not be given before the late tender is made. It must, however, be given within a reasonable time after the party has become, or ought to have become, aware of the late tender. In this, the provision is similar to that of CISG Art. 49(2)(a).

7.2 PECL Art. 9:303(3)(b) deals with an especially tricky situation that exists when tender is late, yet the non-performing party still intends to – and, in fact, does – cure by effecting tender in a reasonable time. While the aggrieved party has no general obligation to accept late tender,[40] it loses its power to terminate the contract altogether if it knew, or has reason to know, that the other party in fact intended to cure by tender in a reasonable time, yet failed to notify the non-performing party in a reasonable time that it will refuse tender. This too may be termed a "relational" clause: it protects the non-performing party's reliance on the aggrieved party's cooperation, and encourages the parties to exchange information re their respective actions and intentions even when a breach situation occurs.[41]

7.3 Although used frequently, the expression "reasonable time" is not defined in the CISG or in the PECL. Courts and commentators offer contextual criteria, noting that what may constitute "reasonable" in any given case may be effected by the nature of the goods, the transaction, the payment arrangements, third party claims, and whether legal advice or expert opinions were actually necessary in order to determine concrete rights (*e.g.*, in cases of non-conformity merely sorting the matter out may be, for practical reasons, longer than under no tender at all).[42] Courts have ruled on the reasonable length of time taking all such circumstances into account; and, in the absence of clear indicators, the question of when does the period begin to run is invariably left to judicial discretion.[43]

7.4 PECL Art. 1:302 supplies some guidelines to "reasonableness" in general, but those are somewhat circular – "reasonable" is what reasonable

persons, acting in good faith, would "consider reasonable." More helpful is the notion that reasonableness is contextual, and takes into consideration "the nature and purposes of the contract, the circumstances of the case" *etc*. Prof. Kritzer has persuasively suggested that reasonableness is a "general principle of the CISG."[44]

7.5 Another approach would be to consider reasonableness in definition and execution of contractual obligations as an articulation of the principle of good faith,[45] which in the context of CISG Art. 49 would seem to mean that buyers have a duty to avoid in good faith only in cases where the goods have been delivered.[46] A different construction – one that would apply a general obligation of good faith to CISG obligations – would undermine the distinction between CISG Art. 49(1) and (2): under a general obligation of good faith, surely any declaration of avoidance by the buyer must be made in reasonable time so as not to create undue hardship for the seller. The limitation of the power of avoidance to a "reasonable time" under CISG Art. 49(2) would then become, in fact, tautological. For further considerations, see commentaries to CISG Arts. 7, 8, and 9 and their PECL counterparts.[47]

8. Avoidance (*termination*) following a *Nachfrist* Period

Consistent with the relational approach, the CISG Art. 49(1)(b) and PECL Art. 8:106(3) allow for avoidance of the contract even for some non-fundamental breaches (or, under a different construction, for what may be termed "constructed fundamentality"). The mechanism in such cases is of two tiers. First, the aggrieved buyer sets an additional, curative period of reasonable length for the seller to perform, so-called a "*Nachfrist*" period after similar provisions in German, Swiss, and other legal systems.[48] Upon the seller's failure to tender curative performance throughout a *Nachfrist* period (or, under conditions tantamount to anticipatory breach, even during it) the aggrieved buyer may avoid the contract (the *Nachfrist* mechanism of PECL Art. 8:106(3) also allows automatic expiry of the contract once the additional period has expired to no avail). Thus these non-fundamental breaches are "upgraded" through the use of the *Nachfrist* mechanism to the status of avoidance-justifying breach.[49]

Curative periods are set by the aggrieved buyer under CISG Art. 47 and PECL Art. 8:106, respectively. They share the same basic structure: under both, the aggrieved buyer may resort to remedies during the curative period (such as

damages), but not avoid the contract, unless the party in breach declares that no curative performance is forthcoming. The main constraint applying to *Nachfrist* periods is that, to allow for eventual avoidance of the contract, the period must be of contextually reasonable length to allow the party in breach to cure its non-performance. Under CISG Art. 47(1), curative periods must be of "reasonable length." Under PECL Art. 8:106(3) if the additional period is "too short," the aggrieved party may terminate only after an overall reasonable time has passed, even if the additional period had already expired.

The *Nachfrist* mechanism may also be used in cases of uncertainty as to the fundamentality of the seller's breach. While avoiding the contract post-*Nachfrist* delays the avoidance, the seller's continuing breach becomes "upgraded." As a consequence buyer who is apprehensive about assuming the risk involved in unlawful avoidance may significantly reduce her exposure to if she follows the *Nachfrist* venue.

The several types of situations where post-*Nachfrist* avoidance under CISG and PECL is available are explored next.

9. Non-Performance during *Nachfrist* Period

A buyer who suffers a non-fundamental non-delivery (or "delay" in the case of the PECL), may, on CISG 49(1)(b) (PECL Art. 8:106(3)) go the two-tier way: first, fix an additional period for performance according to CISG Art. 47 (PECL Art 8:106(1)); then, if the seller fails to perform accordingly, avoid the contract. However, under CISG such strategy is limited to cases of non-delivery only, *i.e.*, situations that, in sale of goods contracts, would often constitute fundamental breach anyway. Prof. Schlechtriem considers the non-delivery 49(1)(b) in to extend by analogy also to the failure to transfer documents of title, the argument being that in typical contexts goods without appropriate documentation cannot be legally possessed: they have been delivered physically perhaps, but not legally, which is tantamount to non-delivery.[50] Under PECL Art. 8:106(3), post-avoidance *Nachfrist* is limited to non-performances of "delay in performance." That may include performances other than delivery of goods, such as delivery of documents, clearing essential formalities, assisting in training personnel, setting a promotion scheme, etc. This interpretative matter requires further elaboration. Scholarly controversy emerged from the fact that the language of CISG Art. 49(1)(b) – "in case of non-delivery" – does not seem to clearly require that the

non-delivery *itself* be the breach for which the additional time is fixed, so that it may conceivably be another non-performance (*e.g.*, non-conformity of goods or of documents).[51] Thus the question is whether Art. 49(1)(b) covers also breaches other than non-delivery, committed under *circumstances* of non-delivery. For instance: assume that the breach in question is the seller's failure to deliver a certificate of origin as required by the buyer and specified in the contract. Buyer then may proceed to set a curative period according to CISG Art. 47(1), namely extending the timeframe for obtaining the certificate. Let us assume that the certificate is required well ahead of the delivery of the goods and that although the goods were not yet delivered within the *Nachfrist* period, that in itself is no breach. May the buyer declare the contract avoided according to Art. 49(1)(b), assuming Art. 49(1)(a) does not apply? While some legal systems extend *Nachfrist*-base avoidance of contract to non-fundamental breaches in general,[52] commentators warn, that while the CISG's *Nachfrist* mechanism allows an aggrieved buyer to exert pressure upon a defaulting seller, "the Nachfrist avoidance procedure was not to be extended any further than the essential obligation of delivery."[53] Art. 49(1)(b) is therefore not designed to allow aggrieved parties to bypass the fundamentality requirement of Art. 49(1)(a) for any reason other than non-delivery of goods[54] or, as suggested above, also of documents of title. Any other conclusion would erode considerably the dependence of avoidance on the fundamentality of breach, as it would suffice to set a *Nachfrist* period for any breach and then declare the contract avoided upon the continuing failure to perform.[55] Professors Schlechtriem and Koch add that drawing analogies from non-delivery to other kinds of non-performance is jurisprudentially dubious, for where no lacuna exists there is no justification for expanding the scope of the clause by analogy – there is here no gap to be filled, but rather a positive apparatus privileging non-delivery over all other breaches.[56] Commentators likewise note that the non-delivery must be complete non-delivery in order to allow application of Art. 49(1)(b); partial performance is not non-performance.[57]

The case is slightly different with PECL Art. 8:106(3) which does not limit failure to perform following a *Nachfrist* period to non-delivery only but to the more general category of "delay in performance which is not fundamental." This still will not include non-performances in terms of non-conforming goods, yet certainly will include – as was the conclusion concerning CISG Art. 49(1)(b) – delay in tendering documents of title. However, the language of the PECL is

wider and more liberal – from the aggrieved party's point of view – than the stringent criterion of the CISG. For non-delivery is a case of "delay," but not the only case. It may be argued that in the example rendered above, failure ("delay") to deliver a certificate of origin throughout a *Nachfrist* period may allow for avoidance under PECL 8:106(3) although – the document in question not pertaining to tile and thus is not "essential" to the goods – that would not be the case under CISG 49(1)(b). Three comments mitigate this discrepancy. The first is, that any interpretation of the "delay of performance" language of PECL 8:106(3) must be conducted within the general framework of PECL Art. 9:301, namely the fundamental breach principle. Thus exceptions to the principle under PECL Art. 8:106(3) should be narrowly and contextually construed. This relates to the second comment, which is that such exceptions must pass the good faith test – no trivial delays in performance should be allowed to result in contract avoidance through a *Nachfrist* mechanism. This mechanism allows for "upgrade" of some non-fundamental delays, but certainly not any and all of them. Thirdly, in the context of international sales, tribunals may look to CISG Art. 49(1)(b) as an interpretative guideline in construing what non-performances would be allowed to result in avoidance of the contract. Certainly, such rulings may still allow for more extensive sets of cases than the CISG would. The drafters of the PECL were cognizant of the parallel rule in the CISG, and the choice to apply *Nachfrist* to non-performances other than delivery is meaningful.

Because of the "crossing of the Rubicon" status that delivery has in sales of goods transactions – and in international sales, where risks to the seller pursuant post-delivery avoidance are especially acute – non-delivery is a prerequisite for CISG Art. 49(1)(b) to kick in. Thus the delivery of non-conforming goods ("*peius*") and that of "wrong goods" ("*aliud*") is to be treated, under CISG Art. 49(1)(b) as well as under Art. 49(2) in the same category, namely they both put the parties in the category of "goods delivered."[58] Recent case law tends to regard these traditional categories as points on a single continuum, which the CISG as well as the PECL in fact endorse. Recent German[59] and Austrian[60] case law confirm this view. According to the German Supreme Court, non-delivery could only be assumed in very blatant and obvious cases of divergence between the goods agreed upon and the goods actually delivered.[61] Once the goods are delivered, the conditions for declaring the contract avoided for non-fundamental breach – on Art. 49(2) –

become stricter. The contextual interpretation of general PECL clauses such as Art. 8:106(3) should attempt to follow an identical logic.

10. Anticipatory Breach during *Nachfrist* Period under the CISG

Under CISG Arts. 49(1)(b) and 49(2)(b)(ii) the buyer may avoid the contract even before the additional fixed period has elapsed, in cases where the seller himself declares that he will not perform within that period (this is also the rule set in CISG Art. 49(1)(b)(iii), governing avoidance of the contract during a curative allowance initiated by the breaching seller under Art. 48(2)). These clauses are tantamount to avoidance for anticipatory breach, with the double distinction, that they apply only within CISG Art. 47 periods, and that the information pertaining to future non-performance must originate from the seller himself, and not come by the buyer's way from incidental sources.[62] In this it differs from the provisions of CISG Art. 72, that allow avoidance of the contract if "it is clear" that a fundamental breach is to occur: *e.g.*, a careful buyer may discover non-conformity through proper inspection prior to delivery. "Clear" appears to be a mid-level degree of certainty, between the lower-level "it becomes apparent" of CISG Art. 71 (which allows for suspension of performance in cases of anticipatory breach) and the highest-level of CISG Art. 49(1)(b), (2)(b)(ii) and (iii) that requires a declaration by the seller himself. Note however, that even the stricter provisions in CISG Art. 49 do not require that the said declaration be a specific one directed at the seller to the effect that buyer will continue defaulting on this specific transaction. While under CISG Art. 26 a declaration of avoidance – a legal act – must be made by notice *to* the party in breach, this is not necessarily the case with declarations of continuing default made *by* the party in breach. A general declaration of insolvency, for instance, should fulfill the "declaration" requirement of CISG Art. 49(1)(b), (2)(b)(ii) and (iii), unless accompanied by a specific communication to the contrary (even an insolvent seller may go ahead with a transaction that will eventually generate value for distribution in eventual bankruptcy). Yet in the communicative framework of *Nachfrist* general third-party information is not basis enough to declare the contract avoided prior to the expiry of the duration.[63]

11. Non-Performance Following *Nachfrist* Period under the PECL

As noted above, PECL Art. 8:106(3) allows an aggrieved party to terminate a contract following a delay in performance that does not amount to fundamental breach, if it had fixed a *Nachfrist* period during which curative performance did not occur. The *Nachfrist* mechanism cannot be used to bypass the reasonable time requirement set in PECL Art. 9:303(2). PECL Art. 8:106(3) requires that the additional period be of "reasonable length." If that additional period is "too short," the aggrieved party may terminate only after an overall reasonable time has passed, even if the additional period has expired. For purposes of termination, this imposes a de-facto "reasonable length" on the *Nachfrist* period, although such is not generally required in PECL Art. 8:106(1). Art. 8:106(3) includes a useful mechanism, in that the *Nachfrist* notice may include a conditional termination notice, which will apply automatically if the non-performing party fails to remedy during the additional period.[64] In this case a contract may be terminated without a designated notice: the *Nachfrist* notice then doubles as a conditional notice of termination.[65] In case the additional period is not deemed to be reasonably long, such automatic termination will take effect after a reasonable time only, in accordance with the principle examined above.

12. Termination for Anticipatory Breach during *Nachfrist* Period under the PECL

Similar to CISG Arts. 49(1)(b) and (2)(b)(ii), PECL Art. 8:106(2) maintains a device whereby the aggrieved party who has set a *Nachfrist* period is allowed to terminate the contract *during* that period if she "receives notice from the other party" to the effect that no curative performance is forthcoming. This requirement is likewise narrower than the general one governing anticipatory breach under the PECL, according to which it must be "clear" that default would persist (PECL Art. 9:304).[66] In this the PECL applies to *Nachfrist*-situations the general rule governing anticipatory breach, with the exception, indeed adequate in the special communicative context of *Nachfrist*, that the notice of continuing default must originate from the defaulting party itself.

This balance follows also from good faith obligations: ceteris paribus, it would be in bad faith for a party to object to termination during a *Nachfrist* period when it knows that no performance is forthcoming, thus merely delaying termination to the period's conclusion; and yet it would be in bad faith for the aggrieved party to

merely assume default based on third party information, once the special communicative framework of *Nachfrist* has been established.

There are two remaining questions. First, whether termination during a *Nachfrist* period due to anticipatory non-performance is limited to a reasonable time after the anticipatory non-performance becomes clear. There is no obvious reason here to deviate from the rules of PECL Arts. 9:303 and 8:106(3), and so the answer must be in the affirmative. Second, whether such notice of termination on anticipatory breach should be allowed to shorten the overall *Nachfrist* period to less than what would otherwise be deemed "reasonable." Here the answer should also be in the affirmative, which does not contrast the general rule: if the period is shortened on reasonable grounds, what is left is not an unresonable time. Once the occurrence of an anticipatory non-performance is declared by the defaulting party, there should be no further limitations on the power to avoid by a buyer who has already fixed a valid additional period. A further delay would serve no purpose and could no longer be justified on the grounds of reasonableness. This answer is consistent with the lack of any mandatory "grace period" for termination in the PECL both in general and in anticipatory breach under Art. 9:304.

NOTES

1. PECL Art. 9:303(4), dealing with automatic avoidance upon impediment, was omitted from this comparative analysis.

2. For avoidance\termination of an installment contract, *see* also CISG Art. 73, PECL Art. 9:302.

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[1] Ole Lando, "Salient Features of the Principles of European Contract Law: A Comparison with the UCC," 13 *Pace International Law Review* (Fall 2001) 339, at p.361.

[2] *See* CISG Art. 81(1), PECL Art. 9:305(2). Nor does avoidance preclude recourse to any remedy consistent with it, such as damages (*see* CISG Art. 81(1), PECL Art. 8:102) The Secretariat Commentary (referring to the 1978 Draft) notes that "Such a provision was important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration and clauses

specifying 'penalties' or 'liquidated damages' for breach, terminate with the rest of the contract" (Official Records pp. 41-42).

[3] *See* CISG Art. 81, PECL. Arts. 9:307 (concerning money) and 9:308 (concerning property). In variations, this seems to be a universal feature of contract avoidance. The effect of CISG Art. 81 on avoidance was even described as "chang[ing] the contractual relationship into a restitutional relationship." *See* Germany 11 October 1995 *Landgericht* [District Court] Düsseldorf, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/951011g1.html>. *See* also Harry M. Flechtner, "Remedies Under the New International Sales Convention: The Perspective from Article 2 of the UCC," 8 *J.L. & Com.* 53 (1988), at 80; Francesco G. Mazzotta, "Commentary on CISG Article 81 and its PECL Counterparts," available online at < http://cisgw3.law.pace.edu/cisg/text/peclcomp81.html >; Günter H. Treitel, "Remedies for Breach of Contract," in: *International Encyclopedia of Comparative Law* (Tübingen, Mouton, The Hague, Paris: J.C.B. Mohr, 1976). Courts acknowledge the CISG restitution as a matter of course; *see* Switzerland 5 February 1997 *Handelsgericht* [Commercial Court] Zürich, case presentation available at <http://cisgw3.law.pace.edu/cases/970205s1.html>; Switzerland 20 February 1997 *Bezirksgericht (Zivilgericht)* [District Court] Saane, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/970220s1.html>.

[4] *See* CISG Art. 71, PECL Art. 8:105.

[5] *See* CISG Arts. 46, 62 (but *see* Art. 28), PECL Arts. 9:101, 9:102.

[6] *See* CISG Art. 50, PECL Art. 9:401.

[7] For the general aspects of relational contract theory as applied both to sales and other kinds of contractual transactions, and especially its emphasis on ongoing, long-term contractual relations that are heavily based in commercial practices, *see* Ian Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980); idem, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law," 72 *Nw. L. Rev.* 854 (1978); Stewart Macaulay, "Non-contractual Relations in Business: A Preliminary Study," 28 *Am. Soc. Rev.* 55 (1963); Robert W. Gordon, "Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law," 1985 *Wis. L. Rev.* 565; Jonathan Yovel, "What is Contract Law 'About'? Speech Act Theory and a Critique of 'Skeletal Promises'," 94 *Northwestern U. L. Rev.* 937-962 (2000).

[8] Some authors remark that in international sales, the effects of avoidance on the breaching party may prove especially onerous, hence the stringent application in the CISG (*see*, *e.g.*, Joseph Lookofsky and Herbert Bernstein, *Understanding the CISG in Europe,* Deventer, 1997, 87). The PECL, of course, applies to domestic as well as international sales.

[9] For what constitutes a fundamental breach (non-performance) see CISG Art. 25, PECL Art. 8:103, respectively; according to Lando, the latter was modeled on the former, *see* Lando, *supra* note 1 p. 362. For a discussion of fundamental breach in CISG law and related UNIDROIT Principles as well as the related topic of non-conformity of goods, *see* Robert Koch, "Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Articles 47 and 49 of the CISG," available online at <http://cisgw3.law.pace.edu/cisg/biblio/koch2.html> and references noted there.

[10] *See* CISC Art. 49(1)(b), discussed below.

[11] *See* PECL Art. 8:106(3), discussed below.

[12] Such discrepancies indeed generated several criticisms regarding the CISG's application to documentary transactions in general. *See* Alastair Mullis, "Avoidance for Breach under the Vienna Convention: A Critical Analysis of some of the Early Cases," *in* Andreas & Jarborg (eds.), *Anglo-Swedish Studies in Law* (Uppsala: Iustus Forlag 1998), p. 326 *et seq*.; *also* Peter Schlechtriem, "Interpretation, gap-filling and further development of the UN Sales Convention" available online at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem6.html>. Prof. Schlechtriem's critique is also germane to the commercial realities of the commodification of contracts, where practitioners regard themselves as dealing not in goods but in "contracts," moving away from the language of the assignment of *in-personam* (contractual) obligations to the *in-rem*, "propertized" language of goods or of commodities. The general question of the adjusted application of commercial law originally designed for transactions in goods (such as the CISG) to transactions in contracts is of course broader than can be dealt with here. Possibly, however, relational approaches to functional conformity of goods – the CISG's approach in the context of avoidance and its limitation to fundamental breach for lack of conformity (CISG Art. 35) – can be extended at least to *some* documentary transactions, the exception continuing to be financial (payment and credit) as well as investment instruments. This cautious approach is partially expressed by CISG Art 2(d).

[13] According to the Secretariat Commentary, Art. 2(d) CISG does not exclude documentary sales of goods from the scope of application of the Convention. The Commentary warns however that in some legal systems such sales may be characterized as sales of commercial paper, excluded by Art. 2(d). *See* Secretariat Commentary on Art. 2, available online at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-02.html >. As prevalent kinds of commercial paper tend to be "negotiated" rather than sold, paper falling under UCC Article 3 ("Negotiable Instruments") – ostensibly given to strict or "formalist" construction based on flaws discernible "on the

face of the instrument" - would not fall under the scope of application of the CISG to begin with.

[14] *See* Secretariat Commentary, para 7.

[15] *See*, e.g., INCOTERMS 2000, CIF, provisions A8, B8.

[16] *See* paragraph 8 below, and especially Prof. Schlechtriem's view that extends the right to declare the contract avoided for non-delivery of goods following a *Nachfrist* period to non-delivery of documents of title, *infra* note 50. One way to solve the apparent discrepancy between Art. 49 and prevalent commercial practices is through Art. 9 CISG and its counterpart, Art. 1:105 PECL. These important provisions subject parties to regularly observed usages and practices (*see* Art. 9(2) ULIS for the strongest formulation of the binding force of *lex mercatoria*). The strict compliance practices widely associated with documentary transactions would then take contractual effect between the parties.

[17] E.g. under various INCOTERMS 2000 (for instance, A8 in all but Ex-Works).

[18] *See* Jonathan Yovel, "Seller's Right to Remedy Failure to Perform: Comparison between provisions of the CISG (Article 48) and the counterpart provisions of the PECL (Articles 8:104 and 9:303)," available online at <http://cisgw3.law.pace.edu/cisg/biblio/yovel48.html>.

[19] *See* CISG Art. 54 according to which "The buyer's obligation to pay the price includes taking such steps … to enable payment to be made."

[20] *See* Honnold at p. 354, Lookofsky at p. 114.

[21] *See* CISG Art. 4(b).

[22] *See* the Australian case *Roder v. Rosedown*, Federal District Court Adelaide, 28 April 1995, available online at <http://cisgw3.law.pace.edu/cases/950428a2.html> (the contract of sales contained a retention of title clause whereby title to the goods did not pass to the purchaser until the purchase price had been paid in full, which was not the case). *See* Robert Koch, "Commentary on Whether the UNIDROIT Principles of International Commercial Contracts may be Used to Interpret or Supplement Article 25 CISG," Pace Review of the Convention on Contracts for the International Sale of Goods (1998) 246, available online at <http://cisgw3.law.pace.edu/cisg/biblio/koch1.html>.

[23] Whether obligations stemming from PECL Arts. 2:301-3 should be properly classified as strictly contractual or belonging to the periphery of contract (quasi-contract, collateral (or "implied" contract), even tort) is a question that cannot be dealt with here; all these legal constructs are, however, obligatory in nature.

[24] CISG Art. 86(2) indeed uses the language of buyer's "right to reject" non-conforming goods. As there is no such general right in the CISG, this clause

should be read in the context of prospective avoidance of the contract, i.e. the case covered by Art. 42(2), in which case the buyer, prior to the avoidance of the contract, must – on the seller's behalf and at his expense – preserve the goods during the interim period; or in the context of either premature delivery or delivery in excess (CISG Art. 52(1) and (2), respectively).

[25] Prof. Schlechtriem considers this a major deviation from common law doctrines, to the extent that the buyer's duty take over defective goods "must be repugnant to the Anglo-Saxon legal convictions" (Peter Schlechtriem, "Interpretation, gap-filling and further development of the UN Sales Convention" available online at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem6.html>). However, White and Summers suggest that, at least in the context of sales transactions governed by the Uniform Commercial Code, various courts' rulings have so eroded the perfect tender rule that "the law would be little changed if §2-601 gave the right to reject only upon 'substantial' non-conformity [instead of the UCC language that grants a right to reject for failure of the goods "in any respect to conform to the contract" - JY]." James J. White & Robert S. Summers, *Uniform Commercial Code* (4th ed., 1995) p. 441.

[26] Prof. Schlechtriem suggests a construction according to which buyer, although not permitted to reject non-conforming goods outrightly, may nevertheless postpone taking them over for a reasonable duration necessary for determining whether under the circumstances avoidance is available or forthcoming (*see* Schlechtriem, *supra* note 25). While any such conduct will still be subject to Art. 86 obligations – namely the buyer's duty to care for the goods taken – such physical taking would not carry any legal effect in the sense of "taking over" the goods according to Art. 69; thus the risk would remain with the seller and would not pass to the buyer who acts, in essence, as the seller's agent in respect to preserving the goods. Note that this construction sits well with Art. 86 that carefully distinguishes between the act of "taking over" (Art. 69) which carries the effect of passage of risk, and "receiving" (Art. 86(1)) or "taking possession" (Art. 86(2)) which do not.

[27] *See* Schlechtriem, *supra* note 25.

[28] With significant exceptions, under the CISG a buyer's inability to make restitution forfeits his right to avoid the contract (CISG Art. 82), which has no exact PECL counterpart (*see* PECL Art. 9:309 which states a right to monetary recovery of value that cannot be restituted, but does not restrict the power to terminate as such).

[29] In one case, the PECL allows for termination even without a termination notice; *see* PECL Art. 8:106(3), discussed above.

[30] In Israel, a "hybrid" legal system whose which in it contract law combines common law, civil law, and original elements, all terminations of contract must be either in reasonable time or in reasonable time after the expiration of

a *Nachfrist* period. This is the prevalent Common Law rule, which holds also in "hybrid" legal systems such as Israel, *see* Contract Law (Remedies for Breach of Contract) 1970, Art. 8. It conforms to several continental rules such as the Danish Sale of Goods Act Arts. 27, 32, and 52; Finnish and Swedish Sale of Goods Acts Arts. 29, 39, 59; Portuguese Civil Code Art. 436(1); and the Dutch BW 6:267, but differs from other legal systems that require court intervention such as French, Belgian and Luxembourg Civil Code Art. 1184(2), Italian Civil Code Art. 1453 and Spanish Civil Code Art.1124 (though in Spain a notice of termination may be effective if it is accepted by the defaulting party: *Diez-Picazo*, II, 722; *Lacruz-Delgado* II, 1, 26, 204; and *Ministerio de Justicia*, art. 1124). *See also* Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law: Parts I and II* (Kluwer Law International (2000) (hereinafter "Lando and Beale"), 415 n1.

[31] *See* commentary to PECL Art. 8:101. Strangely enough, litigants in countries where the rule for avoidance of domestic contracts is different still approach courts for declarations of avoidance even when they themselves claim that the CISG governs the case. *See, e.g.,* France 4 June 2004 *Cour d'appel* [Appellate Court] Paris, SARL NE... v. SAS AMI... et SA Les Comptoirs M..., case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/040604f1.html> where plaintiffs sued for a declaration of avoidance and for damages. Presumably, a court may refuse to hear the first part of the suit (in a common-law country it probably would) referring the plaintiff instead to CISG Art. 49(1)(a). The risk for making an unlawful declaration of avoidance then sits with the aggrieved party; continuing to refer the matters to courts (who are accustomed to such procedures in domestic issues) may be a clever way to avoid that risk, tantamount to a declaratory verdict concerning the fundamentality of the breach which could, conceivably, be sought in a common law system.

[32] *See* Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof*, in: 50 Years of the Bundesgerichtshof, A Celebration Anthology from the Academic Community (2001), at III.1, available online at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem3.html>. Professor Schlechtriem emphasizes the risks associated with retrieving stranded goods. *See* also John Honnold, *Documentary History of the Uniform Law for International Sales* (Deventer: Kluwer, 1989) 575 – 577; Lando, *supra* note 1, p. 361.

[33] However, see above for termination in case of anticipatory breach.

[34] Another issue pertinent to avoidance in reasonable time is that a buyer loses his right to rely on a lack of conformity of the goods — including the right to avoid the contract — if he does not give the seller notice thereof within a reasonable time after he has discovered the lack of conformity or ought to have discovered it; *see* CISG Art. 39.

[35] *See, e.g.*, ruling by a Dutch court of appeal according to which a period of almost eight weeks was considered reasonable for purpose of a declaration of avoidance of a flour sale contract between Dutch and Mozambique parties: Netherlands 23 April 2003 *Gerechtshof 's-Gravenhage* [Appellate Court], *Rynpoort Trading & Transport NV et al. v. Meneba Meel Wormerveer B.V. et al.*, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/030423n1.html>.

[36] For the time in which buyer ought to know of the breach, see CISG Art. 38, which governs the time in which the buyer must examine the goods. One might expect avoidance following *Nachfrist* to be rather swift; however, disagreements might occur over the question of whether additional periods were granted or not. In one German case involving the sale of printing machines to an Egyptian buyer, an additional period of two weeks was set by the buyer, who subsequently avoided the contract seven weeks after the expiration of the period. The court found this to be a reasonable time: Germany 24 May 1995 *Oberlandesgericht* [Appellate Court] Celle, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/950524g1.html>.

[37] Some commentators deem Arts. 49(2)(b)(ii) and (iii) redundant as they spell out the obvious. *See* John Honnold, *Uniform Law for International Sales* (Kluwer, 1999), at 308, available at <http://cisgw3.law.pace.edu/cisg/biblio/honnold.html>. This is not necessarily the case: the use of additional cure periods according to Arts. 47 or 48 does not in itself limit any subsequent termination period to a "reasonable time" after the cured failed. Indeed, Art. 49 itself makes the distinction between cases in which the goods have been delivered and those in which they were not, reserving any "reasonable time" provisions to the former cases.

[38] In Israel, whose contract law combines common law, civil law, and original elements, all terminations of contract must be made either in reasonable time after knowledge of the breach, or in reasonable time after the expiration of a *Nachfrist* period. *See* Contract Law (Remedies for Breach of Contract) 1970, Art. 8.

[39] *See* BGB §121 (controlling all acts of rescission, including HGB §377). German courts acknowledged a discrepancy between the two criteria, even when the facts satisfied both; *see* Germany 17 September 1991 *Oberlandesgericht* [Appellate Court] Frankfurt, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/910917g1.html> (in this case a one-day delay in sending an avoidance telex after the breach was discovered at a trade fair was judged both reasonable and *unverzüglich*). In another case, an Italian buyer of a used car was allowed to avoid the contract three months after she discovered the car was previously stolen and title cannot be transferred; the court accepted the time as pertinent to the various inspections required: Germany 22 August 2002 *Landgericht* [District Court] Freiburg,

case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/020822g1.html>.

[40] *See* PECL Art. 8:104; compare with CISG Art. 48.

[41] For CISG-PECL comparative match-up, *see* commentary to CISG Art. 48, available at <http://cisgw3.law.pace.edu/cisg/text/peclcomp48.html>.

[42] *See* e.g. Germany 31 January 1997 *Oberlandesgericht* [Appellate Court] Koblenz, case presentation available at <http://cisgw3.law.pace.edu/cases/970131g1.html>; *see* also 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* (2002) 57, at 67. For a historical and analytic review of German law *see* Reinhard Zimmermann, "Liability for Non-Conformity: The New system of Remedies in German Sales Law and its Historical Context," 10th John Maurice Kelly Memorial Lecture, Dublin 2004.

[43] *See* France 14 June 2001 *Cour d'appel* [Appellate Court] Paris, *Aluminum and Light Industries Company v. Saint Bernard Miroiterie Vitrerie*, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/010614f1.html>, where the court applied CISG Art. 49(2) to a transaction of faulty fancy glass panels, determining that the eight months that lapsed from the determination of the breach to the notice of avoidance was an unreasonably long period. The court took into account the various expert inspections of the panels sought in this case, and began counting the period from the last one. In different circumstances, the German Supreme Court ruled that the five months that have elapsed between the buyer's being informed of the seller's breach (a delivery stop) made for too long a period and could not be considered as a reasonable time under article 49(1)(b): *see* Germany 15 February 1995 *Bundesgerichtshof* [Supreme Court], case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/950215g1.html>.

[44] *See* Prof. Albert H. Kritzer, "Overview Comments on Reasonableness," available online at <http://cisgw3.law.pace.edu/cisg/text/reason.html>: "Reasonableness is specifically mentioned in thirty-seven provisions of the CISG and clearly alluded to elsewhere in the Uniform Sales Law. Reasonableness is a general principle of the CISG." *See* also comments by Jelena Vilus, available online at <http://cisgw3.law.pace.edu/cisg/text/reason.html#vilus>; rpr. in *Homenaje a Jorge Barrera Graf*, vol. 2, Mexico: *Universidad Nacional Autónoma de Mexico* (1989) 1440-1441. For the definition of reasonableness in the PECL and references to reasonableness in Continental and Common Law domestic rules, doctrine and jurisprudence, *see* Lando & Hugh Beale, pp. 126-128 available online at <http://cisgw3.law.pace.edu/cisg/text/reason.html#def>. For further discussion regarding the correlation between the PECL's definition

of reasonableness and the meaning of this term for CISG drafters *see* <http://cisgw3.law.pace.edu/cisg/text/reason.html#over>.

[45] Peter Schlechtriem, *Uniform Sales Law* (tr. From German: Einliches UN Kaufrecht, Manzsche, Vienna, 1986) 39. *See also* idem (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford 1998; Klein, J, "Good Faith in International Trade," 15 *Liverpool L.R.* 114-141 (1993).

[46] A scholarly controversy exists regarding whether or not good faith is a general principle of the CISG, as it clearly is of the PECL (Art. 1:106). Professor Magnus, drawing on comparisons between CISG Art. 7 and the UNIDROIT Principles (Art. 1.6.) claims that it is (*see* Ulrich Magnus, **"**Remarks on good faith," available online at <http://cisgw3.law.pace.edu/cisg/principles/uni7.html>. Dr Felemegas reads Art. 7 differently, as applying to the interpretation of the CISG only and not to performances in general, *see* John Felemegas, "Remarks on Good Faith and Fair Dealing," available online at <http://cisgw3.law.pace.edu/cisg/text/peclcomp7.html>.This is certainly not the proper place to attempt to resolve this important issue, or even to determine whether it is, properly stated, merely an interpretative question — albeit a preeminent one — as Magnus and Felemegas approach it, or whether its determination transcends mere interpretative approaches. One may doubt, however, whether courts in legal systems that regard good faith obligations (in either the negotiation or performance stage) as immutable tenets of private law — metaphorically speaking, a part of the "constitution" of private law — might not impose derivative obligations also when dealing with contractual obligations governed by the CISG. Such may be inferred from dicta of Israel Supreme Court, where good faith is a general principle of Private Law, (*see e.g.*, *Klemer v. Guy* (1993), 50(1) PD 184) following the Contracts (General Part) Law, 1973, §§12, 39, 61(b) and expressed in the anticipated Civil Code, §§ 2, 163.

[47] Regarding CISG Art. 7, *see* Felemegas, *op. cit.*; regarding CISG Art. 8, *see* Maja Stanivukovic, "Remarks on the Manner in which the PECL may be Used to Interpret or Supplement CISG Article 8," available online at <http://cisgw3.law.pace.edu/cisg/text/peclcomp8.html#er>. Regarding CISG Art. 9, *see* Anja Carlsen, "Remarks on the Manner in which the PECL may be Used to Interpret or Supplement CISG Article 9," available at <http://cisgw3.law.pace.edu/cisg/text/peclcomp9.html#er>.

[48] *See* Lando and Beale, *op. cit.*, at 377. BGB § 326 practically makes Nachfrist periods compulsory in most cases, whereas CISG and PECL merely make it available to the non-breaching party. For the Swiss "Nachfristmodell," *see* Art. 107, 108 Obligationenrecht (Swiss Law of Obligations). Professor Treitel makes the point that other legal systems contain similar mechanisms, *See* Günter H. Treitel, *Remedies for Breach of Contract*, in *International Encyclopedia of Comparative Law* (Tübingen, Mouton, The Hague, Paris:

J.C.B. Mohr, 1976) Ch. 16, §§ 149-151. Such is Art. 7(b) of the Israeli Contract Law (Remedies for Breach of Contract), 1970, which combines the optional version of Nachfrist with the exception that avoidance under Nachfrist for non-fundamental breaches may be objected to on grounds of injustice, with courts retaining appropriate discretion.

[49] In one French case, the seller sent the buyer a notice of avoidance following buyer's refusal to take delivery on a certain early date (amended from the original contractual stipulation). The court judged the breach non-fundamental and determined that the only way for the seller to avoid the contract was to first fix a Nachfrist period, which was not done: France 4 February 1999 Cour d'appel [Appellate Court] Grenoble (Ego Fruits v. La Verja Begastri), case presentation including English translation available online at <http://cisgw3.law.pace.edu/cases/990204f1.html>. In ICC Court of Arbitration case 7585/1992, the tribunal deemed the buyer's failure to open a letter of credit according to the contract a breach, but not a fundamental breach; nevertheless, the seller's declaration of avoidance was effective as it took place several months after the breach, and that time was constructed to operate as a valid Nachfrist period. Published (in English) in the ICC International Court of Arbitration Bulletin Vol. 6/N.2 - November 1995, 60-64; available online at <http://cisgw3.law.pace.edu/cases/927585i1.html>.

[50] *See* Peter Schlechtriem, *Uniform Sales Law: the UN Convention on Contracts for the International Sale of Goods* (Vienna: Manz 1986), 77 also available online at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html> Koch and others support this construction, *see* Koch, *op. cit.* note 6.

[51] This is not to say that all commentators even acknowledge the existence of an interpretative ambiguity: for instance, Lookofsky and Bernstein take for granted that Art. 49(1)(b) applies only to breaches of non-delivery. *See* Joseph Lookofsky and Herbert Bernstein, *Understanding the CISG in Europe* Deventer, 1997, 91-2, take for granted. For a scholarly debate on this and other issues *see* "Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more," 18 *Journal of Law & Commerce* (1999) 191, at 201 *et seq.*; available online at <http://cisgw3.law.pace.edu/cisg/biblio/workshop.html>.

[52] *See* e.g. the Israeli Contract Law (Remedies for Breach of Contract), 1970 Art. 7(b) (Failure to perform following a Nachfrist period may generate a right to declare the contract avoided even for non-fundamental breaches, subject to judicial discretion (the latter does not apply in case of a fundamental breach).

[53] Michael R. Will, *Bianca-Bonell Commentary on the International Sales Law* (Giuffrè: Milan 1987), p. 363, available at <http://cisgw3.law.pace.edu/cisg/biblio/will-bb49.html>.

[54] Although not an overriding interpretative consideration in my view, this interpretation sits well with the legislative history of Art. 49. *See Legislative History; 1980 Vienna Diplomatic Conference Summary Records of Meetings of the First Committee, 22nd meeting, 25 March 1980*, available online at <http://cisgw3.law.pace.edu/cisg/firstcommittee/Meeting22.html>, paras. 61-96.

[55] Or in Prof. Schlechtriem's words, "you cannot reach avoidance of the contract in the case of non-conforming goods where the non-conformity itself does not constitute a fundamental breach, by blowing up minor non-conformities through the process of setting an additional period of time to have them repaired. Because then you could avoid all contracts." *Transcript*, *supra* note 51, at p. 201.

[56] *See* Koch, *op. cit.,* II.I.b.

[57] Or in Prof. Honnold's words, "non-delivery of the whole package," *see Transcript, supra* note 51, p. 211.

[58] Likewise, both would put the buyer under Art. 69 obligations, namely to preserve the goods on the seller's behalf. For in-depth discussion *see* Koch, *op. cit*. II.I.c.

[59] For relevant case law, *see* Germany 3 April 1996 *Bundesgerichtshof* [Supreme Court], case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/960403g1.html>; Germany 12 March 2001 *Oberlandesgericht* [Appellate Court Stuttgart], case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/010312g1.html> (stating that the delivery of an *aliud* does not constitute a non-delivery for the purposes of Art. 49(1)(b) CISG). For further case law, *see* Koch, *op. cit*.

[60] *See* Austria 29 June 1999 *Oberster Gerichtshof* [Supreme Court], presentation including English translation available at <http://cisgw3.law.pace.edu/cases/990629a3.html>.

[61] *See* VIII ZR 51/95 *Bundesgerichtshof* (Germany) 3 April 1996, *supra* note 59 (as a rule, *aliud* delivery does not amount to non-delivery, leaving the question open for the case of an especially blatant deviation of the goods from the contractual specifications).

[62] Note the specific language of CISG Art. 49(2)(b)(ii):"[A]fter the seller has declared that he will not perform his obligations within such an additional period."

[63] *See also* the language of the UCC §2-609, "reasonable grounds for insecurity" with respect to either party's performance. For further comparative and cultural insights, *see* Mirghasem Jafarzadeh, *Buyer's Right to Withhold Performance and Termination of Contract: A Comparative Study Under*

English Law, Vienna Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi'ah Law, Part II § 2.2.2.2, available online at <http://cisgw3.law.pace.edu/cisg/biblio/jafarzadeh.html>.

[64] Whether the *Nachfrist* notice in fact makes this provision or not would become an interpretative question. *See*, in a similar context, such an approach to *Nachfrist* notice by the Austrian Supreme Court: Austria 28 April 2000 *Oberster Gerichtshof* [Supreme Court], case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/000428a3.html>.

[65] *See* Lando and Beale, *op. cit.*, at 415.

[66] It may be argued that the main effect of the "notice" clause of PECL Art. 8:106(2) is to limit the buyer's power to avoid during *Nachfrist* rather than to empower her to do so in the first place. The reason is that the PECL's general doctrine of anticipatory non-performance, expressed in PECL Art. 9:304, may otherwise apply in *Nachfrist* situations. This provision makes termination available whenever a fundamental non-performance becomes "clear" even before the performance's designated time. This may well cover performances expected throughout *Nachfrist* periods. The apparent problem here would be the limitation in PECL Art. 8:106(2) on the aggrieved party's power to terminate during the *Nachfrist*. However, the doctrine of anticipatory breach stipulated in PECL Art. 9:304 is specific to such cases and could conceivably hold also under *Nachfrist* conditions. Superimposing the two articles on each other would allow for termination, under *Nachfrist*, even of non-fundamental anticipatory non-performance. Of course, the termination due to notice of continuing default included in PECL Art. 8:106(2) is narrower and more specific than the said superimposition, and thus the argument is purely speculative.